Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov

Registrar: **Mr. Bongani Majola**

Judgement of: **14 December 2015**

THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO
Arsène Shalom NTAHOBALI
Sylvain NSABIMANA
Alphonse NTEZIRYAYO
Joseph KANYABASHI
Élie NDAYAMBAJE

Case No. ICTR-98-42-A

Judgement

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seised of the appeals of Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje ("co-Accused" and "co-Appellants") as well as of the Office of the Prosecutor ("Prosecution") against the judgement pronounced on 24 June 2011 and issued in writing in English on 14 July 2011 by Trial Chamber II of the Tribunal ("Trial Chamber") in the case of *The Prosecutor v. Pauline Nyiramasuhuko et al.*[1]

I. INTRODUCTION

A. Background

2. Pauline Nyiramasuhuko ("Nyiramasuhuko") was born in April 1946 in Rugara *Cellule*, Ndora Sector, Ndora Commune, Butare Prefecture, and is the mother of Arsène Shalom Ntahobali ("Ntahobali").[2] Nyiramasuhuko was appointed Minister of Family and Women's Development in the government of Rwanda on 16 April 1992 and continued to serve in this post under the interim government headed by Prime Minister Jean Kambanda ("Interim Government" and "Kambanda", respectively) during the events of 1994.[3] When she was appointed Minister, she was elected as a member of the *Mouvement révolutionnaire national pour la démocratie et le développement* ("MRND") National Committee, representing Butare Prefecture.[4] In 1994, she resided in Kigali and regularly returned to Butare Town.[5] Nyiramasuhuko was arrested in Kenya and transferred to the Tribunal's detention facility in Arusha, Tanzania, on 18 July 1997.[6]

3. Ntahobali was born in 1970 in Israel.[7] In April 1994, Ntahobali was both a student and part-time manager of Hotel Ihuliro located in Mamba *Cellule*, Butare-*ville* Sector, Ngoma

[1] *The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Élie Ndayambaje*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011 ("Trial Judgement").
[2] Trial Judgement, paras. 8, 10, 18.
[3] Trial Judgement, paras. 8, 11.
[4] Trial Judgement, para. 11.
[5] Trial Judgement, para. 8.
[6] Trial Judgement, paras. 14, 6295.
[7] Trial Judgement, paras. 10, 18.

Commune, Butare Prefecture.[8] He was arrested in Kenya on 24 July 1997 and transferred to the Tribunal's detention facility on the same day.[9]

4. Sylvain Nsabimana ("Nsabimana") was born on 29 July 1951 in Mbazi Commune, Butare Prefecture.[10] He was a member of the *Parti social démocrate* ("PSD") from the time of the party's creation and served as the head of the Mbazi section of the PSD in Butare Prefecture.[11] He became the head of the PSD in Kigali-rural Prefecture following his relocation to Kigali.[12] Nsabimana served as prefect of Butare from 19 April until 17 June 1994.[13] He was arrested in Kenya on 18 July 1997 and transferred to the Tribunal's detention facility on the same day.[14]

5. Alphonse Nteziryayo ("Nteziryayo") was born on 26 August 1947 in Akagashuma *Cellule*, Nyagahuru Sector, Kibayi Commune, Butare Prefecture.[15] He graduated from the *École des officiers* in Kigali in 1973 and, between 1973 and 1991, occupied a series of senior military positions with the military police, the *gendarmerie*, and the Rwandan army.[16] In September 1991, he was appointed to the Ministry of Interior and Communal Development, where he served as Director of Communal Police Matters until 17 June 1994, when he was appointed prefect of Butare, replacing Nsabimana.[17] Nteziryayo was arrested in Burkina Faso on 26 March 1998[18] and transferred to the Tribunal's detention facility on 21 May 1998.[19]

6. Joseph Kanyabashi ("Kanyabashi") was born in 1937 in Mpare Sector, Huye Commune, Butare Prefecture.[20] He was a member of the PSD and served as *bourgmestre* of Ngoma Commune

[8] Trial Judgement, paras. 18, 20.
[9] Trial Judgement, paras. 23, 6295.
[10] Trial Judgement, para. 27.
[11] Trial Judgement, para. 30.
[12] Trial Judgement, para. 30.
[13] Trial Judgement, para. 31.
[14] Trial Judgement, paras. 32, 6306.
[15] Trial Judgement, para. 37.
[16] Trial Judgement, paras. 39-45.
[17] Trial Judgement, paras. 31, 45.
[18] In the Trial Judgement, relying on the fourth annual report of the Tribunal to the Security Council of the United Nations and on a declaration from Nteziryayo's Counsel during his opening statement, the Trial Chamber stated that Nteziryayo was arrested on 24 April 1998. *See* Trial Judgement, paras. 49, 6309, *referring to* Fourth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. A/54/315 & S/1999/943, 7 September 1999, Annex, p. 2, Nteziryayo Opening Statement, T. 4 December 2006 p. 7. As a result of Nteziryayo's request for clarification of the date of his arrest, the Appeals Chamber instructed the Registrar to make written representations as to Nteziryayo's date of arrest. *See* Decision on Prosecution's Motion for Summary Dismissal or Alternative Remedies, 5 July 2013 ("5 July 2013 Appeal Decision"), paras. 19-23. On 14 March 2014, the Registrar indicated that the authorities of Burkina Faso provided the date of the arrest of Nteziryayo in Ouagadougou, Burkina Faso, as 26 March 1998. *See* The Registrar's Rule 33(B) Submission Concerning Alphonse Nteziryayo's Date of Arrest, 14 March 2014, para. 4, Annex B. Neither Nteziryayo nor the Prosecution has challenged this date in subsequent submissions.
[19] Trial Judgement, para. 49.
[20] Trial Judgement, para. 53.

in Butare Prefecture from April 1974 until he left Rwanda in July 1994.[21] Kanyabashi was arrested in Belgium on 28 June 1995 and transferred to the Tribunal's detention facility on 8 November 1996.[22]

7. Élie Ndayambaje ("Ndayambaje") was born on 8 March 1958 in Cyumba Sector, Muganza Commune, Butare Prefecture.[23] He served as *bourgmestre* of Muganza Commune from 10 January 1983 to October 1992, and from 18 June 1994 until he left Rwanda for Burundi on 7 July 1994.[24] Ndayambaje was arrested in Belgium on 28 June 1995 and transferred to the Tribunal's detention facility on 8 November 1996.[25]

8. The case of Nyiramasuhuko was initially joined to that of Ntahobali,[26] the case of Nsabimana was joined to that of Nteziryayo,[27] and the cases of Kanyabashi and Ndayambaje were pursued separately.[28] The initial joint indictment against Nyiramasuhuko and Ntahobali was confirmed on 29 May 1997 and last amended on 1 March 2001.[29] The initial joint indictment against Nsabimana and Nteziryayo was confirmed on 16 October 1997 and last amended on 12 August 1999.[30] The initial indictment against Kanyabashi was confirmed on 15 July 1996 and last amended on 11 June 2001.[31] The initial indictment against Ndayambaje was confirmed on 21 June 1996 and last amended on 11 August 1999.[32] On 5 October 1999, a bench of Trial Chamber II granted the Prosecution's motion for joinder and ordered the joint trial of the six accused.[33]

9. The joint trial of the co-Accused commenced on 12 June 2001 before a bench of Trial Chamber II composed of Judges William H. Sekule, Arlette Ramaroson, and Winston

[21] Trial Judgement, para. 53.
[22] Trial Judgement, paras. 55, 6276, 6277.
[23] Trial Judgement, para. 60.
[24] Trial Judgement, paras. 63, 67.
[25] Trial Judgement, paras. 69, 6285, 6286.
[26] *See* Trial Judgement, paras. 13, 22, 6294.
[27] *See* Trial Judgement, paras. 33, 48, 6307.
[28] *See* Trial Judgement, paras. 55, 68, 6277, 6286.
[29] Trial Judgement, paras. 13, 17, 22, 26, 6294. *See also The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 1 March 2001 ("Nyiramasuhuko and Ntahobali Indictment").
[30] Trial Judgement, paras. 33, 35, 48, 51, 6307, 6317. *See also The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999 ("Nsabimana and Nteziryayo Indictment").
[31] Trial Judgement, paras. 55, 58, 6277. *See also The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of 12 August 1999, 31 May 2000 and 8 June 2001, 11 June 2001 ("Kanyabashi Indictment").
[32] Trial Judgement, paras. 68, 71, 6292, fn. 14952. *See also The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999 ("Ndayambaje Indictment").
[33] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-I, Decision on the Prosecutor's Motion for Joinder of Trials, 5 October 1999 ("Joinder Decision"), p. 18. *See infra*, Section III.B.

C. M. Maqutu.[34] Judge Solomy B. Bossa was appointed to the bench assigned to this case on 20 October 2003 to replace Judge Maqutu, whose term of office ended on 24 May 2003.[35] The trial resumed on 26 January 2004, with the continued presentation of the Prosecution case.[36] The Prosecution closed its case on 18 October 2004 and the co-Accused presented their cases from 31 January 2005 to 2 December 2008.[37] Four Prosecution witnesses were recalled and gave further testimonies on 23 and 24 February 2009.[38] The closing arguments were heard from 20 to 30 April 2009.[39]

B. Trial Judgement

10. The Trial Chamber pronounced the Trial Judgement on 24 June 2011 and issued it in writing on 14 July 2011. The Trial Judgement was rendered on the basis of four indictments.

11. The events giving rise to this case concern crimes committed in Butare Prefecture. The Trial Chamber found that widespread killings did not occur in Butare before mid-April 1994.[40] It also found established beyond reasonable doubt that from 9 April until 14 July 1994, and in particular between 9 April and 19 April 1994, members of the Interim Government agreed to issue directives to encourage the population to hunt down and kill Tutsis in Butare Prefecture.[41] It determined in particular that, on 16 or 17 April 1994, the Interim Government decided to remove the longstanding prefect of Butare, Jean-Baptiste Habyalimana ("Habyalimana"), who had posed an obstacle to the killing of Tutsis in the prefecture and to replace him with Nsabimana for reasons other than maintaining peace.[42] The Trial Chamber further determined that at the swearing-in ceremony of Nsabimana as new prefect of Butare that took place on 19 April 1994 ("Nsabimana's Swearing-In Ceremony"), President Théodore Sindikubwabo ("Sindikubwabo") and Prime Minister Kambanda made inflammatory speeches and called upon the population to kill Tutsis in the presence of many officials, including Nyiramasuhuko and Kanyabashi.[43] The Trial Chamber held that the removal of Prefect Habyalimana, the appointment of Nsabimana as the new prefect, and Kambanda's and Sindikubwabo's speeches at Nsabimana's Swearing-In Ceremony contributed significantly to

[34] *See* Trial Judgement, paras. 74, 6341, fn. 159.
[35] *See* Trial Judgement, paras. 75, 6392, fn. 160. Judge Maqutu's term of office was only extended for the purposes of concluding two other trials. *See ibid.*, fn. 160. *See also infra*, Section III.C.
[36] Trial Judgement, paras. 75, 6393.
[37] Trial Judgement, paras. 76-82, 84, 6423, 6433-6597.
[38] Trial Judgement, paras. 84, 6604.
[39] Trial Judgement, paras. 85, 6610.
[40] Trial Judgement, paras. 927, 930, 933. *See also ibid*., paras. 931, 984, 5741, 5753, 6155, 6158.
[41] Trial Judgement, para. 5676. *See also ibid*., paras. 583, 1939, 5669, 5733.
[42] Trial Judgement, paras. 862, 864, 5670, 5676. *See also ibid*., para. 5736.
[43] Trial Judgement, paras. 890, 898, 925, 926, 932, 933, 5671-5673.

triggering the widespread killings in Butare Prefecture, including in the communes that had resisted such massacres until that time.[44]

12. The Trial Chamber found established beyond reasonable doubt that, from 20 April 1994 to late June 1994, mass killings, mainly of Tutsis, were perpetrated throughout Butare Prefecture in people's homes, in places where Tutsis had sought refuge, and at roadblocks that were mounted in response to encouragement from officials to target and kill Tutsis.[45]

13. The Trial Chamber found Nyiramasuhuko guilty of:

- conspiracy to commit genocide pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;[46]
- genocide, crimes against humanity (extermination and persecution), and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health, and physical or mental well-being of persons) pursuant to Article 6(1) of the Statute for ordering killings of Tutsis who had sought refuge at the office of Butare Prefecture in Butare Town, Ngoma Commune ("Butare Prefecture Office"), in May and June 1994;[47] and
- crime against humanity (rape) and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (outrages upon personal dignity) pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office in May and June 1994.[48]

The Trial Chamber determined that Nyiramasuhuko also bore responsibility as a superior under Article 6(3) of the Statute for the killings that she ordered at the prefectoral office and took this into account in sentencing.[49] The Trial Chamber sentenced Nyiramasuhuko to life imprisonment.[50]

14. The Trial Chamber found Ntahobali guilty of:

- genocide, crimes against humanity (extermination and persecution), and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health, and physical or mental well-being of persons) pursuant to Article 6(1) of the Statute for: (i) killing numerous Tutsis in late April 1994 at the roadblock erected near Hotel Ihuliro

[44] Trial Judgement, paras. 931, 933, 5670-5673.
[45] *See*, *e.g.*, Trial Judgement, paras. 933, 5675, 5676, 5741, 5742.
[46] Trial Judgement, paras. 5676-5678, 5727, 6186.
[47] Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186. *See also infra*, Section IV.F.1.
[48] Trial Judgement, paras. 6087, 6088, 6093, 6183, 6186. *See also infra*, Section IV.F.1.
[49] Trial Judgement, paras. 5886, 5970, 6052, 6207. *See also infra*, Section IV.F.4.
[50] Trial Judgement, para. 6271.

in Butare Town,[51] including a girl he had first raped; (ii) ordering the killing of Léopold Ruvurajabo ("Ruvurajabo") at this roadblock in late April 1994, killings at the *Institut de recherche scientifique et technique* ("IRST") on 21 April 1994, and killings of Tutsis who had sought refuge at the Butare Prefecture Office in May 1994; and (iii) aiding and abetting the killing of an individual named Rwamukwaya and his family around 29-30 April 1994 as well as the killings of Tutsis abducted from the EER perpetrated between mid-May and early June 1994;[52] and

- crime against humanity (rape) and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (outrages upon personal dignity) pursuant to Article 6(1) of the Statute for: (i) raping a young Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Tutsi women who were taking refuge at the Butare Prefecture Office; (ii) ordering the rapes of Tutsi women at the prefectoral office; and (iii) aiding and abetting the rapes of a Tutsi woman by *Interahamwe* at the prefectoral office.[53]

The Trial Chamber determined that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the killings and rapes committed by *Interahamwe* that he ordered at the prefectoral office, the killing of Ruvurajabo at the Hotel Ihuliro roadblock, and the killings committed by *Interahamwe* at or near the EER that he aided and abetted, and took this into account in sentencing.[54] The Trial Chamber sentenced Ntahobali to life imprisonment.[55]

15. The Trial Chamber found Nsabimana guilty of genocide, crimes against humanity (extermination and persecution) and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health, and physical or mental well-being of persons) pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge

[51] Ntahobali submits that the Trial Chamber should have referred to this roadblock as the "EER roadblock" instead of "Hotel Ihuliro roadblock" as the roadblock was located opposite the *École évangéliste du Rwanda* ("EER") and 50 to 100 metres from the hotel. *See* Ntahobali Notice of Appeal, para. 8. The Appeals Chamber notes that the Trial Chamber carefully reviewed the evidence concerning the location of the roadblock and referred to the roadblock in relation to its proximity to the Hotel Ihuliro. *See* Trial Judgement, para. 3108. *See also ibid*., Section 3.6.23.4.2, paras. 3107, 3111, 3113. The Appeals Chamber finds that the expression "Hotel Ihuliro roadblock" accurately reflects the evidence adduced by both Prosecution and Defence witnesses and will therefore, for the sake of clarity and consistency, refer to the roadblock which the Trial Chamber found was located in the proximity of the EER and the garage known as the "MSM garage" and very close to Hotel Ihuliro as the "Hotel Ihuliro roadblock" throughout this Judgement.
[52] Trial Judgement, paras. 5876, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186. *See also infra*, Sections V.G.1, V.I.1, V.J.1.
[53] Trial Judgement, paras. 6086, 6094, 6184-6186.
[54] Trial Judgement, paras. 5847-5849, 5886, 5917, 5971, 6056, 6086, 6220.
[55] Trial Judgement, para. 6271.

his duty to provide assistance to people in danger and to protect civilians against acts of violence.[56] The Trial Chamber sentenced Nsabimana to 25 years of imprisonment.[57]

16. The Trial Chamber found Nteziryayo guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's swearing-in ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994.[58] The Trial Chamber sentenced Nteziryayo to 30 years of imprisonment.[59]

17. The Trial Chamber found Kanyabashi guilty of:

- committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in May and June 1994 directly calling on the population to kill Tutsis;[60] and
- genocide, crimes against humanity (extermination and persecution), and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health, and physical or mental well-being of persons) as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994.[61]

The Trial Chamber sentenced Kanyabashi to 35 years of imprisonment.[62]

18. The Trial Chamber found Ndayambaje guilty of:

- committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994 and by making a speech containing

[56] Trial Judgement, paras. 5893, 5899, 5900, 5903, 5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.
[57] Trial Judgement, para. 6271.
[58] Trial Judgement, paras. 6022-6029, 6036, 6186. The Trial Chamber found that Ndayambaje was re-appointed *bourgmestre* of Muganza Commune on 18 June 1994 but that his swearing-in ceremony was held on 22 June 1994. *See ibid*., paras. 67, 4645.
[59] Trial Judgement, para. 6271.
[60] Trial Judgement, paras. 6009-6013, 6037, 6186.
[61] Trial Judgement, paras. 5809, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186. Judge Ramaroson dissented with respect to the Trial Chamber's conclusions regarding Matyazo Clinic. The Appeals Chamber notes that the Trial Chamber on a few occasions in the Trial Judgement and Kanyabashi in his appeal submissions also referred to the clinic in Matyazo as the "dispensary" or "health center". For the sake of clarity, the Appeals Chamber will use the terminology most commonly used in the Trial Judgement and will refer to the clinic in Matyazo Sector, Ngoma Commune, Butare Prefecture, as the "Matyazo Clinic" throughout this Judgement.
[62] Trial Judgement, para. 6271.

inciting statements to commit genocide at his swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994;[63] and

- genocide, crimes against humanity (extermination and persecution), and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life, health, and physical or mental well-being of persons) pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994 as well as instigating the killings of Tutsi women and girls abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994.[64]

The Trial Chamber sentenced Ndayambaje to life imprisonment.[65]

C. The Appeals

19. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje, and the Prosecution filed appeals against the Trial Judgement.

20. Nyiramasuhuko initially advanced 32 grounds of appeal against her convictions and sentence in her notice of appeal but formally abandoned Ground 6 of her appeal.[66] She requests that the Appeals Chamber stay the proceedings, or set aside her convictions and acquit her of all counts or, in a further alternative, reduce her sentence.[67]

21. Ntahobali advanced 44 grounds of appeal against his convictions and sentence in his notice of appeal but formally abandoned Grounds 3.8 and 4.10 of his appeal.[68] He requests that the Appeals Chamber set aside his convictions and acquit him of all counts or, in the alternative, order a retrial or, in a further alternative, reduce his sentence.[69]

22. Nsabimana advanced 16 grounds of appeal against his convictions and sentence in his notice of appeal but formally abandoned Ground 3 of his appeal.[70] He requests that the Appeals Chamber set aside his convictions and acquit him of all counts or, in the alternative, substantially reduce his sentence, at least to the time already served.[71]

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[63] Trial Judgement, paras. 5995-6002, 6026-6029, 6038, 6186.
[64] Trial Judgement, paras. 5949, 5976, 5977, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186.
[65] Trial Judgement, para. 6271.
[66] Nyiramasuhuko Notice of Appeal, pp. 6-54; Nyiramasuhuko Appeal Brief, paras. 7 (French), 8.
[67] Nyiramasuhuko Notice of Appeal, p. 55; Nyiramasuhuko Appeal Brief, *e.g.*, paras. 71 (at p. 20), 142, 185, 283, 377, 509, 584, 585, 598, 685, 1295, 1296, 1315.
[68] Ntahobali Notice of Appeal, pp. 6-56; Ntahobali Appeal Brief, paras. 771, 983.
[69] Ntahobali Notice of Appeal, p. 56; Ntahobali Appeal Brief, p. 299.
[70] Nsabimana Notice of Appeal, pp. 2-13; Nsabimana Appeal Brief, paras. 57, 58.
[71] Nsabimana Notice of Appeal, p. 13; Nsabimana Appeal Brief, p. 67.

23. Nteziryayo advances 11 grounds of appeal against his conviction and sentence.[72] He requests that the Appeals Chamber set aside his convictions and acquit him on all counts or, in the alternative, reduce his sentence to time served.[73]

24. Kanyabashi advanced 36 grounds of appeal against his convictions and sentence in his notice of appeal and separately developed 33 grounds of appeal in his appeal brief.[74] He requests that the Appeals Chamber set aside his convictions, acquit him on all counts, and order his immediate release or, in the alternative, stay the proceedings or, in a further alternative, substantially reduce his sentence.[75]

25. Ndayambaje advances 21 grounds of appeal against his convictions and sentence.[76] He requests that the Appeals Chamber set aside his convictions, acquit him on all counts, grant him financial compensation for the prejudice suffered, and order his immediate release or, in the alternative, reduce his sentence to time served and order any other appropriate remedy.[77]

26. The Prosecution advances two grounds of appeal against Kanyabashi's acquittals on the counts of genocide and direct and public incitement to commit genocide in relation to the speech he gave at Nsabimana's Swearing-In Ceremony on 19 April 1994.[78] It requests that the Appeals Chamber set aside Kanyabashi's acquittals and enter findings of guilt of genocide and direct and public incitement to commit genocide based on the speech he made at this event and, consequently, increase Kanyabashi's sentence to life imprisonment or, in the alternative, substantially increase his prison sentence.[79]

27. In response to the Prosecution's appeal, Kanyabashi advances seven supplementary grounds of appeal challenging the Trial Chamber's findings related to Nsabimana's Swearing-In Ceremony.[80]

28. The Appeals Chamber heard oral submissions regarding these appeals from 14 to 22 April 2015.

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[72] Nteziryayo Notice of Appeal, pp. 5-23; Nteziryayo Appeal Brief, pp. 11-112.
[73] Nteziryayo Notice of Appeal, paras. 76, 77; Nteziryayo Appeal Brief, p. 114.
[74] Kanyabashi Notice of Appeal, paras. 8-35; Kanyabashi Appeal Brief, pp. 3-150. Kanyabashi formally abandoned Ground 1.8 of his appeal in his appeal brief and indicated that Grounds 4, 5, and 7 of his appeal were "not developed separately." *See* Kanyabashi Appeal Brief, paras. 147, 362, 363, 382. He also formally abandoned a number of sub-grounds in his appeal brief. *See ibid*., paras. 80, 147, 256, 305, 328.
[75] Kanyabashi Notice of Appeal, paras. 18, 18, 25, 28, 33-35; Kanyabashi Appeal Brief, paras. 395-397.
[76] Ndayambaje Notice of Appeal, pp. 6-42; Ndayambaje Appeal Brief, pp. 14-143.
[77] Ndayambaje Notice of Appeal, p. 43; Ndayambaje Appeal Brief, p. 144.
[78] Prosecution Notice of Appeal, paras. 2-5; Prosecution Appeal Brief, paras. 10-40.
[79] Prosecution Appeal Brief, paras. 41-44. *See also* Prosecution Notice of Appeal, paras. 3, 5.
[80] Kanyabashi Response Brief, pp. 11-72.

II. STANDARD OF APPELLATE REVIEW

29. The Appeals Chamber recalls the applicable standard of appellate review pursuant to Article 24 of the Statute. The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of a trial chamber and errors of fact which have occasioned a miscarriage of justice.[81]

30. Regarding errors of law, the Appeals Chamber has stated:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[82]

31. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.[83] In so doing, the Appeals Chamber not only corrects the legal error, but, where necessary, also applies the correct legal standard to the evidence contained in the trial record and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding may be confirmed on appeal.[84] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the trial chamber in the body of the trial judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and, where applicable, additional evidence admitted on appeal.[85]

32. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a trial chamber:

> Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.[86]

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[81] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 13; *Hategekimana* Appeal Judgement, para. 6; *Nahimana et al.* Appeal Judgement, para. 11. *See also Akayesu* Appeal Judgement, paras. 16, 17; *Furundžija* Appeal Judgement, para. 40.

[82] *Ntakirutimana* Appeal Judgement, para. 11 (internal reference omitted). *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 14; *Akayesu* Appeal Judgement, para. 179; *Furundžija* Appeal Judgement, para. 35.

[83] *See Blaškić* Appeal Judgement, para. 15. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bagosora and Nsengiyumva* Appeal Judgement, para. 17; *Karera* Appeal Judgement, para. 9.

[84] *See Blaškić* Appeal Judgement, para. 15. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 15; *Bagosora and Nsengiyumva* Appeal Judgement, para. 17; *Karera* Appeal Judgement, para. 9.

[85] *See*, *e.g.*, *Đorđević* Appeal Judgement, para. 15; *Šainović et al.* Appeal Judgement, para. 21; *Boškoski and Tarčulovski* Appeal Judgement, para. 12; *Milošević* Appeal Judgement, para. 14.

[86] *Krstić* Appeal Judgement, para. 40 (internal references omitted). *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Niyitegeka* Appeal Judgement, para. 8; *Akayesu* Appeal Judgement, para. 178; *Furundžija* Appeal Judgement, para. 37; *Serushago* Appeal Judgement, para. 22.

The same standard of reasonableness and the same deference to factual findings of a trial chamber apply where the Prosecution appeals against an acquittal.[87] The Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[88] However, considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction.[89] A convicted person must show that the trial chamber's factual errors create a reasonable doubt as to his guilt.[90] The Prosecution must show that, where account is taken of the errors of fact committed by the trial chamber, all reasonable doubt of the accused's guilt has been eliminated.[91]

33. The Appeals Chamber recalls that, where additional evidence has been admitted on appeal and an alleged error of fact is raised, but there is no error in the legal standard applied in relation to the factual finding, the following two-step standard will apply:

> The Appeals Chamber will first determine, on the basis of the trial record alone, whether no reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt. If that is the case, then no further examination of the matter is necessary as a matter of law.
>
> If, however, the Appeals Chamber determines that a reasonable trier of fact could have reached a conclusion of guilt beyond reasonable doubt, then the Appeals Chamber will determine whether, in light of the trial evidence and additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[92]

34. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the trial chamber's rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber.[93] Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[94]

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[87] *Bagilishema* Appeal Judgement, para. 13. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24.
[88] *See Bagilishema* Appeal Judgement, para. 13. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24.
[89] *See Bagilishema* Appeal Judgement, para. 14. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24.
[90] *See Bagilishema* Appeal Judgement, para. 14. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Seromba* Appeal Judgement, para. 11.
[91] *See Bagilishema* Appeal Judgement, para. 14. *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 16; *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24.
[92] *Blaškić* Appeal Judgement, para. 24(c). *See also Šainović et al.* Appeal Judgement, para. 25; *Lukić and Lukić* Appeal Judgement, para. 14; *Krajišnik* Appeal Judgement, para. 15; *Kvočka et al.* Appeal Judgement, para. 426.
[93] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.
[94] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 17; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18; *Kupreškić et al.* Appeal Judgement, para. 23.

35. In order for the Appeals Chamber to assess arguments on appeal, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is made.[95] Moreover, the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague, or suffer from other formal and obvious insufficiencies.[96] Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing, and it will dismiss arguments which are evidently unfounded without providing detailed reasoning.[97]

[95] Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005 ("Practice Direction on Formal Requirements on Appeal"), para. 4(b). *See also*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, para. 44.
[96] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Niyitegeka* Appeal Judgement, para. 10; *Kunarac et al.* Appeal Judgement, para. 43, *referring to Kayishema and Ruzindana* Appeal Judgement, para. 137.
[97] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 18; *Rutaganda* Appeal Judgement, para. 19; *Kunarac et al.* Appeal Judgement, paras. 47, 48.

III. COMMON GROUNDS OF APPEAL ON FAIRNESS OF THE PROCEEDINGS

A. Arrest and Initial Appearance (Nyiramasuhuko Ground 2; Ntahobali Ground 1.2; Nteziryayo Ground 9 in part; Ndayambaje Ground 15 in part)

36. Nyiramasuhuko, Ntahobali, Nteziryayo, and Ndayambaje allege violations of their right to a fair trial in the context of their arrests and initial appearances.[98] The Appeals Chamber will examine their grounds of appeal in turn. Before doing so, the Appeals Chamber recalls that, according to Articles 19(2) and 20(4)(a) of the Statute, an accused is entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charges against him. Furthermore, pursuant to Article 19(3) of the Statute and Rule 62 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), once an accused is taken into the custody of the Tribunal, the accused is to appear before a trial chamber or a judge without delay to be formally charged.[99]

1. Nyiramasuhuko's Arrest and Initial Appearance

37. Nyiramasuhuko was arrested in Kenya and transferred to the custody of the Tribunal on 18 July 1997.[100] Her initial appearance took place on 3 September 1997.[101] On 2 March 2000, Nyiramasuhuko filed a motion alleging that, following her arrest, the Tribunal failed to promptly inform her of the nature and cause of the charges against her and that her initial appearance was not held without delay.[102] On 12 October 2000, Judge Kama, sitting as a single judge of Trial Chamber II of the Tribunal, found that the Registrar transmitted to Nyiramasuhuko all relevant documents informing her of her rights and the charges against her on 26 July 1997 and, while "deplor[ing] this delay", considered that it did not constitute "a substantial violation of [her] fundamental rights".[103] Judge Kama also found that Nyiramasuhuko's initial appearance was not

[98] Nyiramasuhuko Notice of Appeal, para. 1.8; Nyiramasuhuko Appeal Brief, paras. 67-71 (pp. 20, 21); Ntahobali Notice of Appeal, paras. 15-18; Ntahobali Appeal Brief, paras. 32-43; Ndayambaje Appeal Brief, para. 308; AT. 17 April 1994 pp. 18, 19; AT. 21 April 2015 pp. 7-10, 62, 63.
[99] *See also Kajelijeli* Appeal Judgement, para. 250 ("The Appeals Chamber emphasizes that Rule 62 is unequivocal that an initial appearance is to be scheduled without delay.").
[100] Trial Judgement, paras. 14, 6295.
[101] Trial Judgement, paras. 14, 6296.
[102] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Motion for the Exclusion of Evidence and Restitution of Property Seized, 2 March 2000 (originally filed in French, English translation filed on 31 March 2000) ("2 March 2000 Motion"), paras. 3, 7-13, 19, 67, 69-71, 73.
[103] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, 12 October 2000 (originally filed in French, English translation filed on the same day) ("12 October 2000 Decision"), paras. 18, 19. The Trial Chamber further noted that the Registrar transmitted the indictment to her on 9 August 1997. *See ibid.*, para. 19.

without delay as required under Rule 62 of the Rules but that this delay had not caused her serious and irreparable prejudice.[104]

38. On 25 June 2003, after the commencement of trial, Nyiramasuhuko requested a stay of the proceedings against her as a remedy for the accumulation of the alleged violations of her fair trial rights, a request which the Trial Chamber denied on 20 February 2004.[105] The Trial Chamber found that Nyiramasuhuko had failed to demonstrate that her fair trial rights were violated as a result of delays in the trial proceedings.[106] It also rejected Nyiramasuhuko's submissions related to her right to be promptly informed of the reasons of her arrest and her right of initial appearance without delay on the grounds that Nyiramasuhuko had failed: (i) to raise objections in this regard prior to the 25 June 2003 Motion and that the belatedness of her submissions had a purely disruptive effect; and (ii) to show that the alleged violations caused her material prejudice.[107] Nyiramasuhuko requested certification to appeal this decision, highlighting her 2 March 2000 Motion, in which she had raised objections relating to her arrest and initial appearance, and the resulting 12 October 2000 Decision.[108] On 19 March 2004, the Trial Chamber acknowledged that Nyiramasuhuko had previously raised these objections but determined that the issues of violation of her rights were *res judicata* and denied her request for certification based on a lack of legal basis.[109]

39. Nyiramasuhuko submits that the Trial Chamber "erred in law and in fact in failing to consider the previous violations of [her] rights in the course of her arrest and initial appearance, which violations were pleaded cumulatively with the alleged violations of her right to be tried fairly and without undue delay in her [25 June 2003 Motion]."[110] The Appeals Chamber understands Nyiramasuhuko to argue that the Trial Chamber erred in its 20 February 2004 Decision in failing to re-assess and cure the prejudice suffered as a result of the violation of her right to be promptly informed of the nature and cause of the charges against her, which were assessed in the 12 October 2000 Decision, and the violation of her right of initial appearance without delay, which

[104] 12 October 2000 Decision, para. 20.
[105] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, *Requête de Pauline Nyiramasuhuko en arrêt des procédures pour abus de procédures (délais déraisonnables et procès inéquit[a]ble*, 25 June 2003 ("25 June 2003 Motion "); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for a Stay of Proceedings and Abuse of Process, 20 February 2004 ("20 February 2004 Decision"), p. 6.
[106] 20 February 2004 Decision, paras. 13-17.
[107] 20 February 2004 Decision, paras. 23-25.
[108] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Pauline Nyiramasuhuko's Motion for Certification of the Appeal Against the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 27 February 2004 (originally filed in French, English translation filed on 12 March 2004), paras. 12-16.
[109] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for Certification to Appeal the "Decision on Defence Motion for a Stay of Proceedings and Abuse of Process", 19 March 2004 ("19 March 2004 Decision"), paras. 21, 27, 28, p. 8.
[110] Nyiramasuhuko Notice of Appeal, heading Ground 2, p. 8.

was alleged in her 25 June 2003 Motion, in light of "the other violations of her fair trial rights".[111] In support of her contention, Nyiramasuhuko argues that the Trial Chamber failed to consider that the issue of the accumulation of violations had not been ruled upon in the 12 October 2000 Decision and, consequently, that the question of prejudice was not *res judicata*.[112] Nyiramasuhuko also requests that the Appeals Chamber take into account the violations of her rights that have been found at trial and to grant her an appropriate remedy.[113]

40. The Prosecution responds that Nyiramasuhuko's arguments should be summarily dismissed as they misrepresent the Trial Chamber's findings and Nyiramasuhuko fails to articulate any error.[114]

41. Nyiramasuhuko's submissions fail to acknowledge that, in the 20 February 2004 Decision, the Trial Chamber rejected her submission that her fair trial rights were violated as a result of delays in the trial proceedings.[115] Her submissions also ignore that the Trial Chamber did assess the prejudice allegedly resulting from the purported violations of her right to be promptly informed of the nature and cause of the charges against her and her right to initial appearance without delay, finding that Nyiramasuhuko had failed to show material prejudice.[116] Although the Trial Chamber originally erred in finding that Nyiramasuhuko had failed to raise the issue of the violation of these two particular rights earlier in the proceedings,[117] Nyiramasuhuko does not demonstrate that the Trial Chamber erred in finding that she had not shown that she suffered material prejudice for the alleged violations of these rights.

42. As regards Nyiramasuhuko's request for an appropriate remedy for the violations found at trial, the Appeals Chamber observes that the only violations determined to have occurred were the violations of her rights to be informed of the charges against her and of initial appearance without delay recognised in the 12 October 2000 Decision.[118] The Appeals Chamber recalls that "any

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[111] Nyiramasuhuko Notice of Appeal, para. 1.8; Nyiramasuhuko Appeal Brief, para. 67 (p. 20), *referring to* 12 October 2000 Decision, 20 February 2004 Decision, 19 March 2004 Decision. Nyiramasuhuko's submissions are particularly unclear, especially with respect to which Trial Chamber's decision or finding is being challenged as well as with respect to which "other violations of her fair trial rights" she is referring. Although Nyiramasuhuko's ground of appeal could be summarily dismissed based on her failure to properly identify the challenged finding and the lack of clarity of her submissions, the Appeals Chamber will examine the merits of what it understands her challenges to be.
[112] Nyiramasuhuko Appeal Brief, paras. 68-70 (p. 20).
[113] Nyiramasuhuko Appeal Brief, para. 71 (p. 21).
[114] Prosecution Response Brief, paras. 90-96.
[115] *See* 20 February 2004 Decision, paras. 13-16.
[116] *See* 20 February 2004 Decision, para. 25. The Appeals Chamber notes that, in its 19 March 2004 Decision, the Trial Chamber found that the issues of violations of certain of her rights were *res judicata*, not the question of the prejudice suffered as a result of the accumulation of the violation of her rights. *See* 19 March 2004 Decision, para. 28.
[117] *See* 20 February 2004 Decision, paras. 18-26.
[118] *See* Nyiramasuhuko Appeal Brief, para. 71 (p. 21). The Appeals Chamber notes that Nyiramasuhuko has failed to identify in her submissions any other violation recognised by the Trial Chamber that may require remedy and will therefore limit its consideration to the violations of her rights to be informed of the charges against her and of initial appearance without delay, which are expressly discussed in her submissions under this ground of appeal.

violation, even if it entails a relative degree of prejudice, requires a proportionate remedy".[119] The nature and form of the effective remedy should be proportional to the gravity of harm that is suffered.[120] In practice, "the effective remedy accorded by a Chamber for violations of an accused's fair trial rights will almost always take the form of equitable or declaratory relief."[121] The Appeals Chamber considers that, in situations where the violation has not materially prejudiced the accused, a formal recognition of the violation may be considered an effective remedy.[122] Nyiramasuhuko has not developed any argument to demonstrate that the recognition of the violations of her rights to be informed of the charges against her and of initial appearance without delay by Judge Kama in the 12 October 2000 Decision was not an effective remedy. Nyiramasuhuko's claim is therefore dismissed.

43. Based on the foregoing, the Appeals Chamber dismisses Ground 2 of Nyiramasuhuko's appeal.

2. Ntahobali's Initial Appearance

44. Ntahobali was arrested in Kenya and transferred to the custody of the Tribunal on 24 July 1997.[123] He appeared before the Trial Chamber for the first time 41 days later on 3 September 1997 but, in the absence of legal representation, did not enter a plea.[124] Ntahobali entered a plea in the presence of his counsel on 17 October 1997, 86 days after his arrest and transfer to the Tribunal.[125] On 26 November 2008, the Trial Chamber concluded that the failure of Ntahobali's counsel to appear in court on 3 September 1997 and the delay between 3 September 1997 and the initial appearance on 17 October 1997 were attributable to Ntahobali's counsel.[126] The Trial Chamber, however, considered that, even if Ntahobali's initial appearance had been held on 3 September 1997 as initially scheduled, it was not without delay as required under Rule 62 of the Rules.[127] The Trial Chamber further concluded that this delay had not caused serious

[119] *André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Appeal Decision"), para. 24. *See also Kajelijeli* Appeal Judgement, para. 255.
[120] *Rwamakuba* Appeal Decision, para. 27.
[121] *Rwamakuba* Appeal Decision, para. 27 and references cited therein.
[122] *Cf. Rwamakuba* Appeal Decision, para. 27; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007 ("*Rwamakuba* Decision"), para. 69; *Bagosora et al.* Trial Judgement, para. 97.
[123] Trial Judgement, paras. 23, 6295.
[124] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for a Stay of Proceedings for Undue Delay, 26 November 2008 ("26 November 2008 Decision"), para. 45. Ntahobali made his first appearance on 3 September 1997 before a bench of Trial Chamber II composed of Judges Kama, Pillay, and Sekule. For the sake of legibility, the Appeals Chamber will refer to this bench of Trial Chamber II, to the benches that ruled on all pre-trial motions in the separate cases before their joinder, and to the bench that ultimately ruled on the joint case as the "Trial Chamber".
[125] Trial Judgement, paras. 23, 6297; 26 November 2008 Decision, paras. 43, 45.
[126] 26 November 2008 Decision, paras. 49, 53.
[127] 26 November 2008 Decision, para. 53.

and irreparable prejudice so as to warrant the stay of proceedings and immediate release requested by Ntahobali.[128]

45. Ntahobali submits that the Trial Chamber erred in the 26 November 2008 Decision in finding that the delay between 3 September and 17 October 1997 was attributable to his counsel and in failing to acknowledge that his right to initial appearance without delay was violated during this period.[129] Relying on the *Kajelijeli* Appeal Judgement, Ntahobali argues that he should not be blamed for the unavailability of his counsel, and that it was the responsibility of the Tribunal to ensure that the appointed counsel would be available for the initial appearance or to find an alternative solution.[130] Ntahobali asserts that the length of the delay to be taken into account for the evaluation of the violation should accordingly be 86 days and not 41 days.[131]

46. In addition, Ntahobali submits that, regardless of the length of the delay, the Trial Chamber erred in not granting a remedy for the violation of his right to initial appearance without delay and that the Appeals Chamber should correct this error.[132] He contends that the appropriate remedy in this case is a financial compensation if he is acquitted or, should this not be the case, a substantial reduction of his sentence.[133]

47. The Prosecution responds that Ntahobali's arguments should be dismissed as he fails to establish any error in the Trial Chamber's findings.[134] It asserts that the delay between the first attempted initial appearance on 3 September 1997 and the initial appearance on 17 October 1997 is attributable to Ntahobali and that his reliance on the *Kajelijeli* Appeal Judgement is misplaced as the circumstances differ.[135] The Prosecution also submits that Ntahobali fails to describe any prejudice that would warrant a remedy of any kind for the 41-day delay between his arrest and the initial appearance scheduled for 3 September 1997, and that his failure to raise the issue for 11 years shows that the delay did not result in any prejudice.[136]

48. The Appeals Chamber sees no error in the Trial Chamber's finding that the delay between 3 September 1997 and 17 October 1997 was attributable to Ntahobali's counsel. The Appeals

[128] 26 November 2008 Decision, para. 53.
[129] Ntahobali Notice of Appeal, paras. 15, 16; Ntahobali Appeal Brief, para. 35. In his reply brief, Ntahobali contends that, in the absence of counsel, he had no other choice but to accept the postponement of his initial appearance and that it does not mean that he agreed to the delay or was not prejudiced by it. *See* Ntahobali Reply Brief, para. 6.
[130] Ntahobali Appeal Brief, paras. 36, 37, *referring to Kajelijeli* Appeal Judgement, paras. 248, 253. *See also* Ntahobali Reply Brief, para. 5.
[131] Ntahobali Appeal Brief, para. 39.
[132] Ntahobali Notice of Appeal, para. 16; Ntahobali Appeal Brief, paras. 40, 42, 43.
[133] Ntahobali Notice of Appeal, para. 17. *See also* Ntahobali Appeal Brief, para. 43; Ntahobali Reply Brief, para. 9.
[134] Prosecution Response Brief, paras. 741, 746.
[135] Prosecution Response Brief, paras. 742-745. Ntahobali replies that the fact that the circumstances of his case were different from that of the *Kajelijeli* case did not prevent the Tribunal from appointing a duty counsel to ensure that his rights were respected. *See* Ntahobali Reply Brief, para. 5.

Chamber notes that the first scheduled initial appearance was postponed due to the absence of Ntahobali's counsel, who was unavailable and had not made any arrangement for a colleague to represent his client on 3 September 1997.[137] When asked whether he wished to enter his plea in the absence of his assigned counsel or "to do that only in the presence of [his] counsel", Ntahobali unambiguously responded that he "prefer[red] to wait" for his assigned counsel.[138] The new initial appearance was scheduled on 17 October 1997 as a result of Ntahobali's counsel's declared unavailability until mid-October 1997.[139]

49. The Appeals Chamber considers that the circumstances of this case differ from the situation in the *Kajelijeli* case, in which the Appeals Chamber found that the delay in the holding of the initial appearance was attributable to the Tribunal notwithstanding any attribution of fault to Kajelijeli.[140] Unlike in Ntahobali's case, Kajelijeli's initial appearance was held 211 days after his transfer to the Tribunal as a result of difficulties in assigning him a counsel, the Registrar's failure to assign a duty counsel, and the Registry's difficulties in finding a date acceptable to all counsel representing Kajelijeli's co-indicted.[141] Further, unlike Kajelijeli, Ntahobali was given the opportunity to enter his plea on 3 September 1997 but preferred to wait for his assigned counsel. The Appeals Chamber considers that when, like in Ntahobali's case, the counsel for an accused explicitly requests the date of the initial appearance to be postponed and the accused expresses his preference for entering his plea in the presence of his assigned counsel rather than entering it at an earlier opportunity, the delay caused by the postponement of the initial appearance is not attributable to the Tribunal.[142]

50. Turning to the question of remedy for the 41-day delay between Ntahobali's arrest and his first scheduled initial appearance on 3 September 1997, the Appeals Chamber recalls that the Trial Chamber found that this violation of Ntahobali's right had not caused him serious and irreparable

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[136] Prosecution Response Brief, para. 747.

[137] 26 November 2008 Decision, paras. 49, 50; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, T. 3 September 1997 pp. 4-6. The Trial Chamber explained that, although Ntahobali's counsel was aware on 21 August 1997 that he would not be available until mid-September and suggested that one of his colleagues replace him to represent Ntahobali at the initial appearance, once officially notified of the date of the hearing "there is no evidence that [he] made the necessary arrangement for his colleague to be present in Arusha to represent Ntahobali on 3 September 1997." *See* 26 November 2008 Decision, para. 49, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, The Registrar's Further Submission Regarding the « *Réponse de Arsène Shalom Ntahobali aux soumissions du Greffier relativement à la requête de Ntahobali en arrêt des procédures* », 31 October 2008 ("Registrar 31 October 2008 Submissions"), Appendix III.

[138] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, T. 3 September 1997 pp. 4, 5. *See also ibid.*, pp. 3, 4 (French).

[139] *See* 26 November 2008 Decision, para. 50, *referring to* Registrar 31 October 2008 Submissions, Appendix V. *See also ibid*., paras. 5, 7.

[140] *See Kajelijeli* Appeal Judgement, para. 253.

[141] *See Kajelijeli* Appeal Judgement, paras. 248-250.

[142] *Cf. Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, dated 31 May 2000, filed 1 June 2000 (originally filed in French, English translation filed on 4 July 2001) ("*Semanza* Appeal Decision"), paras. 110, 111.

prejudice and therefore did not warrant the stay of proceedings and immediate release which Ntahobali requested as relief.[143] Ntahobali fails to show that the Trial Chamber erred in so finding. In addition, the Appeals Chamber considers that, by recognising that his right to initial appearance without delay had been violated, the Trial Chamber granted him a declaratory remedy for the 41-day delay.[144] Apart from alleging that the appropriate remedy on appeal is a financial compensation or a reduction of his sentence, Ntahobali has not developed any argument demonstrating that the Trial Chamber granted a remedy which was not proportionate to the gravity of any harm he suffered.[145]

51. Based on the foregoing, the Appeals Chamber dismisses Ground 1.2 of Ntahobali's appeal.

3. Nteziryayo's Arrest and Initial Appearance

52. In the Trial Judgement, the Trial Chamber stated that Nteziryayo was arrested in Burkina Faso on 24 April 1998.[146] He was transferred to the custody of the Tribunal on 21 May 1998 and his initial appearance took place on 17 August 1998.[147]

53. Under Ground 9 of his appeal, Nteziryayo alleged a violation of his rights as a result of the delay between his arrest and his initial appearance.[148] However, on 5 July 2013, the Appeals Chamber granted the Prosecution's request for summary dismissal of this allegation on the ground that Nteziryayo had waived his right to raise the issue on appeal.[149] As a result of Nteziryayo's request for clarification of the date of his arrest, the Appeals Chamber further instructed the Registrar to make written representations as to Nteziryayo's date of arrest.[150] On 14 March 2014, the Registrar indicated that the authorities of Burkina Faso provided the date of the arrest of Nteziryayo as 26 March 1998.[151]

54. At the appeals hearing, Nteziryayo requested that the Appeals Chamber reconsider its decision to dismiss his allegation of violation of his right to initial appearance without delay on the ground that the delay between his arrest and initial appearance now appeared to be 144 days and not

[143] 26 November 2008 Decision, para. 53; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Motion for Stay of Proceedings Due to Unreasonable Delay, 22 August 2008 (originally filed in French, English translation filed on 9 March 2009) ("22 August 2008 Motion"), paras. 189, 190, 199, p. 33. *See also* 26 November 2008 Decision, para. 12.
[144] *See supra*, para. 42, *referring to Rwamakuba* Appeal Decision, para. 27.
[145] *See supra*, para. 42, *referring to Rwamakuba* Appeal Decision, para. 27.
[146] *See* Trial Judgement, paras. 49, 6309. *See supra*, fn. 18.
[147] Trial Judgement, paras. 49, 50, 6312.
[148] *See* Nteziryayo Notice of Appeal, para. 66; Nteziryayo Appeal Brief, paras. 265-277.
[149] 5 July 2013 Appeal Decision, paras. 14-18, 23.
[150] 5 July 2013 Appeal Decision, paras. 19-23.
[151] *See supra*, fn. 18.

115 days as initially presumed.[152] In the alternative, Nteziryayo requested that the Appeals Chamber find that special circumstances justifying the non-application of the waiver principle exist or that it exercise its discretion *suo motu* to consider the allegation in the interests of justice.[153]

55. The Prosecution responded that Nteziryayo's requests should be dismissed.[154]

56. The Appeals Chamber recalls that it may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[155] The Appeals Chamber, Judge Agius dissenting, finds that Nteziryayo does not demonstrate any error of reasoning in the 5 July 2013 Appeal Decision. The Appeals Chamber further finds that Nteziryayo also does not show that reconsideration of the decision, which summarily dismisses his allegation of violation of his rights as a result of the delay between his arrest and his initial appearance, is necessary to prevent an injustice. The decision was not premised on the length of the delay but on Nteziryayo's "failure to raise the issue in the nearly 14 years that the trial proceedings lasted in his case."[156] The fact that his arrest occurred a month earlier than the date relied upon in the 5 July 2013 Appeal Decision does not therefore affect the Appeals Chamber's rationale. Similarly, the Appeals Chamber does not consider that the correction of Nteziryayo's date of arrest constitutes a special circumstance that would justify the non-application of the waiver principle.[157]

57. For these reasons, the Appeals Chamber, Judge Agius dissenting, declines to reconsider its 5 July 2013 Appeal Decision and examine on the merits Nteziryayo's allegation of violation of his right resulting from the delay between his arrest and initial appearance.

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[152] AT. 17 April 1994 pp. 18, 19.
[153] AT. 17 April 1994 p. 19.
[154] AT. 17 April 1994 p. 35. The Prosecution argued that Nteziryayo was "mixing" issues as the issue "struck" in the 5 July 2013 Appeal Decision related to the delay between his transfer to the Tribunal and his initial appearance, not to the violation of his rights while being detained in Burkina Faso. It submitted that Nteziryayo could not aggregate the time spent in detention in Burkina Faso to calculate the delay before his initial appearance in Arusha as there is no relationship between the two issues. *See idem.* The Appeals Chamber notes that the Prosecution's arguments stem from a misunderstanding of both the 5 July 2013 Decision which addressed the allegation of delay between Nteziryayo's *arrest* and initial appearance and Nteziryayo's oral arguments at the appeals hearing.
[155] *See*, *e.g.*, *Bernard Munyagishari v. The Prosecutor*, Case No. ICTR-05-89-AR11*bis*, Decision on Bernard Munyagishari's Motion for Reconsideration of the Decision on Appeals Against Referral Decision, 8 July 2013 ("*Munyagishari* Appeal Decision"), para. 13; *Kajelijeli* Appeal Judgement, para. 203; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005 ("*Barayagwiza* 4 February 2005 Appeal Decision"), p. 2.
[156] 5 July 2013 Appeal Decision, para. 16.
[157] As recalled in the 5 July 2013 Appeal Decision, it is settled jurisprudence that if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal. *See* 5 July 2013 Appeal Decision, para. 15 and references cited therein.

4. Ndayambaje's Arrest and Initial Appearance

58. Ndayambaje was arrested in Belgium on 28 June 1995.[158] On 11 January 1996, the Trial Chamber requested Belgium to defer the criminal proceedings against him in favour of the competence of the Tribunal.[159] On 21 June 1996, Ndayambaje's initial indictment was confirmed and an arrest warrant was issued.[160] Ndayambaje was transferred to the custody of the Tribunal on 8 November 1996 and his initial appearance took place on 29 November 1996.[161]

59. Ndayambaje submits that he was illegally detained from 24 January 1996 – the date from which he was allegedly detained on behalf of the Tribunal – until 13 August 1996 as there was no indictment issued by the Tribunal against him during that period.[162] Ndayambaje also complains that three months elapsed between the issuance of his initial indictment and his initial appearance, which took place 21 days after his transfer to the custody of the Tribunal.[163] He asserts that these delays violated his right to be promptly informed of the charges against him and that the Appeals Chamber should remedy this violation.[164] At the appeals hearing, Ndayambaje further submitted that he was deprived of his right to counsel from 24 January 1996 until 22 November 1996, which caused him prejudice.[165]

60. The Prosecution objected to Ndayambaje's contentions at the appeals hearing on the ground that he had waived his right to raise them on appeal since he had failed to raise them at trial and in his notice of appeal.[166]

61. Ndayambaje orally replied that: (i) he had raised the issue of his right to counsel of his own choosing in a motion dated 28 November 1996 and indicated all relevant delays relating to his right to be informed of the charges against him in a motion dated 15 August 2002; (ii) his arguments related to these violations cannot be disassociated from his arguments on his right to be tried without undue delay; and (iii) the seriousness of the violations requires the intervention of the Appeals Chamber, which could intervene *proprio motu* to correct a miscarriage of justice.[167]

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[158] Trial Judgement, paras. 69, 6285.
[159] Trial Judgement, para. 6285.
[160] Trial Judgement, paras. 68, 6286.
[161] Trial Judgement, paras. 69, 70, 6286, 6287.
[162] Ndayambaje Appeal Brief, para. 308, *referring to* Exhibit D704.
[163] Ndayambaje Appeal Brief, para. 308.
[164] Ndayambaje Appeal Brief, para. 308. *See also* AT. 21 April 2015 pp. 4, 7-9.
[165] AT. 21 April 2015 pp. 4, 9, 10.
[166] AT. 21 April 2015 p. 32. The Prosecution further pointed out that Ndayambaje's sole reference in his appeal brief to the violation of his right to be promptly informed of the charges against him was one single sentence and argued that it was not in a position to respond to Ndayambaje's allegation relating to his right to counsel since Ndayambaje was raising it for the first time at the appeals hearing. *See idem.*
[167] AT. 21 April 2015 p. 62. Ndayambaje added that he would not object to the Prosecution filing written submissions in response. *See ibid.*, p. 63.

62. The Appeals Chamber notes that Ndayambaje failed to raise the allegations of violations of his right to be promptly informed of the charges against him and his right to counsel in his notice of appeal. The Appeals Chamber, Judge Agius dissenting, considers that Ndayambaje has further failed to demonstrate that he raised these allegations of violations of his rights at trial, and to identify the error allegedly committed by the Trial Chamber which would justify the intervention of the Appeals Chamber. The Appeals Chamber, Judge Agius dissenting, is of the view that, contrary to Ndayambaje's argument, these allegations were not raised in the motions he referred to during the appeals hearing.[168] Given the specificity of these allegations and the nature of his submissions on his right to be tried without undue delay, the Appeals Chamber is also not persuaded by Ndayambaje's argument that these allegations were encompassed in his submissions related to his right to be tried without undue delay.

63. The Appeals Chamber recalls that, if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[169] The Appeals Chamber, Judge Agius dissenting, does not consider that the seriousness of the violations alleged by Ndayambaje constitutes special circumstances warranting the consideration on the merits of these allegations raised for the first time in the Ndayambaje Appeal Brief or at the appeals hearing. In these circumstances, the Appeals Chamber, Judge Agius dissenting, dismisses without further consideration this part of Ground 15 of Ndayambaje's appeal as well as Ndayambaje's new allegation of error raised at the appeals hearing.

[168] *See The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-I, *Requ*[*ê*]*te aux fins de règlement d'une question préalable*, 29 November 1996; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Extremely Urgent Motion for the Provisional Release, Under Conditions, of the Accused, 21 August 2002 (originally filed in French, English translation filed on 3 October 2002).

[169] *See supra*, fn. 157. This waiver principle has been applied to allegations of fair trial violations. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 31 (right to initial appearance without delay); *Musema* Appeal Judgement, paras. 127 (right to effective cross-examination), 341 (right to have adequate time and facilities for the preparation of the defence); *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376 (right to be informed promptly and in detail of the nature of the charges); *Čelebići* Appeal Judgement, paras. 640, 649, 650 (alleged violation of fair trial right to the attention of judges to the proceedings); *Kambanda* Appeal Judgement, paras. 25, 28 (right to counsel of own choosing); *Tadić* Appeal Judgement, para. 55 (right to equality of arms).

B. Joinder of Trials (Nyiramasuhuko Grounds 1 in part and 4; Ntahobali Ground 1.4)

64. The cases against Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje were initially not joined together.[170] On 5 October 1999, the Trial Chamber granted the Prosecution's motion for joinder and ordered the joint trial of the six accused.[171] In the course of the proceedings, the Trial Chamber dismissed several requests from the co-Accused seeking severance pursuant to Rule 82(B) of the Rules.[172]

65. On 19 June 2001, the Trial Chamber decided that the order for the cross-examination of the Prosecution witnesses would follow the order in which the co-Accused were cited on the cover of the Joinder Decision and, thus, that Nyiramasuhuko would have to cross-examine first among the co-Accused.[173] During a status conference held on 18 October 2004, the Trial Chamber decided to follow the same order for the presentation of the Defence cases, explaining that remedies were available should any prejudice arise in the course of the trial.[174]

66. In the Trial Judgement, the Trial Chamber held that it would not reconsider the Joinder Decision and concluded that "the joinder did not create an injustice."[175] The Trial Chamber also stated that it would not reconsider its 18 October 2004 Oral Decision that required Nyiramasuhuko to present her case first among the co-Accused.[176]

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[170] The cases of Nyiramasuhuko and Ntahobali were joined initially, as were the cases of Nsabimana and Nteziryayo. The cases of Kanyabashi and Ndayambaje were initially pursued separately. *See supra*, para. 8.
[171] Joinder Decision, p. 18. The bench of Trial Chamber II which ordered the joint trial was composed of Judges Pillay, Sekule, and Güney. As mentioned above, for the sake of legibility, the Appeals Chamber will refer to this bench of Trial Chamber II as the "Trial Chamber". The Appeals Chamber rejected the appeals lodged against the Joinder Decision for lack of jurisdiction or as filed out of time. *See Pauline Nyiramasuhuko and Arsène Shalom Ntahobali v. The Prosecutor*, Case No. ICTR-97-21-A, Decision (Appeal Against Trial Chamber II's Decision of 5 October 1999), 17 April 2000, p. 3 (rejecting Nyiramasuhuko's appeal on the ground that a right of appeal against an interlocutory decision arises only out of a decision on a preliminary motion brought under Rule 72 of the Rules); *Pauline Nyiramasuhuko and Arsène Shalom Ntahobali v. The Prosecutor*, Case No. ICTR-97-21-A, Decision (Appeal Against Trial Chamber II's Decision of 5 October 1999), 17 April 2000, p. 3 (rejecting Ntahobali's appeal on the same basis as Nyiramasuhuko's); *Joseph Kanyabashi v. The Prosecutor*, Case No. ICTR-96-15-I, Decision (Appeal Against Trial Chamber II's Decision of 5 October 1999), 17 April 2000, pp. 2, 3 (rejecting Kanyabashi's appeal as filed out of time).
[172] *See*, *e.g.*, *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings, 7 April 2006 ("7 April 2006 Decision"); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Reconsideration of the "Decision on Ntahobali's Motion for Separate Trial", 22 February 2005; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Separate Trial, 2 February 2005 ("2 February 2005 Decision"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on the Motion for Separate Trials, 8 June 2001 ("8 June 2001 Decision"); *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for Separate Trial, 25 April 2001 ("25 April 2001 Decision"); *The Prosecutor v. Sylvain Nsabimana*, Case No. ICTR-97-29A-T, Decision on the Defence Motion Seeking a Separate Trial for the Accused Sylvain Nsabimana, signed 8 September 2000, filed 11 September 2000 ("8 September 2000 Decision").
[173] T. 19 June 2001 pp. 145, 146.
[174] Status Conference, T. 18 October 2004 pp. 16, 17 (closed session) ("18 October 2004 Oral Decision").
[175] Trial Judgement, para. 148.
[176] Trial Judgement, paras. 150-152.

67. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in granting the Prosecution's motion for joinder of trials.[177] In addition, Nyiramasuhuko asserts that the Trial Chamber erred in rejecting her motion for severance and that her right to a fair trial was violated as a result of the order for cross-examination and presentation of the Defence cases.[178]

68. Before examining Nyiramasuhuko's and Ntahobali's arguments, the Appeals Chamber recalls that a trial chamber's decision on joinder, severance, or the order of cross-examination and presentation of cases, like any decision related to the general conduct of trial proceedings, is a matter within the discretion of the trial chamber.[179] This discretion must be exercised consistently with Articles 19 and 20 of the Statute, which require trial chambers to ensure that trials are fair and expeditious.[180] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[181] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[182]

1. Applicable Law

69. Joinder and severance of trials are governed by Rules 48 and 82 of the Rules. Rule 48 of the Rules provides that "[p]ersons accused of the same or different crimes committed in the course of the same transaction may be jointly charged or tried." A transaction is defined under Rule 2 of the Rules as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan." It has been held that, pursuant to Rule 2 of the Rules, a common scheme, strategy, or plan therefore includes

[177] Nyiramasuhuko Notice of Appeal, paras. 1.15-1.18; Nyiramasuhuko Appeal Brief, paras. 143-169; Ntahobali Notice of Appeal, paras. 26-31; Ntahobali Appeal Brief, paras. 75-70.
[178] Nyiramasuhuko Notice of Appeal, paras. 1.7, 1.17, 1.19-1.22; Nyiramasuhuko Appeal Brief, paras. 65-68, 166, 170-184.
[179] *Nizeyimana* Appeal Judgement, para. 92; *Rukundo* Appeal Judgement, para. 147; *Théoneste Bagosora et al. v. The Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009 ("*Ntabakuze* Appeal Decision on Severance"), para. 24; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.16, Decision on Appeal Concerning the Severance of Matthieu Ngirumpatse, 19 June 2009, para. 16; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić et al.* Appeal Decision on Joinder"), p. 3. *See also* Rule 90(F) of the Rules.
[180] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.
[181] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.
[182] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 85; *Renzaho* Appeal Judgement, para. 143; *Kalimanzira* Appeal Judgement, para. 14.

one or a number of events at the same or different locations.[183] There is no requirement under Rules 2 and 48 of the Rules that the events constituting the "same transaction" take place at the same time or be committed together.[184] In deciding whether the case against more than one accused should be joined pursuant to Rule 48 of the Rules, a trial chamber should base its determination upon the factual allegations contained in the indictments and related submissions.[185]

70. Where a trial chamber finds that two or more persons have allegedly committed crimes in the course of the same transaction, it then considers various factors, which it weighs in the exercise of its discretion as to whether joinder should be granted.[186] Rule 82 of the Rules provides:

> (A) In joint trials, each accused shall be accorded the same rights as if he were being tried separately.
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

71. In light of Rule 82 of the Rules, it is therefore appropriate for a trial chamber deciding on a motion for joinder pursuant to Rule 48 of the Rules to consider and weigh the following factors: (i) protection of the fair trial rights of the accused pursuant to Article 20 of the Statute; (ii) avoidance of any conflict of interests that might cause serious prejudice to an accused; and (iii) protection of the interests of justice. Factors that a trial chamber may look to in the interests of justice include: (i) avoiding the duplication of evidence; (ii) promoting judicial economy; (iii) minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence; and (iv) ensuring consistency of verdicts.[187]

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[183] *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Miletić* Appeal Decision on Joinder"), para. 7; *Prosecutor v. Vinko Pandurević and Milorad Trbić*, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurević* Appeal Decision on Joinder"), para. 7.

[184] *Cf. Prosecutor v. Ante Gotovina et al.*, Cases Nos. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("*Gotovina* Appeal Decision on Joinder"), para. 16; *Pandurević* Appeal Decision on Joinder, para. 7. The Appeals Chamber considers that, although these decisions were taken in the context of joinder of cases where the Prosecution requested both joinder of the charges and consequently of the trials, this jurisprudence applies *mutatis mutandis* to cases, like the present case, where only joinder of trials was requested on the basis of several confirmed indictments.

[185] *Gotovina* Appeal Decision on Joinder, para. 16; *Miletić* Appeal Decision on Joinder, para. 7; *Pandurević* Appeal Decision on Joinder, para. 7.

[186] *Miletić* Appeal Decision on Joinder, para. 8; *Pandurević* Appeal Decision on Joinder, para. 8. *See also Gotovina* Appeal Decision on Joinder, para. 17.

[187] *See Gotovina* Appeal Decision on Joinder, para. 17; *Miletić* Appeal Decision on Joinder, para. 8; *Pandurević* Appeal Decision on Joinder, para. 8. *Cf. also Ntabakuze* Appeal Decision on Severance, para. 25.

2. Joinder Decision

72. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in: (i) its assessment of the "same transaction" requirement; (ii) its assessment of the factors weighing in favour of joinder and the rights of the accused; and (iii) showing bias in the Joinder Decision.[188]

(a) "Same Transaction" Requirement

73. In the Joinder Decision, the Trial Chamber decided to apply the following "guidelines" or "test" to determine whether the co-Accused were accused of crimes committed in the course of the same transaction within the meaning of Rule 48 of the Rules:

> 1. The acts of the [a]ccused must be connected to material elements of a criminal act [… ;]
>
> 2. The criminal acts to which the acts of the accused are connected must be capable of specific determination in time and space;
>
> 3. The criminal acts to which the acts of the accused are connected must illustrate the existence of a common scheme, strategy or plan.[189]

74. The Trial Chamber found that the first and second prongs of the test were satisfied as most of the co-Accused, according to their indictments, "held official positions in the Government"[190] and the events in which the co-Accused were alleged to have participated "occurred between 1 January to 31 December 1994 in various Communes in Butare."[191] The Trial Chamber found that the third prong was also satisfied on the grounds that: (i) all co-Accused were alleged to have "elaborated, adhered to and executed" a national plan to exterminate the Tutsis; (ii) "[a]mong the most common facts alleged are the role the accused played in the incitement of people to exterminate the Tutsi, the training of militiamen and the distribution of weapons"; and (iii) "the acts the Accused are alleged to have committed, such as Genocide and Conspiracy to Commit Genocide" correspond to a number of events being part of a common scheme, strategy, or plan.[192] The Trial Chamber concluded that, in the instant case, there was "sufficient showing of 'same transaction'".[193]

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[188] In addition, Nyiramasuhuko submits in her appeal brief that the Trial Chamber erred in finding that the joinder of trials could be granted on the basis of Rule 48 of the Rules as such an interpretation would make the addition of Rule 48*bis* of the Rules superfluous. *See* Nyiramasuhuko Appeal Brief, para. 143. However, because Nyiramasuhuko failed to raise this specific allegation of error in her notice of appeal, even though she amended it twice, and the Prosecution did not respond to it, the Appeals Chamber declines to consider this argument as it exceeds the scope of Nyiramasuhuko's appeal.

[189] Joinder Decision, para. 8, *relying on The Prosecutor v. Aloys Ntabakuze and Gratien Kabiligi*, Case No. ICTR-97-34-I, Decision on the Defence Motion Requesting an Order for Separate Trials, 1 October 1998. *See also ibid*., paras. 7, 9, 10.

[190] Joinder Decision, para. 10.

[191] Joinder Decision, para. 11.

[192] Joinder Decision, para. 12.

[193] Joinder Decision, para. 13. The Appeals Chamber observes that the phrase "same transaction" in Rule 48 of the Rules, translated as "*même operation*" in the French version of the Rules, was incorrectly translated in the French

75. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in concluding that the alleged criminal acts against the co-Accused were part of the "same transaction" for the purpose of joining trials under Rule 48 of the Rules.[194] Specifically, Nyiramasuhuko and Ntahobali contend that the Trial Chamber erred in finding that the fact that most of the co-Accused held official positions in the government was sufficient in itself to connect them with alleged criminal acts.[195] Pointing out that he did not hold any official position in the government, Ntahobali argues that the first condition was not met in his case.[196]

76. Nyiramasuhuko and Ntahobali also argue that the Trial Chamber erred in generally relying on the fact that all alleged events occurred between 1 January and 31 December 1994 in various communes of Butare Prefecture without examining whether the factual allegations against the co-Accused specifically connected them in time and space and illustrated the existence of a common plan.[197]

77. Nyiramasuhuko and Ntahobali further submit that the Trial Chamber erred in relying on the count of conspiracy to commit genocide to find a connection between their alleged acts and a common plan.[198] In particular, Nyiramasuhuko contends that the Trial Chamber erred in relying on the broad allegation in paragraph 5.1 of each indictment against the co-Accused that a national plan to exterminate the Tutsis existed, "whereas it should have sought out sufficient factual allegations of the criminal acts to which the Accused [were] connected through joint participation in a common plan."[199] According to Nyiramasuhuko and Ntahobali, the factual basis set out by the Prosecution in the indictments did not support the count of conspiracy.[200] Nyiramasuhuko also asserts that the Trial Chamber erred in holding that the charges of conspiracy to commit genocide and genocide were

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version of the Joinder Decision as "*entreprise criminelle commune*", which is a distinct legal concept translated into English as "joint criminal enterprise". Consequently, the Appeals Chamber will solely rely on the original English version of the Joinder Decision in this Judgement. *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-I, *Décision relative à la requête du Procureur en jonction d'instances*, 5 October 1999 (originally filed in English, French translation filed on 25 October 1999), paras. 5-13, 17. In her notice of appeal and appeal brief originally filed in French, Nyiramasuhuko relied on the French version of the Joinder Decision and refers to the notion of "*entreprise criminelle commune*". *See* Nyiramasuhuko Notice of Appeal, para. 1.16 (French); Nyiramasuhuko Appeal Brief, paras. 144, 146, 151, 152, 161, 163 (French). The Appeals Chamber considers that a plain reading of Nyiramasuhuko's submissions shows that she intended to challenge the Trial Chamber's finding that the "same transaction" requirement of Rule 48 of the Rules was satisfied and will address her submissions accordingly.

[194] Nyiramasuhuko Notice of Appeal, paras. 1.15, 1.16; Nyiramasuhuko Appeal Brief, paras. 144-156; Ntahobali Notice of Appeal, para. 28; Ntahobali Appeal Brief, paras. 66-70.

[195] Nyiramasuhuko Appeal Brief, para. 146; Ntahobali Appeal Brief, para. 67. Nyiramasuhuko argues that, pursuant to the jurisprudence of the Tribunal, the Prosecution cannot rely on the status of an accused to establish such allegation. *See* Nyiramasuhuko Appeal Brief, para. 146, *referring to The Prosecutor v. Casimir Bizimungu et al.*, Cases No. ICTR-99-50-T, Decision on the Prosecutor's Motion for Joinder, 6 July 2000, para. 71.

[196] Ntahobali Appeal Brief, para. 67.

[197] Nyiramasuhuko Appeal Brief, paras. 147, 148; Ntahobali Appeal Brief, para. 68.

[198] Nyiramasuhuko Appeal Brief, paras. 149-156; Ntahobali Appeal Brief, paras. 68, 70.

[199] Nyiramasuhuko Appeal Brief, para. 149 (emphasis omitted). Nyiramasuhuko adds that none of the elements of the plan listed in paragraph 5.1 of the indictments was imputed to any of the co-Accused. *See ibid.*, para. 150.

[200] Nyiramasuhuko Appeal Brief, para. 149; Ntahobali Appeal Brief, para. 70.

factual allegations that could demonstrate their participation in a crime committed as part of a common plan since they constitute the "legal definition of the material elements."[201] Nyiramasuhuko and Ntahobali argue that, had the Trial Chamber tried to identify in the indictments the common factual allegations supporting the existence of a common scheme, strategy, or plan connecting the co-Accused, it would have concluded that the joinder of trials was unreasonable.[202]

78. The Prosecution responds that most of Nyiramasuhuko's and Ntahobali's arguments should be dismissed as the criteria applied by the Trial Chamber have been superseded by the jurisprudence of the Appeals Chamber[203] and that "it is now evident that there are no mandatory criteria for purposes of determining joinder other than the need for sufficient factual allegations that the persons whose cases are to be joined participated in a common scheme, strategy, or plan."[204] The Prosecution further contends that neither Nyiramasuhuko nor Ntahobali demonstrates that the Trial Chamber erred in the exercise of its discretion in concluding that there were sufficient alleged facts that the co-Accused had participated in a common scheme, strategy, or plan.[205]

79. Ntahobali replies that he contested the Joinder Decision on the basis of the criteria used by the Trial Chamber and maintains that the Trial Chamber erred in law and in fact based on these criteria.[206]

80. The Appeals Chamber notes that Nyiramasuhuko and Ntahobali do not challenge the "guidelines" or "test" identified and followed by the Trial Chamber or the applicable law as such, but rather their application by the Trial Chamber. With respect to the applicable law, the Appeals Chamber clarified a few years after the Joinder Decision that the "same transaction" may be found to exist even where the alleged crimes of the accused are different, or are carried out in different geographical areas or over different periods of time, as long as the acts or omissions of the accused whose cases are to be joined are alleged to form part of a common scheme, strategy, or plan.[207]

81. Comparing the guidelines adopted by the Trial Chamber with the Appeals Chamber's jurisprudence, the Appeals Chamber considers that the third prong of the Trial Chamber's guidelines – the criminal acts to which the acts of the accused are connected must illustrate the existence of a common scheme, strategy, or plan – is the only relevant criterion for the

[201] Nyiramasuhuko Appeal Brief, para. 151; Nyiramasuhuko Reply Brief, paras. 4, 5. *See also* Ntahobali Appeal Brief, para. 68.
[202] Nyiramasuhuko Appeal Brief, paras. 152-156; Ntahobali Appeal Brief, paras. 69, 70. *See also* Nyiramasuhuko Reply Brief, para. 5.
[203] Prosecution Response Brief, paras. 10, 11, 30, 31, *referring to Gotovina* Appeal Decision on Joinder, paras. 21, 22; *Pandurević* Appeal Decision on Joinder, paras. 13, 15, 16, 18.
[204] Prosecution Response Brief, para. 31.
[205] Prosecution Response Brief, paras. 11, 31, 32.
[206] Ntahobali Reply Brief, para. 19.

interpretation of the "same transaction" requirement under Rule 48 of the Rules.[208] The Appeals Chamber will therefore only examine Nyiramasuhuko's and Ntahobali's submissions that there were insufficient factual allegations in the indictments to support a finding that their alleged acts or omissions formed part of a common scheme, strategy, or plan.

82. Turning to Nyiramasuhuko's and Ntahobali's submissions regarding the co-Accused's connection to a common scheme, the Appeals Chamber observes that the Trial Chamber noted that, in each relevant indictment, the Prosecution alleged that "there existed a national plan to exterminate the Tutsi":

> It is alleged, in Paragraph 5.1 of the concise statement of facts, that from the late 1990s to July 1994, *inter alia*, members of the Government, political leaders and other personalities conspired among themselves and worked out a plan with intent to exterminate the civilian population and eliminate members of the opposition. It is further alleged that all the accused […] elaborated, adhered to and executed the said plan with the aim of exterminating the Tutsi. Among the most common facts alleged are the role the accused played in the incitement of people to exterminate the Tutsi, the training of militiamen and the distribution of weapons.[209]

83. The Trial Chamber also held that "the acts the Accused are alleged to have committed, such as Genocide and Conspiracy to Commit Genocide" corresponded to "a number of events, at the same or different locations and being part of a common scheme, strategy or plan."[210] The formulation of the Trial Chamber's latter statement may be confusing as the crimes charged against an accused should be distinguished from the alleged acts and omissions of the accused that give rise to his responsibility for the crimes charged. However, reading the Trial Chamber's statement in context, the Appeals Chamber understands that the Trial Chamber was satisfied that the alleged acts and omissions of the accused, charged as genocide and conspiracy to commit genocide in the relevant indictments, constituted events that were part of a common scheme, strategy, or plan.

84. In support of its conclusion, the Trial Chamber did not make explicit references to specific paragraphs in each indictment, save for paragraph 5.1 which alleged the existence of a national plan to exterminate the Tutsis and the co-Accused's adhesion and execution of the plan. However, the Trial Chamber further stated that the "most common facts alleged are the role the [co-Accused] played in the incitement of people to exterminate the Tutsi, the training of militiamen and the distribution of weapons."[211] In the view of the Appeals Chamber, this reflects that, contrary to Nyiramasuhuko's and Ntahobali's submissions, the Trial Chamber relied on the factual allegations

[207] *See Pandurević* Appeal Decision on Joinder, para. 17.
[208] *Pandurević* Appeal Decision on Joinder, para. 17.
[209] Joinder Decision, para. 12.
[210] Joinder Decision, para. 12.
[211] Joinder Decision, para. 12.

in the indictments that connected the co-Accused to this plan, prior to concluding that these allegations were sufficient to support a finding that the alleged acts or omissions formed part of a common scheme, strategy, or plan. A review of the paragraphs of the indictments listed as underpinning the charges of conspiracy to commit genocide and genocide supports the Trial Chamber's finding regarding the existence of a common scheme connecting the co-Accused for the purpose of Rule 48 of the Rules.[212]

85. In light of the above, the Appeals Chamber finds that Nyiramasuhuko and Ntahobali have failed to demonstrate that the Trial Chamber erred in finding that the co-Accused were accused of crimes committed in the course of the same transaction.

(b) Factors Weighing in Favour of Joinder and Rights of the Accused

86. In the Joinder Decision, the Trial Chamber stated that the joinder "will not cause undue delay, since none of the trials has started or is about to start" and that, rather, the joinder "will promote efficiency and avoid delay in bringing those accused of involvement in one criminal transaction to trial."[213] The Trial Chamber specified that "the accused jointly tried does not lose any of the protection" under Articles 19 and 20 of the Statute.[214] It also considered that the joinder will allow for a better administration of justice by ensuring "a better protection of the victims' and witnesses' physical and mental safety, and by eliminating the need for them to make several journeys and to repeat their testimony."[215]

87. Nyiramasuhuko submits that the date of the commencement of trial is only one of the factors of undue delay and that the Trial Chamber erred in failing to consider: (i) the delays that had already occurred, notably the fact that the co-Accused had been in pre-trial detention for at least two years, and that the joinder would infringe her right to be tried without undue delay;[216] and (ii) "other factors, such as 'concurrent presentation of evidence that is unrelated to the Accused.'"[217]

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[212] For the count of conspiracy to commit genocide, *see* Nyiramasuhuko and Ntahobali Indictment, paras. 6.22, 6.25, 6.32, 6.33, 6.36-6.38, 6.51, 6.52, 6.55, 6.56, p. 38; Nsabimana and Nteziryayo Indictment, paras. 5.8, 5.12, 5.13, 6.21, 6.22, 6.25, 6.28, 6.29, 6.33, 6.41, 6.51-6.59, p. 41, Kanyabashi Indictment, paras. 5.8, 5.12, 5.13, 6.22, 6.26, 6.41, 6.43-6.46, 6.58, 6.62-6.64, p. 41; Ndayambaje Indictment, paras. 5.8, 5.13, 6.33, 6.34, 6.50, 6.54, p. 40. For the count of genocide, *see* Nyiramasuhuko and Ntahobali Indictment, paras. 5.8, 6.25, 6.27, 6.30-6.34, 6.36, 6.39, 6.47, 6.52-6.56, pp. 38, 39; Nsabimana and Nteziryayo Indictment, paras. 5.8, 5.12, 5.13, 6.21, 6.22, 6.26, 6.28, 6.29, 6.33, 6.37, 6.38, 6.51-6.59, p. 42; Kanyabashi Indictment, paras. 5.8, 5.12, 5.13, 6.22-6.26, 6.41-6.46, 6.58-6.64, pp. 41, 42; Ndayambaje Indictment, paras. 5.8, 5.13, 6.34, 6.50-6.54, pp. 40, 41.
[213] Joinder Decision, para. 15.
[214] Joinder Decision, para. 15.
[215] Joinder Decision, para. 16.
[216] Nyiramasuhuko Appeal Brief, para. 164. *See also* Nyiramasuhuko Reply Brief, paras. 7, 8.
[217] Nyiramasuhuko Appeal Brief, para. 165. *See also ibid.*, para. 163. In their notices of appeal, Nyiramasuhuko and Ntahobali further argued that the Trial Chamber erred in concluding that the cross-examinations were enough to remedy the prejudice suffered as a result of the joinder. The Appeals Chamber notes, however, that Nyiramasuhuko and

88. Nyiramasuhuko further submits that the Trial Chamber erred in holding that her "rights could be given up in order to ensure a better protection of witnesses" as Article 19(1) of the Statute "cannot be interpreted as permitting subordination of the fundamental rights of an accused to the said protection."[218] She asserts that Rule 75(A) of the Rules clearly states that measures for the protection of witnesses may be ordered provided that they are consistent with the rights of the accused.[219]

89. The Prosecution responds that Nyiramasuhuko fails to show any discernible error in the Trial Chamber's findings that joinder would not result in undue delay and that it would protect victims and witnesses from the hardships of multiple trials.[220]

90. The Appeals Chamber understands Nyiramasuhuko's submission on the length of the pre-trial detention and the "concurrent presentation of evidence" as alleging that, had the Trial Chamber considered the time already spent in detention and the fact that the co-Accused would present evidence irrelevant to the other accused's cases, it would have determined that the joinder would unduly delay the proceedings.[221] The Appeals Chamber rejects this contention. The Joinder Decision reflects that the Trial Chamber did not ignore the time already spent in pre-trial detention but was convinced that the joinder would "promote efficiency and avoid delay in bringing those accused of involvement in one criminal transaction to trial."[222] A plain reading of the Joinder Decision shows that the Trial Chamber was aware of the importance of bringing the co-Accused to trial as early as possible and was of the view that the joinder would not unduly delay the proceedings. Nyiramasuhuko does not demonstrate any error in the Trial Chamber's exercise of its discretion in this regard. Further, the Appeals Chamber considers that, while aware of the possibility that the trial may be lengthened as a result of the concurrent presentation of unrelated evidence, the Trial Chamber could not have effectively taken this particular factor into account when it ruled on the Prosecution's motion for joinder as, at that stage, the scope of unrelated evidence to be presented by the co-Accused was hypothetical and speculative.

Ntahobali failed to reiterate and develop with argument their allegation in their appeal briefs. Accordingly, the Appeals Chamber dismisses these unsubstantiated allegations without further consideration. *See* Nyiramasuhuko Notice of Appeal, para. 1.22; Ntahobali Notice of Appeal, para. 30. In the absence of any identification of error on the part of the Trial Chamber, the Appeals Chamber also declines to address Nyiramasuhuko's argument that, in support of the joinder, the Prosecution claimed that only half a dozen witnesses were common for three co-accused, while the joinder concerned six co-accused and the Prosecution announced that it would call 103 witnesses. *See* Nyiramasuhuko Appeal Brief, para. 169.

[218] Nyiramasuhuko Appeal Brief, para. 167.

[219] Nyiramasuhuko Appeal Brief, para. 168.

[220] Prosecution Response Brief, paras. 16-21.

[221] The Appeals Chamber notes that Nyiramasuhuko failed to raise an allegation of error with respect to the factors considered by the Trial Chamber to weigh in favour of the joinder in her notice of appeal. However, since the Prosecution did not object on this basis and responded to Nyiramasuhuko's submissions, the Appeals Chamber exercises its discretion to consider the arguments developed in her appeal brief.

[222] Joinder Decision, para. 15.

91. With respect to Nyiramasuhuko's argument relating to the protection of witnesses, the Appeals Chamber recalls that minimising hardship to witnesses and increasing the likelihood that they will be available to give evidence are factors that a trial chamber may take into account in determining whether joinder would be in the interests of justice.[223] Contrary to Nyiramasuhuko's allegation, the Trial Chamber neither stated nor implied that her fair trial rights could be "given up" for the protection of the witnesses. The Trial Chamber expressly held that there must be a balance between the rights of the accused and the protection of witnesses.[224] Nyiramasuhuko does not demonstrate how the Trial Chamber erred in its approach or in balancing the rights of the accused and the protection of witnesses in the Joinder Decision.[225]

92. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate any error in the Trial Chamber's assessment of the factors weighing in favour of joinder and, therefore, dismisses her contentions in this respect.

(c) Alleged Bias

93. Nyiramasuhuko submits that the Trial Chamber's statement that "[o]n the basis of the separate Indictments, it is clear that sufficient elements of each charge have been established to show probability that the Accused participated in a common scheme, strategy, or plan with one another or that they conspired to commit genocide" shows the Trial Chamber's bias and lack of objectivity, especially as it implicitly shifted the burden of proof.[226]

94. The Prosecution responds that Nyiramasuhuko's arguments should be dismissed as she makes no attempt to meet the high threshold required to establish a reasonable apprehension of bias on behalf of the Trial Chamber.[227] The Prosecution contends that, read in context, the excerpts she quotes cannot support an allegation of actual or apparent bias but, on the contrary, reflect that the Trial Chamber withheld judgement on whether or not a conspiracy existed and refrained from looking for *prima facie* evidence to support joinder.[228]

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[223] *Gotovina* Appeal Decision on Joinder, para. 17; *Miletić* Appeal Decision on Joinder, para. 8; *Pandurević* Appeal Decision on Joinder, para. 8.
[224] Joinder Decision, para. 16.
[225] *See Pandurević* Appeal Decision on Joinder, para. 22 ("under the Statute and the Rules of the International Tribunal, it is within the discretion of the Trial Chamber to balance the rights of an accused against its obligation to provide for the protection of witnesses"), fn. 50 and references cited therein.
[226] Nyiramasuhuko Appeal Brief, paras. 157 (emphasis omitted), 158, 162, *referring to* Joinder Decision, para. 12. Nyiramasuhuko's contention that the Trial Chamber erred in "intentionally" allowing the addition of a count of conspiracy against her, thereby showing bias is discussed under Ground 3 of Nyiramasuhuko's appeal in Section IV.B.1 below. *See* Nyiramasuhuko Appeal Brief, paras. 159-161.
[227] Prosecution Response Brief, paras. 12, 15.
[228] Prosecution Response Brief, paras. 12-14.

95. The Appeals Chamber recalls that a presumption of impartiality attaches to the judges of the Tribunal and that this presumption cannot be easily rebutted.[229] It is for the appealing party alleging bias to rebut the presumption of impartiality enjoyed by judges of this Tribunal.[230]

96. In the Joinder Decision, the Trial Chamber expressly emphasised that it was "not called upon at this stage of the proceedings to judge the merits of the charges against the Accused", but only to determine whether, "on the basis of legal and factual assessment", there existed a justification for holding a joint trial.[231] In the course of its decision, the Trial Chamber reiterated that "in view of the present stage of the proceedings, [it] will not, at this time, address the issue of whether or not a conspiracy existed" because it was "a substantive issue of the forthcoming Trial on the merits."[232] Just before making the impugned statement, it also stated that there was "no need in its view for an enquiry into whether there [was] *prima facie* evidence in support of a joint trial."[233] Just after the statement with which Nyiramasuhuko takes issue, the Trial Chamber again stressed that "[a]lthough the additional charge of Conspiracy ha[d] been allowed in the amended Indictment, the Prosecutor will have to convince the Trial Chamber in due course that this charge will hold in law and in fact."[234] Later in the decision, it repeated that it was "not determining a question of fact, nor assessing the truth of the acts alleged, but [was] making a determination about whether or not there exist[ed] a basis for Joinder"[235] and that it was "the Prosecutor's burden to prove guilt beyond reasonable doubt".[236]

97. Read in context, the impugned statement could not reasonably be understood as a pre-judgement by the Trial Chamber or a shift in the burden of proof as suggested by Nyiramasuhuko. Rather, the statement simply reflects that the Trial Chamber was satisfied that there were sufficient factual allegations in the indictments supporting the allegations that the co-Accused participated in a common scheme, strategy, or plan or conspired to commit genocide.

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[229] *Karemera and Ngirumpatse* Appeal Judgement, para. 24; *Hategekimana* Appeal Judgement, para. 16; *Nahimana et al.* Appeal Judgement, para. 48; *Akayesu* Appeal Judgement, para. 91. *See also Renzaho* Appeal Judgement, para. 43 ("[…] in the absence of evidence to the contrary, Judges are presumed to be impartial when ruling on the issues before them"); *Furundžija* Appeal Judgement, para. 197. The Appeals Chamber notes that Nyiramasuhuko failed to raise her allegations concerning the Trial Chamber judges' alleged bias and the shift of the burden of proof in her notice of appeal. However, since the Prosecution did not object on this basis and responded to Nyiramasuhuko's submissions, the Appeals Chamber exercises its discretion to consider the arguments developed in her appeal brief.
[230] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125. While the possibility is not ruled out that decisions rendered by a judge or a chamber could suffice to establish bias, it was held that this would be "truly extraordinary". *See infra*, Section IV.A.1.
[231] Joinder Decision, para. 4.
[232] Joinder Decision, para. 13.
[233] Joinder Decision, para. 13.
[234] Joinder Decision, para. 13.
[235] Joinder Decision, para. 14.
[236] Joinder Decision, para. 15.

98. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contention that the Trial Chamber showed bias and lack of objectivity, or shifted the burden of proof in the Joinder Decision.

3. Decision Denying Severance

99. In the course of the proceedings, the Trial Chamber dismissed several requests from the co-Accused seeking separate trials pursuant to Rule 82 of the Rules.[237] On 7 April 2006, the Trial Chamber denied Nyiramasuhuko's request for a separate trial, concluding that she had not demonstrated the existence of a conflict of interests between her defence strategy and that of Nsabimana and Kanyabashi that would cause her serious prejudice, and that it would not be in the interests of justice to grant the request.[238] The Trial Chamber rejected Nyiramasuhuko's claims that its decisions regarding the timing of the disclosure of the materials relied upon by her co-accused and the fact that she would cross-examine and present her case first had caused her prejudice.[239] The Trial Chamber emphasised that the Rules provided for remedies, which were available should any prejudice arise within the course of the trial, including cross-examination, further cross-examination, recall, or rebuttal evidence.[240]

100. With respect to whether a separate trial was in the interests of justice, the Trial Chamber found that the "instant case raises complex issues of law and fact" and that a joint trial might last longer than that of a single accused without encroaching upon the right to be tried without undue delay.[241] It added that Nyiramasuhuko's submissions that the trials of all accused would be concluded by now had the joinder been denied were "hypothetical and speculative".[242] The Trial Chamber concluded that, on balance, "the length of the proceedings ha[d] not violated […] Nyiramasuhuko's right to be tried without undue delay, given the complexity of the present case

[237] *See supra*, fn. 172. Ntahobali submits that the Trial Chamber erred in the 2 February 2005 Decision "by failing to take that opportunity to minimize the prejudice caused to [him] and by failing to allow severance." *See* Ntahobali Notice of Appeal, para. 27; Ntahobali Appeal Brief, para. 71. *See also* Ntahobali Appeal Brief, para. 65. However, Ntahobali argues that the Trial Chamber erred without particularising any alleged error of law or fact in the 2 February 2005 Decision. *See* Ntahobali Notice of Appeal, paras. 26, 27; Ntahobali Appeal Brief, para. 71. In these circumstances, the Appeals Chamber dismisses Ntahobali's contention without further consideration. Under Ground 15 of his appeal related to the right to be tried without undue delay, Ndayambaje submits that the Trial Chamber erred in the 25 April 2001 Decision in finding that the requested severance would create further delays. He asserts that the joinder did not protect his rights but rather violated them by unnecessarily prolonging the delays. *See* Ndayambaje Appeal Brief, para. 305, *referring to* 25 April 2001 Decision, para. 17. *See also* Ndayambaje Notice of Appeal, para. 121. In the absence of any substantiation of Ndayambaje's allegation of error, the Appeals Chamber dismisses his contention without further consideration.
[238] 7 April 2006 Decision, paras. 68, 71, 80, p. 22.
[239] 7 April 2006 Decision, paras. 59-61, 69.
[240] 7 April 2006 Decision, para. 70.
[241] 7 April 2006 Decision, para. 75.
[242] 7 April 2006 Decision, para. 76.

and taking into account the other elements that make up the interests of justice within the ambit of Rule 82(B) [of the Rules] […], as well as the advanced stage of the proceedings."[243]

101. Nyiramasuhuko submits that the Trial Chamber erred in denying her request for a separate trial.[244] She contends that the Trial Chamber failed to provide a reasoned opinion in support of its conclusions that: (i) she had not demonstrated a conflict of interests between her defence strategy and that of Nsabimana and Kanyabashi;[245] and (ii) she had not been prejudiced by the Trial Chamber's decisions to present her case first and to allow her co-accused to present evidence without disclosing it to her in due time.[246] She also argues that the Trial Chamber erred in finding that alternative remedies were available should any prejudice arise from the joint case without assessing whether those alternative remedies could cure the alleged prejudice and without taking into account their "uncertain nature".[247]

102. In addition, Nyiramasuhuko contends that the Trial Chamber erred in its assessment of whether a separate trial was in the interests of justice.[248] In particular, she submits that the Trial Chamber failed to provide a reasoned opinion in analysing the complexity of the case.[249] In her view, the Trial Chamber erred in concluding that her right to a fair trial without undue delay was outweighed by the advantages of a joint trial and the need to protect witnesses, and in finding that her right to a fair trial without undue delay was not violated.[250]

103. The Prosecution responds that the 7 April 2006 Decision was sufficiently reasoned and that Nyiramasuhuko does not identify how the Trial Chamber's reasoning is lacking or erroneous.[251] It submits that Nyiramasuhuko's claims are unsupported by arguments or references to the record and should accordingly be summarily dismissed.[252]

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[243] 7 April 2006 Decision, para. 79.
[244] Nyiramasuhuko Appeal Brief, paras. 170-179. *See also ibid.*, paras. 65-68.
[245] Nyiramasuhuko Appeal Brief, paras. 171, 172. Nyiramasuhuko argues that she had demonstrated the conflict of interests, referring to her submissions at trial. *See ibid.*, para. 173. *See also* Nyiramasuhuko Notice of Appeal, para. 1.20. The Appeals Chamber recalls that merely referring the Appeals Chamber to arguments set out at trial is insufficient as an argument on appeal. The Appeals Chamber therefore declines to consider this part of her contentions further. *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 369; *Haraqija and Morina* Appeal Judgement, para. 26.
[246] Nyiramasuhuko Appeal Brief, paras. 171, 174, *referring to* 7 April 2006 Decision, para. 69.
[247] Nyiramasuhuko Appeal Brief, para. 175. *See also* Nyiramasuhuko Reply Brief, para. 14.
[248] Nyiramasuhuko Appeal Brief, paras. 176-179.
[249] Nyiramasuhuko Appeal Brief, para. 176, *referring to* 7 April 2006 Decision, para. 75. Nyiramasuhuko also refers to Ground 1 of her appeal, in which she alleges a violation of her right to be tried without undue delay. Nyiramasuhuko's arguments directly related to undue delay have been addressed in Section III.K below.
[250] Nyiramasuhuko Appeal Brief, paras. 177-179.
[251] Prosecution Response Brief, paras. 22, 23.
[252] Prosecution Response Brief, paras. 23, 24.

104. Nyiramasuhuko replies that the few paragraphs that served as reasoning in the 7 April 2006 Decision do not respond to the detailed arguments she developed in her request for severance.[253]

105. The Appeals Chamber emphasises that, while a trial chamber must provide reasoning in support of its findings on the substantive considerations relevant for a decision, it is not required to articulate every step of its reasoning and to discuss each submission.[254] Contrary to Nyiramasuhuko's claim, the Appeals Chamber considers that the 7 April 2006 Decision was sufficiently reasoned. The Trial Chamber expressly stated that it had reviewed "all arguments, including the portions of transcripts in support of the alleged conflict of interests" prior to reaching its decision on Nyiramasuhuko's arguments on the conflict of interests, which it summarised at length in the decision, and provided reasons for rejecting her submissions.[255] The Trial Chamber also expressly rejected Nyiramasuhuko's contention that subsequent decisions, including decisions to present her case first and to allow her co-accused to present evidence without disclosing it to her in due time, had aggravated the prejudice on the ground that they "were legally made".[256] The Appeals Chamber considers that Nyiramasuhuko merely disagrees with the Trial Chamber's assessment without showing any error in its reasoning and rejects her claim that the Trial Chamber failed to provide a reasoned opinion.

106. The Appeals Chamber also sees no error in the Trial Chamber's finding that the Rules provided for several remedies should any prejudice arise in the course of the trial, including cross-examination, further cross-examination, recall, or rebuttal evidence.[257] In light of the Trial Chamber's conclusion that Nyiramasuhuko had failed to demonstrate any prejudice, the Appeals Chamber finds no merit in Nyiramasuhuko's claim that the Trial Chamber should have conducted an assessment of whether the remedies available could have cured any future alleged prejudice or considered the "uncertain nature" of the remedies.

107. With respect to Nyiramasuhuko's challenge to the Trial Chamber's finding that separate trials would not be in the interests of justice, the Appeals Chamber rejects Nyiramasuhuko's claim that the Trial Chamber failed to provide a reasoned opinion in support of its conclusion that the case

[253] Nyiramasuhuko Reply Brief, para. 12.
[254] *See* Article 22(1) of the Statute; *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165. *See also Kvočka et al.* Appeal Judgement, para. 23.
[255] 7 April 2006 Decision, paras. 1-28, 34, 35, 44-52, 59-61, 66, 68-71. Further, the Trial Chamber expressly referenced all the transcripts it reviewed in the decision. *See ibid.*, fn. 178. The Appeals Chamber also observes that the Trial Chamber expressly noted that it is not up to the Trial Chamber to decipher parties' pleadings and that many of the portions of the transcripts cited and relied upon by the Defence were not properly referenced, if referenced at all. *See ibid.*, para. 62.
[256] 7 April 2006 Decision, para. 69.
[257] 7 April 2006 Decision, para. 70.

raised complex issues of law and fact.[258] In the circumstances of this case – the largest case ever heard before the Tribunal involving numerous allegations, crimes that occurred in several locations and on different dates, and given the broad scope of the counts charged[259] – the Appeals Chamber considers that the Trial Chamber was not required to articulate in any further detail its conclusion that the instant case raised "complex issues of law and fact."[260]

108. As to whether the joinder created *undue* delay and thus required the severance of the cases, the Appeals Chamber finds no error in the Trial Chamber's finding that the fact that a joint trial might last longer than that of a single accused does not necessarily encroach the co-accused's right to be tried without undue delay.[261] The Appeals Chamber recalls that Article 20(4)(c) of the Statute makes clear that the right to be tried without undue delay does not protect against any delay in the proceedings; it protects against *undue* delay.[262] Nyiramasuhuko also fails to demonstrate any error in the Trial Chamber's conclusion that her submissions to the effect that trials of all accused would have been concluded by the time the Trial Chamber issued its 7 April 2006 Decision had joinder been denied were "hypothetical and speculative."[263] The Appeals Chamber finds that, although the joinder added some degree of complexity to the proceedings, the mere allegation that separate trials would have proceeded faster is insufficient to substantiate a claim that undue delay occurred as a result of the joinder and that it was unreasonable for the Trial Chamber to deny the severance of Nyiramasuhuko's case.[264]

109. The Appeals Chamber also observes that, contrary to what Nyiramasuhuko suggests, the Trial Chamber did not conclude that her right to a fair trial without undue delay was outweighed by the advantages of a joint trial and the need to protect witnesses.[265] In the impugned decision, the Trial Chamber balanced relevant factors such as the length of the proceedings with the advantages of a joint trial, including the protection of witnesses, and the advanced stage of the proceedings to determine whether the severance requested by Nyiramasuhuko was in the interests of justice.[266] The 7 April 2006 Decision reflects that the Trial Chamber did not "prioritize" the protection of

[258] 7 April 2006 Decision, para. 75.
[259] *See* Trial Judgement, para. 1.
[260] 7 April 2006 Decision, para. 75.
[261] *See* 7 April 2006 Decision, para. 75.
[262] *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006 ("*Halilović* Appeal Decision"), para. 17. *See also Ndindiliyimana et al.* Appeal Judgement, para. 43; *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.
[263] 7 April 2006 Decision, para. 76.
[264] *Gotovina* Appeal Decision on Joinder, para. 44. *See also Neumeister v. Austria*, European Court of Human Rights, No. 1936/63, Judgment, 27 June 1968 ("ECHR *Neumeister* Judgment"), para. 21 ("[t]he course of the investigation would probably have been accelerated had the Applicant's case been severed from those of his co-accused, but nothing suggests that such a severance would here have been compatible with the good administration of justice".).
[265] *See* Nyiramasuhuko Appeal Brief, paras. 177-179.
[266] 7 April 2006 Decision, paras. 77, 78.

witnesses as alleged by Nyiramasuhuko,[267] but reached its conclusion on whether severance should be granted after balancing issues relevant to such a determination.

110. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's challenges against the 7 April 2006 Decision made under Ground 1 of her appeal.

4. Order for Cross-Examination and Presentation of Defence Cases

111. In her closing submissions, Nyiramasuhuko alleged that she was prejudiced by the fact that she had been required to cross-examine and to present her case first among the co-Accused.[268] In the Trial Judgement, the Trial Chamber found that Nyiramasuhuko only offered a "general allegation of prejudice" and that she had not suggested any new fact or material change in circumstances that might justify reconsideration of the 18 October 2004 Oral Decision which decided that she would have to present her case first amongst the co-Accused.[269] The Trial Chamber recalled that to the extent that an accused who had presented his evidence earlier was prejudiced by the order of the presentation of the cases, he may present rejoinder evidence as provided by the Rules, and that the co-Accused "were granted considerable freedom to cross-examine other Defence witnesses" in this case.[270] It added that it would consider the order of the presentation of the cases and any concomitant prejudice in evaluating testimony and other evidence offered by each accused.[271]

112. Nyiramasuhuko reiterates on appeal that the Trial Chamber erred in directing her to cross-examine first despite the fact that she had drawn its attention to the potential conflict of interests with Nsabimana and, subsequently, in deciding, without prior consultation of the parties, that she had to present her case first.[272] In this respect, she argues that the Trial Chamber's decision that the will-say statements of Defence witnesses be filed 21 days before they testified caused her serious prejudice as she had to present her defence without knowing the evidence her co-accused

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[267] *See* Nyiramasuhuko Appeal Brief, para. 178.
[268] *See* Trial Judgement, para. 149, fn. 286.
[269] Trial Judgement, para. 150. *See also ibid*., paras. 149, 151.
[270] Trial Judgement, para. 151.
[271] Trial Judgement, para. 152, *referring to ibid*., paras. 160-203, Section 2.7 "Evidentiary Matters". In Section 2.7 of the Trial Judgement, the Trial Chamber noted that: "[w]hen an accused in a joint trial testifies before other co-accused present their cases, the Chamber will take this fact into consideration when assessing the weight of testimony of each accused relative to evidence subsequently presented, in recognition of the fact that the accused testified without the benefit of knowing what subsequent witnesses would say about their evidence beyond the indication provided in those witnesses' will-say statements". The Trial Chamber also stated that it "is cognisant of the rule that in joint trials, each accused is entitled to the same rights as he or she would be in an individual trial. In this regard, the Chamber has been attentive to the risk that one Accused's evidence will prejudice another Accused, and will diligently assure that the guarantees of Rule 82 (A) are respected." *See ibid.*, paras. 189, 191 (internal references omitted).
[272] Nyiramasuhuko Appeal Brief, para. 180. *See also* Nyiramasuhuko Notice of Appeal, para. 1.19; Nyiramasuhuko Appeal Brief, para. 373; Nyiramasuhuko Reply Brief, paras. 15, 16.

would adduce and knowing that she had a conflict of interests with some of her co-accused.[273] Nyiramasuhuko also contends that her right, provided for in Rule 82 of the Rules, to be tried in a joint trial as if she would be tried alone was violated as a result of the Trial Chamber's reliance on statements made by her co-accused Nsabimana as well as by Kanyabashi Defence Expert Witness Filip Reyntjens and Nsabimana Defence Witness Charles Karemano to convict her.[274] In her view, such reliance was in contradiction with the Trial Chamber's commitment to consider the order of the Defence cases in reaching its conclusions.[275]

113. The Prosecution responds that Nyiramasuhuko fails to establish that the Trial Chamber abused its discretion and made a discernible error in its decisions on the order of cross-examinations and the time-limits imposed for Defence disclosures of will-stay statements.[276] The Prosecution adds that Nyiramasuhuko omits to mention that the witnesses she refers to were relied upon where corroborated.[277]

114. The Appeals Chamber considers that Nyiramasuhuko's arguments fall short of demonstrating any error in the Trial Chamber's exercise of its discretion in the control of the order of interrogating witnesses and presenting evidence provided for in Rule 90(F) of the Rules. Nyiramasuhuko fails to substantiate her contention that the alleged conflict of interests between her defence and that of Nsabimana required that she not present her case first. Nyiramasuhuko also fails to consider that the parties were given the opportunity to be heard on the order of the presentation of the Defence cases, and that the Trial Chamber expressly referred to her counsel's objection on this matter when making its decision.[278] Nyiramasuhuko also does not substantiate her contention that she was prejudiced by the Trial Chamber's decision regarding the timing for the filing of the witnesses' will-say statements with any specific examples or supporting references.[279]

115. With respect to Nyiramasuhuko's contention pertaining to her right under Rule 82 of the Rules to be tried in the joint trial as if she were tried alone, the Appeals Chamber notes that it has addressed and rejected Nyiramasuhuko's arguments relating to Nsabimana's statements in Section III.H below. As for the Trial Chamber's reliance on Expert Witness Reyntjens and

[273] Nyiramasuhuko Notice of Appeal, paras. 1.17, 1.21; Nyiramasuhuko Appeal Brief, para. 181. *See also* Nyiramasuhuko Appeal Brief, para. 373.
[274] Nyiramasuhuko Notice of Appeal, paras. 1.17, 1.21; Nyiramasuhuko Appeal Brief, paras. 182-184. Nyiramasuhuko also asserts that her right to be tried as if she was tried alone was violated as the Prosecution presented evidence against her through Prosecution Witnesses SD and QJ without having informed her of its intention to do so. *See* Nyiramasuhuko Appeal Brief, para. 166. In the absence of any substantiation or reference supporting this allegation, the Appeals Chamber declines to entertain it.
[275] Nyiramasuhuko Appeal Brief, para. 182.
[276] Prosecution Response Brief, paras. 25-27.
[277] Prosecution Response Brief, paras. 28, 29.
[278] *See* 18 October 2004 Oral Decision, pp. 7-16.

Witness Karemano in support of Nyiramasuhuko's conviction for conspiracy to commit genocide,[280] the Appeals Chamber does not see how relying on Defence evidence presented by other co-accused is "contrary"[281] to the Trial Chamber's commitment to "consider the order of Defence cases and any concomitant prejudice in evaluating testimony and other evidence offered by each Accused."[282] Moreover, Rule 82(A) of the Rules does not, as a matter of principle, bar trial chambers from relying on the evidence presented by a co-defendant where that evidence supports the Prosecution case. Trial chambers are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record.[283] As noted by the Trial Chamber, the Rules provide for remedies where the presentation of incriminating evidence through co-accused after the close of the Prosecution case may prejudice one of the co-accused. In the instant case, the evidence of Witnesses Reyntjens and Karemano upon which the Trial Chamber relied was already part of the Prosecution case-in-chief and was only accepted as corroborative of Prosecution evidence.[284] The record shows that Nyiramasuhuko was also afforded the opportunity to cross-examine these witnesses at length and Nyiramasuhuko does not show that she requested further cross-examination, recall, or the presentation of rejoinder evidence. Accordingly, Nyiramasuhuko does not demonstrate how the Trial Chamber's reliance on this evidence violated her fair trial rights or caused her prejudice.

116. In light of the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's contentions related to the order of cross-examination and presentation of the Defence cases.

5. Conclusion

117. The Appeals Chamber finds that Nyiramasuhuko and Ntahobali have not demonstrated any error in relation to the joinder of trials. The Appeals Chamber further finds that no demonstration of error has been made by Nyiramasuhuko as to the Trial Chamber's 7 April 2006 Decision denying severance or its order for cross-examination and presentation of the cases. For the foregoing

[279] *See* Nyiramasuhuko Notice of Appeal, paras. 1.17, 1.21; Nyiramasuhuko Appeal Brief, para. 181, *referring* only to prior filings.
[280] *See* Trial Judgement, paras. 879, 884, 888, 896, 897, 931, 932, 5670-5673. The Appeals Chamber will not address Nyiramasuhuko's argument to the extent that it relates to the Trial Chamber's reliance on these witnesses in support of the factual findings on the basis of which she was not convicted. *See* Nyiramasuhuko Notice of Appeal, paras. 1.17, 1.21, *referring to* Trial Judgement, paras. 194, 457, 477, 516, 589, 783-785, 791-794, 801, 806, 807, 879, 883, 888, 896, 897, 931, 932, 5558.
[281] Nyiramasuhuko Appeal Brief, para. 182.
[282] Trial Judgement, para. 152. *See also ibid.*, paras. 189, 191.
[283] The Appeals Chamber also highlights that a joint trial may give rise to adverse defence strategies and that "the mere possibility of mutually antagonistic defences does not in itself constitute a conflict of interests capable of causing serious prejudice" within the meaning of Rule 82(B) of the Rules. *See Gotovina* Appeal Decision on Joinder, para. 37. *See also infra*, Section V.D.
[284] *See* Trial Judgement, paras. 879, 884, 888, 896, 897, 931, 932.

reasons, the Appeals Chamber dismisses the relevant part of Ground 1 and Ground 4 of Nyiramasuhuko's appeal, as well as Ground 1.4 of Ntahobali's appeal.

C. Replacement of Judge Maqutu (Nyiramasuhuko Ground 5; Ntahobali Ground 1.6; Ndayambaje Ground 16)

118. On 12 June 2001, the joint trial in this case started before Trial Chamber II, composed of Judges William H. Sekule, Arlette Ramaroson, and Winston C. M. Maqutu.[285] Judge Maqutu's term of office ended on 24 May 2003.[286] On 15 July 2003, the two remaining judges, Judges Sekule and Ramaroson, acting pursuant to Rule 15*bis*(D) of the Rules,[287] found that the interests of justice were best served by continuing the trial with a substitute judge.[288] The Appeals Chamber upheld this decision on 24 September 2003.[289] Judge Solomy B. Bossa was appointed to the bench of Trial Chamber II assigned to this case on 20 October 2003, and certified that she was familiar with the proceedings on 5 December 2003.[290] The trial resumed on 26 January 2004, with the continued presentation of the Prosecution case.[291] On 30 March 2004, the Trial Chamber granted the Prosecution's request to drop 30 witnesses from its witness list and add three new witnesses.[292]

119. Following the appointment of Judge Bossa, Nyiramasuhuko, Ntahobali, and Ndayambaje requested the recall of some of the Prosecution witnesses who had testified prior to the replacement of Judge Maqutu.[293] The Trial Chamber granted Ndayambaje's request to recall Prosecution Witness TO on a specific issue but denied the other requests.[294]

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[285] *See* Trial Judgement, paras. 74, 6341, fn. 159.
[286] *See* Trial Judgement, para. 75, fn. 160. Judge Maqutu's term of office was only extended for the purposes of concluding two other trials. *See ibid.*, fn. 160.
[287] Rule 15*bis*(D) of the Rules provides that, if a judge is unable to continue sitting in a part-heard case, the remaining judges may nonetheless decide to continue the proceedings with a substitute judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice.
[288] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision in the Matter of Proceedings under Rule 15*bis*(D), 15 July 2003 ("Decision on Continuation of Trial"), para. 34, p. 22. *See also* Trial Judgement, para. 75.
[289] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings under Rule 15*bis*(D), 24 September 2003 ("Appeal Decision on Continuation of Trial"), para. 37. *See also* Trial Judgement, fn. 162.
[290] Trial Judgement, paras. 75, 6392; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Certification in the Matter of Proceedings under Rule 15*bis*(D), 5 December 2003 ("Judge Bossa Certification").
[291] Trial Judgement, paras. 75, 6393.
[292] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion to Drop and Add Witnesses, 30 March 2004 ("30 March 2004 Decision"), pp. 8, 9.
[293] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Motion to Recall Witness "QAQ" Pursuant to the Appeals Chamber's "Decision in the Matter of Proceedings Under Rule 15*bis*(D)" of 24 September 2003, 23 December2003 (originally filed in French, English translation filed on 12 March 2004) (confidential); *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Motion to Recall Witness QAR, Pursuant to the Appeals Chamber's "Decision in the Matter of Proceedings Under Rule 15*bis*(D)", 19 December 2003 (originally filed in French, English translation filed on 22 April 2004); *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Motion to Recall Witness "TO" Pursuant to the Appeals Chamber's "Decision in the Matter of Proceedings Under Rule 15*bis*(D)" of 24 September 2003, 19 December 2003 (originally filed in French, English translation filed on 12 March 2004); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête aux fins de rappeler les témoins à charge TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD et QY afin qu'ils soient entendus à nouveau sur les évènements allégués s'être déroulés aux bureaux de la Préfecture et ayant un lien avec les actes reprochés à Pauline Nyiramasuhuko à cet endroit, dans son acte d'accusation, ou, à défaut, d'ordonner le procès séparé ou l'arrêt des procédures contre Pauline Nyiramasuhuko*, 8 April 2004 ("Nyiramasuhuko Motion to Recall

120. In the Trial Judgement, the Trial Chamber rejected Nyiramasuhuko's claim that she had been prejudiced by the fact that Judge Bossa had not heard all Prosecution witnesses in person.[295]

121. Nyiramasuhuko, Ntahobali, and Ndayambaje allege on appeal that the trial was rendered unfair by the fact that the substitute judge did not see or hear most of the witnesses upon whom the Trial Chamber ultimately relied in finding them guilty. In particular, Ntahobali submits that the Appeal Decision on Continuation of Trial should be reconsidered.[296] Moreover, Nyiramasuhuko, Ntahobali, and Ndayambaje assert that the Trial Chamber erred in dismissing their requests to recall some of the witnesses.[297] In addition, Nyiramasuhuko and Ntahobali argue that the Trial Chamber committed additional errors on this issue in the Trial Judgement.[298] The Appeals Chamber will examine these contentions in turn.

1. Reconsideration of the Appeal Decision on Continuation of Trial

122. In the Appeal Decision on Continuation of Trial, the Appeals Chamber found that the Trial Chamber did not err in concluding that it was in the interests of justice to continue the proceedings with a substitute judge.[299] The Appeals Chamber noted the contention that it would not be possible for the substitute judge to evaluate the witnesses' demeanour in assessing their credibility given the absence of video-recordings of their testimonies.[300] However, the Appeals Chamber declined to address this point as it had not been previously raised before the two remaining trial judges and held

Witnesses"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Motion to Recall Witnesses, 19 May 2004 (originally filed in French, English translation filed on 31 May 2004) ("Ntahobali 19 May 2004 Motion to Recall Witnesses").

[294] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for Recall of Witnesses, 29 June 2004 ("29 June 2004 Decision"), p. 10; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for Recall of Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY or, in Default a Disjunction of Trial or a Stay of Proceedings Against Nyiramasuhuko, 6 May 2004 ("6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses"), para. 36, p. 7; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on Defence Motion Requesting the Recall of Witness "QAQ" Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15*bis*(D), 6 May 2004 ("6 May 2004 Decision on Motion to Recall Witness QAQ"), p. 4; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on Defence Motion Requesting the Recall of Witness "QAR" Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15*bis*(D), 6 May 2004 ("6 May 2004 Decision on Motion to Recall Witness QAR"), p. 4; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on Defence Motion Requesting the Recall of Witness "TO" Based on the Decision of the Appeals Chamber in the Matter of Proceedings Under Rule 15*bis*(D), 6 May 2004 ("6 May 2004 Decision on Motion to Recall Witness TO"), para. 10, p. 4.

[295] Trial Judgement, paras. 156, 159.

[296] Ntahobali Notice of Appeal, paras. 39-43, 47; Ntahobali Appeal Brief, paras. 103-111.

[297] Nyiramasuhuko Notice of Appeal, paras. 1.25; Nyiramasuhuko Appeal Brief, paras. 197-221; Ntahobali Notice of Appeal, para. 44; Ntahobali Appeal Brief, paras. 112-114; Ndayambaje Notice of Appeal, paras. 127-132; Ndayambaje Appeal Brief, paras. 318-328.

[298] Nyiramasuhuko Notice of Appeal, paras. 1.23, 1.24, 1.26-1.29; Nyiramasuhuko Appeal Brief, paras. 186-196, 222-242; Ntahobali Notice of Appeal, paras. 46-48; Ntahobali Appeal Brief, paras. 114-118.

[299] Appeal Decision on Continuation of Trial, paras. 22, 37.

[300] Appeal Decision on Continuation of Trial, paras. 30-35.

that, in any event, the two judges were entitled to regard the question of adequacy of the records, including the availability of video-recordings, as a matter for the substitute judge.[301]

123. Ntahobali submits that reconsideration of the Appeal Decision on Continuation of Trial is warranted on the grounds that: (i) the Appeals Chamber committed a clear error of reasoning in refusing to take into account the absence of video-recording;[302] and (ii) it is necessary to prevent an injustice, given the change of circumstances caused by the subsequent withdrawal of 30 Prosecution witnesses and the fact that, as a result, Judge Bossa would have heard almost none of the Prosecution witnesses who testified on four incidents for which he was convicted.[303] Ntahobali contends that a new trial should have been ordered and that, given the length of the proceedings to date, the only remedy is to stay the proceedings.[304]

124. The Prosecution responds that Ntahobali's request for reconsideration should be struck or summarily dismissed as improperly filed because an appeal brief should only include arguments in support of alleged errors made by the trial chamber.[305] It argues that Ntahobali should have filed a separate motion for reconsideration with the Appeals Chamber.[306] In the alternative, the Prosecution submits that Ntahobali fails to demonstrate a clear error of reasoning or that reconsideration is necessary to prevent an injustice.[307]

125. Ntahobali replies that the importance of the issue justifies that the Appeals Chamber consider his arguments.[308]

126. The Appeals Chambers recalls that once a trial judgement is pronounced, any request for reconsideration of a decision taken within the framework of first instance proceedings must be raised through the notice of appeal and the appeal brief.[309] The Appeals Chamber therefore rejects the Prosecution's argument that Ntahobali has improperly sought reconsideration of an interlocutory appeal decision through his appeal.

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[301] Appeal Decision on Continuation of Trial, paras. 31-33.
[302] Ntahobali Appeal Brief, paras. 103-107.
[303] Ntahobali Appeal Brief, paras. 109-111. *See also* Ntahobali Notice of Appeal, paras. 39, 40, 47.
[304] Ntahobali Appeal Brief, paras. 108, 118.
[305] Prosecution Response Brief, para. 37.
[306] Prosecution Response Brief, para. 37.
[307] Prosecution Response Brief, paras. 38, 39.
[308] Ntahobali Reply Brief, para. 25.
[309] *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, *Décision relative à la Requête de l'appelant Jean-Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 Juillet 2000 et réparation pour abus de procédure*, 23 June 2006 ("*Barayagwiza* 23 June 2006 Appeal Decision"), para. 27. The Appeals Chamber has in the past reconsidered previous interlocutory decisions in an appeal judgement. *See Kajelijeli* Appeal Judgement, paras. 203-207.

127. Under the settled jurisprudence of the Tribunal, the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[310] The Appeals Chamber emphasises that the exercise of this reconsideration power is only designed to apply in exceptional circumstances.[311] Indeed, the Appeals Chamber recalls that reconsideration is an exception to the principle that prior interlocutory appeal decisions are binding in continued proceedings in the same case as to all issues definitively decided by those decisions.[312] This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.[313]

128. The Appeals Chamber notes that Ntahobali waited nearly a decade, and until after the completion of the trial proceedings, to seek reconsideration of the Appeal Decision on Continuation of Trial through his appeal against the Trial Judgement, without explaining why he did not seek reconsideration earlier. The Appeals Chamber stresses that a "matter must be raised with the court at the time the problem is perceived in order to enable the problem to be remedied".[314] As held in the *Čelebići* Appeal Judgement, "the requirement that the issue must have been raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief."[315] By failing to raise this matter before the Appeals Chamber prior to the completion of the trial proceedings, Ntahobali deprived the Appeals Chamber of the opportunity to re-examine whether it was in the interests of justice to continue the trial with a substitute judge.

129. In these circumstances, the Appeals Chamber declines to exercise its discretionary power to consider Ntahobali's request for reconsideration of the Appeal Decision on Continuation of Trial. Accordingly Ntahobali's request for reconsideration is dismissed.

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[310] *See*, *e.g.*, *Munyagishari* Appeal Decision, para. 13; *Kajelijeli* Appeal Judgement, para. 203; *Barayagwiza* 4 February 2005 Appeal Decision, p. 2.
[311] *See*, *e.g.*, *Prosecutor v. Zoran Žigić*, Case No. IT-98-30/1-A, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgement IT-98-30/1-A Delivered on 28 February 2005", 26 June 2006, para. 5; *Barayagwiza* 23 June 2006 Appeal Decision, para. 22; *Kajelijeli* Appeal Judgement, para. 204.
[312] *See Barayagwiza* 23 June 2006 Appeal Decision, para. 22; *Kajelijeli* Appeal Judgement, para. 202.
[313] *See Barayagwiza* 23 June 2006 Appeal Decision, para. 22; *Kajelijeli* Appeal Judgement, para. 202.
[314] *See Čelebići* Appeal Judgement, para. 641. It is settled jurisprudence that a party should not refrain from making an objection to a matter which was apparent during the course of the trial to raise it only on appeal in the event of an adverse finding against that party. *See Nahimana et al.* Appeal Judgement, para. 215; *Niyitegeka* Appeal Judgement, para. 199; *Čelebići* Appeal Judgement, para. 640; *Tadić* Appeal Judgement, para. 55.
[315] *See Čelebići* Appeal Judgement, para. 641.

2. Decisions Denying the Recall of Witnesses

130. In the Appeal Decision on Continuation of Trial, the Appeals Chamber emphasised that, in the absence of video-recordings, "the recomposed Trial Chamber may, on a motion by a party or *proprio motu*, recall a witness on a particular issue which in the view of the Trial Chamber involves a matter of credibility which the substitute judge may need to assess in the light of the witness's demeanour."[316] The Trial Chamber rejected a number of requests filed by Nyiramasuhuko, Ntahobali, and Ndayambaje to recall Prosecution witnesses who had not testified before Judge Bossa mainly because they had failed to demonstrate any particular issue involving a matter of credibility which the substitute judge may have needed to assess in light of the witness's demeanour.[317]

131. Nyiramasuhuko, Ntahobali, and Ndayambaje submit that the Trial Chamber erred in rejecting their respective requests.[318] The Appeals Chamber will address their submissions in turn.

(a) 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses

132. On 6 May 2004, the Trial Chamber dismissed Nyiramasuhuko's motion to recall 11 Prosecution witnesses who had testified in relation to events at the Butare Prefecture Office prior to Judge Maqutu's replacement.[319] Recalling the Appeal Decision on Continuation of Trial, the Trial Chamber found that Nyiramasuhuko sought a complete re-hearing of the specified witnesses without demonstrating any particular issue that involved a matter of credibility which the substitute judge needed to assess in light of the witness's demeanour.[320] In response to the argument that Judge Bossa had not heard the bulk of the evidence against Nyiramasuhuko, the Trial Chamber explained that the decision to continue the trial was based on an evaluation of the totality of the pertinent circumstances, including the number of witnesses remaining to be heard.[321] It further recalled the Appeals Chamber's statement that it is not "useful to lay down a hard and fast

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[316] Appeal Decision on Continuation of Trial, para. 35. *See also ibid.*, paras. 34, 38.
[317] *See* 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, paras. 32, 36, p. 7; 29 June 2004 Decision, paras. 45, 48, p. 10; 6 May 2004 Decision on Motion to Recall Witness QAQ, para. 9, p. 4; 6 May 2004 Decision on Motion to Recall Witness QAR, para. 12, p. 4.
[318] Nyiramasuhuko Notice of Appeal, para. 1.25; Nyiramasuhuko Appeal Brief, paras. 205-221; Ntahobali Notice of Appeal, para. 44; Ntahobali Appeal Brief, paras. 112-114; Ndayambaje Notice of Appeal, paras. 126-132; Ndayambaje Appeal Brief, paras. 318-328.
[319] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, paras. 1, 2, 9, 36. On 25 May 2004, Nyiramasuhuko's motion for certification to appeal the Decision on Nyiramasuhuko Motion to Recall Witnesses was dismissed by the Trial Chamber as filed out of time. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Certification to Appeal the "Decision on Defence Motion for Recall of Witnesses TA, QJ, TK, SJ, SU, SS, QBP, RE, FAP, SD and QY or, in Default a Disjunction of Trial or a Stay of Proceedings Against Nyiramasuhuko", 25 May 2004, pp. 2, 3.
[320] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 32. *See also ibid.*, paras. 30, 31.
[321] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 33.

relationship between the proportion of witnesses who have already testified and the exercise of the power to order a continuation of the trial with a substitute judge."[322] The Trial Chamber added that:

> in considering whether to recall a witness, it must be born in mind that the substitute judge has certified that she has familiarized herself with the records of the proceedings. Those records include audio-recordings in which the substitute judge can assess the credibility of the witnesses in light of their demeanour when giving evidence in court.[323]

The Trial Chamber concluded that no case had been made by Nyiramasuhuko for the re-hearing of the witnesses as a whole.[324] The Trial Chamber ultimately relied on certain aspects of the testimonies of the witnesses Nyiramasuhuko sought to recall in support of a number of findings against her.[325]

133. Nyiramasuhuko submits that the Trial Chamber erred in dismissing her motion.[326] In particular, she contends that the Trial Chamber erred in relying on the "rules" for the recall of witnesses enunciated in the Appeal Decision on Continuation of Trial as these "rules" could no longer be applied in the new circumstances arising from the withdrawal of 30 Prosecution witnesses.[327] The Appeals Chamber understands Nyiramasuhuko to argue that the Trial Chamber misinterpreted the Appeal Decision on Continuation of Trial in which, according to her, the Appeals Chamber considered that there was a limit as to the proportion of witnesses heard beyond which the trial would be rendered unfair. In her view, this limit was clearly reached as the substitute judge had not seen 11 of the 12 witnesses who testified against her in relation to the Butare Prefecture Office events. According to Nyiramasuhuko, the proportion of witnesses not heard by the substitute judge no longer permitted the Trial Chamber to exercise its discretion to continue the trial without recalling the witnesses.[328]

134. Nyiramasuhuko further submits that the Trial Chamber erred in stating that she did not raise any "particular issue" that would justify the requested recall as she had asked in the alternative that the witnesses be recalled solely to testify on the allegations raised against her in relation to the Butare Prefecture Office.[329] Nyiramasuhuko also argues that the Trial Chamber erred in stating that Judge Bossa could assess the demeanour of witnesses based on the audio-recordings as a witness's demeanour needs also to be observed through the witness's "non-verbal language".[330] She adds that,

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[322] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 33, *quoting* Appeal Decision on Continuation of Trial, para. 27.
[323] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 34.
[324] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, paras. 33, 35.
[325] *See*, *e.g.*, Trial Judgement, paras. 2644, 2686, 2687, 2697, 2698, 2718, 2738, 2743, 2773, 2775.
[326] Nyiramasuhuko Appeal Brief, paras. 205, 221.
[327] Nyiramasuhuko Appeal Brief, paras. 206, 210-212.
[328] Nyiramasuhuko Appeal Brief, paras. 213-220. *See also ibid.*, para. 239.
[329] Nyiramasuhuko Appeal Brief, para. 208, *referring to* Nyiramasuhuko Motion to Recall Witnesses, p. 27.
[330] Nyiramasuhuko Appeal Brief, paras. 191-193.

since all Prosecution witnesses testified in Kinyarwanda, it was difficult, if not impossible, for any judge not proficient in this language to "listen" to the original audio-recordings.[331]

135. Nyiramasuhuko contends that the Trial Chamber's refusal to recall the relevant witnesses in the new circumstances arising from the modification of the Prosecution's witness list violated her right to a fair trial, especially as the Trial Chamber relied on these witnesses to hold her criminally responsible.[332]

136. The Prosecution responds that Nyiramasuhuko mostly repeats arguments already rejected at trial and that she does not demonstrate that the Trial Chamber committed an error warranting the intervention of the Appeals Chamber.[333]

137. The Appeals Chamber highlights that, like all decisions relating to the conduct of the proceedings before them, decisions on requests to recall witnesses are matters within the discretion of trial chambers.[334] The Appeals Chamber did not suggest otherwise in the Appeal Decision on Continuation of Trial, but merely stated that "the recomposed Trial Chamber *may*, on a motion by a party or *proprio motu*, recall a witness".[335] The Appeal Decision on Continuation of Trial did not strip the Trial Chamber of its discretion to determine whether recalling witnesses was necessary or dictate that the substitute judge was required to hear a certain proportion of witnesses to ensure a fair trial. The Appeals Chamber therefore rejects Nyiramasuhuko's contention that the Trial Chamber misinterpreted the Appeal Decision on Continuation of Trial and erred in considering that it retained discretion to decide whether or not to recall the witnesses.

138. The question before the Appeals Chamber is whether the Trial Chamber exercised its discretion consistently with Articles 19 and 20 of the Statute, which require trial chambers to ensure that trials are fair and expeditious.[336] In this regard, the Appeals Chamber reiterates that in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error resulting in prejudice to that party.[337]

139. As discussed above, Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in misinterpreting the Appeal Decision on Continuation of Trial.[338] Nyiramasuhuko also does not

[331] Nyiramasuhuko Appeal Brief, para. 196.
[332] Nyiramasuhuko Appeal Brief, paras. 199-204, 222-224.
[333] Prosecution Response Brief, paras. 34-36.
[334] *See Nizeyimana* Appeal Judgement, para. 286; *Ndindiliyimana et al.* Appeal Judgement, para. 22.
[335] *See* Appeal Decision on Continuation of Trial, para. 35 (emphasis added).
[336] *See Nizeyimana* Appeal Judgement, para. 286; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.
[337] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 14; *Lukić and Lukić* Appeal Judgement, para. 17; *Setako* Appeal Judgement, para. 19.
[338] *See supra*, para. 137.

show that the Trial Chamber erred in finding that she did not raise any particular issue which involved a matter of credibility that the substitute judge needed to assess in light of the witness's "visually observable" demeanour.[339] Nyiramasuhuko's alternative request in her motion that witnesses be recalled to testify solely on the factual allegations raised against her in relation to the Butare Prefecture Office is not the same as raising particular issues involving a matter of credibility which the substitute judge may need to assess in light of the witness's "visually observable" demeanour.

140. Turning to Nyiramasuhuko's contention that Judge Bossa could not assess the demeanour of witnesses based on the audio-recordings, the Appeals Chamber is of the view that the importance of observing first-hand the demeanour of witnesses in court cannot be discounted on the ground that audio-recordings exist. Although the preference for live testimony to be heard by each judge does not represent an "unbending requirement",[340] the Appeals Chamber is not convinced that audio-recordings alone allow a substitute judge to thoroughly assess all aspects of the witness's demeanour in court, in particular when the judge is not proficient in the language spoken by the witness.[341]

141. That being said, in the case at hand, Nyiramasuhuko fails to point to any particular aspect of any witness's demeanour in court which could not have been properly assessed without seeing or hearing the witness live. Judge Bossa certified that she had familiarised herself with the record of the proceedings,[342] and the impugned decision reflects that she did not consider that there were any credibility matters that she needed to assess in light of the witnesses' "visually observable" demeanour in court.[343] Against this background, the Appeals Chamber considers that the Trial Chamber's denial of the Nyiramasuhuko Motion to Recall Witnesses was not so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

142. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's challenges against the 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses.

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[339] *See* 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 32. *See also ibid.*, paras. 30, 31.
[340] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals pursuant to Rule 15*bis*(D), 20 April 2007 ("*Karemera et al.* 20 April 2007 Appeal Decision"), para. 42, *quoting* Appeal Decision on Continuation of Trial, para. 25. *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR15*bis*, Decision on Appeal Against Decision on Continuation of Proceedings, 6 June 2014, para. 37; Appeal Decision on Continuation of Trial, para. 33 ("But [the substitute judge] may feel that, even in the absence of video-recordings, the record of proceedings is enough to enable him to appreciate what has happened. Failure to review video-recordings which, because they are non-existent, do not form part of the record of the proceedings, does not mean that the judge has not familiarized himself with the record of the proceedings as the record stands and therefore does not disqualify him from joining the bench. He may decide to join the bench with any questions of demeanour being left to be resolved".).
[341] The Appeals Chamber notes that the Oxford Dictionary defines "demeanour" as the "manner of comporting oneself outwardly or towards others".
[342] *See* Judge Bossa Certification.
[343] *Cf.* 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 33.

(b) 29 June 2004 Decision

143. On 29 June 2004, the Trial Chamber denied a request from Ntahobali to recall all the Prosecution witnesses who were heard before the appointment of Judge Bossa or, at a minimum, the 14 Prosecution witnesses who testified against him.[344] The Trial Chamber found that parts of Ntahobali's request were "nothing else than an attempt to relitigate issues that were already determined in the [Appeal Decision on Continuation of Trial]."[345] The Trial Chamber further stated that:

> Submissions by the Defence indistinctly refer to miscellaneous demeanours of witnesses, among which are aggressiveness and threats against counsels, reluctance to answer questions, evasiveness, lack of emotion, material inconsistencies, hesitations, doubts, silences, confusing answers, and arrogance. The Defence also referred to "non-verbal demeanour" of witnesses without further explanation. The Trial Chamber notes that the first series of demeanours are reflected in the written transcripts and/or audio-recordings of the witnesses' testimony in court. The Trial Chamber further notes that none of these alleged demeanours constitutes a particular issue which involves a matter of credibility which the substitute Judge may need to assess in the light of the witness' demeanour. Nowhere does the Defence identify such a particular issue.[346]

144. Ntahobali submits that the Trial Chamber erred in rejecting his request to recall the Prosecution witnesses.[347] First, Ntahobali contends that the Trial Chamber erred in finding that the question of the recall of the witnesses was an issue that had already been litigated in the Appeal Decision on Continuation of Trial.[348] He contends that the Trial Chamber ignored his argument that his request was based on the change of circumstances caused by the withdrawal of 30 witnesses from the Prosecution's witness list and the fact that, as a result, Judge Bossa would see none or almost none of the witnesses who testified against him in relation to certain incidents.[349] In Ntahobali's view, the Trial Chamber erred in failing to determine whether this new situation required the recall of witnesses.[350]

145. Second, Ntahobali submits that the Trial Chamber erred in stating that the aggressiveness, reluctance to answer questions, lack of emotion, silences, and arrogance of witnesses were reflected in the transcripts and audio-recordings of the testimonies.[351] He asserts that, contrary to the Trial Chamber's finding, such behaviour constituted "particular issues" which, given the new circumstances, should have required the recalls sought.[352]

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[344] 29 June 2004 Decision, paras. 1, 48, p. 10. Ntahobali referred to Prosecution Witnesses TA, SJ, QCB, TK, TN, FAP, SS, QY, RE, SD, QBP, QJ, SU, and Ghandi Shukri. *See ibid.*, para. 12.
[345] 29 June 2004 Decision, para. 39.
[346] 29 June 2004 Decision, para. 45. *See also ibid.*, paras. 46, 47.
[347] Ntahobali Notice of Appeal, para. 44; Ntahobali Appeal Brief, para. 112.
[348] Ntahobali Appeal Brief, para. 113.
[349] Ntahobali Appeal Brief, para. 113, *referring to* Ntahobali 19 May 2004 Motion to Recall Witnesses, paras. 28-36.
[350] Ntahobali Appeal Brief, para. 113.
[351] Ntahobali Appeal Brief, para. 114.
[352] Ntahobali Appeal Brief, para. 114.

146. The Prosecution did not specifically respond to these arguments.

147. The Appeals Chamber observes that, contrary to Ntahobali's suggestion, the Ntahobali Motion to Recall Witnesses was not premised on the contention that the withdrawal of 30 Prosecution witnesses created a new situation which required the recall of witnesses he had requested. While Ntahobali clearly referred to the new situation arising from the withdrawal of 30 Prosecution witnesses and the fact that, as a result, Judge Bossa would not have seen or heard any of the Prosecution witnesses testifying on four important crime scenes,[353] his main contention was that the interests of justice required that Judge Bossa see and hear all the testimonies which she was expected to assess.[354] The Trial Chamber was correct in stating that this contention had already been determined in the Appeal Decision on Continuation of Trial. It also bears noting that, in line with the Appeals Chamber's guidance in that decision, the Trial Chamber considered whether it was necessary to recall the requested witnesses to testify on particular issues that the substitute judge would need to assess in light of the witnesses' "visually observable" demeanour.[355] By concluding that there was no need to recall these witnesses, the Trial Chamber implicitly determined that the situation did not require the recalls sought.

148. The Appeals Chamber is of the view that transcripts or audio-recordings of a witness's testimony in court do not necessarily always allow a judge to assess thoroughly the witness's possible aggressiveness, reluctance to answer questions, lack of emotion, silences, and arrogance. The 29 June 2004 Decision, however, shows that Judge Bossa did not consider that there were issues with the demeanour of witnesses raised by Ntahobali that she needed to assess by seeing them testify. This reflects that Judge Bossa, together with the two other judges, considered that she was in a position to properly assess the demeanour issues raised by Ntahobali on the basis of the written transcripts and/or audio-recordings of the witnesses' testimony. Ntahobali submits in broad terms that all of the demeanour issues he raised constituted "particular issues" justifying the recall sought in light of the new circumstances.[356] However, he fails to explain how the Trial Chamber erred in finding that none of these issues required that the witnesses be recalled for Judge Bossa to assess their credibility by observing their demeanour in court first-hand. The Appeals Chamber recalls that it is not a second trier of fact and that a party cannot simply repeat arguments on appeal that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh.[357]

[353] *See* Ntahobali 19 May 2004 Motion to Recall Witnesses, paras. 41, 44.
[354] *See* Ntahobali 19 May 2004 Motion to Recall Witnesses, paras. 16, 17, 29-34.
[355] 29 June 2004 Decision, paras. 44-48.
[356] *See* Ntahobali Appeal Brief, para. 114, fn. 197, *referring to* Ntahobali 19 May 2004 Motion to Recall Witnesses, paras. 73, 74, 95, 102, 109, 115, 121, 128, 135, 141, 147, 153.
[357] *Karera* Appeal Judgement, para. 86; *Semanza* Appeal Judgement, para. 9.

149. Recalling the Trial Chamber's broad discretion in the conduct of the proceedings before it and in the absence of a demonstration of error, the Appeals Chamber dismisses Ntahobali's challenges against the 29 June 2004 Decision.

(c) 6 May 2004 Decisions on Ndayambaje Motions to Recall Witnesses QAQ and QAR

150. On 6 May 2004, the Trial Chamber granted Ndayambaje's request to recall Prosecution Witness TO on the ground that there was a particular issue "which may involve a matter of credibility which the substitute judge may need to assess in the light of the witness' demeanour."[358] The same day, the Trial Chamber denied Ndayambaje's requests to recall Prosecution Witnesses QAQ and QAR on the grounds that the issues of credibility raised by Ndayambaje were related to the substance of the evidence and that Ndayambaje had failed to raise any specific issue which involved a matter of credibility that the substitute judge may have needed to assess in light of the witnesses' demeanour.[359] The Trial Chamber ultimately relied on the evidence of Witnesses QAQ and QAR in support of a number of findings against Ndayambaje.[360]

151. Ndayambaje submits that by rejecting his requests to recall Witnesses QAQ and QAR whereas Judge Bossa did not see them testify, the Trial Chamber deprived him of a fair trial and caused him serious prejudice.[361] He argues that, without seeing the witnesses' explanations on the many contradictions and inconsistencies in their testimonies, Judge Bossa was not in a position to properly assess their evidence.[362] In Ndayambaje's view, Article 11(2) of the Statute was implicitly violated as he was in fact convicted by only two judges.[363] He highlights that the credibility of Witnesses QAQ and QAR was highly contested at trial, that Witness QAR was the sole witness the Trial Chamber relied upon in finding him guilty in relation to the events at Mugombwa Church, and

[358] 6 May 2004 Decision on Motion to Recall Witness TO, para. 10, p. 4.
[359] 6 May 2004 Decision on Motion to Recall Witness QAQ, para. 9, p. 4; 6 May 2004 Decision on Motion to Recall Witness QAR, para. 12, p. 4.
[360] *See* Trial Judgement, paras. 1194-1246 (Mugombwa Church), 1409, 1431, 1448, 1452 (Kabuye Hill), 4746 (abductions of Tutsi women and girls).
[361] Ndayambaje Notice of Appeal, paras. 128-132; Ndayambaje Appeal Brief, paras. 318, 322, 327, 328. The Appeals Chamber notes that, in his notice of appeal, Ndayambaje further submitted that the decision to continue the trial with a substitute judge constitutes an error of law. *See* Ndayambaje Notice of Appeal, para. 126. The Appeals Chamber notes that Ndayambaje failed to substantiate this allegation in his appeal brief and dismisses it as a result. The Appeals Chamber also notes that, in his appeal brief, Ndayambaje develops arguments related to the Trial Chamber's decision to recall Witness TO on a limited basis and the assessment of Witness TO's evidence. *See* Ndayambaje Appeal Brief, paras. 321, 324. The Appeals Chamber observes that Ndayambaje not only failed to give notice of his contentions pertaining to the evidence of Witness TO in his notice of appeal, but that he also failed to articulate the alleged error committed by the Trial Chamber in relation to the recall of Witness TO. In these circumstances, the Appeals Chamber will not examine Ndayambaje's contentions in this regard. Ndayambaje also submits that the replacement of Judge Maqutu resulted in an adjournment of the hearing that delayed the entire proceedings and caused him prejudice. *See* Ndayambaje Notice of Appeal, para. 127. This argument is dealt with below in paragraph 364 under Section III.K.
[362] Ndayambaje Appeal Brief, paras. 323, 328.
[363] Ndayambaje Appeal Brief, para. 324. Pointing out that the testimonies of Witnesses QAQ and QAR were not recorded on video, Ndayambaje argues that it was improper for Judge Bossa to evaluate the credibility of the witnesses

that Witness QAQ's testimony was considered as largely corroborative of Prosecution evidence for a number of events.[364] Ndayambaje requests that the Appeals Chamber exclude the testimonies of Witnesses QAQ and QAR and quash the findings of guilt based solely on Witness QAR's testimony.[365]

152. The Prosecution responds that Ndayambaje's submissions should be summarily dismissed as he does not show that the rejection of his requests to recall Witnesses QAQ and QAR constituted an error warranting the intervention of the Appeals Chamber.[366] The Prosecution contends that Ndayambaje does not identify any specific aspects of the witnesses' testimonies that the Trial Chamber would not have relied upon, had Judge Bossa seen the witnesses testify.[367]

153. The Appeals Chamber observes that the decisions denying the recall of Witnesses QAQ and QAR indicate that Judge Bossa, along with the two other judges on the bench, considered that Ndayambaje had failed to raise specific issues in the evidence of these two witnesses that involved matters of credibility which the judges needed to assess in light of the witnesses' "visually observable" demeanour.[368] While Ndayambaje contests the credibility of the two witnesses, he does not demonstrate that the Trial Chamber erred in finding that he had failed to raise specific issues of this sort in his motions seeking the recall of Witnesses QAQ and QAR.

154. Turning to Ndayambaje's argument that he was convicted by only two judges, the Appeals Chamber recalls its finding in the Appeal Decision on Continuation of Trial that the question of adequacy of the record, including the availability of video-recordings, was a matter for the substitute judge.[369] In this case, Judge Bossa certified her familiarisation with the record despite the absence of video-recordings,[370] which demonstrates that she considered that the record of proceedings provided to her was sufficient to enable her to appreciate what had happened.[371] The decisions denying the recall of Witnesses QAQ and QAR further reveal that Judge Bossa did

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on the basis of the written transcripts and audio recordings of the proceedings as the role of the trial judge cannot be fulfilled by an assessment "on paper". *See ibid.*, para. 325; Ndayambaje Notice of Appeal, para. 127.

[364] Ndayambaje Notice of Appeal, paras. 129, 130; Ndayambaje Appeal Brief, paras. 320, 326. *See also* Ndayambaje Appeal Brief, para, 376; Ndayambaje Reply Brief, para. 124.

[365] Ndayambaje Notice of Appeal, para. 132; Ndayambaje Appeal Brief, paras. 327, *referring to* Mugombwa Church and the abduction of Tutsi women and girls in June 1994.

[366] Prosecution Response Brief, paras. 40-42.

[367] Prosecution Response Brief, para. 41.

[368] 6 May 2004 Decision on Motion to Recall Witness QAQ, para. 9; 6 May 2004 Decision on Motion to Recall Witness QAR, para. 12.

[369] Appeal Decision on Continuation of Trial, paras. 31-33.

[370] *See* Judge Bossa Certification.

[371] *Cf.* Appeal Decision on Continuation of Trial, para. 33 ("But [the substitute judge] may feel that, even in the absence of video-recordings, the record of proceedings is enough to enable him to appreciate what has happened. Failure to review video-recordings which, because they are non-existent, do not form part of the record of the proceedings, does not mean that the judge has not familiarized himself with the record of the proceedings as the record stands and therefore does not disqualify him from joining the bench. He may decide to join the bench with any questions of demeanour being left to be resolved".).

not consider that there were issues in relation to the evidence of these two witnesses which involved credibility matters that she needed to assess by observing the witnesses' demeanour.[372] Ndayambaje does not demonstrate that this determination was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.

155. Based on the foregoing, the Appeals Chamber dismisses Ndayambaje's challenges against the 6 May 2004 Decision on Motion to Recall Witness QAQ and the 6 May 2004 Decision on Motion to Recall Witness QAR.

3. Alleged Errors in the Trial Judgement

156. In the Trial Judgement, the Trial Chamber stated that:

> The Nyiramasuhuko Defence avers that Nyiramasuhuko was prejudiced by the fact that Judge Bossa was not present during the presentation of the Prosecution's case and, consequently, did not hear all the Prosecution witnesses testify in person, as she was only appointed to the Bench in 2004.[373]

The Trial Chamber rejected Nyiramasuhuko's contention, reasoning as follows:

> As contemplated by the [Appeal Decision on Continuation of Trial], Judge Bossa did not personally hear all of the Prosecution's evidence in this case. She did, however, familiarise herself with the evidence adduced before she joined the current Bench on the basis of both the written transcripts and audio recordings of the proceedings. Where it was necessary to assess a particular witness' credibility in light of the witness' demeanour, the Chamber granted the motions to recall particular witnesses to be re-heard on specific issues. In such cases, involving Witnesses QCB, QY, SJ, QBQ and QA, Judge Bossa based her assessment of the witness' demeanour on the testimony given when the witness was recalled. The Trial Chamber's approach to this issue has already been endorsed by the Appeals Chamber, and the Nyiramasuhuko Defence demonstrates no new fact, material change in circumstance, or legal error associated with the Chamber's approach. Accordingly, the Chamber will not reconsider its decision on this issue.[374]

157. Nyiramasuhuko submits that the Trial Chamber distorted her closing arguments and failed to understand that she was not requesting reconsideration of the decisions on the continuation of the trial with a substitute judge but, instead, that she was arguing that the withdrawal of 30 Prosecution witnesses constituted new circumstances which led to the violation of her fair trial rights.[375] She argues that the Trial Chamber therefore erred in finding that she had not demonstrated the existence of any new fact, material change in circumstance, or legal error related to the Appeals Chamber's approach since it was not her argument.[376]

158. Nyiramasuhuko further contends that the Trial Chamber erred by suggesting that Prosecution Witnesses QCB, SJ, QBQ, and QA were recalled to allow Judge Bossa to assess their

[372] *Cf.* 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, para. 32.
[373] Trial Judgement, para. 156 (internal reference omitted).
[374] Trial Judgement, para. 159 (internal reference omitted).
[375] Nyiramasuhuko Appeal Brief, paras. 186-189.
[376] Nyiramasuhuko Appeal Brief, para. 190.

credibility, arguing that they were recalled for other reasons.[377] Similarly, Ntahobali contends that the Trial Chamber erred by stating that it adopted the practice of recalling witnesses that Judge Bossa had not observed in court on specific issues as, in fact, it rejected the entirety of his requests to recall witnesses.[378]

159. Ntahobali and Nyiramasuhuko submit that, despite their arguments in this respect at trial and the importance of this factor, the Trial Chamber's failure in the Trial Judgement to refer to the behaviour of the Prosecution witnesses when assessing these witnesses' credibility caused them prejudice.[379] This, Nyiramasuhuko argues, amounts to a failure to provide a reasoned opinion and leads to the conclusion that the credibility and reliability of the testimonial evidence was not properly evaluated by the Trial Chamber, which renders the trial unfair.[380] Nyiramasuhuko and Ntahobali also contend that they were ultimately tried by only two judges in violation of Article 11 of the Statute.[381] As relief, Nyiramasuhuko and Ntahobali request a permanent stay of proceedings.[382] In the alternative, Nyiramasuhuko requests her acquittal on all counts, and Ntahobali requests the exclusion of the testimonial evidence that Judge Bossa did not observe.[383] In a further alternative, Ntahobali argues that the Appeals Chamber should not accord to the Trial Chamber's findings the deference normally due on the ground that the trial judges observed the witnesses in person.[384]

160. The Prosecution did not specifically respond to these arguments.

161. The Appeals Chamber observes that the Trial Chamber addressed Nyiramasuhuko's claim that it was necessary to recall the relevant witnesses in light of the reduction of the number of Prosecution witnesses in the 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses.[385] Since Nyiramasuhuko's claim had already been adjudicated, the Appeals Chamber finds that the Trial Chamber did not err in considering that, by raising it again in her closing arguments, Nyiramasuhuko was seeking reconsideration of the approach the Trial Chamber had taken. In light of Nyiramasuhuko's closing arguments and the relevant portion of the Trial Judgement, the Appeals Chamber finds no merit in Nyiramasuhuko's argument that the Trial Chamber failed to address her contention.

[377] Nyiramasuhuko Appeal Brief, paras. 197, 198.
[378] Ntahobali Appeal Brief, para. 115.
[379] Nyiramasuhuko Appeal Brief, paras. 225, 228, 233, 238; Ntahobali Appeal Brief, para. 116.
[380] Nyiramasuhuko Appeal Brief, paras. 225, 227, 229, 230, 236, 237. Nyiramasuhuko points to the behaviour of specific Prosecution witnesses during their testimony which, in her view, should have been expressly discussed and taken into consideration. *See ibid.*, paras. 234, 235.
[381] Nyiramasuhuko Appeal Brief, paras. 226, 232; Ntahobali Appeal Brief, para. 116.
[382] Nyiramasuhuko Appeal Brief, para. 240; Ntahobali Appeal Brief, para. 118.
[383] Nyiramasuhuko Appeal Brief, para. 242; Ntahobali Appeal Brief, para. 118.

162. With respect to Nyiramasuhuko's submission that the Trial Chamber erred by suggesting that Prosecution Witnesses QCB, SJ, QBQ, and QA were recalled to allow Judge Bossa to assess their credibility, the Appeals Chamber notes that, regardless of the reason why these witnesses were recalled, Judge Bossa was able to observe their demeanour in court. The Appeals Chamber also finds no merit in Ntahobali's contention that the Trial Chamber's rejection of his requests to recall witnesses demonstrates that the Trial Chamber did not recall witnesses where it was necessary to assess their credibility in light of their demeanour.

163. As for the arguments concerning the absence of reference in the Trial Judgement to the observable demeanour of the witnesses when testifying, the Appeals Chamber recalls that a trial chamber is not required to articulate each step of its reasoning and to discuss each submission made at trial.[386] With regard to factual findings, a trial chamber is only required to make findings of those facts which are essential to the determination of guilt on a particular count.[387] It is to be presumed that the trial chamber has evaluated all the evidence presented to it, as long as there is no indication that the trial chamber completely disregarded any particular piece of evidence.[388] Having carefully reviewed the specific instances pointed out by Nyiramasuhuko and Ntahobali in support of their claim, the Appeals Chamber is not persuaded that the absence of express reference to specific behaviour of witnesses in the Trial Judgement indicates that the Trial Chamber disregarded these aspects when assessing their credibility. The Trial Judgement generally reflects a detailed and careful assessment of the testimonial evidence and the fact that the Trial Chamber did not explicitly discuss the elements pointed out by Nyiramasuhuko and Ntahobali fails to demonstrate that the Trial Chamber did not properly assess the credibility and reliability of the witnesses.

164. The Appeals Chamber reiterates that, while there is a clear preference for live testimony to be heard by each and every judge, this preference does not represent an unbending requirement.[389] In the present case, Judge Bossa certified her familiarisation with the record despite the absence of video-recordings, and the decisions challenged by the appellants under these grounds of appeal reveal that she did not consider that there were particular issues which involved credibility matters that she needed to assess in light of the witnesses' "visually observable" demeanour in court. This indicates that Judge Bossa, together with the two other judges, considered that she was in a position to properly assess the testimonies of the relevant witnesses and appropriately perform

[384] Ntahobali Appeal Brief, para. 118.
[385] 6 May 2004 Decision on Nyiramasuhuko Motion to Recall Witnesses, paras. 1, 6, 33.
[386] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165. *See also Kvočka et al.* Appeal Judgement, para. 23.
[387] *Kvočka et al.* Appeal Judgement, para. 23. *See also Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75.
[388] *Kvočka et al.* Appeal Judgement, para. 23. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Karera* Appeal Judgement, para. 20; *Ndindabahizi* Appeal Judgement, para. 75.

her duties in this case. Nothing in the Trial Judgement suggests that such an assessment did not take place and that the appellants were only tried by the two judges who observed all testimonies live. The Appeals Chamber accordingly dismisses these arguments.

4. Conclusion

165. For the foregoing reasons, the Appeals Chamber dismisses Ground 5 of Nyiramasuhuko's appeal, Ground 1.6 of Ntahobali's appeal, and Ground 16 of Ndayambaje's appeal in their entirety.

[389] *See supra*, para. 140.

D. Addition of Witnesses to the Prosecution's Witness List (Nyiramasuhuko Ground 10; Ntahobali Ground 1.11)

166. On 30 March 2004, the Trial Chamber granted the Prosecution's request to remove 30 witnesses from its witness list and, against the objections of the co-Accused, to add Expert Witness Évariste Ntakirutimana as well as Witnesses FA and FCC.[390] The Trial Chamber found that it was in the interests of justice to add these prospective witnesses to the Prosecution's witness list.[391] The Prosecution ultimately did not call Witness FCC to testify.[392]

167. In their closing submissions, Ntahobali and Nyiramasuhuko argued that their right to prepare their defence had been violated by a lack of sufficient notice of Witnesses Ntakirutimana's and FA's evidence, and requested the exclusion of their evidence.[393] In the Trial Judgement, the Trial Chamber found that no prejudice had been established as a result of Witnesses Ntakirutimana and FA being permitted to testify and found no reason to reconsider its 30 March 2004 Decision.[394] The Trial Chamber relied on the evidence of Witness Ntakirutimana in finding Nyiramasuhuko liable for conspiracy to commit genocide[395] and on that of Witness FA in relation to several of Ntahobali's convictions.[396] The Trial Chamber did not rely on Witness FA's evidence in support of any of Nyiramasuhuko's convictions.[397]

168. Nyiramasuhuko submits that the Trial Chamber erred in its 30 March 2004 Decision in concluding that the addition of Witnesses Ntakirutimana, FA, and FCC to the Prosecution's witness list at a late stage of the proceedings was in the interests of justice.[398] She contends that the Trial

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[390] 30 March 2004 Decision, paras. 10-19, 37, pp. 8, 9. The Appeals Chamber notes that, in the Trial Judgement, the Trial Chamber referred to Expert Witness Ntakirutimana at times as "Francis" Ntakirutimana (*see* Trial Judgement, paras. 589, 594, 695, p. 151) and at times as "Evariste" Ntakirutimana (*see ibid*., paras. 194, 457, 476, 3602, 3768, 4446, 6400, pp. 880, 921, 1080). The Appeals Chamber observes that Expert Witness Ntakirutimana testified that his name was "Évariste Ntakirutimana". *See* Évariste Ntakirutimana, T. 13 September 2004 pp. 3, 4. The Appeals Chamber therefore considers the Trial Chamber's reference to "Francis" to be a typographical error.

[391] 30 March 2004 Decision, paras. 31-33. Witness FA testified on 30 June and 1 July 2004, Expert Witness Ntakirutimana testified on 13 and 14 September 2014.

[392] *See* T. 9 September 2004 p. 39 (closed session).

[393] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Final Trial Brief and Annexes Thereto, 17 February 2009 (originally filed in French, English translation filed on 20 July 2009) (confidential) ("Ntahobali Closing Brief"), paras. 80, 81. Ntahobali's submissions were presented on his behalf and on behalf of Nyiramasuhuko. *See idem. See also* Trial Judgement, para. 2923.

[394] Trial Judgement, paras. 460-462, 2926. The Trial Chamber emphasised that Witness FA was only called on 30 June 2004, at the end of the Prosecution case, and that Expert Witness Ntakirutimana was not called until after the end of the Prosecution case, in September 2004. *See ibid.*, paras. 461, 2925, fn. 8099.

[395] Trial Judgement, paras. 868, 873, 875-877, 882-884, 890, 893, 897, 898, 919-921.

[396] In particular, the Trial Chamber relied on Witness FA's evidence in relation to Ntahobali's convictions regarding crimes committed at the Hotel Ihuliro roadblock, the killing of members of the Rwamukwaya family, and as corroborative evidence with respect to the Butare Prefecture Office. *See* Trial Judgement, paras. 2345, 2346, 2666 (Butare Prefecture Office), 3118, 3119, 3123, 3128, 3141, 3144 (Hotel Ihuliro roadblock), 3203-3207, 3209-3213, 3219 (killing of the Rwamukwaya family).

[397] Trial Judgement, paras. 3145-3150.

[398] Nyiramasuhuko Notice of Appeal, para. 1.68; Nyiramasuhuko Appeal Brief, para. 384. *See also* Nyiramasuhuko Notice of Appeal, para. 3.60.

Chamber erred in effectively authorising the Prosecution to mould its case in light of the evidence already presented, emphasising that the Prosecution was in possession of Witness Ntakirutimana's report since December 2002 and had failed to give notice of its intention to call an expert witness in support of its allegations concerning Nsabimana's Swearing-In Ceremony.[399] Nyiramasuhuko also argues that the considerable time she had to spend investigating and preparing for the testimonies of Witnesses FA and FCC and convincing an expert to come testify to counter Witness Ntakirutimana's evidence prejudiced her in the preparation of her defence.[400] According to Nyiramasuhuko, the Trial Chamber failed to strike a proper balance between the Prosecution's obligation to present the best available evidence and her fundamental right to prepare her defence.[401] Nyiramasuhuko requests that the Appeals Chamber recognise "the cumulative violation of Article 20(4)(b) of the Statute" and order a complete stay of proceedings.[402]

169. Ntahobali submits that the Trial Chamber erred in concluding that the addition of Witness FA to the Prosecution's witness list was in the interests of justice.[403] He contends that the Trial Chamber failed to address some of his arguments and failed to consider or erroneously minimised the prejudice arising from: (i) the impossibility of cross-examining witnesses who had already testified on matters to be raised by Witness FA in her forthcoming testimony; (ii) the addition of the witness at such an advanced stage of the proceedings; and (iii) the disclosure of the witness's identity and unredacted statements ten years after the alleged facts.[404]

170. Ntahobali also contends that, contrary to the Trial Chamber's finding, the time period between the disclosure of Witness FA's particulars and her taking the stand was insufficient for him to adequately prepare for cross-examination.[405] Like Nyiramasuhuko, he argues that the Trial Chamber erred in its assessment of the balance that had to be struck between the Prosecution's obligation to present the best available evidence and his right to be afforded adequate time and

[399] Nyiramasuhuko Notice of Appeal, paras. 1.70, 1.71; Nyiramasuhuko Appeal Brief, paras. 379-382.
[400] Nyiramasuhuko Notice of Appeal, para. 1.72; Nyiramasuhuko Appeal Brief, paras. 381, 382.
[401] Nyiramasuhuko Notice of Appeal, para. 1.72; Nyiramasuhuko Appeal Brief, para. 383.
[402] Nyiramasuhuko Appeal Brief, para. 385.
[403] Ntahobali Notice of Appeal, para. 69; Ntahobali Appeal Brief, paras. 131, 132, 140.
[404] Ntahobali Notice of Appeal, para. 69; Ntahobali Appeal Brief, paras. 131-135, 140. In particular, Ntahobali argues that the Trial Chamber failed to consider his arguments that: (i) when Witness FA's identity was finally disclosed, 44 Prosecution witnesses had already testified, including all the witnesses who testified about the crime scenes Witness FA would cover; (ii) the substantial lapse of time between the events and the disclosure of Witness FA's particulars rendered the investigations into her allegations extremely difficult; and (iii) despite being in possession of Witness FA's statements since 26 November 1996 and asserting that her evidence constituted the best available evidence, the Prosecution did not explain why it had not included Witness FA in its original witness list. *See* Ntahobali Appeal Brief, paras. 133-135, *referring to The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, *Réponse de Arsène Shalom Ntahobali à la Requête du Procureur pour retirer de sa liste de témoins trente témoins et y ajouter trois nouveaux témoins*, 23 February 2004 ("Ntahobali Response to Prosecution Motion to Vary Witness List"), paras. 50, 53-61.
[405] Ntahobali Appeal Brief, para. 134.

facilities to prepare his defence.[406] Relying on trial decisions of the ICTY in the *Mrkšić et al.* case, Ntahobali argues that the Trial Chamber should have denied the addition of Witness FA given the closing stage of the Prosecution case and the Prosecution's failure to explain why the request was not presented at an earlier stage.[407] Ntahobali further argues that the Trial Chamber erred in allowing the Prosecution to substitute a number of witnesses with a single witness whose testimony did not cover the same facts.[408]

171. In addition, Ntahobali submits that, in the Trial Judgement, the Trial Chamber erred in failing to acknowledge that his rights had been prejudiced, a finding which would have required the exclusion of Witness FA's evidence.[409] He contends that the Trial Chamber erred in relying on Witness FA's evidence for convicting him even though it was clear that the Prosecution merely added this evidence to mould its case in light of the evidence already presented.[410] Ntahobali requests that the Appeals Chamber exclude the evidence of Witness FA in its entirety, and consequently overturn his convictions for the murder of members of the Rwamukwaya family and in relation to the events at the Hotel Ihuliro roadblock.[411]

172. The Prosecution responds that Nyiramasuhuko and Ntahobali fail to show any error or abuse of discretion in the Trial Chamber's decision to authorise the addition of Witnesses Ntakirutimana and FA and do not substantiate their claim that the addition of these witnesses caused them prejudice.[412] It further contends that, in support of its request to add Witness FA, it specifically argued that other witnesses who could have testified to the events at the Hotel Ihuliro roadblock were deceased, making the witness's evidence unique and valuable to prove several counts.[413]

173. Ntahobali replies that his ability to investigate Witness FA's allegations was greatly affected by the hearings held at the time and the need to investigate another new witness and prepare for the

[406] Ntahobali Appeal Brief, para. 136.
[407] Ntahobali Appeal Brief, para. 137, *referring to Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend Its Rule 65 *ter* List, 6 June 2006, paras. 3-6, *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend Its Rule 65*ter* Witness List, 28 April 2006, paras. 3-5.
[408] Ntahobali Appeal Brief, para. 139. Ntahobali argues that the Prosecution sought to remove these witnesses primarily because it had become apparent that they lacked credibility. *See* Ntahobali Reply Brief, para. 39.
[409] Ntahobali Appeal Brief, paras. 131, 140.
[410] Ntahobali Notice of Appeal, para. 69; Ntahobali Appeal Brief, para. 138. Ntahobali avers that Witness FA is the only Prosecution witness to implicate him in relation to the murder of members of the Rwamukwaya family and to testify about meetings at the Hotel Ihuliro. He contends that Witness FA added several elements in respect of the crimes committed at the Hotel Ihuliro roadblock allowing the Prosecution to re-fashion its case, irreparably affecting the integrity of the proceedings. *See* Ntahobali Appeal Brief, para. 138.
[411] Ntahobali Appeal Brief 140, *referring to* Trial Judgement, paras. 3108-3113, 3118-3128, 3141-3144, 3203-3219. The Appeals Chamber recalls that it has elected to refer to the roadblock which Ntahobali refers to as the "EER roadblock" as the "Hotel Ihuliro roadblock" throughout this Judgement. *See supra*, fn. 51.
[412] Prosecution Response Brief, paras. 104-107, 754, 756, 757.
[413] Prosecution Response Brief, para. 761, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Motion to Drop and Add Witnesses, 12 January 2004 ("Prosecution Motion to Vary Witness List"), paras. 7, 20.

cross-examination of expert witnesses.[414] He also submits that, despite the Prosecution's assertion that Witness FA was added because of the death of a number of other prospective witnesses, none of the removed witnesses was expected to testify about the events at Hotel Ihuliro and its roadblock.[415]

174. Rule 73*bis*(E) of the Rules provides that after the commencement of the trial, the Prosecutor, if he considers it to be in the interests of justice, may move the trial chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called. The rule does not impose a time limit to validly raise a request under this provision. However, the jurisprudence of both the Tribunal and the ICTY indicates that, when assessing whether it is in the interests of justice to permit the Prosecution to vary its witness list, the trial chamber shall take into account the potential prejudice to the Defence and the stage of the proceedings among other factors.[416] The Appeals Chamber nonetheless emphasises that decisions concerning the variation of a party's witness list are among the discretionary decisions of the trial chamber to which the Appeals Chamber must accord deference.[417]

175. In the view of the Appeals Chamber, the 30 March 2004 Decision reflects that the Trial Chamber duly considered the potential prejudice caused to the Defence by the addition of Witnesses Ntakirutimana, FA, and FCC to the Prosecution's witness list at that stage of the proceedings.[418] Notably, the Trial Chamber recalled that it was required to take into consideration the "prejudice to the Defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence" and to balance the Prosecution's duty to present the best available evidence against the right of the accused to have adequate time and facilities to prepare his defence

[414] Ntahobali Reply Brief, para. 35. *See also ibid*., para. 34.
[415] Ntahobali Reply Brief, para. 39.
[416] *See Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-T, Decision on Prosecution's Motion for Leave to Amend the Rule 65*ter* Witness List and for Disclosure of an Expert Witness Report Pursuant to Rule 94*bis*, 31 August 2010, para. 4; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Prosecution's Motion for Leave to Amend Its Witness List to Add Witness KDZ597, 1 July 2010, para. 5; *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Prosecution's Motion to Substitute Expert Witness, 30 October 2009 ("*Perišić* 30 October 2009 Decision"), para. 6; *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Decision on Prosecution's Motion to Add Milan Đaković to the Rule 65*ter* Witness List, 21 May 2009 ("*Đorđević* 21 May 2009 Decision"), para. 6; *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Prosecutor's Motion for Leave to Vary the Witness List Pursuant to Rule 73*bis*(E), 21 May 2004, para. 13. *See also The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-T, Decision on Prosecution Motion to Vary Its List of Witnesses: Rule 73 *bis* (E) of the Rules, 11 February 2005, paras. 22, 23.
[417] *See Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-AR73(C), Decision on Ngirabatware's Appeal of the Decision Reducing the Number of Defence Witnesses, 20 February 2012 ("*Ngirabatware* Appeal Decision"), para. 12; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeal Against the Decision of Trial Chamber II of 21 March 2007 Concerning the Dismissal of Motions to Vary His Witness List, 21 August 2007 ("21 August 2007 Appeal Decision"), para. 10; *Prosecutor v. Milan Milutinović et al*., Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to Its 65*ter* Witness List, 20 April 2007 ("*Milutinović et al.* Appeal Decision"), paras. 9, 10.
[418] *See* 30 March 2004 Decision, paras. 28-30.

and his right to be tried without undue delay.[419] The Trial Chamber took into account that Witness Ntakirutimana's report and the redacted statements of Witnesses FA and FCC had been disclosed to the parties on 12 January 2004 and that the Prosecution submitted that it would not call them "for at least two months following disclosure of their identities to the Defence or call the expert witness until the end of its case."[420] In granting the Prosecution's motion, the Trial Chamber also directed that the newly added witnesses testify at the end of the Prosecution case "[i]n consideration of the interests of the Accused and the fair administration of the proceedings".[421] It further ordered that the unredacted witness statements be disclosed immediately "in order to avoid any delay which could prejudice the Defence in its preparation".[422] In the Trial Judgement, the Trial Chamber emphasised that Witness FA was only called on 30 June 2004, at the end of the Prosecution case, and that Witness Ntakirutimana was called after the Defence cases had already started, in September 2004.[423]

176. Nyiramasuhuko does not demonstrate how the time the Trial Chamber allocated for the preparation of the testimonies of the new witnesses was insufficient to prepare an adequate defence. On this matter, it bears noting that Nyiramasuhuko cross-examined Witnesses Ntakirutimana and FA[424] and called Expert Witness Shimamungu to counter Expert Witness Ntakirutimana's evidence.[425] Likewise, Nyiramasuhuko does not substantiate her claim that the time she had to spend investigating and preparing for the testimonies of Witnesses Ntakirutimana, FA, and FCC prejudiced her in the preparation of her defence or that she was not given enough time to prepare for the hearing of these three Prosecution witnesses.

177. Turning to Ntahobali's argument that the Trial Chamber failed to consider some of his submissions, the Appeals Chamber recalls that, as a general rule, a trial chamber is not required to articulate every step of its reasoning for each finding it makes[426] and that it is within its discretion

[419] 30 March 2004 Decision, para. 28. *See also ibid.*, para. 36.
[420] 30 March 2004 Decision, paras. 31, 34.
[421] 30 March 2004 Decision, para. 36. *See also ibid*., para. 42, p. 8.
[422] 30 March 2004 Decision, para. 39. *See also ibid*., para. 42, p. 8. The Trial Chamber noted that the Prosecution had disclosed the redacted version of Witness FA's statement on 12 January 2004. *See ibid*., para. 31.
[423] Trial Judgement, paras. 461, 2925, fn. 8099.
[424] *See* Witness FA, T. 1 July 2004 pp. 51-53, 58-85 (closed session), 54-57; Évariste Ntakirutimana, T. 14 September 2004 pp. 30-33.
[425] Nyiramasuhuko Expert Witness Eugène Shimamungu testified from 15 to 17, from 21 to 24, and from 29 March 2005 to 1 April 2005. The Appeals Chamber also notes that Nyiramasuhuko introduced Expert Witness Shimamungu's report into evidence. *See* Exhibit D278B ("Butare 1994: Political Communication of the 'Abatabazi' Interim Government and its Impact on the Population") (confidential); Exhibit D279B (Annex 2 of Shimamungu Report entitled "Schedule 2: Comparative Table of Translations of Speeches of President Théodore Sindikubwabo, on 19 April 1994 in Butare"); Exhibit D280 (French version of Annex 3 of Shimamungu Report entitled "*Annexe 3: Les Occurrences de la racine [+Kor-] dans le discours de Theodore Sindikubwabo*").
[426] *See*, *e.g*., *Ntabakuze* Appeal Judgement, para. 161; *Nchamihigo* Appeal Judgement, para. 165; *Musema* Appeal Judgement, paras. 18, 20; *Čelebići* Appeal Judgement, para. 498. The Appeals Chamber considers that, although

as to which arguments to address.[427] While the Trial Chamber did not expressly address some of Ntahobali's objections to the addition of Witness FA,[428] the 30 March 2004 Decision reflects that the Trial Chamber appropriately balanced the Prosecution's right to vary its witness list against the co-Accused's fair trial rights and potential prejudice before concluding that the addition of Witness FA was in the interests of justice.

178. The Appeals Chamber observes that Ntahobali is correct in his submission that none of the 30 prospective witnesses dropped by the Prosecution was expected to testify about events at the Hotel Ihuliro roadblock.[429] The Prosecution's contention that it requested the addition of Witness FA because other witnesses who could testify about these events were deceased therefore does not explain why Witness FA was not included in the original witness list. However, the purpose of Rule 73*bis*(E) of the Rules is to allow the Prosecution to correct its prior assessment of which witnesses to call "after the commencement of [t]rial". Nothing in Rule 73*bis*(E) of the Rules requires that the addition of new witnesses be conditioned upon the removal of witnesses who were expected to testify about the same facts.[430] The Appeals Chamber further notes that the addition of Witness FA was not granted on the basis of a substitution. Rather, the Trial Chamber examined the materiality of the witness's proposed testimony to the case before it, determined that it "could address specific factual circumstances which [were] relevant to the case",[431] and concluded that the witness's addition would be in the interests of justice.[432] Even though the Prosecution had failed to provide a cogent explanation as to why Witness FA was not included in its original witness list, it was within the purview of the Trial Chamber to reach these conclusions and to grant leave to add Witness FA to the Prosecution's witness list.

179. Ntahobali largely repeats submissions made at trial but does not show how the Trial Chamber abused its discretion in finding that it was in the interests of justice to authorise the

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developed in the context of findings reached in a trial judgement, this rule equally applies to trial chambers' findings in interlocutory decisions.

[427] *Kvočka et al.* Appeal Judgement, para. 23. *See also Haradinaj et al.* Appeal Judgement, para. 128; *Furundžija* Appeal Judgement, para. 69.

[428] The Trial Chamber did not expressly address Ntahobali's arguments that: (i) the addition of Witness FA at this late stage of the proceedings made it impossible for him to cross-examine witnesses who had already testified on matters raised by Witness FA in her upcoming testimony; (ii) the substantial lapse of time between the events and the disclosure of Witness FA's particulars rendered the investigations into her allegations extremely difficult; and (iii) the Prosecution had not explained why Witness FA had not been included in its original witness list. *See* Ntahobali Response to Prosecution Motion to Vary Witness List, paras. 26, 27, 49, 50, 53; 30 March 2004 Decision, paras. 28-39.

[429] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. 98-42-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B), 11 April 2001 ("Prosecution Pre-Trial Brief"), "List of Intended Prosecution Witnesses Butare Cases – Witness Summaries Grid (6 April 2001) Appendix" ("Witness Summaries Grid").

[430] *See The Prosecutor v. Augustin Ngirabatware*, Case No. ICTR-99-54-T, Decision on Prosecution Motion for Leave to Vary Its Witness List, 28 January 2010, para. 50, *referring to The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-T, Decision on Sagahutu's Request to Vary His Witness List, 26 May 2008, paras. 5, 6.

[431] *See* 30 March 2004 Decision, para. 32. *See also ibid*., paras. 28, 33.

[432] *See* 30 March 2004 Decision, paras. 28, 32, 33.

addition of Witness FA. In particular, like Nyiramasuhuko, he does not demonstrate how the time the Trial Chamber allocated for the preparation of the testimony of Witness FA was insufficient to conduct the necessary investigation. Furthermore, while the Appeals Chamber observes that trial chambers of the ICTY have previously emphasised considerations such as the stage of the proceedings and the justification provided in support of requests for the amendment of witness lists,[433] the Appeals Chamber finds that Ntahobali's reliance on the *Mrkšić et al.* decisions is not pertinent. The Appeals Chamber stresses that the manner in which the discretion to manage trials is exercised by a trial chamber should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another.[434] The question of whether a trial chamber abused its discretion should not be considered in isolation, but rather by taking into account all relevant circumstances of the case at hand.[435] It can therefore not be held that granting a request for the addition of witnesses in the last stages of a party's presentation of its case is *per se* unreasonable and prejudicial to the opposing party; such an assessment rather requires a careful balancing of various interests and circumstances on a case-by-case basis.

180. The Appeals Chamber thus finds that, like those of Nyiramasuhuko, Ntahobali's submissions fail to demonstrate an error in the Trial Chamber's exercise of its discretion in granting the Prosecution's request to add Witness FA to its witness list. Likewise, the Appeals Chamber finds that Ntahobali fails to demonstrate the existence of prejudice which the Trial Chamber should have considered in the Trial Judgement. In the absence of a demonstration of an error in the 30 March 2004 Decision and of any subsequent prejudice, there is no merit in Nyiramasuhuko's and Ntahobali's submission that the Trial Chamber should not have relied upon Witnesses Ntakirutimana's and FA's testimonies. Nyiramasuhuko's and Ntahobali's argument[436] that the Prosecution should not have been permitted to mould its case is also not pertinent in light of the express provision in the Rules allowing the Prosecution to amend its witness list in the course of the presentation of its case.

181. Accordingly, the Appeals Chamber dismisses Ground 10 of Nyiramasuhuko's appeal and Ground 1.11 of Ntahobali's appeal.

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[433] *See*, *e.g.*, *Perišić* 30 October 2009 Decision, para. 6; *Đorđević* 21 May 2009 Decision, para. 5; *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution's Motion to Amend Prosecution's Witness List (Dr. Fagel), 3 November 2008, p. 3.
[434] *Haradinaj et al.* Appeal Judgement, para. 39.
[435] *Haradinaj et al.* Appeal Judgement, para. 39.
[436] The Appeals Chamber notes that the jurisprudence Ntahobali relies upon with respect to his argument relates to notice of charges. *See* Ntahobali Appeal Brief, para. 138, *referring to Naletilić and Martinović* Appeal Judgement, para. 25.

E. Presence of Prosecution Witnesses in the Courtroom During Objections (Ntahobali Ground 1.9; Ndayambaje Ground 14)

182. In the Trial Judgement, the Trial Chamber recalled that it determined on 30 January 2004 that, for the remainder of the trial, witnesses would be excluded from the courtroom during objections and associated arguments raised during the course of their testimony.[437]

183. Ntahobali and Ndayambaje submit that the Trial Chamber erred in law and in fact in failing to exclude the witnesses from the courtroom during objections by the parties prior to 30 January 2004.[438] They argue that the witnesses' presence made it possible for them to adjust their testimony based on the arguments advanced by the parties[439] and that, by applying the non-exclusion rule during the major part of the presentation of the Prosecution evidence, the Trial Chamber put the Prosecution at an undue advantage.[440] Ntahobali and Ndayambaje contend that this violated their rights to equality of arms and to a fair trial, causing them serious prejudice.[441] Ntahobali requests a stay of the proceedings or, alternatively, compensation.[442] Ndayambaje requests that the testimonies of Prosecution Witnesses QAR, TO, and QAQ be excluded from the record.[443]

184. The Prosecution did not respond to these submissions.[444]

185. The Appeals Chamber observes that Ndayambaje does not point to any instance in the trial record demonstrating that the witnesses he refers to may have adjusted their testimonies upon hearing the parties' arguments relating to objections. Similarly, Ntahobali does not demonstrate that he actually suffered any prejudice as a result of the Trial Chamber not excluding witnesses from the

[437] Trial Judgement, para. 154, *referring to* T. 30 January 2004 p. 10.
[438] Ntahobali Notice of Appeal, paras. 58-63; Ndayambaje Notice of Appeal, paras. 113-115. Ntahobali contends that the situation concerns Prosecution Witnesses Shukry, TA, QJ, QCB, TN, SJ, TK, SU, QBP, RE, SD, SS, QY, and FAP. Ndayambaje refers specifically to Prosecution Witnesses QAR, TO, and QAQ. *See* Ntahobali Notice of Appeal, para. 60; Ndayambaje Notice of Appeal, para. 113.
[439] Ndayambaje Notice of Appeal, para. 113.
[440] Ntahobali Notice of Appeal, paras. 58, 59.
[441] Ntahobali Notice of Appeal, paras. 59, 61; Ndayambaje Notice of Appeal, paras. 114, 115. Ntahobali explained that he could not develop Ground 1.9 in his appeal brief due to the word limit imposed on the brief. Likewise, Ndayambaje did not develop his arguments in his appeal brief, simply referring to his notice of appeal. *See* Ntahobali Appeal Brief, para. 129; Ndayambaje Appeal Brief, para. 294. In contrast, Nyiramasuhuko formally abandoned Ground 6 of her appeal relating to the presence of witnesses during the parties' objections. *See* Nyiramasuhuko Appeal Brief, para. 7. Based on the language used in their appeal briefs, the Appeals Chamber considers that neither Ntahobali nor Ndayambaje has abandoned their respective ground of appeal and is of the view that the arguments Ntahobali and Ndayambaje developed in their notices of appeal in support of their allegations of error should be addressed as a matter of fairness.
[442] Ntahobali Notice of Appeal, paras. 62, 63 (French).
[443] Ndayambaje Notice of Appeal, para. 115.
[444] The Prosecution explained that it considers that, by not presenting arguments in his appeal brief, Ntahobali has abandoned his Ground 1.9. *See* Prosecution Response Brief, para. 753. The Appeals Chamber further notes that, contrary to its submission, the Prosecution failed to address Ndayambaje's Ground 16. *See ibid.*, para. 2169 *and* Section I.

courtroom during arguments pertaining to objections prior to 30 January 2004. The Appeals Chamber recalls that trial chambers enjoy considerable discretion in the conduct of proceedings before them, including in the modalities of examination of witnesses,[445] and that, in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error resulting in prejudice to that party.[446] Having failed to demonstrate any prejudice, the Appeals Chamber dismisses Ntahobali's and Ndayambaje's submissions.

186. Accordingly, the Appeals Chamber dismisses Ground 1.9 of Ntahobali's appeal and Ground 14 of Ndayambaje's appeal.

[445] *See Lukić and Lukić* Appeal Judgement, para. 17; *Nahimana et al*. Appeal Judgement, para. 182; *Prlić et al.* Appeal Decision on Joinder, p. 3.
[446] *See*, *e.g*., *Ndahimana* Appeal Judgement, para. 14; *Lukić and Lukić* Appeal Judgement, para. 17; *Setako* Appeal Judgement, para. 19.

F. Cross-Examination of Prosecution Witness TA (Nyiramasuhuko Ground 12 in part; Ntahobali Ground 1.5 in part)

187. On 24 October 2001, the Trial Chamber denied Nyiramasuhuko's and Ntahobali's oral request for the postponement of the cross-examination of Prosecution Witness TA.[447] Nyiramasuhuko and Ntahobali argued that they were not able to conduct the cross-examination of Witness TA as the Prosecution had failed to disclose the identity and unredacted statements of most of its protected witnesses expected to give evidence in relation to the same allegations about which Witness TA was to testify.[448] The Trial Chamber held that the "parties ha[d] sufficient information upon which they could carry on their cross-examination".[449] Ntahobali's counsel conducted the cross-examination of Witness TA from 29 October to 1 November 2001, while Nyiramasuhuko's counsel cross-examined Witness TA on 1, 5, and 6 November 2001.[450]

188. On 24 November 2008, Ntahobali requested the Trial Chamber to exclude the evidence of Witness TA or, alternatively, to recall the witness for further cross-examination, notably on the ground that the Prosecution's delayed disclosure of the full unredacted statements and personal particulars of its other witnesses impaired his right to effectively cross-examine Witness TA.[451] The Trial Chamber dismissed Ntahobali's request on 19 January 2009 on the basis that the issue of the Prosecution's failure to comply with its disclosure obligations was settled and did not need re-litigation since measures were taken to remedy these failures, including and not limited to the issuance of warnings to Prosecution counsel, and that the request had no legal basis.[452] The Trial Chamber relied on Witness TA's evidence in finding Nyiramasuhuko and Ntahobali criminally liable for crimes perpetrated at the Butare Prefecture Office.[453]

189. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in dismissing their request to postpone the cross-examination of Witness TA on the crimes allegedly committed during attacks at the Butare Prefecture Office despite the fact that they had not been provided with the identity and the unredacted statements of several protected witnesses the Prosecution intended to

[447] Witness TA, T. 24 October 2001 pp. 83-85 ("24 October 2001 Oral Decision").
[448] Witness TA, T. 24 October 2001 pp. 69-74, 79, 80.
[449] 24 October 2001 Oral Decision.
[450] Witness TA testified on 24, 25, 29, 30, and 31 October 2001 as well as on 1, 5, 6, 7, and 8 November 2001.
[451] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case. No. ICTR-97-21-T, *Requête de Arsène Shalom Ntahobali en rappel de témoins*, 24 November 2008 ("Ntahobali 24 November 2008 Motion to Recall Witnesses"), paras. 54, 57, 101-105, p. 26.
[452] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for Exclusion of Evidence or for Recall of Witnesses, 19 January 2009 ("19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses"), paras. 20, 27, p. 6, *referring to* 26 November 2008 Decision, para. 61.
[453] Trial Judgement, paras. 2644, 2653, 2773.

call in relation to these allegations.[454] They argue that, as a result, they were not able to counter Witness TA's allegations with the information contained in the other witnesses' statements, which prevented them from conducting an effective cross-examination of the witness in violation of their fundamental rights.[455] Ntahobali points out that the Trial Chamber itself had recognised that the provision of all unredacted statements and identities of all witnesses was crucial to allow him to prepare an adequate defence.[456] Nyiramasuhuko also highlights that her convictions relating to the attack conducted at the prefectoral office in mid-May 1994 were based solely on the evidence of Witness TA.[457]

190. Ntahobali further submits that the Trial Chamber erred in its 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses in denying the request to recall Witness TA for further cross-examination.[458] He contends that the issuance of warnings did not remedy the prejudice he suffered for not being able to cross-examine Witness TA effectively.[459] Ntahobali argues that because he was deprived of the relevant statements when cross-examining Witness TA, he could not, for instance, question her on her ties with other witnesses whom she denied knowing.[460]

191. The Prosecution responds that Nyiramasuhuko and Ntahobali fail to demonstrate how they were prejudiced in their material ability to prepare their defence.[461]

192. It is not disputed that, at the time of Witness TA's cross-examination, the Prosecution had failed to comply with its disclosure obligations pursuant to Rules 66(A)(ii) and 69(C) of the Rules, which provided that the Prosecution shall disclose to the Defence "[n]o later than 60 days before the date set for trial, copies of the statements of all witnesses whom the Prosecutor intends to call to

[454] Nyiramasuhuko Notice of Appeal, para. 1.77; Nyiramasuhuko Appeal Brief, paras. 388-390; Ntahobali Notice of Appeal, para. 35; Ntahobali Appeal Brief, paras. 97-99; Ntahobali Reply Brief, para. 22. Ntahobali specifies that he was not provided with the identity and the unredacted statements of 34 protected witnesses. *See* Ntahobali Appeal Brief, para. 98, *referring to* Ntahobali 24 November 2008 Motion to Recall Witnesses, paras. 56, 57; Witness TA, T. 24 October 2001 pp. 69-83. Nyiramasuhuko's and Ntahobali's other allegations of error under Grounds 12 and 1.5 of their respective appeals are addressed in other sections of this Judgement. *See infra*, Sections III.G, IV.A.4. Ntahobali further challenges the Trial Chamber's 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses with respect to the amendment of Rule 90(G) of the Rules. This allegation of error is examined *infra* in Section V.A.1.
[455] Nyiramasuhuko Notice of Appeal, para. 1.77; Nyiramasuhuko Appeal Brief, para. 390; Ntahobali Notice of Appeal, para. 35; Ntahobali Appeal Brief, para. 99. *See also* Nyiramasuhuko Reply Brief, para. 229.
[456] Ntahobali Appeal Brief, para. 99, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Defence Motion for Disclosure of Evidence, 1 November 2000 (originally filed in French, English translation filed on 27 November 2001) ("1 November 2000 Decision"), para. 33, *and The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions by Nyiramasuhuko, Ndayambaje and Kanyabashi on, *Inter Alia*, Full Disclosure of Unredacted Prosecution Witness Statements, 13 November 2001, para. 16.
[457] Nyiramasuhuko Appeal Brief, para. 391, *referring to* Trial Judgement, para. 2644.
[458] Ntahobali Notice of Appeal, para. 35; Ntahobali Appeal Brief, paras. 100, 101.
[459] Ntahobali Appeal Brief, para. 100.
[460] Ntahobali Appeal Brief, para. 101; Trial Judgement, para. 2176.
[461] Prosecution Response Brief, paras. 70-72, 75-77.

testify at trial" and that "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence".[462] Prior to Witness TA's testimony, the Trial Chamber had stressed the importance of disclosing the statements of the witnesses that the Prosecution intended to call so that the accused could be in a position to prepare their defence and, in particular, to fully cross-examine the witnesses.[463] Nonetheless, the Trial Chamber held that, since "disclosures ha[d] been made" for a "big part" of the witnesses listed for the session, it "imagine[d] parties ha[d] sufficient information upon which they could carry on their cross-examination once the witness testifies."[464]

193. The Appeals Chamber considers that the Trial Chamber's ruling does not reflect proper consideration of whether the material disclosed to the Defence was indeed sufficient for adequate preparation and, in particular, for allowing Ntahobali and Nyiramasuhuko to fully cross-examine Witness TA. By merely relying on the fact that a "big part" of the necessary disclosure had been made for that session, the Trial Chamber failed to consider Ntahobali's and Nyiramasuhuko's argument that some of the information which the Prosecution had failed to disclose at the time of Witness TA's testimony would have been relevant to their cross-examinations.[465] The Appeals Chamber considers that, in the absence of a proper consideration of whether the Defence had indeed sufficient information to be able to fully cross-examine Witness TA, the Trial Chamber's conclusion that "parties ha[d] sufficient information upon which they could carry on their cross-examination" was so unreasonable as to constitute an abuse of the Trial Chamber's discretion. The Appeals Chamber therefore concludes that the Trial Chamber committed a discernible error in its 24 October 2001 Oral Decision.

194. However, the Appeals Chamber finds that neither Nyiramasuhuko nor Ntahobali demonstrates that the Trial Chamber's error resulted in prejudice.[466] Indeed, while Nyiramasuhuko and Ntahobali contend that they were prejudiced by their inability to counter Witness TA with the

[462] Rule 69(C) of the Rules was amended at the 12th plenary session held on 5 and 6 July 2002 to read: "Subject to Rule 75, the identity of the victim or witness shall be disclosed within such time as determined by Trial Chamber to allow adequate time for preparation of the Prosecution and the Defence". The Appeals Chamber observes that the Prosecution does not dispute that it failed to disclose the identity and unredacted statements of seven protected witnesses relevant to the allegations relating to the Butare Prefecture Office. *See* Prosecution Response Brief, paras. 70, 71. In these circumstances, the Appeals Chamber finds it unnecessary to discuss Ntahobali's contention that he was not provided with the identity and statements of 34 Prosecution witnesses.
[463] 1 November 2000 Decision, para. 33. *See also The Prosecutor v. Sylvain Nsabimana*, Case No. ICTR-97-29-T, Decision on Defence Motion to Limit Possible Evidence to Be Disclosed to the Defence and to Exclude Certain Material Already Disclosed by the Prosecutor, 3 May 2000, p. 5.
[464] 24 October 2001 Oral Decision.
[465] The Appeals Chamber notes that the transcripts of 24 October 2001 do not reflect that this argument was addressed at any point. *See* 24 October 2001 Oral Decision; Witness TA, T. 24 October 2001 pp. 69-74, 79, 80.
[466] The Appeals Chamber recalls that, in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error resulting in prejudice to that party. *See supra*, para. 68.

information contained in the witnesses' statements not disclosed at the time, they fail to identify which information contained therein would in fact have been material to their cross-examination of Witness TA. As the only demonstration of prejudice, Ntahobali refers to his inability to question Witness TA on her ties with Witness QBP, whom she denied knowing. Ntahobali, though, refers to information provided by Witness QBP in her testimony before the Trial Chamber, rather than to information provided through any of the witness's prior statements.[467]

195. Additionally, in the absence of any demonstration of prejudice resulting from his inability to cross-examine Witness TA on the basis of the information that had not been disclosed at the time, the Appeals Chamber also dismisses Ntahobali's challenge to the 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses without further consideration.

196. For the foregoing reasons, the Appeals Chamber dismisses the relevant parts of Ground 12 of Nyiramasuhuko's appeal and Ground 1.5 of Ntahobali's appeal.

[467] *See* Ntahobali Appeal Brief, para. 101, *referring to* Witness QBP, T. 29 October 2002 pp. 80, 81 (closed session) (French).

G. Refusal to Recall Witnesses (Nyiramasuhuko Ground 7 in part; Ntahobali Ground 1.5 in part)

197. During the course of the trial, Nyiramasuhuko and Ntahobali submitted several motions requesting the recall of Prosecution witnesses for further cross-examination, including Witnesses QBQ, QCB, QJ, QY, TA, and TK.[468] The Trial Chamber denied some of these requests[469] and partially granted the others.[470] In its decisions, the Trial Chamber set out that the jurisprudence of the Tribunal allowed for the recall of witnesses if good cause had been shown by the moving party.[471] The Trial Chamber stated that, in the assessment of good cause, it would have to consider the purpose of the proposed testimony and the moving party's justification for not having sought such evidence when the witness originally testified.[472] The Trial Chamber emphasised that:

> The recall of a witness should be granted only in the most compelling of circumstances where further evidence is of significant probative value and not of a cumulative nature, such as to explore inconsistencies between a witness's testimony and a declaration obtained subsequently. In case of inconsistencies, the Defence may request the recall of a witness if prejudice can be shown from its inability to put these inconsistencies to that witness. If there is no need for the witness's explanation of the inconsistency, because it is minor or its nature is self-evident, then the witness will not be recalled.[473]

[468] *See* Witness SJ, T. 24 February 2009 pp. 55-58 (closed session) ("24 February 2009 Oral Decision"); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Exclusion of Evidence, Alternatively for Admission of Documents into Evidence or for Recall of Witness TK, signed 9 December 2008, filed 10 December 2008 ("9 December 2008 Decision on Motion to Recall Witness TK"), p. 2; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Nyiramasuhuko's Motion for Exclusion of Evidence or Admission of the Testimony of Witness QBQ in the Trial of Désiré Munyaneza, or Recall of Witness QBQ, signed 9 December 2008, filed 10 December 2008 ("9 December 2008 Decision on Motion to Recall Witness QBQ"), p. 2; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for the Exclusion of Evidence or for Recall of Prosecution Witnesses QY, SJ, and Others, 3 December 2008 ("3 December 2008 Decision"), p. 2; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Recall and Further Cross-Examination of Prosecution Witness QCB, 20 November 2008 ("20 November 2008 Decision"), p. 2; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Strictly Confidential Motion to Recall Witnesses TN, QBQ, and QY, for Additional Cross-Examination – Rule 54, 73(A), 90(G), Rules of Procedure and Evidence, signed 3 March 2006, filed 4 March 2006 ("3 March 2006 Decision"), paras. 1-15.

[469] *See* 24 February 2009 Oral Decision; 3 December 2008 Decision, p. 7; 20 November 2008 Decision, para. 51; 9 December 2008 Decision on Motion to Recall Witness TK, para. 61.

[470] *See* 3 March 2006 Decision, para. 48; 9 December 2008 Decision on Motion to Recall Witness QBQ, para. 69.

[471] 9 December 2008 Decision on Motion to Recall Witness TK, para. 37; 9 December 2008 Decision on Motion to Recall Witness QBQ, para. 56; 3 December 2008 Decision, para. 21; 20 November 2008 Decision, para. 35; 3 March 2006 Decision, para. 32.

[472] 9 December 2008 Decision on Motion to Recall Witness TK, para. 37; 9 December 2008 Decision on Motion to Recall Witness QBQ, para. 56; 3 December 2008 Decision, para. 21; 20 November 2008 Decision, para. 35; 3 March 2006 Decision, para. 32.

[473] 9 December 2008 Decision on Motion to Recall Witness TK, para. 37; 9 December 2008 Decision on Motion to Recall Witness QBQ, para. 56; 3 December 2008 Decision, para. 21; 20 November 2008 Decision, para. 35. *See also* 3 March 2006 Decision, paras. 32, 33.

198. Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in denying their various requests to recall Witnesses QBQ, QCB, QJ, QY, TA, and TK for further cross-examination.[474] They contend that by relying on the very witnesses whom it did not recall in finding them guilty, the Trial Chamber violated their fair trial rights.[475] Nyiramasuhuko requests that the Appeals Chamber invalidate the Trial Judgement or, at a minimum, exclude the evidence of all witnesses implicated by Prosecution Witnesses SJ and QY to have been part of an alleged collusion.[476] Ntahobali requests that the Appeals Chamber stay the proceedings against him or, in the alternative, exclude the evidence of the concerned witnesses in the determination of his guilt, or draw the relevant inferences based on the information before it.[477]

199. Before turning to Nyiramasuhuko's and Ntahobali's specific challenges, the Appeals Chamber reiterates that, like all decisions relating to the conduct of the proceedings before them, decisions on requests to recall witnesses are matters within the discretion of trial chambers.[478]

1. 3 March 2006 Decision

200. On 9 January 2006, Ntahobali moved the Trial Chamber for the recall of Witness QY and requested permission to further cross-examine her on three issues, namely: (i) the number of times she was raped near the EER; (ii) the identity of the man who allegedly raped her at the EER; and (iii) her presence in Kibeho and Gikongoro.[479] Ntahobali argued that inconsistencies in relation to these matters became apparent after Witness QY's subsequent testimony in the *Muvunyi* case.[480]

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[474] Nyiramasuhuko Notice of Appeal, para. 1.40; Nyiramasuhuko Appeal Brief, paras. 248-251; Ntahobali Notice of Appeal, paras. 32-34, 36; Ntahobali Appeal Brief, paras. 73, 75-96. *See also* AT. 15 April 2015 p. 17. The Appeals Chamber notes that, in her appeal brief, Nyiramasuhuko challenges the Trial Chamber's 9 December 2008 Decision on Motion to Recall Witness QBQ, but failed to raise the alleged error in her notice of appeal, even though she amended it twice. *See* Nyiramasuhuko Appeal Brief, para. 248. Similarly, Ntahobali challenges the Trial Chamber's 3 December 2008 Decision denying the recall of, *inter alia*, Witnesses TK, QJ, and TA, but failed to raise this allegation in his notice of appeal. *See* Ntahobali Appeal Brief, para. 88. Because these allegations of error exceed the scope of Nyiramasuhuko's and Ntahobali's appeals as defined in their notices of appeal and the Prosecution did not respond to these new allegations, the Appeals Chamber declines to consider them.

[475] Nyiramasuhuko Notice of Appeal, para. 1.41; Nyiramasuhuko Appeal Brief, para. 248-251; Ntahobali Notice of Appeal, paras. 34, 36, 37; Ntahobali Appeal Brief, paras. 95, 102.

[476] Nyiramasuhuko Appeal Brief, paras. 251, 282.

[477] Ntahobali Notice of Appeal, para. 37; Ntahobali Appeal Brief, para. 102. The Appeals Chamber observes that, in his notice of appeal, Ntahobali further requested that the Appeals Chamber either: (i) order a re-trial; (ii) admit into evidence transcripts from the Canadian case against Désiré Munyaneza, the admission of which the Trial Chamber had denied; or, at a very minimum, (iii) apply caution towards the evidence of the witnesses concerned; (iv) award him compensation for the numerous violations of his fair trial rights. *See* Ntahobali Notice of Appeal, paras. 37, 38. In his appeal brief, Ntahobali specifically argues that a re-trial would be inappropriate as it would violate his right to a fair trial and does not reiterate this specific alternative relief. *See* Ntahobali Appeal Brief, para. 102.

[478] *See supra*, para. 137.

[479] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête de Arsène Shalom Ntahobali pour faire rappeler les témoins TN, QBQ, QY, pour un contre-interrogatoire supplémentaire*, 9 January 2006 (confidential) ("Ntahobali 9 January 2006 Motion to Recall Witnesses"), paras. 72-77, 80, 81, 83-87, 94.

[480] Ntahobali 9 January 2006 Motion to Recall Witnesses, paras. 3, 5, 90-94, *referring to The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-T ("*Muvunyi* case").

The Trial Chamber granted Ntahobali's motion to recall Witness QY in respect of the latter two issues.[481] It denied Ntahobali's request to put questions to the witness concerning the number of times she was raped at the EER on the ground that the discrepancies in the witness's testimonies in this respect did "not seem to relate directly to the Accused" and did not therefore warrant the witness's recall.[482]

201. Ntahobali submits that the Trial Chamber erred in denying his request to recall Witness QY on the subject matter of the number of times she was raped near the EER.[483] He contends that the Trial Chamber erred in finding that the contradictions regarding the number of alleged rapes did not seem to directly relate to the co-Accused.[484] According to him, there is no requirement that the contradictions in a witness's testimony have a direct link to the accused in order for a chamber to grant a request for recall.[485] Ntahobali argues that, in fact, it is established jurisprudence that a witness may be recalled for impeachment purposes.[486] In this regard, he points out that the Trial Chamber authorised the recall of Witness QY in relation to questions pertaining to the identity of the rapist which, he submits, was not more directly linked to the co-Accused than the number of rapes.[487]

202. The Prosecution did not specifically respond to Ntahobali's submissions.

203. The Appeals Chamber observes that Ntahobali does not dispute the legal standard for the recall of witnesses set out by the Trial Chamber in its 3 March 2006 Decision.[488] In the legal standard, the Trial Chamber did not set out as a requirement to authorise a recall that the contradictions in the witness's testimonies must directly relate to the accused. However, the Appeals Chamber considers that, in exercising its discretion in deciding whether an issue is of such nature or importance as to require further explanation from the witness, a chamber is entitled to look at all factors it deems to be relevant, including whether a discrepancy directly relates to the accused. Contrary to Ntahobali's contention, the Trial Chamber did not elevate this consideration to the level of being a criterion for authorising a recall.[489] Rather, the Trial Chamber considered whether the question was of such centrality to the accused's responsibility that it required further

[481] 3 March 2006 Decision, paras. 46-48, p. 14.
[482] 3 March 2006 Decision, para. 45. *See also ibid.*, p. 14.
[483] Ntahobali Appeal Brief, para. 76. *See also* Ntahobali Notice of Appeal, paras. 32, 33. The Appeals Chamber dismisses Ntahobali's challenge to the 3 March 2006 Decision relating to Witness QBQ as well as his contention that the Trial Chamber erred in denying his motion for certification to appeal the 3 March 2006 Decision for lack of substantiation. *See ibid*., paras. 32, 33; Ntahobali Appeal Brief, para. 76, fn. 105.
[484] Ntahobali Appeal Brief, para. 77, *referring to* 3 March 2006 Decision, para. 45.
[485] Ntahobali Appeal Brief, para. 77.
[486] Ntahobali Appeal Brief, para. 77.
[487] Ntahobali Appeal Brief, para. 77.
[488] *See* Ntahobali Notice of Appeal, paras. 32-38; Ntahobali Appeal Brief, paras. 73-102.
[489] *See* 3 March 2006 Decision, paras. 32, 33.

explanation from the witness and found that it did not rise to this level. Given that the impugned discrepancy related to whether Witness QY was raped once at the EER or twice in the course of one evening,[490] the Appeals Chamber finds no error in the Trial Chamber's conclusion. Conversely, the Appeals Chamber finds that the issue of the identity of the rapist, which the Trial Chamber found to justify the recall of Witness QY, was directly related to Ntahobali's alleged responsibility for ordering, aiding and abetting, and as a superior.[491] Ntahobali therefore fails to demonstrate that the Trial Chamber erred in authorising the recall of Witness QY on that matter while refusing her recall on the subject matter of the number of times she was raped.

204. The Appeals Chamber therefore dismisses Ntahobali's challenge against the 3 March 2006 Decision.

2. 20 November 2008 Decision

205. On 1 October 2008, Ntahobali moved the Chamber for the recall of Witness QCB.[492] Ntahobali argued that, since his testimony before the Trial Chamber, Witness QCB had given several statements to the Canadian police between 2000 and 2004 and testified in 2007 before a Canadian court in the case against Désiré Munyaneza ("Munyaneza" and "*Munyaneza* case", respectively), which, according to Ntahobali, revealed a number of inconsistencies in Witness QCB's evidence.[493] Ntahobali requested Witness QCB's recall so as to question him further in relation to six specific matters, including the location of the killing of Ruvurajabo and the presence of Munyaneza and Pierre-Célestin Halindintwali ("Halindintwali") at "roadblocks 5 and 6".[494]

206. The Trial Chamber denied Ntahobali's request in its entirety. At the outset, the Trial Chamber found that Witness QCB's statements to the Canadian police provided by Ntahobali in support of his request lacked sufficient indicia of reliability as they consisted of visibly edited, unsigned documents, and contained several words in Kinyarwanda that had not been translated into French.[495] It thus considered that their content had to be assessed with caution and in the context of Witness QCB's subsequent testimony before the Canadian court.[496]

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[490] *See* 3 March 2006 Decision, para. 45.
[491] 3 March 2006 Decision, paras. 45, 46, 48.
[492] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête de Arsène Shalom Ntahobali en rappel du témoin QCB*, 1 October 2008 (confidential) ("Ntahobali 1 October 2008 Motion to Recall Witness QCB").
[493] Ntahobali 1 October 2008 Motion to Recall Witness QCB, paras. 9, 10, 13, 14, 25, 32, 33, 39, 40, 43, 44, 56, 63, 69.
[494] Ntahobali 1 October 2008 Motion to Recall Witness QCB, paras. 20, 30, 32, 41, 42.
[495] 20 November 2008 Decision, para. 36.
[496] 20 November 2008 Decision, para. 36.

207. In relation to the location of the killing of Ruvurajabo, the Trial Chamber found that, while there appeared to be an inconsistency in Witness QCB's account between his testimony before the Trial Chamber and the statement he had given to the Canadian police on 16 October 2000, his subsequent statements given to the Canadian police as well as his testimony before the Canadian court seemed to accord with the account he gave before the Trial Chamber.[497] After having recalled its finding on the reliability of the statements Witness QCB had given to the Canadian police, the Trial Chamber concluded that, when viewed in the context of the witness's testimony in the *Munyaneza* case, it could find no discrepancy in the witness's account in relation to the location of the killing of Ruvurajabo and denied Ntahobali's request for recall.[498]

208. With respect to the presence of Munyaneza and Halindintwali at roadblocks 5 and 6, the Trial Chamber considered that Witness QCB's testimony before it and his subsequent statements to the Canadian police did not appear to be inconsistent.[499] Specifically, the Trial Chamber noted that, in his testimony before the Trial Chamber, Witness QCB stated that roadblock 5 was manned by Ntahobali and *Interahamwe* and roadblock 6 was manned by *Interahamwe*.[500] The Trial Chamber observed that the witness was not asked about the presence of Munyaneza or Halidintwali at either roadblock when he gave evidence before the Trial Chamber.[501] On this basis, the Trial Chamber considered that "omitting to mention […] Munyaneza and […] Halidintwali, without having been specifically asked about their presence, [did] not amount to an inconsistency which would require the recall of the [w]itness."[502]

209. Ntahobali argues that the Trial Chamber erred in denying his request to recall Witness QCB for further cross-examination on the issues of the location of Ruvurajabo's killing and the presence of Munyaneza and Halindintwali at roadblocks 5 and 6.[503] With respect to the location of Ruvurajabo's killing, Ntahobali contends that the Trial Chamber erred in finding that Witness QCB's 16 October 2000 statement given to the Canadian police lacked reliability and in relying on the fact that the witness's subsequent statements and testimony before the Canadian court seemed to accord with his testimony before the Tribunal.[504] According to Ntahobali,

[497] 20 November 2008 Decision, para. 37.
[498] 20 November 2008 Decision, para. 37.
[499] 20 November 2008 Decision, para. 38.
[500] 20 November 2008 Decision, para. 38.
[501] 20 November 2008 Decision, para. 38.
[502] 20 November 2008 Decision, para. 38.
[503] Ntahobali Appeal Brief, paras. 78, 80. The Appeals Chamber notes that Ntahobali failed to develop his contention that the Trial Chamber erred in denying his motion for reconsideration of the 20 November 2008 Decision and therefore dismisses it as unsubstantiated. *See* Ntahobali Notice of Appeal, paras. 32, 33; Ntahobali Appeal Brief, para. 78, fn. 109.
[504] Ntahobali Appeal Brief, para. 79, *referring to* 20 November 2008 Decision, para. 37.

safeguarding the fairness of the proceedings would have required the Trial Chamber to recall the witness for further cross-examination on this matter, which is a material fact in issue.[505]

210. Regarding the presence of Munyaneza and Halindintwali at roadblocks 5 and 6, Ntahobali asserts that no reasonable trial chamber would have expected the Defence to question the witness about the presence of these two individuals when the witness denied knowing them during his testimony before the Trial Chamber.[506] Ntahobali argues that the contradiction only transpired after Witness QCB testified before the Canadian court.[507]

211. The Prosecution did not specifically respond to Ntahobali's submissions.

212. In relation to the recall on the location of the killing of Ruvurajabo, the Appeals Chamber observes that the Trial Chamber did not exclude Witness QCB's 16 October 2000 statement from consideration but stated that it would assess it with caution and in the context of the witness's testimony before the Canadian court.[508] The Appeals Chamber recalls that the assessment of material for the purposes of admission as evidence as well as the weighing of evidence are matters within the purview of trial chambers to which the Appeals Chamber must accord deference.[509] While in this case the Trial Chamber did not assess the material for the purposes of admission but for the purposes of considering whether there was an inconsistency between the witness's testimony before it and his subsequent statements, the Appeals Chamber considers that the same standard of reasonableness and the same deference applies. In the present instance, the Appeals Chamber finds no error in the Trial Chamber's cautious approach to edited, unsigned statements such as Witness QCB's 16 October 2000 statement. The Appeals Chamber also finds no error in the Trial Chamber's approach in considering the said statement within the context of the other statements Witness QCB made to the Canadian police and his subsequent testimony in the *Munyaneza* case to determine whether his subsequent statements revealed an inconsistency as to the issue in question. Accordingly, the Appeals Chamber finds that Ntahobali fails to demonstrate any discernible error in the Trial Chamber's decision to deny Ntahobali's request to further question Witness QCB on the issue of the location of the killing of Ruvurajabo.

[505] Ntahobali Appeal Brief, para. 79.
[506] Ntahobali Appeal Brief, para. 80.
[507] Ntahobali Appeal Brief, para. 80.
[508] 20 November 2008 Decision, para. 36.
[509] *See*, *e.g.*, *Šainović et al.* Appeal Judgement, para. 23; *Rutaganda* Appeal Judgement, para. 33; *Halilović* Appeal Judgement, para. 39; *Kupreškić et al*. Appeal Judgement, para. 30; *Čelebići* Appeal Judgement, para. 533. *See also The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-AR73.2, Decision on Pauline Nyiramasuhuko's Appeal on the Admissibility of Evidence, 4 October 2004 ("4 October 2004 Appeal Decision"), para. 7.

213. With respect to the issue pertaining to the presence of Munyaneza and Halindintwali at roadblocks 5 and 6, the Appeals Chamber notes that Ntahobali largely repeats his arguments put forth at trial.[510] Ntahobali does not demonstrate how the Trial Chamber erred in finding that Witness QCB's omission to mention Munyaneza and Halindintwali in the absence of specifically being asked about them did not amount to an inconsistency that would require his recall.[511]

214. In light of the foregoing, the Appeals Chamber dismisses Ntahobali's challenges against the 20 November 2008 Decision.

3. 9 December 2008 Decision on Motion to Recall Witness TK

215. On 13 October 2008, Nyiramasuhuko moved the Trial Chamber for the exclusion of the evidence of Witness TK or, alternatively, the admission into evidence of transcripts of her testimony in the *Munyaneza* case or, in a further alternative, her recall for additional cross-examination on specific topics.[512] On 14 October 2008, Ntahobali joined Nyiramasuhuko's request for further cross-examination of Witness TK on matters relevant to his case.[513] On 9 December 2008, the Trial Chamber denied Nyiramasuhuko's and Ntahobali's requests to recall Witness TK.[514] The Trial Chamber held that apparent contradictions between a witness's statement to Tribunal investigators which were not repeated during the witness's testimony before the Tribunal and testimony given before another court do not prejudice the accused and therefore cannot justify a recall.[515] It also explained that: (i) Witness TK provided explanations for some of the contradictions; (ii) some of the discrepancies were minor; (iii) some of the differences within the witness's evidence or omissions did not amount to inconsistencies; and (iv) some of the Defence's assertions were mere speculations.[516]

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[510] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête de Arsène Shalom Ntahobali en reconsidération de la Décision du 20 Novembre 2008 concernant le témoin QCB*, 25 November 2008.
[511] 20 November 2008 Decision, para. 38.
[512] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête de Pauline Nyiramasuhuko en exclusion de preuve ou, alternativement en versement de preuve de parties de témoignage rendu dans le procès de Désiré Munyaneza ou alternativement en rappel de témoin*, 13 October 2008 (confidential). In December 2008, the Trial Chamber partially granted Ntahobali's request to recall Prosecution Witnesses SJ and QY on the basis that there were discrepancies between their testimonies before the Trial Chamber and their evidence in the *Munyaneza* case in Canada as to their knowledge of other Prosecution witnesses, including Witness TK, and in light of the witnesses' alleged admissions in the *Munyaneza* case that they had lied when testifying before the Trial Chamber upon the instructions of Tribunal employees. The Trial Chamber denied Ntahobali's request to recall all other Prosecution witnesses who had testified against him to be questioned on whether they also had been unduly influenced. *See* 3 December 2008 Decision, paras. 23-28, p. 7.
[513] 9 December 2008 Decision on Motion to Recall Witness TK, para. 13.
[514] 9 December 2008 Decision on Motion to Recall Witness TK, para. 51, p. 13.
[515] 9 December 2008 Decision on Motion to Recall Witness TK, paras. 39, 44.
[516] 9 December 2008 Decision on Motion to Recall Witness TK, paras. 40-43, 45-49.

216. Nyiramasuhuko argues that the Trial Chamber erred in law and in fact by denying her motion to recall Witness TK in order to explore the inconsistencies and "relevant omissions" between Witness TK's testimony before the Trial Chamber and the testimony the witness gave in the *Munyaneza* case.[517]

217. Ntahobali submits that the Trial Chamber erred in denying the recall of Witness TK on the numerous contradictions revealed after her testimony in the *Munyaneza* case concerning: (i) the time of the death of her parents; (ii) whether family members accompanied her when she fled from Gikongoro to Butare; (iii) her parents' presence at the Butare Prefecture Office; (iv) the murder of a number of men at the Butare Prefecture Office; and (v) her knowledge about Witness SJ's travels to Arusha.[518] Ntahobali argues that the Trial Chamber erred in concluding that a contradiction between a witness's statement to Tribunal investigators not repeated during the witness's testimony before the Tribunal and the witness's testimony before another court cannot justify a recall, and in finding that the alleged contradictions were minor or did not amount to contradictions.[519] He argues that the denial of Witness TK's recall eventually resulted in her being judged a credible witness and being relied upon by the Trial Chamber in convicting him of crimes committed at the prefectoral office.[520]

218. The Appeals Chamber notes that the Prosecution did not specifically respond to Nyiramasuhuko's and Ntahobali's submissions in its response brief. In response to a question from the Appeals Chamber at the appeals hearing, the Prosecution submitted that the Trial Chamber's reasoning in relation to the discrepancy in Witness TK's evidence concerning the death of her parents was correct.[521]

219. The Appeals Chamber notes that Nyiramasuhuko has failed to develop arguments supporting her allegation concerning the recall of Witness TK and therefore dismisses it without further consideration.

220. Turning to Ntahobali's submissions, the Appeals Chamber notes that, apart from stating that a contradiction can become apparent only after subsequent testimony,[522] Ntahobali fails to demonstrate how the Trial Chamber erred in holding that any apparent contradiction between a witness's statement to Tribunal investigators not repeated during the witness's testimony before the Tribunal and the witness's testimony before another court does not prejudice the accused and

[517] Nyiramasuhuko Notice of Appeal, para. 1.40; Nyiramasuhuko Appeal Brief, para. 248.
[518] Ntahobali Notice of Appeal, paras. 32, 33; Ntahobali Appeal Brief, paras. 81-87.
[519] Ntahobali Appeal Brief, paras. 82-86.
[520] Ntahobali Appeal Brief, paras. 86, 95.
[521] AT. 16 April 2015 pp. 15, 17, 18.
[522] Ntahobali Appeal Brief, para. 82.

therefore could not justify a recall. Recalling the Tribunal's general preference for live testimony[523] and the trial chambers' discretionary power in deciding whether to recall witnesses,[524] the Appeals Chamber finds no error in the Trial Chamber's approach.

221. The Appeals Chamber considers that Ntahobali's remaining arguments reflect mere disagreement with the Trial Chamber's assessment of the alleged contradictions. Ntahobali fails to demonstrate any error in the Trial Chamber's conclusions that the Defence's assertions as to discrepancies were based on mere speculation or did not amount to inconsistencies which, if not put to the witness, would prejudice the accused and warrant the recall of the witness.[525]

222. Accordingly, the Appeals Chamber dismisses Ntahobali's challenges against the 9 December 2008 Decision on Motion to Recall Witness TK.

4. 24 February 2009 Oral Decision

223. On 24 February 2009, after the completion of the recall testimony of Witnesses QY and SJ,[526] Nyiramasuhuko and Ntahobali jointly moved the Trial Chamber for the recall of several other Prosecution witnesses, including Witnesses QJ, TA, and TK, based on the evidence given by Witnesses QY and SJ which suggested that there was a possibility of contamination of other witnesses who came to Arusha at the same time as these witnesses did and stayed in the same safe houses.[527] Nyiramasuhuko submitted that she should be allowed to recall all witnesses who travelled to Arusha together with other witnesses and testified about the events at the Butare Prefecture Office.[528] In particular, she argued that these witnesses should be questioned as to whether "they were invited to say they didn't know each other" because the evidence given by Witness SJ upon recall, namely that Withess SJ was instructed to deny knowing two other Prosecution witnesses, was "of the utmost importance for the credibility of [the] trial".[529]

224. Acknowledging that, on 3 December 2008, the Trial Chamber rejected as speculative his motion for the recall of witnesses other than Witnesses QY and SJ, Ntahobali argued that the situation had changed with Witness SJ's recall evidence since "the witness said before [the Trial

[523] *See supra*, para. 140.
[524] *See supra*, para. 137.
[525] 9 December 2008 Decision on Motion to Recall Witness TK, para. 49.
[526] Witness QY, T. 23 February 2009 pp. 36-68 (closed session).
[527] Witness SJ, T. 24 February 2009 pp. 55-57 (closed session).
[528] Witness SJ, T. 24 February 2009 p. 56 (closed session).
[529] Witness SJ, T. 24 February 2009 p. 56 (closed session). *See also ibid*., pp. 15-17, 19, 20 (closed session).

Chamber] that Witnesses TK, QJ, and TA were present when she received instructions to lie, as well as other witnesses that had [come] from Butare".[530]

225. The Trial Chamber denied the oral motion, finding that "there [was] entirely no basis that would justify the recall of witnesses that have been mentioned in the submissions".[531] The Trial Chamber considered that Nyiramasuhuko and Ntahobali "talked about possible possibilities [*sic*], but […] having heard these witnesses and having heard the issues that were canvassed and demonstrated before the Trial Chamber during these proceedings, [it was] satisfied that there's no basis that has been demonstrated that could justify the recall of the witnesses concerned."[532]

226. Nyiramasuhuko submits that the Trial Chamber erred in denying the oral request to recall Witnesses TA and TK.[533] She argues that, in light of Witnesses QY's and SJ's admissions that they provided false testimony, the Trial Chamber's refusal to recall Witnesses TA and TK was particularly serious, as it deprived her of the opportunity to demonstrate that other Prosecution witnesses had also been instructed to lie.[534] Nyiramasuhuko argues that this, in turn, affected her ability to conduct an effective defence by demonstrating the lack of credibility of Prosecution witnesses and their "conspiracy to lie".[535] In support of her argument, Nyiramasuhuko relies on a decision rendered by the trial chamber seised of the *Karemera et al.* case, granting a request for the recall of a Prosecution witness on the basis of suspicion of collusion between witnesses.[536]

227. Ntahobali submits that the Trial Chamber erred in finding that the requests to recall Witnesses QJ, TA, and TK lacked legal basis.[537] He points out that Witness SJ testified that Witnesses QJ, TA, and TK were present when a Prosecution employee gave instructions to deny knowing other witnesses, which, in his view, raised serious probabilities that Witnesses QJ, TA, and TK received the same instructions.[538] He argues that Witness TA's testimony that she did not know any other witnesses despite contradictory evidence that she did should have led a reasonable trier of fact to find that the allegations of instructions to lie were more than mere "possibilities" and, as a

[530] Witness SJ, T. 24 February 2009 p. 56 (closed session).
[531] Witness SJ, T. 24 February 2009 pp. 57, 58 (closed session).
[532] Witness SJ, T. 24 February 2009 pp. 57, 58 (closed session).
[533] Nyiramasuhuko Notice of Appeal, para. 1.40; Nyiramasuhuko Appeal Brief, para. 248. Nyiramasuhuko also refers to the denial of Witness QBP's recall but the Appeals Chamber was unable to find any reference to this witness in the impugned oral decision. *See* Nyiramasuhuko Appeal Brief, para. 248, fn. 180.
[534] Nyiramasuhuko Appeal Brief, para. 248.
[535] Nyiramasuhuko Appeal Brief, para. 249.
[536] Nyiramasuhuko Appeal Brief, para. 250, *referring to The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Consolidated Decision on Joseph Nzirorera's Motion to Recall Witness BGU and "*Requête de M. Ngirumpatse visant au rappel du témoin GBU*", 6 August 2008, paras. 7, 9. The Appeals Chamber notes that Ntahobali relies on the same decision to support his arguments. *See* Ntahobali Appeal Brief, para. 94.
[537] Ntahobali Notice of Appeal, para. 32; Ntahobali Appeal Brief, para. 88.
[538] Ntahobali Appeal Brief, paras. 89-91, *referring to* Witness SJ, T. 23 February 2009 pp. 92, 93 (closed session) (French). *See also* AT. 15 April 2015 pp. 17, 19, 20 and 23-25 (closed session).

result, grant the request for recall.[539] According to Ntahobali, the impossibility of challenging the credibility of Witnesses QJ, TA, and TK regarding these allegations of collusion and the Trial Chamber's reliance on these witnesses to find him guilty caused him serious prejudice.[540]

228. The Prosecution did not specifically respond to Nyiramasuhuko's and Ntahobali's submissions.

229. The Appeals Chamber observes that the Trial Chamber heard Witnesses QY and SJ state that they had been instructed by Tribunal interpreters to deny knowledge of other witnesses, including Witnesses QJ, TA, and TK, prior to testifying in the instant proceedings.[541] The Trial Chamber also heard from Witness SJ that she once travelled to Arusha together with Witness TK and on another occasion with Witness QJ,[542] and that while she was alone when she received the instruction from the interpreter to deny knowing the other witnesses,[543] "[i]t used to happen that we discussed this as we chatted and to ask how we were going to deny that we knew our neighbours."[544] Witness SJ explained that when she was asked by the Trial Chamber in her previous testimony about who was with her in the safe house, she answered the way she had been instructed to answer, namely that there were many witnesses she did not know who had come from Butare.[545] When she was asked, upon recall, whether she recalled the names of other witnesses who were with her when this instruction was given to her, she stated that there were many others, but that she only remembered the names of Witnesses QJ, TA, and TK.[546] On the second day of her recall testimony, however, Witness SJ insisted that she had been alone when she was instructed to deny knowing other witnesses and that she could not confirm that Witnesses QJ, TA, and TK had received the same instructions.[547]

230. The Appeals Chamber is of the view that a reasonable trier of fact could have considered that the suspicions raised by the testimonies of Witnesses QY and SJ were sufficient to warrant the recall of Witnesses QJ, TK, and TA for questioning on whether they were also instructed to deny

[539] Ntahobali Appeal Brief, paras. 92, 93, *referring to* Witness TA, T. 7 November 2001 pp. 131-136 (closed session) (French); Witness SJ, T. 24 February 2009 pp. 22, 23 (closed session) (French); Witness QBP, T. 29 October 2002 pp. 80, 81 (closed session) (French).
[540] Ntahobali Appeal Brief, para. 95.
[541] The Appeals Chamber observes that, in her testimony upon recall, Witness QY admitted that she untruthfully stated before the Trial Chamber that she did not know Witnesses QBQ and SJ upon the instructions of a Tribunal interpreter. *See* Witness QY, T. 23 February 2009 pp. 40-43, 51 (closed session). Likewise, Witness SJ admitted that she knew Witnesses QJ, TA, and TK and that she had been instructed by Tribunal interpreters to deny knowing them and therefore lied before the Tribunal in her previous testimony before the Trial Chamber. *See* Witness SJ, T. 23 February 2009 pp. 82, 84 (closed session); T. 24 February 2009 p. 17 (closed session).
[542] Witness SJ, T. 23 February 2009 pp. 82, 83 (closed session).
[543] Witness SJ, T. 23 February 2009 p. 83 (closed session); T. 24 February 2009 p. 19 (closed session).
[544] Witness SJ, T. 23 February 2009 p. 84 (closed session). *See also* T. 24 February 2009 p. 18 (closed session).
[545] Witness SJ, T. 23 February 2009 p. 84 (closed session).
[546] Witness SJ, T. 23 February 2009 p. 83 (closed session).
[547] Witness SJ, T. 24 February 2009 pp. 19, 20 (closed session).

knowing other witnesses. However, the Appeals Chamber emphasises that when an appellant challenges a discretionary decision by a trial chamber, the issue is not whether a reasonable trier of fact could have reached a different conclusion or whether the Appeals Chamber agrees with that decision, but whether the trial chamber has correctly exercised its discretion in reaching that decision. As recalled earlier, a trial chamber enjoys considerable discretion in the conduct of the proceedings before it[548] and the Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[549]

231. In the present case, the Appeals Chamber understands Nyiramasuhuko and Ntahobali to allege that the Trial Chamber's decision is both based on a patently incorrect conclusion of fact and is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion. Given the inconclusiveness of the evidence before the Trial Chamber concerning whether Witnesses QJ, TA, and TK were also instructed to deny knowing other witnesses, the Appeals Chamber finds no error in the Trial Chamber's conclusion that the joint Defence request was based on "possibilities".[550] Noting that Witnesses QY's and SJ's evidence did not give rise to an indication of collusion between witnesses[551] but was limited in nature since it only pertained to the issue whether witnesses knew each other, the Appeals Chamber is further not persuaded that the Trial Chamber's decision denying the recall of Witnesses TK, QJ, and TA was so unfair or unreasonable as to constitute an abuse of discretion.

232. In relation to Nyiramasuhuko's reliance on a decision rendered by the trial chamber seised of the *Karemera et al.* case, the Appeals Chamber recalls that the manner in which the discretion to manage trials is exercised by a trial chamber should be determined in accordance with the case before it; what is reasonable in one trial is not automatically reasonable in another.[552] The Appeals Chamber therefore does not find persuasive the argument that the Trial Chamber erred simply

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[548] *See*, *e.g.*, *Setako* Appeal Judgement, para. 19; *Nchamihigo* Appeal Judgement, para. 18; *Haradinaj et al.* Appeal Judgement, para. 39.
[549] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 85; *Renzaho* Appeal Judgement, para. 143; *Kalimanzira* Appeal Judgement, para. 14.
[550] *See also infra*, Section III.J.
[551] The Appeals Chamber recalls that:

> collusion has been defined as an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose. If an agreement between witnesses for the purpose of untruthfully incriminating an accused were indeed established, their evidence would have to be excluded pursuant to Rule 95 of the Rules. However, a mere risk of collusion is insufficient to exclude evidence under Rule 95 of the Rules.

See Kanyarukiga Appeal Judgement, para. 238 (internal references omitted), *referring to Karera* Appeal Judgement, para. 234, *relying on* Black's Law Dictionary, 6th Edition.
[552] *Haradinaj et al.* Appeal Judgement, para. 39.

because another trial chamber of the Tribunal had authorised the recall of witnesses on the basis of suspicion of collusion.

233. The Appeals Chamber therefore dismisses Nyiramasuhuko's and Ntahobali's challenges against the 24 February 2009 Oral Decision.

5. Conclusion

234. For the foregoing reasons, the Appeals Chamber concludes that Nyiramasuhuko and Ntahobali have failed to demonstrate any discernible error in the exercise of the Trial Chamber's discretion with respect to its 3 March 2006 Decision, 20 November 2008 Decision, 9 December 2008 Decision on Motion to Recall of Witness TK, and 24 February 2009 Oral Decision. Accordingly, the Appeals Chamber dismisses the relevant parts of Ground 7 of Nyiramasuhuko's appeal and Ground 1.5 of Ntahobali's appeal.

H. Nsabimana's Statements (Nyiramasuhuko Grounds 4 and 19 in part; Ntahobali Ground 3.9 in part; Nsabimana Grounds 6 in part and 7)

235. In the course of the trial, the Trial Chamber admitted into evidence the transcript of a journalist's interview with Nsabimana dated 1 October 1994,[553] a letter written by Nsabimana in 1996,[554] and the transcript of a March 1996 phone interview between Prosecution Expert Witness Alison Des Forges and Nsabimana[555] as Exhibits P114, P113, and P185, respectively. The Trial Chamber also heard Witness Des Forges's testimony concerning phone conversations she had with Nsabimana in March and April 1996.[556]

236. Nyiramasuhuko, Ntahobali, and Nsabimana submit that the Trial Chamber erred in law and in fact in relying on Exhibits P113, P114, and P185 as well as on the testimony of Witness Des Forges concerning Nsabimana's 1996 phone conversations to establish their criminal responsibility.[557]

237. Prior to considering the challenges with respect to each piece of evidence, the Appeals Chamber observes that the Trial Chamber did not rely on Exhibits P114 and P185 in support of any of Nyiramasuhuko's convictions.[558] Contrary to Nyiramasuhuko's submissions,[559] the Trial Judgement reflects that Exhibits P114 and P185 were relied upon in relation to Nsabimana's Swearing-In Ceremony only to rebut Nsabimana's assertion that he did not understand the

[553] Exhibit P114 (Interview with Nsabimana, dated 1 October 1994). The English translation of the document was admitted as Exhibit P114A and the French original as Exhibit P114B. The Appeals Chamber conducted its analysis on the basis of the English version as it was the version the Trial Chamber relied upon. It will refer to this version as "Exhibit P114" in this Judgement.
[554] Exhibit P113 (*The Truth About the Massacres in Butare*, by Nsabimana). The English version of the document initialed by Nsabimana was admitted as Exhibit P113A and the French translation as Exhibit P113B. The Appeals Chamber conducted its analysis on the basis of the English version as it was the version the Trial Chamber relied upon. It will refer to this version as "Exhibit P113" in this Judgement. Nsabimana tendered the French original of the letter, which was admitted as Exhibit D494A.
[555] Exhibit P185 (Telephone conversation with Alison Des Forges, March 1996). The French original was admitted as Exhibit P185A and the English translation as Exhibit P185B. The Appeals Chamber conducted its analysis on the basis of the English version as it was the version the Trial Chamber relied upon. It will refer to this version as "Exhibit P185" in this Judgement.
[556] Alison Des Forges, T. 9 June 2004 p. 51, *referring to* conversations of 25 March and 3 April 1996.
[557] Nyiramasuhuko Notice of Appeal, para. 1.17; Nyiramasuhuko Appeal Brief, paras. 182-184, 658; Ntahobali Notice of Appeal, paras. 278, 279; Ntahobali Appeal Brief, paras. 772-783; Nsabimana Notice of Appeal, paras. 64, 66, 75-79; Nsabimana Appeal Brief, paras. 160-179, 269-307. Ntahobali also contends that the Trial Chamber erred in assessing Exhibit P113 and Witness Des Forges's testimony on her phone conversations with Nsabimana. Similarly, Nsabimana submits that the Trial Chamber erred in assessing Exhibits P113 and P114. *See* Ntahobali Appeal Brief, paras. 759, 774, 775, 778, 780, 782; Nsabimana Notice of Appeal, paras. 64-66; Nsabimana Appeal Brief, paras. 180-202, 303, 305. These allegations have been addressed together with Ntahobali's and Nsabimana's submissions regarding the assessment of the evidence of each relevant incident. *See infra*, Sections V.G, V.I.2(v), VI.D.2(a)(i). The Appeals Chamber also notes that Nyiramasuhuko further challenges the Trial Chamber's reliance on a correspondence from Nsabimana to the Prosecutor dated 20 January 1997 admitted as Exhibit D492 (Correspondence from Nsabimana to the Prosecutor of the Tribunal, Carla Del Ponte, 20 January 1997). *See* Nyiramasuhuko Appeal Brief, para. 658. However, since the Trial Chamber did not rely on Exhibit D492 in support of any of its findings, the Appeals Chamber declines to address Nyiramasuhuko's contention in relation to this particular exhibit.
[558] Nyiramasuhuko Appeal Brief, para. 658.

inflammatory nature of the speeches made during the ceremony.[560] Accordingly, the Appeals Chamber declines to address Nyiramasuhuko's contentions as they relate to Exhibits P114 and P185 and will only examine her claim concerning Witness Des Forges's testimony about phone conversations the witness had with Nsabimana.

1. Exhibits P113 and P114

238. During Witness Des Forges's testimony on 8 June 2004, the Trial Chamber admitted into evidence Exhibit P113, a letter written by Nsabimana entitled "*The Truth about the Massacres in Butare*",[561] which Nsabimana sent to Witness Des Forges after telephone conversations between the two in March and April 1996.[562] The Trial Chamber also admitted as Exhibit P114, the transcript of a journalist's interview of Nsabimana dated 1 October 1994.[563] In admitting Exhibits P113 and P114, the Trial Chamber observed that Witness Des Forges's expert report relied upon these documents and determined that they could be admitted through her.[564] During his examination-in-chief, Nsabimana affirmed that Exhibit P113 was the English version of a letter he wrote in French and sent to Witness Des Forges in both French and English.[565] Nsabimana explained that he was not the one who communicated Exhibit P114 to Alison Des Forges, but that he did not object to the introduction of the document in order not to hinder the progress of the proceedings and because what was contained in the document was not 100 percent different from his own way of seeing things or his own writing on certain issues.[566]

239. In the Trial Judgement, the Trial Chamber noted the objections raised by Nsabimana that Exhibits P113 and P114 were accepted only for the purpose of "establishing the basis for Des Forges'[s] opinions" and "contradictions, if necessary".[567] The Trial Chamber rejected these contentions, noting that its deliberations on the admission of Exhibits P113 and P114 necessarily "implicate[d] the weight and probative value" to be attributed to these exhibits.[568] The Trial Chamber further recalled that "Nsabimana acknowledged that Prosecution Exhibit P113 was his

[559] Nyiramasuhuko Appeal Brief, para. 658.
[560] *See* Trial Judgement, paras. 887-890.
[561] *See* Alison Des Forges, T. 8 June 2004 pp. 47-49.
[562] *See* Alison Des Forges, T. 8 June 2004 pp. 35, 36; Exhibit P113 (*The Truth About the Massacres in Butare*, by Nsabimana).
[563] Alison Des Forges, T. 8 June 2004 p. 54; Exhibit P114 (Interview with Nsabimana, dated 1 October 1994).
[564] Alison Des Forges, T. 8 June 2004 pp. 49 ("On the basis of all the above the Chamber finds that Nsabimana document is admissible and that it maybe [*sic*] admitted through the Expert Witness Dr. Alison Des Forges who is relying on it as one of the sources of information for the opinion she makes in her report."), 60-62. *See also* Alison Des Forges, T. 9 June 2004 p. 12.
[565] Nsabimana, T. 17 October 2006 pp. 34, 35.
[566] Nsabimana, T. 13 November 2006 p. 15 (French) ("*Je me suis pas opposé, simplement parce que ce qui est dedans n'est pas … n'est pas 100% différent de ma pensée, de ma façon de voir et différent de ce que j'ai écrit, dans certains cas*."); T. 22 November 2006 p. 47 (French).
[567] Trial Judgement, paras. 603, 2799.

own, including all that it entails, but that he preferred to rely on the French version of the document introduced as Defence Exhibit 494" and that "Nsabimana stated that Prosecution Exhibit P114 reflected his own views."[569] The Trial Chamber further stated that, "[b]ased upon Nsabimana's acknowledgement that these documents were authentic", it would evaluate the weight and probative value of Exhibits P113 and P114 in light of the other evidence, including the testimonies of Witness Des Forges and Nsabimana about these exhibits.[570]

240. The Trial Chamber relied on Exhibit P113 in finding Ntahobali criminally liable for killings perpetrated at the Hotel Ihuliro roadblock.[571] In particular, the Trial Chamber found that Exhibit P113 corroborated other evidence that Tutsis were beaten, raped, and killed at the roadblock[572] as well as additional evidence that Ntahobali manned the roadblock and utilised it to abduct and kill Tutsis.[573] The Trial Chamber also relied on Exhibits P113 and P114 in finding that Nsabimana was aware of the night-time attacks at the Butare Prefecture Office, posted *gendarmes* or soldiers at the prefectoral office sometime between 5 and 15 June 1994, and was aware of a plan to kill Tutsis and of the genocidal intent of those who perpetrated crimes at this office.[574]

241. Nsabimana and Ntahobali submit that the Trial Chamber erred in admitting and relying on Exhibits P113 and P114 to establish their criminal responsibility.[575] In particular, Nsabimana contends that the Trial Chamber violated his right to a fair trial in failing to consider whether the admission of these documents would infringe his fair trial rights, in particular his right to remain silent,[576] and in failing to anticipate that their admission would cause him prejudice.[577]

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[568] Trial Judgement, paras. 604, 2800.
[569] Trial Judgement, para. 2800, *referring to* Nsabimana, T. 22 November 2006 pp. 39, 40. *See also* Trial Judgement, para. 604.
[570] Trial Judgement, para. 2800. *See also ibid*., para. 604.
[571] Trial Judgement, paras. 3113, 3118-3127, 3141-3144, 5842, 5844, 5845, 5971, 6053-6056, 6077-6081, 6094, 6100, 6101, 6121, 6168, 6169, 6184, 6185.
[572] Trial Judgement, paras. 3143, 3144, *referring to* Exhibit P113 (*The Truth About the Massacres in Butare*, by Nsabimana), p. K0016630 (Registry pagination) ("[i]n town, there were some killings at the roadblocks. Some roadblocks were manned by soldiers, others by the *Interahamwe*, or both at the same time. Among the most formidable roadblocks was the one in front of the house of the University Rector, Ntahobari [*sic*], whose son Sharom was in charge of it"). *See also* Trial Judgement, para. 3009.
[573] Trial Judgement, paras. 3127, 3128.
[574] Trial Judgement, paras. 2807, 2812, 5904, 5906. The Trial Chamber also relied on Exhibit P114 in rejecting Nsabimana's testimony that he did not understand the inflammatory nature of President Sindikubwabo's speech at the 19 April 1994 ceremony during which he was sworn-in as prefect of Butare. *See* Trial Judgement, paras. 886-890. The Appeals Chamber notes, however, that Nsabimana was not convicted in relation to this event and that the Trial Chamber did not rely on its finding about Nsabimana's understanding of the nature of Sindikubwabo's speech in support of any of Nsabimana's convictions. On this matter, *see infra*, Section VI.B.
[575] Ntahobali Appeal Brief, paras. 772-779; Nsabimana Appeal Brief, paras. 160-179, 269-307. The Appeals Chamber notes that, while also referring to Exhibit P114 in his notice of appeal, Ntahobali did not develop any submissions with respect to this particular piece of evidence in his appeal brief. The Appeals Chamber therefore dismisses Ntahobali's undeveloped allegation of error concerning Exhibit P114. By contrast, Nsabimana challenges the use of both Exhibits P113 and P114 and developed submissions in respect of both exhibits in his appeal brief.
[576] Nsabimana Appeal Brief, paras. 276, 281-288, 298-300, 304, 306. Nsabimana refers in particular to Articles 19(1), 20(4)(a), and 20(4)(g) of the Statute and to Rules 85, 89(B) and (D), and 95 of the Rules. *See ibid.*, paras. 298, 302, 304;

He acknowledges that he did not object to the admission of the documents, but stresses that he did not know at the time that they could be used against him.[578]

242. Ntahobali argues that the Trial Chamber violated Rule 89(C) of the Rules by admitting Exhibit P113 given the fact that it was a statement by a co-accused and "double hearsay" evidence.[579] In Ntahobali's view, statements of a co-accused posterior to the 1994 events lack sufficient reliability and probative value given the obvious incentive of the author to limit his responsibility while accusing his co-accused.[580] He also asserts that its "nature of double-hearsay" deprived the statement of any probative value.[581] Ntahobali contends that the Trial Chamber should have refused to admit Exhibit P113 into evidence as the probative value of the statement was outweighed by the prejudice he suffered.[582]

243. Nsabimana also contends that it was erroneous for the Trial Chamber to consider that the document admitted as Exhibit P114, a document which was neither signed nor initialed by him and of which Witness Des Forges did not disclose the origin, was his writing.[583] He argues that the fact that he said that the views in the document did not differ completely from his own views did not make him the author of the document and did not allow the Trial Chamber to attribute extracts from the document to him.[584]

244. In addition, Ntahobali and Nsabimana submit that the Trial Chamber erred in using Exhibits P113 and P114 in convicting them given that the Trial Chamber: (i) admitted these exhibits for the limited purpose of identifying one of the sources relied upon by Witness Des Forges in formulating her expert opinions and of establishing contradictions;[585] and (ii) stated that an accused's writing or statement could not be considered as proof of its content but only in the evaluation of the credibility of his testimony.[586] Nsabimana submits that, in contravention of well-established jurisprudence that requires trial chambers to specify the purpose for admission of a

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Nsabimana Reply Brief, para. 132. Nsabimana highlights that the Trial Chamber was aware that the statements reflected in Exhibits P113 and P114 were against his interests. *See ibid.*, para. 299, *referring* to Trial Judgement, para. 2802.

[577] Nsabimana Appeal Brief, para. 278. Nsabimana argues that "at the time the document was produced, [he] could have been uninformed or was not informed that the document would be used (and will be used) as evidence against him, in violation of his right not to incriminate himself." *See ibid.*, para. 279 (emphasis omitted). Nsabimana does not specify whether he refers to Exhibit P113 or Exhibit P114 in this regard.

[578] Nsabimana Appeal Brief, paras. 279, 301; Nsabimana Reply Brief, paras. 118, 119.

[579] Ntahobali Notice of Appeal, para. 279; Ntahobali Appeal Brief, paras. 777-779.

[580] Ntahobali Appeal Brief, paras. 777, 778.

[581] Ntahobali Appeal Brief, para. 779.

[582] Ntahobali Appeal Brief, para. 779.

[583] Nsabimana Appeal Brief, paras. 171, 173-175, fn. 122. *See also* Nsabimana Reply Brief, paras. 80, 81, 84, 114-116.

[584] Nsabimana Appeal Brief, para. 177.

[585] Ntahobali Appeal Brief, para. 774, *referring to* Alison Des Forges, T. 8 June 2004 pp. 47-49; Nsabimana Appeal Brief, paras. 163, 165, 274, 275, *referring to* Alison Des Forges, T. 8 June 2004 p. 53 (French); Nsabimana Reply Brief, para. 117.

[586] Ntahobali Appeal Brief, para. 773; Nsabimana Notice of Appeal, para. 76; Nsabimana Appeal Brief, paras. 160, 161, 163-167, 178, 179, 294-297.

statement, the Trial Chamber failed to indicate that the documents could be used for proof of their contents.[587] Ntahobali stresses that, because he relied on the Trial Chamber's representations that Exhibit P113 would only be admitted as a source relied upon by the expert witness or to evaluate the credibility of his testimony, he did not defend against its content, as he did not understand that it would be used for the purpose of establishing facts in support of his guilt.[588] In the same vein, Nsabimana argues that he was prejudiced as, had he known that Exhibits P113 and P114 could be relied upon by the Trial Chamber as it did, he would have prepared an adequate defence.[589] Ntahobali adds that, to the extent Exhibit P113 was used to support Witness Des Forges's testimony, it could not be used to assess the acts and conduct of the co-Accused given Witness Des Forges's status as an expert witness.[590]

245. The Prosecution responds that neither Ntahobali nor Nsabimana demonstrates that the Trial Chamber abused its discretion in admitting Exhibits P113 and P114.[591] According to it, both exhibits were properly admitted under Rule 89(C) of the Rules.[592] As regards Exhibit P114 in particular, the Prosecution emphasises that Nsabimana stated that the document reflected his own views, that it could be used, and that he "ha[d] nothing against it".[593] It also argues that Nsabimana never questioned its admissibility or authenticity.[594]

246. The Prosecution further responds that the Trial Chamber's rulings reflect that Exhibits P113 and P114 were not admitted for the restricted purpose of assessing credibility and that the Trial Chamber did not abuse its discretion in admitting the documents.[595] It argues that the 23 November 2006 Oral Decision relied upon by Nsabimana was not a general statement of law that all written statements by accused persons would be dealt with in a particular manner, but rather referred specifically to the use of an interview Nsabimana gave to Tribunal investigators which was not presented during the Prosecution case-in-chief.[596] In the Prosecution's view, Exhibits P113 and

[587] Nsabimana Appeal Brief, paras. 270-273. *See also* Nsabimana Reply Brief, paras. 127-129.
[588] Ntahobali Appeal Brief, para. 776.
[589] Nsabimana Appeal Brief, para. 179.
[590] Ntahobali Appeal Brief, para. 775.
[591] Prosecution Response Brief, paras. 1129, 1130, 1324, 1325, 1327, 1331, 1335, 1338. The Prosecution adds that Nsabimana's contentions should be dismissed as he merely repeats arguments already unsuccessfully advanced at trial. *See ibid.*, para. 1303, *referring to The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Final Trial Brief of Sylvain Nsabimana's Trial, 17 February 2009 (originally filed in French, filed in English on 6 April 2009) (confidential) ("Nsabimana Closing Brief"), paras. 203, 204.
[592] Prosecution Response Brief, para. 1332. *See also ibid.*, paras. 1333, 1334.
[593] Prosecution Response Brief, para. 1328, *referring to* Nsabimana, T. 22 November 2006 p. 35.
[594] Prosecution Response Brief, para. 1327. *See also ibid.*, para. 1310.
[595] Prosecution Response Brief, paras. 1129, 1130, 1331, 1334, 1335, 1338.
[596] Prosecution Response Brief, para. 1308. *See also ibid.*, paras. 1309-1312.

P114 were not admitted as prior statements and it was correct for the Trial Chamber to ascribe to them weight and probative value, given that Nsabimana accepted their contents as his own.[597]

247. Nsabimana replies that, contrary to the Prosecution's submissions, he never stated or accepted that the content of Exhibits P113 and P114 reflected the truth and that merely stating that Exhibit P114 could be used does not mean that he conceded that the document was his or approved its content.[598] He also maintains that the 23 November 2006 Oral Decision should have applied to Exhibits P113 and P114 and stresses that these exhibits were not adduced by the Prosecution for the proof of their contents.[599] He reiterates that he did not have any interest in objecting to the admissibility of Exhibits P113 and P114 since he assumed that they were admitted only to support Witness Des Forges's expert opinion.[600]

248. The Appeals Chamber notes that, although his co-accused objected to the admission of Exhibits P113 and P114 partly because Exhibit P114 was unsigned and Exhibit P113 was not tendered by him, Nsabimana did not object to their admission and did not raise any allegation of violation of his right against self-incrimination or any other fair trial right when the documents were admitted.[601] Nsabimana did not raise any claim of this sort when questioned on the exhibits during cross-examination or in his closing submissions.[602] To the contrary, he stated that he accepted Exhibit P113, which he had signed, and made it clear that he had "nothing against" Exhibit P114 and that it could be used in cross-examination.[603] The record also reflects that Nsabimana is the one who communicated Exhibit P113 to the Prosecution in 1997 "to help the ICTR establish the truth"[604] and that Nsabimana's counsel requested the admission of the original French version of Exhibit P113, arguing that there was no reason not to admit this document written by Nsabimana.[605] The Appeals Chamber does not consider that Nsabimana's purported incomprehension that Exhibits P113 and P114 could be used against him prevented him from raising at trial any violation of his fair trial rights when the documents were admitted, regardless of the weight and probative value subsequently attributed to them by the Trial Chamber. Recalling that a "matter must be raised

[597] Prosecution Response Brief, para. 1329. *See also ibid.*, para. 1310.
[598] Nsabimana Reply Brief, paras. 79, 122-124.
[599] Nsabimana Reply Brief, paras. 85-89, *referring to* Nsabimana, T. 23 November 2006 p. 61.
[600] Nsabimana Reply Brief, paras. 116-119.
[601] Alison Des Forges, T. 8 June 2004 pp. 50-63.
[602] *See* Nsabimana Closing Brief, paras. 202-205.
[603] Nsabimana, T. 17 October 2006 p. 42 (French). Nsabimana's counsel also stated that Nsabimana did not contest Exhibit P113. *See ibid.*, p. 39 (French).
[604] *See* Exhibit D492 (Correspondence from Nsabimana to the Prosecutor of the Tribunal, Carla Del Ponte, dated 20 January 1997), p. 1.
[605] Nsabimana, T. 17 October 2006 pp. 44, 45 (French).

with the court at the time the problem is perceived in order to enable the problem to be remedied",[606] the Appeals Chamber dismisses Nsabimana's submissions in this respect.

249. As to Ntahobali's contention that Exhibit P113 lacked sufficient probative value to be admitted under Rule 89(C) of the Rules, the Appeals Chambers considers that the mere fact that a statement is made by a co-accused does not *ipso facto* render the document's contents so unreliable that it could not be admitted under Rule 89(C) of the Rules.[607] Likewise, Ntahobali's argument that the Trial Chamber erred in admitting Exhibit P113 because it was double-hearsay has no merit, as the Rules do not prohibit the admission of hearsay evidence as long as it is of probative value.[608] Ntahobali does not show that Exhibit P113 was so lacking in terms of indicia of reliability that it lacked probative value and was therefore inadmissible. He also fails to substantiate his claim that the probative value of the statement was outweighed by the prejudice he allegedly suffered. In this regard, the Appeals Chamber observes that Ntahobali was able to cross-examine Nsabimana, who was the author of the statement.[609] Thus, any prejudice that might have resulted from admitting an out-of-court statement by a co-accused was effectively remedied.

250. Regarding Nsabimana's challenge to the Trial Chamber's consideration of the document admitted as Exhibit P114 as his own writing, the Appeals Chamber observes that the exhibit is an unsigned document entitled "Interview with Sylvain Nsabimana" dated 1 October 1994, which does not contain information about the circumstances of the interview or the person who conducted the interview or who transcribed it. The Appeals Chamber notes that Witness Des Forges testified that she had received a copy of Exhibit P114 from Nsabimana.[610] During his cross-examination, Nsabimana explained that:

> When Ms. Des Forges tendered this document interview with Sylvain Nsabimana of the 1st of October l994, the French version, like the English here, I did not want to challenge this document simply not to hinder the advance that the Chamber needs to make in these proceedings, but I don't know who gave this document to Ms. Des Forges. If you are interested, I can tell you roughly how she had this document from what I imagine, but I am not the one who gave this document to Ms. Des Forges. I did not oppose it simply because what is said in here is not a hundred percent different from my thinking, my view, and it is [not] different from what I wrote in some instances,

[606] *See Čelebići* Appeal Judgement, para. 641. *See also supra*, para. 128.
[607] *See Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.1, Decision on Appeals against Decision Admitting Material Related to Borovčanin's Questioning, 14 December 2007, para. 50 ("However, it would be wrong to exclude certain evidence solely because of the supposedly intrinsic lack of reliability of the content of a suspect's questioning in relation to persons who later became that suspect's co-accused.").
[608] *See*, *e.g.*, *Nahimana et al.* Appeal Judgement, paras. 215, 509 ("The Appeals Chamber recalls first that it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value, and that it is for Appellant Nahimana to demonstrate that no reasonable trier of fact would have taken this evidence into account because it was second-degree hearsay evidence, which he has failed to do." (internal references omitted)), *referring*, *inter alia*, *to Gacumbitsi* Appeal Judgement, paras. 115, 133, *Naletilić and Martinović* Appeal Judgement, para. 217, Semanza Appeal Judgement, para. 159.
[609] Nsabimana, T. 17 October 2006 pp. 48-82; T. 18 October 2006 pp. 4-87.
[610] Alison Des Forges, T. 8 June 2004 p. 50. *See also ibid*., pp. 54, 57.

> otherwise, apart from this document which is in English and even the one in French, I have the same observations […].[611]

251. When questioned about specific passages of Exhibit P114 in cross-examination, Nsabimana confirmed in one instance that what was written was exact,[612] in two others that it was not,[613] that it was "very probable" that he had said particular words contained in the document to someone,[614] or referred to his examination-in-chief.[615] More importantly, Nsabimana also expressly stated that the words contained in Exhibit P114 were not necessarily his and insisted that he could not accept the statements in the document as his and was referring to his testimony for his views on the questions that were asked to him.[616] It is in this context that Nsabimana stated that the exhibit could be used and that he had "nothing against it."[617] A careful review of the transcripts, together with the video-recording, of the relevant parts of Nsabimana's testimony reflects that Nsabimana unambiguously denied authorship of Exhibit P114 and insisted that the views attributed to him in the document were not necessarily his as he had never seen the document before and could not be sure it was a proper transcription of the interview he had given.[618] When specifically asked if he

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[611] Nsabimana, T. 13 November 2006 p. 14. *See also* T. 13 November 2006 p. 15 (French).
[612] Nsabimana, T. 27 November 2006 pp. 16, 17 (concerning a discussion he had with Bashimiki and Ndungutse regarding the post of Butare Prefect).
[613] Nsabimana, T. 22 November 2006 pp. 37, 38 (French) and p. 37 (English).
[614] Nsabimana, T. 22 November 2006 p. 44.
[615] Nsabimana, T. 13 November 2006 p. 12.
[616] Nsabimana, T. 13 November 2006 pp. 32 ("*Monsieur le Président, je suis prêt à répondre à la question, mais malheureusement, je suis en train de répondre dans un document qui... les paroles ne sont pas nécessairement les miennes. Mais je vous dis que... Permettez-moi de m'exprimer, une minute. Je vous ai expliqué les conditions dans lesquelles ce document, il a été reçu ici. Comme c'est un exhibit, Monsieur le Président m'avait proposé que... qu'on discute les questions posées. Je ne suis pas contre, mais dès que l'on : 'C'est bien ça ?', se référant sur ce document, je suis obligé de réagir. Et quand je réagis, généralement, ça ne donne pas... ça ne fait pas votre affaire*. […] *Mais me dire : 'Est-ce que c'est bien ça ?', je suis obligé de vous dire ' non', puisque je ne connais pas ce document comme étant pas le mien (sic) – vu la façon dont ce document a été transmis à Madame Des Forges. C'est tout*. […] *Monsieur le Président, l'auteur du document ou celui qui a transcrit le document à partir de sources que je ne connais pas, il l'a écrit. Donc, c'est bien ça qui est écrit.*"), 33 ("*Mais maintenant... maintenant, vous m'opposez à quelque chose où je vous dis que ça n'appartient qu'à un autre auteur. Comment voulez-vous que je vous fasse la comparaison ?*") (French); T. 22 November 2006 p. 43 ("I would like to add that I didn't give an interview to Madam Des Forges. We are dealing with a document, but which doesn't tell us to whom this interview was given, and I will not fail to mention that each time we refer to this document."). *See also ibid.*, p. 30 ("Ms Kadji: Mr. President, I think the witness has answered this question and he has explained to us his answer, and he has told us the problems of this document. Now, we want to have confirmed, word-for-word, what is written in this document. He has explained himself, Mr. President."). Having examined the original video-recording of Nsabimana's testimony, the Appeals Chamber notes that some aspects of his testimony were not fully or accurately transcribed in the French or English transcripts. The Appeals Chamber has referred to the version of the transcripts that accurately transcribed Nsabimana's live testimony and has deliberately omitted specific aspects of the transcripts when neither the English nor the French version accurately reflected the live testimony. *See*, *in particular*, video-recording of Nsabimana's testimony of 22 November 2006, at 20:00-23:00.
[617] Nsabimana, T. 22 November 2006 p. 35.
[618] Nsabimana, T. 22 November 2006 p. 45 ("I have the impression that it must have been Mr. Greg Barrow of the BBC at the YMCA. He was with his friend, James Stanley. That is the impression I have, and it would appear to me that this interview either – was given in English, I believe. I didn't speak French in that interview, which is why, well, the English, that is there, seems to be broken English to me. I don't have the document with me. I think those are the two people that I might have talked, and I think they are the ones who – they are the only ones whom I would have given a document, if they had it on video. This is not a transcription. I never had a video. I never had a transcript. And I've also been in contact with Ken Barrow and Stanley, but I never had this document. But I think it came from those people, and they are the ones who might have sent it to Madam Des Forges, that is the videocassette, and she's the one who might have put everything together to produce this document. But at the time that Madam Des Forges was producing this

agreed with the content of Exhibit P114, in particular that he was aware of a plan to exterminate the Tutsis, he responded that he did not.[619]

252. In these circumstances, the Appeals Chamber considers that the Trial Chamber erred in finding that Nsabimana stated that Exhibit P114 "reflected his own views" or "contained a faithful reflection of what he said during the interview"[620] and acknowledged that the document was "authentic".[621] The Trial Chamber also erred in relying on the exhibit as proof of Nsabimana's views, especially in finding that Nsabimana was aware of the plan to exterminate Tutsis when Nsabimana expressly testified to the contrary.[622] The Appeals Chamber will discuss the impact of this finding when examining Nsabimana's submissions on his responsibility for aiding and abetting by omission crimes committed at the Butare Prefecture Office in relation to which the Trial Chamber relied upon Exhibit P114.[623] Accordingly, the Appeals Chamber considers it unnecessary to discuss Nsabimana's remaining arguments regarding Exhibit P114 summarised above.

253. Turning to Ntahobali's and Nsabimana's arguments that the Trial Chamber's use of Exhibit P113 was inconsistent with its own decisions, the Appeals Chamber observes that, in admitting Exhibit P113 during Witness Des Forges's testimony, the Trial Chamber noted that it was relevant and probative of her expert opinion and a source relied upon in her expert report.[624] However, the Trial Chamber's oral decision to admit the statement in no way reflects that the Trial Chamber limited its use to supporting Witness Des Forges's expert opinion. Indeed, although Exhibit P113 was admitted through Witness Des Forges, the Trial Chamber's rulings reflect that it was not admitted as expert opinion evidence.[625] Ntahobali's argument that Exhibit P113 was used beyond the limitations imposed on expert evidence is therefore without merit.

254. The Appeals Chamber also notes that, contrary to Ntahobali's and Nsabimana's submissions, the Trial Chamber did not state that co-accused's statements shall only be used for the purposes of assessing the credibility of their testimonies. Ntahobali and Nsabimana advance their arguments by referring to oral rulings and decisions of the Trial Chamber which reflect the Trial

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I tried to imagine from where the document has come. Unfortunately I never had it either, from those journalists or Madam Des Forges herself.").

[619] Nsabimana, T. 22 November 2006 p. 45 ("My answer to you is no, Counsel. As the things are here and as you put them, it is not the same thing. We can agree on certain terms and certain words and certain things, but not as you put it, which is why I'm refusing. That is why I'm telling you I was not aware of that plan.").

[620] Trial Judgement, para. 887.

[621] Trial Judgement, para. 2800, *referring to* Nsabimana, T. 22 November 2006 pp. 39, 40. *See also* Trial Judgement, para. 604.

[622] Trial Judgement, para. 5904, fn. 14768; Nsabimana, T. 22 November 2006 p. 45. *See supra*, para. 251.

[623] *See infra*, Section VI.D.2(a)(i).

[624] Alison Des Forges, T. 8 June 2004 p. 49.

[625] Alison Des Forges, T. 8 June 2004 pp. 60-62. *See also* Nsabimana, T. 17 October 2006 p. 43. The Appeals Chamber notes that the same principle was applied by the Trial Chamber in relation to Exhibit P115, which, as Exhibit P113, was

Chamber's discretionary decision to limit the use of statements from the co-Accused to prosecutorial authorities for impeachment purposes and could not reasonably be interpreted as applying to all statements by the co-Accused.[626] It also bears noting that, when Nsabimana's counsel sought the admission of Exhibit D494, the French original of Exhibit P113, the Trial Chamber did not accept the arguments that Exhibit P113 had not been admitted for the purpose of establishing the truth of its contents.[627]

255. In light of the foregoing, the Appeals Chamber finds that Ntahobali and Nsabimana have failed to demonstrate that the Trial Chamber erred in admitting or placing undue reliance on Exhibit P113. Although the Appeals Chamber does not find that the Trial Chamber erred in admitting Exhibit P114, it finds that the Trial Chamber erred in considering Exhibit P114 as reflecting Nsabimana's views and in placing undue reliance on it as a result.

2. Exhibit P185

256. During the cross-examination of Nsabimana, the Prosecution tendered a French transcript of a March 1996 phone interview between Witness Des Forges and Nsabimana that the Trial Chamber admitted as Exhibit P185.[628] Nsabimana authenticated the document when it was admitted.[629] As indicated in the Trial Judgement, Exhibit P185 reflects that Nsabimana saw a Peugeot 504 that belonged to someone "he knew".[630] Exhibit P185 further reflects that Nsabimana learned that the person that he saw in the vehicle was named "Shalom".[631]

257. The Trial Chamber found Ntahobali responsible for aiding and abetting the killing of the Rwamukwaya family based, in part, on evidence that Ntahobali was in possession of Rwamukwaya's Peugeot 504 around the time the members of the Rwamukwaya family were

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used as a source of Witness Des Forges's expert report and was tendered by the Prosecution during her testimony. *See* Alison Des Forges, T. 9 June 2004 p. 12.

[626] *See* Ntahobali Appeal Brief, para. 773, *referring to* Nsabimana, T. 21 November 2006 pp. 71-74 (oral ruling relating to an interview of Nsabimana given to Prosecution investigators dated 18 July 1997); Nsabimana Appeal Brief, paras. 160, 161, 163-167, 178, 179, 294-297, *referring to* Nsabimana, T. 23 November 2006 p. 61 (oral ruling relating to an interview of Nsabimana by Prosecution investigators dated 18 July 1997), *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case No. ICTR-98-42-T, Decision on Ntahobali's Motion to Admit Kanyabashi's Custodial Statements, 15 September 2006, para. 18 (relating to an interview of Kanyabashi given to Belgian authorities upon his arrest dated 28 June 1995), *and The Prosecutor v. Pauline Nyiramasuhuko et al*., Case No. ICTR-98-42-T, Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997, 15 May 2006, para. 82 (relating to two interviews of Ntahobali by Prosecution investigators dated 24 and 26 July 1997).

[627] Nsabimana, T. 17 October 2006 pp. 40-43.

[628] Nsabimana, T. 27 November 2006 pp. 65, 66.

[629] Trial Judgement, para. 887, *referring to* Nsabimana, T. 27 November 2006 pp. 64-66. The Trial Chamber noted that, while testifying, Nsabimana recognised Exhibit P185 as having been attached to a letter he sent to the Prosecution in January 1997. *See* Trial Judgement, para. 887, *referring to* Nsabimana, T. 27 November 2006 pp. 64-66.

[630] Trial Judgement, paras. 2405, 3214, *referring to* Exhibit P185 (Telephone conversation with Alison Des Forges, March 1996), p. K0045092 (Registry pagination).

[631] Exhibit P185 (Telephone conversation with Alison Des Forges, March 1996), p. K0045092 (Registry pagination).

killed.[632] In assessing this evidence, the Trial Chamber observed that, during his testimony, Nsabimana agreed that the owner of the Peugeot 504 he referred to in Exhibit P185 was Rwamukwaya.[633] The Trial Chamber further observed that, contrary to what was contained in Exhibit P185, Nsabimana testified that he saw Ntahobali driving a different Peugeot 504.[634] The Trial Chamber noted that Nsabimana's testimony departed from Exhibit P185, expressed concern that his testimony was intended to protect Ntahobali, and concluded that, in light of other consistent evidence, "the Peugeot 504 in which Nsabimana saw Ntahobali is the one belonging to Rwamukwaya".[635]

258. Similar to his submissions concerning Exhibit P113, Ntahobali argues that statements of co-accused posterior to the events lack sufficient probative value and that Exhibit P185 should not have been admitted as it constitutes double-hearsay.[636] Ntahobali also contends that the Trial Chamber improperly used Exhibit P185 for purposes beyond evaluating the credibility of its author.[637] He adds that the Trial Chamber erred when it preferred the account in Exhibit P185, which it had elsewhere stated it would view with caution, over Nsabimana's testimony that contradicted Exhibit P185.[638]

259. The Prosecution responds that the Trial Chamber did not abuse its discretion in admitting and using Exhibit P185.[639]

260. The Appeals Chamber reiterates that posterior statements of co-accused and hearsay evidence are not *per se* barred from admission under Rule 89 of the Rules because of their alleged intrinsic lack of probative value.[640] Ntahobali's arguments in this respect are therefore rejected.[641]

261. The Appeals Chamber finds that Ntahobali also fails to demonstrate that the Trial Chamber erred in its use of Exhibit P185. Contrary to his assertion, the Trial Judgement indicates that the Trial Chamber limited the use of Exhibit P185 to the purposes of impeachment, relying only on testimonial evidence to establish Ntahobali's possession of Rwamukwaya's vehicle.[642]

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[632] Trial Judgement, paras. 3213-3215, 3219, 5852-5855, 6053-6055, 6100, 6101, 6121, 6168, 6169.
[633] Trial Judgement, para. 3214, *referring to* Nsabimana, T. 28 November 2006 pp. 11, 12.
[634] Trial Judgement, para. 3214, *referring to* Nsabimana, T. 28 November 2006 p. 11.
[635] Trial Judgement, para. 3214.
[636] Ntahobali Appeal Brief, paras. 777-779.
[637] Ntahobali Appeal Brief, paras. 773, 774.
[638] Ntahobali Appeal Brief, paras. 779, 781.
[639] Prosecution Response Brief, paras. 1129, 1130.
[640] *See supra*, para. 249.
[641] The Appeals Chamber observes that none of the parties objected to the admission of the document when questioned in this respect by the Presiding Judge. *See* Nsabimana, T. 27 November 2006 p. 65.
[642] Trial Judgement, para. 3219. Noting the discrepancy with Exhibit P185, the Trial Chamber decided to disregard the testimony of Nsabimana that he did not see Ntahobali in Rwamukwaya's Peugeot 504 and instead relied on the consistent testimony of several witnesses who gave evidence that Ntahobali was in possession of Rwamukwaya's

262. Accordingly, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber committed an error in relation to Exhibit P185.

3. 1996 Telephone Conversations

263. The Appeals Chamber observes that, when assessing Witness TA's evidence concerning an attack at the Butare Prefecture Office that occurred in mid-May 1994, the Trial Chamber noted that the statement, which Nsabimana gave to Witness Des Forges during a telephone conversation in 1996, that "soldiers and others were coming to take away women to rape them and other people were being selected to be killed"[643] was "consistent" with the testimony of Witness TA.[644] When considering the number of refugees abducted and killed from the prefectoral office, it noted that "Des Forges testified that Nsabimana told her he did not know how many refugees were taken away from the [Butare Prefecture Office], but that he did know that this was happening."[645] The Trial Chamber found Nyiramasuhuko and Ntahobali criminally responsible for ordering the killings of Tutsi refugees taken from the prefectoral office during this specific attack and Ntahobali responsible for raping Witness TA during the attack.[646]

264. Nyiramasuhuko submits that, by relying on Witness Des Forges's testimony about Nsabimana's statement during their 1996 telephone conversations to corroborate Witness TA's testimony, the Trial Chamber contradicted its own position that prior statements from co-Accused would be admitted for the sole purpose of testing the credibility of the witness.[647] She argues that this aspect of Witness Des Forges's testimony should not have been admitted as "[t]his kind of extrajudicial statement, made after the fact and overwhelmingly against an accused to limit his own responsibility, is inadmissible against co-accused at common law".[648] Ntahobali asserts that the Trial Chamber should not have admitted Witness Des Forges's testimony about Nsabimana's statements during her 1996 telephone conversations with him as it was hearsay and lacked sufficient probative value.[649]

265. The Prosecution did not respond to Nyiramasuhuko's and Ntahobali's arguments concerning this aspect of Witness Des Forges's testimony.

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vehicle around that time. *See ibid.*, paras. 3213, 3214. The Trial Chamber also used Exhibit P185 in assessing Nsabimana's testimony regarding Sindikubwabo's 19 April 1994 speech. *See ibid.*, paras. 887, 889.
[643] Trial Judgement, para. 2632, *referring to* Alison Des Forges, T. 9 June 2004 p. 51.
[644] Trial Judgement, para. 2632.
[645] Trial Judgement, para. 2774, *referring to* Alison Des Forges, T. 9 June 2004 p. 51.
[646] *See infra*, Sections IV.F.1, V.I.1.
[647] Nyiramasuhuko Appeal Brief, para. 184, *referring to* Nsabimana, T. 21 November 2006 pp. 73-75.
[648] Nyiramasuhuko Appeal Brief, para. 184, *referring to R v. Mc Fall* [1980] I.R.C.S. 321.
[649] Ntahobali Appeal Brief, para. 779.

266. The Appeals Chamber considers that Nyiramasuhuko's arguments fail to appreciate that Witness Des Forges's testimony on Nsabimana's oral statements constitutes testimonial evidence and is not akin to a prior statement given by an accused outside a courtroom. As such, the impugned aspect of Witness Des Forges's testimony is not subject to any rules the Trial Chamber may have adopted regarding accused's prior statements or the jurisprudence that Nyiramasuhuko cites in support of her claim. The Appeals Chamber further observes that the Trial Chamber's oral ruling upon which Nyiramasuhuko relies in support of her claim was confined to the use of statements given by a co-accused to Tribunal investigators.[650] Nyiramasuhuko's arguments are therefore rejected.

267. Turning to Ntahobali's contention, the Appeals Chamber observes that Witness Des Forges was allowed to testify as an expert in history and the human rights situation in Rwanda up to and including the events of 1994.[651] The Appeals Chamber recalls that expert witnesses are ordinarily afforded significant latitude to offer opinions within their expertise and that their views need not be based upon first-hand knowledge or experience.[652] It is also settled jurisprudence that experts are allowed to rely on a variety of sources in support of their conclusions and that this may include hearsay.[653] Ntahobali's argument that the impugned aspect of Witness Des Forges's testimony should have been excluded because it was hearsay is therefore without merit. Ntahobali's unsubstantiated claim that it lacked probative value is likewise rejected.

268. Accordingly, the Appeals Chamber concludes that Nyiramasuhuko and Ntahobali have not demonstrated that the Trial Chamber erred in admitting Witness Des Forges's testimony concerning her 1996 telephone conversations with Nsabimana or in placing undue reliance on this aspect of Witness Des Forges's testimony.

4. Conclusion

269. Based on the foregoing, the Appeals Chamber dismisses the relevant parts of Grounds 4 and 19 of Nyiramasuhuko's appeal, Ground 3.9 of Ntahobali's appeal, and the part of Ground 7 of Nsabimana's appeal related to Exhibit P113. However, the Appeals Chamber finds that the Trial Chamber erred in considering Exhibit P114 as reflecting Nsabimana's views and in placing undue reliance on it as a result. The impact of this finding will be discussed in Section VI.D.2 below.

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[650] *See* Nyiramasuhuko Appeal Brief, para. 184, *referring to* Nsabimana, T. 21 November 2006 pp. 73-75 (oral ruling relating to an interview of Nsabimana given to Prosecution investigators dated 18 July 1997); *supra*, para. 254.
[651] Trial Judgement, para. 194, *referring to* Alison Des Forges, T. 7 June 2004 pp. 57-59.
[652] *Bagosora and Nsengiyumva* Appeal Judgement, para. 225; *Renzaho* Appeal Judgement, para. 287; *Nahimana et al.* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.
[653] *Bagosora and Nsengiyumva* Appeal Judgement, para. 226.

I. Participation of a Former Prosecution Legal Officer in the Preparation of the Trial Judgement (Ntahobali Ground 1.8; Ndayambaje Ground 13)

270. In the Trial Judgement, the Trial Chamber noted that, on reviewing the procedural history of the case in July 2009, it became aware that Chile Eboe-Osuji ("Eboe-Osuji"), the then Chief of the Chambers Support Section at the Tribunal, had participated in the present case as an employee of the Office of the Prosecutor in 1998 and 1999.[654] Considering the issue *proprio motu*, the Trial Chamber stated that:

> As an immediate precautionary measure, and before Mr. Eboe-Osuji had participated in any deliberations relating to the guilt or innocence of any of the various Accused, the Chamber determined he would preliminarily not be involved in the judgement drafting process. After reviewing relevant case law, the Trial Chamber concluded that it is unclear whether Mr. Eboe-Osuji's participation would raise a conflict of interest which would impact on the fair trial rights of the various Accused. However, out of an abundance of caution and intent on preserving both justice and the appearance of justice, the Chamber determined in November 2009 that Mr. Eboe-Osuji's involvement from the judgement drafting process would be excluded.[655]

271. Ntahobali and Ndayambaje submit that Eboe-Osuji's participation in the preparation of the Trial Judgement undoubtedly affects their right to a fair trial.[656] Specifically, Ntahobali asserts that Eboe-Osuji's participation in the work of the Trial Chamber in this case prior to his exclusion in November 2009 constitutes a serious conflict of interest or, at least, an appearance of conflict of interest.[657] He adds that the Trial Chamber erred in: (i) failing to take precautionary measures when Eboe-Osuji was hired as the Chief of the Chambers Support Section to avoid this situation; (ii) not providing sufficient details about the extent of Eboe-Osuji's participation in the work of the Trial Chamber; and (iii) allowing the prejudice to persist even though it became aware of the situation in July 2009.[658] Ndayambaje submits that, as a party to the proceedings, Eboe-Osuji should not have participated in the drafting of the Trial Judgement and that there is a "glaring absence of a semblance of justice".[659] He "leaves it to the Appeals Chamber to demand further information about the actual involvement of Eboe-Osuji in the Chamber's deliberations".[660] As a relief, Ntahobali

[654] Trial Judgement, para. 204. The Trial Chamber noted that Eboe-Osuji was listed as counsel for the Prosecution on six decisions. *See ibid.*, para. 204, fn. 375.
[655] Trial Judgement, para. 204 (internal reference omitted).
[656] Ntahobali Notice of Appeal, para. 54; Ndayambaje Notice of Appeal, paras. 110, 111.
[657] Ntahobali Notice of Appeal, para. 54.
[658] Ntahobali Notice of Appeal, para. 55. Ntahobali explained that he could not develop Ground 1.8 in his appeal brief due to the word limit imposed for this brief. Likewise, Ndayambaje did not develop further arguments in his appeal brief, simply referring to his notice of appeal. *See* Ntahobali Appeal Brief, para. 128; Ndayambaje Appeal Brief, para. 293. Based on the language used in their appeal briefs, the Appeals Chamber considers that neither Ntahobali nor Ndayambaje has abandoned their respective ground of appeal and is of the view that the arguments Ntahobali and Ndayambaje developed in their notices of appeal in support of their allegations of error should be addressed as a matter of fairness.
[659] Ndayambaje Notice of Appeal, paras. 110, 112.
[660] Ndayambaje Notice of Appeal, para. 109.

requests a stay of the proceedings or, alternatively, any other reasonable remedy.[661] Ndayambaje requests the Appeals Chamber to reverse all the findings of guilt entered against him.[662]

272. The Prosecution did not respond to these submissions.[663]

273. The Appeals Chamber reiterates that there is a presumption of impartiality which attaches to the judges of the Tribunal and which cannot be easily rebutted.[664] It also emphasises that legal officers assisting judges at the Tribunal are not subject to the same standards of impartiality as the judges of the Tribunal,[665] and that judicial decision-making is the sole purview of the judges.[666] Legal officers merely provide assistance to the judges in legal research and preparing draft decisions, judgements, opinions, and orders in conformity with the instructions given to them by the judges.[667]

274. The Appeals Chamber observes that Ntahobali and Ndayambaje do not point to any element which may suggest that Eboe-Osuji participated in the judicial decision-making process or may have exercised any undue influence on this process. The Trial Judgement reflects that the Trial Chamber excluded Eboe-Osuji from participating in any deliberations relating to the guilt or innocence of the co-Accused, and that he was excluded from all aspects of the Trial Judgement drafting process from July 2009.[668] Ntahobali and Ndayambaje do not provide support for the assertion that the impartiality or appearance of impartiality of the judicial-making process and, consequently, their fair trial rights, may have been affected by Eboe-Osuji's limited involvement in this case prior to July 2009.

275. For the foregoing reasons, the Appeals Chamber dismisses Ground 1.8 of Ntahobali's appeal and Ground 13 of Ndayambaje's appeal.

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[661] Ntahobali Notice of Appeal, paras. 56, 57.
[662] Ndayambaje Notice of Appeal, para. 112.
[663] The Prosecution explained that it considers that, by not presenting arguments in his appeal brief, Ntahobali has abandoned Ground 1.8 of his appeal. *See* Prosecution Response Brief, para. 753. The Appeals Chamber further notes that, contrary to its submission, the Prosecution failed to address Ndayambaje's Ground 13. *See ibid.*, para. 2169, Section I.
[664] *Karemera and Ngirumpatse* Appeal Judgement, para. 24; *Hategekimana* Appeal Judgement, para. 16; *Nahimana et al.* Appeal Judgement, para. 48; *Akayesu* Appeal Judgement, para. 91. *See also Renzaho* Appeal Judgement, para. 43 ("in the absence of evidence to the contrary, Judges are presumed to be impartial when ruling on the issues before them"); *Furundžija* Appeal Judgement, para. 197.
[665] *See The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009 ("*Bizimungu et al.* Appeal Decision"), para. 9.
[666] *Hategekimana* Appeal Judgement, para. 20; *Bizimungu et al.* Appeal Decision, para. 9.
[667] *Bizimungu et al.* Appeal Decision, para. 9.
[668] Trial Judgement, para. 204.

J. Allegations of False Testimony and Contempt (Nyiramasuhuko Ground 7 in part; Ntahobali Grounds 1.3 and 3.12; Kanyabashi Ground 3.11)

276. Nyiramasuhuko, Ntahobali, and Kanyabashi submit that the Trial Chamber erred in relation to the allegations of false testimonies by Prosecution Witnesses QA, QY, and SJ.[669]

1. Procedural Background

277. Witness QA testified at trial in March 2004 and, upon Kanyabashi's request, was recalled for further cross-examination in October 2008 on specific inconsistencies within his testimony and statements made in Rwanda.[670] While being further cross-examined, Witness QA admitted to having lied during his testimony in 2004 about statements made by Kanyabashi and Nsabimana in 1994 and that, "[f]or the most part, [his] testimony was […] lies".[671] On 7 November 2008, the Trial Chamber found that there were strong grounds to believe that Witness QA may have willingly and knowingly given false testimony with the intent to mislead it.[672] As a result, the Trial Chamber directed the Registrar to appoint an independent *amicus curiae* to investigate the allegations of Witness QA's false testimony pursuant to Rule 91(B) of the Rules as well as the allegations of intimidation and bribery related to the witness's appearances before it pursuant to Rule 77 of the Rules, and to report back to it as soon as practicable.[673]

278. Witness SJ testified at trial in May and June 2002,[674] and Witness QY in March 2003 and April 2006.[675] On 3 December 2008, upon Ntahobali's request, the Trial Chamber ordered the recall of both witnesses regarding possible lies in their testimonies and the circumstances surrounding such lies.[676] Upon their recall in February 2009, Witnesses QY and SJ testified that, upon instruction from Prosecution staff, they had falsely denied knowing certain Prosecution witnesses

[669] Nyiramasuhuko Notice of Appeal, paras. 1.32-1.39, 1.42, 1.43; Nyiramasuhuko Appeal Brief, paras. 243-247, 252-283; Ntahobali Notice of Appeal, paras. 19-25, 289-293; Ntahobali Appeal Brief, paras. 44-64; 819-839; Kanyabashi Notice of Appeal, sub-para. 3.11, para. 25; Kanyabashi Appeal Brief, paras. 358-361.
[670] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Re-Open His Case and to Recall Prosecution Witness QA, signed 2 July 2008, filed 3 July 2008 ("2 July 2008 Decision"), paras. 34-36, p. 10, fn. 14.
[671] Witness QA, T. 30 October 2008 p. 49 (closed session). *See also* T. 29 October 2008 pp. 15, 16 (closed session), T. 30 October 2008 p. 24 (closed session).
[672] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court, 7 November 2008 ("7 November 2008 Decision"), paras. 22, 23.
[673] 7 November 2008 Decision, para. 27, p. 7.
[674] Witness SJ testified from 28 to 30 May 2002 and from 3 to 5 June 2002.
[675] Witness QY testified on 19, 20 and from 24 to 26 March 2003 as well as on 10 April 2006.
[676] 3 December 2008 Decision, paras. 24, 26, p. 7. Ntahobali sought the recall of Witnesses QY and SJ following their testimonies in the trial of Munyaneza held in Canada in April 2007 where, according to him, they admitted knowing several Prosecution witnesses they had denied knowing when testifying in this case. *See ibid.*, para. 3.

when they in fact knew them.[677] On 19 March 2009, the Trial Chamber found that there were strong grounds to believe that Witnesses QY and SJ may have knowingly and wilfully provided false testimonies with the intent to mislead it.[678] The Trial Chamber ordered the Registrar to appoint an independent *amicus curiae* to investigate the allegations of false testimonies of Witnesses QY and SJ pursuant to Rule 91(B) of the Rules and coercion by "certain staff of this Tribunal" with respect to these witnesses' testimonies pursuant to Rule 77 of the Rules, and to report back to it as soon as practicable.[679]

279. On 2 July 2009, the *amicus curiae* designated by the Registrar ("First *Amicus Curiae*") filed confidentially and *ex parte* his report on the result of his investigations into the allegations concerning Witnesses QA's, QY's, and SJ's testimonies.[680] On 30 October 2009, noting multiple omissions in the First *Amicus Curiae* Report, including a failure to conduct and/or report on some of the investigations it had requested, the Trial Chamber directed the Registrar to appoint a new *amicus curiae* to investigate the allegations outlined in its prior decisions and to report back to it.[681] On 4 March 2010, the Trial Chamber denied motions by Ntahobali, Nyiramasuhuko, and Kanyabashi to transmit the First *Amicus Curiae* Report to the parties.[682]

280. The second *amicus curiae* designated by the Registrar ("Second *Amicus Curiae*") filed confidentially and *ex parte* his report on the investigations he conducted into the allegations concerning Witness QA's testimony on 25 March 2010 and his report concerning the allegations related to the testimonies of Witnesses QY and SJ on 18 May 2010.[683]

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[677] Witness QY, T. 23 February 2009 pp. 37-62 (closed session); Witness SJ, T. 23 February 2009 pp. 82-85 (closed session).
[678] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Ntahobali's Motion for an Investigation into False Testimony and Kanyabashi's Motion for an Investigation into Contempt of Court Relative to Prosecution Witnesses QY and SJ, 19 March 2009 ("19 March 2009 Decision"), para. 14.
[679] 19 March 2009 Decision, paras. 15-17, pp. 5, 6.
[680] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Report of Boniface Njiru *Amicus Curiae* Appointed by the International Criminal Tribunal for Rwanda to Investigate and Report to the Trial Chamber II [on] False Testimony and Contempt of Court Relative to Prosecution Witnesses QA, QY and SJ, 2 July 2009 ("First *Amicus Curiae* Report") (confidential). The *ex parte* status of the report was lifted by the Trial Chamber on 2 September 2011. *See infra*, para. 288.
[681] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Order, 30 October 2009 ("30 October 2009 Order"), pp. 3, 4.
[682] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision Regarding Ntahobali, Nyiramasuhuko, and Kanyabashi's Motions to Transmit the *Amicus Curiae* Report, signed 4 March 2010, filed 5 March 2010 ("4 March 2010 Decision"), p. 7.
[683] *The Prosecutor v. Pauline Nyiramasuhuko et al*., ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QY and SJ, 18 May 2010 ("Second *Amicus Curiae* Report Concerning Witnesses QY and SJ") (confidential); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QA, 25 March 2010 ("Second *Amicus Curiae* Report Concerning Witness QA") (confidential) (collectively "Second *Amicus Curiae* Reports"). The *ex parte* status of the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ was lifted by the Trial Chamber on 2 September 2011, whereas the *ex parte* status of the Second *Amicus Curiae* Report Concerning Witness QA was lifted by the Appeals Chamber on 18 March 2013. *See infra*, para. 288.

281. In the Trial Judgement, the Trial Chamber noted that "since their testimony in the present case, Prosecution Witnesses QA, QY and SJ ha[d] become the subject of on-going investigations before the Tribunal for false testimony and contempt of court."[684] The Trial Chamber stated that without prejudice to any formal proceedings for false testimony and contempt which may come before the Tribunal, it will "treat these witnesses' testimony with added caution."[685]

282. On 2 September 2011, after the delivery of the Trial Judgement, the Trial Chamber issued a decision in which it found that sufficient grounds existed to believe that Witness QA knowingly and wilfully gave false testimony in this case, issued an order in lieu of an indictment against Witness QA, and directed the Registry to appoint a new *amicus curiae* to prosecute the matter.[686] The same day, the Trial Chamber issued a second decision, in which it found that, despite evidence that Witnesses SJ and QY falsely denied knowing other Prosecution witnesses in their 2002 and 2003 testimonies, it would not be efficient or effective to initiate proceedings against them.[687] The Trial Chamber further considered that there was no *prima facie* case of contempt against any Prosecution staff and insufficient information to justify initiating proceedings against the Prosecution counsel who had prepared Witnesses QY and SJ for trial.[688] In this decision, the Trial Chamber considered that, "in the interests of transparency", the First A*micus Curiae* Report and the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ should be released to the parties.[689]

283. On 18 March 2013, the Appeals Chamber granted Kanyabashi's request to lift the *ex parte* status of the Second A*micus Curiae* Report Concerning Witness QA in the interests of justice and transparency, and directed the Registry to disclose it to the parties without delay.[690]

284. Nyiramasuhuko, Ntahobali, and Kanyabashi submit that the Trial Chamber violated their right to a fair trial in the context of the false testimonies of Witnesses QA, QY, and SJ.[691]

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[684] Trial Judgement, para. 200.
[685] Trial Judgement, paras. 200, 203. *See also ibid.*, paras. 201, 202.
[686] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Confidential Decision Following *Amicus Curiae* Report Related to Allegations of Contempt of the Tribunal and False Testimony [of] Witness QA, 2 September 2011 ("2 September 2011 Decision Concerning Witness QA") (confidential), para. 33, p. 10.
[687] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Confidential Decision Following *Amicus Curiae* Report Related to Allegations of Contempt of the Tribunal and False Testimony and Witnesses QY and SJ, 2 September 2011 ("2 September 2011 Decision Concerning Witnesses QY and SJ") (confidential), paras. 12, 13, 31-33, p. 11.
[688] 2 September 2011 Decision Concerning Witnesses QY and SJ, paras. 35-38, p. 11.
[689] 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 40. On 23 November 2012, the Appeals Chamber clarified that the First *Amicus Curiae* Report and the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ were part of the record on appeal. *See* Decision on Arsène Shalom Ntahobali's Motion to Present Additional Evidence, 23 November 2012 ("23 November 2012 Appeal Decision"), p. 2.
[690] Decision on Kanyabashi's Motion for Disclosure of the *Amicus Curiae* Report Concerning Witness QA, 18 March 2013 ("18 March 2013 Decision") (confidential), paras. 14, 16.

They contend that the Trial Chamber erred in failing: (i) to communicate the First *Amicus Curiae* Report and the Second *Amicus Curiae* Reports (collectively "*Amici Curiae* Reports") before the delivery of the Trial Judgement; (ii) to consider the impact of *Amici Curiae* Reports on the credibility of the Prosecution evidence; and (iii) to take into account that the acts of the Prosecution as revealed in the *Amici Curiae* Reports affected the fairness of the proceedings.[692] In addition to their arguments related to the *Amici Curiae* Reports, Nyiramasuhuko and Ntahobali also argue that the Trial Chamber erred in failing to exclude the evidence of Witnesses QY and SJ as a result of their lies or, in the alternative, to apply the requisite caution in assessing both their testimonies and the evidence of the witnesses who were also allegedly instructed to lie.[693]

285. Nyiramasuhuko and Ntahobali request the Appeals Chamber to order a stay of proceedings, or, in the alternative, to exclude or treat with appropriate caution the testimony of Witnesses QY and SJ as well as the testimonies of all witnesses implicated by Witnesses QY and SJ.[694] Kanyabashi requests the reversal of his conviction for public and direct incitement to commit genocide.[695]

286. The Appeals Chamber will first address the contentions related to the *Amici Curiae* Reports before turning to Nyiramasuhuko's and Ntahobali's additional submissions.

[691] Nyiramasuhuko Notice of Appeal, paras. 1.32, 1.34-1.39, 1.42, 1.43; Nyiramasuhuko Appeal Brief, paras. 243-247, 252-282; Ntahobali Notice of Appeal, paras. 19-21, 24, 25, 289-293; Ntahobali Appeal Brief, paras. 44-64, 819-839; Kanyabashi Notice of Appeal, sub-paras. 3.11.1, 3.11.2; Kanyabashi Appeal Brief, paras. 358-361. *See also* AT. 15 April 2015 pp. 17-20 and 23-25 (closed session); AT. 16 April 2015 pp. 20, 21 (closed session). In their respective notices of appeal, Nyiramasuhuko and Ntahobali also contended that the Trial Chamber erred in failing to issue a decision on whether to initiate false testimony proceedings against Witnesses QA, QY, and SJ prior to the delivery of the Trial Judgement. Ntahobali further argued that the Trial Chamber erred by merely noting in the 2 September 2011 Decision Concerning Witnesses QY and SJ that there was insufficient evidence from the First *Amicus Curiae* Report and the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ to initiate false testimony proceedings against the two witnesses. *See* Nyiramasuhuko Notice of Appeal, para. 1.33; Ntahobali Notice of Appeal, paras. 22, 23. However, neither Nyiramasuhuko nor Ntahobali reiterated or substantiated these allegations in their appeal briefs. Accordingly, the Appeals Chamber rejects them without further consideration.

[692] Nyiramasuhuko Notice of Appeal, paras. 1.32, 1.35-1.38, 1.42; Nyiramasuhuko Appeal Brief, paras. 243-247, 252-254, 256-265, 272, 281; Ntahobali Notice of Appeal, paras. 20, 21, 24, 289-291; Ntahobali Appeal Brief, paras. 45, 47-64, 821, 830-836; Kanyabashi Notice of Appeal, sub-paras. 3.11.1, 3.11.2; Kanyabashi Appeal Brief, paras. 325, 358-361.

[693] Nyiramasuhuko Notice of Appeal, paras. 1.34, 1.43; Nyiramasuhuko Appeal Brief, paras. 255-257, 259, 261, 265, 266, 268, 270-275, 279, 282; Ntahobali Appeal Brief, paras. 821-823, 825-829.

[694] Nyiramasuhuko Appeal Brief, paras. 282, 283; Ntahobali Notice of Appeal, paras. 24, 292, 293; Ntahobali Appeal Brief, paras. 64, 829, 839.

[695] Kanyabashi Appeal Brief, para. 361. *See also* Kanyabashi Notice of Appeal, para. 25.

2. *Amici Curiae* Reports

(a) Communication of the *Amici Curiae* Reports

287. As noted above, the Trial Chamber denied Ntahobali's, Nyiramasuhuko's, and Kanyabashi's requests for transmission of the First A*micus Curiae* Report to the parties on 4 March 2010.[696] In its decision, the Trial Chamber stated that the reports were not commissioned to evaluate the credibility of Witnesses QA, QY, and SJ but to guide it in addressing conduct that interfered with its administration of justice.[697] After noting that the parties had ample opportunity to raise issues of credibility regarding the testimonies of these witnesses and to cross-examine them, the Trial Chamber found that the parties had an adequate opportunity to direct the Chamber's attention to any issues of importance and concluded that the First *Amicus Curiae* Report did not affect the co-Accused's fair trial rights and that its non-disclosure did not prejudice them.[698] It further observed that it had not yet received the report from the Second *Amicus Curiae* and that, upon receipt and review of it and after making its decision thereon, it may consider whether to disclose both reports to the parties.[699] The Trial Chamber pronounced the Trial Judgement on 24 June 2011 and issued it in writing on 14 July 2011.[700]

288. In September 2011, the Trial Chamber decided that the First *Amicus Curiae* Report and the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ should be released to the parties in the interests of transparency.[701] The Second *Amicus Curiae* Report Concerning Witness QA was communicated to the parties pursuant to the Appeals Chamber's decision of 18 March 2013.[702]

289. There is no reference to the *Amici Curiae* Reports in the Trial Judgement.[703]

290. Nyiramasuhuko, Ntahobali, and Kanyabashi submit that the Trial Chamber erred in law in refusing or failing to communicate the *Amici Curiae* Reports to them prior to the delivery of the Trial Judgement.[704] They contend that, by doing so, the Trial Chamber deprived them of the

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[696] 4 March 2010 Decision, p. 7.
[697] 4 March 2010 Decision, para. 23.
[698] 4 March 2010 Decision, paras. 24, 25.
[699] 4 March 2010 Decision, para. 26.
[700] Trial Judgement, para. 6615.
[701] *See* 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 40.
[702] *See* 18 March 2013 Decision, para. 16.
[703] *See infra*, para. 322.
[704] Nyiramasuhuko Notice of Appeal, paras. 1.35, 1.36; Nyiramasuhuko Appeal Brief, paras. 245, 246; Ntahobali Notice of Appeal, para. 20; Ntahobali Appeal Brief, para. 49; Kanyabashi Notice of Appeal, sub-paras. 3.11.1, 3.11.2; Kanyabashi Appeal Brief, paras. 358, 359. Nyiramasuhuko also contends that the Trial Chamber erred by designating a second *amicus curiae proprio motu* without notifying the parties. *See* Nyiramasuhuko Appeal Brief, para. 245. Nyiramasuhuko and Ntahobali also argue that the Trial Chamber erred in stating that the investigations against Witnesses QA, QY, and SJ were "on-going", given that the investigations were completed by May 2010.

opportunity to raise issues related to the contents of the *Amici Curiae* Reports which would have had a significant impact on the trial, rendering the trial unfair.[705]

291. Specifically, Nyiramasuhuko, Ntahobali, and Kanyabashi submit that the First *Amicus Curiae* Report and the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ contain highly relevant information concerning the credibility of Witnesses QY and SJ and other Prosecution witnesses that should reasonably have led to the exclusion of their evidence, establish the existence of collusion between Prosecution witnesses, and confirm that acts of members of the Prosecution seriously interfered with the administration of justice, vitiating the entire proceedings.[706] Ntahobali argues that these reports confirm and establish that, on several occasions, members of the Prosecution instructed witnesses to lie to the Trial Chamber.[707]

292. Kanyabashi also submits that the Trial Chamber's failure to disclose the Second *Amicus Curiae* Report Concerning Witness QA rendered his trial unfair as the report supported his case that the testimonies against him were forged.[708] He contends that this report was crucial to the credibility assessment of Prosecution Witness QI and the allegations of incitement by megaphone[709] as it further shows the involvement of Witness QI's former employer in the fabrication of evidence against him.[710] Kanyabashi submits that, had he been provided with the Second *Amicus Curiae* Report Concerning Witness QA at trial, he would have relied on it in his closing arguments and requested the exclusion of Witness QI's evidence.[711]

293. The Prosecution responds that nothing in the Statute or the Rules obliges chambers to release *amicus curiae* reports to the parties.[712] It also submits that "the role of the *Amicus Curiae* was to investigate allegations of contempt and false testimony as an agent of the Tribunal and its judges; he was independent vis-[à]-vis the Parties."[713] The Prosecution further responds that: (i) the

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See Nyiramasuhuko Notice of Appeal, para. 1.32; Nyiramasuhuko Appeal Brief, paras. 243, 244; Ntahobali Appeal Brief, para. 45.

[705] Nyiramasuhuko Notice of Appeal, para. 1.37; Nyiramasuhuko Appeal Brief, paras. 246-249; Ntahobali Appeal Brief, paras. 50-54; Kanyabashi Appeal Brief, paras. 358, 360.

[706] Nyiramasuhuko Notice of Appeal, paras. 1.37, 1.38, 1.42; Nyiramasuhuko Appeal Brief, paras. 246, 247, 252-254, 256-265, 272; Ntahobali Notice of Appeal, paras. 21, 23, 24, 289-291; Ntahobali Appeal Brief, paras. 47-63, 821, 830-836; Kanyabashi Notice of Appeal, sub-paras. 3.11.1; Kanyabashi Appeal Brief, paras. 325, 358. *See also* AT. 15 April 2015 pp. 24, 25 (closed session); AT. 16 April 2015 pp. 20, 21 (closed session).

[707] Ntahobali Appeal Brief, paras. 50, 51, 57-61.

[708] Kanyabashi Notice of Appeal, sub-para. 3.11.2; Kanyabashi Appeal Brief, paras. 359, 360.

[709] Kanyabashi Appeal Brief, para. 360. Kanyabashi also refers in passing to his speech at Nsabimana's swearing-in ceremony on 19 April 1994 and the events at Matyazo Clinic but fails to develop any argument in these respects. *See idem*.

[710] Kanyabashi Appeal Brief, paras. 359, 360. Kanyabashi points out that the Second *Amicus Curiae* recommended initiating judicial proceedings against Witness QI's former employer and two other individuals for intimidating Witness QA in connection with his testimony against Kanyabashi. *See idem.*

[711] Kanyabashi Appeal Brief, para. 360.

[712] Prosecution Response Brief, para. 54.

[713] Prosecution Response Brief, para. 55. *See also* AT. 15 April 2015 pp. 58, 59 (closed session).

First *Amicus Curiae* Report cannot be relied upon given its multiple defects and the fact that it was rejected by the Trial Chamber;[714] (ii) the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ does not establish that witnesses were given specific instructions to lie and the Trial Chamber was correct in concluding that the false testimony of Witnesses QY and SJ had a minimal effect on the outcome of this case;[715] and (iii) the Second *Amicus Curiae* Report Concerning Witness QA does not contain any information that was not already available to Kanyabashi through Witness QA's testimony of October 2008.[716] It adds that the *Amici Curiae* Reports do not implicate members of the Prosecution interfering with the administration of justice and that Nyiramasuhuko's and Ntahobali's arguments in this respect misrepresent the evidence and the Trial Chamber's findings.[717]

294. Ntahobali replies that, even if there is nothing in the Statute or the Rules that obliged the Trial Chamber to disclose the reports to the parties to the main proceedings, the Trial Chamber had the obligation to ensure that the co-Accused's rights were respected.[718]

295. It is not disputed by the parties that nothing in the Statute or the Rules imposes the mandatory communication to the parties to the main proceedings of an *amicus curiae* report requested pursuant to Rules 77(C)(ii) or 91(B)(ii) of the Rules.[719] The decision to communicate an *amicus curiae* report filed before the trial chamber pursuant to Rules 77 or 91 of the Rules to the parties of the main proceedings therefore falls within the discretion of the trial chamber. This discretion must be exercised consistently with Articles 19 and 20 of the Statute, which require trial chambers to ensure that trials are fair and expeditious.[720] In order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[721] The Appeals Chamber will only reverse a trial chamber's discretionary decision where it is found to be based on an incorrect interpretation of

[714] Prosecution Response Brief, paras. 43, 49, 50, 64.
[715] Prosecution Response Brief, paras. 62, 65, 66, 67. *See also* AT. 15 April 2015 p. 58 (closed session).
[716] Prosecution Response Brief, para. 68.
[717] Prosecution Response Brief, paras. 43, 56-60, *referring to* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 58-60. The Prosecution contends that Ntahobali's allegations "are demonstrably false and a serious breach of professional standards" as "[i]t is unethical for a party to distort evidence". *See ibid.*, para. 59. *See also* AT. 15 April 2015 p. 58 (closed session).
[718] Ntahobali Reply Brief, para. 15.
[719] Both Rules 77(C)(ii) and 91(B)(ii) of the Rules state that the appointed *amicus curiae* is to "report back to the Chamber as to whether there are sufficient grounds for instigating" contempt or false testimony proceedings.
[720] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.
[721] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.

the governing law, based on a patently incorrect conclusion of fact, or where it is so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[722]

296. The Appeals Chamber understands Nyiramasuhuko, Ntahobali, and Kanyabashi to argue that, because it deprived them of the opportunity to raise arguments at trial in relation to the *Amici Curiae* Reports on matters that had a significant impact on the case, the Trial Chamber's failure to communicate the reports was so unfair or unreasonable as to constitute an abuse of its discretion. The Appeals Chamber will first discuss the parties' submission concerning the communication of the First *Amicus Curiae* Report, before addressing those relating to the communication of the Second *Amicus Curiae* Reports.

(i) First *Amicus Curiae* Report

297. The Appeals Chamber observes that none of the appellants develops arguments challenging the Trial Chamber's finding that the parties had ample opportunity to raise issues of credibility regarding the testimonies of Witnesses QA, QY, and SJ and to cross-examine them at trial.[723] The Trial Chamber relied on this finding to conclude that the non-disclosure of the First *Amicus Curiae* Report did not affect the fair trial rights of the co-Accused and did not prejudice them.[724] Instead, Nyiramasuhuko and Ntahobali assert that there was information in the report which was not known to them at the time of the delivery of the Trial Judgement, and which would have impacted the credibility assessment of several witnesses and shows that the fairness of the trial was vitiated.[725]

298. Nyiramasuhuko and Ntahobali, however, fail to appreciate that the First *Amicus Curiae* Report was found to be defective, notably because the First *Amicus Curiae* "did not conduct and/or did not report" on some of the investigations requested by the Trial Chamber, "conducted insufficient investigations into the false testimony of Witnesses QA, QY, and SJ before the Tribunal", and "submitted a report containing conclusions based on his opinion, rather than the results of an investigation."[726] As a result, the Trial Chamber appointed a new *amicus curiae* to "conduct fresh investigations".[727] In these circumstances, the Appeals Chamber is not convinced that, assuming *arguendo* that the First *Amicus Curiae* Report contains information that was not

[722] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 85; *Renzaho* Appeal Judgement, para. 143; *Kalimanzira* Appeal Judgement, para. 14.
[723] *See* 4 March 2010 Decision, para. 24.
[724] 4 March 2010 Decision, para. 25.
[725] *See* Nyiramasuhuko Notice of Appeal, paras. 1.37, 1.42; Nyiramasuhuko Appeal Brief, paras. 246, 247, 252, 254, 272; Ntahobali Notice of Appeal, paras. 21, 23, 289, 292; Ntahobali Appeal Brief, paras. 51, 58-61, 821, 831.
[726] 30 October 2009 Order, p. 3.

known by the parties at trial, it was unfair or unreasonable on the part of the Trial Chamber to decline to communicate a report which was found to suffer from such serious defects, especially where the parties had ample opportunity to raise issues of credibility regarding the testimonies of the witnesses under investigation.[728] The Appeals Chamber finds that the Trial Chamber did not abuse its discretion by not communicating the First *Amicus Curiae* Report before the delivery of the Trial Judgement.

(ii) Second *Amicus Curiae* Reports

299. The Appeals Chamber observes that the Second *Amicus Curiae* Reports contain information about Prosecution witnesses who testified in this case that may have been relevant to the assessment of their credibility. Unlike the First *Amicus Curiae* Report, the Second *Amicus Curiae* Reports were not found by the Trial Chamber to suffer defects that required that new investigations be ordered. Notwithstanding their relevance to the proceedings, the Trial Chamber did not explain the reasons why it elected not to communicate the Second *Amicus Curiae* Reports to the parties before the delivery of the Trial Judgement or, at a minimum, inform the parties that the reports had been filed.[729] In the view of the Appeals Chamber, this not only ran against the interests of transparency,[730] but also deprived the parties of the opportunity to: (i) expose the reasons why they should have been communicated the results of the investigations; and (ii) raise at trial issues related to the credibility of some Prosecution witnesses based on the contents of the Second *Amicus Curiae* Reports.

300. Mindful that the decision to communicate to the parties of the main proceedings an *amicus curiae* report filed pursuant to Rules 77 or 91 of the Rules falls within the discretion of the relevant chamber and that there may be instances where the communication of such reports is not in the interests of justice, the Appeals Chamber fails to understand why, in this case, the Trial Chamber decided to deprive the parties of information that might have been relevant to their cases in the absence of any circumstances that may have justified its non-communication. The Appeals

[727] 30 October 2009 Order, p. 3. The Appeals Chamber also notes that the Trial Chamber entirely disregarded the First *Amicus Curiae* Report in the decisions it issued on 2 September 2011. *See* 2 September 2011 Decision Concerning Witness QA; 2 September 2011 Decision Concerning Witnesses QY and SJ.

[728] The Appeals Chamber also dismisses Nyiramasuhuko's unsubstantiated allegation that the Trial Chamber erred by designating a second *amicus curiae proprio motu* without notifying the parties, an allegation which she had also failed to raise at trial. *See* Nyiramasuhuko Appeal Brief, para. 245.

[729] The Appeals Chamber recalls that there is no reference to the Second *Amicus Curiae* Reports in the Trial Judgement and that it is only in September 2011, when the Trial Chamber decided that the First A*micus Curiae* Report and the Second A*micus Curiae* Report Concerning Witnesses QY and SJ should be released to the parties, that Nyiramasuhuko, Ntahobali, and Kanyabashi became aware of the existence of the Second *Amicus Curiae* Reports. *See* 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 40.

[730] The Appeals Chamber observes that, after the delivery of the Trial Judgement, on 2 September 2011, the Trial Chamber itself stated that the First *Amicus Curiae* Report and the Second *Amicus Curiae* Report Concerning

Chamber therefore finds that the Trial Chamber's decision not to communicate the Second *Amicus Curiae* Reports to the parties before the delivery of the Trial Judgement was unreasonable and constituted an abuse of the Trial Chamber's discretion.[731]

301. Recalling that in order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice, the Appeals Chamber will now turn to examine whether Nyiramasuhuko, Ntahobali, and Kanyabashi show that they have been prejudiced by the Trial Chamber's failure to communicate the Second *Amicus Curiae* Report Concerning QA and the Second *Amicus Curiae* Report Concerning QY and SJ before the delivery of the Trial Judgement.

a. Second *Amicus Curiae* Report Concerning Witness QA

302. The Appeals Chamber observes that the Trial Chamber found that the Second *Amicus Curiae* Report Concerning Witness QA was wanting in several respects.[732] The Trial Chamber noted in particular that the report "applied the incorrect legal standard", "repeatedly examined issues of the credibility and reliability of witness testimony", "confused the alleged contemnors' names", and "may have failed to respect the requirements under Rule 77(E) and 91(D) by interviewing suspects without informing them of their rights."[733]

303. In addition, the Appeals Chamber notes that the Trial Chamber rejected the entirety of Witness QA's evidence because he lacked credibility[734] and that Witness QA's implication of Witness QI's former employer in the fabrication of evidence was known to Kanyabashi at trial. Indeed, Witness QA testified before the Trial Chamber in 2008 that he was encouraged to lie against Kanyabashi by three men he specifically named,[735] and Witness QI revealed in his 2004 testimony that one of the three men named by Witness QA was Witness's QI's former employer.[736] Kanyabashi's closing brief reflects that he was fully aware at trial of the alleged involvement of Witness QI's former employer in the fabrication of evidence against him.[737]

Witnesses QY and SJ should be disclosed to the parties in the "interest of transparency". *See* 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 40.

[731] In light of this outcome, the Appeals Chamber finds it unecessary to considers Nyiramasuhuko's and Ntahobali's contention that the Trial Chamber erred in stating in the Trial Judgement that the investigations against Witnesses QA, QY, and SJ were "on-going".

[732] 2 September 2011 Decision Concerning Witness QA, paras. 40, 41.

[733] 2 September 2011 Decision Concerning Witness QA, para. 40.

[734] *See* Trial Judgement, paras. 376-378, 382, 951, 1953, 1956, 1999, 2004, 3371, 3376.

[735] Witness QA, T. 29 October 2008 pp. 16, 17, 20, 21, 23, 34 (closed session); T. 30 October 2008 p. 24 (closed session).

[736] Witness QI, T. 23 March 2004 pp. 42, 82, 83 (closed session).

[737] In his closing brief, Kanyabashi asserted that Witness QI was doubtful, expressly relying on the witness's close ties with his former employer and arguing that, "urged" by his former employer, Witness QI had already accused a number of people, that he could have done it again out of loyalty, and that he and his former employer "belonged to a group of

304. The Appeals Chamber considers that the fact that the Second *Amicus Curiae* concluded that there were sufficient grounds for initiating contempt proceedings against Witness QI's former employer in connection with Witness QA's testimony of March 2004 does not show that Witness QI may also have been incited to fabricate evidence against Kanyabashi.[738] Moreover, the Appeals Chamber notes that the Trial Chamber stated that the only evidence to support the contempt allegations against Witness QI was that of Witness QA, who had admitted lying before the Tribunal and confessed that most of his 2004 testimony was not truthful.[739]

305. Against this background, the Appeals Chamber finds that Kanyabashi has not demonstrated that he was prejudiced by the Trial Chamber's failure to communicate the Second *Amicus Curiae* Report Concerning Witness QA to the parties in a timely manner.

b. Second *Amicus Curiae* Report Concerning Witnesses QY and SJ

306. The Appeals Chamber notes that the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ confirmed that, when testifying in May 2002, Witness QY falsely denied knowing Prosecution Witnesses TK, SJ, and QBQ and that, when testifying in March 2003, Witness SJ lied about not knowing Prosecution Witnesses TK, QJ, and TA.[740] In this report, the Second *Amicus Curiae* noted that Witnesses QY and SJ explained that they falsely denied knowing these other witnesses upon instructions of a Prosecution interpreter after the interpreter spoke with Prosecution lawyers.[741]

307. The Second *Amicus Curiae* concluded that there were sufficient grounds for initiating proceedings against Witnesses QY and SJ for "'willingly' giving false testimony having a relevant connection with a material issue in this case before the Tribunal in 2002-2003".[742] He nonetheless wrote that "the Tribunal should seriously consider exercising its discretion to not [initiate]

witnesses giving false testimony against him." *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Joseph Kanyabashi's Closing Brief, 17 February 2009 (originally filed in French, English translation filed on 6 April 2009) (confidential) ("Kanyabashi Closing Brief"), paras. 205, 292, 480.

[738] *See* Second *Amicus Curiae* Report Concerning Witness QA, p. 30. *See also ibid.*, pp. 26-29. The Second *Amicus Curiae* also noted that Witness QI's former employer declined his request to be interviewed. *See ibid.*, p. 8.

[739] The Trial Chamber, noting that the only evidence supporting the contempt allegations was the testimony of Witness QA who had admitted lying for the most part and the serious shortcomings of the Second *Amicus Curiae* Report Concerning Witness QA, did not consider that initiating proceedings against the alleged contemnors was the most efficient and effective way of ensuring the proper administration of justice. *See* 2 September 2011 Decision Concerning Witness QA, paras. 39-41.

[740] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 13-16, 33, 40.

[741] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 14-16.

[742] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 57.

proceedings or to impose a nominal punishment, if any."[743] With respect to the allegations concerning members of the Prosecution, the Second *Amicus Curiae* concluded that there were insufficient grounds to initiate contempt proceedings against the Prosecution lawyers who prepared Witnesses SJ and QY for their testimonies – or the interpreters or staff who assisted them – for coercing Witnesses SJ and QY to give false testimony in 2002 and 2003.[744]

308. As emphasised in the 2 September 2011 Decision Concerning Witnesses QY and SJ, the issue of Witnesses QY's and SJ's false testimonies was known to the parties and the Trial Chamber prior to the delivery of the Trial Judgement.[745] Nyiramasuhuko, Ntahobali, and Kanyabashi do not point to any information in the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ regarding the reliability or credibility of the evidence of Witnesses QY and SJ that was not already before the parties and the Trial Chamber at trial.[746] As to the conclusion from the Second *Amicus Curiae* that there were sufficient grounds for initiating proceedings against them for false testimony before the Tribunal in 2002 and 2003, the Appeals Chamber recalls that proceedings for contempt and false testimony are independent of the proceedings out of which they arise[747] and that an assessment of a witness's credibility is a separate inquiry from that of the prosecution of a witness for false testimony.[748]

309. Nyiramasuhuko, Ntahobali, and Kanyabashi further submit that the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ supports their claim that Witnesses QJ, QBQ, QBP, SS, TA, and TK were also instructed to lie and may have lied at trial and, as such, contains valuable and directly relevant information affecting the credibility of these witnesses.[749]

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[743] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 57. The Second *Amicus Curiae* relied upon "the level of intimidation and duress experienced by QY and SJ and the limited materiality of their testimony" in support of his recommendation. *See idem*. *See also ibid.*, pp. 58-60.
[744] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 58.
[745] 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 33. *See also supra*, para. 278.
[746] The Appeals Chamber observes that Nyiramasuhuko and Ntahobali argued at length during their closing arguments that Witnesses QY and SJ were not credible as they both lied in court about not knowing other Prosecution witnesses they in fact knew. *See* Nyiramasuhuko and Ntahobali Closing Arguments, T. 22 April 2009 pp. 18-24, 67-69; Ntahobali Closing Arguments, T. 23 April 2009 pp. 18, 50, 59, 60.
[747] Decision on Pauline Nyiramasuhuko's Motion to Void Trial Chamber Decisions, 30 September 2011, p. 2; *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2010 (confidential) ("*Nzirorera* Appeal Decision of 16 February 2010"), para. 25.
[748] *Nzirorera* Appeal Decision of 16 February 2010, para. 20.
[749] Nyiramasuhuko Notice of Appeal, paras. 1.37, 1.38; Nyiramasuhuko Appeal Brief, paras. 246, 247, 252-254, 256-265; Ntahobali Appeal Brief, paras. 51, 830-836; Kanyabashi Notice of Appeal, sub-para. 3.11.1; Kanyabashi Appeal Brief, paras. 325, 358. *See also* AT. 15 April 2015 pp. 23, 24 (closed session). Ntahobali further refers to Prosecution Witnesses SD, SW, HF, RO, RJ, ALW, and GIO. *See* Ntahobali Appeal Brief, paras. 820, 834, 835, 839. The Appeals Chamber will not entertain Ntahobali's contention that Prosecution Witness RJ (a witness in the *Rwamakuba* case) told the Second *Amicus Curiae* that Witness SD also received instructions to deny knowing other persons she knew as a careful reading of the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ reveals that Witness RJ was not referring to Witness SD but to Prosecution Witness GIO, a witness in the *Rwamakuba* case. *See* Ntahobali Appeal Brief, para. 834, *referring to* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 19-23. The Appeals

310. Having carefully reviewed the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, the Appeals Chamber is not persuaded that the information contained therein regarding Witnesses QJ, QBQ, QBP, SS, TA, and TK was such that the Trial Chamber's failure to disclose it to the parties resulted in prejudice.

311. Specifically, the Appeals Chamber notes that the report only mentions that Witness QJ was with Witness SJ while in Arusha.[750] This information was already known to the Trial Chamber and the parties at trial since Witness SJ had testified to this effect and had even suggested at one point during her recall testimony in 2009 that Witness QJ may also have been instructed to deny knowing other witnesses.[751]

312. The Appeals Chamber also notes that there is no information in the report concerning Witness QBQ that was not before the parties and the Trial Chamber at trial since the report merely confirmed that Witness QY falsely denied knowing Witness QBQ in court in 2003.[752]

313. With respect to Witnesses QBP and SS, the Appeals Chamber notes that the report reveals that Witness QY identified Witnesses QBP and SS as among the witnesses who also received instructions to lie about knowing other Prosecution witnesses, a fact which was not known by the parties at trial.[753] The report also indicates that: (i) Witness QBP refuted the allegation of having been instructed to lie and stated that she could not remember the names of the people from Butare

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Chamber will also not entertain Ntahobali's allegations as they relate to Witnesses HF, RO, RJ, ALW, and GIO as none of them testified in the present case but were either prospective witnesses or witnesses in the *Rwamakuba* case. As for Witness SW, the Appeals Chamber notes that none of the references Ntahobali points to refers to a "Witness SW" and that no witness with this pseudonym testified in this case.

[750] The Appeals Chamber does not interpret the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ as indicating that Witness QJ received instructions to lie. The Second *Amicus Curiae* noted that Witness SJ told him that: "The first time she was told [that if she admitted to knowing other people, the judges will think she is manufacturing a conspiracy to tell lies], she was alone with the interpreter and the prosecutor. Other times, there were other witnesses present. Some were from other places. The only ones she knew were [*inter alios* Witness QJ]." *See* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 16. This is consistent with Witness SJ's 2009 testimony that she was with Witness QJ in Arusha but that, although suggesting earlier that Witness QJ was also instructed to deny knowing witnesses, she could not confirm whether Witness QJ received similar instructions as she was alone when receiving the instruction. *See* Witness SJ, T. 24 February 2009 p. 19 (closed session).

[751] Although Witness SJ insisted in cross-examination that she did not know whether Witness QJ had received the same instruction to lie from the interpreter, she had suggested earlier during her testimony that she discussed with Witness QJ how they were going to deny that they knew their neighbours. *See* Witness SJ, T. 23 February 2009 pp. 83, 84 (closed session); T. 24 February 2009 pp. 11, 19 (closed session). The Appeals Chamber observes that, during their closing arguments, Nyiramasuhuko and Ntahobali specifically challenged the credibility of Witness QJ's testimony in relation to the allegations of false testimonies of Witnesses QY and SJ. *See* Nyiramasuhuko and Ntahobali Closing Arguments, T. 22 April 2009 pp. 25, 26, 65; Ntahobali Closing Arguments, T. 23 April 2009 p. 6. Moreover, in the opinion of the Appeals Chamber, the indication in the report that Witness QJ "failed to appear for his interview" with the Second *Amicus Curiae* relied upon by Ntahobali and Nyiramasuhuko is irrelevant to the question of reliability or credibility of the witness's evidence and, accordingly, did not warrant communication to the parties.

[752] *See* Witness QY, T. 23 February 2009 pp. 37-42 (closed session); Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 14. The Appeals Chamber observes that counsel for Nyiramasuhuko and Ntahobali specifically challenged the credibility of Witness QBQ's testimony in relation to the allegations of false testimonies of Witnesses QY and SJ. *See* Nyiramasuhuko and Ntahobali Closing Arguments, T. 22 April 2009 pp. 27-30, 67; Ntahobali Closing Arguments, T. 23 April 2009 p. 6.

she met while in Arusha to testify;[754] and (ii) Witness SS "declined to be interviewed".[755] The Appeals Chamber does not consider that the information regarding Witness QY's identification of Witnesses QBP and SS as two of the witnesses instructed to lie about knowing other witnesses was material to the present case. The Appeals Chamber notes that Witness QBP expressly denied being instructed to lie about knowing other witnesses when questioned on the matter[756] and is not persuaded that the fact that Witness QY stated that Witness QBP was also instructed to lie demonstrates that Witness QBP actually lied in court when denying knowing a person by the name of Witness QY.[757] As to Witness SS, Ntahobali and Nyiramasuhuko do not point to any instance in her testimony at trial where Witness SS denied knowing other Prosecution witnesses that she may have in fact known or how the fact that she declined being interviewed by the Second *Amicus Curiae* impacted the credibility of her testimony at trial.

314. Turning to Witness TA, the Appeals Chamber observes that the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ contains elements that suggest that Witness TA may have lied in court as to her knowledge of Witness SJ since it reveals that Witness TA indicated to the Second *Amicus Curiae* that she was with someone with Witness SJ's first name when in Arusha the second time, although she had testified in court to not knowing Witness SJ.[758] However, the Appeals Chamber notes that the information that Witness TA was with Witness SJ in Arusha and that they knew each other was already known to the parties before the delivery of the Trial Judgement, as Witness SJ had unambiguously testified to that effect at trial.[759] In the view of the Appeals Chamber, this available information was sufficient for the parties to question Witness TA's testimony that she did not know Witness SJ and to address the impact of this on the credibility of Witness TA's evidence.[760] In fact, the Appeals Chamber observes that counsel for Nyiramasuhuko and Ntahobali jointly moved the Trial Chamber to recall Witness TA on the ground that the

[753] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 13, 25.
[754] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 25.
[755] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 12.
[756] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 25.
[757] Witness QBP, T. 29 October 2002 p. 53 (closed session) ("Q. Madam Witness, do you know a lady who is also from the same region as your mother called [Witness QY] A. I do not know all these people."). Contrary to Nyiramasuhuko's claim, there is no indication in Witness QY's testimony upon recall that the witness testified that she knew Witness QBP. *See* Witness QY, T. 23 February 2009 pp. 36-66 (closed session).
[758] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 24; Witness TA, T. 7 November 2001 pp. 113, 114 (closed session). The Appeals Chamber is further not convinced that the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ may be interpreted as suggesting that Witness TA received instructions to lie since it merely appears to suggest that, at times, Witness SJ was with other witnesses, including Witnesses QJ and TA. This is not inconsistent with Witness SJ's testimony before the Trial Chamber that she was with Witness TA in Arusha, but that she could not confirm whether Witness TA received instructions about denying knowing witnesses as she was alone when receiving the instruction. *See* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 16; Witness SJ, T. 24 February 2009 p. 19 (closed session).
[759] Witness SJ, T. 23 February 2009 pp. 56, 60-62 (closed session); T. 24 February 2009 pp. 19, 20 (closed session).
[760] As for whether the Trial Chamber erred in failing to consider this aspect in light of the evidence adduced in that case, *see infra*, para. 338.

evidence given by Witnesses QY and SJ suggested that there was a possibility of contamination of other witnesses who came to Arusha at the same time as Witnesses QY and SJ and stayed in the same safe houses.[761] The Appeals Chamber also considers that, contrary to Nyiramasuhuko's and Ntahobali's submission,[762] the fact that Witness TA was not found to be "cooperative" by the Second *Amicus Curiae* is immaterial to the question of the credibility of Witness TA's evidence.[763]

315. As regards Witness TK, the Appeals Chamber notes that there is no information in the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ that was not before the parties and the Trial Chamber at trial since both Witnesses SJ and TK admitted knowing each other at trial.[764]

316. As noted above, Ntahobali further contends that the information contained in the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ confirms the existence of collusion between some Prosecution witnesses in this case, in particular Witnesses QJ, TA, and TK.[765] Ntahobali, however, fails to identify what information in the report supports his allegation of collusion. In support of his claim, Ntahobali does not rely on any part of the report but on an aspect of Witness SJ's 2009 testimony[766] and thus does not point to any information in the report regarding possible collusion that was not already before the parties and the Trial Chamber at trial.

317. Finally, the Appeals Chamber finds no merit in Nyiramasuhuko's and Ntahobali's claim that the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ should have been communicated to the parties because it "confirmed and established that the acts of members of the

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[761] Witness SJ, T. 24 February 2009 pp. 55-57 (closed session). *See also supra*, Section III.G.4.

[762] Nyiramasuhuko Appeal Brief, para. 263; Ntahobali Appeal Brief, para. 835.

[763] The Appeals Chamber notes that Nyiramasuhuko and Ntahobali misrepresent the Second *Amicus Curiae* Report Concerning Witnesses QY and SJ when arguing that Witness TA stated that she wanted to refer to IBUKA before answering as they instructed her not to cooperate with the Tribunal. *See* Nyiramasuhuko Appeal Brief, para. 263; Ntahobali Appeal Brief, para. 835. The report instead reads: "[Witness TA] was reluctant to speak with [the Second *Amicus Curiae*] at all because IBUKA had told her (and others) not to cooperate with ICTR, because ICTR was not convicting the perpetrators of the genocide." *See* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 24.

[764] *See* Trial Judgement, para. 2685, *referring to* Witness TK, T. 21 May 2002 pp. 83, 85; Witness SJ, T. 23 February 2009 p. 82 (closed session). As indicated *supra* in fn. 750, the Appeals Chamber does not understand the phrases in the report "[o]ther times, there were other witnesses present. Some were from other places. The only ones she knew were [*inter alios* Witness TK]" as indicating that Witness SJ stated that she was instructed to lie in the presence of Witness TK. In addition, the Appeals Chamber observes that counsel for Nyiramasuhuko and Ntahobali specifically challenged the credibility of Witness TK's testimony in relation to the allegations of false testimonies of Witnesses QY and SJ. *See* Nyiramasuhuko and Ntahobali Closing Arguments, T. 22 April 2009 pp. 25, 26; Ntahobali Closing Arguments, T. 23 April 2009 p. 6. In addition, the Appeals Chamber finds that the fact that Witness TK "declined to be interviewed" is information that is of no relevance to the assessment of the credibility and reliability of the witness's evidence. *See* Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 12.

[765] Ntahobali Appeal Brief, paras. 47, 48. *See also ibid.*, paras. 820, 831, 833, 834; AT. 15 April 2015 pp. 19, 20 and 23-25 (closed session); AT. 16 April 2015 p. 21 (closed session); Nyiramasuhuko Appeal Brief, para. 264. The Prosecution is correct in its contention that Ntahobali had failed to raise the allegation of collusion in his notice of appeal. *See* Prosecution Response Brief, paras. 61, 62. The Appeals Chamber nevertheless considers that it is in the interests of justice to examine this challenge. As the Prosecution responded to this contention despite its objection to its consideration, the Appeals Chamber considers that there is no unfairness to the Prosecution in this respect.

Prosecution staff seriously interfered with the administration of justice" and "vitiated the entire proceedings" and "that the trial was rendered unfair".[767] The allegation reported in the report that Prosecution staff instructed witnesses to lie was already brought to light by both Witnesses QY and SJ when they testified in 2009. More importantly, contrary to what Nyiramasuhuko and Ntahobali contend, the Second *Amicus Curiae* expressly concluded that there was "insufficient evidence to link the lawyers with [the] instruction [to lie] to find beyond a reasonable doubt that they intended for QY and SJ to testify falsely"[768] and "not sufficient evidence for a reasonable trier of fact to find beyond a reasonable doubt that any particular, identifiable language assistant coerced QY or SJ to give false testimony."[769] Nyiramasuhuko's and Ntahobali's submissions fail to appreciate that the Second *Amicus Curiae* expressly concluded that – although the two witnesses "felt compelled", "truly believed, perhaps incorrectly", and "thought that they were being ordered to testify falsely" – evidence was lacking as to "whether that was what the people instructing them actually intented them to understand" and the witnesses "perhaps misunderstood".[770]

318. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko, Ntahobali, and Kanyabashi have failed to demonstrate that the Trial Chamber's discernible error in not communicating the Second *Amicus Curiae* Reports to the parties before the delivery of the Trial Judgement resulted in prejudice and that it therefore warrants the intervention of the Appeals Chamber.

(b) Failure to Consider the Impact of the A*mici Curiae* Reports

319. In the Trial Judgement, the Trial Chamber noted that Witnesses QA, QY, and SJ had become "the subject of on-going investigations before the Tribunal for false testimony and contempt of court" and stated that, without prejudice to any formal proceedings for false testimony

[766] Ntahobali Appeal Brief, para. 48, *referring to* Witness SJ, T. 23 February 2009 pp. 83, 84 (closed session) ("[i]t used to happen that we discussed this as we chatted and to ask how we were going to deny that we knew our neighbours.").
[767] Nyiramasuhuko Notice of Appeal, para. 1.42; Ntahobali Appeal Brief, para. 50. *See also* Ntahobali Notice of Appeal, paras. 21, 23; Ntahobali Appeal Brief, paras. 51, 58-61; AT. 15 April 2015 p. 25 (closed session); AT. 16 April 2015 pp. 20, 21 (closed session). Nyiramasuhuko and Ntahobali also rely on the First *Amicus Curiae* Report in support of their claim but the Appeals Chamber will not address this part of their submissions in light of its conclusion above regarding the First *Amicus Curiae* Report. *See supra*, para. 298.
[768] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 54, 55.
[769] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, p. 56. The Appeals Chamber further observes that the Trial Chamber stated that it agreed with the Second *Amicus Curiae* that there was "no *prima facie* case against any of the language assistants because none of them was identified with any particularity" and "no direct evidence" that Prosecution's lawyers "told Witnesses QY or SJ to testify that they did not know other prosecution witnesses" and, on the basis of Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, ruled that there was insufficient information to justify pursuing this matter further under Rule 77 of the Rules. *See* 2 September 2011 Decision Concerning Witnesses QY and SJ, paras. 36, 38. Ntahobali clarified at the appeals hearing that he was not arguing that the Trial Chamber erred in failing to initiate contempt proceedings. *See* AT. 16 April 2015 p. 21 (closed session).
[770] Second *Amicus Curiae* Report Concerning Witnesses QY and SJ, pp. 58, 59.

and contempt which may come before the Tribunal, it will "treat these witnesses' testimony with added caution."[771]

320. Nyiramasuhuko, Ntahobali, and Kanyabashi contend that the Trial Chamber erred in failing to consider and discuss in the Trial Judgement the evidence contained in the *Amici Curiae* Reports and the impact it had on the admissibility and assessment of the testimonies of many Prosecution witnesses.[772] Nyiramasuhuko and Ntahobali add that the Trial Chamber erred in failing to discuss the seriousness of the Prosecution's conduct as confirmed and established by the reports and its impact on the fairness of the proceedings.[773]

321. The Prosecution responds that Ntahobali and Nyiramasuhuko do not substantiate their claim that the Trial Chamber did not take into account the *Amici Curiae* Reports and recalls that there is a presumption that the Trial Chamber has evaluated all the evidence presented to it.[774] According to the Prosecution, Ntahobali and Nyiramasuhuko fail to demonstrate that the Trial Chamber was unreasonable in its assessment of the *Amici Curiae* Reports.[775]

322. With respect to the Trial Chamber's alleged failure to consider the information contained in the *Amici Curiae* Reports, in particular their impact on the admissibility of the evidence and the assessment of the credibility of Prosecution witnesses, the Appeals Chamber observes that, as noted by Nyiramasuhuko, Ntahobali, and Kanyabashi, there is no mention of any of the reports in the Trial Judgement. However, as discussed at length above, the Appeals Chamber finds that the information in the *Amici Curiae* Reports, including regarding the Prosecution's conduct, would have had no impact on this case. Accordingly, assuming *arguendo* that the Trial Chamber erred in failing to consider the information contained in the *Amici Curiae* Reports, this error would not have the potential to invalidate the decision of the Trial Chamber concerning the admissibility and the assessment of the impugned evidence.[776]

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[771] Trial Judgement, paras. 200, 203. *See also ibid.*, paras. 201, 202, fn. 374.
[772] Nyiramasuhuko Notice of Appeal, para. 1.39; Nyiramasuhuko Appeal Brief, paras. 254, 265, 267, 271, 277; Ntahobali Notice of Appeal, paras. 20, 291; Ntahobali Appeal Brief, paras. 48, 50, 55, 820, 824, 830-838; Kanyabashi Appeal Brief, paras. 358, 360. *See also* AT. 16 April 2015 pp. 20, 21 (closed session). Ntahobali also submits that the Trial Chamber erred in not recalling *proprio motu* Witnesses TK, QJ, and TA to be further cross-examined on the evidence of collusion contained in the reports. *See* Ntahobali Appeal Brief, para. 47; AT. 15 April 2015 pp. 23, 24 (closed session).
[773] Ntahobali Notice of Appeal, para. 21; Nyiramasuhuko Appeal Brief, para. 281; Ntahobali Appeal Brief, paras. 57-64, 824. *See also* AT. 16 April 2015 p. 20 (closed session).
[774] Prosecution Response Brief, paras. 43, 53.
[775] Prosecution Response Brief, paras. 43, 52, 53. Ntahobali replies that nothing supports the Prosecution's assertion that the Trial Chamber took into account the contents of the *Amici Curiae* Reports. *See* Ntahobali Reply Brief, para. 13.
[776] The Appeals Chamber also dismisses Ntahobali's contention concerning the *proprio motu* recall of Witnesses TK, QJ, and TA in light of its conclusion on the contents of the *Amici Curiae* Reports.

323. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's, Ntahobali's, and Kanyabashi's contention that the Trial Chamber erred in failing to consider and discuss in the Trial Judgement the contents of the *Amici Curiae* Reports.

3. Failure to Exclude Evidence and Apply the Requisite Caution

324. On 23 February 2009, upon recall for further cross-examination regarding possible lies in their prior testimonies of May 2002 and March 2003, Witnesses QY and SJ testified that they had not been truthful in their prior testimonies and that they had lied about not knowing other Prosecution witnesses.[777] Witness QY revealed that she lied about not knowing Witnesses TK, SJ, and QBQ[778] and Witness SJ admitted that she in fact knew Witnesses TK, QJ, and TA, who were with her in Arusha when she came to testify the first or second time.[779] Both Witnesses QY and SJ explained that they falsely denied knowing these other witnesses upon the instructions of Prosecution staff.[780]

325. In the Trial Judgement, the Trial Chamber noted that "since their testimony in the present case, Prosecution Witnesses […] QY and SJ have become the subject of on-going investigations before the Tribunal for false testimony and contempt of court."[781] The Trial Chamber stated that:

> With respect to these allegations, and without prejudice to any such proceedings which may come before the Tribunal, the Chamber will treat these witnesses' testimony with added caution.[782]

326. In addition to their arguments pertaining to the impact of the *Amici Curiae* Reports on the credibility of Prosecution witnesses, Nyiramasuhuko and Ntahobali submit that the Trial Chamber erred in fact in referring to "allegations" of false testimony in the Trial Judgement, as both Witnesses QY and SJ admitted their false testimony in court.[783] They contend that this error resulted in an incorrect assessment of Witnesses QY's and SJ's testimonies and that, in accordance with common law principles, the witnesses' admission that they gave false testimony should have

[777] Witness QY, T. 23 February 2009 pp. 40, 41, 50, 51 (closed session); Witness SJ, T. 23 February 2009 pp. 82-85 (closed session).
[778] Witness QY, T. 23 February 2009 pp. 37-40, 42, 45, 49-53, 56, 60-62 (closed session).
[779] Witness SJ, T. 23 February 2009 pp. 82-84 (closed session).
[780] Witness SJ, T. 23 February 2009 pp. 83, 84 (closed session); Witness QY, T. 23 February 2009 pp. 43-45 (closed session).
[781] Trial Judgement, para. 200.
[782] Trial Judgement, paras. 200, 203. *See also ibid.*, paras. 201, 202.
[783] Nyiramasuhuko Notice of Appeal, para. 1.32; Nyiramasuhuko Appeal Brief, paras. 272-275, *referring*, *inter alia*, *to* Trial Judgement, para. 203; Ntahobali Appeal Brief, para. 821, *referring to* Trial Judgement, para. 203.

led to the exclusion of their entire testimonies.[784] In their view, the Trial Chamber therefore erred in not excluding their evidence.[785]

327. In the event the Appeals Chamber were to find that the Trial Chamber did not err in not excluding Witnesses QY's and SJ's evidence, Nyiramasuhuko and Ntahobali submit in the alternative that the Trial Chamber erred in failing to apply added caution in assessing their evidence.[786] They argue that the Trial Judgement shows that the Trial Chamber failed to draw any distinction between "added caution" and mere "caution" and was inconsistent throughout in its assessment of their testimonies.[787] In particular, Ntahobali points out that, while on two occasions the Trial Chamber found that the credibility of Witnesses QY and SJ was seriously undermined because they had lied about knowing other Prosecution witnesses,[788] the Trial Chamber accepted other portions of their testimonies without applying any caution and without even referring to their false testimonies.[789] Nyiramasuhuko and Ntahobali argue that this approach runs contrary to the Trial Chamber's obligation to provide a reasoned opinion justifying why it accepted their testimonies without exercising the added caution that was at the very least required.[790] According to Ntahobali, the evidence of Witnesses QY and SJ should be excluded from the assessment of the evidence or, in the alternative, the exercise of proper caution should lead the Appeals Chamber to reject all aspects of their testimonies that were accepted by the Trial Chamber.[791]

328. Nyiramasuhuko further argues that no reasonable trier of fact would have failed to address: (i) Witness SJ's testimony that Witnesses QJ, TA, and TK had also been instructed to lie before the Trial Chamber; (ii) Witness TA's testimony that she did not know Witness SJ and was not with other witnesses while in Arusha, although Witness SJ's testimony shows that it was not true; and (iii) Witness QBP's testimony that she did not know Witness QY, although Witness QY testified that she knew Witness QBP.[792] She contends that, in light of this evidence, the Trial Chamber erred in failing to apply caution when assessing the evidence of Witnesses QBP, QJ, TA, and TK.[793]

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[784] Nyiramasuhuko Appeal Brief, paras. 265, 266, 272-275, 279, 282; Ntahobali Appeal Brief, paras. 821-823.
[785] Nyiramasuhuko Notice of Appeal, para. 1.34; Nyiramasuhuko Appeal Brief, para. 275; Ntahobali Appeal Brief, paras. 822, 823.
[786] Nyiramasuhuko Appeal Brief, paras. 268-270; Ntahobali Appeal Brief, para. 825. *See also* Ntahobali Appeal Brief, para. 828.
[787] Nyiramasuhuko Appeal Brief, paras. 268-270; Ntahobali Appeal Brief, para. 825. *See also* Ntahobali Appeal Brief, para. 828.
[788] Ntahobali Appeal Brief, para. 826, *referring to* Trial Judgement, paras. 2621, 2626, 2723. *See also* AT. 16 April 2015 p. 21 (closed session).
[789] Ntahobali Appeal Brief, para. 826, *referring to* Trial Judgement, paras. 2634, 2659, 2660, 2663, 2664, 2672, 2675-2779, 2680, 2687, 2698, 2703, 2705, 2713, 2715, 2746-2749, 2775-2779, 3932, 3936, 3943-3949, 3951-3955, 3957-3965. *See also* Ntahobali Reply Brief, para. 340.
[790] Nyiramasuhuko Appeal Brief, para. 271; Ntahobali Appeal Brief, para. 827.
[791] Ntahobali Appeal Brief, para. 829.
[792] Nyiramasuhuko Appeal Brief, paras. 255-257, 259, 261. *See also* AT. 15 April 2015 pp. 17, 19 and 22 (closed session). Nyiramasuhuko also challenges an aspect of the Trial Chamber's assessment of Witnesses TK and QJ.

329. The Prosecution responds that the claims that the Trial Chamber did not exercise caution with respect to Witnesses QY and SJ and that Witnesses QBP, TA, TK, and QJ received instructions to lie are without merit.[794]

330. The Appeals Chamber sees no error in the Trial Chamber's reference to "allegations" of false testimonies in the Trial Judgement as none of the relevant witnesses were convicted of false testimony.[795] Moreover, the Trial Judgement clearly reflects that the Trial Chamber did not misinterpret the facts before it as it expressly and repeatedly noted that Witnesses QY and SJ admitted that they had lied in court regarding their knowledge of other Prosecution witnesses.[796]

331. Likewise, the Appeals Chamber finds no merit in Nyiramasuhuko's and Ntahobali's argument that the fact that the witnesses lied required that their testimonies be excluded. In support of this claim, Ntahobali refers to national jurisprudence.[797] However, the Appeals Chamber highlights that Rule 89(A) of the Rules specifically provides that the Tribunal is not bound by national rules of evidence,[798] and recalls that decisions on the admission or exclusion of evidence fall within the trial chambers' discretion.[799] In the instant case, the Appeals Chamber observes that the testimonies on recall of Witnesses QY and SJ reveal that the witnesses admitted lying in their testimonies with respect to one discrete point which, in the Appeals Chamber's opinion, had no bearing on any material aspects of the case. Witnesses QY and SJ both explained that they understood that they were instructed by Prosecution staff to testify that they did not know other Prosecution witnesses and that, although they did know it was not the truth, they did as they were told.[800] Nyiramasuhuko and Ntahobali do not demonstrate that the evidence of Witnesses QY and SJ was so lacking in terms of the indicia of reliability that it was deprived of any probative value

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Because Nyiramasuhuko's challenge in this respect is unrelated to the issue of Witnesses SJ's and QY's false testimonies, the Appeals Chamber will address it in the section addressing Nyiramasuhuko's submissions relevant to this aspect of Witnesses TK's and QJ's evidence. *See Nyiramasuhuko* Appeal Brief, paras. 260, 261; *infra*, Section IV.F.2(e).

[793] Nyiramasuhuko Appeal Brief, para. 268. The Appeals Chamber notes that Ntahobali's arguments regarding the assessment of the evidence of witnesses other than Witnesses QY and SJ are premised on the contents of the *Amici Curiae* Reports and were not developed independently in his appeal brief. As a result, the Appeals Chamber considers that Ntahobali did not intend to argue that the Trial Chamber should have exercised particular caution when assessing the evidence of witnesses other than Witnesses QY and SJ in light of their 2009 testimonies.

[794] Prosecution Response Brief, paras. 65, 66.

[795] Trial Judgement, para. 203.

[796] Trial Judgement, paras. 2625, 2626, 2723, 3876, 3944, 4089, 4116-4118.

[797] *See* Ntahobali Appeal Brief, para. 822 and references cited therein.

[798] *See also Simba* Appeal Judgement, para. 38; *Akayesu* Appeal Judgement, fn. 577.

[799] *See Gaspard Kanyarukiga v. The Prosecutor*, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010 ("*Kanyarukiga* Appeal Decision"), para. 7; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Appeal Decision"), para. 15; *The Prosecutor v. Arsène Shalom Ntahobali and Pauline Nyiramasuhuko*, Case No. ICTR-97-21-AR73, Decision on "Appeal of Accused Arsène Shalom Ntahobali Against the Decision on Kanyabashi's Oral Motion to Cross-Examine Ntahobali Using Ntahobali's Statements to Prosecution Investigators in July 1997", 27 October 2006 ("27 October 2006 Decision"), para. 10.

and consequently should have been excluded by the Trial Chamber. Accordingly, the Appeals Chamber finds that their argument that the Trial Chamber erred by not excluding their evidence is unpersuasive.[801]

332. Furthermore, the Appeals Chamber does not understand the Trial Chamber's statement that it will treat Witnesses QY's and SJ's testimonies with "added caution" as a reflection of its intention to apply a higher standard than the one it decided to apply to the evidence that it deemed required "caution", "additional caution", or "appropriate caution".[802] The Appeals Chamber considers that, by stating that it would treat the evidence with added caution, the Trial Chamber was merely referring to the fact that it would take into account the fact that Witnesses QY and SJ lied in court about knowing other Prosecution witnesses when assessing the reliability and credibility of their evidence.

333. However, the Appeals Chamber agrees with Nyiramasuhuko and Ntahobali that the Trial Chamber's assessment of the evidence of Witnesses QY and SJ in the Trial Judgement is inconsistent in certain respects. The Appeals Chamber refers to the relevant sections of this Judgement addressing Nyiramasuhuko's and Ntahobali's submissions related to the Butare Prefecture Office, where it finds that the conclusions of the Trial Chamber regarding Witnesses QY's and SJ's evidence pertaining to attacks at the Butare Prefecture Office are irreconcilable and that the Trial Chamber erred in reaching contradictory findings.[803] In these sections, the Appeals Chamber consequently concludes that the Trial Chamber erred in relying on Witnesses QY's and SJ's evidence in relation to the attacks at the Butare Prefecture Office.[804]

334. That being said, the Appeals Chamber does not consider that it was inconsistent or unreasonable on the part of the Trial Chamber to reject parts of Witnesses QY's and SJ's testimonies relating to the Butare Prefecture Office while accepting other aspects of their testimonies relating to Ntahobali's participation in attacks at the EER.

335. The Trial Chamber explained that it would not rely on the part of Witness QY's testimony relating to specific incidents that allegedly occurred at the end of April or early May 1994 at the

[800] *See* 2 September 2011 Decision Concerning Witnesses QY and SJ, para. 33.
[801] Ntahobali also argues that the evidence of Witnesses QY and SJ should have been excluded on the basis of Rule 95 of the Rules because the role of the Prosecution in their false testimonies as revealed by the *Amici Curiae* Reports seriously undermined the integrity of the proceedings. *See* Ntahobali Appeal Brief, para. 824. The Appeals Chamber recalls that it has already dismissed Ntahobali's contention that the reports revealed that acts by members of the Prosecution undermined the integrity of these proceedings. *See supra*, para. 317.
[802] *See*, *e.g.*, Trial Judgement, paras. 171, 182, 183, 363, 2579, 4630, 4909.
[803] *See infra*, Sections IV.F.2(c)(ii)d, IV.F.2(c)(iii)f, IV.F.2(c)(iv), V.I.2(b)(iii)a.ii, V.I.2(b)(iv), V.I.2(d)(ii)a, V.I.2(d)(vii).
[804] *See infra*, Sections IV.F.2(c)(ii)d, IV.F.2(c)(iii)f, IV.F.2(c)(iv), V.I.2(b)(iii)a.ii, V.I.2(b)(iv), V.I.2(d)(ii)a, V.I.2(d)(vii).

Butare Prefecture Office because of the witness's admission that she lied about knowing Witnesses QBQ and SJ, and also because of discrepancies in her testimony concerning these specific events and the unreliable nature of her identification evidence.[805] By contrast, the Trial Chamber did not find discrepancies in Witness QY's testimony regarding the events at the EER and found that her identification of Ntahobali was reliable.[806] The Trial Chamber further made it clear that it relied on Witness QY's testimony as also partly corroborated by Witnesses RE, SX, and TB,[807] witnesses whom she had not falsely denied knowing. Although the Trial Chamber did not expressly refer to Witness QY's lies when assessing her evidence relating to the EER, the Trial Chamber's repeated references to this matter show that it was not ignored.[808]

336. With respect to Witness SJ, the Trial Chamber explained that it did not accept the witness's testimony about the abduction of particular individuals during one of the attacks at the Butare Prefecture Office because she admitted that she had falsely denied knowing Witnesses TK, TA, and QJ.[809] The Appeals Chamber notes that Witnesses TK and QJ were the two other main witnesses testifying to this particular event for which the Trial Chamber refused to rely on Witness SJ's evidence.[810] By contrast, the Trial Chamber found that Witness SJ's evidence relating to the EER was consistent with and corroborative of the testimonies of several other witnesses who were not implicated by her admitted dishonesty.[811] In particular, after stating that it was "cognisant" of Witness SJ's admission upon recall in 2009 that she lied about not knowing Witnesses QBQ and TA, the Trial Chamber concluded that Witness SJ's testimony on the killings near the EER was "credible in that it [was] corroborated by other witnesses and [was] consistent with the other evidence before [it]".[812]

337. The Appeals Chamber has found in the sections discussing Nyiramasuhuko's and Ntahobali's challenges to the Trial Chamber's findings related to the Butare Prefecture Office that the Trial Chamber erred in assessing the evidence of Witnesses QY and SJ relating to the prefectoral office. However, in light of the above, the Appeals Chamber finds no error in the Trial Chamber's decision to rely on their evidence on events at the EER despite their admission that they lied and the Trial Chamber's rejection of other aspects of their evidence. Contrary to Nyiramasuhuko's and Ntahobali's contention, the Appeals Chamber also notes that the Trial

[805] Trial Judgement, para. 2626. *See also ibid.*, paras. 2615, 2616, 2625.
[806] Trial Judgement, paras. 3946, 3948, 3951, 3959-3963.
[807] Trial Judgement, paras. 3943, 3946, 3952, 3959-3963.
[808] Trial Judgement, paras. 203, 2625, 2626, 3876, 4089.
[809] Trial Judgement, para. 2723.
[810] Trial Judgement, paras. 2717-2727.
[811] *See* Trial Judgement, paras. 3943-3945, 3953-3958, *referring to* Prosecution Witnesses RE, QBQ, and QY.
[812] Trial Judgement, para. 3944, fn. 10756.

Chamber did provide reasons for relying on both witnesses' evidence concerning the events at the EER.[813]

338. As for Nyiramasuhuko's argument that the Trial Chamber failed to apply caution when assessing the evidence of Witnesses QBP, QJ, TA, and TK, the Appeals Chamber notes the ambiguity in Witness SJ's recall testimony about whether or not Witnesses QJ, TA, and TK had also been instructed to lie about knowing other witnesses. As noted by the Trial Chamber,[814] Witness SJ stated that she was with persons bearing the same first names as Witnesses QJ, TK, and TA when she received instructions to lie,[815] prior to denying it and testifying that she did not know whether they had received similar instructions.[816] Regardless of the lack of clarity of Witness SJ's testimony, the Appeals Chamber considers that a reasonable trier of fact could have decided not to treat the evidence of Witnesses QBP, QJ, TA, and TK with particular caution given the immateriality of the subject-matter of the alleged lie to the facts of the case. Although Nyiramasuhuko is correct that Witness SJ testified to knowing Witness TA despite the fact that the latter said she did not know anyone by the name of the former,[817] the Appeals Chamber does not find that this establishes that a reasonable trier of fact could not have relied on Witness TA's evidence on the material facts of the case.[818] Finally, the Appeals Chamber notes that Nyiramasuhuko's assertion that Witness QY testified to knowing Witness QBP when recalled for further cross-examination in 2009[819] is unsupported by the record.

4. Conclusion

339. The Appeals Chamber finds that Nyiramasuhuko, Ntahobali, and Kanyabashi have demonstrated that the Trial Chamber abused its discretion thereby committing a discernible error by not communicating the Second *Amicus Curiae* Reports to the parties before the delivery of the Trial Judgement. However, the Appeals Chamber finds that Nyiramasuhuko, Ntahobali, and Kanyabashi have failed to show that this error resulted in prejudice. Nyiramasuhuko and Ntahobali have failed

[813] The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony. *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[814] Trial Judgement, paras. 4117, 4118.
[815] Witness SJ, T. 23 February 2009 pp. 83, 84 (closed session).
[816] Witness SJ, T. 24 February 2009 pp. 19-21 (closed session).
[817] Witness SJ, T. 23 February 2009 p. 84 (closed session); Witness TA, T. 7 November 2001 p. 114 (closed session). The Appeals Chamber notes that, contrary to Nyiramasuhuko's claim, Witness TA did acknowledge that she was staying with other persons while in Arusha. *See* Nyiramasuhuko Appeal Brief, para. 257; Witness TA, T. 7 November 2001 p. 116 (closed session).
[818] The Appeals Chamber notes that, although Nyiramasuhuko and Ntahobali submitted in their closing arguments that the witnesses named by Witnesses QY and SJ in their 2009 testimonies may also have lied in court about knowing each others, they did not argue that the alleged inconsistency between the testimonies of Witnesses SJ and TA undermined the credibility of Witness TA's testimony. *See* Nyiramasuhuko and Ntahobali Closing Arguments, T. 22 April 2009 pp. 31, 65; Ntahobali Closing Arguments, T. 23 April 2009 p. 6.
[819] Nyiramasuhuko Appeal Brief, para. 259.

to demonstrate that the Trial Chamber abused its discretion by not communicating the First *Amicus Curiae* Report before the delivery of the Trial Judgement, erred in failing to consider and discuss in the Trial Judgement the contents of the *Amici Curiae* Reports, or erred in deciding not to exclude from its consideration the evidence of Witnesses QY and SJ.

340. Furthermore, although it has found in the sections discussing Nyiramasuhuko's and Ntahobali's challenges to the Trial Chamber's findings related to the Butare Prefecture Office that the Trial Chamber erred in relying on Witnesses QY's and SJ's evidence in relation to the attacks at the Butare Prefecture Office, the Appeals Chamber concludes that the Trial Chamber did not err in relying on Witnesses QY's and SJ's evidence for the events at the EER. The Appeals Chamber also finds no error in the Trial Chamber's assessment of the evidence of Witnesses QBP, QJ, TA, and TK in relation to the allegations of false testimonies.

341. For the foregoing reasons, the Appeals Chamber grants in parts Ground 7 of Nyiramasuhuko's appeal and 3.12 of Ntahobali's appeal to the extent that the Trial Chamber relied on Witnesses QY and SJ for the events at the Butare Prefecture Office and dismisses Ground 1.3 of Ntahobali's appeal, Ground 3.11 of Kanyabashi's appeal, and the remaining parts of Ground 7 of Nyiramasuhuko's appeal and 3.12 of Ntahobali's appeal.

K. Right to be Tried Without Undue Delay (Nyiramasuhuko Ground 1 in part; Ntahobali Ground 1.1; Nteziryayo Ground 9; Kanyabashi Ground 6; Ndayambaje Ground 15 in part)

342. Kanyabashi and Ndayambaje were arrested in Belgium on 28 June 1995 and transferred to the custody of the Tribunal on 8 November 1996.[820] Nyiramasuhuko and Nsabimana were arrested in Kenya and transferred to the custody of the Tribunal on 18 July 1997.[821] Ntahobali was arrested in Kenya and transferred to the custody of the Tribunal on 24 July 1997.[822] Nteziryayo was arrested in Burkina Faso on 26 March 1998 and transferred to the custody of the Tribunal on 21 May 1998.[823] On 5 October 1999, the Trial Chamber ordered that the cases of the co-Accused be tried jointly.[824]

343. As noted above, the Prosecution case started on 12 June 2001 before a bench of Trial Chamber II composed of Judges Sekule, Ramaroson, and Maqutu.[825] Following the expiration of Judge Maqutu's term of office on 24 May 2003, Judges Sekule and Ramaroson decided to continue the trial with a substitute judge.[826] Judge Bossa was appointed to the bench on 20 October 2003 and certified her familiarity with the proceedings on 5 December 2003.[827] The Prosecution case resumed on 26 January 2004 and ended on 18 October 2004.[828] The co-Accused presented their cases from 31 January 2005 to 2 December 2008.[829] A total of 189 witnesses were heard in 726 trial days.[830] Closing arguments were heard from 20 to 30 April 2009.[831] The Trial Chamber pronounced the judgement orally on 24 June 2011 and issued its written Trial Judgement on 14 July 2011.[832]

344. In the course of the proceedings, the Trial Chamber denied several motions filed by Nyiramasuhuko, Ntahobali, Kanyabashi, and Ndayambaje alleging violations of their right to be tried without undue delay.[833] The Trial Chamber also considered the issue in the Trial Judgement

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[820] *See* Trial Judgement, paras. 55, 69, 6276, 6277, 6285, 6286.
[821] *See* Trial Judgement, paras. 14, 32, 6295, 6306.
[822] *See* Trial Judgement, paras. 23, 6295.
[823] *See supra*, fn. 18.
[824] Trial Judgement, paras. 16, 25, 36, 52, 72, 6320. *See also supra*, Section III.B.
[825] Trial Judgement, paras. 74, 6336, 6341, fn. 159.
[826] Decision on Continuation of Trial, para. 34. *See also* Trial Judgement, paras. 75, 6390-6392; *supra*, Section III.C.
[827] Trial Judgement, paras. 75, 6392; Judge Bossa Certification.
[828] Trial Judgement, paras. 75, 76, 6393, 6423.
[829] Trial Judgement, paras. 77-84, 6433, 6597.
[830] Trial Judgement, para. 139. Four Prosecution witnesses were recalled after the close of the evidentiary phase in February 2009. *See ibid.*, paras. 84, 6604.
[831] Trial Judgement, paras. 85, 6610.
[832] Trial Judgement, para. 6615.
[833] 26 November 2008 Decision; 20 February 2004 Decision; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Motion for a Stay of Proceedings and Order for the Non-Applicability of the Newly Amended Rule 15 *bis*, 20 February 2004; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion for Trial to Proceed before Trial Chamber II, Composed of Judges Sekule, Maqutu and Ramaroson and for Termination of Proceedings, 20 February 2004; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Decision on the Defence Extremely Urgent Motion on Habeas Corpus and for Stoppage of Proceedings, 23 May 2000 ("23 May 2000 Decision").

and concluded that, given the complexity of the case, the total duration of the proceedings was reasonable and the co-Accused's right to be tried without undue delay had not been violated.[834] It determined that the co-Accused had not demonstrated that they suffered any "legal prejudice".[835]

345. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje submit that the Trial Chamber erred in finding that their right to be tried without undue delay was not violated and that they did not suffer prejudice from the delays in the proceedings.[836] They request that the Appeals Chamber find that their proceedings were unduly delayed, conclude that they suffered prejudice as a result, and order a stay or termination of the proceedings[837] or, in the alternative, a reduction of their sentences.[838] Ntahobali and Ndayambaje further request financial compensation for the violation of their right to be tried without undue delay.[839]

346. The Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 20(4)(c) of the Statute and protects an accused against *undue* delay, which is determined on a case-by-case basis.[840] A number of factors are relevant to this assessment, including: the length of the delay; the complexity of the proceedings; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.[841] In this context, the Appeals Chamber recalls that when an appellant alleges on appeal that his right to a fair trial has been infringed, he must prove that the trial chamber violated a provision of the Statute or the Rules and that this violation caused prejudice that amounts to an error of law invalidating the trial judgement.[842] The Appeals Chamber also emphasises that trial chambers have a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.[843]

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[834] Trial Judgement, paras. 139, 142, 143.
[835] Trial Judgement, paras. 140-143.
[836] Nyiramasuhuko Notice of Appeal, paras. 1.1-1.7; Nyiramasuhuko Appeal Brief, paras. 10-71; Ntahobali Notice of Appeal, paras. 9-14; Ntahobali Appeal Brief, paras. 3-31; Nteziryayo Notice of Appeal, paras. 67-69; Nteziryayo Appeal Brief, paras. 262-287; Kanyabashi Notice of Appeal, sub-para. 6.2.4, paras. 31-33; Kanyabashi Appeal Brief, paras. 364-381; Ndayambaje Notice of Appeal, paras. 116-125; Ndayambaje Appeal Brief, paras. 295-317.
[837] Nyiramasuhuko Appeal Brief, para. 71; Ntahobali Notice of Appeal, para. 13; Ntahobali Appeal Brief, para. 30; Kanyabashi Notice of Appeal, sub-para. 6.2.5.1; Kanyabashi Appeal Brief, para. 379; Ndayambaje Appeal Brief, para. 317. *See also* AT. 15 April 2015 p. 17. Kanyabashi specifically requests that the Appeals Chamber reverse all his convictions and acquit him. *See* Kanyabashi Notice of Appeal, para. 33; Kanyabashi Appeal Brief, para. 379.
[838] Ntahobali Notice of Appeal, para. 13; Ntahobali Appeal Brief, para. 31; Nteziryayo Appeal Brief, para. 287; Kanyabashi Notice of Appeal, sub-para. 6.2.5.2, para. 33; Kanyabashi Appeal Brief, para. 381; Ndayambaje Appeal Brief, para. 317. *See also* AT. 15 April 2015 p. 17.
[839] Ntahobali Notice of Appeal, para. 14; Ntahobali Appeal Brief, para. 31; Ndayambaje Appeal Brief, para. 317.
[840] *See*, *e.g.*, *Ndindiliyimana et al.* Appeal Judgement, para. 43; *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 1074.
[841] *See*, *e.g.*, *Ndindiliyimana et al.* Appeal Judgement, para. 43; *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 1074.
[842] *See*, *e.g.*, *Ndindiliyimana et al.* Appeal Judgement, para. 43; *Šainović et al*. Appeal Judgement para. 29; *Gatete* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 1074.
[843] *Sainović et al.* Appeal Judgement, para. 100 and references cited therein.

347. The Appeals Chamber will first examine the arguments advanced by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje regarding the length of the delay, the complexity of the proceedings, and the conduct of the parties and relevant authorities prior to addressing their submissions on prejudice.

1. Length of the Delay, Complexity of the Proceedings, and Conduct of the Parties and Relevant Authorities

348. In addressing the allegation of undue delay in the Trial Judgement, the Trial Chamber noted that the trial chambers seised of the *Nahimana et al.*, *Bagosora et al.*, and *Bizimungu et al.* cases had concluded that, given the complexity of these cases, periods between dates of arrest and the issuance of the trial judgement of seven years and eight months, 11 years, and more than ten years, respectively, did not constitute undue delay.[844] The Trial Chamber then reasoned as follows:

> The Chamber considers the instant case to be at least as complex as *Bagosora*. The Chamber heard 189 witnesses over the course of 726 trial days. Thus, the case is approximately twice the length of *Bagosora* and more than three times the length of *Nahimana et al.* Moreover, while there were fewer witnesses in this case than *Bagosora*, the increased length was necessitated by the replacement of a Judge, the presentation of six different Defence cases and a plurality of cross-examinations for every witness. In the circumstances, given the complexity of the instant case, the Chamber does not consider the length of this case to violate the Accused's right to be tried without undue delay.[845]

349. In addition, the Trial Chamber recalled that, in its 26 November 2008 Decision, it had rejected Ntahobali's arguments that undue delay had resulted from the arrest of his investigator, the non-reelection of Judge Maqutu, and the lack of cooperation of the Rwandan authorities on the basis that the gravity of the charges and the complexity of the case did not render unreasonable the length of the proceedings.[846] It found that there was "no reason to reconsider its assessment of Ntahobali's motion at this time".[847]

350. Ultimately, the Trial Chamber found that, considering the complexity of the case along with the expansive trial record, the total duration of the proceedings, including the time needed for the drafting of the Trial Judgement, was reasonable and did not violate the co-Accused's right to be tried without undue delay.[848] It concluded that, "[a]s the length of delay in this case [was] adequately explained by the complexity of the case, and the Accused ha[d] not demonstrated that

[844] Trial Judgement, para. 138.
[845] Trial Judgement, para. 139.
[846] Trial Judgement, para. 141. *See also* 26 November 2008 Decision, paras. 56, 60.
[847] Trial Judgement, para. 141.
[848] Trial Judgement, paras. 139, 142.

they suffered legal prejudice", it did not need to "consider the conduct of the Prosecution or other legal authorities."[849]

351. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje submit that the Trial Chamber erred in finding that their right to be tried without undue delay had not been violated.[850] Pointing out that they spent between 13 to 16 years in detention before the Trial Judgement was delivered, they assert that the proceedings have been excessively lengthy and that this in itself suggests undue delay.[851]

352. Nyiramasuhuko, Kanyabashi, and Ndayambaje argue, in particular, that the Trial Chamber erred in its complexity assessment by simply comparing the overall size of the instant case with other cases before the Tribunal without taking into account the particular circumstances of this case and by failing to consider that the individual allegations against them were not complex as such.[852] Kanyabashi adds that the Trial Chamber inappropriately engaged in circular reasoning since it initially set out to consider whether the length of the proceedings could be explained by the complexity of the case but eventually held that the length of the proceedings in itself suggested that the case must have been complex.[853]

353. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje also contend that the Trial Chamber erroneously concluded that the length of the proceedings could be explained by the complexity of the case alone.[854] They submit that significant and unjustifiable delays were caused by the conduct of the Prosecution, the Tribunal, the United Nations, and the Government of Rwanda.[855] In this regard, they point to: (i) delays resulting from Judge Maqutu's replacement;

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[849] Trial Judgement, para. 143.
[850] Nyiramasuhuko Notice of Appeal, paras. 1.1-1.7; Nyiramasuhuko Appeal Brief, paras. 10-71; Ntahobali Notice of Appeal, paras. 9-14; Ntahobali Appeal Brief, paras. 3-31; Nteziryayo Notice of Appeal, paras. 67-69; Nteziryayo Appeal Brief, paras. 262-287; Kanyabashi Notice of Appeal, paras. 31-33; Kanyabashi Appeal Brief, paras. 364-381; Ndayambaje Notice of Appeal, paras. 116-125; Ndayambaje Appeal Brief, paras. 295-317.
[851] *See* Nyiramasuhuko Notice of Appeal, para. 1.4; Nyiramasuhuko Appeal Brief, paras. 27, 29; Ntahobali Appeal Brief, paras. 7, 29; Nteziryayo Appeal Brief, paras. 262, 264, 282; Kanyabashi Notice of Appeal, sub-para. 6.2.1; Kanyabashi Appeal Brief, para. 365; Ndayambaje Notice of Appeal, paras. 116, 123; Ndayambaje Appeal Brief, paras. 298, 299, 316. *See also* Ndayambaje Reply Brief, para. 123; AT. 14 April 2015 pp. 7, 8; AT. 21 April 2015 pp. 4, 5.
[852] *See* Nyiramasuhuko Appeal Brief, paras. 14, 15, 33; Kanyabashi Notice of Appeal, sub-para. 6.2.2.1; Kanyabashi Appeal Brief, paras. 366, 372-374; Ndayambaje Appeal Brief, paras. 302, 304, 306. *See also* Kanyabashi Reply Brief, para. 143. *See also* AT. 21 April 2015 p. 5.
[853] Kanyabashi Appeal Brief, para. 371.
[854] Nyiramasuhuko Notice of Appeal, para. 1.1; Nyiramasuhuko Appeal Brief, paras. 11, 12, 25, 70; Ntahobali Notice of Appeal, para. 12; Ntahobali Appeal Brief, para. 10; Nteziryayo Notice of Appeal, para. 67; Nteziryayo Appeal Brief, paras. 282-285; Kanyabashi Notice of Appeal, sub-para. 6.1; Kanyabashi Appeal Brief, paras. 364, 371, 374; Kanyabashi Reply Brief, para. 145; Ndayambaje Notice of Appeal, para. 117; Ndayambaje Appeal Brief, para. 304. *See also* AT. 15 April 2015 p. 14; AT. 16 April 2015 p. 22.
[855] Nyiramasuhuko Notice of Appeal, para. 1.6; Nyiramasuhuko Appeal Brief, paras. 18-21, 25, 36, 38-57; Ntahobali Notice of Appeal, para. 11; Ntahobali Appeal Brief, paras. 11-22; Kanyabashi Notice of Appeal, sub-para. 6.2.3; Kanyabashi Appeal Brief, paras. 367-370, 375-378; Ndayambaje Notice of Appeal, paras. 118-121, 127; Ndayambaje Appeal Brief, paras. 298-310.

(ii) the lack of cooperation of the Government of Rwanda in providing relevant evidence; (iii) the decision to join their trials; (iv) delays caused by the Prosecution's repeated attempts to modify the indictments, its consistent failure to disclose relevant material to the Defence, and several postponements of the start of the trial because the Prosecution was not ready to present its case; (v) the slow pace of the trial proceedings; and (vi) the simultaneous assignment of the judges of the bench to other cases before the Tribunal which limited their availability to finish the present case in due course.[856] Nyiramasuhuko, Ntahobali, Kanyabashi, and Ndayambaje argue that an assessment of undue delay must always be made on the basis of all relevant factors and that the Trial Chamber erred in concluding that it did not need to consider the above-mentioned issues due to the complexity of the case.[857]

354. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje further argue that the drafting phase of the Trial Judgement was excessively long.[858] Ntahobali and Nteziryayo add that it took an unreasonable time for the Tribunal to translate the Trial Judgement into French.[859]

355. The Prosecution responds that the Appeals Chamber should summarily dismiss Nteziryayo's submissions on undue delay because he failed to raise them at trial and thus waived his right to challenge this issue on appeal.[860] On the merits, the Prosecution contends that, although the proceedings in the present case were long, Nyiramasuhuko, Ntahobali, Kanyabashi, Nteziryayo, and Ndayambaje fail to demonstrate that there was undue delay.[861] In its view, the Trial Chamber's conclusion that any delays could be explained by the complexity of the case was supported by

[856] Nyiramasuhuko Notice of Appeal, para. 1.6; Nyiramasuhuko Appeal Brief, paras. 13, 18-21, 34-37, 44-57, 59; Ntahobali Appeal Brief, paras. 12, 14-16, 18-21; Nteziryayo Notice of Appeal, para. 67; Nteziryayo Appeal Brief, paras. 282-285; Kanyabashi Notice of Appeal, sub-paras. 6.2.2.2, 6.2.3; Kanyabashi Appeal Brief, paras. 367-370, 376, 377; Ndayambaje Notice of Appeal, paras. 118-121, 127; Ndayambaje Appeal Brief, paras. 301, 305, 306, 310. *See also* AT. 15 April 2015 pp. 15, 16; AT. 16 April 2015 p. 23; AT. 21 April 2015 pp. 5, 6. Kanyabashi also alleges that the Trial Chamber erred in failing to consider the fact that the Prosecution artificially complicated and lengthened the proceedings by introducing irrelevant evidence and by increasing the number of allegations to which the co-Accused had to respond, although they had no prospect of succeeding, and in rejecting his requests for exclusion of evidence. *See* Kanyabashi Notice of Appeal, sub-paras. 6.2.2.2, 6.2.3.2, 6.2.3.5; Kanyabashi Appeal Brief, para. 376. Ndayambaje also submits that the start of the trial was delayed by the death of Judge Kama. *See* Ndayambaje Appeal Brief, para. 310.

[857] *See* Nyiramasuhuko Notice of Appeal, para. 1.3; Nyiramasuhuko Appeal Brief, paras. 25, 26; Ntahobali Notice of Appeal, para. 12; Ntahobali Appeal Brief, para. 5; Kanyabashi Notice of Appeal, sub-para. 6.1.1; Kanyabashi Appeal Brief, para. 364; Ndayambaje Notice of Appeal, para. 122; Ndayambaje Appeal Brief, paras. 297, 315. *See also* AT. 15 April 2015 p. 15; AT. 16 April 2015 p. 23; AT. 21 April 2015 p. 5.

[858] Nyiramasuhuko Appeal Brief, para. 24; Ntahobali Appeal Brief, paras. 20, 22; Nteziryayo Appeal Brief, paras. 278, 281; Kanyabashi Notice of Appeal, sub-para. 6.2.3.4; Ndayambaje Appeal Brief, paras. 310, 316; Ndayambaje Reply Brief, para. 117. In particular, Ntahobali, Kanyabashi, and Ndayambaje submit that the fact that the Judges of the Trial Chamber were also sitting in other cases before the Tribunal during the deliberations phase delayed the process. *See* Ntahobali Appeal Brief, para. 21; Kanyabashi Notice of Appeal, sub-para. 6.2.3.4; Ndayambaje Appeal Brief, para. 310.

[859] Ntahobali Appeal Brief, paras. 17, 20; Nteziryayo Appeal Brief, paras. 280, 281.

[860] Prosecution Response Brief, para. 1567. *See also* AT. 17 April 2015 pp. 35, 36.

[861] Prosecution Response Brief, paras. 2, 4.

precedent and was reasonable in light of the particular circumstances in this case.[862] The Prosecution further submits that the joinder of trials with which some of the co-Appellants take issue is provided for in the Statute and was justified in the present case.[863] At the appeals hearing, the Prosecution underlined that the co-Accused did not object to the pace at which the trial was proceeding but, on the contrary, requested additional time to prepare their respective defences.[864]

356. Nteziryayo replies that he raised the issue of undue delay in his closing arguments at trial.[865]

357. The Appeals Chamber notes that, at the time of the oral pronouncement of the Trial Judgement, Kanyabashi and Ndayambaje had been detained for almost 16 years, Nyiramasuhuko, Nsabimana, and Ntahobali for almost 14 years, and Nteziryayo for over 13 years.[866] Some of the co-Appellants will have waited more than 20 years for a final determination of their case. It is therefore indisputable that the proceedings in this case have been of an unprecedented and considerable length.

358. Considering the extraordinary length of these proceedings, the Trial Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated,[867] and the interests of justice, the Appeals Chamber will consider Nteziryayo's arguments on undue delay and, if necessary, will *proprio motu* consider the impact of its findings on Nsabimana's rights regardless of the fact that he did not raise allegations in this regard on appeal.

359. Turning to the merits of the submissions before it, the Appeals Chamber recalls that, as previously held, the length of an accused's detention does not in itself constitute undue delay, and the fact that the co-Appellants had been detained for many years at the time of the issuance of the Trial Judgement is insufficient, in itself, to show that the Trial Chamber erred in its determination that there was no undue delay in the proceedings.[868] Because of the Tribunal's mandate and of the

[862] Prosecution Response Brief, paras. 4, 5, *referring*, *inter alia*, *to Mugenzi and Mugiraneza* Appeal Judgement, para. 32. *See also* AT. 14 April 2015 pp. 54-57; AT. 15 April 2015 pp. 60-62; AT. 20 April 2015 pp. 45, 46; AT. 21 April 2015 pp. 33, 34.
[863] Prosecution Response Brief, para. 6. *See also* AT. 14 April 2015 p. 57; AT. 15 April 2015 p. 62; AT. 17 April 2015 p. 37; AT. 21 April 2015 p. 34.
[864] *See* AT. 14 April 2015 pp. 55, 56; AT. 15 April 2015 pp. 61, 62; AT. 17 April 2015 pp. 36, 37; AT. 21 April 2015 p. 34.
[865] Nteziryayo Reply Brief, para. 116, *referring to* Nteziryayo Closing Arguments, T. 28 April 2009 p. 33. Nteziryayo also argues that, because he challenges the overall delay in reaching a final verdict against him, including the appellate phase, it would be inappropriate to consider that he can no longer argue that there was undue delay. *See ibid.*, para. 114. *See also* AT. 17 April 2015 p. 43.
[866] *See supra*, paras. 342, 343.
[867] Trial Judgement, para. 139.
[868] *See Ntabakuze* Appeal Judgement, para. 20.

inherent complexity of the cases before it, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts.[869]

360. It is well established in the Tribunal's jurisprudence that the complexity of a case is one of the factors to be taken into account when assessing whether undue delay has occurred.[870] A number of factors are relevant to determining the level of complexity of a particular case, including the number of counts, the number of accused, the number of witnesses, the quantity of evidence, and the complexity of the facts and of the law.[871]

361. Although the Trial Chamber heavily relied on a comparison with other multi-accused cases at the Tribunal, the Appeals Chamber is not persuaded that the Trial Chamber failed to consider the particular circumstances of the case in determining that it was complex. In its assessment in the Trial Judgement, the Trial Chamber expressly relied on the large number of accused, the number of witnesses heard, the need to replace a judge, the presentation of six different Defence cases and the plurality of cross-examinations for every witness, and the quantity of evidence tendered in the case.[872] In prior interlocutory decisions, the Trial Chamber also considered that the case raised complex issues of law and fact.[873] When arguing that the Trial Chamber failed to consider that the individual allegations against them were not complex as such, Nyiramasuhuko, Ntahobali, and Ndayambaje fail to appreciate these additional factors that the Trial Chamber took into account. Kanyabashi's claim that the Trial Chamber applied circular reasoning and ultimately relied on the length of the proceedings to determine that the case was complex is also not supported by a reading of the Trial Judgement.

362. The Appeals Chamber is satisfied that the Trial Chamber did not err in considering that the instant proceedings were complex. With six accused, this case is the largest ever heard before the Tribunal. The six accused were prosecuted on the basis of numerous allegations with regard to crimes that occurred in several locations and on different dates. The Trial Chamber also had to rule on a particularly broad scope of counts, from conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, to several crimes against humanity and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, as well as to consider a wide range of modes of liability.[874] As noted in the Trial Judgement, the Trial Chamber heard

[869] *Nahimana et al.* Appeal Judgement, para. 1076. *See also Mugenzi and Mugiraneza* Appeal Judgement, para. 32.
[870] *Cf. Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Nahimana et al.* Appeal Judgement, para. 1074.
[871] *Cf. Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074. *See also Rwamakuba* Appeal Decision, para. 13.
[872] Trial Judgement, paras. 139, 142.
[873] 26 November 2008 Decision, para. 59, *referred to* in Trial Judgement, para. 141; 7 April 2006 Decision, para. 75; 8 September 2000 Decision, para. 40.
[874] *See* Trial Judgement, para. 1.

numerous witnesses and had to consider an exceptionally large amount of tendered evidence and trial transcripts.[875]

363. However, the crucial question before the Appeals Chamber is whether the Trial Chamber erred in finding that the length of the proceedings could be explained by the complexity of this case alone. In this respect, the Appeals Chamber recalls that, in addition to the length and the complexity of the proceedings, a number of other factors are relevant to the assessment of an allegation of undue delay, including the conduct of the parties and of the relevant authorities.[876] The Appeals Chamber will therefore examine these other factors pointed out by Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje which, they argue, unjustifiably delayed the proceedings.

364. With respect to the delays resulting from the replacement of Judge Maqutu and the lack of cooperation of the Government of Rwanda, the Appeals Chamber notes that, in the Trial Judgement, the Trial Chamber recalled its 26 November 2008 Decision where it stated that the non-reelection of Judge Maqutu and the lack of cooperation of the Rwandan authorities "may have contributed to the length of the proceedings" but did not find that there was undue delay.[877] The Trial Chamber determined that there was no reason to reconsider its 26 November 2008 Decision.[878] The Appeals Chamber observes that Judge Maqutu was not reelected as a judge of the Tribunal by the United Nations General Assembly in May 2003 and thus had to be replaced midway through the Prosecution case, leading to a suspension of the trial for over eight months.[879] As noted by the Trial Chamber, the proceedings were also stalled at some point due to the inability of witnesses to travel from Rwanda to Arusha as scheduled, resulting in the postponement of several weeks of a planned trial session.[880] However, the Appeals Chamber recalls that Article 20(4)(c) of the Statute makes clear that the right to be tried without undue delay does not protect against any delay in the proceedings; it protects against *undue* delay.[881] In the absence of any arguments showing that the Tribunal's or the United Nations' response to the non-reelection of Judge Maqutu and the inability of witnesses to travel from Rwanda to Arusha was inadequate and

[875] Trial Judgement, paras. 139, 142.
[876] *See supra*, para. 346.
[877] Trial Judgement, para. 141, *referring to* 26 November 2008 Decision, para. 60, p. 13.
[878] Trial Judgement, para. 141.
[879] *See* Trial Judgement, paras. 75, 6390-6392. *See also supra*, para. 118.
[880] As a result of the inability of witnesses to travel from Rwanda to Arusha as scheduled, the Trial Chamber was not able to hear any Prosecution witnesses starting on 10 June 2002. On 27 June 2002, the Trial Chamber decided to adjourn the session, which resulted in a loss of a total of five weeks of planned trial session. The Trial Chamber decided to adjourn the trial until 14 October 2002. *See* T. 10 June 2002 pp. 63-67; T. 27 June 2002 pp. 64-66. *See also* Trial Judgement, para. 6374.
[881] *Halilović* Appeal Decision, para. 17. *See also Ndindiliyimana et al.* Appeal Judgement, para. 43; *Mugenzi and Mugiraneza* Appeal Judgement, para. 30; *Gatete* Appeal Judgement, para. 18; *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.

further delayed the proceedings, the Appeals Chamber finds no error in the Trial Chamber's exercise of its discretion.

365. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje also rely on the delays allegedly caused by the decision to join the trials. When examining the co-Accused's challenges to the joinder in the Trial Judgement, the Trial Chamber recalled its finding that any assertion that the length of a particular trial if conducted independently would have concluded more quickly was "hypothetical and speculative" and concluded that "the joinder did not create an injustice."[882] The Appeals Chamber recalls that the joinder of trials is provided for by the Rules and that it had found no error in the Trial Chamber's decisions to join the trials of the co-Accused and to reject their requests for separate trials.[883] The argument that the excessive length of the proceedings in this case was an unavoidable and clearly foreseeable consequence of the joinder decision is not substantiated.[884] Accordingly, the Appeals Chamber finds that, notwithstanding that the joinder added some degree of complexity to the proceedings, the mere contention that separate trials would have proceeded faster is insufficient to substantiate a claim that undue delay occurred as a result of the joinder.[885] The Appeals Chamber rejects the arguments made in this respect.

366. As for the remaining arguments relating to the conduct of the Prosecution and of the other relevant authorities, the Appeals Chamber finds merit in the submission that the Trial Chamber erred in concluding that it did not need to "consider the conduct of the Prosecution or other legal authorities."[886] As held repeatedly, the conduct of the parties and of the relevant authorities are relevant factors to take into account in determining whether an accused's fundamental right to a trial without undue delay has been infringed.[887] Given the significant length of the instant proceedings at the time it delivered its judgement, it was incumbent upon the Trial Chamber to carefully assess whether, besides the complexity of the case, the conduct of the parties and of other relevant authorities may have contributed to any unjustifiable delays in this case.

367. Concerning the conduct of the Prosecution, the Appeals Chamber observes that, from their arrests to the commencement of the trial on 12 June 2001, Nyiramasuhuko, Ntahobali, and Nsabimana spent almost four years in pre-trial detention, Nteziryayo three years, and Kanyabashi and Ndayambaje six years. The Appeals Chamber accepts that preparing such a case for trial can

[882] Trial Judgement, para. 148, *referring to* 26 November 2008 Decision, para. 59.
[883] *See supra*, Section III.B.
[884] *See* Nteziryayo Appeal Brief, para. 285. *See also supra*, Section III.B.2(b).
[885] *Cf. Gotovina* Appeal Decision on Joinder, para. 44. *See also* ECHR *Neumeister* Judgment, para. 21 ("[t]he course of the investigation would probably have been accelerated had the Applicant's case been severed from those of his co-accused, but nothing suggests that such a severance would here have been compatible with the good administration of justice").
[886] Trial Judgement, para. 143.
[887] *See supra*, para. 346.

reasonably require a lengthy period of time but emphasises that every effort should be made to bring cases to trial as expeditiously as possible.[888]

368. Although the decisions of the Prosecution to request to amend the indictments and to join the trials may have increased the length of the pre-trial proceedings in this case, Nyiramasuhuko, Ntahobali, Kanyabashi, and Ndayambaje do not demonstrate that these decisions, which are expressly allowed by the Rules, improperly prolonged the trial.[889]

369. The Appeals Chamber notes, however, that the Trial Chamber expressly acknowledged in its 26 November 2008 Decision that the Prosecution repeatedly failed to comply with its disclosure obligations towards the Defence.[890] The Trial Chamber generally concluded in this context that measures had been taken to remedy these failures and that the issue was therefore settled and did not need to be relitigated.[891] However, neither in its 26 November 2008 Decision nor in the Trial Judgement did the Trial Chamber specifically address Nyiramasuhuko's and Ntahobali's claim that the Prosecution's disclosure violations unduly delayed the proceedings.[892]

370. As regards the impact of the Prosecution's failure to comply with its disclosure obligations on the length of the proceedings, the Appeals Chamber observes that when the Prosecution requested in 1998 that the trials of the co-Accused be joined and the indictments against them be modified, it stated that it would be ready to start the trial "as soon as the Trial Chamber" would render its decisions on these matters.[893] The amendments of the indictments were granted on 10 and 12 August 1999, and the joinder was decided on 5 October 1999.[894] The trial, however, did not start

[888] *See Renzaho* Appeal Judgement, para. 240.
[889] The Appeals Chamber also rejects Kanyabashi's contention that by requesting his transfer to the Tribunal, the Prosecution deprived him of the opportunity to have a trial within a reasonable time in Belgium as it fails to see how the fact that his trial could have been conducted faster in Belgium has any impact on whether undue delay occurs in these proceedings. Similarly, the Appeals Chamber rejects Kanyabashi's general and unsubstantiated claims that the Prosecution artificially complicated and lengthened the proceedings and that the Trial Chamber erred in rejecting his requests for exclusion of evidence. *See supra*, fn. 856.
[890] 26 November 2008 Decision, para. 61.
[891] 26 November 2008 Decision, para. 61.
[892] *See* 26 November 2008 Decision, para. 8; 22 August 2008 Motion, paras. 106-115. The Appeals Chamber observes that the Trial Chamber denied arguments raised by Nyiramasuhuko on this matter in her motion of 24 June 2003 and found, without further explanation, that the gravity of charges and the complexity of the case did not render unreasonable the length of the proceedings. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Motion by Pauline Nyiramasuhuko for Termination of Proceedings on Grounds of Abuse of Process (Unreasonable Delays and Unfair Trial), 24 June 2003 (originally filed in French, English translation filed on 22 April 2004) ("24 June 2003 Motion"), pp. 32, 33; 20 February 2004 Decision, para. 16. *See also* Nyiramasuhuko Appeal Brief, para. 64.
[893] *See Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998, para. 5(g).
[894] Trial Judgement, paras. 6284, 6292, 6302, 6313, 6317, 6320.

before 12 June 2001,[895] primarily as a result of the Prosecution's failure to comply with its disclosure obligations and its lack of readiness, as discussed in detail below.

371. Specifically, in June 2000, the Prosecution stated that it would be ready to start the presentation of its case only in November 2000.[896] Because the trial had not yet started by February 2001, the then presiding judge of the case, Judge Kama, convened a status conference on 2 February 2001 during which he asked the Prosecutor whether all the disclosures pursuant to Rule 66 of the Rules were finally completed, emphasising that it was the pre-condition for the trial to begin.[897] The record reflects that the Prosecution had still not complied with its Rule 66 disclosure obligations at the time.[898] Judge Kama stressed that the longest periods of detention had occurred in this case and stated that "2001 seemed to be very far away when some commitments were made", expressly referring to the commitment made by the Prosecution in June 2000 to start its case in November of that year.[899] The Prosecutor responded that "it is true that we are rather late. We made pledges that we were not able to keep. I believe that at this time […] we are absolutely ready to begin our trial […] on 1st of April of this year."[900] During this status conference, the trial was set to commence on 14 May 2001.[901] Following the death of Judge Kama on 6 May 2001, the trial finally started on 12 June 2001.[902]

372. It transpires from the procedural history summarised above that the Prosecution's failure to comply with its disclosure obligations and lack of readiness delayed the start of the trial by several months. Although the Prosecution acknowledged its lack of readiness and belatedness in fulfilling its disclosure obligations, upon which the start of the trial depended, it does not provide any explanation as to why it was not in a position to disclose some of the relevant materials despite

[895] Trial Judgement, paras. 74, 6341. The Appeals Chamber also observes that, before the joinder of trials, the dates for the start of the individual trials of Kanayabashi and Ndayambaje had already been set up for 8 April 1997 and 20 May 1997, respectively. *See ibid.*, paras. 6278, 6287, 6290.
[896] *See* Status Conference, T. 2 February 2001 p. 4 ("If you remember, we had held an informal meeting with some of you in June last. I have noted that at that period already – it was in June 2000 – 2001 seemed to be very far away when some commitments were made. The Prosecutor, especially, said that she was ready for November 2000. Now, we are March -- February-March 2001. We wonder whether she is ready now.").
[897] Status Conference, T. 2 February 2001 pp. 4, 5.
[898] *See*, *e.g.*, *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on the Full Disclosure of the Identity and Unredacted Statements of the Protected Witnesses, 8 June 2001 ("8 June 2001 Disclosure Decision"). The Trial Chamber noted that it is only seven months after the start of the trial that full disclosure of the Prosecution's witnesses' identities and statements was carried out. *See* 26 November 2008 Decision, para. 61.
[899] Status Conference, T. 2 February 2001 pp. 4, 5. *See also* 8 June 2001 Decision, para. 21 ("The Chamber is aware of the length of the detention of [Ntahobali] since his arrest and transfer to the Tribunal in July 1997, that is, more than four years ago, and, indeed expressed its concern in this regard at the last Status Conference, held on 2 February 2001, thus reminding both Parties that the trial could not be further postponed and had to take place soon for the sake of all the Accused's right to be tried without undue delay".).
[900] Status Conference, T. 2 February 2001 p. 5.
[901] Status Conference, T. 2 February 2001 p. 117.
[902] Trial Judgement, paras. 74, 6336, 6341, fn. 159.

express orders from the Trial Chamber or why it repeatedly changed the date for its readiness to commence trial. While the trial was postponed by one month as a result of the death of Judge Kama,[903] the record shows that the fact that the trial was delayed to spring 2001 was largely caused by the Prosecution's inability to meet its disclosure obligations and lack of readiness. In light of the foregoing, the Appeals Chamber finds that the Prosecution's failure to fulfill its disclosure obligations created unjustified delays in the start of the trial.

373. With respect to the trial phase, the Appeals Chamber observes that, as highlighted by Ntahobali and Kanyabashi, the trial phase lasted over eight years and was thus proportionally longer than in other multi-accused cases at the Tribunal.[904] The Appeals Chamber, however, stresses that a more accelerated pace of other multi-accused cases does not, in and of itself, demonstrate undue delay.[905]

374. As noted by the Trial Chamber, the length of the proceedings was increased in this particular case by the replacement of a judge in the course of the trial, the presentation of six Defence cases and the plurality of cross-examinations for every witness.[906] Although not taken into account by the Trial Chamber when examining whether undue delay occurred, the Appeals Chamber further observes that, during the trial phase, the judges sitting in this case were also involved in several other proceedings before the Tribunal. Indeed, the Trial Chamber expressly noted in the "Procedural History" section of the Trial Judgement that it was not able to sit in the *Nyiramasuhuko et al.* case: (i) from 4 to 25 July 2001, 1 to 5 October 2001, 26 November to 13 December 2001, 16 September to 9 October 2002, 18 November to 12 December 2002, and 31 March to 24 April 2003 because all three judges of the Trial Chamber were seised of the *Kajelijeli* case; and (ii) from 3 to 25 September 2001, 28 January to 19 February 2002, 6 to 14 May 2002, 19 August to 12 September 2002, 13 January to 30 April 2003, and 5 to 15 May 2003 because all three judges of the Trial Chamber were seised of the *Kamuhanda* case.[907] Moreover, the Appeals Chamber notes that: (i) Judge Bossa, who was assigned to the case on 20 October 2003, was also at the time assigned to the *Ndindabahizi* case, which was in session notably from

[903] In this respect, the Appeals Chamber rejects Ndayambaje's undeveloped claim that the death of Judge Kama unduly delayed the commencement of the trial. *See supra*, fn. 856.
[904] For example:
- in the *Ndindiliyimana et al.* case, a four-accused case, the trial phase extended over four years and nine months;
- in the *Bizimungu et al.* case, a four-accused case, the trial phase lasted over five years;
- in the *Bagosora et al.* case, a four-accused case, the trial phase lasted for five years and two months; and
- in the *Nahimana et al.* case, a three-accused case, the trial phase lasted two years and ten months.
See Ndindiliyimana et al. Trial Judgement, Annex A, paras. 34, 134; *Bizimungu et al.* Trial Judgement, Annex A, paras. 29, 81; *Bagosora et al.* Trial Judgement, Annex A, paras. 2314, 2367; *Nahimana et al.* Trial Judgement, para. 94.
[905] *See Mugenzi and Mugiraneza* Appeal Judgement, para. 32.
[906] Trial Judgement, para. 139.
[907] Trial Judgement, paras. 6345, 6349, 6357, 6361, 6367, 6377, 6379, 6384, 6386, 6389, fns. 159, 160.

27 October to 28 November 2003 and on 1 and 2 March 2004;[908] (ii) all three judges of the Trial Chamber were also seised of the *Bisengimana* sentencing case, in which they sat on 17 November 2005, 7 December 2005, 19 January 2006, and 20 April 2006;[909] and (iii) all three judges of the Trial Chamber were seised of the *Nzabirinda* sentencing case, in which they sat on 14 December 2006, 17 January 2007, and 23 February 2007.[910]

375. It is unquestionable that the pace of the trial was affected by the judges' obligations in other cases. Whereas the proceedings in this case needed interruptions so as to allow the parties to prepare,[911] the judges' obligations in other cases prevented them from sitting in this case for approximately 36 weeks. In light of the time required to dispose of the motions filed in these other cases, deliberate on their merits, and write the judgements, these additional obligations also necessarily significantly reduced the time the Trial Chamber judges could devote to the present case.

376. The Appeals Chamber observes that it was practice for judges of the Tribunal to participate simultaneously in multiple proceedings given the workload of the Tribunal during the relevant period.[912] It also notes that significant efforts were made by the authorities of the Tribunal to obtain the necessary resources to complete its mandate while ensuring the utmost respect for the rights of all accused.[913] However, in the particular circumstances of this case where the co-Accused had already been in detention for nearly 4 to 6 years at the start of the trial and which had already suffered from significant delays,[914] the Appeals Chamber concludes that the additional delays resulting from the judges' simultaneous participation to other proceedings caused undue delay. The Appeals Chamber recalls that logistical considerations should not take priority over the trial

[908] *See Ndindabahizi* Trial Judgement, Section I.4, paras. 17, 21.
[909] *See Bisengimana* Sentencing Judgement, Section VI.A, paras. 220, 228, 233.
[910] *See Nzabirinda* Sentencing Judgement, Section II.A, paras. 9, 48.
[911] As regards the Prosecution's heavy reliance on the fact that most of the co-Accused repeatedly requested more time to prepare their defence, the Appeals Chamber emphasises that an accused cannot be blamed for trying to take full advantage of the resources afforded by the law in their defence as long as his conduct is not obstructive. Noting that the right to a fair trial in Article 20 of the Statute is in *pari materia* with Article 6 of the European Convention on Human Rights, the Appeals Chamber considers that the jurisprudence of the European Court of Human Rights ("ECtHR") may provide useful guidance for the interpretation of the right to trial without undue delay. In this regard, *see*, *e.g.*, *Yagci and Sargin v. Turkey*, ECtHR, Nos. 16419/90 and 16426/90, Judgment, 8 June 1995, para. 66. Regarding the reliance on the jurisprudence of the ECtHR, *see Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006, paras. 18, 19.
[912] During the *Nyiramasuhuko et al.* trial, the Tribunal's trial chambers were seised of 38 cases involving 53 accused.
[913] The Appeals Chamber notes that, in 2002, in response to the request made by the then President of the Tribunal to complete its tasks within a reasonable amount of time in order to "respect the rights of the accused and to meet the expectations of the victims, Rwandan society and the United Nations", the Security Council established a pool of *ad litem* judges. *See* "Identical Letters dated 14 September 2001 from the Secretary-General addressed to the President of the General Assembly and the President of the Security Council", UN Doc. A/56/265-S/2001/764, 19 September 2001, Appendix, p. 7; Security Council Resolution 1431 (2002), UN Doc. S/RES/1431, 6 September 2002, paras. 1, 2.
[914] The Appeals Chamber refers to the delays caused by the Prosecution's lack of readiness, the replacement of Judge Maqutu, and the inability of witnesses to travel from Rwanda to Arusha as scheduled. *See supra*, paras. 364, 370-372.

chamber's duty to safeguard the fairness of the proceedings.[915] In the same vein, the Appeals Chamber is of the view that organisational hurdles and lack of resources cannot reasonably justify the prolongation of proceedings that had already been significantly delayed.[916]

377. With respect to the contention that the judgement drafting phase was excessively long, the Appeals Chamber observes that two years and two and a half months elapsed between the end of the closing arguments and the written delivery of the Trial Judgement.[917] Given the size and complexity of the case, the Appeals Chamber is not persuaded that this period was excessive and amounted to undue delay.[918] The Appeals Chamber therefore dismisses Nyiramasuhuko's,

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[915] *See Sainović et al.* Appeal Judgement, para. 101; *Haradinaj et al.* Appeal Judgement, para. 46.

[916] The Appeals Chamber notes that the United Nations Human Rights Committee, the African Commission on Human and People's Rights, and the ECtHR have held that it is for the contracting States to organise their legal systems in such a way that their courts can meet the requirement of a trial within a reasonable time. *See*, *e.g.*, *B. Lubuto v. Zambia*, Human Rights Committee, Communication No. 390/1990 (Views adopted on 31 October 1995), UN Doc. CCPR/C/55/D/390/1990 (1995), 3 November 1995, para. 7.3 ("The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3(c)."); Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice), 13 April 1984, para. 10 (Views adopted on 12 May 2003), UN Doc. HRI/GEN/1/REV.6, p. 137 ("Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal."); *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia*, African Commission on Human and People's Rights, Communication No. 301/05, 12 October 2013, para. 235 ("The African Commission also agrees with the Complainants that the complexity of a case should not debar domestic courts from acting with due diligence in dealing with a case on the Merits. At any rate, it is the responsibilities of States Parties to the African Charter to organize their judiciary in such a way that the right guaranteed in Article 7 (1) (d) of the Charter can be effectively enjoyed") (internal references omitted); *EKO-Energie, SPOL. S.R.O v. The Czech Republic*, ECtHR, No. 65191/01, Judgment, 17 May 2005, para. 33 ("The Court recalls that the Convention places a duty on the Contracting States to organize their legal system so as to allow the courts to comply with the requirements of Article 6 § 1 of the Convention, including that of trial within a reasonable time. Nonetheless, a temporary backlog of business might not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind."); *Mansur v. Turkey*, ECtHR, No. 16026/90, Judgment, 8 June 1995, para. 68; Dobbertin *v. France*, ECtHR, No. 13089/87, Judgment, 25 February 1993, para. 44; *Vocaturo v. Italy*, ECtHR, No. 11891/85, Judgment, 24 May 1991, para. 17 ("As regards the excessive workload, the Court points out that under Article 6 para. 1 (art. 6-1) of the Convention everyone has the right to a final decision within a reasonable time in the determination of his civil rights and obligations. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement."); *Abdoella v. The Netherlands*, ECtHR, No. 12728/87, Judgment, 25 November 1992, para. 24 ("Article 6 para. 1 (art. 6-1) imposes on the Contracting States the duty to organise their judicial systems in such a way that their courts can meet each of its requirements".). *See also Jean Paul Genie-Lacayo v. Nicaragua*, Inter-American Court of Human Rights, Judgment, 29 January 1997, paras. 39, 80 ("There is excessive delay regarding the application for judicial review filed on 29/8/94 which still has not been disposed of. Even considering complexity of case, and excuses, impediments and substitution of judges of the Supreme Court of Justice, the 2 years that have elapsed since the application was admitted is not reasonable and a breach of art8(1).").

[917] *See* Trial Judgement, paras. 85, 6610, 6615.

[918] The Appeals Chamber notes that in the *Mugenzi and Mugiraneza* case, it did not consider that a three-year period between closing submissions and the issuance of the Trial Judgement constituted undue delay. *See Mugenzi and Mugiraneza* Appeal Judgement, para. 35. The Appeals Chamber also found that an 18-month Judgement drafting phase in a complex single accused case, while concerning, did not amount to undue delay. *See Renzaho* Appeal Judgement, para. 241.

Ntahobali's, Nteziryayo's, Kanyabashi's, and Ndayambaje's contention that the Trial Chamber erred when it found that in light of the complexity of this case the duration of the judgement drafting phase was reasonable.

378. Based on the foregoing, the Appeals Chamber finds that delays in the start of the trial due to the Prosecution's conduct and delays resulting from the Trial Chamber judges' simultaneous assignment to multiple cases cannot be reasonably explained or justified. As a result, the Appeals Chamber finds that the Trial Chamber erred when it found that the length of the proceedings was reasonable and adequately explained by the complexity of the case.

379. The Appeals Chamber now turns to Ntahobali's and Nteziryayo's argument that the appellate stage of the proceedings was also unduly delayed as a result of the unreasonable time taken to translate the Trial Judgement into French.[919] On this matter, the Appeals Chamber observes that the official French translation of the Trial Judgement was served on the parties on 5 February 2013,[920] over one year and a half after the issuance of the written Trial Judgement in English.[921] Given the co-Appellants' inability to understand English, extensions of time for the filing of their appeal briefs were granted from the date of service of the French translation of the Trial Judgement to allow them to make full answer and defence.[922] The initial scheduling of this case was based on a formal revised translation available at the end of August 2012.[923] However, only a non-revised informal working copy of the French translation of the Trial Judgement was made available to the parties in July 2012. As a result of the belated filing of the finalised formal French translation of the Trial Judgement, the co-Appellants' appeal briefs were delayed to April 2013, which impaired the Appeals Chamber's ability to examine their appeals within the expected schedule.

380. The Appeals Chamber underlines the difficulty of translating a 1,468 single-spaced pages document which contains thousands of references and addresses complex legal concepts. The French translation of the Trial Judgement also reflects that the highest quality standards were applied in the present case. Neither Ntahobali nor Nteziryayo effectively demonstrates that the

[919] Ntahobali Appeal Brief, paras. 17, 20; Nteziryayo Appeal Brief, paras. 280, 281.
[920] Decision on Nteziryayo's Motion to Amend His Notice of Appeal and on Prosecution's Motion to Strike Nteziryayo's New Grounds of Appeal, 8 May 2013 ("8 May 2003 Appeal Decision"), para. 5.
[921] *See* Trial Judgement, para. 6615.
[922] *See* Decision on Motions for Extension of Time for the Filing of the Appeal Submissions, 25 July 2011, paras. 11, 13, 16.
[923] Letter dated 13 November 2013 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council, S/2013/663, 13 November 2013, para. 20 ("The initial completion projections in this case were based on the original notices of appeal and the expedited projection for availability of the French translation of the trial judgement at the end of August 2012. However, the French translation of the trial judgement was only completed and served on the parties at the beginning of February 2013, occasioning a five-month delay in the filing of the appeal briefs of the six convicted persons and of the response brief to the prosecution's appeal.").

overall time taken to translate and revise a trial judgement of this complexity and magnitude from English to French was unreasonably long and created undue delay. Their contention is therefore rejected.

381. The Appeals Chamber will now examine the allegations of prejudice.

2. Prejudice

382. In the context of its discussion on undue delay, the Trial Chamber noted that the Defence had offered "no specific assertion of legal prejudice beyond the general complaint that the trial was unfair and that Ndayambaje could not properly answer the charges against him".[924] It concluded that the co-Accused had "not demonstrated that they suffered any legal prejudice".[925]

383. Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje submit that the Trial Chamber erred in its assessment of their prejudice resulting from the delays in the proceedings.[926] In this respect, Nyiramasuhuko, Ntahobali, and Ndayambaje contend that the Trial Chamber erred in requiring them to demonstrate a "legal prejudice" and in failing to provide a reasoned opinion in this respect.[927] Ntahobali, Kanyabashi, and Ndayambaje allege that they suffered prejudice because of: (i) the prolonged detention on remand; (ii) the death or disappearance of witnesses and the alteration of the witnesses' memory due to the passage of time; (iii) limitations in the number of witnesses and the time allowed for examination during trial; (iv) the Trial Chamber's refusal to conduct a site visit because of the considerable time that had elapsed since 1994 and the additional delays it would create; (v) the physical, psychological, and emotional distress caused by the lengthy detention on remand and separation from their families; (vi) pecuniary losses incurred as a result of their detention; and (vii) their inability to complete educational studies.[928] Nyiramasuhuko adds that the Trial Chamber failed to address her argument that, as the only woman in the Tribunal's custody, the conditions of her detention were particularly harsh because she was almost completely isolated.[929]

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[924] Trial Judgement, para. 140.
[925] Trial Judgement, para. 143.
[926] *See* Nyiramasuhuko Notice of Appeal, paras. 1.4, 1.5; Nyiramasuhuko Appeal Brief, paras. 22, 28, 58, 60-63; Ntahobali Notice of Appeal, paras. 11, 12; Ntahobali Appeal Brief, paras. 23-26; Nteziryayo Appeal Brief, para. 282; Kanyabashi Notice of Appeal, sub-para. 6.2.4; Kanyabashi Appeal Brief, paras. 380, 381; Ndayambaje Notice of Appeal, para. 117; Ndayambaje Appeal Brief, paras. 312-314.
[927] *See* Nyiramasuhuko Appeal Brief, para. 22; Ntahobali Appeal Brief, paras. 4, 23; Ndayambaje Notice of Appeal, para. 117; Ndayambaje Appeal Brief, para. 312.
[928] Ntahobali Appeal Brief, paras. 24, 25, fn. 41; Kanyabashi Appeal Brief, paras. 380, 381; Ndayambaje Appeal Brief, paras. 313, 314. *See also* Kanyabashi Reply Brief, para. 144; Ndayambaje Reply Brief, para. 118; AT. 15 April 2015 p. 16; AT. 21 April 2015 p. 6.
[929] Nyiramasuhuko Appeal Brief, paras. 60, 61, *referring to* 20 February 2004 Decision.

384. The Prosecution generally responds that the co-Appellants "vigorously litigated their cases", that the record reflects that they had recourse to all available remedies, and that the Trial Chamber was "generous" in allotting them the time to ensure that their fair trial rights were respected.[930]

385. The meaning of "*legal* prejudice" in the Trial Judgement is not clear. In any event, the Appeals Chamber clarifies that any form of prejudice that a party allegedly suffered as a result of undue delay ought to be considered. The Appeals Chamber finds that the Trial Chamber's failure to expressly address the entirety of the co-Accused's arguments[931] and conduct a comprehensive assessment of their alleged prejudice in the Trial Judgement infringed the co-Accused's rights to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules.

386. Turning to the specific allegations of prejudice, the Appeals Chamber rejects as unsubstantiated or insufficiently supported the arguments related to the death or disappearance of witnesses,[932] the alteration of the witnesses' memory,[933] the limitations in the number of witnesses and time allowed for cross-examination, the pecuniary losses incurred as a result of detention, and the inability to complete educational studies.

387. Although the Trial Chamber specifically relied on the fact that it was unlikely that the sites remained in the same condition so many years after the events in question and that the visits may not have been "completed in a short period of time" in support of its decision to refuse site visits,[934] its decision reflects that it relied on a number of other reasons unrelated to the length of the proceedings to reach its conclusion.[935] The Appeals Chamber therefore finds no merit in the submission that the length of the proceedings deprived the parties of site visits.

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[930] Prosecution Response Brief, para. 7. *See also* AT. 21 April 2015 pp. 35, 36.

[931] The Appeals Chamber observes that Nyiramasuhuko and Ntahobali raised lengthy arguments regarding their prejudice that the Trial Chamber did not address in the 20 February 2004 Decision and 26 November 2008 Decision. *See* Nyiramasuhuko Appeal Brief, paras. 59-64, *referring to* 24 June 2003 Motion, paras. 164-190, 20 February 2004 Decision, para. 16; Ntahobali Appeal Brief, para. 4, *referring to* 22 August 2008 Motion, paras. 53, 120, 134-136, 145-152, 182, 183, 26 November 2008 Decision, paras. 54, 55, 59-61.

[932] Ntahobali does not point to any specific incident where he was unable to locate and present potential Defence witnesses nor does he explain how the testimony of such witnesses would have supported his case. *See* Ntahobali Appeal Brief, para. 24, fn. 41.

[933] Ntahobali does not demonstrate that the Trial Chamber's reliance on the passage of time between the events and the witnesses' testimonies to explain inconsistencies or errors of some Prosecution witnesses caused him prejudice. *See* Ntahobali Appeal Brief, para. 24, fn. 40, *referring to* Trial Judgement, paras. 171, 1436, 2090, 2725, 2770, 3801, 3948, 4174, 4598, 4631, 4711. The Appeals Chamber observes that: (i) paragraphs 171, 1436, 2090, 3801, 4174, 4598, 4631, 4711 of the Trial Judgement referred to by Ntahobali relate to allegations on the basis of which he was not charged; (ii) Ntahobali was not convicted in relation to the allegation discussed in paragraph 2725 of the Trial Judgement; and (iii) although the Trial Chamber relied on the passage of time in paragraphs 2770 and 3948 of the Trial Judgement, there is no indication that such a conclusion would have been different if the witness had testified earlier.

[934] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion for Site Visits in the Republic of Rwanda, 26 February 2009 ("Site Visits Decision"), para. 21. *See also* Trial Judgement, para. 1262.

[935] The Trial Chamber further concluded that the visits were not necessary since: (i) a considerable number of exhibits, including photographs and maps, had already been tendered to assist the Trial Chamber's familiarisation with the

388. However, the Appeals Chamber recalls its finding that the present proceedings were unduly delayed as a result of the Prosecution's conduct and the Trial Chamber judges' simultaneous assignment to multiple proceedings, delays which are not attributable to the co-Accused.[936] These delays prolonged the detention of the co-Accused. The Appeals Chamber finds that these delays and the resulting prolonged detention constitute prejudice *per se* and that the Trial Chamber erred in concluding that the co-Accused did not suffer prejudice.[937]

389. With respect to Nyiramasuhuko's specific argument regarding her conditions of detention, the Appeals Chamber is mindful that, as the only woman in the Tribunal's custody, Nyiramasuhuko's conditions of detention differed from those of the other detainees. However, the Appeals Chamber considers that Nyiramasuhuko fails to substantiate her claim on appeal that the prejudice resulting from the prolongation of her detention on remand was greater than that suffered by her co-Accused. The Appeals Chamber therefore rejects Nyiramasuhuko's contention that she was adversely affected by the undue delay in the present proceedings due to her status as the only female detainee in the Tribunal's custody.

390. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in finding that the period of almost 16 years of pre-trial and trial proceedings was adequately explained by the complexity of the case and that the right of Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje to be tried without undue delay provided for in Article 20(4)(c) of the Statute had not been violated. The Appeals Chamber further finds that this violation caused them prejudice. The Appeals Chamber will now turn to the issue of remedy.

3. Remedy

391. The Appeals Chamber reiterates that "any violation, even if it entails a relative degree of prejudice, requires a proportionate remedy".[938] The nature and form of the effective remedy should be proportional to the gravity of harm that is suffered.[939]

392. Nyiramasuhuko, Ntahobali, Kanyabashi, Nteziryayo, and Ndayambaje request that the Appeals Chamber order a stay or termination of the proceedings[940] or, in the alternative, a reduction

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relevant locations; and (ii) the sites proposed were too numerous and may have had "extraordinary logistical and cost implications for the Tribunal". *See* Site Visits Decision, para. 21. *See also* Trial Judgement, para. 1262; *infra*, Section IX.D.

[936] *See supra*, para. 378.

[937] *Cf. Gatete* Appeal Judgement, paras. 44, 45.

[938] *Rwamakuba* Appeal Decision, para. 24. *See also Gatete* Appeal Judgement, para. 286; *Kajelijeli* Appeal Judgement, para. 255. *See also* International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976 ("ICCPR"), Article 2(3)(a).

[939] *Rwamakuba* Appeal Decision, para. 27.

of their sentences.[941] Ntahobali and Ndayambaje further request financial compensation for the violation of their right to be tried without undue delay.[942]

393. As held above, the Appeals Chamber considers that the undue delay in this case has prejudiced Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje.

394. However, the Appeals Chamber does not find that the violation of the co-Appellants' right to be tried without undue delay and the prejudice they suffered were so serious or egregious as to justify a stay or the termination of the proceedings requested by Nyiramasuhuko, Ntahobali, Kanyabashi, Nteziryayo, and Ndayambaje.[943] Nevertheless, in light of the length of the undue delay, the Appeals Chamber is also not convinced that a formal recognition of the violation would constitute an effective remedy in the present case.

395. The Appeals Chamber observes that a reduction of sentence has been considered an effective remedy in cases where the breach of the fair trial rights resulted in the accused being detained impermissibly or for a longer period than necessary.[944] Financial compensation has also been envisioned in limited situations where the accused was ultimately not found guilty.[945] In the *Rwamakuba* case, where the accused was acquitted of all charges, a financial compensation was

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[940] Nyiramasuhuko Appeal Brief, para. 71; Ntahobali Notice of Appeal, para. 13; Ntahobali Appeal Brief, para. 30; Kanyabashi Notice of Appeal, sub-para. 6.2.5.1; Kanyabashi Appeal Brief, para. 379; Ndayambaje Notice of Appeal, para. 125; Ndayambaje Appeal Brief, para. 317. *See also* AT. 15 April 2015 p. 17. Kanyabashi specifically requests that the Appeals Chamber reverse all his convictions and acquit him. *See* Kanyabashi Notice of Appeal, para. 33; Kanyabashi Appeal Brief, para. 379.

[941] Ntahobali Notice of Appeal, para. 13; Ntahobali Appeal Brief, para. 31; Nteziryayo Appeal Brief, para. 287; Kanyabashi Notice of Appeal, para. 33; Kanyabashi Appeal Brief, para. 381; Ndayambaje Appeal Brief, para. 317. *See also* AT. 15 April 2015 p. 17.

[942] Ntahobali Notice of Appeal, para. 14; Ntahobali Appeal Brief, para. 31; Ndayambaje Appeal Brief, para. 317.

[943] *Cf. Kajelijeli* Appeal Judgement, para. 206 (internal references omitted):

> […] However, even if it were to reconsider the issue of its personal jurisdiction, the Appeals Chamber does not find that these newly and more detailed submitted breaches rise to the requisite level of egregiousness amounting to the Tribunal's loss of personal jurisdiction. The Appeals Chamber is mindful that it must maintain the correct balance between "the fundamental rights of the accused and the essential interests of the international community in the prosecution of persons charged with serious violations of international humanitarian law." While a Chamber may use its discretion under the circumstances of a case to decline to exercise jurisdiction, it should only do so "where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity." For example, "in circumstances where an accused is very seriously mistreated, maybe even subject to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal, this may constitute a legal impediment." However, those cases are exceptional and, in most circumstances, the "remedy of setting aside jurisdiction, will . . . be disproportionate." The Appeals Chamber gives due weight to the violations alleged by the Appellant; however, it does not consider that this case falls within the exceptional category of cases highlighted above.

[944] *See Gatete* Appeal Judgement, paras. 45, 286, 287; *Kajelijeli* Appeal Judgement, paras. 323, 324; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 ("*Barayagwiza* Review Decision"), para. 75; *Semanza* Appeal Decision, p. 34.

[945] *See Barayagwiza* Review Decision, para. 75; *Semanza* Appeal Decision, p. 34. *See also Rwamakuba* Appeal Decision, paras. 24-30.

awarded to André Rwamakuba as part of an effective remedy for the violations of his rights to legal assistance and to initial appearance without delay.[946]

396. The Appeals Chamber considers that any determination as to whether a reduction of sentence or granting of financial compensation may be appropriate and effective remedies in the present case can only be made in light of the gravity of the offences the co-Appellants are convicted of and their individual circumstances. The Appeals Chamber will therefore rule on the matter only after examining the merits of the remaining challenges raised by the co-Appellants and the Prosecution and after reaching its final conclusions on the co-Appellants' guilt and individual circumstances in Section XII below.

4. Conclusion

397. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko, Ntahobali, Nteziryayo, Kanyabashi, and Ndayambaje have demonstrated that the Trial Chamber erred in finding that their right to be tried without undue delay had not been violated, and that this violation caused them prejudice. The Appeals Chamber nonetheless finds that Ntahobali and Nteziryayo have failed to demonstrate that undue delay occurred on appeal.

398. In the interests of justice, the Appeals Chamber finds *proprio motu* that the Trial Chamber also erred in finding that Nsabimana's right to be tried without undue delay had not been violated, and that this violation caused him prejudice.

399. The Appeals Chamber will rule on the appropriate remedy in Section XII below.

[946] *Rwamakuba* Appeal Decision, paras. 31, 32.

IV. APPEAL OF PAULINE NYIRAMASUHUKO

400. The Trial Chamber found Nyiramasuhuko guilty of conspiracy to commit genocide.[947] It also found her guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office.[948] The Trial Chamber further found Nyiramasuhuko guilty of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(3) of the Statute for rapes committed at the Butare Prefecture Office.[949]

401. Nyiramasuhuko raises challenges related to the fairness of the proceedings, her indictment, and the assessment of her allegations of fabrication of evidence. She also submits that the Trial Chamber erred in convicting her of conspiracy to commit genocide, in its assessment of her alibis, in finding her responsible in relation to crimes at the Butare Prefecture Office, and in relation to her responsibility for distributing condoms at the beginning of June 1994. The Appeals Chamber will address these contentions in turn.

[947] Trial Judgement, paras. 5676-5678, 5727, 6186.
[948] Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186. The Trial Chamber also determined that Nyiramasuhuko bore superior responsibility under Article 6(3) of the Statute for the killings committed by *Interahamwe* following her orders during attacks at the Butare Prefecture Office and took this into account as an aggravating factor in sentencing. *See ibid*., paras. 5886, 5970, 6052, 6207.
[949] Trial Judgement, paras. 6087, 6088, 6093, 6182, 6183, 6186.

A. Fairness of the Proceedings (Grounds 8, 9, 11, and 12 in part)

402. Nyiramasuhuko submits that the Trial Chamber demonstrated an appearance of bias through applying different standards when assessing Prosecution and Defence evidence and raises challenges related to Expert Witness Guichaoua's report and testimony, the cross-examination of Prosecution witnesses, and the disclosure of potentially exculpatory material and information that could have assisted her in the preparation of her defence.[950] The Appeals Chamber will examine these contentions in turn.

1. Appearance of Bias (Ground 8)

403. Nyiramasuhuko argues that the Trial Chamber demonstrated an appearance of bias through applying different standards when assessing Prosecution and Defence evidence.[951] She contends that this bias is demonstrated through the Trial Chamber's: (i) failure to scrutinise the credibility of several Prosecution witnesses in light of their ties and the evolving nature of their evidence which suggested collusion, when considered together with its rejection of her Defence witnesses simply because of the witnesses' relationships with her;[952] (ii) quasi-systematic acceptance of "harebrained" explanations from Prosecution witnesses concerning inconsistencies within their evidence,[953] viewed alongside its rejection of Defence evidence based on insignificant contradictions without considering the relevant circumstances;[954] and (iii) reasoning when rejecting certain Defence evidence.[955] Nyiramasuhuko requests that she be acquitted as a result of the appearance of bias demonstrated by the Trial Chamber.[956]

404. The Prosecution responds that the Trial Chamber correctly articulated and applied the law as it relates to the burden of proof, presumption of innocence, and the assessment of evidence and contends that Nyiramasuhuko merely disagrees with the Trial Chamber's assessment of the evidence without identifying any specific error.[957]

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[950] Nyiramasuhuko Notice of Appeal, paras. 1.48-1.67, 1.74-1.76, 1.78; Nyiramasuhuko Appeal Brief, paras. 284-377, 386-392.
[951] Nyiramasuhuko Notice of Appeal, para. 1.48; Nyiramasuhuko Appeal Brief, paras. 284-316. *See also* Nyiramasuhuko Appeal Brief, para. 711. Nyiramasuhuko develops further allegations of bias on the part of the Trial Chamber under other grounds of appeal, which she had failed to raise in her notice of appeal, despite amending it twice. The Appeals Chamber has addressed these allegations where directly relevant above and below when it deemed it in the interests of justice.
[952] Nyiramasuhuko Notice of Appeal, paras. 1.48-1.50; Nyiramasuhuko Appeal Brief, paras. 285-302, 305-308, 312, 313.
[953] Nyiramasuhuko Appeal Brief, paras. 303, 311. *See also* Nyiramasuhuko Notice of Appeal, para. 1.52.
[954] Nyiramasuhuko Notice of Appeal, para. 1.52; Nyiramasuhuko Appeal Brief, paras. 304, 309, 310.
[955] Nyiramasuhuko Appeal Brief, paras. 314, 315.
[956] Nyiramasuhuko Appeal Brief, para. 316.
[957] Prosecution Response Brief, paras. 99-101.

405. The Appeals Chamber reiterates that a presumption of impartiality attaches to the judges of the Tribunal and that this presumption cannot be easily rebutted.[958] An appearance of bias exists if "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[959] It is for the appealing party alleging bias to rebut the presumption of impartiality enjoyed by the judges of this Tribunal.[960] The Appeals Chamber also recalls that the appealing party must set forth the arguments in support of an allegation of bias in a precise manner and that the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.[961]

406. While the possibility is not ruled out that decisions rendered by a judge or a chamber could suffice to establish bias, it was held that this would be "truly extraordinary".[962] In this regard, the Appeals Chamber notes that the European Court of Human Rights has affirmed on several occasions that complaints concerning judges' lack of independence and impartiality grounded on the content of judicial decisions cannot be considered objectively justified.[963]

407. In the present instance, the Appeals Chamber observes that Nyiramasuhuko seeks to demonstrate an appearance of bias through a fragmented view and incomplete reading of the Trial Judgement, challenging only the Trial Chamber's exercise of its discretion in assessing specific parts of the record and particular aspects of the evidence which led to adverse findings.[964]

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[958] *Karemera and Ngirumpatse* Appeal Judgement, para. 24; *Hategekimana* Appeal Judgement, para. 16; *Nahimana et al.* Appeal Judgement, para. 48; *Akayesu* Appeal Judgement, para. 91. *See also Renzaho* Appeal Judgement, para. 43; *Furundžija* Appeal Judgement, para. 197. *See also supra*, paras. 95, 273.

[959] *Šainović et al.* Appeal Judgement, para. 1055; *Nahimana et al.* Appeal Judgement, para. 49, *quoting Akayesu* Appeal Judgement, para. 203. *See also Furundžija* Appeal Judgement, para. 189.

[960] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125.

[961] *See*, *e.g.*, *Hategekimama* Appeal Judgement, para. 16; *Renzaho* Appeal Judgement, para. 23; *Furundžija* Appeal Judgement, para. 197.

[962] *Ferdinand Nahimana v. The Prosecutor*, Case No. ICTR-99-52B-R, Decision on Request for Disqualification of Judge Pocar, 6 June 2012, para. 17, *referring to Prosecutor v. Vidoje Blagojević et al.*, Case No. IT-02-60-PT, Decision on Blagojević's Application Pursuant to Rule 15(B), 19 March 2003, para. 14.

[963] *See*, *e.g.*, *Dimitrov and others v. Bulgaria*, ECtHR, No. 77938/11, Judgement, 1 July 2014, para. 159 ("Under the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary […]. The facts that some of the judges hearing the case ruled against them on some points or decided to proceed in a certain manner do not constitute such proof"); *Previti v. Italy*, ECtHR, No. 45291/06, *Décision sur la recevabilité*, 8 December 2009, para. 258 ("*La Cour a cependant eu l'occasion de souligner que des craintes quant à un manque d'indépendance et d'impartialité des juges nationaux se fondant uniquement sur le contenu des décisions judiciaires prononcées contre un requérant (Bracci précité, § 52) ou sur les simples circonstances qu'une juridiction interne a commis des erreurs de fait ou de droit et que sa décision a été annulée par une instance supérieure (Sofri et autres, décision précitée) ne sauraient passer pour objectivement justifiées.*"); *Bracci v. Italy*, ECtHR, No. 36822/02, *Arrêt*, 15 February 2006, para. 52 ("*La Cour observe également que les craintes du requérant d'un manque d'indépendance et d'impartialité des juges nationaux se fondent uniquement sur le contenu des décisions judiciaires prononcées à son encontre. Elles ne sauraient dès lors passer pour objectivement justifiées*."); *Sofri and others v. Italy*, ECtHR, No. 37234/97, Decision, 4 March 2003, Section B.2.a ("Moreover, the fact that a domestic court has erred in fact or law or that its decision has been set aside by a higher court is not capable by itself of raising objectively justified doubts about its impartiality.").

[964] Nyiramasuhuko's challenges to the assessment of the evidence raised under Ground 8 of her appeal, where developed, have been addressed by the Appeals Chamber in the context of the challenges to each of her convictions. *See*, *e.g.*, *infra*, Sections IV.E.2, IV.F.2(b).

Nyiramasuhuko overlooks, for instance, the Trial Chamber's express consideration of ties between Prosecution witnesses,[965] the reasons the Trial Chamber provided for accepting some Prosecution evidence despite her allegation of fabrication,[966] the fact that her alibi evidence was not rejected simply because her alibi witnesses were related to her,[967] and entire portions of the Trial Chamber's explanations for rejecting the Defence evidence she deems should have been accepted.[968] Nyiramasuhuko also fails to take into account the Trial Chamber's analysis that led to the rejection of Prosecution evidence implicating her in crimes,[969] the Trial Chamber's refusal to enter certain convictions on the basis that it would be prejudicial to her,[970] as well as the fact that she was acquitted of the majority of the charges brought against her by the Prosecution.[971] The Appeals Chamber finds that a reasonable observer, properly informed, would not be led to reasonably apprehend bias in these circumstances. As such, the Appeals Chamber is of the view that Nyiramasuhuko's submissions, even if they revealed errors in the Trial Chamber's assessment of the evidence, would not establish a reasonable apprehension of bias.

408. Based on the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to rebut the presumption of impartiality attached to the judges of the Trial Chamber and, accordingly, dismisses Ground 8 of Nyiramasuhuko's appeal.

2. Expert Witness Guichaoua's Report and Testimony (Ground 9)

409. On 27 April 2004, the Trial Chamber denied Nyiramasuhuko's motion to prevent the Prosecution from filing a portion of a report by André Guichaoua ("Guichaoua") based on Nyiramasuhuko's 1994 diary, seized during her arrest on 18 July 1997 and put under seal pursuant

[965] *See*, *e.g.*, Trial Judgement, paras. 375, 2245, 2281, 2283, 2677, 2685, 2720, 2761, 2870, 3795.
[966] *See*, *e.g.*, Trial Judgement, paras. 382, 383, 2659, 2661, 2686, 2687, 2695, 2698, 2702, 2703, 2707, 2729, 2738, 2747, 4161, 4980-4983.
[967] *See* Trial Judgement, paras. 2547, 2548, 2550. *See also infra*, Section IV.E.
[968] *Compare*, *e.g.*, Nyiramasuhuko Appeal Brief, paras. 304, 305 *with* Trial Judgement, paras. 2684-2686, 2698. The Appeals Chamber also notes that none of the paragraphs of the Trial Judgement cited by Nyiramasuhuko supports her contention that the Trial Chamber excessively scrutinised minor inconsistencies concerning dates or "minor facts" for the purposes of discrediting Defence evidence. *See* Nyiramasuhuko Appeal Brief, para. 310, *referring to* Trial Judgement, paras. 2352, 2503, 2590, 3110. The Appeals Chamber further observes that, contrary to Nyiramasuhuko's claim, the Trial Chamber did not disregard Defence Witness Babin's evidence, but took it into account in order to assess the evidence relevant to her alibi. Similarly, the Trial Judgement reflects that the Trial Chamber did not dismiss Defence Witness WTRT's evidence on the basis of his status as a Hutu soldier. *See* Nyiramasuhuko Appeal Brief, paras. 314, 315; Trial Judgement, paras. 2541. 2776, 2778; *infra*, Section IV.E.2(b)(iii)c.
[969] *See*, *e.g.*, Trial Judgement, paras. 1880-1882, 1889-1891, 2612-2626, 3100-3105, 3145-3149.
[970] Trial Judgement, paras. 5857-5864.
[971] *See*, *e.g.*, Trial Judgement, paras. 1883 (Mutanda stadium), 2782 (killings at Butare Prefecture Office in late April or early May 1994), 3106 (meetings at Hotel Ihuliro), 3972, 5743-5747 (Nsabimana's swearing-in ceremony), 5850 (Hotel Ihuliro roadblock), 5883 (superior responsibility over Ntahobali), 5925 (EER), 5938-5940 (distribution of condoms), 5989 (direct and public incitement to commit genocide through Cabinet meetings).

to a decision of 12 October 2000.[972] The Trial Chamber concluded that the fact that the diary was put under seal did not preclude the Prosecution from using the material for the purposes of prosecution and that any contention about the admissibility of the report or the diary was premature.[973] On 28 April 2004, the Prosecution disclosed Guichaoua's report ("Guichaoua Report"), which contained materials from and an analysis of Nyiramasuhuko's diary for the purposes of disclosure pursuant to Rule 94*bis*(A) of the Rules.[974]

410. On 23 June 2004, the Trial Chamber certified Guichaoua as an expert witness in political science.[975] On 24 June 2004, the Trial Chamber admitted the two volumes of the Guichaoua Report as Exhibits P136 and P137, respectively.[976] In admitting Exhibit P137, the Trial Chamber rejected Nyiramasuhuko's objection that the diary discussed in the Guichaoua Report was not admissible.[977] Nyiramasuhuko filed an appeal against the 24 June 2004 Oral Decision, which the Appeals Chamber dismissed on 4 October 2004.[978]

411. Expert Witness Guichaoua testified in June, September, and October 2004.[979]

412. In the Trial Judgement, the Trial Chamber rejected the contention that Expert Witness Guichaoua lacked impartiality and that his evidence was beyond his area of expertise.[980] The Trial Chamber also dismissed a request to exclude the Guichaoua Report and the expert's testimony on the basis of the lack of notice of his evidence.[981] The Trial Chamber partly relied on

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[972] 12 October 2000 Decision, p. 9; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Oral Motion Regarding Prosecution's Use of Material Under Seal, 27 April 2004 ("27 April 2004 Decision"), p. 6. *See also* Status Conference, T. 31 January 2001 pp. 3, 4.
[973] 27 April 2004 Decision, paras. 27-29. The Trial Chamber also rejected Nyiramasuhuko's request for certification to appeal the 27 April 2004 Decision. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Certification to Appeal the "Decision on Nyiramasuhuko's Oral Motion Regarding Prosecutor's Use of Material Under Seal" and "Decision on Nyiramasuhuko's Urgent Motion to Forbid the Parties in the 'Government I' Trial and any Other Trial from Using the Alleged Diary of Pauline Nyiramasuhuko", 20 May 2004, para. 22, p. 5.
[974] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Full Statement of Expert Witness André Guichaoua, Filed under Rule 94*bis* (A) for Disclosure to the Defence and to Be Filed with the Trial Chamber, 28 April 2004, p. 1. The Guichaoua Report contains two volumes. The first volume consists of the substantive report, the second volume includes the analysis of Nyiramasuhuko's 1994 diary.
[975] T. 23 June 2004 p. 23 ("23 June 2004 Oral Decision").
[976] T. 24 June 2004 pp. 12-16 ("24 June 2004 Oral Decision"). *See* Exhibit P136 (Expert Report by André Guichaoua – Substantive Report (Volume 1)); Exhibit P137 (Expert Report by André Guichaoua – Analysis of Pauline Nyiramasuhuko's Diary (Volume 2)).
[977] 24 June 2004 Oral Decision. In admitting the Guichaoua Report, the Trial Chamber noted that: (i) the provenance of the diary was never challenged; (ii) the alleged Prosecution's failure to preserve the diary did not undermine its admissibility; and (iii) the admission of the diary was not inconsistent with Nyiramasuhuko's right to remain silent. *See idem*. The Trial Chamber admitted Nyiramasuhuko's diary into the record as Exhibit P144 on 25 June 2004. *See* T. 25 June 2004 p. 55.
[978] 4 October 2004 Appeal Decision, para. 8.
[979] Expert Witness Guichaoua testified from 23 to 25 and from 28 to 30 June 2004, from 27 to 30 September 2004 as well as on 1 October 2004 and from 4 to 8 and from 11 to 15 October 2004.
[980] Trial Judgement, paras. 192-195.
[981] Trial Judgement, paras. 459, 463, *referring to* Ntahobali Closing Brief, paras. 80, 81.

the Guichaoua Report and his testimony in finding Nyiramasuhuko responsible for conspiracy to commit genocide.[982]

413. Nyiramasuhuko raises challenges relating to the admission into evidence of the Guichaoua Report containing her diary, and submits that the Trial Chamber erred in allowing Expert Witness Guichaoua to testify beyond his area of expertise and in violation of his obligation of neutrality.[983] The Appeals Chamber will address these contentions in turn.

(a) Admission of the Guichaoua Report

414. Nyiramasuhuko argues that the Prosecution disclosed the Guichaoua Report only at the end of its case in April 2004 despite its earlier commitment in 2001 to disclose the report as soon as it was received.[984] She contends that by failing to notify her of its intention to use the diary and to disclose the report prior to April 2004, the Prosecution violated its due diligence and disclosure obligations.[985] In her view, the Trial Chamber erred in failing to consider that these violations of the Prosecution's obligations and the addition of this voluminous piece of evidence into the record at the end of the Prosecution case violated her fair trial rights and caused her serious prejudice in the preparation of her defence.[986] She also contends that, by authorising the admission of the Guichaoua Report in such circumstances, the Trial Chamber endorsed and encouraged the Prosecution's grossly negligent conduct and demonstrated its partiality in violation of Article 12 of the Statute.[987] Nyiramasuhuko specifies that she "is not requesting the Appeals Chamber to reconsider" the 24 June 2004 Oral Decision but "seeks to present the outcome of the Prosecutor's reprehensible

[982] Trial Judgement, paras. 564-583, 931-933, 5666-5678. In particular, the Trial Chamber found that the Guichaoua Report corroborated other evidence that: (i) the Interim Government was functioning during the three months of war in Rwanda; (ii) Nyiramasuhuko participated in several Cabinet meetings where she was briefed on the massacres of the civilian population; and (iii) the Interim Government made the final decision to remove Prefect Habyalimana and replace him with Nsabimana. *See ibid*., paras. 566, 569, 861.
[983] Nyiramasuhuko Notice of Appeal, paras. 1.53-1.67; Nyiramasuhuko Appeal Brief, paras. 317-377; AT. 14 April 2015 pp. 30, 31 (French).
[984] Nyiramasuhuko Appeal Brief, paras. 323-327, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Defense Motions for an Extension of the Time Limit for Filing the Notice in Respect of Expert Witness Statements, 25 May 2001 ("25 May 2001 Decision"), *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Report filed in compliance with the Trial Chamber's Decision of 25 May 2001, 1 June 2001, para. 17. *See also ibid*., paras. 318-322. Nyiramasuhuko's written submissions are also particularly unclear as to whether or not she argues that the Trial Chamber erred in admitting into evidence the Guichaoua Report, which led to the indirect admission of her diary, or in admitting the diary itself. *See* Nyiramasuhuko Notice of Appeal, paras. 1.57-1.63, 1.65-1.67, heading Ground 9 at p.13; Nyiramasuhuko Appeal Brief, heading Ground 9 at p. 59, paras. 353, 637 (French).
[985] Nyiramasuhuko Notice of Appeal, paras. 1.57, 1.58, 1.63; Nyiramasuhuko Appeal Brief, paras. 331-341, 347, 348. In particular, Nyiramasuhuko argues that the Prosecution violated Articles 15(1) and 20(4) of the Statute, Rules 66(A)(ii) and 94*bis* of the Rules as well as Trial Chamber's decisions. *See* Nyiramasuhuko Appeal Brief, para. 331, *referring to* 1 November 2000 Decision, 25 May 2001 Decision.
[986] Nyiramasuhuko Notice of Appeal, paras. 1.60-1.66; Nyiramasuhuko Appeal Brief, paras. 342, 343, 354, 369-371, 374-376. *See also* AT. 14 April 2015 pp. 31, 32 (French), AT. 15 April 2015 p. 6 (French).
[987] Nyiramasuhuko Appeal Brief, paras. 344, 345, 351, 357. *See also ibid*., heading c) at p. 65 (French).

conduct and the Chamber's complaisant attitude towards [her] during the trial, thus undermining the fairness of the trial."[988]

415. In addition, Nyiramasuhuko submits that the Trial Chamber erred in failing to rule on the arguments pertaining to the violation of fair trial rights that she and Ntahobali submitted at the close of the trial and in limiting itself to the sole question of the admissibility of the Guichaoua Report.[989] Nyiramasuhuko requests that the Appeals Chamber recognise the irreparable harm she suffered and order a permanent stay of proceedings.[990]

416. The Prosecution responds that Nyiramasuhuko attempts to relitigate the admissibility of the diary which was already adjudicated by the Appeals Chamber.[991]

417. At the appeals hearing, in response to the Appeals Chamber's invitation, Nyiramasuhuko clarified that she was not challenging the 24 June 2004 Oral Decision by which the Trial Chamber admitted the Guichaoua Report into evidence but was instead taking issue with the conduct of the Prosecution with respect to the Guichaoua Report.[992] She also explained that she did not raise the Prosecution's alleged violation of its disclosure obligations at the time the Trial Chamber decided to admit the report because she believed, at the time, that she could not raise an objection on the matter.[993] She argued that her allegation on the matter should nonetheless be examined considering that the Trial Chamber itself did not find her allegation untimely and the significance of the prejudice she suffered.[994]

418. The Appeals Chamber observes that, despite her explanation during the appeals hearing, Nyiramasuhuko's submissions remain particularly unclear, if not contradictory. While expressly stating that she does not request the Appeals Chamber to reconsider the 24 June 2004 Oral Decision by which the Trial Chamber admitted the Guichaoua Report, she also unambiguously requests it to

[988] Nyiramasuhuko Appeal Brief, para. 358. Under Ground 9 of her appeal, Nyiramasuhuko also argues that the Trial Chamber erred in allowing Witness Guichaoua to tender her diary into evidence, thus permitting him to add material evidence to the trial, instead of limiting his function to assist the Trial Chamber in understanding the evidence already admitted. *See ibid*., para. 637. Nyiramasuhuko, however, fails to substantiate her claim and fails to appreciate that the diary was tendered by the Prosecution and admitted into the record as a separate piece of evidence as Exhibit P144 on 25 June 2004.
[989] Nyiramasuhuko Appeal Brief, para. 346, *referring to* Trial Judgement, paras. 459, 463, Ntahobali Closing Brief, paras. 80, 81. *See also* Nyiramasuhuko Notice of Appeal, para. 1.64; Nyiramasuhuko Appeal Brief, paras. 332, 351.
[990] Nyiramasuhuko Appeal Brief, para. 377.
[991] Prosecution Response Brief, para. 102, *referring to* 4 October 2004 Appeal Decision, para. 6. During the appeals hearing, the Prosecution submitted that there was "no showing of prejudice", arguing that: (i) Nyiramasuhuko had the appropriate time to prepare her defence; (ii) she never raised the issue of insufficient time and resources for making a defence to the Guichaoua Report; and (iii) the Trial Chamber "went to great lengths to avoid any prejudice to her in the use of those exhibits because it only relied on diary entries that she herself had admitted were her own." *See* AT. 14 April 2015 pp. 53, 54.
[992] *See* Order for the Preparation of the Appeals Hearing, 25 March 2015 ("25 March 2015 Order"), pp. 1, 2; AT. 14 April 2015 pp. 30, 31 (French).
[993] AT. 14 April 2015 p. 31 (French).

find that the Trial Chamber erred in admitting the report into the record and grant her remedy for the prejudice allegedly suffered from the violation of her rights in this regard.

419. As conceded by Nyiramasuhuko, the Appeals Chamber notes that Nyiramasuhuko did not raise to the attention of the Trial Chamber in the context of the admission of the Guichaoua Report the matter of the Prosecution's alleged failure to give notice of its intention to use the diary prior to April 2004 and to timely disclose the report, as well as the alleged resulting violation of her right to have adequate time and facilities for the preparation of her defence. At the time, Nyiramasuhuko limited her objections to the reliability of her diary, its unlawful seizure and improper custody, and the violation of her right to remain silent.[995] The Trial Chamber cannot therefore be faulted for not considering the alleged violation of the Prosecution's obligations and Nyiramasuhuko's resulting prejudice when authorising the admission of the Guichaoua Report on 24 June 2004. Nyiramasuhuko's argument alleging a lack of impartiality on the part of the Trial Chamber in authorising the admission of the Guichaoua Report despite the Prosecution's alleged "grossly negligent conduct" is therefore also dismissed.

420. Nyiramasuhuko raised the matter of the Prosecution's alleged failure to give timely notice of its intention to use the diary and the resulting prejudice in her closing submissions. Specifically, Nyiramasuhuko and Ntahobali requested the exclusion of Expert Witness Guichaoua's evidence, including the Guichaoua Report – which relied heavily upon Nyiramasuhuko's diary – based on the prejudice that they allegedly suffered from the Prosecution's failure to notify them of its intention to use Nyiramasuhuko's diary prior to 16 April 2004.[996] In the Trial Judgement, the Trial Chamber determined that there was no reason to reconsider its 24 June 2004 Oral Decision but did not expressly address the new contention raised by Nyiramasuhuko and Ntahobali about the prejudice resulting from the late notice of the Prosecution's intention to rely on this evidence.[997] Regardless of whether the Trial Chamber erred in failing to expressly assess this new contention in the Trial Judgement, the Appeals Chamber observes that Nyiramasuhuko's and Ntahobali's submissions at trial regarding the belated notice are without merit. Indeed, the record reveals that the Prosecution

[994] AT. 14 April 2015 pp. 31, 32 (French).
[995] *See* Witness QAH, T. 8 April 2004 pp. 47-60, 68-71; André Guichaoua, T. 23 June 2004 pp. 42-51, T. 24 June 2004 pp. 6-9. *See also The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Mémoire d'appel interlocutoire de la Décision orale du 25 juin 2004 déclarant recevables en preuve un agenda allégué appartenir à Pauline Nyiramasuhuko et les parties du Rapport de l'expert Guichaoua qui reprennent, analysent et réfèrent à cet agenda*, 26 July 2004, paras. 20-101.
[996] Ntahobali Closing Brief, paras. 80 ("Further, [Nyiramasuhuko]'s alleged diary was also in the Prosecution's possession since 18/07/97 and the Prosecution had never notified [Nyiramasuhuko] that it intended to rely on the said diary for its case. [Nyiramasuhuko] was simply put before the *fait accompli* on 16/04/04.") (emphasis omitted), 81 ("[Nyiramasuhuko] and [Ntahobali] request this Chamber to find that their right to prepare their defence in response to the allegations of these witnesses has been violated and to exclude from the proceedings the evidence adduced against them by the said witnesses.").
[997] *See* Trial Judgement, para. 463.

gave notice of its intention to retain Nyiramasuhuko's diary "for purpose of the trial" prior to its commencement on 31 January 2001,[998] and included it on its exhibit list submitted on 30 April 2001.[999] Against this background, the Appeals Chamber dismisses Nyiramasuhuko's allegation of prejudice resulting from the admission of the Guichaoua Report, which relied upon Nyiramasuhuko's diary.

(b) Expert Witness Guichaoua's Testimony

421. Nyiramasuhuko submits that the Trial Chamber erred in allowing Expert Witness Guichaoua to testify beyond the scope of his expertise by giving his opinion and speculating on allegations levelled against her.[1000] She contends that the Trial Chamber failed to consider Witness Guichaoua's lack of impartiality and his failure to comply with his obligation as an expert to testify with the utmost neutrality and scientific objectivity.[1001] In support of her argument, Nyiramasuhuko points out Witness Guichaoua's long-standing and active involvement in the Prosecution's investigations[1002] as well as his close friendship with a person killed in April 1994 in Butare and his distress during his cross-examination when the death of his friend was discussed.[1003] Nyiramasuhuko argues that the Trial Chamber's failure to properly evaluate Witness Guichaoua's objectivity was so unjust and unreasonable as to constitute an abuse of discretion.[1004]

422. The Prosecution did not respond to these submissions.[1005]

423. The Appeals Chamber finds that Nyiramasuhuko fails to substantiate her submission that the Trial Chamber erred by allowing Expert Witness Guichaoua to testify beyond his area of expertise. Nyiramasuhuko does not provide any argument in support of her submission beyond the generic

[998] Status Conference, T. 31 January 2001 pp. 3, 4 ("This is document KOO4-3686, which is a diary for the year 1994, having several entries on different days of the days in that year and the Prosecution would wish to retain this for purpose of the trial.").
[999] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-I, Prosecutor's Exh[i]bit List, 30 April 2001, p. 11, entry no. 158. The Appeals Chamber also notes that, on 17 October 2002, the Trial Chamber granted the Prosecution's request to lift the seal on Nyiramasuhuko's diary for the purpose of translation and that the Prosecution agreed to provide a copy of the translation to the Defence. *See* T. 17 October 2002 pp. 57, 58.
[1000] Nyiramasuhuko Notice of Appeal, para. 1.56, *referring to* Trial Judgement, paras. 194, 195, 473-475, 486, 538, 539, 566-569, 580, 582, 583, 589, 906, 910; Nyiramasuhuko Appeal Brief, heading d) at p. 66, para. 359 (French). *See also* Nyiramasuhuko Appeal Brief, para. 637.
[1001] Nyiramasuhuko Appeal Brief, paras. 360, 363, 364.
[1002] Nyiramasuhuko Appeal Brief, paras. 361, 362. Nyiramasuhuko argues that Witness Guichaoua introduced himself as having assisted the Prosecution for eight years as a Prosecution expert witness and that he participated in several meetings where the Prosecution's strategy was discussed. She also points out that his implication in the Prosecution's policy was acknowledged in the *Karemera et al.* trial case. *See ibid*., para. 361.
[1003] Nyiramasuhuko Appeal Brief, paras. 360-364.
[1004] Nyiramasuhuko Appeal Brief, para. 364.
[1005] The Prosecution explained that, by not presenting arguments in her appeal brief and merely referring to her notice of appeal in support of her contentions concerning Witness Guichaoua's qualification as an expert, Nyiramasuhuko has abandoned these contentions. *See* Prosecution Response Brief, para. 103. The Appeals Chamber observes that, contrary to the Prosecution's submission, Nyiramasuhuko did set forth arguments in her appeal brief in addition to referring to her notice of appeal. *See* Nyiramasuhuko Appeal Brief, paras. 359-364.

assertion that, as an expert in political sociology, the expert could not give opinions and make speculations on the notes contained in her diary[1006] and appears to ignore that expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise.[1007] Nyiramasuhuko's undeveloped references to paragraphs of the Trial Judgement also fail to substantiate her claim that Witness Guichaoua testified beyond his expertise.[1008] Nyiramasuhuko's submission in this regard is therefore dismissed.

424. The Appeals Chamber also rejects Nyiramasuhuko's contentions regarding the Trial Chamber's alleged failure to properly assess Expert Witness Guichaoua's alleged lack of objectivity and neutrality. It is well settled that an expert before the Tribunal "is obliged to testify with the utmost neutrality and with scientific objectivity."[1009] However, the Appeals Chamber has also held that the mere fact that an expert witness is employed by or paid by a party does not disqualify him from testifying as an expert witness.[1010] Nyiramasuhuko argues that Witness Guichaoua had a long-standing relationship with the Prosecution but fails to show how this relationship deprived Witness Guichaoua's evidence of reliability and probative value. Similarly, the Appeals Chamber fails to see how the witness's emotion when remembering the death of a close friend in Butare during the genocide[1011] evinces the witness's inability to provide his opinion with the utmost objectivity and impartiality or any possible bias against Niyramasuhuko.

425. The Appeals Chamber concludes that Nyiramasuhuko has not demonstrated that the Trial Chamber erred by allowing Witness Guichaoua to testify beyond his area of expertise or in the assessment of his testimony.

(c) Conclusion

426. For the foregoing reasons, the Appeals Chamber dismisses Ground 9 of Nyiramasuhuko's appeal in its entirety.

[1006] *See* Nyiramasuhuko Notice of Appeal, para. 1.56; Nyiramasuhuko Appeal Brief, para. 359.
[1007] *Bagosora and Nsengiyumva* Appeal Judgement, para. 225; *Renzaho* Appeal Judgement, para. 287; *Nahimana et al.* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.
[1008] *See* Nyiramasuhuko Notice of Appeal, para. 1.56.
[1009] *Nahimana et al.* Appeal Judgement, para. 199. *See also Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008 ("*Popović et al.* Appeal Decision"), para. 27.
[1010] *Popović et al.* Appeal Decision, para. 20; *Nahimana et al.* Appeal Judgement, para. 282, *quoting Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Submission of Statement of Expert Witness Ewan Brown, 3 June 2003, p. 2.
[1011] *See* André Guichaoua, T. 12 October 2004 pp. 9, 10, 13.

3. Undue Limitation of Prosecution Witnesses Cross-Examinations (Ground 11)

427. Nyiramasuhuko submits that the Trial Chamber erred in law and in fact in unduly limiting the cross-examination of Prosecution witnesses by the co-Accused by imposing the limits set out in former Rule 90(G) of the Rules.[1012] She argues that the Trial Chamber should have used its discretionary power to "permit enquiry into additional matters, as if on direct examination."[1013] Nyiramasuhuko contends that, in the circumstances, the Trial Chamber erred in law and in fact in allowing the amended Rule 90(G) of the Rules to apply as soon as it came into effect, thus violating the principle of equality of arms.[1014]

428. The Prosecution did not respond to these submissions.

429. In the absence of identification of the specific findings challenged and considering that Nyiramasuhuko's submissions are not substantiated, the Appeals Chamber dismisses Ground 11 of Nyiramasuhuko's appeal without further consideration.

4. Disclosure of Evidence (Ground 12 in part)

430. Nyiramasuhuko submits that the Trial Chamber erred in failing to order the Prosecution to disclose potentially exculpatory material and information that could have assisted her in the preparation of her defence.[1015] Specifically, she alleges that the Trial Chamber erred in: (i) failing to direct the Prosecution to provide her with the surnames and first names of the parents of its anticipated witnesses; and (ii) dismissing her motion seeking disclosure of the statements of the witnesses who were former members of the Rwandan Patriotic Army ("RPA").[1016]

431. Before examining Nyiramasuhuko's submissions, the Appeals Chamber recalls that decisions concerning the disclosure of evidence relate to the general conduct of trial proceedings and therefore fall within the discretion of the trial chamber.[1017] It also reiterates that in order to successfully challenge a discretionary decision, the appealing party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[1018]

[1012] Nyiramasuhuko Notice of Appeal, para. 1.74.
[1013] Nyiramasuhuko Notice of Appeal, para. 1.74.
[1014] Nyiramasuhuko Notice of Appeal, para. 1.75. Nyiramasuhuko did not develop this ground of appeal in her appeal brief, referring to the arguments set out in her notice of appeal. *See* Nyiramasuhuko Appeal Brief, para. 7.
[1015] Nyiramasuhuko Notice of Appeal, heading "Ground 12" at p. 17, para. 1.76; Nyiramasuhuko Appeal Brief, heading "Ground 12" at p. 87, paras. 386-392.
[1016] Nyiramasuhuko Notice of Appeal, paras. 1.76, 1.78; Nyiramasuhuko Appeal Brief, paras. 386, 387, 392.
[1017] *Karemera and Ngirumpatse* Appeal Judgement, para. 85; *Bagosora and Nsengiyumva* Appeal Judgement, para. 79, fn. 174 and references cited therein.
[1018] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.

(a) Disclosure of Names of the Prosecution Witnesses' Parents

432. On 8 June 2001, the Trial Chamber ordered the Prosecution to provide specific items of information regarding its anticipated protected witnesses when disclosing their written statements, such as the witnesses' names, places of birth, and ethnic origins.[1019] On 26 March 2002, the Trial Chamber dismissed a request by Nyiramasuhuko and Ntahobali to order the Prosecution to disclose additional information on the identifying coversheets of the witnesses' statements, including the names of the witnesses' parents.[1020]

433. Nyiramasuhuko submits that the Trial Chamber erred in failing to direct the Prosecution to provide the surnames and names of the witnesses' parents.[1021] She contends that the Trial Chamber erred in rejecting her argument that this information was essential to enable her to investigate and prepare her defence regarding the Prosecution witnesses because, in the Rwandan context, surnames are as common as first names.[1022] Nyiramasuhuko argues that the Trial Chamber's decision prevented her from conducting the necessary investigations in the preparation of her defence.[1023]

434. The Prosecution responds that Nyiramasuhuko fails to demonstrate any error in the 26 March 2002 Decision and does not substantiate how she was prejudiced in the preparation of her defence.[1024]

435. The Appeals Chamber observes that the Rules, which specifically impose the disclosure of all witnesses' statements and their identity, do not provide for the disclosure of the identity of the witnesses' parents.[1025] Nyiramasuhuko's submissions, in fact, merely reflect her disagreement with the Trial Chamber's exercise of its discretion in denying disclosure to the Defence of the identity of the Prosecution witnesses' parents. She does not demonstate that the Trial Chamber abused its discretion in rejecting her argument that the surnames and names of the witnesses' parents were

[1019] 8 June 2001 Disclosure Decision, p. 10. The bench of Trial Chamber II was then composed of Judges Sekule, Güney, and Møse. As noted earlier, the Appeals Chamber has elected, for the sake of legibility, to refer to this bench of Trial Chamber II, to the benches that ruled on all pre-trial motions in the separate cases before their joinder, and to the bench that ultimately ruled on the joint case as the "Trial Chamber".
[1020] The Trial Chamber observed that the issue had already been adjudicated in a prior decision ruling on motions by Nteziryayo and Kanyabashi in which it had concluded that it was not convinced that the disclosure of additional information on the coversheets of the Prosecution witnesses' statements was required. *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Disclosure of Information on the Coversheets of Prosecution Witness Statements, 26 March 2002 ("26 March 2002 Decision"), paras. 24, 34, p. 4, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for *Inter Alia* Disclosure of Information on the Coversheets of Prosecution Witness Statements, 8 March 2002.
[1021] Nyiramasuhuko Notice of Appeal, para. 1.76; Nyiramasuhuko Appeal Brief, paras. 386, 387.
[1022] Nyiramasuhuko Notice of Appeal, para. 1.76; Nyiramasuhuko Appeal Brief, para. 386.
[1023] Nyiramasuhuko Notice of Appeal, para. 1.76; Nyiramasuhuko Appeal Brief, para. 387.
[1024] Prosecution Response Brief, paras. 73-75.
[1025] *See* Rules 66(A) and 69(C) of the Rules.

essential to prepare her defence and does not substantiate her claim that she was prejudiced in the preparation of her defence. Her contention is therefore dismissed.

(b) Disclosure of Statements of Former RPA Members

436. On 29 April 2008, the Trial Chamber denied Nyiramasuhuko's motion seeking disclosure under Rule 68 of the Rules of witness statements of former RPA members, which were partially disclosed in another case before the Tribunal.[1026] The Trial Chamber found that Nyiramasuhuko had failed to show how such material might have been exculpatory or have a mitigating effect on her defence or how it might have affected the Prosecution witnesses' credibility.[1027] The Trial Chamber was accordingly not satisfied that the statements in question were within the scope of Rule 68(A) of the Rules.[1028]

437. Nyiramasuhuko submits that the Trial Chamber erred in dismissing her request to order the Prosecution to disclose the statements of the witnesses who were former RPA members whereas this evidence was material to her defence and she had demonstrated that the Prosecution had the material in its possession and that some of the statements directly related to Butare.[1029]

438. The Prosecution responds that Nyiramasuhuko's arguments are unsubstantiated and should be dismissed.[1030]

439. The Appeals Chamber finds that Nyiramasuhuko fails to demonstrate any discernible error in the 29 April 2008 Decision. She provides no arguments in support of her contention, beyond the general assertion that such evidence was material to her defence and was in the Prosecution's possession. Nyiramasuhuko's submissions in this respect are accordingly dismissed.

(c) Conclusion

440. In light of the above, the Appeals Chamber dismisses this remaining part of Ground 12 of Nyiramasuhuko's appeal.

[1026] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Motion for Disclosure of Documents Under Rule 68 and for Re-Opening of Her Case, 29 April 2008 ("29 April 2008 Decision"), paras. 39-48.
[1027] 29 April 2008 Decision, para. 46.
[1028] 29 April 2008 Decision, para. 47.
[1029] Nyiramasuhuko Notice of Appeal, para. 1.78; Nyiramasuhuko Appeal Brief, para. 392.
[1030] Prosecution Response Brief, paras. 108, 109.

B. Indictment (Grounds 3, 14-18, and 26 in part)

441. Nyiramasuhuko submits that the Trial Chamber erred in authorising the Prosecution to amend her indictment to add new charges against her and contends that she was not charged with the criminal conduct on the basis of which she was convicted or lacked notice thereof, and that she was materially prejudiced in the preparation of her defence.[1031] Nyiramasuhuko requests that the Appeals Chamber order a stay of the proceedings or overturn all her convictions.[1032]

442. The Appeals Chamber will first examine Nyiramasuhuko's contentions related to the amendment of the indictment, before turning to her submissions related to notice of the allegations concerning conspiracy to commit genocide, the Butare Prefecture Office, and the distribution of condoms. The Appeals Chamber will finally discuss Nyiramasuhuko's allegation of prejudice resulting from the cumulative effect of the defects in the Indictment.

1. Amendment of the Indictment (Ground 3)

443. The Prosecution submitted an initial indictment against Nyiramasuhuko and Ntahobali on 26 May 1997, which was confirmed on 29 May 1997.[1033] On 10 August 1999 the Prosecution was granted leave to amend the indictment, which included adding six new counts, consolidating two existing ones in a single count, and adding in relevant counts the allegation that Nyiramasuhuko and Ntahobali were responsible pursuant to Article 6(3) of the Statute.[1034]

444. In deciding to grant the Prosecution leave to amend the indictment as requested, the Trial Chamber held that there was no need to inquire whether or not a *prima facie* case had been established in support of the new counts since it had only been seised of a motion to amend the

[1031] Nyiramasuhuko Notice of Appeal, paras. 1.9-1.13, 2.1-2.37, 3.1, 3.2, 3.4-3.10, 3.13, 3.24, 3.26, 3.27, 3.31-3.33, 3.46, 3.71-3.74, 5.1-56, 5.8, 7.21, 7.25; Nyiramasuhuko Appeal Brief, paras. 72-142, 398-543, 544-547, 552-559, 561, 563-580, 587, 589, 590, 594, 599-603, 606-621, 663, 664, 671, 672, 745, 746, 756, 761, 831-847, 883, 860, 886. To facilitate readibility, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nyiramasuhuko and Ntahobali Indictment. The Appeals Chamber has also considered Nyiramasuhuko's arguments related to notice developed throughout her appeal submissions under other grounds of appeal, in particular under Grounds 19, 23, and 25.

[1032] Nyiramasuhuko Notice of Appeal, "Relief Sought" at pp. 20, 21, 23; Nyiramasuhuko Appeal Brief, paras. 142, 408, 464, 509, 543, 584, 585. Under Ground 18 of her appeal, Nyiramasuhuko requests a stay of the proceedings against her or, in the alternative, to be acquitted of the count of conspiracy to commit genocide "for flagrant errors of law, abuse of process, *ultra vires*, and irremediable prejudice to the fairness of her trial." *See* Nyiramasuhuko Appeal Brief, paras. 584, 585.

[1033] *See* Trial Judgement, paras. 13, 6294.

[1034] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, T. 10 August 1999 pp. 2-6 (pronouncing the decision orally pending the finalisation of the written decision) ("10 August 1999 Oral Decision"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Decision on the Prosecutor's Request for Leave to Amend the Indictment, dated 10 August 1999, signed 3 September 1999, filed 6 September 1999 ("10 August 1999 Decision"), p. 6. *See also* Trial Judgement, para. 6302; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment, signed 27 November 1997, filed 8 December 1997 ("Nyiramasuhuko and Ntahobali Second Amended Indictment").

indictment pursuant to Rule 50 of the Rules.[1035] The Trial Chamber only satisfied itself that the Prosecution "provided sufficient grounds both in fact and in law".[1036] The Trial Chamber determined that Nyiramasuhuko "will suffer no substantial prejudice if the amendment is granted" and that "whatever prejudice might occur can be cured by the relief provided in the Rules, in particular by Rule 72".[1037]

445. On 5 October 1999, the trial of Nyiramasuhuko and Ntahobali was joined to the trials of Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje.[1038] In discussing in the Trial Judgement the claim that it permitted the amendment of the indictment to add the count of rape against Nyiramasuhuko without performing the requisite evaluation of the existence of *prima facie* evidence to support such a charge, the Trial Chamber reiterated its position that it was not required to do so, reasoning that the relevant provision in Rule 50 of the Rules requiring such determination was only introduced into the Rules in 2004 and, therefore, that it was not bound by this provision.[1039]

446. Nyiramasuhuko submits that the Trial Chamber erred in law in finding that it did not have to ascertain the existence of *prima facie* evidence in support of the six new counts before authorising their inclusion in the indictment and in stating that any prejudice could be cured by Rule 72 of the Rules whereas it dismissed the bulk of the Defence's requests for additional information.[1040]

[1035] 10 August 1999 Decision, para. 17.

[1036] *See* 10 August 1999 Oral Decision, p. 4. *See also ibid.*, p. 3; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 September 1998, para. 13; 10 August 1999 Decision, paras. 16-18; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Preliminary Motion Based on Defects in the Form and the Substance of the Indictment, signed 1 November 2000, filed 2 November 2000 ("1 November 2000 Nyiramasuhuko Decision"), para. 61.

[1037] 10 August 1999 Decision, para. 20.

[1038] *See* Joinder Decision; Trial Judgement, paras. 16, 6320. The Prosecution further amended the indictment against Nyiramasuhuko and Ntahobali pursuant to the Trial Chamber's orders. The new amendments, however, did not alter the counts against Nyiramasuhuko and Ntahobali. This fourth amended indictment, the operative one, was filed on 1 March 2001. *See* Trial Judgement, para. 17.

[1039] *See* Trial Judgement, para. 2157, fn. 5735. Relying further on the fact that Nyiramasuhuko did not appeal the 10 August 1999 Decision or seek reconsideration by the Trial Chamber and that, after the completion of the Prosecution case, sufficient evidence that could sustain a conviction for the crime of rape under Article 6(3) of the Statute had been presented by the Prosecution, the Trial Chamber found that "Ntahobali's assertion on behalf of Nyiramasuhuko is unfounded, untimely and moot." *See ibid.*, para. 2157.

[1040] Nyiramasuhuko Notice of Appeal, paras. 1.9-1.13; Nyiramasuhuko Appeal Brief, paras. 72, 73, 77, 78, 81-83, 86-98, 100, 101, 104, 111, 112, 114, 117, 122-125, 127-129, 132-134, 136-141. *See also* AT. 14 April 2015 p. 7. The Appeals Chamber observes that, in paragraphs 130 and 132 of her appeal brief, Nyiramasuhuko argues that the Trial Chamber erred in ruling that the Prosecution did not have to specify the dates of the alleged attacks in the Indictment. This argument is addressed in Section IV.B.3(a) *infra*, para. 493. Nyiramasuhuko further submits in her appeal brief that the Trial Chamber erred in: (i) deciding that the supporting material presented by the Prosecution in Annexure B of its motion to amend the indictment would not be disclosed to her since Rule 66(A)(i) of the Rules applied; (ii) failing to recall that she requested already on 30 July 1998 that a date be set for her trial and that, during the two preceding years, she had prepared her defence on the basis of the information in the original indictment; (iii) "allowing the Prosecut[ion] to add the count of responsibility under Article 6(3) of the Statute […] whereas [the Prosecution] did not include any factual allegation of [her] status as a superior or, still less, any essential elements of the said status"; and (iv) permitting the addition of the count of rape as a crime against humanity when the count did not

She requests that the Appeals Chamber "note the illegality" of the indictment, quash it, and order her acquittal or a stay of proceedings.[1041] The Appeals Chamber will address Nyiramasuhuko's contentions in turn.

(a) Leave to Amend the Indictment

447. Nyiramasuhuko submits that the Trial Chamber erred in law in finding that it did not have to ascertain the existence of *prima facie* evidence before granting leave to include the six new counts in the indictment.[1042] In particular, she argues that, according to the Statute and the Rules, the Trial Chamber was bound to evaluate the materials presented by the Prosecution in support of the additions sought before granting leave to amend the indictment.[1043] Nyiramasuhuko claims that even before the 2004 amendment of Rule 50 of the Rules, some trial chambers assessed whether *prima facie* evidence justified the requested amendment of the indictment.[1044] In her view, as a result of its failure to observe the required standard and by stating that the confirmation of the initial indictment was applicable to all amendments that followed, the Trial Chamber reversed the principle of presumption of innocence.[1045] Similarly, Nyiramasuhuko argues that the Trial Chamber acted unreasonably in holding, on one hand, that the guarantee set forth in Article 18 of the Statute and the procedure provided for in Rule 47 of the Rules did not apply in deciding to grant leave to amend the indictment and, on the other hand, that the deadline provided for in Rule 66(A)(i) of the Rules did apply.[1046]

448. In addition, Nyiramasuhuko contends that the Trial Chamber exceeded its jurisdiction by justifying *post facto*, in its Joinder Decision, its previous decision to "intentionally" allow the count of conspiracy to commit genocide to be added "solely to enable the Prosecutor to proceed by joinder".[1047] According to her, this demonstrates that the Trial Chamber had not satisfied itself that there was an appropriate basis for adding this count.[1048] Nyiramasuhuko further claims that the Trial

contain the factual basis. *See* Nyiramasuhuko Appeal Brief, paras. 79, 80, 84, 85, 99, 110, 117-120. However, since Nyiramasuhuko failed to raise these specific allegations of error in her notice of appeal, even though she amended it twice, and since the Prosecution did not respond to her allegations, the Appeals Chamber declines to consider these arguments as they exceed the scope of Nyiramasuhuko's appeal.

[1041] Nyiramasuhuko Appeal Brief, para. 142.

[1042] Nyiramasuhuko Notice of Appeal, paras. 1.9-1.11; Nyiramasuhuko Appeal Brief, paras. 72, 83, 86-88, 91, 92, 95-98, 100, 101, 104, 111, 112, 114, 117, 122-125, 127, 129.

[1043] Nyiramasuhuko Appeal Brief, para. 73 (French).

[1044] Nyiramasuhuko Appeal Brief, para. 74 (French). *See also ibid*., para. 75.

[1045] Nyiramasuhuko Appeal Brief, paras. 77, 78, 81, 82.

[1046] Nyiramasuhuko Appeal Brief, paras. 89-91.

[1047] Nyiramasuhuko Appeal Brief, paras. 101, 104. *See also ibid*., paras. 102, 103, 105.

[1048] Nyiramasuhuko Appeal Brief, para. 102.

Chamber failed to consider the Prosecution's justification for the delay in obtaining the new evidence that allegedly supported the amendments.[1049]

449. The Prosecution responds that the Trial Chamber correctly found that there was sufficient factual and legal basis in its oral and written arguments for the amendment of the indictment and that Nyiramasuhuko's allegations are mere assertions of disagreement with the Trial Chamber's ruling without demonstrating any error.[1050]

450. The Appeals Chamber notes that the requirement in Rule 50(A)(ii) of the Rules for granting leave to amend an indictment was only introduced in the Rules on 15 May 2004, following the 14th plenary session held on 23 and 24 April 2004.[1051] According to this amendment, trial chambers shall examine each of the counts and any supporting materials the Prosecution may provide to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the accused. The Appeals Chamber also observes that, prior to the enactment of Rule 50(A)(ii) of the Rules, the practice of the trial chambers of the Tribunal regarding the need to establish a *prima facie* case before granting leave to amend an indictment was not uniform. In several cases, trial chambers found that granting leave to amend an indictment was a matter for their discretion and only required the Prosecution to establish the factual and legal basis in support of its motion to amend.[1052] In other cases, trial chambers examined whether *prima facie* evidence supported the motion to amend.[1053] When seised with appeals against decisions related to the amendment of the indictment prior to the modification of Rule 50 of the Rules, the Appeals Chamber did not provide guidance on this issue.[1054] Against this background, the Appeals Chamber, Judge Pocar and

[1049] Nyiramasuhuko Appeal Brief, paras. 93, 94. *See also ibid*., paras. 123, 124.
[1050] Prosecution Response Brief, para. 97. *See also ibid.*, paras. 842, 843.
[1051] *See* Amendments – 14th Plenary Session (23-24 April 2004), pp. 6, 7.
[1052] *See*, *e.g*., *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment, 25 January 2001, paras. 26, 40; *The Prosecutor v. Éliezer Niyitegeka*, Case No. ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000, paras. 43-45; *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, pp. 3, 4; *The Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, signed 5 November 1999, filed 10 November 1999, paras. 7, 14, 15; *The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze*, Case Nos. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999 ("*Kabiligi* 8 October 1999 Decision"), paras. 42, 43.
[1053] *See*, *e.g*., *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 13 February 2004, para. 35 (originally filed in French, English version filed on 14 May 2004); *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, dated 6 May 1999, signed 24 May 1999, filed 25 May 1999, para. 19. *See also Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Decision on Prosecution's Motion to Amend the Amended Indictment, signed 12 February 2004, filed 13 February 2004, para. 8; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-PT, Decision on Form of Indictment, 17 September 2003, paras. 35, 36.
[1054] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003; *The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("*Bizimungu et al*. 12 February 2004 Appeal Decision"). *See also Nahimana et*

Judge Liu dissenting, finds Nyiramasuhuko's allegation that the Trial Chamber erred in law by not requiring the Prosecution to present a *prima facie* case in support of the new counts to be without merit and deems it unnecessary to discuss Nyiramasuhuko's remaining arguments premised on this alleged error of law.

451. The Appeals Chamber also finds no merit in Nyiramasuhuko's unsubstantiated argument that the Trial Chamber exceeded its jurisdiction by justifying the addition of the count of conspiracy to commit genocide in order to enable the joinder. The 10 August 1999 Decision reflects that the Trial Chamber was satisfied that the Prosecution sufficiently supported the factual and the legal basis for the amendment of the indictment, regardless of any possible joinder of the trials.[1055] Similarly, when reading the Joinder Decision as a whole, it is clear that the Trial Chamber did not allow the inclusion of the additional count of conspiracy to commit genocide so as to support the joinder of the trials, as suggested by Nyiramasuhuko. The Trial Chamber merely concluded that the additional count of conspiracy to commit genocide provided the basis for the joinder.[1056]

452. The Appeals Chamber further rejects Nyiramasuhuko's contention that, in this case, the Trial Chamber failed to consider the belated nature of the Prosecution's request for the amendment. The 10 August 1999 Decision shows that the Trial Chamber took note of the Prosecution's explanation that "the amendments will bring to light evidence gathered in recent months" and that the "newly acquired evidence was obtained after confirmation of the initial indictment and after much investigation at the Butare prefecture".[1057]

453. Accordingly, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, rejects Nyiramasuhuko's challenges to the leave to amend the Indictment.

(b) Dismissal of Requests for Additional Information

454. Nyiramasuhuko submits that the Trial Chamber erred in stating that any prejudice could be cured by Rule 72 of the Rules while dismissing her requests for additional information made

al. Appeal Judgement, paras. 390-393. This issue was subject to disagreement among the judges of the Tribunal. *See Bizimungu et al*. 12 February 2004 Appeal Decision, Individual Opinion of Judge Pocar.

[1055] 10 August 1999 Decision, paras. 18, 21, 23. *See also* 10 August 1999 Oral Decision, pp. 2-4.

[1056] *See* Joinder Decision, para. 13. The Appeals Chamber notes that Nyiramasuhuko further submits that the Trial Chamber demonstrated an appearance of bias in favour of the Prosecution by allowing the addition of the charge of conspiracy to commit genocide "so as to enable [the Prosecution] to carry out [its] strategy to charge [Nyiramasuhuko] with conspiracy to commit genocide, as part of a joinder of the Accused". *See* Nyiramasuhuko Appeal Brief, paras. 106-108. Recalling that the appealing party must set forth the arguments in support of an allegation of bias in a precise manner and that the Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality, the Appeals Chamber dismisses these additional unsubstantiated allegations of bias on the part of the Trial Chamber judges. *See supra*, para. 35.

[1057] 10 August 1999 Decision, paras. 1, 3.

through her preliminary motion alleging defects in the form of the indictment.[1058] Specifically, she argues that the Trial Chamber erred in holding that her amended preliminary motion of 17 April 2000 was filed out of time since, according to her, the deadline only ran from the time her statement was disclosed on 25 May 2000.[1059] She asserts that, as a result, it was erroneous for the Trial Chamber not to consider the said request for additional information.[1060]

455. The Prosecution responds that Nyiramasuhuko's allegations of procedural irregularities are mere assertions of disagreement with the Trial Chamber's ruling without demonstrating any error or showing resulting prejudice.[1061]

456. The Appeals Chamber notes that the Trial Chamber found that, according to the time limit that was set in Rule 72 of the Rules at the relevant time, the deadline for bringing preliminary motions was 27 October 1999.[1062] With regard to Nyiramasuhuko's first preliminary motion, filed on 29 October 1999, the Trial Chamber decided *proprio motu* to waive the time limit and admitted the motion even though it was filed two days after the time limit elapsed.[1063] However, the Trial Chamber found that Nyiramasuhuko's 17 April 2000 Amended Motion was time barred and, as a result, inadmissible.[1064]

457. The Appeals Chamber finds no merit in Nyiramasuhuko's argument that the Trial Chamber erred in holding that her 17 April 2000 Amended Motion was filed past the time limit. Nyiramasuhuko fails to provide any reference to the trial record in support of her argument that the deadline of 27 October 1999 was incorrect or that she was granted an extension of time. Nyiramasuhuko's only argument is that she received her additional statements on 25 May 2000 and that, therefore, her 17 April 2000 Amended Motion was submitted within the time limits of Rule 72(A) of the Rules.[1065] However, Nyiramasuhuko does not provide any support for this

[1058] Nyiramasuhuko Notice of Appeal, para. 1.13; Nyiramasuhuko Appeal Brief, paras. 132-134, 136-141.
[1059] Nyiramasuhuko Appeal Brief, para. 133 (French), *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Preliminary Motion Based on Defects in the Form and Substance of the Indictment, 17 April 2000 (originally filed in French, English translation filed on 12 October 2000) ("17 April 2000 Amended Motion").
[1060] Nyiramasuhuko Appeal Brief, para. 134 (French).
[1061] Prosecution Response Brief, para. 97.
[1062] 1 November 2000 Nyiramasuhuko Decision, para. 46. At the time Nyiramasuhuko filed her first preliminary motion, Rule 72(A) of the Rules provided that "[p]reliminary motions by either party shall be brought within sixty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i), and in any case before the hearing on the merits." Rule 66(A)(i) of the Rules concerned "copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused".
[1063] 1 November 2000 Nyiramasuhuko Decision, para. 51.
[1064] 1 November 2000 Nyiramasuhuko Decision, paras. 51, 52.
[1065] Nyiramasuhuko Appeal Brief, para. 133 (French).

argument.[1066] Moreover, even according to her argument regarding the chain of events, Nyiramasuhuko fails to explain how the receipt of her own statement in May 2000 affects the decision of the Trial Chamber that the deadline for bringing preliminary motions was 27 October 1999, as Nyiramasuhuko confirmed that she received the Prosecution's supporting materials on 28 August 1999.[1067]

458. Accordingly, the Appeals Chamber rejects Nyiramasuhuko's challenges to the dismissal of her requests for additional information.

2. Conspiracy to Commit Genocide (Ground 18)

459. The Trial Chamber found that from 9 April until 14 July 1994, and in particular between 9 April and 19 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to issue directives to encourage the population to hunt down and kill Tutsis in Butare Prefecture.[1068] The Trial Chamber determined that: (i) during a Cabinet meeting of the Interim Government held on 16 or 17 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to remove Prefect Habyalimana and to replace him with Nsabimana;[1069] (ii) on 19 April 1994, Nyiramasuhuko attended Nsabimana's Swearing-In Ceremony and failed to dissociate herself from the content of the speeches of Prime Minister Kambanda and President Sindikubwabo during the ceremony ("Kambanda's and Sindikubwabo's Speeches"), effectively endorsing their inflammatory statements;[1070] and (iii) Nyiramasuhuko, as a member of the Interim Government, adopted and issued a directive on 27 April 1994 encouraging the population to mount and man roadblocks, the purpose of which was to encourage the killing of Tutsis.[1071]

460. On this basis, and considering Nyiramasuhuko's participation with the Interim Government in many of the Cabinet meetings at which the massacre of Tutsis was discussed and in decisions which triggered the onslaught of massacres in Butare Prefecture, the Trial Chamber concluded that the only reasonable conclusion was that Nyiramasuhuko entered into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture with the intent to destroy, in whole or in part, the Tutsi ethnic group.[1072] Based on these findings, the Trial

[1066] Nyiramasuhuko Appeal Brief, para. 133 (French), *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, T. 7 June 2000, pp. 32, 33 (French), in which counsel for Nyiramasuhuko only stated that he received the statement of Nyiramasuhuko on 25 May 2000.
[1067] *See* 17 April 2000 Amended Motion, para. 14. *See also* 1 November 2000 Nyiramasuhuko Decision, para. 46.
[1068] Trial Judgement, para. 5676. *See also ibid*., paras. 583, 1939, 5669, 5733.
[1069] Trial Judgement, paras. 862, 864, 5670, 5676. *See also ibid*., para. 5736.
[1070] Trial Judgement, paras. 921, 5672, 5676. *See also ibid*., paras. 920, 926, 5739, 5746.
[1071] Trial Judgement, para. 5677. *See also ibid*., paras. 1939, 5669, 5674, *referring to* Exhibit P118 (Prime Minister Kambanda's instructions to restore security in the country issued on 27 April 1994) ("27 April Directive").
[1072] Trial Judgement, paras. 5678, 5727.

Chamber convicted Nyiramasuhuko of conspiracy to commit genocide (Count 1) pursuant to Article 6(1) of the Statute.[1073]

461. In summarising the Prosecution case against Nyiramasuhuko with respect to the charge of conspiracy to commit genocide, the Trial Chamber referred to paragraphs 5.1, 6.52, and 6.56 of the Indictment.[1074] The Indictment indicates that these allegations were being pursued under Count 1 pursuant to Article 6(1) of the Statute.[1075] While the Trial Chamber considered that common paragraph 5.1 of the indictments of the co-Accused ("Indictments") set forth the basic elements of the alleged conspiracy, it found that the Indictments were defective in that they did not identify the specific individuals alleged to have entered into the agreement or "when and where the agreement was executed and when the conspiracy ended."[1076] However, the Trial Chamber found that these defects were cured through the Prosecution's opening statement.[1077]

462. Nyiramasuhuko submits that her Indictment was defective in relation to the charge of conspiracy to commit genocide and that the defect was neither curable nor cured.[1078] Specifically, she argues that the Indictment did not inform her of the period when she was alleged to have joined the alleged conspiracy.[1079] She also contends that the allegation that she conspired to commit

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[1073] Trial Judgement, paras. 5727, 6186. *See also ibid*., paras. 6200, 6205.
[1074] Trial Judgement, paras. 5653, 5654, fns. 14605-14607. Paragraphs 5.1, 6.52, and 6.56 of the Nyiramasuhuko and Ntahobali Indictment read as follows:

> 5.1 From late 1990 until July 1994, military personnel, members of the government, political leaders, civil servants and other personalities conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population and eliminate members of the opposition, so that they could remain in power. The components of this plan consisted of, among other things, recourse to hatred and ethnic violence, the training of and distribution of weapons to militiamen as well as the preparation of lists of people to be eliminated. In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi population and of moderate Hutu. Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Elie Ndayambaje, Ladislas Ntaganzwa and Shalom Arsène Ntahobali elaborated, adhered to and executed this plan.
>
> 6.52 The massacres and the assaults thus perpetrated were the result of a strategy adopted and elaborated by political, civil and military authorities in the country, at the national as well as the local level, such as Pauline Nyiramasuhuko, Shalom Arsène Ntahobali, Joseph Kanyabashi, Elie Ndayambaje, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo and Ladislas Ntaganzwa, who conspired to exterminate the Tutsi population.
>
> 6.56 Pauline Nyiramasuhuko, Shalom Arsène Ntahobali, in their positions of authority, acting in concert with, notably, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, Ladislas Ntaganzwa and Elie Ndayambaje, participated in the planning, preparation or execution of a common scheme, strategy or plan, to commit the atrocities set forth above. The crimes were committed by them personally, by persons they assisted or by their subordinates, and with their knowledge or consent.

[1075] *See* Nyiramasuhuko and Ntahobali Indictment, p. 38. Paragraph 6.56 of the Nyiramasuhuko and Ntahobali Indictment was also pursued pursuant to Article 6(3) of the Statute. *See idem*.
[1076] Trial Judgement, paras. 5660, 5661.
[1077] Trial Judgement, paras. 5662-5664.
[1078] Nyiramasuhuko Notice of Appeal, paras. 3.1, 3.2, 3.4-3.10, 3.13, 3.24, 3.26, 3.27, 3.31-3.33, 3.46, 3.71-3.74; Nyiramasuhuko Appeal Brief, paras. 544-547, 552-559, 561, 563-580, 587, 589, 590, 594, 599-603, 606-621, 663, 664, 671, 672; Nyiramasuhuko Reply Brief, paras. 81-83, 86-109, 111-113, 117, 119-132, 136-144. *See also* AT. 14 April 2015 pp. 11-16 (French), AT. 15 April 2015 pp. 5, 6 (French).
[1079] Nyiramasuhuko Appeal Brief, para. 572. *See also ibid*., para. 594. The Appeals Chamber also understands Nyiramasuhuko to argue that the Trial Chamber failed to determine whether the Prosecution demonstrated that the

genocide *with the Interim Government* was not pleaded in the Indictment and that this defect could not be cured as this allegation constituted a new charge distinct from the one alleged in her Indictment[1080] or constituted a radical transformation of the case against her.[1081] She argues that, because the Indictment specifically identified the co-conspirators with whom she was alleged to have conspired as her co-accused and "others" but failed to mention the Interim Government or its specific members, the Prosecution could not substitute these alleged co-conspirators with unidentified members of the Interim Government.[1082] Nyiramasuhuko contends that the members of the Interim Government with whom she was found to have conspired should have been identified in the Indictment.[1083]

463. Nyiramasuhuko's additional submissions under Ground 18 of her appeal are unclear but the Appeals Chamber understands her to argue that, although paragraphs of the Indictment refer to the implication of the Interim Government in a plan to commit genocide, they did not provide her with notice that the facts that they mentioned were pleaded in support of the count of conspiracy to commit genocide.[1084] In particular, she argues that paragraphs 6.10 through 6.12 of the Indictment did not mention her and were not cited in support of Count 1, which demonstrates that she was not charged with conspiracy with the Interim Government.[1085] She also contends that the Trial Chamber erred in relying on her responsibility for adopting governmental directives and instructions to kill Tutsis and removing Prefect Habyalimana from office since, read together with the Prosecution's submissions filed on 31 May 2000 in response to her motion on lack of jurisdiction: (i) paragraph 6.14 of the Indictment could only be understood as alleging that she was responsible for her mission of pacification in Butare and not for the adoption of directives, notably because paragraphs 6.15 and 6.16 of the Indictment, which mention specific directives, were not cited in

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conspiracy between her and the Interim Government of which she was convicted supported the plan agreed upon in 1990 as alleged in the Nyiramasuhuko and Ntahobali Indictment. *See ibid.*, para. 601.

[1080] Nyiramasuhuko Notice of Appeal, paras. 3.8, 3.10, 3.26, 3.27; Nyiramasuhuko Appeal Brief, paras. 545, 553-557. *See also* Nyiramasuhuko Appeal Brief, paras. 561, 572, 589, 590; Nyiramasuhuko Reply Brief, paras. 82, 87, 109, 123, 126, 130, 135, 136.

[1081] Nyiramasuhuko Appeal Brief, paras. 553, 556, 561.

[1082] Nyiramasuhuko Notice of Appeal, paras. 3.6, 3.8, 3.13, 3.24-3.26; Nyiramasuhuko Appeal Brief, paras. 545, 552, 589, 599, 603, 612, 619-621; Nyiramasuhuko Reply Brief, paras. 89, 91, 92, 124, 128, 129, 138. *See also* Nyiramasuhuko Reply Brief, paras. 97, 98. Nyiramasuhuko also argues that the mere mention of André Rwamakuba in the Nyiramasuhuko and Ntahobali Indictment did not allow the Trial Chamber to substitute members of the Interim Government as alleged co-conspirators. *See ibid.*, paras. 113, 125. Under Ground 19 of her appeal, Nyiramasuhuko also develops contentions pertaining to "guilt by association", which the Appeals Chamber has addressed in Section IV.D.6, *infra*. *See* Nyiramasuhuko Appeal Brief, paras. 548-552.

[1083] Nyiramasuhuko Appeal Brief, para. 563, *referring to Nzabonimana* Trial Judgement, para. 1743, *Zigiranyirazo* Trial Judgement, para. 25. *See also ibid.*, para. 612; Nyiramasuhuko Reply Brief, para. 97. Nyiramasuhuko also argues that, given that several members of the Interim Government have been acquitted of the charge of conspiracy, she could not be convicted for having conspired with them. *See* Nyiramasuhuko Appeal Brief, para. 563.

[1084] Nyiramasuhuko Notice of Appeal, paras. 3.25, 3.31-3.33; Nyiramasuhuko Appeal Brief, paras. 599, 607-614.

[1085] Nyiramasuhuko Appeal Brief, paras. 600, 602, 603, 606. *See also ibid.*, paras. 612, 614; Nyiramasuhuko Reply Brief, paras. 131, 132, 139.

support of Count 1;[1086] and (ii) paragraph 6.20 of the Indictment could only be understood as alleging that she incited the population to commit massacres and not that she was responsible for the removal of Prefect Habyalimana, especially since paragraph 6.12 of the Indictment relating to the removal of the prefect does not mention her and was not cited in support of Count 1.[1087]

464. Nyiramasuhuko contends that the Trial Chamber also erred in finding that: (i) ministers were briefed on the situation of the killings without specifying, as the Indictment did, that this was done on a regular basis;[1088] (ii) the massacres began closer to 17 April 1994 rather than after 19 April 1994 as pleaded in the Indictment, leading to a transformation of a material element of paragraph 6.22 of the Indictment;[1089] and (iii) Sindikubwabo's speech contained "coded language" while the Indictment alleged that it openly and explicitly called on the people of Butare to follow the example of the other prefectures.[1090]

465. Finally, Nyiramasuhuko submits that the Trial Chamber erred in concluding that the Prosecution's opening statement clarified the charge of conspiracy to commit genocide and in failing to consider the irreparable prejudice she suffered as a result of the Prosecution's failure to give her notice that she was accused of having conspired with the Interim Government.[1091]

[1086] Nyiramasuhuko Notice of Appeal, paras. 3.6, 3.7; Nyiramasuhuko Appeal Brief, paras. 607-610, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Prosecutor's Response to Accused's Amended Preliminary Motion on Jurisdiction, 31 May 2000 ("31 May 2000 Prosecution Response"), para. 19; Nyiramasuhuko Reply Brief, paras. 99-103, 144. *See also* Nyiramasuhuko Reply Brief, para. 143. Nyiramasuhuko adds that, given that paragraphs 6.15 and 6.16 of the Nyiramasuhuko and Ntahobali Indictment contained material facts that were cited in support of the count of conspiracy to commit genocide in the *Bizimungu et al.* case, the fact that these material facts were not pleaded against her informed her that she was not charged with them. *See idem*. She also contends that the Trial Chamber erred in relying on the double meaning of words such as "enemy", "accomplice", "infiltration", or "infiltrator" in the 27 April Directive whereas paragraph 6.15 did not concern her. *See* Nyiramasuhuko Appeal Brief, para. 611.

[1087] Nyiramasuhuko Appeal Brief, paras. 612-614, *referring to* 31 May 2000 Prosecution Response, para. 19; Nyiramasuhuko Reply Brief, paras. 104-107. *See also* Nyiramasuhuko Notice of Appeal, para. 3.46.

[1088] Nyiramasuhuko Appeal Brief, para. 604, *referring to* Trial Judgement, para. 5669, Nyiramasuhuko and Ntahobali Indictment, para. 6.13. *See also* Nyiramasuhuko Reply Brief, para. 102.

[1089] Nyiramasuhuko Notice of Appeal, paras. 3.71-3.74; Nyiramasuhuko Appeal Brief, paras. 671, 672. Nyiramasuhuko argues that the Trial Chamber erred in relying on Kambanda's speech in its findings against her as the Nyiramasuhuko and Ntahobali Indictment only alleged her responsibility with respect to Sindikubwabo's speech. *See* Nyiramasuhuko Appeal Brief, paras. 616, 617, 663, 664. The Appeals Chamber notes that Nyiramasuhuko failed to raise this allegation of error in her notice of appeal, despite amending it twice, and notes that the Prosecution objects to this impermissible expansion of her appeal and did not respond to this argument. *See* Prosecution Response Brief, para. 271. The Appeals Chamber therefore declines to consider this argument as it exceeds the scope of Nyiramasuhuko's appeal.

[1090] Nyiramasuhuko Appeal Brief, para. 615, *referring to* Nyiramasuhuko and Ntahobali Indictment, para. 6.21, Trial Judgement, para. 5671.

[1091] Nyiramasuhuko Notice of Appeal, paras. 3.1, 3.2, 3.4, 3.5, 3.9, 3.27; Nyiramasuhuko Appeal Brief, paras. 545-547, 554, 558, 559, 564-568, 570-583, 587. *See also* Nyiramasuhuko Reply Brief, paras. 90, 108, 119; AT. 14 April 2015 pp. 12-14 (French). Nyiramasuhuko argues that, in its opening statement, the Prosecutor did not refer to her specifically but to the co-Accused in general and confirmed that she was charged with having conspired with her co-accused. She also contends that the Trial Chamber failed to consider that the Prosecution Pre-Trial Brief informed the co-Accused that they conspired "jointly and severally with one another and others known and unknown" and that the Prosecution's closing brief was the only document reflecting an allegation of conspiracy with the Interim Government in its entirety. *See* Nyiramasuhuko Notice of Appeal, paras. 3.9, 3.27; Nyiramasuhuko Appeal Brief, paras. 564

466. The Prosecution responds that, contrary to the Trial Chamber's finding, the Indictment was not defective regarding the count of conspiracy to commit genocide as it put Nyiramasuhuko on adequate notice that she was charged with having conspired with the Interim Government from 9 April until 14 July 1994.[1092] It argues that a number of paragraphs clearly pleaded that Nyiramasuhuko conspired with members of the Interim Government as well as the conduct that manifested their agreement.[1093] It further argues that a number of paragraphs provided the timeframe for the conspiracy as "between 9 April and 14 July 1994".[1094] In the Prosecution's view, co-conspirators can be adequately pleaded by reference to a category and paragraphs 6.11, 6.15, and 6.16 of the Indictment did not need to be expressly pleaded in support of Count 1 as they referred to evidence.[1095] The Prosecution also contends that Nyiramasuhuko wrongly relies on the 31 May 2000 Prosecution Response as it does not support her claims and paragraphs of this filing "in no way superseded the Indictment which is the primary accusatory instrument".[1096] It adds that its opening statement and closing brief provided further consistent information that Nyiramasuhuko was charged with conspiracy with members of the Interim Government.[1097]

467. Nyiramasuhuko replies that the Prosecution "presents its arguments as though it were appealing the finding that the Indictment was defective because it failed to identify the co-conspirators" although it did not seek leave to do so.[1098] She also argues that the persons alleged to have entered into a conspiracy together must be identified specifically.[1099]

468. As a preliminary matter, the Appeals Chamber clarifies that it considers that the Prosecution did not exceed the scope of its response brief by arguing that the Indictment was not defective regarding the count of conspiracy to commit genocide. The purpose of a response brief is to give a

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(emphasis omitted), 567, 568, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Closing Brief, 17 February 2009 (confidential) ("Prosecution Closing Brief").

[1092] Prosecution Response Brief, paras. 206-225, 227, 229, 231-251, 253, 255-271. *See also* AT. 14 April 2015 p. 35.

[1093] The Prosecution argues that Nyiramasuhuko was given notice that she was alleged to have conspired with members of the Interim government through: (i) paragraph 5.1 which states that "members of the government" among others "conspired among themselves" and explicitly lists Minister André Rwamakuba; (ii) paragraphs 6.13, 6.52, and 6.56, which allege that Minister Rwamakuba was one of the co-conspirators; (iii) several paragraphs pleaded in support of Count 1 which "notified Nyiramasuhuko of the conduct between herself and other government members manifesting their agreement"; and (iv) paragraph 6.10, which, although not specifically pleaded in support of Count 1, allege that numerous government members supported the plan to exterminate the Tutsis (all references are to the Nyiramasuhuko and Ntahobali Indictment). *See* Prosecution Response Brief, paras. 212, 232-256. *See also* AT. 14 April 2015 pp. 36, 37.

[1094] Prosecution Response Brief, paras. 261-265, *referring to* Nyiramasuhuko and Ntahobali Indictment, paras. 2.1, 6.13, 6.14, 6.21. *See also* AT. 14 April 2015 p. 36.

[1095] Prosecution Response Brief, paras. 231, 255, 257, 266-270. The Prosecution contends that Nyiramasuhuko's assertion that she should be acquitted because other ministers of the Interim Government have been acquitted of conspiracy to commit genocide is unsupported. *See ibid*., paras. 227, 258. *See also* AT. 14 April 2015 p. 37.

[1096] Prosecution Response Brief, paras. 238, 240, 253. *See also ibid*., paras. 237, 239, 241, 242.

[1097] Prosecution Response Brief, paras. 206-219. *See also* AT. 14 April 2015 pp. 37, 38.

[1098] Nyiramasuhuko Reply Brief, para. 122. *See also ibid*., para. 88; AT. 14 April 2015 pp. 16, 17 (French).

[1099] Nyiramasuhuko Reply Brief, paras. 94-97, *referring*, *inter alia*, *to Ntagerura et al.* Appeal Judgement, para. 92.

full answer to the issues raised in the relevant appeal brief[1100] and there is nothing in the Rules or the relevant practice directions prohibiting a party from raising an allegation of error in the Trial Judgement in response to an issue raised by the other party. Therefore, the Appeals Chamber finds no merit in Nyiramasuhuko's argument that the Prosecution should have requested leave to argue that the Trial Chamber erred in finding that the Indictment was defective as regards the charge of conspiracy to commit genocide.

469. The Appeals Chamber recalls that when an accused is charged with conspiracy to commit genocide pursuant to Article 2(3)(b) of the Statute, the Prosecution must plead in the indictment: (i) an agreement between individuals aimed at the commission of genocide; and (ii) the fact that the individuals taking part in the agreement possessed the intent to destroy in whole or in part, a national, ethnical, racial, or religious group, as such.[1101] The Appeals Chamber further recalls that, with respect to the *mens rea*, an indictment may plead either: (i) the state of mind of the accused, in which case the facts by which that state of mind is to be established are matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred.[1102]

470. The Trial Chamber did not find, nor does Nyiramasuhuko argue, that the Indictments were defective regarding the pleading of the co-Accused's *mens rea*. It is indeed specifically pleaded under the count of conspiracy to commit genocide and common paragraph 5.1 of the Indictments that the co-Accused acted with the intent to destroy, in whole or in part, a racial or ethnic group, the Tutsis.[1103] The Trial Chamber, however, found that the Indictments were defective in that they did not "identify the specific individuals who entered into [the] agreement" nor "when and where the agreement was executed and when the conspiracy ended."[1104]

471. The Appeals Chamber observes that, read in isolation, paragraph 5.1 of the Indictment, which alleges that "[f]rom late 1990 until July 1994, military personnel, members of the government, political leaders, civil servants and other personalities conspired among themselves and with others to work out a plan with the intent to exterminate the civilian Tutsi population", is overly broad with regard to the timeframe of Nyiramasuhuko's alleged participation in the conspiracy to commit genocide. The Appeals Chamber, however, recalls that in determining

[1100] *Cf.* 21 August 2007 Appeal Decision, para. 11. *See also* Practice Direction on Formal Requirements on Appeal, para. 5.
[1101] *Nzabonimana* Appeal Judgement, para. 255; *Nahimana et al.* Appeal Judgement, para. 344.
[1102] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 136; *Nahimana et al.* Appeal Judgement, para. 347. *See also Blaškić* Appeal Judgement, para. 219.
[1103] *See* Nyiramasuhuko and Ntahobali Indictment, p. 38.
[1104] Trial Judgement, para. 5661.

whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[1105]

472. The Appeals Chamber notes that paragraphs 6.13 and 6.14 of the Indictment, which were expressly pleaded in support of Count 1, allege that Nyiramasuhuko participated in Cabinet meetings "[b]etween 9 April and 14 July 1994", during which ministers were briefed in regard to the massacres of the civilian population, ministers demanded that weapons be distributed to be used in the massacres, and decisions were made to incite, and aid and abet the perpetration of the massacres. Other paragraphs of the Indictment pleaded in support of Count 1 specifically pointed to the participation of members of the Interim Government, including Nyiramasuhuko, in decisions and events of April 1994 aimed at inciting and encouraging the killing of Tutsis.[1106] The Appeals Chamber considers that paragraph 5.1 of the Indictment read in conjunction with these paragraphs put Nyiramasuhuko on clear notice that she was alleged to have entered into an agreement aimed at the commission of genocide on or after 9 April 1994.[1107]

473. The Appeals Chamber is of the view that, contrary to the Trial Chamber's determination,[1108] there is no requirement for the Prosecution to specify in the Indictment when the conspiracy ended. The crime of conspiracy to commit genocide is an inchoate offence, the *actus reus* of which is "a concerted agreement to act for the purpose of committing genocide",[1109] and does not require evidence of the time range and end of the conspiracy. Of significance is when the agreement was formed, not when it ended. Therefore, the Appeals Chamber finds that the Trial Chamber erred in determining that the Indictment was defective because it failed to specify "when the conspiracy ended".

474. Turning to Nyiramasuhuko's contention regarding the identification of the co-conspirators in the Indictment, the Appeals Chamber is not persuaded that the charge of conspiracy to commit genocide as pleaded in the Indictment did not involve the Interim Government or that her alleged co-conspirators were limited to her co-accused as argued by Nyiramasuhuko. The Appeals Chamber sees merit in the Prosecution's argument that the Indictment sufficiently identified the individuals with whom Nyiramasuhuko was alleged to have agreed to commit genocide. The Trial Chamber

[1105] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.
[1106] *See* Nyiramasuhuko and Ntahobali Indictment, paras. 6.20, 6.22.
[1107] The Appeals Chamber notes in this regard that paragraph 6.10 of the Nyiramasuhuko and Ntahobali Indictment, although not specifically invoked in relation to Count 1, states that "[a]s soon as the Interim Government was formed, numerous Cabinet members supported the plan of extermination in place", thus providing further notice that the agreement took place immediately or shortly after the swearing-in of the Interim Government on 9 April 1994.
[1108] *See* Trial Judgement, para. 5661.

appears to have overlooked that paragraph 5.1 of the Indictment specifically alleged that Nyiramasuhuko and her co-accused conspired with, *inter alios*, "members of the government", including "André Rwamakuba",[1110] "to work out a plan with the intent to exterminate the civilian Tutsi population".[1111] Moreover, contrary to Nyiramasuhuko's assertion, the Appeals Chamber considers that the specific individuals with whom the accused is alleged to have reached the agreement aimed at the commission of genocide do not necessarily have to be identified by name and that identification by general category in the Indictment can be sufficient to provide adequate notice to the accused.[1112]

475. Consistent with paragraph 5.1 of the Indictment, paragraphs 6.13, 6.14, 6.20, and 6.22 of the Indictment, all pursued in support of Count 1,[1113] expressly referred to Nyiramasuhuko's contribution to the extermination of the Tutsis as a member of the Interim Government, together with other members of the Interim Government identified by name or with the Interim Government in general. These paragraphs also set forth the material facts upon which the Trial Chamber relied to convict Nyiramasuhuko of conspiracy to commit genocide, namely the decision to dismiss Prefect Habyalimana from office, the adoption of directives during Cabinet meetings inciting the population to kill Tutsis, and the endorsement of Kambanda's and Sindikubwabo's Speeches at Nsabimana's Swearing-In Ceremony.[1114]

476. In the view of the Appeals Chamber, the fact that Nyiramasuhuko was not expressly named in paragraphs 6.10 through 6.12, 6.15 and 6.16 of the Indictment, which further describe the contribution of the Interim Government to the massacres, or that these paragraphs were not relied upon in support of Count 1 could not reasonably be understood by Nyiramasuhuko as indicating that she was not prosecuted for having conspired to commit genocide as unambiguously pleaded in paragraphs 5.1, 6.13, 6.14, 6.20, and 6.22 and the charging section of the Indictment.[1115] Having

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[1109] *See Karemera and Ngirumpatse* Appeal Judgement, para. 643, *quoting Nahimana et al.* Appeal Judgement, para. 896. *See also Nzabonimana* Appeal Judgement, para. 391; *Gatete* Appeal Judgement, para. 260; *Nahimana et al.* Appeal Judgement, para. 894.

[1110] André Rwamakuba held the position of Minister of Primary and Secondary Education in the Interim Government.

[1111] *See also Trial* Judgement, para. 5660, where there is no mention of the "members of the government" specifically listed as co-conspirators in paragraph 5.1 of the Nyiramasuhuko and Ntahobali Indictment ("The Chamber notes that Paragraph 5.1 of each Indictment alleges that from late 1990 until July 1994 *military personnel, political leaders, and civil servants* conspired among themselves to work out a plan with the intent to exterminate the civilian Tutsi population. Each Indictment alleges the conspiracy was on the national as well as the local level, and that all of the Accused were part of this conspiracy.") (emphasis added, internal references omitted).

[1112] *Cf. Nzabonimana* Appeal Judgement, para. 400; *Karemera and Ngirumpatse* Appeal Judgement, para. 370. The Appeals Chamber further finds that the fact that other members of the Interim Government were not convicted for conspiracy before the Tribunal is irrelevant to the question of whether Nyiramasuhuko was put on notice of the charges against her and is not inconsistent with the fact that Nyiramasuhuko was charged with having conspired with other members of the Interim Government. *Cf. Bagosora and Nsengiyumva* Appeal Judgement, para. 121.

[1113] Nyiramasuhuko and Ntahobali Indictment, p. 38.

[1114] Trial Judgement, paras. 5669-5673, 5676.

[1115] The Appeals Chamber also notes that: (i) paragraph 6.14 refers to the same allegation as the one pleaded in paragraph 6.10; (ii) paragraph 6.11 merely provides non-material background information; (iii) paragraph 6.20 contains

reviewed the 31 May 2000 Prosecution Response relied upon by Nyiramasuhuko, the Appeals Chamber fails to see how it could have been interpreted by Nyiramasuhuko as limiting the scope of the charge of conspiracy to commit genocide as alleged in the Indictment, which is the primary accusatory instrument.[1116]

477. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in holding that the Indictment was defective in relation to the charge of conspiracy to commit genocide because it failed to "identify the specific individuals who entered into [the] agreement" and that Nyiramasuhuko has failed to demonstrate that she was not charged with conspiring to commit genocide with the Interim Government in the Indictment.

478. As to the alleged discrepancies pointed out by Nyiramasuhuko between some of the material facts alleged in the Indictment and the Trial Chamber's ultimate conclusions, the Appeals Chamber recalls that, in general, minor differences between the indictment and the evidence presented at trial are not such as to prevent the trial chamber from considering the indictment in light of the evidence presented at trial.[1117] In the present case, the Appeals Chamber considers that the fact that the Trial Chamber found that Nyiramasuhuko was briefed during numerous Cabinet meetings while the Indictment indicated that she was "regularly" briefed constitutes an insignificant variation.[1118] Similarly, the Appeals Chamber considers the difference as to the precise date of the beginning of the massacres to be minor. Also, the Appeals Chamber observes that paragraph 6.21 of the Indictment makes reference to Sindikubwabo's coded language in his speech at Nsabimana's Swearing-In Ceremony. Nyiramasuhuko's arguments in these respects are therefore rejected.

479. Accordingly, the Appeals Chamber concludes that the Indictment was not defective regarding the pleading of Nyiramasuhuko's responsibility for conspiracy to commit genocide and that Nyiramasuhuko was put on adequate notice that she was alleged to have entered into an agreement to exterminate the Tutsi population with, *inter alios*, members of the Interim Government on or after 9 April 1994. The nature of the charge in this regard was further confirmed by the Prosecution in its opening statement and pre-trial brief, in which it specifically referred to a

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information concerning the decision to dismiss Prefect Habyalimana similar to the one contained in paragraph 6.12; (iv) the specific allegation regarding the 27 April Directive contained in paragraph 6.15 is encompassed in the broader allegation set forth in paragraph 6.14; and (v) the Trial Chamber did not rely on the allegation pleaded in paragraph 6.16 in support of the conspiracy count (all references are to the Nyiramasuhuko and Ntahobali Indictment).

[1116] *See*, *e.g.*, *Ntagerura et al*. Appeal Judgement, para. 114; *Kupreškić et al*. Appeal Judgement, para. 114. The Appeals Chamber finds that Nyiramasuhuko's reliance on the indictment in the *Bizimungu et al.* case is similarly misplaced as she fails to demonstrate how the situation in that case is relevant to the present case.

[1117] *See Nzabonimana* Appeal Judgement, para. 164; *Muvunyi* Appeal Judgement of 1 April 2011, para. 29; *Semanza* Appeal Judgement, fn. 492.

[1118] *Compare* Trial Judgement, para. 5669 *with* Nyiramasuhuko and Ntahobali Indictment, para. 6.13.

plan to commit genocide masterminded by the Interim Government and implemented by the co-Accused, including Nyiramasuhuko.[1119]

480. For the foregoing reasons, the Appeals Chamber dismisses Nyiramasuhuko's submissions pertaining to notice of the charge of conspiracy to commit genocide.

3. Butare Prefecture Office (Grounds 14 to 17)

481. The Trial Chamber convicted Nyiramasuhuko of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who were abducted from the Butare Prefecture Office where they had sought refuge.[1120] The Trial Chamber also determined that Nyiramasuhuko bore superior responsibility in connection with the killings committed by *Interahamwe* upon her orders pursuant to Article 6(3) of the Statute and considered this as an aggravating factor when determining her sentence.[1121]

482. The Trial Chamber further convicted Nyiramasuhuko of rape as a crime against humanity (Count 7) and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 11) as a superior under Article 6(3) of the Statute for rapes committed by *Interahamwe* at the Butare Prefecture Office.[1122]

483. In summarising the Prosecution case against Nyiramasuhuko with respect to these allegations, the Trial Chamber referred to paragraphs 6.30, 6.31, 6.37, and 6.53 of the Indictment.[1123] The Indictment indicates that the allegations in paragraph 6.30 were being pursued

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[1119] *See* Prosecution Opening Statement, T. 12 June 2001 pp. 30, 31; Prosecution Pre-Trial Brief, paras. 6-8. Since Nyiramasuhuko was charged with a conspiracy with the Interim Government together with her co-accused, the Appeals Chamber fails to see the relevance of Nyiramasuhuko's assertion that the Prosecution did not refer to her separately in its opening statement. Similarly, the fact that the Prosecution specifically referred to the co-Accused as members of the conspiracy in its opening statement does not indicate that the Interim Government was not part of the conspiracy. *See* Prosecution Opening Statement, T. 12 June 2001 pp. 30, 31, 59, 60. In addition, the Appeals Chamber is of the view that the information contained in the Prosecution Pre-Trial Brief as to the charge of conspiracy is not inconsistent with the Prosecution's opening statement. *See* Prosecution Pre-Trial Brief, paras. 6-8.

[1120] Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186. The Appeals Chamber discusses Nyiramasuhuko's challenges to the imprecision of the Trial Judgement regarding her convictions for crimes committed at the Butare Prefecture Office in detail below in Section IV.F.1.

[1121] Trial Judgement, paras. 5886, 5970, 6052, 6207. *See also ibid*., paras. 5652, 5884, 5885; *infra*, Section IV.F.1.

[1122] Trial Judgement, paras. 6085, 6087, 6088, 6093, 6182, 6183, 6186.

[1123] Trial Judgement, paras. 2149, 2150, 2162, 2163, fns. 5720-5722, 5751. *See also ibid*., paras. 5857-5859. Paragraphs 6.30, 6.31, 6.37, and 6.53 of the Nyiramasuhuko and Ntahobali Indictment read as follows:

> 6.30 Between 19 April and late June 1994, Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, accompanied by *Interahamwe* militiamen such as one JUMAPILI and another NSENGIYUMVA among others and soldiers, identities of whom are unknown on several occasions went to the *préfecture* offices to abduct Tutsi refugees. Those who attempted to resist were assaulted and sometimes killed outright. The

against Nyiramasuhuko under Counts 2, 3, 5, 6, and 8 through 10, and those in paragraph 6.31 under Counts 2, 3, 5, 6, 8 through 11 pursuant to Articles 6(1) and 6(3) of the Statute.[1124] The allegations in paragraph 6.37 were being pursued against Nyiramasuhuko under Counts 7 and 11 pursuant to Article 6(3) of the Statute only.[1125] The allegations in paragraph 6.53 were being pursued against Nyiramasuhuko under Counts 2, 3, 5, 6, and 8 through 11 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 7 pursuant to Article 6(3) of the Statute only.[1126]

484. Prior to discussing Nyiramasuhuko's responsibility for crimes committed at the Butare Prefecture Office, the Trial Chamber considered her assertion that she was not reasonably informed of the charges concerning these crimes.[1127] It determined that "the crimes of abduction and killing at the [Butare Prefecture Office] were clearly pleaded in the Indictment."[1128] It further found that, although the Indictment was defective with respect to the charges of rape, the defects were cured and Nyiramasuhuko did not suffer prejudice in the preparation of her defence.[1129] As regards the pleading of victims in particular, the Trial Chamber held that, "in view of the sheer scale of the attacks, rapes and killings alleged to have taken place at the [Butare Prefecture Office], it [was] impractical to require the Prosecution to name each of the alleged victims of this course of conduct" and that the Indictment was therefore not defective for failing to name each of the alleged victims at the prefectoral office.[1130] The Trial Chamber also determined that the Indictment put Nyiramasuhuko on notice that she was charged with superior responsibility for the alleged acts of the *Interahamwe* at the prefectoral office.[1131]

> survivors were taken to various locations in the *préfecture* to be executed, notably in the woods next to the *Ecole Evangéliste du Rwanda* (E.E.R.) [Evangelical School of Rwanda].
>
> 6.31 When abducting their victims, Pauline Nyiramasuhuko and Arsène Shalom Ntahobali often forced them to undress completely before forcing them into vehicles and taking them to their deaths.
>
> 6.37 Furthermore, aside from his attacks on members of the Tutsi population during this period, Arsène Shalom Ntahobali, assisted by unknown "accomplices", participated in the kidnapping and raping of Tutsi women.
>
> 6.53 During the events referred to in this indictment, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda. These crimes were perpetrated by, among others, soldiers, militiamen and gendarmes against the Tutsi population, in particular Tutsi women and girls.

[1124] Nyiramasuhuko and Ntahobali Indictment, pp. 38-45.
[1125] Nyiramasuhuko and Ntahobali Indictment, pp. 42, 45.
[1126] Nyiramasuhuko and Ntahobali Indictment, pp. 38-45.
[1127] Trial Judgement, paras. 2160-2172, *referring to* Ntahobali Closing Brief, paras. 76-79. The Trial Chamber noted that Ntahobali's arguments in his closing brief were also made on behalf of Nyiramasuhuko. *See ibid*., para. 2160.
[1128] Trial Judgement, para. 2162.
[1129] Trial Judgement, paras. 2163-2166. *See also ibid*., paras. 5859, 5863.
[1130] Trial Judgement, para. 2169. The Trial Chamber, however, found that the late disclosure of the names of specific victims "accorded bias to the Defence in preparing its case" and decided that it will not convict Nyiramasuhuko, if established by the evidence, for the alleged crimes against "Trifina, Mrs. Mbasha, Annonciata, Semanyenzi, Caritas or Immaculée". *See ibid*., para. 2172.
[1131] Trial Judgement, paras. 2159, 5613, 5878.

485. Nyiramasuhuko submits that the Trial Chamber erred in: (i) concluding that her responsibility in the killing of Tutsis abducted from the prefectoral office was adequately pleaded in the Indictment and that she was not prejudiced by the omission of material facts in the Indictment; (ii) convicting her in relation to rapes committed at the prefectoral office, as she was not charged on this basis and that the defect was neither curable nor cured; and (iii) finding her responsible as a superior pursuant to Article 6(3) of the Statute. The Appeals Chamber will address these contentions in turn.

(a) Killings

486. As discussed in detail in Section IV.F below addressing Nyiramasuhuko's challenges to the assessment of the evidence and her responsibility in relation to the prefectoral office, the Appeals Chamber understands that the Trial Chamber found that Nyiramasuhuko ordered *Interahamwe* to kill numerous Tutsis who were abducted from the Butare Prefecture Office where they had sought refuge during attacks conducted in mid-May 1994 and around the end of May or the beginning of June 1994. As noted above, the Trial Chamber convicted Nyiramasuhuko under Counts 2, 6, 8, and 10 pursuant to Article 6(1) of the Statute for ordering killings on this basis and took her superior responsibility into account in sentencing.[1132]

487. In the Trial Judgement, the Trial Chamber determined that "the crimes of abduction and killing at the [Butare Prefecture Office] were clearly pleaded in the Indictment."[1133]

488. Nyiramasuhuko submits that the Trial Chamber erred in finding that the Indictment was not defective concerning the crimes of abduction and killing at the prefectoral office.[1134] In particular, she argues that paragraph 6.30 of the Indictment failed to plead: (i) the location of the killings, mentioning only the woods next to the EER while no witness testified to this location;[1135] (ii) the dates of the attacks;[1136] and (iii) the identity of the perpetrators of the killings, including "Kazungu", whose identity was known to the Prosecution prior to the filing of the Indictment, despite the Trial Chamber's order that the Prosecution name the unknown persons referred to in paragraph 6.30.[1137] Nyiramasuhuko also argues that the Trial Chamber's conclusion that the sheer scale of the attacks made it impractical to require the Prosecution to name each of the alleged

[1132] *See supra*, para. 481.
[1133] Trial Judgement, para. 2162.
[1134] Nyiramasuhuko Appeal Brief, paras. 465, 482, 483.
[1135] Nyiramasuhuko Appeal Brief, paras. 465, 469, 483, 487, *referring to* the arguments developed under Ground 30 of Nyiramasuhuko's appeal.
[1136] Nyiramasuhuko Appeal Brief, paras. 465, 469, 483. *See also* Nyiramasuhuko Notice of Appeal, paras. 2.12, 2.14.
[1137] Nyiramasuhuko Appeal Brief, paras. 465-470, 483; Nyiramasuhuko Reply Brief, paras. 79, 80. Nyiramasuhuko submits that paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment rather refers to the nicknames of two other *Interahamwe* who were not mentioned at trial by any Prosecution witness. *See* Nyiramasuhuko Appeal Brief, para. 468.

victims is unreasonable given that the Prosecution had knowledge of the identity of some specific victims but did not mention them.[1138] Nyiramasuhuko contends that she was prejudiced as a result of the omission of these material facts in the Indictment.[1139]

489. The Prosecution responds that Nyiramasuhuko does not demonstrate that the Trial Chamber erred in finding that the Indictment was not defective with respect to the allegation of abductions and killings at the prefectoral office.[1140] In particular, it contends that, given that Nyiramasuhuko was charged with and convicted for ordering the killings, and not for physically committing them, the information concerning the dates, locations, perpetrators, and victims of the killings did not constitute material facts that needed to be pleaded in the Indictment and that the sheer scale of the crimes made it impracticable to require a high degree of specificity.[1141] The Prosecution adds that, in any case, paragraph 6.30 of the Indictment sufficiently identified the location of the killings, the dates of the attacks, and the perpetrators' and victims' identities and that Nyiramasuhuko fails to show that she suffered any prejudice.[1142]

490. Nyiramasuhuko replies that the material facts must be clearly specified when the accused is charged, as in her case, with direct participation in a crime such as ordering the crime.[1143] She reiterates that the Prosecution was required to specify the information regarding the locations of the killings, the dates, and the identity of the victims and perpetrators, which was in its possession.[1144] She submits that, through its conclusions, the Trial Chamber allowed the Prosecution to mould its case to the evidence heard at trial, rendering her trial unfair.[1145]

491. Nyiramasuhuko was convicted for ordering "*Interahamwe*" at the prefectoral office to abduct and kill Tutsis who had sought refuge there during attacks perpetrated around mid-May and

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[1138] Nyiramasuhuko Appeal Brief, paras. 465, 469, 480. *See also* Nyiramasuhuko Reply Brief, para. 78; AT. 14 April 2015 pp. 20, 21 (French). Nyiramasuhuko points out that the Trial Chamber erred in finding that those who resisted were killed outright at locations such as the EER woods unlike what is alleged in paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment that they were killed at the prefectoral office, thereby failing to differentiate the victims killed outright at the prefectoral office from the victims brought to various locations, including the woods next to the EER, to be killed. *See* Nyiramasuhuko Appeal Brief, paras. 482, 484-486, 488, *referring to* Trial Judgement, para. 2162.

[1139] Nyiramasuhuko Appeal Brief, paras. 468, 472, 473, 475, 487, 490. Nyiramasuhuko also argues that the Trial Chamber erred in stating that it could use the evidence of the abductions and/or killings of Trifina, Mbasha's wife, Annonciata, and Semanyenzi as circumstantial evidence, although it had recognised that she would be prejudiced by the use of this evidence. *See ibid*., paras. 474-478. These arguments have been addressed and dismissed below in Section IV.F.2(a).

[1140] Prosecution Response Brief, paras. 191-204.

[1141] Prosecution Response Brief, paras. 191, 192, 196, 201. *See also* AT. 14 April 2015 p. 38.

[1142] Prosecution Response Brief, paras. 193-203. *See also* AT. 14 April 2015 pp. 38, 39. The Prosecution also responds, *inter alia*, that because Kazungu was not found to have committed crimes at the prefectoral office and that Nyiramasuhuko was not convicted for Kazungu's specific criminal conduct, Nyiramasuhuko does not show that she was prejudiced by the fact that his name was not mentioned in the Nyiramasuhuko and Ntahobali Indictment. *See* Prosecution Response Brief, para. 200.

[1143] Nyiramasuhuko Reply Brief, paras. 72-74.

[1144] Nyiramasuhuko Reply Brief, para. 79.

the end of May or the beginning of June 1994.[1146] The Trial Chamber found that some refugees were killed at the prefectoral office during these attacks and that, regardless of whether the other refugees were taken to Rwabanyanga, Kabutare, Mukoni, or the IRST, the only reasonable inference is that they were abducted from the prefectoral office in order to be killed.[1147]

492. In paragraph 6.30 of the Indictment, the Prosecution clearly pleaded that Nyiramasuhuko went to the prefectoral office on several occasions to abduct Tutsi refugees and that refugees who attempted to resist were "sometimes killed outright" and that the "survivors were taken to various locations in the *prefecture* to be executed, notably in the woods next to the [EER]." Given the nature of the Prosecution case against Nyiramasuhuko regarding the prefectoral office, the Appeals Chamber does not find that the specific locations where the refugees were killed in Butare Prefecture after being abducted from the prefectoral office were material facts that needed to be pleaded in the Indictment. Whether or not the testimonial evidence adduced at trial supported the allegation that refugees were killed in the woods next to the EER is a matter of evidence irrelevant to the issue of notice.[1148]

493. The Prosecution alleged in paragraph 6.30 of the Indictment that Nyiramasuhuko committed these crimes "[b]etween 19 April and late June 1994". In the specific circumstances of the allegation pertaining to the crimes at the prefectoral office, the Appeals Chamber is unconvinced by Nyiramasuhuko's argument that the Trial Chamber erred in finding that this broad date range was insufficient to provide her notice. Although Nyiramasuhuko was ultimately only convicted in relation to specific attacks conducted around mid-May and the end of May or the beginning of June 1994, the Trial Judgement reflects that the evidence adduced by the Prosecution covered a longer period of time and additional attacks.[1149] Given the sheer scale of the alleged crimes spanning over a period of nearly three months, Nyiramasuhuko does not demonstrate that the Prosecution was in a position to provide further specificity concerning the dates of the commission of the crimes.

494. As regards the pleading of the identity of the perpetrators, the Appeals Chamber notes that, in November 2000, the Trial Chamber ordered the Prosecution "to identify the persons alleged in

[1145] Nyiramasuhuko Reply Brief, paras. 76-80.
[1146] *See infra*, para. 749.
[1147] Trial Judgement, para. 2749.
[1148] *Cf. Ntagerura et al*. Appeal Judgement, para. 21; *Niyitegeka* Appeal Judgement, para. 193; *Kupreškić et al.* Appeal Judgement, para. 88 ("In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven"); *Furundžija* Appeal Judgement, para. 147.
[1149] Trial Judgement, paras. 2149-2782.

paragraph[…] 6.30 [of the Indictment …], if known".[1150] The Prosecution subsequently provided the names of Jumapili and Nsengiyumva as some of the *Interahamwe* who accompanied Nyiramasuhuko and Ntahobali to the prefectoral office in the Indictment.[1151] The Prosecution does not dispute that it was in possession of information regarding the involvement of one "Kazungu" when the operative indictment was issued but does not explain why it failed to specify the name of this alleged perpetrator in the Indictment, in particular after it was instructed to do so by the Trial Chamber. In light of the sheer scale of the crimes allegedly committed at the prefectoral office and the fact that paragraph 6.30 identified "*Interahamwe* militiamen" among the perpetrators of the crimes, and recalling that physical perpetrators of the crimes can be identified by category in relation to a particular crime site,[1152] the Appeals Chamber nevertheless finds that the identity of the perpetrators who abducted and killed Tutsi refugees at the prefectoral office was sufficiently pleaded in paragraph 6.30 and that the Indictment was not defective in that regard.

495. The Appeals Chamber also rejects Nyiramasuhuko's contention regarding the identification of the victims. Nyiramasuhuko's argument that the Trial Chamber erred in concluding that the sheer scale of the attacks made it impractical to require the Prosecution to name each of the alleged victims given that the Prosecution had knowledge of the identity of some specific victims fails to appreciate that, where the Trial Chamber considered that the identity of the victims was known to the Prosecution but not pleaded in the indictment, it decided that it would not convict Nyiramasuhuko for any crimes against these specific victims.[1153] Nyiramasuhuko does not demonstrate that the Prosecution was in possession of additional information regarding the names of victims which it failed to disclose.

496. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in finding that her responsibility for the killing of Tutsis who had sought refuge at the Butare Prefecture Office was clearly pleaded in the Indictment.

(b) Rapes

497. As discussed in detail in Section IV.F.1(b) below, the Appeals Chamber understands that the Trial Chamber found Nyiramasuhuko responsible as a superior under Counts 7 and 11 pursuant to Article 6(3) of the Statute in connection with rapes perpetrated by *Interahamwe* at the Butare

[1150] 1 November 2000 Nyiramasuhuko Decision, paras. 60, 64(a)(i).
[1151] In the view of the Appeals Chamber, the fact that the Prosecution and its witnesses did not eventually refer to "Jumapili" and "Nsengiyumva" at trial is not relevant to whether Nyiramasuhuko was provided with sufficient notice of the identity of the perpetrators of the crimes.
[1152] *Bagosora and Nsengiyumva* Appeal Judgement, para. 196.
[1153] Trial Judgement, para. 2172.

Prefecture Office around the end of May or the beginning of June 1994 as well as in the first half of June 1994.[1154]

498. The Trial Chamber made the following determinations regarding the pleading of Nyiramasuhuko's and Ntahobali's responsibility related to rapes at the prefectoral office in the Indictment:

> As to the crime of rape, Paragraph 6.37 of the Nyiramasuhuko and Ntahobali indictment states that aside from the attacks on Tutsis, Ntahobali was assisted by accomplices in kidnapping and raping Tutsi women. The Chamber recalls that an indictment paragraph should be read in conjunction with the entire indictment as a whole. Read in this way, the crimes of kidnapping and rape were separately pled to the attacks occurring throughout the rest of the *préfecture*, including the attacks and abductions at the [Butare Prefecture Office]. Nonetheless, the information in Paragraph 6.37 lacked necessary details, including specific dates, locations and the names of victims, to put Ntahobali and Nyiramasuhuko on notice that they were being charged with raping women or were responsible as a superior for rapes occurring at the [Butare Prefecture Office]. The Indictment was therefore defective in this regard.[1155]

499. The Trial Chamber further determined that the defect in the Indictment was cured through the Prosecution Pre-Trial Brief, the summaries of the anticipated evidence of Witnesses TA, FAP, QBP, QBQ, QZ, RE, RF, RG, RJ, and SW appended to the Prosecution Pre-Trial Brief, and the Prosecution's opening statement, which clearly indicated that Ntahobali and Nyiramasuhuko participated in rapes at the prefectoral office.[1156]

500. However, the Trial Chamber concluded that Nyiramasuhuko was not given sufficient notice that rapes at the prefectoral office would be used in support of the count of genocide and decided that it will not enter a conviction for genocide against Nyiramasuhuko on the basis of any rapes that occurred there.[1157]

501. The Appeals Chamber understands Nyiramasuhuko to first submit that the Trial Chamber erred in convicting her of genocide on the basis of allegations of rape at the prefectoral office, in contradiction with its own determination.[1158]

[1154] The Trial Chamber noted that Nyiramasuhuko was only charged with Count 7 pursuant to Article 6(3) of the Statute, which it "consider[ed] to be a serious omission on the part of the Prosecution". *See* Trial Judgement, para. 6087. *See also ibid*., para. 6182.
[1155] Trial Judgement, para. 2163.
[1156] Trial Judgement, paras. 2164-2166, fn. 5753, *referring to* Prosecution Pre-Trial Brief, para. 29 and Witness Summaries Grid, item 3, Witness TA ("Witness TA's Summary"), item 27, Witness FAP ("Witness FAP's Summary"), item 44, Witness QBP ("Witness QBP's Summary"), item 45, Witness QBQ ("Witness QBQ's Summary"), item 62, Witness QZ ("Witness QZ's Summary"), item 65, Witness RE ("Witness RE's Summary"), item 66, Witness RF ("Witness RF's Summary"), item 67, Witness RG ("Witness RG's Summary"), item 68, Witness RJ ("Witness RJ's Summary"), item 87, Witness SW ("Witness SW's Summary"), Prosecution Opening Statement, T. 21 June 2001 p. 92.
[1157] Trial judgement, paras. 5857-5865, 5877.
[1158] Nyiramasuhuko Notice of Appeal, paras. 7.1-7.6; Nyiramasuhuko Appeal Brief, paras. 840-842, 875. *See also* Nyiramasuhuko Notice of Appeal, para. 7.9; Nyiramasuhuko Appeal Brief, paras. 831, 837, 851, 852, 860, 871-874, 877, 878.

502. Nyiramasuhuko further submits that her responsibility for the rapes of Tutsis women at the prefectoral office was not pleaded in the Indictment, and that such defect was neither curable nor cured.[1159] In support of her claim that the defect in the Indictment was not curable, she argues that the allegation on the basis of which she was convicted constituted a separate charge which should have been pleaded in the Indictment.[1160] Specifically, she contends that: (i) paragraph 6.30 of the Indictment which concerns the prefectoral office does not mention any rapes and was not listed under Count 7; (ii) paragraph 6.37 of the Indictment does not mention her; (iii) paragraph 6.37 does not relate to crimes perpetrated at the prefectoral office but to the Butare University Hospital as it is clear from the relevant heading in the Indictment; and (iv) paragraphs 6.37, 6.53, and 6.56 of the Indictment – the only paragraphs pleading rapes and cited in support of Count 7 – do not refer to the prefectoral office.[1161] In her view, the Prosecution also demonstrated that it did not intend to charge her in connection with rapes at the prefectoral office by not adding the allegation when amending the indictment.[1162]

503. With respect to her alternative contention that the defect in the Indictment concerning her responsibility for rapes at the prefectoral office was not cured, Nyiramasuhuko argues that the Prosecution Pre-Trial Brief read as a whole only informed her that she was accused of participating in rapes *outside* the prefectoral office.[1163] She also submits that the Trial Chamber erred in concluding that the summaries of the Prosecution witnesses' anticipated evidence cured the defect in the Indictment since: (i) the Trial Chamber did not differentiate between witnesses testifying to rapes being committed by Ntahobali or to rapes being ordered by Nyiramasuhuko, whereas 16 witnesses did not allege her participation in rapes; and (ii) some witnesses alleged that rapes

[1159] Nyiramasuhuko Notice of Appeal, paras. 2.26-2.37, 5.1-5.6, 5.8, 7.11; Nyiramasuhuko Appeal Brief, paras. 510-543, 746, 756, 761, 831-847, 860, 870-872, 875, 881. *See also* AT. 14 April 2015 pp. 17-24 (French); AT. 15 April 2015 pp. 8, 9 (French).

[1160] Nyiramasuhuko Notice of Appeal, paras. 2.29, 2.32, 2.35-2.37, 5.3, 5.5; Nyiramasuhuko Appeal Brief, paras. 511, 519, 881. *See also* Nyiramasuhuko Appeal Brief, paras. 832, 838; Nyiramasuhuko Reply Brief, paras. 38, 53, 209, 210. Nyiramasuhuko also raises an obscure and unreferenced argument in paragraph 761 of her appeal brief regarding the paragraphs cited under Counts 7 and 11, which the Appeals Chamber dismisses for lack of clarity.

[1161] Nyiramasuhuko Notice of Appeal, paras. 2.27-2.30, 2.35, 5.1, 5.2, 5.8, 7.11; Nyiramasuhuko Appeal Brief, paras. 427, 511, 521-523, 745, 746, 833, 836, 838, 881; Nyiramasuhuko Reply Brief, paras. 37, 39, 40, 44. *See also* Nyiramasuhuko Appeal Brief, paras. 541, 845; Nyiramasuhuko Reply Brief, para. 210; AT. 14 April 2015 pp. 18, 19 (French). Nyiramasuhuko argues that paragraph 6.53 of the Nyiramasuhuko and Ntahobali Indictment did not mention any location where rapes were committed and contained only background information. *See* Nyiramasuhuko Appeal Brief, para. 834. In paragraph 521 of her appeal brief, Nyiramasuhuko also raises an additional obscure argument regarding the Trial Chamber's interpretation of the words "aside from his attacks" in paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment, which the Appeals Chamber dismisses for lack of clarity.

[1162] Nyiramasuhuko Notice of Appeal, para. 5.6; Nyiramasuhuko Appeal Brief, para. 526. *See also* Nyiramasuhuko Appeal Brief, para. 524.

[1163] Nyiramasuhuko Appeal Brief, paras. 528-533. *See also* Nyiramasuhuko Reply Brief, para. 47; AT. 14 April 2015 pp. 21, 23 (French). To the extent that Nyiramasuhuko's arguments relate to the fact that post-indictment communications did not provide clear and consistent notice of her alleged superior responsibility pursuant to Article 6(3) of the Statute for rapes at the prefectoral office, these arguments are addressed below in Section IV.B.3(c).

were committed by Ntahobali outside the prefectoral office.[1164] She adds that the fact that the post-indictment information required "interpretation" to be understood demonstrates that it was not information capable of curing the defect in the Indictment.[1165] Nyiramasuhuko further contends that the Trial Chamber erred in relying on the Prosecution's opening statement as curing the defect since it did not mention any location.[1166]

504. The Prosecution responds that the Trial Chamber did not convict Nyiramasuhuko of genocide for rapes at the prefectoral office but only considered the evidence that she ordered rapes there as one of several factors from which to infer her genocidal intent.[1167] It further submits that, although paragraphs 6.37, 6.53, and 6.56 of the Indictment are admittedly vague, they nonetheless plead Nyiramasuhuko's responsibility for rapes.[1168]

505. The Prosecution also contends that the Trial Chamber did not err in finding that the vagueness of the Indictment regarding Nyiramasuhuko's alleged responsibility for rapes committed by *Interahamwe* at the prefectoral office was cured by the information provided through its pre-trial brief, the summaries of its witnesses' anticipated evidence along with their prior statements to Tribunal investigators, and its opening statement.[1169] It submits that, in any event, Nyiramasuhuko failed to object in a timely manner to the alleged defect in the Indictment and her defence strategy shows that she was not prejudiced.[1170]

506. Nyiramasuhuko reiterates in reply that the defect in her Indictment concerning her responsibility related to rapes at the prefectoral office was not curable.[1171] She also explains that she

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[1164] Nyiramasuhuko Notice of Appeal, paras. 2.26, 2.34, 2.35; Nyiramasuhuko Appeal Brief, paras. 536, 537, *referring to* Prosecution Witnesses RO, SX, SY, TB, and TN. Nyiramasuhuko points out that the only witnesses' statements alleging her involvement in rapes, namely the statements of Witnesses FAP, QBP, and QBQ, were not in the possession of the Prosecution when it added the count of rape. *See* Nyiramasuhuko Appeal Brief, para. 538, *referring*, *inter alia*, *to* Ground 3 of her appeal. Arguments pertaining to the amendment of the indictment have been addressed under Section IV.B.1 above.

[1165] Nyiramasuhuko Appeal Brief, para. 534.

[1166] Nyiramasuhuko Notice of Appeal, para. 2.26; Nyiramasuhuko Appeal Brief, para. 539.

[1167] Prosecution Response Brief, paras. 188, 462, 579, 584, *referring to* Trial Judgement, para. 5870.

[1168] Prosecution Response Brief, paras. 132, 135, 137. In particular, the Prosecution argues that paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment is not limited to the Butare University Hospital and that there is nothing to suggest that the allegations in paragraphs 6.53 and 6.56 of the Nyiramasuhuko and Ntahobali Indictment could not apply to the prefectoral office. *See ibid.*, paras. 134, 136. *See also* AT. 14 April 2015 pp. 39, 40.

[1169] Prosecution Response Brief, paras. 132-175, 185, 189, 190.

[1170] Prosecution Response Brief, paras. 161-166, 169-176, 189, 190. *See also* AT. 14 April 2015 pp. 41, 42. The Prosecution points out that Nyiramasuhuko did not object when it led evidence on the fact that she had ordered *Interahamwe* to rape at the prefectoral office. *See* Prosecution Response Brief, paras. 167, 168.

[1171] Nyiramasuhuko Reply Brief, paras. 36, 44, 210-213. Nyiramasuhuko also claims that the Prosecution violated the formal requirements applicable on appeal by responding to Grounds 15 and 17 of her appeal together instead of responding to them separately. *See ibid*., paras. 17-24. Given the nature of Nyiramasuhuko's submissions under Grounds 15 and 17 of her appeal, in particular how closely intertwined and repetitive her arguments are under these grounds, the Appeals Chamber does not find fault in the Prosecution's decision to address Nyiramasuhuko's arguments under the same section.

"surmised" the "possibility" that the Prosecution intended to incriminate her as a superior for the rapes committed by Ntahobali and that she prepared her defence accordingly.[1172]

507. As discussed in further detail in the section addressing Nyiramasuhuko's challenges to the assessment of the evidence and her responsibility in relation to the prefectoral office, the Appeals Chamber notes that the Trial Chamber's conclusions on Nyiramasuhuko's responsibility for genocide unequivocally reflect that she was found guilty of this crime on the sole basis of the killings that she ordered during attacks at the prefectoral office.[1173] Nyiramasuhuko's contention that she was erroneously convicted for genocide on the basis of rapes is therefore without merit.

508. To the extent that the Trial Chamber relied on Nyiramasuhuko's orders to rape women as circumstantial evidence of her genocidal intent in relation to the crime of genocide committed at the prefectoral office, the Appeals Chamber observes that the Prosecution expressly pleaded under the count of genocide that Nyiramasuhuko acted with "the intent to destroy, in whole or in part, a racial or ethnic group" in relation to the crimes committed at the Butare Prefecture Office,[1174] thus providing clear notice to Nyiramasuhuko that she was alleged to have acted with genocidal intent. Given that the Indictment pleaded Nyiramasuhuko's specific state of mind in relation to the count of genocide, the evidentiary facts by which her *mens rea* was to be established did not need to be pleaded.[1175] The Appeals Chamber therefore finds no error in the Trial Chamber's reliance on Nyiramasuhuko's orders to commit rape as evidence of her genocidal intent.

509. There is nonetheless no dispute that paragraph 6.30 of the Indictment, which set forth allegations specifically related to the prefectoral office, could not constitute the basis for Nyiramasuhuko's convictions related to rapes insofar as it does not refer to any rapes and was not relied upon in support of Count 7.

510. The Appeals Chamber recalls that in reaching its judgement, a trial chamber can only convict the accused of crimes that are charged in the indictment,[1176] and that the omission of a charge from the indictment cannot be "cured" by the provision of timely, clear, and consistent information.[1177] However, the Appeals Chamber also recalls that in determining whether the

[1172] Nyiramasuhuko Reply Brief, para. 69 (emphasis omitted). Nyiramasuhuko further argues that she challenged the credibility of the witnesses in her cross-examinations and closing brief regardless of the crimes they alleged against her. *See ibid*., para. 70.
[1173] *See infra*, Section IV.F.1(b).
[1174] Nyiramasuhuko and Ntahobali Indictment, pp. 38, 39, *referring to*, *inter alia*, *ibid*., paras. 6.30, 6.31. *See also ibid*., para. 5.1.
[1175] *Cf. supra*, para. 469. *Cf. also infra*, para. 548.
[1176] *See*, *e.g*., *Bagosora and Nsengiyumva* Appeal Judgement, para. 187; *Muvunyi* Appeal Judgement of 1 April 2011, para. 19; *Ntagerura et al.* Appeal Judgement, para. 28.
[1177] *See*, *e.g*., *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on

accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[1178] In proceeding with this holistic consideration, the Trial Chamber found that paragraph 6.37 of the Indictment alleged Nyiramasuhuko's responsibility related to rapes in Butare Prefecture.[1179]

511. Nyiramasuhuko correctly points out that paragraph 6.37 of the Indictment, which alleges the perpetration of rapes of Tutsi women by Ntahobali and unknown "accomplices", does not mention her and is excessively broad as regards the dates, locations, and the identity of Ntahobali's co-perpetrators. While this paragraph *prima facie* did not concern her but Ntahobali, it was nonetheless expressly relied upon in support of Counts 7 and 11 against her pursuant to Article 6(3) of the Statute, together with paragraphs 6.53 and 6.56 of the Indictment. Paragraphs 6.53 and 6.56 also do not refer to Nyiramasuhuko's responsibility related to rapes at the prefectoral office in particular, but allege the commission of rapes against the Tutsi population perpetrated by, among others, militiamen[1180] as well as Nyiramasuhuko's participation in the atrocities set forth in the Indictment committed, notably, by her subordinates.[1181] The Appeals Chamber considers that, by reading paragraph 6.37 in light of paragraphs 6.53 and 6.56 and the charging section of the Indictment, Nyiramasuhuko was put on notice that she incurred criminal responsibility as a superior under Counts 7 and 11 on the basis of the rapes alleged in paragraph 6.37, a fact that she acknowledges in her reply brief.[1182]

512. Contrary to Nyiramasuhuko's contention, the Appeals Chamber does not consider that paragraph 6.37 of the Indictment could only be understood as referring to the Butare University Hospital because it is set forth in a section of the Indictment headed "Butare University Hospital". While the heading "Butare University Hospital" on page 32 of the Indictment preceding paragraphs 6.34 to 6.39 of the Indictment is misleading as to the location of the crimes mentioned in the paragraphs following this headline, a plain and contextual reading of paragraph 6.37 nonetheless clearly reveals that the allegation set out therein was not limited to this specific location but applies to the Butare Prefecture as a whole. Considering the very contents of paragraph 6.37, it would be unreasonable to conclude that the paragraph was limited to events at the Butare University Hospital. When reading the Indictment as a whole, it is clear that the headline "Butare University Hospital" on page 32 was only relevant to paragraph 6.34.

Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora et al.* Appeal Decision on Exclusion of Evidence"), para. 29; *Ntagerura et al.* Appeal Judgement, para. 32.

[1178] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.

[1179] Trial Judgement, para. 2163.

[1180] *See* Nyiramasuhuko and Ntahobali Indictment, para. 6.53.

[1181] *See* Nyiramasuhuko and Ntahobali Indictment, para. 6.56.

[1182] *See* Nyiramasuhuko Reply Brief, para. 69.

513. In the opinion of the Appeals Chamber, the Trial Chamber did not err in finding that the allegation of Nyiramasuhuko's superior responsibility for rapes of Tutsi women at the prefectoral office did not constitute a new charge but fell within the broader allegation pleaded, albeit vaguely, in paragraph 6.37 of the Indictment, when read together with paragraphs 6.53 and 6.56 and the charging section of the Indictment.

514. As the Prosecution obtained information about Nyiramasuhuko's involvement in rapes at the prefectoral office from several witnesses between 1997 and 1999, it is incontestable that it should have pleaded this allegation with greater specificity in the Indictment. However, the Appeals Chamber is not persuaded that the Prosecution's failure to fulfil its obligation to provide clear notice to Nyiramasuhuko of the charges against her demonstrates that it did not intend to pursue her in connection with these rapes. The fact that the prior written statements of four witnesses concerning Nyiramasuhuko's involvement in rapes at the prefectoral office were disclosed to her on several occasions prior to the filing of the operative indictment[1183] as well as the addition of the count of rape against her in August 1999[1184] show that this allegation formed part of the Prosecution case at the time the Indictment was filed. Nyiramasuhuko's contention that the Prosecution did not intend to charge her in connection with rape at the prefectoral office when amending the indictment is further refuted by the fact that the Prosecution supported paragraph 6.37 of the Nyiramasuhuko and Ntahobali Third Amended Indictment with an excerpt of Witness QZ's statement recounting Nyiramasuhuko's presence when Ntahobali and *Interahamwe* raped the witness and other women at the prefectoral office.[1185] The summaries of the anticipated evidence of Witnesses FAP, QBQ, RJ,

[1183] Statement of Witness FAP of 6 May 1999, signed on 10 June 1999, redacted version disclosed on 15 November 2000 ("Witness FAP's Statement"); Statement of Witness QBQ of 6 May 1999, redacted versions disclosed on 10 December 1999 and 15 November 2000 ("Witness QBQ's Statement"); Statement of Witness RJ of 11 September 1997, signed on 17 September 1997, redacted versions disclosed on 30 March 1999, 10 December 1999, and 15 November 2000; Statement of Witness TA of 19 November 1997, redacted versions disclosed on 25 May 1998, 4 November 1998, 15 November 2000, and 1 October 2001 ("Witness TA's Statement"). *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Interoffice Memorandum "Discovery in The Prosecutor vs. P. Nyiramasuhuko & A.S. Ntahobali", 25 May 1998 ("25 May 1998 Disclosure"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Interoffice Memorandum "The Prosecutor vs. Ntahobali, Nsabimana, Kanyabashi, Nteziryayo, Ndayambaje and Nyiramasuhuko", 4 November 1998 (confidential) ("4 November 1998 Disclosure"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, "Redacted Witness Statements", 30 March 1999; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Interoffice Memorandum "Re: Transmission of Redacted Witness Statements", 10 December 1999 ("10 December 1999 Disclosure"); *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Interoffice Memorandum "Butare Group of Cases – Rule 66(A)(ii) Partial Disclosure", 15 November 2000 ("15 November 2000 Disclosure"); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Interoffice Memorandum "Butare Group of Cases ICTR-98-42-T – Disclosure", 1 October 2001.

[1184] *See* 10 August 1999 Decision, p. 6.

[1185] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999 ("Nyiramasuhuko and Ntahobali Third Amended Indictment"), para. 6.37; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Supporting Material, 18 August 1999 (confidential) ("Supporting Material to Nyiramasuhuko and Ntahobali Third Amended Indictment"), p. 118.

TA, and QZ appended to the Prosecution Pre-Trial Brief further reflect that it continued to be part of the Prosecution case after the operative indictment was issued.

515. In light of the above, the Appeals Chamber rejects Nyiramasuhuko's contention that the vagueness of the Indictment concerning her responsibility for rapes at the prefectoral office was not curable.

516. Turning to Nyiramasuhuko's challenges to the Trial Chamber's finding that the defect in the Indictment regarding this allegation was cured, the Appeals Chamber is not persuaded that the formulations "[a]part from the *préfecture* office" and "[a]side from his attacks" in paragraphs 24 and 25 of the Prosecution Pre-Trial Brief reflect that the Prosecution only accused Nyiramasuhuko of being responsible for rapes committed *outside* the prefectoral office. The Appeals Chamber observes that the phrase "[a]part from the *préfecture* office" relates to a separate allegation of killings and that, read in context, the import of the phrase "[a]side from his attacks" is unclear.[1186] Conversely, the Appeals Chamber notes that, in paragraph 29 of its pre-trial brief, the Prosecution made it clear that Nyiramasuhuko was alleged to have ordered and aided and abetted her subordinates and others in carrying out rapes of Tutsi women throughout Rwanda.[1187]

517. The Appeals Chamber also finds no merit in Nyiramasuhuko's contention that the Trial Chamber erred in finding that the summaries of the anticipated evidence of Prosecution witnesses appended to the Prosecution Pre-Trial Brief cured the defect in the Indictment. Indeed, some of the summaries referred to by the Trial Chamber were not directly relevant to her insofar as they did not allege her participation in rapes committed at the prefectoral office.[1188] The Appeals Chamber sees

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[1186] Paragraphs 24 and 25 of the Prosecution Pre-Trial Brief read as follows:

> Apart from the *préfecture* office, the search and the elimination of Tutsis also took place throughout the entire *préfecture* between April and July 1994. During this period, Pauline Ny[i]ramasuhuko and Ars[è]ne Shalom Ntahobali used a roadblock located in front of their house to identify and kill Tutsis.
>
> Arsène Shalom Ntahobali also travelled throughout the *préfecture* to locate and kill Tutsis. Aside from his attacks on the Tutsi population during this period, Arsène Shalom Ntahobali, assisted by unknown "accomplices," participated in the kidnapping and raping of Tutsi women.

[1187] Paragraph 29 of the Prosecution Pre-Trial Brief reads as follows:

> During the events referred to in their indictments, rapes, sexual assaults and other crimes of a sexual nature were widely and notoriously committed throughout Rwanda. These crimes were perpetrated on the Tutsi population particularly Tutsi women and girls by among others, soldiers, militiamen and gendarmes. Military officers, members of the Interim Government and local figures of authority (such as Elie Ndayambaje, Pauline Nyiramasuhuko, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Ladislas Ntaganzwa, Joseph Kanyabashi) and Shalom Arsène Ntahobali committed, ordered, aided and abetted their subordinates and others in the carrying out of rapes, sexual assaults and massacres of the Tutsi population.

The Appeals Chamber notes that Nyiramasuhuko fails to demonstrate that paragraph 29 of the Prosecution Pre-Trial Brief could not be relied on.

[1188] *See* Trial Judgement, para. 2164, fn. 5753, *referring*, *inter alia*, *to* Witness QBP's Summary, Witness RE's Summary, Witness RG's Summary, Witness SW's Summary. It bears noting, however, that some of these summaries refer to Nyiramasuhuko being present at the prefectoral office and/or ordering killings and, more generally, to the fact that rapes were committed there. *See* Witness RE's Summary; Witness SW's Summary.

no error in this as it is not clear that the Trial Chamber intended to rely on all summaries it cited as relevant to remedy Nyiramasuhuko's lack of notice specifically since its analysis and conclusions concerned the notice provided to both Nyiramasuhuko and Ntahobali.

518. Nyiramasuhuko also does not show error in the Trial Chamber's reliance on the summaries of the anticipated evidence of Witnesses FAP, QBQ, RJ, TA, and QZ as providing her timely, clear, and consistent notice of her alleged responsibility for rapes at the prefectoral office. The Appeals Chamber observes that Witnesses FAP's, QBQ's, and RJ's summaries referred to Nyiramasuhuko giving orders to *Interahamwe* or militiamen to rape at the prefectoral office,[1189] whereas Witnesses TA's and QZ's summaries mentioned Nyiramasuhuko witnessing the commission of rapes there and issuing orders to *Interahamwe*.[1190] Witness RF's Summary also reflects that Nyiramasuhuko was alleged to have given orders to *Interahamwe* at the prefectoral office and told them "to do as they pleased." All six summaries were marked relevant to Nyiramasuhuko and were linked to Counts 7 and 11 of her Indictment. The fact that other summaries related to the events at the prefectoral office did not mention Nyiramasuhuko's involvement in rapes at this location was not inconsistent with the clear and coherent information provided through the summaries of Witnesses FAP, QBQ, RJ, TA QZ, and, to some extent, Witness RF's Summary.

519. As for Nyiramasuhuko's argument regarding the Prosecution's opening statement, the Appeals Chamber notes that, while Nyiramasuhuko is correct in her assertion that the Prosecution failed to specify any particular incident of rape or the location where the rapes were alleged to have been committed, its emphasis on Nyiramasuhuko's responsibility for rapes in its opening statement

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[1189] In relevant part, Witness FAP's Summary reads as follows:

> At the Prefecture office, Nyiramasuhuko used to come driven by her son, Ntahobali, in their mud-smeared pick-up with armed militiamen. […] She ordered militiamen to kill and rape. Women who resisted rape were immediately killed. Others were rapes in front of her before being killed.

In relevant part, Witness QBQ's Summary reads as follows:

> Three days later Nyiramasuhuko came to the Prefecture office with *Interahamwe* and communal police. Nyiramasuhuko ordered them to kill men and rape women before killing them. *Inte*[*rah*]*amwe* thus killed and raped women.

In relevant part, Witness RJ's Summary reads as follows:

> RJ went to Prefecture office. […] Later, RJ heard Nyiramasuhuko order soldiers, *Inte*[*rah*]*amwe*, and Ntahobali to select girls and young women and rape them, and kill the older women.

[1190] In relevant part, Witness TA's Summary reads as follows:

> Nyiramasuhuko and Ntahobali came to the Prefecture office often. They stated: "Let's get rid of this dirt." […] TA saw Nyiramasuhuko present during Ntahobali's and his men's rapes[.] Nyiramasuhuko was superior to Ntahobali. Nyiramasuhuko chose people to be killed, and issued orders.

In relevant part, Witness QZ's Summary reads as follows:

> QZ saw Ntahobali and four *Interahamwe* rape a girl. […] QZ was raped by Ntahobali and the *Interahamwe*, and Nyiramasuhuko witnessed the rape. QZ states Nyiramasuhuko ordered the *Interahamwe* to "kill all the Tutsi and to let those with ID cards, show that they are Hutu."

confirmed that it intended to prove that she was responsible on this basis and was consistent with the information provided through the Witness Summaries Grid.[1191]

520. Based on the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that she was not put on sufficient notice that she was charged under Counts 7 and 11 on the basis of rapes perpetrated at the Butare Prefecture Office.

(c) Superior Responsibility

521. As noted above, the Trial Chamber convicted Nyiramasuhuko as a superior pursuant to Article 6(3) of the Statute under Counts 7 and 11 in connection with the rapes committed by *Interahamwe* at the Butare Prefecture Office that she ordered.[1192] The Trial Chamber also found that Nyiramasuhuko bore superior responsibility for the killings of Tutsis abducted from the prefectoral office committed by *Interahamwe* upon her orders but, having found her guilty under Article 6(1) of the Statute, did not convict her of these crimes as a superior.[1193] The Trial Chamber did, however, consider her role as a superior in these killings as an aggravating factor in sentencing.[1194]

522. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead, *inter alia*, that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible.[1195]

523. The Trial Chamber discussed whether Nyiramasuhuko was put on sufficient notice that the *Interahamwe* who perpetrated killings and rapes at the prefectoral office were alleged to be her subordinates both in the "Factual Findings" and "Legal Findings" sections of the Trial Judgement.[1196] It found that, "[a]lthough the Indictment lacks any paragraph specifically detailing Nyiramasuhuko's alleged subordinates",[1197] "a holistic reading of the Indictment demonstrates that numerous paragraphs pled in support of Article 6(3) responsibility […] provide that Nyiramasuhuko is alleged to be superior to *Interahamwe*".[1198] The Trial Chamber further

[1191] *See* Prosecution Opening Statement, T. 12 June 2001 p. 92.
[1192] *See supra*, para. 482.
[1193] *See supra*, para. 481.
[1194] *See supra*, para. 481.
[1195] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218. The Appeals Chamber notes that Nyiramasuhuko did not challenge the Trial Chamber's findings regarding the other elements of superior responsibility that must pleaded in the indictment.
[1196] *See* Trial Judgement, Sections 3.6.19.2, 4.1.2.1.1.
[1197] Trial Judgement, para. 5608. *See also ibid.*, para. 2158.
[1198] Trial Judgement, paras. 2159, 5611, *referring to* Nyiramasuhuko and Ntahobali Indictment, paras. 5.1, 6.20, 6.27, 6.30, 6.37-6.39, 6.47, 6.49-6.56. *See also ibid.*, paras. 5608-5610. Incidentally, the Appeals Chamber observes that the

determined that, in any case, the Prosecution Pre-Trial Brief and the summaries of anticipated evidence appended to it as well as prior witness statements confirmed that Nyiramasuhuko was alleged to be the superior of, among others, *Interahamwe*.[1199] The Trial Chamber concluded that Nyiramasuhuko received sufficient notice that she was charged with superior responsibility for the alleged acts of *Interahamwe* at the prefectoral office.[1200]

524. Nyiramasuhuko submits that the Trial Chamber erred in finding that she was put on notice that she was alleged to be the superior of the *Interahamwe* who committed crimes at the prefectoral office.[1201] Specifically, she argues that the Trial Chamber erred in examining whether she was put on sufficient notice of the identity of her alleged subordinates for the charge of rape before assessing separately the sufficiency of the information relating to the allegation of superior responsibility under Article 6(3) of the Statute in itself.[1202] In her view, had the Trial Chamber proceeded "logically, legally and fairly", it would have concluded that she was not alleged to be a superior and would not have deprived her of a reasoned opinion.[1203]

525. Nyiramasuhuko also argues that the Trial Chamber erred in concluding that a holistic reading of the Indictment provided her notice of her alleged superior authority over the

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Trial Chamber reached contradictory findings regarding notice that Nyiramasuhuko was being charged as a superior to the communal policemen. *Compare ibid*., para. 2159 *with ibid.*, para. 5616.

[1199] Trial Judgement, paras. 2159, 5612, fns. 5743-5747, 14557, 14558, *referring to* Prosecution Pre-Trial Brief, paras. 21, 29-31, Witness Summaries Grid, Witness TA's Summary, item 9, Witness SJ, item 17, Witness FAE ("Witness FAE's Summary"), Witness FAP's Summary, Witness QBP's Summary, Witness QBQ's Summary, item 63, Witness RB, item 64, Witness RD, Witness QZ's Summary, Witness RF's Summary, Witness RJ's Summary, item 72, Witness RN ("Witness RN's Summary"), item 83, Witness SR, item 84, Witness SS ("Witness SS's Summary"); item 86, Witness SU ("Witness SU's Summary"), prior statements to Tribunal investigators of Witnesses SS, SU, TA, TK, QBP, and QBQ disclosed to Nyiramasuhuko before the beginning of the trial.

[1200] Trial Judgement, paras. 2159, 5613, 5878.

[1201] Nyiramasuhuko Notice of Appeal, paras. 2.18-2.25; Nyiramasuhuko Appeal Brief, paras. 409-464. *See also* Nyiramasuhuko Reply Brief, paras. 25-55; AT. 15 April 2015 pp. 6-9 (French). Nyiramasuhuko also appears to contend that the Trial Chamber erred in finding that she received adequate notice of her alleged superior responsibility in relation to Ntahobali, soldiers, gendarmes, and the population. *See* Nyiramasuhuko Notice of Appeal, paras. 2.19-2.24; Nyiramasuhuko Appeal Brief, paras. 435, 437, 439, 452, 453. Because Nyiramasuhuko was only found responsible as a superior in connection with the criminal conduct of the *Interahamwe*, the Appeals Chamber will not entertain Nyiramasuhuko's arguments in this respect. Nyiramasuhuko further submits that the Trial Chamber erred in failing to consider the requests for specificity regarding her alleged superior-subordinate relationships and the identity of her subordinates that she made at trial and her request for reconsideration, causing her prejudice. *See* Nyiramasuhuko Appeal Brief, paras. 409-415, 465, *referring to* T. 7 June 2000 pp. 63-66, 98, 99, 108, 109 (French), 1 November 2000 Nyiramasuhuko Decision. The Appeals Chamber notes that, in Section IV.B.1 above, it has concluded that Nyiramasuhuko failed to demonstrate through Ground 3 of her appeal that the Trial Chamber erred in rejecting her motion for specificity. Nyiramasuhuko does not develop any argument under this ground of appeal that would show error in the Trial Chamber's 1 November 2000 Nyiramasuhuko Decision or its decision to deny reconsideration. Nyiramasuhuko's claims in these respects are therefore rejected.

[1202] Nyiramasuhuko Appeal Brief, paras. 419, 420, 426, 429, *referring to* Trial Judgement, para. 2158. *See also ibid.*, para. 441. Nyiramasuhuko also argues that the Trial Chamber erred in relying on paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment in concluding that she had notice that *Interahamwe* who committed rapes were alleged to be her subordinates since this paragraph did not refer to any rapes at the prefectoral office. *See* Nyiramasuhuko Notice of Appeal, para. 2.20; Nyiramasuhuko Appeal Brief, paras. 425-428, 449. *See also* AT. 15 April 2015 pp. 17-19 (French).

[1203] Nyiramasuhuko Appeal Brief, paras. 421-423, 430. *See also* AT. 14 April 2015 pp. 17, 19 (French).

Interahamwe.[1204] In particular, she contends that the Trial Chamber erred in finding that the paragraphs that were relied upon in support of superior responsibility in the charging section of the Indictment informed her of the identity of her alleged subordinates.[1205] Highlighting that these paragraphs were relied upon against her under both Articles 6(1) and 6(3) of the Statute, she argues that the lack of distinction amounted to an additional defect in the Indictment.[1206] She adds that it was erroneous for the Trial Chamber to find that paragraph 6.37 of the Indictment gave her notice of the identity of her alleged subordinates in relation to the allegation of rapes given that there is no mention of her superior responsibility or of the involvement of *Interahamwe* in this paragraph.[1207] In the same vein, Nyiramasuhuko argues that the Trial Chamber erred in relying on paragraph 6.53 of the Indictment as it referred to militiamen, not *Interahamwe*, and in considering that the term "militiamen" was to be understood as "*Interahamwe*" in the Indictment.[1208]

526. According to Nyiramasuhuko, the fact that paragraphs 4.4 and 4.5 of the Indictment specifically pleaded Ntahobali's authority over the *Interahamwe* evinced the Prosecution's intention not to charge her as their superior, which the Trial Chamber failed to take into account.[1209] She points out that this is the reasoning that the Trial Chamber followed when examining whether Nsabimana received notice of his alleged superior responsibility over the *Interahamwe*.[1210]

527. Moreover, Nyiramasuhuko submits that the Trial Chamber erred in finding that the Prosecution Pre-Trial Brief, summaries of anticipated evidence, and prior witness statements provided her notice of her alleged superior responsibility over the *Interahamwe* who committed crimes at the prefectoral office.[1211] Specifically, she argues that: (i) the Trial Chamber erred in concluding that paragraph 21 of the Prosecution Pre-Trial Brief specified that she was the superior of the *Interahamwe*; (ii) paragraphs 29 and 30 of the Prosecution Pre-Trial Brief added allegations of rapes and responsibility pursuant to Article 6(1) of the Statute not pleaded in the Indictment and, like paragraph 31 of the same brief, did not contain information concerning rapes or superior responsibility; (iii) none of the summaries gave her notice of her alleged superior status over *Interahamwe* and the allegations that she ordered *Interahamwe* to commit crimes contained therein

[1204] Nyiramasuhuko Appeal Brief, paras. 431-433. *See also ibid.*, paras. 440-442.
[1205] Nyiramasuhuko Notice of Appeal, paras. 2.18, 2.19, 2.22; Nyiramasuhuko Appeal Brief, paras. 443-455. *See also* Nyiramasuhuko Reply Brief, paras. 25-27.
[1206] Nyiramasuhuko Appeal Brief, paras. 443, 450; Nyiramasuhuko Reply Brief, para. 29.
[1207] Nyiramasuhuko Appeal Brief, paras. 445, 446, 519. *See also* AT. 15 April 2015 pp. 8, 9 (French). Nyiramasuhuko also avers that the fact that paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment makes reference to "unknown accomplices", instead of *Interahamwe*, militiamen, or subordinates, implied a "joint participation" rather than the participation of subordinates. *See* Nyiramasuhuko Appeal Brief, para. 527 (emphasis omitted).
[1208] Nyiramasuhuko Appeal Brief, paras. 447, 448. *See also ibid.*, para. 461.
[1209] Nyiramasuhuko Appeal Brief, paras. 456-460.
[1210] Nyiramasuhuko Appeal Brief, para. 458, *referring to* Trial Judgement, paras. 2785, 2788. *See also ibid.*, paras. 459, 462.

were insufficient to inform her that she was alleged to be their superior.[1212] Nyiramasuhuko adds that the Prosecution's opening statement alleged her presence and encouragement to commit rape, whereas superior responsibility concerns a failure to act.[1213]

528. The Prosecution responds that the Indictment sufficiently pleaded Nyiramasuhuko's superior responsibility and that Nyiramasuhuko's authority over the *Interahamwe* could be inferred from the fact that the relevant allegations of the Indictment were charged pursuant to Article 6(3) of the Statute.[1214] It adds that the post-indictment communications provided further notice to Nyiramasuhuko in this regard.[1215]

529. The Appeals Chamber observes that the Trial Chamber started its analysis on notice of the identity of Nyiramasuhuko's alleged subordinates by noting her claim that she was not put on notice of her alleged superior responsibility in relation to the charge of rape. However, contrary to Nyiramasuhuko's contention, the Trial Chamber's analysis clearly reflects that it examined whether the Indictment provided her with notice that she was alleged to be the superior of, among others, *Interahamwe* and militiamen within the meaning of Article 6(3) of the Statute generally, rather than in relation to any specific charge.[1216] As demonstrated by its findings summarised above, the Trial Chamber also provided reasons for its conclusion that Nyiramasuhuko received sufficient notice that she was charged with superior responsibility for the alleged acts of, *inter alios*, *Interahamwe* and militiamen. Nyiramasuhuko's contentions that the Trial Chamber did not proceed "logically, legally and fairly" and failed to provide a reasoned opinion are therefore without merit.

530. With respect to Nyiramasuhuko's challenge to the Trial Chamber's finding that the Indictment sufficiently identified her alleged subordinates, the Appeals Chamber is not persuaded by her argument that the fact that the paragraphs of the Indictment were being pursued under the relevant counts pursuant to both Article 6(1) and Article 6(3) of the Statute was a source of confusion. In this respect, the Appeals Chamber recalls that cumulative charging is permitted.[1217] Nyiramasuhuko also fails to demonstrate any error in the Trial Chamber's determination that, given

[1211] Nyiramasuhuko Notice of Appeal, paras. 2.23, 2.24; Nyiramasuhuko Appeal Brief, paras. 434-439. *See also* Nyiramasuhuko Reply Brief, paras. 45-51; AT. 15 April 2015 pp. 8, 9 (French).
[1212] Nyiramasuhuko Appeal Brief, paras. 434-438, 529.
[1213] Nyiramasuhuko Appeal Brief, para. 539.
[1214] Prosecution Response Brief, paras. 132-134. *See also* AT. 14 April 2015 pp. 39, 40.
[1215] Prosecution Response Brief, paras. 138-145, 147-152, 157, 160, 182, 183. *See also* AT. 14 April 2015 pp. 40, 41.
[1216] *See* Trial Judgement, paras. 2158, 2159.
[1217] *See Simba* Appeal Judgement, para. 276; *Semanza* Appeal Judgement, paras. 308, 309; *Musema* Appeal Judgement, paras. 369, 370, *referring to Čelebići* Appeal Judgement, para. 400. *Cf. also Nahimana et al.* Appeal Judgement, para. 487; *Blaškić* Appeal Judgement, para. 91.

the context, it was "clear that the 'militiamen' referenced in this Indictment would have been understood as *Interahamwe*".[1218]

531. However, the Appeals Chamber finds merit in Nyiramasuhuko's contention that the Indictment did not put her on adequate notice that she was alleged to be the superior of the *Interahamwe*. As noted by the Trial Chamber, the Prosecution failed to expressly plead in the Indictment who Nyiramasuhuko's subordinates were alleged to be.[1219] A holistic reading of the paragraphs cited in support of the relevant counts against Nyiramasuhuko pursuant to Article 6(3) of the Statute, together with the very fact that they were expressly relied upon in support of superior responsibility,[1220] indeed suggests that the perpetrators of crimes identified in these paragraphs were alleged to be Nyiramasuhuko's subordinates. The Appeals Chamber also notes that the Indictment makes references to Nyiramasuhuko's responsibility for aiding and abetting her "subordinates" in carrying out the massacres and not taking any measures to stop them.[1221] The Appeals Chamber nonetheless stresses that the charges against the accused and the material facts underpinning them should not be suggested in the Indictment, but clearly and unambiguously set forth. In the present case, although the Indictment put Nyiramasuhuko on notice through the charging section that she was charged as a superior for a number of incidents – including the killing of refugees abducted from the prefectoral office pleaded in paragraph 6.30 of the Indictment and the rapes committed at the time in Butare Prefecture alleged in paragraph 6.37 of the Indictment[1222] – it failed to properly identify the subordinates for whose acts she was alleged to be responsible as a superior.[1223]

532. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in finding that the Indictment provided adequate notice to Nyiramasuhuko that her alleged subordinates included *Interahamwe*.

533. The Appeals Chamber is nonetheless not convinced by Nyiramasuhuko's argument that the fact that the Prosecution specifically pleaded Ntahobali's superior authority over the *Interahamwe* in the Indictment, and not hers, reflected that the Prosecution did not intend to charge her as their superior. The Appeals Chamber observes that, despite its failure to clearly identify any of her

[1218] Trial Judgement, fn. 14554, *referring to* Nyiramasuhuko and Ntahobali Indictment, paras. 1.17, 3.10, 4.4, 4.5, 6.20 (conflating the militia and the *Interahamwe*).
[1219] Trial Judgement, para. 5608. *See also ibid.*, para. 2158.
[1220] *See* Nyiramasuhuko and Ntahobali Indictment, paras. 5.1, 6.20, 6.27, 6.30, 6.31, 6.33, 6.37-6.39, 6.47, 6.49-6.51, 6.53-6.56.
[1221] *See* Nyiramasuhuko and Ntahobali Indictment, paras. 6.54-6.56.
[1222] *See supra*, paras. 492, 513. The Appeals Chamber finds Nyiramasuhuko's argument that the phrasing of paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment implied a "joint participation" rather than the participation of subordinates unpersuasive.
[1223] The Appeals Chamber notes that, in addition to failing to identify the *Interahamwe* as Nyiramasuhuko's subordinates in the Nyiramasuhuko and Ntahobali Indictment, the Prosecution also failed to identify that *Interahamwe*

alleged subordinates in the Indictment, the Prosecution expressly charged Nyiramasuhuko under Article 6(3) of the Statute in relation to crimes involving *Interahamwe* and militiamen. On this issue, the Appeals Chamber notes that, *prima facie*, the Trial Chamber appears to have adopted a different approach with respect to Nsabimana's notice of his authority over the *Interahamwe* at the prefectoral office.[1224] However, read in the context of its overall reasoning, the Trial Chamber's approach concerning Nsabimana in fact responds to the different circumstances posed in the Nsabimana and Nteziryayo Indictment.[1225] Nyiramasuhuko's reliance on the Trial Chamber's conclusion with respect to Nsabimana's notice of the identity of his alleged subordinates fails to appreciate that, in her case, the disclosure the Prosecution made prior to the filing of the operative indictment and the information contained in its post-indictment communications all evinced that her superior responsibility over the *Interahamwe* formed part of the Prosecution case.[1226]

534. Turning to Nyiramasuhuko's challenge to the Trial Chamber's finding that, in any case, she was put on adequate notice through post-indictment communications, the Appeals Chamber notes that, contrary to Nyiramasuhuko's argument, paragraph 21 of the Prosecution Pre-Trial Brief on which the Trial Chamber relied is indeed indicative of her superior-subordinate relationship with the *Interahamwe* involved in crimes at the prefectoral office. While paragraph 31 of the Prosecution Pre-Trial Brief does not reflect Nyiramasuhuko's authority over the *Interahamwe*, paragraph 29, and to a certain extent paragraph 30, provided further notice that she was charged as the superior of the *Interahamwe*/militiamen perpetrating killings and rapes. The Appeals Chamber recalls that it has rejected in the prior section Nyiramasuhuko's submission that the allegation of her responsibility for rapes was not pleaded in the Indictment.[1227]

535. The Appeals Chamber has also concluded above that the summaries of the anticipated evidence of a number of Prosecution witnesses gave her clear and consistent notice that she was alleged to have ordered *Interahamwe* to commit killings and rapes at the prefectoral office.[1228] Considering that these summaries were linked to the relevant counts of the Indictment which were

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were alleged to be involved in the rapes with which Nyiramasuhuko was being charged through paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment.

[1224] Trial Judgement, para. 2787.

[1225] Trial Judgement, paras. 2785-2787.

[1226] *See* Trial Judgement, fn. 5746; *supra*, paras. 514-519; *infra*, paras. 534, 535.

[1227] *See supra*, paras. 511-520.

[1228] *See supra*, para. 518. *See also* Witness SS's Summary which, in relevant part, reads as follows:

> Later on that day, Nyiramasuhuko and the *Interahamwe* arrived in a van to take people away to be killed. […] SS saw Nyiramasuhuko arrive three times at the Prefecture Office and heard her say: "take the young boy children away too. Don't leave anybody behind."

See also Witness SU's Summary which, in relevant part, reads as follows:

> SU heard Nyiramasuhuko give an order to the *Interahamwe* and soldiers who were at the Prefecture to go and look for boy children. The order was carried through and the children were killed.

pursued against her under Article 6(3) of the Statute, the Appeals Chamber finds no merit in Nyiramasuhuko's contention that the allegations that she gave orders to *Interahamwe* contained therein could not inform her that she was also alleged to be their superior. The Appeals Chamber recalls that the same set of facts can support responsibility pursuant to both Articles 6(1) and 6(3) of the Statute.[1229] These summaries also clearly reflect Nyiramasuhuko's general authority and control over the *Interahamwe* involved in attacks at the prefectoral office.[1230]

536. Because allegations of presence at the crime scene and of encouragement to commit the crimes can also support superior responsibility pursuant to Article 6(3) of the Statute, the Appeals Chamber rejects Nyiramasuhuko's contention that the Prosecution's reference to her presence and encouragement to commit rapes in its opening statement implied that she was not charged as a superior.

537. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in considering that the Prosecution Pre-Trial Brief and its summaries of anticipated evidence provided her with the requisite notice of her alleged superior responsibility over the *Interahamwe* who committed crimes against the Tutsis who had sought refuge at the prefectoral office.

538. Based on these considerations, the Appeals Chamber concludes that, although the Trial Chamber erred in finding that the Indictment adequately identified Nyiramasuhuko's alleged subordinates, its error did not invalidate its decision to find Nyiramasuhuko responsible as a superior in connection with the killings and rapes perpetrated by *Interahamwe* that she ordered at the prefectoral office since the defect in the Indictment as regards the identification of these *Interahamwe* as her subordinates was subsequently cured by timely, clear, and consistent information.

(d) Conclusion

539. For the foregoing reasons, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that she lacked sufficient notice that she was alleged to be responsible pursuant to Articles 6(1) and 6(3) of the Statute for ordering *Interahamwe* to kill Tutsis who had sought refuge at the Butare Prefecture Office and pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* at the Butare Prefecture Office following her orders.

[1229] *See*, *e.g.*, *Nahimana et al.* Appeal Judgement, para. 487; *Blaškić* Appeal Judgement, para. 91.
[1230] *See*, *e.g.*, Witness TA's Summary, Witness RF's Summary, Witness RJ's Summary, Witness FAP's Summary, Witness QBQ's Summary, Witness SU's Summary.

4. Distribution of Condoms (Ground 26 in part)

540. The Trial Chamber found that, at the beginning of June 1994, Nyiramasuhuko came to the Cyarwa-Sumo Sector, Ngoma Commune, and distributed condoms for the *Interahamwe* to be used in the raping and killing of Tutsi women in that sector.[1231] The Trial Chamber further found that Nyiramasuhuko gave the following order to the woman to whom she distributed the condoms: "[g]o and distribute these condoms to your young men, so that they use them to rape Tutsi women and to protect themselves from AIDS, and after having raped them they should kill all of them. Let no Tutsi woman survive because they take away our husbands."[1232]

541. However, the Trial Chamber held that there was not "sufficient reliable evidence to show a link between Nyiramasuhuko's actions in distributing the condoms on this occasion, in addition to her utterances evincing her clear intent to target Tutsi women, and actual rapes committed against said Tutsi women."[1233] Moreover, although the Trial Chamber determined that Nyiramasuhuko's order to the woman to whom she distributed the condoms was direct and could not be considered ambiguous in the context of the rapes and large scale massacres committed throughout Butare Prefecture at that time, it found that her statements were more akin to a "conversation" and did not satisfy the "public" element of the crime of direct and public incitement to commit genocide.[1234] Accordingly, the Trial Chamber found Nyiramasuhuko not guilty of genocide, rape as a crime against humanity, and direct and public incitement to commit genocide in relation to this incident.[1235] Nonetheless, the Trial Chamber found that "this circumstantial evidence shows Nyiramasuhuko's intent to destroy, in whole or in substantial part, the Tutsi group"[1236] and relied in part on this evidence to find that Nyiramasuhuko possessed the specific intent to commit genocide in relation to other events.[1237]

542. The Trial Chamber found that the allegation concerning Nyiramasuhuko's distribution of condoms was not specifically pleaded in the Indictment and that the Indictment was therefore defective in this regard.[1238] However, the Trial Chamber found that this defect was cured through the disclosure of the summary of Witness FAE's anticipated testimony appended to the Prosecution

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[1231] Trial Judgement, paras. 4985, 5938, 6014.
[1232] Trial Judgement, paras. 4985, 5938, 6014.
[1233] Trial Judgement, para. 5939. *See also ibid*., paras. 6091, 6092.
[1234] Trial Judgement, paras. 6015, 6016. The Trial Chamber found that "Nyiramasuhuko directed her speech to one woman, in the presence of four other men" and that "[i]n order to possess the requisite *mens rea* for the crime of direct and public incitement, the audience must be much broader than that found in the present circumstance." *See ibid*., para. 6016.
[1235] Trial Judgement, paras. 5940, 6018, 6091, 6092.
[1236] Trial Judgement, paras. 5940, 6018.
[1237] Trial Judgement, paras. 5870, 5871. *See also ibid*., paras. 5873, 5874. As previously noted, Nyiramasuhuko was found guilty of genocide for ordering *Interahamwe* to kill Tutsis who had sought refuge at the Butare Prefecture Office.
[1238] *See* Trial Judgement, para. 4923.

Pre-Trial Brief and Witness FAE's prior statement to Tribunal investigators.[1239] The Trial Chamber concluded that Nyiramasuhuko "was reasonably able to understand the nature of the charges against her" and that she suffered no prejudice in the preparation of her defence.[1240]

543. Nyiramasuhuko submits that the Trial Chamber erred in convicting her on the basis of the allegation concerning the distribution of condoms, whereas it found that the allegation was not pleaded in the Indictment.[1241] She argues that it was erroneous for the Trial Chamber to find that the defect in the Indictment was cured.[1242] In support of this contention, Nyiramasuhuko submits that Witness FAE's prior statement did not provide her notice that she was charged with physically distributing condoms to the *Interahamwe* in early June 1994 and with encouraging them to commit rapes.[1243]

544. The Prosecution responds that since the Trial Chamber only relied on Nyiramasuhuko's distribution of condoms as evidence of her genocidal intent, this allegation was merely evidence that did not need to be pleaded in the Indictment.[1244] It adds that, in any event, the Trial Chamber correctly found that Nyiramasuhuko had notice of the distribution of condoms and that she suffered no prejudice in the preparation of her defence.[1245]

545. Nyiramasuhuko replies that her conduct with regard to the distribution of condoms had to be specifically pleaded in the Indictment since the Trial Chamber relied upon it to convict her.[1246]

546. The Appeals Chamber observes that, contrary to what Nyiramasuhuko appears to suggest in her submissions, she was not found guilty in relation to the distribution of condoms in June 1994, the Trial Chamber having found that there was insufficient evidence demonstrating that actual rapes were committed as a result of this distribution.[1247] As noted above, the Trial Chamber merely relied on its finding on the distribution of condoms as circumstantial evidence of Nyiramasuhuko's genocidal intent in relation to the crimes committed at the Butare Prefecture Office.[1248] In these

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[1239] *See* Trial Judgement, paras. 4925, 4927, 4929, *referring to* Witness FAE's Summary, Witness FAE's Statement, dated 7 May 1999, signed 10 June 1999, disclosed on 15 November 2000 ("Witness FAE's Statement"). *See* 15 November 2000 Disclosure.
[1240] Trial Judgement, para. 4929.
[1241] Nyiramasuhuko Notice of Appeal, paras. 7.21, 7.25; Nyiramasuhuko Appeal Brief, para. 883.
[1242] Nyiramasuhuko Appeal Brief, para. 883, *referring to* Trial Judgement, paras. 4923, 4929.
[1243] Nyiramasuhuko Appeal Brief, para. 886, *referring to* Trial Judgement, para. 4985. Nyiramasuhuko specifically points out that, in her prior statement, Witness FAE did not indicate that Nyiramasuhuko was the person distributing condoms and only stated that Nyiramasuhuko said: "Tutsi woman are to be killed because they are taking away our husbands." *See ibid*., para. 885.
[1244] Prosecution Response Brief, para. 587.
[1245] Prosecution Response Brief, para. 588.
[1246] Nyiramasuhuko Reply Brief, para. 281, *referring to Prosecutor v. Nebojša Pavković et al*., Case No. IT-03-70-PT, Decision on Vladimir Lazarević's Preliminary Motion on Form of Indictment, 8 July 2005, para. 9.
[1247] Trial Judgement, paras. 5939, 5940, 6091, 6092.
[1248] *See* Trial Judgement, paras. 5870, 5871, 5940, 6018.

circumstances, the Appeals Chamber considers that any error committed by the Trial Chamber as regards the pleading of Nyiramasuhuko's responsibility in the distribution of condoms as a separate allegation underpinning criminal charges would not have any impact on Nyiramasuhuko's conviction or sentence.

547. To the extent that the Trial Chamber relied on this event as circumstantial evidence of Nyiramasuhuko's genocidal intent for different incidents, the Appeals Chamber reiterates that, with respect to the *mens rea*, an indictment may plead either: (i) the state of mind of the accused, in which case the facts by which that state of mind is to be established are matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred.[1249]

548. In the present case, the Indictment pleaded under the count of genocide that Nyiramasuhuko acted "with the intent to destroy, in whole or in part, a racial or ethnic group" in relation to the crimes committed at the Butare Prefecture Office,[1250] thus providing clear notice to Nyiramasuhuko that she was alleged to have acted with genocidal intent. Given that the Indictment pleaded Nyiramasuhuko's specific state of mind alleged in relation to the count of genocide, the evidentiary facts by which her *mens rea* was to be established did not need to be pleaded. Accordingly, the Appeals Chamber considers it unnecessary to examine whether the defect in the Indictment concerning the allegation of distribution of condoms was curable or cured since the allegation did not need to be pleaded in the Indictment for the Trial Chamber to rely on it as it ultimately did.

549. In light of the foregoing, the Appeals Chamber dismisses the relevant part of Ground 26 of Nyiramasuhuko's appeal.

5. Cumulative Effect of the Defects (Ground 14)

550. In its preliminary considerations of notice issues in the Trial Judgement, the Trial Chamber recalled the Appeals Chamber's holding that, even if the Prosecution succeeded in arguing that the defects in the indictments were remedied in each individual instance, the Trial Chamber still had to consider whether the overall effect of the numerous defects rendered the trial unfair in itself.[1251] After engaging in analysis to that effect, the Trial Chamber determined that "the Accused were in a reasonable position to understand the charges against them and had the time and resources available

[1249] *See*, *e.g.*, *Nchamihigo* Appeal Judgement, para. 136; *Nahimana et al.* Appeal Judgement, para. 347. *See also Blaškić* Appeal Judgement, para. 219.
[1250] Nyiramasuhuko and Ntahobali Indictment, pp. 38, 39, *referring*, *inter alia*, *to ibid.*, paras. 6.30, 6.31. *See also ibid.*, para. 5.1.
[1251] Trial Judgement, para. 127. *See also ibid.*, paras. 128, 130.

to investigate these charges."[1252] It concluded that "the trial was not rendered unfair and the Accused did not suffer any prejudice in the preparation of their respective defences."[1253]

551. Nyiramasuhuko submits that the Indictment was "inherently defective" and vitiated the entire proceedings, rendering her trial unfair.[1254] She contends that the Trial Chamber's failure to address and remedy the addition of numerous irrelevant allegations and the multiple defects in the Indictment was a serious error of law which "inexorably" prejudiced the proceedings and violated her fair trial rights.[1255] She points in particular to the Trial Chamber's findings that paragraphs 5.1, 6.30, and 6.37 of the Indictment were defective.[1256] Nyiramasuhuko submits that "the glaring determination of the Trial Chamber to find ways of curing what was basically defective bore testimony of its intention to convict [her]".[1257] In her view, the "countless fair trial violations resulting from the Chamber's successive attempts to cure all the defects in the facts supporting the charges sealed and rendered irreversible this prejudice against [her]" and "such conduct by the Chamber could not demonstrate anything other than a clear appearance of bias in favour of the Prosecutor's case and/or, consequently against [her]."[1258]

552. The Prosecution responds that Nyiramasuhuko's general submissions under Ground 14 of her appeal should be summarily dismissed since they fail to identify any specific error or provide supporting references to the Trial Judgement, the trial record, or her other ground of appeals.[1259]

553. In the prior sections addressing Nyiramasuhuko's specific challenges related to the Indictment, the Appeals Chamber reached conclusions reflecting that the Indictment was not

[1252] Trial Judgement, para. 130.
[1253] Trial Judgement, para. 131.
[1254] Nyiramasuhuko Appeal Brief, para. 398. *See also* Nyiramasuhuko Notice of Appeal, paras. 2.1, 2.11. Nyiramasuhuko also alleges that the joinder of trials, "which was based on the defective Indictment, aggravated and doubled each of the violations". *See* Nyiramasuhuko Appeal Brief, para. 399.
[1255] Nyiramasuhuko Notice of Appeal, para. 2.2; Nyiramasuhuko Appeal Brief, paras. 400, 401. The Appeals Chamber notes that, in her notice of appeal, Nyiramasuhuko also argued that the Trial Chamber erred in: (i) failing to make a finding on the Prosecution's failure to inform her of her mode of participation in the crimes alleged under Article 6(1) of the Statute and in recognising the prejudice she suffered in this respect; (ii) failing to determine her mode of participation in conspiracy to commit genocide; (iii) failing to find that the Prosecution's omission to inform her of its intention to call Prosecution witnesses to support some allegations prejudiced her ability to prepare her defence; (iv) shifting the burden of proof with respect to the allegation of prejudice resulting from the vagueness of the Nyiramasuhuko and Ntahobali Indictment; (v) failing to stress that the Prosecution bore the burden to demonstrate that she did not suffer prejudice from the numerous defects in the Nyiramasuhuko and Ntahobali Indictment; and (vi) concluding that it provided additional time to the Defence to prepare its case to investigate the new allegations brought by the Prosecution. *See* Nyiramasuhuko Notice of Appeal, paras. 2.3-2.10, 2.17. The Appeals Chamber notes, however, that Nyiramasuhuko failed to reiterate and develop with argument these allegations in her appeal brief. Accordingly, the Appeals Chamber dismisses these unsubstantiated allegations without further consideration.
[1256] Nyiramasuhuko Appeal Brief, paras. 403, 404.
[1257] Nyiramasuhuko Appeal Brief, para. 405.
[1258] Nyiramasuhuko Appeal Brief, paras. 406, 407. The Appeals Chamber observes that some of the contentions set forth in Ground 14 of Nyiramasuhuko's appeal may appear to be introductory of her specific contentions related to notice developed in Grounds 15 through 18. However, Nyiramasuhuko fails to develop any substantive argument in support of these contentions.

"inherently defective" and found that the Trial Chamber did not err in concluding that Nyiramasuhuko was put on notice of the charges on which she was convicted. Nyiramasuhuko's obscure contention that the Trial Chamber failed to address and remedy the addition of numerous irrelevant allegations and the multiple defects of the Indictment is not only unsupported by any reference, but also ignores the Trial Chamber's findings throughout the Trial Judgement.

554. As regards the overall effect of the defects in the Indictment on the preparation of her defence, Nyiramasuhuko advances allegations of "irreversible" or "irreparable" prejudice which she at no point substantiates. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment with respect to the charges related to the prefectoral office. However, the Appeals Chamber finds that Nyiramasuhuko does not show any error in the Trial Chamber's conclusion that she did not suffer prejudice in the preparation of her defence.

555. Apart from the fact that Nyiramasuhuko's new allegation of bias against the judges of the Trial Chamber is also wholly unsubstantiated, the Appeals Chamber fails to see how the Trial Chamber's detailed consideration of whether Nyiramasuhuko was put on sufficient notice of the charges against her and its findings that the Indictment was largely defective but, at times, cured, could lead a reasonable observer, properly informed, to apprehend bias on the part of the Trial Chamber's judges.[1260]

556. Accordingly, the Appeals Chamber dimisses Nyiramasuhuko's challenges pertaining to the cumulative effect of the defects in the Indictment.

6. Conclusion

557. Based on the above, the Appeals Chamber dismisses Nyiramasuhuko's contentions that the Trial Chamber erred in authorising the Prosecution to amend her indictment to add new counts and the charge of superior responsibility. Likewise, the Appeals Chamber dismisses her contentions that she was not charged with, lacked sufficient notice of, or was materially prejudiced in the preparation of her defence from the lack of notice of her alleged responsibility for conspiracy to commit genocide, the killings and rapes of Tutsis who had sought refuge at the Butare Prefecture Office committed following her orders, and in relation to the distribution of condoms in June 1994.

[1259] Prosecution Response Brief, para. 121.
[1260] The Appeals Chamber reiterates that a presumption of impartiality attaches to the judges of the Tribunal and that this presumption cannot be easily rebutted and that an appearance of bias exists if, notably, "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias." *See supra*, paras. 95, 273, 405.

The Appeals Chamber also dismisses Nyiramasuhuko's claim of prejudice resulting from the accumulation of defects in the Indictment.

558. Accordingly, the Appeals Chamber dismisses Grounds 3, 14 through 18, and the relevant part of Ground 26 of Nyiramasuhuko's appeal.

C. Fabrication of Evidence and Genocide Survivor Groups (Ground 13)

559. Nyiramasuhuko submits that the Trial Chamber erred in fact and in law in failing to assess the testimonies of Prosecution Witnesses FAE, QBP, and SU with great caution given their membership in associations of genocide survivors.[1261] In support of her contention, Nyiramasuhuko emphasises that Witness FAE admitted to being a member of "ARG", an association of genocide survivors, which, according to Kanyabashi Defence Expert Witness Filip Reyntjens, organised denunciations and false testimonies, and sometimes even prepared witnesses and paid them to testify for the Prosecution.[1262] She argues that the Trial Chamber erroneously excluded the testimony of Nyiramasuhuko Defence Witness WNMN, who stated that "Witness FAE was a member of *Ibuka* who had denounced her sister unjustly [in a separate proceeding] and collaborated with some *Ibuka* members in securing her arrest".[1263] Nyiramasuhuko also claims that the Trial Chamber erred in refusing to accept the testimony of Kanyabashi Defence Witness D-13-D, who testified to having learned during *Gacaca* proceedings that Witnesses FAE and SU were influential members of *Ibuka* who falsely accused many people.[1264] Nyiramasuhuko further submits that the Trial Chamber failed to consider Nyiramasuhuko Defence Witness WMCZ's evidence that Witness QBP belonged to an association of genocide survivors and accused people in order to acquire property.[1265]

560. The Prosecution responds that Nyiramasuhuko's arguments should be summarily dismissed as they fail to identify the challenged factual findings and merely assert that the Trial Chamber failed to interpret the evidence in a particular manner or give it sufficient weight.[1266] It submits that the Trial Chamber duly assessed the evidence upon which Nyiramasuhuko relies and that Nyiramasuhuko does not demonstrate any error in the Trial Chamber's assessment.[1267]

561. The Appeals Chamber considers that a witness's membership in an association of survivors alone does not imply a desire or motive to implicate the accused, nor does it render the witness's evidence tainted or his accounts unreliable or partial. The Appeals Chamber therefore sees no

[1261] Nyiramasuhuko Notice of Appeal, paras. 1.79-1.82; Nyiramasuhuko Appeal Brief, paras. 393-396.
[1262] Nyiramasuhuko Notice of Appeal, para. 1.79, *referring to* Trial Judgement, paras. 316-320, 343-345, 4985; Nyiramasuhuko Appeal Brief, para. 393. The Appeals Chamber notes that "ARG" appears to be the acronym for the "Association of Genocide Survivors" ("*Association des rescapés du génocide*"), which is run by *Ibuka*. *See*, *e.g.*, Trial Judgement, paras. 248, 4921, 4980.
[1263] Nyiramasuhuko Notice of Appeal, para. 1.81, *referring to* Trial Judgement, paras. 313-315. *See also* Nyiramasuhuko Appeal Brief, para. 395, *referring to* Witness WNMN, T. 14 June 2005 pp. 59-61 (closed session); Nyiramasuhuko Reply Brief, para. 284.
[1264] Nyiramasuhuko Notice of Appeal, para. 1.82, *referring to* Trial Judgement, paras. 291-294; Nyiramasuhuko Appeal Brief, para. 396, *referring to* Witness D-13-D, T. 19 February 2008 pp. 19-21 (closed session).
[1265] Nyiramasuhuko Notice of Appeal, para. 1.80, *referring to* Trial Judgement, paras. 248, 316; Nyiramasuhuko Appeal Brief, para. 394, *referring to* Witness WMCZ, T. 2 February 2005 pp. 50, 51.
[1266] Prosecution Response Brief, paras. 110, 120.
[1267] Prosecution Response Brief, paras. 111-119.

reason to require, as a matter of principle, a trial chamber to apply particular caution in treating the evidence of witnesses who are members of such associations. The Appeals Chamber also recalls its position that a "statement by Professor Reynt[j]ens that the *Ibuka* Organization paid people to give false evidence cannot, *per se*, constitute a sufficient ground for excluding, in a general manner, the testimony of Prosecution witnesses".[1268]

562. The Appeals Chamber notes that the Trial Chamber explicitly addressed the Defence's allegations of evidence fabrication in the Trial Judgement.[1269] In this context, the Trial Chamber considered arguments that the testimonies of Witnesses FAE, QBP, and SU were improperly influenced by genocide survivor associations.[1270] Having "carefully considered the totality of evidence adduced",[1271] including the evidence of Witnesses Reyntjens, WNMN, WMCZ, and D-13-D relied upon by Nyiramasuhuko,[1272] the Trial Chamber concluded that the Defence evidence on allegations of fabrication of testimony did not undermine the testimonies of Witnesses FAE, QBP, and SU.[1273]

563. The Appeals Chamber recalls that the purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and arguments submitted before the Trial Chamber.[1274] The Trial Judgement reflects that the Trial Chamber duly considered the allegations of fabrication of evidence made by Expert Witness Reyntjens against *Ibuka* and the allegations of Witnesses WNMN, WMCZ, and D-13-D against Witnesses FAE, QBP, and SU. On appeal, Nyiramasuhuko does not demonstrate that the Trial Judgement's rejection thereof constituted an error. Accordingly, the Appeals Chamber dismisses Ground 13 of Nyiramasuhuko's appeal in its entirety.

[1268] *Rutaganda* Appeal Judgement, para. 205.
[1269] *See* Trial Judgement, paras. 246-383. *See also ibid*., paras. 4980-4982.
[1270] Trial Judgement, paras. 246-249, 343-383.
[1271] Trial Judgement, para. 343.
[1272] Trial Judgement, paras. 247-250, 291-294, 310-320, 343, 364-366, 379-383, 3788, 4921, 4980-4982.
[1273] Trial Judgement, para. 383. *See also ibid*., para. 4982.
[1274] *See*, *e.g*., *Ntawukulilyayo* Appeal Judgement, para. 32; *Čelebići* Appeal Judgement, para. 837.

D. Conspiracy to Commit Genocide (Ground 19)

564. The Trial Chamber found that, from 9 April until 14 July 1994, and in particular between 9 April and 19 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to issue directives to encourage the population to hunt down and kill Tutsis in Butare Prefecture.[1275] Specifically, it found that during a Cabinet meeting of the Interim Government held on 16 or 17 April 1994, Nyiramasuhuko agreed with other members of the Interim Government to remove Jean-Baptiste Habyalimana as prefect of Butare, who had posed an obstacle to the killing of Tutsis, and replace him with Nsabimana.[1276] The Trial Chamber further determined that, on 19 April 1994, Nyiramasuhuko attended Nsabimana's Swearing-In Ceremony as prefect of Butare, lending further support to the Interim Government's decision to replace Habyalimana.[1277] It considered that, by her presence and failure to dissociate herself from the content of Prime Minister Kambanda's and President Sindikubwabo's speeches during the ceremony ("Kambanda's Speech" and "Sindikubwabo's Speech", respectively), Nyiramasuhuko effectively endorsed their inflammatory statements.[1278] The Trial Chamber also held that the removal of Habyalimana, the appointment of Nsabimana as the new prefect, and Kambanda's and Sindikubwabo's Speeches were "factors that coincided with the commencement of widespread killings" in Butare Prefecture.[1279] Furthermore, the Trial Chamber found that Nyiramasuhuko, as a member of the Interim Government, adopted and issued the 27 April Directive encouraging the population to mount and man roadblocks, the purpose of which was to encourage the killing of Tutsis.[1280]

565. On this basis, and considering Nyiramasuhuko's participation with the Interim Government in many of the Cabinet meetings at which the massacre of Tutsis was discussed and in decisions which triggered the onslaught of massacres in Butare Prefecture, the Trial Chamber concluded that the only reasonable conclusion was that Nyiramasuhuko entered into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture with the intent to destroy, in whole or in part, the Tutsi ethnic group.[1281] Consequently, the Trial Chamber convicted Nyiramasuhuko of conspiracy to commit genocide.[1282]

566. Nyiramasuhuko submits that the Trial Chamber erred in convicting her of conspiracy to commit genocide.[1283] In particular, she argues that the Trial Chamber erred in: (i) exhibiting bias by

[1275] Trial Judgement, para. 5676. *See also ibid*., paras. 583, 1939, 5669, 5733.
[1276] Trial Judgement, paras. 862, 864, 5670, 5676. *See also ibid*., para. 5736.
[1277] Trial Judgement, para. 5676. *See also ibid*., para. 919.
[1278] Trial Judgement, paras. 921, 5672, 5676. *See also ibid*., paras. 920, 926, 5739, 5746.
[1279] Trial Judgement, paras. 5673, 5676. *See also ibid*., paras. 933, 5741.
[1280] Trial Judgement, para. 5677. *See also ibid*., paras. 1939, 5669, 5674, *referring to* 27 April Directive.
[1281] Trial Judgement, paras. 5678, 5727.
[1282] Trial Judgement, paras. 5727, 6186. *See also ibid*., paras. 6200, 6205.
[1283] Nyiramasuhuko Notice of Appeal, paras. 3.28-3.77; Nyiramasuhuko Appeal Brief, paras. 586-685.

adopting a differential treatment of the evidence between her and her co-accused; (ii) relying on her testimony to convict her; (iii) relying on expert evidence; (iv) its assessment of the 27 April Directive; (v) its assessment of Kambanda's and Sindikubwabo's Speeches; and (vi) making contradictory and inconsistent findings.[1284] The Appeals Chamber will examine these contentions in turn.

1. Appearance of Bias

567. The Trial Chamber found with regard to Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje that there were reasonable inferences from the evidence other than the inference that they had conspired with the Interim Government to commit genocide against the Tutsi population in Butare Prefecture.[1285] Accordingly, the Trial Chamber acquitted them of the count of conspiracy to commit genocide.[1286]

568. Nyiramasuhuko submits that the differences of treatment between the manner the Trial Chamber applied the principles of law regarding the charge of conspiracy in her regard and the manner it applied it in the case of her co-accused raise an appearance of bias against her.[1287] Specifically, she alleges that the Trial Chamber: (i) applied different standards regarding notice of the charge of conspiracy to her and to Ntahobali and Ndayambaje; (ii) relied solely on expert evidence in her case while considering that expert evidence was insufficient in relation to Nsabimana; (iii) treated her presence at Nsabimana's Swearing-In Ceremony differently from that of Nsabimana and Kanyabashi; and (iv) justified its differential treatment of her on the basis that

[1284] The Appeals Chamber notes that Nyiramasuhuko failed to repeat in her appeal brief and develop with precise arguments and supporting references a number of allegations that she had raised in her notice of appeal. Specifically, the Appeals Chamber refers to Nyiramasuhuko's allegations that the Trial Chamber erred in: (i) finding the existence of a conspiracy between Nyiramasuhuko and members of the Interim Government when the Prosecution did not adduce evidence of any agreement with André Rwamakuba, Kambanda, or Sindikubwabo; (ii) relying on the interpretation of Prosecution witnesses, predominantly detainees or former detainees, of the words "enemy" and "work" and in failing to provide reasons for accepting their evidence on the meaning of certain words; (iii) failing to consider the 27 April Directive in light of Nyiramasuhuko's Defence evidence regarding the directives and statements of the Interim Government when making finding on the Interim Government's intent; (iv) failing to consider that Nyiramasuhuko's account on Prefect Habyalimana's removal was corroborated by the testimony of Expert Witness Reyntjens and Witness Karemano; and (v) refusing to recall Witness AND-44, thereby impairing her ability to prepare her defence. *See* Nyiramasuhuko Notice of Appeal, paras. 3.20, 3.42, 3.44, 3.48, 3.77. In the absence of the necessary substantiation, these allegations of errors are dismissed without further consideration.
[1285] Trial Judgement, paras. 5685, 5697, 5708, 5718, 5726, 5728.
[1286] Trial Judgement, paras. 5728, 6186.
[1287] Nyiramasuhuko Appeal Brief, paras. 588, 598, 685. Nyiramasuhuko's submissions under this ground of appeal pertaining to notice of the charge of conspiracy have been addressed in Section IV.B.2 above. S*ee* Nyiramasuhuko Notice of Appeal, paras. 3.31-3.33, 3.41, 3.46, 3.71-3.74; Nyiramasuhuko Appeal Brief, paras. 587, 589, 599-606, 608-621, 663, 664, 671, 672.

she was a member of the Interim Government, thereby finding her guilty "by association" as a member of the Interim Government and not as an individual.[1288]

569. The Prosecution did not specifically respond to the allegation of bias as it pertains to Nyiramasuhuko's conviction for conspiracy to commit genocide. It nonetheless submits that Nyiramasuhuko's contention that she was convicted by association should be dismissed given that the Trial Chamber convicted her of conspiring with members of the Interim Government and not with the Interim Government as an "institution".[1289]

570. The Appeals Chamber recalls the standards applicable to the review of allegations of bias against judges of the Tribunal discussed in Section IV.A.1 above. In the present case, the Appeals Chamber observes that Nyiramasuhuko seeks to demonstrate an appearance of bias of the Trial Chamber against her, alleging a differential treatment with her co-accused, through a fragmented view and incomplete reading of the Trial Judgement, and based on the erroneous premise that her co-accused's cases were identical to hers.

571. With regard to the Trial Chamber's alleged differential treatment of Ntahobali and Ndayambaje concerning notice of the charge of conspiracy to commit genocide specifically, the Appeals Chamber considers that Nyiramasuhuko overlooks that the Prosecution case of conspiracy against her differed from that against Ntahobali and Ndayambaje.[1290] Likewise, her contention that the Trial Chamber found that expert evidence was insufficient in relation to Nsabimana fails to appreciate that, in her case, the Trial Chamber also relied on the evidence of factual witnesses and Nyiramasuhuko's own testimony and that, unlike Nsabimana, she was found to have attended Cabinet meetings where directives were discussed and issued.[1291] The Appeals Chamber also sees no merit in Nyiramasuhuko's unsubstantiated and unreferenced assertion that the Trial Chamber treated her presence at Nsabimana's Swearing-In Ceremony differently from the presence of Nsabimana and Kanyabashi.

572. The Appeals Chamber also does not accept Nyiramasuhuko's assertion that she was convicted "by association". A review of the Trial Judgement clearly reflects that she was convicted

[1288] Nyiramasuhuko Appeal Brief, paras. 588-596, 598, 623, 632, 638, 639. *See also ibid.*, paras. 548-551, 560, 583; Nyiramasuhuko Reply Brief, para. 149. The Appeals Chamber notes that, in her notice of appeal, Nyiramasuhuko failed to raise the allegation of appearance of bias in relation to her conviction for conspiracy to commit genocide. The Prosecution did not object to this allegation in its response brief on this basis, but only generally responded to Nyiramasuhuko's allegations of bias. Given the importance of the issue raised and in light of the substantiation provided by Nyiramasuhuko, the Appeals Chamber has nonetheless decided to exercise its discretion to examine Nyiramasuhuko's submissions.
[1289] Prosecution Response Brief, paras. 228-230.
[1290] *See* Trial Judgement, paras. 5663-5665. *See also ibid.*, paras. 5682, 5685, 5724-5726, 5728.
[1291] *See* Trial Judgement, paras. 570, 571, 574-577, 1946.

of having conspired with members of the Interim Government on the basis of her own acts and omissions.[1292] Nyiramasuhuko's contentions are therefore dismissed.

573. Accordingly, the Appeals Chamber concludes that Nyiramasuhuko has failed to demonstrate that the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias and dismisses her arguments in this respect.

2. Reliance on Nyiramasuhuko's Testimony

574. Nyiramasuhuko submits that the Trial Chamber violated her right to be presumed innocent and not to be compelled to testify against herself by reaching conclusions relating to the Interim Government's directives and instructions as well as the removal of Prefect Habyalimana solely on the basis of her testimony, in the absence of any incriminatory evidence from the Prosecution.[1293] She contends that she raised the problem of self-incrimination at trial when the Trial Chamber admitted her 1994 personal diary into evidence, arguing that its admission compelled her to testify since she was the only person capable of contradicting Expert Witness Guichaoua's interpretation of her diary.[1294]

575. The Prosecution responds that Nyiramasuhuko's arguments should be rejected as the Trial Chamber is entitled to consider any evidence on the record and as Nyiramasuhuko's choice to waive her right to remain silent and to testify in order to rebut Prosecution evidence was her own decision.[1295] It emphasises that the Trial Chamber did not rely exclusively on her evidence in reaching its findings on the Interim Government's directives and instructions and the prefect's removal.[1296]

576. The Appeals Chamber underlines that trial chambers are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record and that neither the Statute nor the Rules prevent a trial chamber from relying on the

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[1292] *See* Trial Judgement, paras. 5676-5678. *See also infra*, para. 644.
[1293] Nyiramasuhuko Appeal Brief, paras. 681-683. *See also ibid*., para. 642.
[1294] Nyiramasuhuko Appeal Brief, para. 684. *See also ibid*., para. 578. The Appeals Chamber notes that, as with her claim of appearance of bias discussed above, Nyiramasuhuko failed to raise the allegation of violation of her right to be presumed innocent and not to be compelled to testify against herself in her notice of appeal. Furthermore, the Appeals Chamber notes that Nyiramasuhuko's argument developed elsewhere in her appeal brief that the Trial Chamber erred in "relying exclusively on the opinion evidence" of expert witnesses regarding certain aspects of her conviction for conspiracy directly contradicts her contention that she was found responsible in relation to the same aspects on the sole basis of her testimony. *See ibid.*, para. 634. *See also* Nyiramasuhuko Notice of Appeal, paras. 3.34, 3.35, 3.45; Nyiramasuhuko Appeal Brief, paras. 635, 642. While endowed with discretion not to consider allegations of error that were not raised in the notice of appeal and contradictory submissions, the Appeals Chamber, noting that the Prosecution responded to them and considering the importance of the issue raised, has decided to consider the merits of Nyiramasuhuko's submissions.
[1295] Prosecution Response Brief, paras. 376, 379. *See also ibid*., para. 223.
[1296] Prosecution Response Brief, para. 377.

testimony of the accused to convict that accused, unless the accused's self-incriminating evidence was compelled in violation of Article 20(4)(g) of the Statute.[1297] In this instance, the Appeals Chamber considers that Nyiramasuhuko's contention of having been compelled to testify against herself is without merit. The mere fact that Nyiramasuhuko decided to testify because of the admission into evidence of her 1994 personal diary does not show any form of improper compulsion by the Prosecution which was aimed at – and able to – coercing her to testify against her free will in violation of her right not to be compelled to testify against herself.[1298] It is also noteworthy that Nyiramasuhuko testified in the presence of her counsel and was not compelled to make any incriminating statements.[1299] As such, the Appeals Chamber sees no error in the Trial Chamber's reliance on Nyiramasuhuko's testimony. Additionally, the Appeals Chamber observes that, contrary to Nyiramasuhuko's ambiguous contention, her conviction is not based solely on her testimony since the Trial Chamber relied on documentary evidence, expert evidence as well as the testimonies of several other witnesses.[1300] Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contentions in this respect.

3. Expert Evidence

577. Nyiramasuhuko submits that the Trial Chamber erred in relying solely on the opinion evidence of Prosecution Expert Witnesses Des Forges, Guichaoua, Ntakirutimana, and Kanyabashi Defence Expert Witness Reyntjens in support of some of the findings underpinning her conviction for conspiracy to commit genocide.[1301] In her view, "[t]he opinion of an expert that is not confirmed

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[1297] *See Karera* Appeal Judgement, para. 19, *quoting*, in part, *Galić* Appeal Judgement, para. 17 ("While '[t]here is a fundamental difference between being an accused, who might testify if he so chooses, and a witness', this does not imply that the rules applied to assess the testimony of an accused are different from those applied with respect to the testimony of an 'ordinary witness'."). *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal Against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013, para. 50 ("The Appeals Chamber emphasises that an accused or appellant may be compelled to testify in other cases before the Tribunal due to the fact that any self-incriminating information elicited in those proceedings cannot be directly or derivatively used against him in his own case. By contrast, an accused or appellant is not compellable in his own case […] as this may violate his right under Article 21(4)(g) of the [ICTY] Statute.").

[1298] *See*, *e.g.*, *Halilović* Appeal Judgement, para. 36, fn. 104; *Prosecutor v. Sefer Halilović*, Case No. IT-01-48-AR73.2, Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table, 19 August 2005, paras. 37-39. The Appeals Chamber has already dismissed Nyiramasuhuko's challenge to the admissibility of her diary which, according to Nyiramasuhuko, would compel her to testify against herself. The Appeals Chamber found that the "Trial Chamber did not abuse its discretion at this stage of the proceedings, and there is thus no need for appellate intervention." *See* 4 October 2004 Appeal Decision, paras. 3, 6. *See also supra*, Section IV.A.2(a).

[1299] The Appeals Chamber further notes that the presiding judge warned Nyiramasuhuko before the start of her testimony that she "will have all the rights like any other witness who appears and testifies before the Tribunal". *See* Nyiramasuhuko, T. 31 August 2005 p. 3.

[1300] *See* Trial Judgement, paras. 574-577, 857, 860-862.

[1301] Nyiramasuhuko Notice of Appeal, para. 3.45; Nyiramasuhuko Appeal Brief, paras. 634, 635, *referring to* Trial Judgement, para. 197. Nyiramasuhuko concedes that the Trial Chamber correctly outlined the principles concerning opinion evidence. *See* Nyiramasuhuko Appeal Brief, para. 635, *referring to* Trial Judgement, paras. 192, 196, 199. *See also* Nyiramasuhuko Notice of Appeal, para. 3.11; Nyiramasuhuko Appeal Brief, para. 642. Nyiramasuhuko argues that opinion evidence cannot be relied upon to determine a fact in dispute. *See* Nyiramasuhuko Reply Brief, para. 164. *See also* AT. 14 April 2015 pp. 15, 16 (French).

by concrete evidence cannot be the basis of a finding of one of the material elements of a charge against an accused."[1302] In particular, Nyiramasuhuko argues that, besides their opinion evidence, the Prosecution did not present any "concrete evidence" establishing: (i) her "awareness and intent" regarding "the implied objective to be regularly informed of the situation of the killings […], to issue directives/instructions in order to encourage the killings, to dismiss *Préfet* Habyalimana […], or to endorse President Sindikubwabo's speech";[1303] and (ii) what happened in the Cabinet meetings to show that she participated in these meetings in order to implement a genocidal policy.[1304] She also contends that the Trial Chamber failed to make a finding on the reliability, credibility, and probative value of the expert evidence it relied upon, despite the fact that it was not confirmed by evidence and was based on unidentified sources.[1305]

578. The Prosecution responds that, contrary to Nyiramasuhuko's contention, the Trial Chamber did not solely rely on expert evidence when making findings on: (i) the fact that massacres of civilians were discussed during Cabinet meetings; (ii) the fact that the Cabinet met on at least 15 occasions between 6 April and 17 July 1994; (iii) the issuance of directives to encourage killings and Prefect Habyalimana's removal; and (iv) the fact that Sindikubwabo's Speech was inflammatory.[1306] The Prosecution contends that Nyiramasuhuko's arguments related to the Trial Chamber's assessment of the expert witnesses' evidence should be rejected as unsubstantiated.[1307]

579. The Appeals Chamber observes that, contrary to Nyiramasuhuko's assertion, the Trial Chamber also relied on factual witnesses and concrete evidence for its findings concerning the discussion of massacres during Cabinet meetings, the issuance of directives inciting the population to kill Tutsis, the decision to replace Prefect Habyalimana, and the inflammatory nature of Sindikubwabo's Speech. More specifically, the Appeals Chamber notes that, with regard to Cabinet meetings where information on massacres was provided and the issuance of directives inciting killings, the Trial Chamber also relied on Nyiramasuhuko's testimony and her personal notes and 1994 diary.[1308] As to the decision to remove Habyalimana from office, the Trial Chamber did not refer solely to the evidence of Expert Witness Guichaoua in its deliberations but also to the

[1302] Nyiramasuhuko Appeal Brief, para. 655. *See also* AT. 14 April 2015 p. 11.
[1303] Nyiramasuhuko Appeal Brief, para. 640 (emphasis omitted).
[1304] Nyiramasuhuko Appeal Brief, para. 641.
[1305] Nyiramasuhuko Appeal Brief, para. 636. *See also* AT. 14 April 2015 pp. 11, 12. Nyiramasuhuko also refers to the experts' "unorthodox translation methods". In the absence of any explanation or substantiation as to what Nyiramasuhuko refers to in this regard, the Appeals Chamber has disregarded this aspect of her submissions. *See* Nyiramasuhuko Appeal Brief, para. 636. Under this ground of appeal, Nyiramasuhuko contends that the Trial Chamber erred in allowing Expert Witness Guichaoua to tender her 1994 personal diary into evidence. *See ibid*., para. 637. This contention has been addressed and rejected in Section IV.A.2(a) above.
[1306] Prosecution Response Brief, paras. 288, 289, 300, 316, 322. *See also* AT. 14 April 2015 p. 48.
[1307] Prosecution Response Brief, para. 373.
[1308] *See* Trial Judgement, paras. 565, 570, 571.

testimony of Nyiramasuhuko.[1309] While not expressly referred to in the deliberations section, the Trial Chamber also summarised the evidence of several witnesses who provided evidence in this respect.[1310] Concerning the inflammatory nature of Sindikubwabo's Speech, the Trial Chamber relied, *inter alia*, on the evidence of Witnesses RV, TQ, and Charles Karemano as well as the testimony of Nsabimana.[1311]

580. In addition, the Appeals Chamber recalls that it has repeatedly held that the role of expert witnesses is to assist the trial chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.[1312] The Appeals Chamber is not persuaded that the Trial Chamber's consideration of Expert Witnesses Des Forges's, Guichaoua's, Ntakirutimana's, and Reyntjens's general evidence about the removal of Prefect Habyalimana and Nsabimana's Swearing-In Ceremony ignored the limitations imposed on expert evidence. The Trial Chamber relied on the expert witnesses' opinion on this matter in light of the evidence of factual witnesses that large scale killings did not occur in Butare Prefecture until after Prefect Habyalimana's removal.[1313]

581. The Appeals Chamber further observes that Nyiramasuhuko does not substantiate her assertion that the expert evidence was based on unidentified sources. On the contrary, the Appeals Chamber finds that a reasonable trier of fact could have relied on Expert Witnesses Des Forges's, Guichaoua's, Ntakirutimana's, and Reyntjens's reports, which were thoroughly substantiated and referenced.[1314] Likewise, the Appeals Chamber is satisfied that the Trial Chamber properly assessed the credibility and probative value of the expert evidence it relied upon and that it acted reasonably when finding these expert witnesses credible. The Appeals Chamber notes that the Trial Chamber indicated that it had "closely considered the qualifications" of the expert witnesses, including their

[1309] Trial Judgement, paras. 857-864.
[1310] The Trial Chamber noted that Witness RV testified that Prefect Habyalimana was replaced because he was suspected of being an *Inkotanyi* accomplice. *See* Trial Judgement, para. 607, *referring to* Witness RV, T. 16 February 2004 p. 32 (closed session). The Trial Chamber also noted that Witness Charles Karemano confirmed that his book stated in relevant part that Prefect Habyalimana did not favour killings and that such killings coincided with his dismissal. *See* Trial Judgement, para. 744, *referring to* Charles Karemano, T. 5 September 2006 p. 22.
[1311] *See* Trial Judgement, paras. 879, 884, 886, 887, 896. *See also ibid*., paras. 609, 614, 745, 746, 820.
[1312] *Bagosora and Nsengiyumva* Appeal Judgement, fn. 503; *Nahimana et al.* Appeal Judgement, para. 509. *See also ibid*., para. 212.
[1313] *See* Trial Judgement, paras. 927-931.
[1314] *See* Exhibits P110A (*Expert Report by Alison Des Forges Prepared for the Butare Case ICTR-98-42-T*) ("Des Forges Report"), P136B (Expert Report by André Guichaoua – Substantive Report (Volume 1)), P158 (*Sociolinguistic Analysis of Polysemic Terms Produced During the War Period (1990-1994) in Rwanda*, by Évariste Ntakirutimana) ("Ntakirutimana Sociolinguistic Analysis"), P159 (*Tolerance or Intransigence in Sindikubwabo's Speech in Butare?*, by Évariste Ntakirutimana) ("Ntakirutimana Report on Sindikubwabo's Speech"), D571 (Expert Report by Filip Reyntjens) ("Reyntjens Report").

relevant experience and methods of inquiry, and that the Defence had "adequate opportunity to *voir dire*" these witnesses.[1315]

582. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's submissions concerning the Trial Chamber's assessment of and reliance on the expert evidence.

4. 27 April Directive

583. The Trial Chamber found that, throughout 1994 in Rwanda, words such as "enemy", "*Inyenzi*", "*Inkotanyi*", "accomplice", and "infiltrator" were used to refer to Tutsis and that such "double-speak" was used by the Interim Government in its directives and instructions.[1316] In particular, the Trial Chamber found that Nyiramasuhuko, as a member of the Interim Government, adopted and issued a directive on 27 April 1994 encouraging the population into mounting and manning roadblocks, the purpose of which was to encourage the killing of Tutsis.[1317] The Trial Chamber concluded that the 27 April Directive had a double meaning and that, while its surface message was apparently to restore calm, the reference to "the restoration of security hid an underlying message", namely the elimination of Tutsis who represented a threat to security.[1318]

584. Nyiramasuhuko submits that the Trial Chamber erred in its interpretation of the 27 April Directive, particularly in concluding that in Rwanda in 1994, the words "enemy, *Inyenzi*, *Inkotanyi*, accomplice and infiltrator" were used to refer to Tutsis.[1319] In support of her contention, she highlights that it was well known at the relevant time that these "words also referred to the real enemy, the RPF, the *Inkotanyi*".[1320] In her view, the Trial Chamber erred in relying on the expert witnesses' theory that the 27 April Directive contained a "double language" in the absence of any "concrete evidence" to sustain this opinion.[1321] She contends that it was erroneous for the Trial Chamber to assert that the "experts, through their opinions on the use of a double language in a document to which the witnesses of fact did not refer and in the absence of any evidence that the

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[1315] *See* Trial Judgement, para. 195. The Appeals Chamber also observes that the Trial Chamber found that Expert Witnesses Guichaoua's, Des Forges's, and Reyntjens's conclusions were "reliable because the assessment of *Préfet* Habyalimana's historical and political role falls squarely within the experts' area of expertise and the experts also agree on this point". *See ibid*., para. 857.
[1316] Trial Judgement, paras. 575, 578.
[1317] Trial Judgement, para. 5677. *See also ibid*., paras. 1939, 5669, 5674.
[1318] Trial Judgement, para. 576.
[1319] Nyiramasuhuko Notice of Appeal, paras. 3.30, 3.34-3.37, 3.44; Nyiramasuhuko Appeal Brief, paras. 643-654. *See also* Nyiramasuhuko Notice of Appeal, para. 3.18; Nyiramasuhuko Appeal Brief, para. 607. Under this ground of appeal, Nyiramasuhuko further contends that the Trial Chamber erred in admitting the testimony of Kanyabashi Defence Expert Witness Reyntjens and in relying in part on the testimony of Nsabimana Defence Witness Fergal Keane on the ground that, had she been tried alone, these witnesses would not have appeared in her trial. *See* Nyiramasuhuko Notice of Appeal, paras. 3.38, 3.40. This contention has been addressed in Section III.B.4 above.
[1320] Nyiramasuhuko Notice of Appeal, para. 3.37; Nyiramasuhuko Appeal Brief, paras. 643, 644. *See also* Nyiramasuhuko Reply Brief, para. 161.
[1321] Nyiramasuhuko Appeal Brief, para. 645 (emphasis omitted).

said witnesses were even aware of the instructions, 'corroborated' the factual evidence that in Rwanda, in 1994, the words 'enemy/accomplices' were used to refer to Tutsis."[1322] She also alleges that the Trial Chamber erred in failing to note that the 27 April Directive was addressed to prefects and, through them and the local authorities, to the population.[1323]

585. Nyiramasuhuko submits that another reasonable inference available from the evidence was that the Interim Government, being aware that some members of the population referred to the Tutsis in general as the enemy and accomplice, had specifically requested the prefects to inform the population that the enemy was the "RPF-*Inkotanyi*" in the 27 April Directive.[1324] This specific identification of the enemy as the Rwandan Patriotic Front ("RPF") in the directive, she argues, demonstrates the "incongruity" of the experts' interpretation of the word "enemy" as referring to Tutsis in the 27 April Directive.[1325] Nyiramasuhuko further contends that the Trial Chamber failed to determine "her own intent regarding the adoption and issuance" of the 27 April Directive.[1326]

586. The Prosecution responds that the expert evidence on the meaning of the 27 April Directive was supported by "overwhelming direct evidence from native Kinyarwanda speakers".[1327] It adds that Nyiramasuhuko's argument that another reasonable inference from the evidence was that the prefects informed the population that the enemy in the 27 April Directive was the RPF-*Inkotanyi* should be rejected as mere speculation.[1328]

587. The Appeals Chamber recalls that the Trial Chamber reached its findings relating to the 27 April Directive primarily based on the evidence of Expert Witnesses Guichaoua, Des Forges, and Reyntjens as well as on the evidence of Nyiramasuhuko Defence Expert Witness Eugène Shimamungu and Nyiramasuhuko's 1994 diary and personal notes.[1329] The Trial Chamber also explicitly relied on a number of factual witnesses and documentary evidence on the use of

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[1322] Nyiramasuhuko Appeal Brief, para. 646 (emphasis omitted). Nyiramasuhuko argues that the Trial Chamber erred in "mixing up evidence concerning the understanding by the Rwandan population […] with the unconfirmed opinion of experts" on the 27 April Directive to reach its conclusion. *See ibid*., para. 647. *See also* Nyiramasuhuko Notice of Appeal, para. 3.36, *referring to* Trial Judgement, paras. 575, 576, 583.
[1323] Nyiramasuhuko Appeal Brief, para. 648, *referring to* Nyiramasuhuko, T. 29 September 2005 pp. 38, 39.
[1324] Nyiramasuhuko Appeal Brief, para. 649 (emphasis omitted), *referring to* Exhibit P118 (27 April Directive), p. 2:

> The enemy who attacked Rwanda is known: It is the RPF *Inkotanyi*. You are therefore requested to explain to members of the population that they must refrain from doing anything which would cause disturbances amongst themselves under the pretext of ethnic groups, regions, religions, political parties, hatred, etc., because such disturbances in the population constitute entry points for the enemy.

[1325] Nyiramasuhuko Appeal Brief, para. 650. *See also ibid*., para. 651.
[1326] Nyiramasuhuko Appeal Brief, para. 653. Nyiramasuhuko contends that the Trial Chamber erred in finding that the Interim Government and herself intended, through the 27 April Directive, to encourage the population to mount roadblocks with the purpose of killing the Tutsis in Butare Prefecture. *See* Nyiramasuhuko Notice of Appeal, para. 3.18.
[1327] Prosecution Response Brief, paras. 299, 300, 305, 306, *referring*, *inter alia*, *to* Expert Witnesses Des Forges and Reyntjens, Witnesses FA, FAG, FAI, FAK, FAL, QI, QJ, QAH, QCB, RV, SX, TA, TK, TQ, Charles Karemano, Fergal Keane, Trial Judgement, paras. 477, 574-576, 5417-5424, 5674, 5675, 5677. *See also ibid*., para. 295.
[1328] Prosecution Response Brief, para. 302. *See also ibid*., para. 304.
[1329] Trial Judgement, paras. 570, 571, 575, 576.

"double-speak" in Rwanda in 1994.[1330] Therefore, the Appeals Chamber rejects Nyiramasuhuko's assertion that there was no "concrete" evidence to sustain the expert opinion on this issue.

588. The Appeals Chamber fails to see the pertinence of Nyiramasuhuko's assertion that the Trial Chamber erred in failing to note that the 27 April Directive was addressed to prefects and, through them, to the population. Moreover, the Appeals Chamber finds that Nyiramasuhuko does not show that the Trial Chamber erred in assessing how the 27 April Directive was disseminated to the population.[1331]

589. Turning to Nyiramasuhuko's contention that another reasonable inference from the evidence was that the prefects informed the population that the enemy in the 27 April Directive was the RPF-*Inkotanyi* rather than the Tutsis in general, the Appeals Chamber is of the view that Nyiramasuhuko does not demonstrate that the Trial Chamber erred in concluding that words such as "accomplice", "enemy", "*Inkotanyi*", or "*Inyenzi*" were used to refer to Tutsis at the time. She only suggests that another reasonable inference was available without demonstrating error in the Trial Chamber's ultimate conclusion, and does not point to any evidence supporting an alternative inference. It also bears noting that the 27 April Directive, in addition to expressly identifying the enemy as the "RPF-INKOTANYI", also refers to the "enemy and his accomplices".[1332] In light of the overwhelming consistent and reliable evidence in the record that the words "accomplice", "enemy", "*Inyenzi*", and "*Inkotanyi*" were used to refer to Tutsis throughout Rwanda in 1994, the Appeals Chamber finds that a reasonable trier of fact could have reached this finding.[1333]

[1330] Trial Judgement, paras. 574, 575, *referring*, *inter alia*, *to* Witnesses FAG, FAH, FAI, Exhibits P118 (27 April Directive), D360 (Transcript of Minister Niyitegeka's Speech of 30 April 1994).
[1331] *See* Trial Judgement, paras. 570, 571, 583.
[1332] *See* Exhibit P118 (27 April Directive), pp. 1, 2.
[1333] *See*, *e.g.*, Witness FAG, T. 3 March 2004 p. 49 ("When the term *Inyenzi* was used it referred to all the Tutsi."); Witness FAH, T. 21 April 2004 p. 15 ("[Nteziryayo] said the enemy was *Inyenzi*, and he said that *Inyenzi* would arrive in our *secteur* and find people who would be accomplices. He then said that once the enemy arrived, he shouldn't find any accomplices, and he was referring to the Tutsis and to no one else."); Witness FAI, T. 31 October 2002 p. 12 (closed session) ("The enemy meant the RPF and the accomplices were the Tutsis."); Witness FAL, T. 9 February 2004 p. 59 ("No distinction was made between the Tutsi inside the country and the Tutsi who had attacked the country. They were all considered to be the enemy."); Witness TQ, T. 6 September 2004 p. 48 (closed session) ("There were soldiers who were intimidating them, beating them, and there were *Interahamwe* who were addressing them calling them *Inkotanyi*. They were characterising them as RPF accomplices and they were calling them Tutsi, *Inyenzi*."); Witness RV, T. 16 February 2004 p. 37 (closed session) ("Q. Now, following a measure of clarification, can I ask you to once again tell the Trial Chamber what you understood the accomplices of the *Inkotanyi* to mean? A. Essentially the Tutsi, and even some [Hutu] who upheld the ideals of the RPF."); Witness TK, T. 20 May 2002 pp. 41, 42 ("Q. When you say we were called *Inyenzis*, can you explain to this court who the 'We' you are referring to are? A. I mean the Tutsis, Madam."); Witness QJ, T. 12 November 2001 p. 33 ("Q. What did the word 'enemy' mean? A. When they said *Umwanzi* or enemy […]. When this word was used, it is also intended to mean Tutsi."); Witness FAK, T. 14 April 2004 p. 16 ("Q. Who did you understand the term *Inkotanyi* to refer to? A. We did not quite understand what that word meant at the time. But, subsequently, we were told, or it was explained to us that *Inkotanyi* were Tutsis."); Fergal Keane, T. 27 September 2006 p. 78 ("At the time, I understood the term *Inyenzi* to mean cockroach and that could be applied to RPF soldiers or to Tutsi civilians, that was my understanding."). Expert Witness Shimamungu also explained that the term "*Inkotanyi*" was used to refer to the Tutsis. *See* Eugène Shimamungu, T. 16 March 2005 p. 38.

590. Similarly, the Appeals Chamber is not persuaded that the fact that some of the factual witnesses relied upon by the Trial Chamber were not aware of the specific content of the instructions means that their evidence as to the use of double language does not corroborate the expert opinion on this issue.[1334] The Trial Chamber did not find that the factual witnesses corroborated the expert evidence on the content and meaning of the 27 April Directive but rather on the general use of double speak in Rwanda at the time of the events.[1335] The Appeals Chamber is thus satisfied that the Trial Chamber did not err in concluding that these witnesses corroborated each other.[1336]

591. Furthermore, the Appeals Chamber finds no error in the Trial Chamber not expressly considering Nyiramasuhuko's own intent with regard to the 27 April Directive.[1337] Indeed, the Appeals Chamber notes that, while the Trial Chamber made no express finding that Nyiramasuhuko endorsed the content of the 27 April Directive, a review of Nyiramasuhuko's testimony reflects that she did not dissociate herself from it and was actively involved in its drafting and dissemination.[1338] Consequently, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Nyiramasuhuko, as a member of the Interim Government, could be held responsible for adopting directives and issuing instructions encouraging the population to kill Tutsis.

592. In light of the above, the Appeals Chamber concludes that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in its interpretation of the 27 April Directive.

5. Nsabimana's Swearing-In Ceremony

593. The Trial Chamber found that, on 19 April 1994, Nyiramasuhuko attended Nsabimana's Swearing-In Ceremony and that, by her presence and failure to dissociate herself from the content of Kambanda's and Sindikubwabo's Speeches delivered that day, she effectively endorsed their inflammatory statements.[1339] The Trial Chamber also held that the removal of Prefect Habyalimana, the appointment of Nsabimana as the new prefect, and Kambanda's and Sindikubwabo's Speeches

[1334] In this respect, the Appeals Chamber notes that some witnesses testified as to the use of double language in Rwanda in general in 1994 and their findings were not exclusively focused on the 27 April Directive. *See*, *e.g.*, Eugène Shimamungu, T. 16 March 2005 p. 38; Fergal Keane, T. 27 September 2006 p. 78.
[1335] *See* Trial Judgement, paras. 574, 575. *See also ibid.*, para. 578.
[1336] The Appeals Chamber recalls that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or a sequence of linked facts. *See Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[1337] *See* Trial Judgement, paras. 583, 5669.
[1338] Nyiramasuhuko, T. 29 September 2005 p. 30 ("We, therefore, drew up this document entitled 'pacification,' which was published and disseminated on the 27th of April l994"). *See also ibid.*, pp. 36-38.
[1339] Trial Judgement, paras. 921, 5672, 5676. *See also ibid.*, paras. 919, 920, 926, 5739, 5746.

were factors that "coincided with the commencement of widespread killings" in Butare Prefecture.[1340]

594. Nyiramasuhuko contends that the Trial Chamber erred regarding the inflammatory nature of Kambanda's and Sindikubwabo's Speeches and the commencement of the widespread killings in Butare Prefecture.[1341]

(a) Kambanda's and Sindikubwabo's Speeches

595. The Trial Chamber concluded that Kambanda's and Sindikubwabo's Speeches contained inflammatory and coded language that was understood by the attendees and the public to identify and kill Tutsis and their accomplices.[1342] The Trial Chamber relied on its finding that Kambanda's and Sindikubwabo's Speeches shared a number of common themes which illustrated that the speeches were complementary and had a common purpose at the swearing-in ceremony, that of inciting the population to take action against Tutsis.[1343] It went on to find that the "enemy" they both described was the Tutsis and that the word "work" contained in the two speeches meant to kill Tutsis.[1344]

596. Nyiramasuhuko submits that the Trial Chamber erred in finding that Kambanda's and Sindikubwabo's Speeches contained coded language and encouraged the population to kill the Tutsis.[1345] In particular, she argues that the Trial Chamber erred in: (i) relying on the report of Expert Witness Ntakirutimana; (ii) relying on Expert Witnesses Des Forges's and Reyntjens's testimonies; (iii) rejecting the evidence of Expert Witness Shimamungu; (iv) its assessment of Witness RV's testimony; and (v) its interpretation of the speeches.[1346] The Appeals Chamber will address these contentions in turn.

(i) Ntakirutimana Reports

597. On 12 January 2004, the Prosecution disclosed two reports by Expert Witness Ntakirutimana, one on the use of proverbs and phrases in Rwanda during the events of 1994 and one on the interpretation of Sindikubwabo's Speech, which were admitted into evidence

[1340] Trial Judgement, paras. 5673, 5676. *See also ibid*., paras. 933, 5741.
[1341] Nyiramasuhuko Appeal Brief, paras. 655-662, 665-670, 673-676.
[1342] Trial Judgement, paras. 890, 898, 925. *See also ibid*., paras. 5671, 5676, 5738, 5990.
[1343] *See* Trial Judgement, para. 892 ("Both speeches underline the existence of war, urge the people of Butare to take action and warn of traitors who underwent weapons training. These common themes illustrate that the speeches were complementary and had a common purpose at the swearing-in ceremony: that of inciting the population to take action against Tutsis.").
[1344] Trial Judgement, paras. 894, 897, 5671.
[1345] Nyiramasuhuko Notice of Appeal, paras. 3.15, 3.64; Nyiramasuhuko Appeal Brief, paras. 615, 655, 662, 670.
[1346] Nyiramasuhuko Appeal Brief, paras. 655-662, 665-670.

as exhibits P158 and P159 during the expert's testimony on 13 September 2004 ("Ntakirutimana Reports").[1347]

598. Nyiramasuhuko submits that the Trial Chamber erred in relying solely on the "report" of Expert Witness Ntakirutimana in support of its finding that Sindikubwabo's Speech was inflammatory as this evidence was merely an opinion "not confirmed by concrete evidence".[1348] She also appears to purport that the expert "report" should not have been relied upon because it was "not confirmed by its author".[1349] Nyiramasuhuko adds that the Trial Chamber erred in relying on the "report" as Expert Witness Ntakirutimana was also a "witness of fact, especially as he lived in Nyanza, [….] and gave factual evidence on the beginning of the killings".[1350] She also argues that the Trial Chamber erred in comparing unconfirmed extracts of the Ntakirutimana Reports with Expert Witness Shimamungu's testimony on Kambanda's Speech whereas Expert Witness Ntakirutimana had never analysed this particular speech.[1351]

599. The Prosecution responds that the Trial Chamber did not solely rely on the Ntakirutimana Report on Sindikubwabo's Speech as it also considered the evidence of Nsabimana, Witnesses Charles Karemano and Tiziano Pegoraro, and Expert Witnesses Des Forges and Reyntjens.[1352] It adds that Nyiramasuhuko fails to identify which part of the Ntakirutimana Report on Sindikubwabo's Speech was not confirmed in his in-court testimony.[1353] The Prosecution also submits that the fact that Expert Witness Ntakirutimana's presence in Nyanza during the impugned period does not affect his status as an expert witness and that Nyiramasuhuko fails to show what impact, if any, this would have on the Trial Chamber's reliance on his report.[1354]

[1347] *See* Trial Judgement, para. 461; Exhibit P158 (Ntakirutimana Sociolinguistic Analysis); Exhibit P159 (Ntakirutimana Report on Sindikubwabo's Speech); Évariste Ntakirutimana, T. 13 September 2004 pp. 12, 13, 42, 44, 81, 82. A third report by Expert Witness Ntakirutimana on Joseph Kanyabashi's speech was admitted into evidence on 14 September 2004 as exhibit P161. *See* Exhibit P161 (*Joseph Kanyabashi's Unswerving Support for the Jean Kambanda Government*, by Évariste Ntakirutimana); Évariste Ntakirutimana, T. 14 September 2004 p. 21.

[1348] Nyiramasuhuko Appeal Brief, paras. 655, 656, *referring to* Trial Judgement, paras. 697-729. Nyiramasuhuko generally refers to the "report of Expert Witness Ntakirutimana" without specifying to which report she refers. The Appeals Chamber understands from the references to the Trial Judgement that she provides that she is referring to both the Ntakirutimana Sociolinguistic Analysis and the Ntakirutimana Report on Sindikubwabo's Speech.

[1349] Nyiramasuhuko Appeal Brief, paras. 656, 665 (French).

[1350] Nyiramasuhuko Appeal Brief, para. 657, *referring to* Évariste Ntakirutimana, T. 14 September 2004 pp. 13, 14, 39, 40.

[1351] Nyiramasuhuko Appeal Brief, para. 665, *referring to* Trial Judgement, paras. 892, 895, Évariste Ntakirutimana, T. 14 September 2004 pp. 27, 28. *See also* Nyiramasuhuko Notice of Appeal, para. 3.56. Under this ground of appeal, Nyiramasuhuko further contends that the Trial Chamber erred in finding that the addition of Expert Witness Ntakirutimana at the end of the Prosecution case did not prejudice her ability to prepare her defence. *See* Nyiramasuhuko Notice of Appeal, para. 3.60; Nyiramasuhuko Reply Brief, para. 170. This contention has been addressed and rejected in Section III.D above.

[1352] Prosecution Response Brief, paras. 323, 324, 327.

[1353] Prosecution Response Brief, para. 325.

[1354] Prosecution Response Brief, para. 326.

600. The Appeals Chamber observes that, contrary to Nyiramasuhuko's claim, Expert Witness Ntakirutimana authenticated his reports in court.[1355] It also notes that the Trial Chamber did not rely solely on the Ntakirutimana Reports to find that Sindikubwabo's Speech was inflammatory, but also on the transcript of the speech itself and the evidence of Nsabimana, Witness Karemano, and Expert Witnesses Des Forges and Reyntjens.[1356] The Appeals Chamber thus rejects Nyiramasuhuko's assertion that Expert Witness Ntakirutimana's evidence was not confirmed by "concrete evidence". The Appeals Chamber is also not persuaded that the fact that Expert Witness Ntakirutimana indicated that he was living in Butare Prefecture in April 1994 and that he testified as to the timing of the beginning of the killings in Butare Prefecture has any impact on his qualification as an expert witness or on the content of his report.[1357]

601. Moreover, Nyiramasuhuko's argument regarding the erroneous reliance on the Ntakirutimana Reports when assessing Expert Witness Shimamungu's testimony on Kambanda's Speech is without merit as the part of the Trial Judgement with which she takes issue does not relate to Expert Witness Shimamungu's testimony on Kambanda's Speech but to his general interpretation of the word "*gukora*".[1358]

602. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contentions regarding the Ntakirutimana Reports.

(ii) Expert Witnesses Des Forges and Reyntjens

603. Nyiramasuhuko submits that the Trial Chamber erred in relying on Expert Witness Des Forges's evidence concerning the content of Sindikubwabo's Speech because the analysis of a speech in Kinyarwanda was beyond her expertise.[1359] In the same vein, she argues that the Trial Chamber erred in relying on Expert Witness Reyntjens's evidence regarding Sindikubwabo's Speech as this subject was not within his area of expertise as recognised by the Trial Chamber.[1360]

[1355] *See* Évariste Ntakirutimana, T. 13 September 2004 pp. 37, 38, 80, 82.
[1356] *See* Trial Judgement, paras. 867, 874, 878, 879, 881, 882, 884, 888, *referring*, *inter alia*, *to* Nsabimana, T. 20 November 2006 p. 36, Charles Karemano, T. 5 September 2006 pp. 23-25, 27, Alison Des Forges, T. 9 July 2004 p. 24, Filip Reyntjens, T. 21 November 2007 p. 45. *See also ibid*., para. 890.
[1357] *See* Trial Judgement, para. 695; Évariste Ntakirutimana, T. 14 September 2004 p. 14.
[1358] Nyiramasuhuko Appeal Brief, para. 665, *referring to* Trial Judgement, paras. 892, 895. *See also* Eugène Shimamungu, T. 16 March 2005 pp. 56, 57; T. 24 March 2005 p. 59; T. 30 March 2005 p. 23.
[1359] Nyiramasuhuko Appeal Brief, para. 659. Nyiramasuhuko also argues that the Trial Chamber erred in accepting Witness Des Forges's testimony on the speech "since the first opinion lies within the exclusive purview of the Chamber." *See idem*. The Appeals Chamber will not entertain this obscure argument. The Appeals Chamber further notes that it has found no merit in Nyiramasuhuko's contention regarding Expert Witness Des Forges's testimony on Nsabimana's statements in Section III.H above. *See* Nyiramasuhuko Appeal Brief, para. 658; Nyiramasuhuko Reply Brief, para. 168.
[1360] Nyiramasuhuko Appeal Brief, para. 660.

604. The Prosecution responds that Nyiramasuhuko only objected to Expert Witnesses Des Forges's and Reyntjens's testimonies about the meaning of Sindikubwabo's Speech in her closing brief and thus waived her right to object on the present basis on appeal.[1361] In any event, the Prosecution maintains that the evidence they provided was within their areas of expertise in Rwandan history and that both expert witnesses had the ability to interpret speeches in Kinyarwanda.[1362]

605. Nyiramasuhuko replies that she objected to the testimonies of the two expert witnesses at the time of their will-say on their qualification as experts.[1363]

606. The Appeals Chamber observes that the Prosecution is mistaken when arguing that Nyiramasuhuko only objected to Expert Witnesses Des Forges's and Reyntjens's testimonies about the meaning of Sindikubwabo's Speech in her closing brief. Nyiramasuhuko expressly objected to Witness Reyntjens's testimony on Sindikubwabo's Speech and questioned Witness Des Forges's expertise to provide evidence on texts written in Kinyarwanda during the witnesses' testimonies.[1364]

607. The Appeals Chamber notes that Nyiramasuhuko fails to substantiate her generic and unreferenced contention that the Trial Chamber erred by allowing these expert witnesses to testify beyond their area of expertise.[1365] The Appeals Chamber recalls that the Trial Chamber certified Expert Witness Des Forges as an expert in history and the human rights situation in Rwanda up to and including the events of 1994, and Expert Witness Reyntjens as an expert in history, law, and governance in Rwanda.[1366] Nyiramasuhuko also appears to ignore that expert witnesses are ordinarily afforded wide latitude to offer opinions within their expertise.[1367]

608. The Appeals Chamber further observes that, while Expert Witnesses Des Forges and Reyntjens provided their opinion on the political meaning of Sindikubwabo's Speech, they were never asked to provide a linguistic analysis of the speech in Kinyarwanda.[1368] The Appeals Chamber is satisfied that the evidence of these witnesses fell within their respective areas of

[1361] Prosecution Response Brief, para. 335.
[1362] Prosecution Response Brief, paras. 336, 337. *See also ibid*., para. 299.
[1363] Nyiramasuhuko Reply Brief, para. 169 (French), *referring to* Filip Reyntjens, T. 20 September 2007 p. 62 (French), Alison Des Forges, T. 7 June 2004 p. 21 (French). *See also ibid*., para. 160.
[1364] Filip Reyntjens, T. 20 September 2007 p. 62 (French); Alison Des Forges, T. 7 June 2004 pp. 20-22 (French).
[1365] *See* Nyiramasuhuko Appeal Brief, paras. 659, 660.
[1366] Trial Judgement, para. 194. *See also ibid*., paras. 635, 783.
[1367] *Bagosora and Nsengiyumva* Appeal Judgement, para. 225; *Renzaho* Appeal Judgement, para. 287; *Nahimana et al.* Appeal Judgement, para. 198; *Semanza* Appeal Judgement, para. 303.
[1368] *See* Alison Des Forges, T. 9 July 2004 pp. 22-24; Filip Reyntjens, T. 21 November 2007 pp. 45-47. *See also* Trial Judgement, paras. 644, 791-794.

expertise.[1369] The Appeals Chamber concludes that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in relying on the evidence of Expert Witnesses Des Forges and Reyntjens regarding Sindikubwabo's Speech.

(iii) Expert Witness Shimamungu

609. The Trial Chamber found that Expert Witness Shimamungu's testimony was "tainted by bias" because of his political and civic activism illustrating his opposition to the RPF, and had to be viewed with appropriate caution.[1370] The Trial Chamber did not find Expert Witness Shimamungu's opinion that it was unclear whether the refugees referred to in Sindikubwabo's Speech were Hutus or Tutsis and that the word "*gukora*" or "work" did not have a coded meaning to be plausible.[1371]

610. Nyiramasuhuko submits that the Trial Chamber erred in rejecting the testimony of Expert Witness Shimamungu on Sindikubwabo's Speech.[1372] She claims that the Trial Chamber erred in: (i) considering that this witness's testimony was tainted by bias because of his political and civic activism and his views against the RPF shared also by Nyiramasuhuko;[1373] (ii) making an adverse finding against the witness on the ground that he testified that he had been called to "criticize" Expert Witness Ntakirutimana's report "whereas the role of an expert entails, among others, criticizing the publications of fellow experts";[1374] and (iii) ascribing "a derogatory meaning to the French word '*critiquer*' (to criticize)".[1375]

611. The Prosecution responds that Nyiramasuhuko fails to demonstrate that the Trial Chamber was unreasonable in finding that Expert Witness Shimamungu lacked the neutrality, objectivity, and impartiality required for an expert witness because of his political activism, his opposition to the RPF, and his close association with the Habyarimana family.[1376]

612. Nyiramasuhuko replies that the activism of Expert Witnesses Des Forges, Guichaoua, and Reyntjens did not lead the Trial Chamber to exclude their testimonies.[1377] In her view, the fact that the Prosecution expert witnesses shared Expert Witness Shimamungu's stance on the involvement

[1369] The Appeals Chamber notes that the Trial Chamber overruled Nyiramasuhuko's objection to the testimony of Expert Witness Reyntjens on the ground that he could give "his opinion within the political context". *See* Filip Reyntjens, T. 20 September 2007 p. 48.
[1370] Trial Judgement, paras. 870-872.
[1371] Trial Judgement, paras. 869, 873, 895, 897.
[1372] Nyiramasuhuko Appeal Brief, para. 661. *See also* Nyiramasuhuko Notice of Appeal, paras. 3.50-3.55.
[1373] Nyiramasuhuko Notice of Appeal, paras. 3.50-3.52, *referring to* Trial Judgement, paras. 870-873.
[1374] Nyiramasuhuko Notice of Appeal, para. 3.53, *referring to* Trial Judgement, paras. 870-873.
[1375] Nyiramasuhuko Notice of Appeal, para. 3.54.
[1376] Prosecution Response Brief, paras. 352-354.
[1377] Nyiramasuhuko Reply Brief, para. 173.

of the RPF in the events without this prompting the Trial Chamber to question their impartiality demonstrates bias on behalf of the Trial Chamber.[1378]

613. While the Appeals Chamber is not convinced that the fact that Expert Witness Shimamungu confirmed that he was asked by the Defence to "criticize" the Ntakirutimana's report evidences bias on his part,[1379] it is nevertheless satisfied that a reasonable trier of fact could have decided to treat his testimony with appropriate caution given his opposition to the RPF, his views on the 1994 genocide, and his links with the Habyarimana family, and given the fact that these positions were shared by Nyiramasuhuko.[1380] The Trial Chamber considered that, while Expert Witness Shimamungu's activism did not adversely affect his credibility "when viewed independently", this was not the case when "viewed against the background of the 1994 events".[1381] The Appeals Chamber sees no error in such reasoning. In light of the above, the Appeals Chamber finds that a reasonable trier of fact could have accepted Expert Witness Ntakirutimana's interpretation of Sindikubwabo's Speech over Expert Witness Shimamungu's interpretation. Furthermore, the Appeals Chamber observes that Nyiramasuhuko fails to point to any evidence indicating activism on the part of Expert Witnesses Des Forges, Guichaoua, or Reyntjens that could have impacted their objectivity.[1382]

614. For these reasons, the Appeals Chamber finds that Nyiramasuhuko has not shown any error in the assessment of Expert Witness Shimamungu's evidence.

(iv) Witness RV

615. Nyiramasuhuko submits that the Trial Chamber erred in relying on Witness RV to find that Sindikubwabo's Speech was inflammatory.[1383] In particular, she argues that Witness RV's position as a detainee who could potentially benefit from accusing her and the fact that he stated that "perhaps he did not hear" Kanyabashi's speech should have led the Trial Chamber to require

[1378] Nyiramasuhuko Reply Brief, para. 174.
[1379] *See* Eugène Shimamungu, T. 30 March 2005 p. 7. *See also* Exhibit D278 (*Butare 1994: Political Communication of the "Abatabazi" Interim Government and its Impact on the Population*, by Eugène Shimamungu) (confidential) ("Shimamungu Report"), p. 9.
[1380] *See* Trial Judgement, paras. 870-873, 897. *See also* Eugène Shimamungu, T. 29 March 2005 pp. 16-19, 38-40; Exhibit P167A (Correspondence from Shimamungu, dated 27 April 2001).
[1381] *See* Trial Judgement, para. 872.
[1382] The Appeals Chamber notes that Nyiramasuhuko did not make any such submissions in her closing brief when addressing the evidence of these witnesses. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Closing Brief of Pauline Nyiramasuhuko with Annex, 17 February 2009 (originally filed in French, English translation filed on 1 April 2009) (confidential) ("Nyiramasuhuko Closing Brief"), paras. 367-507. Moreover, the Appeals Chamber rejects Nyiramasuhuko's unreferenced contention that Expert Witness Des Forges's criticism of President Habyarimana's Government's actions in 1993 displayed "potential bias". *See* Nyiramasuhuko Reply Brief, para. 173.
[1383] Nyiramasuhuko Notice of Appeal, paras. 3.61, 3.62, 3.64; Nyiramasuhuko Appeal Brief, paras. 667, 668.

corroboration.[1384] Nyiramasuhuko also contends that the Trial Chamber erred in: (i) its interpretation of Witness RV's testimony regarding the meaning of the words "enemy" and "work"; (ii) stating that this witness was corroborated by Expert Witness Reyntjens as this expert was not qualified to speak on this matter and was not a factual witness; and (iii) stating that Witness RV was also corroborated by Witness Karemano as this witness testified that the speech was ambiguous.[1385]

616. The Prosecution responds that Nyiramasuhuko fails to demonstrate any error in the Trial Chamber's assessment of Witness RV's evidence.[1386]

617. The Appeals Chamber observes that Witness RV unambiguously testified that he attended Nsabimana's Swearing-In Ceremony and that he listened to Kambanda's and Sindikubwabo's Speeches.[1387] Therefore, the Appeals Chamber fails to see the relevance of Nyiramasuhuko's reference to the fact that Witness RV "did not hear" Kanyabashi's speech.[1388]

618. In addition, the Appeals Chamber observes that, in evaluating the witness's evidence in relation to Kambanda's and Sindikubwabo's Speeches, the Trial Chamber noted that, at the time of his testimony, Witness RV was detained in Rwanda and was serving a sentence for his involvement in the 1994 genocide.[1389] The Trial Chamber concluded that it would treat Witness RV's evidence with appropriate caution given his status as an accomplice witness.[1390] A comprehensive reading of the Trial Judgement evinces that the Trial Chamber considered in detail Witness RV's status as a detained witness and as an accomplice witness in relation to other events upon which he testified.[1391] In this context, the Appeals Chamber is satisfied that the Trial Chamber properly considered Witness RV's possible motivation to implicate Nyiramasuhuko as well as other accused.

619. The Appeals Chamber further notes that, contrary to what Nyiramasuhuko seems to allege, the Trial Chamber did not base its finding as to the meaning of the words "enemy" and "work" in Kambanda's and Sindikubwabo's Speeches solely on Witness RV's testimony but also considered the transcripts of the speeches themselves, the evidence of Expert Witnesses Des Forges,

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[1384] Nyiramasuhuko Notice of Appeal, paras. 3.61, 3.63; Nyiramasuhuko Appeal Brief, para. 667. Nyiramasuhuko further argues that Witness RV's evidence regarding the meaning of the word "work" was hearsay and contradictory, without providing any substantiation or supporting references. *See* Nyiramasuhuko Appeal Brief, para. 668, *referring to* Trial Judgement, para. 896. The Appeals Chamber dismisses this unsubstantiated argument.
[1385] Nyiramasuhuko Notice of Appeal, paras. 3.61, 3.62, *referring to* Witness RV, T. 16 February 2004 pp. 41, 43, 44 (French), Trial Judgement, paras. 894, 896, 897; Nyiramasuhuko Appeal Brief, para. 669, *referring*, *inter alia*, *to* Charles Karemano, T. 5 September 2006 pp. 30, 31.
[1386] Prosecution Response Brief, paras. 339-344, 349.
[1387] *See* Witness RV, T. 16 February 2004 pp. 34, 35 (closed session).
[1388] *See* Witness RV, T. 19 February 2004 p. 58 (closed session). *See also* Trial Judgement, para. 908.
[1389] Trial Judgement, para. 894.
[1390] Trial Judgement, para. 894.
[1391] *See*, *e.g.*, Trial Judgement, paras. 907, 982, 3666, 4630.

Ntakirutimana, and Reyntjens, and the evidence of Witnesses Karemano and TQ.[1392] Consequently, the Appeals Chamber finds no merit in Nyiramasuhuko's contention that the Trial Chamber failed to exercise sufficient caution with respect to Witness RV's evidence and to require corroboration.[1393]

620. As regards the Trial Chamber's interpretation of Witness RV's testimony, the Appeals Chamber finds that the evidence of Witness RV concerning the meaning of the words "enemy" and "work", as correctly summarised by the Trial Chamber, does not differ from the Trial Chamber's findings in its deliberations.[1394]

621. The Appeals Chamber also sees no error in the Trial Chamber's reliance on Expert Witness Reyntjens to corroborate the evidence of Witness RV. As noted above, Nyiramasuhuko fails to demonstrate that Expert Witness Reyntjens was not qualified to testify on the issue.[1395] As to Witness Karemano, while it is true that the witness testified that the word "*gukora*" in Sindikubwabo's Speech was ambiguous, the Appeals Chamber observes that he also agreed that the speech "chang[ed] things" and that people used it to legitimise killings that were subsequently committed.[1396] In the view of the Appeals Chamber, a reasonable trier of fact could have considered that Witness Karemano's account was consistent with the evidence of Expert Witnesses Ntakirutimana, Des Forges, and Reyntjens, and of Witnesses RV and TQ.[1397]

622. The Appeals Chamber accordingly dismisses Nyiramasuhuko's challenges to the assessment of Witness RV's evidence.

(v) Interpretation of the Speeches

623. The Trial Chamber found that when Sindikubwabo took the floor and made his speech, he clearly called on the audience to take action against Tutsis, which meant to participate in the

[1392] Trial Judgement, paras. 892-897.
[1393] In any event, the Appeals Chamber recalls that nothing in the Statute or the Rules prevents a trial chamber from relying on uncorroborated evidence. A trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony. *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Nchamihigo* Appeal Judgement, para. 42; *Milošević* Appeal Judgement, para. 215. This discretion applies equally to the evidence of accomplice witnesses provided that the trier of fact applies the appropriate caution in assessing such evidence *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Muvunyi* Appeal Judgement of 1 April 2011, paras. 37, 38; *Renzaho* Appeal Judgement, para. 263.
[1394] *Compare* Trial Judgement, paras. 609, 894, 896 *with* Witness RV, T. 16 February 2004 p. 35 (closed session). The Trial Chamber noted that "Witness RV testified that 'work' referred to the struggle against the enemy, *i.e.* the Tutsis." *See* Trial Judgement, para. 896.
[1395] *See supra*, para. 581.
[1396] *See* Charles Karemano, T. 5 September 2006 p. 27. *See also* Trial Judgement, paras. 745, 896, 932.
[1397] *See* Trial Judgement, para. 897.

killings.[1398] It concluded that Kambanda's and Sindikubwabo's Speeches shared a number of common themes, in that they underlined the existence of war, urged the people of Butare to take action, and warned of traitors who underwent weapons training.[1399] The Trial Chamber further found that these common themes illustrated that the speeches were complementary and had the common purpose of inciting the population to take action against the Tutsis.[1400] It also considered that "when Kambanda talked about not tolerating those who support the enemy and the *bourgmestres* who he had been told went to train with the *Inkotanyi*, he was in effect inciting his listeners to commit killings and violence against these people."[1401]

624. Nyiramasuhuko contends that the Trial Chamber erred in finding that Sindikubwabo's Speech "clearly" called on the audience to "take measures against the Tutsis" when there is no sentence in the speech that stated such a thing or could be interpreted as such.[1402] Additionally, she submits that the Trial Chamber's inference that Kambanda's and Sindikubwabo's Speeches were complementary and both aimed at inciting the population to kill Tutsis based on the fact that the two speeches spoke about war was unreasonable, especially as the country was at war.[1403]

625. The Prosecution responds that Nyiramasuhuko fails to show that the Trial Chamber's finding that Sindikubwabo's Speech was inflammatory, used coded language, and called on the audience to kill Tutsis and their accomplices was unreasonable.[1404]

626. Although Sindikubwabo's Speech did not expressly call on the audience to "take measures against the Tutsis", the Appeals Chamber finds no error in the Trial Chamber's conclusion that it contained such a message. Indeed, a review of Sindikubwabo's Speech reflects that Sindikubwabo specifically asked his audience to analyse his message to understand the terms he used.[1405] The Appeals Chamber is not persuaded that the Trial Chamber's findings that Sindikubwabo's

[1398] Trial Judgement, para. 890.
[1399] Trial Judgement, para. 892.
[1400] Trial Judgement, para. 892.
[1401] Trial Judgement, para. 892.
[1402] Nyiramasuhuko Appeal Brief, para. 662.
[1403] Nyiramasuhuko Appeal Brief, para. 666. *See also* Nyiramasuhuko Reply Brief, para. 176.
[1404] Prosecution Response Brief, paras. 321, 322, 339, 345, 355-357.
[1405] *See* Exhibit P151B (Speeches Delivered by Théodore Sindikubwabo and Other Personalities on 19 April 1994 in Butare *préfecture*), p. 5 ("I would like you to analy[s]e our message, understand it and analy[s]e the terms we are using; you should understand why we choose to use one term and not another. It is because we are in an unusual period."). *See also ibid.*, p. 4 ("You should not imagine that these are empty words. When I addressed Rwandan citizens recently on the 17th, I asked them to understand, to understand the full weight of the messages in question, because these were not ordinary words … we are in a period of war. […] The truth is that the words we address to you, the messages we transmit to you… the instructions we send you are taken as if these were empty words, but these are things that are quite serious, considering that we are at war.").

Speech contained coded language and that it clearly incited the population to kill Tutsis are irreconcilable or inconsistent.[1406]

627. The Appeals Chamber further observes that the fact that both Kambanda's and Sindikubwabo's Speeches mentioned that the country was at war was not the only feature relied on by the Trial Chamber to reach its finding that they were complementary.[1407] Having reviewed the relevant findings of the Trial Chamber as to the common themes of the speeches, as well as its previous findings on the content, nature, and character of Sindikubwabo's Speech,[1408] the Appeals Chamber finds that, on the basis of the evidence before the Trial Chamber, a reasonable trier of fact could have concluded that it was clear that "when Kambanda talked about not tolerating those who supported the enemy and the *bourgmestres* who he had been told went to train with the *Inkotanyi*, he was in effect inciting his listeners to commit killings and violence against these people."[1409] The Appeals Chamber discerns no error in the Trial Chamber's holistic review of the two speeches in reaching its finding. The Appeals Chamber dismisses Nyiramasuhuko's contentions in that regard.

(b) Commencement of the Widespread Killings in Butare Prefecture

628. The Trial Chamber noted that Nyiramasuhuko's theory at trial "that massacres already occurred in Nyakizu and Maraba before 19 April 1994 [… did] not contradict the Prosecution theory that the genocide in Butare did not commence immediately after the death of the President on 6 April 1994 and that the large-scale massacres of Tutsis began two weeks later."[1410] The Trial Chamber observed that, although there was some evidence that a few massacres and ethnic violence occurred prior to 19 April 1994 within Butare's western communes, there was "overwhelming evidence that massacres in most of the Butare *communes* started in the wake of the events of 19 April 1994."[1411] It concluded that widespread killings of Tutsis did not commence in Butare Prefecture prior to 18 or 19 April 1994.[1412] In reaching these findings, the Trial Chamber took into consideration the removal of Prefect Habyalimana on 16 or 17 April 1994, the appointment of Nsabimana as the new prefect of Butare as well as Kambanda's and Sindikubwabo's Speeches at Nsabimana's Swearing-In Ceremony on 19 April 1994.[1413]

[1406] *Compare* Trial Judgement, para. 883 *with ibid*., para. 890.
[1407] *See* Trial Judgement, para. 892. This conclusion is also confirmed by Witness RV. *See* Witness RV, T. 19 February 2004 p. 26 (closed session). *See also* Trial Judgement, para. 609.
[1408] *See* Trial Judgement, paras. 867-890.
[1409] *See* Trial Judgement, para. 892; Exhibit D573B (Extracts of Speeches by Kambanda and Kanyabashi).
[1410] Trial Judgement, para. 853.
[1411] Trial Judgement, paras. 854, 856, 927.
[1412] Trial Judgement, paras. 930, 933.
[1413] Trial Judgement, paras. 933, 5673. *See also ibid*., paras. 931, 932, 5676.

629. Nyiramasuhuko submits that the Trial Chamber erred in finding that widespread killings did not commence prior to 19 April 1994.[1414] She contends that the Trial Chamber contradicted itself as it found that killings had already started in some communes in Butare Prefecture prior to that date.[1415] She avers that it is clear from the evidence adduced at trial, notably the evidence of Expert Witness Des Forges and Witness TA, that widespread killings had already started before 19 April 1994.[1416] Nyiramasuhuko further contends that the Trial Chamber erred in finding on the sole basis of the evidence of expert witnesses that the removal of Prefect Habyalimana and Kambanda's and Sindikubwabo's Speeches coincided with and contributed to trigger the commencement of widespread killings in Butare Prefecture.[1417]

630. The Prosecution responds that Nyiramasuhuko's arguments should be rejected as: (i) the Trial Chamber clearly distinguished between widespread killings of Tutsis in Butare Prefecture after 19 April 1994 and the occurrence of a few isolated killings in its western communes between 15 and 18 April 1994; (ii) Witness TA's evidence does not undermine the Trial Chamber's finding; and (iii) Expert Witness Des Forges's reference to acts of violence in four out of 20 communes prior to 19 April 1994 does not equate to widespread attacks across Butare Prefecture.[1418] The Prosecution adds that the Trial Chamber's impugned finding was not solely based on expert evidence.[1419]

631. The Appeals Chamber finds no error in the Trial Chamber's conclusion that widespread killings of Tutsis did not occur in Butare Prefecture prior to 19 April 1994. While the Trial Chamber found that a few large scale massacres occurred prior to 19 April 1994 within the prefecture's western communes, it also found that there was overwhelming evidence that massacres

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[1414] Nyiramasuhuko Notice of Appeal, paras. 3.49, 3.66-3.69, 3.75, 3.76; Nyiramasuhuko Appeal Brief, paras. 673-676. *See also* Nyiramasuhuko Notice of Appeal, para. 3.17.

[1415] Nyiramasuhuko Notice of Appeal, paras. 3.49, 3.66-3.68, *referring to* Trial Judgement, paras. 649-652, 855, 856; Nyiramasuhuko Appeal Brief, para. 673. Nyiramasuhuko points out that the Trial Chamber noted the occurrence of killings in Cyahinda parish around 15 April 1994. *See* Nyiramasuhuko Appeal Brief, para. 673, *referring to* Trial Judgement, para. 856.

[1416] Nyiramasuhuko Appeal Brief, paras. 675, 676. Nyiramasuhuko points out that Witness TA testified that Nyaruhengeri, Ngoma, Ndora, and Shyanda Communes had been attacked well before 20 April 1994. *See ibid*., para. 675, *referring to* Witness TA, T. 7 November 2001 pp. 48-50. She further contends that there is concrete evidence that the wave of violence was noticed in four communes on 16 April 1994. *See ibid*., para. 676, *referring to* Trial Judgement, para. 880. *See also* Nyiramasuhuko Reply Brief, para. 165, *referring to* Exhibit P110A (Des Forges Report), pp. 17-20, Alison Des Forges, T. 9 July 2004 pp. 5-10.

[1417] Nyiramasuhuko Notice of Appeal, paras. 3.17, 3.49, 3.69-3.71, 3.75; Nyiramasuhuko Appeal Brief, para. 674.

[1418] Prosecution Response Brief, paras. 362, 364-367, 369. *See also ibid*., para. 370. The Prosecution points out that, while the Trial Chamber took note of the joint *communiqué* of 16 April 1994 confirming that ethnic violence had reached Butare's western communes, it did not find that there were widespread killings throughout Butare Prefecture prior to 19 April 1994. *See ibid*., para. 369, *referring to* Exhibit D240 (*Communiqué* sanctioning the security of the authorities of Butare and Gikongoro, 16 April 1994) ("16 April *Communiqué*").

[1419] Prosecution Response Brief, paras. 363, 371, 374. The Prosecution refers to the Trial Chamber's reliance on the evidence of Ndayambaje, Nyiramasuhuko, and Witnesses QBU, QCB, FAB, FAE, WMCZ, and QA. *See ibid*., para. 374.

in most communes of Butare Prefecture started after 19 April 1994.[1420] As such, the Appeals Chamber considers that the Trial Chamber's distinction between a few large scale massacres prior to 19 April 1994 that took place in specific communes of Butare Prefecture and generalised widespread killings occurring throughout Butare Prefecture after 19 April 1994 was reasonable.[1421]

632. Moreover, the Appeals Chamber is not persuaded by Nyiramasuhuko's argument that the evidence of Expert Witness Des Forges and Witness TA contradicts the Trial Chamber's finding on that issue. Expert Witness Des Forges mentioned that killings occurred around 14 to 18 April 1994 in four western communes of Butare Prefecture.[1422] Witness TA testified that, prior to 20 April 1994, some communes had already been attacked, notably Nyaruhengeri, Ngoma, and Shyanda Communes.[1423] The Trial Chamber's finding is consistent with this evidence.

633. The Appeals Chamber further rejects Nyiramasuhuko's contention that the Trial Chamber made its finding on the commencement of the widespread killings in Butare Prefecture solely on expert witness evidence as the Trial Judgement shows that the Trial Chamber also relied on the evidence of numerous factual witnesses.[1424]

634. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contentions pertaining to the Trial Chamber's findings on the commencement of the widespread killings in Butare Prefecture.

6. Incoherent and Contradictory Findings

635. Nyiramasuhuko submits that the Trial Chamber's conclusion that the only reasonable inference from the evidence was that she entered into an agreement with members of the Interim Government to kill Tutsis in Butare Prefecture is based on "[e]rroneous, incoherent, inconsistent and/or irreconcilable findings".[1425] With respect to the Trial Chamber's findings on the Cabinet meetings of the Interim Government and its decisions and directives in particular, Nyiramasuhuko contends that the Trial Chamber erred in: (i) substituting the intent of the Interim Government for her own specific intent since it did not know what role, if any, she played during the Cabinet

[1420] *See* Trial Judgement, para. 927. *See also* 16 April *Communiqué*.
[1421] *Compare* Trial Judgement, paras. 854-856, 927 *with ibid*., paras. 927-933. The Appeals Chamber stresses that any error in this regard would in any event not affect the Trial Chamber's finding on the existence of a conspiracy to commit genocide since the crime of conspiracy to commit genocide is an inchoate offence, which does not require evidence of implementation. *See Nzabonimana* Appeal Judgement, para. 417; *Gatete* Appeal Judgement, paras. 260, 262. *See also Seromba* Appeal Judgement, para. 218; *Nahimana et al.* Appeal Judgement, para. 894.
[1422] *See* Alison Des Forges, T. 8 July 2004 pp. 73-75. *See also* T. 9 July 2004 p. 5, Exhibit P110A (Des Forges Report) p. 18.
[1423] *See* Witness TA, T. 7 November 2001 p. 49 (closed session).
[1424] *See* Trial Judgement, paras. 928, 930, *referring*, *inter alia*, *to* Witnesses FAM, QBU, FAI, QI, FAB, FAE, WMCZ, RV, and QJ, and Ndayambaje.
[1425] Nyiramasuhuko Appeal Brief, heading "d)" at p. 137, paras. 622-633. *See also* Nyiramasuhuko Reply Brief, para. 146; AT. 14 April 2015 p. 10.

meetings;[1426] (ii) relying on her mere participation at the meeting where the decision was made to replace Prefect Habyalimana;[1427] (iii) rejecting as not credible her testimony explaining that Prefect Habyalimana's removal resulted from an agreement between the PSD and the *Parti libéral* ("PL"), while Expert Witness Des Forges accepted this explanation;[1428] and (iv) finding that she and members of the Interim Government conspired to issue directives to the population between 9 and 19 April 1994 without mentioning which directives and referring only to the 27 April Directive which was issued after the period in question.[1429]

636. With respect to Nsabimana's Swearing-In Ceremony, Nyiramasuhuko argues that the Trial Chamber erred in relying on the fact that she tacitly approved Kambanda's and Sindikubwabo's Speeches, whereas it found that her presence had not significantly contributed to any crime and could not have contributed to the crime of conspiracy.[1430] According to her, the Trial Chamber further erred in finding the existence of a conspiracy which occurred in particular between 9 April and 19 April 1994 on the basis of the dismissal of Prefect Habyalimana and Nsabimana's Swearing-In Ceremony whereas the only finding it made was that these events coincided with the start of the killings.[1431]

637. The Appeals Chamber understands Nyiramasuhuko to further argue that the Trial Judgement therefore reflects that the Trial Chamber's ultimate conclusion was solely based on the 27 April Directive considered together with the "coincidence" of the dismissal of Prefect Habyalimana and Nsabimana's Swearing-In Ceremony with the start of the killings.[1432] She contends that the finding of conspiracy between her and the Interim Government between 9 and 19 April 1994 "is irreconcilable with 'the only reasonable inference' proved mainly through the *post facto* directives of 27 April 1994, and is incompatible with the factual findings of the Chamber that most of the killings were committed between 17 and 19 April 1994 and the end of April 1994 in Butare

[1426] Nyiramasuhuko Appeal Brief, paras. 623, 641, *referring to* Trial Judgement, paras. 5732, 5733. *See also ibid*., paras. 597, 632; Nyiramasuhuko Reply Brief, paras. 149, 167. *See also* AT. 14 April 2015 pp. 11, 12; AT. 15 April 2015 p. 4.
[1427] Nyiramasuhuko Appeal Brief, para. 626. Nyiramasuhuko highlights that, in the *Mugenzi and Mugiraneza* case, the Appeals Chamber considered that mere consent to the decision to dismiss Prefect Habyalimana was insufficient to prove the necessary *mens rea* for the crime of conspiracy to commit genocide. *See idem*, *referring to Mugenzi and Mugiraneza* Appeal Judgement, para. 91. *See also* Nyiramasuhuko Notice of Appeal, para. 3.14.
[1428] Nyiramasuhuko Appeal Brief, paras. 597, 627. *See also* Nyiramasuhuko Reply Brief, paras. 149, 165.
[1429] Nyiramasuhuko Appeal Brief, para. 624.
[1430] Nyiramasuhuko Notice of Appeal, para. 3.65; Nyiramasuhuko Appeal Brief, paras. 633, 678, *referring to* Trial Judgement, paras. 5745, 5746. *See also* Nyiramasuhuko Notice of Appeal, para. 3.16; Nyiramasuhuko Reply Brief, para. 174.
[1431] Nyiramasuhuko Appeal Brief, para. 625, *referring to* Trial Judgement, para. 5676. Nyiramasuhuko submits that the mere coincidence in time of these two events does not allow a finding that the only possible reasonable inference was the existence of a conspiracy. *See ibid*., para. 626. *See also* Nyiramasuhuko Notice of Appeal, para. 3.76.
[1432] Nyiramasuhuko Appeal Brief, para. 628. *See also ibid*., para. 652.

préfecture."[1433] In Nyiramasuhuko's view, it was equally reasonable to infer from the evidence that the Interim Government was not able to put an end to the killings because the population no longer listened to it.[1434]

638. The Prosecution responds that Nyiramasuhuko's arguments fail to demonstrate that the Trial Chamber erred in concluding that the only reasonable inference was that she agreed with members of the Interim Government to commit genocide.[1435] It submits that Nyiramasuhuko's arguments related to the Cabinet meetings and the Interim Government's decisions and directives should be rejected as the Trial Chamber relied on numerous factors to infer her intent as the only reasonable inference.[1436] The Prosecution also argues that: (i) the Trial Chamber's finding that Nyiramasuhuko's role in the Cabinet meetings was not established related to another allegation for which she was not convicted and, in any event, the Trial Chamber's findings "depict Nyiramasuhuko as an active, renowned and key member of the government";[1437] (ii) Nyiramasuhuko's testimony on Prefect Habyalimana's removal was internally inconsistent and contradicted;[1438] and (iii) the Trial Chamber did not only refer to the 27 April Directive but also considered other directives.[1439]

639. Concerning Nyiramasuhuko's argument on Nsabimana's Swearing-In Ceremony, the Prosecution submits that Nyiramasuhuko fails to show that the Trial Chamber could only consider her tacit approval as further confirming the conspiracy unless it substantially contributed to the killings.[1440] It also argues that the "narrower time frame, 9-19 April, was not exhaustive as demonstrated by the Chamber's use of 'in particular' and its multiple references to the broader time

[1433] Nyiramasuhuko Appeal Brief, para. 630 (emphasis omitted). *See also ibid*., paras. 628, 629. Nyiramasuhuko also points out the incoherence of a directive that would have aimed at setting up roadblocks to identify and kill Tutsis at a time when the killings had almost ceased. *See* Nyiramasuhuko Reply Brief, para. 162.
[1434] Nyiramasuhuko Appeal Brief, para. 631. *See also* Nyiramasuhuko Notice of Appeal, para. 3.21; Nyiramasuhuko Appeal Brief, para. 622; Nyiramasuhuko Reply Brief, para. 147.
[1435] Prosecution Response Brief, para. 276. *See also* AT. 14 April 2015 pp. 46, 47.
[1436] Prosecution Response Brief, paras. 277-282. The Prosecution refers to Nyiramasuhuko's attendance at Cabinet meetings, her participation in the adoption of directives designed to encourage the killing of Tutsis through the use of roadblocks, her participation in the decision to remove Prefect Habyalimana, and her approval of Kambanda's and Sindikubwabo's Speeches. *See ibid.*, para. 278. At the appeals hearing, the Prosecution also relied on her role in the crimes committed at the Butare Prefecture Office. *See* AT. 14 April 2015 p. 47.
[1437] Prosecution Response Brief, paras. 284, 285 *referring to* Trial Judgement, paras. 8, 498, 581, 583, 5676, 5677. The Prosecution points out that she participated in issuing genocidal directives and drafted part of the directive issued on 25 May 1994. *See ibid*., para. 285.
[1438] Prosecution Response Brief, paras. 308-313. The Prosecution points out that contrary to Nyiramasuhuko's assertion, Expert Witness Des Forges did not accept her explanation that Prefect Habyalimana's removal was a result of an agreement between the PSD and the PL. It adds that, while Expert Witness Des Forges noted that the political parties "could have made the initial proposal to remove [Prefect] Habyalimana", she did not contradict the Trial Chamber's finding that the decision to remove the prefect was ultimately made by the Interim Government. *See ibid*., paras. 312, 314.
[1439] Prosecution Response Brief, paras. 272, 293, 294, 296, *referring to* Trial Judgement, paras. 498, 570, 571, 581, 5669, 5676, Exhibits D349 (Government-*Préfet* Joint Meeting, 11 April 1994), D350C (English translation of Kambanda's speech of 11 April 1994), P121B (Prime Minister's Directive to *Préfets* on the organization of civil defence, 25 May 1994).

frame, 9 April-14 July".[1441] The Prosecution contends that, contrary to Nyiramasuhuko's suggestion, there is no other reasonable alternative interpretation of the evidence than that of the Trial Chamber.[1442]

640. Nyiramasuhuko replies, *inter alia*, that the Trial Chamber did not rely on Kambanda's instructions to prefects of 11 April 1994, the directives issued on 25 May 1994, her presence in Butare on several occasions between mid-April and late June 1994, or the alleged orders to *Interahamwe* at the Butare Prefecture Office referred to by the Prosecution and that the directives issued on 25 May 1994 did not support the Trial Chamber's finding.[1443] She also argues that there was a protocol requiring ministers to be present at ceremonies attended by the President of Rwanda and that there was no evidence that Sindikubwabo's Speech was previously agreed upon or that she was privy to its content before it was delivered.[1444]

641. Contrary to Nyiramasuhuko's assertion, the Appeals Chamber observes that the Trial Chamber did not exclusively rely on the 27 April Directive to convict her of conspiracy to commit genocide but also relied on a number of other elements, such as the decision to dismiss Prefect Habyalimana from office and her endorsement of Kambanda's and Sindikubwabo's Speeches at Nsabimana's Swearing-In Ceremony.[1445]

642. As noted above, the Trial Chamber also relied on Nyiramasuhuko's participation with the Interim Government in many of the Cabinet meetings at which the massacres of Tutsis was discussed and in decisions taken during these meetings.[1446] In this respect, the Appeals Chamber observes that, when discussing Nyiramasuhuko's responsibility for the crime of genocide later in the Trial Judgement, the Trial Chamber emphasised that it had not found what role, if any, Nyiramasuhuko played at the numerous Cabinet meetings held by the Interim Government between 9 April and 14 July 1994, and that it did not establish, for instance, that Nyiramasuhuko was "assigned responsibility for 'pacification' in Butare".[1447] The Trial Chamber concluded that the

[1440] Prosecution Response Brief, paras. 358, 360.
[1441] Prosecution Response Brief, para. 297.
[1442] Prosecution Response Brief, paras. 273, 278, 286, 360. The Prosecution argues that Nyiramasuhuko's alternative interpretation that the Interim Government could not stop the killings is nonsensical as it ignores that widespread killings occurred in Rwanda as of 7 April 1994, before the government left Kigali, and is based on a decontextualised reading of the record. *See ibid*., paras. 274, 275. *See also* AT. 14 April 2015 p. 47.
[1443] Nyiramasuhuko Reply Brief, paras. 151, 156, 157.
[1444] Nyiramasuhuko Reply Brief, paras. 175, 178, *referring to* Nyiramasuhuko, T. 26 October 2005 pp. 64, 65.
[1445] *See* Trial Judgement, paras. 5670-5673, 5676, 5678.
[1446] *See* Trial Judgement, paras. 5669, 5678, 5727.
[1447] Trial Judgement, para. 5734.

Prosecution had not established that Nyiramasuhuko bore criminal responsibility pursuant to Article 6(1) of the Statute in relation to these Cabinet meetings.[1448]

643. The Trial Chamber's findings as to Nyiramasuhuko's absence of role in Cabinet meetings and lack of criminal responsibility in this respect might appear contradictory with its previous finding that Nyiramasuhuko conspired to commit genocide with the Interim Government notably through her participation in Cabinet meetings and the adoption of directives and instructions during Cabinet meetings.[1449] However, reading the Trial Judgement as a whole, the Appeals Chamber understands the Trial Chamber's findings to simply reflect that, whereas Nyiramasuhuko's participation in Cabinet meetings throughout the relevant period evidenced that she had entered into an agreement with members of the Interim Government to kill Tutsis within Butare Prefecture, it was nonetheless not constitutive of the crime of genocide.

644. As regards the Trial Chamber's reliance on Nyiramasuhuko's participation in Cabinet meetings as evidence of an agreement between her and members of the Interim Government to commit genocide, the Appeals Chamber notes that the Trial Chamber specifically pointed to Nyiramasuhuko's presence at meetings when the ministers were briefed on the massacres of the Tutsi population, and the fact that the Interim Government, including her, did nothing to stop the massacres but, rather, adopted directives and issued instructions which were designed to encourage the killing of Tutsis.[1450] Nyiramasuhuko does not challenge that she did attend a number of these meetings and acknowledged to having been involved in the elaboration of directives and instructions.[1451] Under these circumstances, the Appeals Chamber finds that a reasonable trier of fact could have relied, among other things, on Nyiramasuhuko's participation in Cabinet meetings to find that she conspired to commit genocide. Although the Trial Chamber at times used imprecise language, the Appeals Chamber is nonetheless satisfied from a holistic review of the Trial Chamber's relevant findings that it did not impose strict liability on Nyiramasuhuko but reached its finding of guilt on the basis of Nyiramasuhuko's own acts and omissions and did not substitute the intent of the Interim Government for her intent.

645. Turning to Nyiramasuhuko's submissions that the Trial Chamber erred when assessing her involvement in Prefect Habyalimana's removal, the Appeals Chamber considers that Nyiramasuhuko fails to demonstrate that it was unreasonable for the Trial Chamber to find her

[1448] Trial Judgement, para. 5735.
[1449] *Compare* Trial Judgement, paras. 583, 5676, 5678 *with* Trial Judgement, para. 5734.
[1450] Trial Judgement, para. 5669.
[1451] *See* Nyiramasuhuko, T. 26 September 2005 pp. 61, 62, 64, T. 27 September 2005 pp. 7-12, 30-36, T. 28 September 2005 pp. 40-42, T. 29 September 2005 pp. 30-37, T. 14 November 2005 p. 70, T. 16 November 2005 pp. 16-20, T. 21 November 2005 p. 8, T. 22 November 2005 p. 9; Trial Judgement, paras. 489-498, 505-514, 521-524, 531-536, 542-545, 548-550, 556-560, 563. *See also* Trial Judgement, paras. 570, 571, 581.

explanation as to Prefect Habyalimana's removal not credible. The Appeals Chamber sees no error in the Trial Chamber's finding that, even if the political parties made the initial proposal to remove Prefect Habyalimana from office, the final decision fell to the Interim Government and was taken during a Cabinet meeting attended by Nyiramasuhuko.[1452] The Appeals Chamber recalls that when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[1453] Against this background, the Appeals Chamber finds that it was within the Trial Chamber's discretion to find the explanation provided by Expert Witness Guichaoua more convincing.[1454] The Appeals Chamber also agrees with the Prosecution that Expert Witness Des Forges did not accept Nyiramasuhuko's explanation that the decision to remove Habyalimana was made as a result of an agreement between the PSD and the PL. While Expert Witness Des Forges acknowledged that the political parties could have made the initial proposal for the removal, her testimony does not contradict the Trial Chamber's finding that the Interim Government took the ultimate decision.[1455]

646. Regarding the Trial Chamber's alleged failure to mention which directives of the Interim Government it referred to aside from the 27 April Directive, the Appeals Chamber notes that, although the Trial Chamber referred at length to a number of Cabinet meetings and directives when summarising the relevant evidence, the Trial Chamber only specifically referred in its deliberations in the "Factual Findings" section of the Trial Judgement to the instructions to prefects of 11 April 1994 and to the 27 April Directive.[1456] In its legal finding on conspiracy to commit genocide, the Trial Chamber did not expressly identify a specific directive besides the 27 April Directive.[1457] Nevertheless, a plain reading of the Trial Judgement and the wording used by the Trial Chamber evince that the reference to the 27 April Directive was not exhaustive and that the Trial Chamber intended to rely on the directives it mentioned when summarising the evidence.[1458]

647. As to the timeframe of the conspiracy among the Interim Government members, the Appeals Chamber is of the view that, while the Trial Chamber referred to a period of 9 to 19 April 1994, this narrow timeframe was not meant as exhaustive, as demonstrated by the term "in particular" and its multiple references to the broader timeframe of 9 April to 14 July 1994 in the

[1452] *See* Trial Judgement, paras. 857-864, 5670. The Appeals Chamber notes that the Trial Chamber considered the evidence provided by Nyiramasuhuko in that respect. *See* Trial Judgement, paras. 832-838, 859.
[1453] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[1454] *See* Trial Judgement, paras. 860, 861. The Appeals Chamber finds also no merit in Nyiramasuhuko's reliance on the *Mugenzi and Mugiraneza* Appeal Judgement, which resulted from a separate proceeding against different accused and was based on a different trial record.
[1455] *See* Alison Des Forges, T. 15 June 2004 pp. 63, 64.
[1456] *See* Trial Judgement, paras. 464-563, 570.
[1457] Trial Judgement, paras. 5669, 5677.
[1458] *See* Trial Judgement, paras. 570 ("[i]n particular"), 5669 ("[t]hese included").

Trial Judgement.[1459] Therefore, the Appeals Chamber finds no merit in Nyiramasuhuko's assertion that the finding of conspiracy was irreconcilable with the Trial Chamber's reliance on the "*post facto*" 27 April Directive and the findings that most of the killings were committed between 17 and 19 April and the end of April 1994 in the prefecture.

648. With respect to Nyiramasuhuko's contentions concerning Nsabimana's Swearing-In Ceremony, the Appeals Chamber recalls that the Trial Chamber found that the presence of Nyiramasuhuko, Nsabimana, and Kanyabashi at Nsabimana's Swearing-In Ceremony and their failure to dissociate themselves from the statements made by Kambanda and Sindikubwabo constituted tacit approval of their inflammatory statements.[1460] However, the Trial Chamber found that there was not sufficient evidence to prove beyond reasonable doubt that Nyiramasuhuko's and Nsabimana's conduct substantially contributed to the killings that followed.[1461]

649. The Appeals Chamber finds that Nyiramasuhuko does not demonstrate any contradiction between the Trial Chamber's finding that she tacitly approved Kambanda's and Sindikubwabo's Speeches and its finding that her conduct did not substantially contribute to the subsequent killings. She also fails to demonstrate that these findings are irreconciliable with the Trial Chamber's finding that she was responsible for having conspired to commit genocide with members of the Interim Government. The Appeals Chamber recalls that the *actus reus* of the crime of conspiracy to commit genocide is "a concerted agreement to act for the purpose of committing genocide"[1462] and does not require evidence of implementation.[1463] The Appeals Chamber also finds that, regardless of whether or not Nyiramasuhuko had prior knowledge of the content of Sindikubwabo's Speech, a reasonable trier of fact could have concluded on the basis of the totality of the evidence that, by her presence and failure to dissociate herself from the content of Kambanda's and Sindikubwabo's Speeches, the only reasonable inference was that Nyiramasuhuko endorsed their inflammatory statements.

650. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence only if it is the only

[1459] *See* Trial Judgement, paras. 583, 5669, 5676, 5727.
[1460] Trial Judgement, para. 5739. *See also ibid*., paras. 5672, 5676, 5746.
[1461] Trial Judgement, paras. 5746, 5747. The Trial Chamber however indicated that it would consider Nyiramasuhuko's and Nsabimana's conduct elsewhere in determining whether they possessed the requisite intent for genocide. *See ibid*., para. 5747.
[1462] *See Karemera and Ngirumpatse* Appeal Judgement, para. 643, *quoting Nahimana et al.* Appeal Judgement, para. 896. *See also Nzabonimana* Appeal Judgement, para. 391; *Gatete* Appeal Judgement, para. 260; *Nahimana et al*. Appeal Judgement, para. 894.
[1463] *Gatete* Appeal Judgement, paras. 260, 262. *See also Seromba* Appeal Judgement, para. 218; *Nahimana et al.* Appeal Judgement, para. 894.

reasonable conclusion that could be drawn from the evidence presented.[1464] This also holds true for a conviction for conspiracy to commit genocide based on circumstantial evidence.[1465]

651. In the present case, the Appeals Chamber finds that Nyiramasuhuko's argument that it was equally reasonable to infer that the Interim Government was unable to put an end to the killings as its authority was undermined is unsubstantiated. The Appeals Chamber is satisfied that a reasonable trier of fact could have determined that – on the basis of its findings that Nyiramasuhuko participated in Cabinet meetings where directives encouraging killings were issued, agreed to remove Prefect Habyalimana, attended Nsabimana's Swearing-In Ceremony, and endorsed Kambanda's and Sindikubwabo's Speeches – the only reasonable inference was that Nyiramasuhuko conspired with members of the Interim Government to commit genocide against the Tutsis in Butare Prefecture.[1466]

652. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's allegations of incoherent and contradictory findings.

7. Conclusion

653. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in convicting her of conspiracy to commit genocide with members of the Interim Government and, accordingly, dismisses Ground 19 of her appeal.

[1464] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, paras. 535, 553, 629; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al*. Appeal Judgement, para. 306; *Čelebići* Appeal Judgement, para. 458.
[1465] *Mugenzi and Mugiraneza* Appeal Judgement, paras. 88, 136; *Nahimana et al.* Appeal Judgement, para. 896; *Ntagerura et al.* Appeal Judgement, para. 306.
[1466] *See* Trial Judgement, para. 5678.

E. Alibis (Grounds 20-22)

654. At trial, Nyiramasuhuko presented alibis according to which she was in Kigali until she moved to Murambi, Gitarama Prefecture, with the Interim Government on 12 April 1994 and remained there until 1 June 1994, after which she moved to Muramba, Gisenyi Prefecture, where she stayed from 2 June 1994 until she fled Rwanda.[1467] She stated that, although she was frequently moving around the country and made many trips to Butare Town to participate in meetings and visit her family, she never left Hotel Ihuliro at night when in Butare Town.[1468]

655. The Trial Chamber found that Nyiramasuhuko filed a belated notice of alibi.[1469] Furthermore, it found that, irrespective of whether Nyiramasuhuko was staying in Murambi, the short distance between Butare and Murambi would have permitted her to be present in Butare Town on the nights the attacks occurred at the Butare Prefecture Office.[1470] The Trial Chamber also determined that it was not reasonably possibly true that Nyiramasuhuko was in Muramba from 7 to 9 June 1994, from 12 to 16 June 1994, and on 18 and 19 June 1994.[1471] It further noted that Nyiramasuhuko admitted being present in Butare on the nights of 14, 15, and 30 May, as well as 11 June 1994.[1472] The Trial Chamber concluded that Nyiramasuhuko came to the prefectoral office one night in mid-May 1994, one night around the end of May 1994 or the beginning of June 1994, and during the first half of June 1994 to order the killings and rapes of Tutsi refugees[1473] and convicted her on this basis.[1474]

656. Nyiramasuhuko submits that the Trial Chamber erred in finding that her notice of alibi was filed late and in its assessment of the alibi evidence relating to the periods of 14 to 16 May 1994 and early to mid-June 1994. The Appeals Chamber will examine these contentions in turn.

1. Notice of Alibi

657. On 1 March 2005, the Trial Chamber directed Nyiramasuhuko and her co-accused to "immediately make the necessary disclosures" in accordance with Rule 67 of the Rules if they wished to raise an alibi.[1475] On 4 March 2005, Nyiramasuhuko filed a notice of alibi indicating that

[1467] Trial Judgement, para. 2540. *See also ibid.*, paras. 2406, 2426, 2428.
[1468] Trial Judgement, para. 2540. Hotel Ihuliro was owned by Nyiramasuhuko's husband, Maurice Ntahobali. *See ibid.*, para. 3107.
[1469] Trial Judgement, para. 2536.
[1470] Trial Judgement, para. 2577. *See also ibid.*, para. 2543.
[1471] Trial Judgement, para. 2577. *See also ibid.*, paras. 2543, 2570, 2574, 2575.
[1472] Trial Judgement, para. 2577. *See also ibid.*, para. 2544.
[1473] Trial Judgement, paras. 2644, 2702, 2715, 2773, 2779. *See also ibid.*, paras. 2780, 2781.
[1474] *See infra*, para. 749.
[1475] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Confidential Prosecutor's Motion to be Served with Particulars of Alibi Pursuant to Rule 67(A)(ii)(a), 1 March 2005 ("Alibi Decision"), para. 29, p. 7; Trial Judgement, para. 2536. *See also* Trial Judgement, para. 6439.

she was in Murambi, Gitarama Prefecture, from the end of May to approximately 3 June 1994, and later in Muramba, Gisenyi Prefecture, from about 4 June until 2 July 1994.[1476]

658. In the Trial Judgement, the Trial Chamber observed that the Nyiramasuhuko Notice of Alibi had been proffered "almost four months" after the Prosecution closed its case on 5 November 2004 and consequently found it to be belated.[1477] It further held that the will-say statements of Nyiramasuhuko's alibi witnesses disclosed to the Prosecution in January and February 2005 were no substitute for the requisite notice under Rule 67(A) of the Rules and, in any event, were also belated and did not specify that they related to Nyiramasuhuko's alibis.[1478] The Trial Chamber emphasised that a late notice of alibi may suggest that the alibi is fabricated, tailored to answer the Prosecution case, and took this into account in assessing Nyiramasuhuko's alibis.[1479]

659. Nyiramasuhuko submits that, in the circumstances of this case, the Trial Chamber erred in law and in fact in finding that her notice of alibi was filed late and by using the timing of its filing as a basis for discrediting it.[1480] She argues that the Nyiramasuhuko Notice of Alibi was filed in accordance with the Alibi Decision.[1481] According to Nyiramasuhuko, the Trial Chamber failed to consider that she was not in a position to file a notice of alibi prior to the commencement of the trial since she was not notified of the dates between April and July 1994 during which she allegedly committed crimes at the prefectoral office.[1482] Nyiramasuhuko contends that she was still unable to discern these dates after the conclusion of the Prosecution case and asserts that this matter was also conceded by the Prosecution.[1483]

660. Nyiramasuhuko further submits that it was unreasonable for the Trial Chamber to conclude that it was possible that her alibis were recently fabricated and hold the belated nature of her notice of alibi against her as the Prosecution was in possession of materials and information putting it on notice about her whereabouts between April and July 1994.[1484] In her view, the Trial Chamber erred

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[1476] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Avis au Procureur de l'intention de la Défense de Pauline Nyiramasuhuko d'invoquer une défense d'alibi*, 4 March 2005 (confidential) ("Nyiramasuhuko Notice of Alibi"). *See also* Trial Judgement, para. 2536.
[1477] *See* Trial Judgement, paras. 2536, 6427.
[1478] Trial Judgement, para. 2537.
[1479] Trial Judgement, paras. 2536, 2550, 2562.
[1480] Nyiramasuhuko Notice of Appeal, para. 4.1; Nyiramasuhuko Appeal Brief, para. 686.
[1481] Nyiramasuhuko Notice of Appeal, para. 4.3.
[1482] Nyiramasuhuko Notice of Appeal, para. 4.2; Nyiramasuhuko Appeal Brief, para. 687. *See also* Nyiramasuhuko Reply Brief, paras. 182, 183.
[1483] *See* Nyiramasuhuko Appeal Brief, para. 688, *referring to* Prosecution Closing Brief, paras. 145, 242 at pp. 72, 73, 99, Nyiramasuhuko Closing Arguments, T. 22 April 2009 pp. 12, 13.
[1484] Nyiramasuhuko Notice of Appeal, paras. 4.4-4.7; Nyiramasuhuko Appeal Brief, paras. 690-693. Specifically, Nyiramasuhuko argues that: (i) her pre-defence brief and the will-say statements of relevant witnesses, filed within the requisite time-limit, informed the Prosecution that she claimed to have been at the seat of the Interim Government in Gitarama or Gisenyi during the relevant period; (ii) the Prosecution was provided in a timely manner with all necessary information to interview Denise Ntahobali, who could confirm that she resided in Muramba from 1 June 1994; and (iii) the Prosecution was in possession of her 1994 personal diary since 1997, which informed it that she was residing at

in failing to acknowledge that the Prosecution did not suffer prejudice from the late filing of her notice of alibi.[1485]

661. The Prosecution responds that the Trial Chamber correctly found that Nyiramasuhuko filed a late notice of alibi and took it into account in its findings.[1486] It argues that Nyiramasuhuko had sufficient information about the crimes charged to file a timely alibi notice and that her claim that other documents could substitute it is baseless.[1487] The Prosecution adds that it never conceded that Nyiramasuhuko had not been provided with the dates when the crimes were alleged to have occurred.[1488]

662. Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the Prosecution of its intent to enter a defence of alibi "[a]s early as reasonably practicable and in any event prior to the commencement of the trial". In its Alibi Decision, the Trial Chamber did not permit Nyiramasuhuko to derogate from this provision but merely directed "the Defence to immediately make the necessary disclosures in accordance with Rule 67 [of the Rules], if it wishe[d] to rely on the defence of alibi".[1489] The Nyiramasuhuko Notice of Alibi was filed on 4 March 2005,[1490] nearly four months after the conclusion of the Prosecution case on 5 November 2004, and after the commencement of the Defence case on 31 January 2005.[1491] Accordingly, the Trial Chamber did not err in finding that Nyiramasuhuko's notice of alibi provided pursuant to Rule 67 of the Rules was belated.

663. Nyiramasuhuko advances a number of arguments to justify the late filing of her notice of alibi, such as not being notified of the dates on which she allegedly committed the crimes at the prefectoral office and not having an alibi for the entire period between April and July 1994.[1492] However, these arguments do not change the fact that the Nyiramasuhuko Notice of Alibi was filed after the commencement of the trial and in a manner that was inconsistent with Rule 67(A)(ii)(a) of the Rules. Moreover, the Appeals Chamber does not accept Nyiramasuhuko's argument regarding the broad timeframe of the alleged crimes, as she was only required to indicate in her notice of alibi that she was not in a position to commit the crimes with which she was charged.[1493] In this regard, it

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the various seats of the Interim Government between April and June 1994. *See idem*. *See also* Nyiramasuhuko Reply Brief, paras. 185, 186.

[1485] Nyiramasuhuko Notice of Appeal, para. 4.5. *See also* Nyiramasuhuko Reply Brief, para. 184.

[1486] Prosecution Response Brief, paras. 382, 383, 386.

[1487] Prosecution Response Brief, paras. 385, 386.

[1488] Prosecution Response Brief, para. 385.

[1489] *See* Alibi Decision, p. 7.

[1490] Nyiramasuhuko Notice of Alibi. *See also* Trial Judgement, para. 2536.

[1491] *See* Trial Judgement, paras. 2536, 6427, 6433.

[1492] *See* Nyiramasuhuko Notice of Appeal, paras. 4.2, 4.3; Nyiramasuhuko Appeal Brief, paras. 687, 688.

[1493] *See*, *e.g*., *Renzaho* Appeal Judgement, para. 303; *Nchamihigo* Appeal Judgement, para. 92; *Čelebići* Appeal Judgement, para. 581.

is worth noting that the Nyiramasuhuko Notice of Alibi generally indicates that she was in Murambi from the end of May to around 3 June 1994 and later in Muramba from around 4 June to 2 July 1994.[1494] The Appeals Chamber also notes that Nyiramasuhuko was able to provide at trial a very detailed account of her whereabouts from April to July 1994, including during her admitted presence in Butare.[1495] In addition, the Appeals Chamber observes that, contrary to Nyiramasuhuko's argument, the Prosecution did not concede that she lacked information regarding the dates of the crimes she allegedly committed between April and July 1994.[1496]

664. The Appeals Chamber recalls that the manner in which an alibi is presented may impact its credibility.[1497] The Appeals Chamber has also previously held that failure to raise an alibi in a timely manner may suggest fabrication of the alibi in order to respond to the Prosecution case.[1498] It was therefore correct for the Trial Chamber to note that "a late notice of alibi may suggest that the alibis are fabricated"[1499] and fully within its discretion to take into account Nyiramasuhuko's failure to provide her notice of alibi on time when assessing the alibi evidence.[1500] Contrary to Nyiramasuhuko's assertion, the Trial Chamber was not required to consider whether the Prosecution suffered prejudice from the belated disclosure.[1501]

665. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in finding that the Nyiramasuhuko Notice of Alibi was belated and in taking it into account in its assessment of the alibi evidence.

2. Assessment of Alibi Evidence

666. Before turning to Nyiramasuhuko's challenges to the Trial Chamber's assessment of the alibi evidence, the Appeals Chamber recalls that an accused does not bear the burden of proving his

[1494] *See* Nyiramasuhuko Notice of Alibi.
[1495] *See* Trial Judgement, paras. 2406-2417, 2419-2428, 2431, 2434-2442, 2540, 2542, 2544, 2549, 2551, 2552, 2558, 2559, 2563, 2564, 2569, 2571, 2572, 2574, 2576; Nyiramasuhuko, T. 6 September 2005 pp. 27-36, 42, 49, 50, T. 27 September 2005 pp. 61-64, T. 29 September 2005 pp. 9, 48-52, T. 3 October 2005 pp. 60-62, T. 4 October 2005 pp. 7-10, 17, 47-49, T. 5 October 2005 pp. 11-19, 27-46, T. 6 October 2005 pp. 4, 6-9, 12-14, 25-32.
[1496] *See* Nyiramasuhuko Appeal Brief, para. 688. The paragraphs of the Prosecution Closing Brief to which Nyiramasuhuko refers in support of her assertion merely discuss the refugees' inability to recall the exact dates on which they arrived at the Butare Prefecture Office in April and May 1994 or on which the abductions of the refugees took place during Nyiramasuhuko's and Ntahobali's visits to the prefectoral office between the end of April and late June 1994. *See* Prosecution Closing Brief, paras. 145, 242 at pp. 72, 73, 99.
[1497] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 113; *Kanyarukiga* Appeal Judgement, para. 97; *Munyakazi* Appeal Judgement, para. 18.
[1498] *See Ndahimana* Appeal Judgement, para. 114; *Kanyarukiga* Appeal Judgement, para. 97.
[1499] Trial Judgement, para. 2536.
[1500] *See Ndahimana* Appeal Judgement, para. 113; *Munyakazi* Appeal Judgement, para. 18; *Kalimanzira* Appeal Judgement, para. 56.
[1501] *See Ndahimana* Appeal Judgement, para. 113; *Kanyarukiga* Appeal Judgement, para. 98.

alibi beyond reasonable doubt.[1502] Rather, the accused must simply produce evidence tending to show that he was not present at the time of the alleged crime.[1503] If the alibi is reasonably possibly true, it must be accepted.[1504] When an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[1505]

(a) Alibi for 14 to 16 May 1994

667. The Trial Chamber noted Nyiramasuhuko's alibi for the period from 12 April to 1 June 1994, according to which she moved to and stayed in Murambi with the Interim Government.[1506] It also noted the distance between Murambi and Butare Town as well as Nyiramasuhuko's acknowledgement that it was possible to make a return trip by car in a single day.[1507] The Trial Chamber stated that it was not convinced by Nyiramasuhuko's claim that she did not have access to a car until 25 May 1994.[1508] In light of the above, the Trial Chamber found that evidence of Nyiramasuhuko's stay in Murambi between 12 April and early June 1994 "in and of itself, [did] not raise a reasonable doubt" regarding her presence at the Butare Prefecture Office between mid-May and early June 1994, especially in light of Nyiramasuhuko's admission that she frequently travelled to Butare Town to visit her family.[1509]

668. The Trial Chamber further noted Nyiramasuhuko's admitted presence in Butare Town on several dates from mid-April to early July 1994 during which she claimed going directly to Hotel Ihuliro to visit her family and remaining there at night.[1510] However, it found that, irrespective of this claim, when "Nyiramasuhuko was at Hotel Ihuliro, she was in very close proximity to the [Butare Prefecture Office]".[1511] The Trial Chamber found that Nyiramasuhuko's alibi about being bed-ridden at Hotel Ihuliro from 14 to 16 May 1994 was not reasonably possibly true on the basis of: (i) the conflicting testimony of Defence witnesses;[1512] (ii) the fact that the only witnesses who testified in support of her alibi were Nyiramasuhuko's "family members who may have had a

[1502] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.
[1503] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.
[1504] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.
[1505] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 18; *Karera* Appeal Judgement, para. 330.
[1506] Trial Judgement, para. 2540.
[1507] *See* Trial Judgement, para. 2541.
[1508] Trial Judgement, para. 2542.
[1509] Trial Judgement, para. 2543.
[1510] Trial Judgement, para. 2544. *See also ibid.*, para. 2540.
[1511] Trial Judgement, para. 2545.
[1512] Trial Judgement, para. 2550. *See also ibid.*, paras. 2547-2549.

motive to exculpate her";[1513] and (iii) Nyiramasuhuko's failure to provide any notice of alibi prior to the testimony of her Defence Witness Clarisse Ntahobali in February 2005.[1514]

669. Nyiramasuhuko submits that the Trial Chamber's finding that it was not convinced by her claim that she had no access to a car until 25 May 1994 despite Defence evidence to the contrary is speculative.[1515] She contends that the Trial Chamber reversed the burden of proof and violated her right to be presumed innocent by requiring her to convince it that she did not have access to a car until 25 May 1994 and that she was not at the prefectoral office either at night or during the day between April and July 1994, except for one morning on 16 May 1994.[1516]

670. Nyiramasuhuko further submits that the Trial Chamber erred in finding that her alibi regarding her stay at Hotel Ihuliro from 14 to 16 May 1994 was not reasonably possibly true.[1517] In particular, she argues that the Trial Chamber erred in rejecting her alibi for this period because the witnesses who testified in its support were her relatives.[1518] In Nyiramasuhuko's view, while a cautious approach to the testimony of her family members was warranted, the Trial Chamber could not simply reject their evidence on that basis and was required to analyse their credibility and provide concrete reasons for its adverse assessment.[1519] She adds that, because most of her relatives lived at Hotel Ihuliro, they were best situated to provide evidence of her stay there.[1520]

671. Moreover, Nyiramasuhuko contends that the Trial Chamber erred in finding that the testimony of Defence witnesses about her stay at Hotel Ihuliro with her family from 14 to 16 May 1994 was inconsistent.[1521] She asserts that, contrary to the Trial Chamber's finding, she only testified about being unwell and made no assertion about being bed-ridden, and therefore no contradiction existed between her testimony and that of members of her family, who testified that she was ill without mentioning that she was bed-ridden.[1522] She also claims that the Trial Chamber erroneously considered Witness Clarisse Ntahobali to be an alibi witness and failed to provide reasons for its finding that her evidence, given prior to the filing of the Nyiramasuhuko Notice of Alibi, affected the testimony of other Defence witnesses with respect to her illness and stay at Hotel

[1513] Trial Judgement, para. 2546. *See also ibid*., para. 2550.
[1514] Trial Judgement, para. 2550.
[1515] Nyiramasuhuko Notice of Appeal, para. 4.9, *referring to* Trial Judgement, para. 2542.
[1516] Nyiramasuhuko Notice of Appeal, para. 4.10; Nyiramasuhuko Appeal Brief, para. 705, *referring to* Trial Judgement, para. 2542. *See also* Nyiramasuhuko Reply Brief, paras. 190-192.
[1517] Nyiramasuhuko Notice of Appeal, para. 4.16; Nyiramasuhuko Appeal Brief, para. 706.
[1518] Nyiramasuhuko Notice of Appeal, paras. 1.50, 4.15; Nyiramasuhuko Appeal Brief, paras. 305, 702, *referring to* Trial Judgement, paras. 2546, 2550.
[1519] Nyiramasuhuko Appeal Brief, paras. 308, 702. *See also* Nyiramasuhuko Notice of Appeal, para. 4.35; Nyiramasuhuko Reply Brief, para. 189.
[1520] Nyiramasuhuko Appeal Brief, para. 306.
[1521] Nyiramasuhuko Notice of Appeal, para. 4.11.
[1522] Nyiramasuhuko Notice of Appeal, paras. 4.12, 4.13, 4.15, 4.16; Nyiramasuhuko Appeal Brief, paras. 696, 697, 974, 975, *referring*, *inter alia*, *to* Trial Judgement, paras. 2547-2549. *See also* Nyiramasuhuko Reply Brief, para. 187.

Ihuliro from 14 to 16 May 1994.[1523] In addition, Nyiramasuhuko submits that the Trial Chamber erred in its assessment of the testimony of her Defence Witness Maurice Ntahobali about her access to his car, arguing that the witness did not specify the date he made the car available to her and therefore did not contradict, but instead corroborated, her testimony that she did not leave Hotel Ihuliro until the morning of 16 May 1994.[1524]

672. The Prosecution responds that the Trial Chamber applied the correct burden of proof and that the Trial Chamber's reference to not being "convinced" related to its assessment of Nyiramasuhuko's credibility.[1525] The Prosecution argues that, in any event, Nyiramasuhuko's convictions were not based on the Trial Chamber being convinced of her access to a car prior to 25 May 1994 given Nyiramasuhuko's own admission of her presence in Butare in mid-May 1994, her access to her husband's car, and the prefectoral office being in close proximity to Hotel Ihuliro.[1526] It further submits that the Trial Chamber correctly found that Nyiramasuhuko's alibi for her visit to Butare Town from 14 to 16 May 1994 could not be reasonably possibly true.[1527] The Prosecution asserts that the Trial Chamber properly took into consideration Nyiramasuhuko's failure to file her notice of alibi prior to Clarisse Ntahobali's testimony and the totality of the evidence relevant to Nyiramasuhuko's alibi, including the testimony of witnesses not listed in the Nyiramasuhuko Notice of Alibi.[1528] The Prosecution adds that the Trial Chamber reasonably assessed the testimony of Nyiramasuhuko's family members with caution and was not required to provide the level of detail for its assessment of their credibility that Nyiramasuhuko asserts was required.[1529]

673. The Appeals Chamber considers that the Trial Chamber's finding that it was "not convinced that Nyiramasuhuko did not have access to a car until 25 May 1994" was neither speculative nor suggestive of a shift in the burden of proof.[1530] The Trial Chamber provided a detailed analysis of the evidence adduced by Nyiramasuhuko regarding her access to transportation, such as other people's vehicles in April and May 1994 and, in the context of this analysis, considered that Nyiramasuhuko "had means of transport" to Butare despite her move to Murambi with the Interim Government in mid-April 1994.[1531] The Appeals Chamber considers that, by stating that it was "not convinced", the Trial Chamber was expressing the view that Nyiramasuhuko's evidence that she had no access to a car was not sufficiently credible and thus failed to raise a reasonable possibility

[1523] Nyiramasuhuko Appeal Brief, paras. 699-701. *See also* Nyiramasuhuko Notice of Appeal, para. 4.18.
[1524] Nyiramasuhuko Notice of Appeal, para. 4.14; Nyiramasuhuko Appeal Brief, para. 698.
[1525] Prosecution Response Brief, para. 400.
[1526] Prosecution Response Brief, para. 400.
[1527] Prosecution Response Brief, paras. 388, 391-394, 401.
[1528] Prosecution Response Brief, paras. 395, 396.
[1529] Prosecution Response Brief, para. 397.
[1530] Trial Judgement, para. 2542.

that Nyiramasuhuko was without a vehicle for as long as she claimed. The Appeals Chamber finds that Nyiramasuhuko fails to show any error in this regard.

674. With respect to Nyiramasuhuko's contention regarding her family members' evidence, the Appeals Chamber recalls that it is settled jurisprudence that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence.[1532] It was therefore within the Trial Chamber's discretion to entertain concerns about Ntahobali's as well as Nyiramasuhuko Defence Witnesses Céline Nyiraneza's, WBUC's, Clarisse Ntahobali's, and Maurice Ntahobali's possible motives to exculpate Nyiramasuhuko because of their family ties and examine their testimony with appropriate caution.[1533] Although the Trial Chamber did not explicitly assess their individual credibility, it articulated the reasons for rejecting Nyiramasuhuko's alibi for her stay at Hotel Ihuliro from 14 to 16 May 1994, which were not based solely on these witnesses' connection to Nyiramasuhuko. The Trial Chamber found that their testimonies conflicted with respect to Nyiramasuhuko's lack of mobility due to her illness and considered the absence of any notice of alibi prior to the testimony of Clarisse Ntahobali.[1534]

675. Nyiramasuhuko challenges the Trial Chamber's finding that "there was conflicting evidence as to whether Nyiramasuhuko stayed at Hotel Ihuliro during her visits to Butare."[1535] In assessing the evidence, the Trial Chamber considered that "Nyiramasuhuko claim[ed] to have been bed-ridden" during her stay in Butare from 14 to 16 May 1994.[1536] However, a review of Nyiramasuhuko's testimony reveals that she did not testify about being bed-ridden but merely about being unwell and not leaving Hotel Ihuliro during this visit.[1537] This was explicitly recalled by the Trial Chamber in the summary of her evidence.[1538] The Trial Chamber's reference to Nyiramasuhuko testifying about being bed-ridden was therefore erroneous. The Appeals Chamber nonetheless considers that this error does not affect the Trial Chamber's finding that there was conflicting evidence as to whether Nyiramasuhuko stayed at Hotel Ihuliro. Indeed, as expressly noted by the Trial Chamber, Ntahobali, as well as Witnesses Nyiraneza and WBUC, testified that

[1531] Trial Judgement, para. 2542. *See also ibid*., para. 2543.
[1532] *See*, *e.g*., *Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[1533] *See* Trial Judgement, para. 2546.
[1534] Trial Judgement, paras. 2547, 2548, 2550.
[1535] Trial Judgement, para. 2547.
[1536] Trial Judgement, para. 2547, *referring to* Nyiramasuhuko, T. 4 October 2005 p. 8.
[1537] *See* Nyiramasuhuko, T. 4 October 2005 p. 8 ("Q. […] Did you remain in Butare over that week-end of the 14th to the 15 of May 1994? A. Yes. I was not well, myself, and for that reason I was not in a hurry to return the next day. So I spent the night in Butare on the 14th and on the 15th. Then I felt much better on the 16th. And it is on that date that I left Butare to go to Gitarama. Q. Madam, before you left on the 16th of May 1994, did you go anywhere in Butare outside of the Hotel Ihuliro? A. I did not leave the hotel over those days. I only left the hotel in the morning of the 16th.").
[1538] *See* Trial Judgement, para. 2416.

Nyiramasuhuko was housebound due to her illness,[1539] while Witness Maurice Ntahobali stated that, despite having malaria, Nyiramasuhuko "was moving around at one point and borrowed his service vehicle during her visit".[1540]

676. As for Nyiramasuhuko's argument regarding the assessment of Clarisse Ntahobali's testimony, the Appeals Chamber notes that, contrary to Nyiramasuhuko's assertion,[1541] the Trial Chamber did not hold that Clarisse Ntahobali's testimony "affected" the remaining Defence evidence. The Trial Chamber clearly specified that it did not consider Nyiramasuhuko's alibi reasonably possibly true based, in part, on her "failure to provide any notice of alibi prior to the testimony of Clarisse Ntahobali", not on the basis of Clarisse Ntahobali's testimony.[1542] The Appeals Chamber considers that a reasonable trier of fact could have expressly taken into account Nyiramasuhuko's failure to provide notice prior to the testimony of Clarisse Ntahobali, who was the first Defence witness to give evidence regarding Nyiramasuhuko's whereabouts during the period when the alleged crimes took place.

677. Finally, the Appeals Chamber considers that Nyiramasuhuko is incorrect in her assertion that her husband, Witness Maurice Ntahobali, confirmed her testimony that she did not leave Hotel Ihuliro until the morning of 16 May 1994. While not specifying when he made his service vehicle available to Nyiramasuhuko, Maurice Ntahobali unambiguously testified that she moved around during this stay in Butare.[1543]

678. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber reversed the burden of proof or erred in its assessment of the alibi evidence for the period of 14 to 16 May 1994.

(b) Alibis for Early June to 19 June 1994

679. The Trial Chamber found that Nyiramasuhuko's alibi for 1 to 3 June 1994, according to which she was in Muramba was not credible.[1544] The Trial Chamber observed that the testimonies of Nyiramasuhuko and her Witness Denise Ntahobali about leaving Murambi for Muramba on 1 June 1994 were inconsistent with the Nyiramasuhuko Notice of Alibi, which specified that

[1539] Trial Judgement, para. 2547, *referring to* Ntahobali, T. 25 April 2006 p. 57, T. 1 June 2006 p. 68, Céline Nyiraneza, T. 24 February 2005 pp. 43, 44, Witness WBUC, T. 1 June 2005 p. 63.
[1540] Trial Judgement, para. 2548, *referring to* Maurice Ntahobali, T. 14 September 2005 pp. 38, 39 (English), p. 43 (French), T. 16 September 2005 p. 61.
[1541] Nyiramasuhuko Appeal Brief, para. 701, *referring to* Trial Judgement, para. 2550.
[1542] Trial Judgement, para. 2550.
[1543] *See* Maurice Ntahobali, T. 13 September 2005 p. 19, T. 14 September 2005 p. 38 ("I know that she went around. At one point in time, a vehicle was placed at her disposal, my service vehicle."), T. 16 September 2005 p. 61 ("Nyiramasuhuko was not bed-ridden during her stay in Butare and I believe I did say that for her movements when that was of primary importance, I did make available to her my own vehicle."). *See also* Trial Judgement, paras. 2480, 2548.

Nyiramasuhuko was in Murambi from the end of May to around 3 June 1994, and after in Muramba from around 4 June until early July 1994.[1545] In addition, the Trial Chamber found Denise Ntahobali not credible for several reasons, including her close relationships with members of Nyiramasuhuko's Defence team.[1546] It also found that the testimony of Witnesses WZJM, Maurice Ntahobali, and Céline Nyiraneza was not "sufficiently specific" to corroborate Nyiramasuhuko's testimony regarding her presence in Muramba from 1 to 3 June 1994.[1547]

680. With regard to Nyiramasuhuko's alibi for 4 to 10 June 1994, the Trial Chamber concluded that, based on Nyiramasuhuko's testimony about her attendance at the Interim Government meetings in Muramba and her 1994 personal diary, Nyiramasuhuko only raised a reasonable doubt about her presence in Butare on 6 and 10 June 1994.[1548] The Trial Chamber did not accept Nyiramasuhuko's alibi for 4 and 5 June 1994 due to concerns about discrepancies in her diary entries, the credibility of the witnesses testifying in support of this alibi, and the lateness and incorrectness of the Nyiramasuhuko Notice of Alibi.[1549] The Trial Chamber similarly rejected Nyiramasuhuko's alibi regarding her attendance at Cabinet meetings in Muramba from 7 to 9 June 1994 based on the lack of support from her diary.[1550] It also took into account conflicting testimonies of Ntahobali and Denise Ntahobali placing Nyiramasuhuko in Butare Town around that time, as well as Nyiramasuhuko's and Denise Ntahobali's evidence that the trip from Butare Town to Muramba took between eight and ten hours together with Nyiramasuhuko's own admission that it was possible to travel to Butare Town and return to Muramba the very next day.[1551] The Trial Chamber further found that Nyiramasuhuko was in Butare Prefecture on 11 June 1994.[1552] It also considered that Nyiramasuhuko's alibi placing her in Muramba from 12 to 16 June and on 18 and

[1544] Trial Judgement, para. 2557. *See also ibid*., para. 2562.
[1545] Trial Judgement, paras. 2552, 2553. *See also ibid*., para. 2562.
[1546] Trial Judgement, para. 2554. The Trial Chamber noted that Denise Ntahobali's husband worked as an investigator for Nyiramasuhuko from August 1999 to the beginning of 2005 and that her brother-in-law was working for Nyiramasuhuko at the time of the trial. *See idem*.
[1547] Trial Judgement, para. 2556.
[1548] *See* Trial Judgement, paras. 2563, 2564, 2570.
[1549] *See* Trial Judgement, paras. 2558, 2559, 2562.
[1550] *See* Trial Judgement, para. 2565.
[1551] Trial Judgement, paras. 2566-2569. The Appeals Chamber notes that the Trial Chamber found that "Nyiramasuhuko admitted that she travelled to Butare on 11 June 1994 and returned the very next day on 12 June 1994. Therefore, the fact that Nyiramasuhuko may have been in Muramba on 6 and 10 June 1994 *means that she could not have been* in Butare between 7 and 9 June 1994." *See ibid.*, para. 2569 (emphasis added, internal reference omitted). However, the Trial Chamber's ultimate conclusion was that Nyiramasuhuko had "*not raised a doubt* as to her presence in Butare between 7 and 9 June 1994." *See ibid*., para. 2570 (emphasis added). *See also ibid.*, para. 2773 ("Although Nyiramasuhuko could not have been present [at the Butare Prefecture Office] on 6 and 10 June 1994, she had ample opportunity to perpetrate these crimes on 7 to 9 June and 11 to 19 June 1994."). In the view of the Appeals Chamber, a holistic reading of the Trial Chamber's findings shows that the Trial Chamber concluded that Nyiramasuhuko failed to raise a reasonable possibility that she was not in Butare Town between 7 and 9 June 1994. *See ibid*., paras. 2565-2570.
[1552] Trial Judgement, para. 2571.

19 June 1994 was not reasonably possibly true but that there was, however, a reasonable possibility that she remained in Muramba on 17 June 1994.[1553]

681. Nyiramasuhuko submits that the Trial Chamber: (i) reversed the burden of proof; (ii) erred in its assessment of her evidence; and (iii) erred in its assessment of other Defence evidence. The Appeals Chamber will consider Nyiramasuhuko's contentions in turn.

(i) Reversal of the Burden of Proof

682. Nyiramasuhuko contends that by requiring her to prove her presence in Muramba between 1 and 11 June 1994, the Trial Chamber reversed the burden of proof.[1554]

683. The Prosecution responds that the Trial Chamber applied the correct burden of proof.[1555]

684. The Appeals Chamber recalls the legal standard applicable to the assessment of alibi evidence set out above.[1556] The Appeals Chamber observes that the Trial Chamber correctly articulated the relevant standard, stating that "[t]here can be no conviction for an allegation which takes place during an alibi that is reasonably possibly true", with the "onus remain[ing] on the Prosecution to prove that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence."[1557] Based on its review of the alibi evidence, the Trial Chamber concluded that the alibi placing Nyiramasuhuko in Muramba from 7 to 9 June, from 12 to 16 June, as well as on 18 and 19 June 1994 was "not reasonably possibly true".[1558] The Appeals Chamber notes that, apart from alleging that the Trial Chamber reversed the burden of proof, Nyiramasuhuko does not advance any argument to substantiate her assertion or point to particular language used by the Trial Chamber that evinces a misapplication of the appropriate standard. The Appeals Chamber therefore rejects Nyiramasuhuko's contention in this respect.

(ii) Nyiramasuhuko's Evidence

685. Nyiramasuhuko submits that the Trial Chamber erred in systematically requiring that her testimony about her whereabouts between April and July 1994 be corroborated by her 1994 personal diary.[1559] In particular, she contends that the Trial Chamber erred in accepting that she

[1553] Trial Judgement, paras. 2574, 2575, 2577.
[1554] Nyiramasuhuko Notice of Appeal, paras. 4.27, 4.36; Nyiramasuhuko Appeal Brief, paras. 724, 736. *See also ibid*., para. 741.
[1555] Prosecution Response Brief, para. 416.
[1556] *See supra*, para. 666.
[1557] Trial Judgement, para. 2538 (internal references omitted). *See also ibid*., paras. 185, 186.
[1558] Trial Judgement, para. 2577.
[1559] Nyiramasuhuko Notice of Appeal, paras. 4.26, 4.29, 4.33, 4.34, 7.22; Nyiramasuhuko Appeal Brief, paras. 724, 726, 895.

attended Interim Government meetings in Muramba only when her diary contained entries to that effect.[1560] Nyiramasuhuko argues that, except for stating that she had a motive to exculpate herself, the Trial Chamber failed to assess her credibility, which, in her view, evinces bias against her.[1561]

686. Nyiramasuhuko further submits that the Trial Chamber erred in finding that, between 1 and 10 June 1994, she was at the Interim Government's headquarters in Murambi rather than in Muramba without explaining why it rejected her testimony that the Interim Government fled to Muramba on 1 June 1994 due the advancement of the RPF.[1562] Nyiramasuhuko posits that even the Prosecution evidence established that the flight took place in the beginning of June 1994.[1563] She adds that the Trial Chamber erred in failing to consider that the date specified in the Nyiramasuhuko Notice of Alibi as to when she left Murambi for Muramba in early June 1994 was an inadvertent error, which did not come to her attention until the issuance of the Trial Judgement.[1564] Nyiramasuhuko alleges that Witness WZJM, while unable to provide a specific date, either "supported or corroborated" her testimony and that of Denise Ntahobali about Nyiramasuhuko's presence in Muramba at the beginning of June.[1565]

687. In addition, Nyiramasuhuko contends that it was unreasonable for the Trial Chamber to reject her claim that she attended a Cabinet meeting on 4 June 1994.[1566] She argues that the mention of "Cabinet Meeting Decisions" in her diary on the 4 June page supports her testimony that she was in Muramba attending a Cabinet meeting on 4 June 1994.[1567]

688. Nyiramasuhuko adds that when considering the meetings of 7 and 8 June 1994, the Trial Chamber erred in deeming unimportant the corresponding missing pages of the diary and in failing to construe their absence in her favour, in light of the Prosecution's failure to preserve this evidence and notice the missing pages.[1568] She argues that the Trial Chamber erred in making an adverse

[1560] Nyiramasuhuko Notice of Appeal, para. 4.26; Nyiramasuhuko Appeal Brief, para. 726.
[1561] Nyiramasuhuko Appeal Brief, para. 725. *See also* Nyiramasuhuko Notice of Appeal, paras. 4.28, 4.35.
[1562] Nyiramasuhuko Notice of Appeal, para. 7.26; Nyiramasuhuko Appeal Brief, para. 730.
[1563] Nyiramasuhuko Appeal Brief, para. 730.
[1564] Nyiramasuhuko Appeal Brief, paras. 707, 710, *referring to* Trial Judgement, paras. 2552, 2553. *See also* Nyiramasuhuko Notice of Appeal, para. 4.8. Nyiramasuhuko submits that the will-say statement of Denise Ntahobali filed five weeks before the Nyiramasuhuko Notice of Alibi notified the Prosecution that Denise Ntahobali left Hotel Ihuliro with Nyiramasuhuko for Murambi at the end of May and one or two days later for Muramba. She claims that it was unreasonable for the Trial Chamber to conclude that she would deliberately contradict the testimony of her own witness by the Nyiramasuhuko Notice of Alibi, especially because Denise Ntahobali confirmed the dates specified in her will-say statement not in the Nyiramasuhuko Notice of Alibi. *See* Nyiramasuhuko Appeal Brief, paras. 708, 709 (French), *referring to* Denise Ntahobali, T. 9 June 2005 pp. 32, 50-52 (French).
[1565] Nyiramasuhuko Appeal Brief, paras. 733-736, *referring to* Witness WZJM, T. 21 February 2005 pp. 77-79, T. 22 February 2005 pp. 12, 13, 21-25. *See also* Nyiramasuhuko Reply Brief, paras. 197, 198.
[1566] Nyiramasuhuko Notice of Appeal, para. 4.25; Nyiramasuhuko Appeal Brief, para. 727, *referring to* Trial Judgement, para. 2558. *See also* Nyiramasuhuko Reply Brief, para. 200.
[1567] Nyiramasuhuko Notice of Appeal, para. 4.25; Nyiramasuhuko Appeal Brief, paras. 727, 728.
[1568] Nyiramasuhuko Notice of Appeal, paras. 4.30, 4.31, *referring to* Trial Judgement, para. 2565.

finding against her, even though she opposed the introduction of the diary into evidence and raised the issue of the missing pages.[1569]

689. Nyiramasuhuko also submits that it was unreasonable for the Trial Chamber to conclude that her testimony about returning to see her family in Butare on 11 June 1994 was inconsistent with the testimonies of Witnesses Denise, Maurice, and Clarisse Ntahobali, Nyiraneza, WBUC, WZJM, and CEM, who testified about her return to Hotel Ihuliro about a week rather than ten days after she left Butare on 31 May 1994.[1570] Nyiramasuhuko contends that the Trial Chamber erred in failing to consider that she was able to provide exact dates because of her diary and that without such contemporaneous evidence, it was unreasonable to consider a "few days' difference as contradictions", given the time that had elapsed since the events.[1571]

690. The Prosecution responds that the Trial Chamber properly evaluated the probative value of Nyiramasuhuko's diary as well as her testimony together with other evidence and reasonably rejected her alibis for various dates between 1 and 19 June 1994.[1572] It further submits that: (i) the Trial Chamber's consideration of Nyiramasuhuko's testimony implies assessment of her credibility, for which it was not required to provide detailed findings; (ii) the evidence establishing the flight of the Interim Government from Murambi to Muramba in the beginning of June 1994 was too general to corroborate Nyiramasuhuko's alibi for early June 1994; (iii) the Trial Chamber correctly took into account the inconsistencies between the Nyiramasuhuko Notice of Alibi and the testimonies of Nyiramasuhuko and Denise Ntahobali as to when they departed Murambi for Muramba; and (iv) the Trial Chamber reasonably found that the testimony of Witness WZJM was not sufficiently specific to corroborate Nyiramasuhuko's alibi for the impugned period.[1573]

691. Nyiramasuhuko replies, *inter alia*, that there is no contradiction between her notice of alibi and her testimony as to when she left for Muramba as the dates provided in the Nyiramasuhuko Notice of Alibi were only an approximation.[1574]

692. The Appeals Chamber recalls that trial chambers have full discretionary power in assessing the credibility of witnesses and in determining the weight to be accorded to their respective

[1569] Nyiramasuhuko Notice of Appeal, para. 4.32, *referring to* Trial Judgement, para. 2565. *See also* Nyiramasuhuko Reply Brief, para. 201.
[1570] Nyiramasuhuko Notice of Appeal, para. 4.22, *referring to ibid*., para. 4.16, Trial Judgement, para. 2555. Although Nyiramasuhuko refers to Witness "WHJM", the Appeals Chamber understands Nyiramasuhuko to be referring to Witness WZJM as no witness under the pseudonym "WHJM" appears to have testified at trial. *See* Nyiramasuhuko Appeal Brief, paras. 733-736 (French).
[1571] Nyiramasuhuko Notice of Appeal, para. 4.23, *referring to* Trial Judgement, para. 2557.
[1572] Prosecution Response Brief, paras. 419, 421-423, 426. *See also* AT. 14 April 2015 p. 54.
[1573] Prosecution Response Brief, paras. 403, 414, 417, 424.
[1574] Nyiramasuhuko Reply Brief, para. 194.

testimony.[1575] This assessment is based on a number of factors, including the witness's demeanour in court, his role in the events in question, the plausibility and clarity of the witness's testimony, whether there are contradictions or inconsistencies in his successive statements or between his testimony and other evidence, any prior examples of false testimony, any motivation to lie, and the witness's responses during cross-examination.[1576] Trial chambers are also endowed with the discretion to decide in the circumstances of each case whether corroboration is necessary.[1577]

693. The Appeals Chamber considers that a reasonable trier of fact could have questioned the credibility of Nyiramasuhuko's alibis in the absence of corroboration given the inherent self-interest of her testimony. In this regard, the Trial Chamber properly expressed caution in assessing Nyiramasuhuko's testimony in light of her "obvious motive to exculpate herself" and deemed "Nyiramasuhuko's diary useful in evaluating consistencies and inconsistencies in Nyiramasuhuko's testimony."[1578] Similarly, the Appeals Chamber considers that a reasonable trier of fact could have disbelieved Nyiramasuhuko's alibi in instances where the diary entries she sought to rely on were inconsistent with and provided little support for her claims of attendance of Interim Government meetings in Muramba.[1579] Contrary to Nyiramasuhuko's contention, the Trial Chamber's detailed consideration of the alibi evidence pertaining to June 1994, including Nyiramasuhuko's testimony, shows that the Trial Chamber assessed her credibility to find that her testimony was not sufficiently credible to accept her alibi as reasonably possibly true in the absence of credible corroboration.[1580] The Appeals Chamber fails to see how this determination evinces bias against Nyiramasuhuko on the part of the Trial Chamber.

694. Furthermore, the Appeals Chamber finds no merit in Nyiramasuhuko's argument regarding the date of the Interim Government's relocation from Murambi to Muramba. The Trial Chamber did not make a specific finding that Nyiramasuhuko was at the Interim Government's headquarters in Murambi rather than Muramba between 1 and 10 June 1994 and did not reject Nyiramasuhuko's testimony in relation to the date or the circumstances of the flight of the Interim Government to Muramba in June 1994.[1581] Instead, the Trial Chamber rejected Nyiramasuhuko's claim that she was in Muramba from 1 to 5 June and from 7 to 9 June 1994 as not credible based on an

[1575] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 45; *Ndindiliyimana et al*. Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Nahimana et al*. Appeal Judgement, para. 194.
[1576] *See Kanyarukiga* Appeal Judgement, para. 121. *See also Bikindi* Appeal Judgement, para. 114; *Nchamihigo* Appeal Judgement, para. 47.
[1577] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Munyakazi* Appeal Judgement, para. 25; *Karera* Appeal Judgement, para. 45.
[1578] Trial Judgement, para. 2539.
[1579] *See* Trial Judgement, paras. 2558, 2559, 2562, 2565, 2574, 2575.
[1580] *See* Trial Judgement, paras. 2427-2439, 2558, 2559, 2561, 2563-2565, 2571, 2572, 2574, 2575.
[1581] *See* Trial Judgement, paras. 2552, 2553.

inconsistency between her testimony and the Nyiramasuhuko Notice of Alibi as well as because of a lack of credibility of and corroboration from Defence evidence.[1582]

695. In relation to the discrepancy about the date of Nyiramasuhuko's departure for Muramba, the Trial Chamber noted that both Nyiramasuhuko and Denise Ntahobali indicated that they left Murambi on 1 June 1994 and arrived in Muramba on that same day, their departure being prompted by the advancement of the hostile forces.[1583] It found that Nyiramasuhuko's presence in Muramba on 1 June 1994 was inconsistent with the Nyiramasuhuko Notice of Alibi, which provided that she was in Murambi "from the end of May to around 3 June 1994" and then in Muramba "from around 4 June 1994 to early July 1994."[1584] The Appeals Chamber notes that Nyiramasuhuko's argument in reply that her notice of alibi merely approximated the date of the departure for Muramba contradicts the allegation of error and arguments that she advanced in her notice of appeal and appeal brief. While endowed with discretion not to consider contradictory submissions,[1585] the Appeals Chamber nevertheless observes that the use of the term "around" to estimate the timing of the departure for Muramba in the Nyiramasuhuko Notice of Alibi was noted by the Trial Chamber several times.[1586] Moreover, apart from alleging that the impugned date was an unintentional oversight, Nyiramasuhuko does not substantiate her claim that it was unreasonable for the Trial Chamber to consider the discrepancy as to the dates in assessing the totality of the evidence she tendered.

696. The Appeals Chamber similarly discerns no error in the Trial Chamber's finding that the testimony of Witness WZJM regarding Nyiramasuhuko's presence in Muramba in June 1994 "was not sufficiently specific to corroborate Nyiramasuhuko's assertion that it was on 1, 2 and 3 June 1994."[1587] Indeed, Witness WZJM merely recalled seeing Nyiramasuhuko for the first time in Muramba in early June 1994 and subsequently on a number of other occasions without specifying the dates in corroboration of Nyiramasuhuko's alibi.[1588] Nyiramasuhuko cites the passage of time as a reason for Witness WZJM's inability to provide exact dates,[1589] but fails to show how this demonstrates that the Trial Chamber's finding was unreasonable.

[1582] *See* Trial Judgement, paras. 2551-2559, 2562, 2565-2570.
[1583] *See* Trial Judgement, para. 2552. The Appeals Chamber notes that Nyiramasuhuko is incorrect in asserting that in her will-say statement, Denise Ntahobali specified the dates on which she and Nyiramasuhuko left Butare for Murambi and subsequently for Muramba as it merely repeats that she saw her "mother again at the end of May 1994 at Hotel Ihuliro" and that "around the beginning of June" the witness travelled from Murambi to Muramba. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Disclosure, 24 January 2005 (originally filed in French, English translation filed on 8 February 2005) (confidential), p. 1371 (Registry pagination).
[1584] Trial Judgement, para. 2553.
[1585] *See supra*, para. 35.
[1586] *See* Trial Judgement, paras. 2536, 2553. *See also* Nyiramasuhuko Notice of Alibi ("*Gitarama à Murambi: fin mai 1994 aux environs du 3 juin 1994*", "*Gisenyi à Muramba: aux environs du 4 juin 1994 jusqu'au 2 juillet 1994*").
[1587] Trial Judgement, para. 2556.
[1588] *See* Witness WZJM, T. 21 February 2005 pp. 76, 77, 79.
[1589] *See* Nyiramasuhuko Appeal Brief, para. 735.

697. Turning to Nyiramasuhuko's contention regarding the Trial Chamber's assessment of her alibi for 4 June 1994, the Trial Chamber noted that Nyiramasuhuko sought to rely on her diary entries of 3 and 4 June 1994 in support of her attendance at a Cabinet meeting in Muramba on the latter date, yet the only dated notations that appeared on the 4 June entry were notes pertaining to a meeting on 17 June 1994.[1590] The Trial Chamber also noted Nyiramasuhuko's reliance on a series of entries following the title "Cabinet Meeting Decisions", which otherwise contained neither the date nor the location of the meeting where they were adopted.[1591] Recalling Nyiramasuhuko's own admission that the recorded events only occasionally coincided with dates of the diary entries on which the event occurred, the Trial Chamber concluded that the entry of 4 June 1994 "provid[ed] little support for Nyiramasuhuko's contention that she attended a Cabinet meeting in Muramba" on this date.[1592] The Appeals Chamber observes that the 4 June 1994 diary entry merely reflects several undated appointments of officials under the title "Council of Ministers Decisions" and notes under the title "Appointment of 17/6/94".[1593] The Appeals Chamber fails to see how this entry provides support for Nyiramasuhuko's claim that she was in Muramba on 4 June 1994 or undermines the reasonableness of the Trial Chamber's rejection of this claim.

698. Regarding Nyiramasuhuko's arguments concerning her alibi for 7 and 8 June 1994, the Appeals Chamber observes that the Trial Chamber explicitly acknowledged that her diary pages for these dates were removed.[1594] It also expressly declined to draw an "adverse inference based upon the absence of these pages, but merely not[ed] that Nyiramasuhuko's assertion that there were meetings [on these dates] was not corroborated by her diary".[1595] The Appeals Chamber therefore finds no merit in Nyiramasuhuko's assertions that the Trial Chamber considered the missing pages unimportant or made an adverse finding against her in this respect. The Appeals Chamber is also not convinced by Nyiramasuhuko's suggestion that the absence of the missing pages should have resulted in an inference in her favour since it would have required the Trial Chamber to speculate about the pages' content. In any event, in rejecting Nyiramasuhuko's alibi for the impugned dates, the Trial Chamber did not rely solely on the absence of support from Nyiramasuhuko's diary but also on the testimony of Ntahobali and Denise Ntahobali that placed Nyiramasuhuko in Butare around 8 June 1994.[1596]

[1590] *See* Trial Judgement, para. 2558.
[1591] Trial Judgement, para. 2558.
[1592] Trial Judgement, para. 2558.
[1593] Exhibit P144C (Diary of Pauline Nyiramasuhuko), p. K0271198 (Registry pagination).
[1594] Trial Judgement, para. 2565.
[1595] Trial Judgement, para. 2565, fn. 7228.
[1596] *See* Trial Judgement, paras. 2566, 2567, 2573.

699. Finally, the Appeals Chamber rejects Nyiramasuhuko's challenge to the Trial Chamber's finding that her testimony about returning to Butare on 11 June 1994 was inconsistent with the testimonies of other Defence witnesses. The Trial Chamber correctly noted that Nyiramasuhuko testified that she was not in Butare between 31 May and 11 June 1994.[1597] The Trial Chamber further noted that, by contrast: (i) Witness Denise Ntahobali testified that she returned from Muramba to Butare with Nyiramasuhuko "seven days after 1 June, around 8 June 1994";[1598] (ii) Ntahobali testified to seeing Nyiramasuhuko at Hotel Ihuliro "three to five days" following his return to Butare around 5 June 1994;[1599] (iii) Clarisse Ntahobali testified that Nyiramasuhuko visited Butare twice after the end of May 1994, "two or three days later" and one week later;[1600] (iv) Witness WBUC testified that Nyiramasuhuko returned to Butare a week after her departure on 30 May 1994.[1601] Nyiramasuhuko only cites the passage of time as an explanation for the discrepancy between her and other witnesses' accounts and fails to show that it was unreasonable for the Trial Chamber to find that her claim that from the time she moved to Muramba she did not return to Butare until 11 June 1994 was contradicted by the testimonies of other Defence witnesses.[1602]

700. Based on the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate the Trial Chamber erred in its assessment of her alibi evidence.

(iii) Other Defence Evidence

701. Nyiramasuhuko submits that the Trial Chamber erred in its assessment of the evidence of Defence Witnesses Denise Ntahobali, Clarisse Ntahobali, and Edmond Babin.

a. Witness Denise Ntahobali

702. Nyiramasuhuko contends that the Trial Chamber erred in discrediting Denise Ntahobali's testimony about their stay in Murambi between 31 May to 1 June 1994, and in Muramba from 1 June until the beginning of July 1994 because it disbelieved other aspects of the witness's

[1597] *See* Trial Judgement, para. 2434; Nyiramasuhuko, T. 6 September 2005 pp. 33, 34, T. 22 November 2005 p. 5.
[1598] Trial Judgement, para. 2566. *See also ibid*., para. 2449; Denise Ntahobali, T. 9 June 2005 pp. 44, 45, 48.
[1599] Trial Judgement, para. 2567. *See also ibid*., para. 2487; Ntahobali, T. 26 April 2006 pp. 12, 35, T. 1 June 2006 p. 69.
[1600] *See* Clarisse Ntahobali, T. 9 February 2005 pp. 58, 61, 62. *See also* Trial Judgement, para. 2463.
[1601] *See* Witness WBUC, T. 2 June 2005 p. 7. *See also* Trial Judgement, paras. 2476, 2477.
[1602] Moreover, contrary to Nyiramasuhuko's assertion, neither Witness Nyiraneza nor Witness WZJM testified about her visiting Butare in June 1994, and Witness CEM attested to not seeing Nyiramasuhuko in Butare in June 1994. *See* Witness WZJM, T. 21 February 2005 pp. 76, 79, 80; Céline Nyiraneza, T. 24 February 2005 pp. 46-48; Witness CEM, T. 14 February 2005 p. 60, T. 15 February 2005 p. 23. *See also* Trial Judgement, para. 2452-2454, 2465-2469, 2493. As for Maurice Ntahobali, he merely recounted Nyiramasuhuko's return to Hotel Ihuliro during the first half of June 1994. *See* Maurice Ntahobali, T. 13 September 2005 p. 27 (under seal extract).

testimony that were irrelevant to Nyiramasuhuko's alibi for these periods.[1603] Nyiramasuhuko argues that the Trial Chamber failed to explain why Denise Ntahobali was not credible on this issue.[1604] In Nyiramasuhuko's view, while it was appropriate for the Trial Chamber to take into account that members of Denise Ntahobali's family were on Nyiramasuhuko's Defence team, absent any evidence of an "impact" of this kinship on her testimony, this consideration should have had no negative bearing on her credibility.[1605] To the contrary, Nyiramasuhuko points to Denise Ntahobali's honesty about her discussions with members of the Defence team and asserts that the presence of family members on it was "a matter of public knowledge at the ICTR, including the Chamber."[1606]

703. In addition, Nyiramasuhuko claims that the Trial Chamber erred in finding the evidence of Denise Ntahobali not credible based on an inconsistency between this witness's and Nyiramasuhuko's testimonies as to whether they were accompanied by a convoy when they left Murambi on 1 June 1994.[1607] She posits that since gendarmes and the Prime Minister's staff remained after the departure of other Ministers, being the last Minister to leave Murambi did not exclude the possibility of leaving in a convoy.[1608]

704. The Prosecution responds that the Trial Chamber correctly assessed Denise Ntahobali's evidence in relation to Nyiramasuhuko's alibi for 1 to 3 June 1994 in light of her close relationship with Nyiramasuhuko's Defence team, inconsistencies between Nyiramasuhuko's and her evidence, prior false testimony, as well as contradictory evidence from Clarisse Ntahobali.[1609] It further argues that it was reasonable for the Trial Chamber to consider the inconsistency between the accounts of Nyiramasuhuko and Denise Ntahobali regarding the presence of a convoy when assessing the witness's credibility.[1610]

705. The Appeals Chamber observes that the Trial Chamber provided a comprehensive explanation for finding that Denise Ntahobali's account of Nyiramasuhuko's presence in Muramba on 1, 2, and 3 June 1994 lacked credibility.[1611] It explicitly noted that Denise Ntahobali's testimony about her and Nyiramasuhuko's stay in Murambi on 1 June 1994 and departure for Muramba on this date was not consistent with the Nyiramasuhuko Notice of Alibi and was contradicted by

[1603] Nyiramasuhuko Appeal Brief, para. 718, *referring to* Trial Judgement, para. 2554. *See also* Nyiramasuhuko Reply Brief, para. 195.
[1604] Nyiramasuhuko Appeal Brief, para. 718.
[1605] Nyiramasuhuko Appeal Brief, paras. 712, 713.
[1606] Nyiramasuhuko Appeal Brief, paras. 711, 712.
[1607] Nyiramasuhuko Notice of Appeal, para. 4.19; Nyiramasuhuko Appeal Brief, paras. 715, 716. *See also* Nyiramasuhuko Reply Brief, para. 196.
[1608] Nyiramasuhuko Appeal Brief, para. 716.
[1609] Prosecution Response Brief, paras. 404-409.
[1610] Prosecution Response Brief, para. 407.

Clarisse Ntahobali's evidence.[1612] The Trial Chamber also recalled in great detail other instances where it found Denise Ntahobali's evidence not credible.[1613] Nyiramasuhuko does not demonstrate that, in this context, no reasonable trier of fact could have considered that certain aspects of Denise Ntahobali's testimony lacked credibility when assessing other aspects of her testimony. Against this background, the Appeals Chamber finds no merit in Nyiramasuhuko's claims that the Trial Chamber erred in relying on its finding that certain parts of Denise Ntahobali's testimony lacked credibility and failed to provide a reasoned opinion when finding her alibi evidence not credible. Furthermore, since the existence of ties between an accused and a witness is a factor which may be considered in assessing witnesses' credibility,[1614] it was not improper for the Trial Chamber to entertain concerns about Denise Ntahobali's "very close relationships" with and "particularly strong connection" to Nyiramasuhuko's Defence team, irrespective of her honesty on this issue.[1615]

706. Likewise, the Appeals Chamber sees no error in the Trial Chamber's consideration of the discrepancy between the testimonies of Nyiramasuhuko and Denise Ntahobali about the presence of a convoy upon their departure from Murambi. A review of Denise Ntahobali's testimony reveals that she specifically referenced a convoy of multiple vehicles and numerous gendarmes, including groups of gendarmes behind and in front of other vehicles.[1616] Although Nyiramasuhuko did mention the presence of some gendarmes and the staff of the Prime Minister's office, as well as being the last minister to leave, she made no mention of a convoy.[1617] Nyiramasuhuko's arguments aim at demonstrating that Denise Ntahobali's account was plausible and was not irreconcilable with her own testimony. However, the Trial Chamber did not conclude that this aspect of Denise Ntahobali's testimony was implausible or irreconcilable with Nyiramasuhuko's testimony but, instead, pointed out that Nyiramasuhuko did not mention the convoy when describing the circumstances of her departure from Murambi.[1618] In the view of the Appeals Chamber, Nyiramasuhuko's arguments do not demonstrate that no reasonable trier of fact could have identified the impugned differences and considered them when assessing Denise Ntahobali's credibility.

707. The Appeals Chamber therefore concludes that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in its assessment of Witness Denise Ntahobali's evidence.

[1611] Trial Judgement, paras. 2552-2557.
[1612] Trial Judgement, paras. 2552, 2553, 2555.
[1613] *See* Trial Judgement, para. 2554.
[1614] *See supra*, para. 674.
[1615] Trial Judgement, para. 2554.
[1616] Denise Ntahobali, T. 9 June 2005 pp. 44, 45. *See also* Trial Judgement, paras. 2447, 2554.
[1617] Nyiramasuhuko, T. 5 October 2005 p. 34. *See also* Trial Judgement, paras. 2428, 2554.
[1618] *See* Trial Judgement, para. 2554. *See also ibid*., para. 2552.

b. Witness Clarisse Ntahobali

708. Nyiramasuhuko contends that the Trial Chamber erroneously relied on the fact that Clarisse Ntahobali testified in support of her alibi for early June 1994.[1619] In her view, the Trial Chamber erred in treating Clarisse Ntahobali as an alibi witness in relation to Nyiramasuhuko's stay in Muramba between 1 and 11 June 1994, emphasising that Clarisse Ntahobali, unlike Denise Ntahobali, did not reside with Nyiramasuhuko during this period.[1620] Nyiramasuhuko further argues that, contrary to the Trial Chamber's finding, Clarisse Ntahobali confirmed the testimonies of Nyiramasuhuko and Denise Ntahobali that they left Hotel Ihuliro and went directly to Murambi at the end of May 1994.[1621] Nyiramasuhuko concedes that Clarisse Ntahobali testified about her visit with family members in Butare two to three days after her visit at the end of May 1994.[1622] Nonetheless, she asserts that this was an honest mistake caused by the witness's confusion about the number of days that elapsed between 31 May 1994 and her subsequent visit and faults the Trial Chamber for making an adverse finding against her.[1623]

709. The Prosecution responds that Nyiramasuhuko's arguments concerning Clarisse Ntahobali's testimony are undeveloped and meritless and should be summarily dismissed.[1624]

710. The Appeals Chamber considers Nyiramasuhuko's submission that the Trial Chamber erred in treating Clarisse Ntahobali as an alibi witness regarding her alibi for early June 1994 to be without merit. The Appeals Chamber emphasises that the Trial Chamber, as the trier of fact, was bound to make its own factual findings irrespective of any characterisation of the evidence by the parties.[1625] The Appeals Chamber also notes that Nyiramasuhuko fails to explain how the fact that Clarisse Ntahobali did not reside with her in Muramba between 1 and 11 June 1994 undermines this witness's evidence about Nyiramasuhuko's visits to and presence in Butare.

[1619] Nyiramasuhuko Appeal Brief, para. 714, *referring to* Trial Judgement, para. 2553.
[1620] Nyiramasuhuko Notice of Appeal, paras. 4.17, 4.18; Nyiramasuhuko Appeal Brief, paras. 700, 714, *referring to* Trial Judgement, para. 2553. Nyiramasuhuko further argues that Clarisse Ntahobali testified, like many other witnesses, that she had obtained the information regarding Nyiramasuhuko's whereabouts in early June 1994 from Nyiramasuhuko when Nyiramasuhuko visited Hotel Ihuliro around 10 June 1994. *See* Nyiramasuhuko Appeal Brief, para. 714.
[1621] Nyiramasuhuko Appeal Brief, para. 719, *referring*, *inter alia*, *to* Trial Judgement, para. 2555. Nyiramasuhuko notes that, according to the Nyiramasuhuko Notice of Alibi, she was in Murambi but mostly in Muramba from 2 to 11 June, from 13 to 24 June, and from 25 June to 1 July 1994 with her daughter Denise Ntahobali and her granddaughter. *See ibid*., para. 720.
[1622] Nyiramasuhuko Appeal Brief, para. 721.
[1623] Nyiramasuhuko Notice of Appeal, para. 4.20; Nyiramasuhuko Appeal Brief, para. 721. Nyiramasuhuko alleges that Clarisse Ntahobali was the only witness who testified about one of Nyiramasuhuko's visits to Hotel Ihuliro during that time. *See idem*. Nyiramasuhuko adds that the Trial Chamber ignored more serious inconsistencies in the Prosecution evidence than those imputed to Clarisse Ntahobali. *See* Nyiramasuhuko Notice of Appeal, para. 4.21 (French).
[1624] Prosecution Response Brief, paras. 410-413.
[1625] *See Kanyarukiga* Appeal Judgement, para. 124.

711. The Appeals Chamber further observes that Nyiramasuhuko is incorrect in asserting that the Trial Chamber found that Clarisse Ntahobali contradicted the evidence of Nyiramasuhuko and Denise Ntahobali about leaving Hotel Ihuliro and going directly to Murambi at the end of May 1994. The Trial Chamber did not make such a finding. Rather, the Trial Chamber found that by testifying that Nyiramasuhuko had returned to Butare two to three days after 31 May 1994, "on 2 or 3 June 1994", Clarisse Ntahobali "contradicted Nyiramasuhuko and Denise Ntahobali's testimony that [from Murambi] they went directly to [Muramba in] Gisenyi *préfecture*" and that Nyiramasuhuko was in Muramba on these dates.[1626] The Appeals Chamber observes that Clarisse Ntahobali indeed testified about seeing Nyiramasuhuko "at the end of May at Hotel Ihuliro" before she left for Murambi, then "two or three days later" as Nyiramasuhuko was "going to settle or stay at Muramba", and subsequently one week later.[1627] While Clarisse Ntahobali's testimony corroborated the accounts of Nyiramasuhuko and Denise Ntahobali that they went directly to Murambi when leaving Hotel Ihuliro at the end of May 1994, the Appeals Chamber fails to see how this evidence undermines the Trial Chamber's conclusion that Clarisse Ntahobali "plac[ed] Nyiramasuhuko in Butare town on 2 or 3 June 1994".[1628] Furthermore, since this witness was specific as to the timing of Nyiramasuhuko's two visits to Hotel Ihuliro after the end of May 1994, the Appeals Chamber is not convinced by Nyiramasuhuko's allegation of confusion about the days that elapsed between Nyiramasuhuko's visit to Hotel Ihuliro on 31 May 1994 and her next visit.

712. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's challenges to the assessment of Witness Clarisse Ntahobali's evidence.

c. Witness Edmond Babin

713. Nyiramasuhuko submits that the Trial Chamber ignored Witness Edmond Babin's testimony with respect to the duration of the trip between Muramba and Butare Town in peacetime, and erred in relying solely on the testimonies of Nyiramasuhuko and Denise Ntahobali on this point as well as in minimising the difficulties associated with the journey during wartime in June 1994.[1629] Nyiramasuhuko adds that, by not considering Witness Babin's evidence, the Trial Chamber implicitly found him not credible but failed to provide a reasoned opinion for this conclusion.[1630] Consequently, she argues that no reasonable trier of fact could have found that, in June 1994, she

[1626] Trial Judgement, para. 2555. *See also ibid*., para. 2557.
[1627] Clarisse Ntahobali, T. 9 February 2005 pp. 58, 61, 62. *See also* T. 10 February 2005 p. 23; Trial Judgement, paras. 2462, 2463, 2555.
[1628] Trial Judgement, para. 2557. *See also ibid*., para. 2555.
[1629] Nyiramasuhuko Notice of Appeal, paras. 7.23, 7.24; Nyiramasuhuko Appeal Brief, paras. 314, 731.
[1630] Nyiramasuhuko Appeal Brief, para. 314.

could have attended Interim Government meetings in Gisenyi during the day and been present at the prefectoral office at night, despite, at a minimum, a 16-hour return trip.[1631]

714. The Prosecution responds that Nyiramasuhuko misrepresents the Trial Chamber's findings in relation to her presence in Butare and Muramba in June 1994.[1632]

715. The Trial Judgement reflects that the Trial Chamber did not disregard Witness Babin's evidence; his testimony with respect to the duration of the trips between Butare, Gisenyi, and Gitarama was expressly summarised and his estimate of the time needed to travel from Murambi to Butare was considered in the Trial Chamber's deliberations.[1633] While the Trial Chamber did not expressly discuss Witness Babin's estimate of the duration of the trip between Muramba and Butare when evaluating Nyiramasuhuko's ability to travel between these locations on consecutive days, it primarily relied on the time estimate provided by Denise Ntahobali, which exceeded that of Witness Babin, stating that "[e]ven if the travel time between Muramba to Butare was between 8 and 11 hours at the beginning of June 1994, Nyiramasuhuko admitted that she travelled to Butare on 11 June 1994 and returned the very next day on 12 June 1994".[1634] Nyiramasuhuko does not challenge this finding.

716. Furthermore, the Appeals Chamber notes that, contrary to Nyiramasuhuko's contention that the Trial Chamber minimised the difficulties associated with the journey between Muramba and Butare in June 1994, the Trial Chamber explicitly acknowledged that "the RPF had captured Kabgayi along the main road from Gitarama to Butare around 2 June 1994" and considered it reasonable that "Nyiramasuhuko would have been forced to travel on secondary roads".[1635] Furthermore, the Trial Chamber did not find that Nyiramasuhuko attended meetings in Muramba during the day and returned to the prefectoral office at night. Instead, it found, in accordance with Nyiramasuhuko's own admission, that "she travelled to Butare on 11 June 1994 and returned [to Muramba] the very next day on 12 June 1994."[1636] Nyiramasuhuko fails to show that no reasonable trier of fact could have found that it was possible for Nyiramasuhuko to be in Butare at night and then in Muramba the very next day.

[1631] Nyiramasuhuko Appeal Brief, para. 732.
[1632] Prosecution Response Brief, para. 425.
[1633] Trial Judgement, paras. 2455, 2541.
[1634] Trial Judgement, para. 2569. *See also* Edmond Babin, T. 25 April 2005 p. 10 ("Q. And how much time did you use to cover [the distance between Butare and Gisenyi], excluding the stopover time at Kibuye? A. It took us 8 hours 4 minutes to cover the distance."); Denise Ntahobali, T. 9 June 2005 p. 50 ("Q. Witness, do you have any idea how long, more or less, that trip from Muramba to Butare took? A. It took us a long time, a very long time, between eight to 10 hours.").
[1635] Trial Judgement, para. 2569.
[1636] Trial Judgement, para. 2569. *See also* Nyiramasuhuko, T. 6 September 2005 p. 42.

717. Based on the above, the Appeals Chamber dismisses Nyiramasuhuko's submissions regarding the consideration of Witness Babin's evidence.

3. Conclusion

718. For the foregoing reasons, the Appeals Chamber concludes that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in finding that the Nyiramasuhuko Notice of Alibi was filed late and in its assessment of the alibi evidence relating to the time periods between 14 and 16 May 1994 and between early June and mid-June 1994. Accordingly, the Appeals Chamber dismisses Grounds 20 to 22 of Nyiramasuhuko's appeal in their entirety.

F. Butare Prefecture Office (Grounds 23-25, 28-31)

719. The Trial Chamber convicted Nyiramasuhuko of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis taking refuge at the Butare Prefecture Office.[1637] The Trial Chamber also determined that Nyiramasuhuko bore superior responsibility for killings committed by *Interahamwe* as a result of attacks at the prefectoral office pursuant to Article 6(3) of the Statute and considered this as an aggravating factor when determining her sentence.[1638] The Trial Chamber further convicted Nyiramasuhuko of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior under Article 6(3) of the Statute for rapes committed by *Interahamwe* at the Butare Prefecture Office.[1639]

720. Nyiramasuhuko submits that the Trial Chamber erred in convicting her in relation to crimes committed at the Butare Prefecture Office.[1640] She contends that the Trial Chamber erred in: (i) making imprecise and improper findings; (ii) its assessment of the evidence; (iii) finding her responsible for ordering killings at the prefectoral office; and (iv) finding her responsible as a superior for rapes committed by *Interahamwe* during attacks at the prefectoral office. The Appeals Chamber will consider these contentions in turn.

1. Imprecise and Improper Findings

721. Nyiramasuhuko argues that the Trial Chamber made imprecise and improper findings with respect to her responsibility for killings and rapes of Tutsis who had sought refuge at the Butare Prefecture Office.

(a) Killings

722. The Trial Chamber provided its most detailed assessment of Nyiramasuhuko's criminal responsibility for the killing of Tutsis taking refuge at the Butare Prefecture Office when evaluating

[1637] Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186.
[1638] Trial Judgement, paras. 5886, 5970. *See also ibid.*, paras. 5652, 5884, 5885, 6052, 6207.
[1639] Trial Judgement, paras. 6085, 6087, 6088, 6093, 6182, 6183, 6186.
[1640] The Appeals Chamber observes that Nyiramasuhuko principally challenges her criminal responsibility for crimes committed at the Butare Prefecture Office by alleging errors in the Trial Chamber's assessment of the crime of genocide. *See* Nyiramasuhuko Notice of Appeal, paras. 7.1-7.6, 7.8, 7.9; Nyiramasuhuko Appeal Brief, paras. 824-827, 841, 842, 847, 849-852, 856-860, 870-873, 875, 1288-1293. However, because her challenges with respect to the crime of genocide principally relate to the sufficiency of the findings as they concern the modes of responsibility and include challenges as they pertain to the other crimes for which she was convicted, the Appeals Chamber has addressed her contentions with respect to all crimes where relevant.

the crime of genocide in the "Legal Findings" section of the Trial Judgement.[1641] In particular, the Trial Chamber assessed Nyiramasuhuko's role in the attacks at the prefectoral office that occurred in mid-May 1994 ("Mid-May Attack"), around the end of May or the beginning of June 1994 when Nyiramasuhuko and Ntahobali came to the prefectoral office three times in one night ("Night of Three Attacks"), and in the first half of June 1994 ("First Half of June Attacks").[1642] Specifically, with respect to the Mid-May Attack, the Trial Chamber found:

> Between mid-May and mid-June 1994 Nyiramasuhuko, Ntahobali, *Interahamwe* and soldiers went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and were killed in various locations throughout Butare *préfecture*. In mid-May 1994, Nyiramasuhuko, Ntahobali and about 10 *Interahamwe* came to the [Butare Prefecture Office] aboard a camouflaged pickup. Nyiramasuhuko pointed out Tutsi refugees to the *Interahamwe*, ordering them to force the refugees onto the pickup […]. Ntahobali also gave the *Interahamwe* orders, telling them to stop loading the truck because it could not accept anymore dead. The refugees were taken to other locations in Butare to be killed. Therefore, both Nyiramasuhuko and Ntahobali were responsible for ordering the killings of numerous Tutsi refugees who were forced on board the pickup.[1643]

As regards to the Night of Three Attacks, the Trial Chamber recalled the following:

> Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed. Nyiramasuhuko ordered *Interahamwe* to rape refugees […]. The *Interahamwe* beat, abused and raped many Tutsi women.[1644]

With respect to the First Half of June Attacks, the Trial Chamber found:

> In the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and as a result numerous women were raped at that location. Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks, Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA […].[1645]

The Trial Chamber concluded the "Genocide" section of the Trial Judgement by finding that Nyiramasuhuko was responsible for ordering the killing of "Tutsis taking refuge at the Butare *préfecture* office".[1646] It further found Nyiramasuhuko responsible as a superior on the same basis, concluding that it would take this form of responsibility into account in sentencing.[1647] The Trial Chamber recalled these conclusions throughout the remainder of the "Legal Findings" section of the

[1641] *See* Trial Judgement, paras. 5866, 5867, 5871, 5873, 5874, 5876, 5969, 5970.
[1642] *See* Trial Judgement, paras. 5866-5871, 5873, 5874, 5876, 5877.
[1643] Trial Judgement, para. 5867 (internal references omitted). *See also ibid.*, para. 2781(i).
[1644] Trial Judgement, para. 5873 (internal reference omitted). *See also ibid.*, para. 2781(iii).
[1645] Trial Judgement, para. 5874 (internal reference omitted). *See also ibid.*, para. 2781(v).
[1646] Trial Judgement, para. 5969. *See also ibid.*, paras. 5876, 5970.
[1647] Trial Judgement, paras. 5652, 5886, 5970, 6207. *See also ibid.*, paras. 5884, 5885.

Trial Judgement when considering Nyiramasuhuko's responsibility for other crimes based on the same conduct.[1648]

723. Nyiramasuhuko submits that the Trial Chamber erred in failing to provide a reasoned opinion by not specifying the factual basis on which it relied to find her responsible under Articles 6(1) and 6(3) of the Statute for ordering the killing of Tutsi refugees at the prefectoral office.[1649] She argues that the Trial Chamber erred in failing to point to a factual or legal basis to support the conclusion that she issued orders to kill during the Mid-May Attack, the Night of Three Attacks, and the First Half of June Attacks and contends that no such basis exists.[1650] With respect to the Mid-May Attack in particular, she submits that the Trial Chamber only found that she ordered Tutsi refugees to be abducted without explaining how it inferred from it an order to kill.[1651]

724. The Prosecution responds that the Trial Chamber properly addressed Nyiramasuhuko's responsibility under Article 6(1) of the Statute for ordering killings during the Mid-May Attack and the Night of Three Attacks.[1652] It contends that the Trial Chamber's findings that Nyiramasuhuko ordered abductions during these attacks reflect that she was found to have implicitly ordered killings given the nature of those attacks and that the abducted persons were killed.[1653] The Prosecution appears to submit that the Trial Chamber did not find that Nyiramasuhuko ordered abductions, and by implication killings, during the First Half of June Attacks but contends that this has no impact on her ordering responsibility in light of the Trial Chamber's findings with respect to the Mid-May Attack and the Night of Three Attacks.[1654]

725. On 25 March 2015, the Appeals Chamber requested the Prosecution to provide supplementary submissions discussing what evidence cited in the Trial Judgement and findings of the Trial Chamber would support the conclusion that Nyiramasuhuko was convicted for ordering

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[1648] *See* Trial Judgement, paras. 6049-6052 (extermination as a crime against humanity), 6098, 6099, 6120 (persecution as a crime against humanity), 6166, 6167 (violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II).

[1649] Nyiramasuhuko Appeal Brief, paras. 769, 819, 829, 850, 862-869, 1283, 1294. *See also* Nyiramasuhuko Reply Brief, paras. 239, 266-272.

[1650] Nyiramasuhuko Appeal Brief, paras. 769, 819, 865, 866, 869, 1286, *referring to* Trial Judgement, paras. 2644, 2715, 2738, 2749, 2781, 5867-5876, 5886, 5969, 5970. *See also* Nyiramasuhuko Reply Brief, paras. 239, 248.

[1651] Nyiramasuhuko Appeal Brief, paras. 820, 821, 862, *referring to* Trial Judgement, paras. 5867-5869. Nyiramasuhuko argues that it was an error for the Trial Chamber to infer that such an order "significantly contributed to the death of those persons". *See ibid*., para. 821. This contention is addressed below in Section IV.F.3.

[1652] Prosecution Response Brief, para. 548.

[1653] Prosecution Response Brief, paras. 544-548, 550, 555. *See also* AT. 14 April 2015 pp. 42, 43.

[1654] Prosecution Response Brief, para. 550. The Prosecution concludes that, in light of the Trial Chamber's conclusions regarding the Mid-May Attack and the Night of Three Attacks, "the only reasonable inference was that the refugees abducted to be killed were killed." *See idem.* During the appeals hearing, the Prosecution also pointed to Witness SU's evidence related to the First Half of June Attack and referenced in paragraph 2754 of the Trial Judgement that Nyiramasuhuko ordered *Interahamwe* to load people into a vehicle to be killed as evidence supporting the conclusion that Nyiramasuhuko's orders to load Tutsis into her truck during attacks were understood by everyone to mean that these people would be killed. *See* AT. 14 April 2015 p. 43.

killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Night of Three Attacks.[1655] In response, the Prosecution submits that the Trial Chamber correctly concluded that Nyiramasuhuko was convicted for ordering killings based on her conduct during the Night of Three Attacks.[1656] It contends that this conclusion is the clear and correct result of the Trial Chamber's assessment of "the evidence of the *préfecture* office crimes as a whole" as well as the fact that the Trial Chamber's "findings may be implied in its conclusions, rather than expressly stated."[1657] In support, the Prosecution points to evidence and findings pertaining to the Night of Three Attacks demonstrating: (i) Nyiramasuhuko's general authority; (ii) that she ordered rapes, killings, and that Tutsis be loaded onto the pickup truck and that all these orders were complied with; and (iii) that abducted Tutsis were taken away and killed.[1658]

726. Nyiramasuhuko responds that the relevant findings of the Trial Chamber do not provide a basis to conclude that it found that she ordered killings during the Night of Three Attacks and contests the Prosecution's position that the findings may be implied.[1659] She emphasises that the Trial Chamber made findings in respect of each attack and that the only finding concerning her conduct during the Night of Three Attacks was that she ordered *Interahamwe* to rape refugees and that *Interahamwe* beat, abused, and raped many Tutsi women.[1660] Nyiramasuhuko stresses that the Trial Chamber only concluded that she, Ntahobali, and *Interahamwe* came to the prefectoral office on three occasions abducting Tutsi refugees on each occasion, without finding that she ordered abductions or killings during that particular night.[1661] She further contends that, contrary to the Prosecution's position, the Trial Chamber did not consider a pattern of killings in order to establish her ordering liability for this attack.[1662]

727. The Appeals Chamber observes that the Trial Chamber convicted Nyiramasuhuko of genocide, crimes against humanity, and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering "the killing of Tutsis taking refuge at the Butare *préfecture* office."[1663] The Trial Chamber further found that, in relation to these events, Nyiramasuhuko was responsible as a superior for killings committed by *Interahamwe* based on her

[1655] 25 March 2015 Order, p. 2.
[1656] Prosecution Supplementary Submissions, para. 1.
[1657] Prosecution Supplementary Submissions, para. 2. *See also ibid.*, paras. 1-7, 20.
[1658] Prosecution Supplementary Submissions, paras. 8-19. *See also* AT. 14 April 2015 pp. 42-44.
[1659] Nyiramasuhuko Supplementary Submissions, paras. 1, 6, 7, 27, 32, 33. She also asserts that the Trial Chamber's findings clearly suggest that she was not held responsible for ordering killings committed by soldiers. *See* Nyiramasuhuko Supplementary Submissions, paras. 5, 12, 17, 19.
[1660] Nyiramasuhuko Supplementary Submissions, paras. 4, 13. *See also* AT. 15 April 2015 p. 4.
[1661] Nyiramasuhuko Supplementary Submissions, paras. 17, 18.
[1662] Nyiramasuhuko Supplementary Submissions, paras. 21-24, 26, 27, 30. Nyiramasuhuko also contends that: (i) the Prosecution cannot present any evidence of a consistent pattern of conduct unless the accused receives sufficient and timely notice specifically identifying the evidence to be used in this manner; and (ii) it is improper to raise the theory of consistent pattern of conduct on appeal when it was not raised at trial. *See ibid*., paras. 25, 26.

orders and stated that it would consider this conclusion in sentencing.[1664] The Trial Chamber did not link these general findings to specific attacks at the prefectoral office in which it had concluded that Nyiramasuhuko participated.

728. A review of the Trial Chamber's most detailed factual and legal findings reveals that the Trial Chamber expressly concluded that Nyiramasuhuko was responsible for "ordering the killings of numerous Tutsi refugees who were forced on board the pickup" during the Mid-May Attack.[1665] Nyiramasuhuko is correct in her submissions, however, that the Trial Chamber did not refer to any express order to kill nor did it expressly state that it inferred as the only reasonable conclusion that Nyiramasuhuko ordered the killings that resulted from that attack. Moreover, the Trial Chamber did not specify that Nyiramasuhuko's conduct of pointing out Tutsi refugees to the *Interahamwe* and ordering the *Interahamwe* to force them onto the pickup truck had a direct and substantial effect on the eventual killings of those Tutsis.[1666]

729. The Appeals Chamber recalls that Article 22(2) of the Statute and Rule 88(C) of the Rules require trial chambers to give a reasoned opinion,[1667] which includes the provision of clear, reasoned findings of fact as to each element of the crime charged.[1668] A reasoned opinion in the trial judgement is essential for allowing a meaningful exercise of the right of appeal by the parties and enabling the Appeals Chamber to understand and review the trial chamber's findings.[1669] With respect to the Mid-May Attack, while it is clear that the Trial Chamber found that Nyiramasuhuko was responsible under Article 6(1) of the Statute for ordering killings during this attack and that she bore responsibility as a superior under Article 6(3) of the Statute on the same basis, the Appeals Chamber finds that the absence of clear findings as to the essential elements necessary to establish her ordering responsibility has resulted in a failure to provide a reasoned opinion and constitutes an error of law. The Appeals Chamber will consider whether this error invalidates the Trial Chamber's decision to convict Nyiramasuhuko for ordering killings during the Mid-May Attack – and finding her responsible as a superior on the same basis – by examining whether the Trial Chamber's factual findings and the evidence relied upon by the Trial Chamber and identified by the parties could

[1663] Trial Judgement, paras. 5969, 6050, 6098. *See also ibid.*, paras. 5876, 5970, 6049, 6051, 6099, 6120, 6166, 6167.
[1664] Trial Judgement, paras. 5884-5886, 5970, 6052.
[1665] Trial Judgement, para. 5867.
[1666] Trial Judgement, paras. 2644, 2781(i), 5866-5871. The Trial Chamber's analysis of Nyiramasuhuko's responsibility for extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of this conduct provides no further information. *See ibid.*, paras. 6049-6051, 6098, 6099, 6166, 6167.
[1667] *See also*, *e.g.*, *Bizimungu* Appeal Judgement, para. 18; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139.
[1668] *See Ndindiliyimana et al.* Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320; *Kajelijeli* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 383. *Cf. also Orić* Appeal Judgement, para. 56.

sustain the Trial Chamber's conclusions when assessing Nyiramasuhuko's responsibility for ordering.[1670]

730. Concerning the Night of Three Attacks, the Trial Chamber also made findings about Nyiramasuhuko's involvement in abductions and killings committed during this event in the "Legal Findings" section of the Trial Judgement, but, unlike with respect to the Mid-May Attack, it did not expressly find that Nyiramasuhuko ordered killings during this night or explain if her conduct during the Night of Three Attacks supported her convictions for ordering killings.[1671] Rather, the Trial Chamber merely concluded that "Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed."[1672] The Appeals Chamber finds that the absence of a clear finding in the "Legal Findings" section of the Trial Judgement raises doubts as to whether her conviction for ordering the killing of Tutsis taking refuge at the prefectoral office was also based upon her conduct during the Night of Three Attacks.[1673] This ambiguity also raises doubts as to whether the Trial Chamber's findings that she bore responsibility under Article 6(3) of the Statute for killings committed by *Interahamwe* following her orders was also based upon her participation in these attacks.

731. Notwithstanding the ambiguity in the "Legal Findings" section of the Trial Judgement, the Appeals Chamber observes that, contrary to Nyiramasuhuko's contentions, the "Factual Findings" section of the Trial Judgement contains express conclusions that, during the Night of Three Attacks, Nyiramasuhuko "ordered *Interahamwe* and soldiers to rape Tutsi women, and to kill other refugees",[1674] that she "gave orders to the *Interahamwe* to [attack women and children, assault them, and force them aboard the pickup]" who "were taken away from the [Butare Prefecture

[1669] *Bizimungu* Appeal Judgement, para. 18; *Hadžihasanović and Kubura* Appeal Judgement, para. 13. *See also Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20.
[1670] *See infra*, Section IV.F.3.
[1671] Trial Judgement, paras. 5873, 5969, 6050, 6098, 6166.
[1672] Trial Judgement, para. 5873 (internal reference omitted). *See also ibid.*, paras. 2738, 2781(iii).
[1673] The confusion is compounded by the fact that the Trial Chamber expressly concluded in the "Legal Findings" section of the Trial Judgement that "Nyiramasuhuko ordered *Interahamwe* to rape refugees" with respect to the Night of Three Attacks. *See* Trial Judgement, para. 5873.
[1674] *See* Trial Judgement, para. 2698. The Appeals Chamber notes that Nyiramasuhuko contends that, notwithstanding the Trial Chamber's assertion in paragraph 2698 of the Trial Judgement that it was "convinced that Nyiramasuhuko […] ordered *Interahamwe* and soldiers to rape Tutsi women, and to kill other refugees" during the Night of Three Attacks, the Trial Chamber did not conclude that Nyiramasuhuko ordered killings as such a finding is not contained in its later conclusions in paragraphs 2702, 2781, and 5873 of the Trial Judgement. *See* AT. 15 April 2015 p. 3; Nyiramasuhuko Supplementary Submissions, paras. 11, 12, 20. The Appeals Chamber finds that a plain reading of paragraph 2698 of the Trial Judgement in isolation and in the context of all of the Trial Chamber's findings contradicts Nyiramasuhuko's contention.

Office] and killed elsewhere",[1675] and that she "ordered the *Interahamwe* to force Tutsi refugees onto the pickup" which left with the abducted Tutsi refugees.[1676] The Trial Chamber's discussion of the evidence of the witnesses that it relied upon with respect to the Night of Three Attacks also reflects that Nyiramasuhuko participated in the abductions and killings during that night, issued express orders to kill and abduct refugees who were later killed, and that she held a position of authority among the assailants during the attacks.[1677] Similarly, and contrary to Nyiramasuhuko's contention that the Trial Chamber did not rely on a pattern of killings in relation to the Night of Three Attacks, the Trial Chamber made extensive findings that Tutsi refugees abducted from the prefectoral office during these and other attacks at the prefectoral office were killed.[1678]

732. In this context, the Appeals Chamber finds that the Trial Chamber's deliberations in the "Factual Findings" section of the Trial Judgement demonstrate that the Trial Chamber found that Nyiramasuhuko ordered killings during the Night of Three Attacks and that her conviction in this respect is incorporated in its general conclusion in the "Legal Findings" section of the Trial Judgement that she ordered *Interahamwe* to kill Tutsis taking refuge at the prefectoral office and that she was responsible as a superior on the same basis.[1679]

733. However, the analysis above demonstrates that the Trial Chamber manifestly failed to set out in a clear and articulate manner the basis for Nyiramasuhuko's criminal responsibility for ordering killings during the Night of Three Attacks. Instead, the parties and the Appeals Chamber have had to interpret scattered legal and factual findings as well as the evidence supporting them in order to decipher whether Nyiramasuhuko was found responsible for ordering killings committed during the Night of Three Attacks and as a superior for killings committed by *Interahamwe* who followed her orders. In these circumstances, the Appeals Chamber concludes that the Trial Chamber

[1675] *See* Trial Judgement, para. 2736.
[1676] *See* Trial Judgement, para. 2738.
[1677] *See* Trial Judgement, paras. 2681, 2687-2689, 2691, 2693, 2695, 2696, 2698-2700, 2704, 2706, 2708-2712, 2715, 2736, 2738, 2779.
[1678] *See* Trial Judgement, paras. 2736, 2739-2749, 2781(iv). *See also ibid*., paras. 2774-2779. The Appeals Chamber finds no merit in Nyiramasuhuko's apparent contention that the Prosecution cannot rely on evidence of a consistent pattern of conduct as defined in Rule 93 of the Rules without sufficient notice. The Appeals Chamber observes that the Prosecution is not seeking to introduce such evidence on appeal but is simply highlighting findings of the Trial Chamber and evidence it relied upon tending to show that there was a pattern of killings at the prefectoral office. Moreover, the Appeals Chamber is satisfied that the Trial Chamber did not abuse its discretion in assessing evidence as it pertained to various attacks at the prefectoral office as trial chambers are tasked with determining the guilt or innocence of the accused and must do so in light of the entirety of the evidence admitted into the record. *Cf. supra*, para. 115.
[1679] The Appeals Chamber notes that Nyiramasuhuko was not convicted for having ordered killings committed by soldiers during this attack. Specifically, the Appeals Chamber observes that in the "Legal Findings" section of the Trial Judgement, the Trial Chamber found that, although "soldiers played a role in the events at the [Butare Prefecture Office], no evidence has been led to establish any relationship between the soldiers and Nyiramasuhuko". *See* Trial Judgement, para. 5887. Although made in the context of evaluating Nyiramasuhuko's responsibility under Article 6(3) of the Statute, such a conclusion suggests that no finding of any liability was imposed on Nyiramasuhuko for the

erred in law by failing to provide a reasoned opinion in support of Nyiramasuhuko's conviction for ordering killings in relation to the Night of Three Attacks and her superior responsibility on the same basis.

734. Notwithstanding this error, the Appeals Chamber is satisfied that Nyiramasuhuko has not been denied the opportunity to fully exercise her right to appeal this aspect of her ordering conviction, particularly in light of the opportunity given to her to litigate what evidence cited in the Trial Judgement and findings of the Trial Chamber would support it in relation to the Night of Three Attacks. Consequently, the Appeals Chamber will consider whether this error invalidates the Trial Chamber's decision to convict Nyiramasuhuko for ordering killings during the Night of Three Attacks – and finding her responsible as a superior on the same basis – by examining whether the Trial Chamber's factual findings and the evidence relied upon by it and identified by the parties could sustain the Trial Chamber's conclusions when assessing Nyiramasuhuko's responsibility for ordering.[1680] In so doing, the Appeals Chamber will consider Nyiramasuhuko's additional submissions that the record is insufficient to establish the elements of ordering under Article 6(1) of the Statute.

735. Turning to Nyiramasuhuko's challenges concerning her responsibility for ordering killings during the First Half of June Attacks, the Appeals Chamber observes that, not only did the Trial Chamber not refer to Nyiramasuhuko's involvement in abductions or killings during the First Half of June Attacks in the "Legal Findings" section of the Trial Judgement,[1681] but its conclusions in the "Factual Findings" section of the Trial Judgement do not demonstrate that the Trial Chamber intended to convict her for ordering killings during these attacks. Rather, the Trial Chamber's only factual conclusion with respect to Nyiramasuhuko was that she ordered *Interahamwe* to commit rapes, without reference to her involvement in abductions or killings of Tutsis during these attacks, in contrast to its findings regarding Ntahobali.[1682] These omissions raise further questions as to whether the Trial Chamber's findings that Nyiramasuhuko bore superior responsibility under

conduct of soldiers. A careful review of the relevant Trial Chamber's findings and other legal findings does not suggest otherwise.

[1680] *See infra*, Section IV.F.3.

[1681] *See* Trial Judgement, para. 5874.

[1682] Trial Judgement, paras. 2773 ("Therefore, the Chamber finds it established beyond a reasonable doubt […] that, in addition to those attacks described above, Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] in June 1994 to rape women and abduct refugees. During one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA. It further finds that in June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and that as a result, numerous women were raped at that location."), 2781(v) ("In the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and that as a result numerous women were raped at that location. Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA.").

Article 6(3) of the Statute for killings committed by *Interahamwe* following her orders is also based on her conduct during these attacks.

736. While the Trial Chamber's discussion of the evidence it relied upon in relation to the First Half of June Attacks appears to reflect that Nyiramasuhuko participated in abductions and killings, issued orders in general, and held a position of authority among the assailants during these attacks,[1683] the Trial Chamber nowhere concluded that Nyiramasuhuko expressly ordered abductions or killings on the basis of this evidence. In this context, the Appeals Chamber cannot with any certainty conclude that the Trial Chamber relied on this evidence when generally concluding in the "Legal Findings" section of the Trial Judgement that Nyiramasuhuko ordered the killing of Tutsis taking refuge at the prefectoral office. In the absence of any relevant factual and legal findings underlying Nyiramasuhuko's responsibility for ordering killings during the First Half of June Attacks, the Appeals Chamber concludes that Nyiramasuhuko was not convicted in relation to the killings perpetrated as a result of these attacks. Likewise, the Appeals Chamber finds that her superior responsibility for killings committed by *Interahamwe* who followed her orders is not based on her conduct during these attacks.

737. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber failed to provide a reasoned opinion with respect to Nyiramasuhuko's responsibility for ordering the killing of Tutsis taking refuge at the prefectoral office during the Mid-May Attack and the Night of Three Attacks and, consequently, with respect to its conclusions that she bore superior responsibility for killings committed by *Interahamwe* who followed these orders. However, the Appeals Chamber is satisfied that Nyiramasuhuko has been given the opportunity to fully litigate these conclusions on appeal. Consequently, the Appeals Chamber will consider whether the Trial Chamber's failure to make findings as to the essential elements necessary to establish her ordering responsibility under Article 6(1) of the Statute and, thus, with respect to its conclusion that she bore superior responsibility for killings committed by *Interahamwe* who followed these orders in relation to the Mid-May Attack and the Night of Three Attacks invalidates its decision to hold Nyiramasuhuko responsible on these bases when assessing her responsibility for ordering killings later in this section. The Appeals Chamber determines that Nyiramasuhuko's contentions concerning her responsibility for ordering killings during the First Half of June Attacks as well as her responsibility as a superior for these killings are moot as she was not convicted on this basis.

[1683] *See* Trial Judgement, paras. 2754, 2758, 2764, 2769, 2779.

(b) Rapes

738. The Trial Chamber found that the Prosecution provided insufficient notice of its intention to pursue rape as genocide and concluded that convicting Nyiramasuhuko on this basis would be prejudicial.[1684] Accordingly, the Trial Chamber stated that it would not enter a conviction for genocide on the basis of any rapes that occurred,[1685] but clarified that it would nonetheless consider evidence of rapes in the following manner:

> The Chamber […] will mention rapes in the course of its legal findings on genocide. This will be done to convey the entire set of facts in a coherent fashion, including that the intensity and repeated nature of the attacks provides evidence that rape was, in fact, utilised as a form of genocide. The Chamber will not take this into account in assessing genocide, but instead will consider this for the counts of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.[1686]

739. When assessing the Mid-May Attack in the "Genocide" section of the Trial Judgement, the Trial Chamber held that Nyiramasuhuko aided and abetted rapes.[1687] In the same section, it further concluded that she ordered rapes during the Night of Three Attacks and the First Half of June Attacks.[1688] The Trial Chamber nevertheless recalled that it would "not take rapes into account in assessing genocide, but instead [would] consider them for the counts of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II".[1689]

740. When discussing Nyiramasuhuko's liability for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, the Trial Chamber observed that Nyiramasuhuko was only charged pursuant to Article 6(3) of the Statute and convicted her for rapes perpetrated by *Interahamwe* at the prefectoral office on this basis.[1690] The Trial Judgement reflects that her responsibility pursuant to Article 6(3) of the Statute is predicated on her having ordered rapes.[1691]

741. Nyiramasuhuko argues that the Trial Chamber erred by convicting her of genocide on the basis of rapes committed at the prefectoral office.[1692] She submits that the Trial Chamber went

[1684] Trial Judgement, paras. 5863, 5864.
[1685] Trial Judgement, para. 5864.
[1686] Trial Judgement, para. 5865 (internal reference omitted). *See also ibid*., paras. 6085, 6180.
[1687] Trial Judgement, para. 5869. *See also ibid*., para. 5877.
[1688] Trial Judgement, paras. 5873, 5874. *See also ibid*., para. 5877.
[1689] Trial Judgement, para. 5877.
[1690] Trial Judgement, paras. 6087, 6088, 6093, 6180, 6182, 6183.
[1691] Trial Judgement, paras. 6087, 6093 ("Nyiramasuhuko ordered *Interahamwe* to rape Tutsis at the [Butare Prefecture Office], and bears responsibility as a superior for their rapes. The Chamber therefore finds her guilty of rape as a crime against humanity, pursuant to Article 6(3) of the Statute"), 6182. *Cf. ibid*., paras. 5884-5886.
[1692] Nyiramasuhuko Notice of Appeal, paras. 7.7, 7.9; Nyiramasuhuko Appeal Brief, paras. 840-855, 870-873, 1288, 1289, 1291-1293. *See also* AT. 14 April 2015 p. 23.

beyond discussing rapes committed at the prefectoral office but made specific findings as to her individual criminal responsibility under Article 6(1) of the Statute for aiding and abetting and ordering rapes when assessing the charge of genocide.[1693] She contends that the error of this approach is evident as she was only charged under Article 6(3) of the Statute with respect to rapes.[1694]

742. Nyiramasuhuko also appears to argue that the Trial Chamber erred in convicting her as a superior and pursuant to Article 6(1) of the Statute for aiding and abetting rapes during the Mid-May Attack.[1695] She also submits that the Trial Chamber erred in failing to identify the rapes committed by *Interahamwe* at the prefectoral office of which she was found responsible as a superior.[1696]

743. The Prosecution responds that the Trial Chamber did not convict Nyiramasuhuko for genocide on the basis of rapes or for aiding and abetting rapes under any of the other counts.[1697]

744. Notwithstanding its findings that Nyiramasuhuko aided and abetted and ordered rapes in the "Genocide" section of the Trial Judgement as well as its reliance on these conclusions when determining that she possessed the *mens rea* for genocide,[1698] the Trial Chamber repeatedly confirmed that it would not convict Nyiramasuhuko of genocide in relation to rapes committed at the prefectoral office.[1699] The Trial Chamber's conclusions on Nyiramasuhuko's responsibility for genocide unequivocally reflect that she was found guilty of this crime on the sole basis of the killings that she ordered during attacks at the prefectoral office.[1700] Nyiramasuhuko's contention that she was convicted for genocide on the basis of rapes, thus, is without merit.

745. Moreover, the Appeals Chamber concludes that the Trial Chamber did not err in finding in the "Genocide" section of the Trial Judgement that Nyiramasuhuko aided and abetted or ordered rapes in relation to the Mid-May Attack, the Night of Three Attacks, or the First Half of June Attacks. While the Trial Chamber was not obligated to make findings on individual criminal responsibility for rapes under Article 6(1) of the Statute in relation to the crime of genocide as it determined that the Nyiramasuhuko and Ntahobali Indictment was defective in this respect,

[1693] Nyiramasuhuko Notice of Appeal, paras. 7.2, 7.3; Nyiramasuhuko Appeal Brief, paras. 827, 841, 842, 847, 849-852, 872, 873.
[1694] Nyiramasuhuko Appeal Brief, para. 1292. *See also* Nyiramasuhuko Notice of Appeal, paras. 7.8, 7.10.
[1695] Nyiramasuhuko Appeal Brief, paras. 756, 764, 766-768, 870, 874, 1288.
[1696] Nyiramasuhuko Appeal Brief, para. 1289, *referring to* Trial Judgement, paras. 2781, 6088.
[1697] Prosecution Response Brief, paras. 579, 584.
[1698] Trial Judgement, paras. 5870, 5873, 5874.
[1699] *See* Trial Judgement, paras. 5868, 5873, 5877. *See also ibid.*, paras. 6085, 6180.
[1700] Trial Judgement, paras. 5969, 5970.

Nyiramasuhuko does not demonstrate that it was an error for the Trial Chamber to do so where it did not enter a conviction against her on this basis.

746. Likewise, the Trial Judgement unambiguously reflects that Nyiramasuhuko was not convicted of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II under Article 6(1) of the Statute for aiding and abetting rapes during the Mid-May Attack.[1701] It is clear from the Trial Judgement that Nyiramasuhuko was convicted under these counts solely pursuant to Article 6(3) of the Statute and only on the basis of the rapes committed by *Interahamwe* who were following her orders.[1702] As the Trial Chamber did not find that she ordered *Interahamwe* to commit rapes during the Mid-May Attack,[1703] it is clear that Nyiramasuhuko was not convicted in relation to the rapes committed during this attack.

747. Finally, the Appeals Chamber finds no merit in Nyiramasuhuko's unsupported contention that the Trial Chamber failed to factually identify acts of rape committed by *Interahamwe* at the prefectoral office that would support her liability. The Trial Chamber's conclusions reflect that the rapes supporting her responsibility were those committed by *Interahamwe* who accompanied her to the prefectoral office and followed her orders during the Night of Three Attacks and one of the First Half of June Attacks.[1704]

748. Based on the foregoing, the Appeals Chamber rejects Nyiramasuhuko's arguments that she was convicted of genocide on the basis of rapes committed at the Butare Prefecture Office, or that she was convicted of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for rapes that she aided and abetted during the Mid-May Attack. The Appeals Chamber further finds that Nyiramasuhuko has not demonstrated that the Trial Chamber failed to sufficiently identify the rapes for which she was held criminally responsible.

[1701] Trial Judgement, paras. 6087, 6182.
[1702] Trial Judgement, paras. 6087, 6093, 6182. *Cf. ibid.*, paras. 5884-5886.
[1703] Trial Judgement, para. 5869 ("There was no evidence of Nyiramasuhuko's direct involvement in ordering the rape of Witness TA or the other Tutsi women on this occasion in mid-May 1994. […] Therefore, Nyiramasuhuko, by her presence and position of authority, is guilty of aiding and abetting the rapes at the [Butare Prefecture Office].") (internal reference omitted). *See also ibid.*, para. 5877 ("[T]he evidence establishes that […] Nyiramasuhuko aided and abetted rapes […]."). The Appeals Chamber notes that the Trial Chamber relied on the fact that "Nyiramasuhuko issued instructions to rape the women" when discussing her *mens rea* of genocide for the Mid-May Attack. *See ibid.*, para. 5870. Although this statement may be misleading, it is clear, when read in context, that this statement does not refer to the Mid-May Attack but to later attacks at the prefectoral office where Nyiramasuhuko was found to have ordered rapes. *See ibid.*, paras. 5873, 5874.
[1704] *See* Trial Judgement, paras. 2781(iii), (v), 5884, 6088.

(c) Conclusion

749. The Appeals Chamber concludes that the Trial Judgement reflects that Nyiramasuhuko was convicted of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis taking refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks, and that Nyiramasuhuko's superior responsibility for these killings was considered as an aggravating factor in sentencing. The Appeals Chamber finds that Nyiramasuhuko was not convicted in relation to any of the killings committed during the First Half of June Attacks. It also concludes that Nyiramasuhuko was convicted of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* following her orders during the Night of Three Attacks and one of the First Half of June Attacks.

750. The Appeals Chamber finds that the Trial Chamber erred in law in failing to provide a reasoned opinion with respect to Nyiramasuhuko's responsibility for ordering killings during the Mid-May Attack and the Night of Three Attacks. The Appeals Chamber will consider whether the Trial Chamber's failure to make findings as to the essential elements necessary to establish Nyiramasuhuko's ordering responsibility under Article 6(1) of the Statute in relation to these events invalidates the decision when assessing her responsibility for ordering killings later in this section. The Appeals Chamber dismisses Nyiramasuhuko's remaining challenges concerning the imprecision or impropriety of the Trial Chamber's findings concerning her participation in crimes during attacks at the prefectoral office.

2. Assessment of Evidence

751. With respect to the Mid-May Attack, the Trial Chamber found that, one night in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office aboard a camouflage pickup truck.[1705] The Trial Chamber concluded that Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup truck, that Ntahobali and about eight other *Interahamwe* raped Witness TA, and that the pickup truck left the prefectoral office, abducting Tutsi refugees in the process.[1706] As discussed above, the Trial

[1705] Trial Judgement, paras. 2644, 2781(i).
[1706] Trial Judgement, paras. 2644, 2781(i), 5867.

Chamber convicted Nyiramasuhuko for ordering killings during this attack and found that she bore superior responsibility for the killings committed by *Interahamwe* who followed her orders.[1707]

752. As regards the Night of Three Attacks, the Trial Chamber found that, around the end of May or the beginning of June 1994, Ntahobali, Nyiramasuhuko, and *Interahamwe* came to the Butare Prefecture Office on board a camouflaged pickup truck three times in one night.[1708] They abducted Tutsi refugees each time and took them to other sites in Butare Prefecture to be killed.[1709] The Trial Chamber further found that Nyiramasuhuko ordered *Interahamwe* to rape refugees during these attacks.[1710] The Trial Chamber convicted Nyiramasuhuko for ordering killings during these attacks and as a superior for ordering rapes and found that she bore superior responsibility for the killings committed by *Interahamwe* who followed her orders.[1711] The Trial Chamber partly relied on evidence pertaining to the abduction and/or killings of Mbasha's wife, Trifina, Annonciata, and Semanyenzi during these attacks in support of its findings.[1712]

753. Concerning the First Half of June Attacks, the Trial Chamber determined that, during one of the attacks, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the Butare Prefecture Office and as a result numerous women were raped at that location.[1713] The Trial Chamber convicted Nyiramasuhuko as a superior for ordering rapes on this basis.[1714]

754. Nyiramasuhuko challenges the Trial Chamber's assessment of the evidence concerning these attacks. The Appeals Chamber will first examine Nyiramasuhuko's submissions regarding unpleaded and prejudicial evidence before turning to her contentions pertaining to alleged collusion, the identification evidence, the Mid-May Attack, the Night of Three Attacks, and the First Half of June Attacks.

(a) Unpleaded and Prejudicial Evidence

755. The Trial Chamber observed that the identities of Mbasha's wife, Trifina, Annonciata, and Semanyenzi did not appear in the Nyiramasuhuko and Ntahobali Indictment, the Prosecution Pre-Trial Brief or its appendix, or the Prosecution's opening statement.[1715] It also noted that their identities had only been disclosed in four witness statements less than two months prior to trial,

[1707] *See supra*, para. 749.
[1708] Trial Judgement, paras. 2661, 2715, 2738, 2781(iii), 5873.
[1709] Trial Judgement, paras. 2736, 2738, 2749, 2781(iii), 5873.
[1710] Trial Judgement, paras. 2702, 2781(iii), 5873.
[1711] *See supra*, para. 749.
[1712] Trial Judgement, paras. 2172, 2746-2749. The Trial Chamber had previously determined that Nyiramasuhuko and Ntahobali could not be convicted on the basis of the crimes committed against these named individuals for lack of notice. *See ibid.*, para. 2172.
[1713] Trial Judgement, paras. 2773, 2781(v), 5874.
[1714] *See supra*, para. 749.

without indication that this new information was being provided.[1716] Consequently, the Trial Chamber found that the late disclosure of these victims' names "accorded bias to the Defence in preparing its case" and concluded that it would not convict Nyiramasuhuko or Ntahobali for the alleged crimes against these victims if they were to be established.[1717] Relying on the Admissibility Appeal Decision of 2 July 2004 and the *Kupreškić et al*. Appeal Judgement, the Trial Chamber stated that it would nonetheless consider the evidence concerning these individuals for "other permissible purposes", including "background information, circumstantial evidence in support of other allegations, to demonstrate a special knowledge, opportunity or identification of the accused".[1718]

756. Nyiramasuhuko submits that the Trial Chamber erred in relying on the evidence about Mbasha's wife and children, Trifina, Annonciata, and Semanyenzi as circumstantial evidence to support her convictions for the abductions and killings of other unnamed Tutsi refugees at the Butare Prefecture Office.[1719] She contends that the Trial Chamber erred in its application of the *Kupreškić et al*. Appeal Judgement and breached Rule 93 of the Rules, as evidence of a consistent pattern of conduct must be disclosed by the Prosecution pursuant to Rule 66 of the Rules.[1720] She avers that the Prosecution did not comply with Rule 66 of the Rules as the Trial Chamber found that the victims' names were disclosed less than two months prior to the trial.[1721] Moreover, she argues that the *Kupreškić et al*. Appeal Judgement also prevents the use of evidence for this purpose where it would be "critically unfair" and argues that such is the case in this instance in light of the Prosecution's "repeated violation of disclosure obligations"[1722] as well as the fact that this evidence was central to establishing her guilt in relation to attacks at the prefectoral office.[1723]

[1715] Trial Judgement, para. 2172.
[1716] Trial Judgement, para. 2172.
[1717] Trial Judgement, para. 2172.
[1718] Trial Judgement, para. 2172, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-97-21-AR73, Decision on the Appeals by Pauline Nyiramasuhuko and Arsène Shalom Ntahobali on the "Decision on Defence Urgent Motion to Declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", signed 2 July 2004, filed 5 July 2004 ("Admissibility Appeal Decision of 2 July 2004"), paras. 14, 15, *Kupreškić et al*. Appeal Judgement, paras. 321-323, 336.
[1719] Nyiramasuhuko Notice of Appeal, para. 8.1; Nyiramasuhuko Appeal Brief, paras. 501, 504, 903, 904. *See also* Nyiramasuhuko Reply Brief, para. 245. The Appeals Chamber observes that, in her notice of appeal, Nyiramasuhuko alleges that the Trial Chamber erred in its assessment of the evidence of Prosecution Witnesses QJ, TK, RE, QBQ, SU, SS, and FAP. *See* Nyiramasuhuko Notice of Appeal, paras. 8.5-8.10. To the extent that these arguments are developed under her ground of appeal related to the assessment of evidence for the Night of Three Attacks, the Appeals Chamber will address them under that ground. *See infra*, Section IV.F.2(e).
[1720] Nyiramasuhuko Appeal Brief, para. 905.
[1721] Nyiramasuhuko Appeal Brief, paras. 905, 906, 909.
[1722] In this regard, Nyiramasuhuko notes that the Prosecution was "aware of the victims' identities at the very least since 4 November 1998 and 1 December 1999 and deliberately failed to disclose them". *See* Nyiramasuhuko Appeal Brief, para. 909.
[1723] Nyiramasuhuko Notice of Appeal, para. 8.4; Nyiramasuhuko Appeal Brief, paras. 908-911. *See also* Nyiramasuhuko Reply Brief, para. 245. Nyiramasuhuko contends that the Trial Chamber rewarded the Prosecution's deliberate breach of its disclosure obligations by considering the belatedly disclosed and essentially convicting her on

757. Nyiramasuhuko alternatively submits that the Trial Chamber erred in unreasonably relying on the evidence of the named individuals "as circumstantial evidence of what happened to other Tutsi refugees who were at the [Butare Prefecture Office]."[1724] In her view, the use of the evidence in this manner went beyond the permitted uses identified by the Trial Chamber, namely to "demonstrate special knowledge, an opportunity or identification of the accused".[1725] She requests the exclusion of the evidence related to the abductions and/or killings of Mbasha's wife, Trifina, Annonciata, and Semanyenzi.[1726]

758. The Prosecution responds that nothing precluded the Trial Chamber from determining that the evidence related to Mbasha's wife and children and Trifina could be admitted as circumstantial evidence establishing Nyiramasuhuko's charged conduct in relation to crimes committed at the prefectoral office.[1727] It also responds that it was not required to plead Annonciata's and Semanyenzi's identities in the Nyiramasuhuko and Ntahobali Indictment as their identities and account of the killings were evidence and not material facts.[1728] It contends that the disclosure provisions, as interpreted in the *Kupreškić et al.* Appeal Judgement, do not apply in this instance as the relevant evidence was not used to establish a consistent pattern of conduct.[1729] In the alternative, the Prosecution argues that Nyiramasuhuko does not show how her convictions could not stand without the evidence concerning Mbasha's wife and her children, Trifina, Annonciata, and Semanyenzi.[1730]

759. The Appeals Chamber observes that, after considering and finding credible evidence pertaining to the abduction of Mbasha's wife and children[1731] and the killing of Trifina,[1732] the Trial

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the basis of this evidence given its centrality to the findings that she abducted and killed Tutsi refugees from the Butare Prefecture Office. *See* Nyiramasuhuko Appeal Brief, paras. 910, 911.

[1724] Nyiramasuhuko Appeal Brief, para. 912, *referring to* Trial Judgement, para. 2716.

[1725] Nyiramasuhuko Appeal Brief, paras. 912, 915 (emphasis omitted), *referring to* Trial Judgement, paras. 2172, 2176.

[1726] Nyiramasuhuko Appeal Brief, para. 918.

[1727] Prosecution Response Brief, paras. 513-515, 662. The Prosecution also responds that, as Nyiramasuhuko never objected to the admission of the evidence related to Trifina at trial, she is prevented from challenging this evidence for the first time on appeal. *See ibid.*, para. 156.

[1728] Prosecution Response Brief, para. 536.

[1729] Prosecution Response Brief, paras. 536, 662. The Prosecution also submits that the Trial Chamber erred in finding that it did not disclose Trifina's identity until two months before trial. *See ibid.*, para. 512, fn. 1255. In this regard, it contends that it fully complied with its disclosure obligations pursuant to Rule 66(A)(ii) of the Rules. *See idem*. Nyiramasuhuko responds that, because the Prosecution did not appeal the Trial Chamber's finding that it violated Rule 66 of the Rules, it cannot be contested now. *See* Nyiramasuhuko Reply Brief, para. 242. In light of the rejection of the entirety of Nyiramasuhuko's arguments under Ground 28 of her appeal, the Appeals Chamber declines to address this issue. *See infra*, Section IV.F.2(a).

[1730] Prosecution Response Brief, paras. 536, 662.

[1731] Trial Judgement, paras. 2717-2727. Regarding the Prosecution's argument that Nyiramasuhuko did not object to the admission of the evidence related to Trifina at trial, the Appeals Chamber observes that, as noted by Nyiramasuhuko, Ntahobali objected in his closing brief that evidence related to this event, among other evidence, constituted factual allegations that were not pleaded in the Indictment. *See* Nyiramasuhuko Reply Brief, para. 247, *referring to* Ntahobali Closing Brief, para. 78. The Trial Chamber accepted that this objection was validly raised on behalf of both Ntahobali and Nyiramasuhuko and ruled on the issue for both of them. *See* Trial Judgement, paras. 2167, 2172. Accordingly, given Nyiramasuhuko's contentions on appeal that this evidence was nonetheless improperly used to convict her, the

Chamber recalled that it would not enter convictions on the basis of this conduct but found that the "credible and consistent information" with regard to these events provided circumstantial support for its findings regarding the abduction of other unnamed Tutsi refugees from the Butare Prefecture Office.[1733] The Trial Chamber also relied, in part, on evidence that Semanyenzi and Annonciata had been abducted from the prefectoral office but escaped and returned to it, informing refugees that those who had been abducted were killed.[1734] The Trial Chamber considered this evidence when concluding that the refugees abducted from the prefectoral office were killed.[1735]

760. In this context, the Appeals Chamber rejects Nyiramasuhuko's argument that the Trial Chamber, through its reference to the *Kupreškić et al.* Appeal Judgement, improperly admitted evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute without the notice required by Rule 93 of the Rules.[1736] Nothing in the Trial Chamber's analysis supports the contention that evidence concerning Mbasha's wife and children, Trifina, or Annonciata and Semanyenzi was admitted for the purposes set out under Rule 93 of the Rules,[1737] nor do the excerpts of the *Kupreškić et al.* Appeal Judgement that the Trial Chamber relied upon suggest that this is the only purpose for which unpleaded evidence can be admitted and considered.[1738] All of Nyiramasuhuko's arguments in this regard are dismissed.

761. Furthermore, the Appeals Chamber sees no error in the Trial Chamber's reliance on this evidence as circumstantial support for other pleaded allegations. The Trial Chamber considered that insufficient notice had been given to Nyiramasuhuko concerning the crimes against these particular individuals and that she was prejudiced in this regard.[1739] Such a conclusion, however, is not

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Appeals Chamber considers that Nyiramasuhuko is not precluded from challenging the relevant Trial Chamber's findings on appeal.

[1732] Trial Judgement, paras. 2728-2730.

[1733] Trial Judgement, paras. 2727, 2730.

[1734] *See* Trial Judgement, paras. 2746, 2747.

[1735] *See* Trial Judgement, paras. 2746-2749. Nyiramasuhuko also argues that it was improper for the Trial Chamber to have relied on evidence concerning the unnamed woman as circumstantial evidence to convict her. *See* Nyiramasuhuko Appeal Brief, para. 903. However, the Appeals Chamber notes that the Trial Chamber did not exclude the use of such evidence for lack of notice. *See* Trial Judgement, paras. 2172, 2731-2738. Consequently, Nyiramasuhuko's contentions fail to explain why this evidence should have been excluded and why it was an error for the Trial Chamber to have relied upon it.

[1736] Rule 93(A) of the Rules provides that evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice and Rule 93(B) of the Rules requires the Prosecution to disclose acts tending to show such a pattern of conduct pursuant to Rule 66 of the Rules.

[1737] *See* Trial Judgement, paras. 2172, 2746-2749.

[1738] *See Kupreškić et al.* Appeal Judgement, paras. 321-323, 336, *referred to* in Trial Judgement, para. 2172, fn. 5763.

[1739] *See* Trial Judgement, para. 2172. Nyiramasuhuko's arguments are based on the incorrect premise that the Trial Chamber found that the Prosecution violated its disclosure obligations pursuant to Rule 66 of the Rules with respect to the identities of Mbasha's wife, Trifina, Annonciata, and Semanyenzi in paragraph 2172 of the Trial Judgement. Even if that were the case, Nyiramasuhuko does not demonstrate that any violation in this regard prevented the Trial Chamber from relying on the evidence of these individuals as circumstantial evidence to establish other allegations pleaded in the indictment.

equivalent to a finding that the evidence is inadmissible under Rule 89(C) of the Rules.[1740] The Prosecution has an obligation to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven.[1741] In addition, Rule 89(C) of the Rules allows a trial chamber to admit any relevant evidence it deems to have probative value.[1742]

762. In this case, the evidence identified by Nyiramasuhuko is related in time, geographically, and thematically to the pleaded allegations of her involvement in crimes committed during attacks at the Butare Prefecture Office. While Nyiramasuhuko argues that the Prosecution violated its disclosure obligations, the findings upon which she relies to support this position only reflect the conclusion that she was not provided sufficient notice that she was charged with the crimes against these specific individuals and that convicting her on this basis would be impermissible.[1743] Nyiramasuhuko does not substantiate that the manner in which the information about these particular victims was disclosed required the Trial Chamber to exclude it. Nor does she substantiate her contention that such evidence was essential for establishing her guilt with respect to the crimes she was found to have committed in relation to attacks at the prefectoral office.[1744]

763. As to Nyiramasuhuko's alternative argument that the Trial Chamber erred in using the evidence of the named individuals in a manner that fell outside the limitations that it had imposed on the uses of this evidence, the Appeals Chamber finds that Nyiramasuhuko misrepresents the Trial Judgement.[1745] A plain reading of the Trial Judgement shows that "special knowledge, opportunity, or identification of the accused" were not the only permitted uses identified by the Trial Chamber, which also stated that it could be used for "circumstantial evidence in support of other allegations".[1746]

764. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's arguments concerning the allegedly improper use of unpleaded and prejudicial evidence.

[1740] *See* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15.
[1741] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88.
[1742] Admissibility Appeal Decision of 2 July 2004, para. 15.
[1743] Trial Judgement, para. 2172.
[1744] Indeed, Nyiramasuhuko's submissions as they concern Semanyenzi, Annonciata, and Fidèle ignore the fact that these persons were not killed and that there was no obligation on the Prosecution to plead their abductions from the prefectoral office in support of the charges that Nyiramasuhuko bore responsibility for the killing of refugees abducted from the prefectoral office.
[1745] Nyiramasuhuko Appeal Brief, paras. 912, 915, *referring to* Trial Judgement, paras. 2172, 2176.
[1746] Trial Judgement, para. 2172.

(b) Collusion

765. The Trial Chamber considered and rejected Defence allegations of fabrication of testimony against, *inter alios*, Witnesses TK, QJ, SS, and SU.[1747] When assessing evidence about the events at the Butare Prefecture Office, the Trial Chamber explicitly evaluated the familial relationships between Witnesses TK and QJ, Witnesses TK and RE, and Witnesses SS and SU, and determined that these relationships did not leave their credibility in doubt.[1748]

766. With respect to Witnesses TK and QJ, Nyiramasuhuko notes that they are related and that the Trial Chamber considered and rejected Witness TK's testimony about never discussing with Witness QJ the 1994 events or about coming to Arusha.[1749] She argues that despite this consideration, the Trial Chamber erred in finding that this did not undermine Witness TK's credibility as a whole.[1750] She contends that she was not allowed to cross-examine Witness QJ on whether Witness TK would be testifying after him and that the Trial Chamber failed to sufficiently scrutinise Witness TK's statement during her subsequent testimony that she and Witness QJ did "not spend time discussing [the events of 1994]" even though they both gave interviews to Prosecution investigators on the same day.[1751] She also highlights that Witness TK testified that she did not know anyone with whom she was travelling to Arusha but admitted during cross-examination that she flew to Arusha with Witness SJ.[1752] In Nyiramasuhuko's view, these circumstances: (i) reflect that Witnesses TK and QJ sought to conceal what they had discussed between themselves and with others in their prior statements and testimonies; and (ii) should have been considered by the Trial Chamber.[1753]

767. Nyiramasuhuko also argues that it was insufficient for the Trial Chamber to acknowledge merely that Witness RE was related to Witness TK without concluding that it put Witness RE's credibility in doubt.[1754] She notes that, in her prior statement, Witness RE did not mention what happened to Mbasha's wife and children and stated that Nyiramasuhuko only came twice instead of three times in one night to the prefectoral office.[1755] She posits that Witness RE's later recollection

[1747] *See* Trial Judgement, para. 383.
[1748] *See* Trial Judgement, paras. 2245, 2281, 2283, 2677, 2685, 2720, 2757, 2761.
[1749] Nyiramasuhuko Appeal Brief, paras. 1080, 1081. *See also ibid*., paras. 260, 287.
[1750] Nyiramasuhuko Notice of Appeal, para. 10.24; Nyiramasuhuko Appeal Brief, paras. 1080, 1081. *See also ibid.*, paras. 287-290, 294.
[1751] Nyiramasuhuko Appeal Brief, paras. 288, 289.
[1752] Nyiramasuhuko Appeal Brief, para. 293.
[1753] *See* Nyiramasuhuko Appeal Brief, paras. 286-290, 293, 294.
[1754] Nyiramasuhuko Appeal Brief, para. 291.
[1755] Nyiramasuhuko Appeal Brief, para. 291.

of events, which followed more closely Witness TK's evidence, demonstrates a real possibility of collusion.[1756]

768. In addition, Nyiramasuhuko points out that Witnesses SS and SU testified that they witnessed the events from April to July 1994 together, thereafter lived with each other and maintained close ties, and gave statements to Tribunal investigators on the same day in 1996.[1757] She argues that the fact that "material information" related to the prefectoral office provided by both witnesses during their testimonies was not in their prior statements should have led the Trial Chamber to treat their evidence with caution.[1758] She also contends that the Trial Chamber never established the veracity of Witness SU's statement that she did not discuss the events with Witness SS.[1759]

769. Nyiramasuhuko argues that the Trial Chamber's erroneous evaluation of the evidence of these witnesses in light of the circumstances described above reveals an improper appearance of bias and warrants her acquittal.[1760]

770. The Prosecution responds that the Trial Chamber properly assessed the family relationship between Witnesses TK and QJ and properly exercised its discretion in assessing their evidence.[1761] It further contends that Nyiramasuhuko fails to demonstrate that any of the witnesses had a motive to lie based on their relationships with each other.[1762]

771. At the outset, the Appeals Chamber recalls its prior conclusion that, even if Nyiramasuhuko were to demonstrate errors in the Trial Chamber's analysis of the evidence in the manner she alleges, this would not be sufficient to demonstrate bias on the part of the Trial Chamber in the context of this case.[1763]

772. As noted above, the Trial Chamber expressly considered the ties between Witnesses TK and QJ, Witnesses RE and TK, and Witnesses SS and SU, and rejected Defence evidence that they fabricated evidence.[1764] The Trial Chamber provided several reasons as to why it found Witnesses TK and QJ credible, notwithstanding its disbelief that they had not discussed the events

[1756] Nyiramasuhuko Appeal Brief, para. 292.
[1757] Nyiramasuhuko Appeal Brief, paras. 295, 296.
[1758] Nyiramasuhuko Appeal Brief, paras. 295-298. Specifically, Nyiramasuhuko points out that, although not contained in their prior statements, both witnesses similarly testified that: (i) she was present and ordered *Interahamwe* to commit rapes at the prefectoral office; (ii) rapes occurred there; (iii) Semanyenzi and Fidèle survived and returned to the prefectoral office; and (iv) a woman and her children situated on the veranda were killed. *See idem.*
[1759] Nyiramasuhuko Appeal Brief, para. 296.
[1760] Nyiramasuhuko Appeal Brief, para. 316.
[1761] Prosecution Response Brief, paras. 696-698.
[1762] Prosecution Response Brief, paras. 99, 100.
[1763] *See supra*, Section IV.A.1.
[1764] *See supra*, para. 765.

and their participation in proceedings with each other.[1765] In particular, the Appeals Chamber observes that the Trial Chamber accepted Witness TK's evidence in light of its "significantly detailed nature […] and the corroboration of numerous elements of her testimony by other witnesses".[1766] The Trial Chamber also expressly discussed Witness TK's evidence regarding her knowledge of other witnesses, in particular those who travelled with her to Arusha.[1767] There is also no merit in Nyiramasuhuko's contention that the Trial Chamber barred cross-examination on whether Witness QJ knew that Witness TK was called to testify for the Prosecution, as the witness was asked and answered this question.[1768] Nyiramasuhuko does not demonstrate how the Trial Chamber erred in this regard.

773. In relation to Witness RE, the Appeals Chamber considers Nyiramasuhuko's reliance on alleged inconsistencies between the witness's prior statement and testimony to establish collusion with Witness TK to be speculative. In particular, Nyiramasuhuko's submission ignores the fact that Witness RE's evidence was corroborated by witnesses other than Witness TK.[1769]

774. With respect to Witnesses SS's and SU's evidence, the Appeals Chamber is not persuaded that alleged inconsistencies between their prior statements and testimonies evidenced collusion between them. In particular, the Appeals Chamber observes that their evidence, which Nyiramasuhuko suspects resulted from collusion, is corroborated by other witnesses.[1770] Moreover, while Nyiramasuhuko extensively challenges the credibility of their respective testimonies based on differences between them, she fails to show that the alleged discrepancies within their evidence were so material that, by accepting their evidence, the Trial Chamber failed to exercise caution or sufficient concern for collusion.[1771] Having examined Nyiramasuhuko's arguments in detail, the Appeals Chamber concludes that they fail to demonstrate that the Trial Chamber abused its broad discretion in assessing the evidence of these witnesses.

[1765] *See* Trial Judgement, paras. 2677, 2685, 3795.
[1766] *See* Trial Judgement, para. 2677. *See also ibid*., para. 2662.
[1767] *See* Trial Judgement, para. 2685.
[1768] *See* Witness QJ, T. 12 November 2001 pp. 59, 60 (closed session). In particular, a review of the relevant transcripts does not demonstrate that the Trial Chamber's management of the examination of Witness QJ prevented sufficient interrogation on the nature of the witness's relationship with Witness TK or whether these two witnesses had discussed the events or their testimonies. *See* Nyiramasuhuko Appeal Brief, paras. 288, 289, *referring to* Witness QJ, T. 12 November 2001 pp. 55, 56, 61 (closed session), T. 15 November 2001 pp. 61, 62, Witness TK, T. 21 May 2002 pp. 40, 41, 102, 103 (closed session), T. 23 May 2002 pp. 47-49. While the Appeals Chamber has found that the Trial Chamber erred in relying on an aspect of Witness TK's evidence when convicting Ntahobali in relation to rapes at the Butare Prefecture Office, this conclusion is unrelated to the issue of Witness TK's credibility. *See infra*, Section V.I.1(b).
[1769] *See* Trial Judgement, paras. 2686, 2687, 2695, 2698, 2703, 2707, 2729, 2738, 2747. The Appeals Chamber is also not persuaded that the variance between Witness RE's prior statement and testimony required express analysis from the Trial Chamber, or that it demonstrates that the Trial Chamber failed to sufficiently consider whether her testimony was fabricated based on unsupported allegations of collusion with Witness TK.
[1770] *See* Trial Judgement, paras. 2660, 2661, 2686, 2687, 2693, 2695, 2698, 2701, 2702 (concerning Witness SS's evidence). *See ibid*., paras. 2655-2660, 2698, 2702, 2746 (concerning Witness SU's evidence).
[1771] *See infra*, Section IV.F.2(e).

775. Based on the foregoing, the Appeals Chamber rejects Nyiramasuhuko's contention that the Trial Chamber erred in failing to conclude that the credibility of Witnesses TK, QJ, RE, SS and SU was undermined by their familial relationships and suspicions of collusion.

(c) Identification Evidence

776. In concluding that Nyiramasuhuko participated in the Mid-May Attack and Night of Three Attacks, the Trial Chamber referred to the identification evidence provided by Prosecution Witnesses SU, SD, SS, SJ, QJ, TA, TK, RE, FAP, QY, and QBQ.[1772]

777. Nyiramasuhuko submits that the Trial Chamber erred in its assessment of the credibility and reliability of the evidence relating to her identification during the Mid-May Attack and the Night of Three Attacks.[1773] Specifically, she argues that the Trial Chamber erred in: (i) improperly relying on in-court identifications; (ii) accepting several witnesses' evidence that they had prior knowledge of her; and (iii) accepting witnesses' testimonies of having seen her at the Butare Prefecture Office.[1774] The Appeals Chamber will address these contentions in turn.

(i) In-Court Identification

778. Nyiramasuhuko submits that the Trial Chamber erred in relying on several in-court identifications in light of its position that it would not rely upon such evidence.[1775] She also argues that the in-court identifications of her had no probative value given that she was the only female defendant in a trial involving six co-accused.[1776]

779. The Prosecution rejects Nyiramasuhuko's contention that the Trial Chamber stated that it would not, under any circumstance, rely on in-court identifications.[1777] It further argues that the Trial Chamber took into account many factors when weighing such evidence.[1778]

[1772] Trial Judgement, paras. 2628, 2629, 2686, 2698. *See also ibid.*, paras. 2683-2685, 2687-2702.
[1773] Nyiramasuhuko Notice of Appeal, paras. 6.1, 10.15; Nyiramasuhuko Appeal Brief, paras. 772-775, 815, 816. While Nyiramasuhuko made express reference in her notice of appeal under Ground 24 to paragraphs of the Trial Judgement which relate to the Trial Chamber's general approach to identification evidence, the Night of Three Attacks, and the First Half of June Attacks, she only developed arguments supporting challenges to the Trial Chamber's assessment of the identification evidence related to the Night of Three Attacks under Ground 24 and to the Mid-May Attack under Ground 30. *See* Nyiramasuhuko Notice of Appeal, paras. 6.1, 10.15; Nyiramasuhuko Appeal Brief, paras. 772-817.
[1774] Nyiramasuhuko Appeal Brief, paras. 777-795, 797-802, 806-814. Nyiramasuhuko contends that these purported errors reflect that the Trial Chamber approached identification evidence presented by the Prosecution as *a priori* believable and credible, and that it exercised no caution when evaluating such evidence. *See ibid.*, para. 815.
[1775] Nyiramasuhuko Notice of Appeal, para. 6.1; Nyiramasuhuko Appeal Brief, para. 777, *referring to* Trial Judgement, paras. 173, 2196, 2239, 2263, 2280, 2296, 2961 (which concern identification evidence provided by Witnesses QJ, SJ, SU, RE, and SS).
[1776] Nyiramasuhuko Appeal Brief, para. 777.
[1777] Prosecution Response Brief, para. 486.
[1778] Prosecution Response Brief, para. 486.

780. In the section of the Trial Judgement concerning "Evidentiary Matters", the Trial Chamber discussed principal considerations that would guide its assessment of evidence relating to the identification of the accused.[1779] With respect to in-court identifications, the Trial Chamber stated:

> No probative weight will be assigned to an identification given for the first time by a witness while testifying, who identifies the accused while he is standing in the dock. Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight will be given by the Chamber to these "in court" identifications.[1780]

781. The Appeals Chamber recalls that any in-court identification should be assigned "little or no credence" given the signals that can identify an accused aside from prior acquaintance.[1781]

782. Nyiramasuhuko's submissions fail to identify any error committed by the Trial Chamber with respect to in-court identifications in her case. Her contentions merely refer to the Trial Chamber's summary of identification evidence provided by each witness, without substantiating how the Trial Chamber erred in its consideration of these testimonies.[1782] A review of the Trial Chamber's analysis reveals that the Trial Chamber did not rely on in-court identifications when accepting the ability of witnesses to identify Nyiramasuhuko in connection with the attacks at the Butare Prefecture Office.[1783] Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's submissions regarding the Trial Chamber's assessment of in-court identifications.

(ii) Prior Knowledge

783. Within the "Factual Findings" section of the Trial Judgement concerning the Night of Three Attacks, the Trial Chamber discussed identification evidence relevant to Nyiramasuhuko's participation in these attacks.[1784] In particular, the Trial Chamber concluded that "several witnesses knew Nyiramasuhuko before the April to July 1994 events[,] including Witnesses SU, SD, SS and SJ", and that these witnesses "had an opportunity to identify her in the conditions of calm prior to the commencement of large-scale violence".[1785] The Trial Chamber also stated that "Nyiramasuhuko was widely known as the Minister in charge of Women's Affairs and therefore would likely be recognisable."[1786]

[1779] Trial Judgement, paras. 171-173.
[1780] Trial Judgement, para. 173, *referring to Kunarac et al.* Appeal Judgement, para. 320.
[1781] *Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Kunarac et al.* Appeal Judgement, para. 320.
[1782] Nyiramasuhuko Appeal Brief, para. 777, *referring to* Trial Judgement, paras. 2196, 2239, 2263, 2280, 2296, 2961.
[1783] *See* Trial Judgement, paras. 2628, 2629, 2683-2702, 2758, 2765.
[1784] Trial Judgement, Section 3.6.19.4.7.3.
[1785] Trial Judgement, para. 2698.
[1786] Trial Judgement, para. 2698.

784. Nyiramasuhuko submits that the Trial Chamber erred in finding that the evidence that Witnesses SU, SD, SS, and SJ knew her prior to April 1994 was sufficiently reliable.[1787] The Appeals Chamber will assess Nyiramasuhuko's challenges as they relate to each witness in turn.

a. Witness SU

785. As noted above, the Trial Chamber determined that Witness SU was one of several witnesses who "knew Nyiramasuhuko before the April to July 1994 events" when discussing Nyiramasuhuko's participation in the Night of Three Attacks.[1788] The Trial Chamber provided further analysis regarding Witness SU's prior knowledge of Nyiramasuhuko when considering allegations of Nyiramasuhuko's order to rape during an attack at the Butare Prefecture Office in the first half of June 1994.[1789] In this section of the Trial Judgement, the Trial Chamber again found that Witness SU previously knew Nyiramasuhuko and specifically referred to the witness's evidence that she had "walked past Nyiramasuhuko's home" in Ndora Commune when visiting relatives.[1790]

786. Nyiramasuhuko submits that, in relying on Witness SU's testimony, the Trial Chamber erred in failing to consider that Nyiramasuhuko had not lived in Ndora Commune since 1968 and that Witness SU was unable to identify the period prior to 1994 when she knew her.[1791] Nyiramasuhuko argues that, even if Witness SU were telling the truth, the fact that she met her more than 20 years prior to 1994, coupled with the obvious lack of familiarity between the witness and her since the witness acknowledged that she never spoke with Nyiramasuhuko, rendered Witness SU's identification "unavoidably doubtful".[1792]

787. The Prosecution responds that Nyiramasuhuko mischaracterises Witness SU's evidence and fails to acknowledge that the witness provided additional biographical information about Nyiramasuhuko and her family that supports the Trial Chamber's finding that the witness had prior knowledge of her.[1793]

[1787] Nyiramasuhuko Appeal Brief, para. 778.
[1788] Trial Judgement, para. 2698.
[1789] Trial Judgement, Section 3.6.19.4.9.2.
[1790] Trial Judgement, para. 2758.
[1791] Nyiramasuhuko Appeal Brief, para. 778.
[1792] Nyiramasuhuko Appeal Brief, para. 779 (emphasis omitted).
[1793] Prosecution Response Brief, para. 479. The Prosecution contends that Witness SU's evidence reflects that she was talking about Nyiramasuhuko's "husband's home", the place where she was married. *See idem*, *referring to* Witness SU, T. 21 October 2002 p. 62 (closed session).

788. The Appeals Chamber considers that the fact that Nyiramasuhuko may not have been living in Ndora Commune since 1968[1794] does not suggest that the witness lied about seeing her in front of her home in Ndora. Nyiramasuhuko also misconstrues Witness SU's evidence when arguing that the witness could not provide any indication about the period prior to 1994 she saw her.[1795] Witness SU's testimony reflects that she simply could not recall when she *last* saw Nyiramasuhuko before the events of April 1994.[1796] Likewise, the fact that Witness SU may have first seen Nyiramasuhuko more than 20 years prior to April 1994 and had not spoken with her does not *per se* demonstrate that the Trial Chamber, which took note of this, acted unreasonably in relying on this witness's identification evidence.[1797] Nyiramasuhuko's contentions ignore that Witness SU correctly identified Maurice Ntahobali as Nyiramasuhuko's husband and stated that Nyiramasuhuko had four children with him.[1798] The Appeals Chamber finds that Nyiramasuhuko does not demonstrate that no reasonable trier of fact could have concluded that Witness SU had knowledge of her prior to April 1994.

b. Witness SD

789. Nyiramasuhuko contends that the Trial Chamber erred in finding that Witness SD had prior knowledge of her given that the witness's knowledge was based on having seen a picture of Nyiramasuhuko in the *Imvaho* journal.[1799]

790. The Prosecution responds that Nyiramasuhuko fails to substantiate any error in the Trial Chamber's finding that Witness SD had prior knowledge of her.[1800]

791. Notwithstanding its finding of Witness SD's prior knowledge of Nyiramasuhuko when discussing identification evidence relevant to Nyiramasuhuko's participation in the Night of Three Attacks, the Trial Chamber did not find that Witness SD saw Nyiramasuhuko on this night[1801] and the Trial Judgement reflects that the Trial Chamber did not rely on Witness SD's identification of Nyiramasuhuko at the Butare Prefecture Office.[1802] In this context, the Appeals Chamber finds it

[1794] The Appeals Chamber considers that Nyiramasuhuko's evidence in support of her contention that she did not live in Ndora Commune after 1968 is ambiguous. *See* Nyiramasuhuko, T. 31 August 2005 pp. 21, 22.
[1795] Nyiramasuhuko Appeal Brief, para. 778.
[1796] Witness SU, T. 21 October 2002 p. 61 (closed session).
[1797] *See* Trial Judgement, para. 2263.
[1798] *See* Witness SU, T. 14 October 2002 p. 14, T. 16 October 2002 p. 10. *See also* Maurice Ntahobali, T. 12 September 2005 pp. 16, 17 (testifying that he was a lecturer at a higher education institution, was married to and had three girls and one boy with Nyiramasuhuko); Clarisse Ntahobali, T. 8 February 2005 pp. 87, 88, T. 9 February 2005 p. 6.
[1799] Nyiramasuhuko Appeal Brief, paras. 778, 786, fn. 634.
[1800] Prosecution Response Brief, para. 478.
[1801] *See* Trial Judgement, paras. 2312-2318, 2686.
[1802] In this regard, the Appeals Chamber notes that the Trial Chamber refused to rely on Witness SD's evidence in one context and only found that Witness SD's evidence generally corroborated Witness TA's evidence as it related to the attacks that occurred seven and 11 days after the Mid-May Attack ("Last Half of May Attacks") as well as provided

unnecessary to examine Nyiramasuhuko's challenges to the Trial Chamber's assessment of Witness SD's prior knowledge of Nyiramasuhuko.

c. Witness SS

792. Within the same section of the Trial Judgement relevant to the Night of Three Attacks where it determined that Witness SS was one of several witnesses who had prior knowledge of Nyiramasuhuko, the Trial Chamber expressly recalled Witness SS's evidence that she had passed the road in front of Nyiramasuhuko's house and had seen her three times prior to the genocide.[1803] It also noted Witness SS's evidence of having encountered Nyiramasuhuko at a roadblock during the genocide, in daylight and from less than three metres away.[1804] The Trial Chamber further observed that Witness SS testified that "Nyiramasuhuko was the prime minister who was in charge of gender issues".[1805] The Trial Chamber then stated that "[b]ecause of the multiple opportunities Witness SS had to observe the Accused, and the witness'[s] opportunity to observe Nyiramasuhuko in daylight and prior to the genocide, the Chamber finds Witness SS'[s] identification of Nyiramasuhuko to be both reliable and credible."[1806]

793. Nyiramasuhuko contends that, by crediting Witness SS's evidence of having seen her at her house on three occasions in 1990, the Trial Chamber failed to consider contradictory evidence that the building to which Witness SS referred – Hotel Ihuliro – did not exist before 1993 and did not open until December that year.[1807] Nyiramasuhuko also emphasises that simply because Witness SS knew that she was the Minister of Family and Women's Development is not a reliable basis for identifying her as this fact was widely known.[1808]

794. Nyiramasuhuko further contends that the Trial Chamber failed to apply appropriate caution when also relying on Witness SS's account of previously having seen her at a roadblock during the genocide.[1809] Specifically, she argues that the Trial Chamber failed to sufficiently consider the

circumstantial evidence of the vehicle driven by Ntahobali during the Night of Three Attacks. *See* Trial Judgement, paras. 2620, 2650, 2651, 2663. The Appeals Chamber observes that, while Witness SD's evidence indicated that Nyiramasuhuko participated in attacks at the prefectoral office, the Trial Chamber did not rely on this element of the witness's testimony as it did not find that Nyiramasuhuko was present during the Last Half of May Attacks. *See* Trial Judgement, paras. 2653, 2781(ii).

[1803] Trial Judgement, para. 2689.
[1804] Trial Judgement, para. 2689.
[1805] Trial Judgement, para. 2689.
[1806] Trial Judgement, para. 2690.
[1807] Nyiramasuhuko Appeal Brief, paras. 781, 782. *See also ibid.*, para. 780.
[1808] Nyiramasuhuko Appeal Brief, para. 786.
[1809] Nyiramasuhuko Appeal Brief, paras. 783-785. *See also ibid*., paras. 775, 776.

difficult circumstances surrounding this identification.[1810] Nyiramasuhuko also highlights Witness FAP's evidence that she was stopped at the same roadblock and under the same circumstances as Witness SS, noting that Witness FAP did not identify Nyiramasuhuko as being present.[1811]

795. The Prosecution responds by stressing that Witness SS testified that she did not know of Hotel Ihuliro but of the private residence of Nyiramasuhuko's husband "at that location".[1812] It also contends that Nyiramasuhuko ignores the Trial Chamber's consideration of evidence that Witness SS also saw Nyiramasuhuko at the Huye Stadium prior to the genocide.[1813] The Prosecution adds that the Trial Chamber sufficiently considered the difficult circumstances in which Witness SS observed Nyiramasuhuko at the roadblock during the genocide and that Nyiramasuhuko does not show the relevance of Witness FAP's evidence.[1814]

796. The Appeals Chamber notes that Witness SS was examined extensively as to the three occasions on which she saw Nyiramasuhuko at her home prior to 1994. Her evidence reflects that she saw Nyiramasuhuko during the day on three occasions in 1990, in front of a two storey building, which she was told belonged to Nyiramasuhuko's husband, Maurice Ntahobali.[1815] Nyiramasuhuko argues that the building Witness SS is referring to is Hotel Ihuliro.[1816] The Appeals Chamber observes that the evidence pointed out by Nyiramasuhuko indicates that Hotel Ihuliro was not operational prior to late 1993.[1817] However, contrary to Nyiramasuhuko's suggestion, this evidence does not reflect that the building itself did not exist.[1818] The fact that Hotel Ihuliro did not open or receive guests until 1994 is not incompatible with Witness SS's evidence of seeing Nyiramasuhuko in 1990 in front of the two storey building owned by Maurice Ntahobali that eventually became Hotel Ihuliro.

[1810] Nyiramasuhuko Appeal Brief, paras. 784, 785. Nyiramasuhuko argues that the circumstances were extremely stressful as the witness had seen the corpse of a man whose arm was amputated lying less than three metres from the roadblock. *See ibid*., para. 784.
[1811] Nyiramasuhuko Appeal Brief, para. 785.
[1812] Prosecution Response Brief, para. 480.
[1813] Prosecution Response Brief, para. 480.
[1814] Prosecution Response Brief, para. 481. The Prosecution argues that it is not clear that Witness FAP was at the roadblock at the same time as Witness SS. *See idem*.
[1815] *See* Witness SS, T. 3 March 2003 pp. 34-36, T. 4 March 2004 pp. 13-15, T. 5 March 2004 pp. 15, 16.
[1816] *See* Nyiramasuhuko Appeal Brief, para. 781.
[1817] *See* Maurice Ntahobali, T. 12 September 2005 p. 73, T. 13 September 2005 pp. 4, 5, 87-89, T. 14 September 2005 p. 12, T. 16 September 2005 pp. 69, 70; Clarisse Ntahobali, T. 9 February 2005 pp. 23, 33 (testifying that the hotel was functioning when the witness returned to Rwanda in December 1993 but that "before [she] left, the hotel virtually did not exist"); Céline Nyiraneza, T. 24 February 2005 p. 42 (French) ("*Q. Madame, cet hôtel de votre grande sœur, est-ce que c'était un endroit qui était ouvert depuis peu de temps au mois d'avril 1994 ou cela faisait plus de temps ? R. Il y avait peu de temps que l'hôtel avait ouvert.*"); Nyiramasuhuko, T. 6 October 2005 p. 28 ("Q. Madam, did you stay in Hotel Uhiliro [*sic*] in 1990? A. No, in 1990, […] this hotel did not exist"). The Appeals Chamber observes that the testimony of Denise Ntahobali to which Nyiramasuhuko refers does not shed light on when Hotel Ihuliro was open. *See* Denise Ntahobali, T. 9 June 2005 p. 16 (French).
[1818] Nyiramasuhuko does not point to evidence in the record as to when the building was built.

797. Although not expressly referred to by the Trial Chamber in its analysis of Witness SS's prior knowledge of Nyiramasuhuko, the Appeals Chamber further observes that the witness also testified to having seen Nyiramasuhuko introduced as minister during a ceremony at Huye Stadium,[1819] which the Trial Chamber recalled when summarising her testimony.[1820] Nyiramasuhuko does not challenge this evidence and the Appeals Chamber considers that a reasonable trier of fact, based on all of Witness SS's testimony, including her knowledge that Nyiramasuhuko was the "minister who was in charge of gender issues", could have determined that she knew Nyiramasuhuko prior to the genocide. That this fact might have been well known does not undermine the probative nature of Witness SS's ability to identify Nyiramasuhuko.

798. Likewise, the Appeals Chamber finds that Nyiramasuhuko does not demonstrate that the Trial Chamber failed to sufficiently consider the difficult circumstances surrounding Witness SS's identification of her at a roadblock during the genocide. Before relying on this evidence, the Trial Chamber recalled that the identification was "[d]uring the events of April to July 1994" and assessed the circumstances surrounding this encounter, including the fact that Witness SS was less than three metres from Nyiramasuhuko and that it occurred during the day.[1821] In the view of the Appeals Chamber, Nyiramasuhuko's argument that the identification was made under stressful circumstances as the witness saw her as well as "a corpse with its arms amputated" on the same occasion does not undermine the reliability of this identification.[1822]

799. Turning to Nyiramasuhuko's contention that Witness FAP was stopped at the same roadblock and under the same circumstances as Witness SS, but that Witness FAP did not identify Nyiramasuhuko as being present, the Appeals Chamber observes that several aspects of both witnesses' testimonies could suggest that they passed the same roadblock around the same time.[1823] Nevertheless, Nyiramasuhuko's submissions fail to demonstrate that Witness SS's evidence of Nyiramasuhuko's presence at the roadblock is incompatible with Witness FAP's evidence, particularly as Witness FAP was not questioned as to whether Nyiramasuhuko was present.[1824] Moreover, having carefully reviewed the relevant aspects of both witnesses' testimonies, the

[1819] Witness SS, T. 4 March 2003 pp. 14, 15, 17.
[1820] Trial Judgement, para. 2296.
[1821] *See* Trial Judgement, paras. 2689, 2690.
[1822] Witness SS, T. 3 March 2003 p. 32. *See also* Nyiramasuhuko Appeal Brief, para. 784.
[1823] Both witnesses testified that they left Butare University Hospital with other refugees, including Burundian refugees, on foot and were escorted by four soldiers until they were stopped at a roadblock in front of Nyiramasuhuko's home. Witness SS testified that this occurred on 27 May 1994 and Witness FAP indicated that this was around the last two weeks of May 1994. *See* Witness SS, T. 3 March 2003 pp. 24, 26, 29, T. 4 March 2003 pp. 45, 46, 48, 49, T. 5 March 2003 pp. 19, 20, T. 10 March 2003 p. 61; Witness FAP, T. 11 March 2003 pp. 40-44, 46, T. 12 March 2003 pp. 30, 35, 37-39, 42, T. 13 March 2003 pp. 23 (closed session), 30.
[1824] *See* Witness FAP, T. 11 March 2003 pp. 40-44, T. 12 March 2003 pp. 37-39, T. 13 March 2003 pp. 20, 23 (closed session).

Appeals Chamber is not persuaded that the witnesses' observations were made at the same time or from the same perspective.[1825]

800. In light of the above, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Witness SS had prior knowledge of Nyiramasuhuko.

d. Witness SJ

801. The Trial Chamber stated that Witness SJ identified Nyiramasuhuko during the Night of Three Attacks[1826] and, as noted above, concluded that Witness SJ was one of several witnesses who knew her before the relevant events.[1827]

802. Nyiramasuhuko argues that it was unreasonable for the Trial Chamber to have found beyond reasonable doubt that Witness SJ knew her and her family.[1828]

803. The Prosecution responds that Nyiramasuhuko fails to consider that the witness also identified her in court.[1829]

804. As submitted by both Nyiramasuhuko and the Prosecution in other parts of their submissions,[1830] a review of Witness SJ's evidence reveals that the witness did not identify Nyiramasuhuko at the prefectoral office during the Night of Three Attacks.[1831] The Trial Chamber therefore erred in finding that Witness SJ identified Nyiramasuhuko during the Night of Three Attacks and in relying on this to find that Nyiramasuhuko was present during these attacks. As developed in Section V.I.2(b)(iii)a.ii below, the Appeals Chamber considers that the Trial Chamber more generally erred in relying on Witness SJ's evidence related to the prefectoral

[1825] For example, the Appeals Chamber observes that Witness FAP testified that she was accompanied by 15 to 50 other Tutsi refugees and that Witness SS was unable to estimate the amount in the group. *Compare* Witness FAP, T. 11 March 2003 p. 41, T. 13 March 2003 p. 23 (closed session) *with* Witness SS, T. 4 March 2003 pp. 48, 49. Even assuming that Witnesses FAP and SS were part of the same group, it is not clear that they were in immediate physical proximity to each other. The Appeals Chamber also observes that both witnesses were cross-examined on the basis of whether they knew each other and denied that they did. Witness FAP, T. 13 March 2003 pp. 20, 23 (closed session); Witness SS, T. 4 March 2003 pp. 59, 60 (closed session).
[1826] Trial Judgement, paras. 2660, 2686.
[1827] Trial Judgement, para. 2698. *See also ibid.*, para. 2697.
[1828] Nyiramasuhuko Appeal Brief, paras. 795, 810-812.
[1829] Prosecution Response Brief, para. 483. The Prosecution also asserts that Nyiramasuhuko's submission that Witness SJ's evidence was not reliable because it was not corroborated is erroneous. *See idem*.
[1830] *See* Nyiramasuhuko Appeal Brief, paras. 993, 1031, 1032, 1079, 1139, 1189; Prosecution Response Brief, para. 469. *See also contra* Prosecution Response Brief, para. 483.
[1831] Witness SJ, T. 29 May 2002 pp. 19-65, T. 30 May 2002 pp. 150-158, T. 3 June 2002 pp. 18-24, 31, 32. The Appeals Chamber observes that there was no mention of Witness SJ identifying Nyiramasuhuko during the Night of Three Attacks in the summary of Witness SJ's testimony in the Trial Judgement and that the portions of Witness SJ's testimony referenced by the Trial Chamber in support of the statement that Witness SJ "testified that Ntahobali, Nyiramasuhuko, and *Interahamwe* attacked the [Butare Prefecture Office]" during the Night of Three Attacks do not refer to Nyiramasuhuko's presence. *See* Trial Judgement, paras. 2225-2241, 2660, fn. 7442, *referring to* Witness SJ, T. 29 May 2002 pp. 55, 57, 59.

office.[1832] In these circumstances, the Appeals Chamber finds it unnecessary to examine Nyiramasuhuko's challenges to the Trial Chamber's assessment of Witness SJ's prior knowledge of Nyiramasuhuko. The Appeals Chamber will discuss whether the Trial Chamber's erroneous reliance on Witness SJ's evidence related to the prefectoral office has occasioned a miscarriage of justice after examining Nyiramasuhuko's remaining challenges to the Trial Chamber's reliance on the evidence of other Prosecution witnesses about her presence at the prefectoral office.

(iii) Identification at the Butare Prefecture Office

805. The Trial Chamber relied on Witness TA's identification of Nyiramasuhuko during the Mid-May Attack.[1833] With respect to the Night of Three Attacks, the Trial Chamber stated that, "[i]n addition to Witnesses TK and QJ, Witnesses SS, QBQ, RE, FAP and SJ identified Nyiramasuhuko during this night of three attacks at the [Butare Prefecture Office]."[1834] It also concluded that several witnesses had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity, including Witnesses TA, QJ, TK, RE, FAP, QY, and QBQ.[1835]

806. Nyiramasuhuko submits that the Trial Chamber erred in accepting the testimonies of Witnesses TA, QJ, TK, RE, FAP, QY, and QBQ of having seen her at the prefectoral office.[1836] The Appeals Chamber will examine Nyiramasuhuko's contentions regarding each of these witnesses in turn.

a. Witness TA

807. The Trial Chamber concluded that Nyiramasuhuko was present and participated in the Mid-May Attack based primarily on Witness TA's evidence.[1837] As noted above, the Trial Chamber also mentioned Witness TA as one of several witnesses who had an adequate opportunity to observe

[1832] *See infra*, para. 1657.
[1833] Trial Judgement, paras. 2628, 2629.
[1834] Trial Judgement, para. 2686. The Appeals Chamber does not exclude the possibility that the Trial Chamber may have intended to refer to Witness SU instead of Witness SJ in paragraph 2686 of the Trial Judgement in light of its discussion of Witness SU's evidence that Nyiramasuhuko was present on the Night of Three Attacks in its factual findings and the fact that Witness SJ did not in fact testify to seeing Nyiramasuhuko that night. *See ibid.*, paras. 2251-2256, 2706, 2715, 2731, 2732, 2736, 2738. However, the Appeals Chamber notes that Nyiramasuhuko did not develop any argument other than those addressed in the prior sub-section on Witness SU's prior knowledge in support of her contention that the Trial Chamber erred in relying on Witness SU's identification evidence in relation to the Night of Three Attacks. *See supra*, Section IV.F.2(c)(ii)a. Although expressly referring in her notice of appeal to paragraph 2758 of the Trial Judgement, in which the Trial Chamber discussed Witness SU's identification of Nyiramasuhuko during the First Half of June Attacks, Nyiramasuhuko also did not develop any argument challenging the Trial Chamber's assessment of Witness SU's identification evidence as it relates to the First Half of June Attacks in her appeal brief. Consequently, the Appeals Chamber declines to examine the reasonableness of the Trial Chamber's assessment of Witness SU's identification of Nyiramasuhuko at the Butare Prefecture Office.
[1835] Trial Judgement, para. 2698.
[1836] Nyiramasuhuko Appeal Brief, paras. 787-794, 796-809, 813, 814.

Nyiramasuhuko at the prefectoral office from close proximity when discussing the Night of Three Attacks.[1838]

808. Nyiramasuhuko submits that the Trial Chamber erred in finding Witness TA's identification of her reliable during the Mid-May Attack on the basis that she described how she was dressed and heard her ordering the *Interahamwe* to attack people.[1839] Nyiramasuhuko points out that Witness TA had no prior knowledge of Nyiramasuhuko, only saw her for the first time for a few minutes on an afternoon prior to the attack, and that her sighting of Nyiramasuhuko during the Mid-May Attack occurred at night in difficult conditions.[1840] As part of her challenges regarding the Trial Chamber's findings on the Night of Three Attacks, Nyiramasuhuko further submits that the Trial Chamber erred in finding that Witness TA had an adequate opportunity to observe her from close proximity at the prefectoral office as it failed to discuss the details of how the witness observed her and the context in which the observations were made.[1841]

809. The Prosecution responds that the Trial Chamber provided a reasoned opinion as to why it considered Witness TA's identification of Nyiramasuhuko during the Mid-May Attack reliable and argues that Nyiramasuhuko fails to demonstrate that this was unreasonable.[1842] It adds that Nyiramasuhuko's contentions regarding her identification by Witness TA during the Night of Three Attacks are irrelevant as Witness TA did not testify to seeing her on the Night of Three Attacks.[1843]

810. The Trial Chamber expressly found Witness TA's identification of Nyiramasuhuko during the Mid-May Attack reliable. It stated:

> Witness TA described Nyiramasuhuko's clothing and quoted her as ordering the *Interahamwe* to attack certain individuals. Therefore, Witness TA was close enough to hear what Nyiramasuhuko was saying and identified her as the mother of Shalom. For these reasons, the Chamber finds this identification to be reliable.[1844]

811. The Appeals Chamber considers that a reasonable trier of fact could have relied on Witness TA's ability to describe Nyiramasuhuko's clothing and the fact that she could hear her

[1837] Trial Judgement, para. 2644.
[1838] Trial Judgement, para. 2698.
[1839] Nyiramasuhuko Notice of Appeal, para. 10.15. *See also* AT. 14 April 2015 p. 20. Nyiramasuhuko appears to argue that Witness TA's description of Nyiramasuhuko's clothing during the Mid-May Attack contradicts her prior statement in which she described Nyiramasuhuko as "dressed like an ordinary women also in [k]itenge". However, Witness TA also described Nyiramasuhuko as wearing a *kitenge* during the Mid-May Attack in her testimony. The Appeals Chamber dismisses Nyiramasuhuko's argument on the basis that she fails to identify any contradiction between the witness's prior statement and her testimony. *See* Nyiramasuhuko Notice of Appeal, fn. 20; Exhibit D6B (Witness TA's Statement), p. 3; Witness TA, T. 25 October 2001 p. 40.
[1840] Nyiramasuhuko Notice of Appeal, para. 10.15, *referring to* Witness TA, T. 24 October 2001 pp. 109, 110. *See also* AT. 14 April 2015 p. 21.
[1841] Nyiramasuhuko Appeal Brief, para. 806.
[1842] Prosecution Response Brief, paras. 619, 620.
[1843] Prosecution Response Brief, para. 484, fn. 1190. *See also ibid.*, para. 470.
[1844] Trial Judgement, para. 2629.

specific orders to the *Interahamwe* during the Mid-May Attack as probative of the reliability of her testimony that she saw Nyiramasuhuko from close proximity. This reflects the Trial Chamber's careful consideration of Witness TA's identification of Nyiramasuhuko in light of the circumstances of the attack and the witness's lack of prior knowledge of Nyiramasuhuko before the events at the prefectoral office. Nyiramasuhuko's argument that Witness TA had no prior knowledge of her and only saw her for the first time for a few minutes on an afternoon prior to the Mid-May Attack fails to appreciate that the Trial Chamber accepted the witness's testimony that she learned of the familial relationship between Nyiramasuhuko and Ntahobali from other refugees at the prefectoral office and that she was able to identify Nyiramasuhuko as the Minister of Women's Affairs.[1845] Nyiramasuhuko also overlooks Witness TA's testimony, as recalled by the Trial Chamber, that there was moonlight behind the prefectoral office during several of the attacks at the prefectoral office and that there was occasionally public lighting from across the street.[1846] Nyiramasuhuko appears to merely disagree with the Trial Chamber's assessment of Witness TA's identification evidence and fails to demonstrate that the Trial Chamber erred in accepting it.

812. Furthermore, the Appeals Chamber notes that the Trial Chamber did not conclude that Witness TA saw Nyiramasuhuko at the prefectoral office during the Night of Three Attacks. Rather, in the "Factual Findings" section of the Trial Judgement related to those attacks it only mentioned Witness TA as a witness who had an opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity.[1847] As discussed above, the Trial Chamber addressed the details and context of how Witness TA observed Nyiramasuhuko in its factual findings on the Mid-May Attack.[1848]

813. Based on the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in relying on Witness TA's identification of Nyiramasuhuko during the Mid-May Attack, or in stating that Witness TA had an adequate opportunity to identify Nyiramasuhuko at the prefectoral office.

[1845] Trial Judgement, paras. 2190, 2633.
[1846] Trial Judgement, para. 2630. The Appeals Chamber has discussed at length challenges in relation to Witness TA's evidence about the lighting at the prefectoral office in Section V.I.2(b)(ii) below.
[1847] Trial Judgement, para. 2698.
[1848] Trial Judgement, para. 2629.

b. Witness QJ

814. The Trial Chamber found that Witness QJ identified Nyiramasuhuko on the Night of Three Attacks and that he had an adequate opportunity to observe her at the prefectoral office from close proximity.[1849]

815. Nyiramasuhuko submits that the Trial Chamber failed to discuss and assess the relevant circumstances in which Witness QJ identified her at the prefectoral office and that it erred in concluding that the witness had an adequate opportunity to identify her.[1850] She contends that the Trial Chamber could not have reasonably relied on the identification evidence of Witness QJ, who only saw her on one occasion at the prefectoral office and provided an insufficiently detailed and generic physical description of her.[1851]

816. The Prosecution responds that Nyiramasuhuko fails to show that the Trial Chamber erred in its assessment of Witness QJ's identification evidence.[1852]

817. The Appeals Chamber notes that the Trial Judgement does not set out how the Trial Chamber concluded that Witness QJ identified Nyiramasuhuko on the Night of Three Attacks and how the witness had an adequate opportunity to observe her at the prefectoral office from close proximity.[1853] The Appeals Chamber has carefully reviewed the relevant portions of Witness QJ's testimony and observes that the witness only referred to one encounter with Nyiramasuhuko on the Night of Three Attacks and that nothing in his testimony suggests that he had met her prior to that night.[1854]

818. Witness QJ's testimony, however, reveals that the incident with Nyiramasuhuko that he recounted occurred when there was light.[1855] Witness QJ also provided evidence on the colour of the Toyota pickup truck and, although he could not describe what she was wearing, gave a physical description of Nyiramasuhuko.[1856] While the witness did not indicate at trial the distance between him and Nyiramasuhuko,[1857] it transpires from his testimony that he was close enough to describe

[1849] Trial Judgement, paras. 2686, 2698.
[1850] Nyiramasuhuko Appeal Brief, paras. 787, 806.
[1851] Nyiramasuhuko Appeal Brief, paras. 788, 789, 794.
[1852] Prosecution Response Brief, para. 484. The Prosecution emphasises that Witness QJ was close to Nyiramasuhuko when Mbasha's wife was abducted during the Night of Three Attacks and that Nyiramasuhuko ignores that, in addition to a physical description of her, Witness QJ corroborated Witness TK's account that Nyiramasuhuko arrived at the prefectoral office in a pickup with *Interahamwe*. *See ibid.*, paras. 482, 484.
[1853] The Appeals Chamber notes that paragraphs 2686 and 2698 of the Trial Judgement do not refer to evidence supporting the conclusions reached in these paragraphs.
[1854] *See* Witness QJ, T. 8 November 2001 pp. 145-164, T. 12 November 2001 pp. 13, 38, 78-101 (closed session), 102-124, T. 13 November 2001, pp. 118-123. *See also* Trial Judgement, para. 2196.
[1855] Witness QJ, T. 8 November 2001 pp. 146, 158-161, 163, T. 12 November 2001 pp. 94-96, (closed session), 123.
[1856] Witness QJ, T. 8 November 2001 pp. 146, 158-161, 163, T. 12 November 2001 pp. 94-96, (closed session), 123.
[1857] *See* Witness QJ, T. 8 November 2001 pp. 147-153.

what Mbasha's wife was wearing and estimate the distance between Nyiramasuhuko and the veranda where Mbasha's wife and children were sleeping.[1858] The Appeals Chamber further observes that the Trial Chamber found that Witness QJ's identification of Nyiramasuhuko during the Night of Three Attacks was corroborated by Witnesses TK, SS, QBQ, RE, FAP, and SU.[1859] The Trial Chamber also emphasised that Witness QJ's account was similar to that of Witness TK regarding the abduction of Mbasha's wife during this particular night.[1860]

819. The Appeals Chamber considers that, as part of its reasoned opinion, the Trial Chamber should have articulated the basis on which it was satisfied that the witness was able to identify Nyiramasuhuko and that, in failing to do so, the Trial Chamber committed an error.[1861] However, in light of the details provided by Witness QJ in his testimony and the corroborative evidence of Nyiramasuhuko's presence during the Night of Three Attacks, including the similarity of the accounts of Witnesses TK and QJ regarding the abduction of Mbasha's wife, the Appeals Chamber finds that a reasonable trier of fact could have relied on Witness QJ's identification of Nyiramasuhuko on the Night of Three Attacks. In light of the foregoing, the Appeals Chamber concludes that this error has not invalidated the Trial Chamber's decision to rely on Witness QJ in support of its finding that Nyiramasuhuko was present during the Night of Three Attacks and therefore dismisses Nyiramasuhuko's submissions in this respect.

c. Witness TK

820. The Trial Chamber found that Witness TK identified Nyiramasuhuko on the Night of Three Attacks and that the witness had an adequate opportunity to observe her at the prefectoral office from close proximity.[1862] It noted that Witness TK did not know Nyiramasuhuko's surname, but that Nyiramasuhuko and Ntahobali were identified to her as mother and son and that other women at the prefectoral office had pointed out Nyiramasuhuko to Witness TK during a daytime meeting and referred to her by the name "Pauline".[1863] It also accepted the witness's explanation as to why she had not mentioned Nyiramasuhuko's presence at the prefectoral office in her prior statement.[1864]

[1858] *See* Witness QJ, T. 8 November 2001 pp. 147-153, T. 12 November 2001 pp. 93, 94 (closed session).
[1859] Trial Judgement, paras. 2686, 2736, 2738. The Trial Chamber further referred to Witness SJ but, for reasons explained above, the Appeals Chamber considers that it erred. *See supra*, para. 804.
[1860] Trial Judgement, paras. 2717, 2718.
[1861] *See Lukić and Lukić* Appeal Judgement, para. 118 ("The Appeals Chamber considers that, as part of its reasoned opinion, a trial chamber should articulate the basis on which it was satisfied that the witness had prior knowledge of an accused and was therefore able to recognise that individual at the crime scene."), *referring to Kupreškić et al.* Appeal Judgement, para. 39; *Renzaho* Appeal Judgement, para. 528.
[1862] Trial Judgement, paras. 2686, 2698.
[1863] Trial Judgement, para. 2668.
[1864] Trial Judgement, para. 2683.

821. Nyiramasuhuko asserts that the Trial Chamber failed to discuss and assess the relevant circumstances in which Witness TK identified her at the prefectoral office and erred in concluding that the witness had an adequate opportunity to identify her there.[1865] She also argues that the Trial Chamber's reliance on Witness TK's evidence was an error given the fact that the witness had no prior knowledge of her and that the identification was based solely on unidentified refugees having stated that the woman present was "Pauline".[1866] She submits that the witness was unable to provide a sufficiently precise description of her and highlights that the only identification of her in the witness's prior statement relates to having seen her during the day in late June 1994.[1867] In addition, Nyiramasuhuko contends that, when assessing the general reliability of Witness TK's identification evidence, the Trial Chamber failed to consider that Witness TK's identification of Kanyabashi was unbelievable in light of the witness's concession in her prior statement that she would not be able to identify him.[1868]

822. The Prosecution responds that, in addition to the physical description she provided, Witness TK gave other details of Nyiramasuhuko's presence at the prefectoral office.[1869] It also points to the fact that the Trial Chamber reviewed and discussed the inconsistencies between Witness TK's testimony and her prior statements and found her explanations reasonable.[1870] The Prosecution argues that Nyiramasuhuko fails to demonstrate how Witness TK's evidence about the identification of Kanyabashi is relevant to the witness's identification of Nyiramasuhuko.[1871]

823. The Appeals Chamber observes that the Trial Chamber reviewed and found credible Witness TK's direct evidence of Nyiramasuhuko's involvement in several specific incidents that occurred during the Night of Three Attacks.[1872] As mentioned above, the Trial Chamber discussed in detail how Witness TK came to know who Nyiramasuhuko was. Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in concluding that the witness had an adequate opportunity to observe her from close proximity, which is supported by a comprehensive reading of the witness's evidence.[1873]

824. Furthermore, while the witness's ability to identify Nyiramasuhuko was based on information provided by unidentified women she met at the prefectoral office who referred to

[1865] Nyiramasuhuko Appeal Brief, paras. 787, 806.
[1866] Nyiramasuhuko Appeal Brief, para. 791.
[1867] Nyiramasuhuko Appeal Brief, paras. 790, 791.
[1868] Nyiramasuhuko Appeal Brief, paras. 792, 793.
[1869] Prosecution Response Brief, para. 482.
[1870] Prosecution Response Brief, para. 475.
[1871] Prosecution Response Brief, para. 475.
[1872] *See* Trial Judgement, paras. 2662, 2668, 2717, 2730.
[1873] *See* Witness TK, T. 20 May 2002 pp. 40, 41, 45-47, 55, 73-75, 86, 87, 90-99, T. 22 May 2002 pp. 51, 52, 59, 60, 103, 108, 109, T. 23 May 2002 p. 45.

Nyiramasuhuko as "Pauline",[1874] the Appeals Chamber recalls that the Trial Chamber has the discretion to consider cautiously and rely on hearsay evidence.[1875] In this instance, not only was Nyiramasuhuko identified to Witness TK by her first name, but also as Ntahobali's mother.[1876] Moreover, having reviewed Witness TK's evidence describing Nyiramasuhuko, the Appeals Chamber does not consider that the description the witness provided was so general as to cast doubt on the reasonableness of the Trial Chamber's reliance on Witness TK's identification of Nyiramasuhuko.[1877] In this regard, the Appeals Chamber also notes that Witness TK's identification of Nyiramasuhuko's presence during the Night of Three Attacks was corroborated by other evidence found credible by the Trial Chamber.[1878]

825. Turning to Nyiramasuhuko's argument that the Trial Chamber should have disregarded Witness TK's evidence in light of the witness's failure to identify Nyiramasuhuko as participating in this attack in her prior statement, the Appeals Chamber recalls that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between the testimony and the witness's previous statements, as it is for the trial chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the witness's evidence.[1879] In this instance, the Trial Chamber considered that Witness TK did not mention Nyiramasuhuko's presence at the prefectoral office in her prior statement and accepted her explanation for the omission.[1880] Nyiramasuhuko simply repeats arguments she raised at trial without demonstrating how the Trial Chamber erred.[1881]

826. Finally, the Appeals Chamber considers that Nyiramasuhuko does not show the relevance of any purported inconsistencies between Witness TK's testimony and her previous statement concerning her identification of Kanyabashi and how it renders her identification of Nyiramasuhuko unreliable.[1882] The Appeals Chamber finds that this alleged inconsistency, which does not concern

[1874] Witness TK, T. 20 May 2002 pp. 40, 41, T. 22 May 2002 pp. 52, 59, 60.
[1875] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 95; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.
[1876] *See* Witness TK, T. 20 May 2002 pp. 76, 77. *See also* Trial Judgement, para. 2668.
[1877] Witness TK, T. 20 May 2002 p. 41.
[1878] The Appeals Chamber recalls that the Trial Chamber found that Nyiramasuhuko was present at the Butare Prefecture Office on the Night of Three Attacks based on the testimonies of Witnesses SJ, SU, QY, QJ, TK, SS, QBQ, RE, and FAP. *See* Trial Judgement, paras. 2686, 2732, 2736, 2738. In other sub-sections above and below, the Appeals Chamber has found no error with respect to the assessment of the identification evidence of Witnesses SU, TK, SS, QBQ, and FAP and determined that the errors with respect to Witnesses QJ and RE have not invalidated the decision or occasioned a miscarriage of justice. *See supra*, Sections IV.F.2(c)(ii)a, IV.F.2(c)(ii)c, IV.F.2(c)(iii)b, *infra*, Sections IV.F.2(c)(iii)d, IV.F.2(c)(iii)e, IV.F.2(c)(iii)g. The Appeals Chamber will assess below whether the impact of the Trial Chamber's erroneous reliance on Witnesses SJ's and QY's evidence related to the prefectoral office has occasioned a miscarriage of justice. *See infra*, para. 856.
[1879] *Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.
[1880] Trial Judgement, para. 2683.
[1881] *See* Nyiramasuhuko Closing Brief, para. 67.
[1882] *See* Nyiramasuhuko Appeal Brief, paras. 792, 793, *referring to* Witness TK, T. 27 May 2002 pp. 73, 74.

the identification of Nyiramasuhuko by Witness TK, is insufficient to undermine the reasonableness of the Trial Chamber's acceptance of Witness TK's identification evidence of Nyiramasuhuko.

827. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in relying on Witness TK's identification of her on the Night of Three Attacks.

d. Witness RE

828. The Trial Chamber found that Witness RE identified Nyiramasuhuko on the Night of Three Attacks and that she had an adequate opportunity to observe her at the prefectoral office from close proximity.[1883] Specifically, the Trial Chamber recalled that, although Witness RE did not see Nyiramasuhuko on the Night of Three Attacks, the witness testified that Ntahobali and *Interahamwe* came in a vehicle and heard Ntahobali promise to protect Mbasha's wife, saying he would take her to "Pauline who was in the vehicle".[1884] On this basis, the Trial Chamber stated that "Witness RE surmised that Nyiramasuhuko was at the [prefectoral office]".[1885] It concluded that this evidence was hearsay and provided "additional support to the identification of Nyiramasuhuko" at the prefectoral office.[1886] The Trial Chamber further stated:

> Witness RE's testimony also [lends] support to Witnesses SS'[s] and QBQ's testimon[ies] that Nyiramasuhuko was giving orders to rape in this time period. She testified that Nyiramasuhuko came to the [Butare Prefecture Office] with President Sindikubwabo one day. During this visit, Nyiramasuhuko said, the people should be killed and the young girls among them raped. Although given at a different time than the [Night of Three Attacks], this evidence shows a level of planning and intent on Nyiramasuhuko's part.[1887]

829. Nyiramasuhuko submits that the Trial Chamber erred in finding that Witness RE had an adequate opportunity to identify her at the prefectoral office as it failed to discuss the details as to how Witness RE observed her and the context in which the observations were made.[1888] She emphasises that Witness RE did not know her before 1994 and testified to have seen her at the prefectoral office only on one occasion during a visit with President Sindikubwabo.[1889] Nyiramasuhuko argues that this evidence provides an insufficient basis to support the identification, given the witness's inability to describe Sindikubwabo.[1890] She also contends that it was unreasonable for the Trial Chamber to rely on Witness RE's identification evidence, since she did not see her during the Night of Three Attacks and only inferred that she was present based on

[1883] Trial Judgement, paras. 2686, 2698.
[1884] Trial Judgement, para. 2694.
[1885] Trial Judgement, para. 2694.
[1886] Trial Judgement, para. 2694.
[1887] Trial Judgement, para. 2695 (internal reference omitted).
[1888] Nyiramasuhuko Appeal Brief, para. 806.
[1889] Nyiramasuhuko Appeal Brief, para. 799.
[1890] Nyiramasuhuko Appeal Brief, para. 799.

remarks made by Ntahobali.[1891] Furthermore, she argues that the Trial Chamber should have exercised extreme caution with respect to Witness RE's identification evidence generally, because, when identifying Ntahobali in court – a person who the witness purportedly saw on three occasions at the prefectoral office – she singled out Nteziryayo, who is nearly 25 years older than Ntahobali.[1892]

830. The Prosecution responds that the Trial Chamber properly assessed Witness RE's evidence and that the in-court identification of Ntahobali is irrelevant to the assessment of the witness's identification of Nyiramasuhuko.[1893]

831. With respect to Nyiramasuhuko's argument that the Trial Chamber erred in failing to assess how Witness RE observed her and the context in which the observations were made, the Appeals Chamber underlines that the Trial Chamber recalled and relied on Witness RE's testimony of having seen Nyiramasuhuko on another occasion when she came to the prefectoral office with Sindikubwabo.[1894] However, the Appeals Chamber notes that, elsewhere in the Trial Judgement, the Trial Chamber rejected Witness RE's evidence in this respect, finding that her testimony was not sufficient to establish, *inter alia*, that Nyiramasuhuko met with Sindikubwabo at the prefectoral office.[1895] The Appeals Chamber finds that these findings are irreconcilable and that no reasonable trier of fact could have found that Witness RE's testimony was insufficient to establish that Nyiramasuhuko met with Sindikubwabo at the prefectoral office, while relying on the exact same part of her testimony to conclude that she had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity.[1896] That being said, the Appeals Chamber considers that this error is immaterial since Witness RE testified that she did not see Nyiramasuhuko on the Night of Three Attacks but surmised that she was at the prefectoral office from Ntahobali's words.[1897]

832. Turning to Nyiramasuhuko's contention that it was unreasonable for the Trial Chamber to rely on Witness RE's evidence because she did not see Nyiramasuhuko during the Night of Three Attacks, the Appeals Chamber repeats that the Trial Chamber has the discretion to consider cautiously and rely on hearsay evidence.[1898] In the present case, the Trial Judgement reflects that the

[1891] Nyiramasuhuko Appeal Brief, paras. 797, 798, 801. *Cf.* AT. 14 April 2015 pp. 29, 30.
[1892] Nyiramasuhuko Appeal Brief, paras. 800-802.
[1893] Prosecution Response Brief, paras. 466, 472, 484, 487. *See also ibid.*, para. 469.
[1894] *See* Trial Judgement, para. 2695. *See also ibid.*, para. 2276.
[1895] *See* Trial Judgement, paras. 2901, 2902.
[1896] Trial Judgement, para. 2698.
[1897] Trial Judgement, para. 2694.
[1898] *See*, *e.g.*, *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.

Trial Chamber cautiously assessed Witness RE's hearsay evidence[1899] and relied on it only as corroborative of the evidence of several other witnesses who identified Nyiramasuhuko as being present during this night.[1900] Nyiramasuhuko fails to demonstrate how the Trial Chamber erred in its assessment.

833. As for Nyiramasuhuko's contention that Witness RE's evidence is generally unreliable in light of her in-court misidentification of Ntahobali, the Appeals Chamber recalls that it is within a trial chamber's discretion as the primary trier of fact to evaluate the credibility of separate portions of a witness's testimony differently if the circumstances of the case so require.[1901] In this instance, the Trial Chamber recalled that Witness RE mistook Nteziryayo for Ntahobali, but concluded that it did not consider this misidentification to be probative when assessing evidence of Nyiramasuhuko's presence at the prefectoral office during the Night of Three Attacks.[1902] Nyiramasuhuko, who simply repeats an argument she raised at trial,[1903] fails to show that the Trial Chamber erred in finding that this misidentification of Ntahobali was not probative or that the Trial Chamber exercised insufficient caution in relation to the witness's identification of Nyiramasuhuko.

834. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in concluding that Witness RE had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity, but that this error has not occasioned a miscarriage of justice in relation to the identification of Nyiramasuhuko by Witness RE on the Night of Three Attacks. Furthermore, the Appeals Chamber finds no error in the Trial Chamber's reliance on Witness RE's evidence as providing additional support to identification evidence placing Nyiramasuhuko at the prefectoral office on the Night of Three Attacks.

e. Witness FAP

835. The Trial Chamber found that Witness FAP identified Nyiramasuhuko on the Night of Three Attacks and that she had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity.[1904] In particular, the Trial Chamber recalled Witness FAP's evidence that, during the Night of Three Attacks, Nyiramasuhuko stood by the vehicle and told the *Interahamwe* to take the young girls and the women who were not old, and to rape and kill them because they had refused to marry Hutus.[1905] It further noted Witness FAP's evidence that she

[1899] Trial Judgement, para. 2694. *See also ibid.*, para. 2719.
[1900] Trial Judgement, para. 2686.
[1901] *Bagosora and Nsengiyumva* Appeal Judgement, para. 253. *See also Nizeyimana* Appeal Judgement, para. 108; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[1902] Trial Judgement, fn. 7548.
[1903] *See* Nyiramasuhuko Closing Brief, paras. 113, 128, 129.
[1904] Trial Judgement, paras. 2686, 2698.
[1905] Trial Judgement, para. 2696.

described Nyiramasuhuko as wearing a military uniform and that Witness FAP, who was lying on the ground, "could only see Nyiramasuhuko's top."[1906]

836. Nyiramasuhuko submits that the Trial Chamber erred in finding that Witness FAP had an adequate opportunity to identify her at the prefectoral office as it failed to discuss the details as to how Witness FAP observed her and the context in which the observations were made.[1907]

837. The Prosecution responds that Nyiramasuhuko does not demonstrate that the Trial Chamber erred in relying on Witness FAP to find that Nyiramasuhuko was present during the Night of Three Attacks.[1908] It argues that Witness FAP's testimony corroborates other evidence that Nyiramasuhuko arrived in a pickup truck with *Interahamwe*.[1909]

838. The Appeals Chamber considers that Nyiramasuhuko's argument that the Trial Chamber did not discuss how Witness FAP observed her and the context in which the observations were made fails to appreciate that the Trial Chamber detailed these circumstances elsewhere in the Trial Judgement,[1910] noting in particular Witness FAP's evidence that Nyiramasuhuko wore a military uniform and that the witness was lying on the ground and thus "could only see Nyiramasuhuko's top."[1911] Nyiramasuhuko does not challenge the reasonableness of these findings and ignores that the Trial Chamber found that the evidence of Witness FAP was corroborated by Witness QBQ as to Nyiramasuhuko's conduct at the prefectoral office on that evening, providing further support for Witness FAP's identification of her.[1912] The Trial Chamber also emphasised that several witnesses identified Nyiramasuhuko wearing a military shirt and *kitenge* cloth skirt or just a military shirt.[1913] This too is consistent with Witness FAP's testimony.[1914]

839. Moreover, the Appeals Chamber observes that, although Witness FAP testified that she did not know Nyiramasuhuko prior to this event,[1915] she also testified that she knew Nyiramasuhuko's home and the name of her husband,[1916] that she heard other refugees refer to the woman who arrived in the vehicle as "Pauline" and that she was accompanied by her son "Shalom",[1917] and that

[1906] Trial Judgement, para. 2696.
[1907] Nyiramasuhuko Appeal Brief, para. 806.
[1908] Prosecution Response Brief, paras. 472, 484.
[1909] Prosecution Response Brief, para. 485.
[1910] *See* Trial Judgement, paras. 2304, 2696.
[1911] Trial Judgement, para. 2696.
[1912] Trial Judgement, paras. 2699, 2700.
[1913] Trial Judgement, para. 2698.
[1914] Witness FAP, T. 11 March 2003 p. 54 ("A. The first time I saw [Nyiramasuhuko] she was wearing military uniform."), T. 13 March 2003 p. 5 ("Q. Madam Witness, you told us that that night Mrs. Nyiramasuhuko was allegedly wearing a military uniform, at least in the upper part of her body? A. Yes."). *See also* Trial Judgement, para. 2696.
[1915] Witness FAP, T. 12 March 2003 pp. 12, 13. *See also ibid.*, p. 39.
[1916] Witness FAP, T. 12 March 2003 p. 39.
[1917] Witness FAP, T. 11 March 2003 p. 50. *See also* Witness FAP, T. 12 March 2003 pp. 13, 16.

she was aware of Nyiramasuhuko's position as the Minister of Family Affairs.[1918] Witness FAP further testified that she observed Nyiramasuhuko from about 10 metres away and on three occasions that evening.[1919] Nyiramasuhuko does not discuss these aspects of Witness FAP's evidence.

840. The Appeals Chamber concludes that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in its assessment of Witness FAP's identification evidence.

f. Witness QY

841. In the "Factual Findings" section of the Trial Judgement related to the Night of Three Attacks, the Trial Chamber found that Witness QY had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity.[1920]

842. Nyiramasuhuko submits that the Trial Chamber erred in reaching this finding, as it failed to discuss the details as to how Witness QY observed her and the context in which the observations were made.[1921] Nyiramasuhuko also argues that the Trial Chamber erred in relying on Witness QY's identification evidence, since Witness QY refers to her height to describe the person Witness QY saw at the prefectoral office.[1922] She contends that the Trial Chamber failed to assess the circumstances in which Witness QY identified her, since Witness QY stated that nobody could look at "the accused persons" closely.[1923]

843. The Prosecution responds that Witness QY's reference that she could not look at the accused misstates the evidence as it only refers to Kanyabashi and not Nyiramasuhuko.[1924]

844. The Appeals Chamber observes that the Trial Chamber's conclusion that Witness QY had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity when assessing her involvement in the Night of Three Attacks is not supported by any reference to the record.[1925] Nothing in the Trial Chamber's summary of Witness QY's evidence reflects that the witness saw Nyiramasuhuko during the Night of Three Attacks.[1926]

[1918] Witness FAP, T. 11 March 2003 p. 48, T. 12 March 2003 pp. 13, 52, T. 13 March 2003 pp. 5, 6.
[1919] Witness FAP, T. 11 March 2003 pp. 50, 54, T. 12 March 2003 pp. 12-14, 52.
[1920] Trial Judgement, para. 2698.
[1921] Nyiramasuhuko Appeal Brief, para. 806.
[1922] Nyiramasuhuko Appeal Brief, para. 813.
[1923] Nyiramasuhuko Appeal Brief, para. 814, *referring to* Witness QY, T. 19 March 2003 pp. 64, 65 ("nobody could look at them closely. To look at them was, for us, like looking face to face at a lion").
[1924] Prosecution Response Brief, para. 474.
[1925] *See* Trial Judgement, para. 2698.
[1926] *See* Trial Judgement, paras. 2319-2327.

845. In addition, the Appeals Chamber notes that, in the "Factual Findings" section of the Trial Judgement related to attacks on the prefectoral office around the end of April or early May 1994, the Trial Chamber questioned Witness QY's ability to identify Nyiramasuhuko.[1927] It added that Witness QY's identification of Nyiramasuhuko on certain nights of the events could not be considered reliable given her uncertainty as to when Nyiramasuhuko was present.[1928] The Trial Chamber unequivocally rejected Witness QY's evidence implicating Nyiramasuhuko in attacks at the prefectoral office "between late April or early May 1994" due to discrepancies in her testimony, the unreliable nature of her identification evidence, and her admission that she had lied to the Trial Chamber about whether she knew Witnesses QBQ and SJ.[1929]

846. The conclusions of the Trial Chamber in these distinct sections of the Trial Judgement are irreconcilable and the Appeals Chamber finds that no reasonable trier of fact could have relied on Witness QY's evidence to establish Nyiramasuhuko's presence during the Night of Three Attacks given the concerns related to her credibility highlighted by the Trial Chamber in relation to other attacks at the prefectoral office. The Appeals Chamber will discuss whether this error has occasioned a miscarriage of justice in its conclusion to the present sub-section.

g. Witness QBQ

847. The Trial Chamber found that Witness QBQ identified Nyiramasuhuko on the Night of Three Attacks and that she had an adequate opportunity to observe Nyiramasuhuko at the prefectoral office from close proximity.[1930] In particular, it concluded that Witness QBQ identified Nyiramasuhuko when she arrived aboard a white Toyota pickup truck at the prefectoral office and was about four and a half metres away from her.[1931] The Trial Chamber added that "[i]t was not so dark as to prevent Witness QBQ from seeing Nyiramasuhuko's face. Night had not yet fallen."[1932]

848. The Trial Chamber also found that Witness QBQ had an opportunity to identify Nyiramasuhuko from close proximity as she previously had seen Nyiramasuhuko arrive on foot at

[1927] Trial Judgement, para. 2616.
[1928] Trial Judgement, para. 2620.
[1929] *See* Trial Judgement, paras. 2616, 2620-2626.
[1930] Trial Judgement, paras. 2686, 2698.
[1931] Trial Judgement, para. 2691.
[1932] Trial Judgement, para. 2691 (internal references omitted). The Trial Chamber further stated that Witness QBQ corroborated Witness SS's observation that Nyiramasuhuko stood next to the vehicle and gave orders to the *Interahamwe* to "rape the women and the girls and kill the rest." *See ibid.*, para. 2693. The Trial Chamber added that Witness QBQ testified that upon hearing Nyiramasuhuko's order, the *Interahamwe* immediately attacked the people on the veranda, that many women were raped while Nyiramasuhuko was still on the spot, and that the *Interahamwe*, Nyiramasuhuko, and Ntahobali subsequently loaded the Tutsi refugees onto the vehicle and took them to be killed. *See ibid.*, para. 2699.

the prefectoral office in the morning, accompanied by Prefect Nsabimana, and that she was two and a half metres away from Nyiramasuhuko on this occasion.[1933]

849. Nyiramasuhuko submits that the Trial Chamber erred in finding that Witness QBQ had an adequate opportunity to identify her at the prefectoral office as it failed to discuss the details of how she observed her and the context in which the observations were made.[1934] Nyiramasuhuko avers that the Trial Chamber erred in relying on Witness QBQ's evidence of having seen her during the day with Nsabimana prior to the attack in light of the witness's prior statement, which does not refer to this meeting and indicates that she had only seen her at night.[1935] Likewise, she highlights that Witness QBQ's evidence that other individuals had identified her lacks reliability as the sources of these identifications are unknown.[1936] Nyiramasuhuko also argues that Witness QBQ's explanation as to why she could not describe her while testifying was unbelievable in light of the fact that she allegedly saw her on four occasions, including twice during the night and while she was two and a half metres from her.[1937]

850. The Prosecution responds that the Trial Chamber duly assessed Witness QBQ's testimony in light of her inability to identify Nyiramasuhuko in court.[1938] It adds that Witness QBQ provided other corroborative details of Nyiramasuhuko's presence during the Night of Three Attacks.[1939]

851. The Appeals Chamber observes that Nyiramasuhuko's argument that the Trial Chamber failed to provide a reasoned opinion for its conclusion that Witness QBQ had an adequate opportunity to identify her at the prefectoral office merely refers to paragraph 2698 of the Trial Judgement and fails to appreciate that the Trial Chamber provided a more detailed discussion of Witness QBQ's identification of Nyiramasuhuko earlier in the same section of the Trial Judgement.[1940] This argument is therefore without merit.

852. With respect to Nyiramasuhuko's contention that the Trial Chamber erred in relying on Witness QBQ's evidence of having seen Nyiramasuhuko during the day, in light of the fact that in her prior statement she had only referred to seeing Nyiramasuhuko at night, the Appeals Chamber reiterates that it is for the trial chamber to determine whether an alleged inconsistency between a witness's testimony and prior statement is sufficient to cast doubt on the evidence of the witness

[1933] Trial Judgement, para. 2692.
[1934] Nyiramasuhuko Appeal Brief, para. 806.
[1935] Nyiramasuhuko Appeal Brief, paras. 807, 1163, 1164, *referring to and comparing* Trial Judgement fn. 6569 *with* Exhibit D147 (Witness QBQ's Statement) *and* Witness QBQ, T. 3 February 2004 pp. 52, 53, 64, 65.
[1936] Nyiramasuhuko Appeal Brief, para. 809. Nyiramasuhuko also notes that Witness QBQ could not identify three of the four defendants in the case about whom she testified. *See idem.*
[1937] Nyiramasuhuko Appeal Brief, para. 808.
[1938] Prosecution Response Brief, para. 483.
[1939] Prosecution Response Brief, para. 483.

concerned.[1941] In the present instance, the Trial Chamber accepted Witness QBQ's testimony that, three days after her arrival at the prefectoral office, she had seen Nyiramasuhuko arrive on foot in the morning accompanied by Prefect Nsabimana.[1942] The Trial Chamber did not address the fact that during cross-examination, Witness QBQ was asked why there was no mention of this first encounter during the day in her prior statement, to which she answered that "[q]uite probably the investigators did not correctly take note of what I stated".[1943] However, it is well-established jurisprudence that a trial chamber does not need to set out in detail why it accepted or rejected a particular testimony.[1944] In this case, the Appeals Chamber is not persuaded that the Trial Chamber ignored Witness QBQ's failure to mention the first encounter in her prior statement or that the inconsistency between Witness QBQ's testimony and her prior statement prevented a reasonable trier of fact from relying on this aspect of Witness QBQ's testimony.[1945]

853. Regarding Nyiramasuhuko's argument that Witness QBQ's identification evidence is unreliable because the witness did not know Nyiramasuhuko and those who identified Nyiramasuhuko to the witness were unknown,[1946] the Appeals Chamber repeats that trial chambers have the discretion to consider cautiously and rely on hearsay evidence.[1947] In summarising Witness QBQ's testimony, the Trial Chamber expressly noted that people at the prefectoral office identified Nyiramasuhuko for her.[1948] This shows that the Trial Chamber was aware of the hearsay nature of Witness QBQ's identification evidence.[1949] Moreover, in light of the Trial Chamber's finding that Nyiramasuhuko was widely known as the Minister in charge of Women's Affairs and therefore would likely be recognisable,[1950] the Appeals Chamber is satisfied that the Trial Chamber exercised sufficient caution in assessing this aspect of Witness QBQ's evidence and that it was not unreasonable for the Trial Chamber to have relied on it.[1951]

854. Finally, Witness QBQ's testimony reflects that when asked while testifying whether she could recognise Nyiramasuhuko today, she stated that "[i]t was a very long time ago, I don't think

[1940] *See* Trial Judgement, paras. 2691-2693.
[1941] *Hategekimana* Appeal Judgement, para. 190; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.
[1942] Trial Judgement, para. 2692, *referring to* Witness QBQ, T. 3 February 2004 pp. 7-10, 52, 53. *See also ibid*., para. 2900.
[1943] Witness QBQ, T. 3 February 2004 pp. 52-54. *See also* Witness QBQ's Statement.
[1944] *See*, *e.g*., *Gatete* Appeal Judgement, para. 136; *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269.
[1945] The Appeals Chamber considers Nyiramasuhuko's argument concerning inconsistent findings made by the Trial Chamber with respect to the assessment of Witness QBQ's evidence as to the timing of the meeting between Nsabimana and Nyiramasuhuko and the timing of the Night of Three Attacks in Section IV.F.2(e)(i) below.
[1946] Nyiramasuhuko Appeal Brief, para. 809.
[1947] *See supra*, para. 824.
[1948] *See* Trial Judgement, para. 2329.
[1949] *See* Witness QBQ, T. 3 February 2004 p. 7.
[1950] Trial Judgement, para. 2698.
[1951] *See* Witness QBQ, T. 3 February 2004 p. 7.

I will be in a position to recognise her. You can observe that I, myself, have changed from what I was in 1994."[1952] The Appeals Chamber notes that, although the Trial Chamber did not expressly address this issue when assessing the reliability of Witness QBQ's evidence, it noted in the summary of Witness QBQ's evidence that she was not in a position to identify Nyiramasuhuko since the event took place a long time ago.[1953] The Appeals Chamber is not convinced by Nyiramasuhuko's argument that Witness QBQ's statement that she was no longer in a position to identify Nyiramasuhuko renders her evidence on her identification of Nyiramasuhuko at the prefectoral office unbelievable.[1954]

855. Accordingly, the Appeals Chamber finds that Nyiramasuhuko has failed to show any error in the Trial Chamber's assessment of Witness QBQ's identification evidence related to the Night of Three Attacks.[1955]

(iv) Conclusion

856. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in relying on the testimonies of Witnesses SJ and QY to establish that Nyiramasuhuko was present during the Night of Three Attacks and in finding that Witness RE had an adequate opportunity to observe Nyiramasuhuko from close range. However, the Appeals Chamber concludes that these errors have not occasioned a miscarriage of justice in light of the direct and corroborative evidence of Witnesses SU, SS, QJ, TK, FAP, and QBQ of Nyiramasuhuko's presence at the Butare Prefecture Office during the Night of Three Attacks, as well as Witness RE's indirect yet corroborative evidence of Nyiramasuhuko's presence that supports the firsthand accounts. The Appeals Chamber rejects Nyiramasuhuko's remaining arguments regarding the assessment of the identification evidence.

857. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contentions that the Trial Chamber erred in finding that the evidence established her presence during the Mid-May Attack and the Night of Three Attacks at the Butare Prefecture Office beyond reasonable doubt.

[1952] Witness QBQ, T. 3 February 2004 p. 24.
[1953] *See* Trial Judgement, para. 2334.
[1954] *Cf. Kvočka et al.* Appeal Judgement, para. 473. *Cf. also Lukić and Lukić* Appeal Judgement, para. 120; *Limaj et al.* Appeal Judgement, fn. 68.
[1955] In reaching this finding, the Appeals Chamber has also considered its finding that the Trial Chamber erred in relying on Witness QBQ's evidence as to when she saw Nyiramasuhuko with Nsabimana during the day. *See infra*, Section IV.F.2.(e)(i).

(d) Mid-May Attack

858. The Trial Chamber, relying principally on the testimony of Witness TA, found that during the Mid-May Attack, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office aboard a camouflage pickup truck.[1956] It concluded that Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup truck and that the pickup truck left the prefectoral office, taking the Tutsi refugees forced on board the vehicle, some of whom were forced to undress, to be killed at other locations.[1957] The Trial Chamber convicted her for ordering the killing of the numerous Tutsis forced to board the pickup truck and took into account her superior responsibility for killings committed by *Interahamwe* based on her orders in sentencing.[1958]

859. The Trial Chamber also determined that, during the Mid-May Attack, Ntahobali and about eight other *Interahamwe* raped Witness TA, and that some of the *Interahamwe* raped two other Tutsi women.[1959] The Trial Chamber found that there was no evidence of Nyiramasuhuko's direct involvement in ordering rapes on this occasion, but held that "Nyiramasuhuko, by her presence and position of authority, [was] guilty of aiding and abetting the rapes at the [Butare Prefecture Office."[1960] However, as discussed in Section IV.F.1(b) above, the Trial Chamber did not convict Nyiramasuhuko on the basis of any of the rapes perpetrated during the Mid-May Attack and only relied on this finding as evidence of her *mens rea*.

860. Nyiramasuhuko submits that the Trial Chamber erred in its assessment of the evidence concerning the Mid-May Attack.[1961] In support of her contention, she argues that the Trial Chamber unreasonably placed the attack in mid-May 1994 despite Witness TA's vague recollection that it occurred in "May" and her emphasis that she could not remember months or days.[1962] Nyiramasuhuko also appears to argue that the Trial Chamber should have addressed Witness TA's prior statement that Nyiramasuhuko was not with Ntahobali on the first night when Ntahobali allegedly raped her, which was the Mid-May Attack, and that the witness omitted to mention in the same statement that she saw Nyiramasuhuko at 3.00 p.m. on the afternoon prior to the attack.[1963]

[1956] Trial Judgement, paras. 2644, 2781(i). The Trial Chamber considered that other evidence was consistent with or corroborated the circumstances described by Witness TA. *See ibid*., paras. 2632, 2633.
[1957] Trial Judgement, paras. 2644, 2781(i), 5867.
[1958] *See supra*, para. 749.
[1959] Trial Judgement, paras. 2644, 2781(i).
[1960] Trial Judgement, para. 5869. *See also ibid.*, para. 5877.
[1961] Nyiramasuhuko Notice of Appeal, para. 10.16; Nyiramasuhuko Appeal Brief, paras. 962-976. The Appeals Chamber notes that Nyiramasuhuko's arguments pertaining to the assessment of her alibi in relation to the time period of 14 to 16 May 1994 developed under Ground 30 of her appeal have been addressed and rejected under Section IV.E.2(a) above. *See* Nyiramasuhuko Appeal Brief, paras. 974, 975; Nyiramasuhuko Reply Brief, para. 289.
[1962] Nyiramasuhuko Notice of Appeal, para. 10.3; Nyiramasuhuko Appeal Brief, para. 967; Nyiramasuhuko Reply Brief, paras. 289, 295.
[1963] Nyiramasuhuko Notice of Appeal, para. 10.12; Nyiramasuhuko Appeal Brief, paras. 765, 1005; Nyiramasuhuko Reply Brief, paras. 228, 290, 298. *See also* AT. 14 April 2005 p. 21.

She additionally asserts that the Trial Chamber erred in concluding without reasonable justification that the evidence of Defence Witnesses WUNJN and WUNHE that Witness TA was at her uncle's house as opposed to the prefectoral office during the time of the Mid-May Attack did not undermine Witness TA's credibility.[1964]

861. In Nyiramasuhuko's view, the Trial Chamber also erred in finding that Witness SD corroborated Witnesses QY's and TA's evidence regarding her presence during attacks conducted at night.[1965] She contends that no reasonable trier of fact would have relied on Witness TA's testimony without corroboration, particularly since it was contradicted by Witnesses QBP, RE, and QBQ who testified that they were present at the prefectoral office from April 1994 but witnessed only one attack involving Nyiramasuhuko, which the Trial Chamber determined was the Night of Three Attacks,[1966] and by Witnesses SJ and SD who were also there but did not testify that Nyiramasuhuko was ever present at night.[1967]

862. The Prosecution responds that the Trial Chamber reasonably relied on Witness TA's uncorroborated testimony to find that Nyiramasuhuko participated in the Mid-May Attack at the prefectoral office.[1968] It argues that the Trial Chamber did not err in finding that the attack took place in mid-May 1994 based on Witness TA's testimony and in accepting Witness TA's explanation that her prior statement was wrongly recorded.[1969] It further responds that the testimonies of Witnesses QBP, RE, QBQ, SD, and SJ were irrelevant to the Trial Chamber's assessment of Witness TA's evidence in relation to the Mid-May Attack because they were not at the prefectoral office during the attack and that, even if they had been there, it was within the Trial Chamber's discretion to prefer Witness TA's evidence.[1970]

863. Nyiramasuhuko replies that the Trial Chamber acted outside its discretion in failing to provide a reasoned opinion as to why it preferred Witness TA's evidence over that of Witnesses QBP, RE, QBQ, SD, and SJ, particularly since Witness TA was the only witness to testify about the Mid-May Attack and her evidence should have been treated with caution.[1971]

[1964] Nyiramasuhuko Notice of Appeal, para. 10.14.
[1965] Nyiramasuhuko Appeal Brief, paras. 962-968, *referring to* Trial Judgement, paras. 2620, 2650, 2651. *See also* AT. 14 April 2005 p. 22.
[1966] Nyiramasuhuko Notice of Appeal, para. 10.4; Nyiramasuhuko Appeal Brief, paras. 969, 971. *See also* AT. 14 April 2015 p. 22.
[1967] Nyiramasuhuko Appeal Brief, paras. 968, 970, 971, *referring to* Trial Judgement, paras. 2178, 2628, 2644, Witness SJ, T. 3 June 2002 pp. 123-125, Witness SD, T. 17 March 2003 pp. 9, 10. *See also ibid*., paras. 689, 703, 704, 722, 950-961; Nyiramasuhuko Reply Brief, para. 294. *See also* AT. 14 April 2014 p. 22.
[1968] Prosecution Response Brief, paras. 616-620.
[1969] Prosecution Response Brief, paras. 621-626.
[1970] Prosecution Response Brief, paras. 630-632. The Appeals Chamber notes that the Prosecution stated during the appeals hearing that it did not think that the witnesses moved on the same day from the prefectoral office to the EER. *See* AT. 16 April 2015 p. 14.
[1971] Nyiramasuhuko Reply Brief, paras. 291, 299.

She argues that the Prosecution's assertion that Witnesses RE, SD, SJ, and QBP were not at the prefectoral office at the time is mistaken in light of their evidence,[1972] in particular Witness QBP's testimony that she was always with Witness TA at the prefectoral office and at the EER and Witness RE's testimony that she was with Witness SJ between April and July 1994.[1973] In addition, Nyiramasuhuko asserts that the Trial Chamber found that the refugees were always together at either the prefectoral office or the EER and that it was therefore not possible that Witness TA was at the prefectoral office during the Mid-May Attack while the other refugees were at the EER.[1974] She also points out that Witness TA testified that she was first at the EER with the other refugees from the prefectoral office before being transferred to the prefectoral office where she stayed for one and a half months.[1975] In further support of her contentions, Nyiramasuhuko argues that the Trial Chamber should have explained how it reconciled its finding that the Mid-May Attack occurred with its finding that the refugees from the prefectoral office were at the EER between 15-20 May 1994 and the end of May 1994.[1976]

864. The Appeals Chamber considers that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in concluding that the relevant attack occurred in mid-May 1994 based on Witness TA's testimony that it took place "neither at the beginning nor at the end of that month".[1977] Witness TA consistently testified that she had difficulties remembering the days on which events at the prefectoral office occurred, including the date of Nyiramasuhuko's visit to the prefectoral office during the afternoon.[1978] She situated the attack in this time period when asked to clarify its date following her acknowledgement that she did not know on which specific date in May it occurred.[1979] Although Witness TA testified that "no one could remember months or days", this was in response to questions posed to her during cross-examination as to when she first saw the Prefect at the prefectoral office, after she conceded to being unable to remember in which month this happened.[1980] Given her assertion that the Mid-May Attack occurred in May, at neither the beginning nor the end of the month, the Trial Chamber's finding is therefore consistent with, and accurately reflects, Witness TA's testimony.

[1972] Nyiramasuhuko Reply Brief, para. 291, *referring to* Witness QBP, T. 24 October 2002 pp. 79-81, Witness QBQ, T. 3 February 2004 pp. 6, 7, Witness SD, T. 17 March 2003 pp. 6-8, 36, 37, Witness SJ, T. 28 May 2002 pp. 112, 113.
[1973] Nyiramasuhuko Reply Brief, para. 292.
[1974] Nyiramasuhuko Reply Brief, para. 293, *referring to* Trial Judgement, paras. 2174, 3934. *See also* AT. 14 April 2015 pp. 21, 22.
[1975] Nyiramasuhuko Reply Brief, para. 292, *referring to* Witness TA, T. 24 October 2001 pp. 95, 96, T. 30 October 2001 pp. 69-71 (closed session). *See also* AT. 14 April 2015 pp. 21, 22, *referring to* Witness TA, T. 7 November 2001 pp. 79, 80.
[1976] Nyiramasuhuko Reply Brief, para. 293; AT. 14 April 2015 pp. 21.
[1977] Trial Judgement, para. 2628, *referring to* Witness TA, T. 25 October 2001 p. 29, T. 29 October 2001 pp. 51, 52.
[1978] Witness TA, T. 6 November 2001 p. 84.
[1979] Witness TA, T. 25 October 2001 p. 29, T. 29 October 2001 p. 52. *See also* Witness TA, T. 24 October 2001 p. 94, T. 6 November 2001 p. 84.
[1980] Witness TA, T. 6 November 2001 pp. 105, 106.

865. Regarding Nyiramasuhuko's argument that the Trial Chamber erred in omitting to consider inconsistencies between Witness TA's prior statement and testimony, the Appeals Chamber observes that, unlike her testimony, Witness TA's prior statement reflects that she stated that Nyiramasuhuko "was not with [Ntahobali] this night" of the Mid-May Attack and contains no reference to the witness seeing Nyiramasuhuko at the prefectoral office at 3.00 p.m. on the day of that attack.[1981] When challenged with these inconsistencies, the witness affirmed her testimony, suggesting that the information in her prior statement was improperly recorded or less important than her testimony.[1982]

866. The Appeals Chamber recalls that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between it and the witness's previous statements,[1983] and the fact that a trial chamber does not address or mention alleged discrepancies does not necessarily mean that it did not consider them.[1984] In the view of the Appeals Chamber, it would have been preferable for the Trial Chamber to note that Witness TA's prior statement indicated that Nyiramasuhuko was not with Ntahobali during the Mid-May Attack and explain why this inconsistency did not impact the credibility of her testimony. However, the Appeals Chamber considers that, in light of Witness TA's repeated affirmations of the accuracy of her testimony as well as her repeated explanations that her statement was not a full and accurate recording of the information she provided to investigators,[1985] it was not unreasonable for the Trial Chamber to consider that this inconsistency did not undermine the credibility of Witness TA's detailed account of Nyiramasuhuko's presence and participation in the Mid-May Attack.

867. The Appeals Chamber similarly considers that the Trial Chamber was under no obligation to expressly discuss the absence of any mention in Witness TA's prior statement that she saw Nyiramasuhuko around 3.00 p.m. on the day of the Mid-May Attack. The statement is brief when compared to her testimony. The Appeals Chamber considers that this element of Witness TA's testimony was peripheral to the core features of her evidence concerning the attack, and it is reasonable that more details would arise over the course of the witness's examination in court.

868. In its assessment of Witness TA's testimony relating to the Mid-May Attack, the Trial Chamber considered and concluded, for several reasons, that the evidence of Witnesses WUNHE

[1981] Witness TA's Statement, p. K0043300 (Registry pagination).
[1982] *See* Witness TA, T. 5 November 2001 pp. 55, 56, 59, 60; T. 6 November 2001 pp. 58, 61.
[1983] *Kanyarukiga* Appeal Judgement, para. 121; *Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. *See also Rutaganda* Appeal Judgement, para. 443; *Musema* Appeal Judgement, para. 89.
[1984] *Ntawukulilyayo* Appeal Judgement, para. 152; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18-20.

and WUNJN placing Witness TA at her uncle's home rather than the Butare Prefecture Office when the Mid-May Attack occurred did not undermine her credibility.[1986] Nyiramasuhuko does not advance any argument to show that the Trial Chamber's conclusion was insufficiently reasoned or unreasonable. The Appeals Chamber rejects Nyiramasuhuko's unsubstantiated contention without further consideration.

869. As for Nyiramasuhuko's contention that the Trial Chamber erred in finding that Witness SD corroborated Witnesses QY's and TA's testimonies that Nyiramasuhuko was present at the prefectoral office during attacks conducted at night, the Appeals Chamber notes that the Trial Chamber did not rely on Witness SD's evidence in reaching its findings on the Mid-May Attack or Nyiramasuhuko's involvement in attacks, but in relation to the attacks which occurred seven to 11 days after the Mid-May Attack for which Nyiramasuhuko was not convicted.[1987] Likewise, the Trial Chamber did not rely on Witness QY's testimony in support of its findings on the Mid-May Attack, but only considered it with respect to the Night of Three Attacks and as to attacks prior to the Mid-May Attack where it rejected her evidence implicating Nyiramasuhuko.[1988] The Appeals Chamber therefore dismisses Nyiramasuhuko's arguments as baseless.

870. The Appeals Chamber is also unconvinced that no reasonable trier of fact could have relied on Witness TA's uncorroborated testimony regarding the Mid-May Attack in light of the evidence of Witnesses QBP, QBQ, RE, SD, and SJ. Nyiramasuhuko fails to identify any material contradiction between the fact that these witnesses did not specifically mention the Mid-May Attack and Witness TA's detailed account of the attack. Nyiramasuhuko refers to nothing in their testimonies reflecting that they testified that Nyiramasuhuko did not come to the prefectoral office prior to the Night of Three Attacks or the first half of June 1994 or denied that attacks other than those they specifically described also took place. Nyiramasuhuko merely refers to excerpts of Witnesses RE's and QBQ's testimonies describing the Night of Three Attacks,[1989] Witness QBP's

[1985] Witness TA, T. 1 November 2001 p. 15 (closed session); T. 5 November 2001 pp. 68, 126, 130; T. 6 November 2001 pp. 61, 68.
[1986] Trial Judgement, paras. 2639-2641.
[1987] Trial Judgement, paras. 2650, 2651. The Trial Chamber noted Witness SD's evidence that Nyiramasuhuko was present in the vehicle during the Last Half of May Attacks but the Trial Judgement clearly reflects that the Trial Chamber did not rely on this part of Witness SD's evidence. *See ibid.*, paras. 2650, 2651.
[1988] *See* Trial Judgement, paras. 2621-2626, 2698, 2713. The Appeals Chamber notes that it has concluded above that the Trial Chamber's reliance on Witness QY's evidence identifying Nyiramasuhuko as being at the prefectoral office on the Night of Three Attacks was erroneous but that this error had not occasioned a miscarriage of justice in light of corroborative evidence that she was there during this night. *See supra*, para. 856.
[1989] Nyiramasuhuko refers to: (i) aspects of Witness RE's testimony reflecting that she saw Nyiramasuhuko during the Night of Three Attacks and with President Sindikubwabo between the return of the refugees from Nyange and their transportation to Rango Forest; and (ii) Witness QBQ's testimony recounting the abduction and escape of Semanyenzi *See* Nyiramasuhuko Appeal Brief, paras. 969, 971, *referring to* Trial Judgement, paras. 2657, 2658, fns. 7436, 7437, *referring in turn to* Witness RE, T. 24 February 2003 pp. 9, 19, 21, T. 25 February 2003 pp. 3, 4, 39, T. 27 February 2003 p. 5, Witness QBQ, T. 3 February 2004 pp. 63, 70, 71.

testimony detailing an attack in the first half of June 1994,[1990] and the Trial Chamber's acknowledgements that these were the only attacks at the prefectoral office that these witnesses testified about.[1991] Similarly, Nyiramasuhuko only cites parts of Witnesses SJ's and SD's testimonies recounting the occasions on which they saw Nyiramasuhuko during the day,[1992] which Nyiramasuhuko implies reflects that she was not present at night. A review of the testimonies of Witnesses QBP, QBQ, RE, SD, and SJ reveals that they merely described the occasions they personally saw Nyiramasuhuko at the prefectoral office. Their testimonies, and presence at the prefectoral office, do not necessarily demonstrate that they were aware of all of the attacks that occurred there or all of the occasions when Nyiramasuhuko was present.[1993] The Appeals Chamber also notes that Witnesses SD and RE testified that attacks at the prefectoral office occurred in addition to those that they specifically described in their testimonies.[1994]

871. In addition, Nyiramasuhuko does not reference anything in the evidence of Witnesses QBP, QBQ, RE, SD, and SJ that demonstrates that they were present at the prefectoral office with Witness TA during the Mid-May Attack,[1995] particularly in light of: (i) the Trial Chamber's findings that refugees were moved from the prefectoral office to the EER between 15 and 20 May 1994, and

[1990] Nyiramasuhuko Appeal Brief, paras. 969, 971, *referring to* Trial Judgement, paras. 2657, 2658, fns. 7436, 7437, *referring in turn to* Witness QBP, T. 24 October 2002 p. 84, T. 28 October 2002 pp. 71, 74, T. 29 October 2002 pp. 31, 32, 82, 83 (closed session).
[1991] Nyiramasuhuko Appeal Brief, paras. 969, 971, *referring to* Trial Judgement, paras. 2657, 2658.
[1992] Nyiramasuhuko refers to: (i) Witness SJ's testimony that she was present at the prefectoral office from April 1994 and saw Nyiramasuhuko there on three or four occasions at meetings that were held in the day and never in the night; and (ii) Witness SD's testimony describing the vehicle that he saw used in the attacks, that it came to the prefectoral office during the night, and that he saw Nyiramasuhuko at meetings at the prefectoral office during the day time. *See* Nyiramasuhuko Appeal Brief, paras. 968-971, *referring to* Trial Judgement, paras. 2178, 2628, 2644, Witness SD, T. 17 March 2003 pp. 9, 10.
[1993] Witness QBQ, T. 3 February 2004 pp. 7-10, 52 (testifying that she saw Nyiramasuhuko for the first time three days after she arrived at the prefectoral office during the day and, when questioned as to whether she saw Nyiramasuhuko another time, responding that she saw her that evening with Ntahobali and the *Interahamwe*); Witness RE, T. 24 February 2003 pp. 17, 18, T. 25 February 2003 pp. 39, 40 (testifying that after her return from Nyaruhengeri (Nyange) and before she was transferred to Rango Forest, Nyiramasuhuko came to the prefectoral office and that this was the first time she saw Nyiramasuhuko); Witness SJ, T. 3 June 2002 p. 121, T. 5 June 2002 p. 121 (testifying that she saw Nyiramasuhuko on three or not more than four occasions at the prefectoral office and that she heard that Nyiramasuhuko came on other occasions); Witness QBP, T. 24 October 2002 p. 84 (testifying that after she returned from Nyange to the prefectoral office, she saw Nyiramashuko arrive); Witness SD, T. 17 March 2003 pp. 8, 9 (testifying that she saw Nyiramasuhuko at the prefectoral office having a meeting with Nsabimana). The Trial Chamber determined that Witnesses QBQ's and RE's evidence concerned the Night of Three Attacks. *See* Trial Judgement, paras. 2657, 2658.
[1994] *See*, *e.g.*, Witness SD, T. 17 March 2003 pp. 9-11, 41, 49, 50, 65-71; Witness RE, T. 24 February 2003 p. 19.
[1995] In support of her contention that these witnesses were present at the prefectoral office during the Mid-May Attack, Nyiramasuhuko refers to the following in paragraph 291 of her reply brief: Witness QBP, T. 24 October 2002 pp. 79-81 (testifying about her journey to the prefectoral office, EER, and back to the prefectoral office but not referring to any dates); Witness QBQ, T. 3 February 2004 pp. 6, 7 (testifying that she went to the prefectoral office towards the end of April 1994); Witness SD, T. 17 March 2003 pp. 6-8, and 36, 37 (closed session) (testifying that, after 6 April 1994, she went to Runyinya Commune for three days, then to the Butare University Hospital for one week, then to the prefectoral office for one week, then to the EER for one week, and then back to the prefectoral office, and that she spent the whole of April and probably May at the prefectoral office); Witness SJ, T. 29 May 2002 pp. 112, 113 (testifying that she went to the prefectoral office in April 1994).

returned around 31 May 1994;[1996] (ii) the emphasis that Witnesses QBP, QBQ, RE, SD, and SJ placed on their inability to provide specific dates as to the time period they were at the prefectoral office;[1997] and (iii) the witnesses' recollections of being at the EER around the time period of the Mid-May Attack,[1998] reflecting that their presence at the prefectoral office was not constant during the time period in question.

872. Nyiramasuhuko's reliance on certain aspects of these witnesses' testimonies to assert that they were definitely at the prefectoral office during the Mid-May Attack is without merit. The Appeals Chamber notes that the Trial Chamber expressly found that Witness RE arrived at the EER "sometime around mid-May 1994", and that Witness SJ's testimony corresponded to the same time period implying that she too was at the EER then.[1999] It further notes that Witness SJ testified that during the two weeks she was at the prefectoral office she went to the EER on three or four non-consecutive days but could not recall the month or dates of her visits there.[2000] The Trial Chamber also found that Witness QBQ provided corroborating evidence as to the torrential rain that the refugees from the prefectoral office sheltered from on the first night of their arrival at the EER.[2001] Nyiramasuhuko fails to demonstrate any error in the reasoning of the Trial Chamber in this regard by referring to Witness RE's testimony that she and Witness SJ were "always together", because Witness RE herself testified that this was not the case.[2002] Nyiramasuhuko also fails to demonstrate that Witness QBP was necessarily at the prefectoral office during the time of the Mid-May Attack and over-states the witness's testimony that she was with Witness TA at the

[1996] Trial Judgement, para. 3934.
[1997] Witness QBP, T. 24 October 2002 p. 80; Witness QBQ, T. 3 February 2004 pp. 6, 7, 52; Witness RE, T. 24 February 2003 pp. 9-11; Witness SD, T. 17 March 2003 pp. 7, 8, and 37 (closed session).
[1998] Witness SD testified that he sought refuge at the Butare University Hospital before being forced to go to the prefectoral office, then to the EER, then back to the prefectoral office but was vague in relation to the specific dates on which he did so. *See* Trial Judgement, para. 2312; Witness SD, T. 17 March 2003 pp. 7, 8, and 37 (closed session). Witness SJ testified that she went to the prefectoral office on a Sunday in April 1994 and stayed for about two weeks, during which time she went to the EER on three or four days that were not successive. *See* Trial Judgement, paras. 2225, 2226, 3884; Witness SJ, T. 30 May 2002 pp. 78, 91, 95, T. 3 June 2002 p. 120, T. 4 June 2002 pp. 63, 64. Witness QBP testified that she went to the prefectoral office in mid-April 1994, then to the EER for one or two weeks, and then returned to the prefectoral office. *See* Trial Judgement, para. 2265; Witness QBP, T. 24 October 2002 pp. 79, 80, T. 29 October 2002 p. 83 (closed session). The Trial Chamber determined that Witness RE was at the EER in Mid-May 1994. *See* Trial Judgement, para. 3935. Witness QBQ testified that she went to the prefectoral office in mid-April 1994 and then to the EER where she stayed for one to two weeks. *See ibid.*, paras. 2328, 2334; Witness QBQ, T. 3 February 2004 pp. 6, 7, 23, 24, 52, T. 4 February 2004 p. 8.
[1999] Trial Judgement, paras. 3935, 3936, 3943.
[2000] Witness SJ, T. 30 May 2002 pp. 78, 87, 88, 91, 92, 95, 108, 109, T. 4 June 2002 pp. 63, 64. *See also* Trial Judgement, paras. 2226, 3884.
[2001] Trial Judgement, para. 3943.
[2002] Witness RE, T. 24 February 2003 pp. 55, 56 (closed session) ("Q. I understand, Madam Witness, from your answer that [Witness SJ] was constantly with you during these events, which occurred between April and July. Am I not right? A. Yes. It's true we were together because we met at the [prefectoral office] to which she had come to seek refuge, just as we had done; but it wouldn't be true to say that we were always together because that wasn't possible."). *See also* Witness RE, T. 24 February 2003 p. 60 (closed session) (French).

prefectoral office and the EER as her testimony does not reflect that they were continuously together at each location.[2003]

873. In light of the above, the Appeals Chamber finds Nyiramasuhuko's contention that the Trial Chamber's finding that the refugees were always together precludes the possibility that Witnesses QBP, QBQ, RE, SJ, and SD were not at the prefectoral office during the Mid-May Attack to be without merit. The Appeals Chamber observes that the Trial Chamber did not make this statement as a finding but in its summary of Witness TA's evidence.[2004] Witness TA's testimony reflects that she arrived at the EER, where there were many refugees, and then moved to the prefectoral office with these refugees. She stated that the refugees "never stayed one group at the EER and one group at the [prefectoral office]" but that "they were all together".[2005] Nyiramasuhuko does not demonstrate that Witnesses QBP, QBQ, RE, SD, and SJ were present at the prefectoral office with Witness TA in mid-May 1994 and formed part of the group of refugees to which Witness TA refers. Nor does she demonstrate that, even if the witnesses had been a part of that group, their testimonies necessarily undermined the reasonableness of the Trial Chamber's conclusion, based on Witness TA's evidence, that the Mid-May Attack occurred. The Appeals Chamber therefore sees no error in the Trial Chamber's findings.

874. Furthermore, the Appeals Chamber recalls that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[2006] The Trial Chamber carried out a detailed assessment of Witness TA's evidence concerning the Mid-May Attack[2007] and Nyiramasuhuko fails to identify any contradiction between Witness TA's evidence and that of Witnesses QBP, QBQ, RE, SD and SJ that would have prevented a reasonable trier of fact from relying on her uncorroborated evidence.

875. Finally, the Appeals Chamber finds Nyiramasuhuko's contention that the Trial Chamber should have explained how its finding that the displaced Tutsis who sought refuge at the Butare

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[2003] Nyiramasuhuko argues that "Witness QBP testified that she was always with Witness TA at the [prefectoral office] and at EER". *See* Nyiramasuhuko Reply Brief, para. 292. However, the excerpts of Witness QBP's testimony that Nyiramasuhuko highlights do not demonstrate that they were continually together. *See* Witness QBP, T. 29 October 2002 p. 47 (closed session) ("A. No, I was with Immaculate and [Witness TA] at the préfecture. There were members of our family who were living in the Arab quarters and in the various places where I went, at the Protestant school, I was with [Witness TA] and Immaculate."). In addition, Witness QBP's evidence about initially arriving at the prefectoral office, going to the EER, and returning to the prefectoral office from Nyange reflects that she was with her children and does not include any reference to Witness TA. *See* Witness QBP, T. 24 October 2002 pp. 79, 80; T. 28 October 2002 pp. 37, 48, 49.
[2004] Trial Judgement, para. 2174.
[2005] Witness TA, T. 30 October 2001 p. 70 (closed session), T. 7 November 2001 pp. 67, 68.
[2006] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[2007] Trial Judgement, paras. 2628-2642.

Prefecture Office were transferred to the EER between 15 and 20 May 1994 and stayed there until approximately 31 May 1994 reconciles with its findings as to the Mid-May Attack to be without merit. The Appeals Chamber observes that the Trial Chamber, relying on Nsabimana's testimony which it determined was corroborated by Witnesses RE, SX, Bararwandika, and HBI6, found that the Tutsis who sought refuge at the prefectoral office were transferred to the EER between 15 and 20 May 1994 and stayed there until approximately 31 May 1994 when they returned to the prefectoral office.[2008] Several other related findings of the Trial Chamber give the impression that, at a minimum, no refugees were intended to remain at the prefectoral office once they were ordered to go to the EER.[2009] Notwithstanding these considerations, the Trial Chamber concluded that "it is not disputed that there were a large number of refugees at the [Butare Prefecture Office] compound between April and June 1994."[2010]

876. In the view of the Appeals Chamber, Nyiramasuhuko does not demonstrate that the Trial Chamber's findings are either categorical or necessarily in conflict. It bears noting that Witness TA could only provide estimates with respect to the timing of the events at the prefectoral office.[2011] While the Trial Chamber's conclusions reflect that refugees at the prefectoral office left once Nsabimana ordered them to go to the EER, its findings are not categorical that no refugees remained or arrived at the prefectoral office between the time refugees left for the EER and returned in significant numbers to the prefectoral office at the end of May 1994.[2012] Witnesses TK, SU, SS, and FAP all testified that they arrived at the prefectoral office towards the end of May 1994, and did not testify that they were transferred to the EER,[2013] reflecting that Tutsis arrived at the prefectoral office during this time period. In addition, evidence referred to by the Trial Chamber demonstrates that the prefectoral office and EER were in the immediate proximity of each other[2014] and that refugees moved back and forth between the two locations.[2015] In this context, the Appeals Chamber is not persuaded that the Trial Chamber's conclusions about the transfer of refugees from the prefectoral office to the EER are contradictory with its findings concerning the Mid-May Attack.

[2008] Trial Judgement, para. 3934.
[2009] *See*, *e.g.*, Trial Judgement, para. 3933.
[2010] Trial Judgement, para. 2627.
[2011] *See* Witness TA, T. 24 October 2001 p. 94, T. 29 October 2001 p. 52.
[2012] Trial Judgement, para. 3934. *See also ibid*., para. 3936 ("Accordingly, the Chamber considers the refugees must have *started arriving* at the EER around the start or middle of May 1994.") (emphasis added).
[2013] *See* Witness SU, T. 14 October 2002 p. 8; Witness SS, T. 3 March 2003 pp. 22-24, 26, T. 10 March 2003 p. 28, T. 11 March 2003 p. 14; Witness FAP, T. 12 March 2003 p. 42; Witness TK, T. 20 May 2002 pp. 26. *See also* Witness TK, T. 21 May 2002 pp. 121, 122 (closed session); Trial Judgement, paras. 2201-2203, 2242, 2281, 2298, 2299.
[2014] *See* Trial Judgement, paras. 3856, 3890, 3920, *referring to* Witness RE, T. 24 February 2003 p. 11, Witness QBQ, T. 3 February 2004 pp. 23, 78, Nsabimana, T. 9 October 2006 p. 71.
[2015] *See*, *e.g.*, Trial Judgement, paras. 2265, 2226, 3884, 3912, *referring to* Witness QBP, T. 24 October 2002 p. 80, T. 28 October 2002 pp. 18, 48, 49, 52, T. 30 October 2002 pp. 4-6, Witness SJ, T. 30 May 2002 pp. 78, 91, 95, T. 4 June 2002 pp. 63, 64, Witness WUNBJ, T. 3 April 2006 pp. 38, 39 (closed session). *See also* Witness WUNBJ, T. 8 March 2006 p. 49; Alexandre Bararwandika T. 4 July 2006 p. 10.

877. Based on the foregoing, the Appeals Chamber finds that, in her arguments addressed above, Nyiramasuhuko has not demonstrated that the Trial Chamber erred in its assessment of Witness TA's evidence pertaining to the Mid-May Attack.

(e) Night of Three Attacks

878. The Trial Chamber, relying on the testimonies of multiple witnesses, found that, around the end of May or the beginning of June 1994, Ntahobali, Nyiramasuhuko, and *Interahamwe* came to the Butare Prefecture Office on board a camouflaged pickup truck three times in one night.[2016] It determined that they abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare Prefecture to be killed.[2017] It found that Nyiramasuhuko ordered the *Interahamwe* to commit these crimes, and determined that Ntahobali and the *Interahamwe* attacked women and children at the prefectoral office, assaulted them, and forced them onto the pickup truck.[2018] The Trial Chamber further concluded that Nyiramasuhuko ordered *Interahamwe* and soldiers to rape Tutsi women and to kill other refugees and that she ordered *Interahamwe* to rape refugees because they were Tutsis and that *Interahamwe* beat, abused, and raped many Tutsi women.[2019] The Trial Chamber convicted Nyiramasuhuko for ordering *Interahamwe* to kill the refugees abducted during the Night of Three Attacks and as a superior for the rapes committed by *Interahamwe* upon her orders during that night.[2020]

879. The Trial Chamber identified several refugees assaulted during these attacks and specifically found that: (i) Ntahobali and the *Interahamwe* abducted Mbasha's wife and children; (ii) the *Interahamwe*, on the orders of Nyiramasuhuko, assaulted and killed a woman named Trifina at the prefectoral office; and (iii) an unknown woman and her children were assaulted at the prefectoral office during the attacks.[2021] Recalling its finding that she did not receive notice of the identity of Mbasha's wife and children or of Trifina, the Trial Chamber did not convict Nyiramasuhuko for these specific abductions and killings.[2022] Rather, the Trial Chamber used this as circumstantial evidence to support its findings on abductions and killings of other unnamed Tutsi refugees at the prefectoral office.[2023]

880. Nyiramasuhuko submits that the Trial Chamber conducted a "piecemeal, questionable and erroneous assessment of the evidence" when reaching conclusions about the Night of Three

[2016] Trial Judgement, paras. 2661, 2715, 2738, 2781(iii).
[2017] Trial Judgement, paras. 2715, 2736, 2738, 2748, 2749, 2781(iii).
[2018] Trial Judgement, paras. 2736, 2738, 2781(iii).
[2019] Trial Judgement, paras. 2698, 2702, 2781(iii).
[2020] *See supra*, para. 749.
[2021] Trial Judgement, paras. 2727, 2730, 2736, 2738. *See also ibid*., para. 2661.
[2022] Trial Judgement, paras. 2172, 2716, 2727, 2730, 2782.
[2023] Trial Judgement, paras. 2172, 2716, 2727, 2730.

Attacks, disregarding significant contradictions and erroneously finding Prosecution evidence mutually corroborative.[2024] In particular, Nyiramasuhuko argues that the Trial Chamber erred in: (i) failing to sufficiently consider differences within the Prosecution evidence as to the timing of the Night of Three Attacks as well as the number of attacks that occurred; (ii) failing to consider that Witnesses TA and SD did not testify about the Night of Three Attacks; (iii) its assessment of the abduction of Mbasha's wife and children and the unnamed woman and her children; (iv) its assessment of Nyiramasuhuko's presence and conduct during the attacks as well as her orders to commit rape; (v) its assessment of the attack on a woman named Trifina; and (vi) its evaluation of evidence concerning the locations where abducted refugees were killed and the abductions of Semanyenzi in particular.[2025] The Appeals Chamber will address these challenges in turn.

(i) Timing and Number of Attacks

881. Nyiramasuhuko argues that the Trial Chamber erred in disregarding "significant and critical contradictions" in the evidence of Witnesses SJ, QBQ, QBP, FAP, QJ, RE, SS, SU, and TK to find that they all testified about the same event – the Night of Three Attacks – which occurred during one night "in early June 1994".[2026] Specifically, Nyiramasuhuko submits that Witness QBQ testified that she arrived at the Butare Prefecture Office in April 1994 and that the Night of Three Attacks occurred on the evening of the day she saw Nsabimana and Nyiramasuhuko together at the prefectoral office, which was the "third day following her arrival".[2027] Nyiramasuhuko stresses that the Trial Chamber, relying on Witness QBQ's evidence, elsewhere determined that this meeting between Nsabimana and Nyiramasuhuko at the prefectoral office occurred in April 1994.[2028] Consequently, Nyiramasuhuko argues that it was unreasonable to find that Witness QBQ testified about the Night of Three Attacks, which the Trial Chamber found to have occurred "in early June 1994", and that this error has led to a miscarriage of justice.[2029]

882. In the same vein, Nyiramasuhuko highlights that Witness SJ testified that the Night of Three Attacks occurred within two weeks following her arrival at the prefectoral office in April 1994.[2030] She argues that the Trial Chamber unreasonably relied on other elements of Witness SJ's evidence

[2024] Nyiramasuhuko Appeal Brief, paras. 980, 1042, 1114-1116.
[2025] Nyiramasuhuko Notice of Appeal, paras. 8.5-8.7, 8.9, 8.10, 10.17-10.26, 10.30, 10.41, 10.42, 10.44, 10.45, 10.48, 10.49; Nyiramasuhuko Appeal Brief, paras. 977-1192, 1220-1280; Nyiramasuhuko Reply Brief, paras. 300-336.
[2026] Nyiramasuhuko Appeal Brief, paras. 977, 978, 980 (emphasis omitted).
[2027] Nyiramasuhuko Appeal Brief, paras. 984, 985, 1161 (emphasis omitted). *Cf. ibid*., paras. 1013, 1033, 1036, 1099.
[2028] Nyiramasuhuko Appeal Brief, paras. 986, 1162, 1190.
[2029] Nyiramasuhuko Appeal Brief, paras. 987, 1190. *See also* Nyiramasuhuko Reply Brief, paras. 307, 309. In this context, Nyiramasuhuko contends that it was unreasonable for the Trial Chamber to rely on similarities between the evidence of Witness QBQ and other witnesses concerning the survival of Semanyenzi to find that Witness QBQ testified about the Night of Three Attacks in early June 1994. *See* Nyiramasuhuko Appeal Brief, para. 983, 987, 1034.
[2030] Nyiramasuhuko Appeal Brief, paras. 1188, 1189, *referring to* Trial Judgement, paras. 2231-2236. *See also ibid*., paras. 989-991, *referring*, *inter alia*, *to* Witness SJ, T. 29 May 2002 pp. 19, 20, and 134, 135 (closed session).

that were consistent with evidence of witnesses who testified about the Night of Three Attacks in early June 1994 to find that Witness SJ testified about that same night.[2031]

883. Nyiramasuhuko also argues that the Trial Chamber took irreconcilable and contradictory approaches with respect to the testimonies of Witnesses QBQ and SJ, on one hand, and Witness QY's evidence on the other.[2032] Specifically, she points to the Trial Chamber's acknowledgement that Witness QY's testimony contained parallels with other evidence about the Night of Three Attacks but found that the witness was testifying about another event as she described attacks that occurred in late April or early May 1994.[2033]

884. In addition to contradictions about the timing of the Night of Three Attacks, Nyiramasuhuko contends that the Trial Chamber overlooked or erred in its analysis of inconsistencies within the Prosecution evidence as to the number of attacks that purportedly occurred at the prefectoral office during this evening.[2034] Specifically, she argues that the Trial Chamber relied on the evidence of Witness QBP, but that this witness only testified about one attack.[2035] Nyiramasuhuko further contends that, while the Trial Chamber acknowledged that Witnesses QBQ and SU only testified about two attacks instead of three,[2036] its explanation for this variance would not apply to these witnesses given evidence that they remained there during all three attacks.[2037] Finally, Nyiramasuhuko argues that the Trial Chamber failed to consider sufficiently variances between the evidence of Witnesses QBQ and RE and their prior statements, which, respectively, reflect that only one or two attacks occurred on this evening.[2038]

885. The Prosecution responds that the Trial Chamber reasonably found, based on corroborating and consistent evidence of Witnesses QJ, TK, RE, SU, FAP, and SS, that the Night of Three Attacks occurred in late May or the beginning of June 1994.[2039] It further submits that Witness QBQ's evidence corroborated other witnesses on specific facts during the Night of Three

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[2031] Nyiramasuhuko Appeal Brief, paras. 988, 989, 992, 1187.
[2032] Nyiramasuhuko Appeal Brief, paras. 997-999.
[2033] Nyiramasuhuko Appeal Brief, paras. 995, 996
[2034] Nyiramasuhuko Appeal Brief, paras. 1154-1187.
[2035] Nyiramasuhuko Appeal Brief, paras. 1066-1070, 1155. Nyiramasuhuko suggests, *inter alia*, that the Trial Chamber later did not refer to Witness QBP's evidence of only one attack as it was contradictory to its findings that three attacks occurred on this evening and for which the Trial Chamber provided no explanation. *See ibid*., paras. 1155, 1156.
[2036] Nyiramasuhuko Appeal Brief, paras. 1154, 1169. *See also ibid*., para. 983. During the appeals hearing, Nyiramasuhuko argued that Witness SJ also only testified about two attacks. *See* AT. 14 April 2015 p. 30. This is contrary to her submissions in her appeal brief. *See* Nyiramasuhuko Appeal Brief, paras. 1187, 1188.
[2037] Nyiramasuhuko Appeal Brief, paras. 1169, 1170, 1180, 1181.
[2038] Nyiramasuhuko Appeal Brief, paras. 983, 1158-1160, 1165, *referring to* Witness RE, T. 24 February 2003 pp. 18, 19, Exhibit D87 (Witness RE's Statement, dated 5 December 1996, signed on 10 December 1996) (confidential) ("Witness RE's Statement"), Witness QBQ's Statement. In this regard, Nyiramasuhuko further argues that the Trial Chamber, in footnote 7442 of the Trial Judgement, only referred to Witness RE's evidence about three attacks and ignored evidence from the witness that she only "personally witnessed two attacks." *See ibid*., para. 1160, *referring to* Witness RE, T. 25 February 2003 p. 48.
[2039] Prosecution Response Brief, paras. 643, 645-647, 649.

Attacks.[2040] According to the Prosecution, given that the details provided about the attack were corroborated by other witnesses, it was reasonable for the Trial Chamber to conclude that Witness SJ was testifying to the Night of Three Attacks even if her evidence concerning the timing of the attack was found to be unreliable.[2041]

886. The Prosecution also contends that Nyiramasuhuko's submissions concerning inconsistencies about the number of attacks should be dismissed as the Trial Chamber directly addressed the issue of Witnesses QBQ and SU testifying to two attacks and the evidence reflects that they moved around and were not in a position to see the third attack.[2042] The Prosecution further responds that Nyiramasuhuko's argument regarding contradictions between the testimonies of Witnesses QBQ and RE and their prior statements are without merit.[2043]

887. The Appeals Chamber notes that Nyiramasuhuko does not demonstrate with references purported contradictions among the evidence of Witnesses FAP, QJ, RE, SS, SU, and TK about the timing of the Night of Three Attacks undermining that they testified about this event.[2044] Nyiramasuhuko's contentions in this regard are therefore dismissed.

888. With respect to Nyiramasuhuko's remaining submissions, the Appeals Chamber observes that the Trial Chamber determined that Witnesses QBQ and SJ testified about the Night of Three Attacks.[2045] In this regard, the Trial Chamber noted that Witness QBQ's evidence reflected that the attack she described occurred in the evening, about three days after she arrived at the prefectoral office around the end of April 1994.[2046] However, emphasising that the attack described by Witness QBQ involved the abduction and escape of Semanyenzi, an event that Witnesses RE, SS, SU, and FAP testified occurred during the Night of Three Attacks, the Trial Chamber found that Witness QBQ's testimony pertained to these attacks, which occurred "at the beginning of June 1994."[2047]

889. That being said, the Appeals Chamber notes an apparent contradiction in the Trial Chamber's findings with respect to Witness QBQ. While the Trial Chamber rejected Witness QBQ's evidence about when the Night of Three Attacks occurred – *i.e.* around the end of April 1994 – it elsewhere relied on intrinsically related evidence from her to establish that

[2040] Prosecution Response Brief, para. 647.
[2041] Prosecution Response Brief, paras. 647-649.
[2042] Prosecution Response Brief, para. 650.
[2043] Prosecution Response Brief, paras. 682, 686.
[2044] *See* Nyiramasuhuko Appeal Brief, paras. 977, 978, 980.
[2045] *See* Trial Judgement, paras. 2658, 2659.
[2046] *See* Trial Judgement, paras. 2328-2334.
[2047] Trial Judgement, para. 2658.

Nyiramasuhuko and Nsabimana met at the prefectoral office around the end of April 1994.[2048] The Appeals Chamber nonetheless considers that this error has not occasioned a miscarriage of justice for the reasons developed below.

890. The Appeals Chamber notes that Witness QBQ estimated that she arrived at the prefectoral office "towards the end of April" 1994.[2049] She consistently asserted that she saw Nyiramasuhuko with Nsabimana three days later and that the attacks she observed occurred that evening.[2050] Insofar as the Trial Chamber relied on Witness QBQ's estimates regarding the timing of this meeting to find that Nyiramasuhuko and Nsabimana met at the prefectoral office one day around the end of April 1994,[2051] the reliance on this aspect of the witness's evidence was unreasonable in light of its earlier conclusion that Witness QBQ testified about the Night of Three Attacks as well as its express rejection of Witness QBQ's intrinsically related evidence as to the timing of the transfer of refugees from the prefectoral office to Rango Forest.[2052]

891. However, the Appeals Chamber finds that this error does not undermine the reasonableness of the Trial Chamber's determination that Witness QBQ testified about the Night of Three Attacks nor that it occasioned a miscarriage of justice. Indeed, the Appeals Chamber observes that the Trial Chamber considered Witness QBQ's corroborated evidence that: (i) Ntahobali, Nyiramasuhuko, and *Interahamwe* came multiple times in one night to abduct Tutsi refugees;[2053] (ii) a woman, who refused to be abducted, was killed in front of the pickup truck;[2054] (iii) the pickup truck used in the attacks was "a Toyota or a Toyota Hilux" and that Ntahobali was driving it;[2055]

[2048] *See* Trial Judgement, para. 2900 ("Based on the evidence of Witnesses SJ and QBQ, the Chamber is satisfied that a meeting took place between Nyiramasuhuko and Nsabimana around the end of April 1994, at the [Butare Prefecture Office].") In both sections of the Trial Judgement, the Trial Chamber recalled Witness QBQ's evidence that she arrived at the prefectoral office towards the end of April 1994 and that, three days later, she observed Nyiramasuhuko and Nsabimana walk to the prefectoral office. *See ibid*., paras. 2328, 2329, 2888. Witness QBQ's evidence about the subsequent attacks, which the Trial Chamber determined related to the Night of Three Attacks, suggests that these attacks occurred in the evening of the day she observed Nyiramasuhuko and Nsabimana. *See ibid*., paras. 2330-2333.
[2049] Witness QBQ, T. 3 February 2004 pp. 6, 52.
[2050] Witness QBQ, T. 3 February 2004 pp. 7, 8, 10, 52, 53, 55, 63, 64.
[2051] Trial Judgement, para. 2900. In this regard, the Appeals Chamber observes that the Trial Chamber also relied on Witness SJ's evidence to determine that Nsabimana and Nyiramasuhuko met at the prefectoral office around the end of April 1994. *See idem*. However, similar to Witness QBQ, the Trial Chamber later rejected Witness SJ's estimates as to the timing of the Night of Three Attacks, further undermining the reasonableness of its reliance on this witness's evidence as to the timing of the meeting at the prefectoral office. *See ibid*., para. 2659.
[2052] Trial Judgement, paras. 2658, 5072.
[2053] *See* Trial Judgement, paras. 2330-2333, 2660, 2714, 2738. The Trial Chamber considered Witness QBQ's account in this regard consistent with that of Witnesses TK, RE, SS, SU, and FAP. *See ibid*., paras. 2215, 2253, 2278, 2287, 2307, 2308, 2660, 2704, 2706, 2707, 2738.
[2054] *See* Trial Judgement, paras. 2331, 2729. The Trial Chamber considered that Witness QBQ's evidence about the woman being killed corroborated the testimonies of Witnesses TK and RE with respect to Trifina's death. *See ibid*., para. 2729.
[2055] Trial Judgement, paras. 2663, 2664.

and (iv) Nyiramasuhuko ordered rapes during this night.[2056] Given the considerable overlap between Witness QBQ's evidence and other evidence relating to the Night of Three Attacks, the Appeals Chamber considers that it was within the discretion of the Trial Chamber to consider that she testified about the same attack that Witnesses TK, RE, QJ, FAP, SS, and SU testified about that occurred around the end of May or early June 1994 notwithstanding her evidence that it occurred near the end of April 1994.

892. Furthermore, the Appeals Chamber is not persuaded by Nyiramasuhuko's contention that the Trial Chamber's refusal to rely on Witness QY's evidence – which contained parallels with other evidence about the Night of Three Attacks but was rejected, in part, on the basis that the witness described attacks which occurred in late April or early May 1994[2057] – required the rejection of Witness QBQ's testimony. Nyiramasuhuko's contentions ignore the fact that the Trial Chamber also rejected Witness QY's evidence on the basis that it found aspects of it unreliable and because she had lied to the Trial Chamber about whether she knew Witnesses QBQ and SJ.[2058] The Trial Chamber expressed no such concerns about Witness QBQ.

893. Turning to Nyiramasuhuko's submissions with respect to Witness SJ, the Trial Chamber rejected the witness's evidence about the Night of Three Attacks, and the Appeals Chamber has found that no reasonable trier of fact could have relied on intrinsically related aspects of the witness's testimony to make findings concerning identification during the Night of Three Attacks.[2059] Given these conclusions, Nyiramasuhuko does not demonstrate how any inconsistencies between Witness SJ's testimony and other evidence about when the Night of Three Attacks occurred would undermine the reasonableness of the Trial Chamber's findings concerning this event.[2060]

894. Concerning Nyiramasuhuko's argument about inconsistencies as to the number of attacks that occurred during the Night of Three Attacks and, in particular, the fact that Witness QBP testified that only one attack occurred, the Appeals Chamber observes that, although the Trial Chamber stated that Witness QBP testified about the Night of Three Attacks,[2061] a careful review of the witness's testimony reveals that she did not testify about these attacks. Indeed, as noted in

[2056] The Trial Chamber determined that Witness QBQ's testimony regarding Nyiramasuhuko's orders to rape the Tutsis was corroborated by Witness SS and that Witness RE's evidence tended to support this fact as well. *See* Trial Judgement, paras. 2693, 2695, 2701.
[2057] Trial Judgement, para. 2619.
[2058] *See* Trial Judgement, paras. 2616, 2620, 2626.
[2059] *See supra*, para. 804, *infra*, para. 1764.
[2060] In light of this analysis, the Appeals Chamber need not address whether the Trial Chamber erred in taking inconsistent approaches with respect to the evidence of Witnesses QY and SJ.
[2061] Trial Judgement, para. 2657.

another part of the Trial Judgement,[2062] Witness QBP's testimony concerned an attack at the prefectoral office that occurred after the Night of Three Attacks in the first half of June 1994.[2063] This error, however, has not occasioned a miscarriage of justice as the Trial Chamber did not rely on Witness QBP's evidence regarding the timing of the Night of Three Attacks to establish Nyiramasuhuko's participation or conduct during this particular night[2064] or the crimes committed during them.[2065] The fact that Witness QBP testified about only one attack, rather than three, which occurred separately from the Night of Three Attacks fails to demonstrate that the Trial Chamber erred in its conclusions on the Night of Three Attacks. The Appeals Chamber therefore dismisses Nyiramasuhuko's contention in this respect.[2066]

895. As to Nyiramasuhuko's contention that Witnesses QBQ and SU only testified about two attacks and that the Trial Chamber's explanation for the variance – that a number of refugees had fled the immediate environs of the prefectoral office – would not apply to these witnesses given their evidence that they remained there during all three attacks, the Appeals Chamber observes that Nyiramasuhuko's references do not support her position that they necessarily would have observed all three attacks.[2067] The Appeals Chamber is also not persuaded by Nyiramasuhuko's claim that their evidence is necessarily inconsistent with other evidence concerning the Night of Three Attacks because the witnesses did not testify about a third attack.[2068]

[2062] Trial Judgement, para. 2750.
[2063] Witness QBP, T. 24 October 2002 pp. 84-86, 88, T. 28 October 2002 pp. 71, 74.
[2064] *See* Trial Judgement, para. 2698. *See also ibid*., paras. 2683-2697, 2699-2702. Witness QBP's testimony was only relied upon as circumstantial evidence for the Night of Three Attacks in relation to the vehicle used during the attacks at the prefectoral office, and as to what Nyiramasuhuko wore in general. *See ibid*., paras. 2698, fn. 7559.
[2065] In this regard, the Trial Chamber acknowledged that Witness QBP may have been referring to different attacks than the witnesses who testified about the Night of Three Attacks and that Annonciata and Semanyenzi informed them of where abducted refugees were taken and killed. *See* Trial Judgement, para. 2747, fn. 7689.
[2066] Given that Witness QBP did not testify about the Night of Three Attacks, Nyiramasuhuko's other contentions that Witness QBP's evidence about the attack she observed is consistent with other evidence about the Night of Three Attacks are moot. *See* Nyiramasuhuko Appeal Brief, paras. 1025, 1066-1069, 1089, 1109-1111, 1132, 1134, 1138, 1141, 1155, 1156, 1196, 1215, 1263, 1274, 1277.
[2067] Nyiramasuhuko Appeal Brief, paras. 1169, 1170, 1180, 1181. With respect to Witness QBQ, Nyiramasuhuko emphasises that the witness testified that she stayed at the prefectoral office while other refugees were being removed during the second attack. With respect to Witness SU, Nyiramasuhuko points to the evidence of Witness SS, who testified about three attacks and that she and Witness SU remained at the prefectoral office together during them. *See ibid*., paras. 1170, 1180. *See also ibid*., para. 1060 (noting that Witness SS saw Nyiramasuhuko three times in the course of one night while Witness SU only saw her on two occasions). The Appeals Chamber considers that Witness QBQ's evidence merely reflects being in the same location during the second attack that night. *See* Witness QBQ, T. 3 February 2004 p. 22. As for Witness SU, the Appeals Chamber observes that Nyiramasuhuko's references to Witness SS's testimony provide no support for her contention.
[2068] The Appeals Chamber notes that Nyiramasuhuko also argues that the Trial Chamber reached contradictory findings as to the number of attacks observed by Witness QBQ in paragraphs 2658 and 2660 of the Trial Judgement. *See* Nyiramasuhuko Appeal Brief, para. 1099. *See also ibid*., paras. 1161, 1279. In paragraph 2658 of the Trial Judgement, the Trial Chamber stated that "the only attack at the [Butare Prefecture Office] described by Witness QBQ involved the abduction and escape of Semanyenzi." In paragraph 2660 of the Trial Judgement, it stated that Witness QBQ testified to observing "only two attacks". The Appeals Chamber understands that at paragraph 2658, the Trial Chamber considered that the only attack Witness QBQ observed, throughout her time at the prefectoral office, was the Night of Three Attacks. On the other hand, at paragraph 2660 of the Trial Judgement, the Trial Chamber was

896. Likewise, the Appeals Chamber considers that the absence of any express reference to Nyiramasuhuko coming to the prefectoral office on two occasions in Witness QBQ's prior statement does not necessarily reflect a contradiction with her testimony as to the number of attacks given the brief description contained in her prior statement.[2069]

897. As for the discrepancy between Witness RE's prior statement and testimony, the Appeals Chamber notes that the witness testified about some assailants making three trips on the Night of Three Attacks,[2070] whereas she stated that the assailants came twice in her prior statement.[2071] The Appeals Chamber recalls that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between the said testimony and his previous statements.[2072] Given the similarities between the core elements of Witness RE's evidence and that of Witnesses FAP, SS, SU, and TK with respect to the Night of Three Attacks,[2073] the Appeals Chamber does not find that the variance required the Trial Chamber to reject Witness RE's evidence concerning the Night of Three Attacks.

898. Based on the foregoing, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that inconsistencies in the evidence as to the timing of the Night of Three Attacks or the number of attacks that occurred undermined the reasonableness of the Trial Chamber's findings with respect to this event.

(ii) Failure to Consider Witness TA's and SD's Evidence

899. Nyiramasuhuko argues that the Trial Chamber erred in failing to consider that Witnesses TA and SD, who were at the Butare Prefecture Office during the relevant time, did not testify about the Night of Three Attacks.[2074] She contends that these omissions, which materially contradict evidence

assessing the number of attacks within the Night of Three Attacks. Consequently, the Appeals Chamber does not see any contradiction in these findings.

[2069] Witness QBQ's Statement, p. K0104992 (Registry pagination) ("Pauline paid two more visits to the [prefectoral] office to take people away in a similar fashion.").

[2070] Witness RE, T. 24 February 2003 p. 22.

[2071] Witness RE's Statement, p. K0035131 (Registry pagination).

[2072] *Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.

[2073] These core elements include: (i) the arrival of Ntahobali, Nyiramasuhuko, and the *Interahamwe* on a camouflaged pickup truck; (ii) the *Interahamwe* attacking and abducting refugees, including a woman and her children; (iii) the pickup truck departing with refugees and returning the same night to abduct other refugees; and (iv) the fact that the Night of Three Attacks occurred *prior to* the transfer of refugees from the Butare Prefecture Office to Rango Forest. *See*, *e.g.*, Trial Judgement, paras. 2196, 2203, 2212-2215, 2220, 2242, 2251-2253, 2277, 2278, 2284, 2285, 2287, 2289, 2299, 2302, 2304, 2307, 2308, 2655, 2660, 2663, 2704, 2706, 2709, 2710, 2717-2719, 2731-2736, 2738.

[2074] Nyiramasuhuko Appeal Brief, paras. 981, 1000-1008, 1034, 1037, 1038, 1112, 1113, 1143, 1144, 1191. *See also ibid*., paras. 981, 1071, 1130. *See also* Nyiramasuhuko Reply Brief, para. 309. *Cf.* AT. 14 April 2015 p. 18.

that the Night of Three Attacks occurred, undermine the reasonableness of the Trial Chamber's findings.[2075]

900. The Prosecution responds that Nyiramasuhuko's arguments regarding Witnesses TA and SD should be summarily dismissed for failing to demonstrate how the Trial Chamber erred.[2076]

901. The Appeals Chamber observes that nothing in the Trial Chamber's summary of the evidence of Witnesses TA and SD or its analysis of the Night of Three Attacks reflects that the Trial Chamber considered either witness to have testified about the Night of Three Attacks.[2077] In this context, Nyiramasuhuko does not show that either Witness TA or Witness SD provided evidence that was incompatible with the occurrence of the Night of Three Attacks, as neither denied their occurrence or provided evidence that contradicted that of Witnesses TK, RE, FAP, SS, and SU on these attacks. Accordingly, Nyiramasuhuko does not demonstrate that no reasonable trier of fact could have found that the Night of Three Attacks occurred notwithstanding the fact that Witnesses TA and SD did not directly corroborate evidence about this attack.[2078]

902. Therefore, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in failing to consider that Witnesses TA and SD did not testify about the Night of Three Attacks.

(iii) Abductions of Mbasha's Wife and Children and of Unnamed Woman and Children

903. The Trial Chamber concluded that, during the Night of Three Attacks, Ntahobali and the *Interahamwe* abducted Mbasha's wife and children.[2079] In coming to this conclusion, the Trial Chamber relied on the testimonies of Witnesses TK, QJ, and RE but rejected the evidence of Witness SJ who also testified about the event.[2080] The Trial Chamber also noted that Witnesses SU, SS, and FAP each testified about the abduction of a woman accompanied by children at the Butare Prefecture Office during the Night of Three Attacks.[2081] It stated that Witness FAP's testimony corroborated "numerous details of Witness TK's testimony regarding the abduction of Mbasha's

[2075] *See* Nyiramasuhuko Appeal Brief, paras. 1000-1008, 1031, 1032, 1034, 1035, 1037-1039.
[2076] Prosecution Response Brief, paras. 638, 639.
[2077] *See* Trial Judgement, paras. 2174-2193, 2312-2318, 2654-2661, 2703-2738. *See also supra*, Sections IV.F.2(c)(ii)b, IV.F.2(c)(iii)a.
[2078] The Appeals Chamber observes that Witnesses TA and SD testified to the existence of attacks other than those they specifically described. *See*, *e.g*. Witness TA, T. 1 November 2001 pp. 50, 51; Witness SD, T. 17 March 2003 pp. 9-11, 41, 49, 50, 65-71, T. 18 March 2003 p. 18.
[2079] Trial Judgement, para. 2727. As noted previously, the Trial Chamber determined that it would not enter convictions on the basis of the abduction of Mbasha's wife due to insufficient notice but nonetheless considered that the credible and consistent information with regard to this event provided circumstantial support for its findings regarding the abduction of other unnamed Tutsi refugees from the Butare Prefecture Office. *See supra*, Section IV.F.2(a).
[2080] Trial Judgement, paras. 2717-2723, 2727.
[2081] Trial Judgement, paras. 2732-2734. *See also ibid*., para. 2731.

wife and children",[2082] but also identified elements in Witness FAP's evidence that differed.[2083] The Trial Chamber, noting "the differences in their testimonies" concluded that it was "convinced that Witnesses SU, SS and FAP were describing attacks on different individuals among the group which was abducted from the [Butare Prefecture Office] on the night of three attacks."[2084] In this regard, it concluded that "Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup."[2085]

904. Nyiramasuhuko contends that the Trial Chamber erred in holding that the abduction of Mbasha's wife and children as testified to by Witnesses TK, RE, QJ, and SJ was different from the abductions of an unnamed woman and her children described by Witnesses FAP, SS, and SU and consequently failed to consider the significant contradictions within their evidence that rendered all of it unreliable.[2086] Alternatively, she argues that the Trial Chamber erred by insufficiently assessing differing evidence of Witnesses TK, RE, QJ, and SJ about the abduction of Mbasha's wife and children as well as contradictions between Witnesses FAP, SS, and SU concerning the attack on the unnamed woman and her children.[2087]

a. Same Attack

905. Nyiramasuhuko submits that it was unreasonable for the Trial Chamber to determine that the attack on the unnamed woman and her children as described by Witnesses FAP, SS, and SU was different from the abduction of Mbasha's wife and her children described by Witnesses TK, QJ, RE, and SJ.[2088] Specifically, Nyiramasuhuko emphasises that Witnesses TK, QJ, RE, SJ, SS, and FAP all described the woman and her children as lying on the veranda during the first attack.[2089] She further contends that "[t]hese witnesses" described the woman and her children arriving during the day, that Witnesses TK and QJ identified them as the Mbasha family,[2090] that Witnesses TK,

[2082] Trial Judgement, para. 2734.
[2083] Trial Judgement, para. 2735 ("However, Witness FAP added the children told the *Interahamwe* not to rape them because they were too young; but instead to take their mother if necessary. The mother also cried out and refused to be raped in public and so the *Interahamwe* killed her on the ground. Witness FAP said Ntahobali and the *Interahamwe* killed the mother with knives and dumped her body in the vehicle. They also took her children who had been beaten and drove away.").
[2084] Trial Judgement, para. 2736.
[2085] Trial Judgement, para. 2736. *See also ibid*., paras. 2738, 2781(iii).
[2086] Nyiramasuhuko Appeal Brief, paras. 1015, 1020, 1021, 1023; Nyiramasuhuko Reply Brief, paras. 303, 323, 324. *See also* AT. 14 April 2015 p. 32.
[2087] Nyiramasuhuko Appeal Brief, paras. 1027-1032, 1035, 1039, 1043, 1044, 1047, 1050-1055, 1057-1065, 1076-1079, 1082-1084, 1091, 1139, 1269, 1270.
[2088] Nyiramasuhuko Appeal Brief, paras. 1015, 1020, 1021, 1023; Nyiramasuhuko Reply Brief, paras. 303, 323, 324. Nyiramasuhuko contends that the Prosecution, at the close of trial, argued that Witnesses FAP and SU were talking about the same event. *See* Nyiramasuhuko Appeal Brief, para. 1020, *referring to* Prosecution Closing Brief, paras. 294, 443 at pp. 113, 155.
[2089] Nyiramasuhuko Appeal Brief, para. 1016. Nyiramasuhuko highlights that, although Witness SU did not mention the exact location, she was "close enough to see and hear what was said." *See idem*.
[2090] Nyiramasuhuko Appeal Brief, para. 1017.

SU, FAP, and RE all testified that they came "from the *Procure* or *Economat*",[2091] and that Witnesses TK and SU similarly described the man accompanying them as partially or completely bald.[2092] Nyiramasuhuko stresses that Witness RE testified that the woman she described was "the only woman [she knew] who was taken away with her children."[2093]

906. In Nyiramasuhuko's view, because these circumstances demonstrate that all the witnesses testified about the same event, the Trial Chamber failed to assess material contradictions in this evidence, which substantially affect its credibility.[2094] In particular, Nyiramasuhuko highlights that: (i) while Witnesses FAP, SS, and SU all testified about hearing, for example, Nyiramasuhuko issue orders for *Interahamwe* to target girls, young women, and men, Witnesses TK, RE, and SJ, who were also on the veranda, did not corroborate this aspect of their evidence; (ii) Witness FAP made no reference to Ntahobali's alleged proposal to marry one of the Mbasha children; and (iii) unlike Witnesses TK, RE, SJ, and QJ, Witness FAP testified that the woman was killed.[2095]

907. The Prosecution responds that Nyiramasuhuko simply disagrees with the Trial Chamber's conclusion without demonstrating that it was unreasonable for the Trial Chamber to conclude that Witnesses FAP, SS, and SU were not testifying about the abduction of Mbasha's wife and children but about a different woman and her children.[2096]

908. The Appeals Chamber observes that the Trial Chamber noted numerous elements of the evidence of Witnesses SU, SS, and FAP that could suggest that they testified about the same abduction[2097] and, specifically, about Mbasha's wife and children.[2098] This shows that the Trial Chamber was well aware of the similarities and differences in the relevant evidence.

909. The Appeals Chamber is not persuaded by Nyiramasuhuko's submissions that Witnesses SU, SS, and FAP must have testified about the abduction of Mbasha's wife and children

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[2091] Nyiramasuhuko Appeal Brief, para. 1018 (emphasis omitted).
[2092] Nyiramasuhuko Appeal Brief, para. 1019. Nyiramasuhuko further notes that Defence Witness WKKTD, who the Trial Chamber relied upon to determine the gender, age, and number of children in the Mbasha family, also confirmed the description of Mr. Mbasha provided by Witnesses TK and SU. *See idem*.
[2093] Nyiramasuhuko Appeal Brief, para. 1017 (emphasis omitted).
[2094] Nyiramasuhuko Appeal Brief, paras. 1015, 1020, 1021, 1023. *See also* AT. 14 April 2015 p. 32.
[2095] Nyiramasuhuko Appeal Brief, paras. 1085, 1087-1089. Nyiramasuhuko concedes that, like Witness RE, Witness FAP testified that Ntahobali said that his mother had asked the woman to retrieve her. *See ibid*., para. 1086.
[2096] Prosecution Response Brief, paras. 664, 665, 672, 673.
[2097] The Trial Chamber noted that the evidence of Witnesses FAP, SS, and SU converged on the following facts: (i) the lady came to the prefectoral office with a man and a child or children; (ii) the woman stayed on the veranda; (iii) during their abduction, the lady and/or the children cried out in protest; and (iv) the woman was hit or killed. *See* Trial Judgement, paras. 2250, 2252, 2285, 2304, 2305, 2732-2734.
[2098] *See* Trial Judgement, para. 2734. The Trial Judgement identifies several similarities within the evidence of Witnesses SU, SS, FAP, TK, RE, and QJ: (i) the woman arrived at the prefectoral with a tall, fair-complexioned man; (ii) the mother and Ntahobali had a discussion; (iii) the woman pleaded to spare her children; (iv) the woman and her children were taken from the veranda; and (v) the woman and children were eventually abducted. *See ibid*., paras. 2717-2719, 2732-2734.

and that the Trial Chamber erred in failing to make such a finding. Specifically, while Nyiramasuhuko stresses that Witness RE's evidence reflects that only one woman and her children were abducted that evening, a review of the witness's testimony reflects that the abduction of Mbasha's wife and children was the only abduction of a woman and her children that she knew of.[2099]

910. The Appeals Chamber observes that the Trial Chamber expressly noted that Witnesses RE and FAP both described Ntahobali approaching a woman and children on the veranda of the prefectoral office, and coaxing her to leave.[2100] The Trial Chamber also acknowledged that Witness FAP's evidence corroborated numerous details of Witness TK's evidence regarding the abduction of Mbasha's wife and children.[2101] Therefore, the Appeals Chamber is not persuaded that the Trial Chamber ignored elements of Witness FAP's testimony that corresponded with evidence concerning the abduction of Mbasha's wife and children or that it was compelled to find that Witness FAP was referring to this specific attack. In light of Witness FAP's testimony as noted by the Trial Chamber that the unknown woman she testified about was killed at the prefectoral office,[2102] which is distinct from evidence about the abduction of Mbasha's wife and children,[2103] the Appeals Chamber considers that Nyiramasuhuko fails to demonstrate that no reasonable trier of fact could have found, as the Trial Chamber did, that Witness FAP was not testifying about Mbasha's wife and her children.

911. Similarly, and considering the overlapping aspects of the evidence of Witnesses SS and SU, on one hand, and that of Witnesses TK, QJ, and RE on the other, the Appeals Chamber observes that Witness SU testified that the woman whom she observed being abducted was struck on the neck with a machete and, according to Witness SS, the woman she observed being abducted was dead when loaded onto the vehicle.[2104] The Appeals Chamber observes that the Trial Chamber recounted all of this evidence in detail when deliberating on the relevant evidence.[2105] Under these

[2099] *See* Witness RE, T. 26 February 2003 p. 33 ("Q. Madam Witness, I was asking you -- you said there were three trips of refugees that evening. I would like to know whether during the two subsequent trips whether there were other women with three children who were taken away? A. The only woman I know who was taken away with her children is this one that we are referring to.").
[2100] *See* Trial Judgement, paras. 2719 ("She said that a woman who was sleeping on the [Butare Prefecture Office] veranda with her three children resisted the *Interahamwe* attack that night. Shalom told her: 'We're not going to kill you. We, rather, wanted to take you to Pauline who is in the vehicle so she can go and hide you.'"), 2734 ("Witness FAP testified that the *Interahamwe* approached a mother of two children who was spending the night on the veranda next to her. […] Ntahobali tried to make the woman feel safe by saying that his mother had sent for her. Ntahobali also tried to reassure the girl who cried out by telling her that he was taking her to his mother.").
[2101] Trial Judgement, para. 2734.
[2102] Trial Judgement, para. 2735.
[2103] *See* Trial Judgement, paras. 2196, 2213, 2214, 2277, 2717-2719.
[2104] *See* Witness SU, T. 14 October 2002 p. 36; Witness SS, T. 3 March 2003 p. 57, T. 5 March 2003 p. 65. *See also* Trial Judgement, paras. 2252, 2285, 2732, 2733.
[2105] *See* Trial Judgement, paras. 2728, 2732, 2737.

circumstances, the Appeals Chamber finds that the Trial Chamber did not err when it concluded that the attacks described were different.

b. Mbasha's Wife and Children

912. Nyiramasuhuko alternatively challenges the Trial Chamber's assessment of the evidence related to the abduction of Mbasha's wife and children and specifically points to inconsistencies regarding the manner they were abducted, the content of the conversation between Mbasha's wife and Ntahobali, the timing of the abduction, and whether Ntahobali was present.[2106] She argues that "it is impossible to reconcile" the testimonies of Witnesses TK, QJ, and RE who described different circumstances of the abduction.[2107] Nyiramasuhuko further contends that, notwithstanding the Trial Chamber's finding that Witness QBQ testified about the Night of Three Attacks and her presence on the veranda, this witness provided no evidence concerning the abduction of Mbasha's wife and children.[2108] Finally, Nyiramasuhuko submits that the witnesses who testified to the abduction of Mbasha's wife never mentioned it in their prior statements.[2109]

913. The Prosecution responds that the testimonies of Witnesses TK, QJ, and RE are consistent with respect to the abduction of Mbasha's family.[2110] It submits that Nyiramasuhuko's focus on the timing of the abduction is misplaced and that the fact that Witness QBQ did not testify about this event does not undermine the reasonableness of the Trial Chamber's findings.[2111] Additionally, the Prosecution argues that Nyiramasuhuko does not demonstrate any error regarding alleged discrepancies between the witnesses' testimonies and their prior statements.[2112]

914. Regarding the manner of the abduction, the Appeals Chamber observes that Nyiramasuhuko submits that, whereas Witness TK testified to "violent actions to force" Mbasha's wife onto the vehicle, that "her children were literally being thrown at her", that she pleaded for them to be

[2106] Nyiramasuhuko Appeal Brief, paras. 1043, 1044, 1047, 1050-1055, 1064, 1065, 1076-1079, 1082, 1083, 1269. *See also ibid*., para. 1270; Nyiramasuhuko Reply Brief, paras. 317, 319-321, 326.
[2107] Nyiramasuhuko Appeal Brief, paras. 1047, 1076-1079, 1082-1084 (emphasis omitted).
[2108] Nyiramasuhuko Appeal Brief, paras. 1033, 1036, 1041. *See also* AT. 14 April 2015 p. 31. The Appeals Chamber observes that Nyiramasuhuko repeats her arguments that Witnesses TA and SD did not testify about the Night of Three Attacks but, in this instance, more directly argues that they did not refer specifically to the abduction of Mbasha's wife and children. *See* Nyiramasuhuko Appeal Brief, paras. 1034, 1037, 1038, 1040. The Appeals Chamber has previously considered and rejected Nyiramasuhuko's contention that the failure of Witnesses TA and SD to provide evidence concerning the Night of Three Attacks undermined the Trial Chamber's conclusions that such attacks occurred. *See supra*, Section IV.F.2(e)(ii). Nyiramasuhuko has not provided any further argument or references and the reasoning above applies equally to this particular event, which occurred during the Night of Three Attacks. Consequently, the Appeals Chamber dismisses these contentions without further consideration.
[2109] Nyiramasuhuko Appeal Brief, paras. 1074, 1084, *referring*, *inter alia*, *to* Witness RE, T. 25 February 2003 pp. 47, 48, Witness QJ, T. 12 November 2001 pp. 78, 79 (closed session), Exhibit D8 (Witness QJ's Statements, dated 8 May 1996, 21 November 1996, 22 January 1997, and 28 October 1997) (confidential) ("Witness QJ's Statements"). *See also* Nyiramasuhuko Reply Brief, para. 325; AT. 14 April 2015 p. 18.
[2110] Prosecution Response Brief, paras. 666, 670.
[2111] Prosecution Response Brief, para. 668.

spared, and that she was forced to undress,[2113] Witness RE testified to the contrary that Mbasha's wife was not undressed, had not been beaten, and was told that "they were going to hide her and they took her away, very nicely, with her consent."[2114]

915. The Trial Chamber, having explicitly considered this discrepancy between the accounts of Witnesses TK and RE, determined that "Witness RE partially corroborated Witness TK's account of the abduction."[2115] Recalling the Trial Chamber's discretion to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence,[2116] the Appeals Chamber sees no error in the Trial Chamber's assessment of this alleged discrepancy in their testimonies. Indeed, while Witness RE denied that Mbasha's wife was undressed, she in fact testified, similar to Witness TK, that the *Interahamwe* stripped people at the prefectoral office who were removed from it on that evening, an aspect of her testimony which the Trial Chamber expressly recalled in the Trial Judgement.[2117] As to whether Mbasha's wife was "assaulted" or taken away "peacefully", a review of the transcripts reveals that both witnesses provided materially consistent accounts of how Ntahobali induced Mbasha's wife to leave her position at the prefectoral office.[2118] Witness TK testified that Mbasha's wife started pleading with the *Interahamwe* at the vehicle, and it is not clear from Witness RE's testimony that she then continued to observe the events.[2119] In addition, given that Witness TK's account of the abduction of Mbasha's wife and children was corroborated by Witness QJ,[2120] Nyiramasuhuko does not demonstrate that no reasonable trier of fact could have

[2112] Prosecution Response Brief, para. 667.
[2113] Nyiramasuhuko Appeal Brief, paras. 1043, 1258 (emphasis omitted).
[2114] Nyiramasuhuko Appeal Brief, para. 1044 (emphasis omitted). *See also ibid*., para. 1259.
[2115] Trial Judgement, para. 2719. *See also ibid*., paras. 2214, 2277.
[2116] *See*, *e.g*., *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[2117] *See* Witness RE, T. 24 February 2003 p. 21 ("A. After these people were woken up, the *Interahamwe* asked them to remove their clothes. They then took them to their vehicles and carted them off to a place called Rwabayanga where they were executed."), T. 26 February 2003 p. 31 ("A. I have stated that those people who they have taken away to kill were undressed before being taken away, but this refers to those who are being taken away to be killed."); Witness TK, T. 20 May 2002 p. 87 ("A. They were loaded in atrocious conditions and most of those that were loaded in the vehicle were stripped before hand, Madam."); Trial Judgement, paras. 2215, 2278.
[2118] *Compare* Witness TK, T. 20 May 2002 p. 83 ("Q. Can you tell this court what then happened to Mrs. Mbasha after this conversation? A. At that point Shalom spoke to the lady and asked her to rise and to go towards the vehicle. He reassured her, and told that she should not be afraid, and that nothing bad will come of her.") *with* Witness RE, T. 26 February 2003 p. 32 ("Q. Madam Witness, did I understand, from the description you made of the events that it was not necessary to beat up this woman for her to follow the person you referred to as Shalom? A. They did not beat the woman. They told her they were going to hide her and they took her away, very nicely, with her consent. You will understand that somebody who is telling you that he's going to hide you, he should not be beating you.").
[2119] *See* Witness TK, T. 20 May 2002 p. 86 ("A. Well, so far as the children of Madam Mbasha were concerned, they took them with their mother. They took them from the veranda where they were, that is, in front of the prefecture office, and once they got to the vehicle where they were to be loaded, those that wanted to load Madam Mbasha and her children started throwing her children upon her and Madam Mbasha prayed for the children, pleaded, saying that, 'please pity my children, you can take me. Spare my children, please.[']"); Witness RE, T. 24 February 2003 p. 19, T. 25 February 2003 p. 47, T. 26 February 2003 p. 31.
[2120] *See* Trial Judgement, paras. 2196, 2214, 2717, 2718, *referring*, *inter alia*, *to* Witness TK, T. 20 May 2002 pp. 85, 86, Witness QJ, T. 8 November 2001 pp. 154, 155.

considered the testimonies to be compatible or that the Trial Chamber abused its discretion by not expressly addressing the purported differences in their testimonies.

916. To substantiate discrepancies regarding the conversation between Mbasha's wife and Ntahobali, Nyiramasuhuko notes that, according to Witness TK, Ntahobali asked Mbasha's wife if she knew him, she responded in the affirmative, Ntahobali then expressed his intention to marry the girl among the two children, and Mbasha's wife said it was impossible and pleaded for her children to be spared.[2121] Nyiramasuhuko submits that Witness RE, on the other hand, did not testify about whether the lady knew Ntahobali, Ntahobali's intention to marry one of her children, the mother's plea to spare her children, but merely stated that Ntahobali told the mother: "We're not going to kill you. We rather wanted to take you to Pauline who is in the vehicle so that she can go and hide you."[2122] The Appeals Chamber is not convinced that these purported inconsistencies are material or that they required express consideration by the Trial Chamber. Indeed, having reviewed the testimonies cited by the Trial Chamber,[2123] the Appeals Chamber notes that the evidence of Witnesses TK and RE is consistent as to the manner in which Ntahobali sought to induce Mbasha's wife to leave the prefectoral office,[2124] which is reflected in the Trial Chamber's summary of their accounts.[2125] In the view of the Appeals Chamber, Nyiramasuhuko does not demonstrate that no reasonable trier of fact could have considered the accounts of Witnesses TK and RE to be compatible and corroborative.

917. Concerning the timing of the abduction, Nyiramasuhuko argues that according to Witness QJ, it took place in broad daylight, while Witness TK and other witnesses described the event occurring at night.[2126] The Appeals Chamber considers that Nyiramasuhuko's contention that Witnesses QJ and TK provided contradictory evidence as to whether the events occurred in broad daylight or at night is not supported by the record. The relevant portions of the witnesses'

[2121] Nyiramasuhuko Appeal Brief, paras. 1052, 1053, *referring to* Witness TK, T. 20 May 2002 pp. 30, 31, 81-83.
[2122] Nyiramasuhuko Appeal Brief, paras. 1054, 1055, 1077 (emphasis omitted), *referring to* Witness RE, T. 24 February 2003 p. 19, T. 26 February 2003 pp. 30, 31.
[2123] Trial Judgement, paras. 2213, 2214, 2277, *referring to* Witness TK, 20 May 2002 pp. 76, 77, 81, 83, 86, Witness RE, T. 24 February 2003 p. 19, T. 25 February 2003 pp. 46, 47, T. 26 February 2003 pp. 30, 31. *See also ibid*., paras. 2668, 2674, 2717, 2719.
[2124] *Compare* Witness TK, T. 20 May 2002 p. 83 ("Q. Can you tell this court what then happened to Mbasha's wife after this conversation? A. At that point Shalom spoke to the lady and asked her to rise and to go towards the vehicle. He reassured her, and told that she should not be afraid, and that nothing bad will come of her.") *with* Witness RE, T. 26 February 2003 p. 32 ("Q. Madam Witness, did I understand, from the description you made of the events that it was not necessary to beat up this woman for her to follow the person you referred to as Shalom? A. They did not beat the woman. They told her they were going to hide her and they took her away, very nicely, with her consent. You will understand that somebody who is telling you that he's going to hide you, he should not be beating you.").
[2125] *See*, *e.g*., Trial Judgement, paras. 2668 ("Then [Ntahobali] asked Mbasha's wife to go to the truck, telling her not to be afraid and that nothing bad would happen to her."), 2674 ("Shalom told her: 'We're not going to kill you. We, rather, wanted to take you to Pauline who is in the vehicle so she can go and hide you.") (internal references omitted).
[2126] Nyiramasuhuko Appeal Brief, paras. 1064, 1065, 1082.

testimonies reflect that they both considered that the abduction occurred in the evening and that they could only provide estimates as to when it happened.[2127]

918. Nyiramasuhuko further submits that there is a discrepancy as Witness QJ never testified to Ntahobali's conversation with Mbasha's wife and did not identify him during the Night of Three Attacks.[2128] The Appeals Chamber observes, however, that Witness QJ's testimony reveals that he volunteered that Mbasha's wife begged for pity once she and her children were being led to the vehicle and was not questioned as to whether any conversation preceded this event or if Ntahobali was involved in the abduction.[2129] The Appeals Chamber is not persuaded that any omission in Witness QJ's evidence renders it incompatible with that of Witnesses TK and RE concerning this event.

919. Turning to Nyiramasuhuko's contention that Witness QBQ was on the veranda but did not testify about the abduction of Mbasha's wife and children,[2130] the Appeals Chamber finds that Nyiramasuhuko does not demonstrate how this omission in Witness QBQ's evidence is necessarily incompatible with or undermines the testimonies of Witnesses TK, RE, and QJ concerning this event. Given the Trial Chamber's determination that Witnesses TK, RE, and QJ provided corroborated evidence of the abduction of Mbasha's wife and children, the Appeals Chamber is not convinced that the Trial Chamber was specifically required to consider that Witness QBQ never testified about the abduction of Mbasha's wife and children.

920. Finally, Nyiramasuhuko's general argument that none of the witnesses discussed this abduction in their prior statements is unpersuasive. First, the events concerning the Mbasha family are recorded in prior statements given by Witness TK.[2131] Second, Witnesses QJ, SJ, and RE were

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[2127] *See*, *e.g.*, Witness QJ, T. 8 November 2001 pp. 158 ("Q. I now refer to the attack on the Mbasha family that you saw taking place at the *préfectoral* office. Can you give us an estimate of what time that attack took place? A. I don't quite recall the time. An estimate, it would be in the evening about this time."), 159 ("I don't quite recall the time. I think it was towards the evening at about now."), 160 ("Q. Witness QJ, do you know what time it is now? When you say it's about this time. Do you have a watch on you to know the time now? A. No it's an estimate. I have a watch. I just looked around what it looks like."), 163 ("A. In my country after three p.m. we can start saying that that's evening."), T. 13 November 2001 p. 122 ("A. When the Mbasha family -- Nyiramasuhuko arrived on-board a vehicle. It was in the evening. […] A. [Nsabimana] was not there. The incident occurred in the evening."); Witness TK, T. 23 May 2002 p. 44 ("Q. What time was Mrs. Mbasha and her children abducted? A. She was abducted in the evening. Night had already fallen. Yesterday I had said, I had given you an approximation between 7:00 and 7:30 p.m."). *See also* Witness TK, 22 May 2002 p. 25 ("A. If I focus on what I saw, with respect to Mrs. Mbasha, it is because this woman remained with me in that location for some time. This woman arrived during the day and she was only taken away to be killed in the evening."); Trial Judgement, paras. 2196, 2211-2215.

[2128] Nyiramasuhuko Appeal Brief, paras. 1083, 1269.

[2129] *See*, *in particular*, Witness QJ, T. 8 November 2001 p. 155 ("Q. Who was in the vehicle when this Mbasha family was driven to the Kabutare forest? Was it the *Interahamwe* who picked them up from where they were? A. It was Nyiramasuhuko and her *Interahamwe*. I don't know anyone else who was in the vehicle."). *See also ibid.*, pp. 146-154, T. 12 November 2001 pp. 93, 94 (closed session).

[2130] *See* Nyiramasuhuko Appeal Brief, paras. 1075, 1101.

[2131] *See* Exhibit D44 (Witness TK's Statement, dated 12 November 1996) (confidential) ("Witness TK's November 1996 Statement"), p. K0037330 (Registry pagination) ("You asked me if I know names of people who were taken away

cross-examined extensively on the absence of any mention of the specific abduction of Mbasha's wife and her children in their prior statements.[2132] The Appeals Chamber, having reviewed this evidence and the relevant statements, is of the view that they are not necessarily inconsistent but merely contain less detail than their subsequent testimonies.[2133]

921. In light of the foregoing, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate an error in the Trial Chamber's assessment of the evidence pertaining to the abduction of Mbasha's wife and children.

c. Unnamed Woman and Children

922. Nyiramasuhuko argues that the Trial Chamber erred in its assessment of inconsistencies between the evidence of Witnesses FAP, SS, and SU with respect to the abduction of the unnamed woman and her children.[2134] She points to discrepancies regarding the description of the woman and her children and the circumstances of the abduction.[2135]

923. The Prosecution responds that the Trial Chamber reasonably determined that Witnesses FAP, SS, and SU were discussing attacks on different families.[2136]

924. As to the description of the unnamed woman and children, Nyiramasuhuko notes that according to: (i) Witness FAP, the woman and her two children were on the veranda;[2137] (ii) Witness SS, the woman was on the veranda and was accompanied by a child;[2138] and (iii) Witness SU, the woman had twins, arrived "from the '*Economat*' earlier that same day".[2139] The Appeals Chamber is not convinced that these are material differences and observes that the Trial Chamber explicitly considered these divergent accounts.[2140] Beyond listing these inconsistencies, Nyiramasuhuko fails to show any error in the Trial Chamber's assessment.

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by [S]HALOM and PAULINE. Well, I saw two children of the MBASHA family among them. There were other children transported to Kabutare."); Exhibit D47 (Witness TK's Statement, dated 22 and 23 April 1998) (confidential) ("Witness TK's 1998 Statement"), p. K0052252 (Registry pagination) ("As I have mentioned in my previous statements I also remember Shalom and his discussion with the wife of Mbasha and his wanting to have sex (take as a wife) with one of their small daughters who was only about 9 years old. All the people from this family (Mbasha) were taken away and I never saw them alive again.").

[2132] *See* Witness RE, T. 25 February 2003 pp. 47, 48, T. 26 February 2003 pp. 22, 31, 32; Witness QJ, T. 12 November 2001 pp. 71, 72, 78-87 (closed session); Witness SJ, T. 3 June 2002 pp. 40, 41.

[2133] *See* Witness QJ's Statements; Exhibit D61 (Witness SJ's Statement, dated 3 December 1996) (confidential) ("Witness SJ's Statement"); Witness RE's Statement.

[2134] Nyiramasuhuko Appeal Brief, paras. 1057-1063, 1091. *See also* AT. 15 April 2015 pp. 26, 27.

[2135] Nyiramasuhuko Appeal Brief, paras. 1057, 1058, 1062, 1063, 1086, 1087.

[2136] Prosecution Response Brief, para. 672.

[2137] Nyiramasuhuko Appeal Brief, para. 1057.

[2138] Nyiramasuhuko Appeal Brief, paras. 1063, 1088.

[2139] Nyiramasuhuko Appeal Brief, paras. 1062, 1088 (emphasis omitted).

[2140] *See* Trial Judgement, paras. 2250, 2285, 2304, 2732-2734.

925. Regarding the circumstances of the abduction, Nyiramasuhuko highlights a number of alleged discrepancies between the testimonies of Witnesses FAP, SS, and SU,[2141] which the Trial Chamber expressly considered.[2142] The Trial Chamber determined that, notwithstanding these discrepancies, it was "convinced beyond a reasonable doubt that Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office]" and that "Nyiramasuhuko gave orders to the *Interahamwe* to commit these crimes."[2143] The Appeals Chamber finds that Nyiramasuhuko's mere listing of alleged inconsistencies fails to undermine the Trial Chamber's findings.

926. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's submissions that the Trial Chamber erred in its assessment of the evidence of Witnesses FAP, SS, and SU related to the abduction of an unnamed woman and her children at the prefectoral office.

(iv) Nyiramasuhuko's Presence, Conduct, and Orders to Commit Rapes

927. Having considered the evidence of Witnesses TK, QJ, SS, SU, QBQ, RE, and FAP, the Trial Chamber found that Nyiramasuhuko was present during the Night of Three Attacks.[2144] It further determined, based on the testimonies of Witnesses FAP, SS, and QBQ, that Nyiramasuhuko ordered the *Interahamwe* to rape refugees because they were Tutsis and that the *Interahamwe* beat, abused, and raped many Tutsi women during the attacks.[2145]

928. Nyiramasuhuko argues that the Trial Chamber erred in assessing evidence of her presence and conduct, her alleged orders to commit rape, and the commission of rape during the Night of Three Attacks.[2146] With respect to her presence, she submits that the Trial Chamber put various witness accounts together, despite material contradictions, to find that she was present during the Night of Three Attacks.[2147] According to Nyiramasuhuko, Witnesses TK, RE, QBQ, QJ, and SU,

[2141] Nyiramasuhuko refers to the following discrepancies: (i) Witness FAP testified that the children pleaded not to be raped and rather to rape their mother, that Ntahobali reassured the woman that she would not be killed as his mother had sent him for her, and that the woman was ultimately killed on the spot with her body removed in the vehicle; (ii) Witness SS testified that the woman shouted "[p]lease do not take my child, he is still young", and that it was the *Interahamwe* who replied, "[i]f this child is still young, then breastfeed him"; and (iii) Witness SU stated that the twins were first pulled from the woman, that the woman shouted that they were just children, that the woman was struck on the neck with a machete and that, after this, Nyiramasuhuko stated "[t]hen breastfeed your children". *See* Nyiramasuhuko Appeal Brief, paras. 1058, 1062, 1063, 1086-1088, 1090, 1133 (emphasis omitted).
[2142] *See* Trial Judgement, paras. 2252, 2285, 2304, 2732-2736.
[2143] Trial Judgement, para. 2736.
[2144] Trial Judgement, paras. 2683-2696, 2702, 2704, 2706-2712, 2715, 2717, 2718, 2728-2730, 2732-2734, 2736-2738, 2781(iii). *See also supra*, Section IV.F.2(c).
[2145] Trial Judgement, paras. 2687-2693, 2696, 2698-2702, 2781(iii).
[2146] *See* Nyiramasuhuko Notice of Appeal, paras. 10.12, 10.30, 10.34, 10.39-10.41, 10.45; Nyiramasuhuko Appeal Brief, paras. 1009, 1012, 1014, 1023, 1027-1030, 1035-1039, 1042, 1049, 1071, 1098, 1113, 1120-1124, 1128, 1129, 1133-1135, 1139, 1140, 1142, 1143, 1145-1153, 1189, 1196, 1207-1209, 1215, 1258, 1259, 1262, 1266-1272, 1275-1277.
[2147] Nyiramasuhuko Appeal Brief, paras. 1023, 1039, 1049, 1113, 1152, 1153, 1189.

who were on or near the veranda of the prefectoral office and within metres of each other, should have witnessed the same events, seen the same people and the same perpetrators, and that her presence could not go unnoticed by these witnesses.[2148] She argues that this is however not the case as the evidence of these witnesses is inconsistent as to her presence during the attacks.[2149] Nyiramasuhuko further notes that Witness RE conceded that she did not see her that night but deduced her presence from words she heard between Mbasha's wife and Ntahobali.[2150]

929. Nyiramasuhuko further submits that Witnesses SS and SU, who spent the nights together on the lawn of the prefectoral office, provided divergent accounts of Nyiramasuhuko's presence and her conduct during the Night of Three Attacks.[2151] She also points to discrepancies in their testimonies with respect to her alleged utterances during the second attack.[2152] She argues that the Trial Chamber's assessment of their evidence was unreasonable.[2153]

930. In addition, Nyiramasuhuko challenges the Trial Chamber's assessment of inconsistent accounts from Witnesses TK, RE, QJ, SS, SU, FAP, and QBQ on the presence of Kazungu, who was alleged to be present with Nyiramasuhuko during the Night of Three Attacks.[2154] She specifically argues that Witnesses RE, TK, and SS testified to Kazungu's presence but contradicted each other on his position as a soldier, an *Interahamwe*, or a body guard to her or one

[2148] Nyiramasuhuko Appeal Brief, paras. 1016, 1026-1028, 1134; AT. 14 April 2014 pp. 25, 27-33. Nyiramasuhuko further argues that the Trial Chamber erroneously did not consider that Witness SJ, who was found to have testified about the Night of Three Attacks and was in a position similar to other witnesses who observed Nyiramasuhuko during this event, did not testify that Nyiramasuhuko was present and provided additional evidence contradictory to other Prosecution witnesses. *See* Nyiramasuhuko Appeal Brief, paras. 981, 993, 997, 1031, 1032, 1071, 1112, 1113, 1130, 1139, 1189; AT. 14 April 2015 pp. 26, 28-30. The Appeals Chamber recalls that the Trial Chamber rejected Witness SJ's evidence concerning the abduction of Mbasha's wife and children and that the Appeals Chamber has concluded that no reasonable trier of fact could have relied on intrinsically related evidence concerning the Night of Three Attacks. In this context, Nyiramasuhuko has not demonstrated that the failure of Witness SJ to expressly identify Nyiramasuhuko as being present during the Night of Three Attacks undermines the reasonableness of the Trial Chamber's findings to the contrary. Nyiramasuhuko also submits that Witness QBQ placed Nyiramasuhuko's presence in April 1994, "a totally different time" as the Trial Chamber's findings with respect to the Night of Three Attacks. *See* Nyiramasuhuko Appeal Brief, paras. 1013, 1033, 1036, 1162, 1261. Nyiramasuhuko appears to contradict herself as she argues that Witness QBQ testified to Nyiramasuhuko being present and that rapes were being committed in front of her at the Butare Prefecture Office. *See ibid*., paras. 1105, 1140. As already discussed above, the Appeals Chamber observes that the Trial Chamber did not rely on Witness QBQ's evidence regarding the timing of the Night of Three Attacks. Furthermore, given the considerable overlap between the account of Witness QBQ and that of several other witnesses in relation to these attacks, the Appeals Chamber does not find that the Trial Chamber was unreasonable in relying on Witness QBQ's evidence, despite any variances with respect to the timing of the Night of Three Attacks. The Appeals Chamber dismisses Nyiramasuhuko's arguments pertaining to Witnesses SJ and QBQ in this respect.

[2149] Nyiramasuhuko Appeal Brief, paras. 1029, 1030, 1035, 1036, 1039, 1042. *See also* AT. 14 April 2014 pp. 25, 26, 30.

[2150] Nyiramasuhuko Appeal Brief, paras. 1030, 1035, 1071, 1098, 1139, 1259, 1277; Nyiramasuhuko Reply Brief, para. 309.

[2151] Nyiramasuhuko Appeal Brief, paras. 1145-1148. *See also* AT. 14 April 2015 p. 26.

[2152] Nyiramasuhuko notes that, according to Witness SS, she issued an order to "look for the young boys" and not to leave anyone behind, and that the *Interahamwe* took women and girls as there were not many boys left, whereas Witness SU testified that Nyiramasuhuko asked the *Interahamwe* to start on one end and take men and women on board the vehicle. *See* Nyiramasuhuko Appeal Brief, paras. 1173, 1175, 1176.

[2153] Nyiramasuhuko Appeal Brief, para. 1153.

[2154] Nyiramasuhuko Appeal Brief, paras. 796, 803-805.

of the prefects.[2155] Nyiramasuhuko also notes that Witnesses QJ, SU, FAP, and QBQ did not mention Kazungu at all.[2156] Moreover, she contends that the findings in paragraph 2702 of the Trial Judgement, which concern her presence and conduct, are vague as they simply refer to an "attack".[2157]

931. Regarding her orders to rape and the commission of rapes, Nyiramasuhuko submits that the Trial Chamber's assessment of evidence concerning her utterances, orders, and gestures during the Night of Three Attacks is unreasonable.[2158] She argues that the accounts of Witnesses FAP and SS that she ordered rapes or Witness QBQ that rapes had been ordered and committed during that night are inconsistent with the testimonies of Witnesses TK, RE, and SU, who did not testify to rapes being ordered or committed.[2159] Nyiramasuhuko also argues that Witnesses SS and SU were together during the night and "[were] describing the same attack but referring to orders which even in their face are contradictory".[2160]

932. The Prosecution responds that Nyiramasuhuko mischaracterises the relevant testimonies of the witnesses situated on the veranda and incorrectly asserts that, because Witnesses TK, RE, and QJ were on the veranda, they should have testified to the same events and seen the same persons.[2161] Regarding Witnesses SS and SU, it submits that Nyiramasuhuko alleges discrepancies that are either minor or non-existent and can be attributed to the witnesses' differing vantage points.[2162] The Prosecution further responds that there was overwhelming and consistent evidence for the Trial Chamber to conclude that Nyiramasuhuko ordered the *Interahamwe* to rape Tutsi women and girls during the Night of Three Attacks.[2163]

[2155] Nyiramasuhuko Appeal Brief, para. 796.
[2156] Nyiramasuhuko Appeal Brief, para. 804.
[2157] *See* Nyiramasuhuko Appeal Brief, para. 774.
[2158] *See* Nyiramasuhuko Appeal Brief, para. 1153. *See also* Nyiramasuhuko Notice of Appeal, paras. 10.12, 10.30, 10.34; Nyiramasuhuko Reply Brief, paras. 327, 330.
[2159] Nyiramasuhuko Appeal Brief, paras. 1100, 1104, 1105, 1120-1124, 1128, 1129, 1132-1135, 1140, 1142, 1143, 1149-1152, 1166, 1261. Nyiramasuhuko notes that, according to Witness SS, she stood near the door of the vehicle and allegedly stated: "Start from one side and take the young girls and women and go and rape them because they had refused to marry you." *See ibid.*, para. 1133 (emphasis omitted), *referring to* Witness SS, T. 3 March 2003 p. 52. *See also* Nyiramasuhuko Notice of Appeal, paras. 10.12, 10.30, 10.34; Nyiramasuhuko Appeal Brief, paras. 1149, 1150, 1262, 1266, 1267; Nyiramasuhuko Reply Brief, paras. 220-223, 328, 327, 330.
[2160] Nyiramasuhuko Appeal Brief, paras. 1149, 1150 (emphasis omitted).
[2161] Prosecution Response Brief, para. 652. *See also* AT. 14 April 2014 p. 53. According to the Prosecution, Nyiramasuhuko fails to demonstrate that the Trial Chamber's findings regarding the rapes were undercut by other witnesses who did not specifically testify about them. *See* Prosecution Response Brief, paras. 675, 679.
[2162] Prosecution Response Brief, paras. 656-658.
[2163] Prosecution Response Brief, paras. 675-679. The Prosecution further submits that Witness FAP's prior statement is not inconsistent with her more detailed testimony, which adequately explained and clarified any alleged inconsistencies. *See ibid.*, paras. 683-685. Regarding inconsistencies between Witness SS's testimony and her prior statement, the Prosecution responds that the Trial Chamber was entitled to rely on her testimony and that Nyiramasuhuko fails to demonstrate that the Trial Chamber unreasonably exercised its discretion. *See ibid.*, para. 681.

933. The Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all respects in order to be corroborative and that corroboration may exist even when some details differ.[2164] The Appeals Chamber has carefully considered the evidence highlighted by Nyiramasuhuko concerning the size of the prefectoral office, and its veranda in particular, and the evidence from several Prosecution witnesses indicating that they were on the veranda or very near to it during the Night of Three Attacks.[2165] In addition, it has previously assessed evidence related to distinct aspects of the Night of Three Attacks from the same witnesses Nyiramasuhuko contends should have observed, heard, and testified uniformly about the attacks but purportedly provided contradictory evidence.[2166] The Appeals Chamber is of the view that Nyiramasuhuko's submissions fail to sufficiently appreciate that all but one of the witnesses she has identified as providing inconsistent evidence were Tutsis seeking refuge at the prefectoral office and were the targets of the attacks.[2167] The Appeals Chamber is also of the view that Nyiramasuhuko ignores the Trial Chamber's conclusion that "there were a large number of refugees" at the prefectoral office who were "in poor physical condition" and who "had fled other [communes] and [prefectures] to escape violence and the threat of death."[2168] The Trial Chamber further determined that the circumstances at the prefectoral office, based on the evidence of survivors, "paint[ed] a clear picture of unfathomable depravity and sadism."[2169] In this context, the Appeals Chamber finds that the differences between the testimonies of Witnesses QBQ, TK, RE, SU, FAP, QJ, and SS concerning the Night of Three Attacks as highlighted by Nyiramasuhuko do not demonstrate that the Trial Chamber acted unreasonably in: (i) crediting aspects of their evidence; (ii) finding consistencies compelling; and (iii) determining that other inconsistencies did not raise doubt in their testimonies. More specifically, the fact that Witness RE did not see Nyiramasuhuko while Witnesses TK and QJ did does not undermine the reasonableness of the conclusion that Nyiramasuhuko was present in light of the totality of the evidence. The Appeals Chamber has already determined that a reasonable

[2164] *See Nzabonimana* Appeal Judgement, para. 184; *Ndahimana* Appeal Judgement, para. 93; *Ntabakuze* Appeal Judgement, para. 150. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Nahimana et al.* Appeal Judgement, para. 428.
[2165] *See*, *in particular*, Exhibit P23C (Photo of Butare Prefecture Office); Exhibit P23D (Photo of Butare Prefecture Office); Exhibit P27 (Video of Butare Prefecture Office, EER, Ruins of Nyiramasuhuko's Home); Witness QBQ, T. 3 February 2004 pp. 11, 12; Witness TK, T. 20 May 2002 pp. 80, 81, T. 23 May 2002 pp. 93, 94; Witness RE, T. 24 February 2003 pp. 28, 29; Witness SU, T. 17 October 2002 p. 52; Witness SJ, T. 3 June 2002 pp. 19-21; Witness SS, T. 5 March 2003 pp. 63, 65.
[2166] *See supra*, Section IV.F.2(e)(iii).
[2167] *See* Trial Judgement, paras. 2201-2203, 2242, 2274, 2281, 2297-2299, 2328. Furthermore, although Witness QJ was not a displaced Tutsi seeking refuge at the prefectoral office, he was a Tutsi who had a falsified identification card which indicated that he was Hutu. *See ibid*., para. 2194.
[2168] Trial Judgement, para. 2627.
[2169] Trial Judgement, para. 5866.

trier of fact could have relied on Witness RE's hearsay account and other direct evidence of Nyiramasuhuko's presence at the prefectoral office during the Night of Three Attacks.[2170]

934. The Appeals Chamber also finds that Nyiramasuhuko's contention regarding alleged discrepancies in the testimonies of Witnesses SS and SU likewise lacks merit. Having reviewed their relevant testimonies, the Appeals Chamber observes that Witness SU merely testified that she saw Nyiramasuhuko telling the *Interahamwe* to take Tutsi refugees and "gesticulating and showing, pointing out where they had to start",[2171] while Witness SS simply stated that Nyiramasuhuko got out of the vehicle and stood by the door while she gave instructions.[2172] The Trial Chamber expressly considered these aspects of the witnesses' testimonies, which Nyiramasuhuko does not demonstrate are incompatible.

935. The Trial Chamber also noted that, according to Witness SU, during the second attack, Nyiramasuhuko "repeated her instructions to the *Interahamwe* to start on one side and to take men and women and load them in the vehicle"[2173] and that, according to Witness SS, Nyiramasuhuko "said to bring the young boys and not leave anyone behind."[2174] Nyiramasuhuko merely repeats this evidence without demonstrating that, in the context of this attack in which the witnesses were potential victims, the differences in their evidence render their accounts incompatible or that it was unreasonable for the Trial Chamber to find that, taken as a whole, their evidence was fundamentally consistent, credible, and reliable.

936. Turning to alleged discrepancies regarding Kazungu's presence and position as either a body guard, soldier, or *Interahamwe*, the Appeals Chamber observes that the Trial Chamber took explicit note of divergent accounts on this matter from Witnesses TK, RE, QJ, SS, SU, FAP, and QBQ.[2175] Beyond disagreeing with the Trial Chamber's assessment, Nyiramasuhuko does not demonstrate how the Trial Chamber erred. Furthermore, given the overwhelming evidence of Nyiramasuhuko's presence during the Night of Three Attacks, it is unclear how any inconsistency regarding Kazungu would undermine the Trial Chamber's finding in this regard.

937. Nyiramasuhuko's contention that paragraph 2702 of the Trial Judgement is vague as to which "attack" she was allegedly present for and participated in is similarly without merit as, read in context, there is no ambiguity that the findings in this paragraph concern her involvement in the Night of Three Attacks.

[2170] *See supra*, Section IV.F.2(c)(iii)d.
[2171] Witness SU, T. 14 October 2003 p. 32.
[2172] Witness SS, T. 3 March 2003 pp. 51, 52.
[2173] Trial Judgement, para. 2253.
[2174] Trial Judgement, para. 2287.
[2175] *See* Trial Judgement, paras. 2196, 2203, 2211, 2251-2253, 2277, 2284, 2302-2309, 2330, 2331, 2687, 2707, 2709.

938. As to the alleged inconsistencies concerning the occurrence of rapes, the Trial Chamber noted that Witnesses FAP, SS, and QBQ testified to rapes or Nyiramasuhuko's orders to commit rapes during the Night of Three Attacks, while Witnesses TK, RE, and SU did not.[2176] The Trial Chamber considered that Witnesses FAP, SS, and QBQ provided corroborative accounts that: (i) Nyiramasuhuko gave orders to the *Interahamwe* to rape the women and the girls;[2177] and (ii) upon hearing her orders, Tutsi women and girls were raped by the *Interahamwe*.[2178] Upon review of the relevant evidence, the Appeals Chamber finds that the Trial Chamber's conclusions that Nyiramasuhuko ordered rapes and that rapes were committed were reasonable, notwithstanding the fact that Witnesses TK, RE, and SU did not testify to orders or the commission of rapes.

939. For the foregoing reasons, the Appeals Chamber dismisses Nyiramasuhuko's challenges to the Trial Chamber's findings of her presence and conduct, her orders to rape Tutsi women and girls, and the occurrence of rapes during the Night of Three Attacks.

(v) Trifina

940. The Trial Chamber found credible Witness TK's testimony that, on the orders of Nyiramasuhuko, *Interahamwe* assaulted and killed a woman named Trifina during the Night of

[2176] *Compare* Trial Judgement, paras. 2214, 2215, 2251, 2253, 2277, 2278 (Witnesses TK, SU, RE) *with ibid*., paras. 2284, 2286, 2304, 2306, 2308, 2331, 2688, 2693, 2696, 2699, 2700, 2701, 2712 (Witnesses SS, FAP, and QBQ). The Appeals Chamber notes Nyiramasuhuko's submission that Witness SU did not mention rapes in her prior statement. *See* Nyiramasuhuko Appeal Brief, para. 1151, *referring to* Exhibit D72 (Witness SU's Statement, dated 20 November 1996) (confidential). Considering that Witness SU did not testify to Nyiramasuhuko ordering rapes or the commission of rapes during the Night of Three Attacks, the Appeals Chamber finds that there is no discrepancy between the witness's testimony and prior statement.

[2177] *See* Trial Judgement, paras. 2284, 2304, 2331, 2688, 2693, 2696, *referring to*, *inter alia*, Witness SS, T. 3 March 2003 p. 52, T. 5 March 2003 p. 71, Witness QBQ, T. 3 February 2004 pp. 12, 61, Witness FAP, T. 11 March 2003 p. 54, T. 12 March 2003 p. 53.

[2178] *See* Trial Judgement, paras. 2286, 2306, 2331, 2688, 2699, 2700, 2701, *referring*, *inter alia*, *to* Witness SS, T. 3 March 2003 p. 58, Witness QBQ, T. 3 February 2004 pp. 62, 63, Witness FAP, T. 11 March 2003 pp. 59, 60. The Appeals Chamber notes Nyiramasuhuko's submission that Witness FAP's testimony is inconsistent with her prior statements. *See* Nyiramasuhuko Appeal Brief, paras. 1120-1127. *See also ibid*., para. 1268. Having reviewed Witness FAP's relevant prior statement and her testimony, the Appeals Chamber observes no apparent discrepancy. In her prior statement, Witness FAP explicitly stated that Nyiramasuhuko ordered rapes during the Night of Three Attacks and that some women were raped. *See* Witness FAP's Statement, p. K0104986 (Registry pagination). The Appeals Chamber considers that it can be expected that Witness FAP's prior statement is less detailed than her testimony and Nyiramasuhuko has not shown material contradictions between the two. Nyiramasuhuko also submits that Witness SS did not mention rapes in her prior statement. *See* Nyiramasuhuko Appeal Brief, para. 1151, *referring to* Exhibit D96 (Witness SS's Statement, dated 20 November 1996) (confidential) ("Witness SS's Statement"). The Appeals Chamber observes that, in her prior statement, Witness SS stated that Nyiramasuhuko came three times to the prefectoral office and ordered abductions but made no mention of rapes. *See* Witness SS's Statement, p. K0034442 (Registry pagination). The Appeals Chamber recalls that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between the said testimony and his or her previous statements, as it is for the trial chamber to determine whether the alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned. *See Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. Furthermore, given that Witness SS's account of Nyiramasuhuko's orders to commit rapes were corroborated by Witnesses FAP and QBQ, and the fact that the witness does not deny the existence of the orders or the rapes, the Appeals Chamber dismisses Nyiramasuhuko's argument in this regard.

Three Attacks.[2179] The Trial Chamber determined that Witnesses QBQ and RE provided corroborative evidence.[2180] However, in light of its prior determination that Nyiramasuhuko was not given sufficient notice in relation to this event, the Trial Chamber limited the use of this finding as only providing "circumstantial support for [its] findings regarding the abduction and killing of other unnamed Tutsi refugees from the [Butare Prefecture Office]."[2181]

941. Nyiramasuhuko submits that it was unreasonable for the Trial Chamber to find that the testimonies of Witnesses RE and QBQ corroborated Witness TK's account as to the killing of Trifina.[2182] She avers that, according to Witness TK, while Mbasha's wife was being abducted, Trifina started shouting and Nyiramasuhuko, who was in front of the vehicle, asked that people making noise be stopped and "set aside".[2183] Nyiramasuhuko notes that Witness TK also testified to Trifina being stabbed, having her throat slit, and being thrown into the vehicle.[2184] She argues that Witness RE, on the other hand, testified that when "they hit [Trifina] to wake up, she refused to go and one *Interahamwe* strangled her" and that "[Nyiramasuhuko] did not get off the vehicle and that is why I'm saying I did not hear [Nyiramasuhuko] say anything."[2185] According to Nyiramasuhuko, the testimonies of these witnesses are irreconcilable as Witness TK testified to her issuing an order concerning Trifina, while Witness RE testified to not seeing or hearing her during the entire night of attacks.[2186] Nyiramasuhuko further submits that Witness QBQ, who was on the veranda with Witnesses TK and RE, never attributed utterances to her concerning Trifina.[2187] She notes that, according to Witness QBQ, a woman was struck with a club and died near the door of the vehicle.[2188]

942. The Prosecution responds that corroborative accounts need not be identical and that the discrepancies between the testimonies were minor.[2189] It further responds that given the different vantage points, the traumatic and chaotic experiences, and the passage of time, variations are

[2179] Trial Judgement, paras. 2728-2730.
[2180] Trial Judgement, para. 2729.
[2181] Trial Judgement, para. 2730. *See also ibid*., paras. 2172, 2716.
[2182] Nyiramasuhuko Appeal Brief, para. 1095. *See also* Nyiramasuhuko Reply Brief, para. 336. Nyiramasuhuko submits that Witnesses TK, RE, and QBQ had the same vantage point as they were all on the veranda. *See* Nyiramasuhuko Appeal Brief, paras. 1097, 1101. *See also* Nyiramasuhuko Reply Brief, para. 335.
[2183] Nyiramasuhuko Appeal Brief, para. 1096, *referring to* Witness TK, T. 20 May 2002 pp. 85, 86, 90-92. *See also ibid*., paras. 1136-1138, 1271. Nyiramasuhuko also submits that Witness SS was perhaps testifying about Trifina who allegedly had one child and that the *Interahamwe* told her to breastfeed the child. *See ibid*., para. 1137, *referring to* Witness SS, T. 3 March 2003 pp. 55-57.
[2184] Nyiramasuhuko Appeal Brief, paras. 1096, 1271.
[2185] Nyiramasuhuko Appeal Brief, para. 1097 (emphasis omitted). *See also ibid*., paras. 1137, 1272.
[2186] Nyiramasuhuko Appeal Brief, para. 1098. *See also ibid*., paras. 1102, 1107, 1271, 1272. Nyiramasuhuko also notes that Witnesses FAP, SS, SU, and QJ did not testify to the murder of Trifina. *See ibid*., para. 1274.
[2187] Nyiramasuhuko Appeal Brief, paras. 1101, 1102, 1136.
[2188] Nyiramasuhuko Appeal Brief, para. 1107.
[2189] Prosecution Response Brief, paras. 689, 690.

reasonable and that the Trial Chamber reasonably determined that Witnesses TK, RE, and QBQ corroborated each others' accounts of the attack against Trifina.[2190]

943. The Appeals Chamber does not consider that the Trial Chamber was unreasonable in finding that Trifina was attacked by the *Interahamwe* based on Nyiramasuhuko's orders, or that it erred in concluding that Witnesses RE's and QBQ's testimonies corroborated that of Witness TK.[2191] The Appeals Chamber observes that the Trial Chamber expressly considered the accounts of Witnesses TK, RE, and QBQ and stated that:

> Witness TK provided evidence that during the same attack by *Interahamwe* on Mbasha's wife [during which refugees were stripped and loaded on the truck at around 7.00 p.m. or 7.30 p.m.], a refugee girl named Trifina started shouting. Nyiramasuhuko said that noise should be stopped and those who were shouting should be set aside. Trifina was attacked with daggers and her shoulder was wounded, but she shouted even louder. *Interahamwe* then slit her throat, almost cutting her head off, and threw her dead body into the vehicle. When the vehicle was full of people Ntahobali drove it away with Nyiramasuhuko as a passenger.
>
> Witness TK's account was corroborated by Witnesses QBQ and RE. Witness QBQ said the *Interahamwe* heard Nyiramasuhuko give an order and immediately attacked the people on the veranda, pulling them by their noses. The *Interahamwe* used a club to hit one woman who refused to comply and she died in front of the vehicle. Witness RE also stated that the *Interahamwe* strangled to death a young woman named Trifina because she refused to go.[2192]

944. The Appeals Chamber observes that the three witnesses provided consistent accounts that: (i) a woman, which Witnesses TK and RE identified as Trifina, refused to be abducted by the *Interahamwe* during the Night of Three Attacks;[2193] (ii) upon her refusal, the *Interahamwe* attempted to strangle her;[2194] and (iii) the woman was eventually killed at the prefectoral office.[2195] While Witnesses RE and QBQ did not testify, as Witness TK did, to Nyiramasuhuko stating that the noise be stopped and that those shouting be "set aside", the Appeals Chamber reiterates that corroboration is not a requirement and a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[2196] The Appeals Chamber considers that the Trial Chamber, having found Witness TK's account credible regarding this event, was entitled to rely on her testimony to find that "Trifina was assaulted and killed by *Interahamwe* based on the orders of Nyiramasuhuko" despite the fact that neither Witness QBQ nor Witness RE testified about Nyiramasuhuko issuing such instructions.[2197] As emphasised above, the Appeals Chamber finds no

[2190] Prosecution Response Brief, para. 690.
[2191] *See* Trial Judgement, paras. 2729, 2730.
[2192] Trial Judgement, paras. 2728, 2729.
[2193] *See* Witness TK, T. 20 May 2002 pp. 90-93; Witness QBQ, T. 3 February 2004 pp. 20, 21; Witness RE, T. 24 February 2003 p. 21.
[2194] *See* Witness TK, T. 22 May 2002 p. 77; Witness RE, T. 24 February 2003 p. 21.
[2195] Witness TK, T. 20 May 2002 pp. 90-93, T. 22 May 2002 pp. 73, 77; Witness QBQ, T. 3 February 2004 pp. 20, 21.
[2196] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[2197] Trial Judgement, para. 2730.

merit in Nyiramasuhuko's submission that witnesses, who were allegedly in the same location during the attacks, should have provided identical accounts of the attack on Trifina.

945. In light of the above, the Appeals Chamber dismisses Nyiramasuhuko's challenges to the Trial Chamber's assessment of the evidence regarding the attack against Trifina.

(vi) Killing Locations and Abductions of Semanyenzi

946. The Trial Chamber determined that, regardless of whether refugees were taken to Rwabayanga, Kabutare, Mukoni, or the IRST, the only reasonable inference is that they were abducted from the Butare Prefecture Office to be killed.[2198] In coming to this conclusion, the Trial Chamber considered the evidence of, among others, Witnesses SU, RE, FAP, and QBQ, and their hearsay accounts from survivors such as Semanyenzi.[2199]

947. Nyiramasuhuko submits that the Trial Chamber erred in relying on hearsay evidence that the abducted persons were killed, particularly as the sources of this information did not testify at trial and because the victims of the killings were unknown.[2200] She argues that these persons naturally would not return and that concluding that they were killed was not the only reasonable inference from the evidence.[2201] Moreover, she contends that the Trial Chamber, in relying on this hearsay evidence of killings, disregarded numerous inconsistencies in the testimonies of witnesses who testified to the survival and utterances of Semanyenzi and Annonciata.[2202] She notes the Trial Chamber's acknowledgement of contradictory evidence regarding where abducted refugees were taken,[2203] but argues that it was unreasonable for the Trial Chamber to disregard inconsistencies on this point considering that witnesses, including Witnesses TK, RE, SS, SU, QBQ, and FAP, all testified about the same night of attacks and Semanyenzi's return.[2204] Nyiramasuhuko further submits that it was unreasonable for the Trial Chamber to accept that Semanyenzi, abducted during the first attack, returned during the second attack and was abducted again, returned during the third attack and was abducted yet again, and finally survived and returned to the prefectoral office.[2205]

[2198] Trial Judgement, para. 2749.
[2199] *See* Trial Judgement, paras. 2745-2748.
[2200] Nyiramasuhuko Appeal Brief, paras. 495, 504, 506, 508.
[2201] Nyiramasuhuko Appeal Brief, paras. 505, 506.
[2202] *See* Nyiramasuhuko Notice of Appeal, paras. 10.49, 10.50; Nyiramasuhuko Appeal Brief, paras. 1220-1256. *See also* Nyiramasuhuko Reply Brief, para. 314.
[2203] Nyiramasuhuko Appeal Brief, para. 1221.
[2204] Nyiramasuhuko Appeal Brief, paras. 505, 506, 1220, 1222, 1223. *See also ibid.*, paras. 1232-1234, 1237-1252, 1254-1256.
[2205] Nyiramasuhuko Appeal Brief, para. 1224. Nyiramasuhuko also notes that Semanyenzi was not called as a witness to testify about the events at the Butare Prefecture Office, or his survival. *See ibid.*, paras. 1225-1229.

She also contends that the evidence of Witnesses SS and SU concerning Fidèle contradicts their prior statements.[2206]

948. The Prosecution responds that Nyiramasuhuko's submissions should be dismissed as Witnesses FAP, SS, SU, RE, TK, and QBQ corroborated each other on Semanyenzi's abduction and escape.[2207] According to it, the Trial Chamber's reference to the abduction and escape of Semanyenzi simply demonstrates that these witnesses were testifying about the same night.[2208]

949. The Appeals Chamber considers that Nyiramasuhuko does not show that the Trial Chamber abused its discretion in relying on hearsay evidence concerning the killings of refugees abducted from the prefectoral office. Indeed, when evaluating the hearsay evidence whose sources were Semanyenzi, Annonciata, and Fidèle[2209] – who all saw killings of abducted persons at various locations in Butare – the Trial Chamber acknowledged that these individuals did not testify during the proceedings and that this hearsay evidence must be viewed with caution.[2210] Moreover, the Trial Chamber carefully considered the hearsay evidence along with direct evidence concerning the nature of the attacks at the prefectoral office as well as evidence that refugees who were abducted did not return.[2211]

950. The Trial Chamber also explicitly noted that the evidence relating to where the refugees were taken to be killed was "inconsistent".[2212] It acknowledged that the witnesses who learned about the killings from Semanyenzi and Annonciata might have been expected to identify the same

[2206] Nyiramasuhuko Appeal Brief, para. 503. The Appeals Chamber notes that Nyiramasuhuko further argues that the Trial Chamber erred in relying on: (i) Witness TA's evidence about killings that were unrelated to attacks in which she participated; (ii) Witness Ghandi Shukry's evidence that no "pit" existed at the prefectoral office; and (iii) evidence that there were corpses everywhere in Butare Town. *See ibid.*, paras. 492, 494, 499, 500. Nyiramasuhuko's submissions, however, reflect mere disagreement with the relevance of the impugned evidence without demonstrating how the Trial Chamber erred in recalling this evidence or show that it was relevant to its determination that refugees abducted from the prefectoral office were killed. Consequently, the Appeals Chamber dismisses these contentions without further consideration.
[2207] Prosecution Response Brief, para. 651.
[2208] Prosecution Response Brief, para. 651.
[2209] The Appeals Chamber notes that the Trial Chamber variously referred to Fidèle as "Fidel", "Fidelis", or "Fidele" in the Trial Judgement. *See* Trial Judgement, paras. 2745, 2746.
[2210] Trial Judgement, para. 2745.
[2211] *See* Trial Judgement, paras. 2739-2747.
[2212] Trial Judgement, para. 2747 ("The Chamber notes that Witnesses SJ, QY, RE, FAP and QBQ provided inconsistent testimony as to where an escaped refugee named Semanyenzi had been taken, although he allegedly told each of them how and from where he escaped. Witness SJ said the Mbashas, Annonciata and Semanyenzi were all taken to the same place and that she later learned from Annonciata and *Interahamwe* that the location of the killings was Kabutare. Witness QY said that she learned from Annonciata that the refugees had been taken to Rwabayanga to be killed. Witness RE also learned from Semanyenzi and Annonciata that the people were killed. She said the refugees were killed at Rwabayanga. Witness FAP did not indicate where Semanyenzi had been taken, but testified that certain soldiers warned her that *Interahamwe* were taking people to Rwabayanga. Finally, Witness QBQ testified that Semanyenzi had survived at Mukoni. Given that each of these witnesses had learned from Semanyenzi and Annonciata where the killings had occurred, it might be expected that each would identify the same location.") (internal references omitted).

location.[2213] However, the Trial Chamber also observed that not all the evidence about the location of killings came from these two survivors.[2214] The Trial Chamber then noted that all four locations cited "were all sites of massacres or mass graves" or behind or near such sites and accepted that different groups of refugees could have been taken to these locations on different occasions.[2215] It concluded that, "[r]egardless of whether the refugees were taken to Rwambayanga, Kabutare, Mukoni, or the IRST, the only reasonable inference is that the refugees were abducted from the [Butare Prefecture Office] in order to kill them."[2216]

951. Nyiramasuhuko fails to appreciate that Semanyenzi was not the only source of information regarding the location where abducted refugees were killed and her submissions reflect mere disagreement with the Trial Chamber's analysis without substantiating an error. Her misplaced emphasis on the location of the killings also ignores that the evidence of principal significance – *i.e.* that abducted refugees were *killed* – is entirely consistent.[2217] The Appeals Chamber also finds that Nyiramasuhuko does not demonstrate that the Trial Chamber's consideration of the evidence on the killing sites was unreasonable.

952. The Appeals Chamber also rejects Nyiramasuhuko's arguments with respect to Semanyenzi's abduction, survival, and subsequent abduction. It notes that, compared to findings about Mbasha's wife and children, Trifina, and the unnamed woman and her children, the Trial Chamber made no specific conclusions as to the circumstances of Semanyenzi's abduction or survival in its analysis of events during the Night of Three Attacks.[2218] The Trial Chamber explicitly observed that witnesses provided different accounts of when and to where Semanyenzi was abducted.[2219] The Trial Chamber appears to have referenced his survival to ascertain whether witnesses were indeed testifying about the Night of Three Attacks,[2220] and to assess whether abducted Tutsi refugees were killed.[2221] In this regard, the Appeals Chamber is of the view that inconsistencies related to Semanyenzi's abduction and survival are not material to the Trial

[2213] Trial Judgement, para. 2747.
[2214] Trial Judgement, fn. 7689 ("The Chamber notes that Witnesses QJ and QBP did not attribute their knowledge of the location of the killings to Semanyenzi or Annonciata: […] [Witness QBP] said she learned killings occurred in Kabutare from people who had gone to the market the next day; […] Witness QJ did not indicate her source of information that the refugees were killed in Kabutare[]. The Chamber recognises that these two witnesses may have been referring to different attacks than the other witnesses and therefore, the information they provided does not necessarily contradict that certain refugees were killed at Rwabayanga or Mukoni.") (internal references omitted). *See also ibid*., para. 2747 ("Witness SJ said the Mbashas, Annonciata and Semanyenzi were all taken to the same place and that she later learned from Annonciata and *Interahamwe* that the location of the killings was Kabutare.").
[2215] Trial Judgement, para. 2748.
[2216] Trial Judgement, para. 2749.
[2217] *See* Trial Judgement, para. 2749.
[2218] *See* Trial Judgement, paras. 2654-2738. *See also ibid*., Section 3.6.19.4.7.
[2219] *See* Trial Judgement, paras. 2237, 2278, 2307, 2333, 2745-2747.
[2220] *See*, *e.g.*, Trial Judgement, paras. 2656, 2658, 2659.
[2221] *See* Trial Judgement, paras. 2745-2747. *See also ibid*., Section 3.6.19.4.8.

Chamber's findings that the Night of Three Attacks occurred or that abducted refugees were eventually killed. Nyiramasuhuko does not demonstrate an error in the Trial Chamber's assessment.

953. The Appeals Chamber likewise finds that Nyiramasuhuko fails to demonstrate the materiality of the purported variances between the testimonies of Witnesses SS and SU and their prior statements concerning Fidèle.

954. Consequently, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in its assessment of the locations where persons were killed and the abductions of Semanyenzi.

(vii) Conclusion

955. For the reasons developed above, the Appeals Chamber finds that the Trial Chamber erred in relying on the evidence of Witnesses QBP and SJ in support of its findings regarding the Night of Three Attacks but that this error has not occasioned a miscarriage of justice. The Appeals Chamber dismisses the remainder of Nyiramasuhuko's challenges to the assessment of the evidence pertaining to the Night of Three Attacks.

(f) First Half of June Attacks

956. The Trial Chamber, relying on the testimonies of Witnesses QBP and SU, as partly corroborated by Witnesses SS and TA, found that during an attack on the Butare Prefecture Office conducted in the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women and that, as a result, numerous women were raped at that location.[2222] It found that, although Nyiramasuhuko could not have been present at the prefectoral office on 6 and 10 June 1994, she had ample opportunity to perpetrate these crimes between 7 and 9 June 1994, and between 11 and 19 June 1994.[2223] The Trial Chamber convicted Nyiramasuhuko as a superior for failing to prevent and punish the rapes perpetrated by the *Interahamwe* during this attack.[2224]

[2222] Trial Judgement, paras. 2752-2769, 2773. The Appeals Chamber notes that, in paragraph 2750 of the Trial Judgement, the Trial Chamber stated that "Witness TA's evidence […] corresponds with the attack described by Witness QBP which allegedly occurred in June 1994." In the following paragraph of the Trial Judgement, the Trial Chamber, in reference to Witnesses SU's and SS's evidence, stated that "these additional attacks occurred in the first half of June 1994", which may imply that it considered that Witnesses SS and SU testified to an attack additional to and distinct from that witnessed by Witnesses TA and QBP. However, reading the Trial Chamber's factual findings concerning attacks at the prefectoral office in June 1994 in context, the Appeals Chamber concludes that the Trial Chamber considered aspects of the testimonies of Witnesses SS, SU, TA, and QBP to pertain to the same attack. *See ibid.*, paras. 2752, 2753, 2765, 2770.
[2223] Trial Judgement, para. 2773.
[2224] Trial Judgement, paras. 5874, 5877, 5886, 6087, 6088, 6093, 6182, 6183, 6186.

957. Nyiramasuhuko submits that the Trial Chamber erred in its assessment of the evidence concerning this attack by minimising the differences between Witnesses QBP's, SU's, SS's, TA's, and TK's testimonies, and concluding that they corroborated each other.[2225] In support of her argument, Nyiramasuhuko argues that the Trial Chamber's finding that Witness QBP testified that she ordered rapes during this attack directly contradicts its finding that the only attack Witness QBP described in her testimony was the Night of Three Attacks.[2226] In her view, the Trial Chamber therefore unreasonably concluded that Witness QBP corroborated Witness SU because Witness QBP testified about the Night of Three Attacks.[2227] Nyiramasuhuko further contends that the Trial Chamber failed to consider that Witness SU's testimony was contradicted by Witnesses TA, TK, and SS, who did not testify that Nyiramasuhuko was present during the attack.[2228] According to Nyiramasuhuko, the Trial Chamber also unreasonably failed to address that Witnesses RE, FAP, QBQ, QY, SJ, and SD, who were present at the prefectoral office in the first half of June 1994, did not testify about additional attacks in June 1994 or the presence of Nyiramasuhuko at the prefectoral office during this time period,[2229] particularly in light of Witness SU's testimony that none of the refugees was asleep during the attack and that Nyiramasuhuko was speaking loudly and moving around in an agitated manner.[2230] She also argues that the Trial Chamber's finding that she ordered rapes at the prefectoral office between 7 and 9 and between 11 and 19 June 1994 is incompatible with its acceptance of Witness SU's testimony that from the moment *gendarmes* were posted to protect the Tutsi refugees at the prefectoral office between 5 and 15 June 1994, no one was raped.[2231]

958. The Prosecution responds that Witness QBP's testimony pertained to the same attack in the first half of June 1994 about which Witness SU testified and that the Trial Chamber was therefore reasonable in relying on Witnesses SU's and QBP's mutually consistent testimonies that Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women during this attack.[2232] It contends that the Trial Chamber did not rely on Witness TK's testimony as regards this attack and that the fact that Witnesses SS and TA did not identify Nyiramasuhuko as being present does not undermine the corroboration they provided of other aspects of Witnesses SU's and QBP's evidence.[2233] It adds that

[2225] Nyiramasuhuko Notice of Appeal, paras. 10.7, 10.8, 10.27; Nyiramasuhuko Appeal Brief, paras. 1194, 1199-1217; Nyiramasuhuko Reply Brief, paras. 338, 339, 341.
[2226] Nyiramasuhuko Appeal Brief, paras. 1195-1198, *referring to* Trial Judgement, paras. 2657, 2752.
[2227] Nyiramasuhuko Appeal Brief, paras. 1197, 1198; Nyiramasuhuko Reply Brief, paras. 337, 338.
[2228] Nyiramasuhuko Notice of Appeal, paras. 10.28-10.30, 10.34; Nyiramasuhuko Appeal Brief, paras. 1199-1211, 1216, 1217. *See also* Nyiramasuhuko Reply Brief, para. 337.
[2229] Nyiramasuhuko Appeal Brief, paras. 1214, 1215, 1218; Nyiramasuhuko Reply Brief, paras. 340-342.
[2230] Nyiramasuhuko Appeal Brief, paras. 1212-1214. *See also* AT. 14 April 2014 p. 23.
[2231] Nyiramasuhuko Appeal Brief, paras. 737-740, *referring to* Trial Judgement, paras. 2773, 2808, 2809, 2811, 2812, Witness SU, T. 21 October 2002 pp. 37, 38.
[2232] Prosecution Response Brief, paras. 703-706.
[2233] Prosecution Response Brief, paras. 709-715.

Witnesses QBP's and SU's direct and corroborated evidence is not undermined simply because Witnesses RE, FAP, QBQ, QY, SJ, and SD did not testify to seeing Nyiramasuhuko order rapes during an attack in the first half of June 1994.[2234] Finally, the Prosecution submits that there is no contradiction between the Trial Chamber's finding with respect to the *gendarmes* at the prefectoral office because the dates in question do not entirely overlap.[2235] In its view, Nyiramasuhuko also misstates the evidence and the Trial Chamber's findings, which reflect that the refugees were not necessarily protected by the *gendarmes*.[2236]

959. Nyiramasuhuko replies that no reasonable trier of fact would have concluded that Witnesses TA and SU necessarily discussed the same attack on the basis that Witnesses QBP and TA described the rape of Immaculée Mukagatare while Witness TA did not recollect Nyiramasuhuko's presence, and asserts that the Trial Chamber's findings are ultimately only reliant on the contradictory testimonies of Witnesses SU and QBP.[2237] She further replies that the Trial Chamber relied on Nsabimana's testimony that the *gendarmes* protected the Tutsis and that there were no further attacks, which, in her view, should have raised reasonable doubt as to her involvement in an attack during this time period.[2238]

960. As discussed above, a careful review of Witness QBP's testimony reveals that she did not testify about the Night of Three Attacks but that her testimony on an attack at the prefectoral office concerned an attack that occurred after the Night of Three Attacks in the first half of June 1994 during which Immaculée Mukagatare was raped.[2239] Nyiramasuhuko's argument, which is premised on the assumption that Witness QBP's testimony related to the Night of Three Attacks and not to a later attack in the first half of June 1994, cannot therefore succeed.[2240]

[2234] Prosecution Response Brief, paras. 720-723. The Prosecution also argues that, in any case, the Trial Chamber acted within its discretion in preferring the testimonies of Witnesses SU and QBP and that the reasonableness of the Trial Chamber's findings is further demonstrated by Witnesses RE's, FAP's, and QBQ's testimonies that Nyiramasuhuko issued orders to rape at the prefectoral office, which provides additional circumstantial support for the Trial Chamber's findings. *See ibid.*, para. 722.
[2235] Prosecution Response Brief, para. 716.
[2236] Prosecution Response Brief, paras. 716-719.
[2237] Nyiramasuhuko Reply Brief, paras. 340-342. *See also* AT. 14 April 2015 p. 23.
[2238] Nyiramasuhuko Reply Brief, para. 344, *referring to* Trial Judgement, paras. 2812-2815. The Appeals Chamber notes that Nyiramasuhuko also argues in her reply brief that the Trial Chamber "failed in its duty to provide a reasoned opinion by deciding to convict [her] in respect of an elastic period limited to the dates the Chamber did not believe her alibi, rather than on evidence beyond a reasonable doubt." *See ibid.*, para. 343. Noting that Nyiramasuhuko failed to raise this allegation of error in her notice of appeal and her appeal brief and recalling that reply briefs shall be limited to arguments in reply to the response brief, the Appeals Chamber declines to consider this argument further.
[2239] Witness QBP, T. 24 October 2002 pp. 84-86, 88, T. 28 October 2002 pp. 71, 74. *See also supra*, para. 894.
[2240] As to the Trial Chamber's erroneous statement about the relevance of Witness QBP's evidence to the Night of Three Attacks, the Appeals Chamber observes that the Trial Chamber did not rely on Witness QBP's evidence regarding the timing of the Night of Three Attacks or Ntahobali's and Nyiramasuhuko's conduct during this event. Instead, the Trial Judgement reflects that Witness QBP's testimony was only relied upon as circumstantial evidence for the Night of Three Attacks in relation to the vehicle used during the attacks at the prefectoral office and as to what

961. Concerning Nyiramasuhuko's argument that Witnesses TA and SU did not necessarily discuss the same attack, the Appeals Chamber observes that the Trial Chamber noted that Witness TA, like Witness QBP, was "also an eyewitness to the rape of Immaculée Mukagatare", which Witness QBP had recounted as occurring as part of the attack in the first half of June 1994 during which Nyiramasuhuko ordered the rape of Tutsi women.[2241] The Trial Chamber therefore considered that Witness TA's account of the rape of Immaculée Mukagatare concerned the same attack described by Witness QBP and therefore also related to Witness SU's testimony corroborating Witness QBP's recollection of Immaculée Mukagatare's rape.[2242] Nyiramasuhuko fails to demonstrate that the Trial Chamber's finding in this respect was unreasonable.

962. Though Witness TA did not testify that Nyiramasuhuko was present during the attack, this was not of material importance considering the brief nature of her testimony in relation to the attacks at the prefectoral office in June 1994, the core of which was focused on her own rape by seven *Interahamwe* and her recollection of the violent rape of Immaculée Mukagatare.[2243] Likewise, Witness SS's testimony about this attack was limited to explaining how Witness SU attempted to dissuade the *Interahamwe* from raping her.[2244] Witness SS's testimony concerning this incident was very brief and the witness was not questioned during examination or cross-examination as to the context in which it occurred, or on whether Nyiramasuhuko was present.[2245]

963. In light of the detailed and mutually corroborative evidence of Witnesses SU and QBP concerning the attack at the prefectoral office in the first half of June 1994 during which Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women and the nature of Witnesses TA's and SS's testimonies on this attack, the Appeals Chamber is not persuaded that it was unreasonable on the part of the Trial Chamber to not expressly address that Witnesses TA and SS did not mention Nyiramasuhuko as being present during the attack or consider their evidence to contradict that of Witness SU.

964. Nyiramasuhuko also fails to demonstrate that the Trial Chamber abused its discretion by not finding that Witness TK contradicted Witness SU's testimony that Nyiramasuhuko ordered rapes during this attack. The Trial Chamber did not find that Witness TK's testimony pertained to the same attack during the First Half of June 1994 Attacks as described by Witness SU. By contrast, it stated that Witness TK corroborated Witness TA's testimony regarding "additional attacks" at the

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Nyiramasuhuko wore in general. *See* Trial Judgement, paras. 2663, 2698, fn. 7559. Consequently, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice.

[2241] Trial Judgement, paras. 2750, 2769, 2770.

[2242] Trial Judgement, paras. 2750, 2752, 2769, 2770.

[2243] Witness TA, T. 29 October 2001 pp. 7-28, T. 1 November 2001 pp. 36-48.

[2244] Trial Judgement, para. 2757.

[2245] Witness SS, T. 3 March 2003 p. 74 (closed session).

Butare Prefecture Office during the first half of June 1994.[2246] The Trial Chamber also expressly noted that Witness TK did not see Nyiramasuhuko when rapes occurred at the prefectoral office during the first half of June 1994 and that her sightings of Nyiramasuhuko were either during the day or on the Night of Three Attacks.[2247] Nyiramasuhuko does not point to any aspect of Witness TK's testimony that would demonstrate that she and Witness SU testified to the same specific attack in the first half of June 1994 or that materially contradicts Witness SU's evidence about that specific attack that she described. Nyiramasuhuko also does not show that the Trial Chamber did not consider the aspects of Witness TK's testimony to which she points.[2248]

965. The Appeals Chamber finds that Nyiramasuhuko's contention that the Trial Chamber should have addressed that Witnesses RE, FAP, QBQ, QY, SJ, and SD did not testify that any attacks occurred or that Nyiramasuhuko was present at night in June 1994 or after the Night of Three Attacks despite being at the prefectoral office during the relevant time period is equally unpersuasive. The Appeals Chamber recalls its finding that the Trial Chamber erred in relying on Witnesses QY's and SJ's evidence in relation to the attacks at the prefectoral office[2249] and notes that the Trial Chamber considered in detail the evidence of Witnesses RE, FAP, QBQ, and SD in relation to the Night of Three Attacks and other attacks.[2250] The Appeals Chamber considers that the Trial Chamber was not required to discuss any possible difference within the Prosecution evidence where that evidence was not incompatible.

966. Nyiramasuhuko fails to reference anything in the testimonies of Witnesses RE, FAP, QBQ, and SD reflecting that their evidence renders the Trial Chamber's findings on the attack described by Witnesses QBP and SU unreasonable, or that they were necessarily continuously present at the prefectoral office during the time of the attack. Nyiramasuhuko merely refers to the Trial Chamber's findings that Witnesses RE and FAP witnessed only one attack at the prefectoral office, which was the Night of Three Attacks,[2251] without showing that they denied the occurrence of later attacks or providing any support for her contention with respect to Witnesses QBQ and SD.[2252] While Nyiramasuhuko highlights Witness SU's evidence that Nyiramasuhuko shouted during the

[2246] Trial Judgement, para. 2771.
[2247] Trial Judgement, paras. 2205, 2209-2215, 2218, 2686, 2698, 2704, 2717, 2728, 2730, 2771.
[2248] In her appeal brief, Nyiramasuhuko merely refers to the Trial Chamber's summary of Witness TK's testimony and to excerpts of Witness TK's testimony reflecting that she did not see Nyiramasuhuko during attacks at the prefectoral office other than the Night of Three Attacks, or during the day. *See* Nyiramasuhuko Appeal Brief, paras. 1205-1211, *referring to* Trial Judgement, paras. 2654, 2771, 2773, Witness TK, T. 20 May 2002 pp. 96-98, T. 22 May 2002 pp. 56, 57, T. 28 May 2002 pp. 52, 53.
[2249] *See supra*, paras. 804, 846, *infra*, paras. 1657, 1678.
[2250] Trial Judgement, paras. 2620, 2650, 2651, 2654, 2656, 2658, 2660, 2661, 2663, 2664, 2672-2674, 2676, 2680, 2686, 2687, 2691-2696, 2698-2700, 2703, 2707, 2710-2712, 2714, 2719, 2720, 2731, 2734-2736, 2738.
[2251] Nyiramasuhuko Appeal Brief, para. 1215, *referring to* Trial Judgement, paras. 2654, 2656, 2657.
[2252] *See* Nyiramasuhuko Appeal Brief, paras. 1214, 1215, 1218.

attack and that the refugees were not asleep,[2253] the Appeals Chamber is of the view that it was within the discretion of the Trial Chamber not to consider this as determinative that all refugees present during the attack would necessarily recall it in their testimony, particularly if they were not a targeted victim on that occasion. Given the prevailing circumstances at the prefectoral office, which included numerous attacks against the refugees and conditions of "unfathomable depravity and sadism",[2254] and in light of Witnesses SU's and QBP's reliable and corroborated evidence as to Nyiramasuhuko's participation in the attack, further supported by Witnesses TA's and SS's evidence, the Appeals Chamber finds no error in the Trial Chamber's finding that Nyiramasuhuko participated in an attack after the Night of Three Attacks in the first half of June 1994. The fact that Witnesses RE, FAP, QBQ, and SD did not testify to this specific attack or to Nyiramasuhuko's presence at the prefectoral office during this time period does not demonstrate the unreasonableness of the Trial Chamber's conclusion.

967. Finally, the Appeals Chamber sees no merit in Nyiramasuhuko's argument that the Trial Chamber's reliance on Witness SU's testimony that *gendarmes* were posted at the Butare Prefecture Office is inconsistent with its finding on Nyiramasuhuko's participation in an attack in the first half of June 1994. Nyiramasuhuko overlooks that the Trial Chamber relied on Witness SU's direct evidence of this attack in reaching its finding that Nyiramasuhuko ordered rapes[2255] and that the Trial Chamber similarly relied on her testimony to find that Nsabimana posted *gendarmes* at the prefectoral office sometimes between 5 and 15 June 1994.[2256] Contrary to Nyiramasuhuko's argument, there is no contradiction between these findings or within Witness SU's testimony as the Trial Chamber did not find that all abductions and rapes ceased once *gendarmes* or soldiers were posted at the prefectoral office.[2257] Nor did the Trial Chamber find, or Witness SU testify, that the attack occurred on a specific date. Indeed, the Trial Chamber's finding as to the timing of this attack is limited to the time period of "the first half of June 1994".[2258]

[2253] *See* Nyiramasuhuko Appeal Brief, paras. 1212-1214, *referring to* Witness SU, T. 14 October 2002 pp. 52-54, 57, 58, 60-64.
[2254] Trial Judgement, para. 5866. *See also ibid*., para. 2627.
[2255] *See* Trial Judgement, paras. 2254-2256, 2753-2756, 2758-2762.
[2256] Trial Judgement, paras. 2809, 2811, 2812.
[2257] The Trial Chamber found that "Nsabimana requisitioned the soldiers and/or *gendarmes* to harm the refugees insofar as it relates it to Paragraph 6.36 of the Indictment." *See* Trial Judgement, para. 2815. It also stated that the "evidence establishe[d] that these soldiers forestalled attacks against those taking refuge" at the Butare Prefecture Office. *See ibid*., para. 5902, *referring to* Witness SU, T. 21 October 2002 p. 38, Witness SS, T. 10 March 2003 pp. 34, 35. According to Witness SU, the *gendarmes* prevented the abduction of refugees when a red Toyota vehicle came to the prefectoral office and they continued to guard the refugees. However, she testified that the *gendarmes*, realising that they were guarding Tutsi refugees, threatened to kill the refugees should the RPF arrive. *See* Witness SU, T. 21 October 2002 pp. 38, 39.
[2258] Trial Judgement, paras. 2751, 2773, 2781(v). Witness SU testified that she "did not know the exact date" when the *gendarmes* came to the prefectoral office but that it happened in June. *See* Witness SU, T. 21 October 2002 pp. 37, 40.

968. Therefore, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in relying on the evidence of Witnesses QBP and SU, as partly corroborated by Witnesses SS and TA, in finding that, in the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the Butare Prefecture Office and that, as a result, numerous women were raped at that location.

3. Ordering Responsibility

969. Notwithstanding the imprecision in the Trial Judgement, the Appeals Chamber has determined that the Trial Chamber convicted Nyiramasuhuko of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering killings committed as a result of attacks at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks.[2259]

970. Nyiramasuhuko contends that the Trial Chamber erred in convicting her for ordering killings in the absence of any evidence that she issued orders to kill during these attacks.[2260] She submits that the Trial Chamber only found that she ordered Tutsi refugees to be abducted during the Mid-May Attack and that there is no evidence that this order significantly contributed to the killing of the refugees or that the *Interahamwe* who loaded the vehicle with refugees actually killed them later.[2261] Alternatively, she submits that the Trial Chamber erred in failing to explain how it inferred an order to kill from her alleged orders that refugees be abducted.[2262]

971. With respect to the Night of Three Attacks, Nyiramasuhuko emphasises that the Trial Judgement contains no express finding that she issued any order to kill during this attack and argues that it would be impermissible to infer such orders.[2263] In particular, she contends that the Trial Chamber's conclusion that she ordered rapes during this attack is insufficient to establish that she ordered killings.[2264] Furthermore, she appears to argue that the Trial Chamber did not find that she

[2259] *See supra*, para. 749.
[2260] Nyiramasuhuko Appeal Brief, paras. 865, 866, 869, 1286, *referring to* Trial Judgement, paras. 2644, 2715, 2738, 2749, 2781, 5867-5876, 5886, 5969, 5970. *See also* Nyiramasuhuko Reply Brief, paras. 239, 248; Nyiramasuhuko Supplementary Submissions, para. 12; AT. 15 April 2015 pp. 3, 4.
[2261] Nyiramasuhuko Appeal Brief, paras. 820, 821, 862, *referring to* Trial Judgement, paras. 5867-5869. *See also* Nyiramasuhuko Supplementary Submissions, para. 10.
[2262] Nyiramasuhuko Appeal Brief, paras. 820, 821, 862. *See also* Nyiramasuhuko Supplementary Submissions, para. 6.
[2263] Nyiramasuhuko Supplementary Submissions, paras. 6, 11-13, 21-23, 27, 32. *See also* AT. 15 April 2015 pp. 3, 4.
[2264] Nyiramasuhuko Supplementary Submissions, paras. 10, 13, 28. *See also ibid*., para. 29; AT. 15 April 2015 pp. 3,4.

ordered *Interahamwe* to load the refugees onto the vehicles during the Night of Three Attacks or that such conclusion would provide an adequate basis to establish her liability for ordering.[2265]

972. Nyiramasuhuko further contends that, with respect to the Mid-May Attack and the Night of Three Attacks, the Trial Chamber erred in finding that, between mid-May and mid-June 1994, the abducted refugees were killed at different locations, as it failed to point to evidence or factual findings supporting this conclusion.[2266] She contends that the Trial Chamber made no findings as to the perpetrators of such killings, the fact that the perpetrators were acting on her orders, the means used to commit the killings, or the location and victims of these killings.[2267]

973. In addition, Nyiramasuhuko submits that, in finding her guilty of genocide under Article 6(1) of the Statute for ordering killings, the Trial Chamber erred in its assessment of her *mens rea*.[2268] Specifically, she contends that it erred in relying on the findings that pits were dug which contained those killed at the prefectoral office, that she ordered rapes and distributed condoms on another occasion, and that she tacitly approved the inflammatory speeches at Nsabimana's Swearing-In Ceremony in order to establish her genocidal intent.[2269] She also reiterates that the Trial Chamber could not legally rely on her alleged orders or encouragements to rape refugees at the prefectoral office as it had stated that it would not take rapes into account when assessing her responsibility for genocide.[2270]

974. The Prosecution responds that the Trial Chamber's finding that Nyiramasuhuko ordered abductions sufficiently establishes her responsibility under Article 6(1) of the Statute.[2271] It contends that the evidence and the Trial Chamber's findings demonstrate that she issued such orders knowing the substantial likelihood that crimes would be committed in the execution of them and that her orders had a direct and substantial effect on the subsequent killings.[2272] In support of these inferences, the Prosecution, for example, points to evidence that Nyiramasuhuko issued

[2265] Nyiramasuhuko Supplementary Submissions, 17, 18, 22, 27.
[2266] Nyiramasuhuko Appeal Brief, paras. 822, 853, 861, 867, 879, 1284, *referring to* Trial Judgement, paras. 5867, 5873. *See also* Nyiramasuhuko Reply Brief, paras. 240, 241; AT. 15 April 2015 pp. 3, 4.
[2267] Nyiramasuhuko Appeal Brief, paras. 823, 853, *referring to* Trial Judgement, para. 5873. *See also* Nyiramasuhuko Supplementary Submissions, paras. 7-11; AT. 15 April 2015 p. 4.
[2268] Nyiramasuhuko Appeal Brief, paras. 824-826, 856, 860, 1285, 1290.
[2269] Nyiramasuhuko Notice of Appeal, paras. 7.3, 7.4; Nyiramasuhuko Appeal Brief, paras. 824-826, 858, 859, 896-900 1285, 1290, *referring to* Trial Judgement, paras. 5862, 5863, 5870, 5871, 5873, 5874, 5876. *See also* Nyiramasuhuko Reply Brief, paras. 252, 275-279. Nyiramasuhuko argues that the evidence in this regard was contradicted by Prosecution Witness Ghandi Shukry without explaining how or providing any reference. *See* Nyiramasuhuko Appeal Brief, para. 824.
[2270] Nyiramasuhuko Notice of Appeal, paras. 7.5, 7.6; Nyiramasuhuko Appeal Brief, paras. 827, 856-860, 875, 1285, 1290. In Nyiramasuhuko's view, the Trial Chamber improperly used evidence of rapes to convict her of genocide as the evidentiary record to support her liability for ordering killings at the Butare Prefecture Office was otherwise insufficient. *See* Nyiramasuhuko Appeal Brief, paras. 846, 847. *See also* Nyiramasuhuko Reply Brief, para. 274.
[2271] Prosecution Response Brief, paras. 543-548, 555. *See also* AT. 14 April 2015 pp. 42-44.
[2272] Prosecution Response Brief, paras. 495, 543-548, 555. *See also* Prosecution Supplementary Submissions, paras. 15, 17-19; AT. 14 April 2015 p. 43.

express orders to kill refugees during the attacks, that Tutsis were killed at the prefectoral office during attacks and that their bodies were thrown into pits, and that abducted Tutsis were not seen again.[2273]

975. The Prosecution further contends that the totality of the evidence demonstrates that Nyiramasuhuko possessed genocidal intent and that her targeting of Tutsi women for rape followed the same pattern as her orders to abduct and kill Tutsi refugees at the prefectoral office.[2274] It also argues that the Trial Chamber correctly considered evidence of graves at the prefectoral office, Nyiramasuhuko's role in distributing condoms and ordering rapes, and her tacit approval of inflammatory speeches given during Nsabimana's Swearing-In Ceremony as evincing her genocidal intent.[2275]

976. The Appeals Chamber recalls that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[2276] Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order. Ordering with such awareness has to be regarded as accepting that crime.[2277]

977. Bearing in mind the prior determination that the Trial Chamber failed to provide a reasoned opinion with respect to Nyiramasuhuko's responsibility for ordering killings during the Mid-May Attack and the Night of Three Attacks,[2278] the Appeals Chamber has reviewed the relevant findings and evidence relied upon by the Trial Chamber and identified by the parties to determine whether they sustain its conclusion that Nyiramasuhuko is responsible for ordering killings under Article 6(1) of the Statute in relation to these attacks.

978. With respect to the Mid-May Attack, the Appeals Chamber observes that the Trial Chamber relied upon the evidence of Witness TA as it concerns Nyiramasuhuko's conduct[2279] and recalled her evidence of Nyiramasuhuko's leading role in this attack in detail:

[2273] Prosecution Response Brief, paras. 496-499, 545, 550. *See also* Prosecution Supplementary Submissions, paras. 15, 16; AT. 14 April 2015 pp. 42, 43.
[2274] Prosecution Response Brief, paras. 556-563, 568-574, 586.
[2275] Prosecution Response Brief, paras. 558, 560, 562, 565, 575, 576, 582.
[2276] *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. *See also Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[2277] *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.
[2278] *See supra*, para. 750.
[2279] *See* Trial Judgement, para. 2644.

> Nyiramasuhuko was standing in the courtyard of the [Butare Prefecture Office] pointing out Tutsi refugees to the *Interahamwe*, saying as she pointed, "[t]his is another one, and another one and another one, and why are you leaving that one?" Those Tutsis were refugees. Witness TA testified that those Tutsis were beaten up and forced onto the pickup. Nyiramasuhuko pointed at three refugees who had been cut up and ordered that they be loaded onto the vehicle.[2280]

979. The Trial Chamber's analysis also reveals that it considered the Mid-May Attack at the prefectoral office in the context of other attacks that led to the killing of Tutsis who took refuge there.[2281] The Trial Chamber repeatedly concluded that Nyiramasuhuko issued orders to *Interahamwe* in the midst of the attacks at the prefectoral office, including orders to attack, rape, kill, and abduct refugees and that these orders were followed.[2282] These findings, in the opinion of the Appeals Chamber, sustain the conclusion that Nyiramasuhuko was in a position of authority and that her orders to abduct Tutsis from the prefectoral office during the Mid-May Attack were made with the awareness of the substantial likelihood that killings would be committed in the execution of such orders.

980. Furthermore, and contrary to Nyiramasuhuko's challenges, the Trial Chamber identified the victims of the killings underpinning her ordering conviction during the Mid-May Attack as the numerous Tutsi refuges who were forced on board the pickup truck and abducted from the prefectoral office.[2283] It made further findings that, from mid-May through mid-June 1994, Tutsis abducted from the prefectoral office were killed at several different venues in Butare Prefecture.[2284] In reaching the conclusion that abducted refugees were killed, the Trial Chamber carefully considered the evidence that refugees were attacked and killed at the prefectoral office,[2285] as well as circumstantial and hearsay evidence that those removed refugees were killed.[2286] The Appeals Chamber has determined that the Trial Chamber has not erred in the assessment of this evidence.[2287] Consequently, while the Trial Chamber did not expressly identify the specific perpetrators of the killings, the precise means used to kill the victims, or the precise locations of the killings for those abducted during the Mid-May Attack, Nyiramasuhuko does not demonstrate that these omissions constitute an error. The Appeals Chamber concludes that the Trial Chamber's factual findings and the evidence it relied upon sustain the finding that Nyiramasuhuko's orders to *Interahamwe* to load the pickup truck during the Mid-May Attack had a direct and substantial effect on the subsequent

[2280] Trial Judgement, para. 2628 (internal references omitted).
[2281] *See* Trial Judgement, paras. 5867 ("Between mid-May and mid-June 1994, Nyiramasuhuko […] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and were killed in various locations throughout Butare *préfecture*.") (internal reference omitted), 5870 ("Furthermore, there was a pattern of killing at the [Butare Prefecture Office] itself.").
[2282] *See* Trial Judgement, paras. 2644, 2698, 2736, 2738, 2773, 2781, 5867, 5873, 5874.
[2283] Trial Judgement, paras. 2644, 5867.
[2284] Trial Judgement, paras. 2739, 2748, 2749.
[2285] *See* Trial Judgement, paras. 2742 ("[T]he Chamber is convinced that during the attacks at the [Butare Prefecture Office], Tutsi refugees were killed and thrown into pits."). *See also ibid*., paras. 2739-2741.
[2286] Trial Judgement, paras. 2743-2749.

killing of those individuals, and that these findings and evidence demonstrate that she possessed the requisite *mens rea* for ordering liability.

981. With respect to the Night of Three Attacks, the Appeals Chamber recalls that the Trial Chamber did not expressly conclude in its legal findings that Nyiramasuhuko ordered killings during these specific attacks.[2288] However, throughout the "Factual Findings" section of the Trial Judgement, it determined that Nyiramasuhuko "ordered *Interahamwe* and soldiers to rape Tutsi women, and *to kill other refugees*",[2289] that "Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup", that "Nyiramasuhuko gave orders to the *Interahamwe* to commit these crimes", and that "[t]he women and children were taken away from the [prefectoral office] and killed elsewhere."[2290] The Trial Chamber further concluded that "Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup" during this attack and that these Tutsis were abducted.[2291] In support of its findings, the Trial Chamber relied upon ample evidence that Nyiramasuhuko ordered *Interahamwe* to abduct Tutsis during the Night of Three Attacks[2292] and upon the evidence of two witnesses that Nyiramasuhuko ordered *Interahamwe* to rape and kill during that night.[2293]

[2287] *See supra*, Section IV.F.2(d).
[2288] *See supra*, para. 730.
[2289] *See* Trial Judgement, para. 2698 (emphasis added). The Appeals Chamber has previously considered and dismissed Nyiramasuhuko's contention that paragraph 2698 of the Trial Judgement does not reflect a finding that Nyiramasuhuko ordered killings during the Night of Three Attacks. *See supra*, Section IV.F.1(a).
[2290] Trial Judgement, para. 2736.
[2291] Trial Judgement, para. 2738.
[2292] *See* Trial Judgement, paras. 2706 ("Witness SU said that around 11.00 p.m. the same night Mbasha's wife and children were abducted, Nyiramasuhuko, her driver, her guard and some *Interahamwe* returned in the same vehicle. Nyiramasuhuko repeated her instructions to the *Interahamwe* to start on one side and to take men and women. On a second occasion, Nyiramasuhuko arrived at the [Butare Prefecture Office] in the same Hilux vehicle. Nyiramasuhuko summoned the *Interahamwe* present at the [Butare Prefecture Office] and told them to load people onto the vehicle. Nyiramasuhuko was leaning against the vehicle when it was being loaded with Tutsi refugees and left with the same vehicle."), 2708 ("Witness SS testified that Nyiramasuhuko got out of the vehicle, and said to also bring the young boys and not to leave anyone behind. The persons who came with Nyiramasuhuko took torches and started waking people. The *Interahamwe* took the young boys, but as they were not many, they also took women and girls. While some refugees were loaded onto the pickup, the soldiers and *Interahamwe* attacked them with weapons. When the vehicle left, Nyiramasuhuko, the *Interahamwe*, the driver and the soldier named Kazungu were on board."), 2709 ("On the third attack that same night, Witness SS testified that she saw Nyiramasuhuko, the driver, the *Interahamwe* and the soldier named Kazungu come back to the [Butare Prefecture Office] on board the vehicle. She heard Nyiramasuhuko say, '[p]ut everyone on board, old women, old men, put everybody on board.' The *Interahamwe* got out of the vehicle, put out the light, took their torches and weapons, and woke up everybody. They had traditional weapons such as machetes and clubs, and the soldier had a gun. They loaded refugees onto the vehicle. When the vehicle left, Nyiramasuhuko, *Interahamwe*, the driver and the soldier named Kazungu were on board. In the back of the pickup were *Interahamwe* and the refugees who had been loaded onto the vehicle."), 2711 ("[According to Witness FAP], [o]n a second trip that night, Nyiramasuhuko and Ntahobali, the *Interahamwe* and a soldier returned in the vehicle. Nyiramasuhuko instructed the *Interahamwe* to load the Tutsi refugees into the vehicle. The *Interahamwe* herded young Tutsi men, women and children into the vehicle by beating them; there were no longer any grown men at the [Butare Prefecture Office]. The refugees' clothes were removed and given to the Hutu refugees from Gitarama and Bugesera.") (all internal references omitted).
[2293] *See* Trial Judgement, paras. 2693 ("[Witness QBQ] corroborated Witness SS' observation that Nyiramasuhuko stood next to the vehicle and gave orders to the *Interahamwe* to '[r]ape the women and girls and kill the rest.'")

982. The Appeals Chamber also observes that, in the "Legal Findings" section of the Trial Judgement, the Trial Chamber concluded that the "abducted Tutsi refugees" were taken to "other sites in Butare *préfecture* to be killed" with respect to the Night of Three Attacks.[2294] This finding is based on the Trial Chamber's prior conclusions that women and children were taken away from the prefectoral office and killed during the Night of Three Attacks as well as its general findings that, from mid-May to mid-June 1994, Nyiramasuhuko participated in the abduction of Tutsi refugees from the prefectoral office in multiple truckloads and that these refugees were killed.[2295]

983. The Trial Chamber identified the victims of the Night of Three Attacks – Tutsi refugees abducted from the prefectoral office[2296] – and made findings that, from mid-May through mid-June 1994, Tutsis abducted from the prefectoral office were killed at several different venues in Butare Prefecture.[2297] While the Trial Chamber did not expressly identify the specific perpetrators of the killings, the precise means used to kill the victims, or identify *all* the locations of the killings for those abducted during the Night of Three Attacks, Nyiramasuhuko does not demonstrate that these omissions constitute an error for the same reasons discussed above.[2298] The Appeals Chamber concludes that Nyiramasuhuko's orders to rape, kill, and abduct refugees during the Night of Three Attacks had a direct and substantial effect on the subsequent killing of refugees abducted and killed elsewhere. Likewise, the Appeals Chamber concludes that the relevant findings and evidence relied upon by the Trial Chamber demonstrate that Nyiramasuhuko possessed the requisite *mens rea* to incur ordering liability.

984. Turning to Nyiramasuhuko's contentions regarding the assessment of her *mens rea* in relation to the crime of genocide, the Appeals Chamber observes that the Trial Chamber stated the following:

> Moving to the *mens rea* of genocide, it was clear that those staying at the [Butare Prefecture Office] were Tutsis and this fact was widely known throughout the *préfecture*. […] Furthermore, there was a pattern of killing at the [prefectoral office] itself. There were pits dug which contained those killed at the [prefectoral office]. […] In evaluating Nyiramasuhuko's *mens rea* at the [Butare Prefecture Office], the Chamber also considers Nyiramasuhuko's conduct at Nsabimana's swearing-in ceremony on 19 April 1994 […], where she tacitly approved of the inflammatory speeches of President Sindikubwabo and Prime Minister Kambanda, and also her distribution of condoms in June 1994 […], where she urged Hutus to rape Tutsi women. These actions can only be understood as intending to eliminate this group of persons. By attacking this group of wounded and sick Tutsi refugees, and in light of the evidence as a whole, the only reasonable conclusion is

(internal reference omitted), 2712 ("[According to Witness FAP], Nyiramasuhuko instructed Ntahobali and the *Interahamwe* to systematically select young women and young girls and to rape and kill them.").
[2294] Trial Judgement, para. 5873.
[2295] Trial Judgement, paras. 2736, 2739, 2749, 2781(iv).
[2296] Trial Judgement, paras. 2749, 5873.
[2297] Trial Judgement, paras. 2739, 2748, 2749.
[2298] *See supra*, para. 980.

> that […] Nyiramasuhuko […] possessed the intent to destroy, in whole or in substantial part, the Tutsi group.[2299]

985. While Nyiramasuhuko contends that the Trial Chamber erred in considering evidence concerning the pits as it is contested and insufficient, she does not substantiate this contention.[2300] The Appeals Chamber further notes her submission that it was an error to consider her tacit approval of Sindikubwabo's and Kambanda's inflammatory speeches at Nsabimana's Swearing-In Ceremony as the Trial Chamber did not find that her presence contributed to the commission of a crime and as it did not occur simultaneously with her having ordered the killing of Tutsis seeking refuge at the prefectoral office. However, these contentions do not demonstrate that it was irrelevant to consider this finding when assessing her *mens rea* for the crime of genocide in relation to her participation in the killings resulting from attacks at the prefectoral office. Similarly, Nyiramasuhuko's mere disagreement with the Trial Chamber's consideration of her role in distributing condoms and ordering rapes at a time unrelated to the attacks at the prefectoral office is dismissed. Nyiramasuhuko fails to demonstrate that such conduct was irrelevant to the Trial Chamber's consideration of whether she possessed the *mens rea* for genocide in relation to her participation in attacks at the prefectoral office. Moreover, and of the greatest significance, the Appeals Chamber finds that the Trial Chamber's determination that Nyiramasuhuko possessed the requisite *mens rea* for genocide is principally predicated upon her role in the attacks that occurred there.[2301]

986. The Appeals Chamber also finds no merit in Nyiramasuhuko's contention that the Trial Chamber improperly considered her responsibility for rapes committed at the prefectoral office when determining that she possessed genocidal intent and convicting her of genocide for ordering killings during attacks at the prefectoral office. The Appeals Chamber observes that the relevant indictment pleads Nyiramasuhuko's genocidal intent[2302] and that, in such circumstances, the facts by which such intent is to be established are matters of evidence that need not be pleaded.[2303] Consequently, even though the Trial Chamber found that there was insufficient notice that Nyiramasuhuko was charged with rapes as a form of genocide, this conclusion did not preclude the Trial Chamber from considering evidence of her ordering rapes at the prefectoral office when

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[2299] Trial Judgement, paras. 5870, 5871 (internal references omitted).
[2300] *See* Nyiramasuhuko Appeal Brief, paras. 824, 825; Nyiramasuhuko Reply Brief, para. 252. Nyiramasuhuko simply points to evidence that is reflective of the evidence considered by the Trial Chamber but fails to demonstrate how it erred in the assessment of such evidence.
[2301] Trial Judgement, para. 5871 ("By attacking this group of wounded and sick Tutsi refugees, and in light of the evidence as a whole, the only reasonable conclusion is that Ntahobali, Nyiramasuhuko and the other *Interahamwe* assailants possessed the intent to destroy, in whole or in substantial part, the Tutsi group.").
[2302] *See* Nyiramasuhuko and Ntahobali Indictment, p. 39.
[2303] *See Nchamihigo* Appeal Judgement, para. 136; *Nahimana et al.* Appeal Judgement, para. 347. *See also Blaškić* Appeal Judgement, para. 219.

assessing whether she possessed the requisite *mens rea* for genocide in relation to conduct that could support this charge.

987. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber's factual findings and the evidence it relied upon sustain the conclusion that Nyiramasuhuko bears responsibility under Article 6(1) of the Statute for ordering killings of Tutsis abducted from the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks. Accordingly, the Appeals Chamber concludes that the Trial Chamber's failure to provide a reasoned opinion regarding Nyiramasuhuko's responsibility under Article 6(1) of the Statute for ordering "the killings of Tutsis taking refuge at the Butare *préfecture* office"[2304] does not invalidate its decision to convict her on this basis. Finally, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in its assessment of her *mens rea* with respect to her responsibility for ordering the crime of genocide.

4. Superior Responsibility

988. As discussed above, the Trial Chamber found Nyiramasuhuko responsible pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings perpetrated by the *Interahamwe* that she ordered during the Mid-May Attack and the Night of Three Attacks as well as for failing to prevent and punish the rapes perpetrated by the *Interahamwe* that she ordered during the Night of Three Attacks and one of the First Half of June Attacks at the Butare Prefecture Office. Specifically, the Trial Chamber recalled its finding that "Nyiramasuhuko and Ntahobali issued orders to *Interahamwe* and the *Interahamwe* complied with these orders and perpetrated the acts asked of them, which included abductions, rapes and killings."[2305] On this basis, as well as the fact that she "brought" the *Interahamwe* to the attacks and "considering the evidence in its entirety", the Trial Chamber concluded that she was in a superior-subordinate relationship with the *Interahamwe* at the prefectoral office and wielded effective control over them.[2306] The Trial Chamber further concluded that Nyiramasuhuko's orders to the *Interahamwe* demonstrated that she knew that they were about to commit crimes and had later done so, and that she failed to prevent these crimes and punish the *Interahamwe* for obeying her orders.[2307]

989. Based on these findings, the Trial Chamber convicted Nyiramasuhuko of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the

[2304] Trial Judgement, paras. 5969, 6050, 6098, 6166. *See also ibid*., para. 5867.
[2305] Trial Judgement, para. 5884.
[2306] Trial Judgement, paras. 5884, 6088.
[2307] Trial Judgement, paras. 5885, 6088.

Statute for failing to prevent the rapes perpetrated by the *Interahamwe* that she ordered on the Night of Three Attacks and during one of the First Half of June Attacks and punish the *Interahamwe* who committed them.[2308] Having convicted Nyiramasuhuko of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of the numerous Tutsis forced to board the pickup truck during the Mid-May Attack and Night of Three Attacks,[2309] the Trial Chamber did not enter related convictions pursuant to Article 6(3) of the Statute and considered her responsibility as a superior only in relation to sentencing for these crimes.[2310]

990. Nyiramasuhuko submits that the Trial Chamber erred in finding her responsible pursuant to Article 6(3) of the Statute for the killings of Tutsis who had sought refuge at the Butare Prefecture Office perpetrated by the *Interahamwe* and in convicting her under Article 6(3) of the Statute for the rapes they committed.[2311] In particular, she contends that the Trial Chamber erred in: (i) finding that she had a superior-subordinate relationship with, and effective control over, the *Interahamwe* at the prefectoral office; and (ii) convicting her pursuant to Article 6(3) of the Statute for her active participation in the attacks, contrary to the concept of superior responsibility.[2312] The Appeals Chamber will address these contentions in turn.[2313]

(a) Superior-Subordinate Relationship and Effective Control over the *Interahamwe*

991. In concluding that Nyiramasuhuko had a superior-subordinate relationship with, and effective control over, the *Interahamwe* to whom she issued orders at the Butare Prefecture Office, the Trial Chamber relied on "the evidence in its entirety", including, specifically, their compliance with her orders to abduct, rape, and kill Tutsi refugees and the fact that she "brought" the *Interahamwe* to the prefectoral office.[2314]

[2308] Trial Judgement, paras. 6086-6088, 6093, 6182, 6183, 6186. *See also ibid.*, paras. 5873, 5874, 5877, 5886.
[2309] *See supra*, para. 749.
[2310] *See* Trial Judgement, paras. 5886, 5970, 6052, 6207. *See also ibid.*, paras. 5652, 5884, 5885.
[2311] Nyiramasuhuko Notice of Appeal, paras. 5.7, 7.8, 7.10, 9.1, 9.2; Nyiramasuhuko Appeal Brief, paras. 744, 747-755, 759, 828, 919-932, 1288, 1289.
[2312] Nyiramasuhuko Notice of Appeal, paras. 5.7, 7.8, 7.10, 9.1, 9.2; Nyiramasuhuko Appeal Brief, paras. 747-755, 759, 768, 920-932, 1288. *See also* Nyiramasuhuko Reply Brief, paras. 204-208, 220, 221, 223, 216-218; AT. 14 April 2015 pp. 14, 15.
[2313] The Appeals Chamber observes that Nyiramasuhuko makes a number of additional submissions contending that the Trial Chamber erroneously convicted her pursuant to Article 6(3) of the Statute for aiding and abetting rapes at the prefectoral office. *See* Nyiramasuhuko Appeal Brief, paras. 750, 751, 756-758, 764-767; Nyiramasuhuko Reply Brief, para. 206. The Appeals Chamber reiterates that Nyiramasuhuko's superior responsibility for crimes perpetrated by the *Interahamwe* at the prefectoral office is strictly limited to those crimes that she ordered. *See* Trial Judgement, paras. 5884-5886, 6087, 6093, 6182; *supra*, paras. 727, 740. Nyiramasuhuko was therefore not found responsible, or convicted, as a superior pursuant to Article 6(3) of the Statute for the rapes that she aided and abetted during the Mid-May Attack. The Appeals Chamber dismisses Nyiramasuhuko's arguments in this regard as irrelevant.
[2314] Trial Judgement, paras. 5884, 6088.

992. Nyiramasuhuko submits that the Trial Chamber erred in concluding that she had a superior-subordinate relationship with, and effective control over, the *Interahamwe* at the prefectoral office.[2315] She points out that the Trial Chamber failed to discuss the origin and nature of her authority over the *Interahamwe*, including the existence of a prior or subsequent superior-subordinate relationship between them.[2316] She further argues that the Trial Chamber's finding that she had effective control over the *Interahamwe* was unreasonably based on: (i) "the evidence in its entirety", in violation of her right to a reasoned opinion;[2317] (ii) the incorrect finding that she "brought" the *Interahamwe* to the prefectoral office when the evidence reflects that she merely accompanied them;[2318] and (iii) the *Interahamwe*'s compliance with her orders to rape and kill Tutsis.[2319] With respect to the latter, Nyiramasuhuko contends that evidence that orders are followed is, on its own, insufficient to prove that the person who issued the orders has effective control.[2320] In addition, she asserts that the Trial Chamber failed to properly consider Witness FAP's testimony that *Interahamwe* did not obey her order to rape during one of the attacks[2321] and that the Trial Chamber made no findings that, for example, the *Interahamwe* reported to her or that she rewarded them for anything, which, in her view, demonstrates that her effective control was not established beyond reasonable doubt.[2322]

993. The Prosecution responds that the Trial Chamber provided a reasoned opinion properly establishing Nyiramasuhuko's effective control over the *Interahamwe* at the prefectoral office based on its consideration of the totality of the evidence, including: (i) Nyiramasuhuko's role in transporting the *Interahamwe* to the prefectoral office; (ii) the *de facto* authority that flowed from her position as the Minister for Family and Women's Development; (iii) her membership in the MRND National Committee as a representative of Butare Prefecture; and (iv) the *Interahamwe*'s repeated compliance with her orders.[2323] The Prosecution disputes Nyiramasuhuko's interpretation

[2315] Nyiramasuhuko Notice of Appeal, paras. 9.1, 9.2; Nyiramasuhuko Appeal Brief, paras. 747-754, 920-928, 931.
[2316] Nyiramasuhuko Appeal Brief, paras. 921-923. *See also ibid*., para. 828.
[2317] Nyiramasuhuko Appeal Brief, paras. 927, 928; Nyiramasuhuko Reply Brief, para. 220.
[2318] Nyiramasuhuko Appeal Brief, paras. 748, 921, 922, 928, *referring to* Trial Judgement, para. 6088; Nyiramasuhuko Reply Brief, para. 216. *See also* AT. 15 April 2015 p. 8.
[2319] Nyiramasuhuko Notice of Appeal, paras. 9.1, 9.2; Nyiramasuhuko Appeal Brief, paras. 749-752, 921, 922, 925, 928; Nyiramasuhuko Reply Brief, para. 216.
[2320] Nyiramasuhuko Appeal Brief, paras. 750, 752, 924, 925.
[2321] Nyiramasuhuko Appeal Brief, paras. 753, 754, 931, *referring to* Witness FAP, T. 11 March 2003 pp. 60, 61, T. 13 March 2003 pp. 8-10; Nyiramasuhuko Reply Brief, paras. 216, 231, 232.
[2322] Nyiramasuhuko Appeal Brief, para. 926.
[2323] Prosecution Response Brief, paras. 427-433, 438-441, 444, 446, 448, 451, 453, 454, 459-461, 464, *referring*, *inter alia*, *to* Trial Judgement, paras. 8, 11, 2698. *See also* AT. 14 April 2015 pp. 44, 45. The Prosecution also argues that the Trial Chamber relied on Nyiramasuhuko's diary detailing meetings with *Interahamwe* in Ngoma Commune in May 1994 and with the *Bureau politique* on 12 May 1994 as well as on evidence that she wore military attire when she addressed the *Interahamwe* at the prefectoral office. *See* Prosecution Response Brief, paras. 433-437. Nyiramasuhuko replies that the Prosecution unfairly relies on Defence evidence that the Trial Chamber did not expressly refer to, or specifically declined to consider, as opposed to Prosecution evidence. *See* Nyiramasuhuko Reply Brief, paras. 217, 218. The Appeals Chamber observes that the Trial Chamber did not rely on Nyiramasuhuko's evidence as to the meetings she attended in May 1994 in concluding that she was responsible as a superior pursuant to Article 6(3) of the Statute.

of Witness FAP's testimony[2324] and argues that the Trial Chamber was not obliged to find proof that the *Interahamwe* reported to her on a daily basis or were rewarded.[2325]

994. Nyiramasuhuko replies that the Trial Chamber could not have relied on her status within the MRND as indicative of her effective control over the *Interahamwe* because the Prosecution failed to adduce evidence that those who attacked the Tutsis at the prefectoral office were members of the MRND party and instead presented testimony suggesting that, at the time, "*Interahamwe*" was a broad term used to refer to all those who attacked, robbed, raped, and killed.[2326]

995. The Appeals Chamber recalls that "[i]ndicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish."[2327] It further recalls that the material ability to prevent or punish can only amount to effective control over the perpetrators if it is premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.[2328] The concepts of subordination, hierarchy, and chains of command need not be established in the sense of formal organisational structures so long as the fundamental requirement of effective control over the subordinate, in the sense of material ability to prevent or punish criminal conduct, is satisfied.[2329]

996. Contrary to Nyiramasuhuko's submissions, the Trial Chamber discussed the nature of her authority over the *Interahamwe*, including the superior-subordinate relationship between them.[2330] Although the Trial Chamber did not expressly set out the basis on which this superior-subordinate relationship existed prior to each attack at the prefectoral office in relation to which it found her responsible, the Appeals Chamber considers that the pre-existing and hierarchical nature of the relationship between Nyiramasuhuko and the *Interahamwe* is implicit in its findings as demonstrated by the Trial Chamber's reliance on Nyiramasuhuko's repeated prominent role in the attacks reflected, notably, by the fact that she "brought" the *Interahamwe* to the prefectoral office

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Though it stated in its summary of Witness SS's evidence that she testified that Nyiramasuhuko wore military attire, the Prosecution fails to explain why this is probative of her effective control over the *Interahamwe* or to demonstrate that the Trial Chamber relied on it in reaching its findings. Since the Prosecution's suggestion that the Trial Chamber relied on this evidence is speculative, the Appeals Chamber does not consider this aspect of its response or Nyiramasuhuko's reply.

[2324] The Prosecution points out that the witness's evidence reflects that the *Interahamwe* followed Nyiramasuhuko's order by raping Tutsi women. *See* Prosecution Response Brief, paras. 442, 443, *referring to* Witness FAP, T. 11 March 2003 p. 60, T. 13 March 2003 p. 10 (French).

[2325] Prosecution Response Brief, para. 452.

[2326] Nyiramasuhuko Reply Brief, para. 219.

[2327] *Ndahimana* Appeal Judgement, para. 53, *referring to Blaškić* Appeal Judgement, para. 69.

[2328] *Bizimungu* Appeal Judgement, para. 133; *Halilović* Appeal Judgement, paras. 59, 210. *See also Bagosora and Nsengiyumva* Appeal Judgement, fn. 687; *Čelebići* Appeal Judgement, para. 303.

[2329] *Halilović* Appeal Judgement, para. 210; *Čelebići* Appeal Judgement, para. 254. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 258.

[2330] Trial Judgement, paras. 5884, 6088.

and issued them orders to rape, abduct, and kill Tutsi refugees, with which they complied.[2331] In addition, the Trial Chamber's findings throughout the Trial Judgement also reveal that the *Interahamwe* considered Nyiramasuhuko as an authority figure and the direct evidence of her central role in leading them in the attacks at the prefectoral office is further supported by the influential status in Rwandan society she held at the time through her capacity as a government minister in both the Interim Government and its predecessor and her role as the elected representative of Butare Prefecture to the MRND National Committee.[2332]

997. In this respect, the Appeals Chamber considers that it was unnecessary for the Trial Chamber to determine that the *Interahamwe* involved in the attacks were necessarily directly connected to the MRND party because Nyiramasuhuko's stature in Rwandan society in general, including her position within the MRND party, provided only supplemental support to the direct evidence of her superior-subordinate relationship with the *Interahamwe* who complied with her orders during attacks at the prefectoral office.

998. Concerning Nyiramasuhuko's challenges to the finding that she wielded effective control over these *Interahamwe*, the Appeals Chamber rejects the assertion that the Trial Chamber violated her right to a reasoned opinion on the basis that it relied on "the evidence in its entirety" in arriving at its conclusion. It is clear that, through its reference to its reliance on the entirety of the evidence, the Trial Chamber merely intended to indicate that it reached its findings beyond reasonable doubt on the basis of the totality of the evidence adduced in accordance with the jurisprudence of the Tribunal.[2333]

999. The Trial Chamber considered that Nyiramasuhuko's effective control over the *Interahamwe* at the prefectoral office "was evidenced by the fact that she *brought* them" there.[2334] The evidence relied upon by the Trial Chamber shows that Nyiramasuhuko's transportation of the *Interahamwe* to and from the prefectoral office was an integral part of the attacks. In particular, the Trial Chamber noted that Witnesses TA, SS, FAP, SU, and QBP testified not only that Nyiramasuhuko arrived at the prefectoral office alongside the *Interahamwe*,[2335] but that immediately after their arrival, she issued them orders to rape, abduct, and kill with which they

[2331] Trial Judgement, paras. 2644, 2702, 2738, 2781(i), (iii), (v), 5867, 5873, 5874, 5876, 5884, 6088.
[2332] Trial Judgement, paras. 8, 11, 244, 5669, 5676-5678. The Trial Chamber also stated that "Nyiramasuhuko was widely known as the Minister in charge of Women's Affairs and therefore would likely be recognisable." *See ibid.*, para. 2698.
[2333] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 450; *Nahimana et al.* Appeal Judgement, para. 789; *Ntagerura et al.* Appeal Judgement, paras. 172-175, 399.
[2334] Trial Judgement, para. 6088 (emphasis added).
[2335] The Trial Chamber expressly found that Nyiramasuhuko arrived at the prefectoral office with *Interahamwe* and Ntahobali during the Mid-May Attack and Night of Three Attacks. *See* Trial Judgement, paras. 2644, 2738, 2781(i),

complied, as she supervised and directed the attacks, standing against the vehicle as Tutsis were loaded into it and pointing out individuals to abduct.[2336] Given the methodical and repeated nature of the attacks against the Tutsi refugees at the prefectoral office, it is evident from a contextual reading of this evidence and the Trial Chamber's findings that Nyiramasuhuko did not merely accompany the *Interahamwe* to the prefectoral office, but that she brought them there with the intention of effecting the attacks, and that they did so without dissent. In this respect, the Appeals Chamber considers it immaterial whether Nyiramasuhuko was driving the vehicle.[2337]

1000. In addition to Nyiramasuhuko's transportation of the *Interahamwe* to the prefectoral office to carry out the attacks, the Trial Chamber also relied on their compliance with her orders to rape, abduct, and kill Tutsi refugees as demonstrative of her effective control over the *Interahamwe*.[2338] The Appeals Chamber recalls that a superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control generally relied upon in the jurisprudence of the Tribunal.[2339]

1001. Nyiramasuhuko does not show that, given the context of the multiple attacks at the prefectoral office, during which she was present and played a leading role, it was unreasonable for the Trial Chamber to consider the *Interahamwe*'s repeated compliance with her orders highly probative of their superior-subordinate relationship and of her effective control over them. Nyiramasuhuko's argument that the *Interahamwe*'s compliance with her orders during the attacks was, on its own, insufficient to prove that she exercised effective control ignores that this was not the only factor relied on by the Trial Chamber. As recalled above, the Trial Chamber relied on evidence that Nyiramasuhuko played a decisive and pivotal role in the attacks by bringing the *Interahamwe* to the prefectoral office, and by issuing them orders. In its factual findings, the Trial Chamber also highlighted evidence that Nyiramasuhuko directed and supervised the *Interahamwe*

(iii), 5867, 5869, 5873. *See also ibid*., paras. 2178, 2253, 2266, 2284, 2287, 2289, 2302, 2307, 2687, 2693, 2696, 2704, 2706, 2708-2711, 2732, 2765.

[2336] *See*, *e.g*., Trial Judgement, paras. 2628, 2687, 2688, 2693, 2696, 2698, 2706, 2708, 2709, 2711, 2732, 2766, 2781(iii), (v), 5867, 5873. *See also ibid*., paras. 2178, 2181, 2251, 2253-2255, 2268, 2284, 2285, 2287, 2289, 2304, 2307, 2308.

[2337] In this respect, the Appeals Chamber finds that paragraph 69 of the *Kamuhanda* Appeal Judgement does not demand another conclusion, contrary to Nyiramasuhuko's argument that, in this paragraph, "the Appeals Chamber states the evidence that a person is a passenger in a vehicle is not evidence that that person took attackers to the crime scene." *See* AT. 15 April 2015 p. 8.

[2338] Trial Judgement, paras. 5884, 6088.

[2339] *Karemera and Ngirumpatse* Appeal Judgement, para. 260; *Nizeyimana* Appeal Judgement, para. 202; *Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, para. 299. *See also Strugar* Appeal Judgement, para. 256; *Hadžihasanović and Kubura* Appeal Judgement, para. 199; *Halilović* Appeal Judgement, paras. 204, 207.

as they carried out her orders, sometimes providing them with specific instructions as the attacks unfolded.[2340]

1002. The Appeals Chamber is not convinced by Nyiramasuhuko's assertion that Witness FAP testified that *Interahamwe* disobeyed her order to rape during one of the attacks at the prefectoral office. Witness FAP expressly testified that, during the first attack of the Night of Three Attacks, Nyiramasuhuko ordered the *Interahamwe* to rape Tutsi women and that they carried out her orders.[2341] Witness FAP testified that, during subsequent attacks that night, Nyiramasuhuko issued orders to the *Interahamwe* to rape Tutsi women and that the *Interahamwe* loaded the Tutsis onto the vehicle but did not rape them on the spot.[2342] However, this does not necessarily indicate that the *Interahamwe* did not follow Nyiramasuhuko's order but reflects only that the women were not raped at the prefectoral office itself on those occasions. The Appeals Chamber notes that Witness FAP explained that Nyiramasuhuko's instructions to select young women and young girls and to rape them before killing them were the catalyst for the abduction of the Tutsis.[2343] Nyiramasuhuko's argument that the Trial Chamber failed to properly consider Witness FAP's evidence that *Interahamwe* disobeyed one of her orders is therefore without merit.[2344]

1003. The Appeals Chamber is also unpersuaded by Nyiramasuhuko's assertion that the Prosecution's failure to adduce evidence that the *Interahamwe* reported daily to Nyiramasuhuko, or that she rewarded them, raised reasonable doubt as to her effective control over them. The reporting of subordinates to a superior and rewards by a superior for doing so are indicia relevant to determining effective control but are not a necessary requirement.[2345]

1004. Therefore, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in concluding that she had a superior-subordinate relationship with, and effective control over, the *Interahamwe* to whom she issued orders at the prefectoral office.

[2340] *See* Trial Judgement, paras. 2628, 2687, 2688, 2693, 2696, 2706, 2708, 2709, 2711, 2732, 2766, 2781(iii), (v), 5867, 5973. *See also ibid*., paras. 2178, 2181, 2251, 2253-2255, 2268, 2284, 2285, 2287, 2289, 2304, 2307, 2308.
[2341] Witness FAP, T. 11 March 2003 pp. 59, 60.
[2342] Witness FAP, T. 11 March 2003 pp. 60, 61.
[2343] Witness FAP, T. 11 March 2003 pp. 60, 61, T. 13 March 2003 p. 9.
[2344] *See* Nyiramasuhuko Appeal Brief, paras. 929, 932. Since the Appeals Chamber rejects her contention that Witness FAP's testimony reflects that the *Interahamwe* disobeyed Nyiramasuhuko's orders, Nyiramasuhuko's assertion that the Prosecution failed to lead evidence that Nyiramasuhuko punished the *Interahamwe* when they disobeyed her orders, as described by Witness FAP, is similarly dismissed. *See ibid.*, paras. 753, 754.
[2345] The Appeals Chamber recalls that, in the *Kajelijeli* Appeal Judgement, the Appeals Chamber upheld the Trial Chamber's reliance, with respect to establishing Kajelijeli's *de facto* superior position over *Interahamwe*, on evidence that the *Interahamwe* reported to him the details of the massacres they participated in following his instructions to kill Tutsis and orders to dress up and start work. However, the *Interahamwe*'s daily reporting was only considered as one of several relevant evidentiary indicia of authority in the circumstances of the case and was not considered a necessary element for the establishment of superior authority in general. *See Kajelijeli* Appeal Judgement, para. 90. *See also Ndahimana* Appeal Judgement, para. 53, *referring to Blaškić* Appeal Judgement, para. 69.

(b) Superior Responsibility for Direct Participation in a Crime

1005. Nyiramasuhuko argues that by finding her responsible for ordering rapes and killings pursuant to Article 6(3) of the Statute, the Trial Chamber unreasonably convicted her for her direct participation in the crimes in a manner that is contrary to the concept of superior responsibility because it is intended to criminalise the failure of a person to act.[2346] Specifically, Nyiramasuhuko asserts that "[t]he Trial Chamber erred in illogically applying effective control standards in circumstances pertaining to responsibility under Article 6(1), since it is self-evident that a person cannot prevent or punish the execution of an order given by that person."[2347]

1006. The Prosecution responds that the Trial Chamber acted in accordance with the jurisprudence by considering evidence of Nyiramasuhuko's orders to the *Interahamwe* as indicative of her superior responsibility, and that such evidence may be used to establish responsibility pursuant to both Articles 6(1) and 6(3) of the Statute.[2348]

1007. Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in relying on her orders to the *Interahamwe* and their compliance with these orders as evidence establishing her superior responsibility for these crimes. She further does not substantiate her contention that it is improper to find an accused criminally responsible as a superior pursuant to Article 6(3) of the Statute where his conduct also meets the requirements of other forms of responsibility under Article 6(1) of the Statute and to convict an accused on this basis when a conviction under Article 6(1) of the Statute has not been entered.[2349] Nyiramasuhuko's contention in this regard is dismissed without further consideration.

(c) Conclusion

1008. Accordingly, the Appeals Chamber dismisses Nyiramasuhuko's contentions that the Trial Chamber erred in finding her responsible as a superior for failing to prevent the killing of refugees abducted from the Butare Prefecture Office perpetrated by *Interahamwe* following her orders and punish the *Interahamwe* who committed them and in convicting her pursuant to Article 6(3) of the

[2346] Nyiramasuhuko Notice of Appeal, paras. 5.7, 7.8, 7.10; Nyiramasuhuko Appeal Brief, paras. 755, 768, 929, 930, 932; Nyiramasuhuko Reply Brief, paras. 204, 206-208.
[2347] Nyiramasuhuko Appeal Brief, para. 932.
[2348] Prosecution Response Brief, paras. 427-430.
[2349] Nyiramasuhuko fails to refer to any relevant jurisprudence in support of her contention. *See* Nyiramasuhuko Appeal Brief, para. 929, *referring to The Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-R72, Decision on Defence Motions (i) Objecting to the Form of the Third Amended Indictment and (ii) Requesting the Harmonisation or Reconsideration of the Decision of 2 March 2005, 22 September 2005, para. 5. *See also* Nyiramasuhuko Reply Brief, para. 207.

Statute in relation to the rapes committed by the *Interahamwe* following her orders at the Butare Prefecture Office.

5. Conclusion

1009. For the foregoing reasons, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in convicting her for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks pursuant to Article 6(1) of the Statute and as a superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* upon her orders during the Night of Three Attacks and one of the First Half of June Attacks. The Appeals Chamber further finds that Nyiramasuhuko has not shown that the Trial Chamber erred in finding that she bore superior responsibility for the killings perpetrated by *Interahamwe* upon her orders during the Mid-May Attack and the Night of Three Attacks and in considering her responsibility in this regard in sentencing.[2350]

1010. Consequently, the Appeals Chamber dismisses Grounds 23 through 25 and 28 through 31 of Nyiramasuhuko's appeal.

[2350] *See also infra*, Section XI.A.1.

G. Distribution of Condoms (Grounds 26 in part and 27)

1011. Based on Prosecution Witness FAE's evidence, the Trial Chamber found that, at the beginning of June 1994, Nyiramasuhuko came to the Cyarwa-Sumo Sector, Ngoma Commune, and distributed condoms for the *Interahamwe* to be used in the raping and killing of Tutsi women in that sector.[2351] The Trial Chamber further found that Nyiramasuhuko gave the following order to the woman to whom she distributed the condoms: "[g]o and distribute these condoms to your young men, so that they use them to rape Tutsi women and to protect themselves from AIDS, and after having raped them they should kill all of them. Let no Tutsi woman survive because they take away our husbands."[2352]

1012. However, the Trial Chamber held that there was not "sufficient reliable evidence to show a link between Nyiramasuhuko's actions in distributing the condoms on this occasion, in addition to her utterances evincing her clear intent to target Tutsi women, and actual rapes committed against said Tutsi women."[2353] Moreover, although the Trial Chamber determined that Nyiramasuhuko's order to the woman to whom she distributed the condoms was direct and could not be considered ambiguous in the context of the rapes and large scale massacres committed throughout Butare Prefecture at that time, it found that her statements were more akin to a "conversation" and did not satisfy the "public" element of the crime of direct and public incitement to commit genocide.[2354] Accordingly, the Trial Chamber found Nyiramasuhuko not guilty of genocide, rape as a crime against humanity, or direct and public incitement to commit genocide in relation to this incident.[2355] Nonetheless, the Trial Chamber found that "this circumstantial evidence shows Nyiramasuhuko's intent to destroy, in whole or in substantial part, the Tutsi group"[2356] and relied in part on this evidence to find that Nyiramasuhuko possessed the specific intent to commit genocide in relation to other events.[2357]

1013. Nyiramasuhuko submits that the Trial Chamber erred in law and in fact in: (i) its assessment of Witness FAE's evidence and in convicting her for the distribution of condoms at the beginning of June 1994; and (ii) finding that her specific intent to commit genocide was the only reasonable

[2351] Trial Judgement, paras. 4985, 5938, 6014.
[2352] Trial Judgement, paras. 4985, 5938, 6014.
[2353] Trial Judgement, para. 5939. *See also ibid.*, paras. 6091, 6092.
[2354] Trial Judgement, paras. 6015, 6016. The Trial Chamber found that "Nyiramasuhuko directed her speech to one woman, in the presence of four other men" and that "[i]n order to possess the requisite *mens rea* for the crime of direct and public incitement, the audience must be much broader than that found in the present circumstance." *See ibid*., para. 6016.
[2355] Trial Judgement, paras. 5940, 6018, 6091, 6092.
[2356] Trial Judgement, paras. 5940, 6018.
[2357] Trial Judgement, paras. 5870, 5871. *See also ibid*., paras. 5873, 5874. Nyiramasuhuko was found guilty of genocide for ordering *Interahamwe* to kill Tutsis who had sought refuge at the Butare Prefecture Office. *See ibid*., paras. 5867, 5876, 5969, 5970.

conclusion to be drawn from the evidence relating to this distribution.[2358] In light of these alleged errors, Nyiramasuhuko submits that the Appeals Chamber should overturn the Trial Chamber's findings and acquit her of the distribution of condoms at the beginning of June 1994.[2359]

1014. At the outset, the Appeals Chamber recalls that it has clarified in Section IV.B.4 above that, contrary to what Nyiramasuhuko appears to suggest, she was not found guilty in relation to the distribution of condoms. The Trial Chamber only relied on this circumstantial evidence, among other, to find that Nyiramasuhuko possessed the specific intent to commit genocide.[2360] In this section, the Appeals Chamber will therefore consider Nyiramasuhuko's submissions only to the extent that they may show error in the Trial Chamber's reliance on the evidence concerning this incident as circumstantial evidence of her genocidal intent.

1. Assessment of Evidence

1015. Nyiramasuhuko submits that the Trial Chamber erred in finding, based on Witness FAE's testimony, that she distributed condoms in Cyarwa-Sumo Sector at the beginning of June 1994 to be used by the *Interahamwe* to rape Tutsi women.[2361] Specifically, Nyiramasuhuko contends that the Trial Chamber: (i) unreasonably dismissed the inconsistencies between Witness FAE's prior statement and testimony in relation to whether Nyiramasuhuko personally handed out the condoms and the content of her statements as minor when the details added by the witness at trial "impl[ied] more active participation" by Nyiramasuhuko in the incident than the witness originally recounted;[2362] (ii) erred in dismissing additional inconsistencies between Witness FAE's prior statement and testimony with respect to whether Nyiramasuhuko had a gun with her and the seating arrangements of the persons in the vehicle from which she distributed the condoms;[2363] and (iii) unreasonably accepted Witness FAE's explanation that her prior statement may contain errors because she gave it in French, a language she had not mastered, without an interpreter while the record revealed that she spoke French and that she had the opportunity to review and correct her statement and was able to do so in French.[2364] Nyiramasuhuko asserts that, in these circumstances,

[2358] Nyiramasuhuko Notice of Appeal, paras. 7.12-7.26, heading "Ground 27" at p. 43; Nyiramasuhuko Appeal Brief, paras. 882-901.
[2359] Nyiramasuhuko Notice of Appeal, "Relief sought" at p. 43; Nyiramasuhuko Appeal Brief, para. 901.
[2360] *See supra*, paras. 541, 546, 1012.
[2361] Nyiramasuhuko Notice of Appeal, paras. 7.12-7.20, 7.22; Nyiramasuhuko Appeal Brief, paras. 882, 884-885, 887-895. *See also* Nyiramasuhuko Reply Brief, paras. 284-288.
[2362] Nyiramasuhuko Notice of Appeal, para. 7.14; Nyiramasuhuko Appeal Brief, paras. 885, 887-895; Nyiramasuhuko Reply Brief, paras. 285-287.
[2363] Nyiramasuhuko Appeal Brief, para. 892, fn. 731.
[2364] Nyiramasuhuko Appeal Brief, paras. 888-891; Nyiramasuhuko Reply Brief, para. 287. Nyiramasuhuko points out that the witness information page of Exhibit D214 (Witness FAE's Statement) indicates that Witness FAE spoke French. *See* Nyiramasuhuko Appeal Brief, para. 889.

the Trial Chamber should not have relied on Witness FAE's testimony or, at a minimum, should have required corroboration.[2365]

1016. Nyiramasuhuko further contends that the Trial Chamber shifted the burden of proof by stating that the evidence of Defence Witnesses WZNA, WNMN, and MNW "was not convincing enough to raise a reasonable doubt that FAE had remained at home during the events".[2366] She also argues that the Trial Chamber unreasonably concluded that the testimonies of these three witnesses were inconsistent because they testified to seeing Witness FAE at different times, while it simultaneously acknowledged that they testified to seeing her in "separate contexts".[2367]

1017. The Prosecution responds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in the assessment of Witness FAE's evidence or in its assessment of Witnesses WZNA's, WNMN's, and MNW's evidence.[2368]

1018. The Appeals Chamber observes that Witness FAE's prior statement indicates that Nyiramasuhuko arrived in a car outside her house with a doctor named Ndindabahizi and three *Interahamwe*, that Ndindabahizi handed her neighbour a box of condoms, telling her to give them to their "young supporters" to be put on "before raping the Tutsi women likely to be infected with AIDS", and that Nyiramasuhuko then stated that "Tutsi women are to be killed because they are taking away our husbands".[2369] In comparison, at trial, Witness FAE testified that after Ndindabahizi gave the box of condoms to her neighbour, Nyiramasuhuko handed the woman a second box of condoms and instructed her to "[g]o and distribute these condoms to your young men […] so that they use them to rape Tutsi women and to protect themselves from [AIDS], and after having raped them they should kill all of them", before stating: "Let no Tutsi woman survive because they take away our husbands."[2370]

1019. The Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the impugned differences between Witness FAE's testimony and her prior statement constitute material contradictions in her evidence. Nyiramasuhuko does not identify any actual inconsistencies in

[2365] Nyiramasuhuko Appeal Brief, para. 893; Nyiramasuhuko Reply Brief, para. 284.
[2366] Nyiramasuhuko Appeal Brief, para. 894 (emphasis omitted), *referring to* Trial Judgement, paras. 4977-4979, 4982. The Appeals Chamber notes that, in her notice of appeal, Nyiramasuhuko advanced additional contentions that she failed to reiterate or develop with arguments in her appeal brief. *See* Nyiramasuhuko Notice of Appeal, paras. 7.15, 7.16, 7.18-7.20. The Appeals Chamber dismisses these unsubstantiated contentions. The Appeals Chamber also notes that Nyiramasuhuko's arguments related to her alibis and to Witness FAE's membership in a genocide survivor association have been addressed and dismissed above. *See supra*, Sections IV.C, IV.E.2. *See* Nyiramasuhuko Appeal Brief, para. 895; Nyiramasuhuko Reply Brief, para. 284.
[2367] Nyiramasuhuko Appeal Brief, para. 894.
[2368] Prosecution Response Brief, paras. 589-609.
[2369] Witness FAE's Statement, p. K0128360 (Registry pagination).
[2370] Witness FAE, T. 17 March 2004 pp. 83, 84. *See also* Trial Judgement, paras. 4935, 4967.

Witness FAE's evidence but merely refers to the witness's omission to mention certain details of the incident in her prior statement. The Appeals Chamber considers that these differences reflect additional details concerning the incident elicited during Witness FAE's examination in court as a consequence of more detailed questions and the presence of interpreters. Witness FAE's prior statement and testimony are consistent with respect to the fact that Nyiramasuhuko came to the Cyarwa-Sumo Sector with Ndindabahizi and three *Interahamwe* at the beginning of June 1994 and handed out condoms to a woman with the instructions that they be given to *Interahamwe* to rape Tutsi women before killing them.[2371]

1020. The Appeals Chamber is not persuaded that the Trial Chamber abused its discretion in accepting Witness FAE's explanation that any errors in, or discrepancies with, her prior statement were caused by the fact that she gave it in French, a language she was not fully confident in, without the assistance of an interpreter.[2372] As noted by the Trial Chamber, Witness FAE clarified that she had some knowledge of French but made it clear that it was not her mother tongue and also acknowledged that, although she made some corrections to her prior statement, she may have overlooked others as a result of her linguistic inability.[2373] In this context, Nyiramasuhuko's assertion that Witness FAE's explanation is not credible on the basis that the information sheet of her prior statement stated that the interview was conducted in French and that she corrected some errors in her prior statement does not show that the Trial Chamber erred in its acceptance thereof.

1021. For the same reasons, the Appeals Chamber rejects Nyiramasuhuko's contention that it was unreasonable for the Trial Chamber to dismiss the inconsistencies between Witness FAE's prior statement and her testimony in relation to whether she carried a gun and the seating arrangements of her companions based on her explanation that her statement was given in French.[2374] Besides being minor issues, the Appeals Chamber observes that the Trial Chamber also noted and accepted Witness FAE's explanation that she did not mention Nyiramasuhuko's gun in her prior statement because she only responded to the questions she was asked by the Prosecution at the time, and that the discrepancy between her original description of Nyiramasuhuko as sitting in the "front" of the vehicle and her testimony that she sat in the "back" occurred because Nyiramasuhuko was sitting in the "back seat of the front cabin of the vehicle".[2375] Nyiramasuhuko fails to demonstrate any error in the Trial Chamber's analysis in this regard.

[2371] Witness FAE, T. 17 March 2004 pp. 73 (closed session), 75-80, and 81, 82 (closed session), 83, 84; Witness FAE's Statement, p. K0128360 (Registry pagination).
[2372] Trial Judgement, para. 4969.
[2373] *See* Witness FAE, T. 18 March 2004 pp. 27, 28, 42, 43.
[2374] Trial Judgement, para. 4969.
[2375] Trial Judgement, para. 4968.

1022. In addition, the Appeals Chamber emphasises that the Trial Chamber recognised that Witness FAE was the only Prosecution witness to implicate Nyiramasuhuko in the events at Cyarwa-Sumo Sector.[2376] It performed an in-depth assessment of Witness FAE's evidence, which it described as "extensive", "coherent", and "detailed", and ultimately found Witness FAE to be a "reliable witness who provided credible testimony" despite the "slight inconsistencies" in her testimony based on her knowledge of Nyiramasuhuko and her "proximity to the location where the incident occurred [which] placed her in a strong position to have witnessed the distribution of condoms".[2377] Considering that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony,[2378] and that Nyiramasuhuko fails to demonstrate that the Trial Chamber abused its discretion in dismissing the inconsistencies between Witness FAE's prior statement and her testimony, the Appeals Chamber rejects Nyiramasuhuko's contention that no reasonable trier of fact could have relied on her testimony without corroboration.

1023. The Appeals Chamber also rejects Nyiramasuhuko's contention that the Trial Chamber reversed the burden of proof when assessing the evidence of Witnesses WZNA, WNMN, and MNW. The Trial Chamber stated that these witnesses provided hearsay accounts as to why it was "implausible" that Nyiramasuhuko distributed condoms "without any convincing or detailed analyses."[2379] It also determined that "Witness WNMN's assertions about Witness FAE were not sufficiently credible or convincing to undermine the veracity of Witness FAE's testimony under oath."[2380] In the opinion of the Appeals Chamber, a plain reading of the Trial Judgement reflects that the Trial Chamber was not stating that the evidence of these witnesses did not convince it that Witness FAE's testimony was false, but that their testimonies were unconvincing in the sense of lacking plausibility.[2381]

1024. Nyiramasuhuko's assertion that the Trial Chamber unreasonably concluded that it could not rely on Witnesses WZNA, WNMN, and MNW because there were inconsistencies in their testimonies as to whether Witness FAE was at home during "the events", despite also acknowledging that they saw her in "separate contexts", is also premised on a misreading of the Trial Judgement. First, Witness FAE testified that she was in hiding between April and June 1994,[2382] which was contradicted by Witnesses WZNA and WNMN who said that they saw

[2376] Trial Judgement, paras. 4966, 4983.
[2377] Trial Judgement, paras. 4966, 4967, 4983.
[2378] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[2379] Trial Judgement, para. 4979.
[2380] Trial Judgement, para. 4982.
[2381] The Oxford English Dictionary defines "unconvincing" as "not persuasive, unconvincing; lacking the power to persuade".
[2382] Witness FAE, T. 17 March 2004 pp. 72, 73 (closed session). *See also* Trial Judgement, paras. 4931, 4977.

her at her home and a neighbour's house during that time.[2383] The Trial Chamber noted that these witnesses were inconsistent as to when and where they saw Witness FAE but acknowledged that they may have seen her at different times and on different occasions, and ultimately rejected their evidence on this issue on the basis that it was "unbelievable" that during that time Witness FAE, a Tutsi, would have been at home or visiting a Hutu neighbour's home.[2384] Second, Witness FAE testified that she returned to her home at the beginning of June 1994, after which she saw Nyiramasuhuko distribute the condoms.[2385] This was challenged by Witness MNW's testimony that she did not see Witness FAE in June 1994.[2386] However, as noted by the Trial Chamber, both Witnesses WZNA and WNMN testified to seeing Witness FAE in June 1994.[2387] The Trial Chamber took this into account in concluding that it considered it "impossible to rely on these witnesses to establish that Witness FAE was not in the area in June 1994."[2388]

1025. The Appeals Chamber considers that when the Trial Judgement is read in its context, it is evident that the excerpts of the Trial Judgement relied on by Nyiramasuhuko to substantiate her argument refer to two distinct determinations of the Trial Chamber. Nyiramasuhuko therefore conflates separate issues concerning these witnesses' testimony as to Witness FAE's presence at her home between April and June 1994 and fails to demonstrate any contradiction in the Trial Chamber's analysis of their evidence.[2389]

1026. Based on the foregoing, the Appeals Chamber dismisses Nyiramasuhuko's contention that the Trial Chamber erred in its assessment of, and reliance on, Witness FAE's evidence to find that she distributed condoms in Cyarwa-Sumo Sector in June 1994 to be used by the *Interahamwe* to rape Tutsi women before killing them.

[2383] Witness WZNA, T. 4 April 2005 pp. 33, 34; Witness WNMN, T. 14 June 2005 pp. 41-43 (closed session). *See also* Trial Judgement, paras. 4953, 4960, 4977.
[2384] *See* Trial Judgement, para. 4977.
[2385] Witness FAE, T. 17 March 2004 pp. 72, 73 (closed session). *See also* Trial Judgement, paras. 4932, 4977.
[2386] Witness MNW, T. 10 February 2005 p. 77. *See also ibid.*, pp. 72, 73 (closed session); Trial Judgement, paras. 4945, 4979.
[2387] Witness WZNA, T. 4 April 2005 p. 34; Witness WNMN, T. 14 June 2005 pp. 44, 45 (closed session). *See also* Trial Judgement, paras. 4953, 4960, 4979.
[2388] Trial Judgement, para. 4979 (internal references omitted):

> The Chamber notes that Defence Witnesses MNW, WZNA and WNMN all provided hearsay accounts as to why the allegation is implausible, without any convincing and detailed analyses. Indeed, among the Defence witnesses there are inconsistencies as to when they saw Witness FAE. Witness MNW testified that she did not see Witness FAE in June 1994, whereas Witnesses WZNA and WNMN both testified as to seeing Witness FAE in June 1994. The Chamber considers it impossible to rely on these witnesses to establish that Witness FAE was not in the area in June 1994 or that Nyiramasuhuko did not visit the area at that time.

[2389] Nyiramasuhuko's contentions also ignore the detailed assessment of Witnesses WZNA's, WNMN's, and MNW's evidence undertaken by the Trial Chamber before rejecting it as not credible. *See* Trial Judgement, paras. 4971-4977, 4979-4982.

2. Nyiramasuhuko's Genocidal Intent

1027. Nyiramasuhuko submits that the Trial Chamber erred in law and in fact in finding that her genocidal intent was the only reasonable conclusion to be drawn from the evidence relating to the distribution of condoms at the beginning of June 1994.[2390] In particular, she avers that, although genocidal intent can be inferred, it cannot be split from the *actus reus* and must be assessed with respect to the specific alleged crime, at the alleged time, and in the circumstances alleged.[2391] Thus, in her view, the Trial Chamber erred in using the distribution of condoms at Cyarwa-Sumo Sector to prove her genocidal intent to convict her of genocide committed at the Butare Prefecture Office.[2392] Nyiramasuhuko also contends that her alleged order to rape Tutsi women "because they take away our husbands" could also be reasonably explained by a "willingness to revenge on those women" rather than by the specific intent to destroy, in whole or in part, the Tutsi group.[2393]

1028. The Prosecution responds that the only reasonable conclusion from the totality of the evidence is that Nyiramasuhuko had the specific intent to commit genocide and that Nyiramasuhuko's explicit order to rape Tutsi women before killing them during the distribution of condoms at the beginning of June 1994 unequivocally reveals her genocidal intent.[2394] It also responds that Nyiramasuhuko's argument that the distribution of condoms could not be taken into account in the assessment of her genocidal intent for the crimes committed at different locations and different times is undeveloped and unsupported, and should be summarily dismissed.[2395] The Prosecution adds that there is no evidence to support the alleged other possible inference presented by Nyiramasuhuko and that her argument is based on an isolated and discrete piece of evidence rather than on the totality of the evidence.[2396]

1029. With respect to Nyiramasuhuko's argument that, although genocidal intent can be inferred, it cannot be split from the *actus reus* and must be assessed with respect to the specific alleged crime, at the alleged time, and in the circumstances alleged, the Appeals Chamber recalls that genocidal intent may be inferred, *inter alia*, from evidence of other culpable acts systematically

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[2390] Nyiramasuhuko Notice of Appeal, heading "Ground 27" at p. 43; Nyiramasuhuko Appeal Brief, paras. 896-900.
[2391] Nyiramasuhuko Appeal Brief, para. 899.
[2392] Nyiramasuhuko Appeal Brief, para. 899. Nyiramasuhuko also reiterates that the Trial Chamber erred in contravening its finding that it will not enter a conviction for genocide on the basis of any rapes that occurred and will only assess the alleged order to rape Tutsi women with respect to the count of rape as a crime against humanity, and that, accordingly, she was prejudiced. *See ibid.*, paras. 896-898. The Appeals Chamber recalls that it has already clarified that Nyiramasuhuko was not convicted of genocide on the basis of any rapes and that she was not convicted in relation to her distribution of condoms. *See supra*, Sections IV.B.4, IV.F.1(b).
[2393] Nyiramasuhuko Appeal Brief, para. 900.
[2394] Prosecution Response Brief, paras. 556, 558, 561, 562, 570, 571, 610.
[2395] Prosecution Response Brief, para. 582.
[2396] Prosecution Response Brief, para. 562.

directed against the same group.[2397] The Appeals Chamber recalls that the Trial Chamber convicted Nyiramasuhuko of genocide for ordering killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks.[2398] With respect to Nyiramasuhuko's *mens rea* in relation to the crime of genocide, the Trial Chamber stated the following:

> Moving to the *mens rea* of genocide, it was clear that those staying at the [Butare Prefecture Office] were Tutsis and this fact was widely known throughout the *préfecture.* The *Interahamwe* were armed and forced the defenceless Tutsi refugees to board a Toyota Hilux. Those who refused were killed on the spot. Furthermore, there was a pattern of killing at the [Butare Prefecture Office] itself. There were pits dug which contained those killed at the [Butare Prefecture Office]. The *Interahamwe* were armed with traditional weapons. Ntahobali instructed them to spare no one. Likewise, Nyiramasuhuko issued instructions to rape the women.
>
> In evaluating Nyiramasuhuko's *mens rea* at the [Butare Prefecture Office], the Chamber also considers Nyiramasuhuko's conduct at Nsabimana's swearing-in ceremony on 19 April 1994 […], where she tacitly approved of the inflammatory speeches of President Sindikubwabo and Prime Minister Kambanda, and also her distribution of condoms in June 1994 […], where she urged Hutus to rape Tutsi women. These actions can only be understood as intending to eliminate this group of persons. By attacking this group of wounded and sick Tutsi refugees, and in light of the evidence as a whole, the only reasonable conclusion is that Ntahobali, Nyiramasuhuko and the other *Interahamwe* assailants possessed the intent to destroy, in whole or in substantial part, the Tutsi group.[2399]

1030. The Appeals Chamber notes that Nyiramasuhuko's distribution of condoms and statement evincing her intent to target Tutsi women occurred in the beginning of June 1994. In light of the time elapsed between the Mid-May Attack and this incident, this incident *alone* could not effectively demonstrate Nyiramasuhuko's specific intent when ordering killings of Tutsis at the prefectoral office during the Mid-May Attack.[2400] However, as highlighted previously, the Trial Judgement reflects that the finding of Nyiramasuhuko's genocidal intent when ordering killings at the prefectoral office during the Mid-May Attack – and the Night of Three Attacks – was predicated on her role in the attack that occurred then and there.[2401] In addition, the Trial Chamber also relied on additional circumstantial evidence that Nyiramasuhuko possessed the specific intent to commit genocide from 19 April 1994, when she tacitly approved Kambanda's and Sindikubwabo's Speeches during Nsabimana's Swearing-In Ceremony. Nyiramasuhuko has not demonstrated that the Trial Chamber erred in this regard. To the extent that the Trial Chamber relied on Nyiramasuhuko's distribution of condoms and statement evincing her intent to target Tutsi women as *additional* circumstantial evidence of Nyiramasuhuko's genocidal intent, the Appeals Chamber finds no error in this approach.

[2397] *Rukundo* Appeal Judgement, para. 234; *Blagojević and Jokić* Appeal Judgement, para. 123; *Krstić* Appeal Judgement, para. 33. *See also Jelisić* Appeal Judgement, para. 47; *Semanza* Appeal Judgement, paras. 261, 262; *Kayishema and Ruzindana* Appeal Judgement, para. 159.
[2398] *See supra*, para. 749.
[2399] Trial Judgement, paras. 5870, 5871 (internal references omitted).
[2400] *Cf. Šainović et al.* Appeal Judgement, para. 1035.
[2401] *See supra*, para. 985.

1031. Turning to Nyiramasuhuko's submission that her order to rape Tutsi women could also be reasonably explained by a willingness to take revenge on these women rather than by the specific intent to destroy, in whole or in part, the Tutsi group, the Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred. Indeed, the Appeals Chamber finds that a reasonable trier of fact could have concluded on the basis of the totality of the circumstantial evidence that the only reasonable inference was that Nyiramasuhuko possessed genocidal intent, especially in light of the fact that, during the distribution of condoms, she also uttered that, "after having raped [the Tutsi women,] they should kill all of them" and stated "Let no Tutsi woman survive".[2402] Her submission regarding another possible inference is therefore also dismissed.

3. Conclusion

1032. For the foregoing reasons, the Appeals Chamber dismisses the remaining part of Ground 26 and Ground 27 of Nyiramasuhuko's appeal.

[2402] Trial Judgement, paras. 4985, 5938, 6014.

V. APPEAL OF ARSÈNE SHALOM NTAHOBALI

1033. The Trial Chamber found Ntahobali guilty of committing, ordering, and aiding and abetting genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute in relation to killings perpetrated between April and June 1994 at or near the IRST and the Hotel Ihuliro roadblock, of Tutsis who had sought refuge at the Butare Prefecture Office and the EER as well as for the killing of the Rwamukwaya family.[2403] The Trial Chamber also found Ntahobali guilty of rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for committing, ordering, and aiding and abetting the rapes of Tutsi women at the Hotel Ihuliro roadblock and the Butare Prefecture Office.[2404]

1034. Ntahobali raises challenges related to the fairness of the proceedings, his indictment, the status of Expert Witness Guichaoua, the admission and assessment of his co-accused's evidence, and the assessment of his alibis. He also submits that the Trial Chamber erred in its assessment of the evidence and his responsibility in relation to the crimes perpetrated against Tutsis at the IRST and the Hotel Ihuliro roadblock, to the killing of the Rwamukwaya family, and to the crimes perpetrated against Tutsis who had sought refuge at the Butare Prefecture Office and the EER. Ntahobali further alleges errors regarding the Trial Chamber's findings pertaining to the nexus between the crimes and the armed conflict, the crime of extermination as a crime against humanity, and the crime of persecution as a crime against humanity. The Appeals Chamber will address these contentions in turn.

[2403] Trial Judgement, paras. 5845, 5855, 5876, 5916, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186. *See also supra*, para. 14. The Trial Chamber also determined that Ntahobali bore superior responsibility under Article 6(3) of the Statute for the killing of Ruvurajabo at the Hotel Ihuliro roadblock, the killings and rapes that he ordered at the Butare Prefecture Office as well as the killings that he aided and abetted at or near the EER and took this into account as an aggravating factor in sentencing. *See* Trial Judgement, paras. 5849, 5886, 5917, 5971, 6056, 6086, 6220.
[2404] Trial Judgement, paras. 6080, 6086, 6094, 6185, 6186. *See also supra*, para. 14.

A. Fairness of the Proceedings

1035. Ntahobali raises challenges related to the amendment of Rule 90(G) of the Rules, the admissibility of documentary evidence, and the suspension of his lead investigator.[2405] He also submits that the cumulative effect of the violations of his right to a fair trial irreparably undermined his ability to fully defend himself.[2406] The Appeals Chamber will examine these contentions in turn.

1. Amendment of the Rules (Ground 1.7)

1036. At the 13th plenary session held on 26 and 27 May 2003, Rule 90(G) of the Rules, which addresses the scope of the cross-examination of witnesses, was amended to provide as follows:

> (G) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of the case.
>
> (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
>
> (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.[2407]

1037. On 24 November 2008, Ntahobali requested the Trial Chamber to exclude the evidence of 14 Prosecution witnesses heard before the amendment or, alternatively, to recall the said witnesses for further cross-examination on the basis, *inter alia*, that the amendment of Rule 90(G) of the Rules rendered his trial unfair.[2408] On 19 January 2009, the Trial Chamber denied both requests, holding that Ntahobali had not demonstrated how the amendment of Rule 90(G) of the Rules prejudiced him and how he was prevented from putting his case to Prosecution witnesses during their cross-examination.[2409] The Trial Chamber concluded that the "Defence's right to a full defence

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[2405] Ntahobali Notice of Appeal, paras. 49-52, 64-68, 72-76; Ntahobali Appeal Brief, paras. 119-127, 130, 141-151.
[2406] Ntahobali Notice of Appeal, paras. 77-81; Ntahobali Appeal Brief, paras. 151-157.
[2407] *See* Amendments Adopted at the Thirteenth Plenary (26-27 May 2003), p. 24. Rule 90(G) of the Rules prior to the 2003 amendment read as follows:

> Rule 90: Testimony of Witnesses
> […]
> (G) Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination.

Rule 90(G) of the Rules was amended again on 21 May 2005 but this amendment concerned the French version only. *See* ICTR 15th Plenary Session, 21 May 2005 – Amendments Adopted at the Plenary Session of the Judges, p. 9.
[2408] Ntahobali 24 November 2008 Motion to Recall Witnesses, paras. 18-24, 60-67, 90-106, p. 26. Ntahobali refers to Prosecution Witnesses FAM, TA, QJ, QCB, TN, TK, SJ, SU, QBP, RE, SS, FAP, SD, and QY. *See ibid.*, paras. 100, 105, p. 26. *See also supra*, para. 143.
[2409] 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses, paras. 23, 25-27, p. 6.

ha[d] been safeguarded throughout the proceedings in conformity with the Statute and the Rules, irrespective of amendments which may have taken place."[2410]

1038. Ntahobali submits that the Trial Chamber failed to acknowledge that the application of the amended version of Rule 90(G) of the Rules resulted in prejudice and erred in denying his motion to recall witnesses heard before the said amendment or to exclude their evidence.[2411] Specifically, Ntahobali contends that the Trial Chamber violated his right to a fair trial by applying different procedural rules to the conduct of the cross-examination of witnesses in the course of the trial.[2412] He avers that, until the amendment of Rule 90(G) of the Rules, he was prevented from cross-examining two-thirds of the Prosecution witnesses in an effective and fair manner due to the deficiencies of the rule prior to its amendment.[2413] He contends that, on the other hand, the Prosecution derived a considerable advantage from the provisions of the amended Rule 90(G) of the Rules, as it was permitted under the amended rule to cross-examine fully witnesses called by the Defence.[2414]

1039. In support of his contentions, Ntahobali argues that he was prevented from confronting witnesses with the statements of other witnesses in the case, questioning certain witnesses about their family ties or knowledge of other Prosecution witnesses, and attacking the credibility of Prosecution Witness QCB.[2415] As specific examples, Ntahobali refers to three instances in which he claims the Trial Chamber prevented him from: (i) confronting Prosecution Witness RE with the account given by her sister about Ntahobali's presence at the EER and at the Butare Prefecture Office even though, eventually, the Trial Chamber relied on the evidence of Witness RE to convict him;[2416] (ii) attacking the credibility of Prosecution Witness QCB about the location of roadblocks;[2417] and (iii) cross-examining Prosecution Witness FAM about Ruvurajabo.[2418] He adds

[2410] 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses, para. 23. The Trial Chamber also noted that the request was filed over five years after the entry into force of the amended rule, although it should have been raised at the earliest opportunity pursuant to Rule 5 of the Rules. *See ibid.*, para. 21.
[2411] Ntahobali Notice of Appeal, para. 51; Ntahobali Appeal Brief, paras. 124-126.
[2412] Ntahobali Notice of Appeal, para. 49; Ntahobali Appeal Brief, paras. 119, 124.
[2413] Ntahobali Notice of Appeal, paras. 49, 50; Ntahobali Appeal Brief, paras. 119, 120.
[2414] Ntahobali Notice of Appeal, para. 49; Ntahobali Appeal Brief, para. 124.
[2415] Ntahobali Appeal Brief, para. 122. The Appeals Chamber notes that Ntahobali refers to Grounds 1.3 and 3.12 of his appeal in this respect. However, the Appeals Chamber observes that at no point under these grounds does Ntahobali allege that he was prevented from cross-examining Prosecution witnesses about their knowledge of other Prosecution witnesses on the basis of the previous version of Rule 90(G) of the Rules.
[2416] Ntahobali Appeal Brief, para. 122, *referring to* Witness RE, T. 24 February 2003 pp. 52, 53 (closed session), T. 6 February 2003 pp. 35-37, Trial Judgement, paras. 2660, 2673, 2680-2682, 2707, 3943-3951, 3953, 3956-3958.
[2417] Ntahobali Appeal Brief, para. 122, *referring to* Witness QCB, T. 25 March 2002 pp. 10-15.
[2418] Ntahobali Appeal Brief, para. 122, *referring to* Ntahobali 24 November 2008 Motion to Recall Witnesses, paras. 68-89.

that, in other instances, his counsel clearly had to confine cross-examination to abide by the boundaries set by the Trial Chamber.[2419]

1040. Ntahobali further alleges that, in the Trial Judgement, the Trial Chamber reproached him for not confronting Prosecution witnesses with his alibi during cross-examination, whereas the limitations imposed by the Trial Chamber on cross-examinations at the time prevented him from doing so.[2420] Ntahobali submits that the appropriate remedy is a stay of the proceedings or, alternatively, the exclusion of the evidence that he was prevented from testing during cross-examination or the application of caution towards this evidence by the Appeals Chamber or, in a further alternative, a reduction of his sentence.[2421]

1041. The Prosecution responds that Ntahobali's arguments should be dismissed as untimely and unsupported.[2422] It argues that Ntahobali only refers to two instances where he was disallowed to put questions in cross-examination and does not demonstrate how either of these involves the application of Rule 90(G) of the Rules.[2423] The Prosecution argues that Ntahobali merely repeats on appeal arguments previously raised at trial and fails to demonstrate any discernible error in the 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses warranting the intervention of the Appeals Chamber.[2424]

1042. Ntahobali replies that the question is not whether he could cross-examine the witnesses but whether he suffered prejudice.[2425] He contends that, contrary to the Prosecution's allegation, he listed three examples in his appeal brief, referred to other incidents developed in his motion, and specified that his counsels had to limit their cross-examinations.[2426]

1043. The Appeals Chamber observes that Rule 6(C) of the Rules provides that an amendment of the Rules shall enter into force immediately, but shall not operate to prejudice the rights of the

[2419] Ntahobali Appeal Brief, para. 123.
[2420] Ntahobali Appeal Brief, para. 123, *referring to* Trial Judgement, para. 2584.
[2421] Ntahobali Appeal Brief, para. 127. Ntahobali did not reiterate in his appeal brief his requests for a re-trial or a significant reduction of his sentence. *See* Ntahobali Notice of Appeal, para. 52.
[2422] Prosecution Response Brief, paras. 748, 752. The Prosecution asserts that Ntahobali did not raise contemporaneous objections to the alleged curtailing of his cross-examination of certain witnesses when they allegedly occurred and waited five years after the amendment of Rule 90(G) of the Rules to object. *See idem.*
[2423] Prosecution Response Brief, paras. 749-751.
[2424] Prosecution Response Brief, para. 752.
[2425] Ntahobali Reply Brief, para. 28. Ntahobali further takes issue with the Prosecution's contention that he failed to raise contemporaneous objections stating that, once a decision was taken by the Trial Chamber, his counsel was no longer in a position to challenge that decision and that, after having his arguments rejected by the Trial Chamber, the appropriate remedy was an appeal against judgement, given the absence of a right to interlocutory appeal at the time. *See ibid.*, para. 29.
[2426] Ntahobali Reply Brief, paras. 31, 32.

accused in any pending case.[2427] Accordingly, the pertinent question to be addressed when an amended rule becomes operative in on-going proceedings is whether the amendment will operate to prejudice the rights of the accused.[2428] The Trial Chamber rejected the Ntahobali 24 November 2008 Motion to Recall Witnesses on the merits, noting that Ntahobali had failed to demonstrate how the amendment of Rule 90(G) of the Rules prejudiced him and how he was prevented from putting his case to Prosecution witnesses.[2429]

1044. Ntahobali points to three examples to show that he was prejudiced because the Trial Chamber disallowed questions in the application of Rule 90(G) of the Rules prior to its amendment. In relation to Witness RE, the Appeals Chamber notes that counsel for Ntahobali was not permitted to question the witness on a statement allegedly made by her sister-in-law to an investigator of the Tribunal.[2430] The presiding judge held that counsel could not refer to a statement of another witness not made in testimony before the Trial Chamber as such a statement was untested by cross-examination and could not be verified by the Trial Chamber.[2431] As regards Witness QCB's testimony, the presiding judge intervened in the course of cross-examination by Ntahobali's counsel to ask counsel to explain the relevance of his question suggesting to Witness QCB that he had incorrectly placed the roadblock on a sketch of Butare Town drawn up by the witness in relation to counsel's intended line of questioning, while explicitly stating that the right to cross-examine on the sketch was, as such, not in question.[2432] In the view of the Appeals Chamber, neither of these two examples is premised on an application of an earlier version of Rule 90(G) of the Rules or demonstrates that the proposed line of questioning would have been allowed under the amended version of the rule. These examples do not therefore support Ntahobali's claim that he was prejudiced by the application of the previous version of the rule.

1045. With respect to Witness FAM's testimony, the Appeals Chamber observes that Ntahobali does not put forward his argument with any specific references but merely refers to the 24 November 2008 Motion to Recall Witnesses in general terms.[2433] The Appeals Chamber recalls that an appellant is required to substantiate his arguments in his appeal brief and not by reference to

[2427] The Appeals Chamber notes that it has previously stated that every amendment enters into force immediately and, "whether substantive or procedural, […] applies to all cases of which the Tribunal is then or may in future be seised, the sole qualification being that the amendment, of whatever kind, must not 'operate to prejudice the rights of the accused in any pending case'." *See* Appeal Decision on Continuation of Trial, para. 14.
[2428] *See* Appeal Decision on Continuation of Trial, para. 14.
[2429] 19 January 2009 Decision on Exclusion of Evidence and Recall of Witnesses, para. 23.
[2430] Witness RE, T. 26 February 2003 pp. 35-37.
[2431] Witness RE, T. 26 February 2003 pp. 36, 37.
[2432] Witness QCB, T. 25 March 2002 pp. 10-15. The Appeals Chamber observes that Ntahobali's counsel questioned Witness QCB at length about the sketch of Butare Town drawn up by the witness and was not, as Ntahobali suggests, prevented from questioning Witness QCB in relation to the locations of the roadblocks in Butare Town. *See* Witness QCB, T. 21 March 2002 pp. 107-138, T. 25 March 2002 pp. 9-36.
[2433] *See* Ntahobali Appeal Brief, para. 122, fn. 212.

submissions made elsewhere.[2434] Ntahobali also does not substantiate his argument that counsel had to restrict their cross-examination of Prosecution witnesses by virtue of the Trial Chamber's application of Rule 90(G) of the Rules prior to its amendment.

1046. The Appeals Chamber observes that under this ground of appeal, Ntahobali largely repeats the arguments he raised before the Trial Chamber in his motion of 24 November 2008.[2435] A party cannot simply repeat arguments on appeal that did not succeed at trial in the hope that the Appeals Chamber will consider them afresh.[2436] Ntahobali does not demonstrate that the Trial Chamber's rejection of his arguments constituted an error warranting the intervention of the Appeals Chamber. Furthermore, the Appeals Chamber considers that none of Ntahobali's arguments supports his claim that the Prosecution was advantaged by the amendment of Rule 90(G) of the Rules.

1047. As for Ntahobali's argument that the Trial Chamber reproached him for not having raised his alibi with Prosecution witnesses in cross-examination, the Appeals Chamber recalls that the Trial Chamber found that: "Ntahobali made no mention of [his] alibi [for the period 26 or 27 May to 5 June 1994] prior to 29 September 2005. The Ntahobali Defence did not mention the alibi in its Pre-Trial Brief, opening statement or in its cross-examination of any of the Prosecution witnesses."[2437] The Appeals Chamber considers that this evaluation by the Trial Chamber concerns Ntahobali's failure to put forth timely notice of his alibi and does not concern, as Ntahobali claims, his alleged failure to address his alibi with Prosecution witnesses as such.

1048. Accordingly, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in denying the Ntahobali 24 November 2008 Motion to Recall Witnesses and dismisses Ground 1.7 of Ntahobali's appeal.

2. Admissibility of Documentary Evidence (Ground 1.10)

1049. Ntahobali submits that the Trial Chamber imposed a set of rules on the admissibility of documentary evidence which contravened the Rules and the Appeals Chamber's directions, and denied him the opportunity to produce documentary evidence in support of his defence.[2438] He further contends that the Trial Chamber erred in law in applying the rules of admissibility of

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[2434] *See* Practice Direction on Formal Requirements on Appeal, para. 4; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("*Karadžić* Appeal Decision"), para. 13 and references cited therein; *Nshogoza* Appeal Judgement, para. 18.
[2435] *See* Ntahobali Appeal Brief, paras. 119, 122, 123, *referring to* Ntahobali 24 November 2008 Motion to Recall Witnesses, paras. 68-92.
[2436] *See Karera* Appeal Judgement, para. 86; *Semanza* Appeal Judgement, para. 9.
[2437] Trial Judgement, para. 2584.
[2438] Ntahobali Notice of Appeal, para. 64.

documentary evidence in a manner contrary to the rules established by the Appeals Chamber, which prevented him from mounting a full defence and caused him prejudice.[2439]

1050. The Prosecution did not respond to these submissions.[2440]

1051. In the absence of identification of the specific findings challenged and considering that Ntahobali's submissions are not substantiated, the Appeals Chamber dismisses Ground 1.10 of Ntahobali's appeal without further consideration.

3. Suspension of Lead Investigator (Ground 1.12)

1052. On 16 July 2001, the Registrar suspended Thaddée Kwitonda, Ntahobali's lead investigator, on the basis that he was under investigation by the Prosecution.[2441] On 22 October 2001, Ntahobali orally moved for an adjournment of the proceedings.[2442] His request for adjournment was denied.[2443] The same day, Ntahobali moved the Trial Chamber to reinstate Thaddée Kwitonda as investigator on his Defence team.[2444] On 14 December 2001, the Trial Chamber found that the issue of reinstatement of a suspended investigator was an administrative matter resting with the Registry and accordingly declared Ntahobali's motion inadmissible.[2445] Thereafter, Ntahobali successively presented two candidates for Thaddée Kwitonda's replacement to the Registrar.[2446] The Registrar declined to appoint either of these two candidates.[2447] On 21 October 2002, Ntahobali sought judicial review of the Registrar's decisions by the President of the Tribunal and requested the

[2439] Ntahobali Notice of Appeal, paras. 65, 66. Ntahobali explained that he could not develop Ground 1.10 in his appeal brief due to the word limit. *See* Ntahobali Appeal Brief, para. 130.
[2440] The Prosecution explained that it considers that, by not presenting arguments in his appeal brief, Ntahobali had abandoned Ground 1.10 of his appeal. *See* Prosecution Response Brief, para. 753.
[2441] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Registrar's Representations Pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Defence's Extremely Urgent Motion for the Reinstatement of Suspended Investigator-Mr. Thaddée Kwitonda, 29 October 2001, para. 3, Annex A.
[2442] T. 22 October 2001 pp. 23-27.
[2443] T. 22 October 2001 pp. 31, 32 ("22 October 2001 Oral Decision").
[2444] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Extremely Urgent Motion for the Reinstatement of Suspended Investigator-Mr. Thaddée Kwitonda, 22 October 2001.
[2445] *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Ntahobali's Extremely Urgent Motion for the Re-instatement of Suspended Investigator, Mr. Thaddée Kwitonda, 14 December 2001 ("14 December 2001 Decision"), para. 17.
[2446] *See* Ntahobali Notice of Appeal, para. 74. *See also The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Extremely Urgent Motion from Arsène Shalom to Review Decisions of the Registrar and Obtain the Appointment of an Investigator, 21 October 2002 ("Ntahobali Motion for Appointment of Investigator"), Annexes R-7, R-13.
[2447] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, The President's Decision on the Application by Arsène Shalom Ntahobali for Review of the Registrar's Decision Pertaining to the Assignment of an Investigator, signed on 13 November 2002, filed on 14 November 2002 ("President Review Decision"), para. 11.

President to order the assignment of one of his proposed candidates as investigator.[2448] On 13 November 2002, the President dismissed Ntahobali's request on the merits.[2449]

1053. Ntahobali submits that the Trial Chamber erred in fact and in law in denying his oral motion for an adjournment in violation of his right to have adequate time and facilities for the preparation of his defence as enshrined in Article 20(4)(b) of the Statute and in refusing to exercise jurisdiction when he moved for the reinstatement of his investigator in October 2001.[2450] He argues that investigators play a critical role during the trial proceedings and that the Registrar's decision to suspend his lead investigator impaired his ability to conduct meaningful cross-examinations, which encroached upon his fair trial rights.[2451]

1054. Ntahobali further submits that the Registrar's subsequent refusal to appoint either of the two candidates he proposed was arbitrary, unfounded, affected the fairness of the proceedings, and caused him serious prejudice as he was left without an investigator for more than 18 months.[2452] He also contends that the President erred in refusing to review the Registrar's decisions and in failing to acknowledge the violation of his right to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him as enshrined in Article 20(4)(e) of the Statute.[2453]

1055. According to Ntahobali, the decisions of the Registrar, the Trial Chamber, and the President affected the equality of arms and paralysed the work of his Defence team until an advanced stage of the proceedings.[2454] Ntahobali submits that the Prosecution witnesses whom he could not fully cross-examine as a result of the absence of his investigator should not be relied upon against him.[2455] In the alternative, he requests that the Appeals Chamber take all measures it deems necessary to remedy the prejudice he suffered.[2456]

1056. The Prosecution responds that Ntahobali's request for an adjournment was not premised on the fact that his investigator had been suspended, and that Ntahobali's vague claim that the Trial Chamber's decision breached his rights under Article 20(4)(b) of the Statute does not meet the burden of demonstrating that the Trial Chamber erred.[2457] It argues that Ntahobali fails to explain

[2448] Ntahobali Motion for Appointment of Investigator, paras. 2, 88, p. 15.
[2449] President Review Decision, paras. 13, 14, p. 6.
[2450] Ntahobali Notice of Appeal, para. 73; Ntahobali Appeal Brief, paras. 142, 143, *referring to* 22 October 2001 Oral Decision, 14 December 2001 Decision.
[2451] Ntahobali Appeal Brief, para. 143. *See also ibid*., paras. 148, 149.
[2452] Ntahobali Notice of Appeal, paras. 74, 75; Ntahobali Appeal Brief, paras. 144, 145, 147-149.
[2453] Ntahobali Notice of Appeal, paras. 74, 75; Ntahobali Appeal Brief, para. 146.
[2454] Ntahobali Appeal Brief, para. 147.
[2455] Ntahobali Appeal Brief, para. 150.
[2456] Ntahobali Appeal Brief, para. 150.
[2457] Prosecution Response Brief, para. 763.

how the Trial Chamber erred in the 14 December 2001 Decision and that this ground of his appeal should be summarily dismissed.[2458]

1057. Ntahobali replies that it was clear from the record that the adjournment was requested on the basis, in part, of the absence of an investigator.[2459]

1058. As Ntahobali submits, his oral request for adjournment of 22 October 2001 was partly based on the suspension of his lead investigator.[2460] The Appeals Chamber acknowledges the critical role investigators play to Defence investigations. However, it considers that Ntahobali fails to substantiate his claim that the Trial Chamber erred in denying his request. Ntahobali generally emphasises the important role played by investigators and the fact that, without an investigator at his disposal, he could not conduct meaningful cross-examinations, without showing that the Trial Chamber erred in its reasoning and addressing the particular circumstances that led to the 22 October 2001 Oral Decision. The Appeals Chamber therefore declines to consider this part of Ntahobali's challenge any further.

1059. Similarly, Ntahobali does not substantiate his contention that the Trial Chamber erred in its 14 December 2001 Decision in declining to exercise jurisdiction to review the Registrar's decision to suspend Thaddée Kwitonda. The Appeals Chamber is mindful that, pursuant to its statutory obligation to ensure the fairness of the proceedings before it, any chamber has the inherent power to review administrative decisions where such decisions are closely related to issues involving the fairness of the proceedings.[2461] Ntahobali, however, only makes general submissions with regard to the alleged resulting prejudice without developing any argument to demonstrate that the Trial Chamber erred in declining to exercise its inherent power in this particular instance.

1060. Turning to Ntahobali's challenges against the Registrar's refusal to appoint the investigators he proposed and the President Review Decision, the Appeals Chamber notes that Ntahobali fails to

[2458] Prosecution Response Brief, para. 764.
[2459] Ntahobali Reply Brief, para. 40.
[2460] Ntahobali requested an adjournment of the trial in order for his newly appointed counsel to prepare his defence. Ntahobali's counsel submitted that following his appointment in late July 2001 and the remission of parts of the trial record by Ntahobali's former counsel, large parts of the case file were in the custody of Ntahobali at the detention unit and thus inaccessible to him for some time. Counsel submitted that this fact, coupled with the suspension of Ntahobali's lead investigator, warranted an adjournment so as to enable him to familiarise himself with the trial record and prepare Ntahobali's defence. *See* T. 22 October 2001 pp. 20-26.
[2461] *See*, *e.g.*, *In Re. André Ntagerura*, Case No. ICTR-99-46-A28, Decision on Motion for Leave to Appeal the President's Decision of 31 March 2008 and the Decision of Trial Chamber III Rendered on 15 May 2008, 11 September 2008, para. 12; *Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-R, Decision on Hassan Ngeze's Motions of 17 June 2008 and 10 July 2008, 24 July 2008, p. 3, fn. 5; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006 ("*Nahimana et al.* 23 November 2006 Decision"), para. 9; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Marriage, 6 December 2005, p. 6139/H (Registry pagination).

specify any instance on the trial record or the efforts he made, if any, to bring the matter of the Registrar's alleged arbitrary decisions and the President's alleged erroneous decision to the attention of the Trial Chamber. The Appeals Chamber recalls that it is settled jurisprudence that if a party raises no objection to a particular issue before the trial chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[2462]

1061. Nevertheless, the Appeals Chamber considers that, in stating in its 14 December 2001 Decision that it could not legally be seised of the matter regarding the reinstatement of the suspended investigator,[2463] the Trial Chamber may have given Ntahobali the impression that it would not entertain a motion for the review of decisions regarding the appointment of defence investigators *per se*. The Appeals Chamber is of the view that these circumstances justify its examination of the merits of Ntahobali's challenges against the Registrar's decisions and the President Review Decision despite Ntahobali's failure to raise his challenges before the Trial Chamber.

1062. In relation to the President Review Decision, the Appeals Chamber observes that Ntahobali simply asserts that the decision was erroneous and caused him prejudice without identifying the alleged error. The Appeals Chamber therefore dismisses Ntahobali's contention without further consideration.

1063. With respect to the Registrar's decisions, the Appeals Chamber recalls that in the absence of established unreasonableness, there can be no interference with the margin of appreciation of the facts or merits underlying the administrative decision to which the maker of such an administrative decision is entitled.[2464] The onus of persuasion rests with the party contesting the administrative decision.[2465] In the instant case, Ntahobali takes issue with the outcome of the Registrar's assessment of his candidates, but fails to identify the alleged error in the Registrar's exercise of his discretionary power to appoint investigators at the expense of the Tribunal. His claim is therefore dismissed.

[2462] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 31; *Musema* Appeal Judgement, paras. 127, 341; *Kambanda* Appeal Judgement, para. 25.
[2463] 14 December 2001 Decision, para. 17 ("in view of the administrative powers and responsibilities of the Registry in organising and appointing Defence investigators, the Chamber finds that the issue of re-instatement of a suspended Investigator is an administrative matter resting with the Registry. The Chamber finds that it cannot be legally seized of the matter raised by the Defence and declares the Motion inadmissible.").
[2464] *Nahimana et al.* 23 November 2006 Decision, para. 9, *quoting Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Review of Registrar's Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003 ("*Kvočka et al.* Appeal Decision"), para. 13.
[2465] *Kvočka et al.* Appeal Decision, para. 14.

1064. As Ntahobali has failed to substantiate any of his challenges under Ground 1.12 of his appeal, the Appeals Chamber dismisses this ground of his appeal in its entirety.

4. Cumulative Effect of the Violations (Ground 1.13)

1065. Ntahobali submits that the cumulative effect of the violations of his right to a fair trial irreparably undermined his ability to rebut Prosecution evidence and fully and fairly defend himself.[2466] Specifically, he argues that even if the Appeals Chamber were to consider that the violations did not individually warrant a remedy, the cumulative effect of the delays incurred, the multiple violations of the Prosecution's disclosure obligations, the impossibility of conducting effective investigations in the absence of investigators, the refusal to recall witnesses, the Prosecution's instructions to witnesses to lie, the impossibility of effectively cross-examining Prosecution witnesses in view of the strict application of Rule 90(G) of the Rules, the fact that Judge Bossa could not observe several key witnesses, and the addition of a witness at the close of the Prosecution case, warrant a stay of proceedings or a significant reduction in sentence.[2467] In the alternative, Ntahobali argues that all evidence relating to these violations should be excluded.[2468]

1066. The Prosecution responds that, as Ntahobali provides no references for most of his contentions under this ground or fails to show how his contentions are relevant and essentially repeats "the meritless fair trial allegations" discussed in his other grounds, this ground of appeal should be summarily dismissed.[2469] The Prosecution argues that Ntahobali also fails to demonstrate any error on the Trial Chamber's part that occasioned a miscarriage of justice.[2470]

1067. The Appeals Chamber recalls that it has found no violation of Ntahobali's fair trial rights in relation to his allegations regarding: (i) the suspension of his lead investigator and the Registrar's refusal to appoint the investigators he proposed; (ii) the refusal to recall witnesses; (iii) the scope of cross-examination under former Rule 90(G) of the Rules; (iv) the fact that Judge Bossa could not observe several key witnesses; and (v) the addition of Witness FA at the close of the Prosecution case.[2471]

[2466] Ntahobali Appeal Brief, paras. 152, 153. In his notice of appeal, Ntahobali also argued that the Trial Chamber was aware of many irregularities raised in this case but erred in failing or refusing to find that they individually or collectively prejudiced him. *See* Ntahobali Notice of Appeal, paras. 77, 78. As Ntahobali has failed to reiterate and substantiate this allegation in his appeal brief, the Appeals Chamber declines to consider it.
[2467] Ntahobali Notice of Appeal, paras. 79, 80; Ntahobali Appeal Brief, paras. 151, 153, 154.
[2468] Ntahobali Appeal Brief, paras. 155, 156. In his notice of appeal, Ntahobali also submitted that the Appeals Chamber should award him compensation for the violation of his fair trial rights in conjunction with the other violations raised in his notice of appeal. *See* Ntahobali Notice of Appeal, para. 81.
[2469] Prosecution Response Brief, para. 765.
[2470] Prosecution Response Brief, para. 765.
[2471] *See supra*, Sections III.C, III.D, III.G, V.A.1, V.A.3.

1068. In addition, although the Appeals Chamber found that the Trial Chamber erred in failing to disclose the *Amici Curiae* Reports related to the allegations of false testimony to Ntahobali in a timely manner, the Appeals Chamber concluded that this violation did not cause him prejudice and did not find that Ntahobali's fair trial right had been violated as the result of the Prosecution's alleged "instructions to witnesses to lie."[2472] While the Appeals Chamber also found that the Trial Chamber erred in its 24 October 2001 Oral Decision which denied Ntahobali's request to postpone the cross-examination of Witness TA based on the Prosecution's failure to comply with its disclosure obligations, it concluded that Ntahobali had not demonstrated that the error resulted in any prejudice.[2473]

1069. With respect to the alleged delays incurred, the Appeals Chamber considered that a remedy for Ntahobali's violation of his right to initial appearance without delay had been granted by the Trial Chamber and that Ntahobali had not demonstrated that this remedy was not proportionate to the gravity of the harm he suffered.[2474] The Appeals Chamber will determine below in Section XII the appropriate remedy for the prejudice resulting from the violation of Ntahobali's right to be tried without undue delay.[2475]

1070. In light of the foregoing, the Appeals Chamber considers that there is no cumulative prejudice to assess as a result of Ntahobali's allegations of violation of his fair trial rights and that no further remedy is warranted. Moreover, the Appeals Chamber is not persuaded that the cumulative effect of the violations of his fair trial rights recognised by the Trial Chamber and the Appeals Chamber warrant further remedy than the remedies granted by the Trial Chamber and the Appeals Chamber. Accordingly, the Appeals Chamber dismisses Ground 1.13 of Ntahobali's appeal.

[2472] *See supra*, paras. 317, 318, 339.
[2473] *See supra*, Section III.F.
[2474] *See supra*, Section III.A.2.
[2475] *See supra*, Section III.K.

B. Indictment (Grounds 2.1 to 2.7)

1071. Ntahobali submits that the Trial Chamber erred in authorising the Prosecution to amend his indictment to add charges of superior responsibility, that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.[2476] Ntahobali requests that the Appeals Chamber overturn all his convictions.[2477]

1072. The Appeals Chamber will first examine Ntahobali's contention related to the amendment of the indictment, before turning to his submissions related to notice of the allegations pertaining to the IRST, the Hotel Ihuliro roadblock, the killing of the Rwamukwaya family, the Butare Prefecture Office, the EER, and to his superior responsibility. The Appeals Chamber will conclude this section by discussing Ntahobali's allegation of prejudice resulting from the cumulative effects of the defects in the Indictment.

1. Amendment of the Indictment (Ground 2.6)

1073. As noted in relation to Ground 3 of Nyiramasuhuko's appeal,[2478] the Prosecution was granted leave on 10 August 1999 to amend the indictment against Nyiramasuhuko and Ntahobali, which included adding six new counts, consolidating two existing ones in a single count, and adding in relevant counts the allegation that Nyiramasuhuko and Ntahobali were responsible pursuant to Article 6(3) of the Statute.[2479] In deciding to grant the Prosecution leave to amend the indictment as requested, the Trial Chamber held that there was no need to inquire whether or not a *prima facie* case had been established in support of the new counts since it had only been seised of a motion to amend the indictment pursuant to Rule 50 of the Rules.[2480] The Trial Chamber only satisfied itself that the Prosecution "provided sufficient grounds both in fact and in law".[2481]

[2476] Ntahobali Notice of Appeal, paras. 82-151; Ntahobali Appeal Brief, paras. 158-356. To facilitate readibility, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nyiramasuhuko and Ntahobali Indictment.
[2477] Ntahobali Notice of Appeal, paras. 86, 100, 105, 112, 118, 122, 131, 137, 142, 145, 146, 151; Ntahobali Appeal Brief, paras. 197, 202, 219, 246, 271, 277, 293, 299, 300, 303, 310, 318, 324, 330. *See also* Ntahobali Appeal Brief, para. 356.
[2478] *See supra*, Section IV.B.1(a).
[2479] *See* 10 August 1999 Oral Decision, pp. 5, 6; 10 August 1999 Decision, p. 6. *See also* Trial Judgement, para. 6302.
[2480] 10 August 1999 Decision, para. 17.
[2481] 10 August 1999 Oral Decision, p. 4. *See also ibid.*, p. 3; 10 August 1999 Decision, paras. 16-18. In the Trial Judgement, the Trial Chamber reiterated that it "was not required to make a *prima facie* determination in considering the Prosecution's Motion to add a count of rape against Nyiramasuhuko in 1999" since this requirement was added to Rule 50 in 2004. *See* Trial Judgement, para. 2157.

1074. Ntahobali submits that the Trial Chamber erred in granting the Prosecution leave to amend the indictment to add new counts and to charge him pursuant to Article 6(3) of the Statute.[2482] Specifically, he contends that the Trial Chamber erred in law in considering that there was no need to inquire whether or not a *prima facie* case had been established prior to authorising the addition of the charge of superior responsibility. He argues that, although at the time Rule 50 of the Rules did not textually require the verification of the existence of *prima facie* evidence, the Trial Chamber was nonetheless obliged to proceed with some analysis in order to authorise the addition of new charges and that, holding otherwise, would render the objective of Rule 50 of the Rules meaningless and violate the principle of presumption of innocence.[2483] He posits that, in the absence of any evidence to justify the Prosecution's request to amend the indictment, it was erroneous for the Trial Chamber to grant it.[2484]

1075. Ntahobali further submits that the Trial Chamber violated its obligation to provide a reasoned opinion by failing to consider his arguments regarding the addition of the charge of superior responsibility and by failing to mention how the amendment sought met the relevant requirements.[2485] He argues that, by merely referring to the Prosecution's submissions, which did not provide any explanation as to the reason why the addition of superior responsibility was justified, the Trial Chamber could not have validly justified its decision.[2486] For these reasons, he requests that the findings of superior responsibility be reversed and that his sentence be revised.[2487]

1076. The Prosecution responds that, at the time the indictment was amended to include allegations of Ntahobali's superior responsibility, Rule 50 of the Rules did not require that a trial chamber make a determination whether *prima facie* evidence supported the requested amendment and that the Trial Chamber consequently did not err in law in following the rule as it was at that

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[2482] Ntahobali Notice of Appeal, para. 146; Ntahobali Appeal Brief, para. 319. *See also* Ntahobali Appeal Brief, para. 324; Ntahobali Reply Brief, para. 163. Ntahobali adds that the addition of his responsibility under Article 6(3) of the Statute amounted to a new charge. *See* Ntahobali Appeal Brief, para. 322. In his notice of appeal, Ntahobali primarily argued that the Trial Chamber erred in failing to recognise the principle that the Prosecution should know its case before trial. *See* Ntahobali Notice of Appeal, paras. 143-145. Ntahobali, however, has failed to reiterate and substantiate this allegation in his appeal brief. Therefore, the Appeals Chamber considers that Ntahobali has abandoned this allegation.

[2483] Ntahobali Appeal Brief, paras. 321, 322 (French), *referring to Kabiligi* 8 October 1999 Decision, Separate and Concurring Opinion of Judge Dolenc. *See also* Ntahobali Reply Brief, para. 161, *referring to Bizimungu et al.* 12 February 2004 Appeal Decision, Individual Opinion of Judge Pocar, paras. 1-6. Ntahobali also argues that the Prosecution acknowledged that it had to demonstrate that the proposed amendments were justified in light of the evidence. *See* Ntahobali Appeal Brief, para. 323, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Brief in Support of Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998, para. 3(b).

[2484] Ntahobali Appeal Brief, paras. 320, 324 (French). *See also ibid.*, para. 329.

[2485] Ntahobali Appeal Brief, paras. 326, 327, *referring to* 10 August 1999 Decision, para. 14, *Jean Uwinkindi v. The Prosecutor*, Case No. ICTR-01-75-AR72(C), Decision on Defence Appeal Against the Decision Denying Motion Alleging Defects in the Indictment, 16 November 2011 ("*Uwinkindi* Appeal Decision"), para. 20.

[2486] Ntahobali Appeal Brief, paras. 328, 329.

[2487] Ntahobali Appeal Brief, paras. 324, 330. *See also* Ntahobali Notice of Appeal, paras. 145, 146.

time.[2488] It contends that Ntahobali's arguments are in any event irrelevant because he does not show how he was prejudiced by the Trial Chamber observing the applicable law or by the alleged lack of reasoned opinion.[2489]

1077. In the section addressing Ground 3 of Nyiramasuhuko's appeal, the Appeals Chamber has already addressed and rejected similar arguments raised by Nyiramasuhuko.[2490] There, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, concluded that the allegation that the Trial Chamber erred in law by not requiring, at the time, the Prosecution to present a *prima facie* case in support of the new counts was without merit.[2491] Ntahobali's submissions in this regard do not raise any additional arguments in this respect and the Appeals Chamber, Judge Pocar and Judge Liu dissenting, likewise dismissed them.

1078. As regards Ntahobali's contention that the Trial Chamber violated its obligation to provide a reasoned opinion, the Appeals Chamber notes that the Trial Chamber's decision to authorise the amendment of the indictment clearly reflects consideration of Ntahobali's submissions.[2492] Recalling that, when an appellant alleges on appeal that his right to a fair trial has been infringed, he must not only prove that the trial chamber violated a provision of the Statute or the Rules but also that this violation caused prejudice,[2493] the Appeals Chamber finds that Ntahobali also fails to show how the alleged lack of explanation of the Trial Chamber for its decision to reject his submissions has any impact on the outcome of the decision. Similarly, the Appeals Chamber fails to see how any error regarding the Trial Chamber's articulation of its reasoning for concluding that it was satisfied that there was a "sufficient factual and legal basis" for granting the requested amendments[2494] would have caused prejudice to Ntahobali. In the absence of any demonstrated prejudice, the Appeals Chamber dismisses Ntahobali's contentions pertaining to the violation of his right to a reasoned opinion.

1079. For the foregoing reasons, the Appeals Chamber, Judge Pocar and Judge Liu dissenting, dismisses Ntahobali's contention related to the amendment of the indictment.

[2488] Prosecution Response Brief, paras. 842, 843. The Prosecution adds that the Appeals Chamber upheld convictions for charges added to indictment pursuant to Rule 50 of the Rules where the trial chamber made no finding that *prima facie* evidence existed. *See idem*, *referring to Nahimana et al*. Appeal Judgement, paras. 390-393.
[2489] Prosecution Response Brief, para. 843. In his reply brief, Ntahobali argues that his prejudice is evident since the Trial Chamber took into account his superior responsibility in sentencing. *See* Ntahobali Reply Brief, para. 162.
[2490] *See supra*, Section IV.B.1(a).
[2491] *See supra*, para. 450.
[2492] 10 August 1999 Oral Decision, pp. 2, 3; 10 August 1999 Decision, paras. 14, 16.
[2493] *See*, *e.g.*, *Ndindiliyimana et al.* Appeal Judgement, para. 43; *Šainović et al*. Appeal Judgement, para. 29; *Gatete* Appeal Judgement, para. 18; *Galić* Appeal Judgement, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119.
[2494] 10 August 1999 Decision, paras. 1, 3, 18, 23. *See also* 10 August 1999 Oral Decision, pp. 2-4.

2. Institut de Recherche Scientifique et Technique (Ground 2.1)

1080. Based on Prosecution Witness QCB's testimony, the Trial Chamber found that, on 21 April 1994, Ntahobali participated in the abduction of approximately 40 Tutsis at the Rugira roadblock and ordered the *Interahamwe* present at the roadblock to take them to a location in Butare Town between the IRST and the Laboratory[2495] to join other Tutsis who had been arrested and transported there.[2496] The Trial Chamber found that, at that location, Ntahobali issued orders to the *Interahamwe* to kill the Tutsis, that his orders were followed, and that approximately 200 Tutsis were killed.[2497] The Trial Chamber convicted Ntahobali of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) pursuant to Article 6(1) of the Statute for ordering these killings.[2498]

1081. In summarising the Prosecution case against Ntahobali with respect to this allegation, the Trial Chamber referred to paragraphs 6.15 and 6.35 of the Indictment.[2499] It found that the allegation concerning Ntahobali's responsibility for crimes committed at the IRST was not specifically pleaded in the Indictment and that the Indictment was therefore defective in this regard.[2500] However, the Trial Chamber determined that this defect was cured through post-indictment communications.[2501] It concluded that "Ntahobali was reasonably able to understand the nature of the charges against him" and that he suffered no prejudice in the preparation of his defence.[2502]

[2495] For the purposes of clarity, the Appeals Chamber will, as the Trial Chamber did in the Trial Judgement, generally refer to the location "between the IRST and the Laboratory" as the "IRST".
[2496] Trial Judgement, paras. 1475, 1480. *See also ibid*., para. 5782.
[2497] Trial Judgement, para. 1480. *See also ibid*., para. 5782.
[2498] Trial Judgement, paras. 5786, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186. During the appeals hearing, Ntahobali argued that, according to paragraph 1480 of the Trial Judgement, he was convicted of two incidents in relation to the IRST, namely: (i) his participation in the abduction of approximately 40 Tutsis at the Rugira roadblock and their transfer to the IRST to be killed; and (ii) his orders to take the Tutsis stopped at the roadblock to the IRST and kill them. *See* AT. 15 April 2015 pp. 28-30. The Appeals Chamber finds that, read as a whole, the Trial Judgement clearly reflects that Ntahobali was convicted on the basis of the orders he gave at the IRST, which resulted in the killing of approximately 200 Tutsis and that the events at the Rugira roadblock did not serve as a separate basis for conviction.
[2499] Trial Judgement, para. 1457, fns. 3495, 3496. Paragraphs 6.15 and 6.35 of the Nyiramasuhuko and Ntahobali Indictment read as follows:

> 6.15 On 27 April 1994, the Interim Government ordered roadblocks to be set up, knowing that the roadblocks were being used to identify the Tutsi and their "accomplices" for the purpose of eliminating them.
>
> 6.35 From April to July 1994, Arsène Shalom Ntahobali also travelled throughout Butare *préfecture* in the search for the Tutsi. When the victims were located, Arsène Shalom Ntahobali abducted them and took them to various locations, where they were executed.

[2500] Trial Judgement, para. 1460.
[2501] Trial Judgement, paras. 1461-1464.
[2502] Trial Judgement, para. 1464. *See also ibid*., para. 5787.

1082. Ntahobali submits that his responsibility for the abductions of Tutsis at the Rugira roadblock and the killings perpetrated at the IRST was not pleaded in the Indictment and that such defect was neither curable nor cured.[2503] The Prosecution responds that Ntahobali had sufficient notice that he was charged with ordering the killings of Tutsis perpetrated at the IRST.[2504]

1083. As noted by the Trial Chamber, paragraph 6.15 of the Indictment was not relied upon in support of any counts in the charging section of the Indictment.[2505] Paragraph 6.35 of the Indictment, conversely, was relied upon in support of, *inter alia*, Counts 2, 6, 8, and 10 pursuant to Articles 6(1) and 6(3) of the Statute.[2506] However, in the context of the killings at the IRST, the Appeals Chamber is of the view that paragraph 6.35 is overly broad given the expansive date range and the Prosecution's failure to specify therein the location and the circumstances of this event, Ntahobali's role in the killings, and the identity of the physical perpetrators of the killings. This information was not provided anywhere else in the Indictment. While the Indictment clearly indicates that Ntahobali was alleged to have led a group of *Interahamwe*, exercised authority over *Interahamwe* militiamen in Butare Prefecture during the relevant events, and "organized, ordered, and participated" in massacres,[2507] it is vague as to which form or forms of responsibility under Article 6(1) of the Statute Ntahobali was specifically charged with in relation to paragraph 6.35. The Appeals Chamber therefore concurs with the Trial Chamber that the Indictment was defective in relation to the allegation concerning the IRST. The question before the Appeals Chamber is whether the Trial Chamber erred in finding that the defects were curable and, if not, whether the Trial Chamber erred in finding that the defects were cured.

(a) Whether the Defects Were Curable

1084. Ntahobali submits that the defects in the Indictment in relation to the allegation concerning the IRST could not be cured as this allegation constituted a separate charge which should have been pleaded in the Indictment.[2508] In particular, he contends that the Trial Chamber erroneously relied on paragraph 6.35 of the Indictment as the basis of his convictions for the crimes committed at the IRST as: (i) reading the Indictment as a whole, paragraph 6.35 could only be understood as relating to the Butare University Hospital; (ii) the Trial Chamber never mentioned that the events at the IRST were related to paragraph 6.35 when denying his request for acquittal under Rule 98*bis* of the

[2503] Ntahobali Notice of Appeal, paras. 83-86; Ntahobali Appeal Brief, paras. 158-179. *See also* AT. 15 April 2015 pp. 28-30; AT. 16 April 2015 pp. 23-26.
[2504] Prosecution Response Brief, paras. 766-776. *See also* AT. 15 April 2015 pp. 63-69.
[2505] Trial Judgement, fn. 3495; Nyiramasuhuko and Ntahobali Indictment, pp. 39-44.
[2506] Nyiramasuhuko and Ntahobali Indictment, pp. 39-44.
[2507] Nyiramasuhuko and Ntahobali Indictment, paras. 4.4, 4.5, 5.1.
[2508] Ntahobali Notice of Appeal, para. 85; Ntahobali Appeal Brief, para. 159. *See also* Ntahobali Appeal Brief, para. 165.

Rules but, instead, concluded that this paragraph only concerned events taking place *outside* Butare Town; and (iii) the Prosecution itself did not indicate that Witness QCB's evidence was related to paragraph 6.35 when responding to Ntahobali's request for acquittal.[2509] In the alternative, Ntahobali submits that the addition of an entire massacre site through material facts subsequently disclosed led to a radical transformation of the case against him which caused him prejudice.[2510] In his view, the omission of the IRST allegation from the Indictment, the body of the Prosecution Pre-Trial Brief, and the Prosecution's opening statement demonstrates that the Prosecution never intended to charge him in relation to the crimes perpetrated at the IRST.[2511]

1085. The Prosecution responds that paragraph 6.35 of the Indictment is not limited to incidents at the Butare University Hospital but applies to locations "throughout" Butare Prefecture, which necessarily includes Butare Town.[2512] According to it, the fact that the Trial Chamber referred to an incident outside Butare Town as an example of conduct that could fall under paragraph 6.35 cannot be interpreted to mean that the paragraph only concerned events outside Butare Town.[2513] The Prosecution also emphasises that, although it did not refer to Witness QCB as supporting paragraph 6.35 in its Rule 98*bis* Response, it was clear that the list of witnesses it identified was not exhaustive.[2514]

1086. Ntahobali replies, in contrast with his contention in his appeal brief that paragraph 6.35 of the Indictment could only have been understood as referring to the Butare University Hospital, that it could also have been understood as relating to crimes committed *outside* Butare Town.[2515] He highlights that this was the interpretation he relied on in his Rule 98*bis* motion and contends that, if the Trial Chamber considered that paragraph 6.35 also concerned crimes committed *inside* Butare Town, such as at the IRST, it had the duty to alert him that his understanding that the paragraph solely related to events outside Butare Town was erroneous.[2516] In the same vein,

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[2509] Ntahobali Appeal Brief, paras. 162, 164, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Defence Motions for Acquittal Under Rule 98*bis*, 16 December 2004 ("Rule 98*bis* Decision"), para. 151, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Response to the Motions of Ntahobali and Nyiramasuhuko for Partial Acquittal – Rule 98 *bis* of the Rules of Procedure and Evidence, 1 November 2004 ("Rule 98*bis* Response"), paras. 127, 128. *See also* Ntahobali Reply Brief, para. 43; AT. 15 April 2015 pp. 29, 30. Ntahobali also submits that paragraph 6.35 of the Nyiramasuhuko and Ntahobali Indictment refers to the searching of Tutsis throughout Butare Prefecture, which is not the case for the IRST events. *See* Ntahobali Appeal Brief, para. 163; Ntahobali Reply Brief, para. 52; AT. 15 April 2015 pp. 29, 30.
[2510] Ntahobali Appeal Brief, para. 166. *See also* Ntahobali Notice of Appeal, para. 84.
[2511] Ntahobali Appeal Brief, para. 178. *See also* AT. 15 April 2015 pp. 28, 29.
[2512] Prosecution Response Brief, paras. 767, 768.
[2513] Prosecution Response Brief, para. 768.
[2514] Prosecution Response Brief, para. 768, *referring to* the use of the words "and so on" in paragraph 128 of its Rule 98*bis* Response. *See also* AT. 15 April 2015 pp. 68, 69.
[2515] Ntahobali Reply Brief, para. 44.
[2516] Ntahobali Reply Brief, paras. 44-46, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, *Requête de Arsène Shalom Ntahobali aux fins d'acquittement en application de l'article 98 bis du Règlement de procédure et de preuve*, 25 October 2004 ("Ntahobali Rule 98*bis* Motion"). Ntahobali argues that, instead, the Trial Chamber only referred to a witness's evidence regarding events committed outside Butare Town in its Rule 98*bis*

Ntahobali contends that it would be unreasonable to believe that the Prosecution would not have listed Witness QCB as testifying in support of paragraph 6.35 in its Rule 98*bis* Response had it considered that the witness's evidence related to the allegations set out in this paragraph.[2517]

1087. As discussed earlier, the Appeals Chamber finds that the heading "Butare University Hospital" on page 32 of the Indictment preceding paragraphs 6.34 to 6.39 of the Indictment is misleading as to the location of the crimes mentioned in the paragraphs following this headline.[2518] However, a plain reading of paragraph 6.35 of the Indictment and the Indictment as a whole nonetheless unambiguously reveals that this heading is only relevant to paragraph 6.34 and that the allegation set out in paragraph 6.35 relates to the Butare Prefecture as a whole, including Butare Town. Considering the very contents of paragraph 6.35, it would be unreasonable to conclude that the paragraph was limited to events at the Butare University Hospital or crimes committed outside Butare town.[2519]

1088. Further, a review of the Rule 98*bis* Decision does not support Ntahobali's contention that the Trial Chamber concluded that paragraph 6.35 of the Indictment only concerned events taking place outside Butare Town. It is apparent that, in this decision, the Trial Chamber's reference to events near the border with Burundi outside Butare Town was not aimed at limiting the geographical scope of this paragraph to events taking place outside Butare Town, but was merely used to dismiss the Defence's contention that no evidence supporting paragraph 6.35 was presented to support the allegation that Ntahobali travelled throughout Butare Prefecture in search of Tutsis.[2520] Ntahobali's Rule 98*bis* Motion appears to reflect his understanding that paragraph 6.35

Decision, failing to discuss the killing of approximately 200 victims at the IRST, in Butare Town. He also points out that the Witness Summaries Grid referred only to crimes committed outside Butare Town. *See ibid*., paras. 46, 47.

[2517] Ntahobali Reply Brief, para. 48.

[2518] *See supra*, para. 512. The Appeals Chamber observes that paragraph 6.34 on page 32 of the Nyiramasuhuko and Ntahobali Indictment is directly preceded by the heading "Butare University Hospital". Paragraphs 6.35 to 6.39 of the Nyiramasuhuko and Ntahobali Indictment are not directly preceded by any heading, whereas other paragraphs in the Indictment are presented under different headings referring to specific locations.

[2519] The Appeals Chamber further notes that Ntahobali only linked paragraphs 6.34 and 6.39 of the Nyiramasuhuko and Ntahobali Indictment with events relating to the Butare University Hospital in a prior filing. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Motion to Recall Witnesses, 31 May 2004, para. 25.

[2520] *See* Rule 98*bis* Decision, para. 151 (internal references omitted), which reads as follows:

> The Chamber recalls that Paragragh 6.35 of the Amended Indictment alleges that from April to July 1994, Arsène Shalom Ntahobali travelled throughout the Butare *Préfecture* in search of Tutsi, abducted them and took them to various locations where they were killed. The Defence submits that the evidence adduced by the Prosecution relates to the city of Butare only and that no evidence was adduced that Arsène Shalom Ntahobali travelled throughout the *Préfecture* in search of Tutsi. The Chamber notes that Prosecution Witness TQ testified that Arsène Shalom Ntahobali travelled as far as the Burundian border to stop the evacuation of Tutsi children. The Chamber finds that the evidence led by this witness, if believed, could be sufficient to satisfy a reasonable trier of fact beyond reasonable doubt of Arsène Shalom Ntahobali's responsibility under this paragraph. Acquittal under Rule 98*bis* is therefore denied regarding Paragragh 6.35 of the Amended Indictment.

See also Ntahobali Rule 98*bis* Motion, paras. 82, 83.

only concerned events taking place outside Butare Town.[2521] In these circumstances, the Appeals Chamber considers that it would have been preferable for the Trial Chamber to clarify its understanding that the broad allegation pleaded in paragraph 6.35 was not limited to crimes committed outside Butare Town as suggested by Ntahobali. That being said, the Appeals Chamber does not find that the Trial Chamber erred in its decision to limit its analysis to addressing Ntahobali's incorrect assertion that no evidence of his involvement in acts outside Butare Town had been presented by the Prosecution and to dismiss Ntahobali's motion for acquittal on this basis.

1089. Similarly, the Appeals Chamber does not consider that the fact that the Prosecution did not list Witness QCB's evidence as supporting paragraph 6.35 of the Indictment in its Rule 98*bis* Response was indicative that the witness's testimony did not fall within this paragraph. The Prosecution's use of the expression "and so on" following its enumeration of the Prosecution witnesses who gave evidence in relation to paragraph 6.35 clearly indicated that this list was not exhaustive.[2522]

1090. The Appeals Chamber finds that the allegation concerning the IRST did not constitute a new charge but fell within the broader allegation relating to the abduction and killing of Tutsis throughout Butare Prefecture pleaded in paragraph 6.35 of the Indictment. Likewise, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its conviction led to a radical transformation of the Prosecution case against Ntahobali, nor that these facts could have, on their own, supported a separate charge.[2523] As vague as the charge set out in paragraph 6.35 was, it nonetheless clearly pleaded the involvement of Ntahobali in the abduction and killings of Tutsis in Butare Prefecture from April to July 1994.

1091. Furthermore, the Appeals Chamber is not persuaded by Ntahobali's argument that the material facts on which the Trial Chamber entered its conviction were not part of the Prosecution case against him. It is true that, despite being in possession of information about Ntahobali's involvement in the killings at the IRST from Witness QCB since 1999, the Prosecution did not expressly refer to the killings perpetrated at the IRST in the Indictment, the text of its pre-trial brief, or its opening statement. However, in the view of the Appeals Chamber, the disclosure to Ntahobali in December 1999, and again in November 2000, prior to the filing of the operative indictment, of

[2521] Ntahobali Rule 98*bis* Motion, paras. 81-83.
[2522] Rule 98*bis* Response, para. 128.
[2523] The Appeals Chamber recalls that the possibility of curing the omission of material facts from the indictment is not unlimited. It is settled jurisprudence that the "new material facts" should not lead to a "radical transformation" of the Prosecution case against the accused. If the new material facts are such that they could, on their own, support separate charges, the Prosecution should seek leave from the trial chamber to amend the indictment and the trial chamber should only grant leave if it is satisfied that it would not lead to unfairness or prejudice to the Defence. *See Bagosora et al.* Appeal Decision on Exclusion of Evidence, para. 30; *Muvunyi* Appeal Judgement of 29 August 2008, para. 20; *Nahimana et al.* Appeal Judgement, para. 406.

Witness QCB's prior statement concerning Ntahobali's involvement in the events at the Rugira roadblock and the IRST on 21 April 1994 shows that the IRST killings formed part of the Prosecution case at the time the Indictment was issued.[2524] That Ntahobali's participation in the IRST killings continued to be part of the Prosecution case after the Indictment was issued is further reflected by the summary of Witness QCB's anticipated testimony appended to the Prosecution Pre-Trial Brief.[2525]

1092. Accordingly, the Appeals Chamber considers that the defects in the Indictment regarding Ntahobali's responsibility for the killings perpetrated at the IRST were curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defects were cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(b) Whether the Defects Were Cured

1093. The Trial Chamber determined that the Indictment was cured through the disclosure of Witness QCB's Summary and Statement.[2526]

1094. Ntahobali submits that the Trial Chamber erred in finding that the defects in the Indictment concerning the IRST events had been cured and that he was put on notice that the Prosecution intended to prove that he was criminally responsible for ordering the killings perpetrated by *Interahamwe* at the IRST.[2527] In support of his claim, Ntahobali argues that neither the Indictment nor any subsequent information provided him notice that he was alleged to have "ordered" *Interahamwe* to kill Tutsis at the IRST or identified the perpetrators.[2528] He generally contends that the summaries of the witnesses' anticipated evidence appended to the Prosecution Pre-Trial Brief relied upon by the Trial Chamber could not put him on notice of the allegations against him as the Prosecution failed to specify to which paragraphs of the Indictment the summaries referred, in violation of Rule 73*bis*(B)(iv)(c) of the Rules.[2529] Ntahobali further points out that Witness QCB's

[2524] Statement of Witness QCB of 7 April 1999, signed on 9 October 1999, disclosed in redacted versions on 10 December 1999, 15 November 2000, and 18 September 2001. *See* 10 December 1999 Disclosure; 15 November 2000 Disclosure; *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Interoffice Memorandum "Butare Group of Cases ICTR-98-42-T – Disclosure", 18 September 2001. The unredacted version of Witness QCB's 7 April 1999 statement was disclosed on 1 October 2001 and admitted into evidence on 27 March 2002 as Exhibit D29 (confidential) ("Witness QCB's Statement"). The Nyiramasuhuko and Ntahobali Indictment was filed on 1 March 2001.
[2525] Witness Summaries Grid, item 52, Witness QCB ("Witness QCB's Summary").
[2526] Trial Judgement, paras. 1461-1464, *referring to* Witness QCB's Summary and Witness QCB's Statement (collectively, "Witness QCB's Summary and Statement").
[2527] Ntahobali Notice of Appeal, para. 83; Ntahobali Appeal Brief, paras. 167-179; Ntahobali Reply Brief, paras. 53-62.
[2528] Ntahobali Appeal Brief, paras. 167-171. *See also ibid*., para. 177; Ntahobali Reply Brief, paras. 59, 60.
[2529] Ntahobali Notice of Appeal, para. 150; Ntahobali Appeal Brief, para. 353; Ntahobali Reply Brief, paras. 168, 169, *referring to The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Defence Motions of

Summary and Statement: (i) are silent or ambiguous with regard to whether crimes were committed at the IRST and as to Ntahobali's conduct or even presence at the IRST; and (ii) refer to the "EER" or "ESO" roadblock and not to the "Rugira roadblock".[2530]

1095. The Prosecution responds that Witness QCB's Summary and Statement sufficiently notified Ntahobali of his involvement in the killing of Tutsis at the IRST.[2531] It argues that its pre-trial brief complied with Rule 73*bis*(B)(iv)(c) of the Rules as it referred to the counts that each witness's anticipated testimony would support.[2532] It also highlights that paragraph 5.1 of the Indictment, which is included in all relevant charges, expressly pleaded that Ntahobali "ordered" massacres.[2533] In its view, the identity of the physical perpetrators and the information as to which roadblock Tutsis were arrested or kept at were not material facts that had to be pleaded in the Indictment.[2534] The Prosecution adds that, in any event, Witness QCB's Summary indicated that Ntahobali supervised *Interahamwe* and Ntahobali's claim that he was informed about the wrong roadblock has no basis.[2535] It also contends that the conduct of Ntahobali's defence shows that he fully understood the case against him with respect to the IRST events and did not suffer prejudice.[2536] In this respect, the Prosecution points out that the Trial Chamber discussed lack of notice *proprio motu*, that Ntahobali never claimed at trial that his ability to defend himself in relation to this event had been impaired because of lack of notice, and that Ntahobali thoroughly cross-examined Witness QCB on the matter.[2537]

1096. Ntahobali replies that paragraph 5.1 of the Indictment could not serve as a basis to put him on notice that he was charged with "ordering" killings at the IRST as this paragraph was too general

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Nsengiyumva, Kabiligi, and Ntabakuze Challenging the Prosecutor's Pre-Trial Brief and on the Prosecutor's Counter-Motion, 23 May 2002, para. 12.

[2530] Ntahobali Appeal Brief, paras. 173-177. Ntahobali emphasises that the Trial Chamber accepted that Witness QCB's Statement had not been properly reported by the Prosecution investigators as, instead of saying "I continued towards Mukoni when I heard screams", the witness meant that he had left the Rugira roadblock and then had gone to the IRST where he witnessed people crying and getting killed. Ntahobali argues that this demonstrates that he could not have understood that Witness QCB was expected to testify about killings committed at the IRST. *See ibid*., para. 177, *referring to* Trial Judgement, para. 1479. *See also* Ntahobali Reply Brief, paras. 61, 62.

[2531] Prosecution Response Brief, para. 772. *See also* AT. 15 April 2015 pp. 63-69.

[2532] Prosecution Response Brief, paras. 849, 850.

[2533] Prosecution Response Brief, para. 769. *See also* AT. 15 April 2015 p. 66. During the appeals hearing, the Prosecution also argued that an order need not be explicit in relation of the consequences that it will have and that the Nyiramasuhuko and Ntahobali Indictment put Ntahobali on notice that his order to abduct the Tutsis from the roadblock and transport them to the IRST "gave rise to a substantial likelihood that those Tutsis would be killed." *See* AT. 15 April 2015 p. 65.

[2534] Prosecution Response Brief, paras. 770, 771.

[2535] Prosecution Response Brief, paras. 770, 771. The Prosecution points out that Witness QCB's Summary does not state whether the gathered Tutsis came from the roadblock close to Ntahobali's parents' house or from the close-by Rugira roadblock. It also argues that the reference to Mukoni in Witness QCB's Statement did not provide inconsistent information as Mukoni is very close to the IRST. *See ibid*., paras. 771, 772. The Prosecution further adds that Witness QCB's Statement supplied a precise date for the incident. *See* AT. 15 April 2015 p. 66.

[2536] Prosecution Response Brief, paras. 766, 773-775. *See also* AT. 15 April 2015 pp. 66-69.

[2537] Prosecution Response Brief, paras. 766, 773-775. *See also* AT. 15 April 2015 pp. 66-69.

to be interpreted as comprising this form of responsibility.[2538] He also asserts that the identity of the physical perpetrators and the abduction of the Tutsis at the Rugira roadblock were material facts and emphasises that the Trial Chamber expressly concluded that Witness QCB's Summary did not give him notice that he supervised *Interahamwe* in relation to the events at the IRST.[2539] He maintains that Witness QCB's Summary and Statement did not give clear notice that crimes were committed at the IRST and that he was alleged to have been present.[2540]

1097. In addition, Ntahobali claims that he did not understand that he was accused of having ordered the kidnapping of 40 Tutsis at the Rugira roadblock and the killing of 200 Tutsis at the IRST prior to the testimony of Witness QCB and, consequently, was seriously prejudiced in the preparation of his defence.[2541] He argues that the burden rests on the Prosecution to demonstrate on appeal that his ability to prepare a defence was not materially impaired by the lack of notice on the grounds that: (i) he had objected to the vagueness of paragraph 6.35 of the Indictment and the lack of notice concerning the modes of liability at trial, although he unfortunately omitted to list the allegation concerning the IRST among the ones falling outside the Indictment in his closing brief;[2542] and (ii) the Trial Chamber was clear that objections related to the Indictment would not be granted and should be addressed in closing briefs.[2543] According to Ntahobali, the fact that the Trial Chamber raised this issue *proprio motu* further demonstrates that the Prosecution bears the burden of establishing the absence of prejudice, which it fails to do.[2544] In any event, he develops his allegation of prejudice by submitting that: (i) he was not able to conduct any meaningful investigation to prepare for the cross-examination of Witness QCB; (ii) the cross-examination of Witness QCB demonstrates that he was not adequately prepared to refute the allegations made by the witness; (iii) he did not call any witness to challenge Witness QCB's evidence; (iv) his motion to recall Witness QCB reflects that he had not understood that he was alleged to have ordered the killings at the IRST; and (v) the Trial Chamber's reliance on the absence of cross-examination of

[2538] Ntahobali Reply Brief, paras. 54-56. Ntahobali also argues that the Trial Chamber did not rely on paragraph 5.1 of the Nyiramasuhuko and Ntahobali Indictment to find that the defect was cured. *See ibid*., para. 58.
[2539] Ntahobali Reply Brief, paras. 59, 61, *referring to* Trial Judgement, para. 5788.
[2540] Ntahobali Reply Brief, para. 62.
[2541] Ntahobali Reply Brief, paras. 63-67.
[2542] Ntahobali Reply Brief, para. 65, *referring to* T. 10 July 2000 pp. 49, 50, *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Preliminary Motion Objecting to Defects in the Form and Substance of the Indictment, 26 May 2000 (originally filed in French, English translation filed on 12 June 2000) ("Ntahobali 26 May 2000 Motion"), paras. 76, 77, Ntahobali Closing Brief, paras. 73, 74.
[2543] Ntahobali Reply Brief, para. 66, *referring*, *inter alia*, *to* Witness TO, T. 6 March 2002 pp. 83, 84, 88-105, 122, 123, *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case No. ICTR-98-42-T, Decision on Ndayambaje's Motion for Exclusion of Evidence, 1 September 2006 ("1 September 2006 Decision"), paras. 24, 25, *The Prosecutor v. Pauline Nyiramasuhuko et al*., Case No. ICTR-98-42-T, Decision on Alphonse Nteziryayo's Motion for Exclusion of Evidence, 25 February 2009 ("25 February 2009 Decision"), paras. 27-29, Trial Judgement, paras. 97, 98. Ntahobali argues that this approach was found to be prejudicial by the Appeals Chamber in other cases. *See* Ntahobali Reply Brief, para. 66, *referring to Ntakirutimana* Appeal Judgement, para. 28, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR72.3, Decision on Petković's Appeal on Jurisdiction, 23 April 2008, para. 20. *See also* AT. 16 April 2015 pp. 25, 26.
[2544] Ntahobali Reply Brief, para. 67.

Witness QCB to deny the witness's recall demonstrates that he was not able to effectively cross-examine the witness.[2545]

1098. The Appeals Chamber finds no merit in Ntahobali's general argument that the summaries of the Prosecution witnesses' anticipated evidence appended to the Prosecution Pre-Trial Brief could not inform him of the allegations against him because they were not explicitly linked to any paragraph in the Indictment.[2546] While it would have been preferable for the Prosecution to provide greater specificity given the vagueness of the Indictment and its pre-trial brief regarding many allegations, the contents of Witness QCB's Summary[2547] and the fact that it was expressly marked relevant to Ntahobali and to the relevant counts of his Indictment[2548] – which, in turn, were linked to paragraph 6.35 of the Indictment – provided notice to Ntahobali that the Prosecution intended to rely on the evidence of Witness QCB in support of the broad allegation set forth in paragraph 6.35.

1099. Witness QCB's Summary specifically refers to Tutsis being stopped at roadblocks and led by Ntahobali to the *École des sous-officiers* ("ESO") roadblock and the IRST. Contrary to Ntahobali's contention, it is clear from the reading of Witness QCB's Summary that killings were committed at the IRST.[2549] The summary, however, does not mention the location "Rugira

[2545] Ntahobali Reply Brief, paras. 69, 71, 72, 75, *referring to* Trial Judgement, para. 1459, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, *Requ[ê]te de Arsène Shalom Ntahobali en rappel du témoin QCB*, 1 October 2008 (confidential) ("Ntahobali 1 October 2008 Motion to Recall Witness QCB"), paras. 45-53, 20 November 2008 Decision, paras. 39, 41. *See also* AT. 15 April 2015 p. 29. Ntahobali also refers to his submissions related to the absence of investigators for a long period of time (Ground 1.12), the limitations imposed on cross-examinations (Ground 1.7), and the Prosecution's violation of its disclosure obligations (Ground 1.5). *See* Ntahobali Reply Brief, para. 73. He adds that it is speculative to allege that he would have presented the same defence had he been put on adequate notice of the allegation. *See ibid.*, para. 68.

[2546] The Appeals Chamber observes that neither the Rules nor the jurisprudence require that the summaries appended to a Prosecution's pre-trial brief be linked to the relevant paragraphs of an indictment in order to provide timely, clear, and consistent information detailing the factual basis underpinning the charge. In this regard, the Appeals Chamber notes that Rule 73*bis*(B)(iv)(c) of the Rules relied upon by Ntahobali only states that, at the pre-trial conference, the trial chamber may order the Prosecutor to file "[t]he points in the indictment on which each witness will testify". Ntahobali's reliance on a trial chamber's decision in the *Bagosora et al.* case also fails to appreciate that decisions of trial chambers have no binding force on each other. *See Lukić and Lukić* Appeal Judgement, para. 260; *Rutaganda* Appeal Judgement, para. 188; *Aleksovski* Appeal Judgement, para. 114.

[2547] In relevant part, Witness QCB's Summary reads as follows:

> QCB went to Butare with a Tutsi acquaintance. They went through two roadblocks with many people around, guarded by gendarmes, *Interahamwe* and civilians. Then they came to a third roadblock supervised by Ntahobali. The roadblock was opposite Ntahobali's parents' house. The *Interahamwe* and civilians wearing military vests were checking ID cards allowing Hutu through and segregating Tutsi and putting them by the roadside. QCB's acquaintance[] refused to join the Tutsi group and Ntahobali ordered his killing and he was immediately killed. Ntahobali led the gathered Tutsis to ESO roadblock and *Institut de Recherche Scientifique et Technique*. QCB saw people being struck to death.

[2548] Witness QCB's Summary was marked relevant to Ntahobali and was linked, *inter alia*, to Counts 2, 6, 8, and 10 of his indictment.

[2549] The Appeals Chamber sees no merit in Ntahobali's argument regarding the alleged confusion created by Witness QCB's reference to "continu[ing] towards Mukoni" in his prior statement. *See supra*, fn. 2530. The Appeals Chamber considers that it was clear from Witness QCB's Summary and Witness QCB's Statement that killings were alleged to have occurred at the IRST.

roadblock"[2550] nor does it specify the date of the killings. It is also unclear as to the conduct of Ntahobali at the IRST and the identity of the perpetrators of the killings. The Appeals Chamber recalls that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct with which the accused is charged.[2551] The Appeals Chamber considers that when the Prosecution intends to prove that an accused ordered particular crimes, it must identify in the indictment, at least by category, to whom the accused is alleged to have given orders[2552] and all detail it possesses regarding the location of the incidents.

1100. Only when Witness QCB's Summary is read together with Witness QCB's Statement it is clear that the witness was expected to testify that, on 21 April 1994, Ntahobali took Tutsis from the roadblock near Amandin Rugira's home to lead them towards the IRST and that the killings were alleged to have occurred.[2553]

1101. The Appeals Chamber finds that, by reading the Indictment in conjunction with Witness QCB's Summary and Statement, Ntahobali was put on notice that the Prosecution intended to hold him responsible for abduction of Tutsis at the Rugira roadblock and killings at the IRST on 21 April 1994. Since Witness QCB's Summary contained clear allegations against Ntahobali and was expressly linked to his Indictment, the Appeals Chamber considers that Ntahobali should have been prompted to examine the contents of Witness QCB's Statement upon reading Witness QCB's Summary.

1102. Nevertheless, the Appeals Chamber observes that neither Witness QCB's Summary nor Witness QCB's Statement gave clear notice to Ntahobali that he was alleged to have ordered *Interahamwe* to kill Tutsis at the IRST. While the summary and statement unambiguously indicate that Ntahobali was alleged to have exercised a supervisory role at the roadblocks and authority over

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[2550] The Appeals Chamber notes that Witness QCB indicated that the Rugira roadblock, which he referred to as "roadblock 5", was located further down Ntahobali's parents' house. *See* Exhibit P54 (Sketch map of Butare town by Witness QCB).

[2551] *Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Ntagerura et al.* Appeal Judgement, para. 23; *Kupreškić et al.* Appeal Judgement, para. 89.

[2552] *Cf. Uwinkindi* Appeal Decision, para. 36 ("When the Prosecution pleads a case of 'instigation', it must precisely describe the instigating acts and the instigated persons or groups of persons"), *referring to Blaškić* Appeal Judgement, para. 226. *See also Ndindiliyimana et al.* Appeal Judgement, para. 174.

[2553] In relevant part, Witness QCB's Statement reads as follows:

> […] on 21 April 1994 […] [w]e encountered a second roadblock this time manned by *Interahamwe* and civilians with military-type vests as well as grenades and Kalashnikov rifles. It was located near the road leading to the *Institut de Recherche Scientifique et Technique* (IRST), near the home of the late Amandin RUGIRA. There were many people around [the roadblock]. […] SHALOM found me at the second roadblock. He was leading away the Tutsis who were gathered at the ESO roadblock. He also took the ones who were gathered at this second roadblock and led them all towards the IRST. I continued towards Mukoni when I heard the screams. I was afraid and guessed that these were screams from people who were being killed. […] I looked from the roadside and saw people being struck to death with traditional weapons. […]

the *Interahamwe* present at the roadblocks, the only express discussion of Ntahobali's conduct in relation to this event provided in these documents was that Ntahobali led the Tutsis away before they were killed. In this context, the Appeals Chamber notes the Trial Chamber's analysis that Witness QCB's Summary "does not provide that Ntahobali supervised *Interahamwe* with relation to the events at the IRST."[2554] The Appeals Chamber finds that neither Witness QCB's Summary nor Witness QCB's Statement provided sufficient information to put Ntahobali on notice that he ordered *Interahamwe* to kill the Tutsis he led towards the IRST. The Appeals Chamber therefore concludes that the Trial Chamber erred in finding that the vagueness of the Indictment concerning the allegation related to the IRST was remedied by the disclosure of Witness QCB's Summary and Statement.

1103. The Appeals Chamber also rejects the Prosecution's argument that paragraph 5.1 of the Indictment put Ntahobali on notice that he was charged with ordering the relevant killings given the broad nature of paragraph 5.1, the fact that it is not clearly linked to paragraph 6.35 of the Indictment, and the fact that it refers to several forms of responsibility.[2555] The relevant question is not whether Ntahobali was given notice that he was charged with ordering crimes – which he clearly was – but whether he was given notice that he was charged with ordering the killings perpetrated at the IRST on 21 April 1994.

1104. The Appeals Chamber finds that it is only when Witness QCB testified at trial that Ntahobali was put on unambiguous notice that the Prosecution intended to prove that he was responsible for ordering *Interahamwe* to kill Tutsis at the IRST.[2556] While this information was clear and consistent with the general information concerning Ntahobali's supervisory role and authority over the *Interahamwe* previously disclosed, the Appeals Chamber considers that it was provided too late in the proceedings to constitute "timely" notice.

1105. The Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information causes prejudice to the accused.[2557] The defect may only be deemed harmless through demonstrating that the accused's

[2554] Trial Judgement, para. 5788.
[2555] *See* Nyiramasuhuko and Ntahobali Indictment, para. 5.1 ("[…] In executing the plan, they organized, ordered and participated in the massacres against the Tutsi population and of moderate Hutu. […] Shalom Arsène Ntahobali elaborated, adhered to and executed this plan.").
[2556] *See* Witness QCB, T. 20 March 2002 pp. 88-92. *See also infra*, Section V.F, where the Appeals Chamber discusses Ntahobali's challenges to the Trial Chamber's assessment of Witness QCB's testimony about Ntahobali's role at the IRST on 21 April 1994.
[2557] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58.

ability to prepare his defence was not materially impaired.[2558] When an appellant raises a defect in the indictment for the first time on appeal, the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[2559] When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired.[2560]

1106. While Ntahobali objected to the vagueness of paragraph 6.35 of the Indictment as regards the identity of the alleged victims and the location of the killings in 2000,[2561] he did not object to the vagueness of this paragraph with respect to his particular course of conduct and alleged form of responsibility. In addition, Ntahobali did not raise the vagueness of the allegations pleaded in paragraph 6.35 after he was provided with the particulars appended to the Prosecution Pre-Trial Brief filed in April 2001. The Appeals Chamber considers that the indication that Witness QCB's Summary was expressly linked to his Indictment should have prompted Ntahobali to object to the lack of information he had regarding the incidents about which the witness was expected to testify.

1107. The Appeals Chamber further observes that Ntahobali did not take issue with Witness QCB's testimony regarding his responsibility for ordering *Interahamwe* to kill the Tutsis he led from the Rugira roadblock to the IRST on 21 April 1994 on the ground that he lacked sufficient notice of this allegation.[2562] The Appeals Chamber finds Ntahobali's explanation for his failure to contemporaneously object to Witness QCB's testimony in this respect unpersuasive. Having reviewed the Trial Chamber's oral rulings and decisions pointed out by Ntahobali, the Appeals Chamber considers that none of them could have reasonably been understood as suggesting to the Defence to refrain from making objections related to the indictments because they would not be granted and had rather to be addressed in closing submissions.[2563]

[2558] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreskić et al.* Appeal Judgement, para. 122.
[2559] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Šainović et al*. Appeal Judgement, para. 224; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[2560] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Ntabakuze* Appeal Judgement, fn. 189; *Niyitegeka* Appeal Judgement, para. 200; *Kupreskić et al.* Appeal Judgement, paras. 122, 123.
[2561] *See* Ntahobali 26 May 2000 Motion, paras. 76, 77; T. 10 July 2000 pp. 49, 50.
[2562] Witness QCB, T. 20 March 2002 pp. 85-91.
[2563] The Trial Chamber's oral statements and decisions pointed out by Ntahobali informed the parties that requests to exclude evidence based on defects in the form of the indictments would be ruled upon at a later stage of the proceedings and that such requests did not necessarily preclude admission of the impugned evidence. *See* Witness TO, T. 6 March 2002 pp. 83, 84, 88-105, 122, 123; 25 February 2009 Decision, paras. 27-29; 1 September 2006 Decision, paras. 24, 25. The Appeals Chamber also notes that the decisions cited by Ntahobali are subsequent to the testimony of Witness QCB and that, in one of the decisions cited by Ntahobali, the Trial Chamber expressly recalled that "the appropriate time to object to the admissibility of evidence is when the evidence is introduced." *See* 1 September 2006 Decision, para. 22 (internal reference omitted).

1108. Finally, the Appeals Chamber notes that Ntahobali, as he acknowledges, failed to raise the defects in the Indictment regarding the killings at the IRST in his closing submissions.[2564] The matter was addressed *proprio motu* by the Trial Chamber in the Trial Judgement.[2565] Against this background, the Appeals Chamber considers that Ntahobali is raising the defect in the Indictment concerning his responsibility for ordering the IRST killings for the first time on appeal. The burden, as a consequence, rests on Ntahobali to show that his ability to prepare his defence was materially impaired by the Prosecution's failure to provide him with adequate notice that he was alleged to have ordered *Interahamwe* to perpetrate the killings at the IRST.

1109. The Appeals Chamber finds that Ntahobali has failed to make such a demonstration. Both Witness QCB's Summary and Statement were disclosed well before the witness testified before the Trial Chamber.[2566] While Ntahobali was not put on clear notice of his specific conduct and form of responsibility as regards the IRST events until the testimony of Witness QCB at trial, he was put on notice months before the commencement of the trial that he was alleged to have exercised a supervisory role and authority over the *Interahamwe* present at the roadblocks and to have been responsible for the killings of Tutsis at the IRST on 21 April 1994. The Appeals Chamber is of the opinion that this information allowed him to conduct meaningful investigations.

1110. The Appeals Chamber also considers that the cross-examination of Witness QCB by his counsel does not reflect a lack of preparation. While Ntahobali's counsel did not question Witness QCB on Ntahobali's participation in the killings perpetrated at the IRST, it is worth stressing that, in fact, his counsel did not raise a single question to the witness regarding Ntahobali's acts or conduct during the relevant events whether in respect of the supervision of roadblocks, the killing of Ruvurajabo, the stopping and abductions of Tutsis from the roadblocks, the move to the IRST, or the killings committed there, although Witness QCB was clearly expected to testify about these events and testified at length about them.[2567] Moreover, apart from questioning Witness QCB on how he was able to estimate the number of victims killed at the IRST,[2568] Ntahobali's counsel did not put any questions to the witness regarding the circumstances of the abductions and killings perpetrated on 21 April 1994. Ntahobali's counsel's cross-examination was primarily focused on the witness's knowledge of his client,[2569] the location and dates of setting up

[2564] *See* Ntahobali Reply Brief, para. 65; Ntahobali Closing Arguments, T. 23 April 2009 pp. 3-60; Ntahobali Closing Brief, para. 78.
[2565] *See* Trial Judgement, para. 1460.
[2566] Witness QCB's Statement was disclosed for the first time on 10 December 1999, the Prosecution Pre-Trial Brief was filed on 11 April 2001, and Witness QCB started to testify on 20 March 2002.
[2567] *See* Witness QCB's Summary; Witness QCB's Statement; Witness QCB, T. 21 March 2002, T. 25 March 2002, T. 26 March 2002.
[2568] Witness QCB, T. 25 March 2002 pp. 131, 132.
[2569] *See* Witness QCB, T. 25 March 2002 pp. 39-41 and 45-68 (closed session).

of the roadblocks,[2570] the categories of individuals manning the roadblocks,[2571] the geography of the relevant locations and roads,[2572] and the discrepancies within Witness QCB's evidence.[2573]

1111. Likewise, the Appeals Chamber finds that Ntahobali's decision not to call any witness to specifically counter Witness QCB's allegations does not demonstrate prejudice. Ntahobali acknowledged that he understood that he was accused of having ordered killings at the IRST when Witness QCB testified.[2574] His decision not to call witnesses to challenge Witness QCB's evidence adduced at trial was therefore an informed decision. It is also noteworthy that, in his closing brief, Ntahobali expressly challenged the credibility of Witness QCB regarding these events[2575] and that, on appeal, he explains that his failure to raise the lack of notice regarding the IRST incident in his closing submissions was "a significant and unfortunate oversight".[2576]

1112. As to the Trial Chamber's refusal to recall Witness QCB, the Appeals Chamber observes that Ntahobali's justification for requesting the recall of Witness QCB was to highlight alleged inconsistencies and contradictions between the witness's testimony before the Trial Chamber and his statements and testimony before Canadian authorities in order to challenge his credibility, and not to remedy an alleged prejudice resulting from Ntahobali's inability to effectively cross-examine the witness.[2577] Contrary to Ntahobali's contention, his motion to recall Witness QCB is not indicative of his confusion regarding whether he was alleged to have ordered the killings at the IRST.[2578] The decision denying the recall of Witness QCB also does not reflect, as alleged by Ntahobali, that he was not able to effectively cross-examine the witness.[2579] Of significance in this decision, the Trial Chamber expressly noted that Witness QCB's statement to Canadian authorities

[2570] *See* Witness QCB, T. 25 March 2002 pp. 15-36, 122-152.
[2571] *See* Witness QCB, T. 25 March 2002 pp. 37-39, 116-122, 156-161.
[2572] *See* Witness QCB, T. 21 March 2002 pp. 110-120, 128-143, T. 25 March 2002 pp. 7-10.
[2573] *See* Witness QCB, T. 26 March 2002 pp. 33-48, 54.
[2574] Ntahobali Reply Brief, para. 63 (French) ("*Jamais l'Appelant n'a compris avant le témoignage de QCB que ce dernier l'accusait d'avoir ordonné l'enlèvement de 40 personnes au 'Rugira roadblock' ou d'avoir ordonné 200 meurtres à l'IRST*."). The Appeals Chamber notes that Ntahobali makes a contradictory statement in another context in his submissions in reply. *See ibid*., para. 75.
[2575] *See* Ntahobali Closing Brief, paras. 139-142, 276.
[2576] Ntahobali Reply Brief, para. 65.
[2577] *See* Ntahobali 1 October 2008 Motion to Recall Witness QCB, paras. 8, 28, 39, 43, 71, 72. *See also The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Requête de Arsène Shalom Ntahobali en certification d'appel de la Décision du 20 novembre 2008 concernant le témoin QCB*, 27 November 2008 (confidential), paras. 5-8, 30.
[2578] *See* Ntahobali Reply Brief, para. 75. In his motion to recall Witness QCB, Ntahobali expressly refers to Witness QCB's testimony before the Trial Chamber that he was the leader of the killers at the IRST and points to the fact that Witness QCB was inconsistent as regards whether he physically committed killings in subsequent statements to Canadian authorities. *See* Ntahobali 1 October 2008 Motion to Recall Witness QCB, paras. 45-53.
[2579] 20 November 2008 Decision, paras. 37-41.

that he saw Ntahobali issuing orders to kill at the IRST was consistent with his testimony in this case.[2580]

1113. In these circumstances, the Appeals Chamber finds that Ntahobali has not discharged his burden to demonstrate that his defence was materially impaired by the lack of adequate notice regarding his responsibility for ordering *Interahamwe* to kill Tutsis at the IRST.

(c) Conclusion

1114. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in concluding that the defect in the Indictment concerning Ntahobali's responsibility for the killings perpetrated at the IRST on 21 April 1994 was cured. However, the Appeals Chamber concludes that, because he did not effectively show that his defence was materially impaired by the lack of adequate notice in this respect, Ntahobali has failed to demonstrate that the Trial Chamber's error invalidates its decision to convict him for ordering the killing of approximately 200 Tutsis at the IRST on 21 April 1994.

3. Hotel Ihuliro Roadblock (Ground 2.2 in part)

1115. The Trial Chamber noted that it was not contested that, at the time of the relevant events, the Ntahobali family resided in Hotel Ihuliro in Butare Town.[2581] The Trial Chamber determined that a roadblock was erected near Hotel Ihuliro in late April 1994.[2582] It also determined that Ntahobali manned the roadblock in April 1994, which was used to abduct and kill members of the Tutsi population.[2583] In particular, the Trial Chamber found that Ntahobali ordered the killing of a man named Ruvurajabo at this roadblock on 21 April 1994 and that he raped and murdered a Tutsi girl at the same roadblock around the end of April 1994.[2584] The Trial Judgement also reflects that Ntahobali was found responsible for having physically perpetrated the killing of multiple Tutsis at the roadblock, including but not limited to the killing of the "Tutsi girl".[2585]

[2580] 20 November 2008 Decision, para. 40.
[2581] Trial Judgement, para. 3107.
[2582] Trial Judgement, para. 3113. The Appeals Chamber recalls that it has elected to refer to the roadblock which the Trial Chamber found was located in the proximity of the EER and the garage known as the "MSM garage" and very close to Hotel Ihuliro as the "Hotel Ihuliro roadblock" throughout this Judgement. *See supra*, fn. 51.
[2583] Trial Judgement, paras. 3128, 5842.
[2584] Trial Judgement, paras. 3135, 3140, 5842, 5845, 5971, 6053-6055, 6077-6080, 6094, 6100, 6101, 6168, 6169, 6184. *See also ibid*., paras. 6071, 6072.
[2585] *See* Trial Judgement, paras. 3135, 3140, 5842, 5845, 5971 ("Ntahobali *killed Tutsis* at the Hotel Ihuliro roadblock".), 6053 ("The Chamber has found Ntahobali guilty of genocide for: *killing Tutsis* at the Hotel Ihuliro roadblock, including a Tutsi girl who he had first raped".), 6054, 6055, 6100 ("The Chamber has found that Ntahobali *killed Tutsis* at the Hotel Ihuliro roadblock, including a Tutsi girl who he had first raped".), 6101, 6168 ("Ntahobali *killed Tutsis* at the Hotel Ihuliro roadblocks, including a Tutsi girl who he had first raped".), 6169 (emphasis added in all). The Appeals Chamber discusses Ntahobali's challenges to the imprecision of the Trial Judgement regarding his

1116. On this basis, the Trial Chamber convicted Ntahobali of genocide (Count 2), extermination, rape, and persecution as crimes against humanity (Counts 6, 7, and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Counts 10 and 11, respectively) pursuant to Article 6(1) of the Statute for committing rape and killings and ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock.[2586]

1117. These findings of guilt were entered pursuant to paragraphs 6.27, 6.37, and 6.53 of the Indictment.[2587] The Indictment indicates that the allegation in paragraph 6.27 was being pursued under Counts 2, 3, 5, 6, 8, 9, and 10, the allegation in paragraph 6.37 under Counts 7 and 11, and the allegation in paragraph 6.53 under Counts 2, 3, and 5 through 11 pursuant to Articles 6(1) and 6(3) of the Statute.[2588] Prior to discussing the evidence related to crimes committed at the Hotel Ihuliro roadblock, the Trial Chamber considered Ntahobali's assertion that he was not reasonably informed of the charges concerning these crimes.[2589] It held that, although the Indictment was defective in certain respects in relation to these charges, the defects were cured and Ntahobali did not suffer prejudice in the preparation of his defence.[2590]

1118. Ntahobali submits that the Indictment was defective with respect to the allegation that he committed killings at the Hotel Ihuliro roadblock and that the Trial Chamber erred in finding that the defect was cured and that he was not prejudiced.[2591] He also contends that his responsibility for

convictions for crimes committed at the Hotel Ihuliro roadblock in detail below in Section V.G.1. *See* Ntahobali Appeal Brief, paras. 180, 209.

[2586] Trial Judgement, paras. 5842, 5845, 5971, 6053-6055, 6077-6080, 6094, 6100, 6101, 6121, 6168, 6169, 6184-6186. The Trial Chamber considered that Ntahobali had not received sufficient notice that the charge of genocide would be supported by rapes committed at the Hotel Ihuliro roadblock and, consequently, did not enter a genocide conviction on the basis of the rape of the Tutsi girl in late April 1994. *See ibid*., paras. 5828-5836, 5843. The Trial Chamber also found that Ntahobali bore superior responsibility pursuant to Article 6(3) of the Statute for the killing of Ruvurajabo perpetrated by *Interahamwe* and considered this as an aggravating factor when determining his sentence. *See ibid*., paras. 5847-5849, 5971, 6056, 6220. The Appeals Chamber will address Ntahobali's contentions regarding the lack of notice that he was charged as a superior for this killing in Section V.B.7 below.

[2587] Trial Judgement, paras. 2913, 2915, 2928, 2934, fns. 8076, 8082, 8083. Paragraph 6.27 of the Nyiramasuhuko and Ntahobali Indictment reads as follows:

> 6.27 Between April and July 1994, a roadblock was set up near the residence of Minister Pauline Nyiramasuhuko and Arsène Shalom Ntahobali in Butare town. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali manned this roadblock. During this entire period, Pauline Nyiramasuhuko and Arsène Shalom Ntahobali made use of the roadblock, with the assistance of soldiers, identities of whom are unknown and other unknown persons, to identify, abduct and kill members of the Tutsi population.

For paragraphs 6.37 and 6.53 of the Nyiramasuhuko and Ntahobali Indictment, *see supra*, fn. 1123.

[2588] Nyiramasuhuko and Ntahobali Indictment, pp. 39-45.

[2589] Trial Judgement, paras. 2921, 2923-2942.

[2590] Trial Judgement, paras. 2928, 2932, 2942.

[2591] Ntahobali Notice of Appeal, paras. 114-117; Ntahobali Appeal Brief, paras. 203-210.

ordering the killing of Ruvurajabo at the roadblock and raping a Tutsi girl near the roadblock was not pleaded in the Indictment and that the defects in this regard were neither curable nor cured.[2592]

(a) Committing Killings

1119. As noted above and discussed in further detail below in Section V.G.1 related to the Hotel Ihuliro roadblock, the Trial Chamber found that Ntahobali physically perpetrated the killing of multiple Tutsis at the Hotel Ihuliro roadblock in April 1994, including the killing of a "Tutsi girl" who arrived at the roadblock around the end of April 1994.[2593] In making factual findings regarding the killing of the "Tutsi girl", the Trial Chamber relied on Prosecution evidence that the victim was dragged by Ntahobali from her vehicle into the woods near the roadblock and the EER where she was raped and killed.[2594] The Trial Chamber convicted Ntahobali under Counts 2, 6, 8, and 10 pursuant to Article 6(1) of the Statute on this basis.

1120. The Trial Chamber determined that paragraph 6.27 of the Indictment provided the location of the roadblock, gave an adequate description of the timeframe involved, and alleged that Ntahobali made use of the roadblock with the assistance of others to identify, abduct, and kill Tutsis and that it was therefore not defective concerning the allegation that Ntahobali made use of a roadblock near his home to identify, abduct, and kill Tutsis.[2595] It considered that it was not necessary for the Indictment to provide the exact identity of the alleged co-perpetrators.[2596]

1121. Ntahobali submits that the Trial Chamber erred in finding that the allegation that he committed killings at the Hotel Ihuliro roadblock, including the murder of a Tutsi girl, was pleaded in paragraph 6.27 of the Indictment.[2597] With respect to the murder of the Tutsi girl specifically, Ntahobali contends that: (i) the dates in paragraph 6.27 were too vague to put him on adequate notice that this crime occurred "around the end of April 1994", in particular in light of the fact that the Prosecution failed to indicate the date of establishment of the roadblock;[2598] (ii) the site of the murder, namely the EER woods, was not specified in this paragraph;[2599] and (iii) the Trial Chamber erred in finding that paragraph 6.27 was not defective in failing to mention the co-perpetrators

[2592] Ntahobali Notice of Appeal, paras. 114, 116, 117; Ntahobali Appeal Brief, paras. 181-202.
[2593] *See supra*, para. 1115.
[2594] Trial Judgement, para. 3133.
[2595] Trial Judgement, para. 2928.
[2596] Trial Judgement, para. 2928.
[2597] Ntahobali Notice of Appeal, para. 91; Ntahobali Appeal Brief, para. 203.
[2598] Ntahobali Appeal Brief, para. 205.
[2599] Ntahobali Appeal Brief, para. 206.

whom the Prosecution had identified, such as "Jean-Pierre", in contradiction with the order it had given to the Prosecution in 2000 to identify them in the Indictment.[2600]

1122. As regards the other killings he was found to have committed at the Hotel Ihuliro roadblock, Ntahobali reiterates that paragraph 6.27 of the Indictment was impermissibly vague concerning the dates of the killings and the identity of his accomplices as well as concerning the identity of the victims and the means by which the crimes were committed.[2601] Ntahobali contends that none of these defects was subsequently cured.[2602]

1123. The Prosecution responds that the summaries of the anticipated evidence of Witnesses TB and SX appended to the Prosecution Pre-Trial Brief and their relevant prior statements cured the vagueness in paragraph 6.27 of the Indictment regarding the allegation that he killed a Tutsi girl after raping her at the Hotel Ihuliro roadblock as they provided the approximate date and location of the murder.[2603] The Prosecution also argues that since the Trial Chamber did not find that Jean-Pierre was involved in this murder, no notice was required in that regard.[2604] It further contends that Ntahobali was put on notice that he was charged with other abductions and killings at this roadblock through the disclosure of the summaries of the anticipated evidence of Witnesses SX, SR, and TF.[2605]

1124. Ntahobali replies that the post-indictment information provided by the Prosecution was too contradictory to be considered clear and coherent.[2606]

1125. The Appeals Chamber recalls that criminal acts that were physically committed by the accused personally must be set forth specifically in the indictment, including, where feasible, "the

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[2600] Ntahobali Notice of Appeal, paras. 90, 99; Ntahobali Appeal Brief, para. 207, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Arsène Shalom Ntahobali's Preliminary Motion Objecting to Defects in the Form and Substance of the Indictment, 1 November 2000 ("1 November 2000 Ntahobali Decision"), paras. 30, 35(a)(ii). *See also* Ntahobali Reply Brief, para. 86.

[2601] Ntahobali Appeal Brief, para. 209. In particular, Ntahobali contends that names such as "Kazungu", "Jean-Pierre", "Leonard", "Padiri", "Emmanuel", or "Lambert" should have been specified in the Nyiramasuhuko and Ntahobali Indictment as the Prosecution questioned its witnesses in that regard. *See idem*. In his reply brief, Ntahobali argues that, because he was convicted for committing crimes, the material facts had to be pleaded with even more specificity. *See* Ntahobali Reply Brief, para. 87.

[2602] Ntahobali Notice of Appeal, para. 92; Ntahobali Appeal Brief, paras. 208, 210.

[2603] Prosecution Response Brief, para. 787, *referring to* Trial Judgement, paras. 2941, 2942, *referring in turn to* Witness Summaries Grid, item 88, Witness SX ("Witness SX's Summary"), item 90, Witness TB ("Witness TB's Summary"), statement of Witness SX of 2 December 1997, signed on 4 December 1997, disclosed on 25 May 1998, 4 November 1998, 10 December 1999, and admitted into evidence as Exhibit D145 (confidential) on 9 February 2004 ("Witness SX's Statement"), statement of Witness TB of 5 December 1997, disclosed on 4 November 1998 and admitted into evidence as Exhibit D151 (confidential) on 12 February 2004 ("Witness TB's Statement"). *See* 25 May 1998 Disclosure; 4 November 1998 Disclosure; 10 December 1999 Disclosure.

[2604] Prosecution Response Brief, paras. 787, 788.

[2605] Prosecution Response Brief, para. 788.

[2606] Ntahobali Reply Brief, para. 85. Ntahobali also replies that the Prosecution's failure to specify that he was alleged to have committed crimes against a Tutsi girl with the complicity of "Jean-Pierre" although it had the information indicated that he was not charged with any crimes committed with Jean-Pierre. *See ibid.*, para. 86.

identity of the victim, the time and place of the events and the means by which the acts were committed."[2607]

1126. The Appeals Chamber observes that paragraph 6.27 of the Indictment refers to "[b]etween April and July 1994" as the period of time during which Ntahobali was alleged to have used the Hotel Ihuliro roadblock to kill members of the Tutsi population. The Appeals Chamber recalls that a broad date range, in and of itself, does not invalidate a paragraph of an indictment.[2608] In the case at hand, the Indictment reflects that the Prosecution intended to prove that abductions and killings were recurring at the roadblock and spanned over several months. The Appeals Chamber considers that the sheer scale of these alleged crimes made it impracticable to require a high degree of specificity in the dates for the commission of each crime.[2609] In these circumstances, the Appeals Chamber finds that the Trial Chamber did not err in considering that the allegation concerning the killing of the "Tutsi girl" in late April 1994 was encompassed in paragraph 6.27.

1127. Nevertheless, the Prosecution does not dispute that it was in possession of information regarding the date of establishment of the roadblock in the second half of April 1994,[2610] which would have allowed it to particularise the broad date range in paragraph 6.27 of the Indictment. As the Prosecution was in a position at the time to provide higher specificity regarding Ntahobali's alleged responsibility for committing abductions and killings at the Hotel Ihuliro roadblock, the Appeals Chamber finds that the Trial Chamber erred in considering that the date range "[b]etween April and July 1994" in paragraph 6.27 of the Indictment gave "an adequate description of the time frame involved".[2611]

1128. The Appeals Chamber, however, is not persuaded by Ntahobali's argument that the exact location where the "Tutsi girl" was dragged from the Hotel Ihuliro roadblock to be killed was a material fact that needed to be pleaded in the Indictment. Similarly, as far as Ntahobali was alleged to have personally committed the crimes, the Appeals Chamber finds no merit in Ntahobali's

[2607] *Munyakazi* Appeal Judgement, para. 36; *Muhimana* Appeal Judgement, para. 76; *Gacumbitsi* Appeal Judgement, para. 49; *Ntakirutimana* Appeal Judgement, para. 32, *quoting Kupreškić et al*. Appeal Judgement, para. 89. *See also Ndindabahizi* Appeal Judgement, para. 16.
[2608] *See*, *e.g*., *Karemera and Ngirumpatse* Appeal Judgement, para. 594; *Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Muvunyi* Appeal Judgement of 29 August 2008, para. 58.
[2609] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 150 ("Obviously, there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes."); *Muvunyi* Appeal Judgement of 29 August 2008, para. 58; *Kupreškić et al.* Appeal Judgement, para. 89.
[2610] *See supra*, para. 1123. The Appeals Chamber also refers to its analysis of Ntahobali's argument on the information provided in the Nyiramasuhuko and Ntahobali Indictment on the date of the establishment of the roadblock in para. 1140 below, and to its discussion of the evidence in this respect in Section V.G.2 below.
[2611] Trial Judgement, para. 2928.

argument that the Trial Chamber erred in finding that the exact identity of his co-perpetrators did not have to be provided in the Indictment.[2612]

1129. As for Ntahobali's argument regarding the identity of the victims killed at the Hotel Ihuliro roadblock and the means by which the crimes were committed, the Appeals Chamber finds that, in light of the nature of the allegation, which concerns recurring crimes and a large number of victims, often unidentified, it was impracticable or impossible for the Prosecution to identify the victims by name[2613] and to specify Ntahobali's conduct in further detail in the Indictment.

1130. Turning to whether the defect in the Indictment regarding the date range was cured, the Appeals Chamber observes that the Prosecution informed Ntahobali through Witnesses QCB's and SX's summaries and statements that the Hotel Ihuliro roadblock was being alleged to have been established approximately around 21 April 1994 and that killings took place there from the very same day.[2614] Ntahobali does not substantiate his argument that the information provided in the Prosecution's post-indictment submissions was contradictory on this point. The Appeals Chamber therefore finds that the Prosecution's failure to particularise the broad date range pleaded in paragraph 6.27 of the Indictment by not specifying the date of establishment of the Hotel Ihuliro roadblock was adequately remedied.

1131. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber's error in not considering that the Indictment was overly broad regarding the timeframe of the alleged abductions and killings committed at the Hotel Ihuliro roadblock did not invalidate its decision to convict Ntahobali on this basis as the defect was subsequently cured. The Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in any other respect regarding notice of the allegation that he committed killings at the roadblock.

[2612] The Appeals Chamber understands that the Trial Chamber's order to the Prosecution to provide the "identity of at least some of the 'unknown persons' in paragraph 6.27 [of the Nyiramasuhuko and Ntahobali Indictment]" with whom he was alleged to have worked, if known, was related to the charges brought under Article 6(3) of the Statute and the modes of accessory liability under Article 6(1) of the Statute. *See* 1 November 2000 Ntahobali Decision, para. 35(a)(ii). *See also ibid*., para. 30.

[2613] *See supra*, fn. 2609.

[2614] *See* Witness QCB's Summary ("On 21 April 1994 […] QCB went to Butare with a Tutsi acquaintance. […] Then they came to a third roadblock supervised by Ntahobali. […] QCB's acquaintance[] refused to join the Tutsi group and Ntahobali ordered his killing and he was immediately killed."); Witness SX's Summary ("SX saw a roadblock erected about 100 meters from the EER […]. […] people were allowed to pass or were killed. […] SX estimates that approximately 500 Tutsi were killed at that roadblock."); Witness SX's Statement, pp. K146646, K146647 (Registry pagination) ("The barrier was erected […] approximately two weeks after I heard of the death of the President on Radio Rwanda. […] On the morning that they erected the barrier, people would be coming […]. […] the individual would be killed or let to pass. […] On this first day I estimated approximately 500 people killed at the barrier."). Witnesses QCB's and SX's summaries were marked relevant to Ntahobali and were linked to Counts 2, 3, 5, 6 and 8 through 11 of his indictment. The Appeals Chamber considers that Ntahobali should have been prompted to re-examine Witness SX's Statement upon reading Witness SX's Summary.

(b) Ordering the Killing of Léopold Ruvurajabo

1132. As noted above, the Trial Chamber found that Ntahobali ordered the killing of a man named Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994 and convicted him on this basis under Counts 2, 6, 8, and 10 pursuant to Article 6(1) of the Statute.

1133. The Trial Chamber held that the Prosecution was aware of the identity of the alleged victim Ruvurajabo months before the filing of the Indictment but failed to include this information in the Indictment.[2615] It found that the Indictment was thus defective with respect to this allegation.[2616] However, the Trial Chamber determined that the defect in the Indictment as to the murder of Ruvurajabo was cured through the disclosure of Witness QCB's Summary and Statement, which made clear that Ntahobali was alleged to have ordered the killing of Ruvurajabo.[2617] It concluded that the lack of notice in the Indictment did not prejudice Ntahobali in the preparation of his case with regard to this allegation.[2618]

1134. Ntahobali submits that the defect in the Indictment related to the allegation concerning the killing of Ruvurajabo could not be cured through any subsequent information as this allegation constituted a separate charge which should have been pleaded in the Indictment.[2619] In particular, he contends that the Trial Chamber erred in refusing to apply a trial chamber's decision in the *Kalimanzira* case, in which it was held that the failure to mention particular killings capable of supporting a separate charge could not be cured.[2620] Ntahobali also argues that the Trial Chamber erred by not applying the same reasoning it followed concerning the pleading of the names of victims at the Butare Prefecture Office.[2621]

1135. Ntahobali adds that, because the Prosecution did not specify that the *Interahamwe* were his "accomplices" in paragraph 6.27 of the Indictment unlike in other paragraphs, even though it was in possession of such information and was required to provide the identity of his accomplices by the Trial Chamber, he could only understand that he was not charged with ordering *Interahamwe* at the Hotel Ihuliro roadblock.[2622] In his view, the addition of the allegation concerning the murder of

[2615] Trial Judgement, para. 2930, *referring to* Witness QCB's Statement.
[2616] Trial Judgement, para. 2930.
[2617] Trial Judgement, paras. 2931, 2932.
[2618] Trial Judgement, para. 2932.
[2619] Ntahobali Notice of Appeal, paras. 93, 94, 96; Ntahobali Appeal Brief, paras. 198, 202.
[2620] Ntahobali Appeal Brief, para. 198, *referring to* Trial Judgement, fn. 5749, *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Decision on Defence Motion to Exclude Prosecution Witnesses BWM, BWN, BXB, BXC, BXD and BXL, 24 June 2008, para. 10.
[2621] Ntahobali Appeal Brief, para. 199, *referring to* Trial Judgement, paras. 2167-2172, 2795.
[2622] Ntahobali Notice of Appeal, paras. 90, 99; Ntahobali Appeal Brief, para. 201, *referring to* Nyiramasuhuko and Ntahobali Indictment, paras. 6.30, 6.34, 6.48, 6.50, 6.51, 1 November 2000 Decision, para. 18. *See also* Ntahobali Reply Brief, para. 81.

Ruvurajabo led to a radical transformation of the case against him.[2623] Ntahobali further submits that reading paragraph 6.27 together with paragraph 6.15 of the Indictment – which refers to the Interim Government's decision of 27 April 1994 to establish roadblocks – he could only understand that the Hotel Ihuliro roadblock was alleged to have been established after 27 April 1994 and argues that, consequently, the murder of Ruvurajabo on 21 April 1994 fell beyond the scope of the Indictment.[2624] Finally, Ntahobali contends that the Trial Chamber erred in finding that Witness QCB's Summary and Statement cured the defect in the Indictment, notably given the absence of details concerning the orders to kill Ruvurajabo he allegedly gave.[2625]

1136. The Prosecution responds that Witness QCB's Summary and Statement provided Ntahobali with the missing material facts of Ruvurajabo's murder, including that he was alleged to have ordered *Interahamwe* to kill Ruvurajabo, and did not create new charge or radically transform its case.[2626] It submits that the Trial Chamber's finding regarding notice of the victims' names at the Butare Prefecture Office is distinguishable and that the allegation in paragraph 6.15 of the Indictment did not preclude that roadblocks were set up prior to the Interim Government's decision, nor did it negate the information in Witness QCB's Statement that Ruvurajabo was killed on 21 April 1994.[2627]

1137. Ntahobali replies that the subsequent information provided through Witness QCB's Summary and Statement mentioned *Interahamwe* but also civilians wearing military vests.[2628] He also develops arguments pertaining to the prejudice he allegedly suffered from the lack of notice regarding this specific allegation.[2629]

1138. The Appeals Chamber notes that there is no dispute that the Indictment was defective with respect to the pleading of Ntahobali's responsibility for ordering the killing of Ruvurajabo, whose identity was not specified in the Indictment even though the Prosecution was in possession of the

[2623] Ntahobali Appeal Brief, para. 200.
[2624] Ntahobali Appeal Brief, para. 201.
[2625] Ntahobali Notice of Appeal, paras. 93, 95, 96.
[2626] Prosecution Response Brief, paras. 782-786. *See also* AT. 15 April 2015 pp. 77, 78. The Prosecution also points out that Ntahobali extensively cross-examined Witness QCB on the murder of Ruvurajabo. *See* Prosecution Response Brief, para. 786.
[2627] Prosecution Response Brief, paras. 784, 786. The Prosecution also argues that this discrepancy of approximately six days is minor and that Ntahobali has not established how he was prejudiced by it. *See ibid*., para. 786.
[2628] Ntahobali Reply Brief, para. 80.
[2629] Ntahobali submits that: (i) because he did not know before Witness QCB's testimony at trial that this witness would allege that he ordered *Interahamwe* to kill Ruvurajabo, he was unable to conduct any investigation in that regard; (ii) it was unreasonable for the Trial Chamber to require him to cross-examine witnesses on aspects falling outside the indictment and then rely on that to establish the absence of prejudice; and (iii) the prejudice is apparent from the contradictions in Witness QCB's accounts revealed by the witness's subsequent statements given to Canadian authorities and aggravated by the Trial Chamber's refusal to recall the witness on these contradictions. *See* Ntahobali Reply Brief, para. 81, *referring*, *inter alia*, *to* Ntahobali 1 October 2008 Motion to Recall Witness QCB, paras. 32-36, 48, 20 November 2008 Decision, paras. 38, 40. *See also ibid*., para. 82 (arguing that the Prosecution bears the burden of showing that he was not prejudiced).

information.[2630] To demonstrate that the defect could not be cured by the provision of subsequent information, Ntahobali relies on a trial chamber's decision in the *Kalimanzira* case and on the Trial Chamber's reasoning concerning the pleading of victims' names at the Butare Prefecture Office.[2631] Ntahobali, however, fails to appreciate that decisions of trial chambers have no binding force on each other[2632] and that the Trial Chamber did not conclude that the Prosecution's failure to identify by names victims at the Butare Prefecture Office could not be remedied by the provision of subsequent information but, instead, found that the defects were not cured.[2633]

1139. The Appeals Chamber is also not persuaded by Ntahobali's argument that the Prosecution's failure to specify in the Indictment that he was alleged to have ordered "*Interahamwe*" to commit crimes at the Hotel Ihuliro roadblock indicated that he was not charged on the basis of ordering "*Interahamwe*". Ntahobali is correct in his submission that the Prosecution failed to comply with the Trial Chamber's order to provide the "identity of at least some of the 'unknown persons' in paragraph 6.27 [of the Indictment]" with whom he was alleged to have worked since it knew that *Interahamwe* were alleged to be among them.[2634] However, the fact that the Prosecution repeatedly disclosed Witness QCB's Statement containing this allegation prior to and after the filing of the operative indictment,[2635] together with the Prosecution's express reliance on this aspect of Witness QCB's anticipated evidence in its pre-trial brief in support of its case against Ntahobali,[2636] put Ntahobali on notice that his orders to *Interahamwe* at the Hotel Ihuliro roadblock formed part of the Prosecution case of Ntahobali's "use of the roadblock, with the assistance of […] unknown persons, to identify, abduct and kill members of the Tutsi population" set forth in paragraph 6.27 of the Indictment.

1140. Likewise, the Appeals Chamber rejects Ntahobali's contention that the allegation of the killing of Ruvurajabo on 21 April 1994 fell outside the scope of the Indictment because, in paragraph 6.15 of the Indictment, it was alleged that the Interim Government ordered roadblocks to be set up on 27 April 1994. In the view of the Appeals Chamber, the latter allegation does not materially contradict the former as there is no indication in the Indictment that roadblocks were only set up after the government's order and that paragraph 6.27 of the Indictment generally pleaded that the crimes at roadblocks were committed between April and July 1994.

[2630] *See* Trial Judgement, para. 2930.
[2631] *See supra*, para. 1134.
[2632] *See supra*, fn. 2546.
[2633] Trial Judgement, paras. 2167-2172, 2795.
[2634] Witness QCB's Statement, p. K0119775 (Registry pagination); 1 November 2000 Ntahobali Decision, para. 35(a)(ii). *See also ibid.*, para. 30.
[2635] Witness QCB's Statement was disclosed on 10 December 1999, 15 November 2000, 18 September 2001, and 1 October 2001. *See supra*, fn. 2524.

1141. The Appeals Chamber finds that the allegation concerning the murder of Ruvurajabo fell within the broader allegation relating to Ntahobali's use of the Hotel Ihuliro roadblock to identify, abduct, and kill Tutsis pleaded in paragraph 6.27 of the Indictment and that the Trial Chamber did not err in considering that the defect of the Indictment in this respect was therefore curable.

1142. With respect to Ntahobali's challenges to the Trial Chamber's finding that the defect in the Indictment was cured through the information provided in Witness QCB's Summary and Statement, the Appeals Chamber finds that the reference in these materials to the fact that Ntahobali ordered *Interahamwe* and civilians wearing military vests manning the Hotel Ihuliro roadblock to kill Ruvurajabo – who was immediately killed – provided sufficient detail to Ntahobali as to his alleged responsibility for this killing to allow him to prepare a meaningful defence. The Appeals Chamber does not consider that the reference to the implication of "civilians wearing military vests" or "military-type vests" together with *Interahamwe* in the killing ordered by Ntahobali at the roadblock rendered unclear the information concerning the involvement of *Interahamwe*. Ntahobali fails to develop any other argument to demonstrate that the Trial Chamber erred in finding that the defect in the Indictment concerning his responsibility in the murder of Ruvurajabo was cured and that he was on notice that he was alleged to have ordered *Interahamwe* to commit this crime.

1143. For these reasons, the Appeals Chamber concludes that the Trial Chamber did not err in finding that the vagueness of paragraph 6.27 of the Indictment concerning the killing of Ruvurajabo by *Interahamwe* at the Hotel Ihuliro roadblock on 21 April 1994 following Ntahobali's order was cured by the provision of timely, clear, and consistent information. As Ntahobali has failed to demonstrate error in the conclusion that he was put on adequate notice, the Appeals Chamber considers that his submissions pertaining to the prejudice he allegedly suffered from the lack of notice are without merit and dismisses them without further consideration.

(c) Committing the Rape of a Tutsi Girl

1144. As noted above, the Trial Chamber convicted Ntahobali under Counts 7 and 11 pursuant to Article 6(1) of the Statute for raping a Tutsi girl who arrived at the Hotel Ihuliro roadblock around the end of April 1994 and whom he also killed. In reaching its factual findings, the Trial Chamber relied on Prosecution evidence that the victim was dragged by Ntahobali from her vehicle into the woods near the roadblock and the EER, where she was raped and killed.[2637]

[2636] Witness QCB's Summary was marked relevant to Ntahobali and was linked to Counts 2, 6, 8, and 10 of his indictment.
[2637] Trial Judgement, para. 3133.

1145. The Trial Chamber noted that paragraph 6.27 of the Indictment did not allege that rapes were perpetrated at the Hotel Ihuliro roadblock and that this paragraph was not listed in support of Counts 7 and 11 in the Indictment.[2638] It also found that paragraphs 6.37 and 6.53 of the Indictment, listed in support of Counts 7 and 11, were unduly vague and insufficient to put Ntahobali on notice of the Prosecution's intention to prove that Ntahobali was responsible for abducting and then raping a Tutsi girl at the roadblock.[2639] The Trial Chamber found that the Indictment was defective in this respect.[2640] However, the Trial Chamber considered that this defect was cured through the disclosure of Witnesses SX's and TB's summaries appended to the Prosecution Pre-Trial Brief, together with their prior statements.[2641] The Trial Chamber concluded that Ntahobali was sufficiently put "on notice with respect to the allegation that [he] abducted a Tutsi girl at the roadblock and raped her near the EER" pursued under Counts 7 and 11 and that he suffered no prejudice in the preparation of his defence.[2642]

1146. Ntahobali submits that the defect in the Indictment in relation to the rape of a Tutsi girl at the Hotel Ihuliro roadblock could not be cured as the Indictment was completely silent on this allegation.[2643] He argues that: (i) paragraph 6.27 of the Indictment which specifically relates to the Hotel Ihuliro roadblock does not mention any rapes and is not listed as relevant to Counts 7 and 11; (ii) paragraph 6.37 of the Indictment could only be understood as relating to the "mid-June 1994" period; and (iii) paragraph 6.53 of the Indictment does not mention him and, therefore, could not serve as the basis for his conviction.[2644] Ntahobali further submits that the Trial Chamber should have adopted the same reasoning as that applied for the allegations of rapes at Nyange.[2645] In his view, the addition of this allegation of rape at the Hotel Ihuliro roadblock led to a radical transformation of the case against him, which caused him prejudice.[2646]

[2638] Trial Judgement, paras. 2934, 5828, 5831.
[2639] Trial Judgement, paras. 2934, 5829, 5830.
[2640] Trial Judgement, para. 2934.
[2641] Trial Judgement, paras. 2941, 2942, *referring to* Witness SX's Summary, Witness TB's Summary, Witness SX's Statement, Witness TB's Statement.
[2642] Trial Judgement, para. 2942. By contrast, the Trial Chamber concluded that Ntahobali had not received sufficient notice that the charge of genocide would be supported by rapes committed at the Hotel Ihuliro roadblock and did not enter a genocide conviction on the basis of the rape of the Tutsi girl in late April 1994. *See ibid*., paras. 5828-5837, 5843, 5971.
[2643] Ntahobali Notice of Appeal, para. 98; Ntahobali Appeal Brief, paras. 181-187.
[2644] Ntahobali Appeal Brief, paras. 182-186, 188, *referring to Karera* Appeal Judgement, para. 365. Ntahobali points out that the rape of which he was convicted related to a different location and a different date than the ones referred to in paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment, leading to a *de facto* amendment of the Nyiramasuhuko and Ntahobali Indictment. *See ibid*., para. 185. He also argues that paragraph 6.37 could only be understood as relating to the Butare University Hospital, an argument that was addressed and dismissed in Section IV.B.3(b) above.
[2645] Ntahobali Appeal Brief, para. 183, *referring to* Trial Judgement, para. 4057. *See also* Ntahobali Reply Brief, para. 76.
[2646] Ntahobali Appeal Brief, para. 188, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 160-169.

1147. In the alternative, Ntahobali submits that the Trial Chamber erred in finding that the defects of paragraph 6.37 of the Indictment were cured by the information provided by Witnesses SX's and TB's summaries and statements as this information was so contradictory, ambiguous, and inconsistent that it could not be considered clear and coherent.[2647] In support of this contention, Ntahobali points out inconsistencies and ambiguities in these materials with respect to the date of the rape, the arrival and presence of the victim at the roadblock, what happened to her prior to being raped, the specific words that she uttered, the time spent in the woods, the location where the victim was undressed and the persons who undressed her, and when she was buried.[2648] He argues that he was greatly prejudiced by the lack of notice regarding this allegation.[2649]

1148. The Prosecution responds that the Trial Chamber did not err in considering that the vagueness of paragraphs 6.37 and 6.53 of the Indictment with regard to the impugned allegation was curable and cured.[2650] It submits that paragraph 6.53 was expressly pleaded in support of Counts 7 and 11 and that the Trial Chamber's finding with regard to the allegation concerning Nyange only relates to the Nsabimana and Nteziryayo Indictment and the Kanyabashi Indictment.[2651] The Prosecution further responds that Ntahobali's arguments regarding the lack of curing are undeveloped as well as lack references and evidential support and that: (i) the alleged discrepancy regarding the date of the rape is minor; (ii) the consistency of notice is not determined on the basis of the *viva voce* evidence subsequently given by the witnesses; and (iii) the purported inconsistencies are matters of evidence.[2652]

1149. Ntahobali replies that paragraph 6.53 of the Indictment relates to an indefinite period of time and to the whole territory of Rwanda and that he had repeatedly argued that this paragraph did not allege that he committed any crime.[2653] As regards the lack of curing, Ntahobali replies, *inter alia*, that the difference of eight days is not minor and shows that he could not understand that Witnesses SX and TB were talking about the same incident.[2654]

[2647] Ntahobali Appeal Brief, paras. 189-197.
[2648] Ntahobali Appeal Brief, para. 196. Ntahobali did not provide any references in support of these arguments.
[2649] Ntahobali Notice of Appeal, paras. 97, 98; Ntahobali Appeal Brief, paras. 189, 197. *See also* Ntahobali Reply Brief, para. 79.
[2650] Prosecution Response Brief, paras. 777-781.
[2651] Prosecution Response Brief, paras. 778, 779. The Prosecution argues that the situation in the present case differs from the situation discussed in the *Karera* case upon which Ntahobali relies. *See ibid*., para. 778.
[2652] Prosecution Response Brief, para. 781.
[2653] Ntahobali Reply Brief, para. 77. Ntahobali also points out that the Trial Chamber considered that a similar paragraph in the Kanyabashi Indictment was defective. *See idem*, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, signed 11 May 2000, dated 31 May 2000, filed 7 June 2000 (originally filed in French, English translation filed on the same day) ("31 May 2000 Decision"), paras. 5.16, 5.21(e).
[2654] Ntahobali Reply Brief, para. 78.

1150. The Appeals Chamber finds that Ntahobali does not show that the Trial Chamber erred in determining that the defect of the Indictment with respect to this allegation was curable. While paragraph 6.27 of the Indictment was not relied upon in support of Counts 7 and 11 and did not refer to rapes committed at roadblocks, paragraph 6.37 of the Indictment specifically pleaded Ntahobali's participation in the kidnapping and raping of Tutsis women and was relied upon in support of the relevant counts.[2655] It is also apparent that the allegation in paragraph 6.37 was meant to relate to the period "[b]etween April and July 1994" invoked in paragraph 6.27 of the Indictment and not, as argued by Ntahobali, to the period "mid-June 1994" referred to in the previous paragraph of the Indictment.

1151. In claiming that paragraph 6.53 of the Indictment could not serve as the basis for his conviction for the rape of the "Tutsi girl" because he was not mentioned in the paragraph, Ntahobali also overlooks that an indictment must be considered as a whole and that paragraph 6.53 was expressly relied upon in support of Counts 7 and 11 against him.[2656] Ntahobali's argument in reply concerning the vagueness of this paragraph regarding the timeframe and the location of the allegation of rapes perpetrated throughout Rwanda by militiamen, among others, does not demonstrate that the vagueness could not be remedied by the provision of subsequent information.[2657]

1152. The Appeals Chamber further rejects Ntahobali's contention that the Trial Chamber erred by not applying the same reasoning it adopted in relation to the allegations of rapes at Nyange raised against Nsabimana and Kanyabashi. The Trial Chamber determined that the allegations of rapes at Nyange fell outside the scope of the Nsabimana and Nteziryayo Indictment and the Kanyabashi Indictment as the relevant paragraphs of these indictments did not mention rape as one of the acts perpetrated against refugees at Nyange and that, consequently, "the matter of rapes [fell] outside the scope of the Indictments".[2658] The situation related to the allegation of rape committed by Ntahobali at the Hotel Ihuliro roadblock is clearly distinguishable since, unlike the Nsabimana and Nteziryayo Indictment and the Kanyabashi Indictment, the Indictment against Ntahobali alleged that Ntahobali was involved in rapes and, on this basis, charged him with rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Appeals Chamber, therefore, finds that Ntahobali does not demonstrate that the "new material facts" concerning the specific rape of the "Tutsi girl" led to a transformation of the Prosecution case.

[2655] Nyiramasuhuko and Ntahobali Indictment, pp. 42, 45.
[2656] Nyiramasuhuko and Ntahobali Indictment, pp. 42, 45.

1153. Turning to Ntahobali's alternative challenge to the Trial Chamber's finding that the defect in the Indictment regarding this allegation was cured, the Appeals Chamber observes that it is not clear from the reading of the summaries of their anticipated evidence that Witnesses TB and SX were expected to testify about the same incident of rape. However, although details differ, their accounts in their prior statements of the rape of a girl dragged from her vehicle stopped at the Hotel Ihuliro roadblock to be raped and killed by Ntahobali nearby reflect that both witnesses were describing the same incident.[2659]

1154. As to the date of the incident in particular, the Appeals Chamber observes that Witness TB's Summary indicates that the incident occurred "about 28 April 1994" and her prior statement "around the 28th of April, 1994",[2660] while Witness SX's Summary indicates that the rape occurred on the first day the Hotel Ihuliro roadblock was established, which, according to Witness SX's Statement, corresponds to "approximately two weeks" after the death of President Habyarimana was announced on the radio, that is around 21 April 1994.[2661] Given that it was clear from their statements that both witnesses gave estimates and that both witnesses approximately referred to the same period of time in April 1994, the Appeals Chamber considers that it was reasonable on the part of the Trial Chamber to deem that the information that their summaries and statements provided with regard to the date of the rape was sufficiently clear and consistent.

1155. In the same vein, the Appeals Chamber does not consider that the other variations in Witnesses TB's and SX's summaries and statements concerning the specifics of the victim's arrival at the Hotel Ihuliro roadblock, her rape, and of what happened to her corpse were such as to prevent Ntahobali from understanding that the Prosecution intended to prove that he was responsible for personally raping a Tutsi girl near the Hotel Ihuliro roadblock in the second half of April 1994. In the view of the Appeals Chamber, these variations were not relevant to the material facts required to be pleaded but were matters of evidence relevant to the Prosecution's ability to prove its case.

1156. Accordingly, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that the defect in the Indictment concerning his responsibility for

[2657] The Appeals Chamber considers that the fact that a similarly vague paragraph in the Kanyabashi Indictment was found defective in one of the Trial Chamber's decisions likewise does not suggest that the defect could not be cured.
[2658] Trial Judgement, para. 4057.
[2659] *See* Witness TB's Statement; Witness SX's Statement.
[2660] Witness TB's Statement, p. K046653 (Registry pagination).
[2661] Witness SX's Statement, p. K0146646 (Registry pagination) ("The barrier was erected on the day I came back from my home in Runyinya which was approximately two weeks after I heard of the death of the President on Radio Rwanda.").

raping a Tutsi girl near the Hotel Ihuliro roadblock around the end of April 1994 was curable and cured by timely, clear, and consistent information.

4. Killing of the Rwamukwaya Family (Ground 2.3)

1157. The Trial Chamber found that the Prosecution established beyond reasonable doubt that an individual named Rwamukwaya and his family, who were of Tutsi ethnicity, were killed on or about 29 or 30 April 1994, after Ntahobali had threatened to kill them.[2662] The Trial Chamber held that "[g]iven the narrow time frames involved between Ntahobali's threat pronounced against the Rwamukwaya family, the sighting of their bodies, and the first sightings of Ntahobali in a vehicle known to have belonged to Rwamukwaya, […] the inference drawn as to Ntahobali's responsibility in the killing of the Rwamukwaya family is the only reasonable conclusion based on the totality of the evidence."[2663] The Trial Chamber convicted Ntahobali of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) pursuant to Article 6(1) of the Statute for aiding and abetting the killing of the Rwamukwaya family.[2664]

1158. In summarising the Prosecution case against Ntahobali for the killing of the Rwamukwaya family, the Trial Chamber referred to paragraph 6.35 of the Indictment.[2665] When addressing Ntahobali's contention that the specific allegation concerning his responsibility in the killing of the Rwamukwaya family was not pleaded in the Indictment, the Trial Chamber considered paragraph 6.39 of the Indictment.[2666] The Indictment indicates that the allegations in paragraphs 6.35 and 6.39 of the Indictment were being pursued under, *inter alia*, Counts 2, 6, 8, and 10 pursuant to Articles 6(1) and 6(3) of the Statute.[2667]

1159. The Trial Chamber found that the allegation relating to the killing of the Rwamukwaya family was not specifically pleaded in the Indictment.[2668] In particular, it noted that the Indictment did not provide information with respect to the identity of the victims, the place and approximate date of the alleged criminal acts, and the means by which they were committed, although the

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[2662] Trial Judgement, paras. 3207, 3219, 5852.
[2663] *See* Trial Judgement, para. 3219. *See also ibid.*, para. 5852.
[2664] Trial Judgement, paras. 5855, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186.
[2665] Trial Judgement, para. 3151, fn. 8689. For paragraph 6.35 of the Nyiramasuhuko and Ntahobali Indictment, *see supra*, fn. 2499.
[2666] Trial Judgement, para. 3154. Paragraph 6.39 of the Nyiramasuhuko and Ntahobali Indictment reads as follows:

> 6.39 The entire *préfecture* of Butare was the scene of massacres of the Tutsi population involving Elie Ndayambaje, André Rwamakuba, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Ladislas Ntaganzwa, as well as Pauline Nyiramasuhuko and Shalom Arsène Ntahobali.

[2667] Nyiramasuhuko and Ntahobali Indictment, pp. 39-44.

Prosecution was aware of these details well before the filing of the Indictment.[2669] The Trial Chamber held that the Indictment was therefore defective in this regard.[2670] However, the Trial Chamber determined that this defect was cured through Prosecution post-indictment disclosures and that Ntahobali suffered no prejudice in the preparation of his defence.[2671]

1160. Ntahobali submits that his responsibility in the killing of the Rwamukwaya family was not pleaded in the Indictment, and that such defect was neither curable nor cured.[2672] The Prosecution responds that Ntahobali had sufficient notice that he was charged with aiding and abetting the killing of the Rwamukwaya family.[2673]

1161. As noted by the Trial Chamber, the Indictment was impermissibly vague in relation to the allegation concerning the killing of the Rwamukwaya family. The date, location, name of the victims, perpetrators of the killing, and Ntahobali's specific role in the crime are not specified in paragraphs 6.35 and 6.39 of the Indictment or anywhere else in the Indictment. Whereas paragraph 6.54 of the Indictment referred to by the Prosecution pleads that Ntahobali "aided and abetted [his] subordinates and others in carrying out the massacres of the Tutsi population", which indicates that Ntahobali was charged under this form of responsibility for some of the killings alleged in the Indictment, this paragraph is not expressly linked to paragraphs 6.35 or 6.39 and did not clarify that the allegations in these paragraphs were specifically charged under this form of responsibility.[2674] The Appeals Chamber will now examine whether the Trial Chamber erred in finding that the defects were curable and, if not, whether it erred in finding that the defects were cured.

(a) Whether the Defects Were Curable

1162. Ntahobali submits that the defects in the Indictment in relation to the allegation concerning the killing of the Rwamukwaya family could not be cured as this allegation constituted a separate charge which should have been pleaded in the Indictment.[2675] He contends that the Trial Chamber erroneously relied on paragraphs 6.35 and 6.39 of the Indictment as the basis of his conviction for the killing of the Rwamukwaya family on the grounds that: (i) paragraph 6.35 is totally unrelated to the allegation according to which Ntahobali announced his intention to have the Rwamukwaya

[2668] Trial Judgement, paras. 3154, 3155.
[2669] Trial Judgement, para. 3155, fn. 8696.
[2670] Trial Judgement, para. 3155.
[2671] Trial Judgement, paras. 3156-3161.
[2672] Ntahobali Notice of Appeal, paras. 107-112; Ntahobali Appeal Brief, paras. 220-246; Ntahobali Reply Brief, paras. 92-106. *See also* AT. 15 April 2015 pp. 43-46 (French).
[2673] Prosecution Response Brief, paras. 792-803.
[2674] The same holds true for the Prosecution's reference to paragraph 30 of its pre-trial brief.

family killed;[2676] and (ii) the Prosecution itself considered Prosecution Witness FA's evidence with regard to this crime as related to paragraphs 4.4 and 6.27 of the Indictment, not paragraph 6.35 or 6.39.[2677]

1163. In the alternative, Ntahobali contends that the addition of this allegation led to a radical transformation of the case against him.[2678] In his view, the omission of the allegation concerning the killing of the Rwamukwaya family from the Indictment, the body of the Prosecution Pre-Trial Brief, and the Prosecution's opening statement, demonstrates that the Prosecution did not intend to charge him in relation to the killing of the Rwamukwaya family.[2679]

1164. The Prosecution responds that the Trial Chamber's reliance on paragraphs 6.35 and 6.39 of the Indictment was not erroneous and that the allegation concerning the killing of the Rwamukwaya family did not constitute a distinct charge or radically transform the case.[2680] It adds that Ntahobali's arguments regarding Witness FA's evidence are mistaken.[2681]

1165. The Appeals Chamber accepts Ntahobali's argument that paragraph 6.35 of the Indictment is unrelated to the killing of the Rwamukwaya family; it alleges Ntahobali's responsibility for traveling throughout the prefecture in the search for Tutsis and for abducting and transporting Tutsis to locations within the prefecture where they were executed, whereas Ntahobali's

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[2675] Ntahobali Appeal Brief, paras. 221, 226. *See also* Ntahobali Notice of Appeal, para. 108; AT. 15 April 2015 pp. 43-46 (French).

[2676] Ntahobali Appeal Brief, para. 224; Ntahobali Reply Brief, para. 92. Ntahobali also argues that the Trial Chamber considered in its Rule 98*bis* Decision that paragraph 6.35 of the Nyiramasuhuko and Ntahobali Indictment was solely related to the orphans convoy and could therefore not be relied upon. *See* Ntahobali Appeal Brief, para. 225, *referring to* Rule 98*bis* Decision, para. 151.

[2677] Ntahobali Appeal Brief, para. 224, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Response to "*Requête d'Arsène Ntahobali aux fins d'exclusion de certains éléments du futur[] témoi[g]nage du témoin D-2-13-O de la D[é]fense de Joseph Kanyabashi*", 28 May 2007 (confidential) ("Prosecution 28 May 2007 Response"), paras. 1, 2, fns. 1, 2. Ntahobali adds that the Trial Chamber "seems to endorse this". *See ibid.*, para. 224, *referring to The Prosecution v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Arsène Shalom Ntahobali's Motion to Exclude Certain Evidence from the Expected Testimony of Kanyabashi's Witness D-2-13-O, 29 June 2007 ("29 June 2007 Decision"), paras. 6, 10. In addition, Ntahobali argues that the fact that paragraphs 6.35 and 6.39 of the Nyiramasuhuko and Ntahobali Indictment were listed under the heading "Butare University Hospital" necessarily linked them to this location. *See ibid.*, paras. 223, 224; Ntahobali Reply Brief, para. 92. The Appeals Chamber reiterates that, while the heading "Butare University Hospital" at page 32 of the Nyiramasuhuko and Ntahobali Indictment is misleading as to the location of the crimes mentioned in the paragraphs following this headline, it would be unreasonable to conclude that paragraphs 6.35 and 6.39 of the Nyiramasuhuko and Ntahobali Indictment were limited to events at the Butare University Hospital given the very contents of these two paragraphs, which expressly refer to the "entire *préfecture* of Butare" and "various locations". *See supra*, paras. 512, 1087.

[2678] Ntahobali Appeal Brief, para. 228.

[2679] Ntahobali Notice of Appeal, para. 109; Ntahobali Appeal Brief, paras. 231, 243; AT. 15 April 2015 p. 46 (French); AT. 15 April 2015 p. 46 (French). Ntahobali further highlights that no reference to this specific killing was made in the summaries of the anticipated evidence of Witnesses QF, ST, TF, and TG, which, he argues, indicates that the Prosecution did not intend to prove this allegation through these witnesses. *See* Ntahobali Appeal Brief, para. 231; AT. 15 April 2015 p. 45 (French). Ntahobali also notes that Witnesses QF, ST, and TF were withdrawn from the witness list and did not testify and that the Prosecution had not included Witness FA in its original witness list. *See idem*.

[2680] Prosecution Response Brief, para. 793.

[2681] Prosecution Response Brief, para. 794.

responsibility for the killing of the Rwamukwaya family does not imply any traveling or abduction and transporting of victims. As a result, the Appeals Chamber does not consider that Ntahobali's responsibility for the killing of the Rwamukwaya family fell within the scope of paragraph 6.35.[2682]

1166. By contrast, the allegation concerning the killing of the Rwamukwaya family fell within the broader allegation relating to Ntahobali being involved in massacres of Tutsis within the entire Butare Prefecture pleaded in paragraph 6.39 of the Indictment. In this respect, the Appeals Chamber does not consider that the fact that the Prosecution and the Trial Chamber solely referred to paragraphs 4.4 and 6.27 of the Indictment when referring to the evidence of Witness FA about the killing of the Rwamukwaya family necessarily means that the allegation concerning the killing of the Rwamukwaya family was not encompassed within the broad allegation set out in paragraph 6.39.[2683]

1167. The Appeals Chamber therefore does not find that the allegation constituted a new charge. Likewise, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its conviction led to a radical transformation of the Prosecution case against Ntahobali, nor that these facts could have, on their own, supported a separate charge. As vague as the charge set out in paragraph 6.39 of the Indictment was, it nonetheless clearly pleaded the involvement of Ntahobali in the massacre of the Tutsi population in Butare Prefecture.

1168. The Prosecution did not expressly refer to the killing of the Rwamukwaya family and his responsibility in this crime in its pre-trial brief or opening statement. As the Prosecution obtained information about Ntahobali's involvement in the killing of Rwamukwaya and his family from a number of witnesses which it disclosed in 1998 and 1999,[2684] the Prosecution should have pleaded this allegation with greater specificity in the Indictment and expressly referred to it in the main text of its pre-trial brief. However, the Appeals Chamber is not persuaded by Ntahobali's argument that the Prosecution's failure to specifically refer to the killing of the Rwamukwaya family demonstrates that it did not intend to charge him in relation to these killings. In the view of the Appeals Chamber, the fact that the prior written statements of six witnesses concerning Ntahobali's involvement in the killing of Rwamukwaya and his family were disclosed to Ntahobali in November 1998 and March 1999, and again in November 2000,[2685] prior to the filing of the operative indictment, shows that these killings formed part of the Prosecution case at the time the Indictment was issued.

[2682] The Appeals Chamber therefore considers that Ntahobali's contention with regard to the Rule 98*bis* Decision has become moot and need not be addressed.
[2683] *See* Prosecution 28 May 2007 Response, para. 2, fn. 2; 29 June 2007 Decision, para. 10, fn. 6.
[2684] Trial Judgement, paras. 3155, 3157-3159, fns. 8696, 8699, 8701, 8702.
[2685] *See* Trial Judgement, paras. 3155, 3157-3159, fns. 8696, 8699, 8701, 8702.

1169. Consequently, the Appeals Chamber considers that the defects in the Indictment regarding Ntahobali's responsibility for the killing of the Rwamukwaya family were curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defects were cured.

(b) Whether the Defects Were Cured

1170. The Trial Chamber determined that the defects in the Indictment concerning the killing of the Rwamukwaya family were cured through the disclosure of the summaries of the anticipated evidence of Witnesses RN and TE,[2686] along with Witnesses QF's, ST's, TF's, and TG's prior statements to Tribunal investigators.[2687] The Trial Chamber also noted that the information contained in the statements of Witnesses TE and RN was consistent with the information contained in the summaries of their anticipated evidence.[2688] It further found that the information contained in the summary of Witness FA's anticipated testimony attached to the Prosecution's motion to vary its witness list of 12 January 2004 was consistent with the witness's prior statement and provided additional notice to Ntahobali concerning this allegation.[2689]

1171. Ntahobali submits that the Trial Chamber erred in finding that the defects in the Indictment had been cured by the provision of clear and consistent information and that he was put on notice that the Prosecution intended to prove that he was criminally responsible for aiding and abetting the killing of the entire Rwamukwaya family.[2690] He contends that neither the Indictment nor any subsequent information gave him notice of when the killing allegedly took place, the identity of the principal perpetrator(s), and the fact that he was alleged to have "aided and abetted" the killing of

[2686] Trial Judgement, paras. 3156-3161, *referring to* Witness Summaries Grid, Witness RN's Summary, item 91, Witness TE ("Witness TE's Summary").
[2687] Trial Judgement, paras. 3156-3161, *referring to* Statement of Witness QF of 17 December 1996, signed on 18 December 1996, disclosed in redacted version on 4 November 1998 (confidential) ("Witness QF's Statement"), Statement of Witness ST of 14 November 1996, signed on 15 April 1997, disclosed in redacted versions on 4 November 1998 and 15 November 2000 (confidential) ("Witness ST's Statement"), Statement of Witness TF of 13 November 1996, disclosed in redacted versions on 4 November 1998 and 15 November 2000 (confidential) ("Witness TF's Statement"), Statement of Witness TG of 4 December 1996 disclosed in redacted versions on 4 November 1998 and 15 November 2000. The unredacted version of Witness TG's 4 December 1996 statement was admitted into evidence on 20 April 2004 as Exhibit D210 (confidential) ("Witness TG's Statement"). *See* 4 November 1998 Disclosure; 15 November 2000 Disclosure.
[2688] Trial Judgement, paras. 3157, 3158 *referring to* Statement of Witness TE of 21 November 1996, disclosed in redacted versions on 4 November 1998 and 15 November 2000 ("Witness TE's Statement"), Statement of Witness RN of 20 November 1996, disclosed in redacted version on 30 March 1999 ("Witness RN's Statement"). *See* 4 November 1998 Disclosure; 15 November 2000 Disclosure.
[2689] Trial Judgement, para. 3162, *referring to* Prosecution Motion to Vary Witness List, para. 4, Statement of Witness FA of 26 November 1996, disclosed in redacted version on 12 January 2004 (confidential) ("Witness FA's Statement"). *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Interoffice Memorandum "Butare Group of Cases ICTR-98-42-T – Disclosure", 12 January 2004. The unredacted version of Witness FA's 26 November 1996 statement was admitted into evidence on 14 September 2004 as Exhibit D251 (confidential).
[2690] Ntahobali Notice of Appeal, paras. 107-110; Ntahobali Appeal Brief, paras. 229-242. Ntahobali contends that he never understood that he was charged with aiding and abetting the killing of the entire Rwamukwaya family until the issuance of the Trial Judgement. *See* Ntahobali Appeal Brief, para. 245. *See also* Ntahobali Reply Brief, para. 103.

the family by announcing his intention to see this family dead.[2691] He argues that Witnesses RN's and TE's summaries, together with Witnesses QF's, ST's, TF's, and TG's statements are silent, contradictory, or ambiguous with regard to his specific conduct, the identity of the perpetrators, the dates of his announcement of his intention to kill the family, and the date of the killing itself.[2692] Ntahobali also points out inconsistencies between the statements and summaries of Prosecution witnesses as to whether only Rwamukwaya or his entire family were killed, and as to whether or not Ntahobali was alleged to have personally perpetrated the killings.[2693] Ntahobali adds that the Trial Chamber erred in finding that the addition of Witness FA to the Prosecution's witness list and the disclosure of Witness FA's Statement provided additional notice of this allegation.[2694]

1172. Furthermore, Ntahobali submits that the withdrawal from the Prosecution's witness list in March 2002 of Witnesses RN and TE – the only two witnesses expected to testify about this particular killing – indicates that the Prosecution no longer intended to present evidence regarding the killing of the Rwamukwaya family and that the killing was therefore no longer part of the Prosecution case.[2695]

1173. The Prosecution responds that the Trial Chamber correctly found that the defects in the Indictment regarding the killing of Rwamukwaya and his family were cured.[2696] In particular, the Prosecution argues that: (i) Witnesses RN's and TE's summaries and statements informed Ntahobali of the victims' identity, the approximate date and place of the killing, and that he aided and abetted the killing; (ii) the other relevant witnesses' statements did not present significant inconsistencies; and (iii) it was clear throughout the trial that it intended to prove that Ntahobali was responsible for these killings.[2697] The Prosecution further submits that, even if the defects concerning this incident were not found to be cured, Ntahobali did not suffer prejudice as "he amply defended against these charges."[2698]

[2691] Ntahobali Notice of Appeal, para. 108; Ntahobali Appeal Brief, paras. 229-237. *See also* Ntahobali Reply Brief, paras. 93, 94, 96, 97.
[2692] Ntahobali Appeal Brief, paras. 229-242.
[2693] Ntahobali Appeal Brief, paras. 230, 231, 234, 239-241; Ntahobali Reply Brief, para. 99.
[2694] Ntahobali Notice of Appeal, paras. 110, 111; Ntahobali Appeal Brief, paras. 233, 234. Ntahobali argues that this information was provided too late to constitute timely notice and that nothing in Witness FA's Statement gave him notice that the family was alleged to be dead or that Ntahobali was alleged to have aided and abetted its killing. *See idem*.
[2695] Ntahobali Notice of Appeal, para. 109; Ntahobali Appeal Brief, paras. 243, 246, *referring to Niyitegeka* Appeal Judgement, para. 221. *See also* Ntahobali Reply Brief, paras. 95, 106. In Ntahobali's view, the Trial Chamber also erred in finding that the Prosecution specifically alleged in its closing brief that Ntahobali was responsible for killing the family. *See* Ntahobali Appeal Brief, para. 244.
[2696] Prosecution Response Brief, paras. 794-803.
[2697] Prosecution Response Brief, paras. 795, 796, 800, 801. The Prosecution specifies that while the Rwamukwayas' killing was mentioned in the specific intent section, it was also mentioned as evidence for the murder charge. *See ibid*., para. 801, *referring to* Prosecution Closing Brief, paras. 36, 66, 98 at pp. 168, 169, 182, 193, 194.
[2698] Prosecution Response Brief, para. 802, *referring to* Witness FA, T. 1 July 2004 pp. 45, 46, Ntahobali Closing Brief, paras. 9, 31, 49, 78, 98, 405-412, 706, 710.

1174. Ntahobali replies that the Prosecution had the burden of proof to establish the absence of prejudice but failed to do so.[2699] He contends that he was prejudiced as: (i) it is speculative to assert that the cross-examination of Witness FA would have been conducted the same way had he been properly put on notice of all relevant material facts; (ii) the references to the killing of Rwamukwaya and the use of his car in his closing brief do not demonstrate that he understood the allegation; (iii) he could not cross-examine Witness FA and develop arguments in his closing submissions in relation to his responsibility for aiding and abetting as he did not know that he could be held responsible under this form of responsibility; and (iv) he was deprived of the possibility to cross-examine Witness FA in light of Witness D-2-13-O's testimony on the date of the killing of the Rwamukwaya family.[2700]

1175. In relevant part, Witness RN's Summary indicates that "Ntahobali killed a certain Mr. Rwanukwaya [*sic*], and then confiscated his white Peugeot." Witness TE's Summary indicates that: "Ntahobali went to the Rwamukwaya house. TE heard that the dead bodies of the Rwamukwaya family were found not far from Nyiramasuhuko's house, near the laboratory. TE heard that Ntahobali drove around in Rwamukwaya's car." The Appeals Chamber considers that upon reading these summaries which were indicated as being relevant to his Indictment,[2701] Ntahobali should reasonably have understood that he was alleged to be responsible under Counts 1 through 3 and 5 through 11 for the killing of Rwamukwaya.[2702] These summaries, however, are silent as to the date, circumstances, and location of the killings and, read together, are unclear regarding Ntahobali's specific course of conduct and whether he was alleged to be responsible for the killing of the entire family or only that of Rwamukwaya himself.

1176. Information as to the approximate timeframe of the killing, that is "during the early part of the genocide in Butare" and "after 18 April 1994",[2703] was provided in Witness RN's Statement, which Ntahobali should have been prompted to examine upon reading the summary of the witness's anticipated evidence. However, Witnesses TE's and RN's statements did not provide any further information or clarity as to any other relevant material facts underpinning the allegation against Ntahobali.

[2699] Ntahobali Reply Brief, para. 105.
[2700] Ntahobali Reply Brief, paras. 100-106.
[2701] Witness RN's Summary was specifically linked to Counts 1 through 3 and 5 through 11 of the Nyiramasuhuko and Ntahobali Indictment, and Witness TE's Summary was linked to Counts 1 through 3.
[2702] The Appeals Chamber considers that the fact that Witness TE's Summary was only linked to Counts 1 through 3 of the Nyiramasuhuko and Ntahobali Indictment could not reasonably be understood as limiting the allegation to these counts in light of the fact that Witness RN's Summary referring to the same allegation was clearly linked to Counts 5 through 11 in addition to Counts 1 through 3. The Appeals Chamber dismisses Ntahobali's argument in this respect. *See* Ntahobali Appeal Brief, para. 227.
[2703] Witness RN's Statement, p. 3.

1177. In their prior statements disclosed in November 1998 and November 2000, Witnesses QF, ST, TF, and TG referred to Ntahobali driving Rwamukwaya's car and being responsible for his killing or the killing of members of his family. Even assuming that these witnesses' prior statements could be considered as providing adequate notice despite the fact that the Prosecution failed to indicate that it intended to rely on this aspect of their evidence in its Witness Summaries Grid,[2704] the Appeals Chamber observes that the statements are not consistent as to whether Ntahobali directly participated in the killing himself or instructed or encouraged the killing, whether he was present during the killing, and whether other members of Rwamukwaya's family were killed.

1178. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in holding that Witnesses RN's and TE's summaries, along with the statements of Witnesses QF, ST, TF, and TG, provided clear and consistent information to put Ntahobali on sufficient notice of the allegation against him concerning the killing of the Rwamukwaya family.

1179. As noted above, the Trial Chamber further relied on the summary of Witness FA's testimony attached to the Prosecution Motion to Vary Witness List as providing additional notice to Ntahobali concerning this allegation.[2705] The summary of Witness FA's evidence indicated that the witness "heard [Ntahobali] say to an *Interahamwe* named Kazungu, 'Get up Kazungu. Let's go. Today we will start with killing [a Tutsi named] Rwamukwaya.'"[2706] The Prosecution argued that Witness FA's evidence was material to its case.[2707] Witness FA's Statement, referred to in the Prosecution's motion, also made reference to Ntahobali driving a white van a few days later.[2708] Despite Ntahobali's objection to the addition of this witness, the Trial Chamber granted the Prosecution's request.[2709] At the time, Ntahobali did not object to Witness FA's evidence as falling outside the scope of the Indictment.[2710] Rather, Ntahobali argued that Witness FA would testify on facts already addressed by other witnesses.[2711]

[2704] The Appeals Chamber recalls that "mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial". *See Bagosora and Nsengiyumva* Appeal Judgement, para. 162. *See also Ntagerura et al.* Appeal Judgement, para. 139; *Ntakirutimana* Appeal Judgement, para. 27.
[2705] Trial Judgement, para. 3162.
[2706] Prosecution Motion to Vary Witness List, para. 19.
[2707] Prosecution Motion to Vary Witness List, para. 20.
[2708] *See* Witness FA's Statement, p. 7660 (Registry pagination):

> After a week Shalom [REDACTED] called KAZUNGU. He said as follows, "Get up KAZUNGU, lets go today we will start with killing the RWAMUKWAYAs'." After a couple of days I saw Shalom driving a white Van covered with mud. I saw Shalom and KAZUNGU qua[r]relling about that Van because each one of them wanted it to be his. […] I saw Shalom many many times driving the Van carrying the Tutsis who were to be killed.

[2709] 30 March 2004 Decision, paras. 32, 33, 37, p. 8. *See also supra*, Section III.D.
[2710] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*., Case No. ICTR-97-21-T, *Réponse de Arsène Shalom Ntahobali à la Requête du Procureur pour retirer de sa liste de témoins trente témoins et y ajouter trois nouveaux témoins*, 23 February 2004 ("23 February 2004 Ntahobali Response"), paras. 29-35.
[2711] *See* 23 February 2004 Ntahobali Response, paras. 31, 33. *See also ibid*., para. 34.

1180. The Appeals Chamber considers that the Prosecution Motion to Vary Witness List, along with Witness FA's Statement as disclosed on 12 January 2004 with the motion, put Ntahobali on clear notice that he was alleged to have announced his intention to kill Rwamukwaya and confirmed the allegation that he was driving Rwamukwaya's car at one point. The summary and statement, however, did not clarify whether the Prosecution case was that Ntahobali physically participated in the killing of Rwamukwaya or was solely alleged to be responsible for instigating or encouraging the killing of Rwamukwaya and, indirectly, that of his family. These materials also cannot be said to constitute "timely" notice. The Appeals Chamber thus concludes that the Trial Chamber erred in finding that the defects in the Indictment concerning Ntahobali's responsibility for the killing of Rwamukwaya and his family were cured through Prosecution post-indictment disclosures.[2712]

1181. However, the Appeals Chamber is of the view that, by expressly stating in the Prosecution Motion to Vary Witness List that Witness FA's evidence relating to the killing of Rwamukwaya was "material" to its case and went "to prove counts" of the Indictment,[2713] the Prosecution made it clear that it still intended to prove Ntahobali's responsibility in respect of this killing despite the deletion of Witnesses RN and TE from its witness list ordered by the Trial Chamber in March 2002.[2714]

1182. Turning to the question whether the defects in the Indictment materially impaired Ntahobali's ability to prepare his defence in relation to the allegation concerning the killing of the Rwamukwaya family,[2715] the Appeals Chamber observes that, since Ntahobali raised the issue of lack of notice concerning this allegation in his closing brief and the Trial Chamber examined his claim without considering it untimely,[2716] the burden rests on the Prosecution to prove that Ntahobali's ability to prepare his defence was not materially impaired.[2717]

1183. The Appeals Chamber finds that the Prosecution has met its burden, as it effectively demonstrates that the conduct of Ntahobali's defence reveals that the vagueness of the notice

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[2712] *See* Trial Judgement, paras. 3161, 3162.
[2713] Prosecution Motion to Vary Witness List, para. 20.
[2714] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion to Stay Disclosure Until Protection Measures Are Put in Place, 27 March 2002, p. 4. This decision reflects that the Prosecution intended to call Witnesses RN and TE and did not wish to withdraw them from its witness list. The deletion of these witnesses from the Prosecution's witness list was ordered by the Trial Chamber as a result of the non-disclosure of their unredacted statements. *See ibid.*, paras. 9, 11. Ntahobali's argument that their withdrawal signaled that the Prosecution no longer intended to prove this allegation in 2002 is therefore without merit. The Appeals Chamber also considers that the fact that Witnesses QF, ST, and TF were ultimately not called to testify is irrelevant to the question of whether Ntahobali was provided sufficient notice of the allegation. *See supra*, fn. 2679. Contrary to Ntahobali's contention, the Appeals Chamber further observes that the Prosecution Closing Brief was clear that the allegation that Ntahobali was responsible for the killing of the Rwamukwaya family formed part of the Prosecution case. *See* Prosecution Closing Brief, paras. 36, 66, 98, 181, 199 at pp. 169, 182, 193, 194, 220, 221, 227.
[2715] *See supra*, para. 1105.
[2716] *See* Ntahobali Closing Brief, paras. 78(xv), 80, 81; Trial Chamber, paras. 3156-3161.
[2717] *See supra*, para. 1105.

provided by the Prosecution regarding the nature of his participation in the crime and the number of victims was harmless. Specifically, a review of the transcripts of Witness FA's testimony reflects that Ntahobali was able to conduct an effective cross-examination of Witness FA on the aspects of the witness's evidence on the basis of which he was ultimately convicted.[2718] The Appeals Chamber also notes that Ntahobali did not object to Witness FA's evidence on the killing of the Rwamukwaya family during the course of the witness's testimony for lack of notice[2719] and that he had objected to the addition of this witness in 2004 on the basis that the witness would testify on facts already addressed by other witnesses.[2720] Ntahobali's closing submissions also show that he understood and defended himself against the allegations that he announced his intention to kill Rwamukwaya and participated in the killing of Rwamukwaya *and* his family.[2721] The Appeals Chamber considers that the fact that Ntahobali challenged the allegation that he directly participated in the killing of the Rwamukwaya family did not prevent him from also defending against the allegation that he had announced his intention to kill Rwamukwaya, the primary basis on which the Trial Chamber relied to find him criminally responsible.

1184. In addition, the Appeals Chamber notes that Ntahobali himself testified as to the use of Rwamukwaya's vehicle,[2722] that he questioned one of his witnesses on the use of the vehicle,[2723] and that he called a witness to specifically rebut the allegations of his responsibility in the killing of Rwamukwaya and his family.[2724] The Appeals Chamber also observes that, contrary to Ntahobali's suggestion, his counsel's cross-examination of Witness D-2-13-O reflects that he was prepared to rebut the witness's testimony as regards his responsibility for aiding and abetting the killing of the Rwamukwaya family in the second half of April 1994.[2725]

[2718] *See* Witness FA, T. 1 July 2004 pp. 14-16 (closed session), 25, 45-49.
[2719] The Appeals Chamber reiterates that none of the Trial Chamber's oral statements and decisions pointed out by Ntahobali could have reasonably been understood as suggesting to the Defence to refrain from making objections related to the indictment because they would not be granted at this stage and had rather to be addressed in closing submissions. *See supra*, para. 1107.
[2720] *See* 23 February 2004 Ntahobali Response, paras. 31, 33. *See also ibid*., para. 34.
[2721] Ntahobali Closing Brief, paras. 706, 710; Ntahobali Closing Arguments, T. 23 April 2009 pp. 37, 38.
[2722] *See* Ntahobali, T. 26 April 2006 pp. 47, 48. *See also* Ntahobali Closing Brief, Appendix 3, para. 96.
[2723] Béatrice Munyenyezi, T. 27 February 2006 p. 18. *See also* Ntahobali Closing Brief, Appendix 3, para. 49.
[2724] Witness WQMJP, T. 25 January 2006 pp. 14-16, 23, 24, 28, 29 (closed session). *See also* Ntahobali Closing Brief, Appendix 3, para. 9. Ntahobali indicated in the will-say statement he disclosed in November 2005 that Witness WQMJP would testify, *inter alia*, that Rwamukwaya was alive in May 1994 and that his son was abducted while going around Butare. *See The Prosecutor v. Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Will Say Statement –Witness WQMJP, 24 November 2005 (confidential), p. 2117 (Registry pagination).
[2725] *See* Witness D-2-13-O, T. 7 November 2007 pp. 21-42 (closed session); T. 8 November 2007 pp. 11-72 (closed session). The Appeals Chamber notes that Ntahobali did not request the recall of Witness FA on the basis that he could not cross-examine her in light of the additional evidence provided by Witness D-2-13-O during his testimony. *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Motion by Arsène Shalom Ntahobali for Exclusion of Testimonial Evidence and for Recall of Witnesses, 8 October 2008 (originally filed in French, English translation filed on 9 March 2009) (confidential).

1185. In these circumstances, the Appeals Chamber is persuaded that, despite the vagueness of the Indictment and the Prosecution's failure to provide Ntahobali with clear and timely information on his responsibility for aiding and abetting the killing of the Rwamukwaya family, Ntahobali's ability to prepare a meaningful defence against the material facts on the basis of which he was ultimately convicted was not materially impaired.

(c) Conclusion

1186. For the foregoing reasons, the Appeals Chamber finds that, although the Trial Chamber erred in concluding that the defects in the Indictment concerning Ntahobali's responsibility for the killing of the Rwamukwaya family were cured, this error does not invalidate its decision to convict him for aiding and abetting the killing of the Rwamukwaya family as the Prosecution proved on appeal that Ntahobali's ability to prepare his defence in this respect was not materially impaired.

5. Butare Prefecture Office (Ground 2.5 in part)

1187. The Trial Chamber convicted Ntahobali of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who were abducted from the Butare Prefecture Office where they had sought refuge.[2726] The Trial Chamber also convicted Ntahobali of committing, ordering, and aiding and abetting rapes perpetrated at the Butare Prefecture Office as a crime against humanity (Count 7) and as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 11).[2727]

1188. In summarising the Prosecution case against Ntahobali with respect to these allegations, the Trial Chamber referred to paragraphs 4.5, 6.30, 6.31, 6.37, and 6.53 of the Indictment.[2728]

[2726] Trial Judgement, paras. 5876, 5971, 6053-6055, 6100, 6101, 6168, 6169, 6186. The Trial Chamber also found that Ntahobali bore superior responsibility for the acts of the *Interahamwe* at the prefectoral office, "including their abductions, rapes, and killings" pursuant to Article 6(3) of the Statute and considered this as an aggravating factor when determining his sentence. *See ibid*., paras. 5886, 5971. *See also ibid*., paras. 5652, 5884, 5885, 6056, 6086, 6220. The Appeals Chamber discusses Ntahobali's challenges to the imprecision of the Trial Judgement regarding his convictions for crimes committed at the Butare Prefecture Office in detail below in Section V.I.1. *See* Ntahobali Appeal Brief, para. 284. *See also ibid*., para. 289. The Appeals Chamber will address Ntahobali's contentions regarding the lack of notice that he was charged as a superior for crimes perpetrated at the prefectoral office in Section V.B.7 below.

[2727] Trial Judgement, paras. 6085, 6086, 6094, 6184-6186. While the Trial Chamber considered that the rapes that occurred at the Butare Prefecture Office could establish Ntahobali's responsibility for genocide, it concluded that Ntahobali was not given sufficient notice that rapes committed there would be used in support of this count and did not convict him of genocide on this basis. *See ibid*., paras. 5857-5865, 5868, 5872, 5874, 5875, 5877.

[2728] Trial Judgement, paras. 2149, 2150, 2162, 2163, fns. 5720-5723, 5751. *See also ibid*., paras. 5857-5859. Paragraph 4.5 of the Nyiramasuhuko and Ntahobali Indictment reads as follows:

The Indictment indicates that the allegations in paragraph 6.30 were being pursued against Ntahobali under Counts 2, 3, 5, 6, and 8 through 10, those in paragraph 6.31 under Counts 2, 3, 5, 6, and 8 through 11, and those in paragraph 6.37 under Counts 7 and 11, pursuant to Articles 6(1) and 6(3) of the Statute.[2729] The allegations in paragraph 6.53 were being pursued against him under Counts 2, 3, 5 through 11 pursuant to Articles 6(1) and 6(3) of the Statute.[2730] Paragraph 4.5 was not specifically relied upon in support of any count.

1189. In response to Ntahobali's assertion that he was not reasonably informed of the charges concerning the crimes committed at the Butare Prefecture Office, the Trial Chamber determined that "the crimes of abduction and killing at the [Butare Prefecture Office] were clearly pleaded in the Indictment."[2731] It further found that, although the Indictment was defective with respect to the charges of rape, the defects were cured and Ntahobali did not suffer prejudice in the preparation of his defence.[2732] As regards the pleading of victims in particular, the Trial Chamber held that, "in view of the sheer scale of the attacks, rapes and killings alleged to have taken place at the [Butare Prefecture Office], it [was] impractical to require the Prosecution to name each of the alleged victims of this course of conduct" and that the Indictment was therefore not defective for failing to name each of the alleged victims at the prefectoral office.[2733]

1190. Ntahobali submits that his responsibility in the abductions and killings of Tutsis at the Butare Prefecture Office was not adequately pleaded in the Indictment and that the vagueness of the Indictment was never cured.[2734] He also contends that the Trial Chamber erred in finding that he was provided sufficient notice of the charges of rape at the prefectoral office.[2735]

(a) Killings

1191. As discussed in detail below in Section V.I addressing Ntahobali's challenges to the assessment of the evidence and his responsibility in relation to the Butare Prefecture Office, the Trial Chamber found that Ntahobali ordered *Interahamwe* to kill numerous Tutsis who were abducted from the prefectoral office where they had sought refuge during an attack conducted in

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> 4.5 Arsène Shalom (or Shalome) Ntahobali exercised authority over *Interahamwe* militiamen in Butare *préfecture*.

For paragraphs 6.30, 6.31, 6.37, and 6.53 of the Nyiramasuhuko and Ntahobali Indictment, *see supra*, fn. 1123.
[2729] Nyiramasuhuko and Ntahobali Indictment, pp. 39-45.
[2730] Nyiramasuhuko and Ntahobali Indictment, pp. 39-45.
[2731] Trial Judgement, para. 2162.
[2732] Trial Judgement, paras. 2163-2166. *See ibid.*, paras. 5859, 5863.
[2733] Trial Judgement, para. 2169. The Trial Chamber, however, found that the late disclosure of the names of specific victims "accorded bias to the Defence in preparing its case" and decided that it will not convict Ntahobali, if established by the evidence, for the alleged crimes against "Trifina, Mrs. Mbasha, Annonciata, Semanyenzi, Caritas or Immaculée". *See ibid.*, para. 2172.
[2734] Ntahobali Notice of Appeal, paras. 125, 127, 128, 130, 131; Ntahobali Appeal Brief, paras. 294-299.

mid-May 1994. The Trial Chamber convicted Ntahobali under Counts 2, 6, 8, and 10 pursuant to Article 6(1) of the Statute for ordering killing on this basis.[2736] Although the Appeals Chamber, Judge Khan dissenting, has clarified that Ntahobali was ultimately only convicted in relation to one specific attack conducted in mid-May 1994, the Trial Judgement reflects that the evidence adduced by the Prosecution covered a longer period of time spanning additional attacks.[2737]

1192. In the Trial Judgement, the Trial Chamber determined that "the crimes of abduction and killing at the [Butare Prefecture Office] were clearly pleaded in the Indictment."[2738]

1193. Ntahobali submits that the Trial Chamber erred in finding that the Indictment was not defective concerning the crimes of abduction and killing at the prefectoral office.[2739] Specifically, he argues that the identity of his alleged accomplices was not sufficiently pleaded. He points out that, following the Trial Chamber's order in 2000 to identify his accomplices in paragraph 6.30 of the Indictment, the Prosecution only specified the names of two *Interahamwe* – who were not subsequently mentioned by the witnesses – and failed to provide the names of all the other *Interahamwe* it mentioned at trial.[2740] In his view, the fact that the Prosecution and its witnesses mentioned those names at trial demonstrates that the Prosecution could and should have specified them in the Indictment.[2741]

1194. Ntahobali also argues that the dates provided in paragraph 6.30 of the Indictment were too vague.[2742] He contends that, in the circumstances of this case, given that the refugees were transferred from the prefectoral office to the EER from 15 to 31 May 1994 and to Nyange in the end of May or early-June 1994, and that they left for Rango in June 1994, there could have been no attacks against them during these periods.[2743] According to Ntahobali, the fact that his co-accused's indictments contain dates that were more precise with respect to the absence of refugees from the prefectoral office and the fact that the Trial Chamber split the attacks into several identified times show that the Prosecution was in a position to provide more precise dates.[2744] Ntahobali claims that

[2735] Ntahobali Notice of Appeal, paras. 126, 127, 129-131; Ntahobali Appeal Brief, paras. 272-293.
[2736] *See infra*, Section V.I.1. *See also infra*, Section V.I.3.
[2737] Trial Judgement, paras. 2149-2782.
[2738] Trial Judgement, para. 2162.
[2739] Ntahobali Notice of Appeal, para. 125; Ntahobali Appeal Brief, paras. 294-299.
[2740] Ntahobali Notice of Appeal, para. 130; Ntahobali Appeal Brief, para. 295, *referring to* 1 November 2000 Ntahobali Decision, para. 35(a)(ii). *See also* Ntahobali Reply Brief, paras. 147-149.
[2741] Ntahobali Appeal Brief, para. 295.
[2742] Ntahobali Appeal Brief, para. 297 (French).
[2743] Ntahobali Appeal Brief, para. 297 (French), *referring to Ndindabahizi* Appeal Judgement, para. 20, *Naletilić and Martinović* Appeal Judgement, para. 59.
[2744] Ntahobali Appeal Brief, paras. 297, 298 (French), *referring to* Kanyabashi Indictment, paras. 6.41, 6.42, Nsabimana and Nteziryayo Indictment, paras. 6.38-6.40.

he was never provided notice through the Indictment or any subsequent materials of the approximate dates of the attacks in relation of which he was convicted.[2745]

1195. Ntahobali further submits that the form of responsibility of "ordering" was not pleaded in the Indictment. In his opinion, paragraph 6.30 of the Indictment cannot be considered as including "ordering".[2746] He adds that it is of significance that the names of Jumapili and Nsengiyumva mentioned in the Indictment as his accomplices were only mentioned in the summary of Witness QBM's anticipated evidence, which clearly specified that the orders to kill at the prefectoral office were not given by him.[2747]

1196. The Prosecution responds that Ntahobali does not demonstrate that the Trial Chamber erred in finding that paragraph 6.30 of the Indictment pleaded Ntahobali's responsibility for abductions and killings at the prefectoral office.[2748] It contends that, by identifying that *Interahamwe* militiamen accompanied him to abduct Tutsi refugees, paragraph 6.30 identified his alleged accomplices, and argues that the exact names of the *Interahamwe* were evidence and not material facts that needed to be pleaded in the Indictment.[2749] The Prosecution also responds that the form of responsibility of "ordering" was properly pleaded through paragraph 5.1 of the Indictment, which was listed under all counts, and that the date range provided was not too vague.[2750]

1197. Ntahobali was convicted of ordering "*Interahamwe*" to kill Tutsis who had sought refuge at the prefectoral office and were abducted during an attack perpetrated in mid-May 1994.[2751] In paragraph 6.30 of the Indictment, the Prosecution clearly pleaded that Ntahobali went to the prefectoral office to abduct Tutsi refugees with "*Interahamwe* militiamen such as one JUMAPILI and another NSENGIYUMVA among others". The fact that the Prosecution, or the witnesses it called, referred to specific *Interahamwe* by names in the course of the trial other than those mentioned in the Indictment does not establish that the Prosecution was in possession of this information when the operative indictment was issued or its pre-trial brief was filed. As such, Ntahobali fails to demonstrate that the Prosecution was in possession of additional information regarding the names of the *Interahamwe* who participated in abductions and killings with him at the prefectoral office. In the view of the Appeals Chamber, the fact that the Prosecution and its

[2745] Ntahobali Appeal Brief, para. 297 (French). *See also* Ntahobali Reply Brief, para. 151.
[2746] Ntahobali Appeal Brief, para. 296. *See also* Ntahobali Notice of Appeal, para. 128.
[2747] Ntahobali Appeal Brief, para. 296, *referring to* Witness Summaries Grid, item 43, Witness QBM ("Witness QBM's Summary").
[2748] Prosecution Response Brief, para. 830. *See also* AT. 15 April 2015 pp. 73, 74.
[2749] Prosecution Response Brief, paras. 830, 831. The Prosecution adds that the sheer scale of the crimes charged in paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment made it impracticable to require a high degree of specificity. *See ibid*., para. 830.
[2750] Prosecution Response Brief, paras. 832, 833.
[2751] *See infra*, Section V.I.3.

witnesses did not eventually mention "Jumapili" and "Nsengiyumva" at trial is not relevant to whether Ntahobali was provided sufficient notice of the identity of his alleged "accomplices".

1198. Paragraph 6.30 of the Indictment specifies the relevant date range as "[b]etween 19 April and late June 1994". In the specific circumstances of the allegation pertaining to the crimes at the prefectoral office, the Appeals Chamber is unconvinced by Ntahobali's argument that the Trial Chamber erred in finding that this broad date range was sufficient to provide him notice. Although the Appeals Chamber, Judge Khan dissenting, has clarified that Ntahobali was ultimately only convicted in relation to one specific attack conducted in mid-May 1994, the Trial Judgement reflects that the evidence adduced by the Prosecution covered a longer period of time spanning additional attacks.[2752] Ntahobali's submission that the Indictment should have pleaded the different transfers of the refugees from the prefectoral office to the EER, Nyange, or Rango – as it did in the Kanyabashi Indictment and the Nsabimana and Nteziryayo Indictment[2753] – fails to appreciate that the Prosecution case, as presented at trial, was not that crimes were not committed after or between those transfers but that attacks were ongoing at the prefectoral office from the end of April to the end of June 1994. Given the sheer scale of the alleged crimes ranging over a period of nearly three months, Ntahobali does not demonstrate that the Prosecution was in a position to provide further specificity as regards the dates of the commission of the crimes.[2754]

1199. With respect to the pleading of the form of responsibility, the Appeals Chamber recalls that the alleged nature of the responsibility of the accused should be stated unambiguously in the indictment and that the Prosecution should therefore indicate precisely which form of responsibility is invoked based on the facts alleged.[2755] When it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or the "particular course of conduct" on the part of the accused which forms the basis for the charges in question.[2756]

1200. The Appeals Chamber observes that paragraph 6.30 of the Indictment, which refers to Ntahobali's responsibility for abductions and killings at the prefectoral office, does not specifically refer to Ntahobali giving orders to the *Interahamwe* who accompanied him to abduct refugees, who

[2752] Trial Judgement, paras. 2149-2782.
[2753] *See* Kanyabashi Indictment, paras. 6.41, 6.42; Nsabimana and Nteziryayo Indictment, paras. 6.38-6.40.
[2754] The Appeals Chamber finds no merit in Ntahobali's reliance on the *Naletilić and Martinović* Appeal Judgement, in which the Appeals Chamber found that the indications "in the days following the 9 May 1993 attack" and "during the first days of July 1993" in the indictment did not sufficiently plead the incident on 13 and 14 June and 29 September 1993 in relation to which Vinko Martinović was convicted. *See* Ntahobali Appeal Brief, para. 297 (French), *referring to Naletilić and Martinović* Appeal Judgement, para. 59.
[2755] *Uwinkindi* Appeal Decision, para. 48. *See also Blaškić* Appeal Judgement, para. 215.
[2756] *See*, *e.g.*, *Ndindiliyimana et al*. Appeal Judgement, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Blaškić* Appeal Judgement, para. 213.

were later killed. Paragraph 6.31 of the Indictment which the Trial Chamber took into consideration is not relevant in this respect. The Appeals Chamber is not persuaded by the Prosecution's argument that paragraph 5.1 of the Indictment put Ntahobali on sufficient notice that he was charged with ordering crimes at the prefectoral office given the broad nature of the allegation set forth in this paragraph, the fact that it is not clearly linked to paragraph 6.30, and the fact that it refers to several forms of responsibility.[2757] The Appeals Chamber considers that, by failing to specify that Ntahobali was alleged to have ordered killings at the prefectoral office in particular or sufficiently specify his particular acts or course of conduct in this regard, the Indictment failed to provide adequate notice to Ntahobali that he was charged on this basis. As a result, the Appeals Chamber finds that the Trial Chamber erred in failing to conclude that the Indictment was vague as regards the pleading of the form of responsibility of ordering.

1201. The Appeals Chamber, however, finds that the Trial Chamber's error does not invalidate its decision to convict Ntahobali for ordering *Interahamwe* to kill Tutsis who were abducted from the prefectoral office because the vagueness of the Indictment was remedied by the provision of timely, clear, and consistent information. Specifically, the Appeals Chamber notes that it is clear from the summary of Witness RJ's anticipated evidence attached to the Prosecution Pre-Trial Brief that the Prosecution intended to prove through this witness that Ntahobali exercised authority over the *Interahamwe* involved in crimes at the prefectoral office and issued instructions and orders to kill refugees.[2758] Witnesses RE's and TA's summaries also showed that these witnesses were expected to testify that Ntahobali exercised authority at the prefectoral office and issued orders and instructions to *Interahamwe* while there.[2759] These summaries were expressly marked relevant to Ntahobali and, *inter alia*, to Counts 2, 6, and 8 of his Indictment. The Appeals Chamber considers that the fact that some of these summaries, together with the summaries of the anticipated evidence

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[2757] *See* Nyiramasuhuko and Ntahobali Indictment, para. 5.1 ("[…] In executing the plan, they organized, ordered and participated in the massacres perpetrated against the Tutsi population and of moderate Hutu. […] Shalom Arsène Ntahobali elaborated, adhered to and executed this plan.").

[2758] In relevant part, Witness RJ's Summary reads as follows:

> Later Ntahobali came with soldiers and *Interahamwe* […]. Ntahobali said, "these people must be killed." Ntahobali selected young women and girls and left with them. Next day Nyiramasuhuko and Ntahobali came in a mud-camouflaged car and took away women and girls. Girls asked for mercy but Nyiramasuhuko and Ntahobali refused instead they ordered beatings.

[2759] In relevant part, Witness RE's Summary reads as follows:

> During the night, RE saw Ntahobali […]. He arrived at the Prefecture office with Nyiramasuhuko and some *Interahamwe*. […] RE heard Ntahobali give orders to the *Interahamwe* to force people into cars. […] Ntahobali drove the car and returned in an empty car. RE learned from one survivor that the refugees were brought to a place called Rwabayanga to be killed.

In relevant part, Witness TA's Summary reads as follows:

> Nyiramasuhuko and Ntahobali came to the Prefecture office often. They stated: "Let's get rid of this dirt." People were taken away. […] TA regarded Ntahobali as the leader of the attackers. He issued commands to the attackers.

of other witnesses, including Witness QBM's Summary, also referred to Nyiramasuhuko or others issuing orders and exercising authority during attacks at the prefectoral office is not inconsistent with the fact that Ntahobali was also alleged to have issued orders.

1202. The Appeals Chamber concludes that, although the Indictment was defective regarding the pleading of his responsibility for ordering killings at the prefectoral office, Ntahobali was subsequently put on adequate notice that he was charged with ordering *Interahamwe* to commit killings at the Butare Prefecture Office between 19 April and late June 1994.

(b) Rapes

1203. As discussed in detail below in Section V.I.1(b), the Trial Chamber found that, at the Butare Prefecture Office, Ntahobali: (i) raped Witness TA during an attack conducted in mid-May 1994; (ii) raped and ordered rapes of Witness TA and six other women during attacks that occurred in the last half of May 1994; and (iii) raped women and aided and abetted the rapes of Witness TA during attacks in the first half of June 1994.[2760] The Trial Chamber convicted Ntahobali of committing, ordering, and aiding and abetting rapes under Counts 7 and 11 on this basis.

1204. The Trial Chamber made the following determinations regarding the pleading of Nyiramasuhuko's and Ntahobali's responsibility for rapes at the prefectoral office in the Indictment:

> As to the crime of rape, Paragraph 6.37 of the Nyiramasuhuko and Ntahobali indictment states that aside from the attacks on Tutsis, Ntahobali was assisted by accomplices in kidnapping and raping Tutsi women. The Chamber recalls that an indictment paragraph should be read in conjunction with the entire indictment as a whole. Read in this way, the crimes of kidnapping and rape were separately pled to the attacks occurring throughout the rest of the *préfecture*, including the attacks and abductions at the [Butare Prefecture Office]. Nonetheless, the information in Paragraph 6.37 lacked necessary details, including specific dates, locations and the names of victims, to put Ntahobali and Nyiramasuhuko on notice that they were being charged with raping women or were responsible as a superior for rapes occurring at the [Butare Prefecture Office]. The Indictment was therefore defective in this regard.[2761]

The Trial Chamber determined that the defect in the Indictment was cured through the Prosecution Pre-Trial Brief and the summaries of the anticipated evidence of Witnesses TA, FAP, QBP, QBQ, QZ, RE, RF, RG, RJ, and SW appended to the Prosecution Pre-Trial Brief, which clearly indicated that Ntahobali and Nyiramasuhuko participated in rapes at the prefectoral office.[2762]

[2760] *See also infra*, Section V.I.1(c).
[2761] Trial Judgement, para. 2163.
[2762] Trial Judgement, paras. 2164, 2166, fns. 5752, 5753, *referring to* Prosecution Pre-Trial Brief, para. 29, Witness TA's Summary, Witness FAP's Summary, Witness QBP's Summary, Witness QBQ's Summary, Witness QZ's Summary, Witness RE's Summary, Witness RF's Summary, Witness RG's Summary, Witness RJ's Summary, Witness SW's Summary.

1205. Ntahobali submits that the Trial Chamber erred in convicting him on the basis of rapes committed at the Butare Prefecture Office as this allegation was not pleaded in the Indictment and its addition radically transformed the case against him.[2763] In support of his contention, he asserts that it was unreasonable for the Trial Chamber to consider that the rapes pleaded in paragraph 6.37 of the Indictment could relate to crime scenes discussed in other paragraphs of the Indictment, given: (i) the substitution of the phrase "*as part of* his attack" in paragraph 3.12 of the Nyiramasuhuko and Ntahobali Second Amended Indictment with the phrase "*aside from* his attacks" in paragraph 6.37; and (ii) the fact that none of the paragraphs of the Indictment related to the prefectoral office alleged rapes.[2764]

1206. Alternatively, Ntahobali contends that the Trial Chamber erred in finding that the defects concerning his responsibility for rapes at the prefectoral office were cured.[2765] He argues that the Trial Chamber erred in not examining whether he received sufficient notice of all material facts "in respect of each rape of which he was found guilty".[2766] He also submits that the Trial Chamber could not consider the summaries which were not marked relevant to him in the Witness Summaries Grid as providing him the requisite notice.[2767] Ntahobali further posits that the ten summaries relied upon by the Trial Chamber were too ambiguous and contradictory to constitute clear and consistent notice that he participated in rapes at the prefectoral office.[2768] Specifically, he highlights that: (i) Witnesses QBP, QBQ, and RG were not expected to testify against him; (ii) the summaries of Witnesses RE, RJ, RF, and RG do not mention rapes at the prefectoral office; (iii) the summaries of Witnesses FAP, QBQ, QBP, and SW refer to rapes at the prefectoral office without implicating him; (iv) the summaries of Witnesses FAP, RJ, and QBQ mention orders to rapes which were not issued by him; and (v) Witness RF's Summary and the prior statement of Witness SW name other

[2763] Ntahobali Notice of Appeal, para. 129; Ntahobali Appeal Brief, paras. 273, 277. *See also* AT. 15 April 2015 pp. 30-33. Ntahobali refers to his arguments related to paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment set forth under Ground 2.2 of his appeal, which the Appeals Chamber dismissed in Section V.B.3 above.
[2764] Ntahobali Appeal Brief, para. 275, *referring to* Nyiramasuhuko and Ntahobali Second Amended Indictment, para. 3.12; AT. 15 April 2015 pp. 30-33. Ntahobali also argues that: (i) paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment relating to the prefectoral office does not mention any rapes and is not relied upon in support of Counts 7 and 11; (ii) the allegations in paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment relate to the Butare University Hospital and the period of mid-June 1994 specifically, not the prefectoral office and the crimes committed there between April and June 1994. *See* Ntahobali Appeal Brief, paras. 273, 274. The Appeals Chamber emphasises that the Trial Chamber did not rely on paragraph 6.30 to find Ntahobali guilty under Counts 7 and 11 for his involvement in rapes and recalls that it has already addressed and rejected Ntahobali's contention regarding the geographical and temporal scope of the allegations set forth in paragraph 6.37. *See* Trial Judgement, para. 2163; *supra*, paras. 509, 511, 1150, 1188.
[2765] Ntahobali Appeal Brief, paras. 278-293.
[2766] Ntahobali Appeal Brief, para. 280 (emphasis omitted), *referring to Muhimana* Appeal Judgement, para. 78.
[2767] Ntahobali Appeal Brief, para. 272, *referring to* Trial Judgement, para. 2869 and the summaries of the anticipated evidence of Witnesses QBP, QBQ, SD, SS, SU, and QJ. It is unclear in his appeal brief whether Ntahobali refers to notice of the evidence or notice of the charges. However, read in context of the entirety of his submissions and his reply brief, the Appeals Chamber understands that Ntahobali intended to limit his contention to notice of the charges. *See ibid*., paras. 272, 281; Ntahobali Reply Brief, paras. 124, 128, 131, 134. *See also* Ntahobali Appeal Brief, para. 669.
[2768] Ntahobali Appeal Brief, paras. 281, 282, *referring to* Trial Judgement, para. 2166.

individuals responsible for the selection of victims to rape.[2769] Ntahobali argues that, considered in light of the confusion and ambiguity of the Prosecution case as demonstrated by the above, the summaries of Witnesses TA's and QZ's anticipated evidence – the only summaries referring to his responsibility for rapes at the prefectoral office – did not cure all the defects of paragraph 6.37 of the Indictment.[2770]

1207. With respect to the timing of the rapes, Ntahobali contends that he was never provided notice of rapes at the prefectoral office in June 1994.[2771] Moreover, he submits that the Prosecution failed to give him adequate notice of the forms of responsibility under which he was charged in relation to rapes committed there.[2772] In particular, he argues that, by generally pleading his responsibility for committing, ordering, and aiding and abetting rapes without specifying the locations, dates, co-perpetrators, or victims, the Prosecution Pre-Trial Brief did not provide him with sufficient information curing the defect in the Indictment.[2773] He adds that he did not receive any information regarding his alleged responsibility for aiding and abetting the rapes of Witness TA or ordering rapes at the prefectoral office and that he was never informed of the identity of victims, the location, and the time of the rapes.[2774] According to Ntahobali, the Trial Chamber erred in finding that it was impracticable for the Prosecution to name all the victims because of the sheer scale of the attacks given that he was alleged to have personally committed these rapes.[2775]

1208. Ntahobali further contends that the Prosecution demonstrated through its questions to witnesses that it knew that *Interahamwe* were involved in attacks at the prefectoral office and had information regarding the names of some of the individuals involved which should have been mentioned in the Indictment, but that it never cured the defect in paragraph 6.37 of the Indictment concerning the identity of his alleged accomplices.[2776]

1209. The Prosecution responds that paragraph 6.37 of the Indictment clearly charges rape and is applicable to the Butare Prefecture Office.[2777] It also argues that Ntahobali's contention that the

[2769] Ntahobali Appeal Brief, para. 281. *See also* Ntahobali Reply Brief, paras. 125-131.
[2770] Ntahobali Appeal Brief, para. 283. Ntahobali notes that Witness QZ was not called to testify. *See idem*.
[2771] Ntahobali Appeal Brief, para. 291. Ntahobali underlines that Witness TA's Summary clearly indicated that the refugees had left the prefectoral office for Rango around the end of May 1994 and that Witnesses QBP's and TK's summaries did not implicate him in any rape at the prefectoral office. He also submits that, to the extent that the Trial Chamber convicted him in relation to the rapes of four victims designated by name by Witness QBP during attacks in the first half of June 1994, the Trial Chamber erred as these specific names were not specified in the Nyiramasuhuko and Ntahobali Indictment or in any subsequent disclosures. *See ibid*., paras. 291, 292. As discussed in Sections V.I.1(b), V.I.2(a)(ii) below, the Appeals Chamber understands that Ntahobali was not convicted on the basis of any of the rapes testified to by Witness QBP during attacks in the first half of June 1994. Ntahobali's contention is therefore moot.
[2772] Ntahobali Appeal Brief, paras. 286-289.
[2773] Ntahobali Appeal Brief, para. 286, *referring to* Prosecution Pre-Trial Brief, para. 29.
[2774] Ntahobali Appeal Brief, para. 289. *See also* Ntahobali Reply Brief, paras. 141-143.
[2775] Ntahobali Notice of Appeal, para. 127; Ntahobali Appeal Brief, para. 289.
[2776] Ntahobali Appeal Brief, para. 290.
[2777] Prosecution Response Brief, para. 820.

vagueness of this paragraph was not remedied should be dismissed. It contends that: (i) given their contents and the fact that they were all listed as relevant to Nyiramasuhuko and Counts 1 through 11 of the same Indictment, the summaries of Witnesses QBQ, QBP, SS, QJ, SD, and SU provided Ntahobali notice that they would testify about his participation in crimes at the prefectoral office; (ii) the summaries of Witnesses QZ, TA, RF, and RJ implicated Ntahobali in rapes at the prefectoral office; and (iii) the differences in the summaries do not render them inconsistent.[2778] The Prosecution further responds that Ntahobali was informed that he was charged with committing, aiding and abetting, and ordering rapes at the prefectoral office through paragraph 29 of its pre-trial brief, Witnesses RF's and TA's summaries, and its opening statement and that notice of Ntahobali's accomplices in the rapes was provided through paragraph 6.53 of the Indictment.[2779]

1210. Ntahobali replies, *inter alia*, that he could not understand that the witnesses who were only marked relevant to Nyiramasuhuko in the Witness Summaries Grid would testify against him and that he suffered considerable prejudice from this lack of notice because he did not investigate them as a result.[2780] He also argues that Witness QZ's Summary was not useful as he was ultimately not convicted for the rape mentioned therein.[2781]

1211. The Appeals Chamber notes that there is no dispute that the Indictment was defective regarding the pleading of Ntahobali's responsibility for rapes at the prefectoral office. There is no mention of any rape in paragraph 6.30 of the Indictment, which relates to the prefectoral office in particular, and paragraph 6.37 of the Indictment, which refers to Ntahobali's participation in raping Tutsi women, is excessively broad as regards the dates, locations, identity of his accomplices, and the nature of Ntahobali's participation in the rapes.

1212. The Appeals Chamber, however, finds no merit in Ntahobali's contentions that the allegation was not pleaded in the Indictment or that the addition of material facts underpinning this allegation radically transformed the case against him. In the opinion of the Appeals Chamber, the

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[2778] Prosecution Response Brief, paras. 818, 819, 821-823, *referring to Ntabakuze* Appeal Judgement, paras. 54, 94. *See also ibid*., para. 1039; AT. 15 April 2015 pp. 74-77. The Prosecution further argues that Witnesses QBP, SS, SU, QJ, and QBQ "were all mentioned in [its pre-trial brief] as testifying against Ntahobali for killings, abductions, and rapes at the *préfecture* office." However, the references provided by the Prosecution do not correspond to the Prosecution Pre-Trial Brief and the Appeals Chamber has been unable to identify the document to which the Prosecution intended to refer. *See* Prosecution Response Brief, para. 819, fn. 2051.

[2779] Prosecution Response Brief, paras. 825-827. *See also* AT. 15 April 2015 pp. 74-77. The Prosecution did not provide references to any specific parts of its opening statement.

[2780] Ntahobali Reply Brief, paras. 124, 134. *See also ibid*., para. 146. Ntahobali notes that he did not cross-examine Witnesses QBP, QJ, SS, and SU and was not prepared when he cross-examined Witnesses SD and QBQ. *See ibid*., para. 134.

[2781] Ntahobali Reply Brief, para. 136. Ntahobali also replies that notice of rapes not committed at the prefectoral office was not relevant as he was only convicted for crimes committed there and that paragraph 6.53 of the Nyiramasuhuko and Ntahobali Indictment was too vague and did not plead that he committed any crimes. *See ibid*., paras. 137, 140, 145. The Appeals Chamber considers that these arguments are moot in light of the analysis developed below and the fact that the Trial Chamber did not ultimately rely on paragraph 6.53 regarding these allegations.

allegation of Ntahobali's responsibility for committing, ordering, and aiding and abetting rapes of Tutsi women at the prefectoral office is clearly encompassed in paragraph 6.37 of the Indictment. Ntahobali's argument regarding the amendment of the phrasing of the allegation set out in paragraph 6.37 from "as part of his attack" to "aside from his attacks" lacks merit as the import of this change, read in context of both indictments, is not clear. More importantly, Ntahobali's interpretation of this amendment is refuted by the fact that the Prosecution supported paragraph 6.37 of the Nyiramasuhuko and Ntahobali Third Amendment Indictment, in which the phrasing "aside from his attacks" was first introduced, by an excerpt of Witness QZ's statement recounting how Ntahobali and *Interahamwe* raped her and other women at the prefectoral office.[2782]

1213. As regards Ntahobali's alternative challenges to the Trial Chamber's finding that the defects in the Indictment regarding this allegation were cured, the Appeals Chamber rejects Ntahobali's argument that the Trial Chamber should have examined whether he received sufficient notice of all material facts "in respect of each rape of which he was found guilty" at the prefectoral office. It is manifest that the Prosecution case in relation to the prefectoral office was that Ntahobali was implicated in multiple rapes spanning over a period of nearly three months. The Appeals Chamber considers that, in these circumstances, it was impractical to require a high degree of specificity from the Prosecution regarding each incident of rape given the sheer scale of the alleged rapes at the prefectoral office.[2783]

1214. The Appeals Chamber, however, accepts Ntahobali's argument that the summaries of anticipated evidence which were not marked relevant to him in the Witness Summaries Grid could not be considered as providing him notice. In this respect, the Appeals Chamber finds that, where the Prosecution indicated that specific summaries were solely relevant to Nyiramasuhuko, the fact that they were linked to Ntahobali because he and Nyiramasuhuko were charged under the same indictment is insufficient to show that Ntahobali should have understood that the Prosecution intended to rely on the information contained therein against him.[2784]

1215. A review of the Witness Summaries Grid reveals that the summaries of the anticipated evidence of Witnesses RG, QBP, and QBQ which the Trial Chamber took into consideration were

[2782] Nyiramasuhuko and Ntahobali Third Amended Indictment, para. 6.37; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Supporting Material, 18 August 1999 (confidential), p. 118.
[2783] *See*, *e.g.*, *Muvunyi* Appeal Judgement of 29 August 2008, para. 58; *Muhimana* Appeal Judgement, para. 79; *Kupreškić et al.* Appeal Judgement, para. 89. The Appeals Chamber considers that the present case differs from the circumstances considered in the *Muhimana* Appeal Judgement relied upon by Ntahobali, which concerned an attack occurring over the course of three days and Mikaeli Muhimana's responsibility for the killing of three specific individuals. *See Muhimana* Appeal Judgement, paras. 74, 78, 79.
[2784] Trial Judgement, para. 2164 ("The Appendix to the [Prosecution] Pre-Trial Brief included the summaries of numerous witnesses who were to testify as to rape allegations against Ntahobali and Nyiramasuhuko occurring at the

not marked relevant to Ntahobali but only to Nyiramasuhuko and Kanyabashi.[2785] It is not clear, however, whether the Trial Chamber considered these summaries as relevant to remedying Ntahobali's lack of notice in particular as its analysis and conclusions concerned the notice provided to both Nyiramasuhuko and Ntahobali.[2786] Nevertheless, as far as the Prosecution relies on the summaries of the anticipated evidence of Witnesses QJ, SD, SS, and SU in support of its claim that Ntahobali was provided notice, its argument lacks merit because these summaries were not marked relevant to Ntahobali.[2787]

1216. Conversely, the summaries of the anticipated evidence of Witnesses TA, FAP, QZ, RE, RF, RJ, and SW which the Trial Chamber took into account were marked relevant to Ntahobali. Ntahobali is correct in his submission that Witness RE's Summary does not refer to rapes at the prefectoral office and did not provide him notice in this regard. Having reviewed Witnesses FAP's and SW's summaries, the Appeals Chamber is also not persuaded that they could be said to have provided notice to Ntahobali of his responsibility for rapes as found by the Trial Chamber given that they do not refer to his participation in the rapes perpetrated at the prefectoral office.

1217. Ntahobali, however, erroneously submits that Witnesses RJ's and RF's summaries do not mention rapes being committed at the prefectoral office. Witness RJ's Summary clearly refers to Nyiramasuhuko ordering Ntahobali and *Interahamwe* to commit rapes there[2788] and Witness RF's Summary implicates Ntahobali in selecting girls to rape at the prefectoral office.[2789] Witness TA's Summary also mentions that Ntahobali raped Witness TA and other women at the prefectoral office, that he was implicated in the rapes committed by *Interahamwe* who accompanied him, and that he issued commands to the attackers, who committed multiple rapes.[2790] Similarly,

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[Butare Prefecture Office], including Witnesses TA, FAP, QBP, QBQ, QZ, RE, RF, RJ and SW.") (internal reference omitted).

[2785] *See* Trial Judgement, para. 2164, fn. 5753; Witness Summaries Grid, items 44, 45, 67.

[2786] The Appeals Chamber finds that the Prosecution's reliance on the *Ntabakuze* Appeal Judgement is ill-founded and should be rejected. *See* Prosecution Response Brief, para. 818. Indeed, in the *Ntabakuze* case, the Appeals Chamber found that the defect in the indictment was cured since, although the Prosecution failed to indicate that the summaries of the witnesses' anticipated evidence were cited in support of the relevant counts, the Prosecution specified in its supplement to its pre-trial brief that the evidence of these witnesses was relevant to a paragraph of the indictment that was cited in support of these counts. In the present case, no subsequent information put Ntahobali on notice that the Prosecution intended to rely on these witnesses against him. *See Ntabakuze* Appeal Judgement, para. 54.

[2787] *See* Witness Summaries Grid, items 4, 76, 84, 86.

[2788] In relevant part, Witness RJ's Summary reads as follows:

> Later, RJ heard Nyiramasuhuko order soldiers, *Interahamwe*, and Ntahobali to select girls and young women and rape them, and kill the older women.

[2789] In relevant part, Witness RF's Summary reads as follows:

> Ntahobali selected girls to rape, and RF learned this from girls who returned after being raped.

The Appeals Chamber considers that Witness RF's reference to the girls who "returned" did not necessarily mean that the girls were not raped at the prefectoral office as suggested by Ntahobali, but could reasonably be interpreted as referring to another location within the prefectoral office itself.

[2790] In relevant part, Witness TA's Summary reads as follows:

Witness QZ's Summary refers to Ntahobali and *Interahamwe* raping women at the prefectoral office.[2791] Ntahobali's argument in reply that Witness QZ's Summary could not be effectively relied upon as providing notice because he was ultimately not convicted on the basis of the evidence that the witness provided fails to appreciate that whether the testimonies adduced at trial support the allegations are matters of evidence, not notice of the charges.[2792]

1218. The Appeals Chamber considers that Ntahobali was unambiguously put on notice by those summaries that, as part of its broad allegation of his participation in the raping of Tutsi women set forth in the Indictment, the Prosecution's intention was to prove that he participated in the rape of Tutsi women at the prefectoral office specifically. In the view of the Appeals Chamber, the information provided in some of these summaries,[2793] as well as others,[2794] that Nyiramasuhuko and others issued orders to rape at the prefectoral office was not inconsistent with the information that Ntahobali also issued orders.

1219. With respect to the timing of the rapes, the Appeals Chamber reiterates that it is apparent that the allegation in paragraph 6.37 of the Indictment was meant to relate to the period "[b]etween 19 April and late June 1994" invoked in paragraph 6.30 of the Indictment.[2795] Moreover, while Witness RF's Summary does not provide any date for the rapes committed at the prefectoral office, the witness's 1996 prior statement indicates that Ntahobali and *Interahamwe* raped girls at the prefectoral office from 1 June 1994.[2796] When reading Witness RF's Summary in conjunction with

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> In May 1994, Ntahobali raped TA, under force and threat of force by machete and hammer. TA also witnessed other rapes by men who accompanied Ntahobali. […] Following Ntahobali, eight other men, who accompanied Ntahobali, took turns raping TA. […] On a second occasion, about one week later, Ntahobali again raped TA under force and threat of force by hammer. TA witnessed six other women being raped on the same occasion by men, who accompanied Ntahobali. On a third occasion, about four days later, Ntahobali dragged TA, placed her on the ground, lifted up her[] skirt, called his friends to come over, and said: "Do it quickly." Seven men who accompanied Ntahobali raped TA. TA also witnessed Ntahobali four meters another rape. On another occasion, TA witnessed her friend being raped by Ntahobali. […] On two other occasions, men who accompanied Ntahobali raped TA. TA witnessed these same men rape other women. TA knows three other girls that Ntahobali raped. TA regarded Ntahobali as the leader of the attackers. He issued commands to the attackers.

[2791] In relevant part, Witness QZ's Summary reads as follows:

> QZ saw Ntahobali and four *Interahamwe* rape a girl. Ntahobali stood on the victim's legs after the rape and said: "You the Tutsis are very proud. You have beautiful legs. Could any Hutu have married you in the past?" QZ was raped by Ntahobali and the *Interahamwe*, and Nyiramasuhuko witnessed the rape.

[2792] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 123; *Ntagerura et al.* Appeal Judgement, para. 21.
[2793] *See* Witness RF's Summary; Witness RJ's Summary; Witness TA's Summary.
[2794] *See* Witness FAP's Summary; Witness SW's Summary; Witness QBQ's Summary.
[2795] *Cf. supra*, para. 1150.
[2796] *See* Statement of Witness RF of 19 November 1996, disclosed in redacted versions on 25 May and 4 November 1998 ("Witness RF's Statement"). *See* 25 May 1998 Disclosure; 4 November 1998 Disclosure. In relevant part, Witness RF's Statement reads as follows:

> On the 1st of June 1994 Pauline came in a van driven by her son Shalom. […] I always saw Shalom standing by the [v]an whilst it was being filled with people to be killed. It was Shalom who drove the [v]an. He also selected girls to go and rape them. Some of the girls who came back came to confirm the rape. They took

Witness RF's Statement first disclosed in 1998, it should have been clear to Ntahobali that he was alleged to have been involved in rapes at the prefectoral office also in June 1994.[2797]

1220. Concerning notice of the forms of responsibility, the Appeals Chamber observes that, although the Prosecution only vaguely pleaded Ntahobali's participation in the raping of Tutsi women in paragraph 6.37 of the Indictment and pursued Counts 7 and 11 under all forms of responsibility under Article 6(1) of the Statute, Witnesses TA's, QZ's, RF's, and RJ's summaries informed Ntahobali of the particular acts and course of conduct which formed the basis for his responsibility for committing, aiding and abetting, and ordering under which he was convicted. As discussed above, the Appeals Chamber considers that the Trial Chamber did not err in finding that it was impractical to require a high degree of specificity from the Prosecution regarding each incident of rape given the sheer scale of the alleged rapes at the prefectoral office.[2798]

1221. The Appeals Chamber also dismisses Ntahobali's contention regarding the identification of his alleged accomplices as the relevant summaries made it clear that he was alleged to have ordered and aided and abetted *Interahamwe* in the commission of rapes at the prefectoral office. The Appeals Chamber reiterates that the fact that the Prosecution, or the witnesses it called, referred to specific *Interahamwe* by names in the course of the trial does not establish that the Prosecution was in possession of this information when the operative indictment was issued or its pre-trial brief was filed.[2799]

1222. Consequently, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that the defects in the Indictment concerning his responsibility for rapes at the prefectoral office were curable and cured by timely, clear, and consistent information.

6. École Évangéliste du Rwanda (Ground 2.4 in part)

1223. The Trial Chamber found that, between mid-May and the beginning of June 1994: (i) Ntahobali led *Interahamwe* in carrying out attacks against Tutsis who had sought refuge at the EER; (ii) Ntahobali, soldiers, and *Interahamwe* abducted refugees from the EER; (iii) soldiers raped women and young girls at or near the EER; and (iv) Ntahobali, *Interahamwe*, and soldiers killed the

away girls selected in advance by the Interahamwe who controlled the refugees at the Prefecture and went away to rape them.

[2797] The Appeals Chamber considers that Ntahobali should have been prompted to re-examine Witness RF's Statement upon reading the summary of her anticipated evidence.
[2798] *See supra*, para. 1213.
[2799] *See supra*, para. 1197.

abducted refugees in the woods near the EER school complex.[2800] The Trial Chamber, however, stated that there was no direct evidence that Ntahobali was personally responsible for killing any of the abducted refugees.[2801] Nevertheless, it held that Ntahobali's presence alongside *Interahamwe* and soldiers at the EER amounted to tacit approval and encouragement of the killings perpetrated by *Interahamwe* and soldiers near the EER.[2802] On this basis, the Trial Chamber convicted Ntahobali of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 8, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 10) pursuant to Article 6(1) of the Statute for aiding and abetting these killings.[2803]

1224. In summarising the Prosecution case against Ntahobali with respect to this allegation, the Trial Chamber referred to paragraph 6.30 of the Indictment.[2804] The Indictment indicates that the allegations in paragraph 6.30 were being pursued under Counts 2, 3, 5, 6, and 8 through 10 pursuant to Articles 6(1) and 6(3) of the Statute.[2805] The Trial Chamber noted Ntahobali's assertion that the allegation that he abducted, raped, and killed Tutsi refugees on unspecified dates at or near the EER with soldiers and/or *Interahamwe* was not pleaded in the Indictment.[2806] It appears to have found that Ntahobali did not have sufficient notice that he was alleged to be responsible for rapes committed at or near the EER and did not convict Ntahobali in relation to the rapes committed at or near the EER.[2807]

1225. Ntahobali submits that the Trial Chamber erred in law in failing to address his contention at trial that his responsibility in the abductions and the killings of Tutsis at or near the EER was not

[2800] Trial Judgement, paras. 3965, 5910.
[2801] Trial Judgement, para. 5912.
[2802] Trial Judgement, para. 5912. *See also ibid*., paras. 5913, 5916.
[2803] Trial Judgement, paras. 5916, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186. The Trial Chamber also found that Ntahobali was responsible for these killings as a superior pursuant to Article 6(3) of the Statute and considered this as an aggravating circumstance when determining his sentence. *See ibid*., paras. 5917, 5971, 6056, 6220. The Appeals Chamber will address Ntahobali's contentions regarding the lack of notice that he was charged as a superior for the EER killings in Section V.B.7 below.
[2804] Trial Judgement, para. 3834, fn. 10355. For paragraph 6.30 of the Nyiramasuhuko and Ntahobali Indictment, *see supra*, fn. 1123.
[2805] Nyiramasuhuko and Ntahobali Indictment, pp. 39-44.
[2806] Trial Judgement, para. 3842.
[2807] Trial Judgement, paras. 3843-3845, 5916, 5971, 6089, 6090, 6100, 6121, 6168, 6184, 6185. The Appeals Chamber notes some contradiction in the Trial Chamber's analysis of the defect of the Nyiramasuhuko and Ntahobali Indictment regarding the rape allegation in the "Factual Findings" and "Legal Findings" sections of the Trial Judgement but considers it unnecessary to discuss the matter in light of the fact that Ntahobali was ultimately not convicted in relation to the rapes committed at or near the EER. *Compare* Trial Judgement, paras. 3842-3845 *with ibid*., paras. 5857-5865, 5911, 6089, 6090.

pleaded in the Indictment and in convicting him on this basis since the defect in the Indictment was neither curable nor cured.[2808]

1226. The Appeals Chamber observes that, despite expressly noting it in the Trial Judgement, the Trial Chamber failed to address Ntahobali's contention that the allegation that he participated in the abduction and killing of Tutsi refugees on unspecified dates at or near the EER with soldiers and/or *Interahamwe* was not pleaded in the Indictment,[2809] limiting its examination to the question of whether Ntahobali was put on notice of his alleged responsibility for rapes at or near the EER.[2810] The Appeals Chamber recalls that a trial chamber is not obliged to respond to each and every submission made at trial and has discretion to decide which argument to address.[2811] However, the Appeals Chamber considers that the Trial Chamber should have explained its reasons for disregarding such a serious contention and deciding to enter convictions against Ntahobali for crimes which he claimed he was not charged with. The Appeals Chamber finds that the Trial Chamber's failure to address Ntahobali's contention regarding the pleading of his responsibility for abductions and killings at or near the EER infringed Ntahobali's right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules. The Appeals Chamber will determine whether this error of law invalidates the Trial Chamber's decision to convict Ntahobali in relation to crimes committed at or near the EER in examining whether Ntahobali was charged on this basis and, if so, whether he was provided with sufficient information on the material facts underpinning the charge against him.

(a) Whether the Indictment Was Defective

1227. Ntahobali argues that the allegation concerning the abduction of the refugees from the EER and their killing in the woods nearby was not pleaded in the Indictment.[2812] He points out that paragraph 6.30 of the Indictment only refers to refugees abducted from the Butare Prefecture Office without pleading that refugees stayed at the EER or that he was alleged to have been present during abductions from the EER.[2813] Highlighting that the Prosecution did not refer to crimes at the EER in its opening statement and that, in contrast with his Indictment, the Nsabimana and Nteziryayo Indictment specifically refers to crimes committed against refugees staying at the EER, Ntahobali

[2808] Ntahobali Notice of Appeal, paras. 114-118 (French); Ntahobali Appeal Brief, paras. 247-260.
[2809] Trial Judgement, para. 3842, *referring to* Ntahobali Closing Brief, para. 78(x).
[2810] Trial Judgement, paras. 3842-3845.
[2811] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.
[2812] Ntahobali Notice of Appeal, para. 115 (French); Ntahobali Appeal Brief, para. 249.
[2813] Ntahobali Appeal Brief, paras. 250, 251. *See also ibid.*, para. 257; Ntahobali Reply Brief, para. 108; AT. 15 April 2015 pp. 34, 35; AT. 16 April 2015 p. 26.

submits that it was reasonable for him to understand that the Prosecution did not intend to prosecute him in relation to abductions and killings at the EER.[2814]

1228. In the alternative, Ntahobali contends that the Trial Chamber erred in failing to consider that paragraph 6.30 of the Indictment did not contain all the required material facts for this allegation.[2815] In particular, he argues that paragraph 6.30 is too vague as regards the dates of the crimes, the location of the abductions, and the identity of the perpetrators of the crimes committed near the EER, and does not plead his alleged role in the crimes and the form of his responsibility.[2816] Ntahobali submits that the Prosecution was in possession of some of these material facts when filing the Indictment and should have specified them when the Trial Chamber ordered it to do so in 2000.[2817]

1229. The Prosecution responds that, read as a whole, the Indictment provided Ntahobali with adequate notice that he was charged with abducting and killing Tutsi refugees who had been forced away the prefectoral office and made to stay at the EER.[2818] In its view, the fact that Tutsis were forcibly transferred by *Interahamwe* and soldiers to the EER before being taken away to nearby woods for execution and Ntahobali's presence during abductions at the EER were not material facts but evidence which was not to be pleaded in the Indictment.[2819] The Prosecution argues that paragraph 6.30 of the Indictment appropriately identified the victims, the location, and the time period of the crimes, and that paragraph 6.54 of the Indictment pleaded aiding and abetting.[2820] It also contends that the content of the Nsabimana and Nteziryayo Indictment is irrelevant to the question whether Ntahobali was provided with adequate notice.[2821]

1230. Ntahobali replies that the presence of refugees at and their abduction from a crime scene distinct from the prefectoral office are material facts that should have been pleaded in the Indictment.[2822] He also argues that paragraph 6.54 of the Indictment could not serve as a basis to put

[2814] Ntahobali Appeal Brief, para. 251, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.39. *See also* Ntahobali Reply Brief, paras. 109, 111; AT. 15 April 2015 p. 34; AT. 16 April 2015 p. 26.
[2815] Ntahobali Appeal Brief, paras. 252-258.
[2816] Ntahobali Notice of Appeal, para. 116; Ntahobali Appeal Brief, paras. 254-258.
[2817] Ntahobali Appeal Brief, paras. 256, 258, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.39, 1 November 2000 Ntahobali Decision, para. 35(a)(ii).
[2818] Prosecution Response Brief, paras. 804-806. The Appeals Chamber notes that the Prosecution argues at length that Ntahobali had notice of rapes committed at the EER. *See ibid.*, paras. 804, 808, 810. However, given that the Trial Chamber entered no conviction against Ntahobali for rapes committed at the EER, the Appeals Chamber disregards the Prosecution's contentions in that regard. *See supra*, fn. 2807.
[2819] Prosecution Response Brief, paras. 805, 806.
[2820] Prosecution Response Brief, paras. 806, 815. *See also* AT. 15 April 2015 p. 72.
[2821] Prosecution Response Brief, para. 807.
[2822] Ntahobali Reply Brief, para. 109.

him on notice that he was charged with "aiding and abetting" killings by tacit approval and encouragement.[2823]

1231. The Appeals Chamber rejects Ntahobali's argument that the abduction of Tutsi refugees from the EER amounted to a new charge not pleaded in the Indictment. While paragraph 6.30 of the Indictment only referred to refugees abducted from the "*préfecture* office[]", it nonetheless unambiguously pleaded Ntahobali's criminal responsibility related to killings perpetrated next to the EER. The Appeals Chamber finds that the fact that the allegation that Tutsi refugees – regardless of where they were abducted from – were killed next to the EER put Ntahobali on notice that he was charged in relation to these killings. Moreover, the Appeals Chamber notes that the allegation concerning the abduction of the refugees from the EER and their killing in the woods nearby was also encompassed within the broader allegation relating to the abduction and killing of Tutsis throughout Butare Prefecture pleaded in paragraph 6.35 of the Indictment. That the Prosecution provided more particulars regarding the circumstances of the crimes committed near the EER in the Nsabimana and Nteziryayo Indictment is irrelevant for the interpretation of Ntahobali's Indictment.

1232. Turning to Ntahobali's alternative contention that the charge relating to the crimes committed at or near the EER was not adequately pleaded, in particular regarding the timeframe of the crimes, the Appeals Chamber recalls that a broad date range, in and of itself, does not invalidate a paragraph of an indictment.[2824] The Appeals Chamber observes that, through paragraph 6.30 of the Indictment, the Prosecution appeared to have intended to prove the existence of a series of killings spanning over a certain period of time, potentially making it impracticable to provide a high degree of specificity. However, the Appeals Chamber also notes that the Prosecution was in possession of information prior to the start of the trial that indicated that the killings near the EER were committed in May and June 1994.[2825] In these circumstances, the Appeals Chamber considers that the Prosecution was required to provide greater specificity in the Indictment regarding the date of the killings that took place in the woods near the EER. The Appeals Chamber therefore concludes that the date range "[b]etween 19 April and late June 1994" pleaded in paragraph 6.30 of the Indictment was unreasonably broad in this context and that the Indictment was defective on this point.

[2823] Ntahobali Reply Brief, para. 114.

[2824] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 594; *Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Muvunyi* Appeal Judgement of 29 August 2008, para. 58. The Appeals Chamber reiterates that, in certain circumstances, the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the dates for the commission of the crimes. *See Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Muvunyi* Appeal Judgement of 29 August 2008, para. 58; *Kupreškić et al.* Appeal Judgement, para. 89.

[2825] *See infra*, paras. 1240, 1241.

1233. Similarly, the Appeals Chamber finds that, since paragraph 6.30 of the Indictment only refers to abductions from the prefectoral office, the Indictment was defective as regards the pleading of the fact that refugees killed in the woods near the EER were also alleged to have been abducted from the EER.

1234. With respect to the pleading of the identity of the perpetrators, the Appeals Chamber notes that, in paragraph 6.30 of the Indictment, the Prosecution alleged that "[t]he survivors were taken to various locations in the *préfecture* to be executed, notably in the woods next to the [EER]" without specifying who the perpetrators of the executions were. However, the Appeals Chamber considers that, reading the sentence in context, it is manifest that "Nyiramasuhuko", "Ntahobali", the "*Interahamwe* militiamen such as one JUMAPILI and another NSENGIYUMVA" and the "soldiers" referred to in the first sentence of paragraph 6.30 were alleged to be the perpetrators of the killings committed near the EER. In light of the identification by names of some of the perpetrators[2826] and recalling that physical perpetrators of the crimes can be identified by category in relation to a particular crime site,[2827] the Appeals Chamber finds that the identity of the perpetrators was sufficiently specified in paragraph 6.30 and that the Indictment was not defective in this respect.

1235. As for Ntahobali's submission related to the pleading of his alleged role and form of responsibility, the Appeals Chamber observes that, while the Indictment generally indicates that Ntahobali was alleged to have "organized, ordered and participated" in massacres,[2828] "aided and abetted [his] subordinates and others in carrying out" massacres,[2829] and that the "crimes were committed by [him] personally, by persons [he] assisted or by [his] subordinates",[2830] it is vague as to which form or forms of responsibility under Article 6(1) of the Statute Ntahobali was specifically charged with in relation to paragraph 6.30 of the Indictment. The Appeals Chamber also notes that the Prosecution failed to indicate the particular acts or course of conduct on the part of Ntahobali with respect to the killings near the EER which formed the basis for the charge against him.

1236. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the allegation concerning the abduction of the refugees from the EER and their killing in the woods nearby insofar as the Prosecution failed to set forth

[2826] The Appeals Chamber notes that, on 1 November 2000, the Trial Chamber had ordered the Prosecution to provide the identity of at least some of the "soldiers and militiamen" mentioned in paragraph 6.30 of the first version of the indictment, which the Prosecution did on 1 March 2001. *See* 1 November 2000 Ntahobali Decision, para. 35(a)(ii). Ntahobali does not demonstrate that the Prosecution was in a position to provide greater specificity in this regard.
[2827] *Bagosora and Nsengiyumva* Appeal Judgement, para. 196.
[2828] Nyiramasuhuko and Ntahobali Indictment, para. 5.1.
[2829] Nyiramasuhuko and Ntahobali Indictment, para. 6.54.
[2830] Nyiramasuhuko and Ntahobali Indictment, para. 6.56.

therein the dates of the killings with sufficient specificity, specify that refugees killed nearby were alleged to have been abducted from the EER, and identify the specific form of responsibility and particular course of conduct of Ntahobali. Having concluded that this allegation did not constitute a separate charge and that Ntahobali was put on notice that he was charged in relation to the killings perpetrated near the EER, the Appeals Chamber will now turn to consider whether the defects in the Indictment were cured.

(b) Whether the Defects Were Cured

1237. Ntahobali contends that the defects in the Indictment relating to his responsibility in relation to the abductions and the killings of Tutsis at the EER were not cured and that he suffered prejudice from his inability to adequately prepare his defence against this allegation.[2831]

1238. The Prosecution responds that, to the extent that there was any ambiguity in the Indictment, the summaries of the anticipated evidence of Prosecution Witnesses RE, SX, and QY attached to the Prosecution Pre-Trial Brief and these witnesses' statements "clarified any remaining ambiguity" as to Ntahobali's responsibility in the abductions and killings at the EER.[2832] The Prosecution adds that the conduct of Ntahobali's defence demonstrates that he had notice of the charges relating to the EER.[2833]

1239. Ntahobali replies that the subsequent information related to the evidence of Witnesses RE, SX, and QY was neither clear nor consistent as to whether he aided and abetted by tacit approval the killing of refugees in the woods near the EER from mid-May 1994 until the beginning of June 1994.[2834] In particular, he contends that in the material cited by the Prosecution: (i) Witness RE indicated that Ntahobali was absent during the abductions by members of the Presidential Guard; (ii) Witness SX only mentioned abductions and not killings, did not mention the woods near the EER but unknown destinations, and referred to Ntahobali's direct participation rather than to aiding and abetting by his presence; and (iii) Witness QY only mentioned Tutsis being beaten without referring to Ntahobali aiding and abetting killings in the woods by his

[2831] Ntahobali Notice of Appeal, para. 117; Ntahobali Appeal Brief, paras. 248, 251, 255, 256, 259, 260.
[2832] Prosecution Response Brief, paras. 808-810, 815 *referring to* Witness Summaries Grid, item 61, Witness QY ("Witness QY's Summary"), Witness SX's Summary, Witness RE's Summary, Witness RE's Statement, disclosed in redacted versions on 25 May 1998 and 4 November 1998, Witness SX's Statement, Statement of Witness QY of 15 January 1997, disclosed in redacted version on 4 November 1998. *See* 25 May 1998 Disclosure; 4 November 1998 Disclosure. The unredacted version of Witness RE's Statement was admitted into evidence on 28 February 2003 as Exhibit D87 (confidential). The unredacted version of Witness QY's 15 January 1997 statement was admitted into evidence on 26 March 2003 as Exhibit D112 (confidential) ("Witness QY's 1997 Statement"). *See also* Prosecution Response Brief, para. 815.
[2833] The Prosecution points out that Ntahobali: (i) did not object when the Prosecution witnesses testified about his presence with *Interahamwe* and soldiers at the EER; (ii) put specific questions to the witnesses about his presence and actions at the EER; and (iii) discussed in-depth the evidence on the matter in the Ntahobali Closing Brief. *See* Prosecution Response Brief, paras. 811-814. *See also ibid.*, para. 804; AT. 15 April 2015 pp. 72, 73.

presence.[2835] Ntahobali also replies that the Prosecution has failed to demonstrate that his ability to prepare his defence was not materially impaired by these defects in the Indictment.[2836]

1240. The Appeals Chamber notes that the summaries of the anticipated evidence of Witnesses RE, SX, and QY referred to by the Prosecution were marked relevant to Ntahobali and were linked, *inter alia*, to Counts 2, 6, 8, and 10 of his Indictment. None of these summaries, however, provided clear notice to Ntahobali of the dates of the alleged killings near the EER or that he was alleged to have aided and abetted the killings by tacit approval and encouragement.[2837]

1241. When reading the summaries together with these witnesses' relevant prior statements,[2838] it nonetheless becomes manifest that the events at the EER were alleged to have taken place in May and June 1994.[2839] Given the sheer scale of the alleged crimes and the Prosecution's intention to prove the existence of a series of killings, the Appeals Chamber considers that this information regarding the timeframe was sufficient to allow Ntahobali to prepare a meaningful defence. Contrary to Ntahobali's submissions, the Appeals Chamber also considers that it was clear from the relevant summaries and statements read in context that the Prosecution intended to prove that the refugees "selected" or "taken away" from the EER were killed. The information provided therein was also consistent with the allegation in paragraph 6.30 of the Indictment that the killings took place in the woods next to the EER.

1242. The Appeals Chamber further finds that, by reading the Indictment in conjunction with Witnesses RE's, SX's, and QY's summaries and statements, Ntahobali was put on notice that the Prosecution alleged that: (i) the refugees killed were taken from the EER; (ii) he aided and abetted the abductions and killings through his visits to the EER alongside *Interahamwe* and soldiers and the influence and authority he exercised on the soldiers and the men present with him; and (iii) crimes were committed in his absence following his visits to the EER. While the information provided through Witnesses RE's, SX's, and QY's summaries and statements also indicates that Ntahobali directly participated in, if not instigated or ordered, beatings, rapes, and abductions at or near the EER, this was not inconsistent with the fact that Ntahobali may also have been responsible

[2834] Ntahobali Reply Brief, para. 112.
[2835] Ntahobali Reply Brief, paras. 113, 118.
[2836] Ntahobali Reply Brief, para. 122. In particular, Ntahobali reiterates that the fact that he did not object at trial could not be held against him as the Trial Chamber was clear that objections related to the indictments would not be granted. *See ibid*., paras. 115, 116, *referring to ibid*., para. 66. He also contends that the questions he put to the witnesses during cross-examination and his closing submissions do not demonstrate that he knew that he was charged with aiding and abetting the killings at the EER by tacit approval. He points out that he only challenged the witnesses' credibility and never addressed major contradictions as to his presence, his authority over the perpetrators, or crimes committed while he was absent. *See ibid*., paras. 117, 119, 120.
[2837] *See* Witness RE's Summary; Witness SX's Summary; Witness QY's Summary.
[2838] *See* Witness RE's Statement; Witness SX's Statement; Witness QY's 1997 Statement.
[2839] *See* Witness QY's 1997 Statement, p. 4; Witness SX's Statement, p. K146648 (Registry pagination).

for aiding and abetting the crimes by providing moral support and encouragement. The Appeals Chamber concludes that the subsequent information provided to Ntahobali through Witnesses RE's, SX's, and QY's summaries and statements sufficiently informed him of the course of conduct on his part which formed the basis of the charge, thereby curing the defects in the Indictment.[2840]

1243. This conclusion is bolstered by a review of the conduct of Ntahobali's defence at trial which reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation that his presence alongside *Interahamwe* and soldiers at the EER encouraged the killings perpetrated near the EER. Specifically, the Appeals Chamber observes that Ntahobali's counsel questioned Witnesses RE, SX, and QY at length on the events at and near the EER. Notably, Ntahobali's counsel questioned the witnesses on the Tutsi refugees at the EER, the premises of the EER, the time and weather conditions, the presence and acts of *Interahamwe* and soldiers at or near the EER, the abductions and killings committed at or near the EER, and Ntahobali's role in the attacks at the EER.[2841] The Appeals Chamber notes that, contrary to what Ntahobali asserts, his counsel specifically questioned the witnesses as to his authority over the *Interahamwe*[2842] and his presence at the EER.[2843] Of further significance, Ntahobali challenged the evidence led by the Prosecution that he was present at the EER in his closing brief.[2844] While Ntahobali did not challenge that his conduct at the EER met the legal requirements for a finding of responsibility for aiding and abetting by tacit approval and encouragement in his closing brief, it bears noting that Ntahobali did not in fact discuss any of the legal requirements for any of the forms of responsibility he was charged with pursuant to Article 6(1) of the Statute.

1244. The Appeals Chamber therefore finds that Ntahobali was provided with sufficient information detailing the factual basis on which he was convicted in relation to the crimes committed near the EER to prepare a meaningful defence.

(c) Conclusion

1245. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in law by failing to address Ntahobali's contention regarding the pleading of his responsibility in relation

[2840] The Appeals Chamber observes that the Prosecution confirmed in its closing brief that Ntahobali's course of conduct and presence at the EER were constitutive of aiding and abetting by moral support and encouragement. *See* Prosecution Closing Brief, para. 75 at pp. 185, 186.
[2841] Witness RE, T. 26 February 2003 pp. 8-15, 17, 18; Witness SX, T. 30 January 2004 pp. 27, 40, and 49, 50 (closed session), 52, 53, 55-57; Witness QY, T. 24 March 2003 pp. 34-38.
[2842] Witness RE, T. 26 February 2003 p. 10.
[2843] Witness RE, T. 26 February 2003 pp. 12-14; Witness SX, T. 30 January 2004 pp. 27, 55-57; Witness QY, T. 24 March 2003 pp. 36, 37.
[2844] *See* Ntahobali Closing Brief, paras. 746, 751.

to the crimes committed at or near the EER. However, the Appeals Chamber concludes that Ntahobali has not demonstrated that he lacked sufficient notice of the allegation that he aided and abetted by tacit approval and encouragement the killing of Tutsi refugees near the EER between mid-May and the beginning of June 1994 and, as a result, concludes that the Trial Chamber's error does not invalidate its decision to convict him on this basis.

7. Superior Responsibility (Grounds 2.2, 2.4 and 2.5 in part)

1246. The Trial Chamber found that Ntahobali bore superior responsibility under Article 6(3) of the Statute under Counts 2, 6, and 7 of the Indictment for the killing of Ruvurajabo at the Hotel Ihuliro roadblock, the killings and rapes that he ordered at the Butare Prefecture Office as well as the killings that he aided and abetted at or near the EER but, having found him guilty under Article 6(1) of the Statute, did not convict him of these crimes as a superior.[2845] The Trial Chamber did, however, consider his role as a superior in these crimes as an aggravating factor in sentencing.[2846]

1247. Ntahobali submits that the Trial Chamber erred in finding him responsible as a superior for these crimes as the material facts underpinning the elements of superior responsibility were insufficiently pleaded in the Indictment and that these defects were not cured.[2847] Consequently, he

[2845] Trial Judgement, paras. 5847-5849, 5886, 5917, 5971, 6056, 6086. The Appeals Chamber notes that the Trial Chamber did not examine whether Ntahobali bore superior responsibility under Counts 8 (persecution as a crime against humanity) and 10 (violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II) of the Nyiramasuhuko and Ntahobali Indictment in relation to the killing of Ruvurajabo at the Hotel Ihuliro roadblock, the killings that he ordered at the Butare Prefecture Office, and the killings that he aided and abetted at or near the EER although he was charged on this basis. *See* Nyiramasuhuko and Ntahobali Indictment, pp. 43, 44 (relying on paragraphs 6.27 and 6.30 of the Nyiramasuhuko and Ntahobali Indictment pursuant to Article 6(3) of the Statute). Similarly, the Trial Chamber did not examine whether Ntahobali bore superior responsibility under Count 11 (outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II) of the Nyiramasuhuko and Ntahobali Indictment in relation to the rapes that he ordered at the Butare Prefecture Office. *See ibid.*, p. 45 (relying on paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment pursuant to Article 6(3) of the Statute). The Appeals Chamber finds that, since the Prosecution charged Ntahobali cumulatively under Articles 6(1) and 6(3) of the Statute under Counts 8, 10, and 11 on these bases, the Trial Chamber was required to make findings as to whether Ntahobali incurred superior responsibility under these counts for the purpose of sentencing. *See Setako* Appeal Judgement, para. 268. The Appeals Chamber finds that the Trial Chamber's failure to make such findings constitutes an error of law. However, given that the Prosecution did not appeal this issue, the Appeals Chamber declines to make findings as to the consequences of this error of law.

[2846] Trial Judgement, para. 6220. *See also ibid.*, paras. 5847-5849, 5886, 5917, 5971, 6056, 6086.

[2847] Ntahobali Notice of Appeal, paras. 101-105, 119-122, 132-142; Ntahobali Appeal Brief, paras. 211-219, 261-271, 300-318. The Appeals Chamber notes that Ntahobali also specifically contends that the Trial Chamber erred in finding him responsible for genocide under Article 6(3) of the Statute for the rapes committed by *Interahamwe* at the Butare Prefecture Office whereas the Trial Chamber had acknowledged that the Indictment did not plead rapes in support of the count of genocide. *See* Ntahobali Notice of Appeal, para. 133; Ntahobali Appeal Brief, para. 300, *referring to* Trial Judgement, paras. 5861-5864, 5886. *See also* AT. 15 April 2015 p. 34. The Appeals Chamber observes that, contrary to Ntahobali's submission, the Trial Judgement clearly reflects that he was not found responsible as a superior for rapes under the count of genocide. *See* Trial Judgement, paras. 5826-5836, 5843, 5857-5864, 5911, 5971. The Trial Chamber made it clear that it mentioned Ntahobali's responsibility for rapes in the course of its legal findings on genocide "to convey the entire set of facts in a coherent fashion". *See ibid.*, paras. 5837, 5865. Ntahobali's contention in this respect is therefore dismissed.

requests that his responsibility under Article 6(3) of the Statute be reversed and his sentence reviewed.[2848]

1248. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead the following material facts:

> (i) the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (ii) the criminal conduct of those others for whom the accused is alleged to be responsible;
>
> (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
>
> (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[2849]

(a) Identification of Subordinates

1249. The Trial Chamber discussed whether Ntahobali was put on sufficient notice that he was alleged to be responsible as a superior for the criminal conduct of *Interahamwe* at the Hotel Ihuliro roadblock, the Butare Prefecture Office, and the EER in the "Legal Findings" section of the Trial Judgement. The Trial Chamber concluded that: (i) the defect in paragraph 6.27 of the Indictment concerning the identification of the *Interahamwe* involved in the crimes committed at the Hotel Ihuliro roadblock as Ntahobali's alleged subordinates was cured through Witness QCB's Summary and Statement;[2850] (ii) Ntahobali received notice that he was being charged as a superior of *Interahamwe* at the prefectoral office pursuant to paragraph 6.30 of the Indictment, read along with paragraphs 6.31, 6.53, 6.55, and 6.56 of the Indictment;[2851] and (iii) Ntahobali had sufficient notice of his alleged responsibility pursuant to Article 6(3) of the Statute over *Interahamwe* for the events at the EER.[2852] As for Ntahobali's notice of the allegation of rapes at the prefectoral office in particular, the Trial Chamber held in the "Factual Findings" section of the Trial Judgement that paragraph 6.37 of the Indictment lacked necessary details to put Ntahobali on notice that he was alleged to be responsible as a superior for rapes at the prefectoral office but that post-indictment communications cured the defect.[2853]

1250. Ntahobali submits that the Indictment or any subsequent information failed to provide him sufficient notice regarding the identity of his subordinates at the Hotel Ihuliro roadblock, the

[2848] Ntahobali Notice of Appeal, paras. 105, 122, 137, 142; Ntahobali Appeal Brief, paras. 219, 271, 303, 310, 318.
[2849] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218.
[2850] Trial Judgement, paras. 5839-5841.
[2851] Trial Judgement, paras. 5617-5620, 5878.
[2852] Trial Judgement, fn. 14777, *referring to* Nyiramasuhuko and Ntahobali Indictment, paras. 6.30, 6.55.
[2853] Trial Judgement, paras. 2163-2166.

prefectoral office, and the EER.[2854] First, he argues that he was not put on notice through paragraph 6.27 of the Indictment or Witness QCB's Summary and Statement that *Interahamwe* were alleged to be involved in killings at the Hotel Ihuliro roadblock.[2855] In the same vein, he highlights that paragraphs 6.30 and 6.37 of the Indictment failed to specify that *Interahamwe* were alleged to be present at the EER or involved in crimes at the prefectoral office.[2856] Ntahobali also contends that paragraphs 6.27, 6.30, and 6.37 of the Indictment as well as paragraph 21 of the Prosecution Pre-Trial Brief did not plead a subordinate-superior relationship with his alleged accomplices but could rather be interpreted as referring to a "horizontal" relationship.[2857]

1251. Ntahobali further argues that he never received notice that he was charged as a superior of *Interahamwe* in general, since paragraphs 4.4 and 4.5 of the Indictment only indicated that he was the alleged superior of a group of *Interahamwe* from the MRND coming from Butare Prefecture, whereas there was no evidence that the *Interahamwe* involved in crimes at the Hotel Ihuliro roadblock, the prefectoral office, or the EER were members of the MRND and that they were from Butare Prefecture.[2858]

1252. The Prosecution responds that Ntahobali's submissions should be dismissed as he was not *convicted* under Article 6(3) of the Statute.[2859] In the alternative, it submits that Ntahobali fails to demonstrate that he was not put on notice of the identity of his subordinates involved in the crimes

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[2854] Ntahobali Notice of Appeal, paras. 121, 136, 140; Ntahobali Appeal Brief, paras. 212, 261-268, 301, 305, 312. *See also* AT. 15 April 2015 pp. 31, 33, 34.

[2855] Ntahobali Appeal Brief, paras. 213, 214, 218; Ntahobali Reply Brief, para. 91. *See also* AT. 15 April 2015 p. 34. Ntahobali also argues that the Nyiramasuhuko and Ntahobali Indictment failed to specify that the *Interahamwe* involved in the crimes at the Hotel Ihuliro roadblock were from Kigali and were subordinated to Robert Kajuga. *See* Ntahobali Appeal Brief, para. 216. In addition, Ntahobali contends that the Trial Chamber erred in failing to find that the Prosecution did not comply with its order to provide the identity of Ntahobali's accomplices mentioned at paragraphs 6.27 and 6.30 of the Nyiramasuhuko and Ntahobali Indictment. *See* Ntahobali Notice of Appeal, paras. 104, 141; Ntahobali Appeal Brief, para. 213, *referring to* 1 November 2000 Ntahobali Decision, para. 35(a)(ii).

[2856] Ntahobali Appeal Brief, paras. 262, 305, 312; Ntahobali Reply Brief, para. 156. Ntahobali also argues that the Trial Chamber erred in finding that the defects in paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment were cured without considering whether the defect regarding the pleading of superior responsibility was in fact cured. *See* Ntahobali Notice of Appeal, para. 138; Ntahobali Appeal Brief, para. 303, *referring to* Trial Judgement, paras. 2164-2166; Ntahobali Reply Brief, para. 158. With regard to the Butare Prefecture Office, Ntahobali further submits that the Trial Chamber erred in relying on paragraphs 6.30, 6.31, and 6.55 of the Nyiramasuhuko and Ntahobali Indictment to consider that he had sufficient notice of his responsibility as a superior for rapes committed at the prefectoral office given that these paragraphs were not pleaded under Count 7 and did not mention any rapes. *See* Ntahobali Appeal Brief, para. 302; Ntahobali Reply Brief, para. 152. The Appeals Chamber has clarified in Section V.B.5(b) above that Ntahobali was convicted under Count 7 of the Nyiramasuhuko and Ntahobali Indictment for rapes at the prefectoral office pursuant to paragraph 6.37. *See supra*, para. 1212. Ntahobali's argument relying on paragraphs 6.30, 6.31, and 6.55 is therefore rejected as moot.

[2857] Ntahobali Appeal Brief, paras. 215, 305, 312, 313.

[2858] Ntahobali Appeal Brief, paras. 217, 263-268, 306, 314. Ntahobali posits that the *Interahamwe* who committed crimes at the Hotel Ihuliro roadblock were from Kigali and were subordinated to Robert Kajuga. *See ibid*., para. 216. He further contends that both the Trial Chamber and the Prosecution acknowledged that Ntahobali's subordinates were only official *Interahamwe* from the MRND. *See ibid*., para. 263, *referring to* Rule 98*bis* Decision, para. 144, Prosecution Closing Brief, para. 1 at p. 156.

[2859] Prosecution Response Brief, paras. 816, 834.

committed at the Hotel Ihuliro roadblock, the prefectoral office, and at or near the EER.[2860] The Prosecution argues that the Indictment should be read as a whole with paragraphs 4.4 and 4.5 of the Indictment which pleaded that Ntahobali exercised authority over *Interahamwe* militiamen in Butare Prefecture.[2861] In its view, where the *Interahamwe* came from was a matter of evidence.[2862]

1253. Ntahobali replies that the provenance of the *Interahamwe* is not a matter of evidence since paragraph 4.5 of the Indictment, in its French version, is clear that only the *Interahamwe* from Butare Prefecture were alleged to be his subordinates.[2863] With respect to the rapes committed by *Interahamwe* at the prefectoral office, Ntahobali replies that paragraphs 6.53 and 6.56 of the Indictment are too broad to constitute adequate notice of his responsibility under Article 6(3) of the Statute.[2864] He further contends that it was impossible to understand, when reading Witness TA's Summary together with paragraph 6.53 of the Indictment and paragraph 29 of the Prosecution Pre-Trial Brief, that *Interahamwe* were among the "unknown accomplices" mentioned in paragraph 6.37 of the Indictment.[2865]

1254. The Appeals Chamber rejects the Prosecution's contention that Ntahobali's submissions should be dismissed on the basis that he was not convicted pursuant to Article 6(3) of the Statute, given that, when the accused's responsibility is pleaded under both Articles 6(1) and 6(3) of the Statute for the same count and the same set of fact and the accused is found to be responsible under both, the trial chamber should enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating factor in sentencing.[2866]

1255. With regard to Ntahobali's argument that the Prosecution failed to plead the involvement of *Interahamwe* in crimes at the Hotel Ihuliro roadblock, the prefectoral office, and the EER, the Appeals Chamber recalls that it has already determined in prior sections of this Judgement that while paragraphs 6.27 and 6.37 of the Indictment were defective in that respect, Ntahobali nonetheless received notice that *Interahamwe* were alleged to have participated in these crimes.[2867] The Appeals Chamber also finds that the identification of his subordinates by category, the

[2860] Prosecution Response Brief, paras. 789-791, 817, 834-841. *See also* AT. 15 April 2015 pp. 77, 78.
[2861] Prosecution Response Brief, paras. 789, 838.
[2862] Prosecution Response Brief, para. 791.
[2863] Ntahobali Reply Brief, para. 90.
[2864] Ntahobali Reply Brief, para. 153. Ntahobali further points out that paragraph 6.53 of the Nyiramasuhuko and Ntahobali Indictment is only a "background paragraph" and that paragraph 6.56 of the Nyiramasuhuko and Ntahobali Indictment only relates to the count of conspiracy. *See ibid*., paras. 154, 155.
[2865] Ntahobali Reply Brief, para. 157. *See also ibid*., para. 156.
[2866] *Setako* Appeal Judgement, para. 266. *See also Renzaho* Appeal Judgement, para. 564; *Simba* Appeal Judgement, para. 82, fn. 178.
[2867] *See supra*, Sections V.B.3, V.B.5, V.B.6. The Appeals Chamber finds that Ntahobali's argument that the Trial Chamber's examination of whether the defects in paragraph 6.37 of the Nyiramasuhuko and Ntahobali Indictment were cured was conducted in relation to Article 6(1) responsibility is without merit.

"*Interahamwe*", was sufficient to provide him with adequate notice of the identity of his subordinates in the circumstances of this case.[2868]

1256. The Appeals Chamber also finds no merit in Ntahobali's argument that paragraphs 6.27, 6.30, and 6.37 of the Indictment appeared to plead a "horizontal" relationship between him and those others involved in the crimes. The Appeals Chamber notes that these paragraphs were specifically relied upon in support of Ntahobali's superior responsibility under the relevant counts.[2869] Reading these paragraphs and the curing material in light of paragraphs 4.4 and 4.5 of the Indictment which alleged that Ntahobali "led a group of MRND militiamen, the *Interahamwe*" and that he "exercised authority over *Interahamwe* militiamen in Butare *préfecture*",[2870] the Appeals Chamber is of the view that they informed Ntahobali of his alleged superior-subordinate relationship with the *Interahamwe* involved in the crimes. The Appeals Chamber is not convinced by Ntahobali's argument that the fact that the Indictment mentions that Ntahobali was "accompanied" or "assisted" by his accomplices could have reasonably been interpreted as an indication of a horizontal relationship.[2871]

1257. Ntahobali's argument concerning the provenance of the *Interahamwe* is similarly unpersuasive as, contrary to what he contends, a plain reading of paragraphs 4.4 and 4.5 of the Indictment reflects that the authority he was alleged to exercise was not limited to the militiamen who were official members of the MRND youth wing coming from Butare Prefecture, but concerned all *Interahamwe* militiamen present in Butare Prefecture. The pleading of Ntahobali's superior responsibility over *Interahamwe* in Butare Prefecture as alleged in paragraphs 4.4 and 4.5 is therefore not irreconcilable with the fact that *Interahamwe* from Kigali Prefecture committed crimes in Butare Prefecture.[2872]

[2868] The Appeals Chamber recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute, and that physical perpetrators of the crimes can be identified by category in relation to a particular crime site. *See Bagosora and Nsengiyumva*, para. 196. *See also Renzaho* Appeal Judgement, para. 64; *Muvunyi* Appeal Judgement of 29 August 2008, para. 55, *referring to Blagojević and Jokić* Appeal Judgement, para. 287.

[2869] *See* Nyiramasuhuko and Ntahobali Indictment, pp. 39-45.

[2870] While paragraphs 4.4 and 4.5 of the Nyiramasuhuko and Ntahobali Indictment were not specifically referred to in support of any count, they do not plead allegations that may be separately charged as a crime. As a result, the Appeals Chamber considers that it was not necessary to plead these paragraphs under each of the counts in the charging section of the Nyiramasuhuko and Ntahobali Indictment and they unambiguously applied to all counts charged pursuant to Article 6(3) of the Statute.

[2871] *See* Nyiramasuhuko and Ntahobali Indictment, paras. 6.30, 6.37. However, the Appeals Chamber rejects the Prosecution's argument that paragraph 5.1 of the Nyiramasuhuko and Ntahobali Indictment was sufficient to put Ntahobali on notice that he was charged with ordering killings committed by his subordinates given the broad nature of this paragraph, the fact that it is not linked with paragraphs 6.30 or 6.56 of the Nyiramasuhuko and Ntahobali Indictment, and the fact that this paragraph was only invoked pursuant to Article 6(1) of the Statute.

[2872] The Appeals Chamber recalls that effective control need not be exclusive and can be exercised by more than one superior, whose criminal responsibility is not excluded by the coexisting responsibility of others. *See Bagosora and*

1258. For these reasons, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that he was not put on sufficient notice of the identity of the subordinates for whose acts he was found to be responsible as a superior.

(b) Criminal Conduct of Subordinates

1259. The issue of notice of the crimes allegedly committed by *Interahamwe* at the Hotel Ihuliro roadblock and against Tutsis who had sought refuge at the prefectoral office and the EER has been dealt with in the sections of this Judgement addressing the alleged lack of notice of the material facts underpinning each of the specific incidents. In those sections, the Appeals Chamber has found that Ntahobali was put on notice through the Indictment and other communications that *Interahamwe* under his control were alleged to have killed Ruvurajabo at the Hotel Ihuliro roadblock, killed and raped Tutsis who had sought refuge at the prefectoral office in May and June 1994, and perpetrated killings at or near the EER in May and June 1994.[2873] Ntahobali's arguments alleging lack of notice of the criminal conduct of his subordinates are therefore rejected.[2874]

(c) Knowledge of the Subordinates' Criminal Conduct

1260. The Trial Chamber found that Ntahobali had actual knowledge that his subordinates had committed or were about to commit crimes, which it inferred from his presence at the Hotel Ihuliro roadblock when Ruvurajabo was being killed and from his orders to *Interahamwe* at the prefectoral office.[2875]

1261. Ntahobali submits that the Trial Chamber erred in finding that he received sufficient notice of his knowledge of the crimes of his alleged subordinates at the Hotel Ihuliro roadblock and the prefectoral office.[2876] He further contends that the Trial Chamber erred in failing to address whether he had the requisite knowledge with respect to the events at the EER.[2877] He argues that paragraph 6.55 of the Indictment failed to set forth the criminal conduct by which he knew or had reason to know that the crimes were about to be committed.[2878]

1262. In relation to the crimes committed at the prefectoral office, the Prosecution responds that Ntahobali's orders to commit rapes coupled with Witness TA's Summary put Ntahobali on notice

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Nsengiyumva Appeal Judgement, para. 495. *See also Nizeyimana* Appeal Judgement, para. 346; *Čelebići* Appeal Judgement, paras. 197, 198.
[2873] *See supra*, Sections V.B.3, V.B.5, V.B.6.
[2874] *See* Ntahobali Notice of Appeal, paras. 103, 121, 136; Ntahobali Appeal Brief, paras. 212, 301.
[2875] Trial Judgement, paras. 5848, 5885. *See also ibid*., para. 5884.
[2876] Ntahobali Notice of Appeal, paras. 103, 136; Ntahobali Appeal Brief, paras. 308, 316.
[2877] Ntahobali Notice of Appeal, para. 121; Ntahobali Appeal Brief, para. 269.

of his knowledge that these rapes were occurring.[2879] It also contends that Ntahobali was charged with ordering massacres and thus was put on notice of his conduct as regards his knowledge of the crimes.[2880]

1263. Recalling that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole,[2881] the Appeals Chamber notes that, in paragraph 6.55 of the Indictment – upon which the Trial Chamber specifically relied when making findings on Ntahobali's superior responsibility under the relevant counts[2882] – the Prosecution explicitly alleged that massacres of the civilian population were being committed with Ntahobali's knowledge.[2883] In paragraph 6.56 of the Indictment, the Prosecution further alleged that Ntahobali knew of and consented to the crimes perpetrated by his subordinates. The Appeals Chamber further notes that paragraphs 6.27 and 6.30 of the Indictment refer to the role and frequent participation of *Interahamwe* or militiamen in abductions and killings, in the presence of Ntahobali, at the Hotel Ihuliro roadblock and the prefectoral office.[2884] These paragraphs were specifically relied upon in support of Ntahobali's superior responsibility under the relevant counts.[2885] In addition, the Appeals Chamber recalls that, while it found that paragraph 6.30 of the Indictment failed to plead Ntahobali's presence at the EER with *Interahamwe* and that the Trial Chamber erred in not conducting the required analysis, the defects were cured.[2886]

1264. The Appeals Chamber further recalls that it held that Ntahobali received sufficient notice that he ordered *Interahamwe* to kill Ruvurajabo at the Hotel Ihuliro roadblock and abductions, killings, and rapes at the prefectoral office, and that he aided and abetted *Interahamwe* to commit killings at the EER. The Appeals Chamber considers that, as found by the Trial Chamber, this conduct implied his knowledge of the crimes perpetrated by his subordinates.

[2878] Ntahobali Appeal Brief, para. 269.
[2879] Prosecution Response Brief, para. 839.
[2880] Prosecution Response Brief, para. 841.
[2881] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 370; *Ntabakuze* Appeal Judgement, para. 65; *Gacumbitsi* Appeal Judgement, para. 123.
[2882] *See* Trial Judgement, paras. 5617, 5878.
[2883] At the appeals hearing, Ntahobali pointed out that paragraph 6.55 of the Nyiramasuhuko and Ntahobali Indictment was no longer relied upon in support of Count 7 in the operative indictment, which, according to him, indicated that the Prosecution had no longer the intention to charge him with superior responsibility in relation to rape. *See* AT. 15 April 2015 p. 33. Reading the Nyiramasuhuko and Ntahobali Indictment as a whole and considering that paragraph 6.55 was relied upon in support of all other relevant counts and that Count 7 was expressly pursued pursuant to Article 6(3) of the Statute, the Appeals Chamber is not convinced by Ntahobali's argument. *See* Nyiramasuhuko and Ntahobali Indictment, pp. 38-45.
[2884] The Appeals Chamber finds no merit in Ntahobali's oral argument that paragraph 6.56 of the Nyiramasuhuko and Ntahobali Indictment "had nothing to do with superior responsibility" because it is "a conspiracy-related paragraph". *See* AT. 15 April 2015 p. 33.
[2885] *See* Nyiramasuhuko and Ntahobali Indictment, pp. 39-45.
[2886] *See supra*, Section V.B.6(b).

1265. The Appeals Chamber considers that, taken together, these paragraphs and the subsequent information provided to Ntahobali clearly pleaded that Ntahobali knew or had reason to know that his subordinates were about to and had committed the crimes alleged in the Indictment as well as the conduct by which he was found to have known of his subordinates' criminal conduct. Accordingly, the Appeals Chamber dismisses Ntahobali's arguments concerning the pleading of his knowledge of his subordinates' criminal conduct.

(d) Failure to Prevent or Punish

1266. Ntahobali generally submits that he did not receive notice in the Indictment or through subsequent information of the conduct by which he failed to take the necessary measures to prevent the crimes or to punish the perpetrators thereof.[2887] He argues that paragraph 6.55 of the Indictment could not serve for this purpose.[2888]

1267. With regard to crimes at the prefectoral office, the Prosecution responds that Ntahobali's orders to commit rapes coupled with Witness TA's Summary put Ntahobali on notice of the conduct by which he failed to prevent or punish them.[2889] It also contends that Ntahobali was charged with ordering massacres and thus was put on notice of his conduct as regards his failure to take action in this respect.[2890]

1268. The Appeals Chamber stresses that, in respect of this element of superior responsibility, in many cases it will be sufficient to plead that the accused did not take any necessary and reasonable measures to prevent or punish the commission of criminal acts.[2891] In this case, the Appeals Chamber notes that paragraph 6.55 of the Indictment expressly pleaded that Ntahobali "took no measures to stop" the massacres of the civilian population that he knew were being committed. Given the vagueness of the Indictment concerning the specific crimes for which Ntahobali was alleged to be responsible, the Appeals Chamber finds that this was insufficient to give Ntahobali adequate notice of the conduct by which he had allegedly failed to take the necessary measures to prevent the crimes or to punish the perpetrators thereof. However, the Appeals Chamber finds that the defect of the Indictment in this respect was subsequently cured, notably through paragraph 30 of the Prosecution Pre-Trial Brief, in which the Prosecution alleged, that "[i]nstead of intervening to control and appeal to the perpetrators, [… Ntahobali] ordered, aided and abetted the acts."

[2887] Ntahobali Notice of Appeal, paras. 103, 121, 136; Ntahobali Appeal Brief, paras. 270, 309. Ntahobali argues that the orders relied on by the Trial Chamber are not pleaded in the Nyiramasuhuko and Ntahobali Indictment or in subsequent materials. *See* Ntahobali Appeal Brief, para. 309.
[2888] Ntahobali Appeal Brief, para. 269.
[2889] Prosecution Response Brief, para. 839.
[2890] Prosecution Response Brief, para. 841.

As regards the "acts" in question, the Appeals Chamber recalls its findings that Ntahobali had sufficient notice that he was alleged to have ordered *Interahamwe* to commit killings and rapes at the Hotel Ihuliro roadblock and the prefectoral office, and aided and abetted *Interahamwe* to commit killings at the EER.[2892]

1269. In the opinion of the Appeals Chamber, the Indictment read as a whole and in conjunction with the subsequent information communicated to Ntahobali gave him sufficient notice of the conduct by which he was found to have failed to take the necessary measures to prevent and punish the crimes. For these reasons, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that he was not put on adequate notice of this element of superior responsibility.

(e) Conclusion

1270. In light of the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding him responsible as a superior under Article 6(3) of the Statute for crimes perpetrated at the Hotel Ihuliro roadblock and against Tutsis who had sought refuge at the prefectoral office and the EER based on lack of notice.

8. Cumulative Effect of the Defects (Ground 2.7)

1271. In its preliminary considerations of notice issues in the Trial Judgement, the Trial Chamber recalled the Appeals Chamber's holding that, even if the Prosecution succeeded in arguing that the defects in the indictments were remedied in each individual instance, the Trial Chamber had still to consider whether the overall effect of the numerous defects rendered the trial unfair in itself.[2893] The Trial Chamber noted that it had found specific paragraphs of the Indictment to be unduly vague but underlined that, in many cases, it had determined that these defects were cured.[2894] After noting that, throughout the course of the proceedings, it had given the Defence additional time to prepare its case where appropriate and reiterating that the new information that led to factual findings was disclosed through timely, clear, and consistent disclosures, the Trial Chamber found that "the Accused were in a reasonable position to understand the charges against them and had the time and resources available to investigate these charges."[2895] Consequently, the Trial Chamber concluded

[2891] *Bizimungu* Appeal Judgement, para. 104; *Ntabakuze* Appeal Judgement, para. 123; *Nahimana et al.* Appeal Judgement, para. 323.
[2892] *See supra*, Sections V.B.3, V.B.5, V.B.6.
[2893] Trial Judgement, para. 127, *referring to Ntagerura et al.* Appeal Judgement, para. 114. *See also ibid.*, paras. 128, 130.
[2894] Trial Judgement, para. 129.
[2895] Trial Judgement, para. 130.

that "the trial was not rendered unfair and that the Accused did not suffer any prejudice in the preparation of their respective defences."[2896]

1272. Ntahobali submits that the Trial Chamber erred in its assessment of the cumulative effect of the defects in his Indictment by applying the wrong legal criterion as well as in holding that the numerous defects it found did not prejudice his Defence case and did not render his trial unfair.[2897] Specifically, he asserts that the Trial Chamber erred in relying on the test used for curing defects in the Indictment in order to determine whether the cumulative effect of the defects rendered the trial unfair, rendering the principle "entirely meaningless".[2898] After highlighting that the Trial Chamber found that ten of the 17 paragraphs relied upon against him in the charging section of his Indictment were defective, he contends that the Trial Chamber erred in failing to consider that the number of times defects in an indictment can be cured is limited.[2899] He avers that the Trial Chamber further erred in considering that the additional time granted rendered his trial fair as mere allowance of time did not provide him with better knowledge as to where to direct his investigations.[2900]

1273. Ntahobali submits that it was an impossible task to defend himself given the seriousness of the defects in the Indictment and the confusion of the Prosecution case.[2901] In this respect, he contends that he did not know the allegations against which he had to defend himself and was unable to conduct any meaningful investigations before trial.[2902] He points out as well that numerous allegations advanced in the Prosecution Pre-Trial Brief were never addressed at trial, adding to the confusion as to what the Prosecution case was.[2903] According to Ntahobali, the Trial Chamber also created prejudicial uncertainty in deciding to admit *all* the evidence adduced at trial, where deemed "relevant", including the evidence on allegations not pleaded in the Indictment and for which the accused had not received sufficient notice, holding that its probative value would be determined at the end of the trial.[2904] He argues that this situation forced him to investigate and

[2896] Trial Judgement, para. 131.
[2897] Ntahobali Notice of Appeal, para. 147; Ntahobali Appeal Brief, paras. 331-336; AT. 15 April 2015 p. 27.
[2898] Ntahobali Appeal Brief, para. 336.
[2899] Ntahobali Notice of Appeal, para. 148; Ntahobali Appeal Brief, paras. 334, 354. *See also* Ntahobali Reply Brief, para. 167.
[2900] Ntahobali Appeal Brief, para. 337. Ntahobali argues that the additional time granted to the Defence referred to by the Trial Chamber has nothing to do with allowance of additional time for investigations on allegations not pleaded in the Nyiramasuhuko and Ntahobali Indictment. *See idem*, *referring to* Trial Judgement, fn. 249.
[2901] Ntahobali Appeal Brief, para. 355.
[2902] Ntahobali Notice of Appeal, para. 148; Ntahobali Appeal Brief, paras. 338-347, 354. In particular, Ntahobali argues that the count of conspiracy necessitated numerous investigations which were difficult to conduct given the lack of clarity of the charge. *See* Ntahobali Appeal Brief, para. 341.
[2903] Ntahobali Appeal Brief, para. 340.
[2904] Ntahobali Appeal Brief, para. 342 (French) (emphasis omitted).

prepare for the entirety of the allegations made against him whether or not they were pleaded in the Indictment.[2905]

1274. Furthermore, Ntahobali contends that he was prevented from conducting effective investigations and cross-examinations, and that problems concerning his investigators and the Trial Chamber's refusal to recall witnesses further impacted his ability to defend himself.[2906] He argues that the Prosecution has been able to mould its case during trial and that its behaviour exacerbated the prejudice suffered,[2907] referring in particular to the Prosecution's significant modifications of its list of witnesses at trial, notably the addition of Prosecution Witness FA, and the violation of its Rule 66 disclosure obligations.[2908] In Ntahobali's view, his trial was rendered unfair as a result and a stay of proceedings or a significant reduction of his sentence should be ordered.[2909]

1275. The Prosecution responds that the Trial Chamber adequately verified whether each defect was cured by timely, clear, and consistent post-indictment communications and did not err in finding that Ntahobali did not suffer prejudice.[2910]

1276. The Appeals Chamber rejects Ntahobali's claim that the Trial Chamber applied the wrong legal criterion in evaluating the cumulative effect of the defects in the Indictment. Although the Trial Chamber mainly relied on its finding that the defects of the Indictment concerning allegations on which it made factual findings were cured, its analysis reflects that it did not limit its examination to this matter but, in accordance with the jurisprudence that it expressly recalled, examined whether the Defence had sufficient time and resources to investigate properly all the new material facts and that it was not prejudiced by the addition of numerous material facts. The Appeals Chamber refers in particular to the Trial Chamber's reliance on the additional time allotted to the co-Accused to prepare their case[2911] and its findings throughout the Trial Judgement that, where remedied, the original lack of notice had not caused prejudice.[2912]

1277. The Appeals Chamber also finds no merit in Ntahobali's argument that the number of defects in an indictment that can be cured is limited. The Appeals Chamber considers that, in

[2905] Ntahobali Appeal Brief, para. 342 (French). Ntahobali refers in particular to the murders of "Philippe/Rwabugiri" in Tumba which were found to be outside the Nyiramasuhuko and Ntahobali Indictment and not cured. *See idem*.
[2906] Ntahobali Appeal Brief, paras. 349, 350, 352. In particular, Ntahobali mentions that he was not able to conduct a full cross-examination of Prosecution Witness TA because he did not know to what extent other Prosecution witnesses would testify on the same allegation. *See ibid*., para. 349.
[2907] Ntahobali Notice of Appeal, para. 149; Ntahobali Appeal Brief, paras. 343, 355.
[2908] Ntahobali Appeal Brief, paras. 349, 351. Ntahobali points out that the Prosecution's violation of its obligations prevented him from knowing the identity of the Prosecution witnesses and the content of their redacted written statements before the commencement of the trial. *See ibid*., para. 349.
[2909] Ntahobali Notice of Appeal, para. 151; Ntahobali Appeal Brief, paras. 355, 356.
[2910] Prosecution Response Brief, paras. 846, 848, 850, *referring to* Trial Judgement, para. 130. *See also ibid*., para. 847, *referring to Bagosora and Nsengiyumva* Appeal Judgement, paras. 210, 217; AT. 15 April 2015 pp. 79, 80.
[2911] Trial Judgement, para. 130.

instances where it is found that defective charges have not only been cured but also that the initial lack of notice did not result in prejudice, the question of the number of defects cured becomes secondary. It is clear from the Appeals Chamber's jurisprudence that the key question remains whether or not the accused was materially prejudiced in the preparation of his defence.[2913]

1278. Furthermore, Ntahobali's contention that the Trial Chamber erred in finding that the allowance of additional time rendered the trial fair because this did not remedy the vagueness of the Prosecution case fails to appreciate that the Trial Chamber considered this factor when determining the additional time needed to investigate all the new material facts; in other terms, to investigate the material facts that were curing the vagueness of the Prosecution case. Apart from claiming that the examples provided by the Trial Chamber are not pertinent,[2914] Ntahobali does not argue or demonstrate that he was denied additional time to conduct investigations on new material facts and that, overall, he did not have sufficient time to investigate allegations by the Prosecution. Absent such a demonstration, the Appeals Chamber cannot see any error in the Trial Chamber's reliance on the fact that additional time was given to the Defence to remedy any possible prejudice.

1279. Although Ntahobali argues that he could not defend himself given the seriousness of the defects in the Indictment and the confusion in the Prosecution case, his only substantiation in his appeal submissions relates to the incidents in connection with which he was convicted. The Appeals Chamber has found above that Ntahobali failed to demonstrate that his material ability to prepare his defence regarding the allegations related to the IRST, the Hotel Ihuliro roadblock, the prefectoral office, or the EER had been impaired by the Prosecution's failure to provide appropriate notice in the Indictment.[2915] The Appeals Chamber has also concluded that the Prosecution successfully demonstrated that Ntahobali was not prejudiced by the lack of notice concerning his responsibility in the killing of the Rwamukwaya family.[2916] Therefore, the Appeals Chamber rejects Ntahobali's allegation of prejudice in these respects.

[2912] *See*, *e.g.*, Trial Judgement, paras. 1464, 2166, 2932, 2942, 3161.
[2913] *See Bagosora et al.* Appeal Decision on Exclusion of Evidence, para. 26:

> […] Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence.

[2914] Ntahobali Appeal Brief, para. 337. *See also* Ntahobali Reply Brief, para. 167. A review of the references provided by the Trial Chamber in support of its statement that additional time was granted reveals that the time granted on these occasions was limited and was not specifically granted for the purpose of offering time to the Defence to investigate new material facts. However, it is clear that the Trial Chamber did not intend to list all relevant instances but that it only provided examples. *See* Trial Judgement, para. 130.
[2915] *See supra*, Sections V.B.2, V.B.3, V.B.5, V.B.6.
[2916] *See supra*, Section V.B.4.

1280. The Appeals Chamber is concerned by the practice of trial chambers in the exercise of their discretion, as in this case,[2917] to postpone consideration of Defence objections to the admission of testimonial evidence on the ground of lack of notice to the phase of their final deliberations on the case. In the view of the Appeals Chamber, leaving the issue of whether facts could be relied upon as a potential basis for liability unresolved until the end of the trial, as the Trial Chamber did, creates uncertainty which can be a source of potential prejudice to the Defence.[2918] While the Appeals Chamber considers that it would have been preferable for the Trial Chamber to rule on the Defence objections in a timely fashion to ensure clarity on the facts underpinning the charges on the basis of which it considered it could hold the accused responsible, it notes that Ntahobali, again, fails to substantiate his allegation of prejudice.

1281. Ntahobali also points to a number of factors in support of his contention that he suffered prejudice, such as the Prosecution's violation of its disclosure obligation, the issue of the cross-examination of Witness TA, the absence of investigator, the modification of the Prosecution's witness list, and the Trial Chamber's refusal to recall witnesses. The Appeals Chamber recalls that it has already addressed and rejected elsewhere in this Judgement a number of Ntahobali's allegations of prejudice, notably concerning the addition of witnesses, including Witness FA, the cross-examination of Witness TA, the refusal to recall witnesses, and the suspension of his investigator.[2919] In any event, the Appeals Chamber considers that Ntahobali fails to demonstrate how these factors were pertinent to the determination of the prejudice suffered from the accumulation of the defects in the Indictment.

1282. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment in respect of all of the incidents for which Ntahobali was found guilty. However, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in concluding that his trial had not been rendered unfair due to the number of defects in his Indictment.

9. Conclusion

1283. Based on the above, the Appeals Chamber dismisses Ntahobali's contentions that the Trial Chamber erred in authorising the Prosecution to amend the indictment against him to add charges of superior responsibility as well as his contentions that he was not charged with, lacked sufficient notice of, or was materially prejudiced in the preparation of his defence from the lack of notice of

[2917] *See* Trial Judgement, para. 97.
[2918] *See*, *e.g.*, *Ntakirutimana* Appeal Judgement, para. 28, *referring to Kupreškić et al.* Appeal Judgement, paras. 110, 119.
[2919] *See supra*, Sections III.D, III.F, III.G, V.A.3.

his alleged responsibility for the killings at the IRST, the killings and rape at the Hotel Ihuliro roadblock, the killing of the Rwamukwaya family, the rapes committed and the killings ordered at the Butare Prefecture Office, and the killings at or near the EER. The Appeals Chamber also dismisses Ntahobali's claim of prejudice resulting from the accumulation of defects in the Indictment.

1284. Accordingly, the Appeals Chamber dismisses Grounds 2.1 through 2.7 of Ntahobali's appeal.

C. Expert Witness Guichaoua's Status and Evidence (Ground 3.7)

1285. Ntahobali submits that the Trial Chamber erred in fact and in law in maintaining Prosecution Expert Witness Guichaoua's status as an expert and in finding him and his report credible.[2920] He argues that Witness Guichaoua's testimony reflected partiality that is incompatible with the expected neutrality of an expert.[2921] In his appeal brief, Ntahobali merely refers to "Nyiramasuhuko's arguments".[2922]

1286. The Prosecution responds that this ground should be dismissed as a party may not dispose of its burden on appeal by merely referring to another party's submission.[2923]

1287. The Appeals Chamber notes that it has addressed and dismissed in its entirety Nyiramasuhuko's arguments pertaining to Witness Guichaoua's neutrality and objectivity as an expert and the assessment of his evidence in Section IV.A.2 above. In the absence of any further substantiation in support of Ntahobali's allegations of error, the Appeals Chamber dismisses Ground 3.7 of Ntahobali's appeal without further consideration.

[2920] Ntahobali Notice of Appeal, para. 275.
[2921] Ntahobali Notice of Appeal, para. 276.
[2922] Ntahobali Appeal Brief, para. 770. *See also* Ntahobali Reply Brief, para. 330.
[2923] Prosecution Response Brief, para. 1127, *referring to ibid*., para. 995.

D. Admission and Assessment of Co-Accused's Evidence (Ground 3.10)

1288. The Trial Chamber convicted Ntahobali of genocide, crimes against humanity, and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute in relation, *inter alia*, to the killing of members of the Rwamukwaya family as well as crimes committed against Tutsis at the Hotel Ihuliro roadblock and against Tutsis who had sought refuge at the Butare Prefecture Office in May and June 1994.[2924] The Trial Chamber's findings were, in part, based on the evidence presented by Ntahobali's co-accused.[2925]

1289. Ntahobali submits that the Trial Chamber erred in law and in fact in finding him guilty in relation to these crimes based in part on its reliance upon evidence presented by his co-accused.[2926] Specifically, Ntahobali argues that the Trial Chamber erred in: (i) admitting the testimony of Kanyabashi Defence Witness D-2-13-O about the killing of the Rwamukwaya family; and (ii) failing to exercise the necessary caution in assessing the evidence presented by his co-accused and to provide a reasoned opinion when relying on this evidence against him in relation to the killing of the Rwamukwaya family, crimes committed at the Hotel Ihuliro roadblock, and attacks at the prefectoral office.[2927] He contends that, had the Trial Chamber exercised due caution, it would have acquitted him.[2928] Ntahobali argues that a new assessment should lead the Appeals Chamber to exclude this evidence.[2929]

1290. The Prosecution responds that Ntahobali repeats arguments concerning the admission of Witness D-2-13-O's evidence that failed at trial and that they should be summarily dismissed.[2930] It further responds that Ntahobali fails to demonstrate why the Trial Chamber should have treated the evidence presented by his co-accused with caution or how it acted outside its discretion.[2931] It also submits that Ntahobali has not identified any error that could invalidate the verdict.[2932]

1291. The Appeals Chamber has found below in Section V.H that the Trial Chamber erred in finding that Ntahobali aided and abetted the killing of the Rwamukwaya family and reversed his convictions in this respect. Accordingly, the Appeals Chamber finds that Ntahobali's submissions

[2924] Trial Judgement, paras. 5842, 5844, 5845, 5852-5855, 5867, 5870, 5873, 5876, 5971, 6053-6055, 6077-6081, 6094, 6100, 6101, 6121, 6168, 6169, 6184-6186.
[2925] Trial Judgement, paras. 2666, 3108, 3109, 3125, 3127, 3142, 3205-3207, 3210-3213, 3216, 3218, 3219.
[2926] Ntahobali Notice of Appeal, para. 278; Ntahobali Appeal Brief, para. 784.
[2927] Ntahobali Notice of Appeal, paras. 278-281; Ntahobali Appeal Brief, paras. 785-795; Ntahobali Reply Brief, para. 330.
[2928] Ntahobali Notice of Appeal, para. 281.
[2929] Ntahobali Notice of Appeal, para. 281; Ntahobali Appeal Brief, para. 795.
[2930] Prosecution Response Brief, para. 1131.
[2931] Prosecution Response Brief, para. 1132.
[2932] Prosecution Response Brief, para. 1132.

related to the admission and assessment of the evidence concerning the killing of the Rwamukwaya family under Ground 3.10 of his appeal have become moot and need not be addressed.

1292. With respect to Ntahobali's remaining submissions, the Appeals Chamber considers that Ntahobali fails to show that the Trial Chamber was required, as a matter of law, to treat *all* the evidence presented by his co-accused with caution. Ntahobali simply refers to paragraphs in the *Nchamihigo* Appeal Judgement and *Krajišnik* Appeal Judgement, which concern the treatment of accomplice witness evidence.[2933] However, he does not demonstrate that any witness he contends the Trial Chamber failed to treat with caution was an accomplice witness whose evidence warranted a cautious assessment.

1293. Likewise, while Ntahobali generally contends that the Trial Chamber failed to provide a reasoned opinion when relying on evidence presented by his co-accused, his submissions fail to particularise any error.[2934] The Appeals Chamber also observes that the Trial Chamber, when reviewing the evidence of witnesses presented by Kanyabashi, expressed its concern that these witnesses may have a motive to deflect liability from Kanyabashi and decided to assess their evidence with caution.[2935] Accordingly, when assessing the testimonies from Kanyabashi Defence Witnesses D-13-D, D-2-5-I, and D-2-13-O concerning events at the Hotel Ihuliro roadblock and the prefectoral office, the Trial Chamber only accepted their evidence when corroborated by other evidence.[2936] The Trial Judgement also reflects that the Trial Chamber relied on the testimony of Nsabimana Defence Witnesses Bernadette Kamanzi, Charles Karemano, and Alexandre Bararwandika as corroborative of other evidence.[2937] Having failed to substantiate why the evidence of these witnesses should have been treated with particular caution, Ntahobali does not demonstrate how the Trial Chamber failed to provide a reasoned opinion when relying on their evidence.

1294. Based on the foregoing, the Appeals Chamber dismisses Ground 3.10 of Ntahobali's appeal.

[2933] Ntahobali Appeal Brief, para. 794, *referring to Nchamihigo* Appeal Judgement, para. 46, *Krajišnik* Appeal Judgement, para. 146.
[2934] Ntahobali Appeal Brief, paras. 793-795.
[2935] Trial Judgement, para. 3216.
[2936] Trial Judgement, paras. 2666, 3108, 3109, 3125.
[2937] Trial Judgement, paras. 3108, 3109, 3124, 3125, 3142.

E. Alibis (Ground 3.11)

1295. At trial, Ntahobali presented alibis according to which: (i) he had malaria and was convalescing at Hotel Ihuliro for an entire week around the end of April and the beginning of May 1994;[2938] and (ii) he was in Cyangugu Town from 26 or 27 May 1994 until 5 June 1994.[2939]

1296. The Trial Chamber noted that Ntahobali provided a notice of his alibis only eight months after the start of the presentation of the Defence evidence and considered that the circumstances of this late disclosure adversely affected the credibility of his alibis, raising the possibility that they were fabricated.[2940] The Trial Chamber ultimately concluded that Ntahobali's alibis were not reasonably possibly true[2941] and that Ntahobali participated in crimes in Butare Town during the relevant periods of time.[2942]

1297. Ntahobali submits that the Trial Chamber erred in its assessment of the alibi evidence relating to the periods between late April and early May 1994 and between 26 or 27 May and 5 June 1994,[2943]and requests that the Appeals Chamber overturn his convictions for the crimes committed during these periods of time.[2944]

1298. Before turning to Ntahobali's challenges, the Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt.[2945] Rather, the accused must simply produce evidence tending to show that he was not present at the time of the alleged

[2938] Trial Judgement, para. 2580. *See also ibid*., paras. 2922, 3114, 3153, 3208.
[2939] Trial Judgement, para. 2584. *See also ibid*., paras. 2682, 3941, 4874. The Appeals Chamber also notes that the Trial Chamber found that Ntahobali's alibi that he never left Hotel Ihuliro at night throughout the relevant events as he had the responsibility of ensuring that the generator was turned on and shut off was not believable. *See ibid*., paras. 2596-2599. Ntahobali does not challenge the Trial Chamber's finding on this issue.
[2940] Trial Judgement, para. 2578.
[2941] Trial Judgement, paras. 2583, 2595, 2599, 3117, 3208, 3942.
[2942] Specifically, the Trial Chamber found that Ntahobali: (i) utilised the Hotel Ihuliro roadblock to abduct and kill Tutsis in late April 1994 and, in particular, raped and killed a Tutsi girl at the roadblock around the end of April 1994; (ii) aided and abetted the killing of Rwamukwaya and his family around 29 or 30 April 1994; (iii) was involved in the killing and rape of Tutsis who had sought refuge in the Butare Prefecture Office from mid-May to June 1994; and (iv) aided and abetted the killings of Tutsi refugees at the EER between mid-May and the beginning of June 1994. *See* Trial Judgement, paras. 2781, 3113, 3128, 3135, 3140, 3219, 3965.
[2943] *See* Notice of Appeal, paras. 282-288; Ntahobali Appeal Brief, paras. 796-818; Ntahobali Reply Brief, paras. 331-337. In his notice of appeal, Ntahobali also argued that the Trial Chamber erred in failing to conclude that the Prosecution suffered no prejudice in relation to the alibi evidence and that the Prosecution's failure to provide specific dates for its allegations had prevented him from presenting a specific alibi. *See* Ntahobali Notice of Appeal, paras. 284, 287. However, the Appeals Chamber notes that Ntahobali did not substantiate these allegations in his notice of appeal or develop them in his appeal brief. The Appeals Chamber further recalls that, elsewhere in this Judgement, it found that the Trial Chamber was not required to consider whether the Prosecution suffered prejudice from the belated disclosure. *See supra*, para. 664. Consequently, the Appeals Chamber dismisses these contentions.
[2944] Ntahobali Notice of Appeal, para. 288; Ntahobali Appeal Brief, paras. 802, 813.
[2945] *See*, *e.g*., *Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.

crime.[2946] If the alibi is reasonably possibly true, it must be accepted.[2947] When an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true.[2948]

1. Alibi for Late April to Early May 1994

1299. The Trial Chamber found that Ntahobali's alibi that he had malaria and was convalescing at Hotel Ihuliro for an entire week around the end of April and the beginning of May 1994 was not credible and not reasonably possibly true in light of Ntahobali Defence Witness Béatrice Munyenyezi's lack of credibility, the lack of corroboration from other witnesses who should have had knowledge of Ntahobali's illness and testified about it, and the late notice of alibi.[2949]

1300. In particular, the Trial Chamber observed that, while Nyiramasuhuko Defence Witnesses Denise Ntahobali, Clarisse Ntahobali, WBUC, and Nyiramasuhuko testified that they were at Hotel Ihuliro for the birthday party of Clarisse Ntahobali's daughter on 28 April 1994, they did not corroborate Ntahobali's testimony that he had malaria from the end of April to the beginning of May and was forced to remain in bed.[2950] The Trial Chamber stated that Witness Munyenyezi was the only witness to corroborate Ntahobali's alibi that he was sick with malaria at the end of April 1994, noted aspects of her testimony that undermined her credibility, and considered that, as Ntahobali's wife, she would have a motive to exculpate him.[2951] Specifically, the Trial Chamber found not credible Witness Munyenyezi's testimony that, at the time, she was unaware of massive killings in Butare after 19 April 1994, did not see any dead bodies, and did not hear that the killings between April and July 1994 were ethnically motivated.[2952] It also observed that Witness Munyenyezi testified that Ntahobali's illness began two to three days before his niece's birthday, contrary to Ntahobali's testimony that he felt the symptoms the day of the

[2946] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.
[2947] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.
[2948] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 18; *Karera* Appeal Judgement, para. 330.
[2949] Trial Judgement, paras. 2583, 3117, 3208. The Appeals Chamber notes that Ntahobali refers to Witness Béatrice Munyenyezi in his appeal submissions by her former pseudonym NMBMB. The witness waived certain protective measures and testified under her own name. *See* Béatrice Munyenyezi, T. 24 February 2006 pp. 3-6.
[2950] Trial Judgement, paras. 2581, 2583, 3115, 3117.
[2951] Trial Judgement, paras. 2582, 2583, 3116, 3117.
[2952] Trial Judgement, paras. 2582, 3116.

birthday.[2953] In addition, the Trial Chamber noted that Ntahobali's aunt from whom he purportedly received treatments was not called to testify to corroborate his account.[2954]

1301. Ntahobali submits that the Trial Chamber erred in finding that his alibi for the period between late April and early May 1994 was not credible.[2955] He argues that, by drawing a negative inference from the lack of corroboration on the part of witnesses who "should have had knowledge of Ntahobali's illness", the Trial Chamber wrongly blamed him for not cross-examining co-accused's witnesses.[2956] He contends that the Trial Chamber also wrongly blamed him for not calling his aunt to testify, speculating that she was in a position to do so.[2957] Ntahobali posits that, by doing so, the Trial Chamber imposed a burden on him, counter to the Defence's discretion to choose its own strategy and the manner in which it mounts its case.[2958] He adds that the Trial Chamber treated Prosecution and Defence evidence differently in this regard.[2959]

1302. Ntahobali further submits that the Trial Chamber reversed the burden of proof when concluding that Witness Munyenyezi was not credible for "the sole reason" that it "believed the Prosecution evidence".[2960]

1303. Finally, Ntahobali submits that the Trial Chamber completely disregarded Ntahobali Defence Witness NMBMP's evidence which corroborated the testimony of Witness Munyenyezi that Ntahobali was sick with malaria at the end of April 1994.[2961] He argues that, since the alleged lack of corroboration of Witness Munyenyezi's evidence was a decisive factor in the Trial Chamber's finding that the alibi was not credible, this finding cannot stand.[2962]

1304. The Prosecution responds that Ntahobali's argument concerning Witness NMBMP is unfounded as the Trial Chamber relied on this witness's evidence several times in the Trial

[2953] Trial Judgement, paras. 2580, 2582, 3114.
[2954] Trial Judgement, paras. 2580, 3115.
[2955] Ntahobali Appeal Brief, para. 796.
[2956] Ntahobali Appeal Brief, para. 799 (emphasis omitted), *referring to* Trial Judgement, paras. 2583, 3117.
[2957] Ntahobali Appeal Brief, para. 800.
[2958] Ntahobali Appeal Brief, para. 801, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Decision on Nyiramasuhuko's Strictly Confidential *Ex-Parte* – Under Seal – Motion for Additional Protective Measures for Some Defence Witnesses, 1 March 2005 ("1 March 2005 Decision"), para. 23.
[2959] Ntahobali Appeal Brief, para. 801. Ntahobali refers in particular to the manner in which the Prosecution evidence regarding Semanyenzi, Annonciata, and Fidèle was treated in comparison. *See idem.*
[2960] Ntahobali Appeal Brief, paras. 803-805, *referring to* Trial Judgement, paras. 2582, 3116. Ntahobali also contends that the Trial Chamber's reasoning ignores that Witness Munyenyezi may not have seen killings or corpses as she only came out of Hotel Ihuliro on two or three occasions during the events. *See ibid.*, para. 805.
[2961] Ntahobali Appeal Brief, para. 797.
[2962] Ntahobali Appeal Brief, para. 798.

Judgement.[2963] The Prosecution also submits that Ntahobali does not demonstrate how the Trial Chamber erred in its assessment of the alibi evidence.[2964]

1305. Ntahobali replies that the parts of the Trial Judgement referred to by the Prosecution do not relate to Witness NMBMP's evidence on his alibi.[2965]

1306. The Appeals Chamber finds no merit in Ntahobali's submissions regarding the Trial Chamber's imposition of a burden that improperly interfered with his discretion as to the conduct of his defence.[2966] In the view of the Appeals Chamber, a reasonable trier of fact could have relied on the fact that none of the witnesses who would have been in a position to witness Ntahobali's sickness, since they were at Hotel Ihuliro the day he allegedly fell sick, corroborated that he had malaria and was forced to remain in bed. The Appeals Chamber fails to see how this factually accurate observation could be interpreted as "blaming" Ntahobali's counsel for not cross-examining witnesses called by one of his co-accused. Similarly, observing that an eye-witness was not called to testify does not constitute "blaming" the Defence for not calling that witness; rather, it simply indicates that the Trial Chamber did not receive corroboration of Ntahobali's alibi from this particular source.[2967] Having reviewed the specific portions of the Trial Judgement cited by Ntahobali, the Appeals Chamber is also not persuaded by his argument that the Trial Chamber treated differently Defence and Prosecution evidence in similar situations.

1307. With respect to the assessment of Witness Munyenyezi's evidence, the Appeals Chamber observes that, contrary to Ntahobali's contentions, the Trial Chamber did not conclude that the witness was not credible for "the sole reason" that it found established beyond reasonable doubt that, as alleged by the Prosecution, killings "were occurring throughout Butare *préfecture*, including at locations within a very short distance of the Hotel Ihuliro".[2968] As recalled above, the Trial Chamber relied on a number of other factors, including that Witness Munyenyezi contradicted Ntahobali's testimony on when his illness began, that she would have a motive to exculpate him, and that her evidence raised serious credibility issues as she testified that she did not hear that the

[2963] Prosecution Response Brief, para. 1138. The Prosecution also argues that Ntahobali's argument concerning Witness NMBMP should be dismissed as it was raised for the first time in his appeal brief. *See ibid.*, para. 1133. The Appeals Chamber notes that, contrary to the Prosecution's claim, this allegation of error was expressly raised in Ntahobali's notice of appeal. *See* Ntahobali Notice of Appeal, para. 285 ("The Chamber did not or refused to take into account a testimony confirming the alibis.").
[2964] Prosecution Response Brief, paras. 1137-1140, 1145.
[2965] Ntahobali Reply Brief, para. 332.
[2966] The Appeals Chamber notes that Ntahobali's reliance on the 1 March 2005 Decision is misplaced as this decision focuses only on the requirements for the application of witnesses special protective measures. *See* Ntahobali Appeal Brief, para. 801; 1 March 2005 Decision, para. 23.
[2967] Trial Judgement, paras. 2580, 3115.
[2968] Trial Judgement, para. 3116.

crimes committed between April and July 1994 were ethnically motivated or about any massive killings in Butare after 19 April 1994.[2969] Ntahobali does not demonstrate any error in this respect.

1308. Turning to the Trial Chamber's alleged failure to consider the relevant alibi evidence of Witness NMBMP, the Appeals Chamber recalls that:

> [T]he Trial Chamber is not under the obligation to justify its findings in relation to every submission made during the trial […]. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning […]. If the Trial Chamber did not refer to the evidence given by a witness, even if it is in contradiction to the Trial Chamber's finding, it is to be presumed that the Trial Chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its actual findings.[2970]

1309. The Appeals Chamber observes that Witness NMBMP testified that Ntahobali had malaria for a week, between 27 or 28 April and early May 1994.[2971] According to Witness NMBMP, Ntahobali woke up and felt sick, was bed-ridden for the first three days, and could not leave the premises of Hotel Ihuliro for the rest of the week.[2972]

1310. While the Trial Chamber referred to other parts of Witness NMBMP's testimony in several sections of the Trial Judgement, at no point did it refer to the part of her testimony directly relevant to Ntahobali's alibi.[2973] The Appeals Chamber is of the opinion that the Trial Chamber's statement that Witness Munyenyezi was the only witness to corroborate Ntahobali's alibi that he was sick with malaria at the end of April 1994 clearly indicates that the Trial Chamber disregarded this aspect of Witness NMBMP's testimony.[2974] Given the direct relevance of this evidence, to which Ntahobali expressly referred in his closing brief, and the indication that the Trial Chamber did not assess and weigh it as part of its examination of the alibi evidence, the Appeals Chamber finds that the Trial Chamber erred in failing to consider this aspect of Witness NMBMP's evidence.[2975]

1311. The Appeals Chamber, however, is not convinced by Ntahobali's submission that the Trial Chamber's error invalidates its conclusion that the alibi was not credible. The Appeals Chamber

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[2969] Trial Judgement, paras. 2582, 3116.
[2970] *Kvočka et al.* Appeal Judgement, para. 23 (internal reference omitted). *See also*, *e.g.*, *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Ntabakuze* Appeal Judgement, para. 161; *Kalimanzira* Appeal Judgement, para. 195; *Nchamihigo* Appeal Judgement, para. 166; *Ndindabahizi* Appeal Judgement, para. 75.
[2971] Witness NMBMP, T. 22 April 2008 pp. 33-35 (closed session). *See also* T. 23 April 2008 pp. 25, 26 (closed session).
[2972] Witness NMBMP, T. 22 April 2008 pp. 33-35 (closed session). *See also* T. 23 April 2008 pp. 25, 26 (closed session).
[2973] Trial Judgement, paras. 2919, 2920, 3017, 3018, 3100, 3102, 3112, 3905, 3937, 3955.
[2974] Trial Judgement, para. 2582.
[2975] *See* Ntahobali Closing Brief, Appendix 3, para. 58.

notes that the Trial Chamber considered that the testimony of Witness NMBMP was to be viewed with appropriate caution given her ties with Ntahobali.[2976]

1312. Moreover, the Trial Judgement reflects that the finding that Witness Munyenyezi was the only witness to corroborate Ntahobali's alibi was not a decisive factor in the Trial Chamber's decision to reject the alibi. In finding that Ntahobali's alibi was not credible, the Trial Chamber expressly relied on the lack of credibility of Witness Munyenyezi, the late notice of alibi, and the lack of corroboration from other testifying witnesses who should have had knowledge of Ntahobali's illness.[2977] In view of the overall findings of the Trial Chamber, the Appeals Chamber is not persuaded that the evidence of Witness NMBMP would have prevented a reasonable trier of fact from reaching the conclusion that his alibi with respect to the period between late April and early May 1994 was not credible. In sum, the Appeals Chamber concludes that the Trial Chamber's error of law of failing to consider the totality of the evidence on the record does not invalidate the Trial Chamber's decision regarding Ntahobali's alibi.

1313. For these reasons, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that his alibi relating to the period between late April and early May 1994 was not credible and reasonably possibly true.

2. Alibi for 26 or 27 May to 5 June 1994

1314. The Trial Chamber found that Ntahobali's alibi that he left for Cyangugu on 26 or 27 May 1994 and returned to Butare on 5 June 1994 was not credible and reasonably possibly true.[2978] In reaching its conclusion, the Trial Chamber relied on the late filing of his first notice of alibi, the contradictions as to Ntahobali's alleged return from Cyangugu in his notices of alibis, and the potential bias of the alibi witnesses in favour of Ntahobali.[2979] It also noted Ntahobali's failure to mention his trip to Cyangugu during an interview with a Prosecution investigator in 1997 and found unconvincing his explanation for his prior inconsistent statement.[2980] The Trial Chamber further considered that Witness WBUC directly contradicted Witnesses Munyenyezi, Denise Ntahobali, and Clarisse Ntahobali as to when Ntahobali left Butare for Cyangugu and that the alibi

[2976] Trial Judgement, paras. 3100, 3101; Witness NMBMP, T. 22 April 2008 p. 13 (closed session). The Appeals Chamber also observes that the testimony of Witness NMBMP that Ntahobali had malaria for a week was not consistent with aspects of Witness Munyenyezi's evidence since Witness Munyenyezi testified that Ntahobali felt sick two or three days before the birthday of his niece, which was on 28 April 1994, whereas Witness NMBMP clearly remembered that Ntahobali got malaria on the morning of the same day of the birthday of Ntahobali's niece. *Compare* Béatrice Munyenyezi, T. 27 February 2008 p. 8 *with* Witness NMBMP, T. 22 April 2008 pp. 33-35 (closed session). *See also* Witness NMBMP, T. 23 April 2008 pp. 25, 26 (closed session). Witness NMBMP also contradicted Ntahobali's evidence that he felt sick in the afternoon on 28 April 1994. *See* Ntahobali, T. 25 April 2006 p. 35.
[2977] Trial Judgement, paras. 2583, 3117.
[2978] Trial Judgement, paras. 2595, 2599, 2682, 2737, 3941, 3942, 4874.
[2979] Trial Judgement, paras. 2578, 2584, 2590, 2593-2595.

witnesses disagreed as to when he returned to Butare.[2981] Moreover, it found that Ntahobali Defence Witness WDUSA was not credible in light of the "ambiguity in the dates given", the fact that he was a friend of Ntahobali, and the contradictions in the name of the hotel where he allegedly met with Ntahobali and Béatrice Munyenyezi.[2982]

1315. Ntahobali submits that the Trial Chamber erred in finding that Witness WBUC contradicted the other alibi witnesses on the timing of the alibi as a result of an error in the interpretation into French and English of the witness's testimony.[2983] Ntahobali asserts that a review of Witness WBUC's original testimony in Kinyarwanda reveals that the witness testified that Ntahobali left four or five days *before* her birthday on 30 May 1994, rather than four or five days *after* her birthday as interpreted in English and French and reflected in the official transcripts.[2984] Thus, he contends that Witness WBUC corroborated rather than contradicted the evidence of the other alibi witnesses.[2985] Ntahobali argues that the purported contradiction was critical to the Trial Chamber's decision to reject his alibi, which should therefore be overturned on appeal.[2986]

1316. Furthermore, Ntahobali submits that the Trial Chamber erred in finding that Witness WDUSA was not credible.[2987] In his view, it was unreasonable for the Trial Chamber to conclude that Witness WDUSA and Ntahobali were friends on the basis that the witness "lived with him in Nairobi" since the witness was very clear that they only lived in the same complex, in different apartments.[2988] He also argues that the Trial Chamber erred in finding that Witness WDUSA was imprecise regarding the dates of Ntahobali's stay in Cyangugu as the witness explained that more than ten years had elapsed.[2989]

1317. Finally, Ntahobali submits that the Trial Chamber erred in completely disregarding the aspect of Witness NMBMP's testimony which corroborated the other alibi witnesses regarding his whereabouts between the end of May and early June 1994, invalidating the Trial Chamber's decision to reject his alibi for this period.[2990]

[2980] Trial Judgement, paras. 2585-2588.
[2981] Trial Judgement, paras. 2591, 2593, 2595.
[2982] Trial Judgement, para. 2592. *See also ibid*., para. 2593.
[2983] Ntahobali Appeal Brief, para. 808.
[2984] Ntahobali Appeal Brief, paras. 808, 809, *referring to* audio-video of Witness WBUC's testimony of 2 June 2005, at 1:48:00-01:49:00. Ntahobali argues that this is consistent with Witness WBUC's account of events provided the previous day. *See ibid*., para. 810.
[2985] Ntahobali Appeal Brief, para. 811.
[2986] Ntahobali Appeal Brief, para. 813.
[2987] Ntahobali Appeal Brief, paras. 814-817.
[2988] Ntahobali Appeal Brief, para. 815.
[2989] Ntahobali Appeal Brief, para. 816. In Ntahobali's view, the Trial Chamber applied different standards in its treatment of Prosecution and Defence evidence as to the passage of time. *See idem*.
[2990] Ntahobali Appeal Brief, para. 807.

1318. The Prosecution responds that Ntahobali does not demonstrate that the Trial Chamber's conclusion on Witness WDUSA's credibility was unreasonable or that the Trial Chamber failed to consider Witness NMBMP's testimony.[2991] It also argues that the alleged error in the interpretation of the testimony of Witness WBUC is unfounded and that, if there was such a problem, Ntahobali should have raised it before the Trial Chamber.[2992] It adds that Ntahobali never gave any reasonable explanation to justify his inconsistent statements concerning his trip to Cyangugu.[2993]

1319. Ntahobali replies that he did not realise that there was an interpretation error of Witness WBUC's testimony until the delivery of the Trial Judgement.[2994] He also submits that the Prosecution does not provide any argument to justify the Trial Chamber's omission of Witness NMBMP's evidence.[2995]

1320. Upon careful review of the audio recording of Witness WBUC's original testimony in Kinyarwanda, the Tribunal's language section confirmed that the official French and English transcripts of the witness's testimony of 2 June 2005[2996] do not accurately reflect the witness's testimony.[2997] It is unclear from the corrected interpretation read in isolation whether Witness WBUC testified that the departure for Cyangugu took place four or five days *before* or *after* her birthday on 30 May 1994.[2998] However, the Appeals Chamber is of the view that, considering Witness WBUC's testimony in the context of her statement in examination-in-chief that Béatrice Munyenyezi was not in Butare during her birthday,[2999] no reasonable trier of fact could have concluded that the witness meant that her birthday took place about four to five days *after* Béatrice Munyenyezi left Butare for Cyangugu. The Appeals Chamber therefore finds that the Trial Chamber erred in interpreting the witness's testimony to mean otherwise.

[2991] Prosecution Response Brief, paras. 1142, 1147. The Prosecution also submits that Ntahobali's arguments concerning the assessment of Witnesses WDUSA's and NMBMP's evidence should be dismissed as they were raised for the first time in his appeal brief and that Ntahobali failed to identify in his notice of appeal the witness whose testimony was erroneously interpreted. *See ibid.*, para. 1133. The Appeals Chamber rejects these arguments as ill-founded since Ntahobali did raise the relevant allegations of error and identify the witness in his notice of appeal. *See* Ntahobali Notice of Appeal, paras. 283, 285, 286.
[2992] Prosecution Response Brief, para. 1143.
[2993] Prosecution Response Brief, para. 1146.
[2994] Ntahobali Reply Brief, para. 336.
[2995] Ntahobali Reply Brief, para. 334.
[2996] Witness WBUC, T. 2 June 2005 p. 44 (closed session).
[2997] Registrar's Rule 33(B) Submission Concerning the Verification of Translation of Witness WBUC's Statement, 16 July 2014 (confidential), Annex, Interoffice Memorandum "Verification regarding an alleged interpretation error in the Butare case" ("16 July 2004 Rule 33(B) Submission"), para. 3 (English translation: "My birthday was on the 30th. It was about four or five days later, but I would like you to… I do not remember very clearly, but it was days later."). *Compare with* Witness WBUC, T. 2 June 2005 p. 44 (closed session) ("My birthday was on the 30th. And I think it was about four or five days later. I do not remember very clearly, but I know it was some days *after my birthday when she left*.") (emphasis added).
[2998] *See also* 16 July 2004 Rule 33(B) Submission, para. 4 ("[a]s phrased, Witness WBUC's answer is ambiguous as to whether the departure of Beatrice to Cyangugu occurred before or after Witness WBUC's birthday.") (emphasis omitted).
[2999] Witness WBUC, T. 1 June 2005 pp. 68, 69, 73 (closed session).

1321. In any event, the Appeals Chamber does not find that the Trial Chamber's reliance on the erroneous interpretation of Witness WBUC's testimony has occasioned a miscarriage of justice. The Appeals Chamber indeed observes that the purported contradiction between the evidence of Witness WBUC – a relative of Ntahobali[3000] – and the other alibi witnesses regarding the timing of Ntahobali's departure from Butare was not critical to the Trial Chamber's assessment of the alibi, but was only one of its considerations. As recalled above, the Trial Chamber found that Ntahobali's alibi for this period was not credible based on the contradiction between Witness WBUC and other witnesses, "viewed in conjunction with the late, and incorrect, notice of alibi, and the potential bias of the witnesses in favour of Ntahobali".[3001] The Trial Chamber also referred to Ntahobali's prior inconsistent statement and emphasised that his alibi witnesses disagreed as to when he returned from Cyangugu.[3002] The Appeals Chamber considers that the absence of contradiction between Witness WBUC and the other alibi witnesses does not undermine the rest of the considerations upon which the Trial Chamber relied to conclude that Ntahobali's alibi was not reasonably possibly true.[3003]

1322. With respect to Ntahobali's arguments concerning the assessment of Witness WDUSA's evidence, the Appeals Chamber is of the view that the Trial Chamber's statement that "Witness WDUSA was a friend of Ntahobali, having lived with him in Nairobi when both were in exile" does not indicate that the Trial Chamber understood that they both lived in the same apartment.[3004] In summarising the relevant evidence, the Trial Chamber accurately reflected Ntahobali's testimony that, after their meetings in Cyangugu, he and Witness WDUSA met again in Nairobi between 1994 and 1997, where Ntahobali was in exile and where they lived in the same complex.[3005] Witness WDUSA's evidence further reflects that he was present during Ntahobali's engagement ceremony, that he knew his wife since 1992, that he met several times with Ntahobali and his wife in June 1994 in Cyangugu, and that he was in contact with Ntahobali between 1994 and 1996 while in Nairobi.[3006] Ntahobali also testified that Witness WDUSA was a friend of his wife's older sister's family.[3007] Considering Witness WDUSA's evidence that he lived in the same complex as Ntahobali in Nairobi together with the totality of his evidence, the Appeals Chamber considers that the Trial Chamber did not err in concluding that, in light of his relationship with

[3000] Trial Judgement, para. 2470.
[3001] Trial Judgement, para. 2595.
[3002] Trial Judgement, paras. 2585-2588, 2593.
[3003] Trial Judgement, para. 2595.
[3004] Trial Judgement, para. 2592.
[3005] Trial Judgement, para. 2500, *referring to* Ntahobali, T. 26 April 2006 p. 10 (closed session), T. 21 June 2006 p. 52 (closed session).
[3006] Witness WDUSA, T. 3 April 2006 pp. 55-58 (closed session), T. 4 April 2006 pp. 23-25, 28 (closed session), 33.
[3007] Ntahobali, T. 1 June 2006 p. 43; Trial Judgement, para. 2500.

Ntahobali, Witness WDUSA "may have had an incentive to absolve Ntahobali of responsibility."[3008]

1323. As for Ntahobali's challenge to the Trial Chamber's finding that Witness WDUSA was "imprecise as to the exact dates" when he met with him in Cyangugu, the Appeals Chamber notes that the Trial Chamber relied on "the ambiguity in the dates given" by Witness WDUSA when finding that he was not credible.[3009] The Appeals Chamber observes that Witness WDUSA testified that he saw Ntahobali three times over the course of one week around 27 May 1994 and the end of the first week of June 1994.[3010] In light of the fact that the witness provided multiple temporal references, the short timeframe of the meetings, and the passage of time between the events and his testimony, the Appeals Chamber considers that no reasonable trier of fact could have drawn a negative inference from Witness WDUSA's inability to provide "the exact dates" of his meetings with Ntahobali in May and June 1994.[3011] Nevertheless, the Appeals Chamber is not convinced that the Trial Chamber's determination that Witness WDUSA gave ambiguous dates was decisive for the Trial Chamber's conclusion that the witness was not credible. Considering that the Trial Chamber further relied on his relationship with Ntahobali and the contradictions in the name of the hotel where the witness allegedly met Ntahobali on multiple occasions,[3012] the Appeals Chamber finds that the Trial Chamber's improper reliance on Witness WDUSA's inability to provide exact dates has not occasioned a miscarriage of justice.

1324. Regarding the Trial Chamber's alleged failure to consider the relevant alibi evidence of Witness NMBMP, the Appeals Chamber observes that Witness NMBMP testified that Ntahobali came to Cyangugu at the end of May 1994 in the evening of the day when she moved there with her family and Béatrice Munyenyezi and that Ntahobali remained with them for a week, until 5 June 1994.[3013] This aspect of Witness NMBMP's testimony is not discussed or referred to in any section of the Trial Judgement. The Appeals Chambers considers that the lack of any reference to Witness NMBMP's directly relevant evidence, viewed in light of the Trial Chamber's complete disregard of the part of her testimony on Ntahobali's alibi for late April to early May 1994,[3014] indicates that the Trial Chamber also disregarded this particular aspect of Witness NMBMP's evidence. Given the direct relevance of this evidence, to which Ntahobali expressly referred in his closing brief, and the absence of any indication in the Trial Judgement that the Trial Chamber

[3008] Trial Judgement, para. 2592.
[3009] Trial Judgement, para. 2592.
[3010] Witness WDUSA, T. 3 April 2006 p. 57 (closed session), T. 4 April 2006 p. 26 (closed session). *See also* Trial Judgement, para. 2592.
[3011] The Appeals Chamber considers that, in light of this finding, Ntahobali's argument that the Trial Chamber applied different standards in its treatment of Prosecution and Defence evidence as to the passage of time need not be discussed.
[3012] Trial Judgement, para. 2592.
[3013] Witness NMBMP, T. 23 April 2008 pp. 6-10 (closed session).

assessed and weighed Witness NMBMP's testimony on Ntahobali's alibi between 26 or 27 May and 5 June 1994, the Appeals Chamber concludes that the Trial Chamber erred in failing to consider this evidence.[3015]

1325. However, the Appeals Chamber does not consider that this error invalidates the Trial Chamber's finding that the alibi was not credible. The Appeals Chamber notes that Witness NMBMP's relevant evidence, which was to be viewed with caution,[3016] is repetitive of other Defence evidence discussed at length by the Trial Chamber.[3017] It also notes that aspects of Witness NMBMP's testimony contradict Ntahobali's own testimony.[3018] Upon careful review of the relevant evidence and the Trial Chamber's pertinent findings, the Appeals Chamber is not persuaded that the evidence of Witness NMBMP, when considered with the rest of the Trial Chamber's findings on the late filing of his first notice of alibi, the contradictions in his notices of alibis regarding the time period when he was in Cyangugu, his prior inconsistent statement, the potential bias of the witnesses in his favour, and the contradictions on the date of his return to Butare and his meetings with Witness WDUSA,[3019] would have prevented a reasonable trier of fact from reaching the conclusion that Ntahobali's alibi for the period between 26 or 27 May and 5 June 1994 was not credible.

1326. Accordingly, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that his alibi relating to the period between 26 or 27 May and 5 June 1994 was not credible and reasonably possibly true.

3. Conclusion

1327. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in rejecting his alibis and, accordingly, dismisses Ground 3.11 of Ntahobali's appeal in its entirety.

[3014] *See supra*, para. 1310.
[3015] Ntahobali Closing Brief, Appendix 3, paras. 39, 60. *See also ibid*., para. 87, fn. 60.
[3016] *See supra*, para. 1311.
[3017] *Compare* Witness NMBMP, T. 23 April 2008 pp. 9-11, 16-18 (closed session), T. 28 April 2008 p. 61 (closed session) *with* Ntahobali, T. 26 April 2006 pp. 6-9, 12, T. 21 June 2006 pp. 3-6, 8-16, 52, Witness WDUSA, T. 3 April 2006 pp. 57, 58 (closed session), T. 4 April 2006 pp. 24-30, 43 (closed session), Béatrice Munyenyezi, T. 27 February 2006 pp. 10-15, Denise Ntahobali, T. 9 June 2005 p. 29, T. 13 June 2005 p. 14, Clarisse Ntahobali, T. 9 February 2005 pp. 59, 60, T. 10 February 2005 pp. 7, 8, Céline Nyiraneza, T. 24 February 2005 pp. 45, 46, T. 28 February 2005 pp. 13-15.
[3018] In particular, the Appeals Chamber notes that Witness NMBMP testified that the meetings between Ntahobali and Witness WDUSA took place at Hotel Ituze, whereas Ntahobali testified that they were held in different hotels. *See* Witness NMBMP, T. 23 April 2008 p. 18 (closed session); Ntahobali, T. 26 April 2006 p. 10 (closed session).
[3019] Trial Judgement, paras. 2584-2595.

F. Institut de Recherche Scientifique et Technique (Grounds 3.1 and 4.5)

1328. The Trial Chamber found that, on 21 April 1994, Ntahobali participated in the abduction of approximately 40 Tutsis at the Rugira roadblock and ordered the *Interahamwe* present at the roadblock to take them to a location in Butare Town between the IRST and the Laboratory to join other Tutsis who had been arrested and transported there.[3020] The Trial Chamber found that, at that location, Ntahobali issued orders to the *Interahamwe* to kill the Tutsis, that his orders were followed, and that approximately 200 Tutsis were killed.[3021] On this basis, the Trial Chamber convicted Ntahobali of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of approximately 200 Tutsis near the IRST on 21 April 1994.[3022]

1329. Ntahobali submits that the Trial Chamber erred in law and in fact in its assessment of the evidence. He further argues that the Trial Chamber's findings fail to support his liability for ordering the killings under Article 6(1) of the Statute. The Appeals Chamber will address these contentions in turn.

1. Assessment of Evidence

1330. The Trial Chamber relied exclusively on the evidence of Prosecution Witness QCB to conclude that Ntahobali participated in the abduction of 40 Tutsis at the Rugira roadblock and that he subsequently ordered *Interahamwe* to kill these and other Tutsis at the IRST.[3023] Ntahobali submits that the Trial Chamber: (i) failed to consider or properly assess inconsistencies in Witness QCB's evidence and failed to exercise sufficient caution; (ii) erred in assessing Witness QCB's identification evidence; and (iii) failed to consider or properly assess exculpatory evidence. The Appeals Chamber will address these contentions in turn.

1331. As a preliminary remark, the Appeals Chamber recalls that, on 14 April 2015, it admitted as additional evidence on appeal a confidential statement given by Witness QCB on 27 May 2004 and a second confidential statement that he gave on 2 June 2004 to Canadian investigators during investigations in Canadian criminal proceedings for the purpose of assessing limited aspects of

[3020] Trial Judgement, paras. 1475, 1480. *See also ibid*., para. 5782.
[3021] Trial Judgement, para. 1480. *See also ibid*., para. 5782.
[3022] Trial Judgement, paras. 5782-5786, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186. *See also ibid*., para. 1480.
[3023] Trial Judgement, para. 1480.

these materials as they concerned Witness QCB's testimony.[3024] In accordance with the relevant standard, if the Appeals Chamber determines that a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt on the basis of the trial record alone, the Appeals Chamber will then determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[3025]

(a) Inconsistencies and Insufficient Caution

1332. Ntahobali argues that, given the inconsistent nature of Witness QCB's evidence and his incarceration at the time of his testimony, the Trial Chamber did not exercise sufficient caution when evaluating his evidence.[3026] In support of his contention, Ntahobali argues that the Trial Chamber erred in accepting unreasonable explanations for, or failed to address, material contradictions between Witness QCB's testimony and his prior statement to Tribunal investigators that concerned the killings at the IRST.[3027]

1333. Specifically, Ntahobali argues that, in his prior statement, Witness QCB: (i) stated that, upon leaving the Rugira roadblock on 21 April 1994, he went towards Mukoni rather than approaching the killings at the IRST;[3028] (ii) failed to explicitly mention Ntahobali's participation in the killings at the IRST and to name two other perpetrators whom he later named in his testimony;[3029] (iii) indicated that he never returned to Butare after he left on 21 April 1994 whereas he later testified that he returned and witnessed Ntahobali abduct Tutsis from the Butare Prefecture Office on 28 April 1994;[3030] (iv) indicated that he left the scene of the IRST killings because he was afraid, yet testified that he participated in the killings at Kabakobwa the next day;[3031] and (v) stated that "he had never seen that before" in relation to the killings at the IRST – implying he had never seen a killing before – despite testifying to having seen the killings of a woman, Ruvurajabo, and three others in his sector previously.[3032]

1334. Ntahobali further submits that, given the confusing and inconsistent nature of Witness QCB's evidence as well as the Trial Chamber's conclusion that he may have a motive to

[3024] Decision on Ntahobali's Second and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence, 14 April 2015 (confidential) ("14 April 2015 Appeal Decision"), para. 49.
[3025] *See supra*, para. 33.
[3026] Ntahobali Notice of Appeal, paras. 161-166; Ntahobali Appeal Brief, paras. 381, 382, 391-394. *See also* Ntahobali Reply Brief, paras. 173, 178.
[3027] Ntahobali Notice of Appeal, para. 153; Ntahobali Appeal Brief, paras. 370-373, 382. *See also* Ntahobali Reply Brief, para. 173.
[3028] Ntahobali Appeal Brief, para. 370.
[3029] Ntahobali Appeal Brief, para. 373.
[3030] Ntahobali Appeal Brief, para. 377.
[3031] Ntahobali Appeal Brief, para. 372.
[3032] Ntahobali Appeal Brief, paras. 370, 371 (emphasis omitted).

implicate him, the Trial Chamber should have rejected Witness QCB's uncorroborated evidence.[3033] He highlights that the Trial Chamber found Witness QCB's uncorroborated evidence concerning crimes committed at the Butare Prefecture Office in late April 1994 insufficiently reliable and contends that his evidence concerning the IRST killings should not be treated any differently.[3034]

1335. The Prosecution responds that the Trial Chamber acted within its discretion in relying on Witness QCB's evidence, which it found reliable and credible.[3035] It argues that the Trial Chamber was not obliged to find corroboration for Witness QCB's testimony and that it was not unreasonable to accept the witness's testimony about the IRST killings and reject it in relation to crimes committed at the prefectoral office.[3036]

1336. The Appeals Chamber observes that Witness QCB testified that, after leaving the Rugira roadblock, he went to the IRST and observed the killings.[3037] Witness QCB also testified to Ntahobali's participation in the killings as the leader of the assailants, which included Désiré and Pierre Claver.[3038] In summarising his evidence, the Trial Chamber noted that Witness QCB's Statement read that, after leaving the Rugira roadblock on 21 April 1994, the witness "continued towards Mukoni when [he] heard screams."[3039] The witness affirmed in his testimony that he saw the killings at the IRST before he went towards Mukoni.[3040] When confronted with this inconsistency, Witness QCB testified that the Prosecution investigator failed to properly record his statement.[3041] Witness QCB also added that, during his interview, he did not fully understand what was being read to him as there were several documents and the investigator appeared to be in a hurry.[3042] When assessing Witness QCB's evidence, the Trial Chamber accepted the witness's explanation for this variance between his prior statement and his testimony.[3043] Ntahobali merely asserts that the Trial Chamber erred in accepting the witness's "unreasonable" explanation without demonstrating that doing so was unreasonable.

1337. The Appeals Chamber further finds that none of the other alleged inconsistencies between Witness QCB's prior statement and testimony pointed out by Ntahobali were material contradictions that required the Trial Chamber to make adverse findings as to the witness's credibility. In the view of the Appeals Chamber, the fact that Witness QCB's Statement does not

[3033] Ntahobali Appeal Brief, paras. 377, 381, 391, 394. *See also* AT. 15 April 2015 pp. 53, 54 (closed session).
[3034] Ntahobali Appeal Brief, paras. 381, 393. *See also* AT. 15 April 2015 pp. 53, 54 (closed session).
[3035] Prosecution Response Brief, paras. 853-855. *See also* AT. 16 April 2015 pp. 3-5.
[3036] Prosecution Response Brief, paras. 858, 859. *See also* AT. 16 April 2015 pp. 3, 5.
[3037] Witness QCB, T. 26 March 2002 pp. 37, 39. *See also* Trial Judgement, paras. 1471, 1477.
[3038] Witness QCB, T. 20 March 2002 pp. 89, 90. *See also* Trial Judgement, paras. 1470, 1477.
[3039] Trial Judgement, para. 1471. *See also* Witness QCB's Statement, p. 3.
[3040] Witness QCB, T. 26 March 2002 p. 89. *See also* Trial Judgement, para. 1479.
[3041] Witness QCB, T. 26 March 2002 pp. 37-39. *See also* Trial Judgement, para. 1471.
[3042] Witness QCB, T. 26 March 2002 p. 38. *See also* Trial Judgement, para. 1471.

expressly include reference to Ntahobali's participation in these killings or identify two individuals as co-perpetrators the witness named while testifying does not render the statement inconsistent with Witness QCB's testimony given the brevity of the statement.[3044] It is reasonable that Witness QCB's testimony, given in response to the specific questions arising during his examination, would contain more nuance and detail than Witness QCB's Statement.[3045]

1338. Ntahobali's argument that the Trial Chamber should have rejected Witness QCB's testimony given that his prior statement indicated that he never returned to Butare after 21 April 1994, but that he later testified that he returned and witnessed Ntahobali abduct Tutsis from the prefectoral office on 28 April 1994 is equally unpersuasive. Ntahobali fails to demonstrate the clear relevance of this alleged inconsistency – which pertains to a separate event – to the Trial Chamber's assessment of Witness QCB's evidence about the killings at the IRST. Moreover, the Trial Chamber did assess Witness QCB's evidence concerning Ntahobali's role in the abductions of Tutsis at the prefectoral office on 28 April 1994 elsewhere in the Trial Judgement and rejected it.[3046] Recalling that it is open to a trial chamber to accept some parts of a witness's testimony and reject others,[3047] the Appeals Chamber finds that Ntahobali does not demonstrate any error in the Trial Chamber's evaluation of Witness QCB's evidence about the IRST killings.

1339. The Appeals Chamber also considers that the Trial Chamber was under no obligation to expressly assess every conceivable dissonance between Witness QCB's Statement that he left the IRST out of fear after having observed killings there and his testimony that he perpetrated killings at Kabakobwa.[3048] Furthermore, while Ntahobali points to Witness QCB's evidence that he had previously observed the killing of a woman, Ruvurajabo, and three others in his sector as contradicting the witness's statement that he "never witnessed that before" in relation to the IRST killings, the Appeals Chamber does not see any material contradiction that the Trial Chamber reasonably should have addressed in the Trial Judgement. Witness QCB's evidence of having observed prior killings concerns the murders of a limited number of individuals rather than the slaughter of approximately 200 persons killed at the IRST.[3049]

[3043] Trial Judgement, para. 1479.
[3044] Witness QCB's Statement, p. 3.
[3045] *Cf. Gatete* Appeal Judgement, paras. 208, 212, 213.
[3046] *See* Trial Judgement, para. 2611.
[3047] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[3048] The Appeals Chamber reiterates that a trial chamber is not required to explain every detail of its findings. *See Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165. *See also Kvočka et al.* Appeal Judgement, para. 23. The Appeals Chamber notes that Witness QCB's Statement reflects his assertion that if Hutus refused to massacre the Tutsis at Kabakobwa they faced "immediate death". *See* Witness QCB's Statement, p. 4206 (Registry pagination).
[3049] *See* Witness QCB, T. 20 March 2002 pp. 56, 57, 61, 62, T. 26 March 2005 pp. 40, 41.

1340. As for Ntahobali's argument that the Trial Chamber should have rejected Witness QCB's uncorroborated evidence because of its confusing and inconsistent nature as well as the Trial Chamber's conclusion that this detained witness may have motive to implicate Ntahobali, the Appeals Chamber recalls that nothing in the Statute or the Rules prevents a trial chamber from relying on uncorroborated evidence. A trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[3050] This discretion applies equally to the evidence of accomplice witnesses provided that the trier of fact applies the appropriate caution in assessing such evidence.[3051]

1341. The Appeals Chamber has already determined that Ntahobali has not demonstrated any error as it relates to the Trial Chamber's assessment of Witness QCB's evidence in light of the alleged inconsistencies.[3052] In addition, the Appeals Chamber observes that, in evaluating the witness's evidence in relation to the killings at the IRST, the Trial Chamber expressly noted that, at the time of his testimony, Witness QCB had confessed to participating in killings of certain persons, was detained in Rwanda, and was awaiting sentencing.[3053] The Trial Chamber concluded that it would treat Witness QCB's evidence with appropriate caution as he may have had an incentive to implicate Ntahobali in order to avoid a severe sentence.[3054]

1342. The Trial Chamber's approach demonstrates that it was apprised of the fact that it may be necessary to employ a cautious approach towards witnesses who are charged with crimes of a similar nature to that of an accused.[3055] Indeed, a comprehensive reading of the Trial Judgement reveals that the Trial Chamber considered in detail Witness QCB's status as a detained witness and as an accomplice witness in relation to other events upon which he testified.[3056] In this context, the Trial Chamber properly considered Witness QCB's possible motivation to implicate Ntahobali as well as other accused.[3057]

[3050] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[3051] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Muvunyi* Appeal Judgement of 1 April 2011, paras. 37, 38; *Renzaho* Appeal Judgement, para. 263.
[3052] *See supra*, paras. 1332-1340, 1345.
[3053] Trial Judgement, para. 1474.
[3054] Trial Judgement, para. 1474.
[3055] *Cf. Ntagerura et al.* Appeal Judgement, para. 234.
[3056] *See* Trial Judgement, paras. 383, 1553, 1673, 1686, 2611, 3136, 3138.
[3057] The Trial Chamber considered evidence that Witness QCB had colluded with other witnesses in prison to fabricate evidence. *See* Trial Judgement, paras. 250, 295, 296, 339, 340, 367, 369. However, these allegations pertained to evidence implicating Kanyabashi. The Trial Chamber, mindful that the Defence only need to cast reasonable doubt on the Prosecution case, concluded that the Defence evidence did not undermine the evidence of Witness QCB. *See ibid.*, para. 383. The Appeals Chamber also discusses Ntahobali's contention that the Trial Chamber took contradictory positions as to the need to apply caution to Witness QCB's evidence when assessing Ntahobali's challenges concerning

1343. The Trial Chamber's analysis of Witness QCB's evidence concerning the killings at the IRST also reflects that it considered several factors relevant to a cautious assessment of this witness's credibility. Specifically, the Trial Judgement shows that the Trial Chamber was cognisant of and explicitly considered discrepancies within Witness QCB's testimony, possible inconsistencies with his prior statement as well as inconsistencies between his evidence and other evidence on the record before finding "Witness QCB's detailed evidence to be credible" with respect to this event.[3058] Against this background, the Appeals Chamber finds no merit in Ntahobali's contentions that the Trial Chamber failed to exercise sufficient caution with respect to Witness QCB's evidence and erred in not requiring corroboration.

1344. The Appeals Chamber is mindful that the Trial Chamber did not accept Witness QCB's evidence concerning crimes committed at the prefectoral office in late April 1994 "in the absence of corroboration".[3059] The Appeals Chamber, however, is not persuaded by Ntahobali's argument that there was no reason to treat Witness QCB's evidence concerning the killings at the IRST differently. After careful review of his evidence,[3060] the Trial Chamber considered that Witness QCB's testimony was "detailed" and "credible" with respect to his observations concerning the killings at the IRST.[3061] The Trial Chamber similarly found that Witness QCB's testimony in relation to the killing of Ruvurajabo perpetrated the same day and upon which it relied was "detailed" and "credible".[3062] By contrast, the Trial Chamber was not satisfied that Witness QCB's testimony about the abduction of Tutsis from the Butare Prefecture Office on 28 April 1994 – which it did not find to be detailed[3063] – and hearsay evidence of Ntahobali's participation in killings there was "sufficiently reliable".[3064] Reiterating that it is open to a trial chamber to accept some parts of a witness's testimony and reject others, and that it has discretion to decide whether corroboration of evidence is necessary, the Appeals Chamber finds no error in the Trial Chamber's exercise of its discretionary power in accepting only parts of Witness QCB's uncorroborated evidence.

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the killing of Ruvurajabo. *See infra*, paras. 1434, 1435. The Appeals Chamber is also not persuaded by Ntahobali's contentions that, because the Trial Chamber identified circumstances which could suggest that Witness QCB "may have had an incentive to implicate Ntahobali in order to avoid a severe sentence", it was required to rely on Witness QCB's evidence only where corroborated. *See* Trial Judgement, para. 1474; AT. 15 April 2015 pp. 53, 54, *referring to Muvunyi* Appeal Judgement, para. 131, *Nchamihigo* Appeal Judgement, para. 44.

[3058] Trial Judgement, paras. 1476-1480.

[3059] Trial Judgement, para. 2611.

[3060] *See supra*, paras. 1341-1343.

[3061] Trial Judgement, para. 1480.

[3062] Trial Judgement, para. 3139.

[3063] *Compare* Trial Judgement, paras. 1480, 3139 *with ibid.*, para. 2611.

[3064] Trial Judgement, para. 2611. The Appeals Chamber notes that, Witness QCB's Statement contains no reference to the abductions of Tutsis from the Butare Prefecture Office on 28 April 1994 – unlike the killings at the IRST and the killing of Ruvurajabo – and, as noted by Ntahobali, gives the impression that he was not in Butare Town at this time. *See* Witness QCB's Statement, p. 3.

1345. Based on the foregoing, the Appeals Chamber concludes that Ntahobali has not shown that the Trial Chamber erred in assessing Witness QCB's testimony in light of inconsistencies or that it failed to exercise sufficient caution when relying on his uncorroborated evidence in relation to the killings at the IRST.

(b) Identification Evidence

1346. Ntahobali submits that the Trial Chamber failed to properly analyse Witness QCB's identification evidence.[3065] Ntahobali contends that, when relying on the witness's evidence that the witness knew Ntahobali for years prior to 1994, the Trial Chamber unreasonably accepted the witness's explanation that due to fears for his safety, the witness initially testified in his open session examination-in-chief that he first saw Ntahobali on 21 April 1994.[3066] Ntahobali argues that such an explanation is patently unbelievable as the witness later explained his prior knowledge of Ntahobali in open session during his cross-examination.[3067] Ntahobali also contends that, while Witness QCB testified that he met Ntahobali at Maurice Ntahobali's house in 1989 when Ntahobali was studying at the National University of Rwanda in Butare,[3068] the evidence shows that Ntahobali was in Kigali (and not Butare) in 1989 and that he attended the National University of Rwanda in Butare only in 1992.[3069] Ntahobali further submits that the Trial Chamber failed to consider that the audio recording of Witness QCB's testimony reflects that he referred to him as "Shaloumou",[3070] and that the witness showed a propensity for misidentification because he had previously confused Ntahobali's counsel for someone who visited him in prison in Rwanda.[3071] Finally, Ntahobali argues that the Trial Chamber erred by according weight to Witness QCB's in-court identification of him, particularly since the presiding judge had previously identified his counsel in court.[3072]

1347. The Prosecution responds that Ntahobali exaggerates and manipulates the inconsistencies in Witness QCB's identification evidence.[3073] It disputes that Witness QCB testified that he knew Ntahobali when Ntahobali was at the National University of Rwanda in Butare and submits that the witness said he did not know if Ntahobali was a university student when he first met him.[3074]

[3065] Ntahobali Notice of Appeal, paras. 155-160; Ntahobali Appeal Brief, paras. 384-390.
[3066] Trial Judgement, paras. 1468, 1476.
[3067] Ntahobali Appeal Brief, para. 386, *referring to* Witness QCB, T. 25 March 2002 pp. 39-42, 45-48 (closed session).
[3068] Ntahobali Appeal Brief, para. 387.
[3069] Ntahobali Appeal Brief, para. 387, *referring to* Witness QCB, T. 25 March 2002 pp. 40, 47, 57, 58 (closed session).
[3070] Ntahobali Appeal Brief, para. 389, *referring to* Witness QCB, T. 20 March 2002 pp. 65, 66, audio/video recording of Witness QCB's testimony of 20 March 2002, at 2:07:00-2:07:37.
[3071] Ntahobali Notice of Appeal, para. 159; Ntahobali Appeal Brief, para. 388. *See also* Ntahobali Reply Brief, para. 174.
[3072] Ntahobali Notice of Appeal, paras. 156-158; Ntahobali Appeal Brief, para. 384, *referring to* Witness QCB, T. 20 March 2002 pp. 63, 64. *See also* Ntahobali Reply Brief, para. 174.
[3073] Prosecution Response Brief, paras. 853, 861.
[3074] Prosecution Response Brief, paras. 861-863.

It further points out that the Trial Chamber explicitly recognised that it must consider in-court identification evidence with caution.[3075]

1348. Ntahobali replies that the French transcripts of Witness QCB's testimony indicate that Witness QCB stated that he knew Ntahobali when Ntahobali was at the National University of Rwanda in Butare.[3076] In Ntahobali's view, Witness QCB's response that he did not know if Ntahobali was a university student when he first met him is insufficient to counter his initial testimony and this modification demonstrates Witness QCB's inability to provide consistent evidence as it relates to his ability to identify Ntahobali.[3077]

1349. The Appeals Chamber observes that the Trial Chamber expressly addressed the credibility of Witness QCB's identification evidence. The Trial Chamber noted that, during his open session examination-in-chief, the witness testified that he first saw Ntahobali on 21 April 1994 but during his cross-examination stated that he knew Ntahobali for a while before 1994.[3078] It accepted Witness QCB's explanation that he feared for his safety and that is why he had stated that he only first saw Ntahobali on 21 April 1994 in open session.[3079] In this context, the Trial Chamber appears to have accepted Witness QCB's ability to identify Ntahobali from his testimony that he had in fact known Ntahobali since 1989 when Witness QCB worked at the National University of Rwanda in Butare.[3080]

1350. Ntahobali does not show that Witness QCB's explanation as to the reason why he initially said that he first saw Ntahobali on 21 April 1994 was so unbelievable that no reasonable trier of fact could have accepted it.[3081] While Witness QCB provided general evidence of his prior knowledge of Ntahobali during his open session cross-examination,[3082] he refused to go into detail before going into closed session.[3083] Only then did Witness QCB provide additional information as to how he

[3075] Prosecution Response Brief, para. 864.
[3076] Ntahobali Reply Brief, para. 174.
[3077] Ntahobali Reply Brief, para. 174. Beyond replying to arguments made in the Prosecution Response Brief, Ntahobali further challenges the credibility of Witness QCB's identification evidence by arguing that the witness, as recognised by the Trial Chamber, lied about knowing Major Rusigariye. *See idem*. The Appeals Chamber recalls that reply briefs shall be limited to arguments in reply to the response brief. *See* Practice Direction on Formal Requirements on Appeal, para. 6. Ntahobali was expressly made aware of this limitation in these appeal proceedings. *See* Decision on Motions for Extensions of Time Limit and Word Limit for the Filing of the Reply Briefs, 27 August 2013, p. 4. The Appeals Chamber will therefore not consider this argument further.
[3078] Trial Judgement, para. 1476.
[3079] Trial Judgement, paras. 1468, 1476.
[3080] Trial Judgement, para. 1468.
[3081] *Cf. Kordić and Čerkez* Appeal Judgement, paras. 266, 294.
[3082] *See* Witness QCB, T. 25 March 2002 pp. 39, 40.
[3083] *See* Witness QCB, T. 25 March 2002 pp. 40, 45 (closed session).

knew Ntahobali,[3084] confirming that, contrary to Ntahobali's assertion, the witness did not want to discuss his knowledge of Ntahobali in open session.

1351. Likewise, Ntahobali's submission that Witness QCB testified that he knew Ntahobali when Ntahobali was a student at the National University of Rwanda in Butare in 1989 misinterprets the witness's testimony.[3085] Read in context, it is clear from both the English and French transcripts that Witness QCB did not testify that he knew Ntahobali in 1989 when Ntahobali was a student at the National University of Rwanda. Rather, Witness QCB testified that he was working at the university at that time and that he first met Ntahobali at his father's home during that year.[3086] Witness QCB unambiguously testified that he did not know whether Ntahobali was a university student when he first met him in 1989.[3087] Thus, Ntahobali's citation to Witness QCB's evidence that he knew Ntahobali when he was studying "at the university" clearly concerns a different period during which the witness also had contact with Ntahobali.[3088] Moreover, the Appeals Chamber notes that Ntahobali testified that his parents returned to Butare in 1988 or 1989 and that, although he was living in Gitarama, he would return to Butare to visit them.[3089]

1352. Further, the Appeals Chamber considers that to the extent the audio recording of Witness QCB's testimony would reveal that the witness referred to Ntahobali as "Shaloumou" rather than "Shalom", this would not constitute a material variance requiring express analysis by the Trial Chamber. A review of the transcripts cited by Ntahobali reflects that Witness QCB referred to Ntahobali as "Shalom".[3090] Of greater significance, moments after Ntahobali alleges that Witness QCB identified Ntahobali as "Shaloumou", the witness provided biographical information about Ntahobali demonstrating his ability to identify Ntahobali and that he was referring to him.[3091] In these circumstances, the Appeals Chamber is of the opinion that Witness QCB's misidentification of Ntahobali's counsel is immaterial to his ability to identify Ntahobali.[3092]

1353. The Appeals Chamber also finds no merit in Ntahobali's contention that the Trial Chamber erred in according weight to Witness QCB's in-court identification, particularly since the presiding judge had previously identified his counsel in court. Ntahobali's counsel was indeed identified by the presiding judge in the presence of Witness QCB the day before the witness identified Ntahobali

[3084] *See* Witness QCB, T. 25 March 2002 pp. 40, 45 (closed session).
[3085] Ntahobali Appeal Brief, paras. 386, 387.
[3086] Witness QCB, T. 25 March 2002 p. 46 (closed session); T. 25 March 2002 pp. 52, 53 (closed session) (French).
[3087] Witness QCB, T. 25 March 2002 p. 59 (closed session); T. 25 March 2002 p. 69 (closed session) (French).
[3088] *See* Witness QCB, T. 25 March 2002 pp. 58, 59 (closed session); T. 25 March 2002 pp. 68, 69 (closed session) (French).
[3089] Ntahobali, T. 6 April 2006 p. 25.
[3090] Witness QCB, T. 20 March 2002 pp. 66, 67.
[3091] *See* Witness QCB, T. 20 March 2002 p. 70; T. 20 March 2002 p. 81 (French) (identifying Ntahobali's parents as Maurice Ntahobali and Pauline Nyiramasuhuko).

in court.[3093] However, the Appeals Chamber is not persuaded that these circumstances necessarily made Witness QCB's in-court confirmation that Ntahobali was the person he was referring to in his testimony unreliable.[3094] The Trial Chamber's analysis reflects that it found Witness QCB's identification of Ntahobali reliable in light of the witness's testimony that he had known him since 1989 and not because he identified him in court.[3095]

1354. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate any error on the part of the Trial Chamber in accepting Witness QCB's identification evidence.

(c) Exculpatory Evidence

1355. Ntahobali submits that the Trial Chamber failed to consider or properly assess evidence that contradicted Witness QCB's testimony of Ntahobali's participation in the killings at the IRST on 21 April 1994, and its negative impact on Witness QCB's credibility.[3096] Specifically, he points to his own evidence and that of Witness D-2-13-O, arguing that it materially contradicts Witness QCB's testimony that a Daihatsu carrying Tutsis could go to the IRST without first stopping at the Rugira roadblock.[3097] Ntahobali also argues that Witness QCB's evidence reflects that the Daihatsu avoided the roadblock by taking a route which, in light of the evidence of Ntahobali and Witness D-2-13-O, did not exist.[3098]

1356. Ntahobali further submits that the Trial Chamber reversed the burden of proof in its consideration of Prosecution Witness TN's testimony and erred in concluding that it was not inconsistent with Witness QCB's evidence.[3099] In particular, he contends that the Trial Chamber mischaracterised Witness QCB's evidence by concluding that the killings at the IRST occurred between 9.00 and 9.30 a.m., given that Witness QCB only testified to having left the scene at 9.30 a.m.[3100] He argues that it is pure speculation for the Trial Chamber to have found that Ntahobali left the scene around 9.30 a.m.[3101] and that the Trial Chamber erred in concluding that Witness QCB's testimony was not incompatible with Witness TN's evidence, which reasonably indicates that Ntahobali was present at killings in the Tumba Sector from 9.00 to 10.00 a.m.[3102]

[3092] Trial Judgement, paras. 1468, 1476.
[3093] *See* Witness QCB, T. 20 March 2002 p. 63 (presiding judge identifying Ntahobali's counsel); T. 21 March 2002 pp. 81, 82 (Witness QCB's in-court identification of Ntahobali).
[3094] Notably, Witness QCB also positively identified Joseph Kanyabashi and Sylvain Nsabimana. *See* Witness QCB, T. 21 March 2002 pp. 79-81.
[3095] Trial Judgement, paras. 1468, 1476.
[3096] Ntahobali Appeal Brief, paras. 358-368, 379.
[3097] Ntahobali Appeal Brief, para. 379.
[3098] Ntahobali Appeal Brief, para. 379.
[3099] Ntahobali Appeal Brief, paras. 358-368.
[3100] Ntahobali Appeal Brief, para. 360.
[3101] Ntahobali Appeal Brief, para. 362.
[3102] Ntahobali Appeal Brief, paras. 359, 360, 363.

Ntahobali also asserts that the Trial Chamber failed to address the contradiction between Witness QCB's testimony that Ntahobali was driving a Peugeot and Witness TN's evidence that Ntahobali was in a Toyota on 21 April 1994.[3103]

1357. The Prosecution did not respond to these submissions.

1358. The Appeals Chamber notes that the Trial Chamber made no findings as to the route taken by the Daihatsu and only summarised Witness QCB's evidence that the Daihatsu was moving from the EER to the IRST followed by a Peugeot driven by Ntahobali and that the Peugeot stopped at the Rugira roadblock while the Daihatsu continued its journey.[3104] Having reviewed all of the relevant aspects of Witness QCB's evidence[3105] as well as the allegedly contradictory evidence identified by Ntahobali,[3106] the Appeals Chamber is not persuaded that Ntahobali has identified a material contradiction in the record that the Trial Chamber unreasonably disregarded.[3107] In the view of the Appeals Chamber, of principal significance was the existence of the Rugira roadblock as identified by Witness QCB, which is not disputed by this evidence.

1359. With respect to Ntahobali's contention that the Trial Chamber shifted the burden of proof when stating that Witness TN's evidence "does not exclude the possibility that Ntahobali may have participated in the [IRST] killings", the Appeals Chamber observes that the Trial Chamber ultimately concluded that the evidence provided by Witness TN did "not cast a doubt on the Prosecution's case"[3108] and that the Prosecution had "proven beyond a reasonable doubt" the facts relevant to Ntahobali's liability for the IRST killings.[3109] The Trial Chamber had also recalled earlier that the accused are presumed innocent and that it is the Prosecution's burden to prove every element of the offence charged beyond reasonable doubt.[3110] While the Appeals Chamber considers that the specific language identified by Ntahobali may suggest a misapplication of the burden of proof, read in this context, these statements underscore the Trial Chamber's determination that the evidence of Witness TN did not provide another reasonable possibility that was inconsistent with Witness QCB's evidence of Ntahobali's involvement in the killings at the IRST.

[3103] Ntahobali Appeal Brief, para. 364.
[3104] Trial Judgement, paras. 1469, 1475, *referring to* Witness QCB, T. 20 March 2002 p. 85, T. 25 March 2002 p. 16.
[3105] *See* Witness QCB, T. 20 March 2002 pp. 78, 84, 85, 88; T. 25 March 2002 pp. 16, 18, 21, 22; Exhibit P54 (Sketch map of Butare Town by Witness QCB).
[3106] *See* Ntahobali Appeal Brief, para. 379, *referring to* Ntahobali, T. 18 April 2006 pp. 72-74, Witness D-2-13-O, T. 7 November 2007 pp. 23, 24 (closed session), Exhibit D402 (Sketch map of Butare Town by Ntahobali), Exhibit D412 (Sketch map of Butare Town).
[3107] *See* Ntahobali Closing Brief, para. 139. *See also* Ntahobali Closing Arguments, T. 23 April 2009 pp. 4, 5, 7, 8, 23, 24, 35, 36.
[3108] Trial Judgement, para. 1478.
[3109] Trial Judgement, para. 1480.
[3110] Trial Judgement, para. 162, *referring to* Article 20(3) of the Statute, Rule 87(A) of the Rules.

1360. Regarding the assessment of Witness TN's evidence, the Trial Chamber noted that Witness TN testified that Ntahobali killed Rwabugiri and Philippe behind the Tumba sector office between 9.00 and 10.00 a.m. on 21 April 1994 and that "[t]his would account for a portion of the timeframe during which Witness QCB submits that the killings of Tutsis at the IRST occurred, *i.e.* between 9.00 and 9.30 a.m."[3111] While Ntahobali contests that Witness TN's evidence could be interpreted as reflecting that the killings of Rwabugiri and Philippe lasted from 9.00 to 10.00 a.m., he does not demonstrate that a reasonable trier of fact could not interpret Witness TN's evidence as only referring to a segment of time during the relevant period.[3112]

1361. Similarly, although Witness QCB's evidence reflects that he left the IRST at 9.30 a.m. and does not purport to account for when Ntahobali departed,[3113] the Appeals Chamber sees no error in the Trial Chamber's conclusion that the timing of the events as identified by Witnesses TN and QCB is not necessarily inconsistent with Ntahobali's involvement in both incidents given that the two locations were only approximately one kilometre away and that Ntahobali was in possession of a car at that time.[3114]

1362. Furthermore, the Appeals Chamber notes that the Trial Chamber ultimately found that Witness TN's evidence in relation to Ntahobali's participation in killings in the Tumba Sector on the morning of 21 April 1994 was insufficient to prove the allegation beyond reasonable doubt.[3115] Having rejected this particular aspect of Witness TN's evidence,[3116] the Appeals Chamber finds that a reasonable trier of fact could have decided not to expressly consider the differences between the testimonies of Witnesses QCB and TN as to the vehicle Ntahobali was driving on 21 April 1994.

1363. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of the alleged exculpatory evidence relied upon by Ntahobali in relation to the IRST killings on 21 April 1994.

(d) Additional Evidence Admitted on Appeal

1364. On the basis of the trial record alone, the Appeals Chamber has found that the Trial Chamber did not err in: (i) assessing Witness QCB's testimony in light of inconsistencies;

[3111] Trial Judgement, para. 1478, *referring to* Witness QCB, T. 20 March 2002 pp. 78, 95, T. 26 March 2002 p. 39.
[3112] *See* Witness TN, 3 April 2002 p. 133 ("A. Those people were killed on the 21st of April in the morning between 9.00 am and 10.00 am, madam.").
[3113] *See* Witness QCB, T. 20 March 2002 p. 95 ("Q. Let me go back and ask you to estimate the time at which you left the approximate area of IRST? A. It was approximately at 9:30.").
[3114] *See* Trial Judgement, para. 1478.
[3115] Trial Judgement, para. 1486.
[3116] The Appeals Chamber also notes that the Trial Chamber only relied on Witness QCB's evidence in finding that Ntahobali was in possession of a vehicle on 21 April 1994. *See* Trial Judgement, para. 1478, *referring to* Witness QCB, T. 20 March 2002 p. 85.

(ii) failing to exercise sufficient caution when relying on Witness QCB's uncorroborated evidence in relation to the killings at the IRST; (iii) accepting Witness QCB's identification evidence; or (iv) assessing the alleged exculpatory evidence relied upon by Ntahobali. In accordance with the relevant standard, the Appeals Chamber will therefore determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.

1365. The Appeals Chamber finds Witness QCB's testimony pertaining to the killings at the IRST detailed and coherent.[3117] His explanations given in cross-examination as they concern alleged inconsistencies about this event are clear and convincing.[3118] His evidence is first-hand[3119] and his identification of Ntahobali is compelling.[3120]

1366. The Appeals Chamber admitted as additional evidence on appeal Witness QCB's statement given to the Royal Canadian Mounted Police ("RCMP") on 27 May 2004 and excerpts of Witness QCB's statement given to the RCMP on 2 June 2004 (collectively "Witness QCB's RCMP Statements"), both of which were given confidentially during investigations in Canadian criminal proceedings.[3121] When admitting these statements as additional evidence on appeal, the Appeals Chamber stated:

> [T]he Appeals Chamber observes that the information that Witness QCB provided in relation to the abduction of the children in [Witness QCB's May 2004 Statement] indicates that he observed the event with his "own eyes" and provides details and commentary that would seem to affirm this statement as well as that he also saw the abduction of the pastor. This account of the abductions is inconsistent with Witness QCB's assertions in [Witness QCB's June 2004 Statement], provided less than a week later, that he did not see the abductions but learned about them from another source.[3122]

1367. Ntahobali submits that, given the Trial Chamber's stated concerns that Witness QCB may have an incentive to lie, the additional evidence admitted on appeal shows that Witness "QCB is, in fact, a liar."[3123] He contends that Witness QCB's evidence cannot be accepted beyond reasonable doubt without corroboration.[3124]

[3117] *See*, *e.g.*, Witness QCB, T. 20 March 2002 pp. 77-95, T. 25 March 2002 pp. 131, 132, 151, 152, 154. *See also* Witness QCB, T. 25 March 2002 pp. 15-18, 21, 22, 24-27, 29, 30.
[3118] *See* Witness QCB, T. 25 March 2002 pp. 45, 46, T. 26 March 2002 pp. 37-41.
[3119] *See* Witness QCB, T. 20 March 2002 pp. 78, 84-95.
[3120] *See* Witness QCB, T. 20 March 2002 pp. 65-77, T. 21 March 2002 pp. 81, 82, T. 25 March 2002 pp. 39, 40 and 45-53, 55, 58-61, 65-68 (closed session).
[3121] 14 April 2015 Appeal Decision, paras. 14, 49, *referring to* Arsène Shalom Ntahobali's Second Motion for Leave to Present Additional Evidence, 5 November 2013 (originally filed in French, English translation filed on 6 August 2014) (confidential) ("5 November 2013 Motion"), paras. 1, 17, Annexes F (Witness QCB's statement to the RCMP of 27 May 2004) (confidential) ("Witness QCB's May 2004 Statement"), G (Witness QCB's statement to the RCMP of 2 June 2004) (confidential) ("Witness QCB's June 2004 Statement").
[3122] 14 April 2015 Appeal Decision, para. 33 (internal references omitted).
[3123] AT. 15 April 2015 p. 54 (closed session). In particular Ntahobali submits that the additional evidence "established that [Witness] QCB was able to lie about seeing with his own eyes Mr. Ntahobali's involvement in crimes; was able to

1368. The Appeals Chamber observes that Witness QCB provided contradictory statements to the RCMP as to whether he observed first-hand or learned from another source about abductions that occurred during the genocide in which Ntahobali was implicated as a co-perpetrator.[3125] However, the Appeals Chamber has considered and accepts the witness's explanation for the inconsistency.[3126] Furthermore, the Appeals Chamber reiterates that the contradictory information arose during statements which were not given as testimonies under oath or under penalty of perjury.[3127] Moreover, the abductions recounted in Witness QCB's RCMP Statements were not incidents for which Ntahobali was charged nor has Ntahobali argued that the statements contradict the testimony Witness QCB gave before the Tribunal.[3128] Considering that a reasonable trier of fact has the discretion to rely on uncorroborated, but otherwise credible, witness testimony from an accomplice witness provided that appropriate caution is applied in assessing such evidence,[3129] the Appeals Chamber considers that the additional evidence admitted on appeal does not undermine the credibility of Witness QCB. The Appeals Chamber makes this determination in light of the evidence in the trial record, including Witness TN's evidence highlighted by Ntahobali at trial and on appeal,[3130] Witness D-2-13-O's evidence,[3131] and the evidence related to the alleged fabrication of evidence by Witness QCB.[3132]

1369. In light of the trial evidence and the additional evidence admitted on appeal, and considering its analysis on Ntahobali's responsibility conducted below, the Appeals Chamber is itself convinced beyond reasonable doubt of Ntahobali's guilt concerning the killing of approximately 200 refugees at the IRST on 21 April 1994.

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give numerous details about events he did not personally witness, although saying he was there; and, three, he was able to lie as to the fact that he had been personally present on the premises to see those crimes when he was not." *See idem*.

[3124] AT. 15 April 2015 p. 54 (closed session).

[3125] *Compare* Witness QCB's May 2004 Statement, pp. 139781/H, 13979/H, 13978/H, 13976/H, 13975/H, 13968/H-13959/H (Registry pagination) *with* Witness QCB's June 2004 Statement, pp. 13957/H, 13956/H (Registry pagination).

[3126] *See* Witness QCB's June 2004 Statement, pp. 13957/H-13954/H (Registry pagination).

[3127] 14 April 2015 Appeal Decision, para. 34.

[3128] *See* 5 November 2013 Motion, paras. 39-44; Response to Ntahobali's 2nd Rule 115 Motion, 5 December 2013 (confidential), para. 19; Arsène Shalom Ntahobali's Reply to the Prosecution's Response to Ntahobali's 2nd Rule 115 Motion, 20 December 2013 (originally filed in French, English translation filed on 27 August 2014), paras. 19-24. *See also* 14 April 2015 Appeal Decision, para. 34.

[3129] *See supra*, para. 1340.

[3130] The Appeals Chamber observes that Ntahobali did not call any witnesses with respect to this specific event but principally challenged Witness QCB's credibility. *See* Ntahobali Closing Brief, paras. 139-143. *See also ibid*., paras. 98, 106, 108, 159, 410, 423, 682, 736, 737, Appendix 1, para. 6; Ntahobali Closing Arguments, T. 23 April 2009 pp. 23, 24. As noted by the Trial Chamber, Ntahobali "assert[ed] that Witness QCB's account of the 21 April 1994 events [was] incompatible in time with the testimony of Prosecution Witness TN." *See* Trial Judgement, para. 1459. *See also* Ntahobali Closing Brief, paras. 276, 277, 287, *referring*, *inter alia*, *to* Witness TN, T. 3 April 2002 pp. 172, 173 (closed session) (French); Ntahobali Closing Arguments, T. 23 April 2009 pp. 7, 8; Ntahobali Appeal Brief, para. 359, *referring to* Witness TN, T. 3 April 2002 pp. 155, 157 (French). *See also supra*, Section V.F.1(c).

[3131] *See*, *e.g.*, Witness D-2-13-O, T. 7 November 2007 pp. 23, 24. *See also supra*, Section V.F.1(c).

[3132] *See* Witness D-2-13-D, T. 28 August 2007 pp. 60-62; T. 30 August 2007 pp. 49-51; T. 10 September 2007 pp. 63, 64.

(e) Conclusion

1370. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's submissions as they relate to the assessment of the evidence pertaining to the killings perpetrated at the IRST on 21 April 1994.

2. Ordering Responsibility

1371. As noted above, the Trial Chamber found Ntahobali responsible for ordering the killing of approximately 200 Tutsis near the IRST on 21 April 1994.[3133] The Trial Chamber determined that "Ntahobali issued orders to the *Interahamwe* to kill the Tutsis that had been arrested"[3134] and that his "instructions in this regard were clear."[3135] The Trial Chamber further found that Ntahobali's orders to kill were followed by the *Interahamwe* and that approximately 200 Tutsis were killed as a result.[3136] The Trial Chamber inferred as the only reasonable inference that Ntahobali possessed authority over the *Interahamwe*.[3137]

1372. Ntahobali contends that the Trial Chamber erred in finding him responsible for ordering these killings on the basis of Witness QCB's evidence.[3138] In particular, he argues that Witness QCB did not specify the nature or content of the orders he allegedly gave and that his evidence could not reasonably be relied upon to establish that he ordered the *Interahamwe* to kill the Tutsis at the IRST.[3139] Ntahobali also submits that Witness QCB's general testimony about the orders he issued could reasonably relate to instructions he gave before his arrival at the IRST and therefore have no link to the killings that occurred at the IRST.[3140] He contends that evidence of his mere presence and possible authority over the *Interahamwe* is insufficient to establish that he ordered the killings.[3141] Moreover, Ntahobali argues that the Trial Chamber erred in finding that he possessed sufficient authority over the *Interahamwe* required for ordering liability pursuant to Article 6(1) of the Statute, as such a conclusion relied upon the erroneous finding that he ordered the *Interahamwe* to kill the Tutsis.[3142]

[3133] Trial Judgement, paras. 5782-5786, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169. *See also ibid*., para. 1480.
[3134] Trial Judgement, para. 5782. *See also ibid.*, para. 1480.
[3135] Trial Judgement, para. 5784.
[3136] Trial Judgement, para. 5782. *See also ibid.*, para. 1480.
[3137] Trial Judgement, para. 5785.
[3138] Ntahobali Notice of Appeal, paras. 324, 325; Ntahobali Appeal Brief, paras. 962-971.
[3139] Ntahobali Notice of Appeal, para. 324; Ntahobali Appeal Brief, paras. 962-968.
[3140] Ntahobali Appeal Brief, para. 967, *referring to Karera* Appeal Judgement, para. 185.
[3141] Ntahobali Appeal Brief, para. 969.
[3142] Ntahobali Notice of Appeal, para. 325; Ntahobali Appeal Brief, para. 970.

1373. The Prosecution responds that the Trial Chamber acted reasonably in inferring that Ntahobali ordered the killing of the 200 Tutsis at the IRST.[3143] It submits that Ntahobali's emphasis on the absence of evidence of a verbatim order to kill is misguided and ignores the relevant factual basis supporting this conclusion.[3144]

1374. The Trial Chamber found that, while at the massacre site at the IRST, "Ntahobali issued orders to the *Interahamwe* to kill the Tutsis."[3145] Witness QCB was the only person to testify about this event and the Trial Chamber's factual conclusions rest solely on his testimony.[3146] A review of the Trial Chamber's summary of his evidence does not, however, reflect that Witness QCB testified that he overheard Ntahobali issue express instructions to the *Interahamwe* to kill the Tutsis at the IRST.[3147] Rather, the Trial Chamber noted that the witness identified Ntahobali as one of the assailants at the IRST and as "the leader of the killers" because he witnessed Ntahobali "issuing orders".[3148]

1375. The Appeals Chamber, however, finds that Ntahobali's submissions fail to appreciate the broader context of Witness QCB's evidence and do not demonstrate that the Trial Chamber erred in concluding that Ntahobali ordered the killing of approximately 200 Tutsis at the IRST. Specifically, the Appeals Chamber observes that, in reaching its conclusion, the Trial Chamber relied upon and accepted Witness QCB's evidence that: (i) Ntahobali participated in the abduction of approximately 40 Tutsis from the Rugira roadblock, where he ordered the *Interahamwe* present to take the Tutsis who had been arrested to the IRST where they were ultimately killed;[3149] (ii) the witness went to this particular location and saw about 200 people being stripped naked before being killed with clubs and knives;[3150] and (iii) he observed Ntahobali among the assailants and identified Ntahobali as the leader of the killers, issuing orders.[3151] The Appeals Chamber notes that all of Witness QCB's observations fell within a time span of approximately 20 minutes.[3152] Given the organised nature of the event, the limited timeframe in which it occurred, and Ntahobali's leadership role during it, the Appeals Chamber finds that a reasonable trier of fact could have considered that the only reasonable conclusion from the evidence was that Ntahobali ordered the killings at the IRST.

[3143] Prosecution Response Brief, paras. 1207, 1215.
[3144] Prosecution Response Brief, paras. 1207, 1210-1215.
[3145] Trial Judgement, para. 1480. This conclusion is repeated in the "Legal Findings" section. *See ibid.*, para. 5782.
[3146] *See* Trial Judgement, paras. 1465-1471, 1474, 1480.
[3147] *See* Trial Judgement, para. 1470.
[3148] *See* Trial Judgement, paras. 1470, 1477, *referring to* Witness QCB, T. 20 March 2002 pp. 89, 90. The Appeals Chamber has reviewed the relevant aspects of Witness QCB's testimony and found no express statement that he heard Ntahobali order *Interahamwe* to kill. *See* Witness QCB, T. 20 March 2002 pp. 86-93, T. 26 March 2002 p. 39. The Appeals Chamber further observes that the Prosecution does not cite to any testimony from Witness QCB stating that Ntahobali gave explicit orders to *Interahamwe* to kill. *See* Prosecution Response, paras. 1207-1215.
[3149] Witness QCB, T. 20 March 2002 pp. 86-91. *See also* Trial Judgement, paras. 1470, 1480.
[3150] Witness QCB, T. 20 March 2002 p. 89. *See also* Trial Judgement, paras. 1470, 1477, 1480.

1376. Ntahobali also does not demonstrate that Witness QCB's evidence could reasonably relate to instructions that have no link to the killings at the IRST. The Trial Chamber understood Witness QCB's evidence as referring to orders he heard while observing the killings at the IRST.[3153] The Appeals Chamber finds that a reasonable trier of fact could have come to this conclusion, as Witness QCB's testimony that Ntahobali issued orders was provided while describing the killings at the IRST and in direct response to a question as to why he had previously testified that Ntahobali was the leader of the killers.[3154]

1377. The Appeals Chamber notes that Ntahobali's remaining arguments rely solely on the contention that the Trial Chamber erred in concluding that he possessed sufficient authority because it relied on the allegedly erroneous finding that Ntahobali ordered the *Interahamwe* to kill the Tutsis at the IRST.[3155] Since the Appeals Chamber has found no error in this conclusion, it dismisses the remainder of Ntahobali's arguments as moot.

1378. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding him responsible for ordering the killings perpetrated at the IRST on the basis of Witness QCB's evidence.

3. Conclusion

1379. The Appeals Chamber finds that Ntahobali has failed to demonstrate any error in the Trial Chamber's finding that he was responsible for ordering the killing of approximately 200 Tutsis at the IRST on 21 April 1994. For the foregoing reasons, the Appeals Chamber dismisses Grounds 3.1 and 4.5 of Ntahobali's appeal in their entirety.

[3151] Witness QCB, T. 20 March 2002 p. 90. *See also* Trial Judgement, paras. 1470, 1477, 1480.
[3152] Witness QCB, T. 20 March 2002 pp. 78, 95. *See also* Trial Judgement, paras. 1469, 1470.
[3153] *See* Trial Judgement, para. 1477 ("Roughly 200 people were stabbed or clubbed to death by members of the *Interahamwe* […] According to Witness QCB, Ntahobali was issuing orders during this time.").
[3154] Witness QCB, T. 20 March 2002 p. 90. *See also* Trial Judgement, para. 1470.
[3155] The Appeals Chamber refers to Ntahobali's contentions that his mere presence and possible authority over *Interahamwe* would be insufficient to establish that he ordered the killings and that he did not possess sufficient authority over the *Interahamwe*. *See supra*, para. 1372.

G. Hotel Ihuliro Roadblock (Grounds 3.2, 3.3, and 4.2, 4.3 in part)

1380. The Trial Chamber noted that it was not contested that, at the time of the relevant events, the Ntahobali family resided in Hotel Ihuliro in Butare Town, which was owned by Maurice Ntahobali.[3156] The Trial Chamber found that a roadblock was erected near Hotel Ihuliro in late April 1994.[3157] It also determined that Ntahobali manned the roadblock, which was used to abduct and kill members of the Tutsi population.[3158] In particular, the Trial Chamber found that Ntahobali ordered the killing of Ruvurajabo at this roadblock on 21 April 1994 and that he raped and murdered a Tutsi girl at the same roadblock around the end of April 1994.[3159] The Trial Judgement also reflects that Ntahobali was found responsible for having physically perpetrated the killing of multiple Tutsis at the roadblock, including but not limited to the killing of the "Tutsi girl".[3160]

1381. On this basis, the Trial Chamber convicted Ntahobali of genocide, extermination, rape, and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II for committing rape and killings and ordering the killing of Ruvurajabo pursuant to Article 6(1) of the Statute.[3161] The Trial Chamber also found that Ntahobali bore superior responsibility pursuant to Article 6(3) of the Statute for the killing of Ruvurajabo perpetrated by *Interahamwe* and considered this as an aggravating factor when determining his sentence.[3162]

1382. Ntahobali submits that the Trial Chamber erred in: (i) failing to provide sufficiently clear findings with respect to the extent of his liability for crimes committed at the Hotel Ihuliro roadblock; (ii) finding that the Hotel Ihuliro roadblock was established in late April 1994; (iii) its assessment of the evidence about the killing of Ruvurajabo as well as in its determination that he was responsible as a superior for this crime; and (iv) its assessment of the evidence relating to the rape and murder of a Tutsi girl at the roadblock. The Appeals Chamber will consider these challenges in turn.

[3156] Trial Judgement, para. 3107.
[3157] Trial Judgement, para. 3113. The Appeals Chamber recalls that it has decided to refer to the roadblock which the Trial Chamber found was located in the proximity of the EER and the garage known as the "MSM garage" and very close to Hotel Ihuliro as the "Hotel Ihuliro roadblock" throughout this Judgement. *See supra*, fn. 51.
[3158] Trial Judgement, paras. 3128, 5842.
[3159] Trial Judgement, paras. 3135, 3140, 5842, 5845, 5971, 6053-6055, 6077-6080, 6094, 6100, 6101, 6168, 6169, 6184. *See also ibid.*, paras. 6071, 6072.
[3160] *See infra*, Section V.G.1.
[3161] Trial Judgement, paras. 5842, 5845, 5971, 6053-6055, 6077-6080, 6094, 6100, 6101, 6121, 6168, 6169, 6184-6186. The Trial Chamber considered that Ntahobali had not received sufficient notice that the charge of genocide would be

1. Imprecise and Unsupported Findings

1383. In the "Factual Findings" section of the Trial Judgement concerning Ntahobali's role at the Hotel Ihuliro roadblock, the Trial Chamber recalled the evidence of Prosecution Witnesses FA, QCB, SX, TB, TG, and TQ.[3163] The Trial Chamber considered the ability of Witnesses QCB, SX, TB, TG, and TQ to identify Ntahobali as well as the corroborative nature of their testimonies.[3164] The Trial Chamber found "their accounts credible"[3165] and subsequently concluded as follows:

> Having considered all the evidence before it, the Chamber finds the Prosecution has established beyond a reasonable doubt that during the relevant time period, Ntahobali manned the roadblock in front of his parents' residence and utilised the roadblock with the assistance of soldiers and other unknown persons to abduct and kill members of the Tutsi population.[3166]

1384. The Trial Chamber provided its most detailed assessment of Ntahobali's criminal responsibility for killings at the Hotel Ihuliro roadblock in the "Genocide" section of the "Legal Findings" section of the Trial Judgement.[3167] In this particular section, the Trial Chamber concluded as follows:

> *In April 1994 Ntahobali manned the roadblock near Hotel Ihuliro. With the assistance of soldiers and other unknown persons he utilised the roadblock to abduct and kill members of the Tutsi population.* Towards the end of April 1994, Ntahobali personally raped and murdered one Tutsi girl, and instructed the *Interahamwe* to kill Léopold Ruvurajabo, who was subsequently killed, at the roadblock near Hotel Ihuliro. It was established that various crimes, in particular beatings, rapes and killings, were carried out mostly against Tutsis at this roadblock during the relevant time period […].[3168]
>
> […]
>
> *Ntahobali killed Tutsis at the Hotel Ihuliro roadblock* […]. The Chamber therefore finds Ntahobali guilty of genocide, pursuant to Article 6 (1) of the Statute. […][3169]

1385. The Trial Chamber repeated the conclusion that Ntahobali killed "Tutsis" at the Hotel Ihuliro roadblock, "including a Tutsi girl", when finding him responsible for committing extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[3170]

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supported by rapes committed at the Hotel Ihuliro roadblock and did not enter a genocide conviction on the basis of the rape of the Tutsi girl in late April 1994. *See ibid*., paras. 5828-5836, 5843.
[3162] Trial Judgement, paras. 5847-5849, 5971, 6056, 6220.
[3163] *See* Trial Judgement, paras. 3118-3120, 3124.
[3164] Trial Judgement, para. 3118-3120, 3122-3124.
[3165] Trial Judgement, para. 3124.
[3166] Trial Judgement, para. 3128.
[3167] *Compare* Trial Judgement, paras. 5842-5849, 5971 *with ibid*., paras. 6053-6055, 6100, 6101, 6121, 6168, 6169.
[3168] Trial Judgement, para. 5842 (emphasis added).
[3169] Trial Judgement, para. 5971 (emphasis added).
[3170] Trial Judgement, paras. 6053-6055, 6100, 6101, 6121, 6168, 6169.

1386. Ntahobali submits that the Trial Judgement is unacceptably imprecise regarding his convictions for the killings he allegedly committed at the Hotel Ihuliro roadblock, which violates his right to a reasoned opinion provided for under Article 22(2) of the Statute and Rule 88(C) of the Rules.[3171] Specifically, he contends that, save for the killing of the "Tutsi girl", the Trial Chamber failed to indicate what other killings of Tutsis he was found to have personally committed.[3172] He argues that the Trial Chamber could not have found him liable based on the extended form of committing as it did not make the conclusions that would have been essential to support this mode of responsibility.[3173] Ntahobali submits that the imprecision of the Trial Judgement concerning his responsibility for the killing of multiple Tutsis at the Hotel Ihuliro roadblock prevented him from knowing exactly what he was found responsible for and from mounting an effective appeal.[3174]

1387. In addition, Ntahobali argues that the finding that he committed killings at the Hotel Ihuliro roadblock beyond the killing of the Tutsi girl is not supported by the evidence.[3175] He points out that, except for Witness FA, none of the witnesses found credible by the Trial Chamber testified to having seen him directly perpetrating such killings at this roadblock.[3176] For these reasons, Ntahobali requests that the Appeals Chamber acquit him of all crimes committed at the Hotel Ihuliro roadblock other than the killing of Ruvurajabo and the "Tutsi girl".[3177]

1388. The Prosecution responds that Ntahobali's criminal responsibility for committing killings at the Hotel Ihuliro roadblock is based solely on him having raped and murdered a Tutsi girl.[3178] It contends that the Trial Chamber did not convict Ntahobali under Article 6(1) of the Statute for committing other crimes at the roadblock but "merely found that [other crimes] occurred".[3179]

[3171] Ntahobali Notice of Appeal, paras. 303, 307-309; Ntahobali Appeal Brief, paras. 861, 862, 864. *See also* AT. 16 April 2015 pp. 31, 32.
[3172] Ntahobali Notice of Appeal, para. 303; Ntahobali Appeal Brief, paras. 428, 864-868. Ntahobali observes that the Trial Chamber's conclusion in paragraph 3128 of the Trial Judgement is a verbatim restatement of paragraph 6.27 of the Indictment. *See* Ntahobali Appeal Brief, para. 865.
[3173] Ntahobali Appeal Brief, para. 870, *referring to* the *actus reus* of extended commission as conduct that "was as much an integral part of the genocide as were the killings which it enabled". Alternatively, Ntahobali contends that if the Trial Chamber did rely on the extended form of committing, the Trial Judgement is unacceptably imprecise. *See idem*.
[3174] Ntahobali Notice of Appeal, paras. 307, 308; Ntahobali Appeal Brief, paras. 864, 869.
[3175] Ntahobali Notice of Appeal, para. 303; Ntahobali Appeal Brief, paras. 431, 432, 865.
[3176] Ntahobali Appeal Brief, paras. 431-437. *See also ibid*., paras. 865-687. Ntahobali also argues that it is unclear whether the Trial Chamber disregarded some or all of Witness FA's evidence concerning Ntahobali's participation in crimes at this roadblock. *See ibid*., para. 866, *referring to* Trial Judgement, para. 3123.
[3177] Ntahobali Notice of Appeal, para. 309.
[3178] Prosecution Response Brief, paras. 1161, 1162. *See also ibid*., para. 1159.
[3179] Prosecution Response Brief, para. 1161.

1389. Ntahobali replies that the Trial Judgement clearly reflects that he was convicted for having committed killings other than that of the Tutsi girl at the Hotel Ihuliro roadblock and reiterates that he should be acquitted of these crimes.[3180]

1390. The Appeals Chamber observes that, contrary to the Prosecution's position, the Trial Judgement indicates that Ntahobali's responsibility for committing under Article 6(1) of the Statute is based on him having killed "Tutsis" at the Hotel Ihuliro roadblock, "including a Tutsi girl".[3181] By using the plural "Tutsis", the Trial Chamber's legal findings clearly reflect responsibility for multiple deaths. Furthermore, by utilising the term "killed" or phrase "having killed" when identifying Ntahobali's conduct in the "Legal Findings" section of the Trial Judgement, the Trial Chamber made it clear that Ntahobali's responsibility was based on his physical perpetration of killings[3182] and not on the extended form of commission.[3183] The Appeals Chamber therefore finds that Ntahobali was convicted for having physically perpetrated the killing of multiple Tutsis at the Hotel Ihuliro roadblock, including but not limited to the killing of the "Tutsi girl".

1391. The Appeals Chamber observes that the Trial Chamber's relevant factual findings in the "Factual Findings" section of the Trial Judgement do not support the Trial Chamber's legal conclusion that Ntahobali physically perpetrated the killing of multiple Tutsis at the roadblock. The relevant findings only states that Ntahobali "manned the roadblock in front of his parents' residence and utilised the roadblock with the assistance of soldiers and other unknown persons to abduct and kill members of the Tutsi population",[3184] without specifying that he physically killed multiple Tutsis at the Hotel Ihuliro roadblock, as stated throughout the "Legal Findings" section.[3185] While the Trial Chamber discussed at length Ntahobali's role at the roadblock, at no point did it find that Ntahobali physically killed anybody at that location other than the "Tutsi girl".

1392. Furthermore, the only evidence referred to by the Trial Chamber that Ntahobali personally killed persons at the roadblock in addition to the "Tutsi girl" was Witness FA's "eyewitness testimony that Ntahobali used an axe to kill a girl with long hair" and Witnesses QCB's and SX's testimonies that Ntahobali "participated in the killing of people at this roadblock."[3186] However, Witness FA's account of the incidents at the Hotel Ihuliro roadblock was not found credible by the

[3180] Ntahobali Reply Brief, paras. 349-351. *See also* AT. 16 April 2015 p. 32.
[3181] *See* Trial Judgement, paras. 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169.
[3182] *See Nahimana et al.* Appeal Judgement, para. 478 ("The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent)".).
[3183] On the extended form of committing pursuant to Article 6(1) of the Statute, *see Munyakazi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60.
[3184] Trial Judgement, para. 3128.
[3185] *See* Trial Judgement, paras. 5971, 6053, 6100, 6168.

Trial Chamber.[3187] As for Witness QCB's evidence, the excerpts of the testimony cited by the Trial Chamber relate to Ntahobali ordering the killing of Ruvurajabo[3188] rather than committing that crime.[3189] The relevant excerpts of Witness SX's testimony referred to by the Trial Chamber generally reflect the witness stating that "Shalom was one of the killers" of the Hotel Ihuliro roadblock without referring to any particular killing and with no further detail.[3190] The evidence relied upon by the Trial Chamber therefore does not support the conclusion that Ntahobali physically killed more than one individual at the Hotel Ihuliro roadblock.

1393. In light of the above, the Appeals Chamber considers that the Trial Chamber failed to provide a reasoned opinion for its finding that Ntahobali was criminally responsible under Article 6(1) of the Statute for committing multiple killings of Tutsis at the Hotel Ihuliro roadblock. The Appeals Chamber further finds that no reasonable trier of fact could have found that Ntahobali physically perpetrated killings of Tutsis at the Hotel Ihuliro roadblock in addition to that of the Tutsi girl based on the Trial Chamber's factual findings or the evidence deemed credible by the Trial Chamber.

1394. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding Ntahobali criminally responsible under Article 6(1) of the Statute for committing killings of Tutsis other than the "Tutsi girl" at the Hotel Ihuliro roadblock in April 1994. The Appeals Chamber grants Ground 4.2 of Ntahobali's appeal to the extent that it relates to the Hotel Ihuliro roadblock events and, as a result, reverses Ntahobali's convictions for committing killings of Tutsis at the Hotel Ihuliro roadblock in addition to the "Tutsi girl".

1395. As a result, the Appeals Chamber need not consider Ntahobali's remaining arguments developed under Ground 3.3 of his appeal relating to the assessment of the evidence concerning these crimes at the Hotel Ihuliro roadblock. The Appeals Chamber will nevertheless examine Ntahobali's arguments developed under Ground 3.3 which relate to when the Hotel Ihuliro roadblock was established in light of their relevance to Ntahobali's challenges of the evidence with respect to the crimes committed against Ruvurajabo and the "Tutsi girl".

[3186] Trial Judgement, para. 3118, *referring to* Witness FA, T. 30 June 2004 p. 54 (closed session), T. 1 July 2004 p. 27, Witness QCB, T. 20 March 2002 pp. 62-65, Witness SX, T. 27 January 2004 pp. 17, 18.
[3187] The Trial Chamber did not refer to any of Witness FA's evidence when identifying what evidence it determined to be credible in this section of the Trial Judgement. *See* Trial Judgement, paras. 3122, 3124. The Appeals Chamber also notes that the Trial Chamber found major reliability and credibility issues with regard to Witness FA's testimony in relation to events connected to Hotel Ihuliro. *See ibid*., paras. 3103-3106.
[3188] *See* Witness QCB, T. 20 March 2002 pp. 62, 65.
[3189] The Prosecution acknowledges that Ntahobali was convicted based on his involvement in the killing of Ruvurajabo at the Hotel Ihuliro roadblock but that Ntahobali's responsibility was for ordering this crime. *See* Prosecution Response Brief, para. 1161.
[3190] *See* Witness SX, T. 27 January 2004 p. 17.

2. Date of Establishment of the Roadblock

1396. The Trial Chamber, referring to the testimonies of Prosecution Witnesses FA, QCB, SX, TB, TG, TQ, Nsabimana Defence Witnesses Karemano and Bararwandika as well as Kanyabashi Defence Witnesses D-2-YYYY, D-2-13-D, D-2-5-I, and D-13-D, noted that "a considerable amount of consistent evidence indicat[ed] that the [Hotel Ihuliro] roadblock was mounted towards the end of April 1994."[3191] It further recalled that Ntahobali Defence Witnesses Maurice Ntahobali, Clarisse Ntahobali, Denise Ntahobali and Nyiramasuhuko Defence Witnesses WBNC, WMKL, H1B6, WUNBJ, WCNMC, WBUC, WCUJM as well as Ntahobali and Nyiramasuhuko provided contradictory evidence, suggesting that the roadblock was not established prior to May 1994.[3192] However, the Trial Chamber, noting the family ties between Ntahobali and a number of the Defence witnesses[3193] as well as the considerable amount of evidence that the roadblock was mounted at the end of April 1994,[3194] concluded that the testimonies of these Defence witnesses failed to raise a reasonable doubt as to the allegation that the "roadblock near Hotel Ihuliro was in existence by the end of April 1994."[3195]

1397. The Trial Chamber also considered Prosecution Witness QI's evidence that the roadblock was established after UNAMIR soldiers left Hotel Ihuliro in conjunction with the evidence of Ntahobali and other Defence witnesses indicating that the UNAMIR soldiers had left Hotel Ihuliro by the end of April 1994.[3196] It found that Witness QI's evidence supported the assertion that the roadblock was set up "during the last days of April 1994".[3197] The Trial Chamber ultimately concluded that the totality of the evidence established beyond reasonable doubt that, "in late April 1994", a roadblock was erected near Hotel Ihuliro.[3198]

1398. Finally, elsewhere in the Trial Judgement, the Trial Chamber concluded, relying solely on the testimony of Witness QCB, that Ntahobali ordered the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994.[3199] Based on the testimonies of Witnesses SX and TB, it also found that Ntahobali raped and murdered a Tutsi girl who arrived at the Hotel Ihuliro roadblock "around the end of April 1994".[3200] Relying on, *inter alia*, the testimony of Witness FA that she heard Ntahobali making threats to kill the Rwamukwaya family at the Hotel Ihuliro roadblock towards the

[3191] Trial Judgement, para. 3109.
[3192] Trial Judgement, para. 3110.
[3193] Trial Judgement, para. 3110.
[3194] Trial Judgement, para. 3111.
[3195] Trial Judgement, para. 3111.
[3196] Trial Judgement, para. 3112.
[3197] Trial Judgement, para. 3112.
[3198] Trial Judgement, para. 3113.
[3199] *See* Trial Judgement, paras. 3136-3140. *See also ibid.*, paras. 2957-2959.
[3200] Trial Judgement, para. 3135.

end of April 1994, the Trial Chamber further found that Ntahobali was responsible for killing members of the Rwamukwaya family on or about 29 or 30 April 1994.[3201]

1399. Ntahobali submits that the Trial Chamber erred in finding that the Hotel Ihuliro roadblock was established around late April 1994, and not at the end of May or early June 1994. In particular, he argues that the Trial Chamber erred in: (i) assessing Prosecution evidence indicating that the Hotel Ihuliro roadblock was established in late April 1994; (ii) failing to consider Defence evidence contradicting the finding that the roadblock was established in late April 1994; (iii) concluding that evidence of the roadblock's establishment after the departure of UNAMIR soldiers supported the conclusion that the roadblock was set up in late April 1994; and (iv) failing to give sufficient weight to Defence evidence and reversing the burden of proof. The Appeals Chamber will examine these contentions in turn.

(a) Evidence Relied Upon by the Trial Chamber

1400. Ntahobali contends that the Trial Chamber erroneously relied on Witnesses FA, QCB, SX, TB, TG, TQ, and QI to conclude that the Hotel Ihuliro roadblock was established in late April 1994 given that their evidence on this point was inconsistent and contradictory,[3202] and erred in law in failing to address the inconsistencies and contradictions.[3203] Ntahobali further contends that the Trial Chamber erred in failing to exercise caution when relying on the evidence of witnesses presented by Kanyabashi and Nsabimana, who were co-accused in his proceedings, despite doing so with respect to other crime scenes.[3204]

1401. The Prosecution responds that Ntahobali does not demonstrate how any error by the Trial Chamber about when the Hotel Ihuliro roadblock was established would invalidate the Trial Judgement or result in a miscarriage of justice.[3205] Nevertheless, it highlights the evidence of several witnesses supporting the Trial Chamber's conclusion that the roadblock was established in

[3201] *See* Trial Judgement, paras. 3210, 3219. *See also ibid*., paras. 3209, 3212.
[3202] Specifically, Ntahobali highlights that the establishment of the Hotel Ihuliro roadblock occurred: (i) between 7 and 14 April 1994 according to Witness FA; (ii) on 21 April 1994 at 8.30 a.m. according to Witness QCB; (iii) about two weeks after the death of Habyarimana according to Witness SX; (iv) on 25 or 28 April 1994 according to Witness TB; (v) after the departure of UNAMIR soldiers according to Witness QI, which necessarily occurred after 25 April 1994 as Witness QI was in Matyazo until that date; (vi) after 26 April 1994 according to Witness TG, who later conceded he did not attend the establishment of the roadblock, while he stated the opposite in his statement; and (vii) after 12 April 1994, then between 19 and 21 April 1994, but then after 21 April 1994 according to Witness TQ. *See* Ntahobali Appeal Brief, para. 409. *See also ibid*., para. 380; Ntahobali Reply Brief, paras. 186, 187, 191; AT. 16 April 2015 p. 29. The Appeals Chamber observes that Ntahobali also contends that the Trial Chamber failed to consider grave credibility or reliability issues related to the Prosecution witnesses it relied upon. *See* Ntahobali Appeal Brief, para. 411. However, Ntahobali fails to identify in this specific instance the credibility issues the Trial Chamber was required to address with respect to the Prosecution witnesses. The Appeals Chamber dismisses this unsubstantiated contention without further consideration.
[3203] Ntahobali Appeal Brief, para. 410.
[3204] Ntahobali Appeal Brief, para. 412, *referring to Nchamihigo* Appeal Judgement, para. 46.
[3205] Prosecution Response Brief, para. 883.

late April 1994 and submits that the Trial Chamber exercised caution when assessing the evidence.[3206]

1402. Ntahobali replies that by providing only a vague conclusion that the roadblock was established in late April 1994, the Trial Chamber ignored that Witnesses FA, QCB, SX, and TB contradicted, rather than corroborated, each other, which would have led to the rejection of some of their evidence which supports his convictions.[3207] He submits that this error caused a miscarriage of justice and invalidates the verdict.[3208]

1403. The Appeals Chamber notes that Ntahobali's submissions seek to demonstrate error in the Trial Chamber's assessment of Prosecution evidence concerning the timing of the establishment of the Hotel Ihuliro roadblock by suggesting that witnesses offered precise, yet inconsistent and contradictory dates as to when this occurred and that the Trial Chamber erred in not addressing these differences. However, the Appeals Chamber observes that, while Witness QCB specifically testified that he saw the roadblock on 21 April 1994,[3209] Witnesses FA, SX, TB, and TG emphasised that they could only provide estimates as to when they first saw the roadblock or when it was established[3210] and that some of them refused to confirm specific dates that were suggested to them during their examinations.[3211] Contrary to Ntahobali's submissions,[3212] Witness TQ did not discuss when the roadblock was established but only testified to an incident occurring there after 21 April 1994,[3213] and Witness QI's testimony was ambiguous as to whether the roadblock was

[3206] Prosecution Response Brief, paras. 884-887. The Prosecution also highlights that witnesses frequently cannot recall exact dates and that it was reasonable for the Trial Chamber to determine the date by examining the evidence as a whole. *See ibid*., para. 889, *referring to Ndindabahizi* Appeal Judgement, para. 29.
[3207] Ntahobali Reply Brief, paras. 186-188, 191. Ntahobali posits, as an example, that if the Trial Chamber believed Witnesses SX and TB, whose evidence reflects that the Hotel Ihuliro roadblock was established after 21 April 1994, it should have acquitted Ntahobali of the crimes alleged by Witness QCB, who testified that it was established on 21 April 1994 around 8.00 a.m. and that Ntahobali committed crimes there on that day. *See ibid*., para. 187.
[3208] Ntahobali Reply Brief, para. 186.
[3209] Witness QCB, T. 20 March 2002 pp. 59-61.
[3210] *See* Witness FA, T. 1 July 2004 pp. 35, 36; Witness TB, T. 4 February 2004 p. 41, T. 5 February 2004 p. 12 (closed session); Witness SX, T. 27 January 2004 p. 15; Witness TG, T. 31 March 2004 pp. 26-28.
[3211] Indeed, contrary to Ntahobali's submissions that Witness FA testified that the roadblock was established between 7 and 14 April 1994, the witness refused to confirm this aspect of her prior statement when questioned. *See* Witness FA, T. 1 July 2004 pp. 37, 38. Likewise, Witness TB did not testify that the roadblock was established on 28 April 1994 and refused to confirm that this was the precise date upon which an incident she observed at the roadblock occurred because she "did not count the days". *See* Witness TB, T. 5 February 2004 p. 13 (closed session).
[3212] Ntahobali Appeal Brief, para. 409.
[3213] The Appeals Chamber observes that Witness TQ provided reasonable explanations for his prior references to the dates of 12 and 19 April 1994. *See* Witness TQ, T. 7 September 2004 pp. 10 (closed session), 61-63.

established before or after 25 April 1994.[3214] Furthermore, a review of the witnesses' testimonies reflects that the dates they provided related to several different events at the roadblock.[3215]

1404. Consequently, Ntahobali's submissions that the Prosecution witnesses' testimonies were contradictory and that the Trial Chamber was required to expressly resolve these inconsistencies are not persuasive. Bearing in mind that witnesses often may not recall exact date of events[3216] and that corroboration may exist even when some details differ between testimonies,[3217] the Appeals Chamber finds that Ntahobali has failed to demonstrate that it was unreasonable for the Trial Chamber to rely on the evidence of Witnesses FA, QCB, SX, TB, TG, TQ, and QI to conclude that the Hotel Ihuliro roadblock was established in late April 1994.

1405. With respect to Ntahobali's argument regarding the lack of caution exercised by the Trial Chamber in assessing his co-accused's evidence, the Appeals Chamber considers that Ntahobali does not demonstrate that the Trial Chamber was required, as a matter of law, to treat *all* the evidence presented by his co-accused with caution[3218] or that the evidence of the Defence witnesses the Trial Chamber relied upon to establish that the Hotel Ihuliro roadblock was established in late April 1994 warranted a cautious assessment.[3219] Ntahobali does not show that the Trial Chamber erred in its assessment of their evidence, and the Appeals Chamber dismisses Ntahobali's argument without further consideration.

(b) Failure to Consider Defence Evidence

1406. Ntahobali submits that, in its deliberations concerning the establishment of the Hotel Ihuliro roadblock, the Trial Chamber failed to discuss the testimonies of 13 Defence witnesses – Witnesses WCMD, WQMJP, WCKJ, WCMNA, WCNJ, WBTT, CEM, WZNA, WKNKI, WFGS,

[3214] *See* Witness QI, T. 25 March 2004 pp. 44-46 (closed session). *See also* Witness QI, T. 23 March 2004 pp. 42, 43 (closed session), 44, 45, 49, 50, T. 24 March 2004 pp. 32, 33 (closed session).
[3215] *See* Witness FA, T. 30 June 2004 pp. 53-59 (closed session); Witness QCB, T. 20 March 2002 pp. 61, 62; Witness SX, T. 27 January 2004 pp. 20-24; Witness TB, T. 4 February 2004 pp. 42, 44, 45, 48, 49; Witness TG, T. 31 March 2004 pp. 70, 71; Witness TQ, T. 7 September 2004 pp. 11-14 (closed session).
[3216] *Ndindibahizi* Appeal Judgement, para. 29.
[3217] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428. *See also Ndahimana* Appeal Judgement, para. 93 ("The Appeals Chamber also recalls that two *prima facie* credible testimonies need not be identical in all aspects in order to be corroborative and that corroboration may exist even when some details differ.").
[3218] Ntahobali again simply refers to a paragraph in the *Nchamihigo* Appeal Judgement, which concerns the treatment of accomplice witness evidence. However, Ntahobali does not demonstrate that any witness he contends the Trial Chamber failed to treat with caution was an accomplice witness whose evidence required a cautious assessment. *See* Ntahobali Appeal Brief, para. 412, *referring to Nchamihigo* Appeal Judgement, para. 46.
[3219] The Appeals Chamber observes that the paragraphs of the Trial Judgement to which Ntahobali refers in support of his claim that caution was exercised as regards other crimes scenes: (i) do not concern the witnesses the Trial Chamber relied upon in relation to the establishment of the Hotel Ihuliro roadblock; or (ii) refer to the personal or professional ties of Kanyabashi Witnesses D-13-D, D-2-5-I, and D-2-YYYY with Kanyabashi and the caution to be exercised as a result in assessing their evidence exculpating Kanyabashi. *See* Ntahobali Appeal Brief, para. 412, fn. 646, *referring to* Trial Judgement, paras. 366, 2008, 3216, 3661, 3793, 3810.

WKNNCI, NMBMP, and Béatrice Munyenyezi – who testified that the roadblock was set up in late May or early June 1994.[3220] Ntahobali further argues that the Trial Chamber ignored the evidence of four of these 13 witnesses, namely Witnesses WCMD, WQMJP, WFGS, and WKNNCI, to which there is no reference anywhere in the Trial Judgement.[3221] In his view, fair consideration of this evidence would have necessarily raised reasonable doubt that the Hotel Ihuliro roadblock was established in late April 1994.[3222]

1407. The Prosecution responds that the Trial Chamber reasonably excluded the Defence evidence cited, which failed to raise a reasonable doubt as to the date of establishment of the roadblock.[3223]

1408. The Appeals Chamber observes that the Trial Chamber expressly referred to the evidence of Defence witnesses as well as the accounts of Ntahobali and Nyiramasuhuko, as contradicting other evidence that the Hotel Ihuliro roadblock was established in late April 1994.[3224] Contrary to Ntahobali's claim that the Trial Chamber did not discuss their evidence, the Trial Chamber explicitly rejected the testimonies of Witnesses WCKJ and WCNJ that there was no roadblock in this area at the time.[3225] While the Trial Chamber did not expressly refer to the evidence of Witnesses WCMD, WQMJP, WCMNA, WBTT, CEM, WZNA, WKNKI, WFGS, WKNNCI, NMBMP, and Munyenyezi in its deliberations on the date of the establishment of the roadblock, the Appeals Chamber notes that the Trial Chamber mentioned the evidence of Witnesses WCMNA and WBTT concerning the Hotel Ihuliro roadblock elsewhere in its deliberations.[3226] In addition, the Trial Chamber referred to the relevant parts of the testimonies of Witnesses CEM, WZNA, and WKNKI concerning the mounting of the roadblock in the summary of the evidence concerning the Hotel Ihuliro roadblock.[3227] Therefore, the Appeals Chamber is satisfied that the Trial Chamber considered and assessed the evidence of Witnesses WCMNA, WBTT, CEM, WZNA, and WKNKI and rejects Ntahobali's assertion.

1409. The Trial Chamber did not mention the relevant evidence of Witnesses NMBMP and Munyenyezi in relation to the mounting of the Hotel Ihuliro roadblock when summarising their testimonies even though both witnesses testified that the Hotel Ihuliro roadblock did not exist at the

[3220] Ntahobali Appeal Brief, para. 413. *See also* AT. 16 April 2015 pp. 29, 30.
[3221] Ntahobali Appeal Brief, para. 413.
[3222] Ntahobali Appeal Brief, para. 413.
[3223] Prosecution Response Brief, paras. 887, 890.
[3224] *See* Trial Judgement, para. 3110, *referring to* Witnesses Maurice Ntahobali, Clarisse Ntahobali, Denise Ntahobali, WBNC, WMKL, H1B6, WUNBJ, WCNMC, WBUC, and WCUJM. *See also ibid*., para. 3109.
[3225] Trial Judgement, para. 3107.
[3226] *See* Trial Judgement, para. 3108, fns. 8617, 8618.
[3227] *See* Trial Judgement, paras. 3075, 3077, 3078.

end of April 1994.[3228] However, given the fact that Witnesses NMBMP and Munyenyezi were mentioned in the Trial Judgement's section concerning the Hotel Ihuliro roadblock,[3229] the Appeals Chamber is not persuaded that the Trial Chamber failed to consider their evidence.

1410. With regard to Witness WQMJP's evidence, the Appeals Chamber notes that, while the Trial Judgement does not reflect express consideration of the relevant aspects of the witness's testimony concerning the Hotel Ihuliro roadblock, the Trial Judgement shows that the Trial Chamber did not disregard his testimony, as it expressly referred to and assessed it with respect to another event in the Trial Judgement.[3230] The Appeals Chamber finds that Ntahobali is correct in asserting that the Trial Judgement does not refer to the evidence of Witnesses WFGS,[3231] WKNNCI, and WCMD. Having reviewed their evidence, the Appeals Chamber observes that Witnesses WCMD, WQMJP, WFGS, and WKNNCI testified that there was no roadblock established in front of Hotel Ihuliro in April 1994 or during the first two weeks of May 1994.[3232] The Appeals Chamber notes that this evidence is repetitive of the Defence evidence expressly considered by the Trial Chamber that no "roadblock" existed near Hotel Ihuliro in April 1994 and that it does not contain any fundamental features that would provide additional probative weight to this account.[3233] The Appeals Chamber recalls that if a trial chamber did not refer to the evidence given by a witness, it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its findings.[3234] In the present instance, the Appeals Chamber is not persuaded that the Trial Chamber disregarded the evidence of Witnesses WCMD, WQMJP ,WFGS, and WKNNCI but considers that, given its nature, the Trial Chamber found that this evidence did not prevent it from reaching the conclusion it reached. While it would have been more appropriate for the Trial Chamber to expressly discuss the relevant

[3228] Trial Judgement, paras. 3017, 3026, 3027. *See also* Witness NMBMP, T. 24 April 2008 pp. 19, 20 (closed session); Béatrice Munyenyezi, T. 27 February 2006 p. 9.
[3229] *See* Trial Judgement, paras. 3017, 3026, 3027.
[3230] *See* Trial Judgement, paras. 3183-3188, 3205, 3207. The Appeals Chamber notes that Witness WQMJP's evidence with regard to roadblocks in general was briefly addressed by the Trial Chamber. *See ibid*., fn. 14133, *referring to* Witness WQMJP, T. 25 January 2006 pp. 21, 23 (closed session).
[3231] The Appeals Chamber notes that Witness WFGS is only mentioned as being Nyiramasuhuko's first witness. *See* Trial Judgement, para. 6433.
[3232] *See* Witness WFGS, T. 31 January 2005 pp. 56, 57, T. 1 February 2005 p. 33 (closed session); Witness WKNNCI, T. 8 March 2005 pp. 13, 14; Witness WCMD, T. 28 November 2005 pp. 16-18; Witness WQMJP, T. 25 January 2006 pp. 21-23 (closed session).
[3233] *Compare* Witness WFGS, T. 31 January 2005 p. 56, T. 1 February 2005 p. 33 (closed session), Witness WKNNCI, T. 8 March 2005 pp. 13, 14, Witness WCMD, T. 28 November 2005 pp. 16-18, Witness WQMJP, T. 25 January 2006 pp. 21-23 (closed session) *with* Witness WBUC, T. 1 June 2005 p. 77, Clarisse Ntahobali, T. 9 February 2005 p. 59, Denise Ntahobali, T. 9 June 2005 pp. 27, 30, T. 13 June 2005 p. 18, Maurice Ntahobali, T. 13 September 2005 p. 25, Witness WUNBJ, T. 8 March 2006 p. 32 and p. 34 (closed session), Witness H1B6, T. 1 December 2005 p. 58 (closed session), Witness WCNMC, T. 29 November 2005 p. 36, Witness WBNC, T. 24 February 2005 p. 45, Witness WMKL, T. 6 April 2005 pp. 60, 61, 69, Witness WCUJM, T. 14 February 2006 p. 20.
[3234] *Kvočka et al.* Appeal Judgement, para. 23. *See also*, *e.g*., *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Ntabakuze* Appeal Judgement, para. 161; *Kalimanzira* Appeal Judgement, para. 195; *Nchamihigo* Appeal Judgement, para. 166; *Ndindabahizi* Appeal Judgement, para. 75.

evidence of these witnesses,[3235] the Appeals Chamber finds that Ntahobali does not demonstrate that the Trial Chamber erred in not doing so.

1411. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions concerning the Trial Chamber's alleged failure to consider Defence evidence that the Hotel Ihuliro roadblock was established after late April 1994.

(c) Evidence on UNAMIR's Departure

1412. Ntahobali argues that the Trial Chamber erred in finding that the evidence of Witnesses WBTT, WBUC, NMBMP, Munyenyezi, Denise Ntahobali, and Clarisse Ntahobali as well as Nyiramasuhuko and his, taken together with Witness QI's evidence, could support the conclusion that the Hotel Ihuliro roadblock was established in late April 1994 after the departure of UNAMIR soldiers from Hotel Ihuliro.[3236] He emphasises that, although Witness QI testified that the roadblock was established after UNAMIR's departure, the witness did not specify how long after.[3237] In any event, Ntahobali submits that these Defence witnesses as well as Nyiramasuhuko and he testified that the roadblock was established at the end of May or in early June 1994.[3238]

1413. The Prosecution responds that Witnesses WBUC, NMBMP, Munyenyezi, Denise Ntahobali, Clarisse Ntahobali, and Ntahobali testified that the UNAMIR soldiers left Hotel Ihuliro by the end of April 1994, and that Witness QI testified that after the soldiers left, a roadblock was set up.[3239]

1414. Ntahobali replies that the Trial Chamber ignored that Witnesses QI and FA provided contradictory accounts as to whether the UNAMIR soldiers had left prior to or after the establishment of the Hotel Ihuliro roadblock.[3240]

1415. The Appeals Chamber observes that the Trial Chamber's finding that the Hotel Ihuliro roadblock was established after the departure of UNAMIR soldiers from Hotel Ihuliro took into account the evidence of Ntahobali and several Defence witnesses, whose evidence reflects that these soldiers left Butare prior to 21 April 1994.[3241] While Witness QI did not expressly testify as to how long after their departure the roadblock was mounted, a reasonable trier of fact could have

[3235] *See also infra*, paras. 1424, 1427.
[3236] Ntahobali Appeal Brief, para. 418, *referring to* Trial Judgement, para. 3112.
[3237] Ntahobali Appeal Brief, para. 418.
[3238] Ntahobali Appeal Brief, para. 418.
[3239] Prosecution Response Brief, para. 885, *referring to* Trial Judgement, paras. 3029, 3064, 3071.
[3240] Ntahobali Reply Brief, para. 189.
[3241] *See* Trial Judgement, para. 3112, fn. 8624; Ntahobali, T. 24 April 2006 pp. 34, 35; Witness WBTT, T. 31 May 2005 pp. 47, 48 (closed session); Denise Ntahobali, T. 9 June 2005 pp. 21-23, T. 13 June 2005 p. 17; Witness WBUC, T. 1 June 2005 pp. 54-56. *See also* Trial Judgement, para. 3029.

interpreted the witness's testimony as indicative that the timing of the establishment of the roadblock was tied to the soldiers' departure.[3242]

1416. Moreover, the Appeals Chamber observes that the Trial Chamber expressly considered that Witnesses WBUC, Denise Ntahobali, Clarisse Ntahobali, and Ntahobali testified that the roadblock was not established in late April 1994.[3243] Bearing in mind that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony,[3244] the Appeals Chamber finds that a reasonable trier of fact could have relied on the testimonies of Defence witnesses to establish that UNAMIR soldiers left Hotel Ihuliro in late April 1994 – an uncontested fact – but nonetheless reject their evidence concerning the highly contested fact of when the Hotel Ihuliro roadblock was established given the Trial Chamber's doubts about their credibility and the considerable contradictory evidence.[3245]

1417. As for Ntahobali's contention that the evidence of Witnesses QI and FA was inconsistent as to whether UNAMIR soldiers were present when the Hotel Ihuliro roadblock was established, the Appeals Chamber observes that Witness FA, unlike Witness QI, testified that the soldiers were present when the Hotel Ihuliro roadblock was set up.[3246] Nevertheless, the Appeals Chamber finds that the Trial Chamber retained the prerogative to rely on the testimonies of Witnesses QI, WBUC, NMBMP, Munyenyezi, Denise Ntahobali, and Clarisse Ntahobali as well as Ntahobali, who all provided evidence that no UNAMIR soldiers were present at Hotel Ihuliro when the Hotel Ihuliro roadblock was established, and that the Trial Chamber was not required to explicitly address the aspect of Witness FA's evidence in conflict with this when doing so.

1418. Accordingly, the Appeals Chamber dismisses Ntahobali's submissions regarding the assessment of the evidence on the UNAMIR's departure.

(d) Defence Evidence and Reversal of Burden of Proof

1419. Ntahobali contends that the Trial Chamber failed to provide a reasoned opinion when rejecting the totality of the Defence evidence contradicting the Prosecution evidence.[3247] He contends that, while the Trial Chamber was entitled to treat five Defence witnesses with caution because of their ties with the Accused, this was not the case for the remaining 20 witnesses who

[3242] *See* Witness QI, T. 25 March 2004 p. 46 (closed session) ("But after UNAMIR's departure they set up a roadblock there manned by civilians".).
[3243] *See* Trial Judgement, para. 3110. With respect to Witnesses NMBMP and Munyenyezi, *see supra*, para. 1409.
[3244] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[3245] *See supra*, paras. 1396, 1397.
[3246] *See* Witness FA, T. 1 July 2004 pp. 48, 49.
[3247] Ntahobali Appeal Brief, paras. 413, 415, 416. *See also ibid*., para. 419.

testified that no roadblock had been established before late May or early June 1994.[3248] In light of the abundant Defence evidence reflecting that the Hotel Ihuliro roadblock was not established prior to the end of May or early June 1994, Ntahobali argues that any reasonable trier of fact would have concluded that reasonable doubt existed as to the date of the establishment of the roadblock in April 1994.[3249] He submits that the Trial Chamber misapplied the burden of proof in preferring the Prosecution evidence to the Defence evidence and requests that he be acquitted of all crimes committed at the roadblock prior to the end of May or the beginning of June 1994.[3250]

1420. The Prosecution responds that the Trial Chamber reasonably excluded the Defence evidence relied upon by Ntahobali because some of the witnesses were Ntahobali's relatives.[3251]

1421. The Appeals Chamber notes that the Trial Chamber provided reasons as to why it did not rely on a number of Defence witnesses,[3252] including that some of those mentioned by Ntahobali were his relatives.[3253] The Appeals Chamber also observes that some of the witnesses were his childhood friends.[3254] As such, a reasonable trier of fact could have concluded that these witnesses might have had an incentive to minimise Ntahobali's responsibility for crimes committed at the Hotel Ihuliro roadblock and assess their evidence with caution.[3255] In addition, the Trial Chamber addressed the fact that Witnesses WCNJ's and WCKJ's evidence that they had never seen a roadblock in the area could not raise a reasonable doubt as to whether such roadblock existed.[3256] The Appeals Chamber finds that a reasonable trier of fact could have concluded that the evidence of these two witnesses did not raise doubt in light of consistent Prosecution evidence, supported by a number of Defence witnesses, reflecting the establishment of the Hotel Ihuliro roadblock in late April 1994.

1422. Furthermore, a review of the evidence of Witnesses WBTT and WCUJM reveals that their testimonies are of limited probative value as to whether the Hotel Ihuliro roadblock was established

[3248] Ntahobali Appeal Brief, para. 413, *referring to* the testimonies of Witnesses WFGS, WKNNCI, WCMD, WQMJP, WCKJ, WCMNA, WCNJ, WBTT, CEM, WZNA, WKNKI, NMBMP, and Munyenyezi *and* Trial Judgement, para. 3110 (*referring to* the testimonies of Witnesses Maurice Ntahobali, Clarisse Ntahobali, Denise Ntahobali, WBNC, WMKL, H1B6, WUNBJ, WCNMC, WBUC, WCUJM as well as Ntahobali and Nyiramasuhuko).
[3249] Ntahobali Appeal Brief, paras. 413, 417, 419.
[3250] Ntahobali Appeal Brief, paras. 415-417, 420.
[3251] Prosecution Response Brief, paras. 887, 888. *See also ibid*., para. 890.
[3252] *See* Trial Judgement, paras. 3107, 3111.
[3253] Trial Judgement, para. 3110. *See also ibid*., paras. 10, 3017, 3026, 3053, 3062, 3067. These are Witnesses Maurice Ntahobali, Denise Ntahobali, Clarisse Ntahobali, Munyenyezi, NMBMP, and Nyiramasuhuko.
[3254] *See* Ntahobali Closing Brief, para. 84. The Appeals Chamber notes that Witnesses WQMJP and WCMD were Ntahobali's childhood friends.
[3255] *See* Trial Judgement, para. 3110.
[3256] Trial Judgement, para. 3107, *referring to* Witness WCNJ, T. 2 February 2006 pp. 7, 8, Witness WCKJ, T. 31 January 2006 p. 70. *See also* Trial Judgement, paras. 3020, 3025. The Appeals Chamber notes that, contrary to the Trial Chamber's finding, Witness WCNJ testified to having seen a roadblock in the vicinity of the EER mounted towards the end of May 1994. *Compare* Witness WCNJ, T. 2 February 2006 p. 7 *with* Trial Judgement, para. 3020.

in late April 1994. The Appeals Chamber notes that as Witness WBTT left Butare on 20 April 1994, she could not testify as to the existence of a roadblock in late April 1994.[3257] Likewise, the Appeals Chamber notes that Witness WCUJM testified to having made three trips to Butare Town, the first on 7 April 1994, the second one week after, and the third between May and June 1994. While the witness testified to having seen a roadblock near Hotel Ihuliro during his third trip, his evidence reflects that he did not pass by the road in late April 1994.[3258] Consequently, the Appeals Chamber finds that a reasonable trier of fact could have considered that this evidence did not raise a reasonable doubt as it is not incompatible with the finding that the Hotel Ihuliro roadblock was established in late April 1994.

1423. Having reviewed Witness H1B6's testimony, the Appeals Chamber is also of the view that a reasonable trier of fact could have decided not to credit this witness in light of the likelihood that he did not use the road between Hotel Ihuliro and the EER during the relevant time period and that, as a result, he would have been unable to provide direct evidence as to the date when the Hotel Ihuliro roadblock was established.[3259] With respect to Witness WMKL, the Appeals Chamber notes that the Trial Chamber concluded elsewhere in the Trial Judgement that the witness's account concerning the security of persons seeking refuge at the Butare Prefecture Office was not plausible and did not rely on his account about Ruvurajabo's death.[3260] Against this background, the Appeals Chamber is satisfied that a reasonable trier of fact could have relied on Prosecution and Defence evidence reflecting the establishment of the Hotel Ihuliro roadblock in late April 1994 notwithstanding the evidence of Witnesses H1B6 and WMKL to the contrary. Recalling that a trial chamber does not need to set out in detail why it accepted or rejected a particular testimony,[3261] the Appeals Chamber finds that the Trial Chamber did not fail to provide a reasoned opinion in not articulating every step of its reasoning for not relying on Witnesses WBTT, WCUJM, H1B6, and WMKL.

1424. The Appeals Chamber further finds that, while Witnesses WBNC, WUNBJ, WCNMC, WBUC, WCMNA, CEM, WZNA, WKNKI, WFGS, WKNNCI, WCMD, and WQMJP provided evidence contrary to the Trial Chamber's finding,[3262] a reasonable trier of fact could have

[3257] *See* Witness WBTT, T. 31 May 2005 p. 47 (closed session). *See also* Trial Judgement, paras. 3051, 3052.
[3258] *See* Witness WCUJM, T. 14 February 2006 pp. 19, 20.
[3259] The Trial Chamber noted that the witness's evidence that he used the road between Hotel Ihuliro and the EER was challenged in cross-examination and that the witness conceded that this road was not the shortest itinerary from his residence to the Butare market. *See* Trial Judgement, para. 3016. *See also*, Witness H1B6, T. 5 December 2005 pp. 56, 57 (closed session).
[3260] *See* Trial Judgement, paras. 2814, 3136-3140.
[3261] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 136; *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269.
[3262] *See* Witness WBNC, T. 24 February 2005 p. 46; Witness WUNBJ, T. 8 March 2006 pp. 29-32 (closed session); Witness WCNMC, T. 29 November 2005 p. 36; Witness WBUC, T. 1 June 2005 p. 77; Witness WCMNA, T. 21 February 2006 pp. 24-28 (closed session); Witness CEM, T. 14 February 2005 p. 48; Witness WZNA, T. 4 April 2005 pp. 48-50, 58; Witness WKNKI, T. 2 March 2005 pp. 4, 5, 8, 9; Witness WFGS, T. 31 January 2005

nevertheless relied on the direct and consistent evidence of Witnesses FA, QCB, SX, TB, TG, TQ, Karemano, Bararwandika, D-2-Y-Y-Y, D-2-13-D, D-2-5-I, and D-13-D in finding that the Hotel Ihuliro roadblock was established towards the end of April 1994.[3263] Of particular significance, the Appeals Chamber has affirmed the Trial Chamber's assessment of Prosecution evidence that implicates Ntahobali in criminal conduct at this roadblock in late April 1994.[3264] While it would have been more appropriate for the Trial Chamber to expressly refer to all of the relevant evidence when reaching its conclusion on whether Ntahobali's and Nyiramasuhuko's evidence raised a reasonable doubt as to the allegation that the roadblock was in existence by the end of April 1994,[3265] the Appeals Chamber is satisfied that it was within the Trial Chamber's discretion, as it was presented with two competing accounts, to grant more probative weight to one account and to prefer it over the other.

1425. With regard to Ntahobali's contention that the Trial Chamber misapplied the burden of proof, the Appeals Chamber first recalls that the Prosecution bears the burden of establishing facts material to the guilt of an accused beyond reasonable doubt, and suggesting that the Defence should present evidence proving the contrary would be an impermissible shift of such burden.[3266] In this case, the Appeals Chamber observes that the Trial Chamber took the view that the Defence evidence concerning the establishment of the Hotel Ihuliro roadblock in May or June 1994 did not raise a reasonable doubt as to the existence of this roadblock by the end of April 1994.[3267] The Appeals Chamber finds no error in the Trial Chamber's preference for the account presented by the Prosecution and supported by co-accused evidence. In the opinion of the Appeals Chamber, the Trial Judgement does not reflect that the Trial Chamber reversed the burden of proof but that the Prosecution demonstrated beyond a reasonable doubt that the Hotel Ihuliro roadblock was established in late April 1994 notwithstanding other evidence to the contrary. The Appeals Chamber is satisfied that the Trial Chamber properly applied the burden of proof and the presumption of innocence.

1426. Accordingly, the Appeals Chamber dismisses Ntahobali's arguments regarding the weight granted to the exculpatory evidence and the application of the burden of proof.

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p. 56; T. 1 February 2005 p. 33 (closed session); Witness WKNNCI, T. 8 March 2005 pp. 13, 14; Witness WCMD, T. 28 November 2005 pp. 16-18; Witness WQMJP, T. 25 January 2006 pp. 21-23 (closed session).

[3263] *See supra*, para. 1410.

[3264] *See infra*, Sections V.G.3(c), V.G.4(c).

[3265] The Appeals Chamber notes that the Trial Chamber did not expressly refer to the evidence of Witnesses WCMNA, CEM, WZNA, WKNKI, WFGS, WKNNCI, WCMD, and WQMJP when reaching its conclusion. *See* Trial Judgement, paras. 3109-3113.

[3266] *Ntawukulilyayo* Appeal Judgement, para. 103, *referring to Milošević* Appeal Judgement, para. 231.

[3267] *See* Trial Judgement, para. 3111.

(e) Conclusion

1427. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that no reasonable trier of fact could have concluded based on the totality of the evidence before it that the Hotel Ihuliro roadblock was established in late April 1994.

3. Killing of Léopold Ruvurajabo

1428. The Trial Chamber relied exclusively on the evidence of Witness QCB in finding that Ntahobali ordered the killing of Ruvurajabo, a Tutsi, at the Hotel Ihuliro roadblock on 21 April 1994.[3268]

1429. Ntahobali submits that, in assessing the relevant evidence, the Trial Chamber: (i) failed to exercise sufficient caution in assessing Witness QCB's evidence; (ii) erred in assessing Witness QCB's prior inconsistent statement; (iii) erred in assessing Witness QCB's identification evidence; (iv) failed to assess evidence; and (v) made contradictory findings. Ntahobali further contends that the Trial Chamber erred in finding him responsible as a superior under Article 6(3) of the Statute for the killing of Ruvurajabo. The Appeals Chamber will address these contentions in turn.

1430. As noted previously, on 14 April 2015, the Appeals Chamber admitted as additional evidence on appeal a confidential statement given by Witness QCB on 27 May 2004 and a second confidential statement that he gave on 2 June 2004 to Canadian investigators during investigations in Canadian criminal proceedings for the purpose of assessing limited aspects of these materials as they concerned Witness QCB's testimony.[3269] In accordance with the relevant standard, if the Appeals Chamber determines that a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt on the basis of the trial record alone, the Appeals Chamber will then determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[3270]

(a) Assessment of Evidence

(i) Insufficient Caution

1431. Ntahobali argues that the Trial Chamber failed to exercise sufficient caution with respect to the uncorroborated evidence of Witness QCB, who was detained in Rwanda and awaiting

[3268] *See* Trial Judgement, paras. 3136-3140. *See also ibid*., paras. 2957-2959.
[3269] *See supra*, para. 1331; 14 April 2015 Appeal Decision, para. 49.
[3270] *See supra*, para. 33.

sentencing at the time of his testimony.[3271] He contends that the Trial Chamber erred in concluding that, because the witness had no role in the killing of Ruvurajabo, he did not have an interest in inculpating Ntahobali in this incident.[3272] Ntahobali argues that this conclusion is in direct contradiction with the Trial Chamber's position elsewhere in the Trial Judgement that Witness QCB, who had no role in the IRST killings, had an incentive to implicate Ntahobali with respect to those killings in order to avoid a severe sentence.[3273] He also contends that this position contradicts the Trial Chamber's reasoning concerning Prosecution Witness FAC.[3274] He argues that no reasonable trier of fact could have made such diametrically opposed conclusions.[3275]

1432. Moreover, Ntahobali highlights that the Trial Chamber rejected Witness QCB's evidence concerning crimes committed at the Butare Prefecture Office simply because he was found insufficiently reliable given his status as a detainee and because his evidence was uncorroborated.[3276] He submits that the same conclusion should have been reached with respect to Witness QCB's evidence concerning Ruvurajabo's killing.[3277] Ntahobali argues that no reasonable trier of fact could have relied upon the uncorroborated evidence of Witness QCB.[3278]

1433. The Prosecution responds that Ntahobali does not demonstrate that the Trial Chamber lacked caution in assessing Witness QCB's evidence regarding the killing of Ruvurajabo.[3279] It submits that the Trial Chamber exercised the same caution when evaluating Witness QCB's testimony with respect to the killing of Ruvurajabo as it did when assessing his testimony concerning the killings near the IRST.[3280] The Prosecution also rejects Ntahobali's contention that the Trial Chamber failed to apply caution to Witness QCB's evidence concerning the killing of Ruvurajabo simply because the Trial Chamber required corroboration of Witness QCB's evidence in relation to the Butare Prefecture Office and exercised its discretion not to rely on it in that instance.[3281]

1434. The Appeals Chamber observes that, when considering Witness QCB's evidence in relation to the IRST killings, the Trial Chamber noted that, at the time of his testimony, Witness QCB had confessed to participating in unrelated killings, was detained in Rwanda, and was awaiting

[3271] Ntahobali Notice of Appeal, para. 174; Ntahobali Appeal Brief, paras. 402-405.
[3272] Ntahobali Appeal Brief, para. 402, *referring to* Trial Judgement, para. 3138.
[3273] Ntahobali Appeal Brief, para. 403, *referring to* Trial Judgement, para. 1474. *See also* Ntahobali Reply Brief, para. 183; AT. 15 April 2015 p. 53 (closed session).
[3274] Ntahobali Appeal Brief, para. 403, *referring to* Trial Judgement, paras. 3343, 3748.
[3275] Ntahobali Appeal Brief, para. 403.
[3276] Ntahobali Appeal Brief, para. 404.
[3277] Ntahobali Appeal Brief, paras. 404, 405.
[3278] Ntahobali Notice of Appeal, para. 169; Ntahobali Appeal Brief, para. 405. *See also* AT. 15 April 2015 pp. 53, 54 (closed session).
[3279] Prosecution Response Brief, paras. 877-880. *See also* AT. 16 April 2015 p. 5.
[3280] Prosecution Response Brief, para. 879. *See also* AT. 16 April 2015 p. 4.

sentencing.[3282] The Trial Chamber was of the view that Witness QCB's evidence had to be approached with appropriate caution as he may have had an incentive to implicate Ntahobali in order to avoid a severe sentence.[3283] In assessing Witness QCB's evidence concerning Ruvurajabo's killing, the Trial Chamber recalled that, at the time of his testimony, Witness QCB was a detained witness and that his testimony must be treated with appropriate caution.[3284] The Trial Chamber concluded, however, that because Witness QCB "played no role in the present incident [and] his evidence [was] that of an eyewitness", it did not consider him to have "any personal interest in lying about the facts or inculpating Ntahobali."[3285]

1435. The Appeals Chamber finds that the Trial Chamber reached conflicting conclusions as to whether Witness QCB had an interest in implicating Ntahobali. Notwithstanding these contradictions, the Appeals Chamber is not persuaded that the Trial Chamber's analysis of Witness QCB's evidence in either instance reflects insufficient caution given the circumstances surrounding his testimony. As discussed in detail elsewhere in this Judgement, the Trial Chamber exercised sufficient caution in light of Witness QCB's circumstances at the time of his testimony when assessing his evidence about the IRST killings.[3286] The Trial Chamber's analysis of Witness QCB's evidence concerning the killing of Ruvurajabo also reflects that it took into account various factors relevant to a cautious assessment of his credibility. The Trial Chamber recalled that Witness QCB was a detained witness and that it was required to treat his evidence with appropriate caution.[3287] It considered discrepancies within Witness QCB's testimony[3288] and inconsistencies with his prior statement to Tribunal investigators.[3289] In this context, the Trial Chamber concluded that "Witness QCB's testimony was detailed" and that he was "credible with respect to this incident."[3290] Bearing in mind that a trial chamber enjoys broad discretion in assessing the credibility of witnesses and in determining the weight to be accorded to each testimony,[3291] the Appeals Chamber is satisfied that the Trial Chamber, notwithstanding its statement that Witness QCB did not have an incentive to lie or implicate Ntahobali, assessed Witness QCB's evidence with sufficient caution.

[3281] Prosecution Response Brief, para. 880.
[3282] Trial Judgement, para. 1474.
[3283] Trial Judgement, para. 1474.
[3284] Trial Judgement, para. 3136. *See also ibid*., para. 2957.
[3285] Trial Judgement, para. 3138.
[3286] *See supra*, para. 1345.
[3287] Trial Judgement, para. 3136. The Appeals Chamber observes that the Trial Chamber repeatedly considered that Witness QCB had participated in the genocide, was detained, and was awaiting sentencing when considering his evidence. *See ibid.*, paras. 1465, 1474, 1553, 1673, 1686, 2611, 3138.
[3288] *See* Trial Judgement, paras. 2958, 3137.
[3289] *See* Trial Judgement, para. 3139. *See also ibid*., para. 2959.
[3290] Trial Judgement, para. 3139.
[3291] *See*, *e.g*., *Nzabonimana* Appeal Judgement, para. 45; *Ndindiliyimana et al*. Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Nahimana et al*. Appeal Judgement, para. 194.

1436. The Appeals Chamber further finds that Ntahobali's argument that the Trial Chamber took inconsistent approaches with respect to the assessment of Witnesses QCB and FAC lacks merit. The Appeals Chamber observes that the Trial Chamber concluded that Witness FAC may have had an incentive to implicate Kanyabashi in certain crimes in order to exonerate himself.[3292] In making this finding, the Trial Chamber not only considered that Witness FAC was "a detained accomplice witness" at the time of his testimony but also specific circumstances pointing to his "willingness to tailor his evidence to serve his interests", including his own acknowledgement that he confessed to certain crimes expecting consideration in return.[3293] Ntahobali neither challenges this finding nor suggests that similar factors existed in relation to Witness QCB.

1437. The Appeals Chamber recalls that Ntahobali has failed to demonstrate that the Trial Chamber erred in rejecting Witness QCB's uncorroborated evidence concerning an event at the prefectoral office in late April 1994 while accepting his uncorroborated testimony about killings at the IRST and the killing of Ruvurajabo.[3294] Contrary to what Ntahobali suggests, the Trial Chamber's refusal to rely on Witness QCB's evidence concerning the event at the prefectoral office does not reflect a finding that the witness was not credible or reliable in general and was not an impediment to the Trial Chamber's reliance on his testimony concerning Ruvurajabo's killing.[3295]

1438. For the foregoing reasons, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber failed to exercise sufficient caution when assessing Witness QCB's testimony concerning the killing of Ruvurajabo.

(ii) Prior Inconsistent Statement

1439. In summarising Witness QCB's evidence in relation to the killing of Ruvurajabo, the Trial Chamber understood the witness to have testified in cross-examination that "he met Ruvurajabo at the roadblock".[3296] The Trial Chamber also noted that this was contradicted by the witness's prior statement to Tribunal investigators, which it summarised as stating that "[Witness QCB] had left his home together with Ruvurajabo."[3297] When assessing Witness QCB's evidence, the Trial Chamber

[3292] Trial Judgement, para. 3343. *See also ibid*., para. 3748.
[3293] Trial Judgement, para. 3343. *See also ibid*., paras. 3345, 3748.
[3294] *See supra*, paras. 1344, 1345.
[3295] The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony. *See*, *e.g*., *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[3296] Trial Judgement, para. 2959, *referring to* Witness QCB, T. 20 March 2002 p. 61.
[3297] Trial Judgement, para. 2959. *See also ibid.*, para. 3139, *referring to* Witness QCB's Statement.

concluded that the variance between Witness QCB's Statement and his testimony was minor and did not relate to a material fact.[3298]

1440. Ntahobali contends that the Trial Chamber erred by unreasonably concluding that the inconsistency between Witness QCB's Statement and his testimony concerning the place he met Ruvurajabo was minor or inconsequential.[3299] Ntahobali submits that the witness's explanation for the contradiction was incoherent and vague and that, during his re-examination, the witness confirmed the accuracy of his prior statement, thereby contradicting himself again.[3300] According to Ntahobali, this contradiction was relevant to Witness QCB's entire account of Ruvurajabo's murder and, because the witness's testimony was uncorroborated, the Trial Chamber was required to assess that witness's evidence cautiously.[3301]

1441. The Prosecution responds that the Trial Chamber did not err in finding that the contradictions in Witness QCB's evidence were minor.[3302]

1442. Having reviewed the relevant transcripts, including the portions referred to by the Trial Chamber and Ntahobali, as well as Witness QCB's Statement,[3303] the Appeals Chamber finds no error in the Trial Chamber's conclusion that the variance was minor. Notably, Witness QCB repeatedly confirmed that he met Ruvurajabo at the roadblock near President Sindikubwabo's home and his testimony on this point is consistent in all material respects.[3304] To the extent his testimony differed from his prior statement, which reflects that the witness left Nkubi Sector with Ruvurajabo,[3305] any incoherence in Witness QCB's explanation stemmed from an absence of questioning.[3306]

1443. Furthermore, while Witness QCB confirmed the content of his prior statement during his re-examination,[3307] the Appeals Chamber is not persuaded by Ntahobali's contention that this reflects a further material discrepancy and that the Trial Chamber did not exercise the necessary caution when assessing it. The Appeals Chamber finds that Ntahobali has not demonstrated that no

[3298] Trial Judgement, para. 3139.
[3299] Ntahobali Appeal Brief, paras. 399, 400.
[3300] Ntahobali Appeal Brief, para. 400.
[3301] Ntahobali Appeal Brief, para. 400.
[3302] Prosecution Response Brief, para. 874. *See also ibid*., para. 870.
[3303] *See* Witness QCB, T. 20 March 2002 p. 61, T. 25 March 2002 pp. 112, 113 (closed session), 115, 122-126, 128-131, 140, 141, T. 26 March 2002 pp. 33-36, T. 3 April 2002 pp. 76-78; Witness QCB's Statement, p. K0112439 (Registry pagination).
[3304] Witness QCB, T. 25 March 2002 pp. 112, 113 (closed session) 115, 122, 140, T. 26 March 2002 pp. 33, 36, 37.
[3305] The Appeals Chamber observes that Witness QCB's Statement does not reflect that the witness had left *his home* with Ruvurajabo. *See* Witness QCB's Statement, p. K0112439 (Registry pagination) ("*C'est le même jour, au matin, que j'ai quitté Nkubi pour aller reprendre mon travail à Butare, en compagnie d'un voisin tutsi nommé RUVURAJABO Léopold*."). *See also ibid.*, p. K0119775 (Registry pagination) (English translation).
[3306] *See* Witness QCB, T. 26 March 2002 pp. 36, 37.
[3307] Witness QCB, T. 2 April 2002 pp. 76-78.

reasonable trier of fact could have concluded that the variance between Witness QCB's Statement and his testimony as to the exact location where he met Ruvurajabo was minor.[3308]

1444. The Appeals Chamber therefore finds no error in the Trial Chamber's assessment of Witness QCB's evidence in light of his prior statement.

(iii) Identification Evidence

1445. Ntahobali argues that the Trial Chamber erred in concluding that Witness QCB knew Ntahobali "a long time before the alleged crimes occurred", referring to his challenges raised in relation to Witness QCB's evidence about the IRST killings.[3309] Ntahobali repeats that the Trial Chamber erred in finding Witness QCB's identification evidence credible.[3310]

1446. In response, the Prosecution refers to its arguments made in relation to the IRST killings that the Trial Chamber acted within its discretion in accepting Witness QCB's identification evidence.[3311]

1447. The Appeals Chamber observes that the Trial Chamber concluded that since "Witness QCB already knew Ntahobali, a long time before the alleged crimes occurred", his identification of Ntahobali as the person that he saw at the roadblock where Ruvurajabo was killed was reliable.[3312] The Appeals Chamber notes that this conclusion was based on the evidence of Witness QCB's prior knowledge of Ntahobali, the adequacy of which had been evaluated by the Trial Chamber elsewhere in the Trial Judgement.[3313] The Appeals Chamber recalls that Ntahobali's challenges of Witness QCB's identification evidence, including the basis for his prior knowledge, have already been addressed and dismissed in a prior section of this Judgement.[3314]

1448. Ntahobali's present submissions do not identify a new error in support of his position that the Trial Chamber erred in its assessment of Witness QCB's identification evidence and the Appeals Chamber therefore rejects them.

(iv) Failure to Consider Evidence

1449. Ntahobali submits that the Trial Chamber ignored exculpatory evidence from Defence Witness WMKL that Ruvurajabo was alive until mid-May 1994 and that he was killed later that

[3308] Trial Judgement, para. 3139.
[3309] Ntahobali Appeal Brief, para. 401, *referring to* Trial Judgement, para. 3137.
[3310] Ntahobali Notice of Appeal, paras. 171-173, *referring to ibid.*, paras. 153-158; Ntahobali Appeal Brief, para. 401.
[3311] Prosecution Response Brief, para. 875.
[3312] Trial Judgement, para. 3137, *referring to* Witness QCB, T. 20 March 2002 p. 71, T. 25 March 2002 pp. 46, 47 (closed session).
[3313] *See* Trial Judgement, paras. 1468, 1476.

month, thereby undermining Witness QCB's evidence that Ruvurajabo was killed on 21 April 1994.[3315] Ntahobali emphasises that the Trial Chamber accepted other aspects of Witness WMKL's evidence and that it failed to provide a reasoned opinion by not assessing Witness WMKL's testimony that was in direct contradiction with Witness QCB's evidence.[3316] In his view, no reasonable trier of fact could have relied on Witness QCB's evidence concerning Ruvurajabo's murder in light of Witness WMKL's testimony to the contrary.[3317]

1450. The Prosecution responds that Witness WMKL did not testify that Ruvurajabo was still alive in May 1994 but that he only *thought* he saw Ruvurajabo that month.[3318] It further contends that it was within the Trial Chamber's discretion to accept some but not all of Witness WMKL's evidence and that it was not obliged to discuss his testimony when considering Ruvurajabo's killing.[3319]

1451. The Appeals Chamber observes that Witness WMKL testified that he saw Ruvurajabo around what he "believe[d]" was mid-May 1994.[3320] He further testified that he learned of Ruvurajabo's death towards the end of May, when he overheard someone boasting about having killed him.[3321] The Trial Judgement does not reflect express consideration of these aspects of Witness WMKL's testimony. However, the Trial Judgement shows that the Trial Chamber did not ignore Witness WMKL's testimony, as it expressly assessed his evidence with respect to several other events in the Trial Judgement.[3322]

1452. The Appeals Chamber also notes that Witness WMKL's testimony only approximated that mid-May 1994 was the last time the witness saw Ruvurajabo.[3323] Notably, the Trial Chamber elsewhere rejected Witness WMKL's evidence as it related to the timing of when the Hotel Ihuliro roadblock was established, an event that occurred around the time of Ruvurajabo's killing.[3324] The Appeals Chamber further observes that Witness WMKL's evidence about Ruvurajabo's killing was indirect.[3325] In light of the fact that Witness WMKL could only estimate when he last saw Ruvurajabo, the Trial Chamber's doubts about Witness WMKL's evidence as it related to his ability

[3314] *See supra*, Section V.F.1(b).
[3315] Ntahobali Appeal Brief, paras. 397, 398. *See also ibid*., para. 380; AT. 16 April 2015 pp. 28, 29.
[3316] Ntahobali Appeal Brief, para. 398, *referring to* Trial Judgement, para. 5101. *See also* Ntahobali Reply Brief, paras. 179, 180.
[3317] Ntahobali Appeal Brief, paras. 397, 398.
[3318] Prosecution Response Brief, para. 872 (emphasis added).
[3319] Prosecution Response Brief, para. 873.
[3320] *See* Witness WMKL, T. 7 April 2005 p. 11.
[3321] *See* Witness WMKL, T. 7 April 2005 pp. 11, 13 *and* p. 11 (under seal extract).
[3322] *See* Trial Judgement, paras. 457, 1572, 1676, 1682, 2389-2391, 2777, 2784, 2814, 2920, 3038-3040, 3108, 3110, 3699, 3779, 3809, 4988, 4990, 5062, 5071, 5100, 5101, 6445.
[3323] *See* Witness WMKL, T. 7 April 2005 p. 11.
[3324] *See* Trial Judgement, paras. 3109-3113.
[3325] *See* Witness WMKL, T. 7 April 2005 pp. 11 (under seal extract), 13.

to recall the timing of another event, and the limited probative value of Witness WMKL's testimony when compared to Witness QCB's direct evidence of Ruvurajabo's killing, the Appeals Chamber considers that a reasonable trier of fact could have preferred Witness QCB's evidence over Witness WMKL's and not expressly discuss this aspect of Witness WMKL's testimony in the Trial Judgement.[3326]

1453. Moreover, the Appeals Chamber is not persuaded by Ntahobali's contention that the Trial Chamber's approval of an isolated aspect of Witness WMKL's testimony reflected an overall endorsement of this witness's evidence.[3327] To the contrary, the Trial Chamber found the witness's testimony concerning the timing of the establishment of the Hotel Ihuliro roadblock unpersuasive,[3328] and also concluded that Witness WMKL's account concerning the security of persons seeking refuge at the Butare Prefecture Office was not plausible.[3329] Bearing in mind that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony,[3330] the Appeals Chamber is not convinced by Ntahobali's suggestion that the Trial Chamber's acceptance of an isolated aspect of Witness WMKL's testimony rendered its decision to rely on Witness QCB's account of Ruvurajabo's death unreasonable.

1454. Accordingly, Ntahobali has failed to demonstrate that the Trial Chamber failed to consider Witness WMKL's evidence regarding Ruvurajabo and that no reasonable trier of fact could have relied on Witness QCB's evidence regarding the killing of Ruvurajabo in light of the testimony of Witness WMKL.

(v) Contradictory Findings

1455. Ntahobali highlights that the Trial Chamber, relying in part on the testimony of Witness QI, found that the Hotel Ihuliro roadblock, where Ruvurajabo was killed, was established "during the last days of April 1994."[3331] He contends that this finding is inconsistent with Witness QCB's

[3326] With respect to Ntahobali's submission that the Trial Chamber failed to provide a reasoned opinion when not discussing Witness WMKL's evidence, the Appeals Chamber observes that nowhere in his closing submissions did Ntahobali argue the clear relevance and importance of it to the killing of Ruvurajabo. *See* Ntahobali Closing Brief, paras. 6, 139, 142, 159, 276, 423 *and* Appendix 1, para. 6; Ntahobali Closing Arguments, T. 23 April 2009 pp. 7, 8. *See also* T. 23 April 2009 pp. 4, 5, 23, 24, 34-36 (generally discussing Witness QCB's evidence and credibility).
[3327] The Trial Chamber stated that it "believe[d] the testimonies of Witnesses QY and WMKL to the extent that what was made public to the eyes of the international community was that the refugees would be transferred [to Rango Forest] for their own safety", even though it was of the view that "this might have been part of the strategy to improve the international community's perception of the authorities in Rwanda and hide their true intentions, which were to get rid of the Tutsi refugees." *See* Trial Judgement, para. 5101. *See also ibid*., paras. 5099, 5100.
[3328] *See* Trial Judgement, paras. 3109-3113.
[3329] Trial Judgement, para. 2814.
[3330] *See*, *e.g*., *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[3331] Ntahobali Appeal Brief, para. 380 (emphasis omitted), *referring to* Trial Judgement, para. 3112. Ntahobali develops this argument in the context of whether the Rugira roadblock existed as early as 21 April 1994. However, since

evidence that Ruvurajabo was killed at that roadblock on 21 April 1994, as Witness QI testified that the roadblock had not been established until after the departure of UNAMIR soldiers, which necessarily occurred after 25 April 1994 as Witness QI was in Matyazo until that date.[3332] According to Ntahobali, this contradiction affected Witness QCB's credibility and should have been addressed by the Trial Chamber.[3333]

1456. The Prosecution responds that the Trial Chamber did not err in accepting Witness QCB's evidence concerning when the Hotel Ihuliro roadblock was established.[3334]

1457. The Appeals Chamber has already addressed and rejected Ntahobali's challenges to the Trial Chamber's finding, based in part on Witnesses QCB's and QI's testimonies,[3335] that the roadblock was established in late April 1994.[3336]

1458. Ntahobali suggests that the Trial Judgement elsewhere reflects that Witness QI was at Matyazo Clinic until 25 April 1994 and that his evidence regarding the departure of the UNAMIR soldiers reflects that the establishment of the Hotel Ihuliro roadblock occurred after that date.[3337] Ntahobali's argument relies on the Trial Chamber's finding that Witness QI's testimony placed the attack at Matyazo Clinic, during which he was present, "around 25 April 1994."[3338] Having reviewed the relevant finding and evidence, the Appeals Chamber is of the view that Witness QI's evidence is equivocal as to the timing of his observations of the UNAMIR soldiers and the establishment of the roadblock following their departure.[3339] In particular, Witness QI merely testified that there were UNAMIR soldiers "at Ntahobali's house during the war" and that "after UNAMIR's departure" a roadblock was set up.[3340] The witness confirmed that he made these observations from his employer's house, located nearby, without specifying whether the observations were made before or after his temporary absence from this home, during which he observed that attack at Matyazo Clinic.[3341] Ntahobali's interpretation of the evidence is not persuasive.

Ntahobali's citations are to evidence and findings by the Trial Chamber that relate to the existence of the Hotel Ihuliro roadblock where Ruvurajabo was found to have been killed, the Appeals Chamber assesses these arguments here.
[3332] Ntahobali Appeal Brief, para. 380, *referring to* Trial Judgement, para. 2084.
[3333] Ntahobali Appeal Brief, para. 380.
[3334] Prosecution Response Brief, para. 888.
[3335] *See supra*, Section V.G.2(a). *See also* Trial Judgement, paras. 3109, 3112. The Trial Chamber also referred to the testimonies of Witnesses FA, SX, TB, TG, TQ, Karemano, Bararwandika, D-2-YYYY, D-2-13-D, D-2-5-I, and D-13-D. *See ibid.*, para. 3109.
[3336] *See supra*, Section V.G.2(a). *See also* Trial Judgement, para. 3113.
[3337] Ntahobali Appeal Brief, para. 380, *referring to* Trial Judgement, para. 2084.
[3338] Trial Judgement, para. 2084.
[3339] *See* Witness QI, T. 25 March 2005 pp. 44-46 (closed session).
[3340] Witness QI, T. 25 March 2005 p. 46 (closed session).
[3341] *See* Witness QI, T. 25 March 2005 pp. 44-46 (closed session). *See also* Witness QI, T. 23 March 2005 pp. 42, 43 (closed session), 44, 45, 49, 50, T. 24 March 2005 pp. 32, 33 (closed session).

1459. Furthermore, the Appeals Chamber recalls that the Trial Chamber's finding that the Hotel Ihuliro roadblock was established "in late April 1994"[3342] and after the departure of the UNAMIR soldiers,[3343] took into account the evidence of Ntahobali and several Defence witnesses, who testified that the UNAMIR soldiers left Butare prior to 21 April 1994.[3344] Ntahobali therefore fails to demonstrate that the Trial Chamber's findings that the Hotel Ihuliro roadblock was established in late April 1994, relying in part on the testimony of Witness QI, is inconsistent with the Trial Chamber's reliance on Witness QCB's evidence that Ruvurajabo was killed at that roadblock on 21 April 1994.

1460. The Appeals Chamber therefore dismisses Ntahobali's contention that the Trial Chamber made contradictory findings regarding the date on which the Hotel Ihuliro roadblock was established.

(vi) Additional Evidence Admitted on Appeal

1461. On the basis of the trial record alone, the Appeals Chamber has found that Ntahobali has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence concerning the killing of Ruvurajabo. In accordance with the relevant standard, the Appeals Chamber will now determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.

1462. The Appeals Chamber finds Witness QCB's testimony pertaining to the killing of Ruvurajabo detailed and coherent.[3345] His explanations given in cross-examination as they concern alleged inconsistencies about this event are clear and convincing.[3346] His evidence is first-hand[3347] and his identification of Ntahobali is compelling.[3348]

1463. As noted in Section V.F.1(d) above, the Appeals Chamber admitted as additional evidence on appeal Witness QCB's RCMP Statements which reveal that the witness provided contradictory statements to the RCMP as to whether he observed first-hand or learned from another source about abductions that occurred during the genocide in which Ntahobali was implicated as a co-perpetrator. For the same reasons as developed in relation to Witness QCB's evidence

[3342] Trial Judgement, para. 3113.
[3343] *See* Trial Judgement, para. 3112.
[3344] *See* Ntahobali, T. 24 April 2006 pp. 34, 35; Witness WBTT, T. 31 May 2005 pp. 47-48 (closed session); Denise Ntahobali, T. 9 June 2005 pp. 21-23, T. 13 June 2005 p. 17; Witness WBUC, T. 1 June 2005 pp. 54-56. *See also* Trial Judgement, paras. 3029, 3112, fn. 8624.
[3345] Witness QCB, T. 20 March 2002 pp. 59-62, 65-73, 75-78, T. 25 March 2002 pp. 115, 122-126, 128-131, 140-142 and 93, 94, 96-101, 105, 110-113 (closed session).
[3346] Witness QCB, T. 26 March 2002 pp. 35-37, 40, 41.
[3347] Witness QCB, T. 20 March 2002 pp. 59-62, 65-73, 75-78.

concerning the killings at the IRST, the Appeals Chamber finds that the additional evidence admitted on appeal does not undermine the credibility of Witness QCB.[3349] The Appeals Chamber makes this determination in light of the evidence in the trial record, including potentially conflicting evidence as to Ntahobali's whereabouts on the morning of 21 April 1994, evidence about the date of establishment of the Hotel Ihuliro roadblock, Witness WMKL's evidence about when Ruvurujabo was killed as well as evidence related to the alleged fabrication of evidence by Witness QCB.[3350]

1464. In light of the trial evidence and the additional evidence admitted on appeal, and considering its analysis of Ntahobali's responsibility conducted below, the Appeals Chamber is itself convinced beyond reasonable doubt of Ntahobali's guilt relating to the killing of Ruvurajabo at the Hotel Ihuliro roadblock.

(vii) Conclusion

1465. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's submissions as they relate to the assessment of the evidence pertaining to the killing of Ruvurajabo.

(b) Superior Responsibility

1466. The Trial Chamber concluded that Ntahobali bore superior responsibility pursuant to Article 6(3) of the Statute for the conduct of the *Interahamwe* who killed Ruvurajabo and considered this as an aggravating factor in sentencing.[3351] In particular, it recalled that Ntahobali instructed *Interahamwe* to kill Ruvurajabo and that they followed his order.[3352] On this basis, the Trial Chamber found as the only reasonable inference that Ntahobali exercised effective control over these *Interahamwe* and that he "was in a superior-subordinate relationship to them, on an *ad hoc* or temporary basis, when they killed Ruvurajabo."[3353]

1467. Ntahobali submits that the Trial Chamber erred in concluding that he exercised effective control over the *Interahamwe* who killed Ruvurajabo solely on the evidence that they followed Ntahobali's alleged order to kill him.[3354] He points to case law reflecting that, while a superior's

[3348] Witness QCB, T. 20 March 2002 pp. 65, 68-71, 73-77, T. 21 March 2002 pp. 81, 82, T. 25 March 2002 pp. 40, 41 and 45-53, 55, 57-61, 65-68 (closed session).
[3349] *See supra*, Section V.F.1(d).
[3350] *See supra*, Sections V.F.1(d), V.G.2, V.G.3(a)(iv).
[3351] *See* Trial Judgement, paras. 5847-5849, 5971, 6056, 6220.
[3352] Trial Judgement, para. 5847.
[3353] Trial Judgement, para. 5847.
[3354] Ntahobali Appeal Brief, paras. 907-909.

ability to issue orders may be indicative of effective control, it does not automatically establish it.[3355]

1468. In addition, Ntahobali contends that the Trial Chamber failed to consider Witness QCB's evidence that the *Interahamwe* who killed Ruvurajabo were from Kigali and under Robert Kajuga's ("Kajuga") control, or other evidence that Kajuga or Nteziryayo exercised effective control over them.[3356] In Ntahobali's view, the Trial Chamber failed to provide a reasoned opinion by not addressing this evidence and no reasonable trier of fact could have found beyond reasonable doubt that Ntahobali had effective control over the *Interahamwe* who killed Ruvurajabo.[3357]

1469. The Prosecution responds that the Trial Chamber correctly found that Ntahobali exercised effective control over the *Interahamwe* at the Hotel Ihuliro roadblock based on the evidence that the *Interahamwe* complied with Ntahobali's instructions to kill Ruvurajabo as well as other evidence of Ntahobali's role at that roadblock,[3358] which includes Ntahobali ordering *Interahamwe* to commit other crimes.[3359] The Prosecution contends that the Trial Chamber was not required to ascertain whether other individuals had similar control over the group in question and that, in any event, Ntahobali has not demonstrated that Kajuga or Nteziryayo had effective control over the *Interahamwe* to the extent that it negated Ntahobali's effective control.[3360] It notes that, although Witness QCB referred to the group of *Interahamwe* as Kajuga's *Interahamwe*, the witness maintained that Ntahobali was the head of the group.[3361]

1470. Ntahobali replies that, contrary to the Prosecution's contention, the Trial Chamber did not rely on evidence of his general role at the Hotel Ihuliro roadblock, such as alleged orders to commit other crimes there, when finding that he exercised effective control over the *Interahamwe* who killed Ruvurajabo.[3362] He points out that the only crime the Trial Chamber found that he had *ordered* at the Hotel Ihuliro roadblock was Ruvurajabo's murder and that the Trial Chamber only concluded that he manned the roadblock, not that he controlled it.[3363] Ntahobali argues that the evidence referred to by the Prosecution as reflecting Ntahobali's control over *Interahamwe* does not

[3355] Ntahobali Appeal Brief, para. 908, *referring to Setako* Appeal Judgement, para. 272, *Strugar* Appeal Judgement, para. 253, *Halilović* Appeal Judgement, paras. 68, 70, 139, *Kamuhanda* Trial Judgement, para. 612, *Kordić and Čerkez* Trial Judgement, paras. 838-841.
[3356] Ntahobali Appeal Brief, para. 910. Ntahobali further argues that the Prosecution alleged that these *Interahamwe* were Nteziryayo's subordinates. *See idem*, *referring to* Prosecution Closing Brief, paras. 197, 198 at pp. 366, 367, Trial Judgement, paras. 3982, 4031.
[3357] Ntahobali Appeal Brief, para. 910.
[3358] Prosecution Response Brief, paras. 1177-1179.
[3359] Prosecution Response Brief, para. 1177, *referring to* Trial Judgement, para. 3118.
[3360] Prosecution Response Brief, para. 1180.
[3361] Prosecution Response Brief, para. 1180.
[3362] Ntahobali Reply Brief, paras. 366-368. *See also ibid.*, para. 370 (arguing that the Trial Chamber only found Ntahobali to have ordered the killing of Ruvurajabo and *committed* the rape and killing of the Tutsi girl).
[3363] Ntahobali Reply Brief, paras. 370, 371.

necessarily concern those who killed Ruvurajabo or events at the Hotel Ihuliro roadblock.[3364] Finally, Ntahobali submits that the Prosecution ignores that Witness QCB's evidence suggests that Kajuga controlled the *Interahamwe* as well as his testimony that the *Interahamwe* at the roadblock could have been soldiers.[3365]

1471. The Appeals Chamber first turns to Ntahobali's contention that the Trial Chamber erred in concluding that he exercised effective control over the *Interahamwe* who killed Ruvurajabo solely on the basis of the evidence that they followed his alleged order. The Appeals Chamber recalls that "[i]ndicators of effective control are 'more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish'."[3366] A superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control generally relied upon in the jurisprudence of the Tribunal.[3367]

1472. The Trial Judgement reflects that, in finding that Ntahobali had effective control over the *Interahamwe* who killed Ruvurajabo, the Trial Chamber expressly relied on Ntahobali's issuance of an instruction to the *Interahamwe* to kill Ruvurajabo with which they complied.[3368] In summarising Witness QCB's evidence concerning Ruvurajabo's killing, the Trial Chamber noted that *Interahamwe* sought instructions from Ntahobali in relation to Ruvurajabo upon his refusal to produce identification at the roadblock.[3369] Given the Trial Chamber's acceptance of Witness QCB's evidence as it relates to this event, the Appeals Chamber is not convinced that the Trial Chamber relied solely upon Ntahobali ordering the killing of Ruvurajabo as the indicator of his effective control over the *Interahamwe* that killed Ruvurajabo, but also on Witness QCB's evidence that the *Interahamwe* sought instructions from him.

1473. The Appeals Chamber also considers that Ntahobali's submissions fail to appreciate the broader context of the Trial Chamber's findings concerning his role at the Hotel Ihuliro roadblock. In particular, the Appeals Chamber notes that the Trial Chamber also considered extensive evidence pointing to Ntahobali's leadership position and authoritative conduct at that roadblock.[3370] This evidence led the Trial Chamber to conclude that "Ntahobali manned [Hotel Ihuliro roadblock] and utilised [it] with the assistance of soldiers and other unknown persons to abduct and kill

[3364] Ntahobali Reply Brief, paras. 369, 371.
[3365] Ntahobali Reply Brief, para. 372.
[3366] *Ndahimana* Appeal Judgement, para. 53, *quoting Blaškić* Appeal Judgement, para. 69.
[3367] *Karemera and Ngirumpatse* Appeal Judgement, para. 260; *Nizeyimana* Appeal Judgement, para. 202; *Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, para. 299. *See also Strugar* Appeal Judgement, para. 256; *Hadžihasanović and Kubura* Appeal Judgement, para. 199; *Halilović* Appeal Judgement, paras. 204, 207.
[3368] Trial Judgement, para. 5847.
[3369] Trial Judgement, para. 2959.
[3370] *See* Trial Judgement, paras. 3118-3121, 3124-3127. *See also ibid*., para. 5842.

members of the Tutsi population."[3371] While Ntahobali argues that the Trial Chamber did not find that he ordered the commission of other crimes at the roadblock or that he "controlled" it, the Appeals Chamber is of the view that the evidence accepted by the Trial Chamber concerning Ntahobali's general role at the Hotel Ihuliro roadblock reasonably supports the Trial Chamber's conclusion that Ntahobali exercised effective control over the *Interahamwe* who killed Ruvurajabo when he issued that order.

1474. The Appeals Chamber next turns to Ntahobali's contention that the Trial Chamber erred by not considering evidence from Witness QCB and other witnesses that the *Interahamwe* in question were from Kigali and under the control of Kajuga or Nteziryayo, and did not provide a reasoned opinion when omitting to address this evidence. The Appeals Chamber recalls that effective control need not be exclusive and can be exercised by more than one superior, whose criminal responsibility is not excluded by coexisting responsibility of others.[3372] In this regard, the Appeals Chamber observes that Witness QCB testified that Ruvurajabo was apprehended and attacked by "*Interahamwes* [*sic*] from Kajuga […] it is the Robert Kajuga's *Interahamwe*",[3373] an assertion that is not reflected in the Trial Chamber's summary of his evidence. Nonetheless, the Appeals Chamber considers that Witness QCB's designation of "Kajuga's *Interahamwe*" did not require express analysis, as it was generic and was not inconsistent with the Trial Chamber's finding that Ntahobali exercised effective control over these *Interahamwe* when he ordered them to kill Ruvurajabo. Notably, there is no evidence suggesting that the *Interahamwe* responsible for Ruvurajabo's murder sought confirmation of Ntahobali's order to kill Ruvurajabo from any other alleged superior, including Kajuga.[3374]

1475. Likewise, the Appeals Chamber finds that Ntahobali's references to other evidence that *Interahamwe* led by Kajuga and Nteziryayo committed crimes fail to demonstrate that the Trial Chamber was required to expressly assess this evidence in evaluating Ntahobali's superior responsibility for Ruvurajabo's killing.[3375] Notably, the Trial Chamber considered some of the evidence now highlighted by Ntahobali and the leadership roles Kajuga and Nteziryayo held with

[3371] Trial Judgement, para. 3128.
[3372] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 495. *See also Nizeyimana* Appeal Judgement, para. 346; *Čelebići* Appeal Judgement, paras. 197, 198.
[3373] Witness QCB, T. 20 March 2002 pp. 67, 68. *See also* Trial Judgement, paras. 2957-2959, 3136-3139, 3173, 5361, 5842, 5847, 5848.
[3374] *Cf. Halilović* Appeal Judgement, para. 206. The Appeals Chamber observes that Witness QCB testified that, at another roadblock, *Interahamwe* who came from Kigali were, nonetheless, "headed by" Ntahobali. Witness QCB, T. 25 March 2002 p. 156. The Appeals Chamber observes that both Ntahobali and the Prosecution confuse this reference to *Interahamwe* at the Hotel Ihuliro roadblock. However, read in the context of Witness QCB's entire testimony, this reference is to *Interahamwe* at another, nearby roadblock, which he described as roadblock number "five". The roadblock at which Ruvurajabo was killed was designated by Witness QCB as number "six". *See* Witness QCB, T. 20 March 2002 pp. 56-61, T. 25 March 2002 pp. 100, 112 (closed session).

respect to *Interahamwe* elsewhere in the Trial Judgement.[3376] While the Trial Judgement does not reflect express consideration of the part of Witness FAM's testimony invoked by Ntahobali, the Appeals Chamber fails to see the material relevance of evidence that *Interahamwe* led by Kajuga and Nteziryayo committed crimes during different time periods in other locations.[3377] Ntahobali does not show that the Trial Chamber failed to provide a reasoned opinion in this regard. Similarly, he does not demonstrate that the Trial Chamber erred in finding as the only reasonable inference that Ntahobali exercised effective control over the *Interahamwe* who killed Ruvurajabo.[3378]

1476. The Appeals Chamber therefore dismisses Ntahobali's submissions that the Trial Chamber erred in concluding that Ntahobali bore responsibility as a superior under Article 6(3) of the Statute for the conduct of the *Interahamwe* who killed Ruvurajabo.

(c) Conclusion

1477. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate any error in the Trial Chamber's finding that he was responsible for ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994 and that he also bore responsibility as a superior under Article 6(3) of the Statute.

4. Rape and Murder of a Tutsi Girl

1478. Based on the testimonies of Witnesses SX and TB, the Trial Chamber found that Ntahobali raped and murdered a Tutsi girl who arrived at the Hotel Ihuliro roadblock in a yellow Daihatsu around the end of April 1994.[3379]

1479. Ntahobali argues that the Trial Chamber erred in its assessment of the evidence relating to this incident, contending that it failed to properly assess material inconsistencies within the prior statements and testimonies of Witnesses SX and TB, and that it erred in its assessment of their identification evidence. The Appeals Chamber will address these contentions in turn.

[3375] *See* Ntahobali Appeal Brief, para. 910, *referring to* Witness QJ, T. 8 November 2001 pp. 113-117 (closed session), Witness FAM, T. 14 March 2002 pp. 66-69.
[3376] Specifically, when considering Nteziryayo's responsibility for the abductions and killings of Tutsis at Hotel Ibis committed by the *Interahamwe* between May and June 1994, the Trial Chamber referred to the excerpt of Witness QJ's testimony cited by Ntahobali, noting his testimony that "the *Interahamwe* were under the orders of their leaders, Robert Kajuga, who was their president, and Nteziryayo, who lived with [Kajuga at Hotel Ibis] and was deputy to Kajuga." *See* Trial Judgement, para. 3995, fn. 10878. *See also ibid*., paras. 3982-3985, 399, 3994, 3996, 3997. Furthermore, the Trial Judgement reflects general consideration of Witness FAM's evidence as it related to Nteziryayo's responsibility for the attacks on the Tutsi refugees by the *Interahamwe* and civilians at Kabakobwa. *See*, *e.g*., *ibid*., paras. 1741-1748. *See also ibid*., paras. 1517-1529.
[3377] *Cf. Kvočka et al.* Appeal Judgement, para. 23. *See also Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Kalimanzira* Appeal Judgement, para. 195.
[3378] Trial Judgement, para. 5847.
[3379] Trial Judgement, para. 3135.

(a) Inconsistencies

1480. The Trial Chamber found that the testimony of Witness SX with regard to the rape and murder of a Tutsi girl at the Hotel Ihuliro roadblock was detailed and believable, and that it was corroborated by Witness TB's equally detailed testimony.[3380] It noted that both witnesses testified that the victim arrived in a yellow Daihatsu, that a certain Jean-Pierre was with Ntahobali at the time of the incident, that the car was stopped at the roadblock, and that the people inside the car were asked to show their identity cards.[3381] The Trial Chamber recalled that Witness TB testified to seeing Ntahobali dragging a girl with braids into the woods and to subsequently seeing her dead body with vaginal injuries in the woods, and that Witness SX observed the rape from a hiding place about 20 metres away from Ntahobali and the victim.[3382] In addition, it considered that the witnesses' descriptions regarding the subsequent burial of the body were consistent.[3383] The Trial Chamber further observed that Witnesses SX and TB placed the occurrence of the crime a few days after the Hotel Ihuliro roadblock was erected, and recalled its previous finding that the roadblock was mounted at the end of April 1994.[3384] The Trial Chamber concluded that both witnesses were credible with respect to this allegation and that it was established beyond reasonable doubt that Ntahobali raped and murdered the Tutsi girl who arrived at the Hotel Ihuliro roadblock in a yellow Daihatsu around the end of April 1994.[3385]

1481. Ntahobali submits that the Trial Chamber erred in its assessment of the evidence of Prosecution Witnesses SX and TB relating to the rape and murder of the Tutsi girl.[3386] In particular, he contends that the Trial Chamber failed to consider that the accounts of Witnesses SX and TB conflicted in material respects.[3387] Specifically, he submits that: (i) Witness SX testified that the crime occurred on 21 April 1994 while Witness TB initially testified that it occurred on 25 April 1994 and stated that it happened on 28 April 1994 during cross-examination; (ii) Witness TB never mentioned any other crime at the roadblock that day, while Witness SX mentioned around 500 killings having occurred there; (iii) Witness SX indicated that the four other occupants of the Daihatsu were killed instantly whereas Witness TB testified that three of them were allowed to leave while another girl was also kept along with the Tutsi girl; (iv) Witness SX testified that the Tutsi girl was detained for two to three hours and forced to walk in a gutter before being taken to be raped, while Witness TB testified that she was immediately taken to be raped by

[3380] Trial Judgement, para. 3132.
[3381] Trial Judgement, para. 3132.
[3382] Trial Judgement, para. 3133.
[3383] Trial Judgement, para. 3133.
[3384] Trial Judgement, para. 3134.
[3385] Trial Judgement, para. 3135.
[3386] Ntahobali Appeal Brief, paras. 422-426. *See also* Ntahobali Notice of Appeal, para. 177.
[3387] Ntahobali Appeal Brief, paras. 423, 424.

soldiers and then by Ntahobali and never made any reference to an incident involving a gutter; and (v) Witness SX testified that Ntahobali had a hatchet, while Witness TB testified that Ntahobali only carried a pistol.[3388] Ntahobali also contends that the Trial Chamber disregarded numerous and "major" contradictions between Witnesses SX's and TB's respective testimonies and their prior statements to Tribunal investigators.[3389] Ntahobali submits that no reasonable trier of fact could have relied on the evidence of Witnesses SX and TB or found that they corroborated each other in light of these contradictions and inconsistencies.[3390]

1482. The Prosecution responds that the Trial Chamber did not err in finding that the testimonies of Witnesses SX and TB were credible, consistent, and that they corroborated each other.[3391] It contends that it was within the Trial Chamber's discretion to evaluate any inconsistencies and that any inconsistencies were minor and did not undermine the credibility of the witnesses.[3392]

1483. The Appeals Chamber observes that the Trial Judgement does not reflect express consideration of the purported inconsistencies raised by Ntahobali, many of which were covered during the examination of the witnesses[3393] and raised in Ntahobali's closing brief.[3394] However, the Appeals Chamber recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence,[3395] without explaining its

[3388] Ntahobali Appeal Brief, para. 423. *See also* AT. 16 April 2015 p. 31. Ntahobali also contends that Witness SX testified that he had arrived around 1.00 p.m. on the day the Tutsi girl was killed, while Witness TB testified to having seen Witness SX days before. *See* Ntahobali Appeal Brief, para. 423.
[3389] Specifically, Ntahobali argues that, in his prior statement, Witness SX: (i) never mentioned the residence of Mujeri, while he later testified that he witnessed the killings of nearly 500 persons and the beginning of the incident involving the Tutsi girl from Mujeri's home; (ii) indicated that Ntahobali had only a club whereas he later testified that Ntahobali was carrying a small axe, a knife, and a pistol; (iii) stated that he watched the rape and murder of the victim in the company of Witness TB, while subsequently testifying that Witness TB was not with him; and (iv) indicated that the victim was wearing a skirt, while his testimony reflected that she wore trousers. With regard to Witness TB, Ntahobali submits that her prior statements reflect that: (i) she witnessed the crime in the same building and in the company of Witness SX, while she later testified that it was only the same compound; (ii) four persons stopped with the victim were allowed to leave, while she testified that only three persons were allowed to leave and that another young woman was forced to stay with the victim; (iii) when Ntahobali took the victim, she was nude, having already been undressed by soldiers, whereas she later testified that the victim was wearing a shirt and trousers; and (iv) the soldiers took the victim towards the woods, while she testified that the victim was brought to a sorghum field. Ntahobali also notes that Witness TB's statement failed to mention the existence of a roadblock near Ntahobali's residence whereas she testified about one established about four days after 21 April 1994. *See* Ntahobali Appeal Brief, paras. 423, 424, *referring to* Witness SX's Statement, Witness TB's Statement.
[3390] Ntahobali Appeal Brief, para. 426. In particular, Ntahobali points out that no reasonable trier of fact would have disregarded Witness TB's incredible explanations as to the inconsistencies between her prior statement and her testimony at trial. *See ibid*., para. 425. *See also* AT. 16 April 2015 p. 31.
[3391] Prosecution Response Brief, para. 898. *See also* AT. 16 April 2015 pp. 5, 6.
[3392] Prosecution Response Brief, para. 899.
[3393] *See* Witness SX, T. 27 January 2004 p. 52 (closed session), T. 30 January 2004 pp. 18, 24, 26, 33-38, 66-70, and 72-84 (closed session); Witness TB, T. 5 February 2004 pp. 12-14 (closed session), 20-22, 25-32, 35.
[3394] *See* Ntahobali Closing Brief, paras. 291-307. *See also ibid*., paras. 712-738.
[3395] *See*, *e.g*., *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.

decision in every detail.[3396] Corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[3397]

1484. Having carefully reviewed the evidence of Witnesses SX and TB, the Appeals Chamber finds that a reasonable trier of fact could have concluded that the fundamental features of their testimonies were compatible and compelling. As emphasised by the Trial Chamber,[3398] the testimonies of Witnesses SX and TB are indeed materially consistent concerning the location of the Hotel Ihuliro roadblock,[3399] the arrival of the victim at the roadblock in a yellow Daihatsu with other persons,[3400] the presence of Ntahobali, Jean-Pierre, Lambert, and Kazungu at the roadblock,[3401] the checking of identity cards at the roadblock,[3402] the rape and the murder of the victim by Ntahobali in the woods,[3403] the injuries suffered by the victim,[3404] and the involvement of Witness SX in her burial.[3405] In addition, the Appeals Chamber notes that both witnesses confirmed seeing each other at the EER that specific day.[3406]

1485. The Appeals Chamber also finds that the purported inconsistencies between the testimonies of Witnesses SX and TB highlighted by Ntahobali are not material when viewed in context and in light of the fundamental consistency of their accounts and that it was therefore not unreasonable for the Trial Chamber not to discuss them expressly in the Trial Judgement.

1486. Specifically, the Appeals Chamber is satisfied that the Trial Chamber acted reasonably when finding that Witnesses SX and TB corroborated each other as to the timing of the crimes given that the witnesses themselves insisted that they only provided estimates.[3407] In this regard, the Appeals

[3396] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 223; *Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174; *Kvočka et al.* Appeal Judgement, para. 23.
[3397] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428. *See also Ndahimana* Appeal Judgement, para. 93.
[3398] Trial Judgement, paras. 3132-3134.
[3399] *See* Witness SX, T. 27 January 2004 p. 15; Witness TB, T. 4 February 2004 pp. 41, 42, 51.
[3400] *See* Witness SX, T. 27 January 2004 p. 20; Witness TB, T. 4 February 2004 p. 42.
[3401] *See* Witness SX, T. 27 January 2004 pp. 16, 18; Witness TB, T. 4 February 2004 pp. 41, 42.
[3402] *See* Witness SX, T. 27 January 2004 p. 15; Witness TB, T. 4 February 2004 p. 42.
[3403] *See* Witness SX, T. 27 January 2004 pp. 23, 24; Witness TB, T. 4 February 2004 p. 48, T. 5 February 2004 p. 11 (closed session).
[3404] *See* Witness SX, T. 27 January 2004 p. 24; Witness TB, T. 4 February 2004 p. 49.
[3405] *See* Witness SX, T. 27 January 2004 p. 25; Witness TB, T. 4 February 2004 pp. 5 (closed session), 49.
[3406] *See* Witness SX, T. 27 January 2004 pp. 40, 42 (closed session); Witness TB, T. 5 February 2004 p. 13 (closed session).
[3407] *See* Witness SX, T. 27 January 2004 p. 15; Witness TB, T. 4 February 2004 p. 41, T. 5 February 2004 pp. 11-13 (closed session).

Chamber recalls that the Trial Chamber did not conclude that the crimes took place on a specific date but found that they occurred around the end of April 1994.[3408]

1487. With respect to whether other killings occurred at the Hotel Ihuliro roadblock that day, the Appeals Chamber observes that Witness SX observed the events from a different location than Witness TB, and that Witness SX's testimony reflects that he was not categorical as to the number of persons killed that day.[3409] The Appeals Chamber further notes that Witness TB's testimony indicated that the roadblock was used for the purpose of killing and that killings were taking place during this period.[3410] Against this background, the Appeals Chamber considers that the fact that Witness TB did not specifically mention any other crime at the roadblock that day, while Witness SX mentioned that other killings occurred, did not prevent a reasonable trier of fact from finding that Witnesses SX's and TB's evidence concerning the killing of the Tutsi girl was corroborative.

1488. As to the alleged contradiction regarding the weapons Ntahobali carried during this event, the Appeals Chamber notes that both witnesses indicated that he carried a firearm and Witness TB testified that this was the only weapon that she "could see".[3411] Given the fact that Witness SX observed Ntahobali use a hatchet to kill the victim – an event that Witness TB did not witness – the Appeals Chamber is of the view that the witnesses' testimonies as to the weapons Ntahobali carried are not incompatible.[3412]

1489. With respect to the alleged differences between the testimonies of Witnesses SX and TB as to the fate of the other occupants of the Daihatsu, the Appeals Chamber notes that Witness SX testified that they were killed immediately, while Witness TB testified that they were allowed to leave.[3413] Although the witnesses seem to contradict each other on this point, the Appeals Chamber finds that this issue appears to be of peripheral relevance in light of the core evidence concerning the rape and murder of the victim. The Appeals Chamber further notes that Witnesses SX and TB were not extensively questioned about this issue and that Ntahobali does not demonstrate that the differences in the witnesses' testimonies in this regard render their otherwise consistent testimonies about the killing of the Tutsi girl incompatible.[3414] Accordingly, the Appeals Chamber finds that it was not unreasonable for the Trial Chamber not to address this contradiction in the Trial Judgement

[3408] *See* Trial Judgement, para. 3135. *See also ibid*., para. 3134.
[3409] Witness SX, T. 27 January 2004 p. 18, T. 30 January 2004 pp. 37, 61.
[3410] Witness TB, T. 5 February 2004 pp. 10, 11 and 22 (closed session).
[3411] *See* Witness SX, T. 30 January 2004 p. 26; Witness TB, T. 5 February 2004 p. 24.
[3412] *See* Witness SX, T. 27 January 2004 pp. 23, 24, T. 30 January 2004 p. 26 and pp. 73, 74 (closed session).
[3413] *Compare* Witness SX, T. 27 January 2004 p. 20 *with* Witness TB, T. 4 February 2004 p. 42.
[3414] *See* Witness SX, T. 27 January 2004 pp. 20, 21; Witness TB, T. 4 February 2004 pp. 42-45.

and that it did not undermine the credibility and corroborative nature of Witnesses SX's and TB's accounts.

1490. The Appeals Chamber also finds that Ntahobali's submission that Witness SX's testimony that the victim was detained for two to three hours and forced to walk in a gutter contradicts Witness TB's evidence that soldiers immediately led her away to rape her is without merit. Witness SX did not testify that the victim was detained for two to three hours before being raped, but only that he was at Mujeri's residence and watched the roadblock for that amount of time.[3415] Moreover, it is not clear from Witness TB's evidence that the initial removal of the victim by the soldiers, who did not rape her, was so long that it would have been noticed by Witness SX or incompatible with that witness's evidence.[3416] In addition, the Appeals Chamber does not consider that the fact that Witness TB did not testify to the victim being forced to walk through a gutter was material given that the two witnesses observed the events from different locations.

1491. Finally, the Appeals Chamber rejects Ntahobali's argument that inconsistencies between the testimonies of Witnesses SX and TB and their prior statements raise serious doubts about the reliability of their evidence. The Appeals Chamber considers that many of the identified inconsistencies are minor and that Witnesses SX and TB provided reasonable explanations for them.[3417]

1492. The Appeals Chamber therefore concludes that Ntahobali has not shown that the Trial Chamber erred in its assessment of the evidence of Witnesses SX and TB as to the rape and murder of a Tutsi girl in late April 1994.

[3415] *See* Witness SX, T. 27 January 2004 pp. 17, 21, T. 30 January 2004 pp. 33, 36, 69, 70.
[3416] *See* Witness TB, T. 5 February 2004 pp. 17, 28.
[3417] In particular, the Appeals Chamber observes that Witness SX: (i) explained in cross-examination that he had told the investigators about the residence of Mujeri and later stated that if he forgot to mention it, it was because he only stayed at this specific location for a few hours; (ii) conceded in cross-examination that he was mistaken about Ntahobali wearing a club and that he did not mention the gun since he was only asked about the weapons that were used by Ntahobali; (iii) explained that, to the extent that his prior statement indicates that Witness TB was with him while watching the rape and murder of the Tutsi girl, it was because his observation reflected who else was in the entire EER compound at the time, not only the people who watched the incident with the witness; and (iv) explained that there were two girls following one another, and that it was the girl dragged by Ntahobali that was wearing trousers, while the second one was wearing a skirt. *See* Witness SX, T. 30 January 2004 pp. 26, 35, 36, and 72, 73, 80, 82, 83 (closed session). As for Witness TB, the Appeals Chamber notes that she: (i) explained that, while she learned from Witness SX that he observed the event from nearby, they did not watch it from the same room; (ii) explained that, in Rwanda, the meaning of the word "naked" could describe someone, like the victim, whose chest had been exposed by the time she was in Ntahobali's custody; and (iii) testified that it was implied that an obstacle was in a road when she told investigators that people were arrested (in her statement, Witness TB indicates that the yellow Daihatsu was stopped by Ntahobali and some soldiers in front of the EER, where identity cards were being checked, that soldiers were guarding the road, and that persons were being filtered – details which are materially consistent with her testimony about a roadblock). *See* Witness TB's Statement, pp. 3, 4; Witness TB, T. 5 February 2004 pp. 12, 13 (closed session), 24, 27, 29, 30. The Appeals Chamber finds that the remaining differences between Witness TB's Statement and her testimony identified by Ntahobali are so minor that they do not undermine the reasonableness of the Trial Chamber's findings and do not warrant express consideration. *See* Ntahobali Appeal Brief, paras. 424(c), 424(e).

(b) Identification Evidence

1493. The Trial Chamber found that Witness SX identified Ntahobali in court, recalling that he had testified to having seen him often in Butare near the EER.[3418] It further found that Witness TB knew Ntahobali well, noting that she also identified him in court.[3419]

1494. Ntahobali submits that the Trial Chamber erred in crediting the identification evidence of Witnesses SX and TB.[3420] With respect to Witness SX, Ntahobali contends that the Trial Chamber erred in: (i) failing to consider the witness's reluctance to answer questions with regard to the first name of the person who informed him of Ntahobali's identity;[3421] (ii) failing to assess this hearsay identification evidence with caution;[3422] and (iii) according weight to Witness SX's in-court identification.[3423]

1495. With respect to Witness TB, Ntahobali highlights that unknown individuals informed her that the appellant was called "Shalom" and submits that the Trial Chamber failed to assess this hearsay evidence with appropriate caution.[3424] He contends that, while her description of Ntahobali was so vague that it could encapsulate most Rwandan men, it was nevertheless inconsistent with Witness TQ's evidence that Ntahobali had a large beard.[3425] He also argues that the Trial Chamber further erred by relying on Witness TB's in-court identification of Ntahobali since the presiding judge had previously identified his counsel in court in the witness's presence.[3426]

1496. The Prosecution responds that Witness SX identified Ntahobali in court.[3427] It further disputes that Witness TB learned Ntahobali's identity from hearsay and submits that the witness

[3418] Trial Judgement, para. 3122, *referring to* Witness SX, T. 27 January 2004 pp. 16, 37, and 53 (closed session), T. 30 January 2004 pp. 15 (closed session), 25. *See also ibid*., para. 3880.
[3419] Trial Judgement, para. 3122, *referring to* Witness TB, T. 4 February 2004 p. 54. *See also ibid*., para. 3883.
[3420] Ntahobali Notice of Appeal, paras. 179, 180; Ntahobali Appeal Brief, paras. 445, 451, 452; Ntahobali Reply Brief, paras. 201, 202. *See also* AT. 16 April 2015 p. 30.
[3421] Ntahobali Appeal Brief, para. 451, *referring to* Witness SX, T. 27 January 2004 pp. 52-54 (closed session) (French).
[3422] Ntahobali Appeal Brief, para. 451. *See also ibid*., para. 591 (concerning identification at the EER). *See also* AT. 16 April 2015 p. 30.
[3423] Ntahobali Appeal Brief, para. 451, *referring to* Trial Judgement, para. 3122. Ntahobali also argues that the witness's evidence that Ntahobali "resembles" Shalom is insufficient to establish a positive identification beyond reasonable doubt. *See idem*, *referring to* Witness SX, T. 27 January 2004 p. 37 (French). *See also ibid*., para. 591.
[3424] Ntahobali Appeal Brief, para. 452, *referring to* Witness TB, T. 5 February 2004 p. 29 (French). *See also* Ntahobali Reply Brief, para. 203; AT. 15 April 2015 p. 40; AT. 16 April 2015 p. 30.
[3425] Ntahobali Appeal Brief, para. 452, *referring to* Witness TB, T. 4 February 2004 p. 44 (French), Witness TQ, T. 8 September 2004 p. 19 (closed session) (French). *See also* AT. 15 April 2015 p. 40. The Appeals Chamber notes that, in another part of his appeal, Ntahobali similarly argues that the evidence of Witness SX was inconsistent with that of Witness TQ that Ntahobali had a beard. *See* Ntahobali Appeal Brief, para. 591(concerning identification at the EER).
[3426] Ntahobali Notice of Appeal, paras. 183, 184; Ntahobali Appeal Brief, para. 452, *referring to* Trial Judgement, para. 3122, Witness TB, T. 4 February 2004 p. 38 (closed session) (French). *See also* Ntahobali Appeal Brief, para. 595.
[3427] Prosecution Response Brief, para. 920. The Appeals Chamber notes that the Prosecution erroneously inverted the names of Witnesses SX and TB and references to the transcripts, resulting in unsupported assertions concerning Witness SX's prior knowledge of Ntahobali. *See ibid*., paras. 920, 921, fns. 2290, 2291.

knew Ntahobali and his parents well and met him on several occasions in 1994.[3428] The Prosecution also points out that Witness TB was able to identify positively Ntahobali in court, although she had not seen him since 1994.[3429]

1497. The Appeals Chamber observes that, when considering Witness SX's identification evidence, the Trial Chamber explicitly noted that Witness SX did not know Ntahobali or his family prior to the events of 1994 and learned Ntahobali's identity from a third person.[3430] However, while caution is warranted for conviction based on hearsay evidence,[3431] the Appeals Chamber recalls that neither the Rules nor the jurisprudence of the Tribunal oblige a trial chamber to require a particular type of identification evidence.[3432] Given that Witness SX's evidence implicating Ntahobali in the rape and murder of the Tutsi girl was corroborated by the testimony of Witness TB, the Appeals Chamber is satisfied that the Trial Chamber acted reasonably when accepting Witness SX's identification evidence. Indeed, the Appeals Chamber notes that despite Witness SX's initial reluctance to identify its source, he cooperated after further questioning and even volunteered to facilitate contact with his source.[3433] The Appeals Chamber finds that Ntahobali fails to demonstrate that the Trial Chamber did not exercise the appropriate caution in assessing Witness SX's identification evidence.

1498. With respect to Ntahobali's arguments regarding Witness SX's in-court identification, the Appeals Chamber notes that the Trial Chamber stated that:

> No probative weight will be assigned to an identification given for the first time by a witness while testifying, who identifies the accused while he is standing in the dock. Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), no positive probative weight will be given by the Chamber to these "in court" identifications.[3434]

The Appeals Chamber recalls that any in-court identification should be assigned "little or no credence" given the signals that can identify an accused aside from prior acquaintance.[3435] In the present instance, while the Trial Chamber recalled that Witness SX, who did not know Ntahobali

[3428] Prosecution Response Brief, para. 921. *See also* AT. 16 April 2015 p. 6.
[3429] Prosecution Response Brief, para. 921. *See also* AT. 16 April 2015 p. 6.
[3430] *See* Trial Judgement, paras. 2962, 2963. *See also ibid*., paras. 3880, 3949.
[3431] *Nizeyimana* Appeal Judgement, para. 95; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.
[3432] *Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Musema* Appeal Judgement, para. 90.
[3433] *See* Witness SX, T. 27 January 2004 pp. 52-54 (closed session). The Appeals Chamber observes that Witness SX also gave an explanation for why he did not know the first name of his source.
[3434] Trial Judgement, para. 173, *referring to Kunarac et al*. Appeal Judgement, para. 320.
[3435] *Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Kunarac et al.* Appeal Judgement, para. 320.

prior to the events of 1994,[3436] identified Ntahobali in-court, it relied on Witness SX's testimony that he was an eye-witness to Ntahobali's presence at the roadblock and often saw Ntahobali in Butare near the EER.[3437] Likewise, Witness SX's evidence reflects that a third party identified Ntahobali to him at the Hotel Ihuliro roadblock.[3438] Therefore, the Appeals Chamber finds that the Trial Chamber reasonably relied upon Witness SX's evidence to find that he identified Ntahobali during the events.

1499. Turning to Witness TB's identification evidence, the Appeals Chamber finds that, contrary to Ntahobali's assertion, it was not based on hearsay.[3439] As the Trial Chamber noted, Witness TB testified that she knew Ntahobali and had met him on several occasions in 1994.[3440] Furthermore, while Witness TB's evidence is not consistent with Witness TQ's description that Ntahobali had a beard, Ntahobali fails to demonstrate that this undermines the reasonableness of the Trial Chamber's acceptance of Witness TB's identification evidence. The Appeals Chamber observes that both Witnesses SX and TB provided consistent evidence that Ntahobali did not have a beard during the relevant period.[3441] The Appeals Chamber therefore concludes that Ntahobali does not demonstrate that the Trial Chamber was unreasonable in relying on Witness TB's identification evidence based on her knowledge of him in 1994.

1500. As for Ntahobali's contention that the Trial Chamber erred in relying on Witness TB's in-court identification, the Appeals Chamber observes that, while the Trial Chamber noted that the witness identified Ntahobali in court, it recalled that Witness TB knew Ntahobali well in 1994.[3442] Ntahobali has not demonstrated any error in this conclusion. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's observation that the witness recognised Ntahobali in-court.[3443]

[3436] *See* Trial Judgement, paras. 2962, 2963.
[3437] *See* Trial Judgement, paras. 3118, 3122.
[3438] Trial Judgement, para. 2962.
[3439] The Appeals Chamber observes that Ntahobali also argues that the audio recording of Witness TB's evidence reveals that she referred to Ntahobali as "Charoumou" rather than "Shalom". *See* Ntahobali Appeal Brief, para. 452. Ntahobali provides no specific reference supporting this contention and a review of the transcripts cited by Ntahobali reflects that Witness TB referred to Ntahobali as "Shalom". The Appeals Chamber therefore dismisses this contention.
[3440] *See* Witness TB, T. 4 February 2004 p. 42. *See also* Trial Judgement, para. 2972. The Appeals Chamber further observes that Witness TB correctly identified Ntahobali's parents by name. *See* Witness TB, T. 4 February 2004 p. 42.
[3441] *See* Witness SX, T. 27 January 2004 p. 37; Witness TB, T. 4 February 2004 p. 42.
[3442] Trial Judgement, para. 3122.
[3443] *See* Witness TB, T. 4 February 2004 p. 38 (closed session) (presiding judge identifying Ntahobali's counsel); T. 4 February 2004 p. 54 (Witness TB's in-court identification of Ntahobali). With respect to Ntahobali's contention that the in-court identification of him by Witness TB was improper given the presiding judge's identification of Ntahobali's counsel prior to that exercise, the Appeals Chamber observes that extensive questioning continued before Witness TB was asked to identify Ntahobali in court. Ntahobali did not object to the in-court identification on this basis at that time, or uncover, through cross-examination, that Witness TB's in-court identification of Ntahobali was influenced by the presiding judge's identification of his counsel. *See* Witness TB, T. 4 February 2004 pp. 38-54, 58-62,

1501. Accordingly, the Appeals Chamber concludes that Ntahobali has failed to demonstrate any error on the part of the Trial Chamber in accepting Witnesses SX's and TB's identification evidence.

(c) Conclusion

1502. In light of the above, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence relating to the rape and murder of a Tutsi girl who arrived at the Hotel Ihuliro roadblock around the end of April 1994.

5. Conclusion

1503. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding Ntahobali criminally responsible under Article 6(1) of the Statute for committing killings of Tutsis in addition to the Tutsi girl at the Hotel Ihuliro roadblock in April 1994. Consequently, the Appeals Chamber grants Ground 4.2 of Ntahobali's appeal to the extent that it relates to the Hotel Ihuliro roadblock events and, as a result, reverses Ntahobali's convictions for committing killings of Tutsis at the Hotel Ihuliro roadblock other than the "Tutsi girl". The Appeals Chamber will consider the impact, if any, of this finding on Ntahobali's sentence in the appropriate section below.

1504. The Appeals Chamber finds that Ntahobali has failed to demonstrate any error in the Trial Chamber's conclusions on the date of the establishment of the Hotel Ihuliro roadblock, his responsibility for the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, and his responsibility for the rape and murder of a Tutsi girl at the same roadblock around the end of April 1994. Accordingly, the Appeals Chamber dismisses Grounds 3.2 and 3.3, the remainder of Ground 4.2, and the relevant part of Ground 4.3 of Ntahobali's appeal.

and 63-98 (closed session), T. 5 February 2004 pp. 8-15 (closed session), 18-42. Under the circumstances, Ntahobali's contention that Witness TB's identification was influenced by this identification is speculative.

H. Killing of the Rwamukwaya Family (Grounds 3.4 and 4.7)

1505. The Trial Chamber found that an individual named Rwamukwaya and his family, who were of Tutsi ethnicity, were killed on or about 29 or 30 April 1994, after Ntahobali had threatened to kill them.[3444] The Trial Chamber held that "[g]iven the narrow time frames involved between Ntahobali's threat pronounced against the Rwamukwaya family, the sighting of their bodies, and the first sightings of Ntahobali in a vehicle known to have belonged to Rwamukwaya, […] the inference drawn as to Ntahobali's responsibility in the killing of the Rwamukwaya family is the only reasonable conclusion based on the totality of the evidence."[3445] The Trial Chamber further found that Ntahobali was aware that the principal perpetrators killed the Rwamukwaya family with genocidal intent[3446] and that "Ntahobali's announcement of his intention to have the Rwamukwaya family killed […] substantially contributed to the commission of the Rwamukwayas' death."[3447]

1506. Consequently, the Trial Chamber convicted Ntahobali of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding and abetting the killing of the Rwamukwaya family.[3448]

1507. Ntahobali submits that no reasonable trier of fact could have convicted him for the killing of the Rwamukwaya family based on the evidence on the record.[3449] In particular, he contends that the Trial Chamber erred in concluding that the only reasonable inference available from the circumstantial evidence was that he aided and abetted the killing of the Rwamukwaya family.[3450] Pointing out that the principal perpetrators are unknown, he argues that the conclusions that the perpetrators had genocidal intent and that he was aware of it were not the only reasonable conclusions open to the Trial Chamber.[3451] Ntahobali further submits that the Trial Chamber erred

[3444] Trial Judgement, paras. 3207, 3219, 5852.
[3445] *See* Trial Judgement, para. 3219. *See also ibid.*, para. 5852.
[3446] Trial Judgement, para. 5854.
[3447] Trial Judgement, para. 5855.
[3448] Trial Judgement, paras. 5855, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186.
[3449] Ntahobali Notice of Appeal, paras. 201, 213; Ntahobali Appeal Brief, paras. 495, 500.
[3450] Ntahobali Notice of Appeal, paras. 213, 331; Ntahobali Appeal Brief, paras. 500, 501, 504. *See also* AT. 15 April 2015 pp. 35, 36.
[3451] Ntahobali Notice of Appeal, paras. 330-332 (French). Ntahobali explained that he could not develop in his appeal brief Ground 4.7 of his appeal where he made this allegation of error due to the imposed word limit. *See* Ntahobali Appeal Brief, para. 980. Based on the language used in his appeal brief, the Appeals Chamber considers that Ntahobali has not abandoned this ground of appeal. The Appeals Chamber is of the view that the arguments he developed in his notice of appeal in support of the allegation of error should be addressed as a matter of fairness.

in its overall assessment of the evidence concerning the killing of the Rwamukwaya family.[3452] He requests that the impugned conclusions be set aside and that he be acquitted of this crime.[3453]

1508. The Prosecution responds that Ntahobali fails to demonstrate any unreasonableness in the Trial Chamber's assessment of the totality of the evidence in relation to the killing of the Rwamukwaya family.[3454] In its view, the fact that Ntahobali was seen "gallivanting around Butare in the dead family's car shortly after threatening their murder leads to the only reasonable inference that Ntahobali was responsible for their deaths."[3455] It argues that Ntahobali failed to present any other reasonable conclusion based on the available evidence.[3456]

1509. The Appeals Chamber recalls that a trial chamber may infer the existence of a particular fact upon which the guilt of the accused depends from circumstantial evidence only if it is the only reasonable conclusion that could be drawn from the evidence presented.[3457] If there is another conclusion which is also reasonably open from the evidence, and which is consistent with the non-existence of that fact, the conclusion of guilt beyond reasonable doubt cannot be drawn.[3458]

1510. The Trial Judgement reflects that the Trial Chamber was cognisant of this standard.[3459] The Appeals Chamber considers, however, that in finding that Ntahobali aided and abetted the killing of the Rwamukwaya family, the Trial Chamber failed to explain how this was the only reasonable inference that could be drawn from the evidence. When considering the circumstantial evidence on the record, the Trial Chamber expressly took into account the narrow timeframes between the threat uttered by Ntahobali against the Rwamukwaya family, the sighting of their dead bodies, and the first sighting of the vehicle purportedly belonging to Rwamukwaya being driven by Ntahobali.[3460] In particular, the Trial Chamber considered that "the proximity between the killing of the Rwamukwaya family and the sightings of Ntahobali in Rwamukwaya's vehicle establishes a

[3452] Ntahobali Notice of Appeal, paras. 200-212; Ntahobali Appeal Brief, paras. 467-499, 501-505; Ntahobali Reply Brief, paras. 213-226. Ntahobali submits that the Trial Chamber erred in: (i) finding that Prosecution Witness FA's evidence that Ntahobali pronounced a threat against the Rwamukwaya family was credible; (ii) concluding that the alleged threat was related to the killing; (iii) assessing the evidence as to when the corpses of the family were seen and evidence that Rwamukwaya may have been alive in May 1994; and (iv) ignoring evidence that Ntahobali was seen in Rwamukwaya's car prior to 25 April 1994 as well as inconsistencies within the evidence as to the description of the car. *See also* Ntahobali Reply Brief, paras. 217, 218, 224-226; AT. 15 April 2015 pp. 41, 42.
[3453] Ntahobali Notice of Appeal, paras. 201, 214, 332 (French); Ntahobali Appeal Brief, para. 505.
[3454] Prosecution Response Brief, paras. 942-953. *See also* AT. 16 April 2015 pp. 7, 8. The Prosecution considers that, by not presenting arguments in his appeal brief, Ntahobali had abandoned Ground 4.7 of his appeal. *See* Prosecution Response Brief, para. 1218.
[3455] Prosecution Response Brief, para. 953.
[3456] Prosecution Response Brief, para. 953.
[3457] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, paras. 535, 553, 629; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al*. Appeal Judgement, para. 306; *Čelebići* Appeal Judgement, para. 458.
[3458] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, paras. 535, 553; *Bagosora and Nsengiyumva* Appeal Judgement, para. 515; *Ntagerura et al*. Appeal Judgement, para. 306; *Čelebići* Appeal Judgement, para. 458.
[3459] *See* Trial Judgement, paras. 162, 163, 3219.
[3460] *See* Trial Judgement, paras. 3219, 5852. *See also ibid*., paras. 3212-3218.

link between the killing and the circumstances in which Ntahobali came into possession of the vehicle."[3461] However, the Trial Chamber did not elaborate how the combination of these factors necessarily led to the conclusion that Ntahobali's threat substantially contributed to the killing of the Rwamukwaya family. Even if Ntahobali's threat against the family, their death, and his coming into possession of their vehicle were temporally proximate and occurred in that order, the Appeals Chamber finds that this is an insufficient basis to infer as the only reasonable conclusion that Ntahobali's conduct had a substantial effect on the commission of the killing of the Rwamukwaya family by the principal perpetrators.

1511. Indeed, the Trial Chamber made no findings about the circumstances of the killing of the Rwamukwaya family, its principal perpetrators, including whether they acted pursuant to Ntahobali's threat to kill the Rwamukwaya family, or the circumstances in which Ntahobali came into possession of Rwamukwaya's vehicle. Nor did the Trial Chamber refer to any evidence in these respects.[3462] Likewise, while the Trial Chamber concluded that unidentified principal perpetrators committed the killing with the requisite genocidal intent and that Ntahobali was aware of this intent,[3463] it did not refer to any of its factual findings or evidence on the record to substantiate this conclusion.[3464]

1512. The Appeals Chamber finds that, in the absence of any evidence that Ntahobali's threat contributed to the killing of the Rwamukwaya family, following which he acquired their vehicle, the "narrow time frames involved between Ntahobali's threat pronounced against the Rwamukwaya family, the sighting of their bodies, and the first sightings of Ntahobali in Rwamukwaya's vehicle"[3465] could not lead a reasonable trier of fact to find that the only reasonable inference was that Ntahobali substantially contributed to the crime and was aware of the principal perpetrators' genocidal intent.

1513. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in finding that Ntahobali aided and abetted the killing of the Rwamukwaya family on or about 29 or 30 April 1994.

1514. The Appeals Chamber therefore grants Grounds 3.4, in part, and 4.7 of Ntahobali's appeal and reverses his conviction for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding

[3461] *See* Trial Judgement, para. 3215.
[3462] *See* Trial Judgement, Section 3.6.24.
[3463] *See* Trial Judgement, para. 5854.
[3464] *See* Trial Judgement, Section 4.2.2.3.12.

and abetting the killing of the Rwamukwaya family. The Appeals Chamber will examine the impact, if any, of this finding on Ntahobali's sentence in the appropriate section below.

[3465] *See* Trial Judgement, para. 5852. *See also ibid.*, para. 3219.

I. Butare Prefecture Office (Grounds 3.6, 3.9 in part, 4.2-4.4)

1515. The Trial Chamber convicted Ntahobali of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for ordering the killing of Tutsis taking refuge at the Butare Prefecture Office.[3466] The Trial Chamber also convicted Ntahobali of committing, ordering, and aiding and abetting rapes perpetrated at the Butare Prefecture Office as a crime against humanity and as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[3467] The Trial Chamber further found that Ntahobali bore superior responsibility for the acts of the *Interahamwe* at the prefectoral office, "including their abductions, rapes, and killings" pursuant to Article 6(3) of the Statute and considered this as an aggravating factor when determining his sentence.[3468]

1516. Ntahobali submits that the Trial Chamber erred in convicting him in relation to crimes committed at the Butare Prefecture Office. He contends that the Trial Chamber erred in: (i) making imprecise or unsupported findings; (ii) its assessment of the evidence; (iii) convicting him for ordering killings and rapes committed during attacks at the prefectoral office; and (iv) finding that he bore superior responsibility for the killings and rapes committed by *Interahamwe* during attacks at the prefectoral office. The Appeals Chamber will consider these contentions in turn.

1. Imprecise and Unsupported Findings

1517. In the "Factual Findings" section of the Trial Judgement concerning attacks at the Butare Prefecture Office, the Trial Chamber found that:

> between mid-May and mid-June 1994, Nyiramasuhuko and Ntahobali came to the [Butare Prefecture Office] with the pickup on at least seven occasions (once in mid-May; two additional times from mid-May to the beginning of June; three attacks during one night at the end of May or beginning of June; and another attack in June). Considering the pickup was nearly full on at least seven occasions, the Chamber is convinced beyond a reasonable doubt that hundreds of Tutsi refugees were abducted from the [Butare Prefecture Office] and killed.[3469]

The Trial Chamber further provided the following summary of its factual findings concerning Nyiramasuhuko's and Ntahobali's involvement in crimes committed at the prefectoral office:

[3466] Trial Judgement, paras. 5876, 5971, 6053-6055, 6100, 6101, 6168, 6169, 6186.
[3467] Trial Judgement, paras. 6085, 6086, 6094, 6184-6186. While the Trial Chamber considered that the rapes that occurred at the Butare Prefecture Office could establish Ntahobali's responsibility for genocide, it concluded that Ntahobali was not given sufficient notice that rapes there would be used in support of this count and did not convict him of genocide on this basis. *See ibid.*, paras. 5857-5865, 5868, 5872, 5874, 5875, 5877.
[3468] Trial Judgement, paras. 5886, 5971. *See also ibid.*, paras. 5652, 5884, 5885, 6056, 6086, 6220.
[3469] Trial Judgement, para. 2779 (internal reference omitted).

> The Chamber finds the Prosecution has proven beyond a reasonable doubt that: between 19 April and late June 1994 Nyiramasuhuko, Ntahobali, *Interahamwe* and soldiers went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and the Tutsi refugees were killed in various locations throughout Ngoma *commune*, including the following specific incidents:
>
> > i. In mid-May 1994, Nyiramasuhuko, Ntahobali and about 10 *Interahamwe* came to the [Butare Prefecture Office] aboard a camouflaged pickup. Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup. Ntahobali and about eight other *Interahamwe* raped Witness TA. Some of the *Interahamwe* raped two other Tutsi women. The pickup left the [Butare Prefecture Office], abducting Tutsi refugees in the process, some of whom were forced to undress.
> >
> > ii. During the last half of May 1994, Ntahobali and *Interahamwe* came to the [Butare Prefecture Office] on two more occasions. Ntahobali violently raped Witness TA, hitting her on the head. *Interahamwe* following the orders of Ntahobali raped six other women. In a subsequent attack during this same time period, Ntahobali ordered about seven other *Interahamwe* to rape Witness TA.
> >
> > iii. Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup three times in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, taking them to other sites in Butare *préfecture* to be killed. Nyiramasuhuko ordered *Interahamwe* to rape refugees because they were Tutsi. The *Interahamwe* beat, abused and raped many Tutsi women.
> >
> > iv. Throughout these attacks from 19 April to the end of June 1994, regardless of whether the refugees were taken to Rwabayanga, Kabutare, Mukoni or the IRST, hundreds of refugees were abducted from the [Butare Prefecture Office] and never seen again, including Mbasha's wife and children, Trifina and other women and children. The only reasonable inference is that these refugees were killed.
> >
> > v. In the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and that as a result numerous women were raped at that location. Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA.[3470]

1518. The Trial Chamber provided its most detailed legal analysis of the facts relevant to the crimes committed at the prefectoral office in the "Genocide" section of the "Legal Findings" section of the Trial Judgement,[3471] where it concluded that Ntahobali was responsible for ordering the killing of "Tutsis taking refuge at the Butare *préfecture* office".[3472] The Trial Chamber also concluded that Ntahobali committed, ordered, and aided and abetted rapes at the prefectoral office but did not convict him of genocide on this basis as it found that insufficient notice had been given that this conduct would support the charge of genocide.[3473] The Trial Chamber recalled its findings on killings and rapes made in the "Genocide" section in more condensed summaries throughout the

[3470] Trial Judgement, para. 2781.
[3471] Trial Judgement, paras. 5866-5875.
[3472] Trial Judgement, paras. 5876, 5971.
[3473] Trial Judgement, paras. 5875, 5877. *See also ibid.*, paras. 5863-5865.

remainder of the "Legal Findings" section when considering Ntahobali's responsibility for other crimes based on the same conduct.[3474]

1519. Ntahobali contends that the Trial Judgement violated his right to a reasoned opinion and prevented him from effectively exercising his right of appeal by entering imprecise and unsupported findings with respect to his convictions for killings and rapes during attacks at the prefectoral office.[3475]

(a) Killings

1520. Ntahobali submits that the Trial Chamber failed to provide a reasoned opinion with respect to his convictions relating to the killings committed during: (i) attacks from 19 April to mid-May 1994; (ii) the attacks which occurred seven to 11 days after the attack in mid-May 1994 ("Last Half of May Attacks"); (iii) the Night of Three Attacks; and (iv) the First Half of June Attacks.[3476]

(i) 19 April to Mid-May Attacks

1521. Ntahobali contends that the Trial Judgement implies that he was convicted for killings during attacks occurring between 19 April and mid-May 1994.[3477] In this respect, he points out that the Trial Chamber concluded in paragraph 2781 of the Trial Judgement that he had participated in attacks "between 19 April and late June 1994".[3478] However, he argues that the first of the several attacks upon which the Trial Chamber made findings of his involvement occurred in mid-May 1994 and that the Trial Chamber expressly rejected the evidence of his role in attacks at the prefectoral office prior to mid-May 1994.[3479] Ntahobali also emphasises that the "Legal Findings" section of the Trial Judgement only discusses his liability for attacks at the Butare Prefecture Office from mid-May 1994 and beyond.[3480] Consequently, Ntahobali argues that the Trial Chamber provided no

[3474] *See* Trial Judgement, paras. 6053-6055 (extermination as a crimes against humanity), 6085, 6086, 6094 (rape as a crime against humanity), 6100, 6101, 6121 (persecution as a crime against humanity), 6168, 6169 (violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II), 6184, 6185 (outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II).
[3475] Ntahobali Notice of Appeal, paras. 306-309; Ntahobali Appeal Brief, paras. 882-905; Ntahobali Reply Brief, paras. 356-365. The Appeals Chamber will examine Ntahobali's arguments pertaining to the imprecision of the Trial Judgement regarding his superior responsibility in Section V.I.4 below.
[3476] Ntahobali Notice of Appeal, paras. 306, 307; Ntahobali Appeal Brief, paras. 882-897, 952; Ntahobali Reply Brief, paras. 356-365.
[3477] Ntahobali Appeal Brief, para. 884.
[3478] Ntahobali Appeal Brief, paras. 884, 885.
[3479] Ntahobali Appeal Brief, paras. 884, 886.
[3480] Ntahobali Appeal Brief, para. 886.

reasoned opinion for convicting him for the crimes committed at the Butare Prefecture Office from 19 April to mid-May 1994 and requests that he be acquitted of any responsibility for them.[3481]

1522. The Prosecution responds that Ntahobali was not convicted for the attacks prior to mid-May 1994 "but that the attacks beginning on 19 April [1994] were only mentioned [in the Trial Judgement] to describe the entirety of the genocidal events".[3482]

1523. The Appeals Chamber observes that the statement in paragraph 2781 of the Trial Judgement that "the Prosecution has proven beyond a reasonable doubt that: between 19 April and late June 1994 Nyiramasuhuko, Ntahobali, *Interahamwe* and soldiers went to the [Butare Prefecture Office] to abduct hundreds of Tutsis" does give the impression that Ntahobali was found to have participated in attacks at the Butare Prefecture Office prior to mid-May 1994. However, the Trial Chamber's factual findings reflect that Ntahobali's participation in crimes at the prefectoral office started in mid-May 1994 and was limited to the events specifically identified in paragraphs 2779 and 2781 of the Trial Judgement.[3483] This is consistent with the Trial Chamber's findings that, while the Prosecution had established that attacks occurred at the prefectoral office by the end of April 1994, Ntahobali's involvement in the attacks which occurred between late April and early May 1994 had not been established beyond reasonable doubt.[3484] Furthermore, there is no discussion of Ntahobali's criminal responsibility for any attacks occurring between 19 April and mid-May 1994 in the "Legal Findings" section of the Trial Judgement. Consequently, it is evident from a reading of the Trial Judgement as a whole that Ntahobali was not convicted for attacks occurring before mid-May 1994.

1524. Accordingly, the Appeals Chamber dismisses Ntahobali's contention as moot since the Trial Chamber did not convict him for crimes at the Butare Prefecture Office prior to the attack conducted in mid-May 1994.

(ii) Last Half of May Attacks

1525. In the "Factual Findings" section of the Trial Judgement, the Trial Chamber stated as follows concerning Ntahobali's involvement in crimes committed during the attacks at the Butare Prefecture Office which occurred "around seven and 11 days after the first attack in mid-May 1994":

[3481] Ntahobali Appeal Brief, paras. 886, 887; Ntahobali Reply Brief, paras. 357, 360. *See also* AT. 15 April 2015 p. 49.
[3482] Prosecution Response Brief, paras. 1169, 1171.
[3483] Trial Judgement, paras. 2644, 2653, 2738, 2749, 2773.
[3484] Trial Judgement, para. 2611, 2626.

> The Chamber finds the Prosecution has proven beyond a reasonable doubt that around 7 and 11 days after the first attack in mid-May 1994, Ntahobali and *Interahamwe* came to the [Butare Prefecture Office] on two more occasions. Ntahobali violently raped Witness TA, hitting her on the head with a hammer. *Interahamwe*, following the orders of Ntahobali, raped six other women. In a subsequent attack during this same time period, Ntahobali ordered about seven other *Interahamwe* to rape Witness TA.[3485]

The Trial Chamber recalled these conclusions when summarising all of its factual findings related to Ntahobali's involvement in crimes committed at the prefectoral office.[3486] The Trial Chamber further repeated these conclusions in discussing Ntahobali's responsibility with respect to the Last Half of May Attacks in the "Legal Findings" section of the Trial Judgement, finding that Ntahobali ordered and committed rape during these attacks.[3487] The Trial Chamber did not discuss in the "Legal Findings" section of the Trial Judgement any abductions and killings which occurred during the Last Half of May Attacks.

1526. Ntahobali submits that the Trial Chamber never concluded that abductions and killings occurred during the Last Half of May Attacks despite stating that the pickup truck was full on these occasions.[3488] Ntahobali contends that the Trial Chamber therefore failed to provide a reasoned opinion when convicting him of such conduct and requests that he be acquitted for these murders.[3489]

1527. The Prosecution contends that Ntahobali misstates the evidence, arguing that Witness SD testified that Ntahobali and *Interahamwe* arrived in the same vehicle and would "come and fetch people" some of whom "were taken away and never seen again".[3490]

1528. The Appeals Chamber notes that paragraph 2779 of the Trial Judgement appears to imply that the vehicle Ntahobali used to come to the prefectoral office during the Last Half of May Attacks was used to abduct Tutsis. However, a review of the Trial Chamber's detailed factual findings on these attacks, namely paragraphs 2653 and 2781(ii) of the Trial Judgement, reflects that the Trial Chamber made no findings that abductions and killings occurred during these particular attacks. The Trial Chamber's conclusions in the "Legal Findings" section similarly do not mention abductions and killings occurring during the Last Half of May Attacks.[3491] In this context, the Appeals Chamber concludes that a plain reading of the Trial Chamber's detailed factual and legal

[3485] Trial Judgement, para. 2653.
[3486] Trial Judgement, paras. 2779, 2781(ii).
[3487] Trial Judgement, paras. 5872, 6085, 6086, 6094, 6184, 6185.
[3488] Ntahobali Appeal Brief, para. 888, *referring to* Trial Judgement, para. 2779.
[3489] Ntahobali Appeal Brief, para. 888.
[3490] Prosecution Response Brief, para. 1170, *referring*, *inter alia*, *to* Trial Judgement, para. 2650, Witness SD, T. 17 March 2003 pp. 9, 10.
[3491] Trial Judgement, para. 5872.

conclusions concerning the Last Half of May Attacks reveals that Ntahobali was only convicted based on rapes.

1529. In this regard, the Prosecution's contention that the evidence of Witness SD, as summarised in paragraph 2650 of the Trial Judgement, demonstrates that Ntahobali was convicted for abductions during these attacks is unpersuasive. While Witness SD testified about abductions,[3492] the Trial Chamber expressly considered that this evidence "corroborated important aspects" of the attacks described by Witness TA[3493] without concluding that such abductions occurred during the attacks Witness TA described.[3494] Moreover, the absence of any mention of abductions and killings occurring during these attacks in the "Legal Findings" section of the Trial Judgement further reflects that the Trial Chamber did not enter convictions on this basis.[3495]

1530. In conclusion, the Appeals Chamber dismisses Ntahobali's argument as moot as the Trial Chamber did not convict him on the basis of killings perpetrated during the Last Half of May Attacks.

(iii) Night of Three Attacks and First Half of June Attacks

1531. In the "Factual Findings" section of the Trial Judgement, the Trial Chamber stated as follows concerning Ntahobali's involvement in crimes which occurred at the Butare Prefecture Office during the Night of Three Attacks:

> the Chamber finds beyond a reasonable doubt that Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] three times abducting Tutsi refugees on each occasion on this night.[3496]
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> […]
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> the Chamber is convinced beyond a reasonable doubt that Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup. It further finds that Nyiramasuhuko gave orders to the *Interahamwe* to commit these crimes. The women and children were taken away from the [Butare Prefecture Office] and killed elsewhere.[3497]
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> […]
>
> Therefore, based upon the evidence of Witnesses TK, QBQ, RE, SS, SU and FAP, including the specific evidence as to the abduction of Mbasha's wife and children, the assault of a woman named Trifina and the assault of an unnamed woman and her children, the Chamber finds it established beyond a reasonable doubt that at the end of May or beginning of June 1994,

[3492] Witness SD, T. 17 March 2003 pp. 9, 10.
[3493] Trial Judgement, para. 2650.
[3494] *See* Trial Judgement, paras. 2653, 2781(ii).
[3495] The Appeals Chamber observes that, as noted by the Prosecution, paragraphs 2645 and 2648 of the Trial Judgement include reference to Witness TA's evidence of Ntahobali and *Interahamwe* beating, cutting, and killing people during the Last Half of May Attacks. However, the Trial Chamber did not make factual or legal findings to support the conclusion that Ntahobali was convicted on the basis of this specific conduct.
[3496] Trial Judgement, para. 2715.
[3497] Trial Judgement, para. 2736.

> Nyiramasuhuko, Ntahobali and about 10 *Interahamwe* came to the [Butare Prefecture Office] aboard a camouflaged pickup. Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup. The pickup left the [Butare Prefecture Office], abducting Tutsi refugees in the process, some of whom were forced to undress.[3498]

1532. In the same section, the Trial Chamber found the following regarding Ntahobali's involvement in crimes which occurred at the prefectoral office during the First Half of June Attacks:[3499]

> the Chamber finds it established beyond a reasonable doubt, based on the testimony of Witnesses TA, QBP and TK that, in addition to those attacks described above, Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] in June 1994 to rape women and abduct refugees. During one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA. It further finds that in June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and that as a result, numerous women were raped at that location.[3500]

1533. The Trial Chamber recalled its conclusions concerning the Night of Three Attacks and the First Half of June Attacks in paragraph 2781(iii)-(v) of the Trial Judgement when summarising its factual findings related to Nyiramasuhuko's and Ntahobali's involvement in the crimes committed at the prefectoral office during the Night of Three Attacks and the First Half of June Attacks. In relevant respects, the Trial Chamber concluded as follows in the "Genocide" section of the "Legal Findings" section of the Trial Judgement:

> Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed. Nyiramasuhuko ordered *Interahamwe* to rape refugees […]. The *Interahamwe* beat, abused and raped many Tutsi women. […] In the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and as a result numerous women were raped at that location. Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks, Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA […].[3501]

1534. Ntahobali submits that the Trial Chamber failed to explain what evidence supported his responsibility under Article 6(1) of the Statute for ordering killings during these attacks.[3502] He points to the absence of express findings that he ordered killings or issued any other orders during these attacks and contrasts these omissions with references to specific findings that Nyiramasuhuko issued orders during these attacks.[3503] Ntahobali adds that he is unable to discern the factual basis that would support his criminal responsibility for the killings relating to the

[3498] Trial Judgement, para. 2738.
[3499] *See* Trial Judgement, Section 3.6.19.4.9.
[3500] Trial Judgement, para. 2773.
[3501] Trial Judgement, paras. 5873, 5874 (internal reference omitted).
[3502] Ntahobali Notice of Appeal, para. 306; Ntahobali Appeal Brief, paras. 883, 951, 952.
[3503] Ntahobali Appeal Brief, para. 952, *referring to* Trial Judgement, paras. 2698, 2712, 2730, 2736, 2738.

findings under the "First Half of June 1994" heading in the Trial Judgement[3504] and points to imprecision in the Trial Chamber's findings regarding the attacks during this period.[3505] He argues that the imprecision has prevented him from mounting an effective appeal and that he should therefore be acquitted of all convictions related to these attacks.[3506]

1535. The Prosecution responds that Ntahobali erroneously alleges that he cannot understand which killings he is guilty of despite simultaneously contesting his guilt for the seven attacks of which he was convicted.[3507]

1536. On 25 March 2015, the Appeals Chamber requested the Prosecution to provide supplementary submissions as to what evidence cited in the Trial Judgement and findings of the Trial Chamber would support the conclusion that Ntahobali was convicted for ordering killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.[3508] In response, the Prosecution points to evidence cited in the Trial Judgement and submits that the Trial Chamber correctly concluded that Ntahobali was convicted for ordering killings of Tutsis during the Night of Three Attacks and was held "responsible for ordering, while at the *préfecture* office during the first half of June 1994, additional killings of Tutsi refugees."[3509]

1537. Regarding the Night of Three Attacks, the Prosecution points to the Trial Chamber's findings that, during this night, Ntahobali, Nyiramasuhuko, and *Interahamwe* abducted refugees and took them to other sites in Butare prefecture to be killed, and that abducted refugees during these and other attacks were killed.[3510] It also relies on the Trial Chamber's conclusion that Ntahobali issued orders, including to abduct and kill Tutsis, to *Interahamwe*, who complied with these orders.[3511] The Prosecution contends that these findings and the evidence credited by the Trial

[3504] Ntahobali Appeal Brief, para. 889.
[3505] Ntahobali submits that the Trial Chamber's finding in paragraph 2773 of the Trial Judgement that "Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees" coupled with its use of the phrase that "[d]uring one of these attacks" and the phrase "in addition to those attacks described above" raise questions as to which attacks the Trial Chamber was referring and for which of them he was convicted. He also argues that he cannot understand whether: (i) he was convicted for attacks that occurred during daylight at the prefectoral office based on the evidence of Witnesses TA and TK, which is in contradiction to its findings that the attacks occurred at night; (ii) the Trial Chamber concluded that Nyiramasuhuko and him were together during all the attacks in June 1994 at the prefectoral office; and (iii) he was convicted for ordering killings that occurred at the prefectoral office or killings that occurred elsewhere after refugees were abducted. *See* Ntahobali Appeal Brief, paras. 889-893. *See also* Ntahobali Reply Brief, paras. 364, 365.
[3506] Ntahobali Notice of Appeal, paras. 307-309; Ntahobali Appeal Brief, paras. 892, 894, 960. *See also* Ntahobali Notice of Appeal, para. 322; Ntahobali Reply Brief, paras. 364, 365.
[3507] Prosecution Response Brief, para. 1170.
[3508] 25 March 2015 Order, p. 2.
[3509] Prosecution Supplementary Submissions, para. 1.
[3510] Prosecution Supplementary Submissions, paras. 21, 28, 31, *referring to* Trial Judgement, paras. 2744, 2749, 2779, 2781(iii), (iv), 5873.
[3511] Prosecution Supplementary Submissions, paras. 21, 28, *referring to* Trial Judgement, para. 5884.

Chamber[3512] establish that Ntahobali was convicted for ordering killings during the Night of Three Attacks.[3513]

1538. With respect to the First Half of June Attacks, the Prosecution emphasises that the Trial Chamber concluded that Ntahobali returned to the prefectoral office "with *Interahamwe* 'to rape women and abduct refugees'" and that killings resulted from these attacks.[3514] The Prosecution contends that the Trial Chamber's findings and evidence it relied upon[3515] support Ntahobali's responsibility for ordering killings during the First Half of June Attacks.[3516]

1539. In response, Ntahobali contends that, while the Trial Chamber's findings reveal that he was convicted for all murders committed during the entire period of attacks at the prefectoral office, this conclusion is unsupported and unreasonable, particularly in relation to the Night of Three Attacks and the First Half of June Attacks.[3517] He disputes the Prosecution's position that the Trial Chamber's findings as to the elements of the offence may be implied.[3518] Ntahobali further rejects the Prosecution's submission that the evidence cited by the Trial Chamber supports his responsibility for ordering killings under Article 6(1) of the Statute.[3519]

1540. The Appeals Chamber observes that the Trial Chamber convicted Ntahobali of genocide, crimes against humanity, and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office".[3520] The Trial Chamber did not find Ntahobali responsible under any other form of liability under Article 6(1) of the Statute with respect to the killings of Tutsis who had sought refuge at the prefectoral office.

[3512] In particular, the Prosecution highlights, *inter alia*: (i) the evidence of Witnesses TK and SJ that *Interahamwe* referred to Ntahobali as "*chef*" or "chief", respectively, and that Ntahobali issued orders to *Interahamwe* during the Night of Three Attacks; (ii) Witness TK's testimony that *Interahamwe* attacked refugees upon Ntahobali's instructions; and (iii) Witnesses TK's and RE's evidence concerning Ntahobali's authority over *Interahamwe* during these attacks. *See* Prosecution Supplementary Submissions, paras. 23, 24, 26, 29, 30, *referring to*, *inter alia*, Trial Judgement, paras. 2212, 2231, 2278, 2662, 2668, 2681, 2707. The Prosecution also points to evidence from Witness TA concerning the Mid-May Attack which, in its view, demonstrates that Ntahobali, in conjunction with Nyiramasuhuko, were in charge of the *Interahamwe* and led them in attacks at the prefectoral office. *See ibid*., para. 25, *referring to* Trial Judgement, paras. 2178, 2189.
[3513] Prosecution Supplementary Submissions, paras. 1, 28-33.
[3514] Prosecution Supplementary Submissions, paras. 36, 37, *quoting* Trial Judgement, para. 5874, *referring to* Trial Judgement, para. 2771.
[3515] The Prosecution argues that the Trial Chamber credited Witness TK's evidence that Ntahobali came to determine whether there were any men left, who were then taken away to be killed, and that he instructed *Interahamwe* to "[b]e firm in [their] actions", meaning to "kill all of them." *See* Prosecution Supplementary Submissions, paras. 37-39, *quoting* Trial Judgement, para. 2771.
[3516] Prosecution Supplementary Submissions, paras. 1, 39-41.
[3517] Ntahobali Supplementary Submissions, paras. 11, 36.
[3518] Ntahobali Supplementary Submissions, para. 7.
[3519] *See* Ntahobali Supplementary Submissions, paras. 11, 12, 16-18, 20, 24-27, 29-36, 39, 42-48.
[3520] Trial Judgement, paras. 5971, 6053, 6100, 6168.

1541. A review of the Trial Chamber's most detailed factual and legal findings reveals that the Trial Chamber expressly found that Ntahobali ordered killings during attacks committed at the prefectoral office only with respect to the attack conducted in mid-May 1994 ("Mid-May Attack").[3521] The Trial Chamber also made findings about Ntahobali's involvement in abductions and killings committed at the prefectoral office during the Night of Three Attacks and the First Half of June Attacks but did not expressly find that Ntahobali ordered killings during these attacks or explain if these findings supported his ultimate convictions for ordering killings.[3522] The absence of specific findings that Ntahobali ordered killings during the Night of Three Attacks and the First Half of June Attacks raises the question as to whether Ntahobali's conviction for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office" was also based upon those attacks.[3523]

1542. Given that the Trial Chamber did not provide any further characterisation of Ntahobali's responsibility for the abductions and killings perpetrated during these attacks, Ntahobali's criminal liability for the Night of Three Attacks would be limited to the Trial Chamber's following conclusion: "Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed."[3524] Similarly, Ntahobali's criminal responsibility for ordering killings during the First Half of June Attacks would be limited to the Trial Chamber's statement that "Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees".[3525]

1543. In this context, the Appeals Chamber, Judge Khan dissenting, is of the view that the Trial Chamber's conclusions relating to the Night of Three Attacks and the First Half of June Attacks do not support Ntahobali's conviction for ordering killings. Indeed, the findings do not refer to an express order given by Ntahobali to kill or a particular instruction that had a direct and substantial effect on the relevant killings. Nor do the conclusions specify the category of assailants to whom Ntahobali gave an order. The Appeals Chamber observes that, by contrast, the Trial Chamber expressly concluded in the "Factual Findings" section of the Trial Judgement that Nyiramasuhuko issued orders during the Night of Three Attacks and the First Half of June Attacks.[3526]

1544. The Appeals Chamber observes that the Trial Chamber expressly noted that its conclusions on these attacks were based upon the evidence of Prosecution Witnesses TK, QBQ, RE, SS, SU,

[3521] *See* Trial Judgement, para. 5867, *referring*, *inter alia*, *to* Trial Judgement, Section 3.6.19.4.6.
[3522] *See* Trial Judgement, paras. 5873, 5874. *See also ibid.*, paras. 2715, 2736, 2738, 2773, 2781(iii) and (v).
[3523] Trial Judgement, paras. 5971, 6053, 6100, 6168. *See also ibid.*, para. 5876.
[3524] Trial Judgement, para. 5873. *See also ibid.*, paras. 2738, 2781(iii).
[3525] Trial Judgement, para. 5874. *See also ibid.*, paras. 2773, 2781(v).
[3526] *See* Trial Judgement, paras. 2698, 2730, 2736, 2738, 2773, 2781(iii) and (v).

FAP, and TA.[3527] While the evidence of these witnesses, as summarised and discussed by the Trial Chamber, appears to reflect that Ntahobali participated in abductions and killings, issued orders, and held a position of authority among the assailants during these events,[3528] the Trial Chamber's discussion of this evidence does not allow the Appeals Chamber, Judge Khan dissenting, to conclude that the Trial Chamber relied on this evidence when finding Ntahobali responsible for ordering killings at the prefectoral office.

1545. In the absence of any relevant factual and legal findings underlying Ntahobali's responsibility for ordering killings which occurred during the Night of Three Attacks and the First Half of June Attacks as well as of any clear indication that the Trial Chamber intended to convict Ntahobali on this basis, the Appeals Chamber, Judge Khan dissenting, concludes that Ntahobali was not convicted in relation to the killings perpetrated during these attacks. Accordingly, the Appeals Chamber considers that Ntahobali's arguments regarding the imprecision of the Trial Chamber's findings as regards these attacks are moot and need not be discussed.

(b) Rapes

1546. As noted above, the Trial Chamber provided its most detailed legal analysis of the facts relevant to crimes committed at the Butare Prefecture Office and Ntahobali's responsibility for such crimes in the "Genocide" section of the Trial Judgement.[3529] This section of the Trial Judgement states as follows concerning Ntahobali's involvement in rapes committed at the prefectoral office during the Mid-May Attack, the Last Half of May Attacks, the Night of Three Attacks, and the First Half of June Attacks:

> Furthermore, Witness TA and two other women were raped during this mid-May attack. […] Witness TA was brutally raped by a gang of about eight *Interahamwe* in addition to Ntahobali. At least two other Tutsi women were raped on this occasion by the *Interahamwe*. […][3530]
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> […]
>
> During the last half of May 1994, Ntahobali and *Interahamwe* came to the [Butare Prefecture Office] on two more occasions. Ntahobali violently raped Witness TA, hitting her on the head. *Interahamwe* following the orders of Ntahobali raped six other women. In a subsequent attack during this same time period, Ntahobali ordered about seven other *Interahamwe* to rape Witness TA […].[3531]
>
> Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three

[3527] Trial Judgement, paras. 2738, 2773. The Trial Chamber also referred to the evidence of Witness QBP with respect to the First Half of June Attacks in paragraph 2773 of the Trial Judgement. However, this witness's evidence is only relevant to the Trial Chamber's additional conclusion in paragraph 2773 of the Trial Judgement that Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the Butare Prefecture Office and not to the finding supporting Ntahobali's criminal liability. *See* Trial Judgement, paras. 2763-2769, 2773; *infra*, paras. 1857, 1858.
[3528] *See* Trial Judgement, paras. 2657, 2668, 2681, 2687, 2704, 2707, 2710-2714, 2735, 2770, 2771.
[3529] *See supra*, para. 1518.
[3530] Trial Judgement, para. 5868.
[3531] Trial Judgement, para. 5872.

> occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare préfecture to be killed. Nyiramasuhuko ordered *Interahamwe* to rape refugees […]. The *Interahamwe* beat, abused and raped many Tutsi women.[3532]
>
> In the first half of June 1994, Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the [Butare Prefecture Office] and as a result numerous women were raped at that location. Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks, Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA […]. Each of these attacks constitutes the *actus reus* of genocide. Likewise, as discussed above, the Chamber finds Nyiramasuhuko and Ntahobali possessed genocidal intent.[3533]

1547. Having found that Ntahobali could not be convicted of genocide on the basis of rapes that occurred at the prefectoral office due to lack of notice,[3534] the Trial Chamber assessed Ntahobali's criminal responsibility for rapes as a crime against humanity and as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[3535] In its discussion of these crimes, the Trial Chamber stated in relevant respects:

> The Chamber is satisfied that the rapes of Witness TA and many other unnamed Tutsi women at the [Butare Prefecture Office] were conducted on ethnic grounds. The Chamber finds that Ntahobali bears responsibility as a principal perpetrator for committing these acts, for ordering *Interahamwe* to commit rapes, and also for aiding and abetting rapes. Similarly, the Chamber considers that Ntahobali bears superior responsibility for the rapes committed by the *Interahamwe*, and will take this into account in sentencing.[3536]
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> […]
>
> Ntahobali […] raped Tutsi women at the Butare *préfecture* office, ordered *Interahamwe* to rape Tutsis, and aided and abetted the rapes of a Tutsi. For these acts, the Chamber finds Ntahobali guilty of committing, ordering, and aiding and abetting rape as a crime against humanity, pursuant to Article 6 (1) of the Statute.[3537]
>
> […]
>
> Ntahobali […] also raped Tutsi women at the Butare *préfecture* office, ordered *Interahamwe* to rape Tutsis there, and aided and abetted the rapes of a Tutsi there. […] the Chamber finds Ntahobali guilty of committing, ordering, and aiding and abetting outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[3538]

1548. Ntahobali submits that the language used by the Trial Chamber throughout the "Legal Findings" section of the Trial Judgement is ambiguous, preventing him from effectively exercising his right of appeal.[3539] He contends that this ambiguity requires that he be acquitted for all the rapes

[3532] Trial Judgement, para. 5873 (internal reference omitted).
[3533] Trial Judgement, para. 5874 (internal reference omitted).
[3534] *See supra*, para. 1518.
[3535] Trial Judgement, paras. 6085, 6086, 6094, 6184, 6185. It is clear from the Trial Judgement that Ntahobali's convictions for rapes as a crime against humanity and as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute are predicated on the more detailed analysis provided in the "Genocide" section of the Trial Judgement. *See idem.*
[3536] Trial Judgement, para. 6086.
[3537] Trial Judgement, para. 6094.
[3538] Trial Judgement, paras. 6184, 6185.
[3539] Ntahobali Appeal Brief, paras. 898, 899, 904, 905.

not specifically identified by the Trial Chamber.[3540] Concerning the Mid-May Attack in particular, he argues that the Trial Chamber's conclusion in paragraph 5868 of the Trial Judgement that "*at least* two other Tutsi women were raped" in addition to Witness TA fails to limit the scope of his liability for rapes during this attack.[3541] He also points out that the Trial Chamber is silent as to what form of responsibility was imposed on him in relation to the rapes committed by *Interahamwe* during this attack.[3542]

1549. Concerning the Night of Three Attacks and the First Half of June Attacks, Ntahobali contends that paragraphs 5873 and 5874 of the Trial Judgement are silent as to his form of responsibility in relation to the rapes ordered by Nyiramasuhuko.[3543]

1550. With regard to the First Half of June Attacks, Ntahobali submits that the Trial Chamber's statements that "Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees" and "[d]uring at least one of these attacks, Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA" in paragraph 5874 of the Trial Judgement are vague and fail to inform him of what rapes committed by *Interahamwe* and soldiers support his conviction.[3544] He adds that, while the Trial Chamber indicated in paragraph 5874 of the Trial Judgement that soldiers committed rapes at the prefectoral office, it failed to clarify whether he was held responsible for these rapes.[3545]

1551. With respect to his convictions for committing rapes, Ntahobali contends that paragraphs 6086 and 6184 of the Trial Judgement are ambiguous because they give the impression that he was not only convicted for having committed the rapes of Witness TA but also of other Tutsi women during attacks at the prefectoral office.[3546] However, Ntahobali argues that the only conduct supporting his conviction for committing rapes under Article 6(1) of the Statute could be the Trial Chamber's conclusion that he raped Witness TA during the Mid-May Attack and seven days later, as the Trial Chamber stated that he would not be held criminally responsible for having raped Immaculée Mukagatare and Caritas.[3547]

1552. As regards his convictions for ordering rape, Ntahobali argues that the only rapes for which he clearly incurred ordering responsibility were those that occurred during the Last Half of May

[3540] Ntahobali Appeal Brief, paras. 899, 904, 905.
[3541] Ntahobali Appeal Brief, para. 899 (emphasis in original).
[3542] Ntahobali Appeal Brief, para. 904.
[3543] Ntahobali Appeal Brief, para. 904.
[3544] Ntahobali Appeal Brief, paras. 899, 904.
[3545] Ntahobali Appeal Brief, para. 905.
[3546] Ntahobali Appeal Brief, paras. 899, 901.
[3547] Ntahobali Appeal Brief, para. 901, *referring to* Trial Judgement, paras. 2172, 5868, 5872, 6086.

Attacks. He argues that, in the absence of proper findings, he cannot be held liable under this mode of responsibility for any other rapes.[3548]

1553. Finally, in relation to his conviction for aiding and abetting rapes, Ntahobali submits that the Trial Judgement is vague as to whether he was convicted of aiding and abetting the rapes of Witness TA only during one of the First Half of June Attacks or for all occasions on which the *Interahamwe* raped her at the prefectoral office between mid-May and the first half of June 1994.[3549] He requests that the Appeals Chamber find that the Trial Chamber convicted him only for aiding and abetting Witness TA's rapes during the First Half of June Attacks based on its failure to provide a clear and reasoned opinion.[3550]

1554. The Prosecution responds that Ntahobali misstates the Trial Chamber's findings and fails to demonstrate any error by the Trial Chamber.[3551] It contends that the Trial Chamber found Ntahobali guilty of committing the rape of Witness TA, ordering the rapes of Witness TA "and others", and aiding and abetting the rapes of Witness TA "and others".[3552]

1555. The Appeals Chamber considers that the totality of Ntahobali's criminal responsibility under Article 6(1) of the Statute based on rapes committed during attacks at the Butare Prefecture Office is based on the Trial Chamber's conclusions in paragraphs 2644, 2653, 2773, 2781(i), (ii), and (v) in the "Factual Findings" section of the Trial Judgement where his conduct is particularised,[3553] as further reflected in paragraphs 5868, 5872, 5874, 5875, 5877, 6086, 6094, 6184, and 6185 of the "Legal Findings" section of the Trial Judgement.

1556. In this context, the Appeals Chamber does not agree that the language identified in paragraphs 5868, 5873, or 5874 of the Trial Judgement is ambiguous when considered in the

[3548] Ntahobali Appeal Brief, paras. 903, 904, 958, 959.
[3549] Ntahobali Appeal Brief, para. 902. *See also* Ntahobali Reply Brief, para. 364.
[3550] Ntahobali Appeal Brief, para. 902.
[3551] Prosecution Response Brief, para. 1174.
[3552] Prosecution Response Brief, para. 1174.
[3553] *See* Trial Judgement, paras. 2644 ("Ntahobali and about eight other *Interahamwe* raped Witness TA. Some of the *Interahamwe* raped two other Tutsi women."), 2653 ("The Chamber finds the Prosecution has proven beyond a reasonable doubt that around 7 and 11 days after the first attack in mid-May 1994, Ntahobali and *Interahamwe* came to the [Butare Prefecture Office] on two more occasions. Ntahobali violently raped Witness TA, hitting her on the head with a hammer. *Interahamwe*, following the orders of Ntahobali, raped six other women. In a subsequent attack during this same time period, Ntahobali ordered about seven other *Interahamwe* to rape Witness TA."), 2773 ("Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] in June 1994 to rape women and abduct refugees. During one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA."), 2781(i) ("Ntahobali and about eight other *Interahamwe* raped Witness TA. Some of the *Interahamwe* raped two other Tutsi women."), 2781(ii) ("During the last half of May 1994, Ntahobali and *Interahamwe* came to the [Butare Prefecture Office] on two more occasions. Ntahobali violently raped Witness TA, hitting her on the head. *Interahamwe* following the orders of Ntahobali raped six other women. In a subsequent attack during this same time period, Ntahobali ordered about seven other *Interahamwe* to rape Witness TA"), 2781(v) ("Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees. During at least one of these attacks Ntahobali again handed Witness TA over to about seven *Interahamwe* to rape Witness TA.").

context of the entire Trial Judgement. Paragraph 5868 reflects Ntahobali's criminal liability for having raped Witness TA and not for any other rapes committed by anyone else during the Mid-May Attack.[3554] The Trial Chamber provides no analysis identifying any conduct and does not reach any conclusion as to what Ntahobali's responsibility would be for the rapes of "at least two other women" who were also raped on this occasion. The Trial Chamber also made findings that sufficiently identified what mode of responsibility under Article 6(1) of the Statute applied to Ntahobali's conduct for rapes during each attack.[3555]

1557. Furthermore, while Ntahobali questions whether he was convicted in relation to the rapes ordered by Nyiramasuhuko during the Night of Three Attacks and the First Half of June Attacks, the Appeals Chamber considers that a plain reading of the relevant factual and legal findings in the Trial Judgement indicates that the Trial Chamber did not hold him responsible for the rapes ordered by Nyiramasuhuko during these attacks.[3556]

1558. With respect to the First Half of June Attacks, while the Trial Chamber indicated in paragraph 5874 of the Trial Judgement that Ntahobali, injured soldiers, and *Interahamwe* came to rape women at the prefectoral office, the Appeals Chamber considers that this statement was not meant to broaden Ntahobali's criminal responsibility to include rapes committed by soldiers or *Interahamwe* generally. It is apparent that the Trial Chamber did not impose criminal liability upon Ntahobali for rapes committed by soldiers during this period.[3557] Furthermore, a contextual reading of the Trial Chamber's statement in this paragraph of the Trial Judgement as well as the fact that the Trial Chamber made no findings as to the modes of responsibility that would support Ntahobali's liability for the rapes of women other than Witness TA committed by *Interahamwe* also evinces that he was not convicted for such rapes. Rather, the Trial Judgement reflects that Ntahobali's responsibility under Article 6(1) of the Statute for the rapes committed during the First Half of June Attacks is based on the Trial Chamber's conclusions that Ntahobali went to the prefectoral office

[3554] The Appeals Chamber understands from a reading of the Trial Judgement as a whole that Ntahobali was only held responsible as a superior on the basis of the crimes perpetrated by the *Interahamwe* following his orders. *See infra*, Section V.I.4. Given that Ntahobali did not issue orders to the gang of about eight *Interahamwe* who brutally raped Witness TA during the Mid-May Attack, the Appeals Chamber understands that he was not found responsible as a superior for their crimes.
[3555] *See*, *e.g.*, Trial Judgement, paras. 5868 (finding that Ntahobali raped Witness TA), 5872 (finding that Ntahobali committed rape and ordered rapes), 5875 (finding that Ntahobali aided and abetted rape).
[3556] *See* Trial Judgement, paras. 2654-2738, 2750-2773, 2781, 5873, 5874.
[3557] Specifically, the Appeals Chamber observes that the Trial Chamber found that, although soldiers played a role in events at the Butare Prefecture Office, "no evidence has been led to establish any relationship between the soldiers and […] Ntahobali". *See* Trial Judgement., para. 5887. Although this conclusion was made in the context of evaluating Ntahobali's responsibility under Article 6(3) of the Statute, it suggests that no finding of any liability was imposed on Ntahobali for the conduct of soldiers.

"to rape women" and for having "handed Witness TA over to about seven *Interahamwe* to rape [her]".[3558]

1559. Turning to Ntahobali's contention that the Trial Chamber's findings as to his conviction for committing rapes at the prefectoral office are impermissibly vague, the Appeals Chamber recalls that paragraphs 6094 and 6184 in the "Legal Findings" section of the Trial Judgement state that Ntahobali "raped Tutsi women at the [Butare Prefecture Office]" and serve as the basis for his responsibility under Article 6(1) for committing rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II at the prefectoral office.[3559]

1560. The Appeals Chamber recalls that the Trial Chamber found that Ntahobali raped one woman – Witness TA – during the Mid-May Attack and the attack seven days later.[3560] The only other finding that could support Ntahobali's conviction for committing rapes of women other than Witness TA is found in paragraphs 2773 and 2781(v) of the Trial Judgement, which is repeated in paragraph 5874 of the "Genocide" section of the Trial Judgement.[3561] These paragraphs indicate that, in the first half of June 1994, Ntahobali, injured soldiers, and *Interahamwe* came to the prefectoral office "to rape women".[3562] This conclusion is based on the evidence of Witness TK.[3563]

1561. In the relevant section of the Trial Judgement, the Trial Chamber recalled Witness TK's evidence that Ntahobali came to the prefectoral office "on a number of evenings" accompanied by *Interahamwe* and disabled soldiers and that, on some occasions, Ntahobali "abducted women who were then raped".[3564] Having reviewed the evidence, the Appeals Chamber concludes that Witness TK's evidence is broad and general, providing no context as to whether the witness observed Ntahobali abduct and rape women, or if in fact Ntahobali perpetrated the rapes referred to

[3558] *See* Trial Judgement, para. 5874. *See also ibid.*, para. 5875 (finding Ntahobali responsible for aiding and abetting Witness TA's rape).
[3559] *See also* Trial Judgement, para. 6185.
[3560] Trial Judgement, paras. 5868, 5872.
[3561] The Appeals Chamber recalls that the Trial Chamber found that Ntahobali raped a woman named Caritas during the Mid-May Attack and that he raped a woman named Immaculée Mukagatare during an attack among the First Half of June Attacks. However, the Trial Chamber, finding that insufficient notice had been provided, refused to enter convictions on the basis of this conduct. *See infra*, V.I.2(a)(ii).
[3562] The Appeals Chamber observes that paragraph 2773 of the Trial Judgement only refers to "in June 1994", while paragraph 2781(v) of the Trial Judgement specifies "[i]n the first half of June 1994". However, read in the context of paragraph 5874, which also refers to "the first half of June 1994", the omission in paragraph 2773 appears to be a typographical oversight. *Cf.* Trial Judgement, paras. 2750, 2751.
[3563] *See* Trial Judgement, para. 2773. In this paragraph of the Trial Judgement, the Trial Chamber also referred to the evidence of Witnesses TA and QBP. However, Witness TA's evidence related to the First Half of June Attacks is only relevant to Ntahobali's conviction for aiding and abetting rapes and Witness QBP's evidence is only relevant to the Trial Chamber's additional conclusion that Nyiramasuhuko ordered *Interahamwe* to rape Tutsi women at the Butare Prefecture Office and not to any finding supporting Ntahobali's criminal liability for committing rapes. *See ibid.*, paras. 2763-2769, 2773; *infra*, paras. 1857, 1858, Section V.I.2(e)(i).
[3564] *See* Trial Judgement, para. 2771, *referring to* Witness TK, T. 20 May 2002 p. 100, T. 23 May 2002 p. 126.

by the witness. Given the minimal probative value of this evidence, the Appeals Chamber concludes that no reasonable trier of fact could have relied on this evidence to find that Ntahobali raped women at the Butare Prefecture Office other than Witness TA.

1562. Concerning Ntahobali's convictions for ordering rapes, after having reviewed the Trial Judgement in its entirety and in particular the relevant factual and legal conclusions, the Appeals Chamber sustains Ntahobali's contention and finds that his responsibility for ordering rapes at the Butare Prefecture Office relies exclusively on his conduct related to the Last Half of May Attacks.[3565]

1563. With respect to Ntahobali's convictions for aiding and abetting rapes, the Appeals Chamber observes that the "Legal Findings" section of the Trial Judgement contains no express or implicit finding that Ntahobali aided and abetted the rape of Witness TA during the Mid-May Attack, noting only that Ntahobali and eight *Interahamwe* raped the witness and that *Interahamwe* raped two other women.[3566] Likewise, there is no reference to Ntahobali aiding and abetting Witness TA's rapes committed by *Interahamwe* during the Last Half of May Attacks. Instead, the Trial Chamber explicitly found that Ntahobali's conduct during the Mid-May Attack and the Last Half of May Attacks supports the conclusion that he committed and ordered rapes.[3567]

1564. By contrast, paragraphs 5874 and 5875 of the Trial Judgement, which pertain to the First Half of June Attacks, describe Ntahobali's action during one such attack as having "handed Witness TA over to about seven *Interahamwe* to rape Witness TA"[3568] and expressly conclude that "Ntahobali aided and abetted the rapes of Witness TA."[3569] The Trial Chamber reiterated later in the "Legal Findings" section that Ntahobali aided and abetted the "rapes of a Tutsi."[3570]

1565. Against this background, the Appeals Chamber considers that the Trial Judgement reflects that Ntahobali was not convicted for aiding and abetting the rapes of Witness TA during the Mid-May Attack and the Last Half of May Attacks, but for aiding and abetting the rapes of Witness TA by *Interahamwe* during the First Half of June Attacks.

1566. Finally, the Appeals Chamber rejects the Prosecution's contention that the Trial Chamber convicted Ntahobali of aiding and abetting the rape of Witness TA "and others". Paragraph 6086 of the Trial Judgement to which the Prosecution refers does not support this position. Rather, it states

[3565] *See* Trial Judgement, paras. 2653, 2781(ii), 5872, 6086, 6184.
[3566] Trial Judgement, para. 5868. By contrast, the Trial Chamber expressly found that Nyiramasuhuko aided and abetted these rapes by virtue of her presence and authority. *See ibid.*, para. 5869.
[3567] Trial Judgement, paras. 5868, 5872.
[3568] Trial Judgement, para. 5874.
[3569] Trial Judgement, para. 5875.

that Ntahobali aided and abetted "rapes", which, when read in light of the entire Trial Judgement, reflects Ntahobali's responsibility for the multiple rapes of Witness TA by about seven *Interahamwe* during one of the First Half of June Attacks.[3571]

1567. Based on the foregoing, the Appeals Chamber finds that no reasonable trier of fact could have found, based on the evidence of Witness TK, that Ntahobali committed rapes of Tutsi women at the Butare Prefecture Office other than Witness TA. Consequently, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ntahobali raped Tutsi "women" when convicting him of committing rape as a crime against humanity and as outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II. The Appeals Chamber dismisses the remainder of Ntahobali's challenges that the Trial Chamber erred by making imprecise and unsupported findings with respect to Ntahobali's convictions for rapes at the prefectoral office.

(c) Conclusion

1568. The Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber prevented him from fully exercising his right to appeal by failing to provide a reasoned opinion regarding his convictions for crimes committed at the Butare Prefecture Office pursuant to Article 6(1) of the Statute.[3572] The Trial Judgement reflects that Ntahobali was convicted pursuant to Article 6(1) of the Statute in relation to the Butare Prefecture Office for: (i) ordering killings and committing the rape of Witness TA during the Mid-May Attack; (ii) ordering the rapes of six women and committing the rape of Witness TA during an attack seven days after the Mid-May Attack; (iii) ordering the rapes of Witness TA during an attack 11 days after the Mid-May Attack; and (iv) aiding and abetting Witness TA's rape during one of the First Half of June Attacks.[3573] The Appeals Chamber, Judge Khan dissenting, finds that the Trial Judgement does not reflect that Ntahobali was convicted for ordering killings during attacks other than the Mid-May Attack.

1569. For the reasons set out above, the Appeals Chamber reverses the Trial Chamber's finding that Ntahobali is responsible for committing the rape of any Tutsi woman other than Witness TA at the prefectoral office. The Appeals Chamber will discuss the impact of this finding, if any, in Section XII below.

[3570] Trial Judgement, paras. 6094, 6184.
[3571] Trial Judgement, paras. 5874, 5875. *See also ibid*., paras. 2773, 2781(v).
[3572] *See also infra*, Section V.I.3(a).
[3573] Trial Judgement, paras. 2781, 5867-5877, 5971, 6086, 6185.

2. Assessment of the Evidence

1570. With respect to the Mid-May Attack, the Trial Chamber found that one night in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office aboard a camouflage pickup truck.[3574] The Trial Chamber concluded that Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup truck, that Ntahobali and about eight other *Interahamwe* raped Witness TA, and that the pickup truck left the prefectoral office with the abducted Tutsi refugees.[3575] The Trial Chamber convicted Ntahobali for ordering killings and committing the rape of Witness TA during this attack.[3576]

1571. Concerning the Last Half of May Attacks, the Trial Chamber concluded that around seven and 11 days after the Mid-May Attack, Ntahobali and *Interahamwe* came to the prefectoral office on two more occasions.[3577] In particular, the Trial Chamber determined that during the first attack of the Last Half of May Attacks, which occurred seven days after the Mid-May Attack ("First Attack"), Ntahobali ordered the rapes of six women and raped Witness TA.[3578] The Trial Chamber determined that during the second attack of the Last Half of May Attacks, which occurred 11 days after the Mid-May Attack ("Second Attack"), Ntahobali ordered about seven *Interahamwe* to rape Witness TA.[3579] The Trial Chamber convicted Ntahobali for committing and ordering rape on this basis.[3580] It further found that Ntahobali raped a woman named Caritas during the Second Attack but did not convict Ntahobali on this basis due to insufficient notice.[3581]

1572. As regards the Night of Three Attacks, the Trial Chamber found that, around the end of May or the beginning of June 1994, Ntahobali, Nyiramasuhuko, and *Interahamwe* came to the prefectoral office on board a camouflaged pickup truck three times in one night, and that they abducted Tutsi refugees each time and took them to other sites in Butare Prefecture to be killed.[3582] The Appeals Chamber recalls that it has concluded, Judge Khan dissenting, that Ntahobali was not

[3574] Trial Judgement, paras. 2644, 2781(i).
[3575] Trial Judgement, paras. 2644, 2781(i).
[3576] *See supra*, Section V.I.1(c); *infra*, Section V.I.3(a).
[3577] Trial Judgement, para. 2653.
[3578] Trial Judgement, para. 2653. The Trial Chamber's finding that *Interahamwe*, following the orders of Ntahobali, raped six other women during the First Attack is, however, reversed by the Appeals Chamber below. *See infra*, Sections V.I.3(b), V.I.3(c). The Appeals Chamber deems it unnecessary as a result to examine Ntahobali's challenges to the Trial Chamber's assessment of the evidence for his conviction for ordering the rapes of six women during the First Attack.
[3579] Trial Judgement, para. 2653.
[3580] *See* Trial Judgement, paras. 6085, 6086, 6094, 6184, 6185. *See also supra*, Sections V.I.1(b), V.I.1(c).
[3581] Trial Judgement, paras. 2172, 2648.
[3582] Trial Judgement, paras. 2661, 2715, 2736, 2738, 2748, 2749, 2781(iii). In order to conclude that the refugees abducted from the prefectoral office were killed, the Trial Chamber also relied, in part, on evidence that two refugees named Semanyenzi and Annonciata had been abducted from the prefectoral office during the Night of Three Attacks but escaped and returned to it, informing refugees that those who had been abducted were killed. *See ibid*., paras. 2746-2749. The Trial Chamber had previously determined that the co-Accused could not be convicted on the basis of the crimes committed against Semanyenzi and Annonciata. *See ibid*., para. 2172.

convicted for ordering killings during these attacks.[3583] The Trial Chamber further found that Ntahobali participated in the abduction of "Mbasha's wife and children" from the prefectoral office during these attacks but did not convict him on the basis of this conduct due to insufficient notice.[3584]

1573. Concerning the First Half of June Attacks, the Trial Chamber determined that Ntahobali, injured soldiers, and *Interahamwe* came to the prefectoral office in the first half of June 1994 to rape women and abduct refugees.[3585] It also found that, during one of these attacks, Ntahobali handed Witness TA over to about seven *Interahamwe* to rape her.[3586] The Trial Chamber convicted Ntahobali for aiding and abetting the rape of Witness TA during one of these attacks.[3587]

1574. Ntahobali challenges the Trial Chamber's assessment of the evidence concerning all of these attacks. The Appeals Chamber recalls that it has determined, Judge Khan dissenting, that Ntahobali was not convicted on the basis of his conduct during the Night of Three Attacks or in relation to the killings that were perpetrated during the First Half of June Attacks.[3588] However, the Appeals Chamber considers that the Trial Chamber's factual findings with respect to these attacks were relevant to the Trial Chamber's analysis of Ntahobali's responsibility for ordering the killings and rapes for which he was convicted as well as for the Trial Chamber's finding that Ntahobali bore superior responsibility for the acts of the *Interahamwe*.[3589] In this context, the Appeals Chamber will address Ntahobali's challenges to the assessment of the evidence concerning these attacks as a demonstration of error could have the potential to invalidate the verdict or occasion a miscarriage of justice. Accordingly, the Appeals Chamber will first examine Ntahobali's general challenges before turning to his submissions pertaining to the identification evidence, the Mid-May Attack and Last Half of May Attacks, the Night of Three Attacks, the First Half of June Attacks, and the number of refugees abducted and killed.

[3583] *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[3584] Trial Judgement, paras. 2172, 2727.
[3585] Trial Judgement, paras. 2773, 2781(v).
[3586] Trial Judgement, para. 2773.
[3587] *See* Trial Judgement, paras. 5876, 5971, 6053-6055, 6085, 6086, 6094, 6100, 6101, 6168, 6169, 6184, 6185, 6186. *See also supra*, Sections V.I.1(b), V.I.1(c). The Appeals Chamber has reversed Ntahobali's convictions on the basis that he committed rapes during these attacks. *See supra*, Sections V.I.1(b), V.I.1(c).
[3588] *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[3589] *See infra*, Sections V.I.3, V.I.4. In particular, the Appeals Chamber stresses that, as indicated below, the Trial Chamber relied on Ntahobali's participation in these attacks to support its conclusion that Ntahobali ordered killings during the Mid-May Attack. *See infra*, paras. 1901, 1902. The Appeals Chamber further stresses that the Trial Chamber "consider[ed] the evidence in its entirety" when making findings on Ntahobali's responsibility as a superior under Article 6(3) of the Statute. *See infra*, para. 1920, *quoting* Trial Judgement, para. 5884. *See also infra*, para. 1927.

(a) General Challenges

1575. Ntahobali submits that the Trial Chamber erred in: (i) reversing the burden of proof; (ii) admitting and making findings on unpleaded and prejudicial evidence; (iii) rejecting admissible evidence; (iv) inferring trauma to justify inconsistencies in the Prosecution evidence; (v) improperly assessing expert testimony; and (vi) failing to consider exculpatory evidence.

(i) Reversal of the Burden of Proof

1576. Ntahobali argues that the Trial Chamber erred in law in assessing the evidence related to the attacks committed at the Butare Prefecture Office based on a "chronological framework".[3590] In his view, the Trial Chamber reversed the burden of proof by "accepting the veracity" of the Prosecution evidence before considering the Defence evidence.[3591] He claims that, by doing so, the Trial Chamber foreclosed the possibility that Defence evidence could raise reasonable doubt.[3592]

1577. The Prosecution responds that Ntahobali's contentions are "pure speculation" and that he does not demonstrate that the Trial Chamber abused its discretion or erred in the manner in which it assessed the Prosecution and Defence evidence.[3593]

1578. The Appeals Chamber finds that the manner in which the Trial Chamber organised its assessment of the evidence in the Trial Judgement in no way reflects a failure to properly apply the burden of proof.[3594] Furthermore, the Appeals Chamber observes that the Trial Chamber evaluated Ntahobali's alibi evidence *before* addressing the reliability and credibility of the Prosecution evidence related to attacks committed at the prefectoral office.[3595] It also bears noting that the Trial Chamber made all the factual findings concerning Ntahobali's participation in the crimes related to

[3590] Ntahobali Appeal Brief, para. 603.
[3591] Ntahobali Appeal Brief, paras. 604-606. Ntahobali highlights in particular the Trial Chamber's conclusion that Witness TA's evidence was credible and reliable before assessing the Defence evidence. *See ibid.*, para. 605, *referring to* Trial Judgement, paras. 2629, 2630, 2633, 2635-2638.
[3592] Ntahobali Notice of Appeal, para. 242; Ntahobali Appeal Brief, para. 606; Ntahobali Reply Brief, para. 245. Ntahobali argues that the manner in which the Trial Chamber evaluated the Prosecution evidence before the Defence evidence was contrary to governing and relevant case law. *See* Ntahobali Appeal Brief, para. 606, *referring to R v. Geddes* (Canada, 2011), para. 16, *R v. W (D.)* (Canada, 1991), *R v. C.L.Y.* (Canada, 2008) paras. 24-30; Ntahobali Reply Brief, para. 245, *referring to Ntagerura et al.* Appeal Judgement, paras. 171-174.
[3593] Prosecution Response Brief, paras. 982, 983. The Prosecution also contends that Ntahobali failed to raise the argument that the Trial Chamber reversed the burden of proof in his notice of appeal and that his contention should accordingly be summarily dismissed. *See ibid.*, para. 982. However, the Appeals Chamber notes that Ntahobali alleged in his notice of appeal that the Trial Chamber erred in the "application of the concept of the burden of proof" in assessing the evidence related to the Butare Prefecture Office. *See* Ntahobali Notice of Appeal, para. 242. The Appeals Chamber therefore considers that Ntahobali's allegation of error was properly raised and will examine it.
[3594] *See generally* Trial Judgement, paras. 2535-2782.
[3595] *See*, *in particular*, Trial Judgement, para. 2600 ("Having examined the alibis relevant to the events at the [Butare Prefecture Office], the Chamber now evaluates the Prosecution case bearing in mind those aspects of the alibis that were deemed reasonably possibly true."). *See also ibid*., paras. 2577-2599.

the attacks at the prefectoral office or the occurrence of the crimes during those attacks[3596] after it assessed the relevant Defence evidence.[3597]

1579. The Appeals Chamber therefore dismisses Ntahobali's allegation that the Trial Chamber reversed the burden of proof.

(ii) Unpleaded and Prejudicial Evidence

1580. The Trial Chamber observed that the names of Caritas, "Mrs. Mbasha", Trifina, Immaculée Mukagatare, Annonciata, and Semanyenzi did not appear in the Nyiramasuhuko and Ntahobali Indictment, the Prosecution Pre-Trial Brief or its appendix, or the Prosecution's opening statement.[3598] It also noted that their identities had only been disclosed in four witness statements less than two months prior to trial without any further indication that this new information was being provided.[3599] Consequently, the Trial Chamber found that the late disclosure of these victims' names "accorded bias to the Defence in preparing its case" and concluded that it would not convict the co-Accused for the alleged crimes against these victims if they would be established.[3600] Relying on the Admissibility Appeal Decision of 2 July 2004 and the *Kupreškić et al*. Appeal Judgement, the Trial Chamber stated that it would nonetheless consider the evidence concerning these individuals for "other permissible purposes", including "background information, circumstantial evidence in support of other allegations, to demonstrate a special knowledge, opportunity or identification of the accused".[3601]

1581. Ntahobali argues that the Trial Chamber erred in relying on the evidence of: (i) the rape of Caritas as circumstantial evidence that he and *Interahamwe* raped several unknown women, including Witness TA, at the Butare Prefecture Office;[3602] and (ii) the abduction of Mbasha's wife and children and the killing of Trifina to support his convictions for the abduction and killings of other unnamed Tutsi refugees at the prefectoral office during the Night of Three Attacks.[3603] He submits that the Trial Chamber's reasoning for not allowing him to be convicted for these crimes – because the tardy disclosure of the victims' identities prejudiced him in the preparation of his defence – prevented the Trial Chamber from considering this evidence with respect to evidence

[3596] *See* Trial Judgement, paras. 2653, 2682, 2715, 2727, 2738, 2749, 2773, 2779, 2781.
[3597] *See*, *e.g.*, Trial Judgement, paras. 2577-2600, 2639-2643, 2652, 2665, 2682, 2725, 2726, 2737, 2768, 2778. *Cf. ibid*., para. 2678.
[3598] Trial Judgement, para. 2172.
[3599] Trial Judgement, para. 2172.
[3600] Trial Judgement, para. 2172.
[3601] Trial Judgement, para. 2172, *referring to* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15, *Kupreškić et al*. Appeal Judgement, paras. 321-323, 336.
[3602] Ntahobali Appeal Brief, paras. 762, 763, *referring to* Trial Judgement, paras. 2648, 5868. *See also ibid.*, para. 760.
[3603] Ntahobali Appeal Brief, para. 764, *referring to* Trial Judgement, paras. 2727, 2730, 2738. *See also ibid.*, para. 760.

of rapes, abductions, and killings of unknown victims.[3604] Ntahobali generally argues that the Trial Chamber erred in using evidence concerning the abductions of Annonciata and Semanyenzi as well.[3605] Ntahobali contends that the Trial Chamber fundamentally misinterpreted the Admissibility Appeal Decision of 2 July 2004 to support its position that it could consider this evidence.[3606]

1582. Ntahobali also argues that the Trial Chamber erred in using evidence pertaining to the abduction of Mbasha's wife and children for the purpose of establishing Ntahobali's presence during the Night of Three Attacks, as the probative value of the hearsay identification evidence was outweighed by the prejudicial effect.[3607] He submits that the same reasoning applies to the reliance on evidence of the rape of Immaculée Mukagatare.[3608]

1583. The Prosecution responds that the Trial Chamber was entitled to admit any evidence that it deemed to have probative value, even when lack of notice prevented any conviction on the basis of it.[3609] It contends that Ntahobali does not show how the Trial Chamber misinterpreted the Admissibility Appeal Decision of 2 July 2004.[3610]

1584. The Appeals Chamber observes that, when assessing evidence concerning the Second Attack of the Last Half of May Attacks, during which the Trial Chamber found that Ntahobali ordered about seven *Interahamwe* to rape Witness TA,[3611] the Trial Chamber also recalled Witness TA's evidence of Ntahobali raping a girl named Caritas during the same attack.[3612] Nevertheless, the Trial Chamber did not convict Ntahobali for the rape of Caritas but concluded that

[3604] Ntahobali Appeal Brief, paras. 762, 764. In this regard, Ntahobali argues that the Trial Chamber's logic would allow the Prosecution to conceal the identities of known victims, knowing that evidence of such rapes and killings could serve as a basis to enter a conviction against an accused. *See idem*.
[3605] Ntahobali Notice of Appeal, para. 271; Ntahobali Appeal Brief, para. 760, *referring to* Trial Judgement, paras. 2656, 2658, 2659, 2703, 2745-2747.
[3606] Ntahobali Appeal Brief, paras. 761, 762, 764. Ntahobali argues that, in the *Renzaho* Appeal Judgement, the Appeals Chamber specified that evidence in support of material facts not pleaded in an indictment can be admitted "to the extent that it is relevant to proof of *other* allegations pleaded in the indictment." *See ibid.*, para. 762 (emphasis in original), *referring to Renzaho* Appeal Judgement, paras. 71, 90.
[3607] Ntahobali Appeal Brief, para. 765, *referring to* Trial Judgement, paras. 2667-2677, 2680, 2694.
[3608] Ntahobali Appeal Brief, para. 765, *referring to* Trial Judgement, paras. 2750, 2769, 2770, 2773. *See also ibid.*, para. 760. Ntahobali also contends that the Trial Chamber misapplied the *Kupreškić et al*. Appeal Judgement and, consequently, Rule 93 of the Rules in justifying the use of this evidence because it could not have been admitted through this rule without prior notice from the Prosecution. He alternatively submits that the Trial Chamber improperly used this evidence as prior criminal conduct for the purpose of demonstrating a general propensity or disposition to commit crimes charged. He argues that the evidence should be excluded and that he should be acquitted of the crimes committed at the Butare Prefecture Office. *See* Ntahobali Notice of Appeal, para. 272; Ntahobali Appeal Brief, paras. 766-769. The Prosecution responds that the disclosure provisions, as interpreted in the *Kupreškić et al.* Appeal Judgement, do not apply in this instance as the relevant evidence was not used to establish a pattern of conduct. *See* Prosecution Response Brief, para. 1125. The Appeals Chamber rejects Ntahobali's argument on the same basis as it did for Nyiramasuhuko's identical submission. *See supra*, Section IV.F.2(a). In addition, the Appeals Chamber notes that Ntahobali does not show how any of the disputed evidence constituted "prior criminal conduct" and was used for the purpose of demonstrating a general propensity or disposition of Ntahobali to commit crimes.
[3609] Prosecution Response Brief, paras. 1123, 1124.
[3610] Prosecution Response Brief, para. 1123.
[3611] *See* Trial Judgement, paras. 2653, 2781(ii). *See also ibid*., para. 5872.
[3612] Trial Judgement, para. 2648.

"the details of this rape provide circumstantial evidence to support the fact that *Interahamwe* and Ntahobali raped many women, including Witness TA at the [Butare Prefecture Office]."[3613] Similarly, when assessing evidence concerning the Night of Three Attacks – for which Ntahobali was not convicted – the Trial Chamber accepted the evidence pertaining to the abduction of Mbasha's wife and children and the killing of Trifina.[3614] However, it recalled that it would not enter convictions on the basis of this conduct but found that the "credible and consistent information" with regard to these events provided circumstantial support for its findings regarding the abduction of other unnamed Tutsi refugees from the prefectoral office.[3615] The Trial Chamber also relied, in part, on evidence that Semanyenzi and Annonciata had been abducted from the prefectoral office but escaped and returned to it, informing refugees that those who had been abducted were killed, to conclude that the refugees abducted from that office were killed.[3616]

1585. The Appeals Chamber sees no error in this approach. The Trial Chamber considered that insufficient notice had been given to Ntahobali concerning the crimes against these particular individuals and that he was prejudiced in this regard, which is not equivalent to a finding that the evidence is inadmissible under Rule 89(C) of the Rules.[3617] The Prosecution has an obligation to state the material facts underpinning the charges in an indictment, but not the evidence by which such material facts are to be proven.[3618] Furthermore, Rule 89(C) of the Rules allows a trial chamber to admit any relevant evidence it deems to have probative value.[3619] In this case, the evidence identified by Ntahobali is related temporally, geographically, and thematically to the pleaded allegations of Ntahobali's responsibility for rapes committed at the Butare Prefecture Office as well as the pleaded allegations of his involvement in abductions and killings of those seeking refuge there.[3620] Ntahobali does not demonstrate that the Trial Chamber erred in its consideration of this evidence or in its interpretation of the Admissibility Appeal Decision of 2 July 2004 when doing so.[3621]

[3613] Trial Judgement, para. 2648.
[3614] Trial Judgement, paras. 2717-2730.
[3615] Trial Judgement, paras. 2727, 2730.
[3616] *See* Trial Judgement, paras. 2746-2749.
[3617] *See* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15.
[3618] *Nahimana et al* Appeal Judgement, para. 322; *Simić* Appeal Judgement, para. 20; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88.
[3619] Admissibility Appeal Decision of 2 July 2004, para. 15.
[3620] The Appeals Chamber finds no merit in Ntahobali's contention that if trial chambers were allowed to consider the evidence in this manner, it would, *inter alia*, induce the Prosecution to deliberately conceal identities of victims. The Tribunal's jurisprudence on the pleading of the identities of victims renders this argument meritless as it dictates that the Prosecution name the victims if it is in a position to do so, even in cases where a high degree of specificity is impractical, since the identity of the victim is information that is valuable to the preparation of the Defence case. *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 132; *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 90.
[3621] Furthermore, the Appeals Chamber recalls that it has overturned Ntahobali's convictions for committing rapes of women other than Witness TA and that it found below that the Trial Chamber erred in convicting Ntahobali for

1586. Moreover, as discussed in Section V.I.2(d)(iv) below, the Appeals Chamber finds no merit in Ntahobali's contentions concerning the credibility and probative value of the evidence surrounding the abduction of Mbasha's wife and children.[3622] Ntahobali does not demonstrate that the prejudicial effect of this evidence outweighs its relevance. Indeed, considering that Ntahobali's defence to his participation in attacks committed at the prefectoral office relies in part on a defence of alibi,[3623] evidence concerning Ntahobali's presence during the Night of Three Attacks, as reflected in part through his participation in the abduction of Mbasha's wife and children, is highly relevant to the Trial Chamber's consideration of the pleaded criminal conduct. In light of this analysis, Ntahobali likewise fails to substantiate his position that the Trial Chamber erred in considering the evidence concerning the rape of Immaculée Mukagatare.

1587. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's arguments concerning the allegedly improper use of unpleaded and prejudicial evidence.

(iii) Rejection of Admissible Evidence

1588. Ntahobali submits that the Trial Chamber impermissibly denied the admission of judgements from Rwandan proceedings demonstrating that Prosecution Witness TQ was convicted of crimes committed during the genocide.[3624] Ntahobali argues that this evidence should have led the Trial Chamber to treat the witness's evidence with caution and that it erred in not doing so.[3625] Ntahobali submits that the Appeals Chamber should disregard Witness TQ's evidence for its analysis on the alleged crimes committed at the Butare Prefecture Office.[3626]

1589. The Prosecution responds that the Trial Chamber did not err in rejecting the admission of these documents and that the Trial Chamber properly assessed the evidence of Witness TQ.[3627]

1590. The Appeals Chamber observes that the Trial Chamber relied upon the evidence of Witness TQ about the poor conditions at the prefectoral office together with the evidence of several

ordering the rapes of six other women at the Butare Prefecture Office. *See supra*, Sections V.I.1(b), V.I.1(c); *infra*, Section V.I.3(b). Consequently, his individual responsibility for committing, ordering, and aiding and abetting the rapes as well as his superior responsibility for rapes committed by *Interahamwe* at the prefectoral office is limited to the rapes of Witness TA. *See supra*, Section V.I.1(c); *infra*, Section V.I.4(b). In this regard, Ntahobali's contention that this evidence was unreasonably used to prove that he and *Interahamwe* raped several other unknown women is now moot. The Appeals Chamber also finds no merit in Ntahobali's reliance on the *Renzaho* Appeal Judgement as he fails to demonstrate that the Trial Chamber's analysis of unpleaded evidence in this proceeding is inconsistent with the findings of the Appeals Chamber in that case.

[3622] *See also infra*, Sections V.I.2(b)(i)a, V.I.2(b)(iii)b.

[3623] *See* Trial Judgement, paras. 2578-2600.

[3624] Ntahobali Notice of Appeal, para. 263; Ntahobali Appeal Brief, para. 754, *referring to* Ntahobali Appeal Brief, paras. 458-461.

[3625] Ntahobali Notice of Appeal, para. 264; Ntahobali Appeal Brief, para. 754, *referring to* Ntahobali Appeal Brief, paras. 459-461.

[3626] Ntahobali Notice of Appeal, para. 265; Ntahobali Appeal Brief, para. 754.

[3627] Prosecution Response Brief, para. 1120. *See also ibid*., paras. 934-937.

other witnesses in this regard.[3628] With respect to the attacks at the prefectoral office, the Trial Chamber further considered that Witness TQ's evidence of Ntahobali driving a Peugeot pickup truck formed part of the "substantial evidence rebut[ting] Ntahobali's claim that he did not know how to drive and that it could not have been him driving the pickup to the [Butare Prefecture Office]."[3629] In addition to Witness TQ's testimony, the Trial Chamber also considered the evidence of several witnesses who testified that Ntahobali drove a vehicle to the prefectoral office as well as the evidence of Witnesses TG, FA, D-2-13-O, and D-13-D to find that Ntahobali had been seen driving generally.[3630]

1591. In this context, the Appeals Chamber finds that Ntahobali's contention that the Trial Chamber failed to exercise sufficient caution with respect to Witness TQ's evidence due to its prior erroneous decision denying the admission of judgements from Rwandan proceedings fails to identify an error that would invalidate the decision to rely on Witness TQ's evidence or lead to a miscarriage of justice. His argument that the Trial Chamber failed to exercise sufficient caution with respect to Witness TQ's evidence is indeed belied by the fact that the Trial Chamber only relied on Witness TQ's evidence when it was extensively corroborated. The Appeals Chamber therefore dismisses Ntahobali's contention.

(iv) Inference of Trauma

1592. Ntahobali submits that the Trial Chamber acted *ultra vires* by drawing inferences of trauma to justify discrepancies, inconsistencies, and implausibilities in Witness TA's testimony.[3631] He contends that trauma cannot be automatically inferred and argues that the Trial Chamber points to no evidence demonstrating that Witness TA was traumatised and that it impacted her evidence.[3632] He argues that, because of this error in the analysis of Witness TA's otherwise incredible evidence, the Trial Chamber erred in convicting him on the basis of her testimony.[3633]

1593. The Prosecution responds that, given the nature of Witness TA's experience at the prefectoral office, the Trial Chamber did not require an expert to attest to her trauma and its impact

[3628] Trial Judgement, para. 2627.
[3629] Trial Judgement, para. 2666.
[3630] Trial Judgement, paras. 2664, 2666.
[3631] Ntahobali Notice of Appeal, paras. 266, 267; Ntahobali Appeal Brief, para. 755, *referring to* Trial Judgement, paras. 635, 2637, 2770.
[3632] Ntahobali Appeal Brief, paras. 756, 757 (French).
[3633] Ntahobali Appeal Brief, para. 758.

on her testimony.[3634] It contends that Ntahobali fails to demonstrate that the Trial Chamber abused its discretion in considering the effects of trauma on Witness TA's evidence.[3635]

1594. The Appeals Chamber observes that the Trial Chamber considered the impact of trauma on Witness TA's testimony in finding that the following aspects of her evidence did not undermine her credibility: (i) the variance between her prior statement, which indicated that she was anally raped during the Mid-May Attack, and her testimony that she was not; (ii) her failure to report to the local authorities that Ntahobali had raped her, even though she had reported being raped by other assailants; and (iii) the confusion in her testimony as to whether she was raped on the fourth or fifth occasion Ntahobali visited the prefectoral office and whether she was raped on the same occasion that Immaculée Mukagatare was raped.[3636]

1595. It is established practice for trial chambers to take into consideration the impact of trauma on a witness's evidence.[3637] The Trial Chamber found that Witness TA was raped by Ntahobali and about eight other *Interahamwe* during the Mid-May Attack,[3638] "violently raped" by Ntahobali during the First Attack of the Last Half of May Attacks,[3639] raped by about seven *Interahamwe* during the Second Attack of the Last Half of May Attacks,[3640] and raped by about seven *Interahamwe* during one of the First Half of June Attacks.[3641] These rapes occurred against a backdrop of violence at the prefectoral office witnessed by Witness TA, the evidence of which the Trial Chamber described as "among the worst encountered" and which, in its view, portrayed "a clear picture of unfathomable depravity and sadism".[3642] The Appeals Chamber finds that, in light of the record before the Trial Chamber, a reasonable trier of fact could have considered the fact that Witness TA suffered considerable trauma as it related to the events at the prefectoral office and that Ntahobali has not demonstrated that the Trial Chamber erred in considering this trauma when assessing the witness's evidence.[3643]

[3634] Prosecution Response Brief, para. 1121.
[3635] Prosecution Response Brief, para. 1121.
[3636] Trial Judgement, paras. 2635, 2637, 2770. *See also infra*, paras. 1695, 1697, 1859.
[3637] *Musema* Appeal Judgement, para. 63 ("The issue here is whether the Trial Chamber's consideration of the impact of trauma was in accordance with the law. The established practice of both the Trial Chambers and the Appeals Chamber supports a finding that it was. Trial Chambers normally take the impact of trauma into account in their assessment of evidence given by a witness."). *See also Hategekimana* Appeal Judgement, para. 84; *Ntawukulilyayo* Appeal Judgement, para. 152.
[3638] Trial Judgement, paras. 2644, 2781 (i).
[3639] Trial Judgement, paras. 2653, 2781 (ii).
[3640] Trial Judgement, paras. 2653, 2781 (ii). The Appeals Chamber has found in another sub-section of this Judgement that the Trial Chamber erred in convicting Ntahobali for ordering about seven *Interahamwe* to rape Witness TA during this attack given the insufficient evidentiary record supporting the conclusion that he ordered the crime. *See infra*, Section V.I.3(b). However, the Appeals Chamber does not otherwise find that the Trial Chamber erred in its assessment of the evidence as it concerns the fact that Witness TA was raped during this event. *See infra*, Section V.I.2(c)(ii).
[3641] Trial Judgement, paras. 2773, 2781 (v).
[3642] Trial Judgement, para. 5866.
[3643] *See also infra*, Section V.I.2(c)(i).

1596. The Appeals Chamber therefore dismisses Ntahobali's contention in this respect.

(v) Expert Evidence

1597. Ntahobali contends that the Trial Chamber erred in relying on the evidence of Prosecution Expert Witnesses Guichaoua and Des Forges to corroborate witnesses' testimonies regarding factual evidence of crimes committed at the Butare Prefecture Office, thereby exceeding the limitations imposed on expert evidence.[3644] In particular, Ntahobali asserts that the Trial Chamber erred by using Expert Witness Des Forges's testimony concerning the phone conversations she had with Nsabimana in 1996 to prove Ntahobali's acts and conduct at the prefectoral office notwithstanding the limitations imposed on expert evidence.[3645] He contends that Expert Witnesses Guichaoua's and Des Forges's evidence should be excluded and that he should be acquitted of crimes allegedly committed at the prefectoral office.[3646]

1598. The Prosecution argues that Ntahobali's arguments are meritless and should be summarily dismissed.[3647]

1599. The Appeals Chamber observes that, with respect to the Trial Chamber's allegedly erroneous use of Expert Witness Guichaoua's evidence, Ntahobali simply refers to paragraphs 2560, 2561, and 2575 of the Trial Judgement, which discuss the witness's evidence concerning Nyiramasuhuko's diary.[3648] However, his blanket assertion that the witness's statements referred "to facts rather than opinions" fails to demonstrate that the Trial Chamber erred in the consideration of Expert Witness Guichaoua's interpretations of Nyiramasuhuko's diary and that this evidence exceeded the scope of his area of expertise.[3649]

1600. As for the purported improper use of Expert Witness Des Forges's evidence, the Appeals Chamber observes that, when assessing Witness TA's evidence concerning the Mid-May Attack, the Trial Chamber noted that the statement Nsabimana gave to Expert Witness Des Forges during a telephone conversation in 1996 that "soldiers and others were coming to take away women to rape them and other people were being selected to be killed" was "consistent" with the testimony of

[3644] Ntahobali Notice of Appeal, paras. 268-274; Ntahobali Appeal Brief, para. 759, *referring to* Ntahobali Appeal Brief, para. 499.
[3645] Ntahobali Notice of Appeal, paras. 270, 274; Ntahobali Appeal Brief, paras. 759, 775. *See also* Ntahobali Appeal Brief, para. 774. The Appeals Chamber has addressed and rejected Ntahobali's contention regarding the admissibility of this aspect of Witness Des Forges's testimony above. *See supra*, Section III.H.
[3646] Ntahobali Notice of Appeal, paras. 273, 274.
[3647] Prosecution Response Brief, para. 1122. *See also ibid.*, para. 949.
[3648] Ntahobali Appeal Brief, para. 759. In his notice of appeal, Ntahobali refers to paragraphs 2338-2342, 2405, 2605, 3174, 3205-3207, and 3213 of the Trial Judgement. *See* Ntahobali Notice of Appeal, para. 270. As he has not repeated the references to these paragraphs in this portion of his appeal brief, the Appeals Chamber finds that Ntahobali has abandoned his contentions with respect to these paragraphs, some of which are not directly related to the Butare Prefecture Office.

Witness TA.[3650] When considering the number of refugees abducted and killed from the prefectoral office, the Trial Chamber noted that "Des Forges testified that Nsabimana told her he did not know how many refugees were taken away from the [Butare Prefecture Office], but that he did know that this was happening."[3651]

1601. The Appeals Chamber has repeatedly held that the role of expert witnesses is to assist the trial chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.[3652] In the case at hand, the Appeals Chamber is not persuaded that the Trial Chamber's consideration of Expert Witness Des Forges's general evidence about the rapes, killings, and abductions committed at the prefectoral office ignored the limitations imposed on expert evidence. In particular, Ntahobali fails to demonstrate how Expert Witness Des Forges's general testimony about rapes and killings concerned the acts and conduct of Ntahobali or disputed facts. To the extent the Trial Chamber required corroboration of Witness TA's evidence to find that Ntahobali committed crimes at the prefectoral office during the Mid-May Attack, it relied on factual witnesses who implicated him in crimes there.[3653] Likewise, the Trial Chamber relied on factual witnesses to determine how many refugees were abducted from the prefectoral office and killed.[3654]

1602. Accordingly, the Appeals Chamber concludes that Ntahobali has not demonstrated that the Trial Chamber erred in its use of expert witness testimony in reaching conclusions concerning attacks at the Butare Prefecture Office.

(vi) Exculpatory Evidence

1603. Ntahobali argues that the Trial Chamber ignored evidence from his Witnesses WCNJ and WUNBJ that attacks did not occur at the Butare Prefecture Office and that the Trial Chamber violated its obligation to provide a reasoned opinion by not expressly assessing this evidence.[3655] Specifically, Ntahobali points to Witness WCNJ's testimony that the witness spoke with the Tutsi refugees present at the prefectoral office who never mentioned that they faced security problems, but instead spoke of difficulties in finding food and having to sleep on the veranda.[3656] Ntahobali also highlights Witness WUNBJ's testimony that he was present at the prefectoral office during all working days and sometimes on weekends and that: (i) he never saw or heard of any rapes or

[3649] *See also supra*, Section IV.A.2.
[3650] Trial Judgement, para. 2632, *referring to* Alison Des Forges, T. 9 June 2004 p. 51.
[3651] Trial Judgement, para. 2774, *referring to* Alison Des Forges, T. 9 June 2004 p. 51.
[3652] *Bagosora and Nsengiyumva* Appeal Judgement, fn. 503; *Nahimana et al.* Appeal Judgement, para. 509. *See also Nahimana et al.* Appeal Judgement, para. 212.
[3653] *See* Trial Judgement, para. 2634.
[3654] *See* Trial Judgement, paras. 2774-2779.
[3655] Ntahobali Notice of Appeal, para. 242; Ntahobali Appeal Brief, paras. 608-610.

abductions, or that Ntahobali was involved in criminal activities there; (ii) no mass grave could have been dug without his knowledge, and he did not see corpses at the Butare Prefecture Office; (iii) the night watchman did not inform him that any crimes were committed during the night; and (iv) the number of refugees hardly changed.[3657] Ntahobali contends that the Trial Chamber could not have found that there was a mass grave at the prefectoral office, that there was a visible reduction in the number of refugees, or that there were attacks at night "without dealing with [this] highly relevant and exculpatory piece of evidence."[3658]

1604. The Prosecution responds that the Trial Chamber did not err in rejecting the evidence of Witnesses WUNBJ and WCNJ because their testimonies were contradicted by, *inter alios*, Witnesses TK, SU, RE, SS, FAP, QBQ, and SJ, who provided credible evidence about the rapes, abductions, and killings that occurred at the prefectoral office and of Ntahobali's involvement.[3659]

1605. The Appeals Chamber observes that the Trial Chamber neither summarised nor expressly assessed the evidence of Witnesses WUNBJ and WCNJ referred to by Ntahobali as relevant to whether attacks occurred at the Butare Prefecture Office. The Trial Judgement nonetheless shows that the Trial Chamber did not disregard their testimonies, as it expressly referred to and evaluated them elsewhere in the Trial Judgement in relation to the establishment of the Hotel Ihuliro roadblock and Ntahobali's role in its operation, the number of refugees at the EER, the training of civilians, the distributions of weapons, and the purpose of roadblocks in Butare Town.[3660]

1606. The Appeals Chamber recalls that if a trial chamber did not refer to the evidence given by a witness, it is to be presumed that the trial chamber assessed and weighed the evidence, but found that the evidence did not prevent it from arriving at its findings.[3661] In the instant case, the Appeals Chamber is not persuaded that the Trial Chamber disregarded the evidence of these two witnesses as it relates to the prefectoral office but considers that, given its limited probative value, the Trial Chamber found that the evidence did not prevent it from reaching the conclusion that Ntahobali perpetrated attacks against the Tutsi refugees at the prefectoral office.

[3656] Ntahobali Appeal Brief, para. 609, *referring to* Witness WCNJ, T. 2 February 2006 pp. 8-10 and 53-55 (closed session). *See also* Ntahobali Reply Brief, para. 246.
[3657] Ntahobali Appeal Brief, para. 608, *referring to* Witness WUNBJ, T. 8 March 2006 pp. 40-45 (closed session), 46-51, T. 3 April 2006 pp. 40-42 (closed session).
[3658] Ntahobali Appeal Brief, para. 608, *referring to* Trial Judgement, paras. 2740-2742, 2776.
[3659] Prosecution Response Brief, para. 984.
[3660] *See* Trial Judgement, paras. 3010-3013, 3020, 3107, 3110, 3126, 3907, 3910, 3911, 5195, 5196, 5201-5204, 5251, 5266, 5269, 5270, 5321, 5322, 5328, 5329, 5387, 5388, fns. 8617, 10739, 14129, 14131, 14133, 14135-14137, 14179.
[3661] *See Kvočka et al.* Appeal Judgement, para. 23. *See also Đordević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Kalimanzira* Appeal Judgement, para. 195.

1607. The Appeals Chamber observes that the evidence of Witness WCNJ to which Ntahobali refers is brief and indirect[3662] as well as of questionable credibility in light of mutually corroborating direct and indirect evidence provided by numerous Prosecution witnesses that attacks occurred at the prefectoral office.[3663] As for Witness WUNBJ's evidence, while Ntahobali stresses that the witness testified that he went to work at the prefectoral office on all working days and some weekends, a comprehensive reading of the witness's evidence reflects that he was engaged in one to two weeks of training elsewhere in Butare in the time period between the middle and the end of May 1994 and was manning roadblocks following the training.[3664] As this contradicts the witness's testimony that he went to work at the prefectoral office on all working days, the probative value of the witness's daytime observations of the prefectoral office is diminished. His contradictory evidence also undermines the credibility of his assertion that the number of refugees at the prefectoral office did not change, particularly when considered against the contradictory evidence of multiple Prosecution and Defence witnesses.[3665] Witness WUNBJ's testimony also reflects that he was not one of the displaced persons at the prefectoral office,[3666] was not present there during the evenings[3667] – when the Trial Chamber found that attacks had occurred[3668] – and that his own characterisation of his conversation with those who sought refuge there was nothing more than greeting them.[3669] Witness WUNBJ's statement during cross-examination that he would have known if violence had occurred at night was merely based on his assumption that the night watchman would have informed him.[3670] The Appeals Chamber further notes that, while the witness testified that he saw no mass grave at the prefectoral office and that he would have seen it if one

[3662] Ntahobali Appeal Brief, para. 609, *referring to* Witness WNCJ, T. 2 February 2006 pp. 8-10 and 53-55 (closed session).
[3663] For example, Prosecution Witnesses TA, QJ, TK, SU, RE, SS, FAP, SD, QBP, and QBQ all testified that attacks were perpetrated against the displaced Tutsis seeking refuge at the prefectoral office some time between April and mid-June 1994. *See* Trial Judgement, paras. 2174-2197, 2201-2224, 2242-2318, 2328-2334.
[3664] Witness WUNBJ, T. 8 March 2006 pp. 34 (closed session), 36, 37, T. 5 April 2006 pp. 9, 10 and 14, 15, 42, 43 (closed session).
[3665] Trial Judgement, paras. 2776-2778. *See also infra*, Section V.I.2(f).
[3666] Witness WUNBJ, T. 8 March 2006 pp. 15, 16, 40-44 (closed session).
[3667] Witness WUNBJ, T. 8 March 2006 p. 40 (closed session).
[3668] Trial Judgement, paras. 2644, 2653, 2738, 2773, 2781. Ntahobali argues that Witness WUNBJ's testimony contradicts that of Witnesses TA and TK that daytime attacks occurred at the Butare Prefecture Office. *See* Ntahobali Appeal Brief, para. 608, *referring to* Trial Judgement, paras. 2188, 2218, 2630, 2638, 2771. The Appeals Chamber observes that all but one of the paragraphs referred to by Ntahobali reflect the Trial Chamber's consideration of the evidence of these witnesses that they had observed Ntahobali during the day, not that attacks occurred then. *See* Trial Judgement, paras. 2218, 2630, 2638, 2771. Moreover, while paragraph 2188 of the Trial Judgement recalls Witness TA's testimony that Ntahobali came during the day and took people away to be killed, the Trial Chamber did not expressly accept this evidence, and a comprehensive reading of Witness WUNBJ's testimony reflects that his presence at the prefectoral office was not daily and not necessarily in contradiction with this evidence. The Appeals Chamber dismisses this contention.
[3669] Witness WUNBJ, T. 8 March 2006 p. 44 (closed session).
[3670] Witness WUNBJ, T. 5 April 2006 p. 61 (closed session).

existed,[3671] he also testified that he did not know what a mass grave was and did not know if he could recognise one.[3672]

1608. The Appeals Chamber considers that, in light of the numerous accounts from the relevant Prosecution witnesses that contradict Witness WUNBJ's testimony, a reasonable trier of fact could have found that Witness WUNBJ's indirect evidence that no violence occurred at the prefectoral office and that there were no signs of violence there lacked credibility.[3673]

1609. While it would have been preferable for the Trial Chamber to discuss expressly the relevant aspects of the evidence of Witnesses WUNBJ and WCNJ to which Ntahobali refers, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in failing to consider them.

(b) Identification Evidence

1610. In concluding that Ntahobali participated in the Mid-May Attack, the Last Half of May Attacks, the Night of Three Attacks, and the First Half of June Attacks that led to the abduction, killing, and rape of displaced Tutsis who had sought refuge at the Butare Prefecture Office,[3674] the Trial Chamber relied on identification evidence provided by Prosecution Witnesses TA, TK, QJ, SJ, RE, QBQ, QBP, QY, SD, FAP, SU, and SS, who testified about Ntahobali's presence at the prefectoral office.[3675]

1611. Ntahobali submits that the evidence of these witnesses was not sufficient to establish his involvement in the attacks at the prefectoral office beyond reasonable doubt.[3676] In particular, he argues that the Trial Chamber erred in its evaluation of the identification evidence by: (i) improperly relying on hearsay evidence from witnesses with no prior knowledge of him; and (ii) failing to address the Prosecution's failure to conduct an identification parade and ask certain witnesses to identify him in court as well as by not sufficiently considering the inability of several witnesses to identify him in court.[3677] Ntahobali also contends that the Trial Chamber erred in accepting the evidence of Prosecution witnesses with respect to the Mid-May Attack, the Last Half

[3671] Witness WUNBJ, T. 8 March 2006 p. 46, T. 3 April 2006 p. 41 (closed session), T. 5 April 2006 p. 59 (closed session).
[3672] Witness WUNBJ, T. 5 April 2006 p. 59 (closed session). Ntahobali also argues that Witness WUNBJ did not testify to seeing "bloodstains" at the prefectoral office but the testimony referred to by Ntahobali does not reflect any mention of bloodstains, including any denial that they were there. *See* Ntahobali Appeal Brief, para. 608, *referring to* Witness WUNBJ, T. 8 March 2006 pp. 41-45 (closed session), 46, T. 3 April 2006 pp. 40-42 (closed session).
[3673] Trial Judgement, para. 5427, fn. 14179.
[3674] *See also supra*, Section V.I.1.
[3675] Trial Judgement, paras. 2633, 2638, 2662-2682. *See also ibid*., para. 2771.
[3676] Ntahobali Notice of Appeal, paras. 244-255; Ntahobali Appeal Brief, paras. 716-748.
[3677] Ntahobali Notice of Appeal, paras. 248, 250, 251; Ntahobali Appeal Brief, paras. 716-720, 729-732, 745-747.

of May Attacks, and the Night of Three Attacks.[3678] The Appeals Chamber will address Ntahobali's general challenges prior to examining his contentions related to the specific attacks.

(i) General Challenges

a. Hearsay Evidence

1612. Ntahobali submits that the Trial Chamber failed to apply sufficient caution when assessing identification evidence, because it consisted solely of hearsay evidence from witnesses who had no prior knowledge of him.[3679] He notes that the witnesses' testimonies reflect that he was not known by them, but identified by *Interahamwe*[3680] or unidentified refugees.[3681] He argues that *Interahamwe* may have "falsely used the name Shalom to fool the victims" or that refugees may have misheard the name uttered, as the record reflects that a name similar to his – Salum – was commonly used.[3682] In support of his contention, Ntahobali submits that a review of the transcripts and audio recordings reveals that Witnesses QA, TA, SU, SS, and QBQ mispronounced his name.[3683] Ntahobali also contends that the Trial Chamber's emphasis that some refugees specified that he was the son of Nyiramasuhuko is misplaced given the possibility that the unknown persons who identified him at the Butare Prefecture Office could have been mistaken in their identification.[3684]

1613. In addition, Ntahobali argues that it was inappropriate for the Trial Chamber to rely on jurisprudence affirming the use of hearsay identification evidence, given the material differences between the evidence used to identify him and the convicted persons in the other cases.[3685] According to Ntahobali, no reasonable trier of fact could have convicted him for crimes committed at the prefectoral office in the absence of corroborating "firsthand identification evidence".[3686]

1614. The Prosecution responds that the law allows reliance on hearsay identification evidence without corroboration by firsthand evidence and that the Trial Chamber exercised sufficient caution

[3678] Ntahobali Notice of Appeal, paras. 245-247, 249; Ntahobali Appeal Brief, para. 748.
[3679] Ntahobali Notice of Appeal, paras. 250, 251; Ntahobali Appeal Brief, paras. 716, 718, 719, 720. Ntahobali notes that none of the 12 witnesses who testified about crimes occurring at the Butare Prefecture Office knew him prior to 1994. *See* Ntahobali Appeal Brief, para. 716, *referring to* Witnesses TA, TK, SJ, SU, QBQ, RE, SS, FAP, SD, QY, QBP, and QJ. *See also* AT. 15 April 2015 p. 46; AT. 16 April 2015 p. 35.
[3680] Ntahobali Appeal Brief, para. 728, *referring to* Trial Judgement, para. 2668.
[3681] Ntahobali Appeal Brief, para. 729, *referring to* Trial Judgement, paras. 2633, 2668. *See also* AT. 15 April 2015 p. 46.
[3682] Ntahobali Appeal Brief, paras. 728, 729.
[3683] Ntahobali Appeal Brief, paras. 728, 748, *referring to* Witness QA, T. 23 March 2004 pp. 27, 28 (closed session), Witness TA, T. 25 October 2001 pp. 31, 32, 36, Witness SU, T. 14 October 2002 pp. 37, 38, Witness SS, T. 3 March 2003 pp. 49, 50, Witness QBQ, T. 3 February 2004 pp. 10, 11. *Cf.* AT. 15 April 2015 p. 41.
[3684] Ntahobali Appeal Brief, para. 729. *See also* AT. 15 April 2015 p. 46.
[3685] Ntahobali Appeal Brief, para. 730, *referring to* Trial Judgement, para. 2679, *Rukundo* Appeal Judgement, *Kamuhanda* Appeal Judgement. *See also* Ntahobali Reply Brief, para. 320; AT. 15 April 2015 pp. 46, 47.
[3686] Ntahobali Appeal Brief, paras. 720, 732. *See also* Ntahobali Reply Brief, para. 321; AT. 16 April 2015 pp. 36, 37.

when assessing this evidence.[3687] It contends that Ntahobali's submission that *Interahamwe* would refer to someone other than him by his name is unsupported.[3688] The Prosecution also argues that Ntahobali's contention that he might have been misidentified at the prefectoral office based on someone else having a name similar to his is without merit, noting that the evidence reflects that his name – Shalom – is Hebrew and unique.[3689] Likewise, it contends that Ntahobali fails to demonstrate how the fact that multiple witnesses also referred to him as Nyiramasuhuko's son does not bolster his identification.[3690] It adds that Ntahobali has not drawn any relevant distinction between the Trial Chamber's reliance on hearsay identification evidence and the Tribunal's jurisprudence that has affirmed the use of such identification in other cases.[3691]

1615. Ntahobali replies that the name "Shalom" is not, as the Prosecution contends, unique.[3692]

1616. The Appeals Chamber recalls that neither the Rules nor the jurisprudence of the Tribunal oblige a trial chamber to require a particular type of identification evidence[3693] and that trial chambers have the discretion to consider cautiously and rely on hearsay evidence.[3694] The Appeals Chamber further recalls that a witness's prior knowledge of, or level of familiarity with, an accused is a relevant factor in the assessment of identification evidence; however, contrary to what Ntahobali suggests, the fact that a witness did not personally know an accused prior to the events does not necessarily undermine the reliability of his identification evidence.[3695] In the present case, the Trial Chamber correctly recalled generally the law concerning reliance on hearsay evidence in an introductory section of the Trial Judgement and specifically when considering such evidence with respect to Ntahobali's identification at the prefectoral office.[3696] The Trial Chamber considered the hearsay nature of various witnesses' identifications of Ntahobali at the prefectoral office and concluded that they were reliable for a variety of reasons.[3697] Ntahobali's general contentions concerning the Trial Chamber's use of hearsay, which do not discuss this analysis,[3698] fail to demonstrate that the Trial Chamber erred in this regard.

[3687] Prosecution Response Brief, paras. 1091-1093, 1098, 1099. *See also* AT. 16 April 2015 pp. 9-11.
[3688] Prosecution Response Brief, para. 1095.
[3689] Prosecution Response Brief, para. 1095.
[3690] Prosecution Response Brief, para. 1096.
[3691] Prosecution Response Brief, para. 1097, *referring to Rukundo* Appeal Judgement, para. 201.
[3692] Ntahobali Reply Brief, para. 319, *referring to* Exhibit D413 (Sealed excerpt of Witness CCR's testimony in the *Muvunyi* case) (confidential), p. 17.
[3693] *Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Musema* Appeal Judgement, para. 90.
[3694] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 95; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.
[3695] *Lukić and Lukić* Appeal Judgement, para. 118; *Renzaho* Appeal Judgement, para. 530. *Cf. Kayishema and Ruzindana* Appeal Judgement, paras. 327, 328.
[3696] Trial Judgement, paras. 168, 169, 2638, 2679.
[3697] Trial Judgement, paras. 2633, 2638, 2678-2680.
[3698] *See* Ntahobali Appeal Brief, paras. 716-720.

1617. Turning to Ntahobali's contention that *Interahamwe* may have falsely used the name "Shalom" to fool the victims, the Appeals Chamber understands that Ntahobali raises this contention to demonstrate error in the Trial Chamber's reliance on Witness TK's evidence, who heard *Interahamwe* who had surrounded Ntahobali refer to him as "*Shalom*, *chef*."[3699] The Appeals Chamber considers that Ntahobali's unsupported contention fails to demonstrate that the Trial Chamber erred in relying on Witness TK's evidence, which it found to be "significantly detailed" and corroborated by other witnesses.[3700] Likewise, Ntahobali's argument that he might have been misidentified by refugees because another name similar to his – "Salum" – was common in Butare is as speculative as it is misleading, as the evidence of Witness QA that he cites in support of this submission reflects that this name was only common among Muslims in Butare rather than all men.[3701] Similarly, he does not show that the various pronunciations of his name by witnesses who testified before the Tribunal varied materially from "Shalom" so as to make it unreasonable for the Trial Chamber to rely on hearsay identifications of him.[3702] Indeed, the transcripts from the witnesses pointed out by Ntahobali reflect the name being recorded as "Shalom".[3703] Moreover, the Appeals Chamber finds that, contrary to Ntahobali's assertions, the fact that Ntahobali was identified repeatedly as Nyiramasuhuko's son provided further support to the reliability of the identifications.[3704] Ntahobali does not show that the Trial Chamber abused its discretion in relying on the impugned hearsay evidence.[3705]

[3699] Trial Judgement, para. 2668.

[3700] *See* Trial Judgement, paras. 2668-2677. Witness TA's evidence reflects that, on another occasion, she heard *Interahamwe* refer to Ntahobali as Shalom as well. *See* Witness TA, T. 25 October 2001 p. 60. The Appeals Chamber disagrees with Ntahobali's contention that Witness TK's evidence required corroboration or his implicit assertion that the witness's evidence of *Interahamwe* referring to him as "*Shalom*, *chef*" is somehow incompatible with other evidence on the record. *See* Ntahobali Appeal Brief, para. 728; Ntahobali Reply Brief, para. 319.

[3701] *See* Witness QA, T. 23 March 2004 pp. 27, 28 (closed session).

[3702] *See* Ntahobali Appeal Brief, paras. 728, 748, *referring to* Witness TA, T. 25 October 2001 pp. 31, 32 ("Chaloum"), Witness SU, T. 14 October 2002 pp. 37, 38 ("Sharomo"), Witness SS, T. 3 March 2003 pp. 49, 50 ("Sharomo"), Witness QBQ, T. 3 February 2004 pp. 10, 11 ("Sharomu"). Notably, while Witness TA wrote "Chaloum", the interpreter heard the witness say the name "Shalom." *See* Witness TA, T. 25 October 2001 pp. 31, 32, 35, 36. Furthermore, the interpreter noted that words written with "L" can be pronounced as "R". *See* Witness TA, T. 25 October 2001 p. 31 ("THE INTERPRETER: She couldn't pronounce the 'R'. You hear 'Sharom' but it is written 'Shalom'. She pronounces it Sharom but it is written with an 'L' and not an 'R'. She means Shalom, this is what I hear.").

[3703] *See* Witness TA, T. 25 October 2001 p. 31; Witness SU, T. 14 October 2002 p. 37; Witness SS, T. 3 March 2003 p. 49; Witness QBQ, T. 3 February 2004 p. 10.

[3704] Trial Judgement, paras. 2633, 2668.

[3705] Ntahobali argues that, given the nature of the identification evidence, it is impossible to establish the declarants' reliability and that he was prevented from verifying their information through investigation or cross-examination. *See* Ntahobali Appeal Brief, para. 730. However, Ntahobali's contention is unsupported by any reference and thereby fails to meet the standard required for appellate review. *See supra*, para. 35. Similarly, Ntahobali argues that four witnesses never testified to Ntahobali's presence at the Butare Prefecture Office and that the Trial Chamber failed to assess this omission, particularly because, in Ntahobali's words, "people apparently exclaimed saying 'this is Shalom' or something to that effect". *See* Ntahobali Appeal Brief, para. 744. *See also ibid.*, para. 717. The Prosecution rejects this contention as unsupported and unpersuasive. *See* Prosecution Response Brief, paras. 1094, 1111. Ntahobali does not point to a particular finding of the Trial Chamber nor demonstrate with references to the record how evidence of witnesses hearing Ntahobali's name at the Butare Prefecture Office is necessarily incompatible with witnesses who did not hear people state his name. The Appeals Chamber dismisses this contention without further consideration.

1618. With respect to Ntahobali's contention that the Trial Chamber erred in relying on inapplicable jurisprudence, the Appeals Chamber observes that the Trial Chamber cited to excerpts of the *Kamuhanda* Appeal Judgement and *Rukundo* Appeal Judgement as supporting the proposition that identification of an accused at the scene of a crime may be based on hearsay evidence.[3706] Ntahobali argues that unlike the accused in the *Rukundo* and *Kamuhanda* cases, he was not a figure of authority and that, unlike those cases, hearsay evidence used against him was not corroborated by identification evidence from witnesses who knew him.[3707] While hearsay identification evidence from witnesses who had no prior knowledge of Kamuhanda was used to corroborate more direct identification evidence in that case,[3708] Ntahobali fails to demonstrate material differences between the nature of the identification of Rukundo by witnesses who had no prior knowledge of him and the identification of Ntahobali by witnesses in a similar position with respect to him.[3709] Ntahobali also does not show that being a figure of authority is a necessary ingredient when relying on hearsay identification evidence.

1619. In light of the above, the Appeals Chamber finds that Ntahobali has not demonstrated any error in the Trial Chamber's reliance on hearsay identification evidence.

b. Identification Parade and In-Court Identification

1620. Ntahobali argues that the Trial Chamber failed to rule on his motion of 30 May 2001 requesting the Prosecution to conduct an identification parade; a request that was repeated in his closing brief and similarly ignored.[3710] He further emphasises that, of the 12 witnesses who identified him as being present at the Butare Prefecture Office, the Prosecution failed to ask five of them to identify him in court,[3711] three testified that they would be unable to identify him in court,[3712] one was not found credible by the Trial Chamber for this event,[3713] and one misidentified

[3706] Trial Judgement, para. 2679, *referring to Kamuhanda* Appeal Judgement, paras. 241, 300, *Rukundo* Appeal Judgement, paras. 196-198.
[3707] Ntahobali Appeal Brief, para. 730.
[3708] *See Kamuhanda* Appeal Judgement, paras. 240, 241, 300.
[3709] *Compare Rukundo* Appeal Judgement, paras. 195-198 (noting that, while certain witnesses had no prior knowledge of Rukundo, hearsay identification evidence that provided additional and specific details concerning Rukundo's identity provided a greater indicia of reliability) *with*, *e.g.*, Trial Judgement, paras. 2633 (Witness TA was able to identify Ntahobali by his given name, Shalom, learned of his familial relationship with Pauline Nyiramasuhuko through other refugees, and knew that Nyiramasuhuko was the Minister of Women's Affairs), 2668 (Witness TK overheard a woman refer to Ntahobali as "Shalom" and identify his mother as "Pauline", as well as overheard *Interahamwe* refer to Ntahobali as "*Shalom*, *chef*").
[3710] Ntahobali Appeal Brief, para. 745, *referring to The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Extremely Urgent Motion to Order Disclosure of All Information Regarding Process and Methods of Identification, 30 May 2001 ("30 May 2001 Motion").
[3711] Ntahobali Appeal Brief, para. 746, *referring to* Witnesses QBP, QJ, SD, SS, and SU.
[3712] Ntahobali Appeal Brief, paras. 741, 746, *referring to* Witnesses FAP, QBQ, and QY.
[3713] Ntahobali Appeal Brief, para. 746, *referring to* Witness SJ, Trial Judgement, para. 2723.

Ntahobali as Nteziryayo.[3714] Ntahobali argues that, consequently, only Witnesses TK and TA, whose reliability and credibility he argues are questionable for other reasons, were able to identify him in court.[3715]

1621. The Prosecution responds that in-court identifications are afforded little to no credence and that, accordingly, the Trial Chamber did not rely on them when assessing evidence of Ntahobali's presence at the Butare Prefecture Office.[3716] It adds that Ntahobali fails to demonstrate that the Trial Chamber erred in relying on witnesses who did not identify him in court or in relying on Witness RE's identification evidence notwithstanding the witness's misidentification of Ntahobali in court.[3717]

1622. The Appeals Chamber observes that, contrary to Ntahobali's contention, the Trial Chamber expressly denied his 30 May 2001 Motion requesting that the Prosecution conduct an identification parade.[3718] Ntahobali does not argue that the Trial Chamber erred in its decision and fails to demonstrate why the Trial Chamber should have reconsidered its position based on submissions in the Ntahobali Closing Brief nearly eight years later.[3719] His submissions in this respect are therefore dismissed.

1623. Turning to Ntahobali's contentions that Witnesses QBP, QJ, SD, SU, and SS were not asked to identify Ntahobali in court and that Witnesses FAP, QBQ, and QY testified that they would not be able to do so, the Appeals Chamber observes that Witnesses FAP, QBP, QBQ, QY, SD, SS, and SU were principally used to corroborate the evidence of Witness TK – who identified Ntahobali in court – about the vehicle used by attackers or the fact that it was driven by Ntahobali.[3720] Their prior knowledge of Ntahobali and ability to identify him in the courtroom were therefore of limited to no relevance. Given these circumstances, which were considered by the Trial Chamber, the Appeals Chamber is not persuaded that the fact that in court identifications of Ntahobali were not

[3714] Ntahobali Notice of Appeal, para. 248; Ntahobali Appeal Brief, para. 746, *referring to* Witness RE. *See also* Ntahobali Reply Brief, para. 323, *referring to Kvočka et al.* Appeal Judgement, para. 473; AT. 15 April 2015 pp. 42, 43; AT. 16 April 2015 p. 35.
[3715] Ntahobali Appeal Brief, para. 747, *referring to* Witnesses TA and TK.
[3716] Prosecution Response Brief, para. 1109.
[3717] Prosecution Response Brief, para. 1109, *referring to Kvočka et al.* Appeal Judgement, para. 576.
[3718] T. 11 June 2001 pp. 5, 6, *referring to* 30 May 2001 Motion.
[3719] The Appeals Chamber fails to see how Ntahobali's reference to the first *Haradinaj et al.* Trial Judgement, which concerns a situation where the Prosecution carried out photo-board identifications and failed to follow its own guidelines, is relevant. *See* Ntahobali Appeal Brief, para. 745, fn. 1582, *referring to Haradinaj et al.* Trial Judgement of 3 April 2008, para. 31.
[3720] Trial Judgement, paras. 2663, 2664. *See also ibid*., paras. 2242-2262, 2265-2273, 2281-2298.

requested or that certain witnesses testified that they would be unable to identify him in court prevented the Trial Chamber from relying on their evidence.[3721]

1624. With respect to Witness RE's misidentification in court of Ntahobali as Nteziryayo, the Appeals Chamber observes that the Trial Chamber considered this when assessing the witness's evidence implicating Ntahobali in attacks at the EER.[3722] It found that the misidentification did not undermine the reliability of her identification evidence in light of the "nearly nine years" that had passed since the attacks.[3723] The Trial Chamber also found that Witness RE's evidence concerning the circumstances of her identification of Ntahobali on the Night of Three Attacks was corroborated by other witnesses[3724] and the witness's ability to describe Ntahobali's familial link with Nyiramasuhuko.[3725] Although a witness's failure to identify an accused in court can be a reason for declining to rely on the identification evidence of that witness,[3726] the Appeals Chamber recalls that the failure of courtroom identification does not necessarily destroy any case which might have been otherwise established in evidence.[3727] The Appeals Chamber considers that, in the present instance, Ntahobali fails to show that Witness RE's in-court misidentification of Ntahobali prevented the Trial Chamber from relying on the witness's otherwise credible and corroborated identification evidence of Ntahobali during the Night of Three Attacks.

1625. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate any error concerning the absence of an identification parade, the absence of in-court identifications, or an incorrect in-court identification.

(ii) Mid-May Attack and Last Half of May Attacks

1626. The Trial Chamber concluded that Ntahobali was present and participated in the Mid-May Attack based on Witness TA's identification evidence.[3728] When considering the basis of Witness TA's knowledge of Ntahobali, the Trial Chamber noted that she was not acquainted with Ntahobali prior to encountering him during the Mid-May Attack and only knew him by his given

[3721] The Appeals Chamber assesses in greater detail below Ntahobali's contentions that the Trial Chamber erred in relying on identification evidence from Witnesses QBP, TA, and SD in relation to the Night of Three Attacks as they did not testify about this event. *See infra*, Section V.I.2(b)(iii)c.
[3722] Trial Judgement, para. 3948.
[3723] Trial Judgement, para. 3948. In the context of assessing Witness RE's ability to identify Nyiramasuhuko, the Trial Chamber also stated that Witness RE's misidentification of Nteziryayo as Ntahobali was not "probative". *See ibid*., fn. 7548. *See also supra*, Section IV.F.2(c)(iii)d.
[3724] *See*, *e.g*., Trial Judgement, paras. 2663, 2664, 2668, 2672, 2674, 2675, 2680, 2681.
[3725] *See* Witness RE, T. 25 February 2003 p. 47.
[3726] *See Lukić and Lukić* Appeal Judgement, para. 503. *See also Rukundo* Appeal Judgement, para. 71; *Limaj et al.* Appeal Judgement, fn. 68, *referring to Kvočka et al.* Appeal Judgement, para. 473.
[3727] *Kvočka* Appeal Judgement, paras. 473, 576.
[3728] Trial Judgement, para. 2638.

name, "Shalom".[3729] However, it observed that she learned he was "the son of Pauline Nyiramasuhuko, who was the Minister of Women's Affairs."[3730] Consequently, the Trial Chamber was convinced that Witness TA was referring to Ntahobali throughout her testimony when she referred to "Shalom".[3731]

1627. The Trial Chamber also considered the following circumstances as demonstrating the reliability of Witness TA's identification of Ntahobali during this specific event:

> (1) at times, there was some public lighting from lamp posts that reached the area from the other side of the road; (2) there was moonlight behind the [Butare Prefecture Office] where Witness TA said she was raped by Ntahobali; (3) *Interahamwe* used torches to search through the refugees; and (4) Witness TA provided significant details as to what Ntahobali was carrying, stated what he was wearing, and Ntahobali was in close proximity to Witness TA when he grabbed her hand and raped her. Further, she had also previously seen him in daylight.[3732]

1628. As regard the First Attack of the Last Half of May Attacks, during which the Trial Chamber found that Ntahobali raped Witness TA, the Trial Chamber recalled that, by then, Witness TA had already seen Ntahobali and concluded that she was close enough to identify him because they were in "direct contact".[3733] When assessing Witness TA's evidence about the Second Attack of the Last Half of May Attacks, the Trial Chamber similarly found her identification of Ntahobali reliable because, at that point, "Witness TA had already suffered the same treatment at the hands of Ntahobali" and was again in contact with him because he handed her over to a group of *Interahamwe*.[3734]

1629. Ntahobali argues that the Trial Chamber erred in accepting Witness TA's identification evidence, partly because it relied on her in-court identification of Ntahobali after the Presiding Judge had identified him.[3735] Ntahobali further submits that no reasonable trier of fact could have relied on Witness TA's identification evidence, because she could not provide a credible physical

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[3729] Trial Judgement, para. 2633.
[3730] Trial Judgement, para. 2633.
[3731] Trial Judgement, para. 2633.
[3732] Trial Judgement, para. 2638. *See also ibid.*, para. 2630 ("Witness TA said Shalom and other *Interahamwe* raped her. […] Shalom was wearing trousers and a shirt made of *kitenge*. Over the course of the events, Witness TA saw Shalom on more than eight occasions at the [Butare Prefecture Office]. Further, she stated that Shalom raped her on two occasions and took her by the arm to *Interahamwe* in order to be raped on multiple occasions. Therefore, Witness TA had numerous opportunities to view Shalom up close. Although the attacks at the [Butare Prefecture Office] occurred at night, Witness TA stated there was moonlight behind the [Butare Prefecture Office] on several of those occasions. In addition, there was occasionally some public lighting from the lamp posts that reached the area from the other side of the road near *Chez Venant*. […] Of particular importance, Witness TA testified that she observed Shalom leading an *Interahamwe* training exercise one morning in June 1994. Therefore, she saw Shalom during broad daylight.") (internal references omitted).
[3733] Trial Judgement, para. 2645.
[3734] Trial Judgement, para. 2649.
[3735] Ntahobali Notice of Appeal, paras. 252-254; Ntahobali Appeal Brief, para. 740. *See also* AT. 15 April 2015 p. 46.

description of him and because she conceded that she did not dare to look at anyone in the face.[3736] He also contends that the Trial Chamber failed to consider evidence from Witness TA and several other witnesses, which demonstrated that there was little or no lighting at the prefectoral office[3737] and very little moonlight at the time when the attacks occurred.[3738] He points to the evidence from Witness RE suggesting that, under these circumstances, it was even difficult to identify the uniforms of assailants, and argues that it would have been harder to recognise faces.[3739] Ntahobali adds that the Trial Chamber misstated Witness TA's testimony in paragraph 2628 of the Trial Judgement that the "truck's lights were illuminated" as the witness testified that the vehicle lights were switched off when it was parked.[3740]

1630. Ntahobali further submits that the Trial Chamber erred in finding that Witness TA observed Ntahobali during the day prior to the Mid-May Attack, as her evidence reflects that she saw Ntahobali training *Interahamwe* during the day in June 1994, while the latter were singing.[3741] He also argues that this evidence is uncorroborated and contradicted by Witnesses FAP and RE who testified to having heard no singing throughout their stay at the prefectoral office, and should not have been used to bolster Witness TA's identifications of him during the attacks, which occurred in May 1994.[3742] Ntahobali concludes that, in light of the Trial Chamber's failure to consider the arguments above, the hearsay nature of Witness TA's uncorroborated identification, and the Trial Chamber's failure to consider the difficult circumstances in which she identified him, no reasonable trier of fact could have relied on Witness TA's testimony.[3743]

1631. The Prosecution responds that the Trial Chamber did not rely on Witness TA's in-court identification of Ntahobali, that Ntahobali misrepresents Witness TA's testimony, and that he otherwise fails to demonstrate that the Trial Chamber erred in its assessment of her identification evidence.[3744]

[3736] Ntahobali Appeal Brief, para. 740, *referring to* Witness TA, T. 6 November 2001 pp. 80-82. *See also* Ntahobali Reply Brief, para. 325, *referring to* Witness TA, T. 6 November 2001 pp. 90, 91.
[3737] Ntahobali Appeal Brief, para. 740. Specifically, Ntahobali points to the testimony of Witness TA, who stated that the Butare Prefecture Office yard had no lighting and the evidence of Witnesses RE, SS, FAP, and SU, which, in his view demonstrates that there was no lighting at the Butare Prefecture Office. *See idem*, *referring to* Witness TA, T. 30 October 2001 pp. 109-113, Witness RE, T. 26 February 2003 pp. 20, 21, Witness SS, T. 4 March 2003 pp. 40-42, Witness FAP, T. 12 March 2003 pp. 16, 17, Witness SU, T. 17 October 2002 pp. 91, 92.
[3738] Ntahobali Appeal Brief, para. 740.
[3739] Ntahobali Appeal Brief, para. 740, *referring to* Witness RE, T. 26 February 2003 pp. 24, 25.
[3740] Ntahobali Appeal Brief, para. 740.
[3741] Ntahobali Appeal Brief, para. 740.
[3742] Ntahobali Appeal Brief, para. 740.
[3743] Ntahobali Appeal Brief, para. 740. *See also* AT. 15 April 2015 pp. 46, 47. Ntahobali also raises arguments that Witness TA's evidence is contradicted by that of Witnesses RE and QBP. *See* Ntahobali Appeal Brief, para. 740. These arguments, which pertain to the merits of Witness TA's testimony implicating Ntahobali in crimes at the Butare Prefecture Office rather than the witness's ability to identify Ntahobali are discussed below. *See infra*, Sections V.I.2(c)(iii), V.I.2(c)(iv).
[3744] Prosecution Response Brief, para. 1112. *See also* AT. 16 April 2015 pp. 10, 11.

1632. The Appeals Chamber observes that, contrary to Ntahobali's submission that the Presiding Judge identified Ntahobali in court prior to Witness TA's identification, the Presiding Judge simply identified counsel for Ntahobali.[3745] Furthermore, Witness TA was asked to identify Ntahobali in court four days after this incident.[3746] Ntahobali does not demonstrate how the conduct of the Presiding Judge corrupted the subsequent in-court identification process, to which Ntahobali did not object when it occurred. In addition, the Appeals Chamber notes that the Trial Chamber simply recalled that Witness TA identified Ntahobali in court but that this aspect of her evidence was not material to its assessment of the witness's identification evidence.[3747]

1633. The Appeals Chamber also finds that Ntahobali's undeveloped contention that the Trial Chamber erred in accepting Witness TA's identification evidence because she could not provide a credible physical description of him ignores that Witness TA described Ntahobali when asked to do so.[3748] Witness TA also described what he wore and carried, which the Trial Chamber referred to and found reliable.[3749] While Ntahobali points to an excerpt of Witness TA's testimony that she could not look at anyone in the face, this portion of her evidence arose when she was being asked if she knew who the prefect of Butare was at the end of April 1994.[3750] This statement does not demonstrate that the Trial Chamber's reliance on Witness TA's identification of Ntahobali was unreasonable given that it was elicited for purposes other than establishing how she was able to identify Ntahobali.

1634. With respect to Ntahobali's claim that the Trial Chamber failed to consider evidence that there was insufficient lighting at the prefectoral office, the Appeals Chamber again recalls that the Trial Chamber relied on Witness TA's ability to identify Ntahobali based, in part, on Witness TA's evidence that "at times, there was some public lighting from lamp posts that reached the area from the other side of the road", "there was moonlight behind the [Butare Prefecture Office]", and "*Interahamwe* used torches to search through the refugees".[3751]

1635. Ntahobali's argument that the Trial Chamber erred in not considering other evidence that there was no lighting at the prefectoral office fails to undermine the Trial Chamber's finding that "at times, there was some public lighting from lamp posts that reached the area from the other side

[3745] Witness TA, T. 25 October 2001 p. 70 ("So, if you want to pursue it, the observation made by learned counsel for Ntahobali are [*sic*] valid.").
[3746] *See* Witness TA, T. 29 October 2001 pp. 102-104.
[3747] *See* Trial Judgement, paras. 2193, 2638, 2645, 2649.
[3748] Witness TA, T. 31 October 2001 pp. 37, 38.
[3749] Trial Judgement, paras. 2630, 2634, 2638.
[3750] *See* Witness TA, T. 6 November 2001 p. 81.
[3751] Trial Judgement, para. 2638. *See also ibid.*, para. 2630.

of the road".[3752] Ntahobali simply refers to disparate observations from witnesses at the prefectoral office that do not demonstrate that their observations coincide with times when Witness TA was raped by Ntahobali or handed over by him to be raped by others,[3753] and which are not necessarily incompatible with Witness TA's own evidence that no light came from the prefectoral office[3754] but that there was some public lighting that came from the direction of the town.[3755]

1636. Similarly, Ntahobali's references to evidence that the attacks on Witness TA occurred during the rainy season[3756] is not incompatible with the Trial Chamber's conclusion that there was moonlight behind the prefectoral office when Witness TA said she was raped by Ntahobali.[3757] Ntahobali also fails to demonstrate how Witness RE's evidence is incompatible with Witness TA's evidence that she could identify Ntahobali. Indeed, the evidence of Witness RE reflects that torchlight enabled her to identify Ntahobali and allowed her to specify that the uniforms used were military uniforms,[3758] undermining Ntahobali's assertion that "if it was hard to make out uniforms, it was obviously even harder to make out faces."[3759]

[3752] Trial Judgement, para. 2638. Ntahobali challenges the Trial Chamber's use of the phrase "at times" with respect to the lighting, arguing that the Kinyarwanda recording of Witness TA's testimony reflects that she only saw lighting on one occasion and did not link it to the night she was attacked and argues that this differs from the transcripts. *See* Ntahobali Appeal Brief, para. 740, *referring to* Witness TA, T. 8 November 2001 pp. 23, 24. Ntahobali's contentions ignore that the question concerning the lighting was asked in the context of the first time the witness saw Ntahobali. *See* Witness TA, T. 8 November 2001 p. 23. The Appeals Chamber considers that it was therefore reasonable for the Trial Chamber to consider this evidence in the context of this attack and finds no material significance in the purported distinction raised by Ntahobali.

[3753] *See* Ntahobali Appeal Brief, para. 740, *referring*, *inter alia*, *to* Witness FAP, T. 12 March 2003 p. 16, Witness RE, T. 26 February 2003 pp. 20, 21, Witness SS, T. 4 March 2003 p. 41, Witness SU, T. 17 October 2002 p. 91.

[3754] Witness TA, T. 30 October 2001 pp. 110-113. Ntahobali also appears to argue that the Trial Chamber failed to acknowledge that Witness TA testified that there was no light at the Butare Prefecture Office. *See* Ntahobali Appeal Brief, para. 740. However, the Trial Chamber's conclusions accurately reflect Witness TA's evidence that light came from sources other than the Butare Prefecture Office. *See* Trial Judgement, paras. 2630, 2638. Ntahobali fails to demonstrate how the Trial Chamber erred in its analysis and the Appeals Chamber dismisses this contention without further consideration.

[3755] Witness TA, T. 30 October 2001 pp. 109, 110.

[3756] *See* Ntahobali Appeal Brief, para. 740.

[3757] *See* Trial Judgement, para. 2638. *See also* Witness TA, T. 30 October 2001 pp. 107, 109. The Appeals Chamber observes that Ntahobali also points to an annex of his appeal brief that contains a lunar calendar, which was part of his closing brief at trial and indicates that only nine to 24 percent of the moon was visible in Rwanda in mid-May 1994. *See* Ntahobali Appeal Brief, para. 740, *referring to* Annex F. The Prosecution responds that Annex F is not part of the record. *See* Prosecution Response Brief, fn. 2880. Ntahobali appears to suggest that, because Annex F contains facts of common knowledge, its contents are judicially noticed. *See* Ntahobali Appeal Brief, para. 740, *referring to* Annex F. However, Ntahobali makes no showing that what is contained in Annex F meets the requirements for judicial notice under Rule 94 of the Rules. Moreover, the Appeals Chamber recalls that Rule 94 of the Rules is not a mechanism that may be employed to circumvent the general rules governing the admissibility of evidence. *See Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Blagoje Simić's Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice, 1 June 2006, para. 26. Annex F does not constitute evidence in the trial record and Ntahobali has not sought to admit it under Rule 115 of the Rules as additional evidence on appeal. This contention is therefore dismissed.

[3758] Witness RE, T. 26 February 2003 pp. 21, 22 ("Q. Madam Witness, is it correct to say that at the [Butare Prefecture Office] there was no light at night? A. No there was no light. Q. And when you say that a person – those persons you referred to as Shalom and Kazungu came to the [Butare Prefecture Office], how are you able to say that the one you referred to as the driver was Shalom? A. They came at night and I saw them. I saw them when they were waking up people, shining the torch into their faces."), 25 ("A. Yes, I did say that I know the uniforms worn by our soldiers, but

1637. As to Ntahobali's contentions concerning the Trial Chamber's statement that Witness TA testified that the "truck's lights were illuminated" during the Mid-May Attack, the Appeals Chamber observes that the reference to the witness's testimony provided by the Trial Chamber does not support this statement.[3760] Witness TA testified that the vehicle's lights were switched off when it was parked at the prefectoral office and turned on only when it was moving.[3761] However, the Trial Chamber did not determine that Witness TA was capable of identifying Ntahobali based on lighting from this truck.[3762] The Appeals Chamber therefore finds that this error has not occasioned a miscarriage of justice.

1638. The Appeals Chamber observes that all of Ntahobali's arguments concerning the Trial Chamber's failure to consider evidence demonstrating the absence of lighting at the Butare Prefecture Office ignore the central aspects of Witness TA's evidence, which gave credence to her identification of Ntahobali and which the Trial Chamber accepted. As recalled above, the Trial Chamber's reliance on Witness TA's identification evidence was, in part, based on the witness's extended and direct physical contact with Ntahobali when he raped her and when he handed her over to be raped by others.[3763] Moreover, the Appeals Chamber observes that the Trial Chamber found that Ntahobali raped Witness TA behind the prefectoral office buildings in the direction of the ORINFOR.[3764] Ntahobali fails to demonstrate how the evidence he points to concerning the absence of light on the premises of the prefectoral office would have made it unreasonable for the Trial Chamber to rely on Witness TA's evidence identifying him.

1639. With respect to Ntahobali's submission that the Trial Chamber erroneously found that Witness TA had seen Ntahobali during the day prior to seeing him during the Mid-May Attack,[3765] the Appeals Chamber observes that Witness TA's testimony, as cited by the Trial Chamber, reflects that the Mid-May Attack was the first occasion on which she saw Ntahobali.[3766] The only reference provided by the Trial Chamber of Witness TA seeing Ntahobali during the day is when she observed Ntahobali leading an *Interahamwe* training exercise one morning in June 1994.[3767] Consequently, the Trial Chamber erred in paragraph 2638 of the Trial Judgement when stating that

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I am saying that when they came it was night and I could not distinguish the uniform. And even when they were shining their torch I could not see, but I can confirm that it was a military uniform.").

[3759] Ntahobali Appeal Brief, para. 740.

[3760] Trial Judgement, para. 2628, *referring to* Witness TA, T. 8 November 2001 p. 13.

[3761] Witness TA, T. 8 November 2001 p. 25.

[3762] Trial Judgement, para. 2638.

[3763] *See* Trial Judgement, para. 2638. *See also ibid*., paras. 2631, 2645, 2648, 2770.

[3764] Trial Judgement, paras. 2631, 2645.

[3765] Trial Judgement, para. 2638.

[3766] Trial Judgement, para. 2178.

[3767] Trial Judgement, paras. 2189, 2630, *referring to* Witness TA, T. 29 October 2001 pp. 29, 30, 32, 40, 41. *See*, *in particular*, Witness TA, T. 29 October 2001 p. 32 ("Q. Do you recollect during what month you saw this? A. I recall that it was in June.").

she had "seen him in daylight" prior to the Mid-May Attack as there is no evidence supporting this conclusion.[3768] Nonetheless, the Appeals Chamber is not persuaded that this error renders the Trial Chamber's reliance on Witness TA's identification of Ntahobali unreasonable given the other factors that the Trial Chamber relied on to bolster the credibility and reliability of Witness TA's identification of Ntahobali, including that "Ntahobali was in close proximity to Witness TA when he grabbed her hand and raped her."[3769]

1640. The Appeals Chamber is equally unconvinced by Ntahobali's contention that the Trial Chamber erred in relying on Witness TA's evidence that she saw Ntahobali leading an *Interahamwe* training exercise one morning in June 1994 because it was uncorroborated and contradicted.[3770] The Appeals Chamber recalls that corroboration is not a requirement and that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[3771] Having reviewed the evidence of Witnesses RE and FAP pointed out by Ntahobali, the Appeals Chamber does not consider that it is necessarily incompatible with Witness TA's evidence, as the excerpts cited fail to show that either Witness RE or Witness FAP were in a similar position as Witness TA when she testified to having observed this event.[3772]

1641. Finally, the Appeals Chamber recalls that a reasonable trier of fact could have relied on Witness TA's identification evidence despite the fact that her knowledge of Ntahobali was hearsay and uncorroborated.[3773] The Trial Chamber's assessment of Witness TA's testimony reflects that the Trial Chamber was fully apprised of and carefully considered the circumstances in which Witness TA identified Ntahobali.[3774] Ntahobali's unsupported argument that the Trial Chamber failed to exercise sufficient caution does not demonstrate that it erred in its approach.[3775]

1642. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Witness TA testified that the "truck's lights were illuminated" in paragraph 2628 of the Trial Judgement and in stating that Witness TA had observed Ntahobali during the day prior to the Mid-May Attack. However, the Appeals Chamber concludes that these errors have not occasioned a

[3768] Trial Judgement, para. 2638.
[3769] Trial Judgement, para. 2638.
[3770] Ntahobali Appeal Brief, para. 740.
[3771] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[3772] *See* Witness FAP, T. 13 March 2003 p. 37; Witness RE, T. 26 February 2003 p. 35.
[3773] *See supra*, paras. 1616, 1640.
[3774] *See* Trial Judgement, paras. 2638, 2644, 2645.
[3775] Ntahobali also contends that the Trial Chamber unreasonably failed to address the generic nature of the Prosecution witnesses' description of him, which he argues is similar to that of thousands of Rwandan men. *See* Ntahobali Appeal Brief, para. 748. This general contention is unsupported and fails to demonstrate that no reasonable trier of fact could have relied on Prosecution identification evidence. Indeed, as noted by the Trial Chamber, the Defence evidence

miscarriage of justice given the other factors relied upon by the Trial Chamber to find that Witness TA's identification of Ntahobali was credible and reliable. Consequently, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that he was present at the Butare Prefecture Office during the Mid-May Attack and the Last Half of May Attacks based on Witness TA's identification evidence.

(iii) Night of Three Attacks

1643. When assessing whether Ntahobali was present and involved in the Night of Three Attacks, the Trial Chamber found Witness TK's testimony "particularly convincing" as to the events of that evening.[3776] It further considered Witness TK's evidence, in conjunction with the testimonies of Witnesses TA, QJ, QBQ, QBP, RE, FAP, SD, SJ, SS, and QY, that Ntahobali arrived at the Butare Prefecture Office in a pickup truck and that several of these witnesses described Ntahobali as driving it.[3777]

1644. The Trial Chamber also found that Witness TK, who did not know Ntahobali prior to this evening, was able to identify him based on overhearing a conversation Ntahobali had with Mbasha's wife, which was followed by Ntahobali abducting her and her children.[3778] The Trial Chamber considered that Witnesses QJ, SJ, RE, and WKKTD corroborated some of the "details of the conversation between Mbasha's wife and Ntahobali".[3779] Specifically, the Trial Chamber found that Witnesses SJ and RE "corroborated the occurrence of the conversation between Ntahobali and a woman who was seated on the veranda."[3780] It further found that Witness QJ "corroborated the occurrence of the abduction"[3781] and that this witness and Witness WKKTD testified that Mbasha's wife worked at a pharmacy, "lending credence to the veracity of Witness TK's account that Mbasha's wife said she knew Ntahobali because he was sent to the pharmacy to buy drugs."[3782] The Trial Chamber concluded that, "based upon the consistency and corroboration of the substantive evidence, […] Ntahobali was in fact present at the [Butare Prefecture Office] during the [Night of Three Attacks]."[3783]

1645. Ntahobali submits that the Trial Chamber erred in its assessment of Witness TK's identification evidence generally and in relying on Witness SJ in light of its conclusion that it would

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reflects that Ntahobali had "an average physical appearance". *See* Trial Judgement, para. 3012, *referring to* Witness WUNBJ, T. 5 April 2006 p. 38 (closed session).
[3776] Trial Judgement, para. 2662.
[3777] Trial Judgement, paras. 2662-2664.
[3778] Trial Judgement, paras. 2667, 2668, 2680.
[3779] Trial Judgement, para. 2672.
[3780] Trial Judgement, para. 2673. *See also ibid.*, para. 2674.
[3781] Trial Judgement, para. 2675.
[3782] Trial Judgement, para. 2675. *See also ibid.*, para. 2680.

not rely on that witness's testimony in relation to the abduction of Mbasha's wife.[3784] He further submits that the Trial Chamber erred in accepting the evidence of Witnesses TK, QJ, RE, and SJ concerning the conversation between Ntahobali and Mbasha's wife and the ensuing abduction of her and her children during the Night of Three Attacks.[3785] Ntahobali similarly argues that the Trial Chamber erred in accepting the identification evidence of Witnesses QY, TA, SD, FAP, and QBQ, who the Trial Chamber found corroborated Witness TK's testimony that Ntahobali drove the pickup truck used during the Night of Three Attacks.[3786] The Appeals Chamber will address these arguments in turn.

a. Witnesses TK and SJ

i. Witness TK

1646. As noted above, the Trial Chamber found Witness TK's evidence "particularly convincing" as to the events of the Night of Three Attacks.[3787] Its deliberations on the evidence concerning Ntahobali's presence at the Butare Prefecture Office demonstrate the witness's central importance to its conclusion that Ntahobali was present during these attacks.[3788]

1647. Ntahobali argues that the Trial Chamber erred in according weight to Witness TK's in-court identification of him.[3789] Ntahobali contends that the Trial Chamber also erred in relying on the fact that Witness TK identified him on the basis of a conversation with Mbasha's wife during which he acknowledged his identity to Mbasha's wife, given that Witness TK did not provide evidence to this effect.[3790] Ntahobali adds that the Trial Chamber erred in failing to consider that Witness TK: (i) admitted that she "was not really looking at" him but "only darted glances at him" and that he was surrounded by people; (ii) testified that she covered herself with "some clothing" on the Night of Three Attacks so as not to expose herself, which explained why she could not provide a "detailed description" of him; (iii) refused to say whether she needed glasses or not; and (iv) testified to having seen him during the day on one occasion only and without paying attention if he was in fact

[3783] Trial Judgement, para. 2682.
[3784] Ntahobali Appeal Brief, paras. 722, 737.
[3785] Ntahobali Notice of Appeal, paras. 245-247; Ntahobali Appeal Brief, paras. 721-727.
[3786] Ntahobali Notice of Appeal, paras. 245, 246; Ntahobali Appeal Brief, paras. 733-744.
[3787] Trial Judgement, para. 2662.
[3788] Trial Judgement, paras. 2662-2682.
[3789] Ntahobali Appeal Brief, para. 737, *referring to* Trial Judgement, para. 2223.
[3790] Ntahobali Appeal Brief, para. 722, *referring to* Trial Judgement, paras. 2667, 2668, 2680. *See also* Ntahobali Reply Brief, para. 318.

there that day.[3791] According to Ntahobali, Witness TK's evidence should have been treated with caution under the particular circumstances of her identification.[3792]

1648. The Prosecution responds that Ntahobali's assertion that Witness TK did not testify that Ntahobali acknowledged his identity to Mbasha's wife is based on a misstatement of the Trial Chamber's conclusion that Ntahobali "acknowledged his own identity" during the conversation.[3793] It further argues that the Trial Chamber reasonably relied on Witness TK's identification evidence despite her near-sightedness and highlights that the witness clarified that at the time she could in fact see Ntahobali.[3794]

1649. The Appeals Chamber notes that, in support of his contention that the Trial Chamber erred in relying on Witness TK's in-court identification of him, Ntahobali only cites to the Trial Chamber's summary of this aspect of the witness's evidence.[3795] However, the Trial Chamber's express assessment of Witness TK's evidence placing Ntahobali at the prefectoral office on the Night of Three Attacks in fact contains no reference to the witness's in-court identification of Ntahobali.[3796] Ntahobali's contention in this respect is therefore dismissed.

1650. As suggested by Ntahobali, the Trial Judgement could give the impression that Witness TK testified that Ntahobali expressly acknowledged Mbasha's wife's identification of him.[3797] However, the Appeals Chamber notes that such a conclusion is not supported by the Trial Chamber's prior summaries of Witness TK's testimony or a review of the evidence cited by it.[3798] Witness TK's evidence, as summarised by the Trial Chamber, nonetheless reflects that when Ntahobali asked Mbasha's wife if she knew him and she responded that he was "Shalom" whose mother was "Pauline", he did not reject her response and continued to speak with her.[3799] Her evidence does not reflect that Ntahobali rejected this identification of him – suggesting that he tacitly acknowledged it – and the Appeals Chamber considers that, in any event, any error in the Trial Chamber's reflection of her evidence would not result in a miscarriage of justice.

[3791] Ntahobali Appeal Brief, para. 737, *referring to* Witness TK, T. 22 May 2002 pp. 51, 52, T. 23 May 2002 pp. 88, 89, 91-97, T. 27 May 2002 pp. 40-42.
[3792] Ntahobali Appeal Brief, para. 737. Ntahobali further contends that Witness TK's account of him as a killer trying to convince Mbasha's wife to leave with him, his subsequent assault of her, and that she was undressed and seated in the front cabin of the vehicle is implausible. *See ibid.*, para. 722. The Appeals Chamber dismisses this contention, which only reflects Ntahobali's unsubstantiated opinion.
[3793] Prosecution Response Brief, para. 1106.
[3794] Prosecution Response Brief, para. 1110, *referring to* Witness TK, T. 23 May 2002 pp. 93, 94.
[3795] Ntahobali Appeal Brief, para. 737, *referring to* Trial Judgement, para. 2223.
[3796] Trial Judgement, paras. 2667-2671, 2680, 2681.
[3797] Trial Judgement, para. 2680 ("In this case, the Chamber finds the hearsay identification of Ntahobali to be reliable. Witness TK heard Mbasha's wife identify Ntahobali, stating she knew Ntahobali when he came to the pharmacy where she worked *in response to which Ntahobali acknowledged his own identity*.") (emphasis added).
[3798] *See* Trial Judgement, paras. 2213, 2668.
[3799] *See* Witness TK, T. 20 May 2002 pp. 76, 77, 81-83; Trial Judgement, paras. 2213, 2668.

1651. Similarly, the Appeals Chamber finds that Ntahobali does not demonstrate that the Trial Chamber erred in failing to consider the specific excerpts of Witness TK's testimony concerning the circumstances under which she saw Ntahobali during the Night of Three Attacks or during the day. As evinced by the Prosecution's response, Ntahobali takes aspects of Witness TK's evidence out of context and ignores that the witness maintained that she looked at Ntahobali during the Night of Three Attacks and provided a physical description of him.[3800] The Appeals Chamber considers that it was within the Trial Chamber's discretion to rely on Witness TK's identification evidence, notwithstanding her concessions that she did not stare at him.[3801] Furthermore, the Appeals Chamber finds that Trial Chamber cautiously considered the circumstances concerning Witness TK's ability to observe Ntahobali on this evening. Specifically, it concluded that she was close enough to identify Ntahobali during the Night of Three Attacks without glasses on the basis of her testimony that her near-sightedness was not so bad that she could not identify people in the courtroom without glasses, and her explanation that she was at the front of the prefectoral office and could see everything the *Interahamwe* were doing.[3802]

1652. With respect to Ntahobali's contention that the Trial Chamber erred when considering that Witness TK testified that she saw Ntahobali "during the day on a few occasions",[3803] the Appeals Chamber observes that, in contrast with Ntahobali's assertions, a review of Witness TK's testimony indicates that she testified that Ntahobali "could occasionally be seen" at the prefectoral office during the day in addition to during the evenings when the attacks occurred.[3804] Ntahobali's argument that Witness TK did not pay attention if Ntahobali was at the prefectoral office stems from a reading of the witness's testimony taken out of context and is without merit.[3805]

1653. The Appeals Chamber therefore dismisses Ntahobali's arguments in these respects.

ii. Witness SJ

1654. When assessing evidence of Ntahobali's presence during the Night of Three Attacks, the Trial Chamber considered that Witness SJ's evidence corroborated "some of the details" of Witness TK's evidence concerning the "occurrence" of the conversation between Mbasha's wife and Ntahobali.[3806] In a later section of the Trial Judgement specifically concerning the abduction of Mbasha's wife, the Trial Chamber further found that "Witness SJ corroborated Witness TK's

[3800] *See* Witness TK, T. 23 May 2002 pp. 93-95.
[3801] *See* Witness TK, T. 23 May 2002 pp. 93-97.
[3802] Trial Judgement, para. 2669.
[3803] Trial Judgement, para. 2676, *referring to* Witness TK, T. 23 May 2002 pp. 89, 90.
[3804] Witness TK, T. 23 May 2002 pp. 89, 90.
[3805] *See* Witness TK, T. 23 May 2002 p. 89, *referred to in* Ntahobali Appeal Brief, para. 737.
[3806] Trial Judgement, para. 2673. *See also ibid*., para. 2672.

testimony that Ntahobali took the woman and her children in the vehicle and drove away with them."[3807] However, the Trial Chamber, observing that Witness SJ admitted during her recall testimony in 2009 that she "had not told the truth in her original testimony" when denying knowing Witnesses TK, TA, and QJ upon the instructions of a Prosecution translator, did "not accept Witness SJ's testimony as to this event."[3808]

1655. Ntahobali argues that the Trial Chamber unreasonably relied on Witness SJ's testimony to corroborate the conversation between Mbasha's wife and Ntahobali to establish that he was at the prefectoral office during the Night of Three attacks when it subsequently rejected the witness's inextricably linked testimony concerning Mbasha's wife's abduction.[3809]

1656. The Prosecution responds that Ntahobali fails to demonstrate how the Trial Chamber's reliance on Witness SJ's evidence to corroborate the "occurrence" of the conversation between Ntahobali and Mbasha's wife was unreasonable when the Trial Chamber only held that it did "not accept" Witness SJ's testimony with respect to proving the abduction of Mbasha's wife, for which it relied on Witnesses TK and QJ.[3810]

1657. The Appeals Chamber recalls its settled jurisprudence that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[3811] However, the Appeals Chamber notes that the Trial Chamber rejected Witness SJ's evidence "as to this event", *i.e.* with respect to the abduction of the Mbasha family, because she had falsely denied knowing Witnesses TK, TA, and QJ.[3812] The Appeals Chamber therefore finds that no reasonable trier of fact could have, on the ground articulated by the Trial Chamber, on one hand, rejected Witness SJ's evidence as to the abduction of Mbasha's wife and children, which corroborated that of Witnesses TK and QJ,[3813] but, on the other hand, relied on the witness's evidence concerning the conversation between Ntahobali and Mbasha's wife that immediately preceded the abduction as corroborative of Witness TK's evidence. Witness SJ's evidence concerning the conversation between Ntahobali and Mbasha's wife was inextricably linked to her evidence about the abduction and also corroborated the same witness that Witness SJ had denied knowing. Accordingly, the

[3807] Trial Judgement, para. 2721.
[3808] Trial Judgement, para. 2723.
[3809] Ntahobali Appeal Brief, paras. 725, 746, *referring to* Trial Judgement, paras. 2672, 2673, 2676. *See also* AT. 16 April 2015 p. 34. Ntahobali further contends that Witness SJ's identification evidence is not credible. *See* Ntahobali Appeal Brief, para. 725; AT. 16 April 2015 pp. 34, 35.
[3810] Prosecution Response Brief, para. 1102, *referring to* Trial Judgement, paras. 2673, 2717, 2718, 2721, 2723.
[3811] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[3812] Trial Judgement, para. 2723.
[3813] The Appeals Chamber observes that all three witnesses – Witnesses TA, TK, and QJ – testified about attacks at the Butare Prefecture Office and two of them – Witnesses TK and QJ – were relied upon by the Trial Chamber to find that Ntahobali abducted Mbasha's wife and children. *See* Trial Judgement, paras. 2717-2727.

Appeals Chamber finds that the Trial Chamber erred in relying on Witness SJ's evidence to corroborate Witness TK's evidence identifying Ntahobali as speaking with and abducting Mbasha's wife during the Night of Three Attacks.[3814] The Appeals Chamber will assess the impact of this error, if any, after having reviewed all of Ntahobali's challenges concerning the evidence identifying him in relation to the conversation with and the abduction of Mbasha's wife.

b. Abduction of Mbasha's Wife and Children

1658. When assessing evidence identifying Ntahobali as being present during the Night of Three Attacks, the Trial Chamber detailed Witness TK's account of a conversation between Ntahobali and Mbasha's wife, where Mbasha's wife identified Ntahobali as Nyiramasuhuko's son, who, in the past, had been sent to the pharmacy by his mother.[3815] The Trial Chamber subsequently relied on this aspect of the witness's testimony when finding that Ntahobali was present during the Night of Three Attacks.[3816] In so doing, the Trial Chamber considered that Witnesses SJ and RE "corroborated the occurrence of the conversation between Ntahobali and a woman who was seated on the veranda."[3817] The Trial Chamber further found that Witness QJ "corroborated the occurrence of the abduction" of Mbasha's wife,[3818] and that this witness and Defence Witness WKKTD testified that Mbasha's wife worked at a pharmacy, "lending credence to the veracity of Witness TK's account that Mbasha's wife said she knew Ntahobali because he was sent to the pharmacy to buy drugs."[3819]

1659. Ntahobali submits that the Trial Chamber erred as it failed to consider the following inconsistencies among the evidence of Witnesses TK, RE, QJ, and SJ concerning Ntahobali's conversation with Mbasha's wife and her subsequent abduction:[3820] (i) Witnesses TK and RE were close enough to hear the conversation between Mbasha's wife yet, unlike Witness TK, Witness RE did not testify that Ntahobali asked Mbasha's wife if she knew him, or that the conversation included reference to the family connection between Ntahobali and Nyiramasuhuko;[3821] (ii) Witness QJ did not testify about a conversation between Mbasha's wife and Ntahobali or about

[3814] The Appeals Chamber finds it unnecessary to consider the remainder of Ntahobali's challenges as they relate to the reliability and credibility of Witness SJ's evidence identifying him during the Night of Three Attacks. *See* Ntahobali Appeal Brief, paras. 725, 736.
[3815] Trial Judgement, para. 2668.
[3816] *See* Trial Judgement, paras. 2680, 2682.
[3817] Trial Judgement, para. 2673. *See also ibid*., para. 2674.
[3818] Trial Judgement, para. 2675.
[3819] Trial Judgement, para. 2675. *See also ibid*., para. 2680.
[3820] Ntahobali Appeal Brief, paras. 680-684, 690, 722, 723. *See also* Ntahobali Notice of Appeal, paras. 245, 246; Ntahobali Supplementary Submissions, para. 25 (arguing that it would be unreasonable to rely on uncorroborated aspects of Witness TK's evidence given that all the witnesses who testified about the abduction of Mbasha's wife and children were either on the veranda or very close to it).
[3821] Ntahobali Appeal Brief, para. 724, Annex E. *See also* Ntahobali Reply Brief, paras. 313, 314; AT 16 April 2015 p. 35.

Ntahobali's presence during the event, even though the Trial Chamber found that he was on the veranda with them when this conversation occurred;[3822] (iii) Witness TK testified that Mbasha's wife was assaulted and was stripped before being taken away, whereas Witnesses QJ and RE said she was not undressed and Witness RE testified that she was taken away peacefully;[3823] (iv) Witness TK testified that Mbasha's wife was taken away in the front cabin of the vehicle whereas Witness QJ testified that Mbasha's wife and her children boarded the back of the vehicle;[3824] (v) Witness RE testified that she assumed Nyiramasuhuko was sitting in the vehicle, whereas Witness TK testified that Nyiramasuhuko was near the vehicle;[3825] (vi) Witness QJ testified that the event occurred in broad daylight where Witness TK specified that it occurred at night;[3826] and (vii) Witness TK described Ntahobali as wearing a long black coat and carrying a sword, whereas Witnesses RE and SJ referred to military fatigues and a gun.[3827] Ntahobali further contends that it is implausible for Witnesses QJ, SJ, and RE "to testify about this event" when none of them mentioned it in their prior statements.[3828]

1660. The Prosecution responds that the inconsistencies identified by Ntahobali are misstatements of the relevant evidence or immaterial to the Trial Chamber's analysis.[3829] It submits that Ntahobali fails to demonstrate that the Trial Chamber erred in its assessment of the evidence, which the Trial Chamber found to be corroborative.[3830]

[3822] Ntahobali Notice of Appeal, para. 247; Ntahobali Appeal Brief, para. 724. *See also* Ntahobali Reply Brief, para. 316, *referring to* Trial Judgement, para. 2676; AT. 16 April 2015 p. 34.

[3823] Ntahobali Appeal Brief, paras. 683, 690, 724. *See also ibid*., Annex C, Nos. 7, 8; AT. 16 April 2015 p. 35.

[3824] Ntahobali Appeal Brief, paras. 683, 690, 724. *See also ibid*., Annex C, No. 11. Without support, Ntahobali contends that Witness RE testified that Mbasha's wife was taken away in the "front cabin" of the vehicle. *See ibid*., para. 724. However, in Annex C to his appeal brief, he points to evidence demonstrating that Witness RE did not know where Mbasha's wife and her children were placed on the vehicle. *See ibid*., Annex C, No. 11, *referring to* Witness RE, T. 26 February 2003 p. 34 (French). The Appeals Chamber will not consider Ntahobali's contradictory submissions further.

[3825] Ntahobali Appeal Brief, para. 724, *referring to* Witness, RE, T. 24 February 2003 p. 19, Witness TK, T. 20 May 2002 p. 86. Ntahobali appears to argue that the Trial Chamber also failed to consider that Witness TK's evidence was internally inconsistent as well because the witness's prior statement indicates that Nyiramasuhuko walked around the refugees. *See ibid*., para. 724, *referring to* Exhibit D44 (Witness TK's November 1996 Statement). Ntahobali does not identify any material difference and this contention is dismissed without further consideration.

[3826] Ntahobali Appeal Brief, paras. 682, 724, 738. *See also ibid*., Annex C, No. 4. Ntahobali argues that the Trial Chamber's failure to address contradictory evidence about whether the event occurred during the night or day is critical as this would impact the witnesses' abilities to see Ntahobali. *See ibid*., paras. 724, 738.

[3827] Ntahobali Appeal Brief, paras. 690, 724. *See also ibid.*, para. 737.

[3828] Ntahobali Appeal Brief, para. 726. *See also ibid*., para. 691.

[3829] Prosecution Response Brief, paras. 1101, 1103, 1105, 1106.

[3830] Prosecution Response Brief, paras. 1103, 1104, 1107. The Prosecution argues that Ntahobali's uncited contentions in paragraph 724 of his appeal brief as well as his blanket references to the annexes referred to in paragraphs 723 and 727 of his appeal brief should be summarily dismissed as they, *inter alia*, fail to provide exact references to the parts of the trial record supporting the argument. *See ibid*., paras. 1101, 1104. Ntahobali replies that the uncited contentions found in paragraph 724 of his appeal brief are supported with references in Annexes C, D, and E attached to it. *See* Ntahobali Reply Brief, para. 314. The Appeals Chamber will consider the references provided in the annexes to the extent they support precise arguments fully articulated in the Ntahobali Appeal Brief. In this respect, the Appeals Chamber dismisses the non-particularised arguments in paragraphs 723 and 727 of the Ntahobali Appeal Brief. However, as paragraph 724 identifies arguments as well as their significance, the Appeals Chamber will refer to the relevant annexes, which provide supporting references to the record.

1661. The Appeals Chamber observes that the Trial Judgement does not reflect express consideration of the purported inconsistencies raised by Ntahobali, some of which were covered during the examination of the witnesses.[3831] However, the Appeals Chamber recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence,[3832] without explaining its decision in every detail.[3833] Corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[3834]

1662. As regards purported inconsistencies between the testimonies of Witnesses TK, RE, and QJ concerning the substance and occurrence of a conversation between Ntahobali and Mbasha's wife, the Appeals Chamber finds that the differences identified by Ntahobali are not material and did not require express consideration by the Trial Chamber. Specifically, while Ntahobali emphasises that Witness RE, unlike Witness TK, did not testify to hearing Mbasha's wife identify Ntahobali or make any familial connection between him and Nyiramasuhuko as testified to by Witness TK, the Appeals Chamber, having reviewed the testimonies cited by Ntahobali and the Trial Chamber,[3835] recalls its previous determination that the evidence of Witnesses TK and RE is consistent as to the manner in which Ntahobali sought to induce Mbasha's wife to leave the Butare Prefecture Office and that the Trial Chamber's summary of their accounts reflects this consistency.[3836] The Appeals Chamber further recalls that it has also addressed and dismissed challenges that the evidence of Witness QJ was incompatible with that of Witnesses TK and RE concerning this event because Witness QJ did not testify about the conversation between Mbasha's wife and Ntahobali or identify Ntahobali as present during the Night of Three Attacks.[3837] Ntahobali

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[3831] *See* Witness RE, T. 25 February 2003 pp. 47, 48, T. 26 February 2003 pp. 22, 31, 32; Witness QJ, T. 12 November 2001 pp. 71-81, 93 (closed session); Witness SJ, T. 3 June 2002 pp. 40, 41.

[3832] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.

[3833] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 223; *Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174; *Kvočka et al.* Appeal Judgement, para. 23.

[3834] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428.

[3835] *See supra*, para. 1659, fn. 3820; Trial Judgement, paras. 2213, 2214, 2277, *referring to* Witness TK, 20 May 2002 pp. 76, 77, 81, 83, 86, Witness RE, T. 24 February 2003 p. 19, T. 25 February 2003 pp. 46, 47, T. 26 February 2003 pp. 30, 31. *See also ibid*., paras. 2668, 2674, 2717, 2719.

[3836] *See supra*, Section IV.F.2(e)(iii)b.

[3837] *See supra*, Section IV.F.2(e)(iii)b. Ntahobali further contends that the Trial Chamber erred in stating in paragraphs 2672 and 2680 of the Trial Judgement, respectively, that Witness QJ "corroborated some of the details of the conversation between Mbasha's wife and Ntahobali" and that the witness had "an adequate basis upon which to identify Ntahobali". *See* Ntahobali Appeal Brief, para. 738. These uncited statements give the impression that the Trial Chamber considered that Witness QJ expressly testified about Ntahobali's presence during the conversation with and abduction of Mbasha's wife. However, a review of the Trial Chamber's detailed analysis of Witness QJ's evidence, supported by citations, reveals that the Trial Chamber considered that the witness corroborated the identification of Mbasha's wife, her profession, and the occurrence of the abduction of Mbasha's wife and her children. *See* Trial

fails to demonstrate that no reasonable trier of fact could consider the testimonies of Witnesses TK, RE, and QJ to be compatible or that the Trial Chamber abused its discretion by not expressly addressing the purported differences in their testimonies pointed out by Ntahobali.

1663. The Appeals Chamber also finds no merit in Ntahobali's contention that the Trial Chamber erred in failing to consider that Witness TK testified that Mbasha's wife was assaulted and stripped before being taken away, whereas Witnesses QJ and RE said she was not undressed and Witness RE testified that she was taken away peacefully.[3838] The Appeals Chamber observes that Witness TK testified that Mbasha's wife was stripped by *Interahamwe* once she arrived at the vehicle, and not by Ntahobali.[3839] While Witness RE denied that Mbasha's wife was undressed, she was not able to discuss where Mbasha's wife was placed in the vehicle.[3840] Her evidence suggests that she did not necessarily follow what occurred once Mbasha's wife arrived at the vehicle and that she speculated that Mbasha's wife was not undressed on the basis that she was told by Ntahobali that she would not be killed at the prefectoral office.[3841] Moreover, Witness RE, similarly to Witness TK, testified that *Interahamwe* stripped people at the prefectoral office who were removed from it on that evening,[3842] an aspect of her testimony which the Trial Chamber expressly recalled in the Trial Judgement.[3843] The evidence of Witness QJ is ambiguous on this point as he was not questioned about whether Mbasha's wife was undressed when being loaded on the vehicle.[3844]

1664. In addition, Ntahobali does not substantiate that Witness TK testified that Mbasha's wife was "assaulted" or that this witness's description of the removal of Mbasha's wife was materially inconsistent with Witness RE's testimony that Mbasha's wife was taken away "peacefully." A review of the transcripts reveals that both witnesses provided materially consistent accounts of how Ntahobali induced Mbasha's wife to leave her position at the prefectoral office.[3845] Witness TK

Judgement, para. 2675. *See also ibid*., paras. 2196, 2197 (summarising Witness QJ's evidence), 2718. The Appeals Chamber finds that, while the Trial Judgement is unclear, Ntahobali has not identified an error that has occasioned a miscarriage of justice.

[3838] *See also supra*, Section IV.F.2(e)(iii)b.

[3839] Witness TK, T. 20 May 2002 pp. 83, 85.

[3840] *See* Witness RE, T. 24 February 2003 p. 19; T. 25 February 2003 p. 47; T. 26 February 2003 p. 31.

[3841] *See* Witness RE, T. 24 February 2003 p. 19; T. 25 February 2003 p. 47; T. 26 February 2003 p. 31. *See also supra*, Section IV.F.2(e)(iii)b.

[3842] *See* Witness RE, T. 24 February 2003 p. 21, T. 26 February 2003 p. 31; Witness TK, T. 20 May 2002 p. 87. The Trial Chamber recalled these elements of the testimonies of Witnesses TK and RE. *See* Trial Judgement, paras. 2215, 2278.

[3843] Trial Judgement, para. 2278.

[3844] *See* Witness QJ, T. 8 November 2001 pp. 146-155, T. 12 November 2001 pp. 93, 94 (closed session) ("Q. Witness, could you tell us the clothing that other person was wearing during that event that you say you experienced or witnessed at the prèfecture? [*sic*] A. When I saw that person she was wearing a wraparound that she had wrapped around her waist and a pullover. […] THE INTERPRETER: She was wearing a wraparound that she wrapped around her waist and the wraparound was a *kitenge* that she had wrapped around her waist, and also was wearing a pullover or a sweater.").

[3845] *Compare* Witness TK, T. 20 May 2002 p. 83 ("Q. Can you tell this court what then happened to Mrs. Mbasha after this conversation? A. At that point Shalom spoke to the lady and asked her to rise and to go towards the vehicle. He reassured her, and told that she should not be afraid, and that nothing bad will come of her.") *with* Witness RE,

testified that Mbasha's wife started pleading with the *Interahamwe* at the vehicle[3846] and, as noted above, it is not clear from Witness RE's testimony that she then continued to observe the events.[3847] Against this background, Ntahobali does not demonstrate that no reasonable trier of fact could have considered the testimonies to be compatible or that the Trial Chamber abused its discretion by not expressly addressing the purported differences in their testimonies.[3848]

1665. The Appeals Chamber observes that Ntahobali correctly points out that Witness TK testified that Mbasha's wife was taken away in the front cabin of the vehicle whereas Witness QJ testified that Mbasha's wife and her children boarded the back of the vehicle.[3849] The Trial Chamber expressly recalled Witness QJ's testimony on this point and noted Witness SJ's testimony that Mbasha's wife was placed in the front of the vehicle.[3850] The Trial Chamber did not expressly set forth Witness TK's testimony as to where Mbasha's wife and her children were placed in the vehicle.[3851] Nevertheless, the Appeals Chamber does not find that the variance between the evidence of Witness TK and that of Witness QJ was material to Witness TK's ability to identify Ntahobali on that evening or so material to the witnesses' evidence concerning the abduction of Mbasha's wife that the Trial Chamber was required to expressly assess this difference.[3852]

1666. Furthermore, Ntahobali argues that the Trial Chamber erred in failing to consider that Witness RE testified that she "assumed" Nyiramasuhuko was sitting in the vehicle, whereas Witness TK testified that Nyiramasuhuko was near the vehicle. The Appeals Chamber finds no merit in this contention. Witness RE's evidence shows that she did not see Nyiramasuhuko and that

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T. 26 February 2003 p. 32 ("Q. Madam Witness, did I understand, from the description you made of the events that it was not necessary to beat up this woman for her to follow the person you referred to as Shalom? A. They did not beat the woman. They told her they were going to hide her and they took her away, very nicely, with her consent. You will understand that somebody who is telling you that he's going to hide you, he should not be beating you.").

[3846] *See* Witness TK, T. 20 May 2002 p. 86 ("A. Well, so far as the children of Madam Mbasha were concerned, they took them with their mother. They took them from the verandah where they were, that is, in front of the prefecture office, and once they got to the vehicle where they were to be loaded, those that wanted to load Madam Mbasha and her children started throwing her children upon her and Madam Mbasha prayed for the children, pleaded, saying that, 'please pity my children, you can take me. Spare my children, please.[']").

[3847] *See supra*, para. 1663.

[3848] *See also supra*, Section IV.F.2(e)(iii)b.

[3849] *See* Witness TK, T. 20 May 2002 p. 96 ("A. Pauline was also in that vehicle, in the cabin with Mbasha's wife, who was the only one to be taken on – in the cabin together with her children."); Witness QJ, T. 12 November 2001 p. 122 ("A. I am talking about the people in the cabin but the Mbasha family were in the rear part of the vehicle.").

[3850] *See* Trial Judgement, paras. 2196, 2233, 2721.

[3851] *See* Trial Judgement, paras. 2214, 2717.

[3852] Ntahobali Appeal Brief, para. 724. *See also ibid*., Annex C, No. 11, *referring to* Witness TK, T. 20 May 2002 p. 104 (French), Witness QJ, T. 12 November 2001 pp. 141, 142 (French). Without support, Ntahobali contends that Witness RE testified that Mbasha's wife was taken away in the "front cabin" of the vehicle. *See ibid*., para. 724. However, in Annex C to his appeal brief, he points to evidence demonstrating that Witness RE did not know where Mbasha's wife and her children were placed on the vehicle. *See ibid*., Annex C, No. 11, *referring to* Witness RE, T. 26 February 2003 p. 34 (French). Given the contradictory nature of Ntahobali's submissions, the Appeals Chamber will not consider them further.

she determined that the minister was present based on Ntahobali's comments.[3853] Witness TK's evidence, however, reveals that she saw Nyiramasuhuko when Mbasha's wife was at the vehicle.[3854] The Trial Chamber's summary of the witnesses' evidence reflects their differing perspectives.[3855] Considering the different perspectives of the witnesses, the Appeals Chamber does not consider that no reasonable trier of fact could have considered the testimonies to be compatible or that the Trial Chamber was required to assess any possible differences between them. Indeed, Witness QJ, who also saw Nyiramasuhuko when Mbasha's wife and her children were placed on the vehicle confirmed Witness TK's testimony that Nyiramasuhuko was near the vehicle.[3856]

1667. Ntahobali's contention that Witnesses QJ and TK provided contradictory evidence as to whether the events occurred in broad daylight or at night is not supported by the record. As previously noted, the relevant portions of the witnesses' testimonies reflect that they both considered that the abduction occurred in the evening and that they could only provide estimates as to when it happened.[3857]

1668. Turning next to Ntahobali's argument that the Trial Chamber failed to consider that Witness TK described Ntahobali as wearing a long black coat and carrying a sword, whereas Witnesses RE and SJ referred to military fatigues and a gun, the Appeals Chamber observes that Ntahobali only refers to an excerpt of Witness TK's testimony wherein counsel is reading a prior statement given by the witness.[3858] Witness TK was not asked to confirm the accuracy of the statement as it related to the description of what Ntahobali was wearing or what weapon he

[3853] *See* Witness RE, T. 24 February 2003 p. 19 ("I knew that Pauline was present during that night because it was at night – because there was a woman among the refugees who had three children, and when they tried waking up that woman to take her where she was standing on the verandah, the woman refused to go, and I heard Shalom telling the woman, 'We're not going to kill you. We, rather, wanted to take you to Pauline who is in the vehicle so she can go and hide you'. I, therefore, understood from what was said that Pauline was present within the premises, even though I did not see her personally."), T. 25 February 2003 p. 47 ("Q. Madam Witness, I'm right in saying that that night you did not see, with your own eyes, Pauline Nyiramasuhuko. Is that true? A. It is true I did not see her with my own eyes that night but somebody came, woke up the woman and said he wanted the woman to go to Pauline to be hidden. Q. Madam Witness, you did not see Pauline Nyiramasuhuko next to the woman who had three children that night. Is that true? A. Pauline Nyiramasuhuko was in a vehicle. It was Pauline's son who said he was taking the woman to Pauline. Q. You also did not hear Pauline Nyiramasuhuko talking to *Interahamwe* or those that you referred to as Shalom and Kazungu; is that correct? A. It was Shalom and Kazungu who said they left Pauline in vehicle. The vehicle was close, but I did not hear Pauline say anything from that vehicle. Q. You also did not hear Pauline Nyiramasuhuko say anything, whatsoever, while she was outside the vehicle. Is that correct? A. No, Pauline was aboard the vehicle and did not get off the vehicle, and that is why I'm saying I did not hear Pauline say anything, but I confirm that she was present because her son did say that they were together."). *See also* Trial Judgement, paras. 2277, 2694.

[3854] *See* Witness TK, T. 20 May 2002 pp. 86 ("A. […] At the time [Mbasha's wife] was saying that Pauline was right there. She was in front of the vehicle, Madam."), 89, 90 ("Q. Can you tell this Court when Mr. Mbasha was being taken into a vehicle, you said Pauline was in front of the vehicle. Can you tell where you were standing […]? A. I cannot estimate the distance in terms of metres, but I can say that I was very near her. As a matter of fact, when the other refugees were being loaded, I was very near in front of the *préfecture's* office, and I was able to hide behind the trees, that is, before the *préfecture's* office. And I can say that from where I was, I was able to see all that they did.").

[3855] Trial Judgement, paras. 2214, 2277, 2694.

[3856] *See* Witness QJ, T. 8 November 2001 p. 153.

[3857] *See supra*, Section IV.F.2(e)(iii)b.

[3858] *See supra*, para. 1659, fn. 3827.

possessed.[3859] The Appeals Chamber recalls that prior statements of a witness who provides live testimony are primarily relevant to a trial chamber in its assessment of the witness's credibility, and it is not necessarily the case that they should or could generally in and of themselves constitute evidence that the content thereof is truthful.[3860] Under the circumstances, the Appeals Chamber does not consider that the Trial Chamber was required to discuss any possible variances between Witness TK's prior statement, on one hand, and the testimonies of Witnesses RE and SJ, on the other, as to what Ntahobali was wearing or what weapon he carried.

1669. As for Ntahobali's contention that it is implausible for Witnesses QJ, SJ, and RE "to testify about this event" when none of them mentioned it in their prior statements, the Appeals Chamber recalls that it has already considered and rejected similar arguments raised in Nyiramasuhuko's appeal.[3861] The Appeals Chamber rejects Ntahobali's arguments for the same reasons and does not find that the Trial Chamber was required to discuss any purported variances or that any omissions in the prior statements of these witnesses rendered their evidence unreliable.

1670. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in failing to consider purported inconsistencies between the evidence of Witnesses TK, QJ, RE, and SJ concerning Ntahobali's conversation with Mbasha's wife and her subsequent abduction when determining whether he was present during the Night of Three Attacks.

1671. Nonetheless, the Appeals Chamber recalls that it has found that the Trial Chamber erred in relying on Witness SJ's evidence to corroborate other evidence identifying Ntahobali as speaking with and abducting Mbasha's wife during the Night of Three Attacks. However, because Witness SJ's evidence was used to corroborate the testimony of Witness TK – who the Trial Chamber found "particularly convincing" as to the events of this evening – and the Trial Chamber considered that Witness TK's accounts were corroborated by Witnesses RE and QJ with respect to the conversation with and/or the abduction of Mbasha's wife and children, the Appeals Chamber finds that the error has not occasioned a miscarriage of justice.

c. The Vehicle

1672. When assessing evidence of Ntahobali's presence during the Night of Three Attacks, the Trial Chamber recalled that Witness TK testified that Nyiramasuhuko and Ntahobali came to the Butare Prefecture Office on three occasions "aboard a camouflaged Toyota Hilux with an open

[3859] *See* Witness TK, T. 22 May 2002 pp. 10-14.
[3860] *See Akayesu* Appeal Judgement, para. 134. *See also Simba* Appeal Judgement, para. 103.
[3861] *See supra*, Section IV.F.2(e)(iii)b.

back."[3862] It further observed that Witnesses TA, QJ, QBQ, QBP, and RE "described the pickup as a Toyota or a Toyota Hilux" and that, in addition to Witness TK, Witnesses QBP, FAP, and SD "corroborated the accounts that the vehicle was a pickup with an open back and was camouflaged."[3863] The Trial Chamber found that the description of the vehicle as a camouflaged pickup truck was "largely consistent"[3864] and observed that Witnesses TK, RE, SS, FAP, SD, QY, and QBQ testified that Ntahobali was "driving the vehicle."[3865]

1673. Ntahobali submits that the Trial Chamber failed to apply sufficient caution in assessing the identification evidence of Witnesses QY, SD, FAP, and QBQ.[3866] In particular, Ntahobali argues that the Trial Chamber unreasonably relied on Witness QY's testimony despite finding her identification evidence not credible as it pertained to attacks at the prefectoral office at the end of April or early May 1994.[3867] He contends that the Trial Chamber erred in assigning weight to Witness SD's identification evidence despite characterising it as "devoid of any specific details" and because Witness SD did not actually see Ntahobali but was only told that he drove the vehicle.[3868]

1674. Ntahobali further contends that the Trial Chamber unreasonably relied on Witness FAP's testimony because her identification of Ntahobali was based on hearsay from persons unknown to her and was made under stressful circumstances.[3869] He also points out that the witness was unable to identify Ntahobali in court and that she did not see Ntahobali again at the prefectoral office after the Night of Three Attacks.[3870] He also takes issue with the fact that the Trial Chamber failed to note that Witness QBQ testified that she only saw Ntahobali once at the prefectoral office in late April 1994, at night and under stressful circumstances, and that she never saw him again.[3871] Ntahobali adds that the Trial Chamber failed to address Witness QBQ's mental health issues and points out that the witness only gave a brief and general description of Ntahobali.[3872]

1675. In addition, Ntahobali argues that, since Witnesses TA and SD did not testify about the Night of Three Attacks, it was unreasonable for the Trial Chamber to consider their testimonies

[3862] Trial Judgement, para. 2662.
[3863] Trial Judgement, para. 2663.
[3864] Trial Judgement, para. 2663.
[3865] Trial Judgement, para. 2664.
[3866] Ntahobali Appeal Brief, paras. 733-748.
[3867] Ntahobali Appeal Brief, para. 735, *referring to* Trial Judgement, paras. 2141, 2615, 2616, 2626.
[3868] Ntahobali Appeal Brief, para. 739, *referring to* Trial Judgement, para. 2620. *See also* AT. 15 April 2015 p. 47.
[3869] Ntahobali Appeal Brief, para. 741, *referring to* Witness FAP, T. 12 March 2003 pp. 15, 16.
[3870] Ntahobali Appeal Brief, para. 741, *referring to* Trial Judgement, para. 2311.
[3871] Ntahobali Appeal Brief, para. 742, *referring to* Witness QBQ, T. 3 February 2004 pp. 6-11, 89, 90.
[3872] Ntahobali Appeal Brief, para. 742, *referring to* Witness QBQ, T. 3 February 2004 pp. 28, 29. Ntahobali also argues that Witness QBQ did not mention him in her prior statement and that she was not expected to testify against him according to the Prosecution Pre-Trial Brief. *See idem*, *referring to Ntabakuze* Appeal Judgement, paras. 54, 94.

corroborative of other witness evidence on the vehicle used and Ntahobali's presence during the event.[3873] Finally, Ntahobali submits that the Trial Chamber erroneously assessed inconsistencies concerning the make and colour of the vehicle used during the Night of Three Attacks.[3874]

1676. The Prosecution responds that the Trial Chamber properly assessed the identification evidence from Witnesses QY, SD, and FAP and underlines that the Trial Chamber only used their evidence to corroborate Witness TK's evidence that Ntahobali drove the vehicle to the prefectoral office and that the vehicle used during the attacks was an open-backed pickup truck.[3875] It further responds that Ntahobali's submissions concerning inconsistencies about the pickup truck used during the Night of Three Attacks do not cast doubt on the Trial Chamber's findings and ignore fundamentally consistent evidence regarding the vehicle used.[3876]

1677. The Appeals Chamber observes that, when assessing evidence regarding Ntahobali's presence at the prefectoral office during the Night of Three Attacks, the Trial Chamber listed Witness QY as one of several witnesses who "testified that Ntahobali was driving the vehicle."[3877] However, the Trial Chamber unequivocally rejected Witness QY's evidence implicating Ntahobali in attacks at the prefectoral office at that time, due to discrepancies in her testimony, the unreliable nature of her identification evidence, and her admission that she had lied to the Trial Chamber about whether she knew Witnesses QBQ and SJ.[3878]

1678. In the view of the Appeals Chamber, the conclusions of the Trial Chamber in these distinct sections of the Trial Judgement are irreconcilable and no reasonable trier of fact could have relied on Witness QY's evidence in this respect.[3879] Consequently, the Appeals Chamber finds that the Trial Chamber erred in relying on Witness QY's testimony that Ntahobali drove a vehicle to the prefectoral office when assessing evidence of Ntahobali's involvement in the Night of Three

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Ntahobali fails to demonstrate how any omission in a Prosecution's submission about Witness QBQ's anticipated testimony is relevant to the assessment of that testimony. The Appeals Chamber therefore dismisses this contention.

[3873] Ntahobali Appeal Brief, para. 675.

[3874] Ntahobali Appeal Brief, para. 675, *referring to ibid.*, Annexes C, D, and E. Ntahobali argues that Witness QJ did not testify about a camouflage vehicle. *See idem*. *See also* Ntahobali Reply Brief, para. 278.

[3875] Prosecution Response Brief, para. 1108. The Prosecution does not directly respond to Ntahobali's contentions concerning Witness QBQ. *Cf.* Prosecution Response Brief, para. 1111 (responding to a separate argument raised by Ntahobali).

[3876] Prosecution Response Brief, paras. 1015, 1049.

[3877] Trial Judgement, para. 2664.

[3878] *See* Trial Judgement, paras. 2616, 2620, 2626.

[3879] In so finding, the Appeals Chamber is mindful that the Trial Chamber found that Witness QY's evidence demonstrated her ability to identify Ntahobali at the EER. *See* Trial Judgement, para. 3948. Contrary to Witness QY's evidence concerning the attack at the Butare Prefecture Office around the end of April or early May 1994, the Trial Chamber determined that Witness QY's testimony about Ntahobali's presence at the EER was sufficiently corroborated. *See ibid.*, paras. 3946-3950.

Attacks.[3880] The Appeals Chamber will discuss whether this error has occasioned a miscarriage of justice in its conclusion to the present sub-section.

1679. Concerning Witness SD's identification evidence, the Appeals Chamber observes that the Trial Chamber noted that Witness SD's evidence was "devoid of specific details" in relation to a prior attack on the prefectoral office and when considering whether Witness SD's evidence provided sufficient corroboration to the testimony of the witness who principally testified about the event.[3881] With respect to the Night of Three Attacks, the Trial Chamber did not find Witness SD's evidence to be lacking credibility. To the contrary, when assessing evidence as to Ntahobali's presence during the Night of Three Attacks, the Trial Chamber noted that Witness SD's testimony corroborated other evidence that Ntahobali drove a vehicle to the prefectoral office and that it was a pickup truck with an open back and was camouflaged.[3882] Ntahobali does not demonstrate that the Trial Chamber abused its discretion in relying on these aspects of Witness SD's testimony.

1680. With respect to Witness FAP's evidence, the Appeals Chamber notes that the Trial Chamber considered that the witness's testimony corroborated Witness TK's testimony that Ntahobali drove a pickup truck used in the attacks, a fact which was also corroborated by multiple other witnesses.[3883] The Appeals Chamber also observes that, when assessing Witness FAP's evidence, the Trial Chamber expressly considered that the witness first saw Ntahobali during the Night of Three Attacks, that she learned the identity of Ntahobali from other people, and that she said she was unable to identify Ntahobali in court.[3884] Ntahobali fails to demonstrate that the Trial Chamber acted unreasonably or explain why the absence of any prior knowledge of Ntahobali or the circumstances necessarily rendered Witness FAP's identification evidence unreliable.[3885] Moreover, the Appeals Chamber recalls that hearsay from persons unknown to the witness and a witness's inability to identify an accused in court does not render his identification evidence inadmissible.[3886] The Appeals Chamber also finds that Ntahobali fails to explain the relevance of Witness FAP's testimony that she did not see Ntahobali again after the Night of Three Attacks to the Trial Chamber's consideration of her testimony that he drove the vehicle during these attacks.

1681. Turning to Ntahobali's argument related to Witness QBQ's evidence, the Appeals Chamber observes that the Trial Chamber explicitly acknowledged that the witness testified that Ntahobali and Nyiramasuhuko arrived at the prefectoral office in a white-coloured Toyota pickup truck

[3880] Trial Judgement, para. 2664.
[3881] *See* Trial Judgement, para. 2620. *See also ibid*., paras. 2612, 2619, 2621-2626.
[3882] Trial Judgement, paras. 2663, 2664.
[3883] Trial Judgement, paras. 2663, 2664.
[3884] Trial Judgement, paras. 2302, 2303, 2311.
[3885] Trial Judgement, paras. 2302, 2303, 2311.
[3886] *See supra*, Section V.I.2(b)(i)a. *See also* Trial Judgement, para. 2311.

covered in mud around the end of April 1994.[3887] However, based on the witness's recollection of the abduction and escape of a man named Semanyenzi, which was recalled by Witnesses RE, SS, SU, and FAP with respect to the Night of Three Attacks, the Trial Chamber concluded that Witness QBQ was in fact testifying to events at the beginning of June 1994.[3888] As discussed below, other consistencies between Witness QBQ's evidence and that of witnesses testifying about the Night of Three Attacks rendered this determination reasonable.[3889] The Appeals Chamber finds that Ntahobali fails to demonstrate that the Trial Chamber abused its discretion in its assessment of Witness QBQ's evidence in light of the entire record. Ntahobali also fails to point to any error or substantiate his argument that the Trial Chamber was unreasonable in failing to address Witness QBQ's mental health issues or that her description of Ntahobali was "rather brief and general". He does not demonstrate that these factors necessarily impacted the reliability of her evidence.

1682. In assessing the evidence related to Ntahobali's presence and the appearance of the pickup truck during the Night of Three Attacks,[3890] the Trial Chamber determined that the description of the vehicle as a camouflaged pickup truck was "largely consistent."[3891] In coming to this conclusion, it observed that Witness TA, among several other witnesses, described "the pickup as a Toyota or a Toyota Hilux" and that Witness SD, among others, "corroborated the accounts that the vehicle was a pickup with an open back and was camouflaged."[3892] The Trial Chamber also observed that Witness SD was one of several witnesses who testified that Ntahobali was "driving the vehicle."[3893]

1683. The Trial Chamber's analysis may suggest that it considered Witnesses TA and SD to have provided direct evidence concerning the Night of Three Attacks when discussing the vehicle used by Ntahobali, although there is no dispute that neither witness provided evidence about these particular attacks.[3894] However, read in the context of all the attacks at the prefectoral office, it appears that the Trial Chamber considered that Witnesses TA and SD, who testified about Ntahobali's use of a similar vehicle in other attacks, offered circumstantial evidence supporting the account of witnesses who testified about the appearance of the pickup truck as well as Ntahobali's presence specifically during the Night of Three Attacks. While it would have been preferable for the Trial Chamber to distinguish the direct evidence on the Night of Three Attack from the

[3887] Trial Judgement, paras. 2330, 2331.
[3888] Trial Judgement, para. 2658.
[3889] *See infra*, Section V.I.2(d)(ii)b.
[3890] *See* Trial Judgement, Section 3.6.19.4.7.2 "Identification of Ntahobali".
[3891] Trial Judgement, para. 2663.
[3892] Trial Judgement, para. 2663.
[3893] Trial Judgement, para. 2664.
[3894] *See supra*, para. 1672; *infra*, Section V.I.2(d)(iii).

circumstantial evidence, Ntahobali does not demonstrate that the accounts of Witnesses TA and SD were "irrelevant" or that no reasonable trier of fact could have relied on their testimonies in this manner.

1684. As to Ntahobali's argument regarding alleged inconsistencies related to the make and colour of the vehicle, the Appeals Chamber observes that, when assessing evidence of Ntahobali's presence during the Night of Three Attacks, the Trial Chamber recalled that Witness TK testified to Nyiramasuhuko and Ntahobali coming "aboard a camouflaged Toyota Hilux with an open back."[3895] The Trial Chamber further noted that Witnesses TA, QJ, QBQ, QBP, and RE "described the pickup as a Toyota or a Toyota Hilux" and that, in addition to Witness TK, Witnesses QBP, FAP, and SD "corroborated the accounts that the vehicle was a pickup with an open back and was camouflaged."[3896] The Trial Chamber also noted that Witnesses SJ and SS "described a Peugeot pickup" and that Witnesses SS and SU testified that the pickup truck belonged to "Rwamukwaya",[3897] which was described by Witness SU as "a camouflaged dark-coloured Toyota Hilux".[3898] The Trial Chamber found that the description of the vehicle as a camouflaged pickup truck was "largely consistent".[3899]

1685. In this context, the Appeals Chamber considers that the Trial Chamber assessed inconsistencies with respect to the pickup truck in the Prosecution evidence.[3900] In the view of the Appeals Chamber, Ntahobali simply extracts and lists the various witnesses' testimonies in the annexes to his appeal brief.[3901] He does not demonstrate how the Trial Chamber's analysis is unreasonable or how any error would have occasioned a miscarriage of justice, particularly since other evidence demonstrated Ntahobali's presence and participation in the Night of Three Attacks.[3902] His argument in this regard is therefore dismissed.

1686. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in relying on Witness QY's testimony that Ntahobali drove a vehicle to the Butare Prefecture Office when assessing identification evidence of Ntahobali's involvement in the Night of Three Attacks.[3903] However, given that Witness QY's evidence was used to corroborate the accounts of Witnesses TK,

[3895] Trial Judgement, para. 2662.
[3896] Trial Judgement, para. 2663.
[3897] Trial Judgement, para. 2663.
[3898] Witness SU, T. 14 October 2002 pp. 30, 31, *referred to in* Trial Judgement, para. 3172.
[3899] Trial Judgement, para. 2663.
[3900] The Appeals Chamber has previously dismissed Ntahobali's contentions that the Trial Chamber erred in relying on the identification evidence of Witnesses TA and SD. *See supra*, para. 1683.
[3901] *See* Ntahobali Appeal Brief, Annex C, No. 10, Annex D, No. 10. As recalled previously, the Appeals Chamber will not consider non-particularised arguments in the Ntahobali Appeal Brief that simply provide blanket references to the annexes. *See supra*, fn. 3830.
[3902] *See supra*, Section V.I.2(b)(iii)b.
[3903] Trial Judgement, para. 2664.

RE, SS, FAP, SD, and QBQ on this point, and that Ntahobali has not demonstrated that the Trial Chamber erred in its assessment of their evidence, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice.

(iv) Conclusion

1687. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in its acceptance of the evidence of Witnesses QY and SJ in relation to the Butare Prefecture Office, which was used to identify Ntahobali during the Night of Three Attacks, as well as limited aspects of Witness TA's evidence relevant to identifying Ntahobali during the Mid-May Attack. However, the Appeals Chamber concludes that these errors have not occasioned a miscarriage of justice. The Appeals Chamber finds that Ntahobali has not demonstrated any other errors concerning evidence identifying him at the Butare Prefecture Office.

1688. For these reasons, the Appeals Chamber dismisses Ntahobali's contentions that the Trial Chamber erred in finding that the evidence established his presence during attacks at the Butare Prefecture Office beyond reasonable doubt.

(c) Mid-May Attack and Last Half of May Attacks

1689. The Trial Chamber relied principally on the evidence of Witness TA to find that Ntahobali ordered killings and raped Witness TA during the Mid-May Attack, and raped Witness TA and ordered her rape during the Last Half of May Attacks.[3904] On the basis of these findings, the Trial Chamber convicted Ntahobali for ordering killings and committing the rape of Witness TA during the Mid-May Attack as well as committing the rape and ordering the rapes of Witness TA during the Last Half of May Attacks.[3905]

1690. Ntahobali submits that the Trial Chamber erred in law and in fact in its assessment of the evidence pertaining to his participation in these attacks. In particular, Ntahobali argues that the Trial Chamber erred in: (i) its assessment of Witness TA's evidence concerning the Mid-May Attack; (ii) its assessment of Witness TA's evidence relating to the Last Half of May Attacks; (iii) making contradictory findings and in its assessment of Defence evidence undermining Witness TA's accounts of the Mid-May Attack and Last Half of May Attacks; and (iv) its assessment of evidence

[3904] Trial Judgement, paras. 2644, 2653, 2781(i), (ii), 5867. The Appeals Chamber observes that with respect to the Mid-May Attack and the Last Half of May Attacks, the Trial Chamber found that other witnesses provided evidence that offered circumstantial support to Witness TA's evidence implicating Ntahobali in the attacks. *See ibid.*, paras. 2632, 2634, 2650, 2651. The Trial Chamber also found that *Interahamwe*, following the orders of Ntahobali, raped six other women during the First Attack of the Last Half of May Attacks. *See supra*, para. 1562. The Appeals Chamber, however, has reversed Ntahobali's convictions in this respect below and will therefore not examine Ntahobali's challenges to the assessment of the evidence solely relevant to this incident. *See infra*, paras. 1912, 1913.

that generally undermined Witness TA's credibility.[3906] The Appeals Chamber will address these arguments in turn.

(i) Mid-May Attack

1691. The Trial Chamber, relying principally on the testimony of Witness TA, found that, one night in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office aboard a camouflage pickup truck.[3907] It concluded that Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup truck, that Ntahobali and about eight other *Interahamwe* raped Witness TA, and that "[s]ome of the *Interahamwe* raped two other Tutsi women."[3908] The Trial Chamber further found that the pickup truck left the prefectoral office with the abducted Tutsi refugees, some of whom were forced to undress.[3909] It convicted Ntahobali for ordering killings and committing the rape of Witness TA during this attack on this basis.[3910]

1692. Ntahobali challenges the Trial Chamber's assessment of Witness TA's evidence pertaining to the Mid-May Attack.[3911] Specifically, he argues that the Trial Chamber erred in its evaluation of Witness TA's testimony that she was not anally raped when her prior statement reflects that she was raped vaginally and anally.[3912] Ntahobali submits that this variance is material as it concerns the *actus reus* of the crime of rape and because the witness's statement mentions anal intercourse on two occasions, specifying that it did not happen during a subsequent attack.[3913] He contends that the Trial Chamber's reasoning that the variance was not material in light of the trauma the witness had suffered is unsupported by the witness's testimony and contrary to her own explanation that the variance reflected an incorrect recording of her statement.[3914] Ntahobali further argues that the Trial Chamber erred in finding that Witness TA had never reported to Rwandan authorities that he raped her for reasons of trauma and shame.[3915] He contends that this reasoning is unsupported by the

[3905] *See supra*, Section V.I.1(c).
[3906] Ntahobali Notice of Appeal, para. 242; Ntahobali Appeal Brief, paras. 611-614, 618, 621-624, 626, 628-648; Ntahobali Reply Brief, paras. 247-257.
[3907] Trial Judgement, paras. 2644, 2781(i). The Trial Chamber considered that other evidence was consistent or corroborated the circumstances described by Witness TA. *See ibid*., paras. 2632, 2634.
[3908] Trial Judgement, paras. 2644, 2781(i).
[3909] Trial Judgement, paras. 2644, 2781(i).
[3910] *See supra*, Section V.I.1(c); *infra*, Section V.I.3(a).
[3911] Ntahobali Appeal Brief, paras. 622, 623, 626.
[3912] Ntahobali Appeal Brief, para. 622, *referring to* Exhibit D6B (Witness TA's Statement). The un-highlighted version of the exact same statement admitted as Exhibit D7 has been referred to as "Witness TA's Statement" in this Judgement.
[3913] Ntahobali Appeal Brief, para. 622.
[3914] Ntahobali Appeal Brief, paras. 622, 755-758. *See also supra*, Section V.I.2(a)(iv).
[3915] Ntahobali Appeal Brief, para. 623, *referring to* Trial Judgement, para. 2637.

witness's own explanation that she did not report him because he had left the country and is unreasonable in light of the fact that the witness had reported that others had raped her.[3916]

1693. Ntahobali further submits that the Trial Chamber erred by omitting to consider other variances between Witness TA's prior statement and testimony as well as internal inconsistencies within her evidence concerning the Mid-May Attack.[3917] In particular, he highlights that Witness TA's Statement reflects that Nyiramasuhuko was not with Ntahobali during the evening attack, but that the witness testified that Nyiramasuhuko was present.[3918] Concerning the internal inconsistencies within the witness's evidence, Ntahobali emphasises that Witness TA testified that: (i) 10 *Interahamwe* and Nyiramasuhuko were present during the attack but elsewhere testified that the reference to 10 *Interahamwe* included Nyiramasuhuko; and (ii) during the attack, Nyiramasuhuko immediately identified persons to be abducted who were then loaded onto the vehicle and immediately taken away, while also testifying that Ntahobali and other *Interahamwe* attacked persons at the prefectoral office and that he and eight *Interahamwe* raped the witness before the refugees were put on board the vehicle and left.[3919]

1694. The Prosecution responds that Ntahobali fails to demonstrate that the Trial Chamber's conclusions were so unreasonable that no reasonable trier of fact could have reached them.[3920] It also argues that many of the alleged inconsistencies raised by Ntahobali were reasonably addressed in the Trial Judgement.[3921]

1695. Turning first to Ntahobali's contention that the Trial Chamber erred in its assessment of Witness TA's evidence concerning whether she had been anally raped during the Mid-May Attack, the Appeals Chamber observes that the Trial Chamber considered this variance between her testimony and prior statement and concluded that in light of the "obvious intensity of experiencing

[3916] Ntahobali Appeal Brief, para. 623 (French), *referring to* Witness TA, T. 29 October 2001 p. 99 (French).
[3917] Ntahobali Appeal Brief, para. 626; Ntahobali Reply Brief, para. 252.
[3918] Ntahobali Appeal Brief, para. 626, *referring to* Witness TA's Statement, Witness TA, T. 6 November 2001 pp. 60, 61. Ntahobali also submits that Witness TA's Statement did not indicate that she saw Nyiramasuhuko prior to the Mid-May Attack, whereas she testified that she had seen Nyiramasuhuko for the first time at 3.00 p.m. the day of that attack. *See idem.* For the same reasons as developed in Section IV.F.2(d) addressing Nyiramasuhuko's appeal, the Appeals Chamber rejects this argument.
[3919] Ntahobali Appeal Brief, para. 626. Ntahobali's contention in paragraph 633 of his appeal brief about the improper use of Expert Witness Alison Des Forges's evidence have been addressed above in Section V.I.2(a)(v). Ntahobali also asserts that the Trial Chamber contradicted itself by finding that Tutsi refugees were forcefully undressed during the Mid-May Attack and by using it as a basis to convict him despite concluding that there was insufficient evidence to convict him for this act. *See* Ntahobali Appeal Brief, para. 678, *referring to* Trial Judgement, paras. 2644, 2738, 2781(i), (iii), 5873, 6137. The Appeals Chamber observes that Ntahobali's reference to the Trial Chamber's allegedly contradictory conclusion that the Prosecution failed to adduce sufficient evidence to prove beyond reasonable doubt that Tutsis were forced to undress concerned attacks at the EER as opposed to the prefectoral office. *See* Trial Judgement, paras. 6132, 6137. *See also infra*, para. 1846. Moreover, the Trial Chamber did not enter convictions against Ntahobali in relation to the Mid-May Attack on the basis that Tutsis were forcefully undressed. *See* Trial Judgement, paras. 5866-5871, 6053, 6100, 6168. The Appeals Chamber therefore dismisses this argument.
[3920] Prosecution Response Brief, paras. 982, 989.

multiple gang rapes at the hands of *Interahamwe*, this discrepancy is understandable and does not adversely affect the Chamber's credibility assessment of the witness."[3922] Contrary to Ntahobali's contention, a plain reading of the witness's testimony in its entirety supports the Trial Chamber's rationale that the "intensity of experiencing multiple gang rapes" could impact her recollection of the events.[3923] The Appeals Chamber sees no error in focussing on this consideration rather than on the witness's explanation when confronted with this discrepancy,[3924] as it is established practice for trial chambers to take into consideration the impact of trauma on a witness's evidence.[3925]

1696. Furthermore, while Ntahobali stresses the materiality of this variance, Witness TA's prior statement only reflects that anal penetration was perpetrated by a single individual on one occasion.[3926] By contrast, the witness's prior statement and testimony consistently reflect that she was vaginally raped by multiple people on this occasion alone. The Appeals Chamber is not persuaded that the variance highlighted by Ntahobali was material given her consistent position that she was attacked in a manner that demonstrates that she was raped.

1697. The Appeals Chamber also observes that the Trial Chamber expressly considered that Witness TA had reported that she had been raped by other assailants to authorities in her prefecture without mentioning Ntahobali because he had fled the country.[3927] Ntahobali contends that this evidence does not support the Trial Chamber's conclusion that Witness TA's explanation for not reporting Ntahobali was reasonable in light of a possible trauma and the potential shame associated with these events without demonstrating that the Trial Chamber abused its discretion in so finding.[3928]

1698. Regarding Ntahobali's argument that the Trial Chamber erred by omitting to consider inconsistencies between Witness TA's prior statement and testimony, the Appeals Chamber observes that, unlike her testimony, Witness TA's prior statement reflects that Nyiramasuhuko "was not with [Ntahobali] this night" of the Mid-May Attack and contains no reference to the witness seeing Nyiramasuhuko at the prefectoral office at 3.00 p.m. on the day of that attack.[3929] When

[3921] Prosecution Response Brief, para. 989, *referring to* Ntahobali Appeal Brief, paras. 621-639.
[3922] Trial Judgement, para. 2635.
[3923] *See* Trial Judgement, paras. 2174-2193.
[3924] *See* Witness TA, T. 6 November 2001 pp. 54, 55 ("Q. My question is, madam; you stated on the 19th of November 1997 that one of the eight persons penetrated you through the anus; is that correct? A. That was not put down correctly. When I stated, I said this man went past behind me. And in your question you asked me whether any of those people penetrated me through some other opening, and I said no.").
[3925] *Musema* Appeal Judgement, para. 63. *See also Hategekimana* Appeal Judgement, para. 84; *Ntawukulilyayo* Appeal Judgement, para. 152. *See also supra*, Section V.I.2(a)(iv).
[3926] Witness TA's Statement, pp. K0043300, K0043301 (Registry pagination) ("I believe each of the men actually penetrated my vagina. One man passed in my anus.").
[3927] Trial Judgement, para. 2637.
[3928] Ntahobali Appeal Brief, para. 623, *referring to* Trial Judgement, para. 2637.
[3929] Witness TA's Statement, p. K0043300 (Registry pagination).

challenged with these inconsistencies, the witness affirmed her testimony, suggesting that the information in her prior statement was improperly recorded or less important than her testimony.[3930]

1699. The Appeals Chamber reiterates that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between the said testimony and the witness's previous statements,[3931] and the fact that a trial chamber does not address or mention alleged discrepancies does not necessarily mean that it did not consider them.[3932] The Appeals Chamber considers that it would have been preferable for the Trial Chamber to note that Witness TA's prior statement indicated that Nyiramasuhuko was not with Ntahobali during the Mid-May Attack and explain why this inconsistency did not impact the credibility of her testimony.[3933] However, the Appeals Chamber considers that, in light of Witness TA's repeated affirmations of the accuracy of her testimony as well as her repeated explanations that her statement was not a full and accurate recording of the information she provided to investigators,[3934] a reasonable trier of fact could have considered that this inconsistency was not material and did not undermine the credibility of Witness TA's account.

1700. With respect to the internal inconsistencies within Witness TA's testimony, the Appeals Chamber does not find that the variance between Witness TA's initial testimony that Nyiramasuhuko was present in addition to 10 *Interahamwe* and subsequent account that Nyiramasuhuko was one of those 10 individuals is material.[3935]

1701. Ntahobali also fails to demonstrate any material internal inconsistency in Witness TA's testimony as to whether the Tutsi refugees were immediately removed from the prefectoral office upon being pointed out by Nyiramasuhuko or whether there was time for Ntahobali and eight

[3930] *See* Witness TA, T. 5 November 2001 pp. 55, 56, 59, 60; T. 6 November 2001 pp. 58, 61.
[3931] *Kanyarukiga* Appeal Judgement, para. 121; *Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. *See also Rutaganda* Appeal Judgement, para. 443; *Musema* Appeal Judgement, para. 89.
[3932] *Ntawukulilyayo* Appeal Judgement, para. 152; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18-20.
[3933] The Appeals Chamber considers that the Trial Chamber was under no obligation to consider the absence of any mention in Witness TA's prior statement that she saw Nyiramasuhuko around 3.00 p.m. on the day of the Mid-May Attack. The statement is remarkably brief when compared to the length of her testimony. The Appeals Chamber considers that this element of Witness TA's testimony was peripheral to the core features of her evidence concerning the attack, and it is reasonable that more details would arise over the course of the witness's examination in court.
[3934] Witness TA, T. 1 November 2001 p. 15 (closed session), T. 5 November 2001 pp. 68, 126, 130, T. 6 November 2001 pp. 61, 68. In this regard, the Appeals Chamber observes that Ntahobali generally argues that Witness TA is not reliable given that she blamed Tribunal investigators on at least eight occasions and "gave implausible explanations" for alleged contradictions between her testimony and prior statement. *See* Ntahobali Appeal Brief, para. 629. The Appeals Chamber finds that Ntahobali's submissions do not demonstrate that no reasonable trier of fact could have accepted Witness TA's explanations that recording errors resulted in omissions in her prior statement. Thus, the Appeals Chamber dismisses this general contention.
[3935] Witness TA, T. 25 October 2001 pp. 33, 36 ("A. The *Interahamwe* that I saw, apart from Nyiramasuhuko, were ten in number […] Q. When you say ten members of the *Interahamwe*, did you include Shalom in that number ten? A. Yes."), T. 31 October 2001 p. 41 ("A. All together, including Shalom and his mother, were ten in number.").

Interahamwe to rape Witness TA beforehand. Ntahobali simply extracts parts of Witness TA's evidence and fails to appreciate that the substantial and detailed account provided by her after extensive questioning reveals that after Nyiramasuhuko pointed out Tutsis to be abducted, Ntahobali took the witness to the back of the prefectoral office where he and eight *Interahamwe* raped her.[3936] Witness TA's detailed testimony, in this context, reflects that, after raping her, the assailants left aboard the same vehicle carrying Nyiramasuhuko and the abducted Tutsis.[3937]

1702. Consequently, the Appeals Chamber finds that, in his arguments addressed above, Ntahobali has not demonstrated that the Trial Chamber erred in its assessment of Witness TA's evidence pertaining to the Mid-May Attack.

(ii) Last Half of May Attacks

1703. The Trial Chamber, relying on the testimony of Witness TA, partially corroborated by that of Witness SD, concluded that around seven and 11 days after the Mid-May Attack, Ntahobali and *Interahamwe* came to the prefectoral office on two more occasions.[3938] In particular, the Trial Chamber found that during the First Attack of the Last Half of May Attacks, which occurred seven days after the Mid-May Attack, Ntahobali violently raped Witness TA, hitting her on the head with a hammer.[3939] The Trial Chamber found that during the Second Attack of the Last Half of May Attacks, which occurred 11 days after the Mid-May Attack, Ntahobali ordered about seven *Interahamwe* to rape Witness TA.[3940] The Trial Chamber convicted Ntahobali for committing and ordering rape on this basis.[3941]

1704. Ntahobali contends that the Trial Chamber erred in its assessment of Witness TA's evidence with respect to the First Attack.[3942] Specifically, he submits that the witness initially testified that Ntahobali put his hammer to her forehead, before testifying that he hit her on the face with it, whereas the witness's prior statement only reflects that Ntahobali took out the hammer to deter her from resisting.[3943] He argues that the witness's explanation of blaming investigators is unbelievable and contends that no reasonable trier of fact could have found the variance to be minor as it

[3936] *See* Witness TA, T. 25 October 2001 pp. 46-48, 56, T. 31 October 2001 pp. 31-36, 50-59, T. 6 November 2001 pp. 47, 48. *See also* Trial Judgement, paras. 2631, 2632.
[3937] *See* Witness TA, T. 25 October 2001 pp. 56, 66. *See also* Trial Judgement, para. 2181.
[3938] Trial Judgement, paras. 2650, 2651, 2653.
[3939] Trial Judgement, paras. 2653, 2781(ii). The Trial Chamber also found that *Interahamwe*, following the orders of Ntahobali, raped six other women during the First Attack. *See idem.* As noted earlier, this finding is however reversed by the Appeals Chamber in Section V.I.3(b) below.
[3940] Trial Judgement, paras. 2653, 2781(ii).
[3941] *See supra*, Sections V.I.1(b), V.I.1(c).
[3942] Ntahobali Appeal Brief, paras. 623, 624, 626, 633. *See also* Ntahobali Reply Brief, para. 252.
[3943] Ntahobali Appeal Brief, para. 624.

concerned the "*actus reus*" and was "an integral part of the commission of the rape".[3944] Ntahobali further argues that the Trial Chamber erred in failing to consider that the witness testified that Ntahobali took her behind the prefectoral office to the same place he had raped her during the Mid-May Attack, whereas her prior statement reflects Ntahobali did not take her there on this occasion.[3945] He reiterates that the witness's explanation that her statement was not accurately recorded is implausible.[3946]

1705. Concerning the Second Attack, Ntahobali contends that the Trial Chamber erred in failing to assess that Witness TA's testimony varied as to whether Ntahobali wore banana leaves, and was inconsistent as to whether Ntahobali left after handing Witness TA over to *Interahamwe* or if he remained and raped Caritas next to the witness.[3947] He observes that Witness TA also testified that she could not see while being raped.[3948] Ntahobali further contends that the Trial Chamber erred by omitting to consider that the witness testified that *Interahamwe* took her behind the prefectoral office and that the seven attackers undressed her, whereas her prior statement reflects that he took her behind the prefectoral office and that he lifted her skirt.[3949] He rejects the witness's explanations for these variances, respectively arguing that she implausibly asserted that her prior statement was recorded incorrectly or that her response was confusing.[3950] In addition, he argues that the Trial Chamber erred in not considering that, on two occasions, Witness TA testified that she did not see him after the First Attack and in not concluding that this raised reasonable doubt in her evidence with respect to the Second Attack.[3951]

1706. Finally, Ntahobali argues that the Trial Chamber unreasonably concluded that Witness SD corroborated Witness TA's evidence with respect to the Last Half of May Attacks.[3952] He argues that Witness SD's testimony lacked sufficient detail to meet the minimum standard required for corroboration.[3953] He stresses that the Trial Chamber elsewhere concluded that Witness SD's testimony concerning prior attacks on the prefectoral office was "devoid of any specific details" and did not appear to attach any weight to his evidence, making it unreasonable for the Trial Chamber

[3944] Ntahobali Appeal Brief, para. 624. *See also ibid*., para. 629.
[3945] Ntahobali Appeal Brief, para. 626.
[3946] Ntahobali Appeal Brief, para. 626. *See also ibid*., para. 629.
[3947] Ntahobali Appeal Brief, para. 626.
[3948] Ntahobali Appeal Brief, para. 626.
[3949] Ntahobali Appeal Brief, para. 626.
[3950] Ntahobali Appeal Brief, para. 626. *See also ibid*., para. 629.
[3951] Ntahobali Appeal Brief, para. 646.
[3952] Ntahobali Appeal Brief, paras. 640-645; Ntahobali Reply Brief, paras. 254, 255.
[3953] Ntahobali Appeal Brief, para. 643. In particular, Ntahobali submits that nothing in Witness SD's evidence demonstrates that she referred to the attacks about which Witness TA testified, as she never mentioned Witness TA, did not provide evidence that Ntahobali raped or ordered rapes and abductions, and did not provide any specific dates for the attacks that occurred prior to the transfer to Nyange in early June 1994. *See idem*. *See also* Ntahobali Reply Brief, para. 254; AT. 15 April 2015 pp. 47, 48.

to rely on it in this instance.[3954] He also points out that Witness SD testified that women and girls were taken away to be raped, rather than being raped at the Butare Prefecture Office.[3955] In Ntahobali's view, no reasonable trier of fact could have relied upon Witness TA's evidence absent "proper corroboration".[3956]

1707. The Prosecution responds that Ntahobali fails to demonstrate that the Trial Chamber's conclusions were so unreasonable that no reasonable trier of fact could have reached them.[3957] It argues that many of the alleged inconsistencies raised by Ntahobali were reasonably addressed in the Trial Judgement and that Ntahobali does not demonstrate any error as it relates to the Trial Chamber's conclusion that Witness SD corroborated Witness TA's testimony.[3958]

1708. The Appeals Chamber observes that the Trial Chamber considered the differences between Witness TA's testimony and prior statement concerning whether Ntahobali hit her with a hammer during the First Attack.[3959] The Trial Chamber acknowledged that she affirmed her testimony and accepted her explanation that the investigator may have misunderstood her as the injury she suffered was minor.[3960] While Ntahobali argues that the Trial Chamber was unreasonable in reaching this conclusion, specifically because the variance concerned the "*actus reus*" and was an "integral part of the commission of rape", the Appeals Chamber finds that Ntahobali's contentions are irrelevant to the Trial Chamber's consideration of the elements of rape.[3961] Ntahobali simply disagrees with the Trial Chamber's reasoning without demonstrating any error in the exercise of its discretion in the assessment of the evidence. His contention is accordingly dismissed.

1709. Turning to the differences in Witness TA's testimony and prior statement as to whether Ntahobali took her behind the prefectoral office where she was raped during the Mid-May Attack, the Appeals Chamber observes that, contrary to Ntahobali's submission, the Trial Chamber considered that "Witness TA was confronted with a prior statement in which she said she was in

[3954] Ntahobali Appeal Brief, para. 644, *referring to* Trial Judgement, paras. 2620, 5950. *See also* Ntahobali Reply Brief, paras. 254, 255.
[3955] Ntahobali Appeal Brief, para. 643. Ntahobali also observes that the Trial Chamber found that Witness SD testified that Nyiramasuhuko "arrived every night" at the Butare Prefecture Office, while Witness TA only gave evidence that she was present during the Mid-May Attack (and not the Last Half of May Attacks). *See ibid.*, para. 645; Ntahobali Reply Brief, para. 255. He further argues that the Trial Chamber erred in finding that Witness SD testified that the vehicle came "each night" as the French version of the transcript reflects that the witness only testified that it came "at night". *See* Ntahobali Appeal Brief, para. 642, *referring to* Trial Judgement, paras. 2620, 2650. The Appeals Chamber considers that Ntahobali makes contradictory submissions, arguing that Witness SD contradicts Witness TA by suggesting that Nyiramasuhuko came every night, yet also arguing that Witness SD's transcripts do not support the conclusion that Nyiramasuhuko came every night. These contradictory submissions are dismissed without further consideration.
[3956] Ntahobali Appeal Brief, para. 648.
[3957] Prosecution Response Brief, paras. 982, 989.
[3958] Prosecution Response Brief, paras. 989, 993.
[3959] Trial Judgement, para. 2647.
[3960] Trial Judgement, para. 2647.
[3961] *See*, *in particular*, Trial Judgement, para. 6075.

view of the other refugees when she was raped on this occasion [and] […] maintained in her testimony that she was taken behind the [Butare Prefecture Office]."[3962] In so noting, the Trial Chamber referred to excerpts from the witness's testimony where she was cross-examined on this precise variance.[3963] Ntahobali does not demonstrate that no reasonable trier of fact could have relied upon Witness TA's evidence in light of the purported variance.[3964]

1710. As regards Ntahobali's arguments concerning the Second Attack, the Appeals Chamber finds no material variance in Witness TA's evidence as to whether or not Ntahobali wore banana leaves.[3965] The Appeals Chamber also notes that Ntahobali fails to point to any material inconsistency concerning whether he left after handing Witness TA over to *Interahamwe* to be raped or if he remained and raped Caritas next to the witness. Witness TA testified that *Interahamwe* "raped me and [Ntahobali] left, leaving behind him[…] these men who were raping me"[3966] and that she saw Ntahobali raping Caritas next to where she was when she was being attacked.[3967] During cross-examination, Witness TA testified that she was unable to see or take note of what was happening around her when she was raped but clarified that, "at the end of this – incident" she was able to see Ntahobali who was "very near" to her.[3968] The Appeals Chamber considers that the evolutions in Witness TA's testimony reflect clarifications achieved through precise questioning rather than material contradictions.

1711. The Appeals Chamber is also unpersuaded by Ntahobali's contention that the Trial Chamber erred in failing to consider that Witness TA's testimony and prior statement varied as to whether he or *Interahamwe* took the witness behind the prefectoral office and undressed her. Notably, Witness TA's evidence consistently indicates that Ntahobali found her and physically delivered her to the *Interahamwe* during this attack,[3969] and that Ntahobali raped Caritas about five to six metres away from where the *Interahamwe* attacked her.[3970] In this context, even though her prior statement indicates that Ntahobali led her behind the prefectoral office[3971] whereas her testimony indicates that the *Interahamwe* did this,[3972] the variance is insignificant.

[3962] Trial Judgement, para. 2646.
[3963] Trial Judgement, para. 2646, *referring to* Witness TA, T. 5 November 2001 pp. 125-129, Witness TA's Statement.
[3964] The Appeals Chamber considers that Ntahobali's arguments, as they relate to variances between Witness TA's prior statement and testimony, ignore that she was fundamentally consistent that during this attack only Ntahobali raped her. *Compare* Witness TA's Statement, p. K0043301 (Registry pagination) *with* Witness TA, T. 25 October 2001 pp. 67, 69, T. 31 October 2001 pp. 93-97.
[3965] Witness TA, T. 31 October 2001 pp. 107, 108.
[3966] Witness TA, T. 25 October 2001 pp. 75, 76.
[3967] Witness TA, T. 25 October 2001 pp. 81, 84.
[3968] Witness TA, T. 31 October 2001 p. 111.
[3969] Witness TA, T. 25 October 2001 pp. 75-77, T. 31 October 2001 p. 111, T. 6 November 2001 pp. 9, 10.
[3970] Witness TA, T. 25 October 2001 pp. 81-83. *See also* Witness TA, T. 31 October 2001 p. 111.
[3971] Witness TA's Statement, p. K0043301 (Registry pagination).
[3972] Witness TA, T. 31 October 2001 p. 111.

1712. Likewise, while Witness TA's prior statement indicates that Ntahobali "lifted [her] skirt"[3973] and her testimony reflects that the *Interahamwe* removed her clothes,[3974] the Appeals Chamber does not consider that any difference in this respect made it unreasonable for the Trial Chamber to rely on her testimony. Witness TA's evidence is fundamentally consistent with her prior statement that Ntahobali found her at the prefectoral office and that about seven *Interahamwe* raped her based on Ntahobali's prompting.[3975] The Appeals Chamber finds that a reasonable trier of fact could have relied on her evidence notwithstanding this minor variance, particularly given the fact that Ntahobali was involved in attacking Witness TA on multiple occasions at the prefectoral office. As these inconsistencies were canvassed in detail through Witness TA's cross-examination, the Appeals Chamber is not persuaded that the Trial Chamber ignored them or was required to expressly consider them in the Trial Judgement.

1713. The Appeals Chamber also finds no merit in Ntahobali's contention that the Trial Chamber erred in not considering that, on two occasions, Witness TA testified that she did not see him after the First Attack. Witness TA's evidence that she "did not see [Ntahobali] again", when read in context, reveals that she did not see him again on the night of the First Attack.[3976] Upon further questioning, the witness recalled her testimony that she saw Ntahobali on more than eight occasions and proceeded to discuss the events of the Second Attack, in which Ntahobali gave the witness over to *Interahamwe* to be raped.[3977] Once again, the Appeals Chamber considers that the evolutions in Witness TA's evidence reflect clarifications achieved through precise questioning rather than material contradictions.

1714. The Appeals Chamber observes that, when assessing Witness TA's evidence concerning the Last Half of May Attacks, the Trial Chamber found that "Witness SD corroborated important aspects of each of these attacks."[3978] It noted that, while Witness SD's testimony "was not specific as to what occurred during each attack, she identified the distinctive features of the vehicle, namely that it was covered in mud and contained Nyiramasuhuko, Ntahobali and *Interahamwe*" and concluded that "[t]herefore, her testimony provides corroboration for Witness TA's testimony as to the attacks by Ntahobali."[3979] The Trial Chamber also stated that it was "convinced" that Witness SD was at the prefectoral office prior to the Nyange transfer in early June 1994 and

[3973] Witness TA's Statement, p. K0043301 (Registry pagination).
[3974] *See*, *e.g.*, Witness TA, T. 25 October 2001 pp. 75, 77, 78, T. 31 October 2001 p. 111, T. 6 November 2001 pp. 9-11.
[3975] *Compare* Witness TA's Statement, p. K0043301 (Registry pagination) *with* Witness TA, T. 25 October 2001 pp. 75-77, T. 31 October 2001 pp. 105-111, T. 6 November 2001 pp. 9, 11-13.
[3976] Witness TA, T. 25 October 2001 p. 72.
[3977] *See* Witness TA, T. 25 October 2001 pp. 75, 76-81.
[3978] Trial Judgement, para. 2650.
[3979] Trial Judgement, para. 2651. *See also ibid.*, para. 2650.

observed that she testified that there were "attacks by [Ntahobali] both prior to and after the transfer to Nyange in early June 1994."[3980]

1715. With respect to Ntahobali's contentions that the Trial Chamber unreasonably concluded that Witness SD corroborated Witness TA's evidence with respect to the Last Half of May Attacks, the Appeals Chamber reiterates that two *prima facie* credible testimonies corroborate one another when one testimony is compatible with the other regarding the same fact or a sequence of linked facts.[3981] In the instant case, the Appeals Chamber considers that the Trial Chamber's finding of corroboration is reasonable, reflecting the similarities in the evidence of Witnesses TA and SD concerning: (i) Ntahobali's participation in the attacks at the Butare Prefecture Office prior to early June 1994; (ii) the vehicle used; (ii) the fact that *Interahamwe* took people; and (iv) the fact that women were identified to be raped.[3982] The Trial Chamber's analysis demonstrates that it was aware of all the differences between the testimonies of Witnesses SD and TA that Ntahobali highlights.[3983] In the view of the Appeals Chamber, the differences stressed by Ntahobali do not render Witness SD's evidence incompatible with that of Witness TA. Indeed, the differences would reasonably be expected given the Trial Chamber's findings pertaining to the chaotic and precarious circumstances in which refugees lived at the prefectoral office,[3984] the fact that Witness SD provided a more general account as well as the fact that Witness TA was assaulted repeatedly by Ntahobali whereas Witness SD was not.

1716. Furthermore, although the Trial Chamber noted that Witness SD's evidence was "devoid of any specific details", it did so in relation to a prior attack on the prefectoral office when considering whether the witness's evidence provided sufficient corroboration to the testimony of Witness QY, who principally testified about that event.[3985] The Trial Chamber did not find Witness SD's evidence to be lacking credibility, but instead rejected Witness QY's evidence due to credibility issues concerning that particular witness.[3986] In contrast to its approach to Witness QY's evidence in that instance, the Trial Chamber was convinced by Witness TA's testimony concerning the Last Half of May Attacks. While it noted that Witness SD's testimony "was not specific as to what

[3980] Trial Judgement, para. 2651.
[3981] *Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[3982] *See infra*, para. 1716.
[3983] Trial Judgement, paras. 2650, 2651.
[3984] Trial Judgement, paras. 2627 ("These people consisted mainly of women and children in poor physical condition; many of them had visible skin ailments and were malnourished […] the evidence was clear and consistent that these people had fled other *communes* and *préfectures* to escape violence and the threat of death."), 2740 ("[T]he evidence established that Tutsi refugees were being killed at the [prefectoral office]."), 2781 ("The Chamber finds the Prosecution has proven beyond a reasonable doubt that: between 19 April and late June 1994 […] Tutsi refugees were physically assaulted and raped; and the Tutsi refugees were killed in various locations throughout Ngoma *commune*".).
[3985] *See* Trial Judgement, para. 2620. *See also ibid*., paras. 2621-2626.
[3986] *See* Trial Judgement, paras. 2621-2626.

occurred during each attack" and that aspects of her evidence were hearsay, it nonetheless relied on the distinctive features of it that were consistent with Witness TA's evidence.[3987] The Appeals Chamber is satisfied that the Trial Chamber acted within its discretion, refusing to make findings where Witness SD's general evidence only supported testimony that lacked credibility, yet relying on Witness SD's evidence to the extent that it corroborated the more detailed and credible account given by Witness TA. Consequently, the Appeals Chamber rejects Ntahobali's claim that no "proper corroboration" of Witness TA's evidence existed.

1717. Based on the foregoing, the Appeals Chamber finds that, in his arguments addressed above, Ntahobali has not demonstrated that the Trial Chamber erred in its assessment of Witness TA's evidence pertaining to the Last Half of May Attacks.

(iii) Contradictory Findings and Evidence

1718. Ntahobali argues that the Trial Chamber made contradictory findings and failed to consider evidence that demonstrated that no refugees were at the Butare Prefecture Office at the time when Witness TA testified that the Mid-May Attack and the Last Half of May Attacks occurred.[3988] Ntahobali also points out that Witness RE testified that she arrived at the prefectoral office around 15 May 1994 and asserted that there was no attack between then and her transfer to the EER the following day, that she only saw Ntahobali at the EER, and that she was transported to Nyange one day after returning to the prefectoral office from the EER.[3989]

1719. In addition, Ntahobali argues that the Trial Chamber erred in its assessment of the evidence from Defence Witnesses WUNHE and WUNJN, who testified that Witness TA was not at the prefectoral office between April and June 1994 but was staying with her uncle.[3990] According to

[3987] Trial Judgement, paras. 2650, 2651. The Appeals Chamber observes that the Trial Chamber also noted that Witness SD did not see Ntahobali driving the vehicle but heard that this was the case. *See ibid.*, para. 2650.
[3988] Ntahobali Appeal Brief, paras. 618, 636, 637. *See also* Ntahobali Reply Brief, paras. 249-251. Specifically, Ntahobali points to findings by the Trial Chamber as well as evidence, such as that of Witness RE, which, in his view, reflect that all the refugees were transferred from the prefectoral office to the EER between 15 and 20 May 1994, returning to the prefectoral office only on 31 May 1994. *See* Ntahobali Appeal Brief, paras. 618, 633, 636, 637; Ntahobali Reply Brief, paras. 250, 251.
[3989] Ntahobali Appeal Brief, para. 637. Ntahobali also argues that Witness RE testified that the first and only attack that she mentioned occurred at the Butare Prefecture Office around 10 June 1994 according to her prior statement. *See idem*. The Appeals Chamber addresses this challenge in Section V.I.2(d)(ii)e below. The Appeals Chamber considers that Ntahobali's references to the evidence of Witnesses QBP and SD in paragraph 250 of his reply brief improperly go beyond responding to the Prosecution's contentions and seek to introduce new arguments that should have been raised in his appeal brief. The Appeals Chamber recalls that reply briefs shall be limited to arguments in reply to the response brief. *See* Practice Direction on Formal Requirements on Appeal, para. 6. Ntahobali was expressly made aware of this limitation in these appeal proceedings. *See* Decision on Motions for Extension of Time Limit and Word Limit for the Filing of Reply Briefs, 27 August 2013, para. 4. In any event, the Appeals Chamber notes that it has considered and rejected similar contentions by Nyiramasuhuko in Section IV.F.2(d) above.
[3990] Ntahobali Appeal Brief, paras. 611-614. *See also* Ntahobali Reply Brief, paras. 247, 248; AT. 15 April 2015 p. 49.

him, this evidence raises doubts as to Witness TA's presence at the prefectoral office and the credibility of her testimony concerning the Mid-May Attack and the Last Half of May Attacks.[3991]

1720. The Prosecution responds that Ntahobali does not show contradictions in the Trial Chamber's findings or the Prosecution evidence or that the Trial Chamber abused its discretion in rejecting Witness WUNJN's evidence and in finding that Witness WUNHE's evidence did not undermine the credibility of Witness TA.[3992]

1721. The Appeals Chamber has already considered above in Section IV.F.2(d) similar allegations regarding the absence of refugees from the prefectoral office in May 1994 raised by Nyiramasuhuko. Based on a detailed and careful consideration of the Trial Chamber's findings, the Appeals Chamber has rejected Nyiramasuhuko's contention that the Trial Chamber's conclusions about the transfer of refugees from the prefectoral office to the EER were contradictory with its findings concerning the Mid-May Attack.[3993] For the same reasons, the Appeals Chamber dismisses Ntahobali's contention that the Trial Chamber's conclusions about the transfer of refugees from the prefectoral office to the EER were contradictory with its findings concerning the Mid-May Attack and the Last half of May Attacks.

1722. The Appeals Chamber also finds no merit in Ntahobali's argument that Witness RE's testimony contradicts Witness TA's testimony. While Ntahobali emphasises that Witness RE testified that she arrived at the prefectoral office around 15 May 1994, that she was transferred to the EER the next day without any attack occurring, that she only saw him once at the EER, and that she went to Nyange the day after she returned to the prefectoral office, he does not demonstrate that Witnesses TA and RE were together at the prefectoral office or at the EER in mid to late May 1994 or that their evidence is necessarily contradictory. These arguments are therefore dismissed.[3994]

1723. Turning to the assessment of the evidence of Witnesses WUNJN and WUNHE, who placed Witness TA at her uncle's home rather than the prefectoral office from April to June 1994, the Appeals Chamber observes that the Trial Chamber determined that their evidence did not

[3991] Ntahobali Appeal Brief, paras. 611-614. *See also* Ntahobali Reply Brief, paras. 247, 248; AT. 15 April 2015 p. 49.
[3992] Prosecution Response Brief, paras. 985, 986, 989-991.
[3993] *See supra*, Section IV.F.2(d).
[3994] Ntahobali also argues that when reading Witness TA's evidence as to her own presence at the EER in the context of the Trial Chamber's findings and evidence concerning the transfer of refugees to the EER, it is clear that she actually testified about attacks that occurred in "late July 1994 and even thereafter" rather than the mid and latter half of May 1994. Ntahobali argues, however, that this evidence is unbelievable as all the refugees had left the Butare Prefecture Office for Rango at this point, and that the witness's estimates that 6,000 refugees were present is inconsistent with the Trial Chamber's finding that "around 200" were there after they returned from the EER. *See* Ntahobali Appeal Brief, paras. 618, 632, 636. In light of the analysis in Section IV.F.2(d), the Appeals Chamber finds that Ntahobali simply offers his interpretation of Witness TA's evidence without demonstrating inconsistencies in the Trial Chamber's findings or that it was required to discuss any of the interpretations of her testimony that he now provides. The Appeals Chamber therefore dismisses these contentions without further consideration.

undermine the credibility of Witness TA.[3995] In reaching this conclusion, the Trial Chamber found, *inter alia*, that: (i) Witnesses WUNJN and WUNHE "named a different person whom they said was [Witness TA's] uncle";[3996] (ii) it had doubts as to the "reliability of [Witness WUNJN's] memory concerning the crucial issue of Witness TA's location from April to July 1994" because he admitted that "he confused Witnesses QBP and TA in answering a question as to where Witness QBP had lived";[3997] and (iii) Witness WUNJN's "failure to earlier correct the inaccuracies or incomplete information on his identification sheet further undermines his credibility."[3998] It also stated that "Witness WUNHE testified that he saw Witness TA in April and towards the end of May 1994".[3999]

1724. The Appeals Chamber agrees with Ntahobali that the Trial Chamber erred in reaching each of these conclusions.[4000] First, the Trial Chamber's finding that Witnesses WUNJN and WUNHE were referring to different individuals as Witness TA's uncle is unsupported by the transcripts cited by the Trial Chamber as well as other portions of their evidence.[4001] Second, although Witness WUNJN mistakenly referred to Witness TA as Witness QBP, the witness correctly acknowledged the mistake immediately as a slip of tongue as well as later in his testimony.[4002] The Trial Chamber's conclusion unreasonably ignores the witness's otherwise consistent evidence demonstrating a clear ability to distinguish between the two individuals.[4003] Third, the Appeals Chamber finds that, in this instance, it was unreasonable for the Trial Chamber to find that Witness WUNJN's failure to correct the inaccuracies or incomplete information on his identification sheet undermined the witness's credibility as making such corrections is principally the responsibility of the counsel who files the sheet and because the witness testified that he did in fact inform the counsel of the incompleteness of his form.[4004] The Trial Chamber's analysis fails to sufficiently address these circumstances. Finally, as pointed out by Ntahobali, Witness WUNHE testified that he saw Witness TA "at least twice a week" at her uncle's home after 6 April 1994 and "up to the end of the month of May",[4005] which he confirmed during cross-examination.[4006]

[3995] Trial Judgement, para. 2641.
[3996] Trial Judgement, para. 2639.
[3997] Trial Judgement, para. 2640.
[3998] Trial Judgement, para. 2640.
[3999] Trial Judgement, para. 2641. In the Trial Chamber's summary of Witness WUNHE's testimony, the Trial Chamber stated that Witness WUNHE testified that he saw Witness TA in April 1994 when he witnessed the destruction of her home "but he did not see her after sometime towards the end of May 1994". *See idem*.
[4000] *See* Ntahobali Appeal Brief, para. 612; Ntahobali Reply Brief, paras. 247, 248.
[4001] Of the transcripts cited, the only relevant excerpts reflect that Witnesses WUNJN and WUNHE gave consistent evidence of the person with whom Witness TA sought refuge. *See* Witness WUNJN, T. 7 February 2006 p. 24 (closed session); Witness WUNHE, T. 8 December 2006 p. 66 (closed session). *See also* Witness WUNJN, T. 6 February 2006 pp. 20, 21 (closed session); Witness WUNHE, T. 8 December 2005 pp. 66, 67 (closed session).
[4002] *See* Witness WUNJN, T. 7 February 2006 pp. 12, 13, 23 (closed session).
[4003] Witness WUNJN, T. 6 February 2006 pp. 12-17, 22, 24 (closed session), T. 7 February 2006 pp. 19-23 (closed session).
[4004] *See* Witness WUNJN, T. 6 February 2006 pp. 5, 6 (closed session).
[4005] Witness WUNHE, T. 8 December 2005 pp. 67-69 (closed session).

1725. The Appeals Chamber does not find, however, that these errors undermine the reasonableness of the Trial Chamber's determination that the testimonies of Witnesses WUNJN and WUNHE did not raise doubt with respect to Witness TA's evidence that she was at the Butare Prefecture Office when the Mid-May Attack and Last Half of May Attacks occurred in light of the other factors upon which the Trial Chamber relied.

1726. Indeed, the Appeals Chamber observes that the Trial Chamber stated that it was "not convinced that after narrowly escap[ing] death at the home of her uncle, a fact agreed upon by Witnesses WUNJN and WUNHE, Witness TA would present herself at a drinking establishment at night during the events of April to July 1994."[4007] Ntahobali argues that the Trial Chamber misapplied the burden of proof in using the verb "convinced", and that it incorrectly interpreted the evidence of Witnesses WUNJN and WUNHE as referring to a "drinking establishment" when they described seeing Witness TA in the "sitting room" of her uncle's home.[4008] The Appeals Chamber is of the view that the use of the term "convinced" was intended to indicate that the Trial Chamber did not find the evidence of these witnesses to be *prima facie* credible.[4009] Moreover, a review of the evidence of Witnesses WUNJN and WUNHE, as cited by the Trial Chamber and Ntahobali, supports the Trial Chamber's conclusion that Witness TA's uncle used parts of his residence as a "drinking establishment" that was open to the public.[4010] The Trial Chamber's determination that it did not find credible the testimonies of Witnesses WUNJN and WUNHE that Witness TA, a Tutsi who had narrowly escaped death, would "present herself" at her uncle's drinking establishment to serve beverages to Hutu clients is therefore reasonable.

1727. The Trial Chamber also found "Witness WUNJN's claim that no Tutsis were killed in his *secteur* during the April to July 1994 events […] not believable in light of the fact that killing was widespread throughout Butare *préfecture*" and was contradicted by evidence from Defence Witness AND-30.[4011] Ntahobali does not substantiate his claim that the Trial Chamber erred in reaching this finding, only pointing to the evidence of Witness WUNJN to argue that the situation

[4006] Witness WUNHE, T. 12 December 2005 p. 21 (closed session).
[4007] Trial Judgement, para. 2639.
[4008] Ntahobali Appeal Brief, para. 612, *referring to* Trial Judgement, paras. 2639-2642, Witness WUNJN, T. 6 February 2006 pp. 20, 21 (closed session).
[4009] Notably, the Trial Chamber elsewhere recalled that "the accused has no burden to prove anything at a criminal trial" and its findings demonstrated that it was satisfied that the Prosecution had proven its case "beyond a reasonable doubt". *See* Trial Judgement, paras. 163, 2644.
[4010] Trial Judgement, paras. 2359 (*referring to* Witness WUNJN, T. 6 February 2006 p. 21 (closed session)), 2363 (*referring to* Witness WUNHE, T. 8 December 2005 pp. 65, 66 (closed session)). *See also ibid*., para. 2639.
[4011] Trial Judgement, para. 2640.

may have been different at the lower administrative structures of *cellules*.[4012] This unsubstantiated argument is dismissed without further consideration.

1728. Furthermore, the Trial Chamber noted that it was not put to Witness TA that the person named by Witnesses WUNJN and WUNHE was her uncle before ultimately concluding that the evidence of these two witnesses did not "undermine[] the credibility of Witness TA."[4013] Ntahobali argues that it was unfair for the Trial Chamber to consider this omission in the cross-examination of Witness TA, as he only knew of Witness TA's identity in April 2001, and because he lost his investigator in July 2001 and did not know of the existence of Witness TA's uncle when cross-examining her later that year.[4014] Ntahobali, however, does not point to any part of the record to support his position[4015] and fails to demonstrate that the Trial Chamber erred in considering this omission.[4016] In any event, the Appeals Chamber is not persuaded that this consideration was central to the Trial Chamber's analysis of the credibility of Witnesses WUNJN and WUNHE.

1729. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber reached contradictory findings or erred in its assessment of evidence in a way that would render its conclusions on the credibility of Witness TA's testimony concerning the Mid-May Attack and the Last Half of May Attacks unreasonable.

(iv) Additional Credibility Challenges

1730. Ntahobali contends that the Trial Chamber failed to consider sufficiently additional evidence that should have raised reasonable doubt in Witness TA's testimony generally, including the fact that: (i) Witness QBP, a relative who was allegedly present with Witness TA at the Butare Prefecture Office, did not confirm that Witness TA had been raped; (ii) Exhibit D473, which contains the transcript of an interview between Nsabimana and BBC journalist Fergal Keane, reflects that a white journalist visited the prefectoral office, in contradiction to Witness TA's account that no white people were there; (iii) Witness QBQ's testimony concerning how refugees were removed from the prefectoral office to Nyange is materially inconsistent with Witness TA's evidence; (iv) the evidence of Witnesses RE, QBP, and TK describing the circumstances under

[4012] Ntahobali Appeal Brief, para. 612, *referring to* Witness WUNJN, T. 6 February 2006 pp. 40-42 (closed session).
[4013] Trial Judgement, para. 2641.
[4014] Ntahobali Appeal Brief, para. 613.
[4015] As a preface to this argument, Ntahobali also contends that the Trial Chamber erred in failing to provide a reasoned opinion with respect to its "exclusion of Witness WUNHE's evidence" but only cites to a discussion in the Trial Judgement concerning Witness TA's ability to identify Ntahobali. *See* Ntahobali Appeal Brief, para. 613, *referring to* Trial Judgement, para. 2649. Ntahobali does not develop this general contention further and the Appeals Chamber therefore dismisses it without further consideration.
[4016] *See supra*, Section III.F.

which refugees from the prefectoral office were transferred to Rango Forest is materially different to Witness TA's testimony; and (v) Witness TA did not testify about the Night of Three Attacks.[4017]

1731. Ntahobali further argues that the Trial Chamber unreasonably failed to address several aspects of Witness TA's testimony that he alleges are inconsistent or contradictory, and which concern: (i) her compliance with instructions to remain behind the prefectoral office; (ii) the fact that she was raped in Nkubi; (iii) the number of members of her family who were killed; (iv) when refugees from the prefectoral office were transferred to Rango Forest; and (v) her presence at the EER.[4018] He contends that the Trial Chamber also failed to assess portions of Witness TA's evidence that he deems "implausible"[4019] as well as the witness's "aggressive and arrogant demeanour".[4020]

1732. The Prosecution responds that when the Trial Chamber discussed inconsistencies in Witness TA's testimony, it did so reasonably.[4021]

1733. The Appeals Chamber finds that Ntahobali overstates the nature of the relationship between Witnesses QBP and TA[4022] as well as their continuous presence together at the prefectoral office and the EER.[4023] The Appeals Chamber is therefore not persuaded that the fact that Witness QBP did not testify about the rapes Witness TA suffered demonstrates that the Trial Chamber erred in relying on the evidence of Witness TA that she was raped during the Mid-May Attack and the Last Half of May Attacks.[4024]

[4017] Ntahobali Appeal Brief, paras. 626, 630, 631, 634. *See also ibid.*, para. 677; AT. 15 April 2015 pp. 33, 50; Ntahobali Supplementary Submissions, para. 18.
[4018] Ntahobali Appeal Brief, paras. 626, 628.
[4019] Ntahobali Appeal Brief, para. 628.
[4020] Ntahobali Appeal Brief, para. 621. *See also* AT. 15 April 2015 p. 50. In his submissions with regard to Witness TA's demeanour, Ntahobali also points out that Judge Bossa had no opportunity to observe Witness TA's alleged "aggressive and arrogant" demeanour. *See* Ntahobali Appeal Brief, para. 621, *referring to ibid.*, Ground 1.6. However, the Appeals Chamber recalls that Judge Bossa certified her familiarisation with the record and did not consider that there were particular issues involving witness credibility that she needed to assess in light of the witnesses' visually observable demeanour in court. *See supra*, Section III.C.
[4021] Prosecution Response Brief, para. 989.
[4022] Ntahobali argues that Witness QBP's testimony demonstrates that they were relatives, yet her evidence reflects that she was unsure of the nature of the relationship and that they did not grow up in the same household. *See* Witness QBP, T. 29 October 2002 pp. 42, 43 (closed session).
[4023] Ntahobali argues that Witness QBP testified to "have always been with Witness TA" at the EER and the Butare Prefecture Office. *See* Ntahobali Appeal Brief, para. 634. As noted in relation to Nyiramasuhuko's appeal, the excerpts of Witness QBP's testimony do not reflect that they were continually together. *See supra*, fn. 2003.
[4024] Ntahobali also argues that Witness TA lacked credibility because she testified that she did not know anyone at the Butare Prefecture Office, contradicting Witness QBP's testimony to the contrary. *See* Ntahobali Appeal Brief, paras. 628, 634. However, Witness TA's testimony reflects that she did not meet people with whom she "developed a friendship". *See* Witness TA, T. 7 November 2001 p. 109. Moreover, although Witness TA also testified that she "did not know anybody", this was in response to whether she knew Witness SJ. *See ibid.*, p. 114 (closed session). Her evidence reflects that she knew persons who were at the prefectoral office and Witness TA was not asked if she knew Witness QBP. *See* Witness TA, T. 25 October 2001 pp. 81, 83, T. 29 October 2001 pp. 15, 25. *See also* Trial Judgement, paras. 2183, 2185. The Appeals Chamber is not persuaded by Ntahobali's suggestion that Witness TA sought to conceal that Witness QBP was present, or that no reasonable trier of fact could have relied upon Witness TA's

1734. The Appeals Chamber also fails to see how the evidence that Nsabimana gave an interview to BBC journalist Fergal Keane at the prefectoral office should have raised doubt in Witness TA's evidence concerning the Mid-May Attack and the Last Half of May Attacks. Fergal Keane appeared as a witness and testified that he arrived in Butare Prefecture around 15 June 1994, placing his visit some time after the attacks in question.[4025] The Appeals Chamber further observes that, in response to a compound question about whether "white people" came to film her or give food to the witness at the prefectoral office, Witness TA simply testified that she "did not see them."[4026] Through his blanket reference to the recording of the interview given by Nsabimana to Fergal Keane and the Trial Chamber's consideration of this evidence concerning the number of refugees at the prefectoral office around 15 June 1994,[4027] Ntahobali fails to demonstrate how this evidence contradicts Witness TA's or somehow raises doubts about her accounts concerning the Mid-May Attack and Last Half of May Attacks.

1735. Similarly, Ntahobali does not demonstrate that the Trial Chamber erred in failing to assess Witness TA's evidence concerning the transfer of refugees from the prefectoral office to Nyange in light of Witness QBQ's allegedly contradictory testimony. Ntahobali argues that Witness TA testified that refugees were forced onto "garbage trucks" while Witness QBQ denied this, testifying that there was only "one bus".[4028] However, the Appeals Chamber observes that the Trial Chamber noted Witness TA's evidence "that during her stay at the [Butare Prefecture Office] she and other refugees were picked up by *buses and vehicles used for rubbish collection* and driven to Nyange."[4029] In this regard, Witness TA's evidence is similar to that of several other witnesses, including Witness QBQ's, that refugees were removed from the prefectoral office in buses.[4030] Moreover, the reference provided by Ntahobali does not demonstrate that Witness QBQ unequivocally denied that a garbage truck was used and, contrary to Ntahobali's contention, this witness also indicated that more than one bus was involved.[4031]

1736. Ntahobali also fails to demonstrate any differences between the evidence of Witness TA and that of Witnesses RE, QBP, and TK concerning the circumstances under which refugees were

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evidence about the Mid-May Attack and Last Half of May Attacks because she did not discuss Witness QBP in her testimony. *See also infra*, para. 1860.

[4025] Fergal Keane, T. 25 September 2006 p. 10.

[4026] Witness TA, T. 7 November 2001 p. 94.

[4027] Ntahobali Appeal Brief, para. 626, *referring to* Exhibit D473, Trial Judgement, para. 5077.

[4028] Ntahobali Appeal Brief, para. 628, *referring to* Witness TA, T. 6 November 2001 p. 62, T. 7 November 2001 pp. 25, 26, Witness QBQ, T. 3 February 2004 p. 77.

[4029] Trial Judgement, para. 4125, *referring to* Witness TA, T. 6 November 2001 p. 62 (emphasis added).

[4030] *See* Trial Judgement, paras. 4154-4167.

[4031] *See* Witness QBQ, T. 3 February 2004 pp. 23, 75 (testifying that three buses were used), 77. *See also* Trial Judgement, paras. 4072, 4163. The Appeals Chamber observes that Ntahobali also refers to the testimony of Witness QBP at T. 24 October 2002 p. 100 to support his position concerning inconsistencies between Witness TA's

transferred from the Butare Prefecture Office to Rango Forest that would have prevented the Trial Chamber from relying on Witness TA's evidence concerning the Mid-May Attack and the Last Half of May Attacks. Ntahobali emphasises that Witness TA testified that refugees were attacked prior to boarding vehicles and that 1,000 refugees were transported in two buses, while Witnesses RE and QBP did not confirm that violence was used at this point, and Witnesses RE and TK only testified that one bus was used and that it "may not even have been full."[4032] The Appeals Chamber observes that the Trial Chamber found that it could not rely upon Witness TA's estimates as to the number of refugees taken from the prefectoral office to Rango Forest.[4033] In so finding, it nonetheless considered Witness TA's evidence "credible with respect to the time of her arrival and her experience at the [Butare Prefecture Office]."[4034] Since the Trial Chamber had already expressed doubts as to Witness TA's estimates concerning the number of refugees transferred, the Appeals Chamber is of the view that the Trial Chamber was under no obligation to provide any further analysis as to differences between Witness TA's evidence and any other witness's concerning the number of buses used to transfer refugees to Rango Forest.

1737. Moreover, nothing in Witness TA's testimony reflects, as Ntahobali alleges,[4035] that she testified that Tutsis were being killed as they boarded the buses to Rango Forest. Rather, her testimony indicates that those Tutsis who had not already been killed at the prefectoral office were transferred to Rango Forest.[4036] In contrast to Ntahobali's assertion that the Trial Chamber failed to address the contradictions between Witness TA's evidence and Witness RE's with respect to whether the refugees were beaten, the Appeals Chamber observes that the Trial Chamber found Witness TA's evidence largely consistent with the evidence of Witnesses SU, FAP, and Des Forges that the transfer was coercive.[4037] The Trial Chamber also addressed Witness RE's testimony in reaching this conclusion, noting that she testified that the transfer was supervised by *Interahamwe*.[4038] Indeed, although Witness RE stated that nobody was forced or manhandled into the buses in the excerpt of her testimony referenced by Ntahobali, the witness explained that this was because the transfer was obligatory.[4039] Ntahobali also fails to demonstrate any contradiction between Witness TA's testimony and Witness QBP's testimony that she did not see anyone being

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evidence and Witness QBP's concerning the transfer to Nyange. However, this aspect of Witness QBP's testimony concerns the transfer to Rango Forest.

[4032] Ntahobali Appeal Brief, para. 626.
[4033] Trial Judgement, para. 5075.
[4034] Trial Judgement, para. 5075.
[4035] Ntahobali Appeal Brief, para. 626.
[4036] Witness TA, T. 7 November 2001 pp. 26-30, 104-106, T. 8 November 2001 pp. 65-67.
[4037] Trial Judgement, paras. 5081, 5084.
[4038] Trial Judgement, para. 5081.
[4039] Witness RE, T. 27 February 2003 pp. 53, 54.

beaten because Witness QBP emphasised that she was only speaking from her perspective and confirmed that the transfer was forced.[4040]

1738. As for Ntahobali's contention that Witness TA's failure to testify about the Night of Three Attacks despite her presence at the prefectoral office during this time-period negatively impacts her credibility, the Appeals Chamber notes that Ntahobali fails to reference anything in Witness TA's evidence in support of his argument. Ntahobali merely refers to the testimony of Witness TA reflecting that she stayed at the prefectoral office between her arrival from the EER at the end of April 1994 and her departure to Rango Forest in June 1994, but highlights nothing in her testimony indicating that she stayed at the prefectoral office at all times between these two dates, or that every refugee at the prefectoral office witnessed or would have remembered the Night of Three Attacks.[4041]

1739. Turning to Ntahobali's submissions regarding the Trial Chamber's failure to address various internal inconsistencies within Witness TA's testimony as well as variances between her evidence at trial and in her prior statement, the Appeals Chamber finds that Ntahobali's argument that Witness TA contradicted herself as to whether or not she complied with instructions to remain behind the prefectoral office is without merit. Witness TA's evidence indicates that, while it was forbidden for the Tutsis to move from the back of the office, she and others did not always follow this instruction and sometimes moved to the front of the prefectoral office given the large number of people and lack of discipline.[4042]

1740. Likewise, Ntahobali fails to identify any material inconsistency in an excerpt of Witness TA's testimony that she was raped in Nkubi the day before she fled to the "*préfecture* office".[4043] Ntahobali simply extracts this line of Witness TA's testimony and ignores the surrounding evidence. Witness TA consistently testified that she went to the EER prior to going to the prefectoral office and was equally consistent as to the details of her rape by *Interahamwe* in Nkubi beforehand.[4044] When this statement of Witness TA is read in context with the entirety of her testimony, and particularly with her testimony immediately following it, which describes the roadblocks and corpses she passed on her way to Butare prefecture before reaching the EER and ultimately the prefectoral office,[4045] it is evident that Witness TA was not contradicting her

[4040] Witness QBP, T. 24 October 2002 pp. 8, 9.
[4041] *See* Ntahobali Appeal Brief, paras. 630, 631, 677; *infra*, Section V.I.2(d)(iii). *See also supra*, Section IV.F.2(e)(ii).
[4042] Witness TA, T. 5 November 2001 pp. 68, 99-101. *See also* Witness TA, T. 30 October 2001 pp. 22-26.
[4043] Ntahobali Appeal Brief, para. 626, *referring to* Witness TA, T. 29 October 2001 pp. 91, 92 ("A. […] [t]he day after the rape, I fled to the *préfecture* office.").
[4044] Witness TA, T. 29 October 2001 pp. 91, 92, T. 30 October 2001 pp. 70-72 (closed session), T. 5 November 2001 p. 114 (closed session), T. 6 November 2001 p. 81.
[4045] Witness TA, T. 29 October 2001 pp. 91-100. *See also* Witness TA, T. 30 October 2001 p. 70 (closed session), T. 6 November 2001 p. 32.

testimony that she went to the EER prior to the prefectoral office but merely made a general statement in relation to her movements that subsumed her trip to the EER as part of her journey to the prefectoral office.

1741. Ntahobali also misconceives Witness TA's evidence as to the number of members of her family who were killed during the genocide to suggest it is contradictory.[4046] Witness TA testified that she thought that up to 80 members of her family were killed in Butare in 1994, in general.[4047] Ntahobali confuses this aspect of Witness TA's testimony with her prior statement in which she describes an attack she suffered at the compound of a family member in which she and 30 other victims were thrown – wounded or dead – into a latrine, and with her related cross-examination in which she corrected her prior statement by stating that 60 people died during the attack as opposed to 30.[4048] Although the witness testified that the victims of the attack included members of her family, nothing in her testimony or her prior statement reflects that all of those killed were related to her when she referred to the number of victims.[4049]

1742. With respect to Ntahobali's contention that Witness TA's prior statement was contrary to her testimony about when refugees from the prefectoral office were transferred to Rango Forest, the Appeals Chamber notes that Witness TA consistently stated that this transfer took place in mid-June 1994 when testifying before the Trial Chamber.[4050] In light of the detailed evidence the witness provided as to her location between April and June 1994, and the Trial Chamber's finding that Witness TA was credible as to the timeline of the attack she witnessed at the prefectoral office, Ntahobali fails to demonstrate that the Trial Chamber erred in not expressly discussing the difference between her testimony and prior statement that the transfer occurred in May 1994.[4051]

1743. Contrary to Ntahobali's assertion, the Appeals Chamber further observes that the Trial Chamber expressly noted Witness TA's explanation that her prior statement did not reflect that she went to the EER prior to the prefectoral office because it was improperly recorded.[4052] The Trial Chamber also considered Witness TA's failure to mention that she was transferred to Nyange in her

[4046] Ntahobali Appeal Brief, para. 628, *referring to* Witness TA, T. 1 November 2001 pp. 9-15 (closed session), Trial Judgement, para. 2174.
[4047] Witness TA, T. 29 October 2001 p. 109.
[4048] Witness TA, T. 1 November 2001 pp. 10-15 (closed session).
[4049] Witness TA, T. 1 November 2001 pp. 12-16 (closed session); Witness TA's Statement, p. K0043299 (Registry pagination).
[4050] Witness TA, T. 29 October 2001 pp. 61, 62, T. 6 November 2001 pp. 62, 65, 68, 106, 107.
[4051] Witness TA stated in her prior statement that "[b]y the end of May 94 all the remaining refugees from the Prefecture were taken to Rango Forest where we spent about the whole month of June until the *Inkotanyi* came and rescued us." *See* Witness TA's Statement, p. K0043302 (Registry pagination). The Trial Chamber relied on Witness TA's evidence that the attacks she testified to at the prefectoral office occurred in mid-May 1994, the last half of May 1994, and during the first half of June 1994. *See* Trial Judgement, paras. 2644, 2653, 2773.

prior statement, noting that her testimony only "came out in response to a question posed in cross-examination by the Nyiramasuhuko Defence about Witness TA's transfer from the [prefectoral office] to Rango [Forest]".[4053] It also noted in its summary of Witness TA's evidence as to the events in Nyange that, when it was put to the witness that she had never mentioned having been sent to Nyange before Rango Forest in her prior testimony, she agreed.[4054] Witness TA explained that she had not mentioned it because she had not spent the night there as most of the refugees had been killed.[4055] Ntahobali fails to demonstrate that the Trial Chamber erred in accepting this explanation, particularly since it is consistent with other witness evidence that there was a partial transfer of refugees to Nyange that occurred prior to the transfer to Rango Forest[4056] and that it played a comparatively minor role in her experience of the attacks at the prefectoral office.

1744. The Appeals Chamber turns to Ntahobali's contention that the Trial Chamber failed to address, or erroneously relied on, several aspects of Witness TA's evidence that are "implausible" and failed to consider Witness TA's "aggressive and arrogant demeanour".[4057]

1745. By listing numerous extracted statements in Witness TA's testimony that he considers "implausible" and alleging that no reasonable trier of fact would have relied on Witness TA's evidence, Ntahobali fails to identify any error of fact or law on the part of the Trial Chamber, let alone how the error would have impacted the Trial Chamber's conclusion. Referring to the standards of appellate review recalled at the beginning of this Judgement, the Appeals Chamber dismisses Ntahobali's contention that it was unreasonable for the Trial Chamber to rely on Witness TA's evidence in light of these alleged "implausible accounts" by Witness TA.[4058]

1746. The Appeals Chamber also rejects Ntahobali's contentions that the Trial Chamber failed to address the impact of Witness TA's alleged "aggressive and arrogant demeanour" on her credibility. In support of his claim, Ntahobali argues that the interpreters "toned down" Witness TA's aggressive and arrogant statements by only partially translating them, without pointing to his submissions at trial in this respect.[4059] The Appeals Chamber notes that the Trial Chamber previously adjudicated this issue and Ntahobali fails to demonstrate any error in the Trial

[4052] *See* Trial Judgement, para. 3893, *referring to* Witness TA, T. 5 November 2001 p. 119 (closed session), Witness TA's Statement. The Trial Chamber observed that Witness TA explained that her mention of these events was not recorded in her statement. *See idem*.
[4053] Trial Judgement, para. 4055.
[4054] Trial Judgement, para. 4125. *See also ibid*., para. 5005.
[4055] Witness TA, T. 6 November 2001 pp. 62, 63.
[4056] *See* Trial Judgement, paras. 4153, 5073.
[4057] *See supra*, para. 1731.
[4058] *See supra*, Section II.
[4059] Ntahobali Appeal Brief, para. 621, *referring to ibid.*, Annex H.

Chamber's conclusion that Witness TA's demeanour was reflected in the written transcripts.[4060] Ntahobali also relies on the fact that Witness TA likened Ntahobali and Nyiramasuhuko's counsel to an *Interahamwe* during her testimony.[4061] The Appeals Chamber considers that a trial chamber's assessment of a witness's demeanour may be implicit in its assessment of the witness's credibility.[4062] The Appeals Chamber is of the view that a reasonable trier of fact could have considered that this aspect of Witness TA's demeanour in court did not undermine her credibility, particularly since the witness alluded to this in response to sensitive, and somewhat indelicate, questions posed during cross-examination as to whether she smelled when she was at the prefectoral office as well as in response to questions she feared would disclose her identity to the public.[4063]

1747. Recalling that the assessment of the demeanour of witnesses in considering their credibility is one of the fundamental functions of a trial chamber to which the Appeals Chamber must accord deference,[4064] and having reviewed the transcripts of Witness TA's testimony, the Appeals Chamber is not persuaded that the Trial Chamber was unreasonable in not expressly discussing Witness TA's demeanour or in not concluding that it undermined her credibility.[4065]

1748. Accordingly, the Appeals Chamber rejects these additional challenges to Witness TA's credibility as regards the Mid-May Attack and Last Half of May Attacks.

(v) Conclusion

1749. In light of the analysis above, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in relying on the evidence of Witness TA concerning his participation in the Mid-May Attack and the Last Half of May Attacks.

(d) Night of Three Attacks

1750. The Trial Chamber found that, around the end of May or the beginning of June 1994, Ntahobali, Nyiramasuhuko, and *Interahamwe* came to the Butare Prefecture Office on board a camouflaged pickup truck three times in one night.[4066] They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare Prefecture to be

[4060] 29 June 2004 Decision, para. 45.
[4061] Ntahobali Appeal Brief, para. 621, *referring to* Witness TA, T. 31 October 2001 pp. 63, 64, T. 1 November 2001 pp. 115, 116 (closed session).
[4062] *Cf. Nizeyimana* Appeal Judgement, para. 260; *Kanyarukiga* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 194.
[4063] Witness TA, T. 31 October 2001 pp. 63, 64, T. 1 November 2001 pp. 115, 116 (closed session).
[4064] *Nizeyimana* Appeal Judgement, paras. 56, 260; *Muvunyi* Appeal Judgement of 1 April 2011, para. 26.
[4065] *See also supra*, Section III.F.
[4066] Trial Judgement, paras. 2661, 2715, 2738, 2781(iii).

killed.[4067] It found that Nyiramasuhuko ordered the *Interahamwe* to commit these crimes, and determined that Ntahobali and the *Interahamwe* attacked women and children at the prefectoral office, assaulted them, and forced them onto the pickup truck.[4068] The Appeals Chamber recalls that it has determined, Judge Khan dissenting, that Ntahobali was not convicted on the basis of his conduct during the Night of Three Attacks.[4069] However, for the reasons mentioned above, the Appeals Chamber will nonetheless address Ntahobali's challenges to the assessment of the evidence concerning these attacks.[4070]

1751. The Trial Chamber identified several victims during these attacks, including Mbasha's wife and children, who the Trial Chamber concluded were abducted by Ntahobali and the *Interahamwe*.[4071] Recalling its finding that the Defence did not receive notice of the identity of Mbasha's wife and children, the Trial Chamber did not convict Ntahobali for these specific incidents.[4072] Rather, the Trial Chamber used this as circumstantial evidence to support its findings on abductions and killings of other unnamed Tutsi refugees at the prefectoral office.[4073]

1752. Ntahobali argues that the Trial Chamber erred in: (i) its conclusion related to the timing of the Night of Three Attacks; (ii) its assessment of the credibility and reliability of Prosecution witnesses; (iii) failing to consider Witnesses TA's and SD's silence on the Night of Three Attacks; (iv) its assessment of the abduction of Mbasha's wife and children during these attacks; (v) its assessment of evidence relating to other abductions during the Night of Three Attacks; and (vi) its assessment of general inconsistencies.[4074] The Appeals Chamber will address Ntahobali's contentions in turn.[4075]

(i) Timing of the Night of Three Attacks

1753. The Trial Chamber, noting the "similar timeline as to the date of the attacks" provided by Witnesses TK, QJ, SU, SS, and FAP, concluded that the Night of Three Attacks occurred "around the end of May or beginning of June 1994."[4076] It also concluded that "sometime between 5 June

[4067] Trial Judgement, paras. 2715, 2736, 2738, 2748, 2749, 2781(iii).
[4068] Trial Judgement, paras. 2736, 2738, 2781(iii).
[4069] *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4070] *See supra*, Section V.I.2.
[4071] Trial Judgement, para. 2727. *See also ibid*., para. 2661.
[4072] Trial Judgement, paras. 2172, 2716, 2727, 2730, 2782.
[4073] Trial Judgement, paras. 2172, 2716, 2727, 2730, 2782. *See also supra*, Section V.I.2(a)(ii).
[4074] Ntahobali Notice of Appeal, paras. 242, 243; Ntahobali Appeal Brief, paras. 657-704; Ntahobali Reply Brief, paras. 259-305.
[4075] In relation to the Night of Three Attacks, Ntahobali also relies several times on Nyiramasuhuko's submissions, without further development. *See* Ntahobali Appeal Brief, paras. 665, 693, 702. The Appeals Chamber notes that it has addressed and dismissed Nyiramasuhuko's relevant submissions in Section IV.F.2 above.
[4076] Trial Judgement, para. 2661. *See also ibid*., para. 2781(iii) ("Around the end of May to the beginning of June 1994").

and 15 June 1994" Nsabimana posted "*gendarmes* or soldiers" at the Butare Prefecture Office,[4077] that these security personnel had been "requisitioned by Nsabimana", and that the evidence did not "support an inference that Nsabimana requisitioned the soldiers and/or *gendarmes* to harm the refugees".[4078]

1754. Ntahobali submits that the Trial Chamber erred in finding that the Night of Three Attacks occurred around the end of May or beginning of June 1994.[4079] Relying on the evidence of Witnesses RE, TK, SU, and QBP, he argues that "[a]ny reasonable trier of fact could only have reached the logical and reasonable finding that the alleged attacks must have taken place after 5 June 1994", which is inconsistent with the Trial Chamber's conclusions that Nsabimana deployed *gendarmes* and soldiers to the prefectoral office sometime between 5 and 15 June 1994 and that abductions and rapes had ceased from that time on.[4080] According to Ntahobali, this precludes any finding beyond reasonable doubt that the Night of Three Attacks occurred.[4081]

1755. The Prosecution responds that Ntahobali fails to demonstrate how any reasonable trier of fact could only come to the conclusion based on the evidence at trial that the Night of Three Attacks "undoubtedly occurred after 5 June 1994"[4082] and that his arguments do not undermine the Trial Chamber's finding that the Night of Three Attacks occurred in late May or early June 1994.[4083]

1756. The Appeals Chamber observes that the Trial Chamber explicitly considered the accounts of Witnesses TK, SU, and RE regarding the timing of the attacks relied upon by Ntahobali in support of his contention that the attack must have occurred after 5 June 1994.[4084] The Appeals Chamber

[4077] Trial Judgement, para. 2812.
[4078] Trial Judgement, paras. 2813, 2815.
[4079] Ntahobali Appeal Brief, para. 658.
[4080] Ntahobali Appeal Brief, paras. 658 (*referring to* Trial Judgement, paras. 2809-2812), 660-662. *See also ibid*., paras. 659, 664, 709; AT. 15 April 2015 p. 52; AT. 16 April 2015 pp. 33, 34. Ntahobali argues that the Trial Chamber relied on the testimony of Witness SU to prove that abductions and rapes ceased once soldiers and gendarmes were posted at the Butare Prefecture Office. *See* Ntahobali Appeal Brief, para. 658. *See also* Ntahobali Reply Brief, para. 264; AT. 16 April 2015 p. 33.
[4081] Ntahobali Appeal Brief, paras. 659-662, 664. *See also* AT. 15 April 2015 p. 52.
[4082] Prosecution Response Brief, para. 1003. The Prosecution argues that the first week of June 1994 ran from Wednesday 1 June to Saturday 4 June, that the transfer to Nyange therefore happened between this time, and that the Night of Three Attacks could have occurred during this period, as Witnesses RE and TK testified. *See idem*.
[4083] Prosecution Response Brief, paras. 994, 997-1008.
[4084] The Trial Chamber noted that Witness TK testified to arriving at the Butare Prefecture Office at the end of May or early June, after the attempted transfer of Tutsi refugees to Nyange, and that therefore "all of her testimony pertained to events from the beginning of June 1994." *See* Trial Judgement, paras. 2203, 2655, *referring*, *inter alia*, *to* Witness TK, T. 21 May 2002 pp. 121, 122 (closed session), T. 23 May 2002 pp. 51, 52. As for Witness SU, the Trial Chamber considered her testimony that the Night of Three Attacks occurred "on a Friday after she had arrived at the [Butare Prefecture Office]" and that "[t]his would place the date in June 1994" as the witness arrived towards the end of May 1994. *See* Trial Judgement, paras. 2242, 2251, 2655; Witness SU, T. 14 October 2002 p. 30. With respect to Witness RE, the Trial Chamber explicitly considered her testimony that the Night of Three Attacks occurred after the attempted transfer to Nyange and President Sindikubwabo's visit to the Butare Prefecture Office. *See* Trial Judgement, paras. 2276, 2277, 2657; Witness RE, T. 25 February 2003 pp. 46, 47, T. 27 February 2003 p. 5. Witness RE explicitly

finds that Ntahobali has not demonstrated that, on the basis of this evidence, it was unreasonable for the Trial Chamber to conclude that the Night of Three Attacks could have occurred around the end of May or the beginning of June 1994.

1757. With respect to Witness QBP, the Appeals Chamber observes that the Trial Chamber did not expressly rely on this witness when concluding that the Night of Three Attacks occurred around the end of May or beginning of June 1994.[4085] Nevertheless, the Trial Chamber stated, in the course of its analysis on this event, that it was convinced that Witness QBP was referring to the Night of Three Attacks when testifying about the only attack she described.[4086] However, a careful review of Witness QBP's testimony reveals that she did not testify about the Night of Three Attacks. Instead, as noted in another part of the Trial Judgement, the Trial Chamber found that Witness QBP's testimony on an attack at the prefectoral office concerned an attack after the Night of Three Attacks in the first half of June 1994.[4087] Ntahobali's reliance on Witness QBP's testimony as it relates to the timing of the Night of Three Attacks is therefore misplaced. As to the Trial Chamber's erroneous statement about the relevance of Witness QBP's evidence to the Night of Three Attacks, the Appeals Chamber observes that the Trial Chamber did not in fact rely on Witness QBP's evidence regarding the timing of the Night of Three Attacks, or Ntahobali's and Nyiramasuhuko's conduct during this particular night.[4088] The Appeals Chamber therefore finds that this error has not occasioned a miscarriage of justice.

1758. In any event, regardless of when exactly the Night of Three Attacks occurred at the end of May 1994 or at the beginning of June 1994, the Appeals Chamber sees no merit in Ntahobali's argument that the posting of security personnel at the prefectoral office is inconsistent with the finding that the attacks took place. Contrary to Ntahobali's arguments, the Trial Chamber did not find that all abductions and rapes ceased once *gendarmes* and/or soldiers were posted at the prefectoral office.[4089] In fact, the Trial Chamber expressly determined that additional attacks

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stated that she was unsure of the exact timing of events. *See* Witness RE, T. 25 February 2003 pp. 39, 40, 43, 46, T. 27 February 2003 p. 5.

[4085] *See* Trial Judgement, para. 2661.

[4086] Trial Judgement, para. 2657.

[4087] Witness QBP, T. 24 October 2002 pp. 84-86, 88, T. 28 October 2002 pp. 71, 74; Trial Judgement, para. 2750. *See also supra*, paras. 894, 960; *infra*, paras. 1757, 1863.

[4088] As discussed above, Witness QBP's testimony was only relied upon as circumstantial evidence for the Night of Three Attacks in relation to the vehicle used during the attacks at the prefectoral office, and as to what Nyiramasuhuko wore in general. *See supra*, Section V.I.2(b)(iii)c; Trial Judgement, para. 2698, fn. 7559.

[4089] The Trial Chamber stated that the "evidence establishe[d] that these soldiers forestalled attacks against those taking refuge" at the Butare Prefecture Office. *See* Trial Judgement, para. 5902, *referring to* Witness SU, T. 21 October 2002 p. 38, Witness SS, T. 10 March 2003 pp. 34, 35. According to Witness SU, the *gendarmes* prevented the abduction of refugees when a red Toyota vehicle came to the prefectoral office and they continued to guard the refugees. However, she testified that the *gendarmes*, realising that they were guarding Tutsi refugees, threatened to kill the refugees should the RPF arrive. *See* Witness SU, T. 21 October 2002 pp. 38, 39. Witness SS testified that, on one occasion, the soldiers chased away a vehicle coming to abduct people, but she also stated that "this did not stop the abduction from continuing because later on they came." *See* Witness SS, T. 10 March 2003 pp. 34, 35. *See also* Trial Judgement, para. 2290.

occurred in the first half of June 1994.[4090] The lack of merit of Ntahobali's argument is further reflected by his reliance on Witness SU's evidence to submit that the Night of Three Attacks did not occur because the witness testified that abductions and rapes had ceased once Nsabimana posted *gendarmes* and soldiers at the prefectoral office.[4091] In fact, Witness SU gave direct evidence about the Night of Three Attacks, which the Trial Chamber relied on to find that the attacks occurred.[4092] Similarly, Witnesses RE and TK, on whom Ntahobali relies to support his theory, also testified about the Night of Three Attacks.[4093]

1759. Based on the foregoing, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred as to the timing of the Night of Three Attacks.

(ii) Credibility and Reliability of Prosecution Witnesses

1760. Ntahobali challenges the Trial Chamber's reliance on the testimonies of Witnesses QY, SJ, QBQ, FAP, SS, SU, and RE about the Night of Three Attacks.[4094]

a. Witnesses QY and SJ

1761. The Trial Chamber relied, *inter alia*, on the evidence of Witnesses QY and SJ in support of its finding that Ntahobali and the *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, abducting Tutsi refugees on each occasion.[4095]

1762. Ntahobali argues that, given the Trial Chamber's findings elsewhere in the Trial Judgement, the evidence of Witnesses QY and SJ was not reliable or credible and that the Trial Chamber erred in relying on their testimonies with respect to the Night of Three Attacks.[4096]

1763. The Prosecution responds that Ntahobali's arguments lack merit and that he fails to demonstrate how the Trial Chamber erred in relying on the testimonies of Witnesses QY and SJ where they corroborated other evidence pertaining to the Night of Three Attacks.[4097]

1764. The Appeals Chamber has previously determined that the Trial Chamber erred in relying on the evidence of Witnesses QY and SJ with respect to the presence of Nyiramasuhuko and Ntahobali

[4090] Trial Judgement, para. 2751. *See also ibid*., paras. 2750, 2752-2773.
[4091] *See* Ntahobali Appeal Brief, paras. 658, 659.
[4092] Trial Judgement, paras. 2251-2253, 2661, 2703, 2706, 2715, 2731, 2732, 2736, 2738.
[4093] *Compare* Ntahobali Appeal Brief, para. 661, *referring to* Witnesses RE and TK *with* Trial Judgement, paras. 2211-2216, 2277, 2278, 2654-2661, 2703, 2704, 2707, 2715, 2717, 2719, 2724, 2725, 2727-2730, 2738.
[4094] Ntahobali Appeal Brief, paras. 667-674, 686, 687, 690, 691, 699.
[4095] Trial Judgement, paras. 2663, 2664, 2703, 2705, 2713.
[4096] Ntahobali Appeal Brief, paras. 667, 668. *See also* Ntahobali Reply Brief, para. 275.
[4097] Prosecution Response Brief, paras. 1044-1048.

during the Night of Three Attacks.[4098] For the reasons stated previously,[4099] the Appeals Chamber finds that it was also unreasonable for the Trial Chamber to rely on Witnesses QY's and SJ's testimonies to establish that Nyiramasuhuko, Ntahobali and the *Interahamwe* came to the prefectoral office three times in one night, abducting Tutsi refugees on each occasion.

1765. Nevertheless, as for the issue of identification of Nyiramasuhuko and Ntahobali, the Appeals Chamber is not persuaded that the Trial Chamber's erroneous reliance on Witnesses QY and SJ occasioned a miscarriage of justice.[4100] Aside from the accounts of Witnesses QY and SJ, the Trial Chamber relied on the evidence of Witnesses TK, RE, SU, SS, FAP, and QBQ to establish that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came to the prefectoral office three times in one night to abduct Tutsi refugees.[4101] The Trial Chamber also relied on the evidence of Witnesses RE, FAP, SU, and QBQ to determine that certain refugees survived the abductions and returned to the prefectoral office to inform the remaining refugees that abducted persons had been killed.[4102]

1766. The Appeals Chamber is likewise not persuaded that the evidence of Witness QY or Witness SJ was essential to the Trial Chamber's determinations that: (i) the Night of Three Attacks occurred around the end of May or beginning of June 1994;[4103] (ii) Ntahobali participated in the abduction of Mbasha's wife and children;[4104] and (iii) Ntahobali and the *Interahamwe*, based on Nyiramasuhuko's orders, attacked and forced women and children aboard a pickup truck, and that the women and children were taken from the prefectoral office and killed elsewhere.[4105]

1767. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in relying on the evidence of Witnesses QY and SJ when making findings about the Night of Three Attacks.

[4098] *See supra*, paras. 804, 846, 1657, 1678.
[4099] *See supra*, Sections IV.F.2(c)(ii)d, IV.F.2(c)(iii)f, V.I.2(b)(iii)a.ii, V.I.2(b)(iii)c.
[4100] *See supra*, paras. 856, 1687.
[4101] *See* Trial Judgement, paras. 2703, 2704, 2706-2712, 2714, 2715. The Appeals Chamber has addressed and dismissed in the section below Ntahobali's challenges to the Trial Chamber's reliance on the evidence of Witnesses TK, SU, SS, FAP, and QBQ in these respects.
[4102] *See* Trial Judgement, paras. 2746-2748.
[4103] *See* Trial Judgement, para. 2661. While the Trial Chamber referred to the evidence of Witness SJ as it related to the timing of the Night of Three Attacks, the Trial Chamber emphasised that Witness SJ's account differed from the testimonies of Witnesses TK, QJ, SU, SS, and FAP as to when the attacks occurred. *See ibid*., para. 2659. *See also ibid*., para. 2654. Noting that Witnesses TK, QJ, SU, SS, and FAP provided "a similar timeline", the Trial Chamber reached its conclusion that the Night of Three Attacks occurred around the end of May or beginning of June 1994 based on their evidence. *See ibid*., para. 2661.
[4104] The Trial Chamber expressly rejected Witness SJ's evidence and did not refer to Witness QY's evidence in its analysis pertaining to the abduction of Mbasha's wife and children. *See* Trial Judgement, paras. 2717-2727.
[4105] Trial Judgement, para. 2736. The Trial Chamber did not refer to the evidence of Witnesses QY and SJ to determine that, during the Night of Three Attacks, Ntahobali, Nyiramasuhuko, and the *Interahamwe* abducted refugees who were killed elsewhere. *See idem*. Furthermore, the Appeals Chamber is not persuaded that the evidence of Witnesses QY and SJ was material to the Trial Chamber's conclusion that refugees were abducted from the prefectoral office in order to be killed. *See ibid.*, paras. 2743, 2746, 2747. Consequently, to the extent that the Trial Chamber erred in relying on this evidence, the Appeals Chamber does not find that it has occasioned a miscarriage of justice.

However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice and dismisses Ntahobali's contentions in this regard.

b. Witness QBQ

1768. The Trial Chamber relied on the evidence of Witness QBQ in support of its finding that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, abducting Tutsi refugees on each occasion.[4106]

1769. Ntahobali submits that the Trial Chamber erred in relying on Witness QBQ's testimony about the Night of Three Attacks.[4107] He contends that her evidence reflects that these attacks occurred in April or early May 1994,[4108] before the transfer to Nyange,[4109] therefore contradicting the Trial Chamber's findings "on all events, as well as the testimony of other witnesses that it endorsed."[4110] In this regard, he submits that the Trial Chamber "committed a serious error" in considering that Witness QBQ testified about the Night of Three Attacks "in June" merely because she referred to Semanyenzi's survival.[4111] In Ntahobali's view, the "inconsistencies in the dates" should have led the Trial Chamber to discard Witness QBQ's evidence as it did with Witness QY's, particularly because Witness QY had testified that she and Witness QBQ were "always together" at the prefectoral office.[4112]

1770. Ntahobali also emphasises that, in her prior statement, Witness QBQ only described one attack "on that same night" and did not mention him.[4113] He further contends that the Trial Chamber "erroneously disregarded" several inconsistencies in Witness QBQ's prior statement without noting that she consistently blamed errors on Tribunal investigators.[4114]

[4106] Trial Judgement, paras. 2663, 2664, 2686, 2693, 2699, 2703, 2714, 2715, 2738. The Trial Chamber also relied upon Witness QBQ's evidence in support of its finding that, from mid-May through June 1994, Ntahobali and Nyiramasuhuko participated in the abduction of multiple truckloads of Tutsi refugees from the prefectoral office and that these refugees were killed. *See ibid*., paras. 2747-2749.
[4107] Ntahobali Appeal Brief, para. 669.
[4108] Ntahobali Appeal Brief, para. 669. Specifically, Ntahobali points to Witness QBQ's testimony that she arrived at the prefectoral office in late April 1994 and that the Night of Three Attacks occurred three days after her arrival. *See idem*, *referring to* Witness QBQ, T. 3 February 2004 pp. 6-11.
[4109] Ntahobali Appeal Brief, para. 669, *referring to* Witness QBQ, T. 3 February 2004 pp. 22-24. Ntahobali also notes that Witness QBQ testified that the transfer to Nyange occurred prior to the transfer to the EER and that her evidence indicates that the departure for Rango Forest occurred the "day after" the return from the EER. *See idem*.
[4110] Ntahobali Appeal Brief, para. 669.
[4111] Ntahobali Appeal Brief, para. 669.
[4112] Ntahobali Appeal Brief, para. 669.
[4113] Ntahobali Appeal Brief, para. 669. *See also* Ntahobali Reply Brief, para. 274.
[4114] Ntahobali Appeal Brief, para. 669.

1771. The Prosecution responds that the Trial Chamber reasonably concluded that Witness QBQ testified about the Night of Three Attacks and that Ntahobali distorts her testimony and prior statement to allege inconsistencies that do not exist.[4115]

1772. The Appeals Chamber observes that the Trial Chamber expressly summarised Witness QBQ's testimony with respect to her arrival at the prefectoral office, the timing of the Night of Three Attacks as well as her transfers to Nyange, the EER, and Rango Forest.[4116] The Appeals Chamber notes that the Trial Chamber did not rely on Witness QBQ's testimony when it assessed and determined that the Night of Three Attacks occurred around the end of May or beginning of June 1994.[4117] Nevertheless, the Trial Chamber expressly noted that Witness QBQ testified about the abduction and escape of Semanyenzi and that Witnesses RE, SS, SU, and FAP also testified that "a man named Semanyenzi was abducted on the [N]ight of [T]hree [A]ttacks at the [Butare Prefecture Office] which occurred around the beginning of June 1994."[4118] It then concluded that Witness QBQ's testimony pertained "to this event at the beginning of June 1994."[4119] On this basis, the Appeals Chamber is of the view that the Trial Chamber carefully considered Witness QBQ's testimony in relation to the Night of Three Attacks and the timing of its occurrence.

1773. Bearing this analysis in mind, the Appeals Chamber rejects Ntahobali's submission that the Trial Chamber determined that Witness QBQ testified about the Night of Three Attacks simply because she testified about Semanyenzi's survival. As discussed in detail above, the Trial Judgement shows that Witness QBQ's testimony is consistent with other evidence in relation to significant features relating to the Night of Three Attacks which do not concern Semanyenzi's survival.[4120] Ntahobali demonstrates no error in the Trial Chamber's assessment of the witness's testimony with respect to these other features.[4121] Given the considerable overlap between the account of Witness QBQ and that of several other witnesses in relation to the Night of Three Attacks, the Appeals Chamber finds that a reasonable trier of fact could have relied on Witness QBQ's evidence, despite any variances between her evidence and that of other witnesses regarding the timing of the Night of Three Attacks.

[4115] Prosecution Response Brief, paras. 1041-1043.
[4116] *See* Trial Judgement, paras. 2328-2330, 2334, 3891, 4071-4075, 5022.
[4117] *See* Trial Judgement, para. 2661. The Appeals Chamber relied on the evidence of Witnesses TK, QJ, SS, SU, and FAP to make determinations on the timing of the Night of Three Attacks. *See idem*.
[4118] Trial Judgement, para. 2658.
[4119] Trial Judgement, para. 2658.
[4120] *See supra*, para. 891.
[4121] *See supra*, para. 1681.

1774. Likewise, Ntahobali does not demonstrate that discrepancies between Witness QBQ's testimony and the Trial Chamber's findings, or other evidence on the record, relating to transfers to Nyange, the EER, or Rango Forest made it unreasonable for the Trial Chamber to rely on her otherwise credible and corroborated account of the Night of Three Attacks. The Appeals Chamber understands Ntahobali's argument to be that Witness QBQ's evidence of being transferred to Nyange before being transferred to the EER is contrary to the Trial Chamber's conclusions on the timing of these transfers from the prefectoral office.[4122] In the same vein, he argues that her testimony that the transfer to Rango Forest occurred one day after the return from the EER is also contrary to the Trial Chamber's findings.[4123] The Appeals Chamber notes that the Trial Chamber did not rely on the evidence of Witness QBQ as to the timing of the Nyange transfer or Nsabimana's orders to have refugees transferred to the EER from the prefectoral office.[4124] With respect to the timing of the transfer to Rango Forest, the Trial Chamber explicitly considered that Witness QBQ's testimony conflicted with other evidence and, accordingly, did not find her credible as to the timeframe of this transfer.[4125]

1775. Accordingly, the Appeals Chamber is not persuaded that the Trial Chamber ignored these discrepant aspects of Witness QBQ's evidence or that it was required to assess them when considering her testimony on the Night of Three Attacks. In the view of the Appeals Chamber, Ntahobali's focus on details of Witness QBQ's evidence regarding the timing of events ignores the precarious circumstances upon which she sought refuge at the Butare Prefecture Office, as noted by the Trial Chamber.[4126] Ntahobali also ignores the Trial Chamber's conclusion that the circumstances at the prefectoral office, based on the evidence of survivors, "paint[ed] a clear picture of unfathomable depravity and sadism."[4127] Given the deference which must be accorded to a trial chamber's assessment of witness evidence, the Appeals Chamber considers that the Trial Chamber was entitled to disregard Witness QBQ's testimony regarding the timing of certain events, while relying on her account, where it was credible and corroborated, in relation to the Night of Three Attacks.

1776. The Appeals Chamber turns to Ntahobali's contention that the Trial Chamber should have discarded Witness QBQ's evidence as it discarded that of Witness QY, particularly because

[4122] *See* Ntahobali Appeal Brief, para. 669.
[4123] *See* Ntahobali Appeal Brief, para. 669.
[4124] *See* Trial Judgement, paras. 3890, 3891, 3931-3934, 4071-4076, 4151, 4152.
[4125] Trial Judgement, para. 5072. As noted previously, the Appeals Chamber does not consider that the Trial Chamber's erroneous reliance on aspects of intrinsically related evidence concerning the presence of Nyiramasuhuko and Nsabimana at the prefectoral office in April 1994 precluded a reasonable trier of fact from finding that Witness QBQ testified about the Night of Three Attacks. *See supra*, para. 890.
[4126] *See* Trial Judgement, para. 2328.
[4127] Trial Judgement, para. 5866.

Witness QY had testified that she and Witness QBQ were "always together" at the prefectoral office.[4128] The Appeals Chamber is not convinced that the Trial Chamber was required to assess both witnesses and their evidence identically.[4129] In this regard, the Appeals Chamber recalls that the Trial Chamber unequivocally rejected Witness QY's evidence due to discrepancies in her testimony, the unreliable nature of her identification evidence, and her admission that she had lied to the Trial Chamber about whether she knew Witnesses QBQ and SJ.[4130] To the contrary, the Trial Chamber found several elements of Witness QBQ's evidence about the Night of Three Attacks credible and corroborated.[4131] Furthermore, given the Trial Chamber's determination that Witness QY lacked credibility, Ntahobali does not demonstrate that the Trial Chamber erred in not relying on her testimony that she was "always together" with Witness QBQ at the prefectoral office to discount Witness QBQ's evidence.

1777. Further, the Appeals Chamber finds no merit in Ntahobali's contention about inconsistencies between Witness QBQ's testimony and her June 1999 prior statement.[4132] Having reviewed her prior statement, the Appeals Chamber observes that the witness explicitly mentioned multiple attacks in one night and Ntahobali's presence.[4133] The Appeals Chamber considers that Ntahobali's selective reference to parts of Witness QBQ's prior statement fails to demonstrate that this inconsistency could undermine the witness's credibility or her otherwise corroborated account of the Night of Three Attacks.

1778. As to Ntahobali's allegations of other discrepancies between Witness QBQ's prior statement and her testimony at trial, the Appeals Chamber notes that Ntahobali merely refers to pages of the transcript of her testimony without specifying the discrepancies or explaining how they undermine the Trial Chamber's assessment of her evidence and credibility. Given the vague and unsubstantiated nature of his submissions, the Appeals Chamber dismisses Ntahobali's argument in this regard.

1779. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in its assessment of Witness QBQ's testimony.

[4128] Ntahobali Appeal Brief, para. 699, *referring to* Witness QY, T. 23 February 2009 pp. 39, 40 (closed session).
[4129] *See also supra*, para. 892.
[4130] *See supra*, paras. 892, 1677.
[4131] *See supra*, para. 891.
[4132] *See* Ntahobali Appeal Brief, para. 669, *referring to* Witness QBQ, T. 3 February 2004 pp. 64, 65, 67, 68, Exhibit D148 (Witness QBQ's Statement). *See also* Ntahobali Reply Brief, para. 274.
[4133] Witness QBQ's Statement, p. 5566 (Registry pagination) ("Pauline again came back in the 'Pick up' van described earlier, with her son Shalom as the driver. […] When she arrived, she promptly ordered the *Interahamwe* to select some people from the crowd of refugees. Her orders were carried out to the letter. A woman who resisted was clubbed to death in the presence of Pauline. PAULINE did not even flinch. We learnt later that the people were taken to a place called MUKONI where they were killed and dumped in a mass grave. Pauline paid two more visits to the [prefectoral] office to take people away in similar fashion. The people taken away were never seen again.").

c. Witness FAP

1780. The Trial Chamber relied on the evidence of Witness FAP regarding the timing of the Night of Three Attacks and in support of its finding that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, abducting Tutsi refugees on each occasion.[4134] The Trial Chamber also relied on the evidence of Witness FAP to conclude that Ntahobali and *Interahamwe* attacked women and children at the prefectoral office, forced them aboard the pickup truck, and that the women and children were taken away and killed elsewhere.[4135]

1781. Ntahobali submits that the Trial Chamber unreasonably ignored numerous contradictions and inconsistencies that rendered Witness FAP's evidence incredible with respect to the Night of Three Attacks.[4136] Specifically, he contends that Witness FAP gave inconsistent evidence as to whether Hutu refugees were present during the Night of Three Attacks and submits that Witness QBP contradicted Witness FAP "on the presence of refugees that night".[4137] He also avers that Witness FAP's testimony that no "grown men" were left at the prefectoral office on the Night of Three Attacks was contradicted by "other witnesses" and a video admitted into evidence.[4138] Ntahobali argues that, in light of these errors, it was unreasonable for the Trial Chamber to believe that Witness FAP testified about the Night of Three Attacks simply because she spoke about Semanyenzi's survival.[4139]

1782. In addition, Ntahobali points to alleged contradictions in Witness FAP's testimony that do not directly concern the Night of Three Attacks but, in his view, undermine her credibility.[4140] In particular, he highlights that Nsabimana testified that refugees transferred from the Butare University Hospital to the prefectoral office arrived on 2 May 1994 and suggests that this evidence contradicts Witness FAP's testimony that she left the hospital and arrived at the prefectoral office in the "last two weeks of May" 1994.[4141] He also argues that Witness FAP's evidence about the timing of her arrival at the prefectoral office is contradicted by the Trial Chamber's finding that refugees at the prefectoral office had already been transferred to the EER at this time.[4142] Ntahobali further

[4134] Trial Judgement, paras. 2654, 2656, 2660, 2661, 2663, 2664, 2703, 2710-2712, 2715.
[4135] Trial Judgement, para. 2736. The Trial Chamber also relied upon the testimonies of Witness FAP to find that, from mid-May through June 1994, Ntahobali and Nyiramasuhuko participated in the abduction of multiple Tutsi refugees from the Butare Prefecture Office, who were subsequently killed. *See ibid*., paras. 2746, 2747, 2749.
[4136] Ntahobali Appeal Brief, para. 670. *See also* Ntahobali Reply Brief, para. 280.
[4137] Ntahobali Appeal Brief, para. 670, *referring to* Trial Judgement, paras. 2300, 2302, 2307, 2308, Witness FAP, T. 11 March 2003 pp. 45, 46, Witness QBP, T. 28 October 2002 pp. 49, 50.
[4138] Ntahobali Appeal Brief, para. 670, *referring to* Trial Judgement, para. 2307, Exhibit D473 (Nsabimana Interview with Fergal Keane).
[4139] Ntahobali Appeal Brief, para. 670.
[4140] Ntahobali Appeal Brief, para. 670.
[4141] Ntahobali Appeal Brief, para. 670.
[4142] Ntahobali Appeal Brief, para. 670.

emphasises that Witness FAP did not testify about the transfer to the EER or Nyange, even though she remained at the prefectoral office until she left for Rango Forest.[4143]

1783. The Prosecution responds that Ntahobali's arguments regarding Witness FAP should be dismissed as he fails to demonstrate how the Trial Chamber erred in accepting her testimony.[4144]

1784. In the view of the Appeals Chamber, Ntahobali's contentions regarding inconsistencies and contradictions in Witness FAP's evidence about the Night of Three Attacks ignore the key aspects of the witness's testimony that the Trial Chamber relied upon and found corroborated by Witnesses TK, RE, QBQ, SS, and SU.[4145] In particular, the Trial Chamber noted Witness FAP's testimony that: (i) a black camouflage-coloured vehicle covered with mud arrived three times during the same evening, each time with Nyiramasuhuko and Ntahobali on board, and each time taking away many refugees who never returned;[4146] (ii) on the second trip, Nyiramasuhuko instructed the *Interahamwe* to load the Tutsi refugees into the vehicle and the *Interahamwe* herded young Tutsi men, women, and children into the vehicle by beating them;[4147] and (iii) on the third trip, Nyiramasuhuko instructed Ntahobali and the *Interahamwe* to select systematically young women and girls to rape and kill them, that the women were not raped but thrown onto the vehicle, and that the *Interahamwe* drove them away.[4148] Based on elements of Witness FAP's evidence and that of other witnesses, including Witnesses TK, RE, QBQ, SS, and SU, the Trial Chamber determined that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came aboard a camouflaged pickup truck multiple times in one night, that Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup truck, and that the pickup truck left the prefectoral office abducting refugees.[4149]

1785. In this context, Ntahobali's contention about the purported inconsistency in Witness FAP's testimony as to whether Hutu refugees were still present during the Night of Three Attacks is immaterial.[4150] Likewise, Ntahobali's undeveloped contention that Witness QBP's testimony

[4143] Ntahobali Appeal Brief, para. 670.
[4144] Prosecution Response Brief, paras. 1057-1061.
[4145] *See* Trial Judgement, para. 2738.
[4146] Trial Judgement, paras. 2302, 2710.
[4147] Trial Judgement, para. 2711.
[4148] Trial Judgement, para. 2712.
[4149] *See* Trial Judgement, paras. 2660, 2706-2709, 2715, 2738. *See also ibid*., paras. 2211-2215, 2251-2253, 2277, 2278, 2284, 2285, 2287, 2289.
[4150] The Appeals Chamber observes that, in any event, there is no internal inconsistency in Witness FAP's evidence regarding the presence of Hutu refugees during the Night of Three Attacks. The Trial Chamber noted her evidence that "Hutu refugees stayed in a house, prepared food and the next day were transferred to Mubumbano". *See* Trial Judgement, para. 2300, *referring to* Witness FAP, T. 11 March 2003 p. 45, T. 12 March 2003 pp. 7, 46. However, Witness FAP explicitly stated that the Hutu refugees "were not a stable group", that a group would come and stay for a few days, and that "each time there was another group that would arrive". When asked if the Hutu refugees were a constant presence at the prefectoral office, Witness FAP responded: "Yes, the [prefectoral] office was their

"contradicted Witness FAP's on the presence of refugees that night" fails to identify how the Trial Chamber erred in the assessment of the latter's evidence.[4151] Regarding the absence of grown men during the Night of Three Attacks, Ntahobali simply points to an aspect of Witness FAP's testimony about the second attack on this evening, when young Tutsi men, women, and children were herded and beaten.[4152] Ntahobali's submissions fail to substantiate how this discrete aspect of Witness FAP's testimony could undermine the rest of her evidence or her credibility, particularly given the varying vantage points of all the witnesses who observed the attack as it unfolded. In this regard, Ntahobali does not demonstrate that a BBC video, which the Trial Chamber considered was only created around 15 June 1994, reflecting the presence of men at the prefectoral office is somehow incompatible with Witness FAP's evidence about what she saw during the Night of Three Attacks.[4153] Finally, Ntahobali's contention that the Trial Chamber found that Witness FAP testified about the Night of Three Attacks simply because she spoke about Semanyenzi's survival ignores the numerous other elements of Witness FAP's testimony that were corroborated and found credible by the Trial Chamber and demonstrated that she was present during that particular night.

1786. Turning to Ntahobali's challenges concerning aspects of Witness FAP's testimony that are not directly related to the Night of Three Attacks, the Appeals Chamber finds that Ntahobali fails to demonstrate that Witness FAP's evidence concerning the timing of her arrival at the prefectoral office is necessarily inconsistent with Nsabimana's evidence,[4154] or that her presence at the prefectoral office sometime in the last two weeks of May 1994 is contradictory to the Trial Chamber's findings concerning the transfer of refugees to the EER.[4155] Moreover, Witness FAP's testimony appears to reflect that she arrived at the prefectoral office after refugees were transferred

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resting place before they were transferred elsewhere. Every time they came, they would rest first […] before they continued on their way." *See* Witness FAP, T. 12 March 2003 pp. 46, 47.

[4151] The Appeals Chamber observes that Ntahobali simply points to Witness QBP's testimony at T. 28 October 2002 pp. 49, 50 without referencing the specific portion of Witness FAP's evidence that it allegedly contradicts. Ntahobali also fails to elaborate how his challenge relates to a finding by the Trial Chamber based on Witness FAP's testimony. Consequently, the Appeals Chamber dismisses this aspect of Ntahobali's appeal.

[4152] Ntahobali Appeal Brief, para. 670, *referring to* Trial Judgement, para. 2307.

[4153] *See* Trial Judgement, para. 2384, *referring to* Exhibit D473 (Nsabimana Interview with Fergal Keane), Fergal Keane, T. 25 September 2006 p. 10. *See also ibid*., para. 5077.

[4154] Ntahobali points to the Trial Chamber's summary of Nsabimana's testimony and related exhibits reflecting that certain persons were transferred from the Butare University Hospital to the Butare Prefecture Office on 2 May 1994. *See* Ntahobali Appeal Brief, para. 670, *referring to* Trial Judgement, para. 2394, Exhibit D479B (Letter from Vice-Rector of National University of Rwanda, 25 April 1994), Exhibit D480B (Letter from Nsabimana to Deputy Vice-Chancellor, 2 May 1994). However, it is unclear to the Appeals Chamber how this aspect of Nsabimana's testimony and the relevant exhibits undermine the Trial Chamber's finding that Witness FAP was at the prefectoral office and was an eye-witness to the Night of Three Attacks. Indeed, Ntahobali does not demonstrate that Witness FAP arrived with the refugees, about which Nsabimana was testifying. *Compare* Trial Judgement, para. 2298 (Witness FAP) *with ibid*., paras. 2394, 2395 (Nsabimana).

[4155] As previously discussed, the Appeals Chamber considers that the Trial Chamber's conclusions reflect that displaced Tutsis who sought refuge at the prefectoral office were moved to the EER between 15 and 20 May 1994 and stayed there until approximately 31 May 1994, when they returned to the prefectoral office. However, in the view of the Appeals Chamber, these findings are not categorical or inconsistent with findings and evidence that refugees remained

to the EER, making it reasonable that she would not have testified about that event.[4156] Ntahobali also does not show how any omission in Witness FAP's testimony concerning the transfer of refugees from the prefectoral office to Nyange was material to or undermined the Trial Chamber's reliance on her corroborated evidence concerning the Night of Three Attacks.

1787. For these reasons, the Appeals Chamber dismisses Ntahobali's contentions above that the Trial Chamber erred in its assessment of Witness FAP's testimony regarding the Night of Three Attacks.

d. Witnesses SS and SU

1788. The Trial Chamber relied on the evidence of Witnesses SS and SU regarding the timing of the Night of Three Attacks and in support of its finding that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, abducting Tutsi refugees on each occasion.[4157] The Trial Chamber also relied on the evidence of Witnesses SS and SU to conclude that Ntahobali and *Interahamwe* attacked women and children at the prefectoral office, forced them aboard the pickup truck, and that the women and children were taken away and killed elsewhere.[4158]

1789. Ntahobali submits that the Trial Chamber erred in relying on the evidence of Witnesses SS and SU.[4159] In particular, he argues that, given their familial relationship, the Trial Chamber should have exercised the same caution when considering their evidence as it did with other witnesses who had family ties with the co-Accused.[4160] Ntahobali also contends that no reasonable trier of fact would have believed that Witnesses SU and SS never discussed the events of 1994 or their respective testimonies with each other.[4161]

1790. Ntahobali further claims that, given that Witnesses SS and SU were sleeping in the same place at the prefectoral office, the Trial Chamber should have considered every inconsistency in their testimonies.[4162] In this respect, he submits that the Trial Chamber failed to consider numerous

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or arrived at the prefectoral office between the transfer of refugees to the EER and their return *en masse* at the end of May 1994. *See supra*, Sections IV.F.2(d), V.I.2(c)(iii).

[4156] The Appeals Chamber observes that Witness FAP testified to arriving at the Butare Prefecture Office in the last two weeks of May 1994. *See* Witness FAP, T. 12 March 2003 p. 42.

[4157] Trial Judgement, paras. 2654-2661, 2663, 2664, 2703, 2706, 2707, 2715, 2731-2733, 2736, 2738.

[4158] Trial Judgement, para. 2736. The Trial Chamber also relied upon the testimonies of Witnesses SU and SS to find that, from mid-May through June 1994, Ntahobali and Nyiramasuhuko participated in the abduction of multiple Tutsi refugees from the prefectoral office, who were subsequently killed. *See ibid*., paras. 2741, 2742, 2746, 2749.

[4159] Ntahobali Appeal Brief, paras. 672-674.

[4160] Ntahobali Appeal Brief, paras. 674, 750. *See also* Ntahobali Reply Brief, para. 288.

[4161] Ntahobali Appeal Brief, paras. 674, 750. *See also* Ntahobali Reply Brief, para. 288.

[4162] Ntahobali Appeal Brief, para. 672. *See also* Ntahobali Reply Brief, paras. 283-287.

inconsistencies between their evidence and with other Prosecution evidence,[4163] including: (i) variances in the evidence of Witnesses SU and SS about when Witness SU left the prefectoral office;[4164] (ii) the fact that only Witness SU testified about the presence of Warrant Officer Emmanuel Rekeraho, who drove a Sovu health centre ambulance, during the Night of Three Attacks;[4165] (iii) the evolving and contradictory evidence as to the timing of their arrival at the prefectoral office;[4166] (iv) Witness SU's testimony that the *Interahamwe* were present at the prefectoral office until "the evening of the rapes" whereas Witness SS "did not mention those rapes";[4167] (v) the fact that Witness SS "asserted that a witness who testified that refugees could go to the veranda was a liar" whereas Witness SU gave testimony to this effect;[4168] (vi) Witness SU's testimony concerning the transfer to Nyange was contradicted by Witnesses RE and SJ, and that Witness SS "never testified about Nyange";[4169] and (vii) the fact that Witnesses SS and SU contradicted each other on the circumstances under which their statements were taken and on the location of their mother's death.[4170]

1791. Ntahobali also submits that the Trial Chamber erred in "failing to make a finding" on the evidence of Witnesses D-2-11-D and D-2-21-T, who testified that Witnesses SU and SS remained in their sector and could not have been at the prefectoral office, the EER, Nyange, or Rango Forest.[4171]

1792. In addition, Ntahobali contends that it was implausible for the two witnesses to stay apart during the day in order "to avoid being abducted together" and to sleep in the same place at night when the attacks occurred.[4172] According to him, the demeanour of Witnesses SS and SU further undermined their credibility.[4173] In this regard, Ntahobali contends that Witness SU provided

[4163] Ntahobali Appeal Brief, para. 674.
[4164] Ntahobali Appeal Brief, para. 673. Ntahobali submits that, according to Witness SS, Witness SU left the Butare Prefecture Office at some point in time and did not see her again, while Witness SU testified that she stayed at the prefectoral office with Witness SS, with intermittent absences, until they were taken to Rango Forest. *See idem*, *referring to* Witness SS, T. 4 March 2003 pp. 36-38, Witness SU, T. 15 October 2002 pp. 79, 80, 82, 83.
[4165] Ntahobali Appeal Brief, para. 673.
[4166] Ntahobali Appeal Brief, para. 673, *referring to* Trial Judgement, para. 3934, Witness SU, T. 15 October 2002 pp. 82, 83, T. 3 March 2003 pp. 36, 37, Witness SS, T. 4 March 2003 pp. 49-52. According to Ntahobali, Witness SS arrived on 27 May 1994 and Witness SU on 28 May 1994. He argues that the Trial Chamber failed to explain how these witnesses could have gone to the Butare Prefecture Office when the refugees were at the EER. He further highlights Witnesses SU's and SS's confusion regarding when they were at the Butare University Hospital and their arrival at the Butare Prefecture Office. *See idem*.
[4167] Ntahobali Appeal Brief, para. 673, *referring to* Witness SU, T. 17 October 2002 pp. 87, 88.
[4168] Ntahobali Appeal Brief, para. 673, *referring to* Witness SS, T. 4 March 2003 pp. 27, 28, Witness SU, T. 17 October 2002 p. 88.
[4169] Ntahobali Appeal Brief, para. 673.
[4170] Ntahobali Appeal Brief, para. 673.
[4171] Ntahobali Appeal Brief, para. 674.
[4172] Ntahobali Appeal Brief, para. 673, *referring to* Witness SS, T. 3 March 2003 pp. 38, 39, Witness SU, T. 17 October 2002 pp. 92, 93.
[4173] Ntahobali Appeal Brief, paras. 673, 674. Ntahobali specifically refers to numerous aspects of both witnesses' testimonies that demonstrate, in his view, "[n]umerous demeanour problems". *See ibid*., para. 673.

"spurious answers when confronted with obvious contradictions" and emphasises that the witnesses repeatedly blamed investigators for omissions in their statements.[4174]

1793. The Prosecution responds that the Trial Chamber duly considered the allegations of collusion between Witnesses SS and SU.[4175] It also argues that inconsistencies between the evidence of Witnesses SS and SU are minor or non-existent, and that Ntahobali either misstates their evidence or overstates the inconsistencies.[4176] The Prosecution additionally submits that Ntahobali fails to demonstrate how the Trial Chamber erred in preferring the evidence of Witnesses SS and SU over that of Witnesses D-2-11-D and D-2-21-T.[4177]

1794. The Appeals Chamber observes that, in support of his contention that the Trial Chamber should have treated the evidence of Witnesses SS and SU with caution because they were related, Ntahobali points to paragraphs in the Trial Judgement that assess alibi or Defence witnesses who have family ties with or were detained accomplices of the co-Accused.[4178] The Appeals Chamber is not persuaded that the circumstances of these witnesses required similar treatment for Witnesses SS and SU, who were not accomplices, detained, or related to the defendants. In this regard, Ntahobali fails to demonstrate how the fact that Witnesses SS and SU are related, which the Trial Chamber duly noted,[4179] created an incentive for them to implicate Ntahobali in crimes or to lie about the events.[4180]

1795. Furthermore, the Trial Chamber noted that Witnesses SS and SU were in contact with each other and by implication could have spoken about the 1994 events and their testimonies.[4181] Noting Witness SS's testimony that she and Witness SU did not discuss Witness SU's 2002 testimony[4182] and that, "[a]t the time of her testimony, Witness SU was not living with [Witness SS], although they visited one another", the Trial Chamber accepted Witness SU's testimony that she "never

[4174] Ntahobali Appeal Brief, paras. 673, 674. Noting that Witness SU blamed inconsistencies on the investigators recording her statement and testified that "all that is indicated in this statement, I have seen that mistakes have been made", Ntahobali argues that the witness therefore recanted all her previous evidence on the record. *See ibid*., para. 674, *referring to* Witness SU, T. 21 October 2002 pp. 8-10. The Appeals Chamber fails to see how this citation confirms Ntahobali's assertion and dismisses it without further consideration.
[4175] Prosecution Response Brief, para. 1072.
[4176] Prosecution Response Brief, paras. 1063-1071, 1073.
[4177] Prosecution Response Brief, paras. 1074, 1075.
[4178] *See* Ntahobali Appeal Brief, para. 674, *referring to* Trial Judgement, paras. 2546, 2579, 2590, 3666.
[4179] Trial Judgement, paras. 2245, 2281.
[4180] The Appeals Chamber has determined that "consideration should be given to circumstances showing that accomplice witnesses may have motives or incentives to implicate the accused person before the Tribunal or to lie." *See Setako* Appeal Judgement, para. 143, *referring to Muvunyi* Appeal Judgement of 1 April 2011, para. 37, *Nchamihigo* Appeal Judgement, paras. 47, 305.
[4181] *See* Trial Judgement, paras. 2245, 2281, 2761.
[4182] Trial Judgement, para. 2283, *referring to* Witness SS, T. 4 March 2003 p. 61 (closed session), T. 10 March 2003 pp. 13, 14 (closed session).

discussed the events of 1994 or the events" at the Butare Prefecture Office with Witness SS.[4183] Ntahobali does not demonstrate how the Trial Chamber abused its discretion in the assessment of the evidence in reaching this conclusion. His submissions reflect mere disagreement with the Trial Chamber's determination and are therefore rejected.

1796. Regarding alleged discrepancies in the testimonies of Witnesses SS and SU, the Appeals Chamber recalls that it is within the discretion of a trial chamber to evaluate inconsistencies in the evidence, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence,[4184] without explaining its decision in every detail.[4185]

1797. Contrary to Ntahobali's contention, the Trial Judgement reflects that the Trial Chamber explictly considered the discrepancy concerning Witness SU's departure from the Butare Prefecture Office.[4186] In any event, given the Trial Chamber's finding that Witnesses SS and SU provided consistent evidence regarding the Night of Three Attacks, Ntahobali does not demonstrate how any discrepancy on Witness SU's departure from the prefectoral office, which occurred in June 1994, after the attacks, would undermine their credibility or the Trial Chamber's assessment of their evidence. Furthermore, and contrary to Ntahobali's assertion, Witnesses SS and SU testified to the presence of an ambulance from the Sovu health centre on the Night of Three Attacks.[4187] The Appeals Chamber observes that beyond merely listing differences between the evidence of Witnesses SS and SU, including one that does not exist, Ntahobali fails to demonstrate how this discrepancy would undermine the reasonableness of the Trial Chamber's reliance on the witnesses' testimonies about the Night of Three Attacks.

1798. The Trial Chamber also considered Witness SU's evidence of her arrival at the Butare Prefecture Office on or around 28 May 1994,[4188] and that Witness SS testified to arriving the second time on 27 May 1994.[4189] The Trial Chamber did not discuss as a discrepancy Witness SS's evidence on her second arrival to the prefectoral office, or that Witness SU testified to Witness SS

[4183] Trial Judgement, para. 2761, *referring to* Witness SU, T. 21 October 2002 pp. 47, 48, 50 (closed session). *See*, *in particular*, Witness SU, T. 21 October 2002 pp. 50, 51 (closed session).
[4184] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[4185] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 223; *Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174; *Kvočka et al.* Appeal Judgement, para. 23.
[4186] *See* Trial Judgement, paras. 2242, 2290. The Trial Chamber noted that, according to Witness SU, she left the prefectoral office for Rango Forest at the end of June 1994. *See ibid.*, para. 2242; Witness SU, T. 21 October 2002 p. 35. It also noted that according to Witness SS, her sister left the Butare Prefecture Office for two days and returned later. *See* Trial Judgement, para. 2290; Witness SS, T. 4 March 2003 p. 37.
[4187] *See* Trial Judgement, paras. 2251, 2284, 2285.
[4188] *See* Trial Judgement, paras. 2242, 2245. *See also* Witness SU, T. 15 October 2002 pp. 157, 158 (French).

being at the Butare University Hospital in mid-April and arriving at the prefectoral office in early May 1994.[4190] Nonetheless, the Appeals Chamber perceives no discrepancy nor evolution within Witness SS's evidence that would have required express consideration by the Trial Chamber or warrant particular caution. While Witness SS testified at one point that she arrived on 27 April 1994, she subsequently corrected herself and reconfirmed her arrival date to be 27 May 1994.[4191] It is also unclear whether a discrepancy exists between the evidence of Witnesses SS and SU as claimed by Ntahobali as Witness SS testified that she arrived at the Butare University Hospital in April 1994.[4192] In these circumstances, the Appeals Chamber dismisses Ntahobali's arguments regarding alleged material variances in the testimonies of Witnesses SS and SU with respect to their arrival at the prefectoral office.

1799. Having reviewed the references provided by Ntahobali in support of his submission that the Trial Chamber failed to consider the discrepancy that Witness SU testified about the *Interahamwe* being present at the prefectoral office until "the evening of the rapes" whereas Witness SS "did not mention those rapes",[4193] it is unclear whether these references relate to the Night of Three Attacks, or how the witnesses' credibility or the Trial Chamber's findings could be undermined. Recalling that the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, vague, or suffer from other formal and obvious insufficiencies,[4194] Ntahobali's argument is dismissed without further consideration.

1800. Moreover, the testimonies of Witnesses SS and SU are not necessarily contradictory regarding the presence of Tutsi refugees on the veranda of the prefectoral office.[4195] Ntahobali's argument that Witness SS "asserted that a witness who testified that refugees could go to the veranda was a liar" is unsupported by the witness's evidence.[4196] Having reviewed the evidence

[4189] *See* Trial Judgement, para. 2281. The Trial Chamber noted that Witness SS went to the Butare Prefecture Office on two occasions, that she could not remember the date of the first occasion, and that she went a second time on 27 May 1994. *See idem*. *See also* Witness SS, T. 3 March 2003 pp. 36, 37.
[4190] *See* Ntahobali Appeal Brief, para. 673. Ntahobali also argues that the Trial Chamber failed to explain how Witnesses SS and SU could have gone to the prefectoral office while refugees were at the EER. *See idem*. Given the close proximity between the Butare Prefecture Office and the EER as well as the fact that there was nothing preventing refugees from arriving on their own to the prefectoral office, Ntahobali does not demonstrate why the Trial Chamber had to explicitly consider this alleged contradiction. This argument is therefore dismissed.
[4191] Witness SS, T. 3 March 2003 pp. 36, 37.
[4192] Witness SS, T. 4 March 2003 p. 51.
[4193] Ntahobali Appeal Brief, para. 673, *referring to* Witness SU, T. 4 March 2003 pp. 27, 28.
[4194] *See supra*, para. 35.
[4195] In this regard, the Appeals Chamber notes that Witness SU stated "we were prohibited from approaching the veranda and when it rained, we were rained on in the open air." *See* Witness SU, T. 17 October 2002 p. 88. On the same issue, Witness SS stated "during the day, refugees could not stay on the veranda […] during the night some of the refugees could go to the veranda, but people came and moved them from there." *See* Witness SS, T. 4 March 2003 pp. 27, 28.
[4196] The Appeals Chamber finds that Ntahobali misrepresents Witness SS's testimony as she equivocally responded to the question that if another witness "stated before this Court that it was impossible to get close to the veranda in the

referred to by Ntahobali,[4197] the Appeals Chamber also finds that Ntahobali does not demonstrate how purported differences between the evidence of Witness SU and that of Witnesses RE and SJ on the transfer to Nyange was relevant to the Trial Chamber's assessment of Witness SU's testimony concerning the Night of Three Attacks.[4198] Ntahobali also does not point to excerpts of Witness SS's testimony that would demonstrate that her failure to testify "about Nyange" would be in material contradiction with Witness SU's evidence about the transfer there.

1801. As to the alleged discrepancies concerning the circumstances under which Witnesses SS's and SU's prior statements were given, it is unclear, from Ntahobali's references to Witness SS's testimony, how the testimonies of both witnesses are contradictory[4199] or how any purported inconsistency in this respect would undermine the credibility of their account concerning the Night of Three Attacks. Similarly, Ntahobali makes no demonstration as to how the discrepancy in their testimonies regarding the location of the death of their mother is material to their evidence concerning the Night of Three Attacks.

1802. Turning to Ntahobali's arguments regarding the evidence of Witnesses D-2-11-D and D-2-21-T, the Appeals Chamber observes that the Trial Chamber noted Witness D-2-11-D's evidence regarding events at roadblocks and at the Hotel Ihuliro,[4200] but did not discuss or summarise his testimony that Witness SU sought refuge at his home from mid-April 1994 until July 1994 and that she was not at the Butare Prefecture Office during this time.[4201] The Trial Chamber, however, explicitly considered that it was put to Witness SU that she had not been at the prefectoral office during the time she said she was and was instead at someone's house from 27 May 1994 until the end of the war.[4202] Witness SU replied that "six people were discovered hiding and killed at his place – so, I left on that day 27th of May to Butare".[4203] The Trial Chamber

night for fear of being killed […] was this witness wrong?" that "the [other] witness maybe got it wrong" or "the other witness got it wrong." *See* Witness SS, T. 4 March 2003 pp. 27, 28.

[4197] *See* Witness SU, T. 14 October 2002 pp. 87, 88; Witness RE, T. 24 February 2003 pp. 16, 17; Witness SJ, T. 29 May 2002 pp. 71-73.

[4198] Specifically, Ntahobali submits that, "[a]ccording to Witness SU, the child who informed them about the killings in Nyange alerted them to the danger by signalling the [third] bus to stop, which explains their return to the [Butare Prefecture Office]," whereas Witnesses RE and SJ gave evidence that "it was the return of a young man to the [Butare Prefecture Office] that prompted them not to go to Nyange." Ntahobali also argues that the Trial Chamber erred in failing to consider that Witness SU did not mention that she had gone to Nyange in her prior statement. *See* Ntahobali Appeal Brief, para. 673. However, the Appeals Chamber observes that the Trial Chamber expressly noted this evidence in the Trial Judgement and her explanation that "the omission must have been the fault of the person taking her statement, since many things she said had not been included in her statement." *See* Trial Judgement, para. 4122. Consequently, Ntahobali's contention is without merit and the Appeals Chamber dismisses it without further consideration.

[4199] *See* Ntahobali Appeal Brief, para. 673, *referring to* Witness SS, T. 4 March 2003 pp. 60-62 (closed session).

[4200] *See* Trial Judgement, paras. 3089, 5403.

[4201] *See* Witness D-2-11-D, T. 22 October 2007 pp. 22-24 (closed session), T. 23 October 2007 pp. 30-35 (closed session).

[4202] Trial Judgement, para. 2767.

[4203] Witness SU, T. 21 October 2002 pp. 69, 70 (closed session). *See* Trial Judgement, para. 2767.

concluded that, "[t]herefore, she only spent three days in [this man's] home".[4204] The Appeals Chamber recalls the Trial Chamber's discretion to evaluate inconsistencies in the evidence and decide which version it considers more credible.[4205] In light of the consistency of the account of Witness SU's evidence on the Night of Three Attacks with the accounts of other witnesses,[4206] the Appeals Chamber finds that a reasonable trier of fact could have placed more weight on Witness SU's account over that of Witness D-2-11-D.

1803. With respect to Witness D-2-21-T, the Appeals Chamber notes that the Trial Chamber expressly assessed her evidence with respect to fabrication of evidence as well as events at the Sahera and Tumba Sectors.[4207] The Trial Chamber found Witness D-2-21-T "neither credible nor reliable" in relation to allegations of evidence fabrication.[4208] Ntahobali points to aspects of the witness's testimony that relate to Witnesses SS's and SU's participation in the *Ibuka* association meetings, and submits that the 1994 events recounted by Witness SU during these meetings were lies.[4209] Witness D-2-21-T also testified that Witness SU "told us that this was in July 1994 that she went to the [prefectoral] office" and that "[Witness SU] and her sister were not at the [prefectoral] office during the months of May and June."[4210] Given the hearsay nature of Witness D-2-21-T's testimony of Witnesses SU's and SS's whereabouts between May and July 1994, the Trial Chamber's determination that she lacked credibility, and the consistency of the direct evidence of Witnesses SU and SS regarding the Night of Three Attacks,[4211] the Appeals Chamber sees no error in the Trial Chamber's preference for the evidence of Witnesses SS and SU over that of Witness D-2-21-T.

1804. Likewise, the Appeals Chamber finds no merit in Ntahobali's vague and unsupported contention that parts of Witnesses SS's and SU's testimonies were implausible, in particular the fact that they stayed apart during the day and slept in the same place at night, when attacks took

[4204] Trial Judgement, para. 2767.
[4205] *See*, *e.g.*, *Ndahimana* Appeal Judgement, paras. 46, 93; *Hategekimana* Appeal Judgement, para. 82; *Ntabakuze* Appeal Judgement, fn. 523.
[4206] The Trial Chamber observed the following consistencies between Witness SU's account and that of Witnesses SS, TK, QJ, RE, QBQ, and FAP: (i) Nyiramasuhuko, her driver, and the *Interahamwe* come to the Butare Prefecture Office on a pickup truck covered in mud or cow dung; (ii) Nyiramasuhuko alighted from the vehicle and told the *Interahamwe* to load refugees onto the truck; (iii) the *Interahamwe* began attacking refugees and loaded them onto the vehicle; and (iv) the pickup truck departed with Nyiramasuhuko and returned the same night to abduct other refugees. *See* Trial Judgement, paras. 2196, 2215, 2251-2253, 2277, 2278, 2284, 2285, 2287, 2289, 2302-2304, 2307, 2308, 2330, 2662-2664, 2704, 2706-2711, 2732, 2733, 2738.
[4207] *See* Trial Judgement, paras. 247, 249, 253-282, 346, 359, 402, 451, 1001, 1016, 1483, 1671-1673, 2002-2005, 2093-2095, 3793, 5114, 5162.
[4208] *See* Trial Judgement, paras. 346-359. *See also ibid.*, paras. 402, 451, 1672, 1673, 2002-2005, 2093-2095, 3793, 5114, 5162.
[4209] *See* Witness D-2-21-T, T. 3 November 2008 pp. 46-48 (closed session).
[4210] *See* Witness D-2-21-T, T. 5 November 2008 pp. 59-61 (closed session).
[4211] *See* Trial Judgement, paras. 2706-2709, 2715, 2731-2733, 2736, 2738.

place.[4212] The Appeals Chamber notes that beyond his argument, Ntahobali does not substantiate how their testimonies in this respect are implausible or how this would undermine their corroborated accounts regarding the Night of Three Attacks.

1805. Finally, upon review of the specific passages of their testimonies referred to by Ntahobali in support of his submissions,[4213] the Appeals Chamber does not find that the demeanour of Witnesses SS and SU and their explanations that it was the fault of investigators for omissions in prior statements, prevented a reasonable trier of fact from relying on their evidence concerning the Night of Three Attacks.

1806. Accordingly, the Appeals Chamber finds that Ntahobali's arguments above have not demonstrated that the Trial Chamber erred in relation to the assessment of the evidence of Witnesses SS and SU concerning the Night of Three Attacks.

e. Witness RE

1807. The Trial Chamber relied on the evidence of Witness RE in finding that Ntahobali, Nyiramasuhuko, and the *Interahamwe* came to the Butare Prefecture Office on three occasions in one night, abducting Tutsi refugees on each occasion.[4214]

1808. Ntahobali submits that Witness RE's evidence is contradicted by other evidence and is inconsistent with the Trial Chamber's own findings.[4215] Specifically, he notes that Witness RE only testified about the Night of Three Attacks, which, according to her occurred around 26 to 27 April 1994, approximately two to three days after "the events of Nyange".[4216] Ntahobali contends that this timing contradicts the Trial Chamber's conclusion about when these attacks occurred.[4217] Ntahobali further claims that the Trial Chamber erred in failing to consider that

[4212] *See* Ntahobali Appeal Brief, para. 673, *referring to* Witness SS, T. 3 March 2003 pp. 38, 39, Witness SU, T. 17 October 2002 pp. 92, 93.
[4213] *See* Ntahobali Appeal Brief, para. 673, *referring to* Witness SU, T. 14 October 2002 pp. 21-23, 34, T. 15 October 2002 pp. 43-45, 51, 52, 54, 56-61, 63-65, 97-99, T. 16 October 2002 pp. 7-10, 29, 37, 38, 41, 45-50, T. 17 October 2002 pp. 4-6, 11, 12, 14, 15, 70, 88-90, T. 21 October 2002 pp. 28, 30, 33, Witness SS, T. 5 March 2003 pp. 15, 16, 19-25, 28, 29, 31-36, 38, 39, 58-61, T. 10 March 2003 pp. 6, 7 (closed session).
[4214] Trial Judgement, paras. 2660, 2707, 2715, 2738. The Trial Chamber also relied upon the testimony of Witness RE to find that, from mid-May through June 1994, Ntahobali and Nyiramasuhuko participated in the abduction of multiple Tutsi refugees from the Butare Prefecture Office, who were subsequently killed. *See ibid*., paras. 2746, 2747, 2749.
[4215] Ntahobali Appeal Brief, para. 691.
[4216] Ntahobali Appeal Brief, para. 691. Ntahobali contends that Witness RE testified to arriving at the Butare Prefecture Office around 15 April 1994, situated the "events of Nyange around 24 April 1994", and gave evidence that the Night of Three Attacks occurred two to three days after Nyange. *See idem*, *referring to* Witness RE, T. 24 February 2003 pp. 9-14, T. 25 February 2003 pp. 5-7.
[4217] Ntahobali Appeal Brief, para. 691.

Witness RE, while at the prefectoral office, did not testify about other attacks, such as the Mid-May Attack and the Last Half of May Attacks.[4218]

1809. The Prosecution responds that Ntahobali's challenges to Witness RE's credibility should be dismissed for misstating the evidence and lack of reference.[4219]

1810. The Appeals Chamber recalls the Trial Chamber's conclusion that the Night of Three Attacks occurred around the end of May or beginning of June 1994.[4220] In assessing Witness RE's testimony, the Trial Chamber expressly noted that her account was inconsistent with other evidence about the timing of the Night of Three Attacks, particularly in relation to the transfer to Nyange.[4221] Considering the similarities between the core elements of Witness RE's evidence and that of Witnesses FAP, QBQ, SS, SU, and TK, the Trial Chamber was nonetheless convinced that they were referring to the same night of three attacks.[4222] Ntahobali does not demonstrate that a reasonable trier of fact could not have reached this finding.

1811. In addition, the Appeals Chamber sees no significance in Ntahobali's contention that Witness RE only testified about the Night of Three Attacks and not, for example, about the Mid-May Attack or the Last Half of May Attacks.[4223] In this regard, the Appeals Chamber recalls its previous analysis that Ntahobali does not establish that Witness RE was necessarily at the Butare Prefecture Office during these other attacks.[4224]

1812. For the foregoing reasons, the Appeals Chamber dismisses Ntahobali's submissions regarding Witness RE's credibility.

(iii) Failure to Consider Witnesses TA's and SD's Evidence

1813. Ntahobali submits that the Trial Chamber erred in failing to consider that Witnesses TA and SD, who were at the Butare Prefecture Office during the relevant time, did not testify about the

[4218] Ntahobali Appeal Brief, para. 691.
[4219] Prosecution Response Brief, para. 1081.
[4220] *See* Trial Judgement, paras. 2661, 2738, 2781(iii).
[4221] Trial Judgement, para. 2657.
[4222] Trial Judgement, paras. 2656-2658. These core elements include: (i) the arrival of Ntahobali, Nyiramasuhuko, and the *Interahamwe* on a camouflaged pickup truck; (ii) the *Interahamwe* attacking and abducting refugees, including a woman and her children; (iii) the pickup truck departing with refugees and returning the same night to abduct other refugees; and (iv) the fact that the Night of Three Attacks occurred *prior to* the transfer of refugees from the Butare Prefecture Office to Rango Forest. *See*, *e.g.*, *ibid.*, paras. 2203, 2211-2215, 2220, 2242, 2251-2253, 2277, 2278, 2284, 2285, 2287, 2289, 2299, 2302, 2304, 2307, 2308, 2655, 2660, 2663, 2704, 2706, 2709, 2710, 2717-2719, 2731-2736, 2738.
[4223] *See* Ntahobali Appeal Brief, para. 691.
[4224] *See supra*, paras. 870, 871, 1722. The Appeals Chamber observes that Ntahobali also argues that Witness RE and other refugees were *not* at the Butare Prefecture Office when the Mid-May Attack and the Last Half of May Attacks occurred. *See* Ntahobali Appeal Brief, para. 637. *See also ibid.*, paras. 618, 636.

Night of Three Attacks.[4225] Ntahobali stresses the unreasonableness of this omission especially given the Trial Chamber's acceptance of Witness SS's testimony that the *Interahamwe* "woke up everybody" during the attacks.[4226]

1814. The Prosecution responds that Witnesses TA's and SD's silence regarding the Night of Three Attacks does not demonstrate that the event did not occur and points to elements of their evidence that offer circumstantial support for its occurrence.[4227] According to the Prosecution, the Trial Chamber's conclusion that refugees fled during the Night of Three Attacks is consistent with Witness SS's testimony that everyone was woken up as well as the fact that Witnesses TA and SD did not testify about "these attacks".[4228]

1815. The Appeals Chamber has previously determined that the fact that Witnesses TA and SD did not testify about the Night of Three Attacks does not demonstrate that no reasonable trier of fact could have found that these attacks occurred.[4229] Furthermore, the Appeals Chamber considers that the Trial Chamber was not required to discuss any possible difference within the Prosecution evidence where that evidence was not incompatible. In this instance, Ntahobali does not show that either Witness TA or Witness SD denied the occurrence of the Night of Three Attacks or that they provided evidence that contradicted that of Witnesses TK, RE, FAP, QBQ, SS, and SU on these attacks. While Ntahobali points out Witness SS's evidence that the *Interahamwe* "woke up everybody" on the third attack of the same night, suggesting that Witnesses TA and SD could not have been unaware of the attack, Ntahobali overlooks that both witnesses testified to the existence of other attacks than those they specifically described.[4230]

1816. Based on the above, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in failing to consider that Witnesses TA and SD did not mention the Night of Three Attacks.

[4225] Ntahobali Appeal Brief, para. 677. *See also ibid*., para. 711; Ntahobali Reply Brief, para. 277. Ntahobali adds that Witness TA also testified about attacks at the Butare Prefecture Office that occurred after the Night of Three Attacks. *See* Ntahobali Appeal Brief, para. 677.

[4226] Ntahobali Appeal Brief, para. 677, *referring to* Trial Judgement, para. 2709. The Appeals Chamber has previously considered Ntahobali's contentions that the Trial Chamber erred in relying on the evidence of Witnesses TA and SD as it relates to the vehicle used during the Night of Three Attacks. *See supra*, Section V.I.2(b)(iii)c.

[4227] Prosecution Response Brief, para. 1050.

[4228] Prosecution Response Brief, para. 1050.

[4229] *See supra*, Section IV.F.2(e)(ii).

[4230] *See*, *e.g*., Witness SD, T. 17 March 2003 pp. 9-11, 41, 49, 50, 65-71, T. 18 March 2003 p. 18; Witness TA, T. 1 November 2001 pp. 50, 51. Ntahobali further submits that Witnesses TA's and SD's silence regarding the Night of Three Attacks was also unreasonable, especially since the Trial Chamber accepted evidence that refugees fled the Butare Prefecture Office during the attacks in order to justify why Witnesses SU and QBQ only testified about two attacks that evening. *See* Ntahobali Appeal Brief, para. 677, *referring to* Trial Judgement, para. 2660. In the view of the Appeals Chamber, it is unclear how evidence of refugees fleeing the prefectoral office would render the Trial Chamber's assessment of the Night of Three Attacks unreasonable in light of the fact that Witnesses TA and SD did not testify about it. The Appeals Chamber therefore dismisses Ntahobali's argument.

(iv) Abduction of Mbasha's Wife and Children

1817. The Trial Chamber concluded that, during the Night of Three Attacks, Ntahobali and the *Interahamwe* abducted Mbasha's wife and children.[4231] In coming to this conclusion, the Trial Chamber relied on the testimonies of Prosecution Witnesses TK, QJ, and RE.[4232]

1818. Ntahobali submits that the Trial Chamber failed to apply caution to the evidence of Witnesses TK and QJ, who are related by marriage and lied about not discussing their testimonies in this case.[4233] He avers that the Trial Chamber unreasonably determined that this "lie" did not undermine the credibility of Witnesses TK and QJ, particularly considering allegations of collusion made against them after *amici curiae* investigations.[4234] Ntahobali specifically notes the Trial Chamber's differential treatment between Witnesses TK and QJ and others witnesses, such as Witnesses QA, D-2-13-D, and D-2-14-D.[4235] In the same vein, Ntahobali stresses that Witnesses TK and RE are related by marriage and argues the Trial Chamber failed to exercise sufficient caution when considering this familial link, especially in light of its assessment of Defence witnesses.[4236]

1819. In addition to the several alleged inconsistencies that have been addressed in the subsection addressing Ntahobali's challenge to identification evidence,[4237] Ntahobali also argues that the Trial Chamber erred in concluding that the material inconsistencies within the evidence of Witnesses TK, QJ, RE, SJ, and Witness WKKTD concerning the age and gender of Mbasha's children were insignificant and could be explained by the passage of time.[4238] Ntahobali further submits that the Trial Chamber erred in failing to consider that Witness RE "did not mention Mbasha in her prior statement, but suddenly remembered that at trial" and that "Witness TK did not mention Mbasha or his wife but only their children in her first prior statement".[4239] Ntahobali also contends that the Trial Chamber erred in disregarding the "threatening attitude of Witness TK when confronted with

[4231] Trial Judgement, para. 2727. As noted previously, the Trial Chamber determined that it would not enter convictions on the basis of the abduction of Mbasha's wife due to insufficient notice but nonetheless considered that the credible and consistent information with regard to this event provided circumstantial support for its findings regarding the abduction of other unnamed Tutsi refugees from the Butare Prefecture Office. *See supra*, Sections IV.F.2(a), V.I.2(a)(ii).
[4232] Trial Judgement, paras. 2717-2720, 2727.
[4233] Ntahobali Appeal Brief, para. 685, *referring to* Trial Judgement, para. 2677. *See also ibid*., paras. 750-752.
[4234] Ntahobali Appeal Brief, para. 685. According to Ntahobali, the Trial Chamber also erred in failing to note that it had barred the cross-examination of Witness QJ on whether he knew if his wife was called to testify for the Prosecution. *See idem*, *referring to* Witness QJ, T. 12 November 2001 pp. 59-61 (closed session).
[4235] Ntahobali Appeal Brief, para. 685, *referring to* Trial Judgement paras. 376, 1733, 1999, 3371, 3376.
[4236] Ntahobali Appeal Brief, paras. 750-752. *See also ibid*., para. 691.
[4237] Ntahobali Appeal Brief, paras. 681-684, 689-691. *See also* Ntahobali Reply Brief, para. 293. Specifically, the Appeals Chamber has previously assessed Ntahobali's arguments that the evidence of Witnesses TK, RE, QJ, and/or SJ are, *inter alia*, inconsistent as to: (i) the timing of the attack; (ii) whether the abduction was forceful or not; (iii) where the victims were placed in the vehicle; (iv) whether Mbasha's wife was undressed; and (v) what Ntahobali wore. *See supra*, Section V.I.2(b)(iii)b. The Appeals Chamber has also addressed Ntahobali's challenges pertaining to alleged inconsistencies between the evidence of Witness TK and QJ about the vehicle used. *See supra*, paras. 1684, 1685.
[4238] Ntahobali Appeal Brief, paras. 688, 689. *See also* Ntahobali Reply Brief, para. 294.

that contradiction" and generally argues that she repeatedly provided "implausible and spurious explanations" when confronted with inconsistencies.[4240]

1820. Ntahobali submits that, in light of the inconsistent accounts on the abduction of Mbasha's wife and children, no reasonable trier of fact could have dismissed Witness WKKTD's exculpatory evidence.[4241] He contends that, while Witness WKKTD's testimony was uncorroborated and hearsay, he was found to be credible and his evidence should have raised doubt about the abduction.[4242] He claims that the Trial Chamber reversed the burden of proof in this respect.[4243]

1821. The Prosecution responds that, despite any familial relationships, the Trial Chamber correctly assessed and properly relied on the evidence of Witnesses TK, QJ, and RE in relation to the abduction of Mbasha's wife and children.[4244] It further submits that: (i) inconsistencies regarding the age and gender of Mbasha's children are insignificant; (ii) alleged inconsistencies between witness testimonies and their prior statements as well as challenges to the credibility of Witnesses RE and TK are misstatements of the evidence; and (iii) Witness WKKTD's evidence was unreliable.[4245]

1822. The Appeals Chamber observes that the Trial Chamber considered the relationship between Witnesses TK and QJ and the possibility that they discussed their testimonies before the Tribunal.[4246] Specifically, the Trial Chamber stated:

> Witness QJ testified that he is married to Witness TK, which was confirmed by Witness TK. Both witnesses also testified that they had never discussed the events of April to July 1994 together, and did not know of each other's plans to testify before this Tribunal. The Chamber recalls its previous finding that while it does not believe that these witnesses never discussed the events at issue in this case, or their plans to testify before this Tribunal, this alone does not undermine Witness TK or Witness QJ's credibility.[4247]

1823. The Appeals Chamber has already considered and rejected the contention that it was unreasonable to rely on aspects of Witnesses QJ's and TK's evidence concerning the Night of Three Attacks, notwithstanding the Trial Chamber's disbelief that they had not discussed the events and

[4239] Ntahobali Appeal Brief, paras. 686, 691, 699.
[4240] Ntahobali Appeal Brief, paras. 686, 699.
[4241] Ntahobali Appeal Brief, para. 692.
[4242] Ntahobali Appeal Brief, para. 692.
[4243] Ntahobali Appeal Brief, para. 692.
[4244] Prosecution Response Brief, paras. 1010-1022, 1030-1032, 1036, 1037, 1117. The Prosecution also submits that the Trial Chamber did allow Witness QJ to be cross-examined on his credibility but restricted him from providing answers for Witness TK. *See ibid.*, para. 1016.
[4245] Prosecution Response Brief, paras. 1018-1020, 1030-1032, 1076, 1078, 1081.
[4246] Trial Judgement, para. 2677. *See also ibid.*, para. 3795.
[4247] Trial Judgement, para. 3795 (internal references omitted). *See also ibid.*, para. 2677.

their participation in proceedings with each other.[4248] As to Ntahobali's contention that the *amici curiae* investigations demonstrated collusion between Witnesses TK and QJ and other witnesses, the Appeals Chamber recalls that it has also previously rejected this argument.[4249]

1824. The Appeals Chamber is also not persuaded that, in light of the distinguishable circumstances, the Trial Chamber was required to disregard the evidence of Witnesses TK and QJ as it did with Witnesses QA, D-2-13-D, and D-2-14-D.[4250] The Trial Chamber observed that Witness QA admitted that he lied to Canadian police in another proceeding, lied to the Prosecution in 1996, and admitted that most of his testimony given under oath to the Tribunal in 2004 was false.[4251] The Trial Chamber determined that Witness QA lacked credibility and did not rely on his evidence.[4252] As for Witnesses D-2-13-D and D-2-14-D, the Trial Chamber considered that they were neighbours, were imprisoned together, met and signed their statements to the Kanyabashi Defence investigator together, went to Arusha to testify together, and were detained together while waiting to give their evidence.[4253] It further noted that Witness D-2-13-D even testified that Witness D-2-14-D "helped Witness D-2-13-D draft his confession which was sent to the *Gacaca* courts and was given to Nkeshimana, the Kanyabashi Defence investigator."[4254] In light of their admission to interacting with the Kanyabashi Defence investigator, their close ties, as well as the numerous opportunities which they had to discuss their experiences due to their parallel participation in the case, the Trial Chamber considered that their testimonies were not reliable and their credibility undermined.[4255] By contrast, the Appeals Chamber notes that Witnesses TK and QJ were neither found to have provided false testimony nor to have colluded by helping each other prepare their testimonies or statements to investigators.

1825. Concerning Witness RE's relationship to Witness TK, the Appeals Chamber observes that the Trial Chamber explicitly considered that Witness RE's relative was Witness TK's sister-in-law.[4256] It also noted Witness RE's testimony that she did not inform Witness TK that she was to testify in Arusha.[4257] Having considered other allegations of evidence fabrication, the Trial Chamber did not find that Witness RE's relationship with Witness TK undermined her

[4248] *See supra*, Section IV.F.2(b). The Appeals Chamber has also already rejected the contention that the Trial Chamber barred cross-examination on whether Witness QJ knew that Witness TK was called to testify for the Prosecution, as the references he cites reflect that the witness was asked and answered this very question. *See idem*.
[4249] *See supra*, Section III.J.
[4250] *See* Ntahobali Appeal Brief, para. 685, *referring to* Trial Judgement, paras. 376, 1733, 1999, 3371, 3376.
[4251] *See* Trial Judgement, paras. 376, 1999, 3371.
[4252] Trial Judgement, paras. 885, 951, 1953, 1999, 3371, 3376.
[4253] Trial Judgement, para. 1733.
[4254] Trial Judgement, para. 1733.
[4255] Trial Judgement, para. 1733.
[4256] *See* Trial Judgement, para. 2720.
[4257] Trial Judgement, para. 2720, *referring to* Witness RE, T. 24 February 2003 p. 58 (closed session).

credibility.[4258] Ntahobali simply argues that the Trial Chamber should have exercised greater caution in light of possible collusion,[4259] but fails to substantiate allegations of collusion or demonstrate an error by the Trial Chamber.[4260] Moreover, his submission regarding the Trial Chamber's observation of Defence witnesses is both vague and misguided.[4261] The Appeals Chamber observes that the Trial Chamber applied caution to Defence witnesses with familial ties to Nyiramasuhuko and Ntahobali and who may have had motivation to provide exculpatory evidence for the defendants.[4262] Ntahobali has not shown that any familial link between Witnesses RE and TK provided them with an incentive to implicate him.[4263]

1826. As to inconsistencies regarding Mbasha's children, the Trial Chamber explicitly considered variances among the evidence of Witnesses TK, RE, QJ, and WKKTD, concerning the number, age, and gender of these children.[4264] It specifically noted that:

> In addition, there were some discrepancies as to the number and gender of Mbasha's children. Witness TK testified that the wife of Mbasha was accompanied by one boy and one girl. Witness WKKTD testified that Mbasha had two children aged 7 and 10 or 11, but he said they were both girls. In contrast, Witnesses RE and QJ testified that there were three children.[4265]

1827. The Trial Chamber found that the testimony of Witness WKKTD, who had known the family for six years prior to 1994 and was a close friend of the family, that Mbasha had two daughters was reliable.[4266] It considered that this evidence was not necessarily inconsistent with the testimony of Witness TK, who testified to the children being a girl and a boy,[4267] reasoning that "Witness TK said that Ntahobali asked which of the children was a girl" and since "Ntahobali was not able to identify the gender of the children, both of the children could have been girls."[4268] It also considered that, although Witnesses RE and QJ said there were three children, this discrepancy was not significant in light of the "passage of time between this event and their testimony."[4269]

1828. Ntahobali simply lists discrepancies in the witnesses' testimonies without demonstrating how the Trial Chamber was unreasonable in assessing them.[4270] Considering that Witnesses TK, RE, and QJ observed these children in the midst of an attack, Ntahobali does not show that the

[4258] Trial Judgement, para. 2720.
[4259] *See* Ntahobali Appeal Brief, paras. 749-752.
[4260] *See also supra*, Section III.J.
[4261] *See* Ntahobali Appeal Brief, para. 752.
[4262] *See* Trial Judgement, paras. 2546, 2579, 2590.
[4263] *See also supra*, Section IV.F.2(b).
[4264] *See* Trial Judgement, paras. 2724, 2725
[4265] Trial Judgement, para. 2724 (internal references omitted).
[4266] Trial Judgement, para. 2725.
[4267] Trial Judgement, paras. 2724, 2725.
[4268] Trial Judgement, para. 2725.
[4269] Trial Judgement, para. 2725.
[4270] *See* Ntahobali Appeal Brief, para. 688.

evidence of these witnesses, as well as that of Witness WKKTD, was incompatible despite variances as to the precise age, gender, or number of these children.

1829. Turning to Ntahobali's contentions that the Trial Chamber failed to assess purported inconsistencies between witnesses' testimonies and prior statements concerning this incident, the Appeals Chamber has concluded earlier that the omission related to the Mbasha event in Witness RE's prior statement did not make it unreasonable for the Trial Chamber to rely on her evidence.[4271] Furthermore, having reviewed Witness TK's prior statement and relevant testimony at trial, the Appeals Chamber is not convinced that the witness contradicted herself by not mentioning the presence of Mbasha's wife in her first statement as it is manifest that this statement did not purport to give an exhaustive list of everyone Ntahobali abducted at the prefectoral office.[4272] As noted by Ntahobali, in a subsequent statement that provided more detail, Witness TK recalled Ntahobali's conversation with Mbasha's wife and that she was among the family members abducted.[4273] During her testimony at trial, Witness TK stated that "Ms. Mbasha was present at the time; she was with her children and she was taken away; she was abducted with her children."[4274] In the opinion of the Appeals Chamber, the fact that Witness TK only mentioned the Mbasha children and not their mother in her 1996 prior statement did not require the Trial Chamber to reject the witness's evidence.

1830. As to Ntahobali's contention that the Trial Chamber failed to consider Witness TK's threatening attitude when confronted with the contradiction discussed above as well as others, and that the witness only offered "implausible and spurious explanations" for inconsistencies,[4275] the Appeals Chamber observes that the Trial Chamber explicitly considered omissions in Witness TK's prior statement and accepted her explanations for them.[4276] The Appeals Chamber recalls that trial chambers are best placed to assess the evidence, including the demeanour of witnesses.[4277] Ntahobali provides a list of explanations that he finds "implausible or spurious"

[4271] *See supra*, para. 1669. *See also supra*, Section IV.F.2(e)(iii)b.
[4272] *See* Exhibit D44 (Witness TK's November 1996 Statement), p. K0037330 (Registry pagination) ("You asked me if I know the names of people who were taken away by [S]HALOM and PAULINE. Well, I saw two children of the MBASHA family among them. There were other children transported to Kabutare.").
[4273] Ntahobali Appeal Brief, para. 699; Exhibit D47 (Witness TK's 1998 Statement), p. K0052252 (Registry pagination) ("As I have mentioned in my previous statements I also remember Shalom and his discussion with the wife of Mbasha and his wanting to have sex (take as a wife) with one of their small daughters who was only about 9 years old. All the people from this family (Mbasha) were taken away and I never saw them alive again. In fact, the wife of Mbasha was killed at the Prefecture itself. She was begging for pity for her children".).
[4274] Witness TK, T. 23 May 2002 pp. 20, 21.
[4275] Ntahobali Appeal Brief, para. 686, *referring to* Witness TK, T. 21 May 2002 pp. 53, 54 (closed session), 127-131, 141, T. 22 May 2002 pp. 5-9, 15-18, 29-31, 53, 54, 100, 101, 117, 118, 134-137, T. 23 May 2002 pp. 19-21, 99, 100, 104, 105, 126, 127, 133, T. 27 May 2002 pp. 35-37, T. 28 May 2002 pp. 18, 19.
[4276] Trial Judgement, para. 2683.
[4277] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 45; *Kanyarukiga* Appeal Judgement, para. 121; *Simba* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, para. 213.

without demonstrating that no reasonable trier of fact could have relied upon Witness TK's otherwise corroborated testimony concerning the abduction of Mbasha's wife and children.[4278]

1831. Ntahobali also does not demonstrate that the Trial Chamber erred in dismissing Witness WKKTD's alternative explanation for the disappearance of Mbasha's wife and her children.[4279] The Trial Chamber considered Witness WKKTD's testimony that the Mbashas were killed at a roadblock and that the eldest daughter survived the events, and determined the testimony to be uncorroborated, hearsay, and unreliable.[4280] Given the direct and corroborated evidence of Witnesses TK, QJ, and RE that Mbasha's wife and children were abducted at the prefectoral office,[4281] the Appeals Chamber sees no error in the Trial Chamber's rejection of Witness WKKTD's uncorroborated and hearsay account. Considering the Trial Chamber's discretion to assess and weigh the evidence of different witnesses against each other, the Appeals Chamber is not persuaded that the Trial Chamber reversed the burden of proof in this instance.[4282]

1832. Based on the foregoing, the Appeals Chamber finds that Ntahobali's arguments discussed above fail to demonstrate that the Trial Chamber erred in assessing the evidence related to the abduction of Mbasha's wife and her children.[4283]

(v) Other Abductions

1833. The Trial Chamber noted the evidence of Witnesses FAP, SU, and SS, who each testified about the abduction of a woman accompanied by children at the Butare Prefecture Office during the Night of Three Attacks.[4284] It stated that Witness FAP's testimony corroborated "numerous details

[4278] Ntahobali also avers that, despite finding insufficient evidence to convict Ntahobali for the undressing of refugees, the Trial Chamber erroneously believed Witness TK's testimony that Mbasha's wife was forced to undress and placed in the front cabin of the pickup truck. *See* Ntahobali Appeal Brief, paras. 687, 690, *referring to* Trial Judgement, para. 6137. However, to support his contention, Ntahobali refers to a conclusion in the "Legal Findings" section of the Trial Judgement that concerns the events at the EER and not the Butare Prefecture Office.
[4279] *See* Ntahobali Appeal Brief, para. 692.
[4280] Trial Judgement, para. 2726.
[4281] *See* Trial Judgement, paras. 2717-2719, 2727.
[4282] The Appeals Chamber notes that Ntahobali further argues that the Trial Chamber erred in failing to consider that Witnesses QBQ and QBP never testified about Mbasha or any such abduction, and that the Trial Chamber's assessment was "selective and patently unreasonable". *See* Ntahobali Appeal Brief, para. 701. The Appeals Chamber observes that Ntahobali's argument is a mere statement and that he provides nothing to substantiate his submission. The Appeals Chamber recalls that it has found that Witness QBP's evidence was not relevant to the Night of Three Attacks. *See supra*, Section V.I.2(d)(i). Given that the Trial Chamber's determination that Witnesses TK, RE, and QJ provided corroborated evidence of the abduction of the Mbasha family, the Appeals Chamber is also not persuaded that the Trial Chamber was required to consider that Witness QBQ never testified about the abduction of the Mbashas specifically. *See also supra*, Section IV.F.2(e)(iii)b. The Appeals Chamber therefore dismisses Ntahobali's submission in this regard.
[4283] Ntahobali contends that should the abduction of Mbasha's wife and children be excluded, the Night of Three Attacks "cannot stand up to scrutiny" as the Mbashas' abduction "constituted the lynchpin of the Chamber's assessment." *See* Ntahobali Appeal Brief, para. 703. As Ntahobali's contentions that the Trial Chamber erred in its assessment of this event have been dismissed, this argument is moot.
[4284] Trial Judgement, paras. 2732-2734. *See also ibid.*, para. 2731.

of Witness TK's testimony regarding the abduction of Mbasha's wife and children",[4285] but also identified elements in Witness FAP's evidence that differed.[4286] The Trial Chamber, noting "the differences in their testimonies" concluded that it was "convinced that Witnesses SU, SS and FAP were describing attacks on different individuals among the group which was abducted from the [Butare Prefecture Office] on the [N]ight of [T]hree [A]ttacks."[4287] In this regard, it concluded that "Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup."[4288]

1834. Ntahobali argues that the "differences" in the evidence of Witnesses SU, SS, and FAP referenced by the Trial Chamber were actually inconsistencies about the same event; namely, the abduction of Mbasha's wife and children.[4289] In this regard, Ntahobali avers that the Trial Chamber failed to consider that: (i) like Witness RE, Witness FAP testified that only one woman and her children were abducted during the attack, that they sat on the veranda, and that Ntahobali told the woman she would not be killed but taken to Nyiramasuhuko to hide her; and (ii) like Witness TK, Witnesses SU and SS testified that the woman and her children, coming from the bursary, were abducted on the same day they arrived and were accompanied by a tall, balding, and fair-complexioned man.[4290] In Ntahobali's view, the evidence of Witnesses FAP, SU, and SS "about the identity of that woman and her children converged on [Mbasha's wife]" but the accounts are radically different on "almost all the material facts".[4291] He contends that, had the Trial Chamber assessed the evidence in its entirety and not just the evidence in support of its assessment, it would have found too many inconsistencies to conclude that the "Mbasha abduction was credible beyond reasonable doubt."[4292]

1835. Ntahobali further argues that, assuming that the abductions were separate, the Trial Chamber still erred in failing to consider that it was impossible that Witnesses FAP, SS, and SU neither witnessed nor heard about the event testified to by Witnesses RE, TK, and QJ and *vice*

[4285] Trial Judgement, para. 2734.
[4286] Trial Judgement, para. 2735.
[4287] Trial Judgement, para. 2736.
[4288] Trial Judgement, para. 2736. *See also ibid*., paras. 2738, 2781(iii).
[4289] Ntahobali Appeal Brief, para. 694. *See also* Ntahobali Reply Brief, para. 296. Ntahobali also argues that annexes C, D, and E of his appeal brief reveal radically different accounts of almost all material facts raised and that no reasonable trier of fact could have overlooked these facts which are relevant to assessing the credibility of all those witnesses. *See* Ntahobali Appeal Brief, paras. 697, 700. As discussed previously, because paragraph 697 of the Ntahobali Appeal Brief refers to his annexes in a general and non-particularised manner, the Appeals Chamber dismisses this aspect of his submission. *See supra*, fn. 3830.
[4290] Ntahobali Appeal Brief, para. 695, *referring to* Witness SU, T. 17 October 2002 pp. 59-64, Witness SS, T. 3 March 2003 pp. 55, 56.
[4291] Ntahobali Appeal Brief, paras. 696, 697.
[4292] Ntahobali Appeal Brief, para. 698.

versa.[4293] In addition, Ntahobali contends that the Trial Chamber failed to consider that none of the witnesses, who testified to the unnamed woman and her children being abducted from the veranda, mentioned this abduction in their prior statements.[4294]

1836. The Prosecution responds that Ntahobali fails to demonstrate how the Trial Chamber was unreasonable in concluding that Witnesses FAP, SS, and SU were testifying about other victims, rather than Mbasha's wife and her children.[4295] It also responds that Ntahobali's assertion that none of the witnesses testifying about the unnamed woman mentioned the abduction in their prior statements should be dismissed for lack of references.[4296]

1837. The Appeals Chamber observes that the Trial Chamber noted numerous elements of the evidence of Witnesses SU, SS, and FAP that could suggest that they testified about the same abduction[4297] and, specifically, about Mbasha's wife and children.[4298] This shows that the Trial Chamber was well aware of the similarities and differences in the relevant evidence.

1838. The Appeals Chamber has already considered and rejected the argument that the Trial Chamber erred in failing to find that Witnesses SU, SS, and FAP must have testified about the abduction of Mbasha's wife and chidren, especially in light of the purported parallels between the evidence of Witness FAP, on one hand, and Witnesses RE and TK, on the other hand.[4299] Again, the Appeals Chamber emphasises that Witness FAP's testimony, as noted by the Trial Chamber, reflects that the unknown woman she testified about was killed at the prefectoral office,[4300] which is distinct from evidence about the abduction of Mbasha's wife and children.[4301] Consequently, the Appeals Chamber considers that Ntahobali fails to demonstrate that no reasonable trier of fact could have found, as the Trial Chamber did, that Witness FAP was not testifying about Mbasha's wife and her children.

[4293] Ntahobali Appeal Brief, para. 698.
[4294] Ntahobali Appeal Brief, para. 699.
[4295] Prosecution Response Brief, paras. 1023-1028.
[4296] Prosecution Response Brief, para. 1029.
[4297] The Trial Chamber noted that the evidence of Witnesses FAP, SS, and SU converged on the following facts: (i) the lady came to the prefectoral office with a man and a child or children; (ii) the woman stayed on the veranda; (iii) during their abduction, the lady and/or the children cried out in protest; and (iv) the woman was hit or killed. *See* Trial Judgement, paras. 2250, 2252, 2285, 2304, 2305, 2732-2734.
[4298] *See* Trial Judgement, para. 2734. The Trial Judgement identifies several similarities within the evidence of Witnesses SU, SS, FAP, TK, RE, and QJ: (i) the woman arrived at the prefectoral with a tall, fair-complexioned man; (ii) the mother and Ntahobali had a discussion; (iii) the woman pleaded to spare her children; (iv) the woman and her children were taken from the veranda; and (v) the woman and children were eventually abducted. *See ibid*., paras. 2667, 2668, 2673-2675, 2717-2719, 2732-2734.
[4299] *See supra*, Section IV.F.2(e)(iii)a.
[4300] Trial Judgement, para. 2735.
[4301] *See* Trial Judgement, paras. 2196, 2213, 2214, 2277, 2717-2719.

1839. Turning to the allegedly overlapping elements of Witness TK's evidence, on one hand, and that of Witnesses SU and SS, on the other hand, the Appeals Chamber observes that all the witnesses testified that the woman and her children arrived in a group that included a man,[4302] and Witnesses TK and SU consistently described one man in the group as tall and with a fair complexion.[4303] Nonetheless, Witness SU's evidence reflects that the group did not simply constitute this man and his family.[4304] Moreover, Ntahobali provides no reference to support the contention that Witness TK testified that Mbasha and his family were coming from the bursary.[4305] The evidence of Witnesses SU and SS is distinct on this element.[4306]

1840. Of greater significance, while Witness TK testified about a woman named Trifina being slit across the throat and killed before being loaded onto the vehicle,[4307] she did not suggest that anything similar occurred to Mbasha's wife prior to being placed in the cabin of the vehicle with Nyiramasuhuko.[4308] By contrast, Witness SU testified that the woman whom she observed being abducted was struck on the neck with a machete and, according to Witness SS, the woman she observed being abducted was dead when loaded onto the vehicle.[4309] The Appeals Chamber observes that the Trial Chamber recounted all of this evidence in detail when deliberating on the testimonies of each of these three witnesses.[4310] Under these circumstances, the Appeals Chamber does not find that the Trial Chamber was compelled to conclude that these witnesses were all testifying to the same abduction, and more specifically, that of Mbasha's wife and children.[4311]

[4302] *See* Witness SS, T. 5 March 2003 p. 69. *See also* Trial Judgement, paras. 2210, 2250, 2285, 2305, 2733, 2734.
[4303] *See* Witness TK, T. 20 May 2002 p. 63, T. 23 May 2002 p. 21; Witness SU, T. 14 October 2002 p. 35. *See also* Trial Judgement, paras. 2210, 2250, 2732.
[4304] *See* Witness SU, T. 17 October 2002 p. 59 ("Q. […] Now, the people who came from the economat, including the mother and her two twins, how many people accompanied them? A. […] The people who were brought in from the economat were been conducted in a queue, they were in a single file. Amongst them were women, young girls, men, a young man and an old woman. With these individuals were also a tall person whose complexion was clear, I don't know whether he was a priest, he was balding, but this latter person was taken away, I don't know whether he is still alive or whether he is already dead. Let me add something else. This old man and that old lady who were brought in from the Economat were a couple, a man and his wife, they are still alive, but I do not know where they are now living. It was only those individuals.").
[4305] *See* Ntahobali Appeal Brief, para. 695. *See also ibid*., Annex C.
[4306] *Compare* Witness SU, T. 14 October 2002 p. 32 ("A. […] She called them and ordered them to get the people aboard the vehicle, making a distinction between men and women. They immediately took a lady who had twins. I earlier on had seen people bring this lady and they brought her from the bursar's office, economa. When they when brought her from the accounts office, economa, there were other people who were brought together with her."), 35 ("A. This woman was taken from the economa or the bursar's office by people.") *with* Witness SS, T. 5 March 2003 p. 69 ("Q. Madam Witness, were – did these people not come from the Economat of the procureur? A. I don't know where they were coming from, because I myself did not know.").
[4307] *See* Witness TK, T. 20 May 2002 pp. 90, 91, T. 22 May 2002 pp. 73, 74, 77, 103, 108. *See also* Trial Judgement, paras. 2215, 2728-2730.
[4308] *See* Witness TK, T. 20 May 2002 p. 96. *See also* Trial Judgement, paras. 2213, 2214, 2717.
[4309] *See* Witness SU, T. 14 October 2002 p. 36; Witness SS, T. 3 March 2003 p. 57, T. 5 March 2003 p. 65. *See also* Trial Judgement, paras. 2252, 2285, 2732, 2733.
[4310] *See* Trial Judgement, paras. 2728, 2732, 2733.
[4311] *See also supra*, Section IV.F.2(e)(iii)a.

1841. Having dismissed Ntahobali's contentions that Witnesses SU, SS, and FAP must have testified about the abduction of Mbasha's wife and children, the Appeals Chamber also finds no merit in Ntahobali's contention that the Trial Chamber erred in its analysis of their evidence. Specifically, Ntahobali does not demonstrate with references that the fact that Witnesses TK, RE, and QJ did not refer to the abductions described by Witnesses SU, SS, and FAP, or *vice versa*, necessarily rendered their accounts incompatible. Moreover, his general argument that none of the witnesses discussed this abduction in their prior statements is unpersuasive and unsupported by any reference. Given the vague and insufficient nature of his argument as well as the fact that a trial chamber has the discretion to accept a witness's testimony notwithstanding inconsistencies between the said testimony and his previous statements,[4312] the Appeals Chamber dismisses Ntahobali's undeveloped contention.

(vi) General Inconsistencies

1842. The Trial Chamber determined that, regardless of whether refugees were taken to Rwabayanga, Kabutare, Mukoni, or the IRST, the only reasonable inference is that they were abducted from the Butare Prefecture Office to be killed.[4313] In coming to this conclusion, the Trial Chamber considered the evidence of, among others, Witnesses SU, RE, FAP, and QBQ, and their hearsay accounts from survivors such as Annonciata and Semanyenzi.[4314]

1843. Ntahobali submits that no reasonable trial chamber could have resolved, as the Trial Chamber did, inconsistencies in the evidence on where abducted refugees were taken and killed.[4315] Specifically, he notes that the witnesses testified that the victims were taken to four different locations – Kabutare, Rwabayanga, Mukono, and the IRST – but argues that this information came from two survivors of the abductions, Semanyenzi and Annonciata.[4316] In his view, it was absurd for the Trial Chamber to consider that refugees were taken to four different locations.[4317] Ntahobali adds that the Trial Chamber erred in finding that the abducted refugees were forcefully undressed and erred in using this to convict him, particularly since it determined elsewhere that there was insufficient evidence to sustain such a conviction.[4318]

[4312] *Kanyarukiga* Appeal Judgement, para. 121; *Hategekimana* Appeal Judgement, paras. 190, 198; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. *See also Rutaganda* Appeal Judgement, para. 443; *Musema* Appeal Judgement, para. 89.
[4313] Trial Judgement, para. 2749.
[4314] *See* Trial Judgement, paras. 2745-2748.
[4315] Ntahobali Appeal Brief, para. 676, *referring to* Trial Judgement, paras. 2747-2749.
[4316] Ntahobali Appeal Brief, para. 676. In this regard, Ntahobali also submits that the Trial Chamber failed to note the implausibility of Semanyenzi surviving both the abductions on the Night of Three Attacks and the trip to Nyange. *See idem*, *referring to* Trial Judgement, paras. 4072, 4175.
[4317] Ntahobali Appeal Brief, para. 676. *See also* Ntahobali Reply Brief, para. 279.
[4318] Ntahobali Appeal Brief, para. 678. *See also ibid*., para. 687.

1844. The Prosecution responds that the Trial Chamber reasonably considered divergent accounts on the locations where refugees were taken to be killed and that it properly assessed the evidence.[4319] It also submits that the Trial Chamber's finding that some refugees were forced to undress was not a basis of Ntahobali's conviction and that his argument should be summarily dismissed.[4320]

1845. The Appeals Chamber has already considered and rejected similar contentions raised by Nyiramasuhuko that the Trial Chamber erred in its assessment of the evidence related to the locations where abducted refugees were killed.[4321] Given that Ntahobali's submissions present no materially distinct argument and simply reflect his disagreement with the Trial Chamber's analysis without showing any error, the Appeals Chamber dismisses his contentions. Ntahobali's emphasis on the location of the killings also ignores that the evidence of principal significance – *i.e.* that the abducted refugees were killed – is entirely consistent.[4322] The Appeals Chamber therefore finds that Ntahobali does not demonstrate that the Trial Chamber's consideration of the evidence on the killing sites was unreasonable.[4323]

1846. The Appeals Chamber also dismisses Ntahobali's contention regarding the Trial Chamber's alleged contradictory findings on whether Tutsi refugees were forcefully undressed during the Night of Three Attacks. In support of his argument, Ntahobali refers to a paragraph of the Trial Judgement where the Trial Chamber concluded that the Prosecution failed to adduce sufficient evidence to prove beyond reasonable doubt that Tutsis were forced to undress during attacks at the EER, which is in no way related to the Night of Three Attacks or events at the Butare Prefecture Office.[4324] While the Trial Chamber concluded that some abducted Tutsis were forced to undress during the Night of Three Attacks,[4325] the Trial Chamber's finding that Ntahobali participated in the Night of Three Attacks is not dependent upon this conclusion.[4326]

1847. As a result, the Appeals Chamber dismisses Ntahobali's contentions in these respects.

[4319] Prosecution Response Brief, para. 1052, *referring to* Trial Judgement, para. 2747. *See also ibid*., para. 1053.
[4320] Prosecution Response Brief, para. 1055.
[4321] *See supra*, Section IV.F.2(e)(vi).
[4322] *See* Trial Judgement, para. 2749.
[4323] The Appeals Chamber also finds that Ntahobali fails to demonstrate how Semanyenzi's survival from two different abductions is implausible or how evidence of this nature undermines the reasonableness of the Trial Chamber's conclusion. *See supra*, Section IV.F.2(e)(vi). Furthermore, the Appeals Chamber is not persuaded that the evidence of Witnesses QY and SJ was essential to the Trial Chamber's conclusion that refugees were abducted from the prefectoral office in order to be killed. *See* Trial Judgement, paras. 2743, 2746, 2747. Consequently, to the extent that the Trial Chamber erred in relying on this evidence, the Appeals Chamber does not find that it has occasioned a miscarriage of justice.
[4324] *See* Trial Judgement, paras. 6132, 6137.
[4325] Trial Judgement, para. 5873.
[4326] *See* Trial Judgement, paras. 5876, 6053, 6054, 6100, 6101, 6168, 6169.

(vii) Conclusion

1848. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in relying on the evidence of Witnesses QY and SJ in support of its findings regarding the Night of Three Attacks but that this error has not occasioned a miscarriage of justice. The Appeals Chamber dismisses the remainder of Ntahobali's challenges in Ground 3.6 of his appeal as it concerns the assessment of evidence pertaining to the Night of Three Attacks.

(e) First Half of June Attacks

1849. The Trial Chamber determined that Ntahobali, injured soldiers, and *Interahamwe* came to the Butare Prefecture Office in the first half of June 1994 to rape women and abduct refugees.[4327] It found in particular that during one of these attacks, Ntahobali handed Witness TA over to about seven *Interahamwe* to rape her.[4328] The Trial Chamber convicted Ntahobali for aiding and abetting the rape of Witness TA during one of these attacks.[4329] The Appeals Chamber has reversed Ntahobali's convictions for committing rapes during these attacks.[4330] The Appeals Chamber recalls that it has determined, Judge Khan dissenting, that Ntahobali was not convicted in relation to the killings that were perpetrated during the First Half of June Attacks.[4331] However, for the reasons mentioned above, the Appeals Chamber will nonetheless address Ntahobali's challenges to the assessment of the evidence concerning these attacks.[4332]

1850. Ntahobali submits that the Trial Chamber erred in its assessment of the evidence related to the rapes of Witness TA and the abductions and killings that occurred during the First Half of June Attacks.[4333]

(i) Rapes of Witness TA

1851. When first considering evidence that attacks occurred at the prefectoral office in the first half of June 1994, the Trial Chamber observed that Witness TA testified that Immaculée Mukagatare was raped during the "fourth attack" the witness observed, which corresponded to the first or second week of June 1994.[4334] It further noted that Witness QBP testified that she also observed the rape of a woman named Immaculée Mukagatare.[4335] The Trial Chamber concluded

[4327] Trial Judgement, paras. 2773, 2781(v).
[4328] Trial Judgement, para. 2773.
[4329] *See supra*, Sections V.I.1(b), V.I.1(c).
[4330] *See supra*, Sections V.I.1(b), V.I.1(c).
[4331] *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4332] *See supra*, Section V.I.2.
[4333] Ntahobali Appeal Brief, paras. 625, 627, 628, 634, 708-715.
[4334] Trial Judgement, para. 2750.
[4335] Trial Judgement, para. 2750.

that Witness TA's evidence "corresponds with the attack described by Witness QBP which allegedly occurred in June 1994."[4336]

1852. The Trial Chamber later recalled Witness TA's evidence that, during an attack 18 to 20 days after the "first attack", a group of eight *Interahamwe*, including Ntahobali, arrived at the Butare Prefecture Office.[4337] It concluded that, on this occasion, Ntahobali handed Witness TA over to the *Interahamwe* and told them to be quick, after which seven *Interahamwe* raped her.[4338] The Trial Chamber further discussed Witness TA's evidence of Ntahobali raping Immaculée Mukagatare during the same attack.[4339] However, the Trial Chamber noted that "Witness TA later testified that the rape of Immaculée [Mukagatare] occurred on the fifth occasion that Ntahobali visited the [prefectoral office], on which occasion Witness TA was not personally raped."[4340] The Trial Chamber concluded that, given the traumatic nature of this incident and the amount of time that had passed since this rape, this discrepancy was not "serious or such as to undermine Witness TA's overall credibility as to this account."[4341]

1853. The Trial Chamber convicted Ntahobali for aiding and abetting Witness TA's rapes at the prefectoral office on this basis.[4342] It held that it would not convict Ntahobali for the crimes committed against Immaculée Mukagatare as a result of the Prosecution's late disclosure of the name of this victim.[4343]

1854. Ntahobali argues that the Trial Chamber unreasonably concluded that Witnesses QBP and TA testified to the same attack and that several errors related to the assessment of the evidence pertaining to the rape of Immaculée Mukagatare further undermine the Trial Chamber's reasoning.[4344] He contends that the Trial Chamber unreasonably failed to apply caution to the testimonies of Witnesses QBP and TA in light of their familial relationship and argues that the Trial Chamber erred in unreasonably rejecting Defence evidence raising doubt as to Witness QBP's presence at the prefectoral office.[4345] He also contends that the Trial Chamber erred in its assessment of inconsistencies in Witness TA's evidence as to whether or not she was raped during the fourth or fifth attack she observed at the prefectoral office and whether she saw Ntahobali

[4336] Trial Judgement, para. 2750.
[4337] Trial Judgement, para. 2770.
[4338] Trial Judgement, paras. 2770, 2781(v).
[4339] Trial Judgement, para. 2770. *See also ibid.*, para. 2185.
[4340] Trial Judgement, para. 2770. *See also ibid.*, para. 2185.
[4341] Trial Judgement, para. 2770.
[4342] *See supra*, Sections V.I.1(b), V.I.1(c). *See also* Trial Judgement, paras. 5874, 5875, 6094, 6184.
[4343] Trial Judgement, para. 2172. *See also supra*, Section V.I.2(a)(ii).
[4344] Ntahobali Appeal Brief, paras. 627, 628, 634, 709, 710.
[4345] Ntahobali Appeal Brief, paras. 628, 710; Ntahobali Reply Brief, para. 307.

raping Immaculée Mukagatare on the same occasion that she was raped.[4346] Ntahobali further submits that the Trial Chamber failed to address Witness TA's inability to identify anyone at the prefectoral office, despite Witness QBP's testimony that they were related and that they were together at the prefectoral office.[4347] He also points out that Witness QBP did not identify Witness TA as having been raped at the prefectoral office.[4348] Finally, Ntahobali submits that the Trial Chamber failed to consider sufficiently contradictory evidence from Witnesses QBP, SS, SJ, RE, and FAP that no other attacks occurred after the Night of Three Attacks and the testimonies of Witnesses FAP and QBQ that they did not see Ntahobali after the Night of Three Attacks.[4349]

1855. The Prosecution responds that Ntahobali fails to demonstrate any error in the Trial Chamber's assessment of the evidence relating to the First Half of June Attacks, arguing that the purported inconsistencies are addressed in the Trial Judgement or are too minor to undermine the Trial Chamber's reliance on Witness TA's evidence.[4350] It further responds that Ntahobali's assertion that the Trial Chamber unreasonably concluded that attacks occurred at the prefectoral office after the Night of Three Attacks is incorrect.[4351]

1856. The Appeals Chamber observes that the Trial Chamber's findings, as summarised above, are unclear as to whether the Trial Chamber determined that Witness TA was handed over by Ntahobali to be raped on the same occasion that Immaculée Mukagatare was raped. Witness TA's evidence is unclear in this respect.[4352] However, regardless of whether Witness TA's account of being raped in the first half of June 1994 relates to the attack during which Immaculée Mukagatare was raped, Ntahobali does not demonstrate that any of the purported errors he points out regarding the assessment of the evidence related to the rape of Immaculée Mukagatare or to Witness QBP's evidence relating to this specific attack would undermine the Trial Chamber's conclusion that Ntahobali aided and abetted Witness TA's rape during an attack in the first half of June 1994.

1857. Ntahobali was not held responsible for the rape of Immaculée Mukagatare and the Trial Chamber did not rely on this aspect of the evidence with respect to any of Ntahobali's convictions.

[4346] Ntahobali Appeal Brief, paras. 625, 627.
[4347] Ntahobali Appeal Brief, paras. 628, 750-752.
[4348] Ntahobali Appeal Brief, para. 634. *See also supra*, Section V.I.2(c)(iv).
[4349] Ntahobali Appeal Brief, paras. 706, 708, 714. *See also* Ntahobali Supplementary Submissions, para. 39. The Appeals Chamber notes that, during the appeals hearing, Ntahobali argued that the Trial Chamber's conclusion and evidence that *gendarmes* or soldiers were placed at the prefectoral office between 5-15 June 1994 raises the possibility that no attacks occurred after 5 June 1994, casting doubt on the Trial Chamber's findings in relation to the First Half of June Attacks. *See* AT. 15 April 2015 pp. 51, 52. This argument has been addressed above in Section V.I.2(d)(i). *See also supra*, Section IV.F.2(f).
[4350] Prosecution Response Brief, paras. 982, 989, 1085, 1086. Ntahobali replies that the Prosecution erroneously refers to Witness QBQ as opposed to Witness QBP. *See* Ntahobali Reply Brief, para. 307. The Appeals Chamber notes that the Prosecution mistakenly refers to Witness QBQ in paragraphs 1084 and 1086 of its response brief. However, its references pertain to Witness QBP and the Appeals Chamber therefore considers it a typographical error.
[4351] Prosecution Response Brief, para. 1083.

Although the Trial Chamber stated that it found it established beyond reasonable doubt that "Ntahobali, injured soldiers and *Interahamwe* came to the [prefectoral office] in June 1994 to rape women and abduct refugees" based "on the testimony of Witnesses TA, QBP and TK",[4353] a close examination of the Trial Chamber's analysis reveals that Witness QBP's evidence was not used to establish Ntahobali's role in aiding and abetting the rape of Witness TA or participating in any other rape as she did not testify to Ntahobali's presence during the attack she recounted.[4354]

1858. In this context, the Appeals Chamber finds that the alleged inconsistencies within Witness TA's testimony, and between her testimony and that of Witness QBP, raised by Ntahobali concerning non-material features of Immaculée Mukagatare's rape and the attack during which it occurred[4355] are immaterial to the Trial Chamber's consideration of the evidence implicating Ntahobali in the rapes of Witness TA committed by *Interahamwe* during one of the attacks in the first half of June 1994.[4356] Similarly, the Appeals Chamber considers that the Trial Chamber's alleged failure to treat Witnesses TA's and QBP's evidence on this incident with sufficient caution given their familial links and to assess properly Defence evidence that purported to undermine Witness QBP's testimony that she was present at the prefectoral office when Immaculée Mukagatare was raped are irrelevant to Ntahobali's convictions.

1859. Turning to Ntahobali's challenges to the reliability of Witness TA's evidence related to her rape by *Interahamwe* during the First Half of June Attacks, the Appeals Chamber observes that the Trial Chamber expressly addressed Witness TA's varying evidence as to whether she was raped during the fourth or fifth attack she observed at the prefectoral office and whether she saw Ntahobali raping Immaculée Mukagatare on the same occasion that she was raped.[4357] As noted above, given the traumatic nature of the incident and the amount of time that had passed, the Trial

[4352] *See* Witness TA, T. 29 October 2001 pp. 8-27, T. 1 November 2001 pp. 36-48.
[4353] Trial Judgement, para. 2773.
[4354] Trial Judgement, paras. 2266-2269, 2763-2766, 2768, 2769.
[4355] Ntahobali points out that: (i) Witness TA testified during examination-in-chief that she saw Ntahobali place logs on Immaculée Mukagatare's legs after having raped her, but stated during cross-examination that she did not see Ntahobali place the logs on Immaculée Mukagatare; (ii) Witness TA testified that after handing her over to the *Interahamwe* to be raped, Ntahobali told them to be quick because he was going away, but subsequently testified that after her rape she saw Ntahobali nearby raping Immaculée Mukagatare; (iii) Witness QBP testified that the women, including Immaculée Mukagatare, were raped behind the prefectoral office during an attack at which Nyiramasuhuko was present whereas Witness TA testified that Immaculée Mukagatare was raped in the courtyard and did not mention Nyiramasuhuko's presence; (iv) Witness QBP testified that white people came to the prefectoral office and that Hutus were present whereas Witness TA did not mention white people and testified that there were no Hutus present; and (v) Witness TA testified that, after raping Immaculée Mukagatare, Ntahobali returned to the prefectoral office on four separate occasions, in each case after a number of days, which Ntahobali argues is implausible considering Witness QBP's testimony that the refugees left for Rango Forest a few days after the rape. *See* Ntahobali Appeal Brief, paras. 627, 709. *See also supra*, Section V.I.2(c)(iv).
[4356] The same reasoning applies to Ntahobali's argument that the Trial Chamber erred in its assessment of the evidence of Witnesses SS and SU as their evidence was not relied upon by the Trial Chamber to convict Ntahobali or corroborate the details of Witness TA's evidence concerning her rape during the First Half of June Attacks or Ntahobali's participation in any other rapes during those attacks. *See* Ntahobali Appeal Brief, para. 707.

Chamber did not consider the discrepancy to be serious enough to undermine Witness TA's overall credibility as to her account of the attack. Ntahobali fails to show that the Trial Chamber erred in considering the impact of trauma on Witness TA's testimony.[4358] Recalling that the presence of inconsistencies in a witness's evidence does not, *per se*, require a reasonable trier of fact to reject it as unreliable,[4359] the Appeals Chamber is also not persuaded that, given the numerous times Witness TA was attacked at the prefectoral office, any inconsistency as to whether she was raped by *Interahamwe* on the fourth or fifth attack she observed or whether Immaculée Mukagatare was raped on the same occasion or not prevented a reasonable trier of fact from relying on the fundamental features of Witness TA's evidence. The Appeals Chamber also reiterates that whether *Interahamwe* raped Witness TA during the fourth or fifth time she saw Ntahobali come to the prefectoral office or whether it occurred during the same attack during which Immaculée Mukagatare was raped is of no material importance to Ntahobali's convictions in light of the Trial Chamber's findings.

1860. With respect to the Trial Chamber's alleged failure to address the fact that Witness TA did not mention that Witness QBP, a relative, was present with her at the prefectoral office despite Witness QBP's evidence to this effect, the Appeals Chamber observes that, when Witness TA was asked if she met anyone at the prefectoral office or developed friendships with anyone, she responded that she did not.[4360] However, Witness TA was not questioned as to whether she knew Witness QBP specifically and did not deny knowing her.[4361] Moreover, Ntahobali overstates the probativeness of Witness QBP's testimony that she was with Witness TA at the prefectoral office and the EER, as it does not reflect that they were with each other at all times at each location.[4362] In addition, as observed earlier, Ntahobali exaggerates the relationship between Witnesses QBP and TA, as Witness QBP stated that she did not know their exact relationship and was unsure as to how they were related.[4363] In light of this, the fact that Witness TA did not mention in her testimony that Witness QBP was present with her at the prefectoral office did not render the Trial Chamber's reliance on Witness TA's evidence unreasonable nor was the Trial Chamber required to address expressly this aspect of Witness TA's testimony in its deliberations.

1861. The Appeals Chamber likewise sees no error in the Trial Chamber's reliance on Witness TA's testimony that she was raped despite the fact that Witness QBP did not name her as a

[4357] Trial Judgement, para. 2770.
[4358] *See supra*, Sections V.I.2(a)(iv), V.I.2(c)(i).
[4359] *Ntawukulilyayo* Appeal Judgement, para. 73; *Kupreškić et al.* Appeal Judgement, para. 31. *See also Muvunyi* Appeal Judgement of 1 April 2011, para. 44; *Karera* Appeal Judgement, para. 174.
[4360] Witness TA, T. 7 November 2001 p. 109.
[4361] *See supra*, Section III.F. Witness TA was only specifically asked if she knew Witness SJ. *See* Witness TA, T. 7 November 2001 p. 114 (closed session).
[4362] Witness QBP, T. 29 October 2002 pp. 46, 47 (closed session). *See also supra*, para. 1733.

rape victim. Witness QBP expressly stated that she was unable to estimate the number of women who were taken behind the prefectoral office and raped, stressing the traumatic circumstances in which she was hiding and sought to survive.[4364] Furthermore, as discussed previously, it is not clear that Witness TA was raped on the same occasion as the attack discussed by Witness QBP, which involved the rape of Immaculée Mukagatare.[4365]

1862. Similarly, the Appeals Chamber finds that Ntahobali fails to demonstrate any error on the part of the Trial Chamber regarding the assessment of the evidence of Witnesses QBP, SS, SJ, RE, and FAP that no other attacks occurred after the Night of Three Attacks or that Ntahobali was not seen at the prefectoral office after the Night of Three Attacks. The Trial Chamber assessed the evidence of Witnesses SS, SJ, RE, and FAP as it concerned the Night of Three Attacks in detail.[4366] Recalling that a trier of fact is not obliged to articulate every step of its reasoning[4367] and that it is to be presumed that it assessed and weighed the evidence presented to it, as long as there is no indication that it completely disregarded any particular piece of evidence,[4368] the Appeals Chamber is not persuaded that any discrepancy in their evidence was ignored.

1863. Furthermore, Ntahobali's reliance on the evidence of Witness QBP in this respect is misplaced since her testimony does not concern the Night of Three Attacks but a later attack in the first half of June 1994.[4369] Ntahobali also does not substantiate his argument that Witness SS's testimony does not support that attacks occurred at the prefectoral office subsequent to the Night of Three Attacks.[4370] As for Witnesses SJ, RE, and FAP, it was within the Trial Chamber's discretion to rely on the mutually corroborative evidence of Witnesses SS, SU, and QBP and, in particular, Witnesses TA and TK, who the Trial Chamber found particularly credible and reliable,[4371] to find

[4363] Witness QBP, T. 29 October 2002 pp. 42, 43 (closed session). *See also supra*, para. 1733.
[4364] Witness QBP, T. 24 October 2002 pp. 85, 86 and 107 (closed session), T. 29 October 2002 pp. 12-14.
[4365] *See* Trial Judgement, paras. 2763-2770.
[4366] Trial Judgement, paras. 2654-2657, 2659-2661, 2663, 2664, 2672-2674, 2676, 2680, 2686-2690, 2694-2700, 2703, 2705, 2707-2712, 2719-2724, 2731-2738. *See also supra*, Section V.I.2(d).
[4367] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Ntabakuze* Appeal Judgement, para. 161; *Kanyarukiga* Appeal Judgement, para. 114.
[4368] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, paras. 215, 415; *Ntabakuze* Appeal Judgement, fn. 357; *Kvočka et al.* Appeal Judgement, para. 23.
[4369] *See supra*, paras. 894, 960, 1757.
[4370] The Appeals Chamber observes that, in his appeal brief, Ntahobali refers to Witness SS's testimony to support his contention that Witness SS "testified that attacks occurred only on one day" and during the Night of Three Attacks. *See* Ntahobali Appeal Brief, para. 707, *referring to* Witness SS, T. 3 March 2003 pp. 47-56, 65-71, and 72, 73 (closed session). A reading of the relevant transcripts does not demonstrate that Witness SS's testimony is inconsistent with the Trial Chamber's finding that attacks occurred after the Night of Three Attacks, including one where Witness SU showed the *Interahamwe* her breasts in order to dissuade them from raping her. *See* Trial Judgement, para. 2757, *referring to* Witness SS, T. 3 March 2003 p. 74 (closed session). As observed by the Trial Chamber, Witness SU testified that this incident occurred after the Night of Three Attacks. *See* Trial Judgement, paras. 2753-2756. *See also* Witness SU, T. 14 October 2002 pp. 49-52, 60, 61.
[4371] The Trial Chamber relied primarily on Witness TA to convict Ntahobali for his involvement in the Mid-May Attack and Last Half of May Attacks. *See supra*, Section V.I.2(c). The Trial Chamber also stated that it found Witness TK's testimony concerning the Night of Three Attacks "particularly convincing". *See* Trial Judgement, para. 2662.

that attacks occurred after the Night of Three Attacks. Ntahobali merely states that Witness SJ testified to only one night of attacks and references the Trial Chamber's finding that the only attacks Witnesses RE and FAP testified to occurred on the Night of Three Attacks, but fails to demonstrate or provide any indication as to why the entirety of their testimonies renders it unreasonable for the Trial Chamber to have found that subsequent attacks occurred.[4372]

1864. Accordingly, the Appeals Chamber concludes that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that, during one of the First Half of June Attacks, Ntahobali handed Witness TA to about seven *Interahamwe*, who then raped her.

(ii) Killings

1865. In assessing Ntahobali's participation in killings in relation to attacks at the prefectoral office during the first half of June 1994, the Trial Chamber concluded that Witness TK "corroborated Witness TA's testimony regarding additional attacks" at the prefectoral office apart from the Night of Three Attacks.[4373] The Trial Chamber accepted Witness TK's evidence that Ntahobali came to the prefectoral office "on a number of evenings, accompanied by *Interahamwe* or disabled soldiers", that he "committed crimes on each evening he came to the [Butare Prefecture Office]", and that, on some occasions, Ntahobali "came to determine whether there were any men left, who were then taken away to be killed".[4374] The Trial Chamber also relied on Witness TK's testimony that Ntahobali "would say to the *Interahamwe*, '[b]e firm in your actions,' when he meant, 'kill all of them.'"[4375] The Trial Chamber similarly relied on Witness TA's evidence that "a group of eight *Interahamwe*, including Shalom arrived at the [Butare Prefecture Office] in the same vehicle and attacked the refugees with machetes, hammers, Rwandan clubs and sticks"[4376] and that "[t]hey killed some, wounded others and threw the dead and wounded into their vehicle".[4377]

1866. Ntahobali submits that the Trial Chamber erred in finding that Witness TK corroborated Witness TA's evidence with respect to the occurrence of additional attacks at the prefectoral office after the Night of Three Attacks.[4378] Specifically, he contends that Witness TK's testimony was

[4372] Ntahobali Appeal Brief, para. 708, *referring to* Trial Judgement, paras. 2654, 2655, 2657-2661.
[4373] Trial Judgement, para. 2771.
[4374] *See* Trial Judgement, para. 2771, *referring to* Witness TK, T. 20 May 2002 p. 100, T. 23 May 2002 p. 126.
[4375] *See* Trial Judgement, para. 2771, *referring to* Witness TK, T. 20 May 2002 p. 109.
[4376] Trial Judgement, para. 2770. *See also ibid*., para. 2184.
[4377] Trial Judgement, para. 2184.
[4378] Ntahobali also argues that "Witness TK rebutted Witness TA's evidence on the presence of Nyiramasuhuko on several occasions", but fails to provide any references to either the Trial Judgement or the transcripts in support of this argument. In the same paragraph of his appeal brief, he also argues that Witness TA only testified to Nyiramasuhuko's presence during the Mid-May Attack. *See* Ntahobali Appeal Brief, para. 711. As Ntahobali has not substantiated his vague and contradictory argument with a reference, the Appeals Chamber dismisses it without further consideration.

insufficiently detailed to have any corroborative value.[4379] Moreover, he argues that, in contrast to Witness TK, Witness TA testified that Nyiramasuhuko was only present at the prefectoral office during the Mid-May Attack, did not discuss the Night of Three Attacks, including the abduction of the Mbashas, and did not testify about the presence of wounded soldiers or that Ntahobali "made a mockery of the refugees" during any of the First Half of June Attacks.[4380]

1867. Ntahobali further argues that the Trial Chamber erred in failing to address that Witness TK did not mention any attacks other than the Night of Three Attacks or any rapes committed by Ntahobali in her four prior statements.[4381] He suggests that Witness TK's response during cross-examination as to the omission of rapes from the statements was vague.[4382] In addition, Ntahobali argues that the Trial Chamber unreasonably failed to consider the contradiction between Witness TK's testimony that Ntahobali came to the prefectoral office "very often" to commit crimes and the testimonies of Witnesses FAP and QBQ, who indicated that they did not see Ntahobali after the Night of Three Attacks.[4383]

1868. Finally, in his supplementary submissions, Ntahobali contends that the Trial Chamber erred in failing to consider a BBC video admitted into evidence reflecting that there were refugees at the prefectoral office on 15 June 1994, which he claims contradicts Witness TK's testimony that he allegedly came to the prefectoral office to see whether there were any refugees left and that refugees were abducted during the first half of June 1994.[4384]

1869. The Prosecution responds that the Trial Chamber reasonably concluded that Witness TK corroborated Witness TA as to the existence of attacks after the Night of Three Attacks, emphasising that corroboration does not require that two credible testimonies be identical.[4385] It argues that the absence of reference to attacks other than the Night of Three Attacks in Witness TA's prior statement does not undermine her testimony.[4386]

1870. The Appeals Chamber observes that the Trial Chamber's findings do not reflect that Witnesses TA and TK necessarily observed the same attack or attacks in the first half of

[4379] Ntahobali Appeal Brief, para. 711.
[4380] Ntahobali Appeal Brief, para. 711.
[4381] Ntahobali Appeal Brief, para. 712.
[4382] Ntahobali Appeal Brief, para. 712.
[4383] Ntahobali Appeal Brief, para. 714. *See also* Ntahobali Supplementary Submissions, para. 39.
[4384] Ntahobali Supplementary Submissions, para. 42, *referring to* Exhibit D473 (Nsabimana Interview with Fergal Keane). Although in his supplementary submissions Ntahobali suggests that the video was taken on 17 June 1994, Ntahobali relies on the date of 15 June 1994 in his appeal brief and, during the appeals hearing, disputed that it was taken on 17 June 1994. *See idem*; Ntahobali Appeal Brief, paras. 649, 651; AT. 16 April 2015 p. 34.
[4385] Prosecution Response Brief, paras. 1087, 1088.
[4386] Prosecution Response Brief, para. 1088.

June 1994.[4387] Despite this lack of clarity, the Appeals Chamber is satisfied that a reasonable trier of fact could have found that the evidence of Witnesses TA and TK provided mutual circumstantial corroboration given the consistent fundamental features of their testimonies about attacks in the first half of June 1994.[4388] The parallels in their evidence must also be considered in the context of the Trial Chamber's conclusions about Ntahobali's participation in the Mid-May Attack, the Last Half of May Attacks, and the Night of Three Attacks, which reflect that multiple attacks featuring the same characteristics as those described by Witnesses TA and TK were occurring at the prefectoral office during the time period that displaced Tutsis were seeking refuge there. As mentioned above, the Appeals Chamber has affirmed the Trial Chamber's findings about Ntahobali's involvement in these attacks.[4389]

1871. In these circumstances, the Appeals Chamber is not persuaded that the evidence of Witness TK is too vague to corroborate Witness TA's evidence. Witness TK's testimony reflects first-hand observations of the conduct of *Interahamwe* and Ntahobali at a particular location – the Butare Prefecture Office[4390] – and provides an approximate timeframe for the observations; namely, between the end of May or the beginning of June 1994 and the transfer of the refugees to Rango Forest in mid-June 1994.[4391]

1872. The Appeals Chamber observes that neither Witness TA nor Witness TK implicated Nyiramasuhuko in the attacks at the prefectoral office in the first half of June 1994[4392] and recalls that it has already considered and rejected Ntahobali's contentions that the Trial Chamber erred in failing to consider that Witness TA did not testify about the Night of Three Attacks, including the abduction of the Mbashas.[4393] The Appeals Chamber therefore fails to see how any discrepancy between the evidence of Witnesses TA and TK about this previous event is material to the Trial Chamber's reliance on their subsequent observations of Ntahobali's participation in one or more later attacks at the prefectoral office.

[4387] *See* Trial Judgement, paras. 2770, 2771, 2773, 2781(v). *See also supra*, Section IV.F.2(f). Accordingly, the Appeals Chamber dismisses Ntahobali's argument, raised during the appeals hearing, that the Prosecution considered all of the witnesses who testified to the First Half of June Attacks to be testifying about one attack and that there were major contradictions between their evidence. *See* Ntahobali Supplementary Submissions, para. 38.
[4388] Trial Judgement, paras. 2184 (summary of Witness TA's testimony that "a group of eight *Interahamwe*, including Shalom arrived at the [prefectoral office] in the same vehicle. They attacked the refugees with machetes, hammers, Rwandan clubs and sticks. They killed some, wounded others and threw the dead and wounded into their vehicle."), 2185, 2218 (summary of Witness TK's testimony that "[Ntahobali] came on a number of evenings, accompanied by *Interahamwe* or disabled soldiers who were staying at the *Groupe Scolaire*. […] Shalom also came to determine whether there were any men left, who were then taken away to be killed. Shalom committed crimes on each evening he came to the [prefectoral office].").
[4389] *See supra*, Sections V.I.2(c), V.I.2(d).
[4390] Trial Judgement, para. 2218, *referring to* Witness TK, T. 20 May 2002 p. 100, T. 23 May 2002 p. 88.
[4391] Witness TK, T. 20 May 2002 pp. 98-101.
[4392] Witness TA, T. 29 October 2001 pp. 7-27, T. 1 November 2001 pp. 36-48; Witness TK, T. 20 May 2002, p. 100, T. 23 May 2002 pp. 88, 126, 127.
[4393] *See supra*, Section V.I.2(d)(iii).

1873. With respect to Ntahobali's contention that the evidence of Witness TK varied from Witness TA's as the former testified that wounded soldiers were present during the attacks and that Ntahobali mocked the refugees, the Appeals Chamber recalls that two *prima facie* credible testimonies corroborate one another when one testimony is compatible with the other regarding the same fact or a sequence of linked facts.[4394] The Appeals Chamber does not consider that Witness TK's testimony that Ntahobali was accompanied by *Interahamwe* "or disabled soldiers" and that Ntahobali "came to mock the refugees" is so distinctive that Witness TA's testimony is incompatible with Witness TK's because it does not contain such details.[4395] Ntahobali ignores that the fundamental features of the evidence of Witnesses TA and TK were consistent with the fact that Ntahobali was present and participated in attacks at the prefectoral office in the first half of June 1994, that he was accompanied by *Interahamwe*, and that he and *Interahamwe* attacked refugees at the prefectoral office as well as removed others for the purpose of killing them.[4396]

1874. Turning to Ntahobali's contention that Witness TK's evidence is not credible because none of her four prior statements to Tribunal investigators refer to attacks subsequent to the Night of Three Attacks, the Appeals Chamber notes that Ntahobali did not raise this issue in his cross-examination of Witness TK or in his closing submissions.[4397] More importantly, having reviewed Witness TK's prior statements, the Appeals Chamber observes that three of them are not specific as to the date of the attacks she recalled and whether they occurred in one night,[4398] and the remaining statement focuses entirely on the Night of Three Attacks but does not give any indication that no attacks occurred after.[4399] Against this background, the Appeals Chamber finds no merit in Ntahobali's argument.

1875. Regarding the absence of mention of rapes in Witness TK's prior statements, the Appeals Chamber observes that Witness TK was questioned about these omissions and explained that her

[4394] *Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[4395] Trial Judgement, para. 2771, *referring to* Witness TK, T. 20 May 2002 p. 100, T. 23 May 2006 p. 126.
[4396] *See* Trial Judgement, paras. 2184, 2185, 2218. Moreover, the Trial Chamber noted that Witness QBP, who also testified about an attack occurring in the first half of June 1994, gave evidence that soldiers were involved. *See ibid.*, paras. 2765, 2766.
[4397] During cross-examination, Ntahobali only questioned Witness TK as to why she had omitted to mention in her prior statements rapes as well as the name of four particular *Interahamwe* who she testified accompanied Ntahobali. *See* Witness TK, T. 23 May 2002 pp. 99-106, 133-135. Nyiramasuhuko also did not question Witness TK during cross-examination as to why she failed to mention in her prior statements attacks additional or subsequent to the Night of Three Attacks. *See* Witness TK, T. 20 May 2002 pp. 118-139, T. 21 May 2002 pp. 6-147, T. 22 May 2002 pp. 5-137, T. 23 May 2002 pp. 5-55. In his closing brief, Ntahobali only raised the absence of any mention of rape from Witness TK's four prior statements and of any mention of a Tutsi named Pierre, who was abducted from the prefectoral office. *See* Ntahobali Closing Brief, paras. 240, 520, 530. In his closing arguments, Ntahobali only highlighted that Witness TK's four prior statements did not mention him at all, which is inaccurate. *See* Ntahobali Closing Arguments, T. 23 April 2009 p. 18.
[4398] Exhibit D45 (Witness TK's Statement, dated 17 December 1996) (confidential), Exhibit D46 (Witness TK's Statement, dated 14 November 1997) (confidential), Exhibit D47 (Witness TK's 1998 Statement).
[4399] Exhibit D44 (Witness TK's November 1996 Statement).

statements were based on the questions put to her during the available time.[4400] The Appeals Chamber also notes that her evidence about rapes during the First Half of June Attacks is not detailed.[4401] In these circumstances, the Appeals Chamber is not persuaded that Ntahobali has demonstrated that the Trial Chamber erred in relying on the other aspects of Witness TK's evidence concerning the First Half of June Attacks.

1876. The Appeals Chamber also rejects Ntahobali's argument that the Trial Chamber failed to provide a reasoned opinion by not considering the alleged contradiction between Witness TK's testimony that Ntahobali returned to the prefectoral office "very often" after the Night of Three Attacks and Witnesses FAP's and QBQ's testimonies that they did not see Ntahobali after that night. The Trial Chamber expressly noted that Witnesses FAP and QBQ only testified about the Night of Three Attacks and no others at the prefectoral office.[4402] It bears noting that nothing in the testimonies of Witnesses FAP and QBQ referred to by Ntahobali[4403] reflects that they testified that Ntahobali did not come to the prefectoral office after the Night of Three Attacks or categorically denied that additional attacks occurred. Both witnesses merely testified that they did not see Ntahobali after that night or observed other attacks, Witness QBQ specifying that "I wasn't paying attention […] [y]ou must understand that we were afraid, we were not concentrating on what we were looking at. We just expected to die at any minute without knowing when."[4404] Given the prevailing circumstances at the prefectoral office[4405] and in light of the corroborative evidence of Witnesses TA, SS, SU, and QBP that attacks were carried out on the prefectoral office after the Night of Three Attacks as well as Witness TA's testimony that Ntahobali participated in one of these attacks, the Appeals Chamber sees no error in the Trial Chamber's reliance on Witness TK's testimony that subsequent attacks occurred at the prefectoral office, notwithstanding the evidence of Witnesses FAP and QBQ that they did not see Ntahobali after the Night of Three Attacks.[4406]

1877. Finally, Ntahobali does not demonstrate that a BBC video reflecting the presence of refugees at the prefectoral office is incompatible with Witness TK's evidence that abductions occurred at the prefectoral office during the First Half of June Attacks, particularly because the

[4400] Witness TK, T. 23 May 2002 p. 133.
[4401] The Appeals Chamber recalls that it has reversed Ntahobali's convictions for committing rapes during the First Half of June Attacks entered on the basis of Witness TK's evidence due to its limited probative value. *See supra*, Sections V.I.1(b), V.I.1(c).
[4402] Trial Judgement, paras. 2656, 2658.
[4403] Ntahobali Appeal Brief, para. 714, *referring to* Witness FAP, T. 12 March 2003 p. 16, Witness QBQ, T. 3 February 2004 p. 90.
[4404] Witness QBQ, T. 3 February 2004 p. 90. *See also* Trial Judgement, paras. 2656 (stating that Witness FAP only testified about one attack and that this was the only night she saw Nyiramasuhuko and referring to an excerpt of her transcript in which she states that the three occasions she saw Nyiramasuhuko at the prefectoral office occurred on the same night), 2658 (stating that Witness QBQ testified to only one attack at the prefectoral office and that this attack involved the abduction and escape of Semanyenzi, and referring to excerpts of her testimony relating to Semanyenzi).
[4405] Trial Judgement, paras. 2627, 2781, 5866.

video was created around 15 June 1994[4407] and that no evidence was provided that *all* refugees were abducted during these attacks.

1878. Consequently, the Appeals Chamber finds that Ntahobali has not demonstrated any error in the Trial Chamber's assessment of the evidence of Witnesses TK and TA pertaining to his involvement in the abductions and killings which occurred during the First Half of June Attacks.

(iii) Conclusion

1879. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in relying on the evidence of Witnesses TA and TK concerning his participation in rapes and killings perpetrated during the attacks conducted in the first half of June 1994 at the prefectoral office.

(f) Number of Refugees Abducted and Killed

1880. The Trial Chamber noted that it was "not disputed that there were a large number of refugees at the [Butare Prefecture Office] compound between April and June 1994."[4408] In determining in the "Factual Findings" section of the Trial Judgement the number of refugees abducted from the Butare Prefecture Office and killed, the Trial Chamber also stated the following:

> The Chamber notes that it was […] difficult to estimate the number of refugees who were forced to board the pickup on each occasion when refugees were abducted from the [Butare Prefecture Office]. It was clear that the vehicle was full on each occasion. […] [T]he Chamber has found that between mid-May and mid-June 1994, Nyiramasuhuko and Ntahobali came to the [Butare Prefecture Office] with the pickup on at least seven occasions (once in mid-May; two additional times from mid-May to the beginning of June; three attacks during one night at the end of May or beginning of June; and another attack in June). Considering the pickup was nearly full on at least seven occasions, the Chamber is convinced beyond a reasonable doubt that hundreds of Tutsi refugees were abducted from the [Butare Prefecture Office] and killed.[4409]

In the "Legal Findings" section of the Trial Judgement, the Trial Chamber recalled that "[b]etween mid-May and mid-June 1994 Nyiramasuhuko, Ntahobali, *Interahamwe* and soldiers went to the [prefectoral office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted […]; and were killed in various locations throughout Butare *préfecture*."[4410] However, in its conclusions, the Trial Chamber convicted Ntahobali for ordering killings of Tutsis seeking refuge at the prefectoral office, without identifying the precise number of victims.[4411] When deliberating upon

[4406] *See also supra*, Section IV.F.2(f).
[4407] *See* Trial Judgement, paras. 2384, 5077.
[4408] Trial Judgement, para. 2627.
[4409] Trial Judgement, para. 2779.
[4410] Trial Judgement, para. 5867.
[4411] Trial Judgement, paras. 5876, 5971, 6053, 6100, 6168.

Ntahobali's sentence, the Trial Chamber also noted, with respect to the gravity of the crimes, the "seriousness and atrocity of crimes repetitively perpetrated at the [Butare Prefecture Office], where hundreds of Tutsis were abducted, raped and killed."[4412] However, the Trial Chamber also recalled that it found Ntahobali guilty of various crimes, including "the […] killings of Tutsis at the Butare *préfecture* office", without providing the precise number of victims.[4413]

1881. Ntahobali submits that the Trial Chamber erred in concluding that the fact that there was a large number of refugees at the prefectoral office between April and June 1994 was not disputed.[4414] He argues that the Prosecution's evidence concerning the number of Tutsi refugees at the prefectoral office was "extremely contradictory" and that the Trial Chamber erroneously discounted Defence evidence and made unsupported and contradictory findings, particularly regarding the period after refugees returned from the EER at the end of May 1994.[4415] He submits that the Trial Chamber's findings concerning the Tutsi refugee population at the prefectoral office from the end of May to mid-June 1994 reflect that their numbers increased during this period, negating the reasonable possibility that Ntahobali committed any attacks on them during this period.[4416]

1882. Ntahobali further argues that the Trial Chamber erred in finding that hundreds of refugees were abducted from the prefectoral office based on an unsupported conclusion that the pickup truck used during the seven attacks was full of Tutsis on each occasion.[4417] In his view, the Trial Chamber's estimation that hundreds of Tutsis were abducted and killed is undermined by the fact that no evidence demonstrates: (i) that the pickup truck was full on every occasion; or (ii) how many Tutsis the pickup truck could hold in addition to the *Interahamwe* guarding them.[4418] He argues that these errors warrant an acquittal for the events at the prefectoral office or a significant reduction in sentence.[4419]

[4412] Trial Judgement, para. 6217.
[4413] Trial Judgement, para. 6216.
[4414] Ntahobali Appeal Brief, para. 649. *See also* Ntahobali Notice of Appeal, para. 242; Ntahobali Reply Brief, para. 258.
[4415] Ntahobali Appeal Brief, paras. 649, 651. *See also* Ntahobali Notice of Appeal, para. 242; AT. 15 April 2015 pp. 50, 51.
[4416] Ntahobali Appeal Brief, paras. 650, 652. Ntahobali points to the Trial Chamber's findings that the number of refugees who returned to the Butare Prefecture Office from the EER around the end of May 1994 "well exceeded" 200 people, that in the first few days of June 1994 about 400 persons taken from the prefectoral office to Nyange were killed in attacks that Ntahobali was not involved in, and that the subsequent number of refugees who were finally sent to Rango Forest in mid-June totalled 250 to 300 people. *See ibid.*, paras. 650, 651, *referring to* Trial Judgement, paras. 3938, 4192, 4195, 5077, 5080, 5932. *See also* AT. 15 April 2015 pp. 50, 51.
[4417] Ntahobali Appeal Brief, paras. 653, 654.
[4418] Ntahobali Appeal Brief, paras. 654, 655, *referring to* Witness SJ, T. 29 May 2002 pp. 64-66, Witness FAP, T. 13 March 2003 pp. 36, 37.
[4419] Ntahobali Appeal Brief, para. 656.

1883. The Prosecution responds that the Trial Chamber reasonably concluded that there were a large number of refugees present based on the totality of the evidence, including the credible accounts of Witnesses TQ, TA, TK, SU, RE, and Nsabimana Defence Witness Alexandre Bararwandika.[4420] The Prosecution did not specifically respond to Ntahobali's submission regarding the number of Tutsis abducted from the prefectoral office.

1884. The Appeals Chamber observes that the Trial Chamber did not specify the number of victims for which Ntahobali was held responsible in relation to his convictions for ordering killings of Tutsis who sought refuge at the prefectoral office.[4421] The Appeals Chamber further considers that the Trial Chamber's determination that Ntahobali and Nyiramasuhuko participated in attacks that led to the abduction and killing of "hundreds of Tutsi refugees" principally relies on the Trial Chamber's conclusion that "the pickup was nearly full on at least seven occasions" during the attacks from mid-May to June 1994.[4422]

1885. However, the Appeals Chamber recalls that it has determined, Judge Khan dissenting, that Ntahobali was not convicted on the basis of his conduct during the Night of Three Attacks or in relation to the killings which were perpetrated during the First Half of June Attacks.[4423] Likewise, the Appeals Chamber recalls that it has found that the Trial Chamber made no findings that Tutsis were abducted and killed during the Last Half of May Attacks or that Ntahobali was convicted for such conduct.[4424] Accordingly, the Appeals Chamber considers that no reasonable trier of fact could have determined the number of victims abducted and killed based on the seven occasions the pickup truck left the prefectoral office, as it included the Night of Three Attacks and the First Half of June Attacks for which Ntahobali was not convicted as well as the Last Half of May Attacks where it made no findings that abductions occurred.[4425] Consequently, no basis exists to attribute criminal responsibility to Ntahobali for ordering killings during these attacks.

1886. As regards the remaining occasion when the pickup left the prefectoral office during the attacks for which Ntahobali was convicted for killings – namely the Mid-May Attack[4426] – the Appeals Chamber observes that the Trial Chamber accepted Witness TA's evidence that Ntahobali ordered the *Interahamwe* to stop killing refugees because the number of dead people was "in excess

[4420] Prosecution Response Brief, para. 991.
[4421] Trial Judgement, paras. 5876, 5971, 6053, 6100, 6168.
[4422] *See* Trial Judgement, paras. 2779, 5867. In light of this conclusion, the Appeals Chamber finds it unnecessary to consider Ntahobali's challenges as they concern alleged contradictory findings and evidence as to the number of refugees at the Butare Prefecture Office after many returned from the EER in the end of May and until the refugees at the prefectoral office were transferred to Rango Forest around mid-June 1994.
[4423] *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4424] *See supra*, Section V.I.1(a)(ii).
[4425] The Appeals Chamber notes that the Last Half of May Attacks are referred to in paragraph 2779 of the Trial Judgement as "two additional times from mid-May to the beginning of June".

as to what could be loaded in the vehicle".[4427] This finding, however, is insufficient to attribute responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the prefectoral office.

1887. Based on the foregoing, the Appeals Chamber considers that, although it affirmed Ntahobali's criminal responsibility for the killings of Tutsi refugees abducted during the Mid-May Attack, it also found that the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office is not sustained by the record or is based on findings for which Ntahobali was not convicted by the Trial Chamber. The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

3. Ordering Responsibility

1888. As recalled above, the Trial Chamber convicted Ntahobali of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering killings of Tutsis seeking refuge at the Butare Prefecture Office.[4428] It further convicted Ntahobali for rape as a crime against humanity and outrages upon personal dignity as a serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for, *inter alia*, ordering the rapes of Tutsi women seeking refuge at the prefectoral office.[4429]

1889. Specifically, the Trial Chamber found Ntahobali responsible for ordering killings during the Mid-May Attack.[4430] The Trial Chamber also determined that Ntahobali was responsible for ordering the rape of six women during the First Attack of the Last Half of May Attacks, which was conducted around seven days after the Mid-May Attack, as well as the rape of Witness TA during the Second Attack of the Last Half of May Attacks, which occurred four days later.[4431] The Appeals Chamber, Judge Khan dissenting, has concluded that Ntahobali was not convicted for ordering killings during the Night of Three Attacks or the First Half of June Attacks.

1890. Ntahobali submits that the Trial Chamber erred in law and in fact in finding him responsible for ordering killings and rapes during attacks at the prefectoral office and that he should therefore

[4426] *See supra*, Section V.I.2(c)(i).
[4427] Trial Judgement, para. 2628, *referring to* Witness TA, T. 29 October 2001 pp. 46, 49-51. *See also ibid*., para. 2779.
[4428] *See supra*, Section V.I.1(c).
[4429] *See supra*, Section V.I.1(c).
[4430] *See supra*, Section V.I.2(c)(i).
[4431] *See supra*, Section V.I.1(b).

be acquitted.[4432] The Appeals Chamber will address Ntahobali's challenges pertaining to his responsibility for ordering rapes after examining his challenges concerning his responsibility for ordering killings during the Mid-May Attack.

(a) Ordering Killings

1891. The Trial Chamber found that, in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office in a camouflaged pickup truck and that Nyiramasuhuko pointed out Tutsi refugees to the *Interahamwe*, ordering them to force the refugees onto the pickup truck.[4433] The Trial Chamber found that "Ntahobali also gave the *Interahamwe* orders, telling them to stop loading the truck because it could not accept anymore dead."[4434] The Trial Chamber concluded that "refugees" were taken to other locations in Butare and killed, and it found that "both Nyiramasuhuko and Ntahobali were responsible for ordering the killings of numerous Tutsi refugees who were forced on board the pickup."[4435]

1892. Ntahobali argues that the Trial Chamber erred in fact and in law in finding him responsible for ordering killings during the Mid-May Attack at the prefectoral office.[4436] He submits that the only evidence used to support this finding was Witness TA's testimony that he told *Interahamwe* to stop putting refugees on a truck during this attack.[4437] In his view, such evidence is insufficient to establish that he ordered killings.[4438] Ntahobali also contends that there was no evidence to suggest that he exercised any authority over the *Interahamwe* who carried out the abductions, pointing out that Witness TA testified that Nyiramasuhuko was Ntahobali's superior and that Witness TA's testimony on his authority during that attack was solely based on impressions.[4439] He further stresses that when questioned who had given orders at the prefectoral office, Witness TA never mentioned him.[4440] Ntahobali adds that the Trial Chamber erred in concluding that he told

[4432] Ntahobali Notice of Appeal, paras. 319-323; Ntahobali Appeal Brief, paras. 943-953, 960; Ntahobali Reply Brief, paras. 384-397. The Appeals Chamber will not entertain Ntahobali's submissions to the extent that they challenge his liability for ordering killings during the Night of Three Attacks and First Half of June Attacks as it has determined, Judge Khan dissenting, that Ntahobali was not convicted on this basis. *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4433] Trial Judgement, para. 5867.
[4434] Trial Judgement, para. 5867.
[4435] Trial Judgement, para. 5867.
[4436] Ntahobali Notice of Appeal, paras. 319-322; Ntahobali Appeal Brief, paras. 943, 960.
[4437] Ntahobali Appeal Brief, para. 944. *Cf. ibid.*, para. 949.
[4438] Ntahobali Notice of Appeal, para. 321; Ntahobali Appeal Brief, paras. 945, 946; Ntahobali Reply Brief, paras. 384-387, 389.
[4439] Ntahobali Appeal Brief, para. 947, *referring to* Trial Judgement, para. 5880, Witness TA, T. 25 October 2001 p. 67, T. 29 October 2001 pp. 46, 47. *See also* Ntahobali Reply Brief, paras. 389, 392.
[4440] Ntahobali Appeal Brief, para. 948, *referring to* Witness TA, T. 7 November 2001 p. 107 (French).

Interahamwe who should be forced to board the pickup truck as the evidence of Witness TA cited by the Trial Chamber does not support this finding.[4441]

1893. The Prosecution responds that Ntahobali's conviction for ordering killings at the prefectoral office during the Mid-May Attack was not based solely on Witness TA's testimony that Ntahobali ordered *Interahamwe* to stop loading the pickup truck.[4442] It highlights other evidence from Witness TA indicating that Ntahobali and Nyiramasuhuko ordered killings, led the attack together, and that *Interahamwe* followed Ntahobali's orders to stop killing.[4443] The Prosecution also points to evidence from Witness TK which, in its view, corroborates that Ntahobali ordered killings during his visits to the prefectoral office.[4444] Furthermore, the Prosecution contends that the testimonies of these witnesses demonstrate that Ntahobali had sufficient authority over the *Interahamwe* to incur responsibility for ordering killings.[4445] It submits that, even if Nyiramasuhuko acted as Ntahobali's superior during the attack and issued similar orders to the *Interahamwe*, Ntahobali remains liable for the criminal orders that he gave.[4446]

1894. In reply, Ntahobali disputes the Prosecution's contentions that the Trial Chamber relied upon the evidence of Witness TK to reach its conclusion, that this witness's evidence is relevant to this particular attack, or that it is sufficiently reliable to prove his ordering responsibility.[4447]

1895. The Appeals Chamber recalls that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[4448]

1896. The Appeals Chamber observes that, although the Trial Chamber concluded that Ntahobali ordered killings of Tutsis taken from the prefectoral office during the Mid-May Attack,[4449] it did not refer to any express order to kill, identify a particular instruction that had a direct and substantial

[4441] Ntahobali Appeal Brief, para. 950, *referring to* Trial Judgement, paras. 2178, 2628; Ntahobali Reply Brief, para. 387.
[4442] Prosecution Response Brief, paras. 1194, 1203.
[4443] Prosecution Response Brief, paras. 1194, 1203, *referring to* Witness TA, T. 29 October 2001 pp. 46, 47, 49-51, Trial Judgement, paras. 2628, 2779, 5867, 5869, 5870, 5880.
[4444] Prosecution Response Brief, paras. 1195, 1196.
[4445] Prosecution Response Brief, para. 1204.
[4446] Prosecution Response Brief, para. 1206.
[4447] Ntahobali Reply Brief, paras. 389, 390.
[4448] *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. *See also Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28. Responsibility for ordering is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order. Ordering with such awareness has to be regarded as accepting that crime. *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.
[4449] Trial Judgement, para. 5867.

effect on the eventual killings of Tutsis forced to board the pickup truck, or state that it inferred as the only reasonable conclusion that Ntahobali ordered the killings.[4450]

1897. The Appeals Chamber recalls that Article 22(2) of the Statute and Rule 88(C) of the Rules require the Trial Chamber to give a reasoned opinion, which includes the provision of clear, reasoned findings of fact as to each element of the crime charged.[4451] With respect to this event, the Appeals Chamber finds that the Trial Chamber failed to make clear findings essential to establishing Ntahobali's responsibility for ordering under Article 6(1) of the Statute. The Appeals Chamber therefore finds that the Trial Chamber failed to provide a reasoned opinion and thereby erred in law.

1898. However, for the reasons that follow, the Appeals Chamber, Judge Liu dissenting, finds that this error does not invalidate the Trial Chamber's decision to convict Ntahobali for ordering killings during the Mid-May Attack. At the outset, the Appeals Chamber does not accept Ntahobali's contention that the only evidence supporting the Trial Chamber's conclusion that he ordered killings during this attack was Witness TA's testimony that Ntahobali directed *Interahamwe* to stop putting refugees on the pickup truck.[4452] While the Trial Chamber highlighted this particular instruction before concluding that Ntahobali ordered the killing of Tutsis forced to board a pickup truck during the Mid-May Attack, it also stated that Ntahobali issued "orders"[4453] and later, in relation to the same attack, recalled that "*Interahamwe* were acting under the orders of Ntahobali and Nyiramasuhuko to load the truck with people."[4454] It transpires from a comprehensive review of the Trial Judgement that these findings were based on the testimony of Witness TA.[4455]

1899. Ntahobali contends that the evidence does not support the Trial Chamber's finding that he told the *Interahamwe* who should be forced to board the pickup truck.[4456] The Appeals Chamber

[4450] Trial Judgement, paras. 5866-5871. The Trial Chamber's analysis of Ntahobali's responsibility for extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II on the basis of this conduct provides no further information. Specifically, the Trial Judgement simply states that Ntahobali ordered the killing of Tutsis taking refuge at the Butare Prefecture Office without specifying the precise factual basis supporting this conclusion. *See ibid.*, paras. 6053, 6100, 6168.
[4451] *See Ndindiliyimana et al.* Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320; *Kajelijeli* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 383. *Cf. also Orić* Appeal Judgement, para. 56.
[4452] Ntahobali Appeal Brief, para. 944.
[4453] Trial Judgement, para. 5867.
[4454] Trial Judgement, para. 5869.
[4455] Trial Judgement, para. 2178 ("Nyiramasuhuko and Ntahobali arrived together in the same Hilux pickup and told the *Interahamwe* who should be forced to board the bed of the pickup. […] For example, Shalom ordered the *Interahamwe* to stop killing refugees, as the number of dead people was in excess of what could be loaded in the vehicle.") (internal references omitted). *See also ibid.*, para. 2628 ("Nyiramasuhuko and Shalom arrived together in the same Hilux pickup and told the *Interahamwe* who should be forced to board the bed of the pickup. […] Shalom ordered the *Interahamwe* to stop killing refugees, as the number of dead people was in excess as to what could be loaded in the vehicle.") (internal references omitted).
[4456] Ntahobali Appeal Brief, para. 950, *referring to* Trial Judgement, paras. 2178, 2628, 5869.

observes that the transcripts cited by the Trial Chamber only refer to Witness TA expressly testifying that Nyiramasuhuko selected individuals to be placed on the vehicle.[4457] In addition, Witness TA's evidence indicates that she believed that Nyiramasuhuko was the superior of Ntahobali based on her role in selecting who should or should not be placed on the vehicle.[4458] However, the Appeals Chamber also notes that the witness's testimony indicates that Nyiramasuhuko *and* Ntahobali "were in charge of [the] assailants", that they "were leading the attack together", and that she described Nyiramasuhuko as "assisting her son".[4459] Witness TA's evidence also reflects that Ntahobali ordered the *Interahamwe* to stop loading the vehicle once he determined that it was full and that the *Interahamwe* complied with his order.[4460]

1900. In the view of the Appeals Chamber, Judge Liu dissenting, the Trial Chamber's acceptance of Witness TA's evidence concerning this attack and its findings on Ntahobali's participation in other attacks on the prefectoral office for a period of over a month provided a reasonable basis for the Trial Chamber to consider as the only reasonable inference that Ntahobali ordered the killings of Tutsis who had been forced to board the pickup truck during the Mid-May Attack. Specifically, the Appeals Chamber observes that the Trial Chamber also noted Witness TA's testimony that, in relation to the Mid-May Attack, Ntahobali "moved through the refugees cutting and slashing people with his machete", that he removed the witness's clothes, threatened to "kill her if she refused", raped her, and then "invited some eight other *Interahamwe* to rape her".[4461] The Trial Chamber

[4457] *See* Trial Judgement, paras. 2178, 2628, 2630. *See also* Witness TA, T. 25 October 2001 p. 28 ("A. When I saw [Nyiramasuhuko] the second time, she was showing the *Interahamwe* the persons that were to be sorted out, to be put into the vehicle"); T. 29 October 2001 p. 46 ("A. No, they were not speaking to each other. Nyiramasuhuko was pointing out Tutsis to the *Interahamwe* who had come with them. This is this one, that one, and that one also. […] Yes, my basis is that Nyiramasuhuko was pointing out people and those people were picked up and taken away.").
[4458] *See* Witness TA, T. 29 October 2001 pp. 47-49.
[4459] *See* Witness TA, T. 25 October 2001 pp. 66, 67 ("Q. Of those attackers on that occasion that you have just spoken, did anyone appear to be in charge? A. Well, I had the impression that it is Nyiramasuhuko and her son, that were in charge of those assailants."); T. 29 October 2001 pp. 46 ("Q. Who was leading the *Interahamwe*? A. It was Nyiramasuhuko and her son."), 47 ("A. The day on which I saw them, it was a safe [*sic*], they were leading the attack together. Q. What made it seem to you that they were leading the attack together? A. I say so because they came on board the same vehicle. They ordered the killing of people and then they carried on board the vehicle, including those who were wounded. And when orders were issued, Nyiramasuhuko was assisting her son."). The Appeals Chamber observes that Ntahobali argues that the English transcript incorrectly asserts that Ntahobali and Nyiramasuhuko "ordered the killing of people" as the French version indicates "*ils ont fait tuer les gens*". *See* Ntahobali Reply Brief, paras. 384-386, *referring to* Witness TA, T. 29 October 2001 pp. 51, 53-56. While the translation from French to English is indeed not literal, Ntahobali does not persuade the Appeals Chamber that any differences in this regard are material and, of greater significance, he does not identify any error on the part of the Trial Chamber resulting from this variance.
[4460] *See* Witness TA, T. 29 October 2001 pp. 46, 47 ("Secondly, when [Ntahobali] […] said 'stop,' they stopped and they took the car and they went away."), 49 ("Q. A moment ago you testified that you heard Shalom say 'stop' on that occasion. Can you describe that event and what you saw and heard? A. When Shalom saw that the number of deaths or dead people or injured people was in excess, was too much, he issued the order to stop."), 50, 51 ("Q. When you heard Shalom say 'stop,' meaning killing was in excess, in excess of what do you mean? A. Yes, in excess of the number allowed or that could be fitted into the vehicle. Q. Into which part of the vehicle? A. In the rear section of the vehicle.").
[4461] Trial Judgement, para. 2631.

accepted Witness TA's evidence that Ntahobali and *Interahamwe* raped her,[4462] and convicted him for committing rape on this basis.[4463] The Appeals Chamber, Judge Liu dissenting, considers that Witness TA's evidence of Ntahobali's leading role in this attack, as well as the Trial Chamber's findings concerning Ntahobali's rape of Witness TA, support the Trial Chamber's conclusion that he ordered killings during the Mid-May Attack. In particular, the findings clearly reflect that the aim of the operation was to kill, rape, and terrorise those seeking refuge, that Ntahobali was an active participant in the operation, and that he was working in coordination with the *Interahamwe.*

1901. In addition, the Trial Chamber's analysis reveals that it considered the Mid-May Attack at the prefectoral office in the context of other attacks that led to the killing of Tutsis who took refuge there,[4464] and expressly recalled evidence of Ntahobali's leading role in other such attacks. Specifically, when assessing the elements of genocide in relation to this particular attack, the Trial Chamber recalled that *Interahamwe* forced Tutsis to board "a Toyota Hilux" and that those "who refused were killed on the spot", that there was a pattern of killings at the prefectoral office itself and that Ntahobali instructed *Interahamwe* to spare no one.[4465] A review of the Trial Judgement shows that these findings are principally supported by the evidence of Witness TK about Ntahobali's participation and leading role in separate attacks around the end of May or beginning of June 1994 at the prefectoral office.[4466] The Appeals Chamber, Judge Liu dissenting, considers that this evidence supports the Trial Chamber's conclusion that Ntahobali ordered killings specifically during the Mid-May Attack.

[4462] Trial Judgement, para. 2644.
[4463] Trial Judgement, paras. 5868, 5877, 6085, 6086, 6094, 6184.
[4464] *See* Trial Judgement, paras. 5867 ("Between mid-May and mid-June 1994, […] Ntahobali […] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and were killed in various locations throughout Butare *préfecture*."), 5870 ("Furthermore, there was a pattern of killing at the [Butare Prefecture Office] itself."). *Cf. ibid*., para. 5868 ("This was the first of many such attacks from mid-May until mid-June 1994 during which Tutsi women, including Witness TA were raped […]. Considering the brutality and repetitive nature of these attacks, the vulnerable nature of the population seeking refuge at the [Butare Prefecture Office] and the fact that they were Tutsis, there can be no question that the bodily and mental harm inflicted by Ntahobali and the *Interahamwe* on the Tutsi women at the [Butare Prefecture Office] was of such a serious nature as to threaten the destruction in whole or in part of the Tutsi ethnic group.").
[4465] Trial Judgement, para. 5870.
[4466] *See* Trial Judgement, paras. 2662 ("The *Interahamwe* forced refugees to board the Hilux truck and killed some of them on the spot."), 2681 ("Witness TK testified that upon arriving at the [Butare Prefecture Office], Shalom and some of the *Interahamwe* exclaimed that nobody should be spared or treated leniently."). The Appeals Chamber notes that the Prosecution also argues that Witness SJ's evidence also supports Ntahobali's ordering responsibility. *See* Prosecution Response Brief, para. 1197. Ntahobali contends that no reasonable trier of fact could have relied on Witness SJ for this purpose. *See* Ntahobali Appeal Brief, para. 668; Ntahobali Reply Brief, para. 391. The Appeals Chamber observes that Witness SJ provided evidence similar to Witness TK's of Ntahobali issuing orders to *Interahamwe* during an attack at the Butare Prefecture Office. *See* Trial Judgement, para. 2705, *referring to* Witness SJ, T. 29 May 2002 pp. 53, 54. However, the Appeals Chamber has determined that no reasonable trier of fact could have relied on the evidence of Witness SJ as it relates to the attack now referred to by the Prosecution. *See supra*, Sections IV.F.2(c)(ii)d, V.I.2(b)(iii)a.ii, V.I.2(d)(ii)a.

1902. The Appeals Chamber further recalls the Trial Chamber's finding that this attack was one of several where Ntahobali and Nyiramasuhuko participated in the abduction of Tutsis from the prefectoral office who were then killed throughout Butare Prefecture.[4467] Although the Appeals Chamber, Judge Khan dissenting, has concluded that Ntahobali was not convicted for ordering killings during the Night of Three Attacks or the First Half of June Attacks, the record demonstrates that Ntahobali was involved in these attacks, which resulted in the abductions and killings of a large number of Tutsi refugees from the prefectoral office.[4468] Given the record as a whole, the Appeals Chamber, Judge Liu dissenting, finds that a reasonable trier of fact could have concluded that Ntahobali ordered the killings of Tutsis who had been forced to board the pickup truck during the Mid-May Attack.

1903. Likewise, Ntahobali fails to demonstrate that the Trial Chamber erred in finding him responsible for ordering killings during the Mid-May Attack under Article 6(1) of the Statute on the ground that he did not exercise sufficient authority over the assailants who participated in the attack. The Appeals Chamber observes that the Trial Chamber generally concluded that Ntahobali wielded effective control over the *Interahamwe* at the prefectoral office throughout the events on the basis, notably, that the *Interahamwe* complied with the orders he issued and perpetrated the acts asked of them, which included killings.[4469] As regards the Mid-May Attack, the Appeals Chamber recalls that a comprehensive reading of the Trial Judgement reflects that the Trial Chamber relied on Witness TA's evidence as to the details of this attack before finding him responsible for ordering killings.[4470] Witness TA's testimony, as recalled by the Trial Chamber, reveals that the witness considered that both Nyiramasuhuko and Ntahobali were exercising control over the *Interahamwe* and issuing orders with which the *Interahamwe* complied.[4471] While the witness also testified that she thought Nyiramasuhuko was Ntahobali's superior,[4472] this evidence would not prevent a reasonable trier of fact from concluding that Ntahobali exercised sufficient authority over the assailants to incur responsibility for ordering, particularly when considering the evidence of his leadership role *vis-à-vis* the *Interahamwe* during this and other attacks.[4473]

1904. Moreover, Ntahobali's argument that it was unreasonable for the Trial Chamber to rely on Witness TA's "impressions" as to Ntahobali's authority ignores that the witness testified, and the

[4467] Trial Judgement, paras. 2644, 2715, 2738, 2739, 2749, 2773, 2779, 2781(i)-(iv), 5866-5876.
[4468] *See supra*, Sections V.I.2(d), V.I.2(e).
[4469] Trial Judgement, para. 5884.
[4470] *See* Trial Judgement, paras. 2628-2644, 2781(i), 5867-5869.
[4471] Trial Judgement, para. 2178 ("Witness TA testified that it appeared to her that Nyiramasuhuko and her son were in charge of the *Interahamwe* and leading the attacks at the [Butare Prefecture Office] because Nyiramasuhuko pointed out people who were then taken away, whereas when Ntahobali said 'stop', the *Interahamwe* took their car and left."). *See also ibid*., paras. 2628, 2630.
[4472] *See* Trial Judgement, para. 2178.
[4473] *Cf. Boškoski and Tarčulovski* Appeal Judgement, para. 167.

Trial Chamber found, that Ntahobali issued orders during this attack, and that the Trial Chamber relied upon evidence from other attacks of Ntahobali's leading role in them.[4474] The Appeals Chamber recalls that whether an accused possesses sufficient authority to incur ordering responsibility is a question of fact[4475] and that trial chambers have full discretionary power in assessing the credibility of a witness and in determining the weight to be accorded to his testimony.[4476] Furthermore, the Appeals Chamber considers that Ntahobali's emphasis on the fact that Witness TA did not mention Ntahobali as an authority who issued orders to the *Interahamwe* at the prefectoral office is misplaced, as this evidence arose during an aspect of Witness TA's testimony that did not concern Ntahobali's involvements in attacks.[4477]

1905. Based on the foregoing, the Appeals Chamber, Judge Liu dissenting, considers that Ntahobali has failed to demonstrate that, on the basis of the Trial Chamber's factual findings and relevant evidence, no reasonable trier of fact could have inferred as the only reasonable conclusion that Ntahobali ordered the killings of the Tutsis forced on board the pickup truck during the Mid-May Attack.[4478]

1906. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its obligation to provide a reasoned opinion. However, the Appeals Chamber, Judge Liu dissenting, concludes that this error does not invalidate the Trial Chamber's decision, as its findings and relevant evidence sustain its conclusion that Ntahobali is responsible under Article 6(1) of the Statute for ordering the killings of numerous Tutsi refugees who were forced on board the pickup truck during the Mid-May Attack at the Butare Prefecture Office.

(b) Ordering Rapes

1907. The Trial Chamber found that Ntahobali ordered *Interahamwe* to rape Tutsi women during two attacks at the Butare Prefecture Office in late May 1994 based principally on Witness TA's testimony.[4479] Specifically, the Trial Chamber concluded that during the First Attack of the Last

[4474] *See supra*, paras. 1900-1903.
[4475] *Semanza* Appeal Judgement, para. 363.
[4476] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 45; *Ndindiliyimana et al*. Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Nahimana et al*. Appeal Judgement, para. 194.
[4477] *See* Witness TA, T. 7 November 2001 pp. 93, 94. In particular, Witness TA's response came during an initial line of interrogation as to who could issue orders within the prefecture of Butare generally. *See ibid*., pp. 90-94.
[4478] The Appeals Chamber notes that Ntahobali argues that the Trial Chamber was unclear as to whether he was convicted for killings that occurred at the prefectoral office or only for the killings of Tutsis removed from it during the Mid-May Attack. *See* Ntahobali Appeal Brief, para. 893. The Appeals Chamber observes that the Trial Chamber's legal findings pertaining to this attack expressly limit Ntahobali's convictions to ordering the killings of the "numerous Tutsis refugees who were forced to board the pickup." *See* Trial Judgement, para. 5867.
[4479] Trial Judgement, paras. 2781(ii), 5872, 5877, 5884, 6086, 6184.

Half of May Attacks, six Tutsi women were raped by *Interahamwe* following Ntahobali's orders, and that during the Second Attack, Ntahobali ordered *Interahamwe* to rape Witness TA.[4480]

1908. Ntahobali argues that the Trial Chamber erred in fact and in law in convicting him of ordering *Interahamwe* to rape Tutsi women during the Last Half of May Attacks.[4481] In particular, Ntahobali contends that, during the First Attack, Witness TA did not testify about positive acts taken by Ntahobali that would support the conclusion that he ordered *Interahamwe* to rape any women.[4482] With respect to the Second Attack, Ntahobali submits that Witness TA's evidence concerning statements he made to *Interahamwe* fails to establish that he possessed sufficient authority over the *Interahamwe*, particularly in light of Witness TA's evidence that the *Interahamwe* were Ntahobali's "comrades" or "colleagues".[4483]

1909. The Prosecution responds that the Trial Chamber reasonably found Ntahobali responsible for ordering rapes at the prefectoral office.[4484] It highlights Witness TA's testimony implicating Ntahobali in ordering rapes during the Last Half of May Attacks as well as in raping her and ordering eight *Interahamwe* to rape her during the Mid-May Attack, and in having handed her over to *Interahamwe* to rape her during an attack in the first half of June 1994.[4485] The Prosecution contends that this evidence and the Trial Chamber's findings demonstrate that Ntahobali possessed authority over the *Interahamwe*, and that it makes no difference if the *Interahamwe* willingly followed Ntahobali's orders to rape.[4486]

1910. Ntahobali replies that the evidence cited by the Prosecution is insufficient to conclude that he ordered rapes during attacks on the prefectoral office.[4487]

1911. The Appeals Chamber recalls that the *actus reus* of ordering cannot be established in the absence of a positive action by the person in a position of authority.[4488] However, ordering, like any

[4480] Trial Judgement, paras. 2653, 2781(ii), 5872, 5877.
[4481] Ntahobali Notice of Appeal, para. 397; Ntahobali Appeal Brief, paras. 943, 954, 960.
[4482] Ntahobali Appeal Brief, para. 955, *referring to* Witness TA, T. 25 October 2001 pp. 52, 53.
[4483] Ntahobali Appeal Brief, para. 956, *referring to* Witness TA, T. 31 October 2001 p. 105. Ntahobali reiterates that the Trial Chamber failed to consider that, when questioned as to who issued orders at the Butare Prefecture Office, Witness TA did not mention him. *See ibid.*, para. 957. The Appeals Chamber has addressed and rejected this argument when discussing Ntahobali's responsibility for ordering killings at the prefectoral office. *See supra*, paras. 1892, 1904.
[4484] Prosecution Response Brief, para. 1194.
[4485] Prosecution Response Brief, paras. 1199-1202, *referring to* Witness TA, T. 25 October 2001 pp. 52, 53, 66, 67, 71, 75-77, 79, T. 29 October 2001 pp. 8, 10-12, T. 31 October 2001 pp. 72, 73, 79, 101, 105, 108, 110-111, T. 1 November 2001 pp. 39, 40, Trial Judgement, paras. 2630, 2631, 2644, 2646, 2648-2651, 2653, 2770, 2773, 2781(ii), 2781(v), 5782, 5874.
[4486] Prosecution Response Brief, paras. 1204, 1205.
[4487] Ntahobali Reply Brief, para. 396.
[4488] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 277.

other form of responsibility, can be inferred from circumstantial evidence, provided it is the only reasonable inference.[4489]

1912. With respect to the rapes committed during the First Attack, the Trial Chamber relied on Witness TA's testimony that Ntahobali raped her and that *Interahamwe* raped six other women.[4490] On this basis, and without reference to any other evidence, the Trial Chamber concluded in its factual and legal findings that the six other women were raped by "*Interahamwe* following the orders of Ntahobali".[4491] However, the Trial Chamber's summary of Witness TA's evidence and a review of her testimony reflect that she did not expressly testify that Ntahobali ordered the *Interahamwe* to commit rapes.[4492] Rather, she simply testified that, while Ntahobali raped her, the *Interahamwe* who had accompanied him raped six Tutsi women nearby.[4493] The witness's evidence does not identify any instruction given by Ntahobali or any other positive act on his part that had a direct and substantial effect on the perpetration of these rapes. Moreover, and contrary to the Prosecution's submissions, Witness TA's evidence and the Trial Chamber's findings concerning Ntahobali's participation in other rapes at the prefectoral office do not support as the only reasonable inference that Ntahobali ordered the rapes committed by *Interahamwe* during the First Attack.[4494]

1913. Accordingly, the Appeals Chamber concludes that no reasonable trier of fact could have found Ntahobali responsible for ordering rapes during the First Attack on the basis of Witness TA's evidence and that the Trial Chamber erred in finding that Ntahobali ordered rapes during this attack.

1914. In relation to the Second Attack, the Trial Chamber found, based on Witness TA's evidence, that Ntahobali ordered "about seven" *Interahamwe* to rape Witness TA.[4495] The Trial Chamber referred to Witness TA's testimony that Ntahobali physically delivered the witness to the

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[4489] *Ndindiliyimana et al.* Appeal Judgement, para. 291; *Bagosora and Nsengiyumva* Appeal Judgement, para. 278; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 318; *Galić* Appeal Judgement, para. 178.
[4490] Trial Judgement, paras. 2645-2647, *referring to* Witness TA, T. 25 October 2001 pp. 67, 69, 71, T. 31 October 2001 pp. 93-97, 101.
[4491] Trial Judgement, paras. 2646, 2653, 2781(ii), 5872, 5877.
[4492] Trial Judgement, para. 2182; Witness TA, T. 25 October 2001 pp. 71, 72, T. 31 October 2001 p. 101.
[4493] Witness TA, T. 25 October 2001 pp. 67-71, T. 31 October 2001 pp. 91, 93-97, 99-101.
[4494] The Appeals Chamber recalls that Ntahobali was not found responsible for the rapes of "at least two women" committed by *Interahamwe* at the Butare Prefecture Office during the Mid-May Attack, where, similar to this incident, the rapes were committed as Ntahobali was committing rape and where there was no evidence of Ntahobali instructing *Interahamwe* to commit rape. *See supra*, Section V.I.1(b). Moreover, even where there was credible evidence of Ntahobali prompting *Interahamwe* to commit rapes, the Trial Chamber did not convict him of ordering rapes. *See* Trial Judgement, paras. 2631 (Ntahobali raped Witness TA and then "invited eight other *Interahamwe* to rape [Witness TA]" during the Mid-May Attack), 5868 (convicting Ntahobali of committing rape on the basis of this evidence but making no finding as to his responsibility for the rapes committed by eight *Interahamwe*), 5877. *See also ibid*., paras. 2770 (Ntahobali "again handed Witness TA over to the *Interahamwe* and told them to be quick, after which seven *Interahamwe* raped her"), 5874, 5875 (convicting Ntahobali only of aiding and abetting the rapes of Witness TA on the basis of this evidence).
[4495] Trial Judgement, paras. 2653, 2781(ii), 5872.

Interahamwe who subsequently raped her, and that Ntahobali told them "to do it quickly so that the *Inkotanyi* would not get to a roadblock first".[4496] Ntahobali contends that the Trial Chamber erred in concluding that he possessed sufficient authority over the *Interahamwe* at the Butare Prefecture Office, particularly because Witness TA described the *Interahamwe* as Ntahobali's "colleagues" or "comrades".[4497]

1915. The Appeals Chamber recalls that the *actus reus* of "ordering" is that a person in a position of authority instruct another person to commit an offence.[4498] No formal superior-subordinate relationship between the accused and the perpetrator is required.[4499] It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.[4500]

1916. The Appeals Chamber rejects Ntahobali's argument that Witness TA's testimony that the *Interahamwe* were Ntahobali's "colleagues" or "comrades" demonstrates that the Trial Chamber erred in finding that Ntahobali possessed sufficient authority over these *Interahamwe* to incur ordering liability. With respect to this specific attack, Witness TA testified that "Shalom dragged me and handed me over to a group of *Interahamwe* assailants who were his comrades, his colleagues."[4501] The Appeals Chamber fails to see how this description undermines the conclusion that Ntahobali possessed sufficient authority to compel the *Interahamwe* to rape Witness TA, particularly in light of the fact that they committed the rapes upon Ntahobali's prompting.

1917. Consequently, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in finding that he was liable for ordering *Interahamwe* to rape Witness TA during the Second Attack.

(c) Conclusion

1918. Based on the foregoing, the Appeals Chamber, Judge Liu dissenting, finds that Ntahobali has not demonstrated that the Trial Chamber erred in finding him criminally responsible for ordering *Interahamwe* to commit killings during the Mid-May Attack. Likewise, the Appeals Chamber concludes that Ntahobali has failed to show that the Trial Chamber erred in finding him

[4496] Trial Judgement, para. 2648, *referring to* Witness TA, T. 25 October 2001 pp. 75-77, T. 31 October 2001 pp. 105, 108, 111.
[4497] *See* Trial Judgement, para. 5884.
[4498] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[4499] *Nzabonimana* Appeal Judgement, para. 482; *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[4500] *Nzabonimana* Appeal Judgement, para. 482; *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[4501] Witness TA, T. 31 October 2001 p. 105.

criminally responsible for ordering *Interahamwe* to commit rapes during the Second Attack of the Last Half of May Attacks.

1919. The Appeals Chamber nevertheless finds that the Trial Chamber erred in finding Ntahobali responsible for ordering rapes during the First Attack of the Last Half of May Attacks. Consequently, the Appeals Chamber reverses the Trial Chamber's finding that Ntahobali is responsible for ordering rapes during the First Attack. The Appeals Chamber will discuss the impact of this conclusion, if any, in Section XII below.

4. Superior Responsibility

1920. The Trial Chamber found Ntahobali responsible pursuant to Article 6(3) of the Statute for the acts of the *Interahamwe*, including their perpetration of rapes and killings, against Tutsis who had sought refuge at the Butare Prefecture Office.[4502] Specifically, the Trial Chamber recalled its findings that "Nyiramasuhuko and Ntahobali issued orders to *Interahamwe* and the *Interahamwe* complied with these orders and perpetrated the acts asked of them, which included abductions, rapes and killings."[4503] On this basis, as well as "considering the evidence in its entirety", the Trial Chamber found that Nyiramasuhuko and Ntahobali were in a "superior-subordinate relationship over [the] *Interahamwe* at the [Butare Prefecture Office]" and wielded effective control over them.[4504] However, because the Trial Chamber had found Ntahobali criminally responsible for the rapes and killings of Tutsi refugees by *Interahamwe* pursuant to Article 6(1) of the Statute, it did not enter related convictions against him pursuant to Article 6(3) of the Statute, but stated that it would consider his superior responsibility for these actions in sentencing.[4505]

1921. Ntahobali contends that the Trial Chamber erred in: (i) failing to particularise the conduct and evidence supporting his superior responsibility, violating his right to a reasoned opinion; and (ii) its assessment of the evidence.[4506] The Appeals Chamber will address these contentions in turn.

[4502] Trial Judgement, para. 5886. *See also ibid.*, paras. 6056, 6086. The Appeals Chamber observes that the Trial Judgement states that Ntahobali is responsible pursuant to Article 6(3) of the Statute for "abductions" in addition to rapes and killings committed by *Interahamwe* during attacks committed at the Butare Prefecture Office. *See ibid.*, para. 5886. However, the Trial Chamber did not convict Ntahobali on the basis of abductions of persons seeking refuge at the Butare Prefecture Office nor did it define such conduct as criminal. *See ibid.*, paras. 5876, 5877, 6053, 6086, 6094, 6100, 6101, 6168, 6169, 6184, 6185. Read in the context of the entire Trial Judgement, the reference to "abductions" is not the identification of criminal conduct that individually supports Ntahobali's responsibility pursuant to Article 6(3) of the Statute, but a descriptive element that relates, in particular, to the manner in which killings were routinely carried out upon those who sought refuge at the Butare Prefecture Office. *See*, *e.g.*, *ibid.*, paras. 2715, 2738, 2749, 2779, 2781(i), (iii), (iv), 5867, 5873, 5874.
[4503] Trial Judgement, para. 5884.
[4504] Trial Judgement, para. 5884.
[4505] Trial Judgement, para. 5886. *See also ibid.*, paras. 5652, 6056, 6086.
[4506] *See* Ntahobali Notice of Appeal, paras. 312-318; Ntahobali Appeal Brief, paras. 927-942; Ntahobali Reply Brief, paras. 381-383.

(a) Imprecise Findings

1922. Ntahobali argues that the Trial Chamber erred in fact and in law in finding him responsible pursuant to Article 6(3) of the Statute for all the rapes and killings committed by *Interahamwe* against Tutsis who had sought refuge at the Butare Prefecture Office.[4507] In this regard, Ntahobali contends that the Trial Chamber failed to explain how he exercised effective control over *Interahamwe* who committed rapes and killings based on Nyiramasuhuko's orders, or over *Interahamwe* who committed crimes in his absence.[4508] He submits that by establishing his effective control over *Interahamwe* based on unspecified orders as well as "the evidence in its entirety", the Trial Chamber violated his right to a reasoned opinion.[4509]

1923. The Prosecution responds that the jurisprudence allowed the Trial Chamber to consider the evidence in its entirety when making findings pursuant to Article 6(3) of the Statute.[4510] It also contends that Ntahobali incorrectly asserts that he was held responsible for all "actions by the *Interahamwe*" at the prefectoral office as he was instead found responsible on the basis of orders he issued that led to criminal conduct.[4511]

1924. The Appeals Chamber observes that, in determining Ntahobali's superior responsibility for the crimes committed against Tutsis who had sought refuge at the prefectoral office, the Trial Chamber specifically referred to the orders he issued to *Interahamwe* and the fact that the *Interahamwe* complied with such orders and perpetrated the acts asked of them, including rapes and killings.[4512] This, in the view of the Appeals Chamber, indicates that Ntahobali was held responsible as a superior on the basis of the crimes perpetrated by the *Interahamwe* who followed his orders.[4513]

1925. The Appeals Chamber also notes that the Trial Chamber stated that it would not convict Ntahobali pursuant to Article 6(3) of the Statute on the basis of rapes and killings committed by

[4507] Ntahobali Appeal Brief, paras. 927, 931. *See also ibid*., paras. 929, 939; Ntahobali Reply Brief, para. 382.
[4508] Ntahobali Appeal Brief, paras. 936, 938, 939. Ntahobali also argues that the Trial Chamber failed to: (i) determine whether "Kazungu" was a soldier, a body guard, or an *Interahamwe* when engaging his responsibility for the conduct of Kazungu during the Night of Three Attacks; and (ii) sufficiently differentiate Ntahobali's responsibility for the conduct of *Interahamwe* or soldiers during the First Half of June Attacks, thereby failing to limit the scope of his liability. *See ibid.*, paras. 896, 897. The Appeals Chamber finds it unnecessary to address these contentions as it has determined, Judge Khan dissenting, that Ntahobali was not convicted on the basis of his conduct during the Night of Three Attacks or in relation to the killings that were perpetrated during the First Half of June Attacks. *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4509] Ntahobali Appeal Brief, paras. 928, 929, 932.
[4510] Prosecution Response Brief, para. 1189.
[4511] Prosecution Response Brief, para. 1191.
[4512] Trial Judgement, para. 5884.
[4513] The Appeals Chamber observes that paragraph 6086 of the Trial Judgement, read in isolation, could suggest that Ntahobali bears superior responsibility for the rapes committed by *Interahamwe* that he aided and abetted. However, this paragraph provides no analysis of the elements of superior responsibility. Moreover, such a reading of paragraph 6086 would be contrary to the Trial Chamber's analysis in paragraphs 5884 through 5886 of the Trial Judgement, which limits Ntahobali's effective control over *Interahamwe* to those who acted upon his orders.

Interahamwe during or following attacks at the prefectoral office as it concluded that Ntahobali had already been found criminally responsible pursuant to Article 6(1) of the Statute for these actions.[4514] The Trial Judgement, therefore, clearly reflects that the Trial Chamber limited Ntahobali's responsibility under Article 6(3) of the Statute only to conduct that supports his convictions pursuant to Article 6(1) of the Statute for crimes committed by *Interahamwe* against Tutsis who had sought refuge at the prefectoral office, and only the conduct that resulted from *Interahamwe* who followed his orders.[4515] While superior responsibility pursuant to Article 6(3) of the Statute can be incurred without evidence of any orders issued by the superior, the Trial Judgement shows that, in the present case, the Trial Chamber held Ntahobali responsible as a superior only of those crimes that he ordered and for which he was convicted under Article 6(1) of the Statute.

1926. Bearing this in mind, Ntahobali's contention that he was held responsible under Article 6(3) of the Statute for all crimes committed by *Interahamwe* at the prefectoral office is without merit. Consequently, his arguments that the Trial Chamber failed to explain how he exercised effective control over *Interahamwe* who committed rapes and killings based on Nyiramasuhuko's orders or over *Interahamwe* who committed these crimes in his absence are moot as he was not found to have ordered them.

1927. Turning to Ntahobali's contention that the Trial Chamber violated his right to a reasoned opinion in failing to identify the orders that were essential to demonstrate his superior responsibility, the Appeals Chamber finds that, read as a whole, the Trial Judgement sufficiently identified the orders Ntahobali issued to *Interahamwe* during attacks at the prefectoral office that were central to the Trial Chamber's finding that he bore superior responsibility for the crimes committed by *Interahamwe* who followed them.[4516] The Appeals Chamber finds no merit in Ntahobali's reliance on the Trial Chamber's statement in paragraph 5884 of the Trial Judgement that it "consider[ed] the evidence in its entirety" when assessing Ntahobali's superior responsibility, as it is clear that the Trial Chamber merely intended to indicate that it reached its findings beyond reasonable doubt on the basis of the totality of the evidence adduced. This is consistent with the jurisprudence of the Tribunal.[4517] Ntahobali's argument that the Trial Chamber failed to provide a reasoned opinion is therefore dismissed.

[4514] Trial Judgement, para. 5886. *See also ibid.*, paras. 6053, 6056, 6086.
[4515] Trial Judgement, paras. 5884-5886.
[4516] *See infra*, Section V.I.4(b).
[4517] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 450; *Nahimana et al.* Appeal Judgement, para. 789; *Ntagerura et al.* Appeal Judgement, paras. 172-175, 399.

1928. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions that the Trial Chamber erred in failing to particularise the conduct and evidence supporting his superior responsibility in relation to the crimes committed against Tutsi refugees who had sought refuge at the Butare Prefecture Office and in violating his right to a reasoned opinion.

(b) Assessment of Evidence

1929. The Appeals Chamber recalls that the Trial Chamber found Ntahobali responsible pursuant to Article 6(1) of the Statute for ordering: (i) killings of "Tutsis forced to board the pickup" truck during the Mid-May Attack; (ii) the rapes of six Tutsi women during the First Attack of the Last Half of May Attacks; and (iii) the rape of Witness TA during the Second Attack of the Last Half of May Attacks.[4518]

1930. Considering these conclusions, and recalling that Ntahobali was held responsible as a superior on the basis of the crimes perpetrated by the *Interahamwe* who followed his orders,[4519] the Trial Judgement reflects that Ntahobali was found to bear superior responsibility over *Interahamwe* who killed "Tutsis forced to board the pickup" truck during the Mid-May Attack and who raped Witness TA and six other women during the Last Half of May Attacks.

1931. Ntahobali contends that a superior's authority to issue orders does not automatically establish that superior's effective control.[4520] In this regard, he argues that the only orders the Trial Chamber could have relied upon in establishing his effective control over *Interahamwe* were a single order to stop loading refugees onto the pickup truck during the Mid-May Attack and his orders to rape during the Last Half of May Attacks.[4521] Furthermore, he submits that the impressions of Witness TA and other witnesses that he was the leader of the attacks do not suffice to establish his effective control over the *Interahamwe*.[4522]

1932. In addition, Ntahobali contends that the Trial Chamber erred in its analysis as it failed to consider evidence that *Interahamwe* were at times "under the orders" of Nteziryayo and the

[4518] The Trial Chamber also found Ntahobali responsible for: (i) committing rapes during the Mid-May Attack and the First Attack of the Last Half of May Attacks; and (ii) aiding and abetting the rape of Witness TA during one of the First Half of June Attacks. *See supra*, Sections V.I.1(b), V.I.1(c). Because the Trial Chamber's conclusions as to Ntahobali's participation in these attacks do not include findings that he issued "orders", the Appeals Chamber finds that the Trial Chamber did not find him responsible under Article 6(3) of the Statute on the basis of this conduct. The Appeals Chamber, therefore, rejects the Prosecution's contention to the contrary. *See* Prosecution Response Brief, paras. 1191, 1202.
[4519] *See supra*, para. 1925.
[4520] Ntahobali Appeal Brief, para. 929.
[4521] Ntahobali Appeal Brief, paras. 930, 931.
[4522] Ntahobali Appeal Brief, paras. 930, 934. Ntahobali argues that Witness TA's evidence further reflects the witness's impression that Nyiramasuhuko was his superior but that the Trial Chamber found this insufficient to establish her effective control over him. *See idem*.

President of the *Interahamwe*, Robert Kajuga, and its own findings that Nsabimana had issued orders to *Interahamwe* who were present at the prefectoral office, and that Kanyabashi later issued orders to the same *Interahamwe* at Rango Forest.[4523] He further highlights that the Prosecution alleged that *Interahamwe* collaborated with the Interim Government.[4524] In his view, the Trial Chamber also erred as it failed to consider that the term "*Interahamwe*" was used to designate any person participating in killings or looting and not the official *Interahamwe* of the MRND.[4525] Finally, Ntahobali contends that the fact that he issued orders is insufficient to demonstrate that he knew or had reason to know that crimes were about to be committed at the prefectoral office.[4526]

1933. The Prosecution responds that Ntahobali's leadership position and the fact that he issued orders which were followed by the *Interahamwe* are strong indicators that he exercised effective control over them.[4527] It submits that the relevant evidence does not reflect impressions of Ntahobali's authority, but direct evidence of him ordering *Interahamwe* to commit crimes.[4528] The Prosecution also contends that, even if the evidence and findings identified by Ntahobali were to establish that others had effective control over *Interahamwe* at the prefectoral office, this would not nullify Ntahobali's effective control over them.[4529] In this regard, the Prosecution submits that it was unnecessary for the Trial Chamber to determine whether the attackers were part of the official *Interahamwe*.[4530] It also contends that Ntahobali had the requisite knowledge to establish his superior responsibility because he ordered the specific killings and rapes.[4531]

1934. The Appeals Chamber recalls that "[i]ndicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish."[4532] A superior's ability to issue binding orders that are complied with by subordinates is one of the indicators of effective control generally relied upon in the jurisprudence of the Tribunal.[4533]

1935. The Appeals Chamber recalls that it has overturned the Trial Chamber's conclusion that Ntahobali ordered *Interahamwe* to rape six women during the First Attack of the Last Half of May

[4523] Ntahobali Notice of Appeal, para. 316; Ntahobali Appeal Brief, paras. 935, 936, 937.
[4524] Ntahobali Appeal Brief, para. 935.
[4525] Ntahobali Notice of Appeal, para. 316; Ntahobali Appeal Brief, para. 940.
[4526] Ntahobali Notice of Appeal, para. 313; Ntahobali Appeal Brief, para. 941.
[4527] Prosecution Response Brief, para. 1190.
[4528] Prosecution Response Brief, para. 1191.
[4529] Prosecution Response Brief, para. 1192.
[4530] Prosecution Response Brief, para. 1193.
[4531] Prosecution Response Brief, para. 1191.
[4532] *Ndahimana* Appeal Judgement, para. 53, *referring to Blaškić* Appeal Judgement, para. 69.
[4533] *See Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, para. 299. *See also Strugar* Appeal Judgement, para. 256; *Hadžihasanović and Kubura* Appeal Judgement, para. 199; *Halilović* Appeal Judgement, paras. 204, 207.

Attacks.[4534] Because the Trial Chamber used this conclusion to support its findings that Ntahobali bore superior responsibility for these rapes,[4535] the Appeals Chamber reverses the Trial Chamber's findings of Ntahobali's responsibility pursuant to Article 6(3) of the Statute based on this conduct.

1936. However, bearing in mind the evidence and findings that support Ntahobali's convictions for ordering killings during the Mid-May Attack[4536] as well as the finding that he ordered about seven *Interahamwe* to rape Witness TA during the Second Attack of the Last Half of May Attacks,[4537] the Appeals Chamber, Judge Liu dissenting, finds that it was within the discretion of the Trial Chamber to conclude that Ntahobali possessed effective control over the *Interahamwe* who committed these crimes on the basis of his orders. The temporal proximity and serial nature of these attacks, which repeatedly involved Ntahobali and *Interahamwe*, as well as the credible evidence of Ntahobali's leading role in them provided sufficient basis for the Trial Chamber to conclude that Ntahobali possessed the material ability to prevent the crimes and punish the *Interahamwe* who committed them based on his orders. In this respect, the Appeals Chamber recalls that it has already rejected Ntahobali's contention that Witness TA simply provided impressions of Ntahobali's authority over *Interahamwe*, as her evidence demonstrates that he repeatedly issued orders to *Interahamwe* and was viewed as an authority figure by them.[4538]

1937. Furthermore, the Appeals Chamber finds no merit in Ntahobali's contention that the Trial Chamber erred in failing to consider evidence that others issued orders to *Interahamwe*. Specifically, the Appeals Chamber does not see the material relevance of evidence that *Interahamwe* under the orders of Kajuga and Nteziryayo committed crimes during different time periods in other locations.[4539] Moreover, the Trial Chamber considered some of the evidence highlighted by Ntahobali on appeal and the leadership roles Kajuga and Nteziryayo held with respect to *Interahamwe* elsewhere in the Trial Judgement.[4540]

1938. Likewise, the Appeals Chamber finds no inconsistency in the Trial Chamber's analysis of evidence that Nsabimana and Kanyabashi issued orders to *Interahamwe*[4541] and its conclusion that

[4534] *See supra*, Sections V.I.3(b), V.I.3(c).
[4535] *See* Trial Judgement, paras. 5884-5886.
[4536] *See supra*, Section V.1.3(a). As determined previously, The Appeals Chamber recalls that it has found, Judge Khan dissenting, that the Trial Chamber did not convict Ntahobali for ordering killings during the Night of Three Attacks and the First Half of June Attacks. *See supra*, Sections V.I.1(a)(iii), V.I.1(c).
[4537] Trial Judgement, para. 5872.
[4538] *See supra*, Section V.1.3(a).
[4539] *Cf. Kanyarukiga* Appeal Judgement, para. 127. *See also Kalimanzira* Appeal Judgement, para. 195; *Kvočka et al.* Appeal Judgement, para. 23.
[4540] *See* Trial Judgement, para. 3995, fn. 10878. *See also ibid*., paras. 3982-3985, 3993-3997. Furthermore, the Trial Judgement reflects general consideration of Witness FAM's evidence as it related to Nteziryayo's responsibility for the attacks on the Tutsi refugees by the *Interahamwe* and civilians at Kabakobwa Hill. *See*, *e.g*., *ibid.*, paras. 1741-1748. *See also ibid*., paras. 1517-1529.
[4541] *See* Ntahobali Appeal Brief, paras. 936, 937, *referring to* Trial Judgement, paras. 2899, 2900, 5108, 5941.

Ntahobali exercised effective control over *Interahamwe* to whom he issued orders to commit various crimes at the prefectoral office. The Appeals Chamber recalls that effective control need not be exclusive and can be exercised by more than one superior, whose criminal responsibility is not excluded by the coexisting responsibility of others.[4542]

1939. The Appeals Chamber also finds no relevance in Ntahobali's argument that the Prosecution alleged that the Interim Government collaborated with or had effective control over the *Interahamwe*, as he points to allegations rather than findings of the Trial Chamber that would be inconsistent with the Trial Chamber's conclusions that he exercised effective control over a select group of *Interahamwe*. Ntahobali also fails to demonstrate that it was necessary for the Trial Chamber to determine whether the *Interahamwe* over whom he was found to exercise superior responsibility were officially part of the MRND party.

1940. Finally, the Appeals Chamber rejects Ntahobali's contentions that the orders underpinning his responsibility under Article 6(3) of the Statute were insufficient to establish that he knew or had reason to know that *Interahamwe* were about to commit crimes. As discussed above, Judge Liu dissenting with respect to the killings during the Mid-May Attack, the rapes and killings flowed directly from his orders and Ntahobali does not develop any argument to show that these crimes were committed without his knowledge or in circumstances that would have undermined his ability to know.

1941. Accordingly, the Appeals Chamber concludes that the Trial Chamber erred in finding Ntahobali responsible under Article 6(3) of the Statute on the basis of rapes committed by *Interahamwe* following his orders during the First Attack of the Last Half of May Attacks. However, the Appeals Chamber, Judge Liu dissenting, concludes that Ntahobali has not demonstrated any other error in the Trial Chamber's assessment of the evidence relevant to his responsibility as a superior for crimes committed by *Interahamwe* on the basis of his orders at the Butare Prefecture Office.

(c) Conclusion

1942. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions that the Trial Chamber erred in failing to particularise the conduct and evidence supporting his superior responsibility in relation to crimes committed at the Butare Prefecture Office and in violating his right to a reasoned opinion.

[4542] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 495. *See also Nizeyimana* Appeal Judgement, para. 346; *Čelebići* Appeal Judgement, paras. 197, 198.

1943. The Appeals Chamber concludes that the Trial Chamber erred in finding Ntahobali responsible pursuant to Article 6(3) of the Statute on the basis of the rapes committed by *Interahamwe* following his orders during the First Attack of the Last Half of May Attacks. However, the Appeals Chamber, Judge Liu dissenting, finds that Ntahobali has not demonstrated any other error in the Trial Chamber's assessment of the evidence relevant to his responsibility as a superior for the crimes committed by *Interahamwe* on the basis of his orders during the Mid-May Attack and the Second Attack of the Last Half of May Attacks at the Butare Prefecture Office. The Appeals Chamber will discuss the impact of these findings, if any, in Section XII below.

5. Conclusion

1944. Based on the foregoing, the Appeals Chamber reverses Ntahobali's convictions pursuant to Article 6(1) of the Statute for: (i) ordering the rapes of six women during the First Attack of the Last Half of May Attacks; and (ii) committing rapes during the First Half of June Attacks. The Appeals Chamber further concludes that the Trial Chamber erred in finding that Ntahobali bore superior responsibility pursuant to Article 6(3) of the Statute on the basis of the rapes of six women committed by *Interahamwe* following his orders during the First Attack of the Last Half of May Attacks. The Appeals Chamber will consider the impact of these conclusions, if any, in Section XII below.

1945. However, the Appeals Chamber, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack, affirms Ntahobali's convictions pursuant to Article 6(1) of the Statute for: (i) ordering killings during the Mid-May Attack; (ii) committing the rape of Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks; (iii) ordering the rape of Witness TA during the Second Attack of the Last Half of May Attacks; and (iv) aiding and abetting the rapes of Witness TA during one of the First Half of June Attacks. The Appeals Chamber further concludes, Judge Liu dissenting, that Ntahobali has not demonstrated that the Trial Chamber erred in finding that he bore superior responsibility pursuant to Article 6(3) of the Statute for: (i) killings committed by *Interahamwe* on the basis of his orders during the Mid-May Attack; and (ii) the rapes of Witness TA committed by *Interahamwe* following his orders during the Second Attack of the Last Half of May Attacks.

J. École Évangeliste du Rwanda (Grounds 3.5, 4.1, 4.2, and 4.3 in part)

1946. The Trial Chamber convicted Ntahobali of genocide, extermination and persecution as crimes against humanity as well as violence to life, health and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for aiding and abetting the killing of Tutsi refugees abducted from the EER between mid-May and the beginning of June 1994.[4543] The Trial Chamber also found that Ntahobali was responsible as a superior pursuant to Article 6(3) of the Statute for the killings committed by the *Interahamwe* at or near the EER and considered this as an aggravating factor when determining Ntahobali's sentence.[4544]

1947. Ntahobali submits that the Trial Chamber erred in: (i) making imprecise findings in relation to the crimes committed at the EER, violating his right to a reasoned opinion; (ii) its assessment of the evidence relating to these events; (iii) its assessment of his responsibility for aiding and abetting; and (iv) finding that he was responsible as a superior for these crimes. The Appeals Chamber will assess these contentions in turn.

1. Imprecise Findings

1948. In the "Factual Findings" section of the Trial Judgement, the Trial Chamber reached the following conclusion:

> the Chamber finds it established beyond a reasonable doubt that between mid-May and the beginning of June 1994: soldiers escorted and beat the refugees on the way to the EER; Ntahobali was involved in and led *Interahamwe* in attacks against, and abductions of, Tutsi refugees during their stay at the EER; soldiers, both alone and accompanied by Ntahobali, came to the EER and were also involved in abductions of refugees during the same period; soldiers raped women and young girls at or near the EER school; Ntahobali, *Interahamwe* and soldiers killed the abducted Tutsi refugees in the woods near the EER school complex. However, the Chamber does not find it established beyond a reasonable doubt that Ntahobali led the soldiers to the EER.[4545]

1949. In the "Legal Findings" section of the Trial Judgement, the Trial Chamber concluded as follows:

> There was no direct evidence that Ntahobali was personally responsible for killing any of the abducted refugees. The Chamber is nevertheless satisfied that his presence alongside *Interahamwe* and soldiers at the EER amounted to tacit approval and encouragement of the acts of *Interahamwe* and soldiers at the EER.
>
> The Chamber also recalls Ntahobali's prior conduct in working alongside *Interahamwe* and soldiers in abducting hundreds of refugees from the [Butare Prefecture Office] who were physically assaulted and raped and thereafter killed in various locations throughout Ngoma *commune*, and that he personally committed genocide at the Hotel Ihuliro roadblock […]. As such, Ntahobali's presence at the EER alongside *Interahamwe* and soldiers, when considered together

[4543] Trial Judgement, paras. 5916, 5971, 6053-6055, 6100, 6101, 6121, 6168, 6169, 6186.
[4544] Trial Judgement, paras. 5917, 5971, 6056, 6220.
[4545] Trial Judgement, para. 3965.

> with his prior conduct, leads the Chamber to conclude that Ntahobali's conduct at the EER amounted to his sanctioning of the acts of the *Interahamwe* and soldiers, and thereby substantially contributed to the commission of these crimes. […]
>
> Recalling that those who took refuge at the EER were predominantly Tutsis, the Chamber thus finds it proven beyond a reasonable doubt that Ntahobali committed the *actus reus* of aiding and abetting genocide, through the acts of killing members of the group.
>
> Viewing these attacks in the context of the widespread killing of Tutsis occurring throughout Rwanda, the Chamber finds beyond a reasonable doubt that the soldiers and *Interahamwe* who participated in various killings at or near the EER did so with the intent to destroy, in whole or in substantial part, the Tutsi group. Having regard to the events that surrounded the abductions, and the situation in Rwanda generally, the Chamber is also satisfied that Ntahobali must have known of the soldiers' and *Interahamwe's* intent and knew that he was substantially assisting them in the commission of their crimes.[4546]

1950. Ntahobali submits that the imprecision of the Trial Judgement regarding his convictions for the crimes committed at the EER violates his right to a reasoned opinion.[4547] Specifically, he contends that, despite convicting him for aiding and abetting the crimes at the EER through his presence, the Trial Chamber failed to indicate when he was present at the EER, which, in his view, is an essential element of the offence.[4548] According to him, because he was convicted based on his presence at the EER and the Trial Chamber found that some attacks occurred in his absence, the Trial Chamber should have specified the attacks during which he was present since they were the only attacks for which he could have been held responsible.[4549] Ntahobali argues that the Trial Chamber's factual findings do not allow him to understand when he was found to have been present, pointing out the discrepancies as to the timing of his presence in the witnesses' testimonies relied upon by the Trial Chamber.[4550]

1951. Ntahobali further contends that the Trial Chamber violated his right to a reasoned opinion by failing to specify when the attacks of the *Interahamwe* and soldiers took place or identify the evidence it relied upon for its conclusions, in particular given the inconsistent and contradictory evidence.[4551] He points to inconsistencies in the evidence as to the identity of the attackers, his presence at the EER, and the timing of the attacks that, he submits, the Trial Chamber should have expressly discussed.[4552] He also argues that the Trial Chamber failed to distinguish the attacks

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[4546] Trial Judgement, paras. 5912-5915 (internal references omitted).
[4547] Ntahobali Notice of Appeal, paras. 304, 305, 307-309; Ntahobali Appeal Brief, paras. 861, 862, 881.
[4548] Ntahobali Appeal Brief, paras. 872, 873, 875, *referring*, *inter alia*, *to* Trial Judgement, paras. 5912-5916, *Brdanin* Appeal Judgement, para. 273.
[4549] Ntahobali Appeal Brief, paras. 875, 876. *See also ibid.*, paras. 854-859.
[4550] Ntahobali Notice of Appeal, para. 300; Ntahobali Appeal Brief, paras. 858, 874.
[4551] Ntahobali Appeal Brief, para. 378.
[4552] In particular, Ntahobali contends that: (i) Witnesses TA and RE were imprecise about the timing of these attacks, with the latter also testifying that they occurred in Ntahobali's absence; (ii) Witnesses RE and SJ could not have been describing the same group of *Interahamwe* as, according to Witness RE, the *Interahamwe* donned banana leaves, while Witness SJ recalled them wearing the same uniforms as soldiers; and (iii) he is unable to determine whether the Trial Chamber relied on the evidence of Witness SX since the witness's testimony does not accord with the Trial Chamber's findings regarding the length of the stay of the refugees at the EER and the location they were taken to be killed as well

committed by the *Interahamwe* from those committed by the soldiers despite finding him responsible as a superior only for the crimes committed by the *Interahamwe*.[4553]

1952. Ntahobali submits that the imprecision of the Trial Judgement in these respects prevented him from knowing exactly what he was found responsible for and from raising a comprehensive appeal.[4554] For these reasons, Ntahobali requests that the Appeals Chamber acquit him of all charges relating to the EER.[4555]

1953. The Prosecution responds that the Trial Chamber provided reasons for its conclusion that Ntahobali aided and abetted killings through his tacit approval and sanctioning of the killings of the Tutsi refugees at or near the EER.[4556] It contends that the Trial Chamber found that Ntahobali aided and abetted the killings at the EER through his past conduct in addition to his presence at the scene and that, in any event, presence at the crime scene need not coincide with the commission of the crimes or be continuous.[4557] The Prosecution also argues that the Trial Chamber accepted that Ntahobali was present at the EER several times during the relevant period, that the inconsistencies in the evidence highlighted by Ntahobali were minor, and that their assessment did not require detailed findings.[4558] It adds that it was unnecessary for the Trial Chamber to distinguish the crimes committed by the soldiers from those committed by the *Interahamwe* since Ntahobali was not held responsible for the crimes committed by the soldiers at the EER.[4559] The Prosecution further suggests that Ntahobali was not held accountable as a superior for all the crimes committed by the *Interahamwe* at the EER, but only for the specific crimes established by the evidence of Witnesses QY, SX, and RE.[4560]

1954. The Appeals Chamber recalls that Article 22(2) of the Statute and Rule 88(C) of the Rules require trial chambers to provide a reasoned opinion,[4561] which includes the provision of clear, reasoned findings of fact as to each element of the crime charged.[4562] However, a trial chamber is

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as exceeded the scope of the relevant paragraph of the Indictment. *See* Ntahobali Appeal Brief, paras. 878, 879. *See also* Ntahobali Reply Brief, para. 354.

[4553] Ntahobali Notice of Appeal, paras. 300, 305; Ntahobali Appeal Brief, para. 880. *See also* Ntahobali Reply Brief, para. 378.

[4554] Ntahobali Notice of Appeal, paras. 307, 308; Ntahobali Appeal Brief, para. 881.

[4555] Ntahobali Notice of Appeal, para. 309; Ntahobali Appeal Brief, para. 881.

[4556] Prosecution Response Brief, para. 1165. *See also ibid*., para. 1166.

[4557] Prosecution Response Brief, paras. 1152, 1165, 1666.

[4558] Prosecution Response Brief, paras. 1153, 1167.

[4559] Prosecution Response Brief, paras. 1152, 1154, 1158.

[4560] Prosecution Response Brief, para. 1187.

[4561] *See*, *e.g*., *Bizimungu* Appeal Judgement, para. 18; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139.

[4562] *See Ndindiliyimana et al.* Appeal Judgement, para. 293; *Renzaho* Appeal Judgement, para. 320; *Kajelijeli* Appeal Judgement, para. 60; *Kordić and Čerkez* Appeal Judgement, para. 383. *Cf. also Orić* Appeal Judgement, para. 56.

not required to articulate in its judgement every step of its reasoning in reaching particular findings.[4563]

1955. The Appeals Chamber recalls that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime" and the *mens rea* is "the knowledge that these acts assist the commission of the offense".[4564] The Appeals Chamber has further explained that an individual can be found liable for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.[4565] When this form of aiding and abetting has been a basis for a conviction, "it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it."[4566]

1956. The Appeals Chamber observes that the Trial Chamber's conclusion regarding Ntahobali's responsibility for the killings of Tutsi refugees at or near the EER was premised on its findings that during the refugees' stay at the EER between mid-May and the beginning of June 1994, Ntahobali was present at the EER and, together with the *Interahamwe* and soldiers, involved in the attacks on and the abductions of the refugees from the EER, who were subsequently killed in the woods near the EER complex.[4567] The Trial Chamber noted that "[t]here was no direct evidence that Ntahobali was personally responsible for killing any of the abducted refugees" but was "satisfied that his presence alongside *Interahamwe* and soldiers at the EER amounted to tacit approval and encouragement of the acts of *Interahamwe* and soldiers at the EER."[4568] The Trial Judgement therefore clearly shows that his conviction is predicated on the criminal conduct of *Interahamwe* and soldiers that took place during attacks conducted in his presence and that he was not convicted of the crimes committed in his absence. Contrary to the Prosecution's position, the Trial Judgement

[4563] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Ntabakuze* Appeal Judgement, para. 161; *Kvočka et al.* Appeal Judgement, para. 23.
[4564] *Šainović et al.* Appeal Judgement, para. 1649. *See also ibid.*, paras. 1626-1648, 1650; *Popović et al.* Appeal Judgement, para. 1758; *Blaškić* Appeal Judgement, para. 46.
[4565] *Ndahimana* Appeal Judgement, para. 147; *Kalimanzira* Appeal Judgement, para. 74; *Muvunyi* Appeal Judgement of 29 August 2008, para. 80.
[4566] *Ndahimana* Appeal Judgement, para. 147, *citing Kalimanzira* Appeal Judgement, para. 74. *See also Muvunyi* Appeal Judgement of 29 August 2008, para. 80; *Kayishema and Ruzindana* Appeal Judgement, paras. 201, 202.
[4567] Trial Judgement, paras. 3946-3950, 3965. *See also ibid*., paras. 3856, 3858, 3867-3869, 3878, 3951-3964.
[4568] *See* Trial Judgement, para. 5912.

reflects that Ntahobali was held responsible for aiding and abetting the killings of Tutsi refugees committed by both the *Interahamwe* and soldiers.[4569]

1957. A holistic reading of the pertinent sections of the Trial Judgement, including the summary of testimonial evidence considered in the Trial Chamber's deliberations, shows that the Trial Chamber concluded that Ntahobali was present at the EER during the relevant time period. The Appeals Chamber observes that the evidence of Witnesses RE, QY and SX, deemed credible by the Trial Chamber, demonstrates, irrespective of the inconsistencies underscored by Ntahobali, that he was indeed at the EER on several occasions when the refugees were attacked and abducted by the principal perpetrators.[4570]

1958. To the extent that the Trial Judgement reflects the instances where Ntahobali's presence at the EER coincided with the attacks on and the abductions of the refugees by the principal perpetrators, the Appeals Chamber considers that, despite the discrepancies in the evidence pointed out by Ntahobali, the Trial Chamber was not required to address with greater precision the timing of every attack perpetrated by the *Interahamwe* and soldiers in making legal findings regarding Ntahobali's responsibility. Contrary to Ntahobali's contention, the Trial Chamber expressly cited the testimonies of Witnesses RE, SJ, and TA in support of its finding that "*Interahamwe* committed attacks at the EER"[4571] and the testimonies of Witnesses RE, QY, SJ, and QBQ in concluding that "apart from *Interahamwe*, soldiers came to the EER and variously abducted and killed the refugees."[4572] The Appeals Chamber is not persuaded that it was incumbent on the Trial Chamber to demarcate with more precision the attacks committed by soldiers as opposed to those committed by the *Interahamwe* as a prerequisite for finding Ntahobali responsible as a superior for the attacks committed by the latter.[4573]

1959. The Appeals Chamber is therefore of the view that the factual findings made by the Trial Chamber and the evidence relied upon in making these findings, together with the corresponding legal findings, as set out above, establish with sufficient precision the basis of Ntahobali's conviction for aiding and abetting the killing of Tutsi refugees at or near the EER through his tacit approval and sanctioning of the acts of the principal perpetrators.

[4569] *See* Trial Judgement, para. 5912 (Ntahobali's "presence alongside *the Interahamwe and soldiers* at the EER amounted to tacit approval and encouragement of the acts of *Interahamwe and soldiers* at the EER.") (emphasis added). *See also ibid*., paras. 3965, 5913, 5915.
[4570] Trial Judgement, paras. 3944, 3946, 3951. *See also ibid*., paras. 3856, 3868, 3878. Ntahobali's challenges to the Trial Chamber's assessment of the evidence regarding his presence at the EER are addressed and dismissed in Sections V.J.2(b), V.J.2(c) below.
[4571] Trial Judgement, para. 3945. *See also ibid*., para. 3944.

1960. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contention that the Trial Chamber erred by making imprecise findings with respect to his convictions for aiding and abetting the killing of Tutsi refugees at or near the EER.

2. Assessment of Evidence

1961. As noted above, the Trial Chamber concluded as follows:

> the Chamber finds it established beyond a reasonable doubt that between mid-May and the beginning of June 1994: soldiers escorted and beat the refugees on the way to the EER; Ntahobali was involved in and led *Interahamwe* in attacks against, and abductions of, Tutsi refugees during their stay at the EER; soldiers, both alone and accompanied by Ntahobali, came to the EER and were also involved in abductions of refugees during the same period; soldiers raped women and young girls at or near the EER school; Ntahobali, *Interahamwe* and soldiers killed the abducted Tutsi refugees in the woods near the EER school complex. However, the Chamber [did] not find it established beyond a reasonable doubt that Ntahobali led the soldiers to the EER.[4574]

1962. Ntahobali submits that the Trial Chamber erred in its assessment of the evidence relating to the events at the EER.[4575] In support of his contention, Ntahobali argues that the Trial Chamber: (i) reversed the burden of proof and erroneously discredited or disregarded exculpatory evidence; (ii) erred in its assessment of identification evidence; (iii) erred in its assessment of Prosecution evidence concerning the attacks; and (iv) improperly relied on expert evidence. The Appeals Chamber will examine these contentions in turn.

(a) Reversal of Burden of Proof and Assessment of Exculpatory Evidence

1963. After recalling that the Prosecution evidence concerning the attacks at the EER was credible and reliable and considering that most of the Defence witnesses who testified in this respect were either relatives or friends of Ntahobali, resided in the hotel belonging to Maurice Ntahobali, and therefore may have had a motive to lie, the Trial Chamber found that the testimonies presented by Defence witnesses that no attacks occurred at the EER was not credible.[4576]

1964. The Trial Chamber also concluded that the number of refugees at the EER during late-May 1994 well exceeded 200.[4577] It based its conclusion on Nsabimana's estimate that about 200 refugees returned to the Butare Prefecture Office from the EER in the last days of May 1994, the fact that many refugees at the EER were crowded into classrooms, and the fact that the number of refugees at the prefectoral office around 15 June 1994 after they had returned from the EER may

[4572] Trial Judgement, para. 3952. Ntahobali's challenges to the Trial Chamber's assessment of the evidence as it relates to the participation of *Interahamwe* and soldiers in the attacks at the EER have been addressed and dismissed below. *See infra*, Section V.J.2(c).
[4573] *See infra*, paras. 2107, 2108.
[4574] Trial Judgement, para. 3965.
[4575] Ntahobali Notice of Appeal, paras. 218, 239; Ntahobali Appeal Brief, paras. 571, 572.
[4576] Trial Judgement, para. 3964.

have been around 200 considered in light of its previous findings that many dozens if not hundreds of the refugees had been killed before that time.[4578]

1965. Ntahobali submits that the Trial Chamber misapplied the burden of proof in its assessment of evidence related to the events at the EER.[4579] In support of this contention, he argues that the Trial Chamber reversed the burden of proof by first assessing whether the Prosecution's evidence was credible and reliable before analysing the Defence evidence, notably concerning his presence at the EER and the existence of attacks at the EER, which resulted in the inevitable rejection of the latter.[4580] In his view, it was incumbent on the Trial Chamber to instead begin with the assessment of the Defence evidence, which, if believed, would have led to an acquittal or at least would have raised a reasonable doubt.[4581] Ntahobali contends that the reversal of the burden of proof invalidates the Trial Chamber's findings concerning his involvement in the events at the EER.[4582]

1966. According to Ntahobali, the Trial Chamber further erred in failing to provide a reasoned opinion for its finding that the relevant Defence evidence was not credible in its entirety, as the fact that some Defence witnesses were "relatives or friends" did not automatically indicate that their evidence was not credible or "determine the fate" of the remainder of the Defence evidence.[4583] In particular, he submits that the Trial Chamber failed to take into consideration the Defence evidence reflecting that no crimes were likely to have been committed at the EER since Defence Witnesses H1B6, NMBMP, WCNJ, WUNBJ, CEM, WBUC, Céline Nyiraneza as well as Denise and Maurice Ntahobali did not hear about or see any crime, nor heard gunshots or screams at the EER.[4584] Ntahobali also argues that in its rejection of the Defence evidence, the Trial Chamber failed to consider the contradictory accounts of the Prosecution witnesses.[4585] In this respect, he highlights that some Prosecution witnesses did not hear gunfire during the attacks at the EER and testified that the refugees were killed with traditional weapons,[4586] and others did not mention hearing screams or gunshots during the attacks at the EER.[4587] Ntahobali contends that these testimonies undermined the credibility of Prosecution Witnesses TG and QI, who respectively

[4577] Trial Judgement, para. 3938.
[4578] Trial Judgement, paras. 3937, 3938.
[4579] Ntahobali Notice of Appeal, para. 217; Ntahobali Appeal Brief, para. 506.
[4580] Ntahobali Appeal Brief, paras. 507, 508, *referring*, *inter alia*, *to* Trial Judgement, paras. 3943-3949, 3951, 3953, 3954, 3958, 3964, *R. v. Geddes* (Canada, 2011), paras. 14-16, *R. v. W. (D.)* (Canada, 1991), *R. v. C.L.Y.* (Canada, 2008), paras. 24-30.
[4581] Ntahobali Appeal Brief, para. 508.
[4582] Ntahobali Appeal Brief, para. 508.
[4583] Ntahobali Appeal Brief, paras. 506, 509, fn. 885, *referring*, *inter alia*, *to* Trial Judgement, paras. 3902, 3906, 3908. *See also* Ntahobali Notice of Appeal, para. 217.
[4584] Ntahobali Appeal Brief, para. 509, *referring to* Trial Judgement, paras. 3901, 3905, 3907, 3912-3915, 3917, 3918.
[4585] Ntahobali Appeal Brief, para. 509.
[4586] Ntahobali Appeal Brief, para. 509, *referring to* Witness RE, T. 24 February 2003 pp. 12, 13, Witness SJ, T. 4 June 2002 pp. 64-67.
[4587] Ntahobali Appeal Brief, para. 509, *referring to* Witnesses QY, SX, QBQ, QBP, and SD.

recounted hearing screams and gunfire as well as seeing a gun-wielding policeman, and reinforced Defence evidence regarding the absence of gunshots and screams.[4588]

1967. In addition, Ntahobali submits that in concluding that Defence witnesses attested to seeing only a small number of the refugees at the EER because they were unable to see inside the building, the Trial Chamber disregarded the testimonies of Defence Witnesses WCMNA and WCNMC, who were not his relatives or friends and testified about seeing the refugees inside the classrooms at the EER.[4589] Ntahobali argues that the Trial Chamber acted unreasonably in finding that the number of the refugees "well exceeded 200" without considering the contradictory testimonies of Witnesses RE, SX, and SJ as to their number at the EER.[4590]

1968. The Prosecution responds that the Trial Chamber assessed the totality of the evidence before making findings on Ntahobali's involvement in the attacks at the EER, which is consistent with the Tribunal's jurisprudence.[4591] It also submits that the Trial Chamber assessed the Defence evidence and that Ntahobali himself, while contesting his presence, recognised that the evidence indicated that several abductions were committed at the EER.[4592]

1969. As correctly noted by the Trial Chamber, the burden of proving each and every element of the offences charged against the accused beyond reasonable doubt rests solely on the Prosecution and never shifts to the Defence.[4593] The Appeals Chamber finds that the manner in which the Trial Chamber organised its assessment of the evidence in the Trial Judgement in no way reflects a failure to properly apply the applicable burden or proof. [4594]

1970. The Appeals Chamber is similarly not persuaded by Ntahobali's argument that the Trial Chamber's analysis of the Prosecution evidence before finding that the Defence evidence that no attacks occurred at the EER was not credible evinces a shift in the burden of proof.

[4588] Ntahobali Appeal Brief, para. 509.
[4589] Ntahobali Appeal Brief, para. 509.
[4590] Ntahobali Appeal Brief, para. 509. Ntahobali adds that the Trial Chamber failed to consider Witness FA's testimony, who attested to the absence of the refugees from classrooms at the EER and broadly asserts that the number of refugees stationed at the EER "had an obvious impact" on the number of those killed at the Butare Prefecture Office and the EER. *See idem*. The Appeals Chamber is not persuaded that the Trial Chamber was under an obligation to discuss expressly Witness FA's vague testimony that there was no one at the EER during the war since she did not testify that she personally saw inside the EER buildings. The witness also testified that people were killed at the EER. *See* Witness FA, T. 1 July 2004 pp. 75, 76 (closed session).
[4591] Prosecution Response Brief, para. 958. The Prosecution adds that the Canadian jurisprudence cited by Ntahobali is not binding on the Tribunal. *See idem.* Ntahobali replies that even though the Tribunal is not bound by national jurisprudence, the Appeals Chamber has recognised its utility. *See* Ntahobali Reply Brief, para. 228, *referring to Kupreškić et al.* Appeal Judgement, paras. 34-41.
[4592] Prosecution Response Brief, para. 959.
[4593] *See* Trial Judgement, para. 162.
[4594] Since pursuant to Rule 89(A) of the Rules a Trial Chamber is not bound by national rules of evidence, the Appeals Chamber does not find Ntahobali's reliance on Canadian jurisprudence persuasive. *See also Simba* Appeal Judgement, para. 38; *Akayesu* Appeal Judgement, fn. 577.

The Trial Chamber provided a detailed analysis of the evidence regarding the attacks at the EER adduced by the Prosecution and found it credible and reliable.[4595] Although the Trial Chamber did not expressly detail its assessment of individual credibility of the Defence witnesses in this respect, its conclusions indicate that it did not find their evidence that no attacks occurred at the EER credible in light of the "credible and reliable" evidence presented by the Prosecution as well as the fact that most of the Defence witnesses who testified to that effect were either relatives or friends of Ntahobali, were residing in the hotel belonging to Maurice Ntahobali, and, as a result may have had a motive to lie.[4596] The Appeals Chamber recalls that it is settled jurisprudence that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence.[4597] It was therefore within the Trial Chamber's discretion to take that factor into account when weighing the Defence evidence with that of the Prosecution. In the view of the Appeals Chamber, this does not amount to a reversal of the burden of proof but a finding that the Prosecution proved beyond reasonable doubt that the attacks occurred at the EER.[4598] The Appeals Chamber is therefore satisfied that the Trial Chamber did not misapply the burden of proof.

1971. Contrary to Ntahobali's contention, the Trial Chamber did consider the Defence evidence that no attacks occurred, noting in particular the relevant parts of the testimonies of Witnesses H1B6, NMBMP, WCNJ, WUNBJ, CEM, WBUC, Nyiraneza, as well as Denise and Maurice Ntahobali as regards their perception of the conditions at the EER, including the absence of gunshots and screams.[4599] In addition, while the Trial Judgement indicates that some Prosecution witnesses did not hear or did not mention gunshots and screams,[4600] and others did hear them or saw a gun-wielding policeman,[4601] these witnesses' evidence is consistent on the fact that attacks occurred at the EER and therefore do not support the Defence evidence to the contrary.[4602] The purported inconsistencies between the testimonies of Prosecution witnesses pointed out by Ntahobali simply reflect that different people in different vantage points saw and heard different

[4595] *See* Trial Judgement, paras. 3943-3964.
[4596] *See* Trial Judgement, para. 3964.
[4597] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 117; *Karera* Appeal Judgement, para. 137.
[4598] *See*, *e.g.*, Trial Judgement, para. 3965.
[4599] *See* Trial Judgement, paras. 3901, 3905, 3907, 3912-3915, 3917, 3918.
[4600] *See* Trial Judgement, paras. 2265, 2312, 3856, 3866-3880, 3890, 3891.
[4601] *See* Trial Judgement, paras. 3865, 3892.
[4602] *See* Trial Judgement, paras. 3943-3963. The Appeals Chamber notes that, while the Trial Chamber's analysis of the evidence concerning the events at the EER does not reflect express consideration of the testimonies of Witnesses QBP and SD, the Trial Chamber specifically noted elsewhere in the Trial Judgement that these witnesses testified that they went to the EER. *See ibid.*, paras. 2265, 2312. In addition, the review of Witness QBP's evidence reveals that the witness testified that people were killed at the EER. *See* Witness QBP, T. 28 October 2002 p. 42. As for Witness SD, she merely recounted her whereabouts during the events. *See* Witness SD, T. 17 March 2003 p. 8, T. 17 March 2003 p. 37 (closed session). The Appeals Chamber, therefore, is not persuaded that the testimonies of these witnesses

things and are not material when viewed in the context of the fundamental consistency of the witnesses' accounts that attacks occurred at the EER. Recalling that, as a general rule, a trial chamber is not required to articulate every step of its reasoning for each finding it makes,[4603] the Appeals Chamber is satisfied that the Trial Chamber was not required to discuss these alleged inconsistencies in its analysis of the evidence in relation to the EER. The Appeals Chamber also recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[4604]

1972. With respect to Ntahobali's contention that the Trial Chamber disregarded the evidence of Witnesses WCNMC and WCNMA when determining the number of refugees present at the EER at the relevant time, the Appeals Chamber observes that these witnesses' evidence that they saw refugees inside the classrooms at the EER rather than from Hotel Ihuliro was duly noted by the Trial Chamber in the summary of their evidence.[4605] The Appeals Chamber finds no error in the fact that the Trial Chamber did not discuss this particular aspect of their evidence in its deliberations[4606] in light of the overwhelming evidence that the number of the refugees exceeded the Defence witnesses' estimates.[4607]

1973. In addition, the Appeals Chamber notes that, contrary to Ntahobali's assertion, the Trial Chamber carefully assessed the contradictory aspects of the Prosecution evidence regarding the number of refugees, taking into account the variances within and between the testimonies of Witnesses RE, SX, and SJ and the explanations for it.[4608] The Appeals Chamber therefore finds that Ntahobali fails to demonstrate that the Trial Chamber acted unreasonably when it determined the number of the refugees at the EER.

1974. Accordingly, Appeals Chamber finds that the Trial Chamber did not err in its application of the burden of proof, nor did it disregard exculpatory evidence when assessing the evidence related to events at the EER.

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undermine the credibility of other Prosecution witnesses and does not find that the Trial Chamber was required to refer to their testimonies in assessing evidence concerning the events at the EER.

[4603] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165. *See also Kvočka et al.* Appeal Judgement, para. 23.

[4604] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29 ("Where testimonies are divergent, it is the duty of the [t]rial [c]hamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.") (internal reference omitted).

[4605] *See* Trial Judgement, paras. 3906, 3908.

[4606] The Appeals Chamber notes that the Trial Chamber subsequently erred in its analysis of the evidence concerning the number of refugees at the EER in referring to Witness WCNMC as one of the witnesses who only observed the refugees in the courtyard from Hotel Ihuliro. *See* Trial Judgement, para. 3937. The Appeals Chamber, however, considers that this error has not occasioned a miscarriage of justice for the reason developed below.

[4607] *See* Trial Judgement, paras. 3935-3938.

[4608] *See* Trial Judgement, paras. 3935, 3936. *See also ibid*., paras. 3877, 3881, 3885, 3935-3937.

(b) Identification Evidence

1975. Ntahobali submits that the Trial Chamber erred in finding that the evidence of Witnesses RE, QY, SX, and TB identifying him at the EER was credible and reliable.[4609]

(i) Witness RE

1976. The Trial Chamber noted that Witness RE was among the several witnesses who testified about Ntahobali's presence at the EER.[4610] It recalled that the witness referred to Ntahobali as "Shalom" and observed that, although she did not know him prior to the events, others had identified him.[4611] The Trial Chamber found that this testimony, despite being hearsay evidence, was corroborative of the identification of Ntahobali.[4612] The Trial Chamber further recalled that Witness RE misidentified Ntahobali in court but did not consider that it undermined the credibility or reliability of her identification of Ntahobali as the man who attacked the refugees at the EER, given the time that had elapsed since the events and the detailed and consistent nature of her overall testimony regarding the events at the EER.[4613] The Trial Chamber concluded that the witness had adequate conditions in which to observe Ntahobali at the EER.[4614]

1977. Ntahobali contends that the Trial Chamber erred in crediting identification evidence of Witness RE, in particular by concluding that it was not undermined by the witness's misidentification of him.[4615] In his view, the misidentification could not have been explained by the passage of time and should have raised reasonable doubt as to whether someone other than him, such as Nteziryayo, was present at the EER.[4616]

1978. Ntahobali further submits that, since Witness RE did not identify him, the Trial Chamber erred in finding that his identification by this witness was corroborated by hearsay evidence from unknown persons who informed her of Ntahobali's identity.[4617] He argues that the Trial Chamber

[4609] Ntahobali Notice of Appeal, para. 219; Ntahobali Appeal Brief, paras. 573-597. *See also* AT. 15 April 2015 pp. 42, 43, 45. Ntahobali further submits that the Trial Chamber failed to apply sufficient caution when assessing identification evidence consisting of hearsay from witnesses with no prior knowledge of him, arguing that it was inappropriate for the Trial Chamber to rely on jurisprudence affirming the use of hearsay identification evidence, given the material differences between the evidence used to identify him and the convicted person in another case. *See* Ntahobali Appeal Brief, paras. 577-579, 593. The Appeals Chamber recalls that Ntahobali's arguments about the Trial Chamber's erroneous reliance on inapplicable jurisprudence when assessing identification evidence from witnesses with no prior knowledge of him have already been addressed and rejected. *See supra*, Section V.I.2(b)(i)a.
[4610] Trial Judgement, para. 3946. *See also ibid*., para. 3856.
[4611] Trial Judgement, para. 3946. *See also ibid*., para. 3856.
[4612] Trial Judgement, para. 3946.
[4613] Trial Judgement, para. 3948. *See also ibid*., para. 3862.
[4614] Trial Judgement, para. 3946.
[4615] Ntahobali Appeal Brief, para. 574, *referring to* Trial Judgement, para. 3948. *See also* AT. 15 April 2015 pp. 42, 43; AT. 16 April 2015 p. 35.
[4616] Ntahobali Appeal Brief, paras. 575, 576.
[4617] Ntahobali Appeal Brief, para. 577, *referring to* Trial Judgement, para. 3946. *See also* AT. 15 April 2015 p. 42.

failed to specify which identification evidence corroborate Witness RE's.[4618] He also highlights that the unknown hearsay sources who identified him for Witness RE were from a commune remote from Butare Town.[4619]

1979. In addition, Ntahobali argues that the Trial Chamber erred in law in failing to treat identification evidence of Witness RE with sufficient caution despite the difficult conditions under which she made the identification at the EER.[4620] In particular, he submits that, in concluding that Witness RE "had adequate conditions in which to observe and identify Ntahobali", the Trial Chamber failed to consider that the witness saw him at the EER only once at night, when Ntahobali was wearing a military uniform and was surrounded by soldiers while it was too dark to distinguish the uniforms, and made these observations from a distant corner in a heavy rain.[4621] Ntahobali adds that the Trial Chamber erred in concluding that sufficient lighting was present for Witness RE to identify him, disregarding the witness's own testimony that there was no electricity or lighting at the EER.[4622]

1980. Finally, Ntahobali argues that the Trial Chamber erred in relying on the detailed and consistent nature of Witness RE's as well as Witness QY's overall testimonies concerning the events at the EER to find their identification evidence credible and reliable.[4623] Ntahobali submits that the credibility of these witnesses' testimonies about the events at the EER is an issue distinct from the reliability and credibility of their identification evidence, which does not revolve around honesty.[4624] According to him, since these witnesses were unable to identify him and their testimonies were "mutually inconsistent", the Trial Chamber failed to provide a reasoned opinion for finding their testimonies "consistent".[4625]

1981. The Prosecution responds that the Trial Chamber reasonably found that, in light of the detailed and consistent nature of the overall testimonies of Witnesses RE and QY, Witness RE's identification evidence was credible and that the Trial Chamber cautiously assessed her evidence.[4626]

[4618] Ntahobali Notice of Appeal, para. 225; Ntahobali Appeal Brief, para. 577.
[4619] *See* Ntahobali Appeal Brief, para. 578.
[4620] Ntahobali Appeal Brief, para. 580. *See also* AT. 15 April 2015 p. 43. Ntahobali posits that no reasonable trier of fact could have found Witness RE's identification of him credible or reliable. *See* Ntahobali Appeal Brief, para. 581.
[4621] Ntahobali Appeal Brief, para. 580. *See also* AT. 15 April 2015 p. 43.
[4622] Ntahobali Appeal Brief, para. 580. *See also ibid*., para. 592, *referring to* Trial Judgement, para. 3949.
[4623] Ntahobali Appeal Brief, para. 590, *referring to* Trial Judgement, para. 3948.
[4624] Ntahobali Appeal Brief, para. 590. Ntahobali cites jurisprudence from the Supreme Court of Canada about the danger of wrongful convictions based on persuasive yet faulty identification evidence. *See idem*, *referring to R. v. Hibbert* (Canada, 2002), para. 51. *See also* AT. 16 April 2015 p. 36.
[4625] Ntahobali Appeal Brief, para. 590.
[4626] Prosecution Response Brief, paras. 971, 978. *See also* AT. 16 April 2015 p. 9.

1982. The Appeals Chamber recalls that Ntahobali's challenges regarding the general import of Witness RE misidentifying Ntahobali as Nteziryayo have already been addressed and rejected in a previous section of this Judgement.[4627] Furthermore, in assessing the witness's evidence implicating Ntahobali in the attacks at the EER, the Trial Chamber not only concluded that the misidentification did not undermine the reliability of Witness RE's identification evidence in light of the "nearly nine years" that had passed since the attacks, but also considered the circumstances of her identification of Ntahobali at the EER as well as the overall context of her testimony regarding the events, including its detailed and consistent nature.[4628] In the view of the Appeals Chamber, Ntahobali, who simply repeats the arguments he raised at trial,[4629] merely disagrees with the Trial Chamber's conclusion without demonstrating that the in-court misidentification could not have reasonably been attributed to the passage of time.

1983. The Appeals Chamber similarly sees no merit in Ntahobali's argument that the Trial Chamber erred in relying on hearsay evidence through which he was identified to Witness RE to corroborate Ntahobali's identification at the EER. While Witness RE's ability to identify Ntahobali was based on the information provided by others who identified him as "Shalom",[4630] the Appeals Chamber recalls that it has already addressed and dismissed Ntahobali's challenges to the Trial Chamber's general reliance on hearsay identification evidence.[4631] Moreover, since Witness RE's evidence of Ntahobali's presence at the EER was supported by evidence of other witnesses who attested to seeing Ntahobali, albeit on separate occasions,[4632] the Appeals Chamber is satisfied that a reasonable trier of fact could have concluded that Witness RE's hearsay evidence corroborated Ntahobali's identification at the EER.[4633] Finally, contrary to Ntahobali's contention, the summary of Witness RE's evidence reflects that Ntahobali was identified to her by "others from Butare".[4634]

1984. As for Ntahobali's argument that the Trial Chamber overlooked the difficult conditions in which he was identified by Witness RE at the EER on the first night, the Appeals Chamber notes that, contrary to Ntahobali's contention, Witness RE did not testify that she saw Ntahobali at night

[4627] *See supra*, para. 1624.
[4628] *See* Trial Judgement, paras. 3946, 3948. *See also ibid*., para. 3856.
[4629] *See* Ntahobali Closing Brief, para. 114.
[4630] *See* Trial Judgement, paras. 3856, 3946.
[4631] *See supra*, Section V.I.2(b)(i)a.
[4632] *See infra*, Sections V.J.2(c)(ii)b, V.J.2(c)(ii)c.
[4633] Trial Judgement, para. 3946. *See also ibid*., paras. 3947-3949.
[4634] *See* Trial Judgement, para. 3856. *See also* Witness RE, T. 26 February 2003 p. 9 ("it is Butare people who told us that this person is called Shalom and he comes from Butare."). The Appeals Chamber notes that the excerpt of Witness RE's testimony cited by Ntahobali merely reflects that, according to Witness RE, the refugees from both the Butare Prefecture as well as other prefectures were stationed at the EER. *See* Ntahobali Appeal Brief, para. 578, *referring to* Witness RE, T. 25 February 2003 pp. 18, 19.

or that it was too dark to distinguish the uniforms.[4635] Instead, Witness RE testified that Ntahobali and the accompanying soldiers came in the evening between 5:30 and 6:00 p.m., while it was still relatively bright.[4636] In recounting Witness RE's testimony about her encounter with Ntahobali on the first night, the Trial Chamber referred to this excerpt of the witness's evidence.[4637] Furthermore, having reviewed Witness RE's evidence describing the circumstances of her encounter with Ntahobali,[4638] the Appeals Chamber is not persuaded that other factors listed by Ntahobali, which were expressly noted by the Trial Chamber,[4639] undermine the reasonableness of the Trial Chamber's reliance on this witness's identification evidence.

1985. With respect to Ntahobali's contention that the Trial Chamber erred in relying on the detailed and consistent nature of Witnesses RE's and QY's overall testimonies concerning the events at the EER to find their identification evidence reliable, the Appeals Chamber notes that Ntahobali's challenges related to the inconsistencies between the testimonies of Witnesses RE and QY are discussed and dismissed later in this Judgement.[4640] The Appeals Chamber further recalls that general credibility of witnesses and the reliability of witness testimonies are among the relevant factors that a trier of fact is entitled to take into account when assessing identification evidence.[4641] The Appeals Chamber therefore finds no error in the Trial Chamber's consideration of these factors.

1986. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated an error in the Trial Chamber's reliance on Witness RE's identification evidence as it relates to his presence at the EER.

(ii) Witness QY

1987. The Trial Chamber noted that Witness QY had seen Ntahobali on two occasions before the events at the EER, at the Butare University Hospital and the Butare Prefecture Office, respectively.[4642] It further recalled that Witness QY stated that she would not be able to identify Ntahobali in court but considered that it did not undermine the credibility or reliability of her

[4635] The Appeals Chamber observes that the excerpt of Witness RE's testimony relied upon by Ntahobali in support of this contention details the circumstances in which the witness encountered Ntahobali at the Butare Prefecture Office rather than at the EER. *See* Ntahobali Appeal Brief, para. 580, *referring to* Witness RE, T. 26 February 2003 pp. 24, 25 ("Q. Madam Witness, when you said you saw Shalom and Kazungu come to the *prefecture*, in what way was he dressed? A. When they arrived, Shalom was dressed - was wearing a military uniform. Q. Are you able to describe the military uniform, since you did say that you knew some military uniforms? A. Yes, I did say that I know the uniforms worn by our soldiers, but I am saying that when they came it was night and I could not distinguish the uniform.").
[4636] *See* Witness RE, T. 24 February 2003 p. 11, T. 26 February 2003 pp. 8, 9.
[4637] *See* Trial Judgement, para. 3856, fns. 10397, 10399, *referring to* Witness RE, T. 24 February 2003 p. 11, T. 26 February 2003 pp. 8, 9. *See also ibid*., para. 3943.
[4638] *See* Witness RE, T. 24 February 2003 pp. 11, 38, T. 26 February 2003 pp. 8-10.
[4639] *See* Trial Judgement, paras. 3856, 3946.
[4640] *See infra*, paras. 2038, 2039.
[4641] *See Niyitegeka* Appeal Judgement, paras. 100, 101; *Kayishema and Ruzindana* Appeal Judgement, para. 327.
[4642] Trial Judgement, para. 3947. *See also ibid.*, para. 3875.

identification of Ntahobali as the man who attacked the refugees at the EER given the time that had elapsed since the events and the detailed and consistent nature of her overall testimony regarding the events.[4643]

1988. Ntahobali contends that the Trial Chamber erred in crediting Witness QY's identification evidence, which ought to have been approached with caution.[4644] In particular, he argues that the Trial Chamber erroneously relied on the evidence of two prior sightings of him by the witness at locations other than the EER, while finding that he was not present at these locations.[4645] Specifically, he underlines that the Trial Chamber concluded that it had not been established beyond reasonable doubt that he went to the Butare University Hospital, rejecting Witness QY's identification evidence due to its hearsay nature and the witness's inability to identify Ntahobali in court.[4646] Ntahobali adds that the Trial Chamber failed to mention that Witness QY learned from an unknown hearsay source that the attacker's name was "Sharomo".[4647] Similarly, he emphasises that the Trial Chamber also rejected Witness QY's identification evidence of him at the prefectoral office.[4648]

1989. Ntahobali further submits that the Trial Chamber failed to exercise caution in finding Witness QY's identification evidence credible and reliable despite her failure to identify him in court, her admission that she lied to the court, and the Trial Chamber's conclusion that her sighting of him prior to her seeing him at the EER was not reliable.[4649] In his view, the Trial Chamber failed to provide a reasoned opinion for finding Witness QY credible and reliable despite the adverse credibility findings made by the Trial Chamber concerning this witness as regards other events.[4650]

1990. The Prosecution responds that the Trial Chamber reasonably found that, by the time the refugees were transferred from the prefectoral office to the EER in mid-May 1994, Witness QY had seen Ntahobali on two occasions.[4651] In this context, it submits that the Trial Chamber acted within its discretion in finding that Witness QY's inability to identify Ntahobali in court did not undermine

[4643] Trial Judgement, para. 3948. *See also ibid.*, para. 3875.
[4644] Ntahobali Appeal Brief, paras. 582, 586-588. *See also* Ntahobali Notice of Appeal, para. 224.
[4645] Ntahobali Appeal Brief, paras. 583-586, *referring to* Trial Judgement, paras. 2141, 2142, 2616, 3947, 3948. *See also* AT. 15 April 2015 pp. 42-44.
[4646] Ntahobali Appeal Brief, para. 584, *referring to* Trial Judgement, paras. 2141, 2142. *See also* AT. 15 April 2015 p. 43.
[4647] Ntahobali Appeal Brief, para. 589 (emphasis omitted), *referring to* Witness QY, T. 25 March 2003 pp. 16-18, T. 19 March 2003 pp. 14, 15, video-recording of Witness QY's testimony of 19 March 2003, at 00:54:43 to 00:55:55.
[4648] Ntahobali Appeal Brief, para. 585, *referring to* Trial Judgement, para. 2616. *See also* Ntahobali Notice of Appeal, para. 224; AT. 15 April 2015 pp. 43, 44.
[4649] Ntahobali Appeal Brief, paras. 587, 588, *referring*, *inter alia*, *to* Trial Judgement, paras. 200-203. *See also* AT. 15 April 2015 p. 44.
[4650] Ntahobali Appeal Brief, para. 588, *referring to* Trial Judgement, paras. 2141, 2616, 2620-2626, 3960-3963, 4210.
[4651] Prosecution Response Brief, para. 973.

her credibility or the reliability of her identification evidence, particularly as her account was corroborated.[4652]

1991. The Trial Chamber noted that Witness QY had seen Ntahobali on two prior occasions, at the prefectoral office and the Butare University Hospital, before seeing him at the EER.[4653] However, the Appeals Chamber observes that, elsewhere in the Trial Judgement, the Trial Chamber unequivocally rejected Witness QY's evidence implicating Ntahobali in the attacks at the Butare Prefecture Office in late April or early May 1994 due, in part, to the unreliable nature of her identification evidence.[4654] Moreover, the Appeals Chamber has previously determined that the Trial Chamber erred in relying on the evidence of Witness QY with respect to the presence of Ntahobali during the attacks at the prefectoral office around the end of May or the beginning of June 1994.[4655] Similarly, regarding the events at the Butare University Hospital between April and May 1994, the Trial Chamber also concluded that Witness QY's identification evidence – the only evidence implicating Ntahobali – raised a doubt about Ntahobali's presence during the events.[4656] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in relying on Witness QY's prior sightings of Ntahobali on two occasions in support of the witness's identification of him at the EER.[4657]

1992. However, the Appeals Chamber considers that this error has not occasioned a miscarriage of justice. In particular, the Appeals Chamber observes that Witness QY not only referred to Ntahobali as "Shalom" but also specified that he was the son of Nyiramasuhuko and that she did not know anyone else in Butare by that name, which contradicts Ntahobali's contention that the witness was referring to another person.[4658] The Appeals Chamber is therefore of the view that the Trial Chamber's erroneous reliance on Witness QY's prior sightings of Ntahobali does not undermine its reliance on Witness QY's evidence in identifying him during the events at the EER.

1993. Turning to Witness QY's inability to identify Ntahobali in court, the Appeals Chamber recalls that the failure to identify an accused in court can be a reason for declining to rely on the evidence of an identifying witness but it does not necessarily prevent a reasonable trier of fact from relying on that witness's testimony.[4659] In the current instance, the Trial Chamber acknowledged Witness QY's admission that she would not be able to identify Ntahobali in court but considered

[4652] Prosecution Response Brief, para. 978.
[4653] *See* Trial Judgement, para. 3947.
[4654] *See* Trial Judgement, paras. 2615, 2616, 2626.
[4655] *See supra*, paras. 1686, 1687.
[4656] *See* Trial Judgement, para. 2141. *See also ibid*., para. 2142.
[4657] *See* Trial Judgement, para. 3947.
[4658] *See*, *e.g.*, Witness QY, T. 19 March 2003 pp. 13, 14, 65. *See also* Trial Judgement, para. 3875.
[4659] *See Lukić and Lukić* Appeal Judgement, para. 503. *See also Rukundo* Appeal Judgement, para. 71; *Limaj et al.* Appeal Judgement, fn. 68, *referring to Kvočka et al.* Appeal Judgement, para. 473.

that, in view of the consistent and detailed nature of her overall testimony and the time that elapsed since the events, it did not undermine the credibility or reliability of her identification of Ntahobali as the man who attacked the refugees at the EER.[4660] The Appeals Chamber is therefore satisfied that the Trial Chamber exercised sufficient caution when assessing this aspect of Witness QY's evidence.

1994. With respect to Ntahobali's arguments related to Witness QY lying to the Trial Chamber, the Appeals Chamber recalls that they have already been addressed and dismissed in a prior section of this Judgement.[4661] The Appeals Chamber finds Ntahobali's contention that the Trial Chamber provided insufficient explanation for its reliance on Witness QY's identification evidence in light of its credibility findings regarding this witness in relation to other events unpersuasive. Recalling that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony,[4662] the Appeals Chamber observes that the Trial Chamber not only articulated its reasons for accepting Witness QY's identification evidence with respect to the EER, including, *inter alia*, the detailed and consistent nature of her overall testimony, but also for its decision not to credit her evidence in relation to other events.[4663]

1995. Under these circumstances, the Appeals Chamber considers that Ntahobali has not demonstrated that a reasonable trier of fact could not have relied on Witness QY's identification of him at the EER.

(iii) Witness SX

1996. The Trial Chamber noted that Witness SX learned Ntahobali's identity through a third person at the roadblock in front of Nyiramasuhuko's house.[4664] It further noted that Witness SX had several opportunities to observe Ntahobali at the EER and, recalling its findings about the lighting conditions at the EER, found Witness SX's testimony to be reliable and corroborative of Ntahobali's involvement in the attacks at the EER.[4665]

1997. Ntahobali contends that, in relying on Witness SX's testimony about the lighting conditions at the EER, the Trial Chamber failed to discuss that Witness SX initially testified that he could not recall whether there was lighting at the EER before indicating that light emanated from the lamps

[4660] Trial Judgement, para. 3948. *See also ibid*., para. 3875.
[4661] *See supra*, Section III.J.3.
[4662] *See*, *e.g*., *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[4663] *See supra*, paras. 1991-1993.
[4664] Trial Judgement, para. 3949. *See also ibid*., para. 3880.
[4665] Trial Judgement, para. 3949. *See also ibid*., paras. 3878, 3879, 3946.

on the building across the road.[4666] In his view, it was unreasonable for the Trial Chamber to rely on Witness SX's evidence when considering the circumstances under which he was observed at the EER by Witness RE on the first night, since the latter testimony denotes that the veranda where Witness RE was located was not lit.[4667] Ntahobali also points out that, according to Witness RE, there was no light or electricity available at the EER.[4668]

1998. The Prosecution responds that, based on the several opportunities that he had to observe Ntahobali under adequate lighting, the Trial Chamber reasonably found that Witness SX's testimony was reliable and corroborative of Ntahobali's involvement in the EER attacks.[4669]

1999. The Appeals Chamber observes that the Trial Chamber relied on Witness SX's testimony that there was lighting at the EER school itself, but not in the classrooms.[4670] Contrary to Ntahobali's contention, Witness SX not only mentioned the lights on the building on the other side of the road that shed light onto the EER but also indicated that there were lights on the buildings of the EER school, except in the classrooms.[4671]

2000. Regarding Ntahobali's contention that the Trial Chamber erred in relying on the evidence about lighting at the EER from Witness SX when finding that Witness RE was able to identify Ntahobali, the Appeals Chamber observes that Witness RE testified that there was no electricity or lighting at the EER.[4672] However, the Appeals Chamber finds that Ntahobali places undue emphasis on this purported contradiction between the evidence of Witnesses SX and RE. While Witness SX was asked numerous questions and provided a detailed description of the positioning of lights at the EER and its surroundings, Witness RE broadly indicated that there was no lighting or electricity when discussing the overall conditions at the EER.[4673] The Appeals Chamber is of the view that any

[4666] Ntahobali Appeal Brief, para. 580, *referring to* Witness SX, T. 30 January 2004 p. 49 (closed session). *See also ibid*., para. 592, *referring to* Trial Judgement, para. 3949.
[4667] Ntahobali Appeal Brief, para. 580, *referring to* Witness RE, T. 26 February 2003 pp. 18, 19. *See also* AT. 15 April 2015 p. 43.
[4668] Ntahobali Appeal Brief, para. 580. *See also ibid*., para. 592, *referring to* Trial Judgement, para. 3949. Ntahobali, repeating that the testimony of Witness SX drastically diverged from the testimonies of Witnesses RE and QY as well as the Trial Chamber's own findings, further argues that it was unreasonable for the Trial Chamber to rely on his identification evidence concerning the attacks at the EER in general or to corroborate the evidence of Witnesses RE and QY. *See ibid.*, para. 594. These challenges are addressed and dismissed above and below. *See supra*, Section V.G.4(b); *infra*, Section V.J.2(c)(ii). Ntahobali also submits that the Trial Chamber erred in failing to assess Witness SX's identification evidence with caution even though he did not know Ntahobali prior to the events of 1994 and that the witness's evidence that he "appear[ed]… to resemble" the attacker at the EER was insufficient to establish a positive identification beyond reasonable doubt. *See* Ntahobali Appeal Brief, para. 591. *See also* AT. 15 April 2015 p. 44. The Appeals Chamber has addressed and rejected these arguments when addressing Ntahobali's submissions pertaining to the rape and murder of a Tutsi girl at the Hotel Ihuliro roadblock. *See supra*, Section V.G.4(b).
[4669] Prosecution Response Brief, para. 974, *referring to* Trial Judgement, para. 3949, *Renzaho* Appeal Judgement, para. 530.
[4670] Trial Judgement, para. 3946. *See also ibid*., paras. 3879, 3949.
[4671] *See* Witness SX, T. 30 January 2004 p. 49 (closed session).
[4672] *See* Witness RE, T. 26 February 2003 p. 18.
[4673] *Compare* Witness SX, T. 30 January 2004 p. 49 (closed session) *with* Witness RE, T. 26 February 2003 p. 18.

inconsistency between the two testimonies would not have prevented a reasonable trier of fact from relying on Witness SX's evidence about the lighting conditions at the EER. Furthermore, when reviewing the Trial Chamber's findings as to the conditions under which Witness RE observed Ntahobali at the EER, the Appeals Chamber considers that Witness SX's evidence regarding the availability of lighting at the EER was not essential to the Trial Chamber's conclusion that Witness RE identified Ntahobali since she observed Ntahobali at the EER in the early evening while it was still relatively bright.[4674]

2001. In light of the foregoing, the Appeals Chamber rejects Ntahobali's submissions concerning the Trial Chamber's assessment of Witness SX's identification evidence as it relates to Ntahobali's presence at the EER.

(iv) Witness TB

2002. The Trial Chamber found that the sighting of Ntahobali at the EER church compound by Witness TB, who was not at the EER, contradicted Ntahobali's testimony that he never entered the EER complex, and further corroborated the presence of Ntahobali at the EER.[4675]

2003. Ntahobali submits that the Trial Chamber erred in concluding that Witness TB's evidence corroborated his presence at the EER.[4676] In particular, he argues that Witness TB's testimony that she saw a man called "Sharoumou" at a location different from the EER, at an unspecified time, does not corroborate the evidence of Witnesses RE, QY, and SX about his presence at the EER.[4677]

2004. The Prosecution responds that Witness TB identified Ntahobali in court and gave the names of Ntahobali's parents.[4678]

2005. The Appeals Chamber considers that, assuming that the recording of Witness TB's testimony would reveal that the witness referred to Ntahobali as "Sharoumou" rather than "Shalom", this would not constitute a material variance requiring express analysis by the Trial Chamber. A review of the transcripts cited by Ntahobali reflects that Witness TB referred to

[4674] *See* Trial Judgement, para. 3946. *See also supra*, para. 1984.
[4675] Trial Judgement, para. 3950.
[4676] Ntahobali Appeal Brief, para. 595, *referring to* Trial Judgement, para. 3950.
[4677] Ntahobali Appeal Brief, para. 595. Ntahobali adds that Witness TB never testified about the presence of refugees at the EER and that his testimony was, therefore, so inconsistent with the testimonies of Witnesses RE, QY, and SX that it was unreasonable to rely on her testimony for corroboration. *See idem*.
[4678] Prosecution Response Brief, para. 972.

Ntahobali as "Shalom"[4679] and provided biographical information about Ntahobali demonstrating her ability to identify Ntahobali and that she was referring to him and not to someone else.[4680]

2006. The Appeals Chamber also observes that the Trial Chamber expressly noted that Witness TB was not at the EER but found that her testimony that she saw Ntahobali at the EER church compound nevertheless contradicted Ntahobali's assertion that he never entered the EER complex.[4681] Ntahobali does not challenge this finding. Recalling that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony,[4682] the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in relying on Witness TB's testimony to corroborate other evidence reflecting Ntahobali's presence at the EER.

(v) Conclusion

2007. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in its assessment of the identification evidence relating to his presence at the EER.

(c) Evidence Concerning Attacks

2008. Ntahobali challenges the Trial Chamber's assessment of the Prosecution evidence as it relates to: (i) the timing of the events at the EER and number of refugees; (ii) his presence and involvement in attacks at the EER; and (iii) the killings during such attacks.[4683]

(i) Timing of Events and Number of Refugees

2009. The Trial Chamber accepted Nsabimana's estimation that refugees at the Butare Prefecture Office were transferred to the EER between 15 and 20 May 1994 and stayed there

[4679] *See*, *e.g.*, Witness TB, T. 4 February 2004 p. 42.
[4680] *See* Witness TB, T. 4 February 2004 p. 42 (identifying Ntahobali as the son of Maurice Ntahobali and Pauline Nyiramasuhuko).
[4681] *See* Trial Judgement, para. 3950. *See also ibid.*, para. 3881; Witness TB, T. 4 February 2004 p. 50. The Appeals Chamber considers that, since Witness TB was not at the EER, the fact that she did not testify about the presence of the refugees does not render her testimony incompatible with the remainder of the evidence concerning the events at the EER.
[4682] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428. *See also Ndahimana* Appeal Judgement, para. 93 ("The Appeals Chamber also recalls that two *prima facie* credible testimonies need not be identical in all aspects in order to be corroborative and that corroboration may exist even when some details differ.").
[4683] *See* Ntahobali Notice of Appeal, paras. 217, 218, 228-234; Ntahobali Appeal Brief, paras. 510-571 ; Ntahobali Reply Brief, paras. 229-242.

until approximately 31 May 1994 when they returned to the prefectoral office.[4684] The Trial Chamber concluded that this was corroborated by the evidence of Witnesses RE, SX, Bararwandika, and H1B6.[4685]

2010. Specifically, the Trial Chamber considered Witness RE's evidence that she was one of the refugees transferred to the EER from the prefectoral office based on Nsabimana's orders and found that she arrived there in mid-May 1994.[4686] It also concluded that Witness SJ's testimony about her visits to the EER concerned "approximately the same time period, *i.e*. mid-May 1994."[4687] Having regard to Witness SX's evidence, which reflected that refugees stayed at the EER for a longer period of time than that estimated by Witnesses RE and SJ, the Trial Chamber also concluded that "the refugees must have started arriving at the EER around the start or middle of May 1994."[4688] Finally, the Trial Chamber, having considered the evidence of Witnesses RE, SJ, SX, Nsabimana, and Exhibit P27, which was contrasted by several Defence witnesses, concluded that the "number of refugees at the EER during late-May 1994 well exceeded 200."[4689]

2011. Ntahobali challenges the assessment of Prosecution evidence underpinning these conclusions.[4690] Specifically, he contends that the Trial Chamber erred in finding that Witness RE was at the EER "sometime around mid-May 1994", as the witness's evidence reflects that she was at the EER from 15 to 22 April 1994.[4691] He further submits that Witness RE's testimony that more than 300 refugees at the EER materially contradicts her prior statement that there were 4,000.[4692]

2012. Ntahobali also contends that Witness SJ's evidence that the refugees were shuttled between the prefectoral office and the EER and did not stay at the EER except for three or four non-consecutive days contradicts the evidence of other witnesses and the Trial Chamber's findings that refugees remained at the EER.[4693]

[4684] *See* Trial Judgement, para. 3934, *referring to* Nsabimana, T. 9 October 2006 pp. 71, 73, 75.
[4685] Trial Judgement, para. 3934.
[4686] Trial Judgement, para. 3935.
[4687] Trial Judgement, para. 3936.
[4688] Trial Judgement, para. 3936.
[4689] Trial Judgement, paras. 3935-3938, *referring*, *inter alia*, *to* Exhibit P27 (Videotape of views of the Butare Prefecture Office and the EER).
[4690] Ntahobali Appeal Brief, para. 509.
[4691] Ntahobali Appeal Brief, para. 534, *referring to* Trial Judgement, para. 3935.
[4692] Ntahobali Appeal Brief, para. 531. *See also ibid.*, para. 509.
[4693] Ntahobali Appeal Brief, paras. 566, 567. Ntahobali adds that Witness SJ's evidence should have been dismissed in light of her confessed falsehood and because she was unable to recognize the "EER schools" in a photograph. *See ibid*., paras. 568, 569. The Appeals Chamber recalls, however, that it has already dismissed Ntahobali's contention that the Trial Chamber should have rejected all of Witness SJ's evidence in light of her having falsely denied knowing other witnesses while testifying before the Tribunal. *See supra*, Section III.J.3. Likewise, Appeals Chamber does not consider that Witness SJ's inability to identify a photograph of the EER school made it unreasonable for the Trial Chamber to rely on her evidence given the short and turbulent period in which she testified she was at the complex.

2013. Finally, Ntahobali argues that Witness SX's testimony that the refugees were at the EER for approximately two months, from "a short while after" 21 April 1994 to "shortly before 20 June 1994", is materially inconsistent with the Trial Chamber's conclusions that refugees did not start arriving from the prefectoral office until between 15 and 20 May 1994 and only stayed until around 31 May 1994.[4694] In his view, this material inconsistency should have led to the rejection of Witness SX's evidence concerning the events at the EER.[4695]

2014. The Prosecution did not specifically respond to these arguments.

2015. With respect to the timing of Witness RE's arrival at the EER, the Appeals Chamber observes that the Trial Chamber extensively recalled her evidence as to her whereabouts, which, based on her estimation, could have placed her transfer from the prefectoral office to the EER in April 1994.[4696] However, after considering the corroborative evidence of Witnesses H1B6 and Bararwandika, the Trial Chamber determined that she was at the EER sometime around mid-May 1994.[4697] As noted above, Nsabimana testified that refugees at the prefectoral office were transferred around mid-May 1994,[4698] and Witness RE testified that she was one of those refugees.[4699]

2016. The Appeals Chamber recalls that it is open for a trial chamber "to make factual findings on the date of the events by examining the evidence as a whole and, [that] indeed, this may be particularly necessary when determining dates, as often witnesses may not recall an exact date but describe the timing of the event in relation to other variable."[4700] Notably, Witness RE also emphasised that she could only provide estimates as to the dates when she was in Butare.[4701] Under these circumstances, Ntahobali does not demonstrate that the Trial Chamber's assessment of Witness RE's evidence as to the timing of her arrival at the EER was unreasonable.

2017. With respect to the alleged contradiction between Witness RE's testimony and prior statement as to the number of refugees she saw at the EER, the Trial Chamber recalled that Witness RE's prior statement indicated that there were 4,000 refugees at the EER whereas her testimony reflected that there were more than 300.[4702] It further noted her explanation that she had

[4694] Ntahobali Appeal Brief, para. 560 (emphasis omitted). *See also* AT. 15 April 2015 p. 45.
[4695] Ntahobali Appeal Brief, paras. 560, 919.
[4696] *See* Trial Judgment, para. 3935. *See also* Witness RE, T. 24 February 2004 p. 9, T. 25 February 2004 p. 4.
[4697] Trial Judgement, para. 3935.
[4698] *See* Trial Judgement, para. 3920. *See also ibid.*, para. 3934.
[4699] *See* Trial Judgement, para. 3855. *See also ibid.*, para. 3935.
[4700] *Ndindabahizi* Appeal Judgement, para. 29 (internal references omitted).
[4701] *See* Witness RE, T. 24 February 2003 p. 9, T. 25 February 2003 p. 4.
[4702] Trial Judgement, paras. 3861, 3935.

never given a precise number but only indicated that there were many refugees.[4703] Ntahobali fails to demonstrate the materiality of this contradiction or that the explanation provided by the witness was unreasonable. He also does not show how any error in Trial Chamber's assessment of it would result in a miscarriage of justice given other evidence supporting its conclusion that the number of refugees at the EER during late-May 1994 well exceeded 200.[4704]

2018. As regards Ntahobali's contention that Witness SJ's evidence about refugees not being continuously present at the EER contradicts the evidence of Witness RE and the Trial Chamber's findings that refugees remained there, the Trial Chamber recalled Witness SJ's evidence that, during the time she was at the prefectoral office, she went to the EER on three or four non-successive days.[4705] The transcripts cited by Ntahobali reveal that Witness SJ was only testifying about her own presence at the prefectoral office and the EER rather than that of the refugees in general.[4706] In the view of the Appeals Chamber, no contradiction therefore exists.[4707]

2019. Concerning Ntahobali's challenges that Witness SX's evidence is inconsistent with the conclusion that refugees from the prefectoral office arrived in mid-May 1994 and returned at the end of the month, the Appeals Chamber notes that Witness SX did not specify that the refugees he identified came from the prefectoral office.[4708] Furthermore, he explained that he could only estimate dates as to the refugees' arrival at and departure from the EER.[4709] Ntahobali does not demonstrate that the Trial Chamber acted unreasonably in relying on Witness SX's evidence to conclude that "refugees must have started arriving at the EER around the start or middle of May 1994."[4710]

[4703] *See* Trial Judgement, para. 3861.
[4704] *See* Trial Judgement, paras. 3936-3938.
[4705] *See* Trial Judgement, para. 3884. The Trial Chamber also acknowledged that, according to Witness SJ's Statement, she spent one week at the EER before soldiers took the refugees back to the Butare Prefecture Office as well as her explanation that she did not remember saying this but that the refugees stayed only a short time at the EER. *See* Trial Judgement, para. 3884, *referring to* Witness SJ, T. 30 May 2002 pp. 106, 107, T. 4 June 2002 pp. 65-68, Exhibit D61 (Witness SJ's Statement).
[4706] *See*, *e.g.*, Witness SJ, T. 30 May 2002 p. 78 ("A. […] I think I was there for four days"). While Witness SJ indicated at one point that "we usually would not remain for several days", she did not specify whether she was talking about all the refugees or a few. *See* Witness SJ, T. 4 June 2002 p. 66.
[4707] The Appeals Chamber has previously rejected Ntahobali's contention that the Trial Chamber's conclusions about the transfer of refugees from the prefectoral office to the EER were contradictory to its findings concerning the attacks at the Butare Prefecture Office in May 1994 as well as his challenges to the Trial Chamber's reliance on the evidence of Witness TA concerning the attacks at the prefectoral office. *See supra*, Section V.I.2(c)(iii).
[4708] *See* Trial Judgement, para. 3934; Witness SX, T. 30 January 2004 p. 50 (closed session).
[4709] More specifically, Witness SX testified that he could not remember precisely when the refugees started arriving, estimating that it was one or two weeks after his arrival in Butare and indicating that he was living at the EER around two weeks after the President's death. *See* Trial Judgement, para. 3877, *referring to* Witness SX, T. 27 January 2003 p. 15, T. 30 January 2004 p. 50 (closed session). Witness SX similarly testified that the date he gave for the evacuation of the refugees was an approximation, placing it towards the end of the war. *See* Witness SX, T. 30 January 2004 pp. 52, 55.
[4710] Trial Judgement, para. 3936.

2020. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in its assessment of the evidence regarding the timing of the refugees' arrival at the EER or their number.

(ii) Presence and Involvement of Ntahobali During Attacks

2021. The Trial Chamber, without citation to supporting evidence, concluded that "Ntahobali was involved in and led *Interahamwe* in attacks against, and abductions of, Tutsi refugees during their stay at the EER" and that "soldiers, both alone and accompanied by Ntahobali, came to the EER and were also involved in abductions of refugees during the same period".[4711] A comprehensive reading of the Trial Judgement, as set forth in greater detail below, reflects that these conclusions are based on direct evidence from Witnesses RE, QY, and SX of Ntahobali's presence and participation in attacks at the EER with *Interahamwe* and/or soldiers.[4712]

2022. Ntahobali contends that the accounts of Witnesses RE, QY, and SX – the only witnesses who testified of seeing him committing crimes at the EER – were materially inconsistent and that the Trial Chamber erred in failing to assess these differences.[4713] In particular, Ntahobali submits that these three witnesses all described Ntahobali participating in attacks on the "first day" – *i.e.* the day refugees from the prefectoral office arrived at the EER – and contends that the Trial Chamber failed to draw negative inferences based on the differences among their evidence.[4714]

2023. Ntahobali also argues that the Trial Chamber failed to consider the evidence of Witnesses TA, SJ, QBQ, QBP, and SD, who testified about attacks at the EER, yet never mentioned Ntahobali's presence even though they implicated him in attacks at the prefectoral office.[4715] Ntahobali highlights that the evidence of Witness QY reflects that she and Witness QBQ were always together at the EER and that Witness RE similarly testified about always being together with Witness SJ.[4716]

2024. The Prosecution, emphasising aspects of the testimonies of Witnesses RE, QY, and SX that Ntahobali was present and participated in the attacks at the EER, submits that it was for the Trial Chamber to determine whether the inconsistencies in their accounts were sufficient to cast doubt on

[4711] Trial Judgement, para. 3965.
[4712] *See* Trial Judgement, para. 3946. The Appeals observes that the Trial Chamber also identified Witness TB as a witness who supported the conclusion that Ntahobali was present at the EER. *See idem*. However, the Trial Chamber relied on Witness TB's evidence to the limited extent that Ntahobali was present at the EER's church compound with a man named Kazungu but not to conclude that Ntahobali was present during the attacks at the EER. *See ibid*., para. 3950. *See also ibid*., para. 3881.
[4713] Ntahobali Appeal Brief, paras. 518, 522, 546.
[4714] *See* Ntahobali Appeal Brief, paras. 512, 520, 522, 564.
[4715] *See* Ntahobali Appeal Brief, paras. 519, 520, 528, 530, 536, 538, 540, 596.
[4716] *See* Ntahobali Appeal Brief, paras. 519, 537, 547.

their credibility and that Ntahobali's arguments fail to demonstrate that the Trial Chamber erred in exercising its broad discretionary power.[4717]

2025. Having reviewed the findings of the Trial Chamber, the summary of the evidence referred to by it, and the references provided by Ntahobali, the Appeals Chamber is satisfied that Witness RE testified to Ntahobali's participation in an attack on the EER the night she and other refugees arrived at the EER from the prefectoral office.[4718] While the Trial Chamber, when crediting Witness RE's evidence about this attack found that it was "variously corroborated" by evidence from Witness QY,[4719] the Appeals Chamber is not persuaded that the Trial Chamber found that Witness QY testified to Ntahobali's presence during an attack on the evening refugees arrived from the prefectoral office[4720] nor that her evidence dictates this conclusion.[4721] Likewise, neither the Trial Chamber's summary of, or deliberations on, Witness SX's evidence,[4722] nor a review of his evidence dictates that he testified about Ntahobali's presence specifically during an attack on the night the refugees first arrived from the prefectoral office.[4723] In light of these conclusions, the Appeals Chamber rejects as meritless Ntahobali's direct comparisons between these witnesses' evidence as to, for example, the specific identity of the perpetrators who accompanied Ntahobali or the timing of his presence.[4724]

2026. The Appeals Chamber is also not persuaded by Ntahobali's contention that the Trial Chamber disregarded evidence of Witnesses TA, SJ, QBQ, QBP, and SD since the Trial Chamber set forth and considered the evidence of Witnesses TA, SJ, and QBQ in relation to the events at the

[4717] Prosecution Response Brief, para. 960. *See also ibid*., paras. 966, 968; AT. 16 April 2015 pp. 8, 9.
[4718] *See* Trial Judgement, paras. 3854-3856, 3946; Witness RE, T. 24 February 2004 pp. 10-12, T. 26 February 2004 pp. 8-11.
[4719] Trial Judgement, para. 3943. In particular, the Trial Chamber noted that "[d]etails referring to the rain, some classroom doors being locked and seeking shelter on the veranda and the attack on the first night were variously corroborated" by, *inter alios*, Witness QY. *See idem* (internal references omitted).
[4720] In particular, in summarising Witness QY's evidence, the Trial Chamber noted that soldiers and *Interahamwe* came to the EER to beat refugees on the evening she and other refugees arrived there from the prefectoral office as well as that Ntahobali was not with them. *See* Trial Judgement, paras. 3866, 3867.
[4721] *See* Witness QY, T. 19 March 2003 pp. 52-59, T. 24 March 2003 pp. 35, 36.
[4722] *See* Trial Judgement, para. 3878. Indeed, the Trial Chamber did not rely on Witness SX's evidence in relation to Witness RE's evidence of an attack on the night refugees arrived from the prefectoral office, nor do Ntahobali's references to elements in Witness SX's evidence demonstrate that his testimony concerns that attack. *See* Trial Judgement, para. 3943 (referring only to the testimonies of Witnesses RE, QY, SJ, and QBQ when crediting the former witness's account of an attack on the first evening).
[4723] *See* Witness SX, T. 30 January 2004 p. 56.
[4724] In particular, the Appeals Chamber dismisses without further consideration Ntahobali's contentions: (i) relating to Witness SX in paragraphs 515, 520 of his appeal brief; (ii) concerning the discrepant nature of the testimonies of Witnesses RE, QY, and SX as to the "'status' of the attackers", as well as the fact that Witnesses QY and SX did not testify about Presidential Guard wearing red berets and white belts in paragraph 532 of his appeal brief; and (iii) relating to the alleged general inconsistencies in the testimonies of Witnesses QY and RE as to the presence of Ntahobali, *Interahamwe*, and soldiers as developed in paragraph 546 of his appeal brief.

EER[4725] and, in another part of the Trial Judgement, noted the testimonies of Witnesses QBP and SD that they went to the EER.[4726]

2027. Moreover, contrary to Ntahobali's contention, Witness RE did not claim that she was always with Witness SJ at the EER, but instead testified that they were not together all the time as this was not possible.[4727] Similarly, a review of Witness QY's testimony reveals that she mentioned being with Witness QBQ at the prefectoral office and at the EER, without specifying that they were always together.[4728]

2028. Bearing in mind the conclusion that the direct comparisons between witnesses' evidence is inapposite, as well as the fact that Ntahobali's criminal liability is linked only to attacks where he was present and not attacks at the EER in general,[4729] the Appeals Chamber will now assess the merits of his challenges as they relate, respectively, to the Trial Chamber's reliance on the evidence of Witnesses RE, QY, and SX about Ntahobali's presence and participation in various attacks at the EER.

a. Ntahobali's Presence During the Attack Described by Witness RE

2029. Witness RE's evidence, as summarised and assessed by the Trial Chamber, reflects that she was among the refugees transferred from the Butare Prefecture Office to the EER in mid-May 1994 upon Nsabimana's orders.[4730] The Trial Chamber noted that she testified that, on the evening following this transfer, soldiers, including some from the Presidential Guard, "accompanied by an *Interahamwe* called Shalom" came to EER and that "[t]hey took away men and boys to a nearby forest" and that the witness believed that "they had been executed because they never came back."[4731] The Trial Chamber noted Witness RE's testimony that, during the following days, *Interahamwe* returned to the EER to take away people and killed them and that "Shalom" was their leader.[4732]

2030. When discussing the relevant evidence, the Trial Chamber recalled Witness RE's testimony concerning the transfer of refugees from the prefectoral office to the effect that an attack occurred on the evening of this transfer and found Witness RE's evidence "to be credible".[4733] The Trial Chamber found that Witness RE's evidence was "variously corroborated" by Witnesses QY, SJ,

[4725] *See* Trial Judgement, paras. 3884-3891, 3893, 3894, 3943-3945.
[4726] *See* Trial Judgement, paras. 2265, 2312.
[4727] *See* Witness RE, T. 24 February 2003 p. 56 (closed session).
[4728] *See* Witness QY, T. 23 February 2009 pp. 40, 41 (closed session).
[4729] *See supra*, para. 1956; *infra*, para. 2082.
[4730] *See* Trial Judgement, paras. 3854, 3855, 3935, 3943.
[4731] Trial Judgement, para. 3856. *See also ibid.*, para. 3857.
[4732] Trial Judgement, paras. 3858, 3859.

and QBQ.[4734] It also noted Witness RE's evidence "that *Interahamwe*, including their leader named Shalom, came to the EER, picked out young men and took them to the nearby forest to be killed"[4735] and relied on her account that *Interahamwe* committed attacks at the EER and that Ntahobali was present at the EER.[4736] The Trial Chamber also found that Witness RE corroborated other evidence that soldiers came to the EER to abduct and kill refugees.[4737]

2031. Ntahobali contends that, contrary to the Trial Chamber's finding, Witness RE's evidence does not indicate that he was present at the EER with *Interahamwe* during attacks as the witness only testified to him being present with soldiers.[4738] He also argues that the witness's evidence is replete with material contradictions with her prior statement to Tribunal investigators in relation to the attack during which he was allegedly present and that the Trial Chamber erred in failing to address them.[4739]

2032. Ntahobali also argues that the Trial Chamber erred in crediting Witness RE's evidence that he was present during an attack on the evening refugees arrived from the prefectoral office and in finding that it was "variously corroborated" by Witnesses QY, SJ, and QBQ.[4740] He contends that, aside from Witness RE, none of these witnesses testified that Ntahobali was present during such an attack.[4741] Ntahobali also asserts that Witness RE only testified about soldiers being present during this attack, whereas Witness QY testified that the attack was carried out by soldiers and *Interahamwe*.[4742] He points to further differences between the evidence of Witnesses RE and QY as to whether the refugees arrived at the EER in the afternoon or the evening as well as whether the refugees were confined to the verandas as the school doors were locked or whether some sought refuge in classrooms.[4743]

2033. As regards Witness SJ, Ntahobali emphasises that Witness RE spoke of a single attack that only involved Ntahobali and soldiers, whereas Witness SJ testified about an attack during the day and another in the night by soldiers and *Interahamwe*.[4744] He submits that Witness SJ's evidence

[4733] Trial Judgement, para. 3943.
[4734] Trial Judgement, para. 3943.
[4735] Trial Judgement, para. 3944.
[4736] Trial Judgement, paras. 3945, 3946, 3948.
[4737] Trial Judgement, para. 3952. *See also ibid.*, para. 3953.
[4738] *See* Ntahobali Appeal Brief, paras. 513, 520, 524, 525, 531.
[4739] Ntahobali Appeal Brief, para. 531.
[4740] Ntahobali Appeal Brief, paras. 520, 535, *referring to* Trial Judgement, paras. 3943, 3944.
[4741] Ntahobali Appeal Brief, paras. 519, 520, 530, 536, 538, 539. Ntahobali also appears to argue that Witness QY testified that Ntahobali was present during an attack on the evening refugees arrived at the EER from the prefectoral office. *See ibid.*, paras. 544-546. The Appeals Chamber has dismissed Ntahobali's interpretation of the Trial Judgement and the evidence in this respect below. *See infra*, paras. 2054, 2055.
[4742] Ntahobali Appeal Brief, paras. 513, 514, 537.
[4743] Ntahobali Appeal Brief, para. 520. Ntahobali adds that Witness SJ testified that the school doors were locked on the first evening. *See idem*.
[4744] Ntahobali Appeal Brief, para. 538.

did not corroborate Witness RE's concerning the participation of *Interahamwe* as they gave conflicting descriptions of what they wore.[4745] Ntahobali also argues that Witness QBQ did not testify about an "attack on the first night" and never mentioned the presence of *Interahamwe*.[4746]

2034. The Prosecution responds that Ntahobali does not demonstrate that the Trial Chamber erred in relying on Witness RE's evidence, much of which was corroborated by other evidence.[4747]

2035. With respect to Ntahobali's contention that, contrary to the Trial Chamber's finding, Witness RE did not testify that he was present at the EER with *Interahamwe*, the Appeals Chamber notes that the Trial Chamber's statement that "*Interahamwe*, including their leader named Shalom, came to the EER, picked out young men and took them to the nearby forest to be killed" may give the misleading impression that Witness RE testified that Ntahobali participated in attacks at the EER with *Interahamwe*.[4748] Witness RE, however, only testified about seeing Ntahobali at the EER during one attack in the evening of the refugees' arrival at the EER from the prefectoral office, that he was accompanied by soldiers on this occasion, and that persons were abducted and killed during this attack.[4749]

2036. While the language employed by the Trial Chamber is confusing, a review of the Trial Chamber's summary of Witness RE's evidence and remaining discussion of her evidence nonetheless shows that the Trial Chamber did not misconstrue the witness's testimony. The Trial Chamber only relied on it to the extent that it established Ntahobali's participation in an attack at the EER with soldiers and that *Interahamwe* participated in subsequent attacks on the EER,[4750] corroborating Witness SJ's evidence that *Interahamwe* committed attacks there,[4751] and reflected the witness's understanding that Ntahobali was the leader of the *Interahamwe*.[4752] Witness RE's testimony on the latter issue shows that she considered Ntahobali as the leader of the *Interahamwe*

[4745] Ntahobali Appeal Brief, paras. 525, 526. Specifically, Ntahobali contends that Witness RE testified that the *Interahamwe* wore banana leaves, while Witness SJ testified that they wore civilian clothes at night and military uniforms during the day. He also argues that no reasonable trier of fact would have relied on Witness SJ's identification of *Interahamwe* simply because she named them, particularly because her prior statement contains no reference to *Interahamwe* at the EER and in light of her spurious explanation that she did not have time to mention them. *See ibid*., paras. 525-527. Given the Trial Chamber's acknowledgement that the *Interahamwe* and soldiers may have been interchangeable for Witness SJ because they both wore uniforms, the Appeals Chamber considers that the distinction concerning their attire is inapposite. *See* Trial Judgement, para. 3945. Likewise, apart from impugning the Trial Chamber's reliance on Witness SJ's testimony that named specific *Interahamwe* and the witness's explanation for omissions from her prior statement, Ntahobali does not explain why it was unreasonable for the Trial Chamber to rely on this aspect of the witness's testimony in support of its conclusion that the *Interahamwe* committed attacks at the EER.
[4746] Ntahobali Appeal Brief, para. 536. Ntahobali adds that the Trial Chamber failed to consider that Witness QBQ did not mention that killings or rapes occurred in her prior statement. *See idem*.
[4747] Prosecution Response Brief, paras. 955, 960-964.
[4748] Trial Judgement, para. 3944.
[4749] *See* Witness RE, T. 24 February 2003 pp. 11, 12, 38, T. 26 February 2003 pp. 9, 10, 12-15.
[4750] Trial Judgement, paras. 3856-3858, 3952, 3953.
[4751] Trial Judgement, para. 3945.

not because she saw him participating in attacks at the EER with them but because of the subsequent observations the witness made at the prefectoral office.[4753]

2037. The Appeals Chamber also notes that the Trial Chamber expressly referred to several inconsistencies highlighted by Ntahobali between Witness RE's prior statement and her testimony concerning the attack on the evening of her arrival from the prefectoral office as well as to the witness's explanations for them.[4754] The Appeals Chamber observes that Witness RE also provided an explanation for the variance between her prior statement and testimony, which the Trial Chamber did not expressly discuss, as to whether Ntahobali and the members of the Presidential Guard entered the building or stayed outside as it was locked.[4755] Ntahobali does not establish that no reasonable trier of fact could have accepted the witness's explanations for the discrepancies. Likewise, Ntahobali does not demonstrate that the Trial Chamber erred in not expressly discussing other minor variances in Witness RE's evidence he points out, none of which go to the material aspects of the witness's evidence upon which the Trial Chamber relied to convict him.[4756]

2038. As regards to purported differences between the evidence of Witness RE, on one hand, and that of Witnesses QY, SJ, and QBQ, on the other hand, the Appeals Chamber observes that the Trial Chamber concluded as follows:

> The Chamber notes that Witness RE provided numerous details about the day the refugees arrived, including the fact that when the refugees arrived, the doors of the classroom were locked and the refugees were forced to seek shelter from a torrential rain on the veranda. Details referring to the rain, some classroom doors being locked and seeking shelter on the veranda and the attack on the first night were variously corroborated by Witnesses QY, SJ and QBQ. Based on these details and corroboration, the Chamber finds Witness RE to be credible.[4757]

Ntahobali emphasises that Witnesses QY, SJ, and QBQ did not identify him as being present during the attack that occurred on the evening of the day refugees arrived at the EER from the prefectoral office as described by Witness RE. However, the analysis above reflects that the Trial Chamber was well aware of this, as it did not find that they corroborated Witness RE on this aspect of her

[4752] Trial Judgement, para. 3951.
[4753] *See* Witness RE, T. 24 February 2003 p. 13, T. 26 February 2003 pp. 10, 14, 15.
[4754] In particular, the Trial Chamber noted that: (i) Witness RE explained that even though her statement only referred to people being taken away the day after the rain, the abductions occurred every day, including on the day of the rain; and (ii) there was a discrepancy between Witness RE's prior statement and her testimony about the number of refugees at the EER and her explanation that, in her prior statement, she merely indicated that the refugees were many in number without giving exact figures; and (iii) Witness RE's explanation that she mentioned the presence of both Presidential Guards and ordinary soldiers but that the latter was left out of her prior statement. *See* Trial Judgement, paras. 3857, 3861, 3935, 3953.
[4755] Witness RE explained that the person who wrote down her statement made a mistake in writing that Ntahobali and the Presidential Guards entered the building. *See* Witness RE, T. 26 February 2003 p. 14. *See also* T. 24 February 2003 pp. 11, 12; Witness RE's Statement, p. 3.
[4756] *See*, *e.g.*, Ntahobali Appeal Brief, para. 531.
[4757] Trial Judgement, para. 3943 (internal references omitted).

evidence.[4758] Ntahobali does not show that this difference renders their evidence incompatible. The Appeals Chamber considers that, given the consistent evidence from Witnesses RE and QY that refugees were violently transferred to the EER from the prefectoral office[4759] as well as evidence from Witnesses RE and QY that attacks on the refugees started less than 24 hours after their arrival at the EER,[4760] it would be expected for witnesses to have different view points as well as varying recollections of events. While it would have been preferable for the Trial Chamber to note and expressly assess these differences as to Ntahobali's presence during an attack on the evening refugees arrived at the EER from the prefectoral office, the Appeals Chamber is not persuaded that the absence of any discussion constitutes an error.

2039. Furthermore, the Appeals Chamber finds that the differences between the evidence of Witnesses RE and QY identified by Ntahobali as to whether refugees arrived from the prefectoral office to the EER in the afternoon or the evening as well as whether the refugees were confined to the verandas as the school doors were locked or whether some sought refuge in classrooms are not material and did not require express consideration. Likewise, differences among the evidence of Witnesses RE, QY, and SJ as to whether the attacks involved only soldiers or soldiers and *Interahamwe* would not prevent a reasonable trier of fact from relying on Witness RE's evidence of Ntahobali being present during an attack that evening with soldiers.

2040. Similarly Witness SJ's evidence that an attack occurred during the day and night, as opposed to just the evening as reflected in Witness RE's evidence, is not material in this context. Moreover, the Appeals Chamber is not convinced that simply because Witness QBQ did not testify concerning an attack or the presence of *Interahamwe* or soldiers the evening that refugees arrived at the EER from the prefectoral office renders the Trial Chamber's reliance on Witness RE's evidence that one occurred and that Ntahobali was present unreasonable.

2041. Accordingly, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in relying on the evidence of Witness RE about his presence and participation in an attack on the EER.

b. Ntahobali's Presence During the Attack Described by Witness QY

2042. Witness QY's evidence, as summarised and assessed by the Trial Chamber, reflects that she was among the refugees who were transferred from the Butare Prefecture Office to the EER on

[4758] Indeed, the Trial Chamber's summaries of the evidence of Witnesses QY, SJ, and QBQ also reflect that they did not testify that Ntahobali was present during an attack at the EER on the night refugees arrived from the prefectoral office. *See* Trial Judgement, paras. 3866-3876, 3884-3891.
[4759] *See* Trial Judgement, paras. 3855, 3866, 3952.
[4760] *See* Trial Judgement, paras. 3856, 3867.

Nsabimana's orders.[4761] The Trial Chamber noted that she testified seeing "Shalom" on two occasions at the EER, the first being in the evening following her arrival there and that, later that night, soldiers and *Interahamwe* returned to the EER without "Shalom" and started beating refugees.[4762]

2043. The Trial Judgement further sets forth Witness QY's evidence as reflecting that when she saw Ntahobali for a second time, "Shalom came in a group with people in military uniforms and others in civilian clothes."[4763] The Trial Chamber observed that the witness testified that the "soldiers in military uniform and civilian clothes took the young people, but Shalom directed the attack."[4764] It also recalled her evidence that women were selected to be raped and details her account of being raped by a soldier during this attack.[4765]

2044. The Trial Chamber relied on Witness QY's evidence to find that Ntahobali was present at the EER[4766] as well as on her testimony that "soldiers who were in military uniform and civilian clothes […] took the young people, but that it was Shalom who directed the attack" in concluding that the "*Interahamwe* were led by Ntahobali."[4767] It further noted that Witness QY's evidence corroborated other accounts that soldiers came to the EER and variously abducted and killed the refugees.[4768]

2045. In the course of its deliberations, the Trial Chamber also noted that Witness QY's evidence of women being raped was corroborated by other Prosecution evidence and found that inconsistencies in the witness's evidence and prior statements about her rape during the attack at the EER and another incident in Kibeho did not undermine the reliability of her testimony with respect to her rape at the EER.[4769] However, the Trial Chamber concluded that it would not make any findings as to Ntahobali's alleged role in the rape of Witness QY at or near the EER due to lack of notice of the allegation.[4770]

2046. Ntahobali contends that no reasonable trier of fact could have relied on Witness QY's evidence in light of the fact that she "lied" before the Tribunal and the Trial Chamber's findings that she lacked credibility with respect to the events at the Butare University Hospital, Butare

[4761] Trial Judgement, para. 3866.
[4762] Trial Judgement, para. 3867.
[4763] Trial Judgement, para. 3868.
[4764] Trial Judgement, para. 3868.
[4765] Trial Judgement, para. 3868.
[4766] Trial Judgement, paras. 3946-3948.
[4767] Trial Judgement, para. 3951.
[4768] Trial Judgement, para. 3952.
[4769] Trial Judgement, paras. 3959-3963.
[4770] *See* Trial Judgement, para. 3845. *See also ibid*., paras. 3842-3844.

Prefecture Office, and Nyange as well as regarding her rape at Kibeho.[4771] In addition, Ntahobali submits that the antagonistic attitude exhibited by the witness during her entire testimony, which was not observed by Judge Bossa and which the Trial Chamber did not take into consideration, should have led to the same conclusion.[4772] Likewise, Ntahobali argues that the Trial Chamber failed to address Witness QY's "spurious explanations" when confronted with inconsistencies.[4773]

2047. Concerning Witness QY's testimony about the EER generally, Ntahobali contends that the Trial Chamber erred in failing to consider that the witness was unable to provide an estimate for the duration of her stay at the EER, despite indicating in her prior statement that she was there for a month.[4774] He argues that the Trial Chamber erred in not drawing a negative inference from an implausible explanation provided by the witness for this discrepancy.[4775]

2048. As regards Witness QY's specific evidence of Ntahobali's presence and involvement in an attack at the EER, Ntahobali contends that she "seriously contradicted herself" on the timing of her second sighting of Ntahobali at the EER, highlighting that she testified that she could not recall how many days passed between her first sighting of him and the second occasion, while also testifying that both sightings occurred on the day that refugees had arrived from the prefectoral office.[4776] Ntahobali also contends that Witness QY gave contradictory evidence as to whether soldiers in military and civilian clothes came to the EER and he directed the attack or whether *Interahamwe* participated in the attack and he was not with them.[4777] He adds that Witness QY never mentioned the *Interahamwe* being present at the EER in her previous statements to Tribunal investigators.[4778] Ntahobali also contends that the Trial Chamber erred in failing to: (i) assess inconsistencies in Witness QY's account of her rape at the EER concerning, *inter alia*, from where she was abducted, its exact location, the perpetrator, and the number of times it occurred;[4779] (ii) discredit the witness due to her failure to confront her rapist during his proceeding in Rwanda;[4780] and (iii) draw adverse

[4771] Ntahobali Notice of Appeal, paras. 224, 228-230; Ntahobali Appeal Brief, para. 541. *See also* Ntahobali Appeal Brief, para. 598.
[4772] Ntahobali Appeal Brief, para. 542. In particular, Ntahobali highlights that Witness QY blamed the investigator who took her statement, whom she called a "drunkard", for noting in her prior statement that she was raped at Kibeho prior to going to the EER, and declined to answer questions on this issue. *See ibid*., para. 554.
[4773] Ntahobali Appeal Brief, para. 556.
[4774] Ntahobali Appeal Brief, para. 548.
[4775] Ntahobali Appeal Brief, para. 548. In particular, Ntahobali highlights the witness's explanation that a day seemed like a month and a night like two. *See idem.*
[4776] Ntahobali Appeal Brief, para. 545.
[4777] Ntahobali Appeal Brief, para. 544. Ntahobali further suggests that Witness QY testified that she was unable to see if the attackers were *Interahamwe*. He also points to Witness QY's evidence that the refugees dispersed when they saw the attackers coming and questions how she was then capable of seeing him, arguing that her evidence that she was then apprehended on the veranda is doubtful. *See idem.*
[4778] Ntahobali Notice of Appeal, para. 230; Ntahobali Appeal Brief, para. 544, 549, 552-554.
[4779] Ntahobali Appeal Brief, paras. 549, 551, 552, 555, *referring*, *inter alia*, *to* Trial Judgement, paras. 3960-3963.
[4780] Ntahobali Appeal Brief, para. 553.

inferences from its analysis of inconsistencies concerning this rape and Witness QY's evidence about being raped on a separate occasion in Kibeho.[4781]

2049. The Prosecution responds that the Trial Chamber exercised sufficient caution when assessing Witness QY's evidence and did not err in finding her credible and reliable notwithstanding its decision not to rely on her testimony about the prefectoral office.[4782]

2050. With respect to Ntahobali's general challenges to Witness QY's credibility, the Appeals Chamber recalls its previous determination that it was not inconsistent or unreasonable for the Trial Chamber to reject parts of Witness QY's testimony relating to the prefectoral office while accepting other aspects of her testimony relating to Ntahobali's participation in attacks at the EER.[4783] Similarly, the Appeals Chamber is not persuaded by Ntahobali's contention that the Trial Chamber was precluded from relying on Witness QY's testimony about the EER because it rejected other elements of her evidence related to Ntahobali's presence at the Butare University Hospital, Kanyabashi's presence in Nyange, and the witness's alleged rape at Kibeho.[4784]

2051. In addition, the Appeals Chamber observes that, contrary to Ntahobali's argument, the Trial Chamber considered many of the inconsistencies within Witness QY's evidence as well as between it and her prior statements concerning her rape at the EER.[4785] It further considered the fact that Witness QY "had not confronted her attacker during his trial in Rwandan courts".[4786] Ntahobali has not shown that the Trial Chamber abused its discretion in its express assessment of these inconsistencies or that it was required to address all the purported inconsistencies he raises on appeal, particularly because he was not convicted on the basis of Witness QY having been raped at the EER.[4787]

2052. Ntahobali's arguments with respect to the absence of references in the Trial Judgement to certain behaviours of witnesses, including that of Witness QY, have also already been dismissed.[4788] Finally, having reviewed the references provided by Ntahobali, the Appeals Chamber also finds that his contention that Witness QY provided "spurious explanations" when confronted

[4781] *See* Ntahobali Notice of Appeal, para. 230; Ntahobali Appeal Brief, paras. 549, 553, 554, *referring*, *inter alia*, *to* Trial Judgement, paras. 3960-3963, Witness QY, T. 24 March 2003 pp. 58-66, 69-77 (closed session), Exhibit D123 (Witness QY's Statement, dated 24 July 2000) (confidential) ("Witness QY's 2000 Statement"). Ntahobali incorporates by reference Grounds 1.3 and 3.12 of his appeal. *See idem*.
[4782] Prosecution Response Brief, paras. 962, 963, 965, 977, 978. *See also* AT. 16 April 2015 p. 10.
[4783] *See supra*, Section III.J.3.
[4784] *See* Trial Judgement, paras. 200-203, 2141, 2622, 3962, 4210.
[4785] *See* Trial Judgement, paras. 3960-3963.
[4786] *See* Trial Judgement, para. 3962.
[4787] *See*, *e.g.*, Trial Judgement, para. 6090. *See also ibid.*, para. 5911.
[4788] *See supra*, para. 163. The Appeals Chamber recalls its finding that the Trial Judgement generally reflects a detailed and careful assessment of the evidence and the fact that the Trial Chamber did not explicitly discuss the factors

with inconsistencies fails to demonstrate that the Trial Chamber abused its discretion in its assessment of her evidence.[4789]

2053. The Appeals Chamber also does not consider that the purported inconsistencies between Witness QY's prior statement and evidence as to the duration of her stay at the EER undermine the Trial Chamber's reliance on her evidence generally about the conditions at the EER given that it found broad corroboration from several other witnesses.[4790]

2054. Turning to Ntahobali's challenges as they relate to his presence and involvement in an attack at the EER, the Appeals Chamber rejects Ntahobali's interpretation of the Trial Judgement and Witness QY's evidence as suggesting that the second occasion that she saw him – *i.e.* the time when he was present during an attack – was the evening refugees arrived at the EER from the prefectoral office. This interpretation is neither plain from a reading of the relevant aspects of the Trial Judgement, nor from Witness QY's testimony.[4791] Ntahobali does not demonstrate that Witness QY's evidence is materially inconsistent as to the timing of his presence during an attack at the EER or the identity of the assailants who accompanied him, as his arguments are based on this erroneous interpretation.

2055. Indeed, a review of Witness QY's evidence reflects uncertainty as to when she precisely saw Ntahobali on the second occasion.[4792] In the view of the Appeals Chamber, the ambiguity is not

highlighted by Ntahobali does not indicate that the Trial Chamber did not properly assess the credibility and reliability of the witnesses, including Witness QY. *See idem*.

[4789] *See* Witness QY, T. 19 March 2003 pp. 52-60, T. 24 March 2003 pp. 35, 36, 38, T. 10 April 2006 pp. 37-50; Exhibit D121 (Witness QY's Statement, dated 18 September 1997) (confidential); Exhibit D122 (Witness QY's Statement, dated 11 March 1998 and 13 March 1998) (confidential); Witness QY's 2000 Statement; Exhibit D124 (Witness QY's 1997 Statement and List of Omissions) (confidential).

[4790] *See* Trial Judgement, paras. 3856, 3866, 3885, 3943.

[4791] *See* Trial Judgement, paras. 3867, 3868; Witness QY, T. 19 March 2003 pp. 52-60, T. 24 March 2003 pp. 34-38. In this respect, Ntahobali suggests that Witness QY's evidence that she saw Ntahobali on the same day that she was raped reflects that she testified that she was raped on the day that refugees arrived at the EER from the prefectoral office. This reading of the witness's evidence is not persuasive. *See* Witness QY, T. 19 March 2003 pp. 53, 54, T. 24 March 2003 pp. 36, 37. Indeed, in describing the first occasion upon which she saw Ntahobali and the attack that followed that evening – both occurring the same day as the refugees' arrival from the prefectoral office – the witness repeatedly testified that Ntahobali did nothing on the occasion she first saw him and that he was not present for the attack that followed. *See* Witness QY, T. 19 March 2003 pp. 57-59, T. 24 March 2003 p. 35. Moreover, the witness specified that, when she first saw Ntahobali, he was alone, whereas she gave evidence to the effect that he was accompanied by soldiers on the occasion she was raped. *Compare* Witness QY, T. 19 March 2003, p. 60 *with ibid.*, pp. 53, 54, T. 24 March 2003 p. 37.

[4792] *See*, *in particular*, Witness QY, T. 24 March 2003 pp. 36 ("Q. The second time that you saw the person called Shalom, how many days was that after you arrived at the EER? A. I do not know the number of days I had spent there. Q. Madam Witness, the day that you saw the person called Shalom at the EER, was it the same day – was it during the same day that you were raped? A. Yes."), 37 ("Q. Madam, at the moment when the soldier took you away to rape you, am I right to understand that the person named Shalom had left with the young people and other soldiers to take them to the woods, as you said? A. That is correct."). *See also* Witness QY, T. 19 March 2003 pp. 53, 54 (describing an attack conducted by Ntahobali and soldiers in military uniform and civilian clothes and specifying that she was raped on this occasion, without testifying as to when this occurred in relation to her arrival at the EER), 57 (not specifying when the second occasion upon which she saw Ntahobali was in relation to the arrival of refugees at the EER from the prefectoral office).

unreasonable in light of her testimony, as summarised by the Trial Chamber: (i) about her forcible transfer to the EER with other refugees from the prefectoral office; (ii) that refugees were attacked at the EER on the evening of their arrival; and (iii) that she was raped during the attack which occurred on the second occasion that she saw Ntahobali.[4793] Likewise, in light of the witness's description of the assailants who accompanied Ntahobali, as "soldiers who were in military uniforms and others in civilian clothes",[4794] Ntahobali does not show that Witness QY provided materially inconsistent evidence as to whether soldiers or *Interahamwe* accompanied him, or that any omission about *Interahamwe* at the EER in the witness's prior statements is inconsistent with her evidence concerning the attackers.[4795] Witness QY's evidence, as summarised in the Trial Judgement, implicated *Interahamwe* in the attack that occurred the evening refugees arrived at the EER when Ntahobali was not present.[4796]

2056. In light of the above, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in relying on the evidence of Witness QY about Ntahobali's presence during an attack at the EER.

c. Ntahobali's Presence During the Attacks Described by Witness SX

2057. The Trial Chamber noted that Witness SX testified that he saw "Shalom come to the EER a number of times with *Interahamwe* at night" using "a Hilux pickup truck".[4797] It also observed that the witness testified that "Shalom continued to come and take away refugees from the moment the refugees arrived at the EER until they left the complex and he usually came at night."[4798] The Trial Chamber further recalled Witness SX as testifying that, "[o]n the first night that Shalom came to take the refugees, some of them were staying inside the EER buildings, while others were outside" and that Ntahobali "selected five people from among the adults and took them away with him."[4799]

2058. The Trial Chamber identified Witness SX as one of several witnesses to testify that Ntahobali was present at the EER[4800] and recalled his testimony that "Ntahobali came to the EER a

[4793] *See* Trial Judgement, paras. 3866-3868. *See also* Witness QY, T. 24 March 2003 p. 37.
[4794] *See* Witness QY, T. 19 March 2003 p. 57. *See also ibid.*, pp. 53, 54, T. 24 March 2003 pp. 36, 37; Trial Judgement, para. 3868.
[4795] Nowhere in his closing submissions did Ntahobali argue the clear relevance and importance of Witness QY's omission to mention the presence of *Interahamwe* at the EER in her prior statements. Moreover, the Trial Chamber referred to all the evidence Ntahobali now cites to on appeal. *See* Trial Judgement, para. 3867, *referring to* Witness QY, T. 19 March 2003 pp. 58, 59, T. 24 March 2003 p. 35.
[4796] *See* Trial Judgement, para. 3867; Witness QY, T. 19 March 2003 pp. 57, 59. *See also* Witness QY, T. 24 March 2003 p. 35 (testifying that on the first evening she was unsure if the attack was conducted by *Interahamwe* in addition to soldiers as she and other refugees dispersed upon seeing the "attackers").
[4797] Trial Judgement, para. 3878 (internal reference omitted).
[4798] Trial Judgement, para. 3878.
[4799] Trial Judgement, para. 3878 (internal references omitted).
[4800] Trial Judgment, para. 3946.

number of times with *Interahamwe* at night in a Hilux pickup truck belonging to someone else and on the first night took away five adults."[4801] The Trial Chamber concluded that Witness SX's testimony was "reliable and corroborative of Ntahobali's involvement in the EER attacks."[4802]

2059. Ntahobali submits that the Trial Chamber erred in concluding that Witness SX testified that Ntahobali abducted five persons on one occasion as the witness's evidence reflects, only in "general terms", that Ntahobali *could* abduct five or seven persons.[4803]

2060. Ntahobali further contends that the witness's testimony should have been treated with caution as he is the only witness testifying to Ntahobali's participation in crimes after the "first night".[4804] He also emphasises that only Witness SX testified that refugees were taken away in a Hilux vehicle.[4805] In his view, this testimony is unbelievable as no "motorable road" led from the EER to the woods and is inconsistent with other evidence and the Trial Chamber's findings that refugees were killed in the woods adjoining the EER.[4806]

2061. The Prosecution responds that the Trial Chamber did not err in assessing Witness SX's evidence or credibility.[4807]

2062. The Appeals Chamber observes that Witness SX testified that Ntahobali could take five or seven people and take them away.[4808] However, Ntahobali fails to demonstrate that it was unreasonable for the Trial Chamber to rely on the witness's testimony to conclude that "on the first night [Ntahobali] took away five adults",[4809] since the witness specified that he was indeed "giving […] an account of what happened the first night" he saw Ntahobali and that Ntahobali "continued doing this later on."[4810]

2063. Furthermore, the Appeals Chamber recalls that "the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration",[4811] and finds no merit in Ntahobali's argument that the Trial Chamber was required to treat Witness SX's evidence with caution because he was the only witness to testify to Ntahobali's participation in multiple

[4801] Trial Judgement, para. 3949 (internal references omitted).
[4802] Trial Judgement, para. 3949.
[4803] Ntahobali Appeal Brief, para. 562 (emphasis omitted).
[4804] Ntahobali Appeal Brief, para. 559.
[4805] Ntahobali Appeal Brief, para. 515. *See also* AT. 15 April 2015 p. 45.
[4806] Ntahobali Appeal Brief, para. 561. *See also ibid*., para. 520.
[4807] Prosecution Response Brief, paras. 960, 961, 963, 966.
[4808] *See* Witness SX, T. 30 January 2004 p. 56 (French).
[4809] *See* Trial Judgement, para. 3949.
[4810] Witness SX, T. 30 January 2004 p. 56.
[4811] *Kupreškić et al.* Appeal Judgement, para. 33. *See also Nizeyimana* Appeal Judgement, para. 135; *Nchamihigo* Appeal Judgement, para. 246; *Ntakirutimana* Appeal Judgement, para. 132.

attacks.[4812] Ntahobali also provides no supporting reference demonstrating that there was no passable road between the EER and the adjacent woods and does not show that no reasonable trier of fact could have found that the refugees abducted by him in a Hilux vehicle were taken to the woods to be killed.

2064. Based on the foregoing, the Appeals Chamber finds that Ntahobali has not demonstrated that the Trial Chamber erred in its assessment of Witness SX's evidence of Ntahobali's presence and involvement in attacks at the EER.

(iii) Killings

2065. Without citation to the record or prior findings, the Trial Chamber concluded that "Ntahobali, *Interahamwe* and soldiers killed the abducted Tutsi refugees in the woods near the EER school complex."[4813] Earlier in its deliberations, however, the Trial Chamber specified that Witness RE's testimony that refugees were taken to a nearby forest to be killed was corroborated by Witnesses TG, QY, and TA as well as Witness SJ's testimony that "she hid from the *Interahamwe* in the woods where she came across the bloated and decapitated bodies of persons who had been killed."[4814] Furthermore, in a section entitled "Killings at the EER" the Trial Chamber acknowledged that no Prosecution witness observed the killing of abducted refugees but recalled the evidence of Witnesses RE and SJ as follows:

> Witness RE believed the men and boys that the *Interahamwe* took to a nearby forest had been executed because they never came back. While she did not personally see any killings of abducted refugees, she learned they had been killed with bludgeons. Witness RE also testified that some people who managed to escape and returned to the EER informed the others that those taken away had been killed with clubs and machetes and that this had been done while they were naked.
>
> Witness SJ also testified that persons taken from the EER compound were killed in the nearby forest. While Witness SJ also did not personally see the refugees being killed, she testified that while seeking respite from the conditions at the EER in the woods, they saw skulls in addition to a hole that had been dug; in these narrow holes they sometimes saw bodies with bloated stomachs or that were decapitated.[4815]

The Trial Chamber found the evidence of Witnesses RE and SJ "to be mutually consistent" and determined "that the only reasonable conclusion available from the evidence is that the refugees abducted from the EER were killed in the nearby woods."[4816]

[4812] *See* Trial Judgement, paras. 3867, 3868, 3947.
[4813] Trial Judgement, para. 3965.
[4814] *See* Trial Judgement, para. 3944.
[4815] Trial Judgement, paras. 3956, 3957 (internal references omitted).
[4816] *See* Trial Judgement, para. 3958. The Trial Chamber also accepted "the hearsay evidence of Witness RE that the abducted refugees were killed with clubs and machetes while they were naked, and the direct evidence of Witness SJ that some bodies were decapitated." *See idem*.

2066. Ntahobali argues that the Trial Chamber erred in finding that the accounts of Witnesses TG, QY, SJ, and TA corroborated each other.[4817] He contends that Witness TG did not testify about killings of refugees at the EER but rather about events at a certain roadblock and recounted hearing screams of the victims being shot, while Witness RE testified that she did not hear any gunshots.[4818] Ntahobali also contrasts Witness SJ's testimony about hiding from the *Interahamwe* in the forest near the EER with the testimony of Witness RE that no one could go into the forest and the Trial Chamber's finding that the killings occurred there.[4819]

2067. The Prosecution did not specifically respond to these arguments.

2068. The Appeals Chamber considers that Ntahobali does not demonstrate that a reasonable trier of fact could not have concluded that Witness RE's evidence that the refugees were taken to the nearby forest to be killed was corroborated by that of Witness TG since the latter witness testified that he observed people taken from a certain roadblock to the primary school buildings and killed in the forest near there.[4820] Likewise, the discrepancy as to gunshots and screams of the victims merely indicates that different people in different vantage points saw and heard different things and is not material when viewed in the context of the fundamental consistency of the witnesses' accounts that refugees were killed near the EER.

2069. The Appeals Chamber further observes that a review of the relevant evidence reflects that Witness RE did not testify that the refugees could not go into the woods, but instead that the refugees did not go into the woods near the EER since going there would amount to putting their lives at risk as "[e]veryone who had to be killed was taken to that small woods."[4821] While Witness RE's testimony appears to suggest that refugees did not go into the woods adjacent to the EER as it was dangerous, in contrast with Witness SJ's claim that she hid there from *Interahamwe*, it is nevertheless not incompatible with Witness SJ's account of coming across corpses there.[4822] It similarly accords with the Trial Chamber's conclusion that testimonial evidence, including that of

[4817] Ntahobali Appeal Brief, para. 540.
[4818] Ntahobali Appeal Brief, para. 540, *referring to* Witness TG, T. 30 March 2004 pp. 69-71, Witness RE, T. 24 February 2003 pp. 12, 13, T. 26 February 2003 pp. 12, 13. *See also ibid*., para. 509.
[4819] Ntahobali Appeal Brief, paras. 538, 569, *referring to* Trial Judgement, para. 3958, Witness SJ, T. 29 May 2002 pp. 110-112, Witness RE, T. 26 February 2003 pp. 15-18. *See also ibid*., para. 538. Ntahobali also argues that Witness SJ's evidence is inconsistent with other accounts because she was the only witness to testify that "soldiers were present for three full days". *See ibid*., para. 566.
[4820] Trial Judgement, para. 3865, *referring to* Witness TG, T. 30 March 2004 p. 70.
[4821] *See* Witness RE, T. 26 February 2003 p. 17.
[4822] *See* Trial Judgement, para. 3944; Witness SJ, T. 29 May 2002 pp. 110-112.

Witness SJ, indicates that the refugees abducted from the EER were taken to these woods to be killed.[4823]

2070. Accordingly, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence relating to the killings of the refugees taken from the EER.

(iv) Conclusion

2071. In light of the above, the Appeals Chamber dismisses Ntahobali's arguments related to the timing of the events at the EER and the number of refugees, the presence and involvement of Ntahobali in attacks at the EER, and the killings during such attacks.

(d) Expert Evidence

2072. The Trial Chamber found that Nsabimana's testimony regarding the rationale for transferring the refugees from the Butare Prefecture Office to the EER was corroborated by the testimony of Prosecution Expert Witness Des Forges.[4824] The Trial Chamber also found that her testimony corroborated other testimonial evidence that rapes occurred at the EER.[4825]

2073. Ntahobali submits that portions of the testimony of Witness Des Forges fell outside the scope of her expertise as recognised by the Trial Chamber, constituting facts rather than opinion.[4826] He further argues that the Trial Chamber erred in using her testimony for proscribed purposes in order to sustain purely factual findings.[4827] In Ntahobali's view, the portions of Witness Des Forges's testimony which constituted facts rather than opinions or which went beyond the scope of her expertise should be excluded from the assessment of the evidence in relation to the EER.[4828]

2074. The Prosecution responds that Ntahobali's assertion is undeveloped, contains no reference to the record, and accordingly should be summarily dismissed.[4829]

[4823] *See* Trial Judgement, paras. 3956-3958. Moreover, the Appeals Chamber concludes that, in light of consistent evidence of attacks occurring at the EER as testified to by Witness SJ and other Prosecution witnesses, Ntahobali does not demonstrate how Witness SJ's evidence regarding the presence of soldiers for "three full days" is necessarily incompatible with other evidence on the record.
[4824] *See* Trial Judgement, paras. 3931-3933.
[4825] *See* Trial Judgement, para. 3959.
[4826] Ntahobali Notice of Appeal, para. 237, *referring to* Trial Judgement, paras. 3835, 3895-3897, 3931, 3933. *See also ibid*., para. 238.
[4827] Ntahobali Notice of Appeal, para. 235; Ntahobali Appeal Brief, para. 601, *referring to* Trial Judgement, paras. 3895, 3931, 3959, *Renzaho* Appeal Judgement, para. 288.
[4828] Ntahobali Notice of Appeal, para. 238; Ntahobali Appeal Brief, para. 601.
[4829] Prosecution Response Brief, para. 980, *referring to Krajišnik* Appeal Judgement, para. 26.

2075. The Appeals Chamber recalls that the role of expert witnesses is to assist the trial chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.[4830] In the present case, the Appeals Chamber is not persuaded that the Trial Chamber, by relying on Witness Des Forges's opinion to corroborate other evidence concerning the reason for the transfer of the refugees to the EER and occurrence of rapes therein, ignored the limitations imposed on expert evidence. In particular, the Appeals Chamber considers that Ntahobali's undeveloped reference to paragraphs of the Trial Judgement does not substantiate his claim that certain aspects of Witness Des Forges's testimony constituted facts rather than opinion and exceeded the scope of her expertise.[4831] Likewise, apart from making references to paragraphs of the Trial Judgement and to jurisprudence on the scope of expert testimony, Ntahobali does not advance any argument to substantiate his assertion that the Trial Chamber erred in relying on Witness Des Forges's evidence in support of factual findings.[4832] In any event, the Appeals Chamber observes that Ntahobali's convictions for the crimes committed at the EER do not rely on the Trial Chamber's findings he impugns.[4833]

2076. The Appeals Chamber therefore concludes that Ntahobali has not demonstrated that Witness Des Forges testified beyond the scope of her expertise or that the Trial Chamber made improper use of her testimony concerning the events at the EER.

(e) Conclusion

2077. Based on the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in its overall assessment of the evidence relating to the events at the EER.

3. Aiding and Abetting Responsibility

2078. As noted above, in finding Ntahobali responsible for aiding and abetting the killing of Tutsi refugees at or near the EER, the Trial Chamber made the following findings:

> There was no direct evidence that Ntahobali was personally responsible for killing any of the abducted refugees. The Chamber is nevertheless satisfied that his presence alongside *Interahamwe* and soldiers at the EER amounted to tacit approval and encouragement of the acts of *Interahamwe* and soldiers at the EER.

[4830] *Bagosora and Nsengiyumva* Appeal Judgement, fn. 503; *Nahimana et al.* Appeal Judgement, para. 509. *See also Nahimana et al.* Appeal Judgement, para. 212.
[4831] *See* Ntahobali Notice of Appeal, para. 237, *referring to* Trial Judgement, paras. 3835, 3895-3897, 3931, 3933.
[4832] *See* Ntahobali Appeal Brief, para. 601, *referring to* Trial Judgement, paras. 3895, 3931, 3959, *Renzaho* Appeal Judgement, para. 288.
[4833] *See* Ntahobali Appeal Brief, para. 601, *referring to* Trial Judgement, paras. 3895, 3931, 3959. *See also* Trial Judgement, paras. 3965, 5909-5917.

> The Chamber also recalls Ntahobali's prior conduct in working alongside *Interahamwe* and soldiers in abducting hundreds of refugees from the [Butare Prefecture Office] who were physically assaulted and raped and thereafter killed in various locations throughout Ngoma *commune*, and that he personally committed genocide at the Hotel Ihuliro roadblock […]. As such, Ntahobali's presence at the EER alongside *Interahamwe* and soldiers, when considered together with his prior conduct, leads the Chamber to conclude that Ntahobali's conduct at the EER amounted to his sanctioning of the acts of the *Interahamwe* and soldiers, and thereby substantially contributed to the commission of these crimes. […][4834]

2079. Ntahobali submits that the Trial Chamber erred in finding that his presence alongside *Interahamwe* and soldiers at the EER, considered together with his prior conduct, substantially contributed to the commission of the crimes perpetrated at or near the EER. In particular, Ntahobali contends that the Trial Chamber erred in: (i) convicting him for crimes committed in his absence; (ii) relying on alleged prior criminal conduct; and (iii) failing to analyse his authority over the *Interahamwe* and soldiers who committed the crimes at or near the EER. The Appeals Chamber will address these contentions in turn.

(a) Absence from the Crime Scene

2080. Ntahobali submits that, despite correctly acknowledging that a conviction for aiding and abetting by tacit approval requires the presence of the accused at or near the crime scene, the Trial Chamber erred in convicting him of all the crimes committed at or near the EER, including those committed in his absence.[4835] He argues that it was incumbent on the Trial Chamber to enumerate the specific instances when he was present, in light of contradictory evidence that did not establish his presence at the EER for the duration of all the attacks.[4836] Ntahobali adds that, since crimes were committed in his absence, it was also unreasonable on the part of the Trial Chamber to conclude that his presence at the EER substantially contributed to the crimes committed in his presence.[4837]

2081. The Prosecution responds that Ntahobali's continuous presence at the EER was not required to convict him for aiding and abetting the commission of the crimes.[4838]

2082. The Appeals Chamber recalls its finding that the Trial Judgement clearly reflects that Ntahobali's conviction is predicated on the attacks conducted in his presence and that he was not

[4834] Trial Judgement, paras. 5912, 5913.
[4835] Ntahobali Appeal Brief, paras. 852, 853, 858. *See also* Ntahobali Reply Brief, para. 378.
[4836] Ntahobali Notice of Appeal, para. 300; Ntahobali Appeal Brief, para. 858, *referring to Nchamihigo* Appeal Judgement, para. 82. In particular, Ntahobali points to discrepancies in the accounts of Witnesses RE, QY, and SJ who testified about his presence at the EER as well as about soldiers and the *Interahamwe*, arguing that they are materially inconsistent. *See* Ntahobali Appeal Brief, paras. 855-857. He also highlights the Trial Chamber's findings that he was not involved in all the attacks at the EER and that crimes were committed by soldiers in his absence. *See* Ntahobali Notice of Appeal, para. 300; Ntahobali Appeal Brief, para. 854.
[4837] Ntahobali Appeal Brief, para. 859.
[4838] Prosecution Response Brief, para. 1152.

convicted of the crimes committed in his absence.[4839] Ntahobali's claim that he was convicted for all the crimes committed at or near the EER, including those committed in his absence, is ill-founded.

2083. The Appeals Chamber also sees no merit in Ntahobali's argument that commission of crimes in his absence indicated that he did not substantially contribute to the crimes committed when he was present. The Appeals Chamber recalls its well-established jurisprudence "that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required" as long as "the support of the aider and abettor has a substantial effect upon the perpetration of the crime."[4840] In the view of the Appeals Chamber, the fact that crimes were also committed in Ntahobali's absence does not therefore impact the finding that he substantially contributed to the commission of crimes at or near the EER when he was present there.[4841]

2084. In light of the foregoing, the Appeals Chamber rejects Ntahobali's arguments related to his absence from the crime scene.

(b) Reliance on Prior Conduct

2085. Ntahobali submits that no reasonable trier of fact could have relied on his prior conduct relating to events at the Hotel Ihuliro roadblock and the Butare Prefecture Office to conclude that he substantially contributed to the commission of the crimes at or near the EER.[4842] In particular, he contends that, absent any evidence that the soldiers or the *Interahamwe* who committed the crimes at the EER were aware that he personally committed genocide at the Hotel Ihuliro roadblock, his conduct at the roadblock could not be used to infer his substantial contribution to the crimes committed at the EER.[4843] He further contends that the Trial Chamber erred in taking into account the entirety of the attacks on the prefectoral office as only the attacks that preceded the events at the EER could have been relied upon as prior conduct.[4844] Ntahobali also challenges the Trial Chamber's reliance on its finding that he was working alongside "soldiers in abducting hundreds of

[4839] *See supra*, para. 1956.
[4840] *Brđanin* Appeal Judgement, para. 348. *See also Blaškić* Appeal Judgement, paras. 46, 48; *Simić* Appeal Judgement, para. 85. *Kayishema and Ruzindana Appeal Judgement*, para. 201.
[4841] *See* Trial Judgement, para. 5913.
[4842] Ntahobali Appeal Brief, paras. 850, 851. *See also* Ntahobali Notice of Appeal, para. 301.
[4843] Ntahobali Appeal Brief, para. 850.
[4844] Ntahobali Notice of Appeal, para. 301; Ntahobali Appeal Brief, paras. 845-847, 849.

refugees" from the prefectoral office as it did not conclude that soldiers participated in attacks at the prefectoral office before the refugees were transferred to the EER.[4845]

2086. The Prosecution responds that the Trial Chamber correctly used Ntahobali's prior conduct at the prefectoral office to infer the requisite intent for aiding and abetting genocide and that the remainder of Ntahobali's arguments should be dismissed as obscure and undeveloped.[4846]

2087. The Trial Chamber concluded as follows with respect to Ntahobali's prior conduct:

> The Chamber also recalls Ntahobali's prior conduct in working alongside *Interahamwe* and soldiers in abducting hundreds of refugees from the [Butare Prefecture Office] who were physically assaulted and raped and thereafter killed in various locations throughout Ngoma *commune*, and that he personally committed genocide at the Hotel Ihuliro roadblock (3.6.19.4.11; 4.2.2.3.11; 4.2.2.3.13). As such, Ntahobali's presence at the EER alongside *Interahamwe* and soldiers, when considered together with his prior conduct, leads the Chamber to conclude that Ntahobali's conduct at the EER amounted to his sanctioning of the acts of the *Interahamwe* and soldiers, and thereby substantially contributed to the commission of these crimes.[4847]

2088. The Appeals Chamber observes that in reaching this finding, the Trial Chamber did not make a determination that the principal perpetrators of the crimes witnessed or knew of Ntahobali's prior criminal conduct at the Hotel Ihuliro roadblock or the prefectoral office. A contextual reading of the Trial Chamber's factual findings similarly does not reveal any evidence to allow for such conclusion to be drawn.[4848] Absent such evidence, the Appeals Chamber considers that no reasonable trier of fact could have relied on Ntahobali's prior criminal conduct in support of its finding that Ntahobali's presence at the EER alongside the *Interahamwe* and soldiers substantially contributed to the commission of the crimes at the EER. In these circumstances, the Appeals Chamber finds it unnecessary to assess Ntahobali's remaining arguments regarding the Trial Chamber's reliance on his prior conduct.[4849]

2089. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering Ntahobali's prior conduct at the Hotel Ihuliro roadblock and the Butare Prefecture Office when determining whether Ntahobali's conduct had a substantial effect on the commission of the crimes by *Interahamwe* and soldiers at the EER. The Appeals Chamber will assess the impact of this error, if any, after examining Ntahobali's challenges to the Trial Chamber's finding about his authority over *Interahamwe* and soldiers.

[4845] Ntahobali Appeal Brief, para. 848 (emphasis omitted), *referring to* Trial Judgement, paras. 2627-2653, 5913.
[4846] Prosecution Response Brief, paras. 1155, 1156.
[4847] Trial Judgement, para. 5913.
[4848] *See* Trial Judgement, Section 3.6.36.
[4849] The Appeals Chamber notes that elsewhere in this Judgement it rejected Ntahobali's contention that the Trial Chamber's conclusions about the transfer of refugees from the prefectoral office to the EER were contradictory with its findings concerning the attacks at the Butare Prefecture Office in May 1994 as well as his challenges to the Trial Chamber's reliance on the evidence of Witness TA concerning the attacks at the prefectoral office. *See supra*, Section V.I.2(c)(iii).

(c) Authority over *Interahamwe* and Soldiers

2090. Ntahobali argues that the Trial Chamber erred in failing to analyse his authority over the *Interahamwe* and soldiers who committed the crimes at or near the EER.[4850] He points to case law reflecting that analysis of such authority is essential since aiding and abetting the commission of crimes through their sanctioning is premised on the confluence of authority and presence at the crime scene.[4851] With respect to the *Interahamwe*, he argues that position of authority alone is insufficient to establish that the presence of an accused at the crime scene encouraged the commission of an offence.[4852] In addition, referring to the Trial Chamber's finding that he did not lead the soldiers to the EER, Ntahobali contends that, absent any evidence that he exercised authority over them, the Trial Chamber erred in law and in fact in finding that his mere presence at the EER, even combined with his previous conduct, could amount to substantial contribution to the crimes committed by the soldiers.[4853]

2091. The Prosecution responds that Ntahobali was not convicted for the crimes perpetrated by the soldiers but for aiding and abetting the crimes committed by the *Interahamwe* and for his involvement in the attacks and killings of the Tutsi refugees.[4854] It contends that the Trial Chamber was not required to find that Ntahobali had authority or superior responsibility over the principal perpetrators of the crimes since it was sufficient to establish that his acts as an aider and abettor substantially contributed to the commission of the crimes.[4855]

2092. The Appeals Chamber recalls the requisite elements of aiding and abetting by tacit approval as set out previously in this Judgement.[4856] The Appeals Chamber further recalls that the authority envisaged by the impugned category of aiding and abetting merely connotes an accused whose "status was such that his presence had a significant legitimising or encouraging effect on the principals".[4857]

[4850] Ntahobali Notice of Appeal, para. 299.
[4851] Ntahobali Appeal Brief, para. 842, *referring to Muvunyi* Appeal Judgement of 29 August 2008, para. 80, *Zigiranyirazo* Trial Judgement, para. 386, *Seromba* Trial Judgement, para. 308, *Bagilishema* Trial Judgement, para. 34, *Kalimanzira* Appeal Judgement, para. 74. *See also* Ntahobali Notice of Appeal, para. 299.
[4852] Ntahobali Appeal Brief, para. 844, *referring to Kamuhanda* Trial Judgement, para. 600. *See also* Ntahobali Notice of Appeal, para. 299.
[4853] Ntahobali Appeal Brief, para. 843, *referring to* Trial Judgement, para. 3965. Ntahobali adds that it was equally unreasonable for the Trial Chamber to conclude that he exercised any authority over the Presidential Guard. *See idem*. *See also* Ntahobali Notice of Appeal, para. 299. However, since Ntahobali was not held responsible for the crimes committed by the Presidential Guard, the Appeals Chamber declines to address Ntahobali's contention in this respect. *See* Trial Judgement, paras. 5912-5917.
[4854] Prosecution Response Brief, para. 1151. *See also ibid*., paras. 1154, 1158.
[4855] Prosecution Response Brief, para. 1151.
[4856] *See supra*, para. 1955.
[4857] *See Brđanin* Appeal Judgement, para. 277, *citing Furundžija* Trial Judgement, para. 232. *See also*, *e.g*., *Ndahimana* Appeal Judgement, paras. 144, 148; *Rutaganda* Appeal Judgement, para. 529; *Kayishema and Ruzindana* Appeal Judgement, paras. 201, 202.

2093. The Appeals Chamber notes, as recalled in more detail above, that in holding Ntahobali responsible for aiding and abetting the killings of the Tutsi refugees at or near the EER, the Trial Chamber concluded that Ntahobali's "presence alongside *Interahamwe* and soldiers at the EER amounted to tacit approval and encouragement of the acts of *Interahamwe* and soldiers at the EER"[4858] and that his "conduct at the EER amounted to his sanctioning of the acts of the *Interahamwe* and soldiers".[4859] The Appeals Chamber reiterates that, contrary to the Prosecution's position, the Trial Judgement reflects that Ntahobali was held responsible for aiding and abetting the killings of the Tutsi refugees perpetrated by both the *Interahamwe* and soldiers.[4860] While the Trial Chamber did not make an express finding that Ntahobali wielded authority over the principal perpetrators of the abductions and subsequent killings of the Tutsi refugees, Ntahobali's submissions in this regard fail to appreciate the broader context of the Trial Chamber's findings concerning his involvement in the events at the EER. In particular, the Appeals Chamber notes that the Trial Chamber considered extensive evidence pointing to Ntahobali's leadership role and authoritative conduct during some of the attacks on the refugees, including that he was the leader of the *Interahamwe* and that he was feared and obeyed by them.[4861] The Trial Chamber also relied on evidence that Ntahobali was the leader of the *Interahamwe* involved in the attacks.[4862] The Trial Chamber further concluded that Ntahobali had *de facto* authority and bore superior responsibility over the *Interahamwe* for the killings of the refugees at or near the EER pursuant to Article 6(3) of the Statute.[4863]

2094. In addition, the Trial Chamber set forth witness testimony reflecting that the soldiers were accompanied by Ntahobali on one occasion when they abducted refugees from the EER[4864] and that Ntahobali directed an attack by the soldiers against the refugees on another occasion.[4865] While the Trial Chamber concluded that it was not established beyond a reasonable doubt that Ntahobali led the soldiers to the EER,[4866] the Appeals Chamber does not consider that this conclusion negates the evidence that Ntahobali exerted a level of influence over the soldiers.[4867]

[4858] Trial Judgement, para. 5912.
[4859] Trial Judgement, para. 5913.
[4860] *See supra*, para. 1956.
[4861] Trial Judgement, paras. 3878, 3951.
[4862] Trial Judgement, paras. 3951, 3965.
[4863] *See* Trial Judgement, para. 5917. *See also ibid.*, para. 5971.
[4864] Trial Judgement, para. 3856, *referring to* Witness RE, T. 24 February 2003 pp. 10-12, 38, T. 26 February 2003 pp. 8-10, 12, 18, 60.
[4865] Trial Judgement, para. 3868, *referring to* Witness QY T. 19 March 2003 p. 57. *See also ibid.*, para. 3951.
[4866] *See* Trial Judgement, para. 3965.
[4867] The Trial Chamber did not make a finding with respect to Ntahobali's responsibility as a superior for the crimes committed by the soldiers at or near the EER. *See* Trial Judgement, para. 5917. The Appeals Chamber notes, however, that the Trial Chamber concluded that there was insufficient evidence to find Ntahobali responsible as a superior for the crimes committed by the soldiers at two other locations, namely at the Hotel Ihuliro roadblock and the Butare Prefecture Office. *See ibid.*, paras. 5846, 5887.

2095. In light of the foregoing, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in failing to analyse his authority over the *Interahamwe* and soldiers who committed the crimes at or near the EER.

(d) Conclusion

2096. For the above reasons, the Appeals Chamber finds that the Trial Chamber erred in relying on Ntahobali's prior conduct at the Hotel Ihuliro roadblock and the Butare Prefecture Office to establish his criminal responsibility for aiding and abetting the killings perpetrated by *Interahamwe* and soldiers at or near the EER. However, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's decision to convict Ntahobali for aiding and abetting these killings in light of the Trial Chamber's factual findings and the relevant evidence it relied upon concerning his authority over the *Interahamwe* and soldiers during the attacks on the EER. Consequently, the Appeals Chamber concludes that Ntahobali has not demonstrated that the Trial Chamber erred in finding him responsible for aiding and abetting by tacit approval and encouragement the killings of Tutsi refugees perpetrated by *Interahamwe* and soldiers at or near the EER during attacks conducted in his presence.

4. Superior Responsibility

2097. Recalling its finding that Ntahobali had *de facto* authority over *Interahamwe*, the Trial Chamber concluded that Ntahobali was also responsible as a superior pursuant to Article 6(3) of the Statute for the same criminal acts committed at or near the EER.[4868] However, because the Trial Chamber had found Ntahobali criminally responsible for the killings of Tutsi refugees by *Interahamwe* pursuant to Article 6(1) of the Statute, it did not enter related convictions against him pursuant to Article 6(3) of the Statute, but stated that it would consider his superior responsibility for these acts in sentencing.[4869]

2098. Ntahobali submits that the Trial Chamber erred in holding him responsible for all the attacks committed by the *Interahamwe* at the EER, despite the evidence that the attacks took place in his absence.[4870] In this respect, he contends that there was no evidence that he had effective control over all the *Interahamwe* present in Butare Prefecture or over those involved in the attacks at the EER.[4871] He further argues that the Trial Chamber's conclusion about his *de facto* authority, which

[4868] Trial Judgement, para. 5917.
[4869] Trial Judgement, para. 5917. *See also ibid.*, paras. 5652, 5971, 6056.
[4870] Ntahobali Notice of Appeal, para. 313; Ntahobali Appeal Brief, para. 923.
[4871] Ntahobali Notice of Appeal, para. 312; Ntahobali Appeal Brief, para. 915. Ntahobali also submits that the Trial Chamber erred in failing to consider evidence reflecting that the *Interahamwe* present at the EER were not the official MRND militia, but instead an ill-defined group, opposing the RPF and participating in killings, which comprised

did not reference underlying findings, was vague and imprecise, and violated his right to a reasoned opinion.[4872] In his view, the Trial Chamber also erred in limiting its analysis to his *de facto* authority over the *Interahamwe* without considering and specifically determining whether he possessed effective control over the *Interahamwe* involved in the attacks at the EER.[4873]

2099. Ntahobali also challenges the Trial Chamber's finding that "the *Interahamwe* were led" by him, pointing to various discrepancies in the testimonies of Witnesses RE, SX, and QY that were not considered by the Trial Chamber.[4874] In particular, he contends that the testimony of Witness QY, according to whom he directed an attack at the EER, contained discrepancies regarding whether the attack was perpetrated by soldiers alone or together with the *Interahamwe* as well as with respect to his presence during the attack, which were not considered by the Trial Chamber.[4875] He adds that mere assertion that he directed an attack was insufficient to establish effective control over the *Interahamwe*.[4876]

2100. Moreover, Ntahobali asserts that Witness SX's testimony that he was the leader of the *Interahamwe*, ordered them around, and was feared by them, does not establish effective control.[4877] He highlights that the Trial Chamber did not make a finding that he issued any orders to the *Interahamwe* at the EER.[4878] Ntahobali further posits that Witness SX's perception that he inspired fear, which was at best indicative of a degree of influence, was subjective and speculative, and was merely based on the witness's belief that he was the leader of the *Interahamwe*.[4879] According to Ntahobali, the latter belief was in itself subjective and speculative, given that Witness SX merely mentioned orders not proven to have been issued by him and that the *Interahamwe* consulted him when they had something to discuss and calling him by his first name.[4880]

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soldiers or even civilians, as was done by the Trial Chamber in relation to Kanyabashi. *See* Ntahobali Appeal Brief, para. 925; Ntahobali Reply Brief, paras. 379, 380.

[4872] Ntahobali Appeal Brief, para. 912.

[4873] Ntahobali Appeal Brief, paras. 914, 915. Ntahobali adds that the Trial Chamber could not have relied on its finding elsewhere in the Trial Judgement to conclude that he had *de facto* control over the *Interahamwe* because the Trial Chamber's findings do not reflect that the same group of *Interahamwe* was involved in the events at all the crime scenes. *See ibid.,* para. 915.

[4874] Ntahobali Appeal Brief, paras. 916-922, *referring*, *inter alia*, *to* Trial Judgement, para. 3951.

[4875] Ntahobali Appeal Brief, para. 917, *referring to* Witness QY, T. 19 March 2003 pp. 55-60, T. 24 March 2003 pp. 35-36. Ntahobali adds that Witness QY also testified that, even though the soldiers were not led by anyone, Ntahobali directed the attack. *See idem*, *referring to* Witness QY, T. 19 March 2003 pp. 52, 53, 55-57. *See also* Ntahobali Reply Brief, para. 377.

[4876] Ntahobali Appeal Brief, para. 918. Ntahobali again posits that the Trial Chamber failed to consider inconsistencies in this witness's testimony, including as to the presence of the *Interahamwe* during the impugned attack. *See ibid*., paras. 917, 918.

[4877] Ntahobali Appeal Brief, para. 919.

[4878] Ntahobali Appeal Brief, para. 919. *See also* Ntahobali Reply Brief, para. 373.

[4879] Ntahobali Appeal Brief, para. 919, *referring to Mucić* Trial Judgement, paras. 803-806, *Karera* Trial Judgement, para. 564, *Nahimana et al*. Appeal Judgement, para. 882, *Ntagerura et al.* Trial Judgement, para. 628.

[4880] Ntahobali Appeal Brief, para. 919, *referring to* Witness SX, T. 27 January 2004 pp. 25, 26.

2101. Ntahobali further contests the Trial Chamber's reliance on the testimony of Witness RE in support of the conclusion that he led the *Interahamwe* since the attacks by the *Interahamwe* recounted by the witness took place in Ntahobali's absence.[4881] He points out that Witness RE only testified about one occasion when he saw Ntahobali at the EER when he was the only *Interahamwe* accompanying the soldiers, but that the witness learnt that Ntahobali was the leader of the *Interahamwe* on a later occasion.[4882] Ntahobali reiterates that a mere assertion that he was the leader of the *Interahamwe* was insufficient to establish effective control over them.[4883]

2102. Finally, Ntahobali submits that the Trial Chamber erred in failing to determine whether he had knowledge of the crimes committed during the attacks in his absence.[4884] He also avers that the Trial Chamber failed to discuss any evidence establishing his failure to prevent or punish the crimes committed by the *Interahamwe* at or near the EER.[4885]

2103. The Prosecution responds that the Trial Chamber correctly found that Ntahobali had *de facto* authority and superior responsibility over the *Interahamwe* for the killings committed at or near the EER.[4886] It submits that Ntahobali fails to consider all the relevant parts of the Trial Judgement and that, contrary to his claims, the evidence of Witnesses QY, SX, and RE established that he had effective control over the *Interahamwe* and that he failed to prevent their criminal acts.[4887] The Prosecution points to their evidence that Ntahobali: (i) had influence over and was feared by the *Interahamwe*; (ii) was the leader of those who abducted the refugees from the EER; (iii) issued orders to arrest and abduct the refugees that were followed; and (iv) directed the attacks by the *Interahamwe*.[4888] It contends that a holistic reading of the Trial Judgement reflects consideration of the totality of the evidence by the Trial Chamber to determine Ntahobali's responsibility as a superior, such as its findings that Ntahobali had effective control over the *Interahamwe* at the Butare Prefecture Office and Hotel Ihuliro roadblock.[4889]

2104. In addition, the Prosecution argues that: (i) the attack by the soldiers in Ntahobali's absence recounted by Witness QY was not the same attack which was directed by Ntahobali, according to

[4881] Ntahobali Appeal Brief, para. 921.
[4882] Ntahobali Appeal Brief, para. 920, *referring to* Trial Judgement, para. 3951, Witness RE, T. 24 February 2003 pp. 10-13, T. 26 February 2003 pp. 9, 10.
[4883] Ntahobali Appeal Brief, para. 921, *referring to Semanza* Trial Judgement, paras. 414-416.
[4884] Ntahobali Notice of Appeal, para. 313; Ntahobali Appeal Brief, para. 923, *referring to Orić* Appeal Judgement, para. 51.
[4885] Ntahobali Notice of Appeal, para. 313; Ntahobali Appeal Brief, para. 924.
[4886] Prosecution Response Brief, para. 1181.
[4887] Prosecution Response Brief, para. 1182.
[4888] Prosecution Response Brief, paras. 1182, 1184, 1186, *referring, inter alia, to* Trial Judgement, paras. 3944, 3951, Witness SX, T. 27 January 2004 pp. 25, 26, T. 30 January 2004 p. 55, Witness RE, T. 24 February 2003 pp. 13-15, T. 26 February 2003 p. 10, Witness QY, T. 19 March 2003 pp. 57-59.
[4889] Prosecution Response Brief, para. 1183.

this witness;[4890] and (ii) it was not unreasonable for Witness RE to infer that Ntahobali was the leader of the *Interahamwe* on the basis of her subsequent observations of Ntahobali training the *Interahamwe* at other locations, where they called him their chief.[4891] The Prosecution further submits that Ntahobali had the requisite knowledge for superior responsibility by virtue of his participation in the attacks and abductions of refugees with his subordinates, as witnessed by Witnesses QY, SX, and RE.[4892]

2105. The Appeals Chamber observes that, in determining Ntahobali's superior responsibility for the crimes committed at or near the EER, the Trial Chamber specifically referred to the "same underlying acts of genocide committed at or near the EER".[4893] In the view of the Appeals Chamber, this indicates that Ntahobali was only held responsible as a superior on the basis of the killings perpetrated by the *Interahamwe* that he tacitly approved and encouraged by his presence alongside them.[4894] Such a consideration is supported by the fact that the Trial Chamber stated that it will not convict Ntahobali pursuant to Article 6(3) of the Statute on the basis of acts committed by *Interahamwe* at the EER as it concluded that he had already been found criminally responsible pursuant to Article 6(1) of the Statute for these acts.[4895] The Appeals Chamber therefore considers that Ntahobali's contention that he was held responsible for all crimes committed by the *Interahamwe* at the EER is without merit. Accordingly, Ntahobali's arguments regarding the absence of evidence that he exercised effective control over all the *Interahamwe* involved in the attacks at the EER or those in the Butare Prefecture as well as the precise composition of the *Interahamwe* are moot.

2106. As to Ntahobali's contention that the Trial Chamber violated his right to a reasoned opinion in making a vague finding regarding his *de facto* authority over the *Interahamwe*, the Appeals Chamber considers that the Trial Judgement read as a whole provides sufficient basis for its finding that Ntahobali had *de facto* authority over the *Interahamwe* when he was present alongside them during the attacks at the EER.[4896] Ntahobali's submissions on this issue fail to appreciate the broader context of the Trial Chamber's findings concerning his role at the EER, including extensive evidence considered by it indicating that he had a leadership role among the *Interahamwe*.[4897] Ntahobali's argument that the Trial Chamber failed to provide a reasoned opinion is therefore dismissed.

[4890] Prosecution Response Brief, para. 1186, *referring to* Witness QY, T. 19 March 2003 pp. 57-59, T. 24 March 2003 pp. 36, 37.
[4891] Prosecution Response Brief, para. 1185, *referring to* Witness RE, T. 26 February 2003 pp. 9, 10.
[4892] Prosecution Response Brief, para. 1187. *See also ibid*., para. 1182.
[4893] Trial Judgement, para. 5917.
[4894] *See* Trial Judgement, paras. 5912, 5914.
[4895] Trial Judgement, para. 5917. *See also ibid.*, paras. 5652, 5971, 6056.

2107. The Appeals Chamber similarly considers that, while the Trial Chamber did not make an express finding that Ntahobali exercised effective control over the *Interahamwe*, such a finding is implicit in its factual finding that Ntahobali led the *Interahamwe* as well as in its conclusion that he had *de facto* authority over them.[4898] In the view of the Appeals Chamber, the Trial Chamber's finding that Ntahobali "led *Interahamwe* in attacks against, and abductions of, Tutsi refugees during their stay at the EER"[4899] and the evidence accepted by the Trial Chamber concerning Ntahobali's general role during these attacks at the EER reasonably supports a finding that Ntahobali exercised effective control over the *Interahamwe* during these attacks.

2108. Turning to Ntahobali's challenges to the Trial Chamber's conclusion that "the *Interahamwe* were led by Ntahobali" and its reliance on the relevant evidence of Witnesses QY, SX, and RE, the Appeals Chamber observes that in reaching this conclusion the Trial Chamber considered Witness QY's evidence that the soldiers in military uniform and civilian clothes took the young people, "but it was Shalom who directed the attack."[4900] The Appeals Chamber considers that while, in this particular instance, it was soldiers rather than the *Interahamwe* who took away the refugees, the Trial Chamber relied on Witness QY's testimony to highlight Ntahobali's authoritative conduct in directing the attack. The Appeals Chamber recalls that the remainder of Ntahobali's challenges as they relate to the Trial Chamber's assessment of various discrepancies in Witness QY's account of the events at the EER, including concerning Ntahobali's presence during the attacks recounted by Witness QY, have already been addressed and rejected in another section of this Judgement.[4901] Although Ntahobali is correct in suggesting that a mere assertion that he directed an attack was insufficient to establish effective control over the *Interahamwe*, he overlooks that, as discussed above, this was not the only element taken into account by the Trial Chamber when reaching its conclusion about effective control.[4902]

2109. Ntahobali further fails to demonstrate any error in the Trial Chamber's consideration of his leadership role and influence over the *Interahamwe*, as reflected in the testimony of Witness SX, in concluding that the *Interahamwe* were led by Ntahobali. The Appeals Chamber recalls that "[i]ndicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent [or] punish."[4903] A superior's ability to issue binding orders that are complied with by his subordinates is but one

[4896] *See supra*, para. 1959. *See also infra*, paras. 2108-2111.
[4897] *See* Trial Judgement, paras. 3858, 3878, 3951, 3965.
[4898] *See* Trial Judgement, paras. 3951, 3965, 5917.
[4899] Trial Judgement, para. 3965. *See also ibid*., para. 3951.
[4900] *See* Trial Judgement, para. 3951. *See also ibid*., para. 3868.
[4901] *See supra*, Section V.J.2(c)(ii).
[4902] *See supra*, paras. 2106, 2107.
[4903] *Ndahimana* Appeal Judgement, para. 53, *referring to Blaškić* Appeal Judgement, para. 69.

indicator of effective control relied upon in the jurisprudence of the Tribunal.[4904] The Appeals Chamber therefore is not persuaded that a finding that Ntahobali issued binding orders was necessary for the Trial Chamber to conclude that Ntahobali exercised effective control over the *Interahamwe* who committed attacks at the EER.

2110. The Appeals Chamber further observes that the Trial Chamber noted Witness SX's evidence that the *Interahamwe* feared and obeyed "Shalom".[4905] As acknowledged by Ntahobali, Witness SX's testimony reflects that his belief that Ntahobali was the leader of the *Interahamwe* was grounded in his observations that Ntahobali ordered them around, including ordering to arrest people, that he was consulted on issues that required consultation, and that the *Interahamwe* were fearful of Ntahobali because he was their boss.[4906] The Appeals Chamber considers that a reasonable trier of fact could have relied on this evidence, in conjunction with other related evidence, to establish that Ntahobali exercised effective control over the *Interahamwe* who perpetrated attacks in his presence.[4907]

2111. The Appeals Chamber is likewise not convinced by Ntahobali's argument that the Trial Chamber erred in relying on Witness RE's testimony that he was the leader of the *Interahamwe* to find that the *Interahamwe* were led by Ntahobali. The Trial Chamber did not address all the details of Witness RE's testimony regarding how she came to learn about Ntahobali's leadership role.[4908] However, the Trial Chamber's summary of Witness RE's evidence correctly reflects the witness's testimony that when Ntahobali came to the EER on the day of the refugees' arrival he was accompanied by soldiers, that the *Interahamwe* came on other occasions during the days to take away the refugees, and that their leader was Ntahobali.[4909] While other parts of Witness RE's testimony suggest that the witness only later deduced that Ntahobali was the leader of the *Interahamwe*, the Appeals Chamber is not persuaded that no reasonable trier of fact could have relied on Witness RE's testimony, in conjunction with other evidence, to conclude that Ntahobali exercised effective control over the *Interahamwe* who participated in attacks in his presence.[4910]

[4904] *Karemera and Ngirumpatse* Appeal Judgement, para. 260; *Nizeyimana* Appeal Judgement, para. 202; *Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91; *Kayishema and Ruzindana* Appeal Judgement, para. 299. *See also Strugar* Appeal Judgement, para. 256; *Hadžihasanović and Kubura* Appeal Judgement, para. 199; *Halilović* Appeal Judgement, paras. 204, 207.
[4905] *See* Trial Judgement, para. 3951, *referring* to Witness SX, T. 27 January 2004 p. 26.
[4906] *See* Witness SX, T. 27 January 2004 p. 26. *See also* Trial Judgement, para. 3878.
[4907] *See* Trial Judgement, paras. 3951, 3965.
[4908] *See* Trial Judgement, paras. 3856, 3858, 3944, 3951.
[4909] *See* Trial Judgement, paras. 3856, 3858.
[4910] *See* Trial Judgement, para. 5917.

2112. Finally, recalling that Ntahobali's contention that he was held responsible for *all* the crimes committed by *Interahamwe* at the EER has been rejected above, the Appeals Chamber does not consider it necessary to discuss Ntahobali's knowledge of the crimes committed in his absence. Furthermore, since Ntahobali was present during several attacks at the EER, as discussed in more detail above, the Appeals Chamber considers that the Trial Chamber's findings reasonably support the conclusion that Ntahobali failed to take necessary and reasonable measures to prevent or punish the crimes committed by his subordinate during such attacks.

2113. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's conclusion that Ntahobali was also responsible as a superior pursuant to Article 6(3) of the Statute for the killings committed by the *Interahamwe* at or near the EER.

5. Conclusion

2114. For the foregoing reasons, the Appeals Chamber finds that Ntahobali has failed to demonstrate that the Trial Chamber erred in convicting him pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsi refugees abducted from the EER between mid-May and the beginning of June 1994 and in concluding that he bore superior responsibility under Article 6(3) of the Statute for the above killings committed by the *Interahamwe*. Accordingly, the Appeals Chamber dismisses Grounds 3.5 and 4.1 as well as the relevant parts of Grounds 4.2 and 4.3 of Ntahobali's appeal.

K. Nexus Between Crimes and Armed Conflict (Ground 4.8)

2115. The Trial Chamber found a nexus between the violations of Article 4 of the Statute and the armed conflict and convicted Ntahobali of serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[4911]

2116. Ntahobali submits that the Trial Chamber erred in finding that a nexus existed between the crimes and the non-international armed conflict and requests the Appeals Chamber to overturn the convictions entered against him pursuant to Article 4 of the Statute.[4912]

2117. The Prosecution did not respond to this contention.[4913]

2118. Considering that Ntahobali did not substantiate his submission, the Appeals Chamber dismisses Ground 4.8 of his appeal without further consideration.

[4911] Trial Judgement, paras. 6159, 6168, 6169, 6184, 6185. *See also ibid.*, paras. 6153-6158.
[4912] Ntahobali Notice of Appeal, paras. 335, 336. Ntahobali explained that he could not develop Ground 4.8 in his appeal brief due to the word limit. *See* Ntahobali Appeal Brief, para. 981.
[4913] The Prosecution explained that it considers that, by not presenting arguments in his appeal brief, Ntahobali had abandoned Ground 4.8. *See* Prosecution Response Brief, para. 1219.

L. Crime of Extermination (Ground 4.9)

2119. The Trial Chamber convicted Ntahobali of extermination as a crime against humanity on the basis of killings perpetrated at the Hotel Ihuliro roadblock, including the killing of a "Tutsi girl" and Ruvurajabo, at a location near the IRST, and at or near the EER as well as on the basis of the killing of Tutsis abducted from the Butare Prefecture Office and of the Rwamukwaya family.[4914] The Trial Chamber found that "these killings, taken by themselves or collectively, occurred on a large scale."[4915]

2120. Ntahobali challenges the Trial Chamber's finding that the killings perpetrated at the Hotel Ihuliro roadblock and the killing of the Rwamukwaya family, "considered individually or collectively", support the conclusion that they were committed on a large scale and that they reach the threshold for a conviction for extermination as a crime against humanity.[4916] He contends that the acts underpinning his convictions with respect to the Hotel Ihuliro roadblock and the Rwamukwaya family cannot in any way support the finding that they contributed to the killing of a large number of people.[4917] Ntahobali argues that the reasoning adopted in the *Bagosora and Nsengiyumva* Appeal Judgement should apply in this case and that his convictions for extermination as a crime against humanity should be reversed.[4918]

2121. The Prosecution responds that this ground should be dismissed as it is undeveloped and because merely citing case law is insufficient to establish that the Trial Chamber erred.[4919]

2122. The Appeals Chamber considers that Ntahobali's ground of appeal, although not developed in his appeal brief beyond the reliance on the *Bagosora and Nsengiyumva* Appeal Judgement, was sufficiently substantiated in his notice of appeal to allow for appellate review.[4920] The Appeals Chamber will therefore examine Ntahobali's contention. However, because it has reversed Ntahobali's conviction for extermination as a crime against humanity based on the killing of the Rwamukwaya family,[4921] the Appeals Chamber considers that Ntahobali's allegation of error related to this killing has become moot. While it has also reversed Ntahobali's convictions for extermination as a crime against humanity for committing killings of Tutsis at the Hotel Ihuliro

[4914] *See supra*, para. 14.
[4915] Trial Judgement, para. 6054.
[4916] Ntahobali Notice of Appeal, heading "Motif 4.9" at p. 3152/A (Registry pagination) (French), paras. 338 (emphasis omitted), 339.
[4917] Ntahobali Notice of Appeal, para. 339.
[4918] Ntahobali Notice of Appeal, para. 340; Ntahobali Appeal Brief, para. 982, *referring to Bagosora and Nsengiyumva* Appeal Judgement, paras. 395-397. Ntahobali explained that he could not develop Ground 4.9 any further in his appeal brief due to the word limit. *See idem*.
[4919] Prosecution Response Brief, para. 1220.
[4920] *See supra*, para. 30.
[4921] *See supra*, Section V.H.

roadblock beyond the killing of the Tutsi girl,[4922] the Appeals Chamber considers that Ground 4.9 of Ntahobali's appeal is not moot to the extent that it relates to the killing of the Tutsi girl and Ruvurajabo at the roadblock.

2123. The Appeals Chamber recalls that the *actus reus* of extermination is the act of killing on a large scale.[4923] This is what distinguishes the crime of extermination from the crime of murder.[4924] The Appeals Chamber further recalls that "large scale" does not suggest a strict numerical approach with a minimum number of victims.[4925] The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.[4926] Relevant factors include, *inter alia*, the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.[4927]

2124. There can be no dispute that, "taken by themselves", the individual killings of the Tutsi girl and Ruvurajabo at the Hotel Ihuliro roadblock in late April 1994 do not meet the "large scale" requirement. The Appeals Chamber, however, is not persuaded that the Trial Chamber erred in finding that these two killings, taken collectively with the other killings for which Ntahobali was convicted, "occurred on a large scale".

2125. In the *Bagosora and Nsengiyumva* Appeal Judgement, the Appeals Chamber considered that "the Trial Chamber was unreasonable to conclude that the 'large scale' requirement for extermination was satisfied based on a collective consideration of events committed in different prefectures, in different circumstances, by different perpetrators, and over a period of two months."[4928] The Appeals Chamber observes that, by contrast, the two killings perpetrated at the Hotel Ihuliro roadblock were perpetrated in the same commune, in similar circumstances, by the same category of perpetrators, and approximately at the same time as the numerous killings perpetrated at the locations near the IRST, at or near the EER, and the killings of Tutsis abducted from the Butare Prefecture Office.[4929] For all these events, the Trial Chamber concluded that the

[4922] *See supra*, paras. 1394, 1503.
[4923] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 660; *Lukić and Lukić* Appeal Judgement, para. 536; *Bagosora and Nsengiyumva* Appeal Judgement, para. 394; *Ntakirutimana* Appeal Judgement, para. 516.
[4924] *See*, *e.g.*, *Lukić and Lukić* Appeal Judgement, para. 536; *Stakić* Appeal Judgement, para. 260, *referring to Ntakirutimana* Appeal Judgement, para. 516.
[4925] *See*, *e.g.*, *Lukić and Lukić* Appeal Judgement, para. 537; *Rukundo* Appeal Judgement, para. 185; *Ntakirutimana* Appeal Judgement, para. 516. *See also Bagosora and Nsengiyumva* Appeal Judgement, fn. 924.
[4926] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.
[4927] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.
[4928] *Bagosora and Nsengiyumva* Appeal Judgement, para. 396. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 661.
[4929] *See supra*, Sections V.F, V.G.3, V.G.4, V.I, V.J.

victims were all or predominantly of Tutsi ethnicity and were not targeted in their individual capacity but as part of a collective aim to exterminate the Tutsis.[4930]

2126. In the circumstances of this case, the Appeals Chamber finds no error in the Trial Chamber's collective consideration of the events in relation of which Ntahobali was convicted to find him guilty of extermination as a crime against humanity for the killings perpetrated at the Hotel Ihuliro roadblock and all other killings for which he remains convicted. Accordingly, the Appeals Chamber dismisses Ground 4.9 of Ntahobali's appeal.

[4930] Trial Judgement, paras. 5783, 5784, 5844, 5852, 5854, 5870-5873, 5914, 5915. The Appeals Chamber is mindful that there is no genocidal intent requirement for the crime of extermination as a crime against humanity. However, the Appeals Chamber finds that the Trial Chamber's findings with respect to the perpetrators' and Ntahobali's genocidal intent are relevant in this case to establish that the killings were directed against Tutsis as a collective group rather than victims in their individual capacities.

M. Crime of Persecution (Ground 4.6)

2127. The Trial Chamber found that Ntahobali was responsible for committing, ordering, and aiding and abetting the killings of Tutsis between April and June 1994.[4931] In the "Legal Findings" section of the Trial Judgement concerning the count of persecution as a crime against humanity, the Trial Chamber noted that "the enumerated grounds of discrimination for persecution in Article 3(h) of the Statute do not expressly include ethnic grounds, which is included in the list of discriminatory grounds for the attacks contained in the *chapeau* of Article 3."[4932] The Trial Chamber stated that, nonetheless, "the Appeals Chamber in the *Nahimana et al.* case held that discrimination on ethnic grounds could constitute persecution if the accompanying violation of rights was sufficiently serious, such as killings, torture and rape."[4933] The Trial Chamber then concluded that "Ntahobali and the principal perpetrators acted with discriminatory intent".[4934] Accordingly, the Trial Chamber convicted Ntahobali of committing, ordering, and aiding and abetting persecution as a crime against humanity.[4935]

2128. Ntahobali submits that the Trial Chamber erred in law in finding that he and the principal perpetrators acted with discriminatory intent and that discrimination on ethnic grounds could constitute persecution as a crime against humanity pursuant to Article 3(h) of the Statute.[4936] In particular, Ntahobali contends that Article 3(h) of the Statute does not include ethnicity among the listed discriminatory grounds and that the Trial Chamber therefore violated the principle of legality and went beyond the intention of the drafters of the Statute, who limited the scope of persecution to political, racial, and religious grounds.[4937] Moreover, Ntahobali argues that the Trial Chamber misinterpreted the *Nahimana et al.* Appeal Judgement which, contrary to the interpretation given in the *Bagosora et al.* Trial Judgement, did not include ethnicity among the listed discriminatory grounds for persecution, but simply affirmed the *Nahimana et al.* Trial

[4931] Trial Judgement, para. 6100. Specifically, the Trial Chamber found that "Ntahobali killed Tutsis at the Hotel Ihuliro roadblock, including a Tutsi girl who he first raped; that he ordered the killing of a Tutsi named Léopold Ruvurajabo, the killing of about 200 Tutsis at the IRST, and the killing of Tutsis taking refuge at the Butare *préfecture* office; and that he aided and abetted the killing of the Rwamukwaya family and of Tutsis abducted from the EER." *See idem.*
[4932] Trial Judgement, para. 6097.
[4933] Trial Judgement, para. 6097, *referring to Bagosora et al.* Trial Judgement, para. 2209, *Nahimana et al.* Appeal Judgement, paras. 986-988, 1002.
[4934] Trial Judgement, para. 6101.
[4935] Trial Judgement, paras. 6101, 6121, 6186.
[4936] Ntahobali Notice of Appeal, paras. 328, 329; Ntahobali Appeal Brief, para. 972. The Appeals Chamber notes that, in his notice of appeal, Ntahobali also argues that the Trial Chamber erred in fact in finding him guilty of persecution as a crime against humanity. *See* Ntahobali Notice of Appeal, para. 329. However, the Appeals Chamber notes that Ntahobali did not develop this allegation in his appeal brief. The Appeals Chamber therefore finds that Ntahobali has abandoned this allegation of error.
[4937] Ntahobali Appeal Brief, paras. 973-975. *Cf.* AT. 16 April 2015 p. 27. Ntahobali points out that, by contrast, the Rome Statute of the International Criminal Court ("Rome Statute" and "ICC", respectively) lists ethnicity among the discriminatory grounds of persecution. *See ibid.*, para. 973, *referring to* Rome Statute, Article 7(1)(h). Ntahobali further refers to the holding in the *Semanza* Trial Judgement that the "enumerated grounds of discrimination for persecution […] do not include national or ethnic grounds". *See ibid.*, para. 978, *referring to Semanza* Trial Judgement, para. 350.

Judgement, which itself refers to "persecution on political grounds of an ethnic character".[4938] Ntahobali submits that, in the present case, there is no evidence to support a similar conclusion.[4939] In light of these alleged errors, Ntahobali submits that the Appeals Chamber should overturn the Trial Chamber's findings and acquit him of persecution as a crime against humanity.[4940]

2129. The Prosecution responds that Ntahobali misunderstands the current state of the law on persecution as a crime against humanity and that the Trial Chamber correctly defined this crime in line with the Appeals Chamber's jurisprudence as "an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law, and was carried out deliberately with the intention to discriminate on one of the protected grounds."[4941] It contends that the fact that Ntahobali "acted with discriminatory intent, discriminating on ethnic grounds[,] […] constitutes the crime of persecution as a crime against humanity".[4942]

2130. At the appeals hearing, in response to the Appeals Chamber's invitation to "discuss whether the relevant factual findings of the Trial Chamber and the evidence contained in the record would support the conclusion that Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje committed persecution as a crime against humanity on *political* or *racial* grounds",[4943] the Prosecution argued that Tutsis were targeted on racial and political grounds.[4944] It added that, "[t]argeting the Tutsi ethnic group means targeting a group on racial grounds, because "'racial grounds' in Article 3(h) of the [S]tatute includes ethnic grounds."[4945] It also argued that the Trial Chamber took judicial notice that Tutsis are an ethnic group, which under customary international law also made them a racial group and that, in the *Nahimana et al.* Appeal Judgement, the Appeals Chamber found that "genocidal intent to destroy the Tutsi group necessarily implies the discriminatory intent required for persecution against Tutsis".[4946]

[4938] Ntahobali Appeal Brief, paras. 975, 976, *quoting Nahimana et al*. Trial Judgement, para. 1071 *and referring to Nahimana et al.* Appeal Judgement, paras. 986-988, 1002, *Bagosora et al.* Trial Judgement, para. 2209.
[4939] Ntahobali Appeal Brief, para. 977. *See also* AT. 16 April 2015 p. 27.
[4940] Ntahobali Notice of Appeal, para. 329; Ntahobali Appeal Brief, para. 979.
[4941] Prosecution Response Brief, para. 1217, *quoting* Trial Judgement, para. 6096 *and referring to Nahimana et al.* Appeal Judgement, para. 985.
[4942] Prosecution Response Brief, para. 1217.
[4943] 25 March 2015 Order, p. 1 (emphasis added).
[4944] AT. 14 April 2015 p. 50.
[4945] AT. 14 April 2015 p. 50, *referring to Đordević* Appeal Judgement, paras. 892, 930, *Đordević* Trial Judgement, paras. 1758, 2230, International Convention on the Elimination of All Forms of Racial Discrimination, adopted by General Assembly Resolution 2106(XX), UN Doc. A/RES/20/2106, 21 December 1965, entered into force on 4 January 1969 ("CERD"), Article 1.1. *See also* AT. 16 April 2015 p. 12.
[4946] AT. 14 April 2015 p. 51, *referring to Nahimana et al.* Appeal Judgement, para. 1010. *See also* AT. 16 April 2015 p. 13.

2131. The Prosecution further argued that "Defence and Prosecution experts agreed [that] the government's policy was to commit genocide against the Tutsis" and that "[t]his genocidal policy discriminated on political grounds based on ethnicity or race".[4947] According to the Prosecution, "Nyiramasuhuko and the principal perpetrators subscribed to this policy" and "Nyiramasuhuko issued directives specifically targeting Tutsis, she agreed with calls for killing of Tutsis on the 19th of April, and then implemented this policy at the *préfecture* office by ordering them to be killed."[4948] With respect to Ntahobali, the Prosecution submitted that the Trial Chamber's findings support the conclusion that the "victims of Ntahobali's crimes[…] were targeted on the basis of racial and political motives".[4949]

2132. Ntahobali replied that the Trial Chamber did not conclude that he committed persecution on political or racial grounds and that it did not rely on the evidence that the Tutsis were a different racial group from the Hutus.[4950] He argued that the existence of a genocidal government policy does not establish discrimination on political grounds and that there is no evidence that Ntahobali committed persecution on racial or political grounds.[4951] Ntahobali reiterated that the Statute distinguishes between race and ethnicity.[4952] Nsabimana joined Ntahobali's arguments.[4953]

2133. Ndayambaje similarly argued that the Trial Chamber erred in finding that he possessed the requisite discriminatory intent and that there is no evidence in the record that he possessed the intent to discriminate on political or racial grounds.[4954] Ndayambaje submitted that, by listing political, religious, and racial grounds, the language of the Statute specifically excludes ethnic and national grounds and that the Trial Chamber erred in impermissibly expanding these grounds by relying on ethnicity.[4955]

2134. The Appeals Chamber notes that the Trial Chamber did not expressly state on which discriminatory ground Ntahobali was found to have acted when finding him guilty of persecution as a crime against humanity in paragraph 6101 of the Trial Judgement. However, from a reading of this paragraph in the context of the section on persecution in the Trial Judgement, which does not

[4947] AT. 14 April 2015 p. 51, *referring to* Trial Judgement, paras. 656, 806, *Nahimana et al.* Trial Judgement, para. 1071, *Nahimana et al.* Appeal Judgement, para. 996.
[4948] AT. 14 April 2015 p. 51.
[4949] AT. 16 April 2015 pp. 11, 12. *See also ibid.*, p. 13.
[4949] AT. 16 April 2015 p. 27.
[4950] AT. 16 April 2015 p. 27.
[4951] AT. 16 April 2015 p. 27.
[4952] AT. 16 April 2015 p. 27. Similarly, Ntahobali submitted that Articles 4, 5, and 7 of the CERD distinguish between race and ethnicity. *See ibid.*
[4953] AT. 16 April 2015 p. 64. Nyiramasuhuko and Kanyabashi did not specifically respond to the Prosecution's oral arguments.
[4954] AT. 21 April 2015 pp. 64, 65.

enumerate or discuss any other discriminatory ground than ethnicity, it is clear that the Trial Chamber convicted Ntahobali of persecution as a crime against humanity on ethnic grounds.[4956]

2135. Article 3(h) of the Statute, which confers jurisdiction on the Tribunal over the crime of persecution as a crime against humanity, reads as follows:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: […] (h) Persecutions on political, racial and religious grounds[.]

2136. The Appeals Chamber notes that Article 3(h) of the Statute limits the jurisdiction of the Tribunal over persecution as a crime against humanity to three listed discriminatory grounds, namely political, racial, and religious grounds.[4957] While persecution as a crime against humanity under customary international law might not be restricted to these three discriminatory grounds, the Appeals Chamber recalls that "it [was] open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law."[4958] Whether or not the Security Council may have defined the crime of persecution as a crime against humanity more narrowly than necessary under

[4955] AT. 21 April 2015 pp. 64, 65. Ndayambaje adds that the interpretation of the Statute has to be strict and cannot be expanded by relying on international conventions. *See ibid*., para. 65.

[4956] *See* Trial Judgement, paras. 6095-6097, 6100, 6101, 6121. Similarly, the Appeals Chamber notes that the Trial Chamber did not expressly state on which discriminatory ground Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje were found to have acted when finding them guilty of persecution as a crime against humanity in paragraphs 6099, 6103, 6106, and 6108 of the Trial Judgement, respectively. However, from a reading of these paragraphs in the context of the section on persecution in the Trial Judgement, which does not enumerate or discuss any other discriminatory ground than ethnicity, it is clear that the Trial Chamber convicted them of persecution as a crime against humanity on ethnic grounds. *See ibid*., paras. 6095-6097, 6098, 6099, 6102, 6103, 6105-6108, 6120, 6122, 6124, 6125.

[4957] *Cf. Tadić* Appeal Judgement, para. 284; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on Jurisdiction"), paras. 78, 140-141. The Appeals Chamber notes that this is similar to the Statute of the ICTY. *See* Article 5(h) of the Statute of the ICTY. On the contrary, the Appeals Chamber observes that the Rome Statute does not limit the jurisdiction of the ICC to an exhaustive list of discriminatory grounds on which persecution as a crime against humanity must be committed. Indeed, Article 7(1)(h) of the Rome Statute contains an illustrative (open-ended) list of prohibited grounds for persecution as a crime against humanity, which reads as follows: "For the purpose of this Statute, 'crimes against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: […] (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". The Appeals Chamber further notes that the Statute of the Special Court for Sierra Leone ("SCSL"), which was adopted after the Rome Statute, limits the jurisdiction of the SCSL over the crime of persecution as a crime against humanity to an exhaustive list of four discriminatory grounds, namely political, racial, ethnic, and religious grounds. *See* Article 2(h) of the Statute of the SCSL.

[4958] *Tadić* Appeal Judgement, para. 296. *See also Tadić* Appeal Decision on Jurisdiction, paras. 78, 140, 141. *Cf. also Tadić* Appeal Judgement, paras. 249, 251.

customary international law, the Tribunal's jurisdiction is limited to persecution on political, racial, and religious grounds.[4959]

2137. As ethnicity is not enumerated among the discriminatory grounds of persecution in Article 3(h) of the Statute, the question remains whether it is subsumed under one of the three listed discriminatory grounds, more specifically under the "racial" ground. The Appeals Chamber recalls that, while the Statute "is legally a very different instrument from an international treaty",[4960] it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which reflects customary international law.[4961] In this regard, the Appeals Chamber observes that the *chapeau* of Article 3 of the Statute distinguishes "ethnicity" from "race" in the listed discriminatory grounds for the attack against a civilian population.[4962] The Appeals Chamber, Judge Agius dissenting, considers that, according to the ordinary meaning of the terms of the provision, such distinction reflects the autonomy between the two notions. In the view of the Appeals Chamber, Judge Agius dissenting, this conclusion is also supported by a contextual reading of Article 3 of the Statute which makes it clear that "ethnicity" cannot be encapsulated in "race". Indeed, interpreting the discriminatory ground of "race" in Article 3(h) of the Statute as including "ethnicity" would render the distinction in the *chapeau* of Article 3 of the Statute redundant, illogical, and superfluous.[4963] According to a textual

[4959] *Cf. Tadić* Trial Judgement, para. 711 ("There are no definitive grounds in customary international law on which persecution must be based and a variety of different grounds have been listed in international instruments. The grounds in the Statute are based on the Nürnberg Charter which included race, religion and politics as the three grounds, as did Control Council Law No. 10, both of which were drafted to address the European situation. In contrast the Tokyo Charter excluded religion as a basis for persecution, given its inapplicability to the Pacific theatre of operation while, alternatively, the Convention on the Prevention and Punishment of the Crime of Genocide contains the additional ground of ethnicity as do the 1991 and 1996 versions of the I.L.C. Draft Code, whereas the original 1954 Draft Code included culture as a basis for persecution. The possible discriminatory bases which the International Tribunal is empowered to consider are limited by the Statute to persecutions undertaken on the basis of race, religion and politics.") (internal references omitted).

[4960] *Tadić* Appeal Judgement, para. 282.

[4961] Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, Vol. 1155, p. 331 ("Vienna Convention"). *See also Tadić* Appeal Judgement, para. 282, *referring to* International Court of Justice, *Competence of the General Assembly for the admission of a State to the United Nations*, Advisory Opinion: I.C.J. Reports 1950, p. 4; *Aleksovski* Appeal Judgement, para. 98, *referring to* Article 31(1) of the Vienna Convention ("Ultimately, that question must be answered by an examination of the Tribunal's Statute and Rules, and a construction of them which gives due weight to the principles of interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties."); *Čelebići* Appeal Judgement, para. 67 and references cited therein (reiterating that Article 31 of the Vienna Convention reflects customary international law); *Jelisić* Appeal Judgement, para. 35 ("Following the settled jurisprudence of the Tribunal, those words [(of Rules 98*bis*(B) of the ICTY Rules of Procedure and Evidence)] are to be 'interpreted in good faith in accordance with the ordinary meaning to be given to [them] in their context and in the light of [their] object and purpose', within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties 1969." (alteration in the original)).

[4962] *See supra*, para. 2135.

[4963] The Appeals Chamber recalls that "it is an elementary rule of interpretation that one should not construe a provision or a part of [it] as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements." *See Tadić* Appeal Judgement, para. 284. The Appeals Chamber further observes that the distinction between "race" and "ethnicity" is also clearly

and contextual interpretation of Article 3(h) of the Statute, the Appeals Chamber, Judge Agius dissenting, therefore finds that "ethnicity" cannot be interpreted as being included in the list of discriminatory grounds enumerated therein.

2138. Moreover, the Appeals Chamber notes that the definition of persecution as a crime against humanity is well settled in the jurisprudence of the Tribunal. As reiterated by the Appeals Chamber in the *Nahimana et al.* case, "the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[4964] Thus, in the *Nahimana et al.* case, the Appeals Chamber specified the *mens rea* requirement for persecution as a crime against humanity and, contrary to the Trial Chamber's holding, did not extend it to include "ethnicity" as an additional discriminatory ground. The Appeals Chamber notes that to support its conclusion that "discrimination on ethnic grounds could constitute persecution if the accompanying violation of rights was sufficiently serious, such as killings, torture and rape", the Trial Chamber relied, *inter alia*, on paragraphs 986 through 988, and 1002 of the *Nahimana et al.* Appeal Judgement.[4965] However, the Appeals Chamber observes that the Trial Chamber's reliance on these paragraphs of the *Nahimana et al.* Appeal Judgement to define the *mens rea* of the crime of persecution is misplaced.[4966] Contrary to the Trial Chamber's finding, these paragraphs of the *Nahimana et al.* Appeal Judgement deal with the *actus reus* – and not the *mens rea* – of the crime of persecution, holding that hate speech targeting the population on the basis of ethnicity could constitute an act, which discriminates in fact.[4967]

2139. Accordingly, the Appeals Chamber finds that the Trial Chamber committed an error of law in considering that "discrimination on ethnic grounds could constitute persecution if the accompanying violation of rights was sufficiently serious, such as killings, torture and rape."[4968] It therefore applied an incorrect legal standard in convicting Ntahobali of persecution as a crime

established in the definition of genocide given in Article 2 of the Statute ("Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group […].").

[4964] *Nahimana et al.* Appeal Judgement, para. 985. *See also*, *e.g.*, *Kvočka et al.* Appeal Judgement, para. 320; *Kordić and Čerkez* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 131; *Krnojelac* Appeal Judgement, para. 185.

[4965] Trial Judgement, para. 6097, *referring to Bagosora et al.* Trial Judgement, para. 2209, *Nahimana et al*. Appeal Judgement, paras. 986-988, 1002. The Appeals Chamber notes that paragraph 2209 of the *Bagosora et al.* Trial Judgement also refers to paragraphs 986 through 988, and 1002 of the *Nahimana et al.* Appeal Judgement.

[4966] *See* Trial Judgement, para. 6097.

[4967] *See Nahimana et al.* Appeal Judgement, para. 986. The Appeals Chamber further notes that, in the *Nahimana et al.* case, the convictions for persecution as a crime against humanity were based on the Trial Judgement's finding that "the discriminatory intent of the Accused falls within the scope of crime against humanity of persecution on political grounds of an ethnic character", noting that "RTLM, *Kangura* and CDR […] essentially merged political and ethnic identity, defining their political target on the basis of ethnicity and political positions relating to ethnicity." *See Nahimana et al.* Trial Judgement, para. 1071. This finding was not challenged on appeal.

against humanity on the basis that he acted with discriminatory intent on ethnic grounds.[4969] The Trial Chamber applied a similar incorrect legal standard in convicting Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje of persecution as a crime against humanity on the basis that they acted with discriminatory intent on ethnic grounds.[4970] Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.

2140. After a careful review of the Trial Judgement, the Appeals Chamber, Judge Agius dissenting, finds that the Trial Chamber's factual findings do not support the conclusion that Ntahobali as well as Nyiramasuhuko, Nsabimana, Kanyabashi, and Ndayambaje committed persecution as a crime against humanity on one of the three discriminatory grounds enumerated in Article 3(h) of the Statute, namely on political, racial, or religious grounds. The Appeals Chamber notes that the Prosecution has failed to refer to Trial Chamber's findings or evidence to the contrary.

2141. In light of the above, the Appeals Chamber, Judge Agius dissenting, grants Ground 4.6 of Ntahobali's appeal and reverses his convictions for persecution as a crime against humanity. The Appeals Chamber, Judge Agius dissenting, *proprio motu*, further reverses Nyiramasuhuko's, Nsabimana's, Kanyabashi's, and Ndayambaje's convictions for persecution as a crime against humanity. The Appeals Chamber will examine the impact of these findings, if any, in Section XII below.

[4968] Trial Judgement, para. 6097.
[4969] Trial Judgement, paras. 6100, 6101, 6121.
[4970] Trial Judgement, paras. 6098, 6099, 6102, 6103, 6105-6108, 6120, 6122, 6124, 6125.

VI. APPEAL OF SYLVAIN NSABIMANA

2142. The Trial Chamber found Nsabimana guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence.[4971]

2143. Nsabimana raises challenges related to his indictment. He also contends that the Trial Chamber erred in finding that he tacitly approved the inflammatory speeches given by Kambanda and Sindikubwabo at his swearing-in ceremony. He further raises challenges related to the admission of, and reliance on, alleged prejudicial evidence. Finally, Nsabimana contends that the Trial Chamber erred in finding that he was responsible for aiding and abetting by omission the killings of Tutsi refugees abducted from the Butare Prefecture Office. The Appeals Chamber will address these contentions in turn.

[4971] Trial Judgement, paras. 5893, 5900, 5903, 5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186. The Appeals Chamber notes that, read in context, the references to Nsabimana's responsibility for aiding and abetting "the killings that occurred at the Butare *préfecture* office", "the killings of Tutsis at the Butare *préfecture* office" or "the killings at the Butare *préfecture* office" in paragraphs 6058, 6102, and 6170 of the Trial Judgement must be understood as referring to the killing of the Tutsi refugees who were abducted from the prefectoral office.

A. Indictment (Grounds 1, 2, and 11)

2144. The Trial Chamber found that Nsabimana, in his capacity as prefect, was under the legal duty to provide assistance to people in danger and to protect civilians against acts or threats of violence pursuant to Rwandan law and international humanitarian law.[4972] It also determined that Nsabimana was aware of the night-time attacks conducted against the Tutsis who had sought refuge at the Butare Prefecture Office from mid-May to mid-June 1994 and was presented with multiple requests for assistance from refugees but refused to help.[4973] The Trial Chamber held that, "[b]y refusing to take action in the midst of the continuing attacks at the [Butare Prefecture Office], Nsabimana assisted Nyiramasuhuko, Ntahobali and the *Interahamwe* in the perpetration of their attacks" and that his failure to act had a substantial effect on the realisation of their crimes.[4974] It also found that Nsabimana: (i) knew that those taking refuge at the prefectoral office were being abducted, raped, and killed; (ii) was aware of the perpetrators' genocidal intent; and (iii) knew that his failure to act assisted in the commission of the crimes.[4975]

2145. On this basis, the Trial Chamber convicted Nsabimana of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* by failing to discharge his duty to protect civilians.[4976]

2146. When reaching its findings on Nsabimana's responsibility for the crimes committed at the prefectoral office, the Trial Chamber primarily referred to paragraphs 6.36 and 6.42 of the Indictment.[4977] The Indictment indicates in relevant parts that the allegations in paragraph 6.36 were

[4972] Trial Judgement, paras. 5893, 5895-5899. *See also ibid.*, para. 5894.
[4973] Trial Judgement, paras. 2807, 5900, 5904, 5905.
[4974] Trial Judgement, para. 5900. *See also ibid.*, paras. 5903, 5906, 5972.
[4975] Trial Judgement, paras. 5904, 5905. *See also ibid.*, para. 5972.
[4976] Trial Judgement, paras. 5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.
[4977] Trial Judgement, paras. 2783, 2785, 2789, 2790, fn. 7796. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nsabimana and Nteziryayo Indictment. Paragraphs 6.36 and 6.42 of the Nsabimana and Nteziryayo Indictment read as follows:

> 6.36 As early as 7 April 1994, numerous members of the Tutsi population sought refuge at the Butare town *préfecture* offices. As from 19 April 1994, *Interahamwe* militiamen and soldiers took advantage of this and repeatedly went to the *préfecture* offices to attack the refugees. The attacks took place while *Préfet* Sylvain Nsabimana was present and going about his daily business at the *préfecture* offices. Some of the refugees asked *Préfet* Sylvain Nsabimana to protect them from the violent acts of the militiamen and soldiers. Sylvain Nsabimana did nothing to put a definitive end to the attacks. Refugees were often forcibly abducted, assaulted and sometimes killed outright.
>
> 6.42 The entire *préfecture* of Butare was the scene of massacres of the Tutsi population involving Pauline Nyiramasuhuko, André Rwamakuba, Alphonse Nteziryayo, Joseph Kanyabashi, Ladislas Ntaganzwa, Elie

being pursued against Nsabimana under all counts, except Count 4, pursuant to Articles 6(1) and 6(3) of the Statute.[4978] Paragraph 6.42 was not relied upon in support of any count in the Indictment.[4979]

2147. The Trial Chamber noted that the sentence "The attacks took place while *Préfet* Sylvain Nsabimana was present and going about his daily business at the *préfecture* offices" in paragraph 6.36 of the Indictment "could mean either: (1) that Nsabimana would go to his office during the time period in which the attacks occurred at the [Butare Prefecture Office]; or (2) that the attacks occurred while Nsabimana was sitting in his office at the [Butare Prefecture Office]."[4980] The Trial Chamber concluded that, from reading paragraph 6.36 in conjunction with paragraph 6.42 of the Indictment and the fact that paragraph 6.36 was pleaded in support of both Articles 6(1) and 6(3) of the Statute,[4981] "it [was] clear that the Prosecution sought to prove that Nsabimana, as *préfet*, was responsible for attacks occurring throughout Butare *préfecture* including those occurring at the [Butare Prefecture Office], whether or not he was physically present."[4982] The Trial Chamber also found that Nsabimana was charged with the "culpable omission" on the basis of which he was convicted.[4983]

2148. With regard to the circumstances and timeframe of the attacks at the prefectoral office, the Trial Chamber found that, when read as a whole, the Indictment adequately pleaded that: (i) the attacks included the forcible abduction, assault, and killing of refugees;[4984] and (ii) the refugees' requests for assistance to Nsabimana occurred between his swearing-in as prefect on 19 April 1994 and his replacement on 17 June 1994, while he was going about his daily business at the prefectoral office.[4985] The Trial Chamber considered that details such as the prefect's "attitude and reactions" as well as the form of the requests for assistance constituted evidence which did not need to be pleaded in the Indictment.[4986]

2149. Nsabimana submits that the Trial Chamber erred in law and in fact in expanding the scope of paragraph 6.36 of the Indictment by reading it in conjunction with paragraph 6.42 of the Indictment to conclude that he was charged with responsibility for all attacks that occurred at the

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> Ndayambaje, et [*sic*] Shalome [*sic*] Arsène Ntahobali. These massacres occur[r]ed while Sylvain Nsabimana was exercising his authority as *Préfet* of Butare

[4978] Nsabimana and Nteziryayo Indictment, pp. 41-48.
[4979] Nsabimana and Nteziryayo Indictment, pp. 41-48.
[4980] Trial Judgement, para. 2789.
[4981] The Trial Chamber observed that neither Article 6(1) nor Article 6(3) of the Statute requires the accused to be present during the commission of the crime to be held accountable. *See* Trial Judgement, para. 2789.
[4982] Trial Judgement, para. 2789.
[4983] Trial Judgement, para. 5906, *referring*, *inter alia*, *to Mrkšić and Šljivančanin* Appeal Judgement, paras. 140, 141.
[4984] Trial Judgement, para. 2790, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.36.
[4985] Trial Judgement, para. 2790, *referring to* Nsabimana and Nteziryayo Indictment, paras. 6.21, 6.34, 6.36.

prefectoral office whether or not he was present.[4987] He contends that paragraph 6.36 gave him notice of his responsibility related to day-time attacks conducted in his presence and that the night-time attacks conducted in his absence were material facts which were not pleaded in the Indictment.[4988] He argues that, if anything, the fact that paragraph 6.36 was subject to two interpretations demonstrates that the paragraph was not as clear as required by the jurisprudence.[4989] According to Nsabimana, paragraph 6.42 – which he notes was not specifically pleaded in support of any charge – could not reasonably be relied upon as explaining or particularising the specific charge pleaded in paragraph 6.36 because it was too general and vague.[4990] He also argues that the Trial Chamber erred in taking into account the fact that paragraph 6.36 of the Indictment was pursued under both Articles 6(1) and 6(3) of the Statute when interpreting it.[4991]

2150. Nsabimana further contends that neither paragraph 6.36 of the Indictment nor paragraph 6.42 of the Indictment contains the necessary details regarding his acts or course of conduct that formed the basis of the charges against him.[4992] He also submits that the Trial Chamber erred in law in convicting him based on a duty to act imposed under Article 256 of the Rwandan Penal Code and provisions of international humanitarian law, in particular Articles 7 and 13 of Additional Protocol II, because the Indictment failed to plead that he incurred criminal responsibility for failing in a duty to act under these provisions.[4993] Nsabimana argues that these legal obligations constituted material facts that should have been pleaded in the Indictment and that, by merely referring to his "omission" in the Indictment, the Prosecution failed to sufficiently inform him of the nature and cause of the charges against him.[4994]

2151. In addition, Nsabimana contends that the Trial Chamber erred in: (i) considering that the details concerning his attitude and reactions did not need to be pleaded in the Indictment; and (ii) failing to find that the Indictment did not plead with sufficient specificity the identities of the

[4986] Trial Judgement, para. 2790.
[4987] Nsabimana Notice of Appeal, paras. 16, 18, 19; Nsabimana Appeal Brief, paras. 9, 10, 28, 33. *See also* AT. 16 April 2015 pp. 48-53 (French).
[4988] Nsabimana Appeal Brief, paras. 7, 8, 12, 17, 18, 23, 29, 32-34, 38. *See also ibid.*, para. 129; Nsabimana Reply Brief, paras. 5, 6.
[4989] Nsabimana Appeal Brief, para. 39; Nsabimana Reply Brief, para. 7; AT. 16 April 2015 pp. 50, 51 (French).
[4990] Nsabimana Appeal Brief, paras. 11, 13, 20-22; AT. 16 April 2015 pp. 49, 50 (French). *See also* Nsabimana Reply Brief, para. 4.
[4991] Nsabimana Appeal Brief, paras. 14-16. Nsabimana argues that the fact "[t]hat responsibility under Articles 6(1) and 6(3) does not require the presence of the accused is a matter relating to the constituent elements of the crime, and has nothing to do with the standards for interpreting indictments, especially a defective one." *See ibid.*, para. 16.
[4992] Nsabimana Notice of Appeal, para. 28; Nsabimana Appeal Brief, para. 24, *referring to Ntagerura et al.* Appeal Judgement, para. 25.
[4993] Nsabimana Notice of Appeal, paras. 90-92; Nsabimana Appeal Brief, paras. 349-353.
[4994] Nsabimana Appeal Brief, paras. 353-358. Nsabimana points out that, in the *Mrkšić and Šljivančanin* Appeal Judgement relied upon by the Trial Chamber with respect to pleading of his culpable omission, the Appeals Chamber noted that the relevant indictment referred to the legal provisions imposing obligations on Veselin Šljivančanin as an army officer. *See idem.*

refugees who requested assistance from him, the dates of those requests, and the time period.[4995] He also argues that it was erroneous for the Trial Chamber to rely on paragraph 6.34 of the Indictment regarding the timeframe of his alleged criminal conduct since this paragraph was not pleaded in support of any counts.[4996] In his view, the fact that the Trial Chamber needed to read several paragraphs of the Indictment together to conclude that he received notice proves that the charge in paragraph 6.36 of the Indictment was ambiguous and not properly pleaded.[4997] Nsabimana contends that the Prosecution did not cure these defects.[4998]

2152. For these reasons, Nsabimana submits that he was not fully informed of the charge against him and could not adequately prepare his defence and that, as a result, the verdict against him should be set aside.[4999]

2153. The Prosecution responds that the Trial Chamber correctly found that the Indictment, when read as whole, provided Nsabimana with adequate notice that he was being charged with attacks that occurred between 19 April and 17 June 1994 at the prefectoral office whether or not he was present.[5000] It asserts that paragraph 6.42 of the Indictment set the parameters for Nsabimana's responsibility and that paragraph 6.36 of the Indictment more precisely pleaded his responsibility for the killings that took place at the prefectoral office.[5001] It also argues that it was under no obligation to plead the legal provisions which imposed the duty to act on Nsabimana in the Indictment.[5002] The Prosecution submits that paragraphs 6.36 and 6.41 of the Indictment clearly pleaded the nature of its case and Nsabimana's role in the alleged crimes.[5003]

[4995] Nsabimana Notice of Appeal, paras. 26, 28, 29; Nsabimana Appeal Brief, paras. 25-27, 40-44, 49. *See also* AT. 16 April 2015 pp. 39, 40. Under Ground 6 of his appeal, Nsabimana also argues that the Trial Chamber erred in relying on Prosecution Witness TQ's evidence that he sought Nsabimana's assistance to bury the orphans killed at the *Groupe scolaire* but that Nsabimana told him he was a madman as this allegation was not pleaded in the Nsabimana and Nteziryayo Indictment. *See* Nsabimana Appeal Brief, paras. 210, 211.

[4996] Nsabimana Appeal Brief, para. 42.

[4997] Nsabimana Appeal Brief, paras. 39, 41, 43-46, 53.

[4998] Nsabimana Notice of Appeal, para. 30; Nsabimana Appeal Brief, para. 52.

[4999] Nsabimana Notice of Appeal, paras. 20, 31, 93; Nsabimana Appeal Brief, paras. 26-29, 36, 54, 56, 355, 361; Nsabimana Reply Brief, para. 20.

[5000] Prosecution Response Brief, paras. 1242-1247, 1256, 1261; AT. 16 April 2015 pp. 52, 53.

[5001] Prosecution Response Brief, para. 1250. *See also* AT. 16 April 2015 p. 52.

[5002] Prosecution Response Brief, paras. 1371-1375; AT. 16 April 2015 pp. 54, 55. At the appeals hearing, the Prosecution also argued that paragraphs 2.6 and 3.4 of the Nsabimana and Nteziryayo Indictment set out "the duty that Nsabimana was under" as well as the fact that the victims referred to in the Nsabimana and Nteziryayo Indictment were protected persons under Article 3 common to the Geneva Conventions and Additional Protocol II. It added that the Nsabimana and Nteziryayo Indictment "gave comparable detail as the indictment that was 'approved' in the *Mrkšić and Šljivančanin* [A]ppeal [J]udgement." *See* AT. 16 April 2015 pp. 53, 54.

[5003] Prosecution Response Brief, paras. 1248, 1256, 1373; AT. 16 April 2015 pp. 53, 54. The Prosecution further responds that Nsabimana was not prejudiced in the preparation of his defence because the Prosecution Pre-Trial Brief, together with the annotated indictment disclosed on 25 August 1999 and prior written statements of several witnesses, provided him with further timely, clear, and consistent notice of the charges against him. It adds that Nsabimana's conduct during the proceedings reflected that he was on notice of the allegations against him, including concerning the night-time attacks. *See* Prosecution Response Brief, paras. 1267, 1268, 1271-1276, 1279-1282; AT. 16 April 2015 pp. 54, 55. In reply, Nsabimana disputes that the Prosecution cured any defects in the Nsabimana and Nteziryayo

2154. The Appeals Chamber finds no merit in Nsabimana's contention that the Trial Chamber impermissibly expanded the scope of paragraph 6.36 of the Indictment by convicting him in relation to night-time attacks conducted in his absence. The Appeals Chamber finds that paragraph 6.36 could be reasonably interpreted in two different ways regarding whether or not the attacks referred to therein were conducted in Nsabimana's presence at the prefectoral office. Nsabimana is nonetheless correct that the fact that the paragraph was open to two interpretations in this regard created ambiguity and that this ambiguity was not eliminated by paragraph 6.42 of the Indictment[5004] or the fact that the allegation set forth in paragraph 6.36 was pursued under both Articles 6(1) and 6(3) of the Statute.[5005]

2155. However, the Appeals Chamber is of the view that the ambiguity in paragraph 6.36 of the Indictment as to whether or not Nsabimana incurred responsibility solely in relation to the attacks that took place during the day in his presence was eliminated by paragraph 6.41 of the Indictment in which the Prosecution pleaded that refugees were abducted from the prefectoral office and later killed, without specifying what time of day those events occurred or if Nsabimana was present.[5006] The Prosecution specifically relied upon paragraph 6.41 against Nsabimana in support of all counts, except Count 4.[5007] Moreover, by expressly pleading in paragraph 6.36 that some of the refugees asked Nsabimana to protect them from the violent acts of the militiamen and soldiers, the Prosecution unequivocally gave notice to Nsabimana that he was alleged to have known that the Tutsis who had sought refuge at the prefectoral office were the victims of abductions and killings, and that his source of knowledge was not premised on him being present during the attacks. As such, the Appeals Chamber finds that, read as a whole, the Indictment provided Nsabimana with adequate notice that he was charged with having failed to protect the refugees at the prefectoral

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Indictment and that his conduct during the proceedings reflected that he was aware of the allegations concerning the night-time attacks. *See* Nsabimana Reply Brief, paras. 22-40. *See also* AT. 16 April 2015 pp. 51, 52 (French).

[5004] In the view of the Appeals Chamber, the allegation that the massacres of the Tutsi population occurred "while Sylvain Nsabimana was exercising his authority as *Préfet* of Butare" pleaded in paragraph 6.42 of the Nsabimana and Nteziryayo Indictment did not clarify this particular matter.

[5005] The Appeals Chamber considers that the fact that the allegation set forth in paragraph 6.36 of the Nsabimana and Nteziryayo Indictment was pursued under both Articles 6(1) and 6(3) of the Statute is irrelevant to the question of whether Nsabimana was alleged to have been present during the attacks; the question is not whether Nsabimana was put on notice that he could be held liable for a failure to act – which is clear from paragraph 6.36 – but whether he was alleged to have been present or not during these specific attacks.

[5006] Paragraph 6.41 of the Nsabimana and Nteziryayo Indictment reads as follows:

> 6.41 Between 19 April and late June 1994, Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, accompanied by *Interahamwe* militiamen and soldiers, on several occasions went to the *préfecture* offices to abduct Tutsi refugees, whom they later killed. Those who attempted to resist were assaulted and sometimes killed outright. […].

[5007] *See* Nsabimana and Nteziryayo Indictment, pp. 41-48.

office who he knew were subjected to various forms of abuse at any time of day, regardless of whether he was present or not.[5008]

2156. The Appeals Chamber also rejects Nsabimana's undeveloped contention that the Indictment did not contain the necessary details regarding his acts or course of conduct that formed the basis of the charge against him concerning the crimes committed as a result of the attacks at the Butare Prefecture Office. Paragraphs 6.32, 6.53, and 6.59 of the Indictment expressly allege that Nsabimana "aided and abetted" the population, his subordinates, or others in massacring the Tutsis in Butare Prefecture[5009] and several other paragraphs of the Indictment repeatedly refer to Nsabimana's failure as prefect of Butare to take measures to stop the massacres of Tutsis taking place in the prefecture during his tenure as prefect, including his failure to put an end to the killing of the Tutsis who had sought refuge at the prefectoral office.[5010] As noted by the Trial Chamber,[5011] the charging section of the Indictment also made it clear that Nsabimana was charged with "the acts and omissions described" in these paragraphs. The Appeals Chamber does not consider that the legal provisions from which Nsabimana's duty to act arose were material facts that needed to be pleaded in the Indictment as it was clear from the Indictment that his duty arose from his position as prefect of Butare.[5012]

2157. The Appeals Chamber further finds that Nsabimana fails to show any error in the Trial Chamber's determinations that the details regarding his "attitude and reactions" did not need to be pleaded in the Indictment and that the name of a particular refugee who requested help from him and was later abducted was not a material fact but evidence relevant to the issue of Nsabimana's knowledge of the attacks at the prefectoral office.[5013] Likewise, Nsabimana does not demonstrate

[5008] To the extent that Nsabimana argues that the Trial Chamber erred by interpreting the Nsabimana and Nteziryayo Indictment as charging him with responsibility for attacks that occurred throughout Butare Prefecture, the Appeals Chamber notes that the Trial Chamber did not find that Nsabimana was criminally responsible in relation to all attacks occurring throughout Butare Prefecture, but only in relation to the attacks that occurred at the prefectoral office. *See* Nsabimana Appeal Brief, paras. 9, 33. The Appeals Chamber therefore finds no merit in Nsabimana's submission.
[5009] *See also* Nsabimana and Nteziryayo Indictment, para. 6.61.
[5010] *See* Nsabimana and Nteziryayo Indictment, paras. 6.26, 6.36, 6.60. *See also ibid.*, paras. 6.35, 6.37, 6.42.
[5011] Trial Judgement, para. 5906, fn. 14770, *referring to Mrkšić and Šljivančanin* Appeal Judgement, paras. 140-141; Nsabimana and Nteziryayo Indictment, pp. 41-49.
[5012] The Appeals Chamber recalls that Nsabimana points out that, in the *Mrkšić and Šljivančanin* Appeal Judgement relied upon by the Trial Chamber with respect to the pleading of his culpable omission, the Appeals Chamber noted that the relevant indictment referred to the legal provisions imposing obligations on Veselin Šljivančanin as an army officer. *See supra*, fn. 4994. The Appeals Chamber notes that, when examining whether Veselin Šljivančanin was put on adequate notice that he was charged with aiding and abetting by omission, it referred, *inter alia*, to the fact that, in the indictment against him, Veselin Šljivančanin was alleged to be subject to specific laws and regulations as an army officer which obliged officers and their subordinates to observe the laws of war. *See Mrkšić and Šljivančanin* Appeal Judgement, paras. 139-141. However, the Appeals Chamber does not consider that its reference to this aspect of Veselin Šljivančanin's indictment should be interpreted as requiring the Prosecution to plead these specific facts in the indictment to provide adequate notice to the accused of the nature and cause of the charge against him.
[5013] With respect to Nsabimana's argument that the Trial Chamber erred in relying on Witness TQ's evidence that he sought Nsabimana's assistance to bury the orphans killed at the *Groupe scolaire* but that Nsabimana told him he was a madman as this allegation was not pleaded in the Nsabimana and Nteziryayo Indictment, the Appeals Chamber

that the Trial Chamber erred in concluding that the information in the Indictment that the alleged requests for assistance took place between his swearing-in as prefect on 19 April 1994 and his replacement on 17 June 1994 was sufficient to give him adequate notice given the sheer scale of the crimes allegedly committed at the prefectoral office ranging over a period of nearly three months.[5014] In this respect, the Appeals Chamber sees no error in the Trial Chamber's reliance on the indication in paragraph 6.34 of the Indictment that Nsabimana was replaced as Butare Prefect on 17 June 1994. Given that this indication provided mere contextual background and did not constitute an allegation that should have been pleaded as a charge, the fact that it was not pleaded in support of any count was therefore irrelevant. Nsabimana's argument that the fact that the Trial Chamber needed to read several paragraphs of the Indictment together demonstrates that the Indictment was ambiguous also fails to appreciate that, in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[5015]

2158. In light of the foregoing, the Appeals Chamber concludes that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he was put on adequate notice of the charge on the basis of which he was convicted. Accordingly, the Appeals Chamber dismisses Grounds 1, 2, and 11 of Nsabimana's appeal.

observes that the Trial Chamber relied on this evidence as indicative that Nsabimana refused to help. *See* Trial Judgement, para. 5900. The incident recounted by Witness TQ was therefore merely used as evidence of Nsabimana's failure to act and not treated as a separate allegation. The Appeals Chamber recalls that the evidence by which material facts are to be proven need not be pleaded in the indictment. *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88. Consequently, the Appeals Chamber also dismisses Nsabimana's contention in this respect.

[5014] Trial Judgement, para. 2790.

[5015] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.

B. Nsabimana's Swearing-In Ceremony (Ground 4)

2159. The Trial Chamber found that the speeches given at Nsabimana's Swearing-In Ceremony on 19 April 1994 by President Sindikubwabo and Prime Minister Kambanda were inflammatory and encouraged the population to kill Tutsis.[5016] The Trial Chamber determined that these speeches advocated and incited genocide by substantially contributing to triggering the subsequent widespread killings and large-scale massacres in Butare Prefecture.[5017] The Trial Chamber found that Nsabimana attended his swearing-in ceremony as a political appointee and failed to dissociate himself from the statements made by Sindikubwabo and Kambanda on that occasion.[5018] The Trial Chamber concluded that, in doing so, Nsabimana "gave his tacit approval to the President's and Prime Minister's inflammatory statements."[5019]

2160. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that he gave his tacit approval to Kambanda's and Sindikubwabo's Speeches.[5020] He submits that the Trial Chamber's error occasioned a miscarriage of justice as his "speech relates directly to the material fact which led the Judges to find [him] guilty of aiding and abetting the crime of genocide and other crimes against humanity by omission."[5021]

2161. The Prosecution responds that this ground of appeal should be summarily dismissed as the Trial Chamber did not convict Nsabimana on the basis of the impugned factual finding.[5022]

2162. Nsabimana replies that, in finding that he had knowledge of a plan to exterminate the Tutsis, the Trial Chamber considered that he understood the inflammatory nature of Sindikubwabo's Speech.[5023]

2163. The Appeals Chamber observes that the Trial Chamber did not find Nsabimana guilty of any crime connected to his swearing-in ceremony as it did "not find it established beyond a reasonable doubt that […] Nsabimana's tacit approval of [Kambanda's and Sindikubwabo's] speeches substantially contributed to the killings that followed".[5024] The Trial Chamber concluded that it was not proven that Nsabimana "[was] responsible for aiding and abetting genocide in relation to these

[5016] Trial Judgement, paras. 890, 898, 925, 5671, 5690, 5712, 5722, 5738, 5990.
[5017] Trial Judgement, paras. 932, 5673, 5741, 5753, 5992. *See also ibid.*, paras. 933, 5742, 5746.
[5018] Trial Judgement, para. 924.
[5019] Trial Judgement, para. 924.
[5020] Nsabimana Notice of Appeal, heading "IV" at p. 5, paras. 37-41; Nsabimana Appeal Brief, para. 61. *See also* AT. 16 April 2015, pp. 42, 43.
[5021] Nsabimana Appeal Brief, para. 105. *See also* Nsabimana Reply Brief, para. 44.
[5022] Prosecution Response Brief, paras. 1283, 1284.
[5023] Nsabimana Reply Brief, para. 44.
[5024] Trial Judgement, para. 5747.

events"[5025] and did not convict him on the basis of his conduct at the swearing-in ceremony.[5026] The Trial Chamber convicted Nsabimana solely for aiding and abetting by omission the killing of Tutsi refugees abducted from the Butare Prefecture Office.[5027]

2164. The Trial Chamber noted that it would nonetheless consider Nsabimana's conduct at the ceremony in determining whether he possessed the requisite intent for genocide.[5028] However, in light of its finding that Nsabimana participated in the crimes at the prefectoral office as an aider and abettor, the Trial Chamber did not determine whether he possessed genocidal intent and solely considered his knowledge and awareness.[5029] The Trial Chamber further did not rely on Nsabimana's conduct at the ceremony in concluding that he possessed the requisite knowledge to be held responsible for aiding and abetting the killings of Tutsi refugees abducted from the prefectoral office.[5030] Contrary to Nsabimana's contention, the Trial Judgement reflects that his convictions are not based on the finding that he gave his tacit approval to Kambanda's and Sindikubwabo's Speeches. Any error in respect of this factual finding could therefore not have any impact on the Trial Chamber's verdict against Nsabimana.

2165. Recalling that the Appeals Chamber only reviews errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice and that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits,[5031] the Appeals Chamber dismisses Ground 4 of Nsabimana's appeal without further consideration.

[5025] Trial Judgement, para. 5747.
[5026] *See* Trial Judgement, paras. 5972, 6058, 6059, 6102, 6103, 6122, 6170, 6171.
[5027] *See* Trial Judgement, paras. 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.
[5028] Trial Judgement, para. 5747.
[5029] *See* Trial Judgement, paras. 5904-5906.
[5030] *See* Trial Judgement, paras. 5904, 5905, fns. 14768, 14769.
[5031] *See supra*, para. 34.

C. Admission and Reliance on Prejudicial Evidence (Grounds 5, 6 and 13 in part)

2166. In finding Nsabimana responsible for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe*, the Trial Chamber relied, in part, on the testimonies of Prosecution Witnesses QBP, RE, SU, SS, TK, and TQ.[5032] Specifically, the Trial Chamber relied on their evidence to conclude that: (i) Nsabimana was aware of the night-time attacks at the prefectoral office; (ii) he was presented with multiple requests for assistance from Tutsi refugees but refused to help; (iii) his omission to act had a substantial effect on the perpetration of the crimes committed at the prefectoral office; and (iv) he knew that his failure to act assisted in the commission of the crimes.[5033] The Trial Chamber also relied, *inter alia*, on the evidence of Prosecution Witnesses FAP, QBQ, SD, and TA in finding that Nyiramasuhuko, Ntahobali, and *Interahamwe* committed or participated in abductions, rapes, and killings at the prefectoral office.[5034]

2167. Nsabimana submits that the Trial Chamber erred in admitting and relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ to find him responsible for aiding and abetting by omission the killings of Tutsi refugees because he received no notice that these witnesses would testify against him.[5035] He further submits that the Trial Chamber erred in admitting and relying on Witness TK's evidence because it concerned an allegation that was not pleaded in the Indictment.[5036] The Appeals Chamber will address these contentions in turn.

[5032] Trial Judgement, paras. 2803-2812, 2815, 5900, 5904-5906. The Trial Chamber also relied on Nsabimana's testimony, Expert Witness Des Forges's testimony, and Exhibits P113 and P114. *See ibid*., paras. 2801, 2802, 2807, 2808, 2810, 5904, 5905.

[5033] Trial Judgement, paras. 2804-2807, 5900-5906. *See also ibid*., para. 5972. The Trial Chamber relied on: (i) Witness TK's "credible" evidence of the abduction of a young man named Alphonse who had been forced out Nsabimana's office after calling for help; (ii) Witness TQ's description of Nsabimana's attitude regarding the witness's request to bury the bodies of orphans who had been killed at the *Groupe scolaire*; (iii) Witness RE's "significant[ly] detail[ed]" testimony that she saw a young man and woman leave Nsabimana's office, and that the young woman told her that they had just seen the prefect asking him for help and "that the young man was now being dragged away"; (iv) Witnesses SS's and SU's testimonies that, in a separate incident after attacks occurred at the prefectoral office, three women went to see Nsabimana on behalf of the refugees and that, although neither witness was present at the meeting, they were told that Nsabimana denied knowledge of the attacks and said he would post gendarmes to protect them; (v) Witness QBP's evidence that a woman who was attacked by an *Interahamwe* and wounded on her ear complained to Nsabimana but that he did nothing for her; and (vi) Witness SS's claim that Nsabimana did nothing for those who asked for help. *See ibid.*, paras. 2804-2806, 2810, 5900.

[5034] Trial Judgement, paras. 2644, 2650, 2653, 2654, 2656, 2658, 2660, 2703, 2712, 2715, 2731, 2734-2736, 2738, 2773.

[5035] Nsabimana Notice of Appeal, paras. 42-50, 70-73; Nsabimana Appeal Brief, paras. 106-126, 203-211, 233, 234, 252-261, 432-441. *See also* Nsabimana Reply Brief, paras. 48-67, 109-111; AT. 16 April 2015 pp. 43-45.

[5036] Nsabimana Appeal Brief, paras. 217-229.

1. Evidence of Witnesses Not Identified As Testifying Against Nsabimana

2168. When determining Nsabimana's responsibility for ordering the transfer of Tutsi refugees from the Butare Prefecture Office to Nyange Sector, the Trial Chamber addressed Nsabimana's contention that the evidence of Witnesses QBP, RE, SU, and TA should be excluded insofar as it related to him because he had no notice that these witnesses would be called to testify against him.[5037] The Trial Chamber determined that, although these witnesses were not listed as being brought to testify against him, Nsabimana did not suffer any prejudice that warranted the exclusion of their evidence, particularly because he raised no objections to their testimonies at the time they were given and had the opportunity to cross-examine them.[5038]

2169. Nsabimana argues that the Trial Chamber erred in relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ because he received no notice that these witnesses would testify against him.[5039] He contends that his right to a fair trial was violated as a consequence and that the Trial Chamber erred in finding that he suffered no prejudice from this absence of notice.[5040] In particular, Nsabimana argues that he was prejudiced by having insufficient time to prepare for his cross-examination of these witnesses because he had instead focused his efforts on challenging the evidence of the witnesses he expected to testify against him.[5041] He asserts that his cross-examination of these witnesses was therefore not meaningful and that its occurrence alone should not be considered as a waiver of his rights or as a remedy to the prejudice he suffered.[5042] Nsabimana further argues that, although the Trial Chamber may admit any relevant evidence which it deems to have probative value pursuant to Rule 89(C) of the Rules, "evidence whose credibility cannot be challenged and rebutted by the Defence during a well-prepared cross-examination, cannot have probative value."[5043] He also appears to argue that his right to be tried in a joint trial as if tried separately was violated because, had he been tried alone, he would not

[5037] Trial Judgement, paras. 4053-4058.
[5038] Trial Judgement, paras. 4054-4056, 4058.
[5039] Nsabimana Notice of Appeal, paras. 42-50, 70-73; Nsabimana Appeal Brief, paras. 106-126, 203-208, 216, 233, 234, 252-261, 432-441; Nsabimana Reply Brief, paras. 48-67, 109-111. *See also* AT. 16 April 2015 pp. 43-45. The Appeals Chamber observes that Nsabimana argues that, by not giving notice that these witnesses would testify against him, the Prosecution failed to fulfil its obligation under Rule 73*bis* of the Rules. *See* Nsabimana Appeal Brief, paras. 252, 253. The Appeals Chamber also notes that Nsabimana refers to an excerpt of the *Kamuhanda* Appeal Judgement that refers to the accused's right to be informed of the charges against him. *See ibid*., para. 207, *referring to Kamuhanda* Appeal Judgement, para. 21. As Nsabimana's contentions relate to admission of evidence as opposed to notice of charges, the Appeals Chamber considers this reference irrelevant.
[5040] Nsabimana Appeal Brief, paras. 111-120, 206-208, 254, 259, 260, 431-,439, *referring to* Trial Judgement, paras. 4053-4058. *See also* AT. 16 April 2015 pp. 43-45.
[5041] Nsabimana Notice of Appeal, para. 46; Nsabimana Appeal Brief, paras. 114-117, 208, 233, 234, 259, 439; Nsabimana Reply Brief, para. 66. *See also* AT. 16 April 2015 pp. 44, 45.
[5042] Nsabimana Notice of Appeal, para. 47; Nsabimana Appeal Brief, paras. 115, 118-120; Nsabimana Reply Brief, paras. 59, 61. *See also* AT. 16 April 2015 p. 44.
[5043] Nsabimana Appeal Brief, para. 231 (emphasis omitted). *See also ibid.*, paras. 230-232.

have had to confront evidence of witnesses not announced against him.[5044] Nsabimana requests that the violation of his rights be remedied by excluding the relevant Prosecution witnesses' testimonies and vacating his convictions which are based upon their evidence.[5045]

2170. The Prosecution responds that Nsabimana objected to the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ only in his closing brief and that he cross-examined all of them, with the exception of Witness FAP, on issues directly relevant to the theory of his defence.[5046] It contends that Nsabimana fails to explain why his "comprehensive cross-examinations" of these witnesses had no meaning.[5047] It further argues that Nsabimana's contention that these witnesses would not have been called against him if he had been tried separately is speculative[5048] and that Nsabimana fails to demonstrate that he was prejudiced by the Trial Chamber's reliance on the impugned evidence.[5049]

2171. Nsabimana replies that he objected to the evidence of these witnesses in his closing brief because it was only after the filing of the Prosecution Closing Brief that he became aware that the Prosecution intended to rely on their testimonies to establish his guilt.[5050] He asserts that, had he been aware that the Prosecution sought to do so earlier, through a clear indication in the Prosecution Pre-Trial Brief, he would have objected sooner and requested additional time to prepare for his cross-examinations.[5051] He emphasises that his cross-examination of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ was aimed at establishing that the attacks occurred during the night in his absence or that he did not receive any complaints from the refugees.[5052]

2172. The Appeals Chamber observes that, contrary to Nsabimana's assertion, he was notified by the Witness Summaries Grid appended to the Prosecution Pre-Trial Brief that Witness TQ would testify that he informed Nsabimana of attacks that took place near the prefectoral office and that Nsabimana did not react, which corresponds with the evidence the witness provided at trial and upon which the Trial Chamber relied against Nsabimana.[5053] Likewise, Nsabimana was notified that Witnesses FAP, QBQ, SD, and TA would testify that Tutsis who had sought refuge at the

[5044] Nsabimana Notice of Appeal, paras. 48, 49; Nsabimana Appeal Brief, paras. 121-124; AT. 16 April 2015 p. 44.
[5045] Nsabimana Notice of Appeal, para. 50; Nsabimana Appeal Brief, paras. 125, 126, 216. *See also* AT. 16 April 2015 pp. 43, 44.
[5046] Prosecution Response Brief, paras. 1287, 1288. *See also* AT. 16 April 2015 pp. 55, 56.
[5047] Prosecution Response Brief, paras. 1287-1289. The Prosecution also points out that Nsabimana fails to identify any error that could change the verdict and that his arguments should therefore be dismissed because he fails to reference any findings by the Trial Chamber on which the verdict relies. *See ibid.*, para. 1285. In his reply brief, Nsabimana acknowledges his error and points to the relevant paragraphs of the Trial Judgement. *See* Nsabimana Reply Brief, paras. 48-50. The Appeals Chamber will therefore consider his submissions.
[5048] Prosecution Response Brief, para. 1288.
[5049] Prosecution Response Brief, para. 1289.
[5050] Nsabimana Reply Brief, paras. 56, 57.
[5051] Nsabimana Reply Brief, paras. 55-59.
[5052] Nsabimana Reply Brief, paras. 63-66.

prefectoral office were subjected to abductions, killings, and rapes during attacks conducted by Nyiramasuhuko, Ntahobali, and *Interahamwe* in May and June 1994.[5054] The Trial Judgement reflects that the Trial Chamber relied only on these specific aspects of Witnesses FAP's, QBQ's, SD's, and TA's testimonial evidence to establish Nsabimana's guilt.[5055] Nsabimana's contention that he was not given notice that these witnesses would provide evidence relating to him is therefore ill-founded.

2173. Turning to Nsabimana's arguments concerning the evidence of Witnesses QBP, RE, SU, SS, and TK, the Appeals Chamber notes that it is not disputed that the Prosecution did not notify Nsabimana in its pre-trial brief or any other pre-trial submissions that these witnesses would implicate him,[5056] which constitutes an infringement of Rule 67 of the Rules.[5057] Although Nsabimana argued in his closing brief that the Trial Chamber should have excluded the evidence of these witnesses for the same reasons he adduces on appeal,[5058] the Trial Chamber did not address his contention in the context of its assessment of the evidence pertaining to the attacks at the prefectoral office. As noted above, the Trial Chamber limited its consideration of Nsabimana's contention to Witnesses QBP's, SU's, and RE's evidence concerning Nsabimana's involvement in the transfer of refugees from the prefectoral office to Nyange in early June 1994,[5059] an allegation in relation to which Nsabimana was acquitted.[5060]

2174. While a trial chamber is not obliged to respond to each and every submission made at trial and has discretion to decide which argument to address,[5061] the Appeals Chamber is of the opinion that, because it deemed it necessary to address Nsabimana's contention as it related to the evidence of the transfer to Nyange, the Trial Chamber should have also discussed the merits of Nsabimana's

[5053] Witness Summaries Grid, item 95, Witness TQ; Trial Judgement, para. 5900.
[5054] *See* Witness Summaries Grid, item 76, Witness SD, Witness TA's Summary, Witness QBQ's Summary, Witness FAP's Summary. The Appeals Chamber considers that the fact that the summaries of Witnesses FAP's, QBQ's, SD's, and TA's anticipated testimony were not linked to Nsabimana's indictment in the Witness Summaries Grid is relevant in the context of notice of the charges but not in the context of notice of the evidence.
[5055] *See* Trial Judgement, paras. 2644, 2650, 2653, 2654, 2656, 2658, 2660, 2703, 2712, 2715, 2731, 2734-2736, 2738, 2773. The Trial Chamber did not refer to this evidence directly in assessing Nsabimana's responsibility for aiding and abetting the killings of Tutsi refugees abducted during the attacks at the Butare Prefecture Office, but its analysis was dependent on its findings that these attacks occurred.
[5056] Prosecution Response Brief, paras. 1285-1289. *See also* Trial Judgement, para. 4054. The Prosecution provides no indication in its response brief that it provided any additional indication to Nsabimana prior to the commencement of trial that it intended to rely on these witnesses to establish his guilt.
[5057] Rule 67(A)(i) of the Rules states that the Prosecutor shall "[a]s early as reasonably practicable and in any event prior to the commencement of the trial […] notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused […]." The Appeals Chamber also notes that, by failing to summarise all material facts its witnesses were expected to testify about in the Witness Summaries Grid filed as part of its pre-trial brief pursuant to Rule 73*bis*(B) of the Rules, the Prosecution did not fully comply with Rule 73*bis*(B)(iv)(b) of the Rules which provides that the Prosecution's list of witnesses should include "[a] summary of the facts on which each witness will testify".
[5058] Nsabimana Closing Brief, paras. 63-66.
[5059] Trial Judgement, paras. 4053, 4056, 4058.
[5060] *See* Trial Judgement, paras. 4206, 5934, 5935.

contention in the context of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence concerning the prefectoral office attacks. The Appeals Chamber finds *proprio motu* that the Trial Chamber's failure to fully address Nsabimana's contention infringed his right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules. Nonetheless, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's decision to rely on the impugned evidence because, as discussed below, Nsabimana does not show how the Trial Chamber's reliance thereon violated his right to adequate time to prepare his defence or, if it did, caused him prejudice.

2175. The Appeals Chamber observes that Nsabimana did not object to Witnesses QBP's, RE's, SS's, SU's, and TK's testimonies in court and instead proceeded to cross-examine them without any request for a stay of proceedings.[5062] The Appeals Chamber is not persuaded by Nsabimana's contention that he delayed his objection to this evidence until his closing brief because he only became aware of the Prosecution's intention to rely on their evidence against him at that point in time. Indeed, the Appeals Chamber emphasises that his Indictment put Nsabimana on notice that he was charged in relation to attacks at the prefectoral office. The Appeals Chamber also finds that the material facts of Nsabimana's responsibility for aiding and abetting by omission crimes committed as part of these attacks – including his knowledge of the attacks against the Tutsi refugees and the fact that they sought his assistance but that he took no measures – were properly pleaded.[5063] In addition, the Prosecution Pre-Trial Brief reflected that the evidence of Witnesses RE, SS, SU, and TK concerned the prefectoral office attacks, which Nsabimana knew formed part of his case.[5064] Notably, the specific excerpts of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence relied on by the Trial Chamber all describe incidents in which refugees at the prefectoral office notified Nsabimana of the violence inflicted upon them during the attacks.[5065] Given the relevance of this evidence to Nsabimana, and his awareness that the witnesses were not marked as relevant to him in the Witness Summaries Grid, the Appeals Chamber considers that his failure to raise a

[5061] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.
[5062] Witness QBP, T. 29 October 2002 pp. 57-95 (closed session), T. 30 October 2002 pp. 4-56 and 64-73 (closed session); Witness RE, T. 26 February 2003 pp. 40-47 (closed session), 48-62, T. 27 February 2003 pp. 4-41; Witness SU, T. 21 October 2002 pp. 84-104 (closed session), T. 22 October 2002 pp. 5-81 (closed session); Witness TK, T. 23 May 2002 pp. 136-173, T. 27 May 2002 pp. 5-53; Witness SS, T. 10 March 2003 pp. 4-17 (closed session), 18-39.
[5063] *See* Nteziryayo and Nsabimana Indictment, paras. 6.36 ("Some of the refugees asked *Préfet* Sylvain Nsabimana to protect them from the violent acts of the militiamen and soldiers.") (emphasis omitted), 6.60 ("Knowing that massacres of the civilian population were being committed, political and military authorities, including Sylvain Nsabimana and Alphonse Nteziryayo took no measures to stop them.") (emphasis omitted). *See also ibid.*, Section 7 "Charges" *in conjunction with* paras. 5.1, 5.8, 6.21, 6.22, 6.25, 6.26, 6.28, 6.32-6.38, 6.41, 6.51-6.59; Prosecution Pre-Trial Brief, paras. 22, 26, 28, 29, 30.
[5064] *See* Witness Summaries Grid, item 8, Witness TK, Witness RE's Summary, Witness SU's Summary, Witness SS's Summary.
[5065] *See* Trial Judgement, paras. 2804-2806, 2810.

contemporaneous objection to their evidence indicates that he considered himself able to adequately cross-examine them, and that he was not prejudiced.

2176. Moreover, the record shows that Nsabimana directly cross-examined Witnesses QBP, RE, SU, SS, and TK with respect to the specific segments of their evidence relied on by the Trial Chamber.[5066] The transcripts indicate that Nsabimana asked the witnesses pertinent and relevant questions, challenging their recollections that the refugees notified him of the attacks, or that he had been aware of them.[5067] Nsabimana's argument that his cross-examination was limited to establishing "that either the atrocities at the *préfecture* office, if any, occurred in Nsabimana's absence particularly at night, or [that] the refugees had some free movement, or that they received food, or that [he] never received their complaints"[5068] does not demonstrate that he had insufficient time to prepare his defence or that his defence was prejudiced. Rather, his admission that he attempted to establish that he did not receive complaints from the refugees supports the conclusion that he was not prejudiced because it was this aspect of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence that the Trial Chamber relied on to establish his guilt. Beyond this assertion, Nsabimana fails to substantiate how he would have conducted his defence differently and how that would have impacted his conviction in light of the totality of these witnesses' evidence.[5069]

2177. In the view of the Appeals Chamber, Nsabimana's assertion that his cross-examination of these witnesses does not mean that he waived his fair trial rights is irrelevant. Nsabimana fails to appreciate that it is not the fact that he conducted some form of cross-examination of

[5066] Witness QBP, T. 29 October 2002 pp. 57-95 (closed session), T. 30 October 2002 pp. 4-56 and 57-73 (closed session); Witness RE, T. 26 February 2003 pp. 40-47 (closed session), 48-62, T. 27 February 2003 pp. 4-41; Witness SU, T. 21 October 2002 pp. 84-104 (closed session), T. 22 October 2002 pp. 5-81 (closed session); Witness TK, T. 23 May 2002 pp. 136-173, T. 27 May 2002 pp. 5-53; Witness SS, T. 10 March 2003 pp. 4-17 (closed session), 18-39.

[5067] *See*, *in particular*, Witness QBP, T. 30 October 2002 pp. 31, 47 48 (Nsabimana's counsel cross-examining Witness QBP as to whether refugees met the prefect to raise problems with him and whether the witness knew of a delegation of three women who met the prefect, in response to which, Witness QBP recollected the woman with the wounded ear who complained to the prefect); Witness RE, T. 27 February 2003 pp. 5, 6 (Nsabimana's counsel cross-examining Witness RE on her account of the young man and woman who sought assistance from Nsabimana and that the young man was then taken away); Witness SU, T. 22 October 2002 p. 49 (Nsabimana's counsel cross-examining Witness SU about whether Nsabimana took measures following the delegation of refugees who complained to him); Witness TK, T. 27 May 2002 pp. 18-32 (Nsabimana's counsel extensively cross-examining Witness TK with respect to the abduction of Alphonse); Witness SS, T. 10 March 2003 pp. 14, 15 (closed session), 23, 30, 31 (Nsabimana's counsel not following up on Witness SS's statement that Nsabimana knew there were problems, and cross-examining the witness in relation to whether he spoke to Nsabimana).

[5068] Nsabimana Reply Brief, para. 63.

[5069] In particular, Nsabimana advances that, had he had more time to prepare, he would have asked different questions, without identifying what these questions might have been and why the hypothetical answers would have impacted his conviction. The Appeals Chamber also observes that Nsabimana challenged at length the testimonies of these witnesses in his closing brief. *See* Nsabimana Closing Brief, paras. 1449-1473 (under the heading "Allegation of a request for protection against atrocities by militiamen and soldiers addressed by some refugees to Préfet Nsabimana"). *See ibid*., paras. 1451-1456, 1459-1465 (challenging the evidence of Witnesses SU, SS, QBP, and RE in this regard). *See also ibid*., paras. 1246-1258, 1266-1270, 1276-1283, 1306-1338, 1339-1371, 1393-1405. *See*, *in particular*, *ibid*., paras. 1314-1316, 1335, 1338, 1393-1405 (challenging Witness TK's evidence of Alphonse's abduction and Witness RE's evidence of the abduction of the young man).

Witnesses QBP, RE, SS, SU, and TK on its own that demonstrates that he was not prejudiced. Rather, the foundation of the Appeals Chamber's determination in this instance is the cumulative effect of the nature of the evidence provided by these witnesses, the notice of the charges and underpinning material facts he was provided, his failure to object in a timely manner to their evidence when it was adduced at trial, and the pertinent and relevant cross-examinations of these witnesses he conducted, in combination with his failure to provide any arguments reflecting that he had inadequate time to prepare his defence or was prejudiced.

2178. Considering that Nsabimana fails to demonstrate that he was prejudiced by the Trial Chamber's admission of, and reliance on, the inculpatory evidence of Witnesses QBP, RE, SS, SU, and TK, on the basis that he did not have time to adequately prepare for cross-examination, the Appeals Chamber rejects Nsabimana's assertion that the Trial Chamber could not have admitted their evidence because it was not "probative" within the meaning of Rule 89(C) of the Rules. The Appeals Chamber recalls that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the trial chamber after hearing the totality of the evidence.[5070] Witnesses QBP's, RE's, SS's, SU's, and TK's evidence was temporally, geographically, and thematically related to the pleaded allegation that Nsabimana had knowledge of the attacks against the Tutsis who had sought refuge at the prefectoral office and failed to take measures. The Appeals Chamber therefore sees no error in the admission of this evidence.

2179. Likewise, the Appeals Chamber rejects Nsabimana's assertion that his fair trial rights were violated because, had he been tried individually, this evidence would not have been relied upon by the Trial Chamber. The Appeals Chamber recalls that Rule 82(A) of the Rules states that "[i]n joint trials, each accused shall be accorded the same rights as if he were being tried separately." Nsabimana was tried pursuant to the charges brought against him individually and his assertion that, had he been tried individually, the Prosecution would not have brought the evidence of Witnesses QBP, RE, SS, SU, and TK against him, is speculative.

2180. Based on the foregoing, the Appeals Chamber concludes that Nsabimana has failed to demonstrate that the Trial Chamber erred in admitting and relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ to establish his guilt because he received no notice that they would testify against him.

[5070] Admissibility Appeal Decision of 2 July 2004, para. 15.

2. Witness TK's Evidence of an Unpleaded Allegation

2181. In summarising the evidence concerning the attacks at the Butare Prefecture Office, the Trial Chamber noted Witness TK's evidence that she saw a young refugee named Alphonse enter Nsabimana's office at the Butare Prefecture Office to seek help before being forced out and taken away by *Interahamwe*.[5071] The Trial Chamber did not convict Nsabimana for this specific incident because it found that he received inadequate notice that it would be used as part of the Prosecution case against him.[5072] However, relying on the Admissibility Appeal Decision of 2 July 2004 and the *Kupreškić et al.* Appeal Judgement, it stated that it would consider the evidence of Alphonse's abduction for other permissible purposes.[5073] The Trial Chamber subsequently relied on this evidence to ascertain Nsabimana's awareness of the attacks against Tutsis at the prefectoral office after determining it relevant to this issue and stating that it would consider it only for this limited purpose.[5074]

2182. Nsabimana contends that the Trial Chamber erred in admitting and relying on Witness TK's evidence.[5075] He submits that the Trial Chamber misapplied the *Kupreškić et al.* Appeal Judgement and, consequently, Rule 93 of the Rules on the grounds that the evidence concerning Alphonse's abduction: (i) was an unpleaded allegation which could not be used in support of a second unpleaded allegation as Nsabimana's knowledge of the night-time attacks was similarly unpleaded;[5076] and (ii) could not be considered as evidence of a consistent pattern of conduct as the Prosecution had never provided him notice of its intent to establish a pattern of conduct in accordance with Rule 93 of the Rules.[5077] Nsabimana further contends that the Trial Chamber also misapplied the Admissibility Appeal Decision of 2 July 2004 because it does not support the admission of evidence of an unpleaded allegation pursuant to Rule 89(C) of the Rules in support of another unpleaded allegation.[5078]

2183. The Prosecution responds that Nsabimana fails to demonstrate that it was unreasonable for the Trial Chamber to rely on Witness TK's evidence to infer Nsabimana's knowledge of the

[5071] Trial Judgement, para. 2209. *See also ibid.*, paras. 2797, 2804.
[5072] Trial Judgement, para. 2797.
[5073] Trial Judgement, para. 2797 *referring to* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15, *Kupreškić et al.* Appeal Judgement, paras. 321-323, 336.
[5074] Trial Judgement, para. 2804, *referring to* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15, *Kupreškić et al.* Appeal Judgement, paras. 321-323, 336. The Appeals Chamber observes that the Trial Chamber appears to have confused Witness RE and Witness TK in paragraph 2797 of the Trial Judgement in stating that Witness RE testified to Alphonse's abduction. The record and the Trial Chamber's summary of the evidence reflect that the evidence regarding the abduction of Alphonse was not provided by Witness RE but by Witness TK. *See ibid.*, paras. 2209, 2804. The Appeals Chamber considers the Trial Chamber's reference to Witness RE in paragraph 2797 to be a typographical error.
[5075] Nsabimana Appeal Brief, paras. 217-229. *See also ibid.*, paras. 233-236.
[5076] Nsabimana Appeal Brief, paras. 218-226.
[5077] Nsabimana Appeal Brief, paras. 223-225.

attacks.[5079] It asserts that, contrary to Nsabimana's contention, its case was never that there was a consistent pattern of conduct that should have been disclosed under Rule 93 of the Rules.[5080]

2184. The Appeals Chamber recalls that it has found that Nsabimana's knowledge that attacks took place at any time of the day regardless of whether he was present or not was properly pleaded in the Indictment.[5081] It therefore dismisses as moot Nsabimana's contention that the Trial Chamber erred in relying on the *Kupreškić et al.* Appeal Judgement and the Admissibility Decision of 2 July 2004 to admit Witness TK's evidence because it is premised on his incorrect assumption that his knowledge of the attacks was improperly pleaded.

2185. The Appeals Chamber also rejects Nsabimana's argument that the Trial Chamber, through its reference to the *Kupreškić et al.* Appeal Judgement, improperly admitted evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute without the notice required by Rule 93 of the Rules.[5082] Nothing in the Trial Chamber's analysis supports the contention that the evidence was admitted for the purposes set out under Rule 93 of the Rules, nor do the excerpts of the *Kupreškić et al.* Appeal Judgement that the Trial Chamber relied upon suggest that this is the only purpose in which evidence of unpleaded allegations can be admitted and considered.[5083] In the same vein, Nsabimana does not show that Witness TK's disputed evidence was used for the purpose of demonstrating a general propensity or disposition of Nsabimana to commit crimes.

2186. Accordingly, the Appeals Chamber finds that Nsabimana has failed to identify any error in the Trial Chamber's admission of Witness TK's evidence regarding the incident involving Alphonse at the prefectoral office in the context of determining his knowledge of the night-time attacks at the prefectoral office.

3. Conclusion

2187. Based on the foregoing, the Appeals Chamber dismisses Ground 5 as well as the relevant parts of Grounds 6 and 13 of Nsabimana's appeal.

[5078] Nsabimana Appeal Brief, paras. 227, 228.
[5079] Prosecution Response Brief, paras. 1317, 1318.
[5080] Prosecution Response Brief, para. 1318.
[5081] *See supra*, Section VI.A.
[5082] Rule 93(A) of the Rules provides that evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice and Rule 93(B) of the Rules requires the Prosecution to disclose acts tending to show such a pattern of conduct pursuant to Rule 66 of the Rules.
[5083] *See Kupreškić et al.* Appeal Judgement, paras. 321-323, 336, *referred to* in Trial Judgement, para. 2804, fn. 7835. *See also supra*, Sections IV.F.2(a), V.I.2(a)(ii).

D. Butare Prefecture Office (Grounds 6 in part, 7-10, 12, 13 in part, 14)

2188. Nsabimana challenges the Trial Chamber's finding that the *actus reus* and *mens rea* necessary to establish his responsibility for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* were proven beyond reasonable doubt. Nsabimana requests that "the impugned Judgement" be quashed.[5084] The Appeals Chamber will address Nsabimana's submissions relating to the *actus reus* before turning to his submissions concerning the *mens rea*.

1. *Actus Reus* (Grounds 8 to 10, and 12 in part)

2189. In finding Nsabimana responsible under Article 6(1) of the Statute for aiding and abetting by omission, the Trial Chamber found that, in his capacity as prefect, Nsabimana had the legal duty to provide assistance to people in danger, to ensure the tranquillity, public order, and security of people, and to protect civilians, including the wounded and sick, against acts or threats of violence.[5085] It further held that, by refusing to take action in the midst of the continuing attacks at the prefectoral office, Nsabimana assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks, that his failure to act had a substantial effect on the realisation of their crimes,[5086] and that he had the means available to him to "forestall these harms, but he did nothing".[5087]

2190. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that he had a legal duty to act,[5088] that his omission substantially assisted the perpetration of the crimes,[5089] and that he had the ability to act.[5090] The Appeals Chamber will address these arguments in turn.

(a) Legal Duty to Act

2191. The Trial Chamber found that Nsabimana's legal duty to act as a prefect was based on: (i) Article 256 of the Rwandan Penal Code which imposed on every Rwandan citizen a duty to provide assistance to people in danger;[5091] (ii) Rwandan domestic law which imposed on the prefect an obligation to ensure the tranquillity, public order, and security of people within the

[5084] Nsabimana Appeal Brief, paras. 308-502.
[5085] *See* Trial Judgement, paras. 5893-5899.
[5086] Trial Judgement, para. 5900. *See also ibid.*, paras. 5903, 5906, 5972.
[5087] *See* Trial Judgement, para. 5903. *See also ibid.*, para. 5972.
[5088] Nsabimana Notice of Appeal, paras. 80-89; Nsabimana Appeal Brief, paras. 308, 309, 312, 322-327, 331, 335, 341-344, 391, 392.
[5089] Nsabimana Appeal Brief, paras. 483, 496.
[5090] Nsabimana Notice of Appeal, paras. 94-104; Nsabimana Appeal Brief, paras. 310-321, 331-340, 342-348, 366-398. *See also* Nsabimana Reply Brief, paras. 135-152; AT. 16 April 2015 pp. 46-49.
[5091] Trial Judgement, para. 5893.

prefecture;[5092] and (iii) Articles 7 and 13 of Additional Protocol II to the Geneva Conventions which imposed a legal duty on Nsabimana to protect civilians, including the wounded and sick, against acts or threats of violence.[5093]

2192. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II imposed a legal duty upon him to act.[5094] He contends that individual responsibility by omission under Article 6(1) of the Statute can only be incurred where the alleged omission is punishable under a rule of criminal law[5095] and that the Trial Chamber failed to indicate the legal sanction provided under such texts.[5096]

2193. The Prosecution responds that the Trial Chamber did not err in finding that Nsabimana had a legal duty to act.[5097] In particular, it contends that Nsabimana misconstrues the law and that the jurisprudence is not settled as to whether the legal duty to act must stem from a rule of criminal law.[5098] In the alternative, the Prosecution argues that the Trial Chamber found that one of the sources of Nsabimana's duty to act was criminal law.[5099]

2194. The Appeals Chamber notes that Nsabimana seeks to substantiate his claim that the Trial Chamber erred in finding that Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II imposed a legal duty upon him to act by arguing that criminal liability for failure to discharge a legal duty must derive from a duty imposed by criminal law and that the Trial Chamber failed to indicate the legal sanction provided under such texts.[5100] The question of whether criminal liability for failure to discharge a legal duty to act must derive from a rule entailing individual criminal responsibility has never been examined in the jurisprudence of the Tribunal and

[5092] Trial Judgement, para. 5894, *referring to* Exhibit D468 (Law of 11 March 1975, Structure and Functioning of the *Préfecture*) ("11 March 1975 Law"), Article 8(2). The Trial Chamber found that it did not need to resolve the issue as to whether the legal duty had to be mandated by a rule of criminal law given that "Nsabimana enjoyed a legal duty from additional, and distinct, sources of law". *See ibid*., fn. 14751.
[5093] Trial Judgement, paras. 5897-5899. *See also ibid*., paras. 5895, 5896.
[5094] Nsabimana Notice of Appeal, paras. 83-89; Nsabimana Appeal Brief, paras. 308, 309, 312, 322-326, 335, 341, 342, 344.
[5095] Nsabimana Notice of Appeal, paras. 81, 82; Nsabimana Appeal Brief, paras. 309, 322, *referring to Ntagerura et al.* Trial Judgement, para. 659.
[5096] Nsabimana Notice of Appeal, paras. 83, 84; Nsabimana Appeal Brief, para. 323.
[5097] Prosecution Response Brief, paras. 1342-1353, 1360, 1362, 1363, 1366-1370. *See also* AT. 16 April 2015 p. 56.
[5098] Prosecution Response Brief, paras. 1343, 1344, 1350, 1351, 1362, 1366, *referring*, *inter alia*, *to Tadić* Appeal Judgement, para. 188, *Ntagerura et al*. Appeal Judgement, paras. 334, 335, *Mrkšić and Šljivančanin* Appeal Judgement, paras. 151, 154, *Galić* Appeal Judgement, para. 175. The Prosecution asserts that the approach of the Appeals Chamber is rather that, irrespective of the source of the duty, the legal duty to act must be one whose breach gives rise to individual criminal responsibility. *See ibid*., paras. 1345, 1352.
[5099] Prosecution Response Brief, para. 1353.
[5100] The Appeals Chamber observes that Nsabimana almost exclusively develops his contentions by arguing that he lacked the material ability to act. *See*, *e.g*., Nsabimana Appeal Brief, paras. 311-321, 331-348. These arguments are discussed in detail below. *See infra*, Section VI.D.1(c).

the ICTY.[5101] Nonetheless, the Appeals Chamber finds it unnecessary to make a determination on this issue in the present case as the Trial Chamber found that Nsabimana's duty to act stemmed notably from Rwandan criminal law.[5102] Nsabimana fails to demonstrate that the Trial Chamber erred in relying on Article 256 of the Rwandan Penal Code or that it was under the obligation to specify the criminal sanction incurred from the violation of this provision.

2195. Accordingly, the Appeals Chamber dismisses Nsabimana's contention that the Trial Chamber erred in finding that a legal duty existed that could sustain his criminal responsibility under Article 6(1) of the Statute for aiding and abetting by omission.

(b) Substantial Assistance

2196. As noted above, the Trial Chamber found that by refusing to take action in the midst of the continuing attacks at the Butare Prefecture Office, Nsabimana assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks and that his "failure to act had a substantial effect on the realisation of these crimes."[5103] The Trial Chamber relied, in part, on the evidence of Witnesses QCB, SJ, SU, SS, and RE to conclude that, "[a]lthough many people took refuge at the [Butare Prefecture Office] precisely because they thought the *préfet* would protect them, Nsabimana refused to help."[5104] It further stated that Nsabimana's "attitude in this respect was evidenced by Witness TQ who approached Nsabimana at the [Butare Prefecture Office] asking for help in burying the bodies of orphans that had been killed at the school complex" and recalled that "Nsabimana told Witness TQ that he was a madman."[5105] The Trial Chamber also noted evidence from Witness SS that soldiers prevented attacks at the prefectoral office and determined that, "[h]ad Nsabimana posted *gendarmes* or soldiers sometime prior to 5-15 June 1994, he could have prevented the mass killing and rape, at least in part, at the [Butare Prefecture Office]."[5106]

[5101] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 151 ("The Appeals Chamber recalls that it has previously recognised that the breach of a duty to act imposed by the laws and customs of war gives rise to individual criminal responsibility. The Appeals Chamber further recalls that Šljivančanin's duty to protect the prisoners of war was imposed by the laws and customs of war. Thus, the Appeals Chamber considers that Šljivančanin's breach of such duty gives rise to his individual criminal responsibility. Therefore, it is not necessary for the Appeals Chamber to further address whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law."); *Ntagerura et al*. Appeal Judgement, paras. 334, 335.
[5102] The Trial Chamber also relied on provisions of the laws and customs of war which it considered give rise to individual criminal responsibility in case of violation of such provisions. *See* Trial Judgement, para. 5899 ("In the Chamber's view, the criminalisation of individual conduct encompasses the Geneva Conventions in their entirety, including Articles 7 and 13 of Additional Protocol II."). The Appeals Chamber declines to consider *proprio motu* the correctness of this legal statement in light of the Trial Chamber's reliance on the Rwandan Penal Code.
[5103] Trial Judgement, para. 5900. *See also supra*, para. 2189.
[5104] Trial Judgement, para. 5900 (internal reference omitted).
[5105] Trial Judgement, para. 5900 (internal reference omitted).
[5106] Trial Judgement, para. 5900.

2197. Nsabimana contends that Witness TQ's evidence concerned the abduction of orphans at the *Groupe scolaire* rather than the abduction and killing of refugees from the prefectoral office, and argues that Witness TQ's evidence on an alleged conversation with him about burying the orphans is not believable.[5107] He submits that the Trial Chamber therefore erred in relying on this evidence in finding that he assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks.[5108]

2198. The Prosecution argues that the Trial Chamber reasonably assessed Witness TQ's evidence and accepted it as credible and consistent.[5109]

2199. The Appeals Chamber finds that Nsabimana's contentions concerning the analysis of Witness TQ's evidence fail to identify an error that could invalidate the verdict or could have occasioned a miscarriage of justice. They do not demonstrate that the Trial Chamber's reliance on Witness TQ's evidence was material to its determination that Nsabimana's omission substantially assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the commission of crimes against Tutsis who had sought refuge at the prefectoral office.[5110] The Trial Judgement reveals that Witness TQ's evidence was considered as illustrative of Nsabimana's indifference toward victims of attacks generally, offering circumstantial corroboration of evidence from multiple witnesses that Nsabimana refused to assist refugees at the prefectoral office notwithstanding the fact that he received pleas for assistance from them.[5111]

2200. In light of Nsabimana's failure to identify any error that could invalidate the verdict or could have occasioned a miscarriage of justice, the Appeals Chamber declines to consider his contentions further.

(c) Ability to Act

2201. The Trial Chamber, relying on various sources of Rwandan law, observed that Nsabimana, in his capacity as prefect, had the power to request the intervention of the Rwandan army to restore public order and the ability to verbally request the intervention of the gendarmerie.[5112] It further found that "Nsabimana in fact requisitioned forces around 5-15 June 1994", that the placement of five to six soldiers at the prefectoral office "forestalled attacks against those taking refuge" there, and that these conclusions demonstrated that Nsabimana, as prefect, "had the ability to requisition

[5107] Nsabimana Appeal Brief, paras. 209, 212-215.
[5108] Nsabimana Appeal Brief, paras. 209, 213-215.
[5109] Prosecution Response Brief, paras. 1319, 1321.
[5110] *See* Trial Judgement, para. 5900.
[5111] *See* Trial Judgement, para. 5900.

forces that could forestall the attacks."[5113] The Trial Chamber considered that Nsabimana failed to prevent ongoing attacks at the prefectoral office "for a significant period between the end of April and mid-June 1994" even though "means were available to Nsabimana to fulfil his duty to forestall these harms".[5114]

2202. Nsabimana submits that the Trial Chamber, in finding that he had the ability to act, failed to examine whether he had "the ability and the capacity to act in the specific circumstances of the case."[5115] He argues that no evidence was adduced to demonstrate that he had the means or capacity to discharge his obligations to protect civilians prior to June 1994.[5116] In his view, the Trial Chamber did not consider that soldiers or gendarmes from Butare Prefecture participated in the perpetration of crimes and how this impacted his ability to act and that the security personnel he eventually posted at the prefectoral office in June 1994 were not from the prefecture.[5117] In light of all these considerations, Nsabimana suggests that the existence of a prefect's "theoretically vested" powers prescribed by Rwandan law is insufficient to establish that he had the practical ability to exercise such powers from April to mid-June 1994[5118] and that no reasonable trier of fact could have found that he had the ability to act.[5119]

2203. Furthermore, Nsabimana contends that his ability to post soldiers at the prefectoral office around 5 June 1994 does not necessarily mean that he had the ability to do so prior to that date.[5120] He submits that the Trial Chamber incorrectly characterised the positioning of members of the Rwandan army at the prefectoral office around 5 to 15 June 1994 as a "requisition" within the meaning of Rwandan law.[5121] Finally, Nsabimana submits that he "did his best", despite the lack or

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[5112] *See* Trial Judgement, para. 5901, *referring to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (Law of 23 January 1974, *Création de la Gendarmerie*) ("23 January 1974 Law"), Section 2, Art. 32.
[5113] Trial Judgement, para. 5902. *See also ibid*., para. 5906.
[5114] Trial Judgement, para. 5903. *See also ibid*., para. 5906.
[5115] Nsabimana Appeal Brief, paras. 310-321, 331-338, 342-347, 366-397. *See also* Nsabimana Reply Brief, paras. 135-152; AT. 16 April 2015 pp. 46-49.
[5116] Nsabimana Appeal Brief, paras. 316-320, 334, 343, 368, 369. *See also* Nsabimana Reply Brief, paras. 136, 137. Nsabimana stresses that apart from gendarmes, and to a certain extent soldiers, the prefect cannot requisition any other force to maintain peace and security. *See* Nsabimana Appeal Brief, para. 318. Nsabimana similarly contends that he did not have the ability to discharge his duties pursuant to Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II of the Geneva Conventions. *See ibid*., paras. 331, 332, 335, 336, 342, 344, 347. *See also* AT. 16 April 2015 p. 48.
[5117] Nsabimana Appeal Brief, paras. 314, 319; Nsabimana Reply Brief, paras. 140-143, 145, 148-151. Nsabimana recalls that the Nsabimana and Nteziryayo Indictment and some Prosecution witnesses alleged that the Rwandan Armed Forces were involved in crimes, and that several officers have been convicted in that regard. *See* Nsabimana Appeal Brief, paras. 375-383. *See also* AT. 16 April 2015 pp. 47, 48.
[5118] Nsabimana Appeal Brief, paras. 312, 313, 337, 363, 367, *referring*, *inter alia*, *to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (23 January 1974 Law), Art. 32. While Nsabimana acknowledges that Rwandan law empowered the prefect to requisition the Rwandan Armed Forces, he contends that this text was not sufficient for the Trial Chamber to conclude that he had the ability to requisition the Rwandan Armed Forces or post soldiers prior to June 1994. *See ibid*., paras. 316, 317, 320, 367-369, 392.
[5119] Nsabimana Appeal Brief, paras. 319, 340, 383.
[5120] Nsabimana Appeal Brief, para. 316; Nsabimana Reply Brief, para. 144.
[5121] Nsabimana Appeal Brief, paras. 364, 366, 384-397. *See also* Nsabimana Reply Brief, para. 147.

inadequacy of resources, to discharge his duty to protect civilians.[5122] He asserts that, in addition to getting protection for the prefectoral office, he took many other actions to save the lives of civilians, and did not hesitate to protect people when he was able to do so.[5123]

2204. The Prosecution responds that the Trial Chamber correctly found that Nsabimana had the material ability to act, as demonstrated by his requisition of forces to protect refugees at the prefectoral office around 5 to 15 June 1994.[5124] It submits that, contrary to Nsabimana's arguments, the Trial Chamber did enquire into the means available to Nsabimana to act.[5125] According to the Prosecution, the fact that some gendarmes and soldiers participated in the killings, or whether soldiers originated from Butare Prefecture, did not detract from his ability to act.[5126] It argues that, given that the Trial Chamber's task was to assess Nsabimana's legal power to act, the exercise of his power, and the authorities' compliance with his requests, the Trial Chamber was not required to assess whether soldiers were involved in crimes and that the issue is not whether Nsabimana's request for soldiers amounted to a "requisition" under Rwandan law.[5127]

2205. The Appeals Chamber recalls that aiding and abetting by omission necessarily requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty.[5128]

2206. In the present case, the Trial Chamber observed that, as the prefect of Butare, Nsabimana "ha[d] the power to request the intervention of the Armed Forces to restore public order" and that he could "verbally request the intervention of the National *Gendarmerie* pursuant to the Rwandan Law on the creation of the *Gendarmerie*."[5129] Nsabimana does not dispute the validity of this finding and the Appeals Chamber dismisses his argument that no evidence was adduced to demonstrate his capacity or means to discharge his obligations to protect Tutsi refugees at the prefectoral office.

[5122] Nsabimana Appeal Brief, paras. 339, 345, 346.
[5123] Nsabimana Appeal Brief, paras. 339, 345, 346. Nsabimana notes that: (i) some Prosecution and Defence witnesses testified that refugees at the Butare Prefecture Office received food, blankets, and other items on various occasions; (ii) he helped the Rumiya family and other individuals, including women called Josée, Immaculée Mukantaganira, and Madeleine Mukakagaba; and (iii) he participated in the evacuation of orphans, including 600 children from the *Groupe scolaire*. *See ibid*., para. 346.
[5124] Prosecution Response Brief, paras. 1354-1356, 1376. *See also* AT. 16 April 2015 pp. 59, 60.
[5125] Prosecution Response Brief, para. 1377.
[5126] Prosecution Response Brief, para. 1378.
[5127] Prosecution Response Brief, paras. 1356, 1379. The Prosecution notes that the colonels responded to Nsabimana's oral request because he was a prefect, thus demonstrating his material ability to act. *See ibid*., paras. 1356, 1380. It further points out that when Nsabimana orally requested military personal, his request was complied with and soldiers were posted at the prefectoral office for the purpose of offering protection. *See idem*.
[5128] *Mrkšić and Šljivančanin* Appeal Judgement, para. 154, *referring to Ntagerura et al.* Appeal Judgement, para. 335. *See also ibid.*, paras. 49, 82.
[5129] Trial Judgement, para. 5901, *referring to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (23 January 1974 Law), Section 2, Art. 32.

2207. The Appeals Chamber is also not persuaded that the Trial Chamber erred in simply assessing Nsabimana's "theoretically vested" powers without considering whether he had the ability and the capacity to act in the specific circumstances of the case. The Trial Chamber properly assessed whether a possibility was open to Nsabimana to call on the Rwandan army or the gendarmes to protect refugees and found that:

> Nsabimana in fact requisitioned forces around 5-15 June 1994. At that time, 5-6 soldiers were seconded to the [Butare Prefecture Office] under the command of a female lieutenant. The evidence establishes that these soldiers forestalled attacks against those taking refuge at the Butare *préfecture* office. This shows that Nsabimana, pursuant to his powers as *préfet*, had the ability to requisition forces that could forestall the attacks.[5130]

Having made this assessment, the Trial Chamber then determined that "Nsabimana failed to take any steps to prevent the ongoing attacks at the [Butare Prefecture Office] for a significant period between the end of April and mid-June 1994."[5131]

2208. In the view of the Appeals Chamber, it was open to a reasonable trier of fact to rely on the actual positioning of soldiers or gendarmes at the prefectoral office, at Nsabimana's request, in June 1994 to find that he had the ability to take steps to prevent the attacks between the end of April and mid-June 1994. The Appeals Chamber is not persuaded by Nsabimana's contention that the Trial Chamber failed to sufficiently consider that soldiers were participating in attacks in Butare Prefecture, which, according to him, should have raised doubts about his ability to requisition them earlier than June 1994. Nsabimana ignores evidence referred to throughout the Trial Judgement indicating the Trial Chamber's awareness that soldiers and/or gendarmes participated in attacks in Butare Prefecture and at the prefectoral office specifically.[5132] Likewise, Nsabimana fails to demonstrate why the Trial Chamber was required to consider whether the security forces ultimately placed at the prefectoral office were not from Butare Prefecture.

2209. Furthermore, the Appeals Chamber does not find merit in Nsabimana's contention that the Trial Chamber erred in finding that he "requisition[ed]" soldiers according to Rwandan law. Nsabimana appears to argue that his ability to obtain security forces in June 1994 resulted from the coincidental confluence of circumstances, rather than his ability to do so based on Rwandan law.[5133] However, the Trial Chamber clearly considered the evidence of Nsabimana and others as to how

[5130] Trial Judgement, para. 5902 (internal reference omitted).
[5131] Trial Judgement, para. 5903.
[5132] *See*, *e.g.*, Trial Judgement, paras. 2190, 2191, 2206, 2211, 2214, 2218, 2250, 2276, 2279, 2287, 2307, 2309, 2339, 2711, 2771, 2773, 2781, 2805, 2807.
[5133] Nsabimana avers that, according to Article 32 of the 11 March 1975 Law, the prefect may make a verbal requisition but must confirm this in writing. *See* Nsabimana Appeal Brief, para. 393. Nsabimana submits, however, that his actions did not amount to a requisition because: (i) he used his own relationships, namely through Colonels Munyengango and Mugemanyi, to have soldiers from outside Butare posted at the prefectoral office; (ii) the Trial Chamber did not

security forces were obtained for the purpose of protecting refugees at the prefectoral office between 5 and 15 June 1994.[5134] Nsabimana does not demonstrate on appeal that, in light of the record, no reasonable trier of fact could have found that he had the *de jure* authority as prefect and the actual capacity to obtain security for the refugees at the prefectoral office between the end of April and mid-June 1994.

2210. Finally, as regards Nsabimana's arguments that he "did his best" to protect refugees, the Appeals Chamber notes that he simply points to his efforts to assist Tutsis without demonstrating how the Trial Chamber erred. The Trial Chamber considered his efforts when it assessed mitigating factors in relation to his sentence.[5135] Nsabimana does not demonstrate that the Trial Chamber ignored this evidence or that it prevented a reasonable trier of fact from concluding that he had the ability to act in an attempt to forestall crimes at the prefectoral office between the end of April and mid-June 1994.

2211. Based on the foregoing, the Appeals Chamber dismisses Nsabimana's arguments regarding his ability to act as it pertains to his responsibility for aiding and abetting by omission.

(d) Conclusion

2212. The Appeals Chamber finds that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he had a legal duty to act, that his failure to act had a substantial effect on the realisation of the crimes committed during attacks at the prefectoral office, and that he had the ability to act.

2. *Mens Rea* (Grounds 6 in part, 7, 12 and 13 in part, 14)

2213. In determining that Nsabimana possessed the requisite *mens rea* for aiding and abetting by omission the killings of Tutsis who had sought refuge at the Butare Prefecture Office, the Trial Chamber found that Nsabimana knew of the night-time attacks at the prefectoral office before the end of May 1994 and that the Tutsis seeking refuge there were being abducted, raped, and killed.[5136] It further found that Nsabimana was aware of the perpetrators' genocidal intent and that he also knew that his failure to act assisted in the commission of the crimes.[5137]

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ascertain whether gendarmes or soldiers were posted; and (iii) no evidence was adduced to establish that the Rwandan army hierarchy had received a written requisition from Nsabimana. *See ibid*., paras. 387-397.

[5134] Trial Judgement, paras. 2807-2812.

[5135] *See* Trial Judgement, para. 6232.

[5136] Trial Judgement, paras. 2807, 5904.

[5137] Trial Judgement, paras. 5904, 5905. *See also ibid.*, para. 5972.

2214. Nsabimana submits that the Trial Chamber erred in finding that he had knowledge: (i) of the night-time attacks perpetrated against the Tutsis seeking refuge at the prefectoral office; (ii) of the perpetrators' genocidal intent; and (iii) that his failure to act assisted the commission of the crimes at the prefectoral office.[5138] The Appeals Chamber will address these contentions in turn.

(a) Knowledge of Crimes

2215. In finding that Nsabimana knew of the night-time attacks perpetrated against the Tutsis seeking refuge at the prefectoral office, the Trial Chamber relied on: (i) Exhibit P113, a letter written by Nsabimana entitled "*The Truth about the Massacres in Butare*", which he sent to Prosecution Expert Witness Alison Des Forges after telephone conversations in 1996, and Exhibit P114, the transcript of a journalist's interview of Nsabimana taken in October 1994; (ii) Nsabimana's testimony; and (iii) the evidence of Prosecution Witnesses TK, RE, SS, SU, and QBP.[5139] As to the timing of Nsabimana's knowledge, the Trial Chamber concluded that he "was aware of the night-time attacks at the [prefectoral office] and he was presented with multiple requests for assistance from Tutsi refugees starting, at least, around the end of May 1994."[5140] It further concluded that, "[b]ased upon Nsabimana's own admissions and the open and notorious nature of the attacks, […] Nsabimana was actually aware of the attacks even earlier."[5141]

2216. Nsabimana submits that the Trial Chamber erred in finding he had knowledge of the night-time attacks against the Tutsis at the prefectoral office based on its reliance on: (i) Exhibits P113 and P114;[5142] (ii) his testimony;[5143] and (iii) the evidence of Witnesses TK, RE, SS, SU, and QBP as well as the "open and notorious nature of the attacks".[5144]

(i) Exhibits P113 and P114

2217. In making its finding that Nsabimana was aware of the night-time attacks at the prefectoral office earlier than at the end of May 1994, the Trial Chamber relied on an excerpt of Exhibit P113 in which Nsabimana stated that "there were isolated cases of disappearances at night" which he attributed to unknown soldiers and hooligans, and a portion of Exhibit P114 reflecting that

[5138] Nsabimana Notice of Appeal, paras. 53-69, 74, 105-110; Nsabimana Appeal Brief, paras. 130-158, 180, 181, 190-202, 262-267, 399-427, 429, 431-438, 441, 445-492, 495-502; Nsabimana Reply Brief, paras. 70-78, 94-98, 108, 153-187. *See also* AT. 16 April 2015 pp. 44-46.
[5139] Trial Judgement, paras. 2803-2807, 2810.
[5140] Trial Judgement, para. 2807.
[5141] Trial Judgement, para. 2807.
[5142] Nsabimana Notice of Appeal, paras. 63-66; Nsabimana Appeal Brief, paras. 180-202, 441; Nsabimana Reply Brief, paras. 77, 78, 177. *See also* AT. 16 April 2015 p. 46.
[5143] Nsabimana Notice of Appeal, paras. 53-62; Nsabimana Appeal Brief, paras. 130-158, 441; Nsabimana Reply Brief, paras. 70-76, 95-98, 177. *See also* AT. 16 April 2015 pp. 44, 45.

Nsabimana made a list of people living at the prefectoral office so that he could check if there had been problems the night before.[5145] In the view of the Trial Chamber, Exhibits P113 and P114 contained the writings of Nsabimana and were of "significant probative weight".[5146]

2218. Nsabimana argues that the Trial Chamber's reliance on Exhibits P113 and P114 was unreasonable because: (i) the Trial Chamber decontextualised his statement in Exhibit P113 that there were "isolated cases of disappearances at night" and misrepresented it as referring to the refugees at the prefectoral office when instead it was a generic reference to the situation in Butare Prefecture as a whole;[5147] and (ii) Exhibit P114 only indicates that Nsabimana prepared a list of the refugees at the prefectoral office in case there were "problems" at night and not that abductions in fact occurred, and reflects that the refugees were not attacked or killed, and that their number increased, which reinforces that the prefectoral office was safe.[5148]

2219. The Prosecution responds that Nsabimana fails to demonstrate that the Trial Chamber's assessment of Exhibits P113 and P114 was unreasonable or that it erred in finding that he knew of the night-time attacks against the Tutsis at the prefectoral office.[5149]

2220. The Appeals Chamber observes that when Nsabimana's statement in Exhibit P113 that there were "isolated cases of disappearances at night" is read alongside the rest of his letter, it is not clear that Nsabimana was referring specifically to the refugees at the prefectoral office. Rather, the statement appears in the context of discussing the security situation in Butare Prefecture in general and prior to describing the mobilisation of military police to apprehend looters.[5150] Notably, Exhibit P113 contains a subsequent section focused in particular on the events at the prefectoral office in which Nsabimana states that he protected the refugees and makes no mention of any abductions, disappearances, killings, or rapes.[5151] Consequently, the Appeals Chamber finds that no

[5144] Nsabimana Notice of Appeal, paras. 67-69, 74; Nsabimana Appeal Brief, paras. 203, 235, 251, 262-268, 441; Nsabimana Reply Brief, paras. 94, 107, 108, 177. *See also* AT. 16 April 2015 pp. 45, 46.
[5145] Trial Judgement, para. 2807, *referring to* Exhibit P113, p. K0016627 (Registry pagination), Exhibit P114, p. K0120070 (Registry pagination).
[5146] Trial Judgement, para. 2802.
[5147] Nsabimana Appeal Brief, paras. 195-200, *referring to* Exhibit P113, p. K0016627 (Registry pagination). Nsabimana also argues that the Trial Chamber failed to consider his statements in Exhibit P113 that: (i) he attempted to move the refugees from the prefectoral office to Nyaruhengeri Commune, and that thereafter some refugees returned to the prefectoral office following threats from the local population, which indicated that there was insecurity everywhere; (ii) he was determined to protect the refugees; and (iii) the refugees considered the prefectoral office safe. *See* Nsabimana Appeal Brief, paras. 190-192, *referring to* Exhibit P113, p. 9. In this regard, Nsabimana emphasises that the prefectoral office was an open place and that the refugees were free to move around as they wished, so the decrease in the number of refugees did not necessarily mean that they were killed. *See ibid.*, paras. 193 (*referring* to Witness SU, T. 22 October 2002 pp. 60-63), 194.
[5148] Nsabimana Notice of Appeal, paras. 64-66; Nsabimana Appeal Brief, paras. 182-189; Nsabimana Reply Brief, paras. 99-102.
[5149] Prosecution Response Brief, paras. 1290, 1291, 1294, 1297-1299, 1302, 1313.
[5150] Exhibit P113, p. K0016627 (Registry pagination).
[5151] Exhibit P113, pp. K0016630, K0016631 (Registry pagination).

reasonable trier of fact could have considered the quoted excerpt of Exhibit P113 as a basis for the finding that Nsabimana knew of the night-time attacks against the refugees at the prefectoral office.[5152]

2221. Turning to Exhibit P114, the Appeals Chamber recalls its finding that the Trial Chamber erred in considering that this purported transcript of an interview with Nsabimana reflected his own views and contained a faithful reflection of what he said during the interview, and that he had acknowledged the document as authentic.[5153] Given that there is no indication that Nsabimana acknowledged or authenticated the statement in Exhibit P114 reflecting that he had made a list of people living at the prefectoral office so that he could check if there had been problems the night before[5154] and that no evidence was led through Nsabimana's testimony to this effect,[5155] the Appeals Chamber considers that the Trial Chamber erred in relying on this aspect of Exhibit P114 as evincing Nsabimana's knowledge of the night-time attacks at the prefectoral office prior to the end of May 1994.

2222. The Appeals Chamber will assess the impact, if any, of the Trial Chamber's erroneous reliance on Exhibits P113 and P114 after having reviewed all of Nsabimana's challenges concerning his knowledge of the night-time attacks at the prefectoral office.

(ii) Nsabimana's Testimony

2223. The Trial Chamber relied on Nsabimana's "own admissions", in addition to the "open and notorious nature of the attacks" at the prefectoral office, to conclude that Nsabimana knew of the attacks before the end of May 1994.[5156] Specifically, the Trial Chamber noted that "Nsabimana testified that he responded to the refugees' requests for assistance by posting soldiers at the [Butare Prefecture Office] around 5 June 1994" but "admitted in his testimony that a woman came to his office seeking assistance around 15 June 1994".[5157] According to the Trial Chamber, this called into question "Nsabimana's credibility as to when he knew about the night-time attacks at the [Butare Prefecture Office] because he could not have responded to their requests before he received them".[5158] In addition, the Trial Chamber assigned importance to Nsabimana's admission "during

[5152] In light of this conclusion, the Appeals Chamber dismisses the rest of Nsabimana's challenges to the Trial Chamber's reliance on Exhibit P113 as moot.
[5153] *See supra*, para. 252.
[5154] Trial Judgement, para. 2807, *referring to* Exhibit P114, p. K0120070 (Registry pagination).
[5155] The Appeals Chamber observes that his testimony concerning a list of refugees at the prefectoral office appears to be limited to one that was made in preparation for their transfer to Nyange. *See* Nsabimana, T. 9 October 2006 p. 84, T. 10 October 2006 p. 4.
[5156] Trial Judgement, para. 2807.
[5157] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 10 October 2006 pp. 13, 15, 16.
[5158] Trial Judgement, para. 2807.

his testimony that he was not at peace with himself when he went home from the [Butare Prefecture Office] during this period because he feared that he may not find the refugees when he returned in the morning".[5159]

2224. Nsabimana contends that the Trial Chamber unreasonably misinterpreted his evidence as reflecting that he posted soldiers at the prefectoral office around 5 June 1994 in response to the refugees' requests for assistance.[5160] He points out that, to the contrary, he testified that he placed the soldiers there on his own initiative after he became concerned about reprisals following the killing of the bishops at Kabgayi, observed an "ill soldier" wandering among the refugees at the prefectoral office, and met with Colonels Munyengango and Mugemanyi, who suggested he obtain security and provided him with several convalescing soldiers from the *Groupe scolaire*.[5161] Consequently, Nsabimana asserts that there is no contradiction in his testimony and that the Trial Chamber erred in discrediting his testimony on this basis.[5162] In addition, Nsabimana stresses that he testified that he had already posted soldiers at the prefectoral office by the time the woman he referred to spoke to him, that she did not ask for assistance, and that he was independently aware of the soldier she warned him about when she spoke to him.[5163] He emphasises that his testimony reflects that, between April and June 1994, nobody at the prefectoral office, including the refugees, told him about the night-time attacks.[5164]

2225. Nsabimana further contends that the Trial Chamber misstated his testimony that he was not at peace with himself when he went home from the prefectoral office during this period because he feared he may not find the refugees when he returned in the morning.[5165] He argues that his original French testimony was inaccurately translated into English and that the verb tense of the original version indicates that he knew of the attacks only after their completion, rather than at the time of their perpetration.[5166] Nsabimana adds that the allusions in his testimony to acts of violence and

[5159] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 9 October 2006 pp. 80, 81. The Appeals Chamber notes that in the testimony referred to by the Trial Chamber, Nsabimana does not refer to the "refugees" but to "them". However, the Appeals Chamber understands that the Trial Chamber substituted "them" with the term "refugees" as that was its interpretation of his statement and to provide clarity.
[5160] Nsabimana Notice of Appeal, para. 59; Nsabimana Appeal Brief, para. 130.
[5161] Nsabimana Notice of Appeal, para. 59; Nsabimana Appeal Brief, paras. 130-135, 156, 157 (emphasis omitted).
[5162] Nsabimana Appeal Brief, paras. 130, 131.
[5163] Nsabimana Appeal Brief, paras. 136, 137, 139-143; Nsabimana Reply Brief, paras. 74-76. Nsabimana also notes that the woman was not a witness and there was no evidence that she was a refugee at the prefectoral office, or that she made a specific request for assistance from Nsabimana as opposed to simply mentioning the general insecurity at the Butare Prefecture Office. *See* Nsabimana Appeal Brief, paras. 138, 139.
[5164] Nsabimana Appeal Brief, para. 144; Nsabimana Reply Brief, paras. 95, 96, 98.
[5165] Nsabimana Notice of Appeal, paras. 54-56; Nsabimana Appeal Brief, paras. 146, 147; Nsabimana Reply Brief, paras. 69, 70. *See also* AT. 16 April 2015 pp. 44, 45.
[5166] Nsabimana Notice of Appeal, paras. 57, 58; Nsabimana Appeal Brief, paras. 148-154; Nsabimana Reply Brief, paras. 69-73. *See also* AT. 16 April 2015 pp. 44, 45.

massacres relied on by the Trial Chamber were to those that had occurred throughout the prefecture and not just at the prefectoral office.[5167]

2226. The Prosecution responds that, contrary to Nsabimana's understanding, the Trial Chamber did not conclude that Nsabimana placed soldiers at the prefectoral office based on his testimony that a woman spoke with him on 15 June 1994 because it found that this incident was not the catalyst for him doing so.[5168] It argues that Nsabimana's assertion that the Trial Chamber should have accepted his evidence that no refugees informed him of the attacks fails to identify any error in the Trial Chamber's assessment of the evidence.[5169] The Prosecution further responds that the Trial Chamber reasonably concluded from his acknowledgement that he was not at peace with himself that he was aware that the refugees were being attacked during the night.[5170] It also asserts that Nsabimana's contention that his references to violence were to the entire prefecture rather than the prefectoral office specifically is speculative.[5171]

2227. The Appeals Chamber observes that, in assessing Nsabimana's testimony as to the events at the prefectoral office, the Trial Chamber stated that Nsabimana testified that he posted soldiers there around 5 June 1994 in response to refugees' requests for assistance.[5172] However, the excerpts of Nsabimana's testimony referred to by the Trial Chamber do not support this conclusion. Rather, Nsabimana testified that he placed the soldiers at the prefectoral office after becoming concerned about reprisals following the killing of the bishops at Kabgayi, seeing an "ill soldier" among the refugees at the prefectoral office, and meeting with Colonels Mugemanyi and Munyengango.[5173] Nsabimana also testified that, around 15 June 1994, a woman mentioned to him that there was a soldier amongst the refugees, but that by this point he had already posted the soldiers, and that he was already aware of the presence of the soldier.[5174] Consequently, the Appeals Chamber finds that no reasonable trier of fact could have found that the evidence called "into question Nsabimana's credibility as to when he knew about the night-time attacks at the [Butare Prefecture Office] because he could not have responded to [the refugees'] requests before he received them"[5175] as his

[5167] Nsabimana Notice of Appeal, paras. 54-58; Nsabimana Appeal Brief, paras. 146-157, *referring to* Trial Judgement, paras. 2807, 2399, Nsabimana, T. 9 October 2006 pp. 80, 81 (French), T. 9 October 2006 pp. 80-82.
[5168] Prosecution Response Brief, paras. 1292-1294, 1296, 1299. *See also* AT. 16 April 2015 p. 57.
[5169] Prosecution Response Brief, para. 1295.
[5170] Prosecution Response Brief, paras. 1300, 1301.
[5171] Prosecution Response Brief, para. 1301.
[5172] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 10 October 2006 p. 13.
[5173] Nsabimana, T. 10 October 2006 p. 13.
[5174] Nsabimana, T. 10 October 2006 pp. 15, 16.
[5175] Trial Judgement, para. 2807.

evidence reflects that he did not post soldiers on the basis of requests from the refugees but for other reasons.[5176]

2228. However, the Appeals Chamber does not find that this error has occasioned a miscarriage of justice in light of the remaining evidence relied upon by the Trial Chamber in finding that Nsabimana knew of the attacks. In the view of the Appeals Chamber, the insignificance of this error is clear in light of the fact that the Trial Chamber evaluated Nsabimana's testimony that nobody, including the refugees, informed him of the attacks at the prefectoral office, but rejected it in light of Prosecution evidence to the contrary, which is discussed below.[5177]

2229. The Appeals Chamber also finds that Nsabimana fails to demonstrate any error in the Trial Chamber's reliance on his acknowledgement that "he was not at peace with himself when he went home from the [prefectoral office] during this period because he feared that he may not find the refugees when he returned in the morning."[5178] Nsabimana principally alleges that the Trial Chamber erred because it relied upon an erroneous translation into English of his testimony. However, he does not demonstrate that the English and French versions present materially different information as to when he became aware of the attacks at the prefectoral office.[5179] Nsabimana fails to appreciate that the significance of this comment arises from his statement that he worried about what he would find when he *returned* in the morning, reflecting contemporaneous knowledge of, and concerns about, the attacks at the prefectoral office.

2230. The Appeals Chamber is similarly not persuaded by Nsabimana's assertion that the Trial Chamber unreasonably read his comment as referring to the refugees at the prefectoral office when

[5176] The Appeals Chamber notes that the Trial Chamber stated in the "Factual Findings" section of the Trial Judgement entitled "Posting of *Gendarmes* or Soldiers" that Nsabimana admitted in Exhibit P113 that he provided gendarmes to protect the refugees, and that Witness Fergal Keane stated that Nsabimana said to him on approximately 15 June 1994 that he had posted soldiers at the prefectoral office to protect the refugees. *See* Trial Judgement, para. 2808, *referring to* Exhibit P113, p. K0016631, Fergal Keane, T. 25 September 2006 p. 47, T. 28 September 2006 p. 21. The Appeals Chamber notes that Nsabimana does not explain his motivation for originally placing the soldiers at the prefectoral office beyond protecting the refugees.
[5177] *See* Trial Judgement, para. 2803, *referring to* Nsabimana, T. 10 October 2006 pp. 16, 24.
[5178] Trial Judgement, para. 2807.
[5179] Specifically, Nsabimana argues that his testimony was mistranslated from French into English and that the sentence "you are aware that massacres *took place*" in the English transcript results from an incorrect translation of his testimony, which the Trial Chamber misinterpreted as reflecting that "Nsabimana testified that after he found out that massacres were still carried out during the day and night", whereas he stated in French that "*même une personne qui vous amène une information comme ça, et vous savez que les massacres ont eu lieu*", which should have been translated into English as: "you know massacres have taken place". He alleges that the correct transcription of his original French testimony indicates that he knew about the attacks only after they were carried out as opposed to when they were ongoing. Nsabimana also points out that this comment formed a small part of his testimony and argues that the Trial Chamber "could not conclude, solely on the basis of [his] testimony, that [he] was aware of the attacks and that he posted soldiers because he knew about the night-time attacks at the [prefectoral] office." *See* Nsabimana Notice of Appeal, paras. 54-58 (emphasis in original); Nsabimana Appeal Brief, paras. 147-153 (emphasis in original); Nsabimana Reply Brief, paras. 69-73. However, this contention is meritless as the Trial Chamber relied not only on Nsabimana's testimony but also on other evidence demonstrating his knowledge of the attacks.

he was in fact speaking about Butare Prefecture as a whole. The relevant transcripts show that he made the statement in response to a question specifically asking about refugees at the prefectoral office.[5180]

2231. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its interpretation of Nsabimana's testimony as to why he placed the soldiers at the prefectoral office and that, as a result, it erred in concluding that his credibility was "call[ed] into question […] as to when he knew about the night-time attacks" at the Butare Prefecture Office. However, in light of the Trial Chamber's reliance on other aspects of Nsabimana's testimony to find that he was actually aware of night-time attacks at the prefectoral office earlier than at the end of May 1994, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice.

(iii) Prosecution Evidence and Open and Notorious Nature of the Attacks

2232. In finding that Nsabimana knew of the night-time attacks at the Butare Prefecture Office from "even earlier" than "the end of May 1994",[5181] the Trial Chamber relied upon: (i) Witness TK's "credible" evidence that a man named Alphonse ran to Nsabimana's office to ask for help while Nsabimana was in his office around the end of May or beginning of June 1994;[5182] and (ii) Witness RE's "credible" testimony that a young man and woman went to Nsabimana's office looking for help in early June 1994.[5183] The Trial Chamber also noted Witnesses SS's and SU's testimonies that "in a separate incident after attacks occurred at the [Butare Prefecture Office], three women went to see Nsabimana on behalf of the other refugees" and that, although neither witness was present at the meeting, "they were told that Nsabimana denied knowledge of the attacks and said he would post *gendarmes* to protect them".[5184] In subsequently assessing evidence relating to Nsabimana posting gendarmes or soldiers at the prefectoral office, the Trial Chamber also noted Witness QBP's evidence that a woman who was attacked by *Interahamwe* and wounded on her ear complained to Nsabimana but that he did nothing for her.[5185] The Trial Chamber further determined that Nsabimana's knowledge of attacks at the prefectoral office was based, in part, on "the open and notorious nature of the attacks".[5186]

[5180] Nsabimana, T. 9 October 2006 pp. 77, 78, 80, 81.
[5181] Trial Judgement, para. 2807.
[5182] Trial Judgement, para. 2804.
[5183] Trial Judgement, para. 2805.
[5184] Trial Judgement, para. 2806. *See also ibid.*, para. 2810.
[5185] Trial Judgement, para. 2810.
[5186] Trial Judgement, para. 2807.

2233. Nsabimana contends that the Trial Chamber erred in relying upon the testimonies of Witnesses TK, RE, SS, SU, and QBP in finding that he had knowledge of the night-time attacks.[5187] He points out that their evidence constitutes hearsay, which, in his view, should have cast doubt on its reliability.[5188] In addition, he highlights that Witnesses SD and QBQ testified that they did not inform Nsabimana about the abuses at the prefectoral office, and that Witnesses SS and SU only stated that a delegation of women went to see him and that their evidence could not demonstrate that this delegation in fact saw him.[5189]

2234. Nsabimana further contends that no reasonable trier of fact could have concluded that the attacks were so notorious that they could not have escaped his knowledge.[5190] He argues that the evidence reflects that the prefectoral office was a safe place for the refugees, particularly because they opted to return there each time.[5191] Nsabimana points out that there was no evidence of mass graves or blood stains at the prefectoral office, and he emphasises that the refugees cooked food and that the staff went about their duties.[5192]

2235. The Prosecution responds that Nsabimana fails to demonstrate any error in the Trial Chamber's assessment and reliance on the evidence of Witnesses TK, RE, SS, QBP, and SU to find that Nsabimana knew of the atrocities being committed at the prefectoral office.[5193]

2236. The Appeals Chamber notes that Witness TK provided direct evidence concerning the abduction of a man named Alphonse. Specifically, the Trial Chamber recalled that the witness saw Alphonse run into Nsabimana's office before being forced out as he shouted for help, observed him being approached by a man with a club outside of Nsabimana's office, and saw him being taken away by *Interahamwe*.[5194] The Appeals Chamber further observes that the Trial Chamber's summaries of the evidence of Witnesses RE, SS, SU, and QBP indicate that they were informed of

[5187] Nsabimana Notice of Appeal, paras. 67-69, 74; Nsabimana Appeal Brief, paras. 203-207, 237-243. *See also* Nsabimana Reply Brief, paras. 103, 105-108. *See also* AT. 16 April 2015 p. 63.
[5188] Nsabimana Notice of Appeal, para. 69; Nsabimana Appeal Brief, paras. 238, 239, 243-250, *referring to* Witness SS, T. 10 March 2003 p. 15 (closed session), Witness SU, T. 14 October 2002 p. 83. *See also* Nsabimana Reply Brief, para. 107.
[5189] Nsabimana Appeal Brief, paras. 239-241, *referring to* Witness SD, T. 18 March 2003 p. 20, Witness QBQ, T. 4 February 2004 p. 14, Witness SS, T. 10 March 2003 p. 15 (closed session), Witness SU, T. 14 October 2002 p. 83.
[5190] Nsabimana Appeal Brief, paras. 262-266; Nsabimana Reply Brief, para. 94.
[5191] Nsabimana Appeal Brief, paras. 263, 264, *referring to* Witness SJ, T. 29 May 2002 p. 46, Witness SU, T. 17 October 2002 p. 60, Witness QBP, T. 28 October 2002 pp. 58, 59, Witness RE, T. 24 February 2003 p. 21, Witness SD, T. 17 March 2003 p. 40, Witness QY, T. 19 March 2003 p. 61, Witness FAP, T. 11 March 2003 p. 56. *See also* AT. 16 April 2015 pp. 45, 46.
[5192] Nsabimana Appeal Brief, paras. 264, 265; Nsabimana Reply Brief, para. 94.
[5193] Prosecution Response Brief, paras. 1314-1316, 1322. *See also* AT. 16 April 2015 p. 58.
[5194] Trial Judgement, para. 2804.

the fact that refugees approached Nsabimana for help and were only indirectly aware of the nature and content of these discussions with Nsabimana.[5195]

2237. The Trial Judgement reveals that the Trial Chamber was aware of the indirect nature of the evidence as it concerned Nsabimana's oral communications with these refugees. The Appeals Chamber is not persuaded that simply because aspects of the accounts of Witnesses RE, SS, SU, and QBP were hearsay, a reasonable trier of fact could not have found that this evidence supported the conclusion that Nsabimana was presented with multiple requests for assistance from Tutsi refugees starting, at least, from the end of May 1994. Moreover, in determining that "Nsabimana was actually aware of the attacks even earlier", the Trial Chamber relied upon "the open and notorious nature of the attacks".[5196] Considering that the Trial Chamber has the discretion to consider cautiously and rely on hearsay evidence,[5197] Nsabimana's general contention that the hearsay nature of Witnesses RE's, SS's, SU's, and QBP's testimonies should have cast doubt on them fails to demonstrate any error on the part of the Trial Chamber.

2238. Nsabimana also fails to demonstrate that no reasonable trier of fact could have concluded that he knew of the attacks in light of Witnesses SD's and QBQ's testimonies, which in his view contradict other evidence that the attacks were reported to him. Given the "large number of refugees" at the prefectoral office between May and June 1994[5198] and the general nature of the evidence of Witnesses SD and QBQ that violence was not reported to Nsabimana,[5199] Nsabimana does not demonstrate that their testimonies undermine the Trial Chamber's reliance on the testimonies of Witnesses TK, RE, SS, QBP, and SU.

2239. The Appeals Chamber further rejects Nsabimana's contention that the Trial Chamber unreasonably relied on "the open and notorious nature of the attacks" at the prefectoral office to determine his knowledge of the attacks because the evidence reflects that the prefectoral office was considered safe by the refugees who remained there and because normal activities took place there. Nsabimana's unsubstantiated and undeveloped contention merely disagrees with the Trial Chamber's findings, which reflect that, although the Tutsis hoped to find refuge at the prefectoral office "they instead found themselves subject to abductions, rapes and murder", the evidence of

[5195] Trial Judgement, paras. 2805, 2806, 2810.
[5196] Trial Judgement, para. 2807.
[5197] *Nizeyimana* Appeal Judgement, para. 95; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.
[5198] Trial Judgement, para. 2627.
[5199] Witness QBQ, T. 4 February 2004 p. 14 ("Q. The alleged abductions you referred to yesterday, did you report them to [the] *préfet* or anyone from the *préfectural* offices on the morrow of each time it occurred? A. The events were happening in front of his offices, his *préfecture*. We had nothing to report to him, he knew what was going on."); Witness SD, T. 18 March 2003 p. 18 ("Q. Madam Witness, when work started in the morning, one way or another, were

which "paint[ed] a clear picture of unfathomable depravity and sadism".[5200] While the Trial Chamber's conclusions reflect that Tutsi refugees were systematically abducted from the prefectoral office and killed,[5201] the Trial Chamber also credited evidence that Tutsis were physically assaulted, raped, and killed in and around the prefectoral office's premises,[5202] and that Tutsi refugees were killed and thrown into pits during attacks there.[5203] Nsabimana's unreferenced contentions as to the absence of blood stains or mass graves at the prefectoral office simply ignore the evidence the Trial Chamber accepted without demonstrating that its conclusions about the open and notorious nature of the attacks were unreasonable.[5204] Indeed, while Nsabimana emphasises that Witness QBQ testified that refugees did not inform him of the violence, the Appeals Chamber observes that the witness testified that there was nothing to report to Nsabimana because "he knew what was going on".[5205]

2240. Accordingly, the Appeals Chamber finds that Nsabimana has failed to demonstrate any error in the Trial Chamber's reliance on the evidence of Witnesses TK, RE, SS, QBP, and SU and "the open and notorious nature of the attacks" to infer Nsabimana's knowledge of the night-time attacks at the Butare Prefecture Office "even earlier" than "the end of May 1994".

(iv) Conclusion

2241. In light of the evidence of Witnesses TK, RE, SS, SU, and QBP and "the open and notorious nature of the attacks" at the prefectoral office relied upon by the Trial Chamber in determining Nsabimana's knowledge of the attacks at the prefectoral office prior to the end of May 1994, the Appeals Chamber finds that the Trial Chamber's errors in the assessment of, and reliance on, Exhibits P113 and P114 as well as parts of Nsabimana's testimony have not occasioned a miscarriage of justice. The Appeals Chamber concludes that Nsabimana has failed to demonstrate that no reasonable trier of fact could have concluded that he had knowledge of the attacks at the prefectoral office prior to the end of May 1994.

(b) Knowledge of Genocidal Intent of the Perpetrators

2242. In the "Legal Findings" section of the Trial Judgement, the Trial Chamber concluded that Nsabimana was aware of the genocidal intent of the perpetrators who killed the Tutsis abducted

events of the night reported to the *préfet*? A. Since nobody was in charge of us he could not have been informed. Who would have informed him?").
[5200] Trial Judgement, para. 5866.
[5201] *See generally supra*, Sections IV.F.2(d)-(f), V.I.2(c)-(f).
[5202] *See*, *e.g.*, Trial Judgement, paras. 2184, 2632, 2644, 2653, 2740, 2766, 2769-2771, 2773.
[5203] Trial Judgement, paras. 2740-2742.
[5204] *See also supra*, Section V.I.2(a)(vi).
[5205] Witness QBQ, T. 4 February 2004 p. 14.

from the Butare Prefecture Office during attacks carried out by Ntahobali, Nyiramasuhuko, and *Interahamwe*.[5206] In this regard, the Trial Chamber considered Nsabimana's: (i) knowledge that those taking refuge at the prefectoral office "were Tutsis and on multiple occasions, they asked him directly for protection from the ongoing attacks"; (ii) knowledge that Tutsi refugees "were being abducted, raped and killed"; and (iii) admission that "he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose."[5207]

2243. Nsabimana submits that the Trial Chamber erred in finding that he was aware of the perpetrators' genocidal intent in relation to the attacks at the prefectoral office.[5208] In particular, he argues that no reasonable trier of fact could have found that Exhibits P113 and P114 reflect that he was aware of a plan to kill Tutsis, that Tutsis were being killed, that the militia had been trained for this purpose, and therefore that he was aware of the perpetrators' genocidal intent.[5209]

2244. With respect to Exhibit P113 specifically, Nsabimana submits that none of his statements in this exhibit demonstrates his knowledge of a plan to kill Tutsis during the period from April to June 1994 because the document was drafted in "hindsight" and, therefore, did not reflect his mental state at the time.[5210] He further argues that the Trial Chamber incorrectly relied on the statement in the document that "the final whistle was blown by the architects of the plan" to demonstrate that Nsabimana was speaking about the plan to kill Tutsis when this interpretation is neither clear nor reasonable.[5211] Additionally, Nsabimana contends that the extract from Exhibit P113 that "among those victimized for being Tutsis and well respected persons were the businessmen Semanzi, Rangira, Kayiranga and Deogratias" does not support a finding beyond reasonable doubt that he was aware of events he described "at the time they were happening".[5212]

[5206] Trial Judgement, para. 5904.
[5207] Trial Judgement, para. 5904, *referring*, *inter alia*, *to* Exhibit P113, pp. K0016623, K0016626 (Registry pagination), Exhibit P114, pp. K0120067, K0120073 (Registry pagination).
[5208] Nsabimana Notice of Appeal, paras. 105-107; Nsabimana Appeal Brief, paras. 428-430; Nsabimana Reply Brief, paras. 153-178. In his reply brief, Nsabimana submits that, had he been aware of the perpetrators' genocidal intent or of a plan to kill Tutsis, he would never have let the refugees stay at the prefectoral office, allowed the refugees to return to the prefectoral office from the EER and Nyange, posted soldiers at the prefectoral office, or directly engaged in evacuating Tutsis orphans given the risks that these actions would have entailed. *See* Nsabimana Reply Brief, paras. 169-172. The Appeals Chamber finds that these arguments are speculative and demonstrate no error on the part of the Trial Chamber.
[5209] Nsabimana Appeal Brief, paras. 401, 429, 445, 446, 450-482; Nsabimana Reply Brief, paras. 153-155, 176, 177. *See also* AT. 16 April 2015 p. 64. Nsabimana further contends that the Trial Chamber unreasonably relied on his participation in his swearing-in ceremony as prefect of Butare to find that he was aware of a plan to kill Tutsis and, as a consequence, of the genocidal intent of the perpetrators of the attacks at the Butare Prefecture Office. *See* Nsabimana Appeal Brief, paras. 401-427; Nsabimana Reply Brief, paras. 156-168, 173-175. As the Trial Judgement shows that the Trial Chamber relied on Exhibits P113 and P114 to find that Nsabimana admitted that he was aware of a plan to kill Tutsis, and not on his participation in his swearing-in ceremony, the Appeals Chamber summarily dismisses his argument.
[5210] Nsabimana Appeal Brief, paras. 448, 453-455; Nsabimana Reply Brief, para. 158.
[5211] Nsabimana Appeal Brief, paras. 456-459, *referring to* Exhibit P113, p. K0016623 (Registry pagination).
[5212] Nsabimana Appeal Brief, paras. 460, 461, *referring to* Exhibit P113, p. K0016626 (Registry pagination).

2245. As regards Exhibit P114, Nsabimana contends that the Trial Chamber's reliance on excerpts of this document was erroneous given its questionable authenticity.[5213] Alternatively, he argues that the document, created after the genocide, reflects hindsight rather than contemporaneous views, and that none of the statements reflects an admission of his awareness of a plan to exterminate Tutsis.[5214]

2246. The Prosecution responds that the Trial Chamber's findings were reasonable and that Nsabimana simply invites the Appeals Chamber to substitute his views for that of the Trial Chamber without demonstrating any errors.[5215] It argues that the Trial Chamber correctly determined that Nsabimana was aware of a plan to kill Tutsis and of the perpetrators' genocidal intent during the attacks at the prefectoral office.[5216]

2247. The Appeals Chamber is not convinced by Nsabimana's submissions that the Trial Chamber erred in its interpretation of Exhibit P113. The Trial Chamber cited the following excerpt from Exhibit P113 in support of its finding that "Nsabimana admitted that he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose":

> In everybody's opinion the final whistle was blown by the architects of the plan… [A]mong those victimized for being Tutsi and well respected persons were the businessmen Semanzi, Rangira, Kayiranga, and Deogratias.[5217]

The Appeals Chamber observes that the Trial Chamber extracted the first part of the excerpt from a section entitled "Butare was not spared", where Nsabimana discussed the assassinations of moderate politicians in Butare Prefecture, concluding that "[i]t was necessary to find a political reason to start the massacre hence the death of President [H]abyalimana."[5218] The second part of the excerpt was taken from a section entitled "What happened in reality" and from a paragraph stating that "[s]ince the MRND party was not entrenched in Butare, its leaders wanted to weaken other parties by way of intimidation and advocating regionalism, in order to perpetuate the massacres."[5219] The Appeals Chamber observes that this paragraph and the remainder of the section describe the killings of Tutsis, moderate Hutus, and those who supported the RPF.[5220] On this basis, the Appeals Chamber considers that a reasonable trier of fact could have relied on Exhibit P113 to find that Nsabimana "admitted" to being aware of a plan to kill Tutsis. Beyond providing different interpretations of Exhibit P113, including the unsubstantiated position that these remarks were

[5213] Nsabimana Appeal Brief, paras. 462, 468.
[5214] Nsabimana Appeal Brief, paras. 466-467, 469-476.
[5215] Prosecution Response Brief, paras. 1382-1400.
[5216] Prosecution Response Brief, paras. 1396, 1398, 1399.
[5217] Trial Judgement, para. 5904, fn. 14768, *referring to* Exhibit P113, pp. K0016623, K0016626 (Registry pagination).
[5218] Exhibit P113, pp. K0016623, K0016624 (Registry pagination).
[5219] Exhibit P113, p. K0016626 (Registry pagination).

made in hindsight and do not reflect what he knew during the genocide, Nsabimana fails to demonstrate how the Trial Chamber erred in its analysis of Exhibit P113.

2248. With respect to Exhibit P114, the Appeals Chamber reiterates its finding that the Trial Chamber erred in relying on this exhibit as proof of Nsabimana's own views.[5221] The Appeals Chamber recalls that, when confronted with Exhibit P114 and the suggestion that it reflected his awareness of a plan to exterminate Tutsis, Nsabimana denied that he was aware of such a plan.[5222] In this context, the Appeals Chamber finds that no reasonable trier of fact could have relied on Exhibit P114 to conclude that "Nsabimana admitted that he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose."[5223]

2249. However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice as Nsabimana does not demonstrate any error in the Trial Chamber's reliance on Exhibit P113 as supporting the conclusion that he was aware of the principal perpetrators' genocidal intent. Likewise, as discussed above, Nsabimana has failed to demonstrate any error in the Trial Chamber's conclusion that he was actually aware of night-time attacks which were specifically targeted against Tutsis at the prefectoral office earlier than the end of May 1994 and which involved, *inter alia*, the abduction, rape, and killings of Tutsis.[5224]

2250. In light of these conclusions, the Appeals Chamber finds that Nsabimana has failed to demonstrate that no reasonable trier of fact could have found that he was aware of the perpetrators' genocidal intent.

(c) Knowledge that His Failure to Act Assisted in the Commission of the Crimes

2251. In finding that Nsabimana knew that his failure to act assisted in the commission of the crimes, the Trial Chamber noted that "Nsabimana knew the attacks were occurring at night when he was not at the [prefectoral office] and when there were likely to be fewer witnesses."[5225] It further noted that he testified that after learning of the massacres, he would go home at night fearing that the refugees would not be at the prefectoral office when he returned in the morning.[5226] The Trial

[5220] Exhibit P113, pp. K0016626-K0016629 (Registry pagination).
[5221] *See supra*, para. 252.
[5222] *See* Nsabimana, T. 22 November 2006 p. 45 ("Q. […] these words do you agree with the contents of the document, so, therefore, you agree that you were aware of a plan to exterminate the Tutsis, as stated in this document? A. My answer to you is no, Counsel. As the things are here and as you put them, it is not the same thing. We can agree on certain terms and certain words and certain things, but not as you put it, which is why I'm refusing. That is why I'm telling you I was not aware of that plan. If I had been aware of it, I wouldn't have all that defend of the following."). *See supra*, para. 251.
[5223] Trial Judgement, para. 5904, *referring to* Exhibit P114, pp. K0120067, K0120073 (Registry pagination).
[5224] *See supra*, Section VI.D.2(a).
[5225] Trial Judgement, para. 5905.
[5226] Trial Judgement, para. 5905.

Chamber stated that "the perpetrators of these attacks were given free reign to repeatedly attack the [Butare Prefecture Office] for a significant period between the end of April and mid-June 1994."[5227]

2252. Nsabimana submits that the Trial Chamber erred in finding that he knew that his failure to act would assist and have a substantial impact on the perpetrators of the atrocities at the prefectoral office.[5228] To demonstrate this error, Nsabimana argues that he was not aware that the crimes were being committed at the prefectoral office.[5229] In addition, Nsabimana argues that the Trial Chamber failed to establish that he had specific genocidal intent.[5230]

2253. The Prosecution responds that the Trial Chamber correctly found that Nsabimana knew that his failure to act assisted in the commission of the crimes against the refugees at the prefectoral office.[5231]

2254. The Appeals Chamber recalls that Nsabimana's challenges to the Trial Chamber's findings related to his knowledge of the crimes committed at the prefectoral office have been addressed and dismissed in a prior section of this Judgement.[5232]

2255. As regards Nsabimana's challenge to the Trial Chamber's findings pertaining to the mental element of the crime of genocide, Nsabimana fails to appreciate that the *mens rea* requirements differ depending on the mode of liability. The Appeals Chamber recalls that "the required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal."[5233]

2256. In the present case, the Trial Chamber found that Nsabimana was responsible for aiding and abetting genocide by failing to discharge his duty to protect civilians at the prefectoral office prior to around 5 to 15 June 1994.[5234] In making this finding, the Trial Chamber concluded that Nsabimana knew that the Tutsi refugees at the prefectoral office were being abducted, raped, and killed and that he was aware of the perpetrators' genocidal intent.[5235] It similarly concluded that Nsabimana knew that his failure to act assisted in the commission of the crimes at the prefectoral

[5227] Trial Judgement, para. 5905.
[5228] Nsabimana Notice of Appeal, paras. 108, 109; Nsabimana Appeal Brief, paras. 483, 485.
[5229] Nsabimana Notice of Appeal, para. 110; Nsabimana Appeal Brief, paras. 488, 492.
[5230] Nsabimana Appeal Brief, paras. 484, 486, 487, 495-501.
[5231] Prosecution Response Brief, paras. 1401, 1410, 1411. The Appeals Chamber notes that Nsabimana's submissions in reply either pertain to the arguments raised under Ground 12 of his appeal or are ambiguous and vague. *See* Nsabimana Reply Brief, paras. 179-187.
[5232] *See supra*, Section VI.D.2(a).
[5233] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also Orić* Appeal Judgement, para. 43; *Ntagerura et al.* Appeal Judgement, para. 370.
[5234] *See* Trial Judgement, para. 5906.
[5235] *See* Trial Judgement, para. 5904.

office.[5236] Nsabimana's responsibility for aiding and abetting genocide did not require proof that he possessed genocidal intent. Consequently, his contention in this regard is dismissed.

(d) Conclusion

2257. The Appeals Chamber finds that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he possessed the requisite *mens rea* for the mode of liability of aiding and abetting by omission.

3. Conclusion

2258. In light of the foregoing, the Appeals Chamber dismisses the relevant parts of Grounds 6 and 13 as well as Grounds 7 through 10, 12, and 14 of Nsabimana's appeal in their entirety.

[5236] *See* Trial Judgement, para. 5905.

VII. APPEAL OF ALPHONSE NTEZIRYAYO

2259. The Trial Chamber found Nteziryayo guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute based on his speeches at Ndayambaje's swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994 ("Ndayambaje's Swearing-In Ceremony") and at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994.[5237]

2260. Nteziryayo raises challenges related to his indictment and submits that the Trial Chamber erred in its assessment of the evidence and his responsibility for the speeches he made during Ndayambaje's Swearing-In Ceremony and at the meetings held in Muyaga and Kibayi Communes. He also contends that the Trial Chamber conducted a prejudicial assessment of the evidence, invalidating his convictions. The Appeals Chamber will address these contentions in turn.

[5237] Trial Judgement, paras. 6022-6029, 6036, 6186.

A. Indictment (Grounds 1, 2, and 3)

2261. Nteziryayo submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof.[5238] He further contends that the cumulative effect of the defects in the Indictment "not only rendered the totality of the trial process unfair and caused [him] substantial prejudice, but also invalidate the substantive findings of the Trial Judgment."[5239]

2262. The Appeals Chamber will examine Nteziryayo's submissions related to notice of the allegation concerning Ndayambaje's Swearing-In Ceremony before turning to his submissions related to notice of the allegations concerning the meetings held in Muyaga and Kibayi Communes.

1. Ndayambaje's Swearing-In Ceremony (Ground 1)

2263. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the new *bourgmestre* of Muganza Commune held in the woods near the Muganza commune office on 22 June 1994, Nteziryayo and Ndayambaje told the population to continue with their "work", urged them to "sweep the dirt outside", and instructed that those hiding Tutsis who refused to hand them over should be killed.[5240] The Trial Chamber convicted Nteziryayo pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide (Count 4) on the basis of his statements made during this ceremony.[5241]

2264. In summarising the Prosecution case against Nteziryayo with respect to this allegation of incitement, the Trial Chamber specifically referred to paragraphs 5.8, 6.31, and 6.34 of the Indictment.[5242] The Indictment indicates that the allegations in paragraphs 5.8 and 6.31 were being pursued against Nteziryayo under all counts, including Count 4, pursuant to Article 6(1) of the

[5238] Nteziryayo Notice of Appeal, paras. 7-36; Nteziryayo Appeal Brief, paras. 8-95. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nsabimana and Nteziryayo Indictment.
[5239] Nteziryayo Notice of Appeal, para. 7; AT. 17 April 2015 p. 6.
[5240] *See* Trial Judgement, paras. 4616, 4642, 4645, 5948, 6026, 6027.
[5241] Trial Judgement, paras. 6029, 6036, 6186.
[5242] Trial Judgement, paras. 4260, 4266-4270, fns. 11640, 11641. Paragraphs 5.8, 6.31, and 6.34 of the Nsabimana and Nteziryayo Indictment read as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Ny[i]ramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Ladislas Ntaganzwa and Elie Ndayambaje publicly incited the people to exterminate the Tutsi population and its "accomplices".
>
> 6.31 Between April and June 1994, Colonel Alphonse Nteziryayo, the official in charge of civil defence for Butare *préfecture*, incited the population to slaughter the Tutsi in Butare *préfecture*.
>
> 6.34 On 17 June 1994, Alphonse Nteziryayo was appointed *Préfet* of Butare by the Interim Government, replacing Sylvain Nsabimana. After the handing over of office on 21 June 1994, *Préfet* Alphonse Nteziryayo continued to incite the population to "finish off" the enemy and its "accomplices". He did this notably during the swearing-in ceremony of the *Bourgmestre* of Muganza, Elie Ndayambaje.

Statute.[5243] However, paragraph 6.34 was not being pursued under Count 4 or any other count in the Indictment.[5244]

2265. The Trial Chamber noted that paragraph 6.34 of the Indictment, which was the only paragraph referring to the allegation that Nteziryayo incited the population to "finish off" the enemy and its "accomplices" during Ndayambaje's Swearing-In Ceremony, was not specifically pleaded in support of any counts against Nteziryayo.[5245] It stated that it "recognise[d] that the Prosecution's failure to expressly state that a paragraph in the Indictment supports a particular count is indicative that the allegation is not charged as a crime, but consider[ed that] this [did] not definitively dispose of the current allegation in the present circumstances."[5246] The Trial Chamber found that Nteziryayo's alleged inciting speech at Ndayambaje's Swearing-In Ceremony was not a separate charge which was not pleaded, but rather a material fact that supported the charge of incitement pleaded in paragraphs 5.8 and 6.31 of the Indictment.[5247] It determined that paragraphs 5.8 and 6.31, which were pleaded in support of all counts against Nteziryayo, encompassed the allegation that he incited the population at the ceremony.[5248] Because it considered that paragraphs 5.8 and 6.31 failed to provide any details of specific incidents of incitement, the Trial Chamber found that they were defective.[5249] The Trial Chamber, however, found that the defects were cured through subsequent disclosures and that Nteziryayo was provided with clear and consistent notice that the allegation that he incited the population to kill Tutsis at Ndayambaje's Swearing-In Ceremony in June 1994 was part of the Prosecution case and that he did not suffer any prejudice.[5250]

2266. Nteziryayo submits that the Trial Chamber erred in convicting him on the basis of his utterances at Ndayambaje's Swearing-In Ceremony since this allegation was not charged as a crime in the Indictment.[5251] He contends that the Trial Chamber's statement that it could not make findings against him with respect to paragraph 6.34 of the Indictment because it was not pleaded in support of any count precluded it from basing any conviction on the contents of this paragraph.[5252] According to Nteziryayo, once it declined to rely on paragraph 6.34, the Trial Chamber could not "rely heavily on it in 'curing' paragraphs which otherwise were hopelessly defective" without

[5243] Nsabimana and Nteziryayo Indictment, p. 44.
[5244] Nsabimana and Nteziryayo Indictment, pp. 41-49.
[5245] Trial Judgement, paras. 4266, 4267.
[5246] Trial Judgement, para. 4267 (internal reference omitted).
[5247] Trial Judgement, para. 4268.
[5248] Trial Judgement, para. 4268.
[5249] Trial Judgement, para. 4269.
[5250] Trial Judgement, paras. 4270-4283.
[5251] Nteziryayo Notice of Appeal, paras. 9-14, 17; Nteziryayo Appeal Brief, paras. 17-19, 29. *See also* AT. 17 April 2015 pp. 5-10, 40, 41.
[5252] Nteziryayo Appeal Brief, paras. 10-16. *See also* Nteziryayo Reply Brief, paras. 8, 9. Nteziryayo submits that, in this case, the Trial Chamber found in "categorical terms" that because the paragraph was not pleaded in support of any count, it would not make any finding against Nteziryayo. *See* Nteziryayo Appeal Brief, para. 16.

running against its own conclusion in relation to paragraph 6.34 and being "in conflict with principle and fairness."[5253] He argues that the Trial Chamber's attempt to reintroduce in Count 4 through post-indictment disclosures the allegation in paragraph 6.34 – which was expressly excluded from that count – "amounted to the introduction of a separate charge."[5254] Comparing the situation addressed in the *Muvunyi* Appeal Judgement of 29 August 2008 with the situation at hand, Nteziryayo submits that the defect in the Indictment was not curable through any other means than an amendment of the Indictment and that the Trial Chamber erred in finding otherwise.[5255]

2267. The Prosecution responds that, contrary to Nteziryayo's claim, the Trial Chamber did not rely on paragraph 6.34 of the Indictment to convict him but relied on paragraphs 5.8 and 6.31 of the Indictment.[5256] It argues that an amendment of the Indictment was unnecessary since Nteziryayo's incitement at Ndayambaje's Swearing-In Ceremony was not a separate charge but a material fact that underpinned the charge of incitement under Count 4.[5257] In the Prosecution's view, the situation addressed in the *Muvunyi* case is distinguishable.[5258] The Prosecution also responds that the Trial Chamber was correct in finding that timely, clear, and consistent information put Nteziryayo on notice of the material facts regarding his incitement at the ceremony and that he mounted a full defence to this allegation because he knew it was central to the Prosecution case.[5259]

2268. Nteziryayo replies that the Prosecution's arguments that the Trial Chamber correctly held that the Indictment was cured and that he did not suffer prejudice are "based on a misperception of

[5253] Nteziryayo Appeal Brief, paras. 14, 17, 23, 24. *See also* Nteziryayo Reply Brief, paras. 10, 11, 14, 15.
[5254] Nteziryayo Appeal Brief, paras. 30, 31. In Nteziryayo's view, the Trial Chamber therefore erred in finding that his speech at Ndayambaje's Swearing-In Ceremony qualified as a material fact. *See ibid.*, para. 32. He further highlights that the Trial Chamber adopted differentiated approaches in the Trial Judgement since, elsewhere, it correctly declined to consider an allegation against Nsabimana because paragraph 6.39 of the Nsabimana and Nteziryayo Indictment was not pleaded in support of any count. *See ibid.*, para. 28, *referring to* Trial Judgement, para. 3840.
[5255] Nteziryayo Notice of Appeal, paras. 14, 17; Nteziryayo Appeal Brief, heading b(i) at p. 12, paras. 21, 25-27, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 152, 153, 155, 156. *See also* Nteziryayo Reply Brief, paras. 12, 13. In his notice of appeal, Nteziryayo also argued that, assuming *arguendo* that the Nsabimana and Nteziryayo Indictment was curable, the Trial Chamber erred in finding that it was cured regarding the allegation of incitement at Ndayambaje's Swearing-In Ceremony and in failing to assess his prejudice. *See* Nteziryayo Notice of Appeal, paras. 8, 15, 16. However, Nteziryayo did not develop these claims in his appeal brief and it is clear from his submissions in reply that he has abandoned them. *See infra*, para. 2268.
[5256] Prosecution Response Brief, paras. 1432-1434.
[5257] Prosecution Response Brief, para. 1446.
[5258] The Prosecution highlights that, in this case and contrary to the situation in the *Muvunyi* Appeal Judgement of 29 August 2008, the Trial Chamber did not rely on a paragraph of the Nsabimana and Nteziryayo Indictment that had not been pleaded in support of the respective count and that the Nsabimana and Nteziryayo Indictment contained a vague and curable count. *See* Prosecution Response Brief, paras. 1434-1436; AT. 17 April 2015 p. 24. It also responds that Nteziryayo misrepresents the Trial Judgement when arguing that the Trial Chamber adopted inconsistent approaches to the issue of notice. *See* Prosecution Response Brief, para. 1433.
[5259] Prosecution Response Brief, paras. 1437-1445; AT. 17 April 2015 pp. 23, 24.

the case on appeal, which is that the defect identified by the Chamber was not curable" and are, therefore, "irrelevant […] because they do not respond to [his] appeal."[5260]

2269. The Appeals Chamber observes that, as noted by the Trial Chamber, the allegation that Nteziryayo incited the population to "finish off" the enemy and its "accomplices" at Ndayambaje's Swearing-In Ceremony pleaded in paragraph 6.34 of the Indictment was not relied upon in support of any counts against Nteziryayo.[5261] A plain reading of the Trial Judgement shows that the Trial Chamber concluded that Nteziryayo was put on notice of this alleged inciting speech by relying solely on paragraphs 5.8 and 6.31 of the Indictment – which pleaded in broad terms that Nteziryayo incited the population to kill Tutsis between April and June 1994 and which were relied upon in support of Count 4 – as well as on post-indictment communications.[5262] The situation at hand therefore differs from the situation examined in the *Muvunyi* case where the trial chamber relied on a single paragraph of the indictment that was not pleaded under any count to enter a conviction.[5263]

2270. The Appeals Chamber nonetheless concurs with Nteziryayo that, although the Trial Chamber did not rely on paragraph 6.34 of the Indictment, it is indisputable that it convicted him on the basis of the allegation set forth in this specific paragraph.[5264] The Appeals Chamber repeatedly held that the Prosecution's failure to state expressly that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation in the paragraph is not charged as a crime.[5265] There is therefore merit in Nteziryayo's contention that, by not indicating that the

[5260] Nteziryayo Reply Brief, paras. 5, 6. *See also ibid.*, para. 16; AT. 17 April 2015 pp. 8, 40. At the appeals hearing, Nteziryayo further submitted that it was erroneous on the part of the Trial Chamber to rely on paragraph 6.31 of the Nsabimana and Nteziryayo Indictment to plead crimes committed while he was prefect because that paragraph pleaded crimes committed while he was an official of the civil defence. *See* AT. 17 April 2015 pp. 3-5, 10, 41.
[5261] *See* Trial Judgement, paras. 4266, 4267; Nsabimana and Nteziryayo Indictment, pp. 41-49.
[5262] Trial Judgement, paras. 4268-4270, 4283. In light of its conclusion below regarding Nteziryayo's understanding of the charge against him, the Appeals Chamber deems it unnecessary to address Nteziryayo's new argument raised during the appeals hearing related to paragraph 6.31 of the Nsabimana and Nteziryayo Indictment in the context of the allegation of incitement at Ndayambaje's Swearing-In Ceremony. *See supra*, fn. 5260; *infra*, paras. 2273, 2274.
[5263] *See Muvunyi* Trial Judgement of 12 September 2006, paras. 410, 427; *Muvunyi* Appeal Judgement of 29 August 2008, paras. 153, 156. Nteziryayo also fails to appreciate that, unlike in this case, the relevant count in the *Muvunyi* proceeding was not found to be vague but, instead, "narrowly tailored" to one specific incident. *See Muvunyi* Appeal Judgement of 29 August 2008, para. 155.
[5264] The Appeals Chamber also accepts Nteziryayo's submissions that the Trial Chamber adopted different approaches in relation to paragraphs 6.34 and 6.39 of the Nsabimana and Nteziryayo Indictment. In another part of the Trial Judgement, the Trial Chamber found that, because paragraph 6.39 was not pleaded in support of any count against Nsabimana, it "shall not consider the evidence concerning the allegation in Paragraph 6.39 of the Indictment." *See* Trial Judgement, para. 3840. Unlike its approach to the allegation set forth in paragraph 6.34, the Trial Chamber did not treat the allegation in paragraph 6.39 as a material fact that could underpin broader allegations of Nsabimana's responsibility in the killing of Tutsis pleaded elsewhere in the Nsabimana and Nteziryayo Indictment and determined that the evidence related to this allegation shall not be considered. *Compare ibid.*, para. 3840 *with ibid.*, paras. 4267, 4268. However, for the reasons discussed below in paragraphs 2273 and 2274, the Appeals Chamber does not find that the Trial Chamber's inconsistent approach had any impact on its decision regarding Nteziryayo's notice of the charge against him concerning Ndayambaje's Swearing-In-Ceremony.
[5265] *See Ntabakuze* Appeal Judgement, para. 106; *Karera* Appeal Judgement, para. 365; *Muvunyi* Appeal Judgement of 29 August 2008, para. 156.

allegation in paragraph 6.34 supported any particular count, the Prosecution may have misled him in believing that the allegation was not charged as a crime.

2271. The Appeals Chamber, however, stresses that the fundamental question when examining allegations of lack of notice is whether or not the accused was adequately informed of the nature and cause of the charges against him so as to be able to prepare a meaningful defence.[5266] The Appeals Chamber's case law on notice of the charges was developed in this spirit and was not intended to permit mere technicalities of pleading to intrude where it is clear that the accused was informed of the charges against him precisely and in a timely manner.

2272. In the present case, the phrasing of paragraph 6.34 of the Indictment made it clear that the Prosecution alleged that Nteziryayo engaged in criminal conduct at Ndayambaje's Swearing-In Ceremony which could support the charge of direct and public incitement to commit genocide. Despite the fact that paragraph 6.34 was not relied upon in the charging section of the Indictment, the Prosecution, before and after the filing of the Indictment, repeatedly indicated that Nteziryayo's utterances at this ceremony were part of its case.[5267]

2273. Nteziryayo's conduct at trial also unambiguously shows that he understood that he was charged with this allegation. In his opening statement, in particular, Nteziryayo expressly referred to paragraph 6.34 of the Indictment as one of the basis of the charges against him.[5268] A review of the record also reflects that Nteziryayo was able to undertake detailed cross-examination of the Prosecution witnesses who testified about his utterances at the ceremony,[5269] that he called

[5266] *Cf. Ntakirutimana* Appeal Judgement, paras. 27, 28, 58; *Kvočka et al.* Appeal Judgement, paras. 28, 32-34; *Kupreškić et al.* Appeal Judgement, paras. 88, 122.

[5267] *See The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29A-I, *Éléments justificatifs*, filed on 14 October 1997 and disclosed to Nteziryayo in redacted form on 19 October 1998, p. 25 (relying on a witness's statement discussing Nteziryayo's utterances at Ndayambaje Swearing-In Ceremony in support of paragraph 3.17 of the initial indictment, which was charged under the count of direct and public incitement to commit genocide. *See The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29A-I, Indictment, 16 October 1997, para. 3.17, p. 5; Prosecution Opening Statement, T. 12 June 2001 pp. 78, 79 ("The Prosecutor will prove that Nteziryayo on several occasions, in several places, engaged in the incitement of the population during public rallies, during swearing-in ceremonies; I do recall the swearing-in of Elie Ndayambaje as Bourgmestre of Muganza. And he was engaged in the incitement of the population."); Witness Summaries Grid, item 6, Witness TO ("Witness TO's Summary"), item 19, Witness FAG ("Witness FAG's Summary").

[5268] Nteziryayo Opening Statement, T. 4 December 2006 p. 12 ("Following several points in the indictment, point 116, 129, 58, 634, Alphonse Nteziryayo carried out criminal and reprehensible acts by taking part in a number of public meetings in different localities in the *préfecture* with the aim of using incendiary speeches to incite people to ethnic hatred.").

[5269] *See* Witness FAG, T. 3 March 2004 pp. 43-51 (partly in closed session); Witness FAL, T. 9 February 2004 pp. 42-68 (partly in closed session); Witness QAF, T. 5 February 2004 pp. 75-84 (partly in closed session), T. 6 February 2004 pp. 4-24 (partly in closed session); Witness RV, T. 18 February 2004 pp. 57-73 (closed session), T. 19 February 2004 pp. 4-38 (partly in closed session); Witness TO, T. 4 March 2002 pp. 52-117 (partly in closed session), T. 5 March 2002 pp. 9-58 (partly in closed session); Witness TP, T. 12 February 2004 pp. 26-45 (partly in closed session); Witness FAU, T. 8 March 2004 pp. 72-94 (partly in closed session); T. 9 March 2004 pp. 13-27 (closed session); Witness QAQ, T. 11 November 2002 pp. 52-72 (partly in closed session); Witness QAL, T. 25 February 2004 pp. 14-25 (partly in closed session). The Appeals Chamber also observes that Nteziryayo does not argue that he objected to the evidence of these witnesses for lack of notice of the charge.

witnesses to refute the allegation that his words at Ndayambaje's Swearing-in Ceremony were inflammatory,[5270] and that he testified on this point.[5271] It is also significant that, in his closing brief, Nteziryayo did not refer to the allegation of incitement at the ceremony in the list of incidents which he claimed to have no notice of,[5272] and that it was only during his closing arguments that he pointed out that paragraph 6.34 was not pleaded in support of any counts.[5273]

2274. Against this background, Nteziryayo cannot reasonably claim that he did not understand at trial that the Prosecution intended to prove that he was guilty of direct and public incitement to commit genocide through his conduct at Ndayambaje's Swearing-In Ceremony and that he was misled by the absence of reference to paragraph 6.34 in the charging section of the Indictment. Nteziryayo is correct in his submission that, given the significance of the Indictment, it shall be "presumed to be a full, accurate and true reflection of the drafter's intention and free from oversight and error."[5274] However, in the situation at hand, it is obvious that the Prosecution mistakenly omitted to refer to paragraph 6.34 in the charging section of the Indictment and that it was the Prosecution's consistent intention throughout the case to prosecute Nteziryayo for his utterances at Ndayambaje's Swearing-In Ceremony.

2275. For the foregoing reasons, the Appeals Chamber concludes that Nteziryayo has not demonstrated that the Trial Chamber ultimately erred in finding that he was put on notice that he was charged with direct and public incitement to commit genocide based on his utterances at Ndayambaje's Swearing-In Ceremony and that he did not suffer prejudice.[5275]

2. Muyaga and Kibayi Meetings (Grounds 2 and 3)

2276. The Trial Chamber found that, around mid-June, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting in Muyaga Commune at which he made a speech inciting the population to kill Tutsis.[5276] The Trial Chamber further found that, around mid to late June 1994,

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[5270] *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Pre-Defence Brief for Presentation of Defence Case, 31 December 2004 (originally filed in French, English translation filed on 4 February 2005) ("Nteziryayo Pre-Defence Brief"), pp. 11, 16. *See also* Trial Judgement, paras. 4536-4551 (Witness AND-11), 4552-4563 (Witness AND-73).
[5271] *See* Trial Judgement, paras. 4564-4585.
[5272] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Alphonse Nteziryayo's Closing Brief, 17 February 2009 (confidential) ("Nteziryayo Closing Brief"), para. 765. While Nteziryayo argued in his closing brief that the testimonies of Witnesses FAG, FAL, QAF, and QAL should be excluded, his request was limited to meetings and inciting speeches in Muganza between April and early June 1994. *See ibid.*, para. 765(9).
[5273] *See* Nteziryayo Closing Arguments, T. 28 April 2009 pp. 19-21.
[5274] *See* Nteziryayo Appeal Brief, para. 20.
[5275] As noted above, Nteziryayo made it clear in his reply brief that he no longer argued that the vagueness of the Nsabimana and Nteziryayo Indictment regarding his criminal responsibility in relation to Ndayambaje's Swearing-In Ceremony was not cured and did not develop any argument to demonstrate that he was not put on notice of all necessary material facts underpinning the charge under Count 4. *See supra*, para. 2268.
[5276] Trial Judgement, paras. 3674, 5945, 6022.

Nteziryayo, again in his capacity as Butare Prefect, attended a public meeting on a football pitch next to the Kibayi commune office in Nyabisigara *Cellule*, Mukindo Sector, at which he incited the population to kill the remaining Tutsi survivors in the commune.[5277] The Trial Chamber found that Nteziryayo's speeches at these meetings made to large, fully public assemblies constituted a direct appeal to kill Tutsis and, on this basis, convicted him of direct and public incitement to commit genocide (Count 4).[5278]

2277. In summarising the Prosecution case against Nteziryayo with respect to these allegations of incitement, the Trial Chamber specifically referred to paragraphs 5.8 and 6.31 of the Indictment.[5279] As noted above, the allegations in paragraphs 5.8 and 6.31 were being pursued against Nteziryayo under Count 4 pursuant to Article 6(1) of the Statute.[5280]

2278. The Trial Chamber noted that paragraphs 5.8 and 6.31 of the Indictment failed to specify the locations and dates at which Nteziryayo was alleged to have incited the population to kill Tutsis and found that they were therefore defective.[5281] The Trial Chamber nevertheless determined that paragraphs 5.8 and 6.31 were cured of their defects regarding the meetings at Muyaga and Kibayi Communes through subsequent Prosecution's disclosures and concluded that Nteziryayo did not suffer any prejudice.[5282]

2279. Nteziryayo submits that his responsibility in relation to the Muyaga and Kibayi Communes meetings was not pleaded in the Indictment and that such defect was neither curable nor cured.[5283] He argues that the material facts omitted from the Indictment could on their own support separate charges and that their addition amounted to an impermissible expansion of the charges and a radical transformation of the case.[5284] At the appeals hearing, Nteziryayo further submitted that it was

[5277] Trial Judgement, paras. 3691, 5945, 6022.
[5278] Trial Judgement, paras. 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at these meetings substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to these allegations. *See ibid.*, para. 5946.
[5279] Trial Judgement, para. 3450, fns. 9307, 9309.
[5280] Nsabimana and Nteziryayo Indictment, p. 44.
[5281] Trial Judgement, paras. 3462, 3473.
[5282] Trial Judgement, paras. 3485, 3495. The Appeals Chamber understands that, despite its reference to these paragraphs in several instances, the Trial Chamber did not rely on paragraphs 6.32, 6.53, and 6.59 of the Nsabimana and Nteziryayo Indictment in support of Nteziryayo's convictions for committing direct and public incitement through his speeches at the Muyaga and Kibayi meetings. *See ibid.*, paras. 3450, 3495 ("the Chamber considers that Paragraphs 5.8 and 6.31 of the Nsabimana and Nteziryayo Indictment *relating to incitement*, as well as Paragraphs 6.53 and 6.59 *relating to aiding and abetting* were cured".) (emphasis added); Nteziryayo Appeal Brief, paras. 39-41, 77.
[5283] Nteziryayo Notice of Appeal, paras. 18-36; Nteziryayo Appeal Brief, paras. 33-95, p. 19. *See also* AT. 17 April 2015 pp. 10-13.
[5284] Nteziryayo Notice of Appeal, paras. 19, 23, 26, 28; Nteziryayo Appeal Brief, paras. 43-48, 78; Nteziryayo Reply Brief, para. 18. Nteziryayo argues that the situation is analogous to that of the allegation related to specific attacks at the *Groupe scolaire* which was excluded by the Trial Chamber based on the Prosecution's failure to plead those attacks in the Nsabimana and Nteziryayo Indictment. *See* Nteziryayo Appeal Brief, para. 46, *referring to* Trial Judgement, para. 1815. Nteziryayo, however, fails to appreciate that, in contrast with the allegations of direct and public incitement

erroneous on the part of the Trial Chamber to rely on paragraph 6.31 of the Indictment as giving notice of crimes committed while he was prefect because that paragraph pleaded crimes committed while he was an official of the civil defence.[5285]

2280. The Prosecution responds that paragraphs 5.8 and 6.31 of the Indictment pleaded Nteziryayo's incitement in Butare between April and June 1994 and that the time and place of Nteziryayo's incitements were material facts, not separate charges.[5286] It also responds that post-indictment information cured the vagueness of the Indictment and that Nteziryayo was not prejudiced.[5287]

2281. The Appeals Chamber finds that the Indictment is manifestly defective in relation to the allegations concerning Nteziryayo's speeches at the Muyaga and Kibayi meetings. The Prosecution failed to specify the means by which Nteziryayo was alleged to have incited the population as well as the occurrence of public meetings and their locations. Furthermore, the date range of "[b]etween April to June 1994" is too expansive in light of the absence of other material facts relating to the allegations. The Appeals Chamber also accepts Nteziryayo's submission that, because paragraph 6.31 of the Indictment expressly referred to his responsibility for inciting the population to slaughter the Tutsis in Butare Prefecture between April and June 1994 in his capacity as "Colonel" and while he was "the official in charge of civil defence" for the prefecture, this paragraph could not be reasonably relied upon as giving him notice of a charge related to his responsibility for crimes committed in his capacity as prefect of Butare.

2282. The Appeals Chamber, however, finds that the allegations concerning Nteziryayo's speeches at the Muyaga and Kibayi meetings did not constitute new charges but fell within the broader allegation relating to Nteziryayo's public incitement to exterminate the Tutsi population in Butare Prefecture between April and July 1994 expressly pleaded in paragraph 5.8 of the Indictment. The Appeals Chamber does not consider that the material facts which the Trial Chamber took into account in convicting Nteziryayo represented a radical transformation of the Prosecution case, nor that these facts could have, on their own, supported separate charges. As vague as the charge set out in paragraph 5.8 was, the Indictment nonetheless pleaded the charge for which Nteziryayo was ultimately convicted, namely his responsibility for publicly inciting the extermination of Tutsis in Butare Prefecture from April to July 1994.

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to commit genocide, the Trial Chamber concluded that his participation in attacks was not pleaded under any counts in the Nsabimana and Nteziryayo Indictment. The Appeals Chamber therefore dismisses Nteziryayo's argument in this respect.

[5285] AT. 17 April 2015 pp. 3-5, 11, 41.

[5286] Prosecution Response Brief, paras. 1447-1449, 1460.

[5287] Prosecution Response Brief, paras. 1447-1469. *See also* AT. 17 April 2015 pp. 24-27.

2283. Accordingly, the Appeals Chamber considers that the defects in the Indictment regarding Nteziryayo's responsibility for direct and public incitement to commit genocide at meetings held in Muyaga and Kibayi Communes were curable. The Appeals Chamber will now turn to consider whether, for each meeting, the Trial Chamber erred in finding that the defects were cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(a) Muyaga Commune Meeting

2284. The Trial Chamber found that the defect in the Indictment concerning Nteziryayo's responsibility for direct and public incitement to commit genocide at a meeting held in Muyaga Commune was cured through the disclosure of the summaries of Prosecution Witnesses QBY's and FAB's anticipated evidence appended to the Prosecution Pre-Trial Brief,[5288] as well as Witnesses QBY's and FAB's prior statements to Tribunal investigators.[5289]

2285. In reaching its conclusion, the Trial Chamber noted that Witnesses QBY's and FAB's summaries both stated that, around 5 June 1994, Nteziryayo attended a meeting in Muyaga Commune at which he made a speech asking the population to kill the Tutsis.[5290] It observed that Witness QBY's Statement indicated that, between 4 and 5 June 1994, Nteziryayo spoke at a meeting at the Muyaga commune office, while Witness FAB's Statement indicated that Nteziryayo came to Muyaga Commune between 3 and 5 June 1994 to hold a meeting and that, in his speech, he stated that "the Hutus should kill all the Tutsis and not spare anyone."[5291] Considering that Witnesses QBY and FAB first testified over three years after these disclosures, the Trial Chamber concluded that paragraph 5.8 of the Indictment was cured of its defects.[5292]

[5288] Trial Judgement, paras. 3483, 3485, *referring to* Witness Summaries Grid, item 14, Witness FAB ("Witness FAB's Summary"), Witness QBY's Summary.
[5289] Trial Judgement, para. 3483, *referring to* Statement of Witness QBY of 3 November 1999, disclosed on 10 December 1999 (confidential) ("Witness QBY's Statement"), Statement of Witness FAB of 11 April 1999, disclosed on 15 November 2000 (confidential). A copy of Witness QBY's Statement including highlighting of alleged contradictions was admitted into evidence on 29 April 2004 as Exhibit D216 (confidential). A copy of Witness FAB's statement including highlighting of alleged contradictions was admitted into evidence on 29 April 2004 as Exhibit D217 (confidential). The un-highlighted copy of Witness FAB's Statement was also admitted into evidence on 29 April 2004 as Exhibit D218 (confidential) ("Witness FAB's Statement").
[5290] Trial Judgement, para. 3483.
[5291] Trial Judgement, para. 3483.
[5292] Trial Judgement, paras. 3483-3485. The Trial Chamber also referred to paragraphs 6.53 and 6.59 of the Nsabimana and Nteziryayo Indictment as being cured of their defects but, as noted above, the Appeals Chamber understands that the Trial Chamber intended to rely only on paragraphs 5.8 and 6.31 as regards Nteziryayo's responsibility for committing direct and public incitement to commit genocide. *See supra*, fn. 5282. As mentioned above, the Appeals Chamber has nonetheless found that paragraph 6.31 could not be reasonably relied upon as giving him notice of a charge related to his responsibility for crimes committed in his capacity as prefect of Butare. *See supra*, para. 2281.

2286. Nteziryayo submits that the Trial Chamber erred in law in finding that timely, clear, and consistent information relating to Muyaga Commune cured the defects in the Indictment.[5293] In particular, he argues that because Witnesses QBY's and FAB's summaries and statements all make, "with relative precision", an allegation of a meeting in Muyaga Commune sometime between 3 and 5 June 1994, these documents could not put him on notice of a meeting in Muyaga Commune that occurred on or after 21 June 1994 as found by the Trial Chamber.[5294] Nteziryayo argues that, since the fact that he was sworn-in as prefect on 21 June 1994 was pleaded in the Indictment, if it was the Prosecution case that this meeting occurred after his appointment, the Prosecution should have reflected it in the Indictment.[5295] Pointing out that the Prosecution failed to provide the requisite notice in its opening statement or any other filing and that the Prosecution case remained unclear throughout trial,[5296] Nteziryayo submits that a "much more reasonable interpretation" is that the Prosecution did not know "at any time during the process" that its case was that the meeting took place on or after 21 June 1994.[5297] According to Nteziryayo, it was only in the Trial Judgement that it was made clear that the case he had to answer related to a meeting in Muyaga Commune on or after 21 June 1994.[5298]

2287. Nteziryayo further submits that, since the Trial Chamber recognised that he objected to the lack of notice relating to the Muyaga meeting and did not find his objection to be untimely, it erred in failing to require the Prosecution to discharge its burden of proving an absence of prejudice.[5299] He contends that the lack of clarity of the Prosecution case regarding this meeting deprived him of the opportunity to present a defence and caused him considerable prejudice.[5300] In this respect, Nteziryayo submits that he was deprived of the opportunity of presenting an alibi defence since he was "misled as to the date on which the alibi was to attach" and that he devoted resources to investigating and calling witnesses in respect of a meeting which was not part of the case.[5301]

2288. The Prosecution responds that the Trial Chamber correctly found that Nteziryayo had notice that he incited the killing of Tutsis at a meeting in Muyaga Commune held around mid-June 1994,

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[5293] Nteziryayo Notice of Appeal, paras. 18, 24; Nteziryayo Appeal Brief, paras. 49-63. *See also* AT. 17 April 2015 pp. 11, 12, 41, 42.
[5294] Nteziryayo Appeal Brief, paras. 51, 52, *referring to* Trial Judgement, para. 3672. *See also ibid.*, para. 56.
[5295] Nteziryayo Appeal Brief, para. 60, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.34.
[5296] Nteziryayo Appeal Brief, paras. 55-58. Nteziryayo highlights that Witness QBY testified that the meeting occurred either on 5 May or 5 June 1994, whereas Witness FAB recanted his previous statement and placed the meeting in mid-June 1994, and that the Prosecution referred to "Speeches during May/early June 1994" in its closing brief. *See ibid.*, paras. 57, 58. Nteziryayo argues that the Trial Chamber therefore erred in stating that the Prosecution specified that the Muyaga meeting took place in mid to late June 1994. *See ibid.*, para. 59.
[5297] Nteziryayo Appeal Brief, para. 61.
[5298] Nteziryayo Appeal Brief, para. 62.
[5299] Nteziryayo Notice of Appeal, para. 25; Nteziryayo Appeal Brief, paras. 64-68, heading (iv) at p. 25, *referring to* Trial Judgement, para. 3472.
[5300] Nteziryayo Appeal Brief, paras. 38, 69, 74, 75. *See also* Nteziryayo Reply Brief, para. 24.

relying in part on the reference to Nteziryayo being prefect at the time of the meeting in Witness FAB's Summary.[5302] The Prosecution also submits that, because Nteziryayo's objection based on lack of notice was untimely, he bears the burden to demonstrate that his ability to defend himself was materially impaired.[5303] According to the Prosecution, the conduct of Nteziryayo's defence – in particular his pre-defence brief, his cross-examination of Witnesses QBY and FAB, his examination of Nteziryayo Defence Witness AND-60, and his closing submissions – demonstrates that he fully understood that the meeting was alleged to have occurred in June 1994 when he was prefect and that he was not prejudiced as he claims.[5304]

2289. There appears to be no dispute that Witnesses QBY's and FAB's summaries, together with their prior written statements disclosed in 1999 and 2000, provided timely, clear, and consistent information regarding Nteziryayo's responsibility for direct and public incitement to kill Tutsis through his words at a public meeting held in Muyaga Commune.[5305] Nteziryayo, however, takes issue with the Trial Chamber's finding that he was provided adequate notice of the date of the meeting.

2290. As noted by the Trial Chamber, Witnesses QBY's and FAB's summaries and statements all indicate that the meeting took place between 3 and 5 June 1994.[5306] The Trial Chamber, nonetheless, did not discuss how this information accorded with its conclusion that the meeting occurred "around mid-June 1994",[5307] more specifically "on or after 21 June 1994" since both witnesses were adamant that Nteziryayo attended the meeting in his capacity as Butare Prefect.[5308]

[5301] Nteziryayo Appeal Brief, paras. 69, 72-75; Nteziryayo Reply Brief, paras. 17, 24, 25. *See also* AT. 17 April 2015 pp. 12, 13, 41, 42.
[5302] Prosecution Response Brief, paras. 1447, 1450-1453.
[5303] Prosecution Response Brief, paras. 1449, 1455, *referring to Mugenzi and Mugiraneza* Appeal Judgement, para. 122.
[5304] Prosecution Response Brief, paras. 1457-1459. *See also* AT. 17 April 2015 pp. 25, 26.
[5305] The Appeals Chamber notes that Witnesses QBY's and FAB's summaries were marked relevant to Nteziryayo and were linked to Counts 1 through 4 of the Nsabimana and Nteziryayo Indictment. The Appeals Chamber notes that, in his notice of appeal, Nteziryayo argued that the summaries appended to the Prosecution Pre-Trial Brief could not inform him of the allegations against him as the Prosecution had failed to indicate in the summaries the paragraphs of the Nsabimana and Nteziryayo Indictment on which the witnesses would testify in violation of Rule 73(B)(iv)(c) of the Rules. *See* Nteziryayo Notice of Appeal, paras. 24, 29. Nteziryayo, however, failed to reiterate this allegation in his appeal brief and instead developed different arguments. In these circumstances, the Appeals Chamber understands that Nteziryayo has abandoned this allegation of error. In any event, the Appeals Chamber reiterates that neither the Rules nor the jurisprudence require that the summaries appended to a Prosecution's pre-trial brief be linked to the relevant paragraphs of an indictment in order to provide timely, clear, and consistent information detailing the factual basis underpinning the charge. *See supra*, fn. 2546. It also observes that, in the circumstances of this case, it was abundantly clear that Witnesses QBY's and FAB's summaries were intended to support the allegations of incitement to commit genocide made against Nteziryayo in his indictment.
[5306] Trial Judgement, para. 3483.
[5307] Trial Judgement, para. 3674. *See also ibid*., para. 5945.
[5308] Trial Judgement, para. 3672 ("The Chamber notes that Witnesses QBY and FAB are adamant that on the day of the meeting, Nteziryayo already held his position as *préfet* of Butare. Witness FAB even testified that the purpose of the meeting was to introduce Nteziryayo as the new *préfet*. Flowing from that, it appears that the meeting may have occurred on or after 21 June 1994, as Nteziryayo was appointed *préfet* of Butare on or around 17 June 1994, and his swearing-in ceremony took place on 21 June 1994.") (internal references omitted). In light of the Trial Chamber's statement in this paragraph, the Appeals Chamber finds no merit in the Prosecution's argument that the Trial Chamber

Although it expressly relied on this particular detail in reaching its findings regarding notice of the date of the Kibayi Commune meeting,[5309] the Trial Chamber failed to address expressly the fact that Witness FAB's summary and statement both referred to Nteziryayo as being "prefect" at the time of the Muyaga Commune meeting,[5310] which provided conflicting information as to whether the meeting occurred in early June 1994 as indicated in the relevant summaries or statements, or after Nteziryayo took office as the prefect on 21 June 1994.[5311]

2291. Against this background, the Appeals Chamber finds that the Trial Chamber erred in finding that Witnesses QBY's and FAB's summaries and statements provided clear and consistent information curing the defect of the Indictment as far as it relates to the date of the meeting held in Muyaga Commune at which Nteziryayo would have incited the commission of genocide.

2292. However, the Appeals Chamber considers that the reference to Nteziryayo being the prefect at the time of the Muyaga meeting in Witness FAB's Summary shows that the Prosecution case at trial was that the meeting was held after Nteziryayo was appointed prefect. The record reflects that, despite the absence of express clarification at trial and some ambiguous references in its closing brief,[5312] the Prosecution's intention was to demonstrate that the Muyaga meeting had taken place after Nteziryayo became prefect.[5313] The record before the Appeals Chamber demonstrates that the Prosecution ignored the inconsistencies in the information it provided to Nteziryayo through its pre-trial brief and failed to fulfil its obligation to clarify for Nteziryayo what its case was at the first opportunity.

2293. That being said, the Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information causes prejudice to the accused.[5314] The defect may only be deemed harmless through demonstrating that the

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did not conclude that the meeting occurred on or after 21 April 1994 but merely "around mid-June". *See* Prosecution Response Brief, para. 1454.

[5309] *See* Trial Judgement, paras. 3492, 3493. *See also infra*, para. 2305.

[5310] *See* Witness FAB's Summary ("About 3 to 5 June 1994, FAB attended a meeting in Muyaga commune, Mamba secteur. Prefect Nteziryayo said that the Hutus should kill all the Tutsis and not spare anyone. Prefect Nteziryayo said: 'In order to get rid of the lice, you must also destroy their eggs'".); Witness FAB's Statement, p. K0112989 (Registry pagination) ("Some of them did not come out of hiding until June 1994 when *Préfet* NTEZIRYAYO […] came to Muyaga to hold a meeting sometime between 3 and 5 June in Mamba *secteur*.").

[5311] *See* Nsabimana and Nteziryayo Indictment, para. 6.34 ("On 17 June 1994, Alphonse Nteziryayo was appointed *Préfet* of Butare by the Interim Government, replacing Sylvain Nsabimana. After the handing over of office on 21 June 1994, *Préfet* Alphonse Nteziryayo continued to incite the population to 'finish off' the enemy and its 'accomplices'.").

[5312] *See* Prosecution Closing Brief, pp. 355, 356, where the Prosecution refers to the evidence of Witness FAB under the sub-heading "Speeches during May/early June 1994".

[5313] *See* Witness QBY, T. 19 April 2004 p. 54; Witness FAB, T. 5 April 2004 p. 24.

[5314] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58.

accused's ability to prepare his defence was not materially impaired.[5315] When an appellant raises a defect in the indictment for the first time on appeal, the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[5316] When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired.[5317]

2294. The Appeals Chamber observes that the Trial Chamber examined Nteziryayo's claim of lack of notice relating to the Muyaga meeting raised at trial without considering his claim untimely.[5318] In these circumstances, the Appeals Chamber considers that the burden rests on the Prosecution to prove that Nteziryayo's ability to prepare his defence was not materially impaired.

2295. The Appeals Chamber finds that the Prosecution has met this burden as it effectively demonstrates that the conduct of Nteziryayo's defence reflects that the ambiguity in the notice provided by the Prosecution regarding the date of the Muyaga Commune meeting was harmless. Specifically, as pointed out by the Prosecution and acknowledged by Nteziryayo,[5319] Nteziryayo premised his defence on the occurrence of only one meeting in Muyaga Commune that occurred on 23 May 1994, called witnesses in support of this case,[5320] and was prepared to refute any allegation that the meeting had taken place after that date. In particular, the record shows that Nteziryayo was able to undertake a detailed cross-examination of Witnesses QBY and FAB who testified that he attended the meeting held in Muyaga Commune in his capacity as prefect, challenging specifically discrepancies between their testimonies and prior statements as to the date of the meeting in Muyaga and his position at the time of the meeting.[5321]

2296. The Appeals Chamber is not persuaded by Nteziryayo's submission that the lack of clarity in the Prosecution case prevented him from calling alibi witnesses or devoting resources to prepare his defence as the conduct of his defence shows that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and that he deliberately oriented his defence to demonstrate that the meeting in Muyaga Commune could only have occurred on 23 May 1994.

[5315] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreškić et al.* Appeal Judgement, para. 122.
[5316] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Šainović et al*. Appeal Judgement, para. 224; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[5317] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Ntabakuze* Appeal Judgement, fn. 189; *Niyitegeka* Appeal Judgement, para. 200; *Kupreškić et al.* Appeal Judgement, paras. 122, 123.
[5318] Trial Judgement, paras. 3472-3474, 3483-3485, *referring to* Nteziryayo Closing Brief, para. 765, *referring in turn to*, *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Motion for Exclusion of Evidence, 23 January 2009 (confidential) ("Nteziryayo 23 January 2009 Motion").
[5319] Prosecution Response Brief, paras. 1458, 1459; Nteziryayo Appeal Brief, para. 173.
[5320] *See* Trial Judgement, paras. 3570-3577.

2297. Based on the foregoing, the Appeals Chamber finds that, despite the vagueness of the Indictment and the confusion in the Prosecution's post-indictment communications, Nteziryayo had understood that he had to defend against the allegation that he incited the killing of Tutsis during a meeting held in Muyaga Commune while he was prefect, that is on or after he took on his functions on 21 June 1994. Accordingly, the Appeals Chamber concludes that, although the Trial Chamber erred in relying on paragraph 6.31 of the Indictment and in finding that the defect in the Indictment concerning the date of the Muyaga Commune meeting was cured, these errors do not invalidate its decision to convict Nteziryayo on the basis of this meeting as the Prosecution has proven on appeal that Nteziryayo's ability to prepare his defence was not materially impaired.

(b) Kibayi Commune Meeting

2298. The Trial Chamber found that the defect in the Indictment concerning Nteziryayo's responsibility for direct and public incitement to commit genocide at a meeting held in Kibayi Commune around mid to late June 1994 was cured through the disclosure of the summaries of Prosecution Witnesses FAK's and QBU's anticipated evidence[5322] as well as Witnesses FAK's and QBU's prior statements to Tribunal investigators.[5323]

2299. In reaching its conclusion, the Trial Chamber noted that, whereas the location of the meeting was not specified in the summary of Witnesses FAK's and QBU's anticipated evidence, the omission of this detail was remedied by information contained in their prior written statements, which identified the meeting as taking place at or next to the Kibayi commune office.[5324] The Trial Chamber further observed that Witnesses FAK's and QBU's summaries and statements all placed the meeting in May 1994.[5325] The Trial Chamber nonetheless determined that, having regard to the content of Witnesses FAK's and QBU's statements which refer to Nteziryayo being present at the meeting either as prefect or "the new *Préfet* Nteziryayo", Nteziryayo was put on notice that the meeting about which these witnesses would testify must have taken place after 21 June 1994, the

[5321] *See* Witness QBY, T. 20 April 2004 pp. 4, 8, 11, 21-23; Witness FAB, T. 5 April 2004 pp. 42, 43, 46, 49 and 52 (closed session).
[5322] Trial Judgement, paras. 3486, 3491, *referring to* Witness Summaries Grid, item 23, Witness FAK ("Witness FAK's Summary"), item 47, Witness QBU ("Witness QBU's Summary").
[5323] Trial Judgement, paras. 3487-3489, 3495, fns. 9352-9354, *referring to* Statement of Witness FAK of 24 February 2000, disclosed in French on 15 November 2000 and in English on 4 December 2000 (confidential) ("Witness FAK's February 2000 Statement"), Statement of Witness FAK of 3 May 2000, disclosed in French on 4 December 2000 and in English on 23 May 2001 (confidential) ("Witness FAK's May 2000 Statement"), Statement of Witness QBU of 10 October 1999, disclosed on 1 December 1999 (confidential) ("Witness QBU's Statement"). The unredacted versions of Witness FAK's February 2000 and May 2000 statements were admitted into evidence on 29 April 2004 as Exhibit D219 (confidential) ("Witness FAK's Statements"). A copy of Witness FAK's Statements including highlighting of alleged contradictions was admitted the same day as Exhibit D220 (confidential).
[5324] Trial Judgement, paras. 3486-3491.
[5325] Trial Judgement, para. 3492.

date on which he took office as prefect.[5326] It considered the discrepancy as to the date of the meeting as minor and found that Nteziryayo was put on notice that he would need to defend against the allegation that he incited the population by speeches he gave at a meeting at or near the Kibayi commune office sometime after he assumed office as prefect.[5327] The Trial Chamber concluded that paragraph 6.31 of the Indictment was "cured by the disclosure of clear, consistent and timely information" and that Nteziryayo "did not suffer any prejudice".[5328]

2300. Nteziryayo submits that the Trial Chamber erred in law in finding that the defective Indictment was cured by timely, clear, and consistent information.[5329] Nteziryayo acknowledges that the location was specified in Witnesses FAK's and QBU's statements, but argues that the Trial Chamber erred in law in relying solely on these statements as providing notice since the disclosure of previous statements cannot by itself put an accused on notice of material facts which the Prosecution intends to prove at trial.[5330] He also submits that, even if the Trial Chamber was entitled to rely on these statements, they are consistent with Witness FAK's and QBU's summaries that the meeting took place in May 1994, not mid to late June 1994 as found by the Trial Chamber.[5331] In his view, the reference to him being the prefect at the time of the meeting in Witnesses FAK's and QBU's statements cannot be said to constitute clear and consistent information of a meeting in late June 1994.[5332] Nteziryayo adds that it was only in the Trial Judgement "that the case to answer was put."[5333]

2301. Nteziryayo contends that, since the Trial Chamber recognised that he objected to the lack of notice related to the Kibayi Commune meeting, it erred in failing to require the Prosecution to discharge its burden of proving an absence of prejudice.[5334] He submits that the lack of clarity of the Prosecution case regarding the Kibayi Commune meeting deprived him of the opportunity to present a defence and caused him considerable prejudice.[5335] In particular, he argues that he was deprived of the opportunity of presenting an alibi as he was misled as to the date on which the alibi

[5326] Trial Judgement, paras. 3492, 3493.
[5327] Trial Judgement, para. 3493.
[5328] Trial Judgement, para. 3495.
[5329] Nteziryayo Notice of Appeal, paras. 27-36; Nteziryayo Appeal Brief, paras. 49, 79-89. *See also* AT. 17 April 2015 pp. 11, 12, 41, 42.
[5330] Nteziryayo Appeal Brief, para. 81. *See also ibid.*, para. 54; Nteziryayo Reply Brief, para. 19.
[5331] Nteziryayo Appeal Brief, paras. 82, 83. *See also* Nteziryayo Reply Brief, para. 17.
[5332] Nteziryayo Notice of Appeal, para. 31; Nteziryayo Appeal Brief, paras. 84, 85.
[5333] Nteziryayo Appeal Brief, para. 88. *See also ibid.*, para. 36. Nteziryayo refers to Witnesses FAK's and QBU's evidence at trial and submits that there was no clarity in the Prosecution case even at the close of the presentation of its evidence. *See ibid.*, paras. 86-88, fn. 24, *referring to* Prosecution Closing Brief, pp. 355-358.
[5334] Nteziryayo Notice of Appeal, para. 35; Nteziryayo Appeal Brief, paras. 64-68, 90, heading (ii) at p. 32, *referring to* Trial Judgement, para. 3472.
[5335] Nteziryayo Notice of Appeal, paras. 34, 36; Nteziryayo Appeal Brief, paras. 38, 69, 74, 94. *See also* Nteziryayo Reply Brief, para. 24.

had to attach and that he devoted resources investigating and calling witnesses to a meeting which was not part of the case.[5336]

2302. The Prosecution responds that Witnesses FAK's and QBU's summaries and statements provided notice to Nteziryayo that he was alleged to have incited the killing of Tutsis at a public meeting as well as with respect to the date and location of the meeting, and that the Trial Chamber did not err in determining that the discrepancy concerning the dates was minor.[5337] The Prosecution also submits that, because Nteziryayo's objection based on lack of notice was untimely, he bears the burden to demonstrate that his ability to defend himself was materially impaired, if at all.[5338] According to the Prosecution, the conduct of Nteziryayo's defence – in particular his pre-defence brief, his cross-examination of Witnesses QBU and FAK, and his examination of Nteziryayo Defence Witnesses AND-11, AND-53, and AND-64 – demonstrates that he fully understood that the meeting was alleged to have occurred when he was prefect and did not suffer prejudice as he mounted a full defence against the allegation.[5339]

2303. There appears to be no dispute that Witnesses FAK's and QBU's summaries, together with these witnesses' prior written statements disclosed in 1999 and 2000, provided timely, clear, and consistent information regarding Nteziryayo's responsibility for direct and public incitement to kill Tutsis through the words he proffered at a public meeting.[5340] Nteziryayo, however, takes issue with the Trial Chamber's findings that he was provided adequate notice of the location and date of the meeting.

2304. As noted above, the Trial Chamber acknowledged that the location of the meeting was not specified in Witnesses FAK's and QBU's summaries but considered that this omission was remedied by the information contained in these witnesses' prior statements, which identified the meeting as taking place at, or next to, the Kibayi commune office.[5341] Nteziryayo is correct in submitting that mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[5342] His argument, however, fails to appreciate that the Prosecution did not merely serve Witnesses FAK's and QBU's statements on Nteziryayo. In its Witness Summaries Grid attached to its pre-trial brief, the Prosecution also summarised the

[5336] Nteziryayo Appeal Brief, paras. 69, 73-75, 94; Nteziryayo Reply Brief, paras. 17, 24, 25. *See also* AT. 17 April 2015 pp. 12, 13, 41, 42.
[5337] Prosecution Response Brief, paras. 1461-1465. The Prosecution argues that, contrary to Nteziryayo's submission, a pre-trial brief and witness statements, read together, may provide sufficient notice. *See ibid.*, para. 1463.
[5338] Prosecution Response Brief, paras. 1455, 1456, 1460, 1466.
[5339] Prosecution Response Brief, paras. 1467, 1468; AT. 17 April 2015 pp. 26, 27.
[5340] The Appeals Chamber notes that Witnesses FAK's and QBU's summaries were marked relevant to Nteziryayo and were linked, respectively, to Counts 1 and 4, and 1 through 4 of his indictment.
[5341] Trial Judgement, paras. 3486-3491.

information contained in the statements of Witnesses FAK and QBU that Nteziryayo incited the killing of Tutsis in a public meeting held in Kibayi Commune[5343] and expressly indicated that this evidence was relevant to its case against Nteziryayo.[5344] Upon reading Witnesses FAK's and QBU's summaries, Nteziryayo should have been prompted to read the witnesses' prior statements disclosed to him in 1999 and 2000, which provided timely, clear, and consistent information regarding the location of the alleged meeting.

2305. With regard to the date, Witnesses FAK's and QBU's summaries and statements all indicate that the meeting took place in May 1994.[5345] However, the Trial Chamber correctly noted that, despite this indication, both witnesses referred to Nteziryayo as being the prefect or the "new *Préfet*" at this meeting in their prior statements.[5346] The Appeals Chamber finds no error in the Trial Chamber's consideration that this reference to Nteziryayo's status as prefect at the time of the meeting in the witnesses' statements, repeated in Witness QBU's Summary, suggested that these witnesses would testify about a meeting that must have occurred after he took office as prefect on 21 June 1994.[5347] Nevertheless, the Appeals Chamber considers that the express references in the Prosecution's post-indictment disclosures to the meeting taking place in "May 1994" and to Nteziryayo's attendance as the prefect cannot be said to constitute clear and consistent notice of the date of the meeting held in Kibayi Commune. It is only when Witnesses FAK and QBU took the stand that it became clearer that the Prosecution intended to prove that Nteziryayo was alleged to be responsible for inciting the population at a meeting held in Kibayi when he was prefect.[5348] The Appeals Chamber finds that this does not constitute "timely" notice.[5349]

[5342] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 162; *Ntagerura et al.* Appeal Judgement, para. 139; *Ntakirutimana* Appeal Judgement, para. 27.
[5343] *See* Witness FAK's February 2000 Statement, pp. 3, 4; Witness FAK's May 2000 Statement, p. 3; Witness QBU's Statement, pp. 3, 4.
[5344] *See* Witness FAK's Summary; Witness QBU's Summary. *Cf. Ntakirutimana* Appeal Judgement, paras. 41, 48.
[5345] *See* Witness FAK's Summary ("FAK attended one meeting in May 1994 at which Nteziryayo told the people to kill Tutsi".); Witness FAK's February 2000 Statement, p. K0153200 (Registry pagination) ("Several meetings were held during that period but I only attended one, the meeting held in May 1994 in the Kibayi *commune* office compound."); Witness FAK's May 2000 Statement, p. K0180538 (Registry pagination) ("I recall attending a meeting at the Kibayi communal office in May 1994."); Witness QBU's Summary ("In May [1994], Nteziryayo held a meeting as the Prefect."); Witness QBU's Statement, p. K0112414 (Registry pagination) ("*Au mois de mai 1994*, *s'est tenue au terrain de football de Kibayi situé près du bureau communal*, *une réunion présidée par le Colonel Alphonse NTEZIRYAYO*, *nouveau préfet*".).
[5346] *See* Trial Judgement, paras. 3492, 3493. *See also* Witness FAK's February 2000 Statement, p. K0153200 (Registry pagination); Witness FAK's May 2000 Statement, p. K0180538 (Registry pagination); Witness QBU's Statement, p. K0112414 (Registry pagination).
[5347] *See* Trial Judgement, paras. 3492, 3493.
[5348] Witness FAK, T. 15 April 2004 pp. 19, 24, 27 (closed session); Witness QBU, T. 13 April 2004 pp. 8 (closed session), 37, 54-55, 58 (closed session), T. 14 April 2004 p. 3. The Appeals Chamber notes that the Prosecution never explicitly clarified its case and made ambiguous references to "Speeches during May/early June 1994" in its closing brief when discussing its evidence on the Kibayi meeting. *See* Prosecution Closing Brief, pp. 355, 356.
[5349] The Appeals Chamber observes that, as pointed out by Nteziryayo, the Prosecution Closing Brief refers to the Kibayi Commune meeting under the heading "Speeches during May/early June 1994". *See* Prosecution Closing Brief,

2306. Consequently, the Appeals Chamber finds that the Trial Chamber erred in finding that the defect in the Indictment was cured by timely, clear, and consistent information as it relates to the date of the meeting held in Kibayi Commune at which Nteziryayo was alleged to have incited the commission of genocide.

2307. Turning to the question of whether the defect in the Indictment regarding the date of the meeting materially impaired Nteziryayo's ability to prepare his defence, the Appeals Chamber observes that the Trial Chamber examined Nteziryayo's claim of lack of notice relating to the Kibayi Commune meeting raised at trial without considering his claim untimely.[5350] In these circumstances, the burden rests on the Prosecution to prove that the ability of Nteziryayo to prepare his defence was not materially impaired.

2308. The Appeals Chamber finds that the Prosecution has met its burden as it demonstrates that the conduct of Nteziryayo's defence reflects that the ambiguity regarding the date of the Kibayi Commune meeting was harmless. Specifically, a review of the record shows that Nteziryayo was able to mount a robust cross-examination of Witnesses FAK and QBU who testified that Nteziryayo attended the meeting held in Kibayi in his capacity as prefect. In particular, Nteziryayo challenged the discrepancy between the estimated date of the meeting in Witness FAK's Statements and his testimony[5351] and put to both Witnesses FAK and QBU evidence on the date of his appointment as prefect in support of his claim that both witnesses were incorrect in their estimate of the dates for the meeting.[5352] The Nteziryayo Pre-Defence Brief also reflects that Nteziryayo initially intended to call a witness who was expected to testify, *inter alia*, that she knew Nteziryayo after he was appointed prefect and that she attended a meeting in Kibayi at which Nteziryayo called for peace.[5353]

2309. Furthermore, as pointed out by the Prosecution and Nteziryayo himself, Nteziryayo was able to call three witnesses who testified to attending a meeting that took place on 24 May 1994.[5354] Contrary to Nteziryayo's submissions, not only were these Defence witnesses able to put forward

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p. 355. However, the Appeals Chamber is not convinced that this ambiguity demonstrates Nteziryayo's lack of notice of the case against him.

[5350] Trial Judgement, paras. 3472-3474, 3486-3495, *referring to* Nteziryayo Closing Brief, para. 765, *referring in turn to* Nteziryayo 23 January 2009 Motion.

[5351] *See* Witness FAK, T. 15 April 2004 pp. 19, 27, 28 (closed session).

[5352] *See* Witness FAK, T. 15 April 2004 pp. 29, 30 (closed session); Witness QBU, T. 13 April 2004 pp. 56-58 (closed session).

[5353] *See* Nteziryayo Pre-Defence Brief, p. 5.

[5354] Nteziryayo Appeal Brief, paras. 91, 92, *referring to* Witnesses AND-11, AND-53, and AND-64. The Appeals Chamber observes that Nteziryayo also cross-examined Ntahobali Defence Witness H1B6 on whether Nteziryayo was prefect when he attended a public meeting in May 1994. *See* Witness H1B6, T. 5 December 2005 pp. 11 (closed session), 18, 19.

Nteziryayo's defence case that the meeting occurred in May 1994, but they also testified in rebuttal of the Prosecution case that there was a meeting in June 1994 when he was prefect.[5355]

2310. The Appeals Chamber is not persuaded by Nteziryayo's contention that the lack of clarity in the Prosecution case prevented him from calling alibi witnesses or devoting resources to investigating the matter, as the conduct of his defence shows that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and that he deliberately oriented his defence to demonstrate that the meeting in Kibayi could only have occurred on 24 May 1994.

2311. Based on the foregoing, the Appeals Chamber is persuaded that, despite the vagueness of the Indictment and the confusion in the Prosecution's communications, Nteziryayo had understood that he had to defend against the allegation that he incited the killing of Tutsis during a meeting held in Kibayi Commune while he was prefect, that is on or after he took his functions on 21 June 1994. Accordingly, the Appeals Chamber concludes that, although the Trial Chamber erred in relying on paragraph 6.31 of the Indictment and in finding that the defect in the Indictment concerning the date of the Kibayi Commune meeting was cured, these errors do not invalidate its decision to convict Nteziryayo on the basis of this meeting as the Prosecution has proven on appeal that Nteziryayo's ability to prepare his defence was not materially impaired.

3. Conclusion

2312. The Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in considering that he was put on sufficient notice that he was charged with direct and public incitement to commit genocide at Ndayambaje's Swearing-In Ceremony and that he did not suffer prejudice.

2313. The Appeals Chamber further finds that, although the Trial Chamber erred in concluding that the defects in the Indictment concerning the dates of the meetings held in Muyaga and Kibayi Communes at which Nteziryayo was alleged to have incited the commission of genocide were cured, these errors do not invalidate the Trial Chamber's decision to convict Nteziryayo for direct and public incitement to commit genocide in relation to the speeches he made at these meetings as the Prosecution has successfully demonstrated that Nteziryayo's ability to prepare his defence was not materially impaired by the lack of clear notice.

2314. Finally, the Appeals Chamber dismisses Nteziryayo's claim of prejudice resulting from the accumulation of defects in the Indictment.[5356] The Appeals Chamber does not minimise the extent

[5355] *See*, *e.g.*, Witness AND-11, T. 1 February 2007 pp. 39, 50, T. 5 February 2007 pp. 59 and 61-63 (closed session); Witness AND-53, T. 15 February 2007 pp. 43, 59; Witness AND-64, T. 8 March 2007 p. 47.

of the Prosecution's failure to provide adequate notice in the Indictment: none of the three incidents for which Nteziryayo was found guilty was adequately pleaded in the Indictment. However, Nteziryayo has not demonstrated that the defects in the Indictment in this respect and their cumulative effect materially hampered the preparation of his defence.

2315. For these reasons, the Appeals Chamber dismisses Grounds 1 through 3 of Nteziryayo's appeal.

[5356] *See* Nteziryayo Notice of Appeal, para. 7.

B. Ndayambaje's Swearing-In Ceremony (Ground 4)

2316. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, Nteziryayo and Ndayambaje told the population to continue with their "work", urged them to "sweep the dirt outside", and instructed that those hiding Tutsis who refused to hand them over should be killed.[5357] The Trial Chamber convicted Nteziryayo pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide on the basis of his statements made during the swearing-in ceremony.[5358]

2317. Nteziryayo argues that the Trial Chamber erred in its assessment of the Prosecution and Defence evidence related to his conduct at the ceremony. The Appeals Chamber will first address Nteziryayo's challenges to the assessment of the Prosecution evidence before examining his contentions related to the assessment of the Defence evidence.

1. Assessment of Prosecution Evidence

2318. In reaching its findings regarding Ndayambaje's Swearing-In Ceremony, the Trial Chamber considered, *inter alia*, the evidence of Prosecution Witnesses FAG, FAL, FAU, QAF, QAL, QAQ, QAR, RV, TO, and TP.[5359]

2319. Nteziryayo argues that the Trial Chamber erred in its assessment of the Prosecution evidence by: (i) erroneously using the evidence of Witnesses QAQ and QAR to corroborate other Prosecution evidence; (ii) failing to apply sufficient caution to accomplice evidence; (iii) insufficiently considering discrepancies concerning the content of the speeches, particularly his utterances, and the order in which he and Ndayambaje gave speeches; (iv) failing to sufficiently examine discrepancies as to the date of the event, the attendees, and the time it occurred; and (v) failing to consider other elements in the record and within the Prosecution evidence suggesting that the witnesses were testifying about meetings other than Ndayambaje's Swearing-In Ceremony.[5360] The Appeals Chamber will address these contentions in turn.

[5357] *See* Trial Judgement, paras. 4616, 4642, 4645. *See also ibid.*, paras. 5948, 6026, 6027.
[5358] Trial Judgement, paras. 6029, 6038, 6186.
[5359] *See* Trial Judgement, paras. 4589-4632, 4642-4645.
[5360] Nteziryayo Notice of Appeal, paras. 37-39, 62, 63; Nteziryayo Appeal Brief, paras. 96-157, 161-166, 247, 248, 253-255.

(a) Witnesses QAQ and QAR

2320. Nteziryayo argues that, after having found that Witnesses QAQ and QAR lacked credibility, the Trial Chamber erred in using their evidence for corroboration of other Prosecution evidence.[5361] The Prosecution responds that the Trial Chamber did not rely on the evidence of these witnesses.[5362]

2321. The Appeals Chamber observes that the Trial Chamber declined to rely on the accounts of Witnesses QAQ and QAR about Ndayambaje's Swearing-In Ceremony because it found that Witness QAR did not attend the ceremony and that any probative weight to be accorded to the testimony of Witness QAQ was minimal.[5363] In the paragraphs of the Trial Judgement pointed out by Nteziryayo, the Trial Chamber merely noted that certain aspects of their testimonies were consistent with the evidence of other Prosecution and Defence witnesses but did not rely on it to corroborate other evidence relating to the ceremony.[5364]

2322. The Appeals Chamber therefore dismisses Nteziryayo's submission concerning the evidence of Witnesses QAQ and QAR.

(b) Insufficient Caution

2323. Nteziryayo argues that the Trial Chamber gave no indication that it would treat Witness FAU's evidence with caution and that its "bare assertion" that it would apply caution to the evidence of Witnesses FAG, FAL, QAF, RV, and TO does not demonstrate that it did.[5365] He stresses that Witnesses FAG, FAL, FAU, QAF, and RV testified while awaiting trials or sentencing in Rwanda and that Witnesses FAG, FAL, FAU, and RV were detained in prison together.[5366] As further reason for the need to apply caution to these witnesses, Nteziryayo highlights that: (i) Witness RV admitted to having previously lied to improve his situation and to

[5361] Nteziryayo Appeal Brief, paras. 112, 113, *referring to* Trial Judgement, paras. 4601-4608, 4621, 4595, 4596. *See also ibid*., paras. 102, 114; Nteziryayo Reply Brief, paras. 65, 66.
[5362] Prosecution Response Brief, para. 1481.
[5363] *See* Trial Judgement, paras. 4602-4608.
[5364] *See* Trial Judgement, paras. 4595, 4596. After reviewing all the Prosecution evidence, the Trial Chamber concluded that it would "only consider the evidence of the remaining Prosecution witnesses, namely Witnesses FAG, FAL, FAU, QAF, QAL, RV, TO, and TP, as well as the Defence witnesses with respect to this allegation." *See ibid*., para. 4621.
[5365] Nteziryayo Appeal Brief, paras. 154, 155; Nteziryayo Reply Brief, paras. 67, 68. The Appeals Chamber recalls its decision that paragraphs 249-252 of Nteziryayo's appeal brief, which concern allegations of collusion among Prosecution witnesses, fell outside the scope of Nteziryayo's notice of appeal and would not be considered. *See* Decision on Nteziryayo's Motion for Reconsideration and on Prosecution's Motion for Clarification of the 8 May 2013 Decision, 12 July 2013 ("12 July 2013 Appeal Decision"), paras. 23-25. *See also* 8 May 2013 Appeal Decision, paras. 51, 58 (striking paragraphs raising allegations of collusion from a previous appeal brief filed by Nteziryayo that exceeded the scope of the Nteziryayo Notice of Appeal). Although not expressly addressed in these decisions, the same reasoning applies to Nteziryayo's allegation of collusion included in paragraph 103(d) of his appeal brief and the Appeals Chamber will therefore not consider this otherwise unsubstantiated allegation.
[5366] Nteziryayo Appeal Brief, paras. 103(d), 152, 247, 248, 253; Nteziryayo Reply Brief, para. 109. Nteziryayo argues that "special caution" should have been applied to these witnesses, particularly as witnesses who had been convicted

having to denounce co-perpetrators as part of his confession procedure; (ii) Witness QAF's bail depended upon the substance of his evidence; (iii) Witness FAG lied under oath in his initial testimony to the Trial Chamber; and (iv) Witness TO had been previously imprisoned by Ndayambaje and may have had a motive to "seek revenge against [him]."[5367] In this context, Nteziryayo argues that no reasonable trier of fact could have relied upon the evidence of these witnesses in light of the largely consistent Defence evidence.[5368]

2324. The Prosecution responds that the Trial Chamber applied the requisite level of caution and that Nteziryayo fails to demonstrate any error.[5369] It further contends that Nteziryayo misrepresents the circumstances under which Witnesses FAG, FAU, QAF, RV, and TO testified.[5370]

2325. The Appeals Chamber observes that the Trial Chamber noted Witness FAU's status as a detained witness when summarising his evidence related to Ndayambaje's Swearing-In Ceremony.[5371] The Trial Chamber also repeatedly stated in other parts of the Trial Judgement that it would treat his testimony with appropriate caution since he was a detained witness awaiting trial in Rwanda for crimes related to the 1994 genocide.[5372] Nteziryayo's contention that the Trial Chamber gave no indication of the need to treat Witness FAU's evidence with caution is therefore without merit.

2326. The Trial Judgement also reflects express consideration of the admitted involvement of Witnesses FAG, FAL, QAF, and RV in the genocide as well as the fact that Witness RV was detained and that Witnesses FAG and FAL were awaiting sentencing decisions when they testified.[5373] The Trial Chamber further recognised that the witnesses "may have had incentives to implicate either Ndayambaje or Nteziryayo in order to secure favourable or lenient treatment or to apportion blame to the authorities" and that, because Witness TO was imprisoned during Ndayambaje's tenure as *bourgmestre*, he may have "a motive to seek revenge against Ndayambaje".[5374] Moreover, the Trial Chamber's analysis of the evidence from these witnesses about the ceremony reflects that it undertook a cautious assessment of their credibility, including the consideration of discrepancies and inconsistencies as regards the date of the ceremony, the

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had been forced to wait inordinately long periods without receiving a sentence. *See* Nteziryayo Appeal Brief, para. 253; Nteziryayo Reply Brief, para. 109(b).
[5367] Nteziryayo Appeal Brief, paras. 254, 255, fn. 328; Nteziryayo Reply Brief, paras. 112, 113.
[5368] Nteziryayo Appeal Brief, paras. 155, 156.
[5369] Prosecution Response Brief, paras. 1513, 1514, 1559, 1561. *See also ibid.*, para. 1515; AT. 17 April 2015 p. 30.
[5370] Prosecution Response Brief, paras. 1561-1564. *See also* AT. 17 April 2015 pp. 30, 31.
[5371] *See* Trial Judgement, para. 4397. *See also ibid.*, paras. 1057, 4667.
[5372] Trial Judgement, paras. 1226, 1440, 4713, 5226.
[5373] *See* Trial Judgement, para. 4630. *See also ibid.*, paras. 4322, 4340, 4368, 4663.
[5374] Trial Judgement, para. 4630. *See also ibid.*, para. 4385.

officials present, the order of the speakers, and the content of the speeches.[5375] Significantly, the Trial Chamber found that their testimonies as to the content and meaning of the utterances made during the ceremony were corroborated by several other witnesses.[5376] The Appeals Chamber is therefore satisfied that the Trial Chamber exercised sufficient caution when considering the possible motivations of the witnesses to implicate Nteziryayo as well as the content of their evidence concerning Ndayambaje's Swearing-In Ceremony.

2327. Turning to Nteziryayo's contention that additional caution was warranted with respect to Witness RV as he had lied in previous statements to improve his position, the Appeals Chamber observes that Witness RV acknowledged that he had not been entirely truthful during an interview with a judicial police inspector in order to avoid charges.[5377] The witness explained that, at that time in 1997, he "had not yet decided to tell the whole truth about the events that had occurred."[5378] However, the witness explained that his subsequent recorded statements, including his 2001 confession, contained the truth.[5379] The Appeals Chamber is not persuaded that these circumstances precluded a reasonable trier of fact from relying on Witness RV's evidence. Likewise, the Appeals Chamber does not consider Witness RV's acknowledgement that he had to denounce co-perpetrators as part of his confession as indicative of the fact that the information he provided was untruthful, particularly when testifying before the Tribunal about Nteziryayo.[5380]

2328. Concerning Nteziryayo's contention that Witness QAF's bail depended upon the substance of his evidence, the Appeals Chamber observes that nothing in Witness QAF's testimony suggests that the substance of his evidence before the Tribunal may have had an impact on his bail in Rwanda.[5381] Similarly, Nteziryayo's references do not support his argument that Witness FAG had lied in his prior testimony before the Trial Chamber.[5382] In addition, the Trial Chamber assessed variances in Witness FAG's initial and subsequent testimony as it related to crimes in which he participated in 1994.[5383] With respect to Witness TO, as mentioned above, the Trial Chamber acknowledged that the witness was imprisoned during Ndayambaje's first tenure as *bourgmestre* and his possible motive to seek revenge against Ndayambaje on this basis.[5384]

[5375] *See* Trial Judgement, paras. 4589-4593, 4596, 4610-4617.
[5376] *See* Trial Judgement, paras. 4622-4628.
[5377] *See* Witness RV, T. 18 February 2004 pp. 12-16 (closed session), T. 19 February 2004 p. 28 (closed session).
[5378] Witness RV, T. 18 February 2004 p. 15 (closed session). *See also* Witness RV, T. 19 February 2004 p. 28 (closed session).
[5379] Witness RV, T. 18 February 2004 p. 15, T. 19 February 2004 p. 43 (closed session).
[5380] Witness RV, T. 19 February 2004 p. 43 (closed session).
[5381] *See* Witness QAF, T. 6 February 2004 p. 28 (closed session).
[5382] *Compare* Witness FAG, T. 1 March 2004 p. 10 (closed session) *with* Witness FAG, T. 6 September 2004 p. 10 (closed session). *See also* Nteziryayo Appeal Brief, para. 255, fn. 332.
[5383] Trial Judgement, para. 4334.
[5384] Trial Judgement, para. 4630. *See also ibid*., para. 4385. Ndayambaje served as *bourgmestre* of Muganza Commune from 10 January 1983 to October 1992 and from 18 June 1994 to 7 July 1994. *See supra*, para. 7.

The Appeals Chamber considers that these factors did not require the Trial Chamber to treat this witness's evidence with additional caution as it related to Nteziryayo.

2329. Finally, the Appeals Chamber is not persuaded that, as a rule, no reasonable trier of fact could have accepted evidence from Prosecution witnesses notwithstanding "largely consistent" Defence evidence to the contrary. The Appeals Chamber will address Nteziryayo's specific contentions in this regard below.

2330. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber failed to exercise sufficient caution with respect to Prosecution witnesses.

(c) Nteziryayo's Words and Order of Speeches

2331. Nteziryayo submits that the Trial Chamber erred in concluding that he incited the population to commit genocide at Ndayambaje's Swearing-In Ceremony.[5385] He argues that the Trial Chamber made contradictory findings concerning which statements were made by him.[5386] He contends that the Trial Chamber's uncertainty as to what he said and whether he spoke before or after Ndayambaje undermines its conclusion that he possessed the requisite *mens rea* and committed the *actus reus* of direct and public incitement to commit genocide.[5387]

2332. Nteziryayo further argues that the Prosecution evidence about the speeches is so inconsistent that no reasonable trier of fact could have convicted him based on it.[5388] He submits that the evidence varied as to whether he, Ndayambaje, or both gave speeches and that "[n]one of the eight Prosecution witnesses relied upon testified that both Ndayambaje and Nteziryayo uttered all three elements of the speech (sweep the dirt, continue with work, [and] kill those hiding Tutsis)."[5389] He also points out that the witnesses' testimonies varied as to whether he used plain language, metaphors, or both, and argues that the Trial Chamber could not discount these differences based on passage of time because the witnesses did not say that they could not remember.[5390] Specifically, Nteziryayo notes that Witness RV recounted that Ndayambaje spoke about sweeping dirt and did not recall Nteziryayo inciting violence.[5391] He also highlights that the testimonies include references to "separating the wheat from the chaff", "snakes and eggs", "orders to destroy houses; rats; and

[5385] Nteziryayo Notice of Appeal, para. 37. *See also* Nteziryayo Appeal Brief, para. 105.
[5386] Nteziryayo Appeal Brief, paras. 105-108, *referring*, *in particular*, *to* Trial Judgement, paras. 4632, 4642, 4645. *See also ibid*., para. 99; Nteziryayo Reply Brief, para. 38; AT. 17 April 2015 p. 15.
[5387] Nteziryayo Appeal Brief, para. 107(b). *See also* Nteziryayo Reply Brief, paras. 39-41.
[5388] Nteziryayo Appeal Brief, paras. 99, 109-111. *See also ibid*., paras. 162-164.
[5389] Nteziryayo Appeal Brief, paras. 98, 99, 108, 109. *See also* Nteziryayo Reply Brief, para. 42.
[5390] Nteziryayo Appeal Brief, para. 111. Nteziryayo notes that Witness FAL testified that his memory was refreshed during the *Gacaca* proceedings, further undermining the Trial Chamber's reasoning. *See idem*.
[5391] Nteziryayo Appeal Brief, para. 110. *See also* Nteziryayo Reply Brief, para. 43.

lice", which vary from the Trial Chamber's conclusion.[5392] In his view, inconsistencies as to whether he or Ndayambaje spoke first reflect that the witnesses did not attend the same meeting.[5393]

2333. The Prosecution responds that Nteziryayo mistakes the Trial Chamber's summary of evidence and its findings and that the elements of direct and public incitement to commit genocide were established as the Trial Chamber found that both he and Ndayambaje participated in the material elements of the crime.[5394] It argues that Nteziryayo does not demonstrate that the Trial Chamber erred in its assessment of the variances in the witnesses' accounts of the ceremony.[5395]

2334. The Appeals Chamber does not find that the Trial Chamber reached contradictory findings in paragraphs 4632, 4642, and 4645 of the Trial Judgement as alleged by Nteziryayo. Paragraph 4632 presents a summary of "countervailing and consistent" Prosecution evidence as to whether Nteziryayo or Ndayambaje or both incited the population, which the Trial Chamber had set forth in detail in preceding paragraphs.[5396] On the contrary, paragraphs 4642 and 4645 reflect the Trial Chamber's factual findings "established beyond a reasonable doubt" based on its assessment of the totality of the evidence.

2335. The Appeals Chamber is also not persuaded that the Trial Judgement evinces uncertainty as to whether Nteziryayo's conduct satisfied the *actus reus* and *mens rea* for direct and public incitement to commit genocide. The Appeals Chamber observes that, in the "Legal Findings" section of the Trial Judgement, the Trial Chamber repeated its factual findings that "Nteziryayo and Ndayambaje told the population to continue with their 'work' and urged them to 'sweep the dirt outside'".[5397] It also recalled that the "audience understood the words of both Accused, namely 'to work' and 'sweeping dirt', to mean they needed to kill Tutsis."[5398] The Trial Chamber then considered these findings with respect to the *mens rea* and *actus reus* for direct and public incitement to commit genocide, determining that Nteziryayo's and Ndayambaje's words at Ndayambaje's Swearing-In Ceremony "were direct incitements to commit genocide", that they

[5392] Nteziryayo Appeal Brief, para. 109.
[5393] Nteziryayo Appeal Brief, paras. 135, 136.
[5394] Prosecution Response Brief, paras. 1474, 1475, 1479, 1480. *See also* AT. 17 April 2015 pp. 28, 29.
[5395] Prosecution Response Brief, paras. 1477, 1478. *See also ibid*., para. 1509; AT. 17 April 2015 p. 28.
[5396] *See* Trial Judgement, paras. 4622-4628. Paragraph 4632 of the Trial Judgement reads as follows:

> The Chamber considers the differences in the testimony of the eight Prosecution witnesses as to the content of Ndayambaje and Nteziryayo's speeches can be explained by virtue of these variable factors and for this reasons [*sic*] considers that these particular discrepancies are not significant. The Chamber is strengthened i[n] its view having regard to the countervailing and consistent evidence of the Prosecution witnesses that either Nteziryayo or Ndayambaje or both incited the population by means of parables principally relating to the sweeping of dirt, as well as plain speech. […]

[5397] Trial Judgement, para. 6026.
[5398] Trial Judgement, para. 6027.

were made "publicly", that Nteziryayo and Ndayambaje possessed genocidal intent, and that "they intended to incite the population to commit genocide."[5399]

2336. Consequently, the Trial Chamber concluded "that in urging the population 'to work' and 'to sweep dirt outside' at Ndayambaje's swearing in ceremony, Nteziryayo and Ndayambaje are criminally responsible, pursuant to Article 6 (1) of the Statute, for inciting the population to cause the death and serious bodily and mental harm of Tutsi refugees in Butare."[5400] In this regard, any ambiguity within the Trial Chamber's conclusions as to the order in which Nteziryayo and Ndayambaje made their inciting remarks is immaterial to the determination of Nteziryayo's criminal responsibility. The evidence relied upon by the Trial Chamber reflects that Nteziryayo and Ndayambaje presented a uniform message of direct incitement to the population to commit genocide.[5401]

2337. Turning to Nteziryayo's contention that the Prosecution evidence varies as to whether he, Ndayambaje, or both gave speeches and that none testified that both he and Ndayambaje uttered "sweep the dirt, continue with work, [and] kill those hiding Tutsis", the Appeals Chamber observes that the Trial Chamber recalled that Witnesses FAG and FAL testified that "Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside",[5402] and that Witness FAU gave corroborative evidence to this effect.[5403] The Trial Chamber also noted contrasting evidence from Witnesses TO and TP that only Nteziryayo used the metaphor concerning sweeping dirt,[5404] while Witnesses QAF and RV testified that only Ndayambaje used this metaphor and that Witness QAL provided hearsay corroboration of the evidence of Witnesses QAF and RV.[5405]

2338. In addition, the Trial Chamber recounted that, according to Witnesses FAG, FAL, and TO, Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed, that Witness TP had a similar understanding of the metaphor, as uttered by Nteziryayo, and that Witnesses QAF and RV understood the speech of Ndayambaje in the same way.[5406] The Trial Chamber also considered evidence from Witnesses QAF and TP concerning Nteziryayo and Ndayambaje thanking the population for their "work", which meant "to kill", and urging them

[5399] Trial Judgement, paras. 6027, 6028.
[5400] Trial Judgement, para. 6029.
[5401] The Appeals Chamber finds Nteziryayo's reference to the *Mugenzi and Mugiraneza* Appeal Judgement unpersuasive in this respect. *See* Nteziryayo Appeal Brief, para. 107(b), *referring to Mugenzi and Mugiraneza* Appeal Judgement, para. 136.
[5402] *See* Trial Judgement, para. 4622. *See also ibid*., paras. 4327, 4328, 4345.
[5403] *See* Trial Judgement, para. 4622. *See also ibid*., paras. 4400, 4401.
[5404] *See* Trial Judgement, para. 4623. *See also ibid*., paras. 4378, 4391.
[5405] *See* Trial Judgement, para. 4623. *See also ibid*., paras. 4363, 4372, 4426.
[5406] *See* Trial Judgement, paras. 4627, 4628. *See also ibid*., paras. 4327, 4328, 4345, 4363, 4372, 4378, 4382, 4391.

to continue[5407] as well as Nteziryayo threatening to kill those who were protecting and refusing to give up Tutsis.[5408]

2339. Accordingly, the Appeals Chamber is satisfied that the Trial Chamber fully considered contrasting Prosecution evidence regarding who spoke and the content of the speeches given by Ndayambaje and Nteziryayo. The Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer[5409] and that two *prima facie* credible testimonies need not be identical in all respects in order to be corroborative.[5410] In light of all the evidence reflecting that the purpose of the speeches was to incite the population to commit genocide, Nteziryayo does not demonstrate that a reasonable trier of fact could not have relied on the elements within the Prosecution evidence demonstrating that both he and Ndayambaje urged the population to "sweep the dirt" and to "work".[5411]

2340. The Appeals Chamber is also not persuaded that the Trial Chamber was precluded from finding that Nteziryayo also made an inciting speech given Witness RV's evidence that he could not recall what Nteziryayo said or if he was present for the entirety of Nteziryayo's speech.[5412] Nteziryayo does not demonstrate that Witness RV's evidence was incompatible with other evidence reflecting that Nteziryayo made inciting remarks.

2341. With respect to Nteziryayo's submissions that the Prosecution evidence was materially inconsistent as to the content of the speeches and did not support the Trial Chamber's conclusions as to what was said, the Appeals Chamber observes that the Trial Chamber considered Witness TP's evidence that Nteziryayo spoke about the need to destroy snake's eggs, which no other witness testified about.[5413] The Trial Chamber also set forth Witness QAL's testimony regarding Ndayambaje mentioning separating the wheat from the chaff, as well as Witness TO's evidence that Nteziryayo spoke about lice growing from the dirt, and Witness FAL's testimony concerning Ndayambaje speaking about destroying the houses where Tutsis were hiding.[5414]

[5407] *See* Trial Judgement, para. 4626. *See also ibid*., para. 4624.
[5408] *See* Trial Judgement, para. 4624. *See also ibid*., paras. 4360, 4391.
[5409] *Nizeyimana* Appeal Judgement, para. 254; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44. *See also Muhimana* Appeal Judgement, para. 58.
[5410] *See Nzabonimana* Appeal Judgement, para. 184; *Ndahimana* Appeal Judgement, para. 93; *Ntabakuze* Appeal Judgement, para. 150. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Nahimana et al.* Appeal Judgement, para. 428.
[5411] The Appeals Chamber observes that Nteziryayo also challenges the sufficiency of the evidence supporting the Trial Chamber's conclusion that he and Ndayambaje "instructed that those hiding Tutsis who refused to hand them over should be killed." *See* Nteziryayo Appeal Brief, paras. 98, 99, 108. As this finding was not a basis for Nteziryayo's conviction, the Appeals Chamber does not find it necessary to assess this challenge in detail. *See* Trial Judgement, paras. 6026-6029. In any event, Nteziryayo has not shown that the inconsistencies as they relate to the evidence supporting this conclusion demonstrate that the Trial Chamber abused its discretion.
[5412] *See* Trial Judgement, para. 4371. *See also* Witness RV, T. 17 February 2004 p. 7 (closed session).
[5413] *See* Trial Judgement, para. 4623. *See also ibid*., para. 4391.
[5414] *See* Trial Judgement, paras. 4345, 4378, 4425.

Accordingly, the Appeals Chamber finds that the Trial Chamber did not ignore the differences in the Prosecution evidence as to the content of the speeches. The Appeals Chamber also finds that a reasonable trier of fact could have determined that these differences did not preclude it from finding that these witnesses were nonetheless talking about Ndayambaje's Swearing-In Ceremony where both Nteziryayo and Ndayambaje made inciting speeches by employing the metaphors concerning "sweeping the dirt" and "work".[5415]

2342. Moreover, while the Trial Chamber did not expressly recount Witness FAU's evidence related to Ndayambaje speaking about killing rats, Nteziryayo does not demonstrate that this aspect of the witness's evidence was materially inconsistent with other evidence on the record so as to preclude a reasonable trier of fact from relying on corroborated elements of Witness FAU's evidence concerning the content of the speeches.[5416]

2343. The Appeals Chamber further considers that Nteziryayo merely disagrees with the Trial Chamber's conclusion that the variances as to the content of the speeches in the witnesses' accounts could be attributable, *inter alia*, to the passage of time and the deterioration of human memory without demonstrating that it was unreasonable for the Trial Chamber to reach this conclusion.[5417] The Trial Judgement reveals that the Trial Chamber relied on other considerations to reach its conclusion, such as the level of education of the witnesses, the late arrival of certain witnesses, their position at the venue of the meeting, and the quality of the megaphone or clarity of the speakers.[5418]

2344. Finally, as regards Nteziryayo's contention that variances in the Prosecution evidence as to the order of the speeches given by him and Ndayambaje show that they did not attend the ceremony, the Appeals Chamber observes that the Trial Chamber noted that Witnesses TP and QAL testified that Nteziryayo took the floor after Ndayambaje, in contrast with evidence of the other witnesses.[5419] The Trial Chamber, however, did not regard the discrepancy as to the order of speakers as significant.[5420] Nteziryayo simply disagrees with this conclusion, without demonstrating how discrepancies in this respect undermined the Trial Chamber's determination that all witnesses were testifying about Ndayambaje's Swearing-In Ceremony.

2345. In light of the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred its assessment of the content or the order of the speeches at Ndayambaje's Swearing-In Ceremony.

[5415] *See* Trial Judgement, paras. 4645, 6026, 6027, 6029.
[5416] *See* Trial Judgement, paras. 4622, 4624.
[5417] *See* Trial Judgement, para. 4631.
[5418] *See* Trial Judgement, para. 4631.
[5419] *See* Trial Judgement, para. 4610.
[5420] Trial Judgement, para. 4611.

(d) Date

2346. Nteziryayo argues that it was illogical for the Trial Chamber to conclude that discrepancies as to the date of Ndayambaje's Swearing-In Ceremony were "minor and understandable", yet subsequently conclude that the date was a "significant feature".[5421] He further contends that the Trial Chamber erred in finding that Witnesses FAL and TP "testified to attending the meeting on or around 22 June 1994."[5422]

2347. Nteziryayo also argues that the Trial Chamber failed to sufficiently consider evidence from Witnesses FAG, FAL, FAU, QAL, TO, and TP that suggests that they testified about different meetings which occurred before Ndayambaje's Swearing-In Ceremony on 22 June 1994.[5423] Specifically, Nteziryayo points out that: (i) Witness FAU testified that the meeting he attended occurred "in late May, early June", on the day before the killing of a Tutsi girl named Nambaje, which the witness estimated occurred around 24 May 1994 and who Defence Witness KWEPO testified was killed in May 1994; (ii) Witness FAL testified about a meeting in "May or June 1994", yet linked it to destroying houses and committing murders that, according to his testimony and prior written confession, occurred in late April and early May 1994; (iii) Witness QAL gave evidence that the meeting occurred the day prior to the morning in May 1994 in which her husband was killed; (iv) Witness FAG testified that a girl named Josepha was killed as a result of the meeting and testified that this murder occurred in May 1994; (v) Witness TP testified that the only meeting attended by Ndayambaje and Nteziryayo occurred at the end of April or early May 1994 and long before a subsequent meeting she attended around 28 June 1994; and (vi) Witness TO's prior statement to Tribunal investigators reflects that the meeting attended by Nteziryayo occurred by the beginning of May 1994.[5424]

2348. The Prosecution responds that Nteziryayo misinterprets the evidence as to the date of the meeting, which contained mere approximations.[5425]

2349. Turning first to Nteziryayo's contention that the Trial Chamber's findings about the date of the swearing-in ceremony are illogical, the Appeals Chamber observes that the Trial Chamber found it "minor" and "understandable" that discrepancies within Prosecution evidence as to the

[5421] Nteziryayo Appeal Brief, para. 115 (emphasis omitted), *referring to* Trial Judgement, paras. 4592, 4616. *See also* AT. 17 April 2015 pp. 13, 14.
[5422] Nteziryayo Appeal Brief, para. 116 (emphasis omitted), *referring to* Trial Judgement, para. 4591. *See also ibid*., paras. 123, 130.
[5423] Nteziryayo Appeal Brief, paras. 117-133.
[5424] Nteziryayo Appeal Brief, paras. 118, 119, 123, 124, 127-132(a). *See also* Nteziryayo Reply Brief, paras. 45-66; AT. 17 April 2015 pp. 14, 15. In his reply brief, Nteziryayo argues that "[w]hen viewed holistically the cumulative effect of the vastly disparate body of Prosecution evidence is incompatible". *See* Nteziryayo Reply Brief, para. 61.

precise date of the ceremony existed "in light of the time which had passed between the events in question and the time the witnesses testified".[5426] The Trial Chamber later considered, when examining differences between Prosecution and Defence evidence as to what time of the day the meeting occurred,[5427] that this difference was not important in light of other consistencies on "significant features" of the meeting, which included the date of 22 June 1994.[5428]

2350. The Appeals Chamber finds that, when reading the Trial Chamber's deliberations as a whole, it is apparent that the Trial Chamber accepted the consistent Defence evidence that Ndayambaje's Swearing-In Ceremony occurred on 22 June 1994.[5429] The Trial Chamber noted that the Prosecution evidence varied as to the date, but ultimately determined that other fundamental features shared among the Prosecution and Defence evidence – including that the event was the swearing-in ceremony of Ndayambaje, that the meeting was held in the woods near the Muganza commune office, and that Ndayambaje and Nteziryayo spoke – indicated that all were discussing the same event.[5430] Nteziryayo disagrees with the Trial Chamber's determination, yet as discussed below, fails to demonstrate that the Prosecution evidence regarding the date of the swearing-in ceremony was incompatible with the finding that it occurred on 22 June 1994.

2351. As regards Nteziryayo's argument that the Trial Chamber erred in finding that Witnesses FAL and TP testified to attending the meeting on or around 22 June 1994, the Appeals Chamber agrees that the testimonies of Witnesses FAL and TP cannot reasonably be interpreted, alongside Witness QAF's evidence, to support the conclusion that Ndayambaje's Swearing-In Ceremony occurred specifically "on or around 22 June 1994".[5431] The Trial Chamber appears to have overlooked material aspects of each witness's evidence that reveal their uncertainty as to when the meetings they described had occurred.[5432] The Appeals Chamber finds that no reasonable trier of fact could have relied on the evidence of Witnesses FAL and TP alone to find that Ndayambaje's

[5425] Prosecution Response Brief, paras. 1485, 1488, 1490, 1491, 1495, 1499, 1501, 1505, 1506. *See also* AT. 17 April 2015 p. 29.
[5426] Trial Judgement, para. 4592.
[5427] Trial Judgement, paras. 4614-4616.
[5428] Trial Judgement, para. 4616.
[5429] *See* Trial Judgement, paras. 4614, 4617, 4642, 4645.
[5430] Trial Judgement, para. 4616. *See also ibid*., paras. 4592, 4593, 4594, 4609.
[5431] Indeed, the transcripts of Witness FAL's testimony referred to by the Trial Chamber only contain counsel's suggestion that the incident occurred within a two month timeframe and Witness FAL did not expressly accept this suggestion or provide any clarification. The evidence of Witness TP provides no indication as to when the meeting occurred. *See* Trial Judgement, paras. 4340, 4386, 4591, *referring to* Witness FAL, T. 9 February 2004 p. 37, Witness TP, T. 12 February 2004 p. 38. *See also* Witness TP, T. 12 February 2004 p. 33.
[5432] *See* Trial Judgement, paras. 4340 ("Witness FAL […] testified that in May or June 1994 the population was summoned to a security meeting held in a little bush near the Muganza *commune* office".), 4386 ("Witness TP […] testified that while she was hiding at her uncle's house, she attended a meeting at the Muganza *commune* office around 26 or 28 June 1994. On cross-examination, she stated she was not sure of the date because she was hiding in the bush; the meeting involving the *préfet* and Ndayambaje may have occurred in early May, and another meeting she referred to in her witness statement called solely by Ndayambaje may have occurred on 28 June 1994."). *See also* Witness FAL, T. 9 February 2004 p. 37; Witness TP, T. 11 February 2004 p. 25, T. 12 February 2004 pp. 33 and 36 (closed session).

Swearing-In Ceremony occurred specifically "on or around 22 June 1994" considering the ambiguity in their evidence as to its precise date.[5433] However, the Appeals Chamber does not find that this error has occasioned a miscarriage of justice given other features that the Trial Chamber relied upon to find that Witnesses FAL and TP were discussing this event.[5434]

2352. Concerning Nteziryayo's argument that the Trial Chamber failed to sufficiently consider evidence from Witnesses FAG, FAL, FAU, QAL, TO, and TP that suggest that they testified about a different meeting, the Appeals Chamber observes that the Trial Chamber expressly noted aspects of these witnesses' testimonies reflecting their inability to provide a precise date of the ceremony.[5435] Even accepting that the witnesses provided evidence to suggest that the ceremony they attended could have happened as early as late April, May, or early June 1994, the Appeals Chamber is not convinced that the discrepancies concerning the date of the meeting rendered their evidence unreliable given other significant features within their accounts reflecting that they were discussing the same event. Specifically, as noted by the Trial Chamber, the witnesses identified this meeting as involving the installation of Ndayambaje as the *bourgmestre* of Muganza Commune[5436] or testified that this was the only meeting in Muganza Commune which Nteziryayo and Ndayambaje attended together.[5437]

2353. Furthermore, the Appeals Chamber is not persuaded by Nteziryayo's argument that Witnesses FAG, FAL, FAU, QAL, TO, and TP were testifying about a different meeting because they associated it with particular events that, according to their evidence, occurred well before 22 June 1994. With respect to Witness FAU, who testified that Nambaje was abducted after the swearing-in ceremony, Nteziryayo's submissions ignore that the witness's testimony as to when Nambaje was taken away was only an estimate.[5438] Moreover, the Trial Chamber accepted Witness FAU's evidence that Nambaje was killed after the swearing-in ceremony and rejected Witness KWEPO's contradictory evidence.[5439] Nteziryayo does not demonstrate that the Trial Chamber erred in this regard.

[5433] Trial Judgement, para. 4591.
[5434] In particular, both Witnesses FAL and TP observed the appointment of Ndayambaje as *bourgmestre* at the meeting, were consistent about the meeting taking place in the morning in the small woods near the Muganza commune office, and recounted that Prefect Nteziryayo and *Bourgmestre* Ndayambaje were present. *See* Trial Judgement, paras. 4592, 4593. *See also ibid*., paras. 4340, 4342, 4343, 4386-4388.
[5435] *See* Trial Judgement, paras. 4322, 4323, 4333, 4338, 4340, 4374, 4375, 4386, 4422, 4590, 4594, 4595, 4620.
[5436] *See* Trial Judgement, paras. 4322, 4323, 4342, 4343, 4374, 4387, 4388, 4590.
[5437] *See* Trial Judgement, paras. 4323, 4342, 4374, 4386, 4387, 4398, 4399, 4422.
[5438] *See* Trial Judgement, para. 4397.
[5439] Trial Judgement, para. 4620. The Appeals Chamber finds that, beyond highlighting that Witness FAU's evidence was hearsay as well as asserting that the Trial Chamber did not accord sufficient weight to inconsistencies between his prior statement and testimony, Nteziryayo fails to demonstrate any error in the Trial Chamber's assessment of the witness's evidence. Consequently, the Appeals Chamber dismisses his submissions in this respect without further consideration.

2354. In addition, Nteziryayo's contention based on Witness FAL's prior statement and confession that the witness participated in looting and murders in late April and early May 1994 fails to appreciate that the witness testified that he did not participate in murders after Ndayambaje's Swearing-In Ceremony.[5440] The witness also confirmed at trial that he participated in the destruction of houses resulting from orders that were given during that ceremony.[5441] Nteziryayo does not demonstrate that this is materially inconsistent with Witness FAL's prior statement or confession.

2355. With respect to Witnesses FAG and QAL, their evidence is unequivocal that the murder of Witness QAL's husband and a person named Josepha, respectively, occurred after the swearing-in ceremony.[5442] In light of the inability of Witnesses FAG and QAL to provide precise dates,[5443] Nteziryayo does not show that no reasonable trier of fact could have accepted this evidence, even though the witnesses gave evidence that the ceremony and these events occurred in May 1994.

2356. As for Witness TP, Nteziryayo only suggests a possible interpretation of the witness's evidence that the meeting she attended did not occur around 22 June 1994. As noted above, given that Witness TP could only provide estimates for the date of the meeting, the Appeals Chamber finds that a reasonable trier of fact could have determined that she attended Ndayambaje's Swearing-In Ceremony in light of her testimony that she observed Ndayambaje's reappointment as the *bourgmestre* of Muganza Commune and that Ndayambaje and Nteziryayo gave speeches during the event.[5444]

2357. Regarding Witness TO, while Nteziryayo points to his prior statement – which reflects that the meeting attended by Nteziryayo occurred at the beginning of May 1994 – the Trial Chamber expressly noted this aspect of the statement and that the witness testified that Ndayambaje was reappointed *bourgmestre* of Muganza Commune by Prefect Nteziryayo in June 1994.[5445] It also noted that the witness explained that he was not in a position to provide exact dates, since this was of little concern to him.[5446] Nteziryayo does not demonstrate that a reasonable trier of fact could not

[5440] *See* Witness FAL, T. 9 February 2004 pp. 48 (closed session), 60-64.
[5441] *See* Witness FAL, T. 9 February 2004 pp. 61-64.
[5442] *See* Trial Judgement, paras. 4333, 4431. *See also* Witness QAL, T. 25 February 2004 p. 12; Witness FAG, T. 1 March 2004 p. 34.
[5443] *See* Witness FAG, T. 6 September 2004 pp. 8, 9 (closed session); Witness QAL, T. 25 February 2004 p. 25 (closed session).
[5444] *See* Trial Judgement, paras. 4390-4392, 4592, 4623-4625.
[5445] *See* Trial Judgement, paras. 4374, 4375.
[5446] *See* Trial Judgement, para. 4375. In light of the witness's explanation concerning his inability to provide exact dates, the Appeals Chamber finds that Nteziryayo's contentions concerning the error in time as it concerns the second meeting the witness attended also do not demonstrate that a reasonable trier of fact could not have relied on Witness TO's evidence concerning Ndayambaje's Swearing-In Ceremony. *See* Nteziryayo Appeal Brief, para. 132 (b).

have concluded that the witness recounted Ndayambaje's Swearing-In Ceremony in light of this explanation.

2358. The Appeals Chamber therefore finds that Nteziryayo has not shown that the Trial Chamber erred in assessing Prosecution evidence in light of variations as to the date of the ceremony.

(e) Attendees

2359. Nteziryayo submits that the Trial Chamber erred in finding that the variances in the Prosecution evidence about the attendees at the ceremony were not significant.[5447] As an example, he points to evidence of Witnesses QAF and QAL that indicate that Defence Witness Constant Julius Goetschalckx a.k.a. Brother Stan ("Stan"), a "Caucasian Belgian Priest", was among the dignitaries at the ceremony and was introduced to the crowd, and notes that other Prosecution witnesses were unsure or denied that Witness Stan was present.[5448] He contends that these variances demonstrate that the witnesses lied or that their testimonies relate to a different meeting.[5449] Nteziryayo also highlights inconsistencies in the Prosecution evidence concerning the presence of Callixte Kalimanzira ("Kalimanzira"), Nyiramasuhuko, Chrysologue Bimenyimana ("Bimenyimana"), and Augustin Sebukeye ("Sebukeye") as demonstrating "further incoherency".[5450]

2360. The Prosecution responds that the Trial Chamber considered inconsistencies as to the dignitaries present at the meeting and correctly held that they did not undermine the Prosecution evidence.[5451] It suggests that, given the size of the event, it is understandable that witnesses did not recognise or recall other individuals who may have been present.[5452]

2361. The Appeals Chamber observes that, when assessing Defence evidence, the Trial Chamber observed that "several Defence witnesses testified to the presence of Brother Stan" and noted that this "was corroborated by Prosecution Witnesses QAF, QAL and TO."[5453] The Trial Chamber not only considered the evidence of Witnesses QAF and QAL, which Nteziryayo highlights, but also that of Witness TO.[5454] Furthermore, the Trial Chamber noted the evidence of Witness FAL that

[5447] Nteziryayo Notice of Appeal, para. 38(c).
[5448] Nteziryayo Appeal Brief, paras. 137, 138. *See also ibid*., paras. 145(d),148(d).
[5449] Nteziryayo Appeal Brief, para. 138. *See also* Nteziryayo Reply Brief, para. 64; AT. 17 April 2015 p. 13.
[5450] Nteziryayo Appeal Brief, paras. 137-139. *See also ibid*., para. 145(a).
[5451] Prosecution Response Brief, paras. 1509, 1510.
[5452] Prosecution Response Brief, para. 1510.
[5453] Trial Judgement, para. 4609.
[5454] Trial Judgement, para. 4609, *referring*, *inter alia*, *to* Witness QAF, T. 5 February 2004 pp. 66, 68, T. 6 February 2004 pp. 5, 8, T. 9 February 2004 p. 23, Witness QAL, T. 25 February 2004 p. 11, Witness TO, T. 6 March 2002 pp. 10, 11.

"[h]e did not know whether a white religious person was present"[5455] and of Witness TP that she did not hear a reference to "any religious person".[5456] While the Trial Chamber did not expressly summarise Witness FAG's testimony that it was possible that a white person was present but that he did not try to ascertain this fact,[5457] the Trial Chamber noted the relevant portion of Witness FAG's evidence.[5458] Having reviewed the relevant evidence,[5459] the Appeals Chamber is not persuaded that ambiguous Prosecution evidence as to whether Witness Stan was present at the ceremony, even in light of the evidence of Witnesses QAF and QAL that Witness Stan was referred to in speeches,[5460] prevented a reasonable trier of fact from finding that all the Prosecution witnesses recounted Ndayambaje's Swearing-In Ceremony.[5461]

2362. Turning to Nteziryayo's argument that there was "further incoherency" about the attendance of Kalimanzira, Nyiramasuhuko, Bimenyimana, and Sebukeye, the Appeals Chamber observes that the Trial Chamber expressly considered that Defence evidence diverged from some Prosecution evidence as to the presence of, among others, Kalimanzira and Nyiramasuhuko during the swearing-in ceremony.[5462] The Trial Chamber determined that it need not make findings as to Kalimanzira's presence and found that any discrepancy in this regard was not significant.[5463] Nteziryayo fails to demonstrate that the Trial Chamber's assessment of the evidence on this issue was unreasonable.

2363. The Trial Chamber noted that Witness RV was the sole witness to testify to the presence of Nyiramasuhuko and that Ndayambaje, Nteziryayo, and other Defence witnesses contradicted this

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[5455] *See* Trial Judgement, para. 4349, *referring to* Witness FAL, T. 9 February 2004 p. 60.
[5456] Trial Judgement, para. 4393, *referring to* Witness TP, T. 12 February 2004 pp. 44, 45.
[5457] *See* Witness FAG, T. 3 March 2004 p. 24.
[5458] *See* Trial Judgement, para. 4326, *referring to* Witness FAG, T. 3 March 2004 p. 24.
[5459] *See* Witness FAL, T. 9 February 2004 p. 60 ("Q. Was there among the dignitaries, or at the table of the dignitaries, a white person? A. I don't remember. There were a lot of people. I couldn't tell you whether there was a white person among them. Q. No, I am speaking of the table where the dignitaries were, I am not speaking of the multitude, the crowd. I am sure the whites were not in the majority in Muganza *commune* at the time. Did you see any whites? A. I don't remember."); Witness TP, T. 12 February 2004 p. 45 ("Q. At the meeting, was there, either among the officials or in the crowd, a white man, a white person? A. No, I didn't see anything. Q. Did either of the two speakers mention anything about a curate, a religious person? A. No, I didn't hear any mention of that. Maybe that was a question asked after my departure."); Witness FAG, T. 3 March 2004 p. 24 ("Q. Witness FAG, were there any white persons there? A. I did not pay particular attention to ascertain whether among the participants there were white people. Q. The person I'm referring to would have been with the speakers. Would that person have been with the speakers? A. Are you referring to the person, the white person? I did not pay attention to that detail. It is possible that that person was there, but I didn't pay any attention. I did not notice it. Maybe I saw him but it is a long time ago, but I do not contradict the fact that the person might have been there.").
[5460] *See* Trial Judgement, paras. 4362, 4425.
[5461] In this regard, the Appeals Chamber observes that Nteziryayo also refers to the testimony of Witness QAR, arguing that he was among the witnesses who was "confident [that Witness Stan] was not at the meeting." *See* Nteziryayo Appeal Brief, para. 138, fn. 164, *referring to* Witness QAR, T. 21 November 2001 p. 90. However, the Trial Chamber considered "that Witness QAR did not attend" Ndayambaje's Swearing-In Ceremony. *See* Trial Judgement, para. 4603. Consequently, Witness QAR's evidence as to whether Witness Stan was at the meeting was irrelevant to the Trial Chamber's assessment.
[5462] *See* Trial Judgement, paras. 4610-4612.
[5463] Trial Judgement, para. 4611.

aspect of his evidence.[5464] However, it observed that Witness RV's evidence was consistent with Defence evidence as to the presence of certain other dignitaries and that all Defence witnesses testified to the presence of another female minister, whom the witness did not identify.[5465] In this context, the Trial Chamber rejected Witness RV's evidence as to Nyiramasuhuko's presence but found that this did "not weaken the credibility of [his] testimony with respect to more significant aspects of the swearing-in ceremony."[5466] Once again, Nteziryayo simply expresses his disagreement with this decision, ignoring that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[5467] Indeed, the Defence did not dispute that Witness RV was present at Ndayambaje's Swearing-In Ceremony.

2364. While the Trial Chamber did not expressly assess variances in the Prosecution evidence as to the presence of Bimenyimana, the *bourgmestre* of Muganza Commune being replaced by Ndayambaje, the Appeals Chamber observes that the Defence did not dispute that he was present at the meeting.[5468] Furthermore, three of the witnesses, whom Nteziryayo highlights, confirmed that Bimenyimana was present,[5469] while the remaining witnesses either simply recounted not knowing whether Bimenyimana was present,[5470] did not see him,[5471] or did not remember seeing him there.[5472] Likewise, while Witness FAL testified that Sebukeye was at the ceremony, Nteziryayo does not point to evidence on the record demonstrating that any variance in this regard rendered Witness FAL's testimony incompatible with the other Prosecution evidence.[5473] Nteziryayo does not demonstrate that these variances precluded a reasonable trier of fact from finding that these Prosecution witnesses were testifying about Ndayambaje's Swearing-In Ceremony.

2365. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in its assessment of the evidence about the attendees of Ndayambaje's Swearing-In Ceremony.

[5464] Trial Judgement, para. 4612.
[5465] Trial Judgement, para. 4612.
[5466] Trial Judgement, para. 4612.
[5467] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[5468] *See* Trial Judgement, paras. 4454, 4468, 4493, 4501, 4518, 4538, 4555, 4568.
[5469] *See* Nteziryayo Appeal Brief, fn. 166 (noting that Witnesses FAG, QAF, and RV confirmed that Bimenyimana was "present"). In his appeal brief, Nteziryayo mentions a fourth witness – Witness FAL – who allegedly confirmed that Bimenyimana was present. *See idem*. However, the Appeals Chamber notes that Witness FAL testified that he did not remember having seen Bimenyimana there. *See* Witness FAL, T. 9 February 2004 p. 60.
[5470] Witness TP, T. 12 February 2004 p. 41. The Appeals Chamber observes that the Trial Chamber referred to Witness TP's evidence in this regard. *See* Trial Judgement, para. 4389.
[5471] *See* Witness QAL, T. 25 February 2004 pp. 17, 18.
[5472] Witness FAL, T. 9 February 2004 p. 60.
[5473] *See* Witness FAL, T. 9 February 2004 pp. 62-64. *See also* Trial Judgement, para. 4350.

(f) Time

2366. Nteziryayo argues that the Trial Chamber erred in finding that the discrepancy between the Prosecution evidence of the ceremony occurring in the morning and the evidence of the eight Defence witnesses that it occurred no earlier than 2.30 p.m. was insignificant.[5474] He contends that the Prosecution evidence is implausible[5475] as consistent Defence evidence reflects that he attended the swearing-in of the new *bourgmestre* of Ndora Commune at 11.00 a.m. before attending Ndayambaje's Swearing-In Ceremony between 2.30 and 5.00 p.m.[5476] Nteziryayo adds that the Trial Chamber erred in finding that the timing of the meeting was not put to the Prosecution witnesses, pointing to excerpts from the cross-examinations of Witnesses FAL and TO.[5477]

2367. The Prosecution responds that the Trial Chamber considered the inconsistencies as to when the meeting occurred and emphasises that the Prosecution evidence was consistent that it happened in the morning.[5478]

2368. The Appeals Chamber notes that the Trial Chamber acknowledged that, "in contrast to all the Prosecution evidence, the Defence witnesses testified that the swearing-in ceremony took place in the afternoon of 22 June 1994".[5479] In particular, the Trial Chamber noted that the Prosecution witnesses testified between 2001 and 2004, while the Defence witnesses testified between 2007 and 2008.[5480] It also observed that it was never put to the Prosecution witnesses that they may be mistaken as to the timing of the swearing-in ceremony and that they never had the opportunity to refute the testimonies of the Defence witnesses that it occurred in the afternoon.[5481] The Trial Chamber ultimately concluded that it did not consider this discrepancy to be important given that the Prosecution and Defence witnesses were consistent on the significant features of the meeting, including that it was the swearing-in ceremony of Ndayambaje, that it took place on or around

[5474] Nteziryayo Notice of Appeal, para. 38(e); Nteziryayo Appeal Brief, paras. 140, 142, *referring to* Trial Judgement, para. 4616.
[5475] In particular, Nteziryayo juxtaposes the testimony of Witness TP that when she arrived to the meeting at 9.30 a.m. the prefect was already present with "a compelling body of evidence" that Nteziryayo was in Ndora Commune. *See* Nteziryayo Appeal Brief, para. 148(a). Nteziryayo also highlights the evidence of Witness FAU that, according to him, reflects that the meeting finished at 5.00 p.m. because a girl named Nambaje was abducted between 5.30 and 6.00 p.m. on the day of the meeting. *See ibid.*, para. 149. *See also* Nteziryayo Reply Brief, para. 62.
[5476] Nteziryayo Appeal Brief, paras. 140, 141. In addition, Nteziryayo highlights that the Prosecution had sought to establish his presence at a meeting in Ndora Commune on the morning of Ndayambaje's Swearing-In Ceremony and that Prosecution Witness QG testified that the swearing-in ceremony in Ndora Commune occurred in the afternoon of 22 June 1994. *See ibid.*, para. 141, *referring to* Prosecution Closing Brief, p. 335, Witness QG, T. 16 March 2004 pp. 75-77 (closed session). *See also* Nteziryayo Reply Brief, para. 62.
[5477] Nteziryayo Appeal Brief, para. 143, *referring to* Witness TO, T. 5 March 2002 pp. 113, 114, Witness FAL, T. 9 February 2004 p. 56.
[5478] Prosecution Response Brief, paras. 1509, 1511.
[5479] Trial Judgement, para. 4614. In this respect, the Trial Chamber cited to and summarised the evidence of the eight Defence witnesses Nteziryayo highlights in his appeal brief. *Compare ibid.*, fn. 12283 *with* Nteziryayo Appeal Brief, fn. 170.
[5480] Trial Judgement, para. 4615.

22 June 1994, that it was held in the woods near the Muganza commune office, and that Ndayambaje and Nteziryayo spoke at the meeting.[5482] The Trial Chamber determined that the witnesses testified to the same event, namely Ndayambaje's Swearing-In Ceremony of 22 June 1994.[5483]

2369. The Appeals Chamber considers that Nteziryayo, who largely repeats the arguments he advanced at trial,[5484] fails to demonstrate that the Trial Chamber erred in its analysis. The Trial Chamber considered Nteziryayo's argument that the Prosecution evidence that the ceremony occurred in the morning was implausible because he was at a meeting in Ndora Commune.[5485] However, it recalled that Witness RV attended the Ndora Commune meeting with Nteziryayo "yet still testified that Ndayambaje was installed into office at a ceremony held at about 10.00 or 11.00 a.m."[5486] The Appeals Chamber is therefore satisfied that the Trial Chamber carefully considered the varying evidence as to the timing of the meeting and finds that Nteziryayo does not demonstrate that the Trial Chamber abused its discretion in evaluating these differences.

2370. As regards Nteziryayo's contention that the Trial Chamber erred in finding that the timing of the meeting was not put to the Prosecution witnesses, the Appeals Chamber observes that, contrary to Nteziryayo's contention, the references he provides reflect that, while Witnesses TO and FAL were asked when Ndayambaje's Swearing-In Ceremony started, it was not suggested to these witnesses that they may have been wrong about its timing.[5487]

[5481] Trial Judgement, para. 4615.
[5482] Trial Judgement, para. 4616.
[5483] Trial Judgement, para. 4617.
[5484] *See* Nteziryayo Closing Brief, para. 536.
[5485] *See* Trial Judgement, para. 4614. In particular, the Trial Chamber considered that "Nteziryayo was occupied with the swearing-in ceremony for the new *bourgmestre* of Ndora *commune*, Fidèle Uwizeye, on the morning of 22 June 1994." *See idem*. It summarised Nteziryayo's testimony that the Ndora Commune meeting occurred in the morning. *See ibid*., paras. 4564, 4566. Elsewhere in the Trial Judgement, the Trial Chamber also acknowledged Nteziryayo's reliance on the evidence of Witness AND-31 concerning the meeting in Ndora Commune related to the swearing-in of the new *bourgmestre* as well as Nsabimana's reliance on his own evidence and that of Witnesses AND-30 and AND-31 in relation to the same meeting but did not make findings on this issue. *See ibid*., paras. 4217-4220, 4244. The Appeals Chamber does not consider that the Trial Chamber was also required to discuss expressly these witnesses' testimonies with respect to Ndayambaje's Swearing-In Ceremony. Notably, Nteziryayo did not argue the clear relevance and importance of their evidence to Ndayambaje's Swearing-In Ceremony in his closing submissions, relying on them instead in relation to the meeting in Ndora Commune. *See* Nteziryayo Closing Brief, paras. 287-293, 531-540; Nteziryayo Closing Arguments, T. 28 April 2009 pp. 5, 6. Moreover, having reviewed the relevant evidence, the Appeals Chamber is of the view that it was cumulative of Nteziryayo's as regards his attendance of the meeting in Ndora Commune in the morning of 22 June 1994. *See* Witness AND-30, T. 21 February 2007 pp. 16, 17, 52, 53; Witness AND-31, T. 27 February 2007 pp. 55, 56; Nsabimana, T. 16 November 2006 pp. 61, 62, 67.
[5486] Trial Judgement, para. 4614, *referring to* Witness RV, T. 18 February 2004 p. 43 (closed session), T. 19 February 2004 p. 34 (closed session). The Appeals Chamber further finds that Nteziryayo misrepresents Witness FAU's testimony, in light of his unequivocal response that he "[did] not know when the meeting ended", merely stating that "[i]t was about 5:30 p.m. or 6:00 p.m. when the assailants arrived to take away the person in question." *See* Witness FAU, T. 9 March 2004 p. 22 (closed session).
[5487] *See* Witness TO, T. 5 March 2002 p. 113; Witness FAL, T. 9 February 2004 pp. 55, 56.

2371. Consequently, the Appeals Chamber finds no error in the Trial Chamber's determination that the variance in timing was insignificant and its reliance instead on the similar features of the meeting to determine that all witnesses were referring to Ndayambaje's Swearing-In Ceremony. The Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber acted unreasonably in assessing evidence as to the timing of the swearing-in ceremony.

(g) Different Meeting

2372. Nteziryayo argues that, in addition to his previous challenges, several other elements of the Prosecution evidence allow for the reasonable inference that the Prosecution witnesses were referring to a meeting other than Ndayambaje's Swearing-In Ceremony and that the Trial Chamber failed to consider this.[5488] Specifically, he notes that Witness FAL testified that there were 5,000 participants and that megaphones were used, while Witness QAL only mentioned 200 participants and indicated that no megaphones were used.[5489] Nteziryayo submits that, even when allowing for variances as to the recollection of numbers, Prosecution evidence of a meeting with several thousand participants and where speakers used megaphones "suggests" that other Prosecution evidence about a meeting attended by several hundred people where speakers were "unamplified" concerns a different meeting.[5490]

2373. Nteziryayo further highlights Witness FAL's evidence that the audience expressed discontent about the dismissal of the outgoing *bourgmestre* and that Sebukeye ordered the destruction of houses and suggests that this witness's evidence was distinct from other Prosecution evidence concerning the ceremony.[5491] Similarly, he notes that neither Witness QAL nor Witness FAG saw Ndayambaje get sworn in and that Witness TP testified that the meeting was for the installation of Nteziryayo as the Butare Prefect.[5492] Nteziryayo also stresses that only Witness TO testified about a shooting exercise before the ceremony and that "Habiyambere" was the master of ceremonies.[5493] As a further reflection of the unreliability of the Prosecution evidence, he stresses that Witnesses TP and FAL were unable to identify him in court.[5494] Nteziryayo also points to evidence that several other meetings were held in Muganza Commune "and its

[5488] *See generally* Nteziryayo Appeal Brief, paras. 104, 144-151. Nteziryayo concedes that the Trial Chamber concluded that Witness QAR was referring to an event other than Ndayambaje's Swearing-In Ceremony. *See ibid*., para. 104 (iv), 144. The Appeals Chamber has considered the contentions raised in paragraphs 145(d), 148(a), (b), (d), and 149 of Nteziryayo Appeal Brief above. *See supra*, Sections VII.B.1(c)-(f).
[5489] Nteziryayo Appeal Brief, paras. 145(e), 146(b), (c). *See also ibid*., para. 147; Nteziryayo Reply Brief, para. 63.
[5490] Nteziryayo Appeal Brief, para. 147.
[5491] Nteziryayo Appeal Brief, para. 145(a), (c).
[5492] Nteziryayo Appeal Brief, paras. 146(a), 148(c), fn. 192.
[5493] Nteziryayo Appeal Brief, paras. 132(c), 150. The Appeals Chamber notes that, while Nteziryayo also argued in his notice of appeal that the Trial Chamber erred in finding that the discrepancy as to whether the population was armed was not significant, he did not develop this argument in his appeal brief. *See* Nteziryayo Notice of Appeal, para. 38(c). The Appeals Chamber therefore considers that Nteziryayo has abandoned this contention.

surroundings", which, in his view, shared characteristics of Ndayambaje's Swearing-In Ceremony.[5495] He argues that the variances in the Prosecution evidence together with the evidence that several other meetings were held demonstrate that these witnesses were not testifying about Ndayambaje's Swearing-In Ceremony.[5496]

2374. The Prosecution, pointing to the consistent elements of the testimonial evidence, submits that the discrepancies in the witnesses' evidence were minor and that Nteziryayo's unsubstantiated assertions that the witnesses were recounting another meeting should be rejected.[5497]

2375. The Appeals Chamber observes that the Trial Chamber summarised the respective estimates of Witnesses FAL and QAL that "more than 5,000" or an "estimated 200" persons attended the meeting.[5498] In its deliberations, the Trial Chamber noted that "the testimony of the witnesses shows that between 1,000 and 5,000 people were present" and referred, *inter alia*, to Witness FAL's evidence in this regard.[5499] The Trial Chamber also summarised differing Prosecution and Defence evidence as to whether a megaphone or public address system was used during the swearing-in ceremony.[5500] The Trial Chamber found that, while the Prosecution evidence differed "in varying degrees as to the content of what was said by both Ndayambaje and Nteziryayo", the discrepancies could be attributed, in part, to "the quality of the megaphone or the clarity of the speakers."[5501] The Trial Judgement therefore shows that the Trial Chamber accepted the evidence that the number of attendees ranged from 1,000 to 5,000 persons and that amplification devices were used during the ceremony.

2376. Given the significant number of attendees, a fact uniformly testified to by all witnesses,[5502] the Appeals Chamber is not persuaded that, simply because Witness FAL considered that more than 5,000 people were present or that Witness QAL "estimated" that 200 people were present, a reasonable trier of fact could not have considered that they testified about the same event. Furthermore, although Witness FAL testified that speakers at the event used megaphones and Witness QAL testified that she did not see megaphones, Witness FAL was only three metres from the speakers while Witness QAL's evidence reflects that many people were between her and the

[5494] Nteziryayo Appeal Brief, paras. 145(b), 148(c).
[5495] Nteziryayo Appeal Brief, para. 104(a)(i)-(a)(iii), (a)(v), (a)(vi). *See also* AT. 17 April 2015 p. 14.
[5496] *See generally* Nteziryayo Appeal Brief, paras. 104, 144-151.
[5497] Prosecution Response Brief, paras. 1482-1484, 1488, 1489, 1492-1494, 1496-1498, 1500, 1503, 1504, 1507-1510. *See also ibid*., para. 1473; AT. 17 April 2015 p. 28.
[5498] Trial Judgement, paras. 4341, 4421.
[5499] *See* Trial Judgement, para. 4611, fn. 12275.
[5500] *See* Trial Judgement, paras. 4327, 4359, 4379, 4425, 4490, 4498, 4512, 4538, 4555.
[5501] *See* Trial Judgement, para. 4631.
[5502] *See* Trial Judgement, paras. 4324, 4341, 4357, 4454, 4468, 4499, 4519, 4537, 4560. *See also ibid*., para. 4611.

speakers.[5503] It bears noting that other Prosecution and Defence evidence differed as to whether devices were used to amplify the voice of the speakers.[5504] In the view of the Appeals Chamber, it was within the discretion of the Trial Chamber to rely on the fundamental features that were consistent in the evidence of Witnesses FAL and QAL, including the timing and location of the meeting, the fact that Ndayambaje and Nteziryayo were present and spoke during the event, Ndayambaje's attire, and participants bringing traditional weapons to determine that they testified about the same event.[5505] In these circumstances, the Appeals Chamber finds that Nteziryayo fails to demonstrate that the Trial Chamber erred in concluding that Witnesses FAL and QAL were testifying about Ndayambaje's Swearing-In Ceremony.[5506]

2377. In addition, and contrary to Nteziryayo's assertion, Witness FAL was not alone in testifying that Nteziryayo criticised the outgoing *bourgmestre* as Witness TO also testified to this effect.[5507] The Trial Chamber also acknowledged that their evidence differed from that of other Prosecution witnesses.[5508] Nteziryayo does not show that a reasonable trier of fact could not have found that, notwithstanding this variance, Witness FAL was testifying about Ndayambaje's Swearing-In Ceremony. Likewise, Nteziryayo's reference to Witness FAL's testimony that Sebukeye told the witness to implement the orders given during the ceremony fails to demonstrate that Witness FAL's evidence is incompatible with other evidence about the swearing-in ceremony.[5509]

2378. When summarising the evidence of Witnesses QAL and FAG, the Trial Chamber also noted that these witnesses did not see Ndayambaje get sworn in.[5510] However, it further observed that Witness FAG nonetheless recounted that Ndayambaje "was the person being sworn in as

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[5503] *Compare* Witness FAL, T. 9 February 2004 p. 76 (closed session) ("Q. Can you tell us, Witness FAL, where you were seated at the time of the meeting? How far were you from the speakers? A. I was seated approximately three metres from the speakers.") *with* Witness QAL, T. 25 February 2004 p. 43 (closed session) ("Q. Witness QAL, this morning you testified that during the said meeting you were sitting on the lawn; is that correct? A. That is correct. Q. Were there many people in front of you? A. Yes, I was sitting more or less behind, there were many people in front of me.").

[5504] Specifically, in addition to Witness FAL, Witnesses FAG, QAF, TO, KEPIR, Siborurema, AND-11, and AND-73 gave evidence about Ndayambaje's Swearing-In Ceremony and testified that a megaphone, microphone, and/or public address system was used during the ceremony. *See* Trial Judgement, paras. 4327, 4359, 4379, 4498, 4512, 4538, 4555. In addition to Witness QAL, Witnesses TP and GABON testified to the contrary. *See* Trial Judgement, paras. 4338, 4425, 4490.

[5505] *See* Trial Judgement, paras. 4340, 4342-4347, 4421-4428, 4593, 4594, 4609, 4610.

[5506] The Appeals Chamber observes that, in addition to his arguments pertaining to Witnesses QAL and FAL, Nteziryayo argues that the testimonies of Witnesses TO and TP, on one hand, and the testimonies of Witnesses FAU and FAG, on the other hand, also differ as to the number of attendees and as to whether megaphones were used. *See* Nteziryayo Appeal Brief, para. 147. Nteziryayo did not develop this argument with reference to the record, failing to demonstrate incompatibility among this evidence which would prevent a reasonable trier of fact from concluding that all of these witnesses testified about Ndayambaje's Swearing-In Ceremony. The Appeals Chamber therefore dismisses this argument without further consideration.

[5507] *See* Trial Judgement, para. 4624. *See also ibid*., paras. 4342, 4377.

[5508] Trial Judgement, para. 4624.

[5509] *See* Witness FAL, T. 9 February 2004 pp. 63, 64. *See also* Trial Judgement, para. 4350.

[5510] *See* Trial Judgement, paras. 4330, 4421.

bourgmestre."[5511] It also determined that various elements of Witness QAL's testimony were corroborated by both Prosecution and Defence evidence, including the location and timing of the meeting, Ndayambaje's attire, and the attendance of Witness Stan, and concluded that Witness QAL testified about Ndayambaje's Swearing-In Ceremony.[5512] Nteziryayo does not demonstrate that the Trial Chamber erred in its analysis.

2379. The Appeals Chamber notes that Witness TP, in response to a suggestion by counsel for Nteziryayo that she earlier indicated that "the purpose of the meeting was for the installation", stated that "[i]t was for the installation of *Préfet* Alphonse".[5513] However, the description of the purported installation Witness TP provided accorded with her earlier testimony that Nteziryayo was being introduced at the meeting rather than installed as a new prefect and that Ndayambaje was being installed as the new *bourgmestre*.[5514] Nteziryayo fails to demonstrate that, on this basis, no reasonable trier of fact could have found that Witness TP testified about Ndayambaje's Swearing-In Ceremony.

2380. As regards Witness TO's evidence, the Trial Chamber recalled the witness's testimony that, prior to the ceremony, the population practiced shooting bows and arrows.[5515] The Trial Chamber also noted that Witness FAL recounted a bow-and-arrow shooting exercise near the venue of the meeting, albeit not on the same day,[5516] and the evidence of Defence witnesses that they did not see any archery practice or did not take part in it.[5517] Nteziryayo largely repeats on appeal arguments he made at trial,[5518] without showing why this aspect of Witness TO's evidence undermined his credibility or was so distinctive as to render his testimony incompatible with other evidence about the swearing-in ceremony. Although Nteziryayo points to Witness TO's evidence that Célestin Habiyamere was the master of ceremonies to suggest that he was referring to an event other than Ndayambaje's Swearing-In Ceremony, the Appeals Chamber observes that this aspect of Witness TO's evidence is almost entirely consistent with other Prosecution and Defence evidence confirming this individual's presence and role in the event.[5519]

[5511] *See* Trial Judgement, para. 4323 (internal reference omitted). *See also* Witness FAG, T. 1 March 2004 p. 33.
[5512] *See* Trial Judgement, paras. 4595, 4596.
[5513] *See* Witness TP, T. 12 February 2004 p. 40.
[5514] *See* Witness TP, T. 12 February 2004 p. 40 ("Q. Who had to install him, Élie Ndayambaje? Was it Élie Ndayambaje? A. I don't know. I'm describing to you what we saw when we arrived at the meeting venue. The Accused took the floor and he said he was going to introduce to us Alphonse, who was the new *préfet*. Perhaps the new *préfet* had been introduced at the level of the whole *préfecture* and now it was time for him to be introduced to us in our *secteur* or *commune*. "). *See also* Witness TP, T. 12 February 2004 p. 38 ("A. […] I, all the same, went to the meeting and I witnessed the swearing in of the *bourgmestre*, and the *préfet* was introduced to us").
[5515] *See* Trial Judgement, para. 4383.
[5516] *See* Trial Judgement, para. 4340.
[5517] *See* Trial Judgement, paras. 4554, 4582.
[5518] *See* Nteziryayo Closing Brief, paras. 491, 539, 540.
[5519] *See* Trial Judgement, paras. 4327, 4430, 4455, 4468, 4501, 4519, 4543, 4555.

2381. With respect to the inability of Witnesses TP and FAL to identify Nteziryayo in court, the Trial Chamber noted this aspect of their evidence.[5520] The Appeals Chamber observes, however, that Witness TP stated that she "went to the meeting and [she] witnessed the swearing in of the *bourgmestre*, and the *préfet* was introduced to us", and referred to "*Préfet* Alphonse"; thus indicating that Nteziryayo was the prefect.[5521] Moreover, the witness testified that Nteziryayo was the son of Ntagara, a fact that Nteziryayo confirmed.[5522] In this context, the Appeals Chamber does not consider that Witness TP's admission that "[s]o much time has passed since [she] last saw [Nteziryayo]" and that she did not "think [she] could recognise him"[5523] prevented the Trial Chamber from concluding that she attended Ndayambaje's Swearing-In Ceremony. The Appeals Chamber also notes that Witness FAL recalled that, during the swearing-in ceremony, "Alphonse Nteziryayo [the prefect] said he had come to install Elie Ndayambaje".[5524] The Appeals Chamber therefore considers that the fact that the witness was not able to identify Nteziryayo in court, whom he did not personally know or often see, unlike Ndayambaje,[5525] does not show that the witness's evidence lacked credibility or that no reasonable trier of fact could have found that he testified about Ndayambaje's Swearing-In Ceremony.

2382. Finally, the Appeals Chamber finds no merit in Nteziryayo's broad and speculative contention that evidence that several other meetings were held in Muganza Commune "and its surroundings" prevented the Trial Chamber from concluding that the Prosecution witnesses were testifying about Ndayambaje's Swearing-In Ceremony.[5526]

2383. Based on the foregoing, the Appeals Chamber dismisses Nteziryayo's contention that no reasonable trier of fact could have found that all the Prosecution witnesses testified about Ndayambaje's Swearing-In Ceremony.

2. Assessment of Defence Evidence

2384. When considering evidence in relation to Ndayambaje's Swearing-In Ceremony, the Trial Chamber contrasted the evidence of the Prosecution witnesses with that of Defence witnesses as it concerned the speeches of Nteziryayo and Ndayambaje and whether resulting violence

[5520] Trial Judgement, paras. 4352, 4395.
[5521] *See* Witness TP, T. 12 February 2004 pp. 38, 40.
[5522] Witness TP, T. 11 February 2004 p. 26; Nteziryayo, T. 14 May 2007 p. 10.
[5523] *See* Witness TP, T. 11 February 2004 p. 35.
[5524] *See* Witness FAL, T. 9 February 2004 p. 38.
[5525] *See* Witness FAL, T. 9 February 2004 pp. 39-41.
[5526] The Appeals Chamber observes that Nteziryayo also contends that the killing of Tutsis in Butare was widespread and that "evidence that Tutsi girls were killed after the meeting" does not distinguish Ndayambaje's Swearing-In Ceremony from any other meeting. *See* Nteziryayo Appeal Brief, para. 104(c). As Nteziryayo fails to develop this

occurred.[5527] In particular, it noted Nteziryayo's potential motive to reduce his "personal responsibility for the alleged incitement in question."[5528] It also recalled that Defence Witnesses AND-11 and AND-73 knew Nteziryayo from having previously served in the army together and that Witness AND-11 "knew Nteziryayo well" from his work in Kibayi Commune from 1991 and that he referred to Nteziryayo as a friend.[5529] Acknowledging "the largely consistent nature" of the Defence evidence, the Trial Chamber considered that the credibility of the Defence witnesses was undermined by their "potential motivations and personal ties of each of the Defence witnesses with Ndayambaje and Nteziryayo."[5530] The Trial Chamber concluded that Defence evidence on the whole was not sufficiently credible to raise a reasonable doubt about the nature of the utterances made by Nteziryayo and Ndayambaje at the swearing-in ceremony.[5531]

2385. Nteziryayo contends that the Trial Chamber's finding that the Defence evidence in relation to the ceremony was "largely consistent" calls into question its later conclusion that it was "on the whole not sufficiently credible" to raise reasonable doubt.[5532] He contends that the Trial Chamber erred in concluding that the credibility of three of the witnesses he called was diminished by personal ties, that it did not provide a reasoned opinion in this regard, and that this alone was insufficient to wholly dismiss their evidence.[5533] Nteziryayo adds that the Trial Chamber acted unfairly when determining that personal and professional ties had a greater impact on the credibility of Defence evidence than the "significant" issues that undermine the credibility of the Prosecution evidence.[5534]

2386. The Prosecution responds that the Trial Chamber correctly found that the credibility of Defence witnesses was undermined by their personal ties to Nteziryayo, whose evidence also lacked reliability and credibility.[5535]

2387. Since the existence of ties between an accused and a witness is a factor which may be considered in assessing witnesses' credibility,[5536] the Appeals Chamber finds no error in the Trial Chamber's consideration of these circumstances and does not find that the Trial Chamber failed to

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argument with any citation or demonstrate how the Trial Chamber erred in considering such evidence, the Appeals Chamber dismisses this contention without further consideration.

[5527] Trial Judgement, paras. 4633-4635.

[5528] Trial Judgement, para. 4636.

[5529] Trial Judgement, para. 4638.

[5530] *See* Trial Judgement, para. 4639.

[5531] Trial Judgement, para. 4641.

[5532] Nteziryayo Appeal Brief, para. 158 (emphasis omitted), *referring to* Trial Judgement, paras. 4639, 4641. *See also ibid*., paras. 166, 242; Nteziryayo Reply Brief, para. 69.

[5533] Nteziryayo Appeal Brief, para. 159. *See also ibid*., para. 160, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 142-148.

[5534] Nteziryayo Appeal Brief, para. 161. *See also ibid*., para. 241.

[5535] Prosecution Response Brief, paras. 1515-1518. *See also* AT. 17 April 2015 p. 31.

provide a reasoned opinion for its decision. In this regard, the Appeals Chamber notes that Nteziryayo has pointed to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with Defence witnesses and merely argues that it was unreasonable for the Trial Chamber to base its rejection of Defence evidence on this factor.

2388. The Appeals Chamber further recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[5537] The Appeals Chamber is not persuaded that no reasonable trier of fact could have both noted the consistent nature of Defence evidence as well as the weaknesses in the credibility of Defence witnesses and ultimately rejected such evidence in light of the virtually unanimous Prosecution evidence that inciting speeches were made during Ndayambaje's Swearing-In Ceremony.[5538] Moreover, apart from alleging that the Trial Chamber treated the Defence and Prosecution evidence differently, Nteziryayo does not demonstrate that the Trial Chamber abused its discretion or substantiate with references an improper differential treatment of Defence evidence.

2389. Consequently, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber acted unreasonably in discrediting Defence evidence.

3. Conclusion

2390. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate any error in relation to his conviction for direct and public incitement to commit genocide at Ndayambaje's Swearing-In Ceremony and, accordingly, dismisses Ground 4 of Nteziryayo's appeal.

[5536] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[5537] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81.
[5538] *See* Trial Judgement, paras. 4622-4632, 4636-4639.

C. Muyaga Commune Meeting (Ground 5)

2391. Based on the evidence of Prosecution Witnesses QBY and FAB, the Trial Chamber found that, around mid-June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting in Mamba Sector, Muyaga Commune, at which he incited the population to kill Tutsis by urging the audience to "hunt down, flush out and kill Tutsis without any distinction".[5539]

2392. In reaching its findings, the Trial Chamber observed that Prosecution and Defence evidence consistently reflected that Nteziryayo spoke at a meeting in Muyaga Commune but determined that the evidence from the Defence did not concern the event discussed by the Prosecution witnesses.[5540] Specifically, the Trial Chamber found that the meeting described by Witnesses QBY and FAB took place around mid-June 1994,[5541] more specifically "on or after 21 June 1994", since both witnesses were "adamant" that Nteziryayo attended the meeting in his capacity as prefect.[5542] The Trial Chamber noted that the Defence brought evidence regarding a meeting held on 23 May 1994 that contained similarities with the one described by the Prosecution witnesses but concluded that, while it was possible that this other meeting also occurred the Defence evidence had "no bearing upon [its] assessment of the evidence related to the June 1994 meeting testified to by Witnesses QBY and FAB."[5543]

2393. The Trial Chamber determined that Nteziryayo's speech at the Muyaga Commune meeting as described by Witnesses QBY and FAB constituted a direct appeal to kill Tutsis and convicted him of committing direct and public incitement to commit genocide on this basis.[5544]

2394. Nteziryayo submits that the Trial Chamber erred in finding that, in his capacity as prefect, he incited the commission of genocide during a meeting held in Muyaga Commune in mid-June 1994 and in convicting him of direct and public incitement to commit genocide on this basis.[5545] Nteziryayo argues that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than the meeting on 23 May 1994 described by the

[5539] Trial Judgement, paras. 3674, 5945, 6022.
[5540] Trial Judgement, paras. 3672, 3673.
[5541] Trial Judgement, paras. 3674, 5945.
[5542] Trial Judgement, para. 3672.
[5543] Trial Judgement, para. 3673.
[5544] Trial Judgement, paras. 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at the Muyaga Commune meeting substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to this allegation. *See ibid.*, para. 5946.
[5545] Nteziryayo Notice of Appeal, paras. 41-46, 59-63, 65; Nteziryayo Appeal Brief, paras. 167-212, 240, 241, 243-245, 247, 248.

Defence witnesses and, consequently, in concluding that the Defence evidence was irrelevant to the assessment of the Prosecution case.[5546]

2395. The Appeals Chamber will assess these overarching challenges when addressing Nteziryayo's specific contentions that the Trial Chamber erred in: (i) failing to treat the Prosecution evidence with sufficient caution; (ii) evaluating the Prosecution evidence as to the timing of the meeting; (iii) assessing the Prosecution identification evidence; (iv) insufficiently considering similarities between Prosecution and Defence evidence concerning the meeting; and (v) ignoring Nteziryayo's evidence that precluded his presence at a meeting in Muyaga Commune after his appointment as Butare Prefect on 17 June 1994.[5547]

1. Insufficient Caution

2396. Nteziryayo submits that the Trial Chamber erred in its assessment of the credibility of Witnesses QBY and FAB.[5548] Specifically, he contends that, although Witness FAB was released at the time of his testimony, the Trial Chamber failed to consider that he was an accomplice witness and that his evidence should be treated with requisite caution.[5549] Nteziryayo stresses that Witness FAB pleaded guilty to genocide, attended *Gacaca* sessions while imprisoned, and admitted that his evidence was altered as a result of his participation in these sessions.[5550] With respect to Witness QBY, Nteziryayo contends that, while the Trial Chamber acknowledged the need to treat the witness's evidence with caution,[5551] it failed to consider adequately that he was an incarcerated accomplice witness who had attended five *Gacaca* sessions.[5552]

2397. The Prosecution responds that Nteziryayo does not establish that Witness FAB possessed any motive to implicate him given that the witness had been released at the time of his

[5546] Nteziryayo Notice of Appeal, para. 43(a); Nteziryayo Appeal Brief, paras. 167(iii), 169-178, 183, 184.
[5547] Nteziryayo also challenged the Trial Chamber's assessment of the credibility of Witnesses QBY and FAB in paragraphs 249 and 251 of his appeal brief. However, the Appeals Chamber recalls that it struck these paragraphs from the brief, finding that they exceeded the scope of his appeal. *See* 12 July 2013 Appeal Decision, paras. 24, 25. Consequently, these challenges will not be addressed.
[5548] Nteziryayo Appeal Brief, paras. 167(vi), (vii), 201-211. The Appeals Chamber notes that, while Nteziryayo also alleged in his notice of appeal that the Trial Chamber erred in finding that the discrepancies between the testimonies of Witnesses QBY and FAB were minor and had no impact on their credibility, he did not develop and substantiate this allegation in his appeal brief. The Appeals Chamber considers that Nteziryayo has abandoned this allegation. *See* Nteziryayo Notice of Appeal, paras. 42, 43(b). *See also ibid.*, para. 62.
[5549] Nteziryayo Notice of Appeal, para. 63; Nteziryayo Appeal Brief, paras. 167(vi), 201, 205-207, 247, 248. Nteziryayo emphasises that the fact that Witness FAB was released at the time of his testimony is immaterial as he had already given two statements to the Prosecution while imprisoned and had an interest in ensuring that his testimony was consistent with them in order to avoid being accused of "perverting the course of justice". *See* Nteziryayo Appeal Brief, paras. 201, 206.
[5550] Nteziryayo Appeal Brief, paras. 201, 205(a)-(f).
[5551] Nteziryayo Appeal Brief, para. 209. Nteziryayo argues that the Prosecution did not seek to rely on Witness QBY's evidence. *See ibid.*, para. 208.

testimony.[5553] It further argues that the Trial Chamber acknowledged that Witness QBY's evidence should be treated with caution and sufficiently considered the context in which his evidence was provided.[5554]

2398. The Appeals Chamber observes that Witness FAB was arrested on his return to Rwanda in 1996, confessed that he killed a child, and was sentenced to 15 years in prison for his crime.[5555] However, he was released early in 2003 and was not in detention at the time of his testimony before the Tribunal in April 2004.[5556] Under the circumstances, Nteziryayo does not demonstrate that the Trial Chamber was required to treat the witness's evidence with caution,[5557] as he points to no circumstances indicating that the witness may have had motives or incentives to implicate him when testifying.[5558] Furthermore, none of the evidence Nteziryayo cites concerning the impact of *Gacaca* sessions on Witness FAB's evidence reflects that the witness was encouraged to implicate falsely Nteziryayo before the Tribunal.[5559]

2399. Turning to Witness QBY, the Trial Chamber found that he was incarcerated at the time of his testimony and that he may have had a motive to implicate Nteziryayo or enhance his role in the crimes.[5560] Consequently, the Trial Chamber decided to assess Witness QBY's testimony with "appropriate caution".[5561] The Trial Chamber considered Witness QBY's evidence in light of Witness FAB's,[5562] determining that both "witnesses corroborated each other as to Nteziryayo's actions and words during the course of the meeting, and to the fact that killings of Tutsis occurred after the meeting."[5563] Nteziryayo simply argues that the Trial Chamber treated Witness QBY's evidence with insufficient caution without demonstrating that this was the case. Moreover, the

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[5552] Nteziryayo Notice of Appeal, para. 63; Nteziryayo Appeal Brief, paras. 167(vii), 210. Nteziryayo also refers to his arguments related to the credibility of Witness QBY developed under Ground 8 of his appeal. *See* Nteziryayo Appeal Brief, para. 211.
[5553] Prosecution Response Brief, paras. 1537, 1538. The Prosecution rejects Nteziryayo's claim that the witness had an incentive to perjure himself in order to ensure that his testimony was consistent with the prior statements he gave while incarcerated. *See ibid*., para. 1538.
[5554] Prosecution Response Brief, para. 1539.
[5555] Witness FAB, T. 5 April 2004 pp. 34, 35, and 50, 51, 55 (closed session). Witness FAB testified that he killed a child on 27 or 28 April 1994 and that this crime occurred well before the meeting held in Muyaga Commune. He also denied participating personally in any killings after the meeting. *See ibid*., pp. 42 and 50-52 (closed session).
[5556] Witness FAB, T. 5 April 2004 pp. 35, 37, and 55 (closed session).
[5557] The Appeals Chamber does not consider that Witness FAB's criminal conduct, which was unrelated to and occurred prior to the Muyaga Commune meeting, would make him an accomplice of Nteziryayo as defined in the jurisprudence of the Tribunal. *See Niyitegeka* Appeal Judgement, para. 98 ("The ordinary meaning of the term 'accomplice' is 'an associate in guilt, a partner in crime.'"). *See also Karemera and Ngirumpatse* Appeal Judgement, para. 42; *Munyakazi* Appeal Judgement, para. 93; *Ntagerura et al.* Appeal Judgement, para. 203.
[5558] The Appeals Chamber finds no merit in Nteziryayo's contention that Witness FAB had an incentive to lie while testifying under oath in order to remain consistent with the prior statements he gave while imprisoned and to avoid being accused of "perverting the course of justice".
[5559] *See* Witness FAB, T. 5 April 2004 pp. 36, 37, 42, 43.
[5560] Trial Judgement, para. 3670.
[5561] Trial Judgement, para. 3670.
[5562] Trial Judgement, paras. 3671, 3672.
[5563] Trial Judgement, para. 3674.

Appeals Chamber considers that Witness QBY's evidence concerning his participation in *Gacaca* sessions in no way demonstrates that he was encouraged to implicate falsely Nteziryayo.[5564]

2400. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to apply appropriate caution when assessing the evidence of Witnesses FAB and QBY.

2. Timing of the Meeting

2401. When assessing the Prosecution evidence as to the timing of the meeting, the Trial Chamber stated as follows:

> Witness QBY placed the meeting around either 5 May 1994 or 5 June 1994 whereas Witness FAB referred to mid-June 1994. The Chamber considers that these are both estimates which do not automatically cast doubt on the witnesses' credibility, given the length of time that had elapsed since the event. The Chamber notes that Witnesses QBY and FAB are adamant that on the day of the meeting, Nteziryayo already held his position as *préfet* of Butare. Witness FAB even testified that the purpose of the meeting was to introduce Nteziryayo as the new *préfet*. Flowing from that, it appears that the meeting may have occurred on or after 21 June 1994, as Nteziryayo was appointed *préfet* of Butare on or around 17 June 1994, and his swearing-in ceremony took place on 21 June 1994.[5565]

2402. Nteziryayo argues that the Trial Chamber erred in finding that the Muyaga Commune meeting occurred on or after 21 June 1994 as this finding is in contradiction with the evidence provided by Witnesses QBY and FAB.[5566] Nteziryayo stresses that Witness QBY repeatedly testified that the meeting he attended during which Nteziryayo spoke in his capacity as prefect occurred sometime between 5 May and 5 June 1994.[5567] He submits that it was therefore unreasonable for the Trial Chamber to rely on Witness QBY and to find that the witness was "adamant" that Nteziryayo was prefect of Butare at the time.[5568] Nteziryayo points out that the witness was so certain as to the timing of the meeting that he rejected an official document indicating that Nteziryayo was not appointed prefect until 17 June 1994.[5569]

[5564] *See* Witness QBY, T. 19 April 2004 pp. 72, 73, 75-77.
[5565] Trial Judgement, para. 3672 (internal references omitted).
[5566] Nteziryayo Appeal Brief, para. 175. *See also* AT. 17 April 2015 p. 16.
[5567] Nteziryayo Appeal Brief, paras. 167(ii), 172, 182, 212(b), (c). *See also* Nteziryayo Reply Brief, paras. 73(b), 74. Nteziryayo adds that Witness QBY's evidence that the meeting occurred between 5 May and 5 June 1994 corresponds to his prior statement. *See* Nteziryayo Appeal Brief, paras. 175, 182; Nteziryayo Reply Brief, para. 73(b).
[5568] Nteziryayo Appeal Brief, paras. 180-182 (emphasis omitted). *See also* Nteziryayo Reply Brief, para. 75.
[5569] Nteziryayo Appeal Brief, para. 181, *referring to* Witness QBY, T. 20 April 2004 p. 20. *See also* Nteziryayo Reply Brief, para. 75.

2403. The Appeals Chamber further understands that Nteziryayo submits that the Trial Chamber erred in relying on Witness FAB's testimony that the meeting occurred in mid-June 1994 as this contradicts the witness's prior statement that it occurred around the beginning of that month.[5570]

2404. The Prosecution responds that the Trial Chamber reasonably assessed the evidence of Witnesses QBY and FAB and correctly concluded that Nteziryayo attended a meeting in Muyaga Commune in mid-June 1994.[5571]

2405. The Appeals Chamber notes that the Trial Chamber found that the meeting described by Witnesses QBY and FAB took place around mid-June 1994,[5572] more specifically "on or after 21 June 1994" since both witnesses were "adamant" that Nteziryayo attended the meeting in his capacity as Butare Prefect.[5573] The Appeals Chamber recalls that it is open for a trial chamber to make factual findings on the date of the events by examining the evidence as a whole and that, indeed, this may be particularly necessary when determining dates, as often witnesses may not recall an exact date but describe the timing of the event in relation to other variables.[5574] The Appeals Chamber finds that Nteziryayo places undue importance on the fact that Witness QBY repeatedly referred to the meeting occurring around 5 May or 5 June 1994, as this position ignores the clear indication throughout the witness's testimony that he could not recall the date of the meeting.[5575] On the other hand, the witness was unequivocal that Nteziryayo was introduced at the meeting as the prefect of Butare.[5576] Moreover, there is no merit in Nteziryayo's position that Witness QBY refused to recognise the accuracy of an exhibit which suggested that Nteziryayo was appointed prefect after the date of the meeting that the witness provided, as the witness merely stated that he did not recognise this document and that he could "only say that it was Alphonse Nteziryayo".[5577]

2406. With respect to Witness FAB, the Trial Chamber acknowledged that the witness testified that the meeting occurred "sometime in mid-June 1994, and not between 3 or 5 June 1994 as indicated in his previous statement".[5578] It noted the witness's explanation that he may have been mistaken about the date when he gave his prior statement but realised the mistake during *Gacaca*

[5570] Nteziryayo Appeal Brief, para. 172. *See also ibid*., paras. 201, 205(b), (c); Nteziryayo Reply Brief, para. 73(a); AT. 17 April 2015 p. 16.
[5571] Prosecution Response Brief, paras. 1521-1524, 1533, 1537. *See also* AT. 17 April 2015 pp. 31, 32.
[5572] Trial Judgement, paras. 3674, 5945.
[5573] Trial Judgement, para. 3672. *See also supra*, para. 2290.
[5574] *Ndindabahizi* Appeal Judgement, para. 29.
[5575] Witness QBY, T. 20 April 2004 pp. 8, 11, and 33, 37 (closed session).
[5576] *See* Trial Judgement, para. 3672. *See also* Witness QBY, T. 19 April 2004 p. 54.
[5577] Witness QBY, T. 20 April 1994 p. 23.
[5578] Trial Judgement, para. 3568.

sessions.[5579] Moreover, when questioned about the influence of the *Gacaca* sessions on his memory, the witness replied that, while they made him realise he had made a mistake about "dates", these sessions "had not been held to remind" the participants of the events, nor did they "detract" from his evidence, as he was "speaking from what [he knew] personally."[5580] The Appeals Chamber finds that a reasonable trier of fact could have relied upon Witness FAB's evidence as to the timing of the event, notwithstanding any inconsistency with his prior statement, particularly in light of his explanation and his evidence that Nteziryayo had been installed as the prefect and was being introduced as such at the meeting.[5581]

2407. In light of Witness QBY's uncertainty about the date of the meeting, Witness FAB's credible testimony that the meeting occurred around mid-June 1994, and both witnesses' evidence that Nteziryayo was introduced as the prefect of Butare at the meeting, the Appeals Chamber is not persuaded that Nteziryayo has demonstrated that no reasonable trier of fact could have concluded that the meeting took place after Nteziryayo's appointment as prefect "around mid-June 1994" and more specifically "on or after 21 June 1994".[5582]

3. Identification Evidence

2408. Nteziryayo submits that Witnesses QBY's and FAB's identification evidence was unreliable, noting that neither could identify him in court and that both testified that the meeting was the first time that they had observed him.[5583] He further emphasises that Witness FAB gave no physical description of him[5584] and that Witness QBY's description did not match his but Nsabimana's physical characteristics.[5585] He contends that these circumstances render the identifications unsound and that the Trial Chamber failed to apply sufficient caution when considering them.[5586]

[5579] Trial Judgement, para. 3568.
[5580] Witness FAB, T. 5 April 2004 p. 43. The Appeals Chamber also notes that Witness FAB clarified that, although he was not sure about the exact date of the meeting, it was in the month of June 1994 since he fled between the end of June and beginning of July and that he left Rwanda ten days after the meeting in Muyaga Commune. *See ibid*., pp. 30, 33, 34, 42, 43 and 52 (closed session).
[5581] *See* Trial Judgement, para. 3672. *See also* Witness FAB, T. 5 April 2004 pp. 23-25.
[5582] Trial Judgement, paras. 3672, 3674.
[5583] Nteziryayo Appeal Brief, paras. 181, 188, 194, 212(d). *See also* Nteziryayo Reply Brief, paras. 79, 81, 82; AT. 17 April 2015 p. 18.
[5584] Nteziryayo Appeal Brief, para. 194, *referring to* Witness FAB, T. 5 April 2004 p. 24; AT. 17 April 2015 p. 17.
[5585] Nteziryayo Appeal Brief, paras. 189-191, 193, 212(d), *referring to* Witness QBY, T. 19 April 2004 p. 55, T. 20 April 2004 p. 23, Witness AND-60, T. 13 March 2007 p. 7, Nteziryayo, T. 5 June 2007 p. 59, Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists). Nteziryayo further submits that the Trial Chamber failed to consider Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists). *See ibid*., para. 191. *See also* Nteziryayo Reply Brief, para. 80; AT. 17 April 2015 p. 17.
[5586] Nteziryayo Appeal Brief, paras. 192-194, 212(f)(ii).

2409. The Prosecution responds that, since Nteziryayo was found to be one of the speakers at the meeting based on self-identification as the newly appointed prefect, Nteziryayo's submissions on his physical description and absence of in-court identifications are irrelevant.[5587]

2410. The Appeals Chamber finds no merit in Nteziryayo's arguments that it is significant that neither witness identified him in court, that neither knew him before the events, and that Witness FAB did not provide a physical description of him. All of Nteziryayo's arguments fail to acknowledge that the witnesses testified that they were able to identify him because he was introduced by name at the Muyaga Commune meeting and was identified as the prefect.[5588] In this context, the Appeals Chamber finds that a reasonable trier of fact could have relied on Witnesses QBY's and FAB's identification evidence despite the absence of their in-court identifications,[5589] their lack of prior knowledge of Nteziryayo,[5590] and the absence of a physical description from Witness FAB.

2411. Likewise, Nteziryayo's contention that Witness QBY's description of him as "black" and having "sideburns" suggests that the witness was describing Nsabimana is unpersuasive.[5591] Having carefully reviewed the relevant evidence, the Appeals Chamber finds no merit in Nteziryayo's argument that Witness AND-60's description of Nsabimana, even considered with Nteziryayo's evidence that he did not have facial hair at the time,[5592] prevented the Trial Chamber from accepting Witness QBY's identification evidence of Nteziryayo.[5593]

2412. In light of the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in finding that the person Witnesses QBY and FAB identified as the prefect of Butare at the time of the meeting in Muyaga Commune was Nteziryayo.

[5587] Prosecution Response Brief, para. 1529; AT. 17 April 2015 pp. 32, 33.
[5588] *See*, *e.g.*, Witness FAB, T. 5 April 2004 pp. 23, 24; Witness QBY, T. 19 April 2004 p. 54.
[5589] *See* Trial Judgement, paras. 3564, 3569. The Trial Chamber noted that Witness QBY was not asked to identify Nteziryayo in court and that Witness FAB explained that he would not be able to do so as he only saw him once in 1994. *See idem*.
[5590] The Appeals Chamber recalls that a witness's prior knowledge of, or level of familiarity with, an accused is a relevant factor in the assessment of identification evidence. However, contrary to what Nteziryayo suggests, the fact that a witness did not personally know an accused prior to the events does not necessarily undermine the reliability of his identification evidence. *See Lukić and Lukić* Appeal Judgement, para. 118; *Renzaho* Appeal Judgement, para. 530. *Cf. also Kayishema and Ruzindana* Appeal Judgement, paras. 327, 328.
[5591] *See* Trial Judgement, para. 3559; Witness QBY, T. 19 April 2004 p. 55, T. 20 April 2004 p. 16.
[5592] Nteziryayo, T. 5 June 2007 p. 59.
[5593] The Trial Chamber recalled that Witness QBY testified that Nteziryayo was a tall, black man with sideburns and no spectacles. *See* Trial Judgement, para. 3559. While Witness AND-60's evidence reflects that, at the relevant time, Nsabimana had sideburns and a complexion "between dark and light", he also described Nsabimana as wearing spectacles and being short in stature. *See* Witness AND-60, T. 13 March 2007 p. 7. Witness AND-60 also confirmed Witness QBY's evidence that Nteziryayo was "tall". *See idem*. Of additional significance, Witness QBY further testified that Nteziryayo said he was a soldier, a position that was not held by Nsabimana. *See* Witness QBY, T. 20 April 2004 pp. 3, 4. Moreover, Nteziryayo did not demonstrate that the Trial Chamber erred by not considering Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists).

4. Similarities Between Prosecution and Defence Evidence

2413. When assessing the Defence evidence in its deliberations, the Trial Chamber stated that:

> The Defence brought evidence regarding a meeting on 23 May 1994 in Mamba *secteur*, Muyaga *commune*, which contained similarities to the meeting testified to by Witnesses QBY and FAB. The Chamber does not exclude the possibility that this other meeting, as asserted by the Defence, actually occurred, however this evidence has no bearing upon the Chamber's assessment of the evidence related to the June 1994 meeting testified to by Witnesses QBY and FAB.[5594]

2414. Nteziryayo submits that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than the 23 May 1994 meeting described by the Defence witnesses[5595] and, consequently, in concluding that the Defence evidence was irrelevant to the assessment of the Prosecution case.[5596] Nteziryayo argues that the Trial Chamber failed to consider sufficiently the following "striking similarities" which suggest that they all were testifying about the same event: (i) Witnesses QBY, FAB, and AND-60 testified that the meeting was held in Muyaga Commune and that the latter two specified that it occurred in the midst of eucalyptus bushes; (ii) Witnesses QBY, FAB, and AND-60 recalled that it occurred in the morning and that a microphone or megaphone was used; (iii) Witnesses FAB, AND-60, and Nteziryayo specified that the meeting concerned security matters; (iv) Witnesses FAB and AND-60 described the *bourgmestre* as introducing the new prefect; and (v) Witness QBY, FAB, and AND-60 testified to hearing gunshots, which caused panic among the audience.[5597] Nteziryayo contends that, had the Trial Chamber properly assessed these similarities, it would have found that the Defence evidence raised doubt in the Prosecution case that he incited killings during a meeting held in Muyaga Commune around mid-June 1994.[5598]

2415. The Prosecution responds that the Trial Chamber considered similarities between the Prosecution and Defence evidence but, because it found that the Muyaga Commune meeting occurred in mid-June 1994, it correctly held that the Defence evidence regarding a meeting in Muyaga Commune on 23 May 1994 had no bearing upon the assessment of the Prosecution case and was not required to assess the credibility of the Defence evidence.[5599] The Prosecution further

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[5594] Trial Judgement, para. 3673 (internal reference omitted).
[5595] Nteziryayo Appeal Brief, paras. 167(iii), 169, 171, 173, 174, 183, 184. *See also* Nteziryayo Reply Brief, paras. 77, 78; AT. 17 April 2015 pp. 16, 17.
[5596] Nteziryayo Appeal Brief, paras. 178, 183, 212(f)(ii). Nteziryayo contends that his defence was based on the premise that he attended only one meeting in Muyaga Commune and that this meeting took place on 23 May 1994 and that the Trial Chamber erred by not addressing the clear conflict between his evidence and the Prosecution case. *See ibid.*, paras. 169, 173, 176, 178, 212(e).
[5597] Nteziryayo Appeal Brief, paras. 167(iii), 172, 183-185.
[5598] *See* Nteziryayo Appeal Brief, paras. 167(iv), 172, 175-178, 195.
[5599] Prosecution Response Brief, paras. 1525, 1530.

submits that Nteziryayo overstates the alleged similarities and minimises the differences between the two meetings.[5600]

2416. The Appeals Chamber notes that the Trial Chamber's statement of the parallels between the Prosecution and the Defence evidence is limited to an observation that the latter brought evidence "which contained similarities to the meeting testified to by Witnesses QBY and FAB" as well as a reference to discrete aspects of Witness AND-60's evidence.[5601] The Trial Chamber provided no explanation as to why the similarities did not reasonably suggest that the Prosecution and the Defence evidence concerned the same meeting, although its summary of the evidence reflects that it did not disregard them.[5602] The Appeals Chamber finds that the Trial Chamber's analysis falls below the requirement to provide a reasoned opinion pursuant to Article 22(2) of the Statute and Rule 88(C) of the Rules given the number of similarities in the evidence as well as the Defence's clear position at the close of trial that all the witnesses were talking about the same meeting and that its evidence rebutted allegations that Nteziryayo made inciting statements during it.[5603]

2417. However, the Appeals Chamber finds that this error of law does not invalidate the Trial Chamber's conclusion that Prosecution and Defence witnesses were talking about two different meetings. Having reviewed the evidence cited by the Trial Chamber and the parties, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Witnesses QBY and FAB were referring to an event other than the 23 May 1994 meeting described by Witness AND-60 and Nteziryayo. The Appeals Chamber finds the parallels that the event started in the morning[5604] and that it occurred near the Mamba sector office[5605] to be insignificant in light of Witness AND-60's evidence that public meetings regularly occurred there.[5606] Likewise, overlapping evidence that voice amplification systems were used[5607] and that gunshots were fired[5608] does not necessarily establish as unreasonable, in the context of the totality of the evidence, that Witnesses QBY and FAB, on one hand, and Witness AND-60 and Nteziryayo, on the other hand, were referring to

[5600] Prosecution Response Brief, paras. 1526-1528, *referring to* Trial Judgement, paras. 3628, 3635, 3642, 3647, 3680.
[5601] *See* Trial Judgement, para. 3673, *referring to* Witness AND-60, T. 13 March 2007 pp. 4, 8, 9.
[5602] The similarities are the following: (i) the meeting occurred in Muyaga Commune in the morning next to the Mamba sector office (*see* Trial Judgement, paras. 3557, 3565, 3570, 3578); (ii) a loudspeaker or a microphone was used (*see ibid*., paras. 3557, 3565, 3572); (iii) firing of gunshots occurred during the meeting (*see ibid*., paras. 3558, 3574); and (iv) the new prefect was introduced at the meeting (*see ibid*., paras. 3559, 3565, 3566, 3572).
[5603] *See* Nteziryayo Closing Brief, paras. 215-221; Nteziryayo Closing Arguments, T. 27 April 2009 pp. 71-73.
[5604] *See* Witness FAB, T. 5 April 2004 p. 23; Witness QBY, T. 19 April 2004 p. 52; Witness AND-60, T. 13 March 2007 pp. 4, 10; Nteziryayo, T. 5 June 2007 p. 25.
[5605] *See* Witness FAB, T. 5 April 2004 p. 22; Witness QBY, T. 19 April 2004 p. 52; Witness AND-60, T. 13 March 2007 pp. 3, 4, 14; Nteziryayo, T. 5 June 2007 p. 25.
[5606] *See* Witness AND-60, T. 13 March 2007 p. 14.
[5607] *See* Witness FAB, T. 5 April 2004 pp. 26, 27; Witness QBY, T. 20 April 2004 p. 14; Witness AND-60, T. 13 March 2007 p. 8.
[5608] *See* Witness FAB, T. 5 April 2004 p. 27; Witness QBY, T. 19 April 2004 p. 53; Witness AND-60, T. 13 March 2007 pp. 54, 55. In particular, the Appeals Chamber observes that other Prosecution and Defence

different events.[5609] Contrary to Nteziryayo's assertion, the Prosecution and Defence evidence does not consistently indicate that the *bourgmestre* introduced Nteziryayo,[5610] or that the meeting concerned security matters.[5611]

2418. The Appeals Chamber emphasises that Witnesses QBY and FAB were categorical that Nteziryayo was introduced as the new prefect during this meeting[5612] and recalls that it has affirmed the Trial Chamber's reliance on their ability to identify him on this basis.[5613] This evidence contrasts with Witness AND-60's testimony that Nsabimana was introduced as the new prefect[5614] and Nteziryayo's testimony that he was not prefect at the time of the only meeting he attended in Muyaga.[5615] Based on the record before it, the Appeals Chamber concludes that, notwithstanding the Trial Chamber's failure to provide a reasoned opinion, a reasonable trier of fact could have determined that the Defence evidence did not relate to the Prosecution case and concluded that Witnesses QBY and FAB testified about a later meeting that occurred "around mid-June 1994" or, more specifically, "on or after 21 June 1994".[5616]

2419. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to provide a reasoned opinion but concludes that this error does not invalidate the Trial Chamber's conclusion that the Defence evidence regarding a meeting on 23 May 1994 had no bearing upon its assessment of the evidence related to the June 1994 meeting given by Witnesses FAB and QBY.

5. Nteziryayo's Presence Elsewhere From 17 June 1994 Onwards

2420. Nteziryayo submits that the Trial Chamber failed to consider his testimony about his movements from 17 June 1994 onwards which, he argues, conflicts with the Trial Chamber's finding that he participated in a meeting in Muyaga Commune on or after 21 June 1994.[5617] In this respect, Nteziryayo emphasises that he gave evidence that "from at least 22 June he was fully

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witnesses testified to gunshots fired at other meetings where Colonel Tharcisse Muvunyi ("Muvunyi") was present. *See* Trial Judgement, paras. 3534, 3545, 3588, 3635, 3647, 3655.

[5609] *See* Witness FAB, T. 5 April 2004 p. 22; Witness QBY, T. 19 April 2004 pp. 52-54.

[5610] *Compare* Witness FAB, T. 5 April 2004 pp. 24, 25 (while the *bourgmestre* said the new prefect would be introduced, Nteziryayo introduced himself) *and* Witness QBY, T. 19 April 2004 pp. 53, 54 (Muvunyi introduced the new prefect) *with* Witness AND-60, T. 13 March 2007 p. 10 (the *bourgmestre* introduced the officials).

[5611] The Appeals Chamber does not consider that it amounts to a similarity between the testimonies of Witnesses FAB and AND-60 since Witness FAB only stated that Nteziryayo "mentioned security measures" because they were about to win the war and did not say that the purpose of the meeting was to address them. *See* Witness FAB, T. 5 April 2004 pp. 28, 48, 49 *and compare with* Witness AND-60, T. 13 March 2007 p. 10. The Appeals Chamber also notes that Witness QBY denied that Nteziryayo talked about security. *See* Witness QBY, T. 20 April 2004 p. 23.

[5612] Witness QBY, T. 19 April 2004 p. 54; Witness FAB, T. 5 April 2004 pp. 23-25.

[5613] *See supra*, Section VII.C.3.

[5614] Witness AND-60, T. 13 March 2007 p. 10.

[5615] Nteziryayo, T. 5 June 2007 p. 26.

[5616] Trial Judgement, paras. 3672, 3674.

[5617] Nteziryayo Appeal Brief, paras. 167(v), 196-200, 212(e), 244. *See also ibid.*, paras. 218(vi), 232 (relating to the meeting held in Kibayi); Nteziryayo Reply Brief, para. 103.

occupied in the exercise of his function as *préfet*".[5618] He contends that, in addition to his busy schedule, his testimony demonstrates that he was dedicated to assisting Tutsis and Hutus alike, rendering it unlikely that he incited the population to kill Tutsis at a meeting in Muyaga Commune during this period.[5619] Nteziryayo adds that the only time he would have been able to attend a meeting in Muyaga Commune was from 28 June 1994 to 3 July 1994, but that the evidence demonstrates that there was intense fighting then and chaos as the RPF entered Butare, which undermines the position that a meeting as described by the Prosecution witnesses occurred then.[5620]

2421. The Prosecution, relying on the *Ndindabahizi* Appeal Judgement, responds that Nteziryayo improperly introduces a new alibi on appeal and contends that his arguments should be summarily dismissed.[5621] It submits that, even if the Appeals Chamber were to permit this alibi evidence, Nteziryayo fails to raise reasonable doubt that he was at the meeting held in Muyaga Commune around mid-June 1994.[5622]

2422. Nteziryayo replies that he is not barred from relying on alibi evidence that forms part of the trial record and that only through reading the Trial Judgement it became clear that he needed to emphasise the relevance of this evidence.[5623]

2423. The Appeals Chamber finds that the Prosecution's reliance on the *Ndindabahizi* Appeal Judgement is inapposite, since Nteziryayo is not presenting alibi evidence for the first time on

[5618] Nteziryayo Appeal Brief, para. 196. Specifically, Nteziryayo points to the following: (i) on 17 June 1994, he was appointed prefect; (ii) on 18 June 1994, his appointment was broadcasted and he assisted in the evacuation of approximately 400 orphans to the border of Burundi; (iii) on 19 June 1994, he met the Deputy Prefect of Political and Administrative Affairs and the Deputy Prefect of Social Affairs; (iv) on 20 June 1994, his appointment as prefect was officially announced; (v) on 21 June 1994, he participated in his inauguration as prefect between approximately 11.30 a.m. and 12.00 p.m., contacted officials in the prefecture and apprised himself of the security situation; (vi) on 22 June 1994, he attended the swearing-in ceremony of Fidèle Uwizeye in Ndora Commune at 11.00 a.m., followed by the swearing-in ceremony of Ndayambaje in Muganza Commune between 2.00 and 3.00 p.m. and met with the bishop of Butare in relation to Cardinal Etchégray's visit; (vii) on 23 June 1994, his day was entirely devoted to preparation for the visit of Cardinal Etchégray; (viii) on 24 June 1994, he spent the full day with Cardinal Etchégray; (ix) on 25 June 1994 he spent the morning escorting Cardinal Etchégray to Gikongoro and the afternoon with the bishop of Butare; (x) on 26 June 1994, he met first with the bishop of Butare and also with the director of the School of Veterinary Agriculture Kabutare to discuss the evacuation of 600 students displaced from Byumba; (xi) on 27 to 28 June 1994, alerted by the violence of the fighting, he ceased all other activities to implement the evacuation plan for displaced populations and populations of the city; and (xii) on 28 June 1994, he assisted the evacuation of the Kiruhura sisters to Zaire. *See idem*.
[5619] Nteziryayo Appeal Brief, para. 198.
[5620] Nteziryayo Appeal Brief, para. 199.
[5621] Prosecution Response Brief, paras. 1531, 1532, *referring to Ndindabahizi* Appeal Judgement, paras. 64, 67, 69. *See also ibid.*, para. 1533.
[5622] Prosecution Response Brief, para. 1534. The Prosecution underlines that: (i) Nteziryayo's testimony about his alibi lacks credibility; (ii) the Trial Chamber found that the meeting occurred around mid-June 1994 but Nteziryayo only raises an alibi for 18, 19, and 21 to 28 June 1994; and (iii) Nteziryayo's attempt to establish an alibi for the entire period of 17 to 28 June 1994 is unsupported by the record and fails to account for his whereabouts at all relevant times. *See idem*. *See also ibid.*, para. 1536; AT. 17 April 2015 p. 33.
[5623] Nteziryayo Reply Brief, paras. 83, 88.

appeal.[5624] Nteziryayo's testimony as to his whereabouts after he was appointed as prefect of Butare formed part of the record at trial.[5625]

2424. The Appeals Chamber notes that the Trial Chamber summarised Nteziryayo's testimony that he did not take part in meetings in Muyaga Commune other than the one on 23 May 1994 and that he did not go to that commune at any other time between April and July 1994.[5626] While the Trial Judgement does not reflect express consideration of all aspects of Nteziryayo's testimony about his whereabouts after 17 June 1994 as referred to on appeal, it does expressly refer to some of it.[5627] In this context, the Appeals Chamber is not persuaded that the Trial Chamber ignored all of this evidence. It is also not persuaded that this evidence, which does not provide a comprehensive accounting of Nteziryayo's whereabouts after 17 June 1994 and is based solely on Nteziryayo's uncorroborated testimony,[5628] demonstrates that no reasonable trier of fact could have determined that Nteziryayo participated in the meeting described by Witnesses QBY and FAB.[5629]

2425. Furthermore, Nteziryayo's contention that it is "unlikely" that he incited the killing of Tutsis at a meeting in Muyaga Commune after he was appointed as prefect of Butare in light of his "dedication to assisting Tutsis and Hutus alike" as Butare Prefect is unpersuasive.[5630] The Appeals Chamber is not convinced that this testimony renders the Trial Chamber's reliance on Witnesses QBY and FAB unreasonable in light of their direct and corroborative evidence concerning the nature of his speech at the meeting they described.

2426. Based on the above, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to consider his testimony about his whereabouts from 17 June 1994 onwards.

[5624] *See Ndindabahizi* Appeal Judgement, para. 66.
[5625] *See* Nteziryayo, T. 7 June 2007 pp. 30-32, 46-48, 50-55, T. 11 June 2007 pp. 7, 11, 12, 15, 16, 59-62, T. 12 June 2007 pp. 15-17, 26, 27.
[5626] *See* Trial Judgement, para. 3581, *referring to* Nteziryayo, T. 5 June 2007 p. 33.
[5627] *See*, *e.g.*, Trial Judgement, paras. 4564, 4566 (22 June 1994), 4826, 4845 (18 June 1994).
[5628] *See* Nteziryayo, T. 7 June 2007 pp. 30-32, 46-48, 50-55, T. 11 June 2007 pp. 7, 11, 12, 15, 16, 59-62, T. 12 June 2007 pp. 15-17, 26, 27.
[5629] The Appeals Chamber observes that Nteziryayo did not call any witnesses at trial to confirm that he could not have been present at a meeting in Muyaga Commune on or after 21 June 1994 and that he did not specifically point to the evidence now referred to on appeal as being relevant to this allegation in his closing brief or during closing arguments. *See* Nteziryayo Closing Brief, paras. 181-221; Nteziryayo Closing Arguments, T. 27 April 2009, T. 28 April 2009. While Nteziryayo stresses that he did not rely on evidence of his specific activities after he was appointed prefect at trial when attempting to refute his participation in the meeting at Muyaga Commune because he only became aware of the date from the Trial Judgement, the Appeals Chamber finds no merit in this position. Nteziryayo's defence at trial demonstrates that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and deliberately oriented it to prove that the meeting in Muyaga Commune actually took place on 23 May 1994 when he was not prefect. In this context, he could have equally emphasised what would have prevented him from attending a meeting there after his appointment. *See supra*, paras. 2295-2297.
[5630] *See* Nteziryayo Appeal Brief, para. 198.

6. Conclusion

2427. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide during a meeting held in Muyaga Commune around mid-June 1994 and, on this basis, in convicting him of direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Ground 5 of Nteziryayo's appeal.

D. Kibayi Commune Meeting (Ground 6)

2428. Based on the evidence of Prosecution Witnesses FAK and QBU, the Trial Chamber found that, around mid to late June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting on a football pitch next to the Kibayi commune office in Nyabisigara *Cellule*, Mukindo Sector, at which he incited the population to "flush out and kill the remaining Tutsis survivors in the *commune*".[5631]

2429. The Trial Chamber observed that, while Prosecution and Defence witnesses all testified to attending public meetings on a football pitch next to the Kibayi commune office,[5632] Nteziryayo and the Defence witnesses were referring to a meeting which occurred on 24 May 1994, while Witnesses FAK and QBU were referring to a later meeting which must have taken place after Nteziryayo assumed office as prefect, that is after 17 June 1994.[5633] The Trial Chamber determined that the similarities between the Defence and the Prosecution evidence were "fortuitous" [5634] and noted that there were "patent differences between the opposing parties' evidence", notably concerning whether Nteziryayo was prefect of Butare at the time of the meeting.[5635] It concluded that the evidence led by the parties concerned two different meetings,[5636] and that the evidence led by the Defence regarding a meeting that took place on 24 May 1994 was therefore "not relevant"[5637] and did not rebut the Prosecution evidence with respect to the subsequent meeting at the Kibayi commune office when Nteziryayo was prefect.[5638]

2430. The Trial Chamber found that Nteziryayo's speech at the Kibayi Commune meeting held around mid to late June 1994 constituted a direct appeal to kill Tutsis and convicted Nteziryayo of direct and public incitement to commit genocide on this basis.[5639]

2431. Nteziryayo submits that the Trial Chamber erred in finding that, in his capacity as prefect, he incited the commission of genocide during a meeting held in Kibayi in mid to late June 1994 and, on this basis, erred in convicting him of direct and public incitement to commit genocide.[5640]

[5631] Trial Judgement, paras. 3691, 5945, 6022.
[5632] Trial Judgement, para. 3675, fn. 9871, *referring to* Witnesses FAK and QBU, Nsabimana, Nteziryayo, Nteziryayo Defence Witnesses AND-11, AND-53, and AND-64 as well as Ntahobali Defence Witness H1B6.
[5633] Trial Judgement, paras. 3677, 3678, 3682, 3684. *See also ibid.*, paras. 3676, 3679.
[5634] Trial Judgement, para. 3680.
[5635] Trial Judgement, para. 3681.
[5636] Trial Judgement, para. 3682.
[5637] Trial Judgement, para. 3684.
[5638] Trial Judgement, para. 3685.
[5639] Trial Judgement, paras. 3691, 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at the meeting substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to this allegation. *See ibid.*, para. 5946.
[5640] Nteziryayo Notice of Appeal, paras. 47-65; Nteziryayo Appeal Brief, paras. 7, 213-239, 240, 241, 243-245, 246-249, 253, 255-257.

He argues that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than that described by the Defence witnesses and in dismissing the Defence evidence as irrelevant.[5641]

2432. The Appeals Chamber will assess these overarching challenges when addressing Nteziryayo's specific contentions that the Trial Chamber erred in: (i) failing to treat the Prosecution evidence with sufficient caution; (ii) assessing the Prosecution identification evidence; and (iii) insufficiently considering similarities and in assessing the differences between Prosecution and Defence evidence concerning the meeting.[5642]

1. Insufficient Caution

2433. The Trial Chamber noted that Witnesses FAK and QBU pleaded guilty to genocide in Rwanda and were detained and awaiting trial at the time of their testimonies.[5643] It considered that "these witnesses may have an interest in attributing responsibility for acts they committed during the genocide as being authorised by the authorities and therefore officially sanctioned in order to potentially reduce their respective sentences" and determined that it should view their evidence "with appropriate caution."[5644] In addition, it accepted that the witnesses did not attend the same *Gacaca* proceedings, noted that while "[t]hey met briefly in prison" they did not "share a cell", and concluded that it was satisfied that they "did not discuss their experiences while detained together."[5645]

2434. Nteziryayo argues that, while the Trial Chamber recognised the need for caution, it failed to apply it since his conviction relies entirely on the accomplice evidence from Witnesses FAK and QBU.[5646] Notably, he submits that the Trial Chamber erred in assessing whether the witnesses discussed their experiences, as it relied solely on Witness QBU's evidence to find that he and Witness FAK did not attend *Gacaca* sessions together when Witness FAK's evidence was to the contrary.[5647] He further submits that, whether or not Witnesses FAK and QBU participated in the same *Gacaca* sessions, the Trial Chamber failed to consider the "substantial risk of contamination" from them participating in "open discussions" at which the objective was to discuss, *inter alia*,

[5641] Nteziryayo Notice of Appeal, paras. 55, 59-61; Nteziryayo Appeal Brief, paras. 216, 218(v), 228-231.
[5642] Nteziryayo also refers to prior arguments raised under Ground 5 of his appeal concerning the Trial Chamber's failure to consider his evidence showing that he could not have attended a meeting such as the one held in Kibayi Commune after he assumed the position as Butare Prefect on 21 June 1994. *See* Nteziryayo Appeal Brief, paras. 218(vi), 232; Nteziryayo Reply Brief, para. 103. For the reasons previously articulated under Section VII.C.5, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to consider his testimony about his whereabouts from 21 June 1994 onwards in the Trial Judgement.
[5643] Trial Judgement, para. 3686.
[5644] Trial Judgement, para. 3686.
[5645] Trial Judgement, para. 3687.
[5646] Nteziryayo Appeal Brief, paras. 213, 238, 246, 247. *See also* Nteziryayo Reply Brief, para. 109(a).

events in Kibayi Commune.[5648] Finally, he points to Witness FAK's concession that his prior statements did not entirely contain "true reflections".[5649]

2435. The Prosecution responds that Nteziryayo does not demonstrate that the Trial Chamber exercised insufficient caution with respect to the evidence of Witnesses FAK and QBU.[5650]

2436. The Appeals Chamber finds no merit in Nteziryayo's general contention that the Trial Chamber failed to exercise sufficient caution simply because the finding of his criminal responsibility stemming from the Kibayi Commune meeting relies on two accomplice witnesses.[5651] As to Nteziryayo's argument that the Trial Chamber erred in finding that Witnesses FAK and QBU did not discuss their experiences, the Appeals Chamber notes that Witness QBU testified that he never took part in *Gacaca* sessions with Witness FAK.[5652] While the testimony of Witness FAK indicates that he and Witness QBU were from the same commune and that it was possible that they participated in meetings, Witness FAK does not state that he attended the same *Gacaca* sessions as Witness QBU or that they discussed their experiences with each other.[5653] Likewise, Nteziryayo does not substantiate his contention that the Trial Chamber failed to consider the "substantial risk of contamination" from these witnesses participating in "open discussions" about the events in Kibayi Commune. Nteziryayo's arguments in this regard are therefore dismissed.

2437. The Appeals Chamber notes that, as mentioned by Nteziryayo, Witness FAK appears to have suggested that not all of his prior statements were "true reflections".[5654] However, the Appeals Chamber is not persuaded that this aspect of Witness FAK's testimony precluded a reasonable trier of fact from relying on his evidence as it concerned the Kibayi Commune meeting, as this aspect of the witness's testimony fails to demonstrate that the witness possessed any incentive to perjure himself before the Tribunal in this respect. Indeed, and of particular significance, the Trial Chamber

[5647] Nteziryayo Appeal Brief, para. 236.
[5648] Nteziryayo Appeal Brief, paras. 218(viii), 237, *referring to* Witness QBU, T. 13 April 2004 p. 34 (closed session). The Appeals Chamber observes that, while allegations of collusion as it relates to several Prosecution witnesses fell outside the scope of Nteziryayo's notice of appeal, it concluded that these particular arguments related to Witnesses FAK and QBU did not. *See* 8 May 2013 Appeal Decision, para. 63. However, it determined that paragraphs 249 through 252 of the Nteziryayo Appeal Brief, which, in part, raised arguments relating to Witness FAK, exceeded the scope of the appeal and would not be considered. *See* 12 July 2013 Appeal Decision, paras. 23-25.
[5649] Nteziryayo Appeal Brief, para. 255 (emphasis omitted), *referring to* Witness FAK, T. 15 April 2004 p. 34.
[5650] Prosecution Response Brief, paras. 1554, 1555.
[5651] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251 ("The Appeals Chamber recalls that nothing in the Statute or the Rules prevents a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony. This discretion applies equally to the evidence of accomplice witnesses provided that the trier of fact applies the appropriate caution in assessing such evidence.") (internal references omitted).
[5652] Witness QBU, T. 13 April 2004 p. 33 (closed session).
[5653] Witness FAK, T. 15 April 2004 p. 45 (closed session).
[5654] Witness FAK, T. 15 April 2004 p. 34 (closed session) ("Q. […] Do you acknowledge that in none of these previous statements you had made mention of such a statement? A. I told you that I did note that there were some documents that

expressly noted the differences between Witness FAK's prior statement and his testimony concerning the date of the meeting, but considered the difference to be minor.[5655]

2438. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber failed to exercise sufficient caution with respect to the evidence of Witnesses FAK and QBU.

2. Identification Evidence

2439. The Trial Chamber relied on the identification evidence of Witnesses FAK and QBU and determined that their testimonies that Nteziryayo was the prefect of Butare at the time of the Kibayi Commune meeting reflected "[t]he most salient difference between the Prosecution and Defence evidence".[5656] The Trial Chamber noted that both Witnesses FAK and QBU knew Nteziryayo during 1994 and positively identified him in court.[5657]

2440. Nteziryayo contends that the Trial Chamber erred in its assessment of Witnesses FAK's and QBU's identifications of him as prefect at the time of the meeting about which they testified.[5658] In this regard, he submits that the Trial Chamber: (i) erred in relying on the witnesses' in-court identification;[5659] (ii) failed to consider that the description of the prefect given by Witnesses FAK and QBU most closely matched that of Nsabimana;[5660] and (iii) ignored the reasonable possibility that Witnesses FAK's and QBU's error regarding the date of Nteziryayo's appointment as prefect suggested that they were not wrong about the dates but about the identity of the prefect they saw at the meeting.[5661] Nteziryayo argues that the Trial Chamber's error is significant given its conclusion that the identification of Nteziryayo as the prefect was the "most salient difference" between Prosecution and Defence evidence.[5662]

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were false in that if I did not recognise, I do recall some of them, but a few are not true reflections, but since there is nothing else I can do, I will agree with whatever conclusions are drawn from there.").

[5655] Trial Judgement, para. 3690.

[5656] Trial Judgement, para. 3681.

[5657] Trial Judgement, para. 3681.

[5658] Nteziryayo Appeal Brief, paras. 218 (ii), 220, 222. *See also* AT. 17 April 2015 p. 17.

[5659] Nteziryayo Appeal Brief, paras. 218(i), 219, 221(d), *referring to* Trial Judgement, para. 3681. *See also* Nteziryayo Reply Brief, paras. 91, 92.

[5660] Nteziryayo Appeal Brief, para. 221(b). Nteziryayo argues that Witnesses FAK and QBU both described the prefect at the meeting as having sideburns, which Nsabimana had but not Nteziryayo, and that Witness FAK described the prefect as beginning to bald, whereas Witness AND-11 testified that Nteziryayo had lots of hair. *See idem.*

[5661] Nteziryayo Appeal Brief, para. 221(a). *See also* Nteziryayo Reply Brief, para. 96. Nteziryayo emphasises that Witness QBU testified that he had replaced Jean-Baptiste Habyalimana as prefect when Nsabimana had, and that Witnesses FAK and QBU both firmly believed that Nteziryayo was appointed prefect much earlier than he in fact was. *See* Nteziryayo Appeal Brief, para. 221(c); Nteziryayo Reply Brief, paras. 93, 94.

[5662] Nteziryayo Appeal Brief, paras. 223, 229 (emphasis omitted).

2441. The Prosecution responds that the Trial Chamber held that no positive probative weight would be given to in-court identification[5663] and argues that it was reasonable to determine that the meeting described by Witnesses FAK and QBU took place after Nteziryayo's 17 June 1994 appointment based on: (i) the fact that Nteziryayo identified himself as the new prefect; (ii) Witness FAK's suggestion that, although he was not sure of the date, the meeting occurred on 18 or 19 June 1994; and (iii) Witness QBU's belief that the meeting was in June.[5664] The Prosecution adds that both Prosecution witnesses had seen Nteziryayo before.[5665]

2442. The Appeals Chamber observes that Witnesses FAK's and QBU's identification of Nteziryayo as the prefect at the time of the meeting was the principal basis upon which the Trial Chamber concluded that they testified about a meeting occurring after Nteziryayo's appointment as Butare Prefect on 17 June 1994.[5666] In this respect, the Trial Chamber held that the Prosecution witnesses' identification of Nteziryayo as prefect could not be a case of misidentification as Witnesses FAK and QBU both "knew Nteziryayo during 1994" and positively identified him in court.[5667]

2443. The Appeals Chamber finds no merit in Nteziryayo's submissions regarding the Trial Chamber's reliance on in-court identification[5668] and the Prosecution witnesses' description of the prefect they saw.[5669] The Appeals Chamber observes that the Trial Chamber noted in its summary of their evidence that both Witnesses FAK and QBU stated that the individual they identified as Nteziryayo introduced himself at the meeting as the prefect.[5670] When discussing their identification of Nteziryayo as the prefect, the Trial Chamber also referred to their conflicting evidence as regards the date of the meeting, noting that: (i) in a prior statement, Witness FAK said the meeting occurred in May 1994; (ii) Witness FAK testified in court that "it actually took place in early June and

[5663] Prosecution Response Brief, para. 1541, *referring to* Trial Judgement, para. 173.
[5664] Prosecution Response Brief, para. 1542; AT. 17 April 2015 p. 34.
[5665] Prosecution Response Brief, para. 1543; AT. 17 April 2015 p. 34. The Prosecution argues that Nteziryayo's attempt to impeach their evidence on the basis of their description of him neither discredits their testimonies nor establishes that the Trial Chamber's finding was unreasonable. It submits that Nteziryayo merely repeats his unsuccessful "sideburn defence" from trial and that, as the identification was not made under difficult circumstances, there was no need for the Trial Chamber to consider the issues of sideburns and receding hair. *See* Prosecution Response Brief, para. 1543.
[5666] *See* Trial Judgement, para. 3681.
[5667] Trial Judgement, para. 3681.
[5668] The Appeals Chamber recalls that any in-court identification should be assigned "little or no credence" given the signals that can identify an accused aside from prior acquaintance. *See Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Kunarac et al.* Appeal Judgement, para. 320. In the present case, in addition to noting Witnesses FAK's and QBU's positive in-court identification, the Trial Chamber relied on the fact that they knew Nteziryayo in 1994, a conclusion that Nteziryayo did not challenge. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's reliance on the witnesses' identification of Nteziryayo in-court.
[5669] Having carefully reviewed the relevant parts of their evidence, the Appeals Chamber is also not persuaded by Nteziryayo's arguments that the description of the prefect given by Witnesses FAK and QBU most closely matched that of Nsabimana and, consequently, that this part of the evidence required express consideration by the Trial Chamber.
[5670] Trial Judgement, paras. 3587, 3594; Witness FAK, T. 14 April 2004 p. 19, T. 15 April 2004 pp. 24, 29, 30 (closed session); Witness QBU, T. 13 April 2004 p. 9.

estimated around 18 or 19 June 1994"; and (iii) Witness QBU testified that the meeting "occurred around the end of May or early June 1994."[5671]

2444. A careful review of the witnesses' testimonies indicates, as pointed out by Nteziryayo, that both Prosecution witnesses estimated that the meeting occurred "between May and June 1994" or in "late May, early June".[5672] As observed by the Trial Chamber, when it was put to each Prosecution witness that the meeting to which they testified must have been in June 1994 since Nteziryayo took up duties as Butare Prefect after 21 June 1994, Witness FAK maintained that Nteziryayo was a prefect when he came in May 1994, while Witness QBU contested the validity of Nteziryayo's letter of appointment, stating that it misstated the date of appointment "as much later than the actual appointment."[5673] The Appeals Chamber also notes that Witness QBU testified that Nteziryayo replaced Jean-Baptiste Habyalimana as the prefect of Butare,[5674] although there is no dispute that Habyalimana was replaced as prefect of Butare by Nsabimana around 19 April 1994, who was later replaced by Nteziryayo on 17 June 1994.[5675]

2445. However, the Trial Judgement reflects that the Trial Chamber fully considered these particular aspects of Witnesses FAK's and QBU's evidence.[5676] Based on the unrefuted evidence that Nteziryayo was appointed prefect on 17 June 1994 and the fact that Witnesses FAK and QBU consistently asserted that Nteziryayo introduced himself as prefect at the meeting, the Trial Chamber concluded that "the meeting about which Witnesses FAK and QBU testified must have taken place after Nteziryayo assumed office as *préfet*".[5677] In this context, the Appeals Chamber is of the view that the Trial Chamber carefully considered the identification evidence of Witnesses FAK and QBU, including elements within their testimonies that suggest that it occurred prior to the period when Nteziryayo was appointed as Butare Prefect, and did not ignore the possibility that Witnesses FAK and QBU may have been wrong about the identity of the prefect they saw at the meeting. The Appeals Chamber finds that Nteziryayo has not demonstrated that no reasonable trier of fact could have relied on Witnesses FAK's and QBU's identification of him as

[5671] Trial Judgement, para. 3675.
[5672] Witness FAK, T. 15 April 2004 pp. 19, 24, 27 and 28 (closed session); Witness QBU, T. 13 April 2004 pp. 8 and 56 (closed session), T. 14 April 2004 p. 3. The Appeals Chamber also notes that Witness FAK did not estimate the date to be "around 18 or 19 June 1994" as suggested by the Trial Chamber but merely stated that he could be wrong and that the date could "either be either the 18th or 19th of June 1994" since Nteziryayo told them he was the new prefect at the time when specifically questioned about whether Nteziryayo was then the prefect. Witness FAK, T. 15 April 2004 p. 24 (closed session) ("At that time he told us that he was the new *préfet*. So it was not in May exactly, but between May and June. I may be mistaken, but the exact date could be either the 18th or 19th of June. That is my recollection.").
[5673] Trial Judgement, para. 3676.
[5674] Witness QBU, T. 13 April 2004 pp. 36, 37 (closed session).
[5675] *See* Trial Judgement, paras. 2, 31, 45, 46.
[5676] *See* Trial Judgement, paras. 3675, 3676.
[5677] Trial Judgement, para. 3677.

prefect to find that they were talking about a meeting other than the one described by the Defence witnesses.

2446. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in its assessment of Witnesses FAK's and QBU's identification evidence.

3. Similarities and Differences Between Prosecution and Defence Evidence

2447. In assessing the evidence relevant to a meeting in Kibayi Commune, the Trial Chamber acknowledged that Prosecution and Defence evidence shared similarities regarding: (i) the venue of the meeting; (ii) the fact that the meeting took place in the morning; (iii) the presence of the Kibayi *Bourgmestre*; (iv) the fact that Muvunyi made a speech; and (v) the firing of gunshots as a test for the population.[5678] The Trial Chamber considered, however, that the similarities were "fortuitous".[5679]

2448. Nteziryayo submits that a "proper reflection of the evidence" reveals "a strong suggestion that all the Defence and Prosecution witnesses were referring to the same meeting"[5680] and contends that the Trial Chamber erred in dismissing the similarities between the Prosecution and Defence evidence as fortuitous.[5681] In particular, he argues that "the firing of shots into the air, on the orders of Muvunyi, […] cannot be taken to be a common feature of meetings in the area without evidence supporting that conclusion."[5682] Nteziryayo adds that the Trial Chamber failed to consider that Witness FAK and four Defence witnesses testified that a metaphor about dogs drinking blood was told at the meeting[5683] as well as the broadly consistent evidence on the order of the speakers.[5684]

2449. Nteziryayo further contends that the Trial Chamber erroneously used Witness FAK's testimony that a series of meetings occurred to rebut Witnesses AND-11's and AND-53's testimonies that only one meeting was held in Kibayi Commune.[5685]

[5678] Trial Judgement, para. 3680.
[5679] Trial Judgement, para. 3680.
[5680] Nteziryayo Appeal Brief, para. 231. *See also ibid.*, paras. 213, 224; Nteziryayo Reply Brief, paras. 99, 100.
[5681] Nteziryayo Appeal Brief, paras. 218(iv), 226(c), 227; AT. 17 April 2015 pp. 16, 17.
[5682] Nteziryayo Appeal Brief, para. 226(c).
[5683] Nteziryayo Appeal Brief, para. 226(a), *referring to* Witness FAK, Nteziryayo, Witnesses HB16, AND-53 and AND-64, Trial Judgement, paras. 3588, 3615, 3637, 3649, 3656. In his reply brief, Nteziryayo points out that the Trial Chamber merely referred to the witnesses' evidence on the metaphor of dogs drinking blood in summarising their testimonies, without any indication that this was considered in its deliberations. *See* Nteziryayo Reply Brief, para. 101.
[5684] Nteziryayo Appeal Brief, para. 226(b). Nteziryayo argues that all the witnesses were broadly consistent on the following order of speakers: (i) the Kibayi *Bourgmestre*; (ii) the prefect; and (iii) Muvunyi. *See idem. See also* Nteziryayo Reply Brief, para. 102, fn. 122, *referring to* Trial Judgement, paras. 3586-3588, 3594, 3597, 3679.
[5685] Nteziryayo Appeal Brief, paras. 218(iii), 224, 225, *referring to* Trial Judgement, para. 3684; Nteziryayo Reply Brief, para. 106.

2450. The Prosecution responds that the Trial Chamber reasonably found that the meeting described by Witnesses FAK and QBU was different from the 24 May 1994 meeting described by the Defence witnesses, and that the Defence evidence was therefore irrelevant.[5686] It submits that Nteziryayo fails to demonstrate that the Trial Chamber's assessment of the similarities between the two meetings was unreasonable.[5687] In this regard, it argues that: (i) Muvunyi made a similar firearm demonstration during a meeting in Muyaga Commune on 23 May 1994;[5688] (ii) the Trial Chamber did refer to the metaphor of dogs drinking blood; and (iii) the purported similarity regarding the order of speakers is irrelevant if the speakers, particularly the "*préfet*", are different people.[5689]

2451. Finally, the Prosecution responds that the Trial Chamber properly assessed Witness FAK's testimony that other meetings occurred in Kibayi notwithstanding Defence evidence that only one meeting occurred, highlighting Nsabimana's testimony that he visited Kibayi with Nteziryayo after mid-May 1994.[5690]

2452. Recalling the broad discretion that trial chambers have in assessing evidence,[5691] the Appeals Chamber finds that Nteziryayo does not demonstrate any error in the Trial Chamber's conclusion relating to the assessment of the similarities within the evidence warranting its intervention. The Appeals Chamber observes that the Trial Chamber considered in detail similarities about the venue and timing of the meeting and the presence of the Kibayi *Bourgmestre* and finds that Nteziryayo fails to show that no reasonable trier of fact could have regarded these similarities as "fortuitous".[5692] The Trial Chamber also expressly discussed that the majority of witnesses testified about Muvunyi's speech and the firing of gunshots.[5693] Contrary to Nteziryayo's submissions, the record, as reflected in the Trial Judgement, reveals that the firing of gunshots while Muvunyi addressed public gatherings was not unique to a single meeting in Kibayi Commune,[5694] nor were Muvunyi's comments.[5695] In light of these factors, the Appeals Chamber

[5686] Prosecution Response Brief, paras. 1542, 1547, 1550, 1551; AT. 17 April 2015 pp. 33, 34.
[5687] Prosecution Response Brief, para. 1548; AT. 17 April 2015 p. 34.
[5688] Prosecution Response Brief, para. 1549, *referring to* Trial Judgement, para. 3680, Witness AND-10, T. 13 March 2007 pp. 8, 9, 55.
[5689] Prosecution Response Brief, para. 1548.
[5690] Prosecution Response Brief, para. 1546, *referring to* Trial Judgement, para. 3603, Witness FAK, T. 15 April 2004 pp. 19, 24, 27, 28 (closed session), Nsabimana, T. 20 September 2006 p. 64.
[5691] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 45; *Ndindiliyimana et al*. Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Nahimana et al*. Appeal Judgement, para. 194.
[5692] Trial Judgement, para. 3680.
[5693] Trial Judgement, para. 3680.
[5694] *See* Trial Judgement, paras. 3558, 3559, 3574 (summarising the testimonies of Witnesses QBY and Nteziryayo Defence Witness AND-60 that gunshots were fired as Muvunyi spoke during public meetings in Muyaga Commune). *See also* Witness FAB, T. 5 April 2004 p. 27 (testifying that shots were fired during a public meeting in Muyaga Commune while Muvunyi spoke).
[5695] *Compare* Trial Judgement, paras. 3558, 3567, 3574 *with ibid*., paras. 3588, 3597, 3680. *See also* Witness FAB, T. 5 April 2004 pp. 26, 27; Nteziryayo, T. 5 June 2007 pp. 18, 28.

considers that a reasonable trier of fact could have determined that these similarities were "fortuitous".

2453. The Appeals Chamber notes that Nteziryayo correctly contends that Witness FAK, Nteziryayo, and three Defence witnesses all testified to one of the speakers at the meeting using the metaphor of dogs drinking blood[5696] and that the Trial Chamber did not expressly assess this similarity. However, the Appeals Chamber finds that Nteziryayo does not demonstrate that no reasonable trier of fact could have concluded that the Prosecution and the Defence witnesses were referring to different meetings despite this evidence. Indeed, the Appeals Chamber observes that, in its summary of the witnesses' testimonies, the Trial Chamber noted that Witness FAK stated that the metaphor was used by Muvunyi, whereas Nteziryayo and Defence witnesses all testified that the metaphor was used by Ruzindaza, the President of the court of first instance.[5697] In the view of the Appeals Chamber, this reveals that the Trial Chamber took note that the evidence differed as to who used the metaphor. Moreover, Nteziryayo and two Defence witnesses who testified on his behalf gave evidence that speakers employed strikingly similar metaphors during other meetings in Muyaga and Muganza communes.[5698] Nteziryayo therefore does not demonstrate that this metaphor was unique to the Kibayi Commune meeting such that a reasonable trier of fact would have been compelled to find that the Defence and the Prosecution witnesses were necessarily referring to this meeting, as opposed to other meetings.

2454. Likewise, the Appeals Chamber finds that Nteziryayo does not demonstrate that no reasonable trier of fact could have concluded that the Prosecution and the Defence witnesses were referring to different meetings notwithstanding the broadly consistent evidence as to the order of speakers.[5699] In this respect, the Appeals Chamber notes that the Defence evidence differed from the

[5696] Witness FAK, T. 14 April 2004 p. 26; T. 15 April 1994 p. 23 (closed session); Nteziryayo, T. 5 June 2007 pp. 18, 47; Witness AND-53, T. 14 February 2007 p. 73; T. 19 February 2007 pp. 67, 68; Witness AND-64, T. 8 March 2007 p. 35; T. 12 March 2007 p. 50; Witness H1B6, T. 5 December 2005 p. 20.
[5697] *See* Trial Judgement, paras. 3588 (Witness FAK), 3615 (Nteziryayo), 3637 (Witness AND-53), 3649 (Witness AND-64), 3656 (Witness H1B6).
[5698] *See* Trial Judgement, paras. 3548, 3575, 3579, *referring to* Witness AND-29, T. 19 February 2007 pp. 67, 68, Witness AND-60, T. 13 March 2007 p. 9, Nteziryayo, T. 5 June 2007 p. 27. *See also* Nteziryayo, T. 5 June 2007 pp. 17, 18, 27, 28 (describing Muvunyi as stating during a meeting at Ntyazo Commune that "when you are afraid to spill your blood for your nation then note that the dogs are going to drink of this blood for nothing" and further testifying that the speakers at the Muyaga Commune meeting "talked on the same subject on which they talked at Ntyazo").
[5699] With the exception of Nsabimana and Witness AND-64, all the witnesses testified that the Kibayi *Bourgmestre* spoke first, followed by the prefect, whose identity is disputed. Five of the eight witnesses testified that Muvunyi was next to speak. *See* Witness FAK, T. 14 April 2004 pp. 14 (closed session), 19-22, 24-26, 33-35, T. 15 April 2004 pp. 23, 24, 29, 34 (closed session); Witness QBU, T. 13 April 2004 pp. 9, 10, 64, 72, 73 (closed session), T. 14 April 2004 p. 7; Nteziryayo, T. 23 May 2007 pp. 39, 40, T. 5 June 2007 p. 18; Witness AND-11, T. 1 February 2007 pp. 17, 19, 23, 28-30, 35, 41, 42 (closed session), T. 5 February 2007 pp. 53-55, T. 7 February 2007 pp. 11, 29, 39, 40, 44 (closed session); Witness AND-53, T. 14 February 2007 pp. 62, 69-72, T. 15 February 2007 pp. 8, 52-54, 59, 72, T. 19 February 2007 pp. 7, 8; Witness AND-64, T. 8 March 2007 pp. 28-35, T. 12 March 2007 pp. 12, 15-17, 19, 49; Witness H1B6, T. 5 December 2005 pp. 15 (closed session) and 18-21, T. 6 December 2005 p. 15. *See also* Trial Judgement, paras. 3587, 3588 (Witness FAK), 3594, 3597 (Witness QBU), 3608 (Nteziryayo), 3622-

Prosecution evidence as only Defence witnesses indicated that Nsabimana chaired the meeting in his capacity as Prefect and that Nteziryayo attended in his capacity as a colonel.[5700]

2455. However, the Appeals Chamber finds that the Trial Chamber erred in finding that Witness FAK's evidence that several meetings occurred in Kibayi Commune was inconsistent with Defence evidence that only one public meeting was held.[5701] The Trial Chamber failed to recognise that Witness FAK's evidence of "a series of meetings" held at the Kibayi commune office between April and July 1994, "only one of which Witness FAK attended *since the others were only for authorities*, *and not the general population*"[5702] was consistent with the Defence evidence that the 24 May 1994 meeting was the only public meeting that took place in Kibayi Commune at the time.[5703] The Appeals Chamber is nonetheless not convinced that this error occasioned a miscarriage of justice in light of the Trial Chamber's proper assessment of the limited significance of the similarities between the Prosecution and the Defence evidence and Nsabimana's testimony, as noted by the Trial Chamber, that he attended a meeting in Kibayi Commune another time together with Nteziryayo.[5704]

2456. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that no reasonable trier of fact could have concluded that Prosecution and Defence witnesses were testifying about two different meetings and that, consequently, the Defence evidence was not relevant to and did not rebut the Prosecution case.

4. Conclusion

2457. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide

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3624 (Witness AND-11), 3632-3635 (Witness AND-53), 3645-3649 (Witness AND-64), 3653, 3657 (Witness H1B6). The Trial Chamber noted that Witness AND-64 testified that the *bourgmestre* spoke second and the prefect spoke third, while Nsabimana testified that the prefect spoke first and did not refer to the *bourgmestre* speaking at all. It also noted that Witnesses AND-64 and H1B6 testified that Muvunyi spoke fourth, while Nsabimana did not testify that Muvunyi spoke. *See* Trial Judgement, paras. 3604, 3645-3647, 3655.

[5700] *See* Trial Judgement, para. 3679.

[5701] *See* Trial Judgement, para. 3684.

[5702] Trial Judgement, para. 3684 (emphasis added). *See also ibid.*, para. 3583; Witness FAK, T. 14 April 2004 p. 66 ("These were meetings that brought together authorities. Members of the population were not allowed to attend.").

[5703] *See* Trial Judgement, para. 3684. The Appeals Chamber notes that, contrary to the Prosecution's submission, Witness FAK's testimony was not speculative, but affirmative. *See* Witness FAK, T. 14 April 2004 p. 66. The Prosecution's argument that "[a]lternatively, if a 24 May meeting occurred, FAK may not have known about it or he may have believed that it was one of those not open to the public" is purely speculative and not substantiated by the witness's testimony. *See* Prosecution Response Brief, para. 1546.

[5704] Trial Judgement, para. 3684, *referring to* Nsabimana, T. 20 September 2006 p. 64. The Appeals Chamber notes that the reference to "Kabgaye" and not "Kibayi" in the English transcripts of Nsabimana's testimony referred to by the Trial Chamber is erroneous. A review of the original audio-recording of Nsabimana's testimony reveals that he referred to "Kibayi" as noted by the Trial Chamber in paragraph 3684 of the Trial Judgement and not "Kabgaye". *See* audio-recording of Nsabimana's testimony of 20 September 2006, at 01:59:07-02:01:00. *See also* Nsabimana, T. 20 September 2006 pp. 68, 69 (French).

during a meeting held in Kibayi Commune around mid to late June 1994 and, on this basis, in convicting him of direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Ground 6 of Nteziryayo's appeal.

E. Prejudicial Assessment of Evidence (Grounds 7 and 8)

2458. Nteziryayo submits that the Trial Chamber erred in applying different standards in assessing Prosecution and Defence evidence, which, in his view, invalidates all of his convictions.[5705] In support of this claim, he reiterates his contentions that the Trial Chamber erred in discrediting the Defence evidence regarding Ndayambaje's Swearing-In Ceremony.[5706] He further contends that the Trial Chamber did not discredit the Defence evidence concerning the meetings held in Muyaga and Kibayi Communes but erreoneously determined that it was not relevant and further erred by failing to consider Defence evidence regarding his movements from 21 June 1994 onwards.[5707] Nteziryayo also argues that the Trial Chamber failed to properly assess the credibility of ten Prosecution witnesses who were accomplices or had been arrested for their participation in the genocide, and many of whom remained detained together and were awaiting sentencing at the time of their testimony.[5708] He contends that the Prosecution exploited the circumstances surrounding these witnesses, which facilitated "a deliberate, calculated and Machiavellian scheme" to obtain evidence to inculpate him, and that the Trial Chamber erred in failing to acknowledge this "plain reality".[5709]

2459. The Prosecution responds that Nteziryayo does not substantiate his claim that the Trial Chamber erred in applying different standards when assessing Prosecution and Defence evidence.[5710] It contends that the argument that there was a scheme to obtain inculpatory evidence is unsupported.[5711]

2460. The Appeals Chamber has previously dismissed Nteziryayo's contentions that the Trial Chamber employed differing and prejudicial standards when assessing Defence evidence in relation to Ndayambaje's Swearing-In Ceremony.[5712] It has further concluded that the Trial Chamber did not err in its assessment of the evidence about the meetings in Muyaga and Kibayi Communes,

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[5705] Nteziryayo Notice of Appeal, paras. 59-61; Nteziryayo Appeal Brief, paras. 241, 245. *See also* Nteziryayo Reply Brief, paras. 106, 107.
[5706] Nteziryayo Appeal Brief, paras. 242, 245.
[5707] Nteziryayo Appeal Brief, paras. 243-245.
[5708] Nteziryayo Notice of Appeal, paras. 63, 65; Nteziryayo Appeal Brief, paras. 246-248, 253. In this regard, Nteziryayo posits that "[n]o legitimate explanation" was advanced for the inordinate delay between the arrest in Rwanda and sentencing of several of the witnesses who testified against him before the Tribunal. *See* Nteziryayo Appeal Brief, para. 253. *See also* Nteziryayo Reply Brief, para. 109. The Appeals Chamber recalls that, on 12 July 2013, it clarified that the arguments developed in paragraphs 249 through 252 of the Nteziryayo Appeal Brief would not be entertained as they exceeded the scope of Nteziryayo's appeal. *See* 12 July 2013 Appeal Decision, para. 25. *See also* 8 May 2013 Appeal Decision, paras. 51, 58 (striking paragraphs raising allegations of collusion in Grounds 4 and 5 from a previous appeal brief filed by Nteziryayo that exceeded the scope of Nteziryayo's notice of appeal).
[5709] Nteziryayo Appeal Brief, para. 257. *See also ibid.*, paras. 253-256.
[5710] Prosecution Response Brief, para. 1557.
[5711] Prosecution Response Brief, paras. 1558-1564. *See also* AT. 17 April 2015 pp. 27, 30, 31.
[5712] *See supra*, Section VII.B.2.

including evidence concerning Nteziryayo's movements from 21 June 1994 onwards.[5713] Nteziryayo's general contention that the Trial Chamber applied differing and prejudicial standards in assessing the Defence evidence is unsubstantiated and, as a result, is rejected without further consideration.

2461. Turning to the Trial Chamber's alleged failure to exercise sufficient caution with respect to the Prosecution evidence, the Appeals Chamber recalls that it has considered and rejected Nteziryayo's arguments that the Trial Chamber failed to exercise sufficient caution in light of the specific circumstances relating to the testimonies of the ten witnesses with which Nteziryayo takes issue.[5714] The Appeals Chamber is not persuaded that the fact that ten out of the 12 Prosecution witnesses relied upon by the Trial Chamber had been charged in Rwanda for genocide-related crimes demonstrates the existence of a "scheme" to obtain evidence to inculpate Nteziryayo or any resulting error on the part of the Trial Chamber in failing to recognise this.

2462. Based on the foregoing, the Appeals Chamber dismisses Grounds 7 and 8 of Nteziryayo's appeal.

[5713] *See supra*, Sections VII.C, VII.D.
[5714] *See supra*, Sections VII.B.1(b) (addressing the circumstances of the testimonies of Witnesses RV, QAF, FAG, FAU, FAL, and TO), VII.C.1 (addressing the circumstances of the testimonies of Witnesses QBY and FAB), VII.D.1 (addressing the circumstances of the testimonies of Witnesses FAK and QBU).

VIII. APPEAL OF JOSEPH KANYABASHI

2463. The Trial Chamber found Kanyabashi guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and those perpetrated by soldiers at Matyazo Clinic in late April 1994.[5715] The Trial Chamber also found Kanyabashi guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute based on two megaphone announcements he made in Butare Town in May and June 1994.[5716]

2464. Kanyabashi raises challenges related to the Trial Chamber's denial of his applications to vary his witness list and reopen his case and related to his indictment. He also contends that the Trial Chamber erred in its assessment of the evidence and his responsibility in relation to the killings committed at Kabakobwa Hill and Matyazo Clinic as well as with respect to his incitement by megaphone in May and June 1994.

[5715] Trial Judgement, paras. 5809, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186. Judge Ramaroson dissented with respect to the Trial Chamber's conclusions regarding Matyazo Clinic.
[5716] Trial Judgement, paras. 6009-6013, 6037, 6186.

A. Variation of Witness List and Reopening of Case (Grounds 1.7, 3.9, and 3.10)

2465. During the course of the trial, Kanyabashi submitted a number of motions requesting leave to vary his witness list and the reopening of his Defence case. In particular, during the presentation of his defence in December 2007, Kanyabashi requested leave to vary his witness list to remove or replace 12 witnesses and call 12 new witnesses to testify on a number of allegations, including regarding the killings committed at Kabakobwa Hill and the acts of incitement to commit genocide by megaphone.[5717] The Trial Chamber partly dismissed his request on 15 February 2008.[5718] In June 2008, Kanyabashi requested the reopening of his case to call Witness D-2-23-C, which was denied by the Trial Chamber on 2 July 2008.[5719] Likewise, on 19 January 2009, the Trial Chamber denied Kanyabashi's request for reconsideration of the decision denying his request to reopen his case to call Witness D-2-23-C and his additional request to reopen his case to allow Witness D-11-AB to testify.[5720]

2466. Kanyabashi submits that the Trial Chamber erred in its decisions of 15 February 2008, 2 July 2008, and 19 January 2009 by not allowing him to vary his witness list as requested or to reopen his case to hear the proposed witnesses concerning the Kabakobwa Hill killings and the megaphone announcements.

2467. Before turning to Kanyabashi's specific challenges against the above-mentioned decisions, the Appeals Chamber reiterates that, like all decisions relating to the conduct of proceedings, decisions on requests for leave to vary a party's witness list or to reopen a case to allow for the admission of new evidence are among the discretionary decisions of a trial chamber to which the

[5717] *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, Motion to Vary the List of Joseph Kanyabashi Defence Witnesses Pursuant to Rule 73*ter*, 11 December 2007 (originally filed in French, English translation filed on 21 January 2008) (confidential) ("Kanyabashi 11 December 2007 Motion").
[5718] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73*ter*, 15 February 2008 ("15 February 2008 Decision"). In particular, the Trial Chamber granted Kanyabashi's requests to remove 10 witnesses from his witness list, to substitute one witness, and to call six witnesses to testify about specific elements of his case. The Trial Chamber dismissed the remainder of Kanyabashi's motion, denying his requests for the substitution of Witness D-8-N with Witness D-9-GG and of Witness D-2-13-K with Witness D-2-19-F. It further denied his requests to call Witnesses D-2-10-Y and D-2-16-L to testify about certain additional elements and to add Witnesses D-2-15-V, D-2-17-K, and D-2-17-M to his witness list. *See ibid.*, paras. 39, 44, 51, 54, 56, 58, pp. 17, 18.
[5719] *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, *Requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*, 2 June 2008 (confidential) ("Kanyabashi 2 June 2008 Motion"); 2 July 2008 Decision.
[5720] *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, *Requête de Joseph Kanyabashi en reconsidération de la Décision du 2 juillet 2008 et demandant que D-2-23-C et D-11-AB soient entendus*, 18 November 2008 (confidential) ("Kanyabashi 18 November 2008 Motion"); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motions for Reconsideration of the 2 July 2008 Decision, Requesting that Witnesses D-2-23-C and D-11-AB Be Called to Testify, and for Special Protective Measures for Witnesses D-2-23-C and D-11-AB, 19 January 2009 ("19 January 2009 Decision").

Appeals Chamber must accord deference.[5721] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[5722]

1. 15 February 2008 Decision

2468. On 11 December 2007, Kanyabashi moved the Trial Chamber for leave to replace or remove 12 witnesses on his witness list and call 12 new witnesses pursuant to Rule 73*ter*(E) of the Rules.[5723] The Trial Chamber considered that Kanyabashi's motion sought a "massive" variation of his witness list at a very advanced stage of the proceedings and that there was no adequate explanation for this belated request.[5724] It held that, at this stage of the proceedings, a variation may only be justified if good cause was shown and if there was no material prejudice to the other parties.[5725] It also recalled its prior finding that calling numerous witnesses to testify on the same allegations was unnecessary.[5726] The Trial Chamber partly dismissed Kanyabashi's motion.[5727]

2469. Kanyabashi submits that the Trial Chamber erred in its 15 February 2008 Decision by denying his requests to: (i) substitute Witness D-2-13-K with Witness D-2-19-F and to add Witness D-2-15-V to testify on incidents at Kabakobwa Hill; and (ii) add Witnesses D-9-GG, D-2-17-K, and D-2-17-M to testify in relation to the allegations of incitement by megaphone and by limiting the scope of Witnesses D-2-17-A's and D-2-17-I's testimonies in this respect.[5728] The Appeals Chamber will consider these contentions in turn.

(a) Variation of the Witness List in Relation to Kabakobwa Hill

2470. The Trial Chamber denied Kanyabashi's requests to substitute Witness D-2-13-K with Witness D-2-19-F to testify about the Kabakobwa Hill events and to add Witness D-2-15-V to his witness list to testify about the alleged role played by the *Interahamwe* in Butare Town and the

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[5721] *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010 ("*Gotovina et al.* 1 July 2010 Appeal Decision"), para. 5; 21 August 2007 Appeal Decision, para. 10; *Milutinović et al.* Appeal Decision, paras. 9, 10.
[5722] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.
[5723] Kanyabashi 11 December 2007 Motion, para. 5, p. 12.
[5724] 15 February 2008 Decision, paras. 33, 34. The Trial Chamber noted that the first Defence case started on 31 January 2005 and that the motion was filed four months after Kanyabashi's defence started. *See idem*.
[5725] 15 February 2008 Decision, para. 34.
[5726] 15 February 2008 Decision, para. 35, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of His Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time Within Which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007 ("21 March 2007 Decision"), para. 35, fn. 28.
[5727] 15 February 2008 Decision, pp. 17, 18. *See supra*, fn. 5718.
[5728] Kanyabashi Notice of Appeal, sub-paras. 1.7.1, 1.7.1.1-1.7.1.4, 3.10.1, 3.10.1.1-3.10.1.3; Kanyabashi Appeal Brief, paras. 137-139, 340-357. *See also* Kanyabashi Reply Brief, paras. 134-142.

alleged threats against him.[5729] With regard to Witness D-2-19-F, the Trial Chamber noted that Witness D-2-13-K appeared to be willing to testify and that Kanyabashi had not explained why he requested the substitution at such a late stage of the proceedings and that it had "already heard evidence on the elements listed in D-2-19-F's will-say."[5730] It concluded that Kanyabashi had not shown good cause for the substitution of Witness D-2-13-K with Witness D-2-19-F at this stage of the proceedings.[5731] Similarly, the Trial Chamber denied the addition of Witness D-2-15-V on the ground that it had already heard evidence on the elements listed in the witness's will-say statement.[5732]

2471. Kanyabashi submits that the Trial Chamber erred in denying his requests to substitute Witness D-2-13-K with Witness D-2-19-F and to add Witness D-2-15-V to his witness list.[5733] He contends that Witnesses D-2-19-F and D-2-15-V would have provided evidence relevant to the accounts of Prosecution Witnesses QCB and FAM regarding his presence at Rango Market and the presence of policemen at Kabakobwa Hill, and that the Trial Chamber's refusal to grant leave to hear their evidence was an abuse of its discretionary powers and limited his right to a full answer in defence.[5734] According to Kanyabashi, the prejudice to the parties that would have resulted from granting leave to call these witnesses "was difficult to see" as he had already tried to add these two witnesses prior to the start of his case, the parties were informed of their will-say statements, and the Prosecution did not object.[5735] Kanyabashi adds that the requested substitution complied with the limit of 30 witnesses imposed by the Trial Chamber, and would not have prolonged the proceedings or prejudiced the other parties.[5736] Kanyabashi argues that Witnesses D-2-19-F and D-2-15-V were material witnesses who were in a position to testify to a wide range of events and whose testimonies could have had a decisive effect on the Trial Chamber's guilty verdict.[5737]

2472. The Prosecution responds that Kanyabashi does not demonstrate how Witnesses D-2-19-F and D-2-15-V were an essential component of his defence or provide supporting arguments as to how they could have provided any more relevant evidence on Rango Market and the presence of policemen at Kabakobwa Hill than the witnesses who were called.[5738] The Prosecution adds that nothing indicates that the testimony of these two witnesses could have had any impact on the

[5729] 15 February 2008 Decision, paras. 43, 44, 56, pp. 17, 18.
[5730] 15 February 2008 Decision, para. 43, fn. 35.
[5731] 15 February 2008 Decision, para. 44.
[5732] 15 February 2008 Decision, paras. 55, 56, fn. 38.
[5733] Kanyabashi Notice of Appeal, sub-paras. 1.7.1-1.7.1.4; Kanyabashi Appeal Brief, paras. 137-139.
[5734] Kanyabashi Notice of Appeal, sub-paras. 1.7.1.2, 1.7.1.4; Kanyabashi Appeal Brief, paras. 137-139.
[5735] Kanyabashi Notice of Appeal, sub-para. 1.7.1; Kanyabashi Appeal Brief, para. 138. Kanyabashi submits that only Ntahobali and Nyiramasuhuko objected, pointing out that they were not charged in relation to crimes committed at Kabakobwa Hill. *See* Kanyabashi Appeal Brief, para. 138.
[5736] Kanyabashi Appeal Brief, para. 138.
[5737] Kanyabashi Notice of Appeal, sub-paras. 1.7.1.1-1.7.1.4.
[5738] Prosecution Response Brief, paras. 1731-1733.

verdict as Witness D-2-19-F could only testify to what he heard other people say at *Gacaca* sessions and Witness D-2-15-V could only give cumulative evidence.[5739]

2473. The Appeals Chamber observes that the Trial Chamber did not deny Kanyabashi's request to call Witnesses D-2-19-F and D-2-15-V because their expected evidence was not relevant or because of the prejudice their addition to the witness list would have caused to the other parties. Rather, it primarily relied on the fact that it had already heard evidence on the issues about which the two witnesses were expected to testify.[5740] Kanyabashi's arguments fail to address the primary reason for which his request was denied. The Appeals Chamber stresses that a trial chamber's decision that the accused's case does not necessitate calling numerous witnesses to testify to the same factual allegations is well within the trial chamber's exercise of its discretion in the management of the trial proceedings.[5741] Because Kanyabashi has not demonstrated that the Trial Chamber erred in finding that the evidence would have been repetitive of evidence already heard, the Appeals Chamber dismisses Kanyabashi's submissions regarding the variation of his witness list in relation to Kabakobwa Hill.

(b) Variation of the Witness List in Relation to the Incitement by Megaphone

2474. The Trial Chamber denied Kanyabashi's requests to substitute Witness D-8-N with Witness D-9-GG and to add Witnesses D-2-17-K and D-2-17-M.[5742] The Trial Chamber granted the request to drop Witness D-8-N, who refused to testify, but denied the request to substitute Witness D-9-GG in his place,[5743] noting that it had already heard evidence and was expected to hear further evidence on some of the elements listed in Witness D-9-GG's will-say statement, including on the megaphone incidents.[5744] The Trial Chamber found that it would not be in the interests of justice to hear another witness on these elements.[5745] Similarly, it denied the addition of Witnesses D-2-17-K and D-2-17-M on the grounds that it had already heard several witnesses on the elements listed in their will-say statements.[5746]

[5739] Prosecution Response Brief, paras. 1732, 1734.
[5740] *See supra*, para. 2470.
[5741] *See* 21 August 2007 Appeal Decision, para. 16. *See also Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008, para. 25.
[5742] 15 February 2008 Decision, paras. 39, 58, pp. 17, 18.
[5743] 15 February 2008 Decision, paras. 37, 39, 69, pp. 17, 18.
[5744] 15 February 2008 Decision, para. 38, fn. 34.
[5745] 15 February 2008 Decision, para. 38. The Trial Chamber was also not convinced that Kanyabashi had demonstrated that the new elements in Witness D-9-GG's expected testimony "may be essential to Kanyabashi's case" and considered that the introduction of these elements at that stage of the trial was belated and may be prejudicial to the other parties. *See ibid.*, para. 39.
[5746] 15 February 2008 Decision, paras. 57, 58.

2475. Furthermore, the Trial Chamber granted Kanyabashi's request to call Witnesses D-2-17-A and D-2-17-I but limited the scope of their testimonies to specific issues of fact, denying Kanyabashi's request to call them to testify on the megaphone incidents, for instance.[5747] The Trial Chamber reasoned that it had already heard several witnesses on the elements on which Kanyabashi would not be authorised to question these witnesses, and that it was not in the interests of justice to hear other witnesses on these elements.[5748]

2476. Kanyabashi submits that the Trial Chamber erred in dismissing his requests to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents on the grounds of prejudice and the interests of justice.[5749] He points out that the Prosecution did not oppose the requests and contends that there was no prejudice to the other parties resulting from the belated nature of the motion as they had already received all necessary information regarding four of these witnesses.[5750] Kanyabashi further contends that it was not demonstrated that the requested variation in his witness list would have generated delays that would have caused prejudice.[5751]

2477. In addition, Kanyabashi submits that the principle of equality of arms was undermined as the Trial Chamber applied different standards to the Prosecution.[5752] He emphasises that the Trial Chamber allowed the Prosecution to vary its witness list until three weeks before the close of its case and argues that, had the Trial Chamber applied "the best evidence" standard that it applied in authorising the addition of Prosecution witnesses, it would have agreed to hear Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I on the megaphone incidents.[5753] Emphasising that the Prosecution presented several witnesses for the same incidents, he adds that the repetitive nature of the evidence does not seem to have always been a decisive factor for the Trial Chamber.[5754]

2478. Kanyabashi further submits that, by relying on the fact that a number of witnesses had "already testified on the megaphone incident", the Trial Chamber erred in failing to consider that his right to a full defence implied that he could defend himself specifically against each of the incidents of incitement by megaphone recounted by Witnesses QJ, TK, and QI by calling witnesses

[5747] 15 February 2008 Decision, paras. 59-64, 69, pp. 17, 18.
[5748] 15 February 2008 Decision, paras. 60, 63.
[5749] Kanyabashi Notice of Appeal, sub-paras. 3.10.1, 3.10.1.1, 3.10.1.2; Kanyabashi Appeal Brief, paras. 340-349.
[5750] Kanyabashi Appeal Brief, paras. 343, 344. *See also ibid.*, fns. 1093, 1094; Kanyabashi Reply Brief, para. 135. Kanyabashi asserts that, had it not been for the joint trials, there would have been no opposition to hearing the evidence regarding the allegations of incitement over the megaphone. *See* Kanyabashi Appeal Brief, para. 343.
[5751] Kanyabashi Notice of Appeal, sub-para. 3.10.1; Kanyabashi Appeal Brief, para. 345. Kanyabashi emphasises that he requested substitution, not addition of witnesses, and argues that it would have been necessary to take into account delays attributable to the other parties or to the Trial Chamber. *See* Kanyabashi Appeal Brief, para. 345; Kanyabashi Reply Brief, para. 134.
[5752] Kanyabashi Appeal Brief, para. 346.
[5753] Kanyabashi Appeal Brief, paras. 346-348.

who were at the same locations and dates and, as a result, were in a position to provide unique evidence.[5755] In Kanyabashi's view, the Trial Chamber's refusal to hear the material evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I on the factual allegations regarding the megaphone incidents constituted an error which caused him serious prejudice.[5756]

2479. The Prosecution responds that Kanyabashi fails to demonstrate that the Trial Chamber abused its discretion in denying his request to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I or that this ruling had any impact on the final verdict.[5757] In particular, it submits that the will-say statements of Witnesses D-9-GG, D-2-17-K, and D-2-17-M do not demonstrate that their testimonies were material to Kanyabashi's defence.[5758] It also highlights that Witness D-2-17-I ultimately testified on all elements relevant to impeaching Prosecution Witness TK about the megaphone announcement she heard,[5759] and that Kanyabashi ultimately chose not to call Witness D-2-17-A to testify.[5760]

2480. The Appeals Chamber observes that, contrary to Kanyabashi's contention, the Trial Chamber did not rely on prejudice to dismiss his request to call Witnesses D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents. It instead relied on the fact that it had already heard evidence on the elements on which these witnesses were expected to testify.[5761] Kanyabashi's argument regarding prejudice therefore lacks merit.

2481. The Appeals Chamber considers that Kanyabashi's argument concerning a violation of the principle of equality of arms is similarly ill-founded. Notably, Kanyabashi did not argue in his motion at trial that the evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I was the "best available evidence" on the issue of the megaphone incidents.[5762] More importantly, a review of the decisions on the variation of the Prosecution's witness list pointed out by Kanyabashi reflects that the Trial Chamber applied a similar standard to that applied in the 15 February 2008 Decision. Although the Trial Chamber did not use the terminology "best available evidence" in the impugned decision, a careful reading of the decision reveals that, as done in relation to the Prosecution's requests to vary its witness list, the Trial Chamber examined

[5754] Kanyabashi Appeal Brief, para. 348.
[5755] Kanyabashi Notice of Appeal, sub-para. 3.10.1.2; Kanyabashi Appeal Brief, paras. 353, 355, 357. *See also* Kanyabashi Reply Brief, paras. 136-140.
[5756] Kanyabashi Notice of Appeal, sub-paras. 3.10-3.10.1.3; Kanyabashi Appeal Brief, paras. 354-357. *See also* Kanyabashi Reply Brief, paras. 138, 140.
[5757] Prosecution Response Brief, para. 1960.
[5758] Prosecution Response Brief, paras. 1965, 1967.
[5759] Prosecution Response Brief, para. 1962, *referring to* Witness D-2-17-I, T. 27 March 2008 p. 14 (closed session).
[5760] Prosecution Response Brief, para. 1964. *See also* AT. 20 April 2015 pp. 43, 44.
[5761] 15 February 2008 Decision, paras. 38, 57, 60, 63.
[5762] *See* Kanyabashi 11 December 2007 Motion.

whether the addition of witnesses was in the interests of justice in light of the evidence already heard and the evidence it was scheduled to hear.[5763]

2482. In this respect, the Appeals Chamber notes that Kanyabashi points to specific aspects of the anticipated evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I that allegedly distinguish their evidence from the evidence already heard or expected to be heard on the megaphone incidents. Having reviewed Kanyabashi's submissions at trial, the relevant witnesses' written and will-say statements[5764] as well as the testimonial evidence already heard and referred to by the Trial Chamber,[5765] and recalling the discretion accorded to trial chambers in relation to the variation of a party's witness list, the Appeals Chamber finds that Kanyabashi does not demonstrate that the Trial Chamber abused its discretion in concluding that the proposed evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, and D-2-17-I on the megaphone announcements would have been repetitive. The written and will-say statements of these witnesses do not indicate that the witnesses were in the position to provide unique evidence in this regard.[5766]

2483. By contrast, the written and will-say statements of Witness D-2-17-A reflect that the witness was hiding at the same place as Prosecution Witness QI,[5767] a witness the Trial Chamber relied on to find that Kanyabashi made megaphone announcements in June 1994.[5768] As such, Witness D-2-17-A appears to have been in a position to provide evidence relevant to the credibility of Witness QI's account, which had not been provided yet. This, however, was acknowledged by the Trial Chamber, which granted leave to Kanyabashi to call Witness D-2-17-A to contradict Witness QI about where he was hiding during the relevant events.[5769] Kanyabashi does not demonstrate that the scope of Witness D-2-17-A's recall testimony as authorised by the Trial Chamber deprived him of a reasonable opportunity to refute the allegations made by Witness QI regarding the megaphone announcements, an opportunity that Kanyabashi could not avail himself of due to his inability "to get this witness to testify".[5770]

[5763] *Compare* 15 February 2008 Decision, paras. 38, 57, 60, 63 *with* 30 March 2004 Decision, paras. 28, 29, 32, 33, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion to Add and Transfer Detained Witness QBX, 12 November 2001, paras. 11, 13, 14, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001, paras. 11, 13.
[5764] *See* Kanyabashi 11 December 2007 Motion, Annex I; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Pre-Defence Brief, 11 January 2005 (originally filed in French, English translation filed on 4 February 2005), Witnesses D-2-14-V and D-13-D, pp. 39, 50.
[5765] *See* 15 February 2008 Decision, fns. 34, 40, 43, 44.
[5766] *See* Kanyabashi 11 December 2007 Motion, Annex I, pp. 33-56, 66-68.
[5767] *See* Kanyabashi 11 December 2007 Motion, Annex I, pp. 25-32.
[5768] Trial Judgement, paras. 3815-3826, 6009-6013, 6037.
[5769] 15 February 2008 Decision, paras. 62, 64, pp. 17, 18.
[5770] *See* T. 19 June 2008 p. 40 (closed session). Contrary to Kanyabashi's claim that he did not ultimately call Witness D-2-17-A to testify because it was useless to call him on subsidiary matters, the record shows that Kanyabashi

2484. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has failed to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion in dismissing Kanyabashi's requests to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents in its 15 February 2008 Decision.[5771]

2. 2 July 2008 Decision

2485. On 20 May 2008, the Trial Chamber declared Kanyabashi's defence case closed but for the testimony of Witnesses D-2-17-A and D-2-21-T.[5772] On 2 June 2008, Kanyabashi requested the Trial Chamber to reopen his case to add Witness D-2-23-C to his witness list to testify on, *inter alia*, the allegations of his presence at Rango Market and the fabrication of evidence against him.[5773] The Trial Chamber denied Kanyabashi's request on 2 July 2008 on the ground that Kanyabashi "failed to exercise due diligence in obtaining the evidence in a timely manner and that the probative value of the evidence [did] not outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings."[5774]

2486. In particular, the Trial Chamber found that: (i) Kanyabashi had failed to provide reasons for having identified Witness D-2-23-C at such a late stage of the trial; (ii) the reluctance of the witness to testify during the presentation of Kanyabashi's case did not in itself justify the reopening of the case; and (iii) Kanyabashi had "sufficient opportunities to review [his] case in [his] many requests to vary [his] witness list since the filing of [his] Pre-Defence Brief."[5775] The Trial Chamber also considered that it expected to hear one witness and had already heard many witnesses on the matters about which Witness D-2-23-C was expected to testify and found that the reopening of Kanyabashi's case would further delay the trial proceedings thereby causing prejudice to the other parties.[5776]

2487. Kanyabashi submits that the Trial Chamber abused its discretion in denying his request to reopen his case to add Witness D-2-23-C, violating his "right to make full answer and defence".[5777] He contends that the Trial Chamber erred in finding that he did not exercise due diligence, pointing out that the Trial Chamber acknowledged how difficult it was to obtain the collaboration of

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did not ultimately call the witness because he was "not able to get this witness to testify". *See idem*; Kanyabashi Appeal Brief, para. 354; Prosecution Response Brief, para. 1964.

[5771] Kanyabashi Notice of Appeal, sub-para. 3.10.1.1; Kanyabashi Appeal Brief, para. 343.

[5772] Trial Judgement, para. 6581, *referring to* T. 20 May 2008 p. 29.

[5773] Kanyabashi 2 June 2008 Motion.

[5774] 2 July 2008 Decision, para. 27, p. 10.

[5775] 2 July 2008 Decision, para. 25.

[5776] 2 July 2008 Decision, para. 26, fn. 8. *See also ibid.*, para. 27.

[5777] Kanyabashi Notice of Appeal, sub-para. 1.7.2.2. *See also ibid.*, sub-paras. 1.7.2, 3.9; Kanyabashi Appeal Brief, paras. 141-143, 339.

witnesses fearing for their lives.[5778] He argues that the Trial Chamber should have "softened" the diligence requirement in order to avoid a miscarriage of justice.[5779] Kanyabashi also submits that the Trial Chamber "disregarded the specificities of [Witness] D-2-23-C's [expected] testimony" concerning Rango Market, which partly corroborated Witness D-2-21-T's evidence and was distinct from the testimonies of Witnesses D-2-18-O and D-13-D.[5780] Kanyabashi adds that granting his request would not have prolonged the trial proceedings and that, had the Trial Chamber properly weighed the factors, it would have allowed the reopening of his case.[5781] According to him, the interests that were dispositive in the Trial Chamber's reasoning did not outweigh his right to a fair trial.[5782]

2488. The Prosecution responds that Kanyabashi fails to demonstrate any error in the 2 July 2008 Decision.[5783] It argues that Kanyabashi does not explain why he was not able to identify Witness D-2-23-C before February 2008 and makes general arguments about the difficulty in obtaining the cooperation of individuals like Witness D-2-23-C without describing the steps he took in attempting to call the witness at an earlier stage.[5784] The Prosecution also submits that Kanyabashi does not identify why Witness D-2-23-C's evidence would have been more convincing or corroborative than any of the other evidence heard.[5785]

2489. The Appeals Chamber recalls that "the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application."[5786] If it is shown that the evidence could not have been found through the exercise of reasonable diligence before the close of the case, the trial chamber should exercise its discretion as to whether to allow the evidence to be presented by considering whether its probative value is substantially outweighed by the need to ensure a fair trial.[5787] When making this determination, the trial chamber should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.[5788]

[5778] Kanyabashi Appeal Brief, para. 141.
[5779] Kanyabashi Appeal Brief, para. 141. *See also* Kanyabashi Notice of Appeal, sub-para. 1.7.2.2.
[5780] Kanyabashi Appeal Brief, para. 142. *See also* Kanyabashi Notice of Appeal, sub-para. 1.7.2.
[5781] Kanyabashi Appeal Brief, para. 143.
[5782] Kanyabashi Appeal Brief, para. 143.
[5783] Prosecution Response Brief, para. 1739. *See also ibid.*, para. 1959.
[5784] Prosecution Response Brief, para. 1737.
[5785] Prosecution Response Brief, para. 1738.
[5786] *Čelebići* Appeal Judgement, para. 283. *See also Gotovina et al.* 1 July 2010 Appeal Decision, para. 23; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008, para. 10.
[5787] *Gotovina et al.* 1 July 2010 Appeal Decision, para. 23; *Čelebići* Appeal Judgement, para. 283.
[5788] *Gotovina et al.* 1 July 2010 Appeal Decision, para. 23. *See also Čelebići* Appeal Judgement, para. 283.

2490. Kanyabashi does not dispute that it was reasonable for the Trial Chamber to consider whether he exercised due diligence in identifying and presenting Witness D-2-23-C but challenges the Trial Chamber's conclusion that he failed to do so. However, like at trial, Kanyabashi fails on appeal to explain the reasons why he only sought leave to call Witness D-2-23-C at such a late stage. His general claim that it was difficult to obtain the cooperation of witnesses fearing for their lives and his undeveloped argument that the Trial Chamber should have "softened" the diligence requirement in order to avoid a miscarriage of justice falls short of demonstrating an error in the Trial Chamber's determination that he failed to exercise due diligence in obtaining the evidence in a timely manner.

2491. Kanyabashi's general and unsubstantiated argument that the Trial Chamber disregarded the specificities of Witness D-2-23-C's proposed testimony also fails to demonstrate that the Trial Chamber erred in concluding that the evidence of this witness would have been repetitive of the evidence of the witness it expected to hear and the many witnesses already heard on the question of Kanyabashi's absence from Rango Market and the issue of fabrication of evidence.[5789] Likewise, Kanyabashi does not adduce any convincing argument to show that the Trial Chamber erred in concluding that the reopening of his case would have further delayed the proceedings and that the probative value of the evidence did not outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings.[5790]

2492. Accordingly, the Appeals Chamber concludes that Kanyabashi has failed to demonstrate that the Trial Chamber committed a discernible error in its 2 July 2008 Decision by denying his request to reopen his case to add Witness D-2-23-C.

3. 19 January 2009 Decision

2493. On 18 November 2008, Kanyabashi requested the Trial Chamber to reconsider its decision to deny the addition of Witness D-2-23-C to his witness list. He submitted that the testimonies of Prosecution Witness QA and Defence Witness D-2-21-T about the fabrication of false accusations against him and the Appeals Chamber's decision of 8 October 2008 in the *Munyakazi* case constituted new elements justifying reconsideration of the 2 July 2008 Decision.[5791] Kanyabashi

[5789] *See* 2 July 2008 Decision, para. 26. Kanyabashi does not explain how Witness D-2-23-C's evidence was distinct from that of Witnesses D-2-18-O and D-13-D and does not discuss the other witnesses mentioned by the Trial Chamber.
[5790] 2 July 2008 Decision, para. 27.
[5791] Kanyabashi 18 November 2008 Motion, paras. 6-16, 25, 26, 28, 30, 32, 45, p. 11.

further requested the Trial Chamber to reopen his case in order for Witness D-11-AB to provide evidence on the fabrication of evidence against him.[5792]

2494. The Trial Chamber denied both requests on 19 January 2009.[5793] The Trial Chamber found that Kanyabashi had failed to show that the evidence of Witnesses QA and D-2-21-T or the *Munyakazi* appeal decision constituted new facts or material changes in circumstances warranting reconsideration of the 2 July 2008 Decision and the reopening of the Defence case to hear Witness D-2-23-C.[5794] As regards the addition of Witness D-11-AB, the Trial Chamber found that Kanyabashi had failed to demonstrate that with reasonable diligence, the evidence could not have been identified and presented during his case-in-chief.[5795] It further stated that it was not convinced that the probative value of Witness D-11-AB's expected testimony would outweigh the prejudice caused by delaying the conduct of the proceedings, noting that it had already heard several witnesses on the alleged fabrication of evidence and that further delay in the proceedings would cause prejudice to the other parties.[5796] The Trial Chamber concluded that none of the alleged new elements advanced by Kanyabashi constituted exceptional circumstances warranting the reopening of his case and the addition of Witness D-11-AB to his witness list.[5797]

2495. Kanyabashi submits that the Trial Chamber erred in denying his requests for reconsideration of the 2 July 2008 Decision and to reopen his case to allow Witness D-11-AB to testify.[5798] In relation to his request for reconsideration, Kanyabashi contends that the Trial Chamber erred in failing to find that the recall of Witness QA, the testimony of Witness D-2-21-T, and the "localisation of [Witness] D-11-AB" constituted new facts sufficiently serious to warrant reconsideration of its decision denying his request to add Witness D-2-23-C to his witness list.[5799] He also reiterates that the Trial Chamber erred in considering that the evidence was repetitive and that hearing it would prejudice the parties as well as in imposing an excessively heavy burden on him in finding that he did not exercise diligence.[5800]

[5792] Kanyabashi 18 November 2008 Motion, paras. 30, 33, 42-45, p. 11.
[5793] 19 January 2009 Decision, paras. 39, 43, p. 10.
[5794] 19 January 2009 Decision, paras. 36, 38.
[5795] 19 January 2009 Decision, para. 41.
[5796] 19 January 2009 Decision, para. 42.
[5797] 19 January 2009 Decision, para. 43.
[5798] Kanyabashi Notice of Appeal, sub-paras. 1.7.3-1.7.3.2, 3.9; Kanyabashi Appeal Brief, paras. 144-146, 339. The Appeals Chamber notes that Kanyabashi did not reiterate or substantiate in his appeal brief the allegation in his notice of appeal that the Trial Chamber erred in its 19 January 2009 Decision in denying his alternative request for separate trials, which the Appeals Chamber therefore dismisses without further consideration. *See* Kanyabashi Notice of Appeal, sub-para. 1.7.3.3.
[5799] Kanyabashi Notice of Appeal, sub-para. 1.7.3.1; Kanyabashi Appeal Brief, para. 145. Kanyabashi refers to the evidence of Witnesses QA, D-2-21-T, and D-11-AB on the issue of fabrication of evidence. *See idem.*
[5800] Kanyabashi Notice of Appeal, sub-para. 1.7.3.1; Kanyabashi Appeal Brief, para. 145.

2496. With respect to his request to add Witness D-11-AB to his witness list, Kanyabashi submits that he exercised diligence as the witness was difficult to locate and that the Trial Chamber placed an "excessively heavy burden" on him.[5801] He adds that the evidence of Witness D-11-AB was not repetitive and could have corroborated the allegations of fabrication of evidence by Prosecution Witnesses QP and QAM,[5802] and that Witnesses "D-13-D and D-2-18-O did not testify about the same meetings."[5803] Kanyabashi further asserts that the probative value of the expected testimony of Witness D-11-AB "far outweighed the prejudice" caused by delaying the trial proceedings.[5804]

2497. The Prosecution responds that Kanyabashi fails to demonstrate any error in the Trial Chamber's exercise of its discretion in denying reconsideration of its earlier ruling on Witness D-2-23-C and Kanyabashi's request to reopen his case to call Witness D-11-AB.[5805]

2498. The Appeals Chamber observes that Kanyabashi merely repeats the arguments he made at trial in support of his request for the reconsideration of the 2 July 2008 Decision without demonstrating that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber. His arguments in this respect are therefore rejected.

2499. Concerning the addition of Witness D-11-AB to his witness list, the Appeals Chambers notes that Kanyabashi repeats his submission at trial that it was difficult to locate the witness, but does not explain how the Trial Chamber erred in finding that his Defence had "not sufficiently explained why it was unable to identify Witness D-11-AB until seven years after the beginning of the trial."[5806] Apart from referring to his submissions at trial that two of his witnesses had discussed different meetings,[5807] Kanyabashi does not substantiate his general contention that the evidence of Witness D-11-AB would not have been repetitive of the evidence already heard. His argument that the probative value of the expected testimony of this witness "far outweighed the prejudice" caused by delaying the trial proceedings is similarly not substantiated. The Appeals Chamber therefore finds that Kanyabashi fails to demonstrate that the Trial Chamber erred in the exercise of its discretion in denying his request to reconsider its 2 July 2008 Decision and to reopen his case to call Witness D-11-AB.

2500. Consequently, the Appeals Chamber dismisses Kanyabashi's challenges against the 19 January 2009 Decision.

[5801] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2. *See also* Kanyabashi Appeal Brief, para. 146.
[5802] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2.
[5803] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2; Kanyabashi Appeal Brief, para. 146.
[5804] Kanyabashi Appeal Brief, para. 146.
[5805] Prosecution Response Brief, paras. 1740-1743.
[5806] 19 January 2009 Decision, para. 41.
[5807] Kanyabashi Appeal Brief, para. 146.

4. Conclusion

2501. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has failed to demonstrate any discernible error in the exercise of the Trial Chamber's discretion with respect to its 15 February 2008, 2 July 2008, and 19 January 2009 decisions. Accordingly, the Appeals Chamber dismisses Grounds 1.7, 3.9, and 3.10 of Kanyabashi's appeal.

B. Indictment (Grounds 1.1, 2.1, 2.2, 2.7 in part, 3.1)

2502. Kanyabashi submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.[5808] He also contends that the Trial Chamber erred in failing to assess the cumulative effect of the numerous defects of the Indictment on his fair trial rights.[5809] Kanyabashi requests that the Appeals Chamber quash the Trial Judgement and acquit him on all counts.[5810]

2503. The Appeals Chamber will examine in turn Kanyabashi's contentions related to notice of the allegations concerning Kabakobwa Hill, Matyazo Clinic, and the acts of incitement by megaphone.

1. Kabakobwa Hill (Ground 1.1)

2504. The Trial Chamber found that at least hundreds, if not thousands, of Tutsi refugees were killed at Kabakobwa Hill as a result of an attack conducted by soldiers, civilians, and members of the Ngoma commune police on 22 April 1994.[5811] While the Trial Chamber found that the Prosecution did not establish that Kanyabashi either ordered or was present during the attack, it concluded that Kanyabashi, as *bourgmestre* of Ngoma Commune, exercised effective control over the members of the Ngoma commune police, knew or had reason to know that they participated in the attack, and took no steps to prevent the attack or punish any Ngoma commune policeman for participating in it.[5812] The Trial Chamber inferred Kanyabashi's knowledge from his awareness of the Tutsi refugees' presence at Kabakobwa, the fact that he should have been able to hear the gunshots from the Ngoma commune office during the attack, the relatively small number of Ngoma policemen, the control he exercised over them, and his regular contact with them as well as from his public condemnation of the killings perpetrated at Kabakobwa Hill during a meeting at Huye Stadium around 25 or 26 April 1994.[5813]

2505. Based on these findings, the Trial Chamber convicted Kanyabashi of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) as a superior

[5808] Kanyabashi Notice of Appeal, sub-paras. 1.1-1.1.3, 2.1-2.2.5, 2.7.3, 3.1, 3.1.1-3.1.9; Kanyabashi Appeal Brief, paras. 8, 149-168, 225-227, 229-253. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body of the text of the present section when referring to the Kanyabashi Indictment.
[5809] Kanyabashi Notice of Appeal, sub-paras. 1.1.3, 3.1.9. *See also* Kanyabashi Appeal Brief, heading sub-ground 3.1.9 at p. 97, paras. 167, 168.
[5810] Kanyabashi Notice of Appeal, para. 36; Kanyabashi Appeal Brief, paras. 8, 227, 395.
[5811] Trial Judgement, paras. 1711, 1740, 1741, 1756, 5791, 5800.
[5812] Trial Judgement, paras. 1720, 1756, 5791, 5800-5808. The Trial Chamber noted that the Prosecution only charged Kanyabashi with superior responsibility for the attack at Kabakobwa Hill. *See ibid.*, para. 5793.
[5813] Trial Judgement, paras. 5805-5807.

pursuant to Article 6(3) of the Statute for failing to prevent the crimes committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and for failing to punish them.[5814]

2506. In summarising the Prosecution case against Kanyabashi with respect to the massacre at Kabakobwa Hill, the Trial Chamber referred to paragraphs 4.2, 4.3, 6.29, 6.32, 6.33, 6.45, and 6.65 of the Indictment.[5815] The Indictment indicates that the allegations related to Kabakobwa Hill in paragraphs 6.32, 6.33, and 6.65 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Article 6(3) of the Statute.[5816]

2507. Kanyabashi submits that the Trial Chamber erred in convicting him in relation to the killings committed at Kabakobwa Hill on the basis of conduct with which he was not charged.[5817] He argues that the Prosecution alleged in the Indictment that he was responsible as a superior based on his presence at the crime scene and the orders he gave, not based on his mere knowledge and failure to act.[5818] Kanyabashi contends that he never received notice of the conduct on the basis of which he

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[5814] Trial Judgement, paras. 5809, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.

[5815] Trial Judgement, paras. 1487, 1488, 1510, 1511, 5638, 5793, 5801, fns. 3578-3580, 14584, 14679, 14680. Paragraphs 4.2, 4.3, 6.29, 6.32, 6.33, 6.45, and 6.65 of the Kanyabashi Indictment read as follows:

> 4.2 During the events referred to in this indictment, Joseph Kanyabashi held the office of *Bourgmestre* of Ngoma *commune* in Butare *préfecture* from April 1974 until leaving Rwanda around 4 July 1994.
>
> 4.3 In his capacity as *Bourgmestre* of Ngoma *commune*, Butare *préfecture*, Joseph Kanyabashi exercised authority over his subordinates.
>
> 6.29 Ngoma *commune* was the largest *commune* in Butare *préfecture* at the time of the events. Its *Bourg*[]*mestre*, Joseph Kanyabashi, had been named in 1974. Ngoma *commune* was the site of numerous massacres in which Joseph Kanyabashi was either directly involved or in which his subordinates as set out in paragraph 6.32 below, acting under his orders, were implicated.
>
> 6.32 On 21 and 22 April 1994, Tutsis who were fleeing the massacres took refuge in a pasture in Kabakobwa *cellule*, on the orders of Joseph Kanyabashi, who had promised to protect them. Joseph Kanyabashi subsequently ordered his subordinates, notably *conseillers de secteur* and communal policemen, on the one hand, and asked certain members of the Hutu population, on the other hand, to go to Kabakobwa *cellule* to eliminate the refugees.
>
> 6.33 On 22 April 1994, at around 4:00pm the communal policemen and *conseillers de secteur*, assisted by Hutu peasant farmers and by militiamen, attacked the refugees. Subsequently, Joseph Kanyabashi called in reinforcements from the Presidential Guard. On their arrival, they took part in the attacks.
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> 6.45 Furthermore, on several occasions between 20 April and June 1994, Joseph Kanyabashi encouraged and instructed the soldiers and militiamen, and certain members of the civilian population, to search for the Tutsis who had escaped the massacres, in order to exterminate them. These instructions were given notably on 21 April in Butare, in late April in Save, and in June 1994 near Butare.
>
> 6.65 Knowing that massacres of the civilian population were being committed, political and military authorities, including Joseph Kanyabashi, took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

[5816] Kanyabashi Indictment, pp. 41-45.

[5817] Kanyabashi Notice of Appeal, sub-paras. 1.1-1.1.3; Kanyabashi Appeal Brief, para. 8; Kanyabashi Reply Brief, paras. 5-10. *See also* AT. 20 April 2015 pp. 4-9, 48.

[5818] Kanyabashi Notice of Appeal, sub-para. 1.1.2; Kanyabashi Appeal Brief, para. 8. *See also* AT. 20 April 2015 pp. 4, 5. At the appeals hearing, Kanyabashi argued that the Prosecution "never envisaged that [he] did not take part in the massacre" and that "[t]he case is that he was aware of the crimes because he ordered them." *See ibid.*, p. 6. He also emphasised that the Prosecution did not bring any evidence about the meeting the Trial Chamber found that he attended on 22 April 1994 or about any other relevant meeting. *See ibid.*, p. 7.

was ultimately found to have the requisite knowledge and to have failed to take the necessary and reasonable measures to prevent or punish.[5819] He argues that the prejudice he suffered in this respect is "irreparable" as his defence focused on showing that he did not give any orders and that the communal police did not take part in the attack.[5820] Kanyabashi requests that his convictions in relation to the killings committed at Kabakobwa Hill be vacated and that he be acquitted of all counts in this respect.[5821]

2508. The Prosecution responds that the Indictment provided Kanyabashi with notice of his knowledge and failure to prevent and punish the crimes of his subordinates at Kabakobwa Hill.[5822] It argues that the pleading of Kanyabashi's ordering and supervising the massacre in paragraph 6.32 of the Indictment necessarily implied that he had knowledge of the actions of his subordinates and provided notice of the failure to prevent and punish the crimes committed by members of the Ngoma commune police.[5823] The Prosecution also contends that additional notice of Kanyabashi's knowledge and failure to prevent and punish was given in paragraph 6.65 of the Indictment and through the Prosecution Pre-Trial Brief.[5824]

2509. The Prosecution also argues that "it is sufficient to plead that an accused ordered subordinates to commit a crime so as to put an accused on notice of his knowledge and failure to prevent or punish for purposes of Article 6(3)" and that "[i]f evidence is eventually found insufficient to establish ordering under Article 6(1), it is irrelevant in determining whether an indictment properly pleads knowledge and failure to prevent or punish under Article 6(3)."[5825] According to the Prosecution, this contention finds support in the *Bagosora and Nsengiyumva* Appeal Judgement and *Ntabakuze* Appeal Judgement where the Appeals Chamber vacated convictions for ordering under Article 6(1) of the Statute because it found insufficient evidence that the accused ordered the crimes, but still upheld the convictions under Article 6(3) of the Statute for the same crimes.[5826] At the appeals hearing, the Prosecution argued that Kanyabashi did not suffer

[5819] Kanyabashi Appeal Brief, para. 8.
[5820] Kanyabashi Appeal Brief, para. 8. *See also* AT. 20 April 2015 pp. 5-8, 54.
[5821] Kanyabashi Notice of Appeal, para. 15; Kanyabashi Appeal Brief, para. 8.
[5822] Prosecution Response Brief, para. 1613. *See also* AT. 20 April 2015 pp. 24, 25.
[5823] Prosecution Response Brief, paras. 1614, 1617, 1622. At the appeals hearing, the Prosecution argued that the existence of a subordinate-superior relationship necessarily implies reporting from the subordinate to the supervisor. *See* AT. 20 April 2015 p. 25, *referring to Halilović* Appeal Judgement, para. 86.
[5824] Prosecution Response Brief, paras. 1614-1616, 1618, *referring to* Prosecution Pre-Trial Brief, para. 20.
[5825] Prosecution Response Brief, para. 1621.
[5826] Prosecution Response Brief, paras. 1619, 1620, *referring to Ntabakuze* Appeal Judgement, para. 119, *Bagosora and Nsengiyumva* Appeal Judgement, paras. 279-284, 300, 302.

prejudice from the alleged lack of notice concerning the source of his knowledge of the crimes committed by the communal police at Kabakobwa Hill.[5827]

2510. Kanyabashi replies that: (i) the Prosecution case throughout trial was that he ordered the attack; (ii) the Indictment failed to plead the conduct for which he was ultimately convicted; and (iii) paragraph 6.65 of the Indictment is overly vague and did not provide notice regarding his conduct *vis-à-vis* his subordinates concerning Kabakobwa Hill.[5828] Kanyabashi also submits that the Prosecution's reliance on the *Bagosora and Nsengiyumva* Appeal Judgement and *Ntabakuze* Appeal Judgement is inapposite since, in those cases, the Appeals Chamber seems to have recommended a case-by-case examination of the indictment as a whole, rather than establishing a general principle.[5829]

2511. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead the following material facts:

> (i) the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (ii) the criminal conduct of those others for whom the accused is alleged to be responsible;
>
> (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
>
> (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[5830]

2512. The Appeals Chamber observes that, read in isolation, paragraphs 6.32 and 6.33 of the Indictment do not *prima facie* appear to allege Kanyabashi's superior responsibility for the killings perpetrated at Kabakobwa Hill but, rather, his responsibility for ordering the killings pursuant to Article 6(1) of the Statute. The Appeals Chamber recalls, however, that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the

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[5827] Specifically, the Prosecution argued that Kanyabashi: (i) was given notice by the Kanyabashi Indictment that the Tutsi refugees were at Kabakobwa Hill and defended against this allegation; (ii) received notice from the Kanyabashi Indictment that, as a superior, he would receive reports from his subordinates and the fact that he claimed at trial that he urged the communal policemen not to commit crimes shows that he defended against "this source of knowledge"; (iii) had notice that he was alleged to know that the attack at Kabakobwa Hill was conducted on a large-scale; and (iv) was informed by the summary of Witness QAM's anticipated evidence and the witness's prior statement that he was alleged to have received a report on the day of the attack from the *Interahamwe*, an allegation he defended against. *See* AT. 20 April 2015 pp. 26, 27.

[5828] Kanyabashi Reply Brief, paras. 5-8, 10. *See also* AT. 20 April 2015 pp. 4, 5, 48.

[5829] Kanyabashi Reply Brief, para. 9, *referring to Bagosora and Nsengiyumva* Appeal Judgement, paras. 204, 207, 208, *Ntabakuze* Appeal Judgement, paras. 119, 123-126.

[5830] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218.

indictment must be considered as a whole.[5831] When reading paragraphs 6.32 and 6.33 together with the charging section of the Indictment, it becomes clear that Kanyabashi was charged under Counts 2, 6, 7, and 9 in relation to the Kabakobwa Hill massacre pursuant to superior responsibility since paragraphs 6.32 and 6.33 were indicated as being pursued under these counts solely under Article 6(3) of the Statute.[5832]

2513. Considering the Indictment as a whole, the Appeals Chamber is of the view that it was neither vague nor ambiguous regarding Kanyabashi's alleged superior responsibility in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994. Paragraphs 6.32 and 6.33 of the Indictment, read together with paragraphs 4.2, 4.3 and 6.65, plead with precision all relevant material facts supporting the charge against Kanyabashi regarding the Kabakobwa Hill massacre. Paragraph 6.32 of the Indictment, in particular, expressly identifies the source of Kanyabashi's criminal responsibility in the orders that he gave to the members of the Ngoma commune police to eliminate the Tutsi refugees at Kabakobwa Hill.[5833] Paragraph 6.65 of the Indictment sets out that Kanyabashi knew that massacres of the civilian population were being committed and took no measures to stop them.

2514. The Prosecution reiterated its case as set forth in paragraph 6.32 of the Indictment in its pre-trial brief,[5834] presented evidence supporting this particular case throughout the trial,[5835] relied on Kanyabashi ordering and supervising the killings perpetrated at Kabakobwa Hill in its closing

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[5831] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.

[5832] *See* Kanyabashi Indictment, pp. 41-45. The Appeals Chamber notes that, while originally charging Kanyabashi under Counts 2, 6, 7, and 9 in relation to the Kabakobwa Hill massacre pursuant to both Articles 6(1) and 6(3) of the Statute, the Prosecution amended the indictment on 2 November 2000 to charge Kanyabashi solely pursuant to Article 6(3) of the Statute in this respect. *Compare The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999 ("Kanyabashi Amended Indictment"), pp. 42-48 *with The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999 and 31 May 2000, 2 November 2000 ("Kanyabashi Third Amended Indictment"), pp. 41-45. The Prosecution's amendment resulted from the Trial Chamber's order that the Prosecution clearly distinguish the acts for which Kanyabashi incurred criminal responsibility under Article 6(1) of the Statute from those for which he incurred criminal responsibility under Article 6(3) of the Statute since, in the view of the Trial Chamber, "the same facts cannot simultaneously give rise to the two types of responsibility". *See* 31 May 2000 Decision, paras. 5.9, 5.11, p. 8. The Appeals Chamber emphasises that cumulative charging is permissible. *See Simba* Appeal Judgement, para. 276; *Semanza* Appeal Judgement, paras. 308, 309; *Musema* Appeal Judgement, paras. 369, 370; *Čelebići* Appeal Judgement, para. 400.

[5833] *See also* Kanyabashi Indictment, para. 6.29 ("Ngoma *commune* was the site of numerous massacres, in which Joseph Kanyabashi was either directly involved or in which his subordinates as set out in paragraph 6.32 below, *acting under his orders*, were implicated.") (emphasis added).

[5834] Prosecution Pre-Trial Brief, para. 20 ("During the month of April 1994, thousands of Tutsi refugees gathered in different locations in Ngoma *commune*. They assembled in places such as Kabakobwa Cellule, Matyazo clinic and Ngoma Church, often on the recommendation of Joseph Kanyabashi (the long serving *Bourg*[]*mestre*) who had promised to protect them. *Instead of offering protection, Joseph Kanyabashi ordered and supervised their massacre by communal civil servants, soldiers and militiamen*.") (emphasis added).

[5835] *See* Trial Judgement, paras. 1490-1492, 1517-1529, 1538-1554, 1561-1565; Witness FAM, T. 6 March 2002 pp. 82-87, T. 13 March 2002 p. 58; Witness QCB, T. 20 March 2002 p. 123, T. 2 April 2002 pp. 10, 11, T. 3 April 2002 p. 74.

brief,[5836] and reiterated in its oral closing arguments that its case was that Kanyabashi was an active participant and organiser in the genocide and ordered the killings at Kabakobwa Hill.[5837] The Prosecution does not point to any other material facts pleaded at trial which would have provided an alternative basis for Kanyabashi's superior responsibility in relation to the Kabakobwa Hill massacre. In fact, the Prosecution specifically disputed Kanyabashi's alibi evidence that, at the time of the killings of Kabakobwa Hill, he was in his office chairing a meeting.[5838]

2515. Yet, the Trial Chamber, concluding that it was not proven that Kanyabashi either ordered or was present during the attack at Kabakobwa, found him responsible as a superior on the basis of the following material facts: (i) his awareness of the Tutsi refugees' presence at Kabakobwa; (ii) the fact that, on 22 April 1994, *Interahamwe* went to report to him upon seeing the number of refugees at Kabakobwa Hill, before returning to commence the attack; (iii) the fact that he should have been able to hear the gunshots from the Ngoma commune office during the attack; (iv) the relatively small number of Ngoma commune policemen, his control over them as well as the fact that he was in regular contact with these policemen and that several of them were stationed at his house on the weekend of the attack at Kabakobwa Hill; (v) the systematic and large-scale nature of the attack; (vi) his public condemnation of the killings during a meeting at Huye Stadium; and (vii) the fact that he took no steps to prevent the attack or punish any policeman involved in the attack.[5839]

2516. Although Kanyabashi's awareness of the Tutsi refugees' presence at Kabakobwa Hill and the allegation that he took no measures to stop the massacres of the civilian population were pleaded in the Indictment,[5840] it is apparent that the key source of Kanyabashi's knowledge and the conduct by which he was alleged to have failed to prevent or punish the crimes on the basis of which he was convicted was materially different from the acts expressly pleaded in the Indictment. As such, the Appeals Chamber considers that the Trial Chamber's findings were based upon a set of material facts different from those that were specifically pleaded in the Indictment, set forth in the

[5836] Prosecution Closing Brief, heading "(3)" at p. 411 ("Kanyabashi orders Tutsis at Kabakobwa to be killed"), paras. 41-44, 88-90, 95-97, 101 ("The Prosecution evidence in this regard is that by giving orders, providing training, weapons and encouragement to the militia to kill, Joseph Kanyabashi killed Tutsis and therefore is culpable for committing genocide through the acts of others pursuant to Article 6(3)."), 105-107 at pp. 397, 398, 409, 411, 413-415.
[5837] Prosecution Closing Arguments, T. 21 April 2009 pp. 13 ("It is the Prosecutor's case, Mr. President, that Joseph Kanyabashi was, in fact, an active participator, an active organiser, a person who planned, instigated, committed, ordered and/or abetted in the genocide that took place in Butare *préfecture*. At this juncture, Mr. President, I would like to take you a bit through the evidence with respect to these acts and conducts as well as inferences that he made during the period of April through July 1994 establishing that he had a specific genocidal intent to commit genocide against the Tutsis or illustrating his active participation in facilitating and providing training or giving orders and instructions to the perpetrators of the massacres that ensued."), 22-24.
[5838] Prosecution Closing Brief, paras. 175, 176 at pp. 433, 434 ("The Prosecutor has led credible and reliable evidence that the accused Kanyabashi was part and parcel of the killing machine at Kabakobwa on 22 April 1994. He was not stuck in his office or at home as claimed by D-2-YYYY."); Prosecution Closing Arguments, T. 21 April 2009 pp. 23, 24.
[5839] Trial Judgement, paras. 5805-5809.
[5840] *See* Kanyabashi Indictment, paras. 6.32, 6.65.

Prosecution Pre-Trial Brief, and pursued throughout the trial. The Appeals Chamber finds that the Trial Chamber erred in convicting Kanyabashi based on material facts that were not pleaded by the Prosecution in the Indictment and at trial.

2517. The Prosecution's argument that, by pleading that Kanyabashi ordered and supervised the killings, the Indictment necessarily implied his knowledge and provided notice of his failure to prevent and punish the crimes fails to appreciate Kanyabashi's contention. Kanyabashi does not contend that he lacked notice that he was alleged to have known that his subordinates were about to or had committed crimes and to have failed to prevent such acts or punish his culpable subordinates, but that he was convicted on the basis of different material facts than those specifically set forth in the Indictment and against which he defended at trial.

2518. The Prosecution does not show that, at any point in the Indictment, notice was provided to Kanyabashi that he could be held responsible as a superior in relation to the Kabakobwa Hill massacre on the basis of a conduct other than his ordering or encouraging the killings. While paragraph 6.65 of the Indictment referred to by the Prosecution generally alleges that Kanyabashi had knowledge that massacres were carried out and failed to take measures to stop them, it does not identify any source for such knowledge. Reading the Indictment as a whole, and given the phrasing of paragraph 6.65, it would not be reasonable to consider that this general paragraph provided Kanyabashi with notice of the material facts which ultimately underpinned his conviction on the basis of superior responsibility in relation to Kabakobwa Hill. The Appeals Chamber also observes that the Prosecution Pre-Trial Brief mirrors paragraph 6.32 of the Indictment regarding the material facts relied upon for the allegation related to Kabakobwa Hill[5841] and that neither the Prosecution Pre-Trial Brief nor any other information from the Prosecution provided Kanyabashi with timely, clear, and consistent information detailing the factual basis underpinning the charge for which he was ultimately convicted.[5842]

2519. Furthermore, the Prosecution overlooks that, in the *Bagosora and Nsengiyumva* and *Ntabakuze* cases, the Appeals Chamber found that, along with the specific allegations that the accused ordered their subordinates to commit the crimes, the respective indictments pleaded additional material facts underpinning their superior responsibility for the same crimes.[5843] In those cases, the Appeals Chamber upheld the convictions based on a different mode of liability which was properly pleaded in the indictments.

[5841] *See* Prosecution Pre-Trial Brief, para. 20.
[5842] The Appeals Chamber further notes that the summaries of the Prosecution witnesses' anticipated testimonies appended to the Prosecution Pre-Trial Brief did not provide any notice of a possible alternative basis for Kanyabashi's

2520. Based on the foregoing, the Appeals Chamber finds that Kanyabashi lacked notice of the material facts upon which the Trial Chamber convicted him as a superior in relation to the killings of Tutsi refugees committed at Kabakobwa Hill on 22 April 1994 and, accordingly, that the Trial Chamber erred in convicting him based on these killings.

2. Matyazo Clinic (Grounds 2.1, 2.2, and 2.7 in part)

2521. The Trial Chamber, Judge Ramaroson dissenting, found that in late April 1994, following an initial attack by soldiers, Kanyabashi went to Matyazo Clinic, addressed the Tutsi refugees sheltering there, and thereafter ordered soldiers to open fire on the Tutsis, resulting in many deaths.[5844] Noting that the Prosecution only charged him under Article 6(3) of the Statute in relation to this event,[5845] the Trial Chamber, Judge Ramaroson dissenting, convicted Kanyabashi of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(3) of the Statute for failing to prevent the soldiers from committing these killings and punish them.[5846]

2522. In summarising the Prosecution case against Kanyabashi with respect to this allegation, the Trial Chamber referred to paragraphs 4.3, 6.32, 6.34, and 6.65 of the Indictment.[5847] The Indictment indicates that the allegations in paragraphs 6.32 and 6.34 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Article 6(3) of the Statute, while the allegations in paragraph 6.65 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to both Articles 6(1) and 6(3) of the Statute.[5848]

2523. Kanyabashi submits that the Trial Chamber erred in convicting him as a superior in relation to the killings perpetrated at Matyazo Clinic in late April 1994 because: (i) he understood from the

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superior responsibility in relation to the Kabakobwa Hill killings. *See* Witness Summaries Grid, items 3, 7, 22, 52, 56, 58-60, 70, 73, 82, Witnesses QAM, FAM, FAJ, QP, QR, QW, RO, and SQ.

[5843] *See Ntabakuze* Appeal Judgement, para. 119; *Bagosora and Nsengiyumva* Appeal Judgement, para. 204.

[5844] Trial Judgement, paras. 2084, 2103, 5818. The Appeals Chamber recalls that it has decided to refer to the clinic in Matyazo Sector, Ngoma Commune, Butare Prefecture, as the "Matyazo Clinic". *See supra*, fn. 61.

[5845] Trial Judgement, para. 5819. The Trial Chamber noted that the Prosecution only charged Kanyabashi with superior responsibility for the attack at Matyazo and considered it "a serious omission on the part of the Prosecution." *See idem.*

[5846] Trial Judgement, paras. 5824, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.

[5847] Trial Judgement, paras. 2012, 2021, 5639, 5819, fns. 5248, 14585, 14698. Paragraph 6.34 of the Kanyabashi Indictment reads as follows:

> 6.34 In late April 1994, Tutsi who were fleeing the massacres found refuge at the Matyazo clinic in Ngoma *commune*. Following an initial attack by soldiers and militiamen, Joseph Kanyabashi went to the clinic and asked the Tutsi refugees to remain there for their own safety. Shortly thereafter, Joseph Kanyabashi ordered soldiers to open fire on the refugees. Several people were killed.

For paragraphs 4.3, 6.32, and 6.65 of the Kanyabashi Indictment, *see supra*, fn. 5815.

[5848] Kanyabashi Indictment, pp. 41-45. *See* Trial Judgement, para. 5819.

Indictment that he had to defend against allegations relating to a different attack that occurred on 22 April 1994; and (ii) the Indictment did not properly plead his superior responsibility under Article 6(3) of the Statute.[5849] The Appeals Chamber will address these contentions in turn.

(a) Dates of the Attack

2524. In reaching its findings on Kanyabashi's responsibility for the killings perpetrated at Matyazo Clinic, the Trial Chamber specified that, considering "the details of the attacks described by both the Prosecution and Defence, in particular the dates and times, […] the Defence's version of events could plausibly exist alongside the version advanced by the Prosecution."[5850] The Trial Chamber concluded that it was "possible that Matyazo Clinic was subject to two separate attacks; one on or around 22 April 1994 which took place in the morning and another towards the end of April 1994 which took place at night."[5851] The Trial Chamber observed that such a conclusion was consistent with paragraph 6.34 of the Indictment, which alleged that an initial attack took place at the clinic before the massacre with which Kanyabashi was charged.[5852] The Trial Chamber convicted Kanyabashi for the attack described by the Prosecution witnesses that took place in the evening towards the end of April 1994.[5853]

2525. Kanyabashi submits that he believed that he had to defend against the allegation of an attack that occurred on 22 April 1994 but that the Trial Chamber convicted him for a different attack that took place at the end of April 1994.[5854] In support of his contention, Kanyabashi: (i) points out that the Prosecution did not cross-examine Defence witnesses on an attack that would have occurred later than the one on 22 April 1994 about which they testified; (ii) relies on the Prosecution's reference in its closing submissions to 22 April 1994 as the date of the massacre; and (iii) asserts that the evidence does not support the conclusion that a second attack occurred in late April 1994.[5855]

2526. Kanyabashi also contends that the Prosecution case, as understood by him, never included the allegation that there had been two attacks on different days at Matyazo Clinic.[5856] According to him, paragraph 6.34 of the Indictment, "correctly interpreted", pleaded that the "initial attack" and

[5849] Kanyabashi Notice of Appeal, sub-paras. 2.1-2.2.5, 2.7.3; Kanyabashi Appeal Brief, paras. 149-168. *See also* Kanyabashi Reply Brief, paras. 45-54; AT. 20 April 2015 pp. 14-17, 23, 24 (French).
[5850] Trial Judgement, para. 2102.
[5851] Trial Judgement, para. 2102.
[5852] Trial Judgement, para. 2102.
[5853] Trial Judgement, paras. 2103, 5818-5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174.
[5854] Kanyabashi Notice of Appeal, sub-paras. 2.1-2.1.2; Kanyabashi Appeal Brief, paras. 149, 153-158, fn. 521. *See also* AT. 20 April 2015 pp. 9, 10.
[5855] Kanyabashi Appeal Brief, paras. 151-158, *referring*, *inter alia*, *to* Prosecution Closing Arguments, T. 20 April 2009 p. 57. *See also* Kanyabashi Reply Brief, para. 49.

the attack for which he was charged took place on the same day, which supported his understanding that the attack with which he was charged occurred on 22 April 1994.[5857] In this regard, Kanyabashi highlights that the prior statement of Witness QI relied upon by the Prosecution as supporting material for paragraph 6.34 of the Indictment mentions that the attacks occurred on the same day.[5858] In his view, he was "misled" as to the date of the attack and suffered prejudice as a result, noting, in particular, that he presented an alibi only for the period between 21 and 24 April 1994.[5859]

2527. The Prosecution responds that the date pleaded in paragraph 6.34 of the Indictment was sufficiently specific for Kanyabashi to prepare his defence.[5860] It submits that, in the event of any ambiguity, further notice that the attack occurred at night and in late April 1994 was provided by the summaries of Witnesses RL's and QI's anticipated evidence appended to the Prosecution Pre-Trial Brief and their respective prior statements to Tribunal investigators disclosed four years before the beginning of the trial.[5861] It contends that there was no reason for Kanyabashi to assume that the attack took place on 22 April 1994 since that specific date was not mentioned either in the Indictment or in any post-indictment communications.[5862] It also argues that Kanyabashi's claim that he understood that he had to defend against an attack that took place on 22 April 1994 is not supported by the record.[5863] The Prosecution adds that Kanyabashi was not charged with the "initial attack" evoked in paragraph 6.34 of the Indictment and that, as a result, this initial attack was not a material fact that needed to be pleaded or proven.[5864]

2528. Kanyabashi replies that, contrary to the Prosecution's suggestion, the Indictment and the Prosecution Pre-Trial Brief do not specify the date and the time of the attack, and that the disclosure of Witnesses QI's and RL's statements are irrelevant for the purposes of notice.[5865] He argues that

[5856] Kanyabashi Notice of Appeal, sub-para. 2.1.1; Kanyabashi Appeal Brief, para. 151. *See also* Kanyabashi Reply Brief, para. 47.
[5857] Kanyabashi Notice of Appeal, sub-para. 2.1.2; Kanyabashi Appeal Brief, para. 152 (emphasis omitted).
[5858] Kanyabashi Appeal Brief, para. 152, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Prosecutor's Request for Leave to Amend Indictment, Attachment B "Supporting Material", 18 August 1998 (confidential) ("Supporting Material to Kanyabashi Indictment"), pp. 108, 109, Statement of Witness QI of 11 June 1996, first disclosed in redacted version on 9 January 1997. *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Kanyabashi - Redacted Witness Statement No. 769/K96, 9 January 1997. The unredacted version of Witness QI's 11 June 1996 statement was admitted into evidence on 19 April 2004 as Exhibit D201 (confidential) ("Witness QI's Statement").
[5859] Kanyabashi Notice of Appeal, sub-paras. 2.1.2, 2.7.3 (emphasis omitted); Kanyabashi Appeal Brief, heading 2.1.2 at p. 55, paras. 149, 156, 162, 225-227. *See also* Kanyabashi Reply Brief, para. 49.
[5860] Prosecution Response Brief, paras. 1745, 1746. *See also* AT. 20 April 2015 pp. 33-35.
[5861] Prosecution Response Brief, paras. 1747, 1748, 1753. *See also* AT. 20 April 2015 p. 33.
[5862] Prosecution Response Brief, paras. 1748, 1753.
[5863] Prosecution Response Brief, para. 1748. *See also* AT. 20 April 2015 pp. 33, 34.
[5864] Prosecution Response Brief, paras. 1752, 1753.
[5865] Kanyabashi Reply Brief, para. 45.

these witnesses' statements could in any event be interpreted as placing the attack on Matyazo Clinic on 22 April 1994.[5866]

2529. The Appeals Chamber understands Kanyabashi to claim that he received notice that the events invoked in paragraph 6.34 of the Indictment were alleged to have occurred on 22 April 1994, not that the Indictment was vague in respect of the date of the killings allegedly perpetrated at Matyazo Clinic by soldiers acting under his orders. However, in support of his contention that he was misled into believing that he was charged for an attack that occurred on 22 April 1994, Kanyabashi relies on the evidence adduced at trial and the Prosecution's conduct of its case, without pointing to any part of the Indictment or post-indictment communications which would have provided him notice of this specific date.[5867]

2530. The Appeals Chamber observes that paragraph 6.34 of the Indictment, which sets out the charge relating to Matyazo Clinic, does not refer to 22 April 1994 but to "late April 1994" and that nothing in the Indictment suggests that the latter reference should have been interpreted as referring to 22 April 1994 in particular. There is also no reference to any particular date or information from which to infer the date of 22 April 1994 in the excerpt of Witness QI's statement provided as supporting material by the Prosecution and relied upon by Kanyabashi, in the statement from which the excerpt was extracted, or in the summary of Witness QI's anticipated evidence appended to the Prosecution Pre-Trial Brief.[5868] In fact, the only specific date provided prior to the trial is that of "28 April 1994" referred to in the summary of Witness RL's anticipated testimony, as well as in Witness RL's prior statements of 11 July 1996 and 16 January 1997 disclosed in April 1997.[5869] As to Kanyabashi's argument that the Prosecution referred to 22 April 1994 in its closing submissions as the date of the attack on Matyazo Clinic, the Appeals Chamber observes that it is in fact unclear as to which massacre the Prosecution was referring in its oral submissions and

[5866] Kanyabashi Reply Brief, para. 45. *See also* AT. 20 April 2015 pp. 15, 16 (French).
[5867] To the extent that Kanyabashi's arguments challenge the reasonableness of the Trial Chamber's assessment of the evidence, these arguments are addressed below in Section VIII.D.
[5868] *See* Supporting Material to Kanyabashi Indictment, pp. 108, 109; Witness QI's Statement; Witness Summaries Grid, item 56, Witness QI ("Witness QI's Summary").
[5869] Witness Summaries Grid, item 70, Witness RL, *referring to* 28 April 1994; Statement of Witness RL of 11 July 1996 (placing the attack five days after 23 April 1994), disclosed in redacted version on 10 April 1997; Statement of Witness RL of 16 January 1997 (referring to "28 April 1994"), disclosed in redacted version on 10 April 1997. *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Statements of Witness "A" – *Déclarations du témoin "A"*, 10 April 1997 (confidential). The unredacted versions of Witness RL's 11 July 1996 and 16 January 1997 statements were admitted into evidence on 19 April 2004 as part of Exhibits D202 and D203 (confidential). Contrary to Kanyabashi's argument in reply that the witnesses' statements could not serve to provide notice, the Appeals Chamber considers that, upon reading the summaries of Witnesses QI's and RL's anticipated evidence in the Witness Summaries Grid, Kanyabashi should have been prompted to examine their previously disclosed written statements.

considers that, in any event, such indication is immaterial with respect to the question of notice of the charges prior to the start of the trial.[5870]

2531. In light of the supporting material to the indictment provided by the Prosecution, the Appeals Chamber considers that it was indeed reasonable for Kanyabashi to understand that the two attacks on Matyazo Clinic alleged in paragraph 6.34 of the Indictment occurred on the same day.[5871] Contrary to the Trial Chamber's statement, the conclusion on the possible existence of two separate attacks, one on or around 22 April 1994 and another towards the end of April 1994, was therefore not consistent with paragraph 6.34 as interpreted in light of the relevant supporting material.[5872] However, because Kanyabashi was neither charged nor convicted in relation to the "initial attack" that allegedly occurred on the day of the attack on Matyazo Clinic for which he was convicted, the Appeals Chamber does not find that this error on the part of the Trial Chamber invalidates its decision to convict Kanyabashi for the attack on Matyazo Clinic.

2532. Accordingly, the Appeals Chamber finds that Kanyabashi has failed to demonstrate that the Trial Chamber convicted him for a different attack against Matyazo Clinic than the one pleaded in the Indictment.

(b) Superior Responsibility

2533. In convicting Kanyabashi in relation to the killings at Matyazo Clinic in late April 1994, the Trial Chamber found that Kanyabashi's alleged superior responsibility over the soldiers and their role in the events was correctly pleaded in the Indictment.[5873] In particular, while noting that paragraph 6.34 of the Indictment did not specifically describe the soldiers as Kanyabashi's subordinates, the Trial Chamber observed that paragraph 4.3 of the Indictment alleged that Kanyabashi exercised authority over his subordinates in his capacity as *bourgmestre* of Ngoma Commune and that paragraph 6.32 of the Indictment indicated that these subordinates were not limited to the *conseillers de secteur* and communal policemen but envisaged the existence of other categories of subordinates.[5874] Considering further that paragraph 6.34 referred to Kanyabashi giving orders to soldiers, "which implies that [he] held a position of authority *vis-à-vis* soldiers", the Trial Chamber found it established from reading the Indictment as a whole that the soldiers referred to in paragraph 6.34 were Kanyabashi's alleged subordinates and that this paragraph was

[5870] Kanyabashi Appeal Brief, para. 151, *referring to* Prosecution Closing Arguments, T. 20 April 2009 p. 57.
[5871] *See* Supporting Material to Kanyabashi Indictment, p. 109. *See also* Witness QI's Statement, p. K0028870 (Registry pagination).
[5872] *See* Trial Judgement, para. 2102.
[5873] Trial Judgement, paras. 2020, 2021. *See also ibid.*, paras. 5639, 5820, 5821.
[5874] Trial Judgement, para. 2021.

"sufficiently specific to meet the standards set forth in the case law regarding Article 6 (3) liability."[5875]

2534. Kanyabashi submits that the Trial Chamber erred in concluding that, based on an overall reading of the Indictment, paragraph 6.34 of the Indictment identifies the soldiers as his alleged subordinates and contends that the defect in the Indictment concerning the identification of the soldiers as his subordinates was not curable.[5876] He argues that, in finding that paragraph 6.32 of the Indictment could be interpreted to also include soldiers, the Trial Chamber went beyond the scope of the Indictment and circumvented its previous decision which ordered the Prosecution to specify the identity of his alleged subordinates in paragraph 6.29 of the indictment.[5877] Kanyabashi recalls that, following the Trial Chamber's order, the Prosecution amended paragraph 6.29 of the indictment by simply referring to paragraph 6.32, which only explicitly identifies *conseillers de secteur* and communal policemen as his subordinates.[5878] Kanyabashi submits that, in light of this amendment, he legitimately understood that the *conseillers de secteur* and communal policemen were alleged to be his subordinates with respect to all charges of the Indictment.[5879]

2535. According to Kanyabashi, he was "misled" and, as a result, centred his defence on denying that *conseillers de secteur* and communal policemen took part in the massacre and endeavoured "to demonstrate that the soldiers were the ones responsible for the attack and that he had no authority over them."[5880] He also points out that his counsel declared at the time of Witness QI's testimony "that he had not prepared to deal with 6(3)"[5881] and that he "did not cross-examine on effective control over the specific soldiers."[5882]

2536. The Prosecution responds that the Trial Chamber correctly found that Kanyabashi received sufficient notice that he was charged with superior responsibility for the crimes committed by the

[5875] Trial Judgement, para. 2021. *See also ibid.*, para. 5639.
[5876] Kanyabashi Notice of Appeal, sub-paras. 2.2-2.2.6; Kanyabashi Appeal Brief, paras. 159-161, 165, 166; Kanyabashi Reply Brief, paras. 50-55.
[5877] Kanyabashi Appeal Brief, paras. 159, 160, *referring to* 31 May 2000 Decision, para. 5.21. *See also ibid.*, para. 165; Kanyabashi Reply Brief, paras. 51, 53; AT. 20 April 2015 p. 53.
[5878] Kanyabashi Notice of Appeal, sub-para. 2.2.1; Kanyabashi Appeal Brief, para. 159. Kanyabashi also points out that paragraph 6.29 of the Kanyabashi Indictment immediately follows the sub-heading "Ngoma Commune" and that all sites specified in the other sub-headings were located in Ngoma Commune, of which he was the *bourgmestre*. *See idem.*
[5879] Kanyabashi Notice of Appeal, sub-para. 2.2.2; Kanyabashi Appeal Brief, para. 159.
[5880] Kanyabashi Appeal Brief, para. 162. *See also* Kanyabashi Reply Brief, para. 55; AT. 20 April 2015 pp. 53, 54.
[5881] Kanyabashi Appeal Brief, para. 163, *referring to* Witness QI, T. 23 March 2004 pp. 53-57.
[5882] Kanyabashi Appeal Brief, para. 164. Kanyabashi also generally submits that "[t]here is no mention, with regard to the soldiers, of the requisite ingredients for responsibility under 6(3)." *See ibid.*, para. 165. *See also ibid*., heading 2.2.3 at p. 66. The Appeals Chamber notes that Kanyabashi substantiates his claim regarding the "requisite ingredients" of superior responsibility only with respect to the identification of the subordinates. He does not make any arguments regarding the other material facts that have to be pleaded with respect to superior responsibility. Accordingly, to the extent that Kanyabashi intended to argue that relevant material facts other than the identification of his subordinates were not pleaded, his vague and unsubstantiated claim is dismissed.

soldiers at Matyazo Clinic.[5883] It argues that paragraph 6.34 of the Indictment, read in conjunction with paragraph 6.32 of the Indictment and the fact that paragraph 6.34 was only charged pursuant to Article 6(3) of the Statute, gave notice to Kanyabashi that he was alleged to be the superior of the soldiers who perpetrated the killings at Matyazo Clinic.[5884] It also submits that Kanyabashi failed to raise a timely objection to the evidence related to his superior relationship with the soldiers, that the conduct of his defence demonstrates that he understood the case against him, and that he was not prejudiced.[5885]

2537. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead, *inter alia*, that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he was alleged to be responsible.[5886]

2538. In the instant case, the Appeals Chamber finds that the Trial Chamber erred in holding that adequate notice was provided to Kanyabashi that he was alleged to be the superior of the "soldiers" involved in the killings at Matyazo Clinic referred to in paragraph 6.34 of the Indictment through the following information: (i) the reference in paragraph 4.3 of the Indictment that he "exercised authority over his subordinates"; (ii) the indication – through the term "notably" in paragraph 6.32 of the Indictment – that his subordinates were not limited to "*conseillers de secteur* and communal policemen"; and (iii) the allegation in paragraph 6.34 that he gave orders to soldiers at Matyazo Clinic.[5887] The Appeals Chamber stresses that an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together and that it was incumbent on the Prosecution to set forth clearly and unambiguously in the Indictment all material facts underpinning the charges. The Appeals Chamber considers that the factors relied upon by the Trial Chamber in the Indictment did not provide adequate notice to Kanyabashi that the soldiers invoked

[5883] Prosecution Response Brief, paras. 1766-1774.
[5884] Prosecution Response Brief, paras. 1767, 1769-1772. *See also* AT. 20 April 2015 p. 31. The Prosecution also relies on the fact that Witness QI's Summary and statement also referred to Kanyabashi giving orders which were followed. *See* Prosecution Response Brief, para. 1773.
[5885] Prosecution Response Brief, paras. 1777-1785. *See also* AT. 20 April 2015 p. 32. In reply, Kanyabashi submits, *inter alia*, that he complained about the defects of the Indictment regarding the identification of his subordinates already in 1999 and that the Prosecution does not explain why it did not mention that the soldiers were alleged to be his subordinates when ordered to do so. *See* Kanyabashi Reply Brief, para. 53, *referring to* Kanyabashi Preliminary Motion, paras. 24, 27, 42.
[5886] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218. The Appeals Chamber also recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute and that physical perpetrators of the crimes can be identified by category in relation to a particular crime site. *See Hategekimana* Appeal Judgement, para. 166; *Bagosora and Nsengiyumva* Appeal Judgement, para. 196; *Blagojević and Jokić* Appeal Judgement, para. 287.

in paragraph 6.34 were alleged to be his subordinates within the meaning of Article 6(3) of the Statute.

2539. As emphasised in its submissions, the Prosecution indicated in the charging section of the Indictment that the allegation set forth in paragraph 6.34 was being pursued exclusively pursuant to Article 6(3) of the Statute.[5888] In the opinion of the Appeals Chamber, this was indicative that the Prosecution intended to prove that Kanyabashi was the superior of the soldiers referred to in this paragraph. However, it was incumbent on the Prosecution to identify Kanyabashi's subordinates unambiguously in the Indictment, especially as it was expressly directed to do so by the Trial Chamber in May 2000.[5889] The Appeals Chamber considers that the Prosecution's failure to provide adequate notice to Kanyabashi of the identity of his alleged subordinates in the Indictment is manifest.[5890]

2540. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to Kanyabashi's superior responsibility for the killings perpetrated at Matyazo Clinic by soldiers insofar as it failed to provide adequate notice to Kanyabashi that the soldiers involved in these killings were alleged to be his subordinates.

2541. The Appeals Chamber, however, finds that this error does not invalidate the Trial Chamber's decision to convict Kanyabashi on this basis as it considers that the ambiguity of the Indictment was remedied by the additional information provided in the Prosecution Pre-Trial Brief. Specifically, the Appeals Chamber considers that, reading paragraph 6.34 of the Indictment which was only charged pursuant to Article 6(3) of the Statute together with the allegation in the Prosecution Pre-Trial Brief that Kanyabashi exercised a supervisory role *vis-à-vis* the soldiers involved in the massacres of Tutsi refugees gathered in Matyazo Clinic,[5891] Kanyabashi was put on clear notice that he was alleged to exercise superior authority over the soldiers identified in paragraph 6.34 within the meaning of Article 6(3) of the Statute. The conduct of Kanyabashi's

[5887] The Appeals Chamber recalls that "ordering" liability requires no formal superior-subordinate relationship between the person giving the order and the physical perpetrator. *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 482; *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[5888] *See* Kanyabashi Indictment, pp. 41-45.
[5889] *See* 31 May 2000 Decision, para. 5.21(c), p. 8.
[5890] Following the Trial Chamber's instruction in the 31 May 2000 Decision, the Prosecution merely amended paragraph 6.29 of the indictment by simply referring to paragraph 6.32 of the same indictment which, as noted above, only identifies *conseillers de secteur* and communal policemen as Kanyabashi's subordinates. *Compare* Amended Indictment *with* Kanyabashi Third Amended Indictment, para. 6.29.
[5891] Prosecution Pre-Trial Brief, para. 20.

defence at trial confirms that he understood the charge against him regarding the killings at Matyazo Clinic and was able to prepare a meaningful defence.[5892]

2542. Consequently, the Appeals Chamber finds that Kanyabashi was ultimately put on adequate notice that he was charged pursuant to Article 6(3) of the Statute for the criminal conduct of the soldiers at Matyazo Clinic and that the vagueness of the Indictment in this respect did not impair his ability to prepare his defence.

3. Incitement by Megaphone (Ground 3.1)

2543. The Trial Chamber found that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5893] It further found that, around mid-June 1994, Kanyabashi again used a megaphone to tell the population "to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women."[5894] The Trial Chamber determined that the terms "enemy" and "*Inkotanyi*" when used by Kanyabashi referred to and were understood as referring to Tutsis in general.[5895] The Trial Chamber concluded that Kanyabashi's May and June 1994 megaphone announcements constituted direct and public incitement to commit genocide and, accordingly, convicted him of committing direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute.[5896]

2544. In summarising the Prosecution case against Kanyabashi with respect to this allegation, the Trial Chamber referred to paragraphs 5.8 and 6.45 of the Indictment.[5897] The Indictment indicates

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[5892] In his appeal submissions, Kanyabashi acknowledged that "[a]nother side of the defence was to demonstrate that the soldiers were the ones responsible for the attack and that he had no authority over them." *See* Kanyabashi Appeal Brief, para. 162. The Appeals Chamber further observes that, in his closing brief, Kanyabashi, referring to several testimonies of Defence witnesses, unequivocally contended that there was no relation of subordination between him and the soldiers. *See* Kanyabashi Closing Brief, para. 238. Similarly, in his oral closing arguments, Kanyabashi argued that he did not have power over soldiers, that they considered him an RPF accomplice, and that he was threatened by them. *See* Kanyabashi Closing Arguments, T. 28 April 2009 pp. 37, 42, 46, 69.
[5893] Trial Judgement, paras. 3813, 5928, 6009.
[5894] Trial Judgement, paras. 3824, 5928, 6009.
[5895] Trial Judgement, paras. 3814, 3825, 3826, 5928, 6010. *See also ibid.*, para. 6012.
[5896] Trial Judgement, paras. 6010, 6011, 6013, 6037, 6186.
[5897] Trial Judgement, para. 3693, fns. 9916, 9917. Paragraph 5.8 of the Kanyabashi Indictment reads as follows:

> 5.8 From April to July 1994, various prominent persons, including members of the government and local authorities propagated incitement to hatred and violence. On or about April 19, 1994, after the interim president Théodore Sindikubwabo delivered a speech in Butare encouraging people to fight the enemy, Joseph KANYABASHI, gave a speech in support of the interim president, encouraging the population to follow Sindikubwabo's instructions. Shortly thereafter, widespr[]ead attacks on Tutsis began in the area. In or around late May, 1994, on at least on one occasion, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone. He encouraged the population to systematically search for the "enemy" in the commune and immediately afterwards, more Tutsis were killed in Ngoma commune. Also in or around May, 1994 Joseph KANYABASHI held at least two meetings in Cyarwa sector, Ngoma

that the allegations in paragraphs 5.8 and 6.45 of the Indictment were being pursued under, *inter alia*, Count 4 pursuant to Article 6(1) of the Statute.[5898]

2545. Prior to examining the relevant evidence, the Trial Chamber discussed Kanyabashi's assertion that paragraph 5.8 of the Indictment was impermissibly vague with respect to the date and place of the megaphone announcements as well as regarding the identity of the victims.[5899] It found that paragraph 5.8 was sufficiently precise to provide notice to Kanyabashi of the Prosecution's intention to lead evidence on an incident of incitement by megaphone occurring in Butare Town around late May 1994.[5900] It also determined that the evidence about a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8 on the ground that the Prosecution pleaded therein that Kanyabashi incited the population with a megaphone from a vehicle on "at least one occasion".[5901] It further found that, "[w]hile the Prosecution could have employed precise legal terms to indicate the alleged criminal conduct", paragraph 6.45 of the Indictment was nonetheless "sufficiently precise to provide notice to Kanyabashi of the Prosecution's intention to lead evidence in relation to an incident of incitement by megaphone occurring in June 1994."[5902] The Trial Chamber added that, "[i]n any event", Kanyabashi "did not object to the testimony of Witness QI with respect to the megaphone incident of mid-June 1994 at trial."[5903]

2546. Kanyabashi submits that the Indictment was impermissibly vague with respect to the alleged dates and number of incidents of announcement by megaphone.[5904] In particular, he contends that the words "on at least [on] one occasion" in paragraph 5.8 of the Indictment appeared to refer to the number of rounds that Kanyabashi made in Butare Town during the incident which took place in

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commune, at which he encouraged local residents to kill Tutsis. In the days following the meetings, Tutsis in the area were attacked.

For paragraph 6.45 of the Kanyabashi Indictment, *see supra*, fn. 5815. The Trial Chamber also referred to paragraph 6.53 of the Kanyabashi Indictment but did not rely on it as it relates to the incitement by megaphone. *See* Trial Judgement, paras. 3693, 3710-3718, fn. 9918.

[5898] Kanyabashi Indictment, p. 42.

[5899] *See* Trial Judgement, paras. 3714-3718.

[5900] Trial Judgement, para. 3715.

[5901] Trial Judgement, para. 3716. *See also ibid.*, para. 3803.

[5902] Trial Judgement, para. 3717.

[5903] Trial Judgement, para. 3718.

[5904] Kanyabashi Notice of Appeal, sub-paras. 3.1-3.1.9; Kanyabashi Appeal Brief, paras. 231, 232. *See also* AT. 20 April 2015 pp. 16 and 17 (closed session), 18-20. The Appeals Chamber notes that, in his notice of appeal, Kanyabashi also argued under sub-Ground 3.1.5 that the Trial Chamber erred in finding that he had received sufficient notice in relation to the allegation concerning the late May 1994 megaphone announcement testified to by Witness QJ. *See* Kanyabashi Notice of Appeal, sub-paras. 3.1.5-3.1.5.2. However, the Appeals Chamber notes that, while stating in his appeal that "Grounds […] and 3.1.5 are not developed autonomously, but concurrently with other grounds", Kanyabashi has failed to develop and substantiate his allegation of error related to Witness QJ in his appeal brief or during the appeals hearing. *See* Kanyabashi Appeal Brief, para. 233; AT. 20 April 2015 pp. 16, 18, 19. The Appeals Chamber therefore dismisses Kanyabashi's challenge to the Trial Chamber's finding regarding notice of the late May 1994 megaphone incident as unsubstantiated.

May, not to several incidents occurring on distinct dates.[5905] In Kanyabashi's view, the wording of paragraph 5.8 "does not allow for the addition of a new incident, especially not in mid-June".[5906] He also argues that Witness TK's testimony at trial – on the basis of which he alleges he was convicted – "does not match the mode of participation mentioned in [paragraph] 5.8" since Witness TK testified that the message was not broadcasted by Kanyabashi as alleged in this paragraph, but by somebody else.[5907] Kanyabashi adds that Witness TK's evidence should also have been excluded because the Prosecution failed to give him notice that this witness would testify against him on the megaphone allegations.[5908]

2547. Kanyabashi also contends that he was never provided notice of the mid-June 1994 megaphone announcement incident.[5909] Specifically, he submits that: (i) the Trial Chamber erred in finding that paragraph 6.45 of the Indictment provided notice of this incident;[5910] (ii) it is not clear from the summaries of Witnesses QJ's and QI's anticipated evidence appended to the Prosecution Pre-Trial Brief that the witnesses would testify about two distinct incidents as they mention neither a date nor a place; and (iii) Witness QI's prior statement to Tribunal investigators did not situate the incident in June.[5911] He further argues that, in faulting him for not raising an objection to Witness QI's testimony, the Trial Chamber failed to appreciate that he objected to the vagueness of paragraph 5.8 of the Indictment in several instances, both before and after the trial started,[5912] and

[5905] Kanyabashi Appeal Brief, paras. 232, 243 (emphasis omitted). *See also* Kanyabashi Reply Brief, para. 86.
[5906] Kanyabashi Appeal Brief, para. 243. *See also ibid.*, para. 244.
[5907] Kanyabashi Appeal Brief, paras. 234, 235, 239. Kanyabashi claims that he understood that he was alleged to be the one broadcasting the messages and that this defect was not curable. *See idem*.
[5908] Kanyabashi Notice of Appeal, sub-paras. 3.1.5.2, 3.1.6; Kanyabashi Appeal Brief, paras. 234, 236. Kanyabashi points out that: (i) the Prosecution failed to indicate in its pre-trial brief that Witness TK was expected to testify in relation to the allegations against him, and indicated instead that the witness would exclusively testify in relation to Nyiramasuhuko and Ntahobali; (ii) Witness TK's prior statements were silent or very unclear as regards Kanyabashi's involvement in megaphone announcements; and (iii) Witness TK's will-say statement did not give notice that the witness would testify against him. In addition, Kanyabashi contends that he should have been provided notice of the evidence concerning the *modus operandi* in accordance with Rules 66(A) and 93 of the Rules. He also asserts that Witness TK's prior statements were insufficient to remedy the absence of notice. *See* Kanyabashi Appeal Brief, paras. 236-238, 240, fn. 774; Kanyabashi Reply Brief, paras. 81, 83.
[5909] Kanyabashi Notice of Appeal, sub-paras. 3.1.7-3.1.8; Kanyabashi Appeal Brief, paras. 242-248.
[5910] Kanyabashi Appeal Brief, para. 245. Kanyabashi highlights that, in contrast with paragraph 5.8 of the Kanyabashi Indictment, paragraph 6.45 of the Kanyabashi Indictment does not make any reference to megaphone announcement, refers to instructions given to a selected group of people, and was pursued under both Articles 6(1) and 6(3) of the Statute. He also points out that the French version of paragraph 6.45, read together with paragraph 5.8, created confusion as it specifically refers to instructions provided near "Butare market". *See* Kanyabashi Notice of Appeal, sub-para. 3.1.7.3; Kanyabashi Appeal Brief, paras. 245, 246; Kanyabashi Reply Brief, paras. 89, 90; AT. 20 April 2015 pp. 16 and 17 (closed session), 18.
[5911] Kanyabashi Notice of Appeal, sub-paras. 3.1.7-3.1.7.4, 3.1.9; Kanyabashi Appeal Brief, para. 247, *referring to* Witness Summaries Grid, item 4, Witness QJ ("Witness QJ's Summary"), Witness QI's Summary, Exhibit D215 (Witness QI's Statement, dated 11 June 1996 and List of omissions) (confidential). As already mentioned, Witness QI's Statement was first disclosed in redacted version on 9 January 1997 and its unredacted version was also admitted into evidence on 19 April 2004 as Exhibit D201 (confidential). *See supra*, fn. 5858.
[5912] Kanyabashi Appeal Brief, paras. 249, 251, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Joseph Kanyabashi's Reply to the Response of the Prosecutor, Nyiramasuhuko and Ntahobali to His Motion to Vary His List of Defence Witnesses Pursuant to Rule 73*ter*, 24 December 2007 (originally filed in French under Case No. ICTR-98-42-T, English translation filed on 13 February 2008) (confidential) ("Kanyabashi

that the Trial Chamber had made it clear that issues of this nature were better being raised in closing arguments.[5913] Kanyabashi submits that the vagueness of the Indictment regarding the time of the megaphone incident caused him serious prejudice as he understood that he had to defend himself in respect of only one incident of incitement by megaphone.[5914]

2548. The Prosecution responds that the Trial Chamber correctly concluded that the Indictment, when read as a whole, provided sufficient notice to Kanyabashi regarding the megaphone announcements that occurred in May and June 1994.[5915] It argues that Kanyabashi's interpretation of the phrase "on at least [on] one occasion" in paragraph 5.8 of the Indictment does not show that the Trial Chamber erred in its conclusion and submits that the Trial Chamber did not convict Kanyabashi on the basis of Witness TK's testimony.[5916] Pointing out that it relied upon paragraph 6.45 of the Indictment in support of Count 4 in the charging section of the Indictment, the Prosecution argues that Kanyabashi was put on notice that he was charged with direct and public incitement to commit genocide on the basis of the conduct described in this paragraph.[5917] In its view, the relevant material facts were therefore provided in both paragraphs 5.8 and 6.45.[5918]

2549. The Prosecution further contends that post-indictment communications clearly informed Kanyabashi that Witnesses QJ and QI were testifying about different incidents.[5919] It also argues that, at trial, Kanyabashi only raised general claims of vagueness of the Indictment without

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24 December 2007 Reply"), paras. 29, 30 (paras. 30, 31 in French original), Kanyabashi 11 December 2007 Motion, paras. 39, 42, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, *Appel de Joseph Kanyabashi de la Décision de la Chambre de première instance II du 21 mars 2007*, 9 May 2007 ("Kanyabashi 9 May 2007 Appeal"), para. 56, Kanyabashi Opening Statement, T. 10 July 2007 p. 8, *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Motion to Vary the List of Joseph Kanyabashi's Defence Witnesses Pursuant to Rule 73*ter*, 22 December 2006 (originally filed in French, English translation filed on 8 May 2007) (confidential) ("Kanyabashi 22 December 2006 Motion"), paras. 32, 69, 72, 78, 84, 93, 105, 108, Kanyabashi Preliminary Motion, paras. 23, 25, 38, pp. 17, 18, 25. *See also* Kanyabashi Reply Brief, para. 93.

[5913] Kanyabashi Notice of Appeal, sub-para. 3.1.8; Kanyabashi Appeal Brief, para. 250.

[5914] Kanyabashi Appeal Brief, paras. 252, 253, *referring to* Kanyabashi Closing Brief, paras. 285, 287, 289-292, 296, 300, 302, 303, 308, 309. *See also* Kanyabashi Reply Brief, paras. 94-97; AT. 20 April 2015 pp. 18, 19.

[5915] Prosecution Response Brief, paras. 1859-1878. *See also* AT. 20 April 2015 pp. 39-42.

[5916] Prosecution Response Brief, paras. 1861-1869, 1871, 1872. The Prosecution also submits that the evidence of Witness TK did not constitute a pattern of evidence within the meaning of Rule 93(A) of the Rules and was, as such, not subjected to this rule. It adds that, because Kanyabashi failed to object to the relevant portions of Witness TK's testimony at trial, his belated claim should be dismissed. *See ibid.*, paras. 1869, 1870.

[5917] Prosecution Response Brief, para. 1878.

[5918] Prosecution Response Brief, paras. 1876-1878.

[5919] Prosecution Response Brief, paras. 1871-1878, *referring to* Witness QJ's statements of 8 May 1996 and 22 January 1997, disclosed on 10 April 1997 and 17 June 1999, respectively, and admitted as part of Exhibit D8 on 13 November 2001 ("Witness QJ's 1996 Statement" and "Witness QJ's 1997 Statement", respectively). *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Statement of Witness "S"/*Déclaration du témoin "S"*, 10 April 1997 (confidential); *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Transmission of Redacted Statements in the Case of The Prosecutor v Joseph Kanyabashi, 17 June 1999 (confidential). *See also* AT. 20 April 2015 p. 40 (erroneously referring to Witness QJ's statement of 28 October 1997 instead of Witness QJ's 1997 Statement).

specifically objecting to Witness QI's testimony and that he fails to demonstrate that he suffered prejudice as a result of the alleged lack of notice.[5920]

2550. Kanyabashi replies that the Trial Judgement clearly reflects that Witness TK's evidence was relied upon in relation to both megaphone incidents.[5921] In addition, he submits that the disclosure of Witnesses QJ's and QI's statements did not provide sufficient notice about the mid-June incident.[5922] Kanyabashi further reiterates that his ability to prepare his defence was materially impaired, notably because he was deprived of the opportunity to conduct the necessary investigations.[5923]

2551. The Appeals Chamber acknowledges that the French version of the relevant sentence in paragraph 5.8, when read in isolation, may be interpreted as alleging a single incident involving Kanyabashi making multiple rounds around Butare Town the same day.[5924] However, when the relevant phrase is read in parallel with the English version, Kanyabashi should have understood that the words "on at least on one occasion" in English and "*au moins une fois*" in French refer to the occurrence of multiple incidents of the same nature occurring "[i]n or around late May, 1994". The Appeals Chamber, however, finds that this paragraph was overly vague as regards the number of times Kanyabashi was alleged to have incited the population through a megaphone while driving through Butare Town.

2552. Conversely, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, is not persuaded by Kanyabashi's argument that paragraph 5.8 of the Indictment was defective regarding the pleading of the dates of the incidents. While not referring to the month of June in particular, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that the timeframe "[i]n or around late May, 1994" was sufficiently specific to allow Kanyabashi to prepare his defence against two allegations of incitement occurring in late May and mid-June 1994.[5925] The Appeals Chamber

[5920] Prosecution Response Brief, paras. 1879-1890. *See also* AT. 20 April 2015 pp. 41, 42.
[5921] Kanyabashi Reply Brief, paras. 82, 84, 85.
[5922] Kanyabashi Reply Brief, para. 92. Kanyabashi emphasises that there is no mention of any incitement by megaphone occurring in mid-June in Witness QI's Statement. *See idem.*
[5923] Kanyabashi Reply Brief, para. 95.
[5924] *See* Kanyabashi Indictment, para. 5.8 (French) ("*Vers fin mai 1994, Joseph KANYABASHI a fait, au moins une fois, le tour de la ville de Butare en voiture et s'est adressé à la population avec haut-parleur*.").
[5925] The Appeals Chamber recalls that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct with which the accused is charged. *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 89. *Cf. also Kvočka et al.* Appeal Judgement, para. 436 (finding that the appellant had failed to identify any prejudice from the fact that the indictment referred to 4 June 1992 whereas the trial chamber found that the incident took place on or shortly before 29 June 1992), *quoting Kunarac et al.* Appeal Judgement para. 217 ("[M]inor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in the Indictment IT-96-23 did not occur."); *Rutaganda* Appeal Judgement, paras. 296-306 (finding that the variance between an

notes that, while it was in possession of information regarding the date of the late May incident through Witness QJ's written statements, the Prosecution did not appear to have more specific information regarding the date of the June incident at the time of the filing of the Indictment.[5926] Accordingly, not only the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds no error in the Trial Chamber's finding that the allegation of a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8, but it is also of the view, Judge Pocar and Judge Agius dissenting, that the timeframe of the allegation of megaphone announcements by Kanyabashi pleaded in this paragraph was sufficient to provide him adequate notice.

2553. As to Kanyabashi's contention that Witness TK's evidence fell outside the scope of paragraph 5.8 of the Indictment, the Appeals Chamber notes that Kanyabashi was neither charged nor convicted in relation to the megaphone announcement testified to by Witness TK.[5927] The Trial Judgement reflects that the Trial Chamber used Witness TK's evidence as circumstantial evidence corroborating Witnesses QJ's and QI's testimonies about the other megaphone announcements on the basis of which Kanyabashi was ultimately convicted.[5928] As the evidence by which the material facts underpinning the charges are to be proven need not be pleaded in the indictment,[5929] the Appeals Chamber rejects Kanyabashi's arguments regarding lack of notice of Witness TK's allegation of a megaphone announcement made on behalf of the Ngoma *bourgmestre* at the end of May 1994. To the extent that Kanyabashi claims that he did not receive sufficient notice that Witness TK would provide evidence on a matter relevant to the case against him, the Appeals Chamber notes that, contrary to Kanyabashi's submission, Witness TK's prior statements disclosed to him in 1997 clearly referred to the megaphone announcement the witness testified about at trial,[5930] Kanyabashi did not object to Witness TK's evidence when the witness testified,[5931] and the cross-examination of his counsel reflects that he was prepared to respond to this particular aspect of the witness's evidence.[5932] Kanyabashi's contention regarding the lack of notice of Witness TK's evidence is therefore rejected.

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allegation of distribution of weapons "on or about 6 April 1994" and resulting in convictions for distributions on 8, 15 and 24 April 1994 was not material).

[5926] Witness QI's Statement, p. K0028872 ("I cannot remember the date on which this occurred").

[5927] Trial Judgement, paras. 3802, 3803.

[5928] *See infra*, Section VIII.E.

[5929] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88.

[5930] *See* Exhibit D49 (Witness TK's statement, dated 17 December 1996, signed 22 January 1997) (confidential) ("Witness TK's December 1996 Statement"), p. K0035620 (Registry pagination); Exhibit D50 (Witness TK's statement, dated 14 November 1997, signed 27 November 1997) (confidential), p. 4382 (Registry pagination).

[5931] *See* Witness TK, T. 21 May 2002 (closed session).

[5932] *See* Witness TK, T. 27 May 2002 pp. 136-154 (closed session); T. 28 May 2002 pp. 8-27.

2554. Regarding Kanyabashi's challenge to the Trial Chamber's reliance on paragraph 6.45 of the Indictment, the Appeals Chamber notes that this paragraph refers to Kanyabashi encouraging and instructing "soldiers", "militiamen", and "certain members of the civilian population" between 20 April and June 1994 to search for the Tutsis who had escaped the massacres, without any mention of megaphone announcements or incitement directed at the population of Butare Town in general. The Appeals Chamber finds that the Trial Chamber therefore erred in concluding that paragraph 6.45 provided notice to Kanyabashi of his alleged responsibility for a megaphone announcement directed at the population of Butare Town made in mid-June 1994. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, is of the view that this error is nonetheless inconsequential given the Appeals Chamber's previous conclusion that the pleading of the date of the megaphone incidents in paragraph 5.8 of the Indictment was not overly vague and that the Indictment was not defective in this respect.

2555. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to consider that the Indictment did not put Kanyabashi on adequate notice of the number of times he was alleged to have incited to the commission of genocide through a megaphone while driving through Butare Town.

2556. Turning to the question whether the defect in the Indictment regarding the number of alleged incidents was subsequently cured, the Appeals Chamber observes that there is no mention of the allegation of megaphone announcements in the Prosecution's pre-trial brief or opening statement. In the summaries of the Prosecution witnesses' anticipated evidence appended to the pre-trial brief, it appears that Witness QJ would testify about Kanyabashi making a megaphone announcement inciting the population to search for the enemy in late May[5933] and that Witness QI would also testify about Kanyabashi saying over a megaphone that all Tutsis should be killed while driving past the witness's house on an unspecified date.[5934] Although not obvious from a reading of Witnesses QJ's and QI's summaries, the Appeals Chamber considers, Judge Pocar and Judge Agius dissenting, that a review of the witnesses' prior statements confirms that both witnesses were referring to two distinct incidents implicating Kanyabashi in delivering a message using a

[5933] In relevant part, Witness QJ's Summary, which was marked relevant to Kanyabashi and was linked, *inter alia*, to Count 4 of the Kanyabashi Indictment, reads as follows:

> QJ saw Kanyabashi around late May on an Ngoma commune truck speaking on a megaphone to the public. Kanyabashi said that the enemy still was among them and that they were to make a thorough search for the enemy. This message was repeated for two days. Immediately following the speech, the population began searching for and killing the Tutsis.

[5934] In relevant part, Witness QI's Summary, which was marked relevant to Kanyabashi and was linked, *inter alia*, to Count 4 of the Kanyabashi Indictment, reads as follows:

> QI saw Kanyabashi drive pass the house, talking over a megaphone, saying that the Tutsi enemy still was among the population and that all Tutsis, even the babies should be killed. Kanyabashi also said that the bushes should be cut down so that the *Inkotanyi* could not find a hiding place.

megaphone.[5935] In these circumstances, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, concludes that the vagueness of the Indictment regarding the number of incidents of incitement by megaphone was remedied by Witnesses QJ's and QI's summaries read together with their relevant prior written statements.

2557. Incidentally, the Appeals Chamber observes that Kanyabashi appears to have treated the allegations of megaphone announcements recounted by Witnesses QJ and QI as one and the same incident in his closing brief.[5936] However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, is of the view that the conduct of his defence at trial effectively reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation of a second megaphone announcement in June 1994. In particular, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, notes that Kanyabashi's counsel – who did not object to the relevant part of Witness QI's testimony[5937] – conducted a detailed and

[5935] *Compare* Witness QJ's Summary, Witness QJ's 1996 Statement, p. K0028047 (Registry pagination) ("Towards the end of May, I saw Kanyabashi on board a blue Toyota truck with the inscription 'Ngoma commune'. The truck was being driven by a driver. He was transmitting a message to the public using a megaphone."), Witness QJ's 1997 Statement, p. K0035673 (Registry pagination) ("Around the end of May 1994, at about 10:00 a.m., I saw Joseph Kanyabashi in a green Toyota pick-up truck, and not a blue one, as I said in my statement of 8 May 1996. […] He repeated this message two days in a row. […] He was accompanied on those two days by two men in civilian clothes.") *with* Witness QI's Summary, Witness QI's Statement, p. K0028871 (Registry pagination) ("Kanyabashi is a striking example. I saw him driving to Tumba aboard his white Peugeot 305 car, escorted by two armed soldiers. I saw him driving past […], and heard him talking through a megaphone. He was saying that the Tutsi enemy was still among the population. He requested that Tutsi be killed, including babies."). The Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi should have been prompted to re-examine Witnesses QJ's and QI's prior statements upon reading the Witness Summaries Grid.

[5936] Kanyabashi Closing Brief, paras. 309, 310.

[5937] *See* Trial Judgement, para. 3718. The Appeals Chamber notes that the objections at trial regarding the imprecision of the timeframe of the allegations set forth in paragraph 5.8 of the Kanyabashi Indictment to which Kanyabashi points to were very general and concerned the prior formulation of the paragraph. *See* Kanyabashi 24 December 2007 Reply, para. 29; Kanyabashi 11 December 2007 Motion, para. 39; Kanyabashi 9 May 2007 Appeal, para. 56; Kanyabashi 22 December 2006 Motion, paras. 32, 42, 69, 72, 78, 84, 93, 105, 108; Kanyabashi Preliminary Motion, paras. 23, 25, 38, pp. 17, 18, 25. The objections raised concerned about the previous formulation of paragraph 5.8 contained in the Kanyabashi Amended Indictment, which read as follows:

> From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Ny[i]ramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Ladislas Ntaganzwa and Elie Ndayambaje publicly incited the people to exterminate the Tutsi population and its "accomplices".

In response to the Kanyabashi Preliminary Motion, the Trial Chamber ordered the Prosecution to amend and clarify paragraph 5.8 "align[ing] the wording of this paragraph of the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996, which is more precise". *See* 31 May 2000 Decision, para. 5.21. Kanyabashi also did not contend that the evidence of Witness QI was outside the scope of paragraph 5.8 of the Kanyabashi Indictment in his opening submissions. *See* Kanyabashi Opening Statement, T. 10 July 2007 p. 8. Besides advancing a generic claim of vagueness of the timeframe of the incitement by megaphone allegation in his closing brief, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi also failed to object clearly to Witness QI's evidence on the mid-June 1994 megaphone announcement for lack of notice. *See* Kanyabashi Closing Brief, para. 301 ("Without having a specific date, a specific place and an identifiable victim, it would be impossible to establish the falsity of the account of the megaphone incident."). Although concerned by the practice of trial chambers to postpone consideration of Defence objections to the admission of testimonial evidence on the ground of lack of notice to the phase of final deliberations, the Appeals Chamber considers that none of the Trial Chamber's oral rulings Kanyabashi relies upon could have reasonably been understood as suggesting to the Defence to refrain from making objections

well-prepared cross-examination of Witness QI with respect to the megaphone incident the witness recounted.[5938] Kanyabashi also called witnesses to rebut Witness QI's account of seeing him delivering a message through a megaphone in June 1994[5939] and requested the addition of Witness D-2-17-A to his witness list for the specific purpose of rebutting Witness QI's testimony that he saw Kanyabashi using a megaphone from his hiding place in June 1994.[5940]

2558. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the number of incidents of incitement by megaphone of which Kanyabashi was alleged to be responsible. However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi was ultimately put on adequate notice of the relevant material facts with respect to the number of alleged incidents of incitement by megaphone and that the vagueness of the Indictment did not impair his ability to prepare his defence. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, therefore concludes that the Trial Chamber's error concerning the form of the Indictment regarding the number of incidents of incitement by megaphone did not invalidate its decision to convict Kanyabashi on the basis of the May and June 1994 megaphone announcements.

4. Conclusion

2559. As discussed above, the Appeals Chamber finds that the Trial Chamber erred in convicting Kanyabashi pursuant to Article 6(3) of the Statute in relation to the killings perpetrated by communal policemen at Kabakobwa Hill on 22 April 1994 in the absence of sufficient notice of the material facts underpinning the conviction. Consequently, the Appeals Chamber grants Ground 1.1 of Kanyabashi's appeal and reverses his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on these killings. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

2560. The Appeals Chamber, however, dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility as a superior in relation to the killings perpetrated by

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related to the indictments. *See* Kanyabashi Appeal Brief, para. 250, *referring to* T. 6 March 2002 pp. 83, 84, 104-106, 122-124, T. 15 March 2001 pp. 9, 10, T. 23 March 2004 pp. 56, 57. *See also supra* paras. 1107, 1280.

[5938] Witness QI, T. 24 March 2004 pp. 69-80 (closed session); T. 25 March 2004 pp. 4-16 (closed session).

[5939] Witness D-21-B, T. 7 February 2008 pp. 64-69, 72-75 (closed session); Witness D-2-5-I, T. 22 January 2008 p. 25 (closed session), 27; Witness D-2-14-W, T. 11 February 2008 pp. 41, 42 (closed session); Witness D-13-D, T. 21 February 2008 p. 45; Witness D-2-YYYY, T. 28 November 2007 p. 45 (closed session). *See also* Kanyabashi Closing Brief, paras. 298, 299.

[5940] Kanyabashi 11 December 2007 Motion, paras. 16, 29-33, 51, p. 12 *and* Annex I, pp. 25-32. As noted above, Kanyabashi was ultimately "not able to get this witness to testify". *See supra*, para. 2483, fn. 5770.

soldiers at Matyazo Clinic in late April 1994. The Appeals Chamber, Judge Pocar and Judge Agius dissenting with respect to the mid-June 1994 megaphone announcement, further dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility for committing direct and public incitement to commit genocide through two megaphone announcements in late May and mid-June 1994. In light of the Trial Chamber's analysis concerning the cumulative effect of the defects in the co-Accused's Indictments in the Trial Judgement[5941] and the absence of any substantiation, the Appeals Chamber also dismisses Kanyabashi's allegation of error regarding the assessment of the cumulative effect of the defects of the Indictment on his fair trial rights. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting in part, dismisses Grounds 2.1, 2.2, 2.7 in part, and 3.1 of Kanyabashi's appeal.

[5941] Trial Judgement, paras. 125-131.

C. Kabakobwa Hill (Grounds 1.2-1.7)

2561. The Trial Chamber convicted Kanyabashi of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(3) of the Statute for failing to prevent the crimes committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and for failing to punish them.[5942]

2562. Kanyabashi contends that the Trial Chamber erred in its assessment of the evidence relevant to this event and in concluding that he had sufficient knowledge that his subordinates might commit crimes or had committed crimes at Kabakobwa Hill.[5943]

2563. The Appeals Chamber recalls that it has concluded that the Trial Chamber erred in convicting Kanyabashi in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994 in the absence of sufficient notice of the material facts underpinning his convictions and, on this basis, reversed his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to these killings.[5944] Consequently, the Appeals Chamber dismisses Grounds 1.2 through 1.7 of Kanyabashi's appeal as moot.

[5942] *See supra*, para. 2505.
[5943] Kanyabashi Notice of Appeal, sub-paras. 1.2.1-1.2.7, 1.3.1-1.3.3, 1.5.2, 1.5.3, 1.5.5-1.5.8, 1.6.1, 1.6.1.1-1.6.1.3, 1.6.2; Kanyabashi Appeal Brief, paras. 10-68, 76-79, 81-89, 92-94, 97-118, 120-124, 127-129; Kanyabashi Reply Brief, paras. 11-44.
[5944] *See supra*, paras. 2520, 2559.

D. Matyazo Clinic (Grounds 2.1 to 2.6, 2.7 in part)

2564. Based on the testimonies of Prosecution Witnesses QI and RL, the Trial Chamber, Judge Ramaroson dissenting, found that, in late April 1994, following an initial attack by soldiers, Kanyabashi went to Matyazo Clinic, addressed the Tutsis sheltering there, and thereafter ordered soldiers to open fire on the Tutsis, resulting in many deaths.[5945]

2565. Noting that the Prosecution only charged Kanyabashi under Article 6(3) of the Statute in relation to this event, the Trial Chamber found that it was not proven that Kanyabashi exercised *de jure* authority over the soldiers.[5946] However, recalling that Kanyabashi ordered the soldiers to shoot at the Tutsis and that they obeyed this order, the Trial Chamber concluded that "Kanyabashi exercised effective control over these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them."[5947] Consequently, the Trial Chamber, Judge Ramaroson dissenting, convicted Kanyabashi of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(3) of the Statute for failing to prevent the soldiers from committing these killings and punish them.[5948]

2566. Kanyabashi submits that no reasonable trier of fact could have convicted him for the killings at Matyazo Clinic based on the evidence on the record.[5949] In particular, he argues that the relevant evidence does not demonstrate that he was in a superior-subordinate relationship with the soldiers who allegedly followed his orders or that he had effective control over them.[5950] In his view, while the fact that the persons followed orders may be sufficient to establish responsibility for ordering under Article 6(1) of the Statute, it is insufficient to prove effective control.[5951] Kanyabashi also submits that the Trial Chamber erred in its overall assessment of the evidence concerning this

[5945] Trial Judgement, paras. 2084, 2103, 5818.
[5946] Trial Judgement, paras. 5819, 5820, 5822.
[5947] Trial Judgement, para. 5823.
[5948] Trial Judgement, paras. 5824, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.
[5949] Kanyabashi Notice of Appeal, paras. 16-18, sub-paras. 2.2-2.4.4, 2.6-2.7.2; Kanyabashi Appeal Brief, paras. 149-151, 153-155, 157, 158, 169-220, 222-224; Kanyabashi Reply Brief, paras. 63-77. *See also* AT. 20 April 2015 pp. 12-15, 51, 52, 54.
[5950] Kanyabashi Notice of Appeal, sub-para. 2.2.6; Kanyabashi Appeal Brief, paras. 170, 172; Kanyabashi Reply Brief, paras. 56-62; AT. 20 April 2015 pp. 51, 54. Kanyabashi argues that credible Defence evidence reflects that the soldiers who attacked Matyazo Clinic believed that he was an RPF accomplice, further undermining the finding of his control over them. *See* Kanyabashi Appeal Brief, para. 171; AT. 20 April 2015 p. 51.
[5951] *See* Kanyabashi Appeal Brief, para. 169.

event.[5952] He requests that the impugned conclusions be set aside and that he be acquitted of the crimes committed at Matyazo Clinic.[5953]

2567. The Prosecution responds that the Trial Chamber reasonably assessed the evidence pertaining to the killings at Matyazo Clinic.[5954] It submits that the nature of Kanyabashi's orders, the promptness with which they were executed, and evidence that Kanyabashi transported the soldiers to Matyazo Clinic demonstrate his superior responsibility for the crimes committed by these soldiers.[5955] It points to further evidence demonstrating that Kanyabashi "was an extremely influential and powerful man" to show that soldiers "would obey" his orders.[5956]

2568. The Appeals Chamber recalls that the imposition of superior responsibility necessitates a pre-existing superior-subordinate relationship between the accused and the perpetrators.[5957] While proof that an accused is not only able to issue orders but that his orders are actually followed provides an example of effective control,[5958] the Appeals Chamber has held that:

> [t]he ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise 'effective control' over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[5959]

[5952] Kanyabashi Notice of Appeal, paras. 16-18, sub-paras. 2.3-2.4.4, 2.6-2.7.2; Kanyabashi Appeal Brief, paras. 150, 151, 153-155, 157, 158, 173-220, 222-225; Kanyabashi Reply Brief, paras. 63, 71-77. *See also* AT. 20 April 2015 pp. 12-15, 51, 52.
[5953] Kanyabashi Notice of Appeal, para. 18; Kanyabashi Appeal Brief, paras. 212, 227.
[5954] Prosecution Response Brief, paras. 1786-1854. *See also* AT. 15 April 2015 pp. 34, 35.
[5955] Prosecution Response Brief, paras. 1787, 1791, 1794, 1795. *See also ibid*., paras. 1788, 1789. The Prosecution also points to evidence that Kanyabashi had previously been escorted by soldiers to Matyazo Clinic, moved around with them, and that they were stationed at his house. *See ibid*., paras. 1793, 1794; AT. 15 April 2015 pp. 36, 38.
[5956] Prosecution Response Brief, paras. 1792, 1793. Specifically, the Prosecution refers to evidence showing that: (i) Kanyabashi was in a senior political position and that Butare Town, for which he was *bourgmestre*, was second only to Kigali; (ii) Kanyabashi "had outstanding political experience [and] intimate knowledge of the decision makers"; (iii) President Sindikubwabo was Kanyabashi's friend; (iv) Kanyabashi "was the dean of the Butare mayors"; and (v) "Kanyabashi's Tutsi wife could freely pass through road blocks – which were often manned by the soldiers – since Kanyabashi was her 'true identity card'." *See idem* (internal references omitted). *See also* AT. 15 April 2015 pp. 35, 36, 38.
[5957] *Halilović* Appeal Judgement, para. 210 ("Indeed, the Appeals Chamber recalls that the material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command.") (internal reference omitted). *See also Bizimungu* Appeal Judgement, para. 133 ("The Appeals Chamber recalls that the material ability to prevent or punish can only amount to effective control over the perpetrators if it is premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.") (internal reference omitted).
[5958] *See Halilović* Appeal Judgement, para. 207. *See also Blaškić* Appeal Judgement, para. 69.
[5959] *See Čelebići* Appeal Judgement, para. 303 (internal reference omitted).

2569. The Appeals Chamber observes that, in finding that Kanyabashi had superior responsibility over the soldiers at Matyazo Clinic within the meaning of Article 6(3) of the Statute, the Trial Chamber relied exclusively on its findings that he ordered soldiers to shoot at the Tutsis sheltering at Matyazo Clinic and that the soldiers obeyed this order.[5960] Having previously determined that Kanyabashi – a civilian authority who was the *bourgmestre* of Ngoma Commune[5961] – did not have *de jure* authority over the soldiers,[5962] the Trial Chamber considered that he nonetheless "exercised effective control over these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them."[5963]

2570. The Appeals Chamber considers that the Trial Chamber's findings that Kanyabashi ordered soldiers to shoot at Tutsis and that the soldiers obeyed this order may be demonstrative of the fact that Kanyabashi was in a position of authority or influence that could compel the commission of a crime through the execution of his orders.[5964] As noted above, these findings could be indicative of the fact that Kanyabashi exercised effective control over the soldiers.[5965] However, the Appeals Chamber finds that no reasonable trier of fact could have found that a single order from a civilian authority which was followed by soldiers demonstrated a pre-existing superior-subordinate relationship, which, in turn, imposed a duty on that civilian authority to prevent the soldiers from committing crimes or to punish them for the crimes committed.[5966]

2571. In so finding, the Appeals Chamber notes that the conduct of Kanyabashi as found by the Trial Chamber could have provided a basis for individual criminal liability pursuant to Article 6(1) of the Statute. However, as already emphasised, liability under Article 6(3) of the Statute hinges on the existence of a superior-subordinate relationship which imposes an obligation to prevent crimes or punish culpable subordinates for them. The record relied upon by the Trial Chamber, however,

[5960] Trial Judgement, para. 5823.
[5961] Trial Judgement, para. 53.
[5962] Trial Judgement, para. 5822.
[5963] Trial Judgement, para. 5823.
[5964] This is the type of authority that could allow for the imposition of ordering liability under Article 6(1) of the Statute. *See Semanza* Appeal Judgement, para. 361 ("Thus, in its definition, the Trial Chamber did not require proof of a formal superior-subordinate relationship for the Appellant to be found responsible for ordering. All that it required was the implied existence of a superior-subordinate relationship. The Trial Chamber's approach in this case is consistent with recent jurisprudence of the Appeals Chamber. As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of 'ordering' is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The Trial Chamber thus committed no legal error in its enunciation of the elements of ordering.") (internal references omitted).
[5965] *See supra*, para. 2568.
[5966] The Appeals Chamber stresses that only through an accused's superior position does the corresponding duty arise to exercise effective control to prevent the crimes of subordinates or punish them. *See Halilović* Trial Judgement, para. 87 ("[I]nternational humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason they are placed in a position of control over the acts of their subordinates,

does not support the conclusion that Kanyabashi was in this position with respect to the soldiers who attacked Matyazo Clinic and, consequently, that he was under this obligation. Accordingly, the Appeals Chamber concludes that the Trial Chamber erred in convicting Kanyabashi under Article 6(3) of the Statute on the sole basis that the soldiers executed his orders to shoot at Tutsi refugees at Matyazo Clinic.[5967]

2572. Moreover, the Appeals Chamber finds that the evidence referred to by the Prosecution does not support as the only reasonable conclusion the finding that Kanyabashi was in a superior-subordinate relationship with the soldiers involved in the Matyazo Clinic massacre within the meaning of Article 6(3) of the Statute. Specifically, the Appeals Chamber observes that, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber considered that Witnesses QI and RL consistently testified that soldiers accompanied Kanyabashi in his vehicle when he arrived at Matyazo Clinic on the day of the attack.[5968] It also summarised Witness RL's testimony that, approximately five days before the event, Kanyabashi had arrived at Matyazo Clinic accompanied by about six soldiers in camouflage uniform[5969] and that Witness QI testified that soldiers lived at Kanyabashi's house.[5970] The Appeals Chamber finds that this evidence – which was not relied upon by the Trial Chamber when finding Kanyabashi responsible under Article 6(3) of the Statute[5971] – allows for reasonable inferences other than the existence of a *de facto* hierarchical relationship wherein Kanyabashi was the superior of the soldiers who attacked Matyazo Clinic. One such inference is that Kanyabashi willingly assisted the soldiers without being in a superior-subordinate relationship with them.

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and it is this position which generates a responsibility for failure to act."). *Cf. Bagilishema* Appeal Judgement, paras. 33, 35.

[5967] The Appeals Chamber highlights that Kanyabashi's situation is materially distinct from the Trial Chamber's findings that Nyiramasuhuko and Ntahobali bore superior responsibility for crimes committed by *Interahamwe* who followed their orders at the Butare Prefecture Office as well as Ntahobali's superior responsibility for crimes committed by *Interahamwe* in relation to the killing of Ruvurajabo and Tutsi refugees at the EER. *See supra*, Sections IV.F.4, V.G.3(b), V.I.4. V.J.4. In this regard, the repeated collaboration between Nyiramasuhuko and Ntahobali and *Interahamwe* in attacks at the prefectoral office in particular as well as extensive evidence of the *Interahamwe* consistently following their orders provided a reasonable basis to establish that a pre-existing superior-subordinate relationship existed between Nyiramasuhuko and Ntahobali, on one hand, and the *Interahamwe*, on the other hand, and that Nyiramasuhuko and Ntahobali exercised effective control over them.

[5968] Trial Judgement, para. 2084 ("Both witnesses testified to the presence of soldiers in or near the clinic and further testified that Kanyabashi was accompanied by soldiers during his visit. In this connection, the Chamber recalls Witness QI's testimony that he saw six soldiers close to the gate of the clinic and an additional two soldiers accompanying Kanyabashi. Witness RL similarly testified to the presence of a total of eight soldiers at the clinic, three or four of whom had arrived with Kanyabashi.") (internal references omitted), *referring to* Witness QI, T. 23 March 2004 p. 51, T. 24 March 2004 pp. 48 (closed session), 55, 56, Witness RL, T. 30 March 2004 pp. 16, 17 (closed session).

[5969] Trial Judgement, para. 2034, *referring to* Witness RL, T. 25 March 2004 pp. 77-79, T. 29 March 2004 p. 63 (closed session). *See also ibid*., para. 2037.

[5970] Trial Judgement, para. 2031, *referring to* Witness QI, T. 24 March 2004 pp. 56, 57.

[5971] *See, in particular*, Trial Judgement, para. 5823 ("The Chamber recalls, however, that Kanyabashi ordered the soldiers to shoot at the Tutsis sheltering at Matyazo Clinic in late April 1994, and that the soldiers obeyed this order […]. *Based on this fact*, the Chamber finds beyond a reasonable doubt that Kanyabashi exercised effective control over

2573. Turning to the evidence that Kanyabashi was "an extremely influential and powerful man",[5972] the Appeals Chamber is not convinced that a reasonable trier of fact could have found that Kanyabashi was in a superior-subordinate relationship with the soldiers who killed the Tutsi refugees at Matyazo Clinic on this basis. In this respect, it bears noting that the Trial Chamber did not rely on evidence of Kanyabashi's influence and authority to establish his superior responsibility with respect to these soldiers and that it implicitly found that this general evidence of Kanyabashi's influence and authority was insufficient to demonstrate his superior responsibility over the soldiers implicated in the Kabakobwa Hill massacre.[5973]

2574. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in finding that Kanyabashi was responsible pursuant to Article 6(3) of the Statute for the killings of Tutsi refugees who sought shelter at Matyazo Clinic. As a result, Kanyabashi's remaining challenges to the Trial Chamber's findings concerning this event are moot.

2575. Accordingly, the Appeals Chamber grants the relevant part of Ground 2.2 of Kanyabashi's appeal and reverses his convictions for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Matyazo Clinic. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them.") (emphasis added). *See also ibid*., paras. 2103, 5816-5822, 5824-5826.

[5972] *See* Witness FAU, T. 8 March 2004 p. 68; Witness QI, T. 24 March 2004 p. 56; André Guichaoua, T. 12 October 2004 p. 62, T. 14 October 2004 p. 9; Bernadette Kamanzi, T. 26 November 2007 pp. 37, 50.

[5973] *See generally* Trial Judgement, paras. 5794-5796.

E. Incitement by Megaphone (Grounds 3.2 to 3.8)

2576. The Trial Chamber found that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5974] It further found that, "around mid-June 1994 Kanyabashi [again] used a megaphone to tell the population to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women."[5975] The Trial Chamber determined that the terms "enemy" and "*Inkotanyi*", used by Kanyabashi, referred to and were understood to refer to Tutsis in general.[5976] The Trial Chamber concluded that Kanyabashi's May and June 1994 megaphone announcements constituted direct and public incitement to commit genocide and, accordingly, convicted him of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[5977]

2577. Kanyabashi argues that the Trial Chamber erred in its assessment of the evidence and in finding him responsible for direct and public incitement to commit genocide. The Appeals Chamber will consider these challenges in turn.

1. Assessment of Evidence

2578. The Trial Chamber relied principally on the evidence of Witness QJ to find that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5978] The Trial Chamber considered that Witness TK, although not referring to the same incident as Witness QJ, provided various details that corroborated Witness QJ's evidence as to "the manner in which the announcements were made and the content of the announcements".[5979] With respect to the mid-June 1994 megaphone announcement, the Trial Chamber relied primarily on the direct evidence of Witness QI.[5980] In assessing both incidents, the Trial Chamber also considered evidence which, in its view, established that megaphone announcements from a vehicle were part of the *modus operandi* by

[5974] Trial Judgement, paras. 3813, 5928, 6009.
[5975] Trial Judgement, paras. 3824, 5928, 6009.
[5976] Trial Judgement, paras. 3814, 3825, 3826, 5928, 6010. *See also ibid.*, para. 6012.
[5977] Trial Judgement, paras. 6009-6013, 6037, 6186. The Trial Chamber found that there was insufficient evidence to establish that Kanyabashi's conduct contributed to the subsequent killings and found him not guilty of the crime of genocide based upon his inciting remarks. *See ibid.*, paras. 5930, 5931.
[5978] *See* Trial Judgement, paras. 3796, 3813, 3814.
[5979] Trial Judgement, para. 3804. *See also ibid.*, paras. 3802, 3803.
[5980] *See* Trial Judgement, para. 3824. *See also ibid.*, paras. 3815, 3825.

which messages from Kanyabashi, in his capacity as *bourgmestre*, were delivered to the population of Ngoma Commune from April through June 1994.[5981]

2579. Kanyabashi contends that the Trial Chamber erred in: (i) assessing evidence related to the fabrication of evidence against him; (ii) evaluating exculpatory evidence that was inconsistent with the conclusions that he incited genocide; (iii) finding the existence of a *modus operandi*; (iv) assessing evidence directly related to the late May 1994 megaphone announcement; (v) assessing evidence directly related to the June 1994 megaphone announcement; and (vi) finding that killings occurred after these announcements.[5982] The Appeals Chamber will address these contentions in turn.

(a) Fabrication of Evidence

2580. Before turning to its assessment of the Prosecution evidence, the Trial Chamber recalled that the Defence had asserted that "Prosecution Witnesses QJ, TK, and QI were *Ibuka* members who were induced to falsely testify as to this allegation against Kanyabashi."[5983] However, the Trial Chamber referred to its prior determination that the evidence of Defence Witnesses D-2-21-T, D-13-D, and D-2-18-O "as to the alleged *Ibuka* membership of Witnesses QI, TK and QJ [did] not undermine the credibility of these Prosecution witnesses."[5984]

2581. Kanyabashi submits that, when evaluating such allegations, the Trial Chamber erred in failing to assess collectively the testimonies of Defence Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, and D-1-4-O concerning evidence fabrication by Witnesses QJ, TK, and QI as well as in only considering whether Prosecution witnesses were members of *Ibuka*.[5985] He emphasises that Witness D-2-21-T testified that Witnesses QJ and TK were involved in three meetings, the purpose of which was to forge evidence about a "megaphone story" against Kanyabashi, and that the witness implicated Witness QI as well.[5986] He argues that the rejection of Witness D-2-21-T's

[5981] Trial Judgement, paras. 3812, 3824. *See also ibid*., para. 3811.
[5982] Kanyabashi Notice of Appeal, sub-paras. 3.2-3.8.6; Kanyabashi Appeal Brief, paras. 256-338; Kanyabashi Reply Brief, paras. 98-133.
[5983] Trial Judgement, para. 3793.
[5984] Trial Judgement, para. 3793.
[5985] Kanyabashi Notice of Appeal, sub-paras. 3.4.6, 4.1, 4.2; Kanyabashi Appeal Brief, paras. 265, 266, 283. *See also* Kanyabashi Appeal Brief, para. 320. The Appeals Chamber understands Kanyabashi's reference to Witness D-2-4-O in paragraph 283 of his appeal brief to instead refer to Witness D-1-4-O, as no witness testified under the former pseudonym and the latter provided evidence concerning alleged evidence fabrication against Kanyabashi.
[5986] Kanyabashi Notice of Appeal, sub-para. 4.1.1.3; Kanyabashi Appeal Brief, paras. 318, 331. *See also* Kanyabashi Appeal Brief, para. 265.

evidence on the basis that the allegations raised by his testimony were "tardy" and because the witness "did not take down notes during these meetings" was unreasonable.[5987]

2582. Kanyabashi further argues that the Trial Chamber erred in accepting evidence from Witnesses QJ and TK, who had close personal ties and were in regular contact after the genocide, even though it determined that they were not truthful in denying that they had discussed the events with each other.[5988] He argues that their evidence, which sought to downplay their personal connection, was consistent with other evidence in the record that other witnesses, such as Witnesses SJ and QY, had been instructed to lie and should have been rejected on this basis.[5989] As a demonstration of their collusion, Kanyabashi stresses that only in Witness TK's second statement to Tribunal investigators, which was signed on the same day Witness QJ gave a statement about the "megaphone incident", did Witness TK discuss "a message over a microphone by a spokesperson for Kanyabashi".[5990] Kanyabashi also stresses that, during Witness QJ's testimony, the witness "imputed to Kanyabashi words which were different from those mentioned in his statements, but almost identical with those used by [Witness TK]."[5991]

2583. With respect to Witness QI, Kanyabashi contends that, while the Trial Chamber considered Witness D-2-21-T's evidence of Witness QI's role in fabricating evidence against Kanyabashi, it did not evaluate evidence from Witness D-2-18-O which implicated him in meetings or Witness QA's testimony that Witness QI's former employer incited Witness QA to accuse falsely Kanyabashi.[5992] In addition, Kanyabashi argues that the Trial Chamber should have considered evidence concerning the witness's links with the RPF as raising further doubts about his credibility.[5993] He argues that the Trial Chamber placed undue emphasis on the fact that Witness QI was not cross-examined about the meetings in rejecting the allegations of fabrication of evidence, given that the Defence only learned of them years after the witness had testified.[5994] Kanyabashi contends that, under the circumstances, it was unreasonable to rely on Witness QI's uncorroborated evidence.[5995]

[5987] Kanyabashi Notice of Appeal, sub-para. 4.1.1.3; Kanyabashi Appeal Brief, para. 319. Kanyabashi notes that his Defence did not need "to prove collusion or fabrication of evidence" but only raise reasonable doubt. *See* Kanyabashi Appeal Brief, paras. 180-183, 319.
[5988] Kanyabashi Notice of Appeal, sub-para. 4.1.1.1; Kanyabashi Appeal Brief, paras. 322-324, 326, 327.
[5989] Kanyabashi Notice of Appeal, sub-paras. 3.3.2, 3.3.3; Kanyabashi Appeal Brief, para. 325.
[5990] Kanyabashi Appeal Brief, para. 321. Kanyabashi highlights that Witness TK did not mention Kanyabashi or the megaphone incident in her first statement to Tribunal investigators, that her third statement matched her testimony, and that her fourth statement referred to Nyiramasuhuko rather than Kanyabashi speaking over a megaphone. *See idem*.
[5991] Kanyabashi Appeal Brief, paras. 321 (internal references omitted), 331.
[5992] Kanyabashi Appeal Brief, paras. 190, 283, 331.
[5993] Kanyabashi Appeal Brief, paras. 185-189, 194.
[5994] Kanyabashi Appeal Brief, para. 331.
[5995] Kanyabashi Appeal Brief, para. 331.

2584. The Prosecution responds that Kanyabashi fails to show any error in the Trial Chamber's assessment of the evidence concerning the allegations that Witnesses QJ, TK, and QI fabricated evidence.[5996]

2585. The Appeals Chamber finds no merit in Kanyabashi's unsupported contention that the Trial Chamber erred in failing to assess collectively the testimonies of Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, and D-1-4-O. The Trial Chamber assessed the evidence of these witnesses in detail in a prior section of the Trial Judgement on allegations of fabrication of evidence.[5997] Although the Trial Chamber organised its deliberations by assessing the Defence evidence witness-by-witness and prior to the assessment of the Prosecution evidence concerning the megaphone announcements, this organisation of the Trial Judgement does not demonstrate that the Trial Chamber did not view the evidence collectively.[5998] Likewise, the Trial Judgement reflects that the Trial Chamber did not limit its analysis simply to whether Prosecution witnesses were members of *Ibuka*, but considered specific allegations that Witnesses QJ, TK, and QI participated in meetings where individuals were instructed to implicate Kanyabashi in crimes.[5999]

2586. The Appeals Chamber also rejects Kanyabashi's argument that the Trial Chamber unreasonably rejected Witness D-2-21-T's evidence implicating Witnesses QJ and TK in evidence fabrication on the basis that the allegations it raised were "tardy" and because the witness "did not take down notes". This argument ignores that the Trial Chamber's analysis specifically enumerated nine other factors that led it to conclude that the witness's evidence was neither credible nor reliable.[6000]

2587. Concerning the submission that the Trial Chamber failed to view the evidence of Witnesses QJ and TK with sufficient caution given their close personal relationship, the Appeals Chamber notes the following statement in the Trial Judgement:

> The Chamber recalls that Witness QJ testified that he is married to Witness TK, which was confirmed by Witness TK. Both witnesses also testified that they had never discussed the events of April to July 1994 together, and did not know of each other's plans to testify before this Tribunal. The Chamber recalls its previous finding that while it does not believe that these witnesses never discussed the events at issue in this case, or their plans to testify before this Tribunal, this alone does not undermine Witness TK or Witness QJ's credibility […].[6001]

[5996] Prosecution Response Brief, paras. 1806-1811, 1907, 1919, 1934, 1943. *See also* AT. 20 April 2015 pp. 36, 37.
[5997] Trial Judgement, paras. 343-370.
[5998] *See* Trial Judgement, paras. 343-370.
[5999] *See* Trial Judgement, paras. 343-384.
[6000] Trial Judgement, paras. 346-359. Moreover, the Appeals Chamber dismisses Kanyabashi's suggestion that the Trial Chamber misapplied the burden of proof. When discussing allegations of fabrication of evidence, the Trial Chamber recalled that the Defence evidence only needed to raise a reasonable doubt. *See ibid.*, paras. 343, 383, 2097-2099.
[6001] Trial Judgement, para. 3795 (internal references omitted). *See also ibid*., paras. 375 ("The Kanyabashi Defence also highlights the fact that Witnesses TK and QJ, a married couple, testified that they did not discuss with each other the events that took place between April to July 1994, and this couple testified that they did not discuss with each other

In this regard, the Trial Chamber found, as Kanyabashi argues, that these witnesses sought to minimise the appearance that they had discussed the events. However, Kanyabashi does not demonstrate that, in the circumstances of this case, no reasonable trier of fact could have found their evidence credible. In the view of the Appeals Chamber, the Trial Chamber's finding that Witnesses QJ and TK lacked credibility as to whether they discussed the events with each other and about their involvement in this proceeding does not necessarily imply that they fabricated evidence against Kanyabashi.[6002] Given the broad discretion vested in triers of fact when assessing the demeanour and credibility of witnesses, the Appeals Chamber is not persuaded that the Trial Chamber was required to reject all of Witness QJ's and TK's evidence because it did not believe that these witnesses never discussed the events at issue in this case, or their plans to testify before the Tribunal.[6003]

2588. Furthermore, while Kanyabashi argues that the increasing similarity between the prior statements of Witness TK and the information and evidence provided by Witness QJ reveals that they colluded, a careful analysis does not sustain this argument. Specifically, while Witness TK's second statement to Tribunal investigators is the first time she discussed a message conveyed on behalf of Kanyabashi asking the population to search for the enemy and was signed on the same day that Witness QJ gave a statement to Tribunal investigators,[6004] Kanyabashi ignores that Witness TK's first statement only concerned events that she witnessed at the Butare Prefecture Office. Consequently, it is reasonable that she would not have given information about the megaphone announcements she heard when she was not at the prefectoral office.[6005] In addition, Kanyabashi's argument that the witnesses colluded appears all the more speculative when considering that, unlike Witness QJ, Witness TK did not identify *Kanyabashi* as the person making

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their plans to testify before this Tribunal. The Defence asserts that this testimony was incredible, that the similarity of their evidence indicates that these *Ibuka* members fabricated their testimony. The Chamber does not believe Witness TK and QJ's testimony that they never discussed the events at issue in this case, or their plans to testify before the ICTR. Nevertheless, the Chamber considers that the Defence assertions in this regard do not undermine Witnesses TK's or QJ's credibility.") (internal references omitted), 2677.

[6002] In particular, Kanyabashi emphasises that this conduct mirrors that of, for example, Witnesses SJ and QY, who were found to have lied before the Trial Chamber. The Appeals Chamber recalls that it has already considered and rejected arguments that information concerning allegations of false testimonies from Witnesses SJ and QY was relevant to the assessment of the credibility of several other Prosecution witnesses, including Witnesses QJ and TK. *See supra*, Section III.J.2(a)(ii)b. In this context, the Appeals Chamber rejects Kanyabashi's contention.

[6003] *See also supra*, paras. 1822, 1823.

[6004] *Compare* Exhibit D49 (Witness TK's December 1996 Statement), p. K0035616 (Registry pagination) *with* Witness QJ's Statements, pp. K0035667-K0035670 (Registry pagination).

[6005] *See* Exhibit D48 (Witness's TK Statement, dated 12 November 1996) (confidential). Moreover, the Appeals Chamber finds no merit in Kanyabashi's contention that Witness TK's fourth statement of Nyiramasuhuko making a megaphone announcement is inconsistent with her prior statements implicating the *bourgmestre* of Ngoma Commune in doing so. Specifically, in this statement, Witness TK described a distinct megaphone announcement by Nyiramasuhuko that she heard advertising a meeting to welcome Sindikubwabo. Although Witness TK did not refer to the megaphone announcement given on behalf of Kanyabashi that she heard, this statement was expressly intended to "supplement and clarify" her previous statements and clearly referred to a separate event. *See* Exhibit D53 (Witness TK's Statement, dated 22/23 April 1998) (confidential), p. K0052251 (Registry pagination).

the megaphone announcement in any of her prior statements or in her testimony. Kanyabashi also does not show that Witness QJ's evidence about what Kanyabashi said through the megaphone is materially inconsistent with his prior statements or so similar to Witness TK's evidence that no reasonable trier of fact could have found that the witnesses did not collude.[6006] These contentions are therefore dismissed.

2589. Turning to Kanyabashi's assertion that the Trial Chamber failed to evaluate Witness D-2-18-O's evidence implicating Witness QI in meetings where persons were encouraged to give false testimony against Kanyabashi, the Appeals Chamber observes that the Trial Chamber summarised this aspect of the witness's evidence in detail[6007] and later determined that his evidence in this regard suffered from "serious credibility issues".[6008] Kanyabashi fails to show any error in the Trial Chamber's conclusion.

2590. Likewise, the Appeals Chamber notes that the Trial Chamber did not fail to evaluate Witness QA's evidence. The Trial Chamber expressly rejected the entirety of Witness QA's evidence because the witness lacked credibility.[6009] Further, the Appeals Chamber does not consider that Witness QA's evidence that Witness QI's former employer encouraged Witness QA to accuse falsely Kanyabashi would have required a reasonable trier of fact to speculate as to whether this person also influenced Witness QI to accuse falsely Kanyabashi.[6010] Similarly, the Appeals Chamber does not consider that Witness QI's evidence of his links with the RPF required the Trial Chamber to assess his evidence with particular caution.[6011] The Appeals Chamber is also not persuaded that the Trial Chamber, which relied notably on the fact that Kanyabashi "had ample opportunity to discover this information before the testimony of the said Proscution witnesses",[6012] placed undue emphasis on the fact that Witness QI was not cross-examined about the meetings in which evidence was allegedly fabricated against Kanyabashi when dismissing evidence to this effect.[6013]

2591. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber erred in its analysis of the evidence implicating Prosecution witnesses in

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[6006] *Compare* Witness QJ's Statements, p. K0035673 (Registry pagination) *with* Witness QJ, T. 12 November 2001 p. 26 *and* T. 14 November 2001 p. 100 *with* Witness TK's December 1996 Statement, p. K0035616 (Registry pagination), Witness TK, T. 20 May 2002 pp. 26, 27.
[6007] Trial Judgement, paras. 284-286.
[6008] *See* Trial Judgement, para. 361. *See also ibid*., para. 360. The Trial Chamber determined that Witness D-2-18-O's evidence "should be treated with appropriate caution." *See ibid*., para. 363.
[6009] *See* Trial Judgement, paras. 376-378, 382, 951, 1953, 1956, 1999, 2004, 3371, 3376.
[6010] *See also supra*, para. 304.
[6011] Witness QI, T. 23 March 2004 pp. 80, 81 (closed session), T. 24 March 2004 pp. 13-16 and 43, 44 (closed session), T. 25 March 2004 pp. 25-27.
[6012] Trial Judgement, para. 347.
[6013] Trial Judgement, paras. 346-363.

evidence fabrication or that it failed to exercise sufficient caution with respect to the evidence of Witnesses QJ, TK, and QI.

(b) Exculpatory Evidence

2592. Kanyabashi argues that the Trial Chamber failed to assess evidence that is inconsistent with the testimonies of Witnesses QJ, TK, and QI that he incited the population to kill Tutsis during the genocide.[6014] In this respect, he points to evidence showing that he: (i) had been on a list to be arrested in 1990; (ii) was attacked in the February 1991 issue of the *Ijambo* review for his ties with Tutsis; (iii) had been nicknamed "*Kanyabatutsi*" given his closeness to Tutsis; (iv) was close with the Tutsi Prefect Habyalimana as evidenced by a letter from him;[6015] and (v) wrote a letter to his daughter in May 1994 expressing his "helplessness" and "his resignation to death".[6016]

2593. Kanyabashi further points to: (i) a 14 May 1994 speech in which Kambanda criticised the administrative authorities of Ngoma Commune for their links with the RPF; (ii) evidence that Marcel Gatsinzi was unaware of Kanyabashi being implicated in the genocide; and (iii) his role in hiding and caring for his Tutsi family in his home and Tutsis in the Ngoma commune office.[6017] He also highlights his participation in meetings in Matyazo in May 1994 and in Cyarwa in June 1994 in an effort to stop killings and points to his role in assisting the safe and humane transfer of Tutsi refugees to Rango.[6018]

2594. The Prosecution responds that Kanyabashi's contentions should be dismissed as he repeats arguments already raised at trial without identifying any error in the Trial Chamber's reasoning.[6019]

2595. The Appeals Chamber observes that, at trial, Kanyabashi referred to this evidence when contesting the charge of conspiracy to commit genocide.[6020] The Trial Chamber considered his arguments when assessing and rejecting the Prosecution case on this issue.[6021] Moreover, the Trial Chamber considered in its sentencing deliberations the evidence and arguments Kanyabashi now relies upon on appeal.[6022] The Trial Chamber expressly noted the existence of "evidence indicative of Kanyabashi's efforts, on occasions, to stop the massacres from spreading and to assist the

[6014] Kanyabashi Notice of Appeal, sub-para. 3.4.3; Kanyabashi Appeal Brief, paras. 272, 282.
[6015] Kanyabashi Appeal Brief, para. 273 (French). Kanyabashi also argues that he preached the ideals of the PSD party, which were peace, solidarity, and complementarity. *See ibid*., para. 274.
[6016] Kanyabashi Appeal Brief, para. 276. *Cf.* AT. 20 April 2015 p. 51.
[6017] Kanyabashi Appeal Brief, paras. 275, 277, 278.
[6018] Kanyabashi Appeal Brief, paras. 279, 280.
[6019] Prosecution Response Brief, paras. 1916, 1917.
[6020] Kanyabashi Closing Brief, paras. 23-29.
[6021] *See* Trial Judgement, para. 1899, *referring to* Kanyabashi Closing Brief, para. 29.
[6022] Trial Judgement, para. 6251, *referring to* Kanyabashi Closing Brief, paras. 23, 24, 27. *See also ibid*., paras. 3248, 6252, 6256.

refugees" in determining the individual circumstances relevant to this sentence.[6023] In this context, the Appeals Chamber is not persuaded that the Trial Chamber ignored the evidence Kanyabashi points to or that the Trial Chamber was required to discuss this evidence when assessing allegations of Kanyabashi's alleged incitement by megaphone.[6024] Kanyabashi does not show that this evidence would have precluded a reasonable trier of fact from finding that he made inciting statements by megaphone in May and June 1994.

2596. For these reasons, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber failed to consider the alleged exculpatory evidence to which he points.

(c) Modus Operandi

2597. In assessing the testimony of Witness QJ concerning Kanyabashi's announcement by megaphone in late May 1994, the Trial Chamber noted that Witness TK as well as Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY "corroborated and complemented"[6025] his evidence as it established that "megaphone announcements from a moving vehicle were part of the *modus operandi* by which messages from *Bourgmestre* Kanyabashi were delivered to the population of Ngoma *commune* in the period from April through June 1994."[6026] Likewise, the Trial Chamber found that Witness QI's testimony concerning Kanyabashi's announcement by megaphone in June 1994 was "also supported by evidence […] which establishe[d] that megaphone announcements from a moving vehicle were part of the *modus operandi* by which messages from the *bourgmestre* were disseminated to the population of Ngoma *commune*."[6027]

2598. Kanyabashi submits that the evidence on the record does not support the Trial Chamber's findings on the existence of a *modus operandi* wherein he utilised a megaphone to disseminate messages to the population of Ngoma Commune from April through June 1994.[6028] He contends that Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY testified about messages of general interest disseminated through megaphone by people other than Kanyabashi and that they explicitly denied that this practice continued after April 1994.[6029] He further argues that Witness TK testified about

[6023] Trial Judgement, para. 6256.
[6024] The Trial Chamber also considered evidence that Kanyabashi assisted Tutsis by providing travel documents that allowed him to take Tutsis through roadblocks unharmed when assessing another allegation that Kanyabashi offered a reward for a Tutsi lecturer at a roadblock. *See* Trial Judgement, paras. 3242-3249. The Trial Chamber considered that evidence of this conduct towards Tutsis did not impact its analysis on the specific allegation and determined that, if true, his good conduct could be a mitigating factor to be considered in relation to sentencing. *See ibid*., para. 3248.
[6025] Trial Judgement, para. 3813.
[6026] Trial Judgement, para. 3812. *See also ibid.*, para. 3811.
[6027] Trial Judgement, para. 3824.
[6028] Kanyabashi Notice of Appeal, sub-paras. 3.5-3.5.4; Kanyabashi Appeal Brief, paras. 284-297; Kanyabashi Reply Brief, paras. 107-109. *See also* AT. 20 April 2015 p. 20.
[6029] Kanyabashi Appeal Brief, paras. 288, 290-295.

only one event occurring after April 1994 without implicating Kanyabashi.[6030] According to Kanyabashi, contrary to the Trial Chamber's finding that none of the Defence witnesses provided an explanation as to why the practice of transmitting messages stopped in April 1994, Witness D-2-YYYY testified that they were discontinued because the administrative services were paralysed after April 1994.[6031]

2599. The Prosecution responds that the Trial Chamber reasonably concluded that megaphone announcements from April through June 1994 were part of a *modus operandi*.[6032]

2600. The Appeals Chamber observes that the Trial Chamber exclusively relied on the evidence of Witnesses TK, D-2-5-I, D-2-13-O, and D-2-YYYY in reaching its conclusion on the existence of a *modus operandi* of megaphone announcements from a moving vehicle by which Kanyabashi disseminated messages to the population of Ngoma Commune from April through June 1994.[6033] The Appeals Chamber notes that Witness TK testified about a single event in which she heard a megaphone message delivered from a vehicle at the end of May 1994 that concerned a message from the Ngoma Commune *bourgmestre*.[6034] Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY testified that, before the war, megaphone announcements conveyed messages to the people of Ngoma Commune but clarified that this practice stopped between May and July 1994.[6035] Moreover, contrary to the Trial Chamber findings, Witness D-2-YYYY explained that this practice was discontinued after 6 April 1994 as the war paralysed such administrative services.[6036] However, the Trial Chamber relied on the Defence witnesses' evidence to make a finding – that from April through June 1994 delivering megaphone announcements from a moving vehicle was a *modus operandi* employed by Kanyabashi in his capacity of Ngoma Commune *bourgmestre* – which is contradictory to their testimonies that megaphone announcements were discontinued between April and July 1994. The Appeals Chamber finds that no reasonable trier of fact could have made such finding on the basis of their evidence.

2601. Furthermore, the Appeals Chamber is not satisfied that Witness TK's evidence alone, which concerns a single megaphone announcement in May 1994, could reasonably support the *modus operandi* finding of the Trial Chamber.

[6030] Kanyabashi Appeal Brief, para. 287.
[6031] Kanyabashi Appeal Brief, para. 289. Kanyabashi argues that the Trial Chamber improperly shifted the burden of proof and required him to prove why the dissemination of the messages through a megaphone did not continue in April 1994. *See idem*; Kanyabashi Reply Brief, para. 108.
[6032] Prosecution Response Brief, paras. 1921-1924.
[6033] Trial Judgement, para. 3812.
[6034] *See* Trial Judgement, paras. 3802, 3803.
[6035] Witness D-2-5-I, T. 22 January 2008 pp. 23, 24 (closed session), 27; Witness D-2-13-O, T. 6 November 2007 pp. 25, 26; Witness D-2-YYYY, T. 28 November 2007 pp. 60, 62 (closed session).
[6036] Witness D-2-YYYY, T. 11 December 2007 p. 37 (closed session).

2602. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the evidence of Witnesses TK, D-2-5-I, D-2-13-O, and D-2-YYYY established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994. The Appeals Chamber will consider whether this error occasioned a miscarriage of justice after assessing the remainder of Kanyabashi's challenges with respect to each megaphone announcement.

(d) Late May 1994 Megaphone Announcement

2603. As noted above, the Trial Chamber relied on the evidence of Witness QJ to find that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[6037] The Trial Chamber considered that Witness TK, although not referring to the same incident as Witness QJ, provided various details that corroborated Witness QJ's evidence as to the "manner in which the announcements were made and the content of the announcements".[6038]

2604. Kanyabashi contends that the Trial Chamber erred in: (i) evaluating Witness QJ's identification evidence; (ii) assessing the credibility of Witness QJ; (iii) finding that Witness TK's evidence corroborated Witness QJ's evidence; (iv) reversing the burden of proof when assessing Defence evidence; and (v) rejecting the evidence from Defence witnesses on the basis of their relationships with Kanyabashi.[6039] The Appeals Chamber will address these contentions in turn.

(i) Identification

2605. With respect to Witness QJ's identification evidence, the Trial Chamber stated:

> Turning to Witness QJ's identification of Kanyabashi, the Chamber notes Witness QJ testified that he knew Kanyabashi because Kanyabashi was a senior public official in Ngoma *commune* where the witness was living in 1994. Witness QJ testified that Kanyabashi lived nearby and typically drove past the hotel. Further, Witness QJ saw Kanyabashi several times driving around the city in his own car, on which occasions Kanyabashi was obliged to stop at the roadblocks. Witness QJ also frequently saw Kanyabashi stop to speak to those manning the roadblock at the Hotel Faucon. Lastly, Witness QJ had previously seen Kanyabashi attend a meeting at the MRND Palace in Butare sometime between 17 and 21 April 1994. In light of the number of occasions on which Witness QJ had previously seen Kanyabashi, and Witness QJ's positive identification of Kanyabashi in court, the Chamber is persuaded that Witness QJ's identification of Kanyabashi at the Hotel Faucon roadblock in May 1994 was reliable.[6040]

[6037] *See* Trial Judgement, paras. 3796, 3813, 3814.
[6038] Trial Judgement, para. 3804. *See also ibid*., paras. 3802, 3803.
[6039] Kanyabashi Notice of Appeal, sub-paras. 3.2, 3.3.2, 3.3.5, 3.6.2, 3.6.3, 3.6.5; Kanyabashi Appeal Brief, paras. 257-263, 269, 272-281, 299-316, 332, 333; Kanyabashi Reply Brief, paras. 98-104, 112-122, 128-131. *See also* AT. 20 April 2015 p. 20.
[6040] Trial Judgement, para. 3800 (internal references omitted).

2606. Kanyabashi submits that the Trial Chamber applied the wrong legal standard to Witness QJ's identification evidence by placing undue weight on his prior knowledge of Kanyabashi and his ability to identify him in court.[6041] He also argues that the circumstances surrounding his identification by Witness QJ were difficult and required a careful analysis that the Trial Chamber erroneously did not conduct.[6042] Specifically, Kanyabashi contends that the Trial Chamber erred in accepting Witness QJ's identification evidence because the witness: (i) could not estimate the distance at which he saw him;[6043] and (ii) gave inconsistent evidence as to whether Kanyabashi was seated between two persons in the vehicle or not.[6044] He further argues that Witness QJ's evidence that Kanyabashi was being driven was contradicted by Witness QI's testimony as well as by Defence Witnesses D-2-YYY, D-2-5-I, D-2-14-W, D-2-17-I, D-21-B, and Bernadette Kamanzi whose evidence reflects that Kanyabashi drove himself and was accompanied by a policeman.[6045] Kanyabashi also questions the reliability of the identification, arguing that Witness QJ "imputed the same statements to Nsabimana as those imputed to Kanyabashi, at the same roadblock and in the same vague manner."[6046]

2607. The Prosecution responds that the Trial Chamber properly assessed Witness QJ's evidence and that a slight variation in his testimony does not detract from the reasonableness of the Trial Chamber's reliance on it.[6047] The Prosecution also submits that Witness QJ's evidence concerning Nsabimana is irrelevant to assessing his identification evidence of Kanyabashi.[6048]

2608. The Appeals Chamber rejects Kanyabashi's assertion that the Trial Chamber applied the wrong legal standard when assessing Witness QJ's prior knowledge of Kanyabashi and in-court identification. These were factors considered in addition to Witness QJ's numerous sightings of Kanyabashi prior to the megaphone announcement at the Hotel Faucon roadblock, in Butare Town,

[6041] Kanyabashi Notice of Appeal, sub-para. 3.6.5.1, *referring to* Trial Judgement, paras. 3800, 3821; Kanyabashi Reply Brief, para. 128.
[6042] Kanyabashi Appeal Brief, para. 332. *See also* Kanyabashi Notice of Appeal, sub-paras. 3.6.5.1; Kanyabashi Reply Brief, para. 128.
[6043] Kanyabashi Notice of Appeal, sub-paras. 3.6.5, 3.6.5.1, 3.6.5.5; Kanyabashi Appeal Brief, para. 333; Kanyabashi Reply Brief, para. 129.
[6044] Kanyabashi Appeal Brief, paras. 309, 333, *referring to* Witness QJ, T. 12 November 2001 pp. 24-31, 34, T. 15 November 2001 p. 17.
[6045] Kanyabashi Appeal Brief, para. 310, *referring to* Witness QI, T. 23 March 2004 pp. 50, 51, T. 24 March 2004 pp. 77, 78 (closed session), Witness D-2-YYYY, T. 28 November 2007 pp. 49-52 (closed session), Witness D-2-5-I, T. 11 December 2007 pp. 67, 68 (closed session), T. 21 January 2008 p. 56, Witness D-2-14-W, T. 12 February 2008 pp. 4, 5, Witness D-2-17-I, T. 25 February 2008 pp. 64-66 (closed session), Witness D-21-B, T. 13 May 2008 pp. 48, 49 (closed session), Bernadette Kamanzi, T. 22 November 2007 p. 39.
[6046] Kanyabashi Appeal Brief, para. 333.
[6047] Prosecution Response Brief, paras. 1947, 1948.
[6048] Prosecution Response Brief, para. 1949.

and at a meeting at the MRND Palace and Kanyabashi does not demonstrate that improper weight was placed on them.[6049]

2609. As regards Kanyabashi's contention that Witness QJ was unable to estimate the distance between him and Kanyabashi on the occasion of the megaphone announcement, the Appeals Chamber observes that the witness was able to provide a detailed description of the location at which he saw him – the Hotel Faucon roadblock – and why Witness QJ was in its vicinity.[6050] Kanyabashi's contention that Witness QJ was unable to provide a specific numerical estimate of the distance fails to demonstrate that the Trial Chamber erred in relying on his ability to identify Kanyabashi.[6051]

2610. Likewise, the Appeals Chamber finds no material variance in Witness QJ's evidence as to Kanyabashi's placement in the vehicle.[6052] Furthermore, evidence from Witness QI as well as Witnesses D-2-YYY, D-2-5-I, D-2-14-W, D-21-B, and Kamanzi does not contradict Witness QJ's evidence, as their accounts consist of assertions that Kanyabashi typically drove himself and was usually only accompanied by a policeman.[6053] Notably, while Witness QJ testified that Kanyabashi was not driving the vehicle when he made the announcement,[6054] he, like these witnesses, also testified about Kanyabashi generally driving himself.[6055]

2611. Finally, Kanyabashi's assertion that Witness QJ's testimony that he saw Nsabimana issue the same instructions as Kanyabashi at the Hotel Faucon roadblock necessarily undermines the witness's identification of Kanyabashi making similar statements is without merit. Witness QJ's evidence that Nsabimana gave similar instructions at the Hotel Faucon roadblock is consistent with

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[6049] *See* Trial Judgement, para. 3800.
[6050] Witness QJ, T. 8 November 2001 pp. 96, 102, 134, 135 (closed session), T. 12 November 2001 pp. 25, 34, T. 15 November 2001 pp. 11-16. *See also* Trial Judgement, paras. 3754, 3796.
[6051] Witness QJ, T. 12 November 2001 p. 34.
[6052] Witness QJ, T. 12 November 2001 pp. 26, 30, T. 15 November 2001 pp. 16, 17 (closed session).
[6053] Witness QI, T. 23 March 2004 p. 51 (testifying that he saw Kanyabashi arriving at the dispensary in a car that he drove alongside two armed soldiers), T. 24 March 2004 pp. 71, 78 (closed session) (testifying that Kanyabashi was in his vehicle and driving it when he saw him making a megaphone announcement in June 1994); Witness D-2-YYYY, T. 28 November 2007 pp. 49-52 (closed session) (testifying that, as far as he knew, Kanyabashi did not have a driver and that when he saw Kanyabashi between 6 April and July 1994, he was driving himself and accompanied by a police officer); Witness D-2-5-I, T. 21 January 2008 p. 56 (stating that Kanyabashi travelled in the commune's white Peugeot 305, drove himself, and was accompanied by a policeman but never gendarmes or soldiers); Witness D-2-14-W, T. 12 February 2008 pp. 4-6 (testifying that when he saw Kanyabashi "on several occasions", "[m]ost of the time" Kanyabashi was driving himself and clarifying that, when he saw Kanyabashi between 6 April and 3 July 1994, he "didn't pay attention as to whether [Kanyabashi] was driving himself or whether he was being driven by any driver whatsoever."); Witness D-21-B, T. 13 May 2008 pp. 48, 49 (closed session) (testifying generally that, when he saw Kanyabashi leave his home, he was accompanied by a policeman and the policeman was not driving); Witness D-2-17-I, T. 25 February 2008 pp. 64-66 (closed session) (testifying that he saw Kanyabashi leave a meeting at Huye Stadium one week after the death of the President and that Kanyabashi was driving himself and was accompanied by policemen); Bernadette Kamanzi, T. 22 November 2007 p. 39 (testifying that when he accompanied Kanyabashi to Mpare, Kanyabashi drove the vehicle and they were accompanied by a policeman who sat next to Kanyabashi).
[6054] Witness QJ, T. 12 November 2001 pp. 26, 30, T. 15 November 2001 pp. 16, 17 (closed session).
[6055] Witness QJ, T. 12 November 2001 pp. 32, 33.

his testimony that he frequently heard announcements similar to the one Kanyabashi gave being made by other people during the relevant time period.[6056] Furthermore, Witness QJ described Nsabimana's physical appearance and correctly stated that he was the prefect following the removal of Prefect Habyalimana.[6057]

2612. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has not shown that the Trial Chamber erred in its assessment of Witness QJ's identification of him.

(ii) Credibility

2613. The Trial Chamber found Witness QJ's testimony about the late May 1994 megaphone announcement to be detailed and consistent.[6058]

2614. Kanyabashi contends that the Trial Chamber failed to apply sufficient caution to Witness QJ's evidence with respect to the details of the late May 1994 megaphone announcement.[6059] He points to the Trial Chamber's evaluation of the inconsistencies in Witness QJ's evidence as to whether Kanyabashi gave instructions over a megaphone on one or two occasions at the Hotel Faucon roadblock.[6060] He also highlights that Witness QJ testified that he, Kanyabashi, gave instructions each time he passed the roadblock but did not refer to him using a megaphone and instead testified that he could hear him because he was close to him.[6061] Kanyabashi appears to argue that, in this context, it is unclear during which event he used a megaphone and that this ambiguity raises doubts as to the public nature of the alleged incitement.[6062]

2615. Kanyabashi also submits that no reasonable trier of fact could have found Witness QJ credible and that his testimony was detailed and coherent.[6063] He argues that the Trial Chamber

[6056] Witness QJ, T. 12 November 2001 p. 32.
[6057] *See* Witness QJ, T. 8 November 2001 pp. 100, 101, 107 (closed session), T. 12 November 2001 pp. 10, 11.
[6058] Trial Judgement, para. 3813. *See also ibid*., paras. 3796, 3800, 3801, 3804.
[6059] Kanyabashi Notice of Appeal, sub-paras. 3.6.2.1, 3.6.2.2; Kanyabashi Appeal Brief, paras. 312-316; Kanyabashi Reply Brief, para. 119.
[6060] Kanyabashi Appeal Brief, para. 313, *referring to* Trial Judgement, para. 3801.
[6061] Kanyabashi Appeal Brief, paras. 314, 315, *referring to* Witness QJ, T. 12 November 2001 p. 35, T. 14 November 2001 p. 126. Kanyabashi also points out that the Presiding Judge summarised Witness QJ's account without mentioning Kanyabashi using a megaphone. *See ibid*., para. 314, *referring to* Witness QJ, T. 15 November 2001 pp. 45, 46 (closed session). *See also* AT. 20 April 2015 pp. 21, 22.
[6062] Kanyabashi Appeal Brief, para. 314. *See also ibid*., heading 3.6.2.2 "Contradictions regarding the acts and their public nature", fn. 988, *referring to Kalimanzira* Appeal Judgement, paras. 157-165. Kanyabashi highlights that, in its closing brief, the Prosecution only relied on Witness QJ with respect to its allegation that Kanyabashi issued instructions at a roadblock, but did not rely on Witness QJ's evidence in support of the allegation that these instructions were issued by megaphone. *See* Kanyabashi Appeal Brief, para. 315. *See also* Kanyabashi Reply Brief, para. 118; AT. 20 April 2015 pp. 21, 22.
[6063] Kanyabashi Notice of Appeal, sub-paras. 3.6.2, 3.6.5; Kanyabashi Appeal Brief, paras. 308-316; Kanyabashi Reply Brief, paras. 118-122, 128-131. *See also* AT. 20 April 2015 p. 20.

unreasonably disregarded Witness QJ's "recollection problems" and several contradictions in his testimony that undermine the witness's credibility and reliability.[6064]

2616. The Prosecution responds that the Trial Chamber properly assessed Witness QJ's credibility and that Kanyabashi fails to show any error in its reasoning related to Witness QJ's inconsistencies and recollection problems.[6065]

2617. The Appeals Chamber finds that Kanyabashi fails to identify material inconsistencies in Witness QJ's evidence as to his incitement by megaphone in late May 1994 that would prevent a reasonable trier of fact from relying on the witness' evidence. The Trial Chamber noted that Witness QJ initially testified that he saw Kanyabashi make the megaphone announcement on two occasions but later testified that he only witnessed Kanyabashi make this announcement on one occasion, in May 1994.[6066] The Trial Chamber did not consider the discrepancy to be significant in light of the passage of time between the events at issue and Witness QJ's testimony.[6067] Kanyabashi does not demonstrate any error in this reasoning.

2618. Kanyabashi also fails to demonstrate that Witness QJ's evidence about his observations of Kanyabashi at the Hotel Faucon roadblock reveals that he provided contradictory evidence as to whether Kanyabashi used a megaphone. The Appeals Chamber observes that Witness QJ testified that he often saw Kanyabashi at the Hotel Faucon roadblock.[6068] The witness explained that, on occasions other than the one in which Kanyabashi used the megaphone in May 1994, he saw Kanyabashi stopped at the Hotel Faucon roadblock in his private vehicle and that, each time, Kanyabashi reminded people manning it to be careful and instructed them to ensure that no enemy go through.[6069] Having reviewed the relevant aspects of Witness QJ's direct and cross-examination,

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[6064] Kanyabashi Appeal Brief, para. 308. Kanyabashi argues that Witness QJ: (i) was unable to recall specific facts approximately 60 times during his testimony; (ii) testified that he went to the Butare Prefecture Office only twice, then stated that he went there "often" before testifying again that he went there twice; (iii) testified that Nsabimana went to all of the roadblocks to announce a message similar to that given by Kanyabashi then stated that he only saw Nsabimana at the Hotel Faucon roadblock; and (iv) testified that he could see everything from his hiding place during an attack against Tutsis hiding in the Hotel Faucon but later retracted this. *See idem* (emphasis omitted). *See also* Kanyabashi Reply Brief, paras. 118, 119; AT. 20 April 2015 p. 20.
[6065] Prosecution Response Brief, paras. 1934-1940. *See also* AT. 20 April 2015 pp. 42, 43.
[6066] Trial Judgement, para. 3801.
[6067] Trial Judgement, para. 3801.
[6068] Witness QJ, T. 12 November 2001 p. 25 ("A. The road he normally took was the one that passes in front of Hotel Faucon because he lived nearby and I saw him often at the roadblock.").
[6069] Witness QJ, T. 12 November 2001 pp. 32-34 ("Q. Can you tell us if you saw Bourgmestre Kanyabashi at any other occasion, aside from these two occasions that you saw him in the pickup truck? A. I saw him several times and I also saw him in his own private car, which is a Peug[e]ot 505, and he drove around in this car in the city. […] Q. Did you see Bourgmestre Kanyabashi stop at any of the roadblocks? A. He necessarily had to go to the roadblock and to stop. Not only did the bourgmestre who is in the vehicle had to stop at the roadblock, but also pedestrians also had to stop to go through a check at the roadblock. Further, they had to stop at the roadblock because the roadblock had to be opened for them because there was no other way of going through. […] Q. Can you tell this Court if you saw Bourgmestre Kanyabashi speak to anyone at the roadblock? A. I saw him often. Each time he went through the roadblock, he had to remind people who were manning the roadblock that they had to be careful and ensure that no enemy went through.

the Appeals Chamber also finds that Kanyabashi does not demonstrate that the witness provided contradictory evidence about whether he used a megaphone in May 1994.[6070]

2619. Turning to Kanyabashi's contention that Witness QJ was generally unreliable, the Appeals Chamber observes that Kanyabashi merely refers to excerpts from Witness QJ's testimony in which the witness could not remember precise details when questioned about specific, and often peripheral, aspects of his testimony.[6071] Although Kanyabashi highlights Witness QJ's inability to recall the specific date when the megaphone announcement by Kanyabashi occurred,[6072] Witness QJ consistently stated that the announcement took place in May 1994 and acknowledged his inability to recall the exact day.[6073] Kanyabashi does not show that a reasonable trier of fact could not have relied on his evidence in these circumstances. Likewise, Kanyabashi fails to identify any material inconsistencies in Witness QJ's testimony that a reasonable trier of fact should have addressed in assessing Witness QJ's evidence in relation to this event or that would have precluded it from finding the witness to be credible with respect to it.[6074]

That was what he said often. Q. What did the word 'enemy' mean? A. When they said Umwansi or enemy – I spell Umwansi. U-M-W-A-N-Z-I. When this word was used, it is also intended to mean Tutsi. And, again, to refer to the Tutsis, they could say 'snakes' or 'Nyenzi,' or so on, and so forth.").

[6070] *See* Witness QJ, T. 12 November 2001 pp. 32-34, T. 14 November 2001 pp. 123, 124 and 129-138 (closed session); T. 15 November 2001 pp. 9-17 (closed session). The portions of Witness QJ's testimony highlighted by Kanyabashi generally concern questions to and responses from the witness about when Kanyabashi was addressing the persons manning the roadblock. Kanyabashi does not demonstrate, however, that the evidence of Witness QJ speaking to soldiers manning the roadblock is inconsistent with his evidence that he observed Kanyabashi using a megaphone and "informing the people of Ngoma that the enemies are among us and you are requested to seek them everywhere" at the Hotel Faucon roadblock. *See* Witness QJ, T. 12 November 2001 p. 26, T. 14 November 2001 p. 100. The witness's evidence reflects that his statements to those manning the roadblock mirrored his "announcements". *See* T. 14 November 2001 p. 95 ("Q. Witness QJ, you testified to the effect that Mr. Kanyabashi, at a roadblock, allegedly told the soldiers manning the roadblock to do their work properly so as not to let the enemy through. Do you recall saying that? A. Yes, he said that, *and these were announcements that he was making*.") (emphasis added). Furthermore, Witness QJ repeatedly indicated that the announcements were made throughout Butare Town. *See* T. 12 November 2001 p. 25 ("Q. Can you describe what he was doing when you saw him at the roadblock? A. He made announcements from his vehicle and that, throughout the city."), T. 14 November 2001 pp. 97, 98 ("Q. Witness QJ, is it not correct that this announcement that he made was made at the roadblock at Hotel Faucon to soldiers. […] THE WITNESS: No, the announcement was made across the whole Butare town and on about three occasions.").

[6071] Kanyabashi points to instances wherein Witness QJ could not recall precise details with respect to: (i) his meetings with Prosecution investigators (*see* Witness QJ, T. 12 November 2001 pp. 43-46, and 70, 79, 92, 93, 95, 96 (closed session), T. 13 November 2001 p. 42, T. 15 November 2001 pp. 19, 59 (closed session)); (ii) incidents unrelated to the Kanyabashi's megaphone announcement (*see* Witness QJ, T. 12 November 2001 p. 123, T. 13 November 2001 pp. 45, and 81(closed session), 117, T. 15 November 2001 pp. 66, 68 (closed session)); and (iii) issues related to his general credibility (*see* Witness QJ, T. 12 November 2001 p. 50, T. 13 November 2001 pp. 28, 30 (closed session), and 38, 59, 118, and 129, 131, 132, 134 (closed session), T. 14 November 2001, pp. 24, 25, 27, 30, 47, 52, 53 (closed session), 64, 65, 73, 77, 84, 86, 92, 101, 104, 119, 122, 123, T. 15 November 2001 pp. 52, 58, 64, 66, 68, 111 (closed session)).

[6072] Kanyabashi Appeal Brief, para. 308.

[6073] *See* Witness QJ, T. 12 November 2001 p. 25, T. 15 November 2001 pp. 9, 10 (closed session).

[6074] The Appeals Chamber notes that: (i) Witness QJ consistently testified that he went to the Butare Prefecture Office on two occasions, and, when read in context, his assertion that he "often went to the [prefectoral office] in the evenings" merely reflects that on the two occasions that he went there, it was in the evening (*see* Witness QJ, T. 8 November 2001 p. 137 (closed session); T. 12 November 2001 p. 12); (ii) when Witness QJ's testimony is read in context, it is apparent that his statement that Nsabimana "took that itinerary; he went through all the roadblocks that [Witness QJ] mentioned" was based on Witness QJ's supposition that, at the time, Nsabimana would have had to pass through certain roadblocks,

2620. The Appeals Chamber therefore dismisses Kanyabashi's contention that the Trial Chamber erred in finding that Witness QJ's evidence was detailed and consistent.

(iii) Corroboration

2621. When assessing Witness QJ's evidence of Kanyabashi making a megaphone announcement in May 1994, the Trial Chamber recalled Witness TK's testimony that, while hiding in a convent in Butare at the end of May 1994, she heard a vehicle drive past broadcasting an announcement through a megaphone that the Ngoma *bourgmestre* wished to inform the population that the enemy was still among them and that they had to find the enemy.[6075] The Trial Chamber noted that Witness TK could not identify the person delivering the announcement except that the voice she heard was not Kanyabashi's.[6076] It further concluded that Witnesses QJ and TK were "not testifying about one and the same announcement [made] by Kanyabashi in mid-May 1994."[6077] Nonetheless, the Trial Chamber considered that "various details" of Witness TK's evidence, "such as the manner in which the announcements were made and the content of the announcements" corroborated Witness QJ's testimony.[6078]

2622. Kanyabashi argues that the Trial Chamber erred in concluding that Witness TK corroborated Witness QJ's evidence, as the two witnesses testified about different incidents, and Witness TK, unlike Witness QJ, did not identify Kanyabashi as the person making the announcement.[6079] In addition, Kanyabashi contends that the Trial Chamber erred in failing to examine sufficiently whether Witnesses QJ and TK, in light of their relationship and continuous closeness after the genocide, had inadvertently influenced each other's evidence.[6080]

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in addition to the Hotel Faucon roadblock, based on the route available, as opposed to being an assertion that he had seen Nsabimana passing through those roadblocks, which is consistent with Witness QJ's testimony that he only saw Nsabimana at the Hotel Faucon roadblock (*see* Witness QJ, T. 8 November 2001 pp. 142, 143 (closed session), T. 13 November 2001 pp. 107, 108 (closed session)); and (iii) Witness QJ originally testified that he could see everything that happened during the attack against Tutsis hiding in the Hotel Faucon from his hiding place (*see* Witness QJ, T. 13 November 2001 p. 58), but subsequently clarified that he could not "see" the backyard but could "hear" what was occurring (*see* Witness QJ, T. 14 November 2001 pp. 47-49, 54, 55 (closed session)).

[6075] Trial Judgement, para. 3802.

[6076] Trial Judgement, paras. 3802, 3803.

[6077] Trial Judgement, para. 3804. *See also ibid*., para. 3802 ("However, [Witness TK's] testimony supports Witness QJ's account with regard to the content of the message, the method by which it was disseminated, and the approximate time and place of the announcement.").

[6078] Trial Judgement, para. 3804. *See also ibid*., para. 3802. The Trial Chamber also noted that Witness D-2-13-D's testimony that the commune office owned a Toyota pick-up corroborated Witness QJ's testimony that Kanyabashi was in a Toyota pickup. *See ibid.*, para. 3796.

[6079] Kanyabashi Notice of Appeal, sub-para. 3.6.1.2; Kanyabashi Appeal Brief, paras. 299, 300, 306; Kanyabashi Reply Brief, paras. 112-114. *See also* AT. 20 April 2015 p. 19.

[6080] Kanyabashi Appeal Brief, paras. 301-304.

2623. The Prosecution responds that the Trial Chamber reasonably concluded that the testimony of Witness QJ was corroborated by Witness TK's evidence after expressly considering their ties.[6081]

2624. The Appeals Chamber observes that the Trial Chamber recognised that Witness TK did not testify about the megaphone announcement in May 1994 that Witness QJ testified about.[6082] However, it noted that her testimony corroborated Witness QJ's testimony with respect to the "manner in which the announcements were made and the content of the announcements".[6083] The Trial Chamber recalled that Witness QJ also testified "that these announcements were repeated frequently."[6084] Although Witness TK was not testifying about the same event as Witness QJ, on which Kanyabashi's criminal liability is based, it is clear that the Trial Chamber found that Witness TK's testimony provided circumstantial corroboration for that event.[6085] The Appeals Chamber, Judge Pocar and Judge Agius dissenting, sees no error in the Trial Chamber's approach.[6086]

2625. The Appeals Chamber is also not persuaded that the Trial Chamber failed to sufficiently examine whether Witnesses QJ and TK, in light of their relationship and continuous closeness after the genocide, had influenced each other's evidence. As noted above, the Trial Chamber expressly considered the circumstances in which they testified and determined that it did not find credible that they had not discussed the events or their participation in this proceeding.[6087] Kanyabashi does not point to elements in the witnesses' testimonies demonstrating intentional or unintentional evidence contamination, which would have precluded a reasonable trier of fact from relying on their evidence.

2626. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has not demonstrated that the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony.

(iv) Reversal of Burden of Proof

2627. The Trial Chamber did not find credible Defence evidence that Witnesses QJ and TK did not hear the megaphone messages or that Kanyabashi was not implicated in the megaphone

[6081] Prosecution Response Brief, paras. 1928-1933. *See also* AT. 20 April 2015 p. 43.
[6082] Trial Judgement, para. 3804.
[6083] Trial Judgement, para. 3804. *See also ibid*., para. 3802.
[6084] Trial Judgement, para. 3804 (internal reference omitted).
[6085] Trial Judgement, paras. 3812, 3813.
[6086] The Appeals Chamber recalls that two *prima facie* credible testimonies corroborate one another when one testimony is compatible with the other regarding the same fact or a sequence of linked facts. *See Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[6087] Trial Judgement, paras. 375, 3795.

announcements.[6088] In particular, it did not accept Witness AND-17's evidence that Witness QJ could not have heard the megaphone announcements, noting that Witness AND-17 was not continuously with Witness QJ and had made several implausible statements under oath.[6089] The Trial Chamber also disregarded Witnesses D-2-YYYY's and D-2-17-I's testimonies as they were not continuously at the location in May 1994 from which Witness TK allegedly heard the inciting remarks.[6090] Finally, it found the testimonies of Witnesses D-2-17-I, D-2-YYYY, D-2-5-I, D-2-14-W, D-2-13-O, D-13-D that they never heard Kanyabashi making a megaphone announcement from a moving vehicle to be of a limited weight, noting that none of these witnesses was continuously in Butare and that some of them had close personal or professional ties with Kanyabashi.[6091]

2628. Kanyabashi argues that the Trial Chamber reversed the burden of proof by requiring the Defence to present evidence demonstrating that its witnesses were permanently present at the same locations and on the same dates as Witnesses QJ and TK in order to counter their testimonies.[6092] He contends that the Trial Chamber erred in considering that Witness AND-17's evidence did not raise doubt in Witness QJ's testimony, as the former, although not "attached" to Witness QJ, was continuously present – "night and day" – on the same premises as Witness QJ from April to June 1994.[6093] In the same vein, Kanyabashi submits that the Trial Chamber erred in finding that, because Witness D-2-17-I was not continually at the location in May 1994 from which Witness TK allegedly heard inciting statements, his evidence could not raise reasonable doubt in Witness TK's testimony.[6094] In this regard, he argues that the Trial Chamber erred in finding that Witness D-2-17-I was absent from the convent on four occasions during the relevant period as opposed to two and suggests that the witness was, in fact, present on the relevant day.[6095] Kanyabashi also submits that the Trial Chamber required him to prove that Witness D-2-14-W was continuously present in Butare Town and contends that its finding that he left it is speculative as the witness only testified to having left his *cellule*.[6096]

2629. Kanyabashi further contends that, in light of the public nature of the incitement testified to by Witnesses QJ and TK, "[e]verybody must have heard it" and, consequently, Defence evidence

[6088] Trial Judgement, paras. 3797-3799, 3805-3810.
[6089] Trial Judgement, paras. 3797-3799.
[6090] Trial Judgement, paras. 3805, 3806.
[6091] Trial Judgement, paras. 3809, 3810.
[6092] Kanyabashi Notice of Appeal, sub-para. 3.2.3; Kanyabashi Appeal Brief, paras. 258, 259, 263; Kanyabashi Reply Brief, paras. 98-100, 103, 104.
[6093] Kanyabashi Appeal Brief, para. 262.
[6094] Kanyabashi Appeal Brief, para. 260. Kanyabashi also contends that, while the Trial Chamber found that Witness D-2-17-I was vague about his movements, he was prevented from questioning him in this regard. *See idem*, *referring to* Witness D-2-17-I, T. 27 February 2008 pp. 22, 26, 27, 31.
[6095] Kanyabashi Appeal Brief, para. 260.

that such incitement did not occur necessarily raised a reasonable doubt.[6097] He argues that the fact that approximately 30 other Prosecution witnesses, who were in Butare Town, were not questioned about this incident should have led a reasonable trier of fact to have reasonable doubt that it occurred.[6098]

2630. The Prosecution responds that the Trial Chamber did not shift the burden of proof but correctly exercised its discretion in finding that the evidence of Witnesses AND-17, D-2-17-I, and D-2-14-W did not raise a reasonable doubt with respect to the Prosecution case.[6099] It further responds that Kanyabashi's argument resting on the public nature of the incitement is unsupported.[6100]

2631. The Appeals Chamber finds that the Trial Chamber's acceptance of the Prosecution evidence that incitement occurred over Defence evidence that it did not does not demonstrate the imposition of an improper evidentiary burden on the Defence to prove a case rather than raise reasonable doubt. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trial chamber to decide which version it considers more credible.[6101]

2632. Similarly, the Appeals Chamber finds no merit in Kanyabashi's challenges to the Trial Chamber's assessment of Witness AND-17's evidence. The Trial Chamber rejected Witness AND-17's assertion that he was continuously with Witness QJ during the relevant period as a detailed assessment of Witness AND-17's testimony belied this statement.[6102] Beyond identifying inconsistencies in his testimony, the Trial Chamber further found Witness AND-17's evidence "to be neither credible, nor reliable" based on several other "implausible statements under oath."[6103] Kanyabashi does not demonstrate any error in the Trial Chamber's recounting of Witness AND-17's evidence nor does he demonstrate that the Trial Chamber applied an incorrect burden when assessing it.

2633. As regards Witness D-2-17-I's evidence, the Trial Chamber concluded that his testimony did not contradict Witness TK's evidence as he was not continuously present at the location where

[6096] Kanyabashi Appeal Brief, para. 261; Kanyabashi Reply Brief, para. 102.
[6097] Kanyabashi Appeal Brief, para. 263.
[6098] Kanyabashi Appeal Brief, para. 263.
[6099] Prosecution Response Brief, paras. 1891-1902. The Prosecution contends that Kanyabashi's arguments that Trial Chamber's shifted the burden of proof are underdeveloped and should be summarily dismissed. *See ibid*., para. 1895.
[6100] Prosecution Response Brief, paras. 1903-1906.
[6101] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[6102] Trial Judgement, para. 3798.
[6103] Trial Judgement, para. 3799.

Witness TK was hiding when she heard the megaphone announcement in May 1994.[6104] In this regard, the Trial Chamber noted that Witness D-2-17-I testified that he left the location on four occasions.[6105] The Appeals Chamber observes, however, that Witness D-2-17-I testified that he only left twice in May 1994.[6106] Nonetheless, the Appeals Chamber does not consider that this error occasioned a miscarriage of justice. Kanyabashi's assertion that Witness D-2-17-I's evidence reflects that he would have been with Witness TK on the day she heard inciting remarks is not substantiated.[6107]

2634. With respect to Witness D-2-14-W, the Appeals Chamber observes that the Trial Chamber considered that Kanyabashi did not establish that the witness was continuously present in Butare Town throughout late May 1994.[6108] While Kanyabashi argues that the witness's evidence only reflects that he left his *cellule*, the Appeals Chamber fails to see how any error in this regard has occasioned a miscarriage of justice.[6109] Notably, the witness's evidence reflects that he did not reside in the centre of Butare Town but about two kilometres away.[6110] Accordingly, the Appeals Chamber considers that Kanyabashi does not show that the witness would have necessarily been in a position to hear what Witnesses QJ and TK heard. Moreover, as found below, the Trial Chamber also considered Witness D-2-14-W's interest in defending Kanyabashi due to their relationship.[6111] Kanyabashi does not demonstrate that the Trial Chamber reversed the burden of proof when assessing this witness's evidence.

2635. Finally, the Appeals Chamber finds speculative Kanyabashi's contention that, because of the public nature of the incitement, Defence evidence that it did not occur and the fact that other Prosecution witnesses in Butare Town were not questioned about it must have raised doubt.

2636. Based on the foregoing, the Appeals Chamber dismisses Kanyabashi's contention that the Trial Chamber reversed the burden of proof when assessing the late May 1994 megaphone announcement.

[6104] Trial Judgement, para. 3806.
[6105] Trial Judgement, para. 3806.
[6106] Particularly, while Witness D-2-17-I first generically testified that he left the convent four times between May and July 1994, he then clarifies that he returned home twice on May 1994 and twice on June 1994. *Compare* Witness D-2-17-I, T. 27 February 2008 p. 18 (closed session) *with* T. 27 February 2008 pp. 22, 26, 27, 31 (closed session).
[6107] The Appeals Chamber has elsewhere considered and rejected Kanyabashi's contention that he was impermissibly prevented from reopening his case for the purpose of eliciting further evidence from Witness D-2-17-I as to his presence at the convent. *See supra*, Section VIII.A.1(b).
[6108] Trial Judgement, para. 3809.
[6109] *See* Witness D-2-14-W, T. 11 February 2008 pp. 38-41 (closed session); Witness D-2-14-W's testimony reflects that he went, for example, to Huye Stadium.
[6110] *See*, *e.g.*, Witness D-2-14-W, T. 11 February 2008 p. 40 (closed session).
[6111] *See infra*, para. 2641.

(v) Relationships with Witnesses

2637. In assessing Defence evidence in relation to the megaphone announcement in late May 1994, the Trial Chamber stated that:

> [F]ive of these eight Defence witnesses were closely connected to Kanyabashi in 1994, and as such, may have had an interest in defending him. Witnesses D-2-5-I, D-2-YYYY and D-2-14-W had close professional ties to Kanyabashi, and Witnesses D-13-D and D-2-13-O testified to close personal ties with Kanyabashi.[6112]

2638. Kanyabashi argues that none of the Defence witnesses had ties with him that would support the Trial Chamber's conclusion that they would falsely testify on his behalf.[6113] He contends that the Trial Chamber unreasonably rejected the testimonies of Witnesses D-2-5-I, D-2-YYYY, and D-2-14-W because of close professional ties.[6114] He further contends that the Trial Chamber erred in asserting that he had close personal ties with Witnesses D-2-13-O and D-13-D, as the former simply lived on the same hill as him and the latter was merely a neighbour and not a friend.[6115]

2639. The Prosecution responds that the Trial Chamber correctly assessed the ties between Kanyabashi and his Defence witnesses and argues that he attempts to substitute his assessment of the evidence for that of the Trial Chamber.[6116]

2640. The Appeals Chamber recalls that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence,[6117] and that it is for the trier of fact to determine whether a particular witness may have an incentive to distort the truth.[6118] Kanyabashi does not show that the Trial Chamber erred in considering the ties between him and the Defence witnesses when assessing the credibility of their evidence.

2641. The Appeals Chamber further notes that, in finding that Witnesses D-2-5-I and D-2-YYYY had "close professional ties to Kanyabashi",[6119] the Trial Chamber relied on their evidence that they worked closely with Kanyabashi when employed as policemen in Ngoma Commune and that Witness D-2-YYYY had been employed in that capacity under Kanyabashi's supervision for several years.[6120] In reaching the same conclusion with respect to Witness D-2-14-W, the Trial

[6112] Trial Judgement, para. 3810 (internal references omitted).
[6113] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6114] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6115] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6116] Prosecution Response Brief, paras. 1645, 1646, 1910, 1911.
[6117] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[6118] *Gacumbitsi* Appeal Judgement, para. 71.
[6119] *See* Trial Judgement, para. 3810.
[6120] *See* Witness D-2-YYYY, T. 26 November 2007 p. 62 (closed session), T. 3 December 2007 p. 8 (closed session), T. 5 December 2007 p. 56 (closed session); Witness D-2-5-I, T. 11 December 2007 p. 51 (closed session), T. 21 January 2008 p. 60 (closed session).

Chamber relied on the witness's evidence that his employment was linked closely to a project that Kanyabashi was involved in funding.[6121] Kanyabashi does not show any error in the Trial Chamber's evaluation of these ties when considering the credibility of Witnesses D-2-5-I, D-2-YYYY, and D-2-14-W.

2642. As regards the Trial Chamber's conclusion that Witnesses D-2-13-O and D-13-D "testified to close personal ties with Kanyabashi",[6122] the Appeals Chamber notes that the evidence cited by the Trial Chamber supports its conclusion concerning Witness D-2-13-O.[6123] By contrast, the Appeals Chamber observes that Witness D-13-D's testimony relied upon by the Trial Chamber reflects that, while the witness lived in the vicinity of Kanyabashi, he stated that Kanyabashi was not a "personal friend".[6124] The Trial Chamber also appears to have disregarded additional evidence of Witness D-13-D distancing his family from Kanyabashi's.[6125] The Appeals Chamber considers that, based on the evidence cited, no reasonable trier of fact could have found that Witness D-13-D had close personal ties with Kanyabashi. However, it finds that this error has not occasioned a miscarriage of justice as the Trial Chamber's assessment in any event reveals that it considered Witness D-13-D's evidence to be of low probative value with respect to the late May 1994 megaphone announcement.[6126]

2643. Consequently, the Appeals Chamber finds that Kanyabashi has not demonstrated any error in the assessment of his ties with Defence witnesses that would warrant the intervention of the Appeals Chamber.

(vi) Conclusion

2644. The Appeals Chamber has rejected the vast majority of Kanyabashi's allegations of error with respect to the Trial Chamber's assessment of the evidence concerning the late May 1994 megaphone announcement, including, Judge Pocar and Judge Agius dissenting, that Witness TK's evidence corroborated Witness QJ's evidence concerning the May 1994 megaphone announcement. The Appeals Chamber has, however, determined that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma

[6121] Trial Judgement, para. 3810; Witness D-2-14-W, T. 11 February 2009 pp. 7, 9 (closed session).
[6122] Trial Judgement, para. 3810.
[6123] Witness D-2-13-O, T. 5 November 2007 p. 16 (closed session). *See also* Witness D-2-13-O, T. 7 December 2007 p. 18.
[6124] *See* Witness D-13-D, T. 14 February 2008 pp. 31.
[6125] Witness D-13-D, T. 20 February 2008 p. 25 (closed session).
[6126] *See* Trial Judgement, para. 3809.

Commune from April through June 1994.[6127] The Appeals Chamber will now determine whether this error has occasioned a miscarriage of justice.

2645. The Appeals Chamber observes that the Trial Chamber relied on Witness QJ's evidence to reach its factual conclusion with respect to the late May 1994 megaphone announcement in the following terms:

> Insofar as Witness QJ's account was also corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system, the Chamber finds that the Prosecution has proven beyond a reasonable doubt that around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them.[6128]

2646. Kanyabashi argues that this statement reflects the unambiguous conclusion that Witness QJ's evidence would not have been relied upon but for the existence of the *modus operandi* as corroboration.[6129]

2647. The Prosecution responds that the Trial Chamber could have relied on the testimony of Witness QJ with or without corroboration.[6130]

2648. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them. In this respect, the Appeals Chamber recalls that it has rejected, Judge Pocar and Judge Agius dissenting, Kanyabashi's allegation of error with respect to the Trial Chamber's assessment that Witness TK's evidence corroborated Witness QJ's evidence concerning the May 1994 megaphone announcement. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, notes that the Trial Chamber relied upon Witness TK's evidence that she overheard a vehicle drive past and a megaphone broadcasting an announcement delivered on behalf of the *bourgmestre* of Ngoma Commune in May 1994.[6131] The Appeals Chamber, Judge Pocar and Judge Agius dissenting, is satisfied that this evidence is sufficiently complementary and corroborative of Witness QJ's evidence of "announcements being disseminated from a vehicle with a public address system".[6132] Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice.

[6127] *See supra*, Section VIII.E.1(c).
[6128] Trial Judgement, para. 3813.
[6129] Kanyabashi Appeal Brief, paras. 297, 307. *See also* AT. 20 April 2015 pp. 19-21.
[6130] AT. 20 April 2015 p. 42.

2649. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, concludes that Kanyabashi has failed to demonstrate that the Trial Chamber erred, on the basis of Witness QJ's evidence, in finding that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.

(e) Mid-June 1994 Megaphone Announcement

2650. With respect to the allegation that Kanyabashi made inciting statements through a megaphone in June 1994, the Trial Chamber recalled Witness QI's evidence that, in mid-June 1994 while hiding above a bread oven at his employer's house, he saw Kanyabashi exit his white Peugeot 305 with a hand-held megaphone and announce that the *Bourgmestre* of Ngoma Commune wanted the population to come early in the morning to clear the bushes along the road so the "*Inkotanyi*" would not find anywhere to hide.[6133] It further recalled that Witness QI testified that "Kanyabashi said they should flush out people hiding in the bushes, and everybody found in those bushes should die, including children, old men and women."[6134] The Trial Chamber found Witness QI's testimony "credible, reliable and convincing" and relied on it to find that, around mid-June 1994, Kanyabashi used a megaphone to disseminate inciting statements to commit genocide.[6135]

2651. Kanyabashi argues that the Trial Chamber erred in: (i) assessing Witness QI's identification evidence; (ii) evaluating the witness's credibility; and (iii) reversing the burden of proof.[6136] The Appeals Chamber will address these contentions in turn.

(i) Identification

2652. The Trial Chamber considered Witness QI's prior knowledge of Kanyabashi, the conditions in which the witness observed Kanyabashi, and Defence evidence that was presented as challenging the reliability of this identification.[6137] It concluded that, "notwithstanding the conditions in which Witness QI found himself at the time of observing Kanyabashi's megaphone announcement, and taking into account not only the content of the announcement, but also that Witness QI was already

[6131] *See* Trial Judgement, paras. 3757, 3802, 3803.
[6132] Trial Judgement, para. 3813.
[6133] Trial Judgement, para. 3815.
[6134] Trial Judgement, para. 3815.
[6135] Trial Judgement, para. 3824.
[6136] Kanyabashi Notice of Appeal, sub-paras. 3.2, 3.2.4, 3.6.4-3.6.5.5; Kanyabashi Appeal Brief, paras. 258, 259, 263, 328-332, 334; Kanyabashi Reply Brief, paras. 125-127.
[6137] Trial Judgement, paras. 3816-3820.

familiar with Kanyabashi, […] Witness QI's identification of Kanyabashi on that day in June 1994 [was] reliable."[6138]

2653. Kanyabashi submits that the Trial Chamber erred in its assessment of Witness QI's identification evidence.[6139] He argues that evidence recalled in the Trial Judgement demonstrates that the identification was unreliable or lacked credibility and contends that Witness QI had vision problems.[6140]

2654. The Prosecution responds that the Trial Chamber correctly assessed Witness QI's identification evidence.[6141]

2655. The Appeals Chamber observes that, in support of his argument, Kanyabashi simply lists paragraphs of the Trial Judgement or evidence considered by the Trial Chamber. His contentions merely reflect disagreement with the Trial Chamber's analysis without demonstrating how the Trial Chamber's detailed consideration of Witness QI's ability to identify Kanyabashi was unreasonable.

2656. Kanyabashi's argument that Witness QI had vision problems is likewise without merit. In support of this contention, Kanyabashi refers to a passage of Witness QI's examination-in-chief during which he could not recognise a picture on the screen.[6142] However, the fact that Witness QI may have had vision problems while testifying 10 years after having observed the events does not undermine the reasonableness of the Trial Chamber's reliance on his evidence.

2657. Consequently, the Appeals Chamber dismisses Kanyabashi's contention regarding Witness QI's identification evidence.

(ii) Credibility

2658. Kanyabashi argues that Witness QI's credibility is questionable given that, while he could approximate the date and time of the event when testifying in 2004, he was unable to do so when giving his statement to Tribunal investigators in 1999.[6143] He also submits that the Trial Chamber did not consider Witness QI's evidence in light of his former employer's ties with Kanyabashi.[6144]

[6138] Trial Judgement, para. 3821.
[6139] *See* Kanyabashi Appeal Brief, paras. 209, 332, 334; Kanyabashi Reply Brief, paras. 125-127.
[6140] Kanyabashi Appeal Brief, paras. 209, 334, *referring to* Witness QI, T. 25 March 2004 p. 54 (closed session).
[6141] Prosecution Response Brief, para. 1950.
[6142] *See* Witness QI, T. 25 March 2004 p. 54 (closed session) ("Q. Witness, you can see a red and white house. Do you see a red and white house on the photograph? A. Yes, but because of my sight problem, I can not see well I have eye problems.").
[6143] Kanyabashi Notice of Appeal, sub-paras. 3.6.4, 3.6.4.1, 3.6.4.3-3.6.4.5; Kanyabashi Appeal Brief, para. 329.
[6144] Kanyabashi Appeal Brief, para. 330. In this regard, Kanyabashi highlights that, despite the fact that Witness QI was hiding in his former employer's house, he testified that he never discussed the megaphone announcements with him or his wife. *See idem*, *referring to* Witness QI, T. 25 March 2004 pp. 9, 10 (closed session).

In this regard, Kanyabashi contends that it is unreasonable to believe Witness QI's evidence that he made inciting remarks precisely in front of the house of Witness QI's former employer since, at the relevant time, he – Kanyabashi – was hiding this person's son.[6145]

2659. Kanyabashi also raises general challenges to the witness's credibility, emphasising that Judge Ramaroson found that Witness QI was not a credible witness when assessing the events at Matyazo Clinic.[6146] He also points to Witness QI's testimony that he was not "psychologically" well and argues that the witness's evidence reflected that he "clearly wanted to incriminate Kanyabashi".[6147] He further submits that material aspects of Witness QI's evidence, through cross-examination, turned out to be hearsay or inexact.[6148]

2660. The Prosecution responds that the Trial Chamber considered the inconsistencies between Witness QI's evidence and his previous statements and that it was in its discretion to conclude that he was credible.[6149] It submits that Kanyabashi's arguments concerning Witness QI's former employer are unsupported and speculative.[6150] The Prosecution further contends that it was within the Trial Chamber's discretion to accept Witness QI's evidence after having examined the conditions under which he testified.[6151]

2661. The Appeals Chamber notes that, with regard to the inconsistencies between Witness QI's prior statements and testimony, Witness QI's prior statement reflects that he did not remember the date of the events.[6152] While testifying in 2004, the witness stated that the megaphone announcement he witnessed occurred in June at about 2.00 p.m.[6153] The Trial Chamber addressed this issue in the Trial Judgement and accepted the witness's explanation that, at the time he gave his statement, he forgot the precise date of the incident and that he was not "psychologically well".[6154] Kanyabashi does not demonstrate that no reasonable trier of fact could have accepted the witness's explanation for the variance.

2662. Moreover, the Appeals Chamber considers that Kanyabashi does not show that the Trial Chamber failed to consider sufficiently Witness QI's evidence in light of his former employer's ties with Kanyabashi. His contention that he would not have made inciting remarks in front of Witness QI's former employer's home because he was hiding that individual's son does not

[6145] Kanyabashi Appeal Brief, para. 330.
[6146] Kanyabashi Appeal Brief, para. 328.
[6147] Kanyabashi Appeal Brief, para. 329.
[6148] Kanyabashi Appeal Brief, para. 329.
[6149] Prosecution Appeal Brief, para. 1944. *See also* AT. 20 April 2015 pp. 42, 43.
[6150] Prosecution Response Brief, para. 1945.
[6151] Prosecution Response Brief, para. 1944.
[6152] Witness QI's Statement, p. K0028864 (Registry pagination).
[6153] Witness QI, T. 23 March 2004 p. 59 (closed session). *See also* Witness QI, T. 24 March 2004 p. 77 (closed session).

demonstrate that no reasonable trier of fact could have relied on Witness QI's evidence to the contrary.

2663. With respect to Kanyabashi's general contentions concerning Witness QI's credibility, he does not show that, because Judge Ramaroson found Witness QI lacking credibility with respect to the events at Matyazo Clinic, a reasonable trier of fact could not have found that his evidence concerning the mid-June 1994 megaphone announcement was credible, reliable, and convincing.[6155] Furthermore, while excerpts of Witness QI's evidence reflect the significant emotional impact that recalling the genocide had on the witness,[6156] Kanyabashi does not demonstrate that this would have prevented a reasonable trier of fact from relying on Witness QI's evidence nor does he show that the witness's evidence reflected that he sought to incriminate Kanyabashi in a manner that would raise questions about his credibility.[6157] As regards Kanyabashi's contention that shifts in Witness QI's evidence during cross-examination further undermine his credibility, the Appeals Chamber considers that Kanyabashi only points to clarifications made by the witness, without demonstrating that these clarifications would have led a reasonable trier of fact to reject his testimony.[6158]

2664. Based on the foregoing, the Appeals Chamber concludes that Kanyabashi has failed to demonstrate that the Trial Chamber erred in its assessment of Witness QI's credibility.

(iii) Reversal of Burden of Proof

2665. Kanyabashi repeats his argument that the Trial Chamber reversed the burden of proof by requiring the Defence to present evidence demonstrating that his witnesses were "permanently" present at the same locations and on the same dates as Witness QI in order to counter his evidence.[6159] He also contends that, in light of the incitement testified to by Witness QI, "[e]verybody must have heard it" and argues that, although approximately 30 other Prosecution witnesses were in Butare Town, the fact that they were not questioned about this incident

[6154] Trial Judgement, para. 3822.
[6155] The Appeals Chamber observes that, in her dissenting opinion, Judge Ramaroson concluded that "[a]ll these inconsistencies are serious and major discrepancies which lead me to conclude that Witnesses QI and RL are not credible witnesses." *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Dissenting Opinion of Judge Arlette Ramaroson, dated 24 June 2011, signed 18 July 2011, filed 19 July 2011 (originally filed in French, English translation filed on 21 May 2014) ("Judge Ramaroson Dissenting Opinion"), para. 30. However, as her opinion is confined to the Trial Chamber's conclusions relating to the Matyazo Clinic and because she joined the majority in relying on Witness QI as it relates to mid-June 1994 megaphone announcement, this statement can only reasonably be interpreted to concern Witness QI's evidence concerning the Matyazo Clinic.
[6156] *See* Witness QI, T. 24 March 2004 p. 61 ("It's when I start to remember the events of that time, I feel disturbed. Sometimes I'm even incapable of speaking. That's why I spoke of those days how I did, with regard to the events that I saw, and I don't think I'll be able to continue speaking about this.").
[6157] *See also supra*, paras. 304, 2590.
[6158] Witness QI, T. 24 March 2004 p. 57, T. 25 March 2004 p. 4 (closed session).
[6159] Kanyabashi Appeal Brief, paras. 258 (emphasis omitted), 259. *See also* AT. 20 April 2015 pp. 55, 56.

necessarily raises reasonable doubt that it occurred.[6160] In this regard, he notes that although Witness TG was in the same compound as Witness QI, the former was not questioned about this issue.[6161]

2666. The Prosecution responds that the Trial Chamber applied the correct burden of proof and reasonably assessed the evidence on the record.[6162] The Prosecution further contends that it was not obliged to question other Prosecution witnesses about this incident.[6163]

2667. Kanyabashi does not substantiate his position that the Trial Chamber reversed the burden of proof when assessing Defence evidence pertaining to Witness QI's testimony. He does not point to any aspect of the Defence evidence contradicting or relating to Witness QI's testimony and his contentions in this regard are dismissed. Furthermore, Kanyabashi's contention that reasonable doubt arises from the fact that other Prosecution witnesses were in Butare Town but were not questioned as to this incident is speculative.

2668. Accordingly, the Appeals Chamber dismisses Kanyabashi's contention that the Trial Chamber reversed the burden of proof when assessing Defence evidence concerning the mid-June 1994 megaphone announcement.

(iv) Conclusion

2669. Based on the foregoing analysis, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber erred in its assessment of the evidence concerning the mid-June 1994 megaphone announcement. However, the Appeals Chamber recalls its previous determination that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994.[6164]

2670. The Appeals Chamber observes that the Trial Chamber relied on Witness QI's evidence to reach its conclusion with respect to the mid-June 1994 megaphone announcement in the following terms:

> the Chamber considers Witness QI's testimony on Kanyabashi's megaphone announcement in mid-June 1994 to be credible, reliable and convincing. His testimony is also supported by evidence cited above which establishes that megaphone announcements from a moving vehicle

[6160] Kanyabashi Appeal Brief, para. 263.
[6161] Kanyabashi Appeal Brief, para. 263, fn. 832.
[6162] Prosecution Response Brief, paras. 1891, 1892.
[6163] Prosecution Response Brief, para. 1908.
[6164] *See supra*, Section VIII.E.1(c).

> were part of the *modus operandi* by which messages from the *bourgmestre* were disseminated to the population of Ngoma *commune*.[6165]

2671. Kanyabashi argues that, in view of the importance of the *modus operandi* finding in the Trial Chamber's reliance on Witness QI's testimony about the mid-June 1994 megaphone announcement, the error should result in the overturning of his conviction on this basis.[6166]

2672. The Prosecution responds that the Trial Chamber could have relied on the testimony of Witness QI with or without corroboration.[6167]

2673. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, rejects Kanyabashi's contention and finds that the Trial Chamber's error in finding the existence of a *modus operandi* did not result in a miscarriage of justice. The language in the Trial Judgement cited above reflects that Witness QI's evidence alone was sufficient to support the Trial Chamber's conclusions as to the mid-June 1994 megaphone announcement. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, dismisses Kanyabashi's contentions related to this event.

(f) Killings

2674. The Trial Chamber, based on the evidence of Witnesses QJ, TK, and QI, determined that, "following Kanyabashi's megaphone announcements in mid-May 1994 and in June 1994, searches were conducted for Tutsis and consequently more Tutsis were killed."[6168]

2675. Kanyabashi argues that the evidence does not support the conclusion that killings resulted from the megaphone communications.[6169] He contends that the error is relevant to the Trial Chamber's determination of his sentence.[6170]

2676. The Prosecution responds that direct and public incitement to commit genocide is an inchoate crime and, thus, does not require demonstration that Kanyabashi's megaphone announcements resulted in any subsequent killings.[6171]

2677. The Appeals Chamber recalls that the crime of direct and public incitement to commit genocide is an inchoate crime, punishable even if no act of genocide has resulted therefrom.[6172] Notably, the Trial Chamber did not convict Kanyabashi of genocide on the basis of ensuing killings,

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[6165] Trial Judgement, para. 3824.
[6166] *See* Kanyabashi Appeal Brief, para. 297. *See also ibid*., para. 307.
[6167] AT. 20 April 2015 p. 42.
[6168] *See* Trial Judgement, para. 3832. *See also ibid.*, paras. 3827-3831, 6009, 6010.
[6169] Kanyabashi Appeal Brief, para. 338.
[6170] Kanyabashi Appeal Brief, para. 338.
[6171] Prosecution Response Brief, paras. 1955-1958.
[6172] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al*. Appeal Judgement, para. 678.

finding that there was insufficient evidence to establish that Kanyabashi's conduct contributed to them.[6173]

2678. Notwithstanding this finding, the Trial Chamber concluded that "the fact that after both megaphone announcements searches were conducted and more Tutsis were killed" constituted further evidence that the public understood that the "enemy" and "*Inkotanyi*" referred to in Kanyabashi's speeches were Tutsis and that they were to be killed.[6174] The Appeals Chamber recalls that in determining whether a speech constitutes a direct and public incitement to commit genocide, it may be helpful to examine how the speech was understood by its intended audience in order to determine its true message.[6175] The Trial Chamber's analysis reveals that this was the assessment the Trial Chamber undertook.

2679. In this regard, the Appeals Chamber finds that Kanyabashi's challenge fails to appreciate that the Trial Chamber's conclusion concerning the public understanding of the words that he used in his megaphone announcements was primarily based on the evidence of Witnesses QJ and QI as well as Expert Witness Ntakirutimana who testified that the term "enemy" or "*Inkotanyi*" meant Tutsis.[6176]

2680. Furthermore, and contrary to Kanyabashi's contentions, the Trial Chamber's sentencing deliberations reveal that, while it considered the number of victims resulting from the attacks at the Matyazo Clinic and Kabakobwa Hill, it did not consider killings resulting from the megaphone announcements in determining his sentence.[6177] Consequently, Kanyabashi fails to identify an error that would invalidate his sentence or have occasioned a miscarriage of justice.

2681. As a result, the Appeals Chamber dismisses Kanyabashi's contentions regarding the ensuing killings without further consideration.

(g) Conclusion

2682. In light of the foregoing, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate any error in the Trial Chamber's assessment of the evidence concerning the late May and mid-June 1994 megaphone announcements that occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber.

[6173] Trial Judgement, paras. 5930, 5931.
[6174] Trial Judgement, para. 6010. *See also ibid.*, para. 6009.
[6175] *Cf. Nahimana et al*. Appeal Judgement, paras. 701, 711.
[6176] Trial Judgement, paras. 3814, 3825, 3826.
[6177] Trial Judgement, para. 6254.

2. Criminal Responsibility

2683. In the "Factual Findings" section of the Trial Judgement, the Trial Chamber determined that the term "enemy" as heard by Witness QJ in the late May 1994 megaphone announcement was a reference to Tutsis in general.[6178] It similarly accepted Witness QI's interpretation of Kanyabashi's mid-June 1994 megaphone announcement that his use of the expression "*Inkotanyi*" was a reference to "Tutsis hiding in the bushes".[6179] In both instances, the Trial Chamber considered interpretations of the words "enemy" and "*Inkotanyi*" given by Prosecution Expert Witness Évariste Ntakirutimana that supported this conclusion.[6180]

2684. In the "Legal Findings" Section of the Trial Judgement, the Trial Chamber recalled the following:

> Around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them. Further, around mid-June 1994 Kanyabashi used a megaphone to tell the population to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women. After both of Kanyabashi's announcements in mid-May and June 1994 searches were conducted for Tutsis, and consequently, more Tutsis were killed […].
>
> The Chamber recalls that after hearing Kanyabashi's announcements by megaphone in May and June 1994, the public understood that the "enemy" and "*Inkotanyi*" were Tutsis and they were to be killed, as further evidenced by the fact that after both megaphone announcements searches were conducted and more Tutsis were killed.[…]
>
> The Chamber also considers Kanyabashi's spoken words encouraging the population to search for the "enemy" and "clear bushes", being references to killing Tutsis, evidences Kanyabashi had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group.[6181]

2685. Kanyabashi submits that Witness QJ's evidence is too ambiguous to support as the only reasonable conclusion that the term "enemy" meant Tutsis and, consequently, that he possessed genocidal intent.[6182] In support of his contention, he asserts that this term was used in late May 1994 during the RPF advance and reasonably could have been a reference to these combatants.[6183] During the appeals hearing, Kanyabashi further pointed to Witness QJ's evidence reflecting that "no one was going through the roadblocks" when this announcement was made as well as evidence which, in his view, suggests that Kanyabashi was only speaking to the persons manning the roadblock rather than the public in general.[6184] Kanyabashi argued that, based on the evidence, it could not be

[6178] Trial Judgement, para. 3814.
[6179] Trial Judgement, paras. 3825, 3826.
[6180] *See* Trial Judgement, paras. 3814, 3825.
[6181] Trial Judgement, paras. 6009, 6010, 6012.
[6182] Kanyabashi Appeal Brief, para. 336.
[6183] Kanyabashi Appeal Brief, para. 336.
[6184] AT. 20 April 2015 pp. 21, 22, *referring to* Witness QJ, T. 12 November 2001 pp. 32, 33, 40, 41 (French), T. 14 November 2001 pp. 107, 141, 143 (French), T. 15 November 2001 p. 14 (closed session) (French).

concluded that his statements satisfied the public element of the crime of direct and public incitement to commit genocide.[6185]

2686. Kanyabashi also contends that the evidence of Witness QI is insufficient to establish that Kanyabashi incited the population to clear the bushes with the intention to kill Tutsis.[6186] He argues that the limited number of crimes that followed the megaphone announcements belies the conclusion that his statements constituted direct and public incitement to commit genocide.[6187] Finally, Kanyabashi appears to argue that the Trial Chamber erred in relying on Expert Witness Ntakirutimana's evidence when it refused to hear his own Defence expert evidence in rebuttal.[6188]

2687. The Prosecution responds that the Trial Chamber correctly interpreted the evidence and concluded that Kanyabashi's statements amounted to direct and public incitement to commit genocide and that Kanyabashi fails to substantiate his interpretations to the contrary.[6189] It argues that the Trial Chamber reasonably found that Kanyabashi's incitement by megaphone was of a public nature by virtue of the fact it was made through a public-address system.[6190] The Prosecution also contends that Kanyabashi's contentions concerning the absence of killings is irrelevant as this crime is an inchoate offence.[6191]

2688. The Appeals Chamber finds no merit in Kanyabashi's argument that Witness QJ's evidence was too ambiguous to support as the only reasonable conclusion that the term "enemy" used in the late May 1994 megaphone announcement was a reference to Tutsis in general.[6192] The Trial Chamber considered that the witness's interpretation that the reference to the "enemy" included Tutsis was supported by the evidence of Expert Witness Ntakirutimana, Defence Expert Witness Eugène Shimamungu, and a prior finding of the Trial Chamber – based on an extensive

[6185] AT. 20 April 2015 pp. 22, *referring to Ngirabatware* Appeal Judgement, paras. 53-60.
[6186] Kanyabashi Appeal Brief, para. 336.
[6187] Kanyabashi Appeal Brief, para. 337.
[6188] Kanyabashi Appeal Brief, para. 336, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Kanyabashi's Three Motions to Vary His List of Witnesses and to Admit Written Statements under Rule 92*bis*, 24 April 2008 ("24 April 2008 Decision").
[6189] Prosecution Response Brief, paras. 1951-1954.
[6190] AT. 20 April 2015 pp. 43-45.
[6191] Prosecution Response Brief, para. 1954.
[6192] *See* Witness QJ, T. 12 November 2001 pp. 26 ("A. [Kanyabashi] used to say that the bourgmestre of Ngoma commune is informing the people of Ngoma that the enemies are among us and you are requested to seek them everywhere."), 33, 34 ("Q. What did the word 'enemy' mean? A. When they said Umwanzi or enemy – I spell Umwanzi. U-M-W-A-N-Z-I. When this word was used, it is also intended to mean Tutsi. And, again, to refer to the Tutsis, they could say 'snakes' or 'Nyenzi', or so on, and so forth.").

review of evidence – which reflected that, at the time, words such as "enemy" were used to refer to Tutsis.[6193]

2689. Furthermore, the Appeals Chamber finds that Kanyabashi's contention that Witness QJ's evidence shows that Kanyabashi only intended to address persons manning the roadblock and that there was no public audience when he made the allegedly inciting statement reflects a fragmented reading of the record and the Trial Chamber's findings. The Trial Chamber conclusions, which are reasonably supported by Witness QJ's testimony, are that Kanyabashi was addressing the "population", that he was using a megaphone, and that he drove through town making the announcement.[6194] Kanyabashi's reliance on an incomplete understanding of the record and the Trial Chamber's conclusions fails to demonstrate that the Trial Chamber erred in finding that the announcement as described by Witness QJ was "public".[6195]

2690. Likewise, Kanyabashi fails to show that Witness QI's evidence was insufficient to establish that Kanyabashi incited the population to clear the bushes with the intention to kill Tutsis.[6196] The Trial Chamber assessed the meaning of the term "*Inkotanyi*" based on Witness QI's testimony and that of Expert Witness Ntakirutimana.[6197] Kanyabashi does not demonstrate any error in the Trial Chamber's assessment of their evidence in this regard. Furthermore, Witness QI testified, *inter alia*, that the instruction to clear the bushes so that the *Inkotanyi* would not find anywhere to hide was accompanied by an additional instruction to "flush out people hiding in the bushes, and everybody found in those bushes should die, including children, old men and women."[6198]

[6193] *See* Trial Judgement, para. 3814, *referring to ibid.*, Section 3.4.12.2. *See also ibid*., paras. 573-578. The Appeals Chamber notes that Kanyabashi provides additional citations in support of his contention in his reply brief. *See* Kanyabashi Reply Brief, para. 132, *referring to* Exhibit D574 (Kambanda's speech of 15 May 1994), pp. 2-4, 11-13, 18, 22, 23, 27, Witness D-2-5-W, T. 4 October 2007 p. 17 (closed session), Filip Reyntjens, T. 21 November 2007 pp. 47, 66, 67. Recalling that reply briefs shall be limited to arguments in reply to the response brief, and noting that the Prosecution did not have the opportunity to respond to Kanyabashi's argument in this respect, the Appeals Chamber will not consider these additional references. In any event, the Appeals Chamber observes that Kanyabashi merely refers to abstracted excerpts of evidence, most of which was considered and relied upon by the Trial Chamber in reaching its conclusions elsewhere in the Trial Judgement that "enemy" was used to refer to Tutsis. *See* Trial Judgement, paras. 574-578, 583, 867-890, 5555-5558, 5563-5565. The Trial Chamber did not consider the evidence of Witness D-2-5-W in this respect; however, Kanyabashi merely refers to a portion of his testimony in which he states that at a meeting he attended with Kanyabashi, someone referred to the enemy as "anyone supporting the RPF or anyone working for the RPF". *See* Witness D-2-5-W, T. 4 October 2007 p. 17 (closed session).

[6194] *See* Trial Judgement, para. 3813. *See also* Witness QJ, T. 12 November 2001 p. 25, T. 14 November 2001 pp. 97-100.

[6195] *See* Trial Judgement, para. 6011. In light of this conclusion, Kanyabashi's reliance on paragraphs 53-60 of the *Ngirabatware* Appeal Judgement is misplaced. Similarly, the Appeals Chamber considers that Kanyabashi's references to the Presiding Judge's summary of Witness QJ's evidence, as confirmed by the Prosecution, is not a reflection of the evidence on the record but how a limited number of individuals might have understood it at the time. *See* Witness QJ, T. 15 November 2001 pp. 45, 46. This, however, does not demonstrate any error in the Trial Chamber's ultimate evaluation of Witness QJ's testimony.

[6196] *See* Witness QI, T. 23 March 2004 pp. 59, 60 (closed session) ("A. He meant the Tutsi that were in the bushes that were being sought after in the bushes they were hiding."), 68 (closed session), T. 24 March 2014 pp. 77, 78 (closed session); Witness QI's Statement.

[6197] Trial Judgement, paras. 3825, 3826.

[6198] *See* Trial Judgement, para. 3815.

The Appeals Chamber considers that Kanyabashi has not demonstrated that these remarks allowed for a reasonable inference other than reflecting the intention of those following the instructions to kill Tutsis.

2691. Moreover, the Appeals Chamber has already considered and rejected Kanyabashi's contentions concerning the relevance of the Trial Chamber's determination as it relates to killings that followed the megaphone announcement.[6199] The Appeals Chamber finds that, in the circumstances of this case, the same rationale applies in this instance.

2692. Finally, Kanyabashi appears to simply disagree with the Trial Chamber's decision rejecting his motion to replace one Defence expert witness with another without demonstrating how it erred in reaching this conclusion.[6200]

2693. Based on the foregoing, the Appeals Chamber finds, Judge Pocar and Judge Agius dissenting, that Kanyabashi has not demonstrated that the Trial Chamber erred in convicting him for direct and public incitement to commit genocide.

3. Conclusion

2694. In light of the above, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate that the Trial Chamber erred in finding him responsible for directly and publicly inciting the commission of genocide by making megaphone announcements in Butare Town in late May and mid-June 1994 and dismisses Grounds 3.2 through 3.8 of Kanyabashi's appeal.

[6199] *See supra*, para. 2681.
[6200] *See* 24 April 2008 Decision, paras. 18, 20, 52-54.

IX. APPEAL OF ÉLIE NDAYAMBAJE

2695. The Trial Chamber found Ndayambaje guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute for inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994 and based on a speech he made at his swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994.[6201] The Trial Chamber also found Ndayambaje guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994; and (ii) instigating the killings of Tutsi women and girls abducted from Mugombwa Sector on the basis of his words at the statue of the Virgin Mary ("Virgin Mary Statue") after his swearing-in ceremony of 22 June 1994.[6202]

2696. Ndayambaje raises challenges to his indictment and submits that the Trial Chamber showed bias in the assessment of the evidence. He also challenges the Trial Chamber's findings regarding his alibi and contends that the Trial Chamber erred in not conducting site visits. Ndayambaje further challenges the Trial Chamber's findings concerning his responsibility in relation to the incidents at Mugombwa Church on 20 and 21 April 1994, the killings perpetrated at Kabuye Hill on 22, 23, and 24 April 1994, his swearing-in ceremony held on 22 June 1994, and the abduction of Tutsi women and girls after his swearing-in ceremony. The Appeals Chamber will address these contentions in turn.

[6201] Trial Judgement, paras. 5995-6002, 6026-6029, 6038, 6186.
[6202] Trial Judgement, paras. 5949, 5976, 5977, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186. *See also infra*, para. 3246, fns. 6351, 7443.

A. Indictment (Grounds 1 to 6)

2697. Ndayambaje submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.[6203] He also contends that the "immeasurable accumulation of events not pleaded in the Indictment has caused [him] irreparable prejudice."[6204] Ndayambaje requests that the Appeals Chamber overturn all his convictions.[6205]

2698. The Appeals Chamber will examine Ndayambaje's submissions related to notice of the allegations pertaining to the incidents at Mugombwa Church, before turning to his submissions related to notice of the allegations concerning Kabuye Hill, his swearing-in ceremony, and the abduction of Tutsi women and girls.[6206]

1. Mugombwa Church (Grounds 1, 2, and 6 in part)

2699. Based primarily on the evidence of Prosecution Witness QAR,[6207] the Trial Chamber found that, by his presence at Mugombwa Church, Muganza Commune, Butare Prefecture, on 20 and 21 April 1994 and given his "considerable moral authority", Ndayambaje encouraged the attacks on the Tutsis taking refuge inside the church that took place on these two days, resulting in the deaths of hundreds, if not thousands, of Tutsis.[6208] The Trial Chamber also determined that, on 20 April 1994, Ndayambaje spoke to a group of armed people posted outside the church and told them that their work would no longer be very difficult since the refugees were all gathered together

[6203] Ndayambaje Notice of Appeal, paras. 5-9, 14-65; Ndayambaje Appeal Brief, paras. 7-138. To facilitate legibility, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Ndayambaje Indictment.
[6204] Ndayambaje Notice of Appeal, para. 17. *See also* Ndayambaje Appeal Brief, paras. 22, 134, 137.
[6205] Ndayambaje Notice of Appeal, paras. 27, 31, 39, 49, 58, 64, 65; Ndayambaje Appeal Brief, paras. 43, 49, 79, 99, 119, 132, 138.
[6206] The Appeals Chamber notes that Ndayambaje submits that the Trial Chamber erred in law in deferring until deliberations its decision on objections relating to the exclusion of evidence of facts that were not pleaded in the Ndayambaje Indictment. He argues that, as a result, he was only notified of the charges against him during the delivery of the Trial Judgement. He contends that, in doing so, the Trial Chamber deprived him of his right to be clearly informed of the charges against him in order to prepare his defence. *See* Ndayambaje Appeal Brief, para. 18. *See also* Ndayambaje Notice of Appeal, para. 53. The Appeals Chamber reiterates that the practice of trial chambers in the exercise of their discretion to postpone consideration of Defence objections to the admission of testimonial evidence on the ground of lack of notice to the phase of their final deliberations on the case is a cause of concern. As held above, leaving the issue of whether facts could be relied upon as a potential basis for liability unresolved until the end of the trial creates uncertainty, which can be a source of potential prejudice to the Defence. *See supra*, para. 1280. However, the Appeals Chamber considers that, as any matter related to the conduct of the proceedings before a trial chamber, the timing of the ruling on the motions before it, in the absence of any specific provision, is a matter within the discretion of the trial chamber. The Appeals Chamber recalls that, in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error resulting in prejudice to that party. *See supra*, para. 138. The Appeals Chamber considers that Ndayambaje's general contention of error as developed in his appeal brief fails to demonstrate that he was prejudiced by the Trial Chamber's decision to postpone consideration of a number of his objections.
[6207] Trial Judgement, paras. 1227, 1232, 1241, 1245, 1246.
[6208] Trial Judgement, paras. 5754-5757.

inside the church and that some of them should stay and watch the people in the church while others should search for those hiding in ditches and bushes.[6209] It further determined that the next morning, Ndayambaje again addressed the crowd outside the church, stating that "he could see they were interested in the Tutsis' cows and asking them what they would pay if the Tutsi owners of the cattle escaped."[6210] The Trial Chamber found that Ndayambaje's public addresses at Mugombwa Church on 20 and 21 April 1994 directly and publicly incited the commission of genocide.[6211]

2700. On this basis, the Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide (Count 4) as well as aiding and abetting genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common of the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute.[6212]

2701. In summarising the Prosecution case against Ndayambaje with respect to these allegations, the Trial Chamber referred to paragraph 6.37 of the Indictment.[6213] The Indictment indicates that the allegations in paragraph 6.37 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6214]

2702. Prior to examining the relevant evidence, the Trial Chamber noted that the location and dates of the massacre at Mugombwa Church were not specified in the Indictment and that Ndayambaje's role therein was not sufficiently pleaded.[6215] It found that the Indictment was therefore defective in this regard.[6216] However, the Trial Chamber determined that the defect was cured and that the Prosecution gave Ndayambaje timely, clear, and consistent notice that he was "accused of participating in, including through giving orders, and supervising the massacre at

[6209] Trial Judgement, paras. 1245, 5754.
[6210] Trial Judgement, paras. 1246, 5755.
[6211] Trial Judgement, paras. 5995-6002.
[6212] Trial Judgement, paras. 1245, 1246, 5754-5758, 5976, 5977, 5995-6002, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186.
[6213] Trial Judgement, paras. 1018, 1019. Paragraph 6.37 of the Ndayambaje Indictment reads as follows:

> 6.37 As from 20 April, in Muganza *commune* and the surrounding area, Élie Ndayambaje ordered, supervised and participated in massacres of the Tutsi population, committed by militiamen, soldiers, communal policemen and communal authorities.

[6214] Ndayambaje Indictment, pp. 40-46.
[6215] Trial Judgement, para. 1024.
[6216] Trial Judgement, para. 1024.

Mugombwa Church, Muganza *commune*, along with other c*ommune* authorities in late April 1994."[6217]

2703. Ndayambaje submits that the location and dates of the massacre perpetrated at Mugombwa Church as well as his participation therein were not pleaded in the Indictment, and that such defect was neither curable nor cured.[6218] He also argues that the Indictment failed to put him on notice that he was alleged to have aided and abetted the killings at the church and that he was charged with direct and public incitement to commit genocide based on his addresses at the church.[6219] He contends that the Trial Chamber therefore erred in convicting him in relation to the events at Mugombwa Church and that his convictions should be reversed.[6220]

(a) Location, Dates, and Participation in the Attacks

2704. As noted above, the Trial Chamber found that the location and dates of the massacre at Mugombwa Church were not specified in the Indictment and that Ndayambaje's role therein was not sufficiently pleaded.[6221] It nonetheless determined that the summary of the anticipated evidence of Prosecution Witnesses FAG, FAU, and TU appended to the Prosecution Pre-Trial Brief, together with the Prosecution's opening statement, gave timely, clear, and consistent notice to Ndayambaje that he was accused of participating in, including through giving orders, and supervising the massacre at Mugombwa Church in late April 1994.[6222] It found that the defect in paragraph 6.37 of the Indictment was cured and that Ndayambaje was not prejudiced in the preparation of his defence.[6223]

2705. Ndayambaje submits that the defect in the Indictment concerning the location and dates of the massacre perpetrated at Mugombwa Church as well as his participation therein was neither curable nor cured.[6224] Pointing out that the Prosecution was in possession of the relevant material facts when filing the Indictment, Ndayambaje submits that the Prosecution chose not to mention these facts in the Indictment and that, as a result, it was legitimate for him to understand that these

[6217] Trial Judgement, paras. 1029, 1031.
[6218] Ndayambaje Notice of Appeal, paras. 5, 6, 16, 19-27, 29; Ndayambaje Appeal Brief, paras. 26-43. *See also* AT. 21 April 2015 pp. 11-17, 65-67.
[6219] Ndayambaje Notice of Appeal, paras. 26, 28-30, 59-61, 63; Ndayambaje Appeal Brief, paras. 32, 35, 44-49, 126. *See also* AT. 21 April 2015 pp. 21, 22.
[6220] Ndayambaje Notice of Appeal, paras. 25-27, 31, 59-61, 63; Ndayambaje Appeal Brief, paras. 43, 48, 49, 124, 131, 132.
[6221] Trial Judgement, para. 1024.
[6222] Trial Judgement, paras. 1025-1031, *referring to* Witness Summaries Grid, item 32, Witness FAU ("Witness FAU's Summary"), item 96, Witness TU ("Witness TU's Summary"), Witness FAG's Summary, Prosecution Opening Statement, T. 12 June 2001 p. 85.
[6223] Trial Judgement, para. 1031.
[6224] Ndayambaje Notice of Appeal, paras. 5, 6, 16, 19-27, 29; Ndayambaje Appeal Brief, paras. 7-17, 26-43, 47. *See also* Ndayambaje Reply Brief, paras. 8-10; AT. 21 April 2015 pp. 11-17, 66, 67.

events were not part of the Prosecution case.[6225] He contends that, by convicting him on the basis of his participation in this massacre, the Trial Chamber proceeded to a "*de facto* illegal expansion of the Indictment"[6226] as the allegation concerning these events constituted a separate charge which could only have been added through a formal amendment of the Indictment.[6227]

2706. Ndayambaje further submits that, since none of the summaries of the anticipated evidence relied upon by the Trial Chamber were marked as relevant to paragraph 6.37 of the Indictment, they could not be considered as providing unambiguous information.[6228] He also asserts that: (i) Witness FAG's Summary and prior statements do not provide clear and consistent notice regarding his presence at the church on 20 and 21 April 1994;[6229] (ii) Witness FAU's prior statements are contradictory with one another and Witness FAU's Summary directly contradicts Witness FAG's Summary;[6230] (iii) Witness TU's Summary is inconsistent with Witnesses FAU's and FAG's summaries as it refers to events at Mugombwa Church on 24 April 1994;[6231] and (iv) the Prosecution's opening statement refers to massacre at the church in late April 1994 without specifying the date or his alleged criminal conduct.[6232] Ndayambaje adds that the Prosecution failed to indicate in its pre-trial brief that Witness QAR, the sole witness who testified to his presence at the church, would testify in relation to the attacks on Mugombwa Church, and that the Trial Chamber erred in admitting evidence in relation to these events.[6233]

2707. Ndayambaje submits that the lack of notice regarding the events at Mugombwa Church caused him serious prejudice as it prevented him from conducting efficient investigations and organising his defence.[6234]

[6225] Ndayambaje Appeal Brief, para. 27. *See also* Ndayambaje Reply Brief, para. 8. Ndayambaje also highlights that, in contrast with the Ndayambaje Indictment, the Prosecution pleaded specific locations in Ngoma Commune in the Kanyabashi Indictment. *See* Ndayambaje Appeal Brief, para. 28.
[6226] Ndayambaje Appeal Brief, para. 27.
[6227] Ndayambaje Notice of Appeal, paras. 5, 6, 14-23; Ndayambaje Appeal Brief, paras. 10, 26-29.
[6228] Ndayambaje Notice of Appeal, para. 18; Ndayambaje Appeal Brief, paras. 14, 33, 34, 37, 38. *See also* Ndayambaje Appeal Brief, paras. 59, 92; Ndayambaje Reply Brief, para. 11; AT. 21 April 2015 p. 69.
[6229] Ndayambaje Appeal Brief, paras. 36, 37, *referring to* statements of Witness FAG of 11 August 1998, 18 November 1999, and 23 February 2000 admitted as Exhibit D261 on 18 October 2004 and Exhibits D188 and D189 on 24 March 2004, respectively (confidential) ("Witness FAG's 1998 Statement", "Witness FAG's 1999 Statement", and "Witness FAG's 2000 Statement", respectively). Ndayambaje argues that Witness FAG did not provide clear and consistent information regarding his presence at the church as Witness FAG did not see him driving attackers to the church on 20 and 21 April 1994. In light of this, he submits that he could not understand that Witness FAG was directly implicating him in the events at Mugombwa Church. *See idem.*
[6230] Ndayambaje Appeal Brief, paras. 38, 39, *referring to* statements of Witness FAU of 9 October 1999, 29 December 1999, 22 February 2001 (admitted on 22 February 2001 as Exhibit D195 (confidential)) ("Witness FAU's Statement"), and 22 November 2001. *See also* Ndayambaje Reply Brief, para. 19.
[6231] Ndayambaje Appeal Brief, para. 40.
[6232] Ndayambaje Appeal Brief, para. 41.
[6233] Ndayambaje Notice of Appeal, paras. 14, 23; Ndayambaje Appeal Brief, para. 35, *referring to* Trial Judgement, para. 1025. *See also* Ndayambaje Appeal Brief, para. 202; Ndayambaje Reply Brief, para. 16.
[6234] Ndayambaje Notice of Appeal, para. 24; Ndayambaje Appeal Brief, paras. 22, 29. *See also* AT. 21 April 2015 pp. 68, 69.

2708. The Prosecution responds that the Trial Chamber correctly found that the defective indictment was cured by post-indictment information and that Ndayambaje received sufficient notice of his participation in the Mugombwa Church attacks and suffered no prejudice since he was able to prepare a comprehensive defence.[6235]

2709. There is no dispute that the Indictment was defective in relation to the allegation concerning Ndayambaje's responsibility for the massacre at Mugombwa Church on 20 and 21 April 1994 as there is no mention of the relevant location and dates in paragraph 6.37 of the Indictment or anywhere else in the Indictment.[6236]

2710. However, the Appeals Chamber finds that the allegation of Ndayambaje's participation in the Mugombwa Church massacre did not constitute a new charge but fell within the broader allegation relating to Ndayambaje's participation in massacres of the Tutsi population in Muganza Commune from 20 April 1994 pleaded in paragraph 6.37 of the Indictment.

2711. Moreover, the Appeals Chamber is not persuaded by Ndayambaje's argument that it was legitimate for him to interpret the Prosecution's failure to set forth the relevant material facts of this specific allegation in the Indictment as indicating that it was not part of its case. While the Prosecution should have specifically pleaded the material facts of the dates, location, and Ndayambaje's participation in the Mugombwa Church massacre in the Indictment that were in its possession prior to the filing of the Indictment,[6237] the Appeals Chamber does not consider that these omissions could have reasonably been understood as demonstrating that the Prosecution did not intend to prosecute Ndayambaje in relation to this massacre. In the view of the Appeals Chamber, the fact that the Prosecution disclosed the prior statements of Witnesses QAR and TU which expressly refer to the attacks on Mugombwa Church and Ndayambaje's involvement therein

[6235] Prosecution Response Brief, paras. 1997-1999, 2002-2009, 2052, 2053. *See also* AT. 21 April 2015 pp. 36, 37. In particular, the Prosecution contends that: (i) Witnesses FAU's, FAG's, and TU's summaries were linked to the counts with which Ndayambaje was charged and it was not required to link the summaries to a specific paragraph in the Ndayambaje Indictment; and (ii) the fact that Witness QAR's evidence related to Mugombwa Church was not summarised in its pre-trial brief is irrelevant to the question of whether Ndayambaje received sufficient notice of the charge. *See* Prosecution Response Brief, paras. 1997, 2002.
[6236] *See* Trial Judgement, para. 1024.
[6237] *See* statements of Witness QAR of 20 June 1995, 20 May 1997, and 14 October 1997, disclosed on 21 January 1997 and 4 November 1998 and admitted on 22 November 2001 as Exhibit D11B (confidential) ("Witness QAR's 1995 Statement", "Witness QAR's May 1997 Statement", and "Witness QAR's October 1997 Statement", respectively); statement of Witness TU of 18 December 1996, disclosed on 4 November 1998 on 16 June 1999 ("Witness TU's Statement"). *See also The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Letter from the Prosecution, 21 January 1997; 4 November 1998 Disclosure; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, "Transmission of Redacted Statements in the case of The Prosecutor v Elie Ndayambaje (ICTR – 96 – 8)", 16 June 1999. The Appeals Chamber notes that the statements of Witnesses FAG and FAU concerning Ndayambaje's involvement in the Mugombwa Church massacre were either made or disclosed after the filing of the Ndayambaje Indictment on 11 August 1999.

in 1997, 1998, and 1999,[6238] prior to the filing of the Indictment, shows that these attacks formed part of the Prosecution case at the time the Indictment was issued.

2712. The Appeals Chamber therefore rejects Ndayambaje's contentions that the Trial Chamber allowed a "*de facto* illegal expansion of the Indictment" by convicting him in relation to this massacre and that the defect in the Indictment related to Ndayambaje's responsibility for the killings perpetrated at Mugombwa Church on 20 and 21 April 1994 was not curable.

2713. Turning to Ndayambaje's challenge to the Trial Chamber's finding that the defect regarding the dates, location, and his general participation in the massacre was cured, the Appeals Chamber finds no merit in Ndayambaje's argument that the summaries of the Prosecution witnesses' anticipated evidence appended to the Prosecution Pre-Trial Brief could not inform him of the allegation against him as they were not explicitly linked to any paragraph of the Indictment.[6239] The Appeals Chamber considers that it would have been preferable for the Prosecution to provide greater specificity given the vagueness of the Indictment and its pre-trial brief in this respect. However, it is satisfied that the contents of Witnesses FAG's, FAU's, and TU's summaries and the fact that they were expressly marked relevant to Ndayambaje and to Counts 1 through 9 of his Indictment – which, in turn, were linked to paragraph 6.37 of the Indictment[6240] – provided clear notice to Ndayambaje that the Prosecution intended to rely on the evidence of these witnesses in support of the allegation of his participation in the massacres of the Tutsi population in Muganza Commune set forth in paragraph 6.37.

2714. With regard to Ndayambaje's allegation of inconsistencies within and between the witnesses' statements and summaries, the Appeals Chamber is not persuaded that Witness FAG's Summary and prior statements gave inconsistent information regarding Ndayambaje's implication in the events at Mugombwa Church. While Witness FAG's Summary and prior statements did not explicitly mention Ndayambaje's presence at Mugombwa Church during the days of the attacks, they clearly and consistently implicated him in the events there.[6241] The Appeals Chamber also

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[6238] *See supra*, fn. 6237.

[6239] The Appeals Chamber observes that the jurisprudence Ndayambaje points to does not require that the witness's summaries appended to a Prosecution's pre-trial brief be linked to the relevant paragraphs of an indictment in order to provide timely, clear, and consistent information detailing the factual basis underpinning the charge. It also notes that Rule 73*bis*(B)(iv)(c) of the Rules relied upon by Ndayambaje only states that, at the pre-trial conference, the trial chamber may order the Prosecutor to file "[t]he points in the indictment on which each witness will testify" and that, in paragraph 108 of the Trial Judgement, the Trial Chamber merely recalled the well-established jurisprudence that the summaries appended to a Prosecution's pre-trial brief may in some cases serve to put the accused on notice of the allegations against him. *See* Ndayambaje Notice of Appeal, para. 18, *referring to* Rule 73*bis*(B)(iv)(c) of the Rules, Trial Judgement, para. 108; Ndayambaje Appeal Brief, paras. 14, 33, 34, 37, 38.

[6240] *See* Ndayambaje Indictment, pp. 40-45.

[6241] In relevant part, Witness FAG's Summary reads as follows:

> FAG states that they were ordered by Venant, Kanyenzi, Bosco, the assistant bourgmestre of Muganza, and Viateur to go to Mugombwa where there was group of attackers that was brought there by Ndayambaje. FAG

rejects Ndayambaje's contention that Witness FAU's prior statements are contradictory as unsubstantiated. It also finds that his argument that Witness FAU's Summary contradicts Witness FAG's Summary is without merit as the fact that Witness FAU's Summary did not refer to Ndayambaje's involvement in the same terms as Witness FAU's Summary does not render the summaries of their anticipated evidence contradictory.

2715. Furthermore, while Witness TU's Summary refers to the date of the attack on Mugombwa Church as 24 April 1994, the Appeals Chamber finds that this discrepancy was minor and was not inconsistent with Witness FAU's Summary which referred to "April 1994" or Witness FAG's Summary which did not provide any date. Likewise, Ndayambaje fails to demonstrate any inconsistency between the date range "as from 20 April" provided in the Indictment,[6242] the dates indicated in the relevant witnesses' summaries, and the Prosecution's opening statement which referred to "the end of April".[6243] While Witnesses FAG's, FAU's, and TU's summaries and the Prosecution's opening statement did not mention the exact dates in late April 1994 or Ndayambaje's specific criminal conduct in relation to the Mugombwa Church attacks, the Appeals Chamber finds no error in the Trial Chamber's conclusion that these materials, read together, put Ndayambaje on notice that the Prosecution intended to hold him responsible for his participation in the killings at Mugombwa Church that occurred in late April 2014.

2716. Finally, the Appeals Chamber is of the view that the fact that the Prosecution failed to indicate that Witness QAR – the sole witness who ultimately testified to his presence at Mugombwa Church during the attacks – would testify about the Mugombwa Church massacre in the summary of her anticipated evidence is irrelevant. The question at issue is whether Ndayambaje had sufficient notice of the material facts underpinning the charge against him so as to prepare his defence, not whether the charge was proven through the witnesses initially identified by the

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> states that the attackers threw grenades at the Tutsi and killed them. The attackers finished off the survivors. FAG saw Ndayambaje driving the pick-up with about twenty Burundians on board.

In relevant part, Witness FAG's 1999 Statement reads as follows:

> In April 1994, […] Ndayambaje sought assistance from Burundian refugees armed with grenades, fuel. They attacked Mugombwa where the Tutsis had sought refuge. I participated in this attack. Many of the victims of Mugombwa parish [were] buried a few days later.

In relevant part, Witness FAG's 2000 Statement reads as follows:

> In April 1994, […] KANYENZI, Venant, […] Bosco, Assistant *Bourgmestre* of Muganza, and VIATEUR who was then *Conseiller* of Mugombwa ordered the inhabitants of Bishya to go to Mugombwa. On that location, we found a group of attackers made up of the inhabitants of Mugombwa […]. Some of the attackers said that it was Elie NDAYAMBAJE who had brought them there. Grenades were thrown at Tutsis who were hiding in the *cellule* parish. Some of the Tutsis died on the spot.

The Appeals Chamber considers Ndayambaje's reference to Witness FAG's 1998 Statement irrelevant as it does not discuss any incident at Mugombwa Church.

[6242] Ndayambaje Indictment, para. 6.37.

[6243] Prosecution Opening Statement, T. 12 June 2001 p. 85.

Prosecution.[6244] The Appeals Chamber also finds no error in the Trial Chamber's admission of Witness QAR's evidence on the Mugombwa Church attacks as a trial chamber may admit any relevant evidence which has probative value, such as evidence which is relevant to the proof of an allegation pleaded in the indictment.[6245]

2717. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding that the defects in the Indictment concerning the dates and location of the Mugombwa Church attacks as well as his participation therein were cured.

(b) Aiding and Abetting Responsibility

2718. Ndayambaje submits that the Trial Chamber erred in convicting him for aiding and abetting the killings perpetrated at Mugombwa Church as this form of responsibility was not mentioned in the Indictment, the Prosecution Pre-Trial Brief, or the Prosecution's opening statement.[6246] He also argues that the Indictment failed to put him on notice that he was alleged to have had knowledge that his acts and omissions aided and abetted the assailants and that the assailants possessed genocidal intent.[6247]

2719. The Prosecution responds that the paragraphs in the charging section include all forms of responsibility under Article 6(1) of the Statute and that paragraph 6.56 of the Indictment, which is of general application, specifically emphasised that Ndayambaje aided and abetted massacres.[6248] It argues that all material facts were pleaded in the Indictment and that further notice was provided in its pre-trial brief, leaving no doubt that Ndayambaje was charged "at a minimum" with aiding and abetting.[6249] The Prosecution further argues that Ndayambaje did not raise any objections at trial concerning the modes of liability or argued that he did not know that he was charged pursuant to aiding and abetting in his closing brief.[6250] It contends that Ndayambaje suffered no prejudice as he fully defended against all material facts of aiding and abetting.[6251]

[6244] *Cf. Ntabakuze* Appeal Judgement, para. 50.
[6245] *See Kanyarukiga* Appeal Decision, para. 11; Admissibility Appeal Decision of 2 July 2004, para. 15.
[6246] Ndayambaje Notice of Appeal, paras. 59-61, 63-65; Ndayambaje Appeal Brief, paras. 120-126, 131, 132. *See also* Ndayambaje Reply Brief, paras. 39, 40; AT. 21 April 2015 pp. 21, 22, 66, 67.
[6247] Ndayambaje Appeal Brief, para. 32.
[6248] Prosecution Response Brief, para. 2047. *See also* AT. 21 April 2015 pp. 36, 37, 41.
[6249] Prosecution Response Brief, paras. 2048-2050. The Prosecution asserts that Ndayambaje's *mens rea* for aiding and abetting as well as his knowledge of the perpetrators' genocidal intent could be inferred from the facts pleaded in the Ndayambaje Indictment. *See ibid.*, para. 2049.
[6250] Prosecution Response Brief, para. 2051, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje's Defence Brief, 17 February 2009 (originally filed in French, English translation filed on 3 April 2009) (confidential) ("Ndayambaje Closing Brief"), para. 70.
[6251] Prosecution Response Brief, paras. 2052, 2053. *See also* AT. 21 April 2015 p. 37. The Prosecution points out that Ndayambaje extensively cross-examined Witness QAR on the events at Mugombwa Church, challenged the evidence

2720. Ndayambaje replies, *inter alia*, that the Prosecution's argument that he did not suffer prejudice from the lack of notice is "irrational" and without merit.[6252]

2721. The Trial Chamber did not discuss in the Trial Judgement whether Ndayambaje had received sufficient notice that he could be held responsible for aiding and abetting the Mugombwa Church massacre, concluding generally that he was put on notice that he was "accused of participating in, including through giving orders, and supervising the massacre at Mugombwa Church, Muganza *commune*, along with other c*ommune* authorities in late April 1994."[6253] Although Ndayambaje did not specifically object to the vagueness of paragraph 6.37 of the Indictment regarding his alleged form of responsibility under Article 6(1) of the Statute,[6254] the Appeals Chamber considers that it would have been preferable for the Trial Chamber to explain why it was satisfied that Ndayambaje was put on sufficient notice that he could be held responsible for aiding and abetting the killings perpetrated at Mugombwa Church.

2722. The Appeals Chamber recalls that the alleged nature of the responsibility of the accused should be stated unambiguously in the indictment and that the Prosecution should therefore indicate precisely which form of responsibility is invoked based on the facts alleged.[6255] When it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or the "particular course of conduct" on the part of the accused which forms the basis for the charges in question.[6256]

2723. The Appeals Chamber observes that the Prosecution generally indicated in the charging section of the Indictment that the relevant counts were pursued pursuant to Article 6(1) of the Statute, without specifying any particular form of responsibility. In paragraph 6.37 of the Indictment, the Prosecution alleged that Ndayambaje "ordered, supervised and participated in massacres", without identifying any particular acts on the part of Ndayambaje that may characterise a responsibility for aiding and abetting. Although the Prosecution alleged in paragraph 6.56 of the Indictment, which elaborates on Ndayambaje's responsibility in broad terms, that Ndayambaje

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that he said "encouraging words" to the attackers, did not argue that his cross-examination was impeded in any manner, and called several witnesses to establish that he was not present at the church. It also points out that Ndayambaje questioned Witness QAR on the identity of several persons in order to ascertain whether they were at the church with her, which illustrates that Ndayambaje had time to investigate these events. *See* Prosecution Response Brief, paras. 2001, 2005-2007, 2052.

[6252] Ndayambaje Reply Brief, para. 44.

[6253] Trial Judgement, para. 1031.

[6254] Ndayambaje had objected to the vagueness of paragraph 6.37 of the Ndayambaje Indictment as regards the nature of his participation in the massacres referred therein. *See* Ndayambaje Closing Brief, paras. 61-63.

[6255] *Uwinkindi* Appeal Decision, para. 48; *Blaškić* Appeal Judgement, para. 215.

[6256] *See*, *e.g.*, *Ndindiliyimana et al*. Appeal Judgement, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Blaškić* Appeal Judgement, para. 213.

"aided and abetted [his] subordinates and others in carrying out the massacres", it failed to link this paragraph to paragraph 6.37 or the allegation concerning Ndayambaje's participation in killings in Muganza Commune and the surrounding area pleaded therein, and to specify Ndayambaje's impugned conduct. In this context, the Appeals Chamber is not satisfied that the Indictment put Ndayambaje on sufficient notice of his particular acts or course of conduct which formed the basis for the charge of aiding and abetting the massacres invoked in paragraph 6.37. The Appeals Chamber stresses that the relevant question is not whether Ndayambaje was given notice that he was charged with aiding and abetting crimes, but whether he was given notice that he was charged with aiding and abetting the killings alleged in paragraph 6.37 and whether the particular acts or course of conduct on his part with respect to the killings which formed the basis of the charge against him were identified.

2724. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the allegation that Ndayambaje aided and abetted the massacres in which he was alleged to have participated in paragraph 6.37 of the Indictment.

2725. The Appeals Chamber, however, finds that this error does not invalidate the Trial Chamber's decision to convict Ndayambaje on this basis as it considers that the ambiguity of the Indictment was remedied by the information provided by the Prosecution in its pre-trial brief. Specifically, the Appeals Chamber finds that the Indictment read in conjunction with Witnesses FAG's, FAU's, and TU's summaries gave notice to Ndayambaje that he was alleged to have contributed to the Mugombwa Church massacre through, *inter alia*, his presence at the church during the days of the attacks and his influence and moral authority over the assailants.[6257] Ndayambaje's alleged knowledge of his contribution to the massacre and of the assailants' genocidal intent was also abundantly clear from these materials.[6258] While the information provided through the summaries also indicated that Ndayambaje transported attackers and grenades to the church, supervised the massacre and issued instructions, this was not inconsistent with the fact that Ndayambaje may also have been responsible for aiding and abetting the crimes by providing moral support and encouragement by his presence. The Appeals Chamber concludes that the subsequent

[6257] In paragraph 30 of the Prosecution Pre-Trial Brief, it is only stated in a very general manner that, knowing that massacres of the civilian population were being committed, Ndayambaje and others took no measures to stop them and "[i]nstead of intervening to control and appeal to the perpetrators, [Ndayambaje and others] ordered, aided and abetted the acts."

[6258] Ndayambaje also argues in general terms in his appeal brief that the Trial Chamber erred in convicting him as the Ndayambaje Indictment failed to plead his genocidal intent. *See* Ndayambaje Appeal Brief, para. 131. The Appeals Chamber considers that any error as regards the pleading of Ndayambaje's genocidal intent in relation to his participation in the killings perpetrated at Mugombwa Church would not have the potential of invaliding his convictions for aiding and abetting these killings as this form of responsibility does not require a finding that the aider and abetter had genocidal intent. In any case, the Appeals Chamber notes that the Prosecution pleaded under the count of genocide

information provided to Ndayambaje through Witnesses FAG's, FAU's, and TU's summaries sufficiently informed him of the course of conduct on his part supporting the generally pleaded charge of aiding and abetting, thereby curing the defect in the Indictment.

2726. This conclusion is bolstered by a review of the conduct of Ndayambaje's defence at trial which reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation that his presence at Mugombwa Church encouraged the killings perpetrated there on 20 and 21 April 1994. In defending against the allegation that he was not present during the days of the attacks, Ndayambaje testified and called witnesses to support his alibi for 20 and 21 April 1994 and to rebut the allegations of his presence which, together with his moral authority, is the basis of his conviction for aiding and abetting the killings at Mugombwa Church.[6259] Ndayambaje also extensively cross-examined Witness QAR on aspects of her evidence regarding his role and presence during the days of the attacks.[6260]

2727. In these circumstances, the Appeals Chamber finds that Ndayambaje was ultimately provided with sufficient information detailing the factual basis supporting his conviction for aiding and abetting the killings perpetrated at Mugombwa Church and dismisses Ndayambaje's appeal in this respect.

(c) Direct and Public Incitement to Commit Genocide

2728. Ndayambaje submits that the Trial Chamber erred in convicting him of direct and public incitement to commit genocide on the basis of alleged inciting statements he made at Mugombwa Church as the Indictment does not contain any specific allegations of inciting statements.[6261] He argues that these specific "events at the Church warranted separate charges"[6262] and that the Trial Chamber erred in failing to consider whether the Indictment had been cured of its defects in this respect or assess the prejudice suffered.[6263] In the alternative, he submits that the defect was not cured through the summary of the anticipated evidence of Witnesses QAR, FAU, FAG, or TU

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that Ndayambaje acted "with the intent to destroy, in whole or in part, a racial or ethnic group". *See* Ndayambaje Indictment, p. 41.

[6259] Trial Judgement, para. 1196. *See also ibid*., paras. 1094-1118, 1122-1126, 1136, 1137, 1144, 1149, 1154, 1165-1173, 1181-1193. *See also The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Pre-Defence Brief, 23 December 2004 (originally filed in French, English translation filed on 8 February 2005) ("Ndayambaje Pre-Defence Brief"), Annex 3 "List of Defence Witnesses".

[6260] Witness QAR, T. 20 November 2001 pp. 115, 116, 119-121, 124-128, 130-134; T. 21 November 2001 pp. 5-13, 33-34, 38-49, 52-56.

[6261] Ndayambaje Notice of Appeal, paras. 16, 26, 28-31; Ndayambaje Appeal Brief, para. 45; Ndayambaje Reply Brief, para. 21. *See also* AT. 21 April 2015 p. 67.

[6262] Ndayambaje Appeal Brief, para. 45.

[6263] Ndayambaje Appeal Brief, paras. 46, 48; Ndayambaje Reply Brief, para. 21.

"such as analyzed" in the Trial Judgement.[6264] He also argues that the Indictment failed to put him on notice that he was alleged to have had genocidal intent.[6265]

2729. In its response brief, the Prosecution does not respond directly to Ndayambaje's submissions about the lack of notice of the charge of direct and public incitement to commit genocide at Mugombwa Church, simply pointing out that "Ndayambaje's inciting words at the church" were mentioned in Witness QAR's prior statement of 20 May 1997.[6266] It also asserts that Ndayambaje did not raise a contemporaneous objection to Witness QAR's testimony at trial and that his behaviour at trial shows that he had sufficient notice of what he was charged with and suffered no prejudice from the alleged lack of notice.[6267] In this respect, the Prosecution argues that Ndayambaje extensively cross-examined Witness QAR on the events at Mugombwa Church, notably about her prior statements, did not argue that his cross-examination was impeded in any manner, and called several witnesses to establish that he was not present at the church.[6268] According to the Prosecution, all of this shows that Ndayambaje understood the Mugombwa Church charges, had thoroughly investigated the charges, and was well equipped to defend against them.[6269] At the appeals hearing, in response to a specific question by the Appeals Chamber, the Prosecution argued that paragraph 6.33 of the Indictment "was found to be vague" but that "the vagueness was cured through the post-indictment material that specified [Ndayambaje's] inciting words and the impact [they] had."[6270]

2730. The Appeals Chamber notes that Ndayambaje objected to Witness QAR's testimony at trial on the ground that there was no allegation about Mugombwa Church in the Indictment.[6271] He also objected in his closing brief to the vagueness of paragraph 6.37 of the Indictment as regards the nature of his participation in the massacres referred therein[6272] as well as that of paragraph 5.8 of the Indictment which alleged that he publicly incited the people to exterminate the Tutsi population

[6264] Ndayambaje Appeal Brief, para. 47.
[6265] Ndayambaje Appeal Brief, para. 32.
[6266] Prosecution Response Brief, para. 2001, *referring to* Witness QAR's May 1997 Statement.
[6267] Prosecution Response Brief, paras. 2000, 2004, 2005.
[6268] Prosecution Response Brief, paras. 2001, 2005-2007. *See also ibid.*, para. 2052 where the Prosecution asserts that Ndayambaje challenged the evidence that he said "encouraging words" to the attackers.
[6269] Prosecution Response Brief, paras. 2006-2008.
[6270] AT. 21 April 2015 pp. 37, 38, *referring to* the summaries and prior statements of Witnesses TO and QAQ. When told by the Appeals Chamber that the summaries and prior statements of Witnesses TO and QAQ referred to Ndayambaje's Swearing-In Ceremony and not Mugombwa Church, the Prosecution argued that Witness QAR's statement and summary provided Ndayambaje with notice. *See ibid.*, p. 42.
[6271] Witness QAR, T. 3 March 2004 p. 42 (closed session); *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Requête en extrême urgence d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation*, 31 May 2006 ("31 May 2006 Motion"), paras. 140-182. The Trial Chamber dismissed Ndayambaje's request for exclusion of witnesses' testimonies for lack of notice in the Ndayambaje Indictment primarily because it was not "satisfied that there [was] a basis to exclude the concerned testimonies at this stage." It stated that "[s]ome of the matters raised may be considered at a later stage of the proceedings". *See* 1 September 2006 Decision, para. 25, p. 9.

and its accomplices.[6273] He further specifically claimed that the allegations of incitement made in paragraphs 5.8 and 6.33 of the Indictment were unrelated and too general in nature to include his specific acts at Mugombwa Church as recounted by Witnesses QAR and FAG.[6274]

2731. The Trial Chamber failed to address Ndayambaje's contention that the allegation of incitement at Mugombwa Church was not pleaded in the Indictment. The Trial Chamber instead limited its examination to the question of whether Ndayambaje was put on notice regarding the dates, location, and his general participation, including through giving orders and supervising, in the Mugombwa Church massacre.[6275] The Appeals Chamber recalls that a trial chamber is not obliged to address each and every submission made at trial and has discretion to decide which argument to address.[6276] However, considering the importance of the matter, the Appeals Chamber considers that the Trial Chamber should have addressed Ndayambaje's claim that he was not charged with direct and public incitement to commit genocide at Mugombwa Church. The Appeals Chamber finds that the Trial Chamber's failure to address Ndayambaje's contention regarding the pleading of his responsibility for direct and public incitement to commit genocide in relation to the Mugombwa Church massacre infringed Ndayambaje's right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules. The Appeals Chamber will determine whether this error of law invalidates the Trial Chamber's decision to convict Ndayambaje for direct and public incitement to commit genocide in relation to the Mugombwa Church massacre in examining whether Ndayambaje was charged on this basis and, if so, whether he was provided with sufficient information on the material facts underpinning the charge against him.

2732. The Appeals Chamber observes that, as argued by Ndayambaje, paragraph 6.33 of the Indictment could not put him on notice of the allegation of incitement at Mugombwa Church on 20 and 21 April 1994 as it expressly refers to Ndayambaje inciting the population to kill Tutsis "[i]n June 1994". The Appeals Chamber also notes that there is no mention of any inciting statements in paragraph 6.37 of the Indictment. This paragraph, however, was among those expressly relied upon in support of the count of direct and public incitement to commit genocide (Count 4).[6277] The Appeals Chamber considers that this reliance gave notice to Ndayambaje that the Prosecution intended to engage his responsibility under this count in relation to the massacres referred to in paragraph 6.37. The Appeals Chamber also observes that paragraph 5.8 of the

[6272] Ndayambaje Closing Brief, paras. 61-63.
[6273] Ndayambaje Closing Brief, para. 48.
[6274] Ndayambaje Closing Brief, paras. 80, 81. *See also ibid.*, paras. 78, 79, fn. 74. *See also* 31 May 2006 Motion, paras. 144, 145, 182.
[6275] *See* Trial Judgement, paras. 1023-1031.
[6276] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.
[6277] *See* Ndayambaje Indictment, p. 42.

Indictment, which was being pursued under Count 4 pursuant to Article 6(1) of the Statute, clearly indicates that Ndayambaje was alleged to have publicly incited people to exterminate the Tutsi population.[6278]

2733. The Appeals Chamber finds that paragraph 6.37 of the Indictment read together with paragraph 5.8 and the charging section of the Indictment put Ndayambaje on notice that he was charged with direct and public incitement to commit genocide through inciting the massacres of the Tutsi population in Muganza Commune. The allegation concerning Ndayambaje's inciting statements at Mugombwa Church did not therefore constitute a separate charge.

2734. However, as Ndayambaje was convicted based on the statements he made at Mugombwa Church on 20 and 21 April 1994, such statements constitute material facts underpinning his responsibility for direct and public incitement to commit genocide which should have been pleaded in the Indictment. Nevertheless, there is no mention of any inciting statements in paragraph 6.37 of the Indictment, and paragraph 5.8 of the Indictment does not refer to the attacks on Mugombwa Church. The Indictment is therefore defective in this regard.

2735. Turning to whether the defect was cured, the Appeals Chamber observes that there is no reference to Mugombwa Church in Witness QAR's Summary[6279] and no mention of Ndayambaje making inciting statements at Mugombwa Church in Witnesses FAU's, FAG's, and TU's summaries or prior statements or in the Prosecution's opening statement. While Witness TU's Summary and Witness FAG's Statement refer to Ndayambaje's "instruct[ions]" and "orders" to kill Tutsis,[6280] the Appeals Chamber considers that they could reasonably be understood as underpinning the charges of ordering genocide, murder, extermination, or violence to life rather than that of direct and public incitement to commit genocide. The Prosecution correctly points out that Witness QAR's May 1997 Statement mentions that Ndayambaje proffered inciting words against Tutsis at the church.[6281] However, the Prosecution did not signal in its pre-trial brief that it

[6278] Ndayambaje Indictment, p. 42. Paragraph 5.8 of the Ndayambaje Indictment reads as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. […] Elie Ndayambaje […] publicly incited the people to exterminate the Tutsi population and its "accomplices".

[6279] Witness Summaries Grid, item 5, Witness QAR ("Witness QAR's Summary").

[6280] The Appeals Chamber notes that Witness TU's Summary refers to Ndayambaje "speaking over a microphone, ordering the Hutus to kill the Tutsis" in Muganza Commune in the commune vehicle on 20 April 1994. However, read in context, this statement does not appear to relate to Mugombwa Church. A review of Witness TU's prior statement to Tribunal investigators of 18 December 1996 confirms that these orders given through microphone from the commune vehicle do not relate to Mugombwa Church but to Bishya. *See* Witness TU's Statement, p. 2241 (Registry pagination).

[6281] *See* Witness QAR's May 1997 Statement, which reads, in relevant part, as follows:

> Then around 1 pm, through the broken church windows, I saw Elie NDAYAMBAJE arrive outside the church in a white Toyota pick-up. […] He said the following to a crowd of Hutus assembled there: "The Tutsis must not escape for their God has delivered them" Then he added: "I am going to give weapons to those who do not have any."

intended to rely on this aspect of Witness QAR's evidence. The Appeals Chamber recalls that mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[6282]

2736. The Appeals Chamber finds that, even when Witness QAR testified at trial that Ndayambaje made inciting statements to the assailants and the crowd gathered outside the church,[6283] it was not clear that the Prosecution intended to rely on that part of her testimony to prove that Ndayambaje committed direct and public incitement to commit genocide at Mugombwa Church. In any event, any information in this regard would have been provided too late in the proceedings to constitute "timely" notice.

2737. Consequently, the Appeals Chamber finds that the defect in the Indictment concerning Ndayambaje's inciting statements at Mugombwa Church was not cured through post-indictment disclosures.

2738. The Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information causes prejudice to the accused.[6284] The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[6285] When an appellant raises a defect in the indictment for the first time on appeal, the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[6286] When, however, an accused has previously raised the issue of lack of notice before the trial chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired.[6287]

2739. The Appeals Chamber recalls that Ndayambaje raised a contemporaneous objection to Witness QAR's testimony in relation to the allegation related to Mugombwa Church and objected to the vagueness of the Indictment regarding the allegation of direct and public incitement to

[6282] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 162; *Ntagerura et al.* Appeal Judgement, para. 139; *Ntakirutimana* Appeal Judgement, para. 27.
[6283] *See* Witness QAR, T. 19 November 2001 pp. 17, 26, 27, 29. The Appeals Chamber observes that Witness QAR's testimony on Ndayambaje's inciting statements was not made as a response to the Prosecution's specific inquiry on the matter, but was part of a response to the Prosecution's general question about the conduct of the people who were outside the Mugombwa Church and whether Ndayambaje was carrying anything in his vehicle. *See ibid.*, pp. 16, 17, 26.
[6284] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58.
[6285] *See*, *e.g.*, *Šainović et al*. Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreškić et al.* Appeal Judgement, para. 122.
[6286] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Šainović et al*. Appeal Judgement, para. 224; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[6287] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 30; *Ntabakuze* Appeal Judgement, fn. 189; *Niyitegeka* Appeal Judgement, para. 200; *Kupreškić et al.* Appeal Judgement, paras. 122, 123.

commit genocide at the church.[6288] Thus, the burden rests on the Prosecution to prove that the ability of Ndayambaje to prepare his defence was not materially impaired.

2740. The Appeals Chamber finds that the Prosecution has failed to meet this burden. The Prosecution correctly points out that Ndayambaje called several witnesses and extensively cross-examined Witness QAR at trial in relation to the massacre perpetrated at Mugombwa Church. However, an examination of the trial record shows that Ndayambaje's defence primarily focussed on establishing that he was not present during the attacks on Mugombwa Church and his role in a distribution of weapons.[6289] At no point during cross-examination did Ndayambaje question Witness QAR concerning the inciting statements such as the content of the statements, the audience, the manner in which the statements were uttered, or the place and other circumstances in which the statements were made. The fact that Ndayambaje did not call any witnesses[6290] or made any attempt at trial to refute any allegation concerning direct and public incitement to commit genocide in relation to the Mugombwa Church attacks demonstrates his lack of preparation.

2741. Although Ndayambaje objected, particularly in his 31 May 2006 Motion and closing brief, to the vagueness of the Indictment regarding the charge of public and direct incitement to commit genocide in relation to the events at Mugombwa Church,[6291] his objections do not reflect that he fully understood that Witness QAR's evidence on his addresses at the church on 20 and 21 April 1994 was intended to underpin the charge of direct and public incitement to commit genocide.

2742. For the foregoing reasons, the Appeals Chamber finds that the Prosecution has failed to prove on appeal that Ndayambaje's ability to prepare his defence was not materially impaired by the defect in the Indictment concerning his responsibility for committing direct and public incitement to commit genocide based on his statements at Mugombwa Church on 20 and 21 April 1994. The Appeals Chamber, accordingly, concludes that the Trial Chamber erred in convicting Ndayambaje of committing direct and public incitement to commit genocide on this basis.

[6288] *See supra*, para. 2730.
[6289] *See* Witness QAR, T. 20 November 2001 pp. 115, 119-121, 124-128, 130-134, T. 21 November 2001 pp. 5-13, 33, 34, 38-49, 52-56.
[6290] *See also* Ndayambaje Pre-Defence Brief.
[6291] 31 May 2006 Motion, paras. 140-182; Ndayambaje Closing Brief, paras. 80, 81. *See also* Ndayambaje Closing Brief, paras. 78, 79, fn. 74.

2. Kabuye Hill (Grounds 5, and 6 in part)

2743. The Trial Chamber found that, on 20 April 1994, Ndayambaje and several armed soldiers and communal policemen travelled to Ngiryi Bridge where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, following which soldiers and policemen escorted the refugees to Kabuye Hill.[6292] The Trial Chamber also found that Ndayambaje was present at Kabuye Hill on 22 April 1994 when soldiers, policemen, and armed civilians attacked Tutsis gathered on the hill, resulting in the death of thousands of Tutsis.[6293] In addition, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they participated in attacks against Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and at the Muganza commune office on 23 April 1994, which were later used in the massacres at Kabuye Hill; and (iii) was present during the attacks at Kabuye Hill on 23 and 24 April 1994 that resulted in thousands of deaths.[6294]

2744. After finding that the interception at Ngiryi Bridge and forced escorting of the refugees to Kabuye Hill did not constitute an act of genocide and did not rise to a similar gravity as other crimes against humanity, the Trial Chamber acquitted Ndayambaje of genocide and persecution as a crime against humanity for the interception and forced movement of the Tutsi refugees from Ngiryi Bridge to Kabuye Hill.[6295] However, the Trial Chamber convicted Ndayambaje of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for aiding and abetting the killings at Kabuye Hill from 22 to 24 April 1994.[6296]

2745. In summarising the Prosecution case against Ndayambaje with respect to the events of 20 April 1994 and the attacks at Kabuye Hill from 22 to 24 April 1994, the Trial Chamber referred to paragraphs 6.30, 6.31, and 6.32 of the Indictment.[6297] The Indictment indicates that the

[6292] Trial Judgement, paras. 1414, 5766.
[6293] Trial Judgement, paras. 1423, 1424, 5769.
[6294] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6295] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6296] Trial Judgement, paras. 5777, 5976, 5977, 6064-6066, 6107, 6108, 6175, 6176, 6186.
[6297] Trial Judgement, para. 1248, fn. 2672. Paragraphs 6.30, 6.31, and 6.32 of the Ndayambaje Indictment read as follows:

> 6.30 On 20 April 1994, Elie Ndayambaje took communal policemen to Gisagara. Teaming up with soldiers, they arrested the refugees and took them to the neighboring hill, which was called Kabuye. The soldiers and communal police separated the Tutsi from the other refugees and forced them to relinquish their traditional tools.
>
> 6.31 On 22 April 1994, Elie Ndayambaje, accompanied by communal policemen, gendarmes, soldiers and civilians armed with traditional tools and weapons, attacked the Tutsi refugees who had gathered at Kabuye.

allegations in paragraphs 6.30, 6.31, and 6.32 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute.[6298]

2746. Addressing Ndayambaje's assertion that paragraphs 6.30, 6.31, and 6.32 of the Indictment lacked specificity, the Trial Chamber found that, when reading the Indictment as a whole, these paragraphs provided sufficient notice to Ndayambaje to enable him to prepare his defence.[6299] Specifically, the Trial Chamber found that the "key elements of the Kabuye Hill events", such as the movements of Tutsis to Kabuye Hill, the attacks that took place there, and the distribution of weapons, were "linked" in the Indictment to a specific date or dates and to a specific location.[6300] Similarly, it stated that: (i) Ndayambaje was "placed at the scene of each of these events"; (ii) Ndayambaje's role as a superior over subordinates could be "inferred from the Prosecution's allegations elsewhere in the Indictment"; and (iii) the alleged attackers were identified by reference to their category.[6301] The Trial Chamber further found that the mode of transportation used, the precise number of grenades thrown into the crowd of Tutsis, and the precise number of victims were not material to the Prosecution case.[6302]

2747. Ndayambaje submits that the Trial Chamber erred in finding that: (i) the interception of refugees at Ngiryi Bridge was pleaded in the Indictment and in admitting evidence related to this event; (ii) the circumstances surrounding the transportation of the attackers were not material; (iii) he was sufficiently on notice of the distribution of weapons; (iv) he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the unidentified attackers at Kabuye Hill; and (v) he aided and abetted the massacres at Kabuye Hill because this mode of participation was not pleaded in the Indictment.[6303] Consequently, Ndayambaje requests the Appeals Chamber to reverse all the findings and convictions related to the events at Ngiryi Bridge, to the transportation of attackers, and to the crimes committed at Kabuye Hill.[6304] The Appeals Chamber will address Ndayambaje's contentions in turn.

> Numerous Tutsis were killed or wounded. During the night, armed civilians surrounded the survivors and prevented them from escaping.
>
> 6.32 On 23 and 24 April 1994, the attacks on the Tutsi refugees at Kabuye continued. Elie Ndayambaje transported the attackers to Kabuye and issued them weapons. Elie Ndayambaje threw grenades into the crowd of refugees. During these attacks, numerous Tutsi were killed or wounded.

[6298] Ndayambaje Indictment, pp. 40-45.
[6299] Trial Judgement, paras. 1253-1255.
[6300] Trial Judgement, para. 1255.
[6301] Trial Judgement, para. 1255.
[6302] Trial Judgement, para. 1255.
[6303] Ndayambaje Notice of Appeal, paras. 51, 52, 54, 55, 59-61, 63; Ndayambaje Appeal Brief, paras. 100-118, 120-126, 131, 132. *See also* Ndayambaje Reply Brief, paras. 31, 32, 34; AT. 21 April 2015 pp. 10, 11, 21, 22, 67.
[6304] Ndayambaje Notice of Appeal, paras. 57, 58, 64, 65; Ndayambaje Appeal Brief, paras. 109, 119, 132, 138.

(a) Interception at Ngiryi Bridge and Forced Return to Gisagara

2748. Ndayambaje submits that the allegation that, on 20 April 1994, he travelled to Ngiryi Bridge with several armed soldiers and communal policemen, where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, was not pleaded in the Indictment.[6305] He argues that the events at Ngiryi Bridge cannot be linked to the events at Gisagara, which is pleaded in paragraph 6.30 of the Indictment, or to Kabuye Hill since these were different places.[6306] Ndayambaje asserts that the Trial Chamber erred in failing to inquire whether he had received sufficient notice of the allegation concerning the interception of refugees at Ngiryi Bridge despite the fact that the allegation was a separate charge that had to be specified in the Indictment.[6307] Ndayambaje contends that, in "admitting evidence thereon, [the Trial Chamber] radically and illegally transformed the Indictment."[6308] He underlines that "in admitting evidence of the events at Ngiryi not pleaded in the Indictment" the Trial Chamber caused him serious prejudice.[6309]

2749. The Prosecution responds that Ndayambaje's challenge is moot since he was not convicted for the interception of refugees at Ngiryi Bridge and forced movement of the Tutsi refugees and that the Trial Chamber "only relied on the incident as one piece of evidence for determining the *mens rea* for the Kabuye Hill massacre."[6310]

2750. Ndayambaje replies that he can dispute on appeal whether he was on notice of these incidents since the Trial Chamber relied on these facts in support of its finding that he possessed genocidal intent in relation to the events at Kabuye Hill.[6311] He also argues that, had the Trial Chamber correctly concluded that this charge was not in the Indictment, it would have excluded the related evidence.[6312]

2751. As noted above, the Trial Chamber did not convict Ndayambaje for his role in intercepting and forcing Tutsi refugees to return to Gisagara and then go to Kabuye Hill on 20 April 1994.[6313] To the extent that Ndayambaje argues that the Trial Chamber erred with regard to the pleading of the interception and forced movement of the Tutsi refugees on 20 April 1994 as a separate

[6305] Ndayambaje Notice of Appeal, paras. 52, 54; Ndayambaje Appeal Brief, paras. 100-102, *referring to* Trial Judgement paras. 1248, 1414. *See also* Ndayambaje Appeal Brief, paras. 105, 106.
[6306] Ndayambaje Notice of Appeal, para. 55; Ndayambaje Appeal Brief, paras. 102, 106.
[6307] Ndayambaje Notice of Appeal, para. 53; Ndayambaje Appeal Brief, paras. 102, 105.
[6308] Ndayambaje Appeal Brief, para. 103. *See also* Ndayambaje Notice of Appeal, para. 52; Ndayambaje Appeal Brief, para. 107.
[6309] Ndayambaje Appeal Brief, para. 108. *See also* Ndayambaje Notice of Appeal, para. 56.
[6310] Prosecution Response Brief, para. 2040.
[6311] Ndayambaje Reply Brief, para. 31 (French).
[6312] Ndayambaje Reply Brief, para. 31.
[6313] *See supra*, para. 2744. *See also* AT. 21 April 2015 p. 26.

allegation underpinning criminal charges, his argument is dismissed as it does not have the potential to impact Ndayambaje's conviction or sentence.[6314]

2752. However, the Appeals Chamber notes that the Trial Chamber relied on the interception and forced movement of Tutsi refugees and Ndayambaje's role in these events in finding that he had the required *mens rea* for the crimes of which he was ultimately convicted in connection with the events at Kabuye Hill on 22 April 1994.[6315] As discussed below, the Appeals Chamber is satisfied that the Indictment put Ndayambaje on notice that he was alleged to have had the requisite *mens rea* to incur responsibility for aiding and abetting genocide at Kabuye Hill on 22 April 1994.[6316] The Appeals Chamber recalls that, with respect to the *mens rea*, an indictment may plead either: (i) the state of mind of the accused, in which case the facts by which that state of mind is to be established are matters of evidence, and need not be pleaded, or (ii) the evidentiary facts from which the state of mind is to be inferred.[6317] As the interception of the Tutsi refugees at Ngiryi Bridge and their forced return to Gisagara and subsequent movement to Kabuye Hill, including Ndayambaje's role therein, was ultimately merely relied upon as evidence of Ndayambaje's state of mind expressly pleaded in the Indictment, the Appeals Chamber considers that the evidentiary facts by which Ndayambaje's *mens rea* would be established did not need to be pleaded in the Indictment.

2753. In addition, insofar as Ndayambaje is contesting the admission of evidence concerning the interception of the refugees and their forced return to Gisagara, the Appeals Chamber recalls that a trial chamber may admit any relevant evidence which it deems to have probative value, such as evidence which is relevant to the proof of an allegation pleaded in the Indictment.[6318] Ndayambaje's argument that the Trial Chamber would have excluded the related evidence had it correctly concluded that the charge regarding the interception and forced movement of the refugees was not pleaded in the Indictment fails to appreciate that this evidence was relevant to Ndayambaje's *mens rea* which was pleaded in the Indictment.

2754. For the foregoing reasons, as Ndayambaje was not convicted for the interception of Tutsi refugees and their forced return to Gisagara, the Appeals Chamber finds that any error regarding the pleading of these events in the Indictment would not have invalidated the Trial Judgement.

[6314] *See supra*, para. 34.
[6315] Trial Judgement, paras. 5770, 5771. The Trial Judgement reflects that the Trial Chamber did not rely on the events that led the refugees to Kabuye Hill to establish the genocidal intent of those who attacked the refugees at Kabuye Hill on 23 and 24 April 1994. *See ibid*., paras. 5771, 5773.
[6316] *See infra*, para. 2773.
[6317] *See*, *e.g*., *Kanyarukiga* Appeal Decision, para. 9; *Nchamihigo* Appeal Judgement, para. 136; *Nahimana et al.* Appeal Judgement, para. 347. *See also Blaškić* Appeal Judgement, para. 219.
[6318] *See Kanyarukiga* Appeal Decision, para. 11; Admissibility Appeal Decision of 2 July 2004, para. 15.

The Appeals Chamber also finds no error in the Trial Chamber admitting this evidence to prove Ndayambaje's *mens rea* for the crimes for which he was ultimately convicted in connection with the events at Kabuye Hill.

(b) Transportation of Attackers

2755. Ndayambaje submits that the Trial Chamber erred in finding that the circumstances surrounding the transportation of policemen and soldiers were not material to the Prosecution case.[6319] In his view, as transportation is the alleged criminal conduct on the basis of which he was ultimately found guilty, the points of departure and destination, the means used, the dates and times, the identity of those transported, and their behaviour had to be specified in the Indictment.[6320]

2756. The Prosecution responds that all of the material facts for the Kabuye Hill massacres were pleaded in the Indictment, including the place of the massacre, the timeframe, Ndayambaje's participation, and the identity of the attackers, who were identified by categories.[6321]

2757. The Appeals Chamber recalls that where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[6322]

2758. The Appeals Chamber notes that paragraph 6.32 of the Indictment specifies that, on 23 and 24 April 1994, Ndayambaje transported attackers to Kabuye Hill, and that paragraph 6.31 of the Indictment identifies the attackers by reference to their category of "communal policemen, gendarmes, soldiers and civilians armed with traditional tools and weapons". In the view of the Appeals Chamber, the acts which formed the basis for the charge pertaining to the transportation of attackers were clearly set forth in the Indictment and the identification of the attackers by reference to their category was sufficient to provide appropriate notice. The Appeals Chamber is also not convinced by Ndayambaje's undeveloped assertion that the Trial Chamber erred in finding that the mode of transportation used was not material to the Prosecution case. Similarly, the Appeals Chamber finds unsubstantiated and unmeritorious Ndayambaje's argument that the behaviour of the

[6319] Ndayambaje Notice of Appeal, para. 54; Ndayambaje Appeal Brief, para. 110. *See also* AT. 21 April 2015 pp. 10, 11.
[6320] Ndayambaje Appeal Brief, para. 110.
[6321] Prosecution Response Brief, para. 2041. The Prosecution contends that, in any event, witnesses' summaries and statements disclosed to Ndayambaje further fleshed out the charges against him, including regarding the transport of soldiers, and that Ndayambaje knew what he was charged with and suffered no prejudice. *See ibid.*, paras. 2043-2046.
[6322] *Ndindiliyimana et al*. Appeal Judgement, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Blaškić* Appeal Judgement, para. 213.

attackers during the transportation was a material fact.[6323] Rather, the material fact was that the attackers whom Ndayambaje transported attacked Tutsis after they arrived at Kabuye Hill.

2759. Accordingly, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that the material facts concerning the transportation of the attackers to Kabuye Hill were sufficiently pleaded in the Indictment.

(c) Distribution of Weapons

2760. Ndayambaje submits that the Trial Chamber erred in finding that he had been sufficiently notified of the allegation of weapons distribution at Kabuye Hill.[6324] Specifically, he argues that, in its assessment of whether he was provided with clear and consistent information on the distribution of weapons at Kabuye Hill, the Trial Chamber failed to consider the fact that the Prosecution Pre-Trial Brief, the Prosecution's opening statement, and the witnesses' statements did not provide further information but rather exacerbated the confusion as to the information that was provided to him.[6325] Ndayambaje also points to the fact that the Trial Chamber found elsewhere that the Indictment was defective and was not cured in respect of the distribution of weapons at Mugombwa Church and argues that the same holds true for the distribution of weapons at Kabuye Hill.[6326]

2761. The Prosecution responds that the allegation of Ndayambaje's participation in the massacres by distributing weapons was pleaded in the Indictment and reaffirmed in its closing brief, and that witnesses' summaries and statements provided Ndayambaje with additional information regarding the charge against him.[6327] The Prosecution further argues that Ndayambaje has not pointed to any confusing information from the witnesses' statements.[6328]

2762. The Appeals Chamber notes that paragraph 6.32 of the Indictment clearly put Ndayambaje on notice that, on 23 and 24 April 1994, he was alleged to have transported attackers to Kabuye Hill

[6323] *See* Ndayambaje Appeal Brief, para. 110; Trial Judgement, para. 1255.
[6324] Ndayambaje Notice of Appeal, para. 54; Ndayambaje Appeal Brief, para. 111. *See also* AT. 21 April 2015 pp. 10, 11.
[6325] Ndayambaje Appeal Brief, paras. 111, 112. Ndayambaje contends that the written statements of witnesses exacerbated the confusion as to the information provided to him with regard to the location of the distribution of weapons, as the witnesses stated that it occurred at Kabuye, at a neighbouring hill, at the office in Muganza Sector, in Butare, or at Bishya, in various and incompatible circumstances. *See idem*. Ndayambaje contends that Prosecution Witness EV is the sole witness who placed the distribution of weapons at Kabuye Hill. *See ibid.*, para. 112.
[6326] Ndayambaje Appeal Brief, paras. 113, 512.
[6327] Prosecution Response Brief, paras. 2041, 2043. With regard to Ndayambaje's argument that the information provided to him states that he was involved in criminal conduct at different places, the Prosecution avers that this is simply due to the fact that witnesses saw him in different places, including at Kabuye Hill and Muganza Commune on his way to or from Kabuye Hill. The Prosecution contends that in any event, Ndayambaje knew what he was charged with and suffered no prejudice. *See ibid.*, paras. 2044-2046.
[6328] Prosecution Response Brief, para. 2043.

and issued them weapons.[6329] Ndayambaje's argument that he was insufficiently notified of the allegation of weapons distribution at Kabuye Hill is undeveloped and Ndayambaje fails to specify which material facts were ambiguously or not sufficiently pleaded in the Indictment. In the absence of any demonstration of defect in the Indictment, the Appeals Chamber fails to see why the Trial Chamber should have considered the information provided in the Prosecution's pre-trial brief and opening statement and the witnesses' statements in this respect.

2763. Moreover, Ndayambaje's argument relating to the notice of the distribution of weapons at Mugombwa Church is inapposite. With regard to Mugombwa Church, the Trial Chamber found that the Indictment did not specify the alleged site of the distribution of weapons or the identities of those who received the weapons, that the Indictment was defective, and that this defect was subsequently not cured.[6330] In contrast, paragraph 6.32 of the Indictment related to Kabuye Hill states the site of the weapons distribution and paragraph 6.31 of the Indictment clearly identifies the attackers by category.

2764. For the above reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that he was provided with sufficient notice of the allegation of distribution of weapons at Kabuye Hill on 23 and 24 April 1994.

(d) Authority Over Unidentified Attackers

2765. Ndayambaje submits that the Trial Chamber erred in finding that he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the unidentified attackers.[6331] According to him, the Trial Chamber "erred in law in finding that in the instant case, identification by fictitious categories was sufficient to inform [him], leaving paragraphs 6.30 to 6.32 vague and not informing him in a clear and consistent manner as to his involvement in the events of Kabuye and his possible authority over poorly identified attackers."[6332]

2766. The Prosecution responds that all material facts for the events at Kabuye Hill were pleaded, including the categories of attackers.[6333] It submits that Ndayambaje's argument is obscure, undeveloped, and incapable of showing that the Trial Chamber erred in finding that his authority

[6329] *See also* Trial Judgement, para. 1255.
[6330] Trial Judgement, paras. 1032, 1036, 1037.
[6331] Ndayambaje Appeal Brief, paras. 114, 117. *See also* AT. 21 April 2015 pp. 10, 11.
[6332] Ndayambaje Appeal Brief, para. 117.
[6333] Prosecution Response Brief, para. 2041.

and importance were pleaded and that his contentions as to the pleading of this issue are moot as he was not found responsible as a superior.[6334]

2767. Ndayambaje replies that he did not raise the issue of his responsibility as a superior, but rather underscored the illogical approach of the Trial Chamber in stating that the transportation and distribution of weapons at Kabuye Hill had been pleaded in the Indictment because of his authority over unidentified attackers.[6335]

2768. Contrary to Ndayambaje's contention, the Trial Judgement does not reflect that the Trial Chamber relied on his authority over unidentified attackers in finding that the transportation and distribution of weapons in Kabuye Hill had been sufficiently pleaded in the Indictment. It is clear from the Trial Judgement that the Trial Chamber found that the key elements of the Kabuye Hill events, such as the attacks that took place there and the distribution of weapons, were pleaded in paragraphs 6.31 and 6.32 of the Indictment with sufficient specificity.[6336] The Trial Chamber referred to other paragraphs of the Indictment only to clarify Ndayambaje's "alleged relationship with his subordinates"[6337] and "his role as a superior over subordinates"[6338] in relation to the pleading of Ndayambaje's superior responsibility.[6339] As far as Ndayambaje argues that his position of authority is not sufficient to identify the attackers at Kabuye Hill, the Appeals Chamber recalls that it already determined that the Trial Chamber did not err in finding that the identification of the attackers by reference to their category provided Ndayambaje with sufficient notice.[6340]

2769. The Appeals Chamber therefore rejects Ndayambaje's arguments that the Trial Chamber erred in finding that he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the attackers, as it did not rely on Ndayambaje's authority to find that the charge was sufficiently pleaded in the Indictment or that the attackers were sufficiently identified in the Indictment.

(e) Responsibility for Aiding and Abetting

2770. Ndayambaje submits that the Trial Chamber erred in finding that he aided and abetted the massacres at Kabuye Hill from 22 through 24 April 1994 whereas this form of responsibility was

[6334] Prosecution Response Brief, para. 2042.
[6335] Ndayambaje Reply Brief, para. 32.
[6336] Trial Judgement, para. 1255.
[6337] Trial Judgement, para. 1254.
[6338] Trial Judgement, para. 1255.
[6339] The Appeals Chamber recalls that Ndayambaje was not convicted for the events at Kabuye Hill on the basis of superior responsibility pursuant to Article 6(3) of the Statute. *See* Trial Judgement, paras. 5768, 5780.
[6340] *See supra*, para. 2758.

not pleaded in the Indictment.[6341] Ndayambaje adds that neither the Prosecution's pre-trial brief nor its opening statement mentioned aiding and abetting and that the Trial Chamber chose that form of responsibility *proprio motu*.[6342]

2771. The Prosecution responds that the paragraphs in the charging section of the Indictment include all modes of liability under Article 6(1) of the Statute and that paragraph 6.56 of the Indictment, which is of general application, specifically emphasised that Ndayambaje aided and abetted massacres.[6343] It argues that all material facts were pleaded in the Indictment, that further notice was provided in the Prosecution Pre-Trial Brief, and that Ndayambaje did not suffer any prejudice.[6344]

2772. The Appeals Chamber notes the general reference to Article 6(1) of the Statute in the charging section of the Indictment[6345] and that, in paragraph 6.56 of the Indictment which elaborates in broad terms on Ndayambaje's responsibility, it is stated that Ndayambaje "aided and abetted [his] subordinates and others in carrying out the massacres of the Tutsi population and its accomplices." As held above in relation to Mugombwa Church, the Appeals Chamber considers that this, on its own, was insufficient to put Ndayambaje on notice that he was charged with aiding and abetting the killings at Kabuye Hill and of his conduct underpinning this charge.[6346]

2773. However, the Appeals Chamber observes that paragraphs 6.31 and 6.32 of the Indictment informed Ndayambaje of the material facts underpinning the charge of aiding and abetting the killings of Tutsi refugees at Kabuye Hill from 22 to 24 April 1994. Paragraph 6.31 sets forth that on 22 April 1994, Ndayambaje, accompanied by communal policemen, gendarmes, soldiers, and civilians armed with traditional tools and weapons attacked the Tutsi refugees who had gathered at Kabuye Hill. Paragraph 6.32 expressly states that Ndayambaje "transported the attackers to Kabuye and issued them weapons." In the view of the Appeals Chamber, the information provided in these paragraphs characterises Ndayambaje's conduct for aiding and abetting the killings of Tutsi

[6341] Ndayambaje Notice of Appeal, paras. 59-61; Ndayambaje Appeal Brief, paras. 124, 126, 131. *See also* Ndayambaje Appeal Brief, paras. 120-123; AT. 21 April 2015 pp. 21, 22, 67.
[6342] Ndayambaje Appeal Brief, paras. 126, 132. In the alternative, Ndayambaje argues that the Trial Chamber erred in convicting him as the Indictment failed to plead his genocidal intent. *See ibid.*, paras. 104, 131. As held above in relation to Mugombwa Church, the Appeals Chamber considers that any error as regards the pleading of Ndayambaje's genocidal intent in relation to his participation in the killings perpetrated at Kabuye Hill would not have the potential of invaliding his convictions for aiding and abetting these killings as this form of responsibility does not require a finding that the aider and abetter had genocidal intent. *See supra*, fn. 6258. In any case, the Appeals Chamber recalls that the Prosecution pleaded under the count of genocide that Ndayambaje acted "with the intent to destroy, in whole or in part, a racial or ethnic group". *See* Ndayambaje Indictment, p. 41, *referring*, *inter alia*, *to ibid*., paras. 6.31, 6.32.
[6343] Prosecution Response Brief, paras. 2047, 2049. The Prosecution also reiterates that Ndayambaje did not raise any objections at trial concerning modes of liability. *See ibid.*, para. 2051.
[6344] Prosecution Response Brief, paras. 2048, 2052, 2053. *See also* AT. 21 April 2015 p. 41.
[6345] Ndayambaje Indictment, pp. 40-46.
[6346] *See supra*, paras. 2723, 2724.

refugees at Kabuye Hill from 22 to 24 April 1994. Similarly, the Appeals Chamber is satisfied that the Indictment, when read as a whole, put Ndayambaje on notice that he was alleged to have been aware of the genocidal intent of the attackers at Kabuye Hill and to have known that his actions would assist the attackers in the killing of Tutsi refugees.[6347] Considering the Indictment as a whole, and in particular its charging section as well as paragraph 6.56 in combination with paragraphs 6.31 and 6.32, the Appeals Chamber finds that Ndayambaje was sufficiently put on notice that he was charged with aiding and abetting the killings at Kabuye Hill from 22 to 24 April 1994 and of his conduct which formed the basis of this charge.

2774. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that he was not sufficiently put on notice of the allegation that he aided and abetted the killings of Tutsi refugees at Kabuye Hill from 22 to 24 April 1994.

3. Ndayambaje's Swearing-In Ceremony (Grounds 3, and 6 in part)

2775. The Trial Chamber found that, on the occasion of his public swearing-in ceremony as the *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, Ndayambaje, together with Nteziryayo, "told the population to continue with their 'work' and urged them to 'sweep the dirt outside'", as well as instructed that those hiding Tutsis and refusing to hand them over should be killed.[6348] The Trial Chamber also found it established beyond reasonable doubt that, after the ceremony, searches for Tutsis took place and killings followed.[6349] The Trial Chamber concluded that the audience understood the words used by Ndayambaje to mean they needed to kill Tutsis and that this was further evidenced by the searches conducted and the killings of Tutsis after the ceremony.[6350] The Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute on the basis of the statements he made at his swearing-in ceremony.[6351]

[6347] *See*, *e.g.*, Ndayambaje Indictment, paras. 5.17, 6.9, 6.17, 6.18, 6.24, 6.26, 6.27, 6.30-6.32, 6.51, 6.54, 6.56.
[6348] Trial Judgement, paras. 4642, 4645, 5948, 6026.
[6349] Trial Judgement, para. 4645.
[6350] Trial Judgement, para. 6027.
[6351] Trial Judgement, paras. 6029, 6038, 6186. In the "Legal Findings" section of the Trial Judgement related to genocide, the Trial Chamber also considered Ndayambaje's utterances at the swearing-in ceremony in the context of his responsibility for instigating the ensuing abduction and killings of Tutsi women and girls from Mugombwa Sector. The Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including one named Nambaje, and that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide. *See ibid.*, paras. 5953-5956. The Trial Chamber also held that, by his words at the Virgin Mary Statue in Mugombwa Sector during the abduction, Ndayambaje instigated the killing of the abducted women and girls, including Nambaje. *See ibid.*, paras. 5957-5959, 6031. The Trial Judgement reflects that the Trial Chamber did not ultimately convict Ndayambaje of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje, based on his

2776. In summarising the Prosecution case against Ndayambaje with respect to the incitement of the population to kill Tutsis during Ndayambaje's Swearing-In Ceremony, the Trial Chamber referred to paragraphs 5.8, 6.33, and 6.38 of the Indictment.[6352] The Indictment indicates that the allegations in paragraphs 5.8, 6.33, and 6.38 were being pursued under Counts 1 through 3 and 5 through 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6353]

2777. The Trial Chamber found that paragraph 6.38 of the Indictment did not refer to Ndayambaje's Swearing-In Ceremony or to any criminal conduct by Ndayambaje.[6354] It also determined that paragraphs 5.8 and 6.33 of the Indictment "encompass[ed] the allegation that Ndayambaje incited the population at his swearing-in ceremony"[6355] but that paragraph 5.8 was very general in nature and paragraph 6.33 failed to provide details of specific incidents of incitement and concluded that both paragraphs were, therefore, defective.[6356] However, the Trial Chamber found that the defect in the Indictment regarding the charge of incitement at Ndayambaje's Swearing-In Ceremony in June 1994 was cured by clear, consistent, and timely information, and that no prejudice was caused to Ndayambaje with respect to this allegation.[6357]

2778. When addressing, in the Trial Judgement, Ndayambaje's contention that the Indictment failed to plead the killings that allegedly followed the ceremony, the Trial Chamber further relied on paragraph 6.37 of the Indictment.[6358] It held that, although this paragraph failed to refer to any

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utterances at his swearing-in ceremony, but instead solely relied on his utterances at the Virgin Mary Statue after the ceremony. *See ibid.*, paras. 5957-5959, 5976 ("Ndayambaje also instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 5977, 6064 ("The Chamber has found Ndayambaje guilty of genocide for […] instigating the killing of Tutsis *after* his swearing-in ceremony".), 6066, 6107 ("Ndayambaje […] instigated the killing of Tutsis *after* his swearing-in ceremony."), 6108, 6125, 6175 ("Ndayambaje […] instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 6176, 6186 (emphasis added).

[6352] Trial Judgement, para. 4261, fns. 11642-11644. Paragraphs 5.8, 6.33, and 6.38 of the Ndayambaje Indictment read as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Nyaramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Elie Ndayambaje and Ladislas Ntaganzwa, publicly incited the people to exterminate the Tutsi population and its "accomplices".
>
> 6.33 In June 1994, Elie Ndayambaje incited the population to kill Tutsis.
>
> 6.38 Despite these crimes, Elie Ndayambaje was appointed *Bourgmestre* of Muganza on 20 June 1994 by the Interim Government led by Jean Kambanda.

[6353] Ndayambaje Indictment, pp. 40-45.
[6354] Trial Judgement, para. 4285.
[6355] Trial Judgement, para. 4286.
[6356] Trial Judgement, paras. 4286, 4287.
[6357] Trial Judgement, para. 4297. *See also ibid.*, paras. 4290-4296.
[6358] Trial Judgement, paras. 4298, 4300. For paragraph 6.37 of the Ndayambaje Indictment, *see supra*, fn. 6213.

specific crimes which Ndayambaje allegedly ordered, supervised, or participated in, this defect was cured through post-indictment disclosures.[6359]

2779. Ndayambaje submits that the allegations relating to the inciting statements made at his swearing-in ceremony and the ensuing killings were not pleaded in the Indictment, and that such defects were neither curable nor cured.[6360] Ndayambaje requests the Appeals Chamber to reverse all his convictions entered on the basis of his conduct at the ceremony.[6361] The Prosecution responds that the Trial Chamber correctly found that the defects of the Indictment concerning those allegations were cured and that Ndayambaje suffered no prejudice.[6362]

2780. The Appeals Chamber notes that there is no dispute that the Indictment was impermissibly vague in relation to the allegation concerning Ndayambaje's inciting statements during his swearing-in ceremony. While paragraph 6.38 of the Indictment mentions Ndayambaje's appointment as *bourgmestre* of Muganza Commune on 20 June 1994, it does not refer to Ndayambaje's Swearing-In Ceremony, the speeches during this event, or any criminal conduct by Ndayambaje. Similarly, paragraphs 5.8 and 6.33 of the Indictment do not mention Ndayambaje's Swearing-In Ceremony but plead in broad terms that Ndayambaje incited the population to kill Tutsis.[6363] These paragraphs do not specify the date, location, circumstances or the alleged utterances of Ndayambaje that were found to constitute incitement.

2781. With respect to the pleading of the killings that followed the ceremony, the Appeals Chamber observes that Ndayambaje was not ultimately convicted on the basis that killings were perpetrated as a result of his utterances at the ceremony. The Trial Chamber solely relied on the fact that Tutsis were killed after the ceremony as evidence that the audience understood Ndayambaje's message that they needed to kill Tutsis.[6364] For his words at the ceremony, the Trial Chamber only convicted Ndayambaje of committing direct and public incitement to commit genocide.[6365] As the crime of direct and public incitement to commit genocide is an inchoate crime, the crime is punishable irrespective of whether the incitement substantially contributed to the commission of acts of genocide.[6366] Consequently, the Appeals Chamber considers that there is no need to examine

[6359] Trial Judgement, paras. 4302, 4304-4307.
[6360] Ndayambaje Notice of Appeal, paras. 32-36; Ndayambaje Appeal Brief, paras. 50-75, 78. *See also* AT. 21 April 2015 pp. 10, 11, 17-22.
[6361] Ndayambaje Notice of Appeal, para. 39; Ndayambaje Appeal Brief, para. 79.
[6362] Prosecution Response Brief, paras. 2010-2029.
[6363] The Trial Judgement reflects that the Trial Chamber relied solely on paragraphs 5.8 and 6.33 of the Ndayambaje Indictment, and not paragraph 6.38 of the Ndayambaje Indictment, to find that the Ndayambaje Indictment was defective, curable, and cured. *See* Trial Judgement, paras. 4285-4288.
[6364] *See* Trial Judgement, para. 6027.
[6365] Trial Judgement, para. 6029. *See supra*, para. 2775, fn. 6351.
[6366] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana* et al. Appeal Judgement, para. 678.

whether Ndayambaje was given sufficient notice of the killings that followed his swearing-in ceremony and dismisses Ndayambaje's arguments in this respect.

2782. The Appeals Chamber will now consider whether the Trial Chamber erred in finding that the defect in the Indictment concerning the charge of direct and public incitement to commit genocide through Ndayambaje's utterances at his swearing-in ceremony was curable, and if so, whether the Trial Chamber erred in finding that the defect was cured.

(a) Whether the Defect Was Curable

2783. Ndayambaje submits that the Trial Chamber erred in convicting him on the basis of alleged inciting statements made during his swearing-in ceremony as the Indictment does not contain any allegation of incitement at this event.[6367] He contends that the Trial Chamber erroneously and artificially linked this charge to paragraphs 5.8, 6.33, and 6.38 of the Indictment.[6368] Ndayambaje further argues that, by doing so, the Trial Chamber contradicted its own position: (i) in paragraph 3233 of the Trial Judgement, where it found that the defect in paragraphs 5.8 and 6.33 could not be cured;[6369] and (ii) in paragraph 2912 of the Trial Judgement, where it concluded that mentioning a "main element", which was not pleaded in the Indictment, in the summaries of anticipated evidence appended to the Prosecution Pre-Trial Brief constituted a radical transformation of the Prosecution case.[6370] Ndayambaje submits that, by convicting him on the basis of inciting statements at his swearing-in ceremony, the Trial Chamber proceeded to an illegal expansion of the Indictment as the facts underpinning the allegation were additional material facts which supported on their own a separate charge, and could only have been added through a formal amendment of the Indictment.[6371]

2784. The Prosecution responds that the Trial Chamber correctly found that the vagueness in paragraphs 5.8, 6.33, and 6.38 of the Indictment concerning Ndayambaje's incitement at his swearing-in ceremony was cured.[6372]

[6367] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 50-57. *See also* AT. 21 April 2015 pp. 10, 11, 17-22.
[6368] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 50, 54, 57. *See also* AT. 21 April 2015 pp. 17-20. At the appeals hearing, Ndayambaje further argued that, since paragraph 6.38 of the Ndayambaje Indictment reads that he was appointed *bourgmestre* on 20 June 1994 "[d]espite these crimes", "it is clear that the in[cite]ment referred to in 6.33 occurred before June 1994." *See ibid.*, p. 20 and p. 25 (French).
[6369] Ndayambaje Notice of Appeal, para. 34; Ndayambaje Appeal Brief, para. 51. *See also* AT. 21 April 2015 pp. 18, 20.
[6370] Ndayambaje Appeal Brief, paras. 56, 57; Ndayambaje Reply Brief, paras. 24, 25.
[6371] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 52, 54, 57.
[6372] Prosecution Response Brief, paras. 2010, 2011. The Prosecution elaborates that in paragraph 5.8 of the Ndayambaje Indictment it is alleged that Ndayambaje incited the population to kill Tutsis between April and July 1994, and that in paragraph 6.33 of the Ndayambaje Indictment it is alleged, more precisely, that he so incited in June 1994.

2785. The Appeals Chamber finds that the allegation concerning Ndayambaje's inciting statements at his swearing-in ceremony did not constitute a new charge but fell within the broader allegation relating to Ndayambaje's public incitement to exterminate the Tutsi population in June 1994 expressly pleaded in paragraph 6.33 of the Indictment and, in broader terms, in paragraph 5.8 of the Indictment.[6373] Similarly, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its convictions could have, on their own, supported a separate charge. As vague as the charge set out in paragraphs 5.8 and 6.33 was, the Indictment nonetheless pleaded the charge for which Ndayambaje was ultimately convicted, namely his responsibility for directly and publicly inciting the extermination of Tutsis in June 1994.

2786. The Appeals Chamber also rejects Ndayambaje's argument that the Trial Chamber's finding that paragraphs 5.8 and 6.33 of the Indictment could be cured contradicts its own conclusion in paragraph 3233 of the Trial Judgement. The Appeals Chamber notes that, in paragraph 3233 of the Trial Judgement, the Trial Chamber found that paragraphs 5.8 and 6.33 could not be relied upon to include the allegation that Ndayambaje ordered that roadblocks be erected and encouraged those at roadblocks to search for and kill Tutsis. It found that such allegations were new charges that could not be cured by subsequent disclosures. As Ndayambaje was charged in paragraphs 5.8 and 6.33 with inciting the population to kill Tutsis, the Appeals Chamber considers that paragraph 3233 of the Trial Judgement does not contradict the Trial Chamber's finding that paragraphs 5.8 and 6.33 could include allegations relating to Ndayambaje's inciting speech at his swearing-in ceremony.

2787. Ndayambaje's argument that the Trial Chamber contradicted its own reasoning in paragraph 2912 of the Trial Judgement is likewise without merit. In this paragraph, the Trial Chamber found that his participation in meetings was "an essential ingredient" of the crime of conspiracy to commit genocide which was not contained in the Indictment and, therefore, the subsequent inclusion of such information in the Witness Summaries Grid appended to the Prosecution Pre-Trial Brief constituted a radical transformation of the Prosecution case. Contrary to its finding in paragraph 2912 of the Trial Judgement, the Trial Chamber did not find with regard to the events at Ndayambaje's Swearing-In Ceremony that an essential ingredient was not pleaded in

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The Prosecution adds that paragraph 6.38 of the Ndayambaje Indictment refers to the appointment of Ndayambaje as Muganza *bourgmestre* on 20 June 1994. *See idem.*

[6373] The Appeals Chamber is not convinced by Ndayambaje's argument during the appeals hearing that reading paragraphs 5.8 and 6.33 of the Ndayambaje Indictment in conjunction with paragraph 6.38 of the Ndayambaje Indictment leads to the conclusion that the crime described in paragraphs 5.8 and 6.33 necessarily occurred before Ndayambaje was appointed *bourgmestre* of Muganza. In the view of the Appeals Chamber, a plain reading of the Ndayambaje Indictment shows that the phrase "despite these crimes" in paragraph 6.38 relates to the criminal conduct of Ndayambaje in Muganza Commune and the surrounding area from 20 April 1994 as alleged in paragraph 6.37 of the Ndayambaje Indictment.

the Indictment, but rather that paragraphs 5.8 and 6.33 of the Indictment were very general in nature and, for this reason, defective.[6374]

2788. The Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that the defect in the Indictment regarding his responsibility for direct and public incitement to commit genocide through his utterances at his swearing-in ceremony of 22 June 1994 was curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defect was cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(b) Whether the Defect Was Cured

2789. The Trial Chamber determined that the summary of the anticipated evidence of Prosecution Witnesses TO and QAQ appended to the Prosecution Pre-Trial Brief,[6375] their corresponding witness statements,[6376] and the subsequent addition of Witness RV to the Prosecution's witness list in July 2001[6377] provided Ndayambaje with clear, consistent, and timely information that the allegation that he incited the population to kill Tutsis at his swearing-in ceremony in June 1994 was part of the Prosecution case.[6378] In particular, the Trial Chamber found that, despite the fact that Witness TO's Summary and Witness TO's June 1997 Statement referred to this event as occurring in May 1994, "the description of the event as 'Ndayambaje's swearing-in ceremony' and the reference to Nteziryayo being the *préfet* of Butare at the time of the meeting, sufficed to put the Ndayambaje Defence on notice that the 'meeting' in question concerned Ndayambaje's swearing-in ceremony which occurred in June 1994."[6379] Similarly, while the Trial Chamber found that Witness QAQ's 1997 Statement refers only to "a meeting in May",[6380] it also found that

[6374] Trial Judgement, paras. 4286, 4287.
[6375] Trial Judgement, paras. 4290, 4292, *referring to* Witness Summaries Grid, item 11, Witness QAQ ("Witness QAQ's Summary"), Witness TO's Summary.
[6376] Trial Judgement, paras. 4291, 4292, *referring to* statement of Witness TO of 11 June 1997, disclosed on 25 March 1999 and 4 December 2000 and admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's June 1997 Statement"); statement of Witness QAQ of 14 May 1997, disclosed on 4 November 1998 and 17 June 1999 and admitted as Exhibit D85 on 13 November 2002 (confidential) ("Witness QAQ's 1997 Statement").
[6377] Trial Judgement, para. 4296. *See also ibid*., para. 4282, *referring in turn to* statement of Witness RV of 15 January 1997, disclosed on 14 March 2001 and statement of Witness RV of 2 October 1997, disclosed on 14 March 2001.
[6378] Trial Judgement, paras. 4290-4297.
[6379] Trial Judgement, para. 4294. The Trial Chamber refers to the previous section of the Trial Judgement discussing Nteziryayo's notice of the allegation against him concerning Ndayambaje's Swearing-in Ceremony. *See ibid*., para. 4279.
[6380] Trial Judgement, para. 4294. The Trial Chamber refers to the previous section of the Trial Judgement discussing Nteziryayo's notice of the allegation against him concerning Ndayambaje's Swearing-in Ceremony. *See ibid*., para. 4279. The Appeals Chamber notes that, in paragraph 4294 of the Trial Judgement, the Trial Chamber stated that Witness QAQ's 1997 Statement referred to "a meeting in May", whereas it stated in paragraph 4277 of the Trial Judgement that, according to the witness, the meeting took place towards "the end of May or early June 1994". The latter is the correct quote of Witness QAQ's 1997 Statement.

Ndayambaje would have been aware that the meeting Witness QAQ referred to in this statement was Ndayambaje's Swearing-In Ceremony since the statement mentioned that "during this meeting *Préfet* Nteziryayo sacked *Bourgmestre* Chrysologue Bimenyimana and replaced him with Ndayambaje."[6381]

2790. Ndayambaje submits that the Trial Chamber erred in finding that the Indictment was cured of its defect concerning the allegation of incitement to commit genocide at his swearing-in ceremony.[6382] In particular, Ndayambaje reiterates that the Trial Chamber erred in not considering that the Prosecution failed to link the relevant summaries of anticipated evidence to the relevant paragraphs of the Indictment.[6383]

2791. In addition, Ndayambaje argues that the Trial Chamber: (i) noted that Witness TO's Summary and Witness TO's June 1997 Statement referred to "May 1994" as the date of the ceremony but failed to take this inconsistency into consideration;[6384] (ii) failed to consider the inconsistencies between Witness TO's June 1997 Statement, which it expressly considered, and Witness TO's prior written statements of 8 October 1995 and 16 October 1997 "which placed the meeting respectively in May or/and in late June 1994 and which mentioned another subsequent meeting which allegedly took place two weeks later";[6385] (iii) erred in finding that Witness QAQ's Summary and Witness QAQ's 1997 Statement provided him with clear notice, since they referred to a meeting that was held in late May or early June 1994;[6386] and (iv) failed to consider the inconsistencies between Witness QAQ's Summary and Witness QAQ's 1997 Statement, on one hand, and the witness's statement of 19 June 1995, on the other hand.[6387]

2792. The Appeals Chamber understands Ndayambaje to further argue that the information provided through the prior statements of Prosecution Witness TP and the summaries of the anticipated evidence of Prosecution Witnesses TP, QAR, QAF, QAL, FAD, FAL, FAU, SM, TW, and TX was not coherent with that provided by Witnesses TO's and QAQ's summaries and

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[6381] Trial Judgement, para. 4294.
[6382] Ndayambaje Appeal Brief, paras. 58-75; AT. 21 April 2015 pp. 18, 19.
[6383] Ndayambaje Notice of Appeal, paras. 18, 32, 35, 36; Ndayambaje Appeal Brief, paras. 14, 58, 59. *See also* AT. 21 April 2015 pp. 69, 70.
[6384] Ndayambaje Appeal Brief, para. 63 (French).
[6385] Ndayambaje Appeal Brief, para. 63 (internal references omitted), *referring to* statement of Witness TO of 8 October 1995, disclosed on 7 May 2001 in French and Kinyarwanda and on 1 October 2001 in English, admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's 1995 Statement"), Witness TO's June 1997 Statement, *and* statement of Witness TO of 16 October 1997, disclosed on 4 November 1998 and admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's October 1997 Statement").
[6386] Ndayambaje Appeal Brief, para. 65.
[6387] Ndayambaje Appeal Brief, paras. 65-67 (French), *referring to* statement of Witness QAQ of 19 June 1995, disclosed on 7 May 2001 in French and on 19 September 2001 in English, and admitted as Exhibit D84 on 13 November 2002 (confidential) ("Witness QAQ's 1995 Statement"). Ndayambaje relies on the fact that Witness QAQ's 1995 Statement states that he became *bourgmestre* at the end of May 1994 and held a meeting in June 1994 following which all Tutsi girls were killed. *See ibid.*, para. 66.

statements and added to the confusion since none of them refer to his swearing-in ceremony but instead to another meeting undated or held in May or June 1994.[6388] Ndayambaje adds that, while the Trial Chamber acknowledged that the Prosecution's opening statement was silent on his alleged incitement during the swearing-in ceremony, it failed to imply from this silence that this allegation was not part of the Prosecution case against him.[6389]

2793. Ndayambaje also submits that, as there was no indication in the Indictment that any crime was committed during his swearing-in ceremony, it was not possible to specify the form of responsibility.[6390] In the alternative, Ndayambaje argues that the Trial Chamber erred in convicting him as the Prosecution failed to plead his genocidal intent in his Indictment.[6391]

2794. The Prosecution responds that the Trial Chamber correctly found that the defect in paragraphs 5.8, 6.33, and 6.38 of the Indictment concerning this allegation was cured.[6392] It contends that the prior statements and summaries of the anticipated evidence of Witnesses "TO, QAQ, and QAF supported the allegation that Ndayambaje had incited the population to kill the Tutsis" at Ndayambaje's Swearing-In Ceremony.[6393] While acknowledging that there were minor variations as to the exact date of the events referred to by Witnesses TO and QAQ, the Prosecution argues that "the two witnesses describe the events in a clear and consistent manner that would have enabled Ndayambaje to understand the charges against him."[6394]

2795. The Prosecution further responds that the information provided in Witness TP's summary and statements was not inconsistent with the information provided by other witnesses[6395] and that Ndayambaje fails to demonstrate that the slight difference regarding the dates given in the summaries of the other witnesses he points to caused confusion to an extent that would undermine the Trial Chamber's finding that he had sufficient notice of the incitement at his swearing-in ceremony.[6396]

2796. Concerning Ndayambaje's argument that it failed to plead the form of responsibility in the Indictment, the Prosecution responds that Ndayambaje's conduct at trial showed that he was never

[6388] Ndayambaje Appeal Brief, paras. 69-74.
[6389] Ndayambaje Appeal Brief, para. 75 (French).
[6390] Ndayambaje Notice of Appeal, para. 63; Ndayambaje Appeal Brief, para. 130; AT. 21 April 2015 pp. 21, 22.
[6391] Ndayambaje Appeal Brief, para. 131.
[6392] Prosecution Response Brief, para. 2010.
[6393] Prosecution Response Brief, para. 2013, *referring to* Witness TO's Summary, Witness QAQ's Summary, Witness Summaries Grid, item 35, Witness QAF ("Witness QAF's Summary"). *See also ibid*., paras. 2014, 2015; AT. 21 April 2015 p. 38, 39. The Prosecution argues that the Trial Chamber did nor err in finding that there were no inconsistencies as to the date or the description of the meeting in Witnesses TO's and QAQ's summaries and statements. *See* Prosecution Response Brief, paras. 2018-2020.
[6394] Prosecution Response Brief, para. 2021.
[6395] Prosecution Response Brief, paras. 2023. *See also ibid*., para. 2025.
[6396] Prosecution Response Brief, para. 2026.

concerned about the form of responsibility as he never raised a contemporaneous objection on this matter, and that he challenged every piece of evidence that he asked people to kill Tutsis at his swearing-in ceremony.[6397]

2797. The Appeals Chamber finds no merit in Ndayambaje's argument that the witness summaries appended to the Prosecution Pre-Trial Brief could not inform him of the allegations against him because the Prosecution did not indicate "the relevant paragraphs on which their testimonies would be based".[6398] The Appeals Chamber is of the opinion that it would have been preferable for the Prosecution to provide greater specificity given the vagueness of the Indictment and its pre-trial brief in this respect. However, it is satisfied that the contents of Witnesses TO's and QAQ's summaries and the fact that they were expressly marked relevant to Ndayambaje and, *inter alia*, to Count 4 of the Indictment – which, in turn, was linked to the relevant paragraphs, including paragraphs 5.8 and 6.33 of the Indictment[6399] – provided clear notice to Ndayambaje that the Prosecution intended to rely on the evidence of these witnesses in support of the allegation that he publicly incited the population to kill Tutsis in June 1994 set forth in paragraphs 5.8 and 6.33.[6400]

2798. The Appeals Chamber also notes that, contrary to Ndayambaje's argument, the Trial Chamber considered the inconsistency between Witness TO's Summary and Witness TO's June 1997 Statement, which referred to "May 1994" as the date of the meeting in Muganza Commune during which Ndayambaje would have incited the commission of genocide.[6401] The Appeals Chamber concurs with the Trial Chamber that from the description of the meeting as "Ndayambaje's swearing-in ceremony" it should have been clear to Ndayambaje that the meeting in question was Ndayambaje's Swearing-In Ceremony which occurred in June 1994.[6402]

2799. The Appeals Chamber further notes that, as argued by Ndayambaje, the Trial Chamber did not discuss Witness TO's 1995 Statement and Witness TO's October 1997 Statement. While these statements are consonant with each other and with Witness TO's June 1997 Statement with respect

[6397] Prosecution Response Brief, paras. 2051, 2052.
[6398] Ndayambaje Appeal Brief, para. 59.
[6399] *See* Ndayambaje Indictment, p. 42.
[6400] *See also supra*, fn. 6239.
[6401] Trial Judgement, para. 4294.
[6402] *See* Trial Judgement, para. 4294. The Appeals Chamber observes, however, that Witness TO's Summary, while clearly stating that Ndayambaje made public incitements at his swearing-in ceremony, is confusing as it appears to suggest that the witness attended two meetings at which Ndayambaje and Nteziryayo made inciting speeches – in May 1994, being Ndayambaje's Swearing-In Ceremony, and in late June 1994 where Nteziryayo introduced Ndayambaje. Notwithstanding this ambiguity in the phrasing of Witness TO's Summary, when reading it in conjunction with the witness's written statements previously disclosed to Ndayambaje, which Ndayambaje should have been prompted to examine upon reading Witness TO's Summary, it is clear that the witness was expected to testify that he attended only one meeting where Nteziryayo and Ndayambaje were present and made inciting speeches and that this meeting was Ndayambaje's Swearing-In Ceremony.

to Ndayambaje's Swearing-In Ceremony,[6403] Witness TO's October 1997 Statement states that the swearing-in ceremony took place in late June 1994.[6404] However, Witness TO clarified in his June 1997 statement, which the Trial Chamber considered, that he "no longer remember[ed] the exact date of this ceremony but [that] it probably took place at the beginnin[g] of May 1994."[6405] The Appeals Chamber considers that, in light of Witness TO's admission that he no longer remembered the exact date of the ceremony and the clear indication that Witness TO's Summary and prior statements referred to the meeting held to swear-in Ndayambaje as *bourgmestre* of Muganza Commune, the references to May 1994 in the witness's summary and June 1997 statement were not such as to affect the clarity of the notice provided to Ndayambaje that the Prosecution intended to prove through Witness TO that he made inciting statements at his swearing-in ceremony.

2800. Likewise, the Appeals Chamber rejects Ndayambaje's argument regarding alleged inconsistencies and lack of clarity in Witness QAQ's Summary and prior statements. The Appeals Chamber notes that, according to Witness QAQ's Summary, Ndayambaje made direct and public incitements at a meeting at "the end of May/early June 1994", but that Witness QAQ's Summary does not provide further information concerning this meeting. However, when Witness QAQ's Summary is read together with Witness QAQ's 1997 Statement, it is clear that the meeting took place in the yard of the Muganza commune office and that on this occasion "the *Préfet* replaced the sacked *Bourgmestre* Chrisologue with Ndayambaje".[6406] Since Witness QAQ's Summary contained clear allegations against Ndayambaje and was expressly linked to his Indictment, the Appeals Chamber considers that Ndayambaje should have been prompted to examine the contents of Witness QAQ's 1997 Statement upon reading Witness QAQ's Summary. Finally, the Appeals Chamber fails to see any inconsistency between Witness QAQ's 1995 Statement and Witness QAQ's Summary and Witness QAQ's 1997 Statement as Ndayambaje submits.[6407]

[6403] *See* Witness TO's 1995 Statement, p. K0181563 (Registry pagination) (describing the meeting as the swearing-in ceremony of *bourgmestre* Ndayambaje); Witness TO's June 1997 Statement, p. K0043434 (Registry pagination) (describing the meeting as "Elie Ndayambaje's new swearing-in ceremony which took place in the woods near the communal office"); Witness TO's October 1997 Statement, p. K0052738 (Registry pagination) (describing the meeting as "the meeting to introduce the new *Bourgmestre*, Elie Ndayambaje, who had just replaced Chrysologue Bimenyimana"). The Appeals Chamber is of the view that the fact that Witness TO's Summary, Witness TO's 1995 Statement, and Witness TO's June 1997 Statement mention another meeting two weeks later, where Ndayambaje asked people to strengthen the roadblocks and night patrols because the "*Inkotanyi*" arrived, is irrelevant as to whether Ndayambaje was on notice that he made inciting statements at his swearing-in ceremony in June 1994.
[6404] Witness TO's October 1997 Statement, p. K052738 (Registry pagination). The Appeals Chamber notes that there is no reference to the date of the meeting in Witness TO's 1995 Statement.
[6405] Witness TO's June 1997 Statement, p. K0043434 (Registry pagination). *See also* Witness TO's October 1997 Statement, p. K052738 (Registry pagination).
[6406] Witness QAQ's 1997 Statement, p. K0043430 (Registry pagination).
[6407] *See* Witness QAQ's 1995 Statement, pp. K0181567, K0181568 (Registry pagination).

2801. Accordingly, the Appeals Chamber considers that, despite the minor inconsistencies as regards their estimates of when the meeting took place in May or June 1994, it was clear from Witnesses TO's and QAQ's summaries and prior statements that they were referring to Ndayambaje's Swearing-In Ceremony. The Appeals Chamber also finds that, according to the information provided in paragraph 6.38 of the Indictment, Ndayambaje was on clear notice that it was alleged that his swearing-in ceremony could not have taken place before he was appointed as *bourgmestre* of Muganza Commune on 20 June 1994, which coincides with the allegation in paragraph 6.33 of the Indictment that Ndayambaje incited the population to kill Tutsis in June 1994.

2802. Turning to Ndayambaje's arguments that the prior written statements of Witness TP and the summaries of the anticipated testimonies appended to the Prosecution Pre-Trial Brief of Witnesses TP, QAR, QAF, QAL, FAD, FAL, FAU, SM, TW, and TX did not refer to the swearing-in ceremony but to a meeting that occurred on a different date, the Appeals Chamber finds that Ndayambaje failed to explain how this could render the information provided by the Prosecution concerning Ndayambaje's alleged criminal conduct at his swearing-in ceremony inconsistent or unclear. The fact that other witnesses mentioned a meeting held in May or in June 1994, which was not identified as Ndayambaje's Swearing-In Ceremony, does not render, in and of itself, the information provided by Witnesses TO and QAQ regarding Ndayambaje's Swearing-In Ceremony unclear or inconsistent.[6408] Moreover, given its brevity, the Appeals Chamber does not find that the lack of reference in the Prosecution's opening statement to Ndayambaje's alleged incitement during his swearing-in ceremony affects the timely, clear, and consistent information provided to Ndayambaje in this respect by the Prosecution.

2803. Regarding the pleading of the form of responsibility, the Appeals Chamber notes that, in the charging section of the Indictment, Ndayambaje is generally charged with the crime of direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute.[6409] However, the Appeals Chamber observes that, in paragraphs 5.8 and 6.33 of the Indictment, it is clearly pleaded, respectively, that Ndayambaje "publicly incited the people to exterminate the Tutsi population and its 'accomplices'" and "incited the population to kill Tutsis". It is therefore clear from the relevant paragraphs of the Indictment that Ndayambaje was charged with committing direct and public incitement to commit genocide.

2804. Finally, the Appeals Chamber finds Ndayambaje's undeveloped alternative argument that the Trial Chamber erred in convicting him as the Indictment failed to plead his genocidal intent

[6408] Witness Summaries Grid, items 5, 16, 24, 32, 35, 40, 79, 94, 97, 98; statement of Witness TP of 20 June 1995, disclosed on 15 November 2000 in French, on 4 December 2000 in Kinyarwanda and on 23 May 2001 in English; statement of Witness TP of 16 October 1997, disclosed on 4 November 1998.

unmeritorious since, in Count 4, the Prosecution specifically pleaded that Ndayambaje was "responsible for direct and public incitement to kill and cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group".[6410]

2805. In light of the above, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber erred in finding that he was provided with timely, clear, and consistent information putting him on notice of the allegation that he committed direct and public incitement to commit genocide through statements he made at his swearing-in ceremony in June 1994.

4. Abduction of Tutsi Women and Girls in Mugombwa (Grounds 4, and 6 in part)

2806. The Trial Chamber found that, after Ndayambaje's Swearing-in Ceremony on 22 June 1994, a group of Tutsi women and girls from Mugombwa Sector, Muganza Commune, including one named Nambaje, were abducted by assailants from Saga.[6411] It determined that the assailants came to search for the women and girls because they had attended the swearing-in ceremony "where they were told to search for and throw out dirt".[6412] The Trial Chamber further found that, during the abduction, Ndayambaje came to the Virgin Mary Statue in Mugombwa Sector and made it clear to the abductors that they "were free to do what they wanted with the girls".[6413] The Trial Chamber found that the abducted women and girls were subsequently taken to a brick factory at Gasenyi where they were killed.[6414] On the basis of his words at the Virgin Mary Statue, the Trial Chamber convicted Ndayambaje of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje.[6415]

[6409] Ndayambaje Indictment, p. 42.
[6410] Ndayambaje Indictment, p. 42.
[6411] Trial Judgement, paras. 4708, 4717, 5949.
[6412] Trial Judgement, para. 5953. *See also ibid*., para. 4717.
[6413] Trial Judgement, paras. 4746, 5949, 6030.
[6414] Trial Judgement, paras. 4723, 4746, 5949.
[6415] Trial Judgement, paras. 5959, 5976, 5977, 6064, 6066, 6107, 6108, 6125, 6175, 6176, 6186. The Trial Chamber determined that, because Ndayambaje's words at the Virgin Mary Statue were only addressed to the abductors and not to the general public, Ndayambaje could not be held responsible for direct and public incitement to commit genocide in relation to this event. *See ibid*., paras. 6030, 6032, 6033. As discussed in Section IX.A.3 above, although the Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including Nambaje, and held that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide, Ndayambaje was ultimately not convicted for instigating genocide for the killing of the abducted women and girls based on his inciting statements at his swearing-in ceremony. *See supra*, para. 2775, fn. 6351. As a result, the Appeals Chamber will disregard Ndayambaje's arguments under Ground 4 of his appeal alleging lack of notice that his utterances at the swearing-in ceremony instigated genocide for the killing of the abducted Tutsi women and girls. *See* Ndayambaje Appeal Brief, paras. 85, 87, 92.

2807. In summarising the Prosecution case against Ndayambaje with respect to the abduction of Tutsi women and girls, the Trial Chamber referred to paragraph 6.37 of the Indictment.[6416] The Indictment indicates that the allegations in paragraph 6.37 were being pursued under Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6417]

2808. The Trial Chamber found that the allegation with regard to Ndayambaje's presence during the abduction of the Tutsi women and girls was not sufficiently pleaded in the Indictment, as it failed to specify the site or the date of the allegation, and that the Indictment was therefore defective.[6418] However, the Trial Chamber determined that the defect was subsequently cured and that Ndayambaje was put on adequate notice of the material facts underpinning the relevant charge.[6419]

2809. Ndayambaje submits that the allegation regarding his responsibility for the killing of the abducted Tutsi women and girls was not pleaded in the Indictment and that such defect was neither curable nor cured.[6420] He requests the Appeals Chamber to reverse all his convictions entered on the basis of his involvement in these killings.[6421] The Prosecution responds that the Trial Chamber correctly found that the defect of the Indictment concerning this allegation was cured and that Ndayambaje suffered no prejudice.[6422]

2810. The Appeals Chamber concurs with the Trial Chamber that the Indictment was impermissibly vague in relation to the allegation concerning Ndayambaje's responsibility in the killing of the abducted Tutsi women and girls in Mugombwa. In particular, there is no mention in paragraph 6.37 of the Indictment, or anywhere else in the Indictment, of the abduction of the Tutsi women and girls, the specific date of the abduction, the presence of Ndayambaje at the Virgin Mary Statue and his role in the killing of the Tutsi women and girls. The Appeals Chamber will now discuss whether the Trial Chamber erred in finding that the defect in the Indictment in this regard was curable and, if so, whether the Trial Chamber erred in finding that the defect was cured.

[6416] Trial Judgement, para. 4646, fn. 12370. For paragraph 6.37 of the Ndayambaje Indictment, *see supra*, fn. 6213.
[6417] Ndayambaje Indictment, pp. 40-46.
[6418] Trial Judgement, para. 4649.
[6419] Trial Judgement paras. 4650-4654.
[6420] Ndayambaje Notice of Appeal, paras. 40-45, 47, 59, 60, 62; Ndayambaje Appeal Brief, paras. 80-99, 120-125, 127-129, 131. *See also* AT. 21 April 2015 pp. 10, 11.
[6421] Ndayambaje Notice of Appeal, paras. 49, 50, 64, 65; Ndayambaje Appeal Brief, paras. 99, 132.
[6422] Prosecution Response Brief, paras. 2030-2039, 2047, 2049, 2052, 2517.

(a) Whether the Defect Was Curable

2811. Ndayambaje submits that the Trial Chamber erred in linking the abduction of the Tutsi women and girls after his swearing-in ceremony on 22 June 1994 to paragraph 6.37 of the Indictment since this paragraph "was too vague and too general to support such a specific charge."[6423] Ndayambaje argues that the abduction of the Tutsi women and girls was a material fact that could not properly support a conviction unless it was formally incorporated in the Indictment and that the Trial Chamber radically transformed the Indictment in convicting him on this basis.[6424]

2812. The Prosecution responds that Ndayambaje's argument that paragraph 6.37 of the Indictment was too vague in order to be cured ignores that curing applies to vague allegations and that Ndayambaje simply disagrees with the Trial Chamber's view without providing any reasons.[6425]

2813. The Appeals Chamber finds that the allegation concerning Ndayambaje's responsibility for instigating the killing of the abducted Tutsi women and girls from Mugombwa Sector fell within the broader allegation relating to the killing of Tutsis throughout Muganza Commune pleaded in paragraph 6.37 of the Indictment. Similarly, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its convictions could have, on their own, supported separate charges. As vague as the charge set out in paragraph 6.37 was, the Indictment nonetheless pleaded the charge for which Ndayambaje was ultimately convicted, namely his participation in the killing of Tutsis in Muganza Commune from 20 April 1994.

2814. Accordingly, the Appeals Chamber considers that the defect in the Indictment regarding Ndayambaje's responsibility for instigating the killing of the abducted Tutsi women and girls was curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defect was cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(b) Whether the Defect Was Cured

2815. The Trial Chamber found that the summary of the anticipated evidence of Witnesses QAR and QAF appended to the Prosecution Pre-Trial Brief and their respective prior written statements provided Ndayambaje with clear, timely, and consistent notice that following a meeting at Muganza

[6423] Ndayambaje Appeal Brief, para. 80. *See also* Ndayambaje Notice of Appeal, paras. 42, 44; Ndayambaje Appeal Brief, para. 83; AT. 21 April 2015 pp. 10, 11, 17, 18, 20, 21.
[6424] Ndayambaje Appeal Brief, paras. 81, 83. Ndayambaje contends that the Prosecution was aware of the allegations related to the abductions of Tutsi women and girls four years before the amendment of the indictment in August 1999 and that it should have requested an amendment of the indictment before the start of the trial. *See ibid.*, para. 82.

commune office in June 1994 an abduction of Tutsi women and girls took place in Mugombwa Sector by assailants from Saga, that he was present during the abduction, and that the women and girls were subsequently killed.[6426]

2816. Ndayambaje submits that the Trial Chamber erred in finding that the defect was cured and that he did not suffer prejudice from the lack of notice.[6427] Specifically, Ndayambaje argues that the Prosecution Pre-Trial Brief did not provide any information regarding his alleged responsibility for instigating the abduction at the Virgin Mary Statue or regarding his genocidal intent or knowledge of the attackers' genocidal intent.[6428] Similarly, he contends that the Prosecution's opening statement did not refer to this incident.[6429] Ndayambaje also avers that Witnesses QAR's and QAF's summaries were not linked to paragraph 6.37 of the Indictment.[6430]

2817. In addition, Ndayambaje claims that Witnesses QAR's and QAF's prior statements were inconsistent and insufficient to provide him with clear and consistent information on the abduction of the Tutsi women and girls and his involvement thereon.[6431] In particular, Ndayambaje argues that: (i) there is no reference to his presence during the abduction in Witness QAF's Statement; (ii) Witness QAR's 1995 Statement mentions a massacre that was linked by the witness to the events "at the Church in April 1994 and not to the swearing-in ceremony in June 1994"; (iii) Witness QAR's May 1997 Statement does not refer to any abduction, an omission that was "excused by the [Trial] Chamber; thereby acting *ultra vires*"; and (iv) Witness QAR's October 1997 Statement does not mention the fate of the four abducted girls to whom it refers.[6432] Ndayambaje adds that he was not provided with any information regarding the abduction of the woman named Nambaje on the basis of which he was also convicted.[6433]

2818. Furthermore, Ndayambaje submits that the Trial Chamber erred in law in finding that he instigated the killing of the abducted Tutsi women and girls because this form of responsibility was not pleaded in the Indictment or any other documents of the Prosecution.[6434] In the alternative,

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[6425] Prosecution Response Brief, para. 2031.
[6426] Trial Judgement, paras. 4650-4654, *referring to* Witness Summaries Grid, Witness QAR's Summary, Witness QAF's Summary, Witness QAR's 1995 Statement, Witness QAR's October 1997 Statement; statement of Witness QAF of 14 October 1997, disclosed on 4 November 1998 and on 15 November 2000 in French and English, respectively, admitted as part of Exhibit D158 on 4 March 2004 ("Witness QAF's Statement").
[6427] Ndayambaje Notice of Appeal, para. 40; Ndayambaje Appeal Brief, paras. 84-97.
[6428] Ndayambaje Appeal Brief, para. 85 (French). *See also ibid*., para. 92.
[6429] Ndayambaje Appeal Brief, para. 94.
[6430] Ndayambaje Notice of Appeal, para. 43; Ndayambaje Appeal Brief, paras. 86, 92; AT. 21 April 2015 pp. 69, 70.
[6431] Ndayambaje Appeal Brief, paras. 87-92.
[6432] Ndayambaje Appeal Brief, paras. 88-92.
[6433] Ndayambaje Notice of Appeal, para. 47; Ndayambaje Appeal Brief, para. 93.
[6434] Ndayambaje Notice of Appeal, paras. 59, 60, 62; Ndayambaje Appeal Brief, paras. 120-125, 127-129, 131 (French); AT. 21 April 2015 pp. 21, 67.

Ndayambaje argues that the Indictment failed to plead his genocidal intent.[6435] Finally, Ndayambaje submits that the Trial Chamber erred in concluding that he suffered no prejudice from the lack of notice.[6436]

2819. The Prosecution responds that the Trial Chamber correctly found that paragraph 6.37 of the Indictment was cured and that Ndayambaje received sufficient and consistent notice through the summaries and statements of Witnesses QAR and QAF that, following Ndayambaje's Swearing-in Ceremony, Tutsi women and girls were abducted, that he was present during the abduction, and that the Tutsi women and girls were subsequently killed.[6437] With respect to the form of responsibility, the Prosecution responds that the paragraphs in the charging section include all forms of responsibility under Article 6(1) of the Statute and that the Prosecution Pre-Trial Brief notified Ndayambaje that authorities, such as himself, instigated massacres.[6438] It also reiterates that Ndayambaje did not raise any objection at trial concerning the modes of liability or argue in his closing brief that he did not know that he was charged pursuant to instigating.[6439] It submits that the record reflects that Ndayambaje understood the nature of the case against him and was fully prepared to defend against this particular allegation, which shows that he did not suffer any prejudice.[6440]

2820. The Appeals Chamber notes that, as underlined by Ndayambaje, neither the Prosecution's pre-trial brief nor its opening statement provided information regarding the abduction of Tutsi women and girls and Ndayambaje's responsibility in their killing. The Trial Chamber, however, found that Witnesses QAF's and QAR's summaries and statements provided the relevant information to Ndayambaje.

2821. The Appeals Chamber observes that Witness QAF's Summary was marked relevant to the counts of conspiracy to commit genocide and direct and public incitement to commit genocide (Counts 1 and 4, respectively), and not to any of the counts for which Ndayambaje was convicted in relation to the killing of the abducted Tutsi women and girls. In addition, while providing information that the morning after a meeting in Muganza Commune, where Ndayambaje made a speech, Tutsi girls were taken from their hiding places and killed, Witness QAF's Summary does not implicate Ndayambaje in the abduction of the Tutsi girls.[6441] In the view of the Appeals

[6435] Ndayambaje Appeal Brief, para. 131 (French). *See also ibid*., para. 85.
[6436] Ndayambaje Notice of Appeal, paras. 45, 47; Ndayambaje Appeal Brief, paras. 80, 83, 84, 95-97.
[6437] Prosecution Response Brief, paras. 2030, 2032-2035. *See also* AT. 21 April 2015 p. 40.
[6438] Prosecution Response Brief, paras. 2047, 2048, *referring to* Prosecution Pre-Trial Brief, para. 28.
[6439] Prosecution Response Brief, para. 2051, *referring to* Ndayambaje Closing Brief, para. 70.
[6440] Prosecution Response Brief, paras. 2036-2039. *See also* AT. 21 April 2015 p. 41.
[6441] The Appeals Chamber also notes that Witness QAF's Statement does not provide any information suggesting that Ndayambaje was directly involved in this abduction of Tutsi women and girls.

Chamber, Ndayambaje could not have therefore reasonably understood on the basis of Witness QAF's Summary that he was alleged to have instigated the killing of Tutsi women and girls, abducted after the ceremony, through the utterances he made at the Virgin Mary Statue. The Appeals Chamber finds that the Trial Chamber erred in concluding otherwise.

2822. By contrast, Witness QAR's Summary was marked relevant to Counts 1 through 9 of the Indictment which, in turn, were linked in the Indictment to paragraph 6.37 of the Indictment.[6442] The Appeals Chamber finds that the link between Witness QAR's Summary and paragraph 6.37, together with the contents of the summary, put Ndayambaje on notice that the Prosecution intended to rely on Witness QAR's evidence in support of the allegation of his participation in the massacres in Muganza Commune, as set forth in paragraph 6.37.[6443]

2823. Moreover, the Appeals Chamber finds that, contrary to Ndayambaje's unsubstantiated submission,[6444] it is clear that the incident described in Witness QAR's 1995 Statement in which "women and girls who had been spared were massacred on the orders of Ndayambaje", following an exchange of words regarding their fate between perpetrators from Saga and Ndayambaje, does not refer to another event in April 1994.[6445] This is also clear from the fact that in this incident Ndayambaje is described as the *bourgmestre*, a position he only regained in June 1994.[6446] The Appeals Chamber also rejects Ndayambaje's argument that the Trial Chamber acted *ultra vires* because it "excused" the fact that Witness QAR's May 1997 Statement did not mention the abduction incident.[6447] As the Trial Chamber noted, Witness QAR's May 1997 Statement "dealt solely with the massacre at Mugombwa Church in April 1994".[6448] It is not uncommon that a specific statement of a witness focuses, as a result of investigatory considerations, on a particular event.

2824. The Appeals Chamber also observes, as the Trial Chamber correctly noted,[6449] that Witness QAR's Summary is consistent with Witness QAR's October 1997 Statement, in which it is

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[6442] *See* Ndayambaje Indictment, pp. 40-46. In relevant part, Witness QAR's Summary reads as follows:

> In June 1994, QAR attended a meeting chaired by Nteziryayo, also in attendance was Ndayambaje. […] The next day, there was a house-to-house search for girls and women hiding. QAR states that four girls and a teacher were brought out. […] The people were divided as to whether or not these women should be killed. It was decided to wait for Ndayambaje to ask him what to do with them. Ndayambaje arrived and said "were you not told that if you sweep the dirt towards your house, it heaps up and ends up chasing you out of your house? Then throw away the dirt." QAR later heard that the women were taken by a group to the Mugombwa brickyard.

[6443] *See also supra*, fn. 6239.
[6444] *See* Ndayambaje Appeal Brief, para. 88.
[6445] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination).
[6446] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination).
[6447] *See* Ndayambaje Appeal Brief, para. 89.
[6448] Trial Judgement, para. 4651.
[6449] *See* Trial Judgement, para. 4651.

specified that the assailants were waiting for Ndayambaje to decide what to do with the abductees at the Virgin Mary Statue, as some of the abductors wanted to kill them.[6450] Considering the chain of events, as described in the witness's summary and October 1997 statement, and the fact that Witness QAR's evidence was marked relevant, *inter alia*, to the counts of murder and extermination as crimes against humanity,[6451] the fate of the abductees was sufficiently clear to allow Ndayambaje to prepare an effective defence against the allegation. The Appeals Chamber, therefore, does not find any error in the Trial Chamber's approach to Witness QAR's prior statements.

2825. Notwithstanding the Trial Chamber's erroneous reliance on Witness QAF's summary and statement, the Appeals Chamber considers that Witness QAR's Summary, which attributes to Ndayambaje a major and decisive role in the killing of the abductees, along with Witness QAR's 1995 and October 1997 statements, which were disclosed to Ndayambaje before the beginning of the trial, provided him with timely, clear, and consistent information that his involvement at the Virgin Mary Statue in the killing of Tutsi women and girls who were abducted in June 1994 was part of the Prosecution case. The Appeals Chamber does not find that the lack of reference in the Prosecution's pre-trial brief itself and opening statement to Ndayambaje's responsibility for the killing of these Tutsi women and girls affected the timely, clear, and consistent information that was provided to Ndayambaje through Witness QAR's summary and statements.

2826. Moreover, the Appeals Chamber observes that the Trial Chamber appears to have ultimately considered that Nambaje was part of the group of Tutsi women and girls abducted from Mugombwa Sector and killed at Gasenyi.[6452] Leaving apart whether the Trial Chamber erred in this regard,[6453] the Appeals Chamber considers that, to the extent that the Trial Chamber found that Nambaje was part of the same group of women and girls abducted from their homes that Witness QAR was expected to testify about, Ndayambaje had the requisite notice and his contention to the contrary is rejected.

2827. With respect to Ndayambaje's argument regarding the lack of notice of the form of responsibility, the Appeals Chamber notes that the Trial Chamber did not discuss in the Trial Judgement whether Ndayambaje had received sufficient notice that he could be held responsible for

[6450] Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination). Since Witness QAR's Summary contained clear allegations against Ndayambaje and was expressly linked to the Ndayambaje Indictment in the Prosecution Pre-Trial Brief, the Appeals Chamber considers that Ndayambaje should have been prompted to examine the contents of Witness QAR's statements disclosed to him upon reading Witness QAR's Summary. *See also supra*, para. 1101.
[6451] *See supra*, para. 2822.
[6452] *See infra*, Section IX.H.1(a).
[6453] *See infra*, Section IX.H.1(a).

instigating the killing of the abducted women and girls, concluding generally that he was put on notice that he was "present during the abduction and that the women and girls were subsequently killed."[6454] Although Ndayambaje did not specifically object to the vagueness of paragraph 6.37 of the Indictment regarding his alleged form of responsibility under Article 6(1) of the Statute,[6455] the Appeals Chamber considers that it would have been preferable for the Trial Chamber to explain why it was satisfied that Ndayambaje was put on sufficient notice that he could be held responsible for instigating the killing of the abducted women and girls.

2828. As discussed in relation to the notice of Ndayambaje's responsibility in the Mugombwa Church massacre, the Appeals Chamber observes that the Indictment only generally indicates in its charging section that the relevant counts were pursued pursuant to Article 6(1) of the Statute and, in paragraph 6.37 of the Indictment, that Ndayambaje was alleged to have "ordered, supervised and participated in massacres of the Tutsi population" that were committed by others. In the absence of identification of any particular acts on the part of Ndayambaje that may characterise a responsibility for instigating in paragraph 6.37, the Appeals Chamber does not consider that the general reference to Article 6(1) of the Statute and the reference to participation in paragraph 6.37 put Ndayambaje on sufficient notice that he was charged with instigating the killings of the abducted Tutsi women and girls. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the allegation that he instigated the massacres in which he was alleged to have participated in paragraph 6.37.

2829. However, the Appeals Chamber considers that it is clear from Witness QAR's Summary and her 1995 and October 1997 statements that Ndayambaje was alleged to have ordered or prompted the killing, when he answered the questions of the abductors regarding the fate of the Tutsi women and girls at the Virgin Mary Statue.[6456] The Appeals Chamber finds, therefore, that the failure of the Prosecution to specify the exact form of responsibility in the Indictment was cured since, when reading the Indictment in conjunction with Witness QAR's summary and prior statements, Ndayambaje was put on notice that he was alleged to have instigated the killing of the Tutsi women and girls who were abducted and brought to the Virgin Mary Statue.

[6454] Trial Judgement, para. 4654.
[6455] *See supra*, fn. 6254.
[6456] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination) ("[T]he women and girls who had been spared were massacred on the orders of NDAYAMBAJE […]. He claimed that some of the refugees knew how to write and correspond with the *Inkotanyi* […]. [T]he *Bou*[*r*]*gmestre* replied as follows: 'Do as you please. Are they not the ones who are going to relate what happened when the *Inkotanyi* arrive?'"); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination) ("When the *Bourgmestre* arrived, he said: 'Were you not told that if you sweep the dirt towards your house, it heaps up and ends up chasing you out of your house? Then throw away the dirt.'"). The Appeals Chamber also notes that the Prosecution Pre-Trial Brief states that "[t]he massacres and the assaults thus perpetrated were the result of a strategy planned, adopted, instigated, and elaborated by political, civil and military authorities in the country both at the national and local levels." *See* Prosecution Pre-Trial Brief, para. 28.

2830. Finally, the Appeals Chamber finds Ndayambaje's general and undeveloped alternative argument that the Trial Chamber erred in convicting him as the Prosecution failed to plead his genocidal intent in the Indictment unmeritorious since, in Count 2, in which he is charged with genocide, the Prosecution specifically pleaded that Ndayambaje acted with genocidal intent.[6457]

2831. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber's erroneous reliance on Witness QAF's summary and statement did not invalidate its conclusion that Ndayambaje received clear, timely, and consistent information putting him on notice that, following a meeting at Muganza commune office in June 1994, an abduction of Tutsi women and girls took place in Mugombwa Sector by assailants from Saga, that he was present during the abduction, and that they were subsequently killed. The Appeals Chamber further considers that the subsequent information provided to Ndayambaje through Witnesses QAR's summary and statements sufficiently informed him of the course of conduct on his part supporting the generally pleaded charge of instigating, thereby curing the defect in the Indictment as regards the form of responsibility.

2832. This conclusion is bolstered by a review of the conduct of Ndayambaje's defence at trial which reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation that Ndayambaje instigated the killings of the abductees at the Virgin Mary Statue. In particular, the Appeals Chamber observes that Ndayambaje cross-examined Witness QAR at length regarding the abduction of Tutsi women and girls at the Virgin Mary Statue.[6458] Specifically, Ndayambaje asked questions to the witness about his presence at the Virgin Mary Statue and his behaviour during this event.[6459] Moreover, Ndayambaje called several witnesses in order to challenge and contradict the Prosecution's allegation that he was involved in the deaths of the abducted Tutsi women and girls.[6460] The Appeals Chamber also notes that Ndayambaje challenged in his closing brief the evidence regarding Witness QAR and the allegation that he was involved in the killing of Tutsi women and girls who were abducted and brought to the Virgin Mary Statue.[6461]

2833. Accordingly, the Appeals Chamber finds that Ndayambaje was provided with sufficient information detailing the factual basis on which he was convicted in relation to the killing of the abducted Tutsi women and girls from Mugombwa Sector to prepare a meaningful defence.

[6457] Ndayambaje Indictment, pp. 40, 41.
[6458] Witness QAR, T. 21 November 2001 pp. 95-113.
[6459] Witness QAR, T. 21 November 2001 pp. 99, 100, 104.
[6460] Ndayambaje called, *inter alia*, Witnesses ANGES, BOZAN, JAMES, KWEPO, MATIC, MUZIK, SABINE, and Stan. *See* Trial Judgement paras. 4648, 4673-4706. *See also* Ndayambaje Pre-Defence Brief, Annex 3, items 31, 34, 37.
[6461] *See* Ndayambaje Closing Brief, paras. 201, 781-798.

5. Conclusion

2834. Based on the above, the Appeals Chamber finds that the Trial Chamber erred in convicting Ndayambaje for committing direct and public incitement to commit genocide on the basis of his statements at Mugombwa Church on 20 and 21 April 1994 in the absence of sufficient notice that he was prosecuted on this basis. Accordingly, the Appeals Chamber grants Ground 2 of Ndayambaje's appeal and reverses his conviction for committing direct and public incitement to commit genocide at Mugombwa Church. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

2835. Nevertheless, the Appeals Chamber dismisses Ndayambaje's contentions that he was not charged with or lacked sufficient notice of his alleged responsibility for aiding and abetting the killings at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994, committing direct and public incitement to commit genocide at his swearing-in ceremony on 22 June 1994, and instigating the killings of Tutsi women and girls abducted from Mugombwa Sector after his swearing-in ceremony.

2836. The Appeals Chamber also dismisses Ndayambaje's claim of prejudice resulting from the accumulation of events not pleaded in the Indictment.[6462] The Appeals Chamber recalls that it has found that Ndayambaje was charged with the criminal conduct on the basis of which he was convicted and, with the exception of the charge of direct and public incitement to commit genocide at Mugombwa Church, that the defects in the Indictment concerning these charges were curable and cured by the provision of timely, clear, and consistent information. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment: in respect of the four incidents for which Ndayambaje was found guilty, three were not adequately pleaded in the Indictment. However, Ndayambaje has not demonstrated that the defects in the Indictment materially hampered the preparation of his defence.

2837. Accordingly, the Appeals Chamber dismisses Grounds 1 and 3 through 6 of Ndayambaje's appeal.

[6462] *See* Ndayambaje Notice of Appeal, para. 17; Ndayambaje Appeal Brief, paras. 22, 134, 137.

B. Bias (Ground 8)

2838. Ndayambaje submits that the Trial Chamber demonstrated bias in applying different standards when assessing Prosecution and Defence evidence.[6463] He contends that the fairness of the trial was affected by the fact that the Trial Chamber "unequally assessed the evidence depending on whether it was adduced by the Prosecution or by the Defence".[6464] He argues that this led to a miscarriage of justice and requests the Appeals Chamber "to apply the proper standard in the assessment of all the evidence on the record."[6465]

2839. Specifically, Ndayambaje submits that the Trial Chamber considered as a rule that Prosecution witnesses were credible,[6466] which led it to never reject their evidence entirely, while it "rejected *a priori*" Defence evidence on material facts or only relied on it to corroborate Prosecution evidence.[6467] He also argues that the Trial Chamber: (i) "wrongly and deliberately 'excused'" contradictions and inconsistencies in Prosecution evidence, while rejecting Defence evidence on the basis of "fictitious contradictions" or "futile" and "falsely incriminating reasons";[6468] (ii) adopted a fragmentary approach in its assessment of Prosecution evidence, assessing the credibility of Prosecution witnesses by event and not integrally, while determining that Defence witnesses were not credible in light of an overall assessment of their entire evidence;[6469] (iii) rejected the evidence of Defence witnesses on the basis of the "close ties" they had with him, when it did not discredit Prosecution witnesses on that basis and even found that it enhanced their credibility;[6470] and (iv) relied on the fact that Prosecution witnesses were Tutsis and survivors of the genocide to excuse inconsistencies and weaknesses in their testimonies or enhance their credibility, while considering a Defence witness not credible because the witness merely stated that victims of the massacres were both Tutsis and Hutus.[6471]

[6463] Ndayambaje Notice of Appeal, paras. 76-82; Ndayambaje Appeal Brief, paras. 197-242. *See also* AT. 21 April 2015 p. 28.
[6464] Ndayambaje Appeal Brief, para. 197. *See also* Ndayambaje Reply Brief, para. 62.
[6465] Ndayambaje Appeal Brief, paras. 241, 242. *See also* AT. 21 April 2015 p. 71. In his notice of appeal, Ndayambaje requested the Appeals Chamber to reverse the Trial Chamber's findings regarding its assessment of the credibility of Prosecution and Defence evidence, and to exclude the testimonies of all detained Prosecution witnesses who were awaiting judgement or who were convicted for crimes related to the 1994 events as well as the evidence of the witnesses "who had any dispute with [Ndayambaje] in the past." *See* Ndayambaje Notice of Appeal, paras. 83, 84.
[6466] Ndayambaje Appeal Brief, para. 202.
[6467] Ndayambaje Appeal Brief, para. 203. *See also* Ndayambaje Notice of Appeal, para. 78; Ndayambaje Appeal Brief, paras. 206, 207.
[6468] Ndayambaje Appeal Brief, para. 198. *See also* Ndayambaje Notice of Appeal, para. 79; Ndayambaje Appeal Brief, paras. 201, 233; Ndayambaje Reply Brief, para. 78. Ndayambaje relies on the example of Prosecution Witness QAR to illustrate the Trial Chamber's alleged erroneous assessment of the testimonies of Prosecution witnesses. *See* Ndayambaje Appeal Brief, paras. 209-218; Ndayambaje Reply Brief, para. 97.
[6469] Ndayambaje Appeal Brief, para. 234.
[6470] Ndayambaje Appeal Brief, para. 225. *See also* Ndayambaje Notice of Appeal, para. 77; Ndayambaje Appeal Brief, para. 226; Ndayambaje Reply Brief, para. 63.
[6471] Ndayambaje Appeal Brief, paras. 227, 228.

2840. Ndayambaje also contends that the Trial Chamber "deliberately accused Defence witnesses of lying and attributed to them partial responsibility in the massacres" in the absence of tangible evidence against them,[6472] and relied on these "inventions" and "false incriminations and speculations" to discredit their evidence and enhance Prosecution evidence at all costs.[6473] Ndayambaje further purports that the Trial Chamber failed to provide a reasoned opinion in accepting the evidence of Prosecution witnesses who were detained at the time of their testimonies and failed to take into account this factor when evaluating their credibility, although it did so for Defence witnesses.[6474]

2841. In addition, Ndayambaje submits that the Trial Chamber considered as a "simple omission" the Prosecution's failure to include charges in the Indictment, while finding that the late notification of his alibi suggested that it was fabricated and tailored to suit the Prosecution case and faulting him for not cross-examining Prosecution witnesses about his alibi.[6475] He also argues that the Trial Chamber "saw nothing wrong" with the late addition of Prosecution Witness RV, while faulting him for reinstating Defence Witness MARVA to his witness list in 2008.[6476]

2842. The Prosecution responds that the Trial Chamber did not disbelieve Defence witnesses because of some unexplained bias but because they were not credible.[6477] It argues that Ndayambaje's generic contention that the Trial Chamber treated Prosecution and Defence witnesses differently is undeveloped and should fail because Ndayambaje merely compared isolated aspects of the Trial Chamber's assessment of the evidence without showing that the evidence of Prosecution and Defence witnesses, when seen in context, required similar treatment.[6478] The Prosecution contends that Ndayambaje's claims aimed at showing that the Trial Chamber erred

[6472] Ndayambaje Appeal Brief, para. 219 (internal reference omitted).
[6473] Ndayambaje Appeal Brief, heading 2.3.1.4 at p. 50, paras. 219-224. To illustrate his argument, Ndayambaje relies on the example of Ndayambaje Defence Witness BOZAN, whose testimony regarding the abduction of Tutsi women and girls in Mugombwa Sector was rejected by the Trial Chamber on the basis of his participation in the massacre at Mugombwa Church despite the fact that there was no evidence on the record establishing his criminal involvement. *See ibid.*, para. 229.
[6474] Ndayambaje Notice of Appeal, paras. 80, 81; Ndayambaje Appeal Brief, paras. 198, 208, 235-237. In his notice of appeal, Ndayambaje pointed to a motion in which he requested the exclusion of the testimonies of detained witnesses, which he argues was entirely rejected by the Trial Chamber, like his application for certification to appeal. *See* Ndayambaje Notice of Appeal, para. 81, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje Confidential and Extremely Urgent Motion for Inadmissibility of Testimonies of Witnesses Heard During Trial Who, Prior to their Testifying, were Detained in Lock-Ups and other Detention Centres in Rwanda, 13 October 2004 (originally filed in French, English translation filed on 18 April 2005) (confidential). In the absence of any identification of error and any substantiation in his appeal brief, the Appeals Chamber finds that Ndayambaje has abandoned this contention.
[6475] Ndayambaje Appeal Brief, paras. 204, 205.
[6476] Ndayambaje Appeal Brief, para. 205.
[6477] *See* Prosecution Response Brief, paras. 2085, 2089, 2123.
[6478] Prosecution Response Brief, paras. 2086, 2139, 2151. *See also ibid.*, para. 2087.

in its assessment of the evidence are generally undeveloped and unsupported by the record and should be summarily dismissed.[6479]

2843. The Appeals Chamber recalls that a presumption of impartiality attaches to the judges of the Tribunal and that this presumption cannot be easily rebutted.[6480] An appearance of bias exists if, notably, "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[6481] It is for the appealing party alleging bias to rebut the presumption of impartiality enjoyed by judges of this Tribunal.[6482] The Appeals Chamber also reiterates that it would be "truly extraordinary" that decisions rendered by a judge or a chamber could suffice to establish bias.[6483]

2844. In the present case, the Appeals Chamber observes that, like Nyiramasuhuko,[6484] Ndayambaje seeks to demonstrate bias on the part of the Trial Chamber through a fragmented view and incomplete reading of the Trial Judgement, challenging only the Trial Chamber's exercise of its discretion in assessing specific parts of the record and particular aspects of the evidence which led to adverse findings.[6485] In particular, Ndayambaje's submissions ignore the Trial Chamber's analysis that led to the rejection of Prosecution evidence implicating him in certain crimes[6486] as well as the fact that he was acquitted of some of the charges brought against him by the Prosecution.[6487] Ndayambaje also overlooks that the Trial Chamber provided reasons for rejecting the testimony of Defence witnesses[6488] and accepting the evidence of Prosecution witnesses despite

[6479] Prosecution Response Brief, paras. 2142, 2143, 2150.
[6480] *Karemera and Ngirumpatse* Appeal Judgement, para. 24; *Hategekimana* Appeal Judgement, para. 16; *Nahimana et al.* Appeal Judgement, para. 48; *Akayesu* Appeal Judgement, para. 91. *See also Renzaho* Appeal Judgement, para. 43; *Furundžija* Appeal Judgement, para. 197. *See also supra*, paras. 95, 273, 405.
[6481] *Šainović et al.* Appeal Judgement, para. 1055; *Nahimana et al.* Appeal Judgement, para. 49, *quoting Akayesu* Appeal Judgement, para. 203. *See also Furundžija* Appeal Judgement, para. 189.
[6481] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125.
[6482] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125.
[6483] *See supra*, para. 406.
[6484] *See supra*, Section IV.A.1.
[6485] Ndayambaje's challenges to the assessment of the evidence raised under Ground 8, where developed, have been addressed by the Appeals Chamber in the context of the challenges to each of his convictions. *See infra*, Sections IX.C, E-H.
[6486] *See*, *e.g.*, Trial Judgement, paras. 1427, 1450, 1451, 4602, 4603, 4607, 4643.
[6487] *See* Trial Judgement, paras. 5719-5728 (conspiracy to commit genocide), 5766-5768 (arrest and forced movement of refugees to Kabuye Hill as genocide), 5765, 5778-5781 (superior responsibility for the events at Mugombwa Church and Kabuye Hill), 6109-6114 (arrest and forced movement of refugees to Kabuye Hill as persecution as a crime against humanity), 6129-6131 (guarding the refugees at night at Kabuye Hill as other inhumane acts as a crime against humanity).
[6488] *See*, *e.g.*, Trial Judgement, paras. 1197-1199, 1202-1207, 1209, 1213-1217, 1220-1223, 1387-1396, 1401-1404, 1416, 1417, 1445, 1446, 4620, 4636, 4637-4640, 4721, 4722, 4731, 4735-4740, 4744. The Appeals Chamber has nonetheless determined that the Trial Chamber erred in failing to consider Ndayambaje Defence evidence on two occasions. *See infra*, paras. 3106, 3152, 3153.

the existence of contradictions or inconsistencies,[6489] and relied on Defence evidence in establishing certain material facts[6490] and in instances where their testimonies were not corroborative of Prosecution evidence.[6491] Likewise, Ndayambaje fails to appreciate that, where relevant, the Trial Chamber expressly referred to its assessment of the evidence of Prosecution witnesses regarding particular incidents when deliberating on the evidence of the same witnesses concerning different incidents.[6492] Contrary to Ndayambaje's claim, the Trial Judgement also reflects that the relationship between Defence witnesses and Ndayambaje was just one of several factors considered by the Trial Chamber when assessing their evidence,[6493] and that the Trial Chamber did not rely on the fact that Prosecution witnesses were Tutsis or survivors of the genocide to "excuse inconsistencies and weaknesses" in their testimonies or reject the evidence of a Defence witness merely because the witness stated that the victims of the massacres were both Tutsis and Hutus.[6494]

2845. Moreover, Ndayambaje's contention that the Trial Chamber "deliberately accused Defence witnesses of lying and attributed to them partial responsibility in the massacres" in the absence of tangible evidence and relied on these "inventions" and "false incriminations" to discredit their evidence is not supported by a review of the Trial Judgement. The passages of the Trial Judgement Ndayambaje points to reflect the Trial Chamber's normal exercise of its judicial function to draw conclusions from the evidence on the record and provide a reasoned opinion for its conclusions.[6495] The fact that the Trial Chamber may have committed some errors in the assessment of the evidence cannot reasonably be interpreted as implying any deliberate or malicious intention on the part of professional judges who are bound by the highest standards of integrity and impartiality.[6496]

[6489] The Appeals Chamber has addressed and dismissed Ndayambaje's specific challenges to the Trial Chamber's assessment of Prosecution Witness QAR in the sections examining his allegations of error pertaining to Mugombwa Church, Ndayambaje's Swearing-In Ceremony, and the abduction and killing of Tutsi women and girls from Mugombwa Sector. *See infra*, Sections IX.E.1, IX.G.1, IX.H.1. Likewise, the Appeals Chamber has found no merit in Ndayambaje's challenges to the assessment of the evidence of Prosecution Witnesses TP, QAL, FAU, RV, FAL, FAG, and QAQ related to Kabuye Hill and Ndayambaje's Swearing-In Ceremony. *See infra*, Sections IX.F.2(a)(i), (iv)-(vi), IX.G.1(b), (c), (e), (f), (h), (i).

[6490] *See*, *e.g.*, Trial Judgement, paras. 1227, 1229-1231, 1243, 1244, 1410, 1430, 1435, 1448, 4724-4726, 4728, 4729.

[6491] *See*, *e.g.*, Trial Judgement, paras. 1402, 1403, 1411, 1412.

[6492] *See*, *e.g.*, Trial Judgement, paras. 4602, 4710.

[6493] *See*, *e.g.*, Trial Judgement, paras. 1202-1206, 1209, 1213-1217, 1220-1223, 1388-1394, 1401-1404, 1417, 1446, 4636, 4742, 4744.

[6494] *See* Ndayambaje Appeal Brief, fn. 305, *referring to* Trial Judgement, paras. 1243, 1405, 1448, 4710, 4746. The Appeals Chamber notes that the Trial Chamber did not reject the evidence of Ndayambaje Defence Witness SABINE on the basis that he stated that the victims were both Hutus and Tutsis but rather because the Trial Chamber found that his testimony amounted to a denial of the genocide and suffered from internal inconsistencies. *See* Trial Judgement, para. 4722.

[6495] *See* Ndayambaje Appeal Brief, paras. 219-221, fns. 275, 284-287, 293, *referring to* Trial Judgement, paras. 1198, 1199, 1203-1206, 1212-1217, 1220-1223, 1228, 1230, 1243, 1389-1393, 1395-1398, 1401, 1446, 4636-4640, 4721, 4722, 4731, 4737, 4739, 4744.

[6496] In this respect, the Appeals Chamber refers to its finding that, although the Trial Chamber erred in its assessment of Witness BOZAN's responsibility in the massacres at Mugombwa Church at one point in the Trial Judgement, this error has not occasioned a miscarriage of justice. *See infra*, para. 3289. The Appeals Chamber does not see how this error, which is the only one Ndayambaje points to under Ground 8 of his appeal in support of his contention, shows that the Trial Chamber wrongly and deliberately tried to discredit Defence evidence as Ndayambaje claims it did.

The Appeals Chamber also notes that Ndayambaje's contention regarding the failure to consider the detained status of Prosecution witnesses is likewise without any merit as the Trial Chamber expressly considered and discussed their status when evaluating their credibility.[6497]

2846. Neither the arguments addressed above, nor Ndayambaje's remaining submissions regarding the lack of notice in the indictment, the Trial Chamber's assessment of Ndayambaje's alibi evidence, and the timing of addition of witnesses, even if they revealed errors in the Trial Chamber's exercise of its discretion, would lead a reasonable observer, properly informed, to reasonably apprehend bias on the part of the Trial Chamber.

2847. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber applied a double standard in its assessment of Prosecution and Defence evidence and to rebut the presumption of impartiality attached to the judges of the Trial Chamber. Accordingly, the Appeals Chamber dismisses Ground 8 of Ndayambaje's appeal.

See Ndayambaje Appeal Brief, para. 219, fn. 276. Similarly, the Appeals Chamber does not see how the Trial Chamber's error regarding Ndayambaje Defence Witness KEPIR's implication in the Kabuye Hill attacks discussed under Ground 7 of Ndayambaje's appeal shows bias from the Trial Chamber. *See infra*, Section IX.C.3(c)(vi).

[6497] The Appeals Chamber understands Ndayambaje's submissions and references as pointing to the evidence adduced by Prosecution Witnesses FAG, FAU, RV, QBZ, QAF, and FAL. *See* Ndayambaje Appeal Brief, para. 237, fn. 331. The Appeals Chamber observes that the Trial Chamber considered the detained status of Witnesses FAG, FAL, FAU, RV, and QAF in the Trial Judgement. *See* Trial Judgement, paras. 1226, 1429, 4630, 4713. The Appeals Chamber notes that the Trial Chamber did not rely on the evidence provided by Witness QBZ. *See ibid.*, paras. 393, 1260.

C. Alibi (Ground 7)

2848. At trial, Ndayambaje presented alibi evidence for the period of 20 through 24 April 1994, seeking to raise doubt as to his participation or involvement in: (i) the interception of refugees at Ngiryi Bridge on the morning of 20 April 1994; (ii) the subsequent massacre at Mugombwa Church on 20 and 21 April 1994; and (iii) the distribution of weapons, transportation of attackers, and attacks on Kabuye Hill from 22 through 24 April 1994.[6498]

2849. The Trial Chamber noted that Ndayambaje filed his notice of alibi less than one month before the commencement of his Defence case and took this into account when weighing the credibility of the alibi.[6499] The Trial Chamber ultimately concluded that Ndayambaje's alibi evidence failed to raise reasonable doubt with respect to the Prosecution case that Ndayambaje participated in the interception of Tutsis at Ngiryi Bridge on the morning of 20 April 1994, was present at Mugombwa Church for 15 minutes between about noon and 1.00 p.m. on 20 April 1994 and in the morning of 21 April 1994, and participated in the distribution of weapons, transportation of attackers, and attacks on Kabuye Hill from 22 through 24 April 1994.[6500]

2850. Ndayambaje argues that the Trial Chamber erred in its assessment of the late notice of alibi, reversed the burden of proof relevant to alibi evidence, and erred in its assessment of the alibi evidence.[6501] The Appeals Chamber will address these contentions in turn.

1. Notice of Alibi

2851. On 1 March 2005, the Trial Chamber directed Ndayambaje and his co-accused to "immediately make the necessary disclosures in accordance with Rule 67" of the Rules if they wished to raise an alibi.[6502] More than three years later, and less than one month before the commencement of his Defence case, on 29 April 2008, Ndayambaje filed a document entitled "*Avis additionnel et identification des témoins d'alibi*", in which he recalled that he clearly indicated in his pre-defence brief that he would be contesting his presence at Mugombwa Church and Kabuye Hill at the time of the events based on evidence that he was at the Muganza commune office and in

[6498] Trial Judgement, paras. 1196-1218, 1220-1223, 1386-1404, 1414, 1416, 1417, 1445, 1446.
[6499] Trial Judgement, paras. 1197, 1198, 1387, 1388. Ndayambaje opened his case on 20 May 2008. *See ibid.*, para. 6582.
[6500] Trial Judgement, paras. 1218, 1244, 1245, 1390-1394, 1397, 1404, 1414, 1417, 1423, 1424, 1431, 1443-1446, 1452. *See also ibid*., paras. 1225, 1245 (finding that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and "remained on the spot for about 15 minutes and left").
[6501] Ndayambaje Notice of Appeal, paras. 66-75; Ndayambaje Appeal Brief, paras. 139-192; Ndayambaje Reply Brief, paras. 46-60. The Appeals Chamber also addresses in this section Ndayambaje's specific and sufficiently developed challenges to the assessment of the alibi evidence raised under Grounds 8, 17, and 18 of his appeal.
[6502] Alibi Decision, para. 29, p. 7. *See also* Trial Judgement, paras. 1197, 1387, 6439.

Kibayi Commune successively.[6503] On 23 May 2008, the Trial Chamber considered that this filing of a "further notice of alibi" was the first specific notice of alibi filed by Ndayambaje and that it did not contain sufficient information pertaining to the addresses of certain proposed alibi witnesses.[6504]

2852. In the Trial Judgement, the Trial Chamber recalled that Ndayambaje failed to comply with the Alibi Decision, found that the Ndayambaje Notice of Alibi was no substitute for providing the Prosecution with formal notice of alibi in accordance with the Rules, and took this failure into account when weighing the credibility of the alibi.[6505] When considering the late notice of alibi in the context of crimes committed at Kabuye Hill, the Trial Chamber stated that "the late notice the Defence gave regarding its decision to bring alibi evidence suggests that the alibi may be a fabrication, tailored to suit the Prosecution's case."[6506]

2853. Ndayambaje submits that the Trial Chamber erred in considering that the alibi was fabricated to rebut the Prosecution case based on the late filing of his notice of alibi.[6507] To demonstrate this error, Ndayambaje contends that the Prosecution and the Trial Chamber were informed of his defence of alibi prior to the filing of the Ndayambaje Notice of Alibi through: (i) the statements he gave in 1995 and 1996 to Belgian authorities and the Prosecution; (ii) Prosecution Witness RV's February 2004 testimony; and (iii) his pre-defence brief filed in December 2004.[6508] Ndayambaje also takes specific issue with the Trial Chamber's decision to discredit the evidence of Ndayambaje Defence Witnesses MARVA and Father Tiziano Pegoraro on the "mere suspicion" that it was fabricated based on the fact that they were not identified in the Ndayambaje Notice of Alibi.[6509] In this regard, he points out that Witness MARVA was initially withdrawn from his witness list in 2006 at the Trial Chamber's request before being reinstated as an alibi witness in June 2008.[6510] Ndayambaje adds that the Trial Chamber improperly described

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[6503] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Avis additionnel et identification des témoins d'alibi*, 29 April 2008 (confidential) ("Ndayambaje Notice of Alibi"), paras. 3-6.
[6504] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Prosecution Motion for Further Particulars of Élie Ndayambaje's Alibi Pursuant to Rule 67 (A)(ii)(a), 23 May 2008 (confidential) ("23 May 2008 Decision"), paras. 1, 10, 15.
[6505] Trial Judgement, paras. 1197, 1198, 1387, 1388.
[6506] Trial Judgement, para. 1388.
[6507] Ndayambaje Appeal Brief, para. 175, *referring to* Trial Judgement, paras. 1198, 1387, 1388. *See also ibid*., para. 185.
[6508] Ndayambaje Appeal Brief, paras. 178, 185. *See also* Ndayambaje Reply Brief, paras. 47, 49, 56; AT. 21 April 2015 p. 70. Ndayambaje also argues that the Alibi Decision directing the Defence to provide particulars of the alibi reflects that the Prosecution and the Trial Chamber were aware of his alibi defence at this date and that the Trial Chamber's later 23 May 2008 Decision reflects that the Prosecution, after having reviewed summaries contained in the Ndayambaje Pre-Defence Brief, understood that Ndayambaje would be raising an alibi. *See* Ndayambaje Appeal Brief, paras. 177, 178.
[6509] Ndayambaje Appeal Brief, para. 202, *referring to* Trial Judgement, para. 1198. *See also ibid*., para. 205.
[6510] Ndayambaje Appeal Brief, paras. 178, 399, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-96-42-T, Decision on Ndayambaje's Motion to Vary His List of Witnesses, 4 June 2008. Ndayambaje highlights that, by contrast, the Trial Chamber did not take into account the Prosecution's failure to indicate that certain Prosecution witnesses would testify about certain events in the evaluation of the witnesses' credibility on these particular events. *See ibid.*, paras. 202, 205.

Ndayambaje Defence Witnesses Stan, ANGES, BOZAN, and ALIZA as alibi witnesses and improperly used the late notice of alibi to reject their evidence.[6511]

2854. Ndayambaje further argues that the Trial Chamber erred in using the lateness of the notice of alibi to discard it as the Trial Judgement reflects that Ndayambaje received insufficient notice of several of the charges against him, including the fact that the dates of several crimes were not specified.[6512] In this context, and considering the investigative burdens on the Defence, Ndayambaje submits that the Trial Chamber's sole reliance on the late filing of the notice of alibi to justify adverse credibility findings of the alibi witnesses was "overly used" and "contrary to the spirit of the law" on alibi.[6513]

2855. The Prosecution responds that Ndayambaje failed not only to provide timely notice of his alibi, but that the document he filed also did not contain the particulars required to constitute a notice of alibi as required by Rule 67(A) of the Rules.[6514] It argues that, contrary to Ndayambaje's claim, neither the Belgian statements nor the Ndayambaje Pre-Defence Brief disclosed his alibi as presented at trial, and that the differences between them and the evidence adduced at trial reflect that the alibi was fabricated.[6515] The Prosecution emphasises that the failure to raise an alibi in a timely manner may suggest that it was invented to respond to the Prosecution case and contends that the contradictory and evolving nature of all of Ndayambaje's alibi evidence demonstrates that it was in fact invented.[6516]

2856. The Appeals Chamber recalls that Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the Prosecution of its intent to enter a defence of alibi "[a]s early as reasonably practicable and in any event prior to the commencement of the trial". It also reiterates that the manner in which an alibi is presented may impact its credibility and further recalls that it has previously held that failure to raise an alibi in a timely manner may suggest fabrication of the alibi in order to respond to the Prosecution case.[6517]

[6511] Ndayambaje Appeal Brief, para. 176; Ndayambaje Reply Brief, para. 58.
[6512] Ndayambaje Appeal Brief, paras. 179, 180, 205, *referring to* Trial Judgement, paras. 1024, 1034, 1053, 1056, 1407, 1450, 4649. *See also ibid.*, para. 183; Ndayambaje Reply Brief, para. 46.
[6513] Ndayambaje Appeal Brief, paras. 181-185. In Ndayambaje's view, the Trial Chamber's conduct reflected a predisposition towards conviction. *See ibid.*, para. 185.
[6514] Prosecution Response Brief, paras. 2055, 2057. *See also* AT. 21 April 2015 p. 44.
[6515] Prosecution Response Brief, paras. 2056-2059. The Prosecution argues that Ndayambaje's statements to Belgian authorities and his pre-defence brief did not contain the names and addresses of alibi witnesses. *See ibid.*, para. 2057. *See also* AT. 21 April 2015 pp. 43, 44.
[6516] Prosecution Response Brief, paras. 2054, 2062. The Prosecution further argues that if an accused testifies in support of his alibi after having heard other alibi evidence, as Ndayambaje did, the trial chamber is obligated to take this into account when assessing the weight to be given to such testimony. *See ibid.*, paras. 2054, 2061. *See also* AT. 21 April 2015 p. 51.
[6517] *See*, *e.g.*, *Ndahimana* Appeal Judgement, paras. 113, 114; *Kanyarukiga* Appeal Judgement, paras. 97, 101, 102; *Munyakazi* Appeal Judgement, para. 18.

2857. In the present case, Ndayambaje does not dispute that he did not satisfy the requirements of Rule 67(A)(ii)(a) of the Rules in providing formal notice of his alibi only several years after the close of the Prosecution case. Instead, Ndayambaje submits that the late notice he provided should not have detracted from the alibi's credibility given that elements of his alibi were present in his prior statements to Belgian authorities and the Prosecution and in other evidence before the Trial Chamber.[6518]

2858. The Appeals Chamber, however, observes that Ndayambaje has failed to provide precise references with respect to his prior statements to Belgian authorities or the Prosecution to substantiate his argument. Moreover, the Appeals Chamber notes that the Trial Chamber sustained Ndayambaje's objection to the Prosecution using the statements to the Belgian authorities in court[6519] and that, similarly, his prior statement to the Prosecution does not form part of the trial record. Under these circumstances, Ndayambaje fails to demonstrate how any consistencies between these statements and the alibi evidence he presented at trial were relevant to the Trial Chamber's determination that the manner in which the alibi was presented could factor into its assessment of its credibility and its determination that the late notice "suggest[ed] that the alibi may be a fabrication, tailored to suit the Prosecution's case."[6520]

2859. Having reviewed the testimony of Witness RV highlighted by Ndayambaje as well as the Ndayambaje Pre-Defence Brief,[6521] the Appeals Chamber is also not persuaded that the information they provided on Ndayambaje's alibi was so comprehensive or consistent with the evidence led at trial that it would have prevented a reasonable trier of fact from considering the manner in which the alibi was raised when assessing its credibility. Ndayambaje does not demonstrate any error in this regard.[6522]

[6518] In his reply brief, Ndayambaje further argues that the 1995 statements of Witness Stan to Journalist van den Abeele and his interview before Magistrate Damien Vandermeersch also confirmed elements of his alibi. *See* Ndayambaje Reply Brief, para. 49. Having reviewed these statements, the Appeals Chamber is not persuaded that information contained in these statements prevented the Trial Chamber from considering that the late notice of alibi adversely impacted its credibility.

[6519] Ndayambaje, T. 25 November 2008 pp. 4, 5. Ndayambaje's counsel argued that the statements were obtained in violation of the Tribunal's Rules and Statute. *See idem. See also* AT. 21 April 2015 p. 69 (acknowledging that Ndayambaje's statements to the Belgian authorities were not part of the record).

[6520] Trial Judgement, para. 1388.

[6521] *See* Witness RV, T. 18 February 2004 pp. 9-11, 18, 19 (closed session); Ndayambaje Pre-Defence Brief, pp. 9 ("ANGES: […] The witness also knows about the activities and movements of Élie Ndayambaje and his family from April to July 1994."), 13 ("GABON: […] Moreover, around 20.4.94 he witnessed the circumstances surrounding the events when Élie Ndayambaje and his family came to seek refuge in the communal office. A few days later, he also saw Élie Ndayambaje and his family leave the communal office to go and seek refuge in the neighbouring Kibayi *commune*."), 18 ("KEPIR: […] The witness will also be in a position to give evidence on several events that occurred in Muganza *commune* office in 1994 […]."), 21 ("MARVA: […] The witness followed Élie Ndayambaje's family wherever they went in 1994.").

[6522] Ndayambaje also argues that the Prosecution had remedies available to it to prevent it from being prejudiced by the late notice of alibi and that the Prosecution only exercised them with respect to two alibi witnesses, further

2860. Ndayambaje also fails to show that the Trial Chamber erred in observing in paragraphs 1198 and 1388 of the Trial Judgement that Witnesses MARVA and Tiziano were not named in the Ndayambaje Notice of Alibi. The fact that Witness MARVA was reinstated on the witness list in June 2008, after having been initially removed in January 2006, was expressly taken into consideration by the Trial Chamber[6523] and does not demonstrate any error in its analysis. More importantly, Ndayambaje's argument that Witnesses MARVA's and Tiziano's evidence was erroneously rejected on the basis that they were not identified in the Ndayambaje Notice of Appeal ignores the several other reasons the Trial Chamber relied upon in finding that their evidence did not raise reasonable doubt in the Prosecution case.[6524]

2861. With respect to Ndayambaje's contention that the Trial Chamber incorrectly described Witnesses Stan, ANGES, BOZAN, and ALIZA as alibi witnesses and improperly used the late notice of alibi to reject their evidence, the Appeals Chamber is of the view that, because the evidence of Witnesses Stan and ANGES tended to show that Ndayambaje was not present at the time of alleged crimes, it was reasonably considered as alibi evidence by the Trial Chamber.[6525] The Appeals Chamber further observes that the Trial Chamber provided reasons other than the manner in which the notice of alibi was raised to find that the evidence of Witness Stan did not raise doubt with respect to the Prosecution case[6526] and that the Trial Judgement does not reflect that Witness ANGES's evidence was rejected based on the belated notice of alibi.[6527] As for Witnesses BOZAN and ALIZA, the Trial Chamber appears to have erroneously designated their

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demonstrating that the Trial Chamber placed too much emphasis on the late notice. *See* Ndayambaje Appeal Brief, paras. 183-185. *See also* Ndayambaje Reply Brief, paras. 46, 48. The Prosecution responds that the question of whether remedies were available as a result of the late notice of alibi is irrelevant to the consideration of whether the credibility of the alibi defence is impacted due to its late disclosure. *See* Prosecution Response Brief, para. 2058. The Appeals Chamber rejects Ndayambaje's argument on the basis that a trial chamber is not required to consider whether the Prosecution suffered prejudice from the late notice of alibi when assessing its credibility. *See Ndahimana* Appeal Judgement, para. 113; *Kanyarukiga* Appeal Judgement, para. 98.

[6523] Trial Judgement, paras. 1198, 1388.

[6524] With respect to Witness MARVA, the Trial Chamber observed that the witness, an employee of Ndayambaje living in his house at the time of the events, did not specify when she saw Ndayambaje on the morning of 20 April 1994 and further found that her testimony that Ndayambaje remained with her in the same room in the "IGA building" until 23 April 1994 was contradicted by other evidence and was not credible. *See infra*, Section IX.C.3(c)(iv). As regards Witness Tiziano, the Trial Chamber found, *inter alia*, his evidence contradictory and lacking credibility as to the sequence of events in the morning of 20 April 1994. *See infra*, Section IX.C.3(c)(ii). The Appeals Chamber notes that it has determined in Section IX.C.3(c)(i) below that the Trial Chamber erred in its assessment of Witness Tiziano's alibi evidence in paragraph 1202 of the Trial Judgement but that this error has not occasioned a miscarriage of justice. *See infra*, para. 2892, fn. 6600.

[6525] *See* Trial Judgement, paras. 1213-1217, 1390, 1394, 1413, 1415. This is implicitly acknowledged by Ndayambaje in his appeal submissions, which rely on the evidence of these two witnesses as alibi evidence. *See* Ndayambaje Appeal Brief, paras. 154, 404, 410, 413, 443, 527.

[6526] In particular, the Trial Chamber found that Witness Stan's evidence concerning Ndayambaje's alibi was not credible based on: (i) the witness's testimony about his own conduct during the events and his description of the prevailing situation; (ii) inconsistencies between his evidence and prior statements; (iii) his close friendship with Ndayambaje and because he was a "close associate" of Burundian refugees implicated in massacres at Mugombwa Church and Kabuye Hill. *See infra*, Section IX.C.3(c)(iii).

[6527] *See infra*, para. 2881.

testimonies relevant to 20, 21, and 23 April 1994 as alibi evidence.[6528] Notwithstanding this error, the Trial Judgement reflects that the Trial Chamber did not reject Witness BOZAN's evidence related to this period of time,[6529] and provided reasons unrelated to the notice of alibi to find that the evidence of Witness ALIZA did not raise doubt with respect to the Prosecution case.[6530] For these reasons, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber placed improper emphasis on the late notice of alibi to discredit the evidence of either witness.[6531]

2862. Furthermore, the Appeals Chamber observes that the Trial Chamber considered that sufficient notice was given to Ndayambaje with respect to the timing of the attacks on Mugombwa Church,[6532] and that the Ndayambaje Indictment provided a precise date range of 20 to 24 April 1994 as it related to Ndayambaje's involvement in events leading up to the massacres at Kabuye Hill.[6533] Ndayambaje fails to demonstrate how alleged insufficient notice related to these events or investigative burdens would have prevented him from providing notice of his alibi in compliance with Rule 67 of the Rules.

2863. Additionally, Ndayambaje's arguments focus on two conditional statements in paragraphs 1198 and 1388 of Trial Judgement, which reflect that the manner in which the notice of alibi was raised *could* impact its credibility and the Trial Chamber's finding that the belated notice suggests that the alibi *may* be a fabrication. However, as discussed in greater detail below, a review of the Trial Chamber's analysis of Ndayambaje's alibi reflects that the Trial Chamber took into account several other factors in concluding that the alibi lacked credibility or that it was of insufficient probative value to raise reasonable doubt in the Prosecution case.

2864. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in considering the manner in which Ndayambaje raised his alibi in evaluating its credibility.

[6528] *See* Trial Judgement, para. 1196, 1415. A review of Witnesses BOZAN's and ALIZA's testimonies, as summarised by the Trial Chamber, reveals that the witnesses did not provide evidence tending to show that Ndayambaje was not present at the time of alleged crimes. *See ibid*., paras. 1093, 1165-1177, 1319-1327.
[6529] There is no indication in the Trial Judgement that the Trial Chamber did not find the witness credible with respect to the events of 20 and 21 April 1994 at Mugombwa Church. In fact, the Trial Chamber relied on Witness BOZAN's testimony as corroborative of some aspects of the Prosecution evidence. *See* Trial Judgement, paras. 1227, 1228, 1235. The Appeals Chamber discusses the Trial Chamber's assessment of Witness BOZAN's evidence on 20 and 21 April 1994 at length in Section IX.E.4(c).
[6530] *See* Trial Judgement, paras. 1413, 1415 (assessing the credibility or probative value of the evidence of Witnesses Stan and ALIZA).
[6531] *See also infra*, paras. 2881, 3014.
[6532] *See* Trial Judgement, para. 1031 (finding that Ndayambaje had sufficient notice of attacks at Mugombwa Church "in late April 1994").
[6533] *See* Ndayambaje Indictment, paras. 6.30-6.32. *See also* Trial Judgement, para. 1248.

2. Reversal of the Burden of Proof

2865. The Trial Chamber set forth the relevant principles concerning the assessment of the alibi evidence in paragraphs 185 through 187 of the Trial Judgement. The Trial Chamber notably stated that "[t]o sustain a conviction, the Prosecution must demonstrate that, regardless of the alibi, the facts as alleged are true beyond a reasonable doubt, either by demonstrating that the alibi evidence offered does not negate the presence of the accused at the critical place and at the critical time, or that the alibi evidence is not credible."[6534]

2866. Ndayambaje submits that the Trial Chamber misconstrued the standard of proof applicable to alibi evidence when stating that the Prosecution must demonstrate that the alibi evidence offered "does not negate" the presence of the accused at the critical place and time.[6535] He contends that the Trial Chamber discarded alibi evidence that did not "negate" the Prosecution evidence and improperly shifted the burden of proof on to him.[6536] He points to particular language in paragraphs 1198, 1201, 1209, 1211, 1212, 1220, 1223, 1396, 1400, 1403, and 1404 of the Trial Judgement as a reflection of this burden shifting.[6537] Ndayambaje further contends that the Trial Chamber erroneously applied a beyond reasonable doubt standard in its assessment of some alibi evidence.[6538] In this regard, he refers to the assessment of Witness MARVA's evidence and points out that the Trial Chamber assessed and discredited the alibi evidence prior to its assessment of the Prosecution evidence.[6539]

2867. The Prosecution responds that the Trial Chamber correctly stated the burden of proof applicable to the assessment of alibi evidence and did not reverse the burden of proof.[6540] In its view, the Trial Chamber did not use the term "negate" in the manner in which it had been found in the *Zigiranyirazo* case to show a reversal of the burden of proof, but used this term to explain that alibi evidence may be "irrelevant if it does not address the accused's whereabouts at the critical time".[6541] The Prosecution also contends that the language identified by Ndayambaje in the Trial Judgement does not show that the Trial Chamber reversed the burden of proof.[6542] It adds that the Trial Chamber did not have to address evidence in a specific order.[6543]

[6534] Trial Judgement, para. 186, *referring to Zigiranyirazo* Appeal Judgement, para. 18.
[6535] Ndayambaje Notice of Appeal, paras. 66, 69; Ndayambaje Appeal Brief, para. 145.
[6536] Ndayambaje Appeal Brief, paras. 140, 146, *referring to Zigiranyirazo* Appeal Judgement, para. 19. *See also ibid.*, paras. 139, 141-143.
[6537] Ndayambaje Appeal Brief, paras. 147, 158, 160, 162. *See also ibid.*, paras. 148, 173, 174.
[6538] Ndayambaje Appeal Brief, para. 151.
[6539] Ndayambaje Appeal Brief, paras. 151, 167, 182, 188.
[6540] Prosecution Response Brief, paras. 2063-2065.
[6541] Prosecution Response Brief, paras. 2064, 2065.
[6542] Prosecution Response Brief, para. 2066.
[6543] Prosecution Response Brief, para. 2072. *See also ibid*., para. 2129.

2868. The Appeals Chamber observes that, when setting forth the principles concerning the assessment of alibi evidence, the Trial Chamber stated that alibi "does not carry a separate burden of proof" and that "[i]f the defence is reasonably possibly true, it must be successful."[6544] It then recalled the standard of assessing alibi evidence as articulated by the Appeals Chamber in the *Zigiranyirazo* case, stating that "alibi does not shift the burden of proof to the accused" and that if the alibi evidence is "'likely to raise a reasonable doubt in the Prosecution case,' and '[…] is reasonably possibly true, it must be accepted.'"[6545] It is in this context that the Trial Chamber stated that "[t]o sustain a conviction, the Prosecution must demonstrate that, regardless of the alibi, the facts as alleged are true beyond a reasonable doubt, […] by demonstrating that the alibi evidence offered does not negate the presence of the accused at the critical place and at the critical time".[6546]

2869. The Appeals Chamber recalls that phrasing such as "an accused must 'negate' the Prosecution evidence" might indicate that a trial chamber misapplied the burden of proof.[6547] However, the statement with which Ndayambaje takes issue does not indicate that the Trial Chamber imposed a burden on the Defence to negate the Prosecution case. To the contrary, the impugned statement expressly relates to the burden of the *Prosecution* to prove its case beyond reasonable doubt despite the alibi.[6548] As recalled above, the Trial Chamber clearly specified that introducing an alibi does not carry a separate burden of proof and that, if the alibi is reasonably possibly true, it must be accepted.

2870. The Appeals Chamber also rejects Ndayambaje's contention that the particular language identified in paragraphs 1198, 1201, 1209, 1211, 1212, 1220, 1223, 1396, 1400, 1403, and 1404 of the Trial Judgement reflects that the Trial Chamber required Ndayambaje to "negate" the Prosecution evidence.[6549] With respect to paragraph 1198 of the Trial Judgement, the language identified by Ndayambaje simply indicates that he did not challenge the Prosecution witnesses with the proposition that Ndayambaje was not at the scene of the crime and that this, in the view of the

[6544] Trial Judgement, para. 185.
[6545] Trial Judgement, para. 186, *quoting Zigiranyirazo* Appeal Judgement, para. 17.
[6546] Trial Judgement, para. 186.
[6547] *Zigiranyirazo* Appeal Judgement, para. 19.
[6548] Indeed, the Appeals Chamber observes that the Trial Chamber referred to paragraph 18 of the *Zigiranyirazo* Appeal Judgement when articulating this standard. There, the Appeals Chamber, in relevant respects, stated: "Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime."
[6549] Ndayambaje argues that the Trial Chamber speculated as to his whereabouts and discarded alibi evidence from witnesses who were unable to "guarantee [Ndayambaje's] whereabouts that they were testifying to". *See* Ndayambaje Appeal Brief, para. 172, *referring to* Trial Judgement, paras. 1398, 1402-1404. With the exception of his specific contentions concerning paragraphs 1403 and 1404 of the Trial Judgement which are addressed below, Ndayambaje does not develop this argument further. Having reviewed the relevant paragraphs, the Appeals Chamber dismisses this argument without further consideration as Ndayambaje fails to demonstrate any error.

Trial Chamber, detracted from the credibility of the alibi.[6550] This is consistent with the Trial Chamber's conclusion that the belated nature of the notice of alibi impacted its credibility.[6551]

2871. As for the statements identified by Ndayambaje in paragraphs 1201, 1209, and 1211 of the Trial Judgement,[6552] which are repeated in part in paragraphs 1400 and 1403, the Trial Chamber's analysis reflects that the alibi evidence concerning Ndayambaje's whereabouts on the morning of 20 April 1994 was not comprehensive and, by implication, did not reasonably account for the period when he was alleged to have engaged in the relevant conduct. The additional language identified by Ndayambaje in paragraphs 1209[6553] and 1404[6554] of the Trial Judgement does not suggest the imposition of a burden to negate the Prosecution case, but is merely an express reflection of the Trial Chamber's finding that the alibi evidence for the morning of 20 April 1994 was not reasonably possibly true.

2872. With respect to paragraphs 1212 and 1396 of the Trial Judgement, where the Trial Chamber stated that it did not find Ndayambaje's account regarding his whereabouts, and those of his mother on 20 April 1994 to be convincing, the Appeals Chamber considers that using the term "convincing" could suggest an incorrect standard for assessing alibi evidence.[6555] However, read in the context of the analysis that preceded this statement, the Appeals Chamber finds that the Trial Chamber was merely expressing that Ndayambaje's evidence was *prima facie* "not credible" and was contradicted by other evidence.[6556]

[6550] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, para. 1198 ("[T]he Prosecution witnesses were not confronted with the Defence's assertion that Ndayambaje could not have been at the scene of the events because he had an alibi. This further detracts from the credibility of the alibi."). *See also ibid.*, para. 205.
[6551] Trial Judgement, para. 1198. *See also ibid.*, para. 1388.
[6552] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, paras. 1201 ("Witness MARVA […] does not specify when she saw him for the first time that day."), 1209 ("Witness MARVA did not testify to the whereabouts of the Accused during a substantial part of the morning of 20 April 1994."), 1211 ("Recalling Witness MARVA's evidence above, it is clear that her alibi evidence does not cover the period between 12.00 p.m. and 1.00 p.m. on 20 April 1994"). In addition, Ndayambaje argues that the Trial Chamber's conclusion in paragraph 1211 that "this would be more than enough time for Ndayambaje to travel from Muganza *commune* office to his house and the church" is an additional reflection that it imposed a burden on the alibi to exclude the Prosecution case, rather than require the Prosecution to prove its case beyond a reasonable doubt. *See ibid.*, para. 158. The Appeals Chamber is not persuaded by this argument as this statement, read in context, reflects the Trial Chamber weighing the probative value of alibi evidence in light of the proximity of locations and the time to take to travel between them. *See* Trial Judgement, para. 1211.
[6553] Ndayambaje Appeal Brief, para. 160, *quoting* Trial Judgement, para. 1209 ("[T]he Chamber considers that he could have made a return trip from his home to Gisagara in the time between being seen by Witness RV at around 7.30 a.m. and hiding Chanvrier in his guest room […]. In the absence of any other explanation for the Accused's whereabouts, the Chamber considers that the Defence alibi evidence is not reasonably possibly true, and therefore finds it does not raise a reasonable doubt in the Prosecution case as regards the morning of 20 April 1994.").
[6554] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, para. 1404 ("In the absence of any other explanation for the Accused's whereabouts, the Chamber considers the Defence alibi as regards the morning of 20 April 1994 not to be reasonably possibly true."). *See also ibid.*, paras. 157, 158, 172.
[6555] *Cf. Zigiranyirazo* Appeal Judgement, para. 19.
[6556] Trial Judgement, paras. 1212, 1395.

2873. Likewise, the statements from paragraphs 1220 and 1223 of the Trial Judgement pointed out by Ndayambaje[6557] do not show that the Trial Chamber imposed a burden on him to negate the Prosecution case. Rather the Trial Chamber's analysis reveals its conclusion that Defence witnesses' testimonies that they were with Ndayambaje at all times and that he never left the Muganza commune office compound on 21 April 1994 were not credible given the size and layout of the commune office as well as the number of people present.

2874. Turning to Ndayambaje's assertion that the Trial Chamber applied a beyond reasonable doubt standard in assessing some alibi evidence, the Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt.[6558] Rather the accused must simply produce evidence tending to show that he was not present at the time of the alleged crime.[6559] In this case, the Appeals Chamber observes that the Trial Chamber's assessment of Witness MARVA's alibi evidence pointed out by Ndayambaje does not suggest the application of an incorrect burden of proof.[6560] In the same vein, the Appeals Chamber finds that the manner in which the Trial Chamber organised its assessment of the evidence, primarily identifying and assessing the alibi evidence before assessing the merits of the Prosecution evidence, in no way reflects a failure to properly apply the applicable burden of proof.

2875. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber misconstrued the relevant standard of proof applicable to alibi evidence or reversed the burden of proof.

3. Assessment of Alibi Evidence

2876. Ndayambaje submits that the Trial Chamber erred in assessing the alibi evidence relevant to his participation in the events at Ngiryi Bridge, Mugombwa Church, and Kabuye Hill.[6561]

[6557] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, paras. 1220 ("With respect to the alibi evidence brought by the Defence regarding the whereabouts of Ndayambaje on 21 April 1994, Witness GABON testified that Ndayambaje did not leave the *commune* office compound on 21 April 1994. […] Witness GABON would therefore not have had sight of Ndayambaje at all times during 21 April 1994 due to the size and layout of the *commune* office"), 1223 ("Given the relatively large geographical space and the large number of people present at the *commune* office, the Chamber does not find that the evidence of Witnesses GABON, KEPIR and MARVA that they were with Ndayambaje at all times over the course of 21 April 1994 to be credible and finds that they were not in a position to state that Ndayambaje never left the *commune* office on 21 April 1994."). *See also ibid.*, para. 162; Ndayambaje Reply Brief, paras. 53, 55. The Appeals Chamber considers that Ndayambaje's piecemeal quotation of these paragraphs of the Trial Judgement omits analysis showing that the Trial Chamber properly assessed alibi evidence in light of the applicable standard.

[6558] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.

[6559] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.

[6560] Ndayambaje Appeal Brief, paras. 151, *referring to* Trial Judgement, para. 1201. *See also* Trial Judgement, paras. 1221, 1222, 1416, 1417.

[6561] Ndayambaje Appeal Brief, paras. 173, 174.

Specifically, he contends that the Trial Chamber erred in: (i) failing to consider evidence supporting his alibi; (ii) improperly relying on his relationships with the alibi witnesses; and (iii) its assessment of the alibi evidence.[6562] Ndayambaje requests that the Appeals Chamber reverse the findings of the Trial Chamber and re-assess the alibi evidence.[6563]

2877. Prior to addressing Ndayambaje's contentions, the Appeals Chamber reiterates that a trial chamber enjoys broad discretion in assessing the credibility of witnesses and in determining the weight to be accorded to each testimony.[6564] It is within the discretion of the trial chamber to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[6565]

(a) Failure to Consider Evidence

2878. Ndayambaje contends that Witnesses ANGES and RV provided evidence that confirmed his alibi with respect to the events at Mugombwa Church but that the Trial Chamber ignored it.[6566] Specifically, Ndayambaje argues that the Trial Chamber failed to consider Witness ANGES's testimony that, on 20 April 1994, she saw him at his residence in Mugombwa at 7.30 a.m. and later on the road from Mugombwa around noon, and Witness RV's testimony that Ndayambaje did not leave the Muganza commune office in the morning of 21 April 1994.[6567]

2879. The Prosecution responds that the Trial Chamber assessed and rejected Witness ANGES's evidence relating to 20 April 1994, which lacked credibility, and that Witness RV did not testify that Ndayambaje never left the Muganza commune office in the morning of 21 April 1994.[6568]

2880. The Appeals Chamber observes that the Trial Chamber found that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and was there for about 15 minutes.[6569]

[6562] Ndayambaje Notice of Appeal, para. 72; Ndayambaje Appeal Brief, paras. 149-152, 154, 156, 163, 168, 202, 387-389, 395, 405-412. *See also* Ndayambaje Reply Brief, paras. 52, 54-58; AT. 21 April 2015 pp. 25, 26.
[6563] Ndayambaje Appeal Brief, para. 192. *See also ibid.*, para. 191.
[6564] *Ndahimana* Appeal Judgement, para. 43; *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114.
[6565] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[6566] Ndayambaje Appeal Brief, paras. 163, 345, 347, 359, 404, 418. *See also* Ndayambaje Notice of Appeal, paras. 141, 143, 149; Ndayambaje Reply Brief, para. 132.
[6567] Ndayambaje Appeal Brief, paras. 163, 345, 347, 359, 404, *referring*, *inter alia*, *to* Trial Judgement, paras. 1162-1164, Witness RV, T. 16 February 2004 pp. 37-43, 49 (closed session), T. 18 February 2004 pp. 10, 11, 18-23 (closed session). *See also* Ndayambaje Notice of Appeal, paras. 141, 143, 149; Ndayambaje Reply Brief, para. 132, *referring to* Witness RV, T. 18 February 2004 p. 19 (closed session).
[6568] Prosecution Response Brief, paras. 2076, 2189, 2264, 2265.
[6569] Trial Judgement, para. 1245. The Appeals Chamber has concluded in Section IX.E.3 below that the Trial Chamber erred in finding that Ndayambaje was present at Bishya trade centre on the morning of 20 April 1994 but that this error has not occasioned a miscarriage of justice as that event was not a basis for Ndayambaje's convictions. *See infra*, para. 2991. In this context, the Appeals Chamber considers it unnecessary to assess the alibi in relation to Ndayambaje's presence at Bishya trade centre on 20 April 1994.

It further found established beyond reasonable doubt that Ndayambaje came to Mugombwa Church for half an hour at around 10.00 a.m. on 21 April 1994, left and returned around 10.30 a.m. before departing again.[6570]

2881. The Trial Chamber expressly set forth Witness ANGES's evidence that Ndayambaje claims is relevant to his alibi, namely that she saw Ndayambaje at his residence at around 7.30 a.m. on 20 April 1994 and later saw him driving on the road from Mugombwa towards the Muganza commune office in Remera Sector around midday.[6571] The Trial Chamber likewise noted that Witness ANGES provided alibi evidence in relation to the events at Mugombwa Church.[6572] While the Trial Chamber did not expressly discuss this evidence in the course of its deliberations, the Appeals Chamber, mindful that a trial chamber is not required to articulate every step of its reasoning for each finding it makes or refer to every piece of evidence on the trial record,[6573] is not convinced that the witness's evidence was such that it required express consideration in the Trial Judgement. Indeed, the Appeals Chamber notes that Ndayambaje's presence at his home around 7.30 a.m. on 20 April 1994 was not disputed.[6574] Witness ANGES's testimony that she saw Ndayambaje driving on the road from Mugombwa towards the Muganza commune office in Remera Sector around midday that day is also not necessarily inconsistent with the Trial Chamber's finding that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and "remained on the spot for about 15 minutes and left".[6575]

2882. Turning to the evidence of Witness RV, the Appeals Chamber notes that, while the Trial Chamber did not expressly recount the witness's evidence about Ndayambaje's presence at the Muganza commune office on the morning of 21 April 1994,[6576] it referred to the relevant portions of the transcripts that contain this evidence.[6577] The Appeals Chamber sees no error in the Trial Chamber's decision not to address expressly this testimony in the Trial Judgement. Witness RV's evidence was general in nature and, while the witness mentioned Ndayambaje's presence at the

[6570] Trial Judgement, para. 1246.
[6571] *Compare* Ndayambaje Appeal Brief, para. 404 (*referring to* Witness ANGES, T. 20 August 2008 pp. 26, 27, 34, 35, 37-40) *with* Trial Judgement, paras. 1162-1164 (*referring*, *inter alia*, *to* Witness ANGES, T. 20 August 2008 pp. 26, 27, 31, 32).
[6572] Trial Judgement, para. 1196. Notably, the Trial Chamber recalled that "all of the alibi witnesses have close ties to Ndayambaje." *See ibid.*, para. 1199. While the Trial Chamber did not expressly refer to Witness ANGES in this context, the witness's testimony reflects that she had known Ndayambaje for years and was a former employee of Ndayambaje who had frequent contact with him in that capacity. *See* Witness ANGES, T. 20 August 2008 pp. 16, 17, 19, 20, 43 (closed session).
[6573] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Ntabakuze* Appeal Judgement, para. 161; *Kvočka et al.* Appeal Judgement, para. 23.
[6574] *See* Trial Judgement, paras. 1200, 1202, 1209. *See also ibid.*, paras. 1065, 1067.
[6575] *See* Trial Judgement, para. 1245. *See also ibid.*, para. 1218 (finding that Ndayambaje's alibi "does not raise a reasonable doubt in the Prosecution case that Ndayambaje was present at Mugombwa Church for 15 minutes between about noon and 1.00 p.m. on 20 April 1994.").
[6576] Witness RV, T. 18 February 2004 pp. 18 (closed session), 19.
[6577] *See* Trial Judgement, para. 1070, fn. 2160.

Muganza commune office on that morning, he did not specify whether he was in a position to observe that Ndayambaje remained at the commune office the whole morning of 21 April 1994.[6578] Witness RV's testimony therefore lacked probative value as to Ndayambaje's continued presence at the Muganza commune office on 21 April 1994.[6579]

2883. Consequently, the Appeals Chamber finds that Ndayambaje has not shown that the Trial Chamber erred in failing to consider evidence relevant to his alibi.

(b) Relationships with Alibi Witnesses

2884. Ndayambaje argues that the Trial Chamber erred by rejecting alibi evidence from witnesses who had professional, personal, or financial ties with him, ignoring that these would be the people with whom Ndayambaje would be in contact during a crisis and who would recall being with him.[6580]

2885. The Prosecution responds that the Trial Chamber did not err in considering, among other factors, the personal ties between Ndayambaje and the alibi witnesses when assessing their credibility.[6581]

2886. The Appeals Chamber recalls that it is settled jurisprudence that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence.[6582] The Appeals Chamber finds that the Trial Chamber did not err in considering these circumstances or in placing improper emphasis on them when assessing the alibi evidence.[6583] In particular, the Appeals Chamber notes that the relationship between alibi witnesses

[6578] *See* Witness RV, T. 18 February 2004 pp. 19-22 (closed session). The Appeals Chamber also observes that Witness RV was not questioned about Witness QAR's testimony that Ndayambaje came to Mugombwa Church on the morning of 21 April 1994.
[6579] The Appeals Chamber observes that the Trial Chamber also dismissed alibi evidence that, similar to Witness RV's evidence, lacked probative value. *See* Trial Judgement, para. 1223.
[6580] Ndayambaje Notice of Appeal, para. 72; Ndayambaje Appeal Brief, paras. 149, 152, 168, 395, 400, 402, 405, 406; Ndayambaje Reply Brief, para. 52. *See also* AT. 21 April 2015 p. 25.
[6581] Prosecution Response Brief, paras. 2067, 2068, 2249, 2262, 2270, 2273.
[6582] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[6583] Ndayambaje has pointed to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with alibi witnesses. Ndayambaje merely argues that the Trial Chamber observed that he did not have any *de jure* or *de facto* control over Witness GABON, suggesting that the Trial Chamber erred in assessing his relationship with the witness. *See* Ndayambaje Appeal Brief, paras. 402, 403. However, Ndayambaje does not dispute the evidence concerning the nature of their relationship prior to 1994 nor demonstrate how the absence of *de jure* or *de facto* authority over the witness in 1994 prevented a reasonable trier of fact from noting their prior relationship when assessing Witness GABON's testimony.

and Ndayambaje was just one of several factors considered by the Trial Chamber when assessing their evidence.[6584] The Appeals Chamber therefore dismisses this contention.

(c) Assessment of the Alibi Evidence

2887. Ndayambaje argues that the Trial Chamber erred in assessing and discrediting his evidence as well as evidence of Witnesses Tiziano, Stan, MARVA, GABON, and KEPIR.[6585] The Appeals Chamber will assess Ndayambaje's challenges as they relate to him and each witness in turn.[6586]

(i) Ndayambaje

2888. The Trial Chamber found that the evidence of Ndayambaje and Witness Tiziano that Ndayambaje was at his home at 9.00 a.m. on 20 April 1994 was contradicted by Witness RV and was therefore not credible.[6587] In this context, it noted that "Ndayambaje's testimony must be treated with appropriate caution as he has a personal interest in demonstrating that he was not present at Ngiryi Bridge on the morning of 20 April 1994."[6588] The Trial Chamber also did not find Ndayambaje's account as to why he did not evacuate his mother on 20 April 1994 convincing, which cast further "doubt on the version of events given by Ndayambaje."[6589] It also considered that the evidence of Ndayambaje as well as the evidence of Witnesses GABON, KEPIR, and MARVA that Ndayambaje never left the Muganza commune office on 21 April 1994 was not credible.[6590]

2889. Ndayambaje contends that the Trial Chamber violated the presumption of innocence by assuming, without any proof, that he had an incentive to minimise his role in the events.[6591] With respect to his alibi for 20 April 1994 in particular, he submits that the Trial Chamber: (i) used insignificant contradictions in his evidence and that of Witnesses RV and Tiziano to undermine the credibility of his alibi; (ii) contradicted itself by finding an artificial contradiction between Witness RV's evidence, on one hand, and Ndayambaje's and Witness Tiziano's evidence, on the other, after having determined that their testimonies were coherent regarding their movements and how they met; and (iii) erred in finding him not credible based on the evidence that he did not

[6584] *See* Trial Judgement, paras. 1198-1201, 1203-1207, 1209-1211, 1220-1223, 1389-1394, 1400, 1402-1404, 1413, 1416, 1417, 1445, 1446.
[6585] Ndayambaje Appeal Brief, paras. 150-152, 154-156, 169, 170, 201, 202, 387-389, 395-398, 401-403, 405-415, 417. *See also* AT. 21 April 2015 p. 23.
[6586] In several instances, Ndayambaje generally challenges the Trial Chamber's assessment of the alibi evidence without articulating or identifying how it erred. *See* Ndayambaje Appeal Brief, paras. 443, 477, 479, 527, 529, 579. The Appeals Chamber has assessed Ndayambaje's challenges pertaining to specific witnesses and evidence when developed elsewhere in his appeal but has declined to address his general and unsubstantiated arguments which fail to satisfy the formal requirements applicable on appeal. *See supra*, Section II.
[6587] Trial Judgement, paras. 1200, 1203, 1401.
[6588] Trial Judgement, paras. 1203, 1401.
[6589] Trial Judgement, para. 1212.
[6590] Trial Judgement, para. 1223.
[6591] Ndayambaje Appeal Brief, paras. 413, 415, *referring to* Trial Judgement, paras. 1203, 1401.

immediately evacuate his mother on 20 April 1994.[6592] As regards his alibi for 21 April 1994, Ndayambaje contends that his evidence that he did not leave the Muganza commune office on 21 April 1994 was corroborated by Witnesses GABON, MARVA, and KEPIR and was improperly rejected based on an incorrect assessment of the size of the commune office compound due to the Trial Chamber's failure to conduct a site visit.[6593]

2890. The Prosecution responds that the Trial Chamber was entitled to consider Ndayambaje's incentive to deny criminal conduct and that, contrary to his claim, the Trial Chamber considered several other factors when finding that his evidence was not credible.[6594]

2891. The Appeals Chamber notes that the Trial Chamber's statement that "Ndayambaje's testimony must be treated with appropriate caution as he has a personal interest in demonstrating that he was not present at Ngiryi Bridge on the morning of 20 April 1994"[6595] followed the Trial Chamber's assessment of Ndayambaje's and Witness Tiziano's evidence placing Ndayambaje at his home around 9.00 a.m.[6596] The Trial Chamber did not find this aspect of Ndayambaje's and Witness Tiziano's testimonies credible as it was contradicted by Witness RV's evidence.[6597] The Appeals Chamber finds that a reasonable trier of fact could have considered the possibility of Ndayambaje's incentive to provide exculpatory evidence in the context of all the relevant evidence and that the Trial Chamber's consideration does not denote a violation of the presumption of innocence.[6598]

2892. Moreover, while Ndayambaje argues that the inconsistencies in his and Witness Tiziano's evidence and that of Witness RV are insignificant, he fails to demonstrate any error in the Trial Chamber's exercise of its discretionary power in assessing this evidence.[6599] In addition, although

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[6592] Ndayambaje Appeal Brief, paras. 150, 154, 387, 414. Ndayambaje argues that the evidence showed that the decision to flee was taken in a hurry in light of the emergency and that it was never established that his mother lived under his roof or was under his care or that he allegedly abandoned or neglected his mother. *See ibid*., para. 414. *See also* Ndayambaje Reply Brief, paras. 164, 165.
[6593] Ndayambaje Appeal Brief, para. 417, *referring to* Trial Judgement, para. 1223.
[6594] Prosecution Response Brief, paras. 2281-2283.
[6595] Trial Judgement, paras. 1203, 1401.
[6596] Trial Judgement, para. 1200.
[6597] Trial Judgement, para. 1200.
[6598] *Cf. Musema* Appeal Judgement, para. 50 ("It is correct to state that the sole fact that evidence is proffered by the accused is no reason to find that it is, *ipso facto*, less reliable. Nevertheless, the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document. Where such a document is tendered by an accused, a Trial Chamber may determine, for example, if the accused had the opportunity to concoct the evidence presented and whether or not he or she had cause to do so. This is part of the Trial Chamber's duty to assess the evidence before it.").
[6599] The Trial Chamber observed that Ndayambaje and Witness Tiziano testified that Ndayambaje went to Witness Tiziano's home around 6.00 a.m., departed to see Witness RV, and returned to Ndayambaje's home around 9.00 a.m. *See* Trial Judgement, para. 1200. While Witness RV confirmed that Ndayambaje and Witness Tiziano came to see him around 6.00 a.m., he testified to going to Ndayambaje's home at 7.30 a.m. and informing Ndayambaje and Witness Tiziano that he was going to Butare, which the Trial Chamber found contradicted the evidence of Ndayambaje and Witness Tiziano that they waited in vain for Witness RV outside Ndayambaje's residence at 9.00 a.m. in order to

Ndayambaje correctly notes that the Trial Chamber reached contradictory conclusions as to whether his evidence and that of Witness Tiziano was inconsistent, he fails to demonstrate how the error occasioned a miscarriage of justice.[6600]

2893. With respect to Ndayambaje's submission that the Trial Chamber erred in emphasising that he did not evacuate his mother from the Mugombwa health centre with the rest of his family when they left for the Muganza commune office on 20 April 1994, the Appeals Chamber considers that, in determining whether his alibi was reasonably possibly true, it was within the Trial Chamber's discretion to consider and assess his claim that he fled with his family to seek refuge in the commune office on 20 April 1994, yet failed to bring his mother with them despite her proximity to Ndayambaje's home. While Ndayambaje contends that no evidence demonstrated that the situation was sufficiently alarming when he evacuated his family to the commune office or that he was responsible for and consequently abandoned his mother, he ignores the Trial Chamber's observation that three nuns in charge of the health centre fled Mugombwa parish in the afternoon of 20 April 1994.[6601]

2894. Turning to Ndayambaje's contention regarding the assessment of his alibi for 21 April 1994, the Appeals Chamber observes that Ndayambaje points to no evidence demonstrating that the Trial Chamber incorrectly described the Muganza commune office as a "relatively large geographical space" or stated that there were a "large number of people present" on that day.[6602] As discussed in

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go to Kabuga to address the population. *See idem*. Consequently, the Appeals Chamber finds that a reasonable trier of fact could have found that Witness RV's evidence was materially inconsistent with the evidence of Ndayambaje and Witness Tiziano.

[6600] The Trial Chamber recalled that Witness Tiziano testified that Ndayambaje came to see him around 6.00 a.m. on 20 April 1994, that they went to see Witness RV, that they left the commune office together, that the witness dropped Ndayambaje near his home at an unspecified time before 9.00 a.m., and that the witness later saw Ndayambaje again at the latter's home around 9.00 a.m. *See* Trial Judgement, para. 1200. The Trial Chamber noted this evidence was "consistent with Ndayambaje's account of his movements on the morning of 20 April 1994" and that Witness RV confirmed that Ndayambaje and Witness Tiziano did come to see him at 6.00 a.m. *See idem.* However, the Trial Chamber later concluded that Witness Tiziano's "testimony contradicts that of Ndayambaje and Witness RV regarding Ndayambaje's movements on 20 April 1994." *See ibid*., para. 1202. To support its conclusion, the Trial Chamber highlighted Witness Tiziano's evidence that "he went to Ndayambaje's house at about 9.30 a.m. and left shortly afterwards to return to the parish", that this "was the last time that he saw Ndayambaje", and that he "further testified that when he drove to the Muganza *commune* office at around 11.30 a.m. to report the situation to the authorities, he was alone." *See idem.* The Trial Chamber found that this evidence "contradicts Ndayambaje's testimony that he went to [Witness] Tiziano's house at 6.00 a.m. and that they went to the Muganza *commune* office together to warn the authorities of the insecurity in the area" and that "Ndayambaje's testimony is in concordance with that of Witness RV who testified that he was woken at 6.00 a.m. by Ndayambaje and Father Tiziano warning him of insecurity in the area." *See idem*. The Appeals Chamber finds that the Trial Chamber's analysis is contradictory in this regard. *See also* Prosecution Response Brief, para. 2241. However, the error has no impact on the Trial Chamber's conclusion that the evidence of Ndayambaje and Witness Tiziano on Ndayambaje's presence at his home at around 9.00 a.m. is not credible, as their evidence that they returned to Ndayambaje's home only around 9.00 a.m. remains inconsistent with Witness RV's evidence that he saw them there around 7.30 a.m. *See* Trial Judgement, paras. 1200, 1202.

[6601] Trial Judgement, para. 1212.

[6602] *See* Trial Judgement, para. 1223. The Appeals Chamber observes that the Trial Chamber relied, in part, on a sketch provided by Ndayambaje when stating that the Muganza commune office comprises a number of buildings. *See* Trial Judgement, para. 1220, *referring to* Exhibit D694 (Sketch Map, by Ndayambaje).

detail below in Section IX.D of this Judgement, Ndayambaje also fails to demonstrate any error in the Trial Chamber's decision not to conduct a site visit.[6603] The Appeals Chamber considers that it was within the Trial Chamber's discretion to consider that the relatively large area of the Muganza commune office, coupled with the large number of people present on 21 April 1994, supported the conclusion that Witnesses KEPIR, GABON, and MARVA were not in a position to state that Ndayambaje never left the commune office on 21 April 1994.[6604]

2895. Accordingly, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of his evidence regarding his whereabouts on 20 and 21 April 1994.

(ii) Witness Tiziano

2896. The Trial Chamber found that Witness Tiziano's testimony that he had asked those seeking refuge in Mugombwa Church to leave because it was not safe and, on cross-examination, that he asked them to lay down their weapons because he did not think the refugees would be attacked in the church was contradictory.[6605] The Trial Chamber also stated that "Witnesses QAR and FAU gave first-hand testimony that Father Tiziano attempted to, or succeeded in locking the doors to the church in the morning of 20 April 1994 before leaving the site."[6606] On this basis, it later concluded that, "[c]onsidering the testimon[ies] of Witnesses QAR and FAU placing Father Tiziano at the massacre site and Father Tiziano's incentive to minimise his role, in addition to his testimony that he did not request help for those seeking refuge in the church", Witness Tiziano's testimony was "not credible as to the sequence of events in the morning of 20 April 1994."[6607]

2897. Ndayambaje submits that the Trial Chamber assessed Witness Tiziano's evidence out of context and erred in finding that: (i) his evidence was contradictory; (ii) he did not want to seek help for the refugees in Mugombwa Church; and (iii) he had an incentive to minimise his role in the events.[6608] In particular, Ndayambaje contends that the Trial Chamber erred in relying on the evidence of Prosecution Witnesses QAR and FAU that Witness Tiziano locked refugees inside the church to discredit Witness Tiziano, as it had not yet assessed Witnesses QAR's and FAU's

[6603] *See infra*, para. 2941.
[6604] Ndayambaje argues that Witness RV partially corroborates his alibi that he never left the Muganza commune office on 21 April 1994. *See* Ndayambaje Appeal Brief, fn. 632. However, Ndayambaje also observes that Witness RV testified about going to Mugombwa Church with Ndayambaje that same afternoon. *See ibid*., para. 418. Ndayambaje fails to demonstrate how the Trial Chamber erred in disbelieving his evidence that he never left the commune office on 21 April 1994.
[6605] Trial Judgement, para. 1204.
[6606] Trial Judgement, para. 1204.
[6607] Trial Judgement, para. 1205.

testimonies which were contradictory and lacked credibility.[6609] He submits that Witness FAU's evidence is hearsay and reflects that he only arrived at the church on 22 April 1994, and therefore could not corroborate Witness QAR's evidence of this event, which she testified happened on 20 April 1994.[6610]

2898. The Prosecution responds that the Trial Chamber correctly found that Witness Tiziano's testimony was contradictory and that he had an incentive to minimise his role in the events.[6611] It argues that Ndayambaje's contentions that the Trial Chamber erred in discussing Witnesses QAR's and FAU's evidence after assessing Witness Tiziano's evidence and that the evidence of Witnesses QAR and FAU was contradictory or lacked credibility are without merit.[6612] The Prosecution further points to evidence that Witness Tiziano could have sought help from authorities at the Muganza commune office yet instead returned with a person implicated in the attack on Mugombwa Church.[6613]

2899. The Appeals Chamber finds that Ndayambaje fails to substantiate his contention that the Trial Chamber assessed Witness Tiziano's evidence out of context and erred in finding it contradictory. While Ndayambaje argues that the Trial Chamber erred in finding that Witness Tiziano's testimony reflected that "he did not request help for those seeking refuge in the church",[6614] he fails to appreciate that the Trial Chamber's statement was based on the witness's own acknowledgement that he did not ask the assistant *bourgmestre* for Muganza Commune whom he had brought to Mugombwa Church to "help in ensuring the security of those seeking refuge in the church."[6615] Ndayambaje also overlooks evidence in the record that the assistant *bourgmestre* whom Witness Tiziano transported to the church was armed with a machete and was viewed as a killer.[6616] Ndayambaje's citations to evidence, primarily from Witness Tiziano, that Witness Tiziano sought help for the refugees fail to demonstrate that the Trial Chamber erred in its assessment of this witness's evidence.[6617]

[6608] Ndayambaje Appeal Brief, para. 388, *referring to* Trial Judgement, paras. 1204-1206. *See also* Ndayamabaje Reply Brief, para. 146 (arguing that Witness Tiziano's evidence that he went to Muganza commune office to get help was partially corroborated by Witnesses FAU, RT, RV, BOZAN, GABON, and Ndayambaje); AT. 21 April 2015 p. 23.
[6609] Ndayambaje Appeal Brief, paras. 152, 202, 388-391. In particular, Ndayambaje argues that the Trial Chamber ignored evidence that only one of the several doors at the church could be locked from the outside and that refugees left the church after Witness Tiziano left, undermining the conclusion that Witness Tiziano locked refugees in the church. *See ibid.*, paras. 390-395. *See also* Ndayambaje Reply Brief, para. 53; AT. 21 April 2015 pp. 23-25, 65.
[6610] Ndayambaje Appeal Brief, paras. 350-355.
[6611] Prosecution Response Brief, paras. 2072, 2240, 2242, 2243. *See also* AT. 21 April 2015 p. 52.
[6612] Prosecution Response Brief, paras. 2072, 2245-2248.
[6613] Prosecution Response Brief, para. 2243. *See also ibid*., para. 2244.
[6614] Trial Judgement, para. 1205.
[6615] Trial Judgement, para. 1204.
[6616] *See* Witness BOZAN, T. 17 September 2008 pp. 30, 34 (closed session).
[6617] *See* Ndayambaje Appeal Brief, para. 388; Ndayambaje Reply Brief, para. 146.

2900. Turning to Ndayambaje's argument that the Trial Chamber erred in relying on the "unassessed" testimonies of Witnesses QAR and FAU to find that Witness Tiziano locked persons seeking refuge in Mugombwa Church, the Appeals Chamber, having reviewed the evidence cited by the Trial Chamber, finds no error in the Trial Chamber's statements or assessment of this evidence, which reasonably shows that Witness Tiziano sought to keep refugees locked in the church.[6618] Ndayambaje does not demonstrate that Witness FAU's evidence reflects that Witness Tiziano sought to lock the church on 22 April 1994 rather than 20 April 1994 or that it was hearsay rather than direct evidence.[6619] Furthermore, to the extent that the Trial Chamber's subsequent statement that Witnesses QAR and FAU gave "convincing eyewitness testimony […] that Father Tiziano *locked* those seeking refuge inside the church"[6620] is inconsistent with their evidence that he *attempted* to lock the door or other evidence that locking the door would not lock the entire church, the Appeals Chamber considers that any factual inaccuracy would not have occasioned a miscarriage of justice in the present context. Indeed, the Appeals Chamber considers that, whether or not Witness Tiziano actually locked those seeking refuge inside the church, a reasonable trier of fact could have considered that he was implicated in the attack and that, consequently, he had an incentive to minimise his role in it.[6621]

2901. Furthermore, the Appeals Chamber considers that the fact that the Trial Chamber discussed the evidence of Witnesses QAR and FAU after discussing that of Witness Tiziano in the Trial Judgement cannot reasonably be interpreted as an indication that the Trial Chamber had not assessed their evidence prior to referring to it when assessing Witness Tiziano's testimony. Read as a whole, the Trial Judgement clearly reflects that the Trial Chamber expressly considered the reliability of Witnesses QAR's and FAU's evidence based on other evidence in the record and assessed their testimonies in light of several credibility challenges.[6622]

2902. In light of the above, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the assessment of Witness Tiziano's alibi evidence that would warrant the intervention of the Appeals Chamber.

[6618] *See* Witness QAR, T. 21 November 2001 pp. 12-14; Witness FAU, T. 10 March 2004 pp. 4, 6, 7, 11.
[6619] *See* Witness FAU, T. 10 March 2004 pp. 4, 6, 7, 11, 20.
[6620] Trial Judgement, para. 1206 (emphasis added).
[6621] Ndayambaje argues that the Trial Chamber engaged in speculation and relied on facts not publicly mentioned during the hearings in order to discredit Witness Tiziano. *See* Ndayambaje Appeal Brief, paras. 220-224. However, because Ndayambaje fails to substantiate this claim with references to specific findings, the Appeals Chamber dismisses it without further consideration.
[6622] *See* Trial Judgement, paras. 1228-1235, 1237-1244, 1439-1443.

(iii) Witness Stan

2903. The Trial Chamber found that Witness Stan's evidence concerning Ndayambaje's alibi was not credible based on: (i) his testimony about his own conduct during the events and his descriptions of the prevailing situation; (ii) inconsistencies between his evidence and prior statements; (iii) his close friendship with Ndayambaje and because he was a "close associate" of Burundian refugees implicated in massacres at Mugombwa Church and Kabuye Hill.[6623]

2904. Ndayambaje contends that the Trial Chamber erred in discrediting Witness Stan's evidence on the basis of having "insinuated" that he was an accomplice witness.[6624] He further argues that the Trial Chamber erred in discrediting Witness Stan as a result of an unsupported finding that he had authority over Burundian refugees responsible for attacking Mugombwa Church and Kabuye Hill[6625] and in finding that the witness failed to inform the authorities of the prevailing insecurity, which was contradicted by his evidence.[6626] According to Ndayambaje, the Trial Chamber further erred in using insignificant contradictions between the witness's prior statements and testimony to discredit him, although it found similar contradictions in Prosecution evidence minor or immaterial.[6627] He emphasises that the witness, a friar, had devoted his life to the care of refugees and that the Trial Chamber's credibility findings are inconsistent with the fact that he was later rewarded for his service to humanity.[6628]

2905. The Prosecution generally responds that the Trial Chamber did not err in assessing contradictions in Ndayambaje Defence evidence and that Ndayambaje has not shown how inconsistencies within Witness Stan's testimony were so similar to those in the Prosecution witnesses' evidence that they should have been treated alike.[6629] It further submits that the Trial Chamber was correct in treating Witness Stan's evidence with caution.[6630]

[6623] Trial Judgement, paras. 1213-1217, 1390-1394.
[6624] Ndayambaje Appeal Brief, paras. 154, 169, 405, 408, 412, *referring to* Trial Judgement, paras. 1213, 1391, 1392. *See also* AT. 21 April 2015 p. 26.
[6625] Ndayambaje Appeal Brief, paras. 405, 407, 412. Ndayambaje argues that the evidence established that Witness Stan's duty was to teach about 1,000 youths in the Saga Camp and that he was not responsible for the camp and had no authority over the 60,000 Burundian refugees. *See ibid.*, para. 407, *referring to* Witness Stan, T. 18 September 2008 pp. 25, 26, T. 22 September 2008 pp. 8, 9, T. 23 September 2008 p. 19. *See also* Ndayambaje Reply Brief, paras. 142, 160.
[6626] Ndayambaje Appeal Brief, paras. 405, 409.
[6627] Ndayambaje Appeal Brief, paras. 155, 170, 405, 410, *referring to* Trial Judgement, paras. 1216, 1238-1241, 1393, 1408, 1436, 4592, 4710, 4711. *See also* AT. 21 April 2015 p. 70.
[6628] Ndayambaje Appeal Brief, paras. 405, 411.
[6629] Prosecution Response Brief, paras. 2071, 2078. *Cf.* AT. 21 April 2015 pp. 43, 44.
[6630] Prosecution Response Brief, paras. 2274-2277.

2906. The Appeals Chamber finds that the Trial Chamber did not "insinuate" that Witness Stan was an accomplice,[6631] nor did it err in its assessment of the witness' alibi evidence.

2907. The Trial Chamber did not suggest that it viewed Witness Stan as an accomplice, but stated that it had doubts about Witness Stan's credibility, noting that he had testified that attacks against Tutsis had started by 18 April 1994, yet two days later he left two Tutsis, Mr. Fidèle and his pregnant wife, at a roadblock manned by armed soldiers.[6632] The Trial Chamber also noted that Witness Stan did not attempt to find out what happened to these Tutsis but believed that they may have been killed.[6633] Ndayambaje does not show that the Trial Chamber erred in considering Witness Stan's conduct in the midst of the genocide when assessing the witness's credibility. Moreover, Ndayambaje's contention that Witness Stan did apprise himself of what happened to the two Tutsis he had left at the roadblock is not supported by the witness's testimony, which merely reflects that, when he returned to the roadblock, he was informed that they had gone to the hospital.[6634] Ndayambaje demonstrates no error in the Trial Chamber's statement that Witness Stan "did not attempt to find out what happened to them but […] believed they may have been killed", as nothing in the witness's evidence suggests otherwise.[6635]

2908. Furthermore, the Trial Chamber stated that it found weak Witness Stan's testimony that he could not have disarmed the Burundian refugees from the Saga Camp even though he knew that they had participated in killings on or around 20 April 1994, and that machetes were necessary to the work of the refugees.[6636] The Trial Chamber noted that Witness Stan was not just a "simple priest", but worked in education in the camp and "therefore exercised a degree of authority over the refugees".[6637] It further noted that the Burundian refugees were not working in the fields at the time, casting doubt on Witness Stan's statement that the machetes were for the refugees' work.[6638] In the view of the Appeals Chamber, nothing in these statements suggests that the Trial Chamber treated Witness Stan as an accomplice. Moreover, in support of his contention that the Trial Chamber baselessly attributed to Witness Stan duties which were not his, Ndayambaje simply points to other evidence offered by the witness without demonstrating that the Trial Chamber erred in its reflection

[6631] *See Niyitegeka* Appeal Judgement, para. 98 ("The ordinary meaning of the term 'accomplice' is 'an associate in guilt, a partner in crime.'") (internal reference omitted). *See also Karemera and Ngirumpatse* Appeal Judgement, para. 42; *Munyakazi* Appeal Judgement, para. 93; *Ntagerura et al.* Appeal Judgement, para. 203.
[6632] Trial Judgement, para. 1213.
[6633] Trial Judgement, para. 1213. The Trial Chamber conducted the same analysis when reviewing Witness Stan's evidence later in the Trial Judgement. *See ibid.*, para. 1390.
[6634] Ndayambaje Appeal Brief, para. 408; Witness Stan, T. 23 September 2008 p. 4.
[6635] Trial Judgement, para. 1213, *referring to* Witness Stan, T. 23 September 2008 p. 4, T. 24 September 2008 p. 40.
[6636] Trial Judgement, para. 1391. *See ibid.*, para. 1214.
[6637] Trial Judgement, para. 1391. *See ibid.*, para. 1214.
[6638] Trial Judgement, para. 1391. *See ibid.*, para. 1214.

or analysis of the witness's testimony in this regard, or in expressing doubts about why he chose not to try to disarm the Burundian refugees.[6639]

2909. In addition, the Trial Chamber expressed doubts about Witness Stan's evidence that he did not inform the prefectoral authorities that the Burundian refugees involved in the killings were armed with traditional weapons because he "had never heard of any measure by a *bourgmestre* to take away a person's tools".[6640] The Trial Chamber also stated that Witness Stan, while he had the ability to move freely in Butare prior to 25 April 1994, "made no attempt to notify the authorities of the unrest" until the Kibayi commune office secretary requested that Witness Stan accompany him on a visit to the authorities.[6641] Again, the Appeals Chamber considers that these statements cannot reasonably be construed as "insinuations" that Witness Stan was an accomplice. Furthermore, while Ndayambaje contends that, contrary to the Trial Chamber's finding, Witness Stan's trip of 20 April 1994 to Butare with the Kibayi commune office secretary demonstrates that he sought to inform authorities of the insecurity situation,[6642] the Appeals Chamber finds that he simply disagrees with the Trial Chamber's interpretation of the evidence without demonstrating that the Trial Chamber inaccurately recalled it[6643] or abused its discretion when considering it.[6644]

2910. The Appeals Chamber further finds that Ndayambaje presents no arguments as to how the Trial Chamber erred in identifying or assessing inconsistencies between Witness Stan's testimony and prior statements and fails to substantiate how the Trial Chamber's approach was unreasonable

[6639] Ndayambaje Appeal Brief, para. 407. Ndayambaje argues that the Trial Chamber found Witness Stan not credible because of his association with Burundians responsible for the massacres at Mugombwa Church and Kabuye Hill. *See ibid*., para. 405. However, because Ndayambaje fails to develop this argument, that the Appeals Chamber dismisses it without further consideration.
[6640] Trial Judgement, para. 1392.
[6641] Trial Judgement, para. 1392. *See also ibid.*, para. 1215.
[6642] Ndayambaje Appeal Brief, para. 409, *referring to* Witness Stan, T. 18 September 2008 pp. 37-40, T. 23 September 2008 pp. 19, 20.
[6643] *See*, *in particular*, Witness Stan, T. 18 September 2008 p. 37 ("Q. And can you tell us whether the secretary of the Kibayi *communal* office […] did he give you any reasons for stopping your vehicle? A. He told me that at the *communal* office there was disorder, that there had been attacks, and he asked me to accompany him to go and inform the *bourgmestre* of Kibayi. Q. And did you know at that time where the *bourgmestre* of Kibayi *commune* was? A. No, I did not know. It was the secretary of Kibayi who told me that the *bourgmestre* had gone to Butare. Q. In the light of this information and facing this request from the *communal* secretary, what did you decide to do? A. […] I dropped the supplies in a store below the road. I turned, and together we went back to Butare to inform the *bourgmestre* of Kibayi on the disorder at the *communal* office."), T. 23 September 2008 p. 60 ("Q. Now, just to round up on these series of questions, Mr. Witness, did you make any attempt to see the *préfet* of Butare with regard to disarming Burundian refugees, those who were armed with machetes or what you term were just tools for their usage? A. The Burundian refugees were not armed. They had agricultural instruments. And I did not inform. I would not have known how to go about informing the *préfectural* authorities.").
[6644] Ndayambaje appears to argue that the Trial Chamber also erred in its analysis in paragraph 1215 of the Trial Judgement in concluding, similarly with paragraph 1392 of the Trial Judgement, that Witness Stan failed to notify the authorities. *See* Ndayambaje Appeal Brief, para. 405. Paragraph 1215 of the Trial Judgement generally tracks the analysis in paragraph 1392 of the Trial Judgement. For the reasons detailed above, the Appeals Chamber dismisses Ndayambaje's contention.

in light of its analysis of the Prosecution evidence in the other paragraphs of the Trial Judgement to which he points.[6645]

2911. Finally, Ndayambaje's arguments concerning Witness Stan's position as a friar and the fact that he was later rewarded for his service to humanity fail to demonstrate how the Trial Chamber erred in its assessment of the evidence that formed part of the trial record.

2912. For these reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness Stan's alibi evidence.

(iv) Witness MARVA

2913. In assessing Witness MARVA's alibi evidence, the Trial Chamber observed that the witness, an employee of Ndayambaje living in his house at the time of the events,[6646] did not specify when she saw Ndayambaje on the morning of 20 April 1994.[6647] It further found that her testimony that Ndayambaje remained with her in the same room in the "IGA building" until 23 April 1994 was contradicted by other evidence and was not credible.[6648]

2914. Ndayambaje submits that the Trial Chamber erred in concluding that Witness MARVA did not testify about the time she saw Ndayambaje on the morning of 20 April 1994.[6649] In addition, he argues that the Trial Chamber's finding that Witness MARVA's testimony that Ndayambaje remained in the IGA building of the Muganza commune office until 23 April 1994 was contradicted by the evidence of Witnesses GABON and KEPIR as well as Ndayambaje was based on a misunderstanding of the various locations in the Muganza commune office and Witness MARVA's evidence.[6650] In support of this contention, Ndayambaje argues that a site visit, complemented by Exhibits P38, D553, D554, and D694, would have demonstrated how small the location was and how there was no contradiction in their evidence.[6651] Moreover, Ndayambaje contends that Witness MARVA's testimony that she remained in the same room with Ndayambaje only concerned 21 April 1994.[6652]

2915. The Prosecution responds that the Trial Chamber was entitled to find that Witness MARVA's evidence did not raise a reasonable doubt in the Prosecution case as she could

[6645] *See* Trial Judgement, paras. 1238-1241, 1408, 1436, 4710, 4711.
[6646] Trial Judgement, paras. 1199, 1389.
[6647] Trial Judgement, paras. 1201, 1207, 1400, 1402. *See also ibid*., paras. 1209, 1403.
[6648] Trial Judgement, paras. 1201, 1221-1223, 1416, 1417.
[6649] Ndayambaje Appeal Brief, para. 201, fn. 217, *referring to* Trial Judgement, paras. 1201, 1207.
[6650] Ndayambaje Appeal Brief, paras. 201, 401, *referring to* Trial Judgement, para. 1201. *See also* AT. 21 April 2015 pp. 25, 26.
[6651] Ndayambaje Appeal Brief, para. 401. *See also* Ndayambaje Reply Brief, para. 153.
[6652] Ndayambaje Appeal Brief, para. 201, fn. 217.

not account for Ndayambaje's whereabouts for a substantial part of the morning of 20 April 1994 and her testimony as to Ndayambaje's whereabouts was contradicted by other Defence witnesses.[6653] It further contends that the evidence and a site visit would not demonstrate that Ndayambaje could be inside the IGA building, as testified to by Witness MARVA, and outside it at the same time, as testified to by Witnesses KEPIR and GABON.[6654]

2916. Having reviewed the testimony referred to by Ndayambaje, the Appeals Chamber finds that a reasonable trier of fact could have considered that Witness MARVA did not specify the time when she saw Ndayambaje on the morning 20 April 1994.[6655]

2917. The Appeals Chamber further finds that Ndayambaje's argument that a site visit, complemented by Exhibits P38, D553, D554, and D694, would have prevented the Trial Chamber from discrediting Witness MARVA's evidence is speculative and does not demonstrate any error in the Trial Chamber's analysis of this evidence.[6656] Moreover, while Ndayambaje argues that Witness MARVA only testified that Ndayambaje remained in a room in the IGA building on 21 April 1994, a review of the relevant evidence cited by the Trial Chamber[6657] does not demonstrate any error in the Trial Chamber's interpretation of Witness MARVA's evidence that Ndayambaje remained in the room until Saturday 23 April 1994[6658] or its conclusion that this

[6653] Prosecution Response Brief, para. 2254, *referring to* Trial Judgement, paras. 1201, 1209.
[6654] Prosecution Response Brief, para. 2257. *See also* AT. 21 April 2015 p. 52.
[6655] Ndayambaje Appeal Brief, para. 201, fn. 217, *referring to* Witness MARVA, T. 1 July 2008 pp. 19, 20 (closed session); Trial Judgement, paras. 1201 ("Witness MARVA testified that she was with Ndayambaje on the morning of 20 April 1994 at his home although she does not specify when she saw him for the first time that day.") (internal reference omitted), 1402 (noting that Witness MARVA "said she saw Ndayambaje at an unspecified time in the morning of 20 April 1994 when he hid Chanvrier in the guest room" and that she "could not specify at what time Ndayambaje left his home or the time when he was reunited with his family and the witness at Witness KEPIR's residence.") (internal reference omitted). Notably, Witness MARVA's testimony reflects the approximate time when Chanvrier arrived at Ndayambaje's home and that Ndayambaje hid this individual in a guest room, without specifying when exactly Ndayambaje did this. *See* Witness MARVA, T. 1 July 2008 p. 20 (closed session) ("Q. In any case, witness, are you in a position to tell us at about what time Chanvrier arrived at Ndayambaje's residence? A. I would be hard put to tell the time because this happened a long time ago, but I think the time was about 8:00 or 8:30 a.m. if my memory is not failing me, of course. […] Q. And when Chanvrier showed up at Ndayambaje's residence, what was done to him? A. He was put in the guest room and he was locked up inside for him to hide. Q. Madam, who is it who put Chanvrier in the guest room in order to hide him? A. Élie Ndayambaje is the one who put him in that room and he locked up the room in order to prevent people from noticing that he was there?").
[6656] *See* Trial Judgement, para. 1201. With respect to the question of the site visits, *see also supra*, para. 2894; *infra*, Section IX.D.
[6657] *See* Trial Judgement, para. 1201, *referring to* Witness MARVA, T. 1 July 2008 pp. 24-27 (closed session), T. 2 July 2008 pp. 16, 17 (closed session).
[6658] *See*, *in particular*, Witness MARVA, T. 1 July 2008 pp. 25, 26 (closed session) ("Q. And on that day when you reached the IGA building in the company of all those individuals you have just mentioned, Madam Witness, what day of the week was it? A. It was a Wednesday. Q. Where did you spend the rest of that Wednesday, Madam Witness? A. We stayed in the building, the IGA building. Q. And in the evening and during the following night, […] where did you then go? A. We spent the night in the very same place. Q. And during that day, and during the evening and the night thereafter, was Mr. Élie Ndayambaje in your company at that place? A. Yes, Mr. Ndayambaje spent the night in the same room as us […]. Q. Madam Witness, on the next day, that is to say, the Thursday, where did you spend the day? A. We spent the entire day in the very same room. Q. And on that Thursday, where was Mr. Ndayambaje? A. Mr. Élie Ndayambaje spent the day in that very same room. Q. And up to what point in time did you remain at the *communal* office, Madam Witness, in the IGA building, that is? A. We stayed there until Saturday."), T. 2 July 2008

evidence contradicted the evidence of Witnesses KEPIR and GABON as well as Ndayambaje's testimony that he did not remain in that room during this entire period.[6659]

2918. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness MARVA's alibi evidence.

(v) Witness GABON

2919. The Trial Chamber found that the evidence of Witness GABON, a former employee of Ndayambaje,[6660] that he slept 27 minutes between 20 and 24 April 1994 "unrealistic" in this respect or not "plausible"[6661] and considered that his alibi evidence was not credible.[6662]

2920. Ndayambaje argues that the Trial Chamber erred in discrediting Witness GABON's testimony based on his evidence that he only slept for 27 minutes over the course of a four day period.[6663] In this regard, he submits that the French version of the transcript reflects that the witness stated he slept approximately 20 to 25 minutes, and not precisely 27 minutes, and that the Trial Chamber placed too much emphasis on the incorrect English translation and this secondary aspect of Witness GABON's testimony.[6664] Ndayambaje also contends that the Trial Chamber was in no position to find that Witness GABON would not have been able to see Ndayambaje at all times on 21 April 1994 as it did not conduct a site visit.[6665]

2921. The Prosecution responds that the Trial Chamber correctly assessed Witness GABON's evidence.[6666]

2922. Recalling the broad discretion trial chambers enjoy in assessing witness credibility, the Appeals Chamber finds that Ndayambaje does not demonstrate that it was unreasonable for the Trial Chamber to consider that the limited amount of time Witness GABON testified to sleeping from 20 to 24 April 1994 impacted the plausibility of his testimony, particularly when the point of

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p. 16 (closed session) ("Q. Witness, when you got to the IGA, I am suggesting to you that Élie Ndayambaje did not spend all night and all of the next day inside that enclosed room. What do you say to that suggestion? A. He spent the entire day in the IGA room. Q. So your evidence is he never went outside to get some fresh air, to use the bathroom facilities, to check on his vehicle, that he remained inside that room for 24 hours? Have I understood you? A. Upon our arrival at the *commune* office, he went to see Chrisologue in order to ask about the situation. *And when he returned to the room, he never went out again*.") (emphasis added).

[6659] *See* Trial Judgement, para. 1201.

[6660] Trial Judgement, paras. 1199 ("Witness GABON is a former policeman employed by Ndayambaje. […] Accordingly, their evidence must be reviewed bearing these personal ties in mind.") (internal reference omitted), 1389.

[6661] Trial Judgement, paras. 1220, 1389.

[6662] Trial Judgement, paras. 1220, 1223, 1417, 1446.

[6663] Ndayambaje Appeal Brief, paras. 156, 169, 402, *referring to* Trial Judgement, paras. 1220, 1389. *See also* AT. 21 April 2015 p. 25.

[6664] Ndayambaje Appeal Brief, para. 402, *referring to* Witness GABON, T. 3 September 2008 pp. 8, 9, 13-17 (closed session) (French).

[6665] Ndayambaje Appeal Brief, para. 156. *See also* Ndayambaje Reply Brief, para. 153.

the witness's evidence was to account for Ndayambaje's whereabouts during that specific period.[6667] While Ndayambaje highlights variances between the English and French transcripts as to the precise amount of time Witness GABON slept and argues that the Trial Chamber erred in relying on the incorrect English version, he does not demonstrate that the identified variance is material to the Trial Chamber's analysis.[6668] Finally, Ndayambaje fails to demonstrate how the absence of a site visit rendered the Trial Chamber's assessment of Witness GABON's evidence unreasonable.[6669]

2923. Based on the above, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness GABON's alibi evidence.

(vi) Witness KEPIR

2924. In relevant parts of the Trial Judgement, the Trial Chamber found that the fact that Witness KEPIR, a friend of Ndayambaje, was implicated in the massacres at Kabuye Hill by Prosecution Witnesses EV and FAU had a bearing on Witness KEPIR's credibility.[6670]

2925. Ndayambaje argues that the Trial Chamber erred in fact by relying on the evidence of Witnesses EV and FAU to conclude that Witness KEPIR was among the attackers at Kabuye Hill, and then discrediting his evidence on this basis.[6671] He argues that Witnesses EV's and FAU's identification of Witness KEPIR was merely based on the presence of a vehicle and points to evidence that contradicts Witness FAU's description of Witness KEPIR's vehicle to argue that it was unreasonable for the Trial Chamber to rely on Witness FAU's evidence in this regard.[6672]

2926. The Prosecution does not directly respond to these arguments.

2927. The Appeals Chamber observes that the Trial Chamber expressly stated that Witnesses EV and FAU provided "eyewitness accounts" that "implicated" Witness KEPIR in the massacres at

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[6666] Prosecution Response Brief, paras. 2258-2263. *See also ibid.*, para. 2078.
[6667] *See* Trial Judgement, paras. 1220, 1389.
[6668] *Compare* Witness GABON, T. 3 September 2008 p. 17 (closed session) ("Q. So, Witness, from Wednesday, Thursday, Friday, and the day of Saturday, you only slept for a total of 27 minutes. […] A. That is correct. Over those three days, I only slept for 27 minutes.") *with ibid.*, p. 20 (closed session) (French) ("*Q. Monsieur le Témoin, mercredi, jeudi, vendredi et toute la journée de samedi, pendant tout ce temps, vous n'avez dormi au total que 25 minutes ; c'est bien cela ?* […] *R. C'est exact. Au cours de ces trois journées, je n'ai dormi que pendant ces 25 minutes.*").
[6669] The Appeals Chamber recalls that it has found that Ndayambaje has failed to demonstrate that the Trial Chamber erred by not conducting site visits. *See infra*, Section IX.D.
[6670] Trial Judgement, paras. 1199, 1389. *See also ibid.*, para. 1446.
[6671] Ndayambaje Appeal Brief, paras. 202, 396-398. Ndayambaje notes that Witness KEPIR denied being present at Kabuye Hill. *See ibid.*, para. 396, *referring to* Witness KEPIR, T. 10 September 2008 pp. 74, 75 (closed session), T. 15 September 2008 pp. 26, 27 (closed session).
[6672] Ndayambaje Appeal Brief, para. 397, *referring to* Witness ANGES, T. 20 August 2008 pp. 41, 42 (closed session), Witness GABON, T. 1 September 2008 pp. 20, 21 (closed session), Witness KEPIR, T. 4 September 2008 p. 22 (closed session), Ndayambaje, T. 22 October 2008 pp. 35, 36.

Kabuye Hill and concluded that this had "a bearing on Witness KEPIR's credibility".[6673] The Appeals Chamber notes, however, that Witness FAU did not identify Witness KEPIR at Kabuye Hill and that Witness EV's testimony is too equivocal to be reasonably relied upon as an "eyewitness" account of Witness KEPIR's presence at Kabuye Hill.[6674] Accordingly, the Appeals Chamber finds that no reasonable trier of fact could have found that "eyewitness accounts" "implicated" Witness KEPIR in attacks on Kabuye Hill based on Witnesses FAU's and EV's evidence.[6675]

2928. However, the Appeals Chamber finds that this error does not affect the Trial Chamber's conclusion that Witness KEPIR's alibi evidence was not credible or did not raise reasonable doubt in the Prosecution case regarding Ndayambaje's whereabouts from 20 to 24 April 1994.[6676] The Trial Chamber noted that Witness KEPIR was a friend of Ndayambaje and had previously reported to him on professional matters;[6677] circumstances which Ndayambaje does not dispute. The Appeals Chamber has found that the Trial Chamber did not err in weighing this type of evidence when assessing the credibility of witnesses.[6678] Furthermore, the Trial Chamber correctly recalled Witness FAU's evidence that Ndayambaje used Witness KEPIR's vehicle to pick up weapons for use at Kabuye Hill.[6679] While Ndayambaje points to evidence that Witness KEPIR's vehicle was a colour other than that described by Witness FAU,[6680] the Appeals Chamber is not persuaded that a reasonable trier of fact could not have considered Witness FAU's evidence that Witness KEPIR's car was used in the process of obtaining weapons to be used in an attack when assessing Witness KEPIR's credibility. More importantly, Ndayambaje fails to explain how the Trial Chamber erred when concluding that it did not find credible Witness KEPIR's evidence that

[6673] Trial Judgement, para. 1199, fn. 2555, *referring to* Witness EV, T. 25 February 2004 pp. 74, 75, T. 26 February 2004 pp. 60, 61, Witness FAU, T. 4 March 2004 pp. 71, 72, 78, T. 9 March 2004 pp. 46, 47.
[6674] *See* Witness EV, T. 25 February 2004 p. 75, T. 26 February 2004 p. 61. *See also* Exhibit D676 (Witness KEPIR's Personal Identification Sheet).
[6675] Ndayambaje argues the Trial Chamber engaged in speculation in order to discredit Witness KEPIR. *See* Ndayambaje Appeal Brief, paras. 220-224. Other than the conclusion based on Witness EV's evidence placing Witness KEPIR at Kabuye Hill, Ndayambaje fails to substantiate this claim with references and the Appeals Chamber dismisses this contention without further consideration.
[6676] Trial Judgement, paras. 1223, 1399, 1417, 1446.
[6677] *See* Trial Judgement, para. 1389.
[6678] *See supra*, Section IX.C.3(b).
[6679] *See* Trial Judgement, para. 1389, *referring to* Witness FAU, T. 4 March 2004 pp. 71, 72, T. 9 March 2004 pp. 42, 46, 47.
[6680] *Compare* Witness FAU, T. 4 March 2004 p. 71 *with* Witness ANGES, T. 20 August 2008 pp. 41 (closed session) *and* Witness GABON, T. 1 September 2008 p. 21 (closed session). Ndayambaje also refers to the testimony of Witness KEPIR. *See* Ndayambaje Appeal Brief, para. 397, *referring to* Witness KEPIR, T. 4 September 2008 p. 22 (closed session). However, a review of this evidence reflects that it is not relevant. Likewise, while Ndayambaje also refers to his own testimony at T. 22 October 2008 pp. 35, 36, the only vehicle described in this excerpt is Witness Tiziano's blue, single cabin Toyota Hilux.

he was with Ndayambaje at all times over the course of 21 April 1994 and concluded that he was not in a position to state that Ndayambaje never left the Muganza commune office on that day.[6681]

2929. The Appeals Chamber therefore concludes that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of Witness KEPIR's alibi evidence that would warrant the intervention of the Appeals Chamber.

4. Conclusion

2930. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in relation to his alibi and, accordingly, dismisses Ground 7 of Ndayambaje's appeal.

[6681] Trial Judgement, para. 1223.

D. Denial of Site Visits (Ground 12)

2931. On 23 September 2004, the Trial Chamber denied a request for site visits made by the Prosecution on the ground that, if the visits were to be made, it was "desirable that they be made at the end of the presentation of the cases of both Parties" and invited the parties to make such a request at the end of the presentation of their cases.[6682] In June 2008, the Prosecution again moved the Trial Chamber to conduct site visits,[6683] to which Ndayambaje responded that the request was premature.[6684] On 26 February 2009, the Trial Chamber dismissed the Prosecution's request for site visits in Rwanda, concluding that the visits were no longer necessary since: (i) a considerable number of exhibits, including photographs and maps, had already been tendered to assist the Trial Chamber's familiarisation with the relevant locations; (ii) visiting the sites, which unlikely remained in the same condition 14 years after the events in question, may not provide much assistance in the discovery of the truth and fair determination of the relevant issues; and (iii) the sites proposed were too numerous, may have had "extraordinary logistical and cost implications for the Tribunal", and the visits may not have been "completed in a short period of time."[6685]

2932. In his closing arguments, Ndayambaje claimed that the Trial Chamber's refusal to authorise site visits, in particular to Kabuye Hill, led "to a great incomprehension of the sites and, therefore, have caused a great prejudice".[6686] In the Trial Judgement, the Trial Chamber noted that Ndayambaje did not describe the prejudice he allegedly suffered as a result of the Trial Chamber's refusal to conduct site visits or explain the purported "incomprehension" of the sites caused by it.[6687] The Trial Chamber recalled that it had considered a number of video and photo exhibits as well as sketches relating to Kabuye Hill and concluded that Ndayambaje's allegation of prejudice was not established and that there was no reason to reconsider the Site Visits Decision.[6688]

2933. On appeal, Ndayambaje submits that the reasons advanced by the Trial Chamber for its refusal to conduct the site visits constitute an error of law which led to errors of fact causing a miscarriage of justice.[6689] In particular, Ndayambaje argues that the Trial Chamber erred in:

[6682] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence, 23 September 2004 ("2004 Site Visits Decision"), paras. 14, 15, p. 5.
[6683] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence, 26 June 2008.
[6684] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse d'Elie Ndayambaje à* "Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence", 30 June 2008 ("Ndayambaje Site Visits Response of 2008"), paras. 5-7.
[6685] Site Visits Decision, para. 21, p. 7. *See also* Trial Judgement, para. 1262.
[6686] Ndayambaje Closing Arguments, T. 30 April 2009 p. 6.
[6687] Trial Judgement, para. 1263.
[6688] Trial Judgement, para. 1263.
[6689] Ndayambaje Notice of Appeal, para. 107, *referring to* Trial Judgement, para. 1262, *quoting* Site Visits Decision, para. 21; Ndayambaje Appeal Brief, paras. 270, 274, 275, 290.

(i) making findings regarding the state of the relevant sites due to the passage of time that were speculative and in disregarding the fact that many locations and geographic landmarks remained unchanged even after 14 years;[6690] (ii) concluding that the analysis of photographs, maps, and sketches alone was sufficient to enable the Trial Chamber to familiarise itself with the locations of the relevant sites;[6691] and (iii) "sacrific[ing]" trial fairness for logistical and financial considerations.[6692] Ndayambaje also contends that it was "incomprehensible and unacceptable"[6693] for the judges composing the Trial Chamber to refuse to conduct site visits in the present case when they conducted such visits in other cases at the Tribunal, even more than 14 years after the relevant events, acknowledging the importance of those visits to the assessment of the evidence.[6694]

2934. Ndayambaje further submits that visiting the sites was necessary to enable the Trial Chamber to acquire a better understanding of the evidence.[6695] In his view, because the Trial Chamber lacked knowledge of the relevant sites, it erred in its assessment of the evidence, which resulted in a number of erroneous findings concerning multiple sites and caused him prejudice.[6696] Ndayambaje requests that the Appeals Chamber disregard all the erroneous findings made by the Trial Chamber resulting from its lack of knowledge of the locations.[6697]

2935. The Prosecution responds that Ndayambaje's claim that he suffered prejudice as a result of the Trial Chamber's decision to deny its request for site visits is baseless and should be dismissed.[6698] The Prosecution argues that, during trial, Ndayambaje never asked for a site visit, opposed its request for site visits as premature, and only raised in his closing arguments a cursory and unsubstantiated complaint that the Trial Chamber did not visit Kabuye Hill.[6699] It submits that,

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[6690] Ndayambaje Appeal Brief, para. 283.
[6691] Ndayambaje Appeal Brief, para. 282. *See also* Ndayambaje Reply Brief, para. 109.
[6692] Ndayambaje Appeal Brief, para. 287. *See also ibid*., para. 288.
[6693] Ndayambaje Appeal Brief, para. 284.
[6694] Ndayambaje Appeal Brief, paras. 284, 285, *referring to* the *Hategekimana*, *Nzabonimana*, and *Ngirabatware* trials.
[6695] Ndayambaje Notice of Appeal, para. 102. *See also* Ndayambaje Appeal Brief, para. 278; Ndayambaje Reply Brief, para. 111.
[6696] Ndayambaje Notice of Appeal, paras. 103-106; Ndayambaje Appeal Brief, paras. 278-282, 289, 290. *See also* Ndayambaje Reply Brief, paras. 110, 112, 113; AT. 21 April 2015 pp. 72, 73. Ndayambaje refers in particular to: Mugombwa Church; Kabuye Hill; Muganza commune office; the distance between Muganza Commune and Gisagara; the distance between Gisagara and Ngiryi River; the distance between Muganza Commune and the *bourgmestre*'s residence in Kibayi Commune; the distance between Ndayambaje's residence in Mugombwa and the Muganza commune office; the Muganza-Gisagara-Butare road; and the Virgin Mary Statue. *See* Ndayambaje Notice of Appeal, para. 104; Ndayambaje Appeal Brief, para. 280. The Appeals Chamber notes that, under Ground 12 of his appeal, Ndayambaje broadly impugns the Trial Chamber's factual findings in relation to all of his convictions, without indicating the manner in which these findings were flawed, save for a specific example related to the descriptions of the layout and size of the Muganza commune office by Defence witnesses. *See* Ndayambaje Appeal Brief, para. 279, *referring to* Trial Judgement, para. 1223; Ndayambaje Reply Brief, para. 113. The Appeals Chamber notes, however, that in other parts of his appeal, Ndayambaje highlights specific findings of the Trial Chamber, which, he contends, were affected by the lack of site visits. *See*, *e.g*., Ndayambaje Appeal Brief, paras. 106, 156, 188, 314, 337, 401, 417, 427, 495, 500, 636.
[6697] Ndayambaje Notice of Appeal, para. 108; Ndayambaje Appeal Brief, para. 290.
[6698] Prosecution Response Brief, paras. 2164, 2168.
[6699] Prosecution Response Brief, paras. 2164, 2165. *See also* AT. 21 April 2015 p. 36.

on appeal, Ndayambaje does not explain his failure to seek admission of additional visual aids to further clarify matters of geography and fails to support his allegations of errors of fact by any explanations or evidence.[6700]

2936. Ndayambaje replies that he never opposed a site visit but instead argued that the Prosecution's request of 2008 was premature at the time as he had not yet presented his defence.[6701] At the appeals hearing, Ndayambaje further argued that he joined the Prosecution's request for site visits, adding a number of sites to be visited.[6702]

2937. The Appeals Chamber notes that, when the Prosecution moved the Trial Chamber to conduct site visits in March 2004, Ndayambaje responded that he agreed with the principle and the necessity of a site visit.[6703] However, when the Prosecution made another request for site visits in June 2008, Ndayambaje responded that the request was premature as the presentation of the Defence evidence was still ongoing.[6704] Ndayambaje also explicitly expressed his "serious reservations about the utility of such a site visit 14 years after the events, insofar as the configuration of the sites (vegetation, new constructions, renovation of buildings, roads and trails, etc.) [was] no longer the same".[6705]

2938. The Appeals Chamber further notes that Ndayambaje did not alert the Trial Chamber about the reversal of the position he took in 2008 regarding the utility of the site visits until his closing arguments where, for the first time, he voiced "regrets" that the Trial Chamber did not authorise site visits, arguing that this led to "a great incomprehension of the sites" and therefore "caused a great prejudice".[6706] As discussed above, the Trial Chamber interpreted this claim as a request to reconsider the Site Visits Decision, which it dismissed on the grounds that Ndayambaje had failed to substantiate his claim of prejudice and explain how or why there was a purported incomprehension of the sites.[6707]

[6700] Prosecution Response Brief, paras. 2165-2168.
[6701] Ndayambaje Reply Brief, paras. 107, 108, *referring*, *inter alia*, *to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse à la Requête du Procureur intitulée* "Prosecutor's motion for site visits in the Republic of Rwanda under Rules 4 and 73 of the [R]ules of Procedure and Evidence", 1 June 2004 ("Ndayambaje's Site Visits Response of 2004"), paras. 4-6, 9.
[6702] AT. 21 April 2015 pp. 86, 87 (French), *referring to* the 2004 Site Visits Decision.
[6703] Ndayambaje's Site Visits Response of 2004, para. 4. *See also ibid*., paras. 5, 6. Ndayambaje nonetheless noted that the Prosecution's motion was vague and requested that the Trial Chamber order the Prosecution to adduce further information. *See ibid.*, paras. 7, 8, p. 3.
[6704] Ndayambaje Site Visits Response of 2008, paras. 5-7.
[6705] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse d'Elie Ndayambaje au* "Scheduling Order" *rendu par la Chambre le 26 Septembre 2008*, 29 September 2008, para. 5 (informal translation).
[6706] Ndayambaje Closing Arguments, T. 30 April 2009 p. 6.
[6707] Trial Judgement, para. 1263.

2939. The Appeals Chamber finds no error in the Trial Chamber's decision to deny reconsideration of the Site Visits Decision. Indeed, in his closing submissions, apart from vaguely expressing "regrets that the Trial Chamber did not authorise a visit to Kabuye because this decision does affect the overall view of the Defence" and alleging that it "le[d] to a great incomprehension of the sites", particularly as regards Kabuye Hill, Ndayambaje did not advance any argument to substantiate his assertion that he was prejudiced by the Trial Chamber's refusal to authorise site visits, nor did he seek to demonstrate a clear error of reasoning or that the reconsideration of the impugned decision was necessary to prevent an injustice.[6708] Ndayambaje neither elaborated how his Defence case was affected by the fact that the Trial Chamber did not visit the relevant sites nor, as noted by the Trial Chamber, did he "explain how or why there [was] 'incomprehension' of the sites".[6709] Notably, only on appeal did Ndayambaje argue, *inter alia*, that the "analysis of the photos, sketches and maps tendered in the trial was insufficient to help [the Trial Chamber] to know and familiarize itself with the locations" and that "[o]nly a site visit would have enabled it to really understand the layout of the sites and avoid making a ruling in the abstract."[6710]

2940. The Appeals Chamber also observes that, on appeal, Ndayambaje complains about the fact that the Trial Chamber did not undertake site visits without explaining why he did not move the Trial Chamber to conduct one after the end of the presentation of his case and advances arguments against the Site Visits Decision that were never raised at trial.[6711] Recalling that a party should not be permitted to refrain from raising a matter which was apparent during the course of the trial to raise it only on appeal in the event of an adverse finding against that party,[6712] the Appeals Chamber considers that Ndayambaje has waived his right to introduce this issue as a valid ground of appeal and will accordingly dismiss Ndayambaje's submissions in this regard without further consideration.

2941. Based on the foregoing, the Appeals Chamber dismisses Ground 12 of Ndayambaje's appeal in its entirety.

[6708] The Appeals Chamber recalls that a chamber may reconsider a decision it has previously made if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. *See Munyagishari* Appeal Decision, para. 13; *Kajelijeli* Appeal Judgement, para. 203; *Barayagwiza* 4 February 2005 Appeal Decision, p. 2.
[6709] Trial Judgement, para. 1263.
[6710] Ndayambaje Appeal Brief, para. 282.
[6711] Ndayambaje Appeal Brief, paras. 283-288. *See also* Ndayambaje Reply Brief, paras. 109-113.
[6712] *See Nahimana et al.* Appeal Judgement, para. 215; *Niyitegeka* Appeal Judgement, para. 199; *Čelebići* Appeal Judgement, para. 640; *Tadić* Appeal Judgement, para. 55.

E. Mugombwa Church (Grounds 9 in part, and 17)

2942. The Trial Chamber found that, by his presence on 20 and 21 April 1994 at Mugombwa Church, Muganza Commune, and given his considerable moral authority, Ndayambaje encouraged the attacks on the Tutsis taking refuge inside the church that took place on these two days, resulting in the deaths of hundreds, if not thousands, of Tutsis.[6713] It also found that Ndayambaje's public addresses at Mugombwa Church on 20 and 21 April 1994 directly and publicly incited the commission of genocide.[6714] On this basis, the Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide as well as aiding and abetting genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute.[6715]

2943. Ndayambaje submits that the Trial Chamber erred in its assessment of the evidence related to this event and in finding that he "publicly" incited the commission of genocide and possessed genocidal intent.[6716] The Appeals Chamber recalls that it has found that the Trial Chamber erred in convicting Ndayambaje of committing direct and public incitement to commit genocide at Mugombwa Church as he lacked notice that he was charged on this basis and, consequently, reversed his conviction for committing direct and public incitement to commit genocide at Mugombwa Church.[6717] In these circumstances, Ndayambaje's contentions regarding his conviction for direct and public incitement to commit genocide and his genocidal intent have become moot and need not be addressed.[6718] With respect to his convictions for aiding and abetting the killings at the church, Ndayambaje contends that the Trial Chamber erred in: (i) its assessment of Witness QAR's evidence; (ii) ignoring contradictions in the Prosecution evidence; (iii) failing to consider the lack of corroboration; and (iv) its assessment of Defence evidence.[6719] The Appeals Chamber will address these contentions in turn.

[6713] Trial Judgement, paras. 1245, 1246, 5754-5757.
[6714] Trial Judgement, paras. 1245, 1246, 5995-6001.
[6715] Trial Judgement, paras. 5758, 5976, 5977, 6002, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186.
[6716] Ndayambaje Appeal Brief, paras. 333, 334, 339, 347-349, 355-358, 360-364, 368, 371, 372, 379-381, 384, 386-388, 394, 395, 398, 400, 402, 404, 407, 412, 415, 416, 418, 420-422, 424. *See also* Ndayambaje Notice of Appeal, paras. 141, 142, 144.
[6717] *See supra*, Sections IX.A.1(c), IX.A.5.
[6718] The Appeals Chamber notes that Ndayambaje was otherwise convicted of aiding and abetting genocide and that this form of responsibility does not require that the aider and abetter had genocidal intent.
[6719] Ndayambaje Notice of Appeal, paras. 141-148; Ndayambaje Appeal Brief, paras. 333-386, 422, 424.

1. Assessment of Witness QAR's Evidence

2944. In finding that Ndayambaje participated in the events at Mugombwa Church, the Trial Chamber relied primarily on the evidence of Prosecution Witness QAR.[6720] It noted that Witness QAR placed Ndayambaje at Mugombwa Church on 20 and 21 April 1994.[6721] It found her evidence compelling, consistent, and detailed and further noted that it was corroborated by Prosecution and Defence witnesses in several respects.[6722] The Trial Chamber also considered alibi evidence, inconsistencies, and contradictions in Witness QAR's evidence, and potentially contradictory Prosecution evidence in the Trial Judgement and concluded that this evidence did not cast doubt on the witness's credibility.[6723]

2945. The Appeals Chamber will examine Ndayambaje's submission that the Trial Chamber erred in its assessment of Witness QAR's evidence that she saw him at Mugombwa Church, before turning to his contentions that the Trial Chamber failed to apply the standards applicable to identification under difficult circumstances and ignored material inconsistencies and contradictions within Witness QAR's evidence.[6724]

(a) Presence of Ndayambaje at Mugombwa Church

2946. The Trial Chamber recalled Witness QAR's testimony that, through one of the church's broken windows, she saw Ndayambaje outside the church about 10 metres away from where she stood at about noon on 20 April 1994.[6725] It also noted that Witness QAR testified to seeing Ndayambaje at Mugombwa Church at 10.00 a.m. on 21 April 1994 about 10 metres away from her position inside the church.[6726] The Trial Chamber relied on these aspects of Witness QAR's evidence to find that Ndayambaje was present at Mugombwa Church on 20 and 21 April 1994.[6727]

2947. Ndayambaje submits that the Trial Chamber erred in finding that Witness QAR saw him at Mugombwa Church on 20 April 1994 through one of the church's broken windows.[6728] He argues that: (i) Exhibit P41 contradicts Witness QAR's evidence and shows that the witness could not possibly see him from the position where she claimed she stood; (ii) Witness QAR could not see outside because of the opacity of the window panes; (iii) Witness QAR could not have seen him

[6720] Trial Judgement, paras. 1211, 1219, 1227-1235, 1237-1244.
[6721] Trial Judgement, paras. 1219, 1227, 1232.
[6722] Trial Judgement, paras. 1204, 1205, 1227-1229, 1231, 1233-1235, 1237, 1239, 1242-1245.
[6723] Trial Judgement, paras. 1218, 1230, 1241, 1243, 1244.
[6724] Ndayambaje Notice of Appeal, paras. 142-144; Ndayambaje Appeal Brief, paras. 243-245, 335, 337-341, 348. *See also* Ndayambaje Reply Brief, paras. 125-131, 135; AT. 21 April 2015 pp. 22, 23.
[6725] Trial Judgement, para. 1227.
[6726] Trial Judgement, para. 1232.
[6727] *See* Trial Judgement, paras. 1244-1246.
[6728] Ndayambaje Appeal Brief, paras. 335, 337-341. *See also* Ndayambaje Notice of Appeal, paras. 141, 144.

from behind a window as stones were being thrown and she would have been exposing herself to the stones.[6729] Ndayambaje also contends that the Trial Chamber failed to consider the testimonies of Witnesses BOZAN and Tiziano that the panes of a single window were broken at 12.30 p.m., which contradicts Witness QAR's testimony that the panes of several windows were broken at 12.00 p.m.[6730]

2948. Ndayambaje further submits that the Trial Chamber erred in finding that Witness QAR saw him at Mugombwa Church on 21 April 1994 since neither her viewpoint, nor the crowd inside and outside the church, would have allowed the witness to see and hear everything she described.[6731] He contends that Witness QAR acknowledged her inability to see outside the church and to identify the person who threw grenades at the church on 21 April 1994.[6732] Moreover, Ndayambaje argues that the witness's implausible account of his distribution of weapons at the church, which was excluded by the Trial Chamber, shows Witness QAR's lack of credibility and that, having found her evidence related to his swearing-in ceremony not credible, the Trial Chamber had no reasons to believe the witness in relation to Mugombwa Church.[6733] In his view, the Trial Chamber further erred in assessing Witness QAR's testimony in an isolated manner and not in light of the other events she testified about.[6734]

2949. In addition, Ndayambaje submits that the Trial Chamber erred as a matter of law in relying on the fact that Witness QAR's testimony on Ndayambaje's presence at Mugombwa Church was consistent with Witness QAR's prior statements to bolster the witness's credibility.[6735]

2950. The Prosecution responds that Witness QAR gave consistent, detailed, and clear testimony, supported by video, of her vantage point from where she saw Ndayambaje on 20 April 1994.[6736] It submits that: (i) Exhibit P41 actually corroborates the witness's testimony; (ii) Witness QAR would not have been exposing herself to stone throwers while observing Ndayambaje through the window since the stone throwers stopped upon Ndayambaje's arrival; and (iii) the Trial Chamber merely "observed" that Witness QAR was consistent in her previous statements and that, in any

[6729] Ndayambaje Appeal Brief, paras. 337, 340, 341. *See also* Ndayambaje Reply Brief, paras. 128, 129. Ndayambaje also asserts that Witness QAR's admission that she could not observe the exterior of the church to identify the person who allegedly threw grenades further demonstrated the implausibility of her account and that a site visit would have allowed the Trial Chamber to see these contradictions. *See* Ndayambaje Appeal Brief, para. 337. The Appeals Chamber has already rejected Ndayambaje's allegations of error regarding the denial of site visits. *See supra*, Section IX.D.
[6730] Ndayambaje Appeal Brief, para. 339.
[6731] Ndayambaje Appeal Brief, para. 343.
[6732] Ndayambaje Appeal Brief, para. 337, *referring to* Witness QAR, T. 21 November 2001 pp. 23, 25, 26.
[6733] Ndayambaje Appeal Brief, paras. 344, 370, 578, 579, *referring to* Trial Judgement, paras. 1036, 1037, 1244-1246, 4602-4604.
[6734] Ndayambaje Appeal Brief, paras. 209, 375.
[6735] Ndayambaje Appeal Brief, para. 334.
[6736] Prosecution Response Brief, para. 2180; AT. 21 April 2015 pp. 49, 50.

case, relying on consistent portions of the witness's prior statements to bolster her credibility was permissible in order to rebut the charge of fabrication of testimony.[6737]

2951. The Appeals Chamber observes that Ndayambaje did not question Witness QAR on Exhibit P41, the videotape of the commune office and Mugombwa Church made by a Prosecution investigator.[6738] Ndayambaje also did not raise any arguments related to this exhibit in his closing brief or during his closing arguments.[6739] More importantly, having reviewed Exhibit P41, the Appeals Chamber is not persuaded that it effectively shows that Witness QAR could not possibly see Ndayambaje from the position where she claimed she stood.

2952. The Appeals Chamber also finds no merit in Ndayambaje's argument on the opacity of the window panes given Witness QAR's testimony, which the Trial Chamber accepted, that she saw Ndayambaje speaking to the attackers through a *broken* window, not through a window pane.[6740] Similarly, the Appeals Chamber observes that Ndayambaje's argument that Witness QAR could not have stood near one of the church's windows while stones were being thrown ignores that Witness QAR testified that the crowd outside the church stopped throwing stones upon Ndayambaje's arrival at the church.[6741]

2953. The Appeals Chamber further observes that, contrary to Ndayambaje's claim, the Trial Chamber expressly considered the evidence of Witnesses BOZAN and Tiziano as to the number of church windows broken and when they were broken.[6742] The Trial Chamber noted that Witness BOZAN testified to only one window being broken but considered that his view of the church was restricted to one side of the church and concluded that his evidence therefore did not cast doubt on Witness QAR's testimony that more than one window was broken.[6743] Ndayambaje does not show how the Trial Chamber erred in reaching this finding. The Trial Chamber also noted Witness Tiziano's evidence that the windows in the church were broken by about 12.30 p.m. and found that this corroborated Witness QAR's evidence.[6744] Ndayambaje does not demonstrate how

[6737] Prosecution Response Brief, paras. 2178, 2180-2184.
[6738] *See* Witness QAR, T. 20 November 2001 pp. 112-135, T. 21 November 2001 pp. 4-13, 19-24, 33-52.
[6739] *See* Ndayambaje Closing Brief, paras. 154-254; Ndayambaje Closing Arguments, T. 29 April 2009 pp. 42-84, T. 30 April 2009 pp. 4-46.
[6740] Witness QAR, T. 19 November 2001 p. 20; Trial Judgement, para. 1227.
[6741] Witness QAR, T. 20 November 2001 pp. 115, 116.
[6742] *See* Trial Judgement, paras. 1227, 1228.
[6743] *See* Trial Judgement, para. 1228.
[6744] *See* Trial Judgement, para. 1228. *See also* Tiziano Pegoraro, T. 9 September 2008 pp. 11, 13. The Appeals Chamber also notes Ndayambaje's argument that Witness Tiziano's testimony that, upon returning to the church, he saw "*les vitres brisées de l'église* […]" was erroneously translated into English in "the broken windows of the church." Ndayambaje argues that the word "*vitre*" in French translates into "pane" in English and should therefore not have been translated into "window". *See* Ndayambaje Appeal Brief, para. 339. The Appeals Chamber considers that a reasonable trier of fact, whether relying on the French or English version of Witness Tiziano's testimony, could have found that his testimony corroborated Witness QAR's account of stones being thrown at the church and the breaking of the church's windows. *Compare* Tiziano Pegoraro, T. 9 September 2008 p. 11 (English) *with ibid.*, p. 13 (French).

the evidence of Witnesses QAR and Tiziano is inconsistent in this regard, as Witness Tiziano testified that he came back to the church "[t]oward 12.30" and that upon arrival before entering the parish he saw that the windows of the church were broken,[6745] which is not inconsistent with Witness QAR's testimony that the windows were broken around noon.[6746] Ndayambaje's contention that the Trial Chamber failed to consider the relevant testimonies of Witnesses BOZAN and Tiziano is therefore rejected.

2954. Furthermore, the Appeals Chamber considers that Witness QAR's evidence that she could not see the person who threw grenades at the church on 21 April 1994 does not establish, as Ndayambaje argues, that she would not have been able to see him on that day. The Appeals Chamber observes that the witness testified being at different locations at the moment she saw Ndayambaje and at the moment when the unidentified person threw grenades at the church.[6747] Moreover, the Appeals Chamber notes that the Trial Chamber did not find Witness QAR's account regarding the distribution of weapons implausible, but declined to consider it due to a lack of notice.[6748] Ndayambaje does not substantiate his contention that this particular aspect of Witness QAR's testimony was implausible and how it relates to the witness's ability to observe the events at Mugombwa Church on 21 April 1994. Similarly, Ndayambaje does not explain why the rejection of Witness QAR's testimony related to his swearing-in ceremony, which was based on elements that were specific to this very aspect of the witness's testimony,[6749] required the Trial Chamber to also reject her evidence regarding events at Mugombwa Church.[6750] His general and undeveloped argument that the Trial Chamber considered Witness QAR's testimony in an "isolated manner" also fails to demonstrate any error in the Trial Chamber's assessment of Witness QAR's testimony pertaining to Mugombwa Church.[6751]

2955. Turning to Ndayambaje's argument regarding the Trial Chamber's reliance on Witness QAR's prior consistent statements, the Appeals Chamber recalls that prior consistent statements cannot be used to bolster a witness's credibility, except to rebut a charge of recent

[6745] Tiziano Pegoraro, T. 9 September 2008 pp. 11, 13.
[6746] Witness QAR, T. 20 November 2001 p. 119. *See also ibid*., p. 120.
[6747] *See* Witness QAR, T. 19 November 2001 pp. 11, 13, 20. *See also* Witness QAR, T. 21 November 2001 pp. 22, 26. Witness QAR testified that when she saw Ndayambaje on 21 April 1994 she was standing near the door from which she came out, near a window which was broken. On the other hand, she testified to being near the alter of the church when the grenades were thrown at the church on 21 April 1994. *See idem*.
[6748] Trial Judgement, paras. 1036, 1037.
[6749] Trial Judgement, paras. 4602-4604.
[6750] *See also infra*, para. 3270. It is well-established jurisprudence that trial chambers have the discretion to accept some, but reject other parts of a witness's testimony. *See*, *e.g*., *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[6751] The Appeals Chamber notes that it has found no error in the Trial Chamber's assessment of the credibility of Witness QAR's account related to the abduction of Tutsi women and girls in Mugombwa. *See infra*, Section IX.H.1(b).

fabrication of testimony.[6752] In the *Ntakirutimana* Appeal Judgement, to which Ndayambaje points, the Appeals Chamber also clarified that "there is a difference between using a prior consistent statement to bolster the indicia of credibility observed at trial and rejecting a Defence challenge to credibility based on alleged inconsistencies between testimony and earlier statements. The former is a legal error, while the latter is simply a conclusion that the Defence's arguments are not persuasive."[6753]

2956. In his closing brief, Ndayambaje challenged Witness QAR's credibility on the basis of inconsistencies between her testimony and earlier statements and argued, in particular, that Witness QAR did not see him at the church and that her claim was "pure fabrication".[6754] It is in the context of addressing one of these alleged inconsistencies in the Trial Judgement that the Trial Chamber "observe[d] that [Witness QAR] is consistent in her previous statements that she saw Ndayambaje at the site."[6755] The Appeals Chamber considers that it is clear from the Trial Judgement that Witness QAR's prior consistent statements were not used to bolster her credibility, but to rebut Ndayambaje's challenges of fabrication of evidence and lack of credibility of the witness. Accordingly, the Appeals Chamber finds that the Trial Chamber did not impermissibly rely on Witness QAR's prior consistent statements to bolster her credibility.

2957. Based on the above, the Appeals Chamber finds that Ndayambaje has not demonstrated that no reasonable trier of fact could have accepted Witness QAR's evidence of seeing Ndayambaje at Mugombwa Church on 20 and 21 April 1994.

(b) Identification under Difficult Circumstances

2958. Ndayambaje submits that identification done by a witness in circumstances such as those of Witness QAR required caution and corroboration.[6756] He contends that, in such a situation, the Trial Chamber was required to fully reason its decision, identify the factors it relied upon in support of the identification, and adequately address the factors impacting negatively on the reliability of the identification evidence, which it failed to do.[6757] Ndayambaje argues that the Trial Chamber merely stated that it had considered the circumstances surrounding the identification made by

[6752] *Ntakirutimana* Appeal Judgement, para. 147.
[6753] *Ntakirutimana* Appeal Judgement, para. 148.
[6754] *See* Ndayambaje Closing Brief, paras. 160-171.
[6755] Trial Judgement, para. 1239. *See also ibid.*, paras. 1238, 1240, 1241.
[6756] Ndayambaje Appeal Brief, para. 348. *See also* Ndayambaje Notice of Appeal, paras. 85, 86; Ndayambaje Appeal Brief, paras. 243, 251. Ndayambaje refers to the following circumstances: (i) the church was full of refugees who had to protect themselves from attackers who were throwing stones and could not have exposed themselves near the windows; (ii) Witness QAR moved about "relentlessly" in the crowd; (iii) Witness QAR was close to the door leading to the sacristy; and (iv) Witness QAR did not see Ndayambaje arrive at the church but was merely informed of his arrival by the other refugees. *See* Ndayambaje Appeal Brief, para. 348, fn. 494.
[6757] Ndayambaje Appeal Brief, paras. 244, 348.

Witness QAR but never provided a reasoned opinion for accepting the identification made by the witness.[6758]

2959. The Prosecution responds that corroboration of Witness QAR's identification evidence was not required and that, in any event, her evidence was corroborated on many accounts.[6759] It submits that the Trial Chamber made no error in its assessment of Witness QAR's identification evidence as it noted that the witness had no difficulty seeing Ndayambaje at Mugombwa Church, that she did not have to identify him as many refugees in the church recognised him, and that, in any event, she knew him since childhood and correctly identified him in court.[6760]

2960. Ndayambaje replies that identification of an accused under difficult circumstances cannot automatically be inferred on the sole basis of the witness having prior knowledge of the accused and reiterates that a fully reasoned opinion in such situations is required.[6761]

2961. The Appeals Chamber finds that the fact that Witness QAR's identification of Ndayambaje at Mugombwa Church was not corroborated did not prevent the Trial Chamber from relying on this aspect of her evidence. The Appeals Chamber recalls that a trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[6762]

2962. The Appeals Chamber nonetheless recalls that "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion."[6763] In these instances, the Trial Chamber must "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence".[6764]

[6758] Ndayambaje Appeal Brief, para. 245. *See also* Ndayambaje Notice of Appeal, para. 86; Ndayambaje Reply Brief, para. 135.
[6759] Prosecution Response Brief, para. 2193.
[6760] Prosecution Response Brief, paras. 2152, 2193. *See also* AT. 21 April 2015 p. 48.
[6761] Ndayambaje Reply Brief, para. 135. Ndayambaje adds that none of the refugees who allegedly corroborate Witness QAR's identification evidence testified in court. *See idem.*
[6762] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Nchamihigo* Appeal Judgement, para. 42; *Milošević* Appeal Judgement, para. 215. The jurisprudence cited by Ndayambaje does not suggest otherwise. *See* Ndayambaje Appeal Brief, para. 348, *referring to Kordić* Appeal Judgement, para. 274; *Bagilishema* Appeal Judgement, paras. 78, 79.
[6763] *Lukić and Lukić* Appeal Judgement, para. 136; *Renzaho* Appeal Judgement, para. 527; *Kupreškić et al*. Appeal Judgement, para. 39. *See also Kalimanzira* Appeal Judgement, para. 96.
[6764] *Lukić and Lukić* Appeal Judgement, para. 136; *Haradinaj et al.* Appeal Judgement, para. 152; *Kupreškić et al.* Appeal Judgement, para. 39.

2963. The Trial Chamber did not state that Witness QAR's identification of Ndayambaje was made under difficult circumstances.[6765] Rather, it found that Witness QAR saw Ndayambaje outside the church about 10 metres away from where she stood on 20 April 1994 through one of the church's broken windows, and from about 10 metres away from her position inside the church on 21 April 1994.[6766] The Appeals Chamber is not convinced that any of the elements Ndayambaje points to demonstrate that the circumstances in which Witness QAR identified Ndayambaje required further reasoning from the Trial Chamber.[6767] While Witness QAR had sought refuge in Mugombwa Church on 20 and 21 April 1994, her identification of Ndayambaje at Mugombwa Church did not occur in circumstances that would have made Ndayambaje difficult to identify.[6768]

2964. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness QAR's identification evidence.

(c) Inconsistencies and Contradictions within Witness QAR's Evidence

2965. The Trial Chamber noted discrepancies between Witness QAR's testimony at trial and her prior statements to Tribunal investigators.[6769] It found Witness QAR's explanations that the discrepancies were a result of her statements not being properly recorded by the investigators to be reasonable and accepted them.[6770] It concluded that the discrepancies between Witness QAR's testimony and her prior statements were not material and did not cast doubt on her credibility.[6771]

2966. Ndayambaje submits that no reasonable trier of fact would have accepted Witness QAR's evidence in light of the numerous material inconsistencies and contradictions between her prior statements and her testimony at trial, which undermined her credibility.[6772] Ndayambaje lists a number of inconsistencies and contradictions between Witness QAR's testimony and her prior statements which, he argues, concerned key material facts and should have led the Trial Chamber to reject the witness's evidence.[6773] According to Ndayambaje, it was against all logic that the Trial

[6765] *See* Trial Judgement, para. 1244.
[6766] Trial Judgement, paras. 1227, 1232.
[6767] *See* Ndayambaje Appeal Brief, para. 348, fn. 494. The Appeals Chamber has already rejected Ndayambaje's argument that Witness QAR could not have been standing by the church's window. *See supra*, para. 2951.
[6768] The Appeals Chamber also notes that the Trial Chamber found that Witness QAR knew Ndayambaje since her childhood, a finding Ndayambaje does not challenge. *See* Trial Judgement, para. 1227.
[6769] Trial Judgement, paras. 1238-1241.
[6770] Trial Judgement, para. 1240.
[6771] Trial Judgement, paras. 1239, 1241.
[6772] Ndayambaje Appeal Brief, paras. 363-367, 373. *See also* Ndayambaje Notice of Appeal, paras. 141, 142, 144, 149; Ndayambaje Appeal Brief, para. 215.
[6773] Ndayambaje Appeal Brief, paras. 336, 364, 365. Ndayambaje contends that the Trial Chamber failed to take into account that the previous statements of Witness QAR, although recorded within a few months of each other, are contradictory. *See ibid.*, para. 372.

Chamber considered that these contradictions were not material and that they were attributable to errors on the part of the investigators who recorded Witness QAR's prior statements.[6774]

2967. Ndayambaje further contends that the Trial Chamber failed to consider the contradictions within Witness QAR's testimony in court regarding whether she saw him coming from Remera around 12.00 p.m. or whether she did not see him arrive and was informed of his arrival by the other refugees.[6775] In his view, the witness's contradictory versions demonstrate the implausibility of her account.[6776] He also argues that the Trial Chamber erred in law and in fact in failing to take into account that Witness QAR was hostile when asked about the discrepancies in her evidence.[6777]

2968. The Prosecution responds that the Trial Chamber examined all the inconsistencies raised by Ndayambaje and that he does not demonstrate that it was unreasonable for the Trial Chamber to accept Witness QAR's explanation for them or to consider that they were not material.[6778]

2969. Ndayambaje replies that Witness QAR's allegation that the investigators erred in taking her statements is not believable since it is improbable that the investigators could have made so many mistakes and since the witness signed the statements after they were read back to her.[6779]

2970. The Appeals Chamber observes that the Trial Chamber addressed and found that the inconsistencies between Witness QAR's testimony and prior statements related to the following matters were not material: (i) whether Witness QAR saw Ndayambaje arrive in a vehicle or was informed of his arrival by others; (ii) whether Ndayambaje was holding a gun or not; (iii) whether or not Witness QAR saw who distributed grenades to the attackers, who threw the grenade, and knew the number of grenades thrown; and (iv) whether Witness QAR arrived at the church at 8.00 a.m. or 2.00 p.m. on 20 April 1994.[6780] Ndayambaje fails to demonstrate that the first three discrepancies in Witness QAR's evidence referenced above concern key material facts and that the Trial Chamber erred in concluding that they were not material and did not cast doubt on the witness's credibility.

2971. By contrast, the Appeals Chamber considers that a reasonable trier of fact could not have considered that the discrepancy regarding the time Witness QAR arrived at the church on

[6774] Ndayambaje Appeal Brief, para. 366 (French).
[6775] Ndayambaje Appeal Brief, para. 338.
[6776] Ndayambaje Appeal Brief, para. 338.
[6777] Ndayambaje Appeal Brief, para. 368, *referring to* Witness QAR, T. 21 November 2001 pp. 56, 57, 59, 79, *Rwamakuba* Trial Judgement, paras. 115, 190, 193.
[6778] Prosecution Response Brief, paras. 2171-2177. The Prosecution submits that some of the inconsistencies show, if anything, that Witness QAR did not try to incriminate falsely Ndayambaje because her testimony in court was less incriminating than what was recorded in her statements. *See idem.*
[6779] Ndayambaje Reply Brief, para. 126. *See also ibid.*, para. 125.
[6780] *See* Trial Judgement, paras. 1238-1241. *See also ibid.*, paras. 1038, 1043.

20 April 1994 was not material since it related directly to the witness's ability to see Ndayambaje at the church at around noon.[6781] However, the Appeals Chamber recalls that it is within the trial chamber's discretion to determine whether an alleged inconsistency is sufficient to cast doubt on the witness's credibility.[6782] In the case at hand, the Trial Chamber expressly accepted Witness QAR's testimony that she arrived at Mugombwa Church at around 8.00 a.m. because it found her explanation that the discrepancy regarding her time of arrival resulted from the improper recording of her statement by Tribunal investigators.[6783] Ndayambaje questions the reasonableness of the Trial Chamber's decision by primarily relying on other trial judgements in which trial chambers allegedly rejected similar explanations.[6784] The Appeals Chamber recalls that a trial chamber's assessment of the appropriate weight and credibility to be accorded to the testimony of a witness is made on a case-by-case basis.[6785] Ndayambaje's submissions fail to recognise that the circumstances in the cases he refers to are distinct[6786] and do not demonstrate the unreasonableness of the Trial Chamber's conclusion concerning this particular inconsistency.[6787]

2972. The Appeals Chamber also considers that Ndayambaje's argument that it is improbable that the investigators made so many mistakes while taking Witness QAR's statements is speculative and unsubstantiated. Furthermore, his reliance on the fact that the witness signed the relevant statements, thereby verifying their content in his view, ignores the witness's explanation as to the conditions under which she signed one of the statements[6788] and that she was not questioned on whether the contents of the other statement were read back to her before she placed her thumbprint on it.[6789] Ndayambaje does not establish that no reasonable trier of fact could have accepted Witness QAR's explanation for the discrepancies between her testimony and prior statements.

[6781] *See* Trial Judgement, paras. 1238, 1241.
[6782] *Hategekimana* Appeal Judgement, para. 190; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.
[6783] *See* Trial Judgement, paras. 1238, 1241.
[6784] *See* Ndayambaje Appeal Brief, paras. 366, 367, *referring to Gatete* Trial Judgement, paras. 206-212, *Bagilishema* Trial Judgement, paras. 613 *et seq*., *Bizimungu et al.* Trial Judgement, para. 211.
[6785] *See Nchamihigo* Appeal Judgement, para. 47.
[6786] The Appeals Chamber notes that, in all cases cited by Ndayambaje, the trial chambers' decisions to reject the evidence of a particular witness were not based solely on the inconsistencies with the witness's previous statements or refusal to accept the witness's explanation that the previous statements had not been properly recorded, but also on the basis of a global assessment of the witness's evidence and credibility. *See Gatete* Trial Judgement, paras. 208-215; *Bagilishema* Trial Judgement, paras. 613-636; *Bizimungu et al.* Trial Judgement, paras. 211, 216.
[6787] *Cf. Ntawukulilyayo* Appeal Judgement, para. 15 ("It is only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous, that the Appeals Chamber can substitute its own finding for that of the Trial Chamber").
[6788] Witness QAR explained that the person who had driven her to the place where her May 1997 statement was given retrieved her before she had finished giving her statement. She also explained that her statement was read to her and that she disagreed with certain aspects of it but was told by the investigators that it would not be a problem so she quickly signed it because she had to leave. *See* Witness QAR, T. 20 November 2001 pp. 30, 40.
[6789] Ndayambaje submits that an entry on Witness QAR's 1995 Statement shows that its content was read to the witness and that she approved it. However, this aspect was not put to the witness by Ndayambaje who, instead, simply asked the witness whether she was shown such a statement and whether she put her thumbprint on it. She was not questioned on

Against this background, the Appeals Chamber finds that Ndayambaje fails to demonstrate that the Trial Chamber's error in finding that the discrepancy was not material occasioned a miscarriage of justice.

2973. With regard to the inconsistencies in Witness QAR's evidence concerning whether the distribution of weapons took place on "Wednesday" 20 April 1994 or "Thursday" 21 April 1994 and whether Ndayambaje was present when the doors of the church were broken that were not expressly addressed by the Trial Chamber,[6790] the Appeals Chamber observes that Ndayambaje simply enumerates inconsistencies and argues that so many inconsistencies raise doubt as to the witness's credibility without developing or substantiating how these particular inconsistencies undermined the credibility of the witness.[6791] In these circumstances, and considering that minor inconsistencies commonly occur in witness evidence without rendering the evidence unreliable, the Appeals Chamber finds that Ndayambaje does not demonstrate that the Trial Chamber erred by not expressly discussing these inconsistencies, which do not concern the fundamental features of the witness's evidence.[6792]

2974. Likewise, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber erred in failing to consider the contradiction in Witness QAR's testimony regarding whether she saw Ndayambaje arriving at Mugombwa Church or was informed of his arrival. Not only does the Trial Judgement reflect that the Trial Chamber did not disregard this discrepancy,[6793] but the Appeals Chamber also considers that this discrepancy did not concern a key material fact and did not prevent a reasonable trier of fact from concluding that the fundamental features of Witness QAR's evidence were credible.[6794]

2975. Finally, with respect to the issue of Witness QAR's purported hostility during cross-examination, the Appeals Chamber considers that, after having reviewed the entirety of the witness's cross-examination, none of the portions of the witness's testimony referenced by

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whether its content was in fact read back to her before she placed her thumbprint on it. *See* Witness QAR, T. 19 November 2001 pp. 135-139.

[6790] *See* Ndayambaje Appeal Brief, para. 365. As for the alleged inconsistency regarding Ndayambaje's alleged intervention to allow the Hutu women and their children to get out of the church, the Appeals Chamber notes that Ndayambaje does not provide any references in support of his claim. The Appeals Chamber declines to entertain this argument further. *See supra*, para. 35.

[6791] Ndayambaje Appeal Brief, paras. 365, 366 (French).

[6792] Moreover, the Appeals Chamber notes that Witness QAR explained these inconsistencies in the same manner as she explained the discrepancies expressly addressed in the Trial Judgement and for which the Trial Chamber accepted her explanation. *See* Witness QAR, T. 21 November 2001 pp. 47, 54-57; Trial Judgement, para. 1240.

[6793] The Appeals Chamber observes that the Trial Chamber expressly noted the discrepancy in Witness QAR's testimony on whether or not she saw Ndayambaje arriving at Mugombwa Church when summarising her evidence. It also discussed the same discrepancy in relation to Witness QAR's previous statement in its deliberations, concluding that it was not material and did not cast doubt on the witness's credibility. *See* Trial Judgement, paras. 1238, 1240, 1241.

[6794] *See supra*, para. 2971.

Ndayambaje revealed conduct that required explicit consideration on the part of the Trial Chamber.[6795]

2976. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness QAR's credibility in light of inconsistencies within her evidence and the witness's demeanour.

2. Contradictions in Prosecution Evidence

2977. Ndayambaje submits that Witness EV's testimony that Ndayambaje was at Ngiryi Bridge in the morning of 20 April 1994 where he intercepted refugees attempting to flee to Burundi before he left for Gisagara and Kabuye directly contradicts Witness QAR's testimony that Ndayambaje was at Mugombwa Church at about noon on 20 April 1994.[6796] He argues that since Witnesses EV's and QAR's testimonies are contradictory and mutually exclusive, the Trial Chamber was not in position to conclude which one was true and should have given Ndayambaje the benefit of the doubt, instead of speculating about distances and times.[6797] Ndayambaje also underlines that Witness RT placed Ndayambaje at Ngiryi Bridge around 11.00 a.m. on 21 April 1994.[6798]

2978. Ndayambaje further contends that Witness QAR's testimony that she saw Ndayambaje at Mugombwa Church in the commune vehicle on 20 and 21 April 1994 cannot possibly be true as it was contradicted by the evidence of Witnesses EV and RV.[6799] Ndayambaje asserts that since Muganza Commune had a single vehicle in 1994, the one described by Witness QAR, he could not have possibly been in Butare and at the commune office, at Mugombwa Church, and in "Gisagara-Ngiryi-Kabuye" at the same time.[6800] He submits that the Trial Chamber erred in failing to consider these contradictions in the Prosecution evidence.[6801]

2979. The Prosecution responds that Witness EV's testimony can be read as saying that he saw Ndayambaje for the first time on 22 April 1994 and that, in any event, he should not have been relied upon.[6802] It also submits that Witness RT's testimony does not conflict with Witness QAR's

[6795] The Appeals Chamber considers that the trial record shows that Witness QAR merely exhibited frustration with Ndayambaje's counsel when challenged with inconsistencies that the witness considered she had already explained. *See* Witness QAR, T. 20 November 2001 pp. 111, 112, T. 21 November 2001 pp. 10, 11, 24, 25, 31, 33, 37, 38, 56, 57, 112, 113. Moreover, Ndayambaje's comparison of Witness QAR's demeanour to that of other witnesses in the *Rwamakuba* Trial Judgement does not show any error on the part of the Trial Chamber as a witness's demeanour must be assessed on case-by-case basis. *See* Ndayambaje Appeal Brief, para. 368, *referring to Rwamakuba* Trial Judgement, paras. 115, 190, 193.
[6796] Ndayambaje Appeal Brief, paras. 342, 346. *See also* AT. 21 April 2015 p. 23.
[6797] Ndayambaje Appeal Brief, paras. 342, 422. *See also ibid.*, para. 190.
[6798] Ndayambaje Appeal Brief, para. 345, *referring to* Trial Judgement, para. 1277. *See also ibid.*, para. 190.
[6799] Ndayambaje Appeal Brief, paras. 345-347, 359, 418. *See also* Ndayambaje Reply Brief, para. 130.
[6800] Ndayambaje Appeal Brief, paras. 345-347, 422.
[6801] Ndayambaje Appeal Brief, para. 347.
[6802] Prosecution Response Brief, para. 2190; AT. 21 April 2015 pp. 45, 46.

evidence because both witnesses provided estimates of the times when they saw Ndayambaje.[6803] It underlines that the evidence does not show that Ndayambaje would not have had time to travel between Mugombwa Church and Ngiryi Bridge on 21 April 1994.[6804] The Prosecution further responds that Witness QAR saw Ndayambaje driving a "white vehicle" which was not necessarily the commune vehicle.[6805] It submits that Ndayambaje mischaracterises the evidence of the other witnesses regarding this vehicle.[6806]

2980. Ndayambaje replies that, even though Witnesses QAR and RT only provided estimates as to when they saw him, this does not eliminate the fact that it was impossible for him to have been at the two locations in different cars at the stated times because of the distance between them.[6807] Ndayambaje also emphasises that Witness QAR could only have been referring to the Muganza commune vehicle.[6808]

2981. The Appeals Chamber observes that, while in support of his submission under this ground of appeal Ndayambaje relies on the Trial Chamber's understanding of Witness EV's timeline of events with respect to his movements on 20 April 1994, he argues in other parts of his appeal that the Trial Chamber erred in assessing Witness EV's timeline for the events at Ngiryi Bridge as the witness's testimony reflects that he saw Ndayambaje at Ngiryi Bridge on Thursday, 21 April 1994 and not Wednesday, 20 April 1994 as found by the Trial Chamber.[6809] The Prosecution does not dispute that the Trial Chamber misconstrued Witness EV's testimony about his timeline.[6810] As discussed in further detail in Section IX.F.1 below, a careful review of Witness EV's testimony shows that the witness testified that he was intercepted at Ngiryi Bridge by Ndayambaje on 21 April 1994 and that the Trial Chamber therefore erred in finding that Witness EV testified that the interception at Ngiryi Bridge took place on 20 April 1994.[6811] The Appeals Chamber therefore finds no merit in Ndayambaje's argument under this ground of appeal that Witness EV's testimony on Ndayambaje's presence at Ngiryi Bridge contradicted Witness QAR's testimony that Ndayambaje was at Mugombwa Church for approximately 15 minutes around noon on 20 April 1994.

[6803] Prosecution Response Brief, para. 2191; AT. 21 April 2015 p. 45.
[6804] Prosecution Response Brief, para. 2191.
[6805] Prosecution Response Brief, para. 2185. The Prosecution asserts that there were two other white cars besides the commune vehicle to which the witness could have been referring. *See ibid.*, paras. 2186-2188.
[6806] Prosecution Response Brief, paras. 2189-2192. The Prosecution submits that, while Witness RT testified to sending his driver in a car to Mugombwa Church on the morning of 21 April 1994, he did not testify sending the driver in the commune vehicle. It also points out that Witness RT testified to seeing Ndayambaje in a red Toyota-type single cabin truck and not the white commune vehicle. *See ibid.*, paras. 2190, 2192.
[6807] Ndayambaje Reply Brief, para. 134. Ndayambaje points out that he was seen in a white vehicle in Mugombwa and in a red one at Ngiryi Bridge. *See idem.*
[6808] Ndayambaje Reply Brief, paras. 131, 133.
[6809] Ndayambaje Appeal Brief, paras. 435-437, 457, 460, 463.
[6810] Prosecution Response Brief, para. 2298.
[6811] *See infra*, para. 3028.

2982. As regards Ndayambaje's reliance on Witness RT's alleged contradictory testimony, the Appeals Chamber observes that the Trial Chamber found that the witness's account of Ndayambaje's presence at Ngiryi Bridge at around 11.00 a.m. pertained to 20 April 1994 *or* 21 April 1994.[6812] Regardless of whether Witness RT's account pertained to 20 or 21 April 1994, the Appeals Chamber finds that, given that both witnesses only provided estimates and that undisputed evidence reflects that the travel between the locations took approximately one hour,[6813] Witness RT's evidence of seeing Ndayambaje at 11.00 a.m. at Ngiryi Bridge is not incompatible with Witness QAR's evidence that she saw Ndayambaje at Mugombwa Church around noon on 20 April 1994 and between 10.00 and 10.30 a.m on 21 April 1994. Ndayambaje's argument that the witnesses referred to different cars also fails to take into account the Trial Chamber's finding that Ndayambaje had access to both a white and a red vehicle at the time.[6814]

2983. The Appeals Chamber further notes that Ndayambaje misinterprets the Trial Judgement concerning the use of the Muganza commune vehicle. The Trial Chamber did not find that Ndayambaje came to Mugombwa Church in the Muganza commune vehicle[6815] and, contrary to Ndayambaje's suggestion, Witness QAR did not testify to seeing him at the church in the commune vehicle. The witness merely referred to a "white vehicle".[6816] Having reviewed the relevant parts of Witness QAR's testimony, the Appeals Chamber is not persuaded by Ndayambaje's argument that the witness must have been referring to the Muganza commune vehicle. Even assuming that the vehicle Witness QAR saw was the commune vehicle, Ndayambaje's submissions fail to show that he could not have used this vehicle on 20 and 21 April 1994 to go to Mugombwa Church.[6817]

2984. The Appeals Chamber therefore concludes that Ndayambaje has failed to show any contradiction between Witnesses EV's, RV's, and RT's evidence and the testimony of Witness QAR.

[6812] Trial Judgement, paras. 1406, 1407.
[6813] *See* Trial Judgement, para. 1398.
[6814] Trial Judgement, para. 1409.
[6815] *Cf.* Trial Judgement, paras. 1245, 1246.
[6816] *See* Witness QAR, T. 19 November 2001 pp. 16, 21, T. 20 November 2001 p. 120. *See also* Trial Judgement, paras. 1040, 1229, 1232.
[6817] The Appeals Chamber notes that Ndayambaje merely refers to the summary of Witness RV's evidence in support of his assertion that Witness RV used the commune vehicle throughout the day on 20 April 1994. Having reviewed the evidence pointed out by Ndayambaje, the Appeals Chamber does not find that such evidence conclusively establishes that Witness RV used the commune vehicle during the entire day on 20 April 1994 or went to Butare with that particular vehicle on that day. *See* Ndayambaje Appeal Brief, para. 345; Trial Judgement, paras. 1065-1071; Witness RV, T. 16 February 2004 p. 41 (closed session), T. 17 February 2004 pp. 67-69 (closed session), T. 18 February 2004 p. 7 (closed session). Similarly, Ndayambaje's suggestion that Witness RV sent his driver to Mugombwa Church in the commune vehicle and that this precluded Ndayambaje from using this vehicle at 10.00 a.m. on 21 April 1994 is not supported by the evidence to which he refers. *See* Ndayambaje Appeal Brief, paras. 345, fn. 488, *referring to* Trial Judgement, para. 1070. *See also ibid.*, paras. 359, 418.

3. Lack of Corroboration

2985. The Trial Chamber found that aspects of Witness QAR's evidence on the events of 20 and 21 April 1994 were corroborated by: (i) Witnesses BOZAN and Tiziano, who confirmed that the windows of the church were broken; (ii) Witnesses FAU and MAJIK, who also testified about the absence of policemen, priests, and soldiers; (iii) Witnesses JAMES, ALIZA, and FAU, who corroborated the time the attack was launched on 20 April 1994; (iv) Witness FAG, who gave evidence consistent with Witness QAR as to the time the attack was launched on 21 April 1994, that grenades were thrown at the church, and that the attackers set the church on fire; (v) Witnesses FAG and JAMES, who confirmed the presence of Burundian refugees among the assailants and that attackers tried to break down the church door; (vi) Witnesses BOZAN and JAMES, who identified some of the same attackers as Witness QAR; and (vii) Witness JAMES, who also testified that Witness QAR was spared after the intervention of the Hutu father of her child.[6818]

2986. Ndayambaje submits that the Trial Chamber erred in relying on Witness FAG to corroborate Witness QAR's evidence on the events at Mugombwa Church.[6819] He contends that the Trial Chamber failed to exercise appropriate caution in assessing Witness FAG's credibility, noting that the witness was awaiting a *Gacaca* decision when he testified in this case and that he had been released from custody in exchange for confessions in which he had hidden his involvement in the massacre at Mugombwa Church.[6820] Ndayambaje also argues that the Trial Chamber erroneously relied on Witness FAG's testimony concerning the events of 20 April 1994 as his evidence did not pertain to 20 April but to 21 April 1994.[6821]

2987. In addition, Ndayambaje submits that, while the Trial Chamber found that Witness QAR's evidence was corroborated in several aspects, it failed to find corroboration for her testimony that

[6818] Trial Judgement, paras. 1227-1229, 1231, 1233-1235, 1237, 1242.
[6819] Ndayambaje Notice of Appeal, paras. 142, 144, 145, 151; Ndayambaje Appeal Brief, paras. 356-358, 361, 362. The Appeals Chamber notes that Ndayambaje also challenges under this ground of appeal the credibility of Witness FAU's evidence and notes that these challenges have been addressed above in the section related to Ndayambaje's challenges to the Trial Chamber's findings on his alibi in relation to Witness Tiziano. *See* Ndayambaje Appeal Brief, paras. 350-356; *supra*, paras. 2899-2902.
[6820] Ndayambaje Appeal Brief, para. 356. *See also* Ndayambaje Notice of Appeal, paras. 142, 144, 145, 151.
[6821] Ndayambaje Appeal Brief, paras. 357, 358. In his reply brief, Ndayambaje submits that nothing suggests that the testimony of Witness FAG related to 21 April 1994, which is contradictory with his submissions in his appeal brief. *See* Ndayambaje Reply Brief, para. 136. The Appeals Chamber will therefore not entertain this contradictory submission. *See supra*, para. 35. Ndayambaje adds that the Trial Chamber confused Witness FAG's testimony regarding events that occurred at Kabuye on 22 April 1994 with his account of what happened at Mugombwa Church on 21 April 1994, thus creating new evidence. *See* Ndayambaje Appeal Brief, para. 358, *referring to* Trial Judgement, paras. 1048, 1049, Witness FAG, T. 1 March 2004 pp. 14, 15, 18, 19. However, Ndayambaje merely points to paragraphs of the Trial Judgement and portions of Witness FAG's testimony without identifying any error or explaining its impact. The Appeals Chamber therefore declines to consider the merits of this undeveloped argument.

he was present at the church and involved in the crimes committed there.[6822] According to him, the Trial Chamber erred in using the evidence of Witnesses FAU, FAG, JAMES, and MAJIK to corroborate Witness QAR's evidence since these witnesses did not see Ndayambaje at the church.[6823] Ndayambaje also submits that, having made factual findings premised on this error, it is impossible to know if the Trial Chamber's findings regarding his presence and his involvement in the crimes at the church would have been identical without such corroboration.[6824]

2988. The Prosecution responds that the Trial Chamber was correct in finding that Witness FAG corroborated several aspects of Witness QAR's accounts.[6825] It argues that the Trial Chamber's mistake in stating that Witness FAG saw Ndayambaje on 20 April instead of 21 April 1994 has no impact on the Trial Chamber's findings as the witness provided relevant evidence on the attack on Mugombwa Church of 21 April 1994.[6826] According to the Prosecution, the absence of corroboration of Witness QAR's evidence on Ndayambaje's presence at Mugombwa Church is insufficient to invalidate the Trial Chamber's findings.[6827]

2989. With respect to the credibility of Witness FAG, the Appeals Chamber observes that the Trial Chamber expressly considered all the information Ndayambaje points to on appeal[6828] and stated that it would treat his testimony with caution considering that the witness may have had an incentive to lie during his testimony in order to obtain preferential treatment in connection with his *Gacaca* sentence.[6829] Ndayambaje simply disagrees with the manner the Trial Chamber exercised caution without demonstrating any error in the exercise of its discretion in the assessment of the evidence.

2990. The Appeals Chamber notes that the Trial Chamber did not find that Witness FAG corroborated Witness QAR's testimony with regard to events on 20 April 1994 but regarding the circumstances of the attack that was launched on 21 April 1994.[6830] The Trial Chamber also

[6822] Ndayambaje Appeal Brief, paras. 360-362. *See also* Ndayambaje Notice of Appeal, para. 141; AT. 21 April 2015 p. 23.
[6823] Ndayambaje Appeal Brief, paras. 349, 354, 357, 380.
[6824] Ndayambaje Appeal Brief, para. 361.
[6825] Prosecution Response Brief, paras. 2198-2206. *See also* AT. 21 April 2015 pp. 48, 49.
[6826] Prosecution Response Brief, paras. 2204, 2205. *See also* AT. 21 April 2015 p. 46.
[6827] Prosecution Response Brief, para. 2195.
[6828] The Trial Chamber noted that Witness FAG participated in the attacks on Mugombwa Church and that, at the time of his testimony, he was awaiting a decision by a *Gacaca* court. It further took into consideration that, while giving detailed information regarding the identities of the assailants and the sequence of events at Mugombwa Church in his testimony, Witness FAG had not mentioned the attacks on Mugombwa Church in his confession to the Rwandan authorities. It accepted the witness's explanation that he omitted this information because "he was afraid, and there were things he could not talk about at the time", and accepted the witness's evidence insofar as it related to the massacre at Mugombwa Church on 21 April 1994 and his account of how he came to find himself at Mugombwa Church. *See* Trial Judgement, paras. 1224, 1226, 1236.
[6829] Trial Judgement, para. 1226.
[6830] *See* Trial Judgement, paras. 1233, 1234, 1237.

expressly stated that it accepted Witness FAG's evidence insofar as it related to the massacre at Mugombwa Church on 21 April 1994 and his account of how he came to find himself at the church.[6831]

2991. A review of Witness FAG's testimony, as correctly summarised by the Trial Chamber, reflects that the witness testified that Ndayambaje spoke with community leaders at Bishya trade centre on 21 April 1994.[6832] However, in its conclusions on the events at Mugombwa Church, the Trial Chamber found that "on the morning of 20 April 1994, Ndayambaje spoke with community leaders at Bishya trade centre who immediately thereafter directed men at Bishya, including Witness FAG, to Mugombwa Church".[6833] The Trial Chamber provided no reference to the evidence upon which it based this finding and a review of the Trial Chamber's summary of the evidence relevant to Mugombwa Church reveals that no witness provided evidence about such a meeting taking place on 20 April 1994.[6834] As pointed out by Ndayambaje, the Trial Chamber's finding appears to be based on Witness FAG's evidence.[6835] The Appeals Chamber therefore finds that the Trial Chamber erred in concluding that the meeting between Ndayambaje and community leaders at Bishya trade centre took place on 20 April 1994 since Witness FAG's evidence, as accepted by the Trial Chamber, indicates that the meeting took place on 21 April 1994.[6836] The Appeals Chamber nonetheless finds that this error has not occasioned a miscarriage of justice as none of Ndayambaje's convictions rests on the misstatement of the date when Ndayambaje spoke with community leaders at Bishya trade centre.[6837]

2992. Ndayambaje is correct in his assertion that the Trial Chamber relied exclusively on Witness QAR to conclude that Ndayambaje was present at Mugombwa Church on 20 and 21 April 1994 and for his involvement in the events there.[6838] The Trial Chamber expressly noted that Witnesses FAU, FAG, JAMES, and MAJIK did not testify to the presence of Ndayambaje at the church on these dates, but found that this aspect of their evidence was not incompatible with

[6831] Trial Judgement, para. 1236.
[6832] In the Trial Judgement, the Trial Chamber repeatedly referred to Witness FAG's evidence in the context of Mugombwa Church as pertaining to 21 April 1994. The Trial Chamber noted that the witness did not provide a specific date for the events at the church but relied on the witness's explanation that the events took place on the Thursday two weeks after the death of President Habyarimana. *See* Trial Judgement, paras. 1048-1056. *See also ibid.*, para. 1048, fn. 2088; Witness FAG, T. 1 March 2004 pp. 6, 15 (closed session), T. 2 March 2004 pp. 16-19.
[6833] Trial Judgement, para. 1245.
[6834] *See* Trial Judgement, paras. 1038-1193. The Prosecution does not dispute that no witness provided evidence about such a meeting taking place on 20 April 1994. *See* Prosecution Response Brief, paras. 2205, 2318.
[6835] *See* Ndayambaje Appeal Brief, para. 358; Trial Judgement, paras. 1048-1056.
[6836] *See* Trial Judgement, paras. 1245, 5754.
[6837] The Trial Judgement clearly reflects that, in finding Ndayambaje guilty in relation to the crimes perpetrated at Mugombwa Church on 20 and 21 April 1994, the Trial Chamber relied on evidence of Ndayambaje's presence at Mugombwa Church on 20 and 21 April 1994, his addresses to the attackers while at the church, and his moral authority. *See* Trial Judgement, paras. 5756-5758, 5995-6002, 6064-6066, 6107, 6108, 6175, 6176.
[6838] Trial Judgement, paras. 1219, 1227, 1229, 1230, 1232, 1234, 1244.

Witness QAR's testimony.[6839] Ndayambaje fails to appreciate that nothing in the Statute or the Rules prevents a trial chamber from relying on uncorroborated evidence. A trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[6840] Ndayambaje does not demonstrate that the evidence of Witness QAR was so lacking in reliability and credibility that no reasonable trier of fact could have relied on it without corroboration.

2993. As to Ndayambaje's argument that the Trial Chamber erred in finding corroboration of Witness QAR's evidence from witnesses who did not corroborate the key fact of his presence at Mugombwa Church, the Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.[6841] Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.[6842] It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[6843] Recalling that the Trial Chamber found that the evidence of Witnesses FAU, FAG, JAMES, and MAJIK was not incompatible with Witness QAR's testimony as to Ndayambaje's presence at Mugombwa Church on 20 and 21 April 1994,[6844] Ndayambaje's argument that the evidence of these witnesses could not be found to corroborate that of Witness QAR because they only corroborated peripheral aspects of her testimony lacks merit.

2994. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndayambaje's meeting with community leaders at Bishya trade centre took place on 20 April 1994.[6845] However, the Appeals Chamber finds that this error has no impact on Ndayambaje's convictions. The Appeals Chamber dismisses the remainder of Ndayambaje's arguments related to an alleged lack of corroboration.

[6839] *See* Trial Judgement, paras. 1080, 1083, 1230, 1234.
[6840] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[6841] *See Nzabonimana* Appeal Judgement, para. 184; *Ntabakuze* Appeal Judgement, para. 150; *Ntawukulilyayo* Appeal Judgement, para. 24. *See also Munyakazi* Appeal Judgement, para. 103.
[6842] *Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103; *Nahimana et al.* Appeal Judgement, para. 428.
[6843] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428.
[6844] *See* Trial Judgement, paras. 1080, 1083, 1230, 1234.
[6845] *See* Trial Judgement, paras. 1245, 5754.

4. Assessment of Defence Evidence

2995. Ndayambaje submits that the Trial Chamber erred in rejecting the evidence of Defence Witnesses JAMES, MAJIK, and BOZAN related to Mugombwa Church.[6846]

(a) Witness JAMES

2996. The Trial Chamber observed that Witness JAMES testified that he saw Witness QAR at a bar on the evening of 21 April 1994 and knew that she spent the night at a nearby house, contradicting Witness QAR's evidence that she spent the night of 21 April 1994 at the priest's house.[6847] The Trial Chamber determined that Witness JAMES's testimony that Witness QAR was not telling the truth about where she spent the night of 21 April 1994 did not contradict Witness QAR's evidence in any material aspect.[6848] The Trial Chamber accepted Witness QAR's evidence that she spent the night of 21 April 1994 at the priest's house, noting that "it is possible that Witness JAMES was mistaken and that he in fact saw her on the following evening."[6849] It concluded that Witness JAMES's evidence did not cast doubt on Witness QAR's credibility.[6850]

2997. Ndayambaje submits that the Trial Chamber erred in rejecting without any valid reason Witness JAMES's evidence even though he raised a reasonable doubt as to the presence of Ndayambaje at Mugombwa Church on 20 and 21 April 1994 and contradicted Witness QAR's evidence on every aspect.[6851] He contends that the Trial Chamber speculated that Witness JAMES might have been mistaken and that this shows that Witness JAMES's evidence raised a doubt.[6852]

2998. The Prosecution responds that the Trial Chamber reasonably concluded that Witness JAMES may have been mistaken about the day he saw Witness QAR as the witness conceded that he was not good with dates as he was very young at the time of the events.[6853]

2999. The Appeals Chamber notes that Ndayambaje's claim that Witness JAMES contradicted Witness QAR in every respect is not supported by the portions of the Trial Judgement to which he

[6846] *See* Ndayambaje Appeal Brief, paras. 379-386. *See also* Ndayambaje Notice of Appeal, paras. 146-148, 150; AT. 21 April 2015 p. 23. Under Ground 17 of his appeal, Ndayambaje advances arguments challenging the Trial Chamber's assessment of the alibi evidence. *See* Ndayambaje Appeal Brief, paras. 387-389, 395-415, 417. *See also* AT. 21 April 2015 pp. 23, 24, 26. These submissions have been addressed above by the Appeals Chamber in Section IX.C.
[6847] Trial Judgement, para. 1242.
[6848] Trial Judgement, para. 1243.
[6849] Trial Judgement, para. 1243.
[6850] Trial Judgement, para. 1243.
[6851] Ndayambaje Appeal Brief, para. 379. *See also* Ndayambaje Notice of Appeal, paras. 147, 148; AT. 21 April 2015 p. 25.
[6852] Ndayambaje Appeal Brief, para. 381.
[6853] Prosecution Response Brief, para. 2218.

refers.[6854] In fact, many of the paragraphs Ndayambaje referenced show that the Trial Chamber found Witness JAMES to corroborate Witness QAR's testimony in several aspects.[6855]

3000. Moreover, the Appeals Chamber does not agree that the Trial Chamber rejected Witness JAMES's evidence on the basis of mere speculation. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[6856] In this case, the Trial Chamber found that Witness QAR's eyewitness account was compelling and accepted her account that she spent the night of 21 April 1994 at the priest's house, noting that Witness JAMES's account did not contradict Witness QAR's evidence in any material respect.[6857] Ndayambaje disregards this part of the Trial Chamber's reasoning and focuses exclusively on the Trial Chamber's observation that Witness JAMES may have been mistaken regarding the date. Ndayambaje therefore fails to show that no reasonable trier of fact could have accepted Witness QAR's evidence over Witness JAMES's evidence.[6858]

3001. The Appeals Chamber dismisses Ndayambaje's submissions regarding the Trial Chamber's assessment of Witness JAMES's evidence concerning Witness QAR's whereabouts on 21 April 1994.

(b) Witness MAJIK

3002. The Trial Chamber noted that Witness MAJIK testified that she first "passed by Mugombwa Church at about 11:30 a.m. on 20 April 1994" and that, "[o]n her way back past the church an hour later[,] the attackers had not attacked the church."[6859] It further noted that Witness MAJIK testified that she did not see Ndayambaje on either of her journeys.[6860] The Trial Chamber observed,

[6854] *See* Ndayambaje Appeal Brief, para. 379, *referring to* Trial Judgement, paras. 1073-1087, 1227, 1231, 1234, 1235, 1237, 1242, 1244.
[6855] *See* Trial Judgement, paras. 1231 (finding that the explosions coming from the church that were heard by Witness JAMES corroborated Witness QAR's account of grenades being thrown at the church), 1234 (finding that Witness JAMES's account that he overheard the attackers talking about an attack in which an axe was used to break down a door corroborated Witness QAR's account of how the church's door was broken), 1235 (Witness JAMES corroborated the identity of some of the attackers), 1237 (finding that Witness JAMES corroborated Witness QAR's account regarding the presence of Burundian refugees among the attackers), 1242 (finding that Witness JAMES corroborated Witness QAR with respect to the intervention of the Hutu father of her child in saving her), 1244 (finding that Witness JAMES corroborated Witness QAR with respect to the time of the attack launched on 21 April 1994 and the throwing of grenades).
[6856] *See*, *e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29 ("Where testimonies are divergent, it is the duty of the [t]rial [c]hamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.") (internal reference omitted).
[6857] Trial Judgement, para. 1243.
[6858] The Appeals Chamber notes that the Trial Chamber rejected other aspects of Witness JAMES's testimony in light of the evidence in the record. *See* Trial Judgement, paras. 4605, 4737, 4738, 4740.
[6859] Trial Judgement, para. 1229.
[6860] Trial Judgement, para. 1230.

however, that Witness MAJIK was a passer-by and that she was not at the church for an extended period of time on 20 April 1994.[6861] In light of this, it concluded that Witness MAJIK's testimony did not cast doubt on Witness QAR's eyewitness testimony that Ndayambaje came to the church for 15 minutes at about midday on 20 April 1994.[6862]

3003. Ndayambaje submits that the Trial Chamber misconstrued Witness MAJIK's testimony when finding that she only returned to Mugombwa Church at 12:30 p.m.[6863] He claims that the witness testified that she was at the church at about noon on 20 April 1994 and that she did not see him there.[6864] In his view, a reasonable trier of fact could not have rejected Witness MAJIK's evidence on the basis that she was a passer-by.[6865]

3004. The Prosecution responds that the Trial Chamber was correct in describing Witness MAJIK as a passer-by since the witness was only in the vicinity of the church for a limited period of time.[6866] It also highlights that the Trial Chamber did not state that Witness MAJIK came back to the church only at 12.30 p.m. but rather that she left the parish grounds around 12.30 p.m., having remained there for about half an hour.[6867]

3005. Ndayambaje replies that what is important is not the amount of time Witness MAJIK spent at the church but rather that she was there when Witness QAR alleged to have seen Ndayambaje.[6868]

3006. The Appeals Chamber notes that Witness MAJIK testified that she passed in front of Mugombwa Church at "about 11.30" in the morning of 20 April 1994.[6869] She stated that she stopped at the parish for a short while to ask a young man what had happened, before continuing to the homes of her aunt and uncle, both of which were closed.[6870] Witness MAJIK testified that she then returned to Mugombwa Church to see if her uncle was there.[6871] She added that she stayed on the parish grounds for "about half an hour" and thought that she left "around 12:25 or 12:30".[6872]

3007. In light of this evidence, the Appeals Chamber finds that the Trial Chamber did not err in taking into consideration that Witness MAJIK only stayed on the parish grounds for limited

[6861] Trial Judgement, para. 1230.
[6862] Trial Judgement, para. 1230.
[6863] Ndayambaje Appeal Brief, paras. 385, 386, *referring to* Trial Judgement, paras. 1088-1092, 1225, 1229, 1230.
[6864] Ndayambaje Appeal Brief, para. 386, *referring to* Witness MAJIK, T. 17 June 2008 pp. 56, 57.
[6865] Ndayambaje Appeal Brief, paras. 385, 386. *See also* Ndayambaje Reply Brief, para. 143; AT. 21 April 2015 p. 25.
[6866] Prosecution Response Brief, para. 2229.
[6867] Prosecution Response Brief, para. 2230. The Prosecution also argues that, in any event, Witness MAJIK's evidence is unbelievable and shows that she wanted to help Ndayambaje. *See ibid.*, paras. 2231-2239; AT. 21 April 2015 pp. 50, 51.
[6868] Ndayambaje Reply Brief, para. 143.
[6869] Witness MAJIK, T. 17 June 2008 p. 41 (closed session). *See also* Trial Judgement, para. 1088.
[6870] Witness MAJIK, T. 17 June 2008 pp. 42, 44 (closed session). *See also* Trial Judgement, para. 1089.
[6871] Witness MAJIK, T. 17 June 2008 pp. 44, 45 (closed session). *See also* Trial Judgement, paras. 1089, 1090.
[6872] Witness MAJIK, T. 17 June 2008 pp. 44, 45 (closed session). *See also* Trial Judgement, para. 1090.

amounts of time. In the view of the Appeals Chamber, the Trial Chamber nonetheless did not accurately recall her evidence when stating that she returned to Mugombwa Church "an hour later" after having previously passed by the church at 11.30 a.m., as her testimony reflects that she estimated her return to the church around 12.00 p.m.[6873]

3008. The Appeals Chamber, however, finds that this error has no impact on the Trial Chamber's conclusion that Witness MAJIK's testimony did not cast doubt on Witness QAR's eyewitness testimony that Ndayambaje came to Mugombwa Church for 15 minutes at about midday on 20 April 1994.[6874] Indeed, both Witnesses QAR and MAJIK were very clear that they could not provide exact times but only estimates of what they witnessed or of their whereabouts on 20 April 1994.[6875] In these circumstances, a reasonable trier of fact could have considered that Witness MAJIK was present at the church before or after Ndayambaje's short visit at the church, which Witness QAR observed.[6876]

3009. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that no reasonable trier of fact could have found that Witness MAJIK's testimony did not cast doubt on Witness QAR's evidence concerning Ndayambaje's presence at Mugombwa Church on 20 April 1994.

(c) Witness BOZAN

3010. The Trial Chamber noted Witness QAR's evidence that, on 20 April 1994, she saw, through a broken window, Ndayambaje speaking to the attackers as well as that of Witnesses BOZAN, Tiziano, and JAMES that it was not possible to look through the windows of the church unless they were broken, given that they were made of opaque coloured glass.[6877] The Trial Chamber added that "[t]his evidence supports Witness QAR's account of her sighting of Ndayambaje in the church grounds on that day."[6878] The Trial Chamber further found that:

[6873] *See* Trial Judgement, para. 1229. However, the Appeals Chamber observes that the Trial Chamber accurately recalled Witness MAJIK's testimony when summarising it. *See ibid.*, paras. 1088-1092.
[6874] *See* Trial Judgement, para. 1230.
[6875] *See* Witness QAR, T. 20 November 2001 pp. 119 ("I would say [Ndayambaje] got [to the church] around noon"), 131, 132 ("Q. When [Ndayambaje] came around noon, which is the approximate time you gave, when he came with the vehicle and the picture, would it be correct to say that he spent less than 15 minutes in the church premises? A. Yes, that's correct."); Witness MAJIK, T. 17 June 2008 pp. 41 ("Q. So, madam, I will repeat my question. At what time of the day on Wednesday did you pass in front of the church? And if you are able to tell the Court, please do. Tell us at about what time or hour. A. I think the time was at about – was about 11:30.") (closed session), 44 ("Q. For how long did you stay on the church grounds on that occasion? A. I stayed there for about an hour – about half an hour instead."), 45 ("I think I left the church premises around 12:25 or 12:30.") (closed session). *See also* Trial Judgement, paras. 1040, 1042, 1088, 1090.
[6876] Trial Judgement, para. 1230.
[6877] Trial Judgement, para. 1227.
[6878] Trial Judgement, para. 1227.

> there are conflicting accounts of precisely when the windows in the church were broken. Witness QAR testified that as she entered the church at about 8.00 a.m. on 20 April 1994, people were throwing stones at the church, breaking the windows. According to her testimony, the window by which she was standing was broken by noon, enabling her to see Ndayambaje outside the church. Witness BOZAN testified that the attackers had not started throwing stones at the church by around 9.30 a.m. but that later he saw from his vantage point near the presbytery, that at about 11.15 a.m. a single window nearest the priest's house was broken. The Chamber observes that Witness BOZAN testified that he watched the assailants throwing stones from the presbytery gate where he saw only one window broken. His view of the church was restricted to one side of the church and does not cast doubt on the testimony of Witness QAR that more than one window was broken.[6879]

In addition, the Trial Chamber found that Witness BOZAN partially corroborated Witness QAR's account with respect to the identity of the assailants on 20 April 1994.[6880]

3011. Ndayambaje submits that the Trial Chamber erred in its assessment of Witness BOZAN's testimony.[6881] He asserts that the Trial Chamber erred in stating that the witness testified about 21 April 1994 since in fact he testified about 20 April 1994.[6882] Moreover, Ndayambaje contends that the Trial Chamber erred in rejecting Witness BOZAN's evidence that he did not see him while at Mugombwa Church on 20 April 1994 between 10.00 a.m. and 1.00 p.m. on the basis of the witness's "unspecified" close ties to him and the witness's involvement in the massacre at the church.[6883] He argues that the Trial Chamber confused Witness BOZAN with another person.[6884] According to Ndayambaje, Witness BOZAN was credible and undermined the credibility of Witness QAR.[6885]

3012. The Prosecution concedes that the Trial Chamber mistook Witness BOZAN for another person in relation to another incident but argues that the witness's evidence was in any event incapable of raising a doubt in the Prosecution case against Ndayambaje.[6886]

3013. A review of Witness BOZAN's testimony shows that the event he recounted occurred on 20 April 1994.[6887] While the Trial Chamber, when summarising his evidence, stated that the witness was talking about 21 April 1994,[6888] a plain reading of the Trial Judgement shows that the Trial

[6879] Trial Judgement, para. 1228 (internal references omitted).
[6880] Trial Judgement, para. 1235.
[6881] Ndayambaje Appeal Brief, para. 384.
[6882] Ndayambaje Appeal Brief, para. 383, *referring to* Trial Judgement, para. 1177; Witness BOZAN, T. 17 September 2008 pp. 51, 52.
[6883] Ndayambaje Appeal Brief, para. 382. *See also* AT. 21 April 2015 p. 25.
[6884] Ndayambaje Appeal Brief, para. 382. *See also* Ndayambaje Notice of Appeal, paras. 147, 148; Ndayambaje Reply Brief, para. 141; AT. 21 April 2015 p. 25.
[6885] Ndayambaje Appeal Brief, para. 382.
[6886] Prosecution Response Brief, para. 2220. In addition, the Prosecution responds that Witness BOZAN undoubtedly had close ties to Ndayambaje as he reported to him while Ndayambaje was *bourgmestre*. *See ibid*., para. 2221. The Prosecution adds that, in any event, Witness BOZAN is not credible. *See ibid.*, para. 2222; AT. 21 April 2015 pp. 51, 52.
[6887] *See* Witness BOZAN, T. 17 September 2008 pp. 44 (closed session), 51.
[6888] *See* Trial Judgement, para. 1177.

Chamber only assessed his evidence with regard to events that occurred on 20 April 1994.[6889] The Appeals Chamber considers that the Trial Chamber's misstatement of the date in one paragraph of the Trial Judgement within the summary of Witness BOZAN's evidence had no bearing on its findings and has therefore not occasioned a miscarriage of justice.[6890]

3014. The Appeals Chamber observes that Ndayambaje's remaining arguments are all based on the premise that the Trial Chamber found Witness BOZAN not credible and rejected his evidence. There is, however, no indication in the Trial Judgement that the Trial Chamber did not find the witness credible with respect to the events at Mugombwa Church. In fact, the Trial Chamber relied on Witness BOZAN's testimony as corroborative of some aspects of Witness QAR's evidence.[6891] The Trial Chamber did not refer to, let alone reject, Witness BOZAN's alleged testimony that he did not see Ndayambaje at the church while he was there between 10.00 a.m. and 1.00 p.m. and Ndayambaje does not provide any reference to support his assertion that the witness so testified.[6892] During Witness BOZAN's examination-in-chief, Ndayambaje did not ask the witness whether he was at the church on the morning of 20 April 1994 and whether he saw him there.[6893] While, upon cross-examination by the Prosecution, Witness BOZAN stated that he was at Mugombwa Church on the morning of 20 April 1994 between 9.30 a.m. and 12.30 p.m. and answered "no" when asked whether he saw Ndayambaje around the church that day,[6894] the Defence objected to any follow-up questions as to whether it was possible that Ndayambaje would have been there and the witness would not have seen him and the Prosecution moved to another line of questioning.[6895] The Appeals Chamber considers that no reasonable trier of fact could have relied on this aspect of Witness BOZAN's testimony in these circumstances and that, as a result, the Trial Chamber did not have to discuss it.

3015. As Ndayambaje submits, the Trial Chamber mistook Witness BOZAN for another person and erroneously stated that Witness BOZAN was involved in the massacre at Mugombwa Church.[6896] However, this erroneous finding was made and relied upon in relation to the abduction of Tutsi women and girls after Ndayambaje's Swearing-In Ceremony, a separate event for which

[6889] *See* Trial Judgement, paras. 1227, 1228, 1244.
[6890] *See* Trial Judgement, para. 1177.
[6891] *See*, *e.g.*, Trial Judgement, paras. 1227, 1228, 1235.
[6892] *See* Ndayambaje Appeal Brief, para. 382.
[6893] Witness BOZAN, T. 16 September 2008 pp. 5-10. *See also* T. 17 September 2008 pp. 39, 43, 44 (closed session). There is also no indication in Witness BOZAN's summary of evidence by the Trial Chamber that he testified that he did not see Ndayambaje at Mugombwa Church on 20 April 1994. *See* Trial Judgement, paras. 1165-1177.
[6894] Witness BOZAN, T. 17 September 2008 pp. 14, 15, 44 (closed session), 47.
[6895] Witness BOZAN, T. 17 September 2008 pp. 47-49.
[6896] *See* Trial Judgement, para. 4744. The Appeals Chamber addresses this issue in more detail below in Section IX.H. *See infra*, para. 3289.

Ndayambaje was convicted.[6897] As noted above, the Trial Chamber did not reject Witness BOZAN's evidence insofar as it related to Mugombwa Church.[6898] Likewise, the Trial Judgement does not reflect that the Trial Chamber relied on Witness BOZAN's alleged ties with Ndayambaje in reaching its findings on his evidence relating to the Mugombwa Church incidents.[6899]

3016. Accordingly, the Appeals Chamber dismisses Ndayambaje's arguments concerning the assessment of Witness BOZAN's evidence pertaining to Mugombwa Church.

5. Conclusion

3017. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of the evidence relating to his involvement in crimes perpetrated at Mugombwa Church on 20 and 21 April 1994 that occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber. Recalling that Ndayambaje's submissions pertaining to his responsibility for committing direct and public incitement to commit genocide at Mugombwa Church have become moot, the Appeals Chamber concludes that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings committed at Mugombwa Church on 20 and 21 April 1994 and, accordingly, dismisses the relevant part of Ground 9 and Ground 17 of Ndayambaje's appeal.

[6897] *See* Trial Judgement, paras. 4744, 4746, 5957-5959. The Appeals Chamber will discuss the impact of this error below in the section on the abductions of Tutsis women and girls in Mugombwa. *See infra*, Section IX.H.

[6898] *See* Trial Judgement, paras. 1227, 1228, 1235.

[6899] The Appeals Chamber notes that the Trial Chamber found that Witness BOZAN gave alibi evidence for Ndayambaje. *See* Trial Judgement, para. 1196. When the Trial Chamber assessed the credibility of the alibi witnesses it found that they all have close ties with Ndayambaje but when discussing these ties in more detail, the Trial Chamber did not mention Witness BOZAN. *See ibid.*, para. 1199. Moreover the summary of Witness BOZAN's evidence does not reflect that the witness provided alibi evidence for Ndayambaje at Mugombwa Church on 20 or 21 April 1994. *See ibid.*, paras. 1165-1177. In light of the foregoing, the Appeals Chamber considers that there is no indication in the Trial Judgement that the Trial Chamber found that Witness BOZAN was not credible because he had close ties with Ndayambaje.

F. Kabuye Hill (Grounds 9 in part, 10, 11, 18)

3018. The Trial Chamber found that, on 20 April 1994, Ndayambaje travelled to Ngiryi Bridge with several armed soldiers and communal policemen where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, following which soldiers and policemen escorted the refugees to Kabuye Hill.[6900] The Trial Chamber also found that Ndayambaje was present at Kabuye Hill on 22 April 1994 when soldiers, policemen, and armed civilians attacked Tutsis gathered on the hill, resulting in the death of thousands of Tutsis.[6901] In addition, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they participated in attacks against Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and the Muganza commune office on 23 April 1994, which were later used in the massacres of Tutsis at Kabuye Hill; and (iii) was present during the attacks at Kabuye Hill on 23 and 24 April 1994 that resulted in thousands of deaths.[6902]

3019. After finding that the interception at Ngiryi Bridge and forced escorting of the refugees to Kabuye Hill did not constitute an act of genocide and did not rise to a similar gravity as other crimes against humanity, the Trial Chamber acquitted Ndayambaje of genocide and persecution as a crime against humanity for the interception and forced movement of the Tutsi refugees from Ngiryi Bridge to Kabuye Hill.[6903] However, the Trial Chamber convicted Ndayambaje for aiding and abetting genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for his role in the attacks at Kabuye Hill from 22 to 24 April 1994.[6904]

3020. Ndayambaje submits that the Trial Chamber erred in its assessment of the evidence related to the events at Ngiryi Bridge and in convicting him in relation to the attacks at Kabuye Hill. The Appeals Chamber will examine Ndayambaje's challenges to the Trial Chamber's findings pertaining to the events at Ngiryi Bridge and Kabuye Hill on 20 and 22 April 1994 before turning to his submissions related to the attacks on Kabuye Hill on 23 and 24 April 1994.

3021. As a preliminary remark, the Appeals Chamber recalls that, on 9 April 2015, it admitted as additional evidence on appeal a confidential witness statement dated 30 January 2013 relevant to the assessment of the credibility of Prosecution Witness EV, whose evidence was relied upon by the

[6900] Trial Judgement, paras. 1414, 5766.
[6901] Trial Judgement, paras. 1423, 1424, 5769.
[6902] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6903] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6904] Trial Judgement, paras. 5777, 5976, 6064-6066, 6107, 6108, 6175, 6176, 6186.

Trial Chamber in relation to the events at Kabuye Hill.[6905] On 12 May 2015, the Appeals Chamber admitted as additional evidence on appeal a prior statement and part of the testimony of Witness Claver Habimana in the *Ntawukulilyayo* case relevant to the assessment of the credibility of Prosecution Witness RT, whose evidence was also relied upon by the Trial Chamber in relation to the events at Kabuye Hill.[6906] In accordance with the relevant standard, if the Appeals Chamber determines that a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt on the basis of the trial record alone, the Appeals Chamber will then determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[6907]

1. Interception of Tutsi Refugees at Ngiryi Bridge on 20 April 1994 and Attack on Kabuye Hill on 22 April 1994

3022. Based on the evidence of Prosecution Witnesses EV, RT, and TP, the Trial Chamber determined that, on 20 April 1994, Ndayambaje travelled to Ngiryi Bridge with several armed soldiers and communal policemen where they arrested fleeing Tutsi refugees and forced them to return to Gisagara marketplace.[6908] Specifically, the Trial Chamber found that Witness EV testified that he and other refugees were intercepted at Ngiryi Bridge at daybreak on 20 April 1994.[6909] It also held that his testimony reflected that he arrived at Kabuye Hill before 6.00 p.m. on the same day.[6910]

3023. Relying on Witness EV's evidence, as corroborated by the circumstantial evidence of Witnesses RT and TW about Ndayambaje's general involvement in the Kabuye Hill events, the Trial Chamber further found that Ndayambaje was present during the attack at Kabuye Hill on 22 April 1994.[6911] It relied on its finding that, on the third day of Witness EV's stay at Kabuye Hill, "which would have fallen on 22 April 1994", the witness saw from a distance of about 20 meters Ndayambaje arriving at Kabuye Hill at around 10.00 a.m.[6912]

[6905] *See* Decision on Ndayambaje's First Motion to Present Additional Evidence, 9 April 2015 (confidential) ("9 April 2015 Appeal Decision"), pp. 1, 4; *infra*, paras. 3107, 3108.
[6906] *See* Decision on Ndayambaje's First, Second, Third, and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence, 12 May 2015 (confidential) ("12 May 2015 Appeal Decision"), paras. 25, 90, 91; *infra*, paras. 3107, 3108.
[6907] *See supra*, para. 33.
[6908] Trial Judgement, paras. 1405-1410, 1414.
[6909] Trial Judgement, paras. 1265, 1406. *See also ibid*., para. 1407.
[6910] Trial Judgement, paras. 1406, 1407.
[6911] Trial Judgement, paras. 1418-1424.
[6912] Trial Judgement, para. 1420.

3024. Ndayambaje challenges the Trial Chamber's findings that he was present at Ngiryi Bridge on 20 April 1994 and at Kabuye Hill on 22 April 1994.[6913] In particular, he contends that the Trial Chamber erred in assessing Witness EV's timeline for the events at Ngiryi Bridge and Kabuye Hill.[6914] He argues that Witness EV's testimony reflects that, during the night of "Wednesday" to "Thursday" he was at Ngiryi Bridge and that it was only the following day, on "Thursday", 21 April 1994 – and not Wednesday, 20 April 1994 as found by the Trial Chamber – that he returned to Gisagara.[6915] Ndayambaje adds that Witness EV stated that he returned from Ngiryi Bridge to Gisagara on the day President Sindikubwabo addressed the crowd in Gisagara, which is well known to have been Thursday, 21 April 1994.[6916] According to Ndayambaje, the Trial Chamber therefore erred in concluding that Witness EV arrived at Kabuye Hill on Wednesday, 20 April 1994 since the witness's evidence indicates that he arrived on Thursday, 21 April 1994.[6917] He contends that the Trial Chamber further erred in finding that Witness EV testified to Ndayambaje's presence at Kabuye Hill on 20 and 22 April since the witness was in fact referring to 21 and 23 April 1994.[6918] Ndayambaje also challenges the Trial Chamber's assessment of other aspects of Witness EV's evidence as well as its reliance on the evidence of other Prosecution witnesses to establish his presence at Ngiryi Bridge on 20 April 1994 and at Kabuye Hill on 22 April 1994.[6919]

3025. The Prosecution acknowledges that the Trial Chamber misinterpreted Witness EV's testimony about his timeline as the witness situated the interception of refugees at Ngiryi Bridge on 21 April 1994, and not on 20 April 1994 as found by the Trial Chamber.[6920] It argues that the Trial Chamber should not have relied on Witness EV's evidence since "his timeline was confused and cannot be considered reliable" and aspects of his testimony were contradicted by other Prosecution witnesses.[6921] In the view of the Prosecution, however, Witness EV's unreliability and the Trial Chamber's erroneous reliance thereupon do not affect the Trial Chamber's finding that Ndayambaje

[6913] Ndayambaje Notice of Appeal, paras. 89-99, 153-181; Ndayambaje Appeal Brief, paras. 253-270, 425-441, 444-461, 463-465, 468-473, 477-479, 519-523, 531. *See also* Ndayambaje Reply Brief, paras. 100-106, 168-173, 182, 193-195; AT. 21 April 2015 p. 27.
[6914] Ndayambaje Appeal Brief, paras. 435-437, 457, 460, 463.
[6915] Ndayambaje Appeal Brief, para. 435.
[6916] Ndayambaje Appeal Brief, paras. 435, 436.
[6917] Ndayambaje Appeal Brief, para. 437. Ndayambaje argues that the Trial Chamber prevented the Defence from clarifying this timeframe during the cross-examination of Witness EV. *See idem*.
[6918] Ndayambaje Appeal Brief, paras. 457, 460, 463.
[6919] Ndayambaje Notice of Appeal, paras. 89-99, 153-181; Ndayambaje Appeal Brief, paras. 253-270, 425-434, 436, 438-441, 444-459, 461, 464, 465, 468-473, 477-479, 519-523, 531; Ndayambaje Reply Brief, paras. 100-106, 168-173, 182, 193-195.
[6920] Prosecution Response Brief, para. 2298; AT. 21 April 2015 p. 45.
[6921] Prosecution Response Brief, paras. 2296, 2297, 2299, 2300, 2315, 2321. *See also* AT. 21 April 2015 p. 46.

turned back refugees at Ngiryi Bridge since the finding was further supported by Witnesses QAQ's, RT's, and TP's testimonies.[6922]

3026. The Prosecution further responds that the Trial Chamber's confusion concerning the timeline of events does not impact its finding about Ndayambaje's involvement in the attack on Kabuye Hill of 22 April 1994 since, even disregarding Witness EV's evidence that should not have been relied upon, "taking the evidence as a whole, there was sufficient circumstantial evidence" from Prosecution Witnesses FAG and QAL "to remove any reasonable doubt that Ndayambaje was involved at Kabuye Hill" on 22 April 1994.[6923]

3027. Ndayambaje replies that it is not possible to speculate as to what the Trial Chamber's conclusions would have been, had it not incorrectly assessed Witness EV's evidence.[6924] He contends that he is prejudiced by the Prosecution moulding its case on appeal by now claiming that the Trial Chamber should not have relied on Witness EV's testimony while pleading that the witness was credible at trial.[6925]

3028. The Appeals Chamber notes that a careful review of Witness EV's testimony shows that the witness testified that he was intercepted at Ngiryi Bridge on 21 April 1994 and that he arrived at Kabuye Hill in the evening of the same day, as both Ndayambaje and the Prosecution submit.[6926]

[6922] Prosecution Response Brief, paras. 2301, 2304, 2307-2311, 2325. *See also ibid*., paras. 2297, 2306. The Prosecution further argues that, even if the finding related to Ngiryi Bridge was overturned, it would have no impact on Ndayambaje's convictions as the Trial Chamber merely relied on this finding as one of several factors showing that Ndayambaje knew of the genocidal intent of the Kabuye Hill assailants. *See ibid*., paras. 2301, 2305, 2320.

[6923] Prosecution Response Brief, paras. 2380, 2424. At the appeals hearing, the Prosecution also suggested that Witness QBZ testified that he saw Ndayambaje at Kabuye Hill on 22 April 1994. *See* AT. 21 April 2015 p. 46, *referring to* Prosecution Response Brief, para. 1194, Witness QBZ, T. 23 February 2004 p. 25 *et seq*. The Trial Chamber found that Witness QBZ in the cited portions of his testimony relied upon by the Prosecution recounted an event that occurred around 13 April 1994. *See* Trial Judgement, para. 1428. The Prosecution does not challenge this finding. Accordingly, the Appeals Chamber declines to consider this argument further. The Prosecution also argues that, although the Trial Chamber relied on an aspect of Witness EV's testimony that related to 23 April 1994 in reaching its finding for 22 April 1994, another part of Witness EV's testimony in any case reflects that the witness saw Ndayambaje at Kabuye Hill on 22 April 1994. It submits that, accordingly, Ndayambaje fails to demonstrate any error in the Trial Chamber's reliance on Witness EV as to Ndayambaje's presence at Kabuye Hill on 22 April 1994. *See* Prosecution Response Brief, paras. 2322, 2324, 2332, *referring to* Witness EV, T. 26 February 2004 pp. 60, 61, T. 25 February 2004 pp. 75, 76. *See also* AT. 21 April 2015 p. 46. Given that the Prosecution has repeatedly submitted that the Trial Chamber should not have relied on Witness EV's testimony, and given the phrasing of its additional arguments, the Appeals Chamber understands them to be made in the alternative and in order to respond to Ndayambaje's submissions. *See* Prosecution Response Brief, paras. 2296, 2297, 2300, 2301, 2306, 2315, 2320, 2321.

[6924] Ndayambaje Reply Brief, paras. 169, 172, 175.

[6925] Ndayambaje Reply Brief, paras. 169-172. *See also* AT. 21 April 2015 p. 26.

[6926] Witness EV insisted several times that he hardly remembered the dates, but rather remembered weekdays. He stated in examination-in-chief that he left his residence on 19 April 1994 and, although he was first confused under cross-examination as to whether he left his house on 18 or 19 April 1994, he further stated that the "events broke out" on "a Tuesday to Wednesday" and that he left his house on a "Tuesday". A review of his testimony shows that, after he left his home with his family, they wandered all night, and the group only decided to leave the town and head to Burundi the next morning. Witness EV's testimony further reflects that he passed by Kabuye Hill on his way to Burundi on "Wednesday", then by Gisagara, before leaving the place in the evening, and that it was only the following morning that they were intercepted at Ngiryi Bridge. He further stated that following the interception, he returned to Gisagara, where President Sindikubwabo spoke to the crowd and that he arrived at Kabuye Hill the same day in the evening,

The Trial Chamber therefore erred in finding that Witness EV testified that the interception at Ngiryi Bridge took place on 20 April 1994 and that he arrived at Kabuye Hill on that same day.

3029. Likewise, the Trial Chamber erred in finding that Witness EV testified to seeing Ndayambaje during the attack on the refugees at Kabuye Hill on 22 April 1994 based on a part of his testimony that pertained to the "third day" he spent at Kabuye Hill, since this day corresponded to 23 April 1994 and not 22 April 1994.[6927] Another part of Witness EV's testimony nonetheless reflects that the witness did testify about seeing Ndayambaje at Kabuye Hill the day after his arrival, which is 22 April 1994.[6928] However, the Appeals Chamber notes that one key aspect of this uncorroborated part of Witness EV's testimony – erroneously considered to relate to 20 April 1994 by the Trial Chamber[6929] – was rejected by the Trial Chamber as unconvincing.[6930]

3030. Considering that the Trial Chamber found that Witness EV was the only witness testifying to Ndayambaje's presence at Kabuye Hill on 22 April 1994[6931] and that neither Witness FAG nor Witness QAL relied upon by the Prosecution[6932] testified to Ndayambaje's presence at Kabuye Hill on that date,[6933] the Appeals Chamber finds that no reasonable trier of fact could have concluded as proven beyond reasonable doubt that Ndayambaje was present at Kabuye Hill on 22 April 1994.

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a "Thursday". *See* Witness EV, T. 25 February 2004 pp. 69-76, T. 26 February 2004 pp. 22-45 (French). The Appeals Chamber notes that it is not disputed that President Sindikubwabo was present in Gisagara on Thursday, 21 April 1994. *See* Ndayambaje Appeal Brief, para. 436; Prosecution Response Brief, para. 2298.

[6927] *See* Trial Judgement, paras. 1269-1271, 1420-1422.

[6928] *See* Witness EV, T. 25 February 2004 p. 75, T. 26 February 2004 p. 60. *See also* Trial Judgement, paras. 1269, 1270.

[6929] *See* Trial Judgement, paras. 1269, 1270, 1434, 1450. A review of Witness EV's testimony shows that the witness testified that he saw Ndayambaje arriving at Kabuye Hill "before noon" the day *following his own arrival* at Kabuye Hill and not as the Trial Chamber found *on the day* he arrived at Kabuye Hill. *See* Witness EV, T. 25 February 2004 pp. 73-75, T. 26 February 2004 pp. 45-49, 54, 60. *See also* Trial Judgement, paras. 1267, 1269. The Appeals Chamber acknowledges that according to the English version of the transcripts, Witness EV testified that he saw Ndayambaje "on the day when [he] arrived." *See* Witness EV, T. 25 February 2004 p. 75 ("Q. On the day when you arrived, were you able to recognise any people amongst the attackers? A. I saw Elie Ndayambaje."). However, the French version of the transcripts differs in this respect, the witness answering in the affirmative to the question whether he recognised anyone the day that followed his own arrival. *See* Witness EV, T. 25 February 2004 p. 84 (French) ("*Q. Le jour qui a suivi, donc, votre arrivée, avez-vous été en mesure de reconnaître qui que ce soit parmi les assaillants ?* "). Having listened to the relevant audio-recording, the Appeals Chamber notes that the English version of the transcripts does not capture correctly the question asked in English by the Prosecution, which clearly was about the day following Witness EV's arrival. *See* audio-recording of Witness EV's testimony of 25 February 2004, at 11:24-11:35. This matter was also later clarified during cross-examination, since Witness EV was directly asked if he witnessed Ndayambaje for the first time on Kabuye Hill on the second day of his own arrival at the scene. *See* Witness EV, T. 26 February 2004 pp. 54, 59, 60.

[6930] Trial Judgement, paras. 1450, 1451 ("While the Chamber agrees that it would have been impossible for Witness EV to remember all the details of his stay at Kabuye Hill, the Chamber considers that an incident as striking as the throwing of a grenade by a figure of authority such as Ndayambaje would have been at the forefront of the witness' mind when he recorded his experience in his previous statements. For that reason, the Trial Chamber accepts the witness' testimony that Ndayambaje distributed weapons at Kabuye Hill but finds his uncorroborated account that Ndayambaje threw grenades and shot at the refugees to be unconvincing.").

[6931] Trial Judgement, paras. 1421, 1424.

[6932] *See* Prosecution Response Brief, para. 2424.

[6933] *See* Trial Judgement, paras. 1299, 1311-1314, 1418.

3031. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in holding Ndayambaje responsible for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994 on the basis of his presence during the attack and reverses his convictions for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994.

3032. With respect to the Trial Chamber's findings relating to the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill on 20 April 1994, the Appeals Chamber recalls that Ndayambaje was not convicted for these events.[6934] The Trial Judgement also clearly reflects that the Trial Chamber only relied on its factual findings concerning the interception and forced movement to determine the *mens rea* of the assailants who attacked the refugees at Kabuye Hill on 22 April 1994 and Ndayambaje's knowledge thereof.[6935] Because the Appeals Chamber reversed Ndayambaje's convictions for the killings perpetrated at Kabuye Hill on 22 April 1994, the Appeals Chamber finds it unnecessary to examine the impact of the Trial Chamber's error in assessing Witness EV's evidence concerning the date of the interception and forced movement of the refugees on the Trial Chamber's findings on these specific events as any error in this respect would not have occasioned a miscarriage of justice. For the same reason, the Appeals Chamber declines to consider Ndayambaje's remaining challenges to the Trial Chamber's findings regarding the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill.

2. Attacks on Kabuye Hill on 23 and 24 April 1994

3033. As noted above, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they attacked Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and the Muganza commune office on 23 April 1994, which were later used in the massacres of Tutsis at Kabuye Hill; (iii) was present on 23 and 24 April 1994 during the attacks against Tutsis at Kabuye Hill that resulted in thousands of deaths.[6936]

3034. In concluding that Ndayambaje transported attackers to Kabuye Hill on 23 and 24 April 1994, the Trial Chamber relied on the testimonies of Witnesses EV, RT, TW, QAQ, and FAG.[6937] Concerning the distributions of weapons on 23 April 1994, the Trial Chamber relied on Witness RT's account as supported by Witnesses EV's and QAL's testimonies concerning the

[6934] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6935] Trial Judgement, paras. 5770, 5771. *See also ibid*., paras. 5772-5776. *See also* Ndayambaje Appeal Brief, para. 451; Prosecution Response Brief, para. 2295. The Trial Judgement reflects that the Trial Chamber did not rely on the events that led the refugees to Kabuye Hill to establish the genocidal intent of those who attacked the refugees at Kabuye Hill on 23 and 24 April 1994. *See ibid*., paras. 5769, 5771, 5773.
[6936] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6937] Trial Judgement, paras. 1426, 1428-1431.

distribution at Kabuye Hill, and on the accounts of Witnesses RV and FAU concerning the distribution that took place at the Muganza commune office.[6938] The Trial Chamber relied on Witnesses EV, RT, TW, QAQ, and to some extent on Defence Witnesses ALIZA and KEPIR, in finding that attacks were perpetrated on 23 and 24 April 1994 at Kabuye Hill and that Ndayambaje was present during the attacks.[6939]

3035. Ndayambaje challenges the Trial Chamber's assessment of Prosecution and Defence evidence regarding these events.[6940]

(a) Assessment of Prosecution Evidence

(i) Witness QAQ

3036. In the section of the Trial Judgement where it discussed the evidence related to the transportation of attackers to Kabuye Hill on 23 and 24 April 1994, the Trial Chamber noted that Witness QAQ testified that "[o]n the day following his arrival at Kabuye Hill, which would have fallen on 24 or 25 April 1994, [he] saw Ndayambaje driving a white vehicle transporting over five *gendarmes* to Kabuye Hill."[6941] The Trial Chamber relied on Witness QAQ's evidence, along with that of Witnesses EV, RT, TW, and FAG, to conclude that Ndayambaje transported soldiers, civilians, and policemen to Kabuye Hill on 23 and 24 April 1994 where they participated in attacks against Tutsis and that he was present at Kabuye Hill during the attacks perpetrated against the Tutsi refugees on 23 and 24 April 1994.[6942]

3037. Ndayambaje submits that the Trial Chamber erred in its assessment of Witness QAQ's testimony.[6943] Specifically, he argues that, contrary to the Trial Chamber's finding, it was impossible for Witness QAQ to be in Kabuye Hill on 23 or 24 April 1994 given the timeline the witness gave during his testimony.[6944] In his view, Witness QAQ's testimony reflects that he could not have been in Kabuye Hill before 26 April 1994, namely after the attacks on the refugees.[6945]

[6938] Trial Judgement, paras. 1432, 1434-1443.
[6939] Trial Judgement, paras. 1448-1452.
[6940] Ndayambaje Notice of Appeal, paras. 85-95, 153-160, 164-170; Ndayambaje Appeal Brief, paras. 243-246, 248-260, 480-531. *See also* Ndayambaje Reply Brief, paras. 178-198.
[6941] Trial Judgement, para. 1426. *See also ibid*., para. 1448; *infra*, fn. 6953.
[6942] Trial Judgement, paras. 1431, 1452.
[6943] Ndayambaje Appeal Brief, para. 486.
[6944] Ndayambaje Appeal Brief, paras. 481-483. Ndayambaje adds that Witness QAQ confirmed the timeline he gave during his testimony to Defence Witness Évariste-Emmanuel Siborurema. *See ibid*., para. 482, *referring to* Évariste-Emmanuel Siborurema, T. 25 August 2008 pp. 52-60 (closed session). The Appeals Chamber observes that Évariste-Emmanuel Siborurema is at times referred to under the pseudonym "Witness NAVIC" in the Trial Judgement, a protective measure the witness asked to lift when testifying in court. *See* Évariste-Emmanuel Siborurema, T. 25 August 2008 p. 3.
[6945] *See* Ndayambaje Appeal Brief, para. 483.

He also contends that Witness QAQ acknowledged that he neither saw nor identified Ndayambaje at Kabuye Hill.[6946]

3038. In addition, Ndayambaje avers that the testimonies of Witness TW and Defence Witness KWEPO show that Witness QAQ never went to Kabuye Hill since he was hidden elsewhere "during the events".[6947] Ndayambaje also contends that, having found that Witness QAQ's evidence related to Ndayambaje's Swearing-In Ceremony was not credible, the Trial Chamber should have also found him not credible in relation to the events at Kabuye Hill.[6948]

3039. The Prosecution responds that it can be inferred from Witness QAQ's evidence that he was on Kabuye Hill either on 23 or 24 April 1994 and that the witness had no reason to lie about Ndayambaje's involvement.[6949] The Prosecution adds that Witnesses TW's and KWEPO's evidence does not necessarily contradict Witness QAQ's testimony in this respect.[6950]

3040. As reflected in the Trial Judgement, Witness QAQ did not give a clear timeline between the moment he left his house and his arrival at Kabuye Hill.[6951] The witness specified that he was only providing estimates concerning the dates.[6952] The Appeals Chamber nonetheless understands that, in light of his testimony as to the sequence of events and the description given by other Prosecution witnesses, the Trial Chamber concluded that the transportation of attackers that Witness QAQ recounted occurred on 24 April 1994.[6953] Having carefully reviewed Witness QAQ's testimony, the Appeals Chamber considers that a reasonable trier of fact could have concluded from his testimony, considered in light of the rest of the evidence, that he arrived at Kabuye Hill on 23 April 1994[6954]

[6946] Ndayambaje Appeal Brief, para. 481.
[6947] Ndayambaje Appeal Brief, para. 484. *See also* Ndayambaje Reply Brief, para. 187.
[6948] Ndayambaje Appeal Brief, para. 485, *referring to* Trial Judgement, para. 4607. *See also ibid*., para. 579; Ndayambaje Reply Brief, para. 183.
[6949] Prosecution Response Brief, paras. 2347, 2348. The Prosecution submits that Witness QAQ had lost all notion of time and was not certain about times or the sequence of events. *See ibid*., paras. 2349, 2350.
[6950] Prosecution Response Brief, paras. 2352-2355. The Prosecution contends that Witness Siborurema contradicted Witness KWEPO and probably tailored his testimony in light of Witness QAQ's evidence. *See ibid*., paras. 2356-2358.
[6951] Trial Judgement, para. 1426 ("On the day following his arrival at Kabuye Hill, which would have fallen on 24 or 25 April 1994, Witness QAQ […]."). *See also ibid*., paras. 1289, 1290.
[6952] The Appeals Chamber notes that Witness QAQ repeatedly indicated before the Trial Chamber that he was only providing estimates concerning the dates, and was not sure "how many days" he spent hiding on the hill before going to Kabuye Hill. *See* Witness QAQ, T. 12 November 2002 pp. 50, 56 (closed session). *See also* T. 11 November 2002 p. 25 (closed session), T. 12 November 2002 pp. 14 and 61, 62, 66 (closed session).
[6953] The Appeals Chamber notes that the Trial Chamber stated that Witness QAQ saw Ndayambaje driving a vehicle transporting gendarmes "on 24 or 25 April 1994" and, after discussing the evidence of Witnesses EV, RT, TW, and FAG, concluded that the evidence of these five witnesses demonstrated that Ndayambaje was involved in the transportation of attackers on 23 and 24 April 1994. *See* Trial Judgement, paras. 1426, 1431. As Witness QAQ was not found to have testified about 23 April 1994, the Appeals Chamber understands that the Trial Chamber concluded that he was testifying about 24 April 1994, and not 25 April 1994 as his testimony could also suggest. The Appeals Chamber notes that the Trial Chamber's later reference to the witness testifying about seeing Ndayambaje "on 23 or 24 April 1994" seems to be a typographical mistake in light of the Trial Chamber's summary of the witness's evidence and its discussion of the most relevant part of his evidence. *See ibid*., paras. 1289, 1290, 1426, 1448.
[6954] The Appeals Chamber observes that it is not clear from the witness's evidence whether he left his house on Tuesday, 19 April 1994 or on Wednesday, 20 April 1994. *See* Witness QAQ, T. 11 November 2002 p. 23 (closed

and that his testimony as to the presence of Ndayambaje, the day after his arrival, pertained to 24 April 1994.[6955]

3041. As to whether Witness QAQ saw Ndayambaje at Kabuye Hill, the Appeals Chamber notes that the Trial Chamber stated in its deliberations that the witness "saw Ndayambaje" driving a vehicle transporting gendarmes to Kabuye Hill.[6956] When summarising his evidence, however, the Trial Chamber correctly noted that Witness QAQ explained during cross-examination that "from where he was he could not personally say whether the person in the car was Ndayambaje" and that he was told by other refugees that the vehicle he saw was Ndayambaje's vehicle and was the same vehicle that had prevented them from continuing on their way to Burundi.[6957] The Trial Chamber therefore erred in stating that Witness QAQ saw Ndayambaje at Kabuye Hill. It is unclear to what extent the Trial Chamber relied on this erroneous statement when reaching its finding on Ndayambaje's involvement in the transportation of attackers to Kabuye Hill on 23 April 1994 as the Trial Chamber generally concluded that "the testimony of Witnesses EV, RT, TW, QAQ and FAG [was] credible on the issue of Ndayambaje's involvement in the transportation of attackers and therefore [found] that on 23 and 24 April 1994, Ndayambaje transported soldiers, civilians and policemen to Kabuye Hill."[6958] In any event, Ndayambaje fails to demonstrate that no reasonable trier of fact could have relied on Witness QAQ's testimony, as correctly summarised, that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle, as corroborative of Witness TW's testimony that Ndayambaje transported attackers to Kabuye Hill in the white commune vehicle on 24 April 1994.[6959]

3042. With regard to Ndayambaje's reliance on Witness KWEPO's evidence as contradicting Witness QAQ's testimony that he was present at Kabuye Hill, the Appeals Chamber observes that Witness KWEPO merely gave hearsay evidence that Witness QAQ had been hidden by someone

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session), T. 12 November 2002 p. 55 (closed session). Witness QAQ stated that then, he "hid for three or four day[s], and […] had to move to at least four places of residence" before going to Kabuye Hill, possibly placing his arrival at Kabuye Hill on 23 or 24 April 1994. *See* Witness QAQ, T. 11 November 2002 pp. 24, 25 (closed session), T. 12 November 2002 p. 50 (closed session). The Appeals Chamber notes that Witness QAQ also testified that indeed he spent a single night at three different people's houses and maybe two nights at the house of an old lady. *See* Witness QAQ, T. 12 November 2002 p. 51 (closed session). However, the Appeals Chamber observes that Witness QAQ was hesitating and did not give a categorical statement regarding the number of nights he spent at the house of the old lady. *See idem*, p. 51 (closed session) ("*I think* I went there on two occasions.") (emphasis added), 58 ("I don't remember very well, but I think I spent two nights there […]. Probably we could ask […], but I don't know if she herself can remember the number of nights I spent at her place."). *See also* Witness QAQ, T. 11 November 2002 pp. 24, 25 (closed session). The Appeals Chamber observes that Witness QAQ's testimony about how many nights he spent where was unclear and approximate. *See* Witness QAQ, T. 12 November 2002 pp. 51, 55-58 (closed session). *See also ibid.*, pp. 95, 104 (closed session) (French).

[6955] Witness QAQ, T. 11 November 2002 pp. 26, 30, 31 (closed session).

[6956] Trial Judgement, para. 1426.

[6957] Trial Judgement, para. 1290; Witness QAQ, T. 11 November 2002 pp. 26, 28, 31 (closed session), T. 12 November 2002 pp. 83-85 (closed session).

[6958] Trial Judgement, para. 1431.

during the events and that he did not see him between May and July 1994.[6960] Given the limited probative value of this testimony, the Appeals Chamber considers that a reasonable trier of fact could have decided that it did not cast doubt on Witness QAQ's account that he was present during the relevant period at Kabuye Hill. As for Witness TW, the Appeals Chamber notes that his testimony does not show that Witness QAQ did not go to Kabuye Hill, but rather that he did not see Witness QAQ at Kabuye Hill and that he could not say whether Witness QAQ was there because there were many people.[6961] Ndayambaje's argument that Witness TW's testimony contradicts Witness QAQ's account is therefore without merit.

3043. Finally, recalling that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony, the Appeals Chamber rejects Ndayambaje's unsubstantiated claim that the Trial Chamber erred in accepting Witness QAQ's testimony regarding Kabuye Hill, while rejecting his evidence related to Ndayambaje's Swearing-In Ceremony since this rejection was based on elements that were specific to this very aspect of his testimony.[6962]

3044. In light of the foregoing, the Appeals Chamber finds that, although the Trial Chamber erred in stating that Witness QAQ saw Ndayambaje at Kabuye Hill, Ndayambaje has not demonstrated that a reasonable trier of fact could not have relied on Witness QAQ's evidence that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle, as corroborative of Witness TW's testimony on the attacks on 24 April 1994 at Kabuye Hill.

(ii) Witness RT

3045. The Trial Chamber noted that Witness RT testified that, on the day after his arrival at Kabuye Hill, which would have fallen on 23 April 1994, he saw Ndayambaje "[arriving] at Kabuye Hill in a white Toyota *commune* vehicle" and "distributing what he thought to be grenades to the attackers and supervising their distribution."[6963] The Trial Chamber concluded that Witness RT's eyewitness testimony on the distribution of grenades by Ndayambaje on 23 April 1994 was clear and convincing and that Witnesses EV's and QAL's testimonies lent weight to his account,

[6959] *See infra*, para. 3063.
[6960] Witness KWEPO, T. 27 August 2008 pp. 8, 9 (closed session) ("Q. Did you see [Witness QAQ] in the months of May, June and July in your region, that is, May, June, July '94? A. I didn't see him during those months, but I learnt of where he was.").
[6961] *See* Witness TW, T. 12 February 2004 p. 15 (closed session) (French).
[6962] *See* Trial Judgement, paras. 4606-4608.
[6963] Trial Judgement, para. 1432. The Trial Chamber noted that, while Witness RT did not actually see grenades in Ndayambaje's hands, he stated that Ndayambaje must have been distributing grenades as many assailants subsequently threw grenades at the refugees and that the grenades could only have come from Ndayambaje. *See idem*.

providing circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill."[6964]

3046. Ndayambaje submits that the Trial Chamber erred in relying on Witness RT's testimony and in finding that his testimony evidenced the distribution of weapons at Kabuye Hill.[6965] In particular, Ndayambaje argues that Witness RT never testified to seeing him at Kabuye Hill on 23 April 1994 as the witness testified about seeing him at Dahwe Hill.[6966]

3047. Ndayambaje also contends that the Trial Chamber erred in finding that Witness RT's testimony on the distribution of weapons on 23 April 1994 was corroborated by Witnesses EV and QAL.[6967] Ndayambaje argues that Witness QAL's testimony about seeing him on a "Thursday" and Witness EV's testimony about seeing him on "20 April 1994" cannot corroborate Witness RT's account of a distribution that allegedly took place on "Saturday", 23 April 1994.[6968]

3048. Ndayambaje further submits that the Trial Chamber failed to provide a reasoned opinion in finding that Witness RT identified him despite the extremely difficult circumstances in which the identification was made.[6969] The Appeals Chamber also understands Ndayambaje to argue that it was unreasonable on the part of the Trial Chamber to rely on Witness RT's account of his purported distribution of grenades on 23 April 1994 where the Trial Chamber had itself recognised the "uncertainty" of the witness's account in this respect.[6970] Finally, Ndayambaje suggests that the Trial Chamber could not have found that he distributed weapons on 23 April 1994 on the basis of Witness RT's indirect evidence as it was not the only reasonable possible conclusion.[6971]

3049. The Prosecution responds that Witness RT was a consistent, reliable, and credible witness and that Ndayambaje's undeveloped challenges should be rejected.[6972] It contends that Ndayambaje's claim about the fact that Witness RT saw Ndayambaje on Dahwe Hill and not Kabuye Hill is irrelevant given that "Dahwe Hill is opposite Kabuye Hill and was one of the places

[6964] Trial Judgement, paras. 1434, 1438.
[6965] Ndayambaje Appeal Brief, paras. 492-497. *See also* Ndayambaje Reply Brief, para. 180.
[6966] Ndayambaje Appeal Brief, paras. 492, 495-497. *See also* Ndayambaje Reply Brief, paras. 178, 180; AT. 21 April 2015 p. 27. Ndayambaje reiterates that a site visit was indispensable. *See* Ndayambaje Appeal Brief, para. 495; Ndayambaje Reply Brief, para. 111. The Appeals Chamber has addressed and rejected this claim in Section IX.D above.
[6967] Ndayambaje Appeal Brief, paras. 245, 493-497.
[6968] Ndayambaje Appeal Brief, paras. 493, 497, 503, 508. *See also* Ndayambaje Reply Brief, paras. 180, 189.
[6969] Ndayambaje Notice of Appeal, para. 85; Ndayambaje Appeal Brief, paras. 243-245, 248, 249, 495. Ndayambaje argues that when a finding of guilt is based on identification made under difficult circumstances, such as in this case, a trial chamber should take into account factors that undermined the probative value of this evidence, which the Trial Chamber failed to do so, amounting to a failure to provide a reasoned opinion. *See idem*.
[6970] Ndayambaje Appeal Brief, para. 494, *referring to* Trial Judgement, para. 1432.
[6971] Ndayambaje Appeal Brief, para. 523.
[6972] Prosecution Response Brief, paras. 2333, 2337.

where attackers disembarked and grouped before going to Kabuye Hill."[6973] In the Prosecution's view, there was ample circumstantial evidence supporting Witness RT's testimony of Ndayambaje distributing weapons at Kabuye Hill on 23 April 1994 and Ndayambaje's unsubstantiated arguments regarding identification should be dismissed.[6974]

3050. Ndayambaje replies that the Trial Chamber never established that Dahwe Hill was one of the "places where attackers disembarked and grouped before going to Kabuye Hill."[6975]

3051. In summarising Witness RT's testimony about the attacks on Kabuye Hill, the Trial Chamber noted that the witness testified that, on "Saturday", attackers were "gathered near Dahwe and Gahondo" and that "[s]ubsequently, Ndayambaje arrived".[6976] In the course of its discussion of the evidence, the Trial Chamber referred to Witness RT testifying to seeing Ndayambaje "aboard or arriving with vehicles transporting individuals to Kabuye Hill" [6977] and "arrive at Kabuye Hill".[6978] A review of Witness RT's evidence reflects that he testified that on "Saturday", he saw Ndayambaje and soldiers coming in a Toyota vehicle and that they stopped "on the road that crosses Dahwe hill."[6979] Given that the evidence reflects that Dahwe Hill was the place where attackers disembarked from the vehicles before launching attacks on Kabuye Hill where the refugees were gathered[6980] and that Dahwe Hill was within sight of Kabuye Hill,[6981] the Appeals Chamber finds no merit in Ndayambaje's argument that Witness RT did not see him at Kabuye Hill.

3052. Turning to the issue of corroboration, a plain reading of the Trial Judgement shows that the Trial Chamber relied on Witness RT's evidence alone to find that Ndayambaje distributed weapons at Kabuye Hill on 23 April 1994.[6982] The Trial Chamber merely relied on Witnesses EV's and QAL's evidence as circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill", "lend[ing] weight to Witness RT's account of weapons

[6973] Prosecution Response Brief, para. 2335. *See also ibid*., para. 2386; AT. 21 April 2015 pp. 53, 54. The Prosecution further submits that, in any event, Witness RT did not state that he saw Ndayambaje at Dahwe Hill but in the valley between Kabuye Hill and Dahwe Hill. *See* Prosecution Response Brief, para. 2338.
[6974] Prosecution Response Brief, paras. 2336, 2340.
[6975] Ndayambaje Reply Brief, para. 178. Ndayambaje adds that, contrary to Witness RT's testimony that he saw Ndayambaje in the commune vehicle on 23 April 1994, Witness RV never testified about Ndayambaje using the commune vehicle on that date. *See idem*. The Appeals Chamber notes that Ndayambaje does not provide any reference to support this contention and will therefore not entertain it further.
[6976] Trial Judgement, para. 1279.
[6977] Trial Judgement, para. 1426.
[6978] Trial Judgement, para. 1432.
[6979] Witness RT, T. 11 March 2004 pp. 67, 68, 70, 71.
[6980] Witness RT, T. 10 March 2004 p. 67, T. 11 March 2004 pp. 66, 67; Witness QAQ, T. 11 November 2002 p. 26 (closed session); Witness TP, T. 12 February 2004 pp. 70, 71.
[6981] *See* Witness RT, T. 10 March 2004 p. 67 ("A. Someone in Dahwe and someone in Kabuye, they would be able to see each other."); Witness QAQ, T. 11 November 2002 pp. 26, 30 (closed session), T. 12 November 2002 pp. 84, 85 (closed session); Witness TP, T. 12 February 2004 pp. 70, 71; Witness SHICO, T. 23 June 2008 pp. 24, 25; Witness MAJIK, T. 17 June 2008 p. 56; Witness SABINE, T. 12 June 2008 p. 20.
[6982] Trial Judgement, paras. 1434, 1438.

distribution by Ndayambaje" on 23 April 1994.[6983] For the reasons developed below, the Appeals Chamber considers that Witness EV's testimony as misconstrued by the Trial Chamber could not reasonably provide corroboration of Witness RT's account. However, given the limited weight accorded to his testimony by the Trial Chamber regarding the distribution of weapons on 23 April 1994, the Appeals Chamber considers that this error does not affect the Trial Chamber's finding. Ndayambaje's contention that the Trial Chamber erred in finding that Witness QAL could corroborate Witness RT because his testimony did not pertain to 23 April 1994 but to Thursday, 21 April 1994 is also unpersuasive as corroboration can be found in circumstantial evidence as long as it concerns a sequence of linked facts,[6984] which is the case here. In any event, the Appeals Chamber recalls that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[6985]

3053. Regarding Ndayambaje's contention related to his identification by Witness RT, the Appeals Chamber recalls that "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion"[6986] and that "identifications made in difficult circumstances, such as darkness, obstructed view, or traumatic events, require careful and cautious analysis by a trial chamber."[6987]

3054. The Appeals Chamber notes that the Trial Chamber did not state that Witness RT's identification of Ndayambaje was made under difficult circumstances and did not specifically address in its deliberations the circumstances under which Witness RT identified Ndayambaje.[6988] Ndayambaje points to two elements that, in his view, constitute "difficult circumstances": (i) Kabuye Hill was so far away from Dahwe Hill that it rendered identification impossible; and (ii) Witness RT was being attacked and needed to hide.[6989] However, Ndayambaje ignores Witness RT's testimony that when he saw Ndayambaje distributing grenades, he was situated "maybe 80 to 100 steps" away at "a place where [he] could see clearly."[6990] In addition, although

[6983] Trial Judgement, paras. 1434, 1438.
[6984] *Cf. Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al*. Appeal Judgement, para. 428.
[6985] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[6986] *Lukić and Lukić* Appeal Judgement, para. 136; *Renzaho* Appeal Judgement, para. 527; *Kupreškić et al*. Appeal Judgement, para. 39. *See also Kalimanzira* Appeal Judgement, para. 96.
[6987] *See*, *e.g*., *Gatete* Appeal Judgement, para. 193; *Renzaho* Appeal Judgement, para. 527; *Kalimanzira* Appeal Judgement, para. 96. *See also Lukić and Lukić* Appeal Judgement, para. 137.
[6988] *See* Trial Judgement, paras. 1426, 1432, 1448.
[6989] Ndayambaje Appeal Brief, para. 495.
[6990] *See* Witness RT, T. 10 March 2004 p. 69. *See also* T. 11 March 2004 pp. 67, 68 ("Q. And from where you were, up to the point where the vehicle stopped, what would you say was the distance between those two places? A. The place was quite visible. There is nothing that prevented me from seeing. I would say the distance was about 100 metres. It's a

the record reflects that there was shooting at the refugees the morning Witness RT saw Ndayambaje, the witness explained that he was at a place where he could see the vehicle with the soldiers and Ndayambaje but that the attackers could not see him.[6991] The Appeals Chamber is not convinced that the elements Ndayambaje points to demonstrate that the circumstances in which Witness RT identified him were such as to require further analysis from the Trial Chamber.

3055. As to Ndayambaje's argument that it was unreasonable on the part of the Trial Chamber to rely on Witness RT's account where it recognised its "uncertainty", the Appeals Chamber notes that the Trial Chamber did not state that this part of the witness's testimony was uncertain but merely observed that:

> The witness saw Ndayambaje distributing what he thought to be grenades to the attackers and supervising their distribution. While he did not actually see grenades in Ndayambaje's hands, Witness RT stated that the Accused must have been distributing grenades because many assailants subsequently threw grenades at the refugees and the grenades could only have come from the Accused.[6992]

3056. Apart from generally claiming that the Trial Chamber's finding was unreasonable, Ndayambaje does not develop any argument to demonstrate that the Trial Chamber erred in accepting Witness RT's "clear and convincing" eyewitness account of the distribution of grenades and his inference that Ndayambaje must have distributed the grenades. Ndayambaje merely disagrees with the Trial Chamber's conclusion without showing any error. His contention is accordingly dismissed.

3057. Finally, in the absence of substantiation, the Appeals Chamber dismisses Ndayambaje's contention regarding the existence of other reasonable inferences available from the evidence regarding Ndayambaje's involvement in the distribution of weapons on 23 April 1994 at Kabuye Hill.

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place that you could see if you are on Gahondo hill, you could see the place, and if you are in Dahwe it is even closer to you."), 71 ("I said so yesterday that Ndayambaje also came in the same vehicle. Moreover, he was at a place where he could be seen and I saw him."); Trial Judgement, para. 1279. In addition, the Appeals Chamber notes that the evidence Ndayambaje relies upon does not support his assertion that Kabuye Hill and Dahwe Hill were far away from each other. The Appeals Chamber is also of the view that Ndayambaje misinterpreted the testimony of the witnesses he refers to in support of his claim that they testified about the impossibility of being able to identify someone positioned on Dahwe Hill from Kabuye Hill. It appears clearly from a review of the relevant transcripts that these witnesses were testifying about what they could see from the place they were standing. *See* Witness SHICO, T. 23 June 2008 pp. 24, 25; Witness MAJIK, T. 17 June 2008 pp. 56, 57; Witness SABINE, T. 12 June 2008 pp. 19, 20; Witness GLANA, T. 11 June 2008 p. 11 (closed session); Witness QAQ, T. 12 November 2002 pp. 84, 85 (closed session).

[6991] Witness RT, T. 11 March 2004 pp. 69-71. The Appeals Chamber also observes that Witness RT had known Ndayambaje prior to the events of 1994, "used to see him often, at least twice a week" and that he identified him in court, aspects that Ndayambaje does not challenge. *See* Trial Judgement, para. 1281. *See also* Witness RT, T. 10 March 2004 pp. 76, 77.

[6992] Trial Judgement, para. 1432 (internal references omitted).

3058. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness RT's evidence relating to the attacks on Kabuye Hill.

(iii) Witness TW

3059. When discussing the events at Kabuye Hill on 22 April 1994, the Trial Chamber noted that Witness TW testified that he saw Ndayambaje transporting armed attackers to Kabuye Hill "on three consecutive days", which, by the Trial Chamber's estimation, "would have fallen on 23, 24 and 26 April 1994."[6993] In this part of the Trial Judgement, the Trial Chamber relied on Witness TW's evidence, along with that of Witnesses EV and RT, as circumstantial evidence pointing to "Ndayambaje's general involvement in the Kabuye Hill events" and supporting "the contention that he was also present on 22 April 1994."[6994]

3060. With respect to the events at Kabuye Hill on 23 and 24 April 1994, the Trial Chamber noted Witness TW's testimony that he "saw Ndayambaje at Kabuye Hill on 24 April 1994 driving a white double-cabin Toyota Hilux carrying Hutu civilians armed with traditional weapons."[6995] The Trial Chamber concluded based on this testimony, along with the evidence of Witnesses EV, RT, QAQ, and FAG, that Ndayambaje transported attackers to Kabuye Hill and was present at Kabuye Hill during the attacks on 23 and 24 April 1994.[6996]

3061. Ndayambaje submits that the Trial Chamber erred in finding that Witness TW saw him on Kabuye Hill on 23 April 1994 since the witness testified to seeing him for the first time on 24 April 1994, as reflected in the Trial Chamber's summary of the witness's evidence.[6997] He argues that the Trial Chamber abused its discretion in explaining that, unlike Witnesses EV and RT, Witness TW did not mention that Ndayambaje distributed weapons by the fact that a multitude of refugees were present at Kabuye Hill and the hill was vast.[6998] Ndayambaje further contends that the Trial Chamber did not take into account Witness TW's incentive to lie due to "obvious personal motives of vengeance and hatred."[6999]

[6993] Trial Judgement, para. 1421.
[6994] Trial Judgement, para. 1421.
[6995] Trial Judgement, para. 1426. *See also ibid*., para. 1448.
[6996] Trial Judgement, paras. 1426, 1431, 1448, 1452.
[6997] Ndayambaje Appeal Brief, paras. 498, 499, *referring to* Trial Judgement, paras. 1282-1287, 1421. *See also* Ndayambaje Reply Brief, para. 181.
[6998] Ndayambaje Appeal Brief, para. 500, *referring to* Trial Judgement, para. 1433.
[6999] Ndayambaje Appeal Brief, para. 501.

3062. The Prosecution responds that Ndayambaje fails to demonstrate any error in the Trial Chamber's assessment of Witness TW's evidence.[7000]

3063. According to the Appeals Chamber, a careful review of Witness TW's testimony reflects that Witness TW testified that he saw Ndayambaje at Kabuye Hill for the first time on 24 April 1994.[7001] The Trial Chamber therefore misstated his testimony in stating that Witness TW saw Ndayambaje on 23 April 1994 in the section related to the events on 22 April 1994.[7002] This appears to be a typographical error as the Trial Chamber correctly referred to Witness TW testifying to seeing Ndayambaje on 24 April 1994, and not 23 April 1994, everywhere else in the Trial Judgement.[7003] In any event, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice as the Trial Chamber relied on Witness TW's correct account that he saw Ndayambaje on 24 April 1994 in its deliberations as to the events of 23 and 24 April 1994.[7004]

3064. The Trial Chamber expressly noted that, unlike Witnesses EV and RT, Witness TW did not mention that Ndayambaje distributed weapons at Kabuye Hill. It was of the view that "these witnesses may not have had the same opportunities to witness the events in question."[7005] Ndayambaje's unsubstantiated contention that the Trial Chamber erred in this respect reflects mere disagreement with the Trial Chamber's conclusion and is rejected without further consideration.

3065. Likewise, the Trial Chamber expressly noted that "Witness TW acknowledged that before the 1994 events, he and his brother had been arrested, detained and beaten up on the orders of the Accused" and that "Ndayambaje had been involved in the forced closure of his bar."[7006] It nonetheless concluded that the witness's denial that those events "may have influenced his testimony was vigorous and believable."[7007] Ndayambaje's argument does not show that the Trial Chamber's determination was unreasonable.

3066. The Appeals Chamber concludes that Ndayambaje has failed to demonstrate that the Trial Chamber erred in assessing Witness TW's credibility as it relates to the events at Kabuye Hill on 23 and 24 April 1994.

[7000] Prosecution Response Brief, paras. 2341-2343.
[7001] *See* Witness TW, T. 10 February 2004 pp. 7, 8, 11, 12 and 44-46, 48, 51-54 (closed session), T. 11 February 2004 p. 44.
[7002] Trial Judgement, para. 1421.
[7003] *See* Trial Judgement, paras. 1426, 1448.
[7004] The Appeals Chamber recalls that it reversed Ndayambaje's conviction for the events at Kabuye Hill on 22 April 1994 and that, accordingly, any issue related to a possible impact of this error on the events at Kabuye Hill on 22 April 1994 is moot. *See supra*, paras. 3031-3032.
[7005] Trial Judgement, para. 1433. The Trial Chamber noted that "there were many thousands of refugees on Kabuye Hill, which covered an expansive area." *See idem.*
[7006] Trial Judgement, para. 1449.
[7007] Trial Judgement, para. 1449.

(iv) Witness TP

3067. The Trial Chamber found that Witness TP's account contained "a number of serious discrepancies that rendered her testimony unreliable, but only as it relates to 24 April 1994" and concluded that it would not rely on her evidence as it relates to that day.[7008]

3068. Ndayambaje submits that Witness TP did not see any policeman, soldier, or vehicle on Kabuye Hill on 23 April 1994 and that, since she was not found credible by the Trial Chamber as to the "Sunday", she does not corroborate any witness on the transportation of attackers to Kabuye Hill by Ndayambaje on 24 April 1994.[7009]

3069. The Prosecution responds that Ndayambaje's argument that Witness TP did not give corroborating evidence as to Ndayambaje transporting attackers is correct but irrelevant.[7010]

3070. The Appeals Chamber observes that a plain reading of the Trial Judgement shows that the Trial Chamber did not rely on Witness TP's evidence for the transport of attackers to Kabuye Hill on 23 or 24 April 1994.[7011] Ndayambaje does not show that Witness TP's evidence, which the Trial Chamber did not rely upon, undermines the reasonableness of the Trial Chamber's findings for 23 and 24 April 1994. The Appeals Chamber therefore dismisses Ndayambaje's obscure argument about Witness TP's evidence without further consideration.

(v) Witness QAL

3071. The Trial Chamber found that Witness QAL, who testified that she witnessed Ndayambaje transporting guns and grenades in the direction of Kabuye Hill "one Thursday in April 1994", provided circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill."[7012]

3072. Ndayambaje submits that Prosecution and Defence evidence contradicts Witness QAL's testimony, pointing to: (i) Defence Witness MACHO's evidence that Witness QAL arrived in Muganza Sector "on a Friday at 2 p.m." to find refuge in her parents' house; (ii) Witness RV's testimony that, on Thursday, 21 April 1994, he went to Mugombwa Church with Ndayambaje in the communal vehicle; and (iii) Nteziryayo's and Defence Witness AND-44's testimonies that it was not materially possible to transport unprotected grenades in the rear compartment of a vehicle and

[7008] Trial Judgement, para. 1427.
[7009] Ndayambaje Appeal Brief, para. 502, *referring to* Trial Judgement, paras. 1295, 1427.
[7010] Prosecution Response Brief, para. 2346.
[7011] *See* Trial Judgement, paras. 1426-1431.
[7012] Trial Judgement, paras. 1434, 1438.

on rough roads without a risk of explosion.[7013] Ndayambaje further argues that the Trial Chamber accepted Witness QAL's testimony on the sole basis that she was Hutu and that Ndayambaje officiated at her wedding and ignored the fact that the witness omitted to mention any transport of weapons in her prior statement to Tribunal investigators of 17 October 1997.[7014]

3073. The Prosecution responds that Witness QAL's testimony was credible and reliable.[7015] It argues that Witness MACHO's testimony lacked credibility and reliability, that Witness RV's testimony was not incompatible with Witness QAL's account, and that Nteziryayo and Witness AND-44 did not state that it was impossible to transport grenades in the back of a pickup truck.[7016] The Prosecution also submits that, given the detailed, credible, and consistent nature of Witness QAL's evidence, the Trial Chamber was entitled to accept her testimony despite the inconsistency with her prior statement.[7017]

3074. The Appeals Chamber notes that the Trial Chamber did not discuss in the Trial Judgement Witness MACHO's testimony that Witness QAL arrived in Muganza Sector on a Friday,[7018] although it relied on Witness QAL's testimony that she witnessed Ndayambaje driving in the direction of Kabuye Hill one Thursday in April 1994.[7019] The Appeals Chamber observes that Witness QAL was not sure about the date and that it is only under cross-examination that she referred to seeing Ndayambaje going to Kabuye Hill on a "Thursday".[7020] She was not cross-examined on the basis of Witness MACHO's evidence, which only arose when Witness MACHO testified four years after her, and thus never had an opportunity to clarify the matter.[7021] In these circumstances, and considering that the Trial Chamber relied on Witness QAL's evidence solely as circumstantial evidence that Ndayambaje was generally involved in distributing weapons at Kabuye Hill,[7022] the Appeals Chamber finds that a reasonable trier of fact could have considered that Witness MACHO's evidence did not undermine the credibility of Witness QAL's account and that any error as to whether Witness QAL saw Ndayambaje on "Thursday", 21 April 1994, or "Friday", 22 April 1994 would have no impact on any material issue. Against this

[7013] Ndayambaje Notice of Appeal, para. 175; Ndayambaje Appeal Brief, paras. 504-506.
[7014] Ndayambaje Appeal Brief, paras. 503, 507. *See also ibid*., para. 576.
[7015] Prosecution Response Brief, para. 2360.
[7016] Prosecution Response Brief, paras. 2361, 2364, 2365. The Prosecution adds that, even if Witness MACHO's testimony was true, it is compatible with Witness QAL's statement that she saw Ndayambaje transporting weapons to Kabuye Hill. *See ibid*., para. 2363.
[7017] Prosecution Response Brief, para. 2366.
[7018] Witness MACHO, T. 2 July 2008 pp. 45, 46 (closed session).
[7019] Trial Judgement, paras. 1434, 1438; Witness QAL, T. 25 February 2004 p. 35.
[7020] Witness QAL, T. 25 February 2004 pp. 8, 35.
[7021] Witness QAL, T. 25 February 2004 pp. 7-22 and 23-60 (closed session). The Appeals Chamber notes that Witness QAL was only asked when exactly she lived with her parents between April to July 1994. *See ibid*., p. 25 (closed session).
[7022] Trial Judgement, paras. 1434, 1438.

background, the Appeals Chamber finds no error in the Trial Chamber's decision not to expressly discuss this aspect of Witness MACHO's evidence.

3075. Likewise, the Appeals Chamber is not persuaded that Witnesses RV's and QAL's evidence is mutually exclusive as Witness RV's testimony does not conclusively establish the whereabouts of Ndayambaje for the entire afternoon of 21 April 1994.[7023] Accordingly, the Appeals Chamber finds that a reasonable trier of fact could have decided not to discuss this particular aspect of the evidence in the Trial Judgement and to consider that Witness RV's testimony did not undermine Witness QAL's account. The Appeals Chamber also finds no contradiction between Nteziryayo's and Witness AND-44's evidence and Witness QAL's account as neither Nteziryayo nor Witness AND-44 testified that transporting grenades in the back of a pickup truck would necessarily lead to an explosion but rather gave their personal opinion about the security measures that would generally have to be taken in order to avoid an explosion.[7024]

3076. Furthermore, contrary to Ndayambaje's contention, the Appeals Chamber notes that the Trial Chamber did not accept Witness QAL's evidence "on the sole basis" that she was Hutu and that Ndayambaje officiated at her wedding. Rather, after considering her testimony including this aspect, the Trial Chamber concluded that she would not have had any reason to lie.[7025] Ndayambaje does not adduce any argument to show that the Trial Chamber erred in this regard.

3077. The Appeals Chamber observes that the Trial Chamber did not address in the Trial Judgement the fact that Witness QAL's prior statement of 17 October 1997 did not refer to the transport of weapons about which she testified at trial. During cross-examination, Witness QAL denied stating in her prior statement that she saw Ndayambaje transporting attackers, explaining that what she saw was weapons in Ndayambaje's vehicle.[7026] Bearing in mind that the Trial Chamber relied on Witness QAL's testimony solely as circumstantial evidence to support the contention that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill",[7027] the Appeals Chamber is not persuaded that the discrepancy between Witness QAL's testimony and her prior statement was such as to undermine the credibility of her evidence or require express consideration by the Trial Chamber in the Trial Judgement.

3078. Based on the above, the Appeals Chamber dismisses Ndayambaje's challenges to the Trial Chamber's assessment of Witness QAL's evidence related to the attacks on Kabuye Hill.

[7023] *See* Witness RV, T. 18 February 2004 pp. 18, 19 (closed session). *See also* Trial Judgement, para. 1070.
[7024] *See* Nteziryayo, T. 2 July 2007 pp. 59-61; Witness AND-44, T. 19 April 2007 pp. 19-21, 24.
[7025] Trial Judgement, paras. 1434, 1435, 1437.
[7026] Witness QAL, T. 25 February 2004 pp. 54, 55 (closed session), 59. *See also* Exhibit D172 (Witness QAL's Statement, dated 17 October 1997).
[7027] Trial Judgement, paras. 1434, 1438.

(vi) Witnesses RV and FAU

3079. The Trial Chamber noted that Witness RV testified to seeing Ndayambaje at the Muganza commune office on 23 April 1994 with a communal policeman, taking ammunition and a gun from the weapons store and leaving in the direction of Kabuye Hill.[7028] It also found that Witness FAU testified that he travelled with Ndayambaje to the Muganza commune office, that Brigadier Pierre took a gun there, and that he accompanied Ndayambaje and two policemen to Kabuye Hill.[7029] The Trial Chamber determined that their testimonies partly corroborated each other and that the contradictions between their testimonies did not cast doubt on their eyewitness accounts that Ndayambaje was involved in this distribution of weapons at the Muganza commune office on 23 April 1994.[7030] The Trial Chamber concluded that the Prosecution had proven beyond reasonable doubt that "Ndayambaje distributed weapons at […] the Muganza *commune* office".[7031]

3080. Ndayambaje submits that the Trial Chamber erred in giving substantial weight to the testimonies of Witnesses FAU and RV, notably because neither of them testified that he "distributed" weapons.[7032] He also points out that both witnesses had an incentive to lie since they were detained and accused in trials for genocide-related crimes at the time of their testimonies.[7033] Ndayambaje also asserts that Witness FAU referred to three Kalashnikovs in cross-examination, while he had initially only mentioned one pistol during examination-in-chief, and that Witness RV testified about a single old gun whereas he had mentioned ten guns in his prior statement.[7034]

3081. In addition, Ndayambaje contends that Witnesses FAU's and RV's testimonies contradicted each other as to: (i) the time of the event;[7035] (ii) the number and type of weapons that were taken;[7036] (iii) the identity of the persons who opened the store and distributed the weapons;[7037]

[7028] Trial Judgement, para. 1439.
[7029] Trial Judgement, para. 1440.
[7030] Trial Judgement, paras. 1439, 1441-1443.
[7031] Trial Judgement, para. 1444. *See also ibid*., para. 5772.
[7032] Ndayambaje Appeal Brief, para. 515. Ndayambaje also submits that "Witness FAU never mentioned the date on which the event allegedly took place" and that "[a]s it did in paragraphs 1034 to 1037, the Chamber had to consider this aspect with regard to the Indictment which was itself vague as to the date of the alleged weapons distribution". *See ibid*., para. 512, *referring to* Trial Judgement, paras. 1034-1037. The Appeals Chamber recalls that it has already addressed and rejected Ndayambaje's arguments with respect to the lack of notice concerning Kabuye Hill and, to the extent Ndayambaje is developing a new argument, dismisses it as unclear. *See supra*, paras. 2762-2764.
[7033] Ndayambaje Appeal Brief, paras. 509-511, 520, *referring to* Trial Judgement, paras. 1226, 1439, 1440.
[7034] Ndayambaje Appeal Brief, para. 514. Ndayambaje also avers that Witness RV testified that the weapons were taken at 4.00 p.m. during examination-in-chief, and at 2.00 p.m. on cross-examination. *See ibid*., para. 513.
[7035] Ndayambaje submits that Witness FAU testified that the weapons were taken in the morning and that, according to Witness RV, it happened in the afternoon. *See* Ndayambaje Appeal Brief, para. 513.
[7036] Ndayambaje Appeal Brief, para. 514.
[7037] Ndayambaje submits that, according to Witness FAU's testimony, the weapons store was opened by Brigadier Pierre who distributed the Kalashnikovs to policemen, whereas Witness RV testified that he opened it himself. *See* Ndayambaje Appeal Brief, para. 515.

(iv) the vehicle allegedly used by Ndayambaje;[7038] and (v) Ndayambaje's whereabouts after the distribution of weapons.[7039] Ndayambaje also asserts that the Trial Chamber did not take into account the fact that Witnesses FAU and RV contradicted Witnesses EV and QBZ who placed Ndayambaje elsewhere on Saturday, 23 April 1994.[7040]

3082. The Prosecution responds that the Trial Chamber treated Witnesses RV and FAU with appropriate caution and made no errors in its assessment.[7041] It submits that Ndayambaje is "splitting hairs" when pointing out that Witnesses RV and FAU did not testify that Ndayambaje personally took weapons and distributed them as both testified that he was "the driving force behind bringing weapons and attackers to Kabuye Hill."[7042] It contends that Ndayambaje's unsubstantiated claim regarding their status as detained witnesses awaiting trial should be summarily dismissed.[7043]

3083. The Prosecution further argues that Ndayambaje does not explain how the Trial Chamber erred in: (i) accepting Witnesses RV's and FAU's evidence despite the fact that they placed the distribution of weapons at different times of the day; (ii) assessing Witness RV's evidence; and (iii) finding that the slight contradiction about the time when Ndayambaje left the commune office on 23 April 1994 in Witnesses FAU's and RV's evidence did not cast doubt on their testimonies.[7044] It adds that Witnesses QBZ and EV did not contradict Witnesses RV and FAU.[7045]

3084. The Appeals Chamber notes that, in support of its finding that "Ndayambaje distributed weapons" at the Muganza commune office, the Trial Chamber relied on Witnesses RV's and FAU's evidence that Ndayambaje took the initiative of going to the commune office to take weapons and distribute them and that, although he did not personally proceed with the actual physical distribution

[7038] Ndayambaje submits that Witness RV mentioned a khaki-coloured vehicle belonging to the Health Centre, that no other witness mentioned, while Witness FAU spoke about a white *Projet Agricole de Muganza* ("PAMU") vehicle. *See* Ndayambaje Appeal Brief, paras. 516, 521.
[7039] Ndayambaje submits that, while Witness FAU testified that Ndayambaje went to Kabuye around 11.00 a.m. and to Butare around 1.00 p.m., driving the PAMU vehicle, and that Charles joined them in Kabuye Hill driving the commune vehicle, Witness RV testified that he saw Ndayambaje around 1.00 p.m. on his way to Kibayi in the khaki-coloured vehicle belonging to the Health Centre and around 2.00 p.m., heading for Kabuye Hill together with Witness FAU, in the vehicle driven by Charles. *See* Ndayambaje Appeal Brief, para. 517.
[7040] Ndayambaje submits that: (i) Witness EV placed Ndayambaje on Saturday, 23 April 1994 in Kabuye from 10.00 a.m. to 5.00. p.m.; and (ii) Witness QBZ placed Ndayambaje on Saturday, 23 April 1994 in Kabuye Hill "from morning to evening". *See* Ndayambaje Appeal Brief, para. 518. Ndayambaje contends that Witnesses FAU's testimony is also contradicted by Defense Witnesses GABON and KEPIR who placed Ndayambaje at the Muganza commune office in the afternoon after an attack that took place there. *See idem*. The Appeals Chamber recalls that the Trial Chamber rejected the alibi evidence provided by Witnesses GABON and KEPIR as to Ndayambaje's whereabouts on 23 and 24 April 1994 and that it has affirmed this finding above in Section IX.C. *See supra*, paras. 2919-2929.
[7041] Prosecution Response Brief, paras. 2368, 2369.
[7042] Prosecution Response Brief, para. 2373.
[7043] Prosecution Response Brief, para. 2368.
[7044] Prosecution Response Brief, paras. 2370-2372, 2375.
[7045] Prosecution Response Brief, paras. 2376-2384. The Prosecution also argues that Witness RV described the colour of the vehicle as "white tending towards khaki". *See ibid.*, para. 2374.

of weapons, he was involved in all steps of its material realization.[7046] In this context, the Appeals Chamber finds no merit in Ndayambaje's emphasis that the witnesses did not testify that he personally distributed weapons at the Muganza commune office; a fact that the Trial Chamber duly considered.[7047]

3085. The Trial Judgement also reflects express consideration that Witnesses RV and FAU may have had incentives to lie because of their status as detained witnesses convicted or awaiting trial in the assessment of their evidence pertaining to the distribution of weapons at Muganza Commune.[7048] Ndayambaje does not demonstrate any error in this respect.

3086. Turning to the alleged inconsistencies in the evidence of Witnesses RV and FAU regarding the number and types of weapons, the Appeals Chamber notes that the Trial Chamber expressly recalled Witness FAU's examination-in-chief and cross-examination in this respect and did not find that his testimony was inconsistent but rather that it "was clarified during cross-examination".[7049] Ndayambaje does not advance any argument to show that the Trial Chamber erred in this assessment.[7050] Ndayambaje also ignores that Witness RV explained in subsequent written statements that his prior statement had not been recorded correctly regarding the number of weapons that were taken from the commune office and that he had asked for a formal correction of this statement.[7051]

3087. Furthermore, the Appeals Chamber observes that the Trial Chamber expressly considered the inconsistencies that Ndayambaje points out between Witnesses FAU's and RV's evidence regarding the time of the day of the distribution of weapons, the type and number of weapons that were taken, and the identity of the person who proceeded with the removal and distribution of weapons and concluded that they did not cast doubt on their eyewitness evidence that Ndayambaje

[7046] *See* Trial Judgement, paras. 1304-1306, 1308, 1309, 1439-1443.
[7047] Trial Judgement, paras. 1439, 1443.
[7048] Trial Judgement, paras. 1439, 1440.
[7049] Trial Judgement, paras. 1440, 1441. *See also ibid*., para. 1309.
[7050] The Appeals Chamber also notes that, in examination-in-chief, Witness FAU testified that Pierre took a "gun" from the weapons store. In cross-examination, he stated that Pierre took one gun for himself and gave one to each of the two policemen and that the guns were Kalashnikovs. *See* Witness FAU, T. 4 March 2004 p. 72, T. 9 March 2004 p. 45.
[7051] Exhibit D176 (Witness RV's statement, dated 29 July 1997), p. 4 ("I never told the investigator that I gave ten guns to Celestin, or perhaps the interpreter did not give a proper translation of what I said. What I told the interpreter in my statement was that the communal police had ten guns in[t]heir possession, aside from the *commune* weapons store."); Exhibit D178 (Witness RV's statement, dated 7 and 8 March 2001), p. K0169405 (Registry pagination) ("on line 9 on the distribution of arms, I wish to make a substantial change to the words on the distribution of weapons, since what is recorded does not appear to represent what I said during the taking of the statement […]. [D]elete the words described and substitute them with the following new words […] *Les fusils de la Commune étaient en mains des policiers communaux*."). Witness RV also confirmed during cross-examination that there must have been an error of interpretation. *See* Witness RV, T. 18 February 2004 pp. 33, 34 (closed session).

was involved in the distribution of weapons at the Muganza commune office on 23 April 1994.[7052] Ndayambaje does not advance any argument to show that this conclusion was unreasonable.

3088. By contrast, the Trial Chamber did not explicitly discuss the inconsistencies within Witnesses FAU's and RV's testimonies underscored by Ndayambaje concerning the vehicle he used and his whereabouts after the distribution of weapons at the commune office. The Trial Chamber nonetheless expressly noted these aspects of their evidence in the course of its analysis of the evidence pertaining to the distribution of weapons.[7053] Ndayambaje does not explain why it was unreasonable for the Trial Chamber not to discuss these inconsistencies expressly and fails to advance any argument to demonstrate how these minor inconsistencies undermine the credibility of Witnesses FAU's and RV's accounts of Ndayambaje's involvement in the distribution of weapons.

3089. With respect to Ndayambaje's contentions regarding the contradictions between Witnesses RV's and FAU's testimonies, on one hand, and Witnesses EV's and QBZ's testimonies, on the other hand, the Appeals Chamber does not consider that Witness QBZ's account about Ndayambaje's whereabouts on a "Saturday" in April 1994[7054] contradicts Witnesses RV's and FAU's accounts in light of the Trial Chamber's finding that the event Witness QBZ testified about "occurred about one week after the death of the President, *i.e.* around 13 April 1994"; a finding that Ndayambaje does not challenge.[7055] As for Witness EV, the Appeals Chamber notes that, given that the witness could only provide estimates and did not testify to have constantly seen Ndayambaje, his testimony that on 23 April 1994 he saw Ndayambaje arriving at Kabuye Hill at about 10.00 a.m. and leaving at approximately 3.00 or 4.00 p.m.[7056] is not incompatible with Witnesses RV's and FAU's testimonies recalled by the Trial Chamber that they saw Ndayambaje at the Muganza commune office in the late morning or around 2.00 p.m., before he headed for Kabuye Hill.[7057]

3090. Accordingly, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that Ndayambaje was involved in the distribution of weapons at the Muganza commune office on 23 April 1994 based on Witnesses FAU's and RV's evidence.

[7052] Trial Judgement, paras. 1442, 1443.
[7053] Trial Judgement, paras. 1303, 1304, 1308, 1309.
[7054] Witness QBZ, T. 24 February 2004 pp. 75, 76 (closed session).
[7055] *See* Trial Judgement, para. 1428. *See also ibid.*, paras. 1315, 1316. The Appeals Chamber notes that the Trial Chamber did not rely on the testimony of Witness QBZ regarding any of its findings concerning Ndayambaje's presence at Kabuye Hill on 23 April 1994. *See ibid.*, paras. 1431, 1448.
[7056] Witness EV, T. 26 February 2004 pp. 61, 67, 68 (English), and 79 (French).
[7057] Trial Judgement, paras. 1308, 1309, 1439, 1442.

(vii) Witness EV

3091. The Trial Chamber found that Witness EV testified that he saw Ndayambaje arriving in a convoy of vehicles on the fourth day of his stay at Kabuye Hill, "which would have fallen on 23 April 1994", and that he saw him there again on 24 April 1994.[7058] The Trial Chamber relied on Witness EV's evidence as it interpreted it: (i) together with the evidence of Witnesses RT, TW, QAQ, and FAG to find that Ndayambaje transported attackers to and was present at Kabuye Hill on 23 and 24 April 1994;[7059] and (ii) as circumstantial evidence that Ndayambaje was involved in the distribution of weapons at Kabuye Hill on 23 April 1994.[7060]

3092. Ndayambaje submits that the Trial Chamber's misconstruction of the timeline of events recounted by Witness EV led to the erroneous finding that Witness EV saw him at Kabuye Hill on 23 and 24 April 1994 in the circumstances he described since the witness was in fact testifying about 24 and 25 April 1994.[7061] He also argues that the Trial Chamber erred in finding that Ndayambaje used the Muganza commune vehicle to transport assailants and that there is "an obvious problem with the identification made by Witness EV."[7062]

3093. As mentioned above, the Prosecution submits that Witness EV's evidence should not have been relied upon.[7063] It argues that, "even without EV's evidence, there was considerable Prosecution evidence establishing that Ndayambaje transported attackers, distributed weapons and was present during the attacks against Tutsis at Kabuye on 23 and 24 April."[7064] The Prosecution also responds that the timing of the witness was not clear and that, whichever day Witness EV testified about, his testimony did not cast doubt on the other witnesses' evidence regarding the use of the communal vehicle.[7065]

3094. Ndayambaje replies that his convictions in relation to 23 April 1994 should be quashed as Witness EV is the only witness relied upon by the Trial Chamber to convict him for crimes committed on this day.[7066]

[7058] Trial Judgement, paras. 1426, 1448.
[7059] Trial Judgement, paras. 1426-1431, 1448, 1449, 1452.
[7060] Trial Judgement, paras. 1432-1438.
[7061] Ndayambaje Appeal Brief, para. 487.
[7062] Ndayambaje Appeal Brief, paras. 488-491. The Appeals Chamber notes that Ndayambaje also submits that Witnesses EV, RV, RT, FAU, and FAG gave contradictory evidence as they placed within the same time frame Ndayambaje in four different vehicles going into different directions. *See ibid*., para. 521. Ndayambaje, however, fails to provide any specific reference to sustain his contention, which the Appeals Chamber therefore dismisses.
[7063] Prosecution Response Brief, paras. 2296, 2297, 2300, 2301, 2306, 2315, 2320, 2321.
[7064] Prosecution Response Brief, para. 2387.
[7065] Prosecution Response Brief, paras. 2381-2387.
[7066] Ndayambaje Reply Brief, para. 176.

3095. The Appeals Chamber recalls that the Trial Chamber misconstrued the timeline provided by Witness EV in his testimony.[7067] As a result of this error, the Trial Chamber erroneously relied on aspects of Witness EV's testimony that pertained to 24 April 1994 in support of its findings concerning events on 23 April 1994, and on aspects of the witness's testimony that pertained to 25 April 1994 in support of its findings on 24 April 1994.

3096. However, the Appeals Chamber is not convinced that the Trial Chamber's error occasioned a miscarriage of justice given the Trial Chamber's reliance on other direct evidence in support of its findings about the events of 23 and 24 April 1994. Contrary to Ndayambaje's submission, Witness EV was not the only witness the Trial Chamber relied upon to establish that Ndayambaje was present and transported attackers on 23 April 1994. The Trial Judgement reflects that the Trial Chamber primarily relied on Witness RT's direct testimony in this respect, which it found clear and convincing.[7068] For the distribution of weapons, the Trial Chamber relied on the direct evidence of Witnesses RT, RV, and FAU, as further corroborated by Witness QAL's circumstantial evidence.[7069] Likewise, the Trial Chamber's finding on Ndayambaje's presence and transport of attackers to Kabuye Hill on 24 April 1994 was primarily based on the direct evidence of Witness TW, as corroborated by Witness QAQ's testimony that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle.[7070] The Appeals Chamber has found no error in the Trial Chamber's reliance on this evidence.

3097. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber's error in assessing Witness's EV testimony occasioned a miscarriage of justice since the Trial Chamber's findings based on Witness EV's testimony were supported by other credible evidence. For this reason, the Appeals Chamber finds it unnecessary to consider Ndayambaje's remaining arguments relating to the assessment of the evidence of Witness EV concerning 23 and 24 April 1994.

(b) Assessment of Defence Evidence

3098. Ndayambaje submits that the Trial Chamber erred in failing to consider and discuss in the Trial Judgement the relevant testimonies of his Defence Witnesses ALIZA, GLANA, MAJIK, SHICO, and JEVAN related to the events at Kabuye Hill on 23 and 24 April 1994, thereby failing in its duty to provide a reasoned opinion.[7071] Ndayambaje argues that Witnesses GLANA's,

[7067] *See supra*, paras. 3028, 3029.
[7068] Trial Judgement, para. 1438.
[7069] Trial Judgement, paras. 1438, 1443.
[7070] *See* Trial Judgement, paras. 1426, 1448. *See also supra*, paras. 3040, 3041, 3063.
[7071] Ndayambaje Notice of Appeal, paras. 89, 90, 93, 94, 153, 154, 157, 158, 167-169; Ndayambaje Appeal Brief, paras. 253-257, 259, 524-526, 529. Ndayambaje states that Witness ALIZA was the only Defence witness to be

MAJIK's, and SHICO's evidence that he was not involved in the attacks at Kabuye Hill was "specific and reliable" as they were present among the refugees gathered on Kabuye Hill from 20 to 25 April 1994.[7072] He asserts that their testimonies corroborated Witness ALIZA's evidence and contradicted the Prosecution witnesses' testimonies, particularly as regards the timeline, his presence, and his involvement in the events at Kabuye Hill.[7073] With respect to Witness JEVAN, Ndayambaje highlights that his testimony that the green MRND vehicle was sold prior to 1994 contradicted Witness EV's testimony.[7074] He adds that the testimonies of these five witnesses were not challenged by the Prosecution and that the Trial Chamber did not find contradictions or implausibility in their evidence or establish that they had particular ties with him or any interest in protecting him.[7075] In Ndayambaje's view, this disregarded evidence had "the potential of casting reasonable doubt on the events of Kabuye".[7076]

3099. The Prosecution responds that the evidence pointed out by Ndayambaje was incapable of raising a reasonable doubt in its case.[7077] It argues that Witness ALIZA's evidence was properly considered by the Trial Chamber and that, in any event, he was not a credible witness as he had an incentive to lie for Ndayambaje.[7078] It further submits that: (i) a review of Witnesses GLANA's, MAJIK's, and SHICO's testimonies shows that they were neither reliable nor credible;[7079] (ii) Witnesses GLANA's, MAJIK's, and SHICO's testimonies do not support the contention that Ndayambaje was not at Kabuye Hill;[7080] and (iii) the reason why the Trial Chamber rejected

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considered and assessed by the Trial Chamber in relation to the events at Kabuye Hill but solely for the alibi and for 22 April 1994. *See* Ndayambaje Appeal Brief, paras. 256, 474, 524; Ndayambaje Reply Brief, para. 193. Ndayambaje emphasises that the Trial Chamber did not mention Witnesses GLANA, MAJIK, SHICO, and JEVAN in the list it made of the witnesses Ndayambaje relied upon in support of his arguments regarding Kabuye Hill. *See* Ndayambaje Notice of Appeal, paras. 90, 154, *referring to* Trial Judgement, para. 1252. At the appeals hearing, Ndayambaje claimed that the Trial Chamber also overlooked the testimonies of Defence Witnesses KANUC and Stefaan Marysse related to the events at Kabuye Hill. *See* AT. 21 April 2015 p. 28. The Appeals Chamber observes that, Ndayambaje not only did not raise this allegation in his written appeal submissions but also failed to substantiate and provide any reference to support his claim that the evidence of these witnesses was relevant to the Trial Chamber's findings on the events at Kabuye Hill and should have been addressed in the Trial Chamber's reasoning. Accordingly, the Appeals Chamber declines to consider this argument and dismisses it without further consideration.

[7072] Ndayambaje Notice of Appeal, paras. 91, 155, 168; Ndayambaje Appeal Brief, paras. 255, 257, 476, 524. Ndayambaje Reply Brief, para. 195.

[7073] Ndayambaje Notice of Appeal, paras. 91, 92, 155, 156, 169; Ndayambaje Appeal Brief, paras. 257, 526. Ndayambaje refers to Witnesses EV, RT, TP, TW, FAU, QAQ, and QBZ. *See* Ndayambaje Appeal Brief, para. 525.

[7074] Ndayambaje Appeal Brief, para. 525.

[7075] Ndayambaje Appeal Brief, paras. 257, 524, 526.

[7076] Ndayambaje Notice of Appeal, para. 169; Ndayambaje Appeal Brief, para. 526.

[7077] Prosecution Response Brief, paras. 2153, 2395, 2417, 2423; AT. 21 April 2015 p. 55.

[7078] Prosecution Response Brief, paras. 2153, 2390-2394, 2417, *referring to* Witness ALIZA, T. 4 June 2008 pp. 31, 33, 34 (closed session), 57, T. 5 June 2008 pp. 33, 37, 38 (closed session), 57, 61, 62, T. 9 June 2008 p. 13.

[7079] Prosecution Response Brief, paras. 2395, 2399-2409, 2411, 2412. The Prosecution argues that: (i) the content of Witness GLANA's account of her experience at Kabuye Hill makes it unreliable and not credible and shows that she was not in a position to be able to identify the assailants, even if she pretended to; (ii) Witness GLANA never gave satisfactory explanation as to why she chose to flee to Zaire, "the very place where many *génocidaires* went", and "over-stated her evidence", claiming that no members of the authorities were present at Kabuye Hill, contrary to the evidence that showed that authorities directed the attacks; and (iii) Witness SHICO overstated her evidence and "made over-reaching assertions that were not consistent with her limited ability to observe". *See idem*.

[7080] Prosecution Response Brief, paras. 2395, 2413.

Witness ALIZA's testimony, namely that he had a different experience on the hill from other witnesses and that the fact that he did not see or hear Ndayambaje does not mean that the latter was not there, applies equally to Witnesses GLANA's, MAJIK's, and SHICO's evidence.[7081] The Prosecution also argues that Witness JEVAN's evidence about the MRND Muganza commune vehicle has no impact on the Trial Chamber's findings.[7082]

3100. The Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence provided that there is no indication that the trial chamber completely disregarded any particular piece of evidence; such disregard is shown where evidence that is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[7083]

3101. Contrary to Ndayambaje's contention, the Trial Judgement reflects consideration of Witness ALIZA's evidence in relation to the events at Kabuye Hill on 23 and 24 April 1994. Not only did the Trial Chamber summarise Witness ALIZA's evidence in this regard, but it also referred to it in its deliberations related to the events at Kabuye Hill on 23 and 24 April 1994.[7084] Although the Trial Chamber did not explicitly discuss Witness ALIZA's relevant testimony that he did not see Ndayambaje or hear of his presence at Kabuye Hill on "Saturday afternoon", it is clear that the Trial Chamber's finding that the witness's statement that he did not see or hear about his presence on 22 April 1994 "[did] not mean that [Ndayambaje] was not present at all on that day" was meant to apply equally to the witness's testimony about Saturday, 23 April 1994.[7085] Notably, the Trial Chamber also observed that the witness conceded that, when the attack was launched, he could not see everything that was happening or every person on the hill.[7086] Ndayambaje's argument regarding the assessment of Witness ALIZA's testimony about the attacks on Kabuye Hill of 23 April 1994 is consequently dismissed.

[7081] Prosecution Response Brief, paras. 2396, 2397. The Prosecution submits that the particular circumstances of the Kabuye Hill massacres make it understandable for the witnesses not to have noticed the presence of Ndayambaje. *See ibid*., para. 2398. *See also* AT. 21 April 2015 p. 55.
[7082] Prosecution Response Brief, paras. 2153, 2327, 2328, 2418.
[7083] *See Kvočka et al.* Appeal Judgement, para. 23. *See also Đordević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Kalimanzira* Appeal Judgement, para. 195.
[7084] *See* Trial Judgement, paras. 1324, 1325, 1448. The Appeals Chamber further observes that Witness ALIZA's testimony that he did not see Ndayambaje during the interception of refugees or at Kabuye Hill on 22 April 1994 was expressly addressed in the Trial Judgement in relation to the events on the 20 and 22 April 1994 and that the Trial Chamber concluded that his testimony did not cast a doubt on the testimony of the Prosecution witnesses. *See ibid*., paras. 1413, 1415.
[7085] Trial Judgement, para. 1415. Witness ALIZA testified that, on 24 April 1994, he returned to Kabuye Hill to look for family members, but that because he saw armed civilians killing women and children who had survived, he fled and hid at a sorghum farm. *See ibid*., para. 1326.
[7086] *See* Trial Judgement, para. 1325, *referring to* Witness ALIZA, T. 5 June 2008 p. 40 (closed session), T. 9 June 2008 pp. 15, 16.

3102. While Ndayambaje is correct in asserting that the Trial Chamber did not refer to Witness MAJIK's testimony in the portion of its judgement relating to Kabuye Hill,[7087] the Trial Judgement reflects express consideration of this witness's evidence in the section addressing the massacres at Mugombwa Church.[7088] Given the limited relevance of Witness MAJIK's testimony to the events that took place at Kabuye Hill on 23 and 24 April 1994 – the witness testifying that she remained at home on 23 April 1994 and only returned to Kabuye Hill on Sunday, 24 April 1994, when there were no more refugees there[7089] – the Appeals Chamber considers that the Trial Chamber was under no obligation to expressly discuss this aspect of Witness MAJIK's evidence when reaching its findings on the allegation of Ndayambaje's involvement in the Kabuye Hill massacres of 23 and 24 April 1994.

3103. The Trial Chamber did also not refer to the evidence of Witnesses GLANA and SHICO in relation to the attacks at Kabuye Hill.[7090] Although the Trial Chamber referred to Witness SHICO's testimony elsewhere in the Trial Judgement,[7091] Witness GLANA's testimony is not mentioned at all in the Trial Judgement. As pointed out by Ndayambaje, Witnesses GLANA and SHICO testified that, together with other refugees, they had sought refuge at Kabuye Hill, where they were on Saturday, 23 April 1994.[7092] Both testified that they did not see Ndayambaje or his vehicle on that day or hear about his presence from other refugees.[7093] The Trial Chamber omitted to note in the Trial Judgement that Ndayambaje relied on these aspects of Witnesses GLANA's and SHICO's testimonies in his closing submissions.[7094]

3104. Given the direct relevance of this evidence and the absence of any indication in the Trial Judgement that the Trial Chamber assessed and weighed it, the Appeals Chamber finds that the

[7087] *See* Trial Judgement, paras. 1248-1456.
[7088] Trial Judgement, Section 3.6.4. *See also ibid*., paras. 1088-1092.
[7089] Witness MAJIK, T. 18 June 2008 p. 4. *See also* Ndayambaje Closing Brief, paras. 470, 471.
[7090] *See* Trial Judgement, paras. 1248-1456.
[7091] *See* Trial Judgement, paras. 1178-1180.
[7092] Witness GLANA, T. 11 June 2008 pp. 42-44; Witness SHICO, T. 23 June 2008 pp. 31-33, 47. Witness GLANA stated that he left Kabuye Hill on Sunday, 24 April 1994 early in the morning to return home. *See* Witness GLANA, T. 11 June 2008 p. 44. Witness SHICO testified that she left Kabuye Hill on Saturday when it started raining and went back to her house where she arrived in the morning. *See* Witness SHICO, T. 23 June 2008 p. 34. In light of the foregoing and to the extent that Ndayambaje submits that the Trial Chamber failed to consider Witnesses GLANA's and SHICO's testimony for the events at Kabuye Hill on 24 April 1994, the Appeals Chamber dismisses Ndayambaje's arguments as their evidence cannot be seen as clearly relevant to the events at Kabuye Hill on that particular day.
[7093] Witness GLANA, T. 11 June 2008 pp. 42, 74; Witness SHICO, T. 23 June 2008 pp. 32, 33. *See also* Ndayambaje Closing Brief, paras. 484, 501, 503, 507. Ndayambaje's submissions also seek to demonstrate that Witnesses GLANA's and SHICO's evidence raises a reasonable doubt as to the features and the timeline of the attacks at Kabuye Hill. However, the Appeals Chamber notes that, apart from very general considerations without reference, Ndayambaje only refers to the events of Friday, 22 April 1994. *See* Ndayambaje Notice of Appeal, paras. 91, 155; Ndayambaje Appeal Brief, paras. 257, 476, 526. The Appeals Chamber therefore finds that Ndayambaje fails to substantiate his claim and dismisses his argument in this respect as to the events of 23 and 24 April 1994.
[7094] Trial Judgement, para. 1252 ("In support of its submissions, the Ndayambaje Defence relies on the testimony of Ndayambaje Defence Witnesses ALIZA, TOVIA, KEPIR, GABON, MARVA, BIDI, Father Tiziano, SABINE,

Trial Chamber erred by failing to consider the evidence of Witnesses GLANA and SHICO with respect to the events at Kabuye Hill on 23 April 1994. However, Ndayambaje does not demonstrate that this error invalidates the Trial Chamber's conclusions concerning his role in the attacks at Kabuye Hill. The Appeals Chamber notes that, although Witnesses GLANA and SHICO testified that they did not see or hear about the presence of Ndayambaje on 23 April 1994, their testimonies also suggest that they could not reliably establish that Ndayambaje was not there. In particular, their testimonies reveal that they were not in a position to identify any of the assailants on 23 April 1994.[7095] Moreover, Witness SHICO's testimony reflects that she could not observe everything that was happening because she was taking care of her children and shared information only with people from the same locality as her.[7096] As for Witness GLANA, her testimony shows that, as there was gunfire, she went into hiding from 4.00 p.m. beside a banana tree and laid down to avoid being hit by a bullet.[7097] Recalling the Trial Chamber's finding that "there were many thousands of refugees on Kabuye Hill, which covered an expansive area",[7098] the Appeals Chamber is of the view that the fact that Witnesses GLANA and SHICO did not see Ndayambaje or hear about his presence is of very limited probative value and would not have precluded a reasonable trier of fact from finding that Ndayambaje was present at Kabuye Hill on 23 April 1994 as testified by a credible Prosecution witness and corroborated by circumstantial evidence.

3105. Finally, the Appeals Chamber observes that Ndayambaje fails to provide any reference to the relevant parts of testimonies or the Trial Judgement to support his allegation that Witness JEVAN's evidence contradicts that of Witness EV about the use of the MRND vehicle.[7099] In any case, the Appeals Chamber recalls that the Trial Chamber erred in its assessment of Witness EV's testimony and that it has concluded above that the Trial Chamber's findings nonetheless remain reasonable without Witness EV's evidence.

3106. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to consider the evidence of Witnesses GLANA and SHICO relevant to the question of Ndayambaje's presence at Kabuye Hill on 23 April 1994. However, the Appeals Chamber finds that Ndayambaje

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Nteziryayo Defence Witness AND-5 and Ndayambaje."); Ndayambaje Closing Brief, paras. 483-488, 501-507. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 pp. 43, 44.

[7095] *See* Witness GLANA, T. 11 June 2008 pp. 41 ("Q. Did you, with your very eyes, see the people who had opened fire on you, those who had guns? A. No, but people were saying that it was soldiers that were firing. And people said that these – those who were shooting were dressed in military uniform. But I did not see these persons because I was very, very frightened."), 75; Witness SHICO, T. 23 June 2008 p. 33 ("Q. […] did you see the people that were opening fire on Kabuye hill? A. […] From where I was, I did not see the people that were opening fire, but I was seeing people as they fell. […] I did not personally see the persons that were opening fire.").

[7096] Witness SHICO, T. 23 June 2008 pp. 50, 51.

[7097] Witness GLANA, T. 11 June 2008 pp. 39, 41, 73.

[7098] Trial Judgement, para. 1433.

[7099] *See* Ndayambaje Appeal Brief, para. 525, *referring to* Exhibit D672 (Photo depicting Ndayambaje and other persons close to a vehicle with the mention "M.R.N.D. *Commune* Muganza").

has failed to demonstrate that this error invalidates the Trial Chamber's conclusions regarding his responsibility in the attacks on Kabuye Hill of 23 April 1994. The Appeals Chamber dismisses as without merit Ndayambaje's remaining contentions about the assessment of the Defence evidence.

3. Additional Evidence Admitted on Appeal

3107. On the basis of the trial record alone, the Appeals Chamber has found that the Trial Chamber erred in holding Ndayambaje responsible for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994 and reversed his convictions on this basis.[7100] Consequently, the Appeals Chamber finds it unnecessary to examine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to Ndayambaje's guilt in this respect.[7101]

3108. By contrast, the Appeals Chamber has found that, on the basis of the trial record alone, the Trial Chamber did not err in finding Ndayambaje responsible for aiding and abetting the killings perpetrated during attacks on Kabuye Hill on 23 and 24 April 1994 by transporting attackers to Kabuye Hill, distributing weapons that were later used in the massacres, and being present during the attacks. In accordance with the relevant standard, the Appeals Chamber will therefore determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to this finding of guilt.

3109. The Appeals Chamber recalls that it admitted as additional evidence on appeal: (i) a confidential witness statement dated 30 January 2013 relevant to the assessment of the credibility of Prosecution Witness EV;[7102] and (ii) a prior statement given confidentially to Tribunal investigators by Witness Claver Habimana ("Habimana") on 9 June 2009 and part of his testimony in the *Ntawukulilyayo* case relevant to the assessment of the credibility of Prosecution Witness RT.[7103]

3110. The Appeals Chamber further recalls that it has found that the Trial Chamber's error in assessing Witness EV's testimony on the events of 23 and 24 April 1994 at Kabuye Hill have not occasioned a miscarriage of justice, given the Trial Chamber's reliance on other direct evidence in

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[7100] *See supra*, Section IX.F.1.
[7101] The Appeals Chamber also recalls that Ndayambaje was not convicted in relation to the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill on 20 April 1994. *See supra*, Section IX.F.1.
[7102] 9 April 2015 Appeal Decision, pp. 1, 4, *referring to* Élie Ndayambaje's Motion for Admission of Witness Grégoire Hategekimana's Statement as Additional Evidence, 1 May 2013 (originally filed in French, English translation filed on 10 July 2013) (confidential), Annex A (Statement dated 30 January 2013).
[7103] 12 May 2015 Appeal Decision, paras. 25, 90, 91, fn. 50, *referring to* Élie Ndayambaje's Motion on Violation of Disclosure Obligations by the Prosecutor and for Admission of Additional Evidence, 29 November 2012 (originally filed in French, English translation filed on 7 February 2013), Annex B, Statement of Witness Claver Habimana of 9 June 2009 (confidential) ("Habimana's Statement"), *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Witness Habimana, T. 6 October 2009 pp. 7, 11-17, 27 and i-ix (confidential) ("Habimana's Testimony") (collectively "Habimana's Materials").

support of its findings about these events.[7104] In these circumstances and given that the 30 January 2013 witness statement admitted as additional evidence on appeal concerns solely the credibility of Witness EV, the Appeals Chamber finds it unnecessary to examine it in light of the trial evidence to determine whether it is itself convinced beyond reasonable doubt as to Ndayambaje's guilt regarding these events.

3111. Turning to the additional evidence admitted on appeal relevant to the credibility of Witness RT, the Appeals Chamber recalls that, when admitting Habimana's Materials, it stated:

> Habimana's Materials reflect that Witness RT allegedly arrived at Witness Habimana's house approximately a week after the death of President Habyarimana and stayed there until 16 April 1994, according to Witness Habimana's estimate, whereupon he walked with Witness RT to the border of Burundi and assisted him to cross the river separating Rwanda from Burundi. The Appeals Chamber notes that this evidence is inconsistent with Witness RT's testimony at trial that he was present at Ngiryi Bridge and Kabuye Hill between 20 and 24 April 1994. The Appeals Chamber finds that, had Habimana's Materials been available at trial, they could have impacted the Trial Chamber's assessment of the credibility of Witness RT's testimony.[7105]

3112. Ndayambaje submits that Habimana's Materials: (i) show that Witness RT was no longer in Rwanda on the dates, which according to the witness's testimony, Witness RT saw him at Ngiryi Bridge and Kabuye Hill between 20 and 24 April 1994; and (ii) establish that Witness RT lied at trial and falsely incriminated him.[7106] He also argues that Habimana's Materials call into question the overall assessment of the credibility of the Defence evidence, which, in his view, was rejected for the most part because of the substantial weight granted by the Trial Chamber to the testimony of Witness RT.[7107] Ndayambaje contends that all of the Trial Chamber's findings relying on the evidence of Witness RT should be overturned and that the remainder of the Prosecution evidence is not sufficient to sustain the findings of guilt beyond reasonable doubt.[7108]

3113. The Prosecution submits that the evidence contained in Habimana's Materials is not credible and could not have been a decisive factor at trial, and that Ndayambaje's convictions for the events

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[7104] *See supra*, Section IX.F.2(a)(vii).
[7105] 12 May 2015 Appeal Decision, para. 60 (internal reference omitted).
[7106] Written Submissions Subsequent to the "Decision on Ndayambaje's First, Second, Third and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence" of 12 May 2015, 26 May 2015 (originally filed in French, English translation filed on 3 July 2015) (confidential) ("Ndayambaje Submissions on Additional Evidence"), paras. 6-8, 10-13. The Appeals Chamber recalls that it allowed Ndayambaje and the Prosecution, if they deem it necessary, to file written submissions discussing the possible impact of Habimana's Materials on the Trial Chamber's findings. *See* 12 May 2015 Appeal Decision, para. 91.
[7107] Ndayambaje Submissions on Additional Evidence, para. 14.
[7108] Ndayambaje Submissions on Additional Evidence, paras. 14, 20, 25, 27-29. Ndayambaje also submits that, since Habimana's Materials should not have been taken into account to discredit the Defence witnesses who also testified in relation to the events at Mugombwa Church, Habimana's Materials also invalidate the Trial Chamber's findings related to Mugombwa Church. *See ibid.*, paras. 14, 29. The Appeals Chamber finds that this claim is without merit as the Trial Chamber did not rely on Witness RT's evidence to reject any of the Defence evidence relating to Mugombwa Church. *See supra*, Section IX.E.

at Kabuye Hill would in any event stand without Witness RT's evidence based on other evidence on the record.[7109]

3114. The Appeals Chamber finds Witness RT's testimony pertaining to the interception of Tutsi refugees trying to flee to Burundi at Ngiryi Bridge, his arrival at Kabuye Hill on 22 April 1994, the attacks on the Tutsis who had sought refuge there, and Ndayambaje's distribution of grenades on 23 April 1994 detailed and coherent.[7110] His evidence is first-hand and his identification of Ndayambaje is compelling.[7111] Witness RT's explanations given in cross-examination concerning alleged inconsistencies about how many times and where he saw Ndayambaje during the events are clear and convincing.[7112]

3115. Habimana's Materials reflect that Witness RT allegedly arrived at Habimana's house approximately a week after the death of President Habyarimana and stayed there until 16 April 1994, whereupon he walked with Witness RT to the border of Burundi and assisted him to cross the river separating Rwanda from Burundi.[7113] This evidence directly contradicts Witness RT's testimony that he was present at Kabuye Hill on 23 April 1994, where he saw Ndayambaje distributing grenades, and left for Burundi on 25 April 1994.[7114]

3116. However, upon careful review of his evidence and the totality of the evidence in the trial record, the Appeals Chamber does not find Habimana's evidence that Witness RT came to hide at his place as early as 13 April 1994 credible. The Appeals Chamber notes that Habimana's Statement that Witness RT told Habimana that "[Witness RT] could not spend the night at [Witness RT's] home in Remera as the killings had started there"[7115] is inconsistent with Habimana's Testimony that Witness RT came to hide at Habimana's place because "[Witness RT] had observed that there were disturbances", "tension between Hutus and Tutsis", and "unlawful gatherings everywhere".[7116] It is also not disputed that the killings in Muganza Commune started on

[7109] Prosecution's Submission on Evidence of Claver Nahimana (alias Habimana) and Request for A[d]mission of Rebuttal Evidence, 26 May 2015 (confidential) ("Prosecution Submissions on Additional Evidence"), paras. 1, 2, 25, 26. The Appeals Chamber observes that the Prosecution claims that the name of the witness who testified as Claver Habimana in the *Ntawukulilyayo* trial is, in fact, Claver "Nahimana". *See ibid.*, paras. 1, 3. The Appeals Chamber finds it unnecessary to determine the issue in light of its conclusions on the credibility of the witness. For the sake of clarity, the Appeals Chamber will refer to the relevant individual as Claver "Habimana".
[7110] Witness RT, T. 10 March 2004 pp. 47-72, 76, 77, T. 11 March 2004 pp. 7-9, 21-26, 32-76, 79-90, 103, 104 and 11-20, 28-31, 92, 93, 105 (closed session).
[7111] Witness RT, T. 10 March 2004 pp. 68, 69, 76, 77 and 98-100 (closed session), T. 11 March 2004 pp. 70-72, 83.
[7112] Witness RT, T. 11 March 2004 pp. 85-89.
[7113] Habimana's Testimony, pp. 7, 11-17, 27 and i-ix (extracted); Habimana's Statement, pp. 3456/A-3453/A (Registry pagination).
[7114] Witness RT, T. 11 March 2004 pp. 86 and 93 (closed session).
[7115] Habimana's Statement p. 3454/A (Registry pagination).
[7116] Habimana's Testimony, p. 11.

19 or 20 April 1994, and not a week after the death of the President.[7117] As noted by the Prosecution, Defence and Prosecution evidence consistently shows that people in Muganza Commune started fleeing around 20 April 1994,[7118] which is consistent with Witness RT's account.[7119] Moreover, while Habimana stated that he accepted to help Witness RT because they were friends and because he knew "that a human being's life is very precious",[7120] there is evidence on the record that Habimana was one of the community leaders involved in the genocide.[7121]

3117. Considering Witness RT's detailed and convincing account of the events at Kabuye Hill together with the inconsistencies in the Habimana's Materials, the Appeals Chamber finds that the additional evidence admitted on appeal does not undermine the credibility of Witness RT's account about Ndayambaje's involvement in a distribution of grenades at Kabuye Hill on 23 April 1994. The Appeals Chamber makes this determination in light of the totality of the evidence in the trial record, including the evidence pointed out by Ndayambaje at trial and on appeal regarding the circumstances in which Witness RT identified him at Kabuye Hill on 23 April 1994[7122] as well as the evidence of Ndayambaje and Witnesses ALIZA, ANGES, BIDI, GABON, GLANA, KEPIR, MAJIK, MARVA, SABINE, SHICO, and Stan concerning the events at Kabuye Hill and/or Ndayambaje's alibi highlighted by Ndayambaje in his closing brief and referred to by the Trial Chamber.[7123]

3118. In light of the trial evidence and the additional evidence admitted on appeal, the Appeals Chamber is itself convinced beyond reasonable doubt of Ndayambaje's guilt concerning the killing of Tutsis perpetrated at Kabuye Hill following the distribution of grenades on 23 April 1994.

[7117] In this respect, the Appeals Chamber notes that Ndayambaje testified at trial that, during the period before 18 April 1994, "there was no unrest [in Muganza Commune] for people to seek refuge in churches or other buildings". *See* Ndayambaje, T. 26 November 2008 p. 11. *See also* Ndayambaje, T. 2 December 2008 p. 29.

[7118] *See* Prosecution Submissions on Additional Evidence, para. 19, fn. 32, *referring to* Witness FAG, T. 1 March 2004 p. 13 (closed session), Witness QAL, T. 25 February 2004 p. 36, Witness QAQ, T. 11 November 2002 pp. 23, 24 (closed session), Witness TP, T. 11 February 2004 p. 8, Witness TW, T. 10 February 2004 p. 7, Witness BOZAN, T. 16 September 2008 pp. 8, 9, Witness GLANA, T. 10 June 2008 p. 72, Witness JAMES, T. 2 June 2008 p. 25, Witness KEPIR, T. 10 September 2008 p. 38, Witness KWEPO, T. 28 August 2008, p. 21 (closed session), Witness MATIC, T. 18 June 2008 p. 57 (closed session), Witness SHICO, T. 23 June 2008 pp. 19, 20 (closed session); Tiziano Pegoraro, T. 8 September 2008 p. 62, Witness ALIZA, T. 4 June 2008 p. 35 (closed session).

[7119] Witness RT, T. 10 March 2004 pp. 47, 48, T. 11 March 2004 pp. 7, 8 and 11, 12 (closed session).

[7120] Habimana's Testimony, p. 12.

[7121] *See* Witness FAG, T. 1 March 2004 p. 21 (closed session). The Appeals Chamber notes that, while Witness FAG did not refer to Habimana by his last name, his testimony clearly reflects that he was referring to him. *Compare idem with* Habimana's Statement, p. 3456/A (Registry pagination). The Appeals Chamber further observes that, although the Trial Chamber applied caution to Witness FAG's testimony in light of the fact that witness was still awaiting a decision by a *Gacaca* court at the time of his testimony, it relied on several aspects of his testimony for the events at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill as well as for Ndayambaje's Swearing-In Ceremony. *See* Trial Judgement, paras. 1226, 1233, 1234, 1236, 1237, 1244, 1245, 1409, 1410, 1425, 1428-1431, 4590, 4610, 4621-4623, 4627, 4629. The Appeals Chamber finds Witness FAG's testimony about the implication of Habimana in the genocide credible and reliable.

[7122] *See*, *e.g.*, Witness RT, T. 11 March 2004 pp. 58-78, 84-89 and 100-105 (closed session); Ndayambaje Closing Brief, paras. 336-343, 349, 447-451; *supra*, Section IX.F.2(a)(ii).

4. Conclusion

3119. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Ndayambaje was present at Kabuye Hill on 22 April 1994. The Appeals Chamber grants this part of Ground 18 of Ndayambaje's appeal and, accordingly, reverses his convictions for aiding and abetting genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol in relation to the attacks on Kabuye Hill of 22 April 1994. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

3120. However, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings perpetrated during attacks on Kabuye Hill on 23 and 24 April 1994 by transporting attackers to Kabuye Hill, distributing weapons that were later used in the massacres, and being present during the attacks. Accordingly, the Appeals Chamber dismisses the relevant part of Ground 9 as well as Grounds 10 and 11 and the remaining parts of Ground 18 of Ndayambaje's appeal.

[7123] *See* Ndayambaje Closing Brief, paras. 458-518, 523-622; Trial Judgement, paras. 1319-1327, 1333-1347, 1352-1385, 1389-1398, 1430, 1435, 1445-1447. *See also supra*, Sections IX.C, IX.F.2(b).

G. Ndayambaje's Swearing-In Ceremony (Ground 19)

3121. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, "Nteziryayo and Ndayambaje told the population to continue with their 'work' and urged them to 'sweep the dirt outside'" in reference to the killing of Tutsis and instructed that those hiding Tutsis who refused to hand them over should be killed.[7124] It also found it established beyond reasonable doubt that, after the ceremony, searches for Tutsis took place and killings followed.[7125] The Trial Chamber convicted Ndayambaje pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide on the basis of the statements he made at his swearing-in ceremony.[7126]

3122. Ndayambaje submits that the Trial Chamber erred in the assessment of Prosecution and Defence evidence and made imprecise and unsupported findings.[7127] The Appeals Chamber will address these contentions in turn.

1. Assessment of Prosecution Evidence

3123. In reaching its findings regarding Ndayambaje's Swearing-In Ceremony, the Trial Chamber considered, *inter alia*, the evidence of Prosecution Witnesses FAG, FAL, FAU, QAF, QAL, QAQ, QAR, RV, TO, and TP.[7128]

3124. Ndayambaje contends that the Trial Chamber erred in: (i) failing to exercise sufficient caution with respect to Prosecution witnesses generally; (ii) the assessment of the evidence of Prosecution Witnesses FAL, FAG, QAF, RV, FAU, TO, TP, and QAL; and (iii) determining that all the witnesses were testifying about the same event.[7129]

[7124] *See* Trial Judgement, paras. 4616, 4642, 4645, 5948, 6026, 6027.
[7125] Trial Judgement, paras. 4645, 5948, 6026.
[7126] Trial Judgement, paras. 6029, 6038, 6186. The Appeals Chamber recalls that, although the Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of Tutsi women and girls from Mugombwa Sector, it did not ultimately convict Ndayambaje on this basis. *See supra*, fn. 6351.
[7127] *See generally* Ndayambaje Notice of Appeal, paras. 182-193; Ndayambaje Appeal Brief, paras. 532-611; Ndayambaje Reply Brief, paras. 199-246.
[7128] *See* Trial Judgement, paras. 4589-4632, 4642-4645.
[7129] Ndayambaje further "prays the Appeals Chamber to assume jurisdiction over the motions and requests for certification of appeal which were otherwise denied on grounds of judicial economy." *See* Ndayambaje Appeal Brief, para. 581, *referring to* Trial Judgement, paras. 4311-4313, 6426. The Prosecution objects to the relief Ndayambaje now seeks, as he failed to raise it in his notice of appeal. *See* Prosecution Response Brief, para. 2471. In the absence of any identification of errors or of the necessary references, the Appeals Chamber dismisses this unsubstantiated and unsupported contention. In addition, Ndayambaje, like Nteziryayo, argues that the Trial Chamber erred in relying on the testimonies of Witnesses QAQ and QAR "for the purposes of fictitious corroboration", despite finding elsewhere in the Trial Judgement that they did not attend the swearing-in ceremony and that certain aspects of their evidence were implausible. *See* Ndayambaje Appeal Brief, para. 578, *referring to* Trial Judgement, paras. 4595, 4596, 4603, 4604,

(a) Insufficient Caution

3125. Ndayambaje submits that despite acknowledging that Witnesses FAG, FAL, QAF, RV, and TO had an incentive to implicate him, the Trial Chamber failed to exercise sufficient caution when assessing their evidence.[7130] He also contends that the Trial Chamber erred in failing to consider that similar caution should have been exercised with respect to Witness FAU's testimony, which required corroboration as the witness was detained and awaiting sentencing and therefore had an incentive to lie.[7131]

3126. Ndayambaje also argues that the Trial Chamber failed to consider that Witnesses FAG, FAL, FAU, and RV were detained together, purportedly often discussing the events at Muganza Commune.[7132] Ndayambaje submits that, because these witnesses and Witness QAF took part in *Gacaca* proceedings while in prison, they influenced each other's evidence which, consequently, should have been rejected.[7133] Ndayambaje further contends that the Trial Chamber failed to consider sufficiently the evidence of Defence Witness GABON that he and Witness RV were mistreated and that pressure was put on them to testify against Ndayambaje, and argues that Witness RV's evidence should be rejected on this basis.[7134]

3127. The Prosecution responds that the Trial Chamber considered the challenges raised by Ndayambaje and submits that he does not demonstrate any error in its assessment.[7135] It also argues that Ndayambaje misrepresents the evidence regarding the collective participation of these witnesses in *Gacaca* proceedings as well as the purported influence their participation had on their testimonies.[7136] It contends that Ndayambaje does not substantiate his arguments regarding Witness RV's potential motivation to implicate him.[7137]

4607, 4608. *See also* Ndayambaje Notice of Appeal, paras. 185, 189; Ndayambaje Reply Brief, para. 233. Given that the Trial Judgement reflects that the Trial Chamber declined to rely on the accounts of Witnesses QAQ and QAR about Ndayambaje's Swearing-In Ceremony, the Appeals Chamber dismisses these arguments without further consideration. *See* Trial Judgement, paras. 4602-4608. *See also supra*, Section VII.B.1(a).

[7130] Ndayambaje Appeal Brief, paras. 534, 535, 539, 543, 550, 552, 555, 580, *referring to* Trial Judgement, para. 4630. *See also* Ndayambaje Reply Brief, paras. 202, 225.

[7131] Ndayambaje Appeal Brief, paras. 543, 580.

[7132] Ndayambaje Appeal Brief, para. 580.

[7133] Ndayambaje Appeal Brief, para. 552. *See also* Ndayambaje Reply Brief, para. 218.

[7134] Ndayambaje Appeal Brief, paras. 554, 590. Ndayambaje, without precise reference, "repeats his submissions in his motion to reject detainee witnesses" when challenging Witness RV's credibility. *See ibid.,* para. 554. The Appeals Chamber recalls that merely referring the Appeals Chamber to the arguments set out at trial is insufficient as an argument on appeal. The Appeals Chamber therefore declines to consider this part of Ndayambaje's submissions further. *See*, *e.g.*, *Mugenzi and Mugiraneza* Appeal Judgement, para. 34; *Nchamihigo* Appeal Judgement, para. 369; *Haraqija and Morina* Appeal Judgement, para. 26.

[7135] Prosecution Response Brief, paras. 2428, 2434.

[7136] Prosecution Response Brief, paras. 2450-2452.

[7137] Prosecution Response Brief, para. 2453.

3128. As discussed previously, the Appeals Chamber observes that the Trial Judgement reflects express consideration of the admitted involvement of Witnesses FAG, FAL, QAF, and RV in the genocide as well as the fact that Witness RV was detained and Witnesses FAG and FAL were awaiting sentencing decisions when they testified.[7138] The Trial Chamber further recognised that the impugned witnesses "may have had incentives to implicate either Ndayambaje or Nteziryayo in order to secure favourable or lenient treatment or to apportion blame to the authorities" and that because Witness TO was imprisoned during Ndayambaje's tenure as *bourgmestre*, he may have "a motive to seek revenge against Ndayambaje".[7139] Similarly, the Appeals Chamber has considered and dismissed similar arguments that the Trial Chamber failed to consider sufficiently Witness FAU's status as a detained witness when analysing the evidence related to Ndayambaje's Swearing-In Ceremony, as a holistic reading of the Trial Judgement reflects that it did.[7140]

3129. In addition to its comprehensive discussion of the circumstances raising concerns about the impugned witnesses' motives to implicate the co-Accused, the Trial Chamber's analysis of the evidence of these detained witnesses concerning the ceremony also reflects that it took into account various factors relevant to a cautious assessment of their credibility, including the consideration of discrepancies and inconsistencies in their evidence.[7141] Moreover, it reflects the reliance on these witnesses' testimonies regarding the content and meaning of the utterances made during the ceremony as to which the Trial Chamber found broad corroboration.[7142] Against this background, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber failed to apply sufficient caution.

3130. Regarding the purported impact of the witnesses' detention and participation in *Gacaca* proceedings, the Appeals Chamber observes that nothing in the transcripts cited by Ndayambaje demonstrates that through discussing events in Muganza Commune while in custody, Witnesses FAG, FAL, FAU, QAF, and RV influenced each other's evidence.[7143] With respect to purported coercion Witness RV experienced in detention, the Appeals Chamber notes that, while Witness GABON's testimony indicates that both he and Witness RV were mistreated in custody, it

[7138] *See supra*, Section VII.B.1(b), para. 2326, fn. 5373. Contrary to Ndayambaje's contention that Witness QAF was awaiting judgement at the time of his testimony, the Appeals Chamber observes that, at the time of his testimony, Witness QAF had been released pursuant to a presidential decree. *See* Ndayambaje Appeal Brief, para. 539; Trial Judgement, paras. 4630, 4663.
[7139] *See supra*, Section VII.B.1(b), para. 2326, fns. 5374, 5375.
[7140] *See supra*, Section VII.B.1(b), para. 2325, fns. 5371, 5372.
[7141] *See* Trial Judgement, paras. 4589-4593, 4596, 4610-4617.
[7142] *See* Trial Judgement, paras. 4622-4628.
[7143] *See* Witness FAL, T. 9 February 2004 pp. 49-52, 79, 80 (closed session); Witness RV, T. 17 February 2004 pp. 33-35, T. 18 February 2004 pp. 58-66, T. 19 February 2004 pp. 43, 44, 68, 69 (closed session); Witness QAF, T. 6 February 2004 pp. 32, 33 (closed session); Witness FAG, T. 1 March 2004 pp. 46, 47, T. 2 March 2004 pp. 9, 10 (closed session); Witness FAU, T. 8 March 2004 pp. 85-87, T. 10 March 2004 pp. 31-36 (closed session).

was Witness GABON who was asked to accuse Ndayambaje.[7144] Ndayambaje fails to demonstrate that the Trial Chamber erred in its assessment of Witness RV's evidence in light of the testimony of Witness GABON.

3131. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber failed to exercise sufficient caution when assessing evidence from these witnesses concerning Ndayambaje's Swearing-In Ceremony.

(b) Witness FAL

3132. When evaluating the content of the speeches made during the swearing-in ceremony, the Trial Chamber recalled that Witness FAL, consistent with Witness FAG, testified that "both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside."[7145] It further observed that Witness FAL, like Witnesses FAG and TO, testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed and that Witness FAL gave evidence that Nteziryayo talked about killing the Tutsis.[7146]

3133. Ndayambaje submits that the Trial Chamber failed to consider that Witness FAL contradicted himself as to the time when he arrived at the ceremony, specifically whether he arrived before or after its start.[7147] He further submits that the witness's testimony that there were 5,000 armed participants who protested against Nteziryayo's criticism of the outgoing *bourgmestre* and that Ndayambaje climbed on the table and Sebukeye spoke at the ceremony was contradicted in numerous respects by other witnesses, which made the witness's attendance at the swearing-in ceremony improbable.[7148] In particular, Ndayambaje highlights that: (i) Witness FAG did not see Witness FAL at the meeting, recounted that there were only 1,000 unarmed attendees, and did not recall Ndayambaje climbing on the table or any other attendees taking the floor;[7149] and (ii) Witness QAF testified that none of the attendees carried weapons.[7150] Ndayambaje also highlights Defence evidence, which in his view was erroneously discredited without sufficient reasoning, that the participants were not armed, that Ndayambaje did not climb on the table, that

[7144] *See* Witness GABON, T. 2 September 2008 pp. 26-28 (closed session).
[7145] Trial Judgement, para. 4622. *See also ibid*., para. 4345.
[7146] Trial Judgement, paras. 4625, 4627. *See also ibid*., paras. 4344, 4345. The Trial Chamber also noted aspects of Witness FAL's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting. *See ibid.*, para. 4632.
[7147] Ndayambaje Appeal Brief, paras. 533.
[7148] Ndayambaje Appeal Brief, paras. 533, 534. *See also* Ndayambaje Notice of Appeal, para. 185; Ndayambaje Reply Brief, para. 201.
[7149] Ndayambaje Appeal Brief, para. 536.
[7150] Ndayambaje Appeal Brief, para. 541. Ndayambaje adds that Witness QAF testified that nobody in attendance asked questions. *See idem*.

Sebukeye did not attend the ceremony, and that the participants did not protest against the replacement of the outgoing *bourgmestre*.[7151]

3134. The Prosecution responds that the Trial Chamber was aware that Witness FAL was the only witness to recount certain features of the swearing-in ceremony and that Ndayambaje misrepresents other aspects of the witness's testimony.[7152]

3135. The Appeals Chamber observes that the Trial Chamber noted that Witness FAL testified that he arrived after the start of the meeting but then clarified that he actually arrived half an hour before it started.[7153] Ndayambaje does not demonstrate how this clarification by Witness FAL undermined the credibility of his testimony or would have required express consideration by the Trial Chamber.

3136. The Appeals Chamber further observes that Ndayambaje's contention that Witness FAG did not see Witness FAL at the swearing-in ceremony is not supported by the reference he provides.[7154] In any event, the Appeals Chamber fails to see the purported significance of this aspect of Witness FAG's evidence given the Trial Chamber's findings about the large number of attendees, discussed in more detail below. As regards discrepancies between Witness FAL's evidence that the attendees at the meeting were armed and other evidence to the contrary, the Trial Chamber noted that Witnesses FAL, TP, RV, and QAL testified that the population brought traditional arms, whereas Witnesses FAG and QAF as well Nteziryayo and Defence Witnesses GABON, KEPIR, AND-11, and AND-73 testified that the population was not armed.[7155] The Trial Chamber observed that the evidence showed that between 1,000 and 5,000 people were present and considered "it possible that while some people may have come bearing machetes and other instruments which may double as traditional weapons, others did not, which may account for the discrepancy in the witnesses' evidence."[7156] It did not find any discrepancy as to whether the population was armed "significant."[7157] Ndayambaje does not demonstrate any error in this analysis.

3137. The Trial Chamber also expressly referred to the testimonies of Witness FAL that more than 5,000 people were present and Witness FAG that there were about 1,000 people at the meeting when noting that the evidence showed "that between 1,000 and 5,000 people were present".[7158] This reflects that the Trial Chamber did not consider that the variance as to the number of people attending rendered Witnesses FAL's and FAG's testimonies incompatible. Ndayambaje does not

[7151] Ndayambaje Appeal Brief, para. 585.
[7152] Prosecution Response Brief, paras. 2430-2432.
[7153] Trial Judgement, para. 4341.
[7154] *See* Ndayambaje Appeal Brief, para. 536, *referring to* Trial Judgement, para. 4330.
[7155] Trial Judgement, para. 4610. *See also ibid*., para. 4596.
[7156] Trial Judgement, para. 4611.
[7157] Trial Judgement, para. 4611.
[7158] *See* Trial Judgement, para. 4611, fn. 12275.

show any error in this respect, particularly because these witnesses were simply providing estimates.[7159]

3138. Furthermore, the Appeals Chamber finds that Ndayambaje fails to identify material differences in the testimonies of Witnesses FAL and FAG as to whether Ndayambaje climbed on a table during the ceremony. The Trial Chamber recounted Witness FAL's evidence that Nteziryayo told Ndayambaje to climb on the table before swearing Ndayambaje in as *bourgmestre* and that the swearing-in took place "at the beginning of the meeting and was very quick."[7160] The Trial Chamber also recalled Witness FAG's testimony that he did not see Ndayambaje climb on a chair or table and that "[t]he witness did not personally see the swearing-in of the *bourgmestre*".[7161] Ndayambaje's contentions ignore that Witness FAG's evidence does not demonstrate that he would have been present when Witness FAL heard Nteziryayo instruct Ndayambaje to climb on the table.[7162]

3139. While Ndayambaje and Nteziryayo testified that Ndayambaje did not climb on the table,[7163] Defence Witness KEPIR merely testified that he did not notice Ndayambaje climb on the table,[7164] and several Defence witnesses, including Witness KEPIR, recounted that the dignitaries were seated in front of the table during the swearing-in ceremony.[7165] The Trial Chamber did not ignore this evidence as it noted all of it.[7166] Considering the lack of relevance of this alleged discrepancy to any of the material facts on the basis of which Ndayambaje was found responsible, the Appeals Chamber sees no error in the Trial Chamber not expressly considering it in the Trial Judgement.

3140. Turning to Ndayambaje's argument that only Witness FAL testified that Sebukeye spoke at the ceremony and that the participants protested against Nteziryayo's criticism of the outgoing *bourgmestre*, having reviewed the relevant transcripts, the Appeals Chamber observes that Witness FAL merely testified that Sebukeye was present at the ceremony and at some later time

[7159] *See* Witness FAL, T. 9 February 2004 p. 76 (closed session) ("Q. But can you give us an approximate figure, 1,000, 2,000, 10,000? A. More than 5,000."); Witness FAG, T. 3 March p. 22 ("Q. Could we say more than 100 persons, 1,000 persons? A. Let us say 1,000; 1,000 persons."). *See also* Trial Judgement, paras. 4341, 4611, *referring*, *inter alia*, *to* Witness FAL, T. 9 February 2004 pp. 76, 77 (closed session). The Trial Chamber also noted that Witness RV estimated that 1,000 people were present and that Witness QAF was not able to estimate how many people were present but that there were many participants. *See ibid.*, paras. 4358, 4370, 4611, fn. 12275.
[7160] Trial Judgement, para. 4343. In this regard, the Appeals Chamber observes that neither Witness FAL's testimony nor the Trial Chamber's summary of it definitively indicates that Ndayambaje did climb on the table after being instructed by Nteziryayo to do so. *See idem*; Witness FAL, T. 9 February 2004 pp. 38 (English) and 45 (French).
[7161] Trial Judgement, para. 4330.
[7162] Trial Judgement, paras. 4330, 4343.
[7163] *See* Trial Judgement, paras. 4524, 4581.
[7164] *See* Trial Judgement, para. 4503.
[7165] *See* Trial Judgement, paras. 4454, 4503, 4555.
[7166] *See* Trial Judgement, paras. 4454, 4503, 4524, 4555, 4581.

said that the orders given there had to be implemented.[7167] The Appeals Chamber fails to see why the fact that other witnesses, including Defence witnesses, did not overhear this conversation is material to the assessment of Ndayambaje's conduct during the ceremony. The Appeals Chamber notes that Ndayambaje himself testified that he did not know whether Sebukeye attended the swearing-in ceremony,[7168] and other Defence witnesses relied upon by Ndayambaje stated that they did not see Sebukeye at the ceremony.[7169]

3141. The Appeals Chamber further observes that the Trial Chamber noted that, like Witness FAL, Witness TO testified that Nteziryayo criticised the outgoing *bourgmestre*.[7170] The Trial Chamber also expressly noted that, apart from these two witnesses, no other witness confirmed that Nteziryayo criticised the outgoing *bourgmestre*.[7171] The Appeals Chamber considers that the Trial Chamber was not required to provide a more detailed analysis of Defence evidence on this issue and finds that Ndayambaje has not demonstrated that Witness FAL's account of the ceremony was incompatible with other evidence.

3142. The Appeals Chamber therefore finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness FAL's evidence regarding his swearing-in ceremony.

(c) Witness FAG

3143. As noted above, the Trial Chamber observed that Witness FAG, like Witness FAL, testified "that both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside"[7172] and, consistent with Witnesses FAL and TO, testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed.[7173] The Trial Chamber also noted aspects of Witness FAG's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7174]

3144. Ndayambaje submits that the Trial Chamber erred in accepting Witness FAG's testimony regarding the swearing-in ceremony.[7175] He argues that Witness FAG was recalled to explain his

[7167] *See* Trial Judgement, para. 4350, *referring to* Witness FAL, T. 9 February 2004 pp. 48 (closed session), 63. *See also* Witness FAL, T. 9 February 2004 p. 77 (closed session).
[7168] *See* Trial Judgement, para. 4525.
[7169] *See* Trial Judgement, paras. 4463, 4508, 4561, 4569. The Appeals Chamber observes that, although the summary of Witness BOZAN's evidence by the Trial Chamber indicates that the witness stated that Sebukeye did not attend the swearing-in ceremony, a review of the testimony cited shows that he merely indicated he did not see him in attendance. *See ibid*., para. 4463, *referring to* Witness BOZAN, T. 16 September 2008 p. 40.
[7170] *See* Trial Judgement, para. 4377, *referring to* Witness TO, T. 4 March 2002 pp. 13, 14.
[7171] *See* Trial Judgement, para. 4624. *See also ibid*., para. 4625.
[7172] *See* Trial Judgement, para. 4622. *See also ibid*., para. 4327.
[7173] *See* Trial Judgement, para. 4627. *See also ibid*., para. 4327.
[7174] Trial Judgement, para. 4632.
[7175] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Notice of Appeal, para. 185.

previous silence on crimes which he had hidden from the Trial Chamber and that the latter incorrectly assessed these omissions, which discredited the witness.[7176] He also stresses that the witness did not mention Ndayambaje making a speech in his prior statements of 1999 and 2000.[7177]

3145. In addition, Ndayambaje appears to argue that, since Witness FAG conceded that he was not present for the swearing-in part of the ceremony, the witness could not have heard Nteziryayo or Ndayambaje speak.[7178] The Appeals Chamber further understands Ndayambaje to argue that, because the witness testified that Nteziryayo repeated Ndayambaje's speech, he reversed the order of the speakers, placing the speeches long after Ndayambaje took the oath.[7179]

3146. Ndayambaje also contends that Witness FAG intentionally placed the murder of a woman named Josepha after the swearing-in ceremony in order to implicate him and highlights that the witness, when recalled, testified that the murder took place in May 1994, before the swearing-in ceremony.[7180] Ndayambaje also points to the testimony of Defence Witness KANUC, which, he alleges, contradicted Witness FAG's testimony that Josepha's murder was a consequence of the ceremony and shows that Witness FAG is patently unreliable.[7181]

3147. The Prosecution responds that the Trial Chamber was aware of the omissions from Witness FAG's prior statements and the witness's explanation for them, which Ndayambaje ignores.[7182] It submits that Ndayambaje misrepresents Witness FAG's account of the ceremony and his testimony about the timing of the murder following it.[7183] It adds that the Trial Chamber acted reasonably in assessing Witness KANUC's evidence.[7184]

3148. The Appeals Chamber notes that the Trial Chamber expressly referred to the fact that, upon recall, Witness FAG admitted to having participated in more killings than the ones he had testified about during his initial appearance before the Tribunal[7185] and the witness's explanation for not mentioning those other killings previously when summarising his evidence on Ndayambaje's Swearing-In Ceremony.[7186] It also noted that Witness FAG did not mention Ndayambaje taking the

[7176] Ndayambaje Appeal Brief, para. 535.
[7177] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Reply Brief, para. 208.
[7178] Ndayambaje Appeal Brief, para. 537.
[7179] Ndayambaje Appeal Brief, para. 537.
[7180] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Reply Brief, para. 206.
[7181] Ndayambaje Appeal Brief, para. 567. *See also* Ndayambaje Notice of Appeal, para. 189.
[7182] Prosecution Response Brief, para. 2438.
[7183] Prosecution Response Brief, paras. 2436, 2437.
[7184] Prosecution Response Brief, paras. 2437, 2460.
[7185] *See* Trial Judgement, paras. 4333, 4334, *referring to* Witness FAG, T. 1 March 2004 p. 34, T. 6 September 2004 pp. 8-10, 12-14 (closed session), T. 6 September 2004 p. 10 (closed session) (French). *See also ibid*., para. 4332.
[7186] *See* Trial Judgement, paras. 4334, 4335. The Trial Chamber noted that, when asked about previously denying having participated in other killings, Witness FAG explained that he did not mention these killings but would have admitted having participated in them if asked about them. The Trial Chamber also noted Witness FAG's explanation

floor in his confession to Rwandan authorities of 18 November 1999 and his statement of 23 February 2000 to Tribunal investigators[7187] as well as the witness's explanations for these omissions.[7188] Ndayambaje does not develop any argument to challenge the reasonableness of the witness's explanations or show that no reasonable trier of fact could have accepted Witness FAG's testimony about the swearing-in ceremony, particularly where it was corroborated, despite these omissions.[7189]

3149. The Trial Chamber noted Witness FAG's testimony that he "did not personally see the swearing-in of the *bourgmestre*".[7190] It also noted that the witness nevertheless expressly mentioned that he "heard both Nteziryayo and Ndayambaje address the crowd in parables".[7191] Given the evidence that the incendiary remarks were made both during and after the swearing-in part of the ceremony,[7192] Ndayambaje's suggestion that Witness FAG's evidence demonstrates that he must not have heard what Ndayambaje and Nteziryayo said is not persuasive.

3150. The Appeals Chamber is similarly not persuaded by Ndayambaje's suggestion that, by claiming that Nteziryayo repeated what was said by Ndayambaje, Witness FAG reversed the order of speakers. The Appeals Chamber observes that Witness FAG specified that he did not pay attention to the order in which the speakers spoke.[7193] In any event, the Trial Chamber noted that the evidence was equivocal as to whether Nteziryayo or Ndayambaje took the floor first and found the variances insignificant.[7194] Ndayambaje does not demonstrate any error in this respect.

3151. Regarding the timing of the murder of Josepha, the Appeals Chamber observes that, in summarising Witness FAG's evidence, the Trial Chamber expressly noted that the appointment ceremony for Ndayambaje as *bourgmestre* occurred between May and June 1994[7195] and that the witness estimated that Josepha, who was killed after the statements made at the ceremony, died in May 1994.[7196] The Trial Chamber acknowledged that Witness FAG was equivocal as to the timing

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that he made a distinction between the events in which he participated and could be punished for and those that did not concern him personally and for which he could not be punished. *See idem.*

[7187] *See* Trial Judgement, para. 4331, *referring to* Exhibit D188 (Witness FAG's Confession, dated 18 November 1999) (confidential), Witness FAG's 2000 Statement. Ndayambaje also relies upon the French translation of Witness FAG's 1999 Statement and 2000 Statement. *See* Ndayambaje Appeal Brief, para. 538.

[7188] *See* Trial Judgement, para. 4331. The Trial Chamber noted that Witness FAG explained that "it was difficult to remember everything when giving statements" and that "it was hard to always repeat the same things." It also noted that, when asked about his failure to mention Ndayambaje taking the floor in his statement of 23 February 2000 to Tribunal investigators, the witness explained that he was questioned about Nteziryayo, not Ndayambaje, and therefore did not talk about Ndayambaje with the investigators. *See idem*.

[7189] *See* Trial Judgement, paras. 4622, 4627.

[7190] *See* Trial Judgement, para. 4330.

[7191] *See* Trial Judgement, para. 4327.

[7192] *See* Trial Judgement, paras. 4327, 4328, 4342-4345, 4356-4363, 4376-4378, 4382, 4390-4393, 4421-4427.

[7193] *See* Trial Judgement, para. 4326.

[7194] *See* Trial Judgement, paras. 4610, 4611. *See also ibid*., paras. 4597, 4598.

[7195] *See* Trial Judgement, paras. 4322, 4323.

[7196] *See* Trial Judgement, para. 4333, *referring to* Witness FAG, T. 6 September 2004 pp. 8, 9 (closed session).

of the swearing-in ceremony, but Ndayambaje fails to demonstrate that the witness was equivocal as to whether the killing of Josepha occurred after it or that Witness FAG's evidence in this regard was aimed at maliciously implicating him.[7197]

3152. The Trial Chamber relied on Witness FAG's evidence that Josepha's death occurred after the swearing-in ceremony when observing "the consistent, albeit often general, evidence of the Prosecution witnesses to the effect that after the meeting, killings occurred".[7198] Despite relying on this aspect of Witness FAG's testimony, the Trial Chamber did not address in the Trial Judgement Witness KANUC's evidence of seeing Josepha dead prior to Ndayambaje's swearing-in as *bourgmestre* or any aspects of Witness KANUC's evidence.[7199] Given the direct relevance of this evidence, to which Ndayambaje expressly referred in his closing submissions,[7200] and the absence of any indication in the Trial Judgement that the Trial Chamber assessed and weighed it, the Appeals Chamber finds that the Trial Chamber erred in failing to consider this evidence.

3153. The Appeals Chamber, however, finds that the Trial Chamber's failure to consider Witness KANUC's evidence does not invalidate any of the Trial Chamber's findings pertaining to the swearing-in ceremony. Indeed, the Appeals Chamber observes that the Trial Chamber relied on the evidence of several other witnesses concerning the killings that followed the swearing-in ceremony to conclude that killings occurred and, more importantly, that Ndayambaje was not held responsible on the basis of any resulting killing.[7201] Having reviewed Witness KANUC's testimony, which incidentally was equivocal as to the date of another killing,[7202] the Appeals Chamber also does not consider that the Trial Chamber abused its discretion when finding that Witness FAG testified about Ndayambaje's Swearing-In Ceremony or relying on aspects of his evidence concerning the utterances made during it.[7203]

3154. In light of the above, the Appeals Chamber finds that Ndayambaje has not demonstrated any error in the assessment of Witness FAG's evidence that would invalidate the Trial Chamber's findings relating to Ndayambaje's Swearing-In Ceremony.

See also Witness FAG, T. 6 September 2004 p. 9 (closed session) ("Q. Witness FAG, you say the event took place in May 1994; is that correct? A. Yes, that is correct. Q. So, Witness FAG, can one say that this event, the death of Joseph[a], did not take place at the end of June 1994? A. As a matter of fact, when I said May, I was *estimating*. I think that the event took place at that time, but it was *a mere reckoning*.") (emphasis added).

[7197] *See* Trial Judgement, para. 4590. *See also ibid*., paras. 4322, 4333.

[7198] *See* Trial Judgement, para. 4632, *referring to* Witness FAG, T. 1 March 2004 pp. 33, 34, T. 3 March 2004 p. 25.

[7199] *See* Witness KANUC, T. 9 June 2008 pp. 54, 58-64. The Appeals Chamber observes that the transcript refers to "Yozefa". However, both Witnesses FAG and KANUC identify this person as having the same father. *Compare* Witness FAG, T. 1 March 2004 p. 34 *with* Witness KANUC, T. 9 June 2008 p. 54.

[7200] Ndayambaje Closing Brief, paras. 820, 821.

[7201] *See* Trial Judgement, para. 4629.

[7202] *See* Witness KANUC, T. 10 June 2008 p. 56 (closed session).

[7203] *See supra*, para. 3149.

(d) Witness QAF

3155. The Trial Chamber noted that, consistent with Witness RV, Witness QAF testified that "only Ndayambaje recounted the fable of sweeping dirt", which meant that surviving Tutsis needed to be killed.[7204] The Trial Chamber also considered Witness QAF's evidence that "Nteziryayo congratulated the population for their work", which meant "to kill", and urged them to continue.[7205]

3156. Ndayambaje submits that Witness QAF did not attend the swearing-in ceremony and that the Trial Chamber erred in relying on his evidence.[7206] Specifically, he argues that, contrary to the Trial Chamber's assertion, Witness QAF testified that he attended a security meeting in May 1994, two weeks after the killings in April 1994.[7207] Ndayambaje argues that, because Witness QAF arrived late, missed the swearing-in part of the meeting, and did not notice Ndayambaje wearing "a scarf with national colours", he also could not have heard Nteziryayo's remarks.[7208]

3157. The Prosecution responds that Ndayambaje fails to demonstrate an error in the Trial Chamber's assessment of Witness QAF's testimony.[7209]

3158. Ndayambaje replies that "[s]ince the wearing of a scarf was the tradition during the swearing in of a *bourgmestre*, if [Ndayambaje] was not wearing one it means that it was another meeting."[7210]

3159. The Appeals Chamber notes that, contrary to Ndayambaje's claim, Witness QAF did not specify that the "public safety" meeting[7211] he testified about took place two weeks after the killings started in April 1994, but stated that, after the start of the war in his area in April 1994, "the war stopped for about two weeks, and that it was during that lull of two weeks that the meeting took place" which was "well after the outbreak of the war of April 1994".[7212] The witness also indicated

[7204] *See* Trial Judgement, para. 4623. *See also ibid*., para. 4363.
[7205] *See* Trial Judgement, paras. 4624, 4626. *See also ibid*., paras. 4360, 4361. The Trial Chamber also noted aspects of Witness QAF's evidence when observing the "consistent, albeit often general, evidence of Prosecution witnesses" that killings occurred after the meeting. *See ibid*., para. 4632.
[7206] Ndayambaje Appeal Brief, para. 542. *See also* Ndayambaje Notice of Appeal, para. 185.
[7207] Ndayambaje Appeal Brief, para. 540.
[7208] Ndayambaje Appeal Brief, para. 540.
[7209] Prosecution Response Brief, para. 2440.
[7210] *See also* Ndayambaje Reply Brief, para. 209, *referring to* Ndayambaje, T. 8 November 2008 pp. 42, 43.
[7211] Witness QAF, T. 5 February 2004 pp. 65, 85, T. 9 February 2004 p. 8, *referred to in* Trial Judgement, para. 4591.
[7212] *See* Witness QAF, T. 6 February 2004 p. 11. *See also ibid*., p. 12 (French); Trial Judgement, para. 4354. The Appeals Chamber observes that the English version of the transcript erroneously refers to "June" as the month when the "war started" whereas the French version refers to "*avril*". *See* Witness QAF, T. 6 February 2004 p. 11; *ibid*., p. 12 (French). A review of Witness QAF's testimony reveals that the reference to "June" in the English version of the transcript must have been an error since the witness, as reflected in both English and French transcripts, later referred to "April" as the reference for the "outbreak of war".

that he had poor recollection of the date of the meeting.[7213] Ndayambaje's argument is therefore without merit.

3160. The Appeals Chamber is also not persuaded by Ndayambaje's contention that the late arrival of Witness QAF to the meeting and the fact that he was not present for the swearing-in part of the ceremony demonstrate that he could not have heard Nteziryayo's remarks. In this respect, the Appeals Chamber recalls that Ndayambaje has not demonstrated that missing the swearing-in part of the ceremony precluded another witness from hearing him and Nteziryayo make incendiary remarks during the gathering.[7214] Likewise, the Appeals Chamber does not consider that Witness QAF's failure to notice Ndayambaje wearing a scarf with national colours shows that he did not attend Ndayambaje's Swearing-In Ceremony, given that, as noted by the Trial Chamber, the witness simply stated that he "did not pay any attention as to whether Ndayambaje wore any distinct emblem."[7215]

3161. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness QAF's evidence concerning his swearing-in ceremony.

(e) Witness RV

3162. As recalled above, the Trial Chamber noted that Witness RV, like Witness QAF, testified that "only Ndayambaje recounted the fable of sweeping dirt", understood by the witness to mean that surviving Tutsis needed to be killed.[7216]

3163. Ndayambaje argues that Witness RV's testimony is "peppered with major contradictions and inconsistencies."[7217] Specifically, he points to the witness's evidence that, despite claiming that Ndayambaje spoke after Nteziryayo, he also testified that he left the ceremony during Nteziryayo's speech.[7218] Ndayambaje suggests that the witness's explanation that Nteziryayo spoke twice, once before and once after Ndayambaje, is unbelievable, as is his evidence that he could remember the content of Nteziryayo's speech.[7219]

[7213] *See* Witness QAF, T. 6 February 2004 p. 11 ("Now as concerns the date, I do not have a recollection of what happened.").
[7214] *See supra*, para. 3138.
[7215] *See* Trial Judgement, para. 4358, *referring to* Witness QAF, T. 5 February 2004 p. 66, T. 6 February 2004 p. 5, T. 9 February 2004 pp. 15, 16, 21-23, 28.
[7216] *See* Trial Judgement, paras. 4623, 4628. *See also ibid*., para. 4372.
[7217] Ndayambaje Appeal Brief, para. 550. *See also* Ndayambaje Notice of Appeal, para. 185.
[7218] Ndayambaje Appeal Brief, para. 551.
[7219] Ndayambaje Appeal Brief, para. 551. *See also* Ndayambaje Reply Brief, paras. 209, 217.

3164. Ndayambaje also argues that the Trial Chamber's refusal to rely on Witness RV's evidence relating to Nteziryayo's involvement in events at Kirarambogo due to ambiguity within it should equally apply to the ambiguity surrounding Witness RV's testimony as to his continuous presence at the swearing-in ceremony and ability to recall the "inflammatory speeches" Ndayambaje allegedly made.[7220]

3165. The Prosecution responds that the Trial Chamber was aware of and reasonably assessed the inconsistencies in Witness RV's account of the swearing-in ceremony.[7221]

3166. The Appeals Chamber observes that, when summarising Witness RV's testimony, the Trial Chamber recalled that Witness RV testified that "[h]e could not recall what Nteziryayo said or if he was present for the entirety of Nteziryayo's speech", that "Nteziryayo spoke twice because he spoke again after Ndayambaje's speech",[7222] and that "Ndayambaje was probably the last to speak".[7223] The Trial Chamber further observed that the witness was cross-examined on this alleged inconsistency and noted that Witness RV explained that "he heard Ndayambaje", that the events "occurred a long time ago", and that he left while Nteziryayo was speaking on the second occasion after Ndayambaje spoke.[7224] Ndayambaje simply points to this evidence without demonstrating why it was material to the Trial Chamber's assessment of the witness's testimony. Considering that the Trial Chamber noted Witness FAL's testimony that Nteziryayo addressed the public both before and after Ndayambaje was installed and took the oath,[7225] the Appeals Chamber finds that a reasonable trier of fact could have accepted Witness RV's evidence concerning the ceremony.

3167. Ndayambaje's argument that the Trial Chamber failed to take a consistent approach to the assessment of different parts of Witness RV's evidence likewise lacks merit. The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[7226] When assessing the evidence regarding the events at Kirarambogo and Nteziryayo's involvement in them, the Trial Chamber noted that Witness RV could not remember the exact date of a particular meeting in May 1994, which Nteziryayo purportedly chaired.[7227] It observed that the witness "was a figure of authority at the time the meeting was alleged to have taken place", "affirmed that he convened and organised the meeting at issue", and concluded "that

[7220] Ndayambaje Appeal Brief, para. 553, *referring to* Trial Judgement, paras. 3668, 4373.
[7221] Prosecution Response Brief, para. 2449.
[7222] Trial Judgement, para. 4371, *referring to* Witness RV, T. 17 February 2004 pp. 5, 7 (closed session), T. 18 February 2004 pp. 43, 44 (closed session).
[7223] Trial Judgement, para. 4372, *referring to* Witness RV, T. 18 February 2004 p. 43 (closed session).
[7224] Trial Judgement, para. 4373, *referring to* Witness RV, T. 18 February 2004 pp. 44, 45 (closed session).
[7225] *See* Witness FAL, T. 9 February 2004 pp. 37, 38, 55, 57-60, 64 and 77, 78, 81 (closed session), *referred to* in Trial Judgement, paras. 4342-4345.
[7226] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.

the ambiguity of his testimony as to the date of the meeting undermines his credibility."[7228] The Trial Chamber rejected his evidence in light of the credibility problems arising from this particular part of his testimony, in light of his status as an accomplice witness, and due to the absence of corroborating evidence.[7229] In this context, the Appeals Chamber fails to see how the rejection of Witness RV's evidence in that instance required the Trial Chamber to reject his credible and corroborated evidence concerning Ndayambaje's remarks during the swearing-in ceremony.[7230]

3168. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness RV's evidence concerning his swearing-in ceremony.

(f) Witness FAU

3169. The Trial Chamber noted that Witness FAU provided hearsay corroboration to the evidence of Witnesses FAL and FAG "that both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside".[7231] The Trial Chamber also considered that Witness FAU's evidence corroborated other evidence as to the meaning of this metaphor, observing that "he testified that the killers told him that those protecting Tutsis who refused to hand them over would be killed."[7232]

3170. Ndayambaje submits that contradictions between Witness FAU's prior statements to Tribunal investigators and his testimony called for the rejection of his evidence.[7233] Specifically, Ndayambaje observes that, while Witness FAU testified that he did not attend the ceremony, his prior statement of 22 February 2001 reflects that he did and details that "he sat close to Nteziryayo and heard what he said."[7234] Ndayambaje further notes that the witness's statement of 9 October 1999 reveals that the meeting could have taken place prior to the attacks on Mugombwa Church and Kabuye Hill, which occurred from 20 to 24 April 1994.[7235] Ndayambaje highlights that, elsewhere in the Trial Judgement, the Trial Chamber found Witness FAU not

[7227] *See* Trial Judgement, para. 3668.
[7228] *See* Trial Judgement, para. 3668.
[7229] *See* Trial Judgement, para. 3669. *See also ibid*., paras. 3665-3668.
[7230] *See* Trial Judgement, paras. 4622-4628.
[7231] *See* Trial Judgement, para. 4622. *See also ibid*., paras. 4398, 4400, 4401.
[7232] *See* Trial Judgement, para. 4624. *See also ibid*., para. 4398.
[7233] Ndayambaje Appeal Brief, paras. 546, 547. *See also* Ndayambaje Notice of Appeal, para. 185.
[7234] Ndayambaje Appeal Brief, paras. 544, 546. *See also* Ndayambaje Reply Brief, para. 215.
[7235] Ndayambaje Appeal Brief, para. 546. Ndayambaje does not identify any other inconsistencies or contradictions between Witness FAU's prior statements and his testimony despite mentioning other statements admitted into the record. *See ibid*., para. 545, fn. 829.

credible because of the "confusion" between his prior statements and his testimony at trial as well as his status as an accomplice witness.[7236]

3171. Ndayambaje further contends that the Trial Chamber rejected Defence Witness KWEPO's "entire testimony without any explanation" even though his evidence that Witness FAU rejoined the Rwandan Army in May 1994 and did not return to Muganza Commune contradicts Witness FAU's account that he was in Muganza Commune at the time of the swearing-in ceremony.[7237]

3172. The Prosecution responds that certain aspects of Witness FAU's testimony were corroborated and that the Trial Chamber was aware of and reasonably assessed the discrepancies between Witness FAU's prior statements and his testimony.[7238] The Prosecution adds that, contrary to Ndayambaje's submissions, the Trial Chamber provided reasons for rejecting Witness KWEPO's evidence.[7239]

3173. The Appeals Chamber observes that the Trial Chamber expressly noted in the section of the Trial Judgement addressing Ndayambaje's Swearing-In Ceremony that, when it was put to Witness FAU that his prior statement of February 2001 outlined that he sat close to Nteziryayo and heard what he was saying, the witness explained that "he knew Nteziryayo's words because those returning from the meeting told him so".[7240] Elsewhere in the Trial Judgement, the Trial Chamber also expressly noted Witness FAU's explanation when confronted with his prior statement to the Rwandan Prosecutor that he saw Nteziryayo at the meeting that this was a recording error as he did not attend the meeting.[7241] Ndayambaje does not challenge the reasonableness of the witness's explanations or advance arguments to demonstrate why the Trial Chamber was prevented from relying on Witness FAU's evidence despite these contradictions.

3174. The Appeals Chamber also notes that, contrary to Ndayambaje's contention, Witness FAU's statement of October 1999 to Tribunal investigators indicates that the witness said that the meeting occurred *after* the events at Mugombwa Church and Kabuye Hill not before them.[7242] Ndayambaje's submission in this respect is therefore without merit.

[7236] Ndayambaje Appeal Brief, para. 545, *referring to* Trial Judgement, paras. 5226-5230.
[7237] Ndayambaje Appeal Brief, para. 548 (emphasis omitted). *See also* Ndayambaje Notice of Appeal, para. 189.
[7238] Prosecution Response Brief, paras. 2442, 2444.
[7239] Prosecution Response Brief, para. 2447.
[7240] *See* Trial Judgement, para. 4404.
[7241] *See* Trial Judgement, para. 4671.
[7242] Exhibit D192 (Witness FAU's Statement, dated 9 October 1999) (confidential), p. K0113046 (Registry pagination). The Appeals Chamber observes that the Trial Chamber erroneously stated that "it was put to the witness that his statement of October 1999 said the meeting took place before the killings at Mugombwa Church and Kabuye Hill" in paragraph 4403 of the Trial Judgement as Witness FAU's testimony reflects that he was questioned about his statement of 29 December 1999. *See* Witness FAU, T. 10 March 2004 pp. 25-27. The Appeals Chamber considers this erroneous reference to be inconsequential as, in any event, Witness FAU did not agree with counsel's suggestion that his prior

3175. The Appeals Chamber is also not persuaded by Ndayambaje's contention that the Trial Chamber's rejection of Witness FAU's testimony concerning alleged training and distribution of weapons to militiamen by Ndayambaje reflected an overall denunciation of this witness's evidence. In dismissing this part of Witness FAU's evidence, the Trial Chamber noted his status as a detained witness, highlighted discrepancies between his previous statements and testimony, and rejected his explanations for the discrepancies.[7243] It also considered that his testimony contained internal discrepancies with respect to the allegation, including concerning its key aspect.[7244] In light of these circumstances as well as the fact that Witness FAU was the sole witness that could be relied upon in relation to that allegation,[7245] the Trial Chamber found that it was not proven beyond reasonable doubt.[7246] Bearing in mind that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony,[7247] the Appeals Chamber does not consider that the Trial Chamber's rejection of an isolated aspect of Witness FAU's testimony rendered its decision to rely on his hearsay evidence about the content of the speeches made by Ndayambaje and Nteziryayo during the swearing-in ceremony unreasonable, particularly as it was corroborated by direct evidence.

3176. With respect to the evidence of Witness KWEPO, the Appeals Chamber observes that the Trial Chamber noted that Witness FAU's testimony as to the timeline of the events following the swearing-in ceremony appeared confused.[7248] It nevertheless accepted his testimony regarding a particular abduction and explicitly rejected Witness KWEPO's testimony as to Witness FAU's whereabouts at that time.[7249] Ndayambaje does not demonstrate that the Trial Chamber rejected Witness KWEPO's evidence without providing a reasoned opinion.

3177. The Appeals Chamber therefore dismisses Ndayambaje's submissions concerning the Trial Chamber's assessment of Witness FAU's evidence related to his swearing-in ceremony.

(g) Witness TO

3178. The Trial Chamber noted that Witness TO, in contrast with Witnesses FAG and FAL, testified that only Nteziryayo told the metaphor concerning sweeping dirt and found that

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statement of December 1999 indicated that the ceremony took place before the attacks on Mugombwa Church and Kabuye Hill. *See ibid.*, p. 27.
[7243] *See* Trial Judgement, paras. 5227, 5228.
[7244] Trial Judgement, para. 5229.
[7245] The Trial Chamber determined that it would be unduly prejudicial to the Defence for it to consider the evidence of Witness TO with respect to these allegations. *See* Trial Judgement, para. 5223.
[7246] *See* Trial Judgement, paras. 5229, 5230.
[7247] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[7248] *See* Trial Judgement, para. 4620.
[7249] *See* Trial Judgement, para. 4620.

Witness TP corroborated Witness TO's evidence on this issue.[7250] However, it considered that, consistent with Witnesses FAG and FAL, Witness TO testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed.[7251] The Trial Chamber also noted aspects of Witness TO's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7252]

3179. Ndayambaje argues that the Trial Chamber failed to exercise sufficient caution with respect to Witness TO, highlighting that Defence Witness SABINE testified that Witness TO was sentenced and imprisoned for a murder he committed in 1994, a fact Witness TO denied.[7253] Ndayambaje contends that the Trial Chamber failed to consider this factor and prevented him from exhaustively exploring it.[7254]

3180. Ndayambaje further contends that Witness TO's credibility was "obliterated" because several aspects of his testimony were not supported by any other witness or were contradicted by other evidence.[7255] In particular, Ndayambaje points to the fact that Witness TO "invented" the practice of shooting bows and arrows during the swearing-in ceremony and stories about long ears and tails of *Inkotanyi*, as well as testified about consuming alcohol during a certain event, which led to his recall before the Tribunal on 21 June 2004.[7256] Ndayambaje argues that Defence evidence contradicting Witness TO's testimony concerning the practice of shooting bows and arrows was erroneously rejected.[7257] Ndayambaje also notes that the witness's statement of 11 June 1997 placed the meeting in May 1994.[7258]

3181. In addition, Ndayambaje submits that the Trial Chamber ought to have considered the evidence of Witness SABINE which, in his view, discredited Witness TO's evidence that the murders of Witness TO's cousins took place the day after Ndayambaje's Swearing-In Ceremony.[7259] Specifically, Ndayambaje argues that Witness SABINE, who was found guilty and had served his sentence for these murders, testified that they occurred following the events at Kabuye Hill in April 1994, not after the swearing-in ceremony in June 1994.[7260]

[7250] *See* Trial Judgement, para. 4623. *See also ibid*., para. 4378.
[7251] *See* Trial Judgement, para. 4627. *See also ibid*., para. 4382.
[7252] Trial Judgement, para. 4632.
[7253] Ndayambaje Appeal Brief, para. 559.
[7254] Ndayambaje Appeal Brief, para. 559. *See also* Ndayambaje Reply Brief, para. 223.
[7255] Ndayambaje Appeal Brief, para. 561. *See also* Ndayambaje Notice of Appeal, para. 185.
[7256] Ndayambaje Appeal Brief, para. 561. *See also ibid*., para. 556.
[7257] Ndayambaje Appeal Brief, para. 585.
[7258] Ndayambaje Appeal Brief, para. 557.
[7259] Ndayambaje Appeal Brief, paras. 558, 560.
[7260] Ndayambaje Appeal Brief, paras. 558, 560, *referring to* Trial Judgement, para. 4384, Witness SABINE, T. 12 June 2008 pp. 33-38 (closed session). Ndayambaje argues that Witness TO lied about the timing of these murders to deliberately incriminate him. *See idem.*

3182. Finally, Ndayambaje points out that Witness TO mentioned another meeting two weeks after the swearing-in ceremony.[7261] In his view, the Trial Chamber "confused the two meetings mentioned by Witness TO, who, alone, referred to a second meeting which [Ndayambaje] allegedly chaired at the same place as the swearing-in ceremony, two weeks after."[7262] Ndayambaje further highlights that Defence Witness Stan testified that there were no other meetings in Muganza Commune after 22 June 1994, contradicting Witness TO's evidence.[7263]

3183. The Prosecution responds that the Trial Chamber was aware of the elements relied upon by Ndayambaje to impugn the testimony of Witness TO and that Ndayambaje fails to demonstrate an error in the Trial Chamber's consideration of them.[7264] It argues that the Trial Chamber provided reasons for rejecting Witness SABINE's evidence, which Ndayambaje misrepresents.[7265]

3184. The Appeals Chamber notes that, while a review of the transcripts cited by Ndayambaje reflects that Witness SABINE testified that, in 2007, a *Gacaca* court tried and convicted Witness TO for murders he committed in 1994, Witness TO's testimony, as cited by Ndayambaje, does not reflect that Witness TO denied his participation in crimes.[7266] In any event, the Appeals Chamber does not consider that the Trial Chamber was required to take into account Witness SABINE's claim given that it did not find him either reliable or credible.[7267] The Trial Chamber made it clear that it treated the evidence of Witness TO with caution in view of his imprisonment during Ndayambaje's previous tenure as *bourgmestre*, which may have provided the witness with a motive to seek revenge against Ndayambaje.[7268] Furthermore, having reviewed the portion of Witness TO's testimony cited by Ndayambaje, the Appeals Chamber does not find that the Trial Chamber unfairly curtailed Ndayambaje's ability to examine Witness TO about the witness's conduct as the Presiding Judge, after extensive questioning of the witness by counsel, stopped him from asking the witness questions concerning the conduct of other persons.[7269]

3185. Turning to the contradictory aspects of Witness TO's account of the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber set forth Witness TO's evidence that, prior to

[7261] Ndayambaje Appeal Brief, para. 561.
[7262] Ndayambaje Appeal Brief, para. 562, *referring to* Trial Judgement, para. 4384.
[7263] Ndayambaje Appeal Brief, para. 599.
[7264] Prosecution Response Brief, para. 2455.
[7265] Prosecution Response Brief, para. 2456.
[7266] *See* Witness SABINE, T. 12 June 2008 pp. 55-58 (closed session); Witness TO, T. 5 March 2002 pp. 88-90. *See also* Witness SABINE, T. 12 June 2008 pp. 58-61 (closed session) (French); Witness TO, T. 5 March 2002 pp. 104-108 (French).
[7267] *See* Trial Judgement, para. 4722. The Appeals Chamber further notes that Witness TO's alleged trial for the impugned crimes would have taken place in 2007 according to Witness SABINE, *i.e.* after Witness TO's 2002 testimony in the present proceedings. Thus, there is no basis to assert that, at the time of his testimony, Witness TO had an interest in implicating Ndayambaje in order to receive consideration in Rwanda.
[7268] *See* Trial Judgement, para. 4630.
[7269] *See* Witness TO, T. 5 March 2002 pp. 89-91.

the ceremony, the population practiced shooting bows and arrows.[7270] The Trial Chamber also noted that Witness FAL recounted a bow-and-arrow shooting exercise near the venue of the meeting, albeit not on the same day as the meeting,[7271] and the evidence of Defence witnesses that they did not see any archery practice or did not take part in it.[7272] Ndayambaje largely repeats arguments made at trial[7273] without showing that no reasonable trier of fact could have found that Witness TO was nonetheless testifying about the swearing-in ceremony.

3186. The Appeals Chamber is similarly not persuaded that Witness TO's evidence was incredible based on one element of his testimony concerning how the *Inkotanyi* were portrayed in Rwanda at the time.[7274] In addition, Ndayambaje, who simply refers to Witness TO's testimony upon recall, fails to explain how the basis of the witness's recall, which concerned his demeanour when testifying about an event other than the swearing-in ceremony,[7275] or his testimony regarding consumption of alcoholic beverages at Nteziryayo's parents' house in 1990, undermined the witness's credibility and prevented the Trial Chamber from relying on his evidence concerning the content of Nteziryayo's and Ndayambaje's remarks during the ceremony.[7276]

3187. As regards the date of the meeting, the Appeals Chamber observes that Ndayambaje merely highlights that Witness TO's prior statement indicated that the swearing-in ceremony occurred in May 1994, which was expressly noted by the Trial Chamber,[7277] without demonstrating that no reasonable trier of fact could have found that the witness was nonetheless testifying about Ndayambaje's Swearing-In Ceremony, which it found to have occurred on 22 June 1994.[7278]

3188. The Appeals Chamber further notes that, contrary to Ndayambaje's submission, the Trial Chamber assessed the part of Witness SABINE's testimony upon which Ndayambaje relies when evaluating evidence regarding the abductions of Tutsi women and girls in June 1994 in

[7270] *See* Trial Judgement, para. 4383.
[7271] *See* Trial Judgement, para. 4340.
[7272] *See* Trial Judgement, paras. 4554, 4582.
[7273] *See* Ndayambaje Closing Brief, para. 649.
[7274] The Appeals Chamber observes that the Trial Chamber recalled Witness TO's understanding of "*Inkotanyi*" as Tutsis who had been driven from the country and were considered enemies and cited the pages of his testimony that also contained his recollection as to how they were portrayed. *See* Trial Judgement, para. 4383, fn. 11834, *referring*, *inter alia*, *to* Witness TO, T. 6 March 2002 pp. 15, 16. Notably, like Witness TO, Witness FAL also recounted that the terms "*Inkotanyi*" and Tutsi were used interchangeably and that they were considered the enemy. *See* Witness FAL, T. 9 February 2004 pp. 58, 59. *See also* Trial Judgement, paras. 4344, 4625.
[7275] *See* 6 May 2004 Decision on Motion to Recall Witness TO, paras. 9, 10, p. 4.
[7276] *See* Ndayambaje Appeal Brief, para. 561. *See also* Witness TO, T. 21 June 2004 pp. 5-12.
[7277] *See* Trial Judgement, para. 4375, *referring to* Witness TO, T. 5 March 2002 pp. 28-30, 38, 43, T. 6 March 2002 pp. 28-30, 58, 59. The Trial Chamber also noted the witness's explanation for the variance, namely that he "was not in a position to provide exact dates, since this was of little concern to him" and that the witness later estimated that the meeting occurred in June 1994. *See idem*. *See also* Witness TO, T. 5 March 2002 p. 28 ("It is true that so far as the dates are concerned, I am not in a position to give you the exact dates. I have given approximate dates".).
[7278] *See* Trial Judgement, paras. 4374, 4375.

another part of the Trial Judgement.[7279] The Trial Chamber found that Witness SABINE was neither reliable nor credible.[7280] Consequently, the Appeals Chamber finds that the Trial Chamber was not required to expressly discuss his evidence in its consideration of the allegation pertaining to the swearing-in ceremony.

3189. Turning to the meeting two weeks after the swearing-in ceremony recounted by Witness TO, the Appeals Chamber considers that Ndayambaje's contention that the Trial Chamber confused the swearing-in ceremony with this other meeting is based on an erroneous reading of the transcript.[7281] Moreover, the Trial Chamber excluded Witness TO's evidence about the meeting following the ceremony due to insufficient notice of the allegations related to this meeting, noting that, in any event, the evidence was not sufficient to prove these allegations beyond reasonable doubt.[7282] Ndayambaje merely highlights Witness Stan's testimony that there were no other public meetings in Muganza Commune after Ndayambaje's Swearing-In Ceremony, which was expressly noted by the Trial Chamber,[7283] without explaining how it was material to the Trial Chamber's consideration of Witness TO's evidence concerning the witness's presence at the swearing-in ceremony and the content of the speeches made during it.

3190. For these reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness TO's evidence pertaining to his swearing-in ceremony.

(h) Witness TP

3191. As noted above, the Trial Chamber considered that Witness TP's evidence corroborated Witness TO's evidence that only Nteziryayo used the metaphor concerning sweeping dirt.[7284] The Trial Chamber further considered Witness TP's testimony that Nteziryayo and Ndayambaje thanked the population for their "work", which meant "to kill", and urged them to continue.[7285]

[7279] *See* Trial Judgement, para. 4722. *See ibid*., paras. 4702, 4703.
[7280] *See* Trial Judgement, para. 4722.
[7281] The Appeals Chamber observes that Witness TO testified that, after the meeting chaired by Prefect Nteziryayo during which Ndayambaje was reappointed *bourgmestre*, the population did not comply with the instructions that were issued during the meeting, save for some scoundrels and certain bandits, who engaged in flushing out women and children and in looting. *See* Witness TO, T. 4 March 2002 pp. 10, 11, 26 and 31 (French) ("*Après la réunion dirigée par le préfet, Élie Ndayambaje a aussi pris la parole… Après le discours du préfet, Élie Ndayambaje a également pris la parole. Il n'a pas dit grand-chose à la population, à part lui assurer sa collaboration, et après, la population est rentrée. Mais la population ne s'est pas impliquée dans les massacres pour appliquer les instructions reçues au cours de la réunion, à part quelques voyous et certains bandits qui se sont mis à débusquer les femmes et les enfants, et à commettre le pillage.*"). *See also* Trial Judgement, para. 4384, *referring to* Witness TO, T. 4 March 2002 pp. 26, 27, T. 6 March 2002 pp. 46, 60, 61.
[7282] *See* Trial Judgement, para. 5223.
[7283] *See* Trial Judgement, para. 4487.
[7284] *See* Trial Judgement, paras. 4623, 4627. *See also ibid*., para. 4391.
[7285] *See* Trial Judgement, para. 4626. *See also ibid*., paras. 4390, 4391.

Finally, the Trial Chamber also noted aspects of Witness TP's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7286]

3192. Ndayambaje submits that Witness TP's testimony "was peppered with inconsistencies and contradictions",[7287] arguing that while the Trial Chamber restated many of them – including the place of the meeting, the content of the speeches, and the order of the speakers – it erroneously described them as minor.[7288] He also argues that the Trial Chamber misstated Witness TP's evidence which, in Ndayambaje's view, reflects that she testified about attending Nteziryayo's swearing-in ceremony and not his.[7289]

3193. Ndayambaje further observes that the witness placed Prefect Nteziryayo's swearing-in ceremony not in the small eucalyptus woods where Ndayambaje's Swearing-In Ceremony took place, and argues that the Trial Chamber erred in characterising this discrepancy about the location as minor.[7290] Ndayambaje adds that the Trial Chamber erroneously relied on the English interpretation of Witness Stan's French testimony to corroborate Witness TP's evidence regarding the location of the ceremony.[7291] In his view, the Trial Chamber incorrectly suggested that Witness Stan, like Witness TP, placed the swearing-in ceremony near the football pitch, whereas Witness Stan instead placed it in the small woods close to the road leading from the commune office to Bishya.[7292]

3194. Finally, Ndayambaje argues that Witness TP deliberately placed the abduction of her son and abduction and killing of the son of her brother-in-law after the swearing-in ceremony to implicate him.[7293] He contends that the Trial Chamber disregarded the contradictory evidence of Witness KANUC, who pleaded guilty and served his sentence for the impugned murder and testified that the killing occurred after the events in Kabuye in April 1994 instead of after his swearing-in ceremony.[7294]

[7286] Trial Judgement, para. 4632.
[7287] Ndayambaje Appeal Brief, para. 568.
[7288] *See* Ndayambaje Appeal Brief, para. 566, *referring to* Trial Judgement, paras. 4388-4391, 4611, 4623.
[7289] Ndayambaje Appeal Brief, para. 563, *referring to* Trial Judgement, para. 4592. *See also* Ndayambaje Notice of Appeal, para. 185.
[7290] Ndayambaje Appeal Brief, paras. 564, 565.
[7291] Ndayambaje Appeal Brief, para. 564. *See also* Ndayambaje Reply Brief, para. 227.
[7292] Ndayambaje Appeal Brief, para. 594, *referring to* Trial Judgement, para. 4613.
[7293] Ndayambaje Appeal Brief, paras. 567, 568.
[7294] Ndayambaje Appeal Brief, para. 567, *referring to* Trial Judgement, para. 4394, Witness KANUC , T. 10 June 2008 pp. 4, 12 (closed session), Exhibit P201A (Gacaca Court Document Titled "*Urwego Rw'igihugu Rushinzwe Inkiko Gacaca. Inyandiko Y'urubanza Rw'ibyaha Byo Mu Rwego Rwa Kabiri*", dated 7 September 2006). *See also* Ndayambaje Notice of Appeal, paras. 189, 190. Ndayambaje acknowledges that he was not held responsible for this murder. *See* Ndayambaje Appeal Brief, para. 567.

3195. The Prosecution responds that it was within the Trial Chamber's discretion to accept Witness TP's testimony despite its various inconsistencies.[7295] It submits that the Trial Chamber's reliance on the erroneous English interpretation of Witness Stan's French testimony was not significant since the Trial Chamber also took into account other elements when considering the location of the meeting mentioned by Witness TP.[7296] It further argues that Ndayambaje does not demonstrate that the Trial Chamber erred in disregarding Witness KANUC's testimony.[7297]

3196. The Appeals Chamber finds that Ndayambaje simply disagrees with the Trial Chamber's assessment of purported inconsistencies in Witness TP's evidence about the location of the meeting, the content of the speeches, and the order of the speakers, without identifying how the Trial Chamber abused its discretion. Moreover, a review of the relevant parts of Witness TP's testimony does not support Ndayambaje's argument that the witness testified about Nteziryayo's swearing-in ceremony, not his.[7298] When asked about how she found out about the meeting, Witness TP stated that when she "went to the meeting and [she] witnessed the swearing in of the *bourgmestre*, […] the *préfet* was introduced to [them]."[7299] Accordingly, the Trial Chamber did not misstate the witness's evidence when noting that the testimony of Witness TP showed that during the course of the meeting she attended, Ndayambaje was reappointed *bourgmestre*.

3197. The Appeals Chamber is also not persuaded that the Trial Chamber erred in relying on Witness TP's testimony about her attendance at Ndayambaje's Swearing-In Ceremony because she placed it elsewhere than the eucalyptus woods. The Trial Chamber noted that Witness TP testified that the meeting took place outside the commune office, in the courtyard, and observed that this contrasted with other evidence that it took place in the woods near the commune office.[7300] However, the Trial Chamber further recounted that Witness Stan described the venue as woodland area near the Muganza commune office, just before the football pitch, which was on the opposite side of the Muganza commune office from the woods.[7301] The Trial Chamber, in view of "the relative proximity of the woods where the meeting actually took place *vis-à-vis* the *commune* office

[7295] Prosecution Response Brief, paras. 2457, 2459.
[7296] Prosecution Response Brief, para. 2458.
[7297] Prosecution Response Brief, para. 2460.
[7298] *See* Trial Judgement, para. 4592, *referring to* Witness TP, T. 12 February 2004 pp. 38, 39. *See also* Ndayambaje Appeal Brief, paras. 563, 564, *referring to* Trial Judgement, para. 4388, Witness TP, T. 12 February 2004 pp. 39, 40.
[7299] *See* Witness TP, T. 12 February 2004 p. 38. The Appeals Chamber notes that Witness TP, in response to a suggestion by Nteziryayo that she earlier stated that "the purpose of the meeting was for the installation", responded that "[i]t was for the installation of *Préfet* Alphonse". However, the description of the purported installation she provided accorded with her earlier testimony that Nteziryayo was being introduced at the meeting rather than installed as a new prefect. *See ibid.*, p. 40 ("Q. Who had to install him, Élie Ndayambaje? Was it Élie Ndayambaje? A. I don't know. I'm describing to you what we saw when we arrived at the meeting venue. The Accused took the floor and he said he was going to introduce to us Alphonse, who was the new *préfet*. Perhaps the new *préfet* had been introduced at the level of the whole *préfecture* and now it was time for him to be introduced to us in our *secteur* or *commune*.").
[7300] *See* Trial Judgement, paras. 4388, 4613.
[7301] *See* Trial Judgement, para. 4613, *referring to* Witness Stan, T. 18 September 2008 p. 50.

and the football field, where Witness TP and [Witness] Stan respectively testified the meeting took place, variously described as between 30 and 100 metres", did not "consider the discrepancies in these witnesses' testimony significant."[7302] Ndayambaje is correct in asserting that the relevant excerpt of the French transcript of Witness Stan's testimony, unlike the English transcript relied upon by the Trial Chamber, does not contain a mention of a football pitch.[7303] However, the Appeals Chamber fails to see the purported relevance of this variance given the Trial Chamber's finding that the discrepancy as to the venue of the meeting was not significant. Ndayambaje's contention simply reflects disagreement with the Trial Chamber's conclusion without demonstrating that it erred.

3198. As to Witness TP's testimony regarding the events after the meeting, the Trial Chamber recounted that Witness TP testified that her brother-in-law's children were killed on the day of Ndayambaje's Swearing-In Ceremony, and that she witnessed the killing of her own son who was taken the night after.[7304] The Trial Chamber, while accepting the witness's account of these events, noted that she did not identify who the killers were or how Nteziryayo or Ndayambaje were otherwise implicated in the events.[7305] The Trial Chamber concluded that the Prosecution had not proven beyond reasonable doubt that either Nteziryayo or Ndayambaje were responsible, directly or indirectly, for the impugned killings given the absence of evidence that they were present or in some other ways responsible for the taking of the children.[7306] The Appeals Chamber, to the extent that Ndayambaje argues that Witness KANUC's evidence demonstrates that Witness TP was trying to implicate him, and recalling that it is not necessary for a trial chamber to refer to the testimony of every witness or every piece of evidence on the trial record,[7307] does not consider that the Trial Chamber was under an obligation to discuss expressly the contradictory evidence of Witness KANUC.

[7302] Trial Judgement, para. 4613.
[7303] *Compare* Witness Stan, T. 18 September 2008 p. 50 ("Q. Is it possible to be much clearer regarding the location of the area and venue of the swearing-in ceremony of Mr. Ndayambaje, Witness. A. The ceremony took place in a woodland where reforestation was being done below. And just before you go into the football pitch of Muganza and away from Bishya just before your entrance, there was to your right a reforestation area, a woodland. That is where the meeting took place.") *with ibid*., p. 51 (French) ("Q. *Est-ce qu'il vous est possible d'être un peu plus précis quant à la localisation exacte de l'endroit où s'est déroulée cette cérémonie d'investiture, Monsieur le Témoin? R. La cérémonie s'est déroulée dans un reboisement — ce qu'on appelle reboisement. Un peu en bas, avant d'entrer à l'intérieur même du terrain de la commune Muganza, quand on vient de Bishya, avant d'entrer, il y avait un reboisement, à droite. C'est là que s'est tenue la réunion.*").
[7304] *See* Trial Judgement, para. 4394. *See also ibid*., para. 4643.
[7305] *See* Trial Judgement, para. 4643.
[7306] *See* Trial Judgement, para. 4644.
[7307] *See Kvočka et al.* Appeal Judgement, para. 23. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 648; *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127.

3199. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness TP's evidence related to his swearing-in ceremony.

(i) Witness QAL

3200. The Trial Chamber noted that Witness QAL provided corroborative hearsay evidence that Ndayambaje told the population to clean up and put the dirt out, which the witness understood to mean that good and bad people should be separated and people who were undesirable should be killed.[7308] The Trial Chamber also noted that Witness QAL corroborated Witness QAF's evidence that Nteziryayo questioned people about whether they carried out the instructions given to them and asked those who were married to Tutsis and had children to kill all the Tutsis.[7309]

3201. Ndayambaje argues that elements of Witness QAL's evidence about the swearing-in ceremony – that the participants were armed, that Nteziryayo spoke after Ndayambaje, and that Nteziryayo asked the attendees to raise and show their spears, clubs, and machetes – are unsupported by any other witness or only find corroboration from Witness TP.[7310] In his view, the Trial Chamber erroneously minimised these materially inconsistent aspects of Witness QAL's evidence, undermining the credibility of her evidence about her attendance at the ceremony.[7311] Ndayambaje also points to the evidence of Witness RV as well as Nteziryayo and Ndayambaje that Nteziryayo spoke first, arguing that this evidence was rejected without reason.[7312]

3202. Ndayambaje also contends that the Trial Chamber erred in finding that Witnesses TP, QAR, and QAQ corroborated Witness QAL's evidence, as the Trial Chamber found that their accounts of attending the swearing-in ceremony were implausible.[7313]

[7308] *See* Trial Judgement, paras. 4623, 4628. *See also ibid*., para. 4426.
[7309] *See* Trial Judgement, para. 4624. *See also ibid*., para. 4427.
[7310] Ndayambaje Appeal Brief, paras. 572, 573. *See also* Ndayambaje Notice of Appeal, para. 185. Ndayambaje adds that Witnesses TP and QAL testified that speakers did not use microphones. The Appeals Chamber observes, however, that Ndayambaje's contention in this regard is not supported by the reference he provides since the Trial Chamber noted that the witnesses instead testified that the speakers did not use megaphones. *See* Ndayambaje Appeal Brief, para. 573, *referring to* Trial Judgement, paras. 4425, 4389. This contention is therefore dismissed.
[7311] Ndayambaje Appeal Brief, paras. 570, 573. Ndayambaje also argues that the Trial Chamber erred in finding that "Witness QAL gave detailed and credible evidence about the swearing-in ceremony, including such details as who she went to the meeting with" because it did not hear evidence about who accompanied the witness to the meeting. *See* Ndayambaje Appeal Brief, para. 571 (emphasis omitted), *referring to* Trial Judgement, para. 4600. The Appeals Chamber notes, however, that in citing the relevant portion of Witness QAL's testimony, the Trial Chamber noted that the witness went to the meeting with three other people, including her brother-in-law. *See* Trial Judgement, para. 4600, fn. 12236, *referring to* Witness QAL, T. 25 February 2004 pp. 19 and 24, 39 (closed session). *See also ibid*., para. 4425. The Appeals Chamber therefore dismisses Ndayambaje's contention in this regard.
[7312] Ndayambaje Appeal Brief, para. 585.
[7313] Ndayambaje Appeal Brief, para. 574.

3203. Ndayambaje further argues that the Trial Chamber erred in the assessment of Witness QAL's evidence in light of Defence Witness MACHO's testimony that he was with Witness QAL the entire day of the ceremony and contradicted her evidence that she attended it.[7314] Ndayambaje contends that the Trial Chamber "arbitrarily preferred" Witness QAL's testimony "because she was Hutu and [Ndayambaje] had officiated at her wedding", even though Witness MACHO did not have ties to Ndayambaje or an interest in defending him.[7315] He further submits that by rejecting Witness MACHO's contradictory evidence because Ndayambaje did not cross-examine Witness QAL on the possibility that she was not at the ceremony reflected the Trial Chamber's bias and a reversal of the burden of proof.[7316]

3204. Finally, Ndayambaje contends that the Trial Chamber could not have believed Witness QAL's evidence that she attended the swearing-in ceremony because she testified that her daughter was abducted the day of the ceremony and her husband the following day but placed these events in May, rather than June 1994.[7317] Ndayambaje also argues that Witness GABON undermined Witness QAL's evidence, testifying that the murder of Witness QAL's husband occurred in April 1994 and "contradict[ing] the abduction and ransom paid for Witness QAL's daughter."[7318] Ndayambaje adds that Witness MACHO further contradicted Witness QAL's evidence about the abduction and murder and was rejected by the Trial Chamber without reason.[7319]

3205. The Prosecution responds that Ndayambaje merely disagrees with the Trial Chamber's assessment of Witness QAL's account of the swearing-in ceremony without advancing arguments that demonstrate an error in this regard.[7320] It submits that Ndayambaje similarly does not demonstrate an error in the Trial Chamber's rejection of Witness MACHO's evidence, arguing that it was within the Trial Chamber's discretion to consider the failure of the Defence to challenge certain aspects of the evidence of the Prosecution witnesses.[7321] The Prosecution further submits that the Trial Chamber was correct to disbelieve Witness GABON.[7322]

[7314] Ndayambaje Appeal Brief, para. 576. *See also* Ndayambaje Notice of Appeal, para. 189.
[7315] Ndayambaje Appeal Brief, para. 576. *See also ibid*., para. 591.
[7316] Ndayambaje Appeal Brief, para. 577. Ndayambaje adds that the Trial Chamber had the power to recall the witness to request clarification. *See idem.*
[7317] Ndayambaje Appeal Brief, paras. 569, 575. Ndayambaje also argues that Witness QAL's evidence is implausible as she testified to making a complaint about the murder to a criminal investigation officer which, Ndayambaje claims, is "a gesture she should not have logically made, had the murder been committed on the instructions of the commune authorities." *See ibid*., para. 575, *referring to* Witness QAL, T. 25 February 2004 pp. 49, 50. The Appeals Chamber considers that Ndayambaje's contention is speculative and does not demonstrate any error in the Trial Chamber's analysis of Witness QAL's evidence. The Appeals Chamber therefore dismisses it without further consideration.
[7318] Ndayambaje Appeal Brief, para. 589.
[7319] Ndayambaje Appeal Brief, para. 576.
[7320] Prosecution Response Brief, paras. 2462-2464, 2466.
[7321] Prosecution Response Brief, para. 2469.
[7322] Prosecution Response Brief, para. 2467.

3206. The Appeals Chamber notes that it has previously addressed and rejected Ndayambaje's argument that the Trial Chamber erroneously assessed contrasting evidence as to whether those attending the swearing-in ceremony were armed.[7323] As to the order in which Nteziryayo and Ndayambaje spoke, the Trial Chamber noted that Witness QAL's evidence that Nteziryayo spoke after Ndayambaje contrasted with other Prosecution evidence.[7324] However, it considered that this discrepancy did "not go to the root of the witness' account of the meeting" and that the witness's clarity on this issue could have been "affected by the passage of time."[7325] The Trial Chamber further noted that Witness TP, like Witness QAL, testified that Nteziryayo took the floor after Ndayambaje, in contrast with evidence of the other witnesses and concluded that it did not regard as significant the discrepancy as to the order of the speakers.[7326] Ndayambaje simply disagrees with this analysis without demonstrating any error in the Trial Chamber's reasoning.

3207. The Appeals Chamber also considers that Ndayambaje's contention about Witness QAL's testimony that Nteziryayo asked the attendees to raise and show their spears, clubs, and machetes is based on an erroneous reading of the Trial Judgement, which reflects that Nteziryayo merely asked the participants with different weapons to raise their hands.[7327] Given the Trial Chamber's finding that between 1,000 and 5,000 people attended the meeting,[7328] Ndayambaje does not demonstrate that this aspect of Witness QAL's evidence was material to the Trial Chamber's assessment of the evidence about the ceremony, or that it was incompatible with other accounts given the large number of participants and varying vantage points of witnesses.

3208. Furthermore, the Appeals Chamber finds no merit in Ndayambaje's contention that the Trial Chamber improperly relied on the evidence of Witnesses TP, QAR, and QAQ to corroborate Witness QAL's account as it found the former witnesses' testimonies about the ceremony implausible.[7329] First, the Appeals Chamber observes that the Trial Chamber reached no such finding with respect to Witness TP and, in fact, accepted that the witness was testifying about Ndayambaje's Swearing-In Ceremony.[7330] Similarly, while the Trial Chamber observed similarities in the evidence of Witnesses QAR, QAQ, and QAL,[7331] the Trial Chamber found that Witness QAR did not attend the ceremony and, after expressing doubts about whether Witness QAQ attended this ceremony, concluded that any probative weight to be accorded to the testimony of Witness QAQ

[7323] *See supra*, para. 3136.
[7324] *See* Trial Judgement, para. 4597.
[7325] Trial Judgement, para. 4598.
[7326] Trial Judgement, paras. 4610, 4611.
[7327] *See also* Trial Judgement, para. 4427. *See also* Witness QAL, T. 25 February 2004 p. 12.
[7328] Trial Judgement, para. 4611.
[7329] Ndayambaje Appeal Brief, para. 574, *referring to* Trial Judgement, paras. 4595, 4596, 4602-4608.
[7330] Trial Judgement, para. 4592.
[7331] *See* Trial Judgement, paras. 4594, 4595.

was minimal.[7332] None of the findings made by the Trial Chamber to the extent that it expressly relied on Witness QAL's testimony reflects that it did so in light of the corroborative aspects of the evidence of Witnesses QAR and QAQ.[7333] Indeed, the Trial Chamber specifically stated that it would only consider the evidence of Witnesses FAG, FAL, FAU, QAF, QAL, RV, TO, and TP when evaluating the Prosecution's evidence concerning the swearing-in ceremony.[7334]

3209. Concerning the evidence of Witness MACHO, the Trial Chamber noted that it contradicted Witness QAL's evidence of attending the swearing-in ceremony, as Witness MACHO testified that they spent that day together at his godmother's house.[7335] The Trial Chamber observed that Witness QAL was not cross-examined on the basis of this evidence, which only arose when Witness MACHO testified four years after Witness QAL.[7336] It further considered that Witness QAL gave detailed and credible evidence about the swearing-in ceremony, including such details as with whom she went to the meeting, and that aspects of it were consistent with the testimonies of the other Prosecution witnesses whose presence at the meeting was not contested.[7337]

3210. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trial chamber to decide which version it considers more credible.[7338] The Appeals Chamber will defer to a trial chamber's findings on such issues, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned findings.[7339] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in accepting the evidence of Witness QAL over that of Witness MACHO. Notably, the Trial Chamber found that Witness QAL's evidence about the timing and the location of the meeting, Ndayambaje's attire, the presence of Witness Stan, the population being armed, the use of proverbs and the call to kill Tutsis during the ceremony was broadly corroborated.[7340] Ndayambaje also does not show that the Trial Chamber placed undue emphasis on the fact that Witness QAL was a Hutu and had been married by

[7332] *See* Trial Judgement, paras. 4602, 4603, 4608. *See also ibid.*, paras. 4604-4607.
[7333] *See* Trial Judgement, paras. 4596-4598, 4609, 4623-4625, 4628, 4629.
[7334] *See* Trial Judgement, para. 4621. *See also ibid.*, para. 4632.
[7335] *See* Trial Judgement, para. 4599.
[7336] *See* Trial Judgement, para. 4599.
[7337] *See* Trial Judgement, para. 4600. Ndayambaje also argues that some aspects of Witness QAL's testimony were inconsistent with the testimony of other Prosecution witnesses and that the Trial Chamber erroneously implied that Ndayambaje conceded that all Prosecution witnesses were present at the swearing-in ceremony. *See* Ndayambaje Appeal Brief, para. 570. The Appeals Chamber considers, however, that Ndayambaje fails to identify any error as the Trial Chamber assessed various inconsistencies between Witness QAL's account of the meeting and that of other Prosecution witnesses. *See* Trial Judgement, paras. 4597-4599. Moreover, the Trial Chamber's reasoning does not reflect that Ndayambaje conceded that *all* Prosecution witnesses were present at the meeting but merely reflects that Witness QAL's testimony was consistent with that of certain witnesses whose presence at the swearing-in ceremony was not contested. *See ibid.*, para. 4600.
[7338] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7339] *See Ndahimana* Appeal Judgement, para. 46. *See also Setako* Appeal Judgement, para. 31.

Ndayambaje,[7341] or that it was required to credit Witness MACHO's evidence because she had no incentive to provide exculpatory evidence for Ndayambaje. The Appeals Chamber also fails to see how the Trial Chamber's observation that Witness QAL was not cross-examined on the possibility that she was not at the ceremony evinces bias or a reversal of the burden of proof, particularly given its detailed consideration of inconsistencies and contradictions with other evidence.[7342]

3211. With respect to the date of abduction of Witness QAL's daughter and murder of her husband after the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber noted that Witness QAL, as well as Witnesses FAG, FAL, QAF, and TP, testified that after the ceremony further attacks against Tutsis occurred.[7343] However, when noting the consistent, albeit often general, evidence of the Prosecution witnesses to the effect that after the meeting, killings occurred, the Trial Chamber did not rely on Witness QAL.[7344] The Trial Chamber also expressly noted that Witness QAL did not remember the date of the meeting but recalled that it was held shortly before the RPF invasion of Muganza Commune at the end of June or beginning of July 1994 and that at the time Ndayambaje was *bourgmestre* of Muganza Commune.[7345] While Ndayambaje is correct that the witness testified that her husband died in May 1994, she also specifically testified that her husband was killed the day following the meeting and that her daughter was abducted on the same day as the meeting, when Ndayambaje was introduced as *bourgmestre* of Muganza Commune.[7346] Given the Trial Chamber's acknowledgement that Witness QAL did not remember the day of the meeting,[7347] and its limited reliance on the witness's evidence regarding the abduction of her daughter and murder of her husband, the Appeals Chamber does not consider that the fact that the witness indicated that the murder of her husband took place in May 1994 precluded the Trial Chamber from considering that this witness testified about the swearing-in ceremony.

3212. Similarly, the Appeals Chamber finds no merit in Ndayambaje's argument that the testimony of Witness GABON that Witness QAL's husband was killed at the end of April 1994 and that Witness GABON did not hear about the abduction of Witness QAL's daughter undermined Witness QAL's testimony about the swearing-in ceremony.[7348] The Appeals Chamber observes that, whereas Witness GABON's evidence about the killing of Witness QAL's husband and abduction of

[7340] *See* Trial Judgement, paras. 4595, 4596, 4609, 4610, 4623, 4625, 4628, 4629.
[7341] *See also supra*, para. 3076.
[7342] *See* Trial Judgement, paras. 4597, 4610, 4611.
[7343] *See* Trial Judgement, para. 4629.
[7344] *See* Trial Judgement, para. 4632.
[7345] *See* Trial Judgement, paras. 4422, 4595. *See also* Witness QAL, T. 25 February 2004 pp. 12, 13, and 25, 41, 42 (closed session).
[7346] *See* Witness QAL, T. 25 February pp. 23-25, 41, 42, 48 (closed session). *See also* Trial Judgement, para. 4431.
[7347] *See* Trial Judgement, para. 4595.
[7348] *See* Trial Judgement, para. 4495.

her daughter was hearsay, Witness QAL was an eyewitness to the events.[7349] Of greater significance, the Trial Chamber considered Witness GABON's testimony "unrealistic" and not "plausible", discrediting his alibi evidence in relation to Ndayambaje's involvement in another event.[7350] The Appeals Chamber therefore considers that a reasonable trier of fact could have relied on Witness QAL's evidence notwithstanding Witness GABON's testimony.

3213. Finally, since the Trial Chamber rejected Witness MACHO's testimony concerning Witness QAL's whereabouts during the swearing-in ceremony,[7351] the Appeals Chamber considers that it was under no obligation to provide further justification for rejecting this witness's inextricably linked evidence about the abduction of Witness QAL's daughter on the same day.[7352] Because the Trial Chamber did not rely on Witness QAL's evidence about the murder of her husband,[7353] the Appeals Chamber finds that it was not necessary for the Trial Chamber to assess the differences in the evidence of Witnesses QAL and MACHO in this regard.

3214. The Appeals Chamber therefore finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness QAL's evidence on his swearing-in ceremony.

(j) Date

3215. Ndayambaje submits that no Prosecution witness specified the date of his swearing-in ceremony to be 22 June 1994.[7354] In his view, other reasonable inferences were therefore open regarding the meeting recounted by the Prosecution witnesses.[7355]

3216. The Prosecution responds that the Trial Chamber considered that Prosecution witnesses did not indicate 22 June 1994 as the date of the swearing-in ceremony.[7356]

3217. The Appeals Chamber observes that the Trial Chamber found that the Prosecution evidence established beyond reasonable doubt that Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune occurred "on 22 June 1994".[7357] The Appeals Chamber notes that, earlier in its deliberations, the Trial Chamber recalled that Witnesses FAG, RV, and TO testified that

[7349] *Compare* Witness GABON, T. 2 September 2008 pp. 18-21 (closed session) *with* Witness QAL, T. 25 February 2004 pp. 23, 48 (closed session).
[7350] *See* Trial Judgement, paras. 1220, 1223, 1389,1417, 1446.
[7351] *See supra*, paras. 3209, 3210.
[7352] *See* Trial Judgement, para. 4587.
[7353] The Appeals Chamber is of the view that, while the Trial Chamber referred to the aspect of Witness QAL's evidence regarding the killing of her husband, the Trial Chamber did not rely on this evidence to demonstrate that killings occurred after the ceremony. *Compare* Trial Judgement, para. 4629 *with ibid*., paras. 4632, 4645.
[7354] Ndayambaje Appeal Brief, para. 582, *referring to* Trial Judgement, paras. 3440, 4322, 4323, 4354, 4369, 4375, 4386, 4590, 4591. *See also ibid*., para. 608.
[7355] Ndayambaje Appeal Brief, para. 582.
[7356] Prosecution Response Brief, para. 2472.
[7357] Trial Judgement, para. 4645.

Ndayambaje's Swearing-In Ceremony took place "on various dates in June 1994"[7358] and that Witnesses FAL, QAF, and TP testified about a meeting at Muganza Commune "on or around 22 June 1994".[7359] It also noted that Witness QAL testified to attending a meeting near the Muganza commune office "around May or June 1994" but could not remember its precise date.[7360]

3218. The Appeals Chamber sees no error in the Trial Chamber's summary of the evidence of Witnesses FAG, RV, and TO concerning the timing of the ceremony and Witness QAL's estimate as to the timing of the meeting described.[7361] However, as determined previously, the evidence of Witnesses FAL, QAF, and TP, as relied upon by the Trial Chamber cannot reasonably be interpreted as supporting the conclusion that the meeting occurred specifically "on or around 22 June 1994".[7362] Accordingly, the Appeals Chamber considers that *all* of the Prosecution evidence, as suggested by Ndayambaje, is ambiguous as to the precise date of the swearing-in ceremony whereas the Trial Judgement indicates otherwise.[7363]

3219. Nevertheless, Ndayambaje does not demonstrate that the Trial Chamber erred in concluding that all the Prosecution witnesses it relied upon were testifying about his swearing-in ceremony in Muganza Commune, which the parties do not dispute occurred on 22 June 1994. The Trial Chamber considered the discrepancies in the Prosecution evidence as to the precise date of the meeting and determined that they were minor and understandable in light of the time that had elapsed between the event and the witnesses' appearances in court.[7364] It determined that all the witnesses were discussing the same event given the consistent descriptions of the fundamental features of it.[7365] Ndayambaje only suggests that other reasonable inferences were available without demonstrating any error in the Trial Chamber's ultimate conclusion that all relevant witnesses were referring to his swearing-in ceremony.

3220. The Appeals Chamber therefore concludes that Ndayambaje has not shown that the Trial Chamber erred in determining that the relevant witnesses were testifying about his swearing-in ceremony on 22 June 1994.

[7358] Trial Judgement, para. 4590.
[7359] Trial Judgement, para. 4591.
[7360] Trial Judgement, paras. 4594, 4595. *See also ibid*., para. 4422.
[7361] *See* Witness FAG, T. 1 March 2004 p. 33 (testifying that the meeting was held between the end of May and early June 1994); Witness RV, T. 17 February 2004 pp. 5, 6 (closed session) (referring to 21 June 1994); Witness TO, T. 4 March 2002 pp. 11, 12 (testifying that the meeting was held in June 1994); Witness QAL, T. 25 February 2004 pp. 12, 13 and 25, 40-42 (closed session) (testifying that she did not remember the date of the meeting, but recalled it was held shortly before the RPF invasion of Muganza Commune that occurred at the end of June or beginning of July).
[7362] *See supra* Section, VII.B.1(d), para. 2351.
[7363] Trial Judgement, para. 4591.
[7364] Trial Judgement, para. 4592. *See also ibid*., para. 4595.
[7365] Trial Judgement, paras. 4592, 4593, 4595.

2. Assessment of Defence Evidence

3221. When considering evidence in relation to Ndayambaje's Swearing-In Ceremony, the Trial Chamber compared the relevant Prosecution and Defence evidence concerning Nteziryayo's and Ndayambaje's speeches.[7366] Specifically, it observed that the relevant Defence witnesses, in contrast to the Prosecution witnesses, testified that Nteziryayo's speech concerned security and that Ndayambaje did not use proverbs, including inflammatory metaphors, and that he denounced wrong-doers.[7367] The Trial Chamber noted, however, that all of the witnesses called by Ndayambaje had close ties with him[7368] and that Nteziryayo Defence Witnesses AND-11 and AND-73 were well-acquainted with Nteziryayo.[7369] The Trial Chamber found that, "notwithstanding the largely consistent nature of the testimony of these witnesses", their credibility was "diminished by the potential motivations and personal ties of each of the Defence witnesses with Ndayambaje and Nteziryayo."[7370] The Trial Chamber also noted that Nteziryayo and Ndayambaje "may have a motive in seeking to reduce their personal responsibility for the alleged incitement".[7371]

3222. Ndayambaje submits that the Trial Chamber erred in discrediting the Defence evidence that Nteziryayo and Ndayambaje did not use inciting proverbs during the swearing-in ceremony and that no violence against Tutsis followed it.[7372] In particular, he argues that the Trial Chamber erred in rejecting evidence from Defence witnesses who had professional or personal ties with him.[7373] Ndayambaje also argues that the Trial Chamber erred in finding that the credibility of Defence Witnesses AND-11 and AND-73, who had no connection to him, was diminished only because they knew Nteziryayo.[7374] Moreover, Ndayambaje contends that the Trial Chamber improperly rejected

[7366] Trial Judgement, paras. 4633, 4634.
[7367] Trial Judgement, paras. 4633, 4634.
[7368] Trial Judgement, para. 4636. In particular, the Trial Chamber recalled that Witnesses Stan and KEPIR were friends of Ndayambaje and that Witnesses GABON and BOZAN had professional ties with him, noting that the evidence of these Defence witnesses with respect to Ndayambaje must be reviewed bearing these personal ties in mind. *See ibid*., para. 4637.
[7369] Trial Judgement, para. 4638.
[7370] Trial Judgement, para. 4639.
[7371] *See* Trial Judgement, para. 4636.
[7372] Ndayambaje Appeal Brief, para. 585. *See also* Ndayambaje Notice of Appeal, para. 186; Ndayambaje Appeal Brief, paras. 588, 605, 607; AT. 21 April 2015 pp. 28, 30. Ndayambaje adds that no reasonable trier of fact would have made findings to "excuse" and "justify the incompatibilities, contradictions and inconsistencies" in the Prosecution evidence concerning the content of the speeches made at the swearing-in ceremony, while rejecting the entire contradictory Defence evidence. *See* Ndayambaje Appeal Brief, para. 607. *See also* Ndayambaje Notice of Appeal, paras. 184, 188. Ndayambaje's contentions as they relate to the Prosecution evidence, as well as specific Defence evidence contradicting it, have been previously addressed. *See supra*, Section IX.G.1. Ndayambaje adds that the Trial Chamber erred in disregarding evidence of Nsabimana concerning the swearing-in ceremony. *See* Ndayambaje Notice of Appeal, para. 187. The Appeals Chamber notes, however, that Ndayambaje did not provide any supporting references in his notice of appeal and failed to reiterate or develop this argument in his appeal brief. Accordingly, the Appeals Chamber dismisses this unsubstantiated allegation without further consideration.
[7373] Ndayambaje Appeal Brief, paras. 587, 588, 591, 597, 600. *See also* Ndayambaje Notice of Appeal, para. 186.
[7374] Ndayambaje Appeal Brief, para. 592, *referring to* Trial Judgement, para. 4639. Ndayambaje adds that in so doing the Trial Chamber applied "a banal credibility test" and abused its discretion. *See ibid*., para. 593.

his testimony as well as that of Nteziryayo for the sole reason that they had an interest in minimising their responsibility.[7375]

3223. In addition, Ndayambaje argues that the Trial Chamber rejected the testimony of his Witness Évariste-Emmanuel Siborurema that no inciting speeches were made during the ceremony without providing a reasoned opinion.[7376] He further contends that the Trial Chamber erred in its assessment of Witness Stan's evidence concerning the content of the speeches made during the ceremony, basing its rejection of his evidence on an erroneous English interpretation of his French testimony.[7377] According to him, the Trial Chamber also misread Witness Stan's 1995 interview with a Belgian judge which, in his view, is consistent with his testimony that the expression "dusting behind the fireplace" was not used by him but was a suggestion put to him by the judge who conducted the interview.[7378]

3224. Finally, Ndayambaje submits that the Trial Chamber erred in discounting differences between Prosecution and Defence evidence concerning the presence of Muvunyi, Kalimanzira, and Nyiramasuhuko at the ceremony and erred in not rejecting contradictory Prosecution evidence.[7379] He similarly argues that the Trial Chamber erred in discrediting testimonies of Defence witnesses that the swearing-in ceremony took place in the afternoon,[7380] in contrast with Prosecution witnesses who all testified that it took place before noon.[7381] In his view, by relying on the fact that Prosecution witnesses did not have the opportunity to refute Defence evidence as to the timing of the event when discrediting Defence evidence, the Trial Chamber reversed the burden of proof or disregarded the presumption of innocence.[7382]

3225. The Prosecution responds that the Trial Chamber reasonably assessed the Defence evidence relevant to the swearing-in ceremony and was entitled to consider Ndayambaje's and Nteziryayo's incentives to deny criminal conduct.[7383] It further argues that the Trial Chamber was correct in disbelieving Witness Siborurema and that, despite the errors in the English interpretation of

[7375] Ndayambaje Appeal Brief, para. 602. *See also* Ndayambaje Reply Brief, para. 243.
[7376] Ndayambaje Appeal Brief, para. 604, *referring* to Trial Judgement, paras. 4511-4514.
[7377] Ndayambaje Appeal Brief, para. 595, *referring* to Trial Judgement, paras. 4485, 4640.
[7378] Ndayambaje Appeal Brief, para. 596 (French), *referring to* Witness Stan, T. 23 September 2008 pp. 44-47 (French); Exhibit P204A (French original of Frère Constant Julius Goetschalckx's Statement to Judge Damien Vandermeersch, dated 24 November 1995) ("Witness Stan's Statement"). *See also* Ndayambaje Appeal Brief, para. 599.
[7379] Ndayambaje Appeal Brief, para. 585.
[7380] Ndayambaje Appeal Brief, para. 585, *referring to* Trial Judgement, paras. 4453, 4492, 4493, 4537. In particular, Ndayambaje highlights the evidence of Witnesses AND-30 and AND-31 who, according to him, did not have ties to him or interest in protecting him. *See ibid*., para. 586, *referring to* Trial Judgement, para. 4369, Nsabimana, T. 16 September 2006 pp. 65, 66 (French), Witness AND-30, T. 21 February 2007 pp. 16, 17, 43, 44, Witness AND-31, T. 27 February 2007 pp. 50, 51.
[7381] Ndayambaje Appeal Brief, para. 586, *referring to* Trial Judgement, para. 4593.
[7382] Ndayambaje Appeal Brief, para. 583, *referring to* Trial Judgement, paras. 162, 163, 4615. *See also* Ndayambaje Notice of Appeal, para. 183.
[7383] Prosecution Response Brief, paras. 2476-2482. *See also ibid*., para. 2474.

Witness Stan's testimony, it was also correct in not crediting his evidence.[7384] In addition, the Prosecution submits that Ndayambaje does not demonstrate any errors in the Trial Chamber's assessment of conflicting Prosecution and Defence evidence as to the timing of the ceremony.[7385]

3226. The Appeals Chamber recalls that the existence of ties between an accused and a witness is a factor which may be considered in assessing the witness's credibility,[7386] and concludes that the Trial Chamber did not err in considering these circumstances or placed improper emphasis on them when rejecting Defence evidence.[7387] The Appeals Chamber likewise considers that a reasonable trier of fact could have considered Ndayambaje's and Nteziryayo's incentive to provide exculpatory evidence in the context of all the relevant evidence.[7388] Bearing in mind that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible,[7389] the Appeals Chamber is not persuaded that no reasonable trier of fact could have noted weaknesses in the credibility of Defence witnesses as well as rejected such evidence in light of the virtually unanimous, credible Prosecution evidence that inciting speeches were made during Ndayambaje's Swearing-In Ceremony.[7390]

3227. As to Ndayambaje's contention concerning the evidence of Witness Siborurema,[7391] the Appeals Chamber observes that the Trial Chamber set forth the witness's evidence and cited to it when evaluating Defence evidence about the contents of the speeches made at the swearing-in ceremony.[7392] As nothing in the evidence referred to by the Trial Chamber reflects that the witness had personal ties with Ndayambaje or Nteziryayo,[7393] the Trial Chamber must have considered that, as part of "the Defence evidence on the whole", his evidence was also "not sufficiently credible as to raise a reasonable doubt about the nature of the utterances made by Ndayambaje and Nteziryayo at Ndayambaje's swearing-in ceremony."[7394] In light of the clear indication that Witness Siborurema's evidence was considered by the Trial Chamber and the repetitive nature of his evidence, the Appeals Chamber rejects Ndayambaje's allegation that the Trial Chamber ignored

[7384] Prosecution Response Brief, paras. 2480, 2482, 2483.
[7385] Prosecution Response Brief, para. 2475.
[7386] *See*, *e.g.*, *Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[7387] Ndayambaje does not dispute that such professional and personal connections existed and points to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with Defence witnesses. *See* Ndayambaje Appeal Brief, paras. 588, 591, 597, 600.
[7388] *Cf. Musema* Appeal Judgement, para. 50.
[7389] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7390] *See* Trial Judgement, paras. 4622-4632, 4636-4639.
[7391] Ndayambaje Appeal Brief, para. 482, *referring to* Évariste-Emmanuel Siborurema, T. 25 August 2008 pp. 52-60 (closed session).
[7392] *See* Trial Judgement, para. 4633.
[7393] *See* Trial Judgement, paras. 4511, 4637-4640.
[7394] *See* Trial Judgement, para. 4641.

this relevant evidence or was required to provide any further detail for its rejection given the consistent, credible Prosecution evidence that inciting remarks were made during the ceremony.

3228. With respect to the assessment of Witness Stan's evidence, the Trial Chamber noted that an earlier statement given by the witness to a Belgian judge in 1995 contained references to Ndayambaje talking about "restoring order in the house" and "the dust behind the fireplace".[7395] The Trial Chamber noted Witness Stan's explanations that he only recalled statements concerning "putting order in … Muganza *commune*" and that the Belgian judge must have added the expression concerning the dust behind the fireplace, thereby putting words in Witness Stan's mouth.[7396] The Trial Chamber considered that the discrepancies between the statement and his testimony as well as his explanations for them, which it did not find credible, cast doubt on Witness Stan's testimony as to the contents of the speeches at Ndayambaje's Swearing-In Ceremony.[7397]

3229. Contrary to Ndayambaje's submissions, the Appeals Chamber finds no material discrepancy between the French and English transcripts of Witness Stan's testimony as both reflect that he testified that he did not remember using the expression "the dust behind the fireplace" when speaking with the Belgian judge and that these words appeared in his statement because of the nature of the questioning by the Belgian judge.[7398] The same is true for the French and English versions of Witness Stan's Statement, which both reflect that the judge asked the witness whether Ndayambaje talked about dusting behind the fireplace and that the witness answered that he did not know whether Ndayambaje used this expression.[7399]

[7395] Trial Judgement, para. 4640.
[7396] *See* Trial Judgement, para. 4640. *See also ibid*., para. 4485; Witness Stan, T. 23 September 2008 pp. 40-43.
[7397] Trial Judgement, para. 4640.
[7398] *Compare* Witness Stan, T. 23 September 2008 p. 43 ("Q. Now, Witness, in reference to 'putting the house in order', you have stated that, 'I do not know if he used that term, 'the dust behind the fireplace'.' Do you remember saying this to the investigative judge? A. I see that this sentence is written in this statement, but I do not remember having said it in these terms to the investigative judge. I know that these words were not used in the speech delivered by Mr. Élie Ndayambaje. […] Q. So do you think that the judge was mistaken in including these words in your statement? A. I believe that the investigative judge, Vandermeersch, wanted me – was putting words in my mouth, making me say things that I had not said and which I had not declared. He was not neutral in his stance or in his position.") *with ibid*., p. 47 (French) ("*Q. Monsieur le Témoin, s'agissant de mettre de l'ordre dans la maison, vous avez déclaré: 'Je ne sais pas s'il a utilisé pour cela le terme de «poussière derrière le poêle'. Ceci, vous souvenez-vous l'avoir dit au juge d'instruction? R. Je vois que cette phrase est écrite dans ce rapport. Je ne me souviens pas de l'avoir dit dans ces termes au juge d'instruction. Je sais que ces termes n'ont pas été utilisés dans le discours de Monsieur Ndayambaje.* […] *Q. Donc, pensez-vous qu'il s'agit là d'une erreur du juge lorsqu'il a enregistré votre déclaration? R. Je crois que le juge d'instruction Vandermeersch a voulu me faire dire des choses que je n'avais pas voulu dire, que je n'avais pas déclaré. Ce n'était pas tout à fait neutre dans sa position*.").
[7399] *Compare* Witness Stan's Statement, p. 11 ("*Vous me demandez si à un moment donné il a parlé de nettoyer la poussière derrière le poêle. Il a entre autre dit de restituer les biens à ceux qui étaient restés derrière, soit les survivants. Il a parlé de mettre de l'ordre dans la maison. Je ne sais pas s'il a utilisé pour cela le terme de poussière derrière le po[ê]le.*") *with* Exhibit P204B (English translation of Frère Constant Julius Goetschalckx's Statement to Judge Damien Vandermeersch, dated 24 November 1995), p. 10 ("You asked me whether at one point he talked about dusting behind the pan. He, among other things, talked about returning the property of those who had remained behind, namely, the survivors. He talked about putting the house in order. I do not know whether he used the expression dusting

3230. However, the Appeals Chamber considers that the Trial Chamber erred in finding that there was a discrepancy between Witness Stan's testimony and prior statement as to whether Ndayambaje had used the expression "the dust behind the fireplace". Consistent with Witness Stan's testimony, his prior statement reflects that he was unaware of Ndayambaje using this expression. Contrary to the Trial Chamber's determination, no discrepancy exists in this regard. The Trial Chamber was nonetheless correct in finding a discrepancy between Witness Stan's Statement referring to Ndayambaje talking about "restoring order in the house" and his testimony that he had not said this during this interview and only recalled Ndayambaje talking about "putting order in … Muganza *commune*".[7400] The Appeals Chamber considers that Ndayambaje does not demonstrate that no reasonable trier of fact could have found that this discrepancy, and Witness Stan's explanation for it, cast doubt on the witness's subsequent testimony about the contents of the speeches at the swearing-in ceremony.[7401] In these circumstances, the Appeals Chamber finds that the Trial Chamber's error in relying on a discrepancy within Witness Stan's evidence that did not exist has not occasioned a miscarriage of justice.

3231. Turning to Ndayambaje's challenge to the Trial Chamber's assessment of contradictory evidence as to the presence of various officials, the Appeals Chamber observes that the Trial Chamber expressly considered that Defence evidence diverged from some Prosecution evidence as to the presence of Muvunyi, Kalimanzira, and Nyiramasuhuko during the ceremony.[7402] The Trial Chamber determined it unnecessary to make findings as to the presence of Muvunyi and Kalimanzira and found that any discrepancy as to their presence was not significant.[7403] Ndayambaje fails to demonstrate why no reasonable trier of fact could have assessed the evidence in this manner.

3232. The Appeals Chamber further notes that the Trial Chamber considered that Witness RV may have been mistaken as to Nyiramasuhuko's presence during the swearing-in ceremony, noting that Ndayambaje, Nteziryayo, and other Defence witnesses contradicted this aspect of his evidence.[7404] However, the Trial Chamber observed that Witness RV's evidence was consistent with Defence evidence as to the presence of certain other dignitaries, and highlighted that all Defence witnesses testified to the presence of another female minister, who Witness RV did not identify.[7405] In this context, the Trial Chamber rejected Witness RV's evidence as to Nyiramasuhuko's presence but

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behind the pan."). The Appeals Chamber observes that the English translation of Witness Stan's Statement erroneously refers to dusting behind the "pan" rather than "fireplace". *See also* Witness Stan, T. 23 September 2008 pp. 41-43.
[7400] *See* Trial Judgement, para. 4640, *referring to* Witness Stan, T. 23 September 2008 pp. 42, 43.
[7401] Trial Judgement, para. 4640.
[7402] *See* Trial Judgement, paras. 4610-4612.
[7403] Trial Judgement, para. 4611.
[7404] Trial Judgement, para. 4612.
[7405] Trial Judgement, para. 4612.

found that this did "not weaken the credibility of [his] testimony with respect to more significant aspects of the swearing-in ceremony."[7406] Once again, Ndayambaje simply highlights his disagreement with this finding, ignoring that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[7407]

3233. Regarding Ndayambaje's challenges to the Trial Chamber's assessment of Prosecution and Defence evidence about the timing of the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber acknowledged that "in contrast to all the Prosecution evidence, the Defence witnesses testified that the swearing-in ceremony took place in the afternoon of 22 June 1994, because Nteziryayo was occupied with the swearing-in ceremony for the new *bourgmestre* of Ndora *commune*" and that Witness RV also corroborated the latter aspect of the Defence evidence.[7408] The Trial Chamber, noting that the Prosecution witnesses testified between 2001 and 2004, while Defence witnesses testified between 2007 and 2008, observed that it was never put to the Prosecution witnesses that they may be mistaken as to the timing of the swearing-in ceremony and that they never had the opportunity to refute the testimony of the Defence witnesses that it occurred in the afternoon.[7409] The Trial Chamber concluded, however, that it did not consider this discrepancy to be important given that the Prosecution and the Defence witnesses were consistent on the significant features of the meeting, including that it was the swearing-in ceremony of Ndayambaje, that it took place on or around 22 June 1994, and that it was held in the woods near the Muganza commune office as well as that Ndayambaje and Nteziryayo spoke at the meeting.[7410] The Trial Chamber determined that the witnesses testified to the same event, namely Ndayambaje's Swearing-In Ceremony on 22 June 1994.[7411] The Appeals Chamber considers that Ndayambaje, who largely repeats the arguments he advanced at trial,[7412] fails to demonstrate any error in the Trial Chamber's analysis as to the differences in the timing of the event and its determination that it was insignificant in light of the totality of the evidence.

3234. Likewise, the Appeals Chamber is not persuaded that, by noting that Prosecution witnesses did not have the opportunity to respond to Defence evidence as to the timing of the swearing-in ceremony, the Trial Chamber reversed the burden of proof or disregarded the presumption of innocence. The Appeals Chamber notes that the Prosecution evidence reflects estimates as to the

[7406] Trial Judgement, para. 4612.
[7407] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[7408] Trial Judgement, para. 4614 (internal reference omitted).
[7409] Trial Judgement, para. 4615.
[7410] Trial Judgement, para. 4616.
[7411] Trial Judgement, para. 4617. Since Defence evidence regarding the timing of the swearing-in ceremony was not rejected due to ties between Defence witnesses and Ndayambaje, the Appeals Chamber dismisses Ndayambaje's contention regarding Witnesses AND-30 and AND-31 without further consideration.
[7412] *See* Ndayambaje Closing Brief, paras. 639-648.

timing of the ceremony.[7413] The Appeals Chamber considers that the fact that the Trial Chamber observed that the Prosecution witnesses were not challenged as to the timing implies that the differences between Prosecution and Defence evidence on this point might have reasonably resulted from a failure to question the Prosecution witnesses on the issue. The Appeals Chamber finds no error in the Trial Chamber's determination that the variance in timing was insignificant and its reliance instead on the similar features of the meeting to determine that all witnesses were referring to the one that included Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune.

3235. Based on the foregoing, the Appeals Chamber rejects Ndayambaje's challenges to the Trial Chamber's assessment of the Defence evidence relating to his swearing-in ceremony.

3. Imprecise and Unsupported Findings

3236. Ndayambaje argues that the Trial Chamber failed to determine beyond reasonable doubt who between him and Nteziryayo made inciting speeches during his swearing-in ceremony.[7414] In particular, he contends that the Prosecution evidence does not specify which speaker encouraged the crowd to "sweep out the dirt."[7415] He further argues that the Trial Chamber erred in finding that he possessed the requisite genocidal intent to "commit the crime of genocide."[7416]

3237. The Prosecution responds that it was not unreasonable for the Trial Chamber not to attribute specific utterances to Ndayambaje and Nteziryayo, if it was satisfied that the requisite elements of the offence were met.[7417] It further submits that Ndayambaje's unsubstantiated claim regarding the lack of genocidal intent should be summarily dismissed.[7418]

3238. The Appeals Chamber observes that, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber made the following findings:

> Accordingly, the Chamber finds it established beyond a reasonable doubt that on the occasion of Ndayambaje's swearing in ceremony on 22 June 1994, an event attended by the general population, *Nteziryayo and Ndayambaje* told the population to continue with their "work" and urged them to "sweep the dirt outside". […][7419]
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> […]
>
> […] the Prosecution has established beyond a reasonable doubt that at Ndayambaje's swearing-in as the *bourgmestre* of Muganza *commune* on 22 June 1994, an event attended by the general population, *Ndayambaje and Nteziryayo* urged the population to "sweep the dirt" and instructed that those hiding Tutsis who refused to hand them over should be killed. Further, the Chamber

[7413] *See* Trial Judgement, para. 4593, fn. 12217.
[7414] Ndayambaje Appeal Brief, para. 608, *referring to* Trial Judgement, para. 4645. *See also* Ndayambaje Notice of Appeal, paras. 182, 192; AT. 21 April 2015 p. 29.
[7415] Ndayambaje Appeal Brief, para. 608. *See also* Ndayambaje Reply Brief, para. 245; AT. 21 April 2015 p. 29.
[7416] Ndayambaje Appeal Brief, para. 606.
[7417] Prosecution Response Brief, para. 2485; AT. 21 April 2015 pp. 56, 57.
[7418] Prosecution Response Brief, para. 2480.
[7419] Trial Judgement, para. 4642 (emphasis added).

> finds it established beyond a reasonable doubt that after Ndayambaje's swearing-in ceremony searches for Tutsis took place and killings followed. […][7420]

The Appeals Chamber further notes that, prior to reaching this conclusion, the Trial Chamber extensively considered the consistency of Prosecution evidence as to the content of the speeches given at the swearing-in ceremony and whether Ndayambaje, Nteziryayo, or both made inciting statements.[7421] In particular, the Trial Chamber observed that Witnesses FAG and FAL testified that Ndayambaje and Nteziryayo used metaphors concerning the need to clean the house of dirt and place it outside,[7422] and that Witness FAU gave corroborative evidence to this effect.[7423] It also noted contrasting evidence from Witnesses TO and TP that only Nteziryayo used the metaphor concerning sweeping dirt,[7424] while Witnesses RV and QAF testified that only Ndayambaje used this metaphor and that Witness QAL provided hearsay corroboration of the evidence of Witnesses RV and QAF.[7425]

3239. In addition, the Trial Chamber recounted that, according to Witnesses FAG, FAL, and TO, Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed,[7426] that Witness TP had a similar understanding of the metaphor (as uttered by Nteziryayo),[7427] and that Witnesses RV and QAF understood the speech of Ndayambaje in the same way.[7428] The Trial Chamber also considered evidence concerning Nteziryayo and Ndayambaje thanking the population for their "work" or urging them to continue their "work", which meant "to kill".[7429]

3240. The Appeals Chamber also observes that when finding Ndayambaje guilty of direct and public incitement to commit genocide, the only crime for which he was convicted on the basis of his remarks at the ceremony,[7430] the Trial Chamber recalled that "*Nteziryayo and Ndayambaje* told the population to continue with their 'work' and urged them to 'sweep the dirt outside'".[7431] It also

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[7420] Trial Judgement, para. 4645 (emphasis added).
[7421] Trial Judgement, paras. 4622-4628.
[7422] *See* Trial Judgement, para. 4622. *See also ibid*., paras. 4327, 4328, 4345.
[7423] *See* Trial Judgement, para. 4622. *See also ibid*., paras. 4398, 4400, 4401.
[7424] *See* Trial Judgement, para. 4623. *See also ibid*., paras. 4378, 4391.
[7425] *See* Trial Judgement, para. 4623. *See also ibid*., paras. 4363, 4372, 4426.
[7426] *See* Trial Judgement, para. 4627. *See also ibid*., paras. 4327, 4328, 4345, 4378, 4382.
[7427] *See* Trial Judgement, para. 4627. *See also ibid*., paras. 4391, 4393.
[7428] *See* Trial Judgement, para. 4628. *See also ibid*., paras. 4363, 4372.
[7429] *See* Trial Judgement, para. 4626.
[7430] The Appeals Chamber notes that Ndayambaje argues that the Trial Chamber erred in finding that his remarks at his swearing-in ceremony had a substantial effect on killings that ensued. *See* Ndayambaje Appeal Brief, paras. 655, 656. The Prosecution responds that there was a sufficient connection between Ndayambaje's conduct at the ceremony and the ensuing killings. *See* Prosecution Response Brief, para. 2515. While the Trial Chamber noted that killings occurred after the swearing-in ceremony, the Appeals Chamber observes that whether his words had a substantial effect on the ensuing killings is not an element of the inchoate crime of direct and public incitement to commit genocide of which he is convicted. *See*, *e.g.*, Trial Judgement, paras. 4645, 6026, 6027. As noted above, Ndayambaje was ultimately not convicted for instigating the killings of the Tutsi women and girls abducted from Mugombwa Sector after the ceremony. *See supra*, fn. 6415. Accordingly, the Appeals Chamber dismisses this contention without further consideration.
[7431] Trial Judgement, para. 6026 (emphasis added).

recalled that "the audience understood the words *of both Accused*, namely 'to work' and 'sweeping dirt', to mean they needed to kill Tutsis."[7432]

3241. Considering the conclusions in the factual and legal findings sections of the Trial Judgement as well as the relevant evidence, it is apparent that the Trial Chamber accepted evidence reflecting that both Ndayambaje and Nteziryayo made inciting speeches by employing the metaphor concerning sweeping the "dirt" and using the term "work" during the ceremony. The Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer[7433] and that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.[7434] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in accepting evidence demonstrating that Ndayambaje and Nteziryayo made inciting speeches that included remarks to sweep the "dirt" and to "work".

3242. As to Ndayambaje's argument that the Trial Chamber erred in finding that he possessed the requisite intent to "commit genocide", the Appeals Chamber observes that the Trial Chamber concluded that, "[i]n light of the substance of these statements, the context in which they were made, and the evidence as a whole, the [Trial] Chamber has no doubt that […] Ndayambaje possessed genocidal intent when [he] addressed the population."[7435] Ndayambaje only advances his contention by repeating references to arguments that have already been considered and rejected above.[7436]

3243. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in making imprecise and unsupported findings concerning who made inciting speeches during his swearing-in ceremony.

4. Conclusion

3244. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for committing direct and public incitement to commit genocide through his utterances at his swearing-in ceremony on 22 June 1994 and, accordingly, dismisses Ground 19 of Ndayambaje's appeal.

[7432] Trial Judgement, para. 6027 (emphasis added). *See also ibid*., para. 6029.
[7433] *Nizeyimana* Appeal Judgement, para. 254; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44. *See also Muhimana* Appeal Judgement, para. 58.
[7434] *See Nzabonimana* Appeal Judgement, para. 184; *Ntabakuze* Appeal Judgement, para. 150. *See also Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103.
[7435] Trial Judgement, para. 6028. *See also ibid*., para. 5956.
[7436] *See* Ndayambaje Appeal Brief, para. 606; *supra*, Section IX.G.2.

H. Abduction of Tutsi Women and Girls in Mugombwa (Ground 20)

3245. Based primarily on the evidence of Prosecution Witness QAR, as corroborated by Prosecution Witnesses FAU and QAF, the Trial Chamber found that, after Ndayambaje's Swearing-In Ceremony on 22 June 1994, a group of Tutsi women and girls from Mugombwa Sector, Muganza Commune, including one named Nambaje, were abducted by assailants from Saga.[7437] It determined that the assailants came to search for the girls because they had attended the ceremony "where they were told to search for and throw out dirt".[7438] The Trial Chamber further found that, during the abduction, Ndayambaje came to the Virgin Mary Statue in Mugombwa Sector and made it clear to the abductors that they "were free to do what they wanted with the girls".[7439] The Trial Chamber found that the abducted women and girls were subsequently taken to a brick factory at Gasenyi, a valley between Mugombwa and Kibayi, where they were killed.[7440]

3246. The Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including one named Nambaje, and that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide.[7441] The Trial Chamber also held that, by his words at the Virgin Mary Statue during the abduction, Ndayambaje instigated the killing of the abducted women and girls, including Nambaje.[7442] The Trial Judgement reflects that the Trial Chamber ultimately convicted Ndayambaje of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje, based on his words at the Virgin Mary Statue after the swearing-in ceremony.[7443]

[7437] Trial Judgement, paras. 4708, 4717, 5949.
[7438] Trial Judgement, para. 5953. *See also ibid.*, para. 4717.
[7439] Trial Judgement, paras. 4746, 5949, 6030.
[7440] Trial Judgement, paras. 4723, 4746, 5949.
[7441] Trial Judgement, paras. 5953-5956.
[7442] Trial Judgement, paras. 5957-5959, 6031.
[7443] Trial Judgement, paras. 5959, 5976 ("Ndayambaje also instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 5977, 6064 ("The Chamber has found Ndayambaje guilty of genocide for […] instigating the killing of Tutsis *after* his swearing-in ceremony".), 6066, 6107 ("Ndayambaje […] instigated the killing of Tutsis *after* his swearing-in ceremony."), 6108, 6125, 6175 ("Ndayambaje […] instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 6176, 6186 (emphasis added). The Trial Chamber determined that, because Ndayambaje's words at the Virgin Mary Statue were only addressed to the abductors and not to the general public, Ndayambaje could not be held responsible for direct and public incitement to commit genocide in relation to this event. *See ibid.*, paras. 6030, 6032, 6033. As discussed above, the Trial Chamber nonetheless convicted Ndayambaje of committing direct and public incitement to commit genocide on the basis of his words at his swearing-in ceremony. *See ibid.*, paras. 6026-6029; *supra*, Section IX.G. In these circumstances, Ndayambaje's arguments under Ground 20 of his appeal related to the link between the swearing-in ceremony and the abduction have been addressed only to the extent that they related to Ndayambaje's ultimate conviction for instigating killings through his words at the Virgin Mary Statue.

3247. Ndayambaje submits that the Trial Chamber erred in fact and in law in its findings relating to the abduction of Tutsi women and girls from Mugombwa Sector.[7444] In particular, Ndayambaje contends that the Trial Chamber erred in: (i) its assessment of the Prosecution evidence; (ii) its assessment of the Defence evidence; and (iii) finding that all elements of the crimes of genocide and extermination as a crime against humanity were met in relation to this event. The Appeals Chamber will address these contentions in turn.

1. Assessment of Prosecution Evidence

3248. Ndayambaje submits that the Trial Chamber erred in: (i) finding that Witnesses FAU and QAF corroborated Witness QAR's account of the abduction and killings that followed his alleged utterances at the Virgin Mary Statue; and (ii) its assessment of the credibility of Witnesses QAR and FAU.[7445]

(a) Absence of Corroboration

3249. The Trial Chamber determined that Witness QAR's account of the abduction of Tutsi women and girls in Mugombwa Sector was credible and compelling and, on this basis, found that the Prosecution had proven beyond reasonable doubt that Ndayambaje came to the Virgin Mary Statue during the abduction, that he made it clear that the abductors were free to do what they wanted with the girls, and that the abducted women and girls were subsequently killed at Gasenyi.[7446]

3250. The Trial Chamber found that Witness QAR's account of the abduction of Tutsi women and girls in Mugombwa by assailants from Saga was corroborated by Witnesses FAU and QAF regarding the timing and reason for the abduction.[7447] Specifically, the Trial Chamber found that Witness QAF gave a credible testimony that the abduction took place on the day after Ndayambaje's Swearing-In Ceremony, which corroborated Witness QAR's testimony that the abduction occurred in June 1994.[7448] Based on Witness FAU's evidence that the assailants who came to his house to abduct Nambaje told him that they had attended a meeting the purpose of which was to swear in Ndayambaje, it considered "Witness FAU's hearsay testimony to corroborate

[7444] The Appeals Chamber notes that Ndayambaje's contention under Ground 20 of his appeal that the abduction of the Tutsi women and girls was not pleaded in the Indictment has been considered and rejected above in Section IX.A.4. *See* Ndayambaje Appeal Brief, para. 674.
[7445] Ndayambaje Notice of Appeal, paras. 194, 196, 198, 199, 201; Ndayambaje Appeal Brief, paras. 202, 209-215, 218, 619-623, 625, 630, 647-654, 668, 669, 672. *See also* Ndayambaje Reply Brief, para. 249; AT. 21 April 2015 pp. 30, 31.
[7446] Trial Judgement, para. 4746.
[7447] Trial Judgement, paras. 4715, 4717.
[7448] Trial Judgement, para. 4712.

Witnesses QAR and QAF with regard to the date of the abduction."[7449] The Trial Chamber concluded that, "[n]otwithstanding the evidence brought by the Ndayambaje Defence, and the specific date provided by Witness QAR, […] the detailed evidence proffered by Prosecution Witnesses QAF and FAU affirms that the abduction took place after Ndayambaje's swearing-in ceremony on 22 June 1994."[7450] It further found that Witness QAR's account was corroborated by Witnesses QAF and FAU on the fact that some of the abducted were adolescent girls and that the abducted women and girls were taken from homes, and by Witness QAF regarding the identity of the attackers.[7451]

3251. Ndayambaje contends that the Trial Chamber erred in fact and in law in finding that Witness QAR's evidence was corroborated by that of Witnesses FAU and QAF, whose contradictory testimonies related to different events and did not mention the presence of Ndayambaje.[7452] In particular, Ndayambaje argues that "[i]f Witness QAR was referring to a meeting other than the swearing-in ceremony, the abduction she was a victim of would no longer be the consequence of the swearing-in ceremony" and her evidence "would no longer" corroborate that of Witnesses FAU and QAF as to the date of the abduction.[7453]

3252. Ndayambaje further submits that the Trial Chamber "erroneously fused together in its findings two distinct factual events, namely the abduction of the Mugombwa Tutsi girls and women and the abduction and murder of a certain Nambaje from Baziro *secteur*."[7454] He points out that Witness QAF testified that the abduction of the group of Mugombwa women and girls by attackers from Saga on the morning following the swearing-in ceremony took place at the Virgin Mary Statue, whereas Witness FAU testified that the abduction of Nambaje took place in Baziro Sector on the day of the ceremony and was conducted by attackers from Baziro and did not refer to the presence of Ndayambaje.[7455] In his view, the Trial Chamber erred in "mixing up" these two events, which occurred neither on the same date or place, nor concerned the same actors.[7456]

3253. The Prosecution responds that Ndayambaje fails to demonstrate that the Trial Chamber erred in finding that Witness QAF directly corroborated Witness QAR's testimony that the women and girls were killed and that Witness FAU provided corroboration that the killings occurred after

[7449] Trial Judgement, para. 4715.
[7450] Trial Judgement, para. 4717.
[7451] Trial Judgement, paras. 4723, 4724, 4726, 4727, 4730, fn. 12535.
[7452] Ndayambaje Appeal Brief, paras. 619-621. *See also* AT. 21 April 2015 pp. 30, 31.
[7453] Ndayambaje Appeal Brief, para. 619, *referring to* Trial Judgement, paras. 4712, 4715, 4717.
[7454] Ndayambaje Notice of Appeal, para. 195. *See also ibid*., paras. 202, 207; Ndayambaje Appeal Brief, paras. 647, 670.
[7455] Ndayambaje Appeal Brief, paras. 620, 647.
[7456] Ndayambaje Appeal Brief, para. 670. *See also ibid*., paras. 647, 663, 665; AT. 21 April 2015 p. 30.

the swearing-in ceremony.[7457] The Prosecution submits that the killing of Nambaje and the killing of the Mugombwa women and girls were not unrelated incidents but were part of the same "pattern of killings" as both were consequences of the speeches given at the ceremony.[7458] As such, it argues, the testimonies of Witnesses QAF and FAU were not contradictory but both supported the Trial Chamber's finding that Tutsis were searched for and killed following the ceremony.[7459]

3254. Ndayambaje replies that Witnesses QAF and FAU cannot be said to have provided corroborative evidence as they contradicted each other on material aspects, which clearly indicates that their accounts concerned different events.[7460]

3255. The Appeals Chamber observes that, contrary to what Ndayambaje's speculative argument about the meeting that Witness QAR attended suggests, the Trial Chamber did not find that the meeting in Muganza Commune about which Witness QAR testified was Ndayambaje's Swearing-In Ceremony.[7461] It did not conclude that the abduction of the Mugombwa Tutsi women and girls followed the ceremony based on Witness QAR's testimony, but based on Witnesses FAU's and QAF's testimonies.[7462] Ndayambaje does not substantiate his claim that Witness QAF's evidence was contradictory or related to a different event and does not develop any argument to show that the Trial Chamber's reliance on this part of Witness QAF's evidence was erroneous in any other respect.[7463] Ndayambaje's allegation of error pertaining to the Trial Chamber's reliance on Witness QAF's evidence as relevant to the timing of the abduction and corroborative of Witness QAR's evidence regarding the incident is therefore without merit.

3256. As to Ndayambaje's arguments regarding the Trial Chamber's reliance on Witness FAU's testimony as corroborative of Witness QAR's evidence on the abduction, the Appeals Chamber observes that, after reaching its finding on Ndayambaje's involvement in the abduction of the women and girls subsequently killed at Gasenyi, the Trial Chamber specifically referred to

[7457] Prosecution Response Brief, para. 2493. *See also ibid*., para. 2491; AT. 21 April 2015 p. 58.
[7458] Prosecution Response Brief, paras. 2492, 2512.
[7459] Prosecution Response Brief, paras. 2492, 2512. During the appeals hearing, the Prosecution argued that, while the killers of Nambaje were at the swearing-in ceremony, it was "not know[n] whether [the killers of the victims at the Virgin Mary Statue] were there." *See* AT. 21 April 2015 p. 60.
[7460] Ndayambaje Reply Brief, para. 250. Ndayambaje also argues that it does not make sense for the Prosecution to concede that Witnesses QAR and FAU testified about two distinct incidents while, at the same time, argue that they are linked in the absence of any evidence to this effect. *See ibid*., paras. 247, 267-270.
[7461] Trial Judgement, para. 4710 ("Furthermore, the Chamber observes that Witness QAR may well have been mistaken while placing the purported meeting in mid-June 1994 due to the various meetings she attended at the Muganza *commune* office before, during and after the war. Furthermore, the Chamber recalls its previous finding that Witness QAR did not attend Ndayambaje's swearing-in ceremony, given that she was a Tutsi".) (internal reference omitted).
[7462] Trial Judgement, paras. 4712, 4713, 4715, 4717.
[7463] *See* Ndayambaje Appeal Brief, para. 621. The Appeals Chamber recalls that it has addressed and dismissed Ndayambaje's submissions related to Witness QAF's evidence relating to Ndayambaje's Swearing-In Ceremony in Section IX.G.1(d) above.

Witness FAU's evidence of the abduction and killing of a woman named Nambaje and the young girl she was looking after by three assailants who said that they had just attended a meeting for the swearing-in of Ndayambaje.[7464] The Trial Chamber noted that Witness FAU testified that Nambaje and the young girl were killed after their abduction in the home of a man named Kinyagiro.[7465]

3257. When discussing the timing and reason for the abduction of the group of Tutsi women and girls from Mugombwa by assailants from Saga in the "Factual Findings" section of the Trial Judgement,[7466] the Trial Chamber stated that "Witness FAU testified that the *abductions* took place in late May or early June 1994, and gave hearsay evidence that this followed a meeting at the Muganza *commune* office",[7467] the purpose of which was to swear-in Ndayambaje, and considered "Witness FAU's hearsay testimony to corroborate that of Witnesses QAR and QAF with regard to the date of the *abduction*."[7468] The Trial Chamber further concluded that:

> the detailed evidence proffered by Prosecution Witnesses QAF and FAU affirms that the *abduction* took place after Ndayambaje's swearing-in ceremony of 22 June 1994. On the basis of Witness FAU's hearsay evidence that the assailants came to search for the girls because they were told to search for and throw out dirt, the Chamber also accepts that searches were carried out with a view to locating Tutsis.[7469]

When discussing "Ndayambaje's Alleged Presence During the *Abductions*",[7470] the Trial Chamber referred to Witness FAU as one of the witnesses who "testified to having witnessed various stages of the *abduction*"[7471] and stated that "Witness FAU's testimony that Nambaje was taken from a house by the attackers" corroborated Witness QAR's testimony that the women and girls were taken from their homes.[7472]

3258. In the "Legal Findings" section of the Trial Judgement, the Trial Chamber found that:

> a group of Tutsi women and girls from Mugombwa *secteur*, Muganza *commune*, were abducted by assailants from Saga after Ndayambaje's swearing-in ceremony of 22 June 1994 *including one Nambaje who was abducted from a home*. During the *abduction*, Ndayambaje came to the Statue of the Virgin Mary and made it clear that the abductors were free to do what they wanted with the girls, and the abducted women and girls were subsequently taken to a brick factory at Gasenyi where they were killed […].[7473]

[7464] Trial Judgement, paras. 4713, 4715, 4717, 4730.
[7465] Trial Judgement, para. 4730.
[7466] *See* Trial Judgement, para. 4708, Section 3.6.44.4.1.
[7467] Trial Judgement, para. 4713 (emphasis added).
[7468] Trial Judgement, para. 4715 (emphasis added).
[7469] Trial Judgement, para. 4717 (emphasis added).
[7470] *See* Trial Judgement, heading Section 3.6.44.4.2 at p. 1139 (emphasis added).
[7471] Trial Judgement, para. 4720 (emphasis added).
[7472] Trial Judgement, para. 4727, fn. 12553, *referring to* Witness FAU, T. 9 March 2004 p. 22 (closed session). *See also ibid*., para. 4723 ("Witness QAR's eyewitness testimony of the abduction is corroborated by both Prosecution and Defence witnesses with respect to […] [the fact that the girls] were abducted from houses in *Mugombwa*") (emphasis added), fn. 12535, *referring to* Witness FAU, T. 8 March 2004 p. 89 (closed session), T. 9 March 2004 p. 22 (closed session).
[7473] Trial Judgement, para. 5949 (emphasis added). *See also ibid*., para. 5953.

When further discussing Ndayambaje's responsibility in relation to his utterances at the Virgin Mary Statue specifically, the Trial Chamber declared it proven that "Ndayambaje committed the *actus reus* of instigating the killing of the abducted Tutsi girls *and one Nambaje*"[7474] and that he "knew he was assisting in the deaths of the abducted girls *and Nambaje*."[7475]

3259. In the view of the Appeals Chamber, the Trial Chamber's findings show that it ultimately considered that Nambaje, about whom Witness FAU testified, was part of the group of Tutsi women and girls abducted from Mugombwa Sector by assailants from Saga and killed at Gasenyi following Ndayambaje's utterances at the Virgin Mary Statue.

3260. However, as Ndayambaje points out and as the Trial Chamber correctly noted in other parts of the Trial Judgement,[7476] Witness FAU testified that Nambaje was abducted from his home which was located in Baziro Sector, that the assailants were Casien Ngona, Nyambindi and Rutabana from Baziro Sector, and that Nambaje was taken to the home of a Tutsi named Kinyagiro where she was killed.[7477] The abduction Witness FAU testified about did not concern women from Mugombwa Sector, was not led by assailants from Saga, did not involve a stop at the Virgin Mary Statue or Ndayambaje, and did not end with killings in a brick factory at Gasenyi.

3261. As acknowledged by the Prosecution,[7478] it is apparent that Witnesses QAR and FAU testified about two different incidents of abductions involving different perpetrators and victims. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in considering that Nambaje was part of the group of victims abducted from Mugombwa Sector and killed at Gasenyi following Ndayambaje's words at the Virgin Mary Statue and, consequently, in convicting Ndayambaje for instigating her killing through his words at the Virgin Mary Statue.[7479]

3262. As to the question whether Witness FAU could nonetheless be relied upon as corroborating aspects of Witness QAR's evidence, the Appeals Chamber recalls that the Trial Chamber relied upon his evidence as corroborative of Witness QAR's regarding: (i) the timing of the abduction of the group of Tutsi women and girls, namely in June 1994;[7480] (ii) the fact that the women and girls were taken from their homes;[7481] and (iii) the fact that the group of abductees included adolescent

[7474] Trial Judgement, para. 5957 (emphasis added).
[7475] Trial Judgement, para. 5958 (emphasis added).
[7476] Trial Judgement, paras. 4668, 4730; Ndayambaje Appeal Brief, paras. 620, 647, 649.
[7477] *See* Witness FAU, T. 9 March 2004 pp. 21, 22 (closed session).
[7478] Prosecution Response Brief, para. 2512. *See also ibid*., para. 2493; AT. 21 April 2015 p. 60.
[7479] The Appeals Chamber recalls that the Trial Judgement reflects that Ndayambaje was ultimately not convicted in relation to the abductions discussed in this section on the basis of his utterances at his swearing-in ceremony. *See supra*, fns. 6351, 6415, 7443.
[7480] *See* Trial Judgement, paras. 4711, 4713, 4717.
[7481] Trial Judgement, para. 4727.

girls.[7482] Because Witness FAU testified to a different event, the Appeals Chamber finds that the Trial Chamber erred in relying on his evidence as corroborating these aspects of the different abduction about which Witness QAR testified.

3263. However, because the Trial Judgement does not reflect that Witness FAU's evidence was material to the Trial Chamber's finding that Witness QAR's account of the abduction of Tutsi women and girls – which was in part corroborated by Witness QAF – was credible and proved beyond reasonable doubt Ndayambaje's involvement in the abduction,[7483] the Appeals Chamber finds that the Trial Chamber's erroneous reliance on Witness FAU's evidence as corroborative of Witness QAR's evidence does not invalidate the Trial Chamber's finding in this respect and has not occasioned a miscarriage of justice.

(b) Credibility of Prosecution Witnesses

3264. Ndayambaje submits that the Trial Chamber erred in its assessment of the credibility of Witnesses QAR and FAU.[7484] However, because the Appeals Chamber has concluded above that the Trial Chamber erred in finding Ndayambaje responsible for the abduction recounted by Witness FAU and in relying on his testimony as corroborating Witness QAR's evidence, it finds it unnecessary to address Ndayambaje's submissions concerning Witness FAU's credibility. Consequently, the Appeals Chamber will only examine Ndayambaje's arguments related to the Trial Chamber's assessment of Witness QAR's evidence.

3265. Ndayambaje submits that the Trial Chamber erred in relying on Witness QAR's testimony pertaining to the abduction of Tutsi women and girls from Mugombwa.[7485] Ndayambaje argues that Witness QAR could not be found credible given that her testimony that she did not attend his swearing-in ceremony was not found plausible and that her testimony is implausible in many other respects.[7486] He also avers that it was unreasonable on the part of the Trial Chamber to explain that Witness QAR's specific reference to 18 June 1994 as the date of her abduction may have been the result of a distorted view of the timing due to the passage of time.[7487] Ndayambaje emphasises in

[7482] Trial Judgement, para. 4726.
[7483] Trial Judgement, para. 4746.
[7484] Ndayambaje Notice of Appeal, paras. 194, 196, 198, 199, 201; Ndayambaje Appeal Brief, paras. 202, 209-215, 218, 619-623, 625-630, 647-654, 668, 669, 672. *See also* Ndayambaje Reply Brief, para. 249; AT. 21 April 2015 pp. 30, 31. Ndayambaje submits that the Trial Chamber erred in finding Witness FAU credible and in relying on his contradictory evidence in relation to the date of the abduction and murder of Nambaje. *See* Ndayambaje Notice of Appeal, para. 196; Ndayambaje Appeal Brief, paras. 202, 621, 628, 629, 650, 651, 672, *referring*, *inter alia*, *to* Trial Judgement, paras. 4620, 4715.
[7485] Ndayambaje Notice of Appeal, paras. 194, 198, 199, 201; Ndayambaje Appeal Brief, paras. 615-630, 668, 669. *See also* Ndayambaje Reply Brief, para. 255.
[7486] Ndayambaje Appeal Brief, paras. 214, 616, *referring to* Trial Judgement, paras. 4602, 4603.
[7487] Ndayambaje Appeal Brief, para. 618.

this respect that the Trial Chamber had considered that an ambiguity in a witness's testimony as to the date of another event undermined the witness's credibility.[7488]

3266. Ndayambaje further contends that the Trial Chamber erred in accepting Witness QAR's testimony despite the numerous and material inconsistencies and contradictions within her evidence.[7489] He points in particular to the fact that Witness QAR: (i) said in her 1995 statement that she was an eyewitness to the massacre of four abducted young girls, while she testified at trial that she was part of the group of abducted women and that this group was composed of eight victims; (ii) contradicted her 1995 statement by testifying that the abducted women were not killed at the Virgin Mary Statue but transported to Gasenyi where they were killed; (iii) was inconsistent during her testimony regarding whether she was also one of the victims and transported to Gasenyi; (iv) stated that the assailants were led by the *conseiller* of Saga in her 1994 statement, while she testified at trial that they were led by one man named Masima; and (v) failed to mention the swearing-in ceremony and the abduction in her statement of May 1997.[7490] Ndayambaje argues that Witness QAR's explanation that the investigators recorded her statement poorly is not credible given the nature and materiality of the contradictions and omissions.[7491] In Ndayambaje's view, the Trial Chamber erred in ignoring or considering as insignificant the inconsistencies and contradictions within Witness QAR's evidence and failed to provide a reasoned opinion for accepting Witness QAR's contradicted and doubtful testimony about the abduction.[7492]

3267. The Appeals Chamber also understands Ndayambaje to submit that the Trial Chamber erred in accepting Witness QAR's account on his presence and words spoken at the Virgin Mary Statue during the abduction because it was uncorroborated.[7493]

3268. The Prosecution responds that Ndayambaje fails to demonstrate that the Trial Chamber erred in relying on Witness QAR's consistent evidence.[7494] It argues that a trial chamber can reject parts of a witness's evidence and accept others, that it was reasonable for the Trial Chamber to find that the abduction Witness QAR recounted must have occurred after the swearing-in ceremony in

[7488] Ndayambaje Appeal Brief, para. 618, *referring to* Trial Judgement, para. 3668.
[7489] Ndayambaje Appeal Brief, paras. 622-630, *referring to* Witness QAR's 1995 Statement, Witness QAR's May 1997 Statement, Witness QAR's October 1997 Statement.
[7490] Ndayambaje Appeal Brief, paras. 212, 213, 616, 622, 625, 626. *See also* Ndayambaje Reply Brief, paras. 248-254. In support of his argument regarding whether the witness was one of the victims, Ndayambaje quotes portions of Witness QAR's testimony about the abduction, in which the witness excluded herself from the narrative and referred to "those ladies and young girls" or "the women and girls", comparing them with Witness QAR's testimony on the Mugombwa Church massacre, where she explicitly included herself into the narrative. *See* Ndayambaje Appeal Brief, fn. 262.
[7491] Ndayambaje Appeal Brief, para. 623.
[7492] Ndayambaje Appeal Brief, para. 668. *See also ibid*., paras. 638, 640. Ndayambaje argues that, according to the jurisprudence of the Appeals Chamber, the doubt and ambiguity raised by Witness QAR's testimony ought to have been interpreted in his favour. *See ibid*., para. 669, *referring to Čelebići* Appeal Judgement, para. 452.
[7493] Ndayambaje Notice of Appeal, para. 194; Ndayambaje Appeal Brief, paras. 612, 615, 620.

light of Witnesses QAF's and FAU's evidence, and that the inconsistencies within her evidence highlighted by Ndayambaje do not exist or are not material.[7495]

3269. Ndayambaje replies that, contrary to the Prosecution's assertions, Witness QAR repeatedly changed her testimony with respect to her presence at the events.[7496] He argues that the fact that she failed to mention being one of the victims in her prior statements cannot be considered as non-material.[7497]

3270. The Appeals Chamber observes that the Trial Chamber expressly considered that Witness QAR testified that the abduction took place in the days following a meeting at Mugombwa commune office which Ndayambaje and Nteziryayo attended.[7498] However, the Trial Chamber found that "it [was] not evident that the meeting about which Witness QAR testified [was] Ndayambaje's swearing-in ceremony",[7499] explaining that it was not "plausible" that she attended the meeting in question given that she was a Tutsi and relying on the several inconsistencies between her account and the testimony of other witnesses in this regard.[7500] Ndayambaje does not develop any argument to explain why a reasonable trier of fact could not have accepted Witness QAR's corroborated and detailed testimony about the abduction at Mugombwa, while concluding that she did not personally attend his swearing-in ceremony. His contention in this respect is accordingly rejected. The Appeals Chamber also dismisses Ndayambaje's undeveloped submission that Witness QAR's testimony was implausible in many other respects.

3271. The Trial Chamber recalled in the course of its deliberations that Witness QAR testified that the meeting that preceded the abduction about which she spoke took place on 18 June 1994.[7501] It considered that Witness QAR "may well have been mistaken while placing the purported meeting in mid-June 1994 due to the various meetings she attended at the Muganza *commune* office before, during and after the war" and "may have had a distorted view of the timing of the events in question

[7494] Prosecution Response Brief, para. 2491.
[7495] Prosecution Response Brief, paras. 2488-2491, 2496-2499. The Prosecution submits that Witness QAR was clear at trial that she was detained with the other women and girls kept at the Virgin Mary Statue and that she was not taken to Gasenyi but went home because when her name was read out, another woman who had the same first name was taken. It argues that the English transcript of her testimony does not reflect that she testified that she went to "Mugasenyi" and that, even if the witness in fact testified that "*On nous a conduites à un endroit qu'on appelle 'Mu Gasenyi*'" as reflected in the French transcript, this can be easily explained as a "slip of the tongue". *See ibid*., para. 2489 (emphasis in original), *referring to* Witness QAR, T. 19 November 2001 p. 65 (French). The Prosecution also points out that Ndayambaje failed to cross-examine Witness QAR on the fact that she omitted to mention in her prior statements that she was part of the group of abducted women. It further contends that Witness QAR did not mention her own victimisation because she did not find it important, as illustrated by the fact that she only mentioned it in response to the question why she could be certain about the date of the incident. *See ibid*., para. 2498.
[7496] Ndayambaje Reply Brief, paras. 248-253.
[7497] Ndayambaje Reply Brief, para. 254.
[7498] Trial Judgement, para. 4710.
[7499] Trial Judgement, para. 4710.
[7500] Trial Judgement, paras. 4602, 4603, 4710.

given the passage of the time", finding her to be "credible in all other respects".[7502] Ndayambaje does not show that this determination was unreasonable. He merely refers to the assessment of the credibility of the account of another witness about a different meeting that has no connection with this particular instance and is, as such, irrelevant.[7503]

3272. The Appeals Chamber further observes that, prior to concluding that Witness QAR provided credible evidence with respect to the abduction of the Tutsi women and girls in Mugombwa Sector, the Trial Chamber addressed a number of the alleged inconsistencies and contradictions within Witness QAR's evidence pointed out by Ndayambaje as well as the witness's explanations for them.[7504]

3273. In particular, the Trial Chamber discussed the alleged inconsistencies between Witness QAR's testimony at trial and her prior statements regarding the number of abducted women and girls, whether they were immediately killed, and where they were killed.[7505] The Trial Chamber accepted the witness's explanation that her statements were not recorded correctly and found that these inconsistencies were minor and did not go to the root of her account.[7506] Having reviewed the relevant excerpts of Witness QAR's prior statements and testimony, the Appeals Chamber finds that the Trial Chamber's conclusion was not unreasonable.

3274. The Trial Chamber did not expressly discuss the purported inconsistencies in Witness QAR's evidence relating to whether she was part of the group of abducted women, whether she was transported to Gasenyi, her failure to mention the ceremony and the abduction in her May 1997 statement as well as who was leading the assailants. The Appeals Chamber notes that Ndayambaje did not draw the Trial Chamber's attention to these inconsistencies, notwithstanding his position on appeal that they are so material that Witness QAR's evidence is unbelievable.[7507]

3275. Moreover, concerning Witness QAR's evidence as to whether or not she was part of the group of abducted women, the Appeals Chamber considers that the witness's reference to the group of abducted women and girls as "they", "them", or "these women and girls" in her 1995 and

[7501] Trial Judgement, para. 4710.
[7502] Trial Judgement, paras. 4710, 4711.
[7503] Ndayambaje Appeal Brief, para. 618, *referring to* Trial Judgement, para. 3668 (discussing Witness RV's testimony to the effect that he took part in three meetings in Kirarambogo between April and June 1994).
[7504] Trial Judgement, paras. 4660, 4661, 4733, 4734, 4746.
[7505] Trial Judgement, paras. 4733, 4734.
[7506] Trial Judgement, paras. 4733, 4734.
[7507] The Appeals Chamber observes that the only arguments that Ndayambaje raised in his closing submissions were that Witness QAR falsely testified that she was part of the abducted women and that her testimony was inconsistent about whether the girls and women were killed "on the spot" or brought to and killed at Gasenyi. *See* Ndayambaje Closing Brief, pp. 781-783; Ndayambaje Closing Arguments, T. 30 April 2009 pp. 29, 30.

October 1997 statements and at times in her testimony[7508] is reasonably explained by the fact that she was addressing the issue or answering questions put to her which specifically related to the fate of the women and girls who were abducted *and killed*.[7509] When specifically being asked how she could remember the date of the abduction, Witness QAR unambiguously testified that she was part of the group of abducted women but did not share the fate of others as she was released.[7510] The Appeals Chamber therefore sees no contradiction in Witness QAR's evidence on this issue. It is also not persuaded that, given the witness's emphasis on the fact that the abducted women and girls were killed and the circumstances of her presence at the Virgin Mary Statue, Witness QAR's failure to mention that she was one of the abducted women in her prior statements is material and required discussion by the Trial Chamber.

3276. With respect to whether Witness QAR contradicted herself in stating that she was brought to Gasenyi with the other women and girls, the Tribunal's language section clarified that the French transcript of Witness QAR's testimony given in Kinyarwanda does not accurately reflect the witness's testimony.[7511] Witness QAR did not testify as reflected in the French transcript that she was transported to Gasenyi with the group of abducted women and girls but, instead, consistently stated that she was not taken to Gasenyi.[7512] Ndayambaje's argument in this respect – which relies on the French transcript of the witness' testimony – is therefore rejected.

3277. As to the alleged inconsistency regarding the identity of the leader of the assailants, the Appeals Chamber observes that it is indicated in Witness QAR's 1995 Statement that the group of assailants was led by "the *conseillers* of Saga", whereas she refuted this in court and testified that the leader was not a *conseiller* but a man named Masima.[7513] As noted by the Trial Chamber, Witness QAR explained that her 1995 statement had not been correctly recorded.[7514] The Appeals Chamber reiterates that it is within the discretion of a trial chamber to evaluate inconsistencies in

[7508] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination); Witness QAR, T. 19 November 2001 pp. 57, 58, 60, 61; T. 21 November 2001 pp. 97, 98, 100.
[7509] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination); Witness QAR, T. 19 November 2001 pp. 57, 58; T. 21 November 2001 pp. 96-102, 107.
[7510] Witness QAR, T. 19 November 2001 pp. 57, 58, T. 21 November 2001 pp. 96-99, 102, 107.
[7511] *Compare* Witness QAR, T. 19 November 2001 p. 65 (French) ("*On nous a conduites à un endroit qu'on appelle 'Mu Gasenyi'*") *with* audio recording of Witness QAR's testimony of 19 November 2001, at 02:27:22-02:28:18 ("*Ni ahantu bita Mu Gasenyi hari amatanura. Niho babajyanye*"). *See also* Witness QAR, T. 19 November 2001 p. 58 ("They took them to a place called Mugasenyi"). The Appeals Chamber notes that, according to the Tribunal's language section, the English translation of Witness QAR's testimony in Kinyarwanda is correct.
[7512] *See* Witness QAR, T. 21 November 2001 p. 101 ("Q. You, yourself, madam, were you taken to Gasenyi? A. No, I wasn't taken there."). *See also* Witness QAR, T. 19 November 2001 p. 58, T. 21 November 2001 pp. 97, 102; Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K005227 (Registry pagination).
[7513] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR, T. 21 November 2001 pp. 97, 109-111.
[7514] Trial Judgement, para. 4734, *referring to* Witness QAR, T. 21 November 2001 pp. 111-113.

the evidence, to consider whether the evidence taken as a whole is reliable and credible,[7515] without explaining its decision in every detail,[7516] and that the fact that a trial chamber does not address or mention alleged discrepancies does not necessarily mean that it did not consider them.[7517] In this instance, Ndayambaje does not demonstrate the unreasonableness of Witness QAR's explanation or that the inconsistency in her evidence as regards the identity of the leader of the assailants was such that it required express consideration and undermines the Trial Chamber's finding on Witness QAR's credibility.

3278. Likewise, the Appeals Chamber finds no merit in Ndayambaje's argument that Witness QAR did not mention Ndayambaje's Swearing-In Ceremony or the abduction in her May 1997 Statement given that it is evident from the reading of the statement that it was made in response to queries concerning the Mugombwa Church massacre specifically.[7518]

3279. Finally, the Appeals Chamber recalls that corroboration is not a requirement and that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[7519] In the absence of a demonstration that it was unreasonable for the Trial Chamber to rely on Witness QAR's uncorroborated testimony about Ndayambaje's presence and utterances at the Virgin Mary Statue, the Appeals Chamber rejects Ndayambaje's allegation of error in this respect.

3280. The Appeals Chamber therefore finds that Ndayambaje's arguments addressed above do not demonstrate that the Trial Chamber erred in its assessment of the credibility of Witness QAR's account of the abduction.

2. Assessment of Defence Evidence

3281. Ndayambaje submits that the Trial Chamber erred in rejecting without valid reason the evidence of Defence Witnesses JAMES, BOZAN, MUZIK, ANGES, and Stan as well as his own testimony that he was not involved in the abduction of the women and girls from Mugombwa.[7520]

[7515] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[7516] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 223; *Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174; *Kvočka et al*. Appeal Judgement, para. 23.
[7517] *See*, *e.g.*, *Ntawukulilyayo* Appeal Judgement, para. 152; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18-20.
[7518] *See* Witness QAR's May 1997 Statement.
[7519] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[7520] Ndayambaje Notice of Appeal, paras. 201-206; Ndayambaje Appeal Brief, paras. 631-641, 645, 646, 668. *See also* Ndayambaje Reply Brief, paras. 256-265. The Appeals Chamber notes that Ndayambaje further referred to Witness MATIC's testimony but, because he merely points to the main features of the witness's evidence in his appeal brief without developing any specific argument relating to the assessment of this witness's evidence regarding the

(a) Witnesses JAMES and BOZAN

3282. The Appeals Chamber notes that the Trial Chamber accepted Witness JAMES's evidence insofar as it corroborated Witness QAR's account of the abduction of the Tutsi women and girls, the number of abducted women and girls, the identity of the leader of the group of assailants, and their gathering at the Virgin Mary Statue.[7521] The Trial Chamber similarly accepted Witness BOZAN's evidence insofar as it corroborated Witness QAR's account as to the identity of the leader of the group of assailants, the sequence of events, including the stop at the statue, and the fact that the abducted women and girls were taken to Gasenyi to be killed.[7522]

3283. The Trial Chamber noted that Witnesses JAMES and BOZAN directly contradicted Witness QAR since both testified that Witness QAR was not part of the group of the abducted women and girls and that Ndayambaje did not come to the Virgin Mary Statue.[7523] It found that, because Witness JAMES was working on that day and stayed at the statue for less than five minutes, he was not in a position to testify that Witness QAR did not leave the house where she was staying at all on the day of the abduction and his testimony did not "preclude" Witness QAR's or Ndayambaje's presence at the statue after he left.[7524] It further recalled its previous finding that Witness JAMES was not credible in respect of Witness QAR's whereabouts during the Mugombwa Church massacre and Ndayambaje's Swearing-In Ceremony.[7525] Moreover, the Trial Chamber determined that Witness BOZAN, like Witness JAMES, was not in a position to testify that Witness QAR or Ndayambaje were not present at the statue during the abduction as the witness only stayed there about five minutes.[7526] It also found that Witness BOZAN's testimony was not credible based on his failure to take steps to protect the abducted women and girls or arrest the assailants, even though he knew them, and based on his implication in the Mugombwa Church massacre.[7527] The Trial Chamber concluded:

> In summary, the presence of Witnesses BOZAN and JAMES in the vicinity of the Statue of the Virgin Mary on the day of the abduction, for a short overlapping period of time, does not preclude

abduction, the Appeals Chamber will not examine the Trial Chamber's findings regarding this particular witness's evidence. *See* Ndayambaje Appeal Brief, paras. 642-644. The Appeals Chamber will also not discuss Ndayambaje's challenges to the assessment of the evidence of Witnesses SABINE and KWEPO that he developed under Ground 20 of his appeal as they specifically relate to the abduction of Nambaje and Witness FAU's credibility. *See ibid*., paras. 657-661. As the Appeals Chamber has found above that the Trial Chamber erred in convicting Ndayambaje for the murder of Nambaje and in relying on Witness FAU's evidence, it is therefore unnecessary to discuss his arguments relating to the Trial Chamber's assessment of this evidence. *See supra*, Section IX.H.1(a).

[7521] Trial Judgement, paras. 4724, 4725, 4728, 4736.

[7522] Trial Judgement, paras. 4724, 4728, 4729, 4741.

[7523] Trial Judgement, paras. 4735, 4736, 4742, 4745.

[7524] Trial Judgement, paras. 4737-4739.

[7525] Trial Judgement, para. 4740.

[7526] Trial Judgement, para. 4742. The Trial Chamber noted that Witness BOZAN testified that he returned to the Virgin Mary Statue only one hour and 15 minutes to one hour and 25 minutes later. *See ibid.*, para. 4743.

[7527] Trial Judgement, para. 4744.

> either Witness QAR's or Ndayambaje's presence at the site. Their evidence, although consistent, is not conclusive.[7528]

3284. Ndayambaje submits that the Trial Chamber erred in rejecting the testimonies of Witnesses JAMES and BOZAN contradicting Witness QAR's evidence regarding her presence as well as that of Ndayambaje at the Virgin Mary Statue even though it found their evidence consistent.[7529] With respect to Witness JAMES, Ndayambaje submits that the Trial Chamber's finding that the witness was not in a position to testify that Witness QAR did not leave the house at all on the day of the abduction because he was working on that day is "not justified" given that Witness JAMES "worked just by the entrance of Witness QAR's house".[7530] He also asserts that, contrary to the Trial Chamber's finding, Exhibit D655 – a sketch and photographs of the relevant premises – shows that Witness QAR could not have arrived at the Virgin Mary Statue or come back home after the incident without being seen by Witness JAMES.[7531] He adds that, given Witness JAMES's vantage point at the time, the witness would necessarily have seen Ndayambaje's vehicle pass in front of his place of work and seen him at the statue if he had been there.[7532]

3285. With respect to Witness BOZAN, Ndayambaje submits that the Trial Chamber erred in finding that the witness was not credible on the grounds that he was implicated in the Mugombwa Church massacre and that he failed to take any steps to protect the abducted women or arrest the assailants afterwards, even though it acknowledged that the witness had made considerable efforts to rescue the abducted girls and alert the commune authorities.[7533] Ndayambaje contends that no evidence suggested that Witness BOZAN had either the power or the means to arrest the armed attackers who came from another commune and that the Trial Chamber wrongly ignored that the witness reported the incident to the then *bourgmestre* of Muganza Commune, which also indicated

[7528] Trial Judgement, para. 4745.
[7529] Ndayambaje Appeal Brief, paras. 633, 637, 638, 641. Ndayambaje further argues that the Trial Chamber should have applied the same reasoning applied by the Appeals Chamber in the *Kalimanzira* case and by the Trial Chamber in this case with respect to Witness BCZ's evidence on meetings at the Hotel Ihuliro and that the Trial Chamber impermissibly shifted the burden of proof when assessing Witnesses JAMES's and BOZAN's evidence. *See* Ndayambaje Notice of Appeal, para. 203, *referring to* Trial Judgement, para. 4745; Ndayambaje Appeal Brief, para. 641, *referring to Kalimanzira* Appeal Judgement, para. 185, Trial Judgement, paras. 3103-3106, 4745. In the absence of any explanation as to the pertinence of the assessment of the evidence of other witnesses concerning other incidents in the *Kalimanzira* case and the other parts of the Trial Judgement and as to how the Trial Chamber allegedly reversed the burden of proof, the Appeals Chamber dismisses these contentions without further consideration.
[7530] Ndayambaje Appeal Brief, para. 634, *referring to* Trial Judgement, para. 4737.
[7531] Ndayambaje Appeal Brief, para. 636. *See also* Ndayambaje Appeal Brief, para. 635; Ndayambaje Reply Brief, para. 256.
[7532] Ndayambaje Appeal Brief, para. 636. *See also* Ndayambaje Reply Brief, para. 256. Ndayambaje argues that a site visit by the Trial Chamber would have removed this ambiguity. *See ibid.*
[7533] Ndayambaje Appeal Brief, para. 639, *referring to* Trial Judgement, paras. 4741-4744, fn. 558. *See also ibid.*, para. 229, fn. 276; Ndayambaje Reply Brief, para. 257.

that the abduction took place well before Ndayambaje's Swearing-In Ceremony as *bourgmestre* of Muganza.[7534]

3286. The Prosecution responds that Ndayambaje's submissions regarding Witness JAMES should be rejected as he fails to demonstrate that the Trial Chamber erred in finding that the witness was not credible and that his arguments as to the witness's ability to observe the incident from his place of work are "unsupported and unreferenced speculations".[7535] The Prosecution further responds that, while Ndayambaje is correct that the Trial Chamber erred in finding that Witness BOZAN was implicated in the Mugombwa Church massacre, he does not show that the Trial Chamber erred in finding that the witness was neither reliable nor credible.[7536]

3287. The Appeals Chamber observes that, contrary to the Prosecution's assertion, the Trial Judgement is unclear as to whether the Trial Chamber rejected the evidence of Witnesses JAMES and BOZAN relating to the abduction because it found that they were not credible. Although the Trial Chamber referred to their lack of credibility, its ultimate finding regarding the assessment of their evidence quoted above, and the fact that it relied on certain parts of their evidence as corroborative of that of Witness QAR, suggest that the Trial Chamber concluded that their evidence was not incompatible with Witness QAR's account.

3288. That being said, the Appeals Chamber finds that Ndayambaje does not demonstrate why the Trial Chamber was unreasonable in finding that Witness JAMES could not have accounted for Witness QAR's whereabouts during the whole day and for all events at the Virgin Mary Statue, including on Ndayambaje's presence there. Ndayambaje fails to appreciate that the Trial Chamber carefully considered Witness JAMES's testimony that he was working on that day and the short time that he was present at the statue together with evidence of the proximity of his workplace to the relevant locations.[7537] His arguments regarding Witness JAMES's place of work and the layout of the site are therefore rejected.

3289. Concerning the assessment of Witness BOZAN's evidence, the Appeals Chamber notes that, as held above, the Trial Chamber erred in stating that the witness was "implicated in the massacres at Mugombwa and was said that have had a machete when he went there" as the Trial Chamber did not make such findings anywhere in the Trial Judgement and that they are not supported by the evidence on the record.[7538] However, the Appeals Chamber considers that this mistake has no

[7534] Ndayambaje Appeal Brief, para. 640. *See also* Ndayambaje Reply Brief, para. 263.
[7535] Prosecution Response Brief, paras. 2500-2502. *See also* AT. 21 April 2015 p. 59.
[7536] Prosecution Response Brief, para. 2503.
[7537] *See* Trial Judgement, paras. 4737, 4739; Witness JAMES, T. 2 June 2008 pp. 50-51 (closed session).
[7538] Trial Judgement, para. 4744. *See also supra*, para. 3014. The Trial Chamber confused Witness BOZAN's name with that of another person bearing the same first name. *See supra*, para. 3015.

bearing on the Trial Chamber's findings pertaining to the abduction because the Trial Chamber found that Witness BOZAN's evidence of his presence at the Virgin Mary Statue for a short period of time was not necessarily inconsistent with evidence of Witness QAR's and Ndayambaje's presence at the statue.[7539] Ndayambaje does not demonstrate that the Trial Chamber erred in this respect.

3290. The Trial Judgement also reflects that the Trial Chamber did consider Witness BOZAN's evidence that the abduction took place in mid-May 1994 when Ndayambaje was not *bourgmestre* of Muganza Commune but preferred the detailed evidence of Witness QAF concerning this event.[7540] Recalling that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible,[7541] the Appeals Chamber dismisses Ndayambaje's contention that the Trial Chamber erred in not preferring Witness BOZAN's account of when the incident occurred.

3291. For these reasons, the Appeals finds that Ndayambaje has not demonstrated that the Trial Chamber erred in relying on Witness QAR's evidence despite Witnesses JAMES's and BOZAN's evidence.

(b) Witness MUZIK

3292. The Trial Chamber found that Witness MUZIK's account of the abduction was not credible because he was not present during the abduction but accepted his testimony to the extent that it corroborated Witness QAR's evidence that the abducted women and girls were killed at Gasenyi.[7542]

3293. Ndayambaje argues that the Trial Chamber erred in finding that Witness MUZIK was not credible because he was not present during the abduction and could not save the girls despite relying on other aspects of his testimony that corroborated that of Witness QAR.[7543] He also submits that the Trial Chamber erroneously ignored that Witness MUZIK's testimony that he

[7539] Trial Judgement, para. 4745.
[7540] Trial Judgement, paras. 4716, 4717, fn. 12529.
[7541] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7542] Trial Judgement, paras. 4725, 4729, 4731.
[7543] Ndayambaje Appeal Brief, para. 644, *referring to* Trial Judgement, para. 4731. *See also ibid.*, fn. 276. Ndayambaje argues that the Trial Chamber not only deliberately ignored the efforts made by Witness MUZIK to rescue the girls but also failed to draw a similar negative inference as it pertains to Witness FAU's failure to protect Nambaje. *See ibid.*, para. 644.

reported the incident to the then *bourgmestre* of Muganza Commune, who was not Ndayambaje, confirmed that the abduction occurred well before Ndayambaje's Swearing-In Ceremony.[7544]

3294. The Prosecution responds that the Trial Chamber was correct to find that Witness MUZIK's testimony was not credible.[7545]

3295. The Appeals Chamber notes that, although the Trial Chamber referred to Witness MUZIK's inability to prevent the death of the two Tutsi girls he had in custody, the Trial Judgement reflects that the Trial Chamber rejected Witness MUZIK's testimony on their abduction because he was not present during the incident and that his evidence was therefore "questionable", which the Appeals Chamber understands to mean that the evidence lacked probative value.[7546] Ndayambaje does not demonstrate the unreasonableness of this finding.

3296. A review of the Trial Judgement also shows that the Trial Chamber considered Witness MUZIK's evidence that the abduction took place in mid-May 1994 when Ndayambaje was not *bourgmestre* of Muganza Commune but preferred the detailed evidence of Witness QAF in this regard.[7547] Ndayambaje does not show that the Trial Chamber erred in the exercise of its discretion in the assessment of the evidence in reaching its conclusion.

3297. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of Witness MUZIK's testimony relevant to the abduction in Mugombwa.

(c) Witnesses ANGES, Stan, and Ndayambaje

3298. The Trial Chamber noted that Ndayambaje gave hearsay testimony about the attack and that Witnesses ANGES and Stan corroborated Witness QAR's testimony that the group of abductees included adolescent girls and that the women and girls were taken to Gasenyi, where they were killed.[7548]

3299. Ndayambaje submits that Witnesses ANGES's and Stan's testimonies that they were aware of the abduction of women and girls in mid-May 1994, but did not see or hear about his involvement contradict "the possibility that this event was the consequence of the swearing-in ceremony."[7549] Ndayambaje submits that the Trial Chamber also failed to take into account his own

[7544] Ndayambaje Appeal Brief, para. 643. *See also* Ndayambaje Reply Brief, para. 263.
[7545] Prosecution Response Brief, paras. 2505, 2506.
[7546] Trial Judgement, paras. 4684, 4731.
[7547] Trial Judgement, paras. 4716, 4717, fn. 12529.
[7548] Trial Judgement, paras. 4720, 4726, 4729.
[7549] Ndayambaje Appeal Brief, para. 645.

evidence that he was not involved in the abduction, about which he learned in mid-May 1994, prior to his swearing-in ceremony.[7550]

3300. The Prosecution responds that Ndayambaje's reliance on the evidence of Witnesses ANGES and Stan as well as on his own testimony is "unwarranted, since the Trial Chamber rejected the testimony of all three".[7551]

3301. The Appeals Chamber notes that the Trial Chamber summarised the evidence of Witnesses ANGES and Stan to which Ndayambaje points and referred to it in its deliberations on the abduction,[7552] which shows that it did not ignore this evidence. Similarly, the Trial Chamber referred to Ndayambaje's testimony.[7553] Ndayambaje's suggestion that the Trial Chamber failed to consider this evidence is therefore without merit. To the extent that Ndayambaje also intended to challenge the Trial Chamber's assessment of the evidence, the Appeals Chamber dismisses Ndayambaje's claim in the absence of a demonstration of how the Trial Chamber abused its discretion in assessing this evidence.

3302. Accordingly, the Appeals Chamber rejects Ndayambaje's contention regarding the assessment of his testimony as well as the testimonies of Witnesses ANGES and Stan related to the abduction of the Tutsi women and girls in Mugombwa.

3. Criminal Responsibility

3303. Having regard to the events that preceded the abductions, and the situation in Rwanda generally, and considering that the assailants asked Ndayambaje what they should do with the abducted Tutsi women and girls at the Virgin Mary Statue, the Trial Chamber found that Ndayambaje must have known of the assailants' genocidal intent.[7554] It also found that the killings of the abducted women and girls "taken by themselves or collectively [with the killing of Tutsis at Mugombwa Church and Kabuye Hill] occurred on a large scale."[7555] As noted above, the Trial Chamber concluded that Ndayambaje was responsible of instigating genocide, persecution and extermination as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of the abducted women and girls.[7556]

[7550] Ndayambaje Appeal Brief, para. 646
[7551] Prosecution Response Brief, para. 2508 (internal references omitted).
[7552] Trial Judgement, paras. 4696-4699, 4720, 4726, 4729.
[7553] Trial Judgement, para. 4707.
[7554] Trial Judgement, paras. 5958, 6065.
[7555] Trial Judgement, para. 6065. *See also ibid.*, para. 6064.
[7556] Trial Judgement, paras. 5955-5959, 6064, 6066, 6107, 6108, 6125, 6175, 6176, 6186.

3304. Ndayambaje submits that there is no evidence establishing that the assailants from Saga received instructions at his swearing-in ceremony or attended the event, or evidence supporting the inference that they possessed genocidal intent.[7557] He claims that, consequently, he could not know of their genocidal intent.[7558] In his view, it was deliberate on the part of the Trial Chamber to maintain confusion between the group of assailants from Baziro which were found to have acted pursuant to the instructions received at the ceremony and the group of assailants from Saga.[7559]

3305. The Appeals Chamber also understands Ndayambaje to contend that the Trial Chamber erred in convicting him of extermination in relation to the abduction because the abduction of eight identifiable women and girls in Mugombwa and of Nambaje in Baziro does not satisfy the large scale requirement that characterises the crime of extermination.[7560]

3306. The Prosecution responds that Ndayambaje's claim that the evidence did not establish that the attackers had genocidal intent is unsubstantiated and should therefore be dismissed.[7561] It also contends that Ndayambaje overlooks that the killings of Nambaje and the child she was taking care of and the eight women and girls abducted from Mugombwa were part of a larger pattern of killings following the swearing-in ceremony.[7562] It adds that the victims of the post-swearing-in wave of violence were also linked to the previous mass killings committed at Mugombwa Church and Kabuye Hill and that it would be artificial to consider these killings of victims targeted because of their Tutsi ethnicity in isolation.[7563]

3307. Ndayambaje replies in relation to the crime of extermination that it "is not sufficient for the actions in question to be within the context of 'a larger pattern'" and that the "killing of ten people, even under these circumstances, did not meet the criterion of a 'substantial contribution to extermination'" required for a conviction for extermination.[7564]

[7557] Ndayambaje Appeal Brief, para. 664.
[7558] Ndayambaje Appeal Brief, para. 664.
[7559] Ndayambaje Appeal Brief, para. 665. *See also* AT. 21 April 2015 p. 30.
[7560] Ndayambaje Appeal Brief, paras. 666, 667, *referring to Mpambara* Trial Judgement, paras. 9-11, *Zigiranyirazo* Trial Judgement, para. 438. Ndayambaje also refers to the fact that the girls were abducted by a group of identifiable attackers, coming from a commune other than Ndayambaje's and whose intentions Ndayambaje neither shared nor knew, and that Witness QAR, whom Ndayambaje and everyone knew to be a Tutsi, was released. *See ibid*., para. 666. The Appeals Chamber understands Ndayambaje's reference to the number of victims as relating to the large scale requirement of the crime of extermination as a crime against humanity, but fails to see how the fact that the group was composed of "perfectly identifiable" girls and abducted by a group of "identifiable" attackers demonstrates that the elements of the crime of extermination were not met.
[7561] Prosecution Response Brief, para. 2513.
[7562] Prosecution Response Brief, para. 2514, *referring to Lukić and Lukić* Appeal Judgement, para. 538.
[7563] Prosecution Response Brief, para. 2514.
[7564] Ndayambaje Reply Brief, para. 271, *referring*, *inter alia*, *to Bagosora and Nsengiyumva* Appeal Judgement, para. 396.

3308. The Appeals Chamber notes that the Trial Chamber found that the individuals responsible for the killing of the abducted Tutsi women and girls had genocidal intent based on "the widespread killing of Tutsis throughout Rwanda as well as the fact that the assailants who abducted Nambaje came to a house claiming to look for Tutsis".[7565] The Appeals Chamber recalls its finding that the Trial Chamber erred in considering the abduction of Nambaje and the abduction of the Tutsi women and girls as one event and in convicting Ndayambaje for the abduction of Nambaje.[7566] In this context, the Appeals Chamber finds that the Trial Chamber could not reasonably rely on the circumstances of the abduction of Nambaje to infer the *mens rea* of those who abducted and killed the Tutsi women and girls from Mugombwa Sector. However, Ndayambaje does not demonstrate that no reasonable trier of fact could have concluded that the assailants possessed genocidal intent based on "the widespread killing of Tutsis throughout Rwanda" at the relevant time and the fact that the abducted women and girls were targeted because they were Tutsis.[7567] As Ndayambaje does not show that the Trial Chamber erred in finding that the assailants had genocidal intent, his argument that he could not know of their genocidal intent because they had no such intent is similarly rejected.

3309. With respect to the crime of extermination, the Appeals Chamber recalls that the *actus reus* of extermination is the act of killing on a large scale.[7568] "Large scale" does not suggest a strict numerical approach with a minimum number of victims.[7569] The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.[7570] Relevant factors include, *inter alia*, the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.[7571]

3310. It is unclear whether the individual killing of the eight abducted Tutsi women and girls Witness QAR testified about could be considered to meet the "large scale" requirement.[7572] In any event, the Appeals Chamber finds that the Trial Chamber did not err in finding that, taken collectively with the killings perpetrated at Mugombwa Church and Kabuye Hill for which

[7565] Trial Judgement, para. 5954.
[7566] *See supra*, Section IX.H.1(a).
[7567] Trial Judgement, paras. 4708, 5954. The Appeals Chamber finds no merit in Ndayambaje's argument that Witness QAR, known to be a Tutsi, was nonetheless released.
[7568] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 660; *Lukić and Lukić* Appeal Judgement, para. 536; *Bagosora and Nsengiyumva* Appeal Judgement, para. 394; *Ntakirutimana* Appeal Judgement, para. 516. The Appeals Chamber notes that Ndayambaje failed to raise the alleged error pertaining to the crime of extermination in his notice of appeal. However, since the Prosecution did not object on this basis and responded to Ndayambaje's submission, the Appeals Chamber will exercise its discretion to consider Ndayambaje's arguments developed in his appeal brief.
[7569] *See*, *e.g.*, *Lukić and Lukić* Appeal Judgement, para. 537; *Rukundo* Appeal Judgement, para. 185; *Ntakirutimana* Appeal Judgement, para. 516. *See also Bagosora and Nsengiyumva* Appeal Judgement, fn. 924.
[7570] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.
[7571] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.

Ndayambaje was also convicted, the killing of the group of abducted women and girls "occurred on a large scale". The Appeals Chamber observes that the killing of the abducted women and girls was perpetrated in the same commune as the Mugombwa Church massacre and not far from the Kabuye Hill attacks,[7573] that Ndayambaje similarly encouraged by his presence or his words the assailants to perpetrate the crimes,[7574] and that the victims were not targeted in their individual capacity but as part of a collective aim to exterminate the Tutsis.[7575] The instant situation therefore differs from the situation addressed in the *Bagosora and Nsengiyumva* Appeal Judgement which Ndayambaje relies upon in support of his contention that the "large scale" requirement was not met regarding the killings of the abducted women and girls.[7576]

3311. In the circumstances of this case, the Appeals Chamber finds no error in the Trial Chamber's collective consideration of the events on the basis of which Ndayambaje was convicted to find him guilty of extermination as a crime against humanity for the killings of the group of abducted Tutsi women and girls.[7577] The Appeals Chamber dismisses Ndayambaje's argument in this respect.

4. Conclusion

3312. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering that Nambaje was part of the same group of abducted women and girls Witness QAR testified about and, consequently, in convicting Ndayambaje for instigating her killing through his words at the Virgin Mary Statue. However, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in finding him responsible for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls from Mugombwa Sector based on his utterances at the Virgin Mary Statue in June 1994.

[7572] *Cf. Lukić and Lukić* Appeal Judgement, para. 537.
[7573] *See* Trial Judgement, paras. 1018, 1398, 5949.
[7574] *See* Trial Judgement, paras. 5754, 5757, 5774, 5955.
[7575] Trial Judgement, paras. 5756, 5773, 5954. The Appeals Chamber is mindful that there is no genocidal intent requirement for the crime of extermination as a crime against humanity. However, the Appeals Chamber finds that the Trial Chamber's findings with respect to the perpetrators' and Ndayambaje's genocidal intent are relevant in this case to establish that the killings were directed against Tutsis as a collective group rather than victims in their individual capacities.
[7576] *See also supra*, para. 2125.
[7577] The Appeals Chamber nonetheless recalls that it has concluded that the Trial Chamber erred in convicting Ndayambaje for instigating the killing of Nambaje in June 1994. *See supra*, Section IX.H.1(a).

3313. Accordingly, the Appeals Chamber grants in part Ground 20 of Ndayambaje's appeal and reverses Ndayambaje's convictions for instigating the killing of Nambaje. It will discuss the impact of this finding, if any, in Section XII below. The Appeals Chamber dismisses the remainder of Ground 20 of Ndayambaje's appeal.

X. APPEAL OF THE PROSECUTION

3314. The Trial Chamber found that Nsabimana's Swearing-In Ceremony held on 19 April 1994 was attended by President Sindikubwabo, Prime Minister Kambanda, Nyiramasuhuko, Kanyabashi, and a number of ministers from the Interim Government.[7578] It held that the speeches given at this ceremony by Prime Minister Kambanda and President Sindikubwabo were inflammatory and contained coded language that was understood by the attendees and the public as a call to identify and kill Tutsis and their accomplices.[7579] The Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches contributed to triggering the subsequent widespread killings and large-scale massacres in Butare Prefecture that constituted genocide,[7580] thereby advocating and inciting genocide and contributing to these genocidal killings.[7581]

3315. The Trial Chamber determined that Kanyabashi's presence at the ceremony and his failure to dissociate himself from the statements made by Kambanda and Sindikubwabo constituted tacit approval of their inflammatory statements and the directives and instructions to the population contained therein.[7582] It also found that Kanyabashi gave his own speech ("Kanyabashi's Speech") following those of Kambanda and Sindikubwabo, which supported their message and contained a commitment to execute the directives and instructions they announced.[7583] The Trial Chamber, however, did not find that Kanyabashi's Speech was inflammatory or that it substantially contributed to the genocide that followed.[7584] It concluded that, although Kanyabashi stated his support and commitment for the preceding speeches, his conduct did not rise to the level of directly inciting genocide and that the Prosecution had not adduced sufficient evidence to support that Kanyabashi substantially contributed to any incitement made by Kambanda, Sindikubwabo, or other speakers at the ceremony.[7585] Accordingly, the Trial Chamber acquitted Kanyabashi of genocide and of direct and public incitement to commit genocide in relation to the speech he made at Nsabimana's Swearing-In Ceremony.[7586]

3316. The Prosecution advances two grounds of appeal challenging Kanyabashi's acquittals on the charges of genocide and direct and public incitement to commit genocide based on Kanyabashi's

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[7578] Trial Judgement, para. 865.
[7579] Trial Judgement, paras. 890, 898, 911, 925. *See also ibid.*, paras. 5671, 5676, 5738, 5990.
[7580] Trial Judgement, paras. 932, 5673, 5741, 5753. *See also ibid*., paras. 933, 5742, 5746.
[7581] Trial Judgement, paras. 5753, 5992.
[7582] Trial Judgement, paras. 918, 926, 5712, 5739.
[7583] Trial Judgement, paras. 910, 911, 918, 926, 5713, 5740, 5992. *See also ibid.*, paras. 917 ("the words used by Kanyabashi when he concluded his speech […] constituted an unambiguous commitment to support the objectives of the Interim Government as set forth in the speeches of Sindikubabwo and Kambanda."), 5752 ("Kanyabashi gave his own speech in which he supported their message and committed to carrying out their instructions.").
[7584] Trial Judgement, para. 5753.
[7585] Trial Judgement, para. 5993.
[7586] *See* Trial Judgement, paras. 5753, 5994.

Speech at Nsabimana's Swearing-In Ceremony.[7587] It argues that the Trial Chamber erred in failing to find that Kanyabashi's express support to Kambanda's and Sindikubwabo's inflammatory speeches and his promise to carry out their directives to kill Tutsis made him criminally liable for the resulting genocide and also constituted direct and public incitement to commit genocide.[7588] The Prosecution submits that the Trial Chamber erred in acquitting Kanyabashi of the crime of genocide that he committed or, in the alternative, instigated or aided and abetted, by delivering his speech on 19 April 1994 and in not finding him responsible for committing or aiding and abetting direct and public incitement to commit genocide through his speech.[7589] The Prosecution therefore requests that, for his speech at Nsabimana's Swearing-In Ceremony, the Appeals Chamber: (i) convict Kanyabashi of committing or, in the alternative, instigating or aiding and abetting genocide;[7590] (ii) convict Kanyabashi of committing or, in the alternative, aiding and abetting direct and public incitement to commit genocide;[7591] and accordingly (iii) impose a life sentence on Kanyabashi or, in the alternative, substantially increase his sentence.[7592]

3317. Kanyabashi responds that the Prosecution fails to demonstrate that the Trial Chamber erred by acquitting him of genocide and direct and public incitement to commit genocide for his speech at Nsabimana's Swearing-In Ceremony and that there is no ground to increase his sentence.[7593] In addition, Kanyabashi raises seven supplementary grounds of appeal challenging the Trial Chamber's findings concerning Nsabimana's Swearing-In Ceremony on which the Prosecution relies in support of its submissions.[7594]

[7587] Prosecution Notice of Appeal, paras. 2-5; Prosecution Appeal Brief, paras. 1-44. *See also* AT. 22 April 2015 pp. 3-9.
[7588] Prosecution Appeal Brief, para. 2.
[7589] Prosecution Notice of Appeal, paras. 3, 5; Prosecution Appeal Brief, paras. 9-40.
[7590] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 9, 19, 23, 27, 42.
[7591] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 2, 9, 32, 40, 43.
[7592] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 9, 41, 44.
[7593] Kanyabashi Response Brief, paras. 120, 121, 138, 141, 143, 155, 164, 165, 168. Kanyabashi adds that entering a new conviction on appeal would violate his fundamental right to appeal and that, in any event, an increase of his current sentence of 35 years would not be in the interests of justice. *See ibid.*, paras. 166, 167.
[7594] Kanyabashi Response Brief, paras. 6, 15-118, *referring*, *inter alia*, *to* Practice Direction on Formal Requirements on Appeal, para. 5 ("if an Appellant relies on a particular ground to reverse an acquittal, the Respondent may support the acquittal on additional grounds"). Specifically, Kanyabashi submits that the Trial Chamber erred in: (i) in denying his request to call Fidèle Mpiranya to replace François-Xavier Munyarugerero as an expert witness to analyse the speeches delivered at Nsabimana's Swearing-In Ceremony; (ii) failing to find that the fact that he expressed support for Kambanda's speech through his speech exceeded the scope of the Indictment and could therefore not serve as a basis for entering a conviction against him; (iii) concluding that he spoke after having heard Kambanda's and Sindikubwabo's inflammatory statements; (iv) concluding that Kambanda's and Sindikubwabo's Speeches shared common themes and that Kambanda's Speech was inflammatory; (v) finding that his speech constituted an unambiguous commitment to support the objectives of the Interim Government as set forth in Kambanda's and Sindikubwabo's Speeches; (vi) limiting its acceptance of the defence of duress he raised at trial to the count of conspiracy to commit genocide; and (vii) finding that Kambanda's and Sindikubwabo's Speeches triggered the massacres in Butare Prefecture. *See idem. See also* AT. 22 April 2015 pp. 9-22.

3318. The Appeals Chamber will first address the Prosecution's submissions relating to Kanyabashi's responsibility for genocide before turning to its submissions concerning Kanyabashi's responsibility for direct and public incitement to commit genocide.

A. Crime of Genocide (Ground 1)

3319. As noted above, the Prosecution submits that the Trial Chamber erred in not convicting Kanyabashi of committing or, in the alternative, instigating or aiding and abetting genocide through his speech at Nsabimana's Swearing-In Ceremony.[7595]

1. Committing Responsibility

3320. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech was not inflammatory and consequently not a trigger for the genocide that followed in Butare Prefecture as well as in failing to find that Kanyabashi was responsible for committing genocide.[7596] In support of its contentions, the Prosecution argues that a plain reading of Kanyabashi's Speech shows that, rather than dissociating himself from Kambanda's and Sindikubwabo's inflammatory statements, he approved and embraced as his own their genocidal instructions.[7597] It contends that Kanyabashi's influential position and leadership role in the community gave weight to his endorsement and that, considered in context, his speech was as inflammatory and as much a trigger for the ensuing genocide as Kambanda's and Sindikubwabo's Speeches.[7598] As such, the Prosecution argues that Kanyabashi's call to support and implement instructions to commit genocide was as much an integral part of the genocide as the carrying out of the killings by the physical perpetrators and, therefore, constitutes the *actus reus* of committing genocide.[7599] It further submits that the Trial Chamber's findings provide a basis for the conclusion that Kanyabashi acted with genocidal intent when he pronounced his speech at the ceremony.[7600] The Prosecution therefore requests the Appeals Chamber to enter a conviction against Kanyabashi for committing genocide under Count 2 of the Kanyabashi Indictment for the mass killings that were triggered in Butare.[7601]

3321. Kanyabashi responds that the Prosecution does not demonstrate any error in the Trial Judgement justifying a reversal of his acquittal for committing genocide on the basis of the speech he delivered at Nsabimana's Swearing-In Ceremony.[7602] He contends that the conclusion that he is responsible for committing genocide through this speech is not the only reasonable one from the

[7595] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 9, 19, 23, 27, 42.
[7596] Prosecution Appeal Brief, paras. 10, 15, 19. *See also* AT. 22 April 2015 pp. 3, 8, 9.
[7597] Prosecution Appeal Brief, paras. 10, 13.
[7598] Prosecution Appeal Brief, paras. 10, 12, 14, 15. The Prosecution contends that Kanyabashi's Speech should not have been viewed in isolation as all three speeches were part of the same event and "were elements of one composite unified call to violence." *See ibid.*, para. 14. *See also* Prosecution Reply Brief, paras. 42-44.
[7599] Prosecution Appeal Brief, paras. 10, 11, 16, *referring to Munyakazi* Appeal Judgement, para. 135, *Seromba* Appeal Judgement, paras. 161, 171, *Gacumbitsi* Appeal Judgement, para. 60. *See also* Prosecution Reply Brief, paras. 67-70; AT. 22 April 2015 p. 8.
[7600] Prosecution Appeal Brief, paras. 17, 18.
[7601] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 19, 42.

evidence and that it is not demonstrated beyond reasonable doubt that his speech had any impact on the subsequent killings and massacres.[7603] Kanyabashi further submits that the jurisprudence quoted by the Prosecution cannot lead to his conviction because it concerns accused who were intimately linked with the crimes committed whereas the evidence in this case is not even sufficient to support a conviction for aiding and abetting genocide.[7604]

3322. The Appeals Chamber has held in relation to genocide that "committing" under Article 6(1) of the Statute, which envisions the physical perpetration of a crime, does not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crime.[7605] The question is whether an accused's conduct was "as much an integral part of the [crimes] as were the killings which it enabled."[7606] In the cases where the Appeals Chamber has concluded that an accused's role constituted an integral part of the crimes, the accused were present at the crime scene and conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators.[7607]

3323. Even if the Appeals Chamber were to overturn the Trial Chamber's findings that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the subsequent killings, it is not convinced that Kanyabashi's approval of Kambanda's and Sindikubwabo's Speeches, his position of authority, and the contents of his speech are sufficient to qualify Kanyabashi's overall conduct as that of "committing" genocide. The Appeals Chamber considers that, where it is not established that the accused was present at the scene of the crimes, conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators, making a speech days, if not weeks, before the physical perpetration of killings cannot be deemed to constitute "direct participation in the *actus reus*" of the killings. Nor can such circumstances compel the conclusion that the conduct of the individual who gave the speech was as much an integral part of the genocide as were the killings which it allegedly enabled. In the view of the Appeals Chamber, the notion of commission by playing an integral part in the crime is not as expansive as the Prosecution argues in the present case. Consequently, the Appeals Chamber finds it unnecessary to discuss the Prosecution's submissions concerning Kanyabashi's genocidal intent.

[7602] Kanyabashi Response Brief, paras. 126, 138. *See also* AT. 22 April 2015 pp. 20-22.
[7603] Kanyabashi Response Brief, paras. 126, 128, 131.
[7604] Kanyabashi Response Brief, para. 130.
[7605] *Munyakazi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60.
[7606] *Munyakazi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60. *See also Nzabonimana* Appeal Judgement, para. 477.
[7607] *See Munyakazi* Appeal Judgement, paras. 135, 136; *Seromba* Appeal Judgement, paras. 171, 172; *Gacumbitsi* Appeal Judgement, paras. 60, 61. *See also Nzabonimana* Appeal Judgement, para. 477; *Kalimanzira* Appeal Judgement, paras. 219, 220.

3324. The Appeals Chamber therefore dismisses this aspect of the Prosecution's appeal.

2. Instigating Responsibility

3325. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's conduct did not substantially contribute to the massacres in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony as well as in failing to conclude, on the basis of its own factual findings, that Kanyabashi's Speech amounted to instigating genocide.[7608] The Prosecution contends that "[t]he prompting here was Kanyabashi's public commitment that he and the population would carry out the instructions to massacre Tutsis" and that "[t]he substantial contribution his prompting made to the commission of genocide flowed from the weight of his authority, as the elder of the Butare *bourgmestres*, and the influence and respect he commanded among the people."[7609] It further contends that Kanyabashi was, at a minimum, aware of the substantial likelihood that massacres would be committed following his speech.[7610] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for instigating genocide under Count 2 of the Kanyabashi Indictment.[7611]

3326. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred by acquitting him of instigating genocide for his speech at Nsabimana's Swearing-In Ceremony.[7612] In Kanyabashi's view, there is no basis to conclude that the three speeches were elements of one composite unified call to violence and that it is not the only reasonable conclusion from the evidence.[7613] Kanyabashi submits that the jurisprudence quoted by the Prosecution shows that it needed to establish a link between his speech and the killings that followed and that such a connection was not established in this case.[7614]

3327. The Appeals Chamber recalls that the *actus reus* of instigating is to prompt another person to commit an offence.[7615] It is not necessary to prove that the accused was present when the

[7608] Prosecution Appeal Brief, paras. 20, 23. *See also* AT. 22 April 2015 p. 8.
[7609] Prosecution Appeal Brief, para. 21 (internal references omitted), *referring to* Trial Judgement, paras. 795, 932, 6255. *See also* Prosecution Reply Brief, paras. 46, 47, 56-58.
[7610] Prosecution Appeal Brief, para. 22.
[7611] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 23, 42.
[7612] Kanyabashi Response Brief, paras. 139, 141.
[7613] Kanyabashi Response Brief, paras. 128, 139. Kanyabashi also submits that he was acquitted of conspiracy to commit genocide and that the Prosecution did not appeal this conclusion. *See ibid.*, para. 128. Regarding the *mens rea*, Kanyabashi asserts that the Prosecution only relies on Expert Witness Guichaoua and that it goes beyond the weight that can be given to an expert witness's testimony. *See ibid.*, paras. 129, 140.
[7614] Kanyabashi Response Brief, para. 139, *referring to Seromba* Appeal Judgement, para. 45.
[7615] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 146; *Nahimana et al.* Appeal Judgement, para. 480; *Kordić and Čerkez* Appeal Judgement, para. 27.

instigated crime was committed[7616] or that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[7617]

3328. The Trial Chamber found that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the genocide in Butare Prefecture that followed the ceremony.[7618] The Trial Chamber did not further discuss Kanyabashi's alleged responsibility for instigating genocide in relation to his speech. The Appeals Chamber is not persuaded by the Prosecution's contention that Kanyabashi's conduct as found by the Trial Chamber satisfies the *actus reus* of instigating. As noted above, the Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to identify and kill Tutsis and their accomplices, and that Kanyabashi gave a speech following those of Kambanda and Sindikubwabo, in which he supported their message and committed to execute their directives and instructions. The Appeals Chamber considers that Kanyabashi's commitment to execute the directives and instructions announced by Kambanda and Sindikubwabo to identify and kill Tutsis does not necessarily amount to *prompting* the attendees or the people in Butare Prefecture to kill Tutsis.[7619] In the absence of any evidence discussed by the Trial Chamber or pointed out by the Prosecution that Kanyabashi's Speech was understood as instigating the killing of Tutsis or had any impact on the conduct of those who subsequently committed killings,[7620] the Appeals Chamber finds that a reasonable trier of fact could have concluded that Kanyabashi did not instigate genocide through his speech.

3329. In light of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in not finding that Kanyabashi's Speech prompted the people in Butare Prefecture to kill Tutsis and that Kanyabashi was therefore liable for instigating genocide. The Appeals Chamber therefore dismisses this part of the Prosecution's appeal.

3. Aiding and Abetting Responsibility

3330. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not substantially contribute to the subsequent massacres and, contrary to

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[7616] *Nahimana et al.* Appeal Judgement, para. 660. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 125, fn. 347.
[7617] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 146; *Nahimana et al.* Appeal Judgement, paras. 480, 660; *Kordić and Čerkez* Appeal Judgement, para. 27.
[7618] Trial Judgement, para. 5753.
[7619] The Black's Law Dictionary defines the verb "prompt" as "to incite, especially to immediate action". *See* Black's Law Dictionary, 9th edition, 2009. In the Oxford Dictionary the verb "prompt" is defined as "to incite to action; to move or induce (a person, etc.) *to* or *to do* something". *See* Oxford English Dictionary, 2015.
[7620] *See also infra*, para. 3333.

its own factual findings, in failing to conclude that his speech constituted aiding and abetting genocide.[7621] It contends that Kanyabashi's contribution to the ensuing massacres was rendered substantial when he committed to Kambanda's and Sindikubwabo's instructions to massacre Tutsis, embraced these instructions as his own, and lent moral support through his influential position.[7622] The Prosecution further argues that Kanyabashi's endorsement of and promise to execute the Interim Government's genocidal instructions while knowing that mass killings were taking place in neighbouring prefectures signaled, at a minimum, that he knew of the likelihood that genocide would be committed following the speeches and that his conduct would assist in its commission.[7623] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for aiding and abetting genocide under Count 2 of the Kanyabashi Indictment.[7624]

3331. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred in finding that his speech did not substantially contribute to the killings that followed in Butare Prefecture.[7625] He reiterates that the conclusion that the three speeches were elements of one composite unified call to violence is not the only reasonable conclusion from the evidence.[7626] Kanyabashi further restates that his speech did not substantially contribute to the killings that followed Nsabimana's Swearing-In Ceremony since no link was established between his speech and the principal perpetrators of the killings.[7627]

3332. The Appeals Chamber recalls that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[7628] It is also well-established "that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required" as long as "the support of the aider and abettor has a substantial effect upon the perpetration of the crime."[7629] Whether a particular contribution qualifies as "substantial" is a

[7621] Prosecution Appeal Brief, paras. 24, 27. *See also* AT. 22 April 2015 p. 8.
[7622] Prosecution Appeal Brief, para. 25.
[7623] Prosecution Appeal Brief, para. 26.
[7624] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, para. 27.
[7625] Kanyabashi Response Brief, paras. 142, 143. Kanyabashi contends that the Prosecution does not rely on any evidence to state that Kanyabashi was an influential figure in all Butare Prefecture. *See ibid.*, paras. 127, 142.
[7626] Kanyabashi Response Brief, paras. 128, 142. Kanyabashi also submits that he was acquitted of conspiracy to commit genocide and that the Prosecution did not appeal this conclusion. *See ibid.*, para. 128.
[7627] Kanyabashi Response Brief, paras. 126, 130, 132-137, 142, 143. Regarding the *mens rea*, Kanyabashi argues that the Prosecution only relies on the evidence of Prosecution Expert Witness Guichaoua which goes beyond the weight that can be given to an expert witness's testimony. *See ibid.*, paras. 128, 142, 144.
[7628] *Šainović et al.* Appeal Judgement, para. 1649. *See also Popović et al.* Appeal Judgement, para. 1758; *Blaškić* Appeal Judgement, para. 46.
[7629] *Brđanin* Appeal Judgement, para. 348. *See also Simić* Appeal Judgement, para. 85; *Blaskić* Appeal Judgement, paras. 46, 48; *Kayishema and Ruzindana* Appeal Judgement, para. 201.

fact-based inquiry.[7630] Moreover, the *actus reus* may occur before, during, or after the principal crime has been perpetrated and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[7631] The Appeals Chamber further recalls that it is not necessary for the principal perpetrator to be aware of the aider and abettor's contribution.[7632]

3333. The Appeals Chamber is not persuaded that the Trial Chamber erred in finding that Kanyabashi's Speech did not substantially contribute to the genocide in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony.[7633] The Appeals Chamber notes that, although the Trial Chamber appears to have primarily relied on its finding that Kanyabashi's Speech was not inflammatory to reach its conclusion, it also relied on "the evidence in its totality".[7634] The Prosecution fails to demonstrate that the evidence on the record shows otherwise and eliminates all reasonable doubt that Kanyabashi's Speech substantially contributed to the subsequent massacres in Butare Prefecture. Indeed, the Appeals Chamber observes that, while the Trial Chamber found that Kambanda's and Sindikubwabo's Speeches contributed to the genocide in Butare Prefecture,[7635] the Prosecution does not point to any evidence to support the conclusion that Kanyabashi's Speech did.[7636] In particular, the Prosecution does not point to any evidence showing or suggesting that Kanyabashi's supportive message and commitment to execute Kambanda's and Sindikubwabo's instructions encouraged or provided moral support to the attendees or the people of Butare Prefecture to kill Tutsis. The Prosecution also does not rely on any evidence connecting Kanyabashi's Speech in any way to the genocidal acts that occurred in the prefecture after the swearing-in ceremony, including the massacres expressly cited by the Trial Chamber.[7637] In light of this and bearing in mind the Trial Chamber's finding that Kanyabashi's Speech was not of the same

[7630] *Lukić and Lukić* Appeal Judgement, para. 438; *Kalimanzira* Appeal Judgement, para. 86; *Blagojević and Jokić* Appeal Judgement, para. 134.
[7631] *See Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 372; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.
[7632] *Kalimanzira* Appeal Judgement, para. 87; *Tadić* Appeal Judgement, para. 229.
[7633] Trial Judgement, para. 5753.
[7634] Trial Judgement, para. 5753.
[7635] Trial Judgement, paras. 932, 5673, 5741, 5753. *See also ibid*., paras. 933, 5742, 5746. The Appeals Chamber observes that, as part of his supplementary grounds of appeal, Kanyabashi challenges the Trial Chamber's finding that Kambanda's and Sindikubwabo's Speeches triggered the genocide in Butare Prefecture that occurred after the swearing-in ceremony. *See* Kanyabashi Response Brief, paras. 109-118. The Appeals Chamber considers it unnecessary to discuss this issue in light of its conclusions on the merits of the Prosecution's appeal.
[7636] The Appeals Chamber observes that neither the Trial Chamber nor the Prosecution cited evidence showing or suggesting that Kanyabashi's Speech was one of the factors that triggered the ensuing genocide. The Trial Chamber's conclusion that Kambanda's and Sindikubwabo's Speeches triggered the genocide was primarily based on the evidence on the impact of Sindikubwabo's Speech and the evidence that widespread killings of Tutsis did not occur in Butare Prefecture prior to 19 April 1994 and that there was "overwhelming evidence that massacres in most of the Butare *communes* started in the wake of the events of 19 April 1994." *See* Trial Judgement, paras. 853-856, 927, 930, 932, 933. The Trial Chamber also cited Expert Witnesses Des Forges's and Reyntjens's testimonies that they also considered that both Kambanda's and Sindikubwabo's Speeches were factors that triggered the genocide in Butare Prefecture. *See ibid.*, paras. 640, 643-645 (Alison Des Forges), 786 (Filip Reyntjens). *See also ibid.*, paras. 668, 692-694 (André Guichaoua).
[7637] *See* Trial Judgement, para. 5753, *referring to*, *e.g.*, *ibid.*, Sections 4.2.2.3.3 (Mugombwa Church), 4.2.2.3.4 (Kabuye Hill), 4.2.2.3.6 (Kabakobwa Hill).

nature as those of Kambanda and Sindikubwabo, the Appeals Chamber finds no error in the Trial Chamber's finding that Kanyabashi's Speech did not substantially contribute to the killings in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony.

3334. In light of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Kanyabashi's Speech did not substantially contribute to the genocide that followed Nsabimana's Swearing-In Ceremony and, consequently, in not holding him criminally responsible for aiding and abetting genocide on this basis. Consequently, the Appeals Chamber finds it unnecessary to discuss the Prosecution's submissions concerning Kanyabashi's *mens rea* and dismisses this remaining part of Ground 1 of the Prosecution's appeal.

B. Crime of Direct and Public Incitement to Commit Genocide (Ground 2)

3335. As noted above, the Prosecution submits that the Trial Chamber erred in not convicting Kanyabashi of committing or, in the alternative, aiding and abetting direct and public incitement to commit genocide through his speech at Nsabimana's Swearing-In Ceremony.[7638]

1. Committing Responsibility

3336. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not directly incite genocide and, consequently, in failing to convict him of committing direct and public incitement to commit genocide.[7639] The Prosecution contends that, by unambiguously committing himself and the people under his authority to execute genocidal instructions, Kanyabashi embraced these instructions as his own and called on the population to kill Tutsis.[7640] It further submits that the Trial Chamber's findings of Kanyabashi's genocidal intent in relation to the megaphone incidents in May and June 1994 as well as the fact that he knew that genocide was raging throughout Rwanda when he gave his speech and that he knew that the instructions he promised to carry out were instructions for genocide support the conclusion that Kanyabashi acted with the required *mens rea* for direct and public incitement to commit genocide.[7641] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for committing direct and public incitement to commit genocide under Count 4 of the Kanyabashi Indictment.[7642]

3337. Kanyabashi responds that the Prosecution does not explain the alleged error of law committed by the Trial Chamber and why his guilt is the only reasonable conclusion from the evidence.[7643] He argues that the Trial Chamber did not err in its application of the jurisprudential criteria in finding that his speech did not constitute direct incitement to commit genocide.[7644]

[7638] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 2, 9, 32, 40, 43.
[7639] Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, paras. 28, 32. *See also* AT. 22 April 2015 p. 3.
[7640] Prosecution Appeal Brief, paras. 29, 30. *See also* Prosecution Reply Brief, paras. 48-53; AT. 22 April 2015 p. 7. At the appeals hearing, the Prosecution pointed out that whether an incitement is direct depends on the meaning of the words and their specific context and argued that Kanyabashi did not only promise to implement the Interim Government's objective to carry out genocide but also used genocidal language that ultimately meant that the Tutsis had to be killed. *See* AT. 22 April 2015, pp. 5, 7.
[7641] Prosecution Appeal Brief, para. 31, *referring to ibid.*, paras. 17, 18. *See also* AT. 22 April 2015 pp. 3, 7.
[7642] Prosecution Appeal Brief, para. 32.
[7643] Kanyabashi Response Brief, paras. 145, 146. *See also ibid.*, paras. 147-153.
[7644] Kanyabashi Response Brief, paras. 145, 146. *See also ibid.*, paras. 147-153. Kanyabashi also contends that there is no evidence that members of the population were present at the ceremony, that he knew that his speech was being recorded to be broadcast subsequently, and that he contributed to the drafting of Kambanda's and Sindikubwabo's Speeches. He argues that he did not have the required *mens rea* and that his speech was not made publicly. *See ibid.*, paras. 154, 155, 157; AT. 22 April 2015 pp. 20, 21.

3338. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide pursuant to Article 2(3)(c) of the Statute if he directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).[7645] Direct incitement to commit genocide requires the speech to be a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a vague or indirect suggestion.[7646]

3339. The Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to kill Tutsis and their accomplices.[7647] It also found that Kanyabashi addressed the audience after Kambanda and Sindikubwabo, that his own speech was not inflammatory but that it supported their speeches, and that his address contained a commitment to execute the directives and instructions announced by them.[7648] The Trial Chamber found that this conduct did not rise to the level of directly inciting genocide.[7649]

3340. The Appeals Chamber is not convinced by the Prosecution's contention that, by embracing as his own Kambanda's and Sindikubwabo's Speeches, Kanyabashi's Speech amounted to a call to kill Tutsis. The Appeals Chamber finds that a reasonable trier of fact could have found that Kanyabashi's support and own commitment to Kambanda's and Sindikubwabo's Speeches did not rise to the level of directly appealing to the people in Butare Prefecture to carry out Kambanda's and Sindikubwabo's genocidal instructions.[7650] Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Kanyabashi's Speech did not rise to the level of direct incitement to commit genocide and dismisses this part of the Prosecution's appeal without further consideration.

2. Aiding and Abetting Responsibility

3341. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not substantially contribute to Kambanda's and Sindikubwabo's inciting speeches and, consequently, in failing to convict Kanyabashi of aiding and abetting direct and

[7645] *Nzabonimana* Appeal Judgement, paras. 121, 231, 381; *Bikindi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 155; *Nahimana et al.* Appeal Judgement, para. 677.
[7646] *Nahimana et al.* Appeal Judgement, para. 692.
[7647] Trial Judgement, paras. 890, 898, 911, 925, 5671, 5676, 5690, 5712, 5722, 5738, 5990.
[7648] Trial Judgement, paras. 910, 911, 917, 918, 926, 5713, 5740, 5752, 5992, 5993.
[7649] Trial Judgement, para. 5993.
[7650] *See supra*, para. 3328. The Appeals Chamber finds no merit in the Prosecution's contention raised at the appeals hearing that Kanyabashi's Speech amounted to a call to kill Tutsis because he used genocidal language. The Appeals Chamber observes that the Trial Chamber expressly considered Kanyabashi's reference to the "enemy of Rwanda" and to the issue of security in his speech but concluded that Kanyabashi's Speech did not amount to an inflammatory speech. The Prosecution merely disagrees with the Trial Chamber's assessment without showing any error therein. *See* AT. 22 April 2015 pp. 5, 7; Trial Judgement, paras. 911, 5753.

public incitement to commit genocide.[7651] The Prosecution contends that Kambanda's and Sindikubwabo's Speeches amounted to direct and public incitement to commit genocide and that, by reiterating and reinforcing their message and calling for their instructions to be put into action immediately thereafter, Kanyabashi substantially contributed to their inciting acts.[7652] It argues that "all three speeches comprised a single composite event", complemented one another, and were mutually reinforcing and "brought home the same message: Tutsis must be killed."[7653] The Prosecution also asserts that the fact that Kanyabashi spoke after Kambanda and Sindikubwabo does not mean that he could not have aided and abetted their speeches since the *actus reus* of aiding and abetting may occur after the principal crime has been perpetrated.[7654] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for aiding and abetting direct and public incitement to commit genocide under Count 4 of the Kanyabashi Indictment.[7655]

3342. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred in finding that there was insufficient evidence to support the conclusion that he substantially contributed to any incitement by Kambanda and Sindikubwabo, or other speakers at the ceremony.[7656] He contends that the Trial Chamber had to be convinced beyond reasonable doubt that he knew that his speech contributed to the commission of the crime of direct and public incitement to commit genocide by Kambanda and Sindikubwabo.[7657] Kanyabashi argues that if he spoke last as argued by the Prosecution, the crimes of direct and public incitement committed by Kambanda and Sindikubwabo were already completed.[7658] He submits that, because the crime of direct and public incitement is completed as soon as the discourse in question is uttered or published even though the effects of incitement may extend in time, the Prosecution should have demonstrated that he had previously discussed with Kambanda or Sindikubwabo or that his speech contributed to or influenced their speeches, which it failed to do.[7659] In Kanyabashi's view, in the absence of any evidence that he or his speech had any impact on Kambanda's and Sindikubwabo's Speeches, it cannot be established that he substantially contributed to their speeches.[7660]

[7651] Prosecution Notice of Appeal, paras. 4, 5; Prosecution Appeal Brief, paras. 33, 40.
[7652] Prosecution Appeal Brief, paras. 34-36.
[7653] Prosecution Appeal Brief, paras. 36, 39.
[7654] Prosecution Appeal Brief, paras. 36-39.
[7655] Prosecution Appeal Brief, para. 40.
[7656] Kanyabashi Response Brief, para. 156.
[7657] Kanyabashi Response Brief, para. 161. In relation to Kambanda's and Sindikubwabo's Speeches, Kanyabashi challenges that the speeches were made publicly and submits, accordingly, that their speeches cannot constitute "public" incitement to commit genocide as required by the jurisprudence. *See ibid.*, para. 157. *See also* AT. 22 April 2015 pp. 20, 21.
[7658] Kanyabashi Response Brief, para. 161.
[7659] Kanyabashi Response Brief, paras. 161-163. Kanyabashi contends that there is no evidence that he contributed to the drafting of Kambanda's and Sindikubwabo's Speeches. *See* AT. 22 April 2015 p. 21.
[7660] Kanyabashi Response Brief, paras. 161-163.

3343. The Appeals Chamber reiterates that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".[7661] The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[7662]

3344. The Trial Chamber found that "the Prosecution [had not] adduced sufficient evidence to support that Kanyabashi substantially contributed to any incitement made by Kambanda, Sindikubwabo, or other speakers at this event."[7663] The Appeals Chamber sees no error in the Trial Chamber's determination. Even if Kambanda's and Sindikubwabo's conduct at Nsabimana's Swearing-In Ceremony were found to constitute direct and public incitement to commit genocide,[7664] nothing in the Trial Chamber's findings or in the evidence relied upon by the Prosecution sustains the conclusion that Kanyabashi's Speech substantially contributed to the perpetration of the crime of direct and public incitement to commit genocide committed by Kambanda and Sindikubwabo.

3345. As an inchoate crime,[7665] direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time,[7666] and is punishable even if no act of genocide has resulted therefrom.[7667] Accordingly, in order for Kanyabashi to be found responsible for aiding and abetting direct and public incitement to commit genocide, it would have to be established that he substantially contributed to Kambanda's and Sindikubwabo's inciting speeches themselves and not, as the Prosecution suggests, to the effects of their incitements by "reiterat[ing] and reinforc[ing] their message".[7668] The Appeals Chamber recalls that the Trial Chamber determined that Kanyabashi spoke after Kambanda and Sindikubabwo delivered their speeches.[7669] The Prosecution points to no evidence or findings demonstrating that Kanyabashi's conduct provided substantial assistance to

[7661] *Šainović et al.* Appeal Judgement, para. 1649. *See also Popović et al.* Appeal Judgement, para. 1758; *Blaškić* Appeal Judgement, para. 46.
[7662] *See Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 372; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.
[7663] Trial Judgement, para. 5993.
[7664] The first issue raised by the Prosecution is whether Kambanda's and Sindikubwabo's conduct at Nsabimana's Swearing-In Ceremony constituted direct and public incitement to commit genocide. The Trial Chamber did not make specific legal findings in this respect. Nevertheless, in light of its conclusions on the merits of the Prosecution's appeal, the Appeals Chamber finds it unnecessary to decide this issue and to address Kanyabashi's arguments relating to the "public" nature of the speeches delivered at the ceremony. *See* Prosecution Appeal Brief, para. 34; Prosecution Reply Brief, paras. 54, 55; Kanyabashi Response Brief, para. 157; AT. 22 April 2015 pp. 7, 8, 20, 24.
[7665] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al.* Appeal Judgement, para. 678.
[7666] *Nahimana et al.* Appeal Judgement, para. 723.
[7667] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al.* Appeal Judgement, para. 678.
[7668] *See* Prosecution Appeal Brief, para. 35.
[7669] Trial Judgement, para. 910. *See also ibid.*, paras. 5752, 5992. The Appeals Chamber observes that, as part of his supplementary grounds of appeal, Kanyabashi challenges the Trial Chamber's finding that he spoke after Kambanda

Sindikubwabo or Kambanda in the commission of their direct and public incitement to commit genocide, either before, during, or after their respective speeches.

3346. In these circumstances, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that there was insufficient evidence to support the conclusion that Kanyabashi substantially contributed to any incitement made by Kambanda or Sindikubwabo during Nsabimana's Swearing-In Ceremony. The Appeals Chamber consequently dismisses this remaining part of Ground 2 of the Prosecution's appeal.

and Sindikubwabo. *See* Kanyabashi Response Brief, paras. 29-52. The Appeals Chamber finds it unnecessary to discuss the issue in light of its conclusion on the merits of the Prosecution's appeal.

C. Conclusion

3347. Based on the foregoing, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in law or in fact in acquitting Kanyabashi of genocide and direct and public incitement to commit genocide in relation to the speech he gave at Nsabimana's Swearing-In Ceremony. Accordingly, the Appeals Chamber dismisses the Prosecution's appeal in its entirety. In these circumstances, the Appeals Chamber finds that Kanyabashi's supplementary grounds have become moot and need not be addressed.

XI. SENTENCING APPEALS

3348. The Trial Chamber sentenced Nyiramasuhuko, Ntahobali, and Ndayambaje to life imprisonment and imposed sentences of 25, 30, and 35 years of imprisonment on Nsabimana, Nteziryayo, and Kanyabashi, respectively.[7670] Each convicted person challenges the Trial Chamber's sentencing determinations.[7671]

3349. Before turning to the parties' contentions, the Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[7672] As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.[7673]

[7670] Trial Judgement, para. 6271.
[7671] The Appeals Chamber observes that Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, and Ndayambaje failed to raise in their notice of appeal some of the allegations of error they developed in their appeal brief in contravention with the relevant formal requirements applicable on appeal. The Appeals Chamber refers to: (i) Nyiramasuhuko's allegations of error concerning her aggravating circumstances and the imposition of a life sentence; (ii) Ntahobali's allegation of error concerning double-counting; (iii) Nsabimana's allegation of error concerning the double-counting of the vulnerability of the victims; (iv) Nteziryayo's allegation of error regarding the principle of parity; and (v) Ndayambaje's allegations of error in relation to his aggravating factors. *See* Nyiramasuhuko Appeal Brief, paras. 1299, 1314; Ntahobali Appeal Brief, para. 988-990; Nsabimana Appeal Brief, paras. 529-531; Nteziryayo Appeal Brief, paras. 293-297; Ndayambaje Appeal Brief, paras. 684-687. Considering the nature of the allegations and the fact that the Prosecution did not object to these allegations on this basis and responded to the appellant's submissions, the Appeals Chamber will exercise its discretion to consider these allegations of error.
[7672] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 676; *Ntabakuze* Appeal Judgement, para. 264; *Ntawukulilyayo* Appeal Judgement, para. 232.
[7673] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 676; *Ntabakuze* Appeal Judgement, para. 264; *Setako* Appeal Judgement, para. 277.

A. Nyiramasuhuko's Sentencing Appeal (Ground 32)

3350. The Trial Chamber sentenced Nyiramasuhuko to a single term of life imprisonment for her convictions for conspiracy to commit genocide, genocide, extermination, rape, and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons, and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7674]

3351. Nyiramasuhuko submits that the Trial Chamber erred in: (i) its consideration of the aggravating circumstances; (ii) failing to consider certain mitigating circumstances; and (iii) sentencing her to life imprisonment.[7675] She requests that her sentence be reduced.[7676]

1. Aggravating Circumstances

3352. The Trial Chamber determined that the vast number of victims was far in excess of the threshold for extermination as a crime against humanity and considered this as an aggravating circumstance in determining Nyiramasuhuko's sentence.[7677] It further considered as an aggravating circumstance "the catastrophic number of victims across Butare *préfecture* who perished and suffered as a result of Nyiramasuhuko's participation in the conspiracy to commit genocide."[7678] It also found as an additional aggravating circumstance the numerous victims of rapes and killings at the Butare Prefecture Office, many of whom were particularly vulnerable.[7679]

3353. The Trial Chamber further took into account Nyiramasuhuko's abuse of her position of authority as an aggravating circumstance.[7680] Specifically, it held that Nyiramasuhuko's position as Minister for Family and Women's Affairs made her a person of high authority and influence who was respected throughout Rwanda and in particular in Butare Prefecture from where she came.[7681] It found that, on a number of occasions, instead of preserving peaceful co-existence between communities and the welfare of the family, she used her influence over *Interahamwe* to commit crimes such as rape and murder.[7682]

3354. Nyiramasuhuko submits that the Trial Chamber impermissibly double-counted the large number of victims at the Butare Prefecture Office as an aggravating circumstance as it had already

[7674] Trial Judgement, paras. 6186, 6271.
[7675] Nyiramasuhuko Appeal Brief, paras. 1298-1305, 1307-1314.
[7676] Nyiramasuhuko Notice of Appeal, para. 12.1; Nyiramasuhuko Appeal Brief, paras. 1298, 1315.
[7677] Trial Judgement, para. 6206.
[7678] Trial Judgement, para. 6208.
[7679] Trial Judgement, para. 6208.
[7680] Trial Judgement, para. 6207.
[7681] Trial Judgement, para. 6207.
[7682] Trial Judgement, para. 6207.

considered this when assessing the gravity of the offences.[7683] Stressing that aggravating factors must be proven beyond reasonable doubt, she contends that the Trial Chamber erred in considering the number of victims killed in relation to attacks at the prefectoral office, because its finding in this regard was "doubtful".[7684] She also argues that it was inappropriate for the Trial Chamber to consider the number of victims "across Butare Prefecture" that resulted from her participation in a conspiracy to commit genocide as an aggravating factor as the Trial Chamber could only consider the number of victims of the specific crimes for which she was convicted.[7685] Finally, Nyiramasuhuko contends that the Trial Chamber erred in considering her abuse of authority as an aggravating factor, as this was an element of the crimes for which she was convicted pursuant to Articles 6(1) and 6(3) of the Statute.[7686]

3355. The Prosecution responds that the Trial Chamber properly considered the aggravating circumstances in determining Nyiramasuhuko's sentence.[7687]

3356. The Appeals Chamber dismisses as unfounded Nyiramasuhuko's contention that the Trial Chamber improperly double-counted the number of victims at the Butare Prefecture Office in determining her sentence. Although factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances,[7688] the Appeals Chamber considers that the Trial Chamber's reference to the fact that "hundreds of Tutsis were abducted, raped and killed" at the prefectoral office in its consideration of the gravity of the offences was used to punctuate "the seriousness and atrocity of crimes repetitively perpetrated" at the prefectoral office as opposed to reflecting that the Trial Chamber considered the number of victims in determining the gravity of the offences.[7689]

3357. As for Nyiramasuhuko's submission that the Trial Chamber's finding as to the number of victims killed during attacks at the prefectoral office is "doubtful", the Appeals Chamber recalls that it has previously determined that the record is insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks in which Ntahobali participated.[7690]

[7683] Nyiramasuhuko Appeal Brief, para. 1299.
[7684] Nyiramasuhuko Appeal Brief, para. 1303, *referring*, *inter alia*, *to* Trial Judgement, para. 2779. Nyiramasuhuko further argues that it was improper for the Trial Chamber to consider "the magnitude of the crimes committed" as this was inherent in her convictions for genocide and extermination as a crime against humanity. *See ibid*., para. 1302.
[7685] Nyiramasuhuko Appeal Brief, para. 1301.
[7686] Nyiramasuhuko Appeal Brief, para. 1300.
[7687] Prosecution Response Brief, paras. 726-728. *See also* AT. 14 April 2015 pp. 57, 58.
[7688] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7689] *See* Trial Judgement, para. 6205.
[7690] *See supra*, Section V.I.2(f).

This conclusion equally applies to Nyiramasuhuko.[7691] Notwithstanding this conclusion, the Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the Trial Chamber's error in its determination of the number of refugees abducted and killed during the attacks in which she participated would have prevented a reasonable trier of fact from considering "the numerous victims of rapes and killings at the Butare *préfecture* office in particular, many of whom were particularly vulnerable" as an aggravating circumstance.[7692]

3358. Nyiramasuhuko's contention that the Trial Chamber erred in considering the number of victims across Butare Prefecture in general as an aggravating factor is equally without merit. The Appeals Chamber recalls that the Trial Chamber convicted Nyiramasuhuko of conspiracy to commit genocide against the Tutsi population throughout Butare Prefecture between 9 April 1994 and 14 July 1994 and expressly found that in doing so she took part in Cabinet meetings and Interim Government decisions that "triggered the onslaught of massacres in Butare *préfecture*".[7693] Accordingly, it was within the discretion of the Trial Chamber to consider the number of victims in Butare Prefecture in general as an aggravating circumstance.

3359. With respect to the Trial Chamber's consideration of Nyiramasuhuko's abuse of her authority as an aggravating factor, the Appeals Chamber recalls that the Trial Chamber convicted

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[7691] The Appeals Chamber recalls that the Trial Chamber's determination that Ntahobali and Nyiramasuhuko participated in attacks that led to the abduction and killing of "hundreds of Tutsi refugees" principally relies on the Trial Chamber's conclusion that "the pickup was nearly full on at least seven occasions" during the attacks from mid-May to June 1994. *See supra*, para. 1884. However, the Appeals Chamber recalls that Nyiramasuhuko was only convicted for killings on the basis of her conduct during the Mid-May Attack and the Night of Three Attacks. *See supra*, Sections IV.F.1(a), IV.F.1(c). Accordingly, the Appeals Chamber considers that no reasonable trier of fact could have determined the number of victims abducted and killed based on the seven occasions the pickup truck left the prefectoral office, as it included the Last Half of May Attacks and the First Half of June Attacks for which Nyiramasuhuko was not convicted. Consequently, no basis exists to attribute criminal responsibility to Nyiramasuhuko for ordering killings during these attacks. As regards the remaining occasion when the pickup left the prefectoral office during the attacks for which Nyiramasuhuko was convicted for killings – namely the Mid-May Attack and the Night of Three Attacks – the Appeals Chamber recalls that it has previously considered that the record is insufficient to attribute responsibility for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office for the Mid-May Attack. *See supra*, paras. 1886, 1887. Moreover, having considered the record with respect to the Night of Three Attacks, the Appeals Chamber finds that, while the evidence relied upon by the Trial Chamber paints a nearly categorical picture of numerous persons being loaded onto the vehicle accompanying Nyiramasuhuko that night, it is insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the the Night of Three Attacks. *See* Trial Judgement, paras. 2253, 2278, 2285, 2287, 2289, 2303, 2307, 2308, 2331, 2332. *See also ibid.*, paras. 2703, 2704, 2710-2712, 2714, 2732, 2736, 2738. The Appeals Chamber is of the view that, even when considering the Mid-May Attack and the Night of Three Attacks together, the record remains insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during these attacks.

[7692] Trial Judgement, para. 6208 (internal reference omitted). The Appeals Chamber also dismisses Nyiramasuhuko's contention that the Trial Chamber erred in considering "the magnitude of the crimes committed" as this was inherent in her convictions for genocide and extermination as a crime against humanity. The Appeals Chamber recalls that there is no minimum number of victims required for a conviction of genocide and that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against humanity where the extent of the killings exceeds that required for extermination. *See Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135. *See also Nzabonimana* Appeal Judgement, para. 465. Consequently, Nyiramasuhuko's position lacks merit in light of the Trial Chamber's conclusion that the killings exceeded the threshold required to establish extermination as a crime against humanity. *See* Trial Judgement, para. 6206.

[7693] *See* Trial Judgement, paras. 5669-5678, 5727, 6186.

her pursuant to Article 6(1) of the Statute for ordering the killings of Tutsis taking refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks.[7694] It also found her responsible as a superior under Article 6(3) of the Statute for these killings, which the Trial Chamber stated it would consider in sentencing.[7695] This is consistent with the jurisprudence that when, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both provisions and the accused could be found liable for both, the Trial Chamber should enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating factor in sentencing.[7696] In the present case, the Appeals Chamber, Judge Liu dissenting, finds no error in the Trial Chamber's conclusion that Nyiramasuhuko "used her influence over *Interahamwe* to commit crimes such as […] murder" and that this supported the conclusion that her "abuse of general authority" constituted an aggravating factor.[7697] In the view of the Appeals Chamber, Judge Liu dissenting, Nyiramasuhuko does not demonstrate that the Trial Chamber impermissibly double-counted an element of the crime as an aggravating factor.

3360. The Trial Chamber also convicted Nyiramasuhuko as a superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* following her orders during the Night of Three Attacks and one of the First Half of June Attacks at the Butare Prefecture Office.[7698] The Appeals Chamber recalls that a superior position in itself does not constitute an aggravating factor but that it is the abuse of such a position which may be considered as an aggravating factor.[7699] Given that Nyiramasuhuko was found to have ordered rapes but was only convicted pursuant to Article 6(3) of the Statute – which does not require proof of ordering – Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in concluding that her "abuse of general authority" constituted an aggravating factor by relying, in part, on the finding that Nyiramasuhuko "used her influence over *Interahamwe* to commit crimes such as rape".[7700] For the same reasons, she fails to demonstrate that the Trial Chamber impermissibly double-counted an element of the offence as an aggravating factor.

[7694] *See supra*, Sections IV.F.1(a), IV.F.1(c).
[7695] Trial Judgement, paras. 5886, 5970, 6052. *See also supra*, Sections IV.F.1(a), IV.F.1(c).
[7696] *Setako* Appeal Judgement, para. 266; *Renzaho* Appeal Judgement, para. 564; *Nahimana et al.* Appeal Judgement, para. 487.
[7697] Trial Judgement, para. 6207.
[7698] *See supra*, Sections IV.F.1(b), IV.F.1(c), IV.F.4.
[7699] *See*, *e.g.*, *Simba* Appeal Judgement, para. 284; *Stakić* Appeal Judgement, para. 411; *Kayishema and Ruzindana* Appeal Judgement, paras. 358, 359; *Babić* Sentencing Appeal Judgement, para. 80; *Kamuhanda* Appeal Judgement, para. 347.
[7700] Trial Judgement, para. 6207.

3361. The Appeals Chamber, Judge Liu dissenting with respect to Nyiramasuhuko's abuse of her authority as an aggravating factor, therefore dismisses Nyiramasuhuko's submissions concerning the aggravating circumstances considered by the Trial Chamber in determining her sentence.

2. Mitigating Circumstances

3362. In discussing Nyiramasuhuko's mitigating circumstances, the Trial Chamber stated that it had "considered [her] background and individual circumstances".[7701] It noted her service as a government minister and "long service in the Ministry of Health" but considered that these were "of a very limited weight, given the gravity of the crimes committed by [her]".[7702]

3363. Nyiramasuhuko argues that the Trial Chamber erred by failing to consider the following factors which she raised in mitigation at trial: (i) her age; (ii) the inhumane conditions of solitary confinement she faced as the only woman detained at the Tribunal's detention facility; and (iii) incidences of discrimination against her in prison, including physical violence.[7703]

3364. The Prosecution responds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in its assessment of mitigating circumstances.[7704]

3365. The Appeals Chamber recalls that under Rule 86(C) of the Rules, the parties shall address matters of sentencing in their closing arguments. It was thus Nyiramasuhuko's prerogative to identify any mitigating circumstances she wished to have considered by the Trial Chamber and she cannot raise them for the first time on appeal.[7705] Nyiramasuhuko did not identify her age as a mitigating circumstance to be considered by the Trial Chamber in her closing brief and only referred to the fact that she was "around 60" in her closing arguments without indicating that it was a relevant mitigating factor to be considered in sentencing.[7706] Accordingly, the Appeals Chamber

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[7701] Trial Judgement, para. 6209.
[7702] Trial Judgement, para. 6209.
[7703] Nyiramasuhuko Notice of Appeal, para. 12.2; Nyiramasuhuko Appeal Brief, paras. 1307-1313. *See also* AT. 15 April 2015, pp. 9, 10. Nyiramasuhuko further contends that "[t]he Trial Chamber erred in not taking into consideration the unreasonable delay of 14 years of detention on remand" she raised as a violation of her rights under Rule 20(4)(c) of the Rules at trial, which she argues "must be remedied, at least by a reduction of the sentence". *See* Nyiramasuhuko Appeal Brief, para. 1306 (internal references omitted). *See also* AT. 15 April 2015 pp. 9-11. The Appeals Chamber notes that Nyiramasuhuko raised this contention as a relevant sentencing consideration at trial. However, as Nyiramasuhuko's arguments were dismissed, the Trial Chamber was not required to consider this contention as a mitigating circumstance. *See Setako* Appeal Judgement, para. 297.
[7704] Prosecution Response Brief, paras. 726, 729-732. *See also* AT. 14 April 2015 pp. 58, 59.
[7705] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7706] Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53 ("Imperfectly [*sic*] aware of the sentencing grill [*sic*] which are normally handed out by the ICTR, I've been here for quite some time and able to know them. This lady, who is around 60, is devoted to her country – has devoted her life to the cause of women."). The Appeals Chamber notes that Nyiramasuhuko did not make any submission in relation to sentencing in her closing brief.

finds that the Trial Chamber did not err in not considering this circumstance in mitigation and dismisses Nyiramasuhuko's contention in this respect.

3366. Likewise, while Nyiramasuhuko referred to her situation in detention "as a condition of isolation" in her oral closing arguments, she does not demonstrate that it was erroneous for the Trial Chamber not to have considered it as a mitigating factor.[7707] Nyiramasuhuko's vague statement does not clearly suggest that the nature of her detention as the only woman within the Tribunal's detention facility was inhumane or violated human rights standards – arguments only made clear on appeal – nor does it demonstrate that such alleged violations had been established by the preponderance of the evidence.[7708] Nyiramasuhuko similarly did not raise the alleged instances of discrimination and physical violence she encountered while in detention as mitigating factors in her closing submissions.[7709] Consequently, Nyiramasuhuko does not demonstrate that the Trial Chamber erred in not considering her conditions of detention and the alleged incidences of discrimination against her in prison in determining her sentence.

3367. In light of the above, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in failing to consider mitigating circumstances in determining her sentence.

3. Life Sentence

3368. Nyiramasuhuko argues that the Trial Chamber erred in sentencing her to imprisonment for the remainder of her life because the Tribunal has signed detention agreements with States that have no domestic provisions for conditional release, thereby potentially imposing upon her a life sentence without the possibility of reduction, which constitutes inhumane treatment.[7710]

[7707] *See* Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53 ("I would like to add that the life condition of Mrs. Nyiramasuhuko is very difficult and it will be more difficult if she is the first and the only woman accused and convicted of genocide in history. And here the life condition of the only woman, can be described as a condition of isolation, when she's almost always alone. This is a burden which can be borne by very few people, and should not be borne, Your Honour and I would like you to take this, too, into account.").

[7708] The Appeals Chamber recalls that an accused bears the burden of establishing mitigating factors by a preponderance of the evidence. *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294. The Appeals Chamber further recalls that it found that, as the only woman in the Tribunal's custody, Nyiramasuhuko's conditions of detention differed from those of the other detainees. However, it considered that Nyiramasuhuko has failed to substantiate her claim on appeal that the prejudice resulting from the prolongation of her detention on remand was greater than that suffered by her co-Accused. Accordingly, the Appeals Chamber rejected Nyiramasuhuko's contention that she was adversely affected by the undue delay in the present proceedings due to her status as the only female detainee in the Tribunal's custody. *See also supra*, para. 389.

[7709] *See* Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53.

[7710] Nyiramasuhuko Appeal Brief, para. 1314.

3369. The Prosecution responds that Nyiramasuhuko's assertion "that her life sentence may be inhumane treatment is totally without merit and must fail."[7711]

3370. Nyiramasuhuko's argument that the Trial Chamber erred in sentencing her to life imprisonment because she may be transferred to a State that does not contain domestic legal provisions permitting conditional release is speculative.[7712] In addition, the selection of the State in which Nyiramasuhuko will serve her sentence was not within the discretion of the Trial Chamber when it rendered the Trial Judgement.[7713] As trial chambers are vested with the discretion to sentence convicted persons to imprisonment for the remainder of their lives under Rule 101(A) of the Rules, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in this respect.

4. Conclusion

3371. The Appeals Chamber, Judge Liu dissenting with respect to Nyiramasuhuko's abuse of her authority as an aggravating factor, finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in its assessment of the relevant aggravating and mitigating circumstances or in imposing a sentence of life imprisonment. Accordingly, the Appeals Chamber dismisses Ground 32 of Nyiramasuhuko's appeal.

[7711] Prosecution Response Brief, para. 732. *See also* AT. 14 April 2015 p. 57.
[7712] In this respect, Nyiramasuhuko merely refers to States "including Mali" without pointing to anything in Malian domestic legal provisions to support her contention. *See* Nyiramasuhuko Appeal Brief, para. 1314.
[7713] *See* Rule 103(A) of the Rules.

B. Ntahobali's Sentencing Appeal (Ground 5)

3372. The Trial Chamber sentenced Ntahobali to a single term of life imprisonment for his convictions for genocide, extermination, rape, and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7714]

3373. Ntahobali submits that his sentence should be reduced because the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) its consideration of certain aggravating circumstances; (iii) failing to consider or accord sufficient weight to certain mitigating circumstances; (iv) imposing a higher sentence than that imposed in similar cases; and (v) sentencing him to life imprisonment in violation of his fundamental human rights.[7715]

1. Gravity of the Offences

3374. The Trial Chamber determined that the rapes and killings of Tutsis at the Hotel Ihuliro roadblock and at the Butare Prefecture Office, the killings of Tutsis at the IRST, the killing of the Rwamukwaya family, and the killing of Tutsis abducted from the EER were crimes "of the utmost gravity".[7716] It noted that these crimes were not isolated instances, but occurred in various parts of Butare Prefecture over a significant period of time.[7717] It further considered "the seriousness and atrocity of crimes repetitively perpetrated at the Butare *préfecture* office, where hundreds of Tutsis were abducted, raped and killed."[7718]

3375. Ntahobali submits that the Trial Chamber erred in considering the crimes as having "occurred in various parts of Butare *préfecture*" because he was "convicted only of crimes committed in Butare town itself".[7719] He further argues that the Trial Chamber erred in taking into account "rapes" perpetrated at the Hotel Ihuliro roadblock in assessing the gravity of the offences because he was found guilty of having perpetrated only one rape at this location.[7720]

3376. The Prosecution responds that Ntahobali's contention that the Trial Chamber wrongly considered more than one rape at the roadblock was raised for the first time in his appeal brief and

[7714] Trial Judgement, paras. 6186, 6271.
[7715] Ntahobali Notice of Appeal, paras. 347-357; Ntahobali Appeal Brief, paras. 985-1012.
[7716] Trial Judgement, paras. 6216, 6217.
[7717] Trial Judgement, para. 6217.
[7718] Trial Judgement, para. 6217.
[7719] Ntahobali Appeal Brief, para. 985, *quoting* Trial Judgement, para. 6217. Ntahobali argues in particular that "[t]he Trial Chamber exaggerated the geographical scope of the crimes […] and attributed to them a higher level of gravity and, in the process, erroneously considered a piece of evidence". *See idem.*
[7720] Ntahobali Appeal Brief, para. 986 (emphasis omitted), *referring to* Trial Judgement, paras. 6077-6082, 6216.

should be summarily dismissed.[7721] It also discounts as misleading Ntahobali's remaining argument on the basis that the Butare Prefecture includes Butare Town and further contends that the Trial Chamber determined that Tutsis were abducted and then killed in various locations.[7722]

3377. Ntahobali replies that the interests of justice require that his argument concerning the rapes at the Hotel Ihuliro roadblock be considered.[7723]

3378. The Appeals Chamber fails to see the relevance of Ntahobali's contention that the Trial Chamber erred in finding that he committed crimes "in various parts" of Butare Prefecture while these crimes only occurred in Butare Town, since Ntahobali was convicted of crimes that occurred at several sites within Butare Prefecture.

3379. As to the Trial Chamber's consideration of the "rapes" perpetrated at the Hotel Ihuliro roadblock, Ntahobali does not dispute that he failed to raise this alleged error in his notice of appeal.

3380. The Appeals Chamber recalls that an application to vary the grounds of appeal must be done by way of a motion.[7724] It further recalls that it has prevented Nteziryayo from raising specific challenges in relation to the Trial Chamber's determination of his sentence due to the failure to properly raise them in his notice of appeal as they concerned a distinct legal error.[7725] The Appeals Chamber considers that the current situation is materially similar in that Ntahobali's contention in his appeal brief impermissibly expands the scope of his appeal and the Prosecution objects on this basis. In this context, and given that all the co-Appellants shall be treated equally,[7726] the Appeals Chamber, Judge Agius and Judge Liu dissenting, considers that the interests of justice do not require consideration of this argument.[7727]

3381. For these reasons, the Appeals Chamber, Judge Agius and Judge Liu dissenting, dismisses Ntahobali's challenges pertaining to the determination of the gravity of his offences.

2. Aggravating Circumstances

3382. The Trial Chamber considered as aggravating circumstances in determining Ntahobali's sentence: (i) the vast number of victims, far in excess of the threshold for extermination as a crime against humanity; (ii) the premeditated nature of the atrocities perpetrated by Ntahobali at the

[7721] Prosecution Response Brief, para. 1225.
[7722] Prosecution Response Brief, para. 1224.
[7723] Ntahobali Reply Brief, para. 403.
[7724] Practice Direction on Formal Requirements on Appeal, para. 2.
[7725] 8 May 2013 Appeal Decision, paras. 70, 72(vi), 74.
[7726] *See* Article 20(1) of the Statute.

Butare Prefecture Office, which it determined was shown by the repetitive nature of the attacks; and (iii) Ntahobali's superior responsibility in relation to the Hotel Ihuliro roadblock, the Butare Prefecture Office, and the EER.[7728]

3383. Ntahobali argues that the Trial Chamber engaged in impermissible double-counting by considering the number of victims and the repetitive nature of the crimes perpetrated at the prefectoral office in determining the gravity of the offences and the aggravating circumstances.[7729] He also contends that the Trial Chamber erred in considering as an aggravating circumstance the premeditated nature of the crimes at the prefectoral office because, in his view, premeditation was not proven beyond a reasonable doubt.[7730] Ntahobali further argues that the Trial Chamber erred in considering the number of victims as being far in excess of the threshold for extermination as a crime against humanity because an element of a crime cannot be considered as an aggravating circumstance.[7731]

3384. The Prosecution responds that Ntahobali's argument concerning double-counting the number of victims "is undeveloped and must be summarily dismissed."[7732] It submits that premeditation does not depend on the length of time the crimes persisted but rather on whether Ntahobali planned these acts in advance, a fact which the Trial Chamber found established.[7733] The Prosecution also argues that the Trial Chamber's finding that the number of victims exceeds the threshold for extermination as a crime against humanity is in accordance with the jurisprudence and was proven beyond reasonable doubt based on the evidence.[7734]

3385. With regard to Ntahobali's contention that the Trial Chamber improperly considered the number of victims in the gravity of the offences and again as an aggravating factor, the Appeals Chamber reiterates that factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances.[7735] The Appeals Chamber notes that the Trial Chamber referred to the fact that "hundreds of Tutsis were abducted, raped and killed" at the Butare Prefecture Office in its consideration of the gravity of the offences.[7736]

[7727] *See Gatete* Appeal Judgement, para. 279.
[7728] Trial Judgement, paras. 6218-6220.
[7729] Ntahobali Appeal Brief, paras. 988-990.
[7730] Ntahobali Notice of Appeal, para. 350; Ntahobali Appeal Brief, para. 991. *See also* Ntahobali Reply Brief, para. 404. Ntahobali argues that premeditation was never addressed in the Trial Judgement and the language used by the Trial Chamber indicates that it was speculative. *See* Ntahobali Appeal Brief, para. 991, *referring to* Trial Judgement, para. 6219.
[7731] Ntahobali Notice of Appeal, paras. 347, 348; Ntahobali Appeal Brief, para. 992.
[7732] Prosecution Response Brief, para. 1226.
[7733] Prosecution Response Brief, para. 1227.
[7734] Prosecution Response Brief, para. 1226, *referring*, *inter alia*, *to Ndindabahizi* Appeal Judgement, para. 135.
[7735] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7736] *See* Trial Judgement, para. 6217.

However, the Appeals Chamber considers that the Trial Chamber employed this language to punctuate "the seriousness and atrocity of crimes repetitively perpetrated" at the prefectoral office and did not consider the number of victims in determining the gravity of the offences.[7737]

3386. Indeed, the Appeals Chamber observes that, in finding that "the vast number of victims" during the course of *all* attacks and massacres constituted an aggravating factor, the Trial Chamber did not limit its finding to the number of victims at the prefectoral office alone.[7738] The Appeals Chamber considers that it was the overall number of victims of Ntahobali's crimes that was assessed as an aggravating circumstance and that, as such, it was not the same factor that was taken into account when assessing the gravity of the offence.[7739] Ntahobali's contention that the Trial Chamber erred in double-counting the number of victims is therefore ill-founded.

3387. Ntahobali's contention that the Trial Chamber engaged in double-counting with respect to the repetitive nature of the crimes at the prefectoral office similarly lacks merit. The Appeals Chamber notes that the Trial Chamber did not consider this as an aggravating circumstance in and of itself, but rather relied on this factor as support for its finding that Ntahobali's actions at the prefectoral office were premeditated.[7740]

3388. As to Ntahobali's argument that premeditation had not been established beyond reasonable doubt, the Appeals Chamber observes that the Trial Chamber concluded that the attacks at the prefectoral office were "methodical"[7741] and that, between mid-May and mid-June 1994, Ntahobali with others came to the prefectoral office on various occasions to abduct Tutsis, who were then physically assaulted, raped, and killed.[7742] In these circumstances, the Appeals Chamber considers that Ntahobali does not demonstrate that the Trial Chamber erred in concluding that the repetitive attacks were premeditated and dismisses his argument in this respect.

3389. The Appeals Chamber recalls that where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.[7743] It also reiterates that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against

[7737] *See* Trial Judgement, para. 6217.
[7738] *See* Trial Judgement, para. 6218.
[7739] *See Ntabakuze* Appeal Judgement, para. 273.
[7740] *See* Trial Judgement, para. 6219 (noting that the repetitive atrocities perpetrated by Ntahobali at the prefectoral office demonstrated premeditation and stating that "[s]uch premeditation amounts to an aggravating factor.").
[7741] Trial Judgement, para. 5683.
[7742] Trial Judgement, paras. 5867-5875.
[7743] *See*, *e.g.*, *Ndindabahizi* Appeal Judgement, para. 137; *Blaškić* Appeal Judgement, para. 693; *Vasiljević* Appeal Judgement, paras. 172, 173.

humanity where the extent of the killings exceeds that required for extermination.[7744] In the present case, the Trial Chamber found that Ntahobali, *inter alia*, ordered the killing of about 200 Tutsis at the IRST.[7745] The Appeals Chamber, Judge Liu dissenting, has also affirmed Ntahobali's convictions for ordering the killing of Tutsis abducted and killed during the Mid-May Attack.[7746] Consequently, the Appeals Chamber considers that Ntahobali does not show that the Trial Chamber erred in considering the number of victims as an aggravating circumstance in light of its finding that the number of victims exceeded that required for extermination.[7747]

3390. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's arguments concerning the aggravating circumstances considered by the Trial Chamber in determining his sentence.

3. Mitigating Circumstances

3391. The Trial Chamber determined that four mitigating circumstances weighed in Ntahobali's favour.[7748] It accorded the following three mitigating circumstances "very limited weight": (i) his young age during the events; (ii) the fact that he is the father of three young children; and (iii) his good character before the events.[7749] The Trial Chamber gave greater weight to the fact that Ntahobali voluntarily surrendered himself to the Tribunal.[7750] However, the Trial Chamber considered that, despite the weight accorded to these mitigating circumstances, "they pale[d] in comparison to the sheer gravity of Ntahobali's crimes, even before aggravating circumstances [were] taken into account."[7751]

3392. Ntahobali submits that the Trial Chamber erred in according limited weight to the mitigating circumstances such as his age at the time of the events and arrest, his family circumstances, and his good conduct in detention, which indicate the possibility of rehabilitation.[7752] He also contends that

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[7744] *Nzabonimana* Appeal Judgement, para. 465; *Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135.
[7745] Trial Judgement, paras. 1480, 5782, 6053.
[7746] *See supra*, Sections V.I.3(a), V.I.3(c).
[7747] Trial Judgement, para. 6218. In so finding, the Appeals Chamber, Judge Khan dissenting, recalls that Ntahobali was not convicted in relation to the killings perpetrated during the Night of Three Attacks and the First Half of June Attacks. *See supra*, Sections V.I.1(a)(iii), V.I.1(c). It also has considered its prior conclusion that the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office is not sustained by the record. *See supra*, Section V.I.2(f).
[7748] Trial Judgement, para. 6221.
[7749] Trial Judgement, para. 6221.
[7750] Trial Judgement, para. 6221.
[7751] Trial Judgement, para. 6222.
[7752] Ntahobali Notice of Appeal, paras. 353, 356; Ntahobali Appeal Brief, para. 994-996, *referring to Erdemović* Sentencing Judgement, para. 16. Ntahobali argues that a reasonable trier of fact would not have imposed a sentence of life imprisonment because the consequences of imposing such a sentence on a detainee who is only 27 years old far outweigh those borne by a detainee receiving such a sentence at the age of 50 or 60. He further contends that his age, his family circumstances, and his good conduct indicate that he can be rehabilitated into society and warrant the possibility of being released.

the Trial Chamber abused its discretion by not considering that he "did not hold a position of authority in Rwanda and was not one of the architects of the genocide".[7753]

3393. The Prosecution responds that the Trial Chamber did not err in weighing Ntahobali's mitigating circumstances.[7754]

3394. The Appeals Chamber recalls that, while a trial chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to it.[7755] Accordingly, the existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of life imprisonment where the gravity of the offence so requires.[7756]

3395. The Appeals Chamber notes that the Trial Chamber expressly took into account Ntahobali's young age during the events, the fact that he was the father of three children, and his good character before the events.[7757] In light of a trial chamber's discretion in determining the weight, if any, to be accorded to mitigating circumstances, the Appeals Chamber considers that Ntahobali does not demonstrate that the Trial Chamber erred in failing to give sufficient weight to these mitigating circumstances and dismisses his arguments in this respect.

3396. The Appeals Chamber further observes that Ntahobali argues for the first time on appeal that the fact that he did not hold any position of *de jure* authority in Rwanda warranted mitigation.[7758] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7759] the Appeals Chamber considers that Ntahobali has waived his right to have this circumstance considered on appeal.

[7753] Ntahobali Notice of Appeal, para. 352; Ntahobali Appeal Brief, para. 997, *referring to Simba* Trial Judgement, paras. 435, 436, *Kayishema and Ruzindana* Appeal Judgement, paras. 349, 352. Ntahobali submits that "the principle of gradation of hierarchy in sentencing requires that the longest sentences be reserved for the most serious offences" and that "[o]ffenders receiving the most severe sentences also tend to be senior authorities". *See* Ntahobali Appeal Brief, para. 997, *quoting Nahimana et al.* Appeal Judgement, para. 1060, *Nchamihigo* Trial Judgement, para. 388, *and referring to Tadić* Appeal Judgement, para. 55.
[7754] Prosecution Response Brief, paras. 1229-1231.
[7755] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 445; *Ndahimana* Appeal Judgement, para. 223; *Ntabakuze* Appeal Judgement, para. 280; *Bikindi* Appeal Judgement, para. 158.
[7756] *See*, *e.g.*, *Nizeyimana* Appeal Judgement, para. 445; *Ntabakuze* Appeal Judgement, para. 280; *Niyitegeka* Appeal Judgement, para. 267.
[7757] *See* Trial Judgement, para. 6221.
[7758] *See* Ntahobali Closing Brief, paras. 776-780; Ntahobali Closing Arguments, T. 23 April 2009 pp. 53-58.
[7759] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.

3397. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions related to the Trial Chamber's consideration of the mitigating circumstances relevant to the determination of his sentence.

4. Comparability of Sentences

3398. Ntahobali argues that his sentence is excessive because it is disproportionate to those rendered in similar cases concerning the same offences.[7760] In support of his argument, Ntahobali refers to the cases of Yussuf Munyakazi, Obed Ruzindana, and Gérard Ntakirutimana in which the accused received sentences of 25 years of imprisonment.[7761]

3399. The Prosecution responds that Ntahobali fails to demonstrate that the Trial Chamber committed a discernible error or abused its discretion in determining his sentence.[7762]

3400. The Appeals Chamber recalls that comparison between cases is of limited assistance in challenging a sentence given the broad discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7763] As repeatedly held, any given case may contain a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual,[7764] and often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results for every individual.[7765] Aside from referring to cases in which lesser sentences were imposed and which he contends are similar to his, Ntahobali fails to demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of life imprisonment in light of the sentences imposed on other convicted persons he has identified.

3401. Accordingly, the Appeals Chamber dismisses Ntahobali's contention in this respect.

[7760] Ntahobali Notice of Appeal, para. 351; Ntahobali Appeal Brief, para. 999.
[7761] Ntahobali Appeal Brief, paras. 1000-1003, *referring to Munyakazi* Trial Judgement, paras. 5, 24, 26, 134, 425, 501, 508, 522, *Munyakazi* Appeal Judgement, para. 188, *Kayishema and Ruzindana* Trial Judgement, paras. 564-566, 571, *Ntakirutimana* Trial Judgement, para. 924, *Ntakirutimana* Appeal Judgement, paras. 554-564.
[7762] Prosecution Response Brief, para. 1228.
[7763] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7764] *Ntabakuze* Appeal Judgement, para. 298; *Simba* Appeal Judgement, para. 336; *Strugar* Appeal Judgement, para. 348.
[7765] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 298; *Milošević* Appeal Judgement, para. 326; *Nahimana et al*. Appeal Judgement, para. 1046, *citing Čelebići* Appeal Judgement, para. 719.

5. Life Sentence

3402. Ntahobali submits that, while the Statute of the International Residual Mechanism for Criminal Tribunals ("Residual Mechanism Statute" and "Residual Mechanism", respectively) provides for the possibility of pardon or commutation of sentence, the realisation of such possibility depends on the law of the State where the sentence is being served.[7766] He argues that, given that certain States in which persons convicted by the Tribunal may serve their sentences do not provide for the possibility of parole,[7767] there is a risk that he may be subjected to serving a sentence of life imprisonment without the possibility of parole in violation of, *inter alia*, Article 7 of the ICCPR and other instruments prohibiting cruel, inhumane or degrading treatment or punishment.[7768] Ntahobali further contends that the "Appeals Chamber should take the opportunity to state unequivocally that [a life] sentence violates [his] fundamental rights […] and that the absence of a formal provision in the [Residual Mechanism] Statute enabling mandatory review of sentences after a mandatory period of service of a life sentence violates those rights."[7769] He adds that persons sentenced by the ICTY and ICTR should be treated equally and that, while he may have no prospect of conditional release if his sentence is affirmed, persons convicted by the ICTY generally serve their sentences in States which recognise the principle of conditional release in the case of life sentences.[7770]

3403. The Prosecution responds that Ntahobali does not demonstrate any error of law or fact committed by the Trial Chamber and that his allegations are based on material not on the record and mere assertions unsupported by any evidence.[7771] It submits that Article 7 of the ICCPR does not list life imprisonment as a degrading and inhumane treatment.[7772]

[7766] Ntahobali Appeal Brief, para. 1004, *referring to* Article 26 of the Residual Mechanism Statute.
[7767] Ntahobali points out that countries such as Mali and Rwanda do not provide for the possibility of parole but only refers to Rwandan domestic legislation. *See* Ntahobali Appeal Brief, para. 1005.
[7768] Ntahobali Notice of Appeal, paras. 354, 355; Ntahobali Appeal Brief, paras. 1005-1008, *referring*, *inter alia*, *to* Article 3 of the European Convention on Human Rights, Article 5 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 10 of the Rome Statute. Ntahobali also refers to a number of cases before the ECtHR in support of his contention. *See* Ntahobali Appeal Brief, para. 1008, *referring to Kafkaris v. Cyprus*, ECtHR, No. 21906/04, Judgment, 12 February 2008, para. 97, *Einhorn v. France*, ECtHR, No. 71555/01, Judgment, 16 October 2001, para. 27, *Nivette v. France*, ECtHR, No. 44190/98, Decision, 3 July 2001, *Vinter and others v. United Kingdom*, ECtHR, Nos. 66069/09, 130/10, 3896/10, Judgment, 17 January 2012, paras. 56-58, *Kafkaris v. Cyprus*, ECtHR, No. 21906/04, *Opinion partiellement dissidente commune aux Juges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann et Jebens*, 12 February 2008, para. 6, *Vinter and others v. United Kingdom*, ECtHR, Nos. 66069/09, 130/10, 3896/10, Dissenting Opinion of Judges Garlicki, Thórn Björgvinsson and Nicolaou, 17 January 2012, p. 39.
[7769] Ntahobali Appeal Brief, para. 1009, *referring to Selmouni v. France*, ECtHR, No. 25803/94, Judgment, 28 July 1999, para. 95, *V. v. United Kingdom*. ECtHR, No. 24888/94, Judgment, 16 December 1999.
[7770] Ntahobali Appeal Brief, paras. 1006, 1010.
[7771] Prosecution Response Brief, para. 1232.
[7772] Prosecution Response Brief, para. 1232.

3404. The Appeals Chamber notes that nothing precludes a trial chamber from imposing a term of life imprisonment when the gravity of the offence so requires,[7773] and that neither Article 7 nor Article 10 of the ICCPR prohibits life imprisonment.[7774] The Appeals Chamber considers that Ntahobali's submissions concerning the enforcement of his sentence are speculative. Furthermore, the Appeals Chamber observes that sentence enforcement issues were not matters for the Trial Chamber and that, as such, there can be no error on behalf of the Trial Chamber in this respect. His arguments concerning pardon, commutation of sentence, and early release are therefore dismissed.

3405. The Appeals Chamber further dismisses Ntahobali's contention that the absence in the Residual Mechanism Statute of a mandatory review of his life sentence after a fixed period would violate his fundamental rights. The Appeals Chamber observes that Ntahobali will retain the possibility to directly petition the President of the Residual Mechanism for pardon, commutation of sentence, or early release.[7775]

3406. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions concerning the imposition of a sentence of life imprisonment.

6. Conclusion

3407. The Appeals Chamber, Judge Agius and Judge Liu dissenting with respect to the gravity of the offences, finds that Ntahobali has failed to demonstrate any error in the Trial Chamber's determination of his sentence and, accordingly, dismisses the remainder of Ground 5 of his appeal.

[7773] *See* Rule 101(A) of the Rules; *Ntawukulilyayo* Appeal Judgement, fn. 581; *Munyakazi* Appeal Judgement, para. 186, *quoting* Rukundo Appeal Judgement, para. 260 ("there is no category of cases within the jurisdiction of the Tribunal where the imposition of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated.").
[7774] *See Stakić* Appeal Judgement, para. 395.
[7775] *See* Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism, MICT/3, 5 July 2012, para. 3.

C. Nsabimana's Sentencing Appeal (Grounds 15 and 16)

3408. The Trial Chamber sentenced Nsabimana to a single term of 25 years of imprisonment for his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental-well being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7776]

3409. Nsabimana submits that the Trial Chamber erred in: (i) assessing the aggravating circumstances; (ii) failing to consider or accord sufficient weight to certain mitigating circumstances; and (iii) imposing a sentence manifestly disproportionate to the form and degree of his participation in the crimes.[7777] He requests that the Appeals Chamber "revise the sentence imposed by the Trial Chamber to faithfully reflect the particular circumstances of this case."[7778]

1. Aggravating Circumstances

3410. The Trial Chamber found that the vulnerability of the victims at the Butare Prefecture Office constituted an aggravating circumstance when imposing Nsabimana's sentence.[7779] It noted that other potentially aggravating factors had not been proven.[7780]

3411. Nsabimana argues that the Trial Chamber engaged in impermissible double-counting because it considered the vulnerability of the victims both when assessing the gravity of the offences and as an aggravating circumstance.[7781] He submits that the Trial Chamber also impermissibly considered his participation in the crimes through omission as an aggravating circumstance, as this was also an element of the form of aiding and abetting for which he was convicted.[7782]

3412. The Prosecution responds that Nsabimana does not demonstrate any discernible error in the Trial Chamber's determination that the vulnerability of the refugees at the prefectoral office constitutes an aggravating circumstance.[7783]

[7776] Trial Judgement, paras. 6186, 6271.
[7777] Nsabimana Notice of Appeal, paras. 112-129; Nsabimana Appeal Brief, paras. 503-546; Nsabimana Reply Brief, paras. 188-194.
[7778] Nsabimana Appeal Brief, para. 546.
[7779] Trial Judgement, para. 6231.
[7780] Trial Judgement, para. 6231.
[7781] Nsabimana Appeal Brief, paras. 529-531; Nsabimana Reply Brief, para. 193.
[7782] Nsabimana Notice of Appeal, paras. 113-119; Nsabimana Appeal Brief, paras. 506-510, 533-536, *referring to* Trial Judgement, para. 6230. Nsabimana also submits that the Trial Chamber's "acknowledgement that there was no premeditation" on his part "amounts to confirming that he could not have been aware of the violent acts committed at the [Butare Prefecture Office] because premeditation presupposes preparation prior to the commission of the offence." *See* Nsabimana Appeal Brief, para. 508.
[7783] Prosecution Response Brief, paras. 1412, 1421.

3413. The Appeals Chamber finds that the Trial Chamber relied on the vulnerability of the victims in assessing the gravity of the crimes[7784] and the aggravating circumstances.[7785] By doing so, the Trial Chamber engaged in impermissible double-counting as factors taken into consideration as aspects of the gravity of a crime cannot be additionally taken into account as separate aggravating circumstances and *vice versa*.[7786] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in considering the same factor in assessing the gravity of the offences and as a separate aggravating circumstance and will consider the impact of this error, if any, in Section XII below.

3414. Nsabimana's remaining argument that the Trial Chamber impermissibly considered his indirect participation in crimes committed at the prefectoral office as an aggravating factor as this also constituted an element of aiding and abetting through omission is without merit. As indicated above, the Trial Chamber only considered the vulnerability of the victims as an aggravating factor and, in fact, considered that his indirect participation in crimes through omission warranted "substantial mitigation."[7787]

2. Mitigating Circumstances

3415. The Trial Chamber considered Nsabimana's indirect participation in the crimes at the prefectoral office and the fact that he eventually discharged his legal duty in June 1994 to protect the refugees there as mitigating factors.[7788] It considered as further mitigating circumstances his: (i) humanitarian actions in helping individuals and groups find refuge; (ii) assistance in evacuating orphans, including approximately 600 children from the *Groupe scolaire*; and (iii) remorsefulness and good behaviour in detention as further mitigating circumstances.[7789]

[7784] *See* Trial Judgement, paras. 6229 (noting the "particularly vulnerable" refugees at the Butare Prefecture Office), 6230 ("the magnitude of human devastation could only have occurred because he failed to discharge his legal duty. Nsabimana's position as *préfet* imposed upon him a duty to act to protect those vulnerable people within his realm. His omission in this regard at the Butare *prefecture* office, despite his knowledge that these acts were occurring around him, was central to the crimes that resulted.").

[7785] *See* Trial Judgement, para. 6231 ("The victims of the attacks at the Butare *prefecture* office were particularly vulnerable. The Chamber considers this as an aggravating circumstance.").

[7786] *See Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338. *See also supra*, para. 3385.

[7787] *See* Trial Judgement, para. 6232. To the extent that, through his reference to paragraph 6230 of the Trial Judgement which relates to the Trial Chamber's assessment of the gravity of the offences, Nsabimana intended to argue that the Trial Chamber impermissibly double-counted his participation in the crimes through omission both in assessing the gravity of the offences and as an element of his form of responsibility, the Appeals Chamber recalls that the determination of the gravity of the offences requires a consideration of the particular circumstances of the case as well as the form and degree of the participation of the convicted person in the crime. *See Kanyarukiga* Appeal Judgement, para. 281; *Rukundo* Appeal Judgement, para. 243. The Appeals Chamber therefore finds no error in the Trial Chamber's consideration of the nature of Nsabimana's contribution to the crimes at the prefectoral office when assessing the gravity of his offences.

[7788] Trial Judgement, para. 6232.

[7789] Trial Judgement, paras. 6232, 6233.

3416. Nsabimana submits that the Trial Chamber failed to consider certain mitigating circumstances such as his inexperience for his appointment as prefect, the length of his trial, and his humanitarian actions in providing blankets and food to refugees.[7790] He also argues that the Trial Chamber failed to accord sufficient weight to the factors it considered which, in his view, would have led to a significant reduction of the sentence imposed.[7791]

3417. The Prosecution responds that the Trial Chamber correctly assessed the mitigating circumstances and that Nsabimana fails to identify any error in the Trial Chamber's exercise of its discretion when assessing them.[7792]

3418. The Appeals Chamber notes that Nsabimana failed to identify his inexperience, the length of the proceedings, and his humanitarian acts in assisting refugees by providing food and blankets as mitigating circumstances in his closing brief or oral closing arguments.[7793] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7794] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and considers that Nsabimana has waived his right to have them considered on appeal.

3419. Turning to Nsabimana's remaining contentions that the Trial Chamber failed to give sufficient weight to the mitigating factors it did identify, the Appeals Chamber recalls that mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[7795] The Appeals Chamber observes that the Trial Chamber explicitly stated that Nsabimana's indirect participation "warrants substantial mitigation", listed concrete examples of individuals, families, and groups he aided, and expressly considered his words of remorse as well as an attestation of his good conduct in detention.[7796] Nsabimana does not demonstrate any error in the Trial Chamber's assessment.

[7790] Nsabimana Notice of Appeal, paras. 122-126; Nsabimana Appeal Brief, paras. 511-514, 518-520, 525, 526; Nsabimana Reply Brief, paras. 189-192.
[7791] Nsabimana Notice of Appeal, para. 127; Nsabimana Appeal Brief, paras. 515, 516, 521-524, 527, 528.
[7792] Prosecution Response Brief, paras. 1413, 1416-1418. *See also* AT. 16 April 2015 pp. 60, 61.
[7793] *See* Nsabimana Closing Brief, paras. 1996-2019; Closing Arguments, T. 27 April 2009 p. 23. In this respect, the Appeals Chamber considers that Nsabimana's general statement that he "provided better protection for the lives of some Rwandan Tutsis and Hutus alike through food, drugs etc…" in paragraph 2016 of his closing brief is not sufficiently detailed to identify mitigating circumstances and fails to demonstrate their existence by a preponderance of the evidence. *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294.
[7794] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7795] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 693; *Nchamihigo* Appeal Judgement, para. 157. *See also Martić* Appeal Judgement, para. 19.
[7796] *See* Trial Judgement, paras. 6232, 6233, fns. 14888, 14889.

3420. Based on the foregoing, the Appeals Chamber dismisses Nsabimana's contentions related to the Trial Chamber's consideration of the mitigating circumstances relevant to the determination of his sentence.

3. Form and Degree of Participation in the Crimes

3421. In determining the gravity of his offences, the Trial Chamber noted that it had not found that "Nsabimana was a direct perpetrator in any massacre or killing perpetrated in Butare *préfecture* or that he ordered or was in any other way directly associated with any given attack."[7797] The Trial Chamber, however, considered that "the magnitude of human devastation could only have occurred because he failed to discharge his legal duty" and that "[h]is omission in this regard at the Butare *préfecture* office […] was central to the crimes that resulted."[7798]

3422. Nsabimana submits that the sentence imposed by the Trial Chamber is excessive and manifestly disproportionate given the indirect mode of participation by omission of which he was convicted and the absence of premeditation and lack of direct collaboration.[7799] He argues that secondary or indirect forms of responsibility have generally resulted in lower sentences and that he should have received a sentence of less than 15 years.[7800]

3423. The Prosecution responds that Nsabimana fails to show that the Trial Chamber committed an error in exercising its discretion or in following the applicable law in determinating his sentence.[7801]

3424. The Appeals Chamber considers that Nsabimana's participation in the killings of Tutsis who had sought refuge at the Butare Prefecture Office constituted his culpable conduct and that the fact that he was not found to have acted with premeditation or directly collaborated with the principal perpetrators or those who ordered the crimes does not reduce that culpability. It is correct, however, that aiding and abetting is a form of responsibility that has generally warranted lower sentences than forms of direct participation.[7802] In the specific circumstances of this case and in light of the form and degree of participation of Nsabimana in the crimes committed, the Appeals Chamber considers that the sentence imposed by the Trial Chamber is excessive. Accordingly, the Appeals Chamber

[7797] Trial Judgement, para. 6230.
[7798] Trial Judgement, para. 6230.
[7799] Nsabimana Notice of Appeal, para. 129; Nsabimana Appeal Brief, paras. 538, 541. *See also* AT. 16 April 2015 p. 51.
[7800] Nsabimana Appeal Brief, paras. 539-543, *referring to Semanza* Trial Judgement, para. 563; Nsabimana Reply Brief, paras. 197-199. He further submits that his sentence should be revised due to the errors of fact and law committed by the Trial Chamber in assessing the aggravating and mitigating circumstances. *See* Nsabimana Appeal Brief, paras. 544-546.
[7801] Prosecution Response Brief, paras. 1422-1424. *See also* AT. 16 April 2015 pp. 60, 61.
[7802] *Ntawukuliyayo* Appeal Judgement, para. 244 and references cited therein.

finds that the Trial Chamber committed a discernible error in exercising its discretion and will consider the impact of this error, if any, in Section XII below.

4. Conclusion

3425. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering the vulnerability of the victims in assessing the gravity of the offences and as a separate aggravating factor. The Appeals Chamber further finds that, in light of the form and degree of participation of Nsabimana in the crimes committed, the sentence imposed by the Trial Chamber is excessive and that the Trial Chamber committed a discernible error in exercising its discretion in this regard. The Appeals Chamber will consider the impact of these errors, if any, in Section XII below. The Appeals Chamber dismisses the remainder of Grounds 15 and 16 of Nsabimana's appeal.

D. Nteziryayo's Sentencing Appeal (Grounds 10 and 11)

3426. The Trial Chamber sentenced Nteziryayo to a single term of 30 years of imprisonment for his convictions for direct and public incitement to commit genocide.[7803]

3427. Nteziryayo submits that the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) its consideration of certain aggravating factors; (iii) failing to consider or accord sufficient weight to certain mitigating factors; (iv) failing to impose a sentence proportionate to his criminal conduct; and (v) failing to impose a sentence similar to those imposed in comparable cases.[7804] Nteziryayo requests that his sentence be reduced to time served.[7805]

1. Gravity of the Offences

3428. When considering the gravity of Nteziryayo's offences, the Trial Chamber recalled that he "incited the population to kill Tutsis at meetings."[7806] It further noted, however, that Nteziryayo "was not a direct perpetrator in any massacre or killing perpetrated in Butare *préfecture*."[7807] The Trial Chamber then stated the following:

> The Chamber has determined that Nteziryayo had a leadership role in the civil defence programme in Butare *préfecture*, and that he was later sworn in as *préfet* of Butare, on 17 June 1994. As such, he exerted considerable authority and power in Butare *préfecture* at this time. During this period, soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates.[7808]

3429. Nteziryayo contends that the Trial Chamber erred in considering his role in the civil defence programme as well as crimes committed by "civilian militiamen" in determining the gravity of the offences as it elsewhere found that he could not be held criminally responsible in relation to his involvement in the civil defence programme and acquitted him of crimes committed by its members.[7809]

3430. The Prosecution responds that the Trial Chamber found it established beyond reasonable doubt that Nteziryayo had a leadership role in the civil defence programme in Butare Prefecture,

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[7803] Trial Judgement, paras. 6186, 6271.
[7804] Nteziryayo Notice of Appeal, paras. 70, 71, 73-75; Nteziryayo Appeal Brief, paras. 289-328.
[7805] Nteziryayo Notice of Appeal, paras. 72, 77.
[7806] Trial Judgement, para. 6239.
[7807] Trial Judgement, para. 6239.
[7808] Trial Judgement, para. 6240.
[7809] Nteziryayo Appeal Brief, paras. 306(a), 307-310, 312(b) (emphasis omitted), 325(a), (b), 326, 328, *referring*, *inter alia*, *to* Trial Judgement, paras. 5966, 5967. *See also* Nteziryayo Notice of Appeal, paras. 73, 74; Nteziryayo Reply Brief, paras. 130-133; AT. 17 April 2015 pp. 19, 20.

even though it was not satisfied that the only reasonable inference was that Nteziryayo was responsible for the attacks by civil defence forces.[7810]

3431. The Appeals Chamber recalls that the determination of the gravity of the offence requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the convicted person in the crime.[7811] The Appeals Chamber finds that the Trial Chamber's consideration of Nteziryayo's leadership role in the civilian defence programme when assessing the gravity of his offences constitutes a discernible error as the Trial Chamber had previously found that Nteziryayo could not be held responsible for his role in the civil defence programme and acquitted him for the crimes committed by its members.[7812] Moreover, the Appeals Chamber finds that the Trial Chamber's unreferenced statement that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates"[7813] is insufficiently linked to the crime for which Nteziryayo was convicted – direct and public incitement to commit genocide – and, consequently, irrelevant to the consideration of its gravity.

3432. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in taking into account Nteziryayo's role in the civil defence programme in Butare Prefecture in determining the gravity of his offences and will consider the impact of this error, if any, in Section XII below.

2. Aggravating Circumstances

3433. When assessing Nteziryayo's aggravating circumstances, the Trial Chamber stated the following:

> In aggravation, the Chamber has considered Nteziryayo's role as leader of the civil defence programme and his position as *préfet* of Butare *préfecture*. Given his high profile position, Nteziryayo's active incitement and encouragement of the public to commit genocide demonstrates the abuse of his position. This constitutes an aggravating factor.[7814]

3434. In addition to arguing that he was not found to have committed crimes in relation to his participation in the civil defence programme, Nteziryayo submits that the Trial Chamber's findings as to his role and responsibility in the civil defence programme were vague, preventing the Trial

[7810] Prosecution Response Brief, para. 1588.
[7811] *See Kanyarukiga* Appeal Judgement, para. 281; *Rukundo* Appeal Judgement, para. 243.
[7812] Trial Judgement, paras. 5967, 5968. *See also ibid*., para. 5589.
[7813] Trial Judgement, para. 6240.
[7814] Trial Judgement, para. 6241 (internal references omitted).

Chamber from considering it "in aggravation".[7815] He contends that the Trial Chamber erred in its assessment of the evidence concerning his participation in the civil defence programme.[7816]

3435. The Prosecution responds that the Trial Chamber correctly found that Nteziryayo had a high profile position based on his role in the civil defence programme and position as Butare Prefect and reasonably concluded that his abuse of his position constituted an aggravating factor.[7817]

3436. The Appeals Chamber recalls that Nteziryayo's conviction for direct and public incitement to commit genocide is based on conduct that he engaged in his official capacity as prefect of Butare.[7818] The Appeals Chamber considers that this finding alone reasonably supports the Trial Chamber's determination that his abuse of his authority constituted an aggravating factor.

3437. Consequently, Nteziryayo's challenges about the ambiguity of the Trial Chamber's findings as to his role in the civil defence programme as well as its alleged erroneous assessment of the evidence relating to it, if substantiated, could not invalidate the sentence or lead to a miscarriage of justice. As a result, the Appeals Chamber dismisses these arguments without further consideration.

3. Mitigating Circumstances

3438. In discussing Nteziryayo's mitigating factors, the Trial Chamber stated:

> [The Chamber] has taken into account [Nteziryayo's] selective assistance to some Tutsis in Butare *préfecture* during this period, including Egide Gatera and his wife Rose Umulisa, who he welcomed into his house and helped evacuate to Burundi, as well as, among others, six seminarians of Mbazi, in cooperation with Father Vieckoslav. The Chamber has assessed his efforts to facilitate the evacuation of orphans on 18 June 1994 and 3 July 1994 respectively. It is mindful of Nteziryayo's endeavours in relation to the protection of Bishop Gahamanyi, a Tutsi, and other priests, Tutsi nuns and monks at the Karubanda minor seminary, and religious personalities in Save, including the Tutsi parish of Father Calver Rahundi and the Mother Superior of the Benebikira sisters, where many Tutsi refugees had sought sanctuary. In the Chamber's view, this selective assistance carries only limited weight as a mitigating factor.[7819]

The Trial Chamber concluded, however, that "helping a handful of Tutsi civilians does not outweigh the gravity of the crimes for which Nteziryayo has been charged" and that "the gravity of the crimes and the aggravating factors negate[d] any mitigating factors."[7820]

3439. Nteziryayo submits that the Trial Chamber erred in failing to consider or explain why it did not accord any weight in mitigation to his deteriorating health as well as in failing to consider his: (i) assistance to the refugees in Rango; (ii) participation in an evacuation on 5 June 1994; (iii) role

[7815] Nteziryayo Appeal Brief, paras. 306(b), 313-317, 326-328. *See also* Nteziryayo Notice of Appeal, paras. 73, 74; Nteziryayo Reply Brief, paras. 129, 131-135; AT. 17 April 2015 pp. 19, 20.
[7816] Nteziryayo Appeal Brief, paras. 318-323. *See also* Nteziryayo Reply Brief, paras. 136-139.
[7817] Prosecution Response Brief, paras. 1586-1588. *See also ibid*., paras. 1589-1600; AT. 17 April 2015 pp. 37, 38.
[7818] *See* Trial Judgement, paras. 3672, 3674, 3677, 3691, 5945, 6022-6029, 6036.
[7819] Trial Judgement, para. 6242 (internal references omitted).

in the evacuation of 600 school children on 30 June 1994; (iv) assistance in evacuating a Rwandan woman who was the wife of an expatriate on 25 June 1994; and (v) implementation of security directives which saved thousands of lives.[7821]

3440. Nteziryayo further contends that the Trial Chamber erred in finding that his assistance was selective and that he helped only a handful of Tutsis.[7822] He argues that the Trial Chamber failed to consider the entire scale of his assistance, which shows a consistent pattern of conduct aimed at indiscriminately saving hundreds if not thousands of civilians.[7823]

3441. The Prosecution responds that Nteziryayo failed to demonstrate any discernible error in the Trial Chamber's assessment of the mitigating circumstances.[7824] It submits that Nteziryayo's alleged deteriorating health was considered and that Nteziryayo's submissions are insufficient to establish that it should have been considered as a mitigating factor.[7825] The Prosecution also argues that Nteziryayo did not make submissions at trial regarding his alleged assistance to the Rango refugees, his involvement in the evacuation of a Rwandan woman on 25 June 1994, and his participation in the evacuation of 600 school children on 30 June 1994, which precludes him from raising them for the first time on appeal.[7826]

3442. The Appeals Chamber finds no merit in Nteziryayo's contention that the Trial Chamber failed to consider his health as a mitigating circumstance. The Trial Chamber expressly summarised Nteziryayo's submission that his health problems should be considered in mitigation in the Trial Judgement.[7827] Nteziryayo does not demonstrate that the Trial Chamber committed a discernible error in not giving weight to this argument in light of the vague and unsupported submissions he made at trial.[7828]

[7820] Trial Judgement, para. 6243.
[7821] Nteziryayo Notice of Appeal, para. 71; Nteziryayo Appeal Brief, paras. 298-300, 302, 303. *See also* Nteziryayo Reply Brief, para. 125. Nteziryayo also refers to evacuations on 6 June, 18 June, and 3 July 1994 that the Trial Chamber expressly discussed. *See* Nteziryayo Appeal Brief, para. 302(ii); Trial Judgement, para. 6242. *See also* AT. 17 April 2015 p. 45.
[7822] Nteziryayo Appeal Brief, paras. 301, 304.
[7823] Nteziryayo Appeal Brief, paras. 302, 304. *See also* Nteziryayo Reply Brief, paras. 127, 128; AT. 17 April 2015 p. 45.
[7824] Prosecution Response Brief, paras. 1578-1585.
[7825] Prosecution Response Brief, para. 1580. The Prosecution contends that Nteziryayo did not, for example, refer to any medical documentation to support his claim. *See idem*.
[7826] Prosecution Response Brief, paras. 1583, 1584.
[7827] *See* Trial Judgement, para. 6238.
[7828] Nteziryayo Closing Arguments, T. 28 April 2009 p. 31 ("Apart from that, we would like to draw your kind attention to the fact of the Trial Chamber actually taking into account mitigating circumstances when they look at an accused's health. Recently Alphonse Nteziryayo has been experiencing serious health problems which continue to dog him. Therefore, the judgement of 24th February 2003 in the Prosecutor versus Elizaphan, […] in paragraph 898, agreed to mitigating factors because the Accused was ill. Therefore, we request the Trial Chamber to take into account mitigating circumstances in respect of the Accused Alphonse Nteziryayo.").

3443. The Appeals Chamber also observes that, as noted by the Prosecution, Nteziryayo failed to identify as mitigating circumstances in his closing brief or oral closing arguments his assistance to the Rango refugees, his role in evacuating 600 school children on 30 June 1994, and his assistance in the evacuation of a Rwandan woman who was the wife of an expatriate on 25 June 1994.[7829] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7830] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and considers that Nteziryayo has waived his right to have them considered on appeal.

3444. The Appeals Chamber notes that Nteziryayo did identify, albeit vaguely, the 5 June 1994 evacuation from the *Groupe scolaire* and that he implemented security directives that resulted in the saving of thousands of lives as mitigating factors in his oral closing arguments.[7831] Although the Trial Chamber did not expressly discuss these factors, the Trial Judgement reflects that they were considered by the Trial Chamber.[7832] Moreover, the Appeals Chamber observes that the Trial Chamber found that Nteziryayo "attempted to prevent the evacuation from Butare of about 300 orphans and their adult supervisors and selected about 30 individuals whom they believed to be Tutsi adults and forced them to remain in Rwanda."[7833] The Appeals Chamber therefore finds no error in the Trial Chamber's decision not to consider the 5 June 1994 evacuation in mitigation of Nteziryayo's sentence. Given that an accused bears the burden of establishing mitigating factors by a preponderance of the evidence,[7834] the Appeals Chamber is also not persuaded that, although Nteziryayo's counsel briefly indicated that evidence of Nteziryayo's assistance could be found in his testimony,[7835] the Trial Chamber was required to search for and expressly assess whether Nteziryayo met his burden in establishing that security directives he issued contributed to saving the lives of thousands given the vague and ambiguous nature of his submissions.[7836]

[7829] *See* Nteziryayo Closing Arguments, T. 28 April 2009 pp. 27-31. As for the alleged assistance to the Rango refugees, the Appeals Chamber observes that, in his closing arguments, Nteziryayo merely pointed to Expert Witness Des Forges's testimony that the refugees who had been sent to Rango were fed and survived, without pointing, as he does now for the first time on appeal, to the fact that he visited the refugees and ensured their safety. *See idem.*
[7830] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7831] *See* Nteziryayo Closing Arguments, T. 28 April 2009 p. 29.
[7832] Trial Judgement, para. 6238, fn. 14894, *referring to* Nteziryayo Closing Argument, T. 28 April 2009 pp. 27-31.
[7833] Trial Judgement, para. 4875.
[7834] *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294.
[7835] Nteziryayo Closing Arguments, T. 28 April 2009 p. 29.
[7836] *See* Nteziryayo Closing Arguments, T. 28 April 2009 p. 29 (stating without any reference to the record: "[w]hen the situation became desperate and the population was trying to flee into exile, *Préfet* Nteziryayo took measures to warn urban population in the vicinity of urban centers so that the people there could have directives regarding their own security with regard to when to evacuate from the city. This enabled thousands of lives to be saved, Mr. President.").

3445. The Appeals Chamber also considers that Nteziryayo does not show that the Trial Chamber committed any discernible error in finding that this assistance was selective and that he helped a limited number of Tutsis.

3446. Accordingly, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in failing to consider or according sufficient weight to certain mitigating circumstances.

4. Proportionality of Sentence

3447. Nteziryayo submits that a sentence of 30 years of imprisonment is disproportionate to the offences of which he was convicted.[7837] He emphasises the Trial Chamber's findings that there was "limited evidence of any specific acts committed by members of the population subsequent to Nteziryayo's speeches" and "insufficient evidence to establish that Nteziryayo's words at [Muyaga and Kibayi Communes] meetings substantially contributed to any subsequent crime".[7838] Nteziryayo argues that his sentence is excessive and disproportionate "where no harm, in terms of consequential crime, is established".[7839]

3448. The Prosecution responds that the offence of direct and public incitement to commit genocide, of which Nteziryayo was convicted, is a crime warranting a serious punishment and that the sentence imposed on Nteziryayo was proportionate to the degree of his responsibility.[7840]

3449. The Appeals Chamber observes that the gravity of the crime of direct and public incitement to commit genocide derives from that of the crime of genocide, a crime of the most serious gravity.[7841] The Trial Chamber found that Nteziryayo committed direct and public incitement to commit genocide on three separate occasions.[7842] Accordingly, the Appeals Chamber considers that, regardless of whether or not deaths resulted from his statements, the imposition of a sentence of 30 years of imprisonment was not beyond the Trial Chamber's sentencing discretion.

3450. In light of the above, the Appeals Chamber dismisses Nteziryayo's contention that the Trial Chamber imposed a sentence disproportionate to his criminal conduct.

[7837] Nteziryayo Notice of Appeal, paras. 70, 71; Nteziryayo Appeal Brief, para. 291. *See also* Nteziryayo Notice of Appeal, para. 75; Nteziryayo Reply Brief, para. 120.
[7838] Nteziryayo Appeal Brief, para. 290 (emphasis omitted), *quoting* Trial Judgement, para. 5946.
[7839] Nteziryayo Appeal Brief, para. 291, *referring to Kamuhanda* Appeal Judgement, para. 359. Nteziryayo also highlights that he was acquitted of several crimes. *See ibid*., fn. 361. *See also* AT. 17 April 2015 pp. 43, 44, 46.
[7840] Prosecution Response Brief, paras. 1569, 1570. *See also* AT. 17 April 2015 pp. 38, 39.
[7841] *Cf. Bikindi* Appeal Judgement, para. 208.
[7842] *See* Trial Judgement, paras. 6022-6029, 6036.

5. Comparability of Sentences

3451. Nteziryayo points to parallels between his case and those of Muvunyi, Simon Bikindi ("Bikindi"), Aloys Simba, and Nsabimana[7843] and argues that his criminal conduct "was no more serious than in each of the four cases" and that the higher sentence imposed on him by the Trial Chamber "was wholly unjust in all the circumstances."[7844] In particular, with respect to Nsabimana, Nteziryayo emphasises that his tenure as prefect of Butare was much shorter and that Nsabimana was convicted of more crimes.[7845]

3452. The Prosecution responds that comparing sentences imposed in other cases is not a proper avenue for challenging the exercise of the Trial Chamber's discretion on sentencing and points to factors that distinguish Nteziryayo's case from the cases he cites.[7846]

3453. The Appeals Chamber reiterates that comparison between cases is of limited assistance in challenging a sentence given the discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7847] Aside from referring to cases before the Tribunal in which lesser sentences were imposed and which Nteziryayo contends are similar to his, Nteziryayo does not demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of 30 years of imprisonment in light of the sentences imposed on the other convicted persons he has identified.

3454. With respect to the sentence imposed on Nsabimana, while Nteziryayo highlights the respective length of his and Nsabimana's tenures as prefects of Butare and the number of counts upon which the Trial Chamber entered convictions, his submissions ignore the difference in his and Nsabimana's criminal conduct as well as the aggravating and the mitigating factors considered by the Trial Chamber.[7848] The Appeals Chamber therefore finds that Nteziryayo does not demonstrate that the sentence imposed on him by the Trial Chamber was out of reasonable proportion in comparison to that imposed on Nsabimana.

3455. Accordingly, the Appeals Chamber dismisses Nteziryayo's arguments in this respect.

[7843] Nteziryayo Appeal Brief, paras. 292-296.
[7844] Nteziryayo Appeal Brief, para. 297.
[7845] Nteziryayo Appeal Brief, para. 296.
[7846] Prosecution Response Brief, paras. 1571-1577.
[7847] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7848] *See* Trial Judgement, paras. 6229-6233, 6239-6243.

6. Conclusion

3456. The Appeals Chamber finds that the Trial Chamber erred in considering Nteziryayo's role in the civil defence programme and the unspecified conclusion that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates" when assessing the gravity of his offences. It will consider the impact of this error, if any, in Section XII below. The Appeals Chamber nonetheless finds that Nteziryayo has failed to demonstrate any other error in the Trial Chamber's findings that may impact the determination of his sentence and dismisses the remainder of Grounds 10 and 11 of his appeal.

E. Kanyabashi's Sentencing Appeal (Ground 8)

3457. The Trial Chamber sentenced Kanyabashi to a single term of 35 years of imprisonment for his convictions for genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7849]

3458. Kanyabashi submits that the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) double-counting the aggravating circumstances; (iii) failing to consider or accord sufficient weight to mitigating circumstances; and (iv) imposing a disproportionate sentence which the Appeals Chamber should substantially reduce.[7850] He requests that his sentence be substantially reduced.[7851]

1. Gravity of the Offences

3459. When assessing the gravity of Kanyabashi's offences, the Trial Chamber determined that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries."[7852]

3460. Kanyabashi submits that the Trial Chamber erred in relying on the killings that resulted from the May and June 1994 megaphone announcements that support his conviction for direct and public incitement to commit genocide since the Trial Chamber found that the evidence was insufficient to establish that the megaphone announcements contributed to subsequent killings.[7853] He further contends that it was erroneous and illogical for the Trial Chamber to have considered the number of victims with respect to the Kabakobwa Hill attack in assessing the gravity of the offences as he was found to have failed to punish his culpable subordinates, an act that would have had no impact on the number of casualties.[7854]

3461. The Prosecution did not respond to these contentions.

3462. The Appeals Chamber finds that, contrary to Kanyabashi's contention, the Trial Chamber did not consider the killings that followed the megaphone announcements in order to determine the

[7849] Trial Judgement, paras. 6186, 6271.
[7850] Kanyabashi Notice of Appeal, sub-paras. 8.1.1-8.1.4, para. 35; Kanyabashi Appeal Brief, paras. 383-394.
[7851] Kanyabashi Appeal Brief, para. 397.
[7852] Trial Judgement, para. 6253.
[7853] Kanyabashi Notice of Appeal, sub-para. 8.1.1; Kanyabashi Appeal Brief, para. 383, heading 8.1.1 at p. 131; Kanyabashi Reply Brief, para. 148.
[7854] Kanyabashi Notice of Appeal, sub-para. 8.1.2; Kanyabashi Appeal Brief, para. 384; Kanyabashi Reply Brief, paras. 147, 148.

gravity of his offences. Rather, the Trial Chamber considered that "all [of Kanyabashi's] crimes are of an obvious gravity, resulting in a significant number of casualties in terms of death and injuries."[7855] The Appeals Chamber notes that the Trial Chamber's conclusions related to the casualties that occurred as a result of attacks on Kabakobwa Hill and Matyazo Clinic alone supported the finding as it concerned the "significant number of casualties".[7856] The fact that the Trial Chamber only relied on these casualties in determining Kanyabashi's sentence is obvious as it only considered the number of victims resulting from Kabakobwa Hill and Matyazo Clinic when determining that the number of victims constituted an aggravating circumstance.[7857] Consequently, the Appeals Chamber is not persuaded that the Trial Chamber considered the resulting killings in assessing the gravity of the offence as it related to his conviction for direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Kanyabashi's challenge in this regard.

3463. With respect to Kanyabashi's argument that the Trial Chamber erred in taking into account the casualties resulting from the attack at Kabakobwa Hill, the Appeals Chamber finds that he does not demonstrate that his responsibility under Article 6(3) of the Statute as determined by the Trial Chamber would have prevented the Trial Chamber from considering this factor in determining the gravity of the offences in sentencing.[7858] Accordingly, the Appeals Chamber dismisses his arguments in this respect.

2. Aggravating Circumstances

3464. The Trial Chamber considered Kanyabashi's abuse of authority in committing the crimes that occurred at Matyazo Clinic and the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as aggravating circumstances in determining his sentence.[7859]

3465. Kanyabashi submits that the Trial Chamber erred in relying on his abuse of authority with respect to the killings at Matyazo Clinic since an element of a crime cannot be also considered as an aggravating factor.[7860] He also contends that the Trial Chamber erred in double-counting the

[7855] Trial Judgement, para. 6253.
[7856] Trial Judgement, paras. 2103, 5791, 6061, 6253.
[7857] Trial Judgement, para. 6254.
[7858] *Ntabakuze* Appeal Judgement, para. 302 ("the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates, *i.e.* the gravity of the crimes committed by the direct perpetrator(s)"). *See also Čelebići* Appeal Judgement, para. 738.
[7859] Trial Judgement, paras. 6254, 6255.
[7860] Kanyabashi Notice of Appeal, para. 8.1.3; Kanyabashi Appeal Brief, para. 385, *referring to Naletilić and Martinović* Appeal Judgement, paras. 610-613. *See also* Kanyabashi Reply Brief, para. 149.

number of victims of the attacks on Kabakobwa Hill and at Matyazo Clinic when assessing the gravity of the offences and factors in aggravation.[7861]

3466. The Prosecution responds that the Trial Chamber properly assessed Kanyabashi's aggravating factors and that it did not err in considering his abuse of authority as an aggravating circumstance since it is not an element of superior responsibility.[7862] It also submits that Kanyabashi's sentence reflects his extensive criminal culpability and that, "although the Trial Chamber erred in double counting the number of victims, this error does not warrant a lower sentence."[7863]

3467. With respect to the Trial Chamber's consideration of Kanyabashi's abuse of authority as an aggravating factor, the Appeals Chamber observes that, while Kanyabashi was only convicted pursuant to Article 6(3) of the Statute, the Trial Chamber, Judge Ramaroson dissenting, found that he ordered soldiers to open fire on the Tutsis at Matyazo Clinic, resulting in the deaths of many Tutsi refugees.[7864] As an abuse of authority is not an element of superior responsibility under Article 6(3) of the Statute, the Appeals Chamber finds that it was not improper for the Trial Chamber to consider Kanyabashi's abuse of authority through, for instance, ordering the killings as an aggravating circumstance.[7865]

3468. Turning to Kanyabashi's argument that the Trial Chamber erred in double-counting the number of the casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic for the purpose of the gravity of the offences and as an aggravating factor, the Appeals Chamber recalls that factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances.[7866] Since the Trial Chamber clearly relied on the number of victims from the attacks at Kabakobwa Hill and Matyazo Clinic when assessing the gravity of the offences,[7867] this same factor could not be taken into account as an aggravating circumstance.[7868]

[7861] Kanyabashi Notice of Appeal, sub-para. 8.1.3; Kanyabashi Appeal Brief, para. 386.
[7862] Prosecution Response Brief, paras. 1976-1979.
[7863] Prosecution Response Brief, para. 1982. *See also ibid.*, paras. 1980, 1981.
[7864] Trial Judgement, paras. 2103, 5818.
[7865] *See Karemera and Ngirumpatse* Appeal Judgement, para. 682, *referring to Simba* Appeal Judgement, para. 310; *Ndindabahizi* Appeal judgement, para. 136; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Aleksovski* Appeal Judgement, para. 183. In this regard, Kanyabashi's reliance on the *Naletilić and Martinović* Appeal Judgement is misplaced since Kanyabashi has been convicted only pursuant to Article 6(3) of the Statute despite his direct participation in the killing on Kabakobwa Hill.
[7866] *See*, *e.g.*, *Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7867] Trial Judgement, para. 6253.
[7868] Trial Judgement, para. 6254.

3469. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

3. Mitigating Circumstances

3470. The Trial Chamber took into account "Kanyabashi's purported good character and his 20 years of service as a *bourgmestre*" as well as his "efforts, on occasions, to stop the massacres from spreading and to assist the refugees" as mitigating circumstances in determining his sentence.[7869] However, it found that these mitigating circumstances were of limited weight given the gravity of Kanyabashi's crimes.[7870]

3471. Kanyabashi submits that the Trial Chamber "gravely underestimated the exculpatory evidence".[7871] He also argues that the Trial Chamber did not consider his assistance to a Tutsi woman called Rumiya,[7872] his 18 years of employment at the Butare University Hospital, and the undue delay of the proceedings which resulted in violation of his fair trial rights.[7873] He also contends that the Trial Chamber disregarded his advanced age and his good conduct in detention.[7874] Kanyabashi suggests that, since he was born in 1937, a sentence of 35 years in effect equals a sentence of imprisonment for life.[7875]

3472. The Prosecution responds that the Trial Chamber properly assessed the mitigating circumstances and that, in any case, their existence does not automatically imply a reduction of the sentence.[7876] It also submits that the length of the proceedings is not a factor that a trial chamber must consider as a mitigating circumstance.[7877]

3473. The Appeals Chamber finds that Kanyabashi's contention that the Trial Chamber "underestimated exculpatory evidence" lacks merit. When discussing potential mitigating factors,

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[7869] Trial Judgement, para. 6256.
[7870] Trial Judgement, para. 6256.
[7871] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, para. 389. Kanyabashi also submits that the Trial Chamber failed to consider as a mitigating circumstance "all the elements of the theory of the Appellant's case as stated under Ground of Appeal 5.1". *See* Kanyabashi Notice of Appeal, sub-para. 8.1.4.
[7872] Kanyabashi Appeal Brief, para. 389. Kanyabashi also highlights that during his closing arguments he emphasised: (i) his deep attachment to the people that he governed regardless of their ethnicity; (ii) the fact that he was deeply affected by the death of innocent people; and (iii) his attempts to stop the genocide. *See* Kanyabashi Appeal Brief, para. 390; Kanyabashi Reply Brief, para. 146.
[7873] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, para. 388.
[7874] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, paras. 391, 393; Kanyabashi Reply Brief, para. 146.
[7875] Kanyabashi Appeal Brief, para. 393.
[7876] Prosecution Response Brief, paras. 1971, 1973, 1974. *See also* AT. 20 April 2015 p. 46.
[7877] Prosecution Response Brief, para. 1972.

the Trial Chamber specifically took into account evidence indicative of his efforts to stop the massacres from spreading and assisting the refugees, but it found that these mitigating elements carried limited weight in light of the gravity of the crimes for which Kanyabashi was convicted.[7878] The Appeals Chamber finds that Kanyabashi merely disagrees with the Trial Chamber's determination without demonstrating that it erred and, accordingly, dismisses his contention without further consideration.

3474. The Appeals Chamber also observes that Kanyabashi failed to identify, either in his closing brief or his closing arguments, his assistance to a Tutsi refugee called Rumiya, his previous employment at the Butare University Hospital, and the violation of his right to be tried without undue delay as mitigating circumstances before the Trial Chamber. Given that an accused cannot raise mitigating circumstances for the first time on appeal,[7879] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and finds that Kanyabashi has waived his right to have them considered on appeal.

3475. With respect to Kanyabashi's age and good conduct in detention, the Appeals Chamber notes that, while Kanyabashi did not identify these factors as mitigating circumstances in his closing brief, he referred to them as such in his oral closing submissions.[7880] The Trial Chamber did not expressly refer to these arguments or consider them when assessing his individual circumstances in sentencing.[7881] Instead, it indicated that Kanyabashi did not provide any specific sentencing submissions, referring only to his closing brief and not to his oral closing arguments.[7882]

3476. The Appeals Chamber recalls that the age and state of health of an accused may be relevant factors in sentencing.[7883] While the Trial Judgement clearly reflects that the Trial Chamber was cognisant of Kanyabashi's age, the Appeals Chamber considers that its statement in the "Sentencing" section of the Trial Judgement suggests that it did not consider this as a possible mitigating circumstance. Likewise, the absence of any reference to Kanyabashi's contention concerning his good conduct in detention, of which Kanyabashi gave evidence through the

[7878] Trial Judgement, para. 6256. *See also ibid.*, paras. 6250-6252, *referring to* Kanyabashi Closing Brief, paras. 23, 24, 27, 108, 174-177, 635, 644-646.
[7879] *See*, *e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7880] Kanyabashi Closing Arguments, T. 29 April 2009 pp. 38, 39.
[7881] Trial Judgement, paras. 6250-6252, 6256.
[7882] Trial Judgement, para. 6250 ("The Kanyabashi Defence does not make any submission in relation to sentencing; however, throughout its Closing Brief it refers to a series of factors that might be considered as mitigating circumstances by the Chamber in determining a sentence against Kanyabashi."), *referring to* Kanyabashi Closing Brief, para. 666. In this regard, the Appeals Chamber considers that the Trial Chamber's general statement that Defence teams addressed mitigation in varying degrees during closing arguments does not demonstrate that the Trial Chamber considered the mitigating factors raised by Kanyabashi during them. *See* Trial Judgement, fn. 14855.
[7883] *See Simba* Appeal Judgement, para. 287; *Blaškić* Appeal Judgement, para. 696. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 693.

presentation of a letter from the commander of the Tribunal's detention facility and of which the Trial Chamber took note,[7884] shows that the Trial Chamber also disregarded this factor.

3477. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention in determining his individual circumstances relevant to sentencing. The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

4. Proportionality of Sentence

3478. Kanyabashi submits that his sentence is manifestly excessive in light of the fact that he was acquitted of a number of charges, that he did not personally participate in the killings at Kabakobwa Hill, and that no killings resulted from the megaphone announcements.[7885]

3479. The Prosecution responds that the lack of direct participation in the killings at Kabakobwa Hill does not detract from the seriousness of Kanyabashi's conviction under Article 6(3) of the Statute.[7886]

3480. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, has affirmed Kanyabashi's convictions pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide in relation to megaphone announcements he made in Butare Town in May and June 1994.[7887] However, the Appeals Chamber has reversed Kanyabashi's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a result of its findings that the Trial Chamber erred in finding Kanyabashi guilty of the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994.[7888]

3481. In light of the fact that a majority of Kanyabashi's convictions have been overturned on appeal, the Appeals Chamber finds it unnecessary to rule on Kanyabashi's contentions as to whether his sentence is manifestly excessive but will consider these arguments when determining the impact of the Appeals Chamber's findings on his sentence in Section XII below.

[7884] *See* Kanyabashi Closing Arguments, T. 29 April 2009 pp. 38, 39. Specifically, Kanyabashi submitted a letter from the commander of the Tribunal's detention facility dated 17 February 2009 certifying his good conduct while in detention. *See ibid*., p. 38. While the Trial Chamber did not admit the letter, it took note of its contents. *See ibid.*, p. 39.
[7885] Kanyabashi Appeal Brief, paras. 384, 394.
[7886] Prosecution Response Brief, para. 1975.
[7887] *See supra*, Section VIII.E.
[7888] *See supra*, Sections VIII.B.1, VIII.B.4, VIII.C, VIII.D.

5. Conclusion

3482. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. The Appeals Chamber further concludes that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention when determining his mitigating circumstances relevant to sentencing. It will consider the impact of this error, if any, in Section XII below.

3483. Moreover, the Appeals Chamber notes that, in light of the fact that Kanyabashi's convictions for the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994 have been overturned on appeal, the Trial Chamber's conclusion in its sentencing deliberations that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries" and its reliance on the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as an aggravating circumstance are no longer supported.[7889] Likewise, the Trial Chamber's conclusion that Kanyabashi abused his authority in relation to the crimes that occurred at Matyazo Clinic also lacks support.[7890] The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

3484. The Appeals Chamber also concludes that, in light of the fact that a majority of Kanyabashi's convictions have been overturned on appeal, the Appeals Chamber will consider Kanyabashi's contentions as to whether his sentence is manifestly excessive when determining the impact of its own findings on his sentence in Section XII below. The Appeals Chamber grants these parts of Ground 8 of Kanyabashi's appeal and dismisses his remaining challenges under this ground.

3485. The Appeals Chamber dismisses the remainder of Ground 8 of Kanyabashi's appeal.

[7889] Trial Judgement, paras. 6253, 6254. *See also supra*, Section XI.E.1.
[7890] Trial Judgement, para. 6254.

F. Ndayambaje's Sentencing Appeal (Ground 21)

3486. The Trial Chamber sentenced Ndayambaje to a single term of life imprisonment for his convictions for genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7891]

3487. Ndayambaje submits that the Trial Chamber erred in: (i) assessing certain aggravating factors; (ii) failing to consider or accord sufficient weight to certain mitigating factors; (iii) imposing a sentence disproportionate to the degree of his participation in the crimes; (iv) failing to impose a sentence similar to those imposed in comparable cases; and (v) imposing a single sentence of life imprisonment.[7892] He requests that his sentence be reduced.[7893]

1. Aggravating Circumstances

3488. When discussing Ndayambaje's aggravating factors, the Trial Chamber recalled "that hundreds, if not thousands, of predominantly Tutsis who took refuge at Kabuye Hill and at Mugombwa Church perished following days of intensified attacks."[7894] The Trial Chamber further found that the number of victims "surpasse[d] the threshold for extermination" and considered this as an aggravating factor.[7895] Noting that "Ndayambaje was an influential, respected figure in Butare" who committed crimes before and during his tenure as *bourgmestre* of Muganza Commune in 1994, the Trial Chamber concluded that he "used his status and influence to further these grave crimes" and considered this abuse of authority as an aggravating factor.[7896] Finally, the Trial Chamber was of the view that "the premeditated nature" of the attacks on Mugombwa Church and Kabuye Hill, as evidenced by their prolonged and repetitive nature, also constituted an aggravating factor.[7897]

3489. Ndayambaje argues that the Trial Chamber impermissibly considered the number of victims, abuse of authority, and premeditation as aggravating factors as these were also elements of the offences for which he was convicted.[7898] He also contends that the Trial Chamber erroneously

[7891] Trial Judgement, paras. 6186, 6271.
[7892] Ndayambaje Notice of Appeal, para. 215-219; Ndayambaje Appeal Brief, paras. 677-697.
[7893] Ndayambaje Notice of Appeal, para. 220. *See also* Ndayambaje Appeal Brief, paras. 692, 695; AT. 21 April 2015 p. 31.
[7894] Trial Judgement, para. 6267.
[7895] Trial Judgement, para. 6267.
[7896] Trial Judgement, para. 6268.
[7897] Trial Judgement, para. 6269.
[7898] Ndayambaje Appeal Brief, para. 684, *referring to* Trial Judgement, paras. 6195, 6266, 6269, *Gatete* Appeal Judgement, para. 275, *Ndindabahizi* Appeal Judgement, para. 137. *See also* Ndayambaje Reply Brief, paras. 279-281.

"confused the notions of 'influence' and 'authority'" in finding that he "used his status and influence to further these grave crimes" and considering "this abuse of authority as an aggravating factor".[7899]

3490. Furthermore, Ndayambaje submits that the Trial Chamber erred in relying on the *Semanza* Appeal Judgement because, in relation to his convictions for the crimes committed at Mugombwa Church and Kabuye Hill, he "was just a student at the time", unlike Laurent Semanza who was appointed to serve as a member of Parliament.[7900] In this context, he argues that "[i]t was inconceivable to liken him to an authority [like Semanza] and that he abused an influence which he did not have."[7901] Alternatively, Ndayambaje points to the *Rugambarara* case to argue that, with respect to his convictions for events that occurred after he was installed as *bourgmestre* of Muganza Commune, the position of *bourgmestre* is an insufficiently high level of authority so that abuse of such authority could not constitute an aggravating factor.[7902]

3491. The Prosecution responds that Ndayambaje does not show any error in the Trial Chamber's reliance on the aggravating factors he challenges and that his claims should be summarily dismissed.[7903]

3492. The Appeals Chamber notes that, when finding that the number of victims was an aggravating factor in relation to the attacks at Mugombwa Church and Kabuye Hill, the Trial Chamber recalled that "hundreds, if not thousands, of predominantly Tutsis who took refuge at [these locations] perished" and determined that the number of victims "far surpasse[d] the threshold for extermination".[7904] The Appeals Chamber recalls that there is no minimum number of victims required for a conviction of genocide and that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against humanity where the extent of the killings exceeds that required for extermination.[7905] None of the other crimes for which Ndayambaje was convicted in relation to these events requires a minimum number of victims. Accordingly, the Appeals Chamber dismisses Ndayambaje's contention that the Trial

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Ndayambaje adds that "[t]hese factors also constituted crimes that were not pleaded in the Indictment". *See* Ndayambaje Appeal Brief, para. 684, *incorporating by reference* Grounds 1 to 6 of his appeal. However, as Ndayambaje's challenges pertaining to insufficient notice have been dismissed, the Appeals Chamber also dismisses this contention which is not developed further under this ground of appeal.

[7899] Ndayambaje Appeal Brief, para. 685. *See also* Ndayambaje Reply Brief, para. 281.

[7900] Ndayambaje Appeal Brief, para. 686, *referring*, *inter alia*, *to Semanza* Appeal Judgement, para. 336, Trial Judgement, paras. 64, 1281, 1327, 4338, 4579, 4677, 4706, 5762.

[7901] Ndayambaje Appeal Brief, para. 686, *referring to* Trial Judgement, para. 5762. *See also ibid*., para. 682.

[7902] Ndayambaje Appeal Brief, para. 687, *referring to Rugambarara* Sentencing Judgement, para. 28.

[7903] Prosecution Response Brief, para. 2528.

[7904] Trial Judgement, para. 6267.

[7905] *Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135. *See also Nzabonimana* Appeal Judgement, para. 465.

Chamber erred in considering the number of victims both as an element of the offence and as an aggravating factor.[7906] Likewise, Ndayambaje does not demonstrate that his abuse of authority or the premeditated nature in which the attacks at Mugombwa Church and Kabuye Hill were perpetrated constituted elements of the offences for which he was convicted and that, consequently, they could not be considered as aggravating circumstances.

3493. Turning to Ndayambaje's contention that the Trial Chamber erred in confusing notions of abuse of influence and authority, the Appeals Chamber recalls that a trial chamber may consider the abuse of a convicted person's influence as an aggravating factor in sentencing.[7907] Ndayambaje simply points to semantic differences without demonstrating how the Trial Chamber erred in relying on findings that Ndayambaje used "his status and influence to further […] grave crimes" when determining that his abuse of authority was an aggravating factor.[7908] Moreover, the Trial Chamber did not liken Ndayambaje's authority to that of Laurent Semanza but merely cited the *Semanza* Appeal Judgement in its summary of the applicable law in support of the principle that it "may consider an individual's influence as an aggravating circumstance".[7909] Ndayambaje does not demonstrate how any finding concerning Laurent Semanza's abuse of authority in the *Semanza* case prevented the Trial Chamber from concluding that Ndayambaje abused his authority in relation to the crimes of which it convicted him. Ndayambaje's submission that he was not a public official at the time of the attacks on Mugombwa Church and Kabuye Hill does not demonstrate that the Trial Chamber erred in finding that he was nonetheless influential within the commune and used his "influence to further these grave crimes".[7910]

3494. Moreover, the Appeals Chamber is not persuaded that, simply because the Trial Chamber found the evidence insufficient to establish that he could bear superior responsibility over perpetrators of the attacks at Mugombwa Church and Kabuye Hill, the Trial Chamber erred in finding that he abused his authority in relation to these events. The Trial Chamber considered that "Ndayambaje was an influential, respected figure in Butare" who: (i) "had been *bourgmestre* of Muganza *commune* between 1983 and 1992, prior to his participation in the attacks at Mugombwa Church and Kabuye Hill"; (ii) "committed genocide and incitement to commit genocide both before

[7906] As noted previously by the Appeals Chamber, while extermination as a crime against humanity has been found in relation to the killing of thousands of persons, it has also been found in relation to fewer killings, such as the killings of approximately 60 individuals and less. *See Ndahimana* Appeal Judgement, para. 231 and references cited therein. *See also supra*, para. 2123 ("The Appeals Chamber recalls that the *actus reus* of extermination is the act of killing on a large scale. This is what distinguishes the crime of extermination from the crime of murder. The Appeals Chamber further recalls that "large scale" does not suggest a strict numerical approach with a minimum number of victims. The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.") (internal references omitted).
[7907] *See Karemera and Ngirumpatse* Appeal Judgement, para. 682.
[7908] Trial Judgement, para. 6268.
[7909] Trial Judgement, para. 6196, *referring to Semanza* Appeal Judgement, paras. 335, 336.

and after his reinstallation as *bourgmestre* in June 1994"; and (iii) "used his status and influence to further these grave crimes."[7911] Indeed, when assessing his potential superior responsibility for the attacks at Mugombwa Church, the Trial Chamber emphasised that "Ndayambaje, as former *bourgmestre* of Muganza *commune* for a period of 11 years, and the holder of a number of other offices, was a well-known authority figure and was influential within his *commune*."[7912] The Trial Chamber also referred to "the prominent role that Ndayambaje played in contributing to the attacks at Kabuye Hill".[7913]

3495. With respect to Ndayambaje's final contention that holding a position of *bourgmestre* was insufficient to constitute an aggravating factor given a finding of this nature in the *Rugambarara* Sentencing Judgement, the Appeals Chamber stresses that "the precedential effect of previous sentences rendered by the [ICTY and the Tribunal] is not only 'very limited' but 'also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence'."[7914] Ndayambaje's emphasis on the *Rugambarara* Sentencing Judgement fails to appreciate, for example, that the Appeals Chamber affirmed another trial chamber's determination in the case of Sylvestre Gacumbitsi – who was a *bourgmestre* and an important and influential personality in Rusumo Commune – that the abuse of his powers as a *bourgmestre* constituted an aggravating factor.[7915]

3496. In light of the above, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in its consideration of the aggravating factors in determining his sentence.

2. Mitigating Circumstances

3497. The Trial Chamber considered the propriety of Ndayambaje's first tenure as *bourgmestre* between 1983 and October 1992 as well as the facts that he was described as an honest man concerned about the welfare of the people and the agricultural sector and that he accommodated two Tutsis during the events of May 1994 in his home as mitigating factors.[7916] However, in view of the

[7910] *See* Trial Judgement, para. 6268.
[7911] Trial Judgement, para. 6268.
[7912] Trial Judgement, para. 5763.
[7913] Trial Judgement, para. 5779.
[7914] *Babić* Sentencing Appeal Judgement, para. 32, *quoting Nikolić* Sentencing Appeal Judgement, para. 19. *See also Čelebići* Appeal Judgement, para. 821.
[7915] *See Gacumbitsi* Appeal Judgement, paras. 190, 191, *referring to Gacumbitsi* Trial Judgement, para. 345.
[7916] Trial Judgement, para. 6270.

gravity of Ndayambaje's crimes and the nature of his involvement in them, the Trial Chamber accorded these circumstances "very limited weight".[7917]

3498. Ndayambaje contends that, when assessing his mitigating circumstances, the Trial Chamber erred in failing to consider adequately his age, the possibility of his social reintegration, and the facts that he is the father of three children and that he did not have a criminal record.[7918] Ndayambaje also highlights that he expressed remorse and compassion towards the victims and adds that he was not subject of disciplinary measures while detained.[7919]

3499. Ndayambaje also contends that the Trial Chamber erred in failing to afford mitigation for the violation of his right to an expeditious trial, in particular for the length of his detention on remand.[7920] He argues that he was subject to "the longest preventative detention" and requests a remedy of a considerable reduction in his sentence.[7921]

3500. The Prosecution responds that since Ndayambaje made no submissions regarding mitigating circumstances at trial, he cannot now raise them on appeal for the first time.[7922] It further contends that Ndayambaje has failed to demonstrate undue delay and that a remedy was required in this regard.[7923]

3501. Ndayambaje replies that he identified mitigating circumstances at trial but that the Trial Chamber "incorrectly assessed" them.[7924]

3502. The Appeals Chamber observes that, in his sentencing submissions at trial, Ndayambaje principally argued that "it [was] premature and almost impossible to discuss the sentence at this stage of the proceedings"[7925] and requested that he "be given the broadest mitigating circumstances, taking into account everything that emerged from this trial relating to his personality and the circumstances under which he experienced the extremely difficult events from April to June 1994."[7926] Given the ambiguity of these submissions, the Appeals Chamber considers that the

[7917] Trial Judgement, para. 6270.
[7918] Ndayambaje Notice of Appeal, para. 218; Ndayambaje Appeal Brief, para. 688, *referring to* Trial Judgement, para. 6270. *See also* Ndayambaje Appeal Brief, para. 690.
[7919] Ndayambaje Appeal Brief, paras. 689, 691. *See also* AT. 21 April 2015 pp. 71, 72.
[7920] Ndayambaje Notice of Appeal, para. 218; Ndayambaje Appeal Brief, para. 693. *See also* AT. 21 April 2015 p. 31.
[7921] Ndayambaje Appeal Brief, para. 695. *See also ibid.*, para. 692.
[7922] Prosecution Response Brief, para. 2529, *referring to Bikindi* Appeal Judgement, para. 165.
[7923] Prosecution Response Brief, para. 2530. *See also ibid.*, paras. 4, 7. At the appeals hearing, the Prosecution opposed Ndayambaje's claim that he expressed compassion towards the victims. *See* AT. 21 April 2015 p. 61.
[7924] Ndayambaje Reply Brief, para. 282, *referring to* Ndayambaje Closing Brief, para. 1025, Trial Judgement, para. 6270.
[7925] Ndayambaje Closing Brief, para. 1021. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 p. 46, *referring to* Ndayambaje Closing Brief, paras. 1021-1025.
[7926] Ndayambaje Closing Brief, para. 1025. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 p. 46, *referring to* Ndayambaje Closing Brief, paras. 1021-1025.

Trial Chamber was under no obligation to consider the mitigating circumstances Ndayambaje now points to and that he has waived his right to have them considered on appeal.

3503. Moreover, the Appeals Chamber notes that, notwithstanding the nature of his submissions at trial, the Trial Chamber nevertheless considered as mitigating factors: (i) the propriety of Ndayambaje's first tenure as *bourgmestre* between 1983 and October 1992 as well as the fact that Ndayambaje was described as an honest man concerned about the welfare of the people and the agricultural sector; and (ii) the fact that Ndayambaje accommodated two Tutsis during the events of May 1994 in his home.[7927] However, as noted above, they were accorded only "very limited weight".[7928] While Ndayambaje generally argues that the Trial Chamber "incorrectly assessed" the mitigating circumstances, he does not demonstrate how it committed a discernible error in this respect.

3504. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its consideration of the mitigating factors in determining his sentence.

3. Degree of Participation in the Crimes

3505. Ndayambaje submits that the sentence imposed by the Trial Chamber was disproportionate to the degree of his participation in the crimes as he was only convicted of aiding and abetting and inciting certain crimes.[7929] Quoting the Trial Chamber's finding that "[w]hile Ndayambaje played a role in events surrounding the killings, and substantially contributed to them, the Chamber does not find that his conduct was as much an integral part of genocide as the killings themselves",[7930] Ndayambaje argues that his direct participation in the crimes was not established and the sentence of life imprisonment imposed by the Trial Chamber was excessive and disproportionate.[7931] He further contends that the sentence was disproportionate because he was not a superior and did not possess *de jure* or *de facto* authority over the principal perpetrators.[7932]

[7927] Trial Judgement, para. 6270.
[7928] Trial Judgement, para. 6270.
[7929] Ndayambaje Notice of Appeal, para. 216. *See also* Ndayambaje Appeal Brief, paras. 677-679.
[7930] Ndayambaje Appeal Brief, para. 679, *quoting* Trial Judgement, para. 5776.
[7931] Ndayambaje Notice of Appeal, para. 216; Ndayambaje Appeal Brief, paras. 679, 680.
[7932] Ndayambaje Appeal Brief, para. 682. Ndayambaje adds that a conviction under both Articles 6(1) and 6(3) of the Statute warrants a heavier sentence than a conviction under Article 6(1) of the Statute alone. *See ibid.,* para. 683.

3506. The Prosecution responds that, given the scale of the crimes for which Ndayambaje was found responsible, a life sentence was not disproportionate and that the Trial Chamber did not abuse its discretion.[7933]

3507. The Appeals Chamber recalls that the Trial Chamber found that Ndayambaje aided and abetted the killings of Tutsis at Mugombwa Church and Kabuye Hill, committed direct and public incitement to commit genocide prior to an attack on Mugombwa Church and during his swearing-in ceremony as the new *bourgmestre* of Muganza Commune, and instigated the killings of Tutsi women and girls abducted from Mugombwa Sector.[7934] Furthermore, while the Trial Chamber determined that "his conduct [at Mugombwa Church and Kabuye Hill] was [not] as much an integral part of the genocide as the killings themselves" when determining that aiding and abetting rather than committing best characterised his responsibility under Article 6(1) of the Statute,[7935] it nevertheless "found Ndayambaje guilty of genocide for his direct participation in the massacres at Mugombwa Church and Kabuye Hill".[7936] The Appeals Chamber finds that the Trial Chamber's conclusions as to Ndayambaje's participation in the attacks at Mugombwa Church and Kabuye Hill support the characterisation that he directly participated in the massacres even though he was only found to have aided and abetted them.[7937] Moreover, Ndayambaje's contentions ignore that, with respect to the other events for which he was convicted, he was found responsible under Article 6(1) of the Statute for directly participating in the crimes through committing or instigating them.[7938]

3508. Furthermore, the Appeals Chamber considers that the fact that the Trial Chamber found that the Prosecution failed to lead sufficient evidence that Ndayambaje exercised effective control over the perpetrators of the attacks at Mugombwa Church and Kabuye Hill did not prevent the Trial Chamber from imposing a sentence of life imprisonment.[7939]

3509. In light of the gravity of the crimes which the Trial Chamber described as leading "to a loss of life on a massive scale and caused immense human suffering",[7940] the Appeals Chamber dismisses Ndayambaje's contention that the Trial Chamber imposed a sentence disproportionate to the form and degree of his participation in the crimes of which he was convicted at trial.

[7933] Prosecution Response Brief, paras. 2520-2527. *See* AT. 21 April 2015 pp. 60, 61.
[7934] *See* Trial Judgement, paras. 5949, 5976, 5977, 5995-6002, 6026-6029, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186. *See also ibid.,* para. 6266.
[7935] Trial Judgement, para. 5776, *referring to Seromba* Appeal Judgement, para. 182.
[7936] Trial Judgement, para. 6266.
[7937] *See* Trial Judgement, paras. 1245, 1246, 1424, 1431, 1455, 1456, 5754, 5755, 5769, 5772, 5774, 5775.
[7938] *See* Trial Judgement, paras. 5976, 5977, 6002, 6029, 6031, 6038, 6064, 6066, 6107, 6108, 6125, 6175, 6176.
[7939] *See* Trial Judgement, paras. 5764, 5779.
[7940] *See* Trial Judgement, para. 6266.

4. Comparability of Sentences

3510. Ndayambaje submits that the Trial Chamber erred in not applying the principle of parity and not imposing a similar sentence on him as those imposed on Elizaphan and Gérard Ntakirutimana, Muvunyi, Emmanuel Rukundo, Bikindi, Kalimanzira, and Dominique Ntawukulilyayo.[7941]

3511. The Prosecution did not directly respond to these submissions.

3512. The Appeals Chamber recalls that comparison between cases is of limited assistance in challenging a sentence given the broad discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7942] Apart from referring to other cases before the Tribunal that he argues are comparable to his, Ndayambaje does not demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of life imprisonment in light of the sentences imposed on other convicted persons he has identified.

3513. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in this respect.

5. Life Sentence

3514. Ndayambaje submits that, in imposing a life sentence without a possibility of conditional release, the Trial Chamber violated his rights under Articles 19 and 20 of the Statute as well as his rights under Article 7 of the ICCPR.[7943] In his appeal brief, Ndayambaje further argues that the Trial Chamber erred in imposing a life imprisonment without providing a reasoned opinion and, that, by sentencing him to a single sentence for all of his crimes, the Trial Chamber deprived him of the benefit of any credit based on the period already spent in detention.[7944]

3515. The Prosecution responds that Ndayambaje does not show any error and that his argument should be dismissed.[7945]

[7941] Ndayambaje Notice of Appeal, para. 216, fn. 178; Ndayambaje Appeal Brief, para. 681, fn. 1034.
[7942] *See*, *e.g.*, *Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7943] Ndayambaje Notice of Appeal, para. 219. Ndayambaje, without providing specific references, adds that the ECtHR as well as national courts held that a life sentence should be combined with the possibility of conditional release. *See idem*.
[7944] *See* Ndayambaje Appeal Brief, paras. 696, 697.
[7945] Prosecution Response Brief, para. 2531.

3516. In the absence of substantiation, the Appeals Chamber dismisses Ndayambaje's claim that his sentence of life imprisonment, which is provided for in the Rules, violates Articles 19 and 20 of the Statute and Article 7 of the ICCPR.

3517. The Appeals Chamber also dismisses Ndayambaje's claim that imposing a single life sentence deprived him of the benefit of any credit based on the period already spent in detention and that the Trial Chamber erred in failing to provide a reasoned opinion in this regard. Rule 101(C) of the Rules states that "[c]redit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal". This provision, however, does not affect the ability of a trial chamber to impose the maximum sentence, as provided for by Rule 101(A) of the Rules.[7946]

3518. Moreover, the Appeals Chamber recalls that Rule 87(C) of the Rules provides that "[i]f the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall impose a sentence in respect of each finding of guilt […] unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."[7947] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in deciding to impose a single sentence in this instance.

3519. Based on the foregoing, the Appeals Chamber dismisses Ndayambaje's arguments concerning the imposition of a sentence of life imprisonment.

6. Conclusion

3520. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the Trial Chamber's determination of his sentence and dismisses Ground 21 of his appeal.

[7946] *See Karera* Appeal Judgement, para. 397.
[7947] The Appeals Chamber notes that Rule 87(C) of the Rules was amended on 14 March 2008 to expressly provide for the imposition of single sentences. *See*, *e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 679, fn. 1828; *Ntabakuze* Appeal Judgement, para. 276, fn. 631. Prior to this amendment, the Appeals Chamber confirmed the propriety of this practice. *See Nahimana et al.* Appeal Judgement, paras. 1042, 1043; *Kambanda* Appeal Judgement, paras. 111, 112.

XII. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON SENTENCES

A. Nyiramasuhuko

3521. With respect to Nyiramasuhuko, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that her right to be tried without undue delay had not been violated, and that this violation caused her prejudice.[7948] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Nyiramasuhuko's conviction for persecution as a crime against humanity.[7949]

3522. However, the Appeals Chamber has upheld Nyiramasuhuko's convictions for: (i) conspiracy to commit genocide pursuant to Article 6(1) of the Statute by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;[7950] (ii) genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killings of Tutsis who had sought refuge at the office of Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks;[7951] and (iii) rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.[7952]

3523. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Nyiramasuhuko's sentence of life imprisonment to 47 years of imprisonment.

B. Ntahobali

3524. With respect to Ntahobali, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7953] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Ntahobali's conviction for persecution as a crime against

[7948] *See supra*, Section III.K.
[7949] *See supra*, Section V.M.
[7950] *See supra*, Section IV.D.
[7951] *See supra*, Section IV.F. The Appeals Chamber has further upheld the Trial Chamber's finding that Nyiramasuhuko also bore responsibility as a superior under Article 6(3) of the Statute for these crimes. *See supra*, Section IV.F.4.
[7952] *See supra*, Section IV.F.

humanity.[7954] In addition, the Appeals Chamber has reversed Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) killing numerous Tutsis, other than a Tutsi girl, at the Hotel Ihuliro roadblock in late April 1994; and (ii) aiding and abetting the killing of Rwamukwaya and his family around 29-30 April 1994.[7955] It has also reversed Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) raping Tutsi women, other than Witness TA, at the Butare Prefecture Office; and (ii) ordering the rapes of six Tutsi women, other than Witness TA, at the prefectoral office during the First Attack of the Last Half of May Attacks.[7956]

3525. However, the Appeals Chamber, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack, has upheld Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) killing a Tutsi girl he had first raped at the Hotel Ihuliro roadblock in late April 1994; (ii) ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, killings of Tutsis at the IRST on 21 April 1994, and killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack; and (iii) aiding and abetting the killings of Tutsis abducted from the EER perpetrated between mid-May and early June 1994.[7957] The Appeals Chamber has further upheld Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II

[7953] *See supra*, Section III.K.
[7954] *See supra*, Section V.M.
[7955] *See supra*, Sections V.G, V.H.
[7956] *See supra*, Section V.I. The Appeals Chamber recalls that it has further reversed the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the rapes of six Tutsi women, other than Witness TA, at the prefectoral office during the First Attack of the Last Half of May Attacks.
[7957] *See supra*, Sections V.F, V.G, V.I, V.J. With respect to the Mid-May Attack for which Ntahobali was convicted for ordering killings of Tutsis who had sought refuge at the Butare Prefecture Office, although the Appeals Chamber, Judge Liu dissenting, upheld Ntahobali's responsibility for ordering the killings of Tutsi abducted during the Mid-May Attack, it recalls that is has also found that the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office is not sustained by the record or is based on findings for which Ntahobali was not convicted by the Trial Chamber. *See supra*, Section V.I. The Appeals Chamber recalls that it has, Judge Liu dissenting with respect to Ntahobali's responsibility for the Mid-May Attack, further upheld the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack, and the killings of Tutsis abducted from the EER perpetrated between mid-May and early June 1994. *See supra*, Sections V.G, V.I, V.J. The Appeals Chamber, Judge Liu dissenting, has further upheld the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks. *See supra*, Section V.I.

pursuant to Article 6(1) of the Statute for: (i) raping a Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks at the prefectoral office; (ii) ordering the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks; and (iii) aiding and abetting the rapes of Witness TA at the prefectoral office during the First Half of June Attacks.[7958]

3526. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Ntahobali's sentence of life imprisonment to 47 years of imprisonment.

C. Nsabimana

3527. With respect to Nsabimana, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7959] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Nsabimana's conviction for persecution as a crime against humanity.[7960] The Appeals Chamber has also found that the Trial Chamber erred in considering the vulnerability of the victims in assessing the gravity of the offences and as a separate aggravating factor and that, in light of the form and degree of participation of Nsabimana in the crimes committed, the sentence imposed by the Trial Chamber is excessive and that the Trial Chamber committed a discernible error in exercising its discretion in this regard.[7961]

3528. However, the Appeals Chamber has upheld Nsabimana's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence.[7962]

3529. In light of the above, the Appeals Chamber reduces Nsabimana's sentence of 25 years of imprisonment to 18 years of imprisonment.

D. Nteziryayo

3530. With respect to Nteziryayo, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and

[7958] *See supra*, Sections V.G, V.I
[7959] *See supra*, Section III.K.
[7960] *See supra*, Section V.M.
[7961] *See supra*, Section XI.C.

that this violation caused him prejudice.[7963] The Appeals Chamber has also found that the Trial Chamber erred in considering Nteziryayo's role in the civil defence programme and the unspecified conclusion that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates" when assessing the gravity of his offences.[7964]

3531. However, the Appeals Chamber has upheld Nteziryayo's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's Swearing-In Ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994.[7965]

3532. In light of the above, the Appeals Chamber reduces Nteziryayo's sentence of 30 years of imprisonment to 25 years of imprisonment.

E. Kanyabashi

3533. With respect to Kanyabashi, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7966] In addition, the Appeals Chamber has reversed Kanyabashi's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994.[7967] The Appeals Chamber recalls that, in Section XI.E above, it has concluded that, in light of the fact that a majority of Kanyabashi's convictions have been overturned

[7962] *See supra*, Section VI.D.
[7963] *See supra*, Section III.K.
[7964] *See supra*, Section XI.D.
[7965] *See supra*, Sections VII.B-VII.D.
[7966] *See supra*, Section III.K.
[7967] *See supra*, Sections VIII.B.1, VIII.B.4, VIII.C, VIII.D. *See also supra*, Section V.M. The Appeals Chamber recalls that it had also found that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. *See supra*, Section XI.E. The Appeals Chamber further recalls that it has found that, in light of the fact that Kanyabashi's convictions for the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994 have been overturned on appeal, the Trial Chamber's conclusion in its sentencing deliberations that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries" and its reliance on the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as an aggravating circumstance are no longer supported. Likewise, the Appeals Chamber has found that the Trial Chamber's conclusion that Kanyabashi abused his authority in relation to the crimes that occurred at Matyazo Clinic also lacks support. *See supra*, Section XI.E.

on appeal, the Appeals Chamber will consider Kanyabashi's contentions as to whether his sentence is manifestly excessive when determining the impact of its own findings on his sentence. The Appeals Chamber has also found that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention when determining his mitigating circumstances relevant to sentencing.[7968]

3534. However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, has upheld Kanyabashi's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in late May and mid-June 1994 calling on the population to kill Tutsis.[7969]

3535. In light of the above, the Appeals Chamber reduces Kanyabashi's sentence of 35 years of imprisonment to 20 years of imprisonment.

F. Ndayambaje

3536. With respect to Ndayambaje, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7970] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Ndayambaje's conviction for persecution as a crime against humanity.[7971] In addition, the Appeals Chamber has reversed Ndayambaje's convictions for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994.[7972] It has also reversed Ndayambaje's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Kabuye Hill on 22 April 1994; and (ii) instigating the killing of a Tutsi girl named Nambaje abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994.[7973]

3537. However, the Appeals Chamber has upheld Ndayambaje's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making a

[7968] *See supra*, Section XI.E.
[7969] *See supra*, Section VIII.E.
[7970] *See supra*, Section III.K.
[7971] *See supra*, Section V.M.
[7972] *See supra*, Sections IX.A.1.(c), IX.A.5.
[7973] *See supra*, Sections IX.F, IX.H.

speech containing inciting statements to commit genocide at his swearing in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994.[7974] The Appeals Chamber has further upheld Ndayambaje's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 23 to 24 April 1994; and (ii) instigating the killings of Tutsi women and girls, other than one named Nambaje, abducted from Mugombwa Sector based on his utterances at the Virgin Mary Statute after his swearing-in ceremony on 22 June 1994.[7975]

3538. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Ndayambaje's sentence of life imprisonment to 47 years of imprisonment.

[7974] *See supra*, Section IX.G.
[7975] *See supra*, Sections IX.E, IX.F, IX.H.

XIII. DISPOSITION

3539. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules,

NOTING the written submissions of the parties and their oral arguments presented at the appeals hearing between 14 and 17 April 2015 as well as between 20 and 22 April 2015;

SITTING in open session;

WITH RESPECT TO PAULINE NYIRAMASUHUKO'S APPEAL

GRANTS Ground 1 of Nyiramasuhuko's appeal in part, **FINDS** that the Trial Chamber erred in concluding that her right to be tried without undue delay had not been violated, and **FINDS** that this violation caused her prejudice;

DISMISSES Nyiramasuhuko's appeal in all other respects;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting Nyiramasuhuko for persecution as a crime against humanity, **REVERSES** Nyiramasuhuko's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

AFFIRMS Nyiramasuhuko's convictions for:

- conspiracy to commit genocide pursuant to Article 6(1) of the Statute by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks; and
- rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks;

REDUCES Nyiramasuhuko's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period she has already spent in detention since her arrest on 18 July 1997;

WITH RESPECT TO ARSÈNE SHALOM NTAHOBALI'S APPEAL

GRANTS Ground 1.1 of Ntahobali's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS, Judge Agius dissenting, Ground 4.6 of Ntahobali's appeal, **REVERSES** Ntahobali's conviction for persecution as a crime against humanity, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

GRANTS Ground 4.2 of Ntahobali's appeal in part and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for killing numerous Tutsis, other than a Tutsi girl, at the Hotel Ihuliro roadblock in late April 1994;

GRANTS Grounds 3.4, in part, and 4.7 of Ntahobali's appeal and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killing of Rwamukwaya and his family around 29-30 April 1994;

GRANTS, in part, Grounds 3.6, and 4.2 through 4.4, of Ntahobali's appeal and **REVERSES** his convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping Tutsi women, other than Witness TA, at the Butare Prefecture Office; and
- ordering the rapes of six Tutsi women, other than Witness TA, at the Butare Prefecture Office during the First Attack of the Last Half of May Attacks;

DISMISSES Ntahobali's appeal in all other respects;

AFFIRMS, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack at the Butare Prefecture Office, Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- killing a Tutsi girl he had first raped at the Hotel Ihuliro roadblock in late April 1994;
- ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the killing of Tutsis at the IRST on 21 April 1994, and the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack; and
- aiding and abetting the killings of Tutsis abducted from the EER between mid-May and early June 1994;

AFFIRMS Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping a Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks at the prefectoral office;
- ordering the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks; and
- aiding and abetting the rapes of Witness TA at the prefectoral office during the First Half of June Attacks;

REDUCES Ntahobali's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 24 July 1997;

WITH RESPECT TO SYLVAIN NSABIMANA'S APPEAL

DISMISSES Nsabimana's appeal in all respects;

FINDS, *proprio motu*, that the Trial Chamber erred in concluding that Nsabimana's right to be tried without undue delay had not been violated and **FINDS** that this violation caused him prejudice;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting

Nsabimana for persecution as a crime against humanity, **REVERSES** Nsabimana's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Nsabimana and Nteziryayo Indictment;

AFFIRMS Nsabimana's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence;

REDUCES Nsabimana's sentence of 25 years of imprisonment imposed by the Trial Chamber to 18 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 18 July 1997;

WITH RESPECT TO ALPHONSE NTEZIRYAYO'S APPEAL

GRANTS Ground 9 of Nteziryayo's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

DISMISSES Nteziryayo's appeal in all other respects;

AFFIRMS Nteziryayo's convictions for direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's Swearing-In Ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994;

REDUCES Nteziryayo's sentence of 30 years of imprisonment imposed by the Trial Chamber to 25 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 26 March 1998;

WITH RESPECT TO JOSEPH KANYABASHI'S APPEAL

GRANTS Ground 6 of Kanyabashi's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Grounds 1.1 and 2.2 of Kanyabashi's appeal, **REVERSES** his convictions for genocide extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994, and **ENTERS** a verdict of acquittal under Counts 2, 6, 7, and 9 of the Kanyabashi Indictment;

DISMISSES, Judge Pocar and Judge Agius dissenting with respect to the incitement by megaphone, Kanyabashi's appeal in all other respects;

AFFIRMS, Judge Pocar and Judge Agius dissenting, Kanyabashi's convictions for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in late May and mid-June 1994 calling on the population to kill Tutsis;

REDUCES Kanyabashi's sentence of 35 years of imprisonment imposed by the Trial Chamber to 20 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 28 June 1995;

WITH RESPECT TO ÉLIE NDAYAMBAJE'S APPEAL

GRANTS Ground 15 of Ndayambaje's appeal in part, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Ground 2 of Ndayambaje's appeal and **REVERSES** his conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994;

GRANTS Ground 18 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994;

GRANTS Ground 20 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life,

health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for instigating the killing of a Tutsi girl named Nambaje abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994;

DISMISSES Ndayambaje's appeal in all other respects;

FINDS, *proprio motu*, that the Trial Chamber erred in convicting Ndayambaje for persecution as a crime against humanity, **REVERSES** Ndayambaje's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Ndayambaje Indictment;

AFFIRMS Ndayambaje's convictions for:

- committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making a speech containing inciting statements to commit genocide at his swearing in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994;
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 23 to 24 April 1994; and
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killings of Tutsi women and girls, other than one named Nambaje, abducted from Mugombwa Sector based on his utterances at the Virgin Mary Statute after his swearing-in ceremony on 22 June 1994;

REDUCES Ndayambaje's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 28 June 1995;

WITH RESPECT TO THE APPEAL OF THE PROSECUTION

DISMISSES the Prosecution's appeal in its entirety;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in light of time served, Nsabimana's and Kanyabashi's immediate release; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Nyiramasuhuko, Ntahobali, Nteziryayo, and Ndayambaje are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentence will be served.

Done in English and French, the English text being authoritative.

_____	_____	_____
Fausto Pocar Presiding Judge	Carmel Agius Judge	Liu Daqun Judge

_____	_____
Khalida Rachid Khan Judge	Bakhtiyar Tuzmukhamedov Judge

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Fausto Pocar and Judge Carmel Agius append a joint dissenting opinion.

Judge Carmel Agius appends dissenting and separate opinions.

Judge Liu Daqun appends partially dissenting and dissenting opinions.

Judge Khalida Rachid Khan appends a dissenting opinion and a declaration.

Dated this fourteenth day of December 2015, in Arusha, Tanzania.

[Seal of the Tribunal]

XIV. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. At trial, the Prosecution submitted an initial indictment against Nyiramasuhuko and Ntahobali on 26 May 1997, which was confirmed on 29 May 1997.[1] On 10 August 1999 the Prosecution was granted leave to amend the indictment, which included, *inter alia*, adding six new counts.[2]

2. In deciding to grant the Prosecution leave to amend the indictment as requested, the Trial Chamber held that there was no need to inquire whether or not a *prima facie* case had been established in support of the new counts since it had only been seised of a motion to amend the indictment pursuant to Rule 50 of the Rules.[3] The Trial Chamber only satisfied itself that the Prosecution "provided sufficient grounds both in fact and in law".[4]

3. In this Judgement, the Appeals Chamber finds Nyiramasuhuko's allegation that the Trial Chamber erred in law by not requiring the Prosecution to present a *prima facie* case in support of the six new counts to be without merit.[5] Likewise, the Appeals Chamber also dismisses Ntahobali's similar arguments.[6] I respectfully disagree with both the reasoning and the conclusion of the majority of the Appeals Chamber ("Majority") in this respect.

4. Although on 10 August 1999 when the Prosecution was granted leave to amend the initial indictment against Nyiramasuhuko and Ntahobali Rule 50(A)(ii) of the Rules had not been adopted yet,[7] for the reasons already expressed in my opinion of 12 February 2004 in the *Casimir Bizimungu et al.* case, I believe that – even prior to the adoption of Rule 50(A)(ii) of the Rules – an amendment to an indictment to include new counts could not be allowed if the conditions for confirming the indictment set forth in Rule 47 of the Rules were not satisfied.[8] For the completeness of my argument, I hereby reproduce the relevant paragraphs of my previous opinion:

> 2. […] In paragraph 11 of the decision, it is stated that "…Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber…." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.

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[1] Appeal Judgement, para. 443. *See also* Trial Judgement, paras. 13, 6294.
[2] *See* Appeal Judgement, para. 443.
[3] *See* Appeal Judgement, para. 444, *referring to* 10 August 1999 Decision, para. 17.
[4] *See* Appeal Judgement, para. 444, *quoting* 10 August 1999 Oral Decision, p. 4.
[5] Appeal Judgement, para. 450.
[6] Appeal Judgement, paras. 1077, 1079.
[7] As noted in this Judgement, Rule 50(A)(ii) of the Rules was introduced in the Rules on 15 May 2004, following the 14th plenary session held on 23 and 24 April 2004. *See* Appeal Judgement, para. 450, fn. 1051.
[8] *Bizimungu et al.* 12 February 2004 Appeal Decision, Individual Opinion of Judge Pocar, para. 1. I note that Rule 47 of the Rules applicable on 10 August 1999 is similar to Rule 47 of te Rules applicable today.

3. Article 18(1) of the Statute of the International Tribunal provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The confirmation of an indictment can therefore only take place if a *prima facie* case exists. This statutory requirement is echoed in Rule 47(E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."

4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges—for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.

5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a *prima facie* case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.

6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

5. In light of the above, I dissent from the Majority's conclusion that Nyiramasuhuko's – and Ntahobali's – allegation that the Trial Chamber erred in law by not requiring the Prosecution to present a *prima facie* case in support of the six new counts is without merit.

Done in English and French, the English version being authoritative.

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

_____
Judge Fausto Pocar

[Seal of the Tribunal]

XV. JOINT DISSENTING OPINION OF JUDGE POCAR AND JUDGE AGIUS

1. In this Judgement, the Appeals Chamber considers that, although the Trial Chamber erred in failing to find that the Indictment was defective in relation to the number of incidents of incitement by megaphone of which Kanyabashi was alleged to be responsible, Kanyabashi was ultimately put on adequate notice of the relevant material facts with respect to the number of alleged incidents of incitement by megaphone and that the vagueness of the Indictment did not impair his ability to prepare his defence.[1] Accordingly, the Appeals Chamber finds that the Trial Chamber's error concerning the form of the Indictment regarding the number of incidents of incitement by megaphone did not invalidate its decision to convict Kanyabashi on the basis of the late May and mid-June 1994 megaphone announcements and, therefore, dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility for committing direct and public incitement to commit genocide through two megaphone announcements in late May and mid-June 1994.[2]

2. Moreover, when examining the merits of Kanyabashi's appeal against his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994, the Appeals Chamber concludes that Kanyabashi has not demonstrated that the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony with respect to the megaphone announcement in late May 1994.[3] In light of this conclusion and after having found that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994, the Appeals Chamber finds that Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, is sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[4] Accordingly, the Appeals Chamber finds that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice and that Kanyabashi has failed to demonstrate that the Trial

[1] Appeal Judgement, para. 2558.
[2] Appeal Judgement, paras. 2558, 2560.
[3] Appeal Judgement, para. 2626. *See also ibid.*, paras. 2621-2625.
[4] Appeal Judgement, paras. 2644, 2648.

Chamber erred in finding that, around late May 1994, he drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5]

3. Similarly, with respect to the megaphone announcement in mid-June 1994, the Appeals Chamber rejects Kanyabashi's contention related to this event and finds that the Trial Chamber's error in finding the existence of a *modus operandi* did not result in a miscarriage of justice as Witness QI's evidence alone was sufficient to support the Trial Chamber's conclusions as to the mid-June 1994 megaphone announcement.[6]

4. In light of the above, the Appeals Chamber: (i) finds that Kanyabashi has failed to demonstrate any error in the Trial Chamber's assessment of the evidence concerning the late May and mid-June 1994 megaphone announcements that occasioned a miscarriage of justice and warrants its intervention; (ii) dismisses Grounds 3.2 through 3.8 of his appeal; and (iii) upholds his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994.[7]

5. For the reasons mentioned below, we disagree with both the reasoning and the conclusions of the Majority concerning Kanyabashi's conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994.

1. Kanyabashi Indictment: Mid-June 1994 Incident

6. On one hand, the Appeals Chamber – and we concur with this conclusion – finds that paragraph 5.8 of the Kanyabashi Indictment[8] was overly vague as regards the number of times Kanyabashi was alleged to have incited the population through a megaphone while driving through Butare Town.[9] On the other hand, the Majority – and we disagree with this conclusion – is not persuaded by Kanyabashi's argument that paragraph 5.8 was defective regarding the pleading of the

[5] Appeal Judgement, paras. 2648, 2649.
[6] Appeal Judgement, para. 2673.
[7] Appeal Judgement, paras. 2682, 2694, 3539.
[8] Paragraph 5.8 of the Kanyabashi Indictment reads as follows:

> 5.8 From April to July 1994, various prominent persons, including members of the government and local authorities propagated incitement to hatred and violence. On or about April 19, 1994, after the interim president Théodore Sindikubwabo delivered a speech in Butare encouraging people to fight the enemy, Joseph KANYABASHI, gave a speech in support of the interim president, encouraging the population to follow Sindikubwabo's instructions. Shortly thereafter, widespr[]ead attacks on Tutsis began in the area. In or around late May, 1994, on at least on one occasion, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone. He encouraged the population to systematically search for the "enemy" in the commune and immediately afterwards, more Tutsis were killed in Ngoma commune. Also in or around May, 1994 Joseph KANYABASHI held at least two meetings in Cyarwa sector, Ngoma commune, at which he encouraged local residents to kill Tutsis. In the days following the meetings, Tutsis in the area were attacked.

[9] Appeal Judgement, para. 2551.

dates of the incidents.[10] In particular, the Majority considers that, while the Kanyabashi Indictment does not refer to the month of June in particular, the timeframe "[i]n or around late May, 1994" was sufficiently specific to allow Kanyabashi to prepare his defence against *two* allegations of incitement occurring in late May and mid-June 1994.[11] In this respect, the Majority notes that, although the Prosecution was in possession of information regarding the date of the late May incident through Witness QJ's written statements, it did not have information regarding the date of the June incident at the time of the filing of the Indictment.[12] Accordingly, the Majority finds no error in the Trial Chamber's finding that the allegation of a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8 and considers that the timeframe of the allegation of megaphone announcements by Kanyabashi pleaded in this paragraph was sufficient to provide him adequate notice.[13]

7. In our view, the two above-mentioned conclusions of the Majority are contradictory. Indeed, how can the Majority finds, on one hand, that the Kanyabashi Indictment is defective as to the number of times Kanyabashi was alleged to have incited the population through a megaphone and, on the other hand, that it is not defective regarding the pleading of the date*s* of the incident*s*? In this respect, we recall that paragraph 5.8 of the Kanyabashi Indictment only mentions that, "*[i]n or around late May*, 1994, *on at least on one occasion*, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone."[14] If the Kanyabashi Indictment does not indicate how many times Kanyabashi is alleged to have incited the population through a megaphone while driving through Butare Town, how can it be not defective regarding the pleading of the date*s* of the incident*s*, especially with respect to the mid-June 1994 incident? Thus, we consider that – after having found that the Kanyabashi Indictment is defective as to the number of times Kanyabashi was alleged to have incited the population through a megaphone – the Majoriy had no other choice than to find that the Trial Chamber also erred with respect to the pleading of the date of the mid-June 1994 incident. We consider that Kanyabashi has demonstrated that the phrase "[i]n or around late May, 1994, on at least on one occasion" pleaded in paragraph 5.8 did not provide him with notice that he was to defend against a *second* allegation of incitement by megaphone *occurring in mid-June 1994*. The Trial Chamber therefore erred in determining that the mid-June 1994 megaphone incident fell within the scope of paragraph 5.8 and that Kanyabashi was put on notice that he was alleged to have incited to the commission of genocide through a megaphone announcement while driving though Butare Town in mid-June 1994.

[10] Appeal Judgement, para. 2552.
[11] Appeal Judgement, para. 2552 (emphasis added).
[12] Appeal Judgement, para. 2552.
[13] Appeal Judgement, para. 2552.
[14] Emphasis added. *See also supra*, fn. 8.

8. We also note that, while the Prosecution was in possession of information regarding the date of the late May incident through Witness QJ's written statements when charging Kanyabashi, it did not have information on any incident of incitement by megaphone occurring *in mid-June 1994*.[15] In this respect, we recall that it is the well established jurisprudence of the Appeals Chamber that "the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the evidence unfolds."[16] In light of the fact that the Prosecution only charged Kanyabashi based on megaphone incident(s) taking place "[i]n or around late May, 1994, on at least on one occasion" in paragraph 5.8 of the Kanyabashi Indictment and was not in possession of any information regarding the mid-June 1994 incident when charging Kanyabashi and up until Witness QI testified at trial, we are of the view that the mid-June 1994 megaphone incident was not part of the Prosecution case against Kanyabashi at the time of the filing of the Indictment.

9. Accordingly, we believe that the Trial Chamber erred in convicting Kanyabashi of an incident of incitement by megaphone in mid-June 1994 since he was not charged on this basis in the Kanyabashi Indictment. We would therefore have acquitted Kanyabashi of the mid-June 1994 incident.

2. Assessment of the Evidence: Late May 1994 Incident

10. Turning to the merits of Kanyabashi's appeal against his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town, we would also have acquitted Kanyabashi of the late May 1994 incident for the reasons expressed below.

11. We recall that the Appeals Chamber – and we concur with this conclusion – found that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered

[15] In this respect, we note that, in paragraph 2556 of the Appeal Judgement, the Majority – after having found that the Kanyabashi Indictment was defective but could be cured by the provision of timely, clear, and consistent information – correctly notes that "there is no mention of the allegation of megaphone announcements in the Prosecution's pre-trial brief or opening statement." The Majority then proceeds to examine whether Witnesses QJ's and QI's summaries and prior statements can remedy the defect in the Kanyabashi Indictment. While the Majority concludes that, "[a]lthough not obvious from a reading of Witnesses QJ's and QI's summaries", "a review of the witnesses' prior statements confirms that both witnesses were referring to two distinct incidents implicating Kanyabashi in delivering a message using a megaphone", it fails short to provide any explanation. *See idem*. Indeed, a review of the witnesses' prior statements, even in light of the witnesses' summaries, does not confirm that both witnesses were referring to two distinct incidents. While they contain differences, they are also very similar in many respects. *See ibid*., fns. 5934-5936. In our view, these materials are inconclusive at to whether the witnesses were referring to two distinct incidents and, more importantly, certainly do not prove that the Prosecution intended to charge Kanyabashi with a second incident occurring in mid-June1994.

[16] *See*, *e.g.*, *Ntagerura et al.* Appeal Judgement, para. 27. *See also Kupreškić et al.* Appeal Judgement, para. 92; *Niyitegeka* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, para. 30.

to the population of Ngoma Commune from April through June 1994.[17] We further recall that, as correctly noted by the Appeals Chamber,[18] the Trial Chamber relied on Witness QJ's evidence to reach its factual conclusion with respect to the late May 1994 megaphone announcement in the following terms:

> Insofar as Witness QJ's account was also corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system, the Chamber finds that the Prosecution has proven beyond a reasonable doubt that around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them.[19]

12. In light of the wording of the Trial Chamber's conclusion, it is clear that the Trial Chamber only relied on Witness QJ's evidence concerning the May 1994 megaphone announcement "[i]nsofar as [his] account was corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system".[20] Having determined that the Trial Chamber's findings as they concern the *modus operandi* were unreasonable, the Majority finds that "Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them."[21] It adds that "this evidence is sufficiently complementary and corroborative of Witness QJ's evidence of 'announcements being disseminated from a vehicle with a public address system'."[22] In light of these findings, the Majority concludes that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice and, therefore, finds that Kanyabashi has failed to demonstrate that the Trial Chamber erred in finding that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[23]

13. However, in our view, and contrary to the Majority's position,[24] the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony.[25] Indeed, Witness TK's evidence that an announcement was made to the public with a megaphone from a vehicle by someone else than Kanyabashi is insufficiently linked to Witness QJ's testimony that Kanyabashi directly and publicly incited genocide using a megaphone announcement in late

[17] Appeal Judgement, paras. 2600-2602. *See also ibid*., para. 2644.
[18] Appeal Judgement, para. 2645.
[19] Trial Judgement, para. 3813.
[20] Trial Judgement, para. 3813.
[21] Appeal Judgement, para. 2648.
[22] Appeal Judgement, para. 2648, *quoting* Trial Judgement, para. 3813.
[23] Appeal Judgement, paras. 2648, 2649.
[24] Appeal Judgement, paras. 2624, 2626.
[25] Trial Judgement, para. 3804. *See also ibid*., para. 3802.

May 1994. Witness TK's evidence concerns the conduct of someone else than Kanyabashi. Thus, it simply cannot be corroborative of Witness QJ's testimony. On this basis, we believe that no reasonable trier of fact could have found that Witness TK's evidence corroborated Witness QJ's evidence of Kanyabashi inciting the population using a megaphone in May 1994.

14. Having found that the Trial Chamber's findings as they concern the *modus operandi* were unreasonable and that the Trial Chamber erred in concluding that Witness TK's evidence corroborated Witness QJ's concerning the May 1994 megaphone announcement, we would have found that Witness QJ's evidence is no longer corroborated in the manner in which the Trial Chamber required it to be in order to reach findings beyond reasonable doubt. Consequently, we believe that these errors have occasioned a miscarriage of justice and that fairness requires that the findings concerning the May 1994 megaphone announcement must be set aside.

3. Conclusion

15. For the foregoing reasons, we disagree with both the reasoning and the conclusions of the Majority concerning Kanyabashi's conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994. Given that the mid-June 1994 incident was never part of the Prosecution case against Kanyabashi at the time of the filing of the Indictment and up until Witness QI testified at trial, we would have acquitted Kanyabashi of the mid-June 1994 incident. Moreover, having found that Witness QJ's testimony is no longer corroborated in the manner in which the Trial Chamber required it to be in order to reach findings beyond reasonable doub, we would also have acquitted Kanyabashi of the late May 1994 incident. Accordingly, we would have reversed Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 megaphone announcements.

16. In light of the above, and the fact that the Appeal Chamber reversed Kanybashi convictions in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994 as well as his convictions for failing to prevent the soldiers from committing the killings at Matyazo Clinic in late April 1994 and punish them,[26] we would have acquitted Kanyabashi fully.

[26] Appeal Judgement, paras. 2520, 2563, 2575, 3539.

Done in English and French, the English version being authoritative.

_____	_____
Judge Fausto Pocar	Judge Carmel Agius

Dated this fourteenth day of December 2015, in Arusha, Tanzania.

[Seal of the Tribunal]

XVI. DISSENTING AND SEPARATE OPINIONS OF JUDGE AGIUS

1. I respectfully disagree with the Majority's position concerning: (i) Ndayambaje's and Nteziryayo's arrest and initial appearance; (ii) the reversal of the convictions of Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as a crime against humanity; (iii) Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 Megaphone Announcements; (iv) Ntahobali's appeal on sentencing related to the Trial Chamber's assessment of the gravity of the offences; and (v) the impact of the Appeals Chamber's findings on Nyiramasuhuko's, Ntahobali's, and Ndayambaje's sentences. Moreover, I attach to this Judgement a separate opinion setting out my position in relation to the mode of responsibility of aiding and abetting.

2. My position concerning Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 Megaphone Announcements is expressed above, in a joint dissenting opinion with Judge Pocar.[1] I discuss my views in relation to the other matters below.

A. Dissenting Opinion: Ndayambaje's and Nteziryayo's Arrest and Initial Appearance

1. Ndayambaje's Arrest and Initial Appearance

3. In this Judgement, the Majority declines to consider on the merits Ndayambaje's submissions concerning the legality of his detention prior to the issuance of the indictment against him, as well as the delays in his transfer to the Tribunal and in his initial appearance following the issuance of his indictment.[2] The Majority also declines to examine Ndayambaje's submissions that these delays resulted in violations of his right to be promptly informed of the charges against him, his right to counsel, and his right to initial appearance without delay.[3] It does so on the basis that Ndayambaje failed to raise these submissions during the course of his trial and in his notice of appeal, and that he has failed to identify the error allegedly committed by the Trial Chamber which would justifiy the intervention of the Appeals Chamber.[4] Further, the Majority states that it "does not consider that the seriousness of the violations alleged by Ndayambaje constitutes special circumstances warranting the consideration on the merits of these allegations raised for the first time in the Ndayambaje Appeal Brief or at the appeal hearing."[5] The Majority concludes that

[1] *See supra*, Joint Dissenting Opinion of Judge Pocar and Judge Agius.
[2] Appeal Judgement, para. 63. *See* Ndayambaje Appeal Brief, para. 308; Appeal Judgement, para. 59.
[3] Appeal Judgement, para. 63. *See* Ndayambaje Appeal Brief, para. 308; AT. 21 April 2015 pp. 7-9.
[4] Appeal Judgement, para. 62.
[5] Appeal Judgement, para. 63.

Ndayambaje has therefore waived his right to raise these issues on appeal, and dismisses the relevant part of Ndayambaje's appeal "without further consideration".[6]

4. For the reasons set out below, I respectfully disagree with the approach taken by the Majority and its decision not to consider Ndayambaje's submissions on the merits. In my view, the Appeals Chamber ought to examine the merits of his submissions.

(a) The Issue of Waiver

5. I accept that, as a general principle, if a party raises no objection to a particular issue before the Trial Chamber, in the absence of "special circumstances", the Appeals Chamber will find that the party has waived its right to adduce the issue on appeal.[7] I am also aware that this waiver principle has been applied to allegations of fair trial violations, including allegations of violations of the right to initial appearance without delay and the right to counsel of one's own choosing.[8] However, as set out below, I am not convinced that Ndayambaje did waive his right to adduce the issues on appeal. On the contrary, in my view, he sufficiently raised the issues at trial. Furthermore, even if Ndayambaje had failed to raise these issues, I consider that the nature of the alleged fair trial violations, and particularly their gravity and seriousness in the circumstances described by Ndayambaje, constitutes "special circumstances" requiring the Appeals Chamber to address his submissions on the merits, or otherwise warrants its intervention in the interests of justice.

6. I should note at the outset that I am not in a position to properly assess the merits or accuracy of Ndayambaje's submissions or to establish the precise nature and extent of any violation of his rights. In my view, were the Appeals Chamber minded to consider his submissions on the merits, it would require and indeed should request submissions in writing from both Ndayambaje and the Prosecution.[9] My point is that the seriousness of the alleged violations warrants the attention and concern of the Appeals Chamber, which, upon full briefing by the parties, would then make its own determination on the issues. I will therefore limit my dissenting opinion to whether the Majority rightfully declined to examine Ndayambaje's submissions.

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[6] Appeal Judgement, para. 63.
[7] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 31; *Musema* Appeal Judgement, paras. 127, 341; *Kambanda* Appeal Judgement, para. 25. *Cf. Renzaho* Appeal Judgement, para. 17.
[8] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 31 (right to initial appearance without delay); *Kambanda* Appeal Judgement, paras. 25, 28 (right to counsel of own choosing). *See also*, *Musema* Appeal Judgement, paras. 127 (right to effective cross-examination), 341 (right to have adequate time and facilities for the preparation of the defence); *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376 (right to be informed promptly and in detail of the nature of the charges); *Čelebići* Appeal Judgement, paras. 640, 649, 650 (alleged violation of fair trial right to the attention of judges to the proceedings); *Tadić* Appeal Judgement, para. 55 (right to equality of arms). *See* Appeal Judgement, fn. 169.
[9] *See Augustin Ndindiliyimana et. al v. The Prosecutor*, Case No. ICTR-00-56-A, Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2.

(i) Whether Ndayambaje failed to raise the issues at trial

7. I agree with the Majority that Ndayambaje did not raise the allegations of violations of his right to be promply informed of the charges against him and his right to counsel in his notice of appeal.[10] However, I respectfully disagree with the Majority that "Ndayambaje has further failed to demonstrate that he raised these allegations of violations of his rights at trial".[11] In particular, I take a different view from the Majority when it states that "contrary to Ndayambaje's argument, these allegations were not raised in the motions he referred to during the appeals hearing."[12] I consider that the relevant motions do in fact raise the relevant issues.

8. At the appeal hearing, in response to the Prosecution's submission that he failed to previously raise any issue concerning the appointment of counsel,[13] Ndayambaje referred to a motion dated 28 November 1996, which he stated "underscored his difficulties" in relation to the right to counsel of one's choosing.[14] I note that the Motion of 29 November 1996 indicates, *inter alia*, that Ndayambaje was assigned counsel by the Registrar of the Tribunal on 22 November 1996 and that they met for the first time on the eve of Ndayambaje's initial appearance, on 28 November 1996.[15] The Motion of 29 November 1996 further reflects that Ndayambaje sought to be represented by a different counsel than the assigned counsel, and that the assigned counsel requested the Trial Chamber's intervention to resolve the dispute between Ndayambaje and the Registrar on the assignment of counsel.[16] I note further that, in a correspondence to the Registrar dated 3 December 1996, Ndayambaje reiterated his position that the assigned counsel was not counsel of his choice and provided the names of several lawyers whose assignment would satisfy him.[17] Nonetheless, it appears that Ndayambaje continued to be represented by the assigned counsel at least until 7 July 1998, when the Trial Chamber granted motions by Ndayambaje for the withdrawal of the assigned counsel and the assignment of new counsel to his case.[18]

[10] Appeal Judgement, para. 62; Ndayambaje Notice of Appeal.
[11] Appeal Judgement, para. 62.
[12] Appeal Judgement, para. 62.
[13] AT. 21 April 2015 pp. 32, 33.
[14] AT. 21 April 2015 p. 62, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-I, *Requ[ê]te aux fins de règlement d'une question préalable*, dated 28 November 1996, filed 29 November 1996 ("Motion of 29 November 1996").
[15] Motion of 29 November 1996, p. 42*bis* (Registry pagination). *See also* Appeal Judgement, para. 58.
[16] Motion of 29 November 1996, pp. 42*bis*, 41*bis*, 38*bis* (Registry pagination). The Motion of 29 November 1996 also outlined that Ndayambaje's chosen counsel had not been appointed to the case due to the fact that she was found unqualified by the Registrar. *See* Motion of 29 November 1996, p. 41*bis* (Registry pagination). *See also* AT. 21 April 2015 p. 62.
[17] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-0160, Ndayambaje's Letter to the Registrar of the Tribunal, 3 December 1996.
[18] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Motion of the Accused for the Replacement of Appointed Counsel, 7 July 1998.

9. In response to the Prosecution's submissions that he had also failed to raise issues regarding the delay in service of the Indictment and other pre-trial delays,[19] Ndayambaje referred to an extremely urgent motion for provisional release dated 15 August 2002 and filed 21 August 2002.[20] Ndayambaje stated that, while the violation of his right to counsel had prevented him from raising arguments during the initial pre-trial period with respect to the right to be informed of the charges against him, all of the relevant circumstances, dates and delays were "clearly indicated in that motion".[21] I observe that in the Motion of 21 August 2002, Ndayambaje requested provisional release on the basis of the unduly long period of time in which he had been in detention and the prospect of the trial being exceptionally long, asserting that continued detention throughout the trial would be prejudicial to him.[22] Ndayambaje also asserted that, as of 24 January 1996, his detention in Belgium was based on the request of the ICTR Prosecutor, and that while an indictment was issued against him on 21 June 1996, it was not served on him until 12 August 1996.[23] He further noted that he was transferred to Arusha three months later, on 8 November 1996, which according to him was 289 days after his provisional arrest at the request of the ICTR Prosecutor.[24] Additionally, in describing the many delays to the commencement of his trial, Ndayambaje pointed to the fact that he made his initial appearance before the Trial Chamber on 29 November 1996.[25] Finally, he argued that "his detention to date largely exceeds any acceptable standard".[26]

10. In these circumstances, I am unable to see how Ndayambaje can be claimed to have failed to raise any objection to the alleged violations before the Trial Chamber. In my view, Ndayambaje set out in detail the factual circumstances which form the basis of his allegations and sought remedies for these alleged violations before the Trial Chamber. Furthermore, the Trial Chamber issued its determination on the issues raised by Ndayambaje in a decision on the Motion of 21 August 2002, rejecting his submission that the delays suffered by him were unacceptable.[27] Recalling that "[t]he obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation",[28] and emphasising the duty of the Trial Chamber to ensure the

[19] AT. 21 April 2015 pp. 32, 33.
[20] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Extremely Urgent Motion for the Provisional Release, Under Conditions, of the Accused, 21 August 2002 (originally filed in French, English translation filed on 3 October 2002) ("Motion of 21 August 2002").
[21] AT. 21 April 2015 p. 62.
[22] Motion of 21 August 2002, pp. 48, 49.
[23] Motion of 21 August 2002, paras. 12, 16.
[24] Motion of 21 August 2002, para. 17 (original emphasis omitted).
[25] Motion of 21 August 2002, para. 18.
[26] Motion of 21 August 2002, para. 111.
[27] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for the Provisional Release of the Accused, 22 October 2002, paras. 23, 24, 28.
[28] *Kambanda* Appeal Judgement, para. 25, *citing Tadić* Appeal Judgement, para. 55.

fairness of the trial,[29] I consider that Ndayambaje sufficiently brought his complaints to the Trial Chamber's attention in such a way as to oblige the Trial Chamber to act on the issues and address his allegations with careful attention.

11. Further, in my view, any waiver of the right to adduce issues on appeal must be *unequivocal*. I emphasise in this respect that the European Court of Human Rights ("ECtHR") has held that a waiver of a procedural right, including the right to appeal, must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.[30] I consider that these principles should apply in the instant case, particularly as it concerns allegations of breaches of fundamental fair trial rights.[31] Moreover, I find it very difficult to accept that Ndayambaje has *unequivocally* waived his right to raise the relevant matters on appeal, for the following reasons.

12. First, as set out above, in my view the Motion of 29 November 1996 and Motion of 21 August 2002 clearly relate to the same issues that Ndayambaje elaborated upon in his oral submissions (even if they do not precisely mirror those submissions), and request the Trial Chamber to grant appropriate relief.[32] Second, in his oral submissions in reply, Ndayambaje disputed the Prosecution's assertion that he had not raised the relevant issues before the Trial Chamber, and drew the Appeals Chamber's attention to the motions.[33] Third, in his appeal brief Ndayambaje clearly (albeit briefly) set out his allegations concerning the delays he suffered before his initial appearance and the alleged violation of his right to be informed of the charges.[34] Fourth, Ndayambaje's submission that he was without legal counsel for almost all of the period between his

[29] *See Sainović* Appeal Judgement, para. 100 ("The Appeals Chamber recalls that the primary duty of the trial chamber is to safeguard the fairness of the trial, ensuring that the proceedings are conducted with full respect for the rights of the accused. In this context, the Appeals Chamber also recalls that the right to be tried without undue delay is provided under Article 21(4)(c) of the Statute and embodied in numerous international human rights instruments and is an inseparable and constituent element of the right to a fair trial. Accordingly, the trial chamber has a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.") (internal references omitted).

[30] *See*, *e.g.*, *Litwin v. Germany*, ECtHR, No. 29090/06, Judgment, 3 November 2011, para. 37 ("the Court reiterates that the waiver of a procedural right – in so far as it is permissible under the Convention – must be established in an unequivocal manner. Moreover, such waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance. The Court further considers that the waiver of a right to appeal is, in principle, permissible if the principles mentioned above are adhered to."); *Natsvlishvili and Togonidze v. Georgia*, ECtHR, No. 9043/05, Judgment, 29 April 2014, para. 91 ("it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest."). When examining the circumstances to ensure minimum safeguards are in place, the ECtHR considered, *inter alia*, whether an applicant benefited from legal representation and whether he was aware of the consequences of his waiver and waived his right to appeal voluntarily. *See*, *e.g.*, *Natsvlishvili and Togonidze v. Georgia*, ECtHR, No. 9043/05, Judgment, 29 April 2014, paras. 93, 97; *Litwin v. Germany*, ECtHR, No. 29090/06, Judgment, 3 November 2011, para. 45; *Thind v. Germany*, ECtHR, No. 29752/04, Decision, 23 March 2010, p. 11.

[31] *See infra*, paras. 14-16.

[32] *See supra*, paras. 8, 9.

[33] AT. 21 April 2015 p. 62.

[34] Ndayambaje Appeal Brief, para. 308.

arrest and initial appearance[35] raises serious questions as to whether he was in a position to be able to effectively object to issues before the Trial Chamber during that time.[36] To my mind, these are strong indications that Ndayambaje has not waived his right unequivocally. Regardless, if there is the slightest doubt as to whether the appellant has waived his right, and where the relevant submissions address fundamental fair trial rights, I firmly believe that we ought to err in favour of the appellant in considering those submissions.

(ii) Whether the Appeals Chamber should nevertheless consider Ndayambaje's submissions

13. As noted above, the Majority "does not consider that the seriousness of the violations alleged by Ndayambaje constitutes special circumstances warranting the consideration on the merits of these allegations raised for the first time in the Ndayambaje Appeal Brief or at the appeal hearing."[37] Here, I must respectfully but strongly disagree. Even if I were to agree with the Majority that Ndayambaje did not object to the relevant issues at trial, in my view, the seriousness of the alleged violations in this case most certainly warrants the attention and consideration of the Appeals Chamber.

14. I emphasise in this respect that Ndayambaje has raised issues of the utmost gravity regarding breaches of his fundamental fair trial rights. He alleges, *inter alia*, that he was in detention for **202** days without a warrant of arrest and without an indictment;[38] that he was without legal counsel for **303** days after his arrest;[39] and that the total number of days between his arrest and initial appearance was **311** days.[40]

15. The Tribunal has acknowledged the crucial importance of the rights of a detainee to be brought promptly before a Judge and to be informed of the charges against him.[41] These rights concern the fundamental right to liberty and their protection is key to ensuring that other basic rights of the detainee are respected.[42] I note that the Appeals Chamber held in the *Kajelijeli* Appeal

[35] AT. 21 April 2015 p. 62.
[36] *Supra*, fn. 30.
[37] Appeal Judgement, para. 63.
[38] AT. 21 April 2015 p. 7.
[39] AT. 21 April 2015 p. 9.
[40] AT. 21 April 2015 pp. 8, 9.
[41] *Kajelijeli* Appeal Judgement, paras. 226, 229-233; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, paras. 46, 63.
[42] *Kajelijeli* Appeal Judgement, paras. 229-233. *See also*, with regard to the right to be brought promptly before a judge, *McKay v. The United Kingdom*, ECtHR, No. 543/03, Judgment, 3 October 2006, para. 33 ("The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision"); *Öcalan v. Turkey*, ECtHR, No. 46221/99, Judgment, 12 May 2005, para. 103 ("The Grand Chamber notes

Judgement that a delay of 85 days in serving an arrest warrant and a redacted indictment after a suspect's arrest could not be considered "prompt" or "immediate" within the meaning of the Tribunal's Statute and Rules, and that it was "clearly unlawful and was in violation of the suspect's rights under the Tribunal's Statute and Rules as well as international human rights law".[43] In the present case, where Ndayambaje asserts that he was kept in custody for a period of over six months without a warrant of arrest and without receiving notice of the charges against him, the extent of the alleged violations is far more serious and alarming.

16. Ndayambaje's submission that he was without legal representation from the time of his arrest and until the assignment of duty counsel on 22 November 1996 is also extremely concerning. The right to counsel is one of the fundamental features of a fair trial, being crucial for the ability of the accused to defend himself and to protect his procedural rights.[44] In this light, I am also most concerned by Ndayambaje's submission that, because he was without counsel for almost all of the period between his arrest and initial appearance, he was not able to make submissions before the Trial Chamber concerning alleged violations of other fair trial rights during that time.[45]

17. For these reasons, I simply cannot agree with the Majority that the violations alleged by Ndayambaje are insufficiently serious to constitute "special circumstances". On the contrary, I would consider such breaches, if substantiated, to be an egregious violation of Ndayambaje's fair trial rights. While I again make no comment as to whether such violations have occurred,[46] the very nature of the allegations disturbs me to my core.

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at the outset the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial authority promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment"). Concerning the right of a suspect to be promptly informed about the reasons for his arrest, *see Lutsenko v. Ukraine*, ECtHR, No. 6492/11, Judgment, 3 July 2012, para. 77 ("The Court reiterates that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. By virtue of this provision any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness"); *Nechiporuk and Yonkalo v. Ukraine*, ECtHR, No. 42310/01, Judgment, 21 April 2011, para. 208. Concerning the right of an accused to be promptly informed of the nature and cause of the accusations, *see Nuutinen v. Finland*, ECtHR, No. 45830/99, Judgment, 24 April 2007, para. 30 ("Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair"); *Mulosmani v. Albania*, ECtHR, No. 29864/03, Judgment, 8 October 2013, para. 123.

[43] *Kajelijeli* Appeal Judgement, para. 231.

[44] *See* Article 14 of the International Covenant on Civil and Political Rights; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *See also Krombach v. France*, ECtHR, No. 29731/96, Judgment, 13 February 2001, para. 89; *Omelchenko v. Ukraine*, ECtHR, No. 34592/06, Judgment, 17 July 2014, para. 46.

[45] *See* AT. 21 April 2015 p. 62.

[46] *See supra*, para. 6.

18. I acknowledge (as noted above) that the waiver principle has been applied in cases involving alleged violations of fair trial rights.[47] However, in my view, the seriousness of the allegations in this case eclipses that of the alleged violations in those cases.[48] Further, I note that in other cases concerning alleged violations of fair trial rights, the Appeals Chamber has decided to consider submissions – *notwithstanding* a party's failure to object to the relevant issues at trial – given the general importance of the matter[49] or because it concerned an integral component of the right to a fair trial.[50] I consider that the principles established therein clearly allow the Appeals Chamber to intervene and examine Ndayambaje's submissions in the present case.[51]

19. Most notably, the Appeals Chamber has exercised its discretion in such a manner *in the present Judgement*. In the section of the Judgement dealing with the appellants' right to be tried without undue delay,[52] the Appeals Chamber has considered Nteziryayo's submissions on undue delay despite the fact that he did not raise them at trial.[53] In addition, it has *proprio motu* considered the impact of its findings on undue delay on Nsabimana's rights, regardless of the fact that he did not raise allegations on this issue at all.[54] The Appeals Chamber has addressed these arguments "[c]onsidering the extraordinary length of these proceedings, the Trial Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated, and the interests of justice".[55] I fully agree with this approach.

20. In these circumstances, I am unsure why the Majority is unwilling to also examine Ndayambaje's arguments in the interests of justice, given that his submissions – like Nteziryayo's – relate to serious matters of delay, *inter alia*, and the Trial Chamber made determinations on the

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[47] *See supra*, para. 5, fn. 8.
[48] *See*, *e.g.*, *Bagosora and Nsengiyumva* Appeal Judgement, paras. 28-31 (concerning an alleged delay of almost 10 months between arrest and transfer, and 27 days between the transfer and plea, however unlike in the present case there were no additional allegations of being held without warrant or indictment, or of lack of legal counsel); *Akayesu* Appeal Judgement, paras. 365, 372 (concerning an alleged delay of approximately four months in being informed of the charges while in detention, including also delays in transfer and initial appearance).
[49] *Furundzija* Appeal Judgement, paras. 173, 174; *Galić* Appeal Judgement, para. 34; *Kambanda* Appeal Judgement, para. 55. *See Šainović et al*. Appeal Judgement, para. 182.
[50] *Renzaho* Appeal Judgement, para. 17.
[51] I note further that the Appeals Chamber has, in previous cases, *proprio motu* addressed arguments even though these were not raised by the parties, if they concern an issue of general importance for the case-law or functioning of the Tribunal or if interests of justice so require. *See Krnojelac* Appeal Judgement, para. 6; *Boškoski and Tarčulovski* Appeal Judgement, para. 19; *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, para. 26; *Kordić and Čerkez* Appeal Judgement, para. 1031; *Erdemović* Appeal Judgement, para. 16 (where it was stated that "[t]he Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties.").
[52] Appeal Judgement, paras. 342-399.
[53] Appeal Judgement, paras. 358, 397. As with Ndayambaje's submissions, the Prosecution submitted that Nteziryayo's submissions should be summarily dismissed because he failed to raise them at trial and had therefore waived his right to challenge the issue on appeal. *See* Prosecution Response Brief, para. 1567; AT. 17 April 2015 pp. 35, 36; Appeal Judgement, para. 355.
[54] Appeal Judgement, paras. 358, 398.
[55] Appeal Judgement, para. 358 (internal references omitted).

relevant issues.[56] I consider that the allegations raised by Ndayambaje concern not one, but *several*, integral components of a fair trial, and that these matters are undoubtedly of "general importance". I emphasise further that, as held in the *Mucić et al* case, the Appeals Chamber "has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done."[57] I strongly believe that the allegations brought before us by Ndayambaje relate to the protection of the most fundamental fair trial rights, and indeed call on the Appeals Chamber to utilise its inherent powers in the interests of justice.

(b) Conclusion

21. For the foregoing reasons I respectfully, but strongly, disagree with the Majority that Ndayambaje has waived his right to raise the alleged violations of his fair trial rights on appeal. I also respectfully, but strongly, disagree that the seriousness of these alleged violations does not warrant consideration of his arguments on the merits. In my view, the interests of justice dictate that the Appeals Chamber consider the merits of Ndayambaje's submissions. Accordingly, and it pains me to say it, I cannot accept that the Majority's refusal to consider Ndayambaje's submissions will lead to a just result.

2. Nteziryayo's Arrest and Initial Appearance

22. In the 5 July 2013 Appeal Decision, the Appeals Chamber, of which I was a part, granted the Prosecution's request for summary dismissal of Nteziryayo's allegation of violation of his rights as a result of the delay between his arrest and his initial appearance, on the ground that Nteziryayo had waived his right to raise the issue on appeal.[58] At the appeals hearing, Nteziryayo requested *inter alia* that the Appeals Chamber reconsider its decision to summarily dismiss his submissions, in light particularly of the fact that the length of delay now appeared to be "no less than 144 days".[59]

23. In this Judgement, the Majority declines to reconsider the 5 July 2013 Appeal Decision and to examine on the merits Nteziryayo's allegation of violation of his rights resulting from the delay between his arrest and initial appearance.[60] For the reasons explained below, I respectfully disagree with the reasoning and the outcome reached by the Majority.

[56] *See supra*, paras. 8, 10.
[57] *Prosecutor v. Zdravko Mucić et al* , Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003, para. 16.
[58] 5 July 2013 Appeal Decision, paras. 14-18, 23.
[59] AT. 17 April 1994 p. 18. *See* AT. 17 April 1994 p. 19.
[60] Appeal Judgement, paras. 56, 57.

24. I recall that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[61] In this case, I consider that the Appeals Chamber should have reconsidered the 5 July 2013 Appeal Decision as it contains a clear error of reasoning. Moreover, although I am not in a position to assess whether reconsideration is necessary to prevent an injustice, I consider that Nteziryayo's allegations, if substantiated, would constitute serious violations of his fair trial rights.[62]

25. In the 5 July 2013 Appeal Decision, the Appeals Chamber found that "none of the arguments raised by Nteziryayo constitute special circumstances that may convince the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegation of error despite his failure to raise the issue in the nearly 14 years that the trial proceedings lasted in his case."[63] I observe that, at the time, Nteziryayo had submitted *inter alia* that the issue of the delay between his arrest and initial appearance was a central feature of the right to a fair trial, and that summary dismissal was inappropriate given the Prosecution's acknowledgement of the "anomalous" delay between his arrest and initial appearance.[64]

26. Having reconsidered the issue, I find that Nteziryayo's arguments should have led the Appeals Chamber to conclude, in 2013, that special circumstances existed and therefore should have convinced the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegation of violation of his fair trial rights in light of the delays between his arrest and initial appearance. In this respect, I emphasise that Nteziryayo had raised serious issues regarding breaches of his fundamental fair trial rights. In his relevant appeal submissions, Nteziryayo alleged that 115 days had elapsed between his arrest on behalf of the Tribunal and his presentation to a Judge during his initial appearance, and that the delay between his transfer and initial appearance amounted to 88 days.[65] For the reasons explained above in relation to Ndayambaje, I cannot agree that such alleged violations are insufficiently serious to constitute "special circumstances".[66] I would consider such breaches, if substantiated, to be serious violations of Nteziryayo's fair trial rights. While I cannot make any comment as to whether such violations actually occurred,[67] the very nature of the

[61] *See* Appeal Judgement, para. 56 and references cited therein.
[62] *See infra*, para. 26.
[63] 5 July 2013 Appeal Decision, para. 16.
[64] 5 July 2013 Appeal Decision, para. 12, *referring to* Nteziryayo's Response to Prosecutor's Motion for Summary Dismissal or in the Alternative for Clarification of the Record on Appeal and Admission of Evidence under Rule 115, 23 May 2013 (confidential), para. 9(a) and (h).
[65] *See* Nteziryayo Notice of Appeal, para. 66; Nteziryayo Appeal Brief, paras. 265-277. *See also* 5 July 2013 Appeal Decision, para. 3.
[66] *See supra*, paras. 15-18.
[67] I am not in a position to properly assess the merits or accuracy of Nteziryayo's submissions. I observe that, at the time of the 5 July 2013 Appeal Decision, the Prosecution had requested the Appeals Chamber, as an alternative to the summarily dismissal of Nteziryayo argument, to: (i) instruct the Registry to certify that five documents pertaining to

allegations is sufficiently serious to warrant the Appeals Chamber's attention. I therefore conclude that the Appeals Chamber erred in considering in its 5 July 2013 Appeal Decision that none of Nteziryayo's arguments constituted "special circumstances". I further find that the fact that the authorities of Burkina Faso have since indicated that the date of Nteziryayo's arrest was almost a month earlier than the date taken into account in the Trial Judgement and in the 5 July 2013 Appeal Decision,[68] increases the seriousness of the possible violations. Indeed, it reinforces my conclusion that the 5 July 2013 Appeal Decision should have been reconsidered by the Appeals Chamber.

27. Moreover, I find the way the Majority deals with the waiver principle in this Judgement to be inconsistent and unpredictable. I recall that, in dealing with the appellants' right to be tried without undue delay, the Appeals Chamber has considered Nteziryayo's submissions on undue delay despite the fact that he did not raise them at trial.[69] The Appeals Chamber has addressed his arguments "[c]onsidering the extraordinary length of these proceedings, the Trial Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated, and the interests of justice".[70] As indicated previously, I am in full agreement with this approach.[71] However, I find no valid reason for the Majority not to apply the same reasoning to other serious allegations of violations of Nteziryayo's rights resulting from the delay between his arrest and initial appearance. To the contrary, I find that the Majority's decision to treat these similar allegations of fair trial violations in a different manner creates inconsistency and unpredictability in the application of the waiver principle in this case.[72] Here again, I believe that the Appeals Chamber's decision to address Nteziryayo's arguments on undue delay, despite the waiver principle, strongly supports that there was a clear error of reasoning in the 5 July 2013 Appeal Decision, and that special circumstances exist in this case that should have convinced the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegations on the merits.

Nteziryayo's arrest and detention in Burkina Faso and his transfer to the Tribunal's detention facility ("Documents") were part of the record on appeal or, if the Appeals Chamber found that the Documents were not part of the record, admit them as additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal; and (ii) instruct the Registry pursuant to Rule 33(B) of the Rules to provide clarifications on the dates of, and actions related to, Nteziryayo's arrest, transfer, appointment of counsel, and initial appearance. *See* 5 July 2013 Appeal Decision, para. 4. In my view, were the Appeals Chamber minded to reconsider the 5 July 2013 Appeal Decision and consider Nteziryayo's submissions on the merits, the alternative request of the Prosecution should have been considered and dealt with, and further submissions requested from both Ndayambaje and the Prosecution. Upon full briefing by the parties, the Appeals Chamber would then make its own determination on the issues.

[68] As a result of Nteziryayo's request for clarification of the date of his arrest, the Appeals Chamber instructed the Registrar to make written representations as to Nteziryayo's date of arrest. *See* 5 July 2013 Appeal Decision, paras. 19-23. On 14 March 2014, the Registrar indicated that the authorities of Burkina Faso provided the date of the arrest of Nteziryayo as 26 March 1998. *See* Appeal Judgement, fn. 18. The Trial Chamber initially stated in the Trial Judgement that Nteziryayo was arrested in Burkina Faso on 24 April 1998. *See* Trial Judgement, paras. 49, 6309.

[69] Appeal Judgement, paras. 355, 358. In addition, the Appeals Chamber has *proprio motu* considered the impact of its findings on undue delay on Nsabimana's rights, regardless of the fact that he did not raise allegations on this issue at all. *See* Appeal Judgement, paras. 358, 398. *See also supra*, para. 19.

[70] Appeal Judgement, para. 358 (internal references omitted).

[71] *Supra*, para. 19.

[72] *See also supra*, paras. 19, 20.

28. Based on the foregoing, I find myself unable to agree with the Majority's decision not to reconsider the 5 July 2013 Appeal Decision and examine on the merits Nteziryayo's allegations of violations of his right resulting from the delay between his arrest and initial appearance.

B. Dissenting Opinion: the Crime of Persecution as a Crime Against Humanity

29. The Trial Chamber convicted Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as a crime against humanity on the basis of their individual criminal responsibility for killings of Tutsis between April and June 1994.[73] In this Judgement, the Majority overturns their convictions in this respect.[74] For the reasons detailed below, I respectfully, but strongly, disagree with the reasoning and the conclusion reached by the Majority.

30. I should first emphasise that I do not contest that, in light of Article 3(h) of the Statute, the jurisdiction of the Tribunal over the crime of persecution as a crime against humanity is limited to the three listed discriminatory grounds, namely "racial, political and religious grounds."[75] As a result, I agree with the Appeals Chamber's finding that the Trial Chamber erred in law to the extent that it intended to convict Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje on the basis that they acted with discriminatory intent on "ethnic" grounds as a separate discriminatory ground.[76]

31. I also concur with the Appeals Chamber's statement that while the Statute "is legally a very different instrument from an international treaty", it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which reflects customary international law.[77] However, I disagree with the way the Majority applies this principle of interpretation in this case. In my view, the interpretation conducted by the Majority erroneously leads it to conclude that discrimination on the basis of "ethnicity" cannot be included in one of the three listed discriminatory grounds of persecution and, in particular, under "racial grounds".[78]

[73] Trial Judgement, paras. 6098-6103, 6105-6108, 6120-6122, 6124, 6125.
[74] Appeal Judgement, para. 2141.
[75] Appeal Judgement, para. 2136. I also do not dispute that the Trial Chamber's reliance on the *Nahimana et al.* Appeal Judgement to reach this finding was misplaced. *See* Appeal Judgement, para. 2138.
[76] Appeal Judgement, para. 2139.
[77] Appeal Judgement, para. 2137 and references cited therein.
[78] Appeal Judgement, para. 2137.

32. The Majority reasons as follows: it first notes that the *chapeau* of Article 3 of the Statute distinguishes "ethnicity" from "race" in the listed discriminatory grounds for the attack against a civilian population.[79] The Majority then finds that:

> "[a]ccording to the ordinary meaning of the terms of the provision, such distinction reflects the autonomy between the two notions. This conclusion is also supported by a contextual reading of Article 3 of the Statute which makes it clear that 'ethnicity' cannot be encapsulated in 'race'. Indeed, interpreting the discriminatory ground of 'race' in Article 3(h) of the Statute as including 'ethnicity' would render the distinction in the *chapeau* of Article 3 of the Statute redundant, illogical, and superfluous."[80]

33. I disagree that the fact that "ethnic" and "racial" are listed as two separate terms under the *chapeau* element of Article 3 of the Statute indicates that the two notions are autonomous with respect to persecution as a crime against humanity. I am of the view that this distinction does not mechanically lead to the conclusion that discrimination on the basis of ethnicity cannot overlap or be encompassed in other discriminatory grounds for persecution, in particular, "racial" grounds. The Majority does not interpret the Statute in accordance with the ordinary meaning to be given to the terms "ethnic" and "racial" in their context, but merely states that since the Statute refers to both "ethnicity" and "race", these terms must be different and cannot overlap in any way. This reasoning appears overly restrictive.

34. I further note that when the Majority states that interpreting the discriminatory ground of "racial" in Article 3(h) of the Statute as including "ethnicity" would render the distinction in the *chapeau* of Article 3 of the Statute redundant, illogical, and superfluous, it implies that the intention of the drafters of the Statute was to deliberately exclude discrimination on the basis of ethnicity from the definition of persecution by mentioning in the *chapeau* of Article 3 of the Statute both the terms "ethnic" and "racial". However, as outlined below, I do not detect any such intention from the drafters of the Statute to exclude crimes committed on the basis of ethnicity from the crime of persecution. Further, in my view, the Majority places too much emphasis on the *chapeau* of Article 3 of the Statute, while in fact this additional jurisdictional requirement is of a very different nature from the discriminatory intent required for persecution as a crime against humanity.[81] In doing so, the Majority fails to address the relevant question in this case, which is to define

[79] Appeal Judgement, para. 2137. I note that the Majority refers to "ethnicity" in its reasoning while in the *chapeau* of Article 3 of the Statute the term "ethnic" is used.
[80] Appeal Judgement, para. 2137.
[81] In this respect, I observe that the additional discriminatory grounds contained in the *chapeau* of Article 3 of the Statute narrow the jurisdiction of the Tribunal over crimes against humanity further than would otherwise have been necessary under international customary law, and do not create an additional requirement of discriminatory intent for crimes against humanity other than for the crime of persecution. *See Akayesu* Appeal Judgement, paras. 465, 466, 469; *Tadić* Appeal Judgement, para. 305. *See also Bagosora et al.* Trial Judgement, paras. 2166, 2208. I also note that the discriminatory grounds contained in the *chapeau* of Article 3 of the Statute are not reproduced in Article 5 of the ICTY Statute.

persecution on "racial grounds" as a crime against humanity under Article 3(h) of the Statute at the time the Statute was adopted.

35. In this respect, I recall that as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or discerned from other authoritative sources.[82] I cannot discern such will to depart here. Indeed it appears that the intention of the drafters of the Statute was to mirror the definition of crimes against humanity adopted in the Charter of the International Military Tribunal for the Trial of the Major War Criminals annexed to the London Agreement of 8 August 1945 ("Nuremberg Charter") and in the Control Council Law No. 10, which the Secretary General considered to be reflective of international customary law.[83]

36. Having reviewed relevant international sources, I conclude that at the time of the adoption of the Statute, persecution on "racial grounds" as a crime against humanity was understood under international customary law as including discrimination on the basis of ethnicity. In this respect, I observe that Article 1.1 of the broadly ratified International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin."[84] Indeed, the CERD differentiates the terms "race" and "ethnic", just as the Statute does, but also establishes that exclusion, restriction or preference based on "race" and "ethnic" origin constitutes "racial" discrimination in both cases.

37. Moreover the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention") do not support the conclusion that the notions "ethnical" and "racial" were autonomous at the time of the adoption of

[82] *Tadić* Appeal Judgement, para. 296. *See also Tadić* Appeal Judgement, para. 287 ("In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules").
[83] *See* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, paras. 47-49 ("Report of the Secretary General on ICTY"); Report of the Secretary General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994), U.N. Doc. S/1995/134, 13 February 1995, para. 11, fn. 5 ("Report of the Secretary General on ICTR"). There is no discussion in the Report of the Secretary General on ICTY about the proposed definition of persecution as a crime against humanity and its limitation to persecution committed on "political, racial and religious grounds" in the ICTY Statute. The Report of the Secretary General on ICTY reflects, however, that the definition of persecution suggested by the United Nations Secretary General was based on the definition of the crime provided for in the Nuremberg Charter and the Law No. 10 of the Control Council. The Report of the Secretary General on ICTR merely refers to the list of crimes against humanity defined in Article 5 of the ICTY Statute, suggesting that the definition of the crime was by analogy also based on the Nuremberg Charter and Law No. 10 of the Control Council.
[84] Article 1.1, International Convention on the Elimination of All Forms of Racial Discrimination adopted by General Assembly Resolution 2106(XX), UN Doc. A/RES/20/2106, 21 December 1965, entered into force on 4 January 1969 ("CERD"). I note that there are currently 177 States Parties to the CERD.

the Genocide Convention. It appears that there, the term "ethnical" was added at a late stage in the negotiation process and there was no controversy over its addition since it did not appear to be a "fresh category" compared to the groups already listed in the draft of the Genocide Convention, namely "national", "racial", and "religious". No clear delineation of the concept of ethnicity emerged from the *travaux préparatoires* of the Genocide Convention, in which the concept was considered by the States as largely overlapping or as synonymous with the term "racial" but also in some cases as a "sub-group of a national group" or as "linguistic group".[85]

38. I further note that the post-World War II cases reflect that several convictions were entered for persecution on "racial grounds" as a crime against humanity against the "Poles" and "Jews".[86] In my view, this shows that persecution on "racial grounds" as a crime against humanity was understood in international law at the time as including a broad range of features, including descent or national origin.

39. In my opinion, the foregoing strongly supports the conclusion that at the time the Statute was adopted, persecution on "racial grounds" as a crime against humanity was understood in international customary law as including discrimination on the basis of ethnicity. Accordingly, I consider that persecution on "racial grounds" in Article 3(h) of the Statute should be interpreted as encompassing discrimination on the basis of ethnicity.

40. Moreover, I underline that the Tribunal was created to adjudicate alleged crimes committed in Rwanda in 1994. In this respect, I observe that the Report of the Secretary General on ICTR explicitly makes reference to crimes allegedly committed against the "Tutsi ethnic group."[87] In my view, it would be illogical for the drafters of the Statute to give the Tribunal jurisdiction over persecution as a crime against humanity, but wilfully exclude from its jurisdiction the ground upon which it considered the Tutsis had been persecuted. Concluding otherwise leads to an unreasonable interpretation of Article 3(h) of the Statute.[88]

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[85] *See* UN ORGA, Sixth Committee, Third Session, 74th meeting, UN Doc. A/C.6/SR.74, 14 October 1948, pp. 99, 106; UN ORGA, Sixth Committee, Third Session, 75th meeting, UN Doc. A/C.6/SR.75, 15 October 1948, pp. 115, 116.
[86] *The United States of America v. Alstoetter et al.*, U.S. Military Tribunal, Judgement, 3 and 4 December 1947, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. III, pp. 1041, 1118, 1136, 1142, 1144-1156, 1161; *The United States of America v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. V, p. 152; *The United States of America v. von Weizsaecker et al.*, U.S. Military Tribunal, Judgement, 11 April 1949, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. XIV, p. 575. *See also 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 Herman Wilhelm Göring et al.*, Judgement, 1 October 1946, Trial of Major War Criminals Before the International Military Tribunal Under Control Council Law No. 10, Vol. 1 (1947), pp. 66, 67, 282, 287, 288, 295-298, 300-307, 328-330, 339-341.
[87] Report of the Secretary General on ICTR, para. 3.
[88] The ICTY Appeals Chamber, considering whether the ICTY Statute should be interpreted to include internal conflicts, or solely international conflicts, held that it would defeat the Security Council's purpose to exclude internal

41. I further note that, although the jurisprudence on the matter is not settled, this interpretation finds some support in the jurisprudence of the ICTY. I highlight the *Brđanin* Trial Judgement, for instance, where the trial chamber stated that "the concept of 'race' includes 'ethnicity', which [the trial chamber] finds more appropriate to refer to in the context of the present case."[89] The *Đorđević* Trial Judgement, in which Vladimir Đorđević was convicted of persecution as a crime against humanity on "racial grounds" committed against Kosovo Albanians, also provides support in this respect. In that case, the trial chamber found that the Kosovo Albanians were discriminated against on the basis of their ethnicity.[90] Although this question was not directly addressed by the ICTY Appeals Chamber, the *Đorđević* Appeal Judgement recalled the applicable law as including only the intent to discriminate on "political, racial, or religious grounds."[91] It then held that the victims were discriminated against on the basis of their ethnicity before concluding that the requirements for persecution were fulfilled, without further precision on the ground under which this conviction was entered.[92] In my view, the *Đorđević* Appeal Judgement provides further support for considering that discriminatory intent on the basis of ethnicity is covered by "racial grounds".

42. As a result, I consider that, even if the Trial Chamber erred in law to the extent that it intended to convict Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi and Ndayambaje on the basis that they acted with discriminatory intent on "ethnic" grounds as a separate discriminatory ground, this error does not invalidate the Trial Chamber's decision to convict them for persecution as a crime against humanity. Having articulated the correct legal standard above, I would conclude that the Trial Chamber's factual findings that Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje acted with discriminatory intent against the Tutsi on the basis of their ethnicity

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conflicts as it would be "illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct with which they were concerned only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both." *See Tadić* Appeal Decision on Jurisdiction, para. 78.

[89] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, fn. 2484.

[90] *Đorđević* Trial Judgement, paras. 1758, 1759, 2230. *See also Đorđević* Appeal Judgement, para. 930. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2011 ("*Kvočka et al.* Trial Judgement"), paras. 194, 195 (where the trial chamber appears to consider that the terms "racial" and "ethnic" are interchangeable for the purpose of persecution as a crime against humanity). *See however Kvočka et al.* Trial Judgement, para. 610 (where the trial chamber stated that non-Serbs were detained by reason of their religion, politics, race, or ethnicity).

[91] *Đorđević* Appeal Judgement, para. 886.

[92] *See Đorđević* Appeal Judgement, paras. 892, 893, 895, 897, 898, 901, 929, p. 380. I also note that, in several cases, ICTY trial chambers reasoned in a similar way to the *Đorđević* Appeals Chamber. In these cases, trial chambers recalled the applicable law for persecution as including only the intent to discriminate on "political, racial, or religious grounds", but then went on to define the discriminated-against group by reference to ethnicity before concluding that the requirements for persecution were fulfilled. In my view, these ICTY trial judgements provide further support for considering that discriminatory intent on the basis of ethnicity is covered by "racial grounds" for the crime of persecution as a crime against humanity. *See Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010, paras. 968, 991, 995; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, paras. 113, 118, 358, 363, 367, 411, 416, 432, 473; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, paras. 734, 787, 788, 1126; *See also Kordić and Čerkez* Appeal Judgement, para. 950.

support their convictions for persecution on "racial grounds" as a crime against humanity. Accordingly, I would uphold their convictions in this respect.[93]

43. For these reasons, I find myself unable to agree with the Majority that the convictions of Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as crime against humanity should be overturned on appeal.

C. Separate Opinion: Aiding and Abetting

44. In the *Perišić* Appeal Judgement, the majority, of which I was part, set out why "specific direction" had always been an element of aiding and abetting liability pursuant to the jurisprudence of this Tribunal.[94] I acknowledge that appeal judgements have subsequently been issued in the *Šainović et al.* and the *Popović et al.* cases, departing from the approach adopted in the *Perišić* case.[95] However, I remain of the opinion that the decision in the *Perišić* Appeal Judgement was the correct one, and am not convinced by the reasoning expressed in these subsequent cases. Therefore, I must express my disagreement with paragraphs 1955, 3332, and 3343 of the Judgement to the extent that these paragraphs do not mention "specific direction" when recalling the applicable law on aiding and abetting.[96]

D. Dissenting Opinion: Sentencing

1. Ntahobali's Appeal on the Gravity of the Offences in Sentencing

45. The Majority dismissed Ntahobali's argument that the Trial Chamber erred in taking into account rapes perpetrated at the Hotel Ihuliro roadblock in assessing the gravity of the offences,[97] because Ntahobali failed to raise this alleged error in his notice of appeal, and thus impermissibly expanded the scope of his appeal.[98] The Majority further finds that the interests of justice do not require consideration of this argument.[99] I respectfully disagree with the Majority for the reasons developed by Judge Liu in his dissenting opinion in this respect. To the extent that Judge Liu explains the reasons why the Majority should have considered Ntahobali's argument and finds that

[93] I underline that the question is theoretical in the case of Kanyabashi since I support the reversal of all of his convictions and that, in any event, the Appeals Chamber overturns in this Judgement the factual basis relied upon by the Trial Chamber to convict Kanyabashi for persecution as a crime against humanity. *See* Appeal Judgement, pp. 1211, 1212; Joint Dissenting Opinion of Judge Pocar and Judge Agius.
[94] *See Perišić* Appeal Judgement, paras. 25-40. *See also Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theordor Meron and Carmel Agius.
[95] *See Šainović et al.* Appeal Judgement, paras. 1617-1651; *Popović et al.* Appeal Judgement, paras. 1758, 1764.
[96] Appeal Judgement, paras. 1955, 3332, 3343.
[97] Ntahobali Appeal Brief, para. 986.
[98] Appeal Judgement, paras. 3379-3381.
[99] Appeal Judgement, para. 3380.

the Trial Chamber erred in determining the gravity of the offences in relation to Ntahobali's sentence, I fully endorse his position.[100]

46. I wish, however, to add a further point. I note that the reasons relied upon by the Majority in deciding not to consider Ntahobali's argument are that: (i) all of the co-Appellants shall be treated equally, and that since Nteziryayo was prevented from raising challenges due to his failure to raise them in his notice of appeal, the same should apply to Ntahobali; and (ii) the Prosecution objected to Ntahobali's failure to raise his argument in his notice of appeal.[101] I find this reasoning inconsistent with footnote 7671 of the Judgement, where, contrary to the equality of treatment relied upon by the Majority in declining to examine Ntahobali's argument on the gravity of the offences, the Appeals Chamber exercises its discretion to consider allegations of error on sentencing that were not raised in some of the co-Appellants' notices of appeal.

47. In this footnote, the Appeals Chamber explains that it exercises its discretion to consider allegations of error that some of the co-Appellants' failed to raise in their respective notices of appeal, in light of "the nature of the allegations and the fact that the Prosecution did not object to these allegations on this basis and responded to the appellant's submissions." As explained by Judge Liu, the nature of Ntahobali's allegation on the gravity of the offences clearly justifies the consideration of his argument.[102] In my opinion, it appears that the only difference between Ntahobali's allegation relating to the gravity of the offences and the other co-Appellants' arguments is whether or not the Prosecution objected to the expansion of the scope of the appeal. I do not believe that whether or not the Prosecution objects should be the decisive, if not the only, element to determine whether it is in the interests of justice to examine on the substance an appellant's contention when he or she failed to raise it in his or her notice of appeal.

2. Impact of the Appeals Chamber's Findings on Nyiramasuhuko's, Ntahobali's, and Ndayambaje's Sentences

48. The Majority, addressing the impact of the Appeals Chamber's findings on the Co-Appellants' sentences, reduces the life sentences imposed on Nyiramasuhuko, Ntahobali, and

[100] Partially Dissenting and Dissenting Opinions of Judge Liu, paras. 25-27. I note that Judge Liu further indicates that, given this error regarding the gravity of offences as well as the error he identified in relation to Ntahobali's liability for ordering the killings and superior responsibility at the Butare Prefecture Office, Ntahobali's sentence should be further reduced. *See* Partially Dissenting and Dissenting Opinions of Judge Liu, para. 28. I do not endorse this statement since, with the Majority, I find that the Trial Chamber did not err in relation to Ntahobali's liability for ordering the killings and superior responsibility at the Butare Prefecture Office. My view on the impact of the Appeals Chamber's findings on Ntahobali's sentence is expressed below. *See infra*, para. 48.
[101] Appeal Judgement, para. 3380.
[102] Partially Dissenting and Dissenting Opinions of Judge Liu, paras. 25-27.

Ndayambaje to 47 years of imprisonment.[103] I find myself unable to agree with the sentences imposed by the Majority in this respect. Having given due consideration to the violation of Nyiramasuhuko's, Ntahobali's, and Ndayambaje's rights to be tried without undue delay and the related prejudice they suffered, as well as the errors committed by the Trial Chamber,[104] I believe that a sentence of 45 years of imprisonment in lieu of life imprisonment more adequately reflects the overall criminal responsibility of Nyiramasuhuko, Ntahobali, and Ndayambaje in the present case.

Done in English and French, the English version being authoritative.

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

_____
Judge Carmel Agius

[Seal of the Tribunal]

[103] Appeal Judgement, paras. 3523, 3526, 3538.
[104] Appeal Judgement, paras. 3521, 3524, 3536. In this respect, I recall that I disagree with the Majority's reversal of Nyiramasuhuko's, Ntahobali's, and Ndayambaje's convictions for persecution as a crime against humanity. *See supra*, paras. 29-43.

XVII. PARTIALLY DISSENTING AND DISSENTING OPINIONS OF JUDGE LIU

1. I respectfully disagree with the Majority's position on the following: (i) regarding the appeals of Nyiramasuhuko and Ntahobali on leave to amend the indictment, the Majority upheld the Trial Chamber's position of not requiring the Prosecution to present a *prima facie* case in support of the new counts;[1] (ii) as to Ntahobali's responsibility at the Butare Prefecture Office, the Majority upheld the Trial Chamber's determination that he was responsible for ordering killings during the Mid-May Attack,[2] and was responsible as a superior over the *Interahamwe* who committed crimes based on his orders;[3] and (iii) with respect to sentencing, the Majority found no error in the Trial Chamber's assessment of Nyiramasuhuko's abuse of authority as an aggravating factor,[4] and it declined to consider Ntahobali's appeal on gravity of offences because his contention impermissibly expanded the scope of his appeal.[5] I will discuss my views on these matters in turn.

A. Partially Dissenting Opinion: Leave to Amend Indictment

2. On 10 August 1999, the Trial Chamber granted the Prosecution leave to amend the indictment against Nyiramasuhuko and Ntahobali.[6] The Trial Chamber held that, under Rule 50 of the Rules, there was no necessity to assess whether a *prima facie* case had been met prior to granting the amendment.[7] The Trial Chamber was satisfied that the Prosecution "provided sufficient grounds both in fact and in law",[8] and determined that the accused will suffer no prejudice as any prejudice can be remedied through Rule 72 of the Rules.[9]

3. Nyiramasuhuko and Ntahobali both argue, *inter alia*, that the Trial Chamber erred in law in failing to ascertain the existence of *prima facie* evidence before granting leave to include six new counts in the indictment and the addition of the charge of superior responsibility.[10] The Majority

[1] Appeal Judgement, paras. 450, 453, 1077, 1079.
[2] Appeal Judgement, paras. 1898-1906, 1918, 1945.
[3] Appeal Judgement, paras. 1934-1941, 1943, 1945.
[4] Appeal Judgement, para. 3359, *referring to* Trial Judgement, para. 6207.
[5] Appeal Judgement, paras. 3379-3381.
[6] I note that with respect to Nyiramasuhuko several new charges were added, including: conspiracy to commit genocide, rape as a crime against humanity, as well as her responsibility pursuant to Article 6(3) of the Statute. As for Ntahobali, his superior responsibility under Article 6(3) of the Statute was added in relevant and existing counts of the indictment. *See* 10 August 1999 Oral Decision; 10 August 1999 Decision, p. 6.
[7] 10 August 1999 Decision, para. 17. *See also* 1 November 2000 Nyiramasuhuko Decision, para. 61; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 September 1998, para. 13.
[8] *See* 10 August 1999 Oral Decision, p. 4; 10 August 1999 Decision, para. 23. *See also ibid.*, p. 2-3.
[9] 10 August 1999 Decision, para. 20.
[10] Nyiramasuhuko Notice of Appeal, paras. 1.9-1.11; Nyiramasuhuko Appeal Brief, paras. 72, 83, 86-88, 90-92, 95-98, 100, 101, 104, 111, 112, 114, 117, 122-125, 127, 129; Ntahobali Notice of Appeal, para. 146; Ntahobali Appeal Brief, paras. 319-324.

dismissed this submission on the basis that: (a) the requirement to establish a *prima facie* case for granting leave to amend an indictment pursuant to Rule 50(A)(ii) of the Rules was only introduced on 15 May 2004; (b) prior to this enactment, the practice of trial chambers of the Tribunal was not uniform regarding the need to establish a *prima facie* case; and (c) the Appeals Chamber, when seised with the matter, provided no guidance on this issue.[11]

4. From the Majority's position, it appears that, on the basis of Rule 50 of the Rules at the time, the Trial Chamber had full discretion to choose whether a *prima facie* case had to be met or not before granting amendment of the indictment. Respectfully, I disagree. As a matter of law, I believe that prior to granting leave to amend an indictment, a trial chamber must ensure that the new charges satisfy the same requirements applied at the confirmation stage of the original indictment.[12] Specifically, according to Article 18(1) of the Statute, a judge of the Trial Chamber shall confirm an indictment "[i]f satisfied that a *prima facie* case has been established by the Prosecutor", and if not satisfied, shall dismiss the indictment.[13]

5. While not explicitly stated in Rule 50 of the Rules at the time, it is my view that a *prima facie* case was required prior to granting an amendment to the indictment against Nyiramasuhuko and Ntahobali. In particular, I note that Rule 50 of the Rules was placed within the same section of provisions for the confirmation of indictments and no derogation from the general rule could be inferred from the text.[14] In addition, it would be illogical that an amended indictment satisfies lower thresholds than those necessary for the original indictment's confirmation.[15] Finally, allowing an amendment that fails to satisfy a *prima facie* case could have allowed the Prosecution to insert new counts and undermined the accused's right to be adequately informed of the nature and cause of the charges against him so as to be able to prepare a meaningful defence.[16]

6. Having reviewed the relevant parties' submissions and decisions of the Trial Chamber, I am of the view that a *prima facie* case could have been, in any event, established prior to the Trial

[11] Appeal Judgement, paras. 450, 1077.
[12] *See The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, Individual Opinion of Judge Pocar, 12 February 2004 ("Judge Pocar Individual Opinion"), paras. 2-4.
[13] In the same vein, Rule 47(E) of the Rules, at the time, also provided that the "reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect." *See* Judge Pocar Individual Opinion, para. 3.
[14] *See* Judge Pocar Individual Opinion, para. 5.
[15] *See* Judge Pocar Individual Opinion, para. 5.
[16] *See* Article 20(4)(a) of the Statute stipulating that the accused shall be entitled "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". *See also Kvočka et al.* Appeal Judgement, para. 28; *Ntakirutimana* Appeal Judgement, paras. 25, 27, 28, 58; *Kupreškić et al.* Appeal Judgement, paras. 88, 122.

Chamber granting leave to amend the indictment.[17] Despite my disagreement with the Majority's reasoning, I would therefore reject this submission from Nyiramasuhuko's and Ntahobali's appeals.

B. Dissenting Opinion: Ntahobali's Responsibility at the Butare Prefecture Office

1. Ordering Responsibility for Killings at the Mid-May Attack

7. The Trial Chamber found that, in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office in a camouflaged pickup truck and that Nyiramasuhuko pointed out Tutsi refugees to the *Interahamwe*, ordering them to force the refugees onto the pickup truck.[18] The Trial Chamber found that "Ntahobali also gave the *Interahamwe* orders, telling them to stop loading the truck because it could not accept anymore dead."[19] The Trial Chamber concluded that refugees were taken to other locations in Butare and killed, and it found that "both Nyiramasuhuko and Ntahobali were responsible for ordering the killings of numerous Tutsi refugees who were forced on board the pickup."[20]

8. While determining that the Trial Chamber erred in its obligation to provide a reasoned opinion, the Majority concluded that the error did not invalidate the Trial Chamber's decision, as its findings and relevant evidence sustain the conclusion that Ntahobali is responsible under Article 6(1) of the Statute for ordering the killings of numerous Tutsi refugees who were forced on board the pickup during the Mid-May Attack at the prefectoral office.[21] Contrary to the Majority's position, I cannot agree that the Trial Chamber's error in failing to provide a reasoned opinion did not invalidate Ntahobali's conviction for ordering killings during this specific attack.

9. I recall that a person in a position of authority may incur responsibility for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[22] I find that the Trial Chamber, having concluded that Ntahobali ordered killings of

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[17] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998; *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Brief in Support of Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998, paras. 14-17. *See also* Attachments (Annexes) A and B to the Prosecutor's Request for Leave to Amend Indictment, 18 August 1998. *See also* 10 August 1999 Decision, paras. 18, 23; 10 August 1999 Oral Decision, pp. 2, 3; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, T. 9 August 1999.
[18] Trial Judgement, para. 5867.
[19] Trial Judgement, para. 5867.
[20] Trial Judgement, para. 5867.
[21] Appeal Judgement, para. 1906.
[22] *See e.g.*, *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. Responsibility for ordering is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order. Ordering with such awareness has to be regarded as accepting that crime. *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.

Tutsis during the Mid-May Attack,[23] failed to refer to any express order to kill, identify a particular instruction that had a direct and substantial effect on the eventual killings of Tutsis forced to board the pickup truck, or state that it inferred as the only reasonable conclusion that Ntahobali ordered the killings.[24]

10. In my view, the Trial Chamber's failure to provide a reasoned opinion in this regard was further compounded by the absence of findings or relevant evidence that could sustain Ntahobali's conviction for ordering killings during this specific attack. The only order that the Trial Chamber identified was Ntahobali's instruction to the *Interahamwe* to stop putting refugees on the pickup truck.[25] I fail to see how this instruction could lead to the only reasonable inference that it had direct and substantial effect on the killing of Tutsi refugees who were forced on board the pickup truck.[26] In addition, having reviewed relevant parts of the Trial Judgement and the record, I find that Ntahobali's responsibility cannot be supported on the basis of Witness TA's evidence. According to Witness TA, only Nyiramasuhuko, and not Ntahobali, selected individuals to be placed on the vehicle.[27] Thus, the Trial Chamber's finding that the *Interahamwe* were acting under Ntahobali's orders to load the truck with Tutsi refugees is not supported by the evidence.

11. For the foregoing reasons, I consider the evidence on the record insufficient to support as the only reasonable conclusion that Ntahobali ordered killings during the Mid-May Attack at the prefectoral office. In these circumstances, I therefore consider that Ntahobali's convictions on this basis should be overturned.

2. Superior Responsibility

12. Recalling that "Nyiramasuhuko and Ntahobali issued orders to *Interahamwe* and the *Interahamwe* complied with these orders and perpetrated the acts asked of them, which included abductions, rapes and killings" as well as "considering the evidence in its entirety", the Trial Chamber found that Ntahobali and Nyiramasuhuko were in a superior-subordinate relationship over the *Interhamwe* at the prefectoral office and wielded effective control over them.[28] On this basis, the Trial Chamber determined that Ntahobali was responsible pursuant to Article 6(3) of the Statute for

[23] Trial Judgement, para. 5867.
[24] Trial Judgement, paras. 5866-5871. *See ibid*., paras. 6053, 6100, 6168.
[25] Trial Judgement, para. 5867.
[26] Trial Judgement, para. 5867.
[27] *See* Trial Judgement, paras. 2178, 2628. *See also* Witness TA, T. 25 October 2001 p. 28.
[28] Trial Judgement, para. 5884.

the acts of the *Interahamwe* against Tutsis who had sought refuge at the Butare Prefecture Office, including their perpetration of rapes and killings.[29]

13. The Majority upheld Ntahobali's responsibility under Article 6(3) of the Statute[30] and also considered that, as reflected in the Trial Judgement, he was only held liable as a superior for crimes committed by the *Interahamwe* who followed his orders.[31] Having considered the jurisprudence and reviewed the evidence, I respectfully disagree with the Majority's position to uphold the Trial Chamber's finding as to Ntahobali's superior responsibility at the Butare Prefecture Office.[32] In my view, the Trial Chamber erroneously conflated Ntahobali's liability for ordering and superior responsibility, and no reasonable trier of fact could have concluded that Ntahobali had effective control over the *Interahamwe* at the prefectoral office. As discussed below, I distinguish this from circumstances at the Hotel Ihuliro roadblock and the EER, where I agree that Ntahobali should have incurred superior responsibility over the acts of the *Interahamwe*.

14. I recall that the imposition of superior responsibility necessitates a pre-existing superior-subordinate relationship between the accused and the perpetrators.[33] A commander or superior is "one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed."[34] While "the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts."[35]

15. For a superior to be found criminally liable, it must be shown that he or she exercised effective control over subordinates who have committed crimes.[36] The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[37] According to the jurisprudence of the Tribunal, an accused's ability to issue orders and the fact that his orders were actually followed

[29] Trial Judgement, para. 5886. *See also ibid*., paras. 6056, 6086.
[30] Appeal Judgement, paras. 1941, 1943, 1945.
[31] Appeal Judgement, para. 1925, *referring to* Trial Judgement, paras. 5884-5886.
[32] This applies both to his orders to kill (Mid-May Attack) and orders to commit rape (Last Half of May Attacks).
[33] *Halilović* Appeal Judgement, para. 210. *See also Bizimungu* Appeal Judgement, para. 133.
[34] *Čelebići* Appeal Judgement, para. 192.
[35] *Čelebići* Appeal Judgement, para. 197. I note that the Appeals Chamber in *Čelebići* has also stated that generally possession of *de jure* power in itself may not suffice for finding command responsibility if it does not manifest in effective control. *See idem*.
[36] *See e.g*., *Popović et al*. Appeal Judgement, para. 1857 and references cited therein. The Appeals Chamber in *Čelebići* has stated that "[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of crimes if he failed to exercise such abilities of control." *See Čelebići* Appeal Judgement, para. 198.

can demonstrate effective control.[38] However, this cannot be the *sole* indicator nor does it automatically establish effective control.[39] Indeed, "[i]n circumstances where a superior would not be able to perform the functions necessary to prevent or punish, the superior could not be said to possess the material ability required to exercise effective control."[40] Additionally, a superior need not know the exact identity of his or her subordinates who perpetrate crimes.[41] However, where multiple groups of subordinates may exist, there should be evidence linking the accused to the specific group committing the crimes.[42]

16. In comparison, the threshold to establish authority for ordering liability under Article 6(1) of the Statute is lower than that for superior responsibility. Based on the Tribunal's jurisprudence, ordering liability requires no formal superior-subordinate relationship between the accused and the perpetrator[43] and no effective control.[44] Additionally, the authority may be informal or of a purely temporary nature,[45] and physical perpetrators, those receiving orders, may be identified generally by group.[46] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[47] Whether such authority exists is a question of fact[48] and is a "more subjective criterion that depends on the circumstances and the perceptions of the listener."[49]

17. Turning to the circumstances at the Butare Prefecture Office, I believe that, based on the evidence, no reasonable trier of fact could have found that Ntahobali was in a superior-subordinate relationship with the *Interahamwe* and that he had effective control over them. I observe the Trial Chamber's consideration that, *inter alia*: (i) Nyiramasuhuko *and* Ntahobali (although mostly

[37] *Blaškić* Appeal Judgement, para. 69. *See also Popović et al*. Appeal Judgement, para. 1860; *Ndahimana* Appeal Judgement, para. 53; *Strugar* Appeal Judgement, para. 254.
[38] *Halilović* Appeal Judgement, para. 207. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 260; *Nizeyimana* Appeal Judgement, para. 202; *Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91.
[39] The Appeals Chamber in *Setako* has stated that "a superior's authority to issue orders is one indicator of effective control, but that it does not automatically establish such control." *Setako* Appeal Judgement, para. 272. It further held that "convictions under Article 6(3) of the Statute are generally based on a thorough analysis of various indicators of effective control." *Setako* Appeal Judgement, fn. 615 and references cited therein. According to the Appeals Chamber in *Strugar*: "a superior's authority to issue orders does not *automatically* establish that a superior had effective control over his subordinates." *Strugar* Appeal Judgement, para. 253 (emphasis in original). Furthermore, the Appeals Chamber in *Blaškić* found that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over troops that received the orders." *Blaškić* Appeal Judgement, para. 485.
[40] *Popović et al*. Appeal Judgement, para. 1857.
[41] *Blagojević and Jokić* Appeal Judgement, para. 287.
[42] *Cf. Ntabakuze* Appeal Judgement, paras. 169-174.
[43] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361.
[44] *Seromba* Appeal Judgement, para. 202.
[45] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgemnet, para. 363.
[46] *See Boškoski and Tarčulovski* Appeal Judgement, para. 75, fn. 216 and references cited therein.
[47] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[48] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 363.
[49] *Gacumbitsi* Appeal Judgement, para. 182.

Nyiramasuhuko) appeared to be in charge of assailants;[50] (ii) Ntahobali had the ability to stop the *Interahamwe* from putting more refugees on the pickup truck;[51] and (iii) the *Interahamwe* referred to him as "*Shalom, chef*" and he told them "to do their work seriously."[52] From the evidence and Trial Chamber's findings as to the attacks occurring between May and June 1994 at the prefectoral office, I also note the identification of the *Interahamwe* to be extremely vague.[53] It is unclear whether the *Interahamwe*, who came during separate and multiple attacks, were the same individuals, from the same group, under the same authority, or otherwise. Indeed, as indicated in this Appeal Judgement, Ntahobali was not found liable as a superior of *Interahamwe* who committed crimes on the basis of Nyiramasuhuko's orders.[54]

18. In my view, the evidence could demonstrate that Ntahobali was at most in some temporary position of authority over the *Interahamwe* and this may have been sufficient for ordering liability under Article 6(1) of the Statute. However, irrespective of the Majority's position regarding the alleged repeated nature of his "orders" and the fact that they were followed,[55] there is insufficient evidence, outside these "orders", to conclude that Ntahobali had a *de facto* superior-subordinate relationship over the *Interahamwe* during attacks at the prefectoral office. In assessing Ntahobali's superior responsibility, the Trial Chamber stated that it "consider[ed] the evidence in its entirety".[56] However, other than his orders, it is unclear upon what solid evidence the Trial Chamber relied. There is also inadequate evidence to show that he could materially prevent crimes of the *Interahamwe* before their commission or punish crimes thereafter. The insufficiency of evidence is revealed by the Trial Chamber's circular reasoning in assessing his ability to prevent or punish:

> [Nyiramasuhuko's and Ntahobali's] *orders* demonstrate that they knew that the *Interahamwe* were about to commit a crime and had later done so, and that they failed to prevent the crimes. It is also clear from that evidence that they did not punish the *Interahamwe* for obeying their *orders*.[57]

19. I distinguish the situation at the prefectoral office from the circumstances at the Hotel Ihuliro roadblock and at the EER, where there appears to be stronger indicia of his effective control

[50] *See* Trial Judgement, para. 2178 (emphasis added). *See also* Witness TA, T. 25 October 2001 pp. 66, 67, T. 29 October 2001 pp. 46, 47.
[51] *See* Trial Judgement, para. 2178. *See also* Witness TA, T. 29 October 2001 pp. 46, 47.
[52] *See* Trial Judgement, paras. 2668, 2681. *See also* Witness TK, T. 20 May 2002, p. 88, T. 23 May 2002 p. 93.
[53] *See e.g.*, Trial Judgement, paras. 2628-2632, 2634, 2636, 2638, 2644-2646, 2648-2651, 2653, 2681, 2687, 2688, 2691, 2693, 2694, 2696, 2698, 2699, 2702-2709, 2711-2715, 2717-2719, 2721, 2727-2730, 2732-2736, 2738, 2741, 2742, 2747, 2748, 2770, 2771, 2773, 2781. I note that an individual named Kazungu was identified as either an *Interahamwe* or a soldier. *See ibid.*, paras. 2707-2709. The Trial Chamber considered that other *Interahamwe* were identified, but none appears to be linked to attacks that Ntahobali allegedly ordered. *See ibid.*, para. 2755.
[54] *See* Appeal Judgement, para. 1926.
[55] *See* Appeal Judgement, para. 1936. I consider that, based on my position regarding the Mid-May Attack, I do not believe that Ntahobali was or should have been convicted for ordering killings at the Butare Prefecture Office.
[56] Trial Judgement, para. 5884.
[57] Trial Judgement, para. 5885 (emphasis added).

over the *Interahamwe* present.[58] In particular, at the roadblock, aside from his order to kill Ruvurajabo, the Trial Chamber considered direct evidence that the *Interahamwe*, identified to be present at the time, specifically sought instructions from Ntahobali.[59] At the EER, the Trial Chamber considered concrete evidence that Ntahobali was the leader of the *Interahamwe*,[60] he led attacks at the EER,[61] and that the *Interahamwe* at the scene feared and obeyed him.[62]

20. On the basis of the foregoing, I would accordingly conclude that no reasonable trier of fact could have found that Ntahobali had superior responsibility over the crimes committed by the *Interahamwe* at the prefectoral office.

C. Partially Dissenting Opinion: Sentencing

1. Double-Counting Nyiramasuhuko's Abuse of Authority

21. The Trial Chamber found Nyiramasuhuko guilty of ordering the killing of Tutsi refugees at the Butare Prefecture Office.[63] In determining her sentence, the Trial Chamber stated that "Nyiramasuhuko, on a number of occasions, used her influence over *Interahamwe* to commit crimes such as rape and murder" and concluded that this "abuse of general authority *vis-à-vis* the assailants is an aggravating factor."[64] Nyiramasuhuko submits that the Trial Chamber erred in considering her abuse of authority as an aggravating factor since this was an element of the crimes for which she was convicted.[65]

22. The Majority found no error in the Trial Chamber's conclusion and dismissed Nyiramasukuo's appeal that the Trial Chamber impermissibly double-counted an element of the crime as an aggravating factor.[66] I respectfully disagree with the Majority's conclusion in this regard.

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[58] *See* Appeal Judgement, paras. 1471-1476, 2106-2113.
[59] The Trial Chamber considered that the *Interahamwe* asked Ntahobali "what shall we do with [Ruvurajabo]", to which Ntahobali responded, "[k]ill him." *See* Trial Judgement, paras. 2959, 5847.
[60] *See* Trial Judgement, paras. 3858, 3951; Witness RE, T. 24 February 2003 p. 13.
[61] *See* Trial Judgement, para. 3965.
[62] *See* Trial Judgement, paras. 3878, 3951. According to Witness SX: "[Ntahobali] was their leader, he ordered [the *Interahamwe*] around. He ordered them to arrest anybody. He could turn to anybody to say something and the other would say in turn, Shalom, but they were scared of him because he was their boss. At any rate, when he came, he [was] consulted when there was any issue to be consulted about." Witness SX, T. 27 January 2004 p. 26.
[63] Based on her orders to kill at the prefectoral office, the Trial Chamber convicted Nyiramasuhuko of genocide, extermination and persecution as crimes against humanity, as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common of the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute. Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186.
[64] Trial Judgement, para. 6207.
[65] Nyiramasuhuko Appeal Brief, para. 1300.
[66] Appeal Judgement, para. 3359.

23. According to the Tribunal's jurisprudence, a factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance.[67] The *actus reus* of ordering responsibility requires a person in a position of authority to issue an instruction to commit a crime.[68] In my view, it follows that the abuse of a position of authority is inherent in the mode of liability for ordering.[69] Given Nyrimasuhuko's position as Minister for Family and Women's Affairs[70] and her authority over the *Interahamwe* during the events at the prefectoral office,[71] any order issued by her in breach of the priniciples of international criminal law necessarily entailed an abuse of her position of authority and influence.

24. Based on the foregoing, I would conclude that the Trial Chamber erred by impermissibly double-counting an element of the crime as an aggravating factor when it determined Nyiramasukuo's sentence.

2. Consideration of Argument in Gravity of Offences

25. In assessing gravity of the offences in relation to Ntahobali's sentence, the Trial Chamber considered that the crimes included, *inter alia*, "the rapes and killings of Tutsis at the Hotel Ihuliro roadblock".[72] Ntahobali submits that the Trial Chamber erred in taking into account "rapes" perpetrated at this roadblock because he was found guilty of only perpetrating one rape at this location.[73] Considering that Ntahobali only raised this contention in his appeal brief and not in his notice of appeal, the Majority dismissed his contention because it impermissibly expanded the scope of his appeal and determined that the interests of justice do not require consideration of this argument.[74] I respectfully disagree with the Majority's position and believe that it is in the interests of justice to address Ntahobali's submission. For the reasons set out below, I consider that the Trial Chamber erred in its assessment of gravity of offences and that Ntahobali should not be prejudiced in this regard.

26. I observe that the language in the gravity portion of the "Sentencing" section of the Trial Judgement gives the impression that Ntahobali was found responsible for the rapes of multiple Tutsis at the Hotel Ihuliro roadblock.[75] However, the Trial Chamber's detailed legal findings reflect

[67] *See e.g.*, *Nzabonimana* Appeal Judgement, para. 464 and references cited therein.
[68] *See e.g.*, *Setako* Appeal Judgement, para. 240 and references cited therein.
[69] *See Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, Partly Dissenting Opinion of Judge Liu Daqun, 12 November 2009, para. 30.
[70] Trial Judgement, para. 6207.
[71] Trial Judgement, paras. 5884-5886, 6088.
[72] Trial Judgement, para. 6216.
[73] Ntahobali Appeal Brief, para. 986, *referring to* Trial Judgement, paras. 6077-6082, 6216.
[74] Appeal Judgement, paras. 3379-3381.
[75] Trial Judgement, para. 6216 ("The Chamber has found Ntahobali guilty of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, with respect

that Ntahobali was found responsible for having committed the rape of a single woman at this roadblock.[76] Moreover, while it determined that other rapes were committed against members of the Tutsi population when Ntahobali manned the roadblock, it found that the evidence was insufficient to establish that Ntahobali could be held responsible as a superior for the rapes that occurred near this roadblock.[77] Consequently, the Trial Chamber stated that it would not take into account this "alleged responsibility […] in sentencing."[78] Accordingly, I would find that the Trial Chamber erred to the extent that it considered that Ntahobali was held responsible for more than one rape at the Hotel Ihuliro roadblock and took it into consideration when determining the gravity of the offences.

27. Given that the Trial Chamber erred in determining the gravity of the offences and that this may impact Ntahobali's sentence, I am of the view that he should not bear the burden of this error on the Trial Chamber's part. Thus, contrary to the Majority's findings, I believe his argument should have been considered in the interest of justice and not dismissed on the basis of a technicality.

28. Given my dissent regarding gravity of offences as well as to Ntahobali's liability for ordering killings and superior responsibility at the Butare Prefecture Office, I am of the view that his sentence should be further reduced.

Done in English and French, the English version being authoritative.

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

_____
Judge Liu Daqun

[Seal of the Tribunal]

to his involvement in various crimes. These crimes include the rapes […] of Tutsis at the Hotel Ihuliro roadblock").
[76] *See* Trial Judgement, paras. 6077-6080.
[77] *See* Trial Judgement, paras. 6081, 6082.
[78] *See* Trial Judgement, para. 6082.

XVIII. DISSENTING OPINION AND DECLARATION OF JUDGE KHAN

A. Dissenting Opinion: Ntahobali's Responsibility at the Butare Prefecture Office

1. In this Judgement, the Majority finds that the Trial Chamber did not convict Ntahobali for ordering the killings committed during the Night of Three Attacks and the First Half of June Attacks.[1] The Majority concludes that, although the evidence of Prosecution Witnesses TK, QBQ, RE, SS, SU, FAP, and TA appears to reflect that Ntahobali participated in abductions and killings, issued orders, and held a position of authority over the assailants during these events, the Trial Chamber's discussion of this evidence does not demonstrate that it relied on this evidence to find Ntahobali responsible for ordering killings of Tutsis who sought refuge at the prefectoral office.[2] The Majority therefore concludes that Ntahobali was not convicted for the killings perpetrated during these attacks in the absence of: (i) relevant factual or legal findings underlying Ntahobali's responsibility for ordering such killings; or (ii) any clear indication that the Trial Chamber intended to convict him on this basis.[3] While I see merit to the Majority's conclusion, for the reasons set forth below, I respectfully disagree.

1. The Trial Chamber Convicted Ntahobali for Ordering Killings in Relation to These Attacks

2. At the outset, I fully endorse the Majority's position that, on their face, the Trial Chamber's conclusions in the "Factual Findings" and "Legal Findings" sections of the Trial Judgement about the Night of Three Attacks and the First Half of June Attacks do not: (i) refer to an express order to kill given by Ntahobali or a particular instruction that had a direct and substantial effect on the relevant killings; or (ii) specify the category of assailants to whom Ntahobali gave an order.[4] However, for the reasons set forth below, I find that these omissions are the result of the Trial Chamber's failure in its obligation to provide a reasoned opinion in accordance with Article 22(2) of the Statute and Rule 88(C) of the Rules. The omissions do not, in my view, reflect that the Trial Chamber did not convict him on the basis of his participation in the abduction and killing of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks.

3. As noted by the Majority, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber stated as follows concerning Ntahobali's involvement in crimes which occurred at the Butare Prefecture Office during the Night of Three Attacks:

[1] *See supra*, Appeal Judgement, para. 1545.
[2] *See supra*, Appeal Judgement, para. 1544.
[3] *See supra*, Appeal Judgement, para. 1545.
[4] *See supra*, Appeal Judgement, para. 1543.

> the Chamber finds beyond a reasonable doubt that Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] three times abducting Tutsi refugees on each occasion on this night.[5]
>
> […]
>
> the Chamber is convinced beyond a reasonable doubt that Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup. It further finds that Nyiramasuhuko gave orders to the *Interahamwe* to commit these crimes. The women and children were taken away from the [Butare Prefecture Office] and killed elsewhere.[6]
>
> […]
>
> Therefore, based upon the evidence of Witnesses TK, QBQ, RE, SS, SU and FAP, including the specific evidence as to the abduction of Mbasha's wife and children, the assault of a woman named Trifina and the assault of an unnamed woman and her children, the Chamber finds it established beyond a reasonable doubt that at the end of May or beginning of June 1994, Nyiramasuhuko, Ntahobali and about 10 *Interahamwe* came to the [Butare Prefecture Office] aboard a camouflaged pickup. Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup. The pickup left the [Butare Prefecture Office], abducting Tutsi refugees in the process, some of whom were forced to undress.[7]

4. In the same section, the Trial Chamber found, in relevant respects, the following regarding Ntahobali's involvement in crimes which occurred at the prefectoral office during the First Half of June Attacks:[8]

> the Chamber finds it established beyond a reasonable doubt, based on the testimony of Witnesses TA, QBP and TK that, in addition to those attacks described above, Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] in June 1994 to rape women and abduct refugees.[9]

As noted by the Majority, the Trial Chamber recalled these conclusions when summarising its factual findings related to Nyiramasuhuko's and Ntahobali's involvement in crimes committed at the prefectoral office during the Night of Three Attacks and the First Half of June Attacks.[10] Furthermore, it is worth noting that when concluding in the "Factual Findings" section of the Trial Judgement that "hundreds of Tutsi refugees were abducted from the [prefectoral office] and killed", the Trial Chamber relied, in part, on Ntahobali's participation in the Night of Three Attacks and the First Half of June Attacks.[11]

5. It is my view that the Trial Chamber's extensive and repeated conclusions concerning Ntahobali's participation in the abductions and killing of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks in the "Factual Findings" section of the Trial Judgement support the conclusion that the Trial Chamber intended to convict Ntahobali based on his

[5] Trial Judgement, para. 2715.
[6] Trial Judgement, para. 2736.
[7] Trial Judgement, para. 2738.
[8] *See* Trial Judgement, Section 3.6.19.4.9.
[9] Trial Judgement, para. 2773.
[10] *See* Trial Judgement, para. 2781(iii)-(v).
[11] *See* Trial Judgement, para. 2779.

involvement in these attacks. That the Trial Chamber did convict him for his role in these attacks is, in my view, evident from the fact that, in the "Legal Findings" section, the Trial Chamber again recalled its findings of Ntahobali's participation in the Night of Three Attacks[12] and the First Half of June Attacks[13] before ultimately concluding that Ntahobali was responsible for ordering the killing of "Tutsis taking refuge at the Butare *préfecture* office".[14] Furthermore, in the "Sentencing" section of the Trial Judgement, the Trial Chamber noted, with respect to the gravity of the crimes, the "seriousness and atrocity of crimes repetitively perpetrated at the [Butare Prefecture Office], where hundreds of Tutsis were abducted, raped and killed."[15]

6. Consequently, a holistic reading of the Trial Judgement leads to the conclusion that, when convicting Ntahobali of genocide, crimes against humanity, and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office",[16] the Trial Chamber entered these convictions on the basis of its findings that Ntahobali was involved in the abduction and killings of Tutsis during the Night of Three Attacks and the First Half of June Attacks. For these reasons, I respectfully disagree with the Majority's interpretation of the Trial Judgement that Ntahobali was only convicted for ordering killings during the Mid-May Attack.[17]

2. The Absence of a Reasoned Opinion Does Not Invalidate the Verdict

7. As noted, above, I find that the Trial Chamber erred in law by failing to provide a reasoned opinion in support of Ntahobali's conviction for ordering killings in relation to the Night of Three Attacks and the First Half of June Attacks in accordance with Article 22(2) of the Statute and Rule 88(C) of the Rules.[18] In this respect, the Trial Chamber failed to set out in a clear and articulate manner the factual and legal findings on the basis of which it concluded that Ntahobali was responsible for ordering killings in relation to these attacks. Instead, Ntahobali has had to interpret imprecise legal and scattered factual findings as well as the evidence supporting them in order to decipher the basis of his conviction for ordering these killings.

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[12] *See* Trial Judgement, para. 5873 ("Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed.").
[13] *See* Trial Judgement, para. 5874 ("In the first half of June 1994, […] Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees.").
[14] Trial Judgement, paras. 5971, 6053, 6100, 6168. *See also ibid*., para. 5876 (concluding, after reviewing all the crimes during the various attacks at the Butare Prefecture Office, "Ntahobali responsible for ordering killings" and finding him responsible pursuant to Article 6(1) of the Statute).
[15] Trial Judgement, para. 6217.
[16] Trial Judgement, paras. 5971, 6053, 6100, 6168.
[17] *See supra*, Appeal Judgement, paras. 1545, 1568.
[18] *See supra*, Dissenting Opinion and Declaration of Judge Khan, para. 2.

8. I recall that a reasoned opinion in the trial judgement is essential to allow for a meaningful exercise of the right of appeal by the parties and to enable the Appeals Chamber to understand and review the trial chamber's findings.[19] In this regard, despite the Trial Chamber's failure to provide a reasoned opinion, I do not think that Ntahobali has been denied the opportunity to fully exercise his right to appeal this aspect of his convictions. I note, in particular, that the Appeals Chamber requested further briefing from the Prosecution and a response from Ntahobali as to what evidence cited in the Trial Judgement and findings of the Trial Chamber would support a conviction for ordering the killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.[20]

9. Having found that Ntahobali's right to appeal has not been infringed, I will proceed to examine the Trial Chamber's findings in order to define the scope of Ntahobali's liability for ordering killings before considering whether the findings and the evidence the Trial Chamber relied upon as well as the evidence identified by the parties could sustain its conclusions that Ntahobali was responsible for ordering the killings in relation to the Night of Three Attacks and the First Half of June Attacks.

3. The Scope of Ntahobali's Liability in Relation to These Attacks

10. The imprecision in the Trial Judgement has fuelled considerable confusion as to the scope of Ntahobali's liability for ordering the killings of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks. For example, the Prosecution's arguments suggest that Ntahobali's liability is based on the conduct of soldiers and *Interahamwe* for killings committed at the Butare Prefecture Office and elsewhere.[21] Ntahobali's argues that he could not be convicted for the conduct of soldiers[22] and submits that the Trial Judgement is unclear as to whether he was convicted for killings that occurred at the prefectoral office or only for the killings of Tutsis removed from it during the Night of Three Attacks and the First Half of June Attacks.[23]

11. I recall the Appeals Chamber's previous observation that the Trial Chamber found that, although soldiers played a role in events at the Butare Prefecture Office, "no evidence has been led to establish any relationship between the soldiers and […] Ntahobali".[24] Even though this finding was made in the context of assessing Ntahobali's superior responsibility, the Appeals Chamber has

[19] *See Bizimungu* Appeal Judgement, para. 18; *Hadžihasanović and Kubura* Appeal Judgement, para. 13. *See also Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20.
[20] *See* 25 March 2015 Order, p. 2.
[21] *See* Prosecution Supplementary Submissions, paras. 1, 2, 6, 21, 31, 33, 34, 41, 52.
[22] *See* Ntahobali Appeal Brief, paras. 890, 953. *See also* Ntahobali Supplementary Submissions, paras. 5, 14, 33, 37.
[23] *See* Ntahobali Appeal Brief, para. 893. *See also* Ntahobali Supplementary Submissions, para. 3.
[24] *See supra*, Appeal Judgement, fn. 3557, *referring to* Trial Judgement, para. 5887.

found that "it suggests that no finding of any liability was imposed on Ntahobali for the conduct of soldiers" as it concerns attacks at the prefectoral office.[25] I fully endorse this conclusion and reject any suggestion that the Trial Chamber convicted Ntahobali in relation to killings committed by soldiers during these attacks.[26] Rather, the relevant findings demonstrate that Ntahobali was found responsible in relation to the killings committed by the *Interahamwe*.[27]

12. Unquestionably, there is evidence of Ntahobali issuing orders at the Butare Prefecture Office in relation to killings committed at the prefectoral office during these attacks.[28] Furthermore, the Trial Chamber generally found that Ntahobali was responsible for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office".[29] However, the Trial Chamber's most detailed findings in the "Legal Findings" section of the Trial Judgment necessarily limit Ntahobali's responsibility to ordering the killings of Tutsi refugees who were abducted and taken to other locations in Butare Prefecture to be killed.[30] That the Trial Chamber intended to limit Ntahobali's responsibility for killings in this respect is further reflected by the fact that, when considering the extent of the killings in relation to the attacks perpetrated by Nyiramasuhuko and Ntahobali, the Trial Chamber limited its conclusion specifically to the number of Tutsi refugees who *were abducted and killed*.[31]

13. In light of the above, it is clear to me that Ntahobali was found to have ordered killings of Tutsis abducted from the prefectoral office during the Night of Three Attacks and the First Half of June Attacks, which were perpetrated by *Interahamwe* who participated in these attacks with him.

4. <u>The Record Sustains Ntahobali's Convictions for Ordering Killings During These Attacks</u>

14. I note that the Prosecution points to findings and evidence credited by the Trial Chamber that it contends support the elements establishing Ntahobali's ordering responsibility in relation to

[25] *See supra*, Appeal Judgement, fn. 3557.
[26] *See* Prosecution Supplementary Submissions, para. 6.
[27] *See* Trial Judgement, paras. 2682, 2715, 2727, 2736, 2738, 2781(iii), 5873, 5876.
[28] *See*, *e.g.*, Trial Judgement, paras. 2184, 2218, 2681, 2735, 2736, 2771, *referring to, inter alia,* Witness TA, T. 29 October 2001 pp. 7-9; Witness TK, T. 20 May 2002 pp. 75, 88, 89; Witness TK, T.22 May 2002 p. 109.
[29] Trial Judgement, paras. 5971, 6053, 6100, 6168.
[30] With respect to the Night of Three Attacks, the Trial Chamber concluded that Ntahobali "*abducted* Tutsi refugees" and "took them to other sites in Butare *préfecture* to be killed". *See* Trial Judgement, para. 5873 (emphasis added). It similarly found with respect to the First Half of June Attacks that "Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to […] *abduct refugees*". *See ibid*., para. 5874 (emphasis added). Furthermore, the Trial Chamber's findings reflect that those abducted during the First Half of June Attacks were killed. *See ibid*., para. 2779. *Cf. ibid*., para. 5867 ("Between mid-May and mid-June 1994, […] Ntahobali […] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; *and were killed in various locations throughout Butare [Prefecture].*") (emphasis added).
[31] *See* Trial Judgement, para. 2779.

the Night of Three Attacks[32] and the First Half of June Attacks.[33] Ntahobali's argues that no reasonable trier of fact could rely on the sole order he issued during the Mid-May Attack – the order to stop loading the truck – to find that he ordered all the killings during the subsequent attacks.[34] He further submits that neither the evidence nor the factual and legal findings concerning the Night of Three Attacks and the First Half of June Attacks supports the conclusion that he ordered killings during the Night of Three Attacks[35] or the First Half of June Attacks.[36]

15. I recall that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[37] Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[38]

16. At the outset, I disagree with Ntahobali's contention that the finding of his liability for ordering killings during the Night of Three Attacks and First Half of June Attacks in the Trial Judgement is based solely on the instruction he gave to *Interahamwe* to stop loading the truck during the Mid-May Attack. The Trial Chamber considered the various attacks committed at the Butare Prefecture Office collectively, evidence of Ntahobali's participation therein, as well as the similarity among them to reach its conclusions as to his criminal liability.[39] I note the extensive evidence cited by the Trial Chamber[40] and its findings[41] describing the violent nature of the attacks at the prefectoral office on the Night of Three Attacks as well as the roles that Ntahobali, Nyiramasuhuko, and *Interahamwe* played in abducting Tutsi refugees, as well as their killings. The evidence and findings indicate a regular and systematic pattern of attacks aimed at eliminating Tutsis refugees at the prefectoral office. I therefore find Ntahobali's contention in this respect unpersuasive.

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[32] Prosecution Supplementary Submissions, paras. 21, 23, 24, 26, 28-33, *referring to* Trial Judgement, paras. 2212, 2231, 2278, 2662, 2668, 2681, 2705, 2744, 2749, 2779, 2781(iii), (iv), 5873, 5884.
[33] Prosecution Supplementary Submissions, paras. 37-41, *referring to* Trial Judgement, paras. 2771, 5874.
[34] Ntahobali Appeal Brief, para. 951; Ntahobali Supplementary Submissions, para. 45. *Cf.* Ntahobali Supplementary Submissions, para. 36.
[35] Ntahobali Supplementary Submissions, paras. 11, 16, 20, 25, 26, 31, 33, 35, 36, 39, 45, *referring to* Trial Judgement, paras. 2744, 2773, 2779, 2781(iv), 5867, 5870, 5872-5875, 5884.
[36] *See* Ntahobali Supplemental Submissions, paras. 43-46, *referring to* Trial Judgement, para. 2771. *See also ibid*., paras. 30-35, *referring to* Trial Judgement, para. 2749.
[37] *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. *See also Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[38] *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.
[39] *See*, *e.g*., Trial Judgement, para. 5867 ("Between mid-May and mid-June 1994, […] Ntahobali […] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and were killed in various locations throughout Butare *préfecture*."). *See also supra*, Appeal Judgement, paras. 1901, 1902.
[40] *See*, *e.g*., Trial Judgement, paras. 2703, 2704, 2706-2715, 2731-2736.
[41] *See*, *e.g*., Trial Judgement, paras. 2715, 2736, 2738, 2749.

17. With respect to Ntahobali's ordering responsibility in relation to the Night of Three Attacks, the Appeals Chamber has accepted Ntahobali's submission that Witness SJ's evidence cannot be relied upon in relation to the Night of Three Attacks.[42] I extend this conclusion to my own analysis and will not consider the Prosecution's arguments that rely on this witness's evidence in establishing Ntahobali's responsibility for ordering the killings of Tutsis abducted from the prefectoral office.[43] Nonetheless, the Trial Chamber credited Witness TK's evidence concerning the Night of Three Attacks and, in particular, her testimony as to Ntahobali's conduct and position of authority *vis-à-vis* the *Interahamwe*. The Trial Chamber referred to Witness TK's evidence that *Interahamwe* surrounded Ntahobali and referred to him as "*Shalom*, *chef*."[44] The Trial Chamber similarly pointed to Witness TK's testimony that upon arriving at the prefectoral office during the Night of Three Attacks, Ntahobali "and some of the *Interahamwe* exclaimed that nobody should be spared or treated leniently", that Ntahobali "told the *Interahamwe* to do their work seriously", that "*Interahamwe* attacked the group of refugees and chose people to be taken away to be killed", and that the "truck left behind certain *Interahamwe* to select those who were to be loaded on the next trip."[45] Similarly, the Trial Chamber credited evidence that Tutsi refugees who were abducted from the prefectoral office during, *inter alia*, the Night of Three Attacks were killed.[46]

18. Ntahobali does not demonstrate that it was unreasonable for the Trial Chamber to rely on these aspects of Witness TK's evidence or that it mischaracterised the witness's evidence.[47] Witness TK's evidence demonstrates Ntahobali's authority over the *Interahamwe* present at the prefectoral office and reflects that they followed his instructions.[48] Ntahobali also fails to demonstrate that a reasonable trier of fact could not have concluded that refugees abducted from the prefectoral office during the Night of Three Attacks and other attacks were killed.[49]

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[42] *See supra*, Appeal Judgement, Sections V.I.2(b)(iii)a.ii, V.I.2(d)(ii)a.
[43] *See* Prosecution Supplementary Submissions, paras. 24, 26.
[44] Trial Judgement, para. 2668, *referring to* Witness TK, T. 23 May 2002 p. 93.
[45] Trial Judgement, para. 2681, *referring to* Witness TK, T. 20 May 2002 pp. 75, 88, 89. Ntahobali's assertion that Witness TK's testimony about the alleged instructions issued by Ntahobali cannot reasonably be interpreted as instructions to kill and that the evidence fails to support the conclusion that *Interahamwe* attacked refugees at the prefectoral office based on his orders reflects mere disagreement and does not demonstrate any error on the part of the Trial Chamber. *See* Ntahobali Supplementary Submissions, para. 31.
[46] *See* Trial Judgement, paras. 2739-2749.
[47] The Appeals Chamber has previously considered and rejected contentions that the Trial Chamber failed to apply sufficient caution when assessing Witness TK's evidence. *See supra*, Appeal Judgement, Section III.J.3. It has also found that the Trial Chamber acted reasonably in relying on Witness TK's evidence, notwithstanding its disbelief that Witnesses TK and QJ did not discuss the events at issue in this proceeding or their plans to testify before the Tribunal. *See supra*, Appeal Judgement, Section VIII.E.1(a). Similarly, the Appeals Chamber has rejected contentions that Witness TK's testimony cannot be believed due to variances between her account of the Night of Three Attacks and that of other witnesses who were in proximity to her that evening. *See supra*, Appeal Judgement, Section IV.F.2(e)(iii). I find no merit to any of Ntahobali's additional challenges to the credibility and reliability of Witness TK's evidence concerning the Night of Three Attacks. *See*, *e.g.*, Ntahobali Supplementary Submissions, paras. 25, 26.
[48] I also find no merit to Ntahobali's contention that the record fails to demonstrate that he possessed the requisite authority over the perpetrators. *See* Ntahobali Supplementary Submissions, paras. 16, 20.
[49] *See supra*, Appeal Judgement, Section V.I.2(d)(vi).

19. Furthermore, I am not persuaded by Ntahobali's contention that no evidence could support the conclusion that he ordered killings, in the absence of clear findings and evidence establishing the exact perpetrators of the killings.[50] Based on the evidence relied upon by the Trial Chamber, its general findings that Ntahobali ordered killings and that refugees abducted by Ntahobali and *Interahamwe* from the prefectoral office during, *inter alia*, the Night of Three Attacks were killed, it is clear that the Trial Chamber concluded as the only reasonable inference that some of the *Interahamwe* who participated in the attacks at the prefectoral office subsequently killed the refugees elsewhere on Ntahobali's orders.[51] In my view, it was well within the discretion of the Trial Chamber to make such an inference, notwithstanding its findings that Nyiramasuhuko also ordered killings of Tutsis who were abducted from the prefectoral office during this attack. Given the entire record before the Trial Chamber, including the finding affirmed by the Appeals Chamber, Judge Liu dissenting, that Ntahobali is responsible for ordering killings of Tutsis abducted during the Mid-May Attack,[52] I find that a reasonable trier of fact could have convicted Ntahobali for ordering killings of Tutsi refugees who were abducted and killed during the Night of Three Attacks.

20. Regarding the First Half of June Attacks, the Trial Chamber accepted Witness TK's evidence that Ntahobali came to the Butare Prefecture Office on a number of evenings accompanied by *Interahamwe* "or" disabled soldiers, that he "committed crimes on each evening he came to the [Butare Prefecture Office]" and that, on some occasions, Ntahobali "came to determine whether there were any men left, who were then taken away to be killed".[53] The Trial Chamber also noted that Witness TK testified that Ntahobali "would say to the *Interahamwe*, '[b]e firm in your actions,' when he meant, 'kill all of them.'"[54] The Trial Chamber similarly recalled Witness TA's evidence that "a group of eight *Interahamwe*, including Shalom arrived at the [Butare Prefecture Office] in the same vehicle and attacked the refugees with machetes, hammers, Rwandan clubs and sticks"[55] and that "[th]ey killed some, wounded others and threw the dead and wounded into their vehicle".[56]

21. The Appeals Chamber has previously dismissed Ntahobali's contentions as to the unreliability of the evidence of Witnesses TK and TA that would relate to killings during the First Half of June Attack.[57] I consider Ntahobali's additional submissions challenging this evidence as

[50] *See*, *e.g.*, Ntahobali Supplementary Submissions, paras. 33, 35.
[51] In this respect, Ntahobali's contention that the record fails to demonstrate that his words and actions had a direct and substantial effect on the perpetration of the killings is unpersuasive. *See* Ntahobali Supplementary Submissions, paras. 33, 35.
[52] *See supra*, Appeal Judgement, paras. 1902, 1905, 1906.
[53] Trial Judgement, para. 2771.
[54] Trial Judgement, para. 2771.
[55] Trial Judgement, para. 2770. *See also ibid.*, para. 2184.
[56] Trial Judgement, para. 2184.
[57] *See supra*, Appeal Judgement, Section V.I.2(e)(ii).

unpersuasive.[58] Given the Trial Chamber's factual findings as to Ntahobali's conduct during other attacks at the prefectoral office starting in mid-May 1994 and its conclusions that Tutsis who were abducted from the prefectoral office were killed – findings that have been sustained on appeal[59] – I am also satisfied that it was within the discretion of the Trial Chamber to infer as the only reasonable inference that Ntahobali ordered *Interahamwe* to kill Tutsis who were abducted from the prefectoral office during the First Half of June Attacks.[60]

22. For the foregoing reasons, I conclude that the findings of the Trial Chamber, the evidence it relied upon, and the evidence identified by the parties sustain the conclusion that Ntahobali is responsible for ordering the killings of Tutsi refugees abducted from the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.

5. The Record Sustains Ntahobali's Superior Responsibility for Killings During These Attacks

23. With regards to his responsibility as a superior, as stated in this Judgement, the Trial Chamber held Ntahobali responsible as a superior only of those crimes that he ordered and for which he was convicted under Article 6(1) of the Statute.[61] I agree with this conclusion but, in light of the above, would extend it to include the killings of abducted refugees committed by *Interahamwe* on the basis of Ntahobali's orders during the Night of Three Attacks and the First Half of June Attacks.[62]

6. Number of Refugees Abducted and Killed

24. The Appeals Chamber in this Judgement has found the record insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks of which Ntahobali was convicted by the Trial Chamber.[63] Notwithstanding my view that Ntahobali was convicted for ordering the killings of Tutsi refugees abducted during the Night of Three Attacks and the First Half of June Attacks, I continue to agree that the record remains insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks in which Ntahobali participated.[64]

[58] In particular, Ntahobali's contention that that Witness TK's uncorroborated evidence cannot be relied upon and that her testimony that, during these attacks, he instructed *Interahamwe* to "be firm in [their] actions" is taken out of context and cannot be understood as an order to kill reflects mere disagreement without demonstrating error. *See* Ntahobali Supplementary Submissions, para. 43, *referring to* Trial Judgement, para. 2771, Witness TK, T. 22 May 2002 p. 109.
[59] *See generally supra*, Appeal Judgement, Section V.I.2.
[60] In this respect, I find unpersuasive Ntahobali's contentions that the record is insufficient to demonstrate that any one who killed abducted Tutsis from the prefectoral office was acting on Ntahobali's instructions or that his instructions had a direct and substantial effect on the perpetration of the killings. *See* Ntahobali Supplementary Submissions, paras. 44, 46. *See also ibid*., paras. 30-35.
[61] *See supra*, Appeal Judgement, paras. 1927, 1928.
[62] The analysis and findings in paragraphs 1929-1943 of the Appeal Judgement apply with equal force to these events.
[63] *See supra*, Appeal Judgement, paras. 1884-1887.
[64] With respect to the Night of Three Attacks, the evidence of Witnesses TK, SU, SS, RE, FAP, QJ, and QBQ found credible by the Trial Chamber reflects that the purpose of the attacks that night was to target the refugees at the

Nevertheless, I consider that the evidence reflects Ntahobali's involvement in a regular and systematic pattern of attacks aimed at eliminating Tutsi refugees at the prefectoral office and reasonably demonstrates that he is responsible for a large number of killings of Tutsis abducted from the prefectoral office.

B. Declaration: Joinder

25. I am in full agreement with the conclusion in this Judgement to dismiss the appeals of Nyiramasuhuko and Ntahobali concerning the issues of joinder and severance in the context of this case.[65] The relevant decisions of the Trial Chamber fall within, *inter alia*, the boundaries imposed by Rules 48 and 82 of the Rules as guided by Article 20 of the Statute.[66] Furthermore, I agree with the finding of the Appeals Chamber that "the argument that the excessive length of the proceedings in this case was an unavoidable and clearly foreseeable consequence of the joinder decision is not substantiated."[67] I also agree with the conclusion that "the mere contention that separate trials would have proceeded faster is insufficient to substantiate a claim that undue delay occurred as a result of the joinder."[68]

26. However, armed with the benefit of hindsight, it is my view that the legacy of joined cases in this Tribunal serves as a cautionary one. On the completion of this, the last and longest case of the Tribunal, now is the time to consider the theoretical considerations that have commonly supported the joinder of cases alongside the empirical reality of joined cases before this Tribunal. Ultimately, for the reasons explained below, it is my view that international criminal tribunals should take a more rigorous approach when examining whether joinder is appropriate, notwithstanding permissive rules that might otherwise allow it.

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prefectoral office. *See supra*, Appeal Judgement, Section V.I.2(d); Trial Judgement, paras. 2212, 2253, 2254, 2284, 2287, 2289, 2307. *See also* Trial Judgement, paras. 2705, 2706, 2708, 2709. The evidence further describes persons being loaded onto the vehicle accompanying Ntahobali and Nyiramasuhuko that night. *See* Trial Judgement, paras. 2253, 2278, 2285, 2287, 2289, 2303, 2307, 2308, 2331, 2332. *See also* Trial Judgement, paras. 2703, 2704, 2710-2712, 2714, 2732, 2736, 2738. Notably, Witness TK specified that on at least one occasion the vehicle was full when it left with the abducted refugees. *See* Trial Judgement, para. 2215. With respect to the First Half of June Attacks, Witness TK's evidence, as summarised and relied upon by the Trial Chamber, is of principal relevance as to the number of persons abducted by Ntahobali to be killed, but her account does not provide a specific or estimated number of victims. *See* Trial Judgement, para. 2218. Nonetheless, and as noted by the Trial Chamber, the evidence reflects that those who were abducted from the prefectoral office were, almost without exception, killed. *See* Trial Judgement, paras. 2703, 2740-2749.

[65] *See generally supra*, Appeal Judgement, Section III.B.

[66] *See*, *e.g.*, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010, para. 20; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Tolimir et al*. Decision of 27 January 2006"), para. 8. I note that Article 20 of the Statute contains similar provisions to that of Article 21 of the Statute of the ICTY.

[67] *See supra*, Appeal Judgement, para. 365.

[68] *See supra*, Appeal Judgement, para. 365.

1. Examining the Theoretical Justifications for Joinder

27. In theory, joint proceedings require less court time and judicial resources,[69] minimise hardship to witnesses and ensure the presentation of evidence that might not be available in the future,[70] avoid undue delay for the defendants,[71] and minimise the possibility of inconsistent verdicts while enhancing procedural and substantive fairness among defendants through uniform proceedings.[72] Furthermore, it must be stressed that the purpose of joining cases is to serve the interests of justice and avoid undue delay.[73]

28. Examining first the judicial efficiency theory that joint trials will require less court time and judicial resources, the history of joint proceedings in this Tribunal reflects that they have required more trial days to hear witnesses than single accused trials.[74] On average, a witness's evidence in a multi-accused case will last for nearly two and a quarter trial days while a witness's testimony in a single accused case will last around one trial day.[75] Explained differently, trials with one defendant,

[69] *See*, *e.g.*, *Gotovina et al*. Appeal Decision on Joinder, para. 44 ("Two separate trials, whether conducted simultaneously or otherwise, are still likely to require more court hours in total than one joint trial and require more judicial time and resources."). *See also Ntabakuze* Appeal Decision on Severance, para. 25.

[70] *See*, *e.g.*, *Gotovina et al*. Appeal Decision on Joinder, para. 47 ("The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to generally conclude […] that there will be lesser hardship for some witnesses if only one trial is held and that this should weigh in favour of joinder."); *The Prosecutor v. Théoneste Bagosora et al*., Case No. ICTR-98-41-T, Decision on Request for Severance of Three Accused, 27 March 2006, para. 3 ("A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured.").

[71] *Tolimir et al.* Decision of 27 January 2006, para. 25 ("It is possible that if the Appellant were tried separately from the other Accused, further delay would result as it is not obvious that his separate trial could commence at the same time as this joint trial.").

[72] *See Ntabakuze* Appeal Decision on Severance, para. 25 ("Joint appeal proceedings not only enhance fairness as between the appellants by ensuring a uniform procedure against all but also minimize the possibility of inconsistencies in (a) treatment of such evidence, (b) common legal findings of the Trial Chamber, (c) sentencing, or (d) other matters that could arise from separate appeals."); *Prosecutor v. Radoslav Brdanin and Momir Talić*, Case No. IT-99-36, Decision on Request to Appeal, 16 May 2000 ("Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts.").

[73] *Cf. Gotovina et al*. Appeal Decision on Joinder, para. 44; *Tolimir et al.* Decision of 27 January 2006, para. 8.

[74] In reaching this calculation, I was unable to determine the trial days for the following proceedings before the Tribunal: *Gacumbitsi*; *Kajelijeli*; *Kamuhanda*; *Kayishema*; *Mpambara*; *Ndahimana*; *Rutaganda*; *Seromba*. My calculations in this declaration are based on information provided in the trial and appeal judgements of the relevant cases before the Tribunal.

[75] Single accused trials: *Akayesu* (43 trial days; 41 witnesses); *Bagilishema* (60 trial days; 33 witnesses); *Bikindi* (61 trial days; 57 witnesses); *Gatete* (30 trial days; 49 witnesses); *Hategekimana* (43 trial days; 40 witnesses); *Kajelijeli* (91 trial days; 42 witnesses); *Kalimanzira* (37 trial days; 66 witnesses); *Kanyarukiga* (28 trial days; 34 witnesses); *Karera* (33 trial days; 43 witnesses); *Muhimana* (34 trial days; 52 witnesses); *Munyakazi* (19 trial days; 31 witnesses); *Musema* (39 trial days; 30 witnesses); *Muvunyi I* (80 trial days; 48 witnesses); *Muvunyi II* (9 trial days; 13 witnesses); *Nchamihigo* (57 trial days; 60 witnesses); *Ndindabahizi* (27 trial days; 34 witnesses); *Ngirabatware* (75 trial days; 62 witnesses); *Niyitegeka* (33 trial days; 24 witnesses); *Nizeyimana* (54 trial days; 84 witnesses); *Nsengimana* (42 trial days; 43 witnesses); *Ntawukulilyayo* (33 trial days; 35 witnesses); *Nzabonimana* (87 trial days; 60 witnesses); *Renzaho* (49 trial days; 53 witnesses); *Rukundo* (66 trial days; 50 witnesses); *Rutaganda* (108 trial days; 41 witnesses); *Rwamakuba* (78 trial days; 49 witnesses); *Semanza* (73 trial days; 51 witnesses); *Setako* (60 trial days; 55 witnesses); *Simba* (53 trial days; 36 witnesses); *Zigiranyirazo* (90 trial days; 66 witnesses). Multi-accused trials: *Bagosora et al.* (408 trial days; 242 witnesses); *Bizimungu et al.* (399 trial days; 171 witnesses); *Karemera et al.* (374 trial days; 153 witnesses); *Nahimana et al.* (238 trial days; 93 witnesses); *Ndindiliyimana et al.* (395 trial days; 216 witnesses); *Ntagerura et al.* (161 trial days; 123 witnesses); *Ntakirutimana and Ntakirutimana* (57 trial days; 43 witnesses); *Nyiramasuhuko et al.* (714 trial days; 189 witnesses).

on average, have used 53 trial days to hear around 46 witnesses. Proceedings with multiple defendants have, on average, required around 343 trial days to hear only around 154 witnesses. I must also note that not a single multi-accused case had more witnesses testify than trial days,[76] standing in marked contrast to several single-accused cases.[77]

29. In my view, this comparative inefficiency in hearing witnesses is not simply explained by the greater substantive complexity of multi-accused trials or the notion that witnesses will testify longer in multi-accused trials because they are necessarily giving evidence against more than one accused. Having presided over a multi-accused trial as well as participated in multi-appellant appeal proceedings, it is apparent to me that, in some circumstances, the examination of witnesses in multi-accused cases tends to be less focused and unnecessarily lengthy because the size of the cases can prevent the parties – the prosecution in particular – from fully grasping what evidence is and is not crucial to their case. Furthermore, it is my view that the inefficiency is also a result of the inherently greater procedural complexity that accompanies trials when more than two parties are litigating a case.

30. In addition, when considering judicial resources outside the court room, one must consider that proceedings with multiple defendants present weighty, practical and legal challenges that would not otherwise arise in a single accused case. Motions to sever may arise from pre-trial proceedings through appeal. Defence objections to evidence or motions to exclude evidence may arise not only in relation to prosecution evidence but in relation to inculpatory evidence presented by a co-accused. Health issues concerning one defendant or a single defendant's refusal to participate in proceedings involves extra litigation and inevitably delays proceedings for his co-defendants. The proceedings for co-defendants may also be delayed when: (i) disputes between one defendant and his counsel arise during the proceedings; (ii) there are disputes between one defendant's counsel and the administration that require judicial intervention; or (iii) counsel for one defendant needs to be replaced. While Rule 82 of the Rules requires that "each accused shall be accorded the same rights as if such accused were being tried separately"[78] and empowers a chamber to sever cases when "it is necessary to avoid a conflict of interests that might cause serious

[76] *See Bagosora et al.* (408 trial days; 242 witnesses called); *Bizimungu et al.* (399 trial days; 171 witnesses called); *Karemera et al.* (374 trial days; 153 witnesses called); *Nahimana et al*. (238 trial days; 93 witnesses called); *Ndindiliyimana et al.* (395 trial days; 216 witnesses called); *Ntagerura et al.* (161 trial days; 123 witnesses called); *Ntakirutimana and Ntakirutimana* (57 trial days; 43 witnesses called); *Nyiramasuhuko et al.* (714 trial days; 189 witnesses called).

[77] *See*, *e.g.*, *Gatete* (30 trial days; 49 witnesses called); *Kalimanzira* (37 trial days; 66 witnesses called); *Kanyarukiga* (28 trial days; 34 witnesses called); *Muhimana* (34 trial days; 52 witnesses called); *Munyakazi* (19 trial days; 31 witnesses called); *Muvunyi II* (9 trial days; 13 witnesses called); *Nchamihigo* (57 trial days; 60 witnesses called); *Ndindabahizi* (27 trial days; 34 witnesses called); *Nizeyimana* (54 trial days; 84 witnesses called); *Nsengimana* (42 trial days; 43 witnesses called); *Ntawukulilyayo* (33 trial days; 35 witnesses called); *Renzaho* (49 trial days; 53 witnesses called).

[78] Rule 82(A) of the Rules.

prejudice to an accused or to protect the interests of justice",[79] the issues identified above present perplexing practical and legal questions that require careful consideration by the judiciary. Resolving them can be a difficult and time consuming process.

31. I turn now to the theoretical consideration that joined proceedings will minimise the hardship to witnesses and/or ensure the presentation of evidence that might not be available in the future. There is no question that being a witness is a disruptive and often uncomfortable exercise. For victims of sexual and physical violence or persons who lost loved ones, testifying about such incidents can result in new trauma. Furthermore, there is no certainty that a witness will be able to testify in multiple proceedings. However, let us consider this theory in the context of the *Muvunyi*, *Hategekimana*, and *Nizeyimana* proceedings. In January 2000, a joint indictment was confirmed against these three military figures whose criminal liability was principally based on the crimes committed by *École des sous-officiers* ("ESO") and Ngoma Camp soldiers in and around Butare Town during the genocide. In December 2003, the *Muvunyi* case was severed from that of the *Hategekimana* and *Nizeyimana* cases as Hategekimana had only been arrested in February of that year and was unprepared for trial and because Nizeyimana remained at large.[80] In September 2007, the *Hategekimana* case was severed from the *Nizeyimana* case, as Nizeyimana remained a fugitive.[81] Nizeyimana was eventually arrested in October 2009.[82]

32. What can be seen from an examination of these three cases is that there was considerable overlap as it pertains the crime bases for which each defendant was pursued at trial.[83] What is also clear is that, in three different trials held between February 2005 and September 2011, the relevant

[79] Rule 82(B) of the Rules.
[80] *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-51-I, Decision Regarding the Prosecutor's Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi, 11 December 2003, paras. 1, 7.
[81] *See The Prosecutor v. Ildéphonse Nizeyimana and Ildephonse Hategekimana*, Case No. ICTR-00-55-I, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment of I[l]delphonse Hategekimana, 25 September 2007, paras. 1, 6, p. 11. In granting severance of the *Hategekimana* trial from the *Nizeyimana* case, the Trial Chamber also accepted the prosecution's submission that the "key allegations against Mr. Hategekimana are largely distinct from those made against Mr. Nizeyimana, so a joint trial is not likely to promote judicial economy." *See ibid*., para. 6.
[82] *See The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012 ("*Nizeyimana* Trial Judgement"), Annex A, para. 2.
[83] Muvunyi and Nizeyimana were both pursued on the basis of crimes committed by ESO soldiers at roadblocks throughout Butare Town as well as for attacks at the Butare University and the Butare University Hospital. *See Nizeyimana* Trial Judgement, Sections II.5 (Butare University), II.7.3 (roadblocks), II.8 (Butare University Hospital); *Muvunyi* Trial Judgement of 12 September 2006, Sections II.5.3 (roadblocks), II.5.6 (Butare University Hospital), II.5.8 (Butare University). Muvunyi, Hategekimana, and Nizeyimana were all pursued with respect to the attacks on *Groupe Scolaire* and the Benebrika Convent in late April 1994. *See Nizeyimana* Trial Judgement, Section II.7.3 (Benebrika), II.10 (*Groupe Scolaire*); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Judgement and Sentence, pronounced on 6 December 2010, filed on 14 February 2011 ("*Hategekimana* Trial Judgement"), Sections III.C.12 (*Groupe Scolaire*), III.C.14 (Benebrika); *Muvunyi* Trial Judgement of 12 September 2006, Sections II.5.7 and II.5.12.3 (Benebrika), II.5.10.3 (*Groupe Scolaire*). Hategekimana and Nizeyimana were both tried on the basis of alleged orders issued during a 7 April 1994 meeting at the ESO as well as the rapes about which Witness BUQ testified. *See Nizeyimana* Trial Judgement, Sections II.1 (rapes), II.2 (7 April 1994 meeting); *Hategekimana* Trial Judgement, Sections III.C.1 (7 April 1994 meeting), III.C.2 (rapes).

prosecution and defence teams were able to produce evidence on the same or related events in successive proceedings. Witnesses – including at least one who was a victim of sexual violence – testified in more than one proceeding. While I acknowledge that this "survey sample" is small, it is nonetheless suggestive that we must not blindly fear that hardship on witnesses will prevent them from testifying more than once. Indeed, this Tribunal, like other international criminal tribunals, is equipped with a witness and victims support section with a broad mandate and well trained personnel to mitigate the hardship faced by witnesses through their participation in trials. Likewise, fears that evidence will no longer be available in future proceedings should be examined in light of the fact that evidence of the same or largely similar events was presented in several successive trials before this Tribunal.[84]

33. Let us now examine the theoretical consideration that joined trials avoid undue delay. Based on my calculation from proceedings before this Tribunal, a single accused proceeding from opening statement to the issuance of a trial judgement will last on average 641 days,[85] whereas the length for a multiple accused trial is on average 2,026 days.[86] On average, the time between closing arguments to the issuance of trial judgements in single accused cases before the Tribunal is 196 days,[87] where

[84] As an example, Ndayambaje, Kalimanzira, and Ntawakulilyayo were each prosecuted on the basis of the attacks at Kabuye Hill in April 1994. *See* Trial Judgement, Section III.3.6.5 (Kabuye Hill); *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, pronounced on 3 August 2010, filed on 6 August 2010, Sections II.1.3.2 and II.1.3.4 (Kabuye Hill); *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement, 22 June 2009, Section III.2.4 (Kabuye Hill). Munyakazi, whose trial started in April 2009, was prosecuted on the basis of attacks in Nyamasheke Parish, Shangi Parish, and Mibilizi Parish, which also featured in the *Ntagerura et al.* trial, whose evidentiary phase was completed in first quarter of 2003. *See Munyakazi* Trial Judgement, Sections II.3.7 (Nyamasheke Parish), II.3.8 (Shangi Parish), II.3.9 (Mibilizi Parish); *Ntagerura et al.* Trial Judgement, Sections II.B.5.b (Shangi Parish), II.B.5.c (Mibilizi Parish), II.B.5.d (Nyamasheke Parish). In addition, Ndahimana, Kanyarugika, and Seromba were prosecuted on the basis of attacks at Kivumu Commune and Nyange Parish. *See The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Judgement and Sentence, pronounced on 17 November 2011, signed on 30 December 2011, filed on 18 January 2012, Sections III.1(Kivumu Commune), III.5 and III.6 (Nyange Parish); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-T, Judgement and Sentence, pronounced on 1 November 2010, filed on 9 November 2010, Sections III.2 (Kivumu Commune), III.5 and III.6 (Nyange Parish); *Seromba* Trial Judgement, Sections II.3 (Kivumu Commune), II.6 and II.7 (Nyange Parish). Beyond these anecdotal references, the general reliance on incarcerated witnesses – a practice ubiquitous to proceedings before the Tribunal – also tends to reduce the risk that witnesses will not be located or will be unavailable to testify in more than one proceeding.

[85] *See Akayesu* (632 days); *Bagilishema* (590 days); *Bikindi* (807 days); *Gacumbitsi* (326 days); *Gatete* (528 days): *Hategekimana* (709 days); *Kajelijeli* (994 days); *Kalimanzira* (414 days); *Kamuhanda* (647 days); *Kanyarukiga* (436 days); *Karera* (705 days); *Mpambara* (359 days); *Muhimana* (396 days); *Munyakazi* (440 days); *Musema* (368 days); *Muvunyi I* (568 days); *Muvunyi II* (240 days); *Nchamihigo* (780 days); *Ndahimana* (500 days); *Ndindibahizi* (319 days); *Ngirabatware* (1248 days); *Niyitegeka* (334 days); *Nizeyimana* (523 days); *Nsengimana* (912 days); *Ntawukulilyayo* (458 days); *Nzabonimana* (960 days); *Renzaho* (950 days); *Rukundo* (850 days); *Rutaganda* (994 days); *Rwamukuba* (469 days); *Semanza* (942 days); *Seromba* (821 days); *Setako* (554 days); *Simba* (471 days); *Zigiranyirazo* (1173 days).

[86] *Bagosora et al.* (2506 days) ; *Bizimungu et al.* (2905 days); *Karemera et al.* (2990 days); *Kayishema and Ruzindana* (775 days); *Nahimana et al.* (1139 days); *Ndindiliyimana et al.* (2462 days); *Ntagerura et al.* (1256 days); *Ntakirutimana and Ntakirutimana* (522 days); *Nyiramasuhuko et al.* (3685 days).

[87] *See*, *e.g.*, *Akayesu* (161 days); *Bikindi* (191 days); *Gacumbitsi* (109 days); *Gatete* (117 days); *Hategekimana* (293 days); *Kajelijeli* (139 days); *Kalimanzira* (64 days); *Kamuhanda* (253 days); *Kanyarukiga* (170 days); *Karera* (379 days); *Mpambara* (132 days); *Muhimana* (99 days); *Munyakazi* (159 days); *Musema* (214 days); *Muvunyi I* (82 days); *Muvunyi II* (133 days); *Nchamihigo* (295 days); *Ndahimana* (119 days); *Ndindabahizi* (136 days); *Ngirabatware* (212 days); *Niyitegeka* (78 days); *Nizeyimana* (199 days); *Nsengimana* (340 days); *Ntawukulilyayo* (54 days); *Nzabonimana*

in multiple accused cases it is 479 days.[88] From notice of appeal to appeal judgement, the duration for a case involving a single convicted person is 556 days,[89] where it is 973 days when it involves multiple convicted persons.[90] The average length from the date of arrest to final judgement on appeal for a single accused proceeding before the Tribunal is 2395 days[91] (or around six and a half years), while the length of multiple accused proceedings is approximately 4825 days (or just over 13 years).[92]

34. These numbers do not necessarily reflect the occurrence of undue delay in joined proceedings. However, that an accused convicted at trial in a joined proceeding might expect to spend around six and a half years more in preventative detention before receiving a final verdict than an accused who proceeds at trial and appeal alone reflects a staggering difference.

35. I concede that the data reflecting that single accused proceedings generally advance faster than multiple accused proceedings does not eliminate the possibility of other logistical considerations that could delay the commencement of single accused cases.[93] However, I would nonetheless support that defendants be tried individually, particularly where the circumstances I discuss below that could lead to more efficient joint proceedings are not present,[94] given the relative efficiency of single accused proceedings when compared to multi-accused proceedings.

(249 days); *Renzaho* (547 days); *Rukundo* (388 days); *Rutaganda* (173 days); *Rwamakuba* (153 days); *Semanza* (331 days); *Seromba* (170 days); *Setako* (116 days); *Simba* (159 days); *Zigiranyirazo* (204 days).

[88] *See Bagosora et al.* (620 days); *Bizimungu et al.* (1225 days); *Karemera et al.* (162 days); *Kayishema and Ruzindana* (186 days); *Nahimana et al.* (209 days); *Ndindiliyimana et al.* (722 days); *Ntagerura et al.* (195 days); *Ntakirutimana and Ntakirutimana* (184 days); *Nyiramasuhuko et al.* (806 days).

[89] *See*, *e.g.*, *Akayesu* (975 days); *Bagilishema* (360 days); *Bikindi* (443 days); *Gacumbitsi* (357 days); *Gatete* (526 days); *Hategekimana* (345 days); *Kajelijeli* (510 days); *Kalimanzira* (457 days); *Kamuhanda* (776 days); *Kanyarukiga* (517 days); *Karera* (386 days); *Mpambara* (358 days); *Muhimana* (481 days); *Munyakazi* (442 days); *Musema* (322 days); *Muvunyi I* (688 days); *Muvunyi II* (383 days); *Nchamihigo* (378 days); *Ndahimana* (669 days); *Ndindabahizi* (887 days); *Ngirabatware* (619 days); *Niyitegeka* (386 days); *Nizeyimana* (799 days); *Ntawukulilyayo* (465 days); *Nzabonimana* (823 days); *Renzaho* (547 days); *Rukundo* (555 days); *Rutaganda* (1238 days); *Semanza* (705 days); *Seromba* (419 days); *Setako* (549 days); *Simba* (685 days); *Zigiranyirazo* (306 days).

[90] *See Bagosora and Nsengiyumva* (1007 days); *Ntabakuze* (1155 days); *Karemera et al.* (939 days); *Kayishema and Ruzindana* (715 days); *Mugenzi and Mugiraneza* (442 days); *Nahimana et al.* (1389 days); *Ndindiliyimana et al.* (938 days); *Augustin Bizimungu* (1086 days); *Ntagerura et al.* (835 days); *Ntakirutimana and Ntakirutimana* (634 days); *Nyiramasuhuko et al.* (1566 days).

[91] So as not to skew the statistics when comparing single accused cases to multi-accused proceedings, I have excluded from this calculation single accused cases where guilty pleas were entered as well as cases where defendants were acquitted at trial and where such acquittals were not appealed.

[92] The length of multi-accused cases consists of the entire proceedings through appeal, even where one or multiple defendants was or were acquitted at trial and where such acquittals were not appealed.

[93] In this respect, where defendants who *could be* tried jointly are tried separately, the separate proceedings would require either: (i) more court space and additional judges to hear the separate proceedings; (ii) one bench to hear both cases and splitting the court time for both so that each may proceed at the same time; or (iii) one bench hear both proceedings consecutively, with one defendant waiting for his case to start after the close of the first defendant's case. Thus, the last scenario validates the concern that "further delay would result as it is not obvious that his separate trial could commence at the same time as this joint trial." *See Tolimir et al.* Decision of 27 January 2006, para. 25.

[94] *See infra*, Dissenting Opinion and Declaration of Judge Khan, para. 38.

36. Let us now consider the theoretical justification that joined trials minimise the possibility of inconsistent verdicts while enhancing procedural and substantive fairness among defendants through uniform proceedings. While the work of the Tribunal will contribute to the collective history of the Rwandan genocide, its purpose is not to create a cohesive historical narrative. The Tribunal, like all criminal courts, is tasked with determining the individual criminal liability of each defendant tried before it. "Inconsistent verdicts" might occur in any trial due to the rigorous application of the high standard of proof in criminal proceedings to the evidence of the acts and omissions of each individual defendant, even where they are alleged to bear criminal responsibility for the same or related events. Furthermore, the fairness of proceedings before the Tribunal is enshrined in Article 20 of the Statute and required by Article 19 of the Statute. It is my view that joining trials does not inherently provide further guarantees of such fairness for defendants even where evidence and the alleged crime base is overlapping.

2. Considering Joinder in the Future

37. Having compared the theoretical justifications for joinder with some empirical data, I must first concede that the calculations I have used above are an imperfect reflection of how trials and appeals proceeded before the Tribunal. I have drawn heavily from my personal experiences or used anecdotes to raise questions about broad theories. Furthermore, I also acknowledge that not all single accused cases have proceeded "efficiently" and not all joint proceedings were slow. In fact, the *Kayishema and Ruzindana* and *Ntakirutimana and Ntakirutimana* trials and appeals moved rapidly, even when compared to cases involving single defendants. The *Mugenzi and Mugiraneza* appeal, for example, was quick.[95] However, what can be seen from these cases is that: (i) the crime bases were limited; and (ii) the record in support of the criminal liability for each accused was, or was almost, entirely overlapping.

38. The purpose of this declaration is not to criticise the joinder practice of the Tribunal. The reality for this Tribunal is that the Rules allowing joinder are permissive[96] and cases have been joined accordingly. Nonetheless, I hope that this declaration serves as a starting point for international criminal tribunals to take a more nuanced and sceptical approach to the joinder of the cases before them. It is my suggestion that the judiciary of international criminal tribunals, when

[95] In this respect, I note that Mugenzi and Mugiraneza were prosecuted on the basis of several different actions and particular crimes in the *Bizimungu et al*. trial. However, their appeal was based on their convictions for the two same events, which were supported by the same evidentiary record. *See generally Mugenzi and Mugiraneza* Appeal Judgement.

[96] Rule 48 of the Rules provides that "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Rule 2 of the Rules defines "transaction" as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan."

reviewing the prospective joinder of cases, review the relevant indictments, the prosecution disclosures – including witness statements – and the prosecution pre-trial submissions – such as its pre-trial brief – and ask the following questions: (i) is the crime base limited; (ii) are each of the prospective prosecution witnesses intended to give evidence that is central to establishing the criminal responsibility of *all or almost all of the accused*; and (iii) are the forms of liability for each accused such that the prosecution evidence against one accused is relevant to all accused.

39. If these questions are answered in the affirmative, the possibility of realising the theoretical underpinnings supporting joinder – judicial economy, minimising hardship to witnesses, and avoiding undue delay – is high. However, the theoretical justifications for joinder might not be realised even if some overlap exists where: (i) the crime base is large – *e.g.* an overlapping charge of conspiracy related to an entire conflict; and (ii) it is clear that the case against each accused will require the presentation of unique evidence from different witnesses due to the fact that there are distinct crime bases and/or particular acts and omissions that are unique to each accused.

Done in English and French, the English version being authoritative.

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

_____
Judge Khalida Rachid Khan

[Seal of the Tribunal]

XIX. ANNEX A: PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarised below.

A. Briefing

2. Trial Chamber II of the Tribunal pronounced the judgement in this case on 24 June 2011 and issued its written Trial Judgement in English on 14 July 2011. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje, and the Prosecution appealed the Trial Judgement.

1. Notices of Appeal

3. On 22 July 2011, the Pre-Appeal Judge granted, in part, motions for extensions of time and ordered that the Prosecution file its notice of appeal no later than 1 September 2011 and that Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje file their respective notices of appeal no later than 17 October 2011.[1] Because of the inability of Nteziryayo and his counsel to work in English, the Pre-Appeal Judge, in the same decision, ordered that Nteziryayo file his notice of appeal no later than 90 days from service of the French translation of the Trial Judgement.[2]

4. The Prosecution filed its notice of appeal on 1 September 2011.[3] Nsabimana filed his notice of appeal on 10 October 2011.[4] Nyiramasuhuko,[5] Ntahobali,[6] Kanyabashi,[7] and Ndayambaje[8] filed their respective initial notices of appeal on 17 October 2011.

5. On 22 February 2012, the Appeals Chamber granted Nyiramasuhuko's and Ntahobali's motions to amend their respective notices of appeal.[9] Each filed their first amended notice of appeal on 24 February 2012.[10]

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[1] Decision on Motions for Extension of Time for the Filing of Appeal Submissions, signed on 22 July 2011, filed on 25 July 2011 ("22 July 2011 Appeal Decision"), paras. 13, 16.
[2] 22 July 2011 Appeal Decision, paras. 13, 16.
[3] Prosecutor's Notice of Appeal, 1 September 2011.
[4] Notice of Appeal, 10 October 2011 (originally filed in French, English translation filed on 25 January 2012).
[5] *Acte d'appel [de] Pauline Nyiramasuhuko*, 17 October 2011. Nyiramasuhuko filed a corrigendum to her notice of appeal on 19 October 2011. *See Corrigendum de l'acte d'appel de Pauline Nyiramasuhuko*, 19 October 2011.
[6] *Acte d'appel d'Arsène Shalom Ntahobali*, 17 October 2011.
[7] *Acte d'appel de Joseph Kanyabashi*, 17 October 2011 (confidential; public redacted version filed on 12 May 2014). Kanyabashi filed a corrected notice of appeal on 18 October 2011. *See* Notice of Appeal by Joseph Kanyabashi, 18 October 2011 (originally filed in French, English translation filed on 19 April 2012) (confidential).
[8] Notice of Appeal, 17 October 2011 (originally filed in French, English translation filed on 8 December 2011). Ndayambaje filed a corrigendum to his notice of appeal on 4 January 2012. *See* Corrigendum to Élie Ndayambaje's Notice of Appeal, 4 January 2012 (originally filed in French, English translation filed on 13 February 2012).
[9] Decision on Pauline Nyiramasuhuko's and Arsène Shalom Ntahobali's Motions to Amend Notices of Appeal, 22 February 2012, para. 12.

6. On 1 March 2012, subsequent to the appointment of an English speaking co-counsel to Nteziryayo's Defence, the Pre-Appeal Judge, *proprio motu*, reconsidered his 22 July 2011 Appeal Decision and ordered Nteziryayo to file his notice of appeal no later than 1 May 2012.[11] Nteziryayo filed his initial notice of appeal on 26 April 2012.[12]

7. On 23 October 2012, the Appeals Chamber granted Ntahobali's motion to amend his first amended notice of appeal.[13] Ntahobali filed his second amended notice of appeal on 29 October 2012.[14]

8. On 18 February 2013, the Appeals Chamber granted, in part, Nyiramasuhuko's motion to amend her first amended notice of appeal.[15] Nyiramasuhuko filed her second amended notice of appeal on 21 February 2013.[16]

9. On 5 April 2013, the Appeals Chamber allowed Kanyabashi and Ndayambaje to amend their respective notices of appeal.[17] Ndayambaje and Kanyabashi each filed a second amended notice of appeal on 8 April 2013.[18]

10. On 8 May 2013, the Appeals Chamber granted, in part, Nteziryayo's motion to amend his notice of appeal.[19] Nteziryayo filed his amended notice of appeal on 13 May 2013.[20] On 5 July 2013, the Appeals Chamber granted the Prosecution's request to summarily dismiss Nteziryayo's appeal as it concerned the delay between his arrest and initial appearance, finding that Nteziryayo had waived his right to raise this issue on appeal.[21]

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[10] Pauline Nyiramasuhuko's Amended Notice of Appeal, 24 February 2012 (originally filed in French, English translation filed on 25 June 2012); Amended Notice of Appeal of Arsène Shalom Ntahobali, 24 February 2012 (originally filed in French, English translation filed on 25 July 2012).
[11] Decision on the Filing of Alphonse Nteziryayo's Appeal Submissions, 1 March 2012 ("1 March 2012 Appeal Decision"), paras. 1, 6.
[12] Alphonse Nteziryayo's Notice of Appeal, 26 April 2012.
[13] Decision on Arsène Shalom Ntahobali's Motion to Amend his Amended Notice of Appeal, 23 October 2012, para. 13.
[14] Second Amended Notice of Appeal of Arsène Shalom Ntahobali, 29 October 2012 (originally filed in French, English translation filed on 24 January 2013).
[15] Decision on Pauline Nyiramasuhuko's Motion to Amend her Amended Notice of Appeal, 18 February 2013, paras. 27, 28.
[16] Pauline Nyiramasuhuko's Re-Amended Notice of Appeal, 21 February 2013 (originally filed in French, English translation filed on 25 April 2013).
[17] Decision on Joseph Kanyabashi's Motion to Amend his Notice of Appeal, 5 April 2013, para. 32; Decision on Élie Ndayambaje's Motion to Amend his Notice of Appeal, 5 April 2013, paras. 33, 34.
[18] Élie Ndayambaje's Amended Notice of Appeal, 8 April 2013 (originally filed in French, English translation filed on 7 June 2013); Amended Notice of Appeal by Joseph Kanyabashi, 8 April 2013 (originally filed in French, English translation filed on 24 May 2013) (confidential; French public redacted version filed on 12 May 2014).
[19] 8 May 2013 Appeal Decision, para. 74.
[20] Alphonse Nteziryayo's Amended Notice of Appeal, 13 May 2013.
[21] 5 July 2013 Appeal Decision, paras. 16, 18, 23. In the same decision, the Appeals Chamber also granted Nteziryayo's request to have the date of his arrest in Burkina Faso clarified and ordered the Registrar file written submissions in this respect. *See ibid*., paras. 22, 23.

2. Appeal Briefs

11. On 22 July 2011, the Pre-Appeal Judge ordered that Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje file their respective appeal briefs no later than 60 days from the date of service of the French translation of the Trial Judgement.[22]

12. The Prosecution filed its appeal brief on 15 November 2011.[23]

13. On 13 December 2012, the Pre-Appeal Judge granted, in part, motions for extension of the word limits, and authorised: (i) Nyiramasuhuko and Ntahobali to file appeal briefs not exceeding 80,000 words; (ii) Kanyabashi to file an appeal brief not exceeding 40,000 words; and (iii) Ndayambaje to file an appeal brief not exceeding 50,000 words.[24]

14. The French translation of the Trial Judgement was filed on 1 February 2013.[25] On 8 April 2013, Nyiramasuhuko,[26] Ntahobali,[27] Nsabimana,[28] Nteziryayo,[29] Kanyabashi,[30] and Ndayambaje[31] filed their respective appeal briefs.[32] Ndayambaje filed a corrigendum to his appeal brief on 19 April 2013.[33]

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[22] 22 July 2011 Appeal Decision, paras. 11, 16. *See also* 1 March 2012 Appeal Decision, paras. 1, 6.
[23] Prosecutor's Appellant's Brief, 15 November 2011.
[24] Decision on Nyiramasuhuko's, Ntahobali's, Kanyabashi's, and Ndayambaje's Motions for Extensions of the Word Limit for their Appeal Briefs, 13 December 2012 ("13 December 2012 Appeal Decision"), para. 20.
[25] *Jugement portant condamnation*, 1 February 2013.
[26] Pauline Nyiramasuhuko's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 30 April 2014) (confidential). A public version of Nyiramasuhuko's appeal brief in French was filed on 7 June 2013. On 17 March 2014, the Appeals Chamber ordered Nyiramasuhuko to file an amended public redacted version that preserved the confidentiality of certain information contained therein as well as ordered the reclassification of Nyiramasuhuko's initial public redacted appeal brief as confidential. *See* Decision on Prosecution's Motion to Withdraw Public Filings and on Nyiramasuhuko's and Ntahobali's Counter Motions to Reclassify Confidential Materials, signed on 14 March 2014, filed on 17 March 2014, para. 29 (confidential) ("14 March 2014 Appeal Decision"). Nyiramasuhuko filed the amended public version of her appeal brief in French on 3 April 2014.
[27] Arsène Shalom Ntahobali's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 15 April 2014) (confidential). A public version of Ntahobali's appeal brief in French was filed on 24 May 2013. On 17 March 2014, the Appeals Chamber ordered Ntahobali to file a public redacted version that preserved the confidentiality of certain information contained therein as well as ordered the reclassification of Ntahobali's initial public redacted appeal brief as confidential. *See* 14 March 2014 Appeal Decision, para. 29. Ntahobali filed a second public version of his appeal brief in French on 24 March 2014.
[28] Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 26 September 2013). On 11 April 2013, Nsabimana filed a corrigendum to his appeal brief in order to include the word count of his appeal brief. *See Corrigendum du nombre de mots*, 11 April 2013.
[29] Confidential Appeal Brief on Behalf of Alphonse Nteziryayo, 8 April 2013 (confidential).
[30] Joseph Kanyabashi's Appellant's Brief, 8 April 2013 (originally publicly filed in French, English translation filed on 11 August 2014) (confidential; public redacted version filed in French on 8 May 2014). On 23 April 2014, the Appeals Chamber ordered Kanyabashi to file a public redacted version of his appeal brief that maintained the confidentiality of the content of filings classified as confidential as well as directed the Registry to permanently reclassify Kanyabashi's initial public redacted appeal brief as confidential. *See* Decision on Kanyabashi's Motion to Lift Confidential Status of Certain Documents or to Refer Publicly to Certain Confidential Documents, 23 April 2014 ("23 April 2014 Appeal Decision") (confidential), para. 25. Kanyabashi filed an amended public redacted appeal brief in French on 8 May 2014.
[31] Élie Ndayambaje's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 26 July 2013) (confidential).

15. On 8 May 2013, the Appeals Chamber granted, in part, a Prosecution's motion to strike paragraphs of Nteziryayo's appeal brief containing new grounds of appeal and ordered Nteziryayo to file a revised appeal brief no later than 13 May 2013.[34] Nteziryayo filed his confidential corrected revised appeal brief on 14 June 2013.[35] On 16 July 2013, he filed an addendum to his confidential corrected revised appeal brief.[36]

3. Response Briefs

16. On 28 October 2011, Kanyabashi was granted leave to file his response brief to the Prosecution's appeal no later than 30 days from the service of the French translation of the Trial Judgement and the Prosecution's appeal brief, whichever occurred later.[37] Kanyabashi filed his response to the Prosecution's appeal on 6 March 2013.[38]

17. In his decision of 13 December 2012, the Pre-Appeal Judge allowed the Prosecution to file a consolidated response brief not exceeding 270,000 words in total or separate response briefs not exceeding the word limit granted for the corresponding appeal brief.[39] On 22 April 2013, the Pre-Appeal Judge granted, in part, the Prosecution's motion for an extension of time to file its response briefs, ordering that they be filed no later than 100 days from the date of filing of each corresponding appeal brief.[40]

18. The Prosecution filed a consolidated response brief on 17 July 2013.[41] On 19 July 2013, the Pre-Appeal Judge ordered the Prosecution to re-file a consolidated response brief not exceeding 270,000 words that complied with the formal requirements on appeal no later than

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[32] On 15 April 2013, the Pre-Appeal Judge noted that the appeals briefs filed by Ntahobali, Kanyabashi, and Ndayambaje had systematically omitted necessary spaces between words, numbers, and punctuation marks and considered that, if corrected, these appeal briefs would exceed the word limits imposed on them. The Pre-Appeal Judge issued a formal warning under Rule 46(A) of the Rules to the counsel for Ntahobali, Kanyabashi, and Ndayambaje but, in light of the need to facilitate expeditious appellate proceedings and in order not to prejudice Ntahobali, Kanyabashi, and Ndayambaje for the misconduct of their respective counsel, found their respective appeal briefs validly filed. *See* Order Issuing a Formal Warning to Counsel for Ntahobali, Kanyabashi, and Ndayambaje, 15 April 2013.
[33] Corrigendum Élie Ndayambaje's Appellant's Brief, 19 April 2013 (originally filed in French, English translation filed on 26 July 2013) (confidential; public redacted version filed in French on 4 June 2013).
[34] 8 May 2013 Appeal Decision, paras. 72-74. The Appeals Chamber subsequently denied Nteziryayo's motion for reconsideration of the 8 May 2013 Appeal Decision. *See* 12 July 2013 Appeal Decision, paras. 17, 25.
[35] Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (confidential; public redacted version filed on the same day).
[36] Addendum to Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 16 July 2013.
[37] Decision on Joseph Kanyabashi's Motion for Extension of Time to File his Response Brief, 28 October 2011, p. 826/H (Registry pagination).
[38] Joseph Kanyabashi's Brief in Response to the Prosecutor's Brief, 6 March 2013 (originally filed in French, English translation filed on 13 February 2014).
[39] 13 December 2012 Appeal Decision, para. 20.
[40] Decision on Prosecution's Motion for Extension of Time to File its Response Briefs, 22 April 2013.
[41] Prosecution Consolidated Respondent Brief, 17 July 2013. *See also* Corrigendum to Prosecution Consolidated Respondents [*sic*] Brief, 17 July 2013.

21 August 2013.[42] The Prosecution filed its revised consolidated response brief on 21 August 2013.[43]

4. Reply Briefs

19. The Prosecution filed its reply brief on 21 March 2013.[44]

20. On 27 August 2013, the Pre-Appeal Judge granted, in part, motions for the extension of time and word limits and authorised and ordered: (i) Nyiramasuhuko to file a reply brief of no more than 21,000 words no later than 45 days from the filing of the Prosecution's revised response brief; (ii) Ntahobali to file a reply brief of no more than 23,000 words no later than 45 days from the filing of the Prosecution's revised response brief; (iii) Nsabimana to file his reply brief no later than 30 days from the filing of the Prosecution's revised response brief; (iv) Kanyabashi to file a reply brief of no more than 11,000 words no later than 30 days from the date of the filing of the Prosecution's revised response brief; and (v) Ndayambaje to file a reply brief not exceeding 16,000 words no later than 35 days from the date of filing of the Prosecution's revised response brief.[45] In the same decision, the Pre-Appeal Judge, *proprio motu*, authorised Nteziryayo to file his reply brief no later than 30 days from the date of the filing of the Prosecution's revised response brief.[46]

21. Nsabimana,[47] Nteziryayo,[48] and Kanyabashi[49] each filed their respective reply briefs on 20 September 2013. Ndayambaje filed his reply brief on 25 September 2013.[50] Nyiramasuhuko[51] and Ntahobali[52] each filed their respective reply briefs on 7 October 2013.

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[42] *See* Decision on Prosecution's Motion for Order *Nunc Pro Tunc* and on Ntahobali's Motion to Reject the Prosecution Response Brief, 19 July 2013, p. 4. In the same decision, the Pre-Appeal Judge denied the Prosecution's motion requesting an extension *nunc pro tunc* of 57,330 words for its response brief and issued a formal warning to counsel for the Prosecution, within the meaning of Rule 46(A) of the Rules, to strictly abide by the Appeals Chamber's decisions and practice directions applicable on appeal subject to sanctions for abusive conduct. *See idem*.

[43] Prosecution Consolidated Respondent's Brief, 21 August 2013 (confidential; public redacted version filed on 4 October 2013).

[44] Prosecution Reply Brief, 21 March 2013.

[45] Decision on Motions for Extensions of Time Limit and Word Limit for the Filing of the Reply Briefs, 27 August 2013 ("27 August 2013 Appeal Decision"), p. 5.

[46] 27 August 2013 Appeal Decision, p. 5.

[47] Brief in Reply, 20 September 2013 (originally filed in French, English translation filed on 9 April 2014).

[48] Reply Brief on Behalf of Alphonse Nteziryayo, 20 September 2013.

[49] Joseph Kanyabashi's Brief in Reply to the Prosecutor's Response, 20 September 2013 (originally filed in French, English translation filed on 14 May 2014). On 23 April 2014, the Appeals Chamber ordered Kanyabashi to file an amended public redacted version of his reply brief that maintained the confidentiality of the content of filings classified as confidential as well as directed the Registry to permanently reclassify Kanyabashi's initial public redacted reply brief as confidential. *See* 23 April 2014 Appeal Decision, para. 25. Kanyabashi filed an amended public redacted reply brief in French on 7 May 2014.

[50] Élie Ndayambaje's Brief in Reply, 25 September 2013 (originally filed in French, English translation filed on 4 April 2014) (confidential; public redacted version filed in French on 1 November 2013).

[51] Pauline Nyiramasuhuko's Brief in Reply, 7 October 2013 (originally filed in French, English translation filed on 24 June 2014) (confidential).

B. Assignment of Judges

22. On 15 July 2011, the Presiding Judge of the Appeals Chamber, Judge Patrick Robinson, assigned the following Judges to hear the appeal: Judge Fausto Pocar (Presiding), Judge Liu Daqun, Judge Andrésia Vaz, Judge Theodor Meron, and Judge Carmel Agius.[53] On 21 July 2011, Judge Fausto Pocar assigned himself as Pre-Appeal Judge.[54]

23. On 17 November 2011, Judge Theodor Meron became the Presiding Judge of the Appeals Chamber and assigned Judge Patrick Robinson to replace him in this case.[55] On 11 July 2012, Judge Theodor Meron assigned Judge Bakhtiyar Tuzmukhamedov to replace Judge Liu Daqun.[56]

24. On 2 October 2012, Judge Theodor Meron denied Ndayambaje's motion requesting the disqualification of Judge Fausto Pocar from this case.[57]

25. On 19 March 2013, Judge Theodor Meron assigned Judge Liu Daqun to replace Judge Andrésia Vaz.[58] On 8 October 2013, Judge Theodor Meron assigned Judge Khalida Rachid Khan to replace Judge Patrick Robinson.[59] On 17 November 2015, Judge Carmel Agius became the the Presiding Judge of the Appeals Chamber and, on 18 November 2015, ordered that the Bench in this case shall not change in composition and that Judge Fausto Pocar shall remain the Presiding Judge of this case.[60]

C. Status Conference

26. A status conference was held by the Pre-Appeal Judge on 10 May 2013 in Arusha, Tanzania.[61]

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[52] Arsène Shalom Ntahobali's Brief in Reply, 7 October 2013 (originally publicly filed in French, English translation filed on 5 August 2014) (confidential). Ntahobali's reply brief was initially filed publicly. However, on 17 March 2014, the Appeals Chamber ordered Ntahobali to file a public redacted version of his reply brief that preserved the confidentiality of certain information contained therein as well as ordered the permanent reclassification of Ntahobali's reply brief as confidential. *See* 14 March 2014 Appeal Decision, para. 29. Ntahobali filed a second public redacted version of his reply brief in French on 24 March 2014.
[53] Order Assigning Judges to a Case before the Appeals Chamber, 15 July 2011.
[54] Order Assigning a Pre-Appeal Judge, 21 July 2011.
[55] Order Replacing a Judge in a Case before the Appeals Chamber, 17 November 2011. *See also* Corrigendum to Order Replacing a Judge in a Case before the Appeals Chamber, 21 November 2011.
[56] Order Replacing a Judge in a Case before the Appeals Chamber, 11 July 2012.
[57] Decision on Motion for Disqualification of Judge Fausto Pocar, 2 October 2012, paras. 1, 22.
[58] Order Replacing a Judge in a Case before the Appeals Chamber, 19 March 2013.
[59] Order Replacing a Judge in a Case before the Appeals Chamber, 8 October 2013.
[60] Order on the Composition of the Bench in a Case Before the Appeals Chamber, 18 November 2015.
[61] Status Conference, AT. 10 May 2013. *See also* Order Scheduling a Status Conference, 8 March 2013.

D. Motions for Stay of the Proceedings, Provisional Release, and Severance

27. On 7 February 2014, the Appeals Chamber allowed the Prosecution's application to strike Nyiramasuhuko's motion for a stay of proceedings filed by Nyiramasuhuko on 21 November 2013, finding that Nyiramasuhuko's motion was an unauthorised attempt to expand the scope of her arguments in her written appeal submissions.[62]

28. On 10 September 2014, the Appeals Chamber dismissed Nsabimana's motion for provisional release, finding that Nsabimana failed to satisfy the requirements of Rule 65(I)(iii) of the Rules.[63]

29. On 21 November 2014, the Appeals Chamber denied Nsabimana's request for severance of his appeal on the ground that Nsabimana did not establish a conflict of interest causing him serious prejudice or demonstrate that the severance of his case would protect the interests of justice.[64]

E. Motions for the Admission of Additional Evidence on Appeal

30. In response to a motion filed by Ntahobali, the Appeals Chamber, on 23 November 2012, clarified that *amicus curiae* reports relating to false testimony and contempt investigations were part of the record on appeal, and determined that Ntahobali's request that they be admitted as additional evidence on appeal was moot.[65]

31. On 9 April 2015, the Appeals Chamber granted, in part, a motion filed by Ndayambaje to present additional evidence on appeal and admitted a witness statement as additional evidence on appeal.[66] In the same decision, the Appeals Chamber denied Ndayambaje's request for the admission of a second witness statement.[67]

32. On 14 April 2015, the Appeals Chamber granted, in part, a motion filed by Ntahobali and admitted as additional evidence on appeal statements given by Witness QCB during investigations in Canadian criminal proceedings.[68] The Appeals Chamber denied Ntahobali's further request for the admission of letters and testimony as additional evidence on appeal in the same decision.[69]

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[62] Decision on Prosecution's Motion to Strike Nyiramasuhuko's Motion for Stay of Proceedings, 7 February 2014, pp. 2, 3.
[63] Decision on Nsabimana's Motion for Provisional Release, 10 September 2014 (confidential), p. 4.
[64] Decision on Nsabimana's Motion for Severance, 21 November 2014, p. 4.
[65] 23 November 2012 Appeal Decision, p. 2.
[66] 9 April 2015 Appeal Decision, pp. 3, 4.
[67] 9 April 2015 Appeal Decision, pp. 3, 4.
[68] 14 April 2015 Appeal Decision, paras. 37, 49.
[69] 14 April 2015 Appeal Decision, paras. 25, 48, 49.

33. On 12 May 2015, the Appeals Chamber also granted, in part, Ndayambaje's request to admit as additional evidence on appeal a prior statement and testimony given by a witness in the *Ntawukulilyayo* case.[70] The Appeals Chamber denied Ndayambaje's requests to admit as additional evidence on appeal testimonies and statements from the *Kalimanzira* case and the *Ntawukulilyayo* case in the same decision.[71] On 1 October 2015, the Appeals Chamber dismissed the Prosecution requests to admit rebuttal evidence in light of the additional evidence admitted on appeal.[72]

34. In decisions issued on 27 March 2015,[73] 2 April 2015,[74] 8 April 2015,[75] 9 April 2015,[76] 17 April 2015,[77] 6 May 2015,[78] and 6 October 2015,[79] the Appeals Chamber denied all other motions for the admission of additional evidence on appeal.

F. Appeals Hearing

35. In accordance with the scheduling order of 5 March 2015,[80] the 19 March 2015 order setting the timetable for the appeal hearings,[81] and the 25 March 2015 order inviting the appellants to address certain issues,[82] oral arguments of the parties were heard at a hearing held between 14 and 17 and between 20 and 22 April 2015 in Arusha, Tanzania.

[70] 12 May 2015 Appeal Decision, paras. 61, 90, 91.
[71] 12 May 2015 Appeal Decision, paras. 72, 83, 89, 91.
[72] Decision on Prosecution's Requests for Admission of Rebuttal Evidence and on Ndayambaje's Motion to Dismiss, 1 October 2015 (confidential). In the same decision, the Appeals Chamber dismissed Ndayambaje's request to declare inadmissible and dismiss one of the Prosecution's requests to admit rebuttal evidence pursuant to Rule 115(A) of the Rules. *See idem*.
[73] Decision on Nteziryayo's Motion to Present Additional Evidence, 27 March 2015; Decision on Ntahobali's Fifth Motion to Present Additional Evidence, 27 March 2015.
[74] Decision on Nyiramasuhuko's Third Motion and Ntahobali's Sixth Motion to Present Additional Evidence and on Prosecution's Motion to Strike, 2 April 2015 (confidential); Decision on Ndayambaje's Second Motion to Present Additional Evidence, 2 April 2015 (confidential).
[75] Decision on Nyiramasuhuko's Second Motion for Relief for a Rule 68 Violation and on Ntahobali's Third Motion to Present Additional Evidence, 8 April 2015 (confidential).
[76] Decision on Nyiramasuhuko's First Motion for Relief for Rule 68 Violations and to Present Additional Evidence, 9 April 2015.
[77] Decision on Ndayambaje's Fifth Motion for Relief for Rule 68 Violations and to Present Additional Evidence, 17 April 2015 (confidential).
[78] Decision on Kanyabashi's Motion for Admission of Additional Evidence, 6 May 2015 (confidential).
[79] Decision on Ntahobali's Seventh Motion to Present Additional Evidence, 6 October 2015 (confidential).
[80] Scheduling Order, 5 March 2015.
[81] Order Setting the Timetable for the Appeals Hearing, 19 March 2015.
[82] 25 March 2015 Order.

XX. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

AKAYESU Jean-Paul

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgment, 1 June 2001 (originally filed in French, English translation filed on 23 November 2001) ("*Akayesu* Appeal Judgement").

BAGILISHEMA Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 (originally filed in French, English translation filed on 16 June 2003) ("*Bagilishema* Appeal Judgement").

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement").

BAGOSORA Théoneste *et al.*

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009 ("*Ntabakuze* Appeal Decision on Severance").

The Prosecutor v. Théoneste Bagosora, *Gratien Kabiligi*, *Aloys Ntabakuze*, *and Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 ("*Bagosora et al.* Trial Judgement").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora et al.* Appeal Decision on Exclusion of Evidence").

The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Case Nos. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999 ("*Kabiligi* 8 October 1999 Decision").

BIKINDI Simon

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 ("*Bikindi* Appeal Judgement").

BISENGIMANA Paul

Paul Bisengimana v. The Prosecutor, Case No. ICTR-00-60-T, Corrigendum-Judgement and Sentence, 20 April 2006 ("*Bisengimana* Sentencing Judgement").

BIZIMUNGU Augustin

See Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("*Bizimungu* Appeal Judgement").

BIZIMUNGU Casimir *et al.*

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011 ("*Bizimungu et al.* Trial Judgement").

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009 ("*Bizimungu et al.* Appeal Decision").

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("*Bizimungu et al.* 12 February 2004 Appeal Decision").

GACUMBITSI Sylvestre

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, 17 June 2004 ("*Gacumbitsi* Trial Judgement").

GATETE Jean-Baptiste

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

The Prosecutor v. Jean-Baptiste Gatete Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 ("*Gatete* Trial Judgement").

HATEGEKIMANA Ildephonse

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RUGAMBARARA Juvénal

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RUTAGANDA Georges Anderson Nderubumwe

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Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

PERIŠIĆ Momčilo

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STRUGAR Pavle

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4. Human Rights Committee

B. Lubuto v. Zambia, Human Rights Committee, Communication No. 390/1990 (Views adopted on 31 October 1995), UN Doc. CCPR/C/55/D/390/1990 (1995), 3 November 1995.

5. African Commission on Human and People's Rights

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6. Inter-American Court of Human Rights

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7. European Court of Human Rights

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B. Defined Terms

1. Acronyms and Abbreviations

16 April *Communiqué*	*Communiqué* sanctioning the security of the authorities of Butare and Gikongoro issued on 16 April 1994, admitted as Exhibit D240
27 April Directive	Instructions to restore security in the country issued on 27 April 1994, admitted as Exhibit P118
23 January 1974 Law	Law of 23 January 1974, *Création de la Gendarmerie*, admitted as part of Exhibit D468
11 March 1975 Law	Law of 11 March 1975, Structure and Functioning of the *Préfecture*, admitted as part of Exhibit D468
African Charter on Human and Peoples' Rights	African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1986, entered into force on 21 October 1986
American Convention on Human Rights	American Convention on Human Rights "Pact of San Jose, Costa Rica", adopted on 22 November 1969, entered into force on 18 July 1978
***Amici Curiae* Reports**	First *Amicus Curiae* Report and Second *Amicus Curiae* Reports
Appeals Chamber	Appeals Chamber of the International Criminal Tribunal for Rwanda
AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
Butare Prefecture Office	Office of the prefecture of Butare, Butare Town, Ngoma Commune
Butare University Hospital	Butare University Hospital, Butare Town, Ngoma Commune
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106(XX), UN Doc. A/RES/20/2106, 21 December 1965, entered into force on 4 January 1969
Co-Accused *or* Co-Appellants	Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on 10 December 1984, entered into force on 26 June 1987
Des Forges Report	*Expert Report by Alison Des Forges Prepared for the Butare Case ICTR-98-42-T*, admitted as Exhibit P110
ECtHR	European Court of Human Rights
EER	*École évangéliste du Rwanda*, Butare Town, Ngoma Commune
ESO	*École des sous-officiers*, Butare Town, Ngoma Commune
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force on 3 September 1953
First *Amicus Curiae*	First *Amicus curiae* designated by the Registrar to investigate the allegations of false testimonies of Witnesses QA, QY, and SJ
First *Amicus Curiae* Report	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Report of Boniface Njiru *Amicus Curiae* Appointed by the International Criminal Tribunal for Rwanda to Investigate and Report to the Trial Chamber II [on] False Testimony and Contempt of Court Relative to Prosecution Witnesses QA, QY and SJ, 2 July 2009 (confidential)
First Attack	The first attack of the Last Half of May Attacks conducted against Tutsis who had sought refuge at the Butare Prefecture Office, which occurred seven days after the Mid-May Attack
First Half of June Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place in the first half of June 1994
Guichaoua Report	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Full Statement of Expert Witness André Guichaoua, Filed under Rule 94*bis* (A) for Disclosure to the Defence and to Be Filed with the Trial Chamber, 28 April 2004
ICC	International Criminal Court, established on 17 July 1998
ICCPR	International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

ICTY Rules of Procedure and Evidence	Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (IT/32/Rev. 39)
Interim Government	Interim Government of Rwanda sworn in on 9 April 1994 and headed by Prime Minister Jean Kambanda
IRST	*Institut de recherche scientifique et technique*, Butare Town, Ngoma Commune
Judge Bossa Certification	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Certification in the Matter of Proceedings under Rule 15*bis*(D), 5 December 2003
Judge Ramaroson Dissenting Opinion	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Dissenting Opinion of Judge Arlette Ramaroson, dated 24 June 2011, signed 18 July 2011, filed 19 July 2011 (the English translation of the French original was filed on 21 May 2014)
Kambanda's and Sindikubwabo's Speeches	Kambanda's and Sindikubwabo's speeches given at Nsabimana's swearing-in ceremony of 19 April 1994
Kambanda's Speech	Kambanda's speech given at Nsabimana's swearing-in ceremony of 19 April 1994
Kanyabashi's Speech	Kanyabashi's Speech given at Nsabimana's swearing-in ceremony of 19 April 1994
Last Half of May Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place seven and 11 days after the Mid-May Attack
Matyazo Clinic	Clinic (or dispensary) of Matyazo Sector, Ngoma Commune, Butare Prefecture
Mid-May Attack	Attack against Tutsis who had sought refuge at the Butare Prefecture Office that took place in mid-May 1994
MRND	*Mouvement révolutionnaire national pour la démocratie et le développement* [before 5 July 1991] *Mouvement républicain national pour la démocratie et le développement* [after 5 July 1991]
Ndayambaje's Swearing-In Ceremony	Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune held in Muganza Commune, Butare Prefecture, on 22 June 1994
Night of Three Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place three times in one night around the end of May or the beginning of June 1994

Nsabimana's Swearing-in Ceremony	Nsabimana's swearing-in ceremony as the prefect of Butare held in Butare on 19 April 1994
Ntakirutimana Report on Sindikubwabo's Speech	*Tolerance or Intransigence in Sindikubwabo's Speech in Butare?*, by Évariste Ntakirutimana, admitted as Exhibit P159
Ntakirutimana's Reports	*Tolerance or Intransigence in Sindikubwabo's Speech in Butare?*, by Évariste Ntakirutimana, admitted as Exhibit P159 *and Sociolinguistic Analysis of Polysemic Terms Produced During the War Period (1990-1994) in Rwanda*, by Évariste Ntakirutimana, admitted as Exhibit P158
Ntakirutimana Sociolinguistic Analysis	*Sociolinguistic Analysis of Polysemic Terms Produced During the War Period (1990-1994) in Rwanda*, by Évariste Ntakirutimana, admitted as Exhibit P158
ORINFOR	*Office rwandais d'information* (Rwandan Office of Information)
PAMU	*Projet agricole de Muganza*
PL	*Parti libéral*
Practice Direction on Formal Requirements on Appeal	Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005
Prosecution	Office of the Prosecutor of the International criminal Tribunal for Rwanda
PSD	*Parti social démocrate*
RCMP	Royal Canadian Mounted Police
Registrar	Registrar of the International Criminal Tribunal for Rwanda
Registry	Registry of the International Criminal Tribunal for Rwanda
Residual Mechanism	International Residual Mechanism for Criminal Tribunals

Residual Mechanism Statute	Statute of the International Residual Mechanism for Criminal Tribunals established by Security Council Resolution 1966 (2010)
Reyntjens Report	Expert Report by Filip Reyntjens, admitted as Exhibit D571
Rome Statute	Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, entered into force on 1 July 2002
RPA	Rwandan Patriotic Army
RPF	Rwandan (also Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
SCSL	Special Court for Sierra Leone, established to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000
Second *Amicus Curiae*	Second *Amicus curiae* designated by the Registrar to investigate the allegations of false testimonies of Witnesses QA, QY, and SJ
Second *Amicus Curiae* Report Concerning Witness QA	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QA, 25 March 2010 (confidential)
Second *Amicus Curiae* Report Concerning Witnesses QY and SJ	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QY and SJ, 18 May 2010 (confidential)
Second *Amicus Curiae* Reports	Second *Amicus Curiae* Report Concerning Witness QA and Second *Amicus Curiae* Report Concerning Witnesses QY and SJ (confidential)
Second Attack	The second attack of the Last Half of May Attacks conducted against Tutsis who had sought refuge at the Butare Prefecture Office, which occurred 11 days after the Mid-May Attack
Security Council	Security Council of the United Nations
Shimamungu Report	*Butare 1994: Political Communication of the "Abatabazi" Interim Government and its Impact on the Population*, by Eugène Shimamungu, admitted as Exhibit D278 (confidential)

Sindikubwabo's Speech	Sindikubwabo's speech given at Nsabimana's swearing-in ceremony of 19 April 1994 (transcripts admitted as Exhibit P151B)
Statute	Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)
Statute of the ICTY	Statute of the International Criminal Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (25 May 1993)
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated
Trial Chamber	Trial Chamber II of the International Criminal Tribunal for Rwanda seized of the *Nyiramasuhuko et al.* proceedings
Trial Judgement	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011
Tribunal *or* ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
UNAMIR	United Nations Assistance Mission for Rwanda
Vienna Convention	Vienna Convention on The Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, Vol. 1155
Virgin Mary Statue	Statue of the Virgin Mary in Mugombwa Sector, Muganza Commune, Butare Prefecture

2. Filings of the Parties

Indictments	Operative indictments of all co-Accused
Kanyabashi Amended Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999
Kanyabashi Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 4 February 2014)

Kanyabashi Closing Brief	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Joseph Kanyabashi's Closing Brief, 17 February 2009 (the English translation of the French original was filed on 6 April 2009) (confidential)
Kanyabashi Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of 12 August 1999, 11 June 2001
Kanyabashi Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Amended Notice of Appeal by Joseph Kanyabashi, 8 April 2013 (the English translation of the French original was filed on 24 May 2013) (confidential; public redacted version originally filed in French on 12 May 2014)
Kanyabashi Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Brief in Reply to the Prosecutor's Response, 20 September 2013 (the English translation of the French original was filed on 14 May 2014) (confidential; public redacted version originally filed in French on 7 May 2014)
Kanyabashi Response Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Brief in Response to the Prosecutor's Brief, 6 March 2013 (the English translation of the French original was filed on 13 February 2014)
Kanyabashi Third Amended Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of 12 August 1999 and 31 May 2000, 2 November 2000
Ndayambaje Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 26 July 2013) (confidential), as corrected by *Corrigendum du Mémoire d'appel d'Élie Ndayambaje*, 19 April 2013 (confidential; public redacted version originally filed in French on 4 June 2013)
Ndayambaje Closing Brief	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje's Defence Brief, 17 February 2009 (the English translation of the French original was filed on 3 April 2009) (confidential)
Ndayambaje Indictment	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999
Ndayambaje Notice of Alibi	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Avis additionnel et identification des témoins d'alibi*, 29 April 2008 (confidential)

Ndayambaje Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Amended Notice of Appeal, 8 April 2013 (the English translation of the French original was filed on 7 June 2013)
Ndayambaje Pre-Defence Brief	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Pre-Defence Brief, 8 February 2005
Ndayambaje Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Brief in Reply, 25 September 2013 (the English translation of the French original was filed on 4 April 2014) (confidential; public redacted version originally filed in French on 1 November 2013)
Ndayambaje Submissions on Additional Evidence	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Written Submissions Subsequent to the "Decision on Ndayambaje's First, Second, Third and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence" of 12 May 2015, 26 May 2015 (originally filed in French, English translation filed on 3 July 2015) (confidential)
Nsabimana and Nteziryayo Indictment	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999
Nsabimana Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 26 September 2013) (originally filed confidentially, reclassified as public)
Nsabimana Closing Brief	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Final Brief of Sylvain Nsabimana's Trial, 17 February 2009 (the English translation of the French original was filed on 6 April 2009) (confidential)
Nsabimana Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Notice of Appeal, 10 October 2011 (the English translation of the French original was filed on 25 January 2012)
Nsabimana Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Brief in Reply, 20 September 2013 (the English translation of the French original was filed on 9 April 2014)
Ntahobali Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 15 April 2014) (confidential; public redacted version originally filed in French on 24 March 2014)

Ntahobali Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Final Trial Brief and Annexes Thereto, 17 February 2009 (the English translation of the French original was filed on 20 July 2009) (confidential)
Ntahobali Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Second Amended Notice of Appeal of Arsène Shalom Ntahobali Pursuant to Article 24 of the Statute and Rule 108 of the Rules of Procedure and Evidence, 29 October 2012 (the English translation of the French original was filed on 24 January 2013)
Ntahobali Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Brief in Reply, 7 October 2013 (the English translation of the French original was filed on 5 August 2014) (confidential; public redacted version originally filed in French on 24 March 2014)
Ntahobali Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Response to The Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing, 5 May 2015 (the English translation of the French original was filed on 3 August 2015) (confidential)
Nteziryayo Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (confidential) *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Public Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (public redacted version)
Nteziryayo Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Alphonse Nteziryayo's Closing Brief, 17 February 2009 (confidential)
Nteziryayo Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Alphonse Nteziryayo's Amended Notice of Appeal, 13 May 2013
Nteziryayo Pre-Defence Brief	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Pre-Defence Brief for Presentation of Defence Case, 31 December 2004 (the English translation of the French original was filed on 4 February 2005)
Nteziryayo Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Reply Brief on Behalf of Alphonse Nteziryayo, 20 September 2013
Nyiramasuhuko and Ntahobali Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 1 March 2001

Nyiramasuhuko and Ntahobali Second Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment, signed 27 November 1997, filed 8 December 1997
Nyiramasuhuko and Ntahobali Third Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999
Nyiramasuhuko Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 30 April 2014) (confidential; public redacted version originally filed in French on 3 April 2014)
Nyiramasuhuko Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Closing Brief of Pauline Nyiramasuhuko with Annex, 17 February 2009 (the English translation of the French original was filed on 1 April 2009) (confidential)
Nyiramasuhuko Notice of Alibi	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Avis au Procureur de l'intention de la Défense de Pauline Nyiramasuhuko d'invoquer une défense d'alibi*, 4 March 2005 (confidential)
Nyiramasuhuko Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Re-Amended Notice of Appeal Filed Pursuant to Article 24 of the ICTR Statute, Rule 108 of the Rules of Procedure and Evidence, Article 1 of the Practice Direction on Formal Requirements for Appeals from Judgement, 21 February 2013 (the English translation of the French original was filed on 25 April 2013)
Nyiramasuhuko Pre-Defence Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Pauline Nyiramasuhuko's Revised Pre-Defence Brief, 5 January 2005 (the English translation of the French original was filed on 25 January 2005) (confidential)
Nyiramasuhuko Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Brief in Reply, 7 October 2013 (the English translation of the French original was filed on 24 June 2014)
Nyiramasuhuko Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appellant Pauline Nyiramasuhuko's Response to "Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing", 30 April 2015 (the English translation of the French original was filed on 1 July 2015)
Prosecution Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Appellant's Brief, 15 November 2011

Prosecution Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Closing Brief, 17 February 2009 (confidential)
Prosecution Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Notice of Appeal, 1 September 2011
Prosecution Pre-Trial Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B), 11 April 2001
Prosecution Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Reply Brief, 21 March 2013
Prosecution Response Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Consolidated Respondent's Brief, 21 August 2013 (confidential) *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Consolidated Respondent's Brief, 4 October 2013 (public redacted version)
Prosecution Submissions on Additional Evidence	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution's Submission on Evidence of Claver Nahimana [alias Habimana] and Request for Admission of Rebuttal Evidence, 26 May 2015 (confidential)
Prosecution Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing, 8 April 2015
Supporting Material to Kanyabashi Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Prosecutor's Request for Leave to Amend Indictment, Attachment B "Supporting Material", 18 August 1998 (confidential)
Supporting Material to Nyiramasuhuko and Ntahobali Third Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Supporting Material, 18 August 1999 (confidential)
Witness Summaries Grid	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. 98-42-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B), 11 April 2001, "List of Intended Prosecution Witnesses Butare Cases–Witness Summaries Grid (6 April 2001) Appendix"