



**Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda**

1406/H

Q

ICTR-00-55B-A

8th May 2012

{1406/H – 1302/H}

IN THE APPEALS CHAMBER

Before:

Judge Fausto Pocar, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Andréia Vaz
Judge Carmel Agius

Registrar:

Mr. Adama Dieng

Judgement of:

8 May 2012

ICTR Appeals Chamber

Date: 8th May 2012

Action:

Copied To: Concerned Judges,

Parties, JPU, LDs

Ildephonse HATEGEKIMANA

[Signature]

v.

THE PROSECUTOR

Case No. ICTR-00-55B-A

JUDGEMENT

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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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 an appeal by Ildephonse Hategekimana (“Hategekimana”) against the Judgement and Sentence pronounced on 6 December 2010 and filed in writing on 14 February 2011 by Trial Chamber II of the Tribunal (“Trial Chamber”) in the case of *The Prosecutor v. Ildephonse Hategekimana* (“Trial Judgement”).¹

I. INTRODUCTION

A. Background

2. Hategekimana was born on 1 February 1964 in Mugina Commune, Gitarama Prefecture, Rwanda.² In 1994, he held the rank of lieutenant in the Rwandan army.³ The Trial Chamber determined that, during the relevant period covered by the Indictment, Hategekimana was the commander of the Ngoma Military Camp in Butare Prefecture.⁴

3. The Trial Chamber convicted Hategekimana for committing genocide based on his role in a joint criminal enterprise which resulted in the killings of Salomé Mujawayezu, Alice Mukarwesa, and Jacqueline Mukaburasa and of Tutsi civilians at the Ngoma Parish and the *Maison Générale*.⁵ In addition, the Trial Chamber convicted Hategekimana of murder as a crime against humanity for ordering the abduction and killing of Jean Bosco Rugomboka⁶ and for his role in a joint criminal enterprise which resulted in the deaths of Salomé Mujawayezu, Alice Mukarwesa, Jacqueline Mukaburasa, and Solange Karenzi.⁷ Finally, the Trial Chamber convicted Hategekimana as a superior of rape as a crime against humanity for the rape of Nura Sezirahiga.⁸ Hategekimana was sentenced to a single term of life imprisonment.⁹

¹ For ease of reference, two annexes are appended: Annex A – Procedural History and Annex B – Cited Materials and Defined Terms.

² Defence Closing Brief, para. 1.

³ Trial Judgement, para. 3, *referring to* Indictment, para. 2; Defence Closing Brief, para. 7.

⁴ Trial Judgement, para. 659.

⁵ Trial Judgement, paras. 38, 681, 688, 696, 697, 730.

⁶ Trial Judgement, paras. 39, 712, 721, 730.

⁷ Trial Judgement, paras. 39, 715, 716, 720, 721, 730.

⁸ Trial Judgement, paras. 40, 727-730.

⁹ Trial Judgement, paras. 42, 748.

B. The Appeal

4. Hategekimana has advanced seven grounds of appeal challenging his convictions and sentence.¹⁰ He requests that the Appeals Chamber set aside or reverse his convictions, order his immediate release, or, in the alternative, redress the violations of his fair trial rights by reducing his sentence to time-served and awarding him financial compensation.¹¹ The Prosecution responds that Hategekimana's appeal should be dismissed.¹²

5. The Appeals Chamber heard oral submissions regarding this appeal on 15 December 2011.

¹⁰ Notice of Appeal, paras. 25-142. Notwithstanding the numbering of the grounds of appeal in the Notice of Appeal and Appeal Brief, the Appeals Chamber has identified errors related to seven topics: (i) violations of fair trial rights; (ii) Hategekimana's convictions for the murder of Jean Bosco Rugomboka; (iii) the murder of Salomé Mujawayezu, Alice Mukarwesa, and Jacqueline Mukaburasa; (iv) the rape of Nura Sezirahiga; (v) the attack on the Ngoma Parish; (vi) the attack on the *Maison Générale*; and (vii) his appeal against the sentence. For clarity, the Appeals Chamber has decided to refer to these seven topics as Grounds One through Seven. *See* Decision on Ildephonse Hategekimana's Motion for Leave to Amend His Notice of Appeal, 11 July 2011, paras. 9, 10.

¹¹ Notice of Appeal, paras. 144-147; Appeal Brief, paras. 445-447. *See also* AT. 15 December 2011 p. 36.

¹² Response Brief, para. 261.



II. STANDARDS OF APPELLATE REVIEW

6. The Appeals Chamber recalls the applicable standards 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 the trial chamber and errors of fact which have occasioned a miscarriage of justice.¹³

7. 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.¹⁴

8. 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.¹⁵ In so doing, the Appeals Chamber not only corrects the legal error, but, when 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.¹⁶

9. Regarding errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by the 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.¹⁷

10. 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.¹⁸ Arguments which do not have the potential to cause the

¹³ *Munyakazi* Appeal Judgement, para. 5; *Setako* Appeal Judgement, para. 7. See also *Haradinaj et al.* Appeal Judgement, para. 9.

¹⁴ *Ntakirutimana* Appeal Judgement, para. 11 (internal citation omitted). See also *Furundžija* Appeal Judgement, para. 35; *Akayesu* Appeal Judgement, para. 179.

¹⁵ *Blaškić* Appeal Judgement, para. 15. See also, e.g., *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁶ *Blaškić* Appeal Judgement, para. 15. See also, e.g., *Munyakazi* Appeal Judgement, para. 7; *Setako* Appeal Judgement, para. 9; *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁷ *Krstić* Appeal Judgement, para. 40 (internal citations omitted). See also *Munyakazi* Appeal Judgement, para. 8; *Setako* Appeal Judgement, para. 10; *Haradinaj et al.* Appeal Judgement, para. 12.

¹⁸ *Kupreškić et al.* Appeal Judgement, para. 27. See also, e.g., *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11; *Boškoski and Tarčulovski* Appeal Judgement, para. 16.

impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.¹⁹

11. 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.²⁰ 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.²¹ 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.²²

¹⁹ *Munyakazi* Appeal Judgement, para. 9; *Setako* Appeal Judgement, para. 11. See also *Boškoski and Tarčulovski* Appeal Judgement, para. 16.

²⁰ Practice Direction on Formal Requirements for Appeals from Judgement, 15 June 2007, para. 4(b). See also *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

²¹ *Kunarac et al.* Appeal Judgement, para. 43; *Kayishema and Ruzindana* Appeal Judgement, para. 137. See also, e.g., *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

²² *Krnojelac* Appeal Judgement, para. 16. See also, e.g., *Munyakazi* Appeal Judgement, para. 10; *Setako* Appeal Judgement, para. 12; *Boškoski and Tarčulovski* Appeal Judgement, para. 17.

III. ALLEGED VIOLATIONS OF FAIR TRIAL RIGHTS (GROUND 1)

12. Hategekimana submits that the Trial Chamber violated his right to a fair trial.²³ In this section, the Appeals Chamber considers whether the Trial Chamber: (i) violated Hategekimana's presumption of innocence and exhibited bias; (ii) erred in hearing Prosecution Witness BYO's testimony by video-link in the absence of Defence counsel; (iii) failed to provide a reasoned opinion as a result of mistaken references in the Trial Judgement; (iv) violated Hategekimana's right to be tried in his presence; (v) failed to consider a motion related to disclosure of exculpatory material; (vi) erred in refusing to admit prior statements of Prosecution Witnesses BYQ and QDC; (vii) assumed the role of the Prosecutor or witness; and (viii) erred in failing to take Defence exhibits into account.

A. Presumption of Innocence and Bias

13. At a ceremony held at the Tribunal on 25 October 2010, the Tribunal named the winners of the "Essays and Drawings Competition", which involved students from schools in five East African countries. Some of the drawings entered into this competition were then displayed at the Tribunal.²⁴ According to Hategekimana, one of the first prizes in the competition was awarded to a 12-year old girl from Butare Prefecture, whose drawing depicts a Judge from the Tribunal pointing his finger at an accused and saying the words: "You Hategekimana [...] tell what you have done in genocide. You, Hategekimana you will go in prison 30 years", while the accused is shown uttering the words: "I have killed 77 people".²⁵ Hategekimana contends that this drawing, which was exhibited in the corridors of the Tribunal before the delivery of the Trial Judgement, could be admired by the Judges of the Trial Chamber and that a legal officer involved in the drafting of the Trial Judgement was part of the competition's jury.²⁶ At the pronouncement of the Trial Judgement, Hategekimana complained about the exhibition of the drawing and the Trial Chamber ordered that it be placed under seal.²⁷

14. Hategekimana submits that his rights to be presumed innocent and to be tried by impartial Judges were violated by the legal officer's involvement in the judgement drafting process and by

²³ Notice of Appeal, paras. 25-31, 39-58; Appeal Brief, paras. 8-34. *See also* AT. 15 December 2011 pp. 7-12, 30, 31, 36. In his Notice of Appeal, Hategekimana also challenges the notice he received in his Indictment for his responsibility as a superior under Article 6(3) of the Statute. *See* Notice of Appeal, paras. 32-38. Hategekimana does not develop this argument in his Appeal Brief. The Appeals Chamber therefore considers that he has abandoned this argument and will not consider it.

²⁴ Appeal Brief, Annex A (ICTR Newsletter, October 2010, pp. 1, 2; ICTR Newsletter, May-June 2010, p. 7; ICTR Newsletter, July-August 2010, p. 7; ICTR Newsletter, September 2010, pp. 1, 2).

²⁵ Appeal Brief, para. 9; Reply Brief, para. 36. *See also* Appeal Brief, Annex A; AT. 15 December 2011 p. 8.

²⁶ Notice of Appeal, para. 26; Appeal Brief, paras. 10, 11, 13.

²⁷ T. 6 December 2010 pp. 2, 3. *See also* AT. 15 December 2011 p. 4.

the display of the artwork at the Tribunal.²⁸ He emphasizes the importance of the right to be presumed innocent during the course of a trial and argues that the public representation of a person as being guilty before being convicted is sufficient to violate this right.²⁹ Hategekimana further contends that the Judges of the Trial Chamber violated his presumption of innocence and exhibited bias by posing in front of the drawing for a photograph and by allowing a member of the competition's jury to assist in the judgement drafting process.³⁰ He requests the Appeals Chamber to overturn his convictions and order his release or, alternatively, to order a retrial.³¹

15. The Prosecution responds that Hategekimana fails to demonstrate any violation of his right to be tried before an impartial tribunal and his right to be presumed innocent.³² It submits that Hategekimana's argument that his right to a fair trial was compromised by a legal officer judging a children's art contest is without merit as "[j]udicial decision-making is the sole purview of the Judges and legal officers [...] play no role in it."³³

16. Article 20(3) of the Statute guarantees that an accused person shall be presumed innocent until proven guilty. In addition, the Statute and Rules guarantee an accused's right to be tried by impartial Judges.³⁴ Rule 15(A) of the Rules specifically provides that "[a] Judge may not sit in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality." In particular, a Judge must withdraw from a case if it is shown that actual bias exists or if the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.³⁵ The Appeals Chamber has also emphasized that there is a presumption of impartiality which attaches to any judge of the Tribunal and which cannot be easily

²⁸ Notice of Appeal, paras. 25-27; Appeal Brief, paras. 8-21. *See also* AT. 15 December 2011 pp. 7-9.

²⁹ Appeal Brief, paras. 15-19; Reply Brief, paras. 30, 31. *See also* AT. 15 December 2011 pp. 8-11.

³⁰ Appeal Brief, paras. 10, 11, 13, 14; Reply Brief, paras. 25-29, 32, 34, 35.

³¹ Notice of Appeal, para. 28; Appeal Brief, para. 21. *See also* AT. 15 December 2011 pp. 10, 36.

³² Response Brief, para. 34.

³³ Response Brief, para. 34, *citing The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR-73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009 ("*Bizimungu et al.* Decision of 17 December 2009"), para. 9. *See also* AT. 15 December 2011 p. 20.

³⁴ *Édouard Karemera et al. v. The Prosecutor*, Case No. ICTR-98-44-AR73.15, Decision on Joseph Nzirorera's Appeal Against a Decision of Trial Chamber III Denying the Disclosure of a Copy of the Presiding Judge's Written Assessment of a Member of the Prosecution Team, 5 May 2009 ("*Karemera et al.* Decision of 5 May 2009"), para. 9; *Nahimana et al.* Appeal Judgement, para. 47.

³⁵ *Karemera et al.* Decision of 5 May 2009, para. 9. *See also Nahimana et al.* Appeal Judgement, para. 49, *citing Akayesu* Appeal Judgement, para. 203 ("That there is a general rule that a Judge should not only be subjectively free from bias, but also that there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute: A. A Judge is not impartial if it is shown that actual bias exists. B. There is an unacceptable appearance of bias if: (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."). *See also Furundžija* Appeal Judgement, para. 189.

rebutted.³⁶ Accordingly, it is for the appealing party alleging bias to adduce reliable and sufficient evidence to rebut that presumption.³⁷ The Appeals Chamber cannot entertain sweeping or abstract allegations that are neither substantiated nor detailed to rebut the presumption of impartiality.³⁸

17. The Appeals Chamber acknowledges that it was highly improper to have a drawing of such nature on display in the corridors of the Tribunal during an ongoing trial and that this should have been avoided. However, it considers that Hategekimana provides no support for his allegation that the Judges in his case saw the drawing containing the handwritten inscriptions or posed for a photograph in front of it. The Appeals Chamber observes that none of the Trial Chamber's Judges features in the photographs referred to by Hategekimana.³⁹ In any event, even if the Trial Chamber's Judges had viewed the drawing, this would not be sufficient to create in the mind of a reasonable observer, properly informed, an appearance of bias or to rebut the presumption of impartiality of those Judges.

18. In this respect, the Appeals Chamber observes that, once Hategekimana raised the issue of the public exhibition of the drawing, the Trial Chamber immediately ordered that the drawing be placed under seal by the Registry.⁴⁰ Contrary to Hategekimana's submissions, the Trial Chamber's prompt reaction contradicts any appearance of bias. The Appeals Chamber also finds no merit in Hategekimana's contention that the Trial Chamber should have stayed the proceedings when he drew its attention to the drawing. Additionally, a review of the record shows that Hategekimana did not request such relief from the Trial Chamber.⁴¹

19. The Appeals Chamber turns to Hategekimana's argument that the Trial Chamber violated his rights to the presumption of innocence and to be tried by an independent and impartial tribunal by accepting the legal officer's contribution to the drafting of the Trial Judgement.

20. The Appeals Chamber considers that Hategekimana's submissions are based on the erroneous premise that legal officers play a controlling role in judicial decision-making.⁴² The Appeals Chamber has previously held that "[j]udicial decision-making is the sole purview of the

³⁶ *Renzaho* Appeal Judgement, para. 21; *Nahimana et al.* Appeal Judgement, para. 48; *Galić* Appeal Judgement, para. 41; *Akayesu* Appeal Judgement, para. 91; *Karera et al.* Decision of 5 May 2009, para. 11; *Delalić et al.* Appeal Judgement, para. 707; *Furundžija* Appeal Judgement, paras. 196, 197.

³⁷ *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Nahimana et al.* Appeal Judgement, para. 48; *Niyitegeka* Appeal Judgement, para. 45. See also *Rutaganda* Appeal Judgement, para. 42; *Furundžija* Appeal Judgement, para. 197.

³⁸ *Renzaho* Appeal Judgement, para. 23; *Rutaganda* Appeal Judgement, para. 43; *Ntagerura et al.* Appeal Judgement, para. 135.

³⁹ Appeal Brief, Annex A (ICTR Newsletter, October 2010, pp. 2, 11).

⁴⁰ T. 6 December 2010 pp. 3, 4.

⁴¹ T. 6 December 2010 pp. 3, 4.

⁴² *Bizimungu et al.* Decision of 17 December 2009, para. 9.

Judges and legal officers [...] play no role in it.”⁴³ The Appeals Chamber further considers that “mere assertions to the effect that a staff member may influence a Judge during deliberations or the adjudication process are not a sufficient basis, in and of themselves”,⁴⁴ to create in the mind of a reasonable observer, properly informed, an appearance of bias or to rebut the presumption of impartiality of judges. The Appeals Chamber does not find that the role of the legal officer in the competition is “so problematic” as to impugn the impartiality of the Judges or the appearance thereof.⁴⁵ Therefore, there is no merit to Hategekimana’s contention that the Trial Chamber erred in allowing the legal officer to be involved in the drafting process of the Trial Judgement.

21. Accordingly, Hategekimana has failed to demonstrate that the Trial Chamber violated his presumption of innocence or exhibited bias in connection with the drawing competition.

B. Video-Link of Witness BYO

22. On 6 April 2009, the Trial Chamber decided to hear Witness BYO by video-link from a suitable location in Rwanda.⁴⁶ The witness was scheduled to appear on 14 April 2009, but, according to the Prosecution, was unavailable because she was preparing for examinations.⁴⁷ In view of this, the Trial Chamber agreed to postpone the witness’s video-link testimony and, shortly after 16 April 2009, the parties were informed that she would be heard on 4 May 2009 as the last Prosecution witness.⁴⁸ At the opening of the trial session on 4 May 2009, the co-counsel for Hategekimana in Arusha informed the Trial Chamber that, unlike the Prosecution, the Defence had no representation in Kigali for the video-link.⁴⁹ The co-counsel explained that the lead counsel was supposed to be in Kigali, but had “some problems” which prevented him from travelling there.⁵⁰ He

⁴³ *Bizimungu et al.* Decision of 17 December 2009, para. 9.

⁴⁴ *Bizimungu et al.* Decision of 17 December 2009, para. 10.

⁴⁵ *Bizimungu et al.* Decision of 17 December 2009, para. 11. The Appeals Chambers further observes that it is not apparent whether the handwritten dialogue appearing on the drawing, which mentions Hategekimana, formed part of the original drawing that was entered into the competition or whether it was added later when the drawing was on display after the competition. See T. 6 December 2010 pp. 2-4. Compare Hategekimana Appeal Brief, para. 9 with Hategekimana Reply Brief, para. 36. The two drawings are annexed to a motion contained in Appeal Brief, Annex A (*The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, *Requête en extrême urgence du Lieutenant Ildephonse Hategekimana aux fins de nullité de procédure et de sa mise en liberté avec arrêt définitif des poursuites pour violation grave de son droit à la présomption d’innocence*, 17 December 2010, Annex, Registry pagination 293/A, 292/A). Consequently, the Appeals Chamber is not persuaded that the Trial Chamber’s legal officer observed the handwritten inscription concerning Hategekimana’s guilt when judging the competition.

⁴⁶ *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on the Prosecution Requests for the Video-Link Testimonies of Witnesses QX, BYO and BYS, 6 April 2009, p. 4.

⁴⁷ T. 14 April 2009 p. 2 (status conference).

⁴⁸ T. 4 May 2009 p. 3.

⁴⁹ T. 4 May 2009 p. 2.

⁵⁰ T. 4 May 2009 p. 2.

requested that the Trial Chamber make arrangements for the Defence to be represented in Kigali before hearing the witness.⁵¹

23. After hearing the parties,⁵² the Trial Chamber decided that there was “no justifiable reason to postpone the video link testimony of Witness BYO”.⁵³ It reasoned that the Defence had been given “ample opportunity” to be represented in Kigali for the video-link.⁵⁴ The Trial Chamber found that “the Defence has no valid justification for the absence of a representative in Kigali” and that it had “provided no prior notification of the absence of Defence representation or of any difficulty arising to prevent their physical presence”.⁵⁵ The Trial Chamber further considered that Hategekimana had representation in Arusha to defend his interests and to cross-examine the witness, thereby safeguarding his rights.⁵⁶ The Trial Chamber relied on Witness BYO, along with other witnesses, in convicting Hategekimana for genocide based on his role in the attack on the *Maison Générale* and for murder as a crime against humanity for his role in the killing of Solange Karenzi.⁵⁷

24. Hategekimana submits that the Trial Chamber erred in allowing Witness BYO to testify by video-link from Kigali in the absence of a representative of the Defence.⁵⁸ Hategekimana argues that the Trial Chamber violated the principle of equality of arms since the Prosecution had representation there and that it also exhibited bias by allowing the testimony to proceed despite the objections of the Defence.⁵⁹ Hategekimana submits that the prejudice he suffered is “evident and incalculable” since he was not in a position to follow the witness’s movements during adjournments to verify that she did not consult with the Prosecution or other third parties.⁶⁰

25. The Prosecution responds that Hategekimana has failed to demonstrate that the Trial Chamber violated the principle of equality of arms since: he had ample opportunity to organise representation in Kigali; he did not offer any justification for the absence of representation in Kigali; the examination of the witness by both parties occurred from Arusha; and he did not show any material prejudice.⁶¹

⁵¹ T. 4 May 2009 pp. 3, 4.

⁵² T. 4 May 2009 pp. 2, 3.

⁵³ T. 4 May 2009 p. 4.

⁵⁴ T. 4 May 2009 p. 3.

⁵⁵ T. 4 May 2009 p. 3.

⁵⁶ T. 4 May 2009 pp. 3, 4.

⁵⁷ Trial Judgement, paras. 577-588, 604-637, 697, 720.

⁵⁸ Notice of Appeal, paras. 29, 30; Appeal Brief, paras. 22, 23.

⁵⁹ Notice of Appeal, para. 30; Appeal Brief, paras. 22, 23.

⁶⁰ Reply Brief, para. 37.

⁶¹ Response Brief, paras. 35-40.

26. The Appeals Chamber has held that “the equality of arms principle requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case.”⁶² Although it would have been preferable for the Defence to be represented at the site of the video-link, the Appeals Chamber is not convinced that the absence of representation in Kigali placed Hategekimana at a disadvantage. In this respect, the examination was conducted in its entirety from Arusha where Hategekimana was represented by counsel. A review of Witness BYO’s transcripts does not reveal any instance or difficulty where it would have been necessary for a representative in Kigali to intervene.⁶³ Hategekimana’s suggestion that the witness may have contacted third parties during adjournments is mere speculation and also fails to account for the presence of a Registry officer at the site. Therefore, the Appeals Chamber is not convinced that Hategekimana suffered any prejudice. Finally, the Appeals Chamber observes that the Defence had ample notice to arrange for representation in Kigali and provided no justification or advance notice for not having done so.

27. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in proceeding with the video-link testimony of Witness BYO in the absence of a representative of the Defence in Kigali.

C. Mistaken References in the Trial Judgement

28. Hategekimana submits that the Trial Chamber failed to provide a reasoned opinion by including several erroneous references in the footnotes of the Trial Judgement, which prevented him from identifying the source of the Trial Chamber’s reasoning.⁶⁴ As examples, Hategekimana points to paragraphs 237, 239, 240, and 338 of the Trial Judgement.⁶⁵

29. The Prosecution responds that the mistaken references in the Trial Judgement do not impact its underlying reasoning, which is readily apparent.⁶⁶ The Prosecution further notes that Hategekimana’s Appeal Brief amply demonstrates that he had no difficulty understanding the substance of the findings.⁶⁷

30. A review of the Trial Judgement and the record reveals that there are mistaken references in the various paragraphs cited by Hategekimana. The Appeals Chamber observes, however, that these references were corrected in the corresponding paragraphs of the French version of the Trial Judgement, which was made available on 12 April 2011, more than 45 days before the Appeal Brief

⁶² *Kalimanzira* Appeal Judgement, para. 34, citing *Nahimana et al.* Appeal Judgement, para. 173.

⁶³ See T. 4 May 2009 pp. 6-60 (closed session in part).

⁶⁴ Notice of Appeal, paras. 39, 40; Appeal Brief, paras. 24, 25.

⁶⁵ Notice of Appeal, para. 39; Appeal Brief, para. 24.

⁶⁶ Response Brief, para. 62.

⁶⁷ Response Brief, paras. 61, 62.

was due.⁶⁸ Typographical errors or mistaken references can occur in judgements and decisions even after careful review. Their occurrence, however, does not typically result in a miscarriage of justice, in particular if the meaning of the relevant text can be reasonably ascertained from the surrounding context and where, as here, the factual propositions referred to by the Trial Chamber are in fact supported by the record.⁶⁹ The Appeals Chamber can identify no prejudice to Hategekimana as a result of these mistaken references.

31. Accordingly, Hategekimana has not demonstrated that the Trial Chamber failed to provide a reasoned opinion.

D. Presence at Trial

32. On 16 March 2010, the Trial Chamber set 26 April 2010 as the date for hearing the closing arguments of the parties.⁷⁰ On 6 April 2010, Hategekimana requested the Registrar to remove his lead trial counsel.⁷¹ The Registrar denied the request on 15 April 2010.⁷² On 19 April 2010, Hategekimana filed his Motion for Adjournment and Withdrawal of Counsel before the Trial Chamber, requesting the withdrawal of his lead trial counsel and an adjournment of the closing arguments on the basis of a breakdown in communication and ineffective assistance of counsel.⁷³

33. At the commencement of closing arguments on 26 April 2010, the Trial Chamber noted Hategekimana's absence and ordered that he be brought to court.⁷⁴ After a two hour and 15 minute adjournment, Hategekimana was brought to court.⁷⁵ The Trial Chamber then informed Hategekimana that it had denied his Motion for Adjournment and Withdrawal of Counsel,

⁶⁸ Decision on Ildephonse Hategekimana's Motion for an Extension of Time to File His Appellant's Brief, 13 April 2011 ("Decision of 13 April 2011"), para. 8. The Appeals Chamber observes that Hategekimana does not understand English and that French is the main working language of his counsel. *See* Decision of 13 April 2011, paras. 4, 8.

⁶⁹ *Cf., e.g., Simba Appeal Judgement*, n. 350; *Nahimana et al. Appeal Judgement*, paras. 964, 1011; *Muhimana Appeal Judgement*, paras. 108, 145, 163.

⁷⁰ *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Order Rescheduling Closing Arguments, 16 March 2010, p. 3. *See also The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Decision on Hategekimana's Motion for Withdrawal of Counsel and Adjournment of Closing Arguments, 30 April 2010 ("Decision of 30 April 2010"), para. 5.

⁷¹ *See The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, *Requête en extrême urgence de l'accusé Ildephonse Hategekimana aux fins de reporter à une date ultérieure, les plaidoiries finales dans son procès, prévues à l'audience du 26 avril 2010*, 21 April 2010 ("Motion for Adjournment and Withdrawal of Counsel"), Annex E. *See also* Decision of 30 April 2010, para. 7.

⁷² *See* Motion for Adjournment and Withdrawal of Counsel, Annex G. *See also* Decision of 30 April 2010, para. 8.

⁷³ Motion for Adjournment and Withdrawal of Counsel. *See also* Decision of 30 April 2010, paras. 10, 12, 13.

⁷⁴ T. 26 April 2010 p. 2.

⁷⁵ T. 26 April 2010 p. 4.

explaining that it could identify no exceptional circumstances for replacing his lead trial counsel.⁷⁶ The Prosecution then gave its closing arguments in Hategekimana's presence.⁷⁷

34. After a further adjournment on the same day, Hategekimana refused to return to court for the presentation of the closing arguments from the Defence.⁷⁸ In a letter to the Trial Chamber read onto the record, he cited his lack of confidence in his counsel.⁷⁹ In light of its earlier decision, the Trial Chamber decided to continue with the proceedings,⁸⁰ and the Defence commenced to present its closing arguments.⁸¹ The following day, the Trial Chamber issued an order for Hategekimana to be present for the conclusion of the closing arguments on 28 April 2010.⁸² Hategekimana, however, did not attend the proceedings on 28 April 2010, and the Trial Chamber decided to continue with the proceedings in view of its prior decision.⁸³

35. Hategekimana submits that the Trial Chamber violated his right to be tried in his presence when it proceeded to hear the closing arguments in his absence.⁸⁴ Hategekimana argues that the Trial Chamber should have suspended the proceedings and that it failed to consider that the breakdown in communication between him and his trial lead counsel reasonably justified his absence.⁸⁵

36. The Prosecution responds that Hategekimana was present during the presentation of the closing arguments and thus that there was no violation of his right to be tried in his presence.⁸⁶

37. The Appeals Chamber recalls that, pursuant to Article 20(4)(d) of the Statute, an accused has the right to be physically present at trial.⁸⁷ This right is not absolute, and an accused can waive or forfeit the right to be present at trial, in particular if he refuses to attend proceedings after being given notice of the time and place, the charges against him, and his right to be present.⁸⁸ Hategekimana has not disputed that he had such notice. Rather, he complains that the Trial

⁷⁶ T. 26 April 2010 pp. 4, 5. A written decision followed on 30 April 2010. See Decision of 30 April 2010.

⁷⁷ T. 26 April 2010 pp. 5-36.

⁷⁸ T. 26 April 2010 pp. 36, 37.

⁷⁹ T. 26 April 2010 p. 37.

⁸⁰ T. 26 April 2010 p. 37.

⁸¹ T. 26 April 2010 pp. 36-68.

⁸² *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, *Ordonnance aux fins de comparution de l'accusé Ildephonse Hategekimana pour assister à l'audience de plaidoiries du 28 avril 2010*, 27 April 2010.

⁸³ T. 28 April 2010 p. 2.

⁸⁴ Notice of Appeal, paras. 43, 44; Appeal Brief, para. 26; Reply Brief, para. 39.

⁸⁵ Appeal Brief, para. 26; Reply Brief, para. 39.

⁸⁶ Response, paras. 53, 55, 56.

⁸⁷ See also *Nahimana et al.* Appeal Judgement, para. 96; *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-AR73, Decision on Interlocutory Appeal, 30 October 2006 ("Zigiranyirazo Decision of 30 October 2006"), paras. 8, 13.

⁸⁸ *Nahimana et al.* Appeal Judgement, paras. 99, 109; *Zigiranyirazo* Decision of 30 October 2006, para. 14.

Chamber failed to consider the breakdown in communication in refusing to adjourn the proceedings.

38. The Trial Chamber, however, did consider this issue when it denied his request to withdraw his lead trial counsel and adjourn the proceedings.⁸⁹ The Trial Chamber also explicitly referred to this decision on both occasions when it decided to continue the proceedings in Hategekimana's absence.⁹⁰ Beyond disagreeing with this decision, Hategekimana has not challenged any aspect of the Trial Chamber's reasoning. Therefore, the Appeals Chamber finds no merit in Hategekimana's contention that the Trial Chamber did not consider this matter and is satisfied that Hategekimana waived his right to be present at trial.

39. Accordingly, Hategekimana has not demonstrated that the Trial Chamber violated his right to be tried in his presence.

E. Failure to Consider Motion

40. On 3 December 2010, three days before the pronouncement of the Trial Judgement,⁹¹ Hategekimana filed a motion seeking access to the Prosecution's Electronic Disclosure System in order to search for exculpatory material.⁹² Hategekimana submits that the Trial Chamber violated his right to a fair trial by failing to issue a decision on this motion.⁹³ The Prosecution responds that the Trial Chamber implicitly denied the Motion of 3 December 2010 by issuing the Trial Judgement and, furthermore, contends that the motion lacked merit.⁹⁴

41. Contrary to the Prosecution's submission, validly filed pending motions are not implicitly dismissed with the pronouncement or filing of the trial judgement.⁹⁵ The Trial Chamber, therefore, retained jurisdiction to consider the Motion of 3 December 2010 and should have done so, in particular given the continuing nature of disclosure obligations under Rule 68 of the Rules. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in not deciding this motion.

42. The Appeals Chamber is not convinced, however, that this error invalidates the Trial Judgement. The Appeals Chamber considers that Hategekimana's rights under Rule 68 of the Rules

⁸⁹ T. 26 April 2010 pp. 4, 5. *See also* Decision of 30 April 2010.

⁹⁰ T. 26 April 2010 p. 37; T. 28 April 2009 p. 2.

⁹¹ *See supra* para. 1.

⁹² *The Prosecutor v. Idelphonse Hategekimana*, Case No. ICTR-00-55B-T, *Requête en extrême urgence de [sic] Idelphonse [sic] Hategekimana aux fins de donner injonction au Procureur de s'acquitter de ses obligations de divulgation en vertu des articles 54 et 68 du RPP, 19 et 20 du Statut*, 3 December 2010 ("Motion of 3 December 2010"), p. 5.

⁹³ Notice of Appeal, paras. 46-48; Appeal Brief, paras. 27, 28. *See also* AT. 15 December 2011 p. 12.

⁹⁴ Response Brief, paras. 58, 59.

⁹⁵ *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Decision on Pauline Nyiramasuhuko's Motion to Void Trial Chamber Decisions, 30 September 2011, p. 2.

were not infringed by his lack of access to the Electronic Disclosure System, as requested in his Motion of 3 December 2010, because the Prosecution's Rule 68 obligations are discharged only by its individual consideration of the material in its possession, and not by simply making the Electronic Disclosure System available to the defence.⁹⁶ The Appeals Chamber finds that Hategekimana has not shown either in his Motion of 3 December 2010 or on appeal that the Prosecution failed to discharge such obligations. Furthermore, the Appeals Chamber considers that the filing of such an unmeritorious motion on the eve of the pronouncement of the Trial Judgement was both vexatious and an abuse of process.

43. Accordingly, Hategekimana has not demonstrated that the Trial Chamber violated his right to a fair trial.

F. Prior Statements

44. Hategekimana submits that the Trial Chamber erred in refusing to admit prior statements of Witnesses BYQ and QDC which, in his view, are inconsistent with their testimonies at trial and call into question the Trial Chamber's reliance on their accounts.⁹⁷ Hategekimana contends that the Trial Chamber "drowned" this evidence by only allowing his counsel to read relevant portions onto the record.⁹⁸

45. The Prosecution responds that Hategekimana has failed to demonstrate that the Trial Chamber erred in its treatment of the prior statements of Witnesses BYQ and QDC.⁹⁹

46. The Appeals Chamber recalls that the decision to admit or exclude evidence pursuant to Rule 89(C) of the Rules falls within the discretion of the Trial Chamber and, therefore, warrants appellate intervention only in limited circumstances.¹⁰⁰ With respect to Witness BYQ, the Appeals Chamber notes that Hategekimana has not identified with any precision: the statement which the Trial Chamber refused to admit; the Trial Chamber's decision to deny its admission; the nature of the purported inconsistency; and its alleged impact on the witness's credibility or the findings in the Trial Judgement. In relation to Witness QDC, Hategekimana fails to appreciate that the Trial Chamber denied the admission of the witness's purported prior statement because the Trial

⁹⁶ See *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006, paras. 9, 10.

⁹⁷ Notice of Appeal, para. 50; Appeal Brief, para. 29.

⁹⁸ Notice of Appeal, para. 51; Appeal Brief, para. 30.

⁹⁹ Response Brief, paras. 47-52.

¹⁰⁰ *Simba* Appeal Judgement, para. 19.

Chamber had doubts about its authenticity.¹⁰¹ Hategekimana's submissions fail to address this reason for denying its admission.

47. Accordingly, Hategekimana has not demonstrated any error in the Trial Chamber's decision not to admit the statements related to Witnesses BYQ and QDC.

G. Assumption of the Role of Prosecutor or Witness

48. Hategekimana submits that the Trial Chamber erred "in often substituting itself either for the Prosecution or for the witness to respond in their place, thus undermining [his] interests."¹⁰² Hategekimana illustrates this claim by pointing to examples in the testimonies of Witness BYO and Witness BYQ.¹⁰³ The Prosecution responds that the Trial Chamber's control of the cross-examination of these witnesses was within its authority and discretion.¹⁰⁴

49. The Appeals Chamber recalls that, in accordance with Rule 90(F)(i) of the Rules, a trial chamber has the authority to control the examination of a witness in order to make it "effective for the ascertainment of the truth". A review of the relevant transcripts reveals that, consistent with this authority, the Trial Chamber intervened in the cross-examinations of Witnesses BYO and BYQ solely to clarify a question or to prevent a witness's testimony from being misstated.¹⁰⁵

50. Accordingly, Hategekimana has failed to show that the Trial Chamber acted outside the scope of its discretion.

H. Defence Exhibits

51. Hategekimana submits that the Trial Chamber failed to consider Defence exhibits.¹⁰⁶ In particular, Hategekimana notes that, at the status conference on 4 May 2009, he tendered into evidence several statements relating to inconsistencies in the evidence of Prosecution witnesses, which were together marked as Defence Exhibit 2.¹⁰⁷ He submits that this exhibit, however, was not correctly entered into the case file and was instead mistakenly replaced by the personal identification sheet of one of his witnesses.¹⁰⁸

¹⁰¹ See T. 23 March 2009 p. 76 (closed session) ("We would have liked to have an official document. And nothing looks official in this document. So we are sorry, Counsel, but we believe such documents are not valid.").

¹⁰² Appeal Brief, para. 31. See also Notice of Appeal, paras. 53, 54.

¹⁰³ Notice of Appeal, paras. 53, 54; Appeal Brief, paras. 31, 32.

¹⁰⁴ Response Brief, paras. 41-46.

¹⁰⁵ Witness BYO, T. 4 May 2009 p. 36; Witness BYQ, T. 1 April 2009 pp. 33-37.

¹⁰⁶ Notice of Appeal, paras. 56, 57; Appeal Brief, paras. 33, 34.

¹⁰⁷ Notice of Appeal, para. 56; Appeal Brief, para. 33.

¹⁰⁸ Notice of Appeal, para. 56; Appeal Brief, para. 33.

52. The Prosecution responds that Hategekimana has not demonstrated that any exhibit was improperly stored because the Defence never in fact formally sought admission of the relevant exhibit during its case in accordance with the Trial Chamber's instructions.¹⁰⁹

53. A review of the record reflects that the Trial Chamber did not in fact admit the exhibit mentioned by Hategekimana at the status conference. Rather, it marked a series of documents, containing excerpts of transcripts from the trial, for identification as Defence Exhibit 2.¹¹⁰ The Defence retained custody of the documents in order to clarify the proposed exhibit.¹¹¹ The Trial Chamber then asked the Defence to seek its formal admission during the next trial session.¹¹² This did not occur, which reasonably explains why another exhibit was then assigned the number "D.2". In this context, the Appeals Chamber cannot identify any error on the part of the Trial Chamber. Furthermore, Hategekimana's cursory submissions on appeal fail to identify the exculpatory nature of the purported exhibit and any potential impact on the Trial Chamber's findings.

54. Accordingly, Hategekimana has not demonstrated any error in relation to Defence Exhibit 2 which would invalidate the verdict.

I. Conclusion

55. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's First Ground of Appeal.

¹⁰⁹ Response Brief, paras. 63-65.

¹¹⁰ T. 4 May 2009 pp. 2-6 (status conference).

¹¹¹ T. 4 May 2009 p. 5 (status conference) ("Well, Madam President, if I may make a suggestion to the Trial Chamber, given that we will resume on the 22nd, if it is possible, then we are going to take all those documents back and when we resume on the 22nd it will just be a matter of nanoseconds and this issue will be sorted out.").

¹¹² T. 4 May 2009 pp. 5, 6 (status conference) ("Firstly, can they be admitted subject to clarification from you on the 22nd of June? Would you have something more concise, much clearer? [...] But certainly this is subject to clarifications from you. It has to be very clear. There's no need to file the entire transcript.").

IV. ALLEGED ERRORS RELATING TO THE MURDER OF JEAN BOSCO RUGOMBOKA (GROUND 2)

56. The Trial Chamber convicted Hategekimana of murder as a crime against humanity (Count 3) under Article 6(1) of the Statute for ordering the abduction and killing of Jean Bosco Rugomboka (“Rugomboka”).¹¹³ In particular, the Trial Chamber found that soldiers from the Ngoma Military Camp, acting on Hategekimana’s orders, abducted Rugomboka from his home on the night of 8 to 9 April 1994 and later tortured and killed him.¹¹⁴ The Trial Chamber also determined that Hategekimana could be held responsible for the killing as a superior under Article 6(3) of the Statute, which it considered exclusively in sentencing.¹¹⁵

57. Hategekimana submits that the Trial Chamber erred in convicting him for the murder of Rugomboka.¹¹⁶ In this section, the Appeals Chamber considers Hategekimana’s submissions that the Trial Chamber erred in assessing: (i) the legal elements of crimes against humanity; (ii) the forms of criminal responsibility; and (iii) the evidence.

A. Legal Elements of Crimes Against Humanity

58. The Trial Chamber found that, in April and May 1994, there was a widespread and systematic attack against the civilian population on ethnic and political grounds in Ngoma Commune and also, more generally, in Butare Prefecture.¹¹⁷ Based on the totality of the evidence, the Trial Chamber concluded that this attack began before the occurrence of the crimes for which Hategekimana was held responsible, noting, in particular, that political opponents of the MRND were targeted throughout Rwanda, including in various parts of Butare Prefecture, from 7 April 1994.¹¹⁸ The Trial Chamber found that Rugomboka, a Tutsi, was killed on political grounds based on his affiliation with the RPF and on the fact that the assailants carved an effigy of Fred Rwigema, a founding member of the RPF, into his chest.¹¹⁹

59. Hategekimana submits that the Trial Chamber erred in finding that Rugomboka’s murder formed part of the widespread and systematic attack and thus in convicting him for a crime against humanity.¹²⁰ Specifically, he contends that the Trial Chamber lacked an evidentiary basis to conclude that a widespread and systematic attack began in Ngoma Commune and Butare Prefecture

¹¹³ Trial Judgement, para. 712.

¹¹⁴ Trial Judgement, paras. 304, 306, 709.

¹¹⁵ Trial Judgement, paras. 712, 743.

¹¹⁶ Notice of Appeal, paras. 76-92; Appeal Brief, paras. 36-191; Reply Brief, paras. 48-87.

¹¹⁷ Trial Judgement, paras. 703-707.

¹¹⁸ Trial Judgement, paras. 704, 705, 710.

¹¹⁹ Trial Judgement, paras. 305, 709, 711.

¹²⁰ Appeal Brief, paras. 175-180; Reply Brief, para. 87.

from 7 April 1994.¹²¹ Moreover, he argues that the Appeals Chamber's decision in the *Karemera et al.* case taking judicial notice of the existence of widespread and systematic attacks in Rwanda in 1994 cannot overcome the lack of an evidentiary basis on the record in this case. Hategekimana further notes that this decision did not determine that all violence targeting Tutsis formed part of the attack.¹²²

60. Hategekimana submits that "all the witnesses testified that trouble began in Butare [Prefecture] on 20 and 21 April 1994, that is, after the attack on Rugomboka's house."¹²³ In a similar vein, Hategekimana highlights the Trial Chamber's finding that Tutsi civilians were targeted in Butare Prefecture "particularly" following the speech of President Sindikubwabo on 19 April 1994.¹²⁴ Hategekimana contends that the Trial Chamber failed to establish the commission of similar events or the targeting of other individuals on prohibited grounds in Rugomboka's neighbourhood in the same period. He also notes that the Indictment contains no allegations of such incidents occurring in Butare Prefecture prior to 20 April 1994, other than Rugomboka's killing.¹²⁵ According to Hategekimana, there is no link between the isolated incident of Rugomboka's killing and the widespread and systematic attack in the area which began two weeks later.¹²⁶

61. The Prosecution responds that the Trial Chamber correctly determined that Rugomboka's killing formed part of a widespread or systematic attack.¹²⁷ It notes that the existence of such an attack is a fact of common knowledge and, thus, that the Prosecution was not required to call evidence in this respect.¹²⁸ The Prosecution further notes that the relevant crime need not necessarily be committed in the midst of the attack so long as it is sufficiently connected to it.¹²⁹

62. Article 3 of the Statute requires that the crimes be committed "*as part of* a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."¹³⁰ Hategekimana fails to appreciate that the Trial Chamber did not situate Rugomboka's murder in the context of a widespread and systematic attack that was limited to Ngoma Commune or Butare Prefecture. Rather, the Trial Chamber found that this killing formed part of "a systematic attack against the civilian population on political grounds" occurring "*throughout Rwanda*,

¹²¹ Appeal Brief, para. 177; Reply Brief, para. 82.

¹²² Reply Brief, paras. 79-81, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, para. 28.

¹²³ Appeal Brief, para. 177. See also Reply Brief, para. 82.

¹²⁴ Appeal Brief, para. 178, referring to Trial Judgement, para. 680. See also Reply Brief, para. 82.

¹²⁵ Appeal Brief, para. 179; Reply Brief, para. 85.

¹²⁶ Reply Brief, paras. 84, 86.

¹²⁷ Response Brief, paras. 112-114.

¹²⁸ Response Brief, para. 113.

¹²⁹ Response Brief, para. 113, referring to *Kunarac et al.* Appeal Judgement, para. 100.

¹³⁰ Emphasis added. See also *Mrkšić and Šljivančanin* Appeal Judgement, para. 41; *Kunarac et al.* Appeal Judgement, para. 100.

including various parts of Butare [Prefecture].”¹³¹ In view of this finding, it is immaterial that the Trial Chamber did not point to evidence that there was a widespread and systematic attack specifically in Ngoma Commune or Butare Prefecture *as of 7 April 1994*.¹³² Hategekimana has not challenged on appeal the reasonableness of the Trial Chamber’s finding that this murder related to a systematic attack on political grounds which took place throughout Rwanda.

63. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in finding that Rugomboka’s murder formed part of a systematic attack throughout Rwanda against political opponents of the MRND party.

B. Forms of Responsibility

1. Responsibility for Ordering under Article 6(1) of the Statute

64. The Trial Chamber found that Hategekimana was present at and “led the abduction [of Rugomboka] and that soldiers under his command clearly obeyed him and executed his orders.”¹³³ The Trial Chamber further found that, after the abduction, Rugomboka was detained at the Ngoma Military Camp and that soldiers subsequently “dumped his body” in the forest.¹³⁴ In addition, the Trial Chamber found that Hategekimana took the following actions in relation to Rugomboka’s family and the local population following the abduction and killing:

In a threatening manner, Hategekimana then closely monitored the actions and gestures of members of the population, by preventing any action on their part during the transportation of Rugomboka’s body to his house and during his burial. Hategekimana specifically prohibited the family from leaving their residential compound after Rugomboka’s abduction. He also prohibited the family, as well as members of the population, from using a vehicle to transport Rugomboka’s body, from mourning and from gathering after the burial.¹³⁵

Based on these findings, the Trial Chamber concluded that “the only logical and reasonable inference is that Hategekimana ordered the murder of Rugomboka.”¹³⁶

65. Hategekimana submits that the Trial Chamber erred in finding that he ordered the killing of Rugomboka.¹³⁷ He asserts that, as the Trial Chamber recognized, no witness testified that

¹³¹ Trial Judgement, para. 710 (emphasis added).

¹³² See *Bagosora and Nsengiyumva* Appeal Judgement, para. 390 (“Nsengiyumva’s argument that the Trial Chamber erred in ‘taking the country of Rwanda as one crime scene’ implies that, in order to qualify as crimes against humanity, the attacks in Gisenyi should have been shown to have been widespread or systematic *independently* of attacks taking place elsewhere in Rwanda. Such a suggestion is, however, erroneous, as the requirement is that the attacks be committed within a broader context, that is, *as part of* a widespread or systematic attack.”).

¹³³ Trial Judgement, para. 304.

¹³⁴ Trial Judgement, para. 304.

¹³⁵ Trial Judgement, para. 304.

¹³⁶ Trial Judgement, para. 304.

¹³⁷ Appeal Brief, paras. 181-186.

Hategekimana gave the order and there was no circumstantial evidence of Rugomboka's murder.¹³⁸ In his view, it was therefore impossible to establish that there was an order to kill Rugomboka and that the people who killed him did so on Hategekimana's order.¹³⁹ Hategekimana contends that, in reaching its findings, the Trial Chamber gave undue weight to his position of authority and to his actions following the killing.¹⁴⁰ Furthermore, Hategekimana argues that the Trial Chamber erred in convicting him because it made no findings concerning a "statement or act by [him] revealing hatred for Rugomboka's political opinion and the will to commit a murder for political reasons."¹⁴¹

66. The Prosecution responds that the Trial Chamber reasonably concluded on the basis of the circumstantial evidence, in particular related to his actions during the course of the abduction, that Hategekimana, as the commander of the Ngoma Military Camp, ordered the killing of Rugomboka.¹⁴²

67. The Appeals Chamber recalls 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.¹⁴³ Ordering, like any other form of responsibility, can be inferred from circumstantial evidence, so long as it is the only reasonable inference.¹⁴⁴

68. As described above,¹⁴⁵ the Trial Chamber explained why the evidence compelled the conclusion that Hategekimana issued the order to kill Rugomboka.¹⁴⁶ In addition, even though there is no direct evidence that soldiers committed Rugomboka's killing,¹⁴⁷ the Trial Chamber inferred this based on circumstantial evidence,¹⁴⁸ which was within its discretion.¹⁴⁹ Based on the Trial Chamber's findings, Hategekimana clearly played a prominent role in Rugomboka's abduction and in monitoring and controlling the events in the aftermath of the killing. In addition, soldiers detained Rugomboka at the Ngoma Military Camp prior to his death and later disposed of his mutilated corpse in the forest. Beyond challenging the reliability of the underlying evidence

¹³⁸ Appeal Brief, paras. 183, 186.

¹³⁹ Appeal Brief, para. 186.

¹⁴⁰ Appeal Brief, para. 185.

¹⁴¹ Appeal Brief, para. 187.

¹⁴² Response Brief, paras. 106-110.

¹⁴³ *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, para. 75. See also *Nahimana et al.* Appeal Judgement, para. 481; *Gacumbitsi* Appeal Judgement, para. 182; *Semanza* Appeal Judgement, para. 361; *Galić* Appeal Judgement, para. 176; *Kordić and Čerkez* Appeal Judgement, para. 28.

¹⁴⁴ *Renzaho* Appeal Judgement, para. 318. See also *Dragomir Milošević* Appeal Judgement, para. 265; *Galić* Appeal Judgement, para. 178.

¹⁴⁵ See *supra* para. 64.

¹⁴⁶ Trial Judgement, para. 304.

¹⁴⁷ Trial Judgement, paras. 286, 292.

¹⁴⁸ Trial Judgement, para. 296.

¹⁴⁹ See, e.g., *Muhimana* Appeal Judgement, paras. 49, 50 (finding no error in the Trial Chamber's conclusion based on circumstantial evidence that two women were raped).

discussed below, Hategekimana has not identified any other reasonable inference that could be drawn from these findings than that Hategekimana ordered soldiers to kill Rugomboka and that they carried out this order.

69. Finally, contrary to Hategekimana's submission, the Trial Chamber was not required to find that Hategekimana possessed any animus against Rugomboka's political views or that Hategekimana had the specific intent to kill him on political grounds. The Appeals Chamber has held that "the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent."¹⁵⁰

70. For the foregoing reasons, Hategekimana has not demonstrated that the Trial Chamber erred in convicting him under Article 6(1) of the Statute for ordering the killing of Rugomboka.

2. Responsibility as a Superior under Article 6(3) of the Statute

71. The Trial Chamber found Hategekimana responsible for the killing of Rugomboka as a superior based on Article 6(3) of the Statute.¹⁵¹ The Trial Chamber did not enter a conviction on this basis and only took it into account as an aggravating factor in sentencing.¹⁵²

72. Hategekimana submits that the Trial Chamber erred in finding that he was aware of the criminal conduct of his subordinates.¹⁵³ In particular, he challenges the Trial Chamber's finding in paragraph 706 of the Trial Judgement that, due to his position as commander of the Ngoma Military Camp and as a member of the Prefecture Security Council, he must have received regular intelligence reports.¹⁵⁴ Hategekimana argues that the Trial Chamber's findings that he was a member of the Prefecture Security Council and that he received briefings lack an evidentiary basis.¹⁵⁵

73. The Appeals Chamber recalls that for an accused to be held responsible under Article 6(3) of the Statute, the Prosecution must prove, among other things, that the accused knew or had reason to know that the crime was going to be committed or had been committed by his subordinates.¹⁵⁶ In entering the finding that Hategekimana was responsible as a superior for Rugomboka's murder, the Trial Chamber did not discuss his knowledge of his subordinates' criminal conduct.¹⁵⁷

¹⁵⁰ *Akayesu* Appeal Judgement, para. 467.

¹⁵¹ Trial Judgement, para. 712.

¹⁵² Trial Judgement, paras. 712, 743.

¹⁵³ Appeal Brief, paras. 188-190.

¹⁵⁴ Appeal Brief, paras. 188, 189.

¹⁵⁵ Appeal Brief, paras. 188, 189.

¹⁵⁶ *Setako* Appeal Judgement, para. 269; *Nahimana et al.* Appeal Judgement, para. 484; *Gacumbitsi* Appeal Judgement, para. 143; *Halilović* Appeal Judgement, para. 59; *Delalić et al.* Appeal Judgement, para. 222.

¹⁵⁷ Trial Judgement, para. 712.

Hategekimana's knowledge, however, is clearly apparent in the Trial Chamber's finding that he ordered the soldiers to kill Rugomboka, as well as from its findings as to Hategekimana's presence and conduct during the abduction and after Rugomboka's death.¹⁵⁸ Thus, any possible error in the Trial Chamber's assessment of Hategekimana's role as a purported member of the Prefecture Security Council would not result in a miscarriage of justice.

74. The Appeals Chamber further notes that paragraph 706 of the Trial Judgement relates to Hategekimana's knowledge of whether his actions formed part of a widespread and systematic attack against the Tutsi civilian population. It concerns neither Hategekimana's knowledge of his subordinates' participation in Rugomboka's murder nor his knowledge of whether his actions formed part of the systematic attack on political grounds. Therefore, this assessment does not impact Hategekimana's responsibility as a superior under Article 6(3) of the Statute for the murder of Rugomboka.

75. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in holding him responsible as a superior for this crime under Article 6(3) of the Statute.

C. Assessment of the Evidence

76. The Trial Chamber found that, on the night of 8 to 9 April 1994, Hategekimana and soldiers from the Ngoma Military Camp forcibly entered Rugomboka's home, while other civilian assailants remained outside.¹⁵⁹ On Hategekimana's orders, the soldiers searched the house and then forced Rugomboka to wear a white t-shirt bearing the effigy of Fred Rwigema, a founding member of the RPF, which they found in the house.¹⁶⁰ The soldiers then took Rugomboka from his house and brought him to the Ngoma Military Camp where Hategekimana detained him.¹⁶¹ On 9 April 1994, Witnesses QDC and QCL made enquiries into Rugomboka's whereabouts and the officials they contacted were either evasive or intimated that Hategekimana was involved.¹⁶² The Trial Chamber further found that soldiers subsequently removed Rugomboka from the camp and that his mutilated corpse was found on the morning of 10 April 1994 in a forest near the camp.¹⁶³ Following the killing, Hategekimana monitored the actions of the local population and Rugomboka's family and exercised control over the mourning of Rugomboka's death, as well as the transport and the burial

¹⁵⁸ Trial Judgement, paras. 304, 711.

¹⁵⁹ Trial Judgement, paras. 263, 269, 280, 285, 304, 711.

¹⁶⁰ Trial Judgement, paras. 283, 288, 711.

¹⁶¹ Trial Judgement, paras. 286, 288, 289, 304.

¹⁶² Trial Judgement, para. 286.

¹⁶³ Trial Judgement, paras. 292, 296, 304.

of his body.¹⁶⁴ Based on these findings, the Trial Chamber concluded that Hategekimana ordered the murder of Rugomboka.¹⁶⁵

77. Hategekimana challenges various aspects of the assessment of the evidence underpinning these findings.¹⁶⁶

1. The Abduction

(a) Prosecution Witnesses QDC and QCN

78. The Trial Chamber based its findings relating to the initial phase of the attack on Rugomboka's home principally on the direct evidence of Witnesses QDC and QCN and considered that their testimonies corroborated each other.¹⁶⁷ In particular, the Trial Chamber found that Witness QDC was present at Rugomboka's home on the night of 8 to 9 April 1994.¹⁶⁸ The Trial Judgement reflects that, according to her testimony, assailants arrived at Rugomboka's home at around 11.00 p.m. and unsuccessfully attempted to enter the house.¹⁶⁹ Only after hearing the assailants cock their guns, did Rugomboka and his brother finally open the door and allow them into the house.¹⁷⁰

79. The Trial Chamber found that Witness QCN observed the events at Rugomboka's home that night through a window.¹⁷¹ According to the Trial Judgement, the witness's testimony reflects that, between 10.00 and 11.00 p.m., soldiers first surrounded her house before proceeding to Rugomboka's home nearby.¹⁷² The Trial Chamber also noted the testimony of Witness QCN that the lights were on in Rugomboka's house and his door was open, and that she saw many soldiers in his house.¹⁷³

80. Hategekimana submits that the Trial Chamber erred in relying on these accounts and in considering that they corroborated each other, in particular focusing on the reliability of Witness QCN's evidence.¹⁷⁴ Hategekimana argues that Witness QCN could not have observed what transpired at Rugomboka's home given the poor lighting and the curtains obstructing her view.¹⁷⁵

¹⁶⁴ Trial Judgement, para. 304.

¹⁶⁵ Trial Judgement, para. 304.

¹⁶⁶ Appeal Brief, paras. 37-171, 173, 174.

¹⁶⁷ Trial Judgement, paras. 264-268.

¹⁶⁸ Trial Judgement, paras. 264, 281.

¹⁶⁹ Trial Judgement, para. 234.

¹⁷⁰ Trial Judgement, para. 234.

¹⁷¹ Trial Judgement, para. 264.

¹⁷² Trial Judgement, para. 242.

¹⁷³ Trial Judgement, paras. 242, 264.

¹⁷⁴ Appeal Brief, paras. 37-51.

¹⁷⁵ Appeal Brief, paras. 37-39, 45.

Hategekimana further argues that the Trial Chamber unreasonably minimized the discrepancies between the two witnesses' accounts as well as those between Witness QCN's testimony and her prior statement.¹⁷⁶ In particular, he argues that the Trial Chamber erred in explaining certain differences based on trauma since Witness QCN was not a victim of the attack.¹⁷⁷ Finally, Hategekimana contends that the Trial Chamber failed to make key findings on some issues in order to show that Witness QCN was able to follow the events and to demonstrate that it was possible for her not to have seen Hamdani, a neighbour who tried to assist the soldiers in gaining entry into Rugomboka's home, or at least to hear the calls for help that prompted his arrival. In particular, Hategekimana argues that the Trial Chamber failed to make findings on: the layout of the surrounding area of Rugomboka's home; the existence of the window at Witness QCN's home; and the number of assailants.¹⁷⁸

81. The Prosecution responds that the Trial Chamber reasonably credited the testimonies of Witnesses QDC and QCN.¹⁷⁹

82. The Appeals Chamber is not convinced that Hategekimana has identified any inconsistency between or within the accounts of Witnesses QDC and QCN that would call into question the Trial Chamber's reliance on their evidence. The Appeals Chamber recalls that a trial chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.¹⁸⁰ It is within the discretion of the trial chamber to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.¹⁸¹ The Appeals Chamber further recalls 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."¹⁸²

83. The Trial Chamber considered that Witnesses QDC and QCN were consistent on a number of details, including that the attack occurred on the night of 8 to 9 April 1994, the time at which it began, its sequence, and the fact that the attack involved a large number of soldiers who entered

¹⁷⁶ Appeal Brief, paras. 41, 43-51.

¹⁷⁷ Appeal Brief, para. 42.

¹⁷⁸ Appeal Brief, paras. 38, 45-50.

¹⁷⁹ Response Brief, paras. 72, 73. *See also* AT. 15 December 2011 p. 21.

¹⁸⁰ *Munyakazi* Appeal Judgement, para. 71; *Renzaho* Appeal Judgement, para. 355; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

¹⁸¹ *Munyakazi* Appeal Judgement, para. 71; *Renzaho* Appeal Judgement, para. 355; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

¹⁸² *Nahimana et al.* Appeal Judgement, para. 428. *See also* *Munyakazi* Appeal Judgement, para. 71; *Rukundo* Appeal Judgement, para. 201; *Karera* Appeal Judgement, para. 173.

Rugomboka's home.¹⁸³ The Trial Chamber discussed the purported inconsistencies highlighted by Hategekimana and considered that they were minor and easily explained.¹⁸⁴

84. The Appeals Chamber observes that, although the Trial Chamber did not specify the basis of its finding of trauma in connection with Witness QCN, it follows from her testimony that she was "frightened" after seeing soldiers enter Rugomboka's house.¹⁸⁵ This evidence provides a reasonable basis in support of the Trial Chamber's finding.

85. In addition, as noted by the Trial Chamber, there is nothing in Witness QCN's testimony to suggest that she closely followed all aspects of the attack on Rugomboka's house, including the soldiers' initial entry.¹⁸⁶ Witness QCN also stated that she could not hear any cries for help because she was inside her house.¹⁸⁷ Therefore, Hategekimana has not shown that it was unreasonable for the Trial Chamber to accept that Witness QCN did not see or hear the incident involving Hamdani.

86. The Appeals Chamber considers that, given the factors noted by the Trial Chamber, such as the witnesses' varying vantage points, the number of soldiers, the passage of time, and trauma,¹⁸⁸ it was reasonable for the Trial Chamber to find that Witnesses QDC and QCN corroborated each other. The Appeals Chamber further observes that the specific hours offered by the witnesses in respect of the commencement of the attack were only estimates and thus they are not incompatible.

87. Finally, the Trial Chamber heard testimony from Witnesses QCN concerning the existence of the window in her house, the estimated distance from her house to Rugomboka's home, and her ability to see soldiers after they entered Rugomboka's house.¹⁸⁹ It was within the Trial Chamber's discretion to accept this direct testimony, and Hategekimana has not identified anything in the record which might cast doubt on the reliability of her observations. Indeed, it follows from Witness QCN's testimony that the lights were turned on in Rugomboka's house and her curtains were drawn only after she observed the soldiers in Rugomboka's living room.¹⁹⁰

¹⁸³ Trial Judgement, paras. 264, 267.

¹⁸⁴ Trial Judgement, paras. 265-268.

¹⁸⁵ T. 26 March 2009 p. 28 (closed session).

¹⁸⁶ See Trial Judgement, para. 275 ("Contrary to the Defence submission, the [Trial] Chamber notes that Witness QCN by no means testified that she spent hours watching what was happening in Rugomboka's house, be it during the proceedings or in her prior statement."). It also follows from Witness QCN's testimony that, when she looked out of her window, the soldiers were already in Rugomboka's house. See T. 26 March 2009 p. 28 (closed session).

¹⁸⁷ T. 30 March 2009 p. 30 (closed session) ("We were in a room, and it is difficult to hear the noise coming from outside. But on the following morning, Bosco's mother said that someone had cried out. But when he observed that there were soldiers, he stopped shouting. But we did not hear those cries from the room in which we were.").

¹⁸⁸ Trial Judgement, paras. 265-268.

¹⁸⁹ T. 26 March 2009 pp. 28, 29.

¹⁹⁰ T. 30 March 2009 p. 30.

88. Accordingly, the Appeals Chamber considers that it was reasonable for the Trial Chamber to accept the evidence of Witnesses QDC and QCN concerning the commencement of the attack.

(b) Involvement of Soldiers from the Ngoma Military Camp

89. The Trial Chamber found that soldiers from the Ngoma Military Camp abducted Rugomboka on the night of 8 to 9 April 1994.¹⁹¹ The Trial Chamber relied on Witnesses QDC and QCN who provided first-hand evidence of the role of soldiers during the attack and who heard that the soldiers were from the Ngoma Military Camp.¹⁹² In this respect, the Trial Chamber found that Witness QDC learned from Rugomboka's older brother, Martial, the names of three soldiers who participated in the attack: Pacifique, Gatwaza, and Habimana.¹⁹³ The Trial Chamber considered this information together with the accounts of Witnesses QCL, Masinzo, and BYR, who confirmed in varying degrees that these soldiers were from the Ngoma Military Camp.¹⁹⁴ In addition, the Trial Chamber noted that Witness BYR, also a Ngoma Military Camp soldier, observed his fellow soldiers Pacifique and Gatwaza returning to the camp on the morning of 9 April 1994 with Rugomboka in the company of another camp soldier named Niyonteze.¹⁹⁵ Finally, the Trial Chamber considered the evidence of Witnesses QCL, XR, and Masinzo who heard that the assailants came from the Ngoma Military Camp.¹⁹⁶ The Trial Chamber also accepted that some members of the *Interahamwe* were present during the attack but did not find that they participated in Rugomboka's abduction, torture, or murder.¹⁹⁷

90. Hategekimana submits that the Trial Chamber erred in finding that soldiers from the Ngoma Military Camp abducted Rugomboka.¹⁹⁸ In particular, he argues that Witnesses QDC and QCN had only a limited and unreliable basis of knowledge for recognizing the assailants as soldiers.¹⁹⁹ Hategekimana further notes that these witnesses offered no description of the assailants' insignia or dress which would identify them as soldiers.²⁰⁰ He also highlights an alleged discrepancy between the evidence of Witness QCN and her prior statement, in which she identified the assailants as bandits.²⁰¹

¹⁹¹ Trial Judgement, paras. 280, 304.

¹⁹² Trial Judgement, paras. 269-272.

¹⁹³ Trial Judgement, para. 269.

¹⁹⁴ Trial Judgement, paras. 269, 270.

¹⁹⁵ Trial Judgement, paras. 270, 288, 289.

¹⁹⁶ Trial Judgement, para. 270.

¹⁹⁷ Trial Judgement, paras. 271, 303.

¹⁹⁸ Appeal Brief, paras. 52-90, 143.

¹⁹⁹ Appeal Brief, paras. 69-71, 74; Reply Brief, paras. 63, 64.

²⁰⁰ Appeal Brief, paras. 60, 61.

²⁰¹ Appeal Brief, paras. 62, 63.

91. In addition, Hategekimana challenges the Trial Chamber's reliance on Witness BYR by disputing that he was a soldier assigned to the Ngoma Military Camp and questioning his credibility based on his detention in Rwanda.²⁰² Hategekimana further argues that the Trial Chamber had insufficient evidence to determine that the soldiers seen by Witness BYR arriving at the camp were indeed the same individuals present at Rugomboka's house.²⁰³ Hategekimana also challenges the Trial Chamber's reliance on the hearsay evidence of Witnesses QCN, QCL, XR, and Masinzo as corroboration for Witness QDC since their basis of knowledge was Witness QDC's own account.²⁰⁴

92. Finally, Hategekimana argues that certain aspects of the evidence belie the witnesses' conviction and the Trial Chamber's findings that soldiers played a role in the event. More specifically, he questions why, if soldiers participated in the attack, Witness QCN's husband called the gendarmerie and reported that the area was under attack from "unknown persons" and also why Witness QDC initially searched for Rugomboka at the gendarmerie.²⁰⁵ Hategekimana further contends that, if soldiers had participated in the attack, they would not have knocked on the door, but rather forced it open.²⁰⁶ Hategekimana also notes that the Trial Chamber accepted that civilians and *Interahamwe* were present at the scene of the attack and argues that it was therefore impossible to find who abducted Rugomboka.²⁰⁷

93. The Prosecution responds that the Trial Chamber had a reasonable basis to determine that soldiers from the Ngoma Military Camp abducted Rugomboka.²⁰⁸

94. In finding that soldiers carried out the abduction, the Trial Chamber relied principally on the direct evidence of Witnesses QDC and QCN, who testified that a large number of soldiers attacked Rugomboka's residence.²⁰⁹ The Appeals Chamber does not accept Hategekimana's argument that the witnesses lacked an adequate basis for identifying the assailants as soldiers. Although the Trial Chamber did not expressly address this issue, the Appeals Chamber notes that, according to Witness QDC, these assailants wore "military uniforms, a military cap and military boots".²¹⁰ The witness further explained that the assailants' berets were black, that this was the colour worn by soldiers, and that she was able to distinguish soldiers from gendarmes on this basis.²¹¹ In view of

²⁰² Appeal Brief, paras. 78-87, 128; Reply Brief, paras. 67, 68.

²⁰³ Appeal Brief, paras. 88-89; Reply Brief, para. 69.

²⁰⁴ Appeal Brief, paras. 76, 77; Reply Brief, para. 66.

²⁰⁵ Appeal Brief, paras. 64, 65, 75. See also AT. 15 December 2011 p. 18.

²⁰⁶ Appeal Brief, para. 75. See also AT. 15 December 2011 p. 19.

²⁰⁷ Appeal Brief, paras. 56-59.

²⁰⁸ Response Brief, paras. 80-103.

²⁰⁹ Trial Judgement, paras. 264-272.

²¹⁰ T. 23 March 2009 p. 29 (closed session).

²¹¹ T. 23 March 2009 p. 41 (closed session) ("And they asked me what type of attire the soldiers who had taken away Bosco were wearing, what type of berets they were wearing, and I explained that they were wearing black berets. And then they told me that I was lying, that I did not know the soldiers, and they brought me red berets. And I told them no,

this testimony, the Appeals Chamber finds no merit in Hategekimana's submission that Witness QDC lacked an adequate basis of knowledge to identify the assailants as soldiers.

95. Consistent with the evidence of Witness QDC, Witness QCN also described the assailants' attire as "military uniforms".²¹² The Appeals Chamber observes, however, that Witness QCN did not provide any additional identifying details with respect to the uniforms, other than describing them as camouflage.²¹³ She also noted that she was not able to distinguish between military uniforms.²¹⁴ That said, the Trial Chamber simply considered that Witness QCN's testimony "supplement[ed] the testimony of Witness QDC."²¹⁵ Given that Witness QDC had an adequate basis for identifying the assailants as soldiers, Hategekimana has not demonstrated why any additional detail was required from Witness QCN. Accordingly, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to rely on Witnesses QDC and QCN in order to establish the involvement of soldiers in the attack.

96. In addition, as the Trial Chamber explained, there is no inconsistency between Witness QCN's testimony about seeing soldiers and her prior statement in which she stated that she initially believed that they were bandits, only later to learn that they were soldiers.²¹⁶ Indeed, a review of Witness QCN's evidence reveals that she agreed with her prior statement.²¹⁷ Hategekimana fails to appreciate that Witness QCN's initial uncertainty as to the identity of the assailants is not what is important. The fact remains that Witness QCN consistently described the assailants as wearing military attire in both her statement and testimony.²¹⁸ As noted above, it is this observation which reasonably provides corroboration for Witness QDC's evidence. Accordingly, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that there was no inconsistency between Witness QCN's testimony and her prior statement.

those soldiers were not wearing those type of berets, that I knew these berets and these were berets worn by gendarmes. I insisted that those soldiers were bearing black berets.").

²¹² T. 26 March 2009 pp. 29, 30 (closed session).

²¹³ T. 26 March 2009 pp. 29, 30 (closed session). *See also* T. 30 March 2009 p. 3 ("Usually when I'm talking about military uniforms, I'm referring to camouflage. That was what I observed when I saw them.").

²¹⁴ T. 30 March 2009 p. 3.

²¹⁵ Trial Judgement, para. 272.

²¹⁶ Trial Judgement, paras. 273, 274. Hategekimana also questions Witness QCN's credibility asserting that, given her profession, she would not have been able to afford a landline telephone. *See* Appeal Brief, para. 66. The Appeals Chamber finds that this argument is speculative and does not call into question the reasonableness of the Trial Chamber's reliance on Witness QCN's testimony.

²¹⁷ T. 30 March 2009 p. 8 ("First of all, we thought that they were thieves. But, as time went by, we learned that they were soldiers, because on the following day, the people who had come under attack told us that they had recognised some soldiers among the group of attackers. In these families there were children who recognized the soldiers. And we also subsequently came to the conclusion that these people were soldiers who were based at the Ngoma [Military Camp].").

²¹⁸ T. 26 March 2009 pp. 29, 30 (closed session); Trial Judgement, para. 274.

97. Finally, Hategekimana's suggestion that, had soldiers participated, they would have forced their way into the house is mere speculation and does not call into question the reasonableness of the Trial Chamber's findings.

98. Accordingly, the Appeals Chamber finds that the Trial Chamber reasonably relied on the evidence of Witnesses QDC and QCN in finding that soldiers attacked Rugomboka's house and carried out his abduction.

99. The Appeals Chamber observes that the key elements linking the soldiers to the Ngoma Military Camp are: (i) Witness QDC's testimony that Pacifique, Gatwaza, and Habimana participated in the attack; (ii) the evidence of other witnesses, who knew these soldiers, confirming their affiliation with the Ngoma Military Camp; and (iii) Witness BYR's account of Pacifique, Gatwaza, and Lieutenant Niyonteze returning to the camp with a prisoner on the morning of 9 April 1994.²¹⁹

100. The Trial Chamber noted that Witness QDC identified the assailants as being Ngoma Military Camp soldiers based on information from Rugomboka's older brother, Martial, who recognized Pacifique, Gatwaza, and Habimana.²²⁰ A review of Witness QDC's testimony reflects that she did not attribute this information specifically to Martial and instead spoke more broadly about it coming from one of Rugomboka's siblings.²²¹ However, Witness QCN explained that Witness QDC told her on the morning following the attack that the identification information specifically came from Martial.²²² Consequently, there is no merit to Hategekimana's contention that the source of Witness QDC was not identified. Accordingly, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to rely on Witness QDC in order to establish the involvement of these soldiers in the attack.

101. It follows from Witness QDC's testimony that Rugomboka's home was near the Ngoma Military Camp and that Rugomboka and his brother were familiar with soldiers from the camp and appear to have played football there.²²³ Hategekimana has not shown that, in these circumstances, it would be unreasonable for the Trial Chamber to accept that Rugomboka's brother could identify some of the camp's soldiers. Furthermore, Hategekimana does not dispute the evidence that Pacifique, Gatwaza, and Habimana were soldiers serving at the Ngoma Military Camp.

²¹⁹ Trial Judgement, paras. 269-272.

²²⁰ Trial Judgement, para. 269.

²²¹ T. 23 March 2009 p. 40 (closed session). Rugomboka had seven siblings. See T. 23 March 2009 p. 26 (closed session).

²²² T. 30 March 2009 p. 13 (closed session). The Appeals Chamber notes that in the English version of the transcripts of Witness QCN's testimony "Martial" is spelled "Marcel". The Appeals Chamber notes, however, that in the French version it is correctly spelled "Martial". See T. 30 March 2009 p. 15 (French) (closed session).

²²³ T. 23 March 2009 pp. 42, 64 (closed session).

102. In addition, the Trial Chamber reasonably concluded that Witness BYR's observations corroborated Witness QDC's second-hand testimony that soldiers from the Ngoma Military Camp participated in the abduction. In the Trial Judgement, the Trial Chamber extensively discussed the challenges to Witness BYR's credibility raised by Hategekimana on appeal, including his assignment to the Ngoma Military Camp and his ongoing criminal proceedings in Rwanda.²²⁴ The Trial Chamber, nonetheless, considered Witness BYR's account as "detailed and coherent",²²⁵ reliable²²⁶ and "credible".²²⁷ On appeal, Hategekimana simply attempts to re-litigate matters relating to his credibility and fails to demonstrate that the Trial Chamber erred in accepting the witness's evidence.

103. Furthermore, Hategekimana has identified no evidence in the record which might call into question the Trial Chamber's conclusion that the soldiers named Pacifique and Gatwaza, observed by Witness BYR entering the camp on the morning of 9 April 1994, were the same as those soldiers participating in Rugomboka's abduction. Hategekimana places considerable weight on Witness BYR's inability to identify Rugomboka – including his failure to mention the effigy of Fred Rwigema on the t-shirt – as well as on the discrepancy in timing between when the assailants left Rugomboka's house and their arrival at the camp, and the difference in the number of soldiers returning and those said to have participated in the operation.²²⁸

104. Hategekimana, however, has not demonstrated why in the circumstances it would have been unreasonable for Witness BYR not to have observed or recalled the effigy on the t-shirt. In addition, the Trial Chamber explained the lapse between the abduction and arrival at the camp by reference to the fact that the soldiers returned to the house for a further search after obtaining information.²²⁹ There is also no basis for Hategekimana's suggestion that all soldiers participating in the abduction and search of Rugomboka's house would have returned at the same time.

105. The Appeals Chamber considers that the proximity of Rugomboka's house to the Ngoma Military Camp, the timing of the abduction and arrival at the camp, and the presence of a prisoner wearing a white t-shirt, provided the Trial Chamber with a reasonable basis to confirm that the soldiers who abducted Rugomboka returned to the camp with him on 9 April 1994.

106. In view of this evidence, Hategekimana's challenges to the Trial Chamber's reliance on the evidence of Witnesses QCN, QCL, XR and Masinzo, who heard that soldiers from the Ngoma

²²⁴ Trial Judgement, paras. 292-295.

²²⁵ Trial Judgement, para. 289.

²²⁶ Trial Judgement, para. 293.

²²⁷ Trial Judgement, para. 295.

²²⁸ Appeal Brief, paras. 127-143.

²²⁹ Trial Judgement, para. 291.

Military Camp abducted Rugomboka, are immaterial. In any case, beyond noting this evidence,²³⁰ it does not follow from the Trial Judgement that the Trial Chamber placed decisive weight on this aspect of these witnesses' evidence. In a similar vein, it is also irrelevant that Witness QDC was not aware at the time of the attack or in its immediate aftermath that the soldiers were specifically from the Ngoma Military Camp.²³¹

107. In addition, the Appeals Chamber is satisfied that the Trial Chamber's finding on the presence of civilian assailants is in no way contradictory to its finding that soldiers from the Ngoma Military Camp abducted Rugomboka,²³² particularly in light of Witness BYR's testimony. Hategekimana also fails to appreciate that, although Witness QDC mentioned the presence of civilians, her testimony reflects that these individuals remained outside the house.²³³ In addition, although the Trial Chamber accepted the evidence of Defence witnesses that civilian assailants were present, it identified a number of concerns regarding their credibility and did not accept the specific details of their accounts as to how the attack unfolded.²³⁴ Hategekimana has not demonstrated that this determination was unreasonable.

108. Accordingly, Hategekimana has failed to demonstrate that the Trial Chamber erred in finding that soldiers from the Ngoma Military Camp attacked and abducted Rugomboka from his home on the night of 8 to 9 April 1994.

(c) Presence of Hategekimana

109. The Trial Chamber found that Hategekimana was present during the abduction of Rugomboka and that he "directed operations and gave instructions which were followed by Ngoma [Military] Camp soldiers."²³⁵ In finding that Hategekimana was present during the abduction, the Trial Chamber relied principally on the evidence of Witness QDC.²³⁶ The Trial Chamber noted that she did not personally know Hategekimana prior to the abduction.²³⁷ However, it found that, during the attack, Rugomboka's older brother, Martial, informed Witness QDC that a particular soldier standing against a wall issuing instructions to others was "Bikomago Ildephonse", commander of the Ngoma Military Camp.²³⁸ The Trial Chamber then relied on evidence that "Bikomago" was well

²³⁰ Trial Judgement, para. 272.

²³¹ Hategekimana also challenges various aspects of the accounts of Witnesses QDC and QCL concerning their efforts to locate Rugomboka following the attack. *See* Appeal Brief, paras. 120, 121, 123. These findings, however, do not underpin Hategekimana's criminal responsibility.

²³² Trial Judgement, para. 271.

²³³ T. 23 March 2009 pp. 63, 64.

²³⁴ Trial Judgement, paras. 278, 279.

²³⁵ Trial Judgement, para. 285.

²³⁶ Trial Judgement, paras. 281-284.

²³⁷ Trial Judgement, para. 281.

²³⁸ Trial Judgement, para. 281.

known in the community as the alias for Hategekimana.²³⁹ The Trial Chamber also considered Witness QDC's physical description of the man identified as "Bikomago", noting that she mentioned "a man of medium height, who was quite stocky, not very dark, with a pot belly."²⁴⁰ The Trial Chamber noted its similarity with the description of other credible witness, notably, Witness QCL who described a "man who 'was not tall, and was not very dark, with a big stomach.'"²⁴¹ Finally, the Trial Chamber noted that the participation of soldiers from the Ngoma Military Camp and the fact that "Bikomago" was "supervising and monitoring [their] actions" further supported the conclusion that Hategekimana was the soldier identified by Witness QDC as "Bikomago".²⁴²

110. Hategekimana submits that no reasonable trier of fact could have accepted Witness QDC's evidence identifying him during the abduction of Rugomboka.²⁴³ Hategekimana challenges several aspects of the identification, including that: it was made under difficult and unclear circumstances; Witness QDC's basis for the identification at the time was hearsay; he was identified only as "Bikomago", not by his proper name or position; Witness QDC's association of "Bikomago" with Hategekimana is suspect as it came after the genocide and its basis is unclear; his local fame is speculation; the physical description of him was general and vague; and the Trial Chamber arbitrarily dismissed or failed to consider the descriptions provided by Defence witnesses of him having a beard.²⁴⁴

111. The Prosecution responds that the Trial Chamber reasonably concluded that Hategekimana was present during the abduction and led the attack.²⁴⁵

112. The Appeals Chamber is not convinced that the traumatic circumstances of the attack prevented the Trial Chamber from reasonably relying on Witness QDC's observations about what transpired during the attack. The Trial Chamber was aware of the traumatic nature of the incident,²⁴⁶ and its extensive examination of Witness QDC's testimony reflects that it accepted it after careful consideration.²⁴⁷ Hategekimana fails to appreciate that Witness QDC was present

²³⁹ Trial Judgement, para. 281.

²⁴⁰ Trial Judgement, para. 282.

²⁴¹ Trial Judgement, para. 282, citing T. 16 March 2009 p. 32. The relevant transcript indicates that Witness QCL testified: "[Hategekimana] was not tall, he had a big chest, and he was not very dark." See T. 16 March 2009 p. 32. While the Appeals Chamber notes the slight discrepancy between the transcript and its representation in the Trial Judgement, it considers this to be minor and have no impact on the Trial Chamber's finding *per se*.

²⁴² Trial Judgement, para. 284.

²⁴³ Appeal Brief, paras. 91-101, 104-107; Reply Brief, paras. 50-52, 54.

²⁴⁴ Appeal Brief, paras. 92-101, 103-118; Reply Brief, paras. 50-57. See also AT. 15 December 2011 pp. 15, 16, 18, 19, 38.

²⁴⁵ See Response Brief, paras. 106-110. See also AT. 15 December 2011 pp. 20-23.

²⁴⁶ Trial Judgement, para. 299.

²⁴⁷ Trial Judgement, paras. 264, 266-272, 281-284, 286, 288, 290-292, 299, 301, 302, 304.

throughout the operation, that the lights were on in the house, and that she personally interacted at close range with the soldier identified as “Bikomago”.²⁴⁸

113. In addition, the Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to rely on Witness QDC’s identification of the leader of the attack as “Bikomago”. Witness QDC explained that she learned this information from Rugomboka’s older brother, Martial, during the course of the attack.²⁴⁹ As noted above, Rugomboka’s home was near the Ngoma Military Camp and his brother was familiar with soldiers at the camp.²⁵⁰ Hategekimana has not shown that, in these circumstances, no reasonable trier of fact could accept that Rugomboka’s brother could identify the leader of the attack as “Bikomago”, commander of the camp.

114. The Appeals Chamber further considers that it was reasonable for the Trial Chamber to conclude that “Bikomago” was the alias for Hategekimana. The Trial Chamber considered evidence from several witnesses that Hategekimana was well-known in the local community as “Bikomago”, most significantly from Witness BYR, a soldier assigned to the Ngoma Military Camp.²⁵¹ It was within the discretion of the Trial Chamber to accept such evidence.

115. Although the description of Hategekimana offered by Witnesses QDC and QCL is somewhat general, the Appeals Chamber observes that it is consistent and that Witness QCL was familiar with Hategekimana.²⁵² Hategekimana has also not shown how the Trial Chamber erred in rejecting the Defence evidence describing him as having a beard or how this conflicts with the descriptions of him provided by Witnesses QDC and QCL. Therefore, the Appeals Chamber considers that Witness QDC’s description of Hategekimana’s physical features was a reasonable factor for the Trial Chamber to consider in assessing his participation in the abduction.

116. The Appeals Chamber is also satisfied that, given the leadership role played by the soldier identified as “Bikomago”, as well as the presence of soldiers from the Ngoma Military Camp, it was reasonable for the Trial Chamber to consider the circumstantial evidence of Hategekimana’s role as camp commander in assessing “Bikomago’s” identity.

117. The Appeals Chamber considers that, when considered together, the direct, circumstantial, and hearsay evidence of Hategekimana’s role in the attack provides a reasonable basis for the Trial Chamber’s conclusion. Accordingly, Hategekimana has not demonstrated that it was unreasonable

²⁴⁸ T. 23 March 2009 pp. 28, 68 (closed session).

²⁴⁹ Trial Judgement, para. 269.

²⁵⁰ See *supra* para. 101.

²⁵¹ See, e.g., Witness BYR, T. 9 April 2009 p. 39; Witness QCL, T. 16 March 2009 p. 30; Witness QDC, T. 23 March 2009 p. 42 (closed session); Witness QCN, T. 26 March 2009 p. 41. See also Trial Judgement, para. 281.

²⁵² T. 16 March 2009 p. 32.

for the Trial Chamber to conclude that he was present during the abduction and that he directed the operation.

2. Circumstances Surrounding the Killing and Burial

118. The Trial Chamber found that, following the abduction, Rugomboka was detained at the Ngoma Military Camp, that he was then tortured and killed by soldiers, and that his corpse was then “dumped” in a forest near the camp.²⁵³ The Trial Chamber noted the absence of eyewitnesses of Rugomboka’s torture and killing.²⁵⁴ Nonetheless, it noted that a soldier at the camp named Mukangahe informed Witness BYR that other soldiers were saying that Rugomboka had been removed from the camp on the night of 9 April 1994 by the same individuals who brought him there.²⁵⁵ In addition, the Trial Chamber found that Rugomboka’s mutilated corpse was discovered the next morning in a forest.²⁵⁶ The Trial Chamber also found that, following the killing, Hategekimana and soldiers from the Ngoma Military Camp were present at the site where Rugomboka’s body was discovered. They then closely monitored the population and Rugomboka’s family and prevented certain actions on their part during the transport of the body and its burial.²⁵⁷

119. Hategekimana submits that there was no reliable evidence that Rugomboka was detained at the Ngoma Military Camp.²⁵⁸ Hategekimana also observes that Witness BYR’s information related to Rugomboka’s removal by soldiers from the camp is second or third-hand hearsay.²⁵⁹ He further notes that no other witness assigned to the Ngoma Military Camp mentioned Rugomboka’s detention there.²⁶⁰ In addition, Hategekimana highlights that the Trial Chamber lacked direct evidence of circumstances surrounding Rugomboka’s killing and that it acknowledged that it did not know the exact time of his removal and killing or the specific location where his body was discovered.²⁶¹ In this respect, Hategekimana also argues that the Trial Chamber unreasonably rejected the evidence of Witness MZA, who indicated that the site was far from the Ngoma Military Camp, which is significant since it undermines the inference that camp soldiers participated in the killing of Rugomboka.²⁶²

120. In addition, Hategekimana asserts that the Indictment does not plead his role in the discovery of the body or other conduct following the killing of Rugomboka and thus that the Trial

²⁵³ Trial Judgement, paras. 289, 296, 304.

²⁵⁴ Trial Judgement, para. 286.

²⁵⁵ Trial Judgement, para. 292.

²⁵⁶ Trial Judgement, para. 304.

²⁵⁷ Trial Judgement, paras. 297-299, 304.

²⁵⁸ Appeal Brief, para. 146.

²⁵⁹ Appeal Brief, paras. 147, 148.

²⁶⁰ Appeal Brief, para. 149.

²⁶¹ Appeal Brief, para. 151.

Chamber erred in relying on this to convict him.²⁶³ Hategekimana also points to the evidence that civilian assailants were seen at the site where the body was discovered, and submits that the Trial Chamber thus unreasonably excluded the possibility that they were responsible for the crime.²⁶⁴ In this respect, he also argues that the Trial Chamber unreasonably rejected Defence Witness MZA's testimony that no soldiers were present when the body was discovered.²⁶⁵ He further questions the Trial Chamber's preference for Witness QCL's evidence relating to the presence and actions of Hategekimana and five other soldiers after the discovery of the body over that of Witness QDC, who did not see Hategekimana at that time.²⁶⁶

121. The Appeals Chamber is satisfied that the Trial Chamber reasonably concluded that soldiers from the Ngoma Military Camp killed Rugomboka on the night of 9 to 10 April 1994. The Appeals Chamber has already determined that the Trial Chamber had a reasonable basis to conclude that soldiers from the camp abducted Rugomboka on the night of 8 to 9 April 1994 and subsequently detained him at the Ngoma Military Camp.²⁶⁷ Although Witness BYR's testimony concerning the removal of Rugomboka by soldiers is hearsay, it was within the Trial Chamber's discretion to accept this evidence, especially since it is corroborated by the circumstantial evidence of Witness BYR's familiarity with events at the camp, the location of the detention, and the role of the soldiers in Rugomboka's abduction and transfer to the camp. The fact that other soldiers from the Ngoma Military Camp did not mention this incident is insufficient to demonstrate on appeal that the Trial Chamber erred in accepting Witness BYR's testimony that it occurred.

122. The Appeals Chamber is also not convinced that the Trial Chamber erred in not specifying the exact time of the killing or the precise location where Rugomboka's body was discovered. The Trial Chamber identified the killing as occurring on the night of 9 to 10 April 1994 and heard evidence that the corpse was left in a forest near the Ngoma Military Camp.²⁶⁸ Hategekimana has not explained why additional precision would be required with respect to the time of the killing. In addition, Hategekimana fails to appreciate that the Trial Chamber heard direct evidence, which it accepted, that the corpse was found near the camp.²⁶⁹ In any case, it expressly found that the precise location of the corpse had no impact on its findings concerning who was responsible for the killing.²⁷⁰

²⁶² Appeal Brief, paras. 155-159; Reply Brief, para. 71.

²⁶³ Appeal Brief, paras. 160-163.

²⁶⁴ Appeal Brief, paras. 152, 157, 169-171.

²⁶⁵ Appeal Brief, paras. 152, 169.

²⁶⁶ Appeal Brief, paras. 164-171.

²⁶⁷ See *supra* paras. 105, 108.

²⁶⁸ Trial Judgement, paras. 292, 302, 306.

²⁶⁹ Trial Judgement, para. 302, n. 500.

²⁷⁰ Trial Judgement, para. 302.

123. In addition, Hategekimana has not demonstrated that it was unreasonable for the Trial Chamber to reject many key aspects of Witness MZA's evidence concerning the role of civilians in the killing and the absence of soldiers at the site where the corpse was found. The Trial Chamber considered a number of factors affecting the witness's credibility.²⁷¹ Additionally, the Trial Chamber heard competing first-hand evidence from Witness QCL, which it found reliable and detailed, about the presence and actions of Hategekimana and soldiers following the discovery of Rugomboka's corpse.²⁷² The Trial Chamber also considered that "fright and trauma" explained why Witness QDC did not observe Hategekimana at the site where the body was discovered.²⁷³ The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or among witnesses' testimonies.²⁷⁴ Hategekimana has not shown that the Trial Chamber's evaluation was unreasonable.

124. Hategekimana has also not shown that it was unreasonable for the Trial Chamber to conclude that civilian assailants did not play a role in Rugomboka's removal from the camp and his killing. Notably, the Trial Chamber reasonably found that, despite the presence of civilian assailants at Rugomboka's house, the perpetrators of the abduction were soldiers, that these soldiers detained Rugomboka at the camp, and that Hategekimana and soldiers attempted to control the civilian population throughout the events.²⁷⁵ In these circumstances, the Appeals Chamber is not convinced that, as Hategekimana submits, it would be reasonable to infer that civilian assailants murdered Rugomboka.

125. Finally, the Appeals Chamber is not convinced that the Trial Chamber erred in relying on evidence of Hategekimana's actions following the abduction and killing of Rugomboka as further support for its inference that he ordered the murder. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.²⁷⁶ However, the Prosecution need not plead all of the evidence by which facts are to be proven.²⁷⁷ The Appeals Chamber considers

²⁷¹ Trial Judgement, paras. 278, 279, 301.

²⁷² Trial Judgement, paras. 298, 299.

²⁷³ Trial Judgement, para. 299.

²⁷⁴ *Munyakazi* Appeal Judgement, para. 71; *Renzaho* Appeal Judgement, para. 355; *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

²⁷⁵ Trial Judgement, paras. 285, 289, 296, 303, 304.

²⁷⁶ *Muvunyi II* Appeal Judgement, para. 19; *Muvunyi I* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 7, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49.

²⁷⁷ See *Ntagerura et al.* Appeal Judgement, para. 21. See also *Arsène Shalom Ntahobali and Pauline Nyiramasuhuko v. Prosecutor*, 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", 5 July 2004 ("*Ntahobali and Nyiramasuhuko* Decision of 5 July 2004"), paras. 14-16 (finding that a trial chamber has the discretion to accept any relevant evidence which it deems to have probative value even where it is not possible to convict an accused on such evidence due to lack of notice).

that the events following the killing of Rugomboka were simply used to provide further context to Hategekimana's role in ordering the murder.²⁷⁸ Even if the Prosecution were required to plead the events following the killing, the Appeals Chamber observes that Hategekimana did not object to this issue at trial and that he also has not identified any prejudice to his ability to defend against these allegations.

126. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in concluding that the only reasonable inference from the evidence was that soldiers from the Ngoma Military Camp killed Rugomboka on the night of 9 to 10 April 1994.

3. Conclusion

127. For the foregoing reasons, the Appeals Chamber finds that Hategekimana has failed to demonstrate that the Trial Chamber committed any error in the assessment of the evidence which would occasion a miscarriage of justice.

D. Conclusion

128. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's Second Ground of Appeal.

²⁷⁸ See Trial Judgement, para. 304.

**V. ALLEGED ERRORS RELATING TO THE MURDERS OF SALOMÉ
MUJAWAYEZU, ALICE MUKARWESA, AND JACQUELINE
MUKABURASA (GROUND 3)**

129. The Trial Chamber found Hategekimana guilty of genocide (Count 1) and murder as a crime against humanity (Count 3) under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Salomé Mujawyezu (“Mujawyezu”) and her cousins, Alice Mukarwesa (“Mukarwesa”) and Jacqueline Mukaburasa (“Mukaburasa”), on 23 April 1994.²⁷⁹ The Trial Chamber found beyond a reasonable doubt that the three Tutsi women “were killed by *Interahamwe* and armed civilians outside of Mujawyezu’s home in the presence and with the assistance of Hategekimana and of Ngoma [Military] Camp soldiers.”²⁸⁰

130. Hategekimana submits that the Trial Chamber erred in convicting him for the killings of Mujawyezu, Mukarwesa and Mukaburasa.²⁸¹ In this section, the Appeals Chamber considers Hategekimana’s submissions that the Trial Chamber erred in assessing: (i) the legal elements of genocide; (ii) the form of criminal responsibility; and (iii) the evidence.

A. Legal Elements of Genocide

131. The Trial Chamber found that Hategekimana and the physical perpetrators of the killings of Mujawyezu, Mukarwesa, and Mukaburasa possessed genocidal intent.²⁸² In reaching this conclusion, the Trial Chamber viewed the killings in context with its findings that substantial numbers of Tutsis had been killed during attacks at the Ngoma Parish and the *Maison Générale*, along with other evidence.²⁸³

132. Hategekimana challenges the Trial Chamber’s finding on genocidal intent by arguing that it was unreasonable for the Trial Chamber to consider the attacks at the Ngoma Parish and the *Maison Générale* since they occurred on 30 April 1994, after the killings of the three women.²⁸⁴

133. The Appeals Chamber considers that it was reasonable for the Trial Chamber to take into account the attacks at the Ngoma Parish and the *Maison Générale* in assessing Hategekimana’s and the other perpetrators’ genocidal intent. The Appeals Chamber recalls that, in the absence of direct evidence, a perpetrator’s intent to commit genocide may be inferred from relevant facts and

²⁷⁹ Trial Judgement, paras. 681, 697, 715, 716, 721, 730. *See also* Trial Judgement, para. 389.

²⁸⁰ Trial Judgement, para. 402.

²⁸¹ Notice of Appeal, paras. 96-105; Appeal Brief, paras. 192-242; Reply Brief, paras. 88-92.

²⁸² Trial Judgement, para. 680.

²⁸³ Trial Judgement, paras. 679, 680.

²⁸⁴ Appeal Brief, para. 240.

circumstances, including the general context of the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.²⁸⁵ The fact that those attacks occurred a week after the killings of Mujawayezu, Mukarwesa, and Mukaburasa does not alter their evidentiary value for this purpose.

134. In any event, the Appeals Chamber observes that, although it cited only two specific examples of attacks, the Trial Chamber's consideration of the relevant context was much broader. In particular, the Trial Chamber noted that it "heard extensive evidence, which it accept[ed], about the targeting of [Tutsi] civilians in Butare [Prefecture], particularly following the speech of interim President Sindikubwabo on 19 April 1994."²⁸⁶ Hategekimana has not disputed this.²⁸⁷ Significantly, the Trial Chamber also considered the specific surrounding circumstances of the attack, finding that Hategekimana's search of the identity documents of Mujawayezu, Mukarwesa, and Mukaburasa indicated that these victims were targeted based on their ethnicity.²⁸⁸ Hategekimana has not challenged this finding.

135. Accordingly, Hategekimana has not demonstrated any error in the Trial Chamber's findings regarding Hategekimana's and the other perpetrators' genocidal intent.

B. Form of Responsibility

136. The Trial Chamber found that, on the night of 23 April 1994, civilian assailants unsuccessfully attacked the home of Mujawayezu.²⁸⁹ According to the Trial Judgement, these same assailants returned 30 minutes later in the company of Hategekimana and four armed soldiers from the Ngoma Military Camp.²⁹⁰ The Trial Chamber found that Hategekimana and Conseiller Jacques Habimana entered Mujawayezu's home, checked the occupants' identity cards, and forced Mujawayezu, Mukarwesa, and Mukaburasa outside onto the road where the *Interahamwe* and civilian assailants killed them.²⁹¹ The Trial Chamber found that Hategekimana participated in the

²⁸⁵ See *Seromba* Appeal Judgement, para. 176; *Nahimana et al.* Appeal Judgement, paras. 524, 525; *Simba* Appeal Judgement, para. 264; *Gacumbitsi* Appeal Judgement, paras. 40, 41; *Rutaganda* Appeal Judgement, para. 525; *Semanza* Appeal Judgement, para. 262, citing *Jelisić* Appeal Judgement, para. 47.

²⁸⁶ Trial Judgement, para. 680.

²⁸⁷ Appeal Brief, para. 177.

²⁸⁸ Trial Judgement, para. 679.

²⁸⁹ Trial Judgement, paras. 388, 403, 673.

²⁹⁰ Trial Judgement, paras. 401, 403, 673.

²⁹¹ Trial Judgement, paras. 402, 403, 673.

joint criminal enterprise by providing military assistance and ordering the perpetrators to commit the crimes.²⁹²

137. Hategekimana submits that the Trial Chamber erred in finding that he participated in a joint criminal enterprise to kill Mujawyezu, Mukarwesa, and Mukaburasa.²⁹³ In this respect, Hategekimana challenges the finding that he participated in the joint criminal enterprise by ordering the killings, by pointing to inconsistent findings in the Trial Judgement as to whether he issued orders to the physical perpetrators.²⁹⁴ In addition, Hategekimana contends that the Trial Chamber unreasonably inferred that he issued the order by failing to establish his location at the time of the killings, when and to whom the order was issued, and the type of assailants who physically perpetrated the crime.²⁹⁵

138. The Prosecution responds that the Trial Chamber correctly found that Hategekimana participated in a joint criminal enterprise.²⁹⁶ The Prosecution argues that participation in a joint criminal enterprise “does not require that the accused be physically present” and that the accused’s contribution need only be significant, not necessary or substantial.²⁹⁷ The Prosecution contends that by “leading the attackers to the home, directing the search for Tutsi, ordering the Tutsi to be separated and brought outside, the Trial Chamber reasonably concluded that Hategekimana substantially contributed to the fulfilment of the [joint criminal enterprise’s] common design.”²⁹⁸

139. A review of the Trial Judgement reveals that the Trial Chamber made inconsistent findings concerning the scope of Hategekimana’s order. In its factual findings, the only order mentioned by the Trial Chamber was Hategekimana’s order to his soldiers to participate in the operations, including the killing of Mujawyezu and her two cousins, with the civilian assailants.²⁹⁹ Notably, the Trial Chamber identified the physical perpetrators as “*Interahamwe* and armed civilians”, not soldiers.³⁰⁰ In addition, in its findings on superior responsibility, the Trial Chamber stated: “[n]or did the [Trial] Chamber find that Hategekimana gave orders to *Interahamwe* or armed civilians in killing the three [Tutsi] women, Salomé Mujawyezu, Alice Mukarwesa and Jacqueline Mukaburasa”.³⁰¹ The Appeals Chamber also notes that, in discussing Hategekimana’s role in the

²⁹² Trial Judgement, para. 679.

²⁹³ Appeal Brief, paras. 234-238; Reply Brief, paras. 95-97.

²⁹⁴ Appeal Brief, paras. 234, 235.

²⁹⁵ Appeal Brief, paras. 236-238.

²⁹⁶ Response Brief, paras. 135-139.

²⁹⁷ Response Brief, para. 135 (internal citations omitted).

²⁹⁸ Response Brief, para. 137. *See also* Response Brief, para. 136.

²⁹⁹ Trial Judgement, para. 403 (“As Hategekimana was the Commander of the soldiers, the only reasonable inference is that he ordered the soldiers to participate in the operations with the *Interahamwe* and/or armed civilians, including the killing of Salomé Mujawyezu, Alice Mukarwesa and Jacqueline Mukaburasa on the basis of their ethnicity.”).

³⁰⁰ Trial Judgement, para. 402.

³⁰¹ Trial Judgement, para. 664.

joint criminal enterprise, the Trial Chamber found that “Hategekimana participated in the joint criminal enterprise by leading armed soldiers from the Ngoma [Military] Camp to assist *Conseiller* Jacques Habimana and the other assailants in the attack” and that he “provid[ed] military reinforcements to the *Interahamwe* and civilians, who were the physical perpetrators of the killings.”³⁰²

140. In its conclusions on Hategekimana’s participation in the joint criminal enterprise, however, the Trial Chamber stated that “Hategekimana committed genocide when, as a co-perpetrator in a joint criminal enterprise, he *ordered the deaths* of Salomé Mujawayezu, Alice Mukarwesa and Jacqueline Mukaburasa”.³⁰³ In addition, in its findings on genocide, the Trial Chamber recalled that it “has found that Hategekimana participated in a joint criminal enterprise to kill three [Tutsi] civilians, Salomé Mujawayezu, Alice Mukarwesa and Jacqueline Mukaburasa, by providing armed military assistance as well as *ordering the physical perpetrators to commit the crimes*.”³⁰⁴ Similarly, the Trial Chamber found Hategekimana “guilty of murder as a crime against humanity, on the basis of Article 6(1) of the Statute, *for ordering the killings* of Salomé Mujawayezu, Alice Mukarwesa and Jacqueline Mukaburasa”.³⁰⁵ Beyond recalling its previous findings, the Trial Chamber provided no additional reasoning for its conclusion that Hategekimana ordered the killings.

141. Accordingly, the Appeals Chamber considers that the Trial Chamber failed to provide a reasoned opinion in finding that Hategekimana ordered the physical perpetrators to kill the three victims. Moreover, no reasonable trial chamber could have concluded that Hategekimana issued orders to the physical perpetrators of the killings where it discussed no supporting circumstantial or direct evidence in making this finding.³⁰⁶ Therefore, the Appeals Chamber reverses the Trial Chamber’s findings that Hategekimana ordered the killings.

142. The Appeals Chamber, however, is not convinced that the Trial Chamber’s errors invalidate the verdict or result in a miscarriage of justice. The Trial Chamber also found that Hategekimana participated in the joint criminal enterprise by providing “military reinforcements” to the physical

³⁰² Trial Judgement, para. 676.

³⁰³ Trial Judgement, para. 677 (emphasis added).

³⁰⁴ Trial Judgement, para. 679 (emphasis added).

³⁰⁵ Trial Judgement, para. 716 (emphasis added). The Appeals Chamber notes that the Trial Chamber’s statement in paragraph 716 gives the misimpression that it convicted Hategekimana under Article 6(1) of the Statute for ordering. However, it follows from a reading of the Trial Judgement as a whole that the Trial Chamber in fact convicted him more broadly for his participation in a joint criminal enterprise. See Trial Judgement, paras. 715 (“The [Trial] Chamber has already determined that Hategekimana bears responsibility under Article 6(1) of the Statute, based on his participation in a joint criminal enterprise.”), 721 (“Accordingly, the [Trial] Chamber finds Hategekimana guilty of murder (Count III) as a crime against humanity [...] for his joint participation with Ngoma [Military] Camp soldiers, *Interahamwe* and armed civilians in the murders of Salomé Mujawayezu, Alice Mukarwesa and Jacqueline Mukaburasa on 23 April 1994, under Article 6(1) of the Statute”), 736.

³⁰⁶ Trial Judgement, paras. 403, 677, 679.

perpetrators.³⁰⁷ The Trial Chamber determined that this proved “decisive” given that a previous attack had failed.³⁰⁸ It also concluded that Hategekimana directly contributed to the killing by entering Mujawayezu’s home, demanding to see the occupants’ identity cards, and accompanying the assailants and Tutsi victims out of the home, where they were then killed.³⁰⁹ Hategekimana has not challenged this basis for the Trial Chamber’s finding that he participated in a joint criminal enterprise, and none of Hategekimana’s remaining arguments calls into question its reasonableness.

143. Accordingly, although the Appeals Chamber reverses the finding that Hategekimana ordered the killings, he has failed to demonstrate any error impacting the Trial Chamber’s conclusion that he participated in a joint criminal enterprise to kill Mujawayezu, Mukarwesa, and Mukaburasa.

C. Assessment of the Evidence

144. In making its findings on the killings of Mujawayezu, Mukarwesa, and Mukaburasa, the Trial Chamber relied primarily on Prosecution Witness XR, who was the only eyewitness to testify about these crimes.³¹⁰ The Trial Chamber found that he provided “convincing, first-hand evidence” of the role played by Hategekimana and soldiers from the Ngoma Military Camp in the crimes.³¹¹ The Trial Chamber found that Witness XR had an adequate basis of knowledge to identify Hategekimana based on his attendance at a meeting three days earlier.³¹² In addition, the Trial Chamber was satisfied that the individuals accompanying Hategekimana were soldiers from the Ngoma Military Camp based on the presence of Hategekimana, his authority over the soldiers, and the proximity of the camp to the house.³¹³ The Trial Chamber also considered the evidence of Defence Witnesses ZVK and BTN, but found that their hearsay testimonies about the absence of soldiers in the attack carried little weight and did not cast doubt on Witness XR’s account.³¹⁴

145. Hategekimana submits that the Trial Chamber erred in relying on Witness XR to establish that Mujawayezu, Mukarwesa, and Mukaburasa were killed and that Hategekimana and soldiers from the Ngoma Military Camp participated in the crimes.³¹⁵ In particular, Hategekimana argues that no other Prosecution witness or resident of the house ever mentioned this incident before the Tribunal.³¹⁶ Hategekimana also challenges Witness XR’s credibility based on his relationship with

³⁰⁷ Trial Judgement, para. 676. *See also* Trial Judgement, para. 679.

³⁰⁸ Trial Judgement, para. 676.

³⁰⁹ Trial Judgement, para. 679.

³¹⁰ Trial Judgement, para. 389.

³¹¹ Trial Judgement, para. 401.

³¹² Trial Judgement, paras. 393, 394.

³¹³ Trial Judgement, para. 401.

³¹⁴ Trial Judgement, paras. 396-398.

³¹⁵ Appeal Brief, paras. 194-229, 237, 239.

³¹⁶ Appeal Brief, para. 196; Reply Brief, para. 90.

the victims, his inability to hear their cries, and his failure to explain why he waited three hours after the killing before attempting to recover their bodies.³¹⁷

146. In addition, Hategekimana asserts that Witness XR had an inadequate basis of knowledge to identify him as being present during the attack.³¹⁸ Specifically, Hategekimana challenges the reliability of the evidence that the witness previously saw him during a meeting held on 20 April 1994.³¹⁹ Hategekimana further contends that the witness's ability to describe him and identify him in court likely came from information he received after the events.³²⁰ Hategekimana also notes the witness's failure to mention his beard.³²¹

147. Furthermore, Hategekimana submits that the Trial Chamber erred in finding that soldiers from the Ngoma Military Camp participated in the attack.³²² In particular, Hategekimana contends that this finding follows principally from his own disputed presence and conduct at the scene.³²³ Hategekimana further questions Witness XR's basis of knowledge to differentiate soldiers from *Interahamwe* and notes that the witness was not able to identify or recognize a single soldier.³²⁴ He also contends that the Trial Chamber failed to make findings on any distinguishing features of their uniforms.³²⁵ Moreover, Hategekimana challenges the Trial Chamber's reliance on the proximity of the Ngoma Military Camp, noting that the Trial Chamber did not make any related findings on the distances to ESO and the gendarmerie to exclude their involvement.³²⁶

148. Finally, Hategekimana argues that the Trial Chamber unreasonably rejected the testimonies of Witnesses ZVK and BTN that no soldiers participated in the attack.³²⁷ Hategekimana contends that the Trial Chamber unreasonably discounted Witness BTN's testimony based on a contradiction in a prior statement that he claims resulted from torture.³²⁸

149. The Prosecution responds that the Trial Chamber properly assessed the evidence and reasonably concluded that Hategekimana and soldiers from the Ngoma Military Camp participated in the crimes.³²⁹

³¹⁷ Appeal Brief, paras. 197, 220, 227, 239.

³¹⁸ Appeal Brief, paras. 213-219, 221-226, 229. *See also* AT. 15 December 2011 p. 14.

³¹⁹ Appeal Brief, paras. 213-219, 221, 222; Reply Brief, para. 91. *See also* AT. 15 December 2011 pp. 32, 33.

³²⁰ Appeal Brief, paras. 222, 223.

³²¹ Appeal Brief, paras. 224, 225. *See also* AT. 15 December 2011 pp. 15, 16, 38.

³²² Appeal Brief, paras. 194-212, 241.

³²³ Appeal Brief, paras. 199, 201; Reply Brief, para. 92.

³²⁴ Appeal Brief, paras. 198, 201.

³²⁵ Appeal Brief, para. 202.

³²⁶ Appeal Brief, paras. 200, 204.

³²⁷ Appeal Brief, paras. 207, 208, 212.

³²⁸ Appeal Brief, paras. 209, 210.

³²⁹ Response Brief, paras. 115-133. *See also* AT. 15 December 2011 pp. 25, 26.

150. The Appeals Chamber finds no merit in Hategekimana's contention that the Trial Chamber erred in relying on Witness XR in the absence of corroboration. The Appeals Chamber recalls that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.³³⁰ The fact that other Prosecution witnesses or persons did not recount these events does not call into question the reasonableness of the Trial Chamber's reliance on the evidence of Witness XR. In addition, Hategekimana fails to explain why Witness XR's relationship to the victims,³³¹ his inability to hear their cries, or his delay in retrieving their bodies raises doubt about his credibility.

151. The Appeals Chamber is satisfied that it was reasonable for the Trial Chamber to accept Witness XR's identification of Hategekimana. The Trial Chamber exercised caution in evaluating his identification evidence in view of the traumatic circumstances.³³² It, nonetheless, observed that "the witness had several opportunities to have a close-up view of Hategekimana that night."³³³ Hategekimana has also not shown how the Trial Chamber erred in rejecting the Defence evidence describing him as having a beard or how this conflicts with the description of him provided by Witness XR.³³⁴

152. Furthermore, the Trial Chamber extensively considered the witness's basis of knowledge for identifying Hategekimana and accepted his account of seeing Hategekimana from a distance of five metres during a meeting, at which Hategekimana was introduced.³³⁵ It was within the Trial Chamber's discretion to accept this "consistent and convincing first-hand account", in particular where Hategekimana's challenge both at trial, and on appeal, consisted of "unsupported arguments" that the meeting did not occur.³³⁶ Furthermore, Hategekimana has not substantiated his submission that the witness's testimony about this meeting conflicts with his prior statement.³³⁷ Hategekimana's contention that Witness XR learned his identity only in preparation for trial is speculative and, as such, is not capable of demonstrating that the Trial Chamber erred.

153. The Appeals Chamber is also satisfied that the Trial Chamber correctly determined from the evidence that soldiers from the Ngoma Military Camp participated in the attack. Specifically, the Trial Chamber inferred that the soldiers were from the Ngoma Military Camp, based on the

³³⁰ See *Nchamihigo* Appeal Judgement, para. 42.

³³¹ In any event, the Trial Chamber assessed and rejected the possibility that Witness XR had a motive to falsely implicate Hategekimana. See Trial Judgement, para. 395. Hategekimana has not shown that this finding was unreasonable.

³³² Trial Judgment, para. 400.

³³³ Trial Judgment, para. 400.

³³⁴ The Appeals Chamber further notes that the Trial Chamber found that, apart from Defence Witness BJ3, "none of these Defence witnesses testified to having seen him with a beard during the period alleged in the Indictment". The Trial Chamber considered Witness BJ3's testimony to be irrelevant as it concerned mainly the ESO Camp meeting that was held before the events for which Hategekimana was convicted. See Trial Judgement, para. 84.

³³⁵ Trial Judgement, paras. 393, 394.

³³⁶ See Trial Judgement, para. 394.

presence of Hategekimana, “his authoritative conduct *vis-à-vis* the soldiers”, the camp’s close proximity to Mujawyezu’s home, the relatively greater distance of ESO and the gendarmerie, and the arrival of the soldiers on foot within 30 minutes of the initial failed attack.³³⁸

154. The Appeals Chamber is not convinced that Hategekimana has identified on appeal any reasonable conclusion based on this evidence other than that the soldiers accompanying Hategekimana were from the Ngoma Military Camp. The Appeals Chamber has already determined that the Trial Chamber reasonably determined that Hategekimana was present during the attack. In addition, it is clear from the Trial Judgement that the Trial Chamber was aware of the general distances between the various military camps and Mujawyezu’s home.³³⁹ Hategekimana does not dispute the Trial Chamber’s conclusion that the Ngoma Military Camp was the closest to Mujawyezu’s home. He has also not demonstrated why additional detail on the distances was necessary. In addition, the Appeals Chamber observes that Witness XR stated that the soldiers wore military uniforms and fired gunshots on arrival.³⁴⁰ In view of the foregoing, the Appeals Chamber is not convinced that any additional detail concerning their uniforms was required.

155. Finally, the Appeals Chamber can identify no error in the Trial Chamber’s decision to prefer Witness XR’s account of soldiers participating in the events over the evidence provided by Witnesses ZVK and BTN that they did not so participate. The Trial Chamber extensively considered the credibility of each of these witnesses.³⁴¹ It determined that Witness XR provided “convincing, first-hand evidence”.³⁴² The Trial Chamber also observed that the evidence of Witnesses ZVK and BTN was hearsay and found that it carried little weight.³⁴³ The Appeals Chamber recalls that when faced with competing versions of events, it is the duty of the trial chamber which heard the witnesses to determine which evidence it considers more probative.³⁴⁴ Hategekimana has not identified any error in this respect. Moreover, even if the Trial Chamber erred in assessing the inconsistency between Witness BTN’s statement and testimony, the Appeals Chamber is not convinced that such an error results in a miscarriage of justice in view of the more limited probative value of his hearsay evidence when weighed against the credible eye-witness testimony of Witness XR.

³³⁷ See Appeal Brief, para. 216.

³³⁸ Trial Judgement, para. 401.

³³⁹ Trial Judgement, para. 401. See also T. 2 April 2009 p. 21 (closed session).

³⁴⁰ T. 1 April 2009 pp. 63, 64 (closed session).

³⁴¹ Trial Judgement, paras. 389-401.

³⁴² Trial Judgement, para. 401.

³⁴³ Trial Judgement, paras. 397, 398.

³⁴⁴ *Rukundo* Appeal Judgement, para. 217; *Muhimana* Appeal Judgement, para. 103; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.

156. Accordingly, Hategekimana has not identified any error in the Trial Chamber's assessment of the evidence concerning his role in the killings of Mujawayezu, Mukarwesa, and Mukaburasa.

D. Conclusion

157. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's Third Ground of Appeal.

VI. ALLEGED ERRORS RELATING TO THE RAPE OF NURA SEZIRAHIGA (GROUND 4)

158. The Trial Chamber convicted Hategekimana of rape as a crime against humanity (Count 4) as a superior under Article 6(3) of the Statute for his failure to prevent or punish the rape of Nura Sezirahiga by one of his subordinates, a soldier from the Ngoma Military Camp, on the night of 23 to 24 April 1994.³⁴⁵ The Trial Chamber had insufficient evidence to determine whether Hategekimana was present during the rape.³⁴⁶ However, the Trial Chamber found that, even if Hategekimana was not present during the rape, he had reason to know that one or more of his soldiers was about to commit such an offence or had done so, and yet took no necessary or reasonable measures to prevent or punish it.³⁴⁷

159. Hategekimana submits that the Trial Chamber erred in convicting him for the rape of Nura Sezirahiga.³⁴⁸ In this section, the Appeals Chamber considers Hategekimana's submissions that the Trial Chamber erred in assessing: (i) the legal elements of rape as a crime against humanity; (ii) the form of responsibility; and (iii) the evidence.

A. Legal Elements of Rape As a Crime Against Humanity

160. In its legal findings, the Trial Chamber defined the *actus reus* of rape as a crime against humanity as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive."³⁴⁹ The Trial Chamber further explained that it understood the phrase "physical invasion of a sexual nature" to mean "the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator."³⁵⁰ In applying this definition, the Trial Chamber found, based on the first-hand testimony of Prosecution Witness Sadiki Sezirahiga ("Sezirahiga"), that a soldier from the Ngoma Military Camp raped the witness's daughter, Nura Sezirahiga, while a civilian named Michel Murigande ("Murigande") immobilized her.³⁵¹

161. Hategekimana submits that the Trial Chamber erred in not making any factual findings on whether a "physical invasion of a sexual nature" occurred, thereby failing to establish the *actus reus*

³⁴⁵ Trial Judgement, paras. 665, 725-730.

³⁴⁶ Trial Judgement, paras. 459, 726.

³⁴⁷ Trial Judgement, para. 727.

³⁴⁸ Notice of Appeal, paras. 106-116; Appeal Brief, paras. 243-300.

³⁴⁹ Trial Judgement, para. 723, citing *Akayesu* Trial Judgement, para. 688.

³⁵⁰ Trial Judgement, para. 723, n. 1301, citing *Semanza* Trial Judgement, para. 344, referring to *Kunarac et al.* Appeal Judgement, paras. 127, 128.

³⁵¹ Trial Judgement, paras. 459, 463, 725.

of the crime of rape.³⁵² The Prosecution responds that the Trial Chamber accepted that all the constitutive elements of rape were met.³⁵³

162. The Appeals Chamber is satisfied that the Trial Chamber reasonably relied on Witness Sezirahiga's testimony in finding that the *actus reus* of rape was established. It follows from the Trial Judgement that Witness Sezirahiga observed the commission of the crime from a distance of four meters.³⁵⁴ Although the witness was not specifically asked about the penetration of his daughter, he clearly and constantly used the word "rape" throughout his testimony to describe what happened to her.³⁵⁵ The Appeals Chamber is satisfied that this term was reasonably understood in the context of this case as sexual penetration by the witness, the Trial Chamber, and the parties.³⁵⁶ In this respect, the Appeals Chamber notes that Hategekimana did not dispute at trial that Nura Sezirahiga was raped.³⁵⁷ The Appeals Chamber therefore finds no merit in his challenge to this aspect of the Trial Chamber's finding on appeal.

163. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in its assessment of the elements of rape as a crime against humanity.

B. Form of Responsibility

164. The Trial Chamber found that Nura Sezirahiga was raped by one of the four soldiers from the Ngoma Military Camp who accompanied Hategekimana to her home.³⁵⁸ In addition, it found that Hategekimana had effective control over the soldiers from the Ngoma Military Camp.³⁵⁹

³⁵² Appeal Brief, paras. 297, 298, 300, referring to Trial Judgement, para. 723; Hategekimana Reply Brief, para. 124. See also AT. 15 December 2011 pp. 12, 13. Hategekimana further argues that Witness Sezirahiga "never established that there was actual rape." See also AT. 15 December 2011 p. 32.

³⁵³ Response Brief, paras. 169, 170, referring to, *inter alia*, Trial Judgement, paras. 459, 726. See also AT. 15 December 2011 p. 28.

³⁵⁴ Trial Judgement, para. 459.

³⁵⁵ T. 6 April 2009 pp. 8, 41. In addition, as accepted by the Trial Chamber, Witness Sezirahiga clearly recounted that Murigande immobilized his daughter during the rape. See T. 6 April 2009 p. 41; Trial Judgement, para. 461. See also *infra* para. 199.

³⁵⁶ The Appeals Chamber recalls that in the *Kordić and Čerkez* case, the ICTY Appeals Chamber considered that a trial chamber reasonably found that a woman was sexually assaulted even though the victim's testimony was limited to answering in the affirmative to a question posed by the Prosecution as to whether or not she had suffered sexual assault. See *Kordić and Čerkez* Appeal Judgement, para. 462.

³⁵⁷ Rather, Hategekimana focused principally on the credibility of the evidence implicating him and soldiers from the Ngoma Military Camp in the attack. See Defence Closing Brief, paras. 455-473; T. 26 April 2010 p. 61. The Appeals Chamber further observes that Hategekimana referred to the perpetrator of the crime as a "rapist" in his Closing Brief. See Defence Closing Brief, para. 462 ("It emerges clearly from the testimony of this witness that although he claimed that his daughter, Nura Sezirahiga, was raped by a soldier, on the orders of Michel Muligande, nothing in his testimony identifies the rapist. In the presentation of its evidence, the Prosecution was never able to prove the identity of the person who raped the witness's daughter.").

³⁵⁸ Trial Judgement, paras. 665, 726.

³⁵⁹ Trial Judgement, paras. 658-665, 728.

Consequently, it concluded that Hategekimana was responsible as a superior for the crime under Article 6(3) of the Statute.³⁶⁰

165. Hategekimana contends that the Trial Chamber erred in convicting him as a superior for the rape because there was insufficient evidence as to the identity of the physical perpetrator and of a superior-subordinate relationship between him and the assailant.³⁶¹ The Prosecution responds that the Trial Chamber sufficiently identified the perpetrator of the rape and correctly determined that Hategekimana had effective control over him.³⁶²

166. The Appeals Chamber has held that “[a] superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute.”³⁶³ In addition, the Appeals Chamber recalls that an accused may be sufficiently informed of the identity of his subordinates in relation to an attack by information reflecting that the soldiers came from the camp under his command.³⁶⁴ Therefore, the Appeals Chamber considers that the Trial Chamber’s finding that a soldier from the Ngoma Military Camp perpetrated the rape provided a reasonable identification of the subordinate.³⁶⁵ The Appeals Chamber considers below Hategekimana’s challenge to the Trial Chamber’s assessment of the evidence underpinning its finding that soldiers from the Ngoma Military Camp participated in the attack.

167. In addition, the Trial Chamber set forth and assessed the evidence of Hategekimana’s *de jure* and *de facto* authority as an army officer and commander of the Ngoma Military Camp and concluded that he had effective control throughout April 1994 over the soldiers of the camp and the material ability to prevent and punish their crimes.³⁶⁶ Hategekimana’s cursory and unsubstantiated argument that there is no evidence of a superior-subordinate relationship between him and the soldier who raped Nura Sezirahiga is insufficient to demonstrate that the Trial Chamber erred in its assessment.

168. Accordingly, Hategekimana has failed to demonstrate that the Trial Chamber erred in its assessment of the legal elements of superior responsibility under Article 6(3) of the Statute in connection with the rape Nura Sezirahiga.

³⁶⁰ Trial Judgement, para. 729.

³⁶¹ Notice of Appeal, para. 116; Hategekimana Appeal Brief, paras. 299, 300.

³⁶² Response Brief, paras. 171, 172, *referring to* Trial Judgement, paras. 665, 728. *See also* AT. 15 December 2011 p. 27.

³⁶³ *Muvunyi I* Appeal Judgement, para. 55. *See also* *Blagojević and Jokić* Appeal Judgement, para. 287.

³⁶⁴ *Muvunyi I* Appeal Judgement, para. 56. *See also* *Ntagerura et al.* Appeal Judgement, paras. 140, 141, 153.

³⁶⁵ Trial Judgement, paras. 665, 726, 728, 729.

³⁶⁶ Trial Judgement, paras. 658-665, 728.

C. Assessment of the Evidence

169. The Trial Chamber found that, on the night of 23 to 24 April 1994, a group of armed soldiers and *Interahamwe* surrounded the house of Witness Sezirahiga.³⁶⁷ According to the Trial Judgement, five minutes later, Hategekimana arrived with Murigande and a group of four armed soldiers, who were his subordinates from the Ngoma Military Camp.³⁶⁸ The Trial Chamber found that Hategekimana left at some point during the attack, but that the assailants he arrived with remained.³⁶⁹ According to the Trial Judgement, during the attack Murigande “delivered” the witness’s daughter, Nura Sezirahiga, to a soldier from the Ngoma Military Camp.³⁷⁰ The Trial Chamber found that the soldier raped Nura Sezirahiga as Murigande held her down.³⁷¹ She was then killed.³⁷² In making these findings, the Trial Chamber relied principally on the evidence of Witnesses Sezirahiga and QCO.

1. Involvement of Soldiers from the Ngoma Military Camp

170. Hategekimana submits that the Trial Chamber erred in relying on Witnesses Sezirahiga and QCO to find that soldiers from the Ngoma Military Camp were involved in the attack on Witness Sezirahiga’s house.³⁷³ Hategekimana argues that the Trial Chamber made insufficient findings in order to clearly distinguish the assailants between soldiers and *Interahamwe* or civilians.³⁷⁴ In this respect, Hategekimana notes that, according to Witness Sezirahiga, some *Interahamwe* were dressed partly in military uniform and partly in civilian attire, and the witness provided no details about the uniforms worn by the alleged soldiers.³⁷⁵ In addition, Hategekimana challenges Witness Sezirahiga’s ability to recognize soldiers in light of his failure to name a single one, not even the soldier who allegedly saved his life on two occasions.³⁷⁶ Hategekimana contends that Witness

³⁶⁷ Trial Judgement, paras. 440, 442, 453.

³⁶⁸ Trial Judgement, paras. 440, 453, 458, 726-728.

³⁶⁹ Trial Judgement, paras. 456, 459.

³⁷⁰ Trial Judgement, paras. 459.

³⁷¹ Trial Judgement, paras. 459, 463, 726.

³⁷² Trial Judgement, paras. 459, 726, 727.

³⁷³ Notice of Appeal, para. 108; Appeal Brief, para. 257. Hategekimana also submits that the Trial Chamber erred in fact in rejecting Witness BTN’s testimony in its entirety with respect to the non-involvement of soldiers in the attack, while at the same time admitting Witness BTN’s testimony to corroborate the presence of *Interahamwe* during the attack on Witness Sezirahiga’s house. See Notice of Appeal, para. 109, referring to Trial Judgement, paras. 447, 448, 452. Similarly, Hategekimana further argues that the Trial Chamber erred in fact and abused its power in failing to challenge Witness BTN’s testimony that he was an eyewitness to the attack on Witness Sezirahiga’s house, while at the same time rejecting other Defence witnesses’ testimonies who corroborated that no soldiers were involved in the attacks on Witness Sezirahiga’s house and on Witness QCO’s house. See Hategekimana Notice of Appeal, para. 110, referring to Trial Judgement, paras. 447, 449, 450. Hategekimana does not, however, develop his arguments in his Appeal Brief. The Appeals Chamber therefore considers that he has abandoned his arguments in this respect and will not consider them.

³⁷⁴ Notice of Appeal, para. 108; Appeal Brief, para. 249.

³⁷⁵ Appeal Brief, para. 249; Reply Brief, para. 103.

³⁷⁶ Notice of Appeal, para. 108; Appeal Brief, para. 249.

Sezirahiga's conclusion that the alleged soldiers were affiliated with the Ngoma Military Camp was a mere supposition deduced solely from Hategekimana's disputed presence.³⁷⁷

171. In addition, Hategekimana asserts that Witness QCO did not indicate the composition of the group of assailants that went to Witness Sezirahiga's house.³⁷⁸ Hategekimana notes that, in its summary of Witness QCO's testimony, the Trial Chamber sometimes referred to "attackers" and other times to "soldiers" without specifically linking them to the attack on Witness Sezirahiga's house.³⁷⁹ Finally, Hategekimana asserts that Witness QCO's basis of knowledge for identifying the assailants as soldiers from the Ngoma Military Camp is hearsay from unidentified sources.³⁸⁰

172. The Prosecution responds that the Trial Chamber correctly found that soldiers from the Ngoma Military Camp were involved in the attack on Witness Sezirahiga's house and that Witnesses Sezirahiga and QCO adequately identified and distinguished them from *Interahamwe* or other civilian assailants.³⁸¹

173. The Appeals Chamber considers that the Trial Chamber carefully assessed the evidence in finding that soldiers were among the assailants at Witness Sezirahiga's house.³⁸² The Trial Chamber noted that the soldiers could be adequately identified and distinguished from *Interahamwe* or civilians, who were not wearing complete uniforms.³⁸³ Moreover, a review of Witness Sezirahiga's testimony confirms that he could distinguish soldiers – who wore predominantly green and khaki military uniforms and berets – from *Interahamwe*, who did not wear complete uniform.³⁸⁴ In addition, the Trial Chamber found that Witness QCO corroborated Witness Sezirahiga's testimony in this regard.³⁸⁵ The Appeals Chamber notes that Witness QCO testified that she could also distinguish soldiers as they wore "greenish, kaki" military uniforms, "caps or berets, with a round hem", "solid shoes" and were carrying firearms.³⁸⁶ The Appeals Chamber finds that the Trial Chamber did not err in finding that the witnesses could identify soldiers and distinguish them from *Interahamwe* or civilians.

174. In addition, the Appeals Chamber is satisfied that the Trial Chamber had a reasonable basis for concluding that the soldiers involved in the attack were from the Ngoma Military Camp. In particular, the Trial Chamber relied on Witness Sezirahiga's testimony that the soldiers were

³⁷⁷ Appeal Brief, para. 254, referring to Trial Judgement, para. 410; Reply Brief, para. 110.

³⁷⁸ Appeal Brief, para. 250.

³⁷⁹ Appeal Brief, para. 250, referring to Trial Judgement, paras. 423-425.

³⁸⁰ Notice of Appeal, para. 108; Appeal Brief, paras. 254, 257.

³⁸¹ Response Brief, paras. 142-152.

³⁸² Trial Judgement, paras. 440, 441, 443-453.

³⁸³ Trial Judgement, paras. 441, 444.

³⁸⁴ T. 2 April 2009 p. 56; T. 6 April 2009 p. 20. See also Trial Judgement, para. 444.

³⁸⁵ Trial Judgement, para. 444.

affiliated with the Ngoma Military Camp since they arrived with Hategekimana and acted under his orders.³⁸⁷ In addition, the Trial Chamber noted that Witness QCO equally attested to the fact that the soldiers came from the Ngoma Military Camp.³⁸⁸ Moreover, it follows from Witness QCO's testimony that "people who knew them well" confirmed that the soldiers were assigned to the Ngoma Military Camp.³⁸⁹ Although hearsay, this additional detail provides further support to her testimony.³⁹⁰

175. Finally, Hategekimana has not demonstrated how the fact that Witness Sezirahiga did not name any of the soldiers involved in the attack calls into question the Trial Chamber's assessment of his evidence. With respect to the soldier who saved his life twice, Witness Sezirahiga indicated that he did not know his name but clearly identified him as a soldier.³⁹¹ The witness's lack of knowledge of the names of soldiers does not disprove their presence in the attack.³⁹² Therefore, Hategekimana has not shown that the Trial Chamber's reliance on the evidence of Witness Sezirahiga was unreasonable.

176. Accordingly, Hategekimana has failed to demonstrate that the Trial Chamber erred in relying on Witnesses Sezirahiga and QCO to establish the involvement of soldiers from the Ngoma Military Camp in the attack.

2. Presence of Hategekimana

(a) Inconsistencies with Respect to Hategekimana's Vehicle and the Timing of his Arrival

177. Hategekimana submits that the Trial Chamber failed to provide a reasoned opinion in finding that he was present during the attack by highlighting unexplained conflicting findings and evidence concerning his whereabouts on the night of 23 April 1994 and the type of vehicle he was purportedly driving.³⁹³ In particular, he highlights the inconsistency between the testimony of Witness Sezirahiga that he arrived at the witness's house at around 11.35 p.m. and that of Witness XR, who testified that he was at Salomé Mujawayezu's residence from 11.00 p.m. for at least

³⁸⁶ T. 25 March 2009 p. 30 (closed session).

³⁸⁷ Trial Judgement, paras. 446, 454. *See also* T. 2 April 2009 pp. 56, 57, 59, 65, 67; T. 6 April 2009 pp. 3, 26, 32.

³⁸⁸ Trial Judgement, para. 441. *See also* T. 25 March 2009 pp. 30, 37, 51, 61 (closed session); T. 26 March 2009 p. 7 (closed session).

³⁸⁹ T. 26 March 2009 p. 7 (closed session). *See also* Trial Judgement, para. 425.

³⁹⁰ *Cf. Rukundo Appeal Judgement*, para. 196.

³⁹¹ T. 2 April 2009 p. 65; T. 6 April 2009 p. 5.

³⁹² For the same reasons, the Appeals Chamber further dismisses Hategekimana's argument on the lack of remarks made by soldiers during the attack. *See* Appeal Brief, para. 252, *referring to* Trial Judgement, para. 413. In any event, the Appeals Chamber notes that, contrary to Hategekimana's argument, Witness Sezirahiga did not only report remarks made by Jacques Habimana, an *Interahamwe*, but also testified to remarks made by the soldier who saved his life during the attack on his house. *See* T. 2 April 2009 p. 65.

³⁹³ Appeal Brief, paras. 258, 260-267; Reply Brief, paras. 114, 115, 118, 119.

20 minutes.³⁹⁴ In addition, Hategekimana notes that Witness Sezirahiga described him as driving a blue Daihatsu pickup, whereas Witness XR stated that his vehicle was a green Toyota pickup.³⁹⁵ Hategekimana further submits that Witness Sezirahiga's testimony is further contradicted by Witness QCO, who testified that her house was attacked at around 1.00 a.m. prior to the attack on Witness Sezirahiga's house.³⁹⁶

178. The Prosecution responds that the discrepancy with respect to Hategekimana's vehicle is minor and does not cast doubt on Hategekimana's conviction, which rests on credible, reliable, and corroborated evidence.³⁹⁷ The Prosecution further submits that Hategekimana's argument lacks merit since the houses of Witness Sezirahiga and Mujawayezu were near each other.³⁹⁸

179. The Appeals Chamber considers that the Trial Chamber carefully addressed Witnesses Sezirahiga's and QCO's testimonies with respect to the timing of the attack. The Trial Chamber noted that Witness Sezirahiga testified that the attack on his house started at 11.30 p.m. on 23 April 1994, whereas Witness QCO placed the event at around 01.00 a.m. on 24 April 1994.³⁹⁹ The Trial Chamber found "that the testimonies of the two witnesses do not show any major discrepancies as to the exact time of the attacks but show, at the most, that the attacks took place either very late in the night of 23 April 1994 or very early in the morning of 24 April 1994."⁴⁰⁰ The Appeals Chamber finds no error in the Trial Chamber's reasoning that these inconsistencies between the witnesses' evidence were minor and that their testimonies on this point were largely consistent.

180. Furthermore, the Appeals Chamber does not find that Witness XR contradicts Witnesses Sezirahiga's and QCO's testimonies with respect to Hategekimana's presence in the attack on Witness Sezirahiga's house. The Appeals Chamber first notes that the Trial Chamber did not make

³⁹⁴ Appeal Brief, paras. 258, 260, 262-264, 266, 267, referring to Trial Judgement, paras. 378, 440; Reply Brief, paras. 117, 118. See also AT. 15 December 2011 pp. 13, 33.

³⁹⁵ Hategekimana Appeal Brief, paras. 260, 261, 263, 266, referring to T. 2 April 2009 p. 60, Trial Judgement, para. 378. See also AT. 15 December 2011 pp. 13, 14.

³⁹⁶ Hategekimana Appeal Brief, paras. 264, 265; Hategekimana Reply Brief, para. 119. Hategekimana also submits that the Trial Chamber erred in fact by relying on Witnesses Sezirahiga's and QCO's testimonies to find that the attack on Witness Sezirahiga's house was prior to the one on Witness QCO's house, while Witness BTN placed the attack on Witness QCO's house first. He further argues that the Trial Chamber erred in fact by minimizing the contradiction between Witnesses Sezirahiga's and QCO's testimonies and Witness BTN's testimony on the time of the attacks on the various houses. See Hategekimana Notice of Appeal, paras. 106, 107, referring to Trial Judgement, paras. 440-442. Hategekimana does not, however, develop his arguments in his Appeal Brief. The Appeals Chamber therefore considers that he has abandoned his arguments in this respect and will not consider them.

³⁹⁷ Response Brief, para. 158, referring to Trial Judgement, paras. 378, 410, 459, 463, 464.

³⁹⁸ Response Brief, para. 160, referring to Witness QCO, T. 25 March 2009 pp. 33, 37, 40 (closed session), Witness Sezirahiga, T. 2 April 2009 p. 55, T. 6 April 2009 p. 10; Witness BTN, T. 23 September 2009 pp. 13, 14, 16, 17 (closed session).

³⁹⁹ Trial Judgement, para. 442. See also T. 2 April 2009 pp. 57, 58; T. 25 March 2009 p. 39 (closed session); T. 26 March 2009 pp. 12-15 (closed session).

⁴⁰⁰ Trial Judgement, para. 442.

a specific finding with respect to the time at which Hategekimana left Mujawayezu's house.⁴⁰¹ However, the Appeals Chamber notes that Witness XR testified that Hategekimana returned to Mujawayezu's house at around 11.00 p.m. on 23 April 1994,⁴⁰² and spoke for "about 20 minutes" with Murigande,⁴⁰³ and then left in a green Toyota pickup truck.⁴⁰⁴ The Appeals Chamber finds that Witness XR's testimony is not inconsistent with the Trial Chamber's finding that Hategekimana was present during the attack on Sezirahiga's house which took place "very late in the night of 23 April 1994 or very early in the morning of 24 April 1994",⁴⁰⁵ given that the houses of Witnesses Sezirahiga and QCO and Mujawayezu were near each other.⁴⁰⁶

181. The Trial Chamber did not explicitly address the difference between the testimonies of Witnesses Sezirahiga and XR regarding the colour and the make of the vehicle that Hategekimana used on the night of 23 April 1994. The Appeals Chamber is, nonetheless, satisfied that a reasonable trier of fact could consider this inconsistency to be minor.⁴⁰⁷ Accordingly, the Trial Chamber's failure to address this issue does not call into question the consistency of the witnesses' evidence.⁴⁰⁸

(b) Identification of Hategekimana

182. Hategekimana further submits that the Trial Chamber's findings with respect to his identification by Witness Sezirahiga are unreasonable.⁴⁰⁹ In particular, he contends that the Trial Chamber failed to make any factual findings on how Witness Sezirahiga knew Hategekimana. He further argues that the Trial Chamber's finding that Witness Sezirahiga "must have know the authorities of his [sector]; in particular, the commander of the camp responsible for maintaining peace and security" is speculative as Defence Exhibit 7A shows that the task of maintaining peace and security was assigned to the gendarmerie.⁴¹⁰ Moreover, Hategekimana asserts that the Trial Chamber failed to make any factual findings on Witness Sezirahiga's vantage point when he

⁴⁰¹ Trial Judgement, para. 403.

⁴⁰² T. 1 April 2009 p. 66 (closed session); T. 2 April 2009 pp. 18, 47 (closed session). *See also* Trial Judgement, para. 378.

⁴⁰³ T. 1 April 2009 pp. 66, 69 (closed session); T. 2 April 2009 pp. 3, 46 (closed session). *See also* Trial Judgement, paras. 378, 379.

⁴⁰⁴ T. 1 April 2009 p. 66 (closed session); T. 2 April 2009 p. 41 (closed session). *See also* Trial Judgement, para. 378.

⁴⁰⁵ Trial Judgement, para. 442.

⁴⁰⁶ *See* T. 25 March 2009 pp. 29, 37, 40 (closed session); T. 2 April 2009 p. 55; T. 6 April 2009 p. 10; T. 23 September 2009 p. 16 (closed session). Witness BTN testified that Mujawayezu's house was located approximately 100-110 metres from Witness QCO's house. *See* Trial Judgement, para. 387; T. 23 September 2009 pp. 16, 29 (closed session).

⁴⁰⁷ Witness XR testified that Hategekimana left Mujawayezu's house in a green Toyota pickup truck. *See* Trial Judgement, para. 378; T. 1 April 2009 p. 66 (closed session); T. 2 April 2009 p. 41 (closed session). Witness Sezirahiga testified that Hategekimana arrived at his house in a blue Daihatsu pickup truck. *See* Trial Judgement, paras. 410, 440; T. 2 April 2009 p. 60.

⁴⁰⁸ *Cf. Rukundo Appeal Judgement*, para. 84.

⁴⁰⁹ Appeal Brief, paras. 268-288; Reply Brief, para. 123.

⁴¹⁰ Notice of Appeal, para. 114, *referring to* Trial Judgement, para. 455; Appeal Brief, paras. 272, 273.

allegedly arrived at Sezirahiga's house and that there is no evidence on the time he allegedly spent there, whether he left the vehicle, or addressed anyone.⁴¹¹

183. In addition, Hategekimana contends that the Trial Chamber erred in relying on Witness Sezirahiga's uncorroborated testimony as he is unreliable and lacks credibility. Hategekimana submits that, although Witness Sezirahiga claimed to know him, his testimony on this point is inconsistent with his previous written statement of 1 October 1998 and his out-of-court statements made in 1997 and 1998.⁴¹² More specifically, Hategekimana posits that Witness Sezirahiga testified in court that, although he knew Hategekimana, he only learnt his name from Murigande,⁴¹³ one of the assailants who pleaded guilty to the attack against his family, while both of them were in detention in Rwanda. However, in his written statement of 1 October 1998, Witness Sezirahiga stated that Murigande only informed him about another second lieutenant, who was fat and hailed from Ruhengeri and, according to the Trial Chamber, was not Hategekimana.⁴¹⁴ Hategekimana adds that his name is not mentioned in Witness Sezirahiga's written statement of 1 October 1998, although by that time Witness Sezirahiga was supposed to have already met Murigande in prison.⁴¹⁵ Hategekimana further submits that the Trial Chamber's finding on Hategekimana's identification based on physical description lacks reasoning, in particular because Witness Sezirahiga failed to mention Hategekimana's beard, which distinguished him in a crowd according to several Defence witnesses.⁴¹⁶

184. Hategekimana argues that no evidence was adduced to corroborate Witness Sezirahiga's testimony that the witness had previously lodged a complaint against the commander of the Ngoma Military Camp; that Murigande had acknowledged in his guilty plea the involvement of Hategekimana in the attack on Witness Sezirahiga's house; and that Murigande's statement to the Public Prosecution Office of Rwanda does not indicate Hategekimana's presence in the attack.⁴¹⁷ Hategekimana therefore submits that the Trial Chamber erred by not requesting that Witness Sezirahiga's and Murigande's judicial records in Rwanda be produced.⁴¹⁸ Finally, Hategekimana argues that, in finding Witness Sezirahiga sincere because he could have further incriminated

⁴¹¹ Appeal Brief, paras. 253, 271, 285.

⁴¹² Notice of Appeal, para. 112; Appeal Brief, paras. 279, 280.

⁴¹³ The Appeals Chamber notes that, in his submissions on appeal, Hategekimana refers to Michel Muligande. See Notice of Appeal, para. 112; Appeal Brief, paras. 246, 256, 258, 259, 269, 274-279, 281-283, 289-291, 293. The Appeals Chamber understands that he is, in fact, referring to Michel Murigande.

⁴¹⁴ Notice of Appeal, para. 112; Appeal Brief, paras. 278, 279, 281, 283, *referring to* Trial Judgement, para. 457.

⁴¹⁵ Appeal Brief, para. 282.

⁴¹⁶ Appeal Brief, paras. 285, 286. See also AT. 15 December 2011 pp. 15, 16, 38.

⁴¹⁷ Appeal Brief, paras. 275, 276.

⁴¹⁸ Notice of Appeal, para. 113; Appeal Brief, paras. 277, 293.

Hategekimana in the crimes he described, the Trial Chamber relied on sentimental considerations in assessing Witness Sezirahiga's testimony.⁴¹⁹

185. The Prosecution responds that the Trial Chamber accepted Witness Sezirahiga's testimony that, although he did not know Hategekimana's name, he knew him as being the commander of the Ngoma Military Camp as he usually saw him in the neighbourhood.⁴²⁰ With respect to Defence Exhibit 7A, the Prosecution submits that it may be presumed that the Trial Chamber considered this evidence even if it did not refer to it in the Trial Judgement.⁴²¹ In addition, the Prosecution asserts that Witness Sezirahiga testified that he was two metres outside his house when Hategekimana arrived and that the absence of a factual finding as to any remarks made by Hategekimana does not disprove his presence during the attack.⁴²²

186. The Prosecution further responds that the Trial Chamber properly assessed the hearsay evidence and the inconsistencies in Witness Sezirahiga's testimony with respect to the identification of Hategekimana.⁴²³ With respect to the Rwandan judicial records of Witness Sezirahiga and Murigande, the Prosecution responds that a trial chamber has discretion in declining to require documents in support of witnesses' testimonies and that, in this case, the Trial Chamber correctly noted that "testimony under oath has more probative value than prior statements".⁴²⁴ In any event, the Prosecution asserts that Hategekimana failed to demonstrate any error in the assessment of Witness Sezirahiga's credibility resulting from the absence of the Rwandan judicial records as the Trial Chamber was well aware of Witness Sezirahiga's involvement with Rwandan judicial authorities.⁴²⁵ Finally, the Prosecution responds that Hategekimana's argument that the Trial Chamber relied on sentimental considerations should be summarily dismissed as it is without merit and that Hategekimana fails to support his allegation of judicial bias or partiality with any evidence.⁴²⁶

187. The Appeals Chamber recalls that a reasonable trial chamber must take into account the difficulties associated with identification evidence in a given case and must carefully evaluate any such evidence before accepting it as the basis for sustaining a conviction.⁴²⁷ In order to make a finding on Hategekimana's presence, the Trial Chamber relied on Witness Sezirahiga's

⁴¹⁹ Appeal Brief, para. 280.

⁴²⁰ Response Brief, para. 163, referring to T. 2 April 2009 p. 59, T. 6 April 2009 p. 3, Trial Judgement, paras. 454, 458.

⁴²¹ Response Brief, para. 164, referring to *Ndindabahizi* Appeal Judgement, para. 75, *Kvočka et al.* Appeal Judgement, para. 23.

⁴²² Response Brief, paras. 149, 163, referring to T. 2 April 2009 pp. 60, 62.

⁴²³ Response Brief, para. 165.

⁴²⁴ Response Brief, para. 166, referring to Trial Judgement, para. 461. See also AT. 15 December 2011 p. 28.

⁴²⁵ Response Brief, para. 167, referring to T. 6 April 2009 pp. 11-17.

⁴²⁶ Response Brief, para. 168.

uncorroborated testimony.⁴²⁸ The Appeals Chamber recalls that a trial chamber is at liberty to rely on the uncorroborated evidence of a single witness when making its findings, even if it relates to a material fact.⁴²⁹

188. The Appeals Chamber notes that it is unclear why the Trial Chamber stated that “Sezirahiga must have known the authorities of his [sector]; in particular, the commander of the camp responsible for the maintenance of peace and security in his [sector].”⁴³⁰ The Appeals Chamber notes that this statement seems to be in contradiction with Defence Exhibit 7A, which shows that the task of maintaining peace and security was assigned to the gendarmerie.⁴³¹ However, the Appeals Chamber finds that this statement – and its apparent inconsistency with Defence Exhibit 7A – is immaterial. It does nothing to call into question the Trial Chamber’s finding that Witness Sezirahiga was an eyewitness and “clearly identified the Commander of Ngoma [Military] Camp as the leader of the second group of soldiers” and that, although he did not know Hategekimana’s name, he knew him before the events as Commander of the Ngoma Military Camp.⁴³² The Appeals Chamber recalls that the Trial Chamber found Witness Sezirahiga’s testimony to be direct, reliable, and coherent.⁴³³

189. After having assessed the totality of the evidence, the Trial Chamber found that “[Witness] Sezirahiga recognized the Commander of Ngoma [Military] Camp whose name was later confirmed to him as being Ildephonse Hategekimana.”⁴³⁴ Accordingly, the Trial Chamber found that it was Hategekimana who was leading the soldiers from the Ngoma Military Camp in the attack on Witness Sezirahiga’s house. The Appeals Chamber sees no error in the Trial Chamber’s assessment of Witness Sezirahiga’s evidence.

⁴²⁷ *Rukundo* Appeal Judgement, paras. 67, 195; *Limaj et al.* Appeal Judgement, para. 30; *Kamuhanda* Appeal Judgement, para. 234; *Kupreškić et al.* Appeal Judgement, para. 34.

⁴²⁸ Trial Judgement, paras. 454-458.

⁴²⁹ *Haradinaj et al.* Appeal Judgement, para. 219; *Kupreškić et al.* Appeal Judgement, para. 33; *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgement, para. 62; *Delalić et al.* Appeal Judgement, paras. 492, 506; *Kayishema and Ruzindana* Appeal Judgement, para. 154.

⁴³⁰ Trial Judgement, para. 455.

⁴³¹ Defence Exhibit 7A (23 janvier 1974 – *Décret-Loi : Création de la Gendarmerie*).

⁴³² Trial Judgement, paras. 454, 455 (“[Witness] Sezirahiga further testified that Michel Murigande, one of the assailants who pleaded guilty to the attack against his family, told him, while both of them were in detention at Karubanda prison, that the name of the Commander of Ngoma [Military] Camp was Ildephonse Hategekimana. While entering his plea of guilty, Michel Murigande had acknowledged the involvement of Hategekimana and soldiers of Ngoma [Military] Camp in the attack. For his part, Sezirahiga lodged a complaint against the Commander of Ngoma [Military] Camp, but the latter like the other soldiers being sought for prosecution, could not be found. The [Trial] Chamber accepts that he knew Hategekimana before the events as Commander of Ngoma [Military] Camp and, even if he did not know his name, he usually saw him in the neighbourhood.”) (internal citations omitted). See also T. 2 April 2009 p. 59.

⁴³³ Trial Judgement, para. 456.

⁴³⁴ Trial Judgement, para. 458.

190. 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 an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.⁴³⁵

191. With respect to the alleged inconsistency between Witness Sezirahiga's testimony at trial and his prior written statement of 1 October 1998, the Appeals Chamber notes that the Trial Chamber explicitly considered Hategekimana's submissions on the issue.⁴³⁶ The Trial Chamber stated:

The Defence contests the credibility of Sezirahiga's testimony regarding the presence of Hategekimana who is said to have led a second group of soldiers to the scene. To support this assertion, the Defence points out that, in his statement of 1 October 1998, the witness had talked about the presence of two Second Lieutenants among the group of assailants who came to attack his family. In that statement, Sezirahiga did not expressly mention the presence of the Accused at the scene of the crime. The Chamber notes that the witness stated as follows: "The group of assailants was led by a second lieutenant whom I knew long before at Ngoma Camp; I do not know his name but he was short and a bit light in complexion. The group also included another Second Lieutenant who was fat and I later learnt from Michel Murigande that he hailed from Ruhengeri." The Chamber notes that Sezirahiga saw a Second Lieutenant whom he knew before, which is consistent with his court testimony. Further, the physical description of a Second Lieutenant who was "short and a bit light in complexion" fits Hategekimana. The witness stated clearly that the link was "Ngoma Camp." The Chamber points out that there were two Lieutenants in charge of Ngoma Camp during the events: Commander Hategekimana and his deputy, Niyonteze. The Chamber concludes from Sezirahiga's account that the person concerned can only be Hategekimana. The Chamber considers that the witness's statement of 1 October 1998 is consistent with his court testimony regarding the presence of Hategekimana during the attack against his family. Consequently, the Chamber dismisses Defence allegations on this point.⁴³⁷

Hategekimana merely raises the same argument on appeal as he did at trial and fails to demonstrate that the Trial Chamber erred in its assessment. Accordingly, the Appeals Chamber dismisses this argument.

192. With respect to Hategekimana's arguments that the Trial Chamber erred by not requesting that Witness Sezirahiga's and Murigande's judicial records in Rwanda be produced, the Appeals Chamber considers that Hategekimana does not point to any request made before the Trial Chamber in this regard and fails to demonstrate why the Trial Chamber would have been required to request such records. Hategekimana's argument is therefore dismissed.

193. The Appeals Chamber further dismisses Hategekimana's arguments with respect to the Trial Chamber's alleged lack of factual findings on: Witness Sezirahiga's position when Hategekimana arrived at his house; the time he spent at Witness Sezirahiga's house; and whether he left his vehicle

⁴³⁵ *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. See also *Rutaganda* Appeal Judgement, para. 443; *Musema* Appeal Judgement, para. 89.

⁴³⁶ Trial Judgement, para. 457.

⁴³⁷ Trial Judgement, para. 457 (internal citations omitted).

or addressed anyone. Hategekimana fails to show how any of this information was relevant or material to Witness Sezirahiga's ability to identify him or disprove the Trial Chamber's finding that he was present during the attack on Witness Sezirahiga's house.

194. Similarly, the Appeals Chamber dismisses Hategekimana's argument regarding Witness Sezirahiga's alleged failure to mention his beard, which, as pointed out by Defence Witnesses RGF, CBM2, CKB, MZA, and ZML, distinguished him in a crowd. The Trial Chamber found that "none of these Defence witnesses testified to having seen him with a beard during the period alleged in the Indictment" and therefore reasonably dismissed Hategekimana's submission on this point.⁴³⁸

195. As regards Hategekimana's argument that the Trial Chamber relied on sentimental considerations in assessing Witness Sezirahiga's evidence, the Appeals Chamber is not convinced that it was unreasonable for the Trial Chamber to accept that the witness could have further implicated Hategekimana in the crimes he described, but did not.⁴³⁹ Hategekimana's mere contention that this is a sentimental consideration is insufficient to demonstrate that the Trial Chamber erred. Consequently, Hategekimana has not shown that the Trial Chamber erred in its assessment of Witness Sezirahiga's credibility or that no reasonable trier of fact could have concluded that he was present during the attack on Witness Sezirahiga's house.

3. Involvement of a Soldier in the Rape

196. Hategekimana submits that the Trial Chamber erred in finding that Nura Sezirahiga was raped by a soldier from the Ngoma Military Camp in light of the inconsistencies between Witness Sezirahiga's prior statements and his uncorroborated testimony.⁴⁴⁰ In particular, Hategekimana asserts that, in his written statement of 2 November 1997, Witness Sezirahiga claimed that his daughter was raped by Murigande, while in his testimony he indicated that Murigande delivered her to a soldier, who raped her. Hategekimana adds that, in one of his prior statements, Witness Sezirahiga indicated the death of his children without even mentioning the rape of his daughter.⁴⁴¹ Hategekimana contends that the Trial Chamber erroneously minimized these inconsistencies and Witness Sezirahiga's evasive response to them and incorrectly found that testimony under oath had more probative value than prior written statements.⁴⁴² He argues that, in so doing, the Trial Chamber incorrectly departed from the legal principle that it set forth initially regarding the assessment of inconsistencies.⁴⁴³ Finally, Hategekimana argues that, in finding that, as a father,

⁴³⁸ Trial Judgement, para. 84.

⁴³⁹ Trial Judgement, para. 456.

⁴⁴⁰ Notice of Appeal, para. 115; Appeal Brief, paras. 289-295.

⁴⁴¹ Notice of Appeal, para. 115; Appeal Brief, para. 290. *See also* AT. 15 December 2011 pp. 13, 31.

⁴⁴² Notice of Appeal, para. 115; Appeal Brief, para. 291.

⁴⁴³ Appeal Brief, para. 292, *referring to* Trial Judgement, para. 87; Reply Brief, para. 125.

Witness Sezirahiga could not have fabricated the rape of his own daughter and that he was genuinely moved during his testimony in court, the Trial Chamber relied on sentimental considerations to cover up the lack of evidence on the alleged rape of Nura Sezirahiga.⁴⁴⁴

197. The Prosecution responds that the Trial Chamber reviewed and discussed the inconsistencies between Witness Sezirahiga's testimony and his previous written statement of 2 November 1997 and found the witness's explanations reasonable.⁴⁴⁵

198. The Appeals Chamber recalls that a trial chamber has the discretion to accept a witness's testimony, notwithstanding inconsistencies between the testimony and his or her previous statements, as it is for the trial chamber to determine whether an alleged inconsistency is sufficient to cast doubt on the evidence of the witness concerned.⁴⁴⁶

199. With respect to the alleged inconsistency between Witness Sezirahiga's testimony at trial and his prior written statement of 2 November 1997, the Trial Chamber explicitly considered Hategekimana's submissions on the issue.⁴⁴⁷ The Trial Chamber accepted Witness Sezirahiga's explanation that, whether it was Murigande or the soldier, they were together and Murigande had immobilized his daughter during the rape.⁴⁴⁸ It concluded that the inconsistency was minor and, since testimony under oath has more probative value than prior written statement, it found that Nura Sezirahiga was raped by a soldier.⁴⁴⁹ The Appeals Chamber is satisfied that, in doing so, the Trial Chamber acted within its discretion.

200. In relation to Hategekimana's argument that, in one of his prior statements, Witness Sezirahiga indicated the death of his children without even mentioning the rape of his daughter, the Appeals Chamber notes that Hategekimana fails to provide any reference to such a statement.⁴⁵⁰ The Appeals Chamber recalls that the appealing party must provide precise references and that it cannot be expected to consider submissions in detail if they are obscure, vague, or suffer from other formal and obvious insufficiencies.⁴⁵¹ Hategekimana, therefore, has failed to identify any error on the part of the Trial Chamber in this respect.

201. Moreover, the Appeals Chamber notes that, in paragraph 87 of the Trial Judgement, the Trial Chamber stated that, "[w]hen inconsistencies were raised between the content of a prior

⁴⁴⁴ Appeal Brief, paras. 294, 295.

⁴⁴⁵ Response Brief, para. 165. *See also* AT. 15 December 2011 pp. 28, 29.

⁴⁴⁶ *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96. *See also* *Rutaganda* Appeal Judgement, para. 443; *Musema* Appeal Judgement, para. 89.

⁴⁴⁷ Trial Judgement, para. 461.

⁴⁴⁸ Trial Judgement, para. 461; T. 6 April 2009 pp. 8, 40, 41.

⁴⁴⁹ Trial Judgement, para. 461.

⁴⁵⁰ *See* Appeal Brief, para. 290.

statement and the testimony during trial, [its] point of departure was the account given by a witness in his or her testimony in court” and that only “when the inconsistencies cannot be explained to the satisfaction of the [Trial] Chamber, the probative value of the testimony may be questioned.” Contrary to Hategekimana’s submission,⁴⁵² the Trial Chamber did not depart from this legal principle in its assessment of inconsistencies.

202. Turning to Hategekimana’s argument that the Trial Chamber relied on sentimental considerations in assessing Witness Sezirahiga’s testimony, the Appeals Chamber recalls 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 considerable deference.⁴⁵³ The Appeals Chamber has previously noted that it “is loathe to disturb such credibility assessments”.⁴⁵⁴ Therefore, the Appeals Chamber is not convinced that it was unreasonable for the Trial Chamber, in assessing Witness Sezirahiga’s credibility, to have accepted that “Witness Sezirahiga was sincere when he was talking about the rape of his daughter” and that, “as a father, [he] could not have fabricated the rape of his own daughter.”⁴⁵⁵ Hategekimana’s mere contention that this is a sentimental consideration is insufficient to demonstrate that the Trial Chamber erred.

203. Accordingly, Hategekimana has not shown that the Trial Chamber’s findings are wholly erroneous or that no reasonable trier of fact could have concluded that Nura Sezirahiga was raped by a soldier from the Ngoma Military Camp.

D. Conclusion

204. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana’s Fourth Ground of Appeal.

⁴⁵¹ See *supra* para. 11.

⁴⁵² Appeal Brief, para. 292, referring to Trial Judgement, para. 87; Hategekimana Reply Brief, para. 125.

⁴⁵³ *Muvunyi II* Appeal Judgement, para. 26; *Nchamihigo* Appeal Judgement, para. 47; *Bikindi* Appeal Judgement, para. 114; *Simba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, paras. 14, 194; *Ndindabahizi* Appeal Judgement, para. 34; *Ntagerura et al.* Appeal Judgement, paras. 12, 213; *Semanza* Appeal Judgement, para. 8; *Ntakirutimana* Appeal Judgement, paras. 12, 204, 244; *Kamuhanda* Appeal Judgement, para. 138; *Kayishema and Ruzindana* Appeal Judgement, para. 222.

⁴⁵⁴ *Muvunyi II* Appeal Judgement, para. 26, citing *Ntakirutimana* Appeal Judgement, para. 244.

⁴⁵⁵ Trial Judgement, para. 463, n. 815 (“The [Trial] Chamber had to adjourn because of Sadiki Sezirahiga’s indisposition.”).

VII. ALLEGED ERRORS RELATING TO THE ATTACK AT THE NGOMA PARISH (GROUND 5)

205. The Trial Chamber found Hategekimana guilty of genocide (Count 1) under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Tutsi civilians at the Ngoma Parish on 30 April 1994.⁴⁵⁶ The Trial Chamber found that, on 30 April 1994, Hategekimana led a group of assailants, including soldiers from the Ngoma Military Camp, *Interahamwe*, and other armed civilians, to the Ngoma Parish, where the assailants attacked and killed approximately 500, mostly Tutsi, refugees.⁴⁵⁷

206. Hategekimana submits that the Trial Chamber erred in convicting him for the killings at the Ngoma Parish.⁴⁵⁸ In this section the Appeals Chamber considers Hategekimana's submissions that the Trial Chamber erred in assessing: (i) the form of criminal responsibility; and (ii) the evidence.

A. Form of Responsibility

207. Hategekimana submits that the Trial Chamber erred in convicting him for his participation in a joint criminal enterprise.⁴⁵⁹ Specifically, Hategekimana observes that the Trial Chamber made no factual findings that he searched the premises of the parish, as alleged in paragraph 19 of the Indictment.⁴⁶⁰ In addition, Hategekimana argues that the Trial Chamber lacked direct evidence that he issued the order to attack at the scene of the parish, as alleged in the Indictment.⁴⁶¹ In particular, Hategekimana notes that, according to the Trial Judgement, he departed from the parish after learning that Witness Masinzo could not be found.⁴⁶² Hategekimana further contends that the Trial Chamber failed to specify whether the assailants at the parish participated in the joint criminal enterprise.⁴⁶³

208. The Prosecution responds that the Trial Chamber did not err in its assessment of the elements of joint criminal enterprise.⁴⁶⁴

209. The Appeals Chamber is not satisfied that Hategekimana has identified any error in the Trial Chamber's assessment of his participation in a joint criminal enterprise. Although the Trial Chamber did not expressly find that Hategekimana searched the Ngoma Parish, as alleged in

⁴⁵⁶ Trial Judgement, paras. 688, 697, 730.

⁴⁵⁷ Trial Judgement, paras. 683, 684.

⁴⁵⁸ Notice of Appeal, paras. 118-122; Appeal Brief, paras. 302-375; Reply Brief, paras. 128-138.

⁴⁵⁹ Notice of Appeal, para. 122; Appeal Brief, paras. 372-375.

⁴⁶⁰ Appeal Brief, para. 373.

⁴⁶¹ Appeal Brief, paras. 374, 375. See Reply Brief, para. 137.

⁴⁶² Appeal Brief, para. 374.

⁴⁶³ Appeal Brief, para. 375. See Reply Brief, para. 138.

paragraph 19 of the Indictment, it did make findings that he was present, looking for Witness Masinzo, and had ordered Corporal Mpakaniye to conduct a search.⁴⁶⁵ In any event, it is immaterial that the Trial Chamber did not find that Hategekimana searched the parish. Significantly, paragraph 19 of the Indictment also alleges that Hategekimana led a group of armed soldiers, *Interahamwe*, and civilians to the parish and that he ordered the assailants to attack and kill the Tutsi refugees there. The Trial Chamber made findings on these allegations, which underpin his conviction.⁴⁶⁶

210. A review of the Trial Judgement reflects that the Trial Chamber did not identify the location or timing of when Hategekimana issued the order to soldiers from the Ngoma Military Camp to attack the Tutsi refugees at the Ngoma Parish. The Trial Chamber thus did not find, as alleged in the Indictment, that he gave the order while at the parish. The Trial Chamber accepted, however, the evidence of Witness Rudahunga that Corporal Mpakaniye informed the witness that Hategekimana had ordered him to kill the refugees.⁴⁶⁷ The Appeals Chamber recalls that it is not impermissible to enter a conviction for ordering in the absence of direct evidence of when and where a particular order was issued.⁴⁶⁸ Accordingly, Hategekimana has not shown that the Trial Chamber erred in not identifying the exact time and location at which Hategekimana gave the order.

211. Finally, there is no merit to Hategekimana's contention that the Trial Chamber failed to specify that the assailants participating in the attack were part of the joint criminal enterprise. In this respect, the Trial Chamber expressly found that "Hategekimana shared *the common purpose* with Ngoma [Military] Camp soldiers, under his command, as well as *Interahamwe* and armed civilians, of killing the [Tutsis] who had taken refuge at the Ngoma Parish."⁴⁶⁹ Following this statement, the Trial Chamber went on to discuss whether "Hategekimana and the other participants in the joint criminal enterprise" acted with genocidal intent.⁴⁷⁰

212. Accordingly, Hategekimana has failed to demonstrate that the Trial Chamber erred in assessing the elements of joint criminal enterprise.

B. Assessment of the Evidence

213. The Trial Chamber found that, on 29 April 1994, *Interahamwe* and other civilian assailants attacked the Ngoma Parish and that the parish priests contacted the Ngoma Military Camp for

⁴⁶⁴ Response Brief, paras. 195-197.

⁴⁶⁵ Trial Judgement, paras. 541, 564, 565, 567, 574.

⁴⁶⁶ Trial Judgement, paras. 682-685.

⁴⁶⁷ Trial Judgement, para. 541. See T. 21 April 2009 p. 14.

⁴⁶⁸ See *Haraqija and Morina* Appeal Judgement, n. 196, referring to *Galić* Appeal Judgement, paras. 177, 178, 389.

⁴⁶⁹ Trial Judgement, para. 685 (emphasis added).

assistance.⁴⁷¹ The Trial Chamber noted that the refugees were able to repulse the attack.⁴⁷² The Trial Chamber found that Lieutenant Niyonteze of the Ngoma Military Camp ultimately arrived at the parish with soldiers but did nothing to arrest the assailants.⁴⁷³ According to the Trial Chamber, following the attack, Lieutenant Niyonteze inspected the premises of the parish, verified the number of refugees and their location, and criticized Witness Masinzo, who was a parish priest, for housing “*Inyenzi*” near the camp.⁴⁷⁴ The Trial Chamber concluded that Lieutenant Niyonteze’s inaction in the face of the attack demonstrated his tacit approval of it and that his subsequent inspection of the parish and comments indicated that he was preparing for an attack the next day.⁴⁷⁵

214. The Trial Chamber further found that, on 30 April 1994, Corporal Mpakaniye arrived at the Ngoma Parish and warned Witness Masinzo that Hategekimana would soon arrive to kill him.⁴⁷⁶ The Trial Chamber also accepted that Corporal Mpakaniye told Witness Rudahunga at some point that day that Hategekimana had ordered him to kill the refugees.⁴⁷⁷ The Trial Chamber found that, later that day, Hategekimana arrived at the parish with soldiers from the Ngoma Military Camp and other armed civilian assailants, including those who had participated in the attack the preceding day.⁴⁷⁸ The Trial Chamber found that, on arrival, Hategekimana spoke to Witness Rudahunga and asked him the whereabouts of Witness Masinzo.⁴⁷⁹ It follows from the Trial Judgement that, when Hategekimana could not locate Witness Masinzo, he told the soldiers: “If you find him, bring him to me.”⁴⁸⁰ Hategekimana then departed the Ngoma Parish and the assailants, including Ngoma Military Camp soldiers, began killing the refugees.⁴⁸¹ The Trial Chamber described the attacks of 29 and 30 April 1994 as involving “obvious coordinated action”.⁴⁸²

215. In its legal findings, the Trial Chamber found that, through his presence at the Ngoma Parish on 30 April 1994 and his order to attack the refugees there, Hategekimana contributed significantly to the success of the attack and demonstrated that he shared the common purpose of the assailants of killing the Tutsi refugees at the parish.⁴⁸³

⁴⁷⁰ Trial Judgement, para. 685. *See also* Trial Judgement, paras. 686, 687.

⁴⁷¹ Trial Judgement, paras. 530, 533. *See also* Trial Judgement, para. 683.

⁴⁷² Trial Judgement, paras. 530, 683.

⁴⁷³ Trial Judgement, para. 533. *See also* Trial Judgement, para. 683.

⁴⁷⁴ Trial Judgement, paras. 534, 535, 683.

⁴⁷⁵ Trial Judgement, paras. 533-536.

⁴⁷⁶ Trial Judgement, paras. 539, 565.

⁴⁷⁷ Trial Judgement, para. 541.

⁴⁷⁸ Trial Judgement, paras. 562, 574, 683.

⁴⁷⁹ Trial Judgement, para. 567.

⁴⁸⁰ Trial Judgement, para. 567.

⁴⁸¹ Trial Judgement, para. 574.

⁴⁸² Trial Judgement, para. 537.

⁴⁸³ Trial Judgement, paras. 684, 685.

216. Hategekimana submits that the Trial Chamber erred in its assessment of the evidence related to the attack of 29 April 1994, the presence of soldiers from the Ngoma Military Camp during the attack on 30 April 1994, and his presence at the parish on 30 April 1994.⁴⁸⁴

1. Attack of 29 April 1994

217. Hategekimana submits that the Trial Chamber erred in considering evidence related to the attack at the Ngoma Parish on 29 April 1994.⁴⁸⁵ He argues that this incident, a material fact, was not pleaded in the Indictment.⁴⁸⁶ Furthermore, he argues that the evidence is inconsistent and lacking in detail as to the nature of the prior planning, the involvement of the soldiers, and Lieutenant Niyonteze's tacit approval of the attack.⁴⁸⁷

218. The Prosecution responds that the Trial Chamber did not err in considering the unpleaded events of 29 April 1994 and relying on it as context.⁴⁸⁸

219. Although the Trial Chamber extensively discussed the evidence and made findings related to the attack of 29 April 1994, a review of the Trial Judgement reveals that Hategekimana's conviction rests solely on his order to the soldiers of the Ngoma Military Camp to attack the refugees at the Ngoma Parish and his presence there on the morning of 30 April 1994.⁴⁸⁹ The events that occurred on the night of 29 April 1994 provide only contextual background. A trial chamber has the discretion to admit any relevant evidence which it deems to have probative value even where it is not possible to convict an accused on such evidence due to lack of notice.⁴⁹⁰

220. Accordingly, there is no merit to Hategekimana's contention that the Trial Chamber erred in considering the evidence related to this attack. Moreover, considering that this evidence does not underpin Hategekimana's convictions, he fails to identify any error that would result in a miscarriage of justice.

2. Involvement of Soldiers from the Ngoma Military Camp

221. In finding that soldiers from the Ngoma Military Camp participated in the attack at the parish on 30 April 1994, the Trial Chamber relied on the direct evidence of Witness Rudahunga.⁴⁹¹ In particular, the Trial Chamber found Witness Rudahunga's first-hand account of the arrival of

⁴⁸⁴ Notice of Appeal, paras. 118-121; Appeal Brief, paras. 302-371.

⁴⁸⁵ Appeal Brief, paras. 302-316.

⁴⁸⁶ Appeal Brief, para. 303. *See* Reply Brief, para. 130.

⁴⁸⁷ Appeal Brief, paras. 302-316.

⁴⁸⁸ Response Brief, paras. 175-176.

⁴⁸⁹ Trial Judgement, paras. 684, 685.

⁴⁹⁰ *Ntahobali and Nyiramasuhuko* Decision of 5 July 2004, paras. 14-16.

⁴⁹¹ Trial Judgement, paras. 539-541.

Hategekimana with about six soldiers at the parish to be “detailed, consistent and reliable”.⁴⁹² The Trial Chamber also accepted Witness Rudahunga testimony that, earlier that morning, Corporal Mpakaniye informed the witness that Hategekimana had ordered the soldier to kill the refugees.⁴⁹³ Moreover, the Trial Chamber found credible Witness Rudahunga’s testimony that, after Hategekimana’s departure, Corporal Mpakaniye and the other soldiers in fact participated in the attack.⁴⁹⁴

222. In addition to this direct evidence, the Trial Chamber also considered circumstantial and second-hand accounts of the role of soldiers from the Ngoma Military Camp in the attack. For example, the Trial Chamber accepted the “reliable and consistent” evidence of Witness Masinzo that Corporals Mpakaniye and Nkurunziza came to the parish to warn him of Hategekimana’s intention to kill him.⁴⁹⁵ The Trial Chamber also found credible the account of Witness BYQ, a soldier at the Ngoma Military Camp, who heard from his fellow camp soldiers, including some of his subordinates, about their involvement in the attack.⁴⁹⁶ The Trial Chamber further noted that Witness BYQ provided direct testimony of seeing the soldiers with looted property taken from the victims of the massacre at the parish.⁴⁹⁷

223. Moreover, the Trial Chamber noted that Witness BYR, another soldier from the Ngoma Military Camp, provided a corroborative account that certain soldiers from the camp as well as civilians participated in the attack,⁴⁹⁸ but that the source of Witness BYR’s information was not clear and that he was a potential accomplice in the attack.⁴⁹⁹ Similarly, the Trial Chamber considered that Witness Ntezimana’s observation of soldiers at the parish following the massacre offered additional corroboration to the accounts of Witnesses Rudahunga, BYQ, and BYR.⁵⁰⁰

224. Hategekimana submits that the Trial Chamber erred in relying on this evidence to establish that soldiers from the Ngoma Military Camp participated in the attack.⁵⁰¹ In particular, Hategekimana questions the Trial Chamber’s findings that Corporals Mpakaniye and Nkurunziza were soldiers from the Ngoma Military Camp. He argues that the Trial Chamber failed to verify their status and that neither Witness BYQ nor Witness BYR mentioned them as participants in the

⁴⁹² Trial Judgement, para. 539.

⁴⁹³ Trial Judgement, para. 541.

⁴⁹⁴ Trial Judgement, para. 541.

⁴⁹⁵ Trial Judgement, para. 539.

⁴⁹⁶ Trial Judgement, paras. 543-545.

⁴⁹⁷ Trial Judgement, para. 543.

⁴⁹⁸ Trial Judgement, para. 546.

⁴⁹⁹ Trial Judgement, para. 547.

⁵⁰⁰ Trial Judgement, para. 548.

⁵⁰¹ Appeal Brief, paras. 317-342.

attack.⁵⁰² Furthermore, Hategekimana highlights a discrepancy between these soldiers' knowledge, according to Witness Masinzo, of a plan to attack the parish and the fact that Witness BYQ was not told about any preparation of an attack.⁵⁰³ Accordingly, Hategekimana submits that any testimony based on their information is unreliable.⁵⁰⁴

225. In addition, Hategekimana argues that the Trial Chamber had an insufficient basis to determine that Witness Rudahunga was able to distinguish soldiers from civilian assailants, highlighting the witness's admission that he did not keep company with soldiers as well as evidence from Defence Witness ZML that some of the civilian assailants wore parts of military uniforms.⁵⁰⁵ Hategekimana also contends that Witness Rudahunga's inability to name the soldiers who participated in the attack makes it impossible to determine whether his evidence corroborates that of Witnesses BYQ and BYR, who each mentioned the names of several soldiers participating in the attack.⁵⁰⁶

226. Moreover, Hategekimana highlights a number of inconsistencies and deficiencies in the evidence of Witnesses BYQ and BYR.⁵⁰⁷ In particular, Hategekimana notes that they each named only one soldier in common among their lists of those participating in the attack.⁵⁰⁸ Hategekimana further submits that Witness BYR's testimony was based on an unknown source and thus was inherently unreliable.⁵⁰⁹

227. Hategekimana also suggests that Witness BYQ's testimony that he served as duty officer during the week of 27 April 1994 conflicts with that of Witness BRS, who claimed that he held that post at the time. Hategekimana submits that this calls into question whether Witness BYQ would have held the post which resulted in him learning about the attack from the returning soldiers.⁵¹⁰ According to Hategekimana, the Trial Chamber also took an inconsistent approach in accepting the hearsay evidence of Witnesses BYQ and BYR, when it rejected similar evidence from Witness BRS in relation to the attack at *Groupe scolaire* and Witnesses BYR and BYP in relation to the attack on the Matyazo Health Centre.⁵¹¹ In a similar vein, Hategekimana submits that the Trial Chamber

⁵⁰² Appeal Brief, paras. 320, 321.

⁵⁰³ Appeal Brief, para. 322.

⁵⁰⁴ Appeal Brief, para. 326.

⁵⁰⁵ Appeal Brief, paras. 323, 325. *See also* Reply Brief, para. 132.

⁵⁰⁶ Appeal Brief, para. 324.

⁵⁰⁷ Appeal Brief, paras. 327-334. Hategekimana also disputes that Witness BYR was assigned to the camp at the relevant time and submits that he was a detainee at the time of trial. *See* Appeal Brief, paras. 331-333. The Appeals Chamber has already rejected these arguments. *See supra* 102.

⁵⁰⁸ Appeal Brief, para. 327.

⁵⁰⁹ Appeal Brief, paras. 332, 333.

⁵¹⁰ Appeal Brief, para. 328.

⁵¹¹ Appeal Brief, paras. 329, 334.

exhibited bias in assessing the Defence evidence by accepting portions of their accounts that corroborated Prosecution evidence and unreasonably rejecting the portions that conflicted with it.⁵¹²

228. Finally, Hategekimana submits that the Trial Chamber erred in relying on Witness Ntezimana because the Trial Chamber did not make any findings with respect to the unknown source of his evidence.⁵¹³

229. The Prosecution responds that the Trial Chamber reasonably assessed the evidence and found that soldiers from the Ngoma Military Camp participated in the attack at the Ngoma Parish on 30 April 1994.⁵¹⁴

230. The Appeals Chamber finds no merit in Hategekimana's contention that the Trial Chamber erred in finding that Corporals Mpakaniye and Nkurunziza were soldiers based at the Ngoma Military Camp. Witness Masinzo testified that he was familiar with a number of soldiers stationed at the Ngoma Military Camp, that he knew Hategekimana, and that he had even visited the camp on one occasion.⁵¹⁵ Witness Masinzo further stated that he knew both of these soldiers well and had spoken with them on a number of occasions.⁵¹⁶ Furthermore, Witness Rudahunga testified that he interacted with Corporal Mpakaniye and other soldiers accompanying him several times on the day of the attack and that these individuals confirmed to him that they were from the Ngoma Military Camp.⁵¹⁷

231. The Appeals Chamber considers that the testimonies of Witnesses Rudahunga and Masinzo provided a reasonable basis for the Trial Chamber to conclude that these soldiers were based at the Ngoma Military Camp. Moreover, nothing in the evidence of Witnesses BYQ and BYR has been identified by Hategekimana to suggest that their list of participants in the attack was exhaustive. Consequently, the fact that Witnesses BYQ and BYR did not mention the involvement of Corporals Mpakaniye and Nkurunziza in the attack or that Witness BYQ might not have known about the attack beforehand does not call into question the reasonableness of the Trial Chamber's reliance on direct evidence that Corporals Mpakaniye and Nkurunziza were affiliated with the camp and participated in the attack.

232. Even though Witness Rudahunga acknowledged that he "did not keep company of soldiers",⁵¹⁸ his testimony reveals that he was aware that soldiers wore berets and that the

⁵¹² Appeal Brief, paras. 335-342.

⁵¹³ Appeal Brief, para. 319.

⁵¹⁴ Response Brief, paras. 183-194.

⁵¹⁵ T. 18 March 2009 pp. 52, 72, 73; T. 19 March 2009 pp. 3, 4, 35, 36, 38.

⁵¹⁶ T. 18 March 2009 p. 59.

⁵¹⁷ T. 21 April 2009 pp. 8, 13.

⁵¹⁸ T. 21 April 2009 p. 13.

commander had a distinctive insignia on his headgear.⁵¹⁹ Moreover, Witness Rudahunga noted that, when the soldiers and civilian assailants arrived, the soldiers entered the parish premises alone and were separate from the other attackers.⁵²⁰ Witness Rudahunga also spoke directly with the soldier's commander, whom he identified as the Ngoma Camp Commander.⁵²¹ Moreover, as discussed above, the Trial Chamber had a reasonable basis for concluding that Corporal Mpakaniye was assigned to the Ngoma Military camp. The Appeals Chamber recalls that Witness Rudahunga personally interacted with Corporal Mpakaniye at the parish and witnessed the soldier directly taking part in the attack by leading small groups of refugees from the parish to their death.⁵²² In these circumstances, the Appeals Chamber is satisfied that the Trial Chamber reasonably relied on his ability to distinguish soldiers from civilian assailants, notwithstanding evidence that civilians at times wore portions of military uniforms. The fact that Witness Rudahunga could not name any soldier other than Corporal Mpakaniye does not alter this conclusion.

233. In addition, the Appeals Chamber is not convinced that it was unreasonable for the Trial Chamber to rely on the testimonies of Witnesses BYQ and BYR simply because there was only one common assailant among their respective lists of the participants in the attack. As explained above, Hategekimana has not shown that either witness intended his list to be exhaustive. Furthermore, the Appeals Chamber does not consider that it was unreasonable to give corroborative weight to Witness BYR's account even though the source of his information was unknown. It was within the Trial Chamber's discretion to accept this evidence, which has some indicia of reliability given that Witness BYR was a soldier stationed at the Ngoma Military Camp. Significantly, the Trial Chamber expressly viewed Witness BYR's evidence with caution, given that he was a potential accomplice in the attack at the Ngoma Parish. Nonetheless, it found his testimony to be "sincere and credible" and relied on his evidence as corroboration that soldiers from the Ngoma Military Camp participated in the attack at the Ngoma Parish.⁵²³

234. Hategekimana has also not demonstrated how the purported inconsistency between the evidence of Witness BYQ and BRS concerning their role as duty officer impacts the Trial Chamber's reliance on Witness BYQ's evidence, in particular given that the Trial Chamber highlighted several "problematic aspects" of Witness BRS's testimony.⁵²⁴ The Appeals Chamber is also not convinced that Hategekimana has identified any inconsistency in the approach taken by the Trial Chamber in evaluating hearsay evidence. Hategekimana simply points to superficial

⁵¹⁹ Trial Judgement, para. 564.

⁵²⁰ See T. 21 April 2009 p. 7.

⁵²¹ Trial Judgement, para. 564.

⁵²² See T. 21 April 2009 pp. 5, 6, 8, 12, 13.

⁵²³ Trial Judgement, paras. 546 ("Witness BYR provided a corroborative account that both soldiers and civilians were involved in the Ngoma Parish massacre."), 547.

similarities between the accounts of the Prosecution witnesses accepted in relation to this event and those rejected in relation to others. He fails to appreciate the careful credibility assessments undertaken in relation to each witness and, significantly, the existence of first-hand credible evidence demonstrating the role of the Ngoma Military Camp soldiers in the attack. For the same reasons, Hategekimana's contention that the Trial Chamber took a biased and inconsistent approach in evaluating the Defence evidence must equally be dismissed.

235. Finally, regarding Witness Ntezimana, the Appeals Chamber finds that Hategekimana has misstated the evidence. Contrary to Hategekimana's submission, Witness Ntezimana testified from his own personal knowledge having seen both soldiers and assailants as he approached the parish following the attack.⁵²⁵ The Appeals Chamber therefore dismisses Hategekimana's argument.

236. Accordingly, Hategekimana has failed to demonstrate any error in the Trial Chamber's findings that soldiers from the Ngoma Military Camp participated in the attack at the Ngoma Parish on 30 April 1994.

3. Presence of Hategekimana

237. The Trial Chamber found that Hategekimana arrived at the Ngoma Parish in the company of soldiers and civilian assailants on 30 April 1994.⁵²⁶ The Trial Chamber further found that, on arrival, Hategekimana spoke with Witness Rudahunga in order to seek the whereabouts of Witness Masinzo, who was in hiding in a location from where he could follow their conversation.⁵²⁷ According to the Trial Judgement, after Witness Rudahunga failed to locate Witness Masinzo, Hategekimana departed the premises, and the assailants began killing the Tutsi refugees at the parish.⁵²⁸ In finding that Hategekimana was present at the parish, the Trial Chamber relied on the evidence of Witnesses Rudahunga and Masinzo.⁵²⁹

238. The Trial Chamber observed that Witness Rudahunga was the only eye-witness to Hategekimana's presence at the parish.⁵³⁰ The Trial Chamber found that, at the time Hategekimana and Witness Rudahunga spoke, the witness only knew Hategekimana as the Ngoma Military Camp Commander, but could distinguish him from the other soldiers based on the distinctive insignia on his beret.⁵³¹ According to the Trial Judgement, Witness Masinzo could hear the two discuss him

⁵²⁴ See Trial Judgement, para. 480.

⁵²⁵ Trial Judgement, paras. 503, 504, 548.

⁵²⁶ Trial Judgement, para. 683.

⁵²⁷ Trial Judgement, paras. 564, 566.

⁵²⁸ Trial Judgement, paras. 574, 682.

⁵²⁹ Trial Judgement, paras. 564-567.

⁵³⁰ Trial Judgement, para. 564.

⁵³¹ Trial Judgement, paras. 497, 501, 564.

from his hiding place. Furthermore, Witness Masinzo was able to recognize Hategekimana's voice and hear soldiers refer to Hategekimana by name.⁵³²

239. That evening, Corporal Mpakaniye returned to the parish and confirmed to Witnesses Rudahunga and Masinzo that the individual who spoke with Witness Rudahunga was in fact Hategekimana.⁵³³ In addition, Corporal Mpakaniye told the two witnesses that Hategekimana had ordered him to kill the refugees at the parish earlier that day.⁵³⁴ Corporal Mpakaniye demanded money in order to keep Witness Masinzo's whereabouts secret from Hategekimana.⁵³⁵ Indeed, shortly before Hategekimana had arrived, Corporals Mpakaniye and Nkurunziza warned Witness Masinzo that Hategekimana wanted to kill him and helped the witness hide in a false ceiling above his room.⁵³⁶ The Trial Chamber found the evidence of Witnesses Masinzo and Rudahunga to be "consistent and complementary".⁵³⁷

240. Hategekimana submits that the Trial Chamber erred in relying on the evidence of Witnesses Masinzo and Rudahunga to find that he was present at the Ngoma Parish and ordered the attack there.⁵³⁸ In particular, Hategekimana disputes Witness Rudahunga's basis of knowledge for identifying him as commander.⁵³⁹ Hategekimana also notes that Witness Rudahunga failed to mention his distinctive beard, as attested to by several Defence witnesses.⁵⁴⁰

241. In addition, Hategekimana questions Witness Masinzo's ability to identify him by his voice, citing the traumatic nature of the encounter, the large crowd of assailants outside, the lack of clarity as to the hiding place, and the likely great distance between it and the place where Witness Rudahunga and Hategekimana conversed.⁵⁴¹ Hategekimana also challenges the credibility of Witness Masinzo hearing his soldiers calling their superior by name.⁵⁴² Hategekimana further notes that Witness Rudahunga did not mention hearing this.⁵⁴³ Hategekimana also submits that Witness

⁵³² Trial Judgement, para. 566.

⁵³³ Trial Judgement, paras. 541, 564.

⁵³⁴ Trial Judgement, para. 564. *See also* T. 18 March 2009 pp. 70, 71.

⁵³⁵ Trial Judgement, para. 567.

⁵³⁶ Trial Judgement, para. 565.

⁵³⁷ Trial Judgement, para. 565.

⁵³⁸ Appeal Brief, paras. 343-369. Hategekimana also challenges the Trial Chamber's reliance on Witnesses BYQ and BYR to place him at the scene. *See* Appeal Brief, paras. 370, 371. The Appeals Chamber observes, however, that the Trial Chamber did not rely on these witnesses for that purpose.

⁵³⁹ Appeal Brief, paras. 344-346. *See also* AT. 15 December 2011 p. 14.

⁵⁴⁰ Appeal Brief, para. 348. *See also* AT. 15 December 2011 pp. 15, 16, 38.

⁵⁴¹ Appeal Brief, paras. 356-363, 365-367. *See also* Reply Brief, paras. 133, 134. *See also* AT. 15 December 2011 pp. 17, 18.

⁵⁴² Appeal Brief, para. 359.

⁵⁴³ Appeal Brief, para. 367.

Masinzo failed to specify the distinctive feature of his voice that allowed the witness to recognize it.⁵⁴⁴

242. Finally, Hategekimana challenges the credibility of any aspect of the testimonies of these two witnesses based on the information provided by Corporal Mpakaniye.⁵⁴⁵ In this respect, Hategekimana disputes that Corporal Mpakaniye was affiliated with the Ngoma Military Camp.⁵⁴⁶ In addition, Hategekimana highlights Corporal Mpakaniye's use of blackmail.⁵⁴⁷ Furthermore, Hategekimana submits that no weight can be attached to the order to attack attributed to him by Corporal Mpakaniye since it lacks significant details, such as the occasion, date, and place of issue.⁵⁴⁸

243. The Prosecution responds that the Trial Chamber reasonably concluded based on the evidence that Hategekimana was present at the parish on 30 April 1994.⁵⁴⁹

244. As discussed above,⁵⁵⁰ the Appeals Chamber considers that the Trial Chamber had a reasonable basis to conclude that the soldiers participating in the attack were from the Ngoma Military Camp. Therefore, the fact that Witness Rudahunga did not mention the colour of the commander's beret does not call into question the reasonableness of relying on his testimony. In addition, Hategekimana has not demonstrated why the witness's mention of an insignia on the commander's beret is insufficient to distinguish him as the leader of the group of soldiers. Hategekimana has also not shown how the Trial Chamber erred in rejecting the Defence evidence describing him as having a beard in particular since the witness was not asked to give a physical description of Hategekimana.

245. The Appeals Chamber is not convinced that the traumatic circumstances surrounding the incident prevented the Trial Chamber from reasonably relying on Witness Masinzo's identification evidence. The Trial Chamber expressly noted the traumatic circumstances, described Witness Masinzo's and Hategekimana's close physical proximity, and analyzed whether the prior situations during which the witness became familiar with Hategekimana's voice were sufficient to allow the witness to recognize Hategekimana's voice.⁵⁵¹ The Appeals Chamber observes that the most recent of their encounters had involved discussions "at length" about refugee matters around two weeks

⁵⁴⁴ Appeal Brief, para. 368.

⁵⁴⁵ Appeal Brief, paras. 349, 351.

⁵⁴⁶ Appeal Brief, para. 349.

⁵⁴⁷ Appeal Brief, paras. 349, 351.

⁵⁴⁸ Appeal Brief, para. 350.

⁵⁴⁹ Response Brief, paras. 178-182. *See also* AT. 15 December 2011 p. 29.

⁵⁵⁰ *See supra* para. 236.

⁵⁵¹ Trial Judgement, para. 566.

before the attack.⁵⁵² Hategekimana has not demonstrated why the Trial Chamber should have required a detailed description of the defining features of his voice.

246. In addition, the Appeals Chamber is satisfied that the Trial Chamber had a reasonable basis for determining that Witness Masinzo would have been able to hear and recognize Hategekimana's voice from the short distance between Witness Masinzo's hiding location and the place where Hategekimana spoke with Witness Rudahunga. In this respect, it follows from the evidence that the soldiers were standing near the door of the building where the priests stayed, which was also where Witness Masinzo was hiding.⁵⁵³ Moreover, the fact that Witness Rudahunga did not mention hearing Hategekimana's name does not mean the soldiers at the parish did not use it. Furthermore, Hategekimana's suggestion that his subordinates would not use his name is mere speculation.

247. Turning to the information provided by Corporal Mpakaniye, Hategekimana has not demonstrated that it was unreasonable for the Trial Chamber to rely on the information provided by Corporal Mpakaniye to Witnesses Rudahunga and Masinzo concerning Hategekimana's presence and order to attack the refugees at the parish. As discussed above, it was not impermissible to find that Hategekimana ordered the attack in the absence of specific evidence as to when and where the order was issued.⁵⁵⁴ In addition, the Appeals Chamber recalls that the Trial Chamber had a reasonable basis to conclude that Corporal Mpakaniye was a soldier from the Ngoma Military Camp.⁵⁵⁵ The Appeals Chamber further notes that the issue of blackmail was before the Trial Chamber.⁵⁵⁶ It was free to consider this issue insufficient to impeach the reliability of the confirmation that Hategekimana was present and issued the order.

248. Accordingly, Hategekimana has not demonstrated any error in the Trial Chamber's findings that Hategekimana was present at the Ngoma Parish.

C. Conclusion

249. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's Fifth Ground of Appeal.

⁵⁵² Trial Judgement, para. 566.

⁵⁵³ Compare Witness Rudahunga, T. 21 April 2009 p. 6 ("And when they came they got into the compound of the parish and the compound was located between the building where our rooms were located and the administrative block which hosted the parish secretariat as well as the guest rooms. *So they stood in the compound located between those two buildings and, more specifically, in front of the door of the building where we stayed.*") (emphasis added), with Witness Masinzo, T. 18 March 2009 p. 71 ("When he was speaking *he was at the presbytery*. I was hiding in the [...] ceiling. And the room in which I was, was right next to our kitchen so that I was hiding not far from the chimney. And I could hear the conversations that were *taking place in the compound.*") (emphasis added). See also Witness Rudahunga, T. 21 April 2009 p. 16 (French) (referring to Witness Masinzo hiding in the residences).

⁵⁵⁴ See *supra* para. 210.

⁵⁵⁵ See *supra* paras. 230-232.

⁵⁵⁶ Trial Judgement, para. 567.

VIII. ALLEGED ERRORS RELATING TO THE ATTACK AT THE *MAISON GÉNÉRALICE* AND TO THE MURDER OF SOLANGE KARENZI
(GROUND 6)

250. The Trial Chamber convicted Hategekimana of genocide (Count 1) under Article 6(1) of the Statute based on his participation in a joint criminal enterprise to kill Tutsis at the *Maison Générale*.⁵⁵⁷ The Trial Chamber found that, on or about 30 April 1994, Hategekimana led a group of soldiers from the Ngoma Military Camp, who along with *Interahamwe* and armed civilians, abducted and killed at least 25 Tutsi refugees from the *Maison Générale* of the Benebikira religious order.⁵⁵⁸ The Trial Chamber found that one of the victims was Solange Karenzi. For this killing, the Trial Chamber convicted Hategekimana of murder as a crime against humanity (Count 3).⁵⁵⁹

251. Hategekimana submits that the Trial Chamber erred in convicting him for the killings of Tutsis resulting from the attack at the *Maison Générale*, including the murder of Solange Karenzi.⁵⁶⁰ In this section, the Appeals Chamber considers Hategekimana's submissions challenging: (i) his notice of the nature of his participation in the joint criminal enterprise; and (ii) the assessment of the evidence.

A. Form of the Indictment

252. The *chapeau* paragraphs of the Indictment for the counts of genocide (Count 1) and murder as a crime against humanity (Count 3) allege that Hategekimana participated in a joint criminal enterprise.⁵⁶¹ The Trial Chamber determined that Hategekimana's specific participation in the joint criminal enterprise was pleaded in the various paragraphs underpinning each count.⁵⁶² Paragraphs 20 and 37 of the Indictment are relevant to the crimes committed at the *Maison Générale*.

253. Paragraph 20 of the Indictment reads:

On or about 30 April 1994, **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** led a group of armed soldiers, *Interahamwe* and armed civilians, who were participants in the joint criminal enterprise referred to in paragraph 6 above, to the *Maison Générale* of the religious order of Benebikira, in Buye secteur, Ngoma Commune, where there were a number of Tutsi refugees. After gaining entry to the *Maison Générale* **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** instructed the soldiers, *Interahamwe* and armed civilians to separate those inside according to their ethnicity. Approximately 25 people, mostly children, were singled out as Tutsi,

⁵⁵⁷ Trial Judgement, paras. 696, 697, 730.

⁵⁵⁸ Trial Judgement, para. 689.

⁵⁵⁹ Trial Judgement, paras. 720, 721, 730.

⁵⁶⁰ Notice of Appeal, paras. 124-135; Appeal Brief, paras. 377-422.

⁵⁶¹ Indictment, paras. 6, 34.

⁵⁶² See Trial Judgement, para. 65.

and **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** ordered that they be loaded onto a pick-up truck and taken away. They were killed or caused serious bodily or mental harm shortly thereafter. By his actions described above, **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** planned, ordered, instigated and/or committed genocide.

254. Paragraph 37 of the Indictment reads:

On or about 30 April 1994, **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** led a group of armed soldiers, Interahamwe and armed civilians, to the Maison Générale of the religious order of Benebikira, in Buye secteur, Ngoma Commune, where there were a number of Tutsi refugees. After gaining entry to the Maison Générale **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** instructed the soldiers, Interahamwe and armed civilians to separate those inside according to their ethnicity. Approximately 25 people, mostly children, were singled out as Tutsi, and **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** ordered that they be loaded onto a pick-up truck and taken away. Amongst those abducted and killed were Solange and Mulinga KARENZI, and Clémence. The aforementioned were abducted and killed on the basis of their identification as members of or sympathisers of the Tutsi ethnic or racial group, by soldiers, Interahamwe and armed civilians who were participants in the joint criminal enterprise referred to in paragraph 34 above, and by his actions described herein **ILDEPHONSE HATEGEKIMANA alias BIKOMAGO** ordered, instigated and/or committed murder as a crime against humanity.

255. Based on the evidence presented in support of these Indictment paragraphs, the Trial Chamber found that Hategekimana, soldiers from the Ngoma Military Camp, *Interahamwe*, and armed civilians participated in a joint criminal enterprise to abduct Tutsis from the *Maison Générale* and to kill them.⁵⁶³ The Trial Chamber found that Hategekimana's contribution included, among other things, ordering his soldiers to kill the Tutsi victims.⁵⁶⁴

256. Hategekimana submits that paragraphs 20 and 37 of the Indictment are defective in relation to the evidence relied on by the Trial Chamber to convict him.⁵⁶⁵ Specifically, Hategekimana argues that neither of these paragraphs alleges that he ordered the killing.⁵⁶⁶ Rather, Hategekimana contends that the only order mentioned in relation to him is the order to abduct the refugees.⁵⁶⁷ Accordingly, Hategekimana argues that he was erroneously convicted on the basis of a material fact that was not pleaded in the Indictment.⁵⁶⁸ Hategekimana submits that this defect resulted in prejudice because he focused his defence exclusively on the abduction.⁵⁶⁹

257. The Prosecution responds that the Trial Chamber correctly convicted Hategekimana for the killing of the abducted refugees, including Solange Karenzi, and that paragraphs 20 and 37 of the Indictment put him on notice of these crimes.⁵⁷⁰ In addition, the Prosecution argues that

⁵⁶³ Trial Judgement, paras. 691, 692.

⁵⁶⁴ Trial Judgement, para. 692.

⁵⁶⁵ Appeal Brief, paras. 378-385. *See also* Reply Brief, para. 140.

⁵⁶⁶ Appeal Brief, paras. 381, 421.

⁵⁶⁷ Appeal Brief, para. 381.

⁵⁶⁸ Appeal Brief, paras. 382-385, 421.

⁵⁶⁹ Appeal Brief, para. 385.

⁵⁷⁰ Response Brief, paras. 204, 205.

Hategekimana was on notice of his participation in the basic form of a joint criminal enterprise as pleaded at paragraphs 6, 34, and 42 of the Indictment.⁵⁷¹

258. The Appeals Chamber recalls that charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused.⁵⁷² In cases where the Prosecution intends to rely on the theory of joint criminal enterprise, the Prosecution must plead, among other things, the nature of the accused's participation in the enterprise.⁵⁷³ Failure to specifically plead joint criminal enterprise, including the supporting material facts and the category, constitutes a defect in the indictment.⁵⁷⁴

259. The Appeals Chamber observes that the concluding sentences of paragraphs 20 and 37 of the Indictment, respectively, clearly indicate that Hategekimana could be held liable for ordering the crimes to the extent that the various other actions referred to in the paragraphs are proved. In any case, ordering the killings was only one of several ways that the Trial Chamber found that Hategekimana participated in the joint criminal enterprise. Notably, it also determined that he contributed through his presence, by providing well-armed soldiers, and by issuing orders to his soldiers during the separation and the abduction.⁵⁷⁵ These facts are clearly pleaded in the Indictment. Therefore, even if Hategekimana lacked notice of the allegation that he ordered the crime, it would not invalidate his convictions.

260. Accordingly, Hategekimana has not demonstrated that the Indictment is defective with respect to his form of participation in the joint criminal enterprise.

B. Assessment of the Evidence

1. Involvement of Soldiers from the Ngoma Military Camp

261. The Trial Chamber found that soldiers from the Ngoma Military Camp participated in the attack at the *Maison Généralice* based on a combination of direct, hearsay, and circumstantial evidence. In particular, the Trial Chamber observed that Witnesses BYO, QCQ, and BYS all provided first-hand evidence that soldiers participated in the attack.⁵⁷⁶ In identifying these soldiers as being from the Ngoma Military Camp, the Trial Chamber principally relied on the evidence of

⁵⁷¹ Response Brief, paras. 235-237.

⁵⁷² *Muvunyi II* Appeal Judgement, para. 19; *Renzaho* Appeal Judgement, para. 53; *Kalimanzira* Appeal Judgement, para. 46; *Muvunyi I* Appeal Judgement, para. 18; *Seromba* Appeal Judgement, paras. 27, 100; *Simba* Appeal Judgement, para. 63; *Muhimana* Appeal Judgement, paras. 76, 167, 195; *Gacumbitsi* Appeal Judgement, para. 49; *Ndindabahizi* Appeal Judgement, para. 16.

⁵⁷³ *Simba* Appeal Judgement, para. 63; *Simić* Appeal Judgement, para. 22; *Ntagerura et al.* Appeal Judgement, para. 24.

⁵⁷⁴ *Simba* Appeal Judgement, para. 63; *Simić* Appeal Judgement, para. 22; *Gacumbitsi* Appeal Judgement, para. 162.

⁵⁷⁵ Trial Judgement, paras. 691, 692.

⁵⁷⁶ Trial Judgement, paras. 608, 615, 617-619.

Witness BYO.⁵⁷⁷ In particular, prior to the attack, Witness BYO heard from Sister Spéciose that soldiers from the camp planned to attack.⁵⁷⁸ According to Witness BYO, Sister Spéciose had been warned that morning by a telephone call from an informant at the camp named Innocent.⁵⁷⁹ In addition, Witness BYO learned from Sister Frédérique, who knew Hategekimana, that the soldiers' leader during the attack was the commander of the Ngoma Military Camp.⁵⁸⁰ After the attack, Witness BYO also spoke with several of the soldiers who participated in it, and they informed her that they were from the Ngoma Military Camp.⁵⁸¹ Finally, the Trial Chamber also noted the close proximity of the Ngoma Military Camp to the *Maison Générale*.⁵⁸²

262. Hategekimana submits that the Trial Chamber erred in relying on Witnesses BYO, QCQ, and BYS in finding that soldiers from the Ngoma Military Camp participated in the attack at the *Maison Générale*.⁵⁸³ In particular, Hategekimana emphasizes that the witnesses' description of the various assailants' attire was either vague, contradictory, or entirely absent.⁵⁸⁴ Moreover, Hategekimana observes that none of the witnesses described the attire of the *Interahamwe* who participated in the attack.⁵⁸⁵ Hategekimana submits that the foregoing deficiencies in the Prosecution evidence demonstrate that the Trial Chamber did not have a reasonable basis for relying on the evidence of Witnesses BYO, QCQ, and BYS to distinguish between soldiers and *Interahamwe*.⁵⁸⁶

263. Hategekimana also emphasizes that none of the witnesses could identify a single soldier from the Ngoma Military Camp participating in the attack, despite the camp's proximity to the *Maison Générale*.⁵⁸⁷ According to Hategekimana, this fact raises particular concerns for Witness BYO, who apparently learned from the soldiers after the attack that they were from the Ngoma Military Camp.⁵⁸⁸ In this respect, Hategekimana argues that the Trial Chamber had an insufficient basis to determine that the soldiers with whom Witness BYO spoke after the attack and who claimed to be from the Ngoma Military Camp were indeed the same soldiers who participated in the attack.⁵⁸⁹

⁵⁷⁷ Trial Judgement, para. 610.

⁵⁷⁸ Trial Judgement, paras. 579, 610.

⁵⁷⁹ Trial Judgement, paras. 579, 610.

⁵⁸⁰ Trial Judgement, para. 610.

⁵⁸¹ Trial Judgement, paras. 610, 615, 616.

⁵⁸² Trial Judgement, para. 619.

⁵⁸³ Appeal Brief, paras. 386-399.

⁵⁸⁴ Appeal Brief, paras. 392-394.

⁵⁸⁵ Appeal Brief, para. 392.

⁵⁸⁶ Appeal Brief, para. 394.

⁵⁸⁷ Appeal Brief, para. 391.

⁵⁸⁸ Appeal Brief, paras. 387, 391, 397.

⁵⁸⁹ Appeal Brief, para. 397.

264. In addition, Hategekimana submits that the Trial Chamber erred in relying on the proximity of the Ngoma Military Camp to the *Maison Générale* in inferring that the soldiers hailed from there, in particular in the absence of any consideration of the respective distance to ESO or the gendarmerie camp.⁵⁹⁰

265. Moreover, Hategekimana argues that the Trial Chamber erred in finding, in paragraph 610 of the Trial Judgement, that “Innocent” warned Witness BYO of the impending attack, when in fact her evidence reveals that the witness never spoke directly with Innocent and instead received his warning second-hand from Sister Spéciose.⁵⁹¹

266. Hategekimana contrasts this problematic evidentiary situation with the testimony of Defence Witness RBU, who gave a detailed description of the *Interahamwe*’s attire and who was able to identify several civilian assailants.⁵⁹² Hategekimana further notes that none of the Prosecution witnesses stationed at the Ngoma Military Camp implicated fellow soldiers in this attack, unlike in the case of the Ngoma Parish massacre.⁵⁹³ Consequently, according to Hategekimana, the Trial Chamber abused its discretion in preferring the evidence of Witnesses BYO, QCQ, and BYS over Witness RBU’s account that soldiers from the Ngoma Military Camp did not participate in the attack at the *Maison Générale*.⁵⁹⁴

267. The Prosecution responds that the Trial Chamber reasonably assessed the evidence in finding that soldiers from the Ngoma Military Camp participated in the attack.⁵⁹⁵

268. The Appeals Chamber finds no merit in Hategekimana’s contention that the Trial Chamber had an insufficient basis to determine that soldiers participated in the attack. A review of the Trial Judgement reflects that, in making its findings on this incident, the Trial Chamber principally relied on Witness BYO.⁵⁹⁶ According to Witness BYO, the soldiers wore green camouflage military uniforms and black berets, and they carried firearms.⁵⁹⁷ Witness BYO further stated that she could

⁵⁹⁰ Appeal Brief, para. 390. *See also* AT. 15 December 2011 pp. 13, 14.

⁵⁹¹ Appeal Brief, para. 396, *referring to* Trial Judgement, para. 610, Witness BYO, T. 4 May 2009 p. 16. The Appeals Chamber notes that, in his Appeal Brief, Hategekimana refers to the transcript of 4 April 2009. However, Witness BYO testified on 4 May 2009. The Appeals Chamber understands that Hategekimana is, in fact, referring to the transcript of 4 May 2009.

⁵⁹² Appeal Brief, para. 392.

⁵⁹³ Appeal Brief, para. 398.

⁵⁹⁴ Appeal Brief, para. 399.

⁵⁹⁵ Response Brief, paras. 199-202, 206-230.

⁵⁹⁶ *See infra* para. 283.

⁵⁹⁷ T. 4 May 2009 pp. 15, 35, 58. *See also* Trial Judgement, para. 581.

distinguish between soldiers and gendarmes based on the color of their berets.⁵⁹⁸ Hategekimana has advanced no convincing argument why additional detail would be necessary.⁵⁹⁹

269. The Appeals Chamber equally rejects Hategekimana's argument that the Prosecution witnesses offered inadequate descriptions of the civilian assailants, thereby demonstrating their inability to distinguish between them. While Witness BYO did not describe the attire of the civilian assailants, a review of her evidence indicates that, unlike with respect to soldiers, she was not specifically asked to do so. Furthermore, Witness BYO explained her ability to distinguish the soldiers from the civilian assailants based on their weaponry: "I knew that they were *Interahamwes* because they were carrying traditional weapons, like clubs, and they also had jerrycans full of petrol."⁶⁰⁰ Hategekimana has not shown that this is an unreasonable distinguishing feature between the assailants.

270. The Appeals Chamber notes, as the Trial Chamber observed, that the key evidence underpinning its finding that the soldiers who participated in the attack were from the Ngoma Military Camp was hearsay evidence, which was corroborated by circumstantial evidence.⁶⁰¹ It is well established that, as a matter of law, it is permissible to base a conviction on circumstantial or hearsay evidence.⁶⁰² However, caution is warranted in such circumstances.⁶⁰³ A review of the Trial Judgement reveals that the Trial Chamber engaged in a cautious review of the witnesses' first-hand observations during the attack, the information they learned from other sources, and the surrounding circumstances that resulted in the finding that soldiers from the Ngoma Military Camp participated in the attack.⁶⁰⁴

271. Hategekimana's submissions on appeal do not demonstrate that the Trial Chamber's conclusion was unreasonable. Specifically, the Appeals Chamber is not satisfied that the inability of Witnesses BYO, QCQ, and BYS to name or recognize any of the camp's soldiers raises question about the Trial Chamber's reliance on their evidence. As discussed above, Witness BYO had an adequate basis of knowledge to differentiate soldiers from other assailants and the fact that she did not personally know any particular soldier from the Ngoma Military Camp does nothing to alter

⁵⁹⁸ T. 4 May 2009 p. 35.

⁵⁹⁹ Beyond general complaints, Hategekimana cites to only one purported contradiction, when he submits that Witness BYS gave evidence that "some soldiers wore very dark-coloured and worn-out uniforms" whereas "all Prosecution witnesses testified that soldiers of the former *Forces armées rwandaises* wore dark-coloured berets." See Appeal Brief, para. 393. The Appeals Chamber can identify no apparent contradiction in these statements.

⁶⁰⁰ T. 4 May 2009 p. 17.

⁶⁰¹ Trial Judgement, paras. 610, 619.

⁶⁰² *Muvunyi I* Appeal Judgement, para. 70; *Gacumbitsi* Appeal Judgement, para. 115. See also *Muhimana* Appeal Judgement, para. 49.

⁶⁰³ *Muvunyi I* Appeal Judgement, para. 70; *Ndindabahizi* Appeal Judgement, para. 115. See also *Rutaganda* Appeal Judgement, paras. 34, 156.

⁶⁰⁴ Trial Judgement, para. 623. See also Trial Judgement, paras. 607-622.

this. The Appeals Chamber also cannot see how the lack of such knowledge could call into question the reasonableness of the Trial Chamber's acceptance of the considered body of direct, second-hand, and circumstantial evidence demonstrating the involvement of the camp's soldiers in the attack.

272. In addition, the Appeals Chamber considers that it was reasonable for the Trial Chamber to consider the proximity of the Ngoma Military Camp as part of its general consideration of whether the soldiers hailed from there.⁶⁰⁵ Although the Trial Chamber did not specifically discuss the relative distances of ESO and the gendarmerie to the *Maison Générale*, the Appeals Chamber notes that the Trial Chamber was fully apprised of these matters as a result of its site visit to the relevant locations.⁶⁰⁶

273. The Trial Chamber's summary of Witness BYO's sources of hearsay may give the impression that the informant called the witness directly with the information about the arrival of soldiers from the Ngoma Military Camp.⁶⁰⁷ However, elsewhere in the Trial Judgement, the Trial Chamber unambiguously reflects that it was aware that the witness was informed by Sister Spéciose about the call of the informant.⁶⁰⁸

274. The Appeals Chamber is also not convinced that Hategekimana has shown that the Trial Chamber unreasonably preferred the Prosecution evidence concerning the role played by soldiers from the Ngoma Military Camp over that of Defence Witness RBU, who described the assailants as consisting of *Interahamwe*, not soldiers. While Witness RBU gave a detailed description of the *Interahamwe*'s attire and recognized some of the attackers,⁶⁰⁹ Hategekimana's submissions do not address any of the significant credibility concerns the Trial Chamber highlighted in respect of his testimony.⁶¹⁰

275. Finally, the Appeals Chamber dismisses Hategekimana's submission that other Prosecution witnesses who were based at the Ngoma Military Camp did not mention the involvement of their fellow soldiers in the attack at the *Maison Générale* during their testimonies, or that they might not have known about it. The Appeals Chamber notes that these Prosecution witnesses did not testify about the attack at the *Maison Générale*. Therefore, Hategekimana's argument is

⁶⁰⁵ Trial Judgement, para. 619.

⁶⁰⁶ Report on Site Visit (2 to 6 November HATEGEKIMANA CASE, ICTR-00-55B-T), Ref No. ICTR/JUD-11-6-2-09/088, dated 19 November 2009, filed on 16 December 2009 (confidential).

⁶⁰⁷ Trial Judgement, para. 610 ("The [Trial] Chamber observes that the basis of Witness BYO's identification is hearsay provided by three sources: from an informant named Innocent, who warned of an imminent attack on the convent by Ngoma [Military] Camp soldiers; [...]").

⁶⁰⁸ Trial Judgement, para. 579.

⁶⁰⁹ Trial Judgement, paras. 599, 600.

⁶¹⁰ See Trial Judgement, paras. 620-622.

insufficient on appeal to call into question the reasonableness of the Trial Chamber's reliance on the various other strands of direct, second-hand, and circumstantial evidence that soldiers from the camp did participate.

276. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in finding that soldiers from the Ngoma Military Camp participated in the attack at the *Maison Générale*.

2. Presence of Hategekimana

277. In finding that Hategekimana was present during the attack, the Trial Chamber relied principally on Witnesses BYO and QCQ, who provided a similar description of a soldier issuing orders who appeared to be the assailants' leader.⁶¹¹ The Trial Chamber noted that both witnesses observed this "leader" from close proximity.⁶¹² The Trial Chamber was convinced that the "leader" was Hategekimana based primarily on the information provided to Witness BYO by Sister Frédérique, who knew Hategekimana and spoke with him during the attack.⁶¹³

278. Hategekimana submits that the Trial Chamber erred in relying on the evidence of Witnesses BYO and QCQ to find that he was present during the attack on the *Maison Générale*.⁶¹⁴ In particular, Hategekimana contends that Witness BYO's testimony is inconsistent with her prior statement on important matters related to her basis of knowledge for identifying Hategekimana and other soldiers from the camp.⁶¹⁵ Hategekimana argues that the Trial Chamber erroneously excused these inconsistencies, in particular the omission of the conversation with Sister Frédérique, based on translation or transcription issues.⁶¹⁶ Hategekimana also highlights other differences between the accounts of Witnesses BYO, QCQ, and BYS.⁶¹⁷ Finally, according to Hategekimana, Witnesses BYO and QCQ offered inconsistent evidence as to his manner of dress and failed to mention his distinctive beard, as attested to by several Defence witnesses.⁶¹⁸

279. The Prosecution responds that the Trial Chamber reasonably found that Hategekimana was present along with soldiers from the Ngoma Military Camp during the attack at the *Maison Générale*.⁶¹⁹

⁶¹¹ Trial Judgement, para. 624.

⁶¹² Trial Judgement, paras. 624, 625, 627, 628.

⁶¹³ Trial Judgement, paras. 625, 628.

⁶¹⁴ Appeal Brief, paras. 400-420.

⁶¹⁵ Appeal Brief, paras. 402, 404.

⁶¹⁶ Appeal Brief, paras. 403-408.

⁶¹⁷ Appeal Brief, paras. 409-416.

⁶¹⁸ Appeal Brief, paras. 417, 419. *See also* AT. 15 December 2011 pp. 15, 16, 35, 38.

⁶¹⁹ Response Brief, paras. 199-202, 206-230. *See also* AT. 15 December 2011 pp. 23-25.

280. The Appeals Chamber can identify no error in the Trial Chamber's approach to addressing the purported inconsistencies between Witness BYO's testimony and her written statements. A trial chamber has broad discretion to determine the weight to be given to discrepancies between a witness's testimony and her prior statements.⁶²⁰ Moreover, contrary to Hategekimana's submissions, the Trial Chamber did not explain the omission of the conversation with Sister Frédérique from the statement based on a transcription or translation issue. The Trial Chamber's reasoning was more broad:

In view of the language of the interview, the questions put to the witness, the difficulties of recollecting precise details many years after the occurrence of events and the frequent lack of precision in translation, the [Trial] Chamber finds that the above minor transcription errors and omissions do not cast any doubt on the internal consistency and credibility of [Witness] BYO's candid in-court testimony.⁶²¹

281. Moreover, the Appeals Chamber recalls that "to suggest that if something were true a witness would have included it in a statement or a confession letter is obviously speculative and, in general, it cannot substantiate a claim that a Trial Chamber erred in assessing the witness's credibility."⁶²²

282. In addition, the Appeals Chamber finds no merit in Hategekimana's attempt to call into question the Trial Chamber's reliance on a particular aspect of Witness BYO's testimony by pointing to differences in the evidence of Witnesses QCQ and BYS. The Appeals Chamber recalls that the Trial Chamber has the main responsibility to resolve any inconsistencies that may arise within or amongst witnesses' testimonies.⁶²³ It is within the discretion of the Trial Chamber to evaluate any such inconsistencies, to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.⁶²⁴

283. Although there may be various differences between the accounts of Witnesses BYO, QCQ, and BYS, as explained in the Trial Judgement, the Trial Chamber clearly expressed its preference for and relied principally on Witness BYO's account.⁶²⁵ In particular, the Trial Chamber noted that Witness BYO was the oldest of the three witnesses and held a position of responsibility and trust.⁶²⁶ The Trial Chamber further observed that Witness BYO was the only one who was not physically threatened or forced to undergo the ethnic selection process.⁶²⁷ Moreover, the Trial Chamber

⁶²⁰ *Gacumbitsi* Appeal Judgement, para. 74. See also *Kajelijeli* Appeal Judgement, para. 96.

⁶²¹ Trial Judgement, para. 614. See also Trial Judgement, paras. 612, 613.

⁶²² *Kajelijeli* Appeal Judgement, para. 176.

⁶²³ *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

⁶²⁴ *Rukundo* Appeal Judgement, para. 207; *Simba* Appeal Judgement, para. 103.

⁶²⁵ See Trial Judgement, paras. 609, 610, 615-617, 619, 623.

⁶²⁶ See Trial Judgement, para. 609.

⁶²⁷ See Trial Judgement, para. 609.

provided reasons for viewing the evidence of Witnesses QCQ and BYS as circumstantial corroboration.⁶²⁸

284. Finally, Hategekimana has not shown how the Trial Chamber erred in rejecting the Defence evidence describing him as having a beard or how this conflicts with the descriptions of him provided by Witnesses BYO and QCQ.

285. Accordingly, Hategekimana has not demonstrated that the Trial Chamber erred in assessing the evidence related to his participation in the attack at the *Maison Générale*.

C. Conclusion

286. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's Sixth Ground of Appeal.

⁶²⁸ See Trial Judgement, paras. 617, 619, 623.

IX. ALLEGED ERRORS RELATING TO THE SENTENCE (GROUND 7)

287. The Trial Chamber sentenced Hategekimana to a single sentence of life imprisonment for his convictions for genocide (Count 1), murder as a crime against humanity (Count 3), and rape as a crime against humanity (Count 4).⁶²⁹

288. The Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualize penalties to fit the circumstances of the accused and the gravity of the crimes.⁶³⁰ As a rule, the Appeals Chamber will revise a sentence only if the appealing party demonstrates that the trial chamber committed a discernible error in exercising its sentencing discretion or that it failed to follow the applicable law.⁶³¹

289. Hategekimana submits that the Trial Chamber erred in assessing his sentence and that no trier of fact could have sentenced him to life imprisonment.⁶³² In this section, the Appeals Chamber considers Hategekimana's submissions that the Trial Chamber erred in assessing: (i) the gravity of his crimes; (ii) the aggravating factors; and (iii) the mitigating factors.

A. Gravity of the Crimes

290. Hategekimana submits that the Trial Chamber erred in focusing exclusively on the inherent gravity of the crimes and by failing to consider the nature of his personal participation.⁶³³ Specifically, he contends that he did not play a leading role in the attacks and questions the quality of the evidence underpinning his convictions.⁶³⁴ Hategekimana also challenges the Trial Chamber's comparison of his case to the much more serious crimes committed by the convicted persons in the *Renzaho*, *Seromba*, and *Gacumbitsi* cases.⁶³⁵ Finally, Hategekimana questions how, as a junior officer, his sentence could be significantly harsher than that imposed on the much higher ranking accused in the *Ndindiliyimana et al.* case, which involved the chiefs-of-staff of the Rwandan army and gendarmerie as well as a major and a captain.⁶³⁶ In a similar vein, he notes the reduction on

⁶²⁹ Trial Judgement, paras. 730, 748.

⁶³⁰ See *Munyakazi* Appeal Judgement, para. 166; *Setako* Appeal Judgement, para. 277; *Muvunyi II* Appeal Judgement, para. 63; *Renzaho* Appeal Judgement, para. 606; *Rukundo* Appeal Judgement, para. 240; *Kalimanzira* Appeal Judgement, para. 224; *Nchamihigo* Appeal Judgement, para. 384.

⁶³¹ See *Munyakazi* Appeal Judgement, para. 166; *Setako* Appeal Judgement, para. 277; *Muvunyi II* Appeal Judgement, para. 63; *Renzaho* Appeal Judgement, para. 606; *Rukundo* Appeal Judgement, para. 240; *Kalimanzira* Appeal Judgement, para. 224; *Nchamihigo* Appeal Judgement, para. 384.

⁶³² Notice of Appeal, paras. 140-142, 146; Appeal Brief, paras. 425-443; Reply Brief, para. 154.

⁶³³ Appeal Brief, paras. 426-435; Reply Brief, paras. 153, 154.

⁶³⁴ Appeal Brief, paras. 428, 429, 435.

⁶³⁵ Appeal Brief, para. 427.

⁶³⁶ Appeal Brief, paras. 431-433.

appeal of Lieutenant Samuel Imanishimwe's sentence to 12 years in the *Ntagerura et al.* case and emphasizes that Imanishimwe held a rank identical to his.⁶³⁷

291. The Prosecution responds that the Trial Chamber correctly assessed the gravity of Hategekimana's crimes and acted reasonably in sentencing him to life imprisonment.⁶³⁸

292. The Appeals Chamber recalls that the determination of the gravity of the crimes requires consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crimes.⁶³⁹ Contrary to Hategekimana's submissions, the Trial Chamber noted, for the most part, the nature and form of Hategekimana's participation in the crimes.⁶⁴⁰ In particular, it emphasized his direct role in many of the crimes as a member of a joint criminal enterprise, making him a principal perpetrator.⁶⁴¹ Bearing this finding in mind, the Appeals Chamber dismisses Hategekimana's characterization of his role in the crimes as minor. Moreover, elsewhere in the Judgement, the Appeals Chamber has rejected Hategekimana's challenges to the Trial Chamber's assessment of the evidence underpinning his convictions. His attempts to re-litigate these matters in his sentencing appeal likewise lack merit.

293. The Appeals Chamber also can identify no error in the Trial Chamber's comparison of Hategekimana's case to the situations of the convicted persons in the *Renzaho*, *Seromba*, and *Gacumbitsi* cases. Although the Trial Chamber did not engage in a detailed comparison of the facts underpinning Hategekimana's convictions and sentence and the facts in the other cases resulting in life imprisonment, the Trial Chamber correctly noted that the *Renzaho*, *Seromba*, and *Gacumbitsi* cases involved individuals, like Hategekimana, who directly participated in crimes.⁶⁴² Therefore, the comparison has some relevance. In any event, Hategekimana has not shown that the Trial Chamber gave undue weight to those cases in its analysis. Notably, the Trial Chamber also recalled the inherent limitations of comparing cases given the numerous variables involved in each case and, as discussed above, specifically assessed the individual nature of Hategekimana's participation.⁶⁴³

294. In addition, Hategekimana's comparison of his case to those of other military officers who received more lenient sentences, to support the contention that he should not have been sentenced to life imprisonment, fails to demonstrate that the Trial Chamber erred. The Appeals Chamber has previously noted that drawing comparisons with other cases that have been subject to final

⁶³⁷ Appeal Brief, para. 434.

⁶³⁸ Response Brief, paras. 246, 247, 257-260.

⁶³⁹ *Munyakazi* Appeal Judgement, para. 185; *Rukundo* Appeal Judgement, para. 243; *Kordić and Čerkez* Appeal Judgement, para. 1061. See also *Nahimana et al.* Appeal Judgement, para. 1038.

⁶⁴⁰ Trial Judgement, para. 736.

⁶⁴¹ Trial Judgement, para. 736.

⁶⁴² Trial Judgement, para. 739.

⁶⁴³ Trial Judgement, paras. 735, 736.

determination is of limited assistance in challenging a sentence.⁶⁴⁴ Notably, the sentences imposed in the *Ndindiliyimana et al.* case are under appeal and, therefore, are of even more limited assistance.⁶⁴⁵ Hategekimana also fails to appreciate that the reduction of Imanishimwe's sentence on appeal resulted from the overturning of his genocide conviction.⁶⁴⁶ In any case, Hategekimana only touches on superficial similarities between his case and others, rather than making any attempt to identify factual similarities with respect to the specific underlying criminal conduct.

295. Accordingly, the Appeals Chamber is not convinced that Hategekimana has demonstrated that the Trial Chamber erred in its assessment of the gravity of his offence.

B. Aggravating Factors

296. Hategekimana submits that the Trial Chamber erred in its assessment of the aggravating factors.⁶⁴⁷ In particular, he challenges the Trial Chamber's reliance on his influence in Ngoma Commune, his membership of the Prefecture Security Council, and his purported responsibility for maintaining peace and security.⁶⁴⁸ Hategekimana argues that the Trial Chamber did not identify any instance where he interacted with the local population or participated in a Prefecture Security Council meeting.⁶⁴⁹ He further highlights that the Ngoma Military Camp was one of three military camps in the area, which runs contrary to the Trial Chamber's attempts to portray him as the area commander.⁶⁵⁰ Finally, Hategekimana submits that the Trial Chamber erred in finding that he had the responsibility to maintain peace and security, which was the function of the gendarmerie.⁶⁵¹

297. The Prosecution responds that the Trial Chamber correctly assessed the aggravating factors.⁶⁵²

298. The Appeals Chamber recalls that it is settled jurisprudence of the Tribunal that the abuse of a position of influence and authority in society can be taken into account as an aggravating factor in

⁶⁴⁴ See *Rukundo* Appeal Judgement, para. 263; *Muhimana* Appeal Judgement, para. 232. See also *Dragomir Milošević* Appeal Judgement, para. 326; *Blagojević and Jokić* Appeal Judgement, para. 333.

⁶⁴⁵ *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-00-56-A, Prosecutor's Notice of Appeal, 20 July 2011, paras. 27-31, 44-58.

⁶⁴⁶ *Ntagerura et al.* Appeal Judgement, paras. 442-444.

⁶⁴⁷ Appeal Brief, paras. 436-440. Hategekimana also challenges the Trial Chamber's reliance on the transfer of refugees in assessing his influence, arguing that he lacked notice of the incident and that the assistance does not reveal his influence. See Appeal Brief, para. 437. The Trial Chamber, however, did not refer to this particular incident in assessing his aggravating factors.

⁶⁴⁸ Appeal Brief, paras. 436-440. See also AT. 15 December 2011 p. 38.

⁶⁴⁹ Appeal Brief, para. 438.

⁶⁵⁰ Appeal Brief, para. 439.

⁶⁵¹ Appeal Brief, para. 440.

⁶⁵² Response Brief, paras. 249-252.

sentencing.⁶⁵³ The Appeals Chamber is satisfied that it was reasonable to consider Hategekimana, as an officer in the Rwandan army and a camp commander, to be a person holding a position of influence and authority. Contrary to Hategekimana's submissions, in making its factual findings, the Trial Chamber clearly identified instances where he interacted with or influenced others, most significantly the various assailants committing the crimes for which he was convicted while in his presence or acting under his authority.⁶⁵⁴

299. Furthermore, although the Trial Chamber did not discuss the existence of other military camps in assessing aggravating factors, it follows from other parts of the Trial Judgement that it was clearly aware of the presence of the ESO camp and the Gendarmerie brigade.⁶⁵⁵ Hategekimana has therefore failed to demonstrate that the Trial Chamber did not take their presence in the area into account or to show that their existence would diminish the influence and authority that he derived from his own role at the Ngoma Military Camp.

300. The Appeals Chamber notes that, at several points in the Trial Judgement, the Trial Chamber refers to Hategekimana as being a member of the Prefecture Security Council.⁶⁵⁶ However, the only support for that proposition mentioned by the Trial Chamber is a reference to paragraph 2 of the Indictment⁶⁵⁷ and the evidence of Prosecution Witness Laurien Ntezimana, a religious educator, who testified that the "the commanders of the military camp" were part of the council.⁶⁵⁸ However, Witness Ntezimana further stated that "[o]f course, I was not a member of the committee, so I cannot name the people who actually made up the committee."⁶⁵⁹ The Appeals Chamber considers that no reasonable trier of fact could find that Hategekimana was a member of the Prefecture Security Council based solely on an allegation in the Indictment and on evidence of a witness who specified that he lacked knowledge as to who was on the council. Although such finding was therefore unreasonable, the Appeals Chamber is not satisfied that this error results in a miscarriage of justice. As noted above, Hategekimana's authority and influence over the perpetrators is adequately demonstrated by his role as commander of the Ngoma Military Camp.

301. The Appeals Chamber observes that the Trial Chamber did not fully articulate how it reached the conclusion that Hategekimana "was *in charge* of peace and security in the Ngoma

⁶⁵³ *Munyakazi* Appeal Judgement, para. 170; *Rukundo* Appeal Judgement, para. 250; *Seromba* Appeal Judgement, para. 230. See also *Ndindabahizi* Appeal Judgement, para. 136; *Dragomir Milošević* Appeal Judgement, para. 302; *Simba* Appeal Judgement, para. 284.

⁶⁵⁴ See, e.g., Trial Judgement, paras. 288, 304, 306, 401-403, 458, 460, 463, 570, 574, 630, 674, 676, 684, 690-692, 694, 709, 726, 727.

⁶⁵⁵ See, e.g., Trial Judgement, paras. 123-137, 252.

⁶⁵⁶ Trial Judgement, paras. 3, 658, 706, 738, 743.

⁶⁵⁷ Trial Judgement, para. 3, n. 3.

⁶⁵⁸ See T. 20 March 2009 pp. 14, 15. See also Trial Judgement, para. 187.

⁶⁵⁹ T. 20 March 2009 p. 15.

Commune”.⁶⁶⁰ A review of the Trial Judgement also reflects that there is limited evidence supporting this proposition. Indeed, as noted above, the Trial Chamber erred in finding that Hategekimana was a member of the Prefecture Security Council. It also failed to address or apparently take into account evidence presented by the Defence, indicating that this role was principally the function of the gendarmerie.⁶⁶¹ That said, there is direct evidence, accepted by the Trial Chamber, that Hategekimana assisted in the transfer and security of the refugees at the Matyazo Health Centre.⁶⁶² This evidence demonstrates that he had at least some role in assuring peace and security. It does not compel the conclusion, however, that he was *in charge* of this function for the entire commune. Nevertheless, in view of the gravity of the crimes, the remaining aggravating factors, and the limited mitigation, the Appeals Chamber is not convinced that the Trial Chamber’s error in finding that Hategekimana was in charge of peace and security for the entire commune has any impact on the overall assessment of his sentence.

302. Accordingly, Hategekimana has not identified any error in the Trial Chamber’s assessment of the aggravating factors which would have any bearing on the sentence.

C. Mitigating Factors

303. Hategekimana submits that the Trial Chamber erred in assessing the mitigating factors.⁶⁶³ In particular, he argues that the Trial Chamber failed to note that the Ngoma Military Camp was “of little importance, since the majority of soldiers were war-wounded”.⁶⁶⁴

304. The Prosecution responds that the Trial Chamber correctly assessed the mitigating factors.⁶⁶⁵

305. Pursuant to Rule 101(B)(ii) of the Rules, a trial chamber is required to take into account any mitigating circumstances in determining a sentence.⁶⁶⁶ However, it has broad discretion in determining the weight, if any, to be accorded to them.⁶⁶⁷ The Trial Chamber in the present case did not discuss the specific factor highlighted by Hategekimana in the sentencing section of the Trial Judgement.⁶⁶⁸ The Appeals Chamber is not convinced, however, that Hategekimana has demonstrated that the physical ability of the soldiers at the Ngoma Military Camp should have been

⁶⁶⁰ Trial Judgement, para. 743.

⁶⁶¹ See Defence Exhibit 7A (23 janvier 1974 – Décret-Loi : Création de la Gendarmerie).

⁶⁶² Trial Judgement, paras. 360-362, 660.

⁶⁶³ Appeal Brief, para. 441

⁶⁶⁴ Appeal Brief, para. 441.

⁶⁶⁵ Response Brief, paras. 253-256.

⁶⁶⁶ See also *Munyakazi* Appeal Judgement, para. 174; *Muvunyi II* Appeal Judgement, para. 70; *Rukundo* Appeal Judgement, para. 255; *Nchamihigo* Appeal Judgement, para. 387; *Muhimana* Appeal Judgement, para. 231.

⁶⁶⁷ *Munyakazi* Appeal Judgement, para. 174.

⁶⁶⁸ See Trial Judgement, paras. 740-746.

considered as a mitigating factor. In any event, the Trial Chamber did expressly consider Hategekimana's submissions and the evidence concerning the physical ability of the soldiers at the Ngoma Military Camp in another part of the Trial Judgement.⁶⁶⁹ In that section, the Trial Chamber rejected Hategekimana's contention that only injured and disabled soldiers were stationed at the camp.⁶⁷⁰ Hategekimana has not challenged this finding on appeal. Accordingly, Hategekimana has not demonstrated a discernible error in the Trial Chamber's consideration of the mitigating factors.

D. Conclusion

306. For the foregoing reasons, the Appeals Chamber dismisses Hategekimana's Seventh Ground of Appeal.

⁶⁶⁹ Trial Judgement, paras. 108-122.

⁶⁷⁰ Trial Judgement, para. 122.

X. DISPOSITION

307. 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 hearing on 15 December 2011;

SITTING in open session;

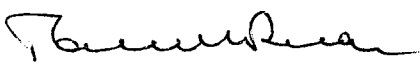
DISMISSES Hategekimana's appeal;

AFFIRMS the sentence of life imprisonment imposed on Hategekimana by the Trial Chamber;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules; and

ORDERS that, in accordance with Rule 103(B) and Rule 107 of the Rules, Hategekimana is to remain in the custody of the Tribunal pending the finalization of arrangements for his transfer to the State where his sentence will be served.

Done in English and French, the English text being authoritative.



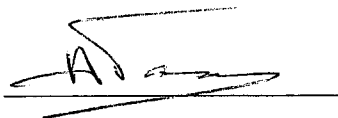
Fausto Pocar
Presiding Judge



Patrick Robinson
Judge



Mehmet Güney
Judge



Andréia Vaz
Judge



Carmel Agius
Judge

Signed on the twenty-sixth day of April 2012 at The Hague, The Netherlands, and pronounced this eighth day of May 2012 at Arusha, Tanzania.

[Seal of the Tribunal]



XI. ANNEX A – PROCEDURAL HISTORY

1. The main aspects of the appeal proceedings are summarized below.

A. Notice of Appeal and Briefs

2. Trial Chamber II of the Tribunal rendered the judgement in this case orally on 6 December 2010 and filed the written Trial Judgement on 14 February 2011. Only Hategekimana appealed.

3. On 20 January 2011, the Pre-Appeal Judge denied Hategekimana's request for an extension of time to file his notice of appeal.¹ On 28 February 2011 and 1 March 2011, respectively, the Pre-Appeal Judge denied his second and third requests for an extension of time to file his notice of appeal.² Hategekimana filed his notice of appeal on 16 March 2011.³ On 8 April 2011, the Pre-Appeal Judge granted Hategekimana's motion to rectify errors in his notice of appeal.⁴ On 13 April 2011, the Pre-Appeal Judge denied his request for a one-month extension of time to file his Appeal Brief due by 30 May 2011.⁵ On 20 May 2011, the Pre-Appeal Judge denied Hategekimana's second request for an extension of time to file his Appeal Brief.⁶

4. On 20 May 2011, Hategekimana filed a motion requesting leave to amend his notice of appeal.⁷ On 23 May 2011, the Pre-Appeal Judge ordered him to file a proposed amended notice of appeal indicating the amendments sought by 30 May 2011.⁸ On 30 May 2011, Hategekimana filed his Notice of Appeal.⁹ On the same day, he filed his Appeal Brief.¹⁰ On 2 June 2011, Hategekimana filed a corrigendum to his Appeal Brief.¹¹ On 11 July 2011, the Appeals Chamber granted

¹ Decision on Ildephonse Hategekimana's Motion for Extension of Time for the Filing of the Notice of Appeal, 20 January 2011.

² Decision on Ildephonse Hategekimana's Second Motion for Extension of Time for the Filing of the Notice of Appeal, 28 February 2011; Decision on Ildephonse Hategekimana's Third Motion for Extension of Time for the Filing of the Notice of Appeal, 1 March 2011.

³ *Acte d'appel du Lieutenant Ildephonse Hategekimana contre le Jugement rendu le 6 décembre 2010 par la Chambre de première instance II du Tribunal pénal international pour le Rwanda(TPIR)*, 16 March 2011. The English translation of the French original was filed on 16 May 2011.

⁴ Decision on Ildephonse Hategekimana's Motion for Rectification of Errors in his Notice of Appeal, 8 April 2011.

⁵ Decision on Ildephonse Hategekimana's Motion for an Extension of Time to File his Appellant's Brief, 13 April 2011.

⁶ Decision on Ildephonse Hategekimana's Second Motion for an Extension of Time to File his Appellant's Brief, 20 May 2011.

⁷ *Requête en extrême urgence d'Ildephonse Hategekimana aux fins d'être autorisé à modifier et ajouter de nouveaux moyens d'appel*, 20 May 2011.

⁸ Order for the Filing of Ildephonse Hategekimana's Proposed Amended Notice of Appeal, 23 May 2011.

⁹ *Acte d'appel amendé du Lieutenant Ildephonse Hategekimana conformément à la décision intitulée «Order for the Filing of Ildephonse Hategekimana's Proposed Amended Notice of Appeal » rendue par le Juge de mise en état en appel le 23 mai 2011*, 30 May 2011 ("Proposed Amended Notice of Appeal"). The English translation of the French original was filed on 8 August 2011.

¹⁰ *Mémoire d'appel d'Ildephonse Hategekimana*, 30 May 2011 (public with confidential Annexes).

¹¹ *Corrigendum au mémoire d'appel d'Ildephonse Hategekimana déposé le 30/05/11*, 2 June 2011. The English translation of the French original was filed on 29 September 2011.

Hategekimana's request to amend his notice of appeal and accepted the Proposed Amended Notice of Appeal as the operative Notice of Appeal.¹² The Prosecution filed its Response Brief on 11 July 2011.¹³ Hategekimana filed his Reply Brief on 27 July 2011.¹⁴

B. Assignment of Judges

5. On 13 January 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to the appeal: Judge Mehmet Güney, Judge Fausto Pocar, Judge Andrésia Vaz, Judge Theodor Meron, and Judge Carmel Agius.¹⁵ The Bench elected Judge Fausto Pocar as Presiding Judge in this case. On 20 January 2011, Judge Pocar designated himself as the Pre-Appeal Judge in this case.¹⁶ On 17 November 2011, Judge Theodor Meron, the Presiding Judge of the Appeals Chamber, assigned Judge Patrick Robinson to replace him on the Bench.¹⁷

C. Motions Related to Judicial Assistance and the Admission of Additional Evidence

6. On 28 February 2011, Hategekimana confidentially filed a motion requesting cooperation and judicial assistance from Belgium and Canada.¹⁸ The Prosecution did not file a response. On 5 May 2011, the Appeals Chamber denied Hategekimana's Request.¹⁹

7. On 29 August 2011, Hategekimana filed a motion for admission of additional evidence.²⁰ The Prosecution responded on 30 September 2011.²¹ Hategekimana replied on 11 October 2011.²² On 8 December 2011, the Appeals Chamber denied Hategekimana's Motion.²³

¹² Decision on Ildephonse Hategekimana's Motion for Leave to Amend his Notice of Appeal, 11 July 2011.

¹³ Prosecutor's Respondent Brief, 11 July 2011.

¹⁴ *Mémoire en réplique de l'appelant Ildephonse Hategekimana*, 27 July 2011. The English translation of the French original was filed on 19 October 2011.

¹⁵ Order Assigning Judges to a Case Before the Appeals Chamber, 13 January 2011.

¹⁶ Order Assigning a Pre-Appeal Judge, 20 January 2011.

¹⁷ Order Replacing a Judge in a Case Before the Appeals Chamber, 17 November 2011.

¹⁸ *Requête en extrême urgence aux fins de coopération et d'entraide judiciaire en vertu de l'article 28 du Statut, 54 et 108bis du Règlement*, with annexes, 28 February 2011 (confidential) ("Request").

¹⁹ Decision on Ildephonse Hategekimana's Motion for Cooperation and Judicial Assistance, 5 May 2011.

²⁰ *Requête de [sic] Ildephonse Hategekimana aux fins de soumission des moyens de preuves supplémentaires, présentée en vertu de l'article 115 du Règlement de procédure et de preuve (RPP), et du paragraphe 7 de la Directive pratique relative aux conditions formelles applicables au recours en appel contre un jugement*, 29 August 2011 (confidential), ("Motion").

²¹ Prosecutor's Response to Ildephonse Hategekimana's Motion for Admission of Additional Evidence Under Rule 115 of the Rules of Procedure and Evidence, 30 September 2011.

²² *Réplique d'Ildephonse Hategekimana au « Prosecutor's response to Ildephonse Hategekimana's motion for admission of additional evidence under rule 115 of the rules of Procedure and evidence » déposé [sic] le 30 septembre 2011*, 11 October 2011.

²³ Decision on Ildephonse Hategekimana's Motion for the Admission of Additional Evidence on Appeal, 8 December 2011. The confidential status of this decision was lifted by the Appeals Chamber on 2 March 2012. See Decision on Ildephonse Hategekimana's Motion to Lift Confidentiality, 2 March 2012.

D. Hearing of the Appeal

8. On 15 December 2011, the parties presented their oral arguments at a hearing held in Arusha, Tanzania in accordance with the Scheduling Order of 28 November 2011.²⁴

²⁴ Scheduling Order, 28 November 2011.

XII. ANNEX B – CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 (the English translation of the French original was filed on 23 November 2001) (“*Akayesu* Appeal Judgement”).

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (“*Akayesu* Trial Judgement”).

BAGOSORA and NSENGIYUMVA

Théoneste Bagosora and Anatole Nsengiyumva, Case No. ICTR-98-41-A, Judgement, 14 December 2011 (“*Bagosora and Nsengiyumva* Appeal Judgement”).

BIKINDI

Simon Bikindi v. The Prosecutor, Case No. ICTR-01-72-A, Judgement, 18 March 2010 (“*Bikindi* Appeal Judgement”).

GACUMBITSI

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-01-64-A, Judgement, 7 July 2006 (“*Gacumbitsi* Appeal Judgement”).

KAJELIJELI

Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 (“*Kajelijeli* Appeal Judgement”).

KALIMANZIRA

Callixte Kalimanzira v. The Prosecutor, Case No. ICTR-05-88-A, Judgement, 20 October 2010 (“*Kalimanzira* Appeal Judgement”).

KAMUHANDA

Jean de Dieu Kamuhanda v. The Prosecutor, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda* Appeal Judgement”).

KARERA

François Karera v. The Prosecutor, Case No. ICTR-01-74-A, Judgement, 2 February 2009 (“*Karera* Appeal Judgement”).

KAYISHEMA and RUZINDANA

The Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgment (Reasons), dated 1 June 2001, filed on 19 July 2001 (the English translation of the French original was filed on 4 December 2001) (“*Kayishema and Ruzindana Appeal Judgement*”).

MUHIMANA

Mikaeli Muhimana v. The Prosecutor, Case No. ICTR-95-1B-A, Judgement, 21 May 2007 (“*Muhimana Appeal Judgement*”).

MUNYAKAZI

The Prosecutor v. Yussuf Munyakazi, Case No. ICTR-97-36A-A, Judgement, 28 September 2011 (“*Munyakazi Appeal Judgement*”).

MUSEMA

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (the English translation of the French original was filed on 25 October 2002) (“*Musema Appeal Judgement*”).

MUVUNYI

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 29 August 2008 (“*Muvunyi I Appeal Judgement*”).

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 (“*Muvunyi II Appeal Judgement*”).

NAHIMANA et al.

Ferdinand Nahimana et al. v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 (the English translation of the French original was filed on 16 May 2008) (“*Nahimana et al. Appeal Judgement*”).

NCHAMIHIGO

Siméon Nchamihigo v. The Prosecutor, Case No. ICTR-01-63-A, Judgement, 18 March 2010 (“*Nchamihigo Appeal Judgement*”).

NDINDABAHIZI

Emmanuel Ndindabahizi v. The Prosecutor, Case No. ICTR-01-71-A, Judgement, 16 January 2007 (“*Ndindabahizi Appeal Judgement*”).

NIYITEGEKA

Eliezér Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 (“*Niyitegeka Appeal Judgement*”).

NTAGERURA et al.

The Prosecutor v. André Ntagerura et al., Case No. ICTR-99-46-A, Judgement, 7 July 2006 (the English translation of the French original was filed on 29 March 2007) (“*Ntagerura et al.* Appeal Judgement”).

NTAKIRUTIMANA

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Case Nos. ICTR-96-10-A & ICTR-96-17-A, Judgement, 13 December 2004 (“*Ntakirutimana* Appeal Judgement”).

RENZAHO

Tharcisse Renzaho v. The Prosecutor, Case No. ICTR-97-31-A, Judgement, 1 April 2011 (“*Renzaho* Appeal Judgement”).

RUKUNDO

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-01-70-A, Judgement, 20 October 2010 (“*Rukundo* Appeal Judgement”).

RUTAGANDA

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (the English translation of the French original was filed on 9 February 2004) (“*Rutaganda* Appeal Judgement”).

SEMANZA

Laurent Semanza v. The Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 (“*Semanza* Appeal Judgement”).

The Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-T, Judgement and Sentence, 15 May 2003 (“*Semanza* Trial Judgement”).

SEROMBA

The Prosecutor v. Athanase Seromba, Case No. ICTR-01-66-A, Judgement, 12 March 2008 (“*Seromba* Appeal Judgement”).

SETAKO

Ephrem Setako v. The Prosecutor, Case No. ICTR-04-81-A, Judgement, 28 September 2011 (“*Setako* Appeal Judgement”).

SIMBA

Aloys Simba v. The Prosecutor, Case No. ICTR-01-76-A, Judgement, 27 November 2007 (“*Simba* Appeal Judgement”).

2. ICTY

ALEKSOVSKI

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 (“*Aleksovski Appeal Judgement*”).

BLAGOJEVIĆ and JOKIĆ

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-06-A, Judgement, 9 May 2007 (“*Blagojević and Jokić Appeal Judgement*”).

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić Appeal Judgement*”).

BOŠKOSKI and TARČULOVSKI

Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Case No. IT-04-82-A, Judgement, 19 May 2010 (“*Boškoski and Tarčulovski Appeal Judgement*”).

DELALIĆ et al.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Delalić et al. Appeal Judgement*”).

FURUNDŽIJA

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija Appeal Judgement*”).

GALIĆ

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić Appeal Judgement*”).

HALILOVIĆ

Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 (“*Halilović Appeal Judgement*”).

HARADINAJ et al.

Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-A, Judgement, 19 July 2010 (“*Haradinaj et al. Appeal Judgement*”).

HARAQIJA and MORINA

Prosecutor v. Astrit Haraqija and Bajrush Morina, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009 (“*Haraqija and Morina* Appeal Judgement”).

JELISIĆ

Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 (“*Jelisić* Appeal Judgement”).

KORDIĆ and ČERKEZ

Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez* Appeal Judgement”).

KRNOJELAC

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 (the English translation of the French original was filed on 5 November 2003) (“*Krnojelac* Appeal Judgement”).

KRSTIĆ

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić* Appeal Judgement”).

KUNARAC et al.

Prosecutor v. Dragoljub Kunarac et al., Case Nos. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac et al.* Appeal Judgement”).

KUPREŠKIĆ et al.

Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić et al.* Appeal Judgement”).

KVOČKA et al.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka et al.* Appeal Judgement”).

LIMAJ et al.

Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-A, Judgement, 27 September 2007 (“*Limaj et al.* Appeal Judgement”).

MILOŠEVIĆ Dragomir

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009, (“*Dragomir Milošević* Appeal Judgement”).



MRKŠIĆ and ŠLJIVANČANIN

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin Appeal Judgement*”).

SIMIĆ Blagoje

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić Appeal Judgement*”).

TADIĆ

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić Appeal Judgement*”).

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B. Defined Terms and Abbreviations

Appeal Brief

Corrigendum au mémoire d'appel d'Ildephonse Hategekimana déposé le 30/05/11, 2 June 2011

AT.

Transcript from the appeal hearing in the present case. All references are to the official English transcript, unless otherwise indicated

Defence Pre-Trial Brief

The Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-T, Mémoire préalable à la présentation des moyens à décharge de la Défense de l'accusé Ildephonse Hategekimana en vertu de l'article 73ter du Règlement de procédure et de preuve, 1 June 2009 (confidential)

ESO

École des sous-officiers (Butare)

ICTR *or* Tribunal

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

Indictment

The Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-I, Amended Indictment, 11 August 2010

MRND

Mouvement révolutionnaire national pour la démocratie et le développement (prior to 5 July 1991) and Mouvement républicain national pour la démocratie et le développement (from 5 July 1991)

Notice of Appeal

Acte d'appel amendé du Lieutenant Ildephonse Hategekimana conformément à la décision intitulée «Order for the Filing of Ildephonse Hategekimana's Proposed Amended Notice of Appeal » rendue par le Juge de mise en état en appel le 23 mai 2011, 30 May 2011

Reply Brief

Mémoire en réplique de l'appelant Ildephonse Hategekimana, 27 July 2011

Response Brief

Prosecutor's Respondent's Brief, 11 July 2011

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footnote

Prosecution

Office of the Prosecutor

RPF

Rwandan (also Rwandese) Patriotic Front

Rules

Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

Statute

Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)

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Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated

Trial Judgement

The Prosecutor v. Ildephonse Hategekimana, Case No. ICTR-00-55B-T, Judgement and Sentence, pronounced on 6 December 2010, filed in writing on 14 February 2011