



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

868/H

AT

ICTR-00-61-A
09th October 2012
{868/H – 761/H}

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Carmel Agius

Acting Registrar: Mr. Pascal Besnier

Judgement of: 9 October 2012

Jean-Baptiste GATETE

v.

THE PROSECUTOR

Case No. ICTR-00-61-A

JUDGEMENT

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The Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James J. Arguin
Ms. Inneke Onsea
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Ms. Priyadarshini Narayanan
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ICTR Appeals Chamber

Date: 09th October 2012
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Parties

JPU, LOs, LSS

[Signature]

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 appeals by Jean-Baptiste Gatete ("Gatete") and the Prosecution against the Judgement and Sentence pronounced by Trial Chamber III of the Tribunal ("Trial Chamber") on 29 March 2011 in the case of *The Prosecutor v. Jean-Baptiste Gatete* ("Trial Judgement").¹

I. INTRODUCTION

A. BACKGROUND

2. Gatete was born in 1953 in Rwankuba sector, Murambi commune, Byumba prefecture, Rwanda.² Between 1982 and 1993, he was the *bourgmestre* of Murambi commune and, in April 1994, he became a director in the Ministry of Women and Family Affairs.³

3. The Trial Chamber found Gatete responsible pursuant to Article 6(1) of the Statute of the Tribunal ("Statute") for the killings of Tutsis in Rwankuba sector on 7 April 1994, at Kiziguro parish on 11 April 1994, and at Mukarange parish on 12 April 1994.⁴ Consequently, it convicted Gatete of genocide⁵ and extermination as a crime against humanity.⁶ The Trial Chamber sentenced Gatete to a single term of life imprisonment.⁷

B. THE APPEALS

4. Gatete presents five grounds of appeal challenging his convictions and sentence and requests that the Appeals Chamber quash all his convictions and acquit him or, alternatively, reduce his sentence.⁸ The Prosecution responds that Gatete's appeal should be dismissed.⁹

5. The Prosecution advances a single ground of appeal. It submits that the Trial Chamber erred in law by failing to enter a conviction for conspiracy to commit genocide, and requests that the

¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Judgement and Sentence, pronounced on 29 March 2011, filed on 31 March 2011. For ease of reference, two annexes are appended: Annex A – Procedural History; Annex B – Cited Materials and Defined Terms.

² Trial Judgement, paras. 1, 81.

³ Trial Judgement, paras. 1, 82.

⁴ Trial Judgement, paras. 151-153, 341, 342, 417, 594, 601, 608, 640, 643, 646.

⁵ Trial Judgement, paras. 594, 601, 608, 668.

⁶ Trial Judgement, paras. 640, 643, 646, 668.

⁷ Trial Judgement, paras. 682, 683.

⁸ Gatete Notice of Appeal, paras. 3-36; Gatete Appeal Brief, paras. 7, 321.

⁹ Prosecution Response Brief, paras. 8, 212.



Appeals Chamber enter a conviction accordingly.¹⁰ Gatete responds that the Prosecution's appeal should be dismissed.¹¹

6. The Appeals Chamber heard oral submissions regarding these appeals on 7 May 2012.

¹⁰ Prosecution Notice of Appeal, paras. 3, 4; Prosecution Appeal Brief, paras. 13-41.

¹¹ Gatete Response Brief, paras. 7, 20, p. 9.

II. STANDARDS OF APPELLATE REVIEW

7. 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.¹²

8. 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.¹³

9. Where the Appeals Chamber finds an error of law in the trial judgement arising from the application of an incorrect legal standard, it will articulate the correct legal standard and review the relevant factual findings of the trial chamber accordingly.¹⁴ 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.¹⁵

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

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice.¹⁶

11. 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

¹² See, e.g., *Hategekimana* Appeal Judgement, para. 6; *Kanyarukiga* Appeal Judgement, para. 7; *Ntabakuze* Appeal Judgement, para. 10. See also *Haradinaj et al.* Appeal Judgement, para. 9.

¹³ *Ntakirutimana* Appeal Judgement, para. 11 (reference omitted). See also, e.g., *Hategekimana* Appeal Judgement, para. 7; *Kanyarukiga* Appeal Judgement, para. 8; *Ntabakuze* Appeal Judgement, para. 11; *Haradinaj et al.* Appeal Judgement, para. 10.

¹⁴ See, e.g., *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁵ See, e.g., *Hategekimana* Appeal Judgement, para. 8; *Kanyarukiga* Appeal Judgement, para. 9; *Ntabakuze* Appeal Judgement, para. 12. See also *Haradinaj et al.* Appeal Judgement, para. 11.

¹⁶ *Krstić* Appeal Judgement, para. 40 (references omitted). See also, e.g., *Hategekimana* Appeal Judgement, para. 9; *Kanyarukiga* Appeal Judgement, para. 10; *Ntabakuze* Appeal Judgement, para. 13.

intervention of the Appeals Chamber.¹⁷ Arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.¹⁸

12. 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.¹⁹ 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.²⁰ 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.²¹

¹⁷ See, e.g., *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14. See also *Haradinaj et al.* Appeal Judgement, para. 13.

¹⁸ See, e.g., *Hategekimana* Appeal Judgement, para. 10; *Kanyarukiga* Appeal Judgement, para. 11; *Ntabakuze* Appeal Judgement, para. 14. See also *Haradinaj et al.* Appeal Judgement, para. 13.

¹⁹ Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 4(b). See also, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

²⁰ See, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

²¹ See, e.g., *Hategekimana* Appeal Judgement, para. 11; *Kanyarukiga* Appeal Judgement, para. 12; *Ntabakuze* Appeal Judgement, para. 15.

III. APPEAL OF JEAN-BAPTISTE GATETE

A. ALLEGED VIOLATIONS OF FAIR TRIAL RIGHTS (GROUNDS 1 AND 2)

1. Alleged Violation of Gatete's Right to Be Tried Without Undue Delay (Ground 1)

13. Gatete was arrested in the Democratic Republic of Congo on 11 September 2002 and was transferred to the custody of the Tribunal on 13 September 2002.²² At his initial appearance on 20 September 2002, Gatete entered a plea of not guilty to all the charges against him.²³ His case was assigned to the Trial Chamber on 6 July 2009 and his trial commenced on 20 October 2009.²⁴

14. The question of whether Gatete's right to be tried without undue delay had been violated was considered in the Trial Judgement.²⁵ The Trial Chamber found that the length of Gatete's pre-trial delay was significant,²⁶ and noted instances in which the conduct of the Prosecution and the relevant authorities resulted in delay that could not be explained or justified.²⁷ However, the Trial Chamber concluded that the pre-trial delay was not undue given that: the case was complex;²⁸ the case had been selected for referral to Rwanda pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence of the Tribunal ("Rules");²⁹ any prejudice occasioned by the delay was minimal;³⁰ and, once the trial commenced, it was conducted with extreme expedition.³¹

15. Gatete submits that the Trial Chamber erred in law and fact when it found that there was no violation of his right to be tried without undue delay.³² In particular, he argues that the Trial Chamber erred in its assessment of the following factors: (i) the conduct of the parties and the relevant authorities;³³ (ii) the complexity of the Prosecution case against him;³⁴ and (iii) the minimal prejudice, if any, occasioned by the delay in the proceedings.³⁵

16. Gatete emphasises that his situation is without precedent, underscoring that he was incarcerated for 2,564 days before the start of the trial and that the Prosecution case against him

²² Trial Judgement, paras. 58, 83, Annex A, para. 2.

²³ Trial Judgement, para. 58, Annex A, para. 2. *See also* Initial Appearance, T. 20 September 2002 pp. 49-51.

²⁴ Trial Judgement, para. 58, Annex A, para. 6.

²⁵ Trial Judgement, paras. 54-64.

²⁶ Trial Judgement, paras. 59, 64.

²⁷ Trial Judgement, paras. 61, 62.

²⁸ Trial Judgement, paras. 60, 64.

²⁹ Trial Judgement, para. 64.

³⁰ Trial Judgement, paras. 63, 64.

³¹ Trial Judgement, para. 64.

³² Gatete Notice of Appeal, paras. 4-6; Gatete Appeal Brief, paras. 8-56. *See also* AT. 7 May 2012 p. 17.

³³ Gatete Appeal Brief, paras. 27, 30.

³⁴ Gatete Notice of Appeal, para. 5; Gatete Appeal Brief, paras. 15, 18.

³⁵ Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, paras. 15, 42.

lasted only 13 days.³⁶ He requests that the Appeals Chamber either quash all of his convictions and enter an acquittal on all counts, or reduce his sentence in light of the prejudice arising from the lengthy pre-trial delay.³⁷

17. The Prosecution responds that the Trial Chamber correctly found no violation of Gatete's right to be tried without undue delay, arguing that no remedy is therefore warranted and that his submissions in this regard should be dismissed.³⁸

18. The Appeals Chamber will consider each of Gatete's challenges in turn. Before doing so, the Appeals Chamber recalls that the right to be tried without undue delay is enshrined in Article 20(4)(c) of the Statute and protects an accused against *undue* delay, which is determined on a case-by-case basis.³⁹ A number of factors are relevant to this assessment, including: the length of the delay; the complexity of the proceedings; the conduct of the parties; the conduct of the relevant authorities; and the prejudice to the accused, if any.⁴⁰ In this context, the Appeals Chamber also recalls that when a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Rules and that this violation caused prejudice that amounts to an error of law invalidating the trial judgement.⁴¹

(a) The Conduct of the Prosecution and the Relevant Authorities

19. The Trial Chamber noted particular instances in which the conduct of the Prosecution and the relevant authorities resulted in pre-trial delay that could not be explained or justified.⁴² Notwithstanding these findings, the Trial Chamber concluded that the length of Gatete's pre-trial detention was not undue.⁴³

20. Before turning to Gatete's submissions, the Appeals Chamber notes the Prosecution's claim that Gatete's challenge concerning the conduct of the parties and the relevant authorities in the

³⁶ Gatete Appeal Brief, para. 8. *See also* Gatete Appeal Brief, paras. 6, 17.

³⁷ Gatete Notice of Appeal, para. 7; Gatete Appeal Brief, para. 57. *See also* Gatete Appeal Brief, para. 56.

³⁸ Prosecution Response Brief, paras. 21, 53. *See also* Prosecution Response Brief, paras. 23, 25; AT. 7 May 2012 p. 25.

³⁹ *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074.

⁴⁰ *Renzaho* Appeal Judgement, para. 238; *Nahimana et al.* Appeal Judgement, para. 1074; *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004, p. 3.

⁴¹ *See, e.g., Haradinaj et al.* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 28. *See also Kanyarukiga* Appeal Judgement, para. 52; *Bagosora and Nsengiyumva* Appeal Judgement, fn. 137; *Renzaho* Appeal Judgement, para. 196.

⁴² Trial Judgement, paras. 61, 62. For example, the Trial Chamber noted the time taken by Trial Chamber I of the Tribunal ("Pre-Trial Chamber") to address pre-trial motions, such as motions relating to indictment issues (*see* Trial Judgement, para. 61). It also noted the time taken by the Prosecution to file an amended indictment and a request for referral pursuant to Rule 11 *bis* of the Rules (*see* Trial Judgement, para. 62).

⁴³ Trial Judgement, para. 64.

context of pre-trial delay constitutes an impermissible expansion of his appeal.⁴⁴ The Appeals Chamber accepts the Prosecution's objection and considers that the challenges in this regard exceed the scope of Gatete's Notice of Appeal. Nevertheless, the Appeals Chamber considers that it is in the interests of justice to examine Gatete's arguments.⁴⁵ As the Prosecution responded to these contentions, the Appeals Chamber considers that there is no unfairness to the Prosecution in this respect.

21. Gatete submits that the Trial Chamber erred when it found instances in which the Prosecution delayed proceedings without justification but concluded that the delay occasioned was not undue.⁴⁶ He likewise argues that, while the Trial Chamber acknowledged numerous instances of pre-trial delay that could only be attributed to the Pre-Trial Chamber, it failed to draw the necessary conclusion, namely that the resulting delay was undue.⁴⁷

22. The Prosecution responds that the Trial Chamber reasonably concluded that the pre-trial delay was not undue, notwithstanding various instances of delay occasioned by the conduct of the Prosecution and the Pre-Trial Chamber.⁴⁸

23. The Appeals Chamber considers that the Trial Chamber erred in finding that the length of Gatete's pre-trial detention was not undue, given that it explicitly noted that the conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified.⁴⁹ By identifying such instances of pre-trial delay, the Appeals Chamber considers that the Trial Chamber itself *ipso facto* recognised that the conduct of the Prosecution and the relevant authorities unduly prolonged Gatete's pre-trial detention. The Trial Chamber's subsequent conclusion that "the delay was not undue" is thus incompatible with its prior acknowledgement that there were various pre-trial delays that could not be explained or justified. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its assessment of the delays occasioned by the conduct of the Prosecution and the relevant authorities.

⁴⁴ Prosecution Response Brief, para. 24. Gatete submits that his arguments in this regard do not raise any additional errors in the Trial Judgement. See Gatete Reply Brief, paras. 17-19.

⁴⁵ See *Ntabakuze* Appeal Judgement, fn. 255; *Bagosora and Nsengiyumva* Appeal Judgement, para. 381; *Deronjić* Judgement on Sentencing Appeal, paras. 102, 103, 130.

⁴⁶ Gatete Appeal Brief, paras. 27, 29, 41. See also AT. 7 May 2012 p. 18.

⁴⁷ Gatete Appeal Brief, para. 30. See also Gatete Appeal Brief, paras. 34, 41. In this respect, Gatete asserts that the pre-trial delay was prolonged as a result of the busy work schedule of the Pre-Trial Chamber, which was not in a position to deal expeditiously with his case as a result. See Gatete Appeal Brief, para. 38.

⁴⁸ Prosecution Response Brief, paras. 37-39, referring to, *inter alia*, Trial Judgement, paras. 61, 62. See also Prosecution Response Brief, para. 40. See also AT. 7 May 2012 pp. 22, 23.

⁴⁹ See Trial Judgement, paras. 61, 62.

(b) The Complexity of the Case

24. The Trial Chamber observed that this “single-accused case” could not be compared to “multi-accused trials which have run for years and involved hundreds of trial days with over a thousand exhibits and in excess of a hundred witnesses.”⁵⁰ Notwithstanding this assessment, the Trial Chamber considered that the number of counts and allegations, the nature of the crimes charged, and the modes of liability involved, indicated that the case against Gatete was complex in both fact and law.⁵¹ The Trial Chamber subsequently relied on this factor, among others, in concluding that though significant, the pre-trial delay was not undue and, therefore, did not warrant a remedy.⁵²

25. Gatete submits that the Trial Chamber erred in law and fact in finding that the pre-trial delay of over seven years was not undue, given the complexity of the Prosecution case.⁵³ He asserts that the Trial Chamber misapplied the legal standard in assessing the complexity of the case by taking into consideration the Defence case and the nature of the counts charged.⁵⁴ Gatete also submits that the Trial Chamber failed to substantiate its finding that the case against him comprised complex legal and factual issues, justifying a pre-trial delay of seven years.⁵⁵

26. In particular, Gatete submits that the Trial Chamber failed to acknowledge that the case against him was simple and small by the Tribunal’s standards.⁵⁶ In this regard, Gatete underscores that: (i) he was tried alone;⁵⁷ (ii) the Prosecution case against him was of short duration;⁵⁸ (iii) the Indictment was limited to a 24-day period;⁵⁹ (iv) no novel or complex legal issues were raised by motion or pre-trial briefing;⁶⁰ and (v) the nature of the evidence presented at trial was straightforward.⁶¹

⁵⁰ Trial Judgement, para. 60.

⁵¹ Trial Judgement, paras. 60, 64.

⁵² Trial Judgement, para. 64.

⁵³ Gatete Notice of Appeal, para. 5. *See also* AT. 7 May 2012 p. 17.

⁵⁴ Gatete Appeal Brief, paras. 18, 20.

⁵⁵ Gatete Appeal Brief, para. 24.

⁵⁶ Gatete Appeal Brief, paras. 19, 23. *See also* Gatete Reply Brief, para. 25. According to Gatete, this is evidenced by the fact that the Trial Judgement was delivered only four months and 21 days after the close of trial proceedings. *See* Gatete Appeal Brief, para. 26.

⁵⁷ Gatete Appeal Brief, para. 19. Gatete compares the duration of his own pre-trial delay with that of other accused before the Tribunal in complex, multi-accused cases, noting in particular that his pre-trial detention exceeded that of the accused in such cases. *See* Gatete Appeal Brief, paras. 12, 25, 55.

⁵⁸ Gatete Appeal Brief, para. 19.

⁵⁹ Gatete Reply Brief, para. 25. *See also* AT. 7 May 2012 p. 17. In his Appeal Brief, Gatete erroneously suggests that the period of time covered by the Indictment was limited to one week. *See* Gatete Appeal Brief, paras. 19, 55.

⁶⁰ Gatete Appeal Brief, para. 19.

⁶¹ Gatete Appeal Brief, para. 21. Gatete notes that all 22 witnesses called by the Prosecution were eye-witnesses who gave relatively short, uncomplicated testimony. *See* Gatete Appeal Brief, para. 21. *See also* Gatete Reply Brief, paras. 23, 25; AT. 7 May 2012 p. 17. Gatete also avers that of the 39 exhibits presented by the Prosecution, only one, a photograph, was anything other than a personal information sheet, prior witness statement, clinical prescription, judicial

27. The Prosecution responds that the Trial Chamber correctly assessed the complexity of the proceedings and properly considered the relevant factors in a manner consistent with established jurisprudence.⁶² The Prosecution submits that Gatete fails to appreciate that other factors may signify the complexity of a case, such as multiple crime sites, multiple theories and modes of liability, and multiple Prosecution and Defence witnesses and exhibits.⁶³ The Prosecution submits that the present case is akin to that of Tharcisse Renzaho, a single accused whose five-year pre-trial detention was deemed not to have constituted undue delay.⁶⁴

28. In reply, Gatete accepts that the nature of the Defence case has some relevance to the evaluation of the complexity of a case in the context of pre-trial delay.⁶⁵ He also argues that his case is less complex than that of Tharcisse Renzaho.⁶⁶

29. Whether a case is sufficiently complex to justify lengthy pre-trial detention is, in the view of the Appeals Chamber, a matter to be determined on a case-by-case basis.⁶⁷ In the present instance, the Trial Chamber correctly observed that the case against Gatete could not be compared to multi-accused trials, which run for years and involve hundreds of trial days, hundreds of witnesses, and over a thousand exhibits.⁶⁸ However, despite this assessment, the Trial Chamber found that the case was complex in light of the number of counts, allegations, and nature of the crimes charged.⁶⁹ The Appeals Chamber considers that the Trial Chamber erred in this regard. Although the Indictment alleges crimes pertaining to different modes of liability and several different incidents, the Prosecution was nonetheless able to present its case in 13 days.⁷⁰ Moreover, the whole trial in this single-accused case ran for only 30 days, during which 49 witnesses were called and 146 exhibits were admitted.⁷¹ Consequently, the Appeals Chamber does not consider that the allegations against

order, or list of names compiled in the course of witness testimony. *See* Gatete Appeal Brief, para. 22. *See also* AT. 7 May 2012 p. 17.

⁶² Prosecution Response Brief, paras. 28, 33, 34. According to the Prosecution, Gatete's assertions that the Trial Chamber erred by considering the scope of the Defence case and the nature of the counts are unsupported in law. *See* Prosecution Response Brief, para. 29. *See also* Prosecution Response Brief, paras. 30, 31. The Prosecution further argues that Gatete's submission that the Trial Chamber should not have considered the volume of evidence in the case as a whole but should have limited its assessment to the size of the Prosecution case, contradicts Gatete's approach at trial wherein he relied on "the case as a whole, including the number of Prosecution and Defence witnesses, and the number of Prosecution and Defence exhibits." The Prosecution maintains that Gatete cannot now fault the Trial Chamber for following the same approach. *See* Prosecution Response Brief, para. 32 (emphasis in original).

⁶³ Prosecution Response Brief, para. 35.

⁶⁴ Prosecution Response Brief, para. 36.

⁶⁵ Gatete Reply Brief, para. 23.

⁶⁶ Gatete Reply Brief, paras. 24, 25. *See also* Gatete Reply Brief, paras. 26, 27.

⁶⁷ *Cf. Renzaho Appeal Judgement*, paras. 238-240.

⁶⁸ Trial Judgement, para. 60.

⁶⁹ Trial Judgement, paras. 60, 64.

⁷⁰ Trial Judgement, Annex A, para. 14.

⁷¹ *See* Trial Judgement, para. 60. Moreover, the Appeals Chamber recognises that all 22 witnesses called by the Prosecution were eye-witnesses who gave relatively short, uncomplicated testimony, and that no expert witnesses were called.

Gatete justified a pre-trial delay of over seven years.⁷² Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding the case particularly complex and in relying on this as one of the factors to support its finding that the pre-trial delay was not undue.

(c) The Prejudice Occasioned by the Pre-Trial Delay

30. The Trial Chamber found that Gatete failed to demonstrate that he suffered prejudice as a result of the pre-trial delay.⁷³ It considered that Gatete had not shown that he was unable to contact specific witnesses because of the pre-trial delay, or that witnesses had died in the interval prior to the commencement of proceedings.⁷⁴ It noted that Gatete was able to present 27 witnesses at trial in response to the allegations against him.⁷⁵ The Trial Chamber also found that Gatete failed to raise the issue of delay during the pre-trial phase or in motions during the trial.⁷⁶ It concluded that Gatete's failure to inform the Trial Chamber of any difficulties he experienced in the preparation of his case until the submission of his Closing Brief indicated that there was minimal, if any, prejudice as a result of the pre-trial delay,⁷⁷ and observed that, once the trial commenced, it was conducted expeditiously.⁷⁸

31. Gatete submits that the Trial Chamber erred in law and fact in finding that he suffered minimal or no prejudice as a result of the pre-trial delay.⁷⁹ He argues that the Trial Chamber wrongly relied on his failure to object to the pre-trial delay as an indication that he suffered no prejudice.⁸⁰ He also argues that the Trial Chamber failed to consider various forms of prejudice resulting from the delay.⁸¹ The Appeals Chamber will consider these submissions in turn.

(i) Gatete's Failure to Object to the Pre-Trial Delay

32. Gatete submits that the Trial Chamber erred in finding that he failed to object to the undue delay during the pre-trial phase of proceedings.⁸² In support of this contention, he refers to a motion filed before the Pre-Trial Chamber on 25 May 2006, in which he objected to his lengthy pre-trial

⁷² The Appeals Chamber considers that, although the Trial Chamber erred in its evaluation of the complexity of the case, it took into account the correct factors, including the fact that the case had been selected for referral to Rwanda pursuant to Rule 11 *bis* of the Rules. See Trial Judgement, para. 64.

⁷³ Trial Judgement, para. 63.

⁷⁴ Trial Judgement, para. 63.

⁷⁵ Trial Judgement, para. 63.

⁷⁶ Trial Judgement, para. 63.

⁷⁷ Trial Judgement, para. 63.

⁷⁸ Trial Judgement, para. 64.

⁷⁹ Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, paras. 15, 42.

⁸⁰ Gatete Appeal Brief, para. 42. See also AT. 7 May 2012 p. 18.

⁸¹ Gatete Notice of Appeal, paras. 4, 6; Gatete Appeal Brief, paras. 42, 47, 48, 51-54. See also AT. 7 May 2012 pp. 18, 20.

⁸² Gatete Notice of Appeal, para. 4; Gatete Appeal Brief, para. 42. See also AT. 7 May 2012 p. 18.

detention.⁸³ In the motion, Gatete asserted that he suffered considerable prejudice as a result of the delay, including: (i) the deprivation of his liberty; (ii) his difficulty in locating certain Defence witnesses who had either moved or died; (iii) the effect of the passage of time on the memory of Defence witnesses; (iv) his difficulty in conducting investigations due to the financial constraints imposed by the Registrar as a result of the uncertainty of the trial date; and (v) the absence of any indication from the Prosecution of its intention to proceed to trial.⁸⁴ According to Gatete, this motion was never translated or addressed and no decision was ever rendered in respect thereof.⁸⁵

33. The Prosecution responds that, in his Closing Brief, Gatete wrongly stated that he had failed to object to the delay in the pre-trial phase of proceedings, and cannot consequently fault the Trial Chamber for accepting his statement at face value.⁸⁶ It also argues that over the years the motion remained pending, Gatete never once pressed for its resolution.⁸⁷

34. Gatete replies that the error in his Closing Brief should not prejudice him and “should not relieve the Trial Chamber of its duty to know what ha[d] been filed in the case.”⁸⁸ He claims that the Trial Chamber’s failure to address his Motion of 25 May 2006 is further evidence that he suffered prejudice as a result of the passage of time and the lack of continuity occasioned by the delay.⁸⁹

35. Although Gatete mistakenly conceded at trial that he had failed to object to the pre-trial delay until the submission of his Closing Brief,⁹⁰ the Appeals Chamber notes that Gatete clearly raised an objection to the length of the pre-trial delay in his Motion of 25 May 2006.⁹¹ Accordingly, the Trial Chamber was not entitled to rely upon his failure to raise such objection as a factor in finding that Gatete suffered minimal, if any, prejudice as a result of the delay. The Appeals Chamber therefore finds that the Trial Chamber erred in this regard.

⁸³ Gatete Notice of Appeal, para. 4; Gatete Appeal Brief, paras. 33, 43, 47, referring to *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, *Requête de la Défense aux fins de fixation de la date d'ouverture du procès*, 25 May 2006 (“Motion of 25 May 2006”). The Appeals Chamber notes that this motion was also stamped as received by the Registry on 29 May 2006.

⁸⁴ Motion of 25 May 2006, paras. 5-7. See also Gatete Appeal Brief, para. 44.

⁸⁵ Gatete Appeal Brief, para. 33.

⁸⁶ Prosecution Response Brief, para. 42. The Prosecution further submits that the issue of pre-trial delay was only broadly raised in the Motion of 25 May 2006 and contends that Gatete failed to provide sufficient detail in support of his general allegations. See Prosecution Response Brief, para. 43.

⁸⁷ Prosecution Response Brief, para. 44.

⁸⁸ Gatete Reply Brief, para. 28.

⁸⁹ Gatete Reply Brief, para. 28.

⁹⁰ See Gatete Closing Brief, para. 1237.

⁹¹ Motion of 25 May 2006, paras. 2, 5, 8.

(ii) The Trial Chamber's Failure to Consider Various Forms of Prejudice

36. Gatete submits that the Trial Chamber erred in failing to consider various forms of prejudice he suffered as a result of the pre-trial delay.⁹² In particular, he claims that the Trial Chamber failed to consider the prejudice to: (i) his physical and psychological health;⁹³ (ii) his ability to prepare his defence and conduct the necessary investigations;⁹⁴ and (iii) his ability to meaningfully defend against the charges given the passage of time.⁹⁵

37. With respect to his physical and psychological health, Gatete claims that, since his arrest in 2002, he has suffered from a number of physical ailments, which he developed in the United Nations Detention Facility, and spent seven years deprived of an opportunity to care for his family, which was thrown into poverty.⁹⁶ Gatete further underscores that such detention is worse than incarceration imposed by sentence because the accused cannot count the days until his release.⁹⁷

38. With respect to the preparation of his defence, Gatete submits that the Trial Chamber erred in failing to analyse the impact of the Registrar's decision to withhold legal aid funding and travel authorisation in the absence of a trial date being set, an argument he had previously raised in the Motion of 25 May 2006.⁹⁸ In addition, he asserts that his inordinately long detention during the pre-trial phase, coupled with the highly accelerated pace of the trial, resulted in a serious inequality of arms in the preparation of the case: the Defence being afforded just three and a half months, in contrast to the seven-year period accorded to the Prosecution.⁹⁹ Gatete underscores that the Defence was confronted with the additional difficulty of finding evidence 15 years after the events, causing him yet further prejudice.¹⁰⁰

39. As to his ability to present his defence, Gatete maintains that the Trial Chamber failed to appreciate that the undue delay undermined his ability to effectively test the Prosecution case against him.¹⁰¹ He emphasises that the Trial Chamber repeatedly relied on the passage of time to excuse defects in Prosecution evidence, which rendered the task of meaningfully challenging witnesses impossible.¹⁰² In addition, Gatete contends that by the time the site visit took place in October 2010, the Rwankuba sector office had been destroyed, depriving him of any chance of

⁹² Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, para. 42.

⁹³ Gatete Appeal Brief, para. 47.

⁹⁴ Gatete Appeal Brief, paras. 52-54. *See also* AT. 7 May 2012 p. 18.

⁹⁵ Gatete Appeal Brief, paras. 48-51. *See also* AT. 7 May 2012 p. 18.

⁹⁶ Gatete Appeal Brief, para. 47. *See also* AT. 7 May 2012 p. 20.

⁹⁷ Gatete Appeal Brief, para. 46.

⁹⁸ Gatete Appeal Brief, para. 52, referring to Motion of 25 May 2006, para. 6. *See also* Gatete Reply Brief, para. 29.

⁹⁹ Gatete Appeal Brief, paras. 53, 54.

¹⁰⁰ *See* Gatete Appeal Brief, para. 54. *See also* AT. 7 May 2012 p. 18.

¹⁰¹ Gatete Appeal Brief, paras. 49, 51. *See also* AT. 7 May 2012 p. 20.

¹⁰² Gatete Notice of Appeal, para. 6; Gatete Appeal Brief, para. 48.

confronting two Prosecution witnesses with the inconsistencies in their testimonies with regard to distance and obstructions.¹⁰³ Gatete claims that the cross-examination of the witnesses was not a complete substitute for being able to actually observe a witness's vantage point.¹⁰⁴

40. The Prosecution responds that the Trial Chamber correctly found that Gatete had failed to demonstrate prejudice resulting from the pre-trial delay.¹⁰⁵ In particular, the Prosecution asserts that, contrary to Gatete's submissions on appeal, Gatete had at least five years to prepare his case prior to the commencement of trial.¹⁰⁶ Referring to the Pre-Trial Chamber's decision issued on 2 November 2004, the Prosecution notes that on 7 July, 23 August, and 17 September 2004, the Registrar authorised work programmes for the Defence to interview more than 100 potential witnesses located in Africa.¹⁰⁷

41. With respect to the alleged prejudicial effect on his health, the Appeals Chamber notes that Gatete mentions high blood pressure and chronic diabetes, which he claims to have suffered since his arrest in 2002.¹⁰⁸ However, Gatete does not provide any medical statement in support of his allegation that the lengthy pre-trial delay caused him physical and psychological suffering. Nor does he present any argument to support his claim that these medical issues were caused by his pre-trial detention or that the Trial Chamber erred by not assessing this factor. Equally, Gatete does not substantiate his claim that his family's poverty was caused by his pre-trial detention. His arguments are accordingly dismissed.

42. The Appeals Chamber considers Gatete's submissions that the Trial Chamber erred in failing to consider the prejudice to his ability to prepare his defence and conduct necessary investigations to be without merit. Gatete has failed to demonstrate that the Trial Chamber erred in failing to consider the effect of the Registrar's decision to withhold legal aid funds and travel authorisation on his ability to prepare his defence, prior to a trial date being set. Gatete does not point to any additional investigations he would have conducted with any supplementary funding, and has failed to show how his ability to contact witnesses or identify exculpatory material was impaired by the pre-trial delay. In these circumstances, the Appeals Chamber considers that Gatete has failed to demonstrate that the Trial Chamber erred in failing to consider this factor in

¹⁰³ Gatete Appeal Brief, para. 50. *See also* AT. 7 May 2012 p. 20.

¹⁰⁴ Gatete Reply Brief, para. 33.

¹⁰⁵ Prosecution Response Brief, para. 46. *See also* Prosecution Response Brief, paras. 48-52; AT. 7 May 2012 pp. 23, 24.

¹⁰⁶ Prosecution Response Brief, para. 47.

¹⁰⁷ Prosecution Response Brief, para. 47, referring to *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-I, Decision on the Defence Request for Necessary Resources for Investigations, 2 November 2004, para. 6. *See also* AT. 7 May 2012 p. 24. The Prosecution also observes that at the time the decision was issued, one of the Defence investigators had already interviewed 24 witnesses while another had interviewed an indeterminate number of witnesses. *See* Prosecution Response Brief, para. 47.

determining whether he suffered prejudice as a result of the pre-trial delay. Consequently, the Appeals Chamber finds that Gatete has failed to show that the Trial Chamber erred in concluding that his ability to prepare his defence was not prejudiced by the pre-trial delay.

43. Contrary to Gatete's argument that the Trial Chamber failed to consider the prejudice to his ability to meaningfully present his defence, the Trial Chamber explicitly took into consideration the fact that Gatete was able to present 27 witnesses at trial in response to the allegations against him.¹⁰⁹ Moreover, the Appeals Chamber considers that Gatete has failed to substantiate his general claim that the Trial Chamber unreasonably relied on the passage of time to justify inconsistencies in Prosecution evidence and that he was unable to effectively cross-examine Prosecution witnesses.¹¹⁰ Gatete has also failed to show how the inability to observe the Rwankuba sector office during the site visit, due to its destruction, undermines the Trial Chamber's assessment of the evidence relating to the events in Rwankuba.¹¹¹ In this regard, Gatete has failed to demonstrate that his cross-examination of Prosecution witnesses was insufficient for the purposes of challenging any inconsistencies in their testimonies about the events in Rwankuba sector.¹¹² Accordingly, Gatete has not shown that his ability to present his defence was prejudiced by the pre-trial delay. Gatete's arguments in this regard are therefore dismissed.

44. Notwithstanding Gatete's failure to demonstrate that his ability to prepare or present his defence case was prejudiced by the delay, the Appeals Chamber finds that the pre-trial delay of more than seven years was undue given that the case against Gatete was not particularly complex. In the circumstances of this case, the Appeals Chamber considers that this protracted delay and the resulting prolonged pre-trial detention constitute prejudice *per se*.

(d) Conclusion

45. In light of the foregoing, the Appeals Chamber considers that the Trial Chamber erred in finding that the length of Gatete's pre-trial detention was not undue given that it explicitly noted that the conduct of the Prosecution and the relevant authorities resulted in instances of pre-trial delay that could not be explained or justified. Moreover, the Trial Chamber erred in finding that the case against Gatete was sufficiently complex to justify, in part, a pre-trial delay of more than seven years. Notwithstanding the necessary interval for pre-trial procedure, and the selection of the case for referral to Rwanda pursuant to Rule 11 *bis* of the Rules, the Appeals Chamber considers that the

¹⁰⁸ See Gatete Appeal Brief, para. 47.

¹⁰⁹ See Trial Judgement, para. 63.

¹¹⁰ The Appeals Chamber will consider below Gatete's challenges to the Trial Chamber's assessment of the Prosecution witnesses. See *infra*, Section III.B.

¹¹¹ See *infra*, Section III.A.2.(a)(i).

¹¹² See *infra*, Section III.B.1.(a).

extent of pre-trial delay disproportionately exceeded the time reasonable for a case of such a relatively limited scope and scale¹¹³ and constitutes prejudice *per se*. Consequently, the Appeals Chamber finds that Gatete's right to be tried without undue delay was violated and grants his first ground of appeal. The Appeals Chamber will take these findings into consideration in determining an appropriate remedy below.¹¹⁴

2. Alleged Errors Relating to the Site Visit (Ground 2)

46. At the status conference held on 29 March 2010, the Trial Chamber decided, *proprio motu*, that a site visit to Rwanda was appropriate in this case¹¹⁵ and subsequently invited submissions from the parties on the matter.¹¹⁶ On 17 June 2010, the Trial Chamber denied Gatete's request to postpone the site visit and issued an itinerary for the site visit as well as modalities for its conduct.¹¹⁷ The Trial Chamber conducted the site visit from 26 to 31 October 2010.¹¹⁸ Following the site visit, the Registry filed its Report on the Site Visit and the parties filed their related submissions.¹¹⁹

47. Gatete submits that the Trial Chamber failed to observe the minimum standards of fairness in the conduct of the site visit, which violated his right to a fair trial.¹²⁰ He asserts that the Trial Chamber's errors invalidate the Trial Judgement and that, as a result, the Appeals Chamber should quash his convictions.¹²¹ Gatete challenges the manner in which the site visit was conducted in

¹¹³ See *supra*, Section III.A.1.(b).

¹¹⁴ See *infra*, Section V.B.

¹¹⁵ Status Conference, T. 29 March 2010 p. 3. See also Trial Judgement, Annex A, para. 22.

¹¹⁶ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Scheduling Order for Filing of Closing Briefs, Hearing of Closing Arguments and Site Visit to Rwanda, 31 March 2010, p. 2. See also Trial Judgement, Annex A, para. 22. The Defence and the Prosecution filed submissions on the site visit on 30 April 2010 and 24 May 2010. See *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Submissions on the Site Visit, 30 April 2010 ("Gatete Submissions on the Proposed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Supplemental Submissions on the Site Visit, confidential, 24 May 2010 ("Gatete Supplemental Submissions on the Proposed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Prosecutor's Submissions Regarding Pending Site Visit, 24 May 2010. See also *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Decision on Site Visit to Rwanda, 17 June 2010 ("Decision of 17 June 2010"), para. 1, fn. 2, referring to an Interoffice Memorandum from Prosecution Counsel to the Chamber with a copy to the Defence dated 28 April 2010 which is not part of the case file.

¹¹⁷ Decision of 17 June 2010, pp. 5, 6, Annex A, confidential. See also Trial Judgement, Annex A, para. 23.

¹¹⁸ Exhibit C1 (Report on Site Visit, Gatete Case, 26 to 31 October 2010) ("Report on the Site Visit"). See also Trial Judgement, Annex A, para. 23. The Trial Judgement incorrectly lists the dates of the site visit as 16 to 31 October 2010 whereas the dates were in fact 26 to 31 October 2010.

¹¹⁹ Report on the Site Visit; *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Defence Submissions Regarding the Site Visit of 26-31 October 2010, confidential, 5 November 2010 ("Gatete Submissions on the Completed Site Visit"); *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Prosecutor's Submissions Regarding Completed Site Visit, 5 November 2010. See also Trial Judgement, Annex A, para. 23.

¹²⁰ Gatete Notice of Appeal, para. 8; Gatete Appeal Brief, paras. 6, 59, 63.

¹²¹ Gatete Notice of Appeal, para. 9; Gatete Appeal Brief, para. 88.

relation to Rwankuba sector, Mukarange parish, and Kiziguro parish.¹²² The Appeals Chamber will consider these arguments in turn.

(a) Alleged Errors Relating to Rwankuba Sector

48. Gatete submits that the Trial Chamber erred when it failed to make relevant observations on the hiding places of Prosecution Witnesses BBR and AIZ during the site visit in order to assess the reliability of their testimonies.¹²³ In particular, Gatete argues that the Trial Chamber erred by failing to: (i) include Witness BBR's hiding place in the site visit itinerary and to view the hiding places of Witnesses BBR and AIZ during the site visit;¹²⁴ (ii) hear the parties' observations during the site visit;¹²⁵ and (iii) ensure that a comprehensive report of the site visit was issued and to provide a reasoned opinion in the Trial Judgement.¹²⁶

(i) Alleged Failure to Include Witness BBR's Hiding Place in the Itinerary and to View the Hiding Places of Witnesses BBR and AIZ During the Site Visit

49. Gatete submits that the Trial Chamber erred by not including the hiding place of Witness BBR in its itinerary.¹²⁷ He further asserts that the Trial Chamber should have viewed the hiding places of both Witnesses BBR and AIZ on the site visit.¹²⁸ He argues that, although he originally opposed the site visit, once it had been ordered, he requested "observations in connection with, [*inter alia*], all locations for which convictions were entered", including the hiding places of Witnesses BBR and AIZ.¹²⁹ Gatete claims that, as a result, he was denied a fair opportunity to have the evidence objectively tested and was prejudiced by these errors.¹³⁰ According to Gatete, had the proper procedures been followed, the Trial Chamber would have discredited the evidence of Witnesses BBR and AIZ.¹³¹

50. Gatete adds that he was prejudiced by the fact that the Rwankuba sector office buildings had been destroyed prior to the site visit,¹³² which precluded the Trial Chamber from determining the

¹²² Gatete Appeal Brief, paras. 64-86.

¹²³ Gatete Appeal Brief, para. 64.

¹²⁴ Gatete Appeal Brief, paras. 65-69.

¹²⁵ Gatete Notice of Appeal, para. 8; Gatete Appeal Brief, paras. 70, 71.

¹²⁶ Gatete Appeal Brief, paras. 72-77.

¹²⁷ Gatete Appeal Brief, para. 66. *See also* AT. 7 May 2012 p. 6.

¹²⁸ Gatete Appeal Brief, para. 69. *See also* Gatete Reply Brief, para. 41; AT. 7 May 2012 p. 6.

¹²⁹ Gatete Appeal Brief, fn. 54. *See also* Gatete Appeal Brief, para. 65; Gatete Reply Brief, para. 39.

¹³⁰ Gatete Appeal Brief, paras. 59, 78.

¹³¹ Gatete Appeal Brief, paras. 63, 78. *See also* Gatete Appeal Brief, para. 64.

¹³² Gatete Appeal Brief, para. 68.

orientation of the buildings and the courtyard where the meeting of 7 April 1994 allegedly took place.¹³³

51. The Prosecution responds that Gatete exceeds the scope of his Notice of Appeal by arguing in his Appeal Brief that, had the site visit been properly conducted, the Trial Chamber would not have found the witnesses credible.¹³⁴ It submits that these additional arguments should accordingly be dismissed.¹³⁵ As to the merits of Gatete's arguments, the Prosecution asserts that Gatete fails to demonstrate any error on the part of the Trial Chamber and that, in any event, the site visit findings were neither crucial to nor determinative of the Trial Chamber's findings on his guilt.¹³⁶

52. Gatete replies that his Appeal Brief does not exceed the scope of his Notice of Appeal as his challenges to the credibility of the witnesses were introduced to demonstrate the prejudice he suffered from the unfair conduct of the site visit.¹³⁷

53. The Appeals Chamber notes that, in his Notice of Appeal, Gatete did not specifically raise any issue of witness credibility in the section on the site visit.¹³⁸ Nonetheless, Gatete's arguments relating to the credibility of Witnesses BBR and AIZ are made to demonstrate that he allegedly suffered prejudice as a result of the manner in which the site visit was conducted.¹³⁹ As such, the Appeals Chamber does not consider that Gatete's arguments in his Appeal Brief impermissibly expand those contained in his Notice of Appeal.

54. The Appeals Chamber recalls that the Trial Chamber has the discretion to decide whether a site visit is necessary or relevant in the assessment of evidence.¹⁴⁰ As such, the Appeals Chamber considers that the determination of the itinerary is also within the discretion of the Trial Chamber. The Appeals Chamber's consideration is therefore limited to determining whether the Trial Chamber abused its discretion by not including Witness BBR's hiding place in the itinerary and by not making observations on the hiding places of Witnesses BBR and AIZ.

55. The Trial Chamber's itinerary indicated that the site visit would include the location of the former Rwankuba sector office buildings but it did not include the hiding place of Witness BBR.¹⁴¹ The Appeals Chamber notes that Witness BBR's ability to observe the meeting from his hiding

¹³³ Gatete Appeal Brief, para. 68.

¹³⁴ Prosecution Response Brief, para. 55.

¹³⁵ Prosecution Response Brief, para. 55.

¹³⁶ Prosecution Response Brief, paras. 64, 65, 67, 68, 72.

¹³⁷ Gatete Reply Brief, para. 36.

¹³⁸ See Gatete Notice of Appeal, paras. 8, 9.

¹³⁹ Gatete Appeal Brief, para. 78.

¹⁴⁰ *Munyakazi* Appeal Judgement, para. 76; *Simba* Appeal Judgement, para. 16, citing *Galić* Appeal Judgement, para. 50.

¹⁴¹ See Decision of 17 June 2010, Annex A, p. 2.

place was a point of contention at trial.¹⁴² Nonetheless, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion by not including Witness BBR's hiding place in the site visit itinerary. The Appeals Chamber observes that in his submissions on the proposed site visit, Gatete indicated that "a site visit is not necessary in order for the [Trial] Chamber to make a determination on the evidence heard",¹⁴³ and specifically that he did not consider that it would be appropriate for the Trial Chamber to visit Rwankuba sector.¹⁴⁴ Gatete did assert that Witness BBR's hiding place should be visited if, notwithstanding his objection, Rwankuba sector were part of the itinerary.¹⁴⁵ However, Gatete did not object to Witness BBR's hiding place not being included on the itinerary either prior to or after the site visit.¹⁴⁶ Consequently, it appears that Gatete did not consider it essential to his case that the site visit include Witness BBR's hiding place. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber abused its discretion by not including the hiding place of Witness BBR in the site visit itinerary. The Appeals Chamber will consider below Gatete's challenges to the Trial Chamber's evaluation of Witness BBR's evidence about his hiding place.¹⁴⁷

56. With respect to Gatete's arguments concerning Witness AIZ, the Appeals Chamber notes that Witness AIZ mentioned having hidden in two different places on 7 April 1994. The first hiding place was the spot from where he observed the meeting at the Rwankuba sector office buildings.¹⁴⁸ The second hiding place was on a sorghum farm, where Witness AIZ stayed with his family after the meeting on 7 April 1994 until 10 p.m. before fleeing to Giti commune.¹⁴⁹ The first hiding place was not included in the site visit itinerary¹⁵⁰ and Gatete did not request that the Trial Chamber

¹⁴² Witness BBR, T. 11 November 2009 pp. 21-24. *See also* Gatete Closing Brief, para. 281 (Gatete challenged whether Witness BBR could have observed the 7 April 1994 meeting from his hiding spot and stated that "the site visit will illustrate that it is not possible that [Witness] BBR was hiding behind this row of houses, and still be 20-25 metres away from the Rwankuba Secteur Office.").

¹⁴³ Gatete Submissions on the Proposed Site Visit, para. 3; Gatete Supplemental Submissions on the Proposed Site Visit, para. 2. *See also* Status Conference, T. 29 March 2010 p. 3.

¹⁴⁴ Gatete Submissions on the Proposed Site Visit, para. 15. *See also* Gatete Supplemental Submissions on the Proposed Site Visit, para. 10. Gatete listed a number of locations that, in his view, should be visited if a site visit were to be undertaken (*see* Gatete Submissions on the Proposed Site Visit, paras. 4-10; Gatete Supplemental Submissions on the Proposed Site Visit, paras. 4-8). However, Rwankuba sector was not included in this list but rather in a separate list of locations which Gatete submitted were "not appropriate" to be visited (*see* Gatete Submissions on the Proposed Site Visit, paras. 11, 14-18; Gatete Supplemental Submissions on the Proposed Site Visit, para. 10).

¹⁴⁵ Notwithstanding his objection to visiting Rwankuba sector, Gatete requested that "[s]hould the Chamber decide that it still intends to visit Rwankuba [sector] despite the destruction of the buildings of seminal relevance to the case", the Trial Chamber should note "[t]he inability to hear a conversation from within the eucalyptus plantation 20 steps from Paul NKURUNZIZA's house at the former site of the Rwankuba Secteur Office (affecting the credibility of [Witness] BBR)." *See* Gatete Submissions on the Proposed Site Visit, para. 17. *See also* Gatete Supplemental Submissions on the Proposed Site Visit, para. 10.

¹⁴⁶ *See* Gatete Submissions on the Completed Site Visit, para. 16; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁴⁷ *See infra*, Section III.B.1.

¹⁴⁸ Witness AIZ, T. 11 November 2009 pp. 47, 48, 51, 52, 60.

¹⁴⁹ Witness AIZ, T. 11 November 2009 pp. 62-63. *See also* Decision of 17 June 2010, Annex A, p. 2.

¹⁵⁰ *See* Decision of 17 June 2010, Annex A, p. 2.

include it.¹⁵¹ Rather, Gatete requested that the second hiding place on the sorghum farm be visited.¹⁵² The Trial Chamber duly included the second hiding place in the itinerary but did not visit it.¹⁵³ The Appeals Chamber notes that all of Gatete's arguments concerning Witness AIZ's "hiding place" are premised on the mistaken assumption that he himself requested that the Trial Chamber include the first hiding place in the site visit itinerary when in fact he only sought to visit the second hiding place. Furthermore, the Appeals Chamber notes that the first hiding place was never a point of contention at trial. Gatete did not challenge Witness AIZ's credibility on the basis of his ability to observe the meeting at the sector office from the first hiding place.¹⁵⁴ Based on the foregoing, Gatete's arguments with respect to Witness AIZ are therefore dismissed.¹⁵⁵

57. As to Gatete's argument that he was prejudiced by the fact that the Rwankuba sector office had been destroyed prior to the site visit, the Appeals Chamber recalls that, despite its destruction and his opposition to visiting it,¹⁵⁶ the Trial Chamber visited the sector office's location on the site visit.¹⁵⁷ The Trial Chamber was therefore able to note its location and gain a general perspective of the area. While the demolition of the building might have precluded the Trial Chamber from observing the specific location of the courtyard where Witness BBR placed Gatete, Gatete has failed to demonstrate how the Trial Chamber's assessment of Witness BBR's evidence could have been impacted by its observation of the courtyard. The Appeals Chamber observes that the Trial Chamber found Witness BBR's evidence to be "consistent and compelling" and that it did not have any reservations about the witness's ability to observe events in the Rwankuba sector office courtyard from his hiding place.¹⁵⁸ The Appeals Chamber recalls that it has found no error in this

¹⁵¹ See Gatete Submissions on the Proposed Site Visit, para. 17; Gatete Supplemental Submissions on the Proposed Site Visit, para. 10.

¹⁵² See Gatete Submissions on the Proposed Site Visit, para. 17(iii); Gatete Supplemental Submissions on the Proposed Site Visit, para. 10(iii).

¹⁵³ See Report on the Site Visit, fn. 9; Decision of 17 June 2010, Annex A, p. 2. The Appeals Chamber notes that Gatete did not object to the second hiding place not having been identified either during or after the site visit. See Gatete Submissions on the Completed Site Visit, para. 16; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁵⁴ See T. 11 November 2009 pp. 52-73; Gatete Closing Brief, paras. 270-278; Gatete Closing Arguments, T. 8 November 2010 pp. 46, 47.

¹⁵⁵ In addition to the arguments related to this section, the following arguments are dismissed on the same basis: (i) the Trial Chamber's alleged failure to hear the parties during the site visit by not allowing the parties to make observations during the site visit in relation to the identification of the hiding place of Witness AIZ (see Gatete Appeal Brief, para. 71); (ii) the alleged absence of any measurements or observations related to the identification of the hiding place of Witness AIZ in the Report of the Site Visit (see Gatete Appeal Brief para. 72); (iii) the alleged absence of explanation in the Report of the Site Visit as to why the Trial Chamber was not able to observe the locations of the hiding places of Witnesses AIZ and BBT (see Gatete Appeal Brief, para. 74); and (iv) the alleged failure to explain in the Trial Judgement why the hiding place of Witness AIZ was not viewed during the site visit (see Gatete Appeal Brief, para. 77).

¹⁵⁶ Gatete asserted that "there is no utility in this exercise, as four days after the announcement of a site visit in this case, the former Rwankuba Secteur Office buildings were destroyed. As such, the [Trial] Chamber is precluded from determining whether the Rwankuba Secteur Office building was visible from the various vantage points as alleged in this case." See Gatete Submissions on the Proposed Site Visit, para. 15.

¹⁵⁷ Report on the Site Visit, para. 10, fn. 8.

¹⁵⁸ See Trial Judgement, paras. 134, 143.

respect.¹⁵⁹ Therefore, the Appeals Chamber finds that Gatete has failed to demonstrate that he was prejudiced by the destruction of the building prior to the site visit.

58. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred by not including the hiding place of Witness BBR in the site visit itinerary and that he was prejudiced by the destruction of the Rwankuba sector office. The Appeals Chamber also dismisses Gatete's arguments with respect to Witness AIZ.

(ii) Alleged Failure to Hear Parties' Submissions During the Site Visit

59. In his Submissions on the Proposed Site Visit, Gatete requested that the parties be given the opportunity to make submissions while on site in order to correct any errors arising from the Registry's determination of where particular sites were located and to explain the relevance of particular sites to the evidence heard in this case.¹⁶⁰ In its Decision of 17 June 2010, the Trial Chamber decided that it would not allow the parties to make oral submissions at the sites, "save where there might be an issue as to whether a site is incorrect."¹⁶¹

60. Gatete submits that the Trial Chamber's decision not to allow observations from the parties during the site visit did not conform to the Practice Direction on Site Visits¹⁶² and amounted to an abuse of discretion.¹⁶³ He asserts that this prohibition prevented the Defence from making observations during the site visit in relation to the failure to identify the hiding place of Witness BBR, and that he was thus denied his right to counsel and to confront the evidence.¹⁶⁴

61. The Prosecution responds that the Appeals Chamber should dismiss this argument because the Practice Direction on Site Visits is permissive and discretionary with respect to hearing the parties during a site visit and Gatete has failed to demonstrate that the Trial Chamber abused its discretion.¹⁶⁵

62. The Practice Direction on Site Visits states that "[w]here necessary, Counsel for the Prosecution and the Defence may make observations for the record of a strictly factual nature".¹⁶⁶ The Appeals Chamber considers that Gatete has failed to demonstrate that the Trial Chamber abused its discretion in its Decision of 17 June 2010. The Trial Chamber disallowed commentary on the events but allowed factual comments to the extent it deemed them necessary, *i.e.* where

¹⁵⁹ See *infra*, paras. 86, 87.

¹⁶⁰ Gatete Submissions on the Proposed Site Visit, para. 22.

¹⁶¹ Decision of 17 June 2010, para. 10, p. 5.

¹⁶² Practice Direction on Site Visits, 3 May 2010 ("Practice Direction on Site Visits").

¹⁶³ Gatete Appeal Brief, para. 70; Gatete Reply Brief, para. 38; AT, 7 May 2012 p. 5.

¹⁶⁴ Gatete Appeal Brief, para. 71.

¹⁶⁵ Prosecution Response Brief, paras. 58-61.

necessary to ensure that the correct sites were identified. Although the parameters set out by the Trial Chamber prevented Gatete from commenting on Witness BBR's hiding place during the site visit, given that it was not included in the itinerary, Gatete could have challenged this prior to the site visit but did not do so. In this regard, the Appeals Chamber notes that the Trial Chamber provided the parties with the opportunity to make submissions both before and after the site visit. Accordingly, the Appeals Chamber dismisses Gatete's arguments in this respect.

(iii) Alleged Failure to Provide a Reasoned Opinion Regarding the Site Visit

63. Gatete submits that the Trial Chamber failed to ensure that the Report on the Site Visit contained sufficient detail.¹⁶⁷ In particular, Gatete asserts that it did not include any measurements or observations made by the court as to the location of the hiding place of Witness BBR.¹⁶⁸ Gatete also argues that the Trial Chamber failed to explain in the Trial Judgement why the hiding place of Witness BBR was not viewed on the site visit or to address the destruction of the Rwankuba sector office or the sites requested to be visited by the parties in general.¹⁶⁹ Gatete claims that this failure to provide a reasoned opinion in connection with the site visit denied him a right to appeal.¹⁷⁰

64. The Prosecution responds that the Trial Chamber was not required to explain every finding and that it did, in any event, provide a reasoned opinion in the Report on the Site Visit and the Trial Judgement.¹⁷¹

65. With respect to the argument that the Trial Judgement failed to address the destruction of the Rwankuba sector office or the sites requested to be visited by the parties, the Appeals Chamber recalls that a trial chamber must provide a reasoned opinion in the trial judgement; however, this requirement relates to the trial judgment as a whole, not to each submission made at trial.¹⁷² As to the argument related to Witness BBR, the Appeals Chamber recalls that a detailed record of a trial chamber's site visit should normally be maintained.¹⁷³ However, in light of the fact that Witness BBR's hiding place was not included in the site visit itinerary, the Appeals Chamber finds no error in it not being noted in the Report on the Site Visit or discussed in the Trial Judgement with reference to the site visit. Accordingly, Gatete's arguments on the alleged failure to provide a reasoned opinion are dismissed.

¹⁶⁶ See Practice Direction on Site Visits, para. 5.4.

¹⁶⁷ Gatete Appeal Brief, para. 75.

¹⁶⁸ Gatete Appeal Brief, para. 72.

¹⁶⁹ Gatete Appeal Brief, para. 77.

¹⁷⁰ Gatete Appeal Brief, paras. 77, 87.

¹⁷¹ Prosecution Response Brief, paras. 76, 77.

¹⁷² See, e.g., *Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20. See also *Krajišnik* Appeal Judgement, para. 139; *Limaj et al.* Appeal Judgement, para. 81.

(iv) Conclusion

66. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber abused its discretion in the conduct of the site visit in relation to Rwankuba sector. Accordingly, Gatete's arguments in this regard are dismissed.

(b) Alleged Errors Relating to Mukarange Parish

67. Gatete submits that, during the site visit, the Trial Chamber failed to visit the eucalyptus plantation where Prosecution Witness BVP allegedly hid and that, as a result, it was deprived of an objective element against which to test Witness BVP's evidence.¹⁷⁴ Gatete argues that the Trial Chamber erred by not including the eucalyptus plantation in the site visit itinerary, despite his requests to visit it in his submissions made prior to the site visit.¹⁷⁵ Gatete asserts that neither the Report on the Site Visit nor the Trial Judgement addressed the eucalyptus plantation with reference to the site visit or explained why the Trial Chamber did not visit the location, despite the fact that he argued, after the site visit, that Witness BVP could not have witnessed the events from the eucalyptus plantation.¹⁷⁶

68. The Prosecution responds that the site visit findings were neither crucial to nor determinative of the Trial Chamber's findings on Gatete's guilt, and that Gatete's arguments should accordingly be dismissed.¹⁷⁷

69. As noted above, in his Submissions on the Proposed Site Visit and his Supplemental Submissions on the Proposed Site Visit, Gatete asserted that a site visit was "not necessary in order for the [Trial] Chamber to make a determination on the evidence heard."¹⁷⁸ Nonetheless, Gatete requested that the site visit itinerary include the eucalyptus plantation in which Witness BVP testified he hid on 12 April 1994 when he observed the events at Mukarange parish.¹⁷⁹ He asked that the Trial Chamber note the fact that it was not possible to see the Mukarange parish buildings

¹⁷³ See *Bikindi* Appeal Judgement, para. 97; *Zigiranyirazo* Appeal Judgement, para. 36; *Karera* Appeal Judgement, para. 50.

¹⁷⁴ Gatete Appeal Brief, para. 79. See also AT, 7 May 2012 p. 7.

¹⁷⁵ Gatete Appeal Brief, para. 80, referring to Gatete Submissions on the Proposed Site Visit, para. 6; Gatete Supplemental Submissions on the Proposed Site Visit, para. 5.

¹⁷⁶ Gatete Appeal Brief, paras. 82-84.

¹⁷⁷ Prosecution Response Brief, para. 64. See also Prosecution Response Brief, paras. 66, 74.

¹⁷⁸ Gatete Submissions on the Proposed Site Visit, para. 3; Gatete Supplemental Submissions on the Proposed Site Visit, para. 2.

¹⁷⁹ Gatete Submissions on the Proposed Site Visit, para. 6; Gatete Supplemental Submissions on the Proposed Site Visit, para. 5.

from the eucalyptus plantation and that it would not have been possible to hide in the eucalyptus plantation given its low density.¹⁸⁰

70. The itinerary of the site visit included Mukarange parish but did not specifically include the eucalyptus plantation.¹⁸¹ Gatete did not object to the fact that the eucalyptus plantation was not included in the site visit itinerary. The Report on the Site Visit reflects that the delegation visited "Mukarange Parish and its surroundings, including the church, the presbytery, the kitchen, the football field and the JOC primary school, as well as the secondary school that is between the Parish and the football field."¹⁸² Moreover, Gatete did not challenge the fact that the site visit did not include a visit to the eucalyptus plantation in either his Submissions on the Completed Site Visit or his closing arguments, although he made clear in both that the question of whether Witness BVP could have witnessed the events from the eucalyptus plantation was an issue of contention.¹⁸³

71. In light of the foregoing, the Appeals Chamber is not convinced that the Trial Chamber abused its discretion by not visiting the eucalyptus plantation during the site visit or that Gatete was prejudiced as a result. Although Gatete requested the visit to the eucalyptus plantation, he did not object to it not being included in the itinerary either prior to or after the site visit. Furthermore, while the Trial Chamber did not specifically visit the eucalyptus plantation, it did visit the surroundings of Mukarange parish and, as such, gained a general perspective on the layout of the area. The Trial Judgement indicates that the Trial Chamber was seised of the challenge to Witness BVP's credibility based on the location of his hiding place, but nonetheless found him to be reliable.¹⁸⁴

72. Additionally, given that the eucalyptus plantation was not included in the itinerary of the site visit, the Appeals Chamber finds no error in it not being addressed in the Report on the Site Visit or in the Trial Judgement with reference to the site visit.

73. In light of the foregoing, the Appeals Chamber dismisses these arguments in their entirety.

(c) Alleged Errors Relating to Kiziguro Parish

74. Gatete submits that during the site visit, the Trial Chamber improperly questioned people who were present, including Father Pierre Nolasque Mbyariyehe, who was cited by a Prosecution

¹⁸⁰ Gatete Submissions on the Proposed Site Visit, para. 6; Gatete Supplemental Submissions on the Proposed Site Visit, para. 5.

¹⁸¹ See Decision of 17 June 2010, Annex A, pp. 2, 3.

¹⁸² Report on the Site Visit, para. 13.

¹⁸³ Gatete Submissions on the Completed Site Visit, para. 20; Gatete Closing Arguments, T. 8 November 2010 p. 53.

¹⁸⁴ Trial Judgement, para. 400.

witness as being present during the events at Kiziguro parish, in the absence of the Defence.¹⁸⁵ He asserts that the Trial Chamber failed to keep a record of the encounters or to address the Defence objections in the Trial Judgement.¹⁸⁶ Gatete argues that this breached the Practice Direction on Site Visits and prejudiced him in relation to the Kiziguro parish attacks as he was unable to confront the extrajudicial statements heard on the visit.¹⁸⁷ Gatete submits that he raised the issue in his Submissions on the Completed Site Visit and that the Prosecution did not oppose it, but that the Trial Chamber failed to address it.¹⁸⁸

75. The Prosecution responds that Gatete produces no evidence in support of his argument that the Judges improperly questioned people in relation to Kiziguro parish, and that his argument should therefore be dismissed.¹⁸⁹

76. The Practice Direction on Site Visits states that “[n]either the parties nor the Trial Chamber shall address questions of a factual or a legal nature to persons found at the locations visited, particularly regarding the condition of the site in 1994.”¹⁹⁰

77. The Appeals Chamber notes that, in his Submissions on the Completed Site Visit, Gatete asserted that during the site visit the Defence partially observed two conversations between Judges and people found at the locations, including a conversation with Father Pierre Nolasque Mbyariyehe, and argued that this was not consistent with the rights of the accused.¹⁹¹ The Appeals Chamber observes that the Trial Chamber did not address this argument in the Trial Judgement or elsewhere. The Appeals Chamber finds that the Trial Chamber erred in failing to do so and emphasises that this error constitutes a serious failure to address Defence arguments.

78. However, the Appeals Chamber has before it no evidence of the content of any such conversation. There is therefore no basis for concluding that the Trial Chamber addressed questions of a factual or legal nature to persons at the site visit locations in violation of the Practice Direction on Site Visits. Accordingly, this argument is dismissed.

(d) Conclusion

79. In light of the foregoing, Gatete’s second ground of appeal is dismissed in its entirety.

¹⁸⁵ Gatete Appeal Brief, para. 85. *See also* AT. 7 May 2012 pp. 5, 6, 8, 9.

¹⁸⁶ Gatete Appeal Brief, para. 85, *referring to* Gatete Submissions on the Completed Site Visit, paras. 7-12. *See also* AT. 7 May 2012 p. 5.

¹⁸⁷ Gatete Appeal Brief, para. 86.

¹⁸⁸ Gatete Reply Brief, para. 43.

¹⁸⁹ Prosecution Response Brief, para. 78. *See also* AT. 7 May 2012 pp. 26, 27.

¹⁹⁰ Practice Direction on Site Visits, para. 5.7.

¹⁹¹ Gatete Submissions on the Completed Site Visit, paras. 10-12.

B. ALLEGED ERRORS RELATING TO FACTUAL FINDINGS (GROUND 3)

80. Gatete submits that the Trial Chamber committed numerous errors of law and fact in its assessment of the evidence relating to the events: (i) in Rwankuba sector; (ii) at Kiziguro parish; and (iii) at Mukarange parish.¹⁹² These arguments will be addressed in turn.

1. Alleged Errors Relating to Rwankuba Sector (Ground 3, Sub-Ground A)

81. The Trial Chamber convicted Gatete of genocide and extermination as a crime against humanity based on his role in the killing of Tutsi civilians in Rwankuba sector on 7 April 1994.¹⁹³ On the basis of the evidence of Prosecution Witnesses BBR and AIZ, the Trial Chamber found that Gatete was present at a gathering on the morning of 7 April 1994 in the Rwankuba sector office courtyard with about 40 *Interahamwe*, *conseiller* Jean Bizimungu, *bourgmestre* Jean de Dieu Mwange, and a communal policeman.¹⁹⁴ It found that Gatete instructed the *Interahamwe* to start killing Tutsis, telling them to “work relentlessly,” and also that he gave instructions to “sensitise” other people to killings.¹⁹⁵ The Trial Chamber found that the *Interahamwe* who received the instructions from Gatete participated in the killing of Tutsis and that those present at the gathering marshalled further reinforcements for the attacks which intensified as the day progressed.¹⁹⁶ It found that at least 25 to 30 Tutsis were killed, including members of Witness BBR’s family, and the *responsable de Nyagasambu cellule*, Damascène Macali.¹⁹⁷

82. Gatete submits that the Trial Chamber committed numerous factual and legal errors in its assessment of the evidence underpinning his convictions for the killings in Rwankuba sector and that these errors individually and cumulatively occasioned a miscarriage of justice and invalidate the judgement.¹⁹⁸ In particular, Gatete argues that the Trial Chamber: (i) failed to properly assess the ability of Witnesses BBR and AIZ to observe the events to which they testified; (ii) erred in finding a causal link between Gatete’s instructions and the killings; (iii) failed to properly analyse the evidence of collusion; and (iv) failed to properly evaluate Defence evidence.¹⁹⁹ Gatete therefore

¹⁹² Gatete Appeal Brief, paras. 91-221. In his Appeal Brief, Gatete argues that the Trial Chamber erred in finding that he issued orders to *Interahamwe*, soldiers, and gendarmes given that there is no evidence on the record as to why these assailants would have followed his orders. See Gatete Appeal Brief, para. 90. However, in light of the fact that Gatete did not raise this in his Notice of Appeal and he was not convicted of ordering, the Appeals Chamber will not address this argument. See *infra*, Section III.C.

¹⁹³ Trial Judgement, paras. 594, 640, 668. Paragraph 594 of the Trial Judgement refers to “on about 7 April 1994”; however, elsewhere the Trial Chamber refers to “on 7 April 1994”.

¹⁹⁴ Trial Judgement, paras. 151, 585.

¹⁹⁵ Trial Judgement, paras. 151, 585.

¹⁹⁶ Trial Judgement, paras. 152, 153, 585.

¹⁹⁷ Trial Judgement, paras. 153, 585, 639.

¹⁹⁸ Gatete Notice of Appeal, paras. 10-13; Gatete Appeal Brief, paras. 91, 93, 94.

¹⁹⁹ Gatete Appeal Brief, paras. 94-121.

requests that his convictions for the events in Rwankuba sector be vacated.²⁰⁰ The Appeals Chamber will consider these arguments in turn.

(a) Alleged Failure to Properly Assess the Vantage Points of Witnesses BBR and AIZ

83. Gatete submits that the Trial Chamber erred in failing to assess the vantage points of Witnesses BBR and AIZ, and in failing to provide a reasoned opinion with regard to the site visit despite the witnesses' material inconsistencies and Defence objections.²⁰¹ Accordingly, he claims that no reasonable trier of fact could have accepted the testimonies of Witnesses BBR and AIZ.²⁰²

(i) Witness BBR

84. Gatete argues that the Trial Chamber erred by merely referring to Witness BBR's contention that he could see and hear Gatete, while failing to consider the presence of a row of houses which blocked the witness's view of the Rwankuba sector office.²⁰³ He asserts that the Trial Chamber distorted the evidence when it found that Witness BBR did not testify that the houses were between the forest and the small courtyard that the witness distinguished from the sector office. According to Gatete, Witness BBR in fact testified that the courtyard separated the sector office from the road.²⁰⁴

85. The Prosecution responds that Witness BBR's hiding place and his ability to see Gatete in the courtyard of the sector office were convincingly established in court.²⁰⁵ Furthermore, the Prosecution rejects Gatete's argument that the Trial Chamber distorted Witness BBR's evidence.²⁰⁶

86. The Trial Chamber considered in detail Gatete's challenge that Witness BBR could not have witnessed Gatete speaking in front of the Rwankuba sector office, given his hiding place, and concluded that it was satisfied that the witness had observed the events.²⁰⁷ The Appeals Chamber

²⁰⁰ Gatete Notice of Appeal, para. 14; Gatete Appeal Brief, para. 122.

²⁰¹ Gatete Appeal Brief, para. 95.

²⁰² Gatete Notice of Appeal, para. 12.

²⁰³ Gatete Appeal Brief, para. 96. *See also* Gatete Appeal Brief, para. 97.

²⁰⁴ Gatete Appeal Brief, para. 99. Gatete argues that the Trial Chamber's failure to identify Witness BBR's hiding place during the site visit prevented it from properly assessing his reliability. *See* Gatete Appeal Brief, para. 100. *See also* Gatete Appeal Brief, paras. 65-69, 98, 99. The Appeals Chamber recalls that it has dismissed Gatete's arguments under his second ground of appeal that the Trial Chamber erred by failing to identify Witness BBR's hiding place during the site visit. *See supra*, Section II.A.2.(a)(i). Therefore, it will not revisit his arguments in that respect here.

²⁰⁵ Prosecution Response Brief, paras. 68, 69.

²⁰⁶ Prosecution Response Brief, paras. 69, 70.

²⁰⁷ Trial Judgement, paras. 133, 134 (references omitted):

Turning to the merits of Witness BBR's evidence, the Defence submits that he could not have witnessed the gathering, or heard what was said, as there was a row of houses between the forest in which he was hiding, and the sector office. However, Witness BBR consistently maintained that he saw Gatete in the sector office courtyard. His testimony describing Gatete's actions and words was clear and compelling. As noted at the outset, it is also largely corroborated by Witness AIZ's account. Accordingly, Witness BBR's responses to questions regarding the layout of the area do not raise doubt with respect to his evidence that he saw and heard Gatete. In any event, his testimony distinguished between the sector office building and its courtyard. He did not testify that

notes that, contrary to Gatete's assertion, the Trial Chamber did not distort Witness BBR's evidence that there were three houses between the forest and the sector office.²⁰⁸ Indeed, it specifically considered this evidence and quoted Witness BBR's testimony in a footnote.²⁰⁹ The Trial Chamber correctly noted that Witness BBR's testimony distinguished between the sector office and the sector office courtyard, which is where the witness saw Gatete, and recalled that Witness BBR did not state that the houses impaired his ability to observe the events in the courtyard.²¹⁰

87. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in its assessment of Witness BBR's evidence.

(ii) Witness AIZ

88. Gatete submits that the Trial Chamber failed to consider Witness AIZ's inconsistent testimony regarding his hiding place.²¹¹ He argues that Witness AIZ contradicted himself as to whether he hid in a shrub or a wooded area and notes that, in his prior statement, the witness did not indicate where he was hiding.²¹² He further asserts that the Prosecution failed to adduce any evidence as to the exact location of Witness AIZ's hiding place at trial or on the site visit.²¹³ In light of this, Gatete contends, the Trial Chamber erred in law in finding that the Prosecution met its burden of proving the reliability of Witness AIZ and in accepting his testimony as credible.²¹⁴

89. The Prosecution responds that Gatete did not challenge Witness AIZ's line of sight at trial.²¹⁵ It asserts that Gatete unfairly twists Witness AIZ's reference to a "shrub" and a "wooded area" when the issue was specifically clarified at trial.²¹⁶ The Prosecution adds that it was not required to identify Witness AIZ's exact hiding spot, whether on the site visit or through other evidence.²¹⁷

the houses were between the forest and the large sector office courtyard, where he saw Gatete and the *Interahamwe*. Nor did he state that the houses blocked his line of vision, such that he could not have observed events in the courtyard.

Moreover, his evidence was consistent with respect to the short distance between where he was hiding and where he saw Gatete. Indeed, it is not disputed that the sector office was close to Nkurunziza's property. Accordingly, having carefully examined Witness BBR's evidence on this point, as well as in its entirety, the Chamber does not have reservations about his ability to have observed events in the Rwankuba sector office courtyard from his hiding place.

²⁰⁸ See Witness BBR, T. 11 November 2009 pp. 23, 24. See also Witness BBR, T. 11 November 2009 pp. 4, 5, 21, 22.

²⁰⁹ Trial Judgement, para. 133, fn. 136.

²¹⁰ Trial Judgement, para. 133.

²¹¹ Gatete Appeal Brief, para. 101.

²¹² Gatete Appeal Brief, para. 102.

²¹³ Gatete Appeal Brief, para. 102.

²¹⁴ Gatete Appeal Brief, para. 103.

²¹⁵ Prosecution Response Brief, para. 72.

²¹⁶ Prosecution Response Brief, para. 72.

²¹⁷ Prosecution Response Brief, para. 72.

90. Witness AIZ initially referred to the hiding spot from which he observed the events at Rwankuba sector office as being “behind a shrub”,²¹⁸ but on further questioning referred to it as “a small wooded area”.²¹⁹ While the Trial Chamber did not address this aspect of Witness AIZ’s testimony when assessing his credibility, the Appeals Chamber finds no error in this regard, given that any distinction between a shrub and a small wooded area in this context is minimal and that the witness clarified at trial that he was referring to the same location.²²⁰ Furthermore, with respect to the fact that the Trial Chamber did not address Witness AIZ’s 1998 statement in relation to his hiding place, the Appeals Chamber notes that the Defence did not request its admission into evidence. In any event, contrary to Gatete’s submission, the extract of the statement read during cross-examination did refer to the witness’s hiding place.²²¹

91. With respect to Gatete’s argument that the Prosecution failed to adduce any evidence as to the exact location from which Witness AIZ observed the meeting, the Appeals Chamber considers that it was open to the Trial Chamber to rely on Witness AIZ’s evidence, without further evidence in this regard. Further, the Appeals Chamber recalls that Gatete did not request that this hiding place be included in the itinerary.²²² Accordingly, Gatete has failed to demonstrate that the Trial Chamber abused its discretion or committed a legal error in finding Witness AIZ to be credible.

92. In light of the foregoing, the Appeals Chamber dismisses Gatete’s arguments that the Trial Chamber erred in its assessment of Witness AIZ’s evidence.

(b) Alleged Error in Finding a Causal Link Between Gatete’s Instructions and the Killings

93. After finding that Gatete instructed the *Interahamwe* present at Rwankuba sector office on 7 April 1994 to kill Tutsis and to sensitise others to killings,²²³ the Trial Chamber found that:

Just hours after the gathering, assailants, who included *Interahamwe*, commenced attacks on Tutsis in and around Nyagasambu *cellule*. Ultimately, soldiers, police and Hutu civilians also joined in the attacks. Some of the *Interahamwe*, who had gathered at the sector office, went with *Conseiller* Bizimungu towards the Mumpara business centre, from where an attack was subsequently launched. Another attack took place near the house of the Tutsi *responsable*, Macali, resulting in his death. Given these circumstances, particularly that *Interahamwe* were involved, as well as the proximity in time and place of the attacks to the gathering, the only reasonable

²¹⁸ Witness AIZ, T. 11 November 2009 p. 48.

²¹⁹ Witness AIZ, T. 11 November 2009 p. 52.

²²⁰ See Witness AIZ, T. 11 November 2009 p. 60. When questioned by Judge Akay as to whether these were two different locations, Witness AIZ clarified “I remained at the same position to listen to what was being said.” See Witness AIZ, T. 11 November 2009 p. 52. Witness AIZ continued to refer to his hiding spot interchangeably as a shrub or wooded area throughout his testimony.

²²¹ See Witness AIZ, T. 11 November 2011 p. 61. In his submissions, Gatete refers to Exhibit P20; however, Exhibit P20 is the protected information sheet of Witness AIZ, not a statement. See Gatete Appeal Brief, fn. 114, referring to Exhibit P20, confidential.

²²² See Gatete Submissions on the Proposed Site Visit, para. 17(iii); Gatete Supplemental Submissions on the Proposed Site Visit, para. 10(iii).

²²³ Trial Judgement, para. 151.

conclusion based on the evidence is that the *Interahamwe*, who received instructions from Gatete that morning, also participated in the killing of Tutsis.

Moreover, it is reasonable that the attacks did not start immediately after the gathering. Indeed, Gatete instructed the crowd at the gathering to "sensitise" others to the killings. Given that attacks commenced a few hours later, increased in intensity as the day progressed, and that the assailants ultimately included not only *Interahamwe*, but also soldiers, policemen and Hutu civilians, the only reasonable conclusion based on the evidence is that the *Interahamwe* and authorities who were present at the gathering complied with Gatete's instructions to "sensitise" others to killings and marshalled further reinforcements for the attacks. [...]²²⁴

94. Gatete submits that the Trial Chamber erred in finding that there was a causal link between his alleged instructions at Rwankuba sector office and the killings that occurred in the area.²²⁵ He asserts that a causal link was not the only reasonable conclusion to be drawn from the evidence, given that hours elapsed between the gathering and the beginning of the attacks, and that the attacks were committed by various assailants coming from other localities.²²⁶ He argues that the Trial Chamber erred in finding that this delay was due to the *Interahamwe* sensitising the population to the killings.²²⁷ Furthermore, according to Gatete, the Trial Chamber failed to acknowledge that Witness BBR testified that the first attacks were launched on the hill opposite his house and that the first attack he was subjected to was launched from Gituza not Mumpara.²²⁸ He also contends that it is unclear whether Witness BBR's evidence that *Interahamwe* present at the gathering went toward Mumpara was direct or hearsay evidence.²²⁹ Gatete asserts that Witness BBR testified that the attack from Mumpara was launched by soldiers, and that only after prompting from the Prosecution did the witness add that *Interahamwe*, members of the population, and policemen took part in it.²³⁰ Gatete adds that Witness AIZ did not corroborate Witness BBR as he did not expressly link the violence to Gatete's instructions.²³¹

95. The Prosecution responds that Gatete's arguments misstate Witness BBR's testimony and the Trial Chamber's findings and fail to show any error.²³² It adds that Witness AIZ corroborated Witness BBR's testimony on the attacks and that Witness AIZ was clear that the killings occurred after Gatete's instructions and as a result of them.²³³

²²⁴ Trial Judgement, paras. 152, 153 (references omitted).

²²⁵ Gatete Appeal Brief, para. 104. See also Gatete Appeal Brief, paras. 105, 108, 110, 111; Gatete Reply Brief, para. 47.

²²⁶ Gatete Appeal Brief, paras. 105, 110.

²²⁷ Gatete Appeal Brief, para. 110.

²²⁸ Gatete Appeal Brief, para. 106.

²²⁹ Gatete Appeal Brief, para. 106. See also Gatete Appeal Brief, para. 108.

²³⁰ Gatete Appeal Brief, para. 107. See also Gatete Appeal Brief, para. 108.

²³¹ Gatete Appeal Brief, para. 109. See also Gatete Reply Brief, para. 48.

²³² Prosecution Response Brief, paras. 94-96, 98, 99; AT. 7 May 2012 pp. 29, 30.

²³³ Prosecution Response Brief, para. 97; AT. 7 May 2012 pp. 29, 30.

96. The Appeals Chamber recalls that Gatete was convicted of the killings in Rwankuba sector on the basis of his participation in a joint criminal enterprise.²³⁴ It further recalls that, in order to enter a conviction for joint criminal enterprise, it need not be established that the offence could not have been committed without the accused's participation.²³⁵ Rather, it must be shown that the accused's contribution to the common purpose amounted to a significant contribution to the execution of the crime.²³⁶ Accordingly, the Appeals Chamber will consider Gatete's arguments that the Trial Chamber erred in its assessment of evidence demonstrating a link between Gatete's actions and the killings only as they relate to whether the Trial Chamber erred in finding that his actions amounted to a significant contribution to the crimes.²³⁷

97. With respect to Gatete's argument that a causal link between his instructions and the killings was not the only reasonable inference, the Appeals Chamber notes that the Trial Chamber considered the time that elapsed between Gatete's instructions and the start of the attacks and concluded that it did not undermine the finding that Gatete's instructions contributed to the killings that ensued.²³⁸ Significantly, the Trial Chamber considered the proximity in time to be one of the factors, together with the proximity in location and the involvement of the *Interahamwe*, which established that his instructions contributed to the killings.²³⁹ Gatete has failed to demonstrate that no reasonable trier of fact could have so found and merely states that this was not the only reasonable inference available from the evidence. Moreover, the Trial Chamber found it reasonable that the attacks did not start immediately after the gathering, considering that Gatete instructed those at the gathering to "sensitise" others to killings.²⁴⁰ Gatete has failed to demonstrate that no reasonable trier of fact could have concluded that this was the only reasonable inference available.

98. The Appeals Chamber also dismisses Gatete's argument that the Trial Chamber failed to acknowledge that Witness BBR testified that the first attacks were launched on the hill opposite his house and that the first attack he experienced was launched from Gituza, not Mumpara. The Trial Chamber expressly noted Witness BBR's evidence that he could see houses being torched on the hill opposite his home, and that the first attack the witness experienced was from Gituza.²⁴¹

²³⁴ Trial Judgement, paras. 593, 594, 640. See also *infra*, Section III.C.1.

²³⁵ *Kvočka et al.* Appeal Judgement, paras. 98, 193, referring to *Tadić* Appeal Judgement, paras. 191, 199.

²³⁶ See *Krajišnik* Appeal Judgement, para. 662, referring to *Brđanin* Appeal Judgement, para. 430.

²³⁷ In Ground 4 of his appeal, Gatete argues, with reference to this section of his appeal, that his significant contribution to the crimes was not proven given the absence of a chain of evidence between the instructions and the crimes that ensued. See Gatete Appeal Brief, para. 248, fn. 446.

²³⁸ See Trial Judgement, paras. 152, 153.

²³⁹ See Trial Judgement, para. 152.

²⁴⁰ Trial Judgement, para. 153.

²⁴¹ Trial Judgement, paras. 107, 108, fn. 168.

99. The Appeals Chamber likewise dismisses Gatete's submission that it was unclear whether Witness BBR's testimony that the *Interahamwe* present at the gathering went to Mumpara was direct evidence or hearsay. It is clear from Witness BBR's testimony that he personally witnessed *Interahamwe* going toward Mumpara, using a road above his residence.²⁴² In any event, even if Witness BBR's testimony had been hearsay evidence, this argument alone would have been insufficient to call into question the Trial Chamber's assessment of the evidence, given that a trial chamber has the discretion to rely on hearsay evidence.²⁴³

100. Gatete's contention that only after prompting from the Prosecution²⁴⁴ did Witness BBR testify that *Interahamwe*, members of the population, and policemen took part in the attack launched from Mumpara also fails to show any error on the part of the Trial Chamber. Witness BBR initially stated that "[t]he assailants *included* soldiers".²⁴⁵ Although the Prosecution posed a somewhat leading question,²⁴⁶ Witness BBR was clear that the assailants "comprised soldiers, *Interahamwe* and other members of the ordinary population" and that communal soldiers also participated in the third attack.²⁴⁷ Given that Witness BBR's initial reference to the assailants being soldiers was not exclusive, and that he was clear about the identity of the assailants in his further testimony, the Appeals Chamber finds that the Trial Chamber reasonably relied on Witness BBR's evidence in this respect.

101. Turning to Gatete's argument that Witness AIZ did not corroborate Witness BBR as he did not expressly link the violence to Gatete's instructions, the Appeals Chamber notes that Witness AIZ's evidence only corroborated Witness BBR's evidence relating to the gathering at Rwankuba sector office as he did not testify about the attacks that followed.²⁴⁸ However, in light of the fact that the Trial Chamber found that Witness BBR's evidence was "consistent and compelling"²⁴⁹ and did not require corroboration, the fact that Witness AIZ's testimony did not

²⁴² See Witness BBR, T. 11 November 2009 p. 8 ("[...] And the *Interahamwe*, whom I had met at the *secteur* office, had accompanied the *secteur conseiller*. They went above my residence and went in the direction of the business centre called Mumpara. It is for that reason that we decided to organise ourselves in order to defend ourselves. [...] Mumpara was located within a kilometre from my residence. But on that day I did not go to Mumpara. It is the *Interahamwe* who had taken the direction of Mumpara, and they used a road which goes above my residence, and my residence is located at about 500 metres from the road. But I would like to point out that the centre called Mumpara is within less than a kilometre from my residence.").

²⁴³ *Munyakazi Appeal Judgement*, para. 77; *Kalimanzira Appeal Judgement*, para. 96, referring to *Karera Appeal Judgement*, para. 39.

²⁴⁴ Gatete Appeal Brief, para. 107.

²⁴⁵ Witness BBR, T. 11 November 2009 p. 8 (emphasis added).

²⁴⁶ Witness BBR, T. 11 November 2009 p. 9 ("Apart from the *Interahamwe* and soldiers, were there other persons attacking you?").

²⁴⁷ Witness BBR, T. 11 November 2009 p. 9.

²⁴⁸ See Trial Judgement, paras. 110-113.

²⁴⁹ Trial Judgement, para. 136.

directly link the gathering at Rwankuba sector office to the ensuing attacks does not undermine the Trial Chamber's assessment of the evidence.

102. In light of the foregoing, the Appeals Chamber dismisses these arguments in their entirety.

(c) Alleged Collusion Between Witnesses BBR and AIZ

103. The Trial Chamber considered Gatete's allegation of collusion between Witnesses BBR and AIZ but concluded that there was insufficient evidence that the two witnesses had colluded to untruthfully implicate Gatete.²⁵⁰

104. Gatete submits that the Trial Chamber erred in finding that the facts "do not *necessarily* lead to a finding of collusion".²⁵¹ He asserts that by so stating, the Trial Chamber imposed too high a standard of proof of collusion.²⁵² According to Gatete, the Trial Chamber also erred in stating that Witnesses BBR and AIZ would have had a very limited opportunity, if any, to discuss their testimonies because they both testified on the same day.²⁵³ He argues that the way in which the two witnesses' testimonies evolved to mirror each other is notable.²⁵⁴ In support of this argument, Gatete points to the fact that Witness BBR only mentioned one vehicle in his 1998 statement but referred to two vehicles in his testimony at trial, and submits that this "conveniently" matched Witness AIZ's testimony.²⁵⁵

105. The Prosecution responds that Gatete's argument of collusion is unsubstantiated and should be dismissed.²⁵⁶ It asserts that the Trial Chamber followed the applicable standard on collusion and carefully considered Gatete's submissions, but found them insufficient to establish collusion.²⁵⁷

106. The Appeals Chamber recalls that collusion is "an agreement, usually secret, between two or more persons for a fraudulent, unlawful, or deceitful purpose."²⁵⁸ If an agreement between witnesses for the purpose of untruthfully incriminating an accused is established, their evidence should be excluded pursuant to Rule 95 of the Rules.²⁵⁹

²⁵⁰ Trial Judgement, para. 129.

²⁵¹ Gatete Appeal Brief, para. 113 (emphasis in original). *See also* Gatete Appeal Brief, para. 112.

²⁵² Gatete Appeal Brief, para. 113.

²⁵³ Gatete Appeal Brief, para. 113. *See also* Gatete Appeal Brief, para. 115.

²⁵⁴ Gatete Appeal Brief, para. 115.

²⁵⁵ Gatete Appeal Brief, para. 114.

²⁵⁶ Prosecution Response Brief, para. 88.

²⁵⁷ Prosecution Response Brief, para. 87. *See also* Prosecution Response Brief, para. 86.

²⁵⁸ *Kanyarukiga* Appeal Judgement, para. 238; *Setako* Appeal Judgement, para. 137, *citing* *Karera* Appeal Judgement, para. 234.

²⁵⁹ Rule 95 of the Rules states: "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage the integrity of the proceedings." *See also* *Kanyarukiga* Appeal Judgement, para. 238.

107. The Appeals Chamber finds that Gatete has failed to demonstrate any error in the Trial Chamber's conclusion that the evidence before it was insufficient to establish that collusion had occurred. The Trial Chamber noted Gatete's submissions made at trial that Witnesses BBR and AIZ had close links and had both been housed in the safe house, but reasonably concluded that this did not establish that they had colluded.²⁶⁰ In particular, the Trial Chamber reasonably considered that Witnesses BBR and AIZ started and completed their evidence on the same day and that they therefore would have had a very limited opportunity, if any, to discuss their testimonies.²⁶¹ It also correctly observed there were a number of differences in the precise details of their accounts.²⁶²

108. With respect to Gatete's argument that Witness BBR changed his evidence in respect of the number of vehicles to match that of Witness AIZ, the Appeals Chamber observes that the Trial Chamber explicitly noted this challenge to Witness BBR's credibility but found his explanation to be reasonable.²⁶³ The Appeals Chamber does not find that the Trial Chamber erred by not expressly considering whether this discrepancy could have amounted to evidence of collusion. It notes that the Trial Chamber was seised of both Gatete's argument of collusion and the variance on this point between Witness BBR's evidence and his prior statement and considers that the later inclusion of this detail is insufficient to raise the suspicion of collusion.

109. In light of the foregoing, the Appeals Chamber dismisses this argument.

(d) Alleged Error in the Assessment of Defence Evidence

110. Gatete submits that the Trial Chamber erred by summarily dismissing the Defence evidence without properly taking into account the Defence witnesses' consistent and corroborated testimonies that there was no gathering at the Rwankuba sector office on 7 April 1994 and that Gatete was not present at the gathering.²⁶⁴ He asserts that the Trial Chamber did not provide sufficient reasons for preferring the testimonies of Witnesses BBR and AIZ over testimonies of Defence Witnesses LA40, LA41, and LA43 as it did not identify any inconsistencies in their evidence or reasons to doubt their credibility.²⁶⁵ Furthermore, Gatete argues that the Trial Chamber erred in dismissing Witness LA41's evidence, despite the fact that she was credible and gave evidence which directly contradicted that of Witnesses BBR and AIZ.²⁶⁶ According to Gatete, the Trial Chamber erred in considering that the absence of his name from *Gacaca* proceedings was not

²⁶⁰ Trial Judgement, para. 129.

²⁶¹ Trial Judgement, para. 129.

²⁶² Trial Judgement, para. 129.

²⁶³ See Trial Judgement, para. 135.

²⁶⁴ Gatete Appeal Brief, para. 116. Gatete erroneously refers to "7 April 2011" instead of 7 April 1994. See also Gatete Appeal Brief, para. 121.

²⁶⁵ Gatete Appeal Brief, para. 117.

²⁶⁶ Gatete Appeal Brief, paras. 118, 119. See also Gatete Reply Brief, para. 52.

significant.²⁶⁷ Gatete submits that, as a result of these errors, the Trial Chamber imposed an improper burden of proof on the Defence.²⁶⁸

111. The Prosecution responds that Gatete's arguments are without merit and merely repeat his trial submissions on appeal.²⁶⁹ It submits that the Trial Chamber properly assessed the Defence evidence, provided a reasoned opinion, and did not shift the burden of proof.²⁷⁰ It adds that Witness LA41 provided no credible basis on which to contest Gatete's presence at Rwankuba sector office on 7 April 1994.²⁷¹

112. The Appeals Chamber finds no merit in Gatete's assertion that the Trial Chamber imposed an improper burden of proof. In this regard, it notes that the Trial Chamber explicitly recalled the burden of proof and correctly applied it when assessing the evidence of Witnesses LA40, LA41, and LA43.²⁷²

113. Furthermore, the Appeals Chamber dismisses Gatete's argument that the Trial Chamber failed to provide sufficient reasons for preferring the testimonies of Witnesses BBR and AIZ over the evidence of Witnesses LA40, LA41, and LA43. The Trial Chamber considered the testimonies of Witnesses LA40, LA41, and LA43 in turn but concluded that these witnesses could not see the Rwankuba sector office at all times during the morning of 7 April 1994.²⁷³ The Trial Chamber consequently found that their evidence that they did not see the gathering involving Gatete was of limited probative value.²⁷⁴ Gatete does not challenge this reasoning except with respect to Witness LA41.

114. With respect to Witness LA41's evidence, Gatete does not address the fact that Witness LA41 testified that, during the relevant time period on 7 April 1994, she was working in the backyard of her establishment from where she could not see the Rwankuba sector office.²⁷⁵ Accordingly, Gatete has failed to demonstrate that the Trial Chamber erred in finding that Witness LA41's evidence did not raise a reasonable doubt about the Prosecution evidence.

115. Finally, the Appeals Chamber notes that the Trial Chamber addressed the fact that Gatete's name did not appear in *Gacaca* records but concluded that this was not significant.²⁷⁶ In light of the

²⁶⁷ Gatete Appeal Brief, para. 120.

²⁶⁸ Gatete Appeal Brief, para. 121.

²⁶⁹ Prosecution Response Brief, para. 100. *See also* Prosecution Response Brief, para. 107.

²⁷⁰ Prosecution Response Brief, para. 101.

²⁷¹ Prosecution Response Brief, paras. 104-106.

²⁷² *See* Trial Judgement, para. 146.

²⁷³ Trial Judgement, paras. 146-149.

²⁷⁴ Trial Judgement, paras. 146-149.

²⁷⁵ Witness LA41, T. 2 March 2010 p. 41 (closed session). *See also* Trial Judgement, para. 147, fn. 163.

²⁷⁶ Trial Judgement, para. 130.

limited probative value of this type of evidence,²⁷⁷ the Appeals Chamber finds no error in the Trial Chamber's assessment.

116. Accordingly, the Appeals Chamber dismisses Gatete's arguments that the Trial Chamber erred in its assessment of the Defence evidence on the events at the Rwankuba sector office and that it imposed an improper burden of proof on the Defence.

(e) Conclusion

117. In light of the foregoing, the Appeals Chamber dismisses Gatete's challenges to the Trial Chamber's assessment of the evidence in respect of the attacks in Rwankuba sector on 7 April 1994 in their entirety.

2. Alleged Errors Relating to Kiziguro Parish (Ground 3, Sub-Ground B)

118. The Trial Chamber convicted Gatete of genocide and extermination as a crime against humanity based on his role in the killing of Tutsi civilians at Kiziguro parish on 11 April 1994.²⁷⁸ The Trial Chamber found that, in the days following 6 April 1994, hundreds and possibly thousands of primarily Tutsi civilians sought refuge at Kiziguro parish.²⁷⁹ Based on the evidence of Prosecution Witnesses BBP, BBM, BUY, BVS, BBJ, and BCS, it found that, on 8, 9, and 10 April 1994, Gatete visited Kiziguro parish and spoke to the gendarmes, who had been guarding the compound, as well as to the priests.²⁸⁰ On 10 April 1994, Gatete and *conseiller* Gaspard Kamali and *Interahamwe* leader Augustin Nkundabazungu took away certain people from the parish.²⁸¹ On the morning of 11 April 1994, Gatete returned to Kiziguro parish with Kamali, Nkundabazungu, and soldiers.²⁸² *Interahamwe* and other civilian militia were also at the parish.²⁸³ The Trial Chamber also found that Gatete was present when the refugees inside the church were forced out into the parish courtyard and when the Tutsis were separated from the Hutus.²⁸⁴ The Trial Chamber found that Tutsis named Munana and Karemera were singled out and removed from the group of refugees pursuant to Gatete's instructions.²⁸⁵ It further found that Gatete issued express orders to kill the

²⁷⁷ See, e.g., *Ntawukulilyayo* Appeal Judgement, paras. 170, 175; *Muhimana* Appeal Judgement, paras. 141, 142.

²⁷⁸ Trial Judgement, paras. 601, 643, 668. See also Trial Judgement paras. 342, 595.

²⁷⁹ Trial Judgement, paras. 291, 595.

²⁸⁰ Trial Judgement, paras. 341, 595.

²⁸¹ Trial Judgement, paras. 341, 595.

²⁸² Trial Judgement, paras. 342, 595.

²⁸³ Trial Judgement, paras. 342, 595.

²⁸⁴ Trial Judgement, paras. 342, 595.

²⁸⁵ Trial Judgement, para. 342.

Tutsi refugees.²⁸⁶ As a result, soldiers surrounded the Tutsis so that they could not escape, and *Interahamwe* and civilian militia attacked the refugees with traditional weapons and guns.²⁸⁷

119. Gatete submits that the Trial Chamber erred in its assessment of the Prosecution and Defence evidence.²⁸⁸ He contends that the Trial Chamber erred in convicting him in relation to the events at Kiziguro parish, and requests that he be acquitted.²⁸⁹

(a) Alleged Errors in the Assessment of Prosecution Evidence

120. Gatete submits that the Trial Chamber disregarded credibility and corroboration issues in: (i) finding the testimonies of Prosecution Witnesses BBP, BBM, BUY, and BVS “consistent and compelling”;²⁹⁰ and (ii) accepting the testimonies of Witnesses BBJ and BCS, to the extent that they were corroborated, despite finding their evidence confusing or contradictory and despite the fact that neither of them provided corroboration for any other Prosecution witness.²⁹¹ The Appeals Chamber notes that these arguments relate to Gatete’s presence at Kiziguro both before and on 11 April 1994 and it will consider them in turn.

(i) Gatete’s Presence at Kiziguro Parish Before 11 April 1994

121. In assessing the evidence relating to Gatete’s presence at Kiziguro parish on 8, 9, and 10 April 1994, the Trial Chamber found that “[w]hile [the witnesses’] accounts diverge with respect to the precise details, there are clear thematic consistencies between them”.²⁹² The Trial Chamber noted in particular the consistencies in the evidence that Gatete went to the parish prior to 11 April 1994, spoke to gendarmes who were guarding the parish and to the two priests at the parish, and that, by 11 April 1994, the priests and gendarmes had left the parish.²⁹³

122. Gatete submits that the Trial Chamber erroneously relied on the evidence of Witnesses BBP, BVS, and BBJ to find that he was present at the parish before 11 April 1994 since they provided accounts of three different visits and none of them corroborated each other.²⁹⁴ Gatete emphasises

²⁸⁶ Trial Judgement, paras. 342, 595.

²⁸⁷ Trial Judgement, paras. 342, 595.

²⁸⁸ Gatete Notice of Appeal, paras. 15, 16. The Appeals Chamber understands that Gatete’s allegation, raised in his Notice of Appeal, that the Trial Chamber failed to order the disclosure of Rwandan judicial documents under Rule 66(A)(ii) of the Rules has been withdrawn since it is not raised in his Appeal Brief. *See* Gatete Notice of Appeal, para. 17.

²⁸⁹ Gatete Notice of Appeal, para. 19; Gatete Appeal Brief, paras. 143, 183.

²⁹⁰ Gatete Appeal Brief, para. 157. Gatete submits that he was denied his right to a reasoned opinion when the Trial Chamber failed to explain the basis for finding the evidence “compelling”, “consistent”, or “convincing”. *See* Gatete Notice of Appeal, para. 18.

²⁹¹ Gatete Notice of Appeal, para. 16; Gatete Appeal Brief, paras. 157, 158.

²⁹² Trial Judgement, para. 298.

²⁹³ Trial Judgement, para. 298.

²⁹⁴ Gatete Appeal Brief, paras. 161, 164-166.

that Witness BVS was the only witness who testified to having seen him at the parish on 8 and 9 April 1994,²⁹⁵ and that the Trial Chamber found one aspect of her evidence “confusing”.²⁹⁶ Gatete argues that Witness BVS’s evidence was unreliable as it was uncorroborated in relation to his alleged presence at the Kiziguro parish prior to 11 April 1994.²⁹⁷

123. With respect to 10 April 1994, Gatete asserts that while Witnesses BBP, BVS, and BBJ all testified that he visited Kiziguro parish that day, their accounts differ “drastically”.²⁹⁸ Gatete argues that their testimonies related to three different visits and that the Trial Chamber “merely compiled the statements of each witness without properly assessing their credibility and corroborative value.”²⁹⁹ Gatete adds that Witnesses BVS and BBJ were considered to be of “limited reliability” and that the Trial Chamber therefore should not have relied upon their uncorroborated statements.³⁰⁰ Gatete also contends that while Witness BBJ’s evidence was found to be unconvincing, the Trial Chamber referred to her evidence as supportive of the Prosecution evidence on Gatete’s visit at Kiziguro parish on 10 April 1994.³⁰¹

124. The Prosecution responds that Gatete erroneously segregates the evidence of his prior visits to Kiziguro parish by claiming that only Witness BVS testified to seeing him at the parish on 8 and 9 April 1994,³⁰² while the Trial Chamber properly considered the accumulation of all the evidence in the case.³⁰³

125. The Appeals Chamber recalls that two testimonies corroborate one another when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the

²⁹⁵ Gatete Appeal Brief, para. 162, referring to Witness BVS, T. 22 October 2009 pp. 3, 4, 14. Gatete submits that Witness BBP, who arrived on 7 April 1994, Witness BCS, who arrived on 8 April 1994, and Witnesses BBJ and BBM, who arrived on 9 April 1994, did not mention seeing him on either 8 or 9 April 1994. See Gatete Appeal Brief, para. 162.

²⁹⁶ Gatete Appeal Brief, para. 162, citing Trial Judgement, para. 321.

²⁹⁷ Gatete Appeal Brief, para. 163.

²⁹⁸ Gatete Appeal Brief, paras. 164, 165. Gatete points out that: Witness BVS testified that on the morning of 10 April 1994, Gatete spoke to two priests at the parish; Witness BBP testified that, during the afternoon of 10 April 1994, Gatete came to the parish with Kamali and Nkundabazungu and took away members of Kibaruta’s family; and Witness BBJ testified that Gatete came to the parish around 9.00 p.m. and spent the night drinking with *Interahamwe*. See Gatete Appeal Brief, para. 164.

²⁹⁹ Gatete Appeal Brief, para. 165.

³⁰⁰ Gatete Appeal Brief, para. 165.

³⁰¹ Gatete Appeal Brief, para. 165, referring to Trial Judgement, fn. 329.

³⁰² Prosecution Response Brief, paras. 109, 110. See also AT. 7 May 2012 p. 30. The Prosecution argues that Witness BVS was a credible witness, whose testimony on the visits of 8 and 9 April 1994 can stand on its own without corroboration. See Prosecution Response Brief, para. 113.

³⁰³ Prosecution Response Brief, para. 110, referring to *Musema Appeal Judgement*, para. 134. See also AT. 7 May 2012 p. 30.

same fact or a sequence of linked facts.³⁰⁴ It is not necessary that both testimonies be identical in all aspects or describe the same fact in the same way.³⁰⁵

126. The Appeals Chamber finds that it was reasonable for the Trial Chamber to find thematic consistencies between the accounts of Witnesses BBP, BVS, and BBJ, “in particular, that Gatete came to the parish prior to 11 April, spoke to gendarmes, who witnesses recalled had guarded the parish, and also spoke to the two priests at the parish.”³⁰⁶ The Appeals Chamber is of the view that it was not necessary that all witnesses described the same visit by Gatete and corroborated each other in this respect for the Trial Chamber to find that Gatete had come to the parish prior to 11 April 1994. That the witnesses may have described different visits does not undermine the conclusion that their accounts were compatible on the fact that Gatete was seen at the parish before 11 April 1994.

127. With respect to Gatete’s specific challenge to Witness BVS’s evidence, the Appeals Chamber observes that the Trial Chamber noted in its assessment of her testimony that one aspect of her evidence was confusing.³⁰⁷ However, the Trial Chamber did not find this to be sufficient “to cast doubt on her otherwise consistent and compelling testimony”.³⁰⁸ Gatete has failed to demonstrate any error in this assessment, beyond asserting that the witness’s evidence relating to 8, 9, and 10 April 1994 was uncorroborated. In light of the Trial Chamber’s finding that Witness BVS’s testimony was consistent and compelling, and absent a finding that it required corroboration, Gatete has failed to demonstrate that no reasonable trier of fact could have relied on her evidence regarding his presence at Kiziguro parish.

128. In support of his argument that the Trial Chamber erroneously relied on Witness BBJ’s uncorroborated evidence to find that Gatete was present at the parish before 11 April 1994, Gatete points to a footnote of the Trial Judgement which refers to Witness BBJ’s testimony about seeing Gatete join *Interahamwe* in the parish courtyard on the night of 10 April 1994.³⁰⁹ He argues that Witness BBJ’s evidence on this point was uncorroborated and thus that the Trial Chamber contradicted itself.³¹⁰ However, the Appeals Chamber does not discern any contradiction. Indeed,

³⁰⁴ *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121, citing *Bikindi* Appeal Judgement, para. 81; *Nahimana et al.* Appeal Judgement, para. 428.

³⁰⁵ *Kanyarukiga* Appeal Judgement, para. 220; *Ntawukulilyayo* Appeal Judgement, para. 24, citing *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81; *Nahimana et al.* Appeal Judgement, para. 428. See also *Ntabakuze* Appeal Judgement, para. 150.

³⁰⁶ Trial Judgement, para. 298.

³⁰⁷ Trial Judgement, para. 321. The part of Witness BVS’s evidence which was found to be confusing concerned the witness’s acknowledgment that, during the information-gathering phase, she mentioned how Gatete had helped her into Kiziguro parish but did not speak about his alleged role in the attack. See Trial Judgement, para. 321.

³⁰⁸ Trial Judgement, para. 321.

³⁰⁹ Gatete Appeal Brief, para. 165, referring to Trial Judgement, fn. 329.

³¹⁰ Gatete Appeal Brief, para. 165, fn. 253.

the Trial Chamber specifically considered Witness BBJ's evidence on this point and only relied on her testimony to the extent that it was corroborated:

[Witness BBJ's] recollection of events was materially different to that of other witnesses, in particular, with respect to the arrival of Gatete on the night of 10 April, as well as the details of the removal of Munana and Karemera on 11 April. Notably, although Witnesses BBP, BBM and BVS described events at the parish on 10 April and the morning of 11 April, they made no reference to Gatete arriving and joining *Interahamwe* in the courtyard for a night of singing, dancing, and drinking, as referred to by Witness BBJ. In view of these differences, the Chamber accepts her account to the extent that it is adequately corroborated.³¹¹

The fact that the Trial Chamber did not rely on this aspect of the witness's evidence did not preclude it from relying on the thematic consistencies between the accounts of Witnesses BVS, BBP, and BBJ to the effect that Gatete came to the parish prior to 11 April 1994.³¹²

129. Accordingly, the Appeals Chamber dismisses Gatete's arguments concerning the Trial Chamber's findings on his presence at the parish before 11 April 1994.

(ii) Gatete's Presence at Kiziguro Parish on 11 April 1994

130. Regarding the events at Kiziguro parish on 11 April 1994, the Trial Chamber found that "Prosecution witnesses consistently confirmed that certain individuals were singled out from the refugees and removed from the compound before the attack commenced",³¹³ and that "Witnesses BBP, BUY and BVS all described how the assailants separated the Tutsis from the Hutus."³¹⁴ It further found that "[t]he fundamental features of Gatete's role in the attack, as described by Witnesses BBP, BBM, BUY and BVS, are also largely consistent. Witnesses BBP, BBM and BUY stated that they heard Gatete issue clear orders to kill the Tutsi refugees."³¹⁵ The Trial Chamber accepted the evidence of Witnesses BBJ and BCS only to the extent that it was adequately corroborated.³¹⁶

131. Gatete submits that the Trial Chamber erroneously relied on the testimonies of Witnesses BVS, BBJ, and BCS without requiring "proper corroboration" and without detailing which parts of their testimonies it considered to be corroborated, despite its finding that these witnesses were unreliable unless corroborated.³¹⁷ In particular, Gatete points to the Trial Chamber's finding that Witness BBJ's evidence was only corroborated regarding Gatete's presence and the fact that an

³¹¹ Trial Judgement, para. 323 (references omitted). See also Trial Judgement, paras. 327, 341, wherein the Trial Judgement makes no reference to Gatete joining the *Interahamwe* on the night of 10 April 1994 for singing, dancing and drinking.

³¹² See Trial Judgement, para. 298.

³¹³ Trial Judgement, para. 301.

³¹⁴ Trial Judgement, para. 302.

³¹⁵ Trial Judgement, para. 303.

³¹⁶ Trial Judgement, paras. 323, 326, 327.

³¹⁷ Gatete Appeal Brief, para. 167. See also Gatete Appeal Brief, paras. 168, 169.

attack took place on 11 April 1994 involving various assailants.³¹⁸ In this regard, Gatete asserts that the *Rutaganda* Appeal Judgement established that it is an error to find that two testimonies which merely corroborate each other as to an accused's presence at a location substantially corroborate each other.³¹⁹

132. Gatete further submits that no reasonable trier of fact could have relied upon the evidence of the Prosecution witnesses regarding his role and presence at Kiziguro parish on 11 April 1994³²⁰ in the absence of corroboration on material facts including: (i) his location at the beginning of the attack;³²¹ (ii) his role in the separation of Tutsi and Hutu refugees;³²² (iii) his role in the killing of Munana;³²³ and (iv) his alleged order to kill Tutsi refugees.³²⁴ Gatete argues that, instead of concluding that there was doubt about his presence and role at Kiziguro parish, the Trial Chamber unreasonably excused the discrepancies and inconsistencies on the basis of the witnesses' varying vantage points, the passage of time, and the tense circumstances, and filled in the gaps in the Prosecution case.³²⁵

133. The Prosecution responds that it is clear from the Trial Chamber's analysis which parts of Witness BBJ's evidence it considered to be corroborated.³²⁶ The Prosecution adds that, similarly, Witness BCS testified to Gatete's armed presence at Kiziguro parish on 11 April 1994 between 9.00 and 10.00 a.m., and the attack that ensued.³²⁷ The Prosecution submits that Gatete incorrectly relies on the *Rutaganda* case, which has no relevance in the present case.³²⁸

134. With respect to the alleged lack of corroboration of material facts, the Prosecution responds that its witnesses provided detailed and compatible evidence, corroborating Gatete's presence and role at Kiziguro parish on the morning of 11 April 1994.³²⁹ It further submits that it was reasonable for the Trial Chamber to consider any minor variation in detail to be immaterial.³³⁰

³¹⁸ Gatete Appeal Brief, para. 168.

³¹⁹ Gatete Appeal Brief, para. 168, referring to *Rutaganda* Appeal Judgement, para. 496.

³²⁰ Gatete Appeal Brief, para. 180.

³²¹ Gatete Appeal Brief, paras. 170-172.

³²² Gatete Appeal Brief, paras. 170, 173, 174.

³²³ Gatete Appeal Brief, paras. 170, 175, 176.

³²⁴ Gatete Appeal Brief, paras. 170, 177-179.

³²⁵ Gatete Appeal Brief, para. 181. See also Gatete Appeal Brief, paras. 173-176, 178-180.

³²⁶ The Prosecution submits in that regard that the corroborated aspects included Gatete's presence at Kiziguro parish at around 10.00 a.m. on 11 April 1994, with Nkundabazungu as Gatete's "assistant", *Interahamwe*, and armed soldiers, as well as the removal of Munana and Karemera to be killed, the singing of the funeral hymn by the refugees, and Gatete's instructions to kill Tutsis which were then implemented by the assailants. See Prosecution Response Brief, para. 123.

³²⁷ Prosecution Response Brief, para. 123.

³²⁸ Prosecution Response Brief, para. 124.

³²⁹ Prosecution Response Brief, paras. 115-120.

³³⁰ Prosecution Response Brief, paras. 116, 118, 119, 122. See also Prosecution Response Brief, para. 117.

135. The Appeals Chamber notes that Gatete misrepresents the Trial Chamber's findings with respect to Witness BVS. As recalled above, the Trial Chamber found Witness BVS's testimony to be consistent and compelling and did not consider that it required corroboration.³³¹ Accordingly, Gatete's arguments relating to Witness BVS are dismissed.

136. Turning to the argument that the Trial Chamber could not have relied on Witness BCS's evidence without specifically indicating which part of his testimony it considered to be corroborated, it is well established jurisprudence that a trial chamber does not need to set out in detail why it accepted or rejected a particular testimony.³³² In any event, although the Trial Chamber did not specify which aspects of Witness BCS's testimony it considered corroborated, the Appeals Chamber observes that it is clear from Witness BCS's testimony that the corroborated part related to Gatete's presence at the Kiziguro parish on the morning of 11 April 1994.³³³

137. Contrary to Gatete's assertion, when assessing the merits of Witness BBJ's testimony, the Trial Chamber clearly set out which portions of her evidence were corroborated.³³⁴ It stated that:

[...] the Chamber accepts [Witness BBJ's] account to the extent that it is adequately corroborated. In this regard, the Chamber notes that key aspects of her evidence, such as Gatete's presence at the parish, and an attack having taken place there on 11 April involving various assailants, is corroborated by other consistent and compelling evidence discussed above.³³⁵

The Appeals Chamber does not discern any error in the Trial Chamber's assessment in this regard. Furthermore, Gatete's reference to the *Rutaganda* case in support of his contention that Witness BBJ could not be relied on is irrelevant and misleading.³³⁶

138. Turning to the facts which Gatete submits required corroboration, the Appeals Chamber recalls that a trial chamber has the discretion to decide, in the circumstances of each case, whether corroboration of evidence is necessary and to rely on uncorroborated, but otherwise credible, witness testimony.³³⁷ A trial chamber has full discretion to assess the credibility of a witness and

³³¹ See Trial Judgement, paras. 327, 341.

³³² See, e.g., *Ntabakuze* Appeal Judgement, para. 161; *Bagosora and Nsengiyumva* Appeal Judgement, para. 269; *Muvunyi* Appeal Judgement of 1 April 2011, para. 47; *Renzaho* Appeal Judgement, para. 405.

³³³ Witness BCS, T. 21 October 2009 pp. 14-16. See also Trial Judgement, para. 327.

³³⁴ See Trial Judgement, para. 323.

³³⁵ Trial Judgement, para. 323 (reference omitted).

³³⁶ In the *Rutaganda* case, the Appeals Chamber considered that the trial chamber had erroneously found that the witnesses' testimonies were compatible with each other when they were not, whereas in the present case, the Trial Chamber correctly found that key aspects of Witness BBJ's testimony were compatible with other evidence. See *Rutaganda* Appeal Judgement, paras. 494-496.

³³⁷ *Ntabakuze* Appeal Judgement, para. 150; *Ntawukulilyayo* Appeal Judgement, para. 21; *Karera* Appeal Judgement, para. 45. See also *Hategukimana* Appeal Judgement, para. 150; *Renzaho* Appeal Judgement, para. 556.

determine the appropriate weight to be accorded to his or her testimony;³³⁸ corroboration is one of many potential factors relevant to this assessment.³³⁹

139. The Appeals Chamber notes that all of the evidence identified by Gatete was corroborated.³⁴⁰ In any event, Witnesses BBP, BBM, BUY, and BVS, who were relied on by the Trial Chamber, were found to be credible³⁴¹ and corroboration was therefore not required. As such, the Appeals Chamber dismisses Gatete's argument that corroboration was necessary. Consequently, the Appeals Chamber limits its analysis to the Trial Chamber's assessment of the alleged discrepancies and inconsistencies.

140. With respect to the alleged inconsistencies between the accounts of Witnesses BBP, BUY, and BVS regarding the separation of Tutsi and Hutu refugees, the Appeals Chamber notes that the Trial Chamber expressly evaluated the difference between the testimony of Witness BUY, who recalled seeing Gatete only after the separation of refugees, and that of Witnesses BBP and BVS, who described him as being present during the separation.³⁴² The Trial Chamber considered that the varying vantage points and the number of people in the compound could account for these variances.³⁴³ Gatete does not show that it was unreasonable for the Trial Chamber to take these factors into account in reconciling the witnesses' accounts.

141. With respect to the removal of Munana from the compound, the Trial Chamber noted the following:

Some [witnesses] recounted that both Munana and Karemera were taken away (Witnesses BBM and BBJ) while others only recalled Munana (Witness[es] BBP and BUY) or Karemera (Witness BCS). Witness BCS was the only witness to refer to his brother being selected, along with Karemera and another individual whom he did not recognise.³⁴⁴

142. The Trial Chamber concluded that the ability of different witnesses to recognise different individuals, as well as their varying vantage points, could account for the variances in the

³³⁸ *Kanyarukiga* Appeal Judgement, para. 121; *Ntawukulilyayo* Appeal Judgement, para. 21; *Nchamihigo* Appeal Judgement, para. 47.

³³⁹ *Ntawukulilyayo* Appeal Judgement, para. 21; *Nchamihigo* Appeal Judgement, para. 47; *Simba* Appeal Judgement, para. 24; *Ntakirutimana* Appeal Judgement, para. 132.

³⁴⁰ With respect to Gatete's location during the relevant events, the Trial Chamber relied on Witnesses BBP, BUY, BVS, and BBM (*see* Trial Judgement, paras. 327, 329). With respect to the separation of the refugees, the Trial Chamber relied on Witnesses BBP, BUY, and BVS (*see* Trial Judgement, para. 302). With respect to the incident related to Munana, the Trial Chamber relied on Witnesses BBP, BBM, and BUY to find that "Tutsis called Munana and Karemera were singled out and removed from the group of refugees pursuant to Gatete's instructions" (*see* Trial Judgement, paras. 327, 328, 342; *see also* Trial Judgement, para. 301: "Prosecution witnesses consistently confirmed that certain individuals were singled out from the refugees and removed from the compound before the attack commenced"). With respect to the order to kill Tutsi refugees, the Trial Chamber relied on Witnesses BBP, BBM, BUY, and BVS (*see* Trial Judgement, para. 303).

³⁴¹ *See* Trial Judgement, para. 341.

³⁴² *See* Trial Judgement, para. 329.

³⁴³ Trial Judgement, para. 329.

³⁴⁴ Trial Judgement, para. 301 (references omitted).

testimonies on this point.³⁴⁵ Gatete does not show that the Trial Chamber was unreasonable in so finding. Further, the Trial Chamber explicitly considered that only Witness BBP saw and heard Gatete order the removal of Munana, while Witness BBM saw Gatete, Nkundabazungu, and Presidential Guards when they took away Munana and Karemera.³⁴⁶ However, it found that the slight differences were not significant given varying vantage points, the passage of time, and the tense circumstances.³⁴⁷ The Trial Chamber explicitly noted that Witness BUY saw Munana being taken away, without seeing Gatete order or participate in his removal, but stated that “it is possible that she exited the church after an order was given” and that “[v]arying vantage points may also account for her failure to see Gatete at the time that Munana was removed.”³⁴⁸ With respect to Witness BCS’s evidence, upon which Gatete relies in support of his argument,³⁴⁹ the Appeals Chamber notes that the Trial Chamber did not rely on his testimony with respect to Munana.³⁵⁰ The Appeals Chamber therefore finds that Gatete has failed to demonstrate any error in the Trial Chamber’s assessment of the evidence that Munana and Karemera were singled out and removed from the group of refugees pursuant to Gatete’s instructions.

143. With respect to the alleged inconsistency between Witness BUY’s prior statement and her testimony at trial as to whether Gatete ordered the killings at Kiziguro parish, the Appeals Chamber notes that Gatete’s submission misrepresents the content of the extract of the prior statement which related to the persons involved in the separation of the Tutsi refugees.³⁵¹ Further, while the Trial Chamber did not address this alleged inconsistency, the Appeals Chamber is not convinced that the Trial Chamber erred in this respect. Gatete did not raise this particular discrepancy when cross-examining Witness BUY³⁵² or when challenging her credibility in his Closing Brief.³⁵³ Witness BUY therefore did not have an opportunity to explain any inconsistency on this point and the Trial Chamber thus could not determine whether any such variance called into question the credibility of her evidence, particularly given that it was not requested that the statement be admitted into evidence. Accordingly, Gatete has failed to show any error in the Trial Chamber’s reliance on Witness BUY’s evidence to find that Gatete ordered the *Interahamwe* to kill the Tutsi refugees.

³⁴⁵ Trial Judgement, para. 301.

³⁴⁶ Trial Judgement, para. 327.

³⁴⁷ Trial Judgement, para. 327.

³⁴⁸ Trial Judgement, para. 328.

³⁴⁹ See Gatete Appeal Brief, para. 176.

³⁵⁰ See Trial Judgement, paras. 327, 328.

³⁵¹ From the extract read out during cross-examination, the 2007 statement referred to Gatsinzi and Nkundabazungu seeming to be among the *Interahamwe* leaders and to Nkundabazungu’s role in the separation of Hutus and Tutsis. See Witness BUY, T. 21 October 2009 p. 70.

144. Finally, the Appeals Chamber notes that the Trial Chamber explicitly considered the alleged inconsistency between Witness BVS's testimony and her prior statement regarding Gatete gesturing to the *Interahamwe*:

Although the statement does not refer to Gatete gesturing to the *Interahamwe*, the witness explained that she only provided information in response to the specific questions asked of her. Moreover, her reference to a "gesture" may not have been recorded by the person taking the statement, or she may not have mentioned it on that occasion, given that she did not actually hear what Gatete said. Under the circumstances, the Chamber finds this omission insufficient to cast doubt on the witness's sworn testimony.³⁵⁴

145. Gatete merely advances the same arguments on appeal as were rejected at trial without demonstrating that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber.

146. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that no reasonable trier of fact could have accepted the Prosecution evidence regarding his role and presence at Kiziguro parish on 11 April 1994.

(iii) Conclusion

147. The Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in its assessment of the Prosecution evidence.

(b) Alleged Errors in the Assessment of Defence Evidence

148. Gatete submits that the Trial Chamber committed legal and factual errors in its assessment of the testimonies of Defence witnesses by misapplying the law on accomplice evidence and by reversing the burden of proof.³⁵⁵

(i) Alleged Misapplication of the Law on Accomplice Evidence

149. When assessing the Defence evidence on Kiziguro parish, the Trial Chamber found that:

[T]he Chamber notes that Witnesses LA84, LA27, Kampayana and LA32 all played a role in the attack and/or burial of victims. The Chamber considers that these witnesses, particularly Witnesses LA84, LA27 and Kampayana, minimised their role in the massacre and does not find them to be reliable. Witness LA32's fugitive status also raises questions about his reliability.³⁵⁶

³⁵² To the question put to her during cross-examination that in the 2007 statement she designated Gatsinzi and Nkundabazungu as ordering the attack, Witness BUY responded that it was not true. See Witness BUY, T. 21 October 2009 p. 68.

³⁵³ See Gatete Closing Brief, paras. 551-566.

³⁵⁴ Trial Judgement, para. 318 (reference omitted).

³⁵⁵ Gatete Notice of Appeal, para. 15; AT. 7 May 2012 p. 7.

³⁵⁶ Trial Judgement, para. 332 (references omitted).

150. Gatete submits that the factors on which the Trial Chamber relied to summarily dismiss the evidence of Defence Witnesses LA84, LA27, Kampayana, and LA32 were irrelevant or insufficient to render their testimonies unreliable *per se*.³⁵⁷ According to Gatete, the Trial Chamber erred in taking into account the participation of Witnesses LA84, LA27, Kampayana, and LA32 in the attack and/or burial of the victims as a basis for finding that their testimonies lacked credibility.³⁵⁸ He argues that a witness who has participated in an attack is not necessarily unreliable but simply has to be treated with caution.³⁵⁹

151. Gatete also submits that the Trial Chamber erred by dismissing the witnesses' evidence solely because they may have minimised their roles in the events.³⁶⁰ He argues that, in any event, nothing on the record supported a finding that any of these witnesses minimised their roles.³⁶¹ In particular, with respect to Witness LA84, Gatete underscores that, even if the witness had minimised his own role in the events, the witness had no interest in exculpating him.³⁶² With respect to Witness LA27, Gatete submits that the Trial Chamber failed to consider a number of factors in assessing the witness's credibility, including that he had confessed that he committed atrocities and had been sentenced and released and that he risked his life to save Witness BUY.³⁶³ With respect to Witness Kampayana, Gatete asserts that the evidence shows that he only stood at the compound entrance and transported bodies, and that Witness LA32 did not know if Kampayana was an *Interahamwe*.³⁶⁴

152. Finally, Gatete submits that the Trial Chamber failed to explain why it considered Witness LA32 to be a fugitive and *per se* unreliable.³⁶⁵ He argues that the Trial Chamber did not address important factors when assessing the witness's credibility including: (i) the reasons for which the witness fled his country; (ii) that the witness's guilty plea in Rwanda was accepted; (iii) that the witness was sentenced to 20 years of imprisonment but did not appeal because he was satisfied with the judgement; (iv) that part of his sentence was converted into community service; and (v) that he breached his probationary sentence because he was ill.³⁶⁶

³⁵⁷ Gatete Appeal Brief, para. 145. See also Gatete Reply Brief, para. 58.

³⁵⁸ Gatete Notice of Appeal, para. 15; Gatete Appeal Brief, para. 146.

³⁵⁹ Gatete Appeal Brief, paras. 147, 148.

³⁶⁰ Gatete Appeal Brief, para. 150.

³⁶¹ Gatete Notice of Appeal, para. 15; Gatete Appeal Brief, paras. 150-154. See also Gatete Reply Brief, para. 58.

³⁶² Gatete Appeal Brief, para. 151.

³⁶³ Gatete Appeal Brief, para. 153, referring to Witness LA27, T. 10 March 2010 pp. 52-54.

³⁶⁴ Gatete Appeal Brief, para. 154.

³⁶⁵ Gatete Appeal Brief, para. 155.

³⁶⁶ Gatete Appeal Brief, para. 155.

153. The Prosecution responds that Gatete fails to demonstrate any error in the Trial Chamber's assessment of the Defence evidence.³⁶⁷

154. The Appeals Chamber recalls that, while a witness's status as an accomplice does not render his or her evidence unreliable *per se*,³⁶⁸ a trial chamber must exercise appropriate caution in assessing his or her evidence.³⁶⁹ The Trial Chamber correctly considered the status of the Defence witnesses as accomplices and also took into account other factors in assessing their evidence. In particular, it considered that all Defence witnesses minimised their roles in the massacre and that Witness LA32 was a fugitive.³⁷⁰

155. Gatete's argument that there was no evidence that the Defence witnesses minimised their roles in the events is without merit. In a footnote, the Trial Chamber specifically pointed to evidence on the record in support of its finding that Witnesses LA84, LA27, and Kampayana minimised their roles in the massacre.³⁷¹ Gatete shows no error in the Trial Chamber's reliance on this evidence and the Appeals Chamber dismisses his argument accordingly.

156. Finally, the Appeals Chamber finds that the Trial Chamber did not consider, as Gatete submits, that Witness LA32's status as a fugitive rendered his testimony *per se* unreliable. The Trial Chamber stated that his "fugitive status also rais[ed] questions about his reliability", after having noted that he played a role in the attack and/or burial of the victims.³⁷² In the Appeals Chamber's view, Gatete merely suggests a different assessment of Witness LA32's credibility without showing that the Trial Chamber erred in its assessment of his evidence.

157. In light of the foregoing, the Appeals Chamber dismisses Gatete's arguments on the application of the law on accomplice evidence.

³⁶⁷ Prosecution Response Brief, para. 125.

³⁶⁸ *Niyitegeka* Appeal Judgement, para. 98.

³⁶⁹ See, e.g., *Kanyarukiga* Appeal Judgement, para. 181; *Nchamihigo* Appeal Judgement, para. 42.

³⁷⁰ See Trial Judgement, para. 332.

³⁷¹ Trial Judgement, fn. 392:

Witness LA84's evidence that he did not kill anyone is difficult to reconcile with his participation in an attack on 9 April, and his participation in the Kiziguro parish massacre on 11 April. T. 9 March 2010 pp. 71-72; T. 10 March 2010 p. 11. It is further inconsistent with Witness LA32's description of Witness LA84 as 'violent like the other *Interahamwes* who were at the gate' and he 'could even kill you if you attempted to flee'. T. 15 March 2010 pp. 96-97, 103. Witness LA27 testified that, during all the attacks in which he participated (on 7, 9 and 11 April), he participated in the killing of only one person. T. 10 March 2010 pp. 66-67. The Chamber also questions Kampayana's testimony that he did not go to Kiziguro parish to participate in the attack, but that he went to look for a friend and, save for obeying an order to transport bodies, merely stood at the compound entrance until the killings were over. T. 11 March 2010 pp. 25-28, 40. According to Witness LA32, Kampayana stood by the gate, preventing people from leaving the compound and was violent. T. 15 March 2010 p. 97.

³⁷² Trial Judgement, para. 332. The Trial Chamber was seised of the fact that Witness LA32 fled Rwanda before completing the community service phase of his sentence. See Trial Judgement, fn. 393.

(ii) Alleged Reversal of the Burden of Proof

158. After recalling that the Defence has no independent burden to raise doubt in the Prosecution case, and having assessed all the evidence relating to the events at Kiziguro parish, the Trial Chamber found that the Defence evidence was insufficient to raise doubt about the consistent, compelling and corroborated Prosecution evidence.³⁷³ The Trial Chamber further stated that “[i]n any event, even if the Chamber were to accept the Defence evidence, it is of limited probative value, as none of the witnesses were in a position to have been able to monitor all events and persons at the parish.”³⁷⁴

159. Gatete submits that the Trial Chamber shifted the burden of proof by failing to consider the individual relevance and cumulative value of the evidence of the four Defence witnesses, which, he argues, fully covered the relevant locations and time-frame.³⁷⁵ Gatete asserts that the Trial Chamber misconstrued the testimonies of Defence Witnesses LA84, LA27, Kampayana, and LA32, who were well-positioned observers at relevant locations and, being on the side of the attackers, were able to know if Gatete was present and a leader.³⁷⁶ He argues that the Trial Chamber failed to explain why it did not consider their evidence to be relevant.³⁷⁷ The Appeals Chamber will address Gatete’s arguments relating to the individual witnesses’ evidence before turning to consider his arguments relating to the probative value of their evidence taken cumulatively.

a. Witness LA84

160. With respect to Witness LA84, the Trial Chamber found that:

[...] Witness LA84 did not see any events which occurred inside the compound, or the “fenced area”. He moved around the area and acknowledged that others [*sic*] persons may have been present. Thus, he would not necessarily have seen Gatete had the latter been present within the compound. For instance, he did not see the removal of Munana, at which point Prosecution witnesses saw Gatete within the compound.³⁷⁸

161. Gatete submits that the Trial Chamber erroneously: (i) dismissed Witness LA84’s evidence only because he did not witness the events occurring inside the compound; and (ii) concluded, without basis in the record, that the witness would not necessarily have seen Gatete, had he been present inside the compound.³⁷⁹ Gatete asserts that Witness LA84 was present at the right time and

³⁷³ Trial Judgement, para. 332.

³⁷⁴ Trial Judgement, para. 333.

³⁷⁵ Gatete Appeal Brief, para. 127; AT. 7 May 2012 p. 7.

³⁷⁶ Gatete Appeal Brief, para. 129.

³⁷⁷ Gatete Appeal Brief, para. 129.

³⁷⁸ Trial Judgement, para. 333 (references omitted).

³⁷⁹ Gatete Appeal Brief, para. 131.

right place to see the leaders at the beginning of the attack.³⁸⁰ He argues that Witness LA84's testimony was therefore relevant and that the Trial Chamber erred in not sufficiently explaining why it did not accept it.³⁸¹

162. The Prosecution responds that it was reasonable for the Trial Chamber to conclude that Witness LA84's evidence was of limited value because he acknowledged that he did not see everyone from his distant position.³⁸²

163. The Appeals Chamber recalls that, on 11 April 1994, Prosecution Witnesses BBP and BBM observed Gatete entering the parish compound³⁸³ and that Prosecution Witnesses BUY and BVS saw Gatete inside the compound.³⁸⁴ However, as the Trial Chamber noted,³⁸⁵ Witness LA84 testified to not seeing any events which occurred inside the compound, or the "fenced area".³⁸⁶ Accordingly, the Appeals Chamber does not discern any error on the part of the Trial Chamber in finding that Witness LA84 "would not necessarily have seen Gatete had the latter been present within the compound."³⁸⁷ Furthermore, Gatete does not demonstrate that the Trial Chamber erred in taking into account the witness's acknowledgement that he may not have seen everyone who was present at the parish compound.³⁸⁸ In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate an error in the Trial Chamber's assessment of Witness LA84's testimony. Accordingly, the Appeals Chamber dismisses Gatete's arguments relating to Witness LA84.

b. Witness LA27

164. With respect to Witness LA27, the Trial Chamber found that:

[...] after the initial attack on the church, [Witness LA27] was occupied with carrying bodies to the mass grave for the majority of his time at the site. He accepted that it was possible that Gatete was there but that he did not see him. Although he later recanted this statement, he acknowledged that he could not see the inner courtyard from the mass grave, or from inside the church. Once outside the compound, he could not see what occurred inside. According to his account, there were

³⁸⁰ See Gatete Appeal Brief, paras. 132, 133. Gatete also submits that the witness explained why he was a well-positioned observer and that the Trial Chamber unfairly emphasised his admission that he was not omniscient and that maybe there were other people he knew but did not see. See Gatete Appeal Brief, para. 134.

³⁸¹ Gatete Appeal Brief, para. 133.

³⁸² Prosecution Response Brief, para. 137.

³⁸³ Witness BBP, T. 20 October 2009 pp. 18-20; Witness BBM, T. 20 October 2009 p. 65. See also Trial Judgement, para. 327.

³⁸⁴ Witness BUY, T. 21 October 2009 pp. 56-59, 74; Witness BVS, T. 22 October 2009 pp. 5, 6. See also Trial Judgement, para. 329.

³⁸⁵ Trial Judgement, para. 333.

³⁸⁶ Witness LA84, T. 9 March 2010 p. 76.

³⁸⁷ Trial Judgement, para. 333.

³⁸⁸ Trial Judgement, para. 333, fn. 395, referring, *inter alia*, to Witness LA84, T. 10 March 2010 p. 14 ("Maybe there were other people whom I knew but I did not see.").

about 800 people within the compound. Under the circumstances, had Gatete been present, the witness would not necessarily have seen him.³⁸⁹

165. Gatete submits that even if not “omniscient”, Witness LA27 was a well-positioned observer as he was moving about and could easily have seen the authorities present and indeed did name the leaders he saw.³⁹⁰ Furthermore, Gatete argues that the Trial Chamber erroneously dismissed Witness LA27’s testimony about the removal and killing of Munana, based on the fact that none of the Prosecution witnesses testified to Gatete’s presence during the killing of Munana but only during his removal.³⁹¹ He argues, however, that Witness LA27 saw Munana’s removal but did not see Gatete.³⁹² Gatete also claims that the Trial Chamber unfairly dismissed Witness LA27’s evidence by relying on an isolated statement during his testimony, in which he admitted that it was possible that Gatete was at Kiziguro parish, which was apparently due to an incorrect interpretation and was immediately corrected.³⁹³ He adds that Witness LA27 always maintained that it was impossible that Gatete was at the parish and that he would have seen him or at least would have learned of his presence if he were there.³⁹⁴

166. The Prosecution responds that Witness LA27 reluctantly admitted that he was not in a position to observe all events at the parish because he was busy carrying bodies to the mass grave.³⁹⁵ The Prosecution submits that Gatete inaccurately represents the Trial Chamber’s findings on Munana’s removal.³⁹⁶

167. The Appeals Chamber finds that a reasonable trier of fact could have concluded that Witness LA27 was not well-positioned to observe Gatete’s presence during the relevant times and in the relevant places. The Trial Chamber considered the fact that Witness LA27 was occupied with carrying bodies to the mass grave for the majority of his time while, according to the Prosecution witnesses, Gatete was inside the parish compound.³⁹⁷

168. Turning to Gatete’s submission that Witness LA27 identified other individuals as being the leaders, the Trial Chamber specifically addressed this issue when noting that Defence evidence suggested that “other individuals played a lead role in gathering and ordering assailants.”³⁹⁸ The Trial Chamber considered that the fact that other individuals played a leading role was “not necessarily inconsistent with evidence that Gatete was also present, and played a lead role in the

³⁸⁹ Trial Judgement, para. 334 (references omitted).

³⁹⁰ Gatete Appeal Brief, paras. 135, 136.

³⁹¹ Gatete Appeal Brief, para. 137.

³⁹² Gatete Appeal Brief, para. 137. *See also* Gatete Appeal Brief, para. 138.

³⁹³ Gatete Appeal Brief, para. 139, *referring to* Trial Judgement, para. 334.

³⁹⁴ Gatete Appeal Brief, paras. 136, 139, *referring, inter alia, to* Witness LA27, T. 10 March 2010 pp. 49, 50, 71, 72.

³⁹⁵ Prosecution Response Brief, para. 138, *referring to* Witness LA27, T. 10 March 2010 pp. 72, 74.

³⁹⁶ Prosecution Response Brief, para. 139.

³⁹⁷ *See* Trial Judgement, paras. 329, 334.

operation", and indeed considered that it was even reasonable considering the large number of assailants marshalled to kill the Tutsis at the parish.³⁹⁹ The Appeals Chamber does not discern any error in this finding.

169. With respect to the removal and killing of Munana, the Appeals Chamber notes that the Trial Chamber did not discount Witness LA27's evidence on the sole basis that the Prosecution witnesses testified to seeing Gatete during Munana's removal. While it is correct that Witness LA27 testified to seeing the removal of Munana as well as his killing,⁴⁰⁰ the Trial Chamber found that the witness's evidence lacked reliability for several reasons, including his testimony that he could not see what occurred inside the compound.⁴⁰¹ The Appeals Chamber does not discern any error in the Trial Chamber's assessment.

170. Finally, the Appeals Chamber rejects Gatete's submission that the Trial Chamber misconstrued Witness LA27's testimony by relying on the "repudiated" statement that it was possible that Gatete was at Kiziguro parish. The Trial Chamber expressly noted that the witness recanted the statement about the possibility that Gatete was there but that he did not see him.⁴⁰² However, the Trial Chamber then considered the witness's statement that "he could not see the inner courtyard from the mass grave, or from inside the church. Once outside the compound, he could not see what occurred inside."⁴⁰³ On that basis, and given the presence of about 800 people inside the compound, the Trial Chamber found that "had Gatete been present, the witness would not necessarily have seen him."⁴⁰⁴ Accordingly, the Appeals Chamber dismisses Gatete's arguments.

c. Witness Kampayana

171. With respect to Witness Kampayana, the Trial Chamber found that:

[...] he testified that he carried bodies to the mass grave, left the parish at about 3.00 p.m., and acknowledged that he could not have seen everyone in the parish. Indeed, according to his account, there were about 900 to 1,000 people there. Moreover, when carrying bodies to the mass grave, he entered the church through the presbytery entrance and exited through the main door, thereby limiting his ability to monitor all persons moving around the compound.⁴⁰⁵

³⁹⁸ Trial Judgement, para. 340.

³⁹⁹ Trial Judgement, para. 340. The Trial Chamber noted that both Prosecution and Defence evidence indicated that *Interahamwe* leader Augustin Nkundabazungu and *conseiller* Gaspard Kamali were present during the attack and provided direction to assailants. See Trial Judgement, para. 340.

⁴⁰⁰ Witness LA27, T. 10 March 2010 pp. 41, 42.

⁴⁰¹ See Trial Judgement, para. 334.

⁴⁰² Trial Judgement, para. 334.

⁴⁰³ Trial Judgement, para. 334.

⁴⁰⁴ Trial Judgement, para. 334.

⁴⁰⁵ Trial Judgement, para. 335 (references omitted).

172. Gatete submits that the Trial Chamber misconstrued Witness Kampayana's evidence by referring selectively to excerpts of his testimony on the carrying of bodies while ignoring the fact that the witness remained at the entrance facing the church backyard during the killings and went into the church only for the removal of bodies.⁴⁰⁶ Gatete asserts that the Trial Chamber erred by failing to consider the witness's evidence, which he argues was relevant since Witness Kampayana: (i) was a well-positioned observer who was standing where the Prosecution witnesses located Gatete; (ii) was able to identify the leaders of the attack; and (iii) saw Nkundabazungu at the entrance of the church but not Gatete.⁴⁰⁷ He argues that the Trial Chamber over-emphasised Witness Kampayana's admission that he could not have seen everybody.⁴⁰⁸

173. The Prosecution responds that the Trial Chamber did not require Witness Kampayana to be omniscient, and that he was not well-positioned to dispute Gatete's presence.⁴⁰⁹

174. The Appeals Chamber rejects Gatete's submission that the Trial Chamber misconstrued Witness Kampayana's evidence. The Trial Chamber explicitly noted his testimony that he remained standing at the compound entrance facing the backyard of the church until the killings were over when the removal of the bodies started.⁴¹⁰ Even if Witness Kampayana had been in a position to better observe the events, the Appeals Chamber finds that it does not render unreasonable the Trial Chamber's conclusion that the witness could not have seen everyone in the parish, considering that the witness estimated that there were about 900 to 1,000 people present.⁴¹¹

175. As with Witness LA27, the Appeals Chamber does not find that the fact that Witness Kampayana named others as the leaders shows an error on the part of the Trial Chamber. The Trial Chamber explicitly noted that Defence evidence suggested that other individuals played a leading role in the attack on Kiziguro parish, but reasonably considered that this was not necessarily inconsistent with Gatete also being present and playing a lead role in the events.⁴¹²

176. Finally, the Trial Chamber noted that Witness Kampayana testified to not seeing Gatete at the parish on 11 April 1994, but it considered that the witness also acknowledged that he could not have seen everyone in the parish.⁴¹³ Gatete has therefore not demonstrated that the Trial Chamber failed to consider this aspect of the witness's testimony or that it over-emphasised the witness's

⁴⁰⁶ Gatete Appeal Brief, para. 140.

⁴⁰⁷ Gatete Appeal Brief, para. 140.

⁴⁰⁸ Gatete Appeal Brief, para. 141.

⁴⁰⁹ Prosecution Response Brief, para. 140.

⁴¹⁰ Trial Judgement, para. 279, fn. 392. *See also* Witness Kampayana, T. 11 March 2010 p. 27.

⁴¹¹ *See* Trial Judgement, para. 335.

⁴¹² Trial Judgement, para. 340.

⁴¹³ Trial Judgement, paras. 331, 335.

admission that he could not see everybody. Accordingly, the Appeals Chamber dismisses Gatete's arguments.

d. Witness LA32

177. With respect to Witness LA32, the Trial Chamber found that:

[...] he arrived at the parish between 1.00 and 2.00 p.m. after most of the killings had taken place, and moved about ten bodies from the parish church and compound to the mass grave, leaving the site at about 4.00 p.m. Thus, he was not present during the initial attack on the church, the removal of refugees from the church, or for most of the killings. As he was carrying bodies to the grave, he could not see all persons at all times and would not necessarily have seen Gatete, had he been at the parish in the afternoon, as recounted by Prosecution Witness BUY.⁴¹⁴

178. Gatete submits that the Trial Chamber erred by summarily dismissing Witness LA32's corroborative evidence.⁴¹⁵ He argues that even if the witness arrived at the parish between 1.00 and 2.00 p.m. and was carrying bodies, the witness still saw many people and identified those who were in charge of giving the orders.⁴¹⁶

179. The Prosecution responds that Gatete fails to explain how Witness LA32's testimony corroborated anything material.⁴¹⁷ It submits that the witness arrived at the parish after the initial attack on the church, after the removal of the refugees, and after most of the killings had occurred.⁴¹⁸

180. The Appeals Chamber observes that the Trial Chamber evaluated the limited reliability and probative value of Witness LA32's testimony. Thus, contrary to Gatete's submission, it did not summarily dismiss his evidence.⁴¹⁹ The fact that the evidence of Witness LA32 corroborated evidence that Nkundabazungu and soldiers gave orders, does not affect the Trial Chamber's finding that the involvement of other individuals was "not necessarily inconsistent with evidence that Gatete was also present, and played a lead role in the operation."⁴²⁰ As noted above, this finding was reasonable considering the number of assailants involved in killing the large number of Tutsis.⁴²¹ Gatete does not demonstrate how the Trial Chamber erred in considering that Witness LA32 was not present at the relevant location and time to be able to raise doubt as to Gatete's presence. Accordingly, the Appeals Chamber dismisses Gatete's arguments.

⁴¹⁴ Trial Judgement, para. 336 (references omitted).

⁴¹⁵ Gatete Appeal Brief, para. 142.

⁴¹⁶ Gatete Appeal Brief, para. 142, referring to Witness LA32, T. 15 March 2010 pp. 67, 68, 91, 92.

⁴¹⁷ Prosecution Response Brief, para. 141.

⁴¹⁸ Prosecution Response Brief, para. 141.

⁴¹⁹ See Trial Judgement, paras. 332, 336, 337.

⁴²⁰ Trial Judgement, para. 340.

e. Probative Value of All Defence Evidence

181. The Trial Chamber found that “[a]fter examining their testimonies in detail in the context of the consistent, compelling and corroborated accounts of Witnesses BBP, BBM, BUY and BVS, [it did] not find the evidence of Defence Witnesses LA84, LA27, Kampayana and LA32 sufficient to raise doubt.”⁴²² The Trial Chamber added that, in any event, even if it were to accept the Defence evidence, it was of limited probative value since “none of the [Defence] witnesses were in a position to have been able to monitor all events and persons at the parish.”⁴²³

182. Gatete submits that the Trial Chamber’s latter finding amounted to imposing an impossible burden on the Defence to raise a reasonable doubt.⁴²⁴ Gatete submits that the Prosecution and Defence witnesses’ accounts of the events at Kiziguro parish are strikingly similar except as to his alleged presence⁴²⁵ and that, as such, no reasonable trier of fact could have favoured one account over the other and disregarded the doubt raised by the Defence witnesses.⁴²⁶ In this respect, Gatete emphasises that the testimony of each Defence witness had to be considered cumulatively with the other Defence evidence.⁴²⁷ Furthermore, noting that all Prosecution witnesses testified that Gatete was with Nkundabazungu when they saw him during the attack in different locations at the parish compound, Gatete submits that the Defence witnesses, who saw Nkundabazungu, would necessarily have seen Gatete if they had been together at the parish.⁴²⁸ Gatete contends that, given this, the different vantage points of the witnesses were irrelevant.⁴²⁹

183. The Prosecution responds that the Trial Chamber did not require “omniscient” witnesses, but considered that none of the witnesses had a sufficient and credible knowledge base to dispute Gatete’s presence.⁴³⁰ It submits that the Trial Chamber did not shift the burden of proof simply because it found that the witnesses, in fact, could not observe the events.⁴³¹

184. The Trial Chamber found that none of the Defence witnesses was at a relevant location, inside the parish compound, at a relevant time (during Munana’s removal, the separation of Tutsis and Hutus, and the launch of the attack) to observe Gatete’s presence and therefore that their

⁴²¹ See *supra*, para. 168. Trial Judgement, para. 340. The Trial Chamber noted that both Prosecution and Defence evidence indicated that *Interahamwe* leader Augustin Nkundabazungu and *conseiller* Gaspard Kamali were present during the attack and provided direction to assailants.

⁴²² Trial Judgement, para. 332.

⁴²³ Trial Judgement, para. 333.

⁴²⁴ Gatete Notice of Appeal, para. 15; Gatete Appeal Brief, para. 126.

⁴²⁵ Gatete Appeal Brief, para. 143.

⁴²⁶ Gatete Appeal Brief, para. 143.

⁴²⁷ Gatete Appeal Brief, para. 127. See also Gatete Appeal Brief, paras. 134, 141.

⁴²⁸ Gatete Appeal Brief, para. 130. See also Gatete Reply Brief, para. 59.

⁴²⁹ Gatete Appeal Brief, para. 130.

⁴³⁰ Prosecution Response Brief, para. 135.

evidence did not raise a reasonable doubt about the Prosecution evidence. It is clear from the Trial Chamber's findings that the Trial Chamber evaluated the evidence of Defence witnesses not only individually but also cumulatively.⁴³² Gatete's submission in this respect is accordingly dismissed. The Appeals Chamber therefore finds that the Trial Chamber did not shift the burden of proof to require that the witnesses be able to monitor all events and persons at the parish complex. As discussed in the preceding sections, the Appeals Chamber finds no error in the Trial Chamber's consideration of the witnesses' different vantage points. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in finding that the Defence evidence was insufficient to raise reasonable doubt in the consistent and compelling Prosecution evidence.

(iii) Conclusion

185. The Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber shifted the burden of proof by failing to consider the individual relevance and cumulative value of the testimonies of the four Defence witnesses.

(c) Conclusion

186. The Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence relating to the events at Kiziguro parish and dismisses his arguments in their entirety.

3. Alleged Errors Relating to Mukarange Parish (Ground 3, Sub-Ground C)

187. The Trial Chamber convicted Gatete of genocide and extermination as a crime against humanity based on his role in the killing of Tutsi civilians at Mukarange parish on 12 April 1994.⁴³³ The Trial Chamber found that, in the days following the President's death, at least a thousand mostly Tutsi civilians sought refuge at Mukarange parish.⁴³⁴ Based on the evidence of Prosecution Witnesses AWF, BVP, and BVR, it found that, on 12 April 1994, *Interahamwe* attacked the parish but that the refugees repelled the attack.⁴³⁵ Later that day, Gatete arrived on the football field near the parish in a vehicle carrying boxes of guns and grenades with *bourgmestre* Célestin Senkware, *conseiller* Samson Gashumba, Gendarme Lieutenant Twahira, an official called Édouard Ngabonzima, and gendarmes.⁴³⁶ The weapons were distributed to assailants, including

⁴³¹ Prosecution Response Brief, para. 136.

⁴³² See Trial Judgement, paras. 331-341.

⁴³³ Trial Judgement, paras. 608, 646.

⁴³⁴ Trial Judgement, paras. 385, 602. See also Trial Judgement, fn. 452.

⁴³⁵ Trial Judgement, paras. 417, 602.

⁴³⁶ Trial Judgement, paras. 417, 602.

Interahamwe, whom Gatete directed to attack the Tutsis in the parish, and who then did so.⁴³⁷ Those Tutsis who survived were later killed by assailants using traditional weapons.⁴³⁸ As a result, “hundreds, if not thousands” of Tutsi civilians were killed that day at Mukarange parish.⁴³⁹

188. Gatete submits that the Trial Chamber erred in law and fact in its assessment of the evidence on the events at Mukarange parish on 12 April 1994 and that, as a result, his convictions for these events should be reversed.⁴⁴⁰ Gatete argues that the Trial Chamber erred in: (i) assessing the identification evidence of the Prosecution witnesses;⁴⁴¹ (ii) finding that the Prosecution witnesses corroborated each other on the events at Mukarange parish;⁴⁴² (iii) assessing discrepancies between the Prosecution witnesses’ prior statements and their testimonies in court;⁴⁴³ (iv) assessing Witness BVR’s evidence in light of his accomplice status;⁴⁴⁴ and (v) assessing the Defence evidence.⁴⁴⁵ The Appeals Chamber will consider these arguments in turn.

(a) Alleged Errors in Assessing Identification Evidence

189. The Trial Chamber accepted the identification evidence of Witnesses AWF, BVP, and BVR.⁴⁴⁶ With respect to the basis of Witness AWF’s ability to identify Gatete, the Trial Chamber noted that he had known Gatete as the *bourgmestre* of Murambi commune since 1992 and had seen him at a school that same year.⁴⁴⁷ In relation to Witness BVP, the Trial Chamber noted the witness’s evidence that he knew Gatete as the *bourgmestre* of Murambi and that he believed that he held this position in 1981 or later.⁴⁴⁸ The Trial Chamber noted that Witness BVR testified that he knew Gatete shortly before and throughout 1994 and believed that he was still the *bourgmestre* of Murambi commune in 1994.⁴⁴⁹ In respect of Witnesses BVP and BVR, the Trial Chamber noted that no further details were elicited about the last time they saw Gatete prior to 12 April 1994. However, it considered that Gatete was a prominent official prior to and during the events of April 1994 and that their evidence of seeing Gatete on the football field on 12 April 1994 was largely corroborated.⁴⁵⁰

⁴³⁷ Trial Judgement, paras. 417, 602.

⁴³⁸ Trial Judgement, paras. 417, 602.

⁴³⁹ Trial Judgement, paras. 417, 602.

⁴⁴⁰ Gatete Notice of Appeal, paras. 20, 25; Gatete Appeal Brief, paras. 185, 221; AT. 7 May 2012 p. 7.

⁴⁴¹ Gatete Notice of Appeal, paras. 22, 23; Gatete Appeal Brief, paras. 185, 187-195.

⁴⁴² Gatete Notice of Appeal, para. 21; Gatete Appeal Brief, paras. 186, 196-201. *See also* Notice of Appeal, para. 24.

⁴⁴³ Gatete Appeal Brief, paras. 186, 202-206.

⁴⁴⁴ Gatete Notice of Appeal, paras. 22, 23; Gatete Appeal Brief, paras. 186, 207-214.

⁴⁴⁵ Gatete Notice of Appeal, para. 22; Gatete Appeal Brief, paras. 186, 215-220.

⁴⁴⁶ Trial Judgement, paras. 395, 400, 403.

⁴⁴⁷ Trial Judgement, para. 395.

⁴⁴⁸ Trial Judgement, para. 400.

⁴⁴⁹ Trial Judgement, para. 403.

⁴⁵⁰ Trial Judgement, paras. 400, 403.

190. Gatete submits that the Trial Chamber erred in law and fact when it found that Witnesses AWF, BVP, and BVR positively identified him as the person they observed at Mukarange on 12 April 1994.⁴⁵¹ Gatete points to the fact that none of these witnesses identified him in the courtroom.⁴⁵² He also asserts that the Trial Chamber erred in relying on his alleged prominent position as a former *bourgmestre* of Murambi commune to infer that the witnesses would have been able to identify him, particularly given that Mukarange and Murambi are located in different prefectures.⁴⁵³ In this regard, Gatete notes that both Witnesses BVP and BVR incorrectly believed that he was still the *bourgmestre* in 1994.⁴⁵⁴

191. With respect to Witness AWF's explanation that he knew Gatete from when he came to his school to arrest the school principal when he was *bourgmestre*, Gatete submits that this was unbelievable given that he was the *bourgmestre* of a different commune in a different prefecture⁴⁵⁵ and Witness AWF did not explain how he knew that the person who came to the school was Gatete.⁴⁵⁶ Additionally, Gatete argues that the Trial Chamber failed to provide a reasoned opinion on the difficult circumstances in which Witnesses AWF and BVP saw him on 12 April 1994 which, in his view, impact the reliability of their evidence.⁴⁵⁷ Gatete notes that Witness AWF was part of a crowd of Tutsis fighting the *Interahamwe* and that he testified that Gatete was 30 to 50 metres from him which, Gatete asserts, is too far to have heard him speak.⁴⁵⁸ He further recalls that Witness BVP was frightened and hidden in an eucalyptus wood 50 to 80 metres from Gatete.⁴⁵⁹

192. The Prosecution responds that Gatete fails to demonstrate any error and that his arguments should be dismissed.⁴⁶⁰

193. The Appeals Chamber recalls that neither the Rules nor the jurisprudence of the Tribunal oblige a trial chamber to require a particular type of identification evidence.⁴⁶¹ However, identifications made in difficult circumstances, such as darkness, obstructed view, or traumatic events, require careful and cautious analysis by a trial chamber.⁴⁶² In addition, the Appeals

⁴⁵¹ Gatete Appeal Brief, para. 187; AT. 7 May 2012 p. 7.

⁴⁵² Gatete Appeal Brief, paras. 187, 190, 192, 195. *See also* Gatete Reply Brief, para. 62; AT. 7 May 2012 p. 7.

⁴⁵³ Gatete Appeal Brief, paras. 187, 189, 192. Gatete asserts that Mukarange is in Kibungo prefecture while Murambi is in Byumba prefecture. *See* Gatete Appeal Brief, para. 189.

⁴⁵⁴ Gatete Appeal Brief, paras. 192, 195.

⁴⁵⁵ Gatete Appeal Brief, para. 192.

⁴⁵⁶ Gatete Appeal Brief, para. 190.

⁴⁵⁷ Gatete Appeal Brief, paras. 188, 191, 193.

⁴⁵⁸ Gatete Appeal Brief, para. 191. *See also* Gatete Appeal Brief, para. 188.

⁴⁵⁹ Gatete Appeal Brief, para. 193. *See also* Gatete Appeal Brief, para. 188.

⁴⁶⁰ Prosecution Response Brief, para. 148; AT. 7 May 2012 pp. 31, 32. *See also* Prosecution Response Brief, paras. 143-148.

⁴⁶¹ *Kalimanzira Appeal Judgement*, para. 96; *Kamuhanda Appeal Judgement*, para. 298.

⁴⁶² *See, e.g., Renzaho Appeal Judgement*, para. 527, referring to *Kupreškić et al. Appeal Judgement*, para. 39; *Kalimanzira Appeal Judgement*, para. 96; *Bagilishema Appeal Judgement*, para. 75.

Chamber recalls that in-court identification evidence should be assigned "little or no credence" given the signals that may identify an accused aside from prior acquaintance.⁴⁶³

194. The Appeals Chamber notes that none of these witnesses was asked to identify Gatete in the courtroom.⁴⁶⁴ In any event, considering the limited probative value of any such identification evidence, the Appeals Chamber finds that the absence of in-court identification does not undermine the Trial Chamber's assessment of the reliability of their evidence.

195. The Trial Chamber also reasonably relied on Gatete's prominent position as a former *bourgmestre* of Murambi commune as one of the factors in support of its finding that the witnesses would have been able to identify him. In this regard, the Appeals Chamber notes that the Trial Chamber referred to evidence indicating that he had been an active *bourgmestre*, who was well-known and influential.⁴⁶⁵ Additionally, although Gatete was the *bourgmestre* of Murambi commune in Byumba prefecture while Mukarange is in Muhazi commune, Kibungo prefecture, the Appeals Chamber observes that these two locations are in close proximity to each other.⁴⁶⁶ In any event, the Trial Chamber did not base its finding that Gatete was a prominent figure only on his position as *bourgmestre*. It also noted that, in April 1994, Gatete was a director at the Ministry of Women and Family Affairs, which was a national position.⁴⁶⁷

196. With respect to Gatete's assertion that Witnesses BVP and BVR incorrectly believed that he was still the *bourgmestre* of Murambi, the Appeals Chamber observes that the Trial Chamber addressed the issue in relation to Witness BVP in a footnote and reasonably found that his testimony "suggests that he believed that Gatete was treated, or acted like a *bourgmestre* during the genocide, not that he actually was *bourgmestre* in 1994."⁴⁶⁸ The Trial Chamber also noted that Witness BVR incorrectly testified that Gatete was *bourgmestre* in 1994, but was nonetheless satisfied with the witness's identification evidence after considering Gatete's prominent personality and the fact that Witness BVR's evidence on Gatete's presence at the football field that day was corroborated.⁴⁶⁹ The Appeals Chamber does not consider that the Trial Chamber erred in so finding,

⁴⁶³ *Kalimanzira Appeal Judgement*, para. 96; *Kamuhanda Appeal Judgement*, para. 243.

⁴⁶⁴ See T. 22 October 2009; T. 2 November 2009.

⁴⁶⁵ See Trial Judgement, fns. 727, 809. The Trial Chamber also noted that Gatete was the *bourgmestre* of Murambi commune for over ten years, between 1982 and 1993. See Trial Judgement, para. 1.

⁴⁶⁶ See Exhibit D86 (Map).

⁴⁶⁷ Trial Judgement, paras. 1, 586, 678.

⁴⁶⁸ Trial Judgement, fn. 477, citing Witness BVP, T. 2 November 2009 pp. 7 ("I said that he was *bourgmestre* because at that time he was working in the ministry of family affairs and women's advancement. He had a police officer who served as his security detail. So one could say that he was *bourgmestre* of Murambi commune, and he still had that policeman on board his vehicle."), 17 ("Mukarange parish is located in the former Muhazi commune, that parish is located not far from Kayonza commune and Senkware was *bourgmestre* of Kayonza commune when Gatete was the former *bourgmestre* of Murambi commune. So they were not far from the area when they decided to attack the Mukarange parish which was found in Muhazi commune.").

⁴⁶⁹ Trial Judgement, para. 403.

particularly in light of the fact that Gatete had ceased to be *bourgmestre* in 1993 and still held a public position, and that Witness BVR did not specify when he had last seen Gatete prior to 12 April 1994.

197. Turning to Gatete's challenge to Witness AWF's explanation of how he knew Gatete, the Appeals Chamber notes that the Trial Chamber found that "[h]e had known Gatete as the *bourgmestre* of Murambi commune since 1992 and had seen him arrive at a school that same year."⁴⁷⁰ The Appeals Chamber understands that the Trial Chamber considered that the witness already knew that Gatete was the *bourgmestre* of Murambi when he saw him at the school. Although Witness AWF did not clearly explain how he knew that Gatete was the *bourgmestre* of Murambi, he was clear in his description of the event at the school and in his assertion that Gatete was the *bourgmestre* of Murambi commune.⁴⁷¹ In these circumstances, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber's assessment was unreasonable.

198. When assessing the witness's identification evidence, the Trial Chamber did not address the traumatic circumstances in which Witness AWF saw Gatete at Mukarange parish where he was part of the group of Tutsis on the football field into which grenades were thrown. However, it was seized of these circumstances and referred to them in considering his evidence.⁴⁷² Furthermore, the Appeals Chamber does not find that the fact that Witness AWF was 30 to 50 metres from Gatete and that, as such, he may not have been able to hear him speak, undermines his identification evidence as the witness did not claim to identify Gatete by his voice.⁴⁷³ The Appeals Chamber considers that these arguments are insufficient to call into question the Trial Chamber's acceptance of Witness AWF's identification evidence.

199. Similarly, in assessing Witness BVP's identification evidence, the Trial Chamber explicitly noted that Witness BVP was hiding in a forest when he saw Gatete.⁴⁷⁴ As such, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber did not consider the circumstances in which the witness identified him.

200. Consequently, the Appeals Chamber finds that Gatete has failed to demonstrate any error in the Trial Chamber's assessment of the Prosecution witnesses' identification evidence.

⁴⁷⁰ Trial Judgement, para. 395.

⁴⁷¹ Witness AWF, T. 22 October 2009 pp. 39-42.

⁴⁷² Trial Judgement, para. 353. Additionally, it was daytime and the witness was not at a large distance from Gatete. See Witness AWF, T. 22 October 2009 pp. 48-50, indicating that the grenades were distributed at about 1.30 p.m. and the witness was at a distance of between 30 and 50 metres from where the grenades were being distributed.

⁴⁷³ See Witness AWF, T. 22 October 2009 p. 51.

⁴⁷⁴ Trial Judgement, para. 400.

(b) Alleged Errors Relating to Corroboration

201. The Trial Chamber found that Witnesses AWF, BVP, and BVR were “largely consistent” with respect to the events of 12 April 1994, including on the fact that Gatete arrived at the football field near Mukarange parish with grenades for distribution to the assailants.⁴⁷⁵ It found that the variations between the witnesses’ testimonies were immaterial.⁴⁷⁶

202. Gatete submits that the Trial Chamber erred in finding that the Prosecution witnesses corroborated each other on the identity of the person who distributed the weapons, and on the role Gatete played on the football field, given the material inconsistencies in the witnesses’ accounts.⁴⁷⁷

203. The Prosecution responds that the Prosecution evidence was compatible with the sequence of events of 12 April 1994 and Gatete’s role in those events.⁴⁷⁸ It asserts that Gatete fails to demonstrate any error in the Trial Chamber’s assessment that the Prosecution witnesses corroborated each other on key aspects of their testimonies.⁴⁷⁹

204. The Appeals Chamber notes that all of the inconsistencies identified by Gatete on appeal were considered in detail by the Trial Chamber in assessing whether the evidence of Witnesses AWF, BVP, and BVR corroborated each other on the events at Mukarange parish.⁴⁸⁰ With respect to Gatete’s role in the distribution of weapons, the Trial Chamber noted, as Gatete concedes,⁴⁸¹ that all three Prosecution witnesses testified that Gatete arrived with grenades for distribution among the assailants.⁴⁸² Furthermore, it specifically noted that Witness AWF only saw Ngabonzima distributing weapons, but considered that this discrepancy was “immaterial and can be explained by varying vantage points, as well as the tense circumstances”.⁴⁸³ It also considered that Witness BVP testified that Gatete issued express instructions to kill and shot three times in the air to signal the start of the attack, and that Witness BVR testified that Gatete selected trained assailants to whom he distributed arms.⁴⁸⁴ It concluded that “all three witnesses described different aspects of the attacks at the parish” and “consider[ed] this to be reasonable, in light of the scale of the massacre, the

⁴⁷⁵ Trial Judgement, paras. 389-394.

⁴⁷⁶ Trial Judgement, paras. 389-391, 393, 394.

⁴⁷⁷ Gatete Appeal Brief, para. 197. *See also* Gatete Notice of Appeal, para. 21. Gatete asserts that Witness AWF only saw Ngabonzima distributing weapons on the football field, while Witness BVP testified that he saw Gatete distributing weapons and Witness BVR did not testify to seeing any distribution of weapons. Gatete notes that Witness BVP was the only witness who testified that he gave the signal for the start of the massacres by shooting three times in the air, and that he made the assailants line up in single file to collect ammunition. Similarly he points to the fact that Witness BVR was the only witness to testify that he selected those who received arms. *See* Gatete Appeal Brief, paras. 198-200.

⁴⁷⁸ Prosecution Response Brief, para. 154. *See also* Prosecution Response Brief, paras. 155-157.

⁴⁷⁹ Prosecution Response Brief, para. 158.

⁴⁸⁰ *See* Trial Judgement, paras. 388-394.

⁴⁸¹ Gatete Appeal Brief, para. 198.

⁴⁸² Trial Judgement, para. 391.

⁴⁸³ Trial Judgement, para. 391.

⁴⁸⁴ Trial Judgement, para. 394.

number of persons present around the site, and the witnesses' different positions in and around the parish."⁴⁸⁵

205. The Appeals Chamber is not convinced that the Trial Chamber erred in finding that the evidence of Witnesses AWF, BVP, and BVR corroborated each other despite the minor inconsistencies it noted. In this regard, the Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.⁴⁸⁶ Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.⁴⁸⁷ It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.⁴⁸⁸

206. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in finding that the Prosecution witnesses corroborated each other on the events at Mukarange parish.

(c) Alleged Error in Assessing Discrepancies in the Prosecution Witnesses' Prior Statements

207. In assessing Witness AWF's evidence, the Trial Chamber noted Gatete's argument that there were several differences between the witness's prior statement and his testimony.⁴⁸⁹ However, after considering Gatete's challenges, the Trial Chamber concluded that the inconsistencies were insufficient to cast doubt on the witness's testimony.⁴⁹⁰ Similarly, having considered Gatete's submission that Witness BVP's prior statement lacked certain details which he testified to in court, the Trial Chamber found the witness's explanation for the variance to be reasonable and that his evidence was generally compelling and consistent.⁴⁹¹

208. Gatete submits that the Trial Chamber erred in assessing the "tardiness" with which the Prosecution witnesses implicated Gatete in the Mukarange events.⁴⁹² Gatete asserts that Witness AWF testified for the first time at trial that Gatete gave instructions to the *Interahamwe*

⁴⁸⁵ Trial Judgement, para. 394.

⁴⁸⁶ See *supra*, para. 125.

⁴⁸⁷ *Ntawukuliyayo* Appeal Judgement, para. 24, referring to *Munyakazi* Appeal Judgement, para. 103; *Bikindi* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 173; *Nahimana et al.* Appeal Judgement, para. 428.

⁴⁸⁸ *Hategukimana* Appeal Judgement, para. 82; *Ntawukuliyayo* Appeal Judgement, para. 24, referring to, *inter alia*, *Munyakazi* Appeal Judgement, para. 71; *Nahimana et al.* Appeal Judgement, para. 428.

⁴⁸⁹ Trial Judgement, paras. 396-398.

⁴⁹⁰ Trial Judgement, paras. 396-398.

⁴⁹¹ Trial Judgement, para. 402.

⁴⁹² Gatete Appeal Brief, paras. 186, 202, 206.

and that he could see Gatete gesturing, whereas these facts did not appear in his prior statement.⁴⁹³ He asserts that no reasonable trier of fact could have accepted such discrepancies or believed that such information might not have been volunteered or recorded.⁴⁹⁴ Gatete notes that the prior statement was given closer to the time of the events than his testimony and that, as such, it was not reasonable for the witness's recollection to become more detailed over time.⁴⁹⁵

209. Gatete also points to the fact that Witness BVP testified for the first time at trial that he observed Gatete brandish grenades and guns and give the signal to start the massacres by shooting in the air, whereas he did not mention these points in his prior statement of 2007.⁴⁹⁶ He argues that no reasonable trier of fact could have accepted these omissions as immaterial, given that the prior statement was given only two years before his testimony and dealt with Gatete's role in the events.⁴⁹⁷

210. The Prosecution responds that Gatete seeks to re-litigate issues that were already considered by the Trial Chamber without showing any error.⁴⁹⁸ It argues that the witnesses' testimonies merely expanded on their prior statements.⁴⁹⁹

211. The Trial Chamber considered Gatete's submission at trial that Witness AWF's December 2004 statement did not mention him giving instructions to the *Interahamwe*.⁵⁰⁰ It noted, however, that the witness's testimony only referred to Gatete gesturing to the *Interahamwe* from which he concluded that Gatete was issuing instructions.⁵⁰¹ It further accepted as reasonable Witness AWF's explanation that he did not hear Gatete speak and that it was possible that not everything was recorded in his statement or that he may not have volunteered this information.⁵⁰² Gatete merely advances the same arguments on appeal as were rejected at trial without demonstrating that no reasonable trier of fact could have accepted the witness's explanation.

212. Similarly, the Trial Chamber considered Gatete's submission at trial that Witness BVP's January 2007 statement made no reference to Gatete brandishing weapons and signalling to the assailants to start the massacres by shooting in the air.⁵⁰³ However, it found the statement to be generally consistent with Witness BVP's testimony and accepted as reasonable the witness's

⁴⁹³ Gatete Appeal Brief, para. 203.

⁴⁹⁴ Gatete Appeal Brief, para. 203.

⁴⁹⁵ Gatete Appeal Brief, para. 204.

⁴⁹⁶ Gatete Appeal Brief, para. 205.

⁴⁹⁷ Gatete Appeal Brief, para. 205.

⁴⁹⁸ Prosecution Response Brief, para. 149.

⁴⁹⁹ Prosecution Response Brief, para. 149.

⁵⁰⁰ Trial Judgement, para. 398. Witness AWF's December 2004 statement was not admitted into evidence. See Trial Judgement, para. 396.

⁵⁰¹ Trial Judgement, para. 398.

⁵⁰² Trial Judgement, para. 398.

explanation that, while the statement was less detailed than his testimony in court, when testifying he had been answering the questions put to him.⁵⁰⁴ Gatete merely advances the same arguments on appeal as were rejected at trial without demonstrating that no reasonable trier of fact could have reached the Trial Chamber's conclusion.

213. In light of the foregoing, the Appeals Chamber dismisses Gatete's arguments that the Trial Chamber erred in its assessment of the discrepancies between the witnesses' prior statements and their testimonies at trial.

(d) Alleged Errors Relating to Witness BVR's Accomplice Status

214. In assessing Witness BVR's credibility, the Trial Chamber stated that it was "mindful that he was convicted and sentenced in Rwanda for his participation in the Mukarange parish attack and, at the time of his testimony, was in the community service phase of his sentence."⁵⁰⁵ The Trial Chamber indicated that it "ha[d], therefore, exercised the appropriate caution when considering his evidence, as it may have been influenced by a desire to positively impact his circumstances in Rwanda."⁵⁰⁶

215. Gatete submits that the Trial Chamber erred in assessing Witness BVR's evidence in light of his accomplice status and that, as a result, Witness BVR's testimony should be set aside.⁵⁰⁷ Gatete argues that the Trial Chamber failed to provide a reasoned opinion on the status of judicial proceedings against Witness BVR in Rwanda at the time of his testimony and the witness's attempts to mislead the Trial Chamber in that respect.⁵⁰⁸ According to Gatete, the Trial Chamber failed to exercise appropriate caution in assessing Witness BVR's evidence despite acknowledging that he may have been influenced by a desire to positively impact his circumstances in Rwanda.⁵⁰⁹ In this regard, Gatete asserts that the Trial Chamber was prevented from properly assessing the status of judicial proceedings against Witness BVR because the Prosecution never disclosed his judicial records despite the Trial Chamber's order for the Prosecution to do so.⁵¹⁰ He also notes that the Trial Chamber did not refer to the Prosecution's failure in this regard in its assessment of Witness BVR's testimony.⁵¹¹ Gatete further points to the fact that Witness BVR testified under a

⁵⁰³ Trial Judgement, para. 402.

⁵⁰⁴ Trial Judgement, para. 402.

⁵⁰⁵ Trial Judgement, para. 405.

⁵⁰⁶ Trial Judgement, para. 405.

⁵⁰⁷ Gatete Appeal Brief, paras. 186, 207, 214. *See also* Gatete Notice of Appeal, paras. 22, 23.

⁵⁰⁸ Gatete Appeal Brief, paras. 207-210.

⁵⁰⁹ Gatete Appeal Brief, para. 213.

⁵¹⁰ Gatete Appeal Brief, paras. 211, 212. *See also* Gatete Reply Brief, para. 68.

⁵¹¹ Gatete Appeal Brief, para. 211.

pseudonym before the Tribunal whereas he had testified publicly in Rwanda, and argues that this further calls his testimony into question.⁵¹²

216. The Prosecution responds that the Trial Chamber was seised of Witness BVR's judicial record in Rwanda and that the witness himself acknowledged before the Tribunal that he was not a free man.⁵¹³ The Prosecution further submits that it made inquiries with the Rwandan authorities regarding Witness BVR's judicial record but that no documents were forthcoming and that, in any event, it is not required to obtain such materials even if they exist.⁵¹⁴

217. Gatete replies that the records necessarily exist and that their disclosure was not voluntary but specifically ordered by the Trial Chamber.⁵¹⁵

218. With respect to Gatete's argument that the Trial Chamber failed to provide a reasoned opinion on the status of judicial proceedings against Witness BVR in Rwanda at the time of his testimony, the Appeals Chamber notes that the Trial Chamber was "mindful that he was convicted and sentenced in Rwanda for his participation in the Mukarange parish attack and, at the time of his testimony, was in the community service phase of his sentence."⁵¹⁶ The Trial Chamber stated that it "therefore, exercised the appropriate caution when considering his evidence, as it may have been influenced by a desire to positively impact his circumstances in Rwanda."⁵¹⁷ It also noted that Witness BVR's evidence was largely corroborated by that of Witnesses AWF and BVP.⁵¹⁸ While the Trial Chamber did not address the details of Witness BVR's evidence regarding the status of judicial proceedings against him or his sentence in Rwanda, it was clearly seised of Witness BVR's status as an accomplice and of the fact that he may have had a desire to positively impact his circumstances.⁵¹⁹

219. With respect to the disclosure of Witness BVR's judicial records, the Appeals Chamber recalls that, on 23 November 2009, the Trial Chamber ordered, *proprio motu* pursuant to Rule 98 of the Rules, the Prosecution to "[u]se all best efforts to make enquiries with the Rwandan authorities as to whether judicial records exist in respect of Witnesses BVR [...] and [i]f such judicial records exist, obtain and disclose these to the Defence immediately".⁵²⁰ On 1 December 2009, the

⁵¹² Gatete Appeal Brief, para. 213.

⁵¹³ Prosecution Response Brief, para. 150.

⁵¹⁴ Prosecution Response Brief, paras. 151, 152.

⁵¹⁵ Gatete Reply Brief, para. 66. *See also* Gatete Reply Brief, para. 67.

⁵¹⁶ Trial Judgement, para. 405.

⁵¹⁷ Trial Judgement, para. 405.

⁵¹⁸ Trial Judgement, para. 405.

⁵¹⁹ Trial Judgement, para. 405, referring to Witness BVR, T. 2 November 2009 pp. 49, 56, 57, 61-63, 66.

⁵²⁰ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009, p. 10.

Prosecution reported to the Trial Chamber that it had made best efforts to obtain the judicial records from Rwandan authorities and listed the efforts made.⁵²¹ However, it reported that it had been unable to obtain any records in relation to Witness BVR.⁵²² Gatete did not raise the issue again at trial or allege that the Prosecution had failed to make best efforts to locate the materials. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber not having addressed the matter in the Trial Judgement. It further finds that Gatete's argument that the Trial Chamber was prevented from properly assessing the status of judicial proceedings against Witness BVR to be speculative.

220. Likewise, the Appeals Chamber dismisses Gatete's assertion that the Trial Chamber should have questioned Witness BVR's credibility on the basis that he testified under a pseudonym before the Tribunal whereas he had testified publicly in Rwanda. The witness first stated that he testified under a pseudonym before the Tribunal because he was implicating Gatete in his testimony, but then elaborated that it was because he feared for his safety.⁵²³

221. In light of the foregoing, the Appeals Chamber dismisses Gatete's submissions regarding Witness BVR's accomplice status.

(e) Alleged Errors in the Assessment of Defence Evidence

222. The Trial Chamber considered Gatete's submission that, had he been involved in the attack at Mukarange parish, his name would have appeared among the accused persons in a September 2000 Rwandan Judgement of the Kibungo Court of First Instance ("Kibungo Judgement") which addressed the events at Mukarange parish.⁵²⁴ It further noted Gatete's submission that he was not mentioned by the accused persons in that case as having been a leader of, or a participant in, the killings at Mukarange.⁵²⁵ However, it concluded that this evidence was "not significant" and that "it is highly speculative to suggest that the general absence of information about an accused in other judicial proceedings necessarily suggests that he was not involved."⁵²⁶

223. Gatete submits that the Trial Chamber committed a discernible error in finding that the Kibungo Judgement had limited probative value and in failing to give it proper consideration.⁵²⁷ He

⁵²¹ *The Prosecutor v. Jean-Baptiste Gatete*, Case No. ICTR-00-61-T, Report on the Results of the Enquiries with the Rwandan Authorities Made by the Prosecutor in Respect of Witnesses BBQ, BVR and BVQ, 1 December 2009 ("Prosecutor's Report on Inquiries with Rwandan Authorities"), paras. 2, 3.

⁵²² Prosecutor's Report on Inquiries with Rwandan Authorities, para. 3.

⁵²³ Witness BVR, T. 2 November 2009 pp. 68, 69.

⁵²⁴ Trial Judgement, para. 409, referring to Exhibit D81 (Kibungo Court of First Instance Judgement of 8 September 2000, Kinyarwanda version and English translation).

⁵²⁵ Trial Judgement, para. 409.

⁵²⁶ Trial Judgement, para. 409.

⁵²⁷ Gatete Appeal Brief, para. 215. See also Gatete Appeal Brief, para. 220.

argues that the 36 co-accused in the Kibungu Judgement were the leaders and principal perpetrators in Kayanza commune, including of the Mukarange parish massacre,⁵²⁸ and the fact that the Prosecutor in that case accepted the guilty pleas of 24 of the 36 accused implied that they had named all their co-perpetrators.⁵²⁹ Gatete asserts that the fact that he was not accused in the proceedings in Rwanda of having been present at Mukarange parish is irreconcilable with the Trial Chamber's findings that he was present, a prominent figure, and played a pivotal role in the Mukarange parish killings.⁵³⁰ He further notes that Defence Witnesses LA50 and Innocent Habyalimana were among the 36 co-accused in the proceedings in Rwanda and participated in the trial and did not implicate him.⁵³¹ Gatete argues that, in these circumstances, the jurisprudence establishing that the absence of information about an accused in other judicial proceedings is of little probative value is "irrelevant".⁵³²

224. The Prosecution responds that Gatete fails to demonstrate any error in the Trial Chamber's finding given that the Kibungu Judgement was not the only comprehensive assessment of the Mukarange parish massacre and therefore has no probative value.⁵³³

225. The Appeals Chamber finds that the Trial Chamber correctly recalled that the absence of reference to an accused in separate proceedings involving different accused carries limited probative value when weighed against corroborated and credible eye-witness testimony.⁵³⁴ Furthermore, the Appeals Chamber considers the Trial Chamber's finding that the Kibungu Judgement was not significant for the present case to be reasonable. In reaching this conclusion, the Trial Chamber noted the evidence of Witness Innocent Habyalimana that the proceedings in which the Kibungu Judgement was rendered were not the only proceedings which took place in Rwanda concerning Mukarange parish and that the witness agreed that the 36 co-accused were not the only persons accused of committing crimes there that month.⁵³⁵ In these circumstances, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in this regard.

(f) Conclusion

226. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in its assessment of the evidence on Mukarange parish, and dismisses his arguments in their entirety.

⁵²⁸ Gatete Appeal Brief, para. 216.

⁵²⁹ Gatete Appeal Brief, para. 216.

⁵³⁰ Gatete Appeal Brief, para. 217.

⁵³¹ Gatete Appeal Brief, para. 218.

⁵³² Gatete Appeal Brief, para. 219.

⁵³³ Prosecution Response Brief, para. 159.

⁵³⁴ See Trial Judgement, para. 409. See also, e.g., *Munyakazi Appeal Judgement*, paras. 85, 121.

⁵³⁵ Trial Judgement, para. 409.

4. Conclusion

227. The Appeals Chamber finds that Gatete has failed to demonstrate any error in the Trial Chamber's assessment of the evidence relating to the events in Rwankuba sector, at Kiziguro parish, and at Mukarange parish. Accordingly, Gatete's third ground of appeal is dismissed in its entirety.

C. ALLEGED LEGAL ERRORS RELATING TO CUMULATIVE MODES OF LIABILITY (GROUND 4)

228. In convicting Gatete for genocide and extermination as a crime against humanity for the crimes committed in Rwankuba sector, at Kiziguro parish, and at Mukarange parish, the Trial Chamber found that Gatete's participation through the basic form of a joint criminal enterprise most aptly described his criminal conduct.⁵³⁶ Nonetheless, the Trial Chamber also found that Gatete was responsible for these crimes pursuant to Article 6(1) of the Statute for planning, instigating, ordering, and aiding and abetting the crimes.⁵³⁷

229. Gatete submits that the Trial Chamber erred in law and fact when it concluded that the same conduct constituted planning, instigating, ordering, committing through a joint criminal enterprise, and aiding and abetting, and convicted him on that basis.⁵³⁸ Gatete contends that the Trial Chamber created considerable ambiguity as to the scope of his criminal responsibility since it convicted him under incompatible and/or redundant modes of liability.⁵³⁹ He acknowledges that a trial chamber may cumulatively refer to various modes of liability to fully characterise the criminal conduct of the accused, but argues that it also has a duty to choose the most relevant modes of liability.⁵⁴⁰ Gatete asserts that such precision is necessary to accurately describe the crime and determine an appropriate sentence, and that a trial chamber must not give the impression of punishing an accused twice for the same conduct under two or more modes of liability as, he claims, the Trial Chamber did in this case.⁵⁴¹ According to Gatete, the Trial Chamber's reasoning is so flawed that the entire Trial Judgement has been rendered invalid thereby warranting a full reversal of all convictions.⁵⁴²

230. Gatete asserts that the Trial Chamber committed a further legal error by entering convictions based on the same conduct under joint criminal enterprise as well as under the individual modes of his participation in this joint criminal enterprise.⁵⁴³ He argues that, according to the Trial Chamber's reasoning, planning, instigating, ordering, and aiding and abetting were the modes of his participation in the joint criminal enterprise.⁵⁴⁴ Gatete claims that if these modes of liability are elements of the joint criminal enterprise, it is "legally redundant" to convict him for them as well as

⁵³⁶ Trial Judgement, paras. 593, 601, 608, 640, 643, 646.

⁵³⁷ Trial Judgement, paras. 594, 601, 608, 640, 643, 646.

⁵³⁸ Gatete Notice of Appeal, para. 26; Gatete Appeal Brief, para. 223. *See also* AT. 7 May 2012 pp. 12, 14.

⁵³⁹ Gatete Appeal Brief, paras. 224, 226, 267, 300. *See also* Gatete Reply Brief, para. 72. In particular, Gatete argues that the Trial Chamber erred by convicting him for the same crimes under incompatible modes of liability: (i) committing and aiding and abetting, and (ii) committing and planning (*see* Gatete Notice of Appeal, para. 26; Gatete Appeal Brief, paras. 227-232; Gatete Reply Brief, paras. 77-80).

⁵⁴⁰ Gatete Appeal Brief, para. 225. *See also* Gatete Reply Brief, para. 73; AT. 7 May 2012 p. 14.

⁵⁴¹ Gatete Appeal Brief, paras. 225, 226. *See also* Gatete Reply Brief, para. 74.

⁵⁴² Gatete Appeal Brief, paras. 237, 267, 300. In the alternative, Gatete requests that the Appeals Chamber retain only its findings on his responsibility for instigating and/or aiding and abetting, and revise the life sentence imposed. *See* Gatete Appeal Brief, paras. 267, 300. *See also* Gatete Appeal Brief, paras. 230, 233, 237.

⁵⁴³ Gatete Appeal Brief, para. 234. *See also* Gatete Reply Brief, paras. 81, 82.

⁵⁴⁴ Gatete Appeal Brief, para. 235.

for joint criminal enterprise in relation to the same conduct.⁵⁴⁵ In this regard, he submits that it is established in the Appeals Chamber practice to reverse convictions for other modes of liability when one mode of liability fully encompasses the criminal conduct.⁵⁴⁶ Gatete argues that the most appropriate modes of liability to properly characterise the actions for which he was found responsible by the Trial Chamber, would be instigating and/or aiding and abetting.⁵⁴⁷

231. Gatete also challenges the Trial Chamber's findings that he planned the crimes in Rwankuba sector, at Kiziguro parish, and at Mukarange parish.⁵⁴⁸ Additionally, in relation to each of the incidents for which he was convicted, Gatete submits in his Appeal Brief that neither the evidence nor the application of the correct legal principles supports the findings of ordering, or committing through joint criminal enterprise, and, in relation to the killings at Rwankuba sector, aiding and abetting.⁵⁴⁹ In his Appeal Brief, Gatete also argues that the Trial Chamber erred in concluding that the Indictment charged him with all modes of liability cumulatively, rather than in the alternative, and that, as such, the Trial Chamber ruled *ultra petita* when it entered convictions under all of the modes of liability.⁵⁵⁰

232. The Prosecution responds that Gatete's arguments should be dismissed and that, even if there was an error, it would not affect the verdict given that he was only convicted once for each crime.⁵⁵¹ With respect to Gatete's arguments that the Trial Chamber could not have found that all the modes of liability were established given its factual findings, the Prosecution submits that, except with respect to planning, Gatete's arguments that the elements of the other modes of liability were not fulfilled were not included in his Notice of Appeal and asserts that these arguments should accordingly be dismissed.⁵⁵² However, it further asserts that the elements of all the modes of liability were indeed fulfilled and that Gatete has failed to show any error.⁵⁵³ The Prosecution also

⁵⁴⁵ Gatete Appeal Brief, para. 235.

⁵⁴⁶ Gatete Appeal Brief, para. 236.

⁵⁴⁷ Gatete Appeal Brief, para. 237. Specifically, Gatete asserts that, according to the Trial Chamber's factual findings, the most appropriate mode of liability to characterise his alleged conduct in Rwankuba sector was instigating, while in relation to his alleged conduct at Kiziguro parish and Mukarange parish it was instigating and/or aiding and abetting. See Gatete Appeal Brief, paras. 241, 250, 251, 258, 259, 266, 267.

⁵⁴⁸ Gatete Notice of Appeal, paras. 27-29; Gatete Appeal Brief, paras. 276-299. Gatete argues that even if the killings were planned, it does not mean that they were planned and organised by him. See Gatete Appeal Brief, paras. 280, 291, 296. See also Gatete Reply Brief, paras. 83-88.

⁵⁴⁹ Gatete Appeal Brief, paras. 244, 254, 262. See also Gatete Appeal Brief, paras. 246-249, 256, 257, 264, 265.

⁵⁵⁰ Gatete Appeal Brief, paras. 239, 240.

⁵⁵¹ Prosecution Response Brief, paras. 162, 176. See also Prosecution Response Brief, paras. 6, 164, 166-169, 171.

⁵⁵² Prosecution Response Brief, para. 183.

⁵⁵³ Prosecution Response Brief, para. 182. See also Prosecution Response Brief, paras. 184-195.

submits that Gatete's arguments about the lack of notice should be dismissed as they were raised for the first time in his Appeal Brief.⁵⁵⁴

233. Gatete replies that he properly raised all arguments in his Notice of Appeal.⁵⁵⁵ He also submits that the ambiguity of the Trial Chamber's legal findings may invalidate the conviction and warrant a reduction of sentence.⁵⁵⁶

234. In the present case, in respect of each of the three incidents for which Gatete was convicted, the Trial Chamber found that Gatete's participation through a basic form of joint criminal enterprise most aptly encompassed his criminal conduct.⁵⁵⁷ However, the Trial Chamber also found that the evidence supported findings that he planned, instigated, ordered, and aided and abetted the crimes.⁵⁵⁸ The Trial Judgement is unclear as to whether the Trial Chamber entered a conviction for these events only pursuant to Gatete's participation in a joint criminal enterprise and merely made findings in relation to the other modes of liability or whether the Trial Chamber convicted Gatete pursuant to all of the modes of liability.

235. In the legal findings on Gatete's conviction for genocide for the killings in Rwankuba sector, the Trial Chamber appears to have entered a conviction on all modes of liability by stating: "[a]ccordingly, the Chamber finds beyond reasonable doubt that Gatete is responsible pursuant to Article 6(1) of the Statute, for planning, instigating, ordering, committing through a basic form of joint criminal enterprise, and aiding and abetting the killing of Tutsis in Rwankuba sector on about 7 April 1994."⁵⁵⁹ However, in the preceding paragraph, after finding that participation through a joint criminal enterprise most aptly summed up Gatete's criminal conduct, the Trial Chamber stated that all other modes reflected merely a fraction of his responsibility.⁵⁶⁰ It further stated that "in order to fully capture the nature of Gatete's criminal culpability and involvement in the crime, it is appropriate to make findings based on all relevant modes of liability. Indeed such findings are also relevant to the charge of conspiracy to commit genocide [...] as well as to sentencing."⁵⁶¹ The Appeals Chamber considers that the discussion in the Trial Judgement indicates that the Trial Chamber was not entering a conviction based on all modes of liability, but was merely making

⁵⁵⁴ Prosecution Response Brief, paras. 6, 178, 181. The Prosecution asserts that, in any event, Gatete was on notice of the Prosecution's reliance on all modes of liability and that the formulation of the Indictment does not denote alternative pleading. See Prosecution Response Brief, paras. 177, 179-181.

⁵⁵⁵ Gatete Reply Brief, para. 71.

⁵⁵⁶ Gatete Reply Brief, para. 75.

⁵⁵⁷ Trial Judgement, paras. 593, 601, 608, 640, 643, 646.

⁵⁵⁸ Trial Judgement, paras. 594, 601, 608, 640, 643, 646.

⁵⁵⁹ Trial Judgement, para. 594.

⁵⁶⁰ Trial Judgement, para. 593.

⁵⁶¹ Trial Judgement, para. 593.

findings on them.⁵⁶² Furthermore, when making its legal findings based on the same acts in respect of extermination as a crime against humanity, the Trial Chamber stated, after finding that joint criminal enterprise most aptly reflected his criminal responsibility, that “[t]he evidence also supports a finding that he planned, instigated, ordered, and aided and abetted the killing of Tutsi civilians in Rwankuba sector on 7 April 1994.”⁵⁶³ The Appeals Chamber considers that the Trial Judgement indicates that the findings on planning, instigating, ordering, and aiding and abetting were secondary, intended to more fully describe Gatete’s conduct and to be taken into consideration in sentencing.⁵⁶⁴ Accordingly, despite the ambiguity, the Appeals Chamber understands that the Trial Chamber only entered a conviction for committing, through a joint criminal enterprise, the killings committed in Rwankuba sector.

236. Similarly, in the legal findings supporting Gatete’s conviction for genocide for the killings committed at Kiziguro and Mukarange parishes, the Trial Chamber stated, after finding that Gatete’s participation in a joint criminal enterprise most aptly described his criminal conduct, that the evidence also supported a finding that “he is responsible under Article 6(1) of the Statute for planning, instigating, ordering and aiding and abetting”.⁵⁶⁵ When entering convictions for extermination as a crime against humanity in relation to the same acts, the Trial Chamber merely stated that “[t]he evidence also supports a finding that he planned, ordered, instigated, and aided and abetted” the killings.⁵⁶⁶ The Trial Chamber’s findings on planning, instigating, ordering, and aiding and abetting appear to have been subsidiary findings simply intended to more fully describe Gatete’s conduct for the purposes of sentencing. Accordingly, as with respect to the findings on Rwankuba sector, the Appeals Chamber understands that the Trial Chamber only entered a conviction for committing, through a joint criminal enterprise, the crimes committed at Kiziguro and Mukarange parishes.

⁵⁶² The Appeals Chamber notes that the Trial Chamber’s language is similar to that commonly used by trial chambers when entering a conviction pursuant to Article 6(1) of the Statute which still make findings pursuant to Article 6(3) of the Statute without entering a conviction. See, e.g., *Renzaho* Trial Judgement, paras. 779, 789, 807; *Bagosora et al.* Trial Judgement, paras. 2158, 2161, 2189, 2197, 2213, 2216, 2245, 2248. See also *Setako* Appeal Judgement, paras. 266, 268.

⁵⁶³ Trial Judgement, para. 640.

⁵⁶⁴ In this regard, the Appeals Chamber notes that in a footnote the Trial Chamber considered that “where the accused is convicted of committing the offence in question, the accused’s role in planning the offence is considered as an aggravating factor during sentencing.” See Trial Judgement, fn. 733. The Appeals Chamber considers that this also indicates that the Trial Chamber did not enter a conviction based on all forms of liability but merely made findings that it intended to consider in its sentencing deliberations.

⁵⁶⁵ Trial Judgement, paras. 601, 608.

⁵⁶⁶ Trial Judgement, paras. 643, 646. Similarly, in the legal findings on murder as a crime against humanity, the Trial Chamber stated that “[Gatete’s] participation through a basic form of joint criminal enterprise most aptly describes his individual criminal responsibility under Article 6(1) of the Statute. The evidence also supports a finding that he planned, ordered, instigated, and aided and abetted the murder of Tutsis in Rwankuba sector, and at Kiziguro and Mukarange parishes in April 1994”. See Trial Judgement, para. 651. However, the Trial Chamber did not convict Gatete of murder as a crime against humanity as it found it to be impermissibly cumulative with his convictions for extermination as a crime against humanity. See Trial Judgement, para. 667.

237. In light of this, the Appeals Chamber finds that Gatete's arguments regarding convictions based on cumulative modes of liability, including his contention that the Indictment charged him with all the modes of liability in the alternative rather than cumulatively, are moot. The Appeals Chamber therefore need not consider these arguments except as to whether the Trial Chamber erred in finding that all elements of joint criminal enterprise had been proven.

238. The Appeals Chamber recalls that Gatete raised the issue of proof of the elements of joint criminal enterprise for the first time in his Appeal Brief and that the Prosecution objected to these arguments on this basis.⁵⁶⁷ However, it also notes that the Prosecution responded to the substance of Gatete's arguments in this regard, submitting that the elements of joint criminal enterprise were indeed fulfilled and that Gatete has failed to show any error.⁵⁶⁸ Accordingly, the Appeals Chamber finds that the Prosecution will not be prejudiced by the consideration of these arguments and exercises its discretion to do so in the interests of justice.⁵⁶⁹

239. In order to enter a conviction under joint criminal enterprise, a trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose; that the accused made a contribution to this common criminal purpose; and that the commonly intended crime did in fact take place.⁵⁷⁰ The *mens rea* of the basic form of joint criminal enterprise requires that the accused must both intend the commission of the crime and intend to participate in a common plan aimed at its commission.⁵⁷¹

1. Rwankuba Sector

240. The Trial Chamber found that Gatete was present at a meeting on the morning of 7 April 1994 in the courtyard of the Rwankuba sector office with about 40 *Interahamwe*, *conseiller* Jean Bizimungu, and *bourgmestre* Jean de Dieu Mwange.⁵⁷² It found that Gatete instructed the *Interahamwe* to start killing Tutsis, and also that he gave instructions to "sensitise" other people to the killings.⁵⁷³ The Trial Chamber found that the *Interahamwe* who received these instructions from Gatete participated in the killing of Tutsis and that those present at the meeting marshalled further reinforcements for the attacks.⁵⁷⁴ The Trial Chamber further found that the gathering at the sector

⁵⁶⁷ See Prosecution Response Brief, paras. 6, 183.

⁵⁶⁸ Prosecution Response Brief, para. 191.

⁵⁶⁹ See *Ntabakuze* Appeal Judgement, fn. 255; *Bagosora and Nsengiyumva* Appeal Judgement, para. 381; *Deronjić* Judgement on Sentencing Appeal, paras. 102, 103, 130.

⁵⁷⁰ *Brdanin* Appeal Judgement, para. 430, referring to *Tadić* Appeal Judgement, para. 227. See also *Kvočka et al.* Appeal Judgement, para. 96; *Ntakirutimana* Appeal Judgement, para. 466; *Vasiljević* Appeal Judgement, para. 100.

⁵⁷¹ *Munyakazi* Appeal Judgement, para. 160; *Brdanin* Appeal Judgement, para. 365. See also *Ntakirutimana* Appeal Judgement, para. 467.

⁵⁷² Trial Judgement, para. 585. See also Trial Judgement, para. 151.

⁵⁷³ Trial Judgement, para. 585. See also Trial Judgement, para. 151.

⁵⁷⁴ Trial Judgement, para. 585. See also Trial Judgement, paras. 152, 153.

office and the subsequent attacks on Tutsis in Rwankuba sector “could not have been achieved without considerable organisation”, leading it to conclude that there was an agreement and a plan to kill Tutsis in the sector and that Gatete was among those who devised that plan.⁵⁷⁵ The Trial Chamber relied on its finding of planning and coordination to conclude that there was a common criminal purpose to kill Tutsis in Rwankuba sector.⁵⁷⁶

241. Gatete submits that the Trial Chamber erred in its assessment of the common purpose element of joint criminal enterprise since “considerable organisation” was not the only reasonable inference to be drawn from the presence of Gatete, Bizimungu, Mwange, and *Interahamwe* at the sector office.⁵⁷⁷ The Appeals Chamber recalls that it is well established that “planning” is not a required element of joint criminal enterprise⁵⁷⁸ and that the common criminal purpose need not be previously arranged or formulated; it may materialise extemporaneously.⁵⁷⁹ Additionally, the Appeals Chamber considers that Gatete has failed to demonstrate that no reasonable trier of fact could have concluded that the only reasonable inference available from the fact that a *conseiller*, a *bourgmestre*, and 40 *Interahamwe* gathered together at the sector office was that there was coordination behind the decision to kill Tutsis in Rwankuba sector. In this regard, the Trial Chamber also took into consideration the fact that the attacks “intensified as the day progressed and involved a range of assailants”.⁵⁸⁰ Even if, as Gatete argues,⁵⁸¹ some people went to the sector office spontaneously, the presence of the authorities and the large number of *Interahamwe* implies coordination. Furthermore, even if the meeting occurred spontaneously, the fact that Gatete issued instructions to kill Tutsis in the presence of the local authorities is evidence that he shared the common purpose to kill Tutsis in the sector.⁵⁸² Accordingly, the Appeals Chamber dismisses Gatete’s argument that the Trial Chamber erred in finding that the common purpose element of joint criminal enterprise was established.

242. Gatete also submits that it was not proven that he made a significant contribution to the execution of the crimes committed in Rwankuba sector and that there was no causal link between his instructions and the crimes.⁵⁸³ However, the Appeals Chamber recalls that it has already dismissed Gatete’s arguments in this regard under his third ground of appeal.⁵⁸⁴ Accordingly, the

⁵⁷⁵ Trial Judgement, paras. 586, 588.

⁵⁷⁶ Trial Judgement, para. 587.

⁵⁷⁷ Gatete Appeal Brief, para. 247. *See also* Gatete Appeal Brief, paras. 279-281.

⁵⁷⁸ *See, e.g., Simba Appeal Judgement*, para. 90.

⁵⁷⁹ *Vasiljević Appeal Judgement*, paras. 100, 109, *referring to Tadić Appeal Judgement*, para. 227. *See also Krajišnik Appeal Judgement*, para. 163, fn. 418; *Simba Appeal Judgement*, para. 74; *Brđanin Appeal Judgement*, para. 418; *Kvočka et al. Appeal Judgement*, para. 96; *Ntakirutimana Appeal Judgement*, para. 466.

⁵⁸⁰ Trial Judgement, para. 586.

⁵⁸¹ Gatete Appeal Brief, paras. 248, 280, 281.

⁵⁸² *See* Trial Judgement, paras. 587, 590.

⁵⁸³ Gatete Appeal Brief, paras. 247, 248.

⁵⁸⁴ *See supra*, Section III.B.1.(b).

Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in finding that his presence at the meeting at the Rwankuba sector office and the instructions he gave at that meeting amounted to a significant contribution to the execution of the joint criminal enterprise.⁵⁸⁵

243. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in concluding that its factual findings supported a finding that he participated in a joint criminal enterprise to kill the Tutsis in Rwankuba sector on 7 April 1994.

2. Kiziguro Parish

244. The Trial Chamber found that on 8, 9, and 10 April 1994, Gatete visited Kiziguro parish, where “hundreds and possibly thousands” of primarily Tutsi civilians sought refuge, and spoke to the gendarmes who were guarding the compound and the priests.⁵⁸⁶ On 10 April 1994, Gatete visited the parish with the Kiziguro sector *conseiller* Gaspard Kamali and *Interahamwe* leader Augustin Nkundabazungu and they took some people away from the parish.⁵⁸⁷ On 11 April 1994, Gatete returned to the parish with Kamali, Nkundabazungu, and soldiers.⁵⁸⁸ The Trial Chamber found that *Interahamwe* and civilian militia were also present.⁵⁸⁹ In Gatete’s presence, Tutsi and Hutu refugees were separated and Gatete gave instructions to the *Interahamwe* and civilian militia to kill the Tutsis.⁵⁹⁰ The Trial Chamber found that pursuant to Gatete’s instructions the *Interahamwe* attacked the Tutsi refugees, facilitated by the soldiers, and that “hundreds and possibly thousands” of Tutsi civilians were killed.⁵⁹¹

245. The Trial Chamber noted that the killings at Kiziguro parish and the burial of the victims were conducted in a systematic and efficient manner, and concluded that the attack must have been a highly organised operation.⁵⁹² It concluded that prior planning and coordination was the only reasonable explanation for the manner in which the large-scale attack was conducted which necessarily involved a plurality of persons including Gatete, Kamali, and Nkundabazungu as well as military personnel, *Interahamwe*, and civilian militia.⁵⁹³ On the basis of these findings, the Trial Chamber found that there existed among the participants a common criminal purpose to kill Tutsis

⁵⁸⁵ See Trial Judgement, para. 589.

⁵⁸⁶ Trial Judgement, para. 595. See also Trial Judgement, paras. 291, 341.

⁵⁸⁷ Trial Judgement, para. 595. See also Trial Judgement, paras. 327, 341.

⁵⁸⁸ Trial Judgement, para. 595. See also Trial Judgement, para. 342.

⁵⁸⁹ Trial Judgement, para. 595. See also Trial Judgement, para. 342.

⁵⁹⁰ Trial Judgement, para. 595. See also Trial Judgement, para. 342.

⁵⁹¹ Trial Judgement, para. 595. See also Trial Judgement, para. 342.

⁵⁹² Trial Judgement, paras. 596, 597.

⁵⁹³ Trial Judgement, para. 598.

at Kiziguro parish and that Gatete coordinated his actions with the members of the joint criminal enterprise before the attacks.⁵⁹⁴

246. Gatete argues that the Trial Chamber erred in its assessment of the existence of a common criminal purpose as it found that there was coordination and planning before the attack whereas he submits that there was no direct evidence of such coordination or planning involving him and that this was not the only reasonable inference.⁵⁹⁵ However, the Appeals Chamber finds that Gatete has failed to address the evidence upon which the Trial Chamber relied in making its finding of planning and coordination. In this regard, the Appeals Chamber recalls that the Trial Chamber considered the systematic and efficient manner in which the attack was undertaken including the fact that, prior to the attack, the refugees were taken out of the church and the Tutsis separated from the Hutus and that, after the attack, victims were made to assist in the disposal of bodies before being killed themselves.⁵⁹⁶ It also took into account the large scale of the attack involving civilian militia and *Interahamwe* and that soldiers were brought in to facilitate it.⁵⁹⁷ Additionally, it noted that local authorities and prominent personalities were present to provide direction and encouragement.⁵⁹⁸ The Appeals Chamber considers that Gatete has failed to demonstrate that no reasonable trier of fact could have concluded from this evidence that the only reasonable inference was that the attack involved prior planning and coordination.

247. Gatete also submits that, even if there was prior planning, there was insufficient evidence to infer his involvement.⁵⁹⁹ However, the Appeals Chamber considers that Gatete's visits to Kiziguro parish on the three days prior to the attack,⁶⁰⁰ his presence during the separation of the Tutsi and Hutu refugees, and his instructions to kill the Tutsis were sufficient for a reasonable trier of fact to conclude that he shared the common purpose to kill the Tutsis at Kiziguro parish.⁶⁰¹

248. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in concluding that its factual findings supported a finding that he participated in a joint criminal enterprise to kill the Tutsis at Kiziguro parish on 11 April 1994.

⁵⁹⁴ Trial Judgement, para. 598.

⁵⁹⁵ Gatete Appeal Brief, para. 257.

⁵⁹⁶ Trial Judgement, para. 596.

⁵⁹⁷ Trial Judgement, para. 597.

⁵⁹⁸ Trial Judgement, para. 597.

⁵⁹⁹ Gatete Appeal Brief, para. 257, referring to Gatete Appeal Brief, Section 4.2.2.2.

⁶⁰⁰ See Trial Judgement, para. 595.

⁶⁰¹ See Trial Judgement, para. 600.

3. Mukarange Parish

249. The Trial Chamber found that, on 12 April 1994, *Interahamwe* launched an attack on Mukarange parish where at least a thousand mostly Tutsi civilians had taken refuge.⁶⁰² The refugees were able to repel the attack.⁶⁰³ It further found that later that day, Gatete arrived at a football field near the parish with *bourgmestre* Célestin Senkware, *conseiller* Samson Gashumba, Gendarme Lieutenant Twahira, an official called Édouard Ngabonzima, and gendarmes in a vehicle carrying boxes of guns and grenades.⁶⁰⁴ These weapons were distributed to the assailants, including *Interahamwe*.⁶⁰⁵ Gatete directed the assailants to attack the Tutsis at the parish, which the assailants did.⁶⁰⁶ As a result, “hundreds, if not thousands” of Tutsi civilians were killed.⁶⁰⁷ The Trial Chamber also found that prior planning and coordination was the only reasonable explanation for the manner in which the perpetrators conducted this large-scale assault, concluding that a common criminal purpose to kill Tutsis at Mukarange parish existed among those coordinating the attacks, including Gatete.⁶⁰⁸

250. Gatete challenges these findings by arguing that there was no direct evidence of coordination or planning before the attack and that this was not the only reasonable inference.⁶⁰⁹ He adds that even if the attack was planned, it did not mean that he was involved in the planning or organisation.⁶¹⁰ The Appeals Chamber considers that Gatete has failed to demonstrate any error in the Trial Chamber’s reasoning in this respect. In particular, Gatete has failed to address the reasons which led the Trial Chamber to conclude that the attack must have had prior planning and coordination, including its findings that a number of officials were present to provide encouragement and direction, that the officials brought guns and weapons which were distributed and used in the attack, and that the attack was large-scale and efficiently undertaken.⁶¹¹ In light of these undisturbed findings, the Appeals Chamber considers that Gatete has failed to demonstrate that no reasonable trier of fact could have concluded that the only reasonable inference was that the attack was planned and coordinated in advance. Similarly, the Appeals Chamber dismisses Gatete’s argument that his participation in the planning and coordination of the attack was not the only reasonable inference given the finding that he was among the authorities who brought the weapons and that he directed the *Interahamwe* to start the killings. Accordingly, the Appeals Chamber finds

⁶⁰² Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰³ Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰⁴ Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰⁵ Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰⁶ Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰⁷ Trial Judgement, para. 602. See also Trial Judgement, para. 417.

⁶⁰⁸ Trial Judgement, para. 605.

⁶⁰⁹ Gatete Appeal Brief, para. 265, referring to Gatete Appeal Brief, Section 4.2.2.3.

⁶¹⁰ Gatete Appeal Brief, para. 296.

⁶¹¹ Trial Judgement, paras. 604, 605.

that Gatete has failed to show that the Trial Chamber erred in concluding that the common criminal purpose element of joint criminal enterprise was fulfilled.

251. In light of the foregoing, the Appeals Chamber finds that Gatete has failed to demonstrate that the Trial Chamber erred in concluding that he participated in a joint criminal enterprise to kill the Tutsis at Mukarange parish on 12 April 1994.

4. Conclusion

252. The Appeals Chamber finds that Gatete has failed to demonstrate any error in the Trial Chamber's finding that he was responsible for having participated in the killings in Rwankuba sector, at Kiziguro parish, and at Mukarange parish as part of a joint criminal enterprise. Accordingly, Gatete's fourth ground of appeal is dismissed in its entirety.

IV. APPEAL OF THE PROSECUTION: CUMULATIVE CONVICTIONS

253. The Trial Chamber found Gatete criminally responsible for the crimes of genocide and conspiracy to commit genocide.⁶¹² However, having considered the issue of cumulative convictions, the Trial Chamber decided not to enter convictions for both crimes and convicted Gatete for genocide while dismissing the count of conspiracy to commit genocide.⁶¹³

254. The Prosecution submits that the Trial Chamber erred in law when it failed to enter a conviction for conspiracy to commit genocide and requests the Appeals Chamber to correct this error by entering such a conviction.⁶¹⁴ It contends that the Trial Chamber erred by failing to apply the applicable standard on cumulative convictions.⁶¹⁵ In the Prosecution's view, a proper application of the standard would have led to cumulative convictions for both conspiracy and genocide as both crimes contain materially distinct elements.⁶¹⁶

255. The Prosecution further contends that when the test on permissibility of cumulative convictions applies, it does not permit the Trial Chamber to exercise its discretion by taking into account unwarranted factors.⁶¹⁷ According to the Prosecution, the Trial Chamber erred in relying on the *Popović et al.* and *Musema* Trial Judgements not to enter convictions for conspiracy to commit genocide, as these judgements do not reflect the current jurisprudence.⁶¹⁸ Moreover, the Prosecution submits that the Trial Chamber erred by comparing the legal elements of the crime of conspiracy with the elements of the mode of liability of joint criminal enterprise as the law on cumulative convictions operates between crimes and not modes of liability.⁶¹⁹

256. Finally, the Prosecution submits that even assuming that the Trial Chamber was correct in finding that the test on permissibility of cumulative convictions was inapplicable, it should nevertheless have entered separate convictions for the crimes of genocide and conspiracy in order to fully capture Gatete's entire criminal culpability.⁶²⁰

⁶¹² Trial Judgement, paras. 594, 601, 608, 619, 625, 629, 654.

⁶¹³ Trial Judgement, paras. 654-662.

⁶¹⁴ Prosecution Notice of Appeal, paras. 3, 4; Prosecution Appeal Brief, paras. 2, 41. *See also* AT. 7 May 2012 p. 36.

⁶¹⁵ Prosecution Appeal Brief, paras. 15-29. *See also* AT. 7 May 2012 pp. 36, 37.

⁶¹⁶ Prosecution Appeal Brief, paras. 26-28. *See also* Prosecution Reply Brief, paras. 12, 13.

⁶¹⁷ Prosecution Appeal Brief, paras. 20, 30-32. *See also* Prosecution Reply Brief, para. 16. The Prosecution emphasised that where a trial chamber has exercised its discretion in the application of the test of cumulative convictions, the Appeals Chamber has held that it constitutes an error of law. *See* Prosecution Appeal Brief, para. 20. *See also* AT. 7 May 2012 pp. 36-38.

⁶¹⁸ Prosecution Appeal Brief, paras. 33-35; Prosecution Reply Brief, paras. 17, 18.

⁶¹⁹ Prosecution Appeal Brief, para. 36; Prosecution Reply Brief, para. 24; AT. 7 May 2012 pp. 38, 39, 42.

⁶²⁰ Prosecution Appeal Brief, paras. 39, 40.

257. Gatete responds that the Trial Chamber correctly applied the law by considering that the test on permissibility of cumulative convictions was not binding in the present case.⁶²¹ Gatete argues that the Trial Chamber correctly relied on the *Musema* and *Popović et al.* Trial Judgements.⁶²² Referring to the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 ("Genocide Convention"), he asserts that the crime of conspiracy is an inchoate crime intended to punish an agreement which did not yet result in genocide.⁶²³ He contends that the converse implication is that no purpose would be served by convicting an accused for the inchoate offence of conspiracy if he has already been found guilty of the substantive offence of genocide.⁶²⁴ Moreover, Gatete submits that he did not appeal the findings made in relation to conspiracy to commit genocide because this charge was dismissed, and that a new conviction entered on appeal would deny him the right to have his conviction and sentence reviewed by a higher tribunal.⁶²⁵

258. In reply, the Prosecution submits that a close reading of the *travaux préparatoires* of the Genocide Convention suggests that conspiracy to commit genocide was established as an independent and separate crime from the substantive crime of genocide.⁶²⁶ The Prosecution argues that it is only by entering convictions for both offences that the primary purpose of the Genocide Convention to prevent genocide can be realised.⁶²⁷ Finally, the Prosecution submits that it seeks only an additional conviction for which the Trial Chamber has already adjudicated Gatete's guilt.⁶²⁸

259. The Appeals Chamber observes that this is the first time that it has been called upon to adjudicate the issue of whether an accused can be convicted both of genocide and conspiracy to commit genocide.⁶²⁹ The Appeals Chamber recalls that convictions entered under different statutory

⁶²¹ Gatete Response Brief, paras. 10, 11.

⁶²² Gatete Response Brief, paras. 12-19, referring to *Musema* Trial Judgement, paras. 185-198; *Popović et al.* Trial Judgement, paras. 2117-2124, 2126, 2127.

⁶²³ Gatete Response Brief, para. 15.

⁶²⁴ Gatete Response Brief, paras. 15, 16, 18.

⁶²⁵ Gatete Response Brief, paras. 6, 7. See also AT. 7 May 2012 pp. 40, 41.

⁶²⁶ Prosecution Reply Brief, para. 22.

⁶²⁷ Prosecution Reply Brief, para. 23.

⁶²⁸ Prosecution Reply Brief, para. 6. The Prosecution also argues that Gatete cannot assert any prejudice as he had ample opportunity to challenge the Trial Chamber's findings of his guilt for conspiracy but failed to do so. See Prosecution Reply Brief, paras. 8, 9.

⁶²⁹ The Appeals Chamber notes that trial chambers have dealt with this issue in various ways, from considering that the test on permissibility of cumulative convictions was applicable to finding that it did not apply and from entering convictions on both crimes to entering a conviction on only one. See *Nzabonimana* Trial Judgement, fn. 2184 (where the trial chamber considered that it did not need to address the issue of whether cumulative convictions may be entered for conspiracy to commit genocide and genocide because the conduct that served as the basis for conspiracy to commit genocide was different from the conduct that served as the basis for genocide); *Karemura and Ngirumpatse* Trial Judgement, para. 1713 (where the trial chamber concurred with the *Musema*, *Popović et al.*, and *Gatete* trial chambers and decided not to enter a conviction of conspiracy considering the conviction of genocide); *Nyiramasuhuko et al.* Trial Judgement, paras. 5678, 5970, fn. 14634 (Nyiramasuhuko was convicted of conspiracy to commit genocide and genocide; the trial chamber considered that it did not need to address whether convictions may be entered simultaneously for conspiracy to commit genocide and for genocide because the conduct that served as the basis for

provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.⁶³⁰

260. The Appeals Chamber recalls that genocide and conspiracy to commit genocide are distinct crimes under Articles 2(3)(a) and 2(3)(b) of the Statute. As the Trial Chamber correctly observed, the crime of genocide has a materially distinct *actus reus* from the crime of conspiracy to commit genocide and both crimes are based on different underlying conduct.⁶³¹ The crime of genocide requires the commission of one of the enumerated acts in Article 2(2) of the Statute,⁶³² while the crime of conspiracy to commit genocide requires the act of entering into an agreement to commit genocide.⁶³³ The Appeals Chamber finds that the Trial Chamber did not err in concluding that the crimes are distinct and that the conduct underlying each crime is not the same.

261. The Appeals Chamber now turns to address the Prosecution's contention that the Trial Chamber erred in exercising its discretion not to enter a conviction for conspiracy to commit genocide.⁶³⁴ In this respect, the Appeals Chamber considers that a trial chamber is bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person.⁶³⁵ Accordingly, the Appeals Chamber finds, Judge Agius dissenting, that by convicting Gatete only of genocide while he was also found criminally responsible for conspiracy to commit genocide, the Trial Chamber failed to hold him responsible for the totality of his criminal conduct, which included entering into the unlawful agreement to commit genocide.

262. Turning to Gatete's reliance on the inchoate nature of the crime of conspiracy to commit genocide in support of his contention that the Trial Chamber was correct in following the approach adopted by the *Popović et al.* and *Musema* trial chambers,⁶³⁶ the Appeals Chamber finds, Judge

conspiracy to commit genocide is different from that forming the basis for genocide); *Nahimana et al.* Trial Judgement, paras. 1043, 1090 (where the trial chamber found that the test on cumulative convictions applied and that cumulative convictions were permissible as both crimes comprise materially distinct elements); *Kajelijeli* Trial Judgement, paras. 787-793, 798 (where the trial chamber noted the discrepancies between *Niyitegeka* and *Musema* Trial Judgements but did not feel called upon to express a preference as *Kajelijeli* was found not guilty of conspiracy to commit genocide); *Niyitegeka* Trial Judgement, paras. 420, 429, 480 (where the accused was convicted of both crimes); *Musema* Trial Judgement, paras. 198, 940, 941, p. 276 (where the trial chamber stated "that [it] has adopted the definition of conspiracy most favourable to *Musema*, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts" without finding the accused guilty of the crime of conspiracy to commit genocide in the absence of any evidence presented by the Prosecution); *Kambanda* Trial Judgement, paras. 3, 39, 40 (where the accused pleaded guilty to both conspiracy to commit genocide and genocide).

⁶³⁰ *Čelebići* Appeal Judgement, para. 412. See also *Ntabakuze* Appeal Judgement, para. 260; *Bagosora and Nsengiyumva* Appeal Judgement, para. 413; *Nahimana et al.* Appeal Judgement, para. 1019; *Ntakirutimana* Appeal Judgement, para. 542.

⁶³¹ See Trial Judgement, para. 654.

⁶³² *Nahimana et al.* Appeal Judgement, para. 492.

⁶³³ *Seromba* Appeal Judgement, para. 218; *Nahimana et al.* Appeal Judgement, para. 894; *Ntagerura et al.* Appeal Judgement, para. 92.

⁶³⁴ See Prosecution Appeal Brief, paras. 20, 30-32, 39, 40. See also Prosecution Reply Brief, para. 16.

⁶³⁵ Cf. *Strugar* Appeal Judgement, para. 324; *Stakić* Appeal Judgement, para. 358.

⁶³⁶ Gatete Response Brief, paras. 15, 16, 18.

Agius dissenting, that argument to be without merit. The Appeals Chamber recalls that criminalising conspiracy to commit genocide, as an inchoate crime, aims to prevent the commission of genocide.⁶³⁷ However, the Appeals Chamber considers that another reason for criminalising conspiracy to commit genocide is to punish the collaboration of a group of individuals resolved to commit genocide.⁶³⁸ The danger represented by such collaboration itself justifies the incrimination of acts of conspiracy, irrespective of whether the substantive crime of genocide has been committed. Thus, the Appeals Chamber finds, Judge Agius dissenting, that the inchoate nature of the crime of conspiracy does not obviate the need to enter a conviction for this crime when genocide has also been committed by the accused, since the crime of genocide does not punish the agreement to commit genocide.

263. Finally, the Trial Chamber inferred from the evidence establishing that Gatete participated in a joint criminal enterprise that he also entered into an agreement to commit genocide. On this basis, it found that entering a conviction for the crime of genocide would render a conviction for conspiracy redundant.⁶³⁹ The Appeals Chamber recalls that conspiracy to commit genocide is a crime under the Statute,⁶⁴⁰ while joint criminal enterprise is a form of criminal responsibility.⁶⁴¹ The Appeals Chamber considers, Judge Agius dissenting, that a comparison of the evidence underpinning these two elements is irrelevant when deciding whether convictions can be entered for both crimes of genocide and conspiracy to commit genocide, as the issue of cumulative convictions arises only between crimes.⁶⁴²

264. In light of the foregoing, the Appeals Chamber finds, Judge Agius dissenting, that the Trial Chamber erred in law by failing to enter a conviction for conspiracy to commit genocide under Count 3 of the Indictment.

⁶³⁷ See Ad Hoc Committee on Genocide, Note by the Secretariat, Economic and Social Council, E/AC.25/3, 2 April 1948, p. 8.

⁶³⁸ A reading of the *travaux préparatoires* of the Genocide Convention shows that the Committee considered that conspiracy to commit genocide must be punished both in view of the gravity of the crime of genocide and of the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons. See Ad Hoc Committee on Genocide, Report of the Committee and Draft Convention Drawn up by the Committee, Economic and Social Council, E/794, 24 May 1948, p. 20.

⁶³⁹ Trial Judgement, para. 661.

⁶⁴⁰ See Article 2(3)(b) of the Statute; *Nahimana et al.* Appeal Judgement, para. 896.

⁶⁴¹ Participation in a joint criminal enterprise is a form of committing under Article 6(1) of the Statute. See, e.g., *Nahimana et al.* Appeal Judgement, para. 478; *Ntagerura et al.* Appeal Judgement, para. 24; *Ntakirutimana* Appeal Judgement, para. 462.

⁶⁴² However, this factor may be relevant when it comes to sentencing as "a penalty must reflect the totality of the crimes committed by a person and be proportionate to both the seriousness of the crimes committed and the degree of participation of the person convicted". See *Ntakirutimana* Appeal Judgement, para. 562; *Rutaganda* Appeal Judgement, para. 591.

265. The Prosecution requests that the Appeals Chamber correct this error by entering a conviction for conspiracy to commit genocide.⁶⁴³ In response, Gatete contends that entering a new conviction on appeal would deny his right to have the conviction reviewed by a higher tribunal.⁶⁴⁴ The Appeals Chamber recalls, Judge Pocar dissenting, that it is established jurisprudence that a new conviction may be entered at the appeal stage⁶⁴⁵ and that the Trial Chamber found that the facts underpinning the elements of conspiracy to commit genocide had been proven.⁶⁴⁶ The Appeals Chamber, Judges Pocar and Agius dissenting, enters a conviction for conspiracy to commit genocide in relation to Rwankuba sector and Kiziguro and Mukarange parishes. Because the Prosecution has not sought an increase in sentence with respect to this additional conviction,⁶⁴⁷ the Appeals Chamber declines to consider any potential impact on sentencing that this new conviction might have had.⁶⁴⁸

266. Accordingly, the Appeals Chamber, Judge Pocar partially dissenting and Judge Agius dissenting, grants the Prosecution's first ground of appeal.

⁶⁴³ Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, paras. 2, 41.

⁶⁴⁴ Gatete Response Brief, para. 7. *See also* AT. 7 May 2012 pp. 40, 41.

⁶⁴⁵ *Cf. Gacumbitsi Appeal Judgement*, para. 124; *Rutaganda Appeal Judgement*, p. 168.

⁶⁴⁶ *See Trial Judgement*, paras. 619, 625, 629, 654.

⁶⁴⁷ Prosecution Notice of Appeal, fn. 4; Prosecution Reply Brief, fn. 5.

⁶⁴⁸ *Cf. Kupreškić et al. Appeal Judgement*, para. 388.

V. SENTENCING

A. ALLEGED ERRORS RELATING TO SENTENCING (GROUND 5)

267. The Trial Chamber sentenced Gatete to life imprisonment.⁶⁴⁹ In the alternative to the quashing of his convictions, Gatete submits that a reduction of sentence is warranted considering the violations of his right to a fair trial and the Trial Chamber's errors in the assessment of the aggravating factors.⁶⁵⁰ The Prosecution responds that Gatete does not show any discernible error and that, accordingly, this ground of appeal should be dismissed.⁶⁵¹

268. In addressing this ground of appeal, the Appeals Chamber bears in mind that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.⁶⁵² As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the trial chamber unless it has been shown that the trial chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.⁶⁵³

1. Implications of the Alleged Fair Trial Rights Violations

269. Gatete submits that his right to a fair trial was violated by the pre-trial delay of over seven years and the unfair conduct of the site visit,⁶⁵⁴ and that the prejudice he suffered as a result is more serious than prejudice in other cases before the Tribunal where a remedy was provided.⁶⁵⁵

270. The Prosecution responds that there is no prejudice warranting a quashing or reduction of sentence since Gatete's right to a fair trial has not been violated.⁶⁵⁶ In any event, the Prosecution contends that Gatete fails to demonstrate that his case is as serious as the other cases and therefore does not warrant a reduction of sentence.⁶⁵⁷

⁶⁴⁹ Trial Judgement, para. 683.

⁶⁵⁰ Gatete Notice of Appeal, paras. 7, 9, 31-36; Gatete Appeal Brief, paras. 57, 88, 301, 320, 321. *See also* Gatete Reply Brief, paras. 96, 98; AT. 7 May 2012 p. 5. Gatete submits that his sentence should not exceed 25 years of imprisonment. *See* Gatete Appeal Brief, paras. 301, 305, 320.

⁶⁵¹ Prosecution Response Brief, paras. 196, 197, 210.

⁶⁵² *See, e.g., Ntabakuze Appeal Judgement*, para. 264; *Kanyarukiga Appeal Judgement*, para. 270; *Hategekimana Appeal Judgement*, para. 288.

⁶⁵³ *See, e.g., Ntabakuze Appeal Judgement*, para. 264; *Kanyarukiga Appeal Judgement*, para. 270; *Hategekimana Appeal Judgement*, para. 288.

⁶⁵⁴ Gatete Notice of Appeal, paras. 3, 5, 8; Gatete Appeal Brief, paras. 302, 305.

⁶⁵⁵ Gatete Appeal Brief, paras. 303-305.

⁶⁵⁶ Prosecution Response Brief, paras. 197, 199.

⁶⁵⁷ Prosecution Response Brief, para. 200.



271. The Appeals Chamber recalls that it granted Gatete's first ground of appeal concerning his right to be tried without undue delay. The appropriate remedy to the violation of his right to be tried without undue delay will be examined below.⁶⁵⁸

2. Alleged Double-Counting of an Aggravating Factor and the Gravity of the Offence

272. When assessing the gravity of the offences, the Trial Chamber stated that it was "difficult to overemphasise the gravity of these offences which led to a loss of life on a massive scale, and caused immense suffering."⁶⁵⁹ With respect to the aggravating circumstances, the Trial Chamber found that "the number of victims of the attacks in Rwankuba sector, and at the Kiziguro and Mukarange parishes, for which Gatete is individually responsible," was one of the aggravating factors held against him.⁶⁶⁰

273. Gatete submits that the Trial Chamber erred in double-counting the number of victims as an aggravating factor.⁶⁶¹ He asserts that the Trial Chamber could not consider the number of victims both as an element of gravity of the crime and as an aggravating factor in relation to the sentence.⁶⁶²

274. The Prosecution responds that the Trial Chamber did not commit any error since the number of victims was not double-counted in any way.⁶⁶³ It argues that the Trial Chamber did not rely on the number of victims as an aspect of the gravity of the crime.⁶⁶⁴

275. The Appeals Chamber recalls that it is well established that "factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances and *vice versa*".⁶⁶⁵ Since the Trial Chamber considered the number of victims when it assessed the gravity of the offences for which Gatete was convicted when it referred to the "loss of life on a massive scale",⁶⁶⁶ this same factor could not be taken into consideration as an aggravating factor.⁶⁶⁷ For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred by considering the same factor in assessing the gravity of the offences and as a separate aggravating factor.

⁶⁵⁸ See *infra*, Section V.B.

⁶⁵⁹ Trial Judgement, para. 675.

⁶⁶⁰ Trial Judgement, para. 679.

⁶⁶¹ Gatete Notice of Appeal, para. 31; Gatete Appeal Brief, paras. 306-312.

⁶⁶² Gatete Appeal Brief, paras. 306, 307, 309, citing, *inter alia*, Milošević Appeal Judgement, paras. 306-309. See also Gatete Reply Brief, paras. 90, 91.

⁶⁶³ Prosecution Response Brief, paras. 201-204; AT. 7 May 2012 pp. 27, 28.

⁶⁶⁴ Prosecution Response Brief, para. 202.

⁶⁶⁵ See Milošević Appeal Judgement, para. 306, citing Nikolić Judgement on Sentencing Appeal, para. 58; Deronjić Judgement on Sentencing Appeal, para. 106. See also Semanza Appeal Judgement, para. 338.

⁶⁶⁶ Trial Judgement, para. 675.

⁶⁶⁷ See Trial Judgement, para. 679. As a consequence, Gatete's remaining submission that the number of victims, as an element of the crime of extermination, could not be considered at the same time as an aggravating factor need not be considered. See Gatete Appeal Brief, paras. 307-309, 311.

3. Alleged Errors Relating to Other Aggravating Factors

276. In assessing the aggravating factors in determining Gatete's sentence, the Trial Chamber stated:

[...] The abuse of his general authority *vis-à-vis* the assailants who carried out the killings, is an aggravating factor. [...] Moreover, Gatete participated in the crimes with particular zeal. He was not merely present, but issued express orders to kill Tutsis, telling assailants to "work relentlessly", provided material support at massacre sites by arriving with military personnel, administrative officials, and weapons capable of killing on a mass-scale. Indeed, he ordered the killing of hundreds, if not thousands of Tutsi civilians. The lead role he took in killings through, planning and ordering, is also an aggravating factor.⁶⁶⁸

277. Gatete submits that the Trial Chamber erred when it considered the other aggravating factors since the factual findings underpinning them were not proven beyond reasonable doubt.⁶⁶⁹ In his Appeal Brief, Gatete submits that the Trial Chamber erred in considering that he participated in the crimes with particular zeal.⁶⁷⁰ In support of his allegation that there was insufficient evidence to prove that he played a lead role in planning the crimes, Gatete asserts that the Trial Chamber only pointed to his orders given to kill Tutsis and the provision of material support to the assailants.⁶⁷¹ Gatete adds that the factual findings relied upon by the Trial Chamber were insufficient to infer that he had any *de jure* or *de facto* authority over the assailants, such that he could have abused any such authority.⁶⁷²

278. The Prosecution responds that the Trial Chamber correctly and reasonably assessed all aggravating circumstances.⁶⁷³

279. With respect to the Trial Chamber's alleged error in considering Gatete's zeal as an aggravating factor, the Appeals Chamber notes that Gatete did not specifically raise this contention in his Notice of Appeal as required by Rule 108 of the Rules,⁶⁷⁴ and that the Prosecution objects to this impermissible expansion of his appeal.⁶⁷⁵ The Appeals Chamber does not find that the interests of justice require it to consider this argument.⁶⁷⁶

⁶⁶⁸ Trial Judgement, paras. 678, 680 (references omitted).

⁶⁶⁹ Gatete Notice of Appeal, paras. 33, 34; Gatete Appeal Brief, paras. 313-316, 318, 319.

⁶⁷⁰ Gatete Appeal Brief, para. 317.

⁶⁷¹ Gatete Appeal Brief, para. 315. Gatete submits that the Trial Chamber erred in imposing a life sentence based on the fact that he was one of the "planners of the genocide". See Gatete Appeal Brief, paras. 313, 315.

⁶⁷² Gatete Appeal Brief, paras. 316, 318.

⁶⁷³ Prosecution Response Brief, paras. 198, 205, 210.

⁶⁷⁴ See Gatete Notice of Appeal, paras. 31-34. The Appeals Chamber understands that Gatete's alleged error, raised in his Notice of Appeal, in convicting him for aiding and abetting and then relying on "providing material support" as an aggravating factor has been withdrawn since it is not raised in his Appeal Brief. See Gatete Notice of Appeal, para. 32.

⁶⁷⁵ Prosecution Response Brief, fn. 527. In any event, the Prosecution submits that Gatete fails to show any error in the Trial Judgement as the evidence and findings demonstrate fervour in perpetrating the crimes. See Prosecution Response Brief, para. 208.

⁶⁷⁶ Cf. *Nchamihigo* Appeal Judgement, para. 241; *Simba* Appeal Judgement, para. 319.



280. The Trial Chamber found that “[t]he lead role [that Gatete] took in [the] killings through, planning and ordering, is [...] an aggravating factor.”⁶⁷⁷ The Appeals Chamber notes that the findings referred to by Gatete in support of his argument on the insufficiency of evidence of planning were made by the Trial Chamber to show the aggravating circumstance of “particular zeal”, and not his “lead role”.⁶⁷⁸ Further, the Appeals Chamber observes it was Gatete’s lead role in the killings, and not his lead role in the planning of such killings, that the Trial Chamber took into account as an aggravating factor. By referring to planning and ordering in addressing Gatete’s lead role in the killings, the Appeals Chamber understands that the Trial Chamber was merely referring to its findings on the nature of his participation. The Appeals Chamber observes that the Trial Chamber made several findings that Gatete played a lead role in the killings.⁶⁷⁹ The Appeals Chamber recalls that Gatete’s challenges to the factual findings have been rejected under his third ground of appeal,⁶⁸⁰ and finds that it was reasonable to conclude that Gatete had a lead role in the killings. Accordingly, the Appeals Chamber finds that Gatete has failed to demonstrate a discernible error in the Trial Chamber’s consideration of Gatete’s lead role in the killings as an aggravating factor.

281. With respect to the abuse of authority as an aggravating factor, the Trial Chamber determined that Gatete was in a position of authority based on his prominent personality in Byumba and Kibungo prefectures, his former position as Murambi commune *bourgmestre*, and his position in April 1994 as a director in the Ministry of Women and Family Affairs.⁶⁸¹ The Trial Chamber concluded that Gatete abused his general authority by stating that: “in Rwankuba sector, assailants, as well as *conseiller* Bizimungu, gathered to receive instructions from him. *Interahamwe* thereafter carried out Gatete’s orders. At Kiziguro and Mukarange parishes, Gatete used his authority to ensure that hundreds and possibly thousands of assailants carried out attacks on Tutsi civilians.”⁶⁸²

282. The Appeals Chamber recalls that it is settled in the jurisprudence of the Tribunal that the abuse of a position of influence and authority in society may be taken into account as an aggravating factor in sentencing.⁶⁸³ Gatete has failed to appreciate that the Trial Chamber’s findings on his general authority are based on his prominent personality and its global assessment of his positions at the local and national levels. Accordingly, the Appeals Chamber finds that Gatete has

⁶⁷⁷ Trial Judgement, para. 680.

⁶⁷⁸ Trial Judgement, para. 680.

⁶⁷⁹ See Trial Judgement, paras. 592, 599, 603, 606.

⁶⁸⁰ See *supra*, Section III.B.

⁶⁸¹ Trial Judgement, para. 678.

⁶⁸² Trial Judgement, para. 678.

⁶⁸³ See, e.g., *Hategekimana* Appeal Judgement, para. 298; *Munyakazi* Appeal Judgement, para. 170; *Rukundo* Appeal Judgement, para. 250; *Seromba* Appeal Judgement, para. 230.

failed to demonstrate any discernible error in the Trial Chamber's consideration of Gatete's abuse of authority as an aggravating factor.

4. Conclusion

283. The Appeals Chamber finds that the Trial Chamber erred in considering the same factor in assessing the gravity of the offences and as a separate aggravating factor. The Appeals Chamber will determine below the impact of this error, if any.⁶⁸⁴ The Appeals Chamber finds that the Trial Chamber did not err in its assessment of the other aggravating factors.

B. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON SENTENCING

284. The Appeals Chamber has affirmed Gatete's convictions for genocide and extermination as a crime against humanity for the killings of Tutsis in Rwankuba sector on 7 April 1994, at Kiziguro parish on 11 April 1994, and at Mukarange parish on 12 April 1994.⁶⁸⁵ The Appeals Chamber recalls that it has declined to consider any potential impact on sentencing that the new conviction for conspiracy to commit genocide might have had.⁶⁸⁶

285. The Appeals Chamber also found that the Trial Chamber erred in considering the same factor in assessing the gravity of the offences and as a separate aggravating factor.⁶⁸⁷ The Appeals Chamber does not find that the error in double-counting the same factor results in a reduction of Gatete's overall culpability which calls for a lower sentence. Therefore, no reduction is warranted on this basis.

286. Having considered all the relevant factors, the Appeals Chamber finds that a term of life imprisonment is the appropriate sentence for Gatete in view of all the convictions that have been upheld. However, the Appeals Chamber recalls that it has found that Gatete's right to be tried without undue delay was violated and that, in this case, the extent of the pre-trial delay constituted prejudice *per se*. The Appeals Chamber recalls that any violation of a person's rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the International Covenant on Civil and Political Rights of 1966.⁶⁸⁸ It is satisfied that a term of years, being by its nature a reduced sentence from that of life imprisonment, is the appropriate remedy for the violation of Gatete's

⁶⁸⁴ See *infra*, Section V.B.

⁶⁸⁵ See *supra*, paras. 79, 227, 252.

⁶⁸⁶ See *supra*, para. 265.

⁶⁸⁷ See *supra*, para. 275.

⁶⁸⁸ International Covenant on Civil and Political Rights, 16 December 1966, entered into force on 23 March 1976.

rights.⁶⁸⁹ In determining an appropriate remedy, the Appeals Chamber recalls its finding that Gatete has failed to demonstrate that he was prejudiced in either the preparation or the presentation of his case.

287. Having considered the gravity of the crimes for which Gatete's convictions have been upheld and taking into account the violation of his rights, the Appeals Chamber sets aside Gatete's sentence of life imprisonment and concludes that his sentence should be reduced to a term of 40 years' imprisonment.

⁶⁸⁹ Cf. *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (an English translation was filed on 7 April 2000), p. 28; *Nahimana et al.* Trial Judgement, paras. 1106, 1107.

VI. DISPOSITION

288. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

SITTING in open session;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 7 May 2012;

GRANTS Ground 1 of Jean-Baptiste Gatete's appeal and **FINDS** that his right to be tried without undue delay was violated;

GRANTS, in part, Ground 5 of Jean-Baptiste Gatete's appeal and **FINDS** that the Trial Chamber erred in considering the same factor in assessing the gravity of the offences and as a separate aggravating factor;

DISMISSES Jean-Baptiste Gatete's appeal in all other aspects;

GRANTS, Judge Pocar partially dissenting and Judge Agius dissenting, the Prosecution's ground of appeal, and **ENTERS**, Judges Pocar and Agius dissenting, a conviction for conspiracy to commit genocide in relation to Rwankuba sector and Kiziguro and Mukarange parishes;

AFFIRMS Jean-Baptiste Gatete's convictions for genocide and extermination as a crime against humanity for the killings of Tutsis in Rwankuba sector on 7 April 1994, at Kiziguro parish on 11 April 1994, and at Mukarange parish on 12 April 1994;

SETS ASIDE the sentence of life imprisonment imposed on Jean-Baptiste Gatete by the Trial Chamber, and **IMPOSES** a sentence of 40 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 11 September 2002;

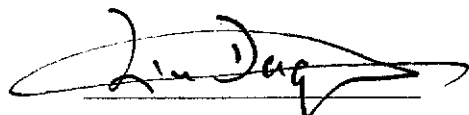
RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Jean-Baptiste Gatete is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

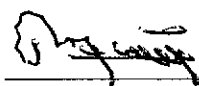
Judge Pocar appends a partially dissenting opinion.

Judge Agius appends a dissenting opinion.

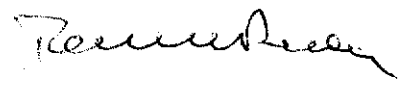
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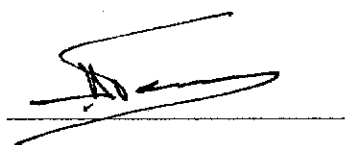
Liu Daqun
Presiding Judge



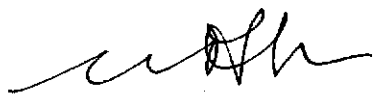
Mehmet Güney
Judge



Fausto Pocar
Judge



Andréia Vaz
Judge



Carmel Agius
Judge

Done this ninth day of October 2012 at Arusha, Tanzania.

[Seal of the Tribunal]




VII. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber, Judge Agius dissenting, allows the Prosecution's first ground of appeal, finds Gatete guilty of conspiracy to commit genocide under Article 2(3)(b) of the Statute, and enters a conviction under Count 3 of the Indictment.¹ I agree with the majority's reasoning and conclusion that the Trial Chamber committed an error in failing to find Gatete guilty of conspiracy to commit genocide under Count 3 of the Indictment.² However, I disagree with the majority's decision to enter a conviction against Gatete on appeal.³

2. For the reasons already expressed in my dissenting opinions in the *Mrkšić and Šljivančanin*,⁴ *Galić*,⁵ *Semanza*,⁶ *Rutaganda*,⁷ and *Setako*⁸ cases, I hereby reaffirm that I do not believe that the Appeals Chamber has the power to remedy an error of the Trial Chamber by subsequently entering a new conviction on appeal. The Appeals Chamber is bound to apply Article 24(2) of the Statute in compliance with fundamental principles of international human rights law as enshrined in, *inter alia*, the International Covenant on Civil and Political Rights of 1966 ("ICCPR").⁹ Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Accordingly, the right to appeal a conviction should be granted to an accused before the Tribunal in all situations. However, the new conviction imposed on Gatete on appeal denies him that right.

3. In this Judgement, the majority claims that "it is established jurisprudence that a new conviction may be entered at the appeal stage".¹⁰ However, I note that, to date, the Appeals Chamber has never explicitly addressed the basis for entering a new conviction on appeal. In fact, this issue has never been contemplated outside separate and dissenting opinions,¹¹ despite two learned colleagues warning that "the absence of any right whatsoever to appeal such a conviction, save in the case where the matter is remitted to the Trial Chamber, is likely to infringe upon the fundamental principle of fairness recognized both in international law and many national legal systems" and that "given the importance of the issue raised, it is absolutely necessary for the

¹ Appeal Judgement, paras. 264-266, 288.

² Appeal Judgement, paras. 259-264.

³ Appeal Judgement, paras. 265, 288.

⁴ *Mrkšić and Šljivančanin* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, pp. 171-177, paras. 1-13.

⁵ *Galić* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.

⁶ *Semanza* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 131-133, paras. 1-4.

⁷ *Rutaganda* Appeal Judgement, Dissenting Opinion of Judge Pocar, pp. 1-4.

⁸ *Setako* Appeal Judgement, Partially Dissenting Opinion of Judge Pocar, paras. 1-6.

⁹ International Covenant on Civil and Political Rights, 16 December 1966, entered into force on 23 March 1976.

¹⁰ Appeal Judgement, para. 265.

¹¹ The most extensive justification of the Appeals Chamber's authority to enter convictions on appeal appears in the separate opinions of Judge Shahabuddeen in the *Galić* and *Rutaganda* cases. See *Rutaganda* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, paras. 1-40; *Galić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, Separate Opinion of Judge Shahabuddeen, paras. 6-29.

Appeals Chamber to deal with it in the future, in order to find solutions consistent with fundamental principles of fairness and due process.”¹² Regrettably, the majority falls short of providing any explanation.

4. In this case, I believe that the Appeals Chamber had another avenue before it under Article 24 of the Statute. The option available to the Appeals Chamber was the one taken in the *Krstić* Appeal Judgement. In that case, the Appeals Chamber found that the trial chamber committed an error of law in disallowing the appellant’s convictions for extermination and for persecutions as crimes against humanity, on grounds that they were impermissibly cumulative with his conviction for genocide based on the same facts.¹³ However, rather than entering two new convictions on appeal against the appellant, the Appeals Chamber simply pronounced the trial chamber’s findings erroneous and, in the Disposition, noted that the trial chamber had incorrectly disallowed the convictions.¹⁴ The Appeals Chamber corrected the trial chamber’s error of law without entering a new conviction and thus, the appellant’s right to an appeal was not violated. This approach was also adopted in, *inter alia*, the *Stakić* Appeal Judgement.¹⁵ Following such an avenue is preferable when the Appeals Chamber would consider, as in the present case, that a conviction should have no impact on the sentence.¹⁶

5. In this case, the majority has not followed this approach. As stated previously, I agree that the Trial Chamber erred in law. However, I cannot agree to correct this error using an approach which, for the reasons expressed here and in my above-mentioned dissenting opinions, is also an error. Therefore, I dissent with the majority’s decision to enter a new conviction against Gatete on appeal.

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

Done this ninth day of October 2012,
at Arusha,
Tanzania.



Judge Fausto Pocar

[Seal of the Tribunal]

¹² See *Rutaganda* Appeal Judgement, Separate Opinion of Judges Meron and Jorda, p. 1.

¹³ *Krstić* Appeal Judgement, paras. 219-229.

¹⁴ *Krstić* Appeal Judgement, p. 87.

¹⁵ *Stakić* Appeal Judgement, para. 141.

¹⁶ Appeal Judgement, para. 265.

VIII. DISSENTING OPINION OF JUDGE AGIUS

1. The Trial Chamber in this case found that the evidence supported findings against Gatete in respect of the crimes of both genocide and conspiracy to commit genocide.¹ However, having considered the jurisprudence of this Tribunal and the ICTY, the Trial Chamber decided to follow the approach taken by the Trial Chambers in both the *Popović et al.* and *Musema* cases.² Accordingly, it entered a conviction against Gatete for genocide,³ but declined to enter a conviction for conspiracy to commit genocide.⁴ In this Judgement, the Appeals Chamber finds by majority that the Trial Chamber erred in law in so doing.⁵ The majority therefore allows the Prosecution's first ground of appeal and enters, Judge Pocar dissenting, a conviction against Gatete under Count 3 of the Indictment.⁶ I do not consider that the Trial Chamber committed an error in this respect, and therefore respectfully disagree with the majority's decision, for the reasons set out below.

2. At the outset, I should emphasise that I do not contest that genocide and conspiracy to commit genocide are distinct crimes under Articles 2(3)(a) and 2(3)(b) of the Statute, and also the Genocide Convention, from which those Articles are drawn.⁷ Further, I do not dispute that the crime of genocide has a materially distinct *actus reus* from the crime of conspiracy to commit genocide.⁸ In this respect, I agree with the Appeals Chamber's finding that the Trial Chamber in this case "did not err in concluding that the crimes are distinct and that the conduct underlying each crime is not the same."⁹ However, it is at this juncture that the majority and I must respectfully part ways.

3. According to the majority, a trial chamber is "bound to enter convictions for all distinct crimes which have been proven in order to fully reflect the criminality of the convicted person."¹⁰ In light of this principle, the majority finds that the Trial Chamber erred by convicting Gatete only of genocide, despite having also found him criminally responsible for conspiracy to commit genocide.¹¹ Certainly, I agree with the general principle that an accused person must be held responsible for the totality of his criminal conduct, and it follows that his convictions must fully reflect his criminality. However, I take issue with the notion that a trial chamber is bound in the

¹ Trial Judgement, paras. 594, 601, 608, 619, 625, 629, 654.

² Trial Judgement, paras. 655-661.

³ Trial Judgement, paras. 664, 668.

⁴ Trial Judgement, paras. 662, 668.

⁵ Appeal Judgement, para. 264.

⁶ Appeal Judgement, paras. 265, 266.

⁷ See Articles 3(a) and 3(b) of the Genocide Convention. See also generally Articles 2(2) and 2(3) of the Statute, which mirror Articles 2 and 3 of the Genocide Convention.

⁸ See Appeal Judgement, para. 260, fn. 632-633.

⁹ Appeal Judgement, para. 260.

¹⁰ Appeal Judgement, para. 261.



absolute manner described by the majority. In this regard, I must respectfully disagree with the jurisprudence underlying the majority's statement indicating that a trial chamber is so bound.¹² In my view, other considerations – and particularly those of fairness – must come into play in deciding whether to enter convictions for all distinct crimes which have been proven. Bearing this in mind, in the circumstances of this case I do not consider that the entering of a conviction for conspiracy to commit genocide is justified, or indeed necessary to reflect the totality of Gatete's criminal conduct. Further, in my view, the principle of fairness to the accused militates against the entering of any such conviction.

4. The unique nature of conspiracy as an inchoate crime warrants particular attention in this context. In this Judgement, the majority finds that a conviction for genocide does not obviate the need for a conviction for conspiracy to commit genocide, "since the crime of genocide does not punish the agreement to commit genocide."¹³ In support of its finding, the majority correctly recalls that the purpose of criminalising conspiracy to commit genocide is to prevent the commission of genocide.¹⁴ According to the majority, a further reason for criminalising conspiracy to commit genocide is to "punish the collaboration of a group of individuals resolved to commit genocide."¹⁵ While I have no doubt that this would indeed be a legitimate aim, or that the framers of the Genocide Convention may also have had this purpose in mind, I disagree with the majority that the "danger represented by such collaboration itself justifies the incrimination of acts of conspiracy, *irrespective of whether the substantive crime of genocide has been committed*."¹⁶

5. In my view, it is precisely the inchoate nature of conspiracy which renders the additional conviction for that crime unnecessary in circumstances where the substantive crime of genocide has been committed, and particularly where the accused's responsibility for that substantive crime is found to be based on his participation in a joint criminal enterprise. As was stated in the *Popović et al.* case, over which I presided:

Once the substantive offence is committed, the justification for punishing the prior conspiracy is less compelling. This is particularly true when proof of the substantive offence is the main piece of evidence from which an inference of a prior illegal agreement is drawn and upon which the conspiracy conviction is based.

These are the circumstances in the instant case. The Accused's participation in the [joint criminal enterprise] to Murder, with genocidal intent, forms the basis for the conviction for genocide. Similarly, the Accused's participation, along with others, in the [joint criminal enterprise] to Murder, with the same genocidal intent, are the bases from which an inference was drawn that an

¹¹ Appeal Judgement, para. 261.

¹² See Appeal Judgement, fn. 635.

¹³ Appeal Judgement, para. 262.

¹⁴ Appeal Judgement, para. 262, fn. 637. See also *Popović et al.* Trial Judgement, para. 2124, fn. 6130.

¹⁵ Appeal Judgement, para. 262, fn. 638.

¹⁶ Appeal Judgement, para. 262 (emphasis added).

agreement to commit genocide was formed. In other words, the basis for both convictions is the Accused's participation in an agreement to murder with the requisite intent.¹⁷

6. The circumstances of the present case are remarkably similar. The Trial Chamber found that Gatete participated, with the requisite genocidal intent, in a joint criminal enterprise with the common purpose of killing Tutsis in Rwankuba sector,¹⁸ at Kiziguro parish,¹⁹ and at Mukarange parish.²⁰ The Trial Chamber then inferred, from the same evidence establishing that Gatete participated in a joint criminal enterprise, that Gatete also entered an agreement to commit genocide in Rwankuba sector,²¹ and at Kiziguro²² and Mukarange²³ parishes.²⁴ Thus, the basis for both convictions lies in Gatete's participation in an agreement to kill Tutsis, with the requisite genocidal intent. In my view, therefore, the totality of Gatete's criminal conduct is already fully reflected in his conviction for genocide through participation in a joint criminal enterprise. Furthermore, Gatete's collaboration with other individuals to commit genocide has, in effect, already been punished through his conviction for genocide through participation in a joint criminal enterprise. Consequently, the purposes that would be served by entering a conviction for conspiracy to commit genocide, as set out by the majority, have already been met through Gatete's existing conviction for genocide. In these circumstances, I consider that a conviction for conspiracy to commit genocide would be redundant.

7. The majority clearly takes a different approach. In its view, entering a conviction for the crime of genocide does not render a conviction for conspiracy redundant, for two reasons: first, conspiracy to commit genocide is a crime under the Statute, while joint criminal enterprise is a form of criminal responsibility;²⁵ and secondly, a comparison of the evidence underpinning the two "is irrelevant when deciding whether convictions can be entered for both crimes of genocide and conspiracy to commit genocide, as the issue of cumulative convictions arises only between crimes."²⁶ I acknowledge that the issue of cumulative convictions arises only between crimes and that the *Čelebići* test²⁷ therefore does not apply in these circumstances, given that conspiracy to commit genocide and genocide are indeed two distinct crimes under the Statute, and that joint criminal enterprise is of course merely a mode of responsibility. Nevertheless, it is vital to recall, as

¹⁷ *Popović et al.* Trial Judgement, paras. 2124-2125.

¹⁸ Trial Judgement, paras. 585-594.

¹⁹ Trial Judgement, paras. 595-601.

²⁰ Trial Judgement, paras. 602-608.

²¹ Trial Judgement, paras. 617-619.

²² Trial Judgement, paras. 620-625.

²³ Trial Judgement, paras. 626-629.

²⁴ Trial Judgement, para. 661.

²⁵ Appeal Judgement, para. 263.

²⁶ Appeal Judgement, para. 263.

²⁷ See Appeal Judgement, para. 259, fn. 630, setting out the *Čelebići* test and relevant jurisprudence: "The Appeals Chamber recalls that convictions entered under different statutory provisions but based on the same conduct are

was done in the *Popović et al.* case, that “the fundamental principle animating the concern regarding multiple convictions for the same act is one of fairness to the accused”,²⁸ and that there is a “real risk of prejudice which lies in allowing cumulative convictions”.²⁹ It was the same principle of fairness that motivated the Trial Chamber in the earlier *Musema* case to decline – in my view, rightly so – to enter convictions both for genocide and conspiracy to commit genocide on the basis of the same acts.³⁰

8. In my opinion, this principle of fairness must apply also in the present case, where the basis for *both* convictions lies in Gatete’s participation in an agreement to kill Tutsis, with the requisite genocidal intent. In circumstances where the criminal acts giving rise to the conviction for conspiracy to commit genocide are already reflected and punished by the conviction for genocide, as is the situation here, the entering of an additional conviction for conspiracy effectively punishes the accused again for the same conduct. I am most uncomfortable with this approach. It therefore cannot be said that a comparison of the evidence underpinning both convictions is “irrelevant”. Indeed, in my view such a comparison must be undertaken and, in the circumstances of this case, can only lead to the conclusion that a conviction for conspiracy to commit genocide is duplicative and unjustified. To conclude otherwise would run counter to principles of fairness, and practicality.

9. For these reasons, I find myself unable to agree with the majority that the Trial Chamber erred in not entering a conviction against Gatete under Count 3 of the Indictment.

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

Done this ninth day of October 2012,
at Arusha,
Tanzania.



[Seal of the Tribunal]

Judge Carmel Agius

permissible only if each statutory provision involved has a materially distinct element not contained in the other.” See also *Popović et al.* Trial Judgement, para. 2111, fn. 6103.

²⁸ *Popović et al.* Trial Judgement, para. 2123, fn. 6128.

²⁹ *Popović et al.* Trial Judgement, para. 2123, fn. 6129.

³⁰ See *Musema* Trial Judgement, para. 198: “In the instant case, the Chamber has adopted the definition of conspiracy most favourable to *Musema*, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts.”

ANNEX A – PROCEDURAL HISTORY

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

A. NOTICES OF APPEAL AND BRIEFS

2. Trial Chamber III of the Tribunal rendered the judgement in this case on 29 March 2011 and issued its written Trial Judgement in English on 31 March 2011. Both parties appealed.

1. Gatete's Appeal

3. Gatete filed his initial notice of appeal on 3 May 2011.¹ On 26 May 2011, the Pre-Appeal Judge granted in part a motion filed by Gatete for an extension of time to file his briefs, and ordered him to file his appeal brief no later than 40 days from the date of the filing of the French translation of the Trial Judgement.² This translation was filed on 16 September 2011.³ On 25 October 2011, the Appeals Chamber granted a motion filed by Gatete to vary his initial notice of appeal⁴ and Gatete filed his amended notice of appeal on the same day.⁵ His confidential appeal brief was filed on 31 October 2011.⁶ The Prosecution filed its brief in response on 12 December 2011.⁷ Gatete filed his brief in reply on 27 December 2011.⁸

4. On 26 July 2011, Gatete filed a motion in order to expunge documents from the appeal case file⁹ which the Pre-Appeal Judge denied on 19 August 2011.¹⁰

¹ Notice of Appeal, 3 May 2011.

² Decision on Extension of Time Limits, 26 May 2011 ("Decision on Extension of Time Limits"). See also Appellant's Motion to Extend Time Limits, 5 May 2011; Prosecution's Response to Motion to Extend Time Limits, 16 May 2011.

³ *Jugement portant condamnation*, 16 September 2011. Gatete was provided with the French translation of the Trial Judgement on 19 September 2011.

⁴ Decision on Motion to Amend Notice of Appeal, 25 October 2011. See also Defence Urgent Motion to Amend the Notice of Appeal, 7 October 2011; Prosecution's Response to Defence Motion to Amend the Notice of Appeal, 13 October 2011; Reply to the Prosecution Response to the Defence Urgent Motion to Amend the Notice of Appeal, 17 October 2011.

⁵ Amended Notice of Appeal, 25 October 2011.

⁶ Appellant's Brief, confidential, 31 October 2011. On 2 November 2011, Gatete filed a public redacted version of his appeal brief and, on 4 November 2011, the Pre-Appeal Judge dismissed the Prosecution's request to file a public version of Gatete's appeal brief as moot. See Appellant's Brief, public version, 2 November 2011; Prosecution's Motion on the Confidential Filing of Gatete's Appellant's Brief, 2 November 2011; Decision on Prosecution's Motion on the Confidential Filing of Gatete's Appellant's Brief, 4 November 2011.

⁷ Prosecution's Respondent's Brief, 12 December 2011.

⁸ Brief in Reply, 27 December 2011.

⁹ Defence Motion to Expunge Documents from the Appeal Case File, 26 July 2011. See also Prosecution's Response to Defence Motion to Expunge Documents from the Appeal Case File, 28 July 2011.

¹⁰ Decision on Motion to Expunge Documents from the Appeal Case File, 19 August 2011.



2. Prosecution's Appeal

5. The Prosecution filed its notice of appeal on 3 May 2011¹¹ and its appellant's brief on 18 July 2011.¹² Gatete filed his brief in response on 4 November 2011.¹³ The Prosecution filed its brief in reply on 21 November 2011.¹⁴

B. ASSIGNMENT OF JUDGES

6. On 4 May 2011, the Presiding Judge of the Appeals Chamber assigned the following Judges to hear the appeal: Judge Mehmet Güney, Judge Fausto Pocar, Judge Liu Daqun, Judge Andréia Vaz, and Judge Carmel Agius.¹⁵ The Bench elected Judge Liu Daqun as Presiding Judge in this case. On 11 May 2011, Judge Liu assigned himself as the Pre-Appeal Judge.¹⁶

C. APPEAL HEARING

7. On 7 May 2012, the parties presented their oral arguments at a hearing held in Arusha, Tanzania, in accordance with the Scheduling Order of 3 April 2012.¹⁷

¹¹ Prosecution's Notice of Appeal, 3 May 2011.

¹² Prosecution's Appellant's Brief, 18 July 2011.

¹³ Gatete's Respondent's Brief, 4 November 2011. On 26 May 2011, the Pre-Appeal Judge ordered Gatete to file his response to the Prosecution's appeal brief no later than 15 days from the date of the filing of the French version of the Trial Judgement or the French version of the Prosecution appeal brief, whichever is later. *See* Decision on Extension of Time Limits, para. 10.

¹⁴ Prosecution's Brief in Reply, 21 November 2011.

¹⁵ Order Assigning Judges to a Case Before the Appeals Chamber, 4 May 2011.

¹⁶ Order Assigning a Pre-Appeal Judge, 11 May 2011.

¹⁷ Scheduling Order, 3 April 2012.

ANNEX B – CITED MATERIALS AND DEFINED TERMS

JURISPRUDENCE1. Tribunal**BAGILISHEMA, Ignace**

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 (“*Bagilishema* Appeal Judgement”).

BAGOSORA, Théoneste and NSENGIYUMVA, Anatole (“MILITARY I”)

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

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze and Anatole Nsengiyumva, Case No. ICTR-98-41-T Judgement and Sentence, 18 December 2008 (“*Bagosora et al.* Trial Judgement”).

BIKINDI, Simon

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

BIZIMUNGU, Casimir *et al.* (“GOVERNMENT II”)

The Prosecutor v. Prosper Mugiraneza, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza’s Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004.

GACUMBITSI, Sylvestre

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

GATETE, Jean-Baptiste

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-T, Judgement and Sentence, 29 March 2011 (“*Trial Judgement*”).

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-T, Decision on Site Visit to Rwanda, 17 June 2010 (“*Decision of 17 June 2010*”).

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-T, Scheduling Order for Filing of Closing Briefs, Hearing of Closing Arguments and Site Visit to Rwanda, 31 March 2010.

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-T, Decision on Defence Motion for Disclosure of Rwandan Judicial Records Pursuant to Rule 66(A)(ii) and Order to the Prosecution to Obtain Documents, 23 November 2009.

The Prosecutor v. Jean-Baptiste Gatete, Case No. ICTR-00-61-I, Decision on the Defence Request for Necessary Resources for Investigations, 2 November 2004.

HATEGEKIMANA, Ildephonse

Ildephonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 (“*Hategekimana Appeal Judgement*”).

KAJELIJELI, Juvénal

The Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement and Sentence, 1 December 2003 (“*Kajelijeli Trial Judgement*”).

KALIMANZIRA, Callixte

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

KAMBANDA, Jean

The Prosecutor v. Jean Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, 4 September 1998 (“*Kambanda Trial Judgement*”).

KAMUHANDA, Jean de Dieu

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

KANYARUKIGA, Gaspard

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-A, Judgement, 8 May 2012 (“*Kanyarukiga Appeal Judgement*”).

KAREMERA, Édouard and NGIRUMPATSE, Matthieu (“GOVERNMENT I”)

The Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse, Case No. ICTR-98-44-T, Judgement and Sentence, 2 February 2012 (“*Karemera and Ngirumpatse Trial Judgement*”).

KARERA, François

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

MUHIMANA, Mikaeli

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

MUNYAKAZI, Yussuf

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

MUSEMA, Alfred

Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 (“*Musema Appeal Judgement*”).

The Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000, ("Musema Trial Judgement").

MUVUNYI, Tharcisse

Tharcisse Muvunyi v. The Prosecutor, Case No. ICTR-00-55A-A, Judgement, 1 April 2011 ("Muvunyi Appeal Judgement of 1 April 2011").

NAHIMANA, Ferdinand et al. ("MEDIA")

Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("Nahimana et al. Appeal Judgement").

The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003, ("Nahimana et al. Trial Judgement").

Jean-Bosco Barayagwiza v. The Prosecutor, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000 (an English translation was filed on 7 April 2000).

NCHAMIHIGO, Siméon

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

NIYITEGEKA, Eliézer

Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("Niyitegeka Appeal Judgement").

The Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("Niyitegeka Trial Judgement").

NTABAKUZE, Aloys

Aloys Ntabakuze v. The Prosecutor, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 ("Ntabakuze Appeal Judgement").

NTAGERURA, André et al.

The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("Ntagerura et al. Appeal Judgement").

NTAKIRUTIMANA, Elizaphan and Gérard

The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("Ntakirutimana Appeal Judgement").

NTAWUKULILYAYO, Dominique

Dominique Ntawukulilyayo v. The Prosecutor, Case No. ICTR-05-82-A, Judgement, 14 December 2011 ("Ntawukulilyayo Appeal Judgement").



NYIRAMASUHUKE, Pauline *et al.* ("BUTARE")

The Prosecutor v. Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi and Élie Ndayambaje, Case No. ICTR-98-42-T, Judgement and Sentence, 24 June 2011 ("*Nyiramasuhuko et al.* Trial Judgement").

NZABONIMANA, Callixte

The Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Judgement and Sentence, 31 May 2012 ("*Nzabonimana* Trial Judgement").

RENZAHU, Tharcisse

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

The Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-T, Judgement and Sentence, 14 July 2009 ("*Renzaho* Trial Judgement").

RUKUNDO, Emmanuel

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

RUTAGANDA, Georges Anderson Nderubumwe

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA, Laurent

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

SEROMBA, Athanase

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

SETAKO, Ephrem

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SIMBA, Aloys

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

ZIGIRANYIRAZO, Protais

Protais Zigiranyirazo v. The Prosecutor, Case No. ICTR-01-73-A, Judgement, 16 November 2009 ("*Zigiranyirazo* Appeal Judgement").

2. International Criminal Tribunal for the Former Yugoslavia**BRĐANIN, Radoslav**

Prosecutor v. Radoslav Brdanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("Brdanin Appeal Judgement").

DELALIĆ, Zejnil et al. ("ČELEBIĆ")

Prosecutor v. Zejnil Delalić, Zdravko Mucić a.k.a. "Pavo", Hazim Delić and Esad Landžo a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("Čelebići Appeal Judgement").

DERONJIĆ, Miroslav

Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("Deronjić Judgement on Sentencing Appeal").

GALIĆ, Stanislav

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

HARADINAJ, Ramush et al.

Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("Haradinaj et al. Appeal Judgement").

KRAJIŠNIK, Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("Krajišnik Appeal Judgement").

KRSTIĆ, Radislav

Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("Krstić Appeal Judgement").

KUPREŠKIĆ, Zoran et al.

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreškić et al. Appeal Judgement").

KVOČKA, Miroslav et al.

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("Kvočka et al. Appeal Judgement").

LIMAJ, Fatmir et al.

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, 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, (“*Milošević Appeal Judgement*”).

MRKŠIĆ, Mile and ŠLJIVANČANIN, Veselin

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin Appeal Judgement*”).

NIKOLIĆ, Momir

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-A, Judgement on Sentencing Appeal, 8 March 2006 (“*Nikolić Judgement on Sentencing Appeal*”).

POPOVIĆ, Vujadin et al.

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero and Vinko Pandurević, Case No. IT-05-88-T, Judgement, 10 June 2010 (“*Popović et al. Trial Judgement*”).

STAKIĆ Milomir

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić Appeal Judgement*”).

STRUGAR, Pavle

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 (“*Strugar Appeal Judgement*”).

TADIĆ, Duško

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić Appeal Judgement*”).

VASILJEVIĆ, Mitar

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević Appeal Judgement*”).

DEFINED TERMS AND ABBREVIATIONS

AT.	Transcript from the appeal hearing in the present case
Gatete Appeal Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Appellant's Brief, public version, 2 November 2011
Gatete Closing Brief	<i>The Prosecutor v. Jean-Baptiste Gatete</i> , Case No. ICTR-00-61-T, The Closing Brief of Jean-Baptiste Gatete, confidential, 25 June 2010
Gatete Notice of Appeal	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Amended Notice of Appeal, 25 October 2011
Gatete Reply Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Brief in Reply, 27 December 2011
Gatete Response Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Gatete's Respondent's Brief, 4 November 2011
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, entered into force on 12 January 1951
Indictment	<i>The Prosecutor v. Jean-Baptiste Gatete</i> , Case No. ICTR-00-61-I, Second Amended Indictment, 7 July 2009
Practice Direction on Site Visits	Practice Direction on Site Visits, 3 May 2010
Pre-Trial Chamber	Trial Chamber I of the Tribunal
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Prosecution's Appellant's Brief, 18 July 2011
Prosecution Notice of Appeal	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Prosecution's Notice of Appeal, 3 May 2011



Prosecution Reply Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Prosecution's Brief in Reply, 21 November 2011
Prosecution Response Brief	<i>Jean-Baptiste Gatete v. The Prosecutor</i> , Case No. ICTR-00-61-A, Prosecution's Respondent's Brief, 12 December 2011
Rules	Rules of Procedure and Evidence of the Tribunal
Statute	Statute of the Tribunal established by Security Council Resolution 955 (1994)
T.	Transcript from hearings at trial in the present case.
Trial Chamber	Trial Chamber III of the Tribunal
Tribunal or ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994