taints the witness's overall credibility or that the witness was not in Mugonero in 1993 and 1994. The fact that Gérard Ntakirutimana was in the United States until March 1993 is of little significance as, on the basis of the evidence, the witness was present in Mugonero from early 1993 until April 1994, and could therefore have seen Gérard Ntakirutimana after March 1993.[554] It should be noted that Elizaphan Ntakirutimana does not directly address this evidence in his submissions.

337. Finally, the Appeals Chamber is of the view that the witness's use of the title "minister" when speaking of the Appellant, who was a pastor, is immaterial in showing that the witness did not know the Appellant.

(e) Witness Coaching

338. The Appellant submits that there are too many inconsistencies and discrepancies in the witness's prior statements to repeat in full, but that their frequency and nature reveal fabrication and coaching.[555]

339. The Appellant's arguments on this point are unsubstantiated and are accordingly rejected.

3. Muyira Hill – Ku Cyapa (Witness SS)

340. With respect to events at Ku Cyapa near Muyira Hill, the Trial Chamber found, on the basis of the sole testimony of Witness SS, that:

> ... one day in May or June the Accused was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers. The Chamber is convinced that the Accused was part of a convoy which included attackers. The evidence establishes that these attackers among others participated in the killing of a large number of Tutsi. Witness SS declared: "On that day the killings were beyond comprehension, and that is the day most people were killed."[556]

(a) Lack of Notice

341. The Appellant argues that the Trial Chamber erred in finding that he had sufficient notice of this event since it was not mentioned in the Prosecution's Closing Brief or in any detail by the witness in his previous written statement.[557]

342. The question of sufficiency of notice has been dealt with above in relation to Gérard Ntakirutimana's arguments on notice. It has been found that the failure to allege the event at Ku

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[554] T. 31 October 2001, pp. 2-16.
[555] Appeal Brief (E. Ntakirutimana), p. 50.
[556] Trial Judgement, para. 661.
[557] Appeal Brief (E. Ntakirutimana), p. 51.

Cyapa with specificity in the Bisesero Indictment was cured by subsequent information communicated to the Defence by the Prosecution.[558]

(b) Insufficiency of Evidence

343. Elizaphan Ntakirutimana contends that the Trial Chamber misapplied the burden of proof as its findings do not follow from the evidence. According to Elizaphan Ntakirutimana, the evidence of Witness SS lacks necessary details as to the road on which the witness saw the Appellant's vehicle travelling and the direction in which the vehicle was going. The Appellant adds that there is insufficient evidence to establish that the buses the witness saw not far from his vehicle were those which transported the attackers to Ku Cyapa.[559]

344. From a review of the evidence, it has not been shown that the Trial Chamber was unreasonable in concluding that the Appellant was part of a convoy of attackers at Ku Cyapa. Indeed, Witness SS testified that, at about noon on a day in May or June 1994, he saw the Appellant in his vehicle and the vehicle of Obed Ruzindana parking on the Gisovu-Gishyita road in the area of Ku Cyapa. The witness observed the Appellant from a distance of approximately 15 meters. He testified that he did not see "many other people" in the vehicles, and presumed that the persons he saw after having fled must have descended from the buses. Witness SS explained that he observed two green buses further behind with attackers aboard, driving up the hill towards Ku Cyapa. The witness immediately fled. He did not see Elizaphan Ntakirutimana again on that day. Witness SS stated that later in the day there was a massive attack in the Bisesero region. He did not see the Appellant on this occasion.[560]

345. The Trial Chamber relied on the evidence of Witness SS to convict the Elizaphan Ntakirutimana of aiding and abetting in genocide by conveying armed attackers to Bisesero.[561] The evidence of Witness SS does not establish that the Appellant participated in the attack at Bisesero, and in the view of the Appeals Chamber it is insufficient to establish that the attackers the witness saw with the Appellant were later involved in a large scale attack at Bisesero.[562] Notwithstanding, the Appeals Chamber does not find that the Trial Chamber erred when it relied on the evidence of Witness SS to the extent that, when placed in context, it was consistent with other evidence in the case that vehicles were often followed by buses with attackers.

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[558] Section II.A.1.(b).
[559] Appeal Brief (E. Ntakirutimana), pp. 51-52.
[560] T. 30 October 2001 pp. 134-138; T. 31 October 2001 pp. 124-132.
[561] Trial Judgement, paras. 827-830.
[562] T. 30 October 2001, p. 138.

4. Murambi Church (Witnesses YY, DD, GG and SS)

346. On the basis of the testimonies of Witnesses YY, DD, GG and SS, the Trial Chamber found:

> As for the involvement of Elizaphan Ntakirutimana in the removal of the church roof, the Chamber notes that Witnesses DD, GG and YY all identified him as having participated in the removal of the roof, and Witnesses DD and GG testified that he personally gave the order for the removal. Witness SS's testimony regarding his sighting of Elizaphan Ntakirutimana's vehicle supports the other witnesses' testimonies. Witnesses GG and YY testified that the church was being used by Tutsi refugees as a shelter, and Witness DD testified that he was himself seeking refuge in the church at the time. The witnesses concur that this incident took place between 17 April 1994 and early May 1994. Witnesses GG and YY saw the iron sheets being removed and placed in Elizaphan Ntakirutimana's car while Witness DD saw the sheeting being placed in one of the two cars. The Chamber finds that there is evidence, beyond a reasonable doubt, that sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, that he went to a church in Murambi where many Tutsi were seeking refuge and that he ordered attackers to destroy the roof of the church.[563]

347. As for the reasons for the removal of the Church's roof, the Trial Chamber found that this act left the Tutsis unprotected from the elements and visible to attackers, and that given the presence of the attackers "those taking part in these events, including Elizaphan Ntakirutimana, could not have had peaceful intentions". It rejected other interpretations suggested by Elizaphan Ntakirutimana of the act of removal of the roof or of the transportation of the individuals involved.[564]

348. In relation to Elizaphan Ntakirutimana's involvement in shooting refugees at the church, the Trial Chamber concluded:

> that neither the Pre-trial Brief nor Witness YY's previous statement contains any explicit allegation that Elizaphan Ntakirutimana killed persons at Murambi Church. This was first raised by Witness YY during his testimony. Consequently, the defect in the Indictment was not cured by subsequent timely notice.[565]

(a) Shooting of Refugees

349. Although not convicted of the shooting of refugees at Murambi church, the Appellant contends that the Trial Chamber erred when it concluded that, despite the fact that Witness YY was the only witness to have testified about the shooting, this did "not render his account implausible, insofar as each witness observed the scene from a different vantage point and for a different length of time".[566] The Appellant adds that the Trial Chamber's finding "questions the ability of the Trial Chamber to find facts rationally".[567]

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[563] Trial Judgement, para. 691.
[564] *Id.*, para. 693.
[565] *Id.*, para. 697.
[566] Trial Judgement, para. 687.
[567] Appeal Brief (E. Ntakirutimana), p. 54.

350. Three witnesses, namely Witnesses GG, DD and YY observed the Appellant at Murambi directing people to remove the roof sheeting. Witness SS saw the Appellant's car and observed persons remove the roof. Witnesses DD, GG and SS did not observe or testify about any shooting at the church. Their testimony was consistent that the Appellant was only involved in the removal of the roof.

351. Witness GG testified that that he was able to hear Elizaphan Ntakirutimana tell people to climb atop the church and remove the roofing. He testified that he was able to hear "everything they were saying".[568] Witness DD also saw Elizaphan Ntakirutimana at the church order people to remove the metal sheeting of the roof. According to the Trial Chamber, the witness, who had an unobstructed view of the church, "observed the entire operation". Although Witness DD testified that he left the church at the time the roof was removed, his testimony in essence is limited to the actions of Elizaphan Ntakirutimana, notably: "I saw him come up in the company of other people who came in his vehicle. He ordered them to take off the roofing sheet of the church, in his opinion, to prevent us from the rain. Then he took them away." The witness was approximately 12 metres from the church at the time of his observations. He indicated that the removal and taking away of the sheeting did not take long.[569]

352. Witness SS, from his vantage point on a small hill overlooking Murambi church, was in a position to observe individuals remove the roofing of the church, saw the Appellant's car but was not able to identify individuals.[570] Witnesses DD, GG and SS did not testify to any gunfire, or that Elizaphan Ntakirutimana and other attackers shot refugees in the Church.

353. By contrast, Witness YY testified that the shooting of the refugees occurred before the removal of the roof. The Trial Chamber found that Witness YY's account was not "implausible" as each witness "observed the scene from a different vantage point and for a different length of time".[571] Yet Witnesses DD, GG and SS who all saw the arrival of Elizaphan Ntakirutimana or of his vehicle and the removal of the roof, did not mention any shooting.

354. Witness YY first spoke of the shooting of refugees during the trial. No specific mention is made of this allegation in his previous statement, in the Indictment or in the Prosecution's Pre-Trial Brief. On the basis of the evidence, the Appeals Chamber is of the view that Witness YY's account of the shooting at the Church is irreconcilable with the evidence of Witnesses DD, GG and SS. The Trial Chamber therefore erred in reasoning that Witness YY's account was not "implausible".

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[568] T. 24 September 2001, pp. 5-7.
[569] T. 23 September 2001, pp. 120-125.
[570] T. 30 October 2001, pp. 123-125; T. 31 October 2001, pp. 103-104.
[571] Trial Judgement, para. 687.

355. However, the Appeals Chamber is not convinced by the Appellant's argument that this error calls into question the overall "ability of the Trial Chamber to find facts rationally", or that the whole fact-finding process is tainted. Although it is indeed unfortunate that the Trial Chamber referred to Witness YY's account of the events as not being "implausible", the Trial Chamber was nevertheless, very cautious in its assessment of the evidence and careful when making its findings. The Appeals Chamber, having reviewed extensively the evidence and findings of the Trial Chamber in assessing the Appellant's numerous grounds of appeal, considers that the Appellant's general proposition against the Trial Chamber, a proposition derived from a single finding of the Trial Chamber, about Witness YY, is devoid of merit.

(b) Removal of the Roof

356. The Appellant also asserts that the evidence of Witnesses DD, YY, GG and SS is insufficient evidence that he was involved in the removal of the roof of Murambi church with the intent to facilitate the killing of the refugees in the church. He suggests that there is no basis for believing that the removal of the roof would make the church a lesser hiding place and suggests that "the walls, if anything, might make it a hiding place". Elizaphan Ntakirutimana further adds that he had "the right and perhaps the duty to remove the roof, to protect church property."[572]

357. The Prosecution submits *inter alia* that the significance of the removal of the church roof cannot be viewed out of the context of frequent attacks, and that it was clearly one in a series of acts intended to worsen the conditions of the refugees, thereby weakening their resolve against further attacks.[573]

358. The evidence before the Trial Chamber established beyond reasonable doubt that the Appellant and others removed the roofing of the church. The Appeals Chamber has reviewed the testimony of Witnesses DD, GG and SS, and finds that the Appellant has not shown that the evidence is insufficient to establish that he was involved in the removal of the Murambi Church roof.

359. The Appeals Chamber likewise finds no merit in the argument of the Appellant that the Trial Chamber erred when it found that the roof was removed so that the church could no longer be used as a hiding place and that the roof was removed with the intent to facilitate the killing. The Trial Chamber's finding was made not in the abstract but on the basis of a number of factors, including the context of the events, the witness's description of "approaching attackers", and that

[572] Appeal Brief (E. Ntakirutimana), p. 55.
[573] Prosecution Response, paras. 5.280-5.286.

Interahamwe armed with machetes were aboard the Appellant's vehicle.[574] Moreover, the Appeals Chamber notes that, by the end of April 1994, killings against Tutsis had already commenced in the region. For instance, the attack at the Mugonero Complex occurred on 16 April 1994. Placed in the context of the then prevailing massacres against the Tutsi, the Trial Chamber reasonably inferred that the removal of the roof was intended to deprive the Tutsi of hiding places and to facilitate their killing.

D. Lack of Intent to Commit Genocide

360. Elizaphan Ntakirutimana challenges the findings of the Trial Chamber that the Appellants participated in the attacks at Bisesero with the intent to commit genocide. Specific reference is made to the conclusions of the Trial Chamber in paragraphs 826 and 830 of the Trial Judgement:

> 826. In Section II.4 above, the Chamber found that a large number of men, women and children, who were predominantly Tutsi, sought refuge in the area of Bisesero from April through June 1994, where there was widespread violence during that period, in the form of attacks targeting this population on an almost daily basis. Witnesses heard attackers singing songs referring to the extermination of the Tutsi. The Chamber concludes that these attacks were carried out with the specific intent to destroy in whole the Tutsi population in Bisesero, for the sole reason of its ethnicity.[575]

> 830. From his presence and participation in attacks in Bisesero, from the fact that at certain occasions, he was present when attackers he had conveyed set upon chasing Tutsi refugees nearby, singing songs about exterminating the Tutsi, Elizaphan Ntakirutimana knew that Tutsi in particular were being targeted for attack, and that by transporting armed attackers to Bisesero and pointing out Tutsi refugees to the attackers, he would be assisting in the killing of the Tutsi in Bisesero. The Chamber has also taken into account his act of conveying to the Mugonero Complex attackers who proceeded to kill Tutsi. Having considered all the evidence, the Chamber finds that Elizaphan Ntakirutimana had the requisite intent to commit genocide, that is, the intent to destroy, in whole, the Tutsi ethnic group.

361. According to Elizaphan Ntakirutimana, the record does not support the Trial Chamber's finding that the Appellants possessed the intent necessary to commit genocide, and contends that the Trial Chamber failed to make factual findings or provide supportive analysis of intent. Elizaphan Ntakirutimana also notes that the Trial Chamber omitted "in part" from its definition of intent, thus requiring a showing of an " intent to destroy, in whole, the Tutsi ethnic group".[576]

362. Elizaphan Ntakirutimana contends that the Trial Chamber did not make factual findings or "supportive analysis" of the Appellants' intent.[577] This contention is meritless. The Appeals Chamber notes that in paragraph 828 of the Trial Judgement, the Trial Chamber outlined the factual findings which led it to conclude, in paragraph 830, that Elizaphan Ntakirutimana had the requisite genocidal intent. Similarly, prior to finding that Gérard Ntakirutimana had the specific intent to

[574] Trial Judgement, para. 693.
[575] Internal reference omitted.
[576] Appeal Brief (E. Ntakirutimana), pp. 57-59.

commit genocide, the Trial Chamber recalled in detail the factual findings upon which this conclusion was based.[578] Consequently, it cannot be said that the Trial Chamber failed to make and analyze factual findings in respect of the Appellants' intent relating to the genocide charge in the Bisesero Indictment.

363. Elizaphan Ntakirutimana submits that the evidence established that the Appellants did not have the intent to destroy Tutsi "solely" because of their ethnicity.[579] As stated above, the definition of the crime of genocide in Article 2 of the Statute, which mirrors the definition set out in the Genocide Convention, does not require that the intent to destroy a group be based solely on one of the enumerated grounds of nationality, ethnicity, race, or religion.[580]

364. In considering whether a perpetrator had the requisite *mens rea*, regard must be had to his mode of participation in the given crime. Under the Bisesero Indictment, Elizaphan Ntakirutimana was convicted of aiding and abetting genocide while Gérard Ntakirutimana was convicted of committing genocide.[581] The requisite *mens rea* for aiding and abetting genocide is the accomplice's knowledge of the genocidal intent of the principal perpetrators.[582] From the evidence, the Trial Chamber found that the attackers in Bisesero had the specific genocidal intent.[583] Furthermore, in the view of the Appeals Chamber, it is clear that Elizaphan Ntakirutimana knew of this intent. The Trial Chamber found that Elizaphan Ntakirutimana was present during several attacks on refugees in Bisesero, including situations where the armed attackers sang: "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests", and "Let us exterminate them", while chasing and killing Tutsis.[584] It is from this, as well as from his transporting the armed attackers and directing them toward fleeing Tutsi refugees that the Trial Chamber found that Elizaphan Ntakirutimana had the requisite intent to commit genocide, convicting him of aiding and abetting genocide. In the view of the Appeals Chamber, it is not necessary to consider whether the Trial Chamber correctly concluded that Elizaphan Ntakirutimana had the specific intent to commit genocide, given that it convicted him not of committing that crime, but rather of aiding and abetting genocide, a mode of criminal participation which does not require the specific intent. The Appeals Chamber finds that Elizaphan Ntakirutimana knew of the genocidal intent of the attackers whom he aided and abetted in the perpetration of genocide in Bisesero and, therefore, that he possessed the requisite *mens rea* for that crime.

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[577] *Id.*, p. 58.
[578] Trial Judgement, paras. 832-834.
[579] Appeal Brief (E. Ntakirutimana), p. 59.
[580] *See supra* Section III B. *See also Niyitegeka* Appeal Judgement, para. 53.
[581] *See* Trial Judgement, paras. 831, 836.
[582] *See infra* Section V. D.; *Krstić* Appeal Judgement, para. 140.
[583] Trial Judgement, para. 826.
[584] *Id.*, para. 828.

365. The Appeals Chamber also finds no error in the Trial Chamber's conclusion that Gérard Ntakirutimana had the specific intent required to sustain his genocide conviction. In determining whether Gérard Ntakirutimana had the specific genocidal intent, the Trial Chamber properly considered his participation in numerous attacks on Tutsis, including his shooting and killing Tutsi individuals.[585] This finding is not undermined by the Trial Chamber's conclusion that Gérard Ntakirutimana had the specific intent to destroy the Tutsi ethnic group "in whole", rather than "in whole or in part" as Article 2 of the Statute prescribes. The record shows that Gérard Ntakirutimana possessed the requisite *mens rea* for committing the crime of genocide.

366. Accordingly, this ground of appeal is dismissed.

E. Aiding and Abetting Genocide

367. Elizaphan Ntakirutimana argues that aiding and abetting genocide was not included in the Genocide Convention and is not punishable under the Genocide Convention or Article 6(1) of the Statute of the Tribunal. According to the Appellant, the phrase "or otherwise aided and abetted" in Article 6(1) of the Statute relates only to common crimes, such as murder and rape, as included in Articles 3 (Crimes against Humanity) and Article 4 (War Crimes) of the Statute, of which aiding and abetting is "a frequent part".[586]

368. Elizaphan Ntakirutimana notes that Article 2 of the Statute (which reproduces Articles 2 and 3 of the Genocide Convention) includes in the acts punishable as genocide conspiracy, complicity, incitement, attempt to commit genocide and complicity in genocide, but not aiding and abetting. By contrast, neither Article 2 nor Article 4 addresses conspiracy or accessory liability, and it was thus necessary to supplement these articles with Article 6(1) of the Statute. The Appellant concludes that the Security Council had no power to enact or modify the Genocide Convention "or to create a criminal code" by adding aiding and abetting to acts punishable under Article 2 of the Statute.[587]

369. The Prosecution responds that this argument was not raised in the Notice of Appeal, is vague and not in conformity with the Practice Direction on Formal Requirements for Appeals from Judgement, and cannot be raised for the first time in the Appeal Brief. The Prosecution submits that the argument should be dismissed without consideration.[588]

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[585] Trial Judgement, paras. 832-834.
[586] Appeal Brief (E. Ntakirutimana), p. 35.
[587] *Id.*, pp. 35-36. In support of his arguments, the Appellant refers generally to "opinions" in *Kayishema and Ruzindana* and *Akayesu*, without providing any specific references.
[588] Prosecution Response, para. 5.326.

370. The Appeals Chamber notes that the Prosecution correctly points out that the present argument was not raised in the Notice of Appeal. The Practice Direction on Formal Requirements for Appeals from Judgement requires an appellant to present in the Notice of Appeal the grounds of appeal, clearly specifying

(i) any alleged error on a question of law invalidating the decision, and/or

(ii) any alleged error of fact which has occasioned a miscarriage of justice;

(iii) an identification of the finding or ruling challenged in the judgement, with specific reference to the page number and paragraph number;

(iv) an identification of any other order, decision or ruling challenged, with specific reference to the date of its filing, and/or transcript page;

(v) if relevant, the overall relief sought.[589]

In accordance with the Practice Direction, the Appeals Chamber may dismiss submissions that do not comply with the prescribed requirements.[590]

371. In addition to Elizaphan Ntakirutimana's failure to properly raise this ground of appeal in the Notice of Appeal, the Appeals Chamber notes that the present submission lacks merit. In essence, the Appellant argues that he could not have been charged and convicted of aiding and abetting genocide because aiding and abetting was not included in the Genocide Convention and is therefore not an act punishable under the Convention or under Article 6(1) of the Statute. The Appeals Chamber does not subscribe to such an interpretation of the Convention or the Statute. As recently held in the *Krstić* Appeal Judgement, the prohibited act of complicity in genocide, which is included in the Genocide Convention and in Article 2 of the Statute, encompasses aiding and abetting.[591] Moreover, Article 6(1) of the Statute expressly provides that a person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Accordingly, liability for the crime of genocide, as defined in Article 2 of the Statute, may attach on grounds of conduct characterized as aiding and abetting.[592]

372. Consequently, this ground of appeal is dismissed.

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[589] Practice Direction on Formal Requirements for Appeals from Judgement, para. 1(c).
[590] *See id.*, para. 13.
[591] *Krstić* Appeal Judgement, paras. 138, 139.
[592] *Id.*, para. 139.

F. Lack of Credibility in the Prosecution Case

373. Elizaphan Ntakirutimana submits that after an analysis of all the inconsistencies, revised testimony, falsity and prejudicial motivations reviewed in the Appellants' briefs, it becomes clear that the Prosecution case was not credible. Elizaphan Ntakirutimana reiterates the legal errors that the Trial Chamber is said to have committed, and notes *inter alia*:

> (i) that Witness QQ's evidence as to the number of bodies and mass graves at Mugonero and the church office is highly questionable;[593]
>
> (ii) that the Trial Chamber must deal seriously with the number of dead and body counts at Mugonero and elsewhere in Rwanda from 1994;[594]
>
> (iii) that the Trial Chamber failed to find a single witness unreliable yet unjustifiably disposed of the alibi evidence;[595] and
>
> (iv) that the Defence had presented compelling testimony of a political campaign against the Appellants, with certain witnesses, namely YY, KK and UU, having participated in activities of the Rwandan Patriotic Front and Rwandan Patriotic Army.[596]

374. Elizaphan Ntakirutimana claims that a lack of credibility on the part of all Prosecution witnesses raised a reasonable doubt as to the Trial Chamber's findings.[597] Elizaphan Ntakirutimana specifically criticizes the Trial Chamber's reliance on Prosecution Witnesses QQ,[598] KK[599] and UU,[600] none of whom Elizaphan Ntakirutimana considers credible. In support of these allegations, Elizaphan Ntakirutimana cites several instances of inconsistency between the testimonies of different witnesses and between these witnesses' testimonies and their pre-trial statements. In summary, Elizaphan Ntakirutimana argues that the Prosecution's case as a whole was "not credible."[601]

375. The Appeals Chamber points out the exceedingly broad and non-specific nature of this element of the Appeal. As elsewhere in the Appeal, Elizaphan Ntakirutimana here attempts to discredit the entire trial proceedings in this case in the span of a few pages. To the extent that

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[593] Appeal Brief (E. Ntakirutimana), pp. 60-61.
[594] *Id.*, p. 61.
[595] *Id.*
[596] *Id.*, pp. 61-62.
[597] *Id.*, p. 59.
[598] *Id.*, pp. 60-61.
[599] *Id.*, p. 62.
[600] *Id.*
[601] *Id.*, p. 59.

Elizaphan Ntakirutimana has cited specific alleged errors in credibility, the Appeals Chamber addresses them below.

376. Elizaphan Ntakirutimana alleges that Witness QQ's testimony with regards to the number killed at Mugonero was not credible.[602] He points out that there were discrepancies between QQ's pre-trial statement and his trial testimony. However, the Trial Chamber took this and other inconsistencies regarding estimates of the number killed into account when making its findings. The Trial Chamber stated that it was not convinced by Witness QQ's estimate because the witness "was a lay person with no claimed expertise in ... distinguishing and counting victims on the basis of their decomposed remains" and because QQ's estimates "appear to be based on the number of coffins used and, more critically, on the number of people required to lift a coffin after it had been filled."[603] The Trial Chamber nevertheless emphasized that Witness QQ's evidence did establish the existence of mass graves and a large number of skeletons at Mugonero Complex.[604] Relying on that evidence and the evidence provided by other witnesses, the Trial Chamber found that the attack of 16 April 1994 resulted in hundreds of dead and a large number of wounded, thereby establishing the allegations in paragraph 4.9 of the Indictment.[605] The Appeals Chamber cannot find any error in this finding or in the Trial Chamber's treatment of Witness QQ's evidence.

377. Elizaphan Ntakirutimana further alleges that the Trial Chamber "did not find a single Prosecution witness unreliable," but "disposed of all the alibi testimony" of the Appellants.[606] The Appeals Chamber notes that the Trial Chamber time and again exercised caution in weighing witness testimony.[607] During the trial, both the Prosecution and the Defence had every opportunity to cross-examine witnesses, and the Trial Chamber took into account the totality of witness testimony, as well as challenges from both opposing parties, in assessing witness credibility. In its Judgement, the Trial Chamber extensively reviewed the testimony of each witness, and provided extended reasons when determining the reliability and credibility of individual witnesses. Thus, the Trial Chamber addressed this issue and Elizaphan Ntakirutimana raises no doubts as to the reasonability of its findings. Accordingly Elizaphan Ntakirutimana has not shown that the Trial Chamber erred in this regard.

378. Elizaphan Ntakirutimana specifically challenges the credibility of Witness KK.[608] The Appeals Chamber notes that the Trial Chamber approached Witness KK's testimony with extreme

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[602] *Id.*, p. 60.
[603] Trial Judgement, n. 477.
[604] *Id.*
[605] Trial Judgement, para. 337.
[606] Appeal Brief (E. Ntakirutimana), p. 61.
[607] *See, e.g.*, Trial Judgement, paras. 151, 360, 421, 429, 548.
[608] Appeal Brief (E. Ntakirutimana), p. 62.

caution, going so far as to state "[the Trial Chamber] will not place great weight on Witness KK's testimony because of doubts created by the discrepancies between the testimony and his previous statement".[609] Elizaphan Ntakirutimana does no more here than indicate a discrepancy already considered by the Trial Chamber. No new element is presented and the Appellant does not raise any doubt as to the reasonability of the Trial Chamber's findings. This contention is therefore without merit.

379. Elizaphan Ntakirutimana attempts to introduce new evidence in order to discredit Witness UU.[610] The Appeals Chamber recalls that there is a settled procedure for the introduction of additional evidence on appeal.[611] The procedure was not followed here. The Appeals Chamber will therefore not consider the new evidence sought to be introduced by the Appellant.

380. As to the contention that there existed a "political campaign" against the Appellants, this is addressed below.[612]

G. Failure of the Prosecution to Provide Notice

381. Elizaphan Ntakirutimana asserts that, as a rule, the Prosecution failed to give the Defence notice of the acts with which the Appellants were charged, and that as a result the Appellants should not have been tried for acts where notice was not provided. [613] The Appeals Chamber, has already addressed this issue above.[614]

H. Defence Testimony Raised a Reasonable Doubt

1. Mugonero Complex: 16 April 1994

382. Regarding the events on the morning of 16 April 1994, Elizaphan Ntakirutimana submits that the alibi of the Appellants is confirmed by the witness statement of Rachel Germaine.[615] He submits that the claims that he conveyed attackers to the Mugonero Complex have been "devastated" by the Trial Chamber's findings, concessions of the Prosecution, and the alibi evidence.[616]

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[609] Trial Judgement, para. 267.
[610] Appeal Brief (E. Ntakirutimana), p. 62.
[611] ICTR Rules, Rule 115.
[612] *See infra* Section V.
[613] Appeal Brief (E. Ntakirutimana), pp. 63-64.
[614] *See supra* Sections II.A.(b) and III. C.
[615] Exhibit No. P43B.
[616] Appeal Brief (E. Ntakirutimana), pp. 64-66.

383. These arguments have been rendered moot in light of the Appeals Chamber's findings on the lack of notice for the allegation that Elizaphan Ntakirutimana conveyed attackers to the Mugonero Complex on 16 April 1994.

2. Gishyita: From 16 April 1994 to End of April or Beginning May 1994

384. Elizaphan Ntakirutimana asserts that the Trial Chamber had no basis on which to find that the alibi witnesses fabricated their evidence so as to assist the Appellants.[617] Elizaphan Ntakirutimana refers specifically to paragraph 467 of the Judgement which reads in part as follows:

> All the alibi witnesses were friends or acquaintances of the Accused, and the Chamber believes that there was a degree of fabrication on the part of most of these witnesses in an endeavour to assist the Accused.

385. The Appeals Chamber notes that the Trial Chamber did not hold that "all eight alibi witnesses (4, 5, 6, 7, 12, 16 and 32, and Royisi Nyirahakizimana) had fabricated their evidence," as alleged by Elizaphan Ntakirutimana in his Appeal Brief.[618] Instead, the Trial Chamber noted its general view that there was "*a degree of* fabrication on the part of *most* of these witnesses...."[619] However, this does not appear to have been the reason for finding that the alibi evidence did not create a reasonable possibility that the Appellants were not at the locations in Murambi and Bisesero where Prosecution witnesses testified to having seen them during that period. The Trial Chamber evaluated separately the testimony of each Defence witness relating to the Gishyita period of the alibi and then considered whether the evidence as a whole created an alibi for the Appellants. The Trial Chamber found that the alibi witnesses' evidence did not create a reasonable possibility that the Appellants never left Gishyita during the period in question.[620] In the view of the Appeals Chamber, neither this finding nor the approach employed by the Trial Chamber to reach it has been shown to be erroneous.

3. Return to Mugonero: End of April to Mid-July 1994

386. Elizaphan Ntakirutimana submits that thirteen Defence witnesses and the Appellants gave evidence in support of the alibi during the period he is said to have travelled almost daily to Bisesero to participate in attacks. He contends that the Trial Chamber disregarded Defence witnesses' evidence because it was either not significant or exaggerated, yet accepted "exaggerated, improbable and unbelievable" testimony presented by Prosecution witnesses. Elizaphan Ntakirutimana additionally contends that, in evaluating the alibi, the Trial Chamber placed undue

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[617] *Id.*, pp. 69-70.
[618] *Id.*, p. 70.
[619] Trial Judgement, para. 467 (emphasis added).
[620] *Id.*, paras. 469-480.

emphasis on the need for a precise accounting of the time. In conclusion, he asserts that if Defence evidence taken with all the evidence in the case succeeds in raising a reasonable doubt as to his guilt then he must be acquitted.[621]

387. With regard to alibi evidence for the period from the end of April to mid-July 1994, the Trial Chamber evaluated separately the testimony of each Defence witness and then considered whether the evidence as a whole created an alibi for the Appellants. The Trial Chamber has held that the Defence witnesses' evidence for this period did not create a reasonable possibility that the Appellants were not at locations outside Mugonero as alleged by Prosecution witnesses.[622]

388. The Defence sought to establish that the daily routine of the Appellants was comprised of a rigid pattern of work and church. However, most of the thirteen witnesses, though testifying that they saw the Appellants on a frequent or daily basis, indicated in their testimonies that there were exceptions and deviations from this pattern. The Trial Chamber has found that the testimonies of the Defence witnesses drew a picture, in accordance with which the Appellants "were at their respective workplaces on weekdays, and at church on Saturday – except when they were not."[623] This is a reasonable assessment of the record.

389. In the view of the Appeals Chamber, it has not been shown that the Trial Chamber erred in assessing whether the alibi evidence created a reasonable possibility that the Appellants were not at the locations outside Mugonero as alleged by the Prosecution witnesses or that the Trial Chamber failed to assess this evidence even-handedly.

4. Error of Law by Drawing an Adverse Inference

390. Elizaphan Ntakirutimana contends that the Trial Chamber erred in law by drawing an adverse inference from the fact that the Appellants testified at the end of their trial.[624] Elizaphan Ntakirutimana submits that such inference is without foundation and necessarily implies that the Trial Chamber was of the view that the Appellants fabricated their evidence, thereby undermining their credibility. Elizaphan Ntakirutimana contends that this legal error resulted in a miscarriage of justice with respect to all the charges because the Appellants' evidence was not fairly evaluated.[625]

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[621] Appeal Brief (E. Ntakirutimana), pp. 70-72.
[622] Trial Judgement, paras. 481-530.
[623] *Id.*, para. 519.
[624] Appeal Brief (E. Ntakirutimana), pp. 72-73.
[625] *Id.*

391. In assessing evidence, a trier of fact is required to determine its overall reliability and credibility.[626] Writing about a Trial Chamber's assessment of documentary evidence tendered by an accused in support of his alibi, the Appeals Chamber in *Musema* stated the following:

> It is correct to state that the sole fact that evidence is proffered by the accused is no reason to find that it is, *ipso facto*, less reliable. Nevertheless, the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document. Where such a document is tendered by an accused, a Trial Chamber may determine, for example, if the accused had the opportunity to concoct the evidence presented and whether or not he or she had cause to do so. This is part of the Trial Chamber's duty to assess the evidence before it.[627]

392. In the present case the Trial Chamber made the following general observation:

> The Chamber also notes that the two Accused chose to testify at the very end of the case, and thus did so with the benefit of having heard the evidence presented by the other Defence witnesses. The Chamber has taken this factor into account in considering the weight to be accorded to the evidence given by the Accused.[628]

393. The Appeals Chamber finds no error in such an approach. In weighing evidence, a trial chamber, must consider, *inter alia*, the context in which it was given, including, in respect of testimony, whether it was given with the benefit of having heard other evidence in the case. When an accused testifies in support of his or her alibi after having heard other alibi evidence, a trial chamber is obligated to take this into account when assessing the weight to be given to such testimony. Along this line, the ICTY Appeals Chamber stated the following during contempt proceedings against Mr. Vujin, a former counsel:

> The Appeals Chamber also considers it right to say to Mr. Vujin that in case he decides to testify not at the beginning but at some later stage, then the Appeals Chamber, in evaluating his evidence, would have to take into account the fact that he had listened to the testimony given by all the Defence witnesses.[629]

394. Accordingly, the appeal on this point is dismissed.

5. Alibi of Gérard Ntakirutimana for the Morning of 16 April 1994

395. The last allegation Elizaphan Ntakirutimana makes with regards to the 16 April 1994 findings is that the Trial Chamber shifted the burden of proof in assessing Gérard Ntakirutimana's alibi for that morning. This is merely a repetition of an identical allegation made in Gérard Ntakirutimana's Appeal Brief.[630] Elizaphan Ntakirutimana does, however, add one specific

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[626] *Musema* Appeal Judgement, para. 50.
[627] *Id.*
[628] Trial Judgement, para. 467. *See also id.* para. 508.
[629] *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujic, 31 January 2000, para. 129 ("The Respondent had been told by the Appeals Chamber that, in evaluating his evidence if it were given after that of his own witnesses, it would take into account the fact that he had heard that evidence before giving his own."); T. 9 September 1999, p. 1373.
[630] *See* Appeal Brief (G. Ntakirutimana), para. 29(a).

allegation, namely that the Trial Chamber failed to acknowledge testimony by Prosecution Witnesses XX and GG, which, in his view, tend to provide Gérard Ntakirutimana with an alibi.

396. The Appellant does not provide sufficient detail to enable the Appeals Chamber to consider his contention that the Trial Chamber failed to acknowledge relevant testimony of Witness GG. Elizaphan Ntakirutimana's brief states that "GG has Doctor Gerard at his father's house after the whites left...."[631] However, the transcript reference given for this quotation in the brief is for a different witness, Witness DD. As has been repeatedly stated: "In order for the Appeals Chamber to assess the appealing party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages ... to which the challenge is being made."[632] Absent a specific reference, the Appeals Chamber cannot be expected to consider the given submission.[633]

397. The Appellant also argues that the Trial Chamber failed to acknowledge the testimony of Witness XX that Gérard Ntakirutimana began staying at his father's house from 12 April 1994.[634] In the section dealing with the alleged denial of treatment of Tutsi patients, the Trial Chamber recalled the testimony of Witness XX that on 13, 14, and 15 April 1994 he did not see Gérard Ntakirutimana at the hospital and that "'it was said that he was living at his father's."[635] The Appeals Chamber finds no error in the fact that the Trial Chamber did not expressly recall this testimony later in the Judgement when discussing Gérard Ntakirutimana's alibi for 15 and 16 April, as it is clear that the Trial Chamber was aware of and has considered Witness XX's evidence. Accordingly, this ground of appeal is dismissed.

I. Failure to Consider the Appellants' Motion to Dismiss

398. The Appellants submit that the Trial Chamber erred in denying their Pre-Trial Motion to Dismiss.[636] The Motion was predicated on the following grounds: (1) that the trial would violate the fundamental rights of the Accused to present their defence and confront witnesses against them;[637] (2) that the proceedings against the Accused would violate guarantees of equal protection and prohibitions on discrimination enshrined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;[638] (3) that the proceedings would violate

[631] Appeal Brief (E. Ntakirutimana), p. 74.
[632] *Niyitegeka* Appeal Judgement, para. 10.
[633] *Id.*
[634] Appeal Brief (E. Ntakirutimana), pp. 73-74.
[635] Trial Judgement, para. 147 citing T. 22 October 2001, pp. 97-99.
[636] Appeal Brief (E. Ntakirutimana), p. 84.
[637] Motion to Dismiss, 16 February 2001, p. 13. The Appeals Chamber notes that while the original Motion was raised as a "Motion to Dismiss or, in the Alternative, Supplemental Motion for the Production and Disclosure of Evidence and Other Discovery Materials," the Appellants allege error only with regards to the Trial Chamber's rejection of "The Accused's Motion to Dismiss." (Appeal Brief (E. Ntakirutimana), p. 84.).
[638] *Id.*, p. 24.

guarantees of independence and impartiality in criminal proceedings also guaranteed by the UDHR and the ICCPR;[639] and (4) that the Charter of the United Nations does not empower the Security Council to establish a criminal court such as the Tribunal.[640]

399. The Appellants now contend that the Motion to Dismiss should be "continuously considered in light of the developing law and facts," and so should be considered anew by the Appeals Chamber despite its denial at trial.[641] However, the Appellants do not point to any area of law or specific facts that have changed significantly since trial such that renewed consideration of the Motion would be warranted. Moreover, the Appeals Chamber finds that the Trial Chamber's reasoning in the Motion was sound, and its decision to reject the Motion was in line with established jurisprudence of both the Tribunal and the ICTY. Therefore, this ground of appeal is dismissed.

[639] *Id.*, p 30.
[640] *Id.*, p. 36.
[641] Appeal Brief (E. Ntakirutimana), p 84.

IV. COMMON GROUND OF APPEAL ON THE EXISTENCE OF A POLITICAL CAMPAIGN AGAINST THE APPELLANTS

400. Elizaphan Ntakirutimana and Gérard Ntakirutimana argue that the Trial Chamber erred by not ruling that physical and testimonial evidence presented at trial demonstrated that there existed a political campaign aimed at falsely incriminating them, and that such campaign created a reasonable doubt in the case of the Prosecution.[642]

401. In support of this ground of appeal, the Appellants revisit the evidence that they presented at trial, and contend that this evidence proves the very existence of the political campaign. The Appellants rely on Exhibits 1D41A, a film narrated by a certain Assiel Kabera, and P29, a publication by *African Rights* entitled "Charge Sheet No. 3: Elizaphan Ntakirutimana",[643] as well as the testimony of Witnesses 9 and 31. The Appellants suggest that Assiel Kabera, a former Prefect of Kibuye, his brother Josue Kayijaho, IBUKA (a survivor's organisation in Rwanda) and *African Rights* campaigned to "vilify and secure the indictment of [Gérard Ntakirutimana and Elizaphan Ntakirutimana] on fabricated charges." They submit that this campaign led Prosecution Witnesses FF, GG, HH, KK, YY, SS, MM, DD, CC and II to make false allegations at trial, thereby calling into question their credibility.[644]

A. Assessment of the Appellants' Witnesses and Evidence

1. Witness 9

402. The Appellants argue that Defence Witness 9 provided incontrovertible proof of the existence of a political campaign against them. The Appellants refer to Witness 9's testimony that he saw the then Prefect Assiel Kabera, Witnesses FF and GG and others attend four closed meetings between November 1994 and March 1995 "to secure indictments against the Appellants", as well as seeing Witness FF at a public meeting during which accusations were levied against three individuals. In addition, the Appellants refer to the witness's testimony that a certain Edison Munyamulinda was allegedly beaten for failing to add his name to a list of persons who were

[642] *Id.* In the Trial Judgement, the Trial Chamber found that "the arguments advanced by the Defense under this section, taken individually or collectively, fail to create a reasonable possibility that the Accused were subject to a campaign of false incrimination, having any bearing on this case." Trial Judgement, para. 177.
[643] "Charge Sheet No. 3, Elizaphan Ntakirutimana, U. S. Supreme Court Supports Extradition to Arusha", report of African Rights, dated 1 February 2000 and tendered on 2 November 2001 as Exhibit P29.
[644] Appeal Brief (E. Ntakirutimana), p. 76.

making false accusations against Gérard Ntakirutimana. They contend that the witness's testimony is corroborated by the evidence of Witnesses QQ, and 31, and Exhibits P29 and 1D41A.[645]

403. The Trial Chamber assessed the evidence of Witness 9 at length in its Judgement. Regarding the closed meetings attended by Witnesses FF and GG and Kabera, it noted that Witness 9 did not personally know what had been discussed during the actual meetings, the witness having testified that he did not attend any of them.[646] In addition, it reasoned that meetings held during and after November 1994 were not relevant to the Appellants given that they had left Rwanda in July 1994 and that Witness 9 alleged that the objective of the meetings was to plan the arrest of people they did not like within the region.[647] Finally, the Trial Chamber considered the only evidence which may have suggested that the meetings were held to falsely accuse individuals, that of a confrontation between the witness and an individual – neither Witness FF nor GG – who, having come out of a bar, allegedly tried to obtain more beer by threatening the witness to "do what he had done to others", citing the name of Elizaphan Ntakirutimana.[648] The Appeals Chamber notes that Witness 9 testified that he did not know what the man intended to do and that the man never said what it was that he would do.[649]

404. The Trial Chamber concluded that even were these events to have occurred as described by Witness 9, "a vague suggestion of false accusation does not ... amount to a reasonable probability that the Accused was a victim of a propaganda campaign."[650]

405. The Trial Chamber also examined Witness 9's testimony that a man was assaulted for failing to make false accusations against Gérard Ntakirutimana.[651] The Trial Chamber noted however that upon cross-examination Witness 9 testified to an alternative explanation for the assault on Munyamulinda, which was not related to his refusal to accuse Gérard Ntakirutimana.[652] It added that, in any case, the incident occurred sometime in September 1994 while the meetings involving Kabera and Witnesses FF and GG did not commence until November 1994,[653] and that Munyamulinda was not a Prosecution witness. Further, the Trial Chamber noted that Witness 9

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[645] *Id.*, pp. 82-83.
[646] Trial Judgement, para. 762.
[647] *Id.*, para. 766.
[648] *Id.*, para. 761; T. 29 April 2002, pp. 86-88; T. 30 April 2002, pp. 66-69.
[649] T. 29 April 2002, p. 86; T. 30 April 2002, p. 68.
[650] Trial Judgement, para. 766. The Appeals Chamber notes that the Trial Chamber used the words "reasonable probability" rather than "reasonable possibility." However, such word choice, when viewed contextually, appears to be a merely a typographical mistake. The standard adopted and consistently applied by the Trial Chamber is one of reasonable possibility.
[651] Trial Judgement, paras. 764, 767.
[652] T. 30 April 2002, p. 69, Witness 9 testified, "Now, coming to details, the fact that he was beaten up in public, that was not told to me because I myself was present at the spot. Now, as for what he told me regarding the reason for his beating, he told me that because the person whom he had wronged had pardoned him in public, but later on he was beaten up in public using the same pretext."

never stated that Munyamulinda was pressured to make "false" accusations.[654] Accordingly, the Trial Chamber found that the assault was, at most, an isolated incident and did not create a reasonable possibility of a political campaign against the Appellants. It added moreover that no connection had been shown to exist between the assault on Munyamulinda and the Prosecution's case.[655]

406. In their submissions, the Appellants have merely restated evidence already heard by the Trial Chamber, and sought only to present their interpretation of the evidence without addressing the findings of the Trial Chamber. In light of the evidence, the Appeals Chamber is of the view that the Trial Chamber's findings are reasonable. As such, the Appeals Chamber sees no reason to disturb the findings of the Trial Chamber in relation to the evidence of Witness 9.

2. Witness 31

407. The Appellants argue that the Trial Chamber erred in ruling that the testimony of Witness 31 did not demonstrate a reasonable possibility of the existence of an organized campaign of false incrimination.[656] They claim that Witness 31 provided clear evidence linking Assiel Kabera to the creation of unsupported, politically motivated lists of alleged *génocidaires* that later led to their indictment.[657] Additionally, the Appellants point to Witness 31's testimony that Josue Kayijaho of IBUKA and Rakiya Omaar of *African Rights* visited the Minister of Justice shortly after the publication of the lists.[658] The Appellants contend that Witness 31's evidence provides a "direct link" between the *African Rights* report, Exhibit P29, the "propaganda" film, Exhibit 1D41A, and the tainted oral testimony of Witness QQ that was a direct result of these exhibits, and that it corroborated Witness 9's evidence about the meetings between Witnesses FF, GG and Kabera.[659]

408. The Appeals Chamber notes that, as with much of the Appellants' appeal on the existence of a political campaign, in their submissions on Witness 31, the Appellants again do not specifically address the findings of the Trial Chamber to show their unreasonableness. Rather, they simply recall the evidence of Witness 31 and suggest conclusions which differ from those of the Trial Chamber.

409. In considering the testimony of Witness 31, the Trial Chamber carefully reviewed the witness's evidence that, while working for the Rwandan Minister of Justice, Witness 31 handled

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[653] T. 29 April 2002, p. 119.
[654] Trial Judgement, para. 767.
[655] *Id.*
[656] Appeal Brief (E. Ntakirutimana), p. 84.
[657] *Id.*, p. 83.
[658] *Id.*, p. 84.
[659] *Id.*

files which contained lists of names received from Kabera and other persons. The Trial Chamber noted that according to the witness the lists were entitled "List of *Génocidaires*" or "Lists of people who were involved in genocide", "who killed", "who raped", "who looted", "those who ate cows", and only had basic identification of individuals. It further noted from the witness's testimony that the Minister of Justice titled the document "List of Alleged *Génocidaires*," and agreed that no charges should be included on the list, as this was the task of a prosecutor. The Trial Chamber remarked that the witness did not mention having seen the names of the Appellants on the list and did not suggest that the lists were false accusations by Kabera or anyone else.[660]

410. The Appellants have raised no new issues relating to this and fail to show that the Trial Chamber unreasonably committed an error in its findings on Witness 31. The Appeals Chamber notes that the evidence of Witness 31 does not support the Appellants' claim of the existence of a political campaign to falsely accuse them. The evidence does show that in the last quarter of 1994, the Ministry of Justice compiled a list of persons who were alleged to have committed offences during the massacres. The names of 400 persons appeared on the list, including former ministers, prefects, members of parliament and authorities. However, although Assiel Kabera provided the Ministry with details of possible suspects, the witness testified that there were many papers in addition to his on which appeared the names of possible suspects. Further, her testimony does not indicate that people on the documents had been falsely accused. More importantly, the witness did not testify to seeing the names of the Appellants.[661] In view of the facts presented, therefore, and absent convincing arguments from the Appellants, the Appeals Chamber considers that the Trial Chamber's evaluation of the lists and of Kabera's relationship to them is reasonable and need not be disturbed.

411. While the Trial Chamber did not find explicitly on the topic of Josue Kayijaho and Rakiya Omaar's purported visit to the Minister of Justice, it is reasonable to assume that the Chamber took this into account it in its overall evaluation of the political campaign. The evidence shows that the meeting lasted only long enough for Kayijaho and Omaar to greet the Minister and leave,[662] and Witness 31 does not testify to their having any known political motivation. The Appellants have simply reiterated their interpretation of the evidence, and do not present a valid challenge to the reasonability of the Trial Chamber's finding. The Appeals Chamber therefore rejects this element of their appeal.

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[660] T. 15 April 2002, pp. 76-94; Trial Judgement, paras. 769-770.
[661] *Id.*, para. 771. The Trial Chamber found "There is no indication that the list from Assiel Kabera was the product of a campaign of false incrimination; there is no evidence connecting Kabera's list to the two Accused; and there is no evidence that the compilation of lists by the Rwandan Minister of Justice in late 1994, as described by Witness 31, has somehow tainted subsequent investigations by the Prosecutor of the Tribunal."
[662] T. 15 April 2002, p. 111.

3. Film 1D41A

412. The Appellants argue that the Trial Chamber erred in failing to find that film 1D41A showed the possibility of a politically motivated campaign against them.[663] They submit that the film was vicious propaganda directed against Elizaphan Ntakirutimana.[664]

413. The Trial Chamber points out that, from the evidence of the Appellants, the film was probably taken in April 1995, although Witness 9 suggested that it may have been produced after July 1995. The Trial Chamber notes that the film opens with a narration, allegedly by Assiel Kabera, stating that Elizaphan Ntakirutimana was present during the killings at the ESI Chapel. Prosecution Witnesses FF and MM are seen speaking on the film, but the content of their statements was not made available to the Trial Chamber by the Defence.[665]

414. The Appellants' argument seems to be, first, that the film shows that Kabera intended to falsely incriminate Elizaphan Ntakirutimana, and, second, that Kabera's pronouncements would have had a far reaching effect in a Rwandan society "with an oral tradition of a simple largely illiterate population, where people often do not distinguish between what they see and what they hear and believe".[666] Yet the evidence would appear to contradict the Appellants' arguments. As the Appellants point out, neither Witness FF nor Witness MM, who appeared on the film, claimed in their witness statements or testimony that they saw either Appellant at the ESI Chapel on 16 April 1994. Although this might suggest that Kabera's statements about Elizaphan Ntakirutimana's involvement may have been untrue, it did not lead Witnesses FF and MM to subsequently incriminate Elizaphan Ntakirutimana. Additionally, as the Trial Chamber noted, Witness 9, who viewed the film prior to testifying, recalled a voice near the middle of the video stating that "Pastor Ntakirutimana had done nothing in regard to the events of 1994."[667] The Appeals Chamber agrees with the Trial Chamber, that had this film been intended to be part of a campaign of false incrimination, it would not likely have contained exculpatory statements of this kind.[668]

415. In light of the evidence, the Appeals Chamber does not view the Trial Chamber's finding that, even if Kabera made allegations against Elizaphan Ntakirutimana and asked Witness FF to speak about the attack on Mugonero, no other related evidence supports the idea that film 1D41A was part of a campaign of deceit against the Appellants, or that it tainted the Prosecution's case, to

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[663] Appeal Brief (E. Ntakirutimana), pp. 77-80, 82-84.
[664] *Id.*, p. 84.
[665] Trial Judgement, paras. 754, 772.
[666] Appeal Brief (E. Ntakirutimana), p. 78; Trial Judgement, para. 772.
[667] Trial Judgement, para. 772; T. 29 April 2002, p. 156; T. 30 April 2002, pp. 96-97.
[668] Trial Judgement, para. 772.

be unreasonable.[669] The Appellants offer no new argument to the contrary. Their contentions on this point are thus rejected.

4. African Rights Booklet P29

416. The Appellants argue that the Trial Chamber erred in failing to find a reasonable possibility of an organized smear campaign from Exhibit P29, a booklet published by *African Rights*.[670] They submit that the repeated quotes by Prosecution Witnesses FF, GG, HH, II, KK, MM, SS and YY are generally extreme and inconsistent or contradictory with their trial testimony.[671] The Appellants contend that every page of the issue concerning Elizaphan Ntakirutimana contains "obvious editorial and quoted false propaganda," and urge the Appeals Chamber to read the edition with care.[672] The Appellants finally assert impropriety and collusion in the fact that many of those interviewed by *African Rights* later became Prosecution witnesses.[673]

417. The Trial Chamber made reasonable findings on each of these issues. Noting the symptomatic nature of witness inconsistencies in Tribunal cases, the Trial Chamber maintained that the Appellants had not demonstrated how such inconsistencies, while pertaining to individual credibility, had genuine bearing on a "concerted effort to fabricate evidence against the Accused."[674] Despite the Appellants' exhortations, the Appeals Chamber will not review the trial evidence *de novo*. Even if there were some merit in the arguments of the Appellants that the contents of the report are at times extreme and inconsistent with the witnesses' subsequent testimony at trial, this alone does not establish that the Prosecution case was tainted or that the witnesses' evidence was unreliable. In the view of the Appeals Chamber, the Trial Chamber, as fact finder, made reasonable conclusions based on the evidence presented. All of the witnesses in question who the Appellant submits formed part of the political campaign and who are quoted in the report had their evidence tested by the parties and the Trial Chamber. Additionally, the Trial Chamber found that the Appellants have failed to establish in any non-speculative way how giving an interview to *African Rights* prior to testifying before the Tribunal indicates a campaign of deceit of the sort that would taint the Prosecution's case.[675] Accordingly, the Appeals Chamber considers that the Trial Chamber's findings in relation to Exhibit P 29 are reasonable.

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[669] *Id.*, para. 773.
[670] Appeal Brief (E. Ntakirutimana), p. 79.
[671] *Id.*
[672] *Id.*
[673] *Id.*, p. 80.
[674] Trial Judgement, para. 774.
[675] *Id.*

B. Appellants' Challenges to Credibility of Prosecution Witnesses

418. In addition to the argument that there existed a political campaign instigated by Assiel Kabera and others, the Appellants contend that the Trial Chamber erred in its assessment of the credibility of Prosecution witnesses. The Appellants argue that, motivated by political propaganda, Prosecution Witnesses GG, HH, KK, YY, SS, FF, MM, DD, CC and II fabricated allegations, testimony, or both.[676] The Appellants point to inconsistencies and discrepancies in the testimony of Prosecution witnesses, and submit that the Trial Chamber erred in failing to "make adverse credibility findings" regarding Prosecution witnesses and in relying on testimony given by such witnesses.[677]

419. The Appellants allege that inconsistencies in testimony of the various witnesses are evidence of political pressure on witnesses, and thus reinforce their contention of a political campaign to falsely incriminate them. Furthermore, the Appellants point to the very identities and associations of the witnesses as evidence of their political motivations. The Appellants' theory is that the Trial Chamber erred in relying on the testimony of these witnesses, whether for their alleged political motivations, or for their inconsistent testimony (in itself evidence of a political campaign, according to the Appellants).

420. As detailed below, the Appellants generally fail to show how individual discrepancies or inconsistencies in testimony prove a concerted propaganda campaign against them. While such inconsistencies may call into question the credibility of a witness's testimony, the Trial Chamber has already dealt with each of the allegations. The same can be said of links between witnesses and groups or individuals seeking indictment or prosecution of the Appellants: while probative of the credibility of a witness's testimony, and duly noted by the Trial Chamber, such alleged associations do not prove the existence of an organized political campaign against the Appellants.

421. The Appeals Chamber reviews below each of the Appellants' challenges to the credibility of said Prosecution witnesses.

1. Witness GG

422. The Appellants claim, *inter alia*, that Witness GG could not have reasonably been found credible since he had long been acquainted with Assiel Kabera.[678] The Appellants, quoting from the *African Rights* report discussed above, allege that Witness GG made false claims against Elizaphan

[676] Appeal Brief (E. Ntakirutimana), pp. 76, 79.
[677] *Id.*, p. 31.
[678] Appeal Brief (E. Ntakirutimana), pp. 8-9.

Ntakirutimana because of a desire to "destroy [the Appellant Elizaphan], whom he called 'evil'".[679] They categorize him as an "early participant" in the alleged campaign, eager to have the Appellants convicted on false testimony.[680] In addition, the Appellants submit that Witness GG had attended IBUKA meetings and talked to IBUKA representatives, although the witness denied this at trial.[681]

423. The Trial Chamber found that Witness GG knew Assiel Kabera and met with him in early 1995. However, since the Appellants presented no convincing evidence pertaining to the content of the meetings, the Trial Chamber accepted Witness GG's testimony that he and Kabera had not discussed the war.[682] Additionally, the Trial Chamber found only "limited significance" in the fact that *African Rights* interviewed Witness GG, noting that in the aftermath of the genocide, many human rights organizations interviewed survivors.[683] As the Appeals Chamber noted above, even if Witness GG's statements to *African Rights* were to be deemed questionable, this alone would not suffice to call into question his credibility. The witness's evidence was tested at trial by the parties and the Trial Chamber. The allegations of the Appellants that the witness "wanted to destroy them" as part of a political campaign, were considered by the Trial Chamber who found no basis for such claims. In the absence of any arguments from the Appellants that differ from those presented at trial, the Appeals Chamber finds the Trial Chamber's credibility evaluation of Witness GG reasonable.

2. Witness HH

424. The Appellants claim, *inter alia*, that Witness HH could not have reasonably been found credible since he first denied, then admitted to being a cousin of Assiel Kabera, with whom he met while Kabera was prefect of Kibuye.[684] The Appellants cast doubt on Witness HH's credibility by stating that he listed Josea Niyibize, a brother of Kabera, as his contact person in a 2 April 1996 witness statement.[685] They suggest that the witness was intimately involved with people who were determined to destroy the Appellants, and cite a discrepancy between the *reported* contents of an *African Rights* interview with HH and his in-court testimony as evidence in this regard.[686]

425. The Trial Chamber took into account Witness HH's inconsistent testimony regarding his relation to Kabera, noting the fact that Witness HH corrected himself under cross-examination to

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[679] *Id.*, pp. 9, 81.
[680] *Id.*, pp. 46-47.
[681] Appeal Brief (G. Ntakirutimana), paras. 112-116.
[682] Trial Judgement, para. 237; T. 25 September 2001, p. 51.
[683] Trial Judgement, para. 237.
[684] Appeal Brief (E. Ntakirutimana), p. 19.
[685] *Id.*; Appeal Brief (G. Ntakirutimana), para. 46.
[686] Appeal Brief (E. Ntakirutimana), pp. 19, 81.

state that he was related to Kabera and had known him for a long time.[687] Recalling that Kabera had been a prominent figure as prefect of Kibuye, the Chamber found no evidence suggesting that meetings between Witness HH and Kabera related to the case against the Appellants. It therefore did not find a basis for concluding that Kabera had influenced HH's witness statements or testimony.[688] Furthermore, the Trial Chamber included in its analysis the fact that Witness HH listed his cousin, a brother of Kabera and alleged member of IBUKA, as contact reference for his written statement of 2 April 1996.[689] The witness denied having knowingly communicated with either IBUKA or the RPF, and the Appellants failed to raise contrary evidence at trial.[690] In regard to the Appellants' argument that Witness HH was part of a group with *African Rights* set on destroying the Appellants, the Trial Chamber stipulated that during Witness HH's testimony, neither the Prosecution nor the Defence addressed his brief statements in *African Rights*.[691] The Trial Chamber concluded its analysis by finding "no support for the Defence contention that Witness HH was part of a political 'campaign' to falsely convict and accuse the two Accused."[692] The Appellants have raised no new arguments with regards to Witness HH's connection to a political campaign. The Appeals Chamber therefore finds the conclusions of the Trial Chamber to have been reasonable.

3. Witness KK

426. The Appellants claim, *inter alia*, that the Trial Chamber could not have reasonably found Witness KK credible due to discrepancies between statements he gave to *African Rights* and his in-court testimony.[693] Additionally, the Appellants claim impropriety in Witness KK's friendship with YY and the fact that both witnesses gave statements to *African Rights* on 17 November 1999, and gave their first statements to the Tribunal in October and November, respectively, of the same year.[694] The Appellants do not explain how these facts connect Witness KK to a political campaign.

427. The Trial Chamber extensively evaluated Witness KK's credibility and testimony.[695] It noted, generally, that the Appellants claimed the witness was not credible because of his alleged participation in a political campaign against Elizaphan Ntakirutimana and Gérard Ntakirutimana.[696] The Trial Chamber also considered the question of the time at which the witness saw Elizaphan

[687] Trial Judgement, para. 253; T. 27 September 2001, pp. 132-134.
[688] Trial Judgement, para. 253.
[689] *Id.*
[690] *Id.*
[691] *Id.*, para. 254.
[692] *Id.*
[693] Appeal Brief (E. Ntakirutimana), p. 20.
[694] *Id.*, p. 21.
[695] Trial Judgement, paras. 261-267, 544-549, 599-608.
[696] *Id.*, paras. 545, 600.

Ntakirutimana with Obed Ruzindana near the ESI Church, and found the related inconsistencies of little significance in light of the amount of time that had passed since the events.[697] Additionally, while accepting that Witness KK's testimony on this issue corroborated evidence from other witnesses, the Trial Chamber did "not place great weight on [it] because of doubts created by the discrepancies."[698] The Appellants do not here substantiate their allegation that such inconsistencies were "[lies] to destroy Pastor Ntakirutimana."[699] The Trial Chamber demonstrated that it took such allegations into consideration while evaluating Witness KK's credibility and came to a reasonable conclusion.

428. In regards to allegations of improper connections between Witness KK and Witness YY, while the Trial Chamber does not specifically address the issue, it does note that Witness KK and Witness YY listed each other as contact persons, and that Witness YY held public office at the local level and was therefore easy to contact.[700] While Elizaphan Ntakirutimana's Appeal Brief stresses the close relationship between Witness KK and Witness YY, it fails to provide any new evidence of impropriety on the part of Witness KK. Indeed, Witness KK stated at trial that he did not talk to Witness YY concerning the investigation or the Tribunal.[701] The Appellants offer no argument to the contrary, but rather rely on reiterated facts and implications. Accordingly, the Appeals Chamber does not find the Trial Chamber's assessment of Witness KK's credibility unreasonable, even in light of the Appellants' allegations of political influence or motivation.

4. Witness YY

429. The Appellants claim, *inter alia*, that the Trial Chamber erred in finding Witness YY credible.[702] They seem to allege collusion between Witnesses YY, KK and GG based on the temporal proximity with which the three witnesses gave statements to both Prosecution investigators and *African Rights*.[703] They claim that Witness YY had a politically motivated "animus and intention to destroy Pastor Ntakirutimana and Doctor Gérard" as evinced by statements to *African Rights* and that he was the leader of a second wave of political witnesses against the Appellants.[704] Finally, the Appellants cast aspersions on Witness YY, claiming he

[697] *Id.*, paras. 265-266, "The Chamber is of the view that the variation in time is of little significance (8.00 instead of 7.00-7.30 a.m.), in view of the lapse of time since the events."
[698] *Id.*, para. 267.
[699] Appeal Brief (E. Ntakirutimana), p. 21.
[700] Trial Judgement, para. 275.
[701] T. 4 October 2001, pp. 41-43.
[702] Appeal Brief (E. Ntakirutimana), p. 24.
[703] *Id.*, p. 23.
[704] *Id.*, pp. 23-24.

reserved his allegations against the Appellants for the last six lines of his witness statement with the intention of "holding his attack until the trial."[705]

430. The Trial Chamber took into account each of these allegations. As with Witness KK, the Appellants fail to bolster their claims linking Witnesses YY and KK or GG; their reliance on suggestion and implication creates neither a new nor a compelling argument. The Trial Chamber addressed the Appellants' claim that Witness YY started a "second wave of politically motivated witnesses."[706] The Trial Chamber noted the Appellants' assertion that the first evidence of a political campaign took the form of the video recording ID41A,[707] filmed on or around 16 April 1995. It then noted that Witness YY gave his statement on 25 October 1999, more than four and half years later.[708] The Appeals Chamber deems reasonable the Trial Chamber's conclusion on this matter: such an extended break between the alleged commencement of the campaign and the "second wave" of allegations is more indicative of the absence of an organized campaign than the existence of one.[709] With regards to Witness YY's previous statements, rather than viewing Witness YY's brief comments regarding Elizaphan Ntakirutimana and Gérard Ntakirutimana as indicia of animus, the Trial Chamber interpreted the last paragraph as likely evidence that Witness YY's interviewers, in conclusion, specifically asked him about the Appellants.[710] The Trial Chamber noted that were Witness YY involved in a political campaign against the Appellants, he would likely have made more damning statements about the Appellants, rather than merely describing their conduct in a cursory manner.[711] Such a conclusion is reasonable in the view of the Appeals Chamber.

5. Witness SS

431. The Appellants claim, *inter alia*, that the Trial Chamber erred in finding Witness SS credible.[712] Gérard Ntakirutimana asserts that Witness SS's awareness of Philip Gourevitch's book[713] influenced his testimony and undermined his impartiality, making it impossible for the Trial Chamber to accept his testimony.[714] Additionally, the Appellants state that Witness SS listed a hospital co-worker, the son of Charles Ukobizaba, as his contact person; they highlight their

[705] *Id.*, p. 25; Appeal Brief (G. Ntakirutimana), para. 138.
[706] Trial Judgement, para. 275.
[707] *Id.*
[708] *Id.*
[709] *Id.*
[710] *Id.*
[711] *Id.*
[712] Appeal Brief (G. Ntakirutimana), paras. 119-120.
[713] Gourevitch, Philip, *We Wish to Inform You that Tomorrow We Will be Killed With Our Families: Stories from Rwanda*, 1998.
[714] Appeal Brief (G. Ntakirutimana), para. 120.

incredulity at the witness's statement that he had not discussed the case with this man to whom they attribute "an obvious interest in securing the conviction of Gérard Ntakirutimana."[715]

432. The Trial Chamber noted the Appellants' general submission that Witness SS was part of a political campaign.[716] Consequently, the Appeals Chamber deems it reasonable to assume that the Trial Chamber took the allegation into consideration when evaluating the witness's credibility, even if it did not expressly discuss the Appellants' specific allegations against Witness SS. The Appeals Chamber reiterates that in writing a reasoned opinion the Trial Chamber need not address every detail that influences its conclusion. In regard to Gourevitch's book and the letter mentioned therein, the Trial Chamber noted that Witness SS was but one of five Prosecution witnesses (Witnesses MM, YY, GG, HH and SS) who testified concerning the letter.[717] Witness SS only mentioned the book in his statement, and did not mention the book in his testimony. While the Appellants referenced the statement in their Closing Brief,[718] they refrained from cross-examining the witness on this issue. The Appeals Chamber notes that the Trial Chamber found Witness SS generally credible, though it did find portions of his testimony unpersuasive.[719] While the Appellants continue to reject Witness SS's contention that he refrained from discussing the case with Charles Ukobizaba's son, the Appeals Chamber notes that the Appellants submit no evidence to contradict this assertion.

6. Witness FF

433. The Appellants claim, *inter alia*, that the Trial Chamber erred in finding Witness FF credible.[720] The Appellants contend that she constituted part of the second wave of witnesses organized by Kabera to falsely incriminate them.[721] The Appellants link Witness FF to Kabera and the alleged political campaign by evidence that she met with him in late 1994 and 1995 and by her appearance in video recording 1D41A.[722] The Appellants point to a scene in the video during which another interviewee, when asked how he knew a fact to be true, pointed to Witness FF and said, "[s]he told me."[723] Gérard Ntakirutimana claims Witness FF's testimony was "influenced or orchestrated," and points specifically to the fact that the witness's statements became increasingly

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[715] *Id.*
[716] Trial Judgement, para. 622.
[717] *Id.*, paras. 206-207.
[718] Defence Closing Brief, p. 158.
[719] Trial Judgement, paras. 392-393 (disbelieving SS's testimony that Gérard Ntakirutimana shot at him); para. 578 (finding SS's testimony that Elizaphan Ntakirutimana said that God ordered the killing and extermination of Tutsi).
[720] *See generally* Appeal Brief (G. Ntakirutimana), paras. 153-161.
[721] *Id.*, para. 154.
[722] *Id.*, paras. 154-155; Appeal Brief (E. Ntakirutimana), pp. 78-79, 82.
[723] Appeal Brief (G. Ntakirutimana), para. 155.

detailed, in some instances implicating Gérard Ntakirutimana in court where the witness had not done so in earlier statements.[724]

434. As discussed in relation to Witness YY, the Trial Chamber was unconvinced of the existence of a "second wave" of witnesses against the Appellants.[725] The Trial Chamber noted the Appellants' general contention that Witness FF participated in a political campaign.[726] However, regarding her association with Assiel Kabera, the Trial Chamber found that the witness denied discussing the genocide with him.[727] The Trial Chamber also noted that the witness avoided incriminating Gérard Ntakirutimana when she had insufficient basis to involve him and that she appeared credible in court.[728]

435. With no new arguments nor a minimum showing of specific contradictory evidence from the Appellants, the Trial Chamber's credibility conclusions do no not seem unreasonable to the Appeals Chamber. Neither does the Trial Chamber's assessment of Witness FF's contribution to record 1D41A. The Trial Chamber found nothing to undermine her credibility in the fact that she was interviewed as a survivor of the 16 April 1994 attack on the Mugonero Complex.[729] Furthermore, Witness FF testified to having been interviewed by a man named Raymond Rutabayira, not Assiel Kabera, and that she was unaware of anyone else in the film who made reference to her as a source of information.[730] Considering that the Appellants did not provide convincing arguments or evidence to refute this testimony, the Appeals Chamber does not find the Trial Chamber's conclusion to have been unreasonable. Similarly, the Trial Chamber's failing to find a connection between Witness FF and *African Rights* or any human rights organization[731] does not seem unreasonable.

436. The Appeals Chamber notes that the Trial Chamber addressed at length the increasing detail and enlarged role of Elizaphan Ntakirutimana and Gérard Ntakirutimana presented by Witness FF in her later statements and testimony.[732] The Trial Chamber analyzed the claim in relationship to

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[724] *Id.*, para. 195.
[725] Trial Judgement, para. 275.
[726] *Id.*, paras. 129, 537, 671.
[727] *Id.*, para. 129; T. 1 October 2001, pp. 62-63 "Mr. Medvene: Didn't Assiel [sic] Kabera speak to you in 1995 about what occurred, to your knowledge, in April of 1994? Witness FF: No, we did not speak about the events that took place in April 1994 ... Mr. Medvene: And is it true, Madam Witness, that sometime in 1995 Assiel [sic] Kabera asked you questions about your knowledge of the occurrences in April of 1994 while you were being videoed? Witness FF: No, I think the person to whom I spoke about these events was the sous-préfect [sic], but that sous-préfet was not from Kibuye originally."
[728] Trial Judgement, para. 542.
[729] *Id.*, para. 129.
[730] T. 1 October 2001, pp. 68-69, 71-72.
[731] Trial Judgement, para. 129.
[732] *See generally* Trial Judgement, paras. 127-130; footnote 160 reads "The first statement of 10 October 1995, is a general account of events at the Complex and Bisesero. The second, dated 14 November 1995, consists of responses to questions about Gérard Ntakirutimana. The third declaration of 10 April 1996 gives a description of the events at the

each specific event, finding the witness's testimony regarding events at the Mugonero Complex to have been credible.[733] With regards to events in Bisesero, the Trial Chamber, noting Witness FF's general consistency in placing Gérard Ntakirutimana as a participant in the shootings, specifically found that "the information about Bisesero in Witness FF's written statements and in her testimony does not indicate that she formed part of a campaign to ensure [Gérard Ntakirutimana's] conviction."[734] The Trial Chamber reasonably reconciled inconsistencies.[735] With regards to events on Mutiti Hill, the Trial Chamber found Witness FF's testimony credible, pointing out that it was "clear and consistent [and] was not shaken under cross-examination."[736] In light of the aforementioned explanations and in the absence of conflicting evidence or new arguments on the part of the Appellants, the Appeals Chamber does not find the Trial Chamber's evaluation of Witness FF's credibility and of the Appellants' argument that she formed part of a political campaign to have been unreasonable.

7. Witness II

437. The Appellants claim, *inter alia*, that the Trial Chamber erred in not concluding that testimony from Witness II provided "direct evidence of a witness being used as part of a campaign to falsely incriminate [Elizaphan and Gérard Ntakirutimana]." The Appellants point out that the witness bore striking similarities with an individual who gave a statement to *African Rights* on 19 November 1999.[737]

438. The Trial Chamber addressed the issue of Witness II's credibility.[738] It noted the similarities between Witness II and the person interviewed by *African Rights*.[739] However, lacking the full statement given to *African Rights* and noting discrepancies in the witness's explanations, the

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Complex and in Bisesero. The fourth statement, signed on 21 October 1999, begins with the witness declaring that she had not been asked about rape or sexual offences in previous interviews. However, the interview provided no such information but contains another account of the Complex and Bisesero events. The fifth statement, dated 14 November 1998, relates to Alfred Musema and makes no reference to either Accused in the present case."

[733] Trial Judgement, paras. 128, 130.

[734] *Id.*, paras. 541, 542.

[735] *Id.*, footnote 898 reads "According to Witness FF's second statement of 14 November 1995, Gérard Ntakirutimana 'had a gun and was shooting people from the top of a hill' in the company of, among others, Mathias Ngirinshuti. The witness 'saw him several times'. It follows from her third statement of 10 April 1996 that she saw Gérard Ntakirutimana in 'several attacks in Bisesero. He was always armed with a rifle and in company with Mathias Ngirinshuti', and she saw him in 'one attack actually shooting at people'. The fourth statement of 21 October 1999, which provides most details, refers to two Bisesero events, one in Murambi and one close to 'spring of water' near Gitwe Primary School Gitwe (including the exchange between the Accused and the refugees about him being the son of a pastor)."

[736] Trial Judgement, para. 673.

[737] Appeal Brief (E. Ntakirutimana), pp. 79-81.

[738] *See generally* Trial Judgement, paras. 652-655.

[739] Trial Judgement, para. 654; "The Chamber notes that the witness and the person interviewed by African Rights bear the same first name and surname, are both farmers from Bisesero born in the same year, and both sustained a machete wound to the left of the head. These are striking similarities."

Chamber concluded that evidence from Witness II did not prove beyond a reasonable doubt that Elizaphan Ntakirutimana participated in the attacks on Muyira Hill.[740] In the view of the Appeals Chamber, such a conclusion is reasonable, and the Appellants have not presented evidence in support of their argument that the witness was used as part of political campaign to falsely accuse the Appellants.

8. Witnesses CC, DD, MM

439. The Appellants allege inconsistencies in testimony by Witnesses CC, DD and MM, and generally question their credibility.[741] It is unclear how such allegations go specifically to show the existence of a political campaign. Rather, the Appellants seem to collate Witnesses CC, DD and MM into a category of witnesses whose alleged testimonial inconsistencies weaken the Prosecution's case, thereby providing circumstantial evidence that a campaign existed. The alleged inconsistencies were addressed in sections of the Appeal dealing wholly with individual witness credibility. The Appeals Chamber does not consider that these alleged inconsistencies provide circumstantial evidence of a political campaign against the Appellants.

[740] Trial Judgement, para. 655.
[741] Appeal Brief (E. Ntakirutimana), CC, pp. 37, 76; DD, pp. 53, 76; MM, pp. 5, 76, 79.

V. PROSECUTION'S FIRST, SECOND AND THIRD GROUNDS OF APPEAL

440. Gérard Ntakirutimana was found guilty of genocide, under Count 1 of the Mugonero Indictment and under Count 1 of the Bisesero Indictment pursuant to Article 6(1) of the Tribunal's Statute. Elizaphan Ntakirutimana was found guilty of aiding and abetting genocide under Count 1 of the Mugonero Indictment, though the Appeals Chamber has quashed this conviction, and under Count 1 of the Bisesero Indictment, for aiding and abetting the killing and causing of serious bodily or mental harm to Tutsi in Bisesero pursuant to Article 6(1) of the Statute.

441. The Prosecution's first, second and third grounds of appeal[742] allege three errors of law related to the genocide convictions of Elizaphan and Gérard Ntakirutimana. The issues raised in these grounds of appeal overlap and the Prosecution has treated them together in the first part of its Appeal Brief. For the sake of clarity, the Appeals Chamber will follow the same approach.

442. First, the Prosecution alleges that the Trial Chamber erred in not applying joint criminal enterprise liability to determine the criminal responsibility of Gérard and Elizaphan Ntakirutimana.[743] Second, the Prosecution claims that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to acts of killing or serious bodily harm that he personally inflicted on Tutsi at the Mugonero Complex and Bisesero.[744] Third, the Prosecution challenges the Trial Chamber's finding at paragraph 787(iii) of the Trial Judgement regarding the *mens rea* requirement for aiding and abetting the crime of genocide.[745]

443. The Appeals Chamber will address each of the three alleged errors successively. Before considering the arguments of the Prosecution, the Appeals Chamber will consider an argument raised by both Gérard Ntakirutimana and Elizaphan Ntakirutimana that these three grounds of appeal are inadmissible.

A. Admissibility of the First Three Grounds of Appeal

444. Gérard Ntakirutimana challenges the admissibility of the Prosecution's first three grounds of appeal arguing that the Prosecution does not claim that the errors alleged would invalidate the Trial Chamber's verdict of conviction for genocide as required by Article 24 of the Statute as well as Article 4(b)(iii) of the Practice Direction on Formal Requirements for Appeals from Judgement.

[742] Prosecution's Notice of Appeal, 21 March 2003.
[743] Prosecution Appeal Brief, para. 2.83.
[744] Prosecution amended Notice of Appeal, Grounds 1 and 2 and Prosecution Appeal Brief, para. 2.18.
[745] Prosecution amended Notice of Appeal, p. 3 and Prosecution Appeal Brief, para. 2.84.

Rather, he says, these grounds challenge the "bases" for this conviction,[746] and are not appealable.[747] Elizaphan Ntakirutimana joins in these arguments.[748]

445. In reply the Prosecution claims that with one partial exception – that is the error related to the correct *mens rea* for aiding and abetting genocide – its first three grounds of appeal raise errors that do have a direct impact on the Trial Chamber's decisions as to the nature and extent of Gérard Ntakirutimana's and Elizaphan Ntakirutimana's responsibility and are *also* matters of general importance.[749] Its argument is that the Trial Chamber erred in its application of the law to the facts and therefore understated the nature and extent of culpability attributable to Gérard Ntakirutimana and Elizaphan Ntakirutimana.[750] The Prosecution argues that the Defence advances an unduly restrictive interpretation of Article 24 of the Statute that is unfair to all parties and is contrary to the existing jurisprudence. It argues that the phrase, "an error on a question of law invalidating the decision", is sufficiently broad to cover grounds of appeal alleging errors that invalidate an aspect of the decision that impacts upon the nature or extent of the accused's culpability.[751]

446. Article 24(1) of the Statute refers only to errors of law *invalidating the decision*, that is legal errors which, if proven, affect the verdict. If the first alleged error of law (failure to apply joint criminal enterprise liability to determine the responsibility of Gérard and Elizaphan Ntakirutimana) is established and the related ground of appeal is successful, Gérard Ntakirutimana could be held responsible as a co-perpetrator of killings and infliction of serious bodily harm to members of the Tutsi group physically committed by others. Likewise, Elizaphan Ntakirutimana could be held responsible as a co-perpetrator of genocide, and not as a mere aider and abettor of genocide as found by the Trial Chamber. If the second alleged error of law (confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted) is established a conviction could be entered against Gérard Ntakirutimana for killings and infliction of serious bodily harm to members of the Tutsi group physically committed by others, alternatively

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[746] Response (G. Ntakirutimana), paras. 1-6.
[747] *Id.*, para. 22, which refers to para. 2 of the Declaration of Judge Shahabuddeen in the *Akayesu* Appeal Judgement ("Declaration") distinguishing an *"appealable ground"* from a *"non-appealable issue"* in that the former being *"an error on a question of law invalidating the decision"* while the later *"may well raise an error on a question of law, but the error is not one which invalidates the decision. If the Trial Chamber committed an error in stating a proposition of law but the error did not affect the result of the decision, the error does not invalidate the decision; such an error is not an appealable ground."* It further refers to para. 4 of the Declaration which states with respect to non-appealable issues *"although the Appeals Chamber cannot proceed as if it were allowing an appeal, it may take notice of the erroneous proposition of law and state its own view as to what is the correct proposition."* According to the Prosecution, Judge Shahabuddeen's concern was to exclude appeals where the error alleged "did not affect the result of the decision" at all which is not the case here (Prosecution's Reply, para. 1.12).
[748] Response (E. Ntakirutimana), p. 3.
[749] Prosecution Reply, paras. 1.2-1.4.
[750] *Id.*, paras. 1.7-1.10.
[751] *Id.*, paras. 1.11-1.24. The Prosecution relies in particular on the *Furundžija* Appeal Judgement (paras. 115-121, 216 and 250-257) and the *Kupreškić et al.* Appeal Judgement (para. 320).

Gérard Ntakirutimana could be held responsible for aiding and abetting the main perpetrators of genocide.

447. The Appeals Chamber is satisfied that, with the exception of the alleged error of law related to the *mens rea* for aiding and abetting genocide, the first three grounds of the Prosecution's appeal will, if successful, affect the verdict. As to the alleged error of law related to the *mens rea* for aiding and abetting genocide, the Appeals Chamber considers the ground to raise an issue of general importance for the case law of the Tribunal and will consider it on that basis.

B. Alleged Error in Not Applying the Joint Criminal Enterprise Doctrine to Determine the Responsibility of Gérard Ntakirutimana and Elizaphan Ntakirutimana

448. The Prosecution argues that the Trial Chamber erred in not applying joint criminal enterprise liability to determine the criminal responsibility of Gérard and Elizaphan Ntakirutimana for their participation in the genocide committed at Mugonero and Bisesero.[752] In making this argument the Prosecution acknowledges that it did not expressly raise this argument at trial,[753] but claims that the Mugonero and Bisesero Indictments, the Prosecution's Pre-Trial Brief and the Prosecution's Closing Brief provide sufficient notice for the Prosecution to raise it on appeal.[754]

449. The Prosecution argues that it is not necessary to specify the precise mode of liability alleged against the accused in an indictment as long as it makes clear to the accused the nature and cause of the charge against him.[755] It argues that the Indictments put the Accused on notice that the case against them included allegations of participation in crimes involving a number of persons[756] and that it was clear from the Indictments that the criminal purpose alleged was to kill and wound Tutsis as part of a genocidal plan.[757] As such, it claims that the absence of an express reference to joint criminal enterprise liability in the Indictments did not create any confusion or ambiguity about the nature and cause of the charges alleged against Gérard and Elizaphan Ntakirutimana.[758]

450. The Prosecution also argues that its Pre-Trial Brief, which did not specify a particular mode of responsibility, left it to the Trial Chamber's discretion to find the Accused guilty on the basis of

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[752] Prosecution Appeal Brief, paras. 2.24 and 2.83.
[753] *Id.*, para. 2.57.
[754] *Id.*
[755] Prosecution Appeal Brief, para. 2.58.
[756] *Id.*, para. 2.65.
[757] *Id.*, para. 2.64 citing Mugonero Indictment paras. 4.7-4.10 and 5.
[758] Prosecution Appeal Brief, para. 2.66. *See also id.*, para. 2.77, where the Prosecution stresses that the acts to be attributed to both Accused as participants in a joint criminal enterprise are the same that form part of Elizaphan Ntakirutimana's conviction for aiding and abetting. That is, responsibility which arises for killing and serious bodily harm inflicted by the attackers with which both Accused acted in concert with at the Mugonero Complex and Bisesero between April and June 1994. Therefore, the Prosecution is not alleging that both Accused should be held responsible for different or new acts but, rather, that another classification of responsibility should be contemplated.

"any action encompassed by Article 6(1) of the Statute of the Tribunal".[759] It says that the factual allegations in the Pre-Trial Brief revealed the collective nature of the crimes with which Gérard and Elizaphan Ntakirutimana are charged and the common criminal plan Gérard and Elizaphan Ntakirutimana shared with the other attackers. It says that, taken together, the Indictments and Pre-Trial Brief were sufficient to put the accused on notice that the crimes alleged against them were collective in nature and that joint criminal enterprise liability could be applied.[760]

451. At the Appeal hearing, the Prosecution stressed that there is no requirement that express modes of liability must be pleaded in an indictment and that this was clear from several Appeals Chamber's decisions such as *Aleksovski*, *Čelebići* and more recently *Krnojelac*. In *Krnojelac*, the Appeals Chamber stated quite clearly that the Prosecution's obligation to address modes of liability is expressed as an obligation to make clear whether Article 7(1), or in the context of the ICTR Statute Article 6(1), is relied upon or whether Article 7(3) or, in the context of the ICTR Statute, Article 6(3) is relied upon.[761]

452. The Prosecution also argues that it is common practice in the jurisprudence of the ICTY for accused to be found liable as participants in a joint criminal enterprise without that mode of liability being expressly pleaded in the indictment. Following this practice, it says it relied on Article 6(1) in general terms and that the reference to commission in Article 6(1) is broad enough to encompass the notion of joint criminal enterprise. It argues that this has been confirmed by the Appeals Chamber on a number of occasions, such as in the *Ojdanić* Joint Criminal Enterprise Appeal Decision.[762] Further, in its Pre-Trial Brief, it made it clear that the Trial Chamber had the authority to rely on any mode of liability, even if different to that expressly advanced by the Prosecution. It argues that the Appeals Chamber cannot allow an error in the classification of the responsibility of the Accused to stand on the basis that the Prosecution did not expressly label the joint criminal enterprise to describe their responsibility. The Trial Chamber's duty to apply the law correctly exists independently of the Prosecution's approach.[763]

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[759] Prosecution Appeal Brief, para. 2.69.
[760] *Id.*, para. 2.73.
[761] Appeal Hearing, T. 8 July 2004, pp. 50-51.
[762] *Id.*, p. 51.
[763] Appeal Hearing, T. 8 July 2004, pp. 50-54. In support of its argument the Prosecution refers to the *Furundžija* Trial Judgement, para. 189; *Kupreškić* Trial Judgement, para. 746; the *Stakić* Trial Judgement; the *Semanza* Trial Judgement, para. 397; and the *Aleksovski* Appeal Judgement, paras. 171-172.

453. At the Appeal hearing, the Prosecution also reiterated its argument that the application of joint criminal enterprise liability by the Appeals Chamber would not result in any unfair prejudice in the relevant sense of rendering the trial unfair.[764]

454. At the Appeal hearing, the Prosecution also repeated arguments made in its Appeal Brief that no prejudice would be suffered by the Accused by the application of joint criminal enterprise liability at this stage of the proceedings. It stressed that both Elizaphan Ntakirutimana and Gérard Ntakirutimana advanced a defence of alibi making it difficult to see how the defence would have been conducted differently if the Prosecution had referred specifically to joint criminal enterprise liability. In these circumstances, the Prosecution says that the onus is on the Defence to demonstrate how the Accused would be unfairly prejudiced by the application of joint criminal enterprise liability by the Appeals Chamber.[765] It argued that the *Aleksovski*, *Čelebići* and *Krnojelac* appeal judgements support the argument that it is only where a failure to expressly plead a theory of liability causes ambiguity or impacts upon the ability of the accused to prepare a defence that a problem arises. It says that this is not the case here. The Accused made no complaint at trial of the Prosecution's pleading of Article 6(1) in its entirety and they cannot now complain that the Indictments were inadequate to advise them that all such forms of liability were alleged.[766]

455. In his response, Gérard Ntakirutimana argues that the failure of the Prosecution to raise joint criminal enterprise liability at trial precludes it from being raised on appeal. He submits that the Prosecution is asking the Appeals Chamber to decide the issue *de novo* on appeal and that this amounts to requesting a new trial, which is not within the scope of the appellate function.[767] Further, and contrary to the Prosecution's arguments that he had sufficient notice that a joint criminal enterprise case was being presented, Gérard Ntakirutimana argues that joint criminal enterprise liability is not specifically mentioned in the Indictments, pleadings, or the Opening and Closing Statements, and therefore that no notice was given of such an argument.[768] He claims further that, as this mode of liability is rarely addressed by the ICTR, he was not on notice that joint criminal enterprise liability could be an issue.[769]

456. Gérard Ntakirutimana also submits that the Indictments do not meet the standard enunciated in the *Milutinović* Decision regarding the facts that must be pleaded with respect to allegations of

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[764] Appeal Hearing, T. 8 July 2004, pp. 55-56. In support the Prosecution referred to the *Tadić* Appeal Judgement; the *Furundžija* Appeal Judgement; and the *Kayishema and Ruzindana* Trial Judgement.
[765] Prosecution Appeal Brief, para. 2.76.
[766] Appeal Hearing, T. 8 July 2004, p. 57.
[767] Response (G. Ntakirutimana), paras. 29-30.
[768] *Id.*, paras. 32-33.
[769] *Id.*, para. 36. In response to the Prosecution's argument based on the *Ojdanić* case, Gérard Ntakirutimana contends that the *Ojdanić* indictment specified that each of the accused participated in a joint criminal enterprise.

individual responsibility arising from participation in a joint criminal enterprise.[770] Also, in his view, the Mugonero and Bisesero Indictments do not meet the "test for sufficiency of indictments" set out in Article 17(4) of the Statute and enunciated in the *Kupreškić et al.* Appeal Judgement.[771] Moreover, Gérard Ntakirutimana claims that the Prosecution's invitation, in its Pre-Trial Brief, to the Trial Chamber to choose the most appropriate form of liability under Article 6(1) of the Statute, contradicts the position it is now arguing in its Appeal Brief.[772]

457. For these reasons, Gérard Ntakirutimana argues that the Defence could not have anticipated that the Prosecution intended to rely on joint criminal enterprise liability. Therefore, he says that the Prosecution is estopped from raising joint criminal enterprise liability on appeal.[773] He asserts that the Prosecution's new plea of joint criminal enterprise is prejudicial to him because his investigation, questioning of prosecution witnesses and presentation of evidence would have been different if this mode of liability had been raised at trial.[774]

458. Elizaphan Ntakirutimana also argues that the Prosecution cannot seek new findings to be made in relation to a form of responsibility never alleged in the Indictments or the Pre-Trial Brief, never placed in evidence or argued in the Closing Brief. He distinguishes the present case from the *Ojdanić* Joint Criminal Enterprise Appeal Decision in which the accused had notice that he was being charged as a participant in a joint criminal enterprise. Similar to his Co-Accused, Elizaphan Ntakirutimana interprets the Prosecution's argument based on joint criminal enterprise as a request for new findings of fact that were neither suggested to nor addressed by the Trial Chamber.[775]

459. In reply, the Prosecution claims that the jurisprudence of the Tribunal makes clear that specific modes of responsibility do not have to be pleaded in the indictment. It claims that the Accused acknowledged that the Prosecution's Pre-Trial Brief put them on notice that the Trial Chamber was at liberty to consider all modes of liability encompassed under Article 6(1) of the Statute[776] and questions the Defence's reason for not seeking clarification in the pre-trial or trial phases if it considered this approach to be prejudicial.[777] The Prosecution submits further that, regardless of the argument presented by the parties, the Trial Chamber has a duty to apply the law

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[770] *Id.*, para. 37 citing *The Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Šainović, 27 March 2003 (*Milutinović* Decision), p. 4.
[771] *Id.*, para. 38.
[772] *Id.*, para. 39. Gérard Ntakirutimana contends that having stressed in its Pre-Trial Brief that although there was no substantial difference as to the Accused's culpability under the different forms of participation the degree of such participation may be considered as a factor in determining an appropriate sentence, the Prosecution is now seeking to frame the case against the Accused pursuant to a particular form of liability.
[773] *Id.*, para. 41.
[774] Response (G. Ntakirutimana), para. 42.
[775] Response (E. Ntakirutimana), p. 9.
[776] Prosecution Reply, para. 2.50 (citing Response (G. Ntakirutimana), para. 39 (iii)).
[777] *Id.*, para. 2.50.

concerning the appropriate characterization of the responsibility of the Accused to the facts of the case.[778] Therefore, the two Accused have no legal basis to assume that a reference in the Indictment to superior responsibility precludes the application of joint criminal responsibility.[779]

460. Applying factors identified in the *Milutinović* Decision, the Prosecution argues that the Indictments contained the underlying material facts relating to the joint criminal enterprise, namely the timeframe, the participants, the role of the accused and the purpose of the enterprise.[780] It argues that technical defects in the pleadings will not be fatal if the material facts have been pleaded and the accused suffers no prejudice.[781] Here, the two Accused suffered no prejudice due to lack of notice because, in its closing address at trial, the Prosecution declared that both Accused "participated in one form or the other in the attacks that took place [...]". This was noted by the Trial Chamber in the Judgement.[782] Additionally, Elizaphan Ntakirutimana and Gérard Ntakirutimana did not articulate what prejudice they claim to have suffered.

1. Law Applicable to the Alleged Error

(a) Joint Criminal Enterprise

461. Article 6(1) of the Statute sets out the forms of individual criminal responsibility which apply to all the crimes falling within the International Tribunal's jurisdiction. It reads as follows:

> **Article 6**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

462. This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. A mirror provision is found in Article 7(1) of the ICTY Statute. The ICTY Appeals Chamber has previously held that the modes of liability identified under Article 7(1) of the ICTY Statute include participation in a joint criminal enterprise as a form of "commission" under that Article.[783]

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[778] *Id.*, para. 2.52.
[779] *Id.*, para. 2.53.
[780] *Id.*, para. 2.54-2.55.
[781] *Id.*, para. 2.56.
[782] *Id.*, para. 2.59.
[783] *See Tadić* Appeal Judgement, para. 188 and para. 226, which provides that "[t]he Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in

463. In the jurisprudence of the ICTY three categories of joint criminal enterprise have been identified as having the status of customary international law.[784] The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention.[785] An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill. This form of joint criminal enterprise is the only one relevant to the present case and will be the focus thereafter.[786]

464. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment.[787] An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

465. The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of

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national legislation, warrant the conclusion that case law reflects customary rules of international criminal law." To reach this finding the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case law relating to many war crimes cases tried after the Second World War (paras. 197 *et seq.*). It further considered the relevant provisions of two international Conventions which reflect the views of many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome) (paras. 221-222). Moreover, the Appeals Chamber referred to national legislation and case law to show that the notion of "common purpose", as it then referred to it, was recognised in many national systems, albeit not all of the countries had the same notion of common purpose (paras. 224-225). The *Tadić* Appeals Chamber used interchangeably the expressions "joint criminal enterprise", "common purpose" and "criminal enterprise", although the concept is generally referred to as "joint criminal enterprise", and this is the term used by the parties in the present appeal. *See also Ojdanić* Joint Criminal Enterprise Appeal Decision, para. 20 regarding joint criminal enterprise as a form of commission.

[784] *See* in particular *Tadić* Appeal Judgement, paras. 195-226, describing the three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. *See* also *Krnojelac* Appeal Judgement, paras. 83-84.

[785] *Tadić* Appeal Judgement, para. 196. *See also Krnojelac* Appeal Judgement, para. 84, providing that, "apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent."

[786] For a description of the second and third, respectively "systemic" and "extended", forms of joint criminal enterprise, see *Tadić* Appeal Judgement, paras. 202-204 and *Vasiljević* Appeal Judgement, paras. 98-99).

[787] *Tadić* Appeal Judgement, paras. 202-203. Although the participants in the joint criminal enterprises of this category tried in the cases referred to were most members of criminal organizations, the *Tadić* case did not require an individual to belong to such an organization in order to be considered a participant in the joint criminal enterprise. The *Krnojelac* Appeal Judgement found that this "systemic" category of joint criminal enterprise may be applied to other cases and especially to serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, para. 89. *See also Vasiljević* Appeal Judgement, para. 98.

executing that common purpose.[788] An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

466. For joint criminal enterprise liability to arise an accused must act with a number of other persons. They need not be organised in a military, political or administrative structure.[789] There is no necessity for the criminal purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[790] The accused's participation in the criminal enterprise need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common purpose.[791]

467. The *mens rea* differs according to the category of joint criminal enterprise under consideration. The basic form requires the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[792] The systemic form (which, as noted above, is a variant of the first), requires personal knowledge of the system of ill-treatment (whether proved by express testimony or as a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.[793] Finally, the extended form of joint criminal enterprise, requires the intention to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly

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[788] *Tadić* Appeal Judgement, para. 204, which held that "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." *See also Vasiljević* Appeal Judgement, para. 99.

[789] *Tadić* Appeal Judgement, para. 227, referring to the *Essen Lynching* and the *Kurt Goebell* cases.

[790] *Id.*, where the *Tadić* Appeal Chamber uses the terms, "purpose", "plan", and "design" interchangeably.

[791] *Ibid.*

[792] *Tadić* Appeal Judgement, paras. 196 and 228. *See also Krnojelac* Appeal Judgement, para. 97, where the Appeals Chamber considers that, "by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes." *See also Vasiljević* Appeal Judgement, para. 101.

[793] *Tadić* Appeal Judgement, paras. 202, 220 and 228.

took that risk"[794] – that is, being aware that such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

468. The Appeals Chamber notes that while joint criminal enterprise liability is firmly established in the jurisprudence of the ICTY this is only the second ICTR case in which the Appeals Chamber has been called upon to address this issue.[795] Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute.

(b) Degree of Specificity Required in an Indictment as to the Form of Responsibility Pleaded

469. Article 17(4) of the Statute provides that the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged". Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

470. As stated earlier in this Judgement,[796] the Prosecution's obligation to set out a concise statement of the facts in the indictment must be interpreted in the light of the provisions of Articles 20(2), 20(4)(a) and 20(4)(b) of the Statute, which provide that in the determination of charges against him or her the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature of the charges against him or her and to have adequate time and facilities for the preparation of his or her defence. In the case law of both the ICTR and the ICTY, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[797] The question of whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him or her so that he or she may prepare his or her defence.

471. As the Appeals Chamber discussed above,[798] the *Kupreškić et al.* Appeal Judgement addressed the degree of specificity required to be pleaded in an indictment. It stressed that it is not acceptable for the Prosecution to omit material aspects of its main allegations in the indictment with

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[794] *Id.*, para. 228. *See also* paras. 204 and 220.
[795] *See Prosecutor v André Rwamakuba,* Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004.
[796] *See supra* section II.A.1(b).
[797] *See also Niyitigeka* Appeal Judgement, para. 193 and *Kupreškić et al.* Appeal Judgement quoting the *Furundžija* Appeal Judgement, para. 147.
[798] *See supra* section II.A.1.(b).

the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[799] It also considered that a defective indictment may, in certain circumstances, cause the Appeals Chamber to reverse a conviction. The ICTY Appeals Chamber, however, did not exclude the possibility that, in a limited number of instances, a defective indictment may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges.[800] In the *Rutaganda* case, the Appeals Chamber found that, before holding that an alleged fact is not material or that differences between the wording of the indictment and the evidence adduced are minor, a trial chamber should generally ensure that such a finding is not prejudicial to the accused.[801] An example of such prejudice would be vagueness capable of misleading the accused as to the nature of the criminal conduct with which he is charged.[802]

472. At the Appeal hearing, the Prosecution sought to argue that a recent decision of the Appeals Chamber in *Nyiramasuhuko and Ntahobali*[803] had expanded the *Kupreškić* holding. It claimed that, following that decision, in all circumstances a defective indictment can be cured by the provision in another form of timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. The Appeals Chamber does not accept this reading of that decision. Accordingly, the applicable law has not changed since the *Kupreškić et al.* Appeal Judgement.

(c) Did the Trial Chamber Err in Failing to Apply Joint Criminal Enterprise Liability to the Accused on the Facts of the Case as Presented by the Prosecution?

473. While the Appeals Chamber accepts that it has been the practice of the Prosecution to merely quote the provisions of Article 6(1), and in the ICTY Article 7(1), the Prosecution has also long been advised by the Appeals Chamber that it is preferable for it not to do so. For example, the ICTY Appeals Chamber in the *Aleksovski* case stated that "the practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged."[804] The Appeals Chamber endorses this statement.

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[799] *Kupreškić et al.* Appeal Judgement, para. 92.
[800] *Id.*, paras. 89-114.
[801] *Rutaganda* Appeal Judgement, para. 303.
[802] *Id.*, quoting the *Furundžija* Appeal Judgement, para. 61.
[803] Appeal Hearing, T. 7 July 2004, p. 71, referring to *Prosecutor v Arsčne Shalom Ntahobali and Pauline Nyiramasuhuko*, case No. ICTR-97-21-AR73, Decision on the Appeals of Arsène Shalom Ntahobali and Pauline Nyiramasuhuko against the "Decision on Defence Urgent Motion to declare Parts of the Evidence of Witnesses RV and QBZ Inadmissible", 2 July 2004.
[804] *Aleksovski* Appeal Judgement, n. 319.

474. In the present case, the Trial Chamber does not appear to have considered joint criminal enterprise liability at any time in determining the responsibility incurred by Gérard and Elizaphan Ntakirutimana for their participation in the massacres committed at Mugonero and Bisesero.[805] As such the Appeals Chamber does not accept that the authorities relied upon by the Prosecution lend the assistance the Prosecution claims. In the *Tadić* Appeal Judgement, the ICTY Appeals Chamber found the accused liable under the third form of joint criminal enterprise for the killing of five men from the village of Jaskići, even though neither this form of liability nor any other form of joint criminal enterprise was expressly pleaded in the indictment.[806] However, in that case and, unlike here, the trial chamber had considered joint criminal enterprise liability[807] and, on appeal, the Prosecution was actually arguing that the trial chamber had misdirected itself as to the application of that doctrine.[808] In the *Furundžija* case, also relied upon by the Prosecution, although the indictment did not expressly include joint criminal enterprise or even co-perpetration as to the charge of torture, the Prosecution pleaded at trial that liability pursuant to Article 7(1) of the Statute can be established by showing that the accused had the intent to participate in the crime, that his acts contributed to its commission and that such contribution did not necessarily require participation in the physical commission of the crime. The *Furundžija* Trial Chamber found that two types of liability for criminal participation "appear to have crystallised in international law – co-perpetrators who participate in a joint criminal enterprise, on the one hand, and aiders and abettors, on the other"[809] and found that Furundžija was responsible as a co-perpetrator.[810] This was upheld by the ICTY Appeals Chamber.[811] Further, the Appeals Chambers notes that in both of these cases the defence does not appear to have raised the issue of lack of notice before the Trial Chamber or the Appeals Chamber.

475. More recently, in the *Krnojelac* Appeal Judgement, where the Prosecution was specifically challenging the trial chamber's conclusion that the accused could not be held liable under the third form of joint criminal enterprise set out in the *Tadić* Appeal Judgement with respect to any of the crimes alleged unless an "extended" form of joint criminal enterprise was pleaded expressly in the indictment, the ICTY Appeals Chamber held that:

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[805] The only express reference to join criminal enterprise is to be found in the Prosecution's Pre-Trial Brief (para. 37), and is repeated in the Prosecution's closing brief. The Prosecution submits under the section "Requisite *mens rea* under Article 6(1)" that the intent can be direct or indirect and that for a joint criminal enterprise, the required *mens rea* is satisfied when each co-participant is able to predict the result.
[806] *Tadić* Appeal Judgement, paras. 230-233.
[807] *Tadić* Trial Judgement, paras, 681-692.
[808] *Tadić* Appeal Judgement, paras. 172-173.
[809] *Furundžija* Trial Judgement, para. 216.
[810] *Id.*, paras. 268, 269.
[811] *Furundžija* Appeal Judgement, paras. 115-121.

> [...] The Appeals Chamber reiterates that Article 18(4) of the Statute requires that the crime or crimes charged in the indictment and the alleged facts be set out concisely in the indictment. With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the indictment to specify at least on what legal basis of the Statute an individual is being charged (Article 7(1) and/or 7(3)). Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial. Likewise, when the Prosecution charges the "commission" of one of the crimes under the Statute within the meaning of Article 7(1), it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both. The Appeals Chamber also considers that it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged. However, this does not, in principle, prevent the Prosecution from pleading elsewhere than in the indictment - for instance in a pre-trial brief - the legal theory which it believes best demonstrates that the crime or crimes alleged are imputable to the accused in law in the light of the facts alleged. This option is, however, limited by the need to guarantee the accused a fair trial.
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> [...]
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> The Appeals Chamber observes that paragraph 86 of the Judgment, cited in paragraph 137 above, shows that the Trial Chamber reached the conclusion it did precisely because the Prosecution failed to amend the Indictment after the Chamber had unambiguously interpreted the second amended indictment as not pleading an extended form of joint criminal enterprise. Given these circumstances, the Trial Chamber decided "in the exercise of its discretion" that it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise to establish his liability.
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> The Appeals Chamber further notes that, while the Prosecution's Pre-Trial Brief of 16 October 2000, that is subsequent to the decision of 11 May 2000, pleads an extended form of joint criminal enterprise for the first time, the Indictment is silent on the matter.
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> It must be noted that these circumstances left the Defence in some uncertainty as to the Prosecution's argument. Therefore, even though it is apparent from Krnojelac's Final Trial Brief that he did take the three forms of joint criminal enterprise described in the *Tadić* Appeals Judgement into consideration before concluding that he had not taken part in a joint criminal enterprise, the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnojelac. (footnotes omitted).[812]

476. Thus, the Appeals Chamber is satisfied that the present case is distinguishable from the authorities relied upon by the Prosecution, in that in those cases joint criminal enterprise liability was a mode of liability considered at trial. Nevertheless, for the sake of completeness, the Appeals Chamber will consider whether the Accused had sufficient notice that that mode of liability was being alleged.

477. The Prosecution acknowledges that it submitted in its Closing Brief that Elizaphan Ntakirutimana's responsibility regarding the Mugonero Indictment was only for aiding and abetting

[812] *Krnojelac* Appeal Judgement, paras. 138-144.

the attackers at the Mugonero Complex.[813] Accordingly, the Prosecution has waived the right to allege on appeal that the Trial Chamber erred in omitting to consider joint criminal enterprise liability when determining his criminal responsibility with respect to the events under the Mugonero Indictment. In the following discussion, the Appeals Chamber will limit its review of the content of the Indictments and related parts of the Pre-Trial Brief in order to determine whether Gérard Ntakirutimana and Elizaphan Ntakirutimana had sufficient notice from these sources that the case alleged against them included criminal responsibility as participants in a joint criminal enterprise. For Elizaphan Ntakirutimana, this review shall be limited to events alleged in the Mugonero Indictment.

(d) The Contents of the Indictments and the Pre-Trial Brief Did Not Put the Trial Chamber and the Accused on Notice that Elizaphan and Gérard Ntakirutimana Were also Charged as Co-Perpetrators of a Joint Criminal Enterprise to Commit Genocide

478. Gérard and Elizaphan Ntakirutimana were charged as follows under Count 1A of the Mugonero Indictment:

> For all the acts outlined in the paragraphs specified in each of the counts, the accused persons named herein, either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of the acts, or knew or had reason to know that persons acting under their authority and control had committed or were about to commit the said acts and they failed to take necessary and reasonable measures to prevent the said illegal acts or punish the perpetrators thereof.
>
> Count 1A: By their acts in relation to the events referred to in paragraphs 4.4-4.10 above, **Elizaphan Ntakirutimana, Gérard Ntakirutimana & Charles Sikubwabo** are individually responsible for the crimes alleged below, pursuant to Article 6(1) of the Statute of the Tribunal.
>
> By their acts in relation to the events referred to in paragraphs 4.4-4.12 above, **Gérard Ntakirutimana & Charles Sikubwabo** are individually responsible for the crimes alleged below, pursuant to Article 6(3) of the Statute of the Tribunal.
>
> **Elizaphan Ntakirutimana, Gérard Ntakirutimana & Charles Sikubwabo**, during the month of April 1994, in Gishyita commune, Kibuye Prefecture, in the Territory of Rwanda, are responsible for the killings and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such, and have thereby committed **GENOCIDE** in violation of Article 2(3)(a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal.

Under Count 1 of the Bisesero Indictment they were charged as follows:

> By their acts in relation to the events referred to above, each of the accused are individually responsible for the crimes alleged below pursuant to Article 6(1) of the Tribunal Statute.

[813] Prosecution Appeal Brief, para. 2.81, referring to its Closing Brief, p. 219. Regarding the Bisesero Indictment, the Prosecution argues that it "made a broader submission, namely that Elizaphan Ntakirutimana acted with intent to destroy the Tutsi group [...] which resulted in the death of thousands", thereby implying that such submission encompasses joint criminal enterprise liability (Prosecution Appeal Brief, para. 2.82, referring to its Closing Brief, p. 227).

> Count 1: **Elizaphan Ntakirutimana & Gérard Ntakirutimana** during the months of April through June 1994, in the area known as Bisesero, in Gishyita and Gisovu communes, Kibuye Prefecture, in the Territory of Rwanda, are responsible for the killings and causing of serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, an ethnic or racial group as such, and have thereby committed **GENOCIDE** in violation of Article 2(3)(a) and punishable in reference to Articles 22 and 23 of the Statute of the Tribunal;

479. Review of the Indictments reveals that no express reference was made by the Prosecution to joint criminal enterprise, common plan or purpose – or even to the fact that it intended to charge the Accused for co-perpetration of genocide, *i.e.*, not only for physically committing genocide but also for assisting those who physically committed it while sharing the same genocidal intent. The only express reference to joint criminal enterprise is to be found in the Prosecution's Pre-Trial Brief (para. 37) and is repeated in the Prosecution's Closing Brief (page 188). Interestingly however, this reference appears under the section "Requisite *Mens Rea* under Article 6(1)" and illustrates the Prosecution's submission that all forms of criminal participation under Article 6(1) may be performed with direct or indirect intent (*dolus eventualis*).[814] In the Closing Brief, the Prosecution states that "for a joint criminal enterprise, the Appeals Chamber has found that the required *mens rea* for each co-participant is satisfied when a member of the group is able to predict the result."[815] Although the Pre-Trial and Closing Briefs are silent as to what form of joint criminal enterprise it refers to, the Appeals Chamber understands that it can only be the third one – that is the extended form of joint criminal enterprise. In the Appeals Chamber's view, the mere reference by the Prosecution to the joint criminal enterprise illustrating the "*dolus eventualis*" doctrine in its Pre-Trial and Closing Briefs cannot be understood as an unambiguous pleading of participation in the first form of joint criminal enterprise which is the form the Prosecution advances on this appeal.

480. The Appeals Chamber notes further that the Prosecution simply reproduced the text of Article 6(1) and part of Article 6(3) of the Statute in paragraph 5 of the Mugonero Indictment, while paragraph 5 of the Bisesero Indictment only referred to Article 6(1) without even using the word "committing".

481. Both Indictments alleged acts and conduct not limited to killings and causing harm to the Tutsi victims, but included for Gérard Ntakirutimana: separating Tutsi patients from non-Tutsi patients,[816] procuring of arms for the attacks,[817] searching Tutsi survivors[818] and conveying attackers;[819] and for Elizaphan Ntakirutimana: refusing to protect them after receiving Pastor

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[814] Pre-Trial Brief, para. 36; Closing Brief, p. 187.
[815] Closing Brief, p. 188.
[816] Pre-Trial Brief, para. 12. Bisesero Indictment, para. 4.6; Mugonero Indictment, para. 4.6.
[817] Pre-Trial Brief, para. 11.
[818] Mugonero Indictment, para. 4.8; *see also* Bisesero Indictment paras. 4.9 and 4.15 for a similar account of the facts.
[819] Pre-Trial Brief, para. 16; Bisesero Indictment, para. 4.15; Mugonero Indictment, para. 4.8.

Sehibe's letter,[820] searching for Tutsi survivors,[821] conveying attackers to the killing sites,[822] being present at killing sites, pursuing survivors and inciting attackers to perpetrate killings.[823] The Indictments also charged Gérard Ntakirutimana and Elizaphan Ntakirutimana for planning, instigating genocide as well as aiding and abetting genocide, complicity in genocide and conspiracy to commit genocide. In this context it is not obvious that reference to the above-mentioned acts in the Indictments were intended to be the material facts underpinning a responsibility for co-perpetration in a joint criminal enterprise to commit genocide. In any event, the Appeals Chamber is of the view that the wording used by the Prosecution was ambiguous.

482. Additionally, and contrary to the *Tadić* and *Furundžija* cases relied upon by the Prosecution, the Trial Chamber obviously did not understand the Indictments to mean that the Accused committed genocide by way of participation in a joint criminal enterprise. As such, the Appeals Chamber considers that the Prosecution did not plead joint criminal enterprise liability, or even its various elements, with sufficient clarity in the Indictments. Further, the Prosecution did not put the Trial Chamber and the Defence on notice that the mode of liability, which it now believes best describes the criminal liability of Gérard and Elizaphan Ntakirutimana, was as participants in a joint criminal enterprise. On the contrary, the Prosecution expressly limited the scope of "committing" to direct commission by the Accused or their agents. In these circumstances, the Appeals Chamber is of the view that the Prosecution left the Trial Chamber and the Defence in some uncertainty as to the case it was advancing at trial.

483. The Appeals Chamber has also reviewed the Prosecution's Closing Brief, which describes the elements of the various forms of liability envisaged under Article 6(1) of the Statute.[824] From that review the Appeals Chamber concludes that the Prosecution only alleged commission by the Accused through personal perpetration of all elements of the *actus reus* of the crime or through use of an agent to perform the relevant conduct.[825] The Appeals Chamber finds that this pleading

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[820] Bisesero Indictment, para. 4.5 and Pre-Trial Brief, paras. 10, 13.
[821] Bisesero Indictment, paras. 4.8, 4.9.
[822] Pre-Trial Brief, paras. 16, 20-21; Bisesero Indictment, para. 4.15.
[823] Pre-Trial Brief, paras. 15-16 and 20-21; Bisesero Indictment, para. 4.15.
[824] Prosecution's Closing Brief, pp. 191-202.
[825] The relevant part of the Prosecution's Closing Brief reads as follows: "The elements of participation through 'commission' through individual perpetration are as follows: 1. *Actus reus*: The accused performed all elements of the *actus reus* of the crime. 2. *Mens rea*: The accused had all elements of the *mens rea* of the crime, or was aware of the substantial likelihood that a crime would occur as an adequate consequence of his or her conduct. This is the most straightforward form of criminal participation, e.g., for willful killing, the specific *actus reus* is 'conduct resulting in the death of the victim, in the sense that the conduct is a substantial cause of the death of the victim' .... The conduct of the accused will satisfy the *actus reus* for willful killing if it substantially contributed to the victim's death. (...) An accused could be regarded as having personally performed the elements of the *actus reus*, even though the accused used an agent to perform the relevant conduct [here footnote 1500 of the Closing Brief refers to perpetration by means or intermediate perpetration as well as commission through another person (as per Article 25(3) of the Rome Statute)]. The Appeals Chamber has clarified in the *Čelebići* Judgement that in the case of 'primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must directly and

precludes the Prosecution from relying on joint criminal enterprise liability on appeal. In any case, having reviewed the content of the Indictments and the Pre-Trial Brief, the Appeals Chamber is satisfied that it was too ambiguous to put the Trial Chamber or Elizaphan and Gérard Ntakirutimana on notice that they were charged for their participation in the first form of joint criminal enterprise.

484. In view of the persistent ambiguity surrounding the issue of what exact theory of responsibility the Prosecution was pleading, the Prosecution has not established that the Trial Chamber erred in omitting to consider whether the liability of the Accused was incurred for their participation in a joint criminal enterprise of genocide. This ground of appeal is dismissed.

485. The Appeals Chamber will now turn to the second error alleged by the Prosecution in relation to Gérard Ntakirutimana's conviction for genocide.

C. Alleged Error in Confining Gérard Ntakirutimana's Conviction for Genocide to the Acts of Killing or Serious Bodily Harm that he Personally Inflicted on Tutsi

486. The Prosecution argues that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily harm that he personally inflicted on Tutsis at the Mugonero Complex and in Bisesero. In doing so, the Prosecution claims that the Trial Chamber ignored its prior factual findings regarding the other acts he performed in furtherance of the genocidal campaign.[826] In support of this ground of appeal the Prosecution lists the Trial Chamber's findings regarding Gérard Ntakirutimana's participation in the 16 April 1994 attack on the Mugonero Complex and in Bisesero between April and June 1994.[827]

487. The Prosecution says that, despite these factual findings, the Trial Chamber referred in its legal findings only to "killing Charles Ukobizaba and shooting at the refugees" at the Mugonero Complex as the basis of Gérard Ntakirutimana's conviction for genocide pursuant to the Mugonero Indictment. Similarly, his conviction under the Bisesero Indictment was limited to his role in the killing of Esdras and the wife of Nzamwita, as well as the harm caused to the Tutsi refugees that he shot at during the attacks at Bisesero.[828] Therefore, in the Prosecution's submission, the Trial Chamber erred in law in basing Gérard Ntakirutimana's liability for genocide on acts that he

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substantially affect the commission of the offence' is an unnecessary one. That particular requirement rather applies to lesser degrees of directness of participation which will ordinarily give rise to accomplice liability (Prosecution's Closing Brief, pp. 197-198).

[826] Prosecution Amended Notice of Appeal, Grounds 1 and 2 and Prosecution Appeal Brief, paras. 2.15.

[827] Prosecution Appeal Brief, paras. 2.15-2.16, 2.18.

[828] *Id.*, para. 2.17.

personally carried out and ignored its prior factual findings regarding other acts in furtherance of the genocidal campaign.[829]

488. In response, Gérard Ntakirutimana claims that the Prosecution does not accurately present the Trial Chamber's findings. He argues that the Prosecution's position is based on misstatements of or omissions from the Trial Chamber's findings.[830] As an alternative argument, he argues that the evidence relating to his participation in preparatory acts is from witnesses whose credibility is questionable (Witness UU's testimony).[831] Gérard Ntakirutimana secondly argues that, if accurately presented, these findings do not support the conclusion that he is guilty. He claims that in order to satisfy the argument of the Prosecution new findings are necessary and argues that making new findings is not the function of the Appeals Chamber.[832]

489. In reply, the Prosecution maintains its argument in relation to the Trial Chamber's erroneous omission from his criminal responsibility a range of acts that Gérard Ntakirutimana performed to facilitate the killings and injuries inflicted by other attackers at Mugonero and Bisesero.[833] It also addresses Gérard Ntakirutimana's attacks on Witness UU's credibility.[834]

490. From the Trial Judgement it is apparent to the Appeals Chamber that the Trial Chamber having found that Gérard Ntakirutimana physically committed genocide by killing and causing harm to Tutsi refugees did not go on to consider whether the acts of assistance it found to be established also constituted a basis for a conviction of genocide either as a co-perpetrator or as an aider and abettor. Indeed, the Trial Chamber expressly found that the alternative Count 1B of the Mugonero Indictment and Count 2 of the Bisesero Indictment for complicity to commit genocide ceased to apply with respect to both Accused in light of its findings in relation to the Count 1A of the Mugonero Indictment and Count 2 of the Bisesero Indictment for genocide.

491. The Trial Chamber found 1) in relation to the Mugonero Indictment that, in addition to killing Charles Ukobizaba and shooting at Tutsi refugees at the Complex, Gérard Ntakirutimana's participation in the attacks included procuring ammunition and gendarmes for the attack on the Complex[835] and participating in the attack on Witness SS;[836] and 2) in relation to the Bisesero Indictment that, in addition to killing Esdras and the wife of Nzamwita, pursuing and shooting at

[829] *Id.*, para. 2.18.
[830] Response (G. Ntakirutimana), para. 66 (i)-(vii).
[831] *Id.*, para. 65.
[832] *Id.*, para. 28.
[833] Prosecution Reply Brief, paras. 1.7-1.9.
[834] *Id.*, paras. 2.65-2.92.
[835] Trial Judgement, section II.3.7.3.
[836] *Id.*, section II.4.11.3.

the refugees, he transported attackers at Kidashya,[837] headed a group of armed attackers at Muyira Hill in June 1994,[838] was at Mutiti Hill in June 1994 with *Interahamwe* where they shot at refugees in a forest by a church,[839] and participated in attacks in Bisesero during the period April to June 1994.[840] The Trial Chamber only considered the above acts and conduct of Gérard Ntakirutimana other than killing and shooting at Tutsi in order to determine that he had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group.[841] The wording used by the Trial Chamber at paragraphs 794-795 and 835-836 of the Judgement shows that the Trial Chamber limited its finding of guilt of genocide to the killings and harm that Gérard Ntakirutimana had personally inflicted:

> 794. The Chamber finds that in killing Charles Ukobizaba and shooting at the refugees, Gérard Ntakirutimana is individually criminally responsible for the death of Charles Ukobizaba, pursuant to Article 6(1) of the Statute.
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> 795. Accordingly, the Chamber finds that Gérard Ntakirutimana is guilty of genocide as charged in Count 1A of the Mugonero Indictment.
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> 835. In shooting at the refugees and participating in the attacks, Gérard Ntakirutimana is individually criminally responsible for the death of Esdras and the wife of Nzamwita and the harm caused to these Tutsi refugees, pursuant to Article 6(1) of the Statute.
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> 836. Accordingly, the Chamber finds that Gérard Ntakirutimana is guilty of genocide as charged in Count 1 of the Bisesero Indictment.

492. In doing so, the Trial Chamber omitted to determine Gérard Ntakirutimana's liability as to the killings and harm inflicted by others to Tutsi, although he was clearly charged under Count 1 of the Bisesero Indictment and Count 1A of the Mugonero Indictment for acts and conducts not limited to killing and causing serious bodily harm but also including acts of assistance to others who physically committed genocide. This, in the Appeals Chamber's view, constitutes an error on the part of the Trial Chamber.

493. As the Appeals Chamber has already determined that the Prosecution should not be allowed to plead joint criminal enterprise for the first time on appeal, the issue to be determined is whether the Trial Chamber's findings, which have not been reversed on appeal, support a conviction for aiding and abetting genocide. Before doing so it is necessary to turn to the third error alleged by the Prosecution in relation to the genocide conviction of Elizaphan Ntakirutimana regarding the *mens rea* required for aiding and abetting genocide.

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[837] *Id.*, section II.4.21.3.
[838] *Id.*, section II.4.21.3.
[839] *Id.*, section II.4.22.3.
[840] *Id.*, section II.4.24.3.
[841] *Id.*, paras. 793, 834.

D. Alleged Error in Defining the *Mens Rea* Requirement for Aiding and Abetting Genocide

494. The Prosecution submits that the Trial Chamber erred in finding that aiding and abetting genocide, within the meaning of Article 6(1) of the Statute, requires proof that the accused "had the intent to destroy, in whole or in part, an ethnic or racial group, as such".[842]

495. According to the Prosecution, the test adopted by the Trial Chamber is drawn from the *Akayesu* Trial Judgement, which has generally not been followed by other cases before the ICTR or the ICTY. It argues that the *Akayesu* test has been expressly rejected by the *Semanza* Trial Chamber and that, in light of ICTR and ICTY jurisprudence, the proper *mens rea* for aiding and abetting genocide under Article 6(1) of the Statute is "knowledge", not intent.[843] The Prosecution further contends that the Trial Chamber's adoption of this *mens rea* requirement for aiding and abetting pursuant to Article 6(1) of the Statute contradicts the one it applied for complicity to commit genocide under Article 2(3)(e) of the Statute, which includes aiding and abetting, since it found that the *mens rea* standard for complicity in genocide is knowledge.[844] Furthermore, it points out that a survey of the International Law Commission's work and of domestic legislation on the crime of genocide confirms that "knowledge" is the *mens rea* for aiding and abetting irrespective of the underlying offence of the perpetrator.[845] The Prosecution also points out that, because no distinction is made in the language of Article 6(1) of the Statute between genocide and other crimes within its jurisdiction, the specific intent requirement of Article 2(2) should not disturb the general application of Article 6(1) regarding genocide.[846]

496. In response, Gérard Ntakirutimana argues that adoption of the Prosecution's theory on *mens rea* for aiding and abetting would have the adverse effect of significantly lowering the threshold of liability for genocide, extermination and murder, and thereby potentially prejudice future litigants by affecting convictions.[847] Elizaphan Ntakirutimana contends further that the Security Council does not have the power to add "aiding and abetting" to the list of acts punishable under Article 2.[848]

497. In its Reply, the Prosecution submits that neither Elizaphan Ntakirutimana nor Gérard Ntakirutimana analyzes the *mens rea* standard for aiding and abetting genocide. In response to

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[842] Prosecution Amended Notice of Appeal, p. 3 and Prosecution Appeal Brief, paras. 2.13, 2.84.
[843] Prosecution Appeal Brief, paras. 2.90, 2.92, 2.103. The Prosecution also relies on the *Ojdanić* Joint Criminal Enterprise Appeal Decision, para. 20 (Prosecution Appeal Brief, para. 2.104) as well as on the *Kvočka* Trial Judgement and the *Furundžija* Trial Judgement (Prosecution Appeal Brief, paras. 2.106-2.108).
[844] Prosecution Appeal Brief, paras. 2.100-2.102.
[845] *Id.*, para. 2.110.
[846] *Id.*, para. 2.111.
[847] Response (G. Ntakirutimana), para. 17.
[848] Response (E. Ntakirutimana), p. 8.

Gérard Ntakirutimana's assertion that the Prosecution's "knowledge" standard would lower the threshold of liability for genocide, the Prosecution argues that the Accused ignores ICTY jurisprudence; "knowledge" has already been adopted by the ICTY for serious crimes (such as persecution).[849] Contrary to the Accused's suggestion, this standard does not extinguish the specific intent requirement of genocide. To convict an accused of aiding and abetting genocide based on the "knowledge" standard, the Prosecution must prove that those who physically carried out crimes acted with the specific intent to commit genocide.[850]

498. At the Appeal hearing the Prosecution argued that the term complicity as included in the Genocide Convention included the term "aiding and abetting". It claimed that this was clear from the report of the *ad hoc* Committee on genocide. It argued that this understanding was consistent with both civil and common law domestic jurisdictions and was reflected in the jurisprudence of the Tribunal. The Prosecution referred to the recent *Krstić* Appeal Judgement which it says clearly establishes that aiding and abetting requires a knowledge standard.[851]

499. In its Judgement, the Trial Chamber followed the approach adopted by the *Akayesu* Trial Chamber that the *dolus specialis* required for genocide was required for each mode of participation under Article 6(1) of the Statute, including aiding and abetting. Surprisingly, when considering the *mens rea* requirement for complicity under Article 2(3)(e) of the Statute, the Trial Chamber in *Akayesu* considered that it "implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly".[852] "Knowingly" in the context of genocide means knowledge of the principal offender's genocidal intent. The Trial Chamber in *Akayesu* summarized its position as follows:

> In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[853]

The Trial Chamber in *Semanza* took a similar approach holding that: "In cases involving a form of accomplice liability, the *mens rea* requirement will be satisfied where an individual acts intentionally and with the awareness that he is influencing or assisting the principal perpetrator to

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[849] Prosecution Reply, para. 2.12.
[850] *Ibid.*
[851] Appeal Hearing, T. 8 July 2004, p. 68.
[852] *Akayesu* Trial Judgement, para. 538.
[853] *Id.*, para. 545. *See also* para. 540: As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

commit the crime. The accused need not necessarily share the *mens rea* of the principal perpetrator: the accused must be aware, however, of the essential elements of the principal's crime including the *mens rea*."[854]

500. The ICTY Appeals Chamber has explained, on several occasions, that an individual who aids and abets other individuals committing a specific intent offence may be held responsible if he assists the commission of the crime knowing the intent behind the crime.[855] More recently, as the Prosecution argued at the Appeal hearing, in the *Krstić* case the ICTY Appeals Chamber considered that the same principle applies to the Statute's prohibition of genocide and that "[t]he conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of the Tribunal."[856] In reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute and Article 4 of the ICTY Statute would also encompass aiding and abetting, based on the same *mens rea*, while other forms of complicity may require proof of specific intent.

501. The Appeals Chamber endorses this view and finds that a conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator's genocidal intent is permitted by the Statute and case-law of this Tribunal. Accordingly, the Trial Chamber erred in determining that the *mens rea* for aiding and abetting genocide requires intent to commit genocide. It is not disputed that the above-mentioned error did not invalidate the Trial Chamber's verdict in the present case.

502. It is now possible to go back to the Prosecution's allegation that the Trial Chamber erred in confining Gérard Ntakirutimana's conviction for genocide to the acts of killing or serious bodily

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[854] *Semanza* Trial Judgement, para. 388 (references omitted). *See also id.*, para. 395.

[855] *See Krnojelac* Appeal Judgement, para. 52 ("the aider and abettor in persecution, an offence with a specific intent, must be aware . . . of the discriminatory intent of the perpetrators of that crime," but "need not share th[at] intent"); *Vasiljević* Appeal Judgement, para. 142 ("In order to convict [the accused] for aiding and abetting the crime of persecution, the Appeals Chamber must establish that [he] had knowledge that the principal perpetrators of the joint criminal enterprise intended to commit the underlying crimes, and by their acts they intended to discriminate . . . ."); *see also Tadić* Appeal Judgement, para. 229 ("In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.").

[856] *Krstić* Appeal Judgement, para. 140. It must be stressed that, in the *Krstić* case, the Appeals Chamber has considered at paragraph 134 of the Judgement that "As has been demonstrated, all that the evidence can establish is that Krstić was aware of the intent to commit genocide on the part of some members of the VRS Main Staff, and with that knowledge, he did nothing to prevent the use of Drina Corps personnel and resources to facilitate those killings. This knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Krstić, therefore, is not guilty of genocide as a principal perpetrator."

harm that he personally inflicted on Tutsi at the Mugonero Complex and Bisesero. The issue before the Appeals Chamber is whether the Trial Chamber's findings which have not been reversed on appeal support a conviction for aiding and abetting genocide.

503. In the part of the Judgement dealing with Gérard Ntakirutimana's legal errors the Appeals Chamber has upheld a number of his grounds of appeal arguing that he and Elizaphan Ntakirutimana were given insufficient notice of the material facts of the Prosecution's case and that the Trial Chamber erred in basing a conviction on those material facts.

504. As a result of the errors committed by the Trial Chamber, the Appeals Chamber has quashed the findings of the Trial Chamber supporting Gérard Ntakirutimana's convictions under the Bisesero Indictment that: "on or about 18 April 1994 Gérard Ntakirutimana was with *Interahamwe* in Murambi Hill pursuing and attacking Tutsi refugees" and "in the last part of April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees;"[857] "sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and he participated in chasing and shooting at Tutsi refugees in the hills;"[858] "sometime in June 1994, Gérard Ntakirutimana was in an attack at Mutiti Hill with *Interahamwe*, where they shot at refugees;"[859] "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at refugees;"[860] "sometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees;"[861] "Gérard Ntakirutimana participated in the attack against Tutsi refugees at Muyira Hill on 13 May 1994 and that he shot and killed the wife of one Nzamwita, a Tutsi civilian;"[862] and that Gérard Ntakirutimana killed a person named "Esdras" during an attack at Gitwe Hill at the end of April or the beginning of May 1994.[863]

505. The following factual findings made by the Trial Chamber concerning Gérard Ntakirutimana in relation to two separate events under the Bisesero Indictment are upheld, namely: that Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, where he pursued and shot at Tutsi refugees (a finding based on the testimony of HH);[864] and that Gérard Ntakirutimana participated in an attack at

[857] Trial Judgement, para. 543, *see also id.* para. 832 (i)-(ii).
[858] *Id.*, paras., 832(vi), *see also id.* para.586.
[859] *Id.*, paras., 832(ix), *see also id.* para. 674.
[860] *Id.*, para. 668; *see also id.*, para. 832(viii).
[861] Trial Judgement, para. 832(v), see also *id.* paras 635-636.
[862] *Id.*, paras. 642, see also *id.* para. 832(iv).
[863] *Id.*, para. 832(iii), see also *id.* para. 559.
[864] *Id.*, paras. 552-559, 832(iii).

Mubuga Primary School in June 1994 and shot at Tutsi refugees (finding based on the testimony of SS).[865]

506. Additionally, the Trial Chamber's factual finding concerning Gérard Ntakirutimana's involvement in relation to two separate events under the Mugonero Indictment are upheld, namely that whilst participating in the attack at the Mugonero Complex, Gérard Ntakirutimana killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994,[866] and that Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994, and that he procured gendarmes and ammunition for the attack on Mugonero complex on 16 April 1994.[867]

507. Under the Bisesero Indictment, the factual findings supporting Gérard Ntakirutimana's conviction for aiding and abetting genocide consist of pursuing Tutsi refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, and participating in an attack at Mubuga Primary School in June 1994 and shooting at Tutsi refugees; under the Mugonero Indictment, a conviction of aiding and abetting genocide is supported by the procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994.

508. As established above, intent to commit genocide is not required for an accused to be found guilty for aiding and abetting genocide. However, a finding by the Trial Chamber that the accused had the intent to commit genocide and did so by killing and causing harm to members of the group does not per se prevent a finding that he also knowingly aided and abetted other perpetrators of genocide. Accordingly to establish that Gérard Ntakirutimana aided and abetted genocide requires proof that (i) by his acts and conduct Gérard Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others which had a substantial effect upon the perpetration of that crime, and (ii) Gérard Ntakirutimana knew that the above acts and conduct assisted the commission of genocide by others.

509. It is clear from the Trial Chamber's findings at paragraphs 785 and 826 of the Trial Judgement that it found that the attacks were carried out with intent to destroy, in its whole, the Tutsi population at the Mugonero Complex and in Bisesero. It results further from the Trial

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[865] *Id.*, paras. 628, 832(vii).
[866] *Id.*, paras. 384, 791.
[867] *Id.*, paras. 186, 791. Gérard Ntakirutimana's conviction for committing genocide stands in relating to the killing of Charles Ukobizaba in Mugonero Hospital courtyard around midday on 16 April 1994 as well as shooting at refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 and at Muguba primary school in June 1994.

Chamber findings at paragraphs 793 and 834 that it found that by his conduct and participation in the attacks Gérard Ntakirutimana had the intent to destroy, in whole, the Tutsi ethnic group. The only reasonable inference from the circumstances described by the Trial Chamber to support the above findings is that Gérard Ntakirutimana had knowledge that his acts and conduct had a substantial effect upon the commission of genocide by others. Accordingly, the Appeals Chamber finds that by the other acts of assistance identified by the Trial Chamber Gérard Ntakirutimana incurred criminal responsibility as an aider and abettor to genocide.

VI. PROSECUTION'S FOURTH GROUND OF APPEAL (EXTERMINATION)

510. Elizaphan Ntakirutimana and Gérard Ntakirutimana were found not guilty by the Trial Chamber of a crime against humanity (extermination) under Count 4 of the Mugonero Indictment and Count 5 of the Bisesero Indictment.[868] Count 4 alleges the massacre of civilians during the month of April 1994 in Gishyita commune, Kibuye Prefecture, and Count 5 alleges the extermination of civilians during the months of April through June 1994 in the area known as Bisesero, in Gishyita and Gisovu communes, Kibuye Prefecture.

511. The Prosecution appeals the acquittals under these two counts.

A. Alleged Error for Requiring that Victims be Named or Described Persons

512. In its appeal, the Prosecution argues that the Trial Chamber erred in law at paragraphs 813 and 851 of the Trial Judgement when, in addition to the element of mass killing or mass destruction, it held that "victims be named or described persons" in order to impute liability for extermination. The Prosecution argues that this element does not exist in customary international law,[869] and that the ICTR jurisprudence does not establish that "killing certain named or described persons" is an element under Article 3(b).[870] Furthermore, it argues that the Trial Chamber's addition of the requirement that victims be named or identified could lead to undesirable consequences, such as rendering many prosecutions impossible when mass graves are discovered years after the killings are perpetrated and identification of victims is difficult.[871] In the alternative, the Prosecution argues that the Trial Chamber erred in law in paragraphs 814 and 852 of the Trial Judgement by interpreting this requirement too narrowly to the facts of the case and inconsistently with the Tribunal's case law.[872] It argues that the victims at the Mugonero Complex and in Bisesero were adequately described according to the case law of the International Tribunal.[873] At the Appeal hearing the Prosecution argued that, had the Trial Chamber not included the element of killing certain named or described persons, or given the narrow interpretation that it gave to this element, the Trial Chamber would have come to the inescapable conclusion that the mass element required for the crime of extermination was established. The Prosecution argued that the mass element was

[868] Trial Judgement, paras. 814, 852.
[869] Prosecution Appeal Brief, paras. 3.17-3.18, 3.20, 3.22.
[870] *Id.*, paras. 3.24-3.33.
[871] *Id.*, para. 3.16.
[872] *Id.*, paras. 3.37-3.46.
[873] Prosecution Appeal Brief, para. 3.47.

met because at the Mugonero Complex, hundreds of people were killed, and in Bisesero, thousands of people were killed.[874]

513. In response, Gérard Ntakirutimana argues that the Trial Chamber's acquittal on the charge of extermination reflects a lack of evidence regarding the killing of a large number of individuals as a result of the Accused's actions.[875] Therefore, the additional definitional element is irrelevant to Trial Chamber's decision. He argues that the requirement that victims be "named or described" serves as proof that a certain number of people actually died as a result of the Accused's conduct. However, if the Appeals Chamber admits that such element is not a component of the crime of extermination, the matter must be remitted to the Trial Chamber for a new determination.[876]

514. In its Judgement the Trial Chamber made the following legal findings:

> The Chamber found above the killing of only one named or described individual, that is, Charles Ukobizaba. The Chamber is not persuaded that the element of "mass destruction" or "the taking of a large number of lives" has been established in relation to the Accused, or that the Accused were responsible for the mass killing of named or described individuals. There is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions. Therefore, the Chamber is not satisfied that Elizaphan Ntakirutimana or Gérard Ntakirutimana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of a crime against humanity (extermination). Accordingly, the Chamber finds that Elizaphan Ntakirutimana and Gérard Ntakirutimana are not guilty of a crime against humanity (extermination) as charged in Count 4 of the Mugonero Indictment.[877]
>
> [...]
>
> The Chamber found above the killing of only two named or described individuals, that is, the killings of Esdras and the wife of Nzamwita, by Gérard Ntakirutimana. The Chamber is not persuaded that the element of "mass destruction" or "the taking of a large number of lives" has been established in relation to the Accused, or that the Accused were responsible for the mass killing of named or described individuals. There is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions. The Chamber is not satisfied that Elizaphan Ntakirutimana or Gérard Ntakirutimana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of a crime against humanity (extermination). Accordingly, the Chamber finds that Elizaphan Ntakirutimana and Gérard Ntakirutimana are not guilty of a crime against humanity (extermination) as charged in Count 5 of the Bisesero Indictment.[878]

515. The acquittal on the charge of personal commission of extermination was motivated by the fact that the Trial Chamber was not convinced, on the evidence, that Elizaphan Ntakirutimana personally killed anyone and that Gérard Ntakirutimana personally killed more than one victim at Mugonero and more than two victims at Bisesero. The basis for their further acquittal on the charge of planning, instigating, ordering or otherwise aiding and abetting in the planning preparation and execution of the crime of extermination is less clear. In light of the Trial Chamber's other

[874] Appeal Hearing, T. 8 July 2004, p. 71.
[875] Response (G. Ntakirutimana), para. 80.
[876] *Id.*, para. 83.
[877] Trial Judgement, para. 814.

findings,[879] it is conceivable that the Trial Chamber reached this conclusion considering that the requirement that the mass killing be of named or described individuals was not met.

516. In its Judgement, the Trial Chamber followed the *Akayesu* Trial Judgement in defining extermination as "a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not required for murder."[880] The Appeals Chamber agrees with the Trial Chamber that the crime of extermination is the act of killing on a large scale.[881] The expressions "on a large scale" or "large number" do not, however, suggest a numerical minimum.[882] As a crime against humanity, for the purposes of the ICTR Statute, the act of killing must occur within the context of a widespread or systematic attack[883] against the civilian population for national, political, ethnic, racial or religious grounds.

517. In finding that an element of the crime of extermination was the "killing of certain named or described persons"[884] the Trial Chamber purported to be following the *Akayesu* Trial Judgement,[885] which it found had since been followed in *Rutaganda* and *Musema*.[886] More recently, this element was also stated in the *Niyitegeka* Trial Judgement.[887] In other judgements issued by ICTR Trial Chambers "certain named or described persons" has not been considered to be an element of the crime of extermination.[888] Further, none of the judgements of the ICTY which have considered the charge of extermination has identified killing "certain named or described persons" to be an element of the crime of extermination.[889]

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[878] Trial Judgement, para. 852.
[879] *See* in particular, Trial Judgement, paras. 785, 788-790, which establish that Elizaphan Ntakirutimana was guilty of aiding and abetting genocide for the killings of hundreds of Tutsis identified at the Mugonero Complex.
[880] Trial Judgement, para. 813 citing *Akayesu* Trial Judgement, para. 591. This position has been endorsed in all the ICTR Trial Judgements: *Kayishema and Ruzindana* Trial Judgement, para. 142; *Rutaganda* Trial Judgement, para. 82; *Musema* Trial Judgement, para. 217; *Bagilishema* Trial Judgement, para. 86; *Semanza* Trial Judgement, para. 340; *Niyitekega* Trial Judgement, para. 450; *Kajelijeli* Trial Judgement, para. 890; *Media* Trial Judgement, para. 1044; *Kamuhanda* Trial Judgement, para. 691. *See also*, ICTY, *Krstić* Trial Judgement, para. 503; *Vasiljević* Trial Judgement, para. 227; *Stakić* Trial Judgement, para. 639.
[881] Trial Judgement, para. 813 citing *Vasiljević* Trial Judgement, para. 232.
[882] *Kayishema and Ruzindana* Trial Judgement, para. 145; *Bagilishema* Trial Judgement, para. 87; *Kajelijeli* Trial Judgement, para. 891; *Media* Trial Judgement, para. 1044; *Kamuhanda* Trial Judgement, para. 692.
[883] While the English version of the ICTR Statute reads "widespread or systematic", the French version of Article 3 reads "généralisée et systématique", the French version containing an error in the translation of the English text.
[884] Trial Judgement, para. 813 citing *Akayesu* Trial Judgement, para. 592.
[885] *Akayesu* Trial Judgement, para. 592.
[886] Trial Judgement, n. 1154. It must be noted that this definition was not challenged on appeal in *Rutaganda* and *Musema*.
[887] *Niyitekega* Trial Judgement, para. 450.
[888] *Kayishema and Ruzindana* Trial Judgement, paras. 142-147; *Bagilishema* Trial Judgement para. 89; *Semanza* Trial Judgement, paras. 340-463; *Kajelijeli* Trial Judgement, paras. 891-893; *Media* Trial Judgement, para. 1044; *Kamuhanda* Trial Judgement, paras. 691-695.
[889] *Krstić* Trial Judgement, paras. 495-505; *Vasiljević* Trial Judgement, paras. 216-233; *Stakić* Trial Judgement, paras. 638-661. Although the definition in the *Akayesu* Judgement is mentioned in the *Krstić* Judgement, it should be noted,

518. The Appeals Chamber agrees with the Prosecution that customary international law does not consider a precise description or designation by name of victims to be an element of the crime of extermination. There is no mention of such an element in Article 6(c) of the Statute of the Nuremberg International Military Tribunal, nor was extermination interpreted by that Tribunal as requiring proof of such an element in judgements rendered. The International Law Commission Draft Code of Crimes against the Peace and Security of Mankind also does not consider a precise description or designation of the victims by name to be an element of the crime of extermination:

> "Extermination is a crime which by its very nature is directed against a group of individuals. In addition, the act used to carry out the offence of extermination involves an element of mass destruction which is not required for murder. [...] In this regard, extermination is closely related to the crime of genocide in that both crimes are directed against a large number of victims. However, the crime of extermination would apply to situations that differ from those covered by the crime of genocide. Extermination covers situations in which a group of individuals who do not share any common characteristics are killed [...]"[890]

519. Incidentally, that the victims be "certain named or described persons" is not identified as an element of the crime of extermination under Article 7(1)(b) of the Statute of the International Criminal Court.[891]

520. In the *Rutaganda, Musema* and *Niyitegeka* Trial Judgements, from which the Trial Chamber purported to derive this element, the majority of victims were identified by the Trial Chamber as civilians of Tutsi origin, without designating them by name or describing them with greater precision.[892] The interpretation they placed upon the requirement that the victims be "certain named or described persons" was met by the identification of civilians of a particular origin. In these cases, the requirement to designate the victims by name or to give a precise description of the victims killed was not extended to embrace the literal meaning, but seems rather to have been understood as expressing the fact that all crimes against humanity under the ambit of the ICTR Statute must be committed because of a victim belonging to a national, political, ethnic, racial or religious group.

521. It is not an element of the crime of extermination that a precise identification of "certain named or described persons" be established. It is sufficient that the Prosecution satisfy the Trial Chamber that mass killings occurred. In this case that element was satisfied by the Trial Chamber's

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however, that the Trial Chamber in *Krstić* did not endorse this definition and preferred to make its own assessment to determine the underlying elements of extermination. It seems, moreover, that the Trial Chamber in *Krstić* decided on the need for identification of the victims (para. 499) as a mere requirement of identification of the victims as civilians.

[890] Commentaries on the ILC Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session, 6 May - 26 July 1996*, Official Documents of the United Nations General Assembly's 51st session, Supplement no. 10 (A/51/10), Article 18, p. 118.

[891] Report of the Preparatory Commission for the International Criminal Court, Finalized draft text of the Elements of Crimes, PCNICC/2000/1/Add.2, 2 November 2000. The Appeals Chamber notes that with respect to the state of customary international law in 1994, the time at which the crimes were committed, the legal instruments coming into effect after that date are of less legal significance.

[892] *Rutaganda* Trial Judgement, para. 416; *Musema* Trial Judgement, para. 949; *Niyitegeka* Trial Judgement, para. 454.

findings that hundreds of people were killed at the Mugonero Complex and that thousands of people were killed in Bisesero. To require greater identification of those victims would, as the Prosecution argued, increase the burden of proof to such an extent that it hinders a large number of prosecutions for extermination.

522. Accordingly, the Appeals Chamber finds that the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result. Applying this definition, the Trial Chamber erred in law by interpreting the requirement of "killing of certain named or described persons" to be an element of the crime of extermination.

523. The Prosecution argues that the Trial Chamber's legal error led to acquittal of Elizaphan Ntakirutimana and Gérard Ntakirutimana on the charges of extermination. The Trial Chamber concluded that "[t]here is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions" to establish the criminal liability of the Accused pursuant to Article 6(1) of the Tribunal's Statute. The issue to be examined next by the Appeals Chamber is whether this factual conclusion reached by the Trial Chamber was based upon its legal error that an element of the crime of extermination is that the victims must be "named or described persons".

B. Alleged Error for Failing to Consider that the Accused Participated in a Joint Criminal Enterprise or Aided and Abetted the Crime of Extermination

524. On appeal, the Prosecution argues that both Elizaphan Ntakirutimana and Gérard Ntakirutimana should be found guilty of extermination as participants in a joint criminal enterprise to exterminate predominantly Tutsi civilians who had sought refuge at the Mugonero Complex and in Bisesero.[893] Alternatively, the Prosecution argues that Gérard Ntakirutimana and Elizaphan Ntakirutimana should be found guilty as aiders and abettors of extermination.[894] In its Notice of Appeal, the Prosecution did not advance the ground that the Accused acted as participants in a joint criminal enterprise to exterminate. This ground of appeal was developed in the Prosecution Appeal Brief and argued at the Appeal hearing.[895] The Appeals Chamber has already rejected the Prosecution's argument that this mode of liability should have been considered by the Trial Chamber in relation to the crime of genocide and those same considerations apply here. Moreover,

[893] Prosecution Appeal Brief, paras. 3.57-3.58; Appeal Hearing, T. 8 July 2004, p. 79.
[894] Prosecution Appeal Brief, para. 3.59.
[895] Prosecution Amended Notice of Appeal, Ground 5, pp. 3-4.

the Prosecution's failure to specify this ground of appeal in its Notice of Appeal is not rectified by the Prosecution's development of that argument in its Appeal Brief. Upon this basis, the Appeals Chamber considers that it has not been properly seized of this ground of appeal, and will therefore limit its consideration to other forms of individual criminal liability, namely direct commission and aiding and abetting the commission of the crime of extermination.

525. In support of its argument that the Trial Chamber erred in finding that Elizaphan Ntakirutimana and Gérard Ntakirutimana were not responsible for the taking of a large number of lives, and that the element of mass destruction had not been met, the Prosecution points to the factual findings made by the Trial Chamber. The Trial Chamber found that, on 16 April 1994, a massacre occurred at the Mugonero Complex, which "claimed hundreds of lives".[896] It also found that, from April to June 1994, there were widespread attacks in Bisesero and that Gérard Ntakirutimana and Elizaphan Ntakirutimana intentionally participated in them.[897] On 13 May 1994, Gérard Ntakirutimana was found to have participated in the attack on Muyira Hill. This attack, the Prosecution argues, was considered to constitute extermination in the *Kayishema and Ruzindana*, *Musema* and *Niyitegeka* Trial Judgements.[898]

526. The Prosecution argues that the Trial Chamber erroneously removes from its consideration the large number of persons whose killings were aided and abetted by the two Accused.[899] The Trial Chamber found that Elizaphan Ntakirutimana was guilty of aiding and abetting genocide for the killings of hundreds of Tutsis identified at the Mugonero Complex[900] but that he was not liable for extermination because there was insufficient evidence as to the large number of persons killed as a result of his actions.[901] According to the Prosecution, these findings are irreconcilable and the Trial Chamber erred in failing to consider that Elizaphan Ntakirutimana's intentional aiding and abetting of massacres satisfies the mass destruction element of extermination.[902] In addition, the Prosecution argues that the Trial Chamber found that Gérard Ntakirutimana provided assistance and participated in the attack at the Mugonero Complex with the requisite genocidal intent. That attack resulted in killings committed in addition to those that Gérard Ntakirutimana personally committed. Because Gérard Ntakirutimana substantially assisted in killings, the Prosecution argues that the mass destruction element was proven and a conviction for extermination should have been entered.[903]

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[896] Prosecution Appeal Brief, para. 3.8 citing Trial Judgement, para. 785.
[897] Prosecution Appeal Brief, para. 3.8 citing Trial Judgement, paras. 446, 447.
[898] Prosecution Appeal Brief, para. 49 citing *Niyitegeka* Trial Judgement, paras. 451, 413.
[899] Prosecution Reply, para. 3.12.
[900] Prosecution Reply, para. 3.13 citing Trial Judgement, paras. 788-790.
[901] *Id.*, para. 3.13.
[902] *Id.*, paras. 3.13, 3.14.
[903] *Id.*, para. 3.14.

527. It clearly appears from the Mugonero and Bisesero Indictments, from the Prosecution's Pre-Trial Brief[904] and from the Prosecution's Closing Brief,[905] that the individual criminal responsibility of Elizaphan Ntakirutimana and Gérard Ntakirutimana was founded on Article 6(1) of the Statute of the Tribunal.[906] Consequently, the form of responsibility pleaded by the Prosecution for both Accused embraces "having either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4" of the Statute.[907]

528. As mentioned earlier, the Trial Chamber acquitted the Accused on the charge of personal commission of extermination because it was not convinced, on the evidence, that Elizaphan Ntakirutimana personally killed anyone or that Gérard Ntakirutimana personally killed more than one victim at Mugonero and more than two victims at Bisesero. Why the Trial Chamber failed to consider whether the acts of aiding and abetting which supported the conviction for genocide could also form the basis for a conviction for aiding and abetting the crime of extermination is unclear.

529. One possibility is that the Trial Chamber pronounced these acquittals based solely on its legal error that an element of the crime of extermination required proof that the Accused were responsible for the mass killing of precisely "named or described individuals". The second possibility is that, when the Trial Chamber stated that "there is insufficient evidence as to a large number of individuals killed as a result of the Accused's actions", it meant that aiding and abetting the crime of extermination requires that the acts of assistance provided by the Accused to the main perpetrators effectively resulted in the killing of a large number of people. This interpretation of aiding and abetting would also constitute a legal error.

530. The *actus reus* for aiding and abetting the crime of extermination is that the accused carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of that crime. This support must have a substantial effect upon the perpetration of the crime. The requisite *mens rea* is knowledge that the acts performed by the aider and abettor assist the commission of the crime of extermination committed by the principal. If it is established that the accused provided a weapon to one principal, knowing that the principal will use that weapon to take part with others in a mass killing, as part of a widespread and systematic attack against the civilian population, and if the mass killing in question occurs, the fact that the weapon procured by the accused "only" killed a limited number of persons is irrelevant to determining the accused's responsibility as an aider and abettor of the crime of extermination.

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[904] Prosecution's Pre-Trial Brief, paras. 23-39.
[905] Prosecution's Closing Brief, paras. 1085, 1086, 1088, 1109, 1112.

531. The Appeals Chamber will next determine whether the above error invalidates the verdict. As already stated, the Appeals Chamber has quashed a number of the Trial Chamber's factual findings for lack of notice.[908] Accordingly, the Appeals Chamber must determine whether the remaining factual findings are sufficient to support a finding of criminal responsibility of the Accused for the crime of extermination.

532. With respect to Elizaphan Ntakirutimana, the remaining findings are: one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill,[909]; one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them; on this occasion, Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers, who then chased these refugees singing, "Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests";[910] one day on May or June 1994 Elizaphan Ntakirutimana was seen arriving at Ku Cyapa in a vehicle followed by two buses of attackers, and he was part of a convoy which included attackers;[911] and sometime between 17 April and early May 1994, Elizaphan Ntakirutimana was in Murambi within the area of Bisesero, and he went to a church in Murambi where many Tutsi were seeking refuge and ordered attackers to destroy the roof of the church.[912]

533. These findings are sufficient to sustain the Trial Chamber's finding of criminal responsibility on the part of Elizaphan Ntakirutimana for aiding and abetting the crime of genocide. The Appeals Chamber is satisfied that in carrying out these acts Elizaphan Ntakirutimana assisted, encouraged or lent moral support to the perpetration of genocide by others, and that his acts had a substantial effect upon the perpetration of that crime, and that he knew that these acts and conduct assisted the commission of genocide by others.

534. The Appeals Chamber finds that in carrying out these acts of participation Elizaphan Ntakirutimana knew that the intent of the actual perpetrators was the extermination of the Tutsi refugees and that he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Murambi. Accordingly, the Appeals Chamber holds that these factual findings support the mass killing element of the crime of extermination, that Elizaphan Ntakirutimana had the required *mens rea* for aiding and abetting extermination and accordingly

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[906] Gérard Ntakirutimana was also prosecuted pursuant to Article 6(3) of the Statute of the Tribunal.
[907] Prosecution's Closing Brief, para. 1112.
[908] *Supra*, section II. A.1.(b).
[909] Trial Judgement, para. 579.
[910] *Id.*, para. 594.
[911] *Id.*, para. 661.
[912] *Id.*, para. 691.

finds that Elizaphan Ntakirutimana incurred individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity.

535. With respect to Gérard Ntakirutimana, the remaining factual findings under the Bisesero Indictment are his participation in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, where he pursued and shot at Tutsi refugees; [913] and his participation in an attack at Mubuga Primary School in June 1994, where he shot at Tutsi refugees.[914] In relation to the Mugonero Indictment the remaining factual findings are his killing of Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994 during an attack at the Mugonero Complex;[915] and his attendance at a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994 and his procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994.[916]

536. The Appeals Chamber has already determined that the factual findings supporting Gérard Ntakirutimana's conviction for aiding and abetting genocide consist of pursuing Tutsi refugees at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994, and participating in an attack at Mubuga Primary School in June 1994, where he shot at Tutsi refugees, under the Bisesero Indictment, and procuring gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994, under the Mugonero Indictment.

537. The Appeals Chamber finds that in carrying out these acts Gérard Ntakirutimana knew that the intention of the other participants was the extermination of the Tutsi refugees and that by his acts and conduct he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Gitwe Hill, Mubuga Primary School and at the Mugonero Complex. The Appeals Chamber holds that these factual findings support the mass killing element of the crime of extermination, that Gérard Ntakirutimana had the required *mens rea* for aiding and abetting extermination, and accordingly finds that Gérard Ntakirutimana incurred individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity. The Appeals Chamber is satisfied that Gérard Ntakirutimana shared the intent to exterminate. However, as pleaded in the Indictment, the actions of Gérard Ntakirutimana alone do not satisfy the

[913] *Id.*, paras. 552-559, 832(iii).
[914] *Id.*, paras. 628, 832(vii).
[915] *Id.*, paras. 384, 791.
[916] *Id.*, paras. 186 and 791.

mass scale killing element for the Appeals Chamber to be able to enter a conviction for extermination.[917]

C. Additional Issues Raised by the Accused in Relation to the Prosecution Fourth Ground of Appeal

538. Elizaphan and Gérard Ntakirutimana argued that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the large scale killings.[918] The Accused noted that the Trial Chamber rejected charges under Article 6(3) of the Statute because it found that Gérard Ntakirutimana had no effective control over any persons during the applicable period.[919]

539. The argument put forward by both Elizaphan Ntakirutimana and Gérard Ntakirutimana stems from an erroneous interpretation of the *Vasiljević* Trial Judgement. In that case, Trial Chamber II of ICTY did not consider that the accused had to be in a position of authority for the crime of extermination.[920] The paragraph of the *Vasiljević* Trial Judgement on which they rely is a simple outline of the policy for the crime of extermination as practised by tribunals after World War II, and has no impact on the definition of the crime.[921] There was no finding in *Vasiljević* that extermination charges are reserved for persons exercising power and authority or who otherwise had the capacity to be instrumental in the killings of large numbers. As Elizaphan Ntakirutimana and Gérard Ntakirutimana have identified no other authority in support of their argument that the crime of extermination should be reserved for this category of individuals alone, and authorities of this Tribunal and that of the ICTY have established otherwise, this ground of appeal is dismissed as unfounded.

540. Elizaphan Ntakirutimana and Gérard Ntakirutimana also argue that cumulative convictions for genocide and extermination based on the same facts are prohibited.[922] Gérard Ntakirutimana argues that the *Krstić* Trial Judgement establishes that when facts support a conviction for both extermination and genocide, the verdict of genocide should be upheld because it is more specific.[923] Gérard Ntakirutimana further submits that an extermination conviction, as well as convictions for the murders of Charles Ukobizaba, Esdras and Nzamwita's wife, would be impermissibly cumulative on the basis of the *Rutaganda* Trial Judgement. Gérard Ntakirutimana argues, therefore,

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[917] *Id.*, para. 524.
[918] Response (G. Ntakirutimana), para. 84 citing *Vasiljević* Trial Judgement, para. 222; Response (E. Ntakirutimana), p. 16.
[919] Trial Judgement, paras. 819-822.
[920] *Vasiljević* Trial Judgement, para. 229.
[921] *Id.*, para. 222.
[922] Response (G. Ntakirutimana), para. 86; Response (E. Ntakirutimana), p. 16.

that if a conviction for extermination is entered, the murder conviction should be vacated. [924] As the Appeals Chamber has already reversed Gérard Ntakirutimana's conviction for the murders of Esdras and Nzamwita's wife it will only consider the above argument in relation to the murder of Charles Ukobizaba.

541. In response the Prosecution argues that, in *Musema,* the Appeals Chamber found that convictions for both genocide and extermination based on the same conduct are permissible.[925] Furthermore, the Prosecution argues that *Musema* overruled the *Krstić* Trial Judgement because *Musema* was rendered later.[926] However, the Prosecution agrees with Gérard Ntakirutimana that an extermination conviction cannot stand cumulatively with the murder conviction if they emanate from the same events because murder is subsumed within the crime of extermination.

542. Following the principles established in *Čelebići,* the Appeals Chamber in *Musema* held that multiple criminal convictions entered under different statutory 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. [927] An element is materially distinct from another if it requires proof of a fact not required by the other.[928] Applying this principle, the *Musema* Appeals Chamber held that the crime of genocide under Article 2 of the Statute and the crime of extermination under Article 3 of the Statute each contained a materially distinct element not required by the other. The materially distinct element of genocide is the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The materially distinct element of extermination, as a crime against humanity, is the requirement that the crime was committed as part of a widespread or systematic attack against a civilian population.[929] Upon this basis, the Appeals Chamber held that convictions for genocide and extermination as a crime against humanity, based on the same facts, are permissible.[930] This conclusion has recently been confirmed by the ICTY Appeals Chamber in the *Krstić* case.[931] Conviction for murder as a crime against humanity and conviction for extermination as a crime against humanity, based on the same set of facts, however, cannot be cumulative.[932] Murder as a crime against humanity does not contain a materially distinct element from

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[923] Response (G .Ntakirutimana), paras. 87-89.
[924] *Id.*, para. 96.
[925] Prosecution Reply, para. 3.24, citing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Decision of the Appeals Chamber, 31 May 2000, para. 92.
[926] Prosecution Reply, para. 3.25.
[927] *Musema* Appeal Judgement, paras. 358-370.
[928] *Čelebići* Appeal Judgement, para. 412. The standard was clarified in the *Kunarac et al.* Appeal Judgement, para. 168. *See also Vasiljević* Appeal Judgement, paras. 135, 146; *Krstić* Appeal Judgement, para. 218.
[929] *Musema* Appeal Judgement, para. 366.
[930] *Musema* Appeal Judgement, para. 370.
[931] *Krstić* Appeal Judgement, paras. 219-227.
[932] *See Kayishema and Ruzindana* Trial Judgement, paras. 647-650; *Rutaganda* Trial Judgement, para. 422; *Musema* Trial Judgement, para. 957; *Semanza* Trial Judgement, paras. 500-505.

extermination as a crime against humanity; each involves killing within the context of a widespread or systematic attack against the civilian population, and the only element that distinguishes these offences is the requirement of the offence of extermination that the killings occur on a mass scale.

VII. PROSECUTION'S FIFTH GROUND OF APPEAL MURDER (MURDER AS A CRIME AGAINST HUMANITY)

543. The Accused were charged with the crime of murder as a crime against humanity under Count 3 of the Mugonero Indictment and Count 4 of the Bisesero Indictment. The Trial Chamber acquitted Elizaphan Ntakirutimana of these counts;[933] Gérard Ntakirutimana was found guilty of the murders of Charles Ukobizaba, Esdras and the wife of Nzamwita.[934] Count 3 of the Mugonero Indictment alleged the massacre of civilians during the month of April 1994 in Gishyita commune, Kibuye Prefecture, and Count 4 of the Bisesero Indictment alleged the massacre of civilians during the months of April through June 1994 in the area known as Bisesero, in Gishyita and Gisovu communes, Kibuye Prefecture.

544. The Prosecution contends that the Trial Chamber erred in law in its determination of the elements required for murder as a crime against humanity as applied to both the Mugonero Indictment and the Bisesero Indictment. Specifically, it alleges that the Trial Chamber erred in paragraphs 803 (Mugonero) and 843 (Bisesero) in finding that one of the elements of the crime of murder (crime against humanity) is that the perpetrator personally killed the victim(s).[935] According to the Prosecution, this error invalidates the Judgement when the Trial Chamber did not find Elizaphan Ntakirutimana and Gérard Ntakirutimana guilty of murder as a crime against humanity for their participation in the hundreds of killings at the Mugonero Complex and the thousands of killings in Bisesero.[936] The Prosecution requests that the Appeals Chamber reverse the verdict and enter convictions for Gérard Ntakirutimana and Elizaphan Ntakirutimana based on Count 3 of the Mugonero Indictment and Count 4 of the Bisesero Indictment.[937] This request is submitted, however, in the event that the Appeals Chamber does not convict Gérard Ntakirutimana and Elizaphan Ntakirutimana of extermination.[938]

545. At the Appeals hearing the Prosecution requested that the Appeals Chamber, even if it granted the Prosecution's fourth ground of appeal, clarify the law with respect to the material element of murder as a crime against humanity by including a finding in the Judgement that it is not a requirement for responsibility under Article 3(a) of the Statute that the accused personally commits the killing. Having found that the Trial Chamber erred in relation to the elements of the

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[933] Trial Judgement, paras. 805, 844.
[934] *Id.*, paras. 809-810 and 848-849.
[935] Prosecution Amended Notice of Appeal, p. 4.
[936] *Id.*, pp. 4-5.
[937] *Id.*, p. 5.
[938] *Id.*

crime of extermination, the Appeals Chamber clarifies the law on the material element of murder as a crime against humanity.

546. Murder as a crime against humanity under Article 3(a) does not require the Prosecution to establish that the accused personally committed the killing. Personal commission is only one of the modes of liability identified under Article 6(1) of the ICTR Statute. All modes of liability under that Article are applicable to the crimes defined in Articles 2 to 4 of the Statute. Similarly, an accused can also be convicted of a crime defined in Articles 2 to 4 of the Statute on the basis of his responsibility as a superior according to Article 6(3) of the ICTR Statute.

VIII. SENTENCE

547. In Section II.A.1. above, the Appeals Chamber has upheld a number of Gérard Ntakirutimana's grounds of appeal that he and Elizaphan Ntakirutimana were given insufficient notice of the material facts of the Prosecution's case and that the Trial Chamber erred in basing a conviction on those material facts. In Sections VI.B. and VII., the Appeals Chamber has also upheld the Prosecution's appeal in relation to the elements of extermination as a crime against humanity and confirmed that the *mens rea* for aiding and abetting genocide is knowledge of the perpetrator's genocidal intent. The Appeals Chamber now considers how those errors impact upon the criminal responsibility and sentences of Elizaphan Ntakirutimana and Gérard Ntakirutimana. The Appeals Chamber will also assess the merits of the Prosecution's sixth ground of appeal against the Trial Chamber's determination of the sentence to be applied to Elizaphan Ntakirutimana and Gérard Ntakirutimana.

A. Prosecution's Sixth Ground of Appeal

548. Pursuant to Article 23 of the Statute, in determining the terms of imprisonment, the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of Rwanda. The Prosecution argues that, although the Trial Chamber did refer to the relevant Rwandan legislation on sentencing practices, it did so not for the purpose of determining the general sentencing practices in Rwanda, but rather in support of a principle of gradation discussed in the Trial Judgement. The Prosecution submits that under the general sentencing practice in Rwanda both Elizaphan Ntakirutimana and Gérard Ntakirutimana would have received more severe terms of imprisonment, namely mandatory life sentences.[939]

549. It is established jurisprudence that the imposition of a sentence is a decision which falls to the Trial Chamber. A Trial Chamber has considerable discretion when determining a sentence and the Appeals Chamber will not intervene unless there has been a discernible error in the exercise of the Trial Chamber's discretion.[940]

550. In its discussion, the Trial Chamber did indeed refer to the principle of gradation of sentences, noting that harsher penalties may be imposed on individuals who committed crimes with "especial zeal or sadism" and that the sentences "consequently stigmatize those crimes at a level that corresponds to their overall magnitude and reflects the extent of the suffering inflicted upon the

[939] Prosecution Appeal Brief, paras. 5.4-5.15. Referring to the Rwandan Organic Law No. 8/96 on the Organization of Prosecutions for Offences constituting Genocide or Crimes Against Humanity committed since 1 October 1990 and the Rwandan Penal Code of 18 August 1977.

victims."[941] It also noted that this principle could be found in the relevant dispositions of the Rwandan Criminal Code and the practices of Rwandan courts in respect of sentencing.[942] However, it cannot be said, as the Prosecution suggests, that by invoking such a principle, the Trial Chamber minimised the crimes committed and the conduct of the Accused. Quite the reverse.

551. The Trial Chamber concluded that this principle would allow for imposition of "the highest sentence if the circumstances of the case, after assessment of any individual and mitigating factors, are deemed to require it."[943] The Trial Chamber added that by the same token not all persons convicted of genocide must be given the highest sentence.[944] The Appeals Chamber understands this to mean that the Trial Chamber could likewise impose a lesser sentence if justified after an assessment of any individual and mitigating factors. The Trial Chamber was therefore positing that the appropriate sentence to be applied to the Accused depended largely on the circumstances of the case, including consideration of mitigating and aggravating factors. This approach is in conformity with Rule 101(A) of the Rules, and within the discretion of the Trial Chamber.

552. The Trial Chamber reached its decision on sentence only after having discussed relevant mitigating and aggravating factors, and after having noted the Prosecution's submission that both Accused would have received death sentences in Rwanda as they fell under Category I of Rwanda's Organic Law.[945] The Appeals Chambers is therefore not persuaded by the Prosecution's argument that by recalling the principle of gradation of sentence, the Trial Chamber committed a discernible error.

553. The Prosecution also submits that the sentences given to Gérard and Elizaphan Ntakirutimana are in disparity with the Tribunal's sentencing practice in genocide cases and are manifestly disproportionate to the crimes. The Prosecution requests that the Appeals Chamber increase the sentence of Elizaphan Ntakirutimana to 20 years' imprisonment, and that of Gérard Ntakirutimana to life imprisonment.[946] Given that the Appeals Chamber has quashed a number of convictions for each Accused, the submissions of the Prosecution in this regard are now moot.

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[940] *Vasiljević* Appeal Judgement, para. 9; *Krstić* Appeal Judgement, paras. 241-242.
[941] Trial Judgement, para. 884.
[942] *Id.*, para. 885.
[943] *Id.*, para. 886.
[944] *Id.*
[945] *Id.*, para. 890.
[946] Prosecution's Appeal Brief, paras. 5.16-5.53.

B. Convictions and Sentence for Gérard Ntakirutimana

554. Gérard Ntakirutimana was sentenced to 25 years' imprisonment. He was arrested on 29 October 1996 in the Ivory Coast and transferred to the Tribunal on 30 November 1996. He has since his transfer been detained in the United Nations Detention Facilities in Arusha, Tanzania.

555. As a result of the errors committed by the Trial Chamber, the following Trial Chamber findings supporting Gérard Ntakirutimana's convictions under the Bisesero Indictment have been quashed:

> (i) "on or about 18 April 1994 Gérard Ntakirutimana was with *Interahamwe* in Murambi Hill pursuing and attacking Tutsi refugees" and "in the last part of April or possibly in May, Gérard Ntakirutimana was with attackers in Gitwe Hill where he shot at refugees;"[947]
>
> (ii) "sometime between April and June 1994, Gérard Ntakirutimana was in Kidashya Hill transporting armed attackers, and he participated in chasing and shooting at Tutsi refugees in the hills;"[948]
>
> (iii) "Gérard Ntakirutimana participated in an attack at Mutiti Hill, where he shot at refugees;"[949]
>
> (iv) "one day in June 1994, Gérard Ntakirutimana headed a group of armed attackers at Muyira Hill. He carried a gun and shot at refugees;"[950]
>
> (v) "sometime in mid-May 1994, at Muyira Hill, Gérard Ntakirutimana took part in an attack on Tutsi refugees;"[951]
>
> (vi) "Gérard Ntakirutimana participated in the attack against Tutsi refugees at Muyira Hill on 13 May 1994 and [ ] he shot and killed the wife of one Nzamwita, a Tutsi civilian;"[952]
>
> (vii) "Gérard Ntakirutimana killed a person named "Esdras" during an attack at Gitwe Hill at the end of April or the beginning of May 1994."[953]

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[947] Trial Judgement, para. 543; *see also id.*, paras. 832(i)-(ii).
[948] *Id.*, para. 586; *see also id.*, para. 832(vi).
[949] *Id.*, para. 674; *see also id.*, para. 832(ix).
[950] *Id.*, para. 668; *see also id.*, para. 832(viii).
[951] *Id.*, para. 832(v); *see also id.*, para. 635.
[952] *Id.*, para. 642; *see also id.*, para. 832(iv).
[953] *Id.*, paras. 559, 832(iii).

556. The following factual findings made by the Trial Chamber concerning Gérard Ntakirutimana in relation to two separate events under the Bisesero Indictment are upheld:

(i) Gérard Ntakirutimana participated in an attack at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 where he pursued and shot at Tutsi refugees;[954]

(ii) Gérard Ntakirutimana participated in an attack at Mubuga Primary School in June 1994 and shot at Tutsi refugees.[955]

557. Additionally, the Trial Chamber's factual finding concerning Gérard Ntakirutimana's involvement in relation to two separate events under the Mugonero Indictment are upheld, namely:

(i) Gérard Ntakirutimana killed Charles Ukobizaba by shooting him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994;[956]

(ii) Gérard Ntakirutimana attended a meeting with the commander of the Kibuye gendarmerie camp and Obed Ruzindana in Kibuye town on the afternoon of 15 April 1994 and he procured gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994.[957]

558. Also as found above, the Trial Chamber erred in law in considering that an element of the crime of extermination is that the victims must be "named or described persons". Considering the impact of the error in question on the verdict, the Appeals Chamber found that in carrying out the acts supporting his conviction for genocide and aiding and abetting genocide, Gérard Ntakirutimana knew that the intention of the other participants was the extermination of the Tutsi refugees and that by his acts and conducts he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at Gitwe Hill, Mubuga Hill and at the Mugonero Complex. Therefore, Gérard Ntakirutimana incurs individual criminal responsibility for aiding and abetting extermination of the Tutsi as a crime against humanity.

559. The Appeals Chamber therefore upholds the Trial Chamber's conviction of Gérard Ntakirutimana for Genocide, for his participation to the attack at the Mugonero Complex during which he killed Charles Ukobizaba, as charged in Count 1A of the Mugonero Indictment, and the conviction for murder as a crime against humanity under Count 3 of the Mugonero Indictment. For

[954] *Id.*, paras. 552-559, 832(iii).
[955] *Id.*, paras. 628, 832(vii).
[956] *Id.*, paras. 384, 791.
[957] *Id.*, paras. 186, 791.

reasons explained in Section VI of the present Judgement, for his procurement of gendarmes and ammunition for the attack on the Mugonero Complex on 16 April 1994, the Appeals Chamber enters a conviction of aiding and abetting extermination under Count 4 of the Mugonero Indictment. Furthermore, the Appeals Chamber enters a conviction for aiding an abetting genocide on the basis of his procurement of gendarmes and ammunition for the attack on Mugonero Complex on 16 April 1994, as charged under Count 1A of the Mugonero Indictment.[958]

560. In relation to the Bisesero Indictment, there are no remaining findings that Gérard Ntakirutimana killed or injured individuals during the attacks at Gitwe Hill and Mubuga Primary School. In light of the fact that the Appeals Chamber found that the Prosecution could not rely on the doctrine of joint criminal enterprise in this case, a conviction for genocide cannot be entered for Gérard Ntakirutimana's participation in the abovementioned attacks. However, convictions for aiding and abetting genocide, as charged under Count 1 of the Bisesero Indictment, and aiding and abetting extermination as a crime against humanity, as charged under Count 5 of the Bisesero Indictment, are warranted here.[959] Accordingly, in addition to the convictions upheld above, Gérard Ntakirutimana is also guilty of the following:

(i) aiding and abetting genocide for his participation in the attack at Gitwe Hill, near Gitwe Primary School, at the end of April or beginning of May 1994, and in the attack at Mubuga Primary School in June 1994;

(ii) aiding and abetting a crime against humanity (extermination) for his participation in the attack at Gitwe Hill, near Gitwe Primary School, at the end of April or beginning of May 1994, and in the attack at Mubuga Primary School in June 1994.

561. Gérard Ntakirutimana's conviction for murder as a crime against humanity under Count 4 of the Bisesero Indictment is quashed.

562. The Appeals Chamber recalls that 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.[960] In the view of the Appeals Chamber, Gérard Ntakirutimana's convictions for his participation in attacks at Gitwe Hill, near Gitwe Primary School, at the end of April or the beginning of May 1994 and at Mubuga Primary School in June 1994, where he pursued and shot at Tutsi refugees, his killing of Charles Ukobizaba by shooting

[958] *See supra* para. 500.
[959] *Id.*
[960] *Rutaganda* Appeal Judgement, para. 591; *Vasiljević* Appeal Judgement, para. 156, referring to *Furundžija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182; *Kupreškić et al.* Appeal Judgement, para. 852.

him in the chest, from a short distance, in Mugonero Hospital courtyard around midday on 16 April 1994, and his procurement of gendarmes and ammunition for the attack on the Mugonero Complex, are, taken as a whole, extremely grave. The Trial Chamber's finding that Gérard Ntakirutimana committed these crimes with the intent to destroy in whole or in part the Tutsi group is still applicable.[961] So is the Trial Chamber's finding that these acts were committed with the knowledge that they were part of a widespread and systematic attack against the civilian Tutsi population.[962]

563. The Appeals Chamber has also considered the mitigating and aggravating factors discussed by the Trial Chamber, and concurs with the Trial Chamber that the aggravating factors outweigh the mitigating factors in Gérard Ntakirutimana's case.[963] In particular, the Appeals Chamber has considered the following aggravating factors, namely that Gérard Ntakirutimana (i) abused his personal position in the community to commit the crimes, (ii) personally shot at Tutsi refugees, including Charles Ukobizaba, and (iii) participated in attacks at the Mugonero Complex, where he was a doctor, as well as in other safe havens in which refugees had sought shelter.

564. The Appeals Chamber finds that the revision of the verdict in respect of both the acquittals and the new convictions does not affect the validity of the elements which form the basis of the sentence of 25 years' imprisonment imposed by the Trial Chamber. Accordingly, the Appeals Chamber maintains the sentence of 25 years' imprisonment handed down by the Trial Chamber.

C. Convictions and Sentence for Elizaphan Ntakirutimana

565. Elizaphan Ntakirutimana was sentenced to ten years' imprisonment. He was arrested at the request of the Tribunal on 29 September 1996 and initially detained in Texas, USA. Having petitioned against his arrest and transfer to the International Tribunal, he was released on 17 December 1997 by a US Magistrate on constitutional grounds.[964] The US State Department petitioned against that decision, and he was ultimately re-arrested on 26 February 1998 and transferred to the United Nations Detention Facilities in Arusha on 24 March 2000.

566. As a result of the errors committed by the Trial Chamber in basing convictions on unpleaded material facts, Elizaphan Ntakirutimana's conviction under the Mugonero Indictment, for conveying attackers to the Mugonero Complex is quashed,[965] and under the Bisesero Indictment, his convictions for his participation in a convoy of vehicles carrying attackers to Kabatwa Hill, where

[961] Trial Judgement, paras. 793, 834,
[962] *Id.* paras. 808, 848.
[963] *Id.*, paras. 908-913.
[964] In the Matter of Surrender of Elizaphan Ntakirutimana, U.S. Dist. Ct. Southern Dist. of TX, Laredo Div., Misc. No. L-96-5 (Dec. 17, 1997).
[965] Trial Judgement, para. 788.

he pointed out Tutsi Refugees at Gitwa Hill, and for transporting attackers to and being present at an attack at Mubuga Primary School in mid-May, under the Bisesero Indictment are quashed. Elizaphan Ntakirutimana remains guilty in relation to four separate events under the Bisesero Indictment, namely:

> (i) "one day in May or June 1994, he transported armed attackers who were chasing Tutsi survivors at Murambi Hill;"[966]
>
> (ii) "one day in the middle of May 1994, he brought armed attackers in the rear hold of his vehicle to Nyarutovu Hill, and the group was searching for Tutsi refugees and chasing them. Elizaphan Ntakirutimana pointed out the fleeing refugees to the attackers who then chased these refugees singing: 'Exterminate them; look for them everywhere; kill them; and get it over with, in all the forests';"[967]
>
> (iii) "one day in May or June 1994, he arrived at Ku Cyapa in a vehicle followed by two buses of attackers and he was part of a convoy, which included attackers;"[968] and
>
> (iv) "sometime between 17 April and early May 1994, he conveyed attackers to Murambi Church and ordered the removal of the church roof so that it could no longer be used as a hiding place for the Tutsi, and in so doing, he facilitated the hunting down and the killing of the Tutsi refugees hiding in Murambi Church in Bisesero."[969]

567. The Appeals Chamber finds that the Trial Chamber's conviction of Elizaphan Ntakirutimana for genocide for having aided and abetted in the killing and causing serious bodily or mental harm to Tutsi in Bisesero stands in relation to these remaining findings. The Trial Chamber's finding that Elizaphan Ntakirutimana had the requisite intent to commit genocide is undisturbed despite the quashing of a number of convictions.[970]

568. Also as found above, the Trial Chamber erred in law in considering that an element of the crime of extermination is that the victims must be "named or described persons". In carrying out the acts supporting his conviction for aiding and abetting genocide, Elizaphan Ntakirutimana knew that the intent of the actual perpetrators was the extermination of the Tutsi refugees and that he was making a substantial contribution to the acts of mass killing of the Tutsi victims that occurred at

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[966] *Id.*, para. 828(v).
[967] *Id.*, para. 828(ii).
[968] *Id.*, para. 828(vi).
[969] *Id.*, para. 828(i).
[970] *Id.*, para. 830.

Murambi Hill and Nyarutovu Hill. Elizaphan Ntakirutimana also incurs individual criminal responsibility for aiding and abetting the extermination of the Tutsi as a crime against humanity.

569. In the view of the Appeals Chamber, the remaining convictions against Elizaphan Ntakirutimana are of a serious nature. By these acts, in particular transporting and encouraging attackers, Elizaphan Ntakirutimana knowingly participated in the massacres of Tutsis in Bisesero. Although his convictions under the Mugonero Indictment have been quashed, the remaining proven facts establish that Elizaphan Ntakirutimana also had the intent to commit genocide. Despite the seriousness of these acts, the Appeals Chamber agrees that special consideration should be given to his individual and mitigating circumstances, notably his age and his state of health, as discussed by the Trial Chamber.[971]

570. Consequently, the Appeals Chamber finds that the revision of the verdict in respect of both the acquittals and the new convictions does not affect the validity of the elements which form the basis of the sentence of ten years' imprisonment imposed by the Trial Chamber. This sentence is maintained.

[971] *Id.*, paras. 895-898.

IX. DISPOSITION

For the foregoing reasons,

THE APPEALS CHAMBER

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

NOTING the written submissions of the parties and their oral arguments presented at the hearings on 7, 8 and 9 July 2004;

SITTING in an open session;

With respect to Elizaphan Ntakirutimana,

QUASHES the conviction for aiding and abetting genocide under Count 1A of the Mugonero Indictment;

AFFIRMS the conviction for aiding and abetting genocide under Count 1 of the Bisesero Indictment;

REVERSES the acquittal for extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

DISMISSES the Defence and Prosecution appeals concerning Elizaphan Ntakirutimana in all other respects;

AFFIRMS the sentence of 10 years' imprisonment handed down, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention;

With respect to Gérard Ntakirutimana,

QUASHES the conviction for murder as a crime against humanity under Count 4 of the Bisesero Indictment;

AFFIRMS the conviction for committing genocide under Count 1A of the Mugonero Indictment, in relation to the killing of Charles Ukobizaba;

ENTERS a conviction for aiding and abetting genocide under Count 1A of the Mugonero Indictment, for the procurement of gendarmes and ammunition for the attack on the Mugonero Complex;

AFFIRMS the conviction for genocide under Count 1 of the Bisesero Indictment, but finds that his responsibility was that of an aider and abettor;

AFFIRMS the conviction for murder as a crime against humanity under Count 3 of Mugonero Indictment, in relation to the killing of Charles Ukobizaba;

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 4 of the Mugonero Indictment, for the procurement of gendarmes and ammunition for the attack on the Mugonero Complex;

ENTERS a conviction for aiding and abetting extermination as a crime against humanity under Count 5 of the Bisesero Indictment;

DISMISSES the Defence and Prosecution appeals concerning Gérard Ntakirutimana in all other respects;

AFFIRMS the sentence of 25 years' imprisonment handed down, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention;

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

ORDERS, in accordance with Rules 103(B) and 107 of the Rules of Procedure and Evidence, that Gérard Ntakirutimana and Elizaphan Ntakirutimana are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

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

Theodor Meron
Presiding Judge

Florence Ndepele Mwachande Mumba
Judge

Mehmet Güney
Judge

Wolfgang Schomburg
Judge

Inés Mónica Weinberg de Roca
Judge

Signed on the 9th day of December 2004
at The Hague, The Netherlands,
and issued on the 13th day of December 2004
at Arusha, Tanzania.

[SEAL OF THE TRIBUNAL]

ANNEX A : PROCEDURAL BACKGROUND

1. On 21 March 2003, the Appellants and the Prosecution filed their notices of appeal against Trial Chamber I's Judgement and Sentence of 21 February 2003. On 28 March 2003, the Presiding Judge of the Appeals Chamber assigned Judges Theodor Meron, Fausto Pocar, Mohamed Shahabuddeen, David Hunt and Mehmet Güney to the appeal and designated Judge Mehmet Güney to serve as pre-appeal judge.[971] Thereafter, Judge Inés Weinberg de Roca replaced Judge Hunt,[972] Judge Wolfgang Schomburg replaced Judge Pocar,[973] and Judge Florence Mumba replaced Judge Shahabuddeen.[974]

2. The Prosecution's Appeal Brief was filed on 23 June 2003. Following a number of decisions from the pre-appeal judge on requests for extension of page limits and time, Gérard Ntakirutimana and Elizaphan Ntakirutimana's Appeal Briefs were re-filed on 28 July 2003 and 11 August 2003, respectively. Briefings were complete by 13 October 2003 with the filing of the Appellants' Reply Briefs.[975] The Appeals Chamber also granted the Prosecution's request for an extension of time within which to file its Appeal Book.[976]

3. On 8 April 2004, the Appeals Chamber rejected Gérard Ntakirutimana's motion for the admission of additional evidence. In the motion, Gérard Ntakirutimana requested pursuant to Rule 115 of the Rules an order from the Appeals Chamber for the admission as additional evidence of the transcripts of the public and *in camera* testimony of Witness KJ in the case of *Eliézer Niyitegeka* (Witness OO in the instant case), and also sought an order permitting him to file an addendum to his brief on Appeal. The Appeals Chamber reviewed the transcripts of the witness and concluded that the witness's evidence in *Niyitegeka* was not such that it could have affected the verdict in this case.

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[971] Order of the Presiding Judge Designating the Pre-Appeal Judge and Order of the Presiding Judge to Assign Judges, dated 28 March 2003.
[972] Order of the Presiding Judge Replacing a Judge in a Case before the Appeals Chamber, dated 17 July 2003.
[973] Order of the Presiding Judge Replacing a Judge in a Case before the Appeals Chamber, dated 14 October 2003.
[974] Order of the Presiding Judge Replacing a Judge in a Case before the Appeals Chamber, dated 11 May 2004.
[975] Order Granting an Extension of time for the Filing of the Appellants' Appeal Briefs, dated 20 May 2003; Décision ("Extremely Urgent Defence Motion for a Brief Extension of Four Days for the Filing of the Appellant's Appeal Briefs"), dated 23 June 2003; Décision sur les demandes en modification des moyens d'appel et les requêtes aux fins d'outrepasser la limite de pages dans le mémoire de l'appelant, dated 21 July 2003 ; Motifs de la Décision du 24 juillet 2003 sur la "Defence Motion for an Extension of Time for the Refiling of the Appellants' Appeal Brief pursuant to the Order Issued by the Appeals Chamber on July 21, 2003", dated 28 July 2003 ; Reasons for Oral decision of 8 August 2003 in Response to Elizaphan Ntakirutimana's Request for a Brief Extension to Re-File his Appeal Brief, dated 12 August 2003; Decision Regarding the Prosecution's Motion for Extension of Page Limits, dated 26 August 2003 ; Decision on the Prosecution's Extremely Urgent Motion for Extension of Page Limits, dated 11 September 2003 ; Order on the Appellant's Motion for an Extension of Time for the Filing of the Appellant's Reply Briefs, dated 3 October 2003.
[976] Décision relative à la *"Urgent Prosecution Motion pursuant to Rule 116 of the Rules of Procedure and Evidence"*, dated 6 November 2003.

It also noted that, as the transcripts did not form part of the record and were not to be admitted as additional evidence, it would not consider any references to Witness OO's testimony in *Niyitegeka* although the Prosecution had sought to rely on parts of transcripts in its submissions on appeal in this case.[977]

4. On 24 June 2004, the Appeals Chamber granted in part Gérard Ntakirutimana's motion to strike Annex B from the Prosecution Response Brief and for re-certification of the record. The Appeals Chamber recalled that, in support of one of his grounds of appeal, Gérard Ntakirutimana argued, with reference to the transcript, that Witness GG had personally spelt names of people and places whilst testifying before the Trial Chamber, despite the witness' claim of illiteracy. In its Response Brief, the Prosecution had submitted that the transcript failed to reflect that it was the interpreter, rather than Witness GG, who spelt out the names. The Prosecution presented in Annex B of its Response Brief a "Certification of audio transcripts by Mathias Ruzindana, Reviser; Language Services Section, 3 September 2003." The Appeals Chamber considered that the Certification provided in Annex B raised legitimate doubts on the accuracy of the transcript as to whether it was the Witness GG or the interpreter who spelt names during the witness' testimony before the Trial Chamber and was of the view that, in light of the Appellant's argument regarding the credibility of Witness GG, it would be in the interests of justice to clarify the matter. Consequently, the Appeals Chamber granted the motion in part and ordered the Registry to review the transcript of the testimony given by Witness GG before the Trial Chamber for accuracy and to submit to the Appeals Chamber and the parties newly certified copies of the accurate transcripts in the official languages of the International Tribunal not later than 1 July 2004.[978]

5. On 5 July 2004, the Appeals Chamber dismissed two further motions for the admission of additional evidence filed by the Appellants. In the motions, the Appellants sought notably to have admitted as additional evidence: a statement dated 13 and 14 January 2004; transcripts of the testimony of Witness KJ (Witness OO in the instant case), who testified in the case of *Bagosora et al.* from 19 to 27 April 2004; the transcripts of the testimony of Witness AT (Witness GG in the instant case) who testified in the *Muhimana* case on 19 and 20 April 2004; materials from proceedings before a United States Immigration Court in a case involving several individuals who testified as witnesses at the Appellants' trial; transcripts of the testimony of Witness BH (Witness DD in the instant case), who testified in the Muhimana case on 8 April 2004; and transcripts of the testimony of Witness BI (Witness YY in the instant case), who testified in the *Muhimana* case on 8 April 2004. Finding both motions to be timely within the meaning of Rule 115, the Appeals

[977] Decision on Request for Admission of Additional Evidence, dated 8 April 2004.
[978] Decision on Defence Motion to Strike Annex B from the Prosecution Response Brief and for Re-Certification of the Record, dated 24 June 2004.

Chamber concluded that the evidence which the Appellants sought to have admitted did not meet the criteria of admissibility under Rule 115. The Appeals Chamber was also not persuaded by the Appellants arguments that it should reconsider its previous Rule 115 decision in this case, wherein the Appeals Chamber dismissed the Appellant's argument that the witness presented inconsistent evidence in this case and in *Niyitegeka*.[979]

6. Appeal hearings in the case were postponed on two occasions. On 20 November 2003, the Appeals Chamber, by majority, granted the Prosecution's request for adjournment of the hearings.[980] The Prosecution's request to adjourn the hearing until 1 March 2004 was based on the United Nations Security Council's decision to amend Article 15 of the Statute of the International Tribunal to create the new position of Prosecutor of the International Tribunal, separate from the holder of the office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, and to appoint a new Prosecutor of the International Tribunal effective 15 September 2003. The Prosecution argued that as a result it was still recruiting staff and that the only appeals lawyer then hired was a senior appeals counsel who was to take up his duties on 8 February 2004. The Prosecution submitted that it was not in a position to argue the Appeals or to assist the Appeals Chamber in any matters to be raised during the scheduled hearing in December.

7. The Appeals Chamber expressed its disappointment that the Prosecution had not been able to make arrangements for it to be adequately represented in this case notwithstanding that it had time to do so. It noted that the Prosecution had been aware of the complex and substantial nature of the Appeals since at least the end of July 2003, when the Appellants' Briefs were filed, and had known of the division of the two Prosecutors' Offices since the Security Council's resolutions were adopted on 28 August and 4 September 2003. The Appeals Chamber also noted that the Prosecution accordingly had two months to assign attorneys already present in the Arusha Office of the Prosecutor to cover the Appeals and to begin work on them even before they were formally transferred from the appeals section of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia.

8. Despite the regrettable situation, the Appeals Chamber was persuaded that, in light of the complexity of the Appeals and the likelihood of substantial questioning from the bench, the interests of justice narrowly supported an adjournment in the circumstances.

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[979] Decision on Request for Admission of Additional Evidence, dated 5 July 2004, and Reasons for the Decision on Request for Admission of Additional Evidence, dated 8 September 2004.
[980] Decision on Extremely Urgent Prosecution Application for an Adjournment of the Oral Hearing, dated 20 November 2003.

9. Subsequently, further to a request from Counsel for Elizaphan Ntakirutimana, on 5 April 2004, the Appeals Chamber granted a further postponement of the hearings. Counsel for Elizaphan Ntakirutimana had suffered an automobile accident which required extensive surgery and necessitated a prolonged post-operatic recovery period. He had been advised against long air travel. The Appeals Chamber noted that Mr. Clark was the sole counsel for Elizaphan Ntakirutimana and had represented him continuously during the proceedings before the Tribunal. It considered Mr. Clark's participation at the hearing essential to the proper consideration of these Appeals. Consequently, the Appeals Chamber re-scheduled the hearing of the Appeals to Wednesday, 7 July, Thursday, 8 July, and Friday, 9 July 2004.[981]

[981] Decision on the Urgent Application by Defendant Elizaphan Ntakirutimana for an Adjournment of the Hearing, dated 5 April 2004.

ANNEX B : CITED MATERIALS/DEFINED TERMS

A. Jurisprudence

1. ICTR

AKAYESU

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

Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

BAGILISHEMA

Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 ("*Bagilishema* Trial Judgement")

KAJELIJELI

Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-T, Judgement, 1 December 2003 ("*Kajelijeli* Trial Judgement")

KAMUHANDA

Prosecutor v. Jean de Dieu Kamuhanda, Case No. ICTR-99-54A-T, Judgement, 22 January 2004 ("*Kamuhanda* Trial Judgement")

KAYISHEMA AND RUZINDANA

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgement, 21 May 1999 ("*Kayishema and Ruzindana* Trial Judgement")

Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement")

"MEDIA CASE"/ NAHIMANA ET AL.

Prosecutor v. Ferdinand Nahimana, et al., Case No. ICTR-99-52-T, Judgement, 3 December 2003 ("*Media Case* Trial Judgement")

MUSEMA

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgement")

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

NIYITEGEKA

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003 ("*Niyitegeka* Trial Judgement")

Eliézer Niyitegeka v. Prosecutor, Case No. ICTR-96-14-A, Judgement, 9 July 2004 ("*Niyitigeka* Appeal Judgement")

RUTAGANDA

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, 6 December 1999 ("*Rutaganda* Trial Judgement")

Prosecutor v. Georges Anderson Nderubumwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement")

RWAMAKUBA

Prosecutor v. André Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004

SEMANZA

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

2. ICTY

ALEKSOVSKI

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

BLAŠKIĆ

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Decision on the Production of Discovery Materials, 27 January 1997

BRĐANIN AND TALIĆ

Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001

"ČELEBIĆI CASE"/DELALIĆ ET AL.

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

FURUNDŽIJA

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

KRNOJELAC

Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement")

KRSTIĆ

Prosecutor v. *Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 ("*Krstić* Trial Judgement")

Prosecutor v. *Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC ET AL.

Prosecutor v. Dragoljub Kunarac, et al., Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

KUPREŠKIĆ ET AL.

Prosecutor v. Zoran Kupreškić, et al., Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, et al., Case No. IT-95-16-A, Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA ET AL.

Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999 ("*Kvočka* Decision of 12 April 1999")

Prosecutor v. Miroslav Kvočka, et al., Case No. IT-98-30/1-T, Judgement, 2 November 2001 ("*Kvočka et al.* Trial Judgement")

MILUTINOVIĆ, ŠAINOVIĆ & OJDANIĆ

Prosecutor v. Milan Milutinović, et al., Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003 ("*Ojdanić* Joint Criminal Enterprise Appeal Decision")

STAKIĆ

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Decision on the Defence Rule 98 *bis* Motion for Judgement of Acquittal, 31 October 2002 ("*Stakić* Decision on Rule 98 *bis* Motion for Judgement of Acquittal")

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement, 31 July 2003 ("*Stakić* Trial Judgement")

TADIĆ

Prosecutor v. Duško Tadić a/k/a "Dule", Case No. IT-94-1-T, Judgement, 7 May 1997 ("*Tadić* Trial Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

VASILJEVIĆ

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

3. Other Jurisdictions

Tome v. United States, 513 U.S. 150, 157 (1995)

R. v. Beland and Phillips, 36 C.C.C. (3d) 481, 489 (Supreme Court of Canada 1987)

B. Other Material

1. Books/Chapters in Books

4 J.H Wigmore, Evidence in Trials at Common Law § 1124 (J.H. Chadbourn rev. 1972)

2. Other

Commentaries on the ILC Draft Code of Crimes against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session, 6 May - 26 July 1996*, Official Documents of the United Nations General Assembly's 51st session, Supplement no. 10 (A/51/10), Article 18, p. 118.

Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945, 82 UNTS 279 ("Statute of the Nuremberg International Military Tribunal")

Rome Statute of the International Criminal Court, UN doc. A/CONF.183/9* dated 17 July 1998

C. Defined Terms

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)

Elizaphan Ntakirutimana and Gérard Ntakirutimana ("Appellant" individually or "Appellants" collectively, or "Accused")

Gérard Ntakirutimana's "Defence Appeal Brief" filed 28 July 2003 ("Appeal Brief (G. Ntakirutimana)")

Gérard Ntakirutimana's "Defence Reply Brief" filed 13 October 2003 ("Reply" or "Reply (G. Ntakirutimana)").

International Criminal Tribunal for the Former Yugoslavia ("ICTY").

Judgement rendered by Trial Chamber I in the case of *Prosecutor v. Elizaphan and Gérard Ntakirutimana* on 21 February 2003 ("Trial Judgement")

"Pastor Elizaphan Ntakirutimana's Appeal Brief" filed 11 August 2003 ("Appeal Brief (E. Ntakirutimana)").

"Pastor Elizaphan Ntakirutimana's Reply Brief" filed 13 October 2003 ("Reply" or "Reply (E. Ntakirutimana)").

"Prosecution Response Brief", filed on 22 September 2003 ("Prosecution Response").

Rules of Procedure and Evidence of the Tribunal, ("Rules").

Statute of the Tribunal, ("ICTR Statute").