Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Bongani Majola**

Judgement of: **14 December 2015**

THE PROSECUTOR

v.

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

Case No. ICTR-98-42-A

Volume II

ICTR Appeals Chamber
Date: 14 DEC 2015
Action: Irina R.
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International Criminal Tribunal for Rwanda
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DATE: 14 DEC 2015

Judgement

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VI. APPEAL OF SYLVAIN NSABIMANA

2142. The Trial Chamber found Nsabimana guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence.[4971]

2143. Nsabimana raises challenges related to his indictment. He also contends that the Trial Chamber erred in finding that he tacitly approved the inflammatory speeches given by Kambanda and Sindikubwabo at his swearing-in ceremony. He further raises challenges related to the admission of, and reliance on, alleged prejudicial evidence. Finally, Nsabimana contends that the Trial Chamber erred in finding that he was responsible for aiding and abetting by omission the killings of Tutsi refugees abducted from the Butare Prefecture Office. The Appeals Chamber will address these contentions in turn.

[4971] Trial Judgement, paras. 5893, 5900, 5903, 5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186. The Appeals Chamber notes that, read in context, the references to Nsabimana's responsibility for aiding and abetting "the killings that occurred at the Butare *préfecture* office", "the killings of Tutsis at the Butare *préfecture* office" or "the killings at the Butare *préfecture* office" in paragraphs 6058, 6102, and 6170 of the Trial Judgement must be understood as referring to the killing of the Tutsi refugees who were abducted from the prefectoral office.

A. Indictment (Grounds 1, 2, and 11)

2144. The Trial Chamber found that Nsabimana, in his capacity as prefect, was under the legal duty to provide assistance to people in danger and to protect civilians against acts or threats of violence pursuant to Rwandan law and international humanitarian law.[4972] It also determined that Nsabimana was aware of the night-time attacks conducted against the Tutsis who had sought refuge at the Butare Prefecture Office from mid-May to mid-June 1994 and was presented with multiple requests for assistance from refugees but refused to help.[4973] The Trial Chamber held that, "[b]y refusing to take action in the midst of the continuing attacks at the [Butare Prefecture Office], Nsabimana assisted Nyiramasuhuko, Ntahobali and the *Interahamwe* in the perpetration of their attacks" and that his failure to act had a substantial effect on the realisation of their crimes.[4974] It also found that Nsabimana: (i) knew that those taking refuge at the prefectoral office were being abducted, raped, and killed; (ii) was aware of the perpetrators' genocidal intent; and (iii) knew that his failure to act assisted in the commission of the crimes.[4975]

2145. On this basis, the Trial Chamber convicted Nsabimana of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* by failing to discharge his duty to protect civilians.[4976]

2146. When reaching its findings on Nsabimana's responsibility for the crimes committed at the prefectoral office, the Trial Chamber primarily referred to paragraphs 6.36 and 6.42 of the Indictment.[4977] The Indictment indicates in relevant parts that the allegations in paragraph 6.36 were

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[4972] Trial Judgement, paras. 5893, 5895-5899. *See also ibid.*, para. 5894.
[4973] Trial Judgement, paras. 2807, 5900, 5904, 5905.
[4974] Trial Judgement, para. 5900. *See also ibid.*, paras. 5903, 5906, 5972.
[4975] Trial Judgement, paras. 5904, 5905. *See also ibid.*, para. 5972.
[4976] Trial Judgement, paras. 5906, 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.
[4977] Trial Judgement, paras. 2783, 2785, 2789, 2790, fn. 7796. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nsabimana and Nteziryayo Indictment. Paragraphs 6.36 and 6.42 of the Nsabimana and Nteziryayo Indictment read as follows:

> 6.36 As early as 7 April 1994, numerous members of the Tutsi population sought refuge at the Butare town *préfecture* offices. As from 19 April 1994, *Interahamwe* militiamen and soldiers took advantage of this and repeatedly went to the *préfecture* offices to attack the refugees. The attacks took place while *Préfet* Sylvain Nsabimana was present and going about his daily business at the *préfecture* offices. Some of the refugees asked *Préfet* Sylvain Nsabimana to protect them from the violent acts of the militiamen and soldiers. Sylvain Nsabimana did nothing to put a definitive end to the attacks. Refugees were often forcibly abducted, assaulted and sometimes killed outright.
>
> 6.42 The entire *préfecture* of Butare was the scene of massacres of the Tutsi population involving Pauline Nyiramasuhuko, André Rwamakuba, Alphonse Nteziryayo, Joseph Kanyabashi, Ladislas Ntaganzwa, Elie

being pursued against Nsabimana under all counts, except Count 4, pursuant to Articles 6(1) and 6(3) of the Statute.[4978] Paragraph 6.42 was not relied upon in support of any count in the Indictment.[4979]

2147. The Trial Chamber noted that the sentence "The attacks took place while *Préfet* Sylvain Nsabimana was present and going about his daily business at the *préfecture* offices" in paragraph 6.36 of the Indictment "could mean either: (1) that Nsabimana would go to his office during the time period in which the attacks occurred at the [Butare Prefecture Office]; or (2) that the attacks occurred while Nsabimana was sitting in his office at the [Butare Prefecture Office]."[4980] The Trial Chamber concluded that, from reading paragraph 6.36 in conjunction with paragraph 6.42 of the Indictment and the fact that paragraph 6.36 was pleaded in support of both Articles 6(1) and 6(3) of the Statute,[4981] "it [was] clear that the Prosecution sought to prove that Nsabimana, as *préfet*, was responsible for attacks occurring throughout Butare *préfecture* including those occurring at the [Butare Prefecture Office], whether or not he was physically present."[4982] The Trial Chamber also found that Nsabimana was charged with the "culpable omission" on the basis of which he was convicted.[4983]

2148. With regard to the circumstances and timeframe of the attacks at the prefectoral office, the Trial Chamber found that, when read as a whole, the Indictment adequately pleaded that: (i) the attacks included the forcible abduction, assault, and killing of refugees;[4984] and (ii) the refugees' requests for assistance to Nsabimana occurred between his swearing-in as prefect on 19 April 1994 and his replacement on 17 June 1994, while he was going about his daily business at the prefectoral office.[4985] The Trial Chamber considered that details such as the prefect's "attitude and reactions" as well as the form of the requests for assistance constituted evidence which did not need to be pleaded in the Indictment.[4986]

2149. Nsabimana submits that the Trial Chamber erred in law and in fact in expanding the scope of paragraph 6.36 of the Indictment by reading it in conjunction with paragraph 6.42 of the Indictment to conclude that he was charged with responsibility for all attacks that occurred at the

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> Ndayambaje, et [*sic*] Shalome [*sic*] Arsène Ntahobali. These massacres occur[r]ed while Sylvain Nsabimana was exercising his authority as *Préfet* of Butare

[4978] Nsabimana and Nteziryayo Indictment, pp. 41-48.
[4979] Nsabimana and Nteziryayo Indictment, pp. 41-48.
[4980] Trial Judgement, para. 2789.
[4981] The Trial Chamber observed that neither Article 6(1) nor Article 6(3) of the Statute requires the accused to be present during the commission of the crime to be held accountable. *See* Trial Judgement, para. 2789.
[4982] Trial Judgement, para. 2789.
[4983] Trial Judgement, para. 5906, *referring, inter alia, to Mrkšić and Šljivančanin* Appeal Judgement, paras. 140, 141.
[4984] Trial Judgement, para. 2790, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.36.
[4985] Trial Judgement, para. 2790, *referring to* Nsabimana and Nteziryayo Indictment, paras. 6.21, 6.34, 6.36.

prefectoral office whether or not he was present.[4987] He contends that paragraph 6.36 gave him notice of his responsibility related to day-time attacks conducted in his presence and that the night-time attacks conducted in his absence were material facts which were not pleaded in the Indictment.[4988] He argues that, if anything, the fact that paragraph 6.36 was subject to two interpretations demonstrates that the paragraph was not as clear as required by the jurisprudence.[4989] According to Nsabimana, paragraph 6.42 – which he notes was not specifically pleaded in support of any charge – could not reasonably be relied upon as explaining or particularising the specific charge pleaded in paragraph 6.36 because it was too general and vague.[4990] He also argues that the Trial Chamber erred in taking into account the fact that paragraph 6.36 of the Indictment was pursued under both Articles 6(1) and 6(3) of the Statute when interpreting it.[4991]

2150. Nsabimana further contends that neither paragraph 6.36 of the Indictment nor paragraph 6.42 of the Indictment contains the necessary details regarding his acts or course of conduct that formed the basis of the charges against him.[4992] He also submits that the Trial Chamber erred in law in convicting him based on a duty to act imposed under Article 256 of the Rwandan Penal Code and provisions of international humanitarian law, in particular Articles 7 and 13 of Additional Protocol II, because the Indictment failed to plead that he incurred criminal responsibility for failing in a duty to act under these provisions.[4993] Nsabimana argues that these legal obligations constituted material facts that should have been pleaded in the Indictment and that, by merely referring to his "omission" in the Indictment, the Prosecution failed to sufficiently inform him of the nature and cause of the charges against him.[4994]

2151. In addition, Nsabimana contends that the Trial Chamber erred in: (i) considering that the details concerning his attitude and reactions did not need to be pleaded in the Indictment; and (ii) failing to find that the Indictment did not plead with sufficient specificity the identities of the

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[4986] Trial Judgement, para. 2790.
[4987] Nsabimana Notice of Appeal, paras. 16, 18, 19; Nsabimana Appeal Brief, paras. 9, 10, 28, 33. *See also* AT. 16 April 2015 pp. 48-53 (French).
[4988] Nsabimana Appeal Brief, paras. 7, 8, 12, 17, 18, 23, 29, 32-34, 38. *See also ibid.*, para. 129; Nsabimana Reply Brief, paras. 5, 6.
[4989] Nsabimana Appeal Brief, para. 39; Nsabimana Reply Brief, para. 7; AT. 16 April 2015 pp. 50, 51 (French).
[4990] Nsabimana Appeal Brief, paras. 11, 13, 20-22; AT. 16 April 2015 pp. 49, 50 (French). *See also* Nsabimana Reply Brief, para. 4.
[4991] Nsabimana Appeal Brief, paras. 14-16. Nsabimana argues that the fact "[t]hat responsibility under Articles 6(1) and 6(3) does not require the presence of the accused is a matter relating to the constituent elements of the crime, and has nothing to do with the standards for interpreting indictments, especially a defective one." *See ibid.*, para. 16.
[4992] Nsabimana Notice of Appeal, para. 28; Nsabimana Appeal Brief, para. 24, *referring to Ntagerura et al.* Appeal Judgement, para. 25.
[4993] Nsabimana Notice of Appeal, paras. 90-92; Nsabimana Appeal Brief, paras. 349-353.
[4994] Nsabimana Appeal Brief, paras. 353-358. Nsabimana points out that, in the *Mrkšić and Šljivančanin* Appeal Judgement relied upon by the Trial Chamber with respect to pleading of his culpable omission, the Appeals Chamber noted that the relevant indictment referred to the legal provisions imposing obligations on Veselin Šljivančanin as an army officer. *See idem.*

refugees who requested assistance from him, the dates of those requests, and the time period.[4995] He also argues that it was erroneous for the Trial Chamber to rely on paragraph 6.34 of the Indictment regarding the timeframe of his alleged criminal conduct since this paragraph was not pleaded in support of any counts.[4996] In his view, the fact that the Trial Chamber needed to read several paragraphs of the Indictment together to conclude that he received notice proves that the charge in paragraph 6.36 of the Indictment was ambiguous and not properly pleaded.[4997] Nsabimana contends that the Prosecution did not cure these defects.[4998]

2152. For these reasons, Nsabimana submits that he was not fully informed of the charge against him and could not adequately prepare his defence and that, as a result, the verdict against him should be set aside.[4999]

2153. The Prosecution responds that the Trial Chamber correctly found that the Indictment, when read as whole, provided Nsabimana with adequate notice that he was being charged with attacks that occurred between 19 April and 17 June 1994 at the prefectoral office whether or not he was present.[5000] It asserts that paragraph 6.42 of the Indictment set the parameters for Nsabimana's responsibility and that paragraph 6.36 of the Indictment more precisely pleaded his responsibility for the killings that took place at the prefectoral office.[5001] It also argues that it was under no obligation to plead the legal provisions which imposed the duty to act on Nsabimana in the Indictment.[5002] The Prosecution submits that paragraphs 6.36 and 6.41 of the Indictment clearly pleaded the nature of its case and Nsabimana's role in the alleged crimes.[5003]

[4995] Nsabimana Notice of Appeal, paras. 26, 28, 29; Nsabimana Appeal Brief, paras. 25-27, 40-44, 49. *See also* AT. 16 April 2015 pp. 39, 40. Under Ground 6 of his appeal, Nsabimana also argues that the Trial Chamber erred in relying on Prosecution Witness TQ's evidence that he sought Nsabimana's assistance to bury the orphans killed at the *Groupe scolaire* but that Nsabimana told him he was a madman as this allegation was not pleaded in the Nsabimana and Nteziryayo Indictment. *See* Nsabimana Appeal Brief, paras. 210, 211.

[4996] Nsabimana Appeal Brief, para. 42.

[4997] Nsabimana Appeal Brief, paras. 39, 41, 43-46, 53.

[4998] Nsabimana Notice of Appeal, para. 30; Nsabimana Appeal Brief, para. 52.

[4999] Nsabimana Notice of Appeal, paras. 20, 31, 93; Nsabimana Appeal Brief, paras. 26-29, 36, 54, 56, 355, 361; Nsabimana Reply Brief, para. 20.

[5000] Prosecution Response Brief, paras. 1242-1247, 1256, 1261; AT. 16 April 2015 pp. 52, 53.

[5001] Prosecution Response Brief, para. 1250. *See also* AT. 16 April 2015 p. 52.

[5002] Prosecution Response Brief, paras. 1371-1375; AT. 16 April 2015 pp. 54, 55. At the appeals hearing, the Prosecution also argued that paragraphs 2.6 and 3.4 of the Nsabimana and Nteziryayo Indictment set out "the duty that Nsabimana was under" as well as the fact that the victims referred to in the Nsabimana and Nteziryayo Indictment were protected persons under Article 3 common to the Geneva Conventions and Additional Protocol II. It added that the Nsabimana and Nteziryayo Indictment "gave comparable detail as the indictment that was 'approved' in the *Mrkšić and Šljivančanin* [A]ppeal [J]udgement." *See* AT. 16 April 2015 pp. 53, 54.

[5003] Prosecution Response Brief, paras. 1248, 1256, 1373; AT. 16 April 2015 pp. 53, 54. The Prosecution further responds that Nsabimana was not prejudiced in the preparation of his defence because the Prosecution Pre-Trial Brief, together with the annotated indictment disclosed on 25 August 1999 and prior written statements of several witnesses, provided him with further timely, clear, and consistent notice of the charges against him. It adds that Nsabimana's conduct during the proceedings reflected that he was on notice of the allegations against him, including concerning the night-time attacks. *See* Prosecution Response Brief, paras. 1267, 1268, 1271-1276, 1279-1282; AT. 16 April 2015 pp. 54, 55. In reply, Nsabimana disputes that the Prosecution cured any defects in the Nsabimana and Nteziryayo

2154. The Appeals Chamber finds no merit in Nsabimana's contention that the Trial Chamber impermissibly expanded the scope of paragraph 6.36 of the Indictment by convicting him in relation to night-time attacks conducted in his absence. The Appeals Chamber finds that paragraph 6.36 could be reasonably interpreted in two different ways regarding whether or not the attacks referred to therein were conducted in Nsabimana's presence at the prefectoral office. Nsabimana is nonetheless correct that the fact that the paragraph was open to two interpretations in this regard created ambiguity and that this ambiguity was not eliminated by paragraph 6.42 of the Indictment[5004] or the fact that the allegation set forth in paragraph 6.36 was pursued under both Articles 6(1) and 6(3) of the Statute.[5005]

2155. However, the Appeals Chamber is of the view that the ambiguity in paragraph 6.36 of the Indictment as to whether or not Nsabimana incurred responsibility solely in relation to the attacks that took place during the day in his presence was eliminated by paragraph 6.41 of the Indictment in which the Prosecution pleaded that refugees were abducted from the prefectoral office and later killed, without specifying what time of day those events occurred or if Nsabimana was present.[5006] The Prosecution specifically relied upon paragraph 6.41 against Nsabimana in support of all counts, except Count 4.[5007] Moreover, by expressly pleading in paragraph 6.36 that some of the refugees asked Nsabimana to protect them from the violent acts of the militiamen and soldiers, the Prosecution unequivocally gave notice to Nsabimana that he was alleged to have known that the Tutsis who had sought refuge at the prefectoral office were the victims of abductions and killings, and that his source of knowledge was not premised on him being present during the attacks. As such, the Appeals Chamber finds that, read as a whole, the Indictment provided Nsabimana with adequate notice that he was charged with having failed to protect the refugees at the prefectoral

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Indictment and that his conduct during the proceedings reflected that he was aware of the allegations concerning the night-time attacks. *See* Nsabimana Reply Brief, paras. 22-40. *See also* AT. 16 April 2015 pp. 51, 52 (French).

[5004] In the view of the Appeals Chamber, the allegation that the massacres of the Tutsi population occurred "while Sylvain Nsabimana was exercising his authority as *Préfet* of Butare" pleaded in paragraph 6.42 of the Nsabimana and Nteziryayo Indictment did not clarify this particular matter.

[5005] The Appeals Chamber considers that the fact that the allegation set forth in paragraph 6.36 of the Nsabimana and Nteziryayo Indictment was pursued under both Articles 6(1) and 6(3) of the Statute is irrelevant to the question of whether Nsabimana was alleged to have been present during the attacks; the question is not whether Nsabimana was put on notice that he could be held liable for a failure to act – which is clear from paragraph 6.36 – but whether he was alleged to have been present or not during these specific attacks.

[5006] Paragraph 6.41 of the Nsabimana and Nteziryayo Indictment reads as follows:

> 6.41 Between 19 April and late June 1994, Pauline Nyiramasuhuko and Arsène Shalom Ntahobali, accompanied by *Interahamwe* militiamen and soldiers, on several occasions went to the *préfecture* offices to abduct Tutsi refugees, whom they later killed. Those who attempted to resist were assaulted and sometimes killed outright. [...].

[5007] *See* Nsabimana and Nteziryayo Indictment, pp. 41-48.

office who he knew were subjected to various forms of abuse at any time of day, regardless of whether he was present or not.[5008]

2156. The Appeals Chamber also rejects Nsabimana's undeveloped contention that the Indictment did not contain the necessary details regarding his acts or course of conduct that formed the basis of the charge against him concerning the crimes committed as a result of the attacks at the Butare Prefecture Office. Paragraphs 6.32, 6.53, and 6.59 of the Indictment expressly allege that Nsabimana "aided and abetted" the population, his subordinates, or others in massacring the Tutsis in Butare Prefecture[5009] and several other paragraphs of the Indictment repeatedly refer to Nsabimana's failure as prefect of Butare to take measures to stop the massacres of Tutsis taking place in the prefecture during his tenure as prefect, including his failure to put an end to the killing of the Tutsis who had sought refuge at the prefectoral office.[5010] As noted by the Trial Chamber,[5011] the charging section of the Indictment also made it clear that Nsabimana was charged with "the acts and omissions described" in these paragraphs. The Appeals Chamber does not consider that the legal provisions from which Nsabimana's duty to act arose were material facts that needed to be pleaded in the Indictment as it was clear from the Indictment that his duty arose from his position as prefect of Butare.[5012]

2157. The Appeals Chamber further finds that Nsabimana fails to show any error in the Trial Chamber's determinations that the details regarding his "attitude and reactions" did not need to be pleaded in the Indictment and that the name of a particular refugee who requested help from him and was later abducted was not a material fact but evidence relevant to the issue of Nsabimana's knowledge of the attacks at the prefectoral office.[5013] Likewise, Nsabimana does not demonstrate

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[5008] To the extent that Nsabimana argues that the Trial Chamber erred by interpreting the Nsabimana and Nteziryayo Indictment as charging him with responsibility for attacks that occurred throughout Butare Prefecture, the Appeals Chamber notes that the Trial Chamber did not find that Nsabimana was criminally responsible in relation to all attacks occurring throughout Butare Prefecture, but only in relation to the attacks that occurred at the prefectoral office. *See* Nsabimana Appeal Brief, paras. 9, 33. The Appeals Chamber therefore finds no merit in Nsabimana's submission.

[5009] *See also* Nsabimana and Nteziryayo Indictment, para. 6.61.

[5010] *See* Nsabimana and Nteziryayo Indictment, paras. 6.26, 6.36, 6.60. *See also ibid.*, paras. 6.35, 6.37, 6.42.

[5011] Trial Judgement, para. 5906, fn. 14770, *referring to Mrkšić and Šljivančanin* Appeal Judgement, paras. 140-141; Nsabimana and Nteziryayo Indictment, pp. 41-49.

[5012] The Appeals Chamber recalls that Nsabimana points out that, in the *Mrkšić and Šljivančanin* Appeal Judgement relied upon by the Trial Chamber with respect to the pleading of his culpable omission, the Appeals Chamber noted that the relevant indictment referred to the legal provisions imposing obligations on Veselin Šljivančanin as an army officer. *See supra*, fn. 4994. The Appeals Chamber notes that, when examining whether Veselin Šljivančanin was put on adequate notice that he was charged with aiding and abetting by omission, it referred, *inter alia*, to the fact that, in the indictment against him, Veselin Šljivančanin was alleged to be subject to specific laws and regulations as an army officer which obliged officers and their subordinates to observe the laws of war. *See Mrkšić and Šljivančanin* Appeal Judgement, paras. 139-141. However, the Appeals Chamber does not consider that its reference to this aspect of Veselin Šljivančanin's indictment should be interpreted as requiring the Prosecution to plead these specific facts in the indictment to provide adequate notice to the accused of the nature and cause of the charge against him.

[5013] With respect to Nsabimana's argument that the Trial Chamber erred in relying on Witness TQ's evidence that he sought Nsabimana's assistance to bury the orphans killed at the *Groupe scolaire* but that Nsabimana told him he was a madman as this allegation was not pleaded in the Nsabimana and Nteziryayo Indictment, the Appeals Chamber

that the Trial Chamber erred in concluding that the information in the Indictment that the alleged requests for assistance took place between his swearing-in as prefect on 19 April 1994 and his replacement on 17 June 1994 was sufficient to give him adequate notice given the sheer scale of the crimes allegedly committed at the prefectoral office ranging over a period of nearly three months.[5014] In this respect, the Appeals Chamber sees no error in the Trial Chamber's reliance on the indication in paragraph 6.34 of the Indictment that Nsabimana was replaced as Butare Prefect on 17 June 1994. Given that this indication provided mere contextual background and did not constitute an allegation that should have been pleaded as a charge, the fact that it was not pleaded in support of any count was therefore irrelevant. Nsabimana's argument that the fact that the Trial Chamber needed to read several paragraphs of the Indictment together demonstrates that the Indictment was ambiguous also fails to appreciate that, in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the indictment must be considered as a whole.[5015]

2158. In light of the foregoing, the Appeals Chamber concludes that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he was put on adequate notice of the charge on the basis of which he was convicted. Accordingly, the Appeals Chamber dismisses Grounds 1, 2, and 11 of Nsabimana's appeal.

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observes that the Trial Chamber relied on this evidence as indicative that Nsabimana refused to help. *See* Trial Judgement, para. 5900. The incident recounted by Witness TQ was therefore merely used as evidence of Nsabimana's failure to act and not treated as a separate allegation. The Appeals Chamber recalls that the evidence by which material facts are to be proven need not be pleaded in the indictment. *See, e.g., Nzabonimana* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88. Consequently, the Appeals Chamber also dismisses Nsabimana's contention in this respect.

[5014] Trial Judgement, para. 2790.

[5015] *See, e.g., Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.

B. Nsabimana's Swearing-In Ceremony (Ground 4)

2159. The Trial Chamber found that the speeches given at Nsabimana's Swearing-In Ceremony on 19 April 1994 by President Sindikubwabo and Prime Minister Kambanda were inflammatory and encouraged the population to kill Tutsis.[5016] The Trial Chamber determined that these speeches advocated and incited genocide by substantially contributing to triggering the subsequent widespread killings and large-scale massacres in Butare Prefecture.[5017] The Trial Chamber found that Nsabimana attended his swearing-in ceremony as a political appointee and failed to dissociate himself from the statements made by Sindikubwabo and Kambanda on that occasion.[5018] The Trial Chamber concluded that, in doing so, Nsabimana "gave his tacit approval to the President's and Prime Minister's inflammatory statements."[5019]

2160. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that he gave his tacit approval to Kambanda's and Sindikubwabo's Speeches.[5020] He submits that the Trial Chamber's error occasioned a miscarriage of justice as his "speech relates directly to the material fact which led the Judges to find [him] guilty of aiding and abetting the crime of genocide and other crimes against humanity by omission."[5021]

2161. The Prosecution responds that this ground of appeal should be summarily dismissed as the Trial Chamber did not convict Nsabimana on the basis of the impugned factual finding.[5022]

2162. Nsabimana replies that, in finding that he had knowledge of a plan to exterminate the Tutsis, the Trial Chamber considered that he understood the inflammatory nature of Sindikubwabo's Speech.[5023]

2163. The Appeals Chamber observes that the Trial Chamber did not find Nsabimana guilty of any crime connected to his swearing-in ceremony as it did "not find it established beyond a reasonable doubt that [...] Nsabimana's tacit approval of [Kambanda's and Sindikubwabo's] speeches substantially contributed to the killings that followed".[5024] The Trial Chamber concluded that it was not proven that Nsabimana "[was] responsible for aiding and abetting genocide in relation to these

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[5016] Trial Judgement, paras. 890, 898, 925, 5671, 5690, 5712, 5722, 5738, 5990.
[5017] Trial Judgement, paras. 932, 5673, 5741, 5753, 5992. *See also ibid.*, paras. 933, 5742, 5746.
[5018] Trial Judgement, para. 924.
[5019] Trial Judgement, para. 924.
[5020] Nsabimana Notice of Appeal, heading "IV" at p. 5, paras. 37-41; Nsabimana Appeal Brief, para. 61. *See also* AT. 16 April 2015, pp. 42, 43.
[5021] Nsabimana Appeal Brief, para. 105. *See also* Nsabimana Reply Brief, para. 44.
[5022] Prosecution Response Brief, paras. 1283, 1284.
[5023] Nsabimana Reply Brief, para. 44.
[5024] Trial Judgement, para. 5747.

events"[5025] and did not convict him on the basis of his conduct at the swearing-in ceremony.[5026] The Trial Chamber convicted Nsabimana solely for aiding and abetting by omission the killing of Tutsi refugees abducted from the Butare Prefecture Office.[5027]

2164. The Trial Chamber noted that it would nonetheless consider Nsabimana's conduct at the ceremony in determining whether he possessed the requisite intent for genocide.[5028] However, in light of its finding that Nsabimana participated in the crimes at the prefectoral office as an aider and abettor, the Trial Chamber did not determine whether he possessed genocidal intent and solely considered his knowledge and awareness.[5029] The Trial Chamber further did not rely on Nsabimana's conduct at the ceremony in concluding that he possessed the requisite knowledge to be held responsible for aiding and abetting the killings of Tutsi refugees abducted from the prefectoral office.[5030] Contrary to Nsabimana's contention, the Trial Judgement reflects that his convictions are not based on the finding that he gave his tacit approval to Kambanda's and Sindikubwabo's Speeches. Any error in respect of this factual finding could therefore not have any impact on the Trial Chamber's verdict against Nsabimana.

2165. Recalling that the Appeals Chamber only reviews errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice and that arguments which do not have the potential to cause the impugned decision to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits,[5031] the Appeals Chamber dismisses Ground 4 of Nsabimana's appeal without further consideration.

[5025] Trial Judgement, para. 5747.
[5026] *See* Trial Judgement, paras. 5972, 6058, 6059, 6102, 6103, 6122, 6170, 6171.
[5027] *See* Trial Judgement, paras. 5972, 6057-6059, 6102, 6103, 6122, 6170, 6171, 6186.
[5028] Trial Judgement, para. 5747.
[5029] *See* Trial Judgement, paras. 5904-5906.
[5030] *See* Trial Judgement, paras. 5904, 5905, fns. 14768, 14769.
[5031] *See supra*, para. 34.

C. Admission and Reliance on Prejudicial Evidence (Grounds 5, 6 and 13 in part)

2166. In finding Nsabimana responsible for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe*, the Trial Chamber relied, in part, on the testimonies of Prosecution Witnesses QBP, RE, SU, SS, TK, and TQ.[5032] Specifically, the Trial Chamber relied on their evidence to conclude that: (i) Nsabimana was aware of the night-time attacks at the prefectoral office; (ii) he was presented with multiple requests for assistance from Tutsi refugees but refused to help; (iii) his omission to act had a substantial effect on the perpetration of the crimes committed at the prefectoral office; and (iv) he knew that his failure to act assisted in the commission of the crimes.[5033] The Trial Chamber also relied, *inter alia*, on the evidence of Prosecution Witnesses FAP, QBQ, SD, and TA in finding that Nyiramasuhuko, Ntahobali, and *Interahamwe* committed or participated in abductions, rapes, and killings at the prefectoral office.[5034]

2167. Nsabimana submits that the Trial Chamber erred in admitting and relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ to find him responsible for aiding and abetting by omission the killings of Tutsi refugees because he received no notice that these witnesses would testify against him.[5035] He further submits that the Trial Chamber erred in admitting and relying on Witness TK's evidence because it concerned an allegation that was not pleaded in the Indictment.[5036] The Appeals Chamber will address these contentions in turn.

[5032] Trial Judgement, paras. 2803-2812, 2815, 5900, 5904-5906. The Trial Chamber also relied on Nsabimana's testimony, Expert Witness Des Forges's testimony, and Exhibits P113 and P114. *See ibid.*, paras. 2801, 2802, 2807, 2808, 2810, 5904, 5905.

[5033] Trial Judgement, paras. 2804-2807, 5900-5906. *See also ibid.*, para. 5972. The Trial Chamber relied on: (i) Witness TK's "credible" evidence of the abduction of a young man named Alphonse who had been forced out Nsabimana's office after calling for help; (ii) Witness TQ's description of Nsabimana's attitude regarding the witness's request to bury the bodies of orphans who had been killed at the *Groupe scolaire*; (iii) Witness RE's "significant[ly] detail[ed]" testimony that she saw a young man and woman leave Nsabimana's office, and that the young woman told her that they had just seen the prefect asking him for help and "that the young man was now being dragged away"; (iv) Witnesses SS's and SU's testimonies that, in a separate incident after attacks occurred at the prefectoral office, three women went to see Nsabimana on behalf of the refugees and that, although neither witness was present at the meeting, they were told that Nsabimana denied knowledge of the attacks and said he would post gendarmes to protect them; (v) Witness QBP's evidence that a woman who was attacked by an *Interahamwe* and wounded on her ear complained to Nsabimana but that he did nothing for her; and (vi) Witness SS's claim that Nsabimana did nothing for those who asked for help. *See ibid.*, paras. 2804-2806, 2810, 5900.

[5034] Trial Judgement, paras. 2644, 2650, 2653, 2654, 2656, 2658, 2660, 2703, 2712, 2715, 2731, 2734-2736, 2738, 2773.

[5035] Nsabimana Notice of Appeal, paras. 42-50, 70-73; Nsabimana Appeal Brief, paras. 106-126, 203-211, 233, 234, 252-261, 432-441. *See also* Nsabimana Reply Brief, paras. 48-67, 109-111; AT. 16 April 2015 pp. 43-45.

[5036] Nsabimana Appeal Brief, paras. 217-229.

1. Evidence of Witnesses Not Identified As Testifying Against Nsabimana

2168. When determining Nsabimana's responsibility for ordering the transfer of Tutsi refugees from the Butare Prefecture Office to Nyange Sector, the Trial Chamber addressed Nsabimana's contention that the evidence of Witnesses QBP, RE, SU, and TA should be excluded insofar as it related to him because he had no notice that these witnesses would be called to testify against him.[5037] The Trial Chamber determined that, although these witnesses were not listed as being brought to testify against him, Nsabimana did not suffer any prejudice that warranted the exclusion of their evidence, particularly because he raised no objections to their testimonies at the time they were given and had the opportunity to cross-examine them.[5038]

2169. Nsabimana argues that the Trial Chamber erred in relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ because he received no notice that these witnesses would testify against him.[5039] He contends that his right to a fair trial was violated as a consequence and that the Trial Chamber erred in finding that he suffered no prejudice from this absence of notice.[5040] In particular, Nsabimana argues that he was prejudiced by having insufficient time to prepare for his cross-examination of these witnesses because he had instead focused his efforts on challenging the evidence of the witnesses he expected to testify against him.[5041] He asserts that his cross-examination of these witnesses was therefore not meaningful and that its occurrence alone should not be considered as a waiver of his rights or as a remedy to the prejudice he suffered.[5042] Nsabimana further argues that, although the Trial Chamber may admit any relevant evidence which it deems to have probative value pursuant to Rule 89(C) of the Rules, "evidence whose credibility cannot be challenged and rebutted by the Defence during a well-prepared cross-examination, cannot have probative value."[5043] He also appears to argue that his right to be tried in a joint trial as if tried separately was violated because, had he been tried alone, he would not

[5037] Trial Judgement, paras. 4053-4058.
[5038] Trial Judgement, paras. 4054-4056, 4058.
[5039] Nsabimana Notice of Appeal, paras. 42-50, 70-73; Nsabimana Appeal Brief, paras. 106-126, 203-208, 216, 233, 234, 252-261, 432-441; Nsabimana Reply Brief, paras. 48-67, 109-111. *See also* AT. 16 April 2015 pp. 43-45. The Appeals Chamber observes that Nsabimana argues that, by not giving notice that these witnesses would testify against him, the Prosecution failed to fulfil its obligation under Rule 73*bis* of the Rules. *See* Nsabimana Appeal Brief, paras. 252, 253. The Appeals Chamber also notes that Nsabimana refers to an excerpt of the *Kamuhanda* Appeal Judgement that refers to the accused's right to be informed of the charges against him. *See ibid.*, para. 207, *referring to Kamuhanda* Appeal Judgement, para. 21. As Nsabimana's contentions relate to admission of evidence as opposed to notice of charges, the Appeals Chamber considers this reference irrelevant.
[5040] Nsabimana Appeal Brief, paras. 111-120, 206-208, 254, 259, 260, 431-,439, *referring to* Trial Judgement, paras. 4053-4058. *See also* AT. 16 April 2015 pp. 43-45.
[5041] Nsabimana Notice of Appeal, para. 46; Nsabimana Appeal Brief, paras. 114-117, 208, 233, 234, 259, 439; Nsabimana Reply Brief, para. 66. *See also* AT. 16 April 2015 pp. 44, 45.
[5042] Nsabimana Notice of Appeal, para. 47; Nsabimana Appeal Brief, paras. 115, 118-120; Nsabimana Reply Brief, paras. 59, 61. *See also* AT. 16 April 2015 p. 44.
[5043] Nsabimana Appeal Brief, para. 231 (emphasis omitted). *See also ibid.*, paras. 230-232.

have had to confront evidence of witnesses not announced against him.[5044] Nsabimana requests that the violation of his rights be remedied by excluding the relevant Prosecution witnesses' testimonies and vacating his convictions which are based upon their evidence.[5045]

2170. The Prosecution responds that Nsabimana objected to the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ only in his closing brief and that he cross-examined all of them, with the exception of Witness FAP, on issues directly relevant to the theory of his defence.[5046] It contends that Nsabimana fails to explain why his "comprehensive cross-examinations" of these witnesses had no meaning.[5047] It further argues that Nsabimana's contention that these witnesses would not have been called against him if he had been tried separately is speculative[5048] and that Nsabimana fails to demonstrate that he was prejudiced by the Trial Chamber's reliance on the impugned evidence.[5049]

2171. Nsabimana replies that he objected to the evidence of these witnesses in his closing brief because it was only after the filing of the Prosecution Closing Brief that he became aware that the Prosecution intended to rely on their testimonies to establish his guilt.[5050] He asserts that, had he been aware that the Prosecution sought to do so earlier, through a clear indication in the Prosecution Pre-Trial Brief, he would have objected sooner and requested additional time to prepare for his cross-examinations.[5051] He emphasises that his cross-examination of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ was aimed at establishing that the attacks occurred during the night in his absence or that he did not receive any complaints from the refugees.[5052]

2172. The Appeals Chamber observes that, contrary to Nsabimana's assertion, he was notified by the Witness Summaries Grid appended to the Prosecution Pre-Trial Brief that Witness TQ would testify that he informed Nsabimana of attacks that took place near the prefectoral office and that Nsabimana did not react, which corresponds with the evidence the witness provided at trial and upon which the Trial Chamber relied against Nsabimana.[5053] Likewise, Nsabimana was notified that Witnesses FAP, QBQ, SD, and TA would testify that Tutsis who had sought refuge at the

[5044] Nsabimana Notice of Appeal, paras. 48, 49; Nsabimana Appeal Brief, paras. 121-124; AT. 16 April 2015 p. 44.
[5045] Nsabimana Notice of Appeal, para. 50; Nsabimana Appeal Brief, paras. 125, 126, 216. *See also* AT. 16 April 2015 pp. 43, 44.
[5046] Prosecution Response Brief, paras. 1287, 1288. *See also* AT. 16 April 2015 pp. 55, 56.
[5047] Prosecution Response Brief, paras. 1287-1289. The Prosecution also points out that Nsabimana fails to identify any error that could change the verdict and that his arguments should therefore be dismissed because he fails to reference any findings by the Trial Chamber on which the verdict relies. *See ibid.*, para. 1285. In his reply brief, Nsabimana acknowledges his error and points to the relevant paragraphs of the Trial Judgement. *See* Nsabimana Reply Brief, paras. 48-50. The Appeals Chamber will therefore consider his submissions.
[5048] Prosecution Response Brief, para. 1288.
[5049] Prosecution Response Brief, para. 1289.
[5050] Nsabimana Reply Brief, paras. 56, 57.
[5051] Nsabimana Reply Brief, paras. 55-59.
[5052] Nsabimana Reply Brief, paras. 63-66.

prefectoral office were subjected to abductions, killings, and rapes during attacks conducted by Nyiramasuhuko, Ntahobali, and *Interahamwe* in May and June 1994.[5054] The Trial Judgement reflects that the Trial Chamber relied only on these specific aspects of Witnesses FAP's, QBQ's, SD's, and TA's testimonial evidence to establish Nsabimana's guilt.[5055] Nsabimana's contention that he was not given notice that these witnesses would provide evidence relating to him is therefore ill-founded.

2173. Turning to Nsabimana's arguments concerning the evidence of Witnesses QBP, RE, SU, SS, and TK, the Appeals Chamber notes that it is not disputed that the Prosecution did not notify Nsabimana in its pre-trial brief or any other pre-trial submissions that these witnesses would implicate him,[5056] which constitutes an infringement of Rule 67 of the Rules.[5057] Although Nsabimana argued in his closing brief that the Trial Chamber should have excluded the evidence of these witnesses for the same reasons he adduces on appeal,[5058] the Trial Chamber did not address his contention in the context of its assessment of the evidence pertaining to the attacks at the prefectoral office. As noted above, the Trial Chamber limited its consideration of Nsabimana's contention to Witnesses QBP's, SU's, and RE's evidence concerning Nsabimana's involvement in the transfer of refugees from the prefectoral office to Nyange in early June 1994,[5059] an allegation in relation to which Nsabimana was acquitted.[5060]

2174. While a trial chamber is not obliged to respond to each and every submission made at trial and has discretion to decide which argument to address,[5061] the Appeals Chamber is of the opinion that, because it deemed it necessary to address Nsabimana's contention as it related to the evidence of the transfer to Nyange, the Trial Chamber should have also discussed the merits of Nsabimana's

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[5053] Witness Summaries Grid, item 95, Witness TQ; Trial Judgement, para. 5900.
[5054] *See* Witness Summaries Grid, item 76, Witness SD, Witness TA's Summary, Witness QBQ's Summary, Witness FAP's Summary. The Appeals Chamber considers that the fact that the summaries of Witnesses FAP's, QBQ's, SD's, and TA's anticipated testimony were not linked to Nsabimana's indictment in the Witness Summaries Grid is relevant in the context of notice of the charges but not in the context of notice of the evidence.
[5055] *See* Trial Judgement, paras. 2644, 2650, 2653, 2654, 2656, 2658, 2660, 2703, 2712, 2715, 2731, 2734-2736, 2738, 2773. The Trial Chamber did not refer to this evidence directly in assessing Nsabimana's responsibility for aiding and abetting the killings of Tutsi refugees abducted during the attacks at the Butare Prefecture Office, but its analysis was dependent on its findings that these attacks occurred.
[5056] Prosecution Response Brief, paras. 1285-1289. *See also* Trial Judgement, para. 4054. The Prosecution provides no indication in its response brief that it provided any additional indication to Nsabimana prior to the commencement of trial that it intended to rely on these witnesses to establish his guilt.
[5057] Rule 67(A)(i) of the Rules states that the Prosecutor shall "[a]s early as reasonably practicable and in any event prior to the commencement of the trial [...] notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused [...]." The Appeals Chamber also notes that, by failing to summarise all material facts its witnesses were expected to testify about in the Witness Summaries Grid filed as part of its pre-trial brief pursuant to Rule 73*bis*(B) of the Rules, the Prosecution did not fully comply with Rule 73*bis*(B)(iv)(b) of the Rules which provides that the Prosecution's list of witnesses should include "[a] summary of the facts on which each witness will testify".
[5058] Nsabimana Closing Brief, paras. 63-66.
[5059] Trial Judgement, paras. 4053, 4056, 4058.
[5060] *See* Trial Judgement, paras. 4206, 5934, 5935.

contention in the context of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence concerning the prefectoral office attacks. The Appeals Chamber finds *proprio motu* that the Trial Chamber's failure to fully address Nsabimana's contention infringed his right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules. Nonetheless, the Appeals Chamber finds that this error does not invalidate the Trial Chamber's decision to rely on the impugned evidence because, as discussed below, Nsabimana does not show how the Trial Chamber's reliance thereon violated his right to adequate time to prepare his defence or, if it did, caused him prejudice.

2175. The Appeals Chamber observes that Nsabimana did not object to Witnesses QBP's, RE's, SS's, SU's, and TK's testimonies in court and instead proceeded to cross-examine them without any request for a stay of proceedings.[5062] The Appeals Chamber is not persuaded by Nsabimana's contention that he delayed his objection to this evidence until his closing brief because he only became aware of the Prosecution's intention to rely on their evidence against him at that point in time. Indeed, the Appeals Chamber emphasises that his Indictment put Nsabimana on notice that he was charged in relation to attacks at the prefectoral office. The Appeals Chamber also finds that the material facts of Nsabimana's responsibility for aiding and abetting by omission crimes committed as part of these attacks – including his knowledge of the attacks against the Tutsi refugees and the fact that they sought his assistance but that he took no measures – were properly pleaded.[5063] In addition, the Prosecution Pre-Trial Brief reflected that the evidence of Witnesses RE, SS, SU, and TK concerned the prefectoral office attacks, which Nsabimana knew formed part of his case.[5064] Notably, the specific excerpts of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence relied on by the Trial Chamber all describe incidents in which refugees at the prefectoral office notified Nsabimana of the violence inflicted upon them during the attacks.[5065] Given the relevance of this evidence to Nsabimana, and his awareness that the witnesses were not marked as relevant to him in the Witness Summaries Grid, the Appeals Chamber considers that his failure to raise a

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[5061] *See, e.g., Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.

[5062] Witness QBP, T. 29 October 2002 pp. 57-95 (closed session), T. 30 October 2002 pp. 4-56 and 64-73 (closed session); Witness RE, T. 26 February 2003 pp. 40-47 (closed session), 48-62, T. 27 February 2003 pp. 4-41; Witness SU, T. 21 October 2002 pp. 84-104 (closed session), T. 22 October 2002 pp. 5-81 (closed session); Witness TK, T. 23 May 2002 pp. 136-173, T. 27 May 2002 pp. 5-53; Witness SS, T. 10 March 2003 pp. 4-17 (closed session), 18-39.

[5063] *See* Nteziryayo and Nsabimana Indictment, paras. 6.36 ("Some of the refugees asked *Préfet* Sylvain Nsabimana to protect them from the violent acts of the militiamen and soldiers.") (emphasis omitted), 6.60 ("Knowing that massacres of the civilian population were being committed, political and military authorities, including Sylvain Nsabimana and Alphonse Nteziryayo took no measures to stop them.") (emphasis omitted). *See also ibid.*, Section 7 "Charges" *in conjunction with* paras. 5.1, 5.8, 6.21, 6.22, 6.25, 6.26, 6.28, 6.32-6.38, 6.41, 6.51-6.59; Prosecution Pre-Trial Brief, paras. 22, 26, 28, 29, 30.

[5064] *See* Witness Summaries Grid, item 8, Witness TK, Witness RE's Summary, Witness SU's Summary, Witness SS's Summary.

[5065] *See* Trial Judgement, paras. 2804-2806, 2810.

contemporaneous objection to their evidence indicates that he considered himself able to adequately cross-examine them, and that he was not prejudiced.

2176. Moreover, the record shows that Nsabimana directly cross-examined Witnesses QBP, RE, SU, SS, and TK with respect to the specific segments of their evidence relied on by the Trial Chamber.[5066] The transcripts indicate that Nsabimana asked the witnesses pertinent and relevant questions, challenging their recollections that the refugees notified him of the attacks, or that he had been aware of them.[5067] Nsabimana's argument that his cross-examination was limited to establishing "that either the atrocities at the *préfecture* office, if any, occurred in Nsabimana's absence particularly at night, or [that] the refugees had some free movement, or that they received food, or that [he] never received their complaints"[5068] does not demonstrate that he had insufficient time to prepare his defence or that his defence was prejudiced. Rather, his admission that he attempted to establish that he did not receive complaints from the refugees supports the conclusion that he was not prejudiced because it was this aspect of Witnesses QBP's, RE's, SS's, SU's, and TK's evidence that the Trial Chamber relied on to establish his guilt. Beyond this assertion, Nsabimana fails to substantiate how he would have conducted his defence differently and how that would have impacted his conviction in light of the totality of these witnesses' evidence.[5069]

2177. In the view of the Appeals Chamber, Nsabimana's assertion that his cross-examination of these witnesses does not mean that he waived his fair trial rights is irrelevant. Nsabimana fails to appreciate that it is not the fact that he conducted some form of cross-examination of

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[5066] Witness QBP, T. 29 October 2002 pp. 57-95 (closed session), T. 30 October 2002 pp. 4-56 and 57-73 (closed session); Witness RE, T. 26 February 2003 pp. 40-47 (closed session), 48-62, T. 27 February 2003 pp. 4-41; Witness SU, T. 21 October 2002 pp. 84-104 (closed session), T. 22 October 2002 pp. 5-81 (closed session); Witness TK, T. 23 May 2002 pp. 136-173, T. 27 May 2002 pp. 5-53; Witness SS, T. 10 March 2003 pp. 4-17 (closed session), 18-39.

[5067] *See, in particular*, Witness QBP, T. 30 October 2002 pp. 31, 47 48 (Nsabimana's counsel cross-examining Witness QBP as to whether refugees met the prefect to raise problems with him and whether the witness knew of a delegation of three women who met the prefect, in response to which, Witness QBP recollected the woman with the wounded ear who complained to the prefect); Witness RE, T. 27 February 2003 pp. 5, 6 (Nsabimana's counsel cross-examining Witness RE on her account of the young man and woman who sought assistance from Nsabimana and that the young man was then taken away); Witness SU, T. 22 October 2002 p. 49 (Nsabimana's counsel cross-examining Witness SU about whether Nsabimana took measures following the delegation of refugees who complained to him); Witness TK, T. 27 May 2002 pp. 18-32 (Nsabimana's counsel extensively cross-examining Witness TK with respect to the abduction of Alphonse); Witness SS, T. 10 March 2003 pp. 14, 15 (closed session), 23, 30, 31 (Nsabimana's counsel not following up on Witness SS's statement that Nsabimana knew there were problems, and cross-examining the witness in relation to whether he spoke to Nsabimana).

[5068] Nsabimana Reply Brief, para. 63.

[5069] In particular, Nsabimana advances that, had he had more time to prepare, he would have asked different questions, without identifying what these questions might have been and why the hypothetical answers would have impacted his conviction. The Appeals Chamber also observes that Nsabimana challenged at length the testimonies of these witnesses in his closing brief. *See* Nsabimana Closing Brief, paras. 1449-1473 (under the heading "Allegation of a request for protection against atrocities by militiamen and soldiers addressed by some refugees to Préfet Nsabimana"). *See ibid.*, paras. 1451-1456, 1459-1465 (challenging the evidence of Witnesses SU, SS, QBP, and RE in this regard). *See also ibid.*, paras. 1246-1258, 1266-1270, 1276-1283, 1306-1338, 1339-1371, 1393-1405. *See, in particular, ibid.*, paras. 1314-1316, 1335, 1338, 1393-1405 (challenging Witness TK's evidence of Alphonse's abduction and Witness RE's evidence of the abduction of the young man).

Witnesses QBP, RE, SS, SU, and TK on its own that demonstrates that he was not prejudiced. Rather, the foundation of the Appeals Chamber's determination in this instance is the cumulative effect of the nature of the evidence provided by these witnesses, the notice of the charges and underpinning material facts he was provided, his failure to object in a timely manner to their evidence when it was adduced at trial, and the pertinent and relevant cross-examinations of these witnesses he conducted, in combination with his failure to provide any arguments reflecting that he had inadequate time to prepare his defence or was prejudiced.

2178. Considering that Nsabimana fails to demonstrate that he was prejudiced by the Trial Chamber's admission of, and reliance on, the inculpatory evidence of Witnesses QBP, RE, SS, SU, and TK, on the basis that he did not have time to adequately prepare for cross-examination, the Appeals Chamber rejects Nsabimana's assertion that the Trial Chamber could not have admitted their evidence because it was not "probative" within the meaning of Rule 89(C) of the Rules. The Appeals Chamber recalls that admissibility of evidence should not be confused with the assessment of the weight to be accorded to that evidence, an issue to be decided by the trial chamber after hearing the totality of the evidence.[5070] Witnesses QBP's, RE's, SS's, SU's, and TK's evidence was temporally, geographically, and thematically related to the pleaded allegation that Nsabimana had knowledge of the attacks against the Tutsis who had sought refuge at the prefectoral office and failed to take measures. The Appeals Chamber therefore sees no error in the admission of this evidence.

2179. Likewise, the Appeals Chamber rejects Nsabimana's assertion that his fair trial rights were violated because, had he been tried individually, this evidence would not have been relied upon by the Trial Chamber. The Appeals Chamber recalls that Rule 82(A) of the Rules states that "[i]n joint trials, each accused shall be accorded the same rights as if he were being tried separately." Nsabimana was tried pursuant to the charges brought against him individually and his assertion that, had he been tried individually, the Prosecution would not have brought the evidence of Witnesses QBP, RE, SS, SU, and TK against him, is speculative.

2180. Based on the foregoing, the Appeals Chamber concludes that Nsabimana has failed to demonstrate that the Trial Chamber erred in admitting and relying on the evidence of Witnesses FAP, QBP, QBQ, RE, SD, SS, SU, TA, TK, and TQ to establish his guilt because he received no notice that they would testify against him.

[5070] Admissibility Appeal Decision of 2 July 2004, para. 15.

2. Witness TK's Evidence of an Unpleaded Allegation

2181. In summarising the evidence concerning the attacks at the Butare Prefecture Office, the Trial Chamber noted Witness TK's evidence that she saw a young refugee named Alphonse enter Nsabimana's office at the Butare Prefecture Office to seek help before being forced out and taken away by *Interahamwe*.[5071] The Trial Chamber did not convict Nsabimana for this specific incident because it found that he received inadequate notice that it would be used as part of the Prosecution case against him.[5072] However, relying on the Admissibility Appeal Decision of 2 July 2004 and the *Kupreškić et al.* Appeal Judgement, it stated that it would consider the evidence of Alphonse's abduction for other permissible purposes.[5073] The Trial Chamber subsequently relied on this evidence to ascertain Nsabimana's awareness of the attacks against Tutsis at the prefectoral office after determining it relevant to this issue and stating that it would consider it only for this limited purpose.[5074]

2182. Nsabimana contends that the Trial Chamber erred in admitting and relying on Witness TK's evidence.[5075] He submits that the Trial Chamber misapplied the *Kupreškić et al.* Appeal Judgement and, consequently, Rule 93 of the Rules on the grounds that the evidence concerning Alphonse's abduction: (i) was an unpleaded allegation which could not be used in support of a second unpleaded allegation as Nsabimana's knowledge of the night-time attacks was similarly unpleaded;[5076] and (ii) could not be considered as evidence of a consistent pattern of conduct as the Prosecution had never provided him notice of its intent to establish a pattern of conduct in accordance with Rule 93 of the Rules.[5077] Nsabimana further contends that the Trial Chamber also misapplied the Admissibility Appeal Decision of 2 July 2004 because it does not support the admission of evidence of an unpleaded allegation pursuant to Rule 89(C) of the Rules in support of another unpleaded allegation.[5078]

2183. The Prosecution responds that Nsabimana fails to demonstrate that it was unreasonable for the Trial Chamber to rely on Witness TK's evidence to infer Nsabimana's knowledge of the

[5071] Trial Judgement, para. 2209. *See also ibid.*, paras. 2797, 2804.
[5072] Trial Judgement, para. 2797.
[5073] Trial Judgement, para. 2797 *referring to* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15, *Kupreškić et al.* Appeal Judgement, paras. 321-323, 336.
[5074] Trial Judgement, para. 2804, *referring to* Admissibility Appeal Decision of 2 July 2004, paras. 14, 15, *Kupreškić et al.* Appeal Judgement, paras. 321-323, 336. The Appeals Chamber observes that the Trial Chamber appears to have confused Witness RE and Witness TK in paragraph 2797 of the Trial Judgement in stating that Witness RE testified to Alphonse's abduction. The record and the Trial Chamber's summary of the evidence reflect that the evidence regarding the abduction of Alphonse was not provided by Witness RE but by Witness TK. *See ibid.*, paras. 2209, 2804. The Appeals Chamber considers the Trial Chamber's reference to Witness RE in paragraph 2797 to be a typographical error.
[5075] Nsabimana Appeal Brief, paras. 217-229. *See also ibid.*, paras. 233-236.
[5076] Nsabimana Appeal Brief, paras. 218-226.
[5077] Nsabimana Appeal Brief, paras. 223-225.

attacks.[5079] It asserts that, contrary to Nsabimana's contention, its case was never that there was a consistent pattern of conduct that should have been disclosed under Rule 93 of the Rules.[5080]

2184. The Appeals Chamber recalls that it has found that Nsabimana's knowledge that attacks took place at any time of the day regardless of whether he was present or not was properly pleaded in the Indictment.[5081] It therefore dismisses as moot Nsabimana's contention that the Trial Chamber erred in relying on the *Kupreškić et al.* Appeal Judgement and the Admissibility Decision of 2 July 2004 to admit Witness TK's evidence because it is premised on his incorrect assumption that his knowledge of the attacks was improperly pleaded.

2185. The Appeals Chamber also rejects Nsabimana's argument that the Trial Chamber, through its reference to the *Kupreškić et al.* Appeal Judgement, improperly admitted evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute without the notice required by Rule 93 of the Rules.[5082] Nothing in the Trial Chamber's analysis supports the contention that the evidence was admitted for the purposes set out under Rule 93 of the Rules, nor do the excerpts of the *Kupreškić et al.* Appeal Judgement that the Trial Chamber relied upon suggest that this is the only purpose in which evidence of unpleaded allegations can be admitted and considered.[5083] In the same vein, Nsabimana does not show that Witness TK's disputed evidence was used for the purpose of demonstrating a general propensity or disposition of Nsabimana to commit crimes.

2186. Accordingly, the Appeals Chamber finds that Nsabimana has failed to identify any error in the Trial Chamber's admission of Witness TK's evidence regarding the incident involving Alphonse at the prefectoral office in the context of determining his knowledge of the night-time attacks at the prefectoral office.

3. Conclusion

2187. Based on the foregoing, the Appeals Chamber dismisses Ground 5 as well as the relevant parts of Grounds 6 and 13 of Nsabimana's appeal.

[5078] Nsabimana Appeal Brief, paras. 227, 228.
[5079] Prosecution Response Brief, paras. 1317, 1318.
[5080] Prosecution Response Brief, para. 1318.
[5081] *See supra*, Section VI.A.
[5082] Rule 93(A) of the Rules provides that evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice and Rule 93(B) of the Rules requires the Prosecution to disclose acts tending to show such a pattern of conduct pursuant to Rule 66 of the Rules.
[5083] *See Kupreškić et al.* Appeal Judgement, paras. 321-323, 336, *referred to* in Trial Judgement, para. 2804, fn. 7835. *See also supra*, Sections IV.F.2(a), V.I.2(a)(ii).

D. Butare Prefecture Office (Grounds 6 in part, 7-10, 12, 13 in part, 14)

2188. Nsabimana challenges the Trial Chamber's finding that the *actus reus* and *mens rea* necessary to establish his responsibility for aiding and abetting by omission the killings of the Tutsi refugees abducted from the Butare Prefecture Office during attacks committed by Nyiramasuhuko, Ntahobali, and *Interahamwe* were proven beyond reasonable doubt. Nsabimana requests that "the impugned Judgement" be quashed.[5084] The Appeals Chamber will address Nsabimana's submissions relating to the *actus reus* before turning to his submissions concerning the *mens rea*.

1. *Actus Reus* (Grounds 8 to 10, and 12 in part)

2189. In finding Nsabimana responsible under Article 6(1) of the Statute for aiding and abetting by omission, the Trial Chamber found that, in his capacity as prefect, Nsabimana had the legal duty to provide assistance to people in danger, to ensure the tranquillity, public order, and security of people, and to protect civilians, including the wounded and sick, against acts or threats of violence.[5085] It further held that, by refusing to take action in the midst of the continuing attacks at the prefectoral office, Nsabimana assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks, that his failure to act had a substantial effect on the realisation of their crimes,[5086] and that he had the means available to him to "forestall these harms, but he did nothing".[5087]

2190. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that he had a legal duty to act,[5088] that his omission substantially assisted the perpetration of the crimes,[5089] and that he had the ability to act.[5090] The Appeals Chamber will address these arguments in turn.

(a) Legal Duty to Act

2191. The Trial Chamber found that Nsabimana's legal duty to act as a prefect was based on: (i) Article 256 of the Rwandan Penal Code which imposed on every Rwandan citizen a duty to provide assistance to people in danger;[5091] (ii) Rwandan domestic law which imposed on the prefect an obligation to ensure the tranquillity, public order, and security of people within the

[5084] Nsabimana Appeal Brief, paras. 308-502.
[5085] *See* Trial Judgement, paras. 5893-5899.
[5086] Trial Judgement, para. 5900. *See also ibid.*, paras. 5903, 5906, 5972.
[5087] *See* Trial Judgement, para. 5903. *See also ibid.*, para. 5972.
[5088] Nsabimana Notice of Appeal, paras. 80-89; Nsabimana Appeal Brief, paras. 308, 309, 312, 322-327, 331, 335, 341-344, 391, 392.
[5089] Nsabimana Appeal Brief, paras. 483, 496.
[5090] Nsabimana Notice of Appeal, paras. 94-104; Nsabimana Appeal Brief, paras. 310-321, 331-340, 342-348, 366-398. *See also* Nsabimana Reply Brief, paras. 135-152; AT. 16 April 2015 pp. 46-49.
[5091] Trial Judgement, para. 5893.

prefecture;[5092] and (iii) Articles 7 and 13 of Additional Protocol II to the Geneva Conventions which imposed a legal duty on Nsabimana to protect civilians, including the wounded and sick, against acts or threats of violence.[5093]

2192. Nsabimana submits that the Trial Chamber erred in law and in fact in finding that Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II imposed a legal duty upon him to act.[5094] He contends that individual responsibility by omission under Article 6(1) of the Statute can only be incurred where the alleged omission is punishable under a rule of criminal law[5095] and that the Trial Chamber failed to indicate the legal sanction provided under such texts.[5096]

2193. The Prosecution responds that the Trial Chamber did not err in finding that Nsabimana had a legal duty to act.[5097] In particular, it contends that Nsabimana misconstrues the law and that the jurisprudence is not settled as to whether the legal duty to act must stem from a rule of criminal law.[5098] In the alternative, the Prosecution argues that the Trial Chamber found that one of the sources of Nsabimana's duty to act was criminal law.[5099]

2194. The Appeals Chamber notes that Nsabimana seeks to substantiate his claim that the Trial Chamber erred in finding that Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II imposed a legal duty upon him to act by arguing that criminal liability for failure to discharge a legal duty must derive from a duty imposed by criminal law and that the Trial Chamber failed to indicate the legal sanction provided under such texts.[5100] The question of whether criminal liability for failure to discharge a legal duty to act must derive from a rule entailing individual criminal responsibility has never been examined in the jurisprudence of the Tribunal and

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[5092] Trial Judgement, para. 5894, *referring to* Exhibit D468 (Law of 11 March 1975, Structure and Functioning of the *Préfecture*) ("11 March 1975 Law"), Article 8(2). The Trial Chamber found that it did not need to resolve the issue as to whether the legal duty had to be mandated by a rule of criminal law given that "Nsabimana enjoyed a legal duty from additional, and distinct, sources of law". *See ibid.*, fn. 14751.

[5093] Trial Judgement, paras. 5897-5899. *See also ibid.*, paras. 5895, 5896.

[5094] Nsabimana Notice of Appeal, paras. 83-89; Nsabimana Appeal Brief, paras. 308, 309, 312, 322-326, 335, 341, 342, 344.

[5095] Nsabimana Notice of Appeal, paras. 81, 82; Nsabimana Appeal Brief, paras. 309, 322, *referring to Ntagerura et al.* Trial Judgement, para. 659.

[5096] Nsabimana Notice of Appeal, paras. 83, 84; Nsabimana Appeal Brief, para. 323.

[5097] Prosecution Response Brief, paras. 1342-1353, 1360, 1362, 1363, 1366-1370. *See also* AT. 16 April 2015 p. 56.

[5098] Prosecution Response Brief, paras. 1343, 1344, 1350, 1351, 1362, 1366, *referring, inter alia, to Tadić* Appeal Judgement, para. 188, *Ntagerura et al.* Appeal Judgement, paras. 334, 335, *Mrkšić and Šljivančanin* Appeal Judgement, paras. 151, 154, *Galić* Appeal Judgement, para. 175. The Prosecution asserts that the approach of the Appeals Chamber is rather that, irrespective of the source of the duty, the legal duty to act must be one whose breach gives rise to individual criminal responsibility. *See ibid.*, paras. 1345, 1352.

[5099] Prosecution Response Brief, para. 1353.

[5100] The Appeals Chamber observes that Nsabimana almost exclusively develops his contentions by arguing that he lacked the material ability to act. *See, e.g.*, Nsabimana Appeal Brief, paras. 311-321, 331-348. These arguments are discussed in detail below. *See infra*, Section VI.D.1(c).

the ICTY.[5101] Nonetheless, the Appeals Chamber finds it unnecessary to make a determination on this issue in the present case as the Trial Chamber found that Nsabimana's duty to act stemmed notably from Rwandan criminal law.[5102] Nsabimana fails to demonstrate that the Trial Chamber erred in relying on Article 256 of the Rwandan Penal Code or that it was under the obligation to specify the criminal sanction incurred from the violation of this provision.

2195. Accordingly, the Appeals Chamber dismisses Nsabimana's contention that the Trial Chamber erred in finding that a legal duty existed that could sustain his criminal responsibility under Article 6(1) of the Statute for aiding and abetting by omission.

(b) Substantial Assistance

2196. As noted above, the Trial Chamber found that by refusing to take action in the midst of the continuing attacks at the Butare Prefecture Office, Nsabimana assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks and that his "failure to act had a substantial effect on the realisation of these crimes."[5103] The Trial Chamber relied, in part, on the evidence of Witnesses QCB, SJ, SU, SS, and RE to conclude that, "[a]lthough many people took refuge at the [Butare Prefecture Office] precisely because they thought the *préfet* would protect them, Nsabimana refused to help."[5104] It further stated that Nsabimana's "attitude in this respect was evidenced by Witness TQ who approached Nsabimana at the [Butare Prefecture Office] asking for help in burying the bodies of orphans that had been killed at the school complex" and recalled that "Nsabimana told Witness TQ that he was a madman."[5105] The Trial Chamber also noted evidence from Witness SS that soldiers prevented attacks at the prefectoral office and determined that, "[h]ad Nsabimana posted *gendarmes* or soldiers sometime prior to 5-15 June 1994, he could have prevented the mass killing and rape, at least in part, at the [Butare Prefecture Office]."[5106]

[5101] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 151 ("The Appeals Chamber recalls that it has previously recognised that the breach of a duty to act imposed by the laws and customs of war gives rise to individual criminal responsibility. The Appeals Chamber further recalls that Šljivančanin's duty to protect the prisoners of war was imposed by the laws and customs of war. Thus, the Appeals Chamber considers that Šljivančanin's breach of such duty gives rise to his individual criminal responsibility. Therefore, it is not necessary for the Appeals Chamber to further address whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law."); *Ntagerura et al.* Appeal Judgement, paras. 334, 335.

[5102] The Trial Chamber also relied on provisions of the laws and customs of war which it considered give rise to individual criminal responsibility in case of violation of such provisions. *See* Trial Judgement, para. 5899 ("In the Chamber's view, the criminalisation of individual conduct encompasses the Geneva Conventions in their entirety, including Articles 7 and 13 of Additional Protocol II."). The Appeals Chamber declines to consider *proprio motu* the correctness of this legal statement in light of the Trial Chamber's reliance on the Rwandan Penal Code.

[5103] Trial Judgement, para. 5900. *See also supra*, para. 2189.

[5104] Trial Judgement, para. 5900 (internal reference omitted).

[5105] Trial Judgement, para. 5900 (internal reference omitted).

[5106] Trial Judgement, para. 5900.

2197. Nsabimana contends that Witness TQ's evidence concerned the abduction of orphans at the *Groupe scolaire* rather than the abduction and killing of refugees from the prefectoral office, and argues that Witness TQ's evidence on an alleged conversation with him about burying the orphans is not believable.[5107] He submits that the Trial Chamber therefore erred in relying on this evidence in finding that he assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the perpetration of their attacks.[5108]

2198. The Prosecution argues that the Trial Chamber reasonably assessed Witness TQ's evidence and accepted it as credible and consistent.[5109]

2199. The Appeals Chamber finds that Nsabimana's contentions concerning the analysis of Witness TQ's evidence fail to identify an error that could invalidate the verdict or could have occasioned a miscarriage of justice. They do not demonstrate that the Trial Chamber's reliance on Witness TQ's evidence was material to its determination that Nsabimana's omission substantially assisted Nyiramasuhuko, Ntahobali, and *Interahamwe* in the commission of crimes against Tutsis who had sought refuge at the prefectoral office.[5110] The Trial Judgement reveals that Witness TQ's evidence was considered as illustrative of Nsabimana's indifference toward victims of attacks generally, offering circumstantial corroboration of evidence from multiple witnesses that Nsabimana refused to assist refugees at the prefectoral office notwithstanding the fact that he received pleas for assistance from them.[5111]

2200. In light of Nsabimana's failure to identify any error that could invalidate the verdict or could have occasioned a miscarriage of justice, the Appeals Chamber declines to consider his contentions further.

(c) Ability to Act

2201. The Trial Chamber, relying on various sources of Rwandan law, observed that Nsabimana, in his capacity as prefect, had the power to request the intervention of the Rwandan army to restore public order and the ability to verbally request the intervention of the gendarmerie.[5112] It further found that "Nsabimana in fact requisitioned forces around 5-15 June 1994", that the placement of five to six soldiers at the prefectoral office "forestalled attacks against those taking refuge" there, and that these conclusions demonstrated that Nsabimana, as prefect, "had the ability to requisition

[5107] Nsabimana Appeal Brief, paras. 209, 212-215.
[5108] Nsabimana Appeal Brief, paras. 209, 213-215.
[5109] Prosecution Response Brief, paras. 1319, 1321.
[5110] *See* Trial Judgement, para. 5900.
[5111] *See* Trial Judgement, para. 5900.

forces that could forestall the attacks."[5113] The Trial Chamber considered that Nsabimana failed to prevent ongoing attacks at the prefectoral office "for a significant period between the end of April and mid-June 1994" even though "means were available to Nsabimana to fulfil his duty to forestall these harms".[5114]

2202. Nsabimana submits that the Trial Chamber, in finding that he had the ability to act, failed to examine whether he had "the ability and the capacity to act in the specific circumstances of the case."[5115] He argues that no evidence was adduced to demonstrate that he had the means or capacity to discharge his obligations to protect civilians prior to June 1994.[5116] In his view, the Trial Chamber did not consider that soldiers or gendarmes from Butare Prefecture participated in the perpetration of crimes and how this impacted his ability to act and that the security personnel he eventually posted at the prefectoral office in June 1994 were not from the prefecture.[5117] In light of all these considerations, Nsabimana suggests that the existence of a prefect's "theoretically vested" powers prescribed by Rwandan law is insufficient to establish that he had the practical ability to exercise such powers from April to mid-June 1994[5118] and that no reasonable trier of fact could have found that he had the ability to act.[5119]

2203. Furthermore, Nsabimana contends that his ability to post soldiers at the prefectoral office around 5 June 1994 does not necessarily mean that he had the ability to do so prior to that date.[5120] He submits that the Trial Chamber incorrectly characterised the positioning of members of the Rwandan army at the prefectoral office around 5 to 15 June 1994 as a "requisition" within the meaning of Rwandan law.[5121] Finally, Nsabimana submits that he "did his best", despite the lack or

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[5112] *See* Trial Judgement, para. 5901, *referring to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (Law of 23 January 1974, *Création de la Gendarmerie*) ("23 January 1974 Law"), Section 2, Art. 32.
[5113] Trial Judgement, para. 5902. *See also ibid.*, para. 5906.
[5114] Trial Judgement, para. 5903. *See also ibid.*, para. 5906.
[5115] Nsabimana Appeal Brief, paras. 310-321, 331-338, 342-347, 366-397. *See also* Nsabimana Reply Brief, paras. 135-152; AT. 16 April 2015 pp. 46-49.
[5116] Nsabimana Appeal Brief, paras. 316-320, 334, 343, 368, 369. *See also* Nsabimana Reply Brief, paras. 136, 137. Nsabimana stresses that apart from gendarmes, and to a certain extent soldiers, the prefect cannot requisition any other force to maintain peace and security. *See* Nsabimana Appeal Brief, para. 318. Nsabimana similarly contends that he did not have the ability to discharge his duties pursuant to Article 256 of the Rwandan Penal Code and Articles 7 and 13 of Additional Protocol II of the Geneva Conventions. *See ibid.*, paras. 331, 332, 335, 336, 342, 344, 347. *See also* AT. 16 April 2015 p. 48.
[5117] Nsabimana Appeal Brief, paras. 314, 319; Nsabimana Reply Brief, paras. 140-143, 145, 148-151. Nsabimana recalls that the Nsabimana and Nteziryayo Indictment and some Prosecution witnesses alleged that the Rwandan Armed Forces were involved in crimes, and that several officers have been convicted in that regard. *See* Nsabimana Appeal Brief, paras. 375-383. *See also* AT. 16 April 2015 pp. 47, 48.
[5118] Nsabimana Appeal Brief, paras. 312, 313, 337, 363, 367, *referring, inter alia, to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (23 January 1974 Law), Art. 32. While Nsabimana acknowledges that Rwandan law empowered the prefect to requisition the Rwandan Armed Forces, he contends that this text was not sufficient for the Trial Chamber to conclude that he had the ability to requisition the Rwandan Armed Forces or post soldiers prior to June 1994. *See ibid.*, paras. 316, 317, 320, 367-369, 392.
[5119] Nsabimana Appeal Brief, paras. 319, 340, 383.
[5120] Nsabimana Appeal Brief, para. 316; Nsabimana Reply Brief, para. 144.
[5121] Nsabimana Appeal Brief, paras. 364, 366, 384-397. *See also* Nsabimana Reply Brief, para. 147.

inadequacy of resources, to discharge his duty to protect civilians.[5122] He asserts that, in addition to getting protection for the prefectoral office, he took many other actions to save the lives of civilians, and did not hesitate to protect people when he was able to do so.[5123]

2204. The Prosecution responds that the Trial Chamber correctly found that Nsabimana had the material ability to act, as demonstrated by his requisition of forces to protect refugees at the prefectoral office around 5 to 15 June 1994.[5124] It submits that, contrary to Nsabimana's arguments, the Trial Chamber did enquire into the means available to Nsabimana to act.[5125] According to the Prosecution, the fact that some gendarmes and soldiers participated in the killings, or whether soldiers originated from Butare Prefecture, did not detract from his ability to act.[5126] It argues that, given that the Trial Chamber's task was to assess Nsabimana's legal power to act, the exercise of his power, and the authorities' compliance with his requests, the Trial Chamber was not required to assess whether soldiers were involved in crimes and that the issue is not whether Nsabimana's request for soldiers amounted to a "requisition" under Rwandan law.[5127]

2205. The Appeals Chamber recalls that aiding and abetting by omission necessarily requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty.[5128]

2206. In the present case, the Trial Chamber observed that, as the prefect of Butare, Nsabimana "ha[d] the power to request the intervention of the Armed Forces to restore public order" and that he could "verbally request the intervention of the National *Gendarmerie* pursuant to the Rwandan Law on the creation of the *Gendarmerie*."[5129] Nsabimana does not dispute the validity of this finding and the Appeals Chamber dismisses his argument that no evidence was adduced to demonstrate his capacity or means to discharge his obligations to protect Tutsi refugees at the prefectoral office.

[5122] Nsabimana Appeal Brief, paras. 339, 345, 346.
[5123] Nsabimana Appeal Brief, paras. 339, 345, 346. Nsabimana notes that: (i) some Prosecution and Defence witnesses testified that refugees at the Butare Prefecture Office received food, blankets, and other items on various occasions; (ii) he helped the Rumiya family and other individuals, including women called Josée, Immaculée Mukantaganira, and Madeleine Mukakagaba; and (iii) he participated in the evacuation of orphans, including 600 children from the *Groupe scolaire*. *See ibid.*, para. 346.
[5124] Prosecution Response Brief, paras. 1354-1356, 1376. *See also* AT. 16 April 2015 pp. 59, 60.
[5125] Prosecution Response Brief, para. 1377.
[5126] Prosecution Response Brief, para. 1378.
[5127] Prosecution Response Brief, paras. 1356, 1379. The Prosecution notes that the colonels responded to Nsabimana's oral request because he was a prefect, thus demonstrating his material ability to act. *See ibid.*, paras. 1356, 1380. It further points out that when Nsabimana orally requested military personal, his request was complied with and soldiers were posted at the prefectoral office for the purpose of offering protection. *See idem.*
[5128] *Mrkšić and Šljivančanin* Appeal Judgement, para. 154, *referring to Ntagerura et al.* Appeal Judgement, para. 335. *See also ibid.*, paras. 49, 82.
[5129] Trial Judgement, para. 5901, *referring to* Exhibit D468 (11 March 1975 Law), Art. 11, Exhibit D583 (23 January 1974 Law), Section 2, Art. 32.

2207. The Appeals Chamber is also not persuaded that the Trial Chamber erred in simply assessing Nsabimana's "theoretically vested" powers without considering whether he had the ability and the capacity to act in the specific circumstances of the case. The Trial Chamber properly assessed whether a possibility was open to Nsabimana to call on the Rwandan army or the gendarmes to protect refugees and found that:

> Nsabimana in fact requisitioned forces around 5-15 June 1994. At that time, 5-6 soldiers were seconded to the [Butare Prefecture Office] under the command of a female lieutenant. The evidence establishes that these soldiers forestalled attacks against those taking refuge at the Butare *préfecture* office. This shows that Nsabimana, pursuant to his powers as *préfet*, had the ability to requisition forces that could forestall the attacks.[5130]

Having made this assessment, the Trial Chamber then determined that "Nsabimana failed to take any steps to prevent the ongoing attacks at the [Butare Prefecture Office] for a significant period between the end of April and mid-June 1994."[5131]

2208. In the view of the Appeals Chamber, it was open to a reasonable trier of fact to rely on the actual positioning of soldiers or gendarmes at the prefectoral office, at Nsabimana's request, in June 1994 to find that he had the ability to take steps to prevent the attacks between the end of April and mid-June 1994. The Appeals Chamber is not persuaded by Nsabimana's contention that the Trial Chamber failed to sufficiently consider that soldiers were participating in attacks in Butare Prefecture, which, according to him, should have raised doubts about his ability to requisition them earlier than June 1994. Nsabimana ignores evidence referred to throughout the Trial Judgement indicating the Trial Chamber's awareness that soldiers and/or gendarmes participated in attacks in Butare Prefecture and at the prefectoral office specifically.[5132] Likewise, Nsabimana fails to demonstrate why the Trial Chamber was required to consider whether the security forces ultimately placed at the prefectoral office were not from Butare Prefecture.

2209. Furthermore, the Appeals Chamber does not find merit in Nsabimana's contention that the Trial Chamber erred in finding that he "requisition[ed]" soldiers according to Rwandan law. Nsabimana appears to argue that his ability to obtain security forces in June 1994 resulted from the coincidental confluence of circumstances, rather than his ability to do so based on Rwandan law.[5133] However, the Trial Chamber clearly considered the evidence of Nsabimana and others as to how

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[5130] Trial Judgement, para. 5902 (internal reference omitted).
[5131] Trial Judgement, para. 5903.
[5132] *See, e.g.*, Trial Judgement, paras. 2190, 2191, 2206, 2211, 2214, 2218, 2250, 2276, 2279, 2287, 2307, 2309, 2339, 2711, 2771, 2773, 2781, 2805, 2807.
[5133] Nsabimana avers that, according to Article 32 of the 11 March 1975 Law, the prefect may make a verbal requisition but must confirm this in writing. *See* Nsabimana Appeal Brief, para. 393. Nsabimana submits, however, that his actions did not amount to a requisition because: (i) he used his own relationships, namely through Colonels Munyengango and Mugemanyi, to have soldiers from outside Butare posted at the prefectoral office; (ii) the Trial Chamber did not

security forces were obtained for the purpose of protecting refugees at the prefectoral office between 5 and 15 June 1994.[5134] Nsabimana does not demonstrate on appeal that, in light of the record, no reasonable trier of fact could have found that he had the *de jure* authority as prefect and the actual capacity to obtain security for the refugees at the prefectoral office between the end of April and mid-June 1994.

2210. Finally, as regards Nsabimana's arguments that he "did his best" to protect refugees, the Appeals Chamber notes that he simply points to his efforts to assist Tutsis without demonstrating how the Trial Chamber erred. The Trial Chamber considered his efforts when it assessed mitigating factors in relation to his sentence.[5135] Nsabimana does not demonstrate that the Trial Chamber ignored this evidence or that it prevented a reasonable trier of fact from concluding that he had the ability to act in an attempt to forestall crimes at the prefectoral office between the end of April and mid-June 1994.

2211. Based on the foregoing, the Appeals Chamber dismisses Nsabimana's arguments regarding his ability to act as it pertains to his responsibility for aiding and abetting by omission.

(d) Conclusion

2212. The Appeals Chamber finds that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he had a legal duty to act, that his failure to act had a substantial effect on the realisation of the crimes committed during attacks at the prefectoral office, and that he had the ability to act.

2. *Mens Rea* (Grounds 6 in part, 7, 12 and 13 in part, 14)

2213. In determining that Nsabimana possessed the requisite *mens rea* for aiding and abetting by omission the killings of Tutsis who had sought refuge at the Butare Prefecture Office, the Trial Chamber found that Nsabimana knew of the night-time attacks at the prefectoral office before the end of May 1994 and that the Tutsis seeking refuge there were being abducted, raped, and killed.[5136] It further found that Nsabimana was aware of the perpetrators' genocidal intent and that he also knew that his failure to act assisted in the commission of the crimes.[5137]

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ascertain whether gendarmes or soldiers were posted; and (iii) no evidence was adduced to establish that the Rwandan army hierarchy had received a written requisition from Nsabimana. *See ibid.*, paras. 387-397.

[5134] Trial Judgement, paras. 2807-2812.

[5135] *See* Trial Judgement, para. 6232.

[5136] Trial Judgement, paras. 2807, 5904.

[5137] Trial Judgement, paras. 5904, 5905. *See also ibid.*, para. 5972.

2214. Nsabimana submits that the Trial Chamber erred in finding that he had knowledge: (i) of the night-time attacks perpetrated against the Tutsis seeking refuge at the prefectoral office; (ii) of the perpetrators' genocidal intent; and (iii) that his failure to act assisted the commission of the crimes at the prefectoral office.[5138] The Appeals Chamber will address these contentions in turn.

(a) Knowledge of Crimes

2215. In finding that Nsabimana knew of the night-time attacks perpetrated against the Tutsis seeking refuge at the prefectoral office, the Trial Chamber relied on: (i) Exhibit P113, a letter written by Nsabimana entitled "*The Truth about the Massacres in Butare*", which he sent to Prosecution Expert Witness Alison Des Forges after telephone conversations in 1996, and Exhibit P114, the transcript of a journalist's interview of Nsabimana taken in October 1994; (ii) Nsabimana's testimony; and (iii) the evidence of Prosecution Witnesses TK, RE, SS, SU, and QBP.[5139] As to the timing of Nsabimana's knowledge, the Trial Chamber concluded that he "was aware of the night-time attacks at the [prefectoral office] and he was presented with multiple requests for assistance from Tutsi refugees starting, at least, around the end of May 1994."[5140] It further concluded that, "[b]ased upon Nsabimana's own admissions and the open and notorious nature of the attacks, [...] Nsabimana was actually aware of the attacks even earlier."[5141]

2216. Nsabimana submits that the Trial Chamber erred in finding he had knowledge of the night-time attacks against the Tutsis at the prefectoral office based on its reliance on: (i) Exhibits P113 and P114;[5142] (ii) his testimony;[5143] and (iii) the evidence of Witnesses TK, RE, SS, SU, and QBP as well as the "open and notorious nature of the attacks".[5144]

(i) Exhibits P113 and P114

2217. In making its finding that Nsabimana was aware of the night-time attacks at the prefectoral office earlier than at the end of May 1994, the Trial Chamber relied on an excerpt of Exhibit P113 in which Nsabimana stated that "there were isolated cases of disappearances at night" which he attributed to unknown soldiers and hooligans, and a portion of Exhibit P114 reflecting that

[5138] Nsabimana Notice of Appeal, paras. 53-69, 74, 105-110; Nsabimana Appeal Brief, paras. 130-158, 180, 181, 190-202, 262-267, 399-427, 429, 431-438, 441, 445-492, 495-502; Nsabimana Reply Brief, paras. 70-78, 94-98, 108, 153-187. *See also* AT. 16 April 2015 pp. 44-46.
[5139] Trial Judgement, paras. 2803-2807, 2810.
[5140] Trial Judgement, para. 2807.
[5141] Trial Judgement, para. 2807.
[5142] Nsabimana Notice of Appeal, paras. 63-66; Nsabimana Appeal Brief, paras. 180-202, 441; Nsabimana Reply Brief, paras. 77, 78, 177. *See also* AT. 16 April 2015 p. 46.
[5143] Nsabimana Notice of Appeal, paras. 53-62; Nsabimana Appeal Brief, paras. 130-158, 441; Nsabimana Reply Brief, paras. 70-76, 95-98, 177. *See also* AT. 16 April 2015 pp. 44, 45.

Nsabimana made a list of people living at the prefectoral office so that he could check if there had been problems the night before.[5145] In the view of the Trial Chamber, Exhibits P113 and P114 contained the writings of Nsabimana and were of "significant probative weight".[5146]

2218. Nsabimana argues that the Trial Chamber's reliance on Exhibits P113 and P114 was unreasonable because: (i) the Trial Chamber decontextualised his statement in Exhibit P113 that there were "isolated cases of disappearances at night" and misrepresented it as referring to the refugees at the prefectoral office when instead it was a generic reference to the situation in Butare Prefecture as a whole;[5147] and (ii) Exhibit P114 only indicates that Nsabimana prepared a list of the refugees at the prefectoral office in case there were "problems" at night and not that abductions in fact occurred, and reflects that the refugees were not attacked or killed, and that their number increased, which reinforces that the prefectoral office was safe.[5148]

2219. The Prosecution responds that Nsabimana fails to demonstrate that the Trial Chamber's assessment of Exhibits P113 and P114 was unreasonable or that it erred in finding that he knew of the night-time attacks against the Tutsis at the prefectoral office.[5149]

2220. The Appeals Chamber observes that when Nsabimana's statement in Exhibit P113 that there were "isolated cases of disappearances at night" is read alongside the rest of his letter, it is not clear that Nsabimana was referring specifically to the refugees at the prefectoral office. Rather, the statement appears in the context of discussing the security situation in Butare Prefecture in general and prior to describing the mobilisation of military police to apprehend looters.[5150] Notably, Exhibit P113 contains a subsequent section focused in particular on the events at the prefectoral office in which Nsabimana states that he protected the refugees and makes no mention of any abductions, disappearances, killings, or rapes.[5151] Consequently, the Appeals Chamber finds that no

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[5144] Nsabimana Notice of Appeal, paras. 67-69, 74; Nsabimana Appeal Brief, paras. 203, 235, 251, 262-268, 441; Nsabimana Reply Brief, paras. 94, 107, 108, 177. *See also* AT. 16 April 2015 pp. 45, 46.
[5145] Trial Judgement, para. 2807, *referring to* Exhibit P113, p. K0016627 (Registry pagination), Exhibit P114, p. K0120070 (Registry pagination).
[5146] Trial Judgement, para. 2802.
[5147] Nsabimana Appeal Brief, paras. 195-200, *referring to* Exhibit P113, p. K0016627 (Registry pagination). Nsabimana also argues that the Trial Chamber failed to consider his statements in Exhibit P113 that: (i) he attempted to move the refugees from the prefectoral office to Nyaruhengeri Commune, and that thereafter some refugees returned to the prefectoral office following threats from the local population, which indicated that there was insecurity everywhere; (ii) he was determined to protect the refugees; and (iii) the refugees considered the prefectoral office safe. *See* Nsabimana Appeal Brief, paras. 190-192, *referring to* Exhibit P113, p. 9. In this regard, Nsabimana emphasises that the prefectoral office was an open place and that the refugees were free to move around as they wished, so the decrease in the number of refugees did not necessarily mean that they were killed. *See ibid.*, paras. 193 (*referring* to Witness SU, T. 22 October 2002 pp. 60-63), 194.
[5148] Nsabimana Notice of Appeal, paras. 64-66; Nsabimana Appeal Brief, paras. 182-189; Nsabimana Reply Brief, paras. 99-102.
[5149] Prosecution Response Brief, paras. 1290, 1291, 1294, 1297-1299, 1302, 1313.
[5150] Exhibit P113, p. K0016627 (Registry pagination).
[5151] Exhibit P113, pp. K0016630, K0016631 (Registry pagination).

reasonable trier of fact could have considered the quoted excerpt of Exhibit P113 as a basis for the finding that Nsabimana knew of the night-time attacks against the refugees at the prefectoral office.[5152]

2221. Turning to Exhibit P114, the Appeals Chamber recalls its finding that the Trial Chamber erred in considering that this purported transcript of an interview with Nsabimana reflected his own views and contained a faithful reflection of what he said during the interview, and that he had acknowledged the document as authentic.[5153] Given that there is no indication that Nsabimana acknowledged or authenticated the statement in Exhibit P114 reflecting that he had made a list of people living at the prefectoral office so that he could check if there had been problems the night before[5154] and that no evidence was led through Nsabimana's testimony to this effect,[5155] the Appeals Chamber considers that the Trial Chamber erred in relying on this aspect of Exhibit P114 as evincing Nsabimana's knowledge of the night-time attacks at the prefectoral office prior to the end of May 1994.

2222. The Appeals Chamber will assess the impact, if any, of the Trial Chamber's erroneous reliance on Exhibits P113 and P114 after having reviewed all of Nsabimana's challenges concerning his knowledge of the night-time attacks at the prefectoral office.

(ii) Nsabimana's Testimony

2223. The Trial Chamber relied on Nsabimana's "own admissions", in addition to the "open and notorious nature of the attacks" at the prefectoral office, to conclude that Nsabimana knew of the attacks before the end of May 1994.[5156] Specifically, the Trial Chamber noted that "Nsabimana testified that he responded to the refugees' requests for assistance by posting soldiers at the [Butare Prefecture Office] around 5 June 1994" but "admitted in his testimony that a woman came to his office seeking assistance around 15 June 1994".[5157] According to the Trial Chamber, this called into question "Nsabimana's credibility as to when he knew about the night-time attacks at the [Butare Prefecture Office] because he could not have responded to their requests before he received them".[5158] In addition, the Trial Chamber assigned importance to Nsabimana's admission "during

[5152] In light of this conclusion, the Appeals Chamber dismisses the rest of Nsabimana's challenges to the Trial Chamber's reliance on Exhibit P113 as moot.
[5153] *See supra*, para. 252.
[5154] Trial Judgement, para. 2807, *referring to* Exhibit P114, p. K0120070 (Registry pagination).
[5155] The Appeals Chamber observes that his testimony concerning a list of refugees at the prefectoral office appears to be limited to one that was made in preparation for their transfer to Nyange. *See* Nsabimana, T. 9 October 2006 p. 84, T. 10 October 2006 p. 4.
[5156] Trial Judgement, para. 2807.
[5157] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 10 October 2006 pp. 13, 15, 16.
[5158] Trial Judgement, para. 2807.

his testimony that he was not at peace with himself when he went home from the [Butare Prefecture Office] during this period because he feared that he may not find the refugees when he returned in the morning".[5159]

2224. Nsabimana contends that the Trial Chamber unreasonably misinterpreted his evidence as reflecting that he posted soldiers at the prefectoral office around 5 June 1994 in response to the refugees' requests for assistance.[5160] He points out that, to the contrary, he testified that he placed the soldiers there on his own initiative after he became concerned about reprisals following the killing of the bishops at Kabgayi, observed an "ill soldier" wandering among the refugees at the prefectoral office, and met with Colonels Munyengango and Mugemanyi, who suggested he obtain security and provided him with several convalescing soldiers from the *Groupe scolaire*.[5161] Consequently, Nsabimana asserts that there is no contradiction in his testimony and that the Trial Chamber erred in discrediting his testimony on this basis.[5162] In addition, Nsabimana stresses that he testified that he had already posted soldiers at the prefectoral office by the time the woman he referred to spoke to him, that she did not ask for assistance, and that he was independently aware of the soldier she warned him about when she spoke to him.[5163] He emphasises that his testimony reflects that, between April and June 1994, nobody at the prefectoral office, including the refugees, told him about the night-time attacks.[5164]

2225. Nsabimana further contends that the Trial Chamber misstated his testimony that he was not at peace with himself when he went home from the prefectoral office during this period because he feared he may not find the refugees when he returned in the morning.[5165] He argues that his original French testimony was inaccurately translated into English and that the verb tense of the original version indicates that he knew of the attacks only after their completion, rather than at the time of their perpetration.[5166] Nsabimana adds that the allusions in his testimony to acts of violence and

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[5159] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 9 October 2006 pp. 80, 81. The Appeals Chamber notes that in the testimony referred to by the Trial Chamber, Nsabimana does not refer to the "refugees" but to "them". However, the Appeals Chamber understands that the Trial Chamber substituted "them" with the term "refugees" as that was its interpretation of his statement and to provide clarity.
[5160] Nsabimana Notice of Appeal, para. 59; Nsabimana Appeal Brief, para. 130.
[5161] Nsabimana Notice of Appeal, para. 59; Nsabimana Appeal Brief, paras. 130-135, 156, 157 (emphasis omitted).
[5162] Nsabimana Appeal Brief, paras. 130, 131.
[5163] Nsabimana Appeal Brief, paras. 136, 137, 139-143; Nsabimana Reply Brief, paras. 74-76. Nsabimana also notes that the woman was not a witness and there was no evidence that she was a refugee at the prefectoral office, or that she made a specific request for assistance from Nsabimana as opposed to simply mentioning the general insecurity at the Butare Prefecture Office. *See* Nsabimana Appeal Brief, paras. 138, 139.
[5164] Nsabimana Appeal Brief, para. 144; Nsabimana Reply Brief, paras. 95, 96, 98.
[5165] Nsabimana Notice of Appeal, paras. 54-56; Nsabimana Appeal Brief, paras. 146, 147; Nsabimana Reply Brief, paras. 69, 70. *See also* AT. 16 April 2015 pp. 44, 45.
[5166] Nsabimana Notice of Appeal, paras. 57, 58; Nsabimana Appeal Brief, paras. 148-154; Nsabimana Reply Brief, paras. 69-73. *See also* AT. 16 April 2015 pp. 44, 45.

massacres relied on by the Trial Chamber were to those that had occurred throughout the prefecture and not just at the prefectoral office.[5167]

2226. The Prosecution responds that, contrary to Nsabimana's understanding, the Trial Chamber did not conclude that Nsabimana placed soldiers at the prefectoral office based on his testimony that a woman spoke with him on 15 June 1994 because it found that this incident was not the catalyst for him doing so.[5168] It argues that Nsabimana's assertion that the Trial Chamber should have accepted his evidence that no refugees informed him of the attacks fails to identify any error in the Trial Chamber's assessment of the evidence.[5169] The Prosecution further responds that the Trial Chamber reasonably concluded from his acknowledgement that he was not at peace with himself that he was aware that the refugees were being attacked during the night.[5170] It also asserts that Nsabimana's contention that his references to violence were to the entire prefecture rather than the prefectoral office specifically is speculative.[5171]

2227. The Appeals Chamber observes that, in assessing Nsabimana's testimony as to the events at the prefectoral office, the Trial Chamber stated that Nsabimana testified that he posted soldiers there around 5 June 1994 in response to refugees' requests for assistance.[5172] However, the excerpts of Nsabimana's testimony referred to by the Trial Chamber do not support this conclusion. Rather, Nsabimana testified that he placed the soldiers at the prefectoral office after becoming concerned about reprisals following the killing of the bishops at Kabgayi, seeing an "ill soldier" among the refugees at the prefectoral office, and meeting with Colonels Mugemanyi and Munyengango.[5173] Nsabimana also testified that, around 15 June 1994, a woman mentioned to him that there was a soldier amongst the refugees, but that by this point he had already posted the soldiers, and that he was already aware of the presence of the soldier.[5174] Consequently, the Appeals Chamber finds that no reasonable trier of fact could have found that the evidence called "into question Nsabimana's credibility as to when he knew about the night-time attacks at the [Butare Prefecture Office] because he could not have responded to [the refugees'] requests before he received them"[5175] as his

[5167] Nsabimana Notice of Appeal, paras. 54-58; Nsabimana Appeal Brief, paras. 146-157, *referring to* Trial Judgement, paras. 2807, 2399, Nsabimana, T. 9 October 2006 pp. 80, 81 (French), T. 9 October 2006 pp. 80-82.
[5168] Prosecution Response Brief, paras. 1292-1294, 1296, 1299. *See also* AT. 16 April 2015 p. 57.
[5169] Prosecution Response Brief, para. 1295.
[5170] Prosecution Response Brief, paras. 1300, 1301.
[5171] Prosecution Response Brief, para. 1301.
[5172] Trial Judgement, para. 2807, *referring to* Nsabimana, T. 10 October 2006 p. 13.
[5173] Nsabimana, T. 10 October 2006 p. 13.
[5174] Nsabimana, T. 10 October 2006 pp. 15, 16.
[5175] Trial Judgement, para. 2807.

evidence reflects that he did not post soldiers on the basis of requests from the refugees but for other reasons.[5176]

2228. However, the Appeals Chamber does not find that this error has occasioned a miscarriage of justice in light of the remaining evidence relied upon by the Trial Chamber in finding that Nsabimana knew of the attacks. In the view of the Appeals Chamber, the insignificance of this error is clear in light of the fact that the Trial Chamber evaluated Nsabimana's testimony that nobody, including the refugees, informed him of the attacks at the prefectoral office, but rejected it in light of Prosecution evidence to the contrary, which is discussed below.[5177]

2229. The Appeals Chamber also finds that Nsabimana fails to demonstrate any error in the Trial Chamber's reliance on his acknowledgement that "he was not at peace with himself when he went home from the [prefectoral office] during this period because he feared that he may not find the refugees when he returned in the morning."[5178] Nsabimana principally alleges that the Trial Chamber erred because it relied upon an erroneous translation into English of his testimony. However, he does not demonstrate that the English and French versions present materially different information as to when he became aware of the attacks at the prefectoral office.[5179] Nsabimana fails to appreciate that the significance of this comment arises from his statement that he worried about what he would find when he *returned* in the morning, reflecting contemporaneous knowledge of, and concerns about, the attacks at the prefectoral office.

2230. The Appeals Chamber is similarly not persuaded by Nsabimana's assertion that the Trial Chamber unreasonably read his comment as referring to the refugees at the prefectoral office when

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[5176] The Appeals Chamber notes that the Trial Chamber stated in the "Factual Findings" section of the Trial Judgement entitled "Posting of *Gendarmes* or Soldiers" that Nsabimana admitted in Exhibit P113 that he provided gendarmes to protect the refugees, and that Witness Fergal Keane stated that Nsabimana said to him on approximately 15 June 1994 that he had posted soldiers at the prefectoral office to protect the refugees. *See* Trial Judgement, para. 2808, *referring to* Exhibit P113, p. K0016631, Fergal Keane, T. 25 September 2006 p. 47, T. 28 September 2006 p. 21. The Appeals Chamber notes that Nsabimana does not explain his motivation for originally placing the soldiers at the prefectoral office beyond protecting the refugees.

[5177] *See* Trial Judgement, para. 2803, *referring to* Nsabimana, T. 10 October 2006 pp. 16, 24.

[5178] Trial Judgement, para. 2807.

[5179] Specifically, Nsabimana argues that his testimony was mistranslated from French into English and that the sentence "you are aware that massacres *took place*" in the English transcript results from an incorrect translation of his testimony, which the Trial Chamber misinterpreted as reflecting that "Nsabimana testified that after he found out that massacres were still carried out during the day and night", whereas he stated in French that "*même une personne qui vous amène une information comme ça, et vous savez que les massacres ont eu lieu*", which should have been translated into English as: "you know massacres have taken place". He alleges that the correct transcription of his original French testimony indicates that he knew about the attacks only after they were carried out as opposed to when they were ongoing. Nsabimana also points out that this comment formed a small part of his testimony and argues that the Trial Chamber "could not conclude, solely on the basis of [his] testimony, that [he] was aware of the attacks and that he posted soldiers because he knew about the night-time attacks at the [prefectoral] office." *See* Nsabimana Notice of Appeal, paras. 54-58 (emphasis in original); Nsabimana Appeal Brief, paras. 147-153 (emphasis in original); Nsabimana Reply Brief, paras. 69-73. However, this contention is meritless as the Trial Chamber relied not only on Nsabimana's testimony but also on other evidence demonstrating his knowledge of the attacks.

he was in fact speaking about Butare Prefecture as a whole. The relevant transcripts show that he made the statement in response to a question specifically asking about refugees at the prefectoral office.[5180]

2231. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in its interpretation of Nsabimana's testimony as to why he placed the soldiers at the prefectoral office and that, as a result, it erred in concluding that his credibility was "call[ed] into question [...] as to when he knew about the night-time attacks" at the Butare Prefecture Office. However, in light of the Trial Chamber's reliance on other aspects of Nsabimana's testimony to find that he was actually aware of night-time attacks at the prefectoral office earlier than at the end of May 1994, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice.

(iii) Prosecution Evidence and Open and Notorious Nature of the Attacks

2232. In finding that Nsabimana knew of the night-time attacks at the Butare Prefecture Office from "even earlier" than "the end of May 1994",[5181] the Trial Chamber relied upon: (i) Witness TK's "credible" evidence that a man named Alphonse ran to Nsabimana's office to ask for help while Nsabimana was in his office around the end of May or beginning of June 1994;[5182] and (ii) Witness RE's "credible" testimony that a young man and woman went to Nsabimana's office looking for help in early June 1994.[5183] The Trial Chamber also noted Witnesses SS's and SU's testimonies that "in a separate incident after attacks occurred at the [Butare Prefecture Office], three women went to see Nsabimana on behalf of the other refugees" and that, although neither witness was present at the meeting, "they were told that Nsabimana denied knowledge of the attacks and said he would post *gendarmes* to protect them".[5184] In subsequently assessing evidence relating to Nsabimana posting gendarmes or soldiers at the prefectoral office, the Trial Chamber also noted Witness QBP's evidence that a woman who was attacked by *Interahamwe* and wounded on her ear complained to Nsabimana but that he did nothing for her.[5185] The Trial Chamber further determined that Nsabimana's knowledge of attacks at the prefectoral office was based, in part, on "the open and notorious nature of the attacks".[5186]

[5180] Nsabimana, T. 9 October 2006 pp. 77, 78, 80, 81.
[5181] Trial Judgement, para. 2807.
[5182] Trial Judgement, para. 2804.
[5183] Trial Judgement, para. 2805.
[5184] Trial Judgement, para. 2806. *See also ibid.*, para. 2810.
[5185] Trial Judgement, para. 2810.
[5186] Trial Judgement, para. 2807.

2233. Nsabimana contends that the Trial Chamber erred in relying upon the testimonies of Witnesses TK, RE, SS, SU, and QBP in finding that he had knowledge of the night-time attacks.[5187] He points out that their evidence constitutes hearsay, which, in his view, should have cast doubt on its reliability.[5188] In addition, he highlights that Witnesses SD and QBQ testified that they did not inform Nsabimana about the abuses at the prefectoral office, and that Witnesses SS and SU only stated that a delegation of women went to see him and that their evidence could not demonstrate that this delegation in fact saw him.[5189]

2234. Nsabimana further contends that no reasonable trier of fact could have concluded that the attacks were so notorious that they could not have escaped his knowledge.[5190] He argues that the evidence reflects that the prefectoral office was a safe place for the refugees, particularly because they opted to return there each time.[5191] Nsabimana points out that there was no evidence of mass graves or blood stains at the prefectoral office, and he emphasises that the refugees cooked food and that the staff went about their duties.[5192]

2235. The Prosecution responds that Nsabimana fails to demonstrate any error in the Trial Chamber's assessment and reliance on the evidence of Witnesses TK, RE, SS, QBP, and SU to find that Nsabimana knew of the atrocities being committed at the prefectoral office.[5193]

2236. The Appeals Chamber notes that Witness TK provided direct evidence concerning the abduction of a man named Alphonse. Specifically, the Trial Chamber recalled that the witness saw Alphonse run into Nsabimana's office before being forced out as he shouted for help, observed him being approached by a man with a club outside of Nsabimana's office, and saw him being taken away by *Interahamwe*.[5194] The Appeals Chamber further observes that the Trial Chamber's summaries of the evidence of Witnesses RE, SS, SU, and QBP indicate that they were informed of

[5187] Nsabimana Notice of Appeal, paras. 67-69, 74; Nsabimana Appeal Brief, paras. 203-207, 237-243. *See also* Nsabimana Reply Brief, paras. 103, 105-108. *See also* AT. 16 April 2015 p. 63.
[5188] Nsabimana Notice of Appeal, para. 69; Nsabimana Appeal Brief, paras. 238, 239, 243-250, *referring to* Witness SS, T. 10 March 2003 p. 15 (closed session), Witness SU, T. 14 October 2002 p. 83. *See also* Nsabimana Reply Brief, para. 107.
[5189] Nsabimana Appeal Brief, paras. 239-241, *referring to* Witness SD, T. 18 March 2003 p. 20, Witness QBQ, T. 4 February 2004 p. 14, Witness SS, T. 10 March 2003 p. 15 (closed session), Witness SU, T. 14 October 2002 p. 83.
[5190] Nsabimana Appeal Brief, paras. 262-266; Nsabimana Reply Brief, para. 94.
[5191] Nsabimana Appeal Brief, paras. 263, 264, *referring to* Witness SJ, T. 29 May 2002 p. 46, Witness SU, T. 17 October 2002 p. 60, Witness QBP, T. 28 October 2002 pp. 58, 59, Witness RE, T. 24 February 2003 p. 21, Witness SD, T. 17 March 2003 p. 40, Witness QY, T. 19 March 2003 p. 61, Witness FAP, T. 11 March 2003 p. 56. *See also* AT. 16 April 2015 pp. 45, 46.
[5192] Nsabimana Appeal Brief, paras. 264, 265; Nsabimana Reply Brief, para. 94.
[5193] Prosecution Response Brief, paras. 1314-1316, 1322. *See also* AT. 16 April 2015 p. 58.
[5194] Trial Judgement, para. 2804.

the fact that refugees approached Nsabimana for help and were only indirectly aware of the nature and content of these discussions with Nsabimana.[5195]

2237. The Trial Judgement reveals that the Trial Chamber was aware of the indirect nature of the evidence as it concerned Nsabimana's oral communications with these refugees. The Appeals Chamber is not persuaded that simply because aspects of the accounts of Witnesses RE, SS, SU, and QBP were hearsay, a reasonable trier of fact could not have found that this evidence supported the conclusion that Nsabimana was presented with multiple requests for assistance from Tutsi refugees starting, at least, from the end of May 1994. Moreover, in determining that "Nsabimana was actually aware of the attacks even earlier", the Trial Chamber relied upon "the open and notorious nature of the attacks".[5196] Considering that the Trial Chamber has the discretion to consider cautiously and rely on hearsay evidence,[5197] Nsabimana's general contention that the hearsay nature of Witnesses RE's, SS's, SU's, and QBP's testimonies should have cast doubt on them fails to demonstrate any error on the part of the Trial Chamber.

2238. Nsabimana also fails to demonstrate that no reasonable trier of fact could have concluded that he knew of the attacks in light of Witnesses SD's and QBQ's testimonies, which in his view contradict other evidence that the attacks were reported to him. Given the "large number of refugees" at the prefectoral office between May and June 1994[5198] and the general nature of the evidence of Witnesses SD and QBQ that violence was not reported to Nsabimana,[5199] Nsabimana does not demonstrate that their testimonies undermine the Trial Chamber's reliance on the testimonies of Witnesses TK, RE, SS, QBP, and SU.

2239. The Appeals Chamber further rejects Nsabimana's contention that the Trial Chamber unreasonably relied on "the open and notorious nature of the attacks" at the prefectoral office to determine his knowledge of the attacks because the evidence reflects that the prefectoral office was considered safe by the refugees who remained there and because normal activities took place there. Nsabimana's unsubstantiated and undeveloped contention merely disagrees with the Trial Chamber's findings, which reflect that, although the Tutsis hoped to find refuge at the prefectoral office "they instead found themselves subject to abductions, rapes and murder", the evidence of

[5195] Trial Judgement, paras. 2805, 2806, 2810.
[5196] Trial Judgement, para. 2807.
[5197] *Nizeyimana* Appeal Judgement, para. 95; *Munyakazi* Appeal Judgement, para. 77; *Kalimanzira* Appeal Judgement, para. 96; *Karera* Appeal Judgement, para. 39.
[5198] Trial Judgement, para. 2627.
[5199] Witness QBQ, T. 4 February 2004 p. 14 ("Q. The alleged abductions you referred to yesterday, did you report them to [the] *préfet* or anyone from the *préfectural* offices on the morrow of each time it occurred? A. The events were happening in front of his offices, his *préfecture*. We had nothing to report to him, he knew what was going on."); Witness SD, T. 18 March 2003 p. 18 ("Q. Madam Witness, when work started in the morning, one way or another, were

which "paint[ed] a clear picture of unfathomable depravity and sadism".[5200] While the Trial Chamber's conclusions reflect that Tutsi refugees were systematically abducted from the prefectoral office and killed,[5201] the Trial Chamber also credited evidence that Tutsis were physically assaulted, raped, and killed in and around the prefectoral office's premises,[5202] and that Tutsi refugees were killed and thrown into pits during attacks there.[5203] Nsabimana's unreferenced contentions as to the absence of blood stains or mass graves at the prefectoral office simply ignore the evidence the Trial Chamber accepted without demonstrating that its conclusions about the open and notorious nature of the attacks were unreasonable.[5204] Indeed, while Nsabimana emphasises that Witness QBQ testified that refugees did not inform him of the violence, the Appeals Chamber observes that the witness testified that there was nothing to report to Nsabimana because "he knew what was going on".[5205]

2240. Accordingly, the Appeals Chamber finds that Nsabimana has failed to demonstrate any error in the Trial Chamber's reliance on the evidence of Witnesses TK, RE, SS, QBP, and SU and "the open and notorious nature of the attacks" to infer Nsabimana's knowledge of the night-time attacks at the Butare Prefecture Office "even earlier" than "the end of May 1994".

(iv) Conclusion

2241. In light of the evidence of Witnesses TK, RE, SS, SU, and QBP and "the open and notorious nature of the attacks" at the prefectoral office relied upon by the Trial Chamber in determining Nsabimana's knowledge of the attacks at the prefectoral office prior to the end of May 1994, the Appeals Chamber finds that the Trial Chamber's errors in the assessment of, and reliance on, Exhibits P113 and P114 as well as parts of Nsabimana's testimony have not occasioned a miscarriage of justice. The Appeals Chamber concludes that Nsabimana has failed to demonstrate that no reasonable trier of fact could have concluded that he had knowledge of the attacks at the prefectoral office prior to the end of May 1994.

(b) Knowledge of Genocidal Intent of the Perpetrators

2242. In the "Legal Findings" section of the Trial Judgement, the Trial Chamber concluded that Nsabimana was aware of the genocidal intent of the perpetrators who killed the Tutsis abducted

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events of the night reported to the *préfet*? A. Since nobody was in charge of us he could not have been informed. Who would have informed him?").

[5200] Trial Judgement, para. 5866.

[5201] *See generally supra*, Sections IV.F.2(d)-(f), V.I.2(c)-(f).

[5202] *See, e.g.*, Trial Judgement, paras. 2184, 2632, 2644, 2653, 2740, 2766, 2769-2771, 2773.

[5203] Trial Judgement, paras. 2740-2742.

[5204] *See also supra*, Section V.I.2(a)(vi).

[5205] Witness QBQ, T. 4 February 2004 p. 14.

from the Butare Prefecture Office during attacks carried out by Ntahobali, Nyiramasuhuko, and *Interahamwe*.[5206] In this regard, the Trial Chamber considered Nsabimana's: (i) knowledge that those taking refuge at the prefectoral office "were Tutsis and on multiple occasions, they asked him directly for protection from the ongoing attacks"; (ii) knowledge that Tutsi refugees "were being abducted, raped and killed"; and (iii) admission that "he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose."[5207]

2243. Nsabimana submits that the Trial Chamber erred in finding that he was aware of the perpetrators' genocidal intent in relation to the attacks at the prefectoral office.[5208] In particular, he argues that no reasonable trier of fact could have found that Exhibits P113 and P114 reflect that he was aware of a plan to kill Tutsis, that Tutsis were being killed, that the militia had been trained for this purpose, and therefore that he was aware of the perpetrators' genocidal intent.[5209]

2244. With respect to Exhibit P113 specifically, Nsabimana submits that none of his statements in this exhibit demonstrates his knowledge of a plan to kill Tutsis during the period from April to June 1994 because the document was drafted in "hindsight" and, therefore, did not reflect his mental state at the time.[5210] He further argues that the Trial Chamber incorrectly relied on the statement in the document that "the final whistle was blown by the architects of the plan" to demonstrate that Nsabimana was speaking about the plan to kill Tutsis when this interpretation is neither clear nor reasonable.[5211] Additionally, Nsabimana contends that the extract from Exhibit P113 that "among those victimized for being Tutsis and well respected persons were the businessmen Semanzi, Rangira, Kayiranga and Deogratias" does not support a finding beyond reasonable doubt that he was aware of events he described "at the time they were happening".[5212]

[5206] Trial Judgement, para. 5904.
[5207] Trial Judgement, para. 5904, *referring, inter alia, to* Exhibit P113, pp. K0016623, K0016626 (Registry pagination), Exhibit P114, pp. K0120067, K0120073 (Registry pagination).
[5208] Nsabimana Notice of Appeal, paras. 105-107; Nsabimana Appeal Brief, paras. 428-430; Nsabimana Reply Brief, paras. 153-178. In his reply brief, Nsabimana submits that, had he been aware of the perpetrators' genocidal intent or of a plan to kill Tutsis, he would never have let the refugees stay at the prefectoral office, allowed the refugees to return to the prefectoral office from the EER and Nyange, posted soldiers at the prefectoral office, or directly engaged in evacuating Tutsis orphans given the risks that these actions would have entailed. *See* Nsabimana Reply Brief, paras. 169-172. The Appeals Chamber finds that these arguments are speculative and demonstrate no error on the part of the Trial Chamber.
[5209] Nsabimana Appeal Brief, paras. 401, 429, 445, 446, 450-482; Nsabimana Reply Brief, paras. 153-155, 176, 177. *See also* AT. 16 April 2015 p. 64. Nsabimana further contends that the Trial Chamber unreasonably relied on his participation in his swearing-in ceremony as prefect of Butare to find that he was aware of a plan to kill Tutsis and, as a consequence, of the genocidal intent of the perpetrators of the attacks at the Butare Prefecture Office. *See* Nsabimana Appeal Brief, paras. 401-427; Nsabimana Reply Brief, paras. 156-168, 173-175. As the Trial Judgement shows that the Trial Chamber relied on Exhibits P113 and P114 to find that Nsabimana admitted that he was aware of a plan to kill Tutsis, and not on his participation in his swearing-in ceremony, the Appeals Chamber summarily dismisses his argument.
[5210] Nsabimana Appeal Brief, paras. 448, 453-455; Nsabimana Reply Brief, para. 158.
[5211] Nsabimana Appeal Brief, paras. 456-459, *referring to* Exhibit P113, p. K0016623 (Registry pagination).
[5212] Nsabimana Appeal Brief, paras. 460, 461, *referring to* Exhibit P113, p. K0016626 (Registry pagination).

2245. As regards Exhibit P114, Nsabimana contends that the Trial Chamber's reliance on excerpts of this document was erroneous given its questionable authenticity.[5213] Alternatively, he argues that the document, created after the genocide, reflects hindsight rather than contemporaneous views, and that none of the statements reflects an admission of his awareness of a plan to exterminate Tutsis.[5214]

2246. The Prosecution responds that the Trial Chamber's findings were reasonable and that Nsabimana simply invites the Appeals Chamber to substitute his views for that of the Trial Chamber without demonstrating any errors.[5215] It argues that the Trial Chamber correctly determined that Nsabimana was aware of a plan to kill Tutsis and of the perpetrators' genocidal intent during the attacks at the prefectoral office.[5216]

2247. The Appeals Chamber is not convinced by Nsabimana's submissions that the Trial Chamber erred in its interpretation of Exhibit P113. The Trial Chamber cited the following excerpt from Exhibit P113 in support of its finding that "Nsabimana admitted that he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose":

> In everybody's opinion the final whistle was blown by the architects of the plan... [A]mong those victimized for being Tutsi and well respected persons were the businessmen Semanzi, Rangira, Kayiranga, and Deogratias.[5217]

The Appeals Chamber observes that the Trial Chamber extracted the first part of the excerpt from a section entitled "Butare was not spared", where Nsabimana discussed the assassinations of moderate politicians in Butare Prefecture, concluding that "[i]t was necessary to find a political reason to start the massacre hence the death of President [H]abyalimana."[5218] The second part of the excerpt was taken from a section entitled "What happened in reality" and from a paragraph stating that "[s]ince the MRND party was not entrenched in Butare, its leaders wanted to weaken other parties by way of intimidation and advocating regionalism, in order to perpetuate the massacres."[5219] The Appeals Chamber observes that this paragraph and the remainder of the section describe the killings of Tutsis, moderate Hutus, and those who supported the RPF.[5220] On this basis, the Appeals Chamber considers that a reasonable trier of fact could have relied on Exhibit P113 to find that Nsabimana "admitted" to being aware of a plan to kill Tutsis. Beyond providing different interpretations of Exhibit P113, including the unsubstantiated position that these remarks were

[5213] Nsabimana Appeal Brief, paras. 462, 468.
[5214] Nsabimana Appeal Brief, paras. 466-467, 469-476.
[5215] Prosecution Response Brief, paras. 1382-1400.
[5216] Prosecution Response Brief, paras. 1396, 1398, 1399.
[5217] Trial Judgement, para. 5904, fn. 14768, *referring to* Exhibit P113, pp. K0016623, K0016626 (Registry pagination).
[5218] Exhibit P113, pp. K0016623, K0016624 (Registry pagination).
[5219] Exhibit P113, p. K0016626 (Registry pagination).

made in hindsight and do not reflect what he knew during the genocide, Nsabimana fails to demonstrate how the Trial Chamber erred in its analysis of Exhibit P113.

2248. With respect to Exhibit P114, the Appeals Chamber reiterates its finding that the Trial Chamber erred in relying on this exhibit as proof of Nsabimana's own views.[5221] The Appeals Chamber recalls that, when confronted with Exhibit P114 and the suggestion that it reflected his awareness of a plan to exterminate Tutsis, Nsabimana denied that he was aware of such a plan.[5222] In this context, the Appeals Chamber finds that no reasonable trier of fact could have relied on Exhibit P114 to conclude that "Nsabimana admitted that he was aware of a plan to kill Tutsis, that Tutsis were being killed, and that the militia had been trained for this purpose."[5223]

2249. However, the Appeals Chamber concludes that this error has not occasioned a miscarriage of justice as Nsabimana does not demonstrate any error in the Trial Chamber's reliance on Exhibit P113 as supporting the conclusion that he was aware of the principal perpetrators' genocidal intent. Likewise, as discussed above, Nsabimana has failed to demonstrate any error in the Trial Chamber's conclusion that he was actually aware of night-time attacks which were specifically targeted against Tutsis at the prefectoral office earlier than the end of May 1994 and which involved, *inter alia*, the abduction, rape, and killings of Tutsis.[5224]

2250. In light of these conclusions, the Appeals Chamber finds that Nsabimana has failed to demonstrate that no reasonable trier of fact could have found that he was aware of the perpetrators' genocidal intent.

(c) Knowledge that His Failure to Act Assisted in the Commission of the Crimes

2251. In finding that Nsabimana knew that his failure to act assisted in the commission of the crimes, the Trial Chamber noted that "Nsabimana knew the attacks were occurring at night when he was not at the [prefectoral office] and when there were likely to be fewer witnesses."[5225] It further noted that he testified that after learning of the massacres, he would go home at night fearing that the refugees would not be at the prefectoral office when he returned in the morning.[5226] The Trial

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[5220] Exhibit P113, pp. K0016626-K0016629 (Registry pagination).
[5221] *See supra*, para. 252.
[5222] *See* Nsabimana, T. 22 November 2006 p. 45 ("Q. [...] these words do you agree with the contents of the document, so, therefore, you agree that you were aware of a plan to exterminate the Tutsis, as stated in this document? A. My answer to you is no, Counsel. As the things are here and as you put them, it is not the same thing. We can agree on certain terms and certain words and certain things, but not as you put it, which is why I'm refusing. That is why I'm telling you I was not aware of that plan. If I had been aware of it, I wouldn't have all that defend of the following."). *See supra*, para. 251.
[5223] Trial Judgement, para. 5904, *referring to* Exhibit P114, pp. K0120067, K0120073 (Registry pagination).
[5224] *See supra*, Section VI.D.2(a).
[5225] Trial Judgement, para. 5905.
[5226] Trial Judgement, para. 5905.

Chamber stated that "the perpetrators of these attacks were given free reign to repeatedly attack the [Butare Prefecture Office] for a significant period between the end of April and mid-June 1994."[5227]

2252. Nsabimana submits that the Trial Chamber erred in finding that he knew that his failure to act would assist and have a substantial impact on the perpetrators of the atrocities at the prefectoral office.[5228] To demonstrate this error, Nsabimana argues that he was not aware that the crimes were being committed at the prefectoral office.[5229] In addition, Nsabimana argues that the Trial Chamber failed to establish that he had specific genocidal intent.[5230]

2253. The Prosecution responds that the Trial Chamber correctly found that Nsabimana knew that his failure to act assisted in the commission of the crimes against the refugees at the prefectoral office.[5231]

2254. The Appeals Chamber recalls that Nsabimana's challenges to the Trial Chamber's findings related to his knowledge of the crimes committed at the prefectoral office have been addressed and dismissed in a prior section of this Judgement.[5232]

2255. As regards Nsabimana's challenge to the Trial Chamber's findings pertaining to the mental element of the crime of genocide, Nsabimana fails to appreciate that the *mens rea* requirements differ depending on the mode of liability. The Appeals Chamber recalls that "the required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal."[5233]

2256. In the present case, the Trial Chamber found that Nsabimana was responsible for aiding and abetting genocide by failing to discharge his duty to protect civilians at the prefectoral office prior to around 5 to 15 June 1994.[5234] In making this finding, the Trial Chamber concluded that Nsabimana knew that the Tutsi refugees at the prefectoral office were being abducted, raped, and killed and that he was aware of the perpetrators' genocidal intent.[5235] It similarly concluded that Nsabimana knew that his failure to act assisted in the commission of the crimes at the prefectoral

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[5227] Trial Judgement, para. 5905.
[5228] Nsabimana Notice of Appeal, paras. 108, 109; Nsabimana Appeal Brief, paras. 483, 485.
[5229] Nsabimana Notice of Appeal, para. 110; Nsabimana Appeal Brief, paras. 488, 492.
[5230] Nsabimana Appeal Brief, paras. 484, 486, 487, 495-501.
[5231] Prosecution Response Brief, paras. 1401, 1410, 1411. The Appeals Chamber notes that Nsabimana's submissions in reply either pertain to the arguments raised under Ground 12 of his appeal or are ambiguous and vague. *See* Nsabimana Reply Brief, paras. 179-187.
[5232] *See supra*, Section VI.D.2(a).
[5233] *See Mrkšić and Šljivančanin* Appeal Judgement, para. 159. *See also Orić* Appeal Judgement, para. 43; *Ntagerura et al.* Appeal Judgement, para. 370.
[5234] *See* Trial Judgement, para. 5906.
[5235] *See* Trial Judgement, para. 5904.

office.[5236] Nsabimana's responsibility for aiding and abetting genocide did not require proof that he possessed genocidal intent. Consequently, his contention in this regard is dismissed.

(d) Conclusion

2257. The Appeals Chamber finds that Nsabimana has failed to demonstrate that the Trial Chamber erred in finding that he possessed the requisite *mens rea* for the mode of liability of aiding and abetting by omission.

3. Conclusion

2258. In light of the foregoing, the Appeals Chamber dismisses the relevant parts of Grounds 6 and 13 as well as Grounds 7 through 10, 12, and 14 of Nsabimana's appeal in their entirety.

[5236] *See* Trial Judgement, para. 5905.

VII. APPEAL OF ALPHONSE NTEZIRYAYO

2259. The Trial Chamber found Nteziryayo guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute based on his speeches at Ndayambaje's swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994 ("Ndayambaje's Swearing-In Ceremony") and at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994.[5237]

2260. Nteziryayo raises challenges related to his indictment and submits that the Trial Chamber erred in its assessment of the evidence and his responsibility for the speeches he made during Ndayambaje's Swearing-In Ceremony and at the meetings held in Muyaga and Kibayi Communes. He also contends that the Trial Chamber conducted a prejudicial assessment of the evidence, invalidating his convictions. The Appeals Chamber will address these contentions in turn.

[5237] Trial Judgement, paras. 6022-6029, 6036, 6186.

A. Indictment (Grounds 1, 2, and 3)

2261. Nteziryayo submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof.[5238] He further contends that the cumulative effect of the defects in the Indictment "not only rendered the totality of the trial process unfair and caused [him] substantial prejudice, but also invalidate the substantive findings of the Trial Judgment."[5239]

2262. The Appeals Chamber will examine Nteziryayo's submissions related to notice of the allegation concerning Ndayambaje's Swearing-In Ceremony before turning to his submissions related to notice of the allegations concerning the meetings held in Muyaga and Kibayi Communes.

1. Ndayambaje's Swearing-In Ceremony (Ground 1)

2263. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the new *bourgmestre* of Muganza Commune held in the woods near the Muganza commune office on 22 June 1994, Nteziryayo and Ndayambaje told the population to continue with their "work", urged them to "sweep the dirt outside", and instructed that those hiding Tutsis who refused to hand them over should be killed.[5240] The Trial Chamber convicted Nteziryayo pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide (Count 4) on the basis of his statements made during this ceremony.[5241]

2264. In summarising the Prosecution case against Nteziryayo with respect to this allegation of incitement, the Trial Chamber specifically referred to paragraphs 5.8, 6.31, and 6.34 of the Indictment.[5242] The Indictment indicates that the allegations in paragraphs 5.8 and 6.31 were being pursued against Nteziryayo under all counts, including Count 4, pursuant to Article 6(1) of the

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[5238] Nteziryayo Notice of Appeal, paras. 7-36; Nteziryayo Appeal Brief, paras. 8-95. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Nsabimana and Nteziryayo Indictment.
[5239] Nteziryayo Notice of Appeal, para. 7; AT. 17 April 2015 p. 6.
[5240] *See* Trial Judgement, paras. 4616, 4642, 4645, 5948, 6026, 6027.
[5241] Trial Judgement, paras. 6029, 6036, 6186.
[5242] Trial Judgement, paras. 4260, 4266-4270, fns. 11640, 11641. Paragraphs 5.8, 6.31, and 6.34 of the Nsabimana and Nteziryayo Indictment read as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Ny[i]ramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Ladislas Ntaganzwa and Elie Ndayambaje publicly incited the people to exterminate the Tutsi population and its "accomplices".
>
> 6.31 Between April and June 1994, Colonel Alphonse Nteziryayo, the official in charge of civil defence for Butare *préfecture*, incited the population to slaughter the Tutsi in Butare *préfecture*.
>
> 6.34 On 17 June 1994, Alphonse Nteziryayo was appointed *Préfet* of Butare by the Interim Government, replacing Sylvain Nsabimana. After the handing over of office on 21 June 1994, *Préfet* Alphonse Nteziryayo continued to incite the population to "finish off" the enemy and its "accomplices". He did this notably during the swearing-in ceremony of the *Bourgmestre* of Muganza, Elie Ndayambaje.

Statute.[5243] However, paragraph 6.34 was not being pursued under Count 4 or any other count in the Indictment.[5244]

2265. The Trial Chamber noted that paragraph 6.34 of the Indictment, which was the only paragraph referring to the allegation that Nteziryayo incited the population to "finish off" the enemy and its "accomplices" during Ndayambaje's Swearing-In Ceremony, was not specifically pleaded in support of any counts against Nteziryayo.[5245] It stated that it "recognise[d] that the Prosecution's failure to expressly state that a paragraph in the Indictment supports a particular count is indicative that the allegation is not charged as a crime, but consider[ed that] this [did] not definitively dispose of the current allegation in the present circumstances."[5246] The Trial Chamber found that Nteziryayo's alleged inciting speech at Ndayambaje's Swearing-In Ceremony was not a separate charge which was not pleaded, but rather a material fact that supported the charge of incitement pleaded in paragraphs 5.8 and 6.31 of the Indictment.[5247] It determined that paragraphs 5.8 and 6.31, which were pleaded in support of all counts against Nteziryayo, encompassed the allegation that he incited the population at the ceremony.[5248] Because it considered that paragraphs 5.8 and 6.31 failed to provide any details of specific incidents of incitement, the Trial Chamber found that they were defective.[5249] The Trial Chamber, however, found that the defects were cured through subsequent disclosures and that Nteziryayo was provided with clear and consistent notice that the allegation that he incited the population to kill Tutsis at Ndayambaje's Swearing-In Ceremony in June 1994 was part of the Prosecution case and that he did not suffer any prejudice.[5250]

2266. Nteziryayo submits that the Trial Chamber erred in convicting him on the basis of his utterances at Ndayambaje's Swearing-In Ceremony since this allegation was not charged as a crime in the Indictment.[5251] He contends that the Trial Chamber's statement that it could not make findings against him with respect to paragraph 6.34 of the Indictment because it was not pleaded in support of any count precluded it from basing any conviction on the contents of this paragraph.[5252] According to Nteziryayo, once it declined to rely on paragraph 6.34, the Trial Chamber could not "rely heavily on it in 'curing' paragraphs which otherwise were hopelessly defective" without

[5243] Nsabimana and Nteziryayo Indictment, p. 44.
[5244] Nsabimana and Nteziryayo Indictment, pp. 41-49.
[5245] Trial Judgement, paras. 4266, 4267.
[5246] Trial Judgement, para. 4267 (internal reference omitted).
[5247] Trial Judgement, para. 4268.
[5248] Trial Judgement, para. 4268.
[5249] Trial Judgement, para. 4269.
[5250] Trial Judgement, paras. 4270-4283.
[5251] Nteziryayo Notice of Appeal, paras. 9-14, 17; Nteziryayo Appeal Brief, paras. 17-19, 29. *See also* AT. 17 April 2015 pp. 5-10, 40, 41.
[5252] Nteziryayo Appeal Brief, paras. 10-16. *See also* Nteziryayo Reply Brief, paras. 8, 9. Nteziryayo submits that, in this case, the Trial Chamber found in "categorical terms" that because the paragraph was not pleaded in support of any count, it would not make any finding against Nteziryayo. *See* Nteziryayo Appeal Brief, para. 16.

running against its own conclusion in relation to paragraph 6.34 and being "in conflict with principle and fairness."[5253] He argues that the Trial Chamber's attempt to reintroduce in Count 4 through post-indictment disclosures the allegation in paragraph 6.34 – which was expressly excluded from that count – "amounted to the introduction of a separate charge."[5254] Comparing the situation addressed in the *Muvunyi* Appeal Judgement of 29 August 2008 with the situation at hand, Nteziryayo submits that the defect in the Indictment was not curable through any other means than an amendment of the Indictment and that the Trial Chamber erred in finding otherwise.[5255]

2267. The Prosecution responds that, contrary to Nteziryayo's claim, the Trial Chamber did not rely on paragraph 6.34 of the Indictment to convict him but relied on paragraphs 5.8 and 6.31 of the Indictment.[5256] It argues that an amendment of the Indictment was unnecessary since Nteziryayo's incitement at Ndayambaje's Swearing-In Ceremony was not a separate charge but a material fact that underpinned the charge of incitement under Count 4.[5257] In the Prosecution's view, the situation addressed in the *Muvunyi* case is distinguishable.[5258] The Prosecution also responds that the Trial Chamber was correct in finding that timely, clear, and consistent information put Nteziryayo on notice of the material facts regarding his incitement at the ceremony and that he mounted a full defence to this allegation because he knew it was central to the Prosecution case.[5259]

2268. Nteziryayo replies that the Prosecution's arguments that the Trial Chamber correctly held that the Indictment was cured and that he did not suffer prejudice are "based on a misperception of

[5253] Nteziryayo Appeal Brief, paras. 14, 17, 23, 24. *See also* Nteziryayo Reply Brief, paras. 10, 11, 14, 15.
[5254] Nteziryayo Appeal Brief, paras. 30, 31. In Nteziryayo's view, the Trial Chamber therefore erred in finding that his speech at Ndayambaje's Swearing-In Ceremony qualified as a material fact. *See ibid.*, para. 32. He further highlights that the Trial Chamber adopted differentiated approaches in the Trial Judgement since, elsewhere, it correctly declined to consider an allegation against Nsabimana because paragraph 6.39 of the Nsabimana and Nteziryayo Indictment was not pleaded in support of any count. *See ibid.*, para. 28, *referring to* Trial Judgement, para. 3840.
[5255] Nteziryayo Notice of Appeal, paras. 14, 17; Nteziryayo Appeal Brief, heading b(i) at p. 12, paras. 21, 25-27, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 152, 153, 155, 156. *See also* Nteziryayo Reply Brief, paras. 12, 13. In his notice of appeal, Nteziryayo also argued that, assuming *arguendo* that the Nsabimana and Nteziryayo Indictment was curable, the Trial Chamber erred in finding that it was cured regarding the allegation of incitement at Ndayambaje's Swearing-In Ceremony and in failing to assess his prejudice. *See* Nteziryayo Notice of Appeal, paras. 8, 15, 16. However, Nteziryayo did not develop these claims in his appeal brief and it is clear from his submissions in reply that he has abandoned them. *See infra*, para. 2268.
[5256] Prosecution Response Brief, paras. 1432-1434.
[5257] Prosecution Response Brief, para. 1446.
[5258] The Prosecution highlights that, in this case and contrary to the situation in the *Muvunyi* Appeal Judgement of 29 August 2008, the Trial Chamber did not rely on a paragraph of the Nsabimana and Nteziryayo Indictment that had not been pleaded in support of the respective count and that the Nsabimana and Nteziryayo Indictment contained a vague and curable count. *See* Prosecution Response Brief, paras. 1434-1436; AT. 17 April 2015 p. 24. It also responds that Nteziryayo misrepresents the Trial Judgement when arguing that the Trial Chamber adopted inconsistent approaches to the issue of notice. *See* Prosecution Response Brief, para. 1433.
[5259] Prosecution Response Brief, paras. 1437-1445; AT. 17 April 2015 pp. 23, 24.

the case on appeal, which is that the defect identified by the Chamber was not curable" and are, therefore, "irrelevant [...] because they do not respond to [his] appeal."[5260]

2269. The Appeals Chamber observes that, as noted by the Trial Chamber, the allegation that Nteziryayo incited the population to "finish off" the enemy and its "accomplices" at Ndayambaje's Swearing-In Ceremony pleaded in paragraph 6.34 of the Indictment was not relied upon in support of any counts against Nteziryayo.[5261] A plain reading of the Trial Judgement shows that the Trial Chamber concluded that Nteziryayo was put on notice of this alleged inciting speech by relying solely on paragraphs 5.8 and 6.31 of the Indictment – which pleaded in broad terms that Nteziryayo incited the population to kill Tutsis between April and June 1994 and which were relied upon in support of Count 4 – as well as on post-indictment communications.[5262] The situation at hand therefore differs from the situation examined in the *Muvunyi* case where the trial chamber relied on a single paragraph of the indictment that was not pleaded under any count to enter a conviction.[5263]

2270. The Appeals Chamber nonetheless concurs with Nteziryayo that, although the Trial Chamber did not rely on paragraph 6.34 of the Indictment, it is indisputable that it convicted him on the basis of the allegation set forth in this specific paragraph.[5264] The Appeals Chamber repeatedly held that the Prosecution's failure to state expressly that a paragraph in the indictment supports a particular count in the indictment is indicative that the allegation in the paragraph is not charged as a crime.[5265] There is therefore merit in Nteziryayo's contention that, by not indicating that the

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[5260] Nteziryayo Reply Brief, paras. 5, 6. *See also ibid.*, para. 16; AT. 17 April 2015 pp. 8, 40. At the appeals hearing, Nteziryayo further submitted that it was erroneous on the part of the Trial Chamber to rely on paragraph 6.31 of the Nsabimana and Nteziryayo Indictment to plead crimes committed while he was prefect because that paragraph pleaded crimes committed while he was an official of the civil defence. *See* AT. 17 April 2015 pp. 3-5, 10, 41.

[5261] *See* Trial Judgement, paras. 4266, 4267; Nsabimana and Nteziryayo Indictment, pp. 41-49.

[5262] Trial Judgement, paras. 4268-4270, 4283. In light of its conclusion below regarding Nteziryayo's understanding of the charge against him, the Appeals Chamber deems it unnecessary to address Nteziryayo's new argument raised during the appeals hearing related to paragraph 6.31 of the Nsabimana and Nteziryayo Indictment in the context of the allegation of incitement at Ndayambaje's Swearing-In Ceremony. *See supra*, fn. 5260; *infra*, paras. 2273, 2274.

[5263] *See Muvunyi* Trial Judgement of 12 September 2006, paras. 410, 427; *Muvunyi* Appeal Judgement of 29 August 2008, paras. 153, 156. Nteziryayo also fails to appreciate that, unlike in this case, the relevant count in the *Muvunyi* proceeding was not found to be vague but, instead, "narrowly tailored" to one specific incident. *See Muvunyi* Appeal Judgement of 29 August 2008, para. 155.

[5264] The Appeals Chamber also accepts Nteziryayo's submissions that the Trial Chamber adopted different approaches in relation to paragraphs 6.34 and 6.39 of the Nsabimana and Nteziryayo Indictment. In another part of the Trial Judgement, the Trial Chamber found that, because paragraph 6.39 was not pleaded in support of any count against Nsabimana, it "shall not consider the evidence concerning the allegation in Paragraph 6.39 of the Indictment." *See* Trial Judgement, para. 3840. Unlike its approach to the allegation set forth in paragraph 6.34, the Trial Chamber did not treat the allegation in paragraph 6.39 as a material fact that could underpin broader allegations of Nsabimana's responsibility in the killing of Tutsis pleaded elsewhere in the Nsabimana and Nteziryayo Indictment and determined that the evidence related to this allegation shall not be considered. *Compare ibid.*, para. 3840 *with ibid.*, paras. 4267, 4268. However, for the reasons discussed below in paragraphs 2273 and 2274, the Appeals Chamber does not find that the Trial Chamber's inconsistent approach had any impact on its decision regarding Nteziryayo's notice of the charge against him concerning Ndayambaje's Swearing-In-Ceremony.

[5265] *See Ntabakuze* Appeal Judgement, para. 106; *Karera* Appeal Judgement, para. 365; *Muvunyi* Appeal Judgement of 29 August 2008, para. 156.

allegation in paragraph 6.34 supported any particular count, the Prosecution may have misled him in believing that the allegation was not charged as a crime.

2271. The Appeals Chamber, however, stresses that the fundamental question when examining allegations of lack of notice is whether or not the accused was adequately informed of the nature and cause of the charges against him so as to be able to prepare a meaningful defence.[5266] The Appeals Chamber's case law on notice of the charges was developed in this spirit and was not intended to permit mere technicalities of pleading to intrude where it is clear that the accused was informed of the charges against him precisely and in a timely manner.

2272. In the present case, the phrasing of paragraph 6.34 of the Indictment made it clear that the Prosecution alleged that Nteziryayo engaged in criminal conduct at Ndayambaje's Swearing-In Ceremony which could support the charge of direct and public incitement to commit genocide. Despite the fact that paragraph 6.34 was not relied upon in the charging section of the Indictment, the Prosecution, before and after the filing of the Indictment, repeatedly indicated that Nteziryayo's utterances at this ceremony were part of its case.[5267]

2273. Nteziryayo's conduct at trial also unambiguously shows that he understood that he was charged with this allegation. In his opening statement, in particular, Nteziryayo expressly referred to paragraph 6.34 of the Indictment as one of the basis of the charges against him.[5268] A review of the record also reflects that Nteziryayo was able to undertake detailed cross-examination of the Prosecution witnesses who testified about his utterances at the ceremony,[5269] that he called

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[5266] *Cf. Ntakirutimana* Appeal Judgement, paras. 27, 28, 58; *Kvočka et al.* Appeal Judgement, paras. 28, 32-34; *Kupreškić et al.* Appeal Judgement, paras. 88, 122.

[5267] *See The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29A-I, *Éléments justificatifs*, filed on 14 October 1997 and disclosed to Nteziryayo in redacted form on 19 October 1998, p. 25 (relying on a witness's statement discussing Nteziryayo's utterances at Ndayambaje Swearing-In Ceremony in support of paragraph 3.17 of the initial indictment, which was charged under the count of direct and public incitement to commit genocide. *See The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29A-I, Indictment, 16 October 1997, para. 3.17, p. 5; Prosecution Opening Statement, T. 12 June 2001 pp. 78, 79 ("The Prosecutor will prove that Nteziryayo on several occasions, in several places, engaged in the incitement of the population during public rallies, during swearing-in ceremonies; I do recall the swearing-in of Elie Ndayambaje as Bourgmestre of Muganza. And he was engaged in the incitement of the population."); Witness Summaries Grid, item 6, Witness TO ("Witness TO's Summary"), item 19, Witness FAG ("Witness FAG's Summary").

[5268] Nteziryayo Opening Statement, T. 4 December 2006 p. 12 ("Following several points in the indictment, point 116, 129, 58, 634, Alphonse Nteziryayo carried out criminal and reprehensible acts by taking part in a number of public meetings in different localities in the *préfecture* with the aim of using incendiary speeches to incite people to ethnic hatred.").

[5269] *See* Witness FAG, T. 3 March 2004 pp. 43-51 (partly in closed session); Witness FAL, T. 9 February 2004 pp. 42-68 (partly in closed session); Witness QAF, T. 5 February 2004 pp. 75-84 (partly in closed session), T. 6 February 2004 pp. 4-24 (partly in closed session); Witness RV, T. 18 February 2004 pp. 57-73 (closed session), T. 19 February 2004 pp. 4-38 (partly in closed session); Witness TO, T. 4 March 2002 pp. 52-117 (partly in closed session), T. 5 March 2002 pp. 9-58 (partly in closed session); Witness TP, T. 12 February 2004 pp. 26-45 (partly in closed session); Witness FAU, T. 8 March 2004 pp. 72-94 (partly in closed session); T. 9 March 2004 pp. 13-27 (closed session); Witness QAQ, T. 11 November 2002 pp. 52-72 (partly in closed session); Witness QAL, T. 25 February 2004 pp. 14-25 (partly in closed session). The Appeals Chamber also observes that Nteziryayo does not argue that he objected to the evidence of these witnesses for lack of notice of the charge.

witnesses to refute the allegation that his words at Ndayambaje's Swearing-in Ceremony were inflammatory,[5270] and that he testified on this point.[5271] It is also significant that, in his closing brief, Nteziryayo did not refer to the allegation of incitement at the ceremony in the list of incidents which he claimed to have no notice of,[5272] and that it was only during his closing arguments that he pointed out that paragraph 6.34 was not pleaded in support of any counts.[5273]

2274. Against this background, Nteziryayo cannot reasonably claim that he did not understand at trial that the Prosecution intended to prove that he was guilty of direct and public incitement to commit genocide through his conduct at Ndayambaje's Swearing-In Ceremony and that he was misled by the absence of reference to paragraph 6.34 in the charging section of the Indictment. Nteziryayo is correct in his submission that, given the significance of the Indictment, it shall be "presumed to be a full, accurate and true reflection of the drafter's intention and free from oversight and error."[5274] However, in the situation at hand, it is obvious that the Prosecution mistakenly omitted to refer to paragraph 6.34 in the charging section of the Indictment and that it was the Prosecution's consistent intention throughout the case to prosecute Nteziryayo for his utterances at Ndayambaje's Swearing-In Ceremony.

2275. For the foregoing reasons, the Appeals Chamber concludes that Nteziryayo has not demonstrated that the Trial Chamber ultimately erred in finding that he was put on notice that he was charged with direct and public incitement to commit genocide based on his utterances at Ndayambaje's Swearing-In Ceremony and that he did not suffer prejudice.[5275]

2. Muyaga and Kibayi Meetings (Grounds 2 and 3)

2276. The Trial Chamber found that, around mid-June, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting in Muyaga Commune at which he made a speech inciting the population to kill Tutsis.[5276] The Trial Chamber further found that, around mid to late June 1994,

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[5270] *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Pre-Defence Brief for Presentation of Defence Case, 31 December 2004 (originally filed in French, English translation filed on 4 February 2005) ("Nteziryayo Pre-Defence Brief"), pp. 11, 16. *See also* Trial Judgement, paras. 4536-4551 (Witness AND-11), 4552-4563 (Witness AND-73).
[5271] *See* Trial Judgement, paras. 4564-4585.
[5272] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Alphonse Nteziryayo's Closing Brief, 17 February 2009 (confidential) ("Nteziryayo Closing Brief"), para. 765. While Nteziryayo argued in his closing brief that the testimonies of Witnesses FAG, FAL, QAF, and QAL should be excluded, his request was limited to meetings and inciting speeches in Muganza between April and early June 1994. *See ibid.*, para. 765(9).
[5273] *See* Nteziryayo Closing Arguments, T. 28 April 2009 pp. 19-21.
[5274] *See* Nteziryayo Appeal Brief, para. 20.
[5275] As noted above, Nteziryayo made it clear in his reply brief that he no longer argued that the vagueness of the Nsabimana and Nteziryayo Indictment regarding his criminal responsibility in relation to Ndayambaje's Swearing-In Ceremony was not cured and did not develop any argument to demonstrate that he was not put on notice of all necessary material facts underpinning the charge under Count 4. *See supra*, para. 2268.
[5276] Trial Judgement, paras. 3674, 5945, 6022.

Nteziryayo, again in his capacity as Butare Prefect, attended a public meeting on a football pitch next to the Kibayi commune office in Nyabisigara *Cellule*, Mukindo Sector, at which he incited the population to kill the remaining Tutsi survivors in the commune.[5277] The Trial Chamber found that Nteziryayo's speeches at these meetings made to large, fully public assemblies constituted a direct appeal to kill Tutsis and, on this basis, convicted him of direct and public incitement to commit genocide (Count 4).[5278]

2277. In summarising the Prosecution case against Nteziryayo with respect to these allegations of incitement, the Trial Chamber specifically referred to paragraphs 5.8 and 6.31 of the Indictment.[5279] As noted above, the allegations in paragraphs 5.8 and 6.31 were being pursued against Nteziryayo under Count 4 pursuant to Article 6(1) of the Statute.[5280]

2278. The Trial Chamber noted that paragraphs 5.8 and 6.31 of the Indictment failed to specify the locations and dates at which Nteziryayo was alleged to have incited the population to kill Tutsis and found that they were therefore defective.[5281] The Trial Chamber nevertheless determined that paragraphs 5.8 and 6.31 were cured of their defects regarding the meetings at Muyaga and Kibayi Communes through subsequent Prosecution's disclosures and concluded that Nteziryayo did not suffer any prejudice.[5282]

2279. Nteziryayo submits that his responsibility in relation to the Muyaga and Kibayi Communes meetings was not pleaded in the Indictment and that such defect was neither curable nor cured.[5283] He argues that the material facts omitted from the Indictment could on their own support separate charges and that their addition amounted to an impermissible expansion of the charges and a radical transformation of the case.[5284] At the appeals hearing, Nteziryayo further submitted that it was

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[5277] Trial Judgement, paras. 3691, 5945, 6022.
[5278] Trial Judgement, paras. 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at these meetings substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to these allegations. *See ibid.*, para. 5946.
[5279] Trial Judgement, para. 3450, fns. 9307, 9309.
[5280] Nsabimana and Nteziryayo Indictment, p. 44.
[5281] Trial Judgement, paras. 3462, 3473.
[5282] Trial Judgement, paras. 3485, 3495. The Appeals Chamber understands that, despite its reference to these paragraphs in several instances, the Trial Chamber did not rely on paragraphs 6.32, 6.53, and 6.59 of the Nsabimana and Nteziryayo Indictment in support of Nteziryayo's convictions for committing direct and public incitement through his speeches at the Muyaga and Kibayi meetings. *See ibid.*, paras. 3450, 3495 ("the Chamber considers that Paragraphs 5.8 and 6.31 of the Nsabimana and Nteziryayo Indictment *relating to incitement*, as well as Paragraphs 6.53 and 6.59 *relating to aiding and abetting* were cured".) (emphasis added); Nteziryayo Appeal Brief, paras. 39-41, 77.
[5283] Nteziryayo Notice of Appeal, paras. 18-36; Nteziryayo Appeal Brief, paras. 33-95, p. 19. *See also* AT. 17 April 2015 pp. 10-13.
[5284] Nteziryayo Notice of Appeal, paras. 19, 23, 26, 28; Nteziryayo Appeal Brief, paras. 43-48, 78; Nteziryayo Reply Brief, para. 18. Nteziryayo argues that the situation is analogous to that of the allegation related to specific attacks at the *Groupe scolaire* which was excluded by the Trial Chamber based on the Prosecution's failure to plead those attacks in the Nsabimana and Nteziryayo Indictment. *See* Nteziryayo Appeal Brief, para. 46, *referring to* Trial Judgement, para. 1815. Nteziryayo, however, fails to appreciate that, in contrast with the allegations of direct and public incitement

erroneous on the part of the Trial Chamber to rely on paragraph 6.31 of the Indictment as giving notice of crimes committed while he was prefect because that paragraph pleaded crimes committed while he was an official of the civil defence.[5285]

2280. The Prosecution responds that paragraphs 5.8 and 6.31 of the Indictment pleaded Nteziryayo's incitement in Butare between April and June 1994 and that the time and place of Nteziryayo's incitements were material facts, not separate charges.[5286] It also responds that post-indictment information cured the vagueness of the Indictment and that Nteziryayo was not prejudiced.[5287]

2281. The Appeals Chamber finds that the Indictment is manifestly defective in relation to the allegations concerning Nteziryayo's speeches at the Muyaga and Kibayi meetings. The Prosecution failed to specify the means by which Nteziryayo was alleged to have incited the population as well as the occurrence of public meetings and their locations. Furthermore, the date range of "[b]etween April to June 1994" is too expansive in light of the absence of other material facts relating to the allegations. The Appeals Chamber also accepts Nteziryayo's submission that, because paragraph 6.31 of the Indictment expressly referred to his responsibility for inciting the population to slaughter the Tutsis in Butare Prefecture between April and June 1994 in his capacity as "Colonel" and while he was "the official in charge of civil defence" for the prefecture, this paragraph could not be reasonably relied upon as giving him notice of a charge related to his responsibility for crimes committed in his capacity as prefect of Butare.

2282. The Appeals Chamber, however, finds that the allegations concerning Nteziryayo's speeches at the Muyaga and Kibayi meetings did not constitute new charges but fell within the broader allegation relating to Nteziryayo's public incitement to exterminate the Tutsi population in Butare Prefecture between April and July 1994 expressly pleaded in paragraph 5.8 of the Indictment. The Appeals Chamber does not consider that the material facts which the Trial Chamber took into account in convicting Nteziryayo represented a radical transformation of the Prosecution case, nor that these facts could have, on their own, supported separate charges. As vague as the charge set out in paragraph 5.8 was, the Indictment nonetheless pleaded the charge for which Nteziryayo was ultimately convicted, namely his responsibility for publicly inciting the extermination of Tutsis in Butare Prefecture from April to July 1994.

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to commit genocide, the Trial Chamber concluded that his participation in attacks was not pleaded under any counts in the Nsabimana and Nteziryayo Indictment. The Appeals Chamber therefore dismisses Nteziryayo's argument in this respect.

[5285] AT. 17 April 2015 pp. 3-5, 11, 41.

[5286] Prosecution Response Brief, paras. 1447-1449, 1460.

[5287] Prosecution Response Brief, paras. 1447-1469. *See also* AT. 17 April 2015 pp. 24-27.

2283. Accordingly, the Appeals Chamber considers that the defects in the Indictment regarding Nteziryayo's responsibility for direct and public incitement to commit genocide at meetings held in Muyaga and Kibayi Communes were curable. The Appeals Chamber will now turn to consider whether, for each meeting, the Trial Chamber erred in finding that the defects were cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(a) Muyaga Commune Meeting

2284. The Trial Chamber found that the defect in the Indictment concerning Nteziryayo's responsibility for direct and public incitement to commit genocide at a meeting held in Muyaga Commune was cured through the disclosure of the summaries of Prosecution Witnesses QBY's and FAB's anticipated evidence appended to the Prosecution Pre-Trial Brief,[5288] as well as Witnesses QBY's and FAB's prior statements to Tribunal investigators.[5289]

2285. In reaching its conclusion, the Trial Chamber noted that Witnesses QBY's and FAB's summaries both stated that, around 5 June 1994, Nteziryayo attended a meeting in Muyaga Commune at which he made a speech asking the population to kill the Tutsis.[5290] It observed that Witness QBY's Statement indicated that, between 4 and 5 June 1994, Nteziryayo spoke at a meeting at the Muyaga commune office, while Witness FAB's Statement indicated that Nteziryayo came to Muyaga Commune between 3 and 5 June 1994 to hold a meeting and that, in his speech, he stated that "the Hutus should kill all the Tutsis and not spare anyone."[5291] Considering that Witnesses QBY and FAB first testified over three years after these disclosures, the Trial Chamber concluded that paragraph 5.8 of the Indictment was cured of its defects.[5292]

[5288] Trial Judgement, paras. 3483, 3485, *referring to* Witness Summaries Grid, item 14, Witness FAB ("Witness FAB's Summary"), Witness QBY's Summary.
[5289] Trial Judgement, para. 3483, *referring to* Statement of Witness QBY of 3 November 1999, disclosed on 10 December 1999 (confidential) ("Witness QBY's Statement"), Statement of Witness FAB of 11 April 1999, disclosed on 15 November 2000 (confidential). A copy of Witness QBY's Statement including highlighting of alleged contradictions was admitted into evidence on 29 April 2004 as Exhibit D216 (confidential). A copy of Witness FAB's statement including highlighting of alleged contradictions was admitted into evidence on 29 April 2004 as Exhibit D217 (confidential). The un-highlighted copy of Witness FAB's Statement was also admitted into evidence on 29 April 2004 as Exhibit D218 (confidential) ("Witness FAB's Statement").
[5290] Trial Judgement, para. 3483.
[5291] Trial Judgement, para. 3483.
[5292] Trial Judgement, paras. 3483-3485. The Trial Chamber also referred to paragraphs 6.53 and 6.59 of the Nsabimana and Nteziryayo Indictment as being cured of their defects but, as noted above, the Appeals Chamber understands that the Trial Chamber intended to rely only on paragraphs 5.8 and 6.31 as regards Nteziryayo's responsibility for committing direct and public incitement to commit genocide. *See supra*, fn. 5282. As mentioned above, the Appeals Chamber has nonetheless found that paragraph 6.31 could not be reasonably relied upon as giving him notice of a charge related to his responsibility for crimes committed in his capacity as prefect of Butare. *See supra*, para. 2281.

2286. Nteziryayo submits that the Trial Chamber erred in law in finding that timely, clear, and consistent information relating to Muyaga Commune cured the defects in the Indictment.[5293] In particular, he argues that because Witnesses QBY's and FAB's summaries and statements all make, "with relative precision", an allegation of a meeting in Muyaga Commune sometime between 3 and 5 June 1994, these documents could not put him on notice of a meeting in Muyaga Commune that occurred on or after 21 June 1994 as found by the Trial Chamber.[5294] Nteziryayo argues that, since the fact that he was sworn-in as prefect on 21 June 1994 was pleaded in the Indictment, if it was the Prosecution case that this meeting occurred after his appointment, the Prosecution should have reflected it in the Indictment.[5295] Pointing out that the Prosecution failed to provide the requisite notice in its opening statement or any other filing and that the Prosecution case remained unclear throughout trial,[5296] Nteziryayo submits that a "much more reasonable interpretation" is that the Prosecution did not know "at any time during the process" that its case was that the meeting took place on or after 21 June 1994.[5297] According to Nteziryayo, it was only in the Trial Judgement that it was made clear that the case he had to answer related to a meeting in Muyaga Commune on or after 21 June 1994.[5298]

2287. Nteziryayo further submits that, since the Trial Chamber recognised that he objected to the lack of notice relating to the Muyaga meeting and did not find his objection to be untimely, it erred in failing to require the Prosecution to discharge its burden of proving an absence of prejudice.[5299] He contends that the lack of clarity of the Prosecution case regarding this meeting deprived him of the opportunity to present a defence and caused him considerable prejudice.[5300] In this respect, Nteziryayo submits that he was deprived of the opportunity of presenting an alibi defence since he was "misled as to the date on which the alibi was to attach" and that he devoted resources to investigating and calling witnesses in respect of a meeting which was not part of the case.[5301]

2288. The Prosecution responds that the Trial Chamber correctly found that Nteziryayo had notice that he incited the killing of Tutsis at a meeting in Muyaga Commune held around mid-June 1994,

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[5293] Nteziryayo Notice of Appeal, paras. 18, 24; Nteziryayo Appeal Brief, paras. 49-63. *See also* AT. 17 April 2015 pp. 11, 12, 41, 42.
[5294] Nteziryayo Appeal Brief, paras. 51, 52, *referring to* Trial Judgement, para. 3672. *See also ibid.*, para. 56.
[5295] Nteziryayo Appeal Brief, para. 60, *referring to* Nsabimana and Nteziryayo Indictment, para. 6.34.
[5296] Nteziryayo Appeal Brief, paras. 55-58. Nteziryayo highlights that Witness QBY testified that the meeting occurred either on 5 May or 5 June 1994, whereas Witness FAB recanted his previous statement and placed the meeting in mid-June 1994, and that the Prosecution referred to "Speeches during May/early June 1994" in its closing brief. *See ibid.*, paras. 57, 58. Nteziryayo argues that the Trial Chamber therefore erred in stating that the Prosecution specified that the Muyaga meeting took place in mid to late June 1994. *See ibid.*, para. 59.
[5297] Nteziryayo Appeal Brief, para. 61.
[5298] Nteziryayo Appeal Brief, para. 62.
[5299] Nteziryayo Notice of Appeal, para. 25; Nteziryayo Appeal Brief, paras. 64-68, heading (iv) at p. 25, *referring to* Trial Judgement, para. 3472.
[5300] Nteziryayo Appeal Brief, paras. 38, 69, 74, 75. *See also* Nteziryayo Reply Brief, para. 24.

relying in part on the reference to Nteziryayo being prefect at the time of the meeting in Witness FAB's Summary.[5302] The Prosecution also submits that, because Nteziryayo's objection based on lack of notice was untimely, he bears the burden to demonstrate that his ability to defend himself was materially impaired.[5303] According to the Prosecution, the conduct of Nteziryayo's defence – in particular his pre-defence brief, his cross-examination of Witnesses QBY and FAB, his examination of Nteziryayo Defence Witness AND-60, and his closing submissions – demonstrates that he fully understood that the meeting was alleged to have occurred in June 1994 when he was prefect and that he was not prejudiced as he claims.[5304]

2289. There appears to be no dispute that Witnesses QBY's and FAB's summaries, together with their prior written statements disclosed in 1999 and 2000, provided timely, clear, and consistent information regarding Nteziryayo's responsibility for direct and public incitement to kill Tutsis through his words at a public meeting held in Muyaga Commune.[5305] Nteziryayo, however, takes issue with the Trial Chamber's finding that he was provided adequate notice of the date of the meeting.

2290. As noted by the Trial Chamber, Witnesses QBY's and FAB's summaries and statements all indicate that the meeting took place between 3 and 5 June 1994.[5306] The Trial Chamber, nonetheless, did not discuss how this information accorded with its conclusion that the meeting occurred "around mid-June 1994",[5307] more specifically "on or after 21 June 1994" since both witnesses were adamant that Nteziryayo attended the meeting in his capacity as Butare Prefect.[5308]

[5301] Nteziryayo Appeal Brief, paras. 69, 72-75; Nteziryayo Reply Brief, paras. 17, 24, 25. *See also* AT. 17 April 2015 pp. 12, 13, 41, 42.
[5302] Prosecution Response Brief, paras. 1447, 1450-1453.
[5303] Prosecution Response Brief, paras. 1449, 1455, *referring to Mugenzi and Mugiraneza* Appeal Judgement, para. 122.
[5304] Prosecution Response Brief, paras. 1457-1459. *See also* AT. 17 April 2015 pp. 25, 26.
[5305] The Appeals Chamber notes that Witnesses QBY's and FAB's summaries were marked relevant to Nteziryayo and were linked to Counts 1 through 4 of the Nsabimana and Nteziryayo Indictment. The Appeals Chamber notes that, in his notice of appeal, Nteziryayo argued that the summaries appended to the Prosecution Pre-Trial Brief could not inform him of the allegations against him as the Prosecution had failed to indicate in the summaries the paragraphs of the Nsabimana and Nteziryayo Indictment on which the witnesses would testify in violation of Rule 73(B)(iv)(c) of the Rules. *See* Nteziryayo Notice of Appeal, paras. 24, 29. Nteziryayo, however, failed to reiterate this allegation in his appeal brief and instead developed different arguments. In these circumstances, the Appeals Chamber understands that Nteziryayo has abandoned this allegation of error. In any event, the Appeals Chamber reiterates that neither the Rules nor the jurisprudence require that the summaries appended to a Prosecution's pre-trial brief be linked to the relevant paragraphs of an indictment in order to provide timely, clear, and consistent information detailing the factual basis underpinning the charge. *See supra*, fn. 2546. It also observes that, in the circumstances of this case, it was abundantly clear that Witnesses QBY's and FAB's summaries were intended to support the allegations of incitement to commit genocide made against Nteziryayo in his indictment.
[5306] Trial Judgement, para. 3483.
[5307] Trial Judgement, para. 3674. *See also ibid.*, para. 5945.
[5308] Trial Judgement, para. 3672 ("The Chamber notes that Witnesses QBY and FAB are adamant that on the day of the meeting, Nteziryayo already held his position as *préfet* of Butare. Witness FAB even testified that the purpose of the meeting was to introduce Nteziryayo as the new *préfet*. Flowing from that, it appears that the meeting may have occurred on or after 21 June 1994, as Nteziryayo was appointed *préfet* of Butare on or around 17 June 1994, and his swearing-in ceremony took place on 21 June 1994.") (internal references omitted). In light of the Trial Chamber's statement in this paragraph, the Appeals Chamber finds no merit in the Prosecution's argument that the Trial Chamber

Although it expressly relied on this particular detail in reaching its findings regarding notice of the date of the Kibayi Commune meeting,[5309] the Trial Chamber failed to address expressly the fact that Witness FAB's summary and statement both referred to Nteziryayo as being "prefect" at the time of the Muyaga Commune meeting,[5310] which provided conflicting information as to whether the meeting occurred in early June 1994 as indicated in the relevant summaries or statements, or after Nteziryayo took office as the prefect on 21 June 1994.[5311]

2291. Against this background, the Appeals Chamber finds that the Trial Chamber erred in finding that Witnesses QBY's and FAB's summaries and statements provided clear and consistent information curing the defect of the Indictment as far as it relates to the date of the meeting held in Muyaga Commune at which Nteziryayo would have incited the commission of genocide.

2292. However, the Appeals Chamber considers that the reference to Nteziryayo being the prefect at the time of the Muyaga meeting in Witness FAB's Summary shows that the Prosecution case at trial was that the meeting was held after Nteziryayo was appointed prefect. The record reflects that, despite the absence of express clarification at trial and some ambiguous references in its closing brief,[5312] the Prosecution's intention was to demonstrate that the Muyaga meeting had taken place after Nteziryayo became prefect.[5313] The record before the Appeals Chamber demonstrates that the Prosecution ignored the inconsistencies in the information it provided to Nteziryayo through its pre-trial brief and failed to fulfil its obligation to clarify for Nteziryayo what its case was at the first opportunity.

2293. That being said, the Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information causes prejudice to the accused.[5314] The defect may only be deemed harmless through demonstrating that the

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did not conclude that the meeting occurred on or after 21 April 1994 but merely "around mid-June". *See* Prosecution Response Brief, para. 1454.

[5309] *See* Trial Judgement, paras. 3492, 3493. *See also infra*, para. 2305.

[5310] *See* Witness FAB's Summary ("About 3 to 5 June 1994, FAB attended a meeting in Muyaga commune, Mamba secteur. Prefect Nteziryayo said that the Hutus should kill all the Tutsis and not spare anyone. Prefect Nteziryayo said: 'In order to get rid of the lice, you must also destroy their eggs'".); Witness FAB's Statement, p. K0112989 (Registry pagination) ("Some of them did not come out of hiding until June 1994 when *Préfet* NTEZIRYAYO [...] came to Muyaga to hold a meeting sometime between 3 and 5 June in Mamba *secteur*.").

[5311] *See* Nsabimana and Nteziryayo Indictment, para. 6.34 ("On 17 June 1994, Alphonse Nteziryayo was appointed *Préfet* of Butare by the Interim Government, replacing Sylvain Nsabimana. After the handing over of office on 21 June 1994, *Préfet* Alphonse Nteziryayo continued to incite the population to 'finish off' the enemy and its 'accomplices'.").

[5312] *See* Prosecution Closing Brief, pp. 355, 356, where the Prosecution refers to the evidence of Witness FAB under the sub-heading "Speeches during May/early June 1994".

[5313] *See* Witness QBY, T. 19 April 2004 p. 54; Witness FAB, T. 5 April 2004 p. 24.

[5314] *See, e.g., Šainović et al.* Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58.

accused's ability to prepare his defence was not materially impaired.[5315] When an appellant raises a defect in the indictment for the first time on appeal, the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[5316] When, however, an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired.[5317]

2294. The Appeals Chamber observes that the Trial Chamber examined Nteziryayo's claim of lack of notice relating to the Muyaga meeting raised at trial without considering his claim untimely.[5318] In these circumstances, the Appeals Chamber considers that the burden rests on the Prosecution to prove that Nteziryayo's ability to prepare his defence was not materially impaired.

2295. The Appeals Chamber finds that the Prosecution has met this burden as it effectively demonstrates that the conduct of Nteziryayo's defence reflects that the ambiguity in the notice provided by the Prosecution regarding the date of the Muyaga Commune meeting was harmless. Specifically, as pointed out by the Prosecution and acknowledged by Nteziryayo,[5319] Nteziryayo premised his defence on the occurrence of only one meeting in Muyaga Commune that occurred on 23 May 1994, called witnesses in support of this case,[5320] and was prepared to refute any allegation that the meeting had taken place after that date. In particular, the record shows that Nteziryayo was able to undertake a detailed cross-examination of Witnesses QBY and FAB who testified that he attended the meeting held in Muyaga Commune in his capacity as prefect, challenging specifically discrepancies between their testimonies and prior statements as to the date of the meeting in Muyaga and his position at the time of the meeting.[5321]

2296. The Appeals Chamber is not persuaded by Nteziryayo's submission that the lack of clarity in the Prosecution case prevented him from calling alibi witnesses or devoting resources to prepare his defence as the conduct of his defence shows that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and that he deliberately oriented his defence to demonstrate that the meeting in Muyaga Commune could only have occurred on 23 May 1994.

[5315] *See, e.g., Šainović et al.* Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreškić et al.* Appeal Judgement, para. 122.
[5316] *See, e.g., Nzabonimana* Appeal Judgement, para. 30; *Šainović et al.* Appeal Judgement, para. 224; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[5317] *See, e.g., Nzabonimana* Appeal Judgement, para. 30; *Ntabakuze* Appeal Judgement, fn. 189; *Niyitegeka* Appeal Judgement, para. 200; *Kupreškić et al.* Appeal Judgement, paras. 122, 123.
[5318] Trial Judgement, paras. 3472-3474, 3483-3485, *referring to* Nteziryayo Closing Brief, para. 765, *referring in turn to, The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Motion for Exclusion of Evidence, 23 January 2009 (confidential) ("Nteziryayo 23 January 2009 Motion").
[5319] Prosecution Response Brief, paras. 1458, 1459; Nteziryayo Appeal Brief, para. 173.
[5320] *See* Trial Judgement, paras. 3570-3577.

2297. Based on the foregoing, the Appeals Chamber finds that, despite the vagueness of the Indictment and the confusion in the Prosecution's post-indictment communications, Nteziryayo had understood that he had to defend against the allegation that he incited the killing of Tutsis during a meeting held in Muyaga Commune while he was prefect, that is on or after he took on his functions on 21 June 1994. Accordingly, the Appeals Chamber concludes that, although the Trial Chamber erred in relying on paragraph 6.31 of the Indictment and in finding that the defect in the Indictment concerning the date of the Muyaga Commune meeting was cured, these errors do not invalidate its decision to convict Nteziryayo on the basis of this meeting as the Prosecution has proven on appeal that Nteziryayo's ability to prepare his defence was not materially impaired.

(b) Kibayi Commune Meeting

2298. The Trial Chamber found that the defect in the Indictment concerning Nteziryayo's responsibility for direct and public incitement to commit genocide at a meeting held in Kibayi Commune around mid to late June 1994 was cured through the disclosure of the summaries of Prosecution Witnesses FAK's and QBU's anticipated evidence[5322] as well as Witnesses FAK's and QBU's prior statements to Tribunal investigators.[5323]

2299. In reaching its conclusion, the Trial Chamber noted that, whereas the location of the meeting was not specified in the summary of Witnesses FAK's and QBU's anticipated evidence, the omission of this detail was remedied by information contained in their prior written statements, which identified the meeting as taking place at or next to the Kibayi commune office.[5324] The Trial Chamber further observed that Witnesses FAK's and QBU's summaries and statements all placed the meeting in May 1994.[5325] The Trial Chamber nonetheless determined that, having regard to the content of Witnesses FAK's and QBU's statements which refer to Nteziryayo being present at the meeting either as prefect or "the new *Préfet* Nteziryayo", Nteziryayo was put on notice that the meeting about which these witnesses would testify must have taken place after 21 June 1994, the

[5321] *See* Witness QBY, T. 20 April 2004 pp. 4, 8, 11, 21-23; Witness FAB, T. 5 April 2004 pp. 42, 43, 46, 49 and 52 (closed session).
[5322] Trial Judgement, paras. 3486, 3491, *referring to* Witness Summaries Grid, item 23, Witness FAK ("Witness FAK's Summary"), item 47, Witness QBU ("Witness QBU's Summary").
[5323] Trial Judgement, paras. 3487-3489, 3495, fns. 9352-9354, *referring to* Statement of Witness FAK of 24 February 2000, disclosed in French on 15 November 2000 and in English on 4 December 2000 (confidential) ("Witness FAK's February 2000 Statement"), Statement of Witness FAK of 3 May 2000, disclosed in French on 4 December 2000 and in English on 23 May 2001 (confidential) ("Witness FAK's May 2000 Statement"), Statement of Witness QBU of 10 October 1999, disclosed on 1 December 1999 (confidential) ("Witness QBU's Statement"). The unredacted versions of Witness FAK's February 2000 and May 2000 statements were admitted into evidence on 29 April 2004 as Exhibit D219 (confidential) ("Witness FAK's Statements"). A copy of Witness FAK's Statements including highlighting of alleged contradictions was admitted the same day as Exhibit D220 (confidential).
[5324] Trial Judgement, paras. 3486-3491.
[5325] Trial Judgement, para. 3492.

date on which he took office as prefect.[5326] It considered the discrepancy as to the date of the meeting as minor and found that Nteziryayo was put on notice that he would need to defend against the allegation that he incited the population by speeches he gave at a meeting at or near the Kibayi commune office sometime after he assumed office as prefect.[5327] The Trial Chamber concluded that paragraph 6.31 of the Indictment was "cured by the disclosure of clear, consistent and timely information" and that Nteziryayo "did not suffer any prejudice".[5328]

2300. Nteziryayo submits that the Trial Chamber erred in law in finding that the defective Indictment was cured by timely, clear, and consistent information.[5329] Nteziryayo acknowledges that the location was specified in Witnesses FAK's and QBU's statements, but argues that the Trial Chamber erred in law in relying solely on these statements as providing notice since the disclosure of previous statements cannot by itself put an accused on notice of material facts which the Prosecution intends to prove at trial.[5330] He also submits that, even if the Trial Chamber was entitled to rely on these statements, they are consistent with Witness FAK's and QBU's summaries that the meeting took place in May 1994, not mid to late June 1994 as found by the Trial Chamber.[5331] In his view, the reference to him being the prefect at the time of the meeting in Witnesses FAK's and QBU's statements cannot be said to constitute clear and consistent information of a meeting in late June 1994.[5332] Nteziryayo adds that it was only in the Trial Judgement "that the case to answer was put."[5333]

2301. Nteziryayo contends that, since the Trial Chamber recognised that he objected to the lack of notice related to the Kibayi Commune meeting, it erred in failing to require the Prosecution to discharge its burden of proving an absence of prejudice.[5334] He submits that the lack of clarity of the Prosecution case regarding the Kibayi Commune meeting deprived him of the opportunity to present a defence and caused him considerable prejudice.[5335] In particular, he argues that he was deprived of the opportunity of presenting an alibi as he was misled as to the date on which the alibi

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[5326] Trial Judgement, paras. 3492, 3493.
[5327] Trial Judgement, para. 3493.
[5328] Trial Judgement, para. 3495.
[5329] Nteziryayo Notice of Appeal, paras. 27-36; Nteziryayo Appeal Brief, paras. 49, 79-89. *See also* AT. 17 April 2015 pp. 11, 12, 41, 42.
[5330] Nteziryayo Appeal Brief, para. 81. *See also ibid.*, para. 54; Nteziryayo Reply Brief, para. 19.
[5331] Nteziryayo Appeal Brief, paras. 82, 83. *See also* Nteziryayo Reply Brief, para. 17.
[5332] Nteziryayo Notice of Appeal, para. 31; Nteziryayo Appeal Brief, paras. 84, 85.
[5333] Nteziryayo Appeal Brief, para. 88. *See also ibid.*, para. 36. Nteziryayo refers to Witnesses FAK's and QBU's evidence at trial and submits that there was no clarity in the Prosecution case even at the close of the presentation of its evidence. *See ibid.*, paras. 86-88, fn. 24, *referring to* Prosecution Closing Brief, pp. 355-358.
[5334] Nteziryayo Notice of Appeal, para. 35; Nteziryayo Appeal Brief, paras. 64-68, 90, heading (ii) at p. 32, *referring to* Trial Judgement, para. 3472.
[5335] Nteziryayo Notice of Appeal, paras. 34, 36; Nteziryayo Appeal Brief, paras. 38, 69, 74, 94. *See also* Nteziryayo Reply Brief, para. 24.

had to attach and that he devoted resources investigating and calling witnesses to a meeting which was not part of the case.[5336]

2302. The Prosecution responds that Witnesses FAK's and QBU's summaries and statements provided notice to Nteziryayo that he was alleged to have incited the killing of Tutsis at a public meeting as well as with respect to the date and location of the meeting, and that the Trial Chamber did not err in determining that the discrepancy concerning the dates was minor.[5337] The Prosecution also submits that, because Nteziryayo's objection based on lack of notice was untimely, he bears the burden to demonstrate that his ability to defend himself was materially impaired, if at all.[5338] According to the Prosecution, the conduct of Nteziryayo's defence – in particular his pre-defence brief, his cross-examination of Witnesses QBU and FAK, and his examination of Nteziryayo Defence Witnesses AND-11, AND-53, and AND-64 – demonstrates that he fully understood that the meeting was alleged to have occurred when he was prefect and did not suffer prejudice as he mounted a full defence against the allegation.[5339]

2303. There appears to be no dispute that Witnesses FAK's and QBU's summaries, together with these witnesses' prior written statements disclosed in 1999 and 2000, provided timely, clear, and consistent information regarding Nteziryayo's responsibility for direct and public incitement to kill Tutsis through the words he proffered at a public meeting.[5340] Nteziryayo, however, takes issue with the Trial Chamber's findings that he was provided adequate notice of the location and date of the meeting.

2304. As noted above, the Trial Chamber acknowledged that the location of the meeting was not specified in Witnesses FAK's and QBU's summaries but considered that this omission was remedied by the information contained in these witnesses' prior statements, which identified the meeting as taking place at, or next to, the Kibayi commune office.[5341] Nteziryayo is correct in submitting that mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[5342] His argument, however, fails to appreciate that the Prosecution did not merely serve Witnesses FAK's and QBU's statements on Nteziryayo. In its Witness Summaries Grid attached to its pre-trial brief, the Prosecution also summarised the

[5336] Nteziryayo Appeal Brief, paras. 69, 73-75, 94; Nteziryayo Reply Brief, paras. 17, 24, 25. *See also* AT. 17 April 2015 pp. 12, 13, 41, 42.
[5337] Prosecution Response Brief, paras. 1461-1465. The Prosecution argues that, contrary to Nteziryayo's submission, a pre-trial brief and witness statements, read together, may provide sufficient notice. *See ibid.*, para. 1463.
[5338] Prosecution Response Brief, paras. 1455, 1456, 1460, 1466.
[5339] Prosecution Response Brief, paras. 1467, 1468; AT. 17 April 2015 pp. 26, 27.
[5340] The Appeals Chamber notes that Witnesses FAK's and QBU's summaries were marked relevant to Nteziryayo and were linked, respectively, to Counts 1 and 4, and 1 through 4 of his indictment.
[5341] Trial Judgement, paras. 3486-3491.

information contained in the statements of Witnesses FAK and QBU that Nteziryayo incited the killing of Tutsis in a public meeting held in Kibayi Commune[5343] and expressly indicated that this evidence was relevant to its case against Nteziryayo.[5344] Upon reading Witnesses FAK's and QBU's summaries, Nteziryayo should have been prompted to read the witnesses' prior statements disclosed to him in 1999 and 2000, which provided timely, clear, and consistent information regarding the location of the alleged meeting.

2305. With regard to the date, Witnesses FAK's and QBU's summaries and statements all indicate that the meeting took place in May 1994.[5345] However, the Trial Chamber correctly noted that, despite this indication, both witnesses referred to Nteziryayo as being the prefect or the "new *Préfet*" at this meeting in their prior statements.[5346] The Appeals Chamber finds no error in the Trial Chamber's consideration that this reference to Nteziryayo's status as prefect at the time of the meeting in the witnesses' statements, repeated in Witness QBU's Summary, suggested that these witnesses would testify about a meeting that must have occurred after he took office as prefect on 21 June 1994.[5347] Nevertheless, the Appeals Chamber considers that the express references in the Prosecution's post-indictment disclosures to the meeting taking place in "May 1994" and to Nteziryayo's attendance as the prefect cannot be said to constitute clear and consistent notice of the date of the meeting held in Kibayi Commune. It is only when Witnesses FAK and QBU took the stand that it became clearer that the Prosecution intended to prove that Nteziryayo was alleged to be responsible for inciting the population at a meeting held in Kibayi when he was prefect.[5348] The Appeals Chamber finds that this does not constitute "timely" notice.[5349]

[5342] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 162; *Ntagerura et al.* Appeal Judgement, para. 139; *Ntakirutimana* Appeal Judgement, para. 27.
[5343] *See* Witness FAK's February 2000 Statement, pp. 3, 4; Witness FAK's May 2000 Statement, p. 3; Witness QBU's Statement, pp. 3, 4.
[5344] *See* Witness FAK's Summary; Witness QBU's Summary. *Cf. Ntakirutimana* Appeal Judgement, paras. 41, 48.
[5345] *See* Witness FAK's Summary ("FAK attended one meeting in May 1994 at which Nteziryayo told the people to kill Tutsi".); Witness FAK's February 2000 Statement, p. K0153200 (Registry pagination) ("Several meetings were held during that period but I only attended one, the meeting held in May 1994 in the Kibayi *commune* office compound."); Witness FAK's May 2000 Statement, p. K0180538 (Registry pagination) ("I recall attending a meeting at the Kibayi communal office in May 1994."); Witness QBU's Summary ("In May [1994], Nteziryayo held a meeting as the Prefect."); Witness QBU's Statement, p. K0112414 (Registry pagination) ("*Au mois de mai 1994, s'est tenue au terrain de football de Kibayi situé près du bureau communal, une réunion présidée par le Colonel Alphonse NTEZIRYAYO, nouveau préfet*".).
[5346] *See* Trial Judgement, paras. 3492, 3493. *See also* Witness FAK's February 2000 Statement, p. K0153200 (Registry pagination); Witness FAK's May 2000 Statement, p. K0180538 (Registry pagination); Witness QBU's Statement, p. K0112414 (Registry pagination).
[5347] *See* Trial Judgement, paras. 3492, 3493.
[5348] Witness FAK, T. 15 April 2004 pp. 19, 24, 27 (closed session); Witness QBU, T. 13 April 2004 pp. 8 (closed session), 37, 54-55, 58 (closed session), T. 14 April 2004 p. 3. The Appeals Chamber notes that the Prosecution never explicitly clarified its case and made ambiguous references to "Speeches during May/early June 1994" in its closing brief when discussing its evidence on the Kibayi meeting. *See* Prosecution Closing Brief, pp. 355, 356.
[5349] The Appeals Chamber observes that, as pointed out by Nteziryayo, the Prosecution Closing Brief refers to the Kibayi Commune meeting under the heading "Speeches during May/early June 1994". *See* Prosecution Closing Brief,

2306. Consequently, the Appeals Chamber finds that the Trial Chamber erred in finding that the defect in the Indictment was cured by timely, clear, and consistent information as it relates to the date of the meeting held in Kibayi Commune at which Nteziryayo was alleged to have incited the commission of genocide.

2307. Turning to the question of whether the defect in the Indictment regarding the date of the meeting materially impaired Nteziryayo's ability to prepare his defence, the Appeals Chamber observes that the Trial Chamber examined Nteziryayo's claim of lack of notice relating to the Kibayi Commune meeting raised at trial without considering his claim untimely.[5350] In these circumstances, the burden rests on the Prosecution to prove that the ability of Nteziryayo to prepare his defence was not materially impaired.

2308. The Appeals Chamber finds that the Prosecution has met its burden as it demonstrates that the conduct of Nteziryayo's defence reflects that the ambiguity regarding the date of the Kibayi Commune meeting was harmless. Specifically, a review of the record shows that Nteziryayo was able to mount a robust cross-examination of Witnesses FAK and QBU who testified that Nteziryayo attended the meeting held in Kibayi in his capacity as prefect. In particular, Nteziryayo challenged the discrepancy between the estimated date of the meeting in Witness FAK's Statements and his testimony[5351] and put to both Witnesses FAK and QBU evidence on the date of his appointment as prefect in support of his claim that both witnesses were incorrect in their estimate of the dates for the meeting.[5352] The Nteziryayo Pre-Defence Brief also reflects that Nteziryayo initially intended to call a witness who was expected to testify, *inter alia*, that she knew Nteziryayo after he was appointed prefect and that she attended a meeting in Kibayi at which Nteziryayo called for peace.[5353]

2309. Furthermore, as pointed out by the Prosecution and Nteziryayo himself, Nteziryayo was able to call three witnesses who testified to attending a meeting that took place on 24 May 1994.[5354] Contrary to Nteziryayo's submissions, not only were these Defence witnesses able to put forward

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p. 355. However, the Appeals Chamber is not convinced that this ambiguity demonstrates Nteziryayo's lack of notice of the case against him.

[5350] Trial Judgement, paras. 3472-3474, 3486-3495, *referring to* Nteziryayo Closing Brief, para. 765, *referring in turn to* Nteziryayo 23 January 2009 Motion.

[5351] *See* Witness FAK, T. 15 April 2004 pp. 19, 27, 28 (closed session).

[5352] *See* Witness FAK, T. 15 April 2004 pp. 29, 30 (closed session); Witness QBU, T. 13 April 2004 pp. 56-58 (closed session).

[5353] *See* Nteziryayo Pre-Defence Brief, p. 5.

[5354] Nteziryayo Appeal Brief, paras. 91, 92, *referring to* Witnesses AND-11, AND-53, and AND-64. The Appeals Chamber observes that Nteziryayo also cross-examined Ntahobali Defence Witness H1B6 on whether Nteziryayo was prefect when he attended a public meeting in May 1994. *See* Witness H1B6, T. 5 December 2005 pp. 11 (closed session), 18, 19.

Nteziryayo's defence case that the meeting occurred in May 1994, but they also testified in rebuttal of the Prosecution case that there was a meeting in June 1994 when he was prefect.[5355]

2310. The Appeals Chamber is not persuaded by Nteziryayo's contention that the lack of clarity in the Prosecution case prevented him from calling alibi witnesses or devoting resources to investigating the matter, as the conduct of his defence shows that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and that he deliberately oriented his defence to demonstrate that the meeting in Kibayi could only have occurred on 24 May 1994.

2311. Based on the foregoing, the Appeals Chamber is persuaded that, despite the vagueness of the Indictment and the confusion in the Prosecution's communications, Nteziryayo had understood that he had to defend against the allegation that he incited the killing of Tutsis during a meeting held in Kibayi Commune while he was prefect, that is on or after he took his functions on 21 June 1994. Accordingly, the Appeals Chamber concludes that, although the Trial Chamber erred in relying on paragraph 6.31 of the Indictment and in finding that the defect in the Indictment concerning the date of the Kibayi Commune meeting was cured, these errors do not invalidate its decision to convict Nteziryayo on the basis of this meeting as the Prosecution has proven on appeal that Nteziryayo's ability to prepare his defence was not materially impaired.

3. Conclusion

2312. The Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in considering that he was put on sufficient notice that he was charged with direct and public incitement to commit genocide at Ndayambaje's Swearing-In Ceremony and that he did not suffer prejudice.

2313. The Appeals Chamber further finds that, although the Trial Chamber erred in concluding that the defects in the Indictment concerning the dates of the meetings held in Muyaga and Kibayi Communes at which Nteziryayo was alleged to have incited the commission of genocide were cured, these errors do not invalidate the Trial Chamber's decision to convict Nteziryayo for direct and public incitement to commit genocide in relation to the speeches he made at these meetings as the Prosecution has successfully demonstrated that Nteziryayo's ability to prepare his defence was not materially impaired by the lack of clear notice.

2314. Finally, the Appeals Chamber dismisses Nteziryayo's claim of prejudice resulting from the accumulation of defects in the Indictment.[5356] The Appeals Chamber does not minimise the extent

[5355] *See, e.g.*, Witness AND-11, T. 1 February 2007 pp. 39, 50, T. 5 February 2007 pp. 59 and 61-63 (closed session); Witness AND-53, T. 15 February 2007 pp. 43, 59; Witness AND-64, T. 8 March 2007 p. 47.

of the Prosecution's failure to provide adequate notice in the Indictment: none of the three incidents for which Nteziryayo was found guilty was adequately pleaded in the Indictment. However, Nteziryayo has not demonstrated that the defects in the Indictment in this respect and their cumulative effect materially hampered the preparation of his defence.

2315. For these reasons, the Appeals Chamber dismisses Grounds 1 through 3 of Nteziryayo's appeal.

[5356] *See* Nteziryayo Notice of Appeal, para. 7.

B. Ndayambaje's Swearing-In Ceremony (Ground 4)

2316. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, Nteziryayo and Ndayambaje told the population to continue with their "work", urged them to "sweep the dirt outside", and instructed that those hiding Tutsis who refused to hand them over should be killed.[5357] The Trial Chamber convicted Nteziryayo pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide on the basis of his statements made during the swearing-in ceremony.[5358]

2317. Nteziryayo argues that the Trial Chamber erred in its assessment of the Prosecution and Defence evidence related to his conduct at the ceremony. The Appeals Chamber will first address Nteziryayo's challenges to the assessment of the Prosecution evidence before examining his contentions related to the assessment of the Defence evidence.

1. Assessment of Prosecution Evidence

2318. In reaching its findings regarding Ndayambaje's Swearing-In Ceremony, the Trial Chamber considered, *inter alia*, the evidence of Prosecution Witnesses FAG, FAL, FAU, QAF, QAL, QAQ, QAR, RV, TO, and TP.[5359]

2319. Nteziryayo argues that the Trial Chamber erred in its assessment of the Prosecution evidence by: (i) erroneously using the evidence of Witnesses QAQ and QAR to corroborate other Prosecution evidence; (ii) failing to apply sufficient caution to accomplice evidence; (iii) insufficiently considering discrepancies concerning the content of the speeches, particularly his utterances, and the order in which he and Ndayambaje gave speeches; (iv) failing to sufficiently examine discrepancies as to the date of the event, the attendees, and the time it occurred; and (v) failing to consider other elements in the record and within the Prosecution evidence suggesting that the witnesses were testifying about meetings other than Ndayambaje's Swearing-In Ceremony.[5360] The Appeals Chamber will address these contentions in turn.

[5357] *See* Trial Judgement, paras. 4616, 4642, 4645. *See also ibid.*, paras. 5948, 6026, 6027.
[5358] Trial Judgement, paras. 6029, 6038, 6186.
[5359] *See* Trial Judgement, paras. 4589-4632, 4642-4645.
[5360] Nteziryayo Notice of Appeal, paras. 37-39, 62, 63; Nteziryayo Appeal Brief, paras. 96-157, 161-166, 247, 248, 253-255.

(a) Witnesses QAQ and QAR

2320. Nteziryayo argues that, after having found that Witnesses QAQ and QAR lacked credibility, the Trial Chamber erred in using their evidence for corroboration of other Prosecution evidence.[5361] The Prosecution responds that the Trial Chamber did not rely on the evidence of these witnesses.[5362]

2321. The Appeals Chamber observes that the Trial Chamber declined to rely on the accounts of Witnesses QAQ and QAR about Ndayambaje's Swearing-In Ceremony because it found that Witness QAR did not attend the ceremony and that any probative weight to be accorded to the testimony of Witness QAQ was minimal.[5363] In the paragraphs of the Trial Judgement pointed out by Nteziryayo, the Trial Chamber merely noted that certain aspects of their testimonies were consistent with the evidence of other Prosecution and Defence witnesses but did not rely on it to corroborate other evidence relating to the ceremony.[5364]

2322. The Appeals Chamber therefore dismisses Nteziryayo's submission concerning the evidence of Witnesses QAQ and QAR.

(b) Insufficient Caution

2323. Nteziryayo argues that the Trial Chamber gave no indication that it would treat Witness FAU's evidence with caution and that its "bare assertion" that it would apply caution to the evidence of Witnesses FAG, FAL, QAF, RV, and TO does not demonstrate that it did.[5365] He stresses that Witnesses FAG, FAL, FAU, QAF, and RV testified while awaiting trials or sentencing in Rwanda and that Witnesses FAG, FAL, FAU, and RV were detained in prison together.[5366] As further reason for the need to apply caution to these witnesses, Nteziryayo highlights that: (i) Witness RV admitted to having previously lied to improve his situation and to

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[5361] Nteziryayo Appeal Brief, paras. 112, 113, *referring to* Trial Judgement, paras. 4601-4608, 4621, 4595, 4596. *See also ibid.*, paras. 102, 114; Nteziryayo Reply Brief, paras. 65, 66.
[5362] Prosecution Response Brief, para. 1481.
[5363] *See* Trial Judgement, paras. 4602-4608.
[5364] *See* Trial Judgement, paras. 4595, 4596. After reviewing all the Prosecution evidence, the Trial Chamber concluded that it would "only consider the evidence of the remaining Prosecution witnesses, namely Witnesses FAG, FAL, FAU, QAF, QAL, RV, TO, and TP, as well as the Defence witnesses with respect to this allegation." *See ibid.*, para. 4621.
[5365] Nteziryayo Appeal Brief, paras. 154, 155; Nteziryayo Reply Brief, paras. 67, 68. The Appeals Chamber recalls its decision that paragraphs 249-252 of Nteziryayo's appeal brief, which concern allegations of collusion among Prosecution witnesses, fell outside the scope of Nteziryayo's notice of appeal and would not be considered. *See* Decision on Nteziryayo's Motion for Reconsideration and on Prosecution's Motion for Clarification of the 8 May 2013 Decision, 12 July 2013 ("12 July 2013 Appeal Decision"), paras. 23-25. *See also* 8 May 2013 Appeal Decision, paras. 51, 58 (striking paragraphs raising allegations of collusion from a previous appeal brief filed by Nteziryayo that exceeded the scope of the Nteziryayo Notice of Appeal). Although not expressly addressed in these decisions, the same reasoning applies to Nteziryayo's allegation of collusion included in paragraph 103(d) of his appeal brief and the Appeals Chamber will therefore not consider this otherwise unsubstantiated allegation.
[5366] Nteziryayo Appeal Brief, paras. 103(d), 152, 247, 248, 253; Nteziryayo Reply Brief, para. 109. Nteziryayo argues that "special caution" should have been applied to these witnesses, particularly as witnesses who had been convicted

having to denounce co-perpetrators as part of his confession procedure; (ii) Witness QAF's bail depended upon the substance of his evidence; (iii) Witness FAG lied under oath in his initial testimony to the Trial Chamber; and (iv) Witness TO had been previously imprisoned by Ndayambaje and may have had a motive to "seek revenge against [him]."[5367] In this context, Nteziryayo argues that no reasonable trier of fact could have relied upon the evidence of these witnesses in light of the largely consistent Defence evidence.[5368]

2324. The Prosecution responds that the Trial Chamber applied the requisite level of caution and that Nteziryayo fails to demonstrate any error.[5369] It further contends that Nteziryayo misrepresents the circumstances under which Witnesses FAG, FAU, QAF, RV, and TO testified.[5370]

2325. The Appeals Chamber observes that the Trial Chamber noted Witness FAU's status as a detained witness when summarising his evidence related to Ndayambaje's Swearing-In Ceremony.[5371] The Trial Chamber also repeatedly stated in other parts of the Trial Judgement that it would treat his testimony with appropriate caution since he was a detained witness awaiting trial in Rwanda for crimes related to the 1994 genocide.[5372] Nteziryayo's contention that the Trial Chamber gave no indication of the need to treat Witness FAU's evidence with caution is therefore without merit.

2326. The Trial Judgement also reflects express consideration of the admitted involvement of Witnesses FAG, FAL, QAF, and RV in the genocide as well as the fact that Witness RV was detained and that Witnesses FAG and FAL were awaiting sentencing decisions when they testified.[5373] The Trial Chamber further recognised that the witnesses "may have had incentives to implicate either Ndayambaje or Nteziryayo in order to secure favourable or lenient treatment or to apportion blame to the authorities" and that, because Witness TO was imprisoned during Ndayambaje's tenure as *bourgmestre*, he may have "a motive to seek revenge against Ndayambaje".[5374] Moreover, the Trial Chamber's analysis of the evidence from these witnesses about the ceremony reflects that it undertook a cautious assessment of their credibility, including the consideration of discrepancies and inconsistencies as regards the date of the ceremony, the

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had been forced to wait inordinately long periods without receiving a sentence. *See* Nteziryayo Appeal Brief, para. 253; Nteziryayo Reply Brief, para. 109(b).

[5367] Nteziryayo Appeal Brief, paras. 254, 255, fn. 328; Nteziryayo Reply Brief, paras. 112, 113.

[5368] Nteziryayo Appeal Brief, paras. 155, 156.

[5369] Prosecution Response Brief, paras. 1513, 1514, 1559, 1561. *See also ibid.*, para. 1515; AT. 17 April 2015 p. 30.

[5370] Prosecution Response Brief, paras. 1561-1564. *See also* AT. 17 April 2015 pp. 30, 31.

[5371] *See* Trial Judgement, para. 4397. *See also ibid.*, paras. 1057, 4667.

[5372] Trial Judgement, paras. 1226, 1440, 4713, 5226.

[5373] *See* Trial Judgement, para. 4630. *See also ibid.*, paras. 4322, 4340, 4368, 4663.

[5374] Trial Judgement, para. 4630. *See also ibid.*, para. 4385.

officials present, the order of the speakers, and the content of the speeches.[5375] Significantly, the Trial Chamber found that their testimonies as to the content and meaning of the utterances made during the ceremony were corroborated by several other witnesses.[5376] The Appeals Chamber is therefore satisfied that the Trial Chamber exercised sufficient caution when considering the possible motivations of the witnesses to implicate Nteziryayo as well as the content of their evidence concerning Ndayambaje's Swearing-In Ceremony.

2327. Turning to Nteziryayo's contention that additional caution was warranted with respect to Witness RV as he had lied in previous statements to improve his position, the Appeals Chamber observes that Witness RV acknowledged that he had not been entirely truthful during an interview with a judicial police inspector in order to avoid charges.[5377] The witness explained that, at that time in 1997, he "had not yet decided to tell the whole truth about the events that had occurred."[5378] However, the witness explained that his subsequent recorded statements, including his 2001 confession, contained the truth.[5379] The Appeals Chamber is not persuaded that these circumstances precluded a reasonable trier of fact from relying on Witness RV's evidence. Likewise, the Appeals Chamber does not consider Witness RV's acknowledgement that he had to denounce co-perpetrators as part of his confession as indicative of the fact that the information he provided was untruthful, particularly when testifying before the Tribunal about Nteziryayo.[5380]

2328. Concerning Nteziryayo's contention that Witness QAF's bail depended upon the substance of his evidence, the Appeals Chamber observes that nothing in Witness QAF's testimony suggests that the substance of his evidence before the Tribunal may have had an impact on his bail in Rwanda.[5381] Similarly, Nteziryayo's references do not support his argument that Witness FAG had lied in his prior testimony before the Trial Chamber.[5382] In addition, the Trial Chamber assessed variances in Witness FAG's initial and subsequent testimony as it related to crimes in which he participated in 1994.[5383] With respect to Witness TO, as mentioned above, the Trial Chamber acknowledged that the witness was imprisoned during Ndayambaje's first tenure as *bourgmestre* and his possible motive to seek revenge against Ndayambaje on this basis.[5384]

[5375] *See* Trial Judgement, paras. 4589-4593, 4596, 4610-4617.
[5376] *See* Trial Judgement, paras. 4622-4628.
[5377] *See* Witness RV, T. 18 February 2004 pp. 12-16 (closed session), T. 19 February 2004 p. 28 (closed session).
[5378] Witness RV, T. 18 February 2004 p. 15 (closed session). *See also* Witness RV, T. 19 February 2004 p. 28 (closed session).
[5379] Witness RV, T. 18 February 2004 p. 15, T. 19 February 2004 p. 43 (closed session).
[5380] Witness RV, T. 19 February 2004 p. 43 (closed session).
[5381] *See* Witness QAF, T. 6 February 2004 p. 28 (closed session).
[5382] *Compare* Witness FAG, T. 1 March 2004 p. 10 (closed session) *with* Witness FAG, T. 6 September 2004 p. 10 (closed session). *See also* Nteziryayo Appeal Brief, para. 255, fn. 332.
[5383] Trial Judgement, para. 4334.
[5384] Trial Judgement, para. 4630. *See also ibid.*, para. 4385. Ndayambaje served as *bourgmestre* of Muganza Commune from 10 January 1983 to October 1992 and from 18 June 1994 to 7 July 1994. *See supra*, para. 7.

The Appeals Chamber considers that these factors did not require the Trial Chamber to treat this witness's evidence with additional caution as it related to Nteziryayo.

2329. Finally, the Appeals Chamber is not persuaded that, as a rule, no reasonable trier of fact could have accepted evidence from Prosecution witnesses notwithstanding "largely consistent" Defence evidence to the contrary. The Appeals Chamber will address Nteziryayo's specific contentions in this regard below.

2330. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber failed to exercise sufficient caution with respect to Prosecution witnesses.

(c) Nteziryayo's Words and Order of Speeches

2331. Nteziryayo submits that the Trial Chamber erred in concluding that he incited the population to commit genocide at Ndayambaje's Swearing-In Ceremony.[5385] He argues that the Trial Chamber made contradictory findings concerning which statements were made by him.[5386] He contends that the Trial Chamber's uncertainty as to what he said and whether he spoke before or after Ndayambaje undermines its conclusion that he possessed the requisite *mens rea* and committed the *actus reus* of direct and public incitement to commit genocide.[5387]

2332. Nteziryayo further argues that the Prosecution evidence about the speeches is so inconsistent that no reasonable trier of fact could have convicted him based on it.[5388] He submits that the evidence varied as to whether he, Ndayambaje, or both gave speeches and that "[n]one of the eight Prosecution witnesses relied upon testified that both Ndayambaje and Nteziryayo uttered all three elements of the speech (sweep the dirt, continue with work, [and] kill those hiding Tutsis)."[5389] He also points out that the witnesses' testimonies varied as to whether he used plain language, metaphors, or both, and argues that the Trial Chamber could not discount these differences based on passage of time because the witnesses did not say that they could not remember.[5390] Specifically, Nteziryayo notes that Witness RV recounted that Ndayambaje spoke about sweeping dirt and did not recall Nteziryayo inciting violence.[5391] He also highlights that the testimonies include references to "separating the wheat from the chaff", "snakes and eggs", "orders to destroy houses; rats; and

[5385] Nteziryayo Notice of Appeal, para. 37. *See also* Nteziryayo Appeal Brief, para. 105.
[5386] Nteziryayo Appeal Brief, paras. 105-108, *referring, in particular, to* Trial Judgement, paras. 4632, 4642, 4645. *See also ibid.*, para. 99; Nteziryayo Reply Brief, para. 38; AT. 17 April 2015 p. 15.
[5387] Nteziryayo Appeal Brief, para. 107(b). *See also* Nteziryayo Reply Brief, paras. 39-41.
[5388] Nteziryayo Appeal Brief, paras. 99, 109-111. *See also ibid.*, paras. 162-164.
[5389] Nteziryayo Appeal Brief, paras. 98, 99, 108, 109. *See also* Nteziryayo Reply Brief, para. 42.
[5390] Nteziryayo Appeal Brief, para. 111. Nteziryayo notes that Witness FAL testified that his memory was refreshed during the *Gacaca* proceedings, further undermining the Trial Chamber's reasoning. *See idem.*
[5391] Nteziryayo Appeal Brief, para. 110. *See also* Nteziryayo Reply Brief, para. 43.

lice", which vary from the Trial Chamber's conclusion.[5392] In his view, inconsistencies as to whether he or Ndayambaje spoke first reflect that the witnesses did not attend the same meeting.[5393]

2333. The Prosecution responds that Nteziryayo mistakes the Trial Chamber's summary of evidence and its findings and that the elements of direct and public incitement to commit genocide were established as the Trial Chamber found that both he and Ndayambaje participated in the material elements of the crime.[5394] It argues that Nteziryayo does not demonstrate that the Trial Chamber erred in its assessment of the variances in the witnesses' accounts of the ceremony.[5395]

2334. The Appeals Chamber does not find that the Trial Chamber reached contradictory findings in paragraphs 4632, 4642, and 4645 of the Trial Judgement as alleged by Nteziryayo. Paragraph 4632 presents a summary of "countervailing and consistent" Prosecution evidence as to whether Nteziryayo or Ndayambaje or both incited the population, which the Trial Chamber had set forth in detail in preceding paragraphs.[5396] On the contrary, paragraphs 4642 and 4645 reflect the Trial Chamber's factual findings "established beyond a reasonable doubt" based on its assessment of the totality of the evidence.

2335. The Appeals Chamber is also not persuaded that the Trial Judgement evinces uncertainty as to whether Nteziryayo's conduct satisfied the *actus reus* and *mens rea* for direct and public incitement to commit genocide. The Appeals Chamber observes that, in the "Legal Findings" section of the Trial Judgement, the Trial Chamber repeated its factual findings that "Nteziryayo and Ndayambaje told the population to continue with their 'work' and urged them to 'sweep the dirt outside'".[5397] It also recalled that the "audience understood the words of both Accused, namely 'to work' and 'sweeping dirt', to mean they needed to kill Tutsis."[5398] The Trial Chamber then considered these findings with respect to the *mens rea* and *actus reus* for direct and public incitement to commit genocide, determining that Nteziryayo's and Ndayambaje's words at Ndayambaje's Swearing-In Ceremony "were direct incitements to commit genocide", that they

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[5392] Nteziryayo Appeal Brief, para. 109.
[5393] Nteziryayo Appeal Brief, paras. 135, 136.
[5394] Prosecution Response Brief, paras. 1474, 1475, 1479, 1480. *See also* AT. 17 April 2015 pp. 28, 29.
[5395] Prosecution Response Brief, paras. 1477, 1478. *See also ibid.*, para. 1509; AT. 17 April 2015 p. 28.
[5396] *See* Trial Judgement, paras. 4622-4628. Paragraph 4632 of the Trial Judgement reads as follows:

> The Chamber considers the differences in the testimony of the eight Prosecution witnesses as to the content of Ndayambaje and Nteziryayo's speeches can be explained by virtue of these variable factors and for this reasons [*sic*] considers that these particular discrepancies are not significant. The Chamber is strengthened i[n] its view having regard to the countervailing and consistent evidence of the Prosecution witnesses that either Nteziryayo or Ndayambaje or both incited the population by means of parables principally relating to the sweeping of dirt, as well as plain speech. [...]

[5397] Trial Judgement, para. 6026.
[5398] Trial Judgement, para. 6027.

were made "publicly", that Nteziryayo and Ndayambaje possessed genocidal intent, and that "they intended to incite the population to commit genocide."[5399]

2336. Consequently, the Trial Chamber concluded "that in urging the population 'to work' and 'to sweep dirt outside' at Ndayambaje's swearing in ceremony, Nteziryayo and Ndayambaje are criminally responsible, pursuant to Article 6 (1) of the Statute, for inciting the population to cause the death and serious bodily and mental harm of Tutsi refugees in Butare."[5400] In this regard, any ambiguity within the Trial Chamber's conclusions as to the order in which Nteziryayo and Ndayambaje made their inciting remarks is immaterial to the determination of Nteziryayo's criminal responsibility. The evidence relied upon by the Trial Chamber reflects that Nteziryayo and Ndayambaje presented a uniform message of direct incitement to the population to commit genocide.[5401]

2337. Turning to Nteziryayo's contention that the Prosecution evidence varies as to whether he, Ndayambaje, or both gave speeches and that none testified that both he and Ndayambaje uttered "sweep the dirt, continue with work, [and] kill those hiding Tutsis", the Appeals Chamber observes that the Trial Chamber recalled that Witnesses FAG and FAL testified that "Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside",[5402] and that Witness FAU gave corroborative evidence to this effect.[5403] The Trial Chamber also noted contrasting evidence from Witnesses TO and TP that only Nteziryayo used the metaphor concerning sweeping dirt,[5404] while Witnesses QAF and RV testified that only Ndayambaje used this metaphor and that Witness QAL provided hearsay corroboration of the evidence of Witnesses QAF and RV.[5405]

2338. In addition, the Trial Chamber recounted that, according to Witnesses FAG, FAL, and TO, Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed, that Witness TP had a similar understanding of the metaphor, as uttered by Nteziryayo, and that Witnesses QAF and RV understood the speech of Ndayambaje in the same way.[5406] The Trial Chamber also considered evidence from Witnesses QAF and TP concerning Nteziryayo and Ndayambaje thanking the population for their "work", which meant "to kill", and urging them

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[5399] Trial Judgement, paras. 6027, 6028.
[5400] Trial Judgement, para. 6029.
[5401] The Appeals Chamber finds Nteziryayo's reference to the *Mugenzi and Mugiraneza* Appeal Judgement unpersuasive in this respect. *See* Nteziryayo Appeal Brief, para. 107(b), *referring to Mugenzi and Mugiraneza* Appeal Judgement, para. 136.
[5402] *See* Trial Judgement, para. 4622. *See also ibid.*, paras. 4327, 4328, 4345.
[5403] *See* Trial Judgement, para. 4622. *See also ibid.*, paras. 4400, 4401.
[5404] *See* Trial Judgement, para. 4623. *See also ibid.*, paras. 4378, 4391.
[5405] *See* Trial Judgement, para. 4623. *See also ibid.*, paras. 4363, 4372, 4426.
[5406] *See* Trial Judgement, paras. 4627, 4628. *See also ibid.*, paras. 4327, 4328, 4345, 4363, 4372, 4378, 4382, 4391.

to continue[5407] as well as Nteziryayo threatening to kill those who were protecting and refusing to give up Tutsis.[5408]

2339. Accordingly, the Appeals Chamber is satisfied that the Trial Chamber fully considered contrasting Prosecution evidence regarding who spoke and the content of the speeches given by Ndayambaje and Nteziryayo. The Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer[5409] and that two *prima facie* credible testimonies need not be identical in all respects in order to be corroborative.[5410] In light of all the evidence reflecting that the purpose of the speeches was to incite the population to commit genocide, Nteziryayo does not demonstrate that a reasonable trier of fact could not have relied on the elements within the Prosecution evidence demonstrating that both he and Ndayambaje urged the population to "sweep the dirt" and to "work".[5411]

2340. The Appeals Chamber is also not persuaded that the Trial Chamber was precluded from finding that Nteziryayo also made an inciting speech given Witness RV's evidence that he could not recall what Nteziryayo said or if he was present for the entirety of Nteziryayo's speech.[5412] Nteziryayo does not demonstrate that Witness RV's evidence was incompatible with other evidence reflecting that Nteziryayo made inciting remarks.

2341. With respect to Nteziryayo's submissions that the Prosecution evidence was materially inconsistent as to the content of the speeches and did not support the Trial Chamber's conclusions as to what was said, the Appeals Chamber observes that the Trial Chamber considered Witness TP's evidence that Nteziryayo spoke about the need to destroy snake's eggs, which no other witness testified about.[5413] The Trial Chamber also set forth Witness QAL's testimony regarding Ndayambaje mentioning separating the wheat from the chaff, as well as Witness TO's evidence that Nteziryayo spoke about lice growing from the dirt, and Witness FAL's testimony concerning Ndayambaje speaking about destroying the houses where Tutsis were hiding.[5414]

[5407] *See* Trial Judgement, para. 4626. *See also ibid.*, para. 4624.
[5408] *See* Trial Judgement, para. 4624. *See also ibid.*, paras. 4360, 4391.
[5409] *Nizeyimana* Appeal Judgement, para. 254; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44. *See also Muhimana* Appeal Judgement, para. 58.
[5410] *See Nzabonimana* Appeal Judgement, para. 184; *Ndahimana* Appeal Judgement, para. 93; *Ntabakuze* Appeal Judgement, para. 150. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Nahimana et al.* Appeal Judgement, para. 428.
[5411] The Appeals Chamber observes that Nteziryayo also challenges the sufficiency of the evidence supporting the Trial Chamber's conclusion that he and Ndayambaje "instructed that those hiding Tutsis who refused to hand them over should be killed." *See* Nteziryayo Appeal Brief, paras. 98, 99, 108. As this finding was not a basis for Nteziryayo's conviction, the Appeals Chamber does not find it necessary to assess this challenge in detail. *See* Trial Judgement, paras. 6026-6029. In any event, Nteziryayo has not shown that the inconsistencies as they relate to the evidence supporting this conclusion demonstrate that the Trial Chamber abused its discretion.
[5412] *See* Trial Judgement, para. 4371. *See also* Witness RV, T. 17 February 2004 p. 7 (closed session).
[5413] *See* Trial Judgement, para. 4623. *See also ibid.*, para. 4391.
[5414] *See* Trial Judgement, paras. 4345, 4378, 4425.

Accordingly, the Appeals Chamber finds that the Trial Chamber did not ignore the differences in the Prosecution evidence as to the content of the speeches. The Appeals Chamber also finds that a reasonable trier of fact could have determined that these differences did not preclude it from finding that these witnesses were nonetheless talking about Ndayambaje's Swearing-In Ceremony where both Nteziryayo and Ndayambaje made inciting speeches by employing the metaphors concerning "sweeping the dirt" and "work".[5415]

2342. Moreover, while the Trial Chamber did not expressly recount Witness FAU's evidence related to Ndayambaje speaking about killing rats, Nteziryayo does not demonstrate that this aspect of the witness's evidence was materially inconsistent with other evidence on the record so as to preclude a reasonable trier of fact from relying on corroborated elements of Witness FAU's evidence concerning the content of the speeches.[5416]

2343. The Appeals Chamber further considers that Nteziryayo merely disagrees with the Trial Chamber's conclusion that the variances as to the content of the speeches in the witnesses' accounts could be attributable, *inter alia*, to the passage of time and the deterioration of human memory without demonstrating that it was unreasonable for the Trial Chamber to reach this conclusion.[5417] The Trial Judgement reveals that the Trial Chamber relied on other considerations to reach its conclusion, such as the level of education of the witnesses, the late arrival of certain witnesses, their position at the venue of the meeting, and the quality of the megaphone or clarity of the speakers.[5418]

2344. Finally, as regards Nteziryayo's contention that variances in the Prosecution evidence as to the order of the speeches given by him and Ndayambaje show that they did not attend the ceremony, the Appeals Chamber observes that the Trial Chamber noted that Witnesses TP and QAL testified that Nteziryayo took the floor after Ndayambaje, in contrast with evidence of the other witnesses.[5419] The Trial Chamber, however, did not regard the discrepancy as to the order of speakers as significant.[5420] Nteziryayo simply disagrees with this conclusion, without demonstrating how discrepancies in this respect undermined the Trial Chamber's determination that all witnesses were testifying about Ndayambaje's Swearing-In Ceremony.

2345. In light of the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred its assessment of the content or the order of the speeches at Ndayambaje's Swearing-In Ceremony.

[5415] *See* Trial Judgement, paras. 4645, 6026, 6027, 6029.
[5416] *See* Trial Judgement, paras. 4622, 4624.
[5417] *See* Trial Judgement, para. 4631.
[5418] *See* Trial Judgement, para. 4631.
[5419] *See* Trial Judgement, para. 4610.
[5420] Trial Judgement, para. 4611.

(d) Date

2346. Nteziryayo argues that it was illogical for the Trial Chamber to conclude that discrepancies as to the date of Ndayambaje's Swearing-In Ceremony were "minor and understandable", yet subsequently conclude that the date was a "significant feature".[5421] He further contends that the Trial Chamber erred in finding that Witnesses FAL and TP "testified to attending the meeting on or around 22 June 1994."[5422]

2347. Nteziryayo also argues that the Trial Chamber failed to sufficiently consider evidence from Witnesses FAG, FAL, FAU, QAL, TO, and TP that suggests that they testified about different meetings which occurred before Ndayambaje's Swearing-In Ceremony on 22 June 1994.[5423] Specifically, Nteziryayo points out that: (i) Witness FAU testified that the meeting he attended occurred "in late May, early June", on the day before the killing of a Tutsi girl named Nambaje, which the witness estimated occurred around 24 May 1994 and who Defence Witness KWEPO testified was killed in May 1994; (ii) Witness FAL testified about a meeting in "May or June 1994", yet linked it to destroying houses and committing murders that, according to his testimony and prior written confession, occurred in late April and early May 1994; (iii) Witness QAL gave evidence that the meeting occurred the day prior to the morning in May 1994 in which her husband was killed; (iv) Witness FAG testified that a girl named Josepha was killed as a result of the meeting and testified that this murder occurred in May 1994; (v) Witness TP testified that the only meeting attended by Ndayambaje and Nteziryayo occurred at the end of April or early May 1994 and long before a subsequent meeting she attended around 28 June 1994; and (vi) Witness TO's prior statement to Tribunal investigators reflects that the meeting attended by Nteziryayo occurred by the beginning of May 1994.[5424]

2348. The Prosecution responds that Nteziryayo misinterprets the evidence as to the date of the meeting, which contained mere approximations.[5425]

2349. Turning first to Nteziryayo's contention that the Trial Chamber's findings about the date of the swearing-in ceremony are illogical, the Appeals Chamber observes that the Trial Chamber found it "minor" and "understandable" that discrepancies within Prosecution evidence as to the

[5421] Nteziryayo Appeal Brief, para. 115 (emphasis omitted), *referring to* Trial Judgement, paras. 4592, 4616. *See also* AT. 17 April 2015 pp. 13, 14.
[5422] Nteziryayo Appeal Brief, para. 116 (emphasis omitted), *referring to* Trial Judgement, para. 4591. *See also ibid.*, paras. 123, 130.
[5423] Nteziryayo Appeal Brief, paras. 117-133.
[5424] Nteziryayo Appeal Brief, paras. 118, 119, 123, 124, 127-132(a). *See also* Nteziryayo Reply Brief, paras. 45-66; AT. 17 April 2015 pp. 14, 15. In his reply brief, Nteziryayo argues that "[w]hen viewed holistically the cumulative effect of the vastly disparate body of Prosecution evidence is incompatible". *See* Nteziryayo Reply Brief, para. 61.

precise date of the ceremony existed "in light of the time which had passed between the events in question and the time the witnesses testified".[5426] The Trial Chamber later considered, when examining differences between Prosecution and Defence evidence as to what time of the day the meeting occurred,[5427] that this difference was not important in light of other consistencies on "significant features" of the meeting, which included the date of 22 June 1994.[5428]

2350. The Appeals Chamber finds that, when reading the Trial Chamber's deliberations as a whole, it is apparent that the Trial Chamber accepted the consistent Defence evidence that Ndayambaje's Swearing-In Ceremony occurred on 22 June 1994.[5429] The Trial Chamber noted that the Prosecution evidence varied as to the date, but ultimately determined that other fundamental features shared among the Prosecution and Defence evidence – including that the event was the swearing-in ceremony of Ndayambaje, that the meeting was held in the woods near the Muganza commune office, and that Ndayambaje and Nteziryayo spoke – indicated that all were discussing the same event.[5430] Nteziryayo disagrees with the Trial Chamber's determination, yet as discussed below, fails to demonstrate that the Prosecution evidence regarding the date of the swearing-in ceremony was incompatible with the finding that it occurred on 22 June 1994.

2351. As regards Nteziryayo's argument that the Trial Chamber erred in finding that Witnesses FAL and TP testified to attending the meeting on or around 22 June 1994, the Appeals Chamber agrees that the testimonies of Witnesses FAL and TP cannot reasonably be interpreted, alongside Witness QAF's evidence, to support the conclusion that Ndayambaje's Swearing-In Ceremony occurred specifically "on or around 22 June 1994".[5431] The Trial Chamber appears to have overlooked material aspects of each witness's evidence that reveal their uncertainty as to when the meetings they described had occurred.[5432] The Appeals Chamber finds that no reasonable trier of fact could have relied on the evidence of Witnesses FAL and TP alone to find that Ndayambaje's

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[5425] Prosecution Response Brief, paras. 1485, 1488, 1490, 1491, 1495, 1499, 1501, 1505, 1506. *See also* AT. 17 April 2015 p. 29.
[5426] Trial Judgement, para. 4592.
[5427] Trial Judgement, paras. 4614-4616.
[5428] Trial Judgement, para. 4616.
[5429] *See* Trial Judgement, paras. 4614, 4617, 4642, 4645.
[5430] Trial Judgement, para. 4616. *See also ibid.*, paras. 4592, 4593, 4594, 4609.
[5431] Indeed, the transcripts of Witness FAL's testimony referred to by the Trial Chamber only contain counsel's suggestion that the incident occurred within a two month timeframe and Witness FAL did not expressly accept this suggestion or provide any clarification. The evidence of Witness TP provides no indication as to when the meeting occurred. *See* Trial Judgement, paras. 4340, 4386, 4591, *referring to* Witness FAL, T. 9 February 2004 p. 37, Witness TP, T. 12 February 2004 p. 38. *See also* Witness TP, T. 12 February 2004 p. 33.
[5432] *See* Trial Judgement, paras. 4340 ("Witness FAL [...] testified that in May or June 1994 the population was summoned to a security meeting held in a little bush near the Muganza *commune* office".), 4386 ("Witness TP [...] testified that while she was hiding at her uncle's house, she attended a meeting at the Muganza *commune* office around 26 or 28 June 1994. On cross-examination, she stated she was not sure of the date because she was hiding in the bush; the meeting involving the *préfet* and Ndayambaje may have occurred in early May, and another meeting she referred to in her witness statement called solely by Ndayambaje may have occurred on 28 June 1994."). *See also* Witness FAL, T. 9 February 2004 p. 37; Witness TP, T. 11 February 2004 p. 25, T. 12 February 2004 pp. 33 and 36 (closed session).

Swearing-In Ceremony occurred specifically "on or around 22 June 1994" considering the ambiguity in their evidence as to its precise date.[5433] However, the Appeals Chamber does not find that this error has occasioned a miscarriage of justice given other features that the Trial Chamber relied upon to find that Witnesses FAL and TP were discussing this event.[5434]

2352. Concerning Nteziryayo's argument that the Trial Chamber failed to sufficiently consider evidence from Witnesses FAG, FAL, FAU, QAL, TO, and TP that suggest that they testified about a different meeting, the Appeals Chamber observes that the Trial Chamber expressly noted aspects of these witnesses' testimonies reflecting their inability to provide a precise date of the ceremony.[5435] Even accepting that the witnesses provided evidence to suggest that the ceremony they attended could have happened as early as late April, May, or early June 1994, the Appeals Chamber is not convinced that the discrepancies concerning the date of the meeting rendered their evidence unreliable given other significant features within their accounts reflecting that they were discussing the same event. Specifically, as noted by the Trial Chamber, the witnesses identified this meeting as involving the installation of Ndayambaje as the *bourgmestre* of Muganza Commune[5436] or testified that this was the only meeting in Muganza Commune which Nteziryayo and Ndayambaje attended together.[5437]

2353. Furthermore, the Appeals Chamber is not persuaded by Nteziryayo's argument that Witnesses FAG, FAL, FAU, QAL, TO, and TP were testifying about a different meeting because they associated it with particular events that, according to their evidence, occurred well before 22 June 1994. With respect to Witness FAU, who testified that Nambaje was abducted after the swearing-in ceremony, Nteziryayo's submissions ignore that the witness's testimony as to when Nambaje was taken away was only an estimate.[5438] Moreover, the Trial Chamber accepted Witness FAU's evidence that Nambaje was killed after the swearing-in ceremony and rejected Witness KWEPO's contradictory evidence.[5439] Nteziryayo does not demonstrate that the Trial Chamber erred in this regard.

[5433] Trial Judgement, para. 4591.
[5434] In particular, both Witnesses FAL and TP observed the appointment of Ndayambaje as *bourgmestre* at the meeting, were consistent about the meeting taking place in the morning in the small woods near the Muganza commune office, and recounted that Prefect Nteziryayo and *Bourgmestre* Ndayambaje were present. *See* Trial Judgement, paras. 4592, 4593. *See also ibid.*, paras. 4340, 4342, 4343, 4386-4388.
[5435] *See* Trial Judgement, paras. 4322, 4323, 4333, 4338, 4340, 4374, 4375, 4386, 4422, 4590, 4594, 4595, 4620.
[5436] *See* Trial Judgement, paras. 4322, 4323, 4342, 4343, 4374, 4387, 4388, 4590.
[5437] *See* Trial Judgement, paras. 4323, 4342, 4374, 4386, 4387, 4398, 4399, 4422.
[5438] *See* Trial Judgement, para. 4397.
[5439] Trial Judgement, para. 4620. The Appeals Chamber finds that, beyond highlighting that Witness FAU's evidence was hearsay as well as asserting that the Trial Chamber did not accord sufficient weight to inconsistencies between his prior statement and testimony, Nteziryayo fails to demonstrate any error in the Trial Chamber's assessment of the witness's evidence. Consequently, the Appeals Chamber dismisses his submissions in this respect without further consideration.

2354. In addition, Nteziryayo's contention based on Witness FAL's prior statement and confession that the witness participated in looting and murders in late April and early May 1994 fails to appreciate that the witness testified that he did not participate in murders after Ndayambaje's Swearing-In Ceremony.[5440] The witness also confirmed at trial that he participated in the destruction of houses resulting from orders that were given during that ceremony.[5441] Nteziryayo does not demonstrate that this is materially inconsistent with Witness FAL's prior statement or confession.

2355. With respect to Witnesses FAG and QAL, their evidence is unequivocal that the murder of Witness QAL's husband and a person named Josepha, respectively, occurred after the swearing-in ceremony.[5442] In light of the inability of Witnesses FAG and QAL to provide precise dates,[5443] Nteziryayo does not show that no reasonable trier of fact could have accepted this evidence, even though the witnesses gave evidence that the ceremony and these events occurred in May 1994.

2356. As for Witness TP, Nteziryayo only suggests a possible interpretation of the witness's evidence that the meeting she attended did not occur around 22 June 1994. As noted above, given that Witness TP could only provide estimates for the date of the meeting, the Appeals Chamber finds that a reasonable trier of fact could have determined that she attended Ndayambaje's Swearing-In Ceremony in light of her testimony that she observed Ndayambaje's reappointment as the *bourgmestre* of Muganza Commune and that Ndayambaje and Nteziryayo gave speeches during the event.[5444]

2357. Regarding Witness TO, while Nteziryayo points to his prior statement – which reflects that the meeting attended by Nteziryayo occurred at the beginning of May 1994 – the Trial Chamber expressly noted this aspect of the statement and that the witness testified that Ndayambaje was reappointed *bourgmestre* of Muganza Commune by Prefect Nteziryayo in June 1994.[5445] It also noted that the witness explained that he was not in a position to provide exact dates, since this was of little concern to him.[5446] Nteziryayo does not demonstrate that a reasonable trier of fact could not

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[5440] *See* Witness FAL, T. 9 February 2004 pp. 48 (closed session), 60-64.
[5441] *See* Witness FAL, T. 9 February 2004 pp. 61-64.
[5442] *See* Trial Judgement, paras. 4333, 4431. *See also* Witness QAL, T. 25 February 2004 p. 12; Witness FAG, T. 1 March 2004 p. 34.
[5443] *See* Witness FAG, T. 6 September 2004 pp. 8, 9 (closed session); Witness QAL, T. 25 February 2004 p. 25 (closed session).
[5444] *See* Trial Judgement, paras. 4390-4392, 4592, 4623-4625.
[5445] *See* Trial Judgement, paras. 4374, 4375.
[5446] *See* Trial Judgement, para. 4375. In light of the witness's explanation concerning his inability to provide exact dates, the Appeals Chamber finds that Nteziryayo's contentions concerning the error in time as it concerns the second meeting the witness attended also do not demonstrate that a reasonable trier of fact could not have relied on Witness TO's evidence concerning Ndayambaje's Swearing-In Ceremony. *See* Nteziryayo Appeal Brief, para. 132 (b).

have concluded that the witness recounted Ndayambaje's Swearing-In Ceremony in light of this explanation.

2358. The Appeals Chamber therefore finds that Nteziryayo has not shown that the Trial Chamber erred in assessing Prosecution evidence in light of variations as to the date of the ceremony.

(e) Attendees

2359. Nteziryayo submits that the Trial Chamber erred in finding that the variances in the Prosecution evidence about the attendees at the ceremony were not significant.[5447] As an example, he points to evidence of Witnesses QAF and QAL that indicate that Defence Witness Constant Julius Goetschalckx a.k.a. Brother Stan ("Stan"), a "Caucasian Belgian Priest", was among the dignitaries at the ceremony and was introduced to the crowd, and notes that other Prosecution witnesses were unsure or denied that Witness Stan was present.[5448] He contends that these variances demonstrate that the witnesses lied or that their testimonies relate to a different meeting.[5449] Nteziryayo also highlights inconsistencies in the Prosecution evidence concerning the presence of Callixte Kalimanzira ("Kalimanzira"), Nyiramasuhuko, Chrysologue Bimenyimana ("Bimenyimana"), and Augustin Sebukeye ("Sebukeye") as demonstrating "further incoherency".[5450]

2360. The Prosecution responds that the Trial Chamber considered inconsistencies as to the dignitaries present at the meeting and correctly held that they did not undermine the Prosecution evidence.[5451] It suggests that, given the size of the event, it is understandable that witnesses did not recognise or recall other individuals who may have been present.[5452]

2361. The Appeals Chamber observes that, when assessing Defence evidence, the Trial Chamber observed that "several Defence witnesses testified to the presence of Brother Stan" and noted that this "was corroborated by Prosecution Witnesses QAF, QAL and TO."[5453] The Trial Chamber not only considered the evidence of Witnesses QAF and QAL, which Nteziryayo highlights, but also that of Witness TO.[5454] Furthermore, the Trial Chamber noted the evidence of Witness FAL that

[5447] Nteziryayo Notice of Appeal, para. 38(c).
[5448] Nteziryayo Appeal Brief, paras. 137, 138. *See also ibid.*, paras. 145(d),148(d).
[5449] Nteziryayo Appeal Brief, para. 138. *See also* Nteziryayo Reply Brief, para. 64; AT. 17 April 2015 p. 13.
[5450] Nteziryayo Appeal Brief, paras. 137-139. *See also ibid.*, para. 145(a).
[5451] Prosecution Response Brief, paras. 1509, 1510.
[5452] Prosecution Response Brief, para. 1510.
[5453] Trial Judgement, para. 4609.
[5454] Trial Judgement, para. 4609, *referring, inter alia, to* Witness QAF, T. 5 February 2004 pp. 66, 68, T. 6 February 2004 pp. 5, 8, T. 9 February 2004 p. 23, Witness QAL, T. 25 February 2004 p. 11, Witness TO, T. 6 March 2002 pp. 10, 11.

"[h]e did not know whether a white religious person was present"[5455] and of Witness TP that she did not hear a reference to "any religious person".[5456] While the Trial Chamber did not expressly summarise Witness FAG's testimony that it was possible that a white person was present but that he did not try to ascertain this fact,[5457] the Trial Chamber noted the relevant portion of Witness FAG's evidence.[5458] Having reviewed the relevant evidence,[5459] the Appeals Chamber is not persuaded that ambiguous Prosecution evidence as to whether Witness Stan was present at the ceremony, even in light of the evidence of Witnesses QAF and QAL that Witness Stan was referred to in speeches,[5460] prevented a reasonable trier of fact from finding that all the Prosecution witnesses recounted Ndayambaje's Swearing-In Ceremony.[5461]

2362. Turning to Nteziryayo's argument that there was "further incoherency" about the attendance of Kalimanzira, Nyiramasuhuko, Bimenyimana, and Sebukeye, the Appeals Chamber observes that the Trial Chamber expressly considered that Defence evidence diverged from some Prosecution evidence as to the presence of, among others, Kalimanzira and Nyiramasuhuko during the swearing-in ceremony.[5462] The Trial Chamber determined that it need not make findings as to Kalimanzira's presence and found that any discrepancy in this regard was not significant.[5463] Nteziryayo fails to demonstrate that the Trial Chamber's assessment of the evidence on this issue was unreasonable.

2363. The Trial Chamber noted that Witness RV was the sole witness to testify to the presence of Nyiramasuhuko and that Ndayambaje, Nteziryayo, and other Defence witnesses contradicted this

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[5455] *See* Trial Judgement, para. 4349, *referring to* Witness FAL, T. 9 February 2004 p. 60.
[5456] Trial Judgement, para. 4393, *referring to* Witness TP, T. 12 February 2004 pp. 44, 45.
[5457] *See* Witness FAG, T. 3 March 2004 p. 24.
[5458] *See* Trial Judgement, para. 4326, *referring to* Witness FAG, T. 3 March 2004 p. 24.
[5459] *See* Witness FAL, T. 9 February 2004 p. 60 ("Q. Was there among the dignitaries, or at the table of the dignitaries, a white person? A. I don't remember. There were a lot of people. I couldn't tell you whether there was a white person among them. Q. No, I am speaking of the table where the dignitaries were, I am not speaking of the multitude, the crowd. I am sure the whites were not in the majority in Muganza *commune* at the time. Did you see any whites? A. I don't remember."); Witness TP, T. 12 February 2004 p. 45 ("Q. At the meeting, was there, either among the officials or in the crowd, a white man, a white person? A. No, I didn't see anything. Q. Did either of the two speakers mention anything about a curate, a religious person? A. No, I didn't hear any mention of that. Maybe that was a question asked after my departure."); Witness FAG, T. 3 March 2004 p. 24 ("Q. Witness FAG, were there any white persons there? A. I did not pay particular attention to ascertain whether among the participants there were white people. Q. The person I'm referring to would have been with the speakers. Would that person have been with the speakers? A. Are you referring to the person, the white person? I did not pay attention to that detail. It is possible that that person was there, but I didn't pay any attention. I did not notice it. Maybe I saw him but it is a long time ago, but I do not contradict the fact that the person might have been there.").
[5460] *See* Trial Judgement, paras. 4362, 4425.
[5461] In this regard, the Appeals Chamber observes that Nteziryayo also refers to the testimony of Witness QAR, arguing that he was among the witnesses who was "confident [that Witness Stan] was not at the meeting." *See* Nteziryayo Appeal Brief, para. 138, fn. 164, *referring to* Witness QAR, T. 21 November 2001 p. 90. However, the Trial Chamber considered "that Witness QAR did not attend" Ndayambaje's Swearing-In Ceremony. *See* Trial Judgement, para. 4603. Consequently, Witness QAR's evidence as to whether Witness Stan was at the meeting was irrelevant to the Trial Chamber's assessment.
[5462] *See* Trial Judgement, paras. 4610-4612.
[5463] Trial Judgement, para. 4611.

aspect of his evidence.[5464] However, it observed that Witness RV's evidence was consistent with Defence evidence as to the presence of certain other dignitaries and that all Defence witnesses testified to the presence of another female minister, whom the witness did not identify.[5465] In this context, the Trial Chamber rejected Witness RV's evidence as to Nyiramasuhuko's presence but found that this did "not weaken the credibility of [his] testimony with respect to more significant aspects of the swearing-in ceremony."[5466] Once again, Nteziryayo simply expresses his disagreement with this decision, ignoring that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[5467] Indeed, the Defence did not dispute that Witness RV was present at Ndayambaje's Swearing-In Ceremony.

2364. While the Trial Chamber did not expressly assess variances in the Prosecution evidence as to the presence of Bimenyimana, the *bourgmestre* of Muganza Commune being replaced by Ndayambaje, the Appeals Chamber observes that the Defence did not dispute that he was present at the meeting.[5468] Furthermore, three of the witnesses, whom Nteziryayo highlights, confirmed that Bimenyimana was present,[5469] while the remaining witnesses either simply recounted not knowing whether Bimenyimana was present,[5470] did not see him,[5471] or did not remember seeing him there.[5472] Likewise, while Witness FAL testified that Sebukeye was at the ceremony, Nteziryayo does not point to evidence on the record demonstrating that any variance in this regard rendered Witness FAL's testimony incompatible with the other Prosecution evidence.[5473] Nteziryayo does not demonstrate that these variances precluded a reasonable trier of fact from finding that these Prosecution witnesses were testifying about Ndayambaje's Swearing-In Ceremony.

2365. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in its assessment of the evidence about the attendees of Ndayambaje's Swearing-In Ceremony.

[5464] Trial Judgement, para. 4612.
[5465] Trial Judgement, para. 4612.
[5466] Trial Judgement, para. 4612.
[5467] *See, e.g., Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[5468] *See* Trial Judgement, paras. 4454, 4468, 4493, 4501, 4518, 4538, 4555, 4568.
[5469] *See* Nteziryayo Appeal Brief, fn. 166 (noting that Witnesses FAG, QAF, and RV confirmed that Bimenyimana was "present"). In his appeal brief, Nteziryayo mentions a fourth witness – Witness FAL – who allegedly confirmed that Bimenyimana was present. *See idem.* However, the Appeals Chamber notes that Witness FAL testified that he did not remember having seen Bimenyimana there. *See* Witness FAL, T. 9 February 2004 p. 60.
[5470] Witness TP, T. 12 February 2004 p. 41. The Appeals Chamber observes that the Trial Chamber referred to Witness TP's evidence in this regard. *See* Trial Judgement, para. 4389.
[5471] *See* Witness QAL, T. 25 February 2004 pp. 17, 18.
[5472] Witness FAL, T. 9 February 2004 p. 60.
[5473] *See* Witness FAL, T. 9 February 2004 pp. 62-64. *See also* Trial Judgement, para. 4350.

(f) Time

2366. Nteziryayo argues that the Trial Chamber erred in finding that the discrepancy between the Prosecution evidence of the ceremony occurring in the morning and the evidence of the eight Defence witnesses that it occurred no earlier than 2.30 p.m. was insignificant.[5474] He contends that the Prosecution evidence is implausible[5475] as consistent Defence evidence reflects that he attended the swearing-in of the new *bourgmestre* of Ndora Commune at 11.00 a.m. before attending Ndayambaje's Swearing-In Ceremony between 2.30 and 5.00 p.m.[5476] Nteziryayo adds that the Trial Chamber erred in finding that the timing of the meeting was not put to the Prosecution witnesses, pointing to excerpts from the cross-examinations of Witnesses FAL and TO.[5477]

2367. The Prosecution responds that the Trial Chamber considered the inconsistencies as to when the meeting occurred and emphasises that the Prosecution evidence was consistent that it happened in the morning.[5478]

2368. The Appeals Chamber notes that the Trial Chamber acknowledged that, "in contrast to all the Prosecution evidence, the Defence witnesses testified that the swearing-in ceremony took place in the afternoon of 22 June 1994".[5479] In particular, the Trial Chamber noted that the Prosecution witnesses testified between 2001 and 2004, while the Defence witnesses testified between 2007 and 2008.[5480] It also observed that it was never put to the Prosecution witnesses that they may be mistaken as to the timing of the swearing-in ceremony and that they never had the opportunity to refute the testimonies of the Defence witnesses that it occurred in the afternoon.[5481] The Trial Chamber ultimately concluded that it did not consider this discrepancy to be important given that the Prosecution and Defence witnesses were consistent on the significant features of the meeting, including that it was the swearing-in ceremony of Ndayambaje, that it took place on or around

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[5474] Nteziryayo Notice of Appeal, para. 38(e); Nteziryayo Appeal Brief, paras. 140, 142, *referring to* Trial Judgement, para. 4616.
[5475] In particular, Nteziryayo juxtaposes the testimony of Witness TP that when she arrived to the meeting at 9.30 a.m. the prefect was already present with "a compelling body of evidence" that Nteziryayo was in Ndora Commune. *See* Nteziryayo Appeal Brief, para. 148(a). Nteziryayo also highlights the evidence of Witness FAU that, according to him, reflects that the meeting finished at 5.00 p.m. because a girl named Nambaje was abducted between 5.30 and 6.00 p.m. on the day of the meeting. *See ibid.*, para. 149. *See also* Nteziryayo Reply Brief, para. 62.
[5476] Nteziryayo Appeal Brief, paras. 140, 141. In addition, Nteziryayo highlights that the Prosecution had sought to establish his presence at a meeting in Ndora Commune on the morning of Ndayambaje's Swearing-In Ceremony and that Prosecution Witness QG testified that the swearing-in ceremony in Ndora Commune occurred in the afternoon of 22 June 1994. *See ibid.*, para. 141, *referring to* Prosecution Closing Brief, p. 335, Witness QG, T. 16 March 2004 pp. 75-77 (closed session). *See also* Nteziryayo Reply Brief, para. 62.
[5477] Nteziryayo Appeal Brief, para. 143, *referring to* Witness TO, T. 5 March 2002 pp. 113, 114, Witness FAL, T. 9 February 2004 p. 56.
[5478] Prosecution Response Brief, paras. 1509, 1511.
[5479] Trial Judgement, para. 4614. In this respect, the Trial Chamber cited to and summarised the evidence of the eight Defence witnesses Nteziryayo highlights in his appeal brief. *Compare ibid.*, fn. 12283 *with* Nteziryayo Appeal Brief, fn. 170.
[5480] Trial Judgement, para. 4615.

22 June 1994, that it was held in the woods near the Muganza commune office, and that Ndayambaje and Nteziryayo spoke at the meeting.[5482] The Trial Chamber determined that the witnesses testified to the same event, namely Ndayambaje's Swearing-In Ceremony of 22 June 1994.[5483]

2369. The Appeals Chamber considers that Nteziryayo, who largely repeats the arguments he advanced at trial,[5484] fails to demonstrate that the Trial Chamber erred in its analysis. The Trial Chamber considered Nteziryayo's argument that the Prosecution evidence that the ceremony occurred in the morning was implausible because he was at a meeting in Ndora Commune.[5485] However, it recalled that Witness RV attended the Ndora Commune meeting with Nteziryayo "yet still testified that Ndayambaje was installed into office at a ceremony held at about 10.00 or 11.00 a.m."[5486] The Appeals Chamber is therefore satisfied that the Trial Chamber carefully considered the varying evidence as to the timing of the meeting and finds that Nteziryayo does not demonstrate that the Trial Chamber abused its discretion in evaluating these differences.

2370. As regards Nteziryayo's contention that the Trial Chamber erred in finding that the timing of the meeting was not put to the Prosecution witnesses, the Appeals Chamber observes that, contrary to Nteziryayo's contention, the references he provides reflect that, while Witnesses TO and FAL were asked when Ndayambaje's Swearing-In Ceremony started, it was not suggested to these witnesses that they may have been wrong about its timing.[5487]

[5481] Trial Judgement, para. 4615.
[5482] Trial Judgement, para. 4616.
[5483] Trial Judgement, para. 4617.
[5484] *See* Nteziryayo Closing Brief, para. 536.
[5485] *See* Trial Judgement, para. 4614. In particular, the Trial Chamber considered that "Nteziryayo was occupied with the swearing-in ceremony for the new *bourgmestre* of Ndora *commune*, Fidèle Uwizeye, on the morning of 22 June 1994." *See idem.* It summarised Nteziryayo's testimony that the Ndora Commune meeting occurred in the morning. *See ibid.*, paras. 4564, 4566. Elsewhere in the Trial Judgement, the Trial Chamber also acknowledged Nteziryayo's reliance on the evidence of Witness AND-31 concerning the meeting in Ndora Commune related to the swearing-in of the new *bourgmestre* as well as Nsabimana's reliance on his own evidence and that of Witnesses AND-30 and AND-31 in relation to the same meeting but did not make findings on this issue. *See ibid.*, paras. 4217-4220, 4244. The Appeals Chamber does not consider that the Trial Chamber was also required to discuss expressly these witnesses' testimonies with respect to Ndayambaje's Swearing-In Ceremony. Notably, Nteziryayo did not argue the clear relevance and importance of their evidence to Ndayambaje's Swearing-In Ceremony in his closing submissions, relying on them instead in relation to the meeting in Ndora Commune. *See* Nteziryayo Closing Brief, paras. 287-293, 531-540; Nteziryayo Closing Arguments, T. 28 April 2009 pp. 5, 6. Moreover, having reviewed the relevant evidence, the Appeals Chamber is of the view that it was cumulative of Nteziryayo's as regards his attendance of the meeting in Ndora Commune in the morning of 22 June 1994. *See* Witness AND-30, T. 21 February 2007 pp. 16, 17, 52, 53; Witness AND-31, T. 27 February 2007 pp. 55, 56; Nsabimana, T. 16 November 2006 pp. 61, 62, 67.
[5486] Trial Judgement, para. 4614, *referring to* Witness RV, T. 18 February 2004 p. 43 (closed session), T. 19 February 2004 p. 34 (closed session). The Appeals Chamber further finds that Nteziryayo misrepresents Witness FAU's testimony, in light of his unequivocal response that he "[did] not know when the meeting ended", merely stating that "[i]t was about 5:30 p.m. or 6:00 p.m. when the assailants arrived to take away the person in question." *See* Witness FAU, T. 9 March 2004 p. 22 (closed session).
[5487] *See* Witness TO, T. 5 March 2002 p. 113; Witness FAL, T. 9 February 2004 pp. 55, 56.

2371. Consequently, the Appeals Chamber finds no error in the Trial Chamber's determination that the variance in timing was insignificant and its reliance instead on the similar features of the meeting to determine that all witnesses were referring to Ndayambaje's Swearing-In Ceremony. The Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber acted unreasonably in assessing evidence as to the timing of the swearing-in ceremony.

(g) Different Meeting

2372. Nteziryayo argues that, in addition to his previous challenges, several other elements of the Prosecution evidence allow for the reasonable inference that the Prosecution witnesses were referring to a meeting other than Ndayambaje's Swearing-In Ceremony and that the Trial Chamber failed to consider this.[5488] Specifically, he notes that Witness FAL testified that there were 5,000 participants and that megaphones were used, while Witness QAL only mentioned 200 participants and indicated that no megaphones were used.[5489] Nteziryayo submits that, even when allowing for variances as to the recollection of numbers, Prosecution evidence of a meeting with several thousand participants and where speakers used megaphones "suggests" that other Prosecution evidence about a meeting attended by several hundred people where speakers were "unamplified" concerns a different meeting.[5490]

2373. Nteziryayo further highlights Witness FAL's evidence that the audience expressed discontent about the dismissal of the outgoing *bourgmestre* and that Sebukeye ordered the destruction of houses and suggests that this witness's evidence was distinct from other Prosecution evidence concerning the ceremony.[5491] Similarly, he notes that neither Witness QAL nor Witness FAG saw Ndayambaje get sworn in and that Witness TP testified that the meeting was for the installation of Nteziryayo as the Butare Prefect.[5492] Nteziryayo also stresses that only Witness TO testified about a shooting exercise before the ceremony and that "Habiyambere" was the master of ceremonies.[5493] As a further reflection of the unreliability of the Prosecution evidence, he stresses that Witnesses TP and FAL were unable to identify him in court.[5494] Nteziryayo also points to evidence that several other meetings were held in Muganza Commune "and its

[5488] *See generally* Nteziryayo Appeal Brief, paras. 104, 144-151. Nteziryayo concedes that the Trial Chamber concluded that Witness QAR was referring to an event other than Ndayambaje's Swearing-In Ceremony. *See ibid.*, para. 104 (iv), 144. The Appeals Chamber has considered the contentions raised in paragraphs 145(d), 148(a), (b), (d), and 149 of Nteziryayo Appeal Brief above. *See supra*, Sections VII.B.1(c)-(f).
[5489] Nteziryayo Appeal Brief, paras. 145(e), 146(b), (c). *See also ibid.*, para. 147; Nteziryayo Reply Brief, para. 63.
[5490] Nteziryayo Appeal Brief, para. 147.
[5491] Nteziryayo Appeal Brief, para. 145(a), (c).
[5492] Nteziryayo Appeal Brief, paras. 146(a), 148(c), fn. 192.
[5493] Nteziryayo Appeal Brief, paras. 132(c), 150. The Appeals Chamber notes that, while Nteziryayo also argued in his notice of appeal that the Trial Chamber erred in finding that the discrepancy as to whether the population was armed was not significant, he did not develop this argument in his appeal brief. *See* Nteziryayo Notice of Appeal, para. 38(c). The Appeals Chamber therefore considers that Nteziryayo has abandoned this contention.

surroundings", which, in his view, shared characteristics of Ndayambaje's Swearing-In Ceremony.[5495] He argues that the variances in the Prosecution evidence together with the evidence that several other meetings were held demonstrate that these witnesses were not testifying about Ndayambaje's Swearing-In Ceremony.[5496]

2374. The Prosecution, pointing to the consistent elements of the testimonial evidence, submits that the discrepancies in the witnesses' evidence were minor and that Nteziryayo's unsubstantiated assertions that the witnesses were recounting another meeting should be rejected.[5497]

2375. The Appeals Chamber observes that the Trial Chamber summarised the respective estimates of Witnesses FAL and QAL that "more than 5,000" or an "estimated 200" persons attended the meeting.[5498] In its deliberations, the Trial Chamber noted that "the testimony of the witnesses shows that between 1,000 and 5,000 people were present" and referred, *inter alia*, to Witness FAL's evidence in this regard.[5499] The Trial Chamber also summarised differing Prosecution and Defence evidence as to whether a megaphone or public address system was used during the swearing-in ceremony.[5500] The Trial Chamber found that, while the Prosecution evidence differed "in varying degrees as to the content of what was said by both Ndayambaje and Nteziryayo", the discrepancies could be attributed, in part, to "the quality of the megaphone or the clarity of the speakers."[5501] The Trial Judgement therefore shows that the Trial Chamber accepted the evidence that the number of attendees ranged from 1,000 to 5,000 persons and that amplification devices were used during the ceremony.

2376. Given the significant number of attendees, a fact uniformly testified to by all witnesses,[5502] the Appeals Chamber is not persuaded that, simply because Witness FAL considered that more than 5,000 people were present or that Witness QAL "estimated" that 200 people were present, a reasonable trier of fact could not have considered that they testified about the same event. Furthermore, although Witness FAL testified that speakers at the event used megaphones and Witness QAL testified that she did not see megaphones, Witness FAL was only three metres from the speakers while Witness QAL's evidence reflects that many people were between her and the

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[5494] Nteziryayo Appeal Brief, paras. 145(b), 148(c).
[5495] Nteziryayo Appeal Brief, para. 104(a)(i)-(a)(iii), (a)(v), (a)(vi). *See also* AT. 17 April 2015 p. 14.
[5496] *See generally* Nteziryayo Appeal Brief, paras. 104, 144-151.
[5497] Prosecution Response Brief, paras. 1482-1484, 1488, 1489, 1492-1494, 1496-1498, 1500, 1503, 1504, 1507-1510. *See also ibid.*, para. 1473; AT. 17 April 2015 p. 28.
[5498] Trial Judgement, paras. 4341, 4421.
[5499] *See* Trial Judgement, para. 4611, fn. 12275.
[5500] *See* Trial Judgement, paras. 4327, 4359, 4379, 4425, 4490, 4498, 4512, 4538, 4555.
[5501] *See* Trial Judgement, para. 4631.
[5502] *See* Trial Judgement, paras. 4324, 4341, 4357, 4454, 4468, 4499, 4519, 4537, 4560. *See also ibid.*, para. 4611.

speakers.[5503] It bears noting that other Prosecution and Defence evidence differed as to whether devices were used to amplify the voice of the speakers.[5504] In the view of the Appeals Chamber, it was within the discretion of the Trial Chamber to rely on the fundamental features that were consistent in the evidence of Witnesses FAL and QAL, including the timing and location of the meeting, the fact that Ndayambaje and Nteziryayo were present and spoke during the event, Ndayambaje's attire, and participants bringing traditional weapons to determine that they testified about the same event.[5505] In these circumstances, the Appeals Chamber finds that Nteziryayo fails to demonstrate that the Trial Chamber erred in concluding that Witnesses FAL and QAL were testifying about Ndayambaje's Swearing-In Ceremony.[5506]

2377. In addition, and contrary to Nteziryayo's assertion, Witness FAL was not alone in testifying that Nteziryayo criticised the outgoing *bourgmestre* as Witness TO also testified to this effect.[5507] The Trial Chamber also acknowledged that their evidence differed from that of other Prosecution witnesses.[5508] Nteziryayo does not show that a reasonable trier of fact could not have found that, notwithstanding this variance, Witness FAL was testifying about Ndayambaje's Swearing-In Ceremony. Likewise, Nteziryayo's reference to Witness FAL's testimony that Sebukeye told the witness to implement the orders given during the ceremony fails to demonstrate that Witness FAL's evidence is incompatible with other evidence about the swearing-in ceremony.[5509]

2378. When summarising the evidence of Witnesses QAL and FAG, the Trial Chamber also noted that these witnesses did not see Ndayambaje get sworn in.[5510] However, it further observed that Witness FAG nonetheless recounted that Ndayambaje "was the person being sworn in as

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[5503] *Compare* Witness FAL, T. 9 February 2004 p. 76 (closed session) ("Q. Can you tell us, Witness FAL, where you were seated at the time of the meeting? How far were you from the speakers? A. I was seated approximately three metres from the speakers.") *with* Witness QAL, T. 25 February 2004 p. 43 (closed session) ("Q. Witness QAL, this morning you testified that during the said meeting you were sitting on the lawn; is that correct? A. That is correct. Q. Were there many people in front of you? A. Yes, I was sitting more or less behind, there were many people in front of me.").

[5504] Specifically, in addition to Witness FAL, Witnesses FAG, QAF, TO, KEPIR, Siborurema, AND-11, and AND-73 gave evidence about Ndayambaje's Swearing-In Ceremony and testified that a megaphone, microphone, and/or public address system was used during the ceremony. *See* Trial Judgement, paras. 4327, 4359, 4379, 4498, 4512, 4538, 4555. In addition to Witness QAL, Witnesses TP and GABON testified to the contrary. *See* Trial Judgement, paras. 4338, 4425, 4490.

[5505] *See* Trial Judgement, paras. 4340, 4342-4347, 4421-4428, 4593, 4594, 4609, 4610.

[5506] The Appeals Chamber observes that, in addition to his arguments pertaining to Witnesses QAL and FAL, Nteziryayo argues that the testimonies of Witnesses TO and TP, on one hand, and the testimonies of Witnesses FAU and FAG, on the other hand, also differ as to the number of attendees and as to whether megaphones were used. *See* Nteziryayo Appeal Brief, para. 147. Nteziryayo did not develop this argument with reference to the record, failing to demonstrate incompatibility among this evidence which would prevent a reasonable trier of fact from concluding that all of these witnesses testified about Ndayambaje's Swearing-In Ceremony. The Appeals Chamber therefore dismisses this argument without further consideration.

[5507] *See* Trial Judgement, para. 4624. *See also ibid.*, paras. 4342, 4377.

[5508] Trial Judgement, para. 4624.

[5509] *See* Witness FAL, T. 9 February 2004 pp. 63, 64. *See also* Trial Judgement, para. 4350.

[5510] *See* Trial Judgement, paras. 4330, 4421.

bourgmestre."[5511] It also determined that various elements of Witness QAL's testimony were corroborated by both Prosecution and Defence evidence, including the location and timing of the meeting, Ndayambaje's attire, and the attendance of Witness Stan, and concluded that Witness QAL testified about Ndayambaje's Swearing-In Ceremony.[5512] Nteziryayo does not demonstrate that the Trial Chamber erred in its analysis.

2379. The Appeals Chamber notes that Witness TP, in response to a suggestion by counsel for Nteziryayo that she earlier indicated that "the purpose of the meeting was for the installation", stated that "[i]t was for the installation of *Préfet* Alphonse".[5513] However, the description of the purported installation Witness TP provided accorded with her earlier testimony that Nteziryayo was being introduced at the meeting rather than installed as a new prefect and that Ndayambaje was being installed as the new *bourgmestre*.[5514] Nteziryayo fails to demonstrate that, on this basis, no reasonable trier of fact could have found that Witness TP testified about Ndayambaje's Swearing-In Ceremony.

2380. As regards Witness TO's evidence, the Trial Chamber recalled the witness's testimony that, prior to the ceremony, the population practiced shooting bows and arrows.[5515] The Trial Chamber also noted that Witness FAL recounted a bow-and-arrow shooting exercise near the venue of the meeting, albeit not on the same day,[5516] and the evidence of Defence witnesses that they did not see any archery practice or did not take part in it.[5517] Nteziryayo largely repeats on appeal arguments he made at trial,[5518] without showing why this aspect of Witness TO's evidence undermined his credibility or was so distinctive as to render his testimony incompatible with other evidence about the swearing-in ceremony. Although Nteziryayo points to Witness TO's evidence that Célestin Habiyamere was the master of ceremonies to suggest that he was referring to an event other than Ndayambaje's Swearing-In Ceremony, the Appeals Chamber observes that this aspect of Witness TO's evidence is almost entirely consistent with other Prosecution and Defence evidence confirming this individual's presence and role in the event.[5519]

[5511] *See* Trial Judgement, para. 4323 (internal reference omitted). *See also* Witness FAG, T. 1 March 2004 p. 33.
[5512] *See* Trial Judgement, paras. 4595, 4596.
[5513] *See* Witness TP, T. 12 February 2004 p. 40.
[5514] *See* Witness TP, T. 12 February 2004 p. 40 ("Q. Who had to install him, Élie Ndayambaje? Was it Élie Ndayambaje? A. I don't know. I'm describing to you what we saw when we arrived at the meeting venue. The Accused took the floor and he said he was going to introduce to us Alphonse, who was the new *préfet*. Perhaps the new *préfet* had been introduced at the level of the whole *préfecture* and now it was time for him to be introduced to us in our *secteur* or *commune*. "). *See also* Witness TP, T. 12 February 2004 p. 38 ("A. [...] I, all the same, went to the meeting and I witnessed the swearing in of the *bourgmestre*, and the *préfet* was introduced to us").
[5515] *See* Trial Judgement, para. 4383.
[5516] *See* Trial Judgement, para. 4340.
[5517] *See* Trial Judgement, paras. 4554, 4582.
[5518] *See* Nteziryayo Closing Brief, paras. 491, 539, 540.
[5519] *See* Trial Judgement, paras. 4327, 4430, 4455, 4468, 4501, 4519, 4543, 4555.

2381. With respect to the inability of Witnesses TP and FAL to identify Nteziryayo in court, the Trial Chamber noted this aspect of their evidence.[5520] The Appeals Chamber observes, however, that Witness TP stated that she "went to the meeting and [she] witnessed the swearing in of the *bourgmestre*, and the *préfet* was introduced to us", and referred to "*Préfet* Alphonse"; thus indicating that Nteziryayo was the prefect.[5521] Moreover, the witness testified that Nteziryayo was the son of Ntagara, a fact that Nteziryayo confirmed.[5522] In this context, the Appeals Chamber does not consider that Witness TP's admission that "[s]o much time has passed since [she] last saw [Nteziryayo]" and that she did not "think [she] could recognise him"[5523] prevented the Trial Chamber from concluding that she attended Ndayambaje's Swearing-In Ceremony. The Appeals Chamber also notes that Witness FAL recalled that, during the swearing-in ceremony, "Alphonse Nteziryayo [the prefect] said he had come to install Elie Ndayambaje".[5524] The Appeals Chamber therefore considers that the fact that the witness was not able to identify Nteziryayo in court, whom he did not personally know or often see, unlike Ndayambaje,[5525] does not show that the witness's evidence lacked credibility or that no reasonable trier of fact could have found that he testified about Ndayambaje's Swearing-In Ceremony.

2382. Finally, the Appeals Chamber finds no merit in Nteziryayo's broad and speculative contention that evidence that several other meetings were held in Muganza Commune "and its surroundings" prevented the Trial Chamber from concluding that the Prosecution witnesses were testifying about Ndayambaje's Swearing-In Ceremony.[5526]

2383. Based on the foregoing, the Appeals Chamber dismisses Nteziryayo's contention that no reasonable trier of fact could have found that all the Prosecution witnesses testified about Ndayambaje's Swearing-In Ceremony.

2. Assessment of Defence Evidence

2384. When considering evidence in relation to Ndayambaje's Swearing-In Ceremony, the Trial Chamber contrasted the evidence of the Prosecution witnesses with that of Defence witnesses as it concerned the speeches of Nteziryayo and Ndayambaje and whether resulting violence

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[5520] Trial Judgement, paras. 4352, 4395.
[5521] *See* Witness TP, T. 12 February 2004 pp. 38, 40.
[5522] Witness TP, T. 11 February 2004 p. 26; Nteziryayo, T. 14 May 2007 p. 10.
[5523] *See* Witness TP, T. 11 February 2004 p. 35.
[5524] *See* Witness FAL, T. 9 February 2004 p. 38.
[5525] *See* Witness FAL, T. 9 February 2004 pp. 39-41.
[5526] The Appeals Chamber observes that Nteziryayo also contends that the killing of Tutsis in Butare was widespread and that "evidence that Tutsi girls were killed after the meeting" does not distinguish Ndayambaje's Swearing-In Ceremony from any other meeting. *See* Nteziryayo Appeal Brief, para. 104(c). As Nteziryayo fails to develop this

occurred.[5527] In particular, it noted Nteziryayo's potential motive to reduce his "personal responsibility for the alleged incitement in question."[5528] It also recalled that Defence Witnesses AND-11 and AND-73 knew Nteziryayo from having previously served in the army together and that Witness AND-11 "knew Nteziryayo well" from his work in Kibayi Commune from 1991 and that he referred to Nteziryayo as a friend.[5529] Acknowledging "the largely consistent nature" of the Defence evidence, the Trial Chamber considered that the credibility of the Defence witnesses was undermined by their "potential motivations and personal ties of each of the Defence witnesses with Ndayambaje and Nteziryayo."[5530] The Trial Chamber concluded that Defence evidence on the whole was not sufficiently credible to raise a reasonable doubt about the nature of the utterances made by Nteziryayo and Ndayambaje at the swearing-in ceremony.[5531]

2385. Nteziryayo contends that the Trial Chamber's finding that the Defence evidence in relation to the ceremony was "largely consistent" calls into question its later conclusion that it was "on the whole not sufficiently credible" to raise reasonable doubt.[5532] He contends that the Trial Chamber erred in concluding that the credibility of three of the witnesses he called was diminished by personal ties, that it did not provide a reasoned opinion in this regard, and that this alone was insufficient to wholly dismiss their evidence.[5533] Nteziryayo adds that the Trial Chamber acted unfairly when determining that personal and professional ties had a greater impact on the credibility of Defence evidence than the "significant" issues that undermine the credibility of the Prosecution evidence.[5534]

2386. The Prosecution responds that the Trial Chamber correctly found that the credibility of Defence witnesses was undermined by their personal ties to Nteziryayo, whose evidence also lacked reliability and credibility.[5535]

2387. Since the existence of ties between an accused and a witness is a factor which may be considered in assessing witnesses' credibility,[5536] the Appeals Chamber finds no error in the Trial Chamber's consideration of these circumstances and does not find that the Trial Chamber failed to

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argument with any citation or demonstrate how the Trial Chamber erred in considering such evidence, the Appeals Chamber dismisses this contention without further consideration.

[5527] Trial Judgement, paras. 4633-4635.
[5528] Trial Judgement, para. 4636.
[5529] Trial Judgement, para. 4638.
[5530] *See* Trial Judgement, para. 4639.
[5531] Trial Judgement, para. 4641.
[5532] Nteziryayo Appeal Brief, para. 158 (emphasis omitted), *referring to* Trial Judgement, paras. 4639, 4641. *See also ibid.*, paras. 166, 242; Nteziryayo Reply Brief, para. 69.
[5533] Nteziryayo Appeal Brief, para. 159. *See also ibid.*, para. 160, *referring to Muvunyi* Appeal Judgement of 29 August 2008, paras. 142-148.
[5534] Nteziryayo Appeal Brief, para. 161. *See also ibid.*, para. 241.
[5535] Prosecution Response Brief, paras. 1515-1518. *See also* AT. 17 April 2015 p. 31.

provide a reasoned opinion for its decision. In this regard, the Appeals Chamber notes that Nteziryayo has pointed to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with Defence witnesses and merely argues that it was unreasonable for the Trial Chamber to base its rejection of Defence evidence on this factor.

2388. The Appeals Chamber further recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[5537] The Appeals Chamber is not persuaded that no reasonable trier of fact could have both noted the consistent nature of Defence evidence as well as the weaknesses in the credibility of Defence witnesses and ultimately rejected such evidence in light of the virtually unanimous Prosecution evidence that inciting speeches were made during Ndayambaje's Swearing-In Ceremony.[5538] Moreover, apart from alleging that the Trial Chamber treated the Defence and Prosecution evidence differently, Nteziryayo does not demonstrate that the Trial Chamber abused its discretion or substantiate with references an improper differential treatment of Defence evidence.

2389. Consequently, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber acted unreasonably in discrediting Defence evidence.

3. Conclusion

2390. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate any error in relation to his conviction for direct and public incitement to commit genocide at Ndayambaje's Swearing-In Ceremony and, accordingly, dismisses Ground 4 of Nteziryayo's appeal.

[5536] *See, e.g., Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[5537] *See, e.g., Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81.
[5538] *See* Trial Judgement, paras. 4622-4632, 4636-4639.

C. Muyaga Commune Meeting (Ground 5)

2391. Based on the evidence of Prosecution Witnesses QBY and FAB, the Trial Chamber found that, around mid-June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting in Mamba Sector, Muyaga Commune, at which he incited the population to kill Tutsis by urging the audience to "hunt down, flush out and kill Tutsis without any distinction".[5539]

2392. In reaching its findings, the Trial Chamber observed that Prosecution and Defence evidence consistently reflected that Nteziryayo spoke at a meeting in Muyaga Commune but determined that the evidence from the Defence did not concern the event discussed by the Prosecution witnesses.[5540] Specifically, the Trial Chamber found that the meeting described by Witnesses QBY and FAB took place around mid-June 1994,[5541] more specifically "on or after 21 June 1994", since both witnesses were "adamant" that Nteziryayo attended the meeting in his capacity as prefect.[5542] The Trial Chamber noted that the Defence brought evidence regarding a meeting held on 23 May 1994 that contained similarities with the one described by the Prosecution witnesses but concluded that, while it was possible that this other meeting also occurred the Defence evidence had "no bearing upon [its] assessment of the evidence related to the June 1994 meeting testified to by Witnesses QBY and FAB."[5543]

2393. The Trial Chamber determined that Nteziryayo's speech at the Muyaga Commune meeting as described by Witnesses QBY and FAB constituted a direct appeal to kill Tutsis and convicted him of committing direct and public incitement to commit genocide on this basis.[5544]

2394. Nteziryayo submits that the Trial Chamber erred in finding that, in his capacity as prefect, he incited the commission of genocide during a meeting held in Muyaga Commune in mid-June 1994 and in convicting him of direct and public incitement to commit genocide on this basis.[5545] Nteziryayo argues that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than the meeting on 23 May 1994 described by the

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[5539] Trial Judgement, paras. 3674, 5945, 6022.
[5540] Trial Judgement, paras. 3672, 3673.
[5541] Trial Judgement, paras. 3674, 5945.
[5542] Trial Judgement, para. 3672.
[5543] Trial Judgement, para. 3673.
[5544] Trial Judgement, paras. 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at the Muyaga Commune meeting substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to this allegation. *See ibid.*, para. 5946.
[5545] Nteziryayo Notice of Appeal, paras. 41-46, 59-63, 65; Nteziryayo Appeal Brief, paras. 167-212, 240, 241, 243-245, 247, 248.

Defence witnesses and, consequently, in concluding that the Defence evidence was irrelevant to the assessment of the Prosecution case.[5546]

2395. The Appeals Chamber will assess these overarching challenges when addressing Nteziryayo's specific contentions that the Trial Chamber erred in: (i) failing to treat the Prosecution evidence with sufficient caution; (ii) evaluating the Prosecution evidence as to the timing of the meeting; (iii) assessing the Prosecution identification evidence; (iv) insufficiently considering similarities between Prosecution and Defence evidence concerning the meeting; and (v) ignoring Nteziryayo's evidence that precluded his presence at a meeting in Muyaga Commune after his appointment as Butare Prefect on 17 June 1994.[5547]

1. Insufficient Caution

2396. Nteziryayo submits that the Trial Chamber erred in its assessment of the credibility of Witnesses QBY and FAB.[5548] Specifically, he contends that, although Witness FAB was released at the time of his testimony, the Trial Chamber failed to consider that he was an accomplice witness and that his evidence should be treated with requisite caution.[5549] Nteziryayo stresses that Witness FAB pleaded guilty to genocide, attended *Gacaca* sessions while imprisoned, and admitted that his evidence was altered as a result of his participation in these sessions.[5550] With respect to Witness QBY, Nteziryayo contends that, while the Trial Chamber acknowledged the need to treat the witness's evidence with caution,[5551] it failed to consider adequately that he was an incarcerated accomplice witness who had attended five *Gacaca* sessions.[5552]

2397. The Prosecution responds that Nteziryayo does not establish that Witness FAB possessed any motive to implicate him given that the witness had been released at the time of his

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[5546] Nteziryayo Notice of Appeal, para. 43(a); Nteziryayo Appeal Brief, paras. 167(iii), 169-178, 183, 184.
[5547] Nteziryayo also challenged the Trial Chamber's assessment of the credibility of Witnesses QBY and FAB in paragraphs 249 and 251 of his appeal brief. However, the Appeals Chamber recalls that it struck these paragraphs from the brief, finding that they exceeded the scope of his appeal. *See* 12 July 2013 Appeal Decision, paras. 24, 25. Consequently, these challenges will not be addressed.
[5548] Nteziryayo Appeal Brief, paras. 167(vi), (vii), 201-211. The Appeals Chamber notes that, while Nteziryayo also alleged in his notice of appeal that the Trial Chamber erred in finding that the discrepancies between the testimonies of Witnesses QBY and FAB were minor and had no impact on their credibility, he did not develop and substantiate this allegation in his appeal brief. The Appeals Chamber considers that Nteziryayo has abandoned this allegation. *See* Nteziryayo Notice of Appeal, paras. 42, 43(b). *See also ibid.*, para. 62.
[5549] Nteziryayo Notice of Appeal, para. 63; Nteziryayo Appeal Brief, paras. 167(vi), 201, 205-207, 247, 248. Nteziryayo emphasises that the fact that Witness FAB was released at the time of his testimony is immaterial as he had already given two statements to the Prosecution while imprisoned and had an interest in ensuring that his testimony was consistent with them in order to avoid being accused of "perverting the course of justice". *See* Nteziryayo Appeal Brief, paras. 201, 206.
[5550] Nteziryayo Appeal Brief, paras. 201, 205(a)-(f).
[5551] Nteziryayo Appeal Brief, para. 209. Nteziryayo argues that the Prosecution did not seek to rely on Witness QBY's evidence. *See ibid.*, para. 208.

testimony.[5553] It further argues that the Trial Chamber acknowledged that Witness QBY's evidence should be treated with caution and sufficiently considered the context in which his evidence was provided.[5554]

2398. The Appeals Chamber observes that Witness FAB was arrested on his return to Rwanda in 1996, confessed that he killed a child, and was sentenced to 15 years in prison for his crime.[5555] However, he was released early in 2003 and was not in detention at the time of his testimony before the Tribunal in April 2004.[5556] Under the circumstances, Nteziryayo does not demonstrate that the Trial Chamber was required to treat the witness's evidence with caution,[5557] as he points to no circumstances indicating that the witness may have had motives or incentives to implicate him when testifying.[5558] Furthermore, none of the evidence Nteziryayo cites concerning the impact of *Gacaca* sessions on Witness FAB's evidence reflects that the witness was encouraged to implicate falsely Nteziryayo before the Tribunal.[5559]

2399. Turning to Witness QBY, the Trial Chamber found that he was incarcerated at the time of his testimony and that he may have had a motive to implicate Nteziryayo or enhance his role in the crimes.[5560] Consequently, the Trial Chamber decided to assess Witness QBY's testimony with "appropriate caution".[5561] The Trial Chamber considered Witness QBY's evidence in light of Witness FAB's,[5562] determining that both "witnesses corroborated each other as to Nteziryayo's actions and words during the course of the meeting, and to the fact that killings of Tutsis occurred after the meeting."[5563] Nteziryayo simply argues that the Trial Chamber treated Witness QBY's evidence with insufficient caution without demonstrating that this was the case. Moreover, the

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[5552] Nteziryayo Notice of Appeal, para. 63; Nteziryayo Appeal Brief, paras. 167(vii), 210. Nteziryayo also refers to his arguments related to the credibility of Witness QBY developed under Ground 8 of his appeal. *See* Nteziryayo Appeal Brief, para. 211.
[5553] Prosecution Response Brief, paras. 1537, 1538. The Prosecution rejects Nteziryayo's claim that the witness had an incentive to perjure himself in order to ensure that his testimony was consistent with the prior statements he gave while incarcerated. *See ibid.*, para. 1538.
[5554] Prosecution Response Brief, para. 1539.
[5555] Witness FAB, T. 5 April 2004 pp. 34, 35, and 50, 51, 55 (closed session). Witness FAB testified that he killed a child on 27 or 28 April 1994 and that this crime occurred well before the meeting held in Muyaga Commune. He also denied participating personally in any killings after the meeting. *See ibid.*, pp. 42 and 50-52 (closed session).
[5556] Witness FAB, T. 5 April 2004 pp. 35, 37, and 55 (closed session).
[5557] The Appeals Chamber does not consider that Witness FAB's criminal conduct, which was unrelated to and occurred prior to the Muyaga Commune meeting, would make him an accomplice of Nteziryayo as defined in the jurisprudence of the Tribunal. *See Niyitegeka* Appeal Judgement, para. 98 ("The ordinary meaning of the term 'accomplice' is 'an associate in guilt, a partner in crime.'"). *See also Karemera and Ngirumpatse* Appeal Judgement, para. 42; *Munyakazi* Appeal Judgement, para. 93; *Ntagerura et al.* Appeal Judgement, para. 203.
[5558] The Appeals Chamber finds no merit in Nteziryayo's contention that Witness FAB had an incentive to lie while testifying under oath in order to remain consistent with the prior statements he gave while imprisoned and to avoid being accused of "perverting the course of justice".
[5559] *See* Witness FAB, T. 5 April 2004 pp. 36, 37, 42, 43.
[5560] Trial Judgement, para. 3670.
[5561] Trial Judgement, para. 3670.
[5562] Trial Judgement, paras. 3671, 3672.
[5563] Trial Judgement, para. 3674.

Appeals Chamber considers that Witness QBY's evidence concerning his participation in *Gacaca* sessions in no way demonstrates that he was encouraged to implicate falsely Nteziryayo.[5564]

2400. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to apply appropriate caution when assessing the evidence of Witnesses FAB and QBY.

2. Timing of the Meeting

2401. When assessing the Prosecution evidence as to the timing of the meeting, the Trial Chamber stated as follows:

> Witness QBY placed the meeting around either 5 May 1994 or 5 June 1994 whereas Witness FAB referred to mid-June 1994. The Chamber considers that these are both estimates which do not automatically cast doubt on the witnesses' credibility, given the length of time that had elapsed since the event. The Chamber notes that Witnesses QBY and FAB are adamant that on the day of the meeting, Nteziryayo already held his position as *préfet* of Butare. Witness FAB even testified that the purpose of the meeting was to introduce Nteziryayo as the new *préfet*. Flowing from that, it appears that the meeting may have occurred on or after 21 June 1994, as Nteziryayo was appointed *préfet* of Butare on or around 17 June 1994, and his swearing-in ceremony took place on 21 June 1994.[5565]

2402. Nteziryayo argues that the Trial Chamber erred in finding that the Muyaga Commune meeting occurred on or after 21 June 1994 as this finding is in contradiction with the evidence provided by Witnesses QBY and FAB.[5566] Nteziryayo stresses that Witness QBY repeatedly testified that the meeting he attended during which Nteziryayo spoke in his capacity as prefect occurred sometime between 5 May and 5 June 1994.[5567] He submits that it was therefore unreasonable for the Trial Chamber to rely on Witness QBY and to find that the witness was "adamant" that Nteziryayo was prefect of Butare at the time.[5568] Nteziryayo points out that the witness was so certain as to the timing of the meeting that he rejected an official document indicating that Nteziryayo was not appointed prefect until 17 June 1994.[5569]

[5564] *See* Witness QBY, T. 19 April 2004 pp. 72, 73, 75-77.
[5565] Trial Judgement, para. 3672 (internal references omitted).
[5566] Nteziryayo Appeal Brief, para. 175. *See also* AT. 17 April 2015 p. 16.
[5567] Nteziryayo Appeal Brief, paras. 167(ii), 172, 182, 212(b), (c). *See also* Nteziryayo Reply Brief, paras. 73(b), 74. Nteziryayo adds that Witness QBY's evidence that the meeting occurred between 5 May and 5 June 1994 corresponds to his prior statement. *See* Nteziryayo Appeal Brief, paras. 175, 182; Nteziryayo Reply Brief, para. 73(b).
[5568] Nteziryayo Appeal Brief, paras. 180-182 (emphasis omitted). *See also* Nteziryayo Reply Brief, para. 75.
[5569] Nteziryayo Appeal Brief, para. 181, *referring to* Witness QBY, T. 20 April 2004 p. 20. *See also* Nteziryayo Reply Brief, para. 75.

2403. The Appeals Chamber further understands that Nteziryayo submits that the Trial Chamber erred in relying on Witness FAB's testimony that the meeting occurred in mid-June 1994 as this contradicts the witness's prior statement that it occurred around the beginning of that month.[5570]

2404. The Prosecution responds that the Trial Chamber reasonably assessed the evidence of Witnesses QBY and FAB and correctly concluded that Nteziryayo attended a meeting in Muyaga Commune in mid-June 1994.[5571]

2405. The Appeals Chamber notes that the Trial Chamber found that the meeting described by Witnesses QBY and FAB took place around mid-June 1994,[5572] more specifically "on or after 21 June 1994" since both witnesses were "adamant" that Nteziryayo attended the meeting in his capacity as Butare Prefect.[5573] The Appeals Chamber recalls that it is open for a trial chamber to make factual findings on the date of the events by examining the evidence as a whole and that, indeed, this may be particularly necessary when determining dates, as often witnesses may not recall an exact date but describe the timing of the event in relation to other variables.[5574] The Appeals Chamber finds that Nteziryayo places undue importance on the fact that Witness QBY repeatedly referred to the meeting occurring around 5 May or 5 June 1994, as this position ignores the clear indication throughout the witness's testimony that he could not recall the date of the meeting.[5575] On the other hand, the witness was unequivocal that Nteziryayo was introduced at the meeting as the prefect of Butare.[5576] Moreover, there is no merit in Nteziryayo's position that Witness QBY refused to recognise the accuracy of an exhibit which suggested that Nteziryayo was appointed prefect after the date of the meeting that the witness provided, as the witness merely stated that he did not recognise this document and that he could "only say that it was Alphonse Nteziryayo".[5577]

2406. With respect to Witness FAB, the Trial Chamber acknowledged that the witness testified that the meeting occurred "sometime in mid-June 1994, and not between 3 or 5 June 1994 as indicated in his previous statement".[5578] It noted the witness's explanation that he may have been mistaken about the date when he gave his prior statement but realised the mistake during *Gacaca*

[5570] Nteziryayo Appeal Brief, para. 172. *See also ibid.*, paras. 201, 205(b), (c); Nteziryayo Reply Brief, para. 73(a); AT. 17 April 2015 p. 16.
[5571] Prosecution Response Brief, paras. 1521-1524, 1533, 1537. *See also* AT. 17 April 2015 pp. 31, 32.
[5572] Trial Judgement, paras. 3674, 5945.
[5573] Trial Judgement, para. 3672. *See also supra*, para. 2290.
[5574] *Ndindabahizi* Appeal Judgement, para. 29.
[5575] Witness QBY, T. 20 April 2004 pp. 8, 11, and 33, 37 (closed session).
[5576] *See* Trial Judgement, para. 3672. *See also* Witness QBY, T. 19 April 2004 p. 54.
[5577] Witness QBY, T. 20 April 1994 p. 23.
[5578] Trial Judgement, para. 3568.

sessions.[5579] Moreover, when questioned about the influence of the *Gacaca* sessions on his memory, the witness replied that, while they made him realise he had made a mistake about "dates", these sessions "had not been held to remind" the participants of the events, nor did they "detract" from his evidence, as he was "speaking from what [he knew] personally."[5580] The Appeals Chamber finds that a reasonable trier of fact could have relied upon Witness FAB's evidence as to the timing of the event, notwithstanding any inconsistency with his prior statement, particularly in light of his explanation and his evidence that Nteziryayo had been installed as the prefect and was being introduced as such at the meeting.[5581]

2407. In light of Witness QBY's uncertainty about the date of the meeting, Witness FAB's credible testimony that the meeting occurred around mid-June 1994, and both witnesses' evidence that Nteziryayo was introduced as the prefect of Butare at the meeting, the Appeals Chamber is not persuaded that Nteziryayo has demonstrated that no reasonable trier of fact could have concluded that the meeting took place after Nteziryayo's appointment as prefect "around mid-June 1994" and more specifically "on or after 21 June 1994".[5582]

3. Identification Evidence

2408. Nteziryayo submits that Witnesses QBY's and FAB's identification evidence was unreliable, noting that neither could identify him in court and that both testified that the meeting was the first time that they had observed him.[5583] He further emphasises that Witness FAB gave no physical description of him[5584] and that Witness QBY's description did not match his but Nsabimana's physical characteristics.[5585] He contends that these circumstances render the identifications unsound and that the Trial Chamber failed to apply sufficient caution when considering them.[5586]

[5579] Trial Judgement, para. 3568.
[5580] Witness FAB, T. 5 April 2004 p. 43. The Appeals Chamber also notes that Witness FAB clarified that, although he was not sure about the exact date of the meeting, it was in the month of June 1994 since he fled between the end of June and beginning of July and that he left Rwanda ten days after the meeting in Muyaga Commune. *See ibid.*, pp. 30, 33, 34, 42, 43 and 52 (closed session).
[5581] *See* Trial Judgement, para. 3672. *See also* Witness FAB, T. 5 April 2004 pp. 23-25.
[5582] Trial Judgement, paras. 3672, 3674.
[5583] Nteziryayo Appeal Brief, paras. 181, 188, 194, 212(d). *See also* Nteziryayo Reply Brief, paras. 79, 81, 82; AT. 17 April 2015 p. 18.
[5584] Nteziryayo Appeal Brief, para. 194, *referring to* Witness FAB, T. 5 April 2004 p. 24; AT. 17 April 2015 p. 17.
[5585] Nteziryayo Appeal Brief, paras. 189-191, 193, 212(d), *referring to* Witness QBY, T. 19 April 2004 p. 55, T. 20 April 2004 p. 23, Witness AND-60, T. 13 March 2007 p. 7, Nteziryayo, T. 5 June 2007 p. 59, Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists). Nteziryayo further submits that the Trial Chamber failed to consider Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists). *See ibid.*, para. 191. *See also* Nteziryayo Reply Brief, para. 80; AT. 17 April 2015 p. 17.
[5586] Nteziryayo Appeal Brief, paras. 192-194, 212(f)(ii).

2409. The Prosecution responds that, since Nteziryayo was found to be one of the speakers at the meeting based on self-identification as the newly appointed prefect, Nteziryayo's submissions on his physical description and absence of in-court identifications are irrelevant.[5587]

2410. The Appeals Chamber finds no merit in Nteziryayo's arguments that it is significant that neither witness identified him in court, that neither knew him before the events, and that Witness FAB did not provide a physical description of him. All of Nteziryayo's arguments fail to acknowledge that the witnesses testified that they were able to identify him because he was introduced by name at the Muyaga Commune meeting and was identified as the prefect.[5588] In this context, the Appeals Chamber finds that a reasonable trier of fact could have relied on Witnesses QBY's and FAB's identification evidence despite the absence of their in-court identifications,[5589] their lack of prior knowledge of Nteziryayo,[5590] and the absence of a physical description from Witness FAB.

2411. Likewise, Nteziryayo's contention that Witness QBY's description of him as "black" and having "sideburns" suggests that the witness was describing Nsabimana is unpersuasive.[5591] Having carefully reviewed the relevant evidence, the Appeals Chamber finds no merit in Nteziryayo's argument that Witness AND-60's description of Nsabimana, even considered with Nteziryayo's evidence that he did not have facial hair at the time,[5592] prevented the Trial Chamber from accepting Witness QBY's identification evidence of Nteziryayo.[5593]

2412. In light of the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in finding that the person Witnesses QBY and FAB identified as the prefect of Butare at the time of the meeting in Muyaga Commune was Nteziryayo.

[5587] Prosecution Response Brief, para. 1529; AT. 17 April 2015 pp. 32, 33.
[5588] *See, e.g.*, Witness FAB, T. 5 April 2004 pp. 23, 24; Witness QBY, T. 19 April 2004 p. 54.
[5589] *See* Trial Judgement, paras. 3564, 3569. The Trial Chamber noted that Witness QBY was not asked to identify Nteziryayo in court and that Witness FAB explained that he would not be able to do so as he only saw him once in 1994. *See idem.*
[5590] The Appeals Chamber recalls that a witness's prior knowledge of, or level of familiarity with, an accused is a relevant factor in the assessment of identification evidence. However, contrary to what Nteziryayo suggests, the fact that a witness did not personally know an accused prior to the events does not necessarily undermine the reliability of his identification evidence. *See Lukić and Lukić* Appeal Judgement, para. 118; *Renzaho* Appeal Judgement, para. 530. *Cf. also Kayishema and Ruzindana* Appeal Judgement, paras. 327, 328.
[5591] *See* Trial Judgement, para. 3559; Witness QBY, T. 19 April 2004 p. 55, T. 20 April 2004 p. 16.
[5592] Nteziryayo, T. 5 June 2007 p. 59.
[5593] The Trial Chamber recalled that Witness QBY testified that Nteziryayo was a tall, black man with sideburns and no spectacles. *See* Trial Judgement, para. 3559. While Witness AND-60's evidence reflects that, at the relevant time, Nsabimana had sideburns and a complexion "between dark and light", he also described Nsabimana as wearing spectacles and being short in stature. *See* Witness AND-60, T. 13 March 2007 p. 7. Witness AND-60 also confirmed Witness QBY's evidence that Nteziryayo was "tall". *See idem.* Of additional significance, Witness QBY further testified that Nteziryayo said he was a soldier, a position that was not held by Nsabimana. *See* Witness QBY, T. 20 April 2004 pp. 3, 4. Moreover, Nteziryayo did not demonstrate that the Trial Chamber erred by not considering Exhibit D460A (CD-Rom Containing Nsabimana's Interview with BBC Journalists).

4. Similarities Between Prosecution and Defence Evidence

2413. When assessing the Defence evidence in its deliberations, the Trial Chamber stated that:

> The Defence brought evidence regarding a meeting on 23 May 1994 in Mamba *secteur*, Muyaga *commune*, which contained similarities to the meeting testified to by Witnesses QBY and FAB. The Chamber does not exclude the possibility that this other meeting, as asserted by the Defence, actually occurred, however this evidence has no bearing upon the Chamber's assessment of the evidence related to the June 1994 meeting testified to by Witnesses QBY and FAB.[5594]

2414. Nteziryayo submits that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than the 23 May 1994 meeting described by the Defence witnesses[5595] and, consequently, in concluding that the Defence evidence was irrelevant to the assessment of the Prosecution case.[5596] Nteziryayo argues that the Trial Chamber failed to consider sufficiently the following "striking similarities" which suggest that they all were testifying about the same event: (i) Witnesses QBY, FAB, and AND-60 testified that the meeting was held in Muyaga Commune and that the latter two specified that it occurred in the midst of eucalyptus bushes; (ii) Witnesses QBY, FAB, and AND-60 recalled that it occurred in the morning and that a microphone or megaphone was used; (iii) Witnesses FAB, AND-60, and Nteziryayo specified that the meeting concerned security matters; (iv) Witnesses FAB and AND-60 described the *bourgmestre* as introducing the new prefect; and (v) Witness QBY, FAB, and AND-60 testified to hearing gunshots, which caused panic among the audience.[5597] Nteziryayo contends that, had the Trial Chamber properly assessed these similarities, it would have found that the Defence evidence raised doubt in the Prosecution case that he incited killings during a meeting held in Muyaga Commune around mid-June 1994.[5598]

2415. The Prosecution responds that the Trial Chamber considered similarities between the Prosecution and Defence evidence but, because it found that the Muyaga Commune meeting occurred in mid-June 1994, it correctly held that the Defence evidence regarding a meeting in Muyaga Commune on 23 May 1994 had no bearing upon the assessment of the Prosecution case and was not required to assess the credibility of the Defence evidence.[5599] The Prosecution further

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[5594] Trial Judgement, para. 3673 (internal reference omitted).
[5595] Nteziryayo Appeal Brief, paras. 167(iii), 169, 171, 173, 174, 183, 184. *See also* Nteziryayo Reply Brief, paras. 77, 78; AT. 17 April 2015 pp. 16, 17.
[5596] Nteziryayo Appeal Brief, paras. 178, 183, 212(f)(ii). Nteziryayo contends that his defence was based on the premise that he attended only one meeting in Muyaga Commune and that this meeting took place on 23 May 1994 and that the Trial Chamber erred by not addressing the clear conflict between his evidence and the Prosecution case. *See ibid.*, paras. 169, 173, 176, 178, 212(e).
[5597] Nteziryayo Appeal Brief, paras. 167(iii), 172, 183-185.
[5598] *See* Nteziryayo Appeal Brief, paras. 167(iv), 172, 175-178, 195.
[5599] Prosecution Response Brief, paras. 1525, 1530.

submits that Nteziryayo overstates the alleged similarities and minimises the differences between the two meetings.[5600]

2416. The Appeals Chamber notes that the Trial Chamber's statement of the parallels between the Prosecution and the Defence evidence is limited to an observation that the latter brought evidence "which contained similarities to the meeting testified to by Witnesses QBY and FAB" as well as a reference to discrete aspects of Witness AND-60's evidence.[5601] The Trial Chamber provided no explanation as to why the similarities did not reasonably suggest that the Prosecution and the Defence evidence concerned the same meeting, although its summary of the evidence reflects that it did not disregard them.[5602] The Appeals Chamber finds that the Trial Chamber's analysis falls below the requirement to provide a reasoned opinion pursuant to Article 22(2) of the Statute and Rule 88(C) of the Rules given the number of similarities in the evidence as well as the Defence's clear position at the close of trial that all the witnesses were talking about the same meeting and that its evidence rebutted allegations that Nteziryayo made inciting statements during it.[5603]

2417. However, the Appeals Chamber finds that this error of law does not invalidate the Trial Chamber's conclusion that Prosecution and Defence witnesses were talking about two different meetings. Having reviewed the evidence cited by the Trial Chamber and the parties, the Appeals Chamber finds that a reasonable trier of fact could have concluded that Witnesses QBY and FAB were referring to an event other than the 23 May 1994 meeting described by Witness AND-60 and Nteziryayo. The Appeals Chamber finds the parallels that the event started in the morning[5604] and that it occurred near the Mamba sector office[5605] to be insignificant in light of Witness AND-60's evidence that public meetings regularly occurred there.[5606] Likewise, overlapping evidence that voice amplification systems were used[5607] and that gunshots were fired[5608] does not necessarily establish as unreasonable, in the context of the totality of the evidence, that Witnesses QBY and FAB, on one hand, and Witness AND-60 and Nteziryayo, on the other hand, were referring to

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[5600] Prosecution Response Brief, paras. 1526-1528, *referring to* Trial Judgement, paras. 3628, 3635, 3642, 3647, 3680.
[5601] *See* Trial Judgement, para. 3673, *referring to* Witness AND-60, T. 13 March 2007 pp. 4, 8, 9.
[5602] The similarities are the following: (i) the meeting occurred in Muyaga Commune in the morning next to the Mamba sector office (*see* Trial Judgement, paras. 3557, 3565, 3570, 3578); (ii) a loudspeaker or a microphone was used (*see ibid.*, paras. 3557, 3565, 3572); (iii) firing of gunshots occurred during the meeting (*see ibid.*, paras. 3558, 3574); and (iv) the new prefect was introduced at the meeting (*see ibid.*, paras. 3559, 3565, 3566, 3572).
[5603] *See* Nteziryayo Closing Brief, paras. 215-221; Nteziryayo Closing Arguments, T. 27 April 2009 pp. 71-73.
[5604] *See* Witness FAB, T. 5 April 2004 p. 23; Witness QBY, T. 19 April 2004 p. 52; Witness AND-60, T. 13 March 2007 pp. 4, 10; Nteziryayo, T. 5 June 2007 p. 25.
[5605] *See* Witness FAB, T. 5 April 2004 p. 22; Witness QBY, T. 19 April 2004 p. 52; Witness AND-60, T. 13 March 2007 pp. 3, 4, 14; Nteziryayo, T. 5 June 2007 p. 25.
[5606] *See* Witness AND-60, T. 13 March 2007 p. 14.
[5607] *See* Witness FAB, T. 5 April 2004 pp. 26, 27; Witness QBY, T. 20 April 2004 p. 14; Witness AND-60, T. 13 March 2007 p. 8.
[5608] *See* Witness FAB, T. 5 April 2004 p. 27; Witness QBY, T. 19 April 2004 p. 53; Witness AND-60, T. 13 March 2007 pp. 54, 55. In particular, the Appeals Chamber observes that other Prosecution and Defence

different events.[5609] Contrary to Nteziryayo's assertion, the Prosecution and Defence evidence does not consistently indicate that the *bourgmestre* introduced Nteziryayo,[5610] or that the meeting concerned security matters.[5611]

2418. The Appeals Chamber emphasises that Witnesses QBY and FAB were categorical that Nteziryayo was introduced as the new prefect during this meeting[5612] and recalls that it has affirmed the Trial Chamber's reliance on their ability to identify him on this basis.[5613] This evidence contrasts with Witness AND-60's testimony that Nsabimana was introduced as the new prefect[5614] and Nteziryayo's testimony that he was not prefect at the time of the only meeting he attended in Muyaga.[5615] Based on the record before it, the Appeals Chamber concludes that, notwithstanding the Trial Chamber's failure to provide a reasoned opinion, a reasonable trier of fact could have determined that the Defence evidence did not relate to the Prosecution case and concluded that Witnesses QBY and FAB testified about a later meeting that occurred "around mid-June 1994" or, more specifically, "on or after 21 June 1994".[5616]

2419. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to provide a reasoned opinion but concludes that this error does not invalidate the Trial Chamber's conclusion that the Defence evidence regarding a meeting on 23 May 1994 had no bearing upon its assessment of the evidence related to the June 1994 meeting given by Witnesses FAB and QBY.

5. Nteziryayo's Presence Elsewhere From 17 June 1994 Onwards

2420. Nteziryayo submits that the Trial Chamber failed to consider his testimony about his movements from 17 June 1994 onwards which, he argues, conflicts with the Trial Chamber's finding that he participated in a meeting in Muyaga Commune on or after 21 June 1994.[5617] In this respect, Nteziryayo emphasises that he gave evidence that "from at least 22 June he was fully

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witnesses testified to gunshots fired at other meetings where Colonel Tharcisse Muvunyi ("Muvunyi") was present. *See* Trial Judgement, paras. 3534, 3545, 3588, 3635, 3647, 3655.

[5609] *See* Witness FAB, T. 5 April 2004 p. 22; Witness QBY, T. 19 April 2004 pp. 52-54.

[5610] *Compare* Witness FAB, T. 5 April 2004 pp. 24, 25 (while the *bourgmestre* said the new prefect would be introduced, Nteziryayo introduced himself) *and* Witness QBY, T. 19 April 2004 pp. 53, 54 (Muvunyi introduced the new prefect) *with* Witness AND-60, T. 13 March 2007 p. 10 (the *bourgmestre* introduced the officials).

[5611] The Appeals Chamber does not consider that it amounts to a similarity between the testimonies of Witnesses FAB and AND-60 since Witness FAB only stated that Nteziryayo "mentioned security measures" because they were about to win the war and did not say that the purpose of the meeting was to address them. *See* Witness FAB, T. 5 April 2004 pp. 28, 48, 49 *and compare with* Witness AND-60, T. 13 March 2007 p. 10. The Appeals Chamber also notes that Witness QBY denied that Nteziryayo talked about security. *See* Witness QBY, T. 20 April 2004 p. 23.

[5612] Witness QBY, T. 19 April 2004 p. 54; Witness FAB, T. 5 April 2004 pp. 23-25.

[5613] *See supra*, Section VII.C.3.

[5614] Witness AND-60, T. 13 March 2007 p. 10.

[5615] Nteziryayo, T. 5 June 2007 p. 26.

[5616] Trial Judgement, paras. 3672, 3674.

[5617] Nteziryayo Appeal Brief, paras. 167(v), 196-200, 212(e), 244. *See also ibid.*, paras. 218(vi), 232 (relating to the meeting held in Kibayi); Nteziryayo Reply Brief, para. 103.

occupied in the exercise of his function as *préfet*".[5618] He contends that, in addition to his busy schedule, his testimony demonstrates that he was dedicated to assisting Tutsis and Hutus alike, rendering it unlikely that he incited the population to kill Tutsis at a meeting in Muyaga Commune during this period.[5619] Nteziryayo adds that the only time he would have been able to attend a meeting in Muyaga Commune was from 28 June 1994 to 3 July 1994, but that the evidence demonstrates that there was intense fighting then and chaos as the RPF entered Butare, which undermines the position that a meeting as described by the Prosecution witnesses occurred then.[5620]

2421. The Prosecution, relying on the *Ndindabahizi* Appeal Judgement, responds that Nteziryayo improperly introduces a new alibi on appeal and contends that his arguments should be summarily dismissed.[5621] It submits that, even if the Appeals Chamber were to permit this alibi evidence, Nteziryayo fails to raise reasonable doubt that he was at the meeting held in Muyaga Commune around mid-June 1994.[5622]

2422. Nteziryayo replies that he is not barred from relying on alibi evidence that forms part of the trial record and that only through reading the Trial Judgement it became clear that he needed to emphasise the relevance of this evidence.[5623]

2423. The Appeals Chamber finds that the Prosecution's reliance on the *Ndindabahizi* Appeal Judgement is inapposite, since Nteziryayo is not presenting alibi evidence for the first time on

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[5618] Nteziryayo Appeal Brief, para. 196. Specifically, Nteziryayo points to the following: (i) on 17 June 1994, he was appointed prefect; (ii) on 18 June 1994, his appointment was broadcasted and he assisted in the evacuation of approximately 400 orphans to the border of Burundi; (iii) on 19 June 1994, he met the Deputy Prefect of Political and Administrative Affairs and the Deputy Prefect of Social Affairs; (iv) on 20 June 1994, his appointment as prefect was officially announced; (v) on 21 June 1994, he participated in his inauguration as prefect between approximately 11.30 a.m. and 12.00 p.m., contacted officials in the prefecture and apprised himself of the security situation; (vi) on 22 June 1994, he attended the swearing-in ceremony of Fidèle Uwizeye in Ndora Commune at 11.00 a.m., followed by the swearing-in ceremony of Ndayambaje in Muganza Commune between 2.00 and 3.00 p.m. and met with the bishop of Butare in relation to Cardinal Etchégray's visit; (vii) on 23 June 1994, his day was entirely devoted to preparation for the visit of Cardinal Etchégray; (viii) on 24 June 1994, he spent the full day with Cardinal Etchégray; (ix) on 25 June 1994 he spent the morning escorting Cardinal Etchégray to Gikongoro and the afternoon with the bishop of Butare; (x) on 26 June 1994, he met first with the bishop of Butare and also with the director of the School of Veterinary Agriculture Kabutare to discuss the evacuation of 600 students displaced from Byumba; (xi) on 27 to 28 June 1994, alerted by the violence of the fighting, he ceased all other activities to implement the evacuation plan for displaced populations and populations of the city; and (xii) on 28 June 1994, he assisted the evacuation of the Kiruhura sisters to Zaire. *See idem.*

[5619] Nteziryayo Appeal Brief, para. 198.

[5620] Nteziryayo Appeal Brief, para. 199.

[5621] Prosecution Response Brief, paras. 1531, 1532, *referring to Ndindabahizi* Appeal Judgement, paras. 64, 67, 69. *See also ibid.*, para. 1533.

[5622] Prosecution Response Brief, para. 1534. The Prosecution underlines that: (i) Nteziryayo's testimony about his alibi lacks credibility; (ii) the Trial Chamber found that the meeting occurred around mid-June 1994 but Nteziryayo only raises an alibi for 18, 19, and 21 to 28 June 1994; and (iii) Nteziryayo's attempt to establish an alibi for the entire period of 17 to 28 June 1994 is unsupported by the record and fails to account for his whereabouts at all relevant times. *See idem. See also ibid.*, para. 1536; AT. 17 April 2015 p. 33.

[5623] Nteziryayo Reply Brief, paras. 83, 88.

appeal.[5624] Nteziryayo's testimony as to his whereabouts after he was appointed as prefect of Butare formed part of the record at trial.[5625]

2424. The Appeals Chamber notes that the Trial Chamber summarised Nteziryayo's testimony that he did not take part in meetings in Muyaga Commune other than the one on 23 May 1994 and that he did not go to that commune at any other time between April and July 1994.[5626] While the Trial Judgement does not reflect express consideration of all aspects of Nteziryayo's testimony about his whereabouts after 17 June 1994 as referred to on appeal, it does expressly refer to some of it.[5627] In this context, the Appeals Chamber is not persuaded that the Trial Chamber ignored all of this evidence. It is also not persuaded that this evidence, which does not provide a comprehensive accounting of Nteziryayo's whereabouts after 17 June 1994 and is based solely on Nteziryayo's uncorroborated testimony,[5628] demonstrates that no reasonable trier of fact could have determined that Nteziryayo participated in the meeting described by Witnesses QBY and FAB.[5629]

2425. Furthermore, Nteziryayo's contention that it is "unlikely" that he incited the killing of Tutsis at a meeting in Muyaga Commune after he was appointed as prefect of Butare in light of his "dedication to assisting Tutsis and Hutus alike" as Butare Prefect is unpersuasive.[5630] The Appeals Chamber is not convinced that this testimony renders the Trial Chamber's reliance on Witnesses QBY and FAB unreasonable in light of their direct and corroborative evidence concerning the nature of his speech at the meeting they described.

2426. Based on the above, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to consider his testimony about his whereabouts from 17 June 1994 onwards.

[5624] *See Ndindabahizi* Appeal Judgement, para. 66.
[5625] *See* Nteziryayo, T. 7 June 2007 pp. 30-32, 46-48, 50-55, T. 11 June 2007 pp. 7, 11, 12, 15, 16, 59-62, T. 12 June 2007 pp. 15-17, 26, 27.
[5626] *See* Trial Judgement, para. 3581, *referring to* Nteziryayo, T. 5 June 2007 p. 33.
[5627] *See, e.g.*, Trial Judgement, paras. 4564, 4566 (22 June 1994), 4826, 4845 (18 June 1994).
[5628] *See* Nteziryayo, T. 7 June 2007 pp. 30-32, 46-48, 50-55, T. 11 June 2007 pp. 7, 11, 12, 15, 16, 59-62, T. 12 June 2007 pp. 15-17, 26, 27.
[5629] The Appeals Chamber observes that Nteziryayo did not call any witnesses at trial to confirm that he could not have been present at a meeting in Muyaga Commune on or after 21 June 1994 and that he did not specifically point to the evidence now referred to on appeal as being relevant to this allegation in his closing brief or during closing arguments. *See* Nteziryayo Closing Brief, paras. 181-221; Nteziryayo Closing Arguments, T. 27 April 2009, T. 28 April 2009. While Nteziryayo stresses that he did not rely on evidence of his specific activities after he was appointed prefect at trial when attempting to refute his participation in the meeting at Muyaga Commune because he only became aware of the date from the Trial Judgement, the Appeals Chamber finds no merit in this position. Nteziryayo's defence at trial demonstrates that he was prepared to respond to the allegation that the meeting had taken place when he was prefect and deliberately oriented it to prove that the meeting in Muyaga Commune actually took place on 23 May 1994 when he was not prefect. In this context, he could have equally emphasised what would have prevented him from attending a meeting there after his appointment. *See supra*, paras. 2295-2297.
[5630] *See* Nteziryayo Appeal Brief, para. 198.

6. Conclusion

2427. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide during a meeting held in Muyaga Commune around mid-June 1994 and, on this basis, in convicting him of direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Ground 5 of Nteziryayo's appeal.

D. Kibayi Commune Meeting (Ground 6)

2428. Based on the evidence of Prosecution Witnesses FAK and QBU, the Trial Chamber found that, around mid to late June 1994, Nteziryayo, in his capacity as Butare Prefect, attended a public meeting on a football pitch next to the Kibayi commune office in Nyabisigara *Cellule*, Mukindo Sector, at which he incited the population to "flush out and kill the remaining Tutsis survivors in the *commune*".[5631]

2429. The Trial Chamber observed that, while Prosecution and Defence witnesses all testified to attending public meetings on a football pitch next to the Kibayi commune office,[5632] Nteziryayo and the Defence witnesses were referring to a meeting which occurred on 24 May 1994, while Witnesses FAK and QBU were referring to a later meeting which must have taken place after Nteziryayo assumed office as prefect, that is after 17 June 1994.[5633] The Trial Chamber determined that the similarities between the Defence and the Prosecution evidence were "fortuitous" [5634] and noted that there were "patent differences between the opposing parties' evidence", notably concerning whether Nteziryayo was prefect of Butare at the time of the meeting.[5635] It concluded that the evidence led by the parties concerned two different meetings,[5636] and that the evidence led by the Defence regarding a meeting that took place on 24 May 1994 was therefore "not relevant"[5637] and did not rebut the Prosecution evidence with respect to the subsequent meeting at the Kibayi commune office when Nteziryayo was prefect.[5638]

2430. The Trial Chamber found that Nteziryayo's speech at the Kibayi Commune meeting held around mid to late June 1994 constituted a direct appeal to kill Tutsis and convicted Nteziryayo of direct and public incitement to commit genocide on this basis.[5639]

2431. Nteziryayo submits that the Trial Chamber erred in finding that, in his capacity as prefect, he incited the commission of genocide during a meeting held in Kibayi in mid to late June 1994 and, on this basis, erred in convicting him of direct and public incitement to commit genocide.[5640]

[5631] Trial Judgement, paras. 3691, 5945, 6022.
[5632] Trial Judgement, para. 3675, fn. 9871, *referring to* Witnesses FAK and QBU, Nsabimana, Nteziryayo, Nteziryayo Defence Witnesses AND-11, AND-53, and AND-64 as well as Ntahobali Defence Witness H1B6.
[5633] Trial Judgement, paras. 3677, 3678, 3682, 3684. *See also ibid.*, paras. 3676, 3679.
[5634] Trial Judgement, para. 3680.
[5635] Trial Judgement, para. 3681.
[5636] Trial Judgement, para. 3682.
[5637] Trial Judgement, para. 3684.
[5638] Trial Judgement, para. 3685.
[5639] Trial Judgement, paras. 3691, 6022-6025, 6036, 6186. The Trial Chamber concluded that there was insufficient evidence to establish that Nteziryayo's words at the meeting substantially contributed to any subsequent crime and accordingly found that he was not criminally responsible for genocide with respect to this allegation. *See ibid.*, para. 5946.
[5640] Nteziryayo Notice of Appeal, paras. 47-65; Nteziryayo Appeal Brief, paras. 7, 213-239, 240, 241, 243-245, 246-249, 253, 255-257.

He argues that the Trial Chamber erred in determining that the Prosecution witnesses testified about a meeting other than that described by the Defence witnesses and in dismissing the Defence evidence as irrelevant.[5641]

2432. The Appeals Chamber will assess these overarching challenges when addressing Nteziryayo's specific contentions that the Trial Chamber erred in: (i) failing to treat the Prosecution evidence with sufficient caution; (ii) assessing the Prosecution identification evidence; and (iii) insufficiently considering similarities and in assessing the differences between Prosecution and Defence evidence concerning the meeting.[5642]

1. Insufficient Caution

2433. The Trial Chamber noted that Witnesses FAK and QBU pleaded guilty to genocide in Rwanda and were detained and awaiting trial at the time of their testimonies.[5643] It considered that "these witnesses may have an interest in attributing responsibility for acts they committed during the genocide as being authorised by the authorities and therefore officially sanctioned in order to potentially reduce their respective sentences" and determined that it should view their evidence "with appropriate caution."[5644] In addition, it accepted that the witnesses did not attend the same *Gacaca* proceedings, noted that while "[t]hey met briefly in prison" they did not "share a cell", and concluded that it was satisfied that they "did not discuss their experiences while detained together."[5645]

2434. Nteziryayo argues that, while the Trial Chamber recognised the need for caution, it failed to apply it since his conviction relies entirely on the accomplice evidence from Witnesses FAK and QBU.[5646] Notably, he submits that the Trial Chamber erred in assessing whether the witnesses discussed their experiences, as it relied solely on Witness QBU's evidence to find that he and Witness FAK did not attend *Gacaca* sessions together when Witness FAK's evidence was to the contrary.[5647] He further submits that, whether or not Witnesses FAK and QBU participated in the same *Gacaca* sessions, the Trial Chamber failed to consider the "substantial risk of contamination" from them participating in "open discussions" at which the objective was to discuss, *inter alia*,

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[5641] Nteziryayo Notice of Appeal, paras. 55, 59-61; Nteziryayo Appeal Brief, paras. 216, 218(v), 228-231.
[5642] Nteziryayo also refers to prior arguments raised under Ground 5 of his appeal concerning the Trial Chamber's failure to consider his evidence showing that he could not have attended a meeting such as the one held in Kibayi Commune after he assumed the position as Butare Prefect on 21 June 1994. *See* Nteziryayo Appeal Brief, paras. 218(vi), 232; Nteziryayo Reply Brief, para. 103. For the reasons previously articulated under Section VII.C.5, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in failing to consider his testimony about his whereabouts from 21 June 1994 onwards in the Trial Judgement.
[5643] Trial Judgement, para. 3686.
[5644] Trial Judgement, para. 3686.
[5645] Trial Judgement, para. 3687.
[5646] Nteziryayo Appeal Brief, paras. 213, 238, 246, 247. *See also* Nteziryayo Reply Brief, para. 109(a).

events in Kibayi Commune.[5648] Finally, he points to Witness FAK's concession that his prior statements did not entirely contain "true reflections".[5649]

2435. The Prosecution responds that Nteziryayo does not demonstrate that the Trial Chamber exercised insufficient caution with respect to the evidence of Witnesses FAK and QBU.[5650]

2436. The Appeals Chamber finds no merit in Nteziryayo's general contention that the Trial Chamber failed to exercise sufficient caution simply because the finding of his criminal responsibility stemming from the Kibayi Commune meeting relies on two accomplice witnesses.[5651] As to Nteziryayo's argument that the Trial Chamber erred in finding that Witnesses FAK and QBU did not discuss their experiences, the Appeals Chamber notes that Witness QBU testified that he never took part in *Gacaca* sessions with Witness FAK.[5652] While the testimony of Witness FAK indicates that he and Witness QBU were from the same commune and that it was possible that they participated in meetings, Witness FAK does not state that he attended the same *Gacaca* sessions as Witness QBU or that they discussed their experiences with each other.[5653] Likewise, Nteziryayo does not substantiate his contention that the Trial Chamber failed to consider the "substantial risk of contamination" from these witnesses participating in "open discussions" about the events in Kibayi Commune. Nteziryayo's arguments in this regard are therefore dismissed.

2437. The Appeals Chamber notes that, as mentioned by Nteziryayo, Witness FAK appears to have suggested that not all of his prior statements were "true reflections".[5654] However, the Appeals Chamber is not persuaded that this aspect of Witness FAK's testimony precluded a reasonable trier of fact from relying on his evidence as it concerned the Kibayi Commune meeting, as this aspect of the witness's testimony fails to demonstrate that the witness possessed any incentive to perjure himself before the Tribunal in this respect. Indeed, and of particular significance, the Trial Chamber

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[5647] Nteziryayo Appeal Brief, para. 236.
[5648] Nteziryayo Appeal Brief, paras. 218(viii), 237, *referring to* Witness QBU, T. 13 April 2004 p. 34 (closed session). The Appeals Chamber observes that, while allegations of collusion as it relates to several Prosecution witnesses fell outside the scope of Nteziryayo's notice of appeal, it concluded that these particular arguments related to Witnesses FAK and QBU did not. *See* 8 May 2013 Appeal Decision, para. 63. However, it determined that paragraphs 249 through 252 of the Nteziryayo Appeal Brief, which, in part, raised arguments relating to Witness FAK, exceeded the scope of the appeal and would not be considered. *See* 12 July 2013 Appeal Decision, paras. 23-25.
[5649] Nteziryayo Appeal Brief, para. 255 (emphasis omitted), *referring to* Witness FAK, T. 15 April 2004 p. 34.
[5650] Prosecution Response Brief, paras. 1554, 1555.
[5651] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 251 ("The Appeals Chamber recalls that nothing in the Statute or the Rules prevents a Trial Chamber from relying on uncorroborated evidence; it has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony. This discretion applies equally to the evidence of accomplice witnesses provided that the trier of fact applies the appropriate caution in assessing such evidence.") (internal references omitted).
[5652] Witness QBU, T. 13 April 2004 p. 33 (closed session).
[5653] Witness FAK, T. 15 April 2004 p. 45 (closed session).
[5654] Witness FAK, T. 15 April 2004 p. 34 (closed session) ("Q. [...] Do you acknowledge that in none of these previous statements you had made mention of such a statement? A. I told you that I did note that there were some documents that

expressly noted the differences between Witness FAK's prior statement and his testimony concerning the date of the meeting, but considered the difference to be minor.[5655]

2438. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber failed to exercise sufficient caution with respect to the evidence of Witnesses FAK and QBU.

2. Identification Evidence

2439. The Trial Chamber relied on the identification evidence of Witnesses FAK and QBU and determined that their testimonies that Nteziryayo was the prefect of Butare at the time of the Kibayi Commune meeting reflected "[t]he most salient difference between the Prosecution and Defence evidence".[5656] The Trial Chamber noted that both Witnesses FAK and QBU knew Nteziryayo during 1994 and positively identified him in court.[5657]

2440. Nteziryayo contends that the Trial Chamber erred in its assessment of Witnesses FAK's and QBU's identifications of him as prefect at the time of the meeting about which they testified.[5658] In this regard, he submits that the Trial Chamber: (i) erred in relying on the witnesses' in-court identification;[5659] (ii) failed to consider that the description of the prefect given by Witnesses FAK and QBU most closely matched that of Nsabimana;[5660] and (iii) ignored the reasonable possibility that Witnesses FAK's and QBU's error regarding the date of Nteziryayo's appointment as prefect suggested that they were not wrong about the dates but about the identity of the prefect they saw at the meeting.[5661] Nteziryayo argues that the Trial Chamber's error is significant given its conclusion that the identification of Nteziryayo as the prefect was the "most salient difference" between Prosecution and Defence evidence.[5662]

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were false in that if I did not recognise, I do recall some of them, but a few are not true reflections, but since there is nothing else I can do, I will agree with whatever conclusions are drawn from there.").

[5655] Trial Judgement, para. 3690.

[5656] Trial Judgement, para. 3681.

[5657] Trial Judgement, para. 3681.

[5658] Nteziryayo Appeal Brief, paras. 218 (ii), 220, 222. *See also* AT. 17 April 2015 p. 17.

[5659] Nteziryayo Appeal Brief, paras. 218(i), 219, 221(d), *referring to* Trial Judgement, para. 3681. *See also* Nteziryayo Reply Brief, paras. 91, 92.

[5660] Nteziryayo Appeal Brief, para. 221(b). Nteziryayo argues that Witnesses FAK and QBU both described the prefect at the meeting as having sideburns, which Nsabimana had but not Nteziryayo, and that Witness FAK described the prefect as beginning to bald, whereas Witness AND-11 testified that Nteziryayo had lots of hair. *See idem.*

[5661] Nteziryayo Appeal Brief, para. 221(a). *See also* Nteziryayo Reply Brief, para. 96. Nteziryayo emphasises that Witness QBU testified that he had replaced Jean-Baptiste Habyalimana as prefect when Nsabimana had, and that Witnesses FAK and QBU both firmly believed that Nteziryayo was appointed prefect much earlier than he in fact was. *See* Nteziryayo Appeal Brief, para. 221(c); Nteziryayo Reply Brief, paras. 93, 94.

[5662] Nteziryayo Appeal Brief, paras. 223, 229 (emphasis omitted).

2441. The Prosecution responds that the Trial Chamber held that no positive probative weight would be given to in-court identification[5663] and argues that it was reasonable to determine that the meeting described by Witnesses FAK and QBU took place after Nteziryayo's 17 June 1994 appointment based on: (i) the fact that Nteziryayo identified himself as the new prefect; (ii) Witness FAK's suggestion that, although he was not sure of the date, the meeting occurred on 18 or 19 June 1994; and (iii) Witness QBU's belief that the meeting was in June.[5664] The Prosecution adds that both Prosecution witnesses had seen Nteziryayo before.[5665]

2442. The Appeals Chamber observes that Witnesses FAK's and QBU's identification of Nteziryayo as the prefect at the time of the meeting was the principal basis upon which the Trial Chamber concluded that they testified about a meeting occurring after Nteziryayo's appointment as Butare Prefect on 17 June 1994.[5666] In this respect, the Trial Chamber held that the Prosecution witnesses' identification of Nteziryayo as prefect could not be a case of misidentification as Witnesses FAK and QBU both "knew Nteziryayo during 1994" and positively identified him in court.[5667]

2443. The Appeals Chamber finds no merit in Nteziryayo's submissions regarding the Trial Chamber's reliance on in-court identification[5668] and the Prosecution witnesses' description of the prefect they saw.[5669] The Appeals Chamber observes that the Trial Chamber noted in its summary of their evidence that both Witnesses FAK and QBU stated that the individual they identified as Nteziryayo introduced himself at the meeting as the prefect.[5670] When discussing their identification of Nteziryayo as the prefect, the Trial Chamber also referred to their conflicting evidence as regards the date of the meeting, noting that: (i) in a prior statement, Witness FAK said the meeting occurred in May 1994; (ii) Witness FAK testified in court that "it actually took place in early June and

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[5663] Prosecution Response Brief, para. 1541, *referring to* Trial Judgement, para. 173.
[5664] Prosecution Response Brief, para. 1542; AT. 17 April 2015 p. 34.
[5665] Prosecution Response Brief, para. 1543; AT. 17 April 2015 p. 34. The Prosecution argues that Nteziryayo's attempt to impeach their evidence on the basis of their description of him neither discredits their testimonies nor establishes that the Trial Chamber's finding was unreasonable. It submits that Nteziryayo merely repeats his unsuccessful "sideburn defence" from trial and that, as the identification was not made under difficult circumstances, there was no need for the Trial Chamber to consider the issues of sideburns and receding hair. *See* Prosecution Response Brief, para. 1543.
[5666] *See* Trial Judgement, para. 3681.
[5667] Trial Judgement, para. 3681.
[5668] The Appeals Chamber recalls that any in-court identification should be assigned "little or no credence" given the signals that can identify an accused aside from prior acquaintance. *See Gatete* Appeal Judgement, para. 193; *Kalimanzira* Appeal Judgement, para. 96. *See also Kunarac et al.* Appeal Judgement, para. 320. In the present case, in addition to noting Witnesses FAK's and QBU's positive in-court identification, the Trial Chamber relied on the fact that they knew Nteziryayo in 1994, a conclusion that Nteziryayo did not challenge. In these circumstances, the Appeals Chamber finds no error in the Trial Chamber's reliance on the witnesses' identification of Nteziryayo in-court.
[5669] Having carefully reviewed the relevant parts of their evidence, the Appeals Chamber is also not persuaded by Nteziryayo's arguments that the description of the prefect given by Witnesses FAK and QBU most closely matched that of Nsabimana and, consequently, that this part of the evidence required express consideration by the Trial Chamber.
[5670] Trial Judgement, paras. 3587, 3594; Witness FAK, T. 14 April 2004 p. 19, T. 15 April 2004 pp. 24, 29, 30 (closed session); Witness QBU, T. 13 April 2004 p. 9.

estimated around 18 or 19 June 1994"; and (iii) Witness QBU testified that the meeting "occurred around the end of May or early June 1994."[5671]

2444. A careful review of the witnesses' testimonies indicates, as pointed out by Nteziryayo, that both Prosecution witnesses estimated that the meeting occurred "between May and June 1994" or in "late May, early June".[5672] As observed by the Trial Chamber, when it was put to each Prosecution witness that the meeting to which they testified must have been in June 1994 since Nteziryayo took up duties as Butare Prefect after 21 June 1994, Witness FAK maintained that Nteziryayo was a prefect when he came in May 1994, while Witness QBU contested the validity of Nteziryayo's letter of appointment, stating that it misstated the date of appointment "as much later than the actual appointment."[5673] The Appeals Chamber also notes that Witness QBU testified that Nteziryayo replaced Jean-Baptiste Habyalimana as the prefect of Butare,[5674] although there is no dispute that Habyalimana was replaced as prefect of Butare by Nsabimana around 19 April 1994, who was later replaced by Nteziryayo on 17 June 1994.[5675]

2445. However, the Trial Judgement reflects that the Trial Chamber fully considered these particular aspects of Witnesses FAK's and QBU's evidence.[5676] Based on the unrefuted evidence that Nteziryayo was appointed prefect on 17 June 1994 and the fact that Witnesses FAK and QBU consistently asserted that Nteziryayo introduced himself as prefect at the meeting, the Trial Chamber concluded that "the meeting about which Witnesses FAK and QBU testified must have taken place after Nteziryayo assumed office as *préfet*".[5677] In this context, the Appeals Chamber is of the view that the Trial Chamber carefully considered the identification evidence of Witnesses FAK and QBU, including elements within their testimonies that suggest that it occurred prior to the period when Nteziryayo was appointed as Butare Prefect, and did not ignore the possibility that Witnesses FAK and QBU may have been wrong about the identity of the prefect they saw at the meeting. The Appeals Chamber finds that Nteziryayo has not demonstrated that no reasonable trier of fact could have relied on Witnesses FAK's and QBU's identification of him as

[5671] Trial Judgement, para. 3675.
[5672] Witness FAK, T. 15 April 2004 pp. 19, 24, 27 and 28 (closed session); Witness QBU, T. 13 April 2004 pp. 8 and 56 (closed session), T. 14 April 2004 p. 3. The Appeals Chamber also notes that Witness FAK did not estimate the date to be "around 18 or 19 June 1994" as suggested by the Trial Chamber but merely stated that he could be wrong and that the date could "either be either the 18th or 19th of June 1994" since Nteziryayo told them he was the new prefect at the time when specifically questioned about whether Nteziryayo was then the prefect. Witness FAK, T. 15 April 2004 p. 24 (closed session) ("At that time he told us that he was the new *préfet*. So it was not in May exactly, but between May and June. I may be mistaken, but the exact date could be either the 18th or 19th of June. That is my recollection.").
[5673] Trial Judgement, para. 3676.
[5674] Witness QBU, T. 13 April 2004 pp. 36, 37 (closed session).
[5675] *See* Trial Judgement, paras. 2, 31, 45, 46.
[5676] *See* Trial Judgement, paras. 3675, 3676.
[5677] Trial Judgement, para. 3677.

prefect to find that they were talking about a meeting other than the one described by the Defence witnesses.

2446. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has not demonstrated that the Trial Chamber erred in its assessment of Witnesses FAK's and QBU's identification evidence.

3. Similarities and Differences Between Prosecution and Defence Evidence

2447. In assessing the evidence relevant to a meeting in Kibayi Commune, the Trial Chamber acknowledged that Prosecution and Defence evidence shared similarities regarding: (i) the venue of the meeting; (ii) the fact that the meeting took place in the morning; (iii) the presence of the Kibayi *Bourgmestre*; (iv) the fact that Muvunyi made a speech; and (v) the firing of gunshots as a test for the population.[5678] The Trial Chamber considered, however, that the similarities were "fortuitous".[5679]

2448. Nteziryayo submits that a "proper reflection of the evidence" reveals "a strong suggestion that all the Defence and Prosecution witnesses were referring to the same meeting"[5680] and contends that the Trial Chamber erred in dismissing the similarities between the Prosecution and Defence evidence as fortuitous.[5681] In particular, he argues that "the firing of shots into the air, on the orders of Muvunyi, [...] cannot be taken to be a common feature of meetings in the area without evidence supporting that conclusion."[5682] Nteziryayo adds that the Trial Chamber failed to consider that Witness FAK and four Defence witnesses testified that a metaphor about dogs drinking blood was told at the meeting[5683] as well as the broadly consistent evidence on the order of the speakers.[5684]

2449. Nteziryayo further contends that the Trial Chamber erroneously used Witness FAK's testimony that a series of meetings occurred to rebut Witnesses AND-11's and AND-53's testimonies that only one meeting was held in Kibayi Commune.[5685]

[5678] Trial Judgement, para. 3680.
[5679] Trial Judgement, para. 3680.
[5680] Nteziryayo Appeal Brief, para. 231. *See also ibid.*, paras. 213, 224; Nteziryayo Reply Brief, paras. 99, 100.
[5681] Nteziryayo Appeal Brief, paras. 218(iv), 226(c), 227; AT. 17 April 2015 pp. 16, 17.
[5682] Nteziryayo Appeal Brief, para. 226(c).
[5683] Nteziryayo Appeal Brief, para. 226(a), *referring to* Witness FAK, Nteziryayo, Witnesses HB16, AND-53 and AND-64, Trial Judgement, paras. 3588, 3615, 3637, 3649, 3656. In his reply brief, Nteziryayo points out that the Trial Chamber merely referred to the witnesses' evidence on the metaphor of dogs drinking blood in summarising their testimonies, without any indication that this was considered in its deliberations. *See* Nteziryayo Reply Brief, para. 101.
[5684] Nteziryayo Appeal Brief, para. 226(b). Nteziryayo argues that all the witnesses were broadly consistent on the following order of speakers: (i) the Kibayi *Bourgmestre*; (ii) the prefect; and (iii) Muvunyi. *See idem. See also* Nteziryayo Reply Brief, para. 102, fn. 122, *referring to* Trial Judgement, paras. 3586-3588, 3594, 3597, 3679.
[5685] Nteziryayo Appeal Brief, paras. 218(iii), 224, 225, *referring to* Trial Judgement, para. 3684; Nteziryayo Reply Brief, para. 106.

2450. The Prosecution responds that the Trial Chamber reasonably found that the meeting described by Witnesses FAK and QBU was different from the 24 May 1994 meeting described by the Defence witnesses, and that the Defence evidence was therefore irrelevant.[5686] It submits that Nteziryayo fails to demonstrate that the Trial Chamber's assessment of the similarities between the two meetings was unreasonable.[5687] In this regard, it argues that: (i) Muvunyi made a similar firearm demonstration during a meeting in Muyaga Commune on 23 May 1994;[5688] (ii) the Trial Chamber did refer to the metaphor of dogs drinking blood; and (iii) the purported similarity regarding the order of speakers is irrelevant if the speakers, particularly the "*préfet*", are different people.[5689]

2451. Finally, the Prosecution responds that the Trial Chamber properly assessed Witness FAK's testimony that other meetings occurred in Kibayi notwithstanding Defence evidence that only one meeting occurred, highlighting Nsabimana's testimony that he visited Kibayi with Nteziryayo after mid-May 1994.[5690]

2452. Recalling the broad discretion that trial chambers have in assessing evidence,[5691] the Appeals Chamber finds that Nteziryayo does not demonstrate any error in the Trial Chamber's conclusion relating to the assessment of the similarities within the evidence warranting its intervention. The Appeals Chamber observes that the Trial Chamber considered in detail similarities about the venue and timing of the meeting and the presence of the Kibayi *Bourgmestre* and finds that Nteziryayo fails to show that no reasonable trier of fact could have regarded these similarities as "fortuitous".[5692] The Trial Chamber also expressly discussed that the majority of witnesses testified about Muvunyi's speech and the firing of gunshots.[5693] Contrary to Nteziryayo's submissions, the record, as reflected in the Trial Judgement, reveals that the firing of gunshots while Muvunyi addressed public gatherings was not unique to a single meeting in Kibayi Commune,[5694] nor were Muvunyi's comments.[5695] In light of these factors, the Appeals Chamber

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[5686] Prosecution Response Brief, paras. 1542, 1547, 1550, 1551; AT. 17 April 2015 pp. 33, 34.
[5687] Prosecution Response Brief, para. 1548; AT. 17 April 2015 p. 34.
[5688] Prosecution Response Brief, para. 1549, *referring to* Trial Judgement, para. 3680, Witness AND-10, T. 13 March 2007 pp. 8, 9, 55.
[5689] Prosecution Response Brief, para. 1548.
[5690] Prosecution Response Brief, para. 1546, *referring to* Trial Judgement, para. 3603, Witness FAK, T. 15 April 2004 pp. 19, 24, 27, 28 (closed session), Nsabimana, T. 20 September 2006 p. 64.
[5691] *See, e.g.*, *Nzabonimana* Appeal Judgement, para. 45; *Ndindiliyimana et al.* Appeal Judgement, para. 331; *Ndahimana* Appeal Judgement, para. 43; *Nahimana et al.* Appeal Judgement, para. 194.
[5692] Trial Judgement, para. 3680.
[5693] Trial Judgement, para. 3680.
[5694] *See* Trial Judgement, paras. 3558, 3559, 3574 (summarising the testimonies of Witnesses QBY and Nteziryayo Defence Witness AND-60 that gunshots were fired as Muvunyi spoke during public meetings in Muyaga Commune). *See also* Witness FAB, T. 5 April 2004 p. 27 (testifying that shots were fired during a public meeting in Muyaga Commune while Muvunyi spoke).
[5695] *Compare* Trial Judgement, paras. 3558, 3567, 3574 *with ibid.*, paras. 3588, 3597, 3680. *See also* Witness FAB, T. 5 April 2004 pp. 26, 27; Nteziryayo, T. 5 June 2007 pp. 18, 28.

considers that a reasonable trier of fact could have determined that these similarities were "fortuitous".

2453. The Appeals Chamber notes that Nteziryayo correctly contends that Witness FAK, Nteziryayo, and three Defence witnesses all testified to one of the speakers at the meeting using the metaphor of dogs drinking blood[5696] and that the Trial Chamber did not expressly assess this similarity. However, the Appeals Chamber finds that Nteziryayo does not demonstrate that no reasonable trier of fact could have concluded that the Prosecution and the Defence witnesses were referring to different meetings despite this evidence. Indeed, the Appeals Chamber observes that, in its summary of the witnesses' testimonies, the Trial Chamber noted that Witness FAK stated that the metaphor was used by Muvunyi, whereas Nteziryayo and Defence witnesses all testified that the metaphor was used by Ruzindaza, the President of the court of first instance.[5697] In the view of the Appeals Chamber, this reveals that the Trial Chamber took note that the evidence differed as to who used the metaphor. Moreover, Nteziryayo and two Defence witnesses who testified on his behalf gave evidence that speakers employed strikingly similar metaphors during other meetings in Muyaga and Muganza communes.[5698] Nteziryayo therefore does not demonstrate that this metaphor was unique to the Kibayi Commune meeting such that a reasonable trier of fact would have been compelled to find that the Defence and the Prosecution witnesses were necessarily referring to this meeting, as opposed to other meetings.

2454. Likewise, the Appeals Chamber finds that Nteziryayo does not demonstrate that no reasonable trier of fact could have concluded that the Prosecution and the Defence witnesses were referring to different meetings notwithstanding the broadly consistent evidence as to the order of speakers.[5699] In this respect, the Appeals Chamber notes that the Defence evidence differed from the

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[5696] Witness FAK, T. 14 April 2004 p. 26; T. 15 April 1994 p. 23 (closed session); Nteziryayo, T. 5 June 2007 pp. 18, 47; Witness AND-53, T. 14 February 2007 p. 73; T. 19 February 2007 pp. 67, 68; Witness AND-64, T. 8 March 2007 p. 35; T. 12 March 2007 p. 50; Witness H1B6, T. 5 December 2005 p. 20.

[5697] *See* Trial Judgement, paras. 3588 (Witness FAK), 3615 (Nteziryayo), 3637 (Witness AND-53), 3649 (Witness AND-64), 3656 (Witness H1B6).

[5698] *See* Trial Judgement, paras. 3548, 3575, 3579, *referring to* Witness AND-29, T. 19 February 2007 pp. 67, 68, Witness AND-60, T. 13 March 2007 p. 9, Nteziryayo, T. 5 June 2007 p. 27. *See also* Nteziryayo, T. 5 June 2007 pp. 17, 18, 27, 28 (describing Muvunyi as stating during a meeting at Ntyazo Commune that "when you are afraid to spill your blood for your nation then note that the dogs are going to drink of this blood for nothing" and further testifying that the speakers at the Muyaga Commune meeting "talked on the same subject on which they talked at Ntyazo").

[5699] With the exception of Nsabimana and Witness AND-64, all the witnesses testified that the Kibayi *Bourgmestre* spoke first, followed by the prefect, whose identity is disputed. Five of the eight witnesses testified that Muvunyi was next to speak. *See* Witness FAK, T. 14 April 2004 pp. 14 (closed session), 19-22, 24-26, 33-35, T. 15 April 2004 pp. 23, 24, 29, 34 (closed session); Witness QBU, T. 13 April 2004 pp. 9, 10, 64, 72, 73 (closed session), T. 14 April 2004 p. 7; Nteziryayo, T. 23 May 2007 pp. 39, 40, T. 5 June 2007 p. 18; Witness AND-11, T. 1 February 2007 pp. 17, 19, 23, 28-30, 35, 41, 42 (closed session), T. 5 February 2007 pp. 53-55, T. 7 February 2007 pp. 11, 29, 39, 40, 44 (closed session); Witness AND-53, T. 14 February 2007 pp. 62, 69-72, T. 15 February 2007 pp. 8, 52-54, 59, 72, T. 19 February 2007 pp. 7, 8; Witness AND-64, T. 8 March 2007 pp. 28-35, T. 12 March 2007 pp. 12, 15-17, 19, 49; Witness H1B6, T. 5 December 2005 pp. 15 (closed session) and 18-21, T. 6 December 2005 p. 15. *See also* Trial Judgement, paras. 3587, 3588 (Witness FAK), 3594, 3597 (Witness QBU), 3608 (Nteziryayo), 3622-

Prosecution evidence as only Defence witnesses indicated that Nsabimana chaired the meeting in his capacity as Prefect and that Nteziryayo attended in his capacity as a colonel.[5700]

2455. However, the Appeals Chamber finds that the Trial Chamber erred in finding that Witness FAK's evidence that several meetings occurred in Kibayi Commune was inconsistent with Defence evidence that only one public meeting was held.[5701] The Trial Chamber failed to recognise that Witness FAK's evidence of "a series of meetings" held at the Kibayi commune office between April and July 1994, "only one of which Witness FAK attended *since the others were only for authorities, and not the general population*"[5702] was consistent with the Defence evidence that the 24 May 1994 meeting was the only public meeting that took place in Kibayi Commune at the time.[5703] The Appeals Chamber is nonetheless not convinced that this error occasioned a miscarriage of justice in light of the Trial Chamber's proper assessment of the limited significance of the similarities between the Prosecution and the Defence evidence and Nsabimana's testimony, as noted by the Trial Chamber, that he attended a meeting in Kibayi Commune another time together with Nteziryayo.[5704]

2456. Based on the foregoing, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that no reasonable trier of fact could have concluded that Prosecution and Defence witnesses were testifying about two different meetings and that, consequently, the Defence evidence was not relevant to and did not rebut the Prosecution case.

4. Conclusion

2457. For the foregoing reasons, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in finding that he incited the commission of genocide

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3624 (Witness AND-11), 3632-3635 (Witness AND-53), 3645-3649 (Witness AND-64), 3653, 3657 (Witness H1B6). The Trial Chamber noted that Witness AND-64 testified that the *bourgmestre* spoke second and the prefect spoke third, while Nsabimana testified that the prefect spoke first and did not refer to the *bourgmestre* speaking at all. It also noted that Witnesses AND-64 and H1B6 testified that Muvunyi spoke fourth, while Nsabimana did not testify that Muvunyi spoke. *See* Trial Judgement, paras. 3604, 3645-3647, 3655.

[5700] *See* Trial Judgement, para. 3679.

[5701] *See* Trial Judgement, para. 3684.

[5702] Trial Judgement, para. 3684 (emphasis added). *See also ibid.*, para. 3583; Witness FAK, T. 14 April 2004 p. 66 ("These were meetings that brought together authorities. Members of the population were not allowed to attend.").

[5703] *See* Trial Judgement, para. 3684. The Appeals Chamber notes that, contrary to the Prosecution's submission, Witness FAK's testimony was not speculative, but affirmative. *See* Witness FAK, T. 14 April 2004 p. 66. The Prosecution's argument that "[a]lternatively, if a 24 May meeting occurred, FAK may not have known about it or he may have believed that it was one of those not open to the public" is purely speculative and not substantiated by the witness's testimony. *See* Prosecution Response Brief, para. 1546.

[5704] Trial Judgement, para. 3684, *referring to* Nsabimana, T. 20 September 2006 p. 64. The Appeals Chamber notes that the reference to "Kabgaye" and not "Kibayi" in the English transcripts of Nsabimana's testimony referred to by the Trial Chamber is erroneous. A review of the original audio-recording of Nsabimana's testimony reveals that he referred to "Kibayi" as noted by the Trial Chamber in paragraph 3684 of the Trial Judgement and not "Kabgaye". *See* audio-recording of Nsabimana's testimony of 20 September 2006, at 01:59:07-02:01:00. *See also* Nsabimana, T. 20 September 2006 pp. 68, 69 (French).

during a meeting held in Kibayi Commune around mid to late June 1994 and, on this basis, in convicting him of direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Ground 6 of Nteziryayo's appeal.

E. Prejudicial Assessment of Evidence (Grounds 7 and 8)

2458. Nteziryayo submits that the Trial Chamber erred in applying different standards in assessing Prosecution and Defence evidence, which, in his view, invalidates all of his convictions.[5705] In support of this claim, he reiterates his contentions that the Trial Chamber erred in discrediting the Defence evidence regarding Ndayambaje's Swearing-In Ceremony.[5706] He further contends that the Trial Chamber did not discredit the Defence evidence concerning the meetings held in Muyaga and Kibayi Communes but erreoneously determined that it was not relevant and further erred by failing to consider Defence evidence regarding his movements from 21 June 1994 onwards.[5707] Nteziryayo also argues that the Trial Chamber failed to properly assess the credibility of ten Prosecution witnesses who were accomplices or had been arrested for their participation in the genocide, and many of whom remained detained together and were awaiting sentencing at the time of their testimony.[5708] He contends that the Prosecution exploited the circumstances surrounding these witnesses, which facilitated "a deliberate, calculated and Machiavellian scheme" to obtain evidence to inculpate him, and that the Trial Chamber erred in failing to acknowledge this "plain reality".[5709]

2459. The Prosecution responds that Nteziryayo does not substantiate his claim that the Trial Chamber erred in applying different standards when assessing Prosecution and Defence evidence.[5710] It contends that the argument that there was a scheme to obtain inculpatory evidence is unsupported.[5711]

2460. The Appeals Chamber has previously dismissed Nteziryayo's contentions that the Trial Chamber employed differing and prejudicial standards when assessing Defence evidence in relation to Ndayambaje's Swearing-In Ceremony.[5712] It has further concluded that the Trial Chamber did not err in its assessment of the evidence about the meetings in Muyaga and Kibayi Communes,

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[5705] Nteziryayo Notice of Appeal, paras. 59-61; Nteziryayo Appeal Brief, paras. 241, 245. *See also* Nteziryayo Reply Brief, paras. 106, 107.
[5706] Nteziryayo Appeal Brief, paras. 242, 245.
[5707] Nteziryayo Appeal Brief, paras. 243-245.
[5708] Nteziryayo Notice of Appeal, paras. 63, 65; Nteziryayo Appeal Brief, paras. 246-248, 253. In this regard, Nteziryayo posits that "[n]o legitimate explanation" was advanced for the inordinate delay between the arrest in Rwanda and sentencing of several of the witnesses who testified against him before the Tribunal. *See* Nteziryayo Appeal Brief, para. 253. *See also* Nteziryayo Reply Brief, para. 109. The Appeals Chamber recalls that, on 12 July 2013, it clarified that the arguments developed in paragraphs 249 through 252 of the Nteziryayo Appeal Brief would not be entertained as they exceeded the scope of Nteziryayo's appeal. *See* 12 July 2013 Appeal Decision, para. 25. *See also* 8 May 2013 Appeal Decision, paras. 51, 58 (striking paragraphs raising allegations of collusion in Grounds 4 and 5 from a previous appeal brief filed by Nteziryayo that exceeded the scope of Nteziryayo's notice of appeal).
[5709] Nteziryayo Appeal Brief, para. 257. *See also ibid.*, paras. 253-256.
[5710] Prosecution Response Brief, para. 1557.
[5711] Prosecution Response Brief, paras. 1558-1564. *See also* AT. 17 April 2015 pp. 27, 30, 31.
[5712] *See supra*, Section VII.B.2.

including evidence concerning Nteziryayo's movements from 21 June 1994 onwards.[5713] Nteziryayo's general contention that the Trial Chamber applied differing and prejudicial standards in assessing the Defence evidence is unsubstantiated and, as a result, is rejected without further consideration.

2461. Turning to the Trial Chamber's alleged failure to exercise sufficient caution with respect to the Prosecution evidence, the Appeals Chamber recalls that it has considered and rejected Nteziryayo's arguments that the Trial Chamber failed to exercise sufficient caution in light of the specific circumstances relating to the testimonies of the ten witnesses with which Nteziryayo takes issue.[5714] The Appeals Chamber is not persuaded that the fact that ten out of the 12 Prosecution witnesses relied upon by the Trial Chamber had been charged in Rwanda for genocide-related crimes demonstrates the existence of a "scheme" to obtain evidence to inculpate Nteziryayo or any resulting error on the part of the Trial Chamber in failing to recognise this.

2462. Based on the foregoing, the Appeals Chamber dismisses Grounds 7 and 8 of Nteziryayo's appeal.

[5713] *See supra*, Sections VII.C, VII.D.
[5714] *See supra*, Sections VII.B.1(b) (addressing the circumstances of the testimonies of Witnesses RV, QAF, FAG, FAU, FAL, and TO), VII.C.1 (addressing the circumstances of the testimonies of Witnesses QBY and FAB), VII.D.1 (addressing the circumstances of the testimonies of Witnesses FAK and QBU).

VIII. APPEAL OF JOSEPH KANYABASHI

2463. The Trial Chamber found Kanyabashi guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and those perpetrated by soldiers at Matyazo Clinic in late April 1994.[5715] The Trial Chamber also found Kanyabashi guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute based on two megaphone announcements he made in Butare Town in May and June 1994.[5716]

2464. Kanyabashi raises challenges related to the Trial Chamber's denial of his applications to vary his witness list and reopen his case and related to his indictment. He also contends that the Trial Chamber erred in its assessment of the evidence and his responsibility in relation to the killings committed at Kabakobwa Hill and Matyazo Clinic as well as with respect to his incitement by megaphone in May and June 1994.

[5715] Trial Judgement, paras. 5809, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186. Judge Ramaroson dissented with respect to the Trial Chamber's conclusions regarding Matyazo Clinic.
[5716] Trial Judgement, paras. 6009-6013, 6037, 6186.

A. Variation of Witness List and Reopening of Case (Grounds 1.7, 3.9, and 3.10)

2465. During the course of the trial, Kanyabashi submitted a number of motions requesting leave to vary his witness list and the reopening of his Defence case. In particular, during the presentation of his defence in December 2007, Kanyabashi requested leave to vary his witness list to remove or replace 12 witnesses and call 12 new witnesses to testify on a number of allegations, including regarding the killings committed at Kabakobwa Hill and the acts of incitement to commit genocide by megaphone.[5717] The Trial Chamber partly dismissed his request on 15 February 2008.[5718] In June 2008, Kanyabashi requested the reopening of his case to call Witness D-2-23-C, which was denied by the Trial Chamber on 2 July 2008.[5719] Likewise, on 19 January 2009, the Trial Chamber denied Kanyabashi's request for reconsideration of the decision denying his request to reopen his case to call Witness D-2-23-C and his additional request to reopen his case to allow Witness D-11-AB to testify.[5720]

2466. Kanyabashi submits that the Trial Chamber erred in its decisions of 15 February 2008, 2 July 2008, and 19 January 2009 by not allowing him to vary his witness list as requested or to reopen his case to hear the proposed witnesses concerning the Kabakobwa Hill killings and the megaphone announcements.

2467. Before turning to Kanyabashi's specific challenges against the above-mentioned decisions, the Appeals Chamber reiterates that, like all decisions relating to the conduct of proceedings, decisions on requests for leave to vary a party's witness list or to reopen a case to allow for the admission of new evidence are among the discretionary decisions of a trial chamber to which the

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[5717] *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, Motion to Vary the List of Joseph Kanyabashi Defence Witnesses Pursuant to Rule 73*ter*, 11 December 2007 (originally filed in French, English translation filed on 21 January 2008) (confidential) ("Kanyabashi 11 December 2007 Motion").

[5718] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motion to Vary His List of Witnesses Pursuant to Rule 73*ter*, 15 February 2008 ("15 February 2008 Decision"). In particular, the Trial Chamber granted Kanyabashi's requests to remove 10 witnesses from his witness list, to substitute one witness, and to call six witnesses to testify about specific elements of his case. The Trial Chamber dismissed the remainder of Kanyabashi's motion, denying his requests for the substitution of Witness D-8-N with Witness D-9-GG and of Witness D-2-13-K with Witness D-2-19-F. It further denied his requests to call Witnesses D-2-10-Y and D-2-16-L to testify about certain additional elements and to add Witnesses D-2-15-V, D-2-17-K, and D-2-17-M to his witness list. *See ibid.*, paras. 39, 44, 51, 54, 56, 58, pp. 17, 18.

[5719] *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, *Requête de Joseph Kanyabashi en réouverture de sa défense aux fins d'inclure D-2-23-C à sa liste de témoins et produire le dossier Gacaca du témoin à charge QA*, 2 June 2008 (confidential) ("Kanyabashi 2 June 2008 Motion"); 2 July 2008 Decision.

[5720] *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-97-15-T, *Requête de Joseph Kanyabashi en reconsidération de la Décision du 2 juillet 2008 et demandant que D-2-23-C et D-11-AB soient entendus*, 18 November 2008 (confidential) ("Kanyabashi 18 November 2008 Motion"); *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Kanyabashi's Motions for Reconsideration of the 2 July 2008 Decision, Requesting that Witnesses D-2-23-C and D-11-AB Be Called to Testify, and for Special Protective Measures for Witnesses D-2-23-C and D-11-AB, 19 January 2009 ("19 January 2009 Decision").

Appeals Chamber must accord deference.[5721] In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber committed a discernible error resulting in prejudice to that party.[5722]

1. 15 February 2008 Decision

2468. On 11 December 2007, Kanyabashi moved the Trial Chamber for leave to replace or remove 12 witnesses on his witness list and call 12 new witnesses pursuant to Rule 73*ter*(E) of the Rules.[5723] The Trial Chamber considered that Kanyabashi's motion sought a "massive" variation of his witness list at a very advanced stage of the proceedings and that there was no adequate explanation for this belated request.[5724] It held that, at this stage of the proceedings, a variation may only be justified if good cause was shown and if there was no material prejudice to the other parties.[5725] It also recalled its prior finding that calling numerous witnesses to testify on the same allegations was unnecessary.[5726] The Trial Chamber partly dismissed Kanyabashi's motion.[5727]

2469. Kanyabashi submits that the Trial Chamber erred in its 15 February 2008 Decision by denying his requests to: (i) substitute Witness D-2-13-K with Witness D-2-19-F and to add Witness D-2-15-V to testify on incidents at Kabakobwa Hill; and (ii) add Witnesses D-9-GG, D-2-17-K, and D-2-17-M to testify in relation to the allegations of incitement by megaphone and by limiting the scope of Witnesses D-2-17-A's and D-2-17-I's testimonies in this respect.[5728] The Appeals Chamber will consider these contentions in turn.

(a) Variation of the Witness List in Relation to Kabakobwa Hill

2470. The Trial Chamber denied Kanyabashi's requests to substitute Witness D-2-13-K with Witness D-2-19-F to testify about the Kabakobwa Hill events and to add Witness D-2-15-V to his witness list to testify about the alleged role played by the *Interahamwe* in Butare Town and the

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[5721] *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals Against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010 ("*Gotovina et al.* 1 July 2010 Appeal Decision"), para. 5; 21 August 2007 Appeal Decision, para. 10; *Milutinović et al.* Appeal Decision, paras. 9, 10.

[5722] *See, e.g.*, *Nizeyimana* Appeal Judgement, para. 286; *Šainović et al.* Appeal Judgement, para. 29; *Ndahimana* Appeal Judgement, para. 14; *Setako* Appeal Judgement, para. 19.

[5723] Kanyabashi 11 December 2007 Motion, para. 5, p. 12.

[5724] 15 February 2008 Decision, paras. 33, 34. The Trial Chamber noted that the first Defence case started on 31 January 2005 and that the motion was filed four months after Kanyabashi's defence started. *See idem.*

[5725] 15 February 2008 Decision, para. 34.

[5726] 15 February 2008 Decision, para. 35, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Joseph Kanyabashi's Motions for Modification of His Witness List, the Defence Responses to the Scheduling Order of 13 December 2006 and Ndayambaje's Request for Extension of Time Within Which to Respond to the Scheduling Order of 13 December 2006, 21 March 2007 ("21 March 2007 Decision"), para. 35, fn. 28.

[5727] 15 February 2008 Decision, pp. 17, 18. *See supra*, fn. 5718.

[5728] Kanyabashi Notice of Appeal, sub-paras. 1.7.1, 1.7.1.1-1.7.1.4, 3.10.1, 3.10.1.1-3.10.1.3; Kanyabashi Appeal Brief, paras. 137-139, 340-357. *See also* Kanyabashi Reply Brief, paras. 134-142.

alleged threats against him.[5729] With regard to Witness D-2-19-F, the Trial Chamber noted that Witness D-2-13-K appeared to be willing to testify and that Kanyabashi had not explained why he requested the substitution at such a late stage of the proceedings and that it had "already heard evidence on the elements listed in D-2-19-F's will-say."[5730] It concluded that Kanyabashi had not shown good cause for the substitution of Witness D-2-13-K with Witness D-2-19-F at this stage of the proceedings.[5731] Similarly, the Trial Chamber denied the addition of Witness D-2-15-V on the ground that it had already heard evidence on the elements listed in the witness's will-say statement.[5732]

2471. Kanyabashi submits that the Trial Chamber erred in denying his requests to substitute Witness D-2-13-K with Witness D-2-19-F and to add Witness D-2-15-V to his witness list.[5733] He contends that Witnesses D-2-19-F and D-2-15-V would have provided evidence relevant to the accounts of Prosecution Witnesses QCB and FAM regarding his presence at Rango Market and the presence of policemen at Kabakobwa Hill, and that the Trial Chamber's refusal to grant leave to hear their evidence was an abuse of its discretionary powers and limited his right to a full answer in defence.[5734] According to Kanyabashi, the prejudice to the parties that would have resulted from granting leave to call these witnesses "was difficult to see" as he had already tried to add these two witnesses prior to the start of his case, the parties were informed of their will-say statements, and the Prosecution did not object.[5735] Kanyabashi adds that the requested substitution complied with the limit of 30 witnesses imposed by the Trial Chamber, and would not have prolonged the proceedings or prejudiced the other parties.[5736] Kanyabashi argues that Witnesses D-2-19-F and D-2-15-V were material witnesses who were in a position to testify to a wide range of events and whose testimonies could have had a decisive effect on the Trial Chamber's guilty verdict.[5737]

2472. The Prosecution responds that Kanyabashi does not demonstrate how Witnesses D-2-19-F and D-2-15-V were an essential component of his defence or provide supporting arguments as to how they could have provided any more relevant evidence on Rango Market and the presence of policemen at Kabakobwa Hill than the witnesses who were called.[5738] The Prosecution adds that nothing indicates that the testimony of these two witnesses could have had any impact on the

[5729] 15 February 2008 Decision, paras. 43, 44, 56, pp. 17, 18.
[5730] 15 February 2008 Decision, para. 43, fn. 35.
[5731] 15 February 2008 Decision, para. 44.
[5732] 15 February 2008 Decision, paras. 55, 56, fn. 38.
[5733] Kanyabashi Notice of Appeal, sub-paras. 1.7.1-1.7.1.4; Kanyabashi Appeal Brief, paras. 137-139.
[5734] Kanyabashi Notice of Appeal, sub-paras. 1.7.1.2, 1.7.1.4; Kanyabashi Appeal Brief, paras. 137-139.
[5735] Kanyabashi Notice of Appeal, sub-para. 1.7.1; Kanyabashi Appeal Brief, para. 138. Kanyabashi submits that only Ntahobali and Nyiramasuhuko objected, pointing out that they were not charged in relation to crimes committed at Kabakobwa Hill. *See* Kanyabashi Appeal Brief, para. 138.
[5736] Kanyabashi Appeal Brief, para. 138.
[5737] Kanyabashi Notice of Appeal, sub-paras. 1.7.1.1-1.7.1.4.
[5738] Prosecution Response Brief, paras. 1731-1733.

verdict as Witness D-2-19-F could only testify to what he heard other people say at *Gacaca* sessions and Witness D-2-15-V could only give cumulative evidence.[5739]

2473. The Appeals Chamber observes that the Trial Chamber did not deny Kanyabashi's request to call Witnesses D-2-19-F and D-2-15-V because their expected evidence was not relevant or because of the prejudice their addition to the witness list would have caused to the other parties. Rather, it primarily relied on the fact that it had already heard evidence on the issues about which the two witnesses were expected to testify.[5740] Kanyabashi's arguments fail to address the primary reason for which his request was denied. The Appeals Chamber stresses that a trial chamber's decision that the accused's case does not necessitate calling numerous witnesses to testify to the same factual allegations is well within the trial chamber's exercise of its discretion in the management of the trial proceedings.[5741] Because Kanyabashi has not demonstrated that the Trial Chamber erred in finding that the evidence would have been repetitive of evidence already heard, the Appeals Chamber dismisses Kanyabashi's submissions regarding the variation of his witness list in relation to Kabakobwa Hill.

(b) Variation of the Witness List in Relation to the Incitement by Megaphone

2474. The Trial Chamber denied Kanyabashi's requests to substitute Witness D-8-N with Witness D-9-GG and to add Witnesses D-2-17-K and D-2-17-M.[5742] The Trial Chamber granted the request to drop Witness D-8-N, who refused to testify, but denied the request to substitute Witness D-9-GG in his place,[5743] noting that it had already heard evidence and was expected to hear further evidence on some of the elements listed in Witness D-9-GG's will-say statement, including on the megaphone incidents.[5744] The Trial Chamber found that it would not be in the interests of justice to hear another witness on these elements.[5745] Similarly, it denied the addition of Witnesses D-2-17-K and D-2-17-M on the grounds that it had already heard several witnesses on the elements listed in their will-say statements.[5746]

[5739] Prosecution Response Brief, paras. 1732, 1734.
[5740] *See supra*, para. 2470.
[5741] *See* 21 August 2007 Appeal Decision, para. 16. *See also Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.7, Decision on Defendant's Appeal Against "*Décision portant attribution du temps à la Défense pour la présentation des moyens à décharge*", 1 July 2008, para. 25.
[5742] 15 February 2008 Decision, paras. 39, 58, pp. 17, 18.
[5743] 15 February 2008 Decision, paras. 37, 39, 69, pp. 17, 18.
[5744] 15 February 2008 Decision, para. 38, fn. 34.
[5745] 15 February 2008 Decision, para. 38. The Trial Chamber was also not convinced that Kanyabashi had demonstrated that the new elements in Witness D-9-GG's expected testimony "may be essential to Kanyabashi's case" and considered that the introduction of these elements at that stage of the trial was belated and may be prejudicial to the other parties. *See ibid.*, para. 39.
[5746] 15 February 2008 Decision, paras. 57, 58.

2475. Furthermore, the Trial Chamber granted Kanyabashi's request to call Witnesses D-2-17-A and D-2-17-I but limited the scope of their testimonies to specific issues of fact, denying Kanyabashi's request to call them to testify on the megaphone incidents, for instance.[5747] The Trial Chamber reasoned that it had already heard several witnesses on the elements on which Kanyabashi would not be authorised to question these witnesses, and that it was not in the interests of justice to hear other witnesses on these elements.[5748]

2476. Kanyabashi submits that the Trial Chamber erred in dismissing his requests to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents on the grounds of prejudice and the interests of justice.[5749] He points out that the Prosecution did not oppose the requests and contends that there was no prejudice to the other parties resulting from the belated nature of the motion as they had already received all necessary information regarding four of these witnesses.[5750] Kanyabashi further contends that it was not demonstrated that the requested variation in his witness list would have generated delays that would have caused prejudice.[5751]

2477. In addition, Kanyabashi submits that the principle of equality of arms was undermined as the Trial Chamber applied different standards to the Prosecution.[5752] He emphasises that the Trial Chamber allowed the Prosecution to vary its witness list until three weeks before the close of its case and argues that, had the Trial Chamber applied "the best evidence" standard that it applied in authorising the addition of Prosecution witnesses, it would have agreed to hear Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I on the megaphone incidents.[5753] Emphasising that the Prosecution presented several witnesses for the same incidents, he adds that the repetitive nature of the evidence does not seem to have always been a decisive factor for the Trial Chamber.[5754]

2478. Kanyabashi further submits that, by relying on the fact that a number of witnesses had "already testified on the megaphone incident", the Trial Chamber erred in failing to consider that his right to a full defence implied that he could defend himself specifically against each of the incidents of incitement by megaphone recounted by Witnesses QJ, TK, and QI by calling witnesses

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[5747] 15 February 2008 Decision, paras. 59-64, 69, pp. 17, 18.
[5748] 15 February 2008 Decision, paras. 60, 63.
[5749] Kanyabashi Notice of Appeal, sub-paras. 3.10.1, 3.10.1.1, 3.10.1.2; Kanyabashi Appeal Brief, paras. 340-349.
[5750] Kanyabashi Appeal Brief, paras. 343, 344. *See also ibid.*, fns. 1093, 1094; Kanyabashi Reply Brief, para. 135. Kanyabashi asserts that, had it not been for the joint trials, there would have been no opposition to hearing the evidence regarding the allegations of incitement over the megaphone. *See* Kanyabashi Appeal Brief, para. 343.
[5751] Kanyabashi Notice of Appeal, sub-para. 3.10.1; Kanyabashi Appeal Brief, para. 345. Kanyabashi emphasises that he requested substitution, not addition of witnesses, and argues that it would have been necessary to take into account delays attributable to the other parties or to the Trial Chamber. *See* Kanyabashi Appeal Brief, para. 345; Kanyabashi Reply Brief, para. 134.
[5752] Kanyabashi Appeal Brief, para. 346.
[5753] Kanyabashi Appeal Brief, paras. 346-348.

who were at the same locations and dates and, as a result, were in a position to provide unique evidence.[5755] In Kanyabashi's view, the Trial Chamber's refusal to hear the material evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I on the factual allegations regarding the megaphone incidents constituted an error which caused him serious prejudice.[5756]

2479. The Prosecution responds that Kanyabashi fails to demonstrate that the Trial Chamber abused its discretion in denying his request to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I or that this ruling had any impact on the final verdict.[5757] In particular, it submits that the will-say statements of Witnesses D-9-GG, D-2-17-K, and D-2-17-M do not demonstrate that their testimonies were material to Kanyabashi's defence.[5758] It also highlights that Witness D-2-17-I ultimately testified on all elements relevant to impeaching Prosecution Witness TK about the megaphone announcement she heard,[5759] and that Kanyabashi ultimately chose not to call Witness D-2-17-A to testify.[5760]

2480. The Appeals Chamber observes that, contrary to Kanyabashi's contention, the Trial Chamber did not rely on prejudice to dismiss his request to call Witnesses D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents. It instead relied on the fact that it had already heard evidence on the elements on which these witnesses were expected to testify.[5761] Kanyabashi's argument regarding prejudice therefore lacks merit.

2481. The Appeals Chamber considers that Kanyabashi's argument concerning a violation of the principle of equality of arms is similarly ill-founded. Notably, Kanyabashi did not argue in his motion at trial that the evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I was the "best available evidence" on the issue of the megaphone incidents.[5762] More importantly, a review of the decisions on the variation of the Prosecution's witness list pointed out by Kanyabashi reflects that the Trial Chamber applied a similar standard to that applied in the 15 February 2008 Decision. Although the Trial Chamber did not use the terminology "best available evidence" in the impugned decision, a careful reading of the decision reveals that, as done in relation to the Prosecution's requests to vary its witness list, the Trial Chamber examined

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[5754] Kanyabashi Appeal Brief, para. 348.
[5755] Kanyabashi Notice of Appeal, sub-para. 3.10.1.2; Kanyabashi Appeal Brief, paras. 353, 355, 357. *See also* Kanyabashi Reply Brief, paras. 136-140.
[5756] Kanyabashi Notice of Appeal, sub-paras. 3.10-3.10.1.3; Kanyabashi Appeal Brief, paras. 354-357. *See also* Kanyabashi Reply Brief, paras. 138, 140.
[5757] Prosecution Response Brief, para. 1960.
[5758] Prosecution Response Brief, paras. 1965, 1967.
[5759] Prosecution Response Brief, para. 1962, *referring to* Witness D-2-17-I, T. 27 March 2008 p. 14 (closed session).
[5760] Prosecution Response Brief, para. 1964. *See also* AT. 20 April 2015 pp. 43, 44.
[5761] 15 February 2008 Decision, paras. 38, 57, 60, 63.
[5762] *See* Kanyabashi 11 December 2007 Motion.

whether the addition of witnesses was in the interests of justice in light of the evidence already heard and the evidence it was scheduled to hear.[5763]

2482. In this respect, the Appeals Chamber notes that Kanyabashi points to specific aspects of the anticipated evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I that allegedly distinguish their evidence from the evidence already heard or expected to be heard on the megaphone incidents. Having reviewed Kanyabashi's submissions at trial, the relevant witnesses' written and will-say statements[5764] as well as the testimonial evidence already heard and referred to by the Trial Chamber,[5765] and recalling the discretion accorded to trial chambers in relation to the variation of a party's witness list, the Appeals Chamber finds that Kanyabashi does not demonstrate that the Trial Chamber abused its discretion in concluding that the proposed evidence of Witnesses D-9-GG, D-2-17-K, D-2-17-M, and D-2-17-I on the megaphone announcements would have been repetitive. The written and will-say statements of these witnesses do not indicate that the witnesses were in the position to provide unique evidence in this regard.[5766]

2483. By contrast, the written and will-say statements of Witness D-2-17-A reflect that the witness was hiding at the same place as Prosecution Witness QI,[5767] a witness the Trial Chamber relied on to find that Kanyabashi made megaphone announcements in June 1994.[5768] As such, Witness D-2-17-A appears to have been in a position to provide evidence relevant to the credibility of Witness QI's account, which had not been provided yet. This, however, was acknowledged by the Trial Chamber, which granted leave to Kanyabashi to call Witness D-2-17-A to contradict Witness QI about where he was hiding during the relevant events.[5769] Kanyabashi does not demonstrate that the scope of Witness D-2-17-A's recall testimony as authorised by the Trial Chamber deprived him of a reasonable opportunity to refute the allegations made by Witness QI regarding the megaphone announcements, an opportunity that Kanyabashi could not avail himself of due to his inability "to get this witness to testify".[5770]

[5763] *Compare* 15 February 2008 Decision, paras. 38, 57, 60, 63 *with* 30 March 2004 Decision, paras. 28, 29, 32, 33, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on the Prosecutor's Motion to Add and Transfer Detained Witness QBX, 12 November 2001, paras. 11, 13, 14, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motions for Leave to Call Additional Witnesses and for the Transfer of Detained Witnesses, 24 July 2001, paras. 11, 13.
[5764] *See* Kanyabashi 11 December 2007 Motion, Annex I; *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Pre-Defence Brief, 11 January 2005 (originally filed in French, English translation filed on 4 February 2005), Witnesses D-2-14-V and D-13-D, pp. 39, 50.
[5765] *See* 15 February 2008 Decision, fns. 34, 40, 43, 44.
[5766] *See* Kanyabashi 11 December 2007 Motion, Annex I, pp. 33-56, 66-68.
[5767] *See* Kanyabashi 11 December 2007 Motion, Annex I, pp. 25-32.
[5768] Trial Judgement, paras. 3815-3826, 6009-6013, 6037.
[5769] 15 February 2008 Decision, paras. 62, 64, pp. 17, 18.
[5770] *See* T. 19 June 2008 p. 40 (closed session). Contrary to Kanyabashi's claim that he did not ultimately call Witness D-2-17-A to testify because it was useless to call him on subsidiary matters, the record shows that Kanyabashi

2484. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has failed to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion in dismissing Kanyabashi's requests to call Witnesses D-9-GG, D-2-17-K, D-2-17-M, D-2-17-A, and D-2-17-I to testify on the megaphone incidents in its 15 February 2008 Decision.[5771]

2. 2 July 2008 Decision

2485. On 20 May 2008, the Trial Chamber declared Kanyabashi's defence case closed but for the testimony of Witnesses D-2-17-A and D-2-21-T.[5772] On 2 June 2008, Kanyabashi requested the Trial Chamber to reopen his case to add Witness D-2-23-C to his witness list to testify on, *inter alia*, the allegations of his presence at Rango Market and the fabrication of evidence against him.[5773] The Trial Chamber denied Kanyabashi's request on 2 July 2008 on the ground that Kanyabashi "failed to exercise due diligence in obtaining the evidence in a timely manner and that the probative value of the evidence [did] not outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings."[5774]

2486. In particular, the Trial Chamber found that: (i) Kanyabashi had failed to provide reasons for having identified Witness D-2-23-C at such a late stage of the trial; (ii) the reluctance of the witness to testify during the presentation of Kanyabashi's case did not in itself justify the reopening of the case; and (iii) Kanyabashi had "sufficient opportunities to review [his] case in [his] many requests to vary [his] witness list since the filing of [his] Pre-Defence Brief."[5775] The Trial Chamber also considered that it expected to hear one witness and had already heard many witnesses on the matters about which Witness D-2-23-C was expected to testify and found that the reopening of Kanyabashi's case would further delay the trial proceedings thereby causing prejudice to the other parties.[5776]

2487. Kanyabashi submits that the Trial Chamber abused its discretion in denying his request to reopen his case to add Witness D-2-23-C, violating his "right to make full answer and defence".[5777] He contends that the Trial Chamber erred in finding that he did not exercise due diligence, pointing out that the Trial Chamber acknowledged how difficult it was to obtain the collaboration of

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did not ultimately call the witness because he was "not able to get this witness to testify". *See idem*; Kanyabashi Appeal Brief, para. 354; Prosecution Response Brief, para. 1964.

[5771] Kanyabashi Notice of Appeal, sub-para. 3.10.1.1; Kanyabashi Appeal Brief, para. 343.

[5772] Trial Judgement, para. 6581, *referring to* T. 20 May 2008 p. 29.

[5773] Kanyabashi 2 June 2008 Motion.

[5774] 2 July 2008 Decision, para. 27, p. 10.

[5775] 2 July 2008 Decision, para. 25.

[5776] 2 July 2008 Decision, para. 26, fn. 8. *See also ibid.*, para. 27.

[5777] Kanyabashi Notice of Appeal, sub-para. 1.7.2.2. *See also ibid.*, sub-paras. 1.7.2, 3.9; Kanyabashi Appeal Brief, paras. 141-143, 339.

witnesses fearing for their lives.[5778] He argues that the Trial Chamber should have "softened" the diligence requirement in order to avoid a miscarriage of justice.[5779] Kanyabashi also submits that the Trial Chamber "disregarded the specificities of [Witness] D-2-23-C's [expected] testimony" concerning Rango Market, which partly corroborated Witness D-2-21-T's evidence and was distinct from the testimonies of Witnesses D-2-18-O and D-13-D.[5780] Kanyabashi adds that granting his request would not have prolonged the trial proceedings and that, had the Trial Chamber properly weighed the factors, it would have allowed the reopening of his case.[5781] According to him, the interests that were dispositive in the Trial Chamber's reasoning did not outweigh his right to a fair trial.[5782]

2488. The Prosecution responds that Kanyabashi fails to demonstrate any error in the 2 July 2008 Decision.[5783] It argues that Kanyabashi does not explain why he was not able to identify Witness D-2-23-C before February 2008 and makes general arguments about the difficulty in obtaining the cooperation of individuals like Witness D-2-23-C without describing the steps he took in attempting to call the witness at an earlier stage.[5784] The Prosecution also submits that Kanyabashi does not identify why Witness D-2-23-C's evidence would have been more convincing or corroborative than any of the other evidence heard.[5785]

2489. The Appeals Chamber recalls that "the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application."[5786] If it is shown that the evidence could not have been found through the exercise of reasonable diligence before the close of the case, the trial chamber should exercise its discretion as to whether to allow the evidence to be presented by considering whether its probative value is substantially outweighed by the need to ensure a fair trial.[5787] When making this determination, the trial chamber should consider the stage in the trial at which the evidence is sought to be adduced and the potential delay that would be caused to the trial.[5788]

[5778] Kanyabashi Appeal Brief, para. 141.
[5779] Kanyabashi Appeal Brief, para. 141. *See also* Kanyabashi Notice of Appeal, sub-para. 1.7.2.2.
[5780] Kanyabashi Appeal Brief, para. 142. *See also* Kanyabashi Notice of Appeal, sub-para. 1.7.2.
[5781] Kanyabashi Appeal Brief, para. 143.
[5782] Kanyabashi Appeal Brief, para. 143.
[5783] Prosecution Response Brief, para. 1739. *See also ibid.*, para. 1959.
[5784] Prosecution Response Brief, para. 1737.
[5785] Prosecution Response Brief, para. 1738.
[5786] *Čelebići* Appeal Judgement, para. 283. *See also Gotovina et al.* 1 July 2010 Appeal Decision, para. 23; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.5, Decision on Vujadin Popović's Interlocutory Appeal Against the Decision on the Prosecution's Motion to Reopen Its Case-in-Chief, 24 September 2008, para. 10.
[5787] *Gotovina et al.* 1 July 2010 Appeal Decision, para. 23; *Čelebići* Appeal Judgement, para. 283.
[5788] *Gotovina et al.* 1 July 2010 Appeal Decision, para. 23. *See also Čelebići* Appeal Judgement, para. 283.

2490. Kanyabashi does not dispute that it was reasonable for the Trial Chamber to consider whether he exercised due diligence in identifying and presenting Witness D-2-23-C but challenges the Trial Chamber's conclusion that he failed to do so. However, like at trial, Kanyabashi fails on appeal to explain the reasons why he only sought leave to call Witness D-2-23-C at such a late stage. His general claim that it was difficult to obtain the cooperation of witnesses fearing for their lives and his undeveloped argument that the Trial Chamber should have "softened" the diligence requirement in order to avoid a miscarriage of justice falls short of demonstrating an error in the Trial Chamber's determination that he failed to exercise due diligence in obtaining the evidence in a timely manner.

2491. Kanyabashi's general and unsubstantiated argument that the Trial Chamber disregarded the specificities of Witness D-2-23-C's proposed testimony also fails to demonstrate that the Trial Chamber erred in concluding that the evidence of this witness would have been repetitive of the evidence of the witness it expected to hear and the many witnesses already heard on the question of Kanyabashi's absence from Rango Market and the issue of fabrication of evidence.[5789] Likewise, Kanyabashi does not adduce any convincing argument to show that the Trial Chamber erred in concluding that the reopening of his case would have further delayed the proceedings and that the probative value of the evidence did not outweigh the prejudice caused by delaying the fair and expeditious conduct of the proceedings.[5790]

2492. Accordingly, the Appeals Chamber concludes that Kanyabashi has failed to demonstrate that the Trial Chamber committed a discernible error in its 2 July 2008 Decision by denying his request to reopen his case to add Witness D-2-23-C.

3. 19 January 2009 Decision

2493. On 18 November 2008, Kanyabashi requested the Trial Chamber to reconsider its decision to deny the addition of Witness D-2-23-C to his witness list. He submitted that the testimonies of Prosecution Witness QA and Defence Witness D-2-21-T about the fabrication of false accusations against him and the Appeals Chamber's decision of 8 October 2008 in the *Munyakazi* case constituted new elements justifying reconsideration of the 2 July 2008 Decision.[5791] Kanyabashi

[5789] *See* 2 July 2008 Decision, para. 26. Kanyabashi does not explain how Witness D-2-23-C's evidence was distinct from that of Witnesses D-2-18-O and D-13-D and does not discuss the other witnesses mentioned by the Trial Chamber.
[5790] 2 July 2008 Decision, para. 27.
[5791] Kanyabashi 18 November 2008 Motion, paras. 6-16, 25, 26, 28, 30, 32, 45, p. 11.

further requested the Trial Chamber to reopen his case in order for Witness D-11-AB to provide evidence on the fabrication of evidence against him.[5792]

2494. The Trial Chamber denied both requests on 19 January 2009.[5793] The Trial Chamber found that Kanyabashi had failed to show that the evidence of Witnesses QA and D-2-21-T or the *Munyakazi* appeal decision constituted new facts or material changes in circumstances warranting reconsideration of the 2 July 2008 Decision and the reopening of the Defence case to hear Witness D-2-23-C.[5794] As regards the addition of Witness D-11-AB, the Trial Chamber found that Kanyabashi had failed to demonstrate that with reasonable diligence, the evidence could not have been identified and presented during his case-in-chief.[5795] It further stated that it was not convinced that the probative value of Witness D-11-AB's expected testimony would outweigh the prejudice caused by delaying the conduct of the proceedings, noting that it had already heard several witnesses on the alleged fabrication of evidence and that further delay in the proceedings would cause prejudice to the other parties.[5796] The Trial Chamber concluded that none of the alleged new elements advanced by Kanyabashi constituted exceptional circumstances warranting the reopening of his case and the addition of Witness D-11-AB to his witness list.[5797]

2495. Kanyabashi submits that the Trial Chamber erred in denying his requests for reconsideration of the 2 July 2008 Decision and to reopen his case to allow Witness D-11-AB to testify.[5798] In relation to his request for reconsideration, Kanyabashi contends that the Trial Chamber erred in failing to find that the recall of Witness QA, the testimony of Witness D-2-21-T, and the "localisation of [Witness] D-11-AB" constituted new facts sufficiently serious to warrant reconsideration of its decision denying his request to add Witness D-2-23-C to his witness list.[5799] He also reiterates that the Trial Chamber erred in considering that the evidence was repetitive and that hearing it would prejudice the parties as well as in imposing an excessively heavy burden on him in finding that he did not exercise diligence.[5800]

[5792] Kanyabashi 18 November 2008 Motion, paras. 30, 33, 42-45, p. 11.
[5793] 19 January 2009 Decision, paras. 39, 43, p. 10.
[5794] 19 January 2009 Decision, paras. 36, 38.
[5795] 19 January 2009 Decision, para. 41.
[5796] 19 January 2009 Decision, para. 42.
[5797] 19 January 2009 Decision, para. 43.
[5798] Kanyabashi Notice of Appeal, sub-paras. 1.7.3-1.7.3.2, 3.9; Kanyabashi Appeal Brief, paras. 144-146, 339. The Appeals Chamber notes that Kanyabashi did not reiterate or substantiate in his appeal brief the allegation in his notice of appeal that the Trial Chamber erred in its 19 January 2009 Decision in denying his alternative request for separate trials, which the Appeals Chamber therefore dismisses without further consideration. *See* Kanyabashi Notice of Appeal, sub-para. 1.7.3.3.
[5799] Kanyabashi Notice of Appeal, sub-para. 1.7.3.1; Kanyabashi Appeal Brief, para. 145. Kanyabashi refers to the evidence of Witnesses QA, D-2-21-T, and D-11-AB on the issue of fabrication of evidence. *See idem.*
[5800] Kanyabashi Notice of Appeal, sub-para. 1.7.3.1; Kanyabashi Appeal Brief, para. 145.

2496. With respect to his request to add Witness D-11-AB to his witness list, Kanyabashi submits that he exercised diligence as the witness was difficult to locate and that the Trial Chamber placed an "excessively heavy burden" on him.[5801] He adds that the evidence of Witness D-11-AB was not repetitive and could have corroborated the allegations of fabrication of evidence by Prosecution Witnesses QP and QAM,[5802] and that Witnesses "D-13-D and D-2-18-O did not testify about the same meetings."[5803] Kanyabashi further asserts that the probative value of the expected testimony of Witness D-11-AB "far outweighed the prejudice" caused by delaying the trial proceedings.[5804]

2497. The Prosecution responds that Kanyabashi fails to demonstrate any error in the Trial Chamber's exercise of its discretion in denying reconsideration of its earlier ruling on Witness D-2-23-C and Kanyabashi's request to reopen his case to call Witness D-11-AB.[5805]

2498. The Appeals Chamber observes that Kanyabashi merely repeats the arguments he made at trial in support of his request for the reconsideration of the 2 July 2008 Decision without demonstrating that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber. His arguments in this respect are therefore rejected.

2499. Concerning the addition of Witness D-11-AB to his witness list, the Appeals Chambers notes that Kanyabashi repeats his submission at trial that it was difficult to locate the witness, but does not explain how the Trial Chamber erred in finding that his Defence had "not sufficiently explained why it was unable to identify Witness D-11-AB until seven years after the beginning of the trial."[5806] Apart from referring to his submissions at trial that two of his witnesses had discussed different meetings,[5807] Kanyabashi does not substantiate his general contention that the evidence of Witness D-11-AB would not have been repetitive of the evidence already heard. His argument that the probative value of the expected testimony of this witness "far outweighed the prejudice" caused by delaying the trial proceedings is similarly not substantiated. The Appeals Chamber therefore finds that Kanyabashi fails to demonstrate that the Trial Chamber erred in the exercise of its discretion in denying his request to reconsider its 2 July 2008 Decision and to reopen his case to call Witness D-11-AB.

2500. Consequently, the Appeals Chamber dismisses Kanyabashi's challenges against the 19 January 2009 Decision.

[5801] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2. *See also* Kanyabashi Appeal Brief, para. 146.
[5802] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2.
[5803] Kanyabashi Notice of Appeal, sub-para. 1.7.3.2; Kanyabashi Appeal Brief, para. 146.
[5804] Kanyabashi Appeal Brief, para. 146.
[5805] Prosecution Response Brief, paras. 1740-1743.
[5806] 19 January 2009 Decision, para. 41.
[5807] Kanyabashi Appeal Brief, para. 146.

4. Conclusion

2501. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has failed to demonstrate any discernible error in the exercise of the Trial Chamber's discretion with respect to its 15 February 2008, 2 July 2008, and 19 January 2009 decisions. Accordingly, the Appeals Chamber dismisses Grounds 1.7, 3.9, and 3.10 of Kanyabashi's appeal.

B. Indictment (Grounds 1.1, 2.1, 2.2, 2.7 in part, 3.1)

2502. Kanyabashi submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.[5808] He also contends that the Trial Chamber erred in failing to assess the cumulative effect of the numerous defects of the Indictment on his fair trial rights.[5809] Kanyabashi requests that the Appeals Chamber quash the Trial Judgement and acquit him on all counts.[5810]

2503. The Appeals Chamber will examine in turn Kanyabashi's contentions related to notice of the allegations concerning Kabakobwa Hill, Matyazo Clinic, and the acts of incitement by megaphone.

1. Kabakobwa Hill (Ground 1.1)

2504. The Trial Chamber found that at least hundreds, if not thousands, of Tutsi refugees were killed at Kabakobwa Hill as a result of an attack conducted by soldiers, civilians, and members of the Ngoma commune police on 22 April 1994.[5811] While the Trial Chamber found that the Prosecution did not establish that Kanyabashi either ordered or was present during the attack, it concluded that Kanyabashi, as *bourgmestre* of Ngoma Commune, exercised effective control over the members of the Ngoma commune police, knew or had reason to know that they participated in the attack, and took no steps to prevent the attack or punish any Ngoma commune policeman for participating in it.[5812] The Trial Chamber inferred Kanyabashi's knowledge from his awareness of the Tutsi refugees' presence at Kabakobwa, the fact that he should have been able to hear the gunshots from the Ngoma commune office during the attack, the relatively small number of Ngoma policemen, the control he exercised over them, and his regular contact with them as well as from his public condemnation of the killings perpetrated at Kabakobwa Hill during a meeting at Huye Stadium around 25 or 26 April 1994.[5813]

2505. Based on these findings, the Trial Chamber convicted Kanyabashi of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) as a superior

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[5808] Kanyabashi Notice of Appeal, sub-paras. 1.1-1.1.3, 2.1-2.2.5, 2.7.3, 3.1, 3.1.1-3.1.9; Kanyabashi Appeal Brief, paras. 8, 149-168, 225-227, 229-253. To facilitate readability, the Appeals Chamber will use the term "Indictment" in the body of the text of the present section when referring to the Kanyabashi Indictment.
[5809] Kanyabashi Notice of Appeal, sub-paras. 1.1.3, 3.1.9. *See also* Kanyabashi Appeal Brief, heading sub-ground 3.1.9 at p. 97, paras. 167, 168.
[5810] Kanyabashi Notice of Appeal, para. 36; Kanyabashi Appeal Brief, paras. 8, 227, 395.
[5811] Trial Judgement, paras. 1711, 1740, 1741, 1756, 5791, 5800.
[5812] Trial Judgement, paras. 1720, 1756, 5791, 5800-5808. The Trial Chamber noted that the Prosecution only charged Kanyabashi with superior responsibility for the attack at Kabakobwa Hill. *See ibid.*, para. 5793.
[5813] Trial Judgement, paras. 5805-5807.

pursuant to Article 6(3) of the Statute for failing to prevent the crimes committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and for failing to punish them.[5814]

2506. In summarising the Prosecution case against Kanyabashi with respect to the massacre at Kabakobwa Hill, the Trial Chamber referred to paragraphs 4.2, 4.3, 6.29, 6.32, 6.33, 6.45, and 6.65 of the Indictment.[5815] The Indictment indicates that the allegations related to Kabakobwa Hill in paragraphs 6.32, 6.33, and 6.65 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Article 6(3) of the Statute.[5816]

2507. Kanyabashi submits that the Trial Chamber erred in convicting him in relation to the killings committed at Kabakobwa Hill on the basis of conduct with which he was not charged.[5817] He argues that the Prosecution alleged in the Indictment that he was responsible as a superior based on his presence at the crime scene and the orders he gave, not based on his mere knowledge and failure to act.[5818] Kanyabashi contends that he never received notice of the conduct on the basis of which he

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[5814] Trial Judgement, paras. 5809, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.

[5815] Trial Judgement, paras. 1487, 1488, 1510, 1511, 5638, 5793, 5801, fns. 3578-3580, 14584, 14679, 14680. Paragraphs 4.2, 4.3, 6.29, 6.32, 6.33, 6.45, and 6.65 of the Kanyabashi Indictment read as follows:

> 4.2 During the events referred to in this indictment, Joseph Kanyabashi held the office of *Bourgmestre* of Ngoma *commune* in Butare *préfecture* from April 1974 until leaving Rwanda around 4 July 1994.
>
> 4.3 In his capacity as *Bourgmestre* of Ngoma *commune*, Butare *préfecture*, Joseph Kanyabashi exercised authority over his subordinates.
>
> 6.29 Ngoma *commune* was the largest *commune* in Butare *préfecture* at the time of the events. Its *Bourg*[]*mestre*, Joseph Kanyabashi, had been named in 1974. Ngoma *commune* was the site of numerous massacres in which Joseph Kanyabashi was either directly involved or in which his subordinates as set out in paragraph 6.32 below, acting under his orders, were implicated.
>
> 6.32 On 21 and 22 April 1994, Tutsis who were fleeing the massacres took refuge in a pasture in Kabakobwa *cellule*, on the orders of Joseph Kanyabashi, who had promised to protect them. Joseph Kanyabashi subsequently ordered his subordinates, notably *conseillers de secteur* and communal policemen, on the one hand, and asked certain members of the Hutu population, on the other hand, to go to Kabakobwa *cellule* to eliminate the refugees.
>
> 6.33 On 22 April 1994, at around 4:00pm the communal policemen and *conseillers de secteur*, assisted by Hutu peasant farmers and by militiamen, attacked the refugees. Subsequently, Joseph Kanyabashi called in reinforcements from the Presidential Guard. On their arrival, they took part in the attacks.
>
> 6.45 Furthermore, on several occasions between 20 April and June 1994, Joseph Kanyabashi encouraged and instructed the soldiers and militiamen, and certain members of the civilian population, to search for the Tutsis who had escaped the massacres, in order to exterminate them. These instructions were given notably on 21 April in Butare, in late April in Save, and in June 1994 near Butare.
>
> 6.65 Knowing that massacres of the civilian population were being committed, political and military authorities, including Joseph Kanyabashi, took no measures to stop them. On the contrary, they refused to intervene to control and appeal to the population as long as a cease-fire had not been declared. This categorical refusal was communicated to the Special Rapporteur via the Chief of Staff of Rwandan Army, Major-General Augustin Bizimungu.

[5816] Kanyabashi Indictment, pp. 41-45.

[5817] Kanyabashi Notice of Appeal, sub-paras. 1.1-1.1.3; Kanyabashi Appeal Brief, para. 8; Kanyabashi Reply Brief, paras. 5-10. *See also* AT. 20 April 2015 pp. 4-9, 48.

[5818] Kanyabashi Notice of Appeal, sub-para. 1.1.2; Kanyabashi Appeal Brief, para. 8. *See also* AT. 20 April 2015 pp. 4, 5. At the appeals hearing, Kanyabashi argued that the Prosecution "never envisaged that [he] did not take part in the massacre" and that "[t]he case is that he was aware of the crimes because he ordered them." *See ibid.*, p. 6. He also emphasised that the Prosecution did not bring any evidence about the meeting the Trial Chamber found that he attended on 22 April 1994 or about any other relevant meeting. *See ibid.*, p. 7.

was ultimately found to have the requisite knowledge and to have failed to take the necessary and reasonable measures to prevent or punish.[5819] He argues that the prejudice he suffered in this respect is "irreparable" as his defence focused on showing that he did not give any orders and that the communal police did not take part in the attack.[5820] Kanyabashi requests that his convictions in relation to the killings committed at Kabakobwa Hill be vacated and that he be acquitted of all counts in this respect.[5821]

2508. The Prosecution responds that the Indictment provided Kanyabashi with notice of his knowledge and failure to prevent and punish the crimes of his subordinates at Kabakobwa Hill.[5822] It argues that the pleading of Kanyabashi's ordering and supervising the massacre in paragraph 6.32 of the Indictment necessarily implied that he had knowledge of the actions of his subordinates and provided notice of the failure to prevent and punish the crimes committed by members of the Ngoma commune police.[5823] The Prosecution also contends that additional notice of Kanyabashi's knowledge and failure to prevent and punish was given in paragraph 6.65 of the Indictment and through the Prosecution Pre-Trial Brief.[5824]

2509. The Prosecution also argues that "it is sufficient to plead that an accused ordered subordinates to commit a crime so as to put an accused on notice of his knowledge and failure to prevent or punish for purposes of Article 6(3)" and that "[i]f evidence is eventually found insufficient to establish ordering under Article 6(1), it is irrelevant in determining whether an indictment properly pleads knowledge and failure to prevent or punish under Article 6(3)."[5825] According to the Prosecution, this contention finds support in the *Bagosora and Nsengiyumva* Appeal Judgement and *Ntabakuze* Appeal Judgement where the Appeals Chamber vacated convictions for ordering under Article 6(1) of the Statute because it found insufficient evidence that the accused ordered the crimes, but still upheld the convictions under Article 6(3) of the Statute for the same crimes.[5826] At the appeals hearing, the Prosecution argued that Kanyabashi did not suffer

[5819] Kanyabashi Appeal Brief, para. 8.
[5820] Kanyabashi Appeal Brief, para. 8. *See also* AT. 20 April 2015 pp. 5-8, 54.
[5821] Kanyabashi Notice of Appeal, para. 15; Kanyabashi Appeal Brief, para. 8.
[5822] Prosecution Response Brief, para. 1613. *See also* AT. 20 April 2015 pp. 24, 25.
[5823] Prosecution Response Brief, paras. 1614, 1617, 1622. At the appeals hearing, the Prosecution argued that the existence of a subordinate-superior relationship necessarily implies reporting from the subordinate to the supervisor. *See* AT. 20 April 2015 p. 25, *referring to Halilović* Appeal Judgement, para. 86.
[5824] Prosecution Response Brief, paras. 1614-1616, 1618, *referring to* Prosecution Pre-Trial Brief, para. 20.
[5825] Prosecution Response Brief, para. 1621.
[5826] Prosecution Response Brief, paras. 1619, 1620, *referring to Ntabakuze* Appeal Judgement, para. 119, *Bagosora and Nsengiyumva* Appeal Judgement, paras. 279-284, 300, 302.

prejudice from the alleged lack of notice concerning the source of his knowledge of the crimes committed by the communal police at Kabakobwa Hill.[5827]

2510. Kanyabashi replies that: (i) the Prosecution case throughout trial was that he ordered the attack; (ii) the Indictment failed to plead the conduct for which he was ultimately convicted; and (iii) paragraph 6.65 of the Indictment is overly vague and did not provide notice regarding his conduct *vis-à-vis* his subordinates concerning Kabakobwa Hill.[5828] Kanyabashi also submits that the Prosecution's reliance on the *Bagosora and Nsengiyumva* Appeal Judgement and *Ntabakuze* Appeal Judgement is inapposite since, in those cases, the Appeals Chamber seems to have recommended a case-by-case examination of the indictment as a whole, rather than establishing a general principle.[5829]

2511. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead the following material facts:

> (i) the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible;
>
> (ii) the criminal conduct of those others for whom the accused is alleged to be responsible;
>
> (iii) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and
>
> (iv) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.[5830]

2512. The Appeals Chamber observes that, read in isolation, paragraphs 6.32 and 6.33 of the Indictment do not *prima facie* appear to allege Kanyabashi's superior responsibility for the killings perpetrated at Kabakobwa Hill but, rather, his responsibility for ordering the killings pursuant to Article 6(1) of the Statute. The Appeals Chamber recalls, however, that in determining whether an accused was adequately put on notice of the nature and cause of the charges against him, the

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[5827] Specifically, the Prosecution argued that Kanyabashi: (i) was given notice by the Kanyabashi Indictment that the Tutsi refugees were at Kabakobwa Hill and defended against this allegation; (ii) received notice from the Kanyabashi Indictment that, as a superior, he would receive reports from his subordinates and the fact that he claimed at trial that he urged the communal policemen not to commit crimes shows that he defended against "this source of knowledge"; (iii) had notice that he was alleged to know that the attack at Kabakobwa Hill was conducted on a large-scale; and (iv) was informed by the summary of Witness QAM's anticipated evidence and the witness's prior statement that he was alleged to have received a report on the day of the attack from the *Interahamwe*, an allegation he defended against. *See* AT. 20 April 2015 pp. 26, 27.

[5828] Kanyabashi Reply Brief, paras. 5-8, 10. *See also* AT. 20 April 2015 pp. 4, 5, 48.

[5829] Kanyabashi Reply Brief, para. 9, *referring to Bagosora and Nsengiyumva* Appeal Judgement, paras. 204, 207, 208, *Ntabakuze* Appeal Judgement, paras. 119, 123-126.

[5830] *See, e.g., Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218.

indictment must be considered as a whole.[5831] When reading paragraphs 6.32 and 6.33 together with the charging section of the Indictment, it becomes clear that Kanyabashi was charged under Counts 2, 6, 7, and 9 in relation to the Kabakobwa Hill massacre pursuant to superior responsibility since paragraphs 6.32 and 6.33 were indicated as being pursued under these counts solely under Article 6(3) of the Statute.[5832]

2513. Considering the Indictment as a whole, the Appeals Chamber is of the view that it was neither vague nor ambiguous regarding Kanyabashi's alleged superior responsibility in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994. Paragraphs 6.32 and 6.33 of the Indictment, read together with paragraphs 4.2, 4.3 and 6.65, plead with precision all relevant material facts supporting the charge against Kanyabashi regarding the Kabakobwa Hill massacre. Paragraph 6.32 of the Indictment, in particular, expressly identifies the source of Kanyabashi's criminal responsibility in the orders that he gave to the members of the Ngoma commune police to eliminate the Tutsi refugees at Kabakobwa Hill.[5833] Paragraph 6.65 of the Indictment sets out that Kanyabashi knew that massacres of the civilian population were being committed and took no measures to stop them.

2514. The Prosecution reiterated its case as set forth in paragraph 6.32 of the Indictment in its pre-trial brief,[5834] presented evidence supporting this particular case throughout the trial,[5835] relied on Kanyabashi ordering and supervising the killings perpetrated at Kabakobwa Hill in its closing

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[5831] *See, e.g., Ntabakuze* Appeal Judgement, para. 65; *Bagosora and Nsengiyumva* Appeal Judgement, para. 182; *Gacumbitsi* Appeal Judgement, para. 123.

[5832] *See* Kanyabashi Indictment, pp. 41-45. The Appeals Chamber notes that, while originally charging Kanyabashi under Counts 2, 6, 7, and 9 in relation to the Kabakobwa Hill massacre pursuant to both Articles 6(1) and 6(3) of the Statute, the Prosecution amended the indictment on 2 November 2000 to charge Kanyabashi solely pursuant to Article 6(3) of the Statute in this respect. *Compare The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999 ("Kanyabashi Amended Indictment"), pp. 42-48 *with The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999 and 31 May 2000, 2 November 2000 ("Kanyabashi Third Amended Indictment"), pp. 41-45. The Prosecution's amendment resulted from the Trial Chamber's order that the Prosecution clearly distinguish the acts for which Kanyabashi incurred criminal responsibility under Article 6(1) of the Statute from those for which he incurred criminal responsibility under Article 6(3) of the Statute since, in the view of the Trial Chamber, "the same facts cannot simultaneously give rise to the two types of responsibility". *See* 31 May 2000 Decision, paras. 5.9, 5.11, p. 8. The Appeals Chamber emphasises that cumulative charging is permissible. *See Simba* Appeal Judgement, para. 276; *Semanza* Appeal Judgement, paras. 308, 309; *Musema* Appeal Judgement, paras. 369, 370; *Čelebići* Appeal Judgement, para. 400.

[5833] *See also* Kanyabashi Indictment, para. 6.29 ("Ngoma *commune* was the site of numerous massacres, in which Joseph Kanyabashi was either directly involved or in which his subordinates as set out in paragraph 6.32 below, *acting under his orders*, were implicated.") (emphasis added).

[5834] Prosecution Pre-Trial Brief, para. 20 ("During the month of April 1994, thousands of Tutsi refugees gathered in different locations in Ngoma *commune*. They assembled in places such as Kabakobwa Cellule, Matyazo clinic and Ngoma Church, often on the recommendation of Joseph Kanyabashi (the long serving *Bourg*[]*mestre*) who had promised to protect them. *Instead of offering protection, Joseph Kanyabashi ordered and supervised their massacre by communal civil servants, soldiers and militiamen.*") (emphasis added).

[5835] *See* Trial Judgement, paras. 1490-1492, 1517-1529, 1538-1554, 1561-1565; Witness FAM, T. 6 March 2002 pp. 82-87, T. 13 March 2002 p. 58; Witness QCB, T. 20 March 2002 p. 123, T. 2 April 2002 pp. 10, 11, T. 3 April 2002 p. 74.

brief,[5836] and reiterated in its oral closing arguments that its case was that Kanyabashi was an active participant and organiser in the genocide and ordered the killings at Kabakobwa Hill.[5837] The Prosecution does not point to any other material facts pleaded at trial which would have provided an alternative basis for Kanyabashi's superior responsibility in relation to the Kabakobwa Hill massacre. In fact, the Prosecution specifically disputed Kanyabashi's alibi evidence that, at the time of the killings of Kabakobwa Hill, he was in his office chairing a meeting.[5838]

2515. Yet, the Trial Chamber, concluding that it was not proven that Kanyabashi either ordered or was present during the attack at Kabakobwa, found him responsible as a superior on the basis of the following material facts: (i) his awareness of the Tutsi refugees' presence at Kabakobwa; (ii) the fact that, on 22 April 1994, *Interahamwe* went to report to him upon seeing the number of refugees at Kabakobwa Hill, before returning to commence the attack; (iii) the fact that he should have been able to hear the gunshots from the Ngoma commune office during the attack; (iv) the relatively small number of Ngoma commune policemen, his control over them as well as the fact that he was in regular contact with these policemen and that several of them were stationed at his house on the weekend of the attack at Kabakobwa Hill; (v) the systematic and large-scale nature of the attack; (vi) his public condemnation of the killings during a meeting at Huye Stadium; and (vii) the fact that he took no steps to prevent the attack or punish any policeman involved in the attack.[5839]

2516. Although Kanyabashi's awareness of the Tutsi refugees' presence at Kabakobwa Hill and the allegation that he took no measures to stop the massacres of the civilian population were pleaded in the Indictment,[5840] it is apparent that the key source of Kanyabashi's knowledge and the conduct by which he was alleged to have failed to prevent or punish the crimes on the basis of which he was convicted was materially different from the acts expressly pleaded in the Indictment. As such, the Appeals Chamber considers that the Trial Chamber's findings were based upon a set of material facts different from those that were specifically pleaded in the Indictment, set forth in the

[5836] Prosecution Closing Brief, heading "(3)" at p. 411 ("Kanyabashi orders Tutsis at Kabakobwa to be killed"), paras. 41-44, 88-90, 95-97, 101 ("The Prosecution evidence in this regard is that by giving orders, providing training, weapons and encouragement to the militia to kill, Joseph Kanyabashi killed Tutsis and therefore is culpable for committing genocide through the acts of others pursuant to Article 6(3)."), 105-107 at pp. 397, 398, 409, 411, 413-415.
[5837] Prosecution Closing Arguments, T. 21 April 2009 pp. 13 ("It is the Prosecutor's case, Mr. President, that Joseph Kanyabashi was, in fact, an active participator, an active organiser, a person who planned, instigated, committed, ordered and/or abetted in the genocide that took place in Butare *préfecture*. At this juncture, Mr. President, I would like to take you a bit through the evidence with respect to these acts and conducts as well as inferences that he made during the period of April through July 1994 establishing that he had a specific genocidal intent to commit genocide against the Tutsis or illustrating his active participation in facilitating and providing training or giving orders and instructions to the perpetrators of the massacres that ensued."), 22-24.
[5838] Prosecution Closing Brief, paras. 175, 176 at pp. 433, 434 ("The Prosecutor has led credible and reliable evidence that the accused Kanyabashi was part and parcel of the killing machine at Kabakobwa on 22 April 1994. He was not stuck in his office or at home as claimed by D-2-YYYY."); Prosecution Closing Arguments, T. 21 April 2009 pp. 23, 24.
[5839] Trial Judgement, paras. 5805-5809.
[5840] *See* Kanyabashi Indictment, paras. 6.32, 6.65.

Prosecution Pre-Trial Brief, and pursued throughout the trial. The Appeals Chamber finds that the Trial Chamber erred in convicting Kanyabashi based on material facts that were not pleaded by the Prosecution in the Indictment and at trial.

2517. The Prosecution's argument that, by pleading that Kanyabashi ordered and supervised the killings, the Indictment necessarily implied his knowledge and provided notice of his failure to prevent and punish the crimes fails to appreciate Kanyabashi's contention. Kanyabashi does not contend that he lacked notice that he was alleged to have known that his subordinates were about to or had committed crimes and to have failed to prevent such acts or punish his culpable subordinates, but that he was convicted on the basis of different material facts than those specifically set forth in the Indictment and against which he defended at trial.

2518. The Prosecution does not show that, at any point in the Indictment, notice was provided to Kanyabashi that he could be held responsible as a superior in relation to the Kabakobwa Hill massacre on the basis of a conduct other than his ordering or encouraging the killings. While paragraph 6.65 of the Indictment referred to by the Prosecution generally alleges that Kanyabashi had knowledge that massacres were carried out and failed to take measures to stop them, it does not identify any source for such knowledge. Reading the Indictment as a whole, and given the phrasing of paragraph 6.65, it would not be reasonable to consider that this general paragraph provided Kanyabashi with notice of the material facts which ultimately underpinned his conviction on the basis of superior responsibility in relation to Kabakobwa Hill. The Appeals Chamber also observes that the Prosecution Pre-Trial Brief mirrors paragraph 6.32 of the Indictment regarding the material facts relied upon for the allegation related to Kabakobwa Hill[5841] and that neither the Prosecution Pre-Trial Brief nor any other information from the Prosecution provided Kanyabashi with timely, clear, and consistent information detailing the factual basis underpinning the charge for which he was ultimately convicted.[5842]

2519. Furthermore, the Prosecution overlooks that, in the *Bagosora and Nsengiyumva* and *Ntabakuze* cases, the Appeals Chamber found that, along with the specific allegations that the accused ordered their subordinates to commit the crimes, the respective indictments pleaded additional material facts underpinning their superior responsibility for the same crimes.[5843] In those cases, the Appeals Chamber upheld the convictions based on a different mode of liability which was properly pleaded in the indictments.

[5841] *See* Prosecution Pre-Trial Brief, para. 20.

[5842] The Appeals Chamber further notes that the summaries of the Prosecution witnesses' anticipated testimonies appended to the Prosecution Pre-Trial Brief did not provide any notice of a possible alternative basis for Kanyabashi's

2520. Based on the foregoing, the Appeals Chamber finds that Kanyabashi lacked notice of the material facts upon which the Trial Chamber convicted him as a superior in relation to the killings of Tutsi refugees committed at Kabakobwa Hill on 22 April 1994 and, accordingly, that the Trial Chamber erred in convicting him based on these killings.

2. Matyazo Clinic (Grounds 2.1, 2.2, and 2.7 in part)

2521. The Trial Chamber, Judge Ramaroson dissenting, found that in late April 1994, following an initial attack by soldiers, Kanyabashi went to Matyazo Clinic, addressed the Tutsi refugees sheltering there, and thereafter ordered soldiers to open fire on the Tutsis, resulting in many deaths.[5844] Noting that the Prosecution only charged him under Article 6(3) of the Statute in relation to this event,[5845] the Trial Chamber, Judge Ramaroson dissenting, convicted Kanyabashi of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively) as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(3) of the Statute for failing to prevent the soldiers from committing these killings and punish them.[5846]

2522. In summarising the Prosecution case against Kanyabashi with respect to this allegation, the Trial Chamber referred to paragraphs 4.3, 6.32, 6.34, and 6.65 of the Indictment.[5847] The Indictment indicates that the allegations in paragraphs 6.32 and 6.34 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Article 6(3) of the Statute, while the allegations in paragraph 6.65 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to both Articles 6(1) and 6(3) of the Statute.[5848]

2523. Kanyabashi submits that the Trial Chamber erred in convicting him as a superior in relation to the killings perpetrated at Matyazo Clinic in late April 1994 because: (i) he understood from the

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superior responsibility in relation to the Kabakobwa Hill killings. *See* Witness Summaries Grid, items 3, 7, 22, 52, 56, 58-60, 70, 73, 82, Witnesses QAM, FAM, FAJ, QP, QR, QW, RO, and SQ.

[5843] *See Ntabakuze* Appeal Judgement, para. 119; *Bagosora and Nsengiyumva* Appeal Judgement, para. 204.

[5844] Trial Judgement, paras. 2084, 2103, 5818. The Appeals Chamber recalls that it has decided to refer to the clinic in Matyazo Sector, Ngoma Commune, Butare Prefecture, as the "Matyazo Clinic". *See supra*, fn. 61.

[5845] Trial Judgement, para. 5819. The Trial Chamber noted that the Prosecution only charged Kanyabashi with superior responsibility for the attack at Matyazo and considered it "a serious omission on the part of the Prosecution." *See idem.*

[5846] Trial Judgement, paras. 5824, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.

[5847] Trial Judgement, paras. 2012, 2021, 5639, 5819, fns. 5248, 14585, 14698. Paragraph 6.34 of the Kanyabashi Indictment reads as follows:

> 6.34 In late April 1994, Tutsi who were fleeing the massacres found refuge at the Matyazo clinic in Ngoma *commune*. Following an initial attack by soldiers and militiamen, Joseph Kanyabashi went to the clinic and asked the Tutsi refugees to remain there for their own safety. Shortly thereafter, Joseph Kanyabashi ordered soldiers to open fire on the refugees. Several people were killed.

For paragraphs 4.3, 6.32, and 6.65 of the Kanyabashi Indictment, *see supra*, fn. 5815.

[5848] Kanyabashi Indictment, pp. 41-45. *See* Trial Judgement, para. 5819.

Indictment that he had to defend against allegations relating to a different attack that occurred on 22 April 1994; and (ii) the Indictment did not properly plead his superior responsibility under Article 6(3) of the Statute.[5849] The Appeals Chamber will address these contentions in turn.

(a) Dates of the Attack

2524. In reaching its findings on Kanyabashi's responsibility for the killings perpetrated at Matyazo Clinic, the Trial Chamber specified that, considering "the details of the attacks described by both the Prosecution and Defence, in particular the dates and times, [...] the Defence's version of events could plausibly exist alongside the version advanced by the Prosecution."[5850] The Trial Chamber concluded that it was "possible that Matyazo Clinic was subject to two separate attacks; one on or around 22 April 1994 which took place in the morning and another towards the end of April 1994 which took place at night."[5851] The Trial Chamber observed that such a conclusion was consistent with paragraph 6.34 of the Indictment, which alleged that an initial attack took place at the clinic before the massacre with which Kanyabashi was charged.[5852] The Trial Chamber convicted Kanyabashi for the attack described by the Prosecution witnesses that took place in the evening towards the end of April 1994.[5853]

2525. Kanyabashi submits that he believed that he had to defend against the allegation of an attack that occurred on 22 April 1994 but that the Trial Chamber convicted him for a different attack that took place at the end of April 1994.[5854] In support of his contention, Kanyabashi: (i) points out that the Prosecution did not cross-examine Defence witnesses on an attack that would have occurred later than the one on 22 April 1994 about which they testified; (ii) relies on the Prosecution's reference in its closing submissions to 22 April 1994 as the date of the massacre; and (iii) asserts that the evidence does not support the conclusion that a second attack occurred in late April 1994.[5855]

2526. Kanyabashi also contends that the Prosecution case, as understood by him, never included the allegation that there had been two attacks on different days at Matyazo Clinic.[5856] According to him, paragraph 6.34 of the Indictment, "correctly interpreted", pleaded that the "initial attack" and

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[5849] Kanyabashi Notice of Appeal, sub-paras. 2.1-2.2.5, 2.7.3; Kanyabashi Appeal Brief, paras. 149-168. *See also* Kanyabashi Reply Brief, paras. 45-54; AT. 20 April 2015 pp. 14-17, 23, 24 (French).
[5850] Trial Judgement, para. 2102.
[5851] Trial Judgement, para. 2102.
[5852] Trial Judgement, para. 2102.
[5853] Trial Judgement, paras. 2103, 5818-5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174.
[5854] Kanyabashi Notice of Appeal, sub-paras. 2.1-2.1.2; Kanyabashi Appeal Brief, paras. 149, 153-158, fn. 521. *See also* AT. 20 April 2015 pp. 9, 10.
[5855] Kanyabashi Appeal Brief, paras. 151-158, *referring, inter alia, to* Prosecution Closing Arguments, T. 20 April 2009 p. 57. *See also* Kanyabashi Reply Brief, para. 49.

the attack for which he was charged took place on the same day, which supported his understanding that the attack with which he was charged occurred on 22 April 1994.[5857] In this regard, Kanyabashi highlights that the prior statement of Witness QI relied upon by the Prosecution as supporting material for paragraph 6.34 of the Indictment mentions that the attacks occurred on the same day.[5858] In his view, he was "misled" as to the date of the attack and suffered prejudice as a result, noting, in particular, that he presented an alibi only for the period between 21 and 24 April 1994.[5859]

2527. The Prosecution responds that the date pleaded in paragraph 6.34 of the Indictment was sufficiently specific for Kanyabashi to prepare his defence.[5860] It submits that, in the event of any ambiguity, further notice that the attack occurred at night and in late April 1994 was provided by the summaries of Witnesses RL's and QI's anticipated evidence appended to the Prosecution Pre-Trial Brief and their respective prior statements to Tribunal investigators disclosed four years before the beginning of the trial.[5861] It contends that there was no reason for Kanyabashi to assume that the attack took place on 22 April 1994 since that specific date was not mentioned either in the Indictment or in any post-indictment communications.[5862] It also argues that Kanyabashi's claim that he understood that he had to defend against an attack that took place on 22 April 1994 is not supported by the record.[5863] The Prosecution adds that Kanyabashi was not charged with the "initial attack" evoked in paragraph 6.34 of the Indictment and that, as a result, this initial attack was not a material fact that needed to be pleaded or proven.[5864]

2528. Kanyabashi replies that, contrary to the Prosecution's suggestion, the Indictment and the Prosecution Pre-Trial Brief do not specify the date and the time of the attack, and that the disclosure of Witnesses QI's and RL's statements are irrelevant for the purposes of notice.[5865] He argues that

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[5856] Kanyabashi Notice of Appeal, sub-para. 2.1.1; Kanyabashi Appeal Brief, para. 151. *See also* Kanyabashi Reply Brief, para. 47.
[5857] Kanyabashi Notice of Appeal, sub-para. 2.1.2; Kanyabashi Appeal Brief, para. 152 (emphasis omitted).
[5858] Kanyabashi Appeal Brief, para. 152, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Prosecutor's Request for Leave to Amend Indictment, Attachment B "Supporting Material", 18 August 1998 (confidential) ("Supporting Material to Kanyabashi Indictment"), pp. 108, 109, Statement of Witness QI of 11 June 1996, first disclosed in redacted version on 9 January 1997. *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Kanyabashi - Redacted Witness Statement No. 769/K96, 9 January 1997. The unredacted version of Witness QI's 11 June 1996 statement was admitted into evidence on 19 April 2004 as Exhibit D201 (confidential) ("Witness QI's Statement").
[5859] Kanyabashi Notice of Appeal, sub-paras. 2.1.2, 2.7.3 (emphasis omitted); Kanyabashi Appeal Brief, heading 2.1.2 at p. 55, paras. 149, 156, 162, 225-227. *See also* Kanyabashi Reply Brief, para. 49.
[5860] Prosecution Response Brief, paras. 1745, 1746. *See also* AT. 20 April 2015 pp. 33-35.
[5861] Prosecution Response Brief, paras. 1747, 1748, 1753. *See also* AT. 20 April 2015 p. 33.
[5862] Prosecution Response Brief, paras. 1748, 1753.
[5863] Prosecution Response Brief, para. 1748. *See also* AT. 20 April 2015 pp. 33, 34.
[5864] Prosecution Response Brief, paras. 1752, 1753.
[5865] Kanyabashi Reply Brief, para. 45.

these witnesses' statements could in any event be interpreted as placing the attack on Matyazo Clinic on 22 April 1994.[5866]

2529. The Appeals Chamber understands Kanyabashi to claim that he received notice that the events invoked in paragraph 6.34 of the Indictment were alleged to have occurred on 22 April 1994, not that the Indictment was vague in respect of the date of the killings allegedly perpetrated at Matyazo Clinic by soldiers acting under his orders. However, in support of his contention that he was misled into believing that he was charged for an attack that occurred on 22 April 1994, Kanyabashi relies on the evidence adduced at trial and the Prosecution's conduct of its case, without pointing to any part of the Indictment or post-indictment communications which would have provided him notice of this specific date.[5867]

2530. The Appeals Chamber observes that paragraph 6.34 of the Indictment, which sets out the charge relating to Matyazo Clinic, does not refer to 22 April 1994 but to "late April 1994" and that nothing in the Indictment suggests that the latter reference should have been interpreted as referring to 22 April 1994 in particular. There is also no reference to any particular date or information from which to infer the date of 22 April 1994 in the excerpt of Witness QI's statement provided as supporting material by the Prosecution and relied upon by Kanyabashi, in the statement from which the excerpt was extracted, or in the summary of Witness QI's anticipated evidence appended to the Prosecution Pre-Trial Brief.[5868] In fact, the only specific date provided prior to the trial is that of "28 April 1994" referred to in the summary of Witness RL's anticipated testimony, as well as in Witness RL's prior statements of 11 July 1996 and 16 January 1997 disclosed in April 1997.[5869] As to Kanyabashi's argument that the Prosecution referred to 22 April 1994 in its closing submissions as the date of the attack on Matyazo Clinic, the Appeals Chamber observes that it is in fact unclear as to which massacre the Prosecution was referring in its oral submissions and

[5866] Kanyabashi Reply Brief, para. 45. *See also* AT. 20 April 2015 pp. 15, 16 (French).
[5867] To the extent that Kanyabashi's arguments challenge the reasonableness of the Trial Chamber's assessment of the evidence, these arguments are addressed below in Section VIII.D.
[5868] *See* Supporting Material to Kanyabashi Indictment, pp. 108, 109; Witness QI's Statement; Witness Summaries Grid, item 56, Witness QI ("Witness QI's Summary").
[5869] Witness Summaries Grid, item 70, Witness RL, *referring to* 28 April 1994; Statement of Witness RL of 11 July 1996 (placing the attack five days after 23 April 1994), disclosed in redacted version on 10 April 1997; Statement of Witness RL of 16 January 1997 (referring to "28 April 1994"), disclosed in redacted version on 10 April 1997. *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Statements of Witness "A" – *Déclarations du témoin "A"*, 10 April 1997 (confidential). The unredacted versions of Witness RL's 11 July 1996 and 16 January 1997 statements were admitted into evidence on 19 April 2004 as part of Exhibits D202 and D203 (confidential). Contrary to Kanyabashi's argument in reply that the witnesses' statements could not serve to provide notice, the Appeals Chamber considers that, upon reading the summaries of Witnesses QI's and RL's anticipated evidence in the Witness Summaries Grid, Kanyabashi should have been prompted to examine their previously disclosed written statements.

considers that, in any event, such indication is immaterial with respect to the question of notice of the charges prior to the start of the trial.[5870]

2531. In light of the supporting material to the indictment provided by the Prosecution, the Appeals Chamber considers that it was indeed reasonable for Kanyabashi to understand that the two attacks on Matyazo Clinic alleged in paragraph 6.34 of the Indictment occurred on the same day.[5871] Contrary to the Trial Chamber's statement, the conclusion on the possible existence of two separate attacks, one on or around 22 April 1994 and another towards the end of April 1994, was therefore not consistent with paragraph 6.34 as interpreted in light of the relevant supporting material.[5872] However, because Kanyabashi was neither charged nor convicted in relation to the "initial attack" that allegedly occurred on the day of the attack on Matyazo Clinic for which he was convicted, the Appeals Chamber does not find that this error on the part of the Trial Chamber invalidates its decision to convict Kanyabashi for the attack on Matyazo Clinic.

2532. Accordingly, the Appeals Chamber finds that Kanyabashi has failed to demonstrate that the Trial Chamber convicted him for a different attack against Matyazo Clinic than the one pleaded in the Indictment.

(b) Superior Responsibility

2533. In convicting Kanyabashi in relation to the killings at Matyazo Clinic in late April 1994, the Trial Chamber found that Kanyabashi's alleged superior responsibility over the soldiers and their role in the events was correctly pleaded in the Indictment.[5873] In particular, while noting that paragraph 6.34 of the Indictment did not specifically describe the soldiers as Kanyabashi's subordinates, the Trial Chamber observed that paragraph 4.3 of the Indictment alleged that Kanyabashi exercised authority over his subordinates in his capacity as *bourgmestre* of Ngoma Commune and that paragraph 6.32 of the Indictment indicated that these subordinates were not limited to the *conseillers de secteur* and communal policemen but envisaged the existence of other categories of subordinates.[5874] Considering further that paragraph 6.34 referred to Kanyabashi giving orders to soldiers, "which implies that [he] held a position of authority *vis-à-vis* soldiers", the Trial Chamber found it established from reading the Indictment as a whole that the soldiers referred to in paragraph 6.34 were Kanyabashi's alleged subordinates and that this paragraph was

[5870] Kanyabashi Appeal Brief, para. 151, *referring to* Prosecution Closing Arguments, T. 20 April 2009 p. 57.
[5871] *See* Supporting Material to Kanyabashi Indictment, p. 109. *See also* Witness QI's Statement, p. K0028870 (Registry pagination).
[5872] *See* Trial Judgement, para. 2102.
[5873] Trial Judgement, paras. 2020, 2021. *See also ibid.*, paras. 5639, 5820, 5821.
[5874] Trial Judgement, para. 2021.

"sufficiently specific to meet the standards set forth in the case law regarding Article 6 (3) liability."[5875]

2534. Kanyabashi submits that the Trial Chamber erred in concluding that, based on an overall reading of the Indictment, paragraph 6.34 of the Indictment identifies the soldiers as his alleged subordinates and contends that the defect in the Indictment concerning the identification of the soldiers as his subordinates was not curable.[5876] He argues that, in finding that paragraph 6.32 of the Indictment could be interpreted to also include soldiers, the Trial Chamber went beyond the scope of the Indictment and circumvented its previous decision which ordered the Prosecution to specify the identity of his alleged subordinates in paragraph 6.29 of the indictment.[5877] Kanyabashi recalls that, following the Trial Chamber's order, the Prosecution amended paragraph 6.29 of the indictment by simply referring to paragraph 6.32, which only explicitly identifies *conseillers de secteur* and communal policemen as his subordinates.[5878] Kanyabashi submits that, in light of this amendment, he legitimately understood that the *conseillers de secteur* and communal policemen were alleged to be his subordinates with respect to all charges of the Indictment.[5879]

2535. According to Kanyabashi, he was "misled" and, as a result, centred his defence on denying that *conseillers de secteur* and communal policemen took part in the massacre and endeavoured "to demonstrate that the soldiers were the ones responsible for the attack and that he had no authority over them."[5880] He also points out that his counsel declared at the time of Witness QI's testimony "that he had not prepared to deal with 6(3)"[5881] and that he "did not cross-examine on effective control over the specific soldiers."[5882]

2536. The Prosecution responds that the Trial Chamber correctly found that Kanyabashi received sufficient notice that he was charged with superior responsibility for the crimes committed by the

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[5875] Trial Judgement, para. 2021. *See also ibid.*, para. 5639.
[5876] Kanyabashi Notice of Appeal, sub-paras. 2.2-2.2.6; Kanyabashi Appeal Brief, paras. 159-161, 165, 166; Kanyabashi Reply Brief, paras. 50-55.
[5877] Kanyabashi Appeal Brief, paras. 159, 160, *referring to* 31 May 2000 Decision, para. 5.21. *See also ibid.*, para. 165; Kanyabashi Reply Brief, paras. 51, 53; AT. 20 April 2015 p. 53.
[5878] Kanyabashi Notice of Appeal, sub-para. 2.2.1; Kanyabashi Appeal Brief, para. 159. Kanyabashi also points out that paragraph 6.29 of the Kanyabashi Indictment immediately follows the sub-heading "Ngoma Commune" and that all sites specified in the other sub-headings were located in Ngoma Commune, of which he was the *bourgmestre*. *See idem.*
[5879] Kanyabashi Notice of Appeal, sub-para. 2.2.2; Kanyabashi Appeal Brief, para. 159.
[5880] Kanyabashi Appeal Brief, para. 162. *See also* Kanyabashi Reply Brief, para. 55; AT. 20 April 2015 pp. 53, 54.
[5881] Kanyabashi Appeal Brief, para. 163, *referring to* Witness QI, T. 23 March 2004 pp. 53-57.
[5882] Kanyabashi Appeal Brief, para. 164. Kanyabashi also generally submits that "[t]here is no mention, with regard to the soldiers, of the requisite ingredients for responsibility under 6(3)." *See ibid.*, para. 165. *See also ibid.*, heading 2.2.3 at p. 66. The Appeals Chamber notes that Kanyabashi substantiates his claim regarding the "requisite ingredients" of superior responsibility only with respect to the identification of the subordinates. He does not make any arguments regarding the other material facts that have to be pleaded with respect to superior responsibility. Accordingly, to the extent that Kanyabashi intended to argue that relevant material facts other than the identification of his subordinates were not pleaded, his vague and unsubstantiated claim is dismissed.

soldiers at Matyazo Clinic.[5883] It argues that paragraph 6.34 of the Indictment, read in conjunction with paragraph 6.32 of the Indictment and the fact that paragraph 6.34 was only charged pursuant to Article 6(3) of the Statute, gave notice to Kanyabashi that he was alleged to be the superior of the soldiers who perpetrated the killings at Matyazo Clinic.[5884] It also submits that Kanyabashi failed to raise a timely objection to the evidence related to his superior relationship with the soldiers, that the conduct of his defence demonstrates that he understood the case against him, and that he was not prejudiced.[5885]

2537. The Appeals Chamber recalls that when an accused is charged with superior responsibility pursuant to Article 6(3) of the Statute, the indictment must plead, *inter alia*, that the accused is the superior of sufficiently identified subordinates over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he was alleged to be responsible.[5886]

2538. In the instant case, the Appeals Chamber finds that the Trial Chamber erred in holding that adequate notice was provided to Kanyabashi that he was alleged to be the superior of the "soldiers" involved in the killings at Matyazo Clinic referred to in paragraph 6.34 of the Indictment through the following information: (i) the reference in paragraph 4.3 of the Indictment that he "exercised authority over his subordinates"; (ii) the indication – through the term "notably" in paragraph 6.32 of the Indictment – that his subordinates were not limited to "*conseillers de secteur* and communal policemen"; and (iii) the allegation in paragraph 6.34 that he gave orders to soldiers at Matyazo Clinic.[5887] The Appeals Chamber stresses that an accused should not have to decipher the alleged basis of his criminal responsibility from scattered factors read together and that it was incumbent on the Prosecution to set forth clearly and unambiguously in the Indictment all material facts underpinning the charges. The Appeals Chamber considers that the factors relied upon by the Trial Chamber in the Indictment did not provide adequate notice to Kanyabashi that the soldiers invoked

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[5883] Prosecution Response Brief, paras. 1766-1774.
[5884] Prosecution Response Brief, paras. 1767, 1769-1772. *See also* AT. 20 April 2015 p. 31. The Prosecution also relies on the fact that Witness QI's Summary and statement also referred to Kanyabashi giving orders which were followed. *See* Prosecution Response Brief, para. 1773.
[5885] Prosecution Response Brief, paras. 1777-1785. *See also* AT. 20 April 2015 p. 32. In reply, Kanyabashi submits, *inter alia*, that he complained about the defects of the Indictment regarding the identification of his subordinates already in 1999 and that the Prosecution does not explain why it did not mention that the soldiers were alleged to be his subordinates when ordered to do so. *See* Kanyabashi Reply Brief, para. 53, *referring to* Kanyabashi Preliminary Motion, paras. 24, 27, 42.
[5886] *See, e.g., Ntabakuze* Appeal Judgement, para. 100; *Nahimana et al.* Appeal Judgement, para. 323; *Blaškić* Appeal Judgement, para. 218. The Appeals Chamber also recalls that a superior need not necessarily know the exact identity of his subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute and that physical perpetrators of the crimes can be identified by category in relation to a particular crime site. *See Hategekimana* Appeal Judgement, para. 166; *Bagosora and Nsengiyumva* Appeal Judgement, para. 196; *Blagojević and Jokić* Appeal Judgement, para. 287.

in paragraph 6.34 were alleged to be his subordinates within the meaning of Article 6(3) of the Statute.

2539. As emphasised in its submissions, the Prosecution indicated in the charging section of the Indictment that the allegation set forth in paragraph 6.34 was being pursued exclusively pursuant to Article 6(3) of the Statute.[5888] In the opinion of the Appeals Chamber, this was indicative that the Prosecution intended to prove that Kanyabashi was the superior of the soldiers referred to in this paragraph. However, it was incumbent on the Prosecution to identify Kanyabashi's subordinates unambiguously in the Indictment, especially as it was expressly directed to do so by the Trial Chamber in May 2000.[5889] The Appeals Chamber considers that the Prosecution's failure to provide adequate notice to Kanyabashi of the identity of his alleged subordinates in the Indictment is manifest.[5890]

2540. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to Kanyabashi's superior responsibility for the killings perpetrated at Matyazo Clinic by soldiers insofar as it failed to provide adequate notice to Kanyabashi that the soldiers involved in these killings were alleged to be his subordinates.

2541. The Appeals Chamber, however, finds that this error does not invalidate the Trial Chamber's decision to convict Kanyabashi on this basis as it considers that the ambiguity of the Indictment was remedied by the additional information provided in the Prosecution Pre-Trial Brief. Specifically, the Appeals Chamber considers that, reading paragraph 6.34 of the Indictment which was only charged pursuant to Article 6(3) of the Statute together with the allegation in the Prosecution Pre-Trial Brief that Kanyabashi exercised a supervisory role *vis-à-vis* the soldiers involved in the massacres of Tutsi refugees gathered in Matyazo Clinic,[5891] Kanyabashi was put on clear notice that he was alleged to exercise superior authority over the soldiers identified in paragraph 6.34 within the meaning of Article 6(3) of the Statute. The conduct of Kanyabashi's

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[5887] The Appeals Chamber recalls that "ordering" liability requires no formal superior-subordinate relationship between the person giving the order and the physical perpetrator. *See, e.g., Nzabonimana* Appeal Judgement, para. 482; *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[5888] *See* Kanyabashi Indictment, pp. 41-45.
[5889] *See* 31 May 2000 Decision, para. 5.21(c), p. 8.
[5890] Following the Trial Chamber's instruction in the 31 May 2000 Decision, the Prosecution merely amended paragraph 6.29 of the indictment by simply referring to paragraph 6.32 of the same indictment which, as noted above, only identifies *conseillers de secteur* and communal policemen as Kanyabashi's subordinates. *Compare* Amended Indictment *with* Kanyabashi Third Amended Indictment, para. 6.29.
[5891] Prosecution Pre-Trial Brief, para. 20.

defence at trial confirms that he understood the charge against him regarding the killings at Matyazo Clinic and was able to prepare a meaningful defence.[5892]

2542. Consequently, the Appeals Chamber finds that Kanyabashi was ultimately put on adequate notice that he was charged pursuant to Article 6(3) of the Statute for the criminal conduct of the soldiers at Matyazo Clinic and that the vagueness of the Indictment in this respect did not impair his ability to prepare his defence.

3. Incitement by Megaphone (Ground 3.1)

2543. The Trial Chamber found that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5893] It further found that, around mid-June 1994, Kanyabashi again used a megaphone to tell the population "to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women."[5894] The Trial Chamber determined that the terms "enemy" and "*Inkotanyi*" when used by Kanyabashi referred to and were understood as referring to Tutsis in general.[5895] The Trial Chamber concluded that Kanyabashi's May and June 1994 megaphone announcements constituted direct and public incitement to commit genocide and, accordingly, convicted him of committing direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute.[5896]

2544. In summarising the Prosecution case against Kanyabashi with respect to this allegation, the Trial Chamber referred to paragraphs 5.8 and 6.45 of the Indictment.[5897] The Indictment indicates

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[5892] In his appeal submissions, Kanyabashi acknowledged that "[a]nother side of the defence was to demonstrate that the soldiers were the ones responsible for the attack and that he had no authority over them." *See* Kanyabashi Appeal Brief, para. 162. The Appeals Chamber further observes that, in his closing brief, Kanyabashi, referring to several testimonies of Defence witnesses, unequivocally contended that there was no relation of subordination between him and the soldiers. *See* Kanyabashi Closing Brief, para. 238. Similarly, in his oral closing arguments, Kanyabashi argued that he did not have power over soldiers, that they considered him an RPF accomplice, and that he was threatened by them. *See* Kanyabashi Closing Arguments, T. 28 April 2009 pp. 37, 42, 46, 69.

[5893] Trial Judgement, paras. 3813, 5928, 6009.

[5894] Trial Judgement, paras. 3824, 5928, 6009.

[5895] Trial Judgement, paras. 3814, 3825, 3826, 5928, 6010. *See also ibid.*, para. 6012.

[5896] Trial Judgement, paras. 6010, 6011, 6013, 6037, 6186.

[5897] Trial Judgement, para. 3693, fns. 9916, 9917. Paragraph 5.8 of the Kanyabashi Indictment reads as follows:

> 5.8 From April to July 1994, various prominent persons, including members of the government and local authorities propagated incitement to hatred and violence. On or about April 19, 1994, after the interim president Théodore Sindikubwabo delivered a speech in Butare encouraging people to fight the enemy, Joseph KANYABASHI, gave a speech in support of the interim president, encouraging the population to follow Sindikubwabo's instructions. Shortly thereafter, widespr[]ead attacks on Tutsis began in the area. In or around late May, 1994, on at least on one occasion, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone. He encouraged the population to systematically search for the "enemy" in the commune and immediately afterwards, more Tutsis were killed in Ngoma commune. Also in or around May, 1994 Joseph KANYABASHI held at least two meetings in Cyarwa sector, Ngoma

that the allegations in paragraphs 5.8 and 6.45 of the Indictment were being pursued under, *inter alia*, Count 4 pursuant to Article 6(1) of the Statute.[5898]

2545. Prior to examining the relevant evidence, the Trial Chamber discussed Kanyabashi's assertion that paragraph 5.8 of the Indictment was impermissibly vague with respect to the date and place of the megaphone announcements as well as regarding the identity of the victims.[5899] It found that paragraph 5.8 was sufficiently precise to provide notice to Kanyabashi of the Prosecution's intention to lead evidence on an incident of incitement by megaphone occurring in Butare Town around late May 1994.[5900] It also determined that the evidence about a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8 on the ground that the Prosecution pleaded therein that Kanyabashi incited the population with a megaphone from a vehicle on "at least one occasion".[5901] It further found that, "[w]hile the Prosecution could have employed precise legal terms to indicate the alleged criminal conduct", paragraph 6.45 of the Indictment was nonetheless "sufficiently precise to provide notice to Kanyabashi of the Prosecution's intention to lead evidence in relation to an incident of incitement by megaphone occurring in June 1994."[5902] The Trial Chamber added that, "[i]n any event", Kanyabashi "did not object to the testimony of Witness QI with respect to the megaphone incident of mid-June 1994 at trial."[5903]

2546. Kanyabashi submits that the Indictment was impermissibly vague with respect to the alleged dates and number of incidents of announcement by megaphone.[5904] In particular, he contends that the words "on at least [on] one occasion" in paragraph 5.8 of the Indictment appeared to refer to the number of rounds that Kanyabashi made in Butare Town during the incident which took place in

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commune, at which he encouraged local residents to kill Tutsis. In the days following the meetings, Tutsis in the area were attacked.

For paragraph 6.45 of the Kanyabashi Indictment, *see supra*, fn. 5815. The Trial Chamber also referred to paragraph 6.53 of the Kanyabashi Indictment but did not rely on it as it relates to the incitement by megaphone. *See* Trial Judgement, paras. 3693, 3710-3718, fn. 9918.

[5898] Kanyabashi Indictment, p. 42.

[5899] *See* Trial Judgement, paras. 3714-3718.

[5900] Trial Judgement, para. 3715.

[5901] Trial Judgement, para. 3716. *See also ibid.*, para. 3803.

[5902] Trial Judgement, para. 3717.

[5903] Trial Judgement, para. 3718.

[5904] Kanyabashi Notice of Appeal, sub-paras. 3.1-3.1.9; Kanyabashi Appeal Brief, paras. 231, 232. *See also* AT. 20 April 2015 pp. 16 and 17 (closed session), 18-20. The Appeals Chamber notes that, in his notice of appeal, Kanyabashi also argued under sub-Ground 3.1.5 that the Trial Chamber erred in finding that he had received sufficient notice in relation to the allegation concerning the late May 1994 megaphone announcement testified to by Witness QJ. *See* Kanyabashi Notice of Appeal, sub-paras. 3.1.5-3.1.5.2. However, the Appeals Chamber notes that, while stating in his appeal that "Grounds [...] and 3.1.5 are not developed autonomously, but concurrently with other grounds", Kanyabashi has failed to develop and substantiate his allegation of error related to Witness QJ in his appeal brief or during the appeals hearing. *See* Kanyabashi Appeal Brief, para. 233; AT. 20 April 2015 pp. 16, 18, 19. The Appeals Chamber therefore dismisses Kanyabashi's challenge to the Trial Chamber's finding regarding notice of the late May 1994 megaphone incident as unsubstantiated.

May, not to several incidents occurring on distinct dates.[5905] In Kanyabashi's view, the wording of paragraph 5.8 "does not allow for the addition of a new incident, especially not in mid-June".[5906] He also argues that Witness TK's testimony at trial – on the basis of which he alleges he was convicted – "does not match the mode of participation mentioned in [paragraph] 5.8" since Witness TK testified that the message was not broadcasted by Kanyabashi as alleged in this paragraph, but by somebody else.[5907] Kanyabashi adds that Witness TK's evidence should also have been excluded because the Prosecution failed to give him notice that this witness would testify against him on the megaphone allegations.[5908]

2547. Kanyabashi also contends that he was never provided notice of the mid-June 1994 megaphone announcement incident.[5909] Specifically, he submits that: (i) the Trial Chamber erred in finding that paragraph 6.45 of the Indictment provided notice of this incident;[5910] (ii) it is not clear from the summaries of Witnesses QJ's and QI's anticipated evidence appended to the Prosecution Pre-Trial Brief that the witnesses would testify about two distinct incidents as they mention neither a date nor a place; and (iii) Witness QI's prior statement to Tribunal investigators did not situate the incident in June.[5911] He further argues that, in faulting him for not raising an objection to Witness QI's testimony, the Trial Chamber failed to appreciate that he objected to the vagueness of paragraph 5.8 of the Indictment in several instances, both before and after the trial started,[5912] and

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[5905] Kanyabashi Appeal Brief, paras. 232, 243 (emphasis omitted). *See also* Kanyabashi Reply Brief, para. 86.
[5906] Kanyabashi Appeal Brief, para. 243. *See also ibid.*, para. 244.
[5907] Kanyabashi Appeal Brief, paras. 234, 235, 239. Kanyabashi claims that he understood that he was alleged to be the one broadcasting the messages and that this defect was not curable. *See idem.*
[5908] Kanyabashi Notice of Appeal, sub-paras. 3.1.5.2, 3.1.6; Kanyabashi Appeal Brief, paras. 234, 236. Kanyabashi points out that: (i) the Prosecution failed to indicate in its pre-trial brief that Witness TK was expected to testify in relation to the allegations against him, and indicated instead that the witness would exclusively testify in relation to Nyiramasuhuko and Ntahobali; (ii) Witness TK's prior statements were silent or very unclear as regards Kanyabashi's involvement in megaphone announcements; and (iii) Witness TK's will-say statement did not give notice that the witness would testify against him. In addition, Kanyabashi contends that he should have been provided notice of the evidence concerning the *modus operandi* in accordance with Rules 66(A) and 93 of the Rules. He also asserts that Witness TK's prior statements were insufficient to remedy the absence of notice. *See* Kanyabashi Appeal Brief, paras. 236-238, 240, fn. 774; Kanyabashi Reply Brief, paras. 81, 83.
[5909] Kanyabashi Notice of Appeal, sub-paras. 3.1.7-3.1.8; Kanyabashi Appeal Brief, paras. 242-248.
[5910] Kanyabashi Appeal Brief, para. 245. Kanyabashi highlights that, in contrast with paragraph 5.8 of the Kanyabashi Indictment, paragraph 6.45 of the Kanyabashi Indictment does not make any reference to megaphone announcement, refers to instructions given to a selected group of people, and was pursued under both Articles 6(1) and 6(3) of the Statute. He also points out that the French version of paragraph 6.45, read together with paragraph 5.8, created confusion as it specifically refers to instructions provided near "Butare market". *See* Kanyabashi Notice of Appeal, sub-para. 3.1.7.3; Kanyabashi Appeal Brief, paras. 245, 246; Kanyabashi Reply Brief, paras. 89, 90; AT. 20 April 2015 pp. 16 and 17 (closed session), 18.
[5911] Kanyabashi Notice of Appeal, sub-paras. 3.1.7-3.1.7.4, 3.1.9; Kanyabashi Appeal Brief, para. 247, *referring to* Witness Summaries Grid, item 4, Witness QJ ("Witness QJ's Summary"), Witness QI's Summary, Exhibit D215 (Witness QI's Statement, dated 11 June 1996 and List of omissions) (confidential). As already mentioned, Witness QI's Statement was first disclosed in redacted version on 9 January 1997 and its unredacted version was also admitted into evidence on 19 April 2004 as Exhibit D201 (confidential). *See supra*, fn. 5858.
[5912] Kanyabashi Appeal Brief, paras. 249, 251, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Joseph Kanyabashi's Reply to the Response of the Prosecutor, Nyiramasuhuko and Ntahobali to His Motion to Vary His List of Defence Witnesses Pursuant to Rule 73*ter*, 24 December 2007 (originally filed in French under Case No. ICTR-98-42-T, English translation filed on 13 February 2008) (confidential) ("Kanyabashi

that the Trial Chamber had made it clear that issues of this nature were better being raised in closing arguments.[5913] Kanyabashi submits that the vagueness of the Indictment regarding the time of the megaphone incident caused him serious prejudice as he understood that he had to defend himself in respect of only one incident of incitement by megaphone.[5914]

2548. The Prosecution responds that the Trial Chamber correctly concluded that the Indictment, when read as a whole, provided sufficient notice to Kanyabashi regarding the megaphone announcements that occurred in May and June 1994.[5915] It argues that Kanyabashi's interpretation of the phrase "on at least [on] one occasion" in paragraph 5.8 of the Indictment does not show that the Trial Chamber erred in its conclusion and submits that the Trial Chamber did not convict Kanyabashi on the basis of Witness TK's testimony.[5916] Pointing out that it relied upon paragraph 6.45 of the Indictment in support of Count 4 in the charging section of the Indictment, the Prosecution argues that Kanyabashi was put on notice that he was charged with direct and public incitement to commit genocide on the basis of the conduct described in this paragraph.[5917] In its view, the relevant material facts were therefore provided in both paragraphs 5.8 and 6.45.[5918]

2549. The Prosecution further contends that post-indictment communications clearly informed Kanyabashi that Witnesses QJ and QI were testifying about different incidents.[5919] It also argues that, at trial, Kanyabashi only raised general claims of vagueness of the Indictment without

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24 December 2007 Reply"), paras. 29, 30 (paras. 30, 31 in French original), Kanyabashi 11 December 2007 Motion, paras. 39, 42, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-AR73, *Appel de Joseph Kanyabashi de la Décision de la Chambre de première instance II du 21 mars 2007*, 9 May 2007 ("Kanyabashi 9 May 2007 Appeal"), para. 56, Kanyabashi Opening Statement, T. 10 July 2007 p. 8, *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Motion to Vary the List of Joseph Kanyabashi's Defence Witnesses Pursuant to Rule 73*ter*, 22 December 2006 (originally filed in French, English translation filed on 8 May 2007) (confidential) ("Kanyabashi 22 December 2006 Motion"), paras. 32, 69, 72, 78, 84, 93, 105, 108, Kanyabashi Preliminary Motion, paras. 23, 25, 38, pp. 17, 18, 25. *See also* Kanyabashi Reply Brief, para. 93.

[5913] Kanyabashi Notice of Appeal, sub-para. 3.1.8; Kanyabashi Appeal Brief, para. 250.

[5914] Kanyabashi Appeal Brief, paras. 252, 253, *referring to* Kanyabashi Closing Brief, paras. 285, 287, 289-292, 296, 300, 302, 303, 308, 309. *See also* Kanyabashi Reply Brief, paras. 94-97; AT. 20 April 2015 pp. 18, 19.

[5915] Prosecution Response Brief, paras. 1859-1878. *See also* AT. 20 April 2015 pp. 39-42.

[5916] Prosecution Response Brief, paras. 1861-1869, 1871, 1872. The Prosecution also submits that the evidence of Witness TK did not constitute a pattern of evidence within the meaning of Rule 93(A) of the Rules and was, as such, not subjected to this rule. It adds that, because Kanyabashi failed to object to the relevant portions of Witness TK's testimony at trial, his belated claim should be dismissed. *See ibid.*, paras. 1869, 1870.

[5917] Prosecution Response Brief, para. 1878.

[5918] Prosecution Response Brief, paras. 1876-1878.

[5919] Prosecution Response Brief, paras. 1871-1878, *referring to* Witness QJ's statements of 8 May 1996 and 22 January 1997, disclosed on 10 April 1997 and 17 June 1999, respectively, and admitted as part of Exhibit D8 on 13 November 2001 ("Witness QJ's 1996 Statement" and "Witness QJ's 1997 Statement", respectively). *See The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Statement of Witness "S"/*Déclaration du témoin "S"*, 10 April 1997 (confidential); *The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Transmission of Redacted Statements in the Case of The Prosecutor v Joseph Kanyabashi, 17 June 1999 (confidential). *See also* AT. 20 April 2015 p. 40 (erroneously referring to Witness QJ's statement of 28 October 1997 instead of Witness QJ's 1997 Statement).

specifically objecting to Witness QI's testimony and that he fails to demonstrate that he suffered prejudice as a result of the alleged lack of notice.[5920]

2550. Kanyabashi replies that the Trial Judgement clearly reflects that Witness TK's evidence was relied upon in relation to both megaphone incidents.[5921] In addition, he submits that the disclosure of Witnesses QJ's and QI's statements did not provide sufficient notice about the mid-June incident.[5922] Kanyabashi further reiterates that his ability to prepare his defence was materially impaired, notably because he was deprived of the opportunity to conduct the necessary investigations.[5923]

2551. The Appeals Chamber acknowledges that the French version of the relevant sentence in paragraph 5.8, when read in isolation, may be interpreted as alleging a single incident involving Kanyabashi making multiple rounds around Butare Town the same day.[5924] However, when the relevant phrase is read in parallel with the English version, Kanyabashi should have understood that the words "on at least on one occasion" in English and "*au moins une fois*" in French refer to the occurrence of multiple incidents of the same nature occurring "[i]n or around late May, 1994". The Appeals Chamber, however, finds that this paragraph was overly vague as regards the number of times Kanyabashi was alleged to have incited the population through a megaphone while driving through Butare Town.

2552. Conversely, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, is not persuaded by Kanyabashi's argument that paragraph 5.8 of the Indictment was defective regarding the pleading of the dates of the incidents. While not referring to the month of June in particular, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that the timeframe "[i]n or around late May, 1994" was sufficiently specific to allow Kanyabashi to prepare his defence against two allegations of incitement occurring in late May and mid-June 1994.[5925] The Appeals Chamber

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[5920] Prosecution Response Brief, paras. 1879-1890. *See also* AT. 20 April 2015 pp. 41, 42.
[5921] Kanyabashi Reply Brief, paras. 82, 84, 85.
[5922] Kanyabashi Reply Brief, para. 92. Kanyabashi emphasises that there is no mention of any incitement by megaphone occurring in mid-June in Witness QI's Statement. *See idem.*
[5923] Kanyabashi Reply Brief, para. 95.
[5924] *See* Kanyabashi Indictment, para. 5.8 (French) ("*Vers fin mai 1994, Joseph KANYABASHI a fait, au moins une fois, le tour de la ville de Butare en voiture et s'est adressé à la population avec haut-parleur.*").
[5925] The Appeals Chamber recalls that a decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct with which the accused is charged. *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 150; *Ntakirutimana* Appeal Judgement, para. 25; *Kupreškić et al.* Appeal Judgement, para. 89. *Cf. also Kvočka et al.* Appeal Judgement, para. 436 (finding that the appellant had failed to identify any prejudice from the fact that the indictment referred to 4 June 1992 whereas the trial chamber found that the incident took place on or shortly before 29 June 1992), *quoting Kunarac et al.* Appeal Judgement para. 217 ("[M]inor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in the Indictment IT-96-23 did not occur."); *Rutaganda* Appeal Judgement, paras. 296-306 (finding that the variance between an

notes that, while it was in possession of information regarding the date of the late May incident through Witness QJ's written statements, the Prosecution did not appear to have more specific information regarding the date of the June incident at the time of the filing of the Indictment.[5926] Accordingly, not only the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds no error in the Trial Chamber's finding that the allegation of a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8, but it is also of the view, Judge Pocar and Judge Agius dissenting, that the timeframe of the allegation of megaphone announcements by Kanyabashi pleaded in this paragraph was sufficient to provide him adequate notice.

2553. As to Kanyabashi's contention that Witness TK's evidence fell outside the scope of paragraph 5.8 of the Indictment, the Appeals Chamber notes that Kanyabashi was neither charged nor convicted in relation to the megaphone announcement testified to by Witness TK.[5927] The Trial Judgement reflects that the Trial Chamber used Witness TK's evidence as circumstantial evidence corroborating Witnesses QJ's and QI's testimonies about the other megaphone announcements on the basis of which Kanyabashi was ultimately convicted.[5928] As the evidence by which the material facts underpinning the charges are to be proven need not be pleaded in the indictment,[5929] the Appeals Chamber rejects Kanyabashi's arguments regarding lack of notice of Witness TK's allegation of a megaphone announcement made on behalf of the Ngoma *bourgmestre* at the end of May 1994. To the extent that Kanyabashi claims that he did not receive sufficient notice that Witness TK would provide evidence on a matter relevant to the case against him, the Appeals Chamber notes that, contrary to Kanyabashi's submission, Witness TK's prior statements disclosed to him in 1997 clearly referred to the megaphone announcement the witness testified about at trial,[5930] Kanyabashi did not object to Witness TK's evidence when the witness testified,[5931] and the cross-examination of his counsel reflects that he was prepared to respond to this particular aspect of the witness's evidence.[5932] Kanyabashi's contention regarding the lack of notice of Witness TK's evidence is therefore rejected.

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allegation of distribution of weapons "on or about 6 April 1994" and resulting in convictions for distributions on 8, 15 and 24 April 1994 was not material).

[5926] Witness QI's Statement, p. K0028872 ("I cannot remember the date on which this occurred").

[5927] Trial Judgement, paras. 3802, 3803.

[5928] *See infra*, Section VIII.E.

[5929] *See, e.g.*, *Nzabonimana* Appeal Judgement, para. 29; *Ntagerura et al.* Appeal Judgement, para. 21; *Kupreškić et al.* Appeal Judgement, para. 88.

[5930] *See* Exhibit D49 (Witness TK's statement, dated 17 December 1996, signed 22 January 1997) (confidential) ("Witness TK's December 1996 Statement"), p. K0035620 (Registry pagination); Exhibit D50 (Witness TK's statement, dated 14 November 1997, signed 27 November 1997) (confidential), p. 4382 (Registry pagination).

[5931] *See* Witness TK, T. 21 May 2002 (closed session).

[5932] *See* Witness TK, T. 27 May 2002 pp. 136-154 (closed session); T. 28 May 2002 pp. 8-27.

2554. Regarding Kanyabashi's challenge to the Trial Chamber's reliance on paragraph 6.45 of the Indictment, the Appeals Chamber notes that this paragraph refers to Kanyabashi encouraging and instructing "soldiers", "militiamen", and "certain members of the civilian population" between 20 April and June 1994 to search for the Tutsis who had escaped the massacres, without any mention of megaphone announcements or incitement directed at the population of Butare Town in general. The Appeals Chamber finds that the Trial Chamber therefore erred in concluding that paragraph 6.45 provided notice to Kanyabashi of his alleged responsibility for a megaphone announcement directed at the population of Butare Town made in mid-June 1994. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, is of the view that this error is nonetheless inconsequential given the Appeals Chamber's previous conclusion that the pleading of the date of the megaphone incidents in paragraph 5.8 of the Indictment was not overly vague and that the Indictment was not defective in this respect.

2555. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in failing to consider that the Indictment did not put Kanyabashi on adequate notice of the number of times he was alleged to have incited to the commission of genocide through a megaphone while driving through Butare Town.

2556. Turning to the question whether the defect in the Indictment regarding the number of alleged incidents was subsequently cured, the Appeals Chamber observes that there is no mention of the allegation of megaphone announcements in the Prosecution's pre-trial brief or opening statement. In the summaries of the Prosecution witnesses' anticipated evidence appended to the pre-trial brief, it appears that Witness QJ would testify about Kanyabashi making a megaphone announcement inciting the population to search for the enemy in late May[5933] and that Witness QI would also testify about Kanyabashi saying over a megaphone that all Tutsis should be killed while driving past the witness's house on an unspecified date.[5934] Although not obvious from a reading of Witnesses QJ's and QI's summaries, the Appeals Chamber considers, Judge Pocar and Judge Agius dissenting, that a review of the witnesses' prior statements confirms that both witnesses were referring to two distinct incidents implicating Kanyabashi in delivering a message using a

[5933] In relevant part, Witness QJ's Summary, which was marked relevant to Kanyabashi and was linked, *inter alia*, to Count 4 of the Kanyabashi Indictment, reads as follows:

> QJ saw Kanyabashi around late May on an Ngoma commune truck speaking on a megaphone to the public. Kanyabashi said that the enemy still was among them and that they were to make a thorough search for the enemy. This message was repeated for two days. Immediately following the speech, the population began searching for and killing the Tutsis.

[5934] In relevant part, Witness QI's Summary, which was marked relevant to Kanyabashi and was linked, *inter alia*, to Count 4 of the Kanyabashi Indictment, reads as follows:

> QI saw Kanyabashi drive pass the house, talking over a megaphone, saying that the Tutsi enemy still was among the population and that all Tutsis, even the babies should be killed. Kanyabashi also said that the bushes should be cut down so that the *Inkotanyi* could not find a hiding place.

megaphone.[5935] In these circumstances, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, concludes that the vagueness of the Indictment regarding the number of incidents of incitement by megaphone was remedied by Witnesses QJ's and QI's summaries read together with their relevant prior written statements.

2557. Incidentally, the Appeals Chamber observes that Kanyabashi appears to have treated the allegations of megaphone announcements recounted by Witnesses QJ and QI as one and the same incident in his closing brief.[5936] However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, is of the view that the conduct of his defence at trial effectively reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation of a second megaphone announcement in June 1994. In particular, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, notes that Kanyabashi's counsel – who did not object to the relevant part of Witness QI's testimony[5937] – conducted a detailed and

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[5935] *Compare* Witness QJ's Summary, Witness QJ's 1996 Statement, p. K0028047 (Registry pagination) ("Towards the end of May, I saw Kanyabashi on board a blue Toyota truck with the inscription 'Ngoma commune'. The truck was being driven by a driver. He was transmitting a message to the public using a megaphone."), Witness QJ's 1997 Statement, p. K0035673 (Registry pagination) ("Around the end of May 1994, at about 10:00 a.m., I saw Joseph Kanyabashi in a green Toyota pick-up truck, and not a blue one, as I said in my statement of 8 May 1996. [...] He repeated this message two days in a row. [...] He was accompanied on those two days by two men in civilian clothes.") *with* Witness QI's Summary, Witness QI's Statement, p. K0028871 (Registry pagination) ("Kanyabashi is a striking example. I saw him driving to Tumba aboard his white Peugeot 305 car, escorted by two armed soldiers. I saw him driving past [...], and heard him talking through a megaphone. He was saying that the Tutsi enemy was still among the population. He requested that Tutsi be killed, including babies."). The Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi should have been prompted to re-examine Witnesses QJ's and QI's prior statements upon reading the Witness Summaries Grid.

[5936] Kanyabashi Closing Brief, paras. 309, 310.

[5937] *See* Trial Judgement, para. 3718. The Appeals Chamber notes that the objections at trial regarding the imprecision of the timeframe of the allegations set forth in paragraph 5.8 of the Kanyabashi Indictment to which Kanyabashi points to were very general and concerned the prior formulation of the paragraph. *See* Kanyabashi 24 December 2007 Reply, para. 29; Kanyabashi 11 December 2007 Motion, para. 39; Kanyabashi 9 May 2007 Appeal, para. 56; Kanyabashi 22 December 2006 Motion, paras. 32, 42, 69, 72, 78, 84, 93, 105, 108; Kanyabashi Preliminary Motion, paras. 23, 25, 38, pp. 17, 18, 25. The objections raised concerned about the previous formulation of paragraph 5.8 contained in the Kanyabashi Amended Indictment, which read as follows:

> From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Ny[i]ramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Ladislas Ntaganzwa and Elie Ndayambaje publicly incited the people to exterminate the Tutsi population and its "accomplices".

In response to the Kanyabashi Preliminary Motion, the Trial Chamber ordered the Prosecution to amend and clarify paragraph 5.8 "align[ing] the wording of this paragraph of the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996, which is more precise". *See* 31 May 2000 Decision, para. 5.21. Kanyabashi also did not contend that the evidence of Witness QI was outside the scope of paragraph 5.8 of the Kanyabashi Indictment in his opening submissions. *See* Kanyabashi Opening Statement, T. 10 July 2007 p. 8. Besides advancing a generic claim of vagueness of the timeframe of the incitement by megaphone allegation in his closing brief, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi also failed to object clearly to Witness QI's evidence on the mid-June 1994 megaphone announcement for lack of notice. *See* Kanyabashi Closing Brief, para. 301 ("Without having a specific date, a specific place and an identifiable victim, it would be impossible to establish the falsity of the account of the megaphone incident."). Although concerned by the practice of trial chambers to postpone consideration of Defence objections to the admission of testimonial evidence on the ground of lack of notice to the phase of final deliberations, the Appeals Chamber considers that none of the Trial Chamber's oral rulings Kanyabashi relies upon could have reasonably been understood as suggesting to the Defence to refrain from making objections

well-prepared cross-examination of Witness QI with respect to the megaphone incident the witness recounted.[5938] Kanyabashi also called witnesses to rebut Witness QI's account of seeing him delivering a message through a megaphone in June 1994[5939] and requested the addition of Witness D-2-17-A to his witness list for the specific purpose of rebutting Witness QI's testimony that he saw Kanyabashi using a megaphone from his hiding place in June 1994.[5940]

2558. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the number of incidents of incitement by megaphone of which Kanyabashi was alleged to be responsible. However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, considers that Kanyabashi was ultimately put on adequate notice of the relevant material facts with respect to the number of alleged incidents of incitement by megaphone and that the vagueness of the Indictment did not impair his ability to prepare his defence. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, therefore concludes that the Trial Chamber's error concerning the form of the Indictment regarding the number of incidents of incitement by megaphone did not invalidate its decision to convict Kanyabashi on the basis of the May and June 1994 megaphone announcements.

4. Conclusion

2559. As discussed above, the Appeals Chamber finds that the Trial Chamber erred in convicting Kanyabashi pursuant to Article 6(3) of the Statute in relation to the killings perpetrated by communal policemen at Kabakobwa Hill on 22 April 1994 in the absence of sufficient notice of the material facts underpinning the conviction. Consequently, the Appeals Chamber grants Ground 1.1 of Kanyabashi's appeal and reverses his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II based on these killings. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

2560. The Appeals Chamber, however, dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility as a superior in relation to the killings perpetrated by

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related to the indictments. *See* Kanyabashi Appeal Brief, para. 250, *referring to* T. 6 March 2002 pp. 83, 84, 104-106, 122-124, T. 15 March 2001 pp. 9, 10, T. 23 March 2004 pp. 56, 57. *See also supra* paras. 1107, 1280.

[5938] Witness QI, T. 24 March 2004 pp. 69-80 (closed session); T. 25 March 2004 pp. 4-16 (closed session).

[5939] Witness D-21-B, T. 7 February 2008 pp. 64-69, 72-75 (closed session); Witness D-2-5-I, T. 22 January 2008 p. 25 (closed session), 27; Witness D-2-14-W, T. 11 February 2008 pp. 41, 42 (closed session); Witness D-13-D, T. 21 February 2008 p. 45; Witness D-2-YYYY, T. 28 November 2007 p. 45 (closed session). *See also* Kanyabashi Closing Brief, paras. 298, 299.

[5940] Kanyabashi 11 December 2007 Motion, paras. 16, 29-33, 51, p. 12 *and* Annex I, pp. 25-32. As noted above, Kanyabashi was ultimately "not able to get this witness to testify". *See supra*, para. 2483, fn. 5770.

soldiers at Matyazo Clinic in late April 1994. The Appeals Chamber, Judge Pocar and Judge Agius dissenting with respect to the mid-June 1994 megaphone announcement, further dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility for committing direct and public incitement to commit genocide through two megaphone announcements in late May and mid-June 1994. In light of the Trial Chamber's analysis concerning the cumulative effect of the defects in the co-Accused's Indictments in the Trial Judgement[5941] and the absence of any substantiation, the Appeals Chamber also dismisses Kanyabashi's allegation of error regarding the assessment of the cumulative effect of the defects of the Indictment on his fair trial rights. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting in part, dismisses Grounds 2.1, 2.2, 2.7 in part, and 3.1 of Kanyabashi's appeal.

[5941] Trial Judgement, paras. 125-131.

C. Kabakobwa Hill (Grounds 1.2-1.7)

2561. The Trial Chamber convicted Kanyabashi of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(3) of the Statute for failing to prevent the crimes committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and for failing to punish them.[5942]

2562. Kanyabashi contends that the Trial Chamber erred in its assessment of the evidence relevant to this event and in concluding that he had sufficient knowledge that his subordinates might commit crimes or had committed crimes at Kabakobwa Hill.[5943]

2563. The Appeals Chamber recalls that it has concluded that the Trial Chamber erred in convicting Kanyabashi in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994 in the absence of sufficient notice of the material facts underpinning his convictions and, on this basis, reversed his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to these killings.[5944] Consequently, the Appeals Chamber dismisses Grounds 1.2 through 1.7 of Kanyabashi's appeal as moot.

[5942] *See supra*, para. 2505.
[5943] Kanyabashi Notice of Appeal, sub-paras. 1.2.1-1.2.7, 1.3.1-1.3.3, 1.5.2, 1.5.3, 1.5.5-1.5.8, 1.6.1, 1.6.1.1-1.6.1.3, 1.6.2; Kanyabashi Appeal Brief, paras. 10-68, 76-79, 81-89, 92-94, 97-118, 120-124, 127-129; Kanyabashi Reply Brief, paras. 11-44.
[5944] *See supra*, paras. 2520, 2559.

D. Matyazo Clinic (Grounds 2.1 to 2.6, 2.7 in part)

2564. Based on the testimonies of Prosecution Witnesses QI and RL, the Trial Chamber, Judge Ramaroson dissenting, found that, in late April 1994, following an initial attack by soldiers, Kanyabashi went to Matyazo Clinic, addressed the Tutsis sheltering there, and thereafter ordered soldiers to open fire on the Tutsis, resulting in many deaths.[5945]

2565. Noting that the Prosecution only charged Kanyabashi under Article 6(3) of the Statute in relation to this event, the Trial Chamber found that it was not proven that Kanyabashi exercised *de jure* authority over the soldiers.[5946] However, recalling that Kanyabashi ordered the soldiers to shoot at the Tutsis and that they obeyed this order, the Trial Chamber concluded that "Kanyabashi exercised effective control over these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them."[5947] Consequently, the Trial Chamber, Judge Ramaroson dissenting, convicted Kanyabashi of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(3) of the Statute for failing to prevent the soldiers from committing these killings and punish them.[5948]

2566. Kanyabashi submits that no reasonable trier of fact could have convicted him for the killings at Matyazo Clinic based on the evidence on the record.[5949] In particular, he argues that the relevant evidence does not demonstrate that he was in a superior-subordinate relationship with the soldiers who allegedly followed his orders or that he had effective control over them.[5950] In his view, while the fact that the persons followed orders may be sufficient to establish responsibility for ordering under Article 6(1) of the Statute, it is insufficient to prove effective control.[5951] Kanyabashi also submits that the Trial Chamber erred in its overall assessment of the evidence concerning this

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[5945] Trial Judgement, paras. 2084, 2103, 5818.
[5946] Trial Judgement, paras. 5819, 5820, 5822.
[5947] Trial Judgement, para. 5823.
[5948] Trial Judgement, paras. 5824, 5826, 5974, 5975, 6061-6063, 6105, 6106, 6124, 6173, 6174, 6186.
[5949] Kanyabashi Notice of Appeal, paras. 16-18, sub-paras. 2.2-2.4.4, 2.6-2.7.2; Kanyabashi Appeal Brief, paras. 149-151, 153-155, 157, 158, 169-220, 222-224; Kanyabashi Reply Brief, paras. 63-77. *See also* AT. 20 April 2015 pp. 12-15, 51, 52, 54.
[5950] Kanyabashi Notice of Appeal, sub-para. 2.2.6; Kanyabashi Appeal Brief, paras. 170, 172; Kanyabashi Reply Brief, paras. 56-62; AT. 20 April 2015 pp. 51, 54. Kanyabashi argues that credible Defence evidence reflects that the soldiers who attacked Matyazo Clinic believed that he was an RPF accomplice, further undermining the finding of his control over them. *See* Kanyabashi Appeal Brief, para. 171; AT. 20 April 2015 p. 51.
[5951] *See* Kanyabashi Appeal Brief, para. 169.

event.[5952] He requests that the impugned conclusions be set aside and that he be acquitted of the crimes committed at Matyazo Clinic.[5953]

2567. The Prosecution responds that the Trial Chamber reasonably assessed the evidence pertaining to the killings at Matyazo Clinic.[5954] It submits that the nature of Kanyabashi's orders, the promptness with which they were executed, and evidence that Kanyabashi transported the soldiers to Matyazo Clinic demonstrate his superior responsibility for the crimes committed by these soldiers.[5955] It points to further evidence demonstrating that Kanyabashi "was an extremely influential and powerful man" to show that soldiers "would obey" his orders.[5956]

2568. The Appeals Chamber recalls that the imposition of superior responsibility necessitates a pre-existing superior-subordinate relationship between the accused and the perpetrators.[5957] While proof that an accused is not only able to issue orders but that his orders are actually followed provides an example of effective control,[5958] the Appeals Chamber has held that:

> [t]he ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise 'effective control' over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[5959]

[5952] Kanyabashi Notice of Appeal, paras. 16-18, sub-paras. 2.3-2.4.4, 2.6-2.7.2; Kanyabashi Appeal Brief, paras. 150, 151, 153-155, 157, 158, 173-220, 222-225; Kanyabashi Reply Brief, paras. 63, 71-77. *See also* AT. 20 April 2015 pp. 12-15, 51, 52.
[5953] Kanyabashi Notice of Appeal, para. 18; Kanyabashi Appeal Brief, paras. 212, 227.
[5954] Prosecution Response Brief, paras. 1786-1854. *See also* AT. 15 April 2015 pp. 34, 35.
[5955] Prosecution Response Brief, paras. 1787, 1791, 1794, 1795. *See also ibid.*, paras. 1788, 1789. The Prosecution also points to evidence that Kanyabashi had previously been escorted by soldiers to Matyazo Clinic, moved around with them, and that they were stationed at his house. *See ibid.*, paras. 1793, 1794; AT. 15 April 2015 pp. 36, 38.
[5956] Prosecution Response Brief, paras. 1792, 1793. Specifically, the Prosecution refers to evidence showing that: (i) Kanyabashi was in a senior political position and that Butare Town, for which he was *bourgmestre*, was second only to Kigali; (ii) Kanyabashi "had outstanding political experience [and] intimate knowledge of the decision makers"; (iii) President Sindikubwabo was Kanyabashi's friend; (iv) Kanyabashi "was the dean of the Butare mayors"; and (v) "Kanyabashi's Tutsi wife could freely pass through road blocks – which were often manned by the soldiers – since Kanyabashi was her 'true identity card'." *See idem* (internal references omitted). *See also* AT. 15 April 2015 pp. 35, 36, 38.
[5957] *Halilović* Appeal Judgement, para. 210 ("Indeed, the Appeals Chamber recalls that the material ability to punish and its corresponding duty to punish can only amount to effective control over the perpetrators if they are premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators. In this regard, the ability to exercise effective control in the sense of a material power to prevent or punish necessitates a pre-existing relationship of subordination, hierarchy or chain of command.") (internal reference omitted). *See also Bizimungu* Appeal Judgement, para. 133 ("The Appeals Chamber recalls that the material ability to prevent or punish can only amount to effective control over the perpetrators if it is premised upon a pre-existing superior-subordinate relationship between the accused and the perpetrators.") (internal reference omitted).
[5958] *See Halilović* Appeal Judgement, para. 207. *See also Blaškić* Appeal Judgement, para. 69.
[5959] *See Čelebići* Appeal Judgement, para. 303 (internal reference omitted).

2569. The Appeals Chamber observes that, in finding that Kanyabashi had superior responsibility over the soldiers at Matyazo Clinic within the meaning of Article 6(3) of the Statute, the Trial Chamber relied exclusively on its findings that he ordered soldiers to shoot at the Tutsis sheltering at Matyazo Clinic and that the soldiers obeyed this order.[5960] Having previously determined that Kanyabashi – a civilian authority who was the *bourgmestre* of Ngoma Commune[5961] – did not have *de jure* authority over the soldiers,[5962] the Trial Chamber considered that he nonetheless "exercised effective control over these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them."[5963]

2570. The Appeals Chamber considers that the Trial Chamber's findings that Kanyabashi ordered soldiers to shoot at Tutsis and that the soldiers obeyed this order may be demonstrative of the fact that Kanyabashi was in a position of authority or influence that could compel the commission of a crime through the execution of his orders.[5964] As noted above, these findings could be indicative of the fact that Kanyabashi exercised effective control over the soldiers.[5965] However, the Appeals Chamber finds that no reasonable trier of fact could have found that a single order from a civilian authority which was followed by soldiers demonstrated a pre-existing superior-subordinate relationship, which, in turn, imposed a duty on that civilian authority to prevent the soldiers from committing crimes or to punish them for the crimes committed.[5966]

2571. In so finding, the Appeals Chamber notes that the conduct of Kanyabashi as found by the Trial Chamber could have provided a basis for individual criminal liability pursuant to Article 6(1) of the Statute. However, as already emphasised, liability under Article 6(3) of the Statute hinges on the existence of a superior-subordinate relationship which imposes an obligation to prevent crimes or punish culpable subordinates for them. The record relied upon by the Trial Chamber, however,

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[5960] Trial Judgement, para. 5823.
[5961] Trial Judgement, para. 53.
[5962] Trial Judgement, para. 5822.
[5963] Trial Judgement, para. 5823.
[5964] This is the type of authority that could allow for the imposition of ordering liability under Article 6(1) of the Statute. *See Semanza* Appeal Judgement, para. 361 ("Thus, in its definition, the Trial Chamber did not require proof of a formal superior-subordinate relationship for the Appellant to be found responsible for ordering. All that it required was the implied existence of a superior-subordinate relationship. The Trial Chamber's approach in this case is consistent with recent jurisprudence of the Appeals Chamber. As recently clarified by the ICTY Appeals Chamber in *Kordić and Čerkez*, the *actus reus* of 'ordering' is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order. The Trial Chamber thus committed no legal error in its enunciation of the elements of ordering.") (internal references omitted).
[5965] *See supra*, para. 2568.
[5966] The Appeals Chamber stresses that only through an accused's superior position does the corresponding duty arise to exercise effective control to prevent the crimes of subordinates or punish them. *See Halilović* Trial Judgement, para. 87 ("[I]nternational humanitarian law entrusts commanders with a role of guarantors of laws dealing with humanitarian protection and war crimes, and for this reason they are placed in a position of control over the acts of their subordinates,

does not support the conclusion that Kanyabashi was in this position with respect to the soldiers who attacked Matyazo Clinic and, consequently, that he was under this obligation. Accordingly, the Appeals Chamber concludes that the Trial Chamber erred in convicting Kanyabashi under Article 6(3) of the Statute on the sole basis that the soldiers executed his orders to shoot at Tutsi refugees at Matyazo Clinic.[5967]

2572. Moreover, the Appeals Chamber finds that the evidence referred to by the Prosecution does not support as the only reasonable conclusion the finding that Kanyabashi was in a superior-subordinate relationship with the soldiers involved in the Matyazo Clinic massacre within the meaning of Article 6(3) of the Statute. Specifically, the Appeals Chamber observes that, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber considered that Witnesses QI and RL consistently testified that soldiers accompanied Kanyabashi in his vehicle when he arrived at Matyazo Clinic on the day of the attack.[5968] It also summarised Witness RL's testimony that, approximately five days before the event, Kanyabashi had arrived at Matyazo Clinic accompanied by about six soldiers in camouflage uniform[5969] and that Witness QI testified that soldiers lived at Kanyabashi's house.[5970] The Appeals Chamber finds that this evidence – which was not relied upon by the Trial Chamber when finding Kanyabashi responsible under Article 6(3) of the Statute[5971] – allows for reasonable inferences other than the existence of a *de facto* hierarchical relationship wherein Kanyabashi was the superior of the soldiers who attacked Matyazo Clinic. One such inference is that Kanyabashi willingly assisted the soldiers without being in a superior-subordinate relationship with them.

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and it is this position which generates a responsibility for failure to act."). *Cf. Bagilishema* Appeal Judgement, paras. 33, 35.

[5967] The Appeals Chamber highlights that Kanyabashi's situation is materially distinct from the Trial Chamber's findings that Nyiramasuhuko and Ntahobali bore superior responsibility for crimes committed by *Interahamwe* who followed their orders at the Butare Prefecture Office as well as Ntahobali's superior responsibility for crimes committed by *Interahamwe* in relation to the killing of Ruvurajabo and Tutsi refugees at the EER. *See supra*, Sections IV.F.4, V.G.3(b), V.I.4. V.J.4. In this regard, the repeated collaboration between Nyiramasuhuko and Ntahobali and *Interahamwe* in attacks at the prefectoral office in particular as well as extensive evidence of the *Interahamwe* consistently following their orders provided a reasonable basis to establish that a pre-existing superior-subordinate relationship existed between Nyiramasuhuko and Ntahobali, on one hand, and the *Interahamwe*, on the other hand, and that Nyiramasuhuko and Ntahobali exercised effective control over them.

[5968] Trial Judgement, para. 2084 ("Both witnesses testified to the presence of soldiers in or near the clinic and further testified that Kanyabashi was accompanied by soldiers during his visit. In this connection, the Chamber recalls Witness QI's testimony that he saw six soldiers close to the gate of the clinic and an additional two soldiers accompanying Kanyabashi. Witness RL similarly testified to the presence of a total of eight soldiers at the clinic, three or four of whom had arrived with Kanyabashi.") (internal references omitted), *referring to* Witness QI, T. 23 March 2004 p. 51, T. 24 March 2004 pp. 48 (closed session), 55, 56, Witness RL, T. 30 March 2004 pp. 16, 17 (closed session).

[5969] Trial Judgement, para. 2034, *referring to* Witness RL, T. 25 March 2004 pp. 77-79, T. 29 March 2004 p. 63 (closed session). *See also ibid.*, para. 2037.

[5970] Trial Judgement, para. 2031, *referring to* Witness QI, T. 24 March 2004 pp. 56, 57.

[5971] *See, in particular*, Trial Judgement, para. 5823 ("The Chamber recalls, however, that Kanyabashi ordered the soldiers to shoot at the Tutsis sheltering at Matyazo Clinic in late April 1994, and that the soldiers obeyed this order [...]. *Based on this fact*, the Chamber finds beyond a reasonable doubt that Kanyabashi exercised effective control over

2573. Turning to the evidence that Kanyabashi was "an extremely influential and powerful man",[5972] the Appeals Chamber is not convinced that a reasonable trier of fact could have found that Kanyabashi was in a superior-subordinate relationship with the soldiers who killed the Tutsi refugees at Matyazo Clinic on this basis. In this respect, it bears noting that the Trial Chamber did not rely on evidence of Kanyabashi's influence and authority to establish his superior responsibility with respect to these soldiers and that it implicitly found that this general evidence of Kanyabashi's influence and authority was insufficient to demonstrate his superior responsibility over the soldiers implicated in the Kabakobwa Hill massacre.[5973]

2574. In light of the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in finding that Kanyabashi was responsible pursuant to Article 6(3) of the Statute for the killings of Tutsi refugees who sought shelter at Matyazo Clinic. As a result, Kanyabashi's remaining challenges to the Trial Chamber's findings concerning this event are moot.

2575. Accordingly, the Appeals Chamber grants the relevant part of Ground 2.2 of Kanyabashi's appeal and reverses his convictions for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings at Matyazo Clinic. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

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these soldiers on an *ad hoc* or temporary basis, and that he was in a superior-subordinate relationship over them.") (emphasis added). *See also ibid.*, paras. 2103, 5816-5822, 5824-5826.

[5972] *See* Witness FAU, T. 8 March 2004 p. 68; Witness QI, T. 24 March 2004 p. 56; André Guichaoua, T. 12 October 2004 p. 62, T. 14 October 2004 p. 9; Bernadette Kamanzi, T. 26 November 2007 pp. 37, 50.

[5973] *See generally* Trial Judgement, paras. 5794-5796.

E. Incitement by Megaphone (Grounds 3.2 to 3.8)

2576. The Trial Chamber found that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5974] It further found that, "around mid-June 1994 Kanyabashi [again] used a megaphone to tell the population to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women."[5975] The Trial Chamber determined that the terms "enemy" and "*Inkotanyi*", used by Kanyabashi, referred to and were understood to refer to Tutsis in general.[5976] The Trial Chamber concluded that Kanyabashi's May and June 1994 megaphone announcements constituted direct and public incitement to commit genocide and, accordingly, convicted him of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[5977]

2577. Kanyabashi argues that the Trial Chamber erred in its assessment of the evidence and in finding him responsible for direct and public incitement to commit genocide. The Appeals Chamber will consider these challenges in turn.

1. Assessment of Evidence

2578. The Trial Chamber relied principally on the evidence of Witness QJ to find that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5978] The Trial Chamber considered that Witness TK, although not referring to the same incident as Witness QJ, provided various details that corroborated Witness QJ's evidence as to "the manner in which the announcements were made and the content of the announcements".[5979] With respect to the mid-June 1994 megaphone announcement, the Trial Chamber relied primarily on the direct evidence of Witness QI.[5980] In assessing both incidents, the Trial Chamber also considered evidence which, in its view, established that megaphone announcements from a vehicle were part of the *modus operandi* by

[5974] Trial Judgement, paras. 3813, 5928, 6009.
[5975] Trial Judgement, paras. 3824, 5928, 6009.
[5976] Trial Judgement, paras. 3814, 3825, 3826, 5928, 6010. *See also ibid.*, para. 6012.
[5977] Trial Judgement, paras. 6009-6013, 6037, 6186. The Trial Chamber found that there was insufficient evidence to establish that Kanyabashi's conduct contributed to the subsequent killings and found him not guilty of the crime of genocide based upon his inciting remarks. *See ibid.*, paras. 5930, 5931.
[5978] *See* Trial Judgement, paras. 3796, 3813, 3814.
[5979] Trial Judgement, para. 3804. *See also ibid.*, paras. 3802, 3803.
[5980] *See* Trial Judgement, para. 3824. *See also ibid.*, paras. 3815, 3825.

which messages from Kanyabashi, in his capacity as *bourgmestre*, were delivered to the population of Ngoma Commune from April through June 1994.[5981]

2579. Kanyabashi contends that the Trial Chamber erred in: (i) assessing evidence related to the fabrication of evidence against him; (ii) evaluating exculpatory evidence that was inconsistent with the conclusions that he incited genocide; (iii) finding the existence of a *modus operandi*; (iv) assessing evidence directly related to the late May 1994 megaphone announcement; (v) assessing evidence directly related to the June 1994 megaphone announcement; and (vi) finding that killings occurred after these announcements.[5982] The Appeals Chamber will address these contentions in turn.

(a) Fabrication of Evidence

2580. Before turning to its assessment of the Prosecution evidence, the Trial Chamber recalled that the Defence had asserted that "Prosecution Witnesses QJ, TK, and QI were *Ibuka* members who were induced to falsely testify as to this allegation against Kanyabashi."[5983] However, the Trial Chamber referred to its prior determination that the evidence of Defence Witnesses D-2-21-T, D-13-D, and D-2-18-O "as to the alleged *Ibuka* membership of Witnesses QI, TK and QJ [did] not undermine the credibility of these Prosecution witnesses."[5984]

2581. Kanyabashi submits that, when evaluating such allegations, the Trial Chamber erred in failing to assess collectively the testimonies of Defence Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, and D-1-4-O concerning evidence fabrication by Witnesses QJ, TK, and QI as well as in only considering whether Prosecution witnesses were members of *Ibuka*.[5985] He emphasises that Witness D-2-21-T testified that Witnesses QJ and TK were involved in three meetings, the purpose of which was to forge evidence about a "megaphone story" against Kanyabashi, and that the witness implicated Witness QI as well.[5986] He argues that the rejection of Witness D-2-21-T's

[5981] Trial Judgement, paras. 3812, 3824. *See also ibid.*, para. 3811.
[5982] Kanyabashi Notice of Appeal, sub-paras. 3.2-3.8.6; Kanyabashi Appeal Brief, paras. 256-338; Kanyabashi Reply Brief, paras. 98-133.
[5983] Trial Judgement, para. 3793.
[5984] Trial Judgement, para. 3793.
[5985] Kanyabashi Notice of Appeal, sub-paras. 3.4.6, 4.1, 4.2; Kanyabashi Appeal Brief, paras. 265, 266, 283. *See also* Kanyabashi Appeal Brief, para. 320. The Appeals Chamber understands Kanyabashi's reference to Witness D-2-4-O in paragraph 283 of his appeal brief to instead refer to Witness D-1-4-O, as no witness testified under the former pseudonym and the latter provided evidence concerning alleged evidence fabrication against Kanyabashi.
[5986] Kanyabashi Notice of Appeal, sub-para. 4.1.1.3; Kanyabashi Appeal Brief, paras. 318, 331. *See also* Kanyabashi Appeal Brief, para. 265.

evidence on the basis that the allegations raised by his testimony were "tardy" and because the witness "did not take down notes during these meetings" was unreasonable.[5987]

2582. Kanyabashi further argues that the Trial Chamber erred in accepting evidence from Witnesses QJ and TK, who had close personal ties and were in regular contact after the genocide, even though it determined that they were not truthful in denying that they had discussed the events with each other.[5988] He argues that their evidence, which sought to downplay their personal connection, was consistent with other evidence in the record that other witnesses, such as Witnesses SJ and QY, had been instructed to lie and should have been rejected on this basis.[5989] As a demonstration of their collusion, Kanyabashi stresses that only in Witness TK's second statement to Tribunal investigators, which was signed on the same day Witness QJ gave a statement about the "megaphone incident", did Witness TK discuss "a message over a microphone by a spokesperson for Kanyabashi".[5990] Kanyabashi also stresses that, during Witness QJ's testimony, the witness "imputed to Kanyabashi words which were different from those mentioned in his statements, but almost identical with those used by [Witness TK]."[5991]

2583. With respect to Witness QI, Kanyabashi contends that, while the Trial Chamber considered Witness D-2-21-T's evidence of Witness QI's role in fabricating evidence against Kanyabashi, it did not evaluate evidence from Witness D-2-18-O which implicated him in meetings or Witness QA's testimony that Witness QI's former employer incited Witness QA to accuse falsely Kanyabashi.[5992] In addition, Kanyabashi argues that the Trial Chamber should have considered evidence concerning the witness's links with the RPF as raising further doubts about his credibility.[5993] He argues that the Trial Chamber placed undue emphasis on the fact that Witness QI was not cross-examined about the meetings in rejecting the allegations of fabrication of evidence, given that the Defence only learned of them years after the witness had testified.[5994] Kanyabashi contends that, under the circumstances, it was unreasonable to rely on Witness QI's uncorroborated evidence.[5995]

[5987] Kanyabashi Notice of Appeal, sub-para. 4.1.1.3; Kanyabashi Appeal Brief, para. 319. Kanyabashi notes that his Defence did not need "to prove collusion or fabrication of evidence" but only raise reasonable doubt. *See* Kanyabashi Appeal Brief, paras. 180-183, 319.
[5988] Kanyabashi Notice of Appeal, sub-para. 4.1.1.1; Kanyabashi Appeal Brief, paras. 322-324, 326, 327.
[5989] Kanyabashi Notice of Appeal, sub-paras. 3.3.2, 3.3.3; Kanyabashi Appeal Brief, para. 325.
[5990] Kanyabashi Appeal Brief, para. 321. Kanyabashi highlights that Witness TK did not mention Kanyabashi or the megaphone incident in her first statement to Tribunal investigators, that her third statement matched her testimony, and that her fourth statement referred to Nyiramasuhuko rather than Kanyabashi speaking over a megaphone. *See idem.*
[5991] Kanyabashi Appeal Brief, paras. 321 (internal references omitted), 331.
[5992] Kanyabashi Appeal Brief, paras. 190, 283, 331.
[5993] Kanyabashi Appeal Brief, paras. 185-189, 194.
[5994] Kanyabashi Appeal Brief, para. 331.
[5995] Kanyabashi Appeal Brief, para. 331.

2584. The Prosecution responds that Kanyabashi fails to show any error in the Trial Chamber's assessment of the evidence concerning the allegations that Witnesses QJ, TK, and QI fabricated evidence.[5996]

2585. The Appeals Chamber finds no merit in Kanyabashi's unsupported contention that the Trial Chamber erred in failing to assess collectively the testimonies of Witnesses D-2-21-T, D-2-18-O, D-13-D, D-2-13-D, and D-1-4-O. The Trial Chamber assessed the evidence of these witnesses in detail in a prior section of the Trial Judgement on allegations of fabrication of evidence.[5997] Although the Trial Chamber organised its deliberations by assessing the Defence evidence witness-by-witness and prior to the assessment of the Prosecution evidence concerning the megaphone announcements, this organisation of the Trial Judgement does not demonstrate that the Trial Chamber did not view the evidence collectively.[5998] Likewise, the Trial Judgement reflects that the Trial Chamber did not limit its analysis simply to whether Prosecution witnesses were members of *Ibuka*, but considered specific allegations that Witnesses QJ, TK, and QI participated in meetings where individuals were instructed to implicate Kanyabashi in crimes.[5999]

2586. The Appeals Chamber also rejects Kanyabashi's argument that the Trial Chamber unreasonably rejected Witness D-2-21-T's evidence implicating Witnesses QJ and TK in evidence fabrication on the basis that the allegations it raised were "tardy" and because the witness "did not take down notes". This argument ignores that the Trial Chamber's analysis specifically enumerated nine other factors that led it to conclude that the witness's evidence was neither credible nor reliable.[6000]

2587. Concerning the submission that the Trial Chamber failed to view the evidence of Witnesses QJ and TK with sufficient caution given their close personal relationship, the Appeals Chamber notes the following statement in the Trial Judgement:

> The Chamber recalls that Witness QJ testified that he is married to Witness TK, which was confirmed by Witness TK. Both witnesses also testified that they had never discussed the events of April to July 1994 together, and did not know of each other's plans to testify before this Tribunal. The Chamber recalls its previous finding that while it does not believe that these witnesses never discussed the events at issue in this case, or their plans to testify before this Tribunal, this alone does not undermine Witness TK or Witness QJ's credibility [...].[6001]

[5996] Prosecution Response Brief, paras. 1806-1811, 1907, 1919, 1934, 1943. *See also* AT. 20 April 2015 pp. 36, 37.
[5997] Trial Judgement, paras. 343-370.
[5998] *See* Trial Judgement, paras. 343-370.
[5999] *See* Trial Judgement, paras. 343-384.
[6000] Trial Judgement, paras. 346-359. Moreover, the Appeals Chamber dismisses Kanyabashi's suggestion that the Trial Chamber misapplied the burden of proof. When discussing allegations of fabrication of evidence, the Trial Chamber recalled that the Defence evidence only needed to raise a reasonable doubt. *See ibid.*, paras. 343, 383, 2097-2099.
[6001] Trial Judgement, para. 3795 (internal references omitted). *See also ibid.*, paras. 375 ("The Kanyabashi Defence also highlights the fact that Witnesses TK and QJ, a married couple, testified that they did not discuss with each other the events that took place between April to July 1994, and this couple testified that they did not discuss with each other

In this regard, the Trial Chamber found, as Kanyabashi argues, that these witnesses sought to minimise the appearance that they had discussed the events. However, Kanyabashi does not demonstrate that, in the circumstances of this case, no reasonable trier of fact could have found their evidence credible. In the view of the Appeals Chamber, the Trial Chamber's finding that Witnesses QJ and TK lacked credibility as to whether they discussed the events with each other and about their involvement in this proceeding does not necessarily imply that they fabricated evidence against Kanyabashi.[6002] Given the broad discretion vested in triers of fact when assessing the demeanour and credibility of witnesses, the Appeals Chamber is not persuaded that the Trial Chamber was required to reject all of Witness QJ's and TK's evidence because it did not believe that these witnesses never discussed the events at issue in this case, or their plans to testify before the Tribunal.[6003]

2588. Furthermore, while Kanyabashi argues that the increasing similarity between the prior statements of Witness TK and the information and evidence provided by Witness QJ reveals that they colluded, a careful analysis does not sustain this argument. Specifically, while Witness TK's second statement to Tribunal investigators is the first time she discussed a message conveyed on behalf of Kanyabashi asking the population to search for the enemy and was signed on the same day that Witness QJ gave a statement to Tribunal investigators,[6004] Kanyabashi ignores that Witness TK's first statement only concerned events that she witnessed at the Butare Prefecture Office. Consequently, it is reasonable that she would not have given information about the megaphone announcements she heard when she was not at the prefectoral office.[6005] In addition, Kanyabashi's argument that the witnesses colluded appears all the more speculative when considering that, unlike Witness QJ, Witness TK did not identify *Kanyabashi* as the person making

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their plans to testify before this Tribunal. The Defence asserts that this testimony was incredible, that the similarity of their evidence indicates that these *Ibuka* members fabricated their testimony. The Chamber does not believe Witness TK and QJ's testimony that they never discussed the events at issue in this case, or their plans to testify before the ICTR. Nevertheless, the Chamber considers that the Defence assertions in this regard do not undermine Witnesses TK's or QJ's credibility.") (internal references omitted), 2677.

[6002] In particular, Kanyabashi emphasises that this conduct mirrors that of, for example, Witnesses SJ and QY, who were found to have lied before the Trial Chamber. The Appeals Chamber recalls that it has already considered and rejected arguments that information concerning allegations of false testimonies from Witnesses SJ and QY was relevant to the assessment of the credibility of several other Prosecution witnesses, including Witnesses QJ and TK. *See supra*, Section III.J.2(a)(ii)b. In this context, the Appeals Chamber rejects Kanyabashi's contention.

[6003] *See also supra*, paras. 1822, 1823.

[6004] *Compare* Exhibit D49 (Witness TK's December 1996 Statement), p. K0035616 (Registry pagination) *with* Witness QJ's Statements, pp. K0035667-K0035670 (Registry pagination).

[6005] *See* Exhibit D48 (Witness's TK Statement, dated 12 November 1996) (confidential). Moreover, the Appeals Chamber finds no merit in Kanyabashi's contention that Witness TK's fourth statement of Nyiramasuhuko making a megaphone announcement is inconsistent with her prior statements implicating the *bourgmestre* of Ngoma Commune in doing so. Specifically, in this statement, Witness TK described a distinct megaphone announcement by Nyiramasuhuko that she heard advertising a meeting to welcome Sindikubwabo. Although Witness TK did not refer to the megaphone announcement given on behalf of Kanyabashi that she heard, this statement was expressly intended to "supplement and clarify" her previous statements and clearly referred to a separate event. *See* Exhibit D53 (Witness TK's Statement, dated 22/23 April 1998) (confidential), p. K0052251 (Registry pagination).

the megaphone announcement in any of her prior statements or in her testimony. Kanyabashi also does not show that Witness QJ's evidence about what Kanyabashi said through the megaphone is materially inconsistent with his prior statements or so similar to Witness TK's evidence that no reasonable trier of fact could have found that the witnesses did not collude.[6006] These contentions are therefore dismissed.

2589. Turning to Kanyabashi's assertion that the Trial Chamber failed to evaluate Witness D-2-18-O's evidence implicating Witness QI in meetings where persons were encouraged to give false testimony against Kanyabashi, the Appeals Chamber observes that the Trial Chamber summarised this aspect of the witness's evidence in detail[6007] and later determined that his evidence in this regard suffered from "serious credibility issues".[6008] Kanyabashi fails to show any error in the Trial Chamber's conclusion.

2590. Likewise, the Appeals Chamber notes that the Trial Chamber did not fail to evaluate Witness QA's evidence. The Trial Chamber expressly rejected the entirety of Witness QA's evidence because the witness lacked credibility.[6009] Further, the Appeals Chamber does not consider that Witness QA's evidence that Witness QI's former employer encouraged Witness QA to accuse falsely Kanyabashi would have required a reasonable trier of fact to speculate as to whether this person also influenced Witness QI to accuse falsely Kanyabashi.[6010] Similarly, the Appeals Chamber does not consider that Witness QI's evidence of his links with the RPF required the Trial Chamber to assess his evidence with particular caution.[6011] The Appeals Chamber is also not persuaded that the Trial Chamber, which relied notably on the fact that Kanyabashi "had ample opportunity to discover this information before the testimony of the said Proscution witnesses",[6012] placed undue emphasis on the fact that Witness QI was not cross-examined about the meetings in which evidence was allegedly fabricated against Kanyabashi when dismissing evidence to this effect.[6013]

2591. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber erred in its analysis of the evidence implicating Prosecution witnesses in

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[6006] *Compare* Witness QJ's Statements, p. K0035673 (Registry pagination) *with* Witness QJ, T. 12 November 2001 p. 26 *and* T. 14 November 2001 p. 100 *with* Witness TK's December 1996 Statement, p. K0035616 (Registry pagination), Witness TK, T. 20 May 2002 pp. 26, 27.
[6007] Trial Judgement, paras. 284-286.
[6008] *See* Trial Judgement, para. 361. *See also ibid.*, para. 360. The Trial Chamber determined that Witness D-2-18-O's evidence "should be treated with appropriate caution." *See ibid.*, para. 363.
[6009] *See* Trial Judgement, paras. 376-378, 382, 951, 1953, 1956, 1999, 2004, 3371, 3376.
[6010] *See also supra*, para. 304.
[6011] Witness QI, T. 23 March 2004 pp. 80, 81 (closed session), T. 24 March 2004 pp. 13-16 and 43, 44 (closed session), T. 25 March 2004 pp. 25-27.
[6012] Trial Judgement, para. 347.
[6013] Trial Judgement, paras. 346-363.

evidence fabrication or that it failed to exercise sufficient caution with respect to the evidence of Witnesses QJ, TK, and QI.

(b) Exculpatory Evidence

2592. Kanyabashi argues that the Trial Chamber failed to assess evidence that is inconsistent with the testimonies of Witnesses QJ, TK, and QI that he incited the population to kill Tutsis during the genocide.[6014] In this respect, he points to evidence showing that he: (i) had been on a list to be arrested in 1990; (ii) was attacked in the February 1991 issue of the *Ijambo* review for his ties with Tutsis; (iii) had been nicknamed "*Kanyabatutsi*" given his closeness to Tutsis; (iv) was close with the Tutsi Prefect Habyalimana as evidenced by a letter from him;[6015] and (v) wrote a letter to his daughter in May 1994 expressing his "helplessness" and "his resignation to death".[6016]

2593. Kanyabashi further points to: (i) a 14 May 1994 speech in which Kambanda criticised the administrative authorities of Ngoma Commune for their links with the RPF; (ii) evidence that Marcel Gatsinzi was unaware of Kanyabashi being implicated in the genocide; and (iii) his role in hiding and caring for his Tutsi family in his home and Tutsis in the Ngoma commune office.[6017] He also highlights his participation in meetings in Matyazo in May 1994 and in Cyarwa in June 1994 in an effort to stop killings and points to his role in assisting the safe and humane transfer of Tutsi refugees to Rango.[6018]

2594. The Prosecution responds that Kanyabashi's contentions should be dismissed as he repeats arguments already raised at trial without identifying any error in the Trial Chamber's reasoning.[6019]

2595. The Appeals Chamber observes that, at trial, Kanyabashi referred to this evidence when contesting the charge of conspiracy to commit genocide.[6020] The Trial Chamber considered his arguments when assessing and rejecting the Prosecution case on this issue.[6021] Moreover, the Trial Chamber considered in its sentencing deliberations the evidence and arguments Kanyabashi now relies upon on appeal.[6022] The Trial Chamber expressly noted the existence of "evidence indicative of Kanyabashi's efforts, on occasions, to stop the massacres from spreading and to assist the

[6014] Kanyabashi Notice of Appeal, sub-para. 3.4.3; Kanyabashi Appeal Brief, paras. 272, 282.
[6015] Kanyabashi Appeal Brief, para. 273 (French). Kanyabashi also argues that he preached the ideals of the PSD party, which were peace, solidarity, and complementarity. *See ibid.*, para. 274.
[6016] Kanyabashi Appeal Brief, para. 276. *Cf.* AT. 20 April 2015 p. 51.
[6017] Kanyabashi Appeal Brief, paras. 275, 277, 278.
[6018] Kanyabashi Appeal Brief, paras. 279, 280.
[6019] Prosecution Response Brief, paras. 1916, 1917.
[6020] Kanyabashi Closing Brief, paras. 23-29.
[6021] *See* Trial Judgement, para. 1899, *referring to* Kanyabashi Closing Brief, para. 29.
[6022] Trial Judgement, para. 6251, *referring to* Kanyabashi Closing Brief, paras. 23, 24, 27. *See also ibid.*, paras. 3248, 6252, 6256.

refugees" in determining the individual circumstances relevant to this sentence.[6023] In this context, the Appeals Chamber is not persuaded that the Trial Chamber ignored the evidence Kanyabashi points to or that the Trial Chamber was required to discuss this evidence when assessing allegations of Kanyabashi's alleged incitement by megaphone.[6024] Kanyabashi does not show that this evidence would have precluded a reasonable trier of fact from finding that he made inciting statements by megaphone in May and June 1994.

2596. For these reasons, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber failed to consider the alleged exculpatory evidence to which he points.

(c) Modus Operandi

2597. In assessing the testimony of Witness QJ concerning Kanyabashi's announcement by megaphone in late May 1994, the Trial Chamber noted that Witness TK as well as Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY "corroborated and complemented"[6025] his evidence as it established that "megaphone announcements from a moving vehicle were part of the *modus operandi* by which messages from *Bourgmestre* Kanyabashi were delivered to the population of Ngoma *commune* in the period from April through June 1994."[6026] Likewise, the Trial Chamber found that Witness QI's testimony concerning Kanyabashi's announcement by megaphone in June 1994 was "also supported by evidence [...] which establishe[d] that megaphone announcements from a moving vehicle were part of the *modus operandi* by which messages from the *bourgmestre* were disseminated to the population of Ngoma *commune*."[6027]

2598. Kanyabashi submits that the evidence on the record does not support the Trial Chamber's findings on the existence of a *modus operandi* wherein he utilised a megaphone to disseminate messages to the population of Ngoma Commune from April through June 1994.[6028] He contends that Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY testified about messages of general interest disseminated through megaphone by people other than Kanyabashi and that they explicitly denied that this practice continued after April 1994.[6029] He further argues that Witness TK testified about

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[6023] Trial Judgement, para. 6256.
[6024] The Trial Chamber also considered evidence that Kanyabashi assisted Tutsis by providing travel documents that allowed him to take Tutsis through roadblocks unharmed when assessing another allegation that Kanyabashi offered a reward for a Tutsi lecturer at a roadblock. *See* Trial Judgement, paras. 3242-3249. The Trial Chamber considered that evidence of this conduct towards Tutsis did not impact its analysis on the specific allegation and determined that, if true, his good conduct could be a mitigating factor to be considered in relation to sentencing. *See ibid.*, para. 3248.
[6025] Trial Judgement, para. 3813.
[6026] Trial Judgement, para. 3812. *See also ibid.*, para. 3811.
[6027] Trial Judgement, para. 3824.
[6028] Kanyabashi Notice of Appeal, sub-paras. 3.5-3.5.4; Kanyabashi Appeal Brief, paras. 284-297; Kanyabashi Reply Brief, paras. 107-109. *See also* AT. 20 April 2015 p. 20.
[6029] Kanyabashi Appeal Brief, paras. 288, 290-295.

only one event occurring after April 1994 without implicating Kanyabashi.[6030] According to Kanyabashi, contrary to the Trial Chamber's finding that none of the Defence witnesses provided an explanation as to why the practice of transmitting messages stopped in April 1994, Witness D-2-YYYY testified that they were discontinued because the administrative services were paralysed after April 1994.[6031]

2599. The Prosecution responds that the Trial Chamber reasonably concluded that megaphone announcements from April through June 1994 were part of a *modus operandi*.[6032]

2600. The Appeals Chamber observes that the Trial Chamber exclusively relied on the evidence of Witnesses TK, D-2-5-I, D-2-13-O, and D-2-YYYY in reaching its conclusion on the existence of a *modus operandi* of megaphone announcements from a moving vehicle by which Kanyabashi disseminated messages to the population of Ngoma Commune from April through June 1994.[6033] The Appeals Chamber notes that Witness TK testified about a single event in which she heard a megaphone message delivered from a vehicle at the end of May 1994 that concerned a message from the Ngoma Commune *bourgmestre*.[6034] Witnesses D-2-5-I, D-2-13-O, and D-2-YYYY testified that, before the war, megaphone announcements conveyed messages to the people of Ngoma Commune but clarified that this practice stopped between May and July 1994.[6035] Moreover, contrary to the Trial Chamber findings, Witness D-2-YYYY explained that this practice was discontinued after 6 April 1994 as the war paralysed such administrative services.[6036] However, the Trial Chamber relied on the Defence witnesses' evidence to make a finding – that from April through June 1994 delivering megaphone announcements from a moving vehicle was a *modus operandi* employed by Kanyabashi in his capacity of Ngoma Commune *bourgmestre* – which is contradictory to their testimonies that megaphone announcements were discontinued between April and July 1994. The Appeals Chamber finds that no reasonable trier of fact could have made such finding on the basis of their evidence.

2601. Furthermore, the Appeals Chamber is not satisfied that Witness TK's evidence alone, which concerns a single megaphone announcement in May 1994, could reasonably support the *modus operandi* finding of the Trial Chamber.

[6030] Kanyabashi Appeal Brief, para. 287.
[6031] Kanyabashi Appeal Brief, para. 289. Kanyabashi argues that the Trial Chamber improperly shifted the burden of proof and required him to prove why the dissemination of the messages through a megaphone did not continue in April 1994. *See idem*; Kanyabashi Reply Brief, para. 108.
[6032] Prosecution Response Brief, paras. 1921-1924.
[6033] Trial Judgement, para. 3812.
[6034] *See* Trial Judgement, paras. 3802, 3803.
[6035] Witness D-2-5-I, T. 22 January 2008 pp. 23, 24 (closed session), 27; Witness D-2-13-O, T. 6 November 2007 pp. 25, 26; Witness D-2-YYYY, T. 28 November 2007 pp. 60, 62 (closed session).
[6036] Witness D-2-YYYY, T. 11 December 2007 p. 37 (closed session).

2602. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in finding that the evidence of Witnesses TK, D-2-5-I, D-2-13-O, and D-2-YYYY established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994. The Appeals Chamber will consider whether this error occasioned a miscarriage of justice after assessing the remainder of Kanyabashi's challenges with respect to each megaphone announcement.

(d) Late May 1994 Megaphone Announcement

2603. As noted above, the Trial Chamber relied on the evidence of Witness QJ to find that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[6037] The Trial Chamber considered that Witness TK, although not referring to the same incident as Witness QJ, provided various details that corroborated Witness QJ's evidence as to the "manner in which the announcements were made and the content of the announcements".[6038]

2604. Kanyabashi contends that the Trial Chamber erred in: (i) evaluating Witness QJ's identification evidence; (ii) assessing the credibility of Witness QJ; (iii) finding that Witness TK's evidence corroborated Witness QJ's evidence; (iv) reversing the burden of proof when assessing Defence evidence; and (v) rejecting the evidence from Defence witnesses on the basis of their relationships with Kanyabashi.[6039] The Appeals Chamber will address these contentions in turn.

(i) Identification

2605. With respect to Witness QJ's identification evidence, the Trial Chamber stated:

> Turning to Witness QJ's identification of Kanyabashi, the Chamber notes Witness QJ testified that he knew Kanyabashi because Kanyabashi was a senior public official in Ngoma *commune* where the witness was living in 1994. Witness QJ testified that Kanyabashi lived nearby and typically drove past the hotel. Further, Witness QJ saw Kanyabashi several times driving around the city in his own car, on which occasions Kanyabashi was obliged to stop at the roadblocks. Witness QJ also frequently saw Kanyabashi stop to speak to those manning the roadblock at the Hotel Faucon. Lastly, Witness QJ had previously seen Kanyabashi attend a meeting at the MRND Palace in Butare sometime between 17 and 21 April 1994. In light of the number of occasions on which Witness QJ had previously seen Kanyabashi, and Witness QJ's positive identification of Kanyabashi in court, the Chamber is persuaded that Witness QJ's identification of Kanyabashi at the Hotel Faucon roadblock in May 1994 was reliable.[6040]

[6037] *See* Trial Judgement, paras. 3796, 3813, 3814.
[6038] Trial Judgement, para. 3804. *See also ibid.*, paras. 3802, 3803.
[6039] Kanyabashi Notice of Appeal, sub-paras. 3.2, 3.3.2, 3.3.5, 3.6.2, 3.6.3, 3.6.5; Kanyabashi Appeal Brief, paras. 257-263, 269, 272-281, 299-316, 332, 333; Kanyabashi Reply Brief, paras. 98-104, 112-122, 128-131. *See also* AT. 20 April 2015 p. 20.
[6040] Trial Judgement, para. 3800 (internal references omitted).

2606. Kanyabashi submits that the Trial Chamber applied the wrong legal standard to Witness QJ's identification evidence by placing undue weight on his prior knowledge of Kanyabashi and his ability to identify him in court.[6041] He also argues that the circumstances surrounding his identification by Witness QJ were difficult and required a careful analysis that the Trial Chamber erroneously did not conduct.[6042] Specifically, Kanyabashi contends that the Trial Chamber erred in accepting Witness QJ's identification evidence because the witness: (i) could not estimate the distance at which he saw him;[6043] and (ii) gave inconsistent evidence as to whether Kanyabashi was seated between two persons in the vehicle or not.[6044] He further argues that Witness QJ's evidence that Kanyabashi was being driven was contradicted by Witness QI's testimony as well as by Defence Witnesses D-2-YYY, D-2-5-I, D-2-14-W, D-2-17-I, D-21-B, and Bernadette Kamanzi whose evidence reflects that Kanyabashi drove himself and was accompanied by a policeman.[6045] Kanyabashi also questions the reliability of the identification, arguing that Witness QJ "imputed the same statements to Nsabimana as those imputed to Kanyabashi, at the same roadblock and in the same vague manner."[6046]

2607. The Prosecution responds that the Trial Chamber properly assessed Witness QJ's evidence and that a slight variation in his testimony does not detract from the reasonableness of the Trial Chamber's reliance on it.[6047] The Prosecution also submits that Witness QJ's evidence concerning Nsabimana is irrelevant to assessing his identification evidence of Kanyabashi.[6048]

2608. The Appeals Chamber rejects Kanyabashi's assertion that the Trial Chamber applied the wrong legal standard when assessing Witness QJ's prior knowledge of Kanyabashi and in-court identification. These were factors considered in addition to Witness QJ's numerous sightings of Kanyabashi prior to the megaphone announcement at the Hotel Faucon roadblock, in Butare Town,

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[6041] Kanyabashi Notice of Appeal, sub-para. 3.6.5.1, *referring to* Trial Judgement, paras. 3800, 3821; Kanyabashi Reply Brief, para. 128.
[6042] Kanyabashi Appeal Brief, para. 332. *See also* Kanyabashi Notice of Appeal, sub-paras. 3.6.5.1; Kanyabashi Reply Brief, para. 128.
[6043] Kanyabashi Notice of Appeal, sub-paras. 3.6.5, 3.6.5.1, 3.6.5.5; Kanyabashi Appeal Brief, para. 333; Kanyabashi Reply Brief, para. 129.
[6044] Kanyabashi Appeal Brief, paras. 309, 333, *referring to* Witness QJ, T. 12 November 2001 pp. 24-31, 34, T. 15 November 2001 p. 17.
[6045] Kanyabashi Appeal Brief, para. 310, *referring to* Witness QI, T. 23 March 2004 pp. 50, 51, T. 24 March 2004 pp. 77, 78 (closed session), Witness D-2-YYYY, T. 28 November 2007 pp. 49-52 (closed session), Witness D-2-5-I, T. 11 December 2007 pp. 67, 68 (closed session), T. 21 January 2008 p. 56, Witness D-2-14-W, T. 12 February 2008 pp. 4, 5, Witness D-2-17-I, T. 25 February 2008 pp. 64-66 (closed session), Witness D-21-B, T. 13 May 2008 pp. 48, 49 (closed session), Bernadette Kamanzi, T. 22 November 2007 p. 39.
[6046] Kanyabashi Appeal Brief, para. 333.
[6047] Prosecution Response Brief, paras. 1947, 1948.
[6048] Prosecution Response Brief, para. 1949.

and at a meeting at the MRND Palace and Kanyabashi does not demonstrate that improper weight was placed on them.[6049]

2609. As regards Kanyabashi's contention that Witness QJ was unable to estimate the distance between him and Kanyabashi on the occasion of the megaphone announcement, the Appeals Chamber observes that the witness was able to provide a detailed description of the location at which he saw him – the Hotel Faucon roadblock – and why Witness QJ was in its vicinity.[6050] Kanyabashi's contention that Witness QJ was unable to provide a specific numerical estimate of the distance fails to demonstrate that the Trial Chamber erred in relying on his ability to identify Kanyabashi.[6051]

2610. Likewise, the Appeals Chamber finds no material variance in Witness QJ's evidence as to Kanyabashi's placement in the vehicle.[6052] Furthermore, evidence from Witness QI as well as Witnesses D-2-YYY, D-2-5-I, D-2-14-W, D-21-B, and Kamanzi does not contradict Witness QJ's evidence, as their accounts consist of assertions that Kanyabashi typically drove himself and was usually only accompanied by a policeman.[6053] Notably, while Witness QJ testified that Kanyabashi was not driving the vehicle when he made the announcement,[6054] he, like these witnesses, also testified about Kanyabashi generally driving himself.[6055]

2611. Finally, Kanyabashi's assertion that Witness QJ's testimony that he saw Nsabimana issue the same instructions as Kanyabashi at the Hotel Faucon roadblock necessarily undermines the witness's identification of Kanyabashi making similar statements is without merit. Witness QJ's evidence that Nsabimana gave similar instructions at the Hotel Faucon roadblock is consistent with

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[6049] *See* Trial Judgement, para. 3800.
[6050] Witness QJ, T. 8 November 2001 pp. 96, 102, 134, 135 (closed session), T. 12 November 2001 pp. 25, 34, T. 15 November 2001 pp. 11-16. *See also* Trial Judgement, paras. 3754, 3796.
[6051] Witness QJ, T. 12 November 2001 p. 34.
[6052] Witness QJ, T. 12 November 2001 pp. 26, 30, T. 15 November 2001 pp. 16, 17 (closed session).
[6053] Witness QI, T. 23 March 2004 p. 51 (testifying that he saw Kanyabashi arriving at the dispensary in a car that he drove alongside two armed soldiers), T. 24 March 2004 pp. 71, 78 (closed session) (testifying that Kanyabashi was in his vehicle and driving it when he saw him making a megaphone announcement in June 1994); Witness D-2-YYYY, T. 28 November 2007 pp. 49-52 (closed session) (testifying that, as far as he knew, Kanyabashi did not have a driver and that when he saw Kanyabashi between 6 April and July 1994, he was driving himself and accompanied by a police officer); Witness D-2-5-I, T. 21 January 2008 p. 56 (stating that Kanyabashi travelled in the commune's white Peugeot 305, drove himself, and was accompanied by a policeman but never gendarmes or soldiers); Witness D-2-14-W, T. 12 February 2008 pp. 4-6 (testifying that when he saw Kanyabashi "on several occasions", "[m]ost of the time" Kanyabashi was driving himself and clarifying that, when he saw Kanyabashi between 6 April and 3 July 1994, he "didn't pay attention as to whether [Kanyabashi] was driving himself or whether he was being driven by any driver whatsoever."); Witness D-21-B, T. 13 May 2008 pp. 48, 49 (closed session) (testifying generally that, when he saw Kanyabashi leave his home, he was accompanied by a policeman and the policeman was not driving); Witness D-2-17-I, T. 25 February 2008 pp. 64-66 (closed session) (testifying that he saw Kanyabashi leave a meeting at Huye Stadium one week after the death of the President and that Kanyabashi was driving himself and was accompanied by policemen); Bernadette Kamanzi, T. 22 November 2007 p. 39 (testifying that when he accompanied Kanyabashi to Mpare, Kanyabashi drove the vehicle and they were accompanied by a policeman who sat next to Kanyabashi).
[6054] Witness QJ, T. 12 November 2001 pp. 26, 30, T. 15 November 2001 pp. 16, 17 (closed session).
[6055] Witness QJ, T. 12 November 2001 pp. 32, 33.

his testimony that he frequently heard announcements similar to the one Kanyabashi gave being made by other people during the relevant time period.[6056] Furthermore, Witness QJ described Nsabimana's physical appearance and correctly stated that he was the prefect following the removal of Prefect Habyalimana.[6057]

2612. Based on the foregoing, the Appeals Chamber finds that Kanyabashi has not shown that the Trial Chamber erred in its assessment of Witness QJ's identification of him.

(ii) Credibility

2613. The Trial Chamber found Witness QJ's testimony about the late May 1994 megaphone announcement to be detailed and consistent.[6058]

2614. Kanyabashi contends that the Trial Chamber failed to apply sufficient caution to Witness QJ's evidence with respect to the details of the late May 1994 megaphone announcement.[6059] He points to the Trial Chamber's evaluation of the inconsistencies in Witness QJ's evidence as to whether Kanyabashi gave instructions over a megaphone on one or two occasions at the Hotel Faucon roadblock.[6060] He also highlights that Witness QJ testified that he, Kanyabashi, gave instructions each time he passed the roadblock but did not refer to him using a megaphone and instead testified that he could hear him because he was close to him.[6061] Kanyabashi appears to argue that, in this context, it is unclear during which event he used a megaphone and that this ambiguity raises doubts as to the public nature of the alleged incitement.[6062]

2615. Kanyabashi also submits that no reasonable trier of fact could have found Witness QJ credible and that his testimony was detailed and coherent.[6063] He argues that the Trial Chamber

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[6056] Witness QJ, T. 12 November 2001 p. 32.
[6057] *See* Witness QJ, T. 8 November 2001 pp. 100, 101, 107 (closed session), T. 12 November 2001 pp. 10, 11.
[6058] Trial Judgement, para. 3813. *See also ibid.*, paras. 3796, 3800, 3801, 3804.
[6059] Kanyabashi Notice of Appeal, sub-paras. 3.6.2.1, 3.6.2.2; Kanyabashi Appeal Brief, paras. 312-316; Kanyabashi Reply Brief, para. 119.
[6060] Kanyabashi Appeal Brief, para. 313, *referring to* Trial Judgement, para. 3801.
[6061] Kanyabashi Appeal Brief, paras. 314, 315, *referring to* Witness QJ, T. 12 November 2001 p. 35, T. 14 November 2001 p. 126. Kanyabashi also points out that the Presiding Judge summarised Witness QJ's account without mentioning Kanyabashi using a megaphone. *See ibid.*, para. 314, *referring to* Witness QJ, T. 15 November 2001 pp. 45, 46 (closed session). *See also* AT. 20 April 2015 pp. 21, 22.
[6062] Kanyabashi Appeal Brief, para. 314. *See also ibid.*, heading 3.6.2.2 "Contradictions regarding the acts and their public nature", fn. 988, *referring to Kalimanzira* Appeal Judgement, paras. 157-165. Kanyabashi highlights that, in its closing brief, the Prosecution only relied on Witness QJ with respect to its allegation that Kanyabashi issued instructions at a roadblock, but did not rely on Witness QJ's evidence in support of the allegation that these instructions were issued by megaphone. *See* Kanyabashi Appeal Brief, para. 315. *See also* Kanyabashi Reply Brief, para. 118; AT. 20 April 2015 pp. 21, 22.
[6063] Kanyabashi Notice of Appeal, sub-paras. 3.6.2, 3.6.5; Kanyabashi Appeal Brief, paras. 308-316; Kanyabashi Reply Brief, paras. 118-122, 128-131. *See also* AT. 20 April 2015 p. 20.

unreasonably disregarded Witness QJ's "recollection problems" and several contradictions in his testimony that undermine the witness's credibility and reliability.[6064]

2616. The Prosecution responds that the Trial Chamber properly assessed Witness QJ's credibility and that Kanyabashi fails to show any error in its reasoning related to Witness QJ's inconsistencies and recollection problems.[6065]

2617. The Appeals Chamber finds that Kanyabashi fails to identify material inconsistencies in Witness QJ's evidence as to his incitement by megaphone in late May 1994 that would prevent a reasonable trier of fact from relying on the witness' evidence. The Trial Chamber noted that Witness QJ initially testified that he saw Kanyabashi make the megaphone announcement on two occasions but later testified that he only witnessed Kanyabashi make this announcement on one occasion, in May 1994.[6066] The Trial Chamber did not consider the discrepancy to be significant in light of the passage of time between the events at issue and Witness QJ's testimony.[6067] Kanyabashi does not demonstrate any error in this reasoning.

2618. Kanyabashi also fails to demonstrate that Witness QJ's evidence about his observations of Kanyabashi at the Hotel Faucon roadblock reveals that he provided contradictory evidence as to whether Kanyabashi used a megaphone. The Appeals Chamber observes that Witness QJ testified that he often saw Kanyabashi at the Hotel Faucon roadblock.[6068] The witness explained that, on occasions other than the one in which Kanyabashi used the megaphone in May 1994, he saw Kanyabashi stopped at the Hotel Faucon roadblock in his private vehicle and that, each time, Kanyabashi reminded people manning it to be careful and instructed them to ensure that no enemy go through.[6069] Having reviewed the relevant aspects of Witness QJ's direct and cross-examination,

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[6064] Kanyabashi Appeal Brief, para. 308. Kanyabashi argues that Witness QJ: (i) was unable to recall specific facts approximately 60 times during his testimony; (ii) testified that he went to the Butare Prefecture Office only twice, then stated that he went there "often" before testifying again that he went there twice; (iii) testified that Nsabimana went to all of the roadblocks to announce a message similar to that given by Kanyabashi then stated that he only saw Nsabimana at the Hotel Faucon roadblock; and (iv) testified that he could see everything from his hiding place during an attack against Tutsis hiding in the Hotel Faucon but later retracted this. *See idem* (emphasis omitted). *See also* Kanyabashi Reply Brief, paras. 118, 119; AT. 20 April 2015 p. 20.
[6065] Prosecution Response Brief, paras. 1934-1940. *See also* AT. 20 April 2015 pp. 42, 43.
[6066] Trial Judgement, para. 3801.
[6067] Trial Judgement, para. 3801.
[6068] Witness QJ, T. 12 November 2001 p. 25 ("A. The road he normally took was the one that passes in front of Hotel Faucon because he lived nearby and I saw him often at the roadblock.").
[6069] Witness QJ, T. 12 November 2001 pp. 32-34 ("Q. Can you tell us if you saw Bourgmestre Kanyabashi at any other occasion, aside from these two occasions that you saw him in the pickup truck? A. I saw him several times and I also saw him in his own private car, which is a Peug[e]ot 505, and he drove around in this car in the city. [...] Q. Did you see Bourgmestre Kanyabashi stop at any of the roadblocks? A. He necessarily had to go to the roadblock and to stop. Not only did the bourgmestre who is in the vehicle had to stop at the roadblock, but also pedestrians also had to stop to go through a check at the roadblock. Further, they had to stop at the roadblock because the roadblock had to be opened for them because there was no other way of going through. [...] Q. Can you tell this Court if you saw Bourgmestre Kanyabashi speak to anyone at the roadblock? A. I saw him often. Each time he went through the roadblock, he had to remind people who were manning the roadblock that they had to be careful and ensure that no enemy went through.

the Appeals Chamber also finds that Kanyabashi does not demonstrate that the witness provided contradictory evidence about whether he used a megaphone in May 1994.[6070]

2619. Turning to Kanyabashi's contention that Witness QJ was generally unreliable, the Appeals Chamber observes that Kanyabashi merely refers to excerpts from Witness QJ's testimony in which the witness could not remember precise details when questioned about specific, and often peripheral, aspects of his testimony.[6071] Although Kanyabashi highlights Witness QJ's inability to recall the specific date when the megaphone announcement by Kanyabashi occurred,[6072] Witness QJ consistently stated that the announcement took place in May 1994 and acknowledged his inability to recall the exact day.[6073] Kanyabashi does not show that a reasonable trier of fact could not have relied on his evidence in these circumstances. Likewise, Kanyabashi fails to identify any material inconsistencies in Witness QJ's testimony that a reasonable trier of fact should have addressed in assessing Witness QJ's evidence in relation to this event or that would have precluded it from finding the witness to be credible with respect to it.[6074]

That was what he said often. Q. What did the word 'enemy' mean? A. When they said Umwansi or enemy – I spell Umwansi. U-M-W-A-N-Z-I. When this word was used, it is also intended to mean Tutsi. And, again, to refer to the Tutsis, they could say 'snakes' or 'Nyenzi,' or so on, and so forth.").

[6070] *See* Witness QJ, T. 12 November 2001 pp. 32-34, T. 14 November 2001 pp. 123, 124 and 129-138 (closed session); T. 15 November 2001 pp. 9-17 (closed session). The portions of Witness QJ's testimony highlighted by Kanyabashi generally concern questions to and responses from the witness about when Kanyabashi was addressing the persons manning the roadblock. Kanyabashi does not demonstrate, however, that the evidence of Witness QJ speaking to soldiers manning the roadblock is inconsistent with his evidence that he observed Kanyabashi using a megaphone and "informing the people of Ngoma that the enemies are among us and you are requested to seek them everywhere" at the Hotel Faucon roadblock. *See* Witness QJ, T. 12 November 2001 p. 26, T. 14 November 2001 p. 100. The witness's evidence reflects that his statements to those manning the roadblock mirrored his "announcements". *See* T. 14 November 2001 p. 95 ("Q. Witness QJ, you testified to the effect that Mr. Kanyabashi, at a roadblock, allegedly told the soldiers manning the roadblock to do their work properly so as not to let the enemy through. Do you recall saying that? A. Yes, he said that, *and these were announcements that he was making.*") (emphasis added). Furthermore, Witness QJ repeatedly indicated that the announcements were made throughout Butare Town. *See* T. 12 November 2001 p. 25 ("Q. Can you describe what he was doing when you saw him at the roadblock? A. He made announcements from his vehicle and that, throughout the city."), T. 14 November 2001 pp. 97, 98 ("Q. Witness QJ, is it not correct that this announcement that he made was made at the roadblock at Hotel Faucon to soldiers. [...] THE WITNESS: No, the announcement was made across the whole Butare town and on about three occasions.").

[6071] Kanyabashi points to instances wherein Witness QJ could not recall precise details with respect to: (i) his meetings with Prosecution investigators (*see* Witness QJ, T. 12 November 2001 pp. 43-46, and 70, 79, 92, 93, 95, 96 (closed session), T. 13 November 2001 p. 42, T. 15 November 2001 pp. 19, 59 (closed session)); (ii) incidents unrelated to the Kanyabashi's megaphone announcement (*see* Witness QJ, T. 12 November 2001 p. 123, T. 13 November 2001 pp. 45, and 81(closed session), 117, T. 15 November 2001 pp. 66, 68 (closed session)); and (iii) issues related to his general credibility (*see* Witness QJ, T. 12 November 2001 p. 50, T. 13 November 2001 pp. 28, 30 (closed session), and 38, 59, 118, and 129, 131, 132, 134 (closed session), T. 14 November 2001, pp. 24, 25, 27, 30, 47, 52, 53 (closed session), 64, 65, 73, 77, 84, 86, 92, 101, 104, 119, 122, 123, T. 15 November 2001 pp. 52, 58, 64, 66, 68, 111 (closed session)).

[6072] Kanyabashi Appeal Brief, para. 308.

[6073] *See* Witness QJ, T. 12 November 2001 p. 25, T. 15 November 2001 pp. 9, 10 (closed session).

[6074] The Appeals Chamber notes that: (i) Witness QJ consistently testified that he went to the Butare Prefecture Office on two occasions, and, when read in context, his assertion that he "often went to the [prefectoral office] in the evenings" merely reflects that on the two occasions that he went there, it was in the evening (*see* Witness QJ, T. 8 November 2001 p. 137 (closed session); T. 12 November 2001 p. 12); (ii) when Witness QJ's testimony is read in context, it is apparent that his statement that Nsabimana "took that itinerary; he went through all the roadblocks that [Witness QJ] mentioned" was based on Witness QJ's supposition that, at the time, Nsabimana would have had to pass through certain roadblocks,

2620. The Appeals Chamber therefore dismisses Kanyabashi's contention that the Trial Chamber erred in finding that Witness QJ's evidence was detailed and consistent.

(iii) Corroboration

2621. When assessing Witness QJ's evidence of Kanyabashi making a megaphone announcement in May 1994, the Trial Chamber recalled Witness TK's testimony that, while hiding in a convent in Butare at the end of May 1994, she heard a vehicle drive past broadcasting an announcement through a megaphone that the Ngoma *bourgmestre* wished to inform the population that the enemy was still among them and that they had to find the enemy.[6075] The Trial Chamber noted that Witness TK could not identify the person delivering the announcement except that the voice she heard was not Kanyabashi's.[6076] It further concluded that Witnesses QJ and TK were "not testifying about one and the same announcement [made] by Kanyabashi in mid-May 1994."[6077] Nonetheless, the Trial Chamber considered that "various details" of Witness TK's evidence, "such as the manner in which the announcements were made and the content of the announcements" corroborated Witness QJ's testimony.[6078]

2622. Kanyabashi argues that the Trial Chamber erred in concluding that Witness TK corroborated Witness QJ's evidence, as the two witnesses testified about different incidents, and Witness TK, unlike Witness QJ, did not identify Kanyabashi as the person making the announcement.[6079] In addition, Kanyabashi contends that the Trial Chamber erred in failing to examine sufficiently whether Witnesses QJ and TK, in light of their relationship and continuous closeness after the genocide, had inadvertently influenced each other's evidence.[6080]

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in addition to the Hotel Faucon roadblock, based on the route available, as opposed to being an assertion that he had seen Nsabimana passing through those roadblocks, which is consistent with Witness QJ's testimony that he only saw Nsabimana at the Hotel Faucon roadblock (*see* Witness QJ, T. 8 November 2001 pp. 142, 143 (closed session), T. 13 November 2001 pp. 107, 108 (closed session)); and (iii) Witness QJ originally testified that he could see everything that happened during the attack against Tutsis hiding in the Hotel Faucon from his hiding place (*see* Witness QJ, T. 13 November 2001 p. 58), but subsequently clarified that he could not "see" the backyard but could "hear" what was occurring (*see* Witness QJ, T. 14 November 2001 pp. 47-49, 54, 55 (closed session)).

[6075] Trial Judgement, para. 3802.

[6076] Trial Judgement, paras. 3802, 3803.

[6077] Trial Judgement, para. 3804. *See also ibid.*, para. 3802 ("However, [Witness TK's] testimony supports Witness QJ's account with regard to the content of the message, the method by which it was disseminated, and the approximate time and place of the announcement.").

[6078] Trial Judgement, para. 3804. *See also ibid.*, para. 3802. The Trial Chamber also noted that Witness D-2-13-D's testimony that the commune office owned a Toyota pick-up corroborated Witness QJ's testimony that Kanyabashi was in a Toyota pickup. *See ibid.*, para. 3796.

[6079] Kanyabashi Notice of Appeal, sub-para. 3.6.1.2; Kanyabashi Appeal Brief, paras. 299, 300, 306; Kanyabashi Reply Brief, paras. 112-114. *See also* AT. 20 April 2015 p. 19.

[6080] Kanyabashi Appeal Brief, paras. 301-304.

2623. The Prosecution responds that the Trial Chamber reasonably concluded that the testimony of Witness QJ was corroborated by Witness TK's evidence after expressly considering their ties.[6081]

2624. The Appeals Chamber observes that the Trial Chamber recognised that Witness TK did not testify about the megaphone announcement in May 1994 that Witness QJ testified about.[6082] However, it noted that her testimony corroborated Witness QJ's testimony with respect to the "manner in which the announcements were made and the content of the announcements".[6083] The Trial Chamber recalled that Witness QJ also testified "that these announcements were repeated frequently."[6084] Although Witness TK was not testifying about the same event as Witness QJ, on which Kanyabashi's criminal liability is based, it is clear that the Trial Chamber found that Witness TK's testimony provided circumstantial corroboration for that event.[6085] The Appeals Chamber, Judge Pocar and Judge Agius dissenting, sees no error in the Trial Chamber's approach.[6086]

2625. The Appeals Chamber is also not persuaded that the Trial Chamber failed to sufficiently examine whether Witnesses QJ and TK, in light of their relationship and continuous closeness after the genocide, had influenced each other's evidence. As noted above, the Trial Chamber expressly considered the circumstances in which they testified and determined that it did not find credible that they had not discussed the events or their participation in this proceeding.[6087] Kanyabashi does not point to elements in the witnesses' testimonies demonstrating intentional or unintentional evidence contamination, which would have precluded a reasonable trier of fact from relying on their evidence.

2626. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has not demonstrated that the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony.

(iv) Reversal of Burden of Proof

2627. The Trial Chamber did not find credible Defence evidence that Witnesses QJ and TK did not hear the megaphone messages or that Kanyabashi was not implicated in the megaphone

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[6081] Prosecution Response Brief, paras. 1928-1933. *See also* AT. 20 April 2015 p. 43.
[6082] Trial Judgement, para. 3804.
[6083] Trial Judgement, para. 3804. *See also ibid.*, para. 3802.
[6084] Trial Judgement, para. 3804 (internal reference omitted).
[6085] Trial Judgement, paras. 3812, 3813.
[6086] The Appeals Chamber recalls that two *prima facie* credible testimonies corroborate one another when one testimony is compatible with the other regarding the same fact or a sequence of linked facts. *See Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[6087] Trial Judgement, paras. 375, 3795.

announcements.[6088] In particular, it did not accept Witness AND-17's evidence that Witness QJ could not have heard the megaphone announcements, noting that Witness AND-17 was not continuously with Witness QJ and had made several implausible statements under oath.[6089] The Trial Chamber also disregarded Witnesses D-2-YYYY's and D-2-17-I's testimonies as they were not continuously at the location in May 1994 from which Witness TK allegedly heard the inciting remarks.[6090] Finally, it found the testimonies of Witnesses D-2-17-I, D-2-YYYY, D-2-5-I, D-2-14-W, D-2-13-O, D-13-D that they never heard Kanyabashi making a megaphone announcement from a moving vehicle to be of a limited weight, noting that none of these witnesses was continuously in Butare and that some of them had close personal or professional ties with Kanyabashi.[6091]

2628. Kanyabashi argues that the Trial Chamber reversed the burden of proof by requiring the Defence to present evidence demonstrating that its witnesses were permanently present at the same locations and on the same dates as Witnesses QJ and TK in order to counter their testimonies.[6092] He contends that the Trial Chamber erred in considering that Witness AND-17's evidence did not raise doubt in Witness QJ's testimony, as the former, although not "attached" to Witness QJ, was continuously present – "night and day" – on the same premises as Witness QJ from April to June 1994.[6093] In the same vein, Kanyabashi submits that the Trial Chamber erred in finding that, because Witness D-2-17-I was not continually at the location in May 1994 from which Witness TK allegedly heard inciting statements, his evidence could not raise reasonable doubt in Witness TK's testimony.[6094] In this regard, he argues that the Trial Chamber erred in finding that Witness D-2-17-I was absent from the convent on four occasions during the relevant period as opposed to two and suggests that the witness was, in fact, present on the relevant day.[6095] Kanyabashi also submits that the Trial Chamber required him to prove that Witness D-2-14-W was continuously present in Butare Town and contends that its finding that he left it is speculative as the witness only testified to having left his *cellule*.[6096]

2629. Kanyabashi further contends that, in light of the public nature of the incitement testified to by Witnesses QJ and TK, "[e]verybody must have heard it" and, consequently, Defence evidence

[6088] Trial Judgement, paras. 3797-3799, 3805-3810.
[6089] Trial Judgement, paras. 3797-3799.
[6090] Trial Judgement, paras. 3805, 3806.
[6091] Trial Judgement, paras. 3809, 3810.
[6092] Kanyabashi Notice of Appeal, sub-para. 3.2.3; Kanyabashi Appeal Brief, paras. 258, 259, 263; Kanyabashi Reply Brief, paras. 98-100, 103, 104.
[6093] Kanyabashi Appeal Brief, para. 262.
[6094] Kanyabashi Appeal Brief, para. 260. Kanyabashi also contends that, while the Trial Chamber found that Witness D-2-17-I was vague about his movements, he was prevented from questioning him in this regard. *See idem, referring to* Witness D-2-17-I, T. 27 February 2008 pp. 22, 26, 27, 31.
[6095] Kanyabashi Appeal Brief, para. 260.

that such incitement did not occur necessarily raised a reasonable doubt.[6097] He argues that the fact that approximately 30 other Prosecution witnesses, who were in Butare Town, were not questioned about this incident should have led a reasonable trier of fact to have reasonable doubt that it occurred.[6098]

2630. The Prosecution responds that the Trial Chamber did not shift the burden of proof but correctly exercised its discretion in finding that the evidence of Witnesses AND-17, D-2-17-I, and D-2-14-W did not raise a reasonable doubt with respect to the Prosecution case.[6099] It further responds that Kanyabashi's argument resting on the public nature of the incitement is unsupported.[6100]

2631. The Appeals Chamber finds that the Trial Chamber's acceptance of the Prosecution evidence that incitement occurred over Defence evidence that it did not does not demonstrate the imposition of an improper evidentiary burden on the Defence to prove a case rather than raise reasonable doubt. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trial chamber to decide which version it considers more credible.[6101]

2632. Similarly, the Appeals Chamber finds no merit in Kanyabashi's challenges to the Trial Chamber's assessment of Witness AND-17's evidence. The Trial Chamber rejected Witness AND-17's assertion that he was continuously with Witness QJ during the relevant period as a detailed assessment of Witness AND-17's testimony belied this statement.[6102] Beyond identifying inconsistencies in his testimony, the Trial Chamber further found Witness AND-17's evidence "to be neither credible, nor reliable" based on several other "implausible statements under oath."[6103] Kanyabashi does not demonstrate any error in the Trial Chamber's recounting of Witness AND-17's evidence nor does he demonstrate that the Trial Chamber applied an incorrect burden when assessing it.

2633. As regards Witness D-2-17-I's evidence, the Trial Chamber concluded that his testimony did not contradict Witness TK's evidence as he was not continuously present at the location where

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[6096] Kanyabashi Appeal Brief, para. 261; Kanyabashi Reply Brief, para. 102.
[6097] Kanyabashi Appeal Brief, para. 263.
[6098] Kanyabashi Appeal Brief, para. 263.
[6099] Prosecution Response Brief, paras. 1891-1902. The Prosecution contends that Kanyabashi's arguments that Trial Chamber's shifted the burden of proof are underdeveloped and should be summarily dismissed. *See ibid.*, para. 1895.
[6100] Prosecution Response Brief, paras. 1903-1906.
[6101] *See, e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[6102] Trial Judgement, para. 3798.
[6103] Trial Judgement, para. 3799.

Witness TK was hiding when she heard the megaphone announcement in May 1994.[6104] In this regard, the Trial Chamber noted that Witness D-2-17-I testified that he left the location on four occasions.[6105] The Appeals Chamber observes, however, that Witness D-2-17-I testified that he only left twice in May 1994.[6106] Nonetheless, the Appeals Chamber does not consider that this error occasioned a miscarriage of justice. Kanyabashi's assertion that Witness D-2-17-I's evidence reflects that he would have been with Witness TK on the day she heard inciting remarks is not substantiated.[6107]

2634. With respect to Witness D-2-14-W, the Appeals Chamber observes that the Trial Chamber considered that Kanyabashi did not establish that the witness was continuously present in Butare Town throughout late May 1994.[6108] While Kanyabashi argues that the witness's evidence only reflects that he left his *cellule*, the Appeals Chamber fails to see how any error in this regard has occasioned a miscarriage of justice.[6109] Notably, the witness's evidence reflects that he did not reside in the centre of Butare Town but about two kilometres away.[6110] Accordingly, the Appeals Chamber considers that Kanyabashi does not show that the witness would have necessarily been in a position to hear what Witnesses QJ and TK heard. Moreover, as found below, the Trial Chamber also considered Witness D-2-14-W's interest in defending Kanyabashi due to their relationship.[6111] Kanyabashi does not demonstrate that the Trial Chamber reversed the burden of proof when assessing this witness's evidence.

2635. Finally, the Appeals Chamber finds speculative Kanyabashi's contention that, because of the public nature of the incitement, Defence evidence that it did not occur and the fact that other Prosecution witnesses in Butare Town were not questioned about it must have raised doubt.

2636. Based on the foregoing, the Appeals Chamber dismisses Kanyabashi's contention that the Trial Chamber reversed the burden of proof when assessing the late May 1994 megaphone announcement.

[6104] Trial Judgement, para. 3806.
[6105] Trial Judgement, para. 3806.
[6106] Particularly, while Witness D-2-17-I first generically testified that he left the convent four times between May and July 1994, he then clarifies that he returned home twice on May 1994 and twice on June 1994. *Compare* Witness D-2-17-I, T. 27 February 2008 p. 18 (closed session) *with* T. 27 February 2008 pp. 22, 26, 27, 31 (closed session).
[6107] The Appeals Chamber has elsewhere considered and rejected Kanyabashi's contention that he was impermissibly prevented from reopening his case for the purpose of eliciting further evidence from Witness D-2-17-I as to his presence at the convent. *See supra*, Section VIII.A.1(b).
[6108] Trial Judgement, para. 3809.
[6109] *See* Witness D-2-14-W, T. 11 February 2008 pp. 38-41 (closed session); Witness D-2-14-W's testimony reflects that he went, for example, to Huye Stadium.
[6110] *See, e.g.*, Witness D-2-14-W, T. 11 February 2008 p. 40 (closed session).
[6111] *See infra*, para. 2641.

(v) Relationships with Witnesses

2637. In assessing Defence evidence in relation to the megaphone announcement in late May 1994, the Trial Chamber stated that:

> [F]ive of these eight Defence witnesses were closely connected to Kanyabashi in 1994, and as such, may have had an interest in defending him. Witnesses D-2-5-I, D-2-YYYY and D-2-14-W had close professional ties to Kanyabashi, and Witnesses D-13-D and D-2-13-O testified to close personal ties with Kanyabashi.[6112]

2638. Kanyabashi argues that none of the Defence witnesses had ties with him that would support the Trial Chamber's conclusion that they would falsely testify on his behalf.[6113] He contends that the Trial Chamber unreasonably rejected the testimonies of Witnesses D-2-5-I, D-2-YYYY, and D-2-14-W because of close professional ties.[6114] He further contends that the Trial Chamber erred in asserting that he had close personal ties with Witnesses D-2-13-O and D-13-D, as the former simply lived on the same hill as him and the latter was merely a neighbour and not a friend.[6115]

2639. The Prosecution responds that the Trial Chamber correctly assessed the ties between Kanyabashi and his Defence witnesses and argues that he attempts to substitute his assessment of the evidence for that of the Trial Chamber.[6116]

2640. The Appeals Chamber recalls that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence,[6117] and that it is for the trier of fact to determine whether a particular witness may have an incentive to distort the truth.[6118] Kanyabashi does not show that the Trial Chamber erred in considering the ties between him and the Defence witnesses when assessing the credibility of their evidence.

2641. The Appeals Chamber further notes that, in finding that Witnesses D-2-5-I and D-2-YYYY had "close professional ties to Kanyabashi",[6119] the Trial Chamber relied on their evidence that they worked closely with Kanyabashi when employed as policemen in Ngoma Commune and that Witness D-2-YYYY had been employed in that capacity under Kanyabashi's supervision for several years.[6120] In reaching the same conclusion with respect to Witness D-2-14-W, the Trial

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[6112] Trial Judgement, para. 3810 (internal references omitted).
[6113] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6114] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6115] Kanyabashi Notice of Appeal, sub-para. 3.3.5; Kanyabashi Appeal Brief, para. 269.
[6116] Prosecution Response Brief, paras. 1645, 1646, 1910, 1911.
[6117] *See, e.g., Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[6118] *Gacumbitsi* Appeal Judgement, para. 71.
[6119] *See* Trial Judgement, para. 3810.
[6120] *See* Witness D-2-YYYY, T. 26 November 2007 p. 62 (closed session), T. 3 December 2007 p. 8 (closed session), T. 5 December 2007 p. 56 (closed session); Witness D-2-5-I, T. 11 December 2007 p. 51 (closed session), T. 21 January 2008 p. 60 (closed session).

Chamber relied on the witness's evidence that his employment was linked closely to a project that Kanyabashi was involved in funding.[6121] Kanyabashi does not show any error in the Trial Chamber's evaluation of these ties when considering the credibility of Witnesses D-2-5-I, D-2-YYYY, and D-2-14-W.

2642. As regards the Trial Chamber's conclusion that Witnesses D-2-13-O and D-13-D "testified to close personal ties with Kanyabashi",[6122] the Appeals Chamber notes that the evidence cited by the Trial Chamber supports its conclusion concerning Witness D-2-13-O.[6123] By contrast, the Appeals Chamber observes that Witness D-13-D's testimony relied upon by the Trial Chamber reflects that, while the witness lived in the vicinity of Kanyabashi, he stated that Kanyabashi was not a "personal friend".[6124] The Trial Chamber also appears to have disregarded additional evidence of Witness D-13-D distancing his family from Kanyabashi's.[6125] The Appeals Chamber considers that, based on the evidence cited, no reasonable trier of fact could have found that Witness D-13-D had close personal ties with Kanyabashi. However, it finds that this error has not occasioned a miscarriage of justice as the Trial Chamber's assessment in any event reveals that it considered Witness D-13-D's evidence to be of low probative value with respect to the late May 1994 megaphone announcement.[6126]

2643. Consequently, the Appeals Chamber finds that Kanyabashi has not demonstrated any error in the assessment of his ties with Defence witnesses that would warrant the intervention of the Appeals Chamber.

(vi) Conclusion

2644. The Appeals Chamber has rejected the vast majority of Kanyabashi's allegations of error with respect to the Trial Chamber's assessment of the evidence concerning the late May 1994 megaphone announcement, including, Judge Pocar and Judge Agius dissenting, that Witness TK's evidence corroborated Witness QJ's evidence concerning the May 1994 megaphone announcement. The Appeals Chamber has, however, determined that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma

[6121] Trial Judgement, para. 3810; Witness D-2-14-W, T. 11 February 2009 pp. 7, 9 (closed session).
[6122] Trial Judgement, para. 3810.
[6123] Witness D-2-13-O, T. 5 November 2007 p. 16 (closed session). *See also* Witness D-2-13-O, T. 7 December 2007 p. 18.
[6124] *See* Witness D-13-D, T. 14 February 2008 pp. 31.
[6125] Witness D-13-D, T. 20 February 2008 p. 25 (closed session).
[6126] *See* Trial Judgement, para. 3809.

Commune from April through June 1994.[6127] The Appeals Chamber will now determine whether this error has occasioned a miscarriage of justice.

2645. The Appeals Chamber observes that the Trial Chamber relied on Witness QJ's evidence to reach its factual conclusion with respect to the late May 1994 megaphone announcement in the following terms:

> Insofar as Witness QJ's account was also corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system, the Chamber finds that the Prosecution has proven beyond a reasonable doubt that around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them.[6128]

2646. Kanyabashi argues that this statement reflects the unambiguous conclusion that Witness QJ's evidence would not have been relied upon but for the existence of the *modus operandi* as corroboration.[6129]

2647. The Prosecution responds that the Trial Chamber could have relied on the testimony of Witness QJ with or without corroboration.[6130]

2648. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them. In this respect, the Appeals Chamber recalls that it has rejected, Judge Pocar and Judge Agius dissenting, Kanyabashi's allegation of error with respect to the Trial Chamber's assessment that Witness TK's evidence corroborated Witness QJ's evidence concerning the May 1994 megaphone announcement. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, notes that the Trial Chamber relied upon Witness TK's evidence that she overheard a vehicle drive past and a megaphone broadcasting an announcement delivered on behalf of the *bourgmestre* of Ngoma Commune in May 1994.[6131] The Appeals Chamber, Judge Pocar and Judge Agius dissenting, is satisfied that this evidence is sufficiently complementary and corroborative of Witness QJ's evidence of "announcements being disseminated from a vehicle with a public address system".[6132] Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice.

[6127] *See supra*, Section VIII.E.1(c).
[6128] Trial Judgement, para. 3813.
[6129] Kanyabashi Appeal Brief, paras. 297, 307. *See also* AT. 20 April 2015 pp. 19-21.
[6130] AT. 20 April 2015 p. 42.

2649. Accordingly, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, concludes that Kanyabashi has failed to demonstrate that the Trial Chamber erred, on the basis of Witness QJ's evidence, in finding that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.

(e) Mid-June 1994 Megaphone Announcement

2650. With respect to the allegation that Kanyabashi made inciting statements through a megaphone in June 1994, the Trial Chamber recalled Witness QI's evidence that, in mid-June 1994 while hiding above a bread oven at his employer's house, he saw Kanyabashi exit his white Peugeot 305 with a hand-held megaphone and announce that the *Bourgmestre* of Ngoma Commune wanted the population to come early in the morning to clear the bushes along the road so the "*Inkotanyi*" would not find anywhere to hide.[6133] It further recalled that Witness QI testified that "Kanyabashi said they should flush out people hiding in the bushes, and everybody found in those bushes should die, including children, old men and women."[6134] The Trial Chamber found Witness QI's testimony "credible, reliable and convincing" and relied on it to find that, around mid-June 1994, Kanyabashi used a megaphone to disseminate inciting statements to commit genocide.[6135]

2651. Kanyabashi argues that the Trial Chamber erred in: (i) assessing Witness QI's identification evidence; (ii) evaluating the witness's credibility; and (iii) reversing the burden of proof.[6136] The Appeals Chamber will address these contentions in turn.

(i) Identification

2652. The Trial Chamber considered Witness QI's prior knowledge of Kanyabashi, the conditions in which the witness observed Kanyabashi, and Defence evidence that was presented as challenging the reliability of this identification.[6137] It concluded that, "notwithstanding the conditions in which Witness QI found himself at the time of observing Kanyabashi's megaphone announcement, and taking into account not only the content of the announcement, but also that Witness QI was already

[6131] *See* Trial Judgement, paras. 3757, 3802, 3803.
[6132] Trial Judgement, para. 3813.
[6133] Trial Judgement, para. 3815.
[6134] Trial Judgement, para. 3815.
[6135] Trial Judgement, para. 3824.
[6136] Kanyabashi Notice of Appeal, sub-paras. 3.2, 3.2.4, 3.6.4-3.6.5.5; Kanyabashi Appeal Brief, paras. 258, 259, 263, 328-332, 334; Kanyabashi Reply Brief, paras. 125-127.
[6137] Trial Judgement, paras. 3816-3820.

familiar with Kanyabashi, [...] Witness QI's identification of Kanyabashi on that day in June 1994 [was] reliable."[6138]

2653. Kanyabashi submits that the Trial Chamber erred in its assessment of Witness QI's identification evidence.[6139] He argues that evidence recalled in the Trial Judgement demonstrates that the identification was unreliable or lacked credibility and contends that Witness QI had vision problems.[6140]

2654. The Prosecution responds that the Trial Chamber correctly assessed Witness QI's identification evidence.[6141]

2655. The Appeals Chamber observes that, in support of his argument, Kanyabashi simply lists paragraphs of the Trial Judgement or evidence considered by the Trial Chamber. His contentions merely reflect disagreement with the Trial Chamber's analysis without demonstrating how the Trial Chamber's detailed consideration of Witness QI's ability to identify Kanyabashi was unreasonable.

2656. Kanyabashi's argument that Witness QI had vision problems is likewise without merit. In support of this contention, Kanyabashi refers to a passage of Witness QI's examination-in-chief during which he could not recognise a picture on the screen.[6142] However, the fact that Witness QI may have had vision problems while testifying 10 years after having observed the events does not undermine the reasonableness of the Trial Chamber's reliance on his evidence.

2657. Consequently, the Appeals Chamber dismisses Kanyabashi's contention regarding Witness QI's identification evidence.

(ii) Credibility

2658. Kanyabashi argues that Witness QI's credibility is questionable given that, while he could approximate the date and time of the event when testifying in 2004, he was unable to do so when giving his statement to Tribunal investigators in 1999.[6143] He also submits that the Trial Chamber did not consider Witness QI's evidence in light of his former employer's ties with Kanyabashi.[6144]

[6138] Trial Judgement, para. 3821.
[6139] *See* Kanyabashi Appeal Brief, paras. 209, 332, 334; Kanyabashi Reply Brief, paras. 125-127.
[6140] Kanyabashi Appeal Brief, paras. 209, 334, *referring to* Witness QI, T. 25 March 2004 p. 54 (closed session).
[6141] Prosecution Response Brief, para. 1950.
[6142] *See* Witness QI, T. 25 March 2004 p. 54 (closed session) ("Q. Witness, you can see a red and white house. Do you see a red and white house on the photograph? A. Yes, but because of my sight problem, I can not see well I have eye problems.").
[6143] Kanyabashi Notice of Appeal, sub-paras. 3.6.4, 3.6.4.1, 3.6.4.3-3.6.4.5; Kanyabashi Appeal Brief, para. 329.
[6144] Kanyabashi Appeal Brief, para. 330. In this regard, Kanyabashi highlights that, despite the fact that Witness QI was hiding in his former employer's house, he testified that he never discussed the megaphone announcements with him or his wife. *See idem*, *referring to* Witness QI, T. 25 March 2004 pp. 9, 10 (closed session).

In this regard, Kanyabashi contends that it is unreasonable to believe Witness QI's evidence that he made inciting remarks precisely in front of the house of Witness QI's former employer since, at the relevant time, he – Kanyabashi – was hiding this person's son.[6145]

2659. Kanyabashi also raises general challenges to the witness's credibility, emphasising that Judge Ramaroson found that Witness QI was not a credible witness when assessing the events at Matyazo Clinic.[6146] He also points to Witness QI's testimony that he was not "psychologically" well and argues that the witness's evidence reflected that he "clearly wanted to incriminate Kanyabashi".[6147] He further submits that material aspects of Witness QI's evidence, through cross-examination, turned out to be hearsay or inexact.[6148]

2660. The Prosecution responds that the Trial Chamber considered the inconsistencies between Witness QI's evidence and his previous statements and that it was in its discretion to conclude that he was credible.[6149] It submits that Kanyabashi's arguments concerning Witness QI's former employer are unsupported and speculative.[6150] The Prosecution further contends that it was within the Trial Chamber's discretion to accept Witness QI's evidence after having examined the conditions under which he testified.[6151]

2661. The Appeals Chamber notes that, with regard to the inconsistencies between Witness QI's prior statements and testimony, Witness QI's prior statement reflects that he did not remember the date of the events.[6152] While testifying in 2004, the witness stated that the megaphone announcement he witnessed occurred in June at about 2.00 p.m.[6153] The Trial Chamber addressed this issue in the Trial Judgement and accepted the witness's explanation that, at the time he gave his statement, he forgot the precise date of the incident and that he was not "psychologically well".[6154] Kanyabashi does not demonstrate that no reasonable trier of fact could have accepted the witness's explanation for the variance.

2662. Moreover, the Appeals Chamber considers that Kanyabashi does not show that the Trial Chamber failed to consider sufficiently Witness QI's evidence in light of his former employer's ties with Kanyabashi. His contention that he would not have made inciting remarks in front of Witness QI's former employer's home because he was hiding that individual's son does not

[6145] Kanyabashi Appeal Brief, para. 330.
[6146] Kanyabashi Appeal Brief, para. 328.
[6147] Kanyabashi Appeal Brief, para. 329.
[6148] Kanyabashi Appeal Brief, para. 329.
[6149] Prosecution Appeal Brief, para. 1944. *See also* AT. 20 April 2015 pp. 42, 43.
[6150] Prosecution Response Brief, para. 1945.
[6151] Prosecution Response Brief, para. 1944.
[6152] Witness QI's Statement, p. K0028864 (Registry pagination).
[6153] Witness QI, T. 23 March 2004 p. 59 (closed session). *See also* Witness QI, T. 24 March 2004 p. 77 (closed session).

demonstrate that no reasonable trier of fact could have relied on Witness QI's evidence to the contrary.

2663. With respect to Kanyabashi's general contentions concerning Witness QI's credibility, he does not show that, because Judge Ramaroson found Witness QI lacking credibility with respect to the events at Matyazo Clinic, a reasonable trier of fact could not have found that his evidence concerning the mid-June 1994 megaphone announcement was credible, reliable, and convincing.[6155] Furthermore, while excerpts of Witness QI's evidence reflect the significant emotional impact that recalling the genocide had on the witness,[6156] Kanyabashi does not demonstrate that this would have prevented a reasonable trier of fact from relying on Witness QI's evidence nor does he show that the witness's evidence reflected that he sought to incriminate Kanyabashi in a manner that would raise questions about his credibility.[6157] As regards Kanyabashi's contention that shifts in Witness QI's evidence during cross-examination further undermine his credibility, the Appeals Chamber considers that Kanyabashi only points to clarifications made by the witness, without demonstrating that these clarifications would have led a reasonable trier of fact to reject his testimony.[6158]

2664. Based on the foregoing, the Appeals Chamber concludes that Kanyabashi has failed to demonstrate that the Trial Chamber erred in its assessment of Witness QI's credibility.

(iii) Reversal of Burden of Proof

2665. Kanyabashi repeats his argument that the Trial Chamber reversed the burden of proof by requiring the Defence to present evidence demonstrating that his witnesses were "permanently" present at the same locations and on the same dates as Witness QI in order to counter his evidence.[6159] He also contends that, in light of the incitement testified to by Witness QI, "[e]verybody must have heard it" and argues that, although approximately 30 other Prosecution witnesses were in Butare Town, the fact that they were not questioned about this incident

[6154] Trial Judgement, para. 3822.
[6155] The Appeals Chamber observes that, in her dissenting opinion, Judge Ramaroson concluded that "[a]ll these inconsistencies are serious and major discrepancies which lead me to conclude that Witnesses QI and RL are not credible witnesses." *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Dissenting Opinion of Judge Arlette Ramaroson, dated 24 June 2011, signed 18 July 2011, filed 19 July 2011 (originally filed in French, English translation filed on 21 May 2014) ("Judge Ramaroson Dissenting Opinion"), para. 30. However, as her opinion is confined to the Trial Chamber's conclusions relating to the Matyazo Clinic and because she joined the majority in relying on Witness QI as it relates to mid-June 1994 megaphone announcement, this statement can only reasonably be interpreted to concern Witness QI's evidence concerning the Matyazo Clinic.
[6156] *See* Witness QI, T. 24 March 2004 p. 61 ("It's when I start to remember the events of that time, I feel disturbed. Sometimes I'm even incapable of speaking. That's why I spoke of those days how I did, with regard to the events that I saw, and I don't think I'll be able to continue speaking about this.").
[6157] *See also supra*, paras. 304, 2590.
[6158] Witness QI, T. 24 March 2004 p. 57, T. 25 March 2004 p. 4 (closed session).
[6159] Kanyabashi Appeal Brief, paras. 258 (emphasis omitted), 259. *See also* AT. 20 April 2015 pp. 55, 56.

necessarily raises reasonable doubt that it occurred.[6160] In this regard, he notes that although Witness TG was in the same compound as Witness QI, the former was not questioned about this issue.[6161]

2666. The Prosecution responds that the Trial Chamber applied the correct burden of proof and reasonably assessed the evidence on the record.[6162] The Prosecution further contends that it was not obliged to question other Prosecution witnesses about this incident.[6163]

2667. Kanyabashi does not substantiate his position that the Trial Chamber reversed the burden of proof when assessing Defence evidence pertaining to Witness QI's testimony. He does not point to any aspect of the Defence evidence contradicting or relating to Witness QI's testimony and his contentions in this regard are dismissed. Furthermore, Kanyabashi's contention that reasonable doubt arises from the fact that other Prosecution witnesses were in Butare Town but were not questioned as to this incident is speculative.

2668. Accordingly, the Appeals Chamber dismisses Kanyabashi's contention that the Trial Chamber reversed the burden of proof when assessing Defence evidence concerning the mid-June 1994 megaphone announcement.

(iv) Conclusion

2669. Based on the foregoing analysis, the Appeals Chamber finds that Kanyabashi has not demonstrated that the Trial Chamber erred in its assessment of the evidence concerning the mid-June 1994 megaphone announcement. However, the Appeals Chamber recalls its previous determination that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994.[6164]

2670. The Appeals Chamber observes that the Trial Chamber relied on Witness QI's evidence to reach its conclusion with respect to the mid-June 1994 megaphone announcement in the following terms:

> the Chamber considers Witness QI's testimony on Kanyabashi's megaphone announcement in mid-June 1994 to be credible, reliable and convincing. His testimony is also supported by evidence cited above which establishes that megaphone announcements from a moving vehicle

[6160] Kanyabashi Appeal Brief, para. 263.
[6161] Kanyabashi Appeal Brief, para. 263, fn. 832.
[6162] Prosecution Response Brief, paras. 1891, 1892.
[6163] Prosecution Response Brief, para. 1908.
[6164] *See supra*, Section VIII.E.1(c).

> were part of the *modus operandi* by which messages from the *bourgmestre* were disseminated to the population of Ngoma *commune*.[6165]

2671. Kanyabashi argues that, in view of the importance of the *modus operandi* finding in the Trial Chamber's reliance on Witness QI's testimony about the mid-June 1994 megaphone announcement, the error should result in the overturning of his conviction on this basis.[6166]

2672. The Prosecution responds that the Trial Chamber could have relied on the testimony of Witness QI with or without corroboration.[6167]

2673. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, rejects Kanyabashi's contention and finds that the Trial Chamber's error in finding the existence of a *modus operandi* did not result in a miscarriage of justice. The language in the Trial Judgement cited above reflects that Witness QI's evidence alone was sufficient to support the Trial Chamber's conclusions as to the mid-June 1994 megaphone announcement. Consequently, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, dismisses Kanyabashi's contentions related to this event.

(f) Killings

2674. The Trial Chamber, based on the evidence of Witnesses QJ, TK, and QI, determined that, "following Kanyabashi's megaphone announcements in mid-May 1994 and in June 1994, searches were conducted for Tutsis and consequently more Tutsis were killed."[6168]

2675. Kanyabashi argues that the evidence does not support the conclusion that killings resulted from the megaphone communications.[6169] He contends that the error is relevant to the Trial Chamber's determination of his sentence.[6170]

2676. The Prosecution responds that direct and public incitement to commit genocide is an inchoate crime and, thus, does not require demonstration that Kanyabashi's megaphone announcements resulted in any subsequent killings.[6171]

2677. The Appeals Chamber recalls that the crime of direct and public incitement to commit genocide is an inchoate crime, punishable even if no act of genocide has resulted therefrom.[6172] Notably, the Trial Chamber did not convict Kanyabashi of genocide on the basis of ensuing killings,

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[6165] Trial Judgement, para. 3824.
[6166] *See* Kanyabashi Appeal Brief, para. 297. *See also ibid.*, para. 307.
[6167] AT. 20 April 2015 p. 42.
[6168] *See* Trial Judgement, para. 3832. *See also ibid.*, paras. 3827-3831, 6009, 6010.
[6169] Kanyabashi Appeal Brief, para. 338.
[6170] Kanyabashi Appeal Brief, para. 338.
[6171] Prosecution Response Brief, paras. 1955-1958.
[6172] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al.* Appeal Judgement, para. 678.

finding that there was insufficient evidence to establish that Kanyabashi's conduct contributed to them.[6173]

2678. Notwithstanding this finding, the Trial Chamber concluded that "the fact that after both megaphone announcements searches were conducted and more Tutsis were killed" constituted further evidence that the public understood that the "enemy" and "*Inkotanyi*" referred to in Kanyabashi's speeches were Tutsis and that they were to be killed.[6174] The Appeals Chamber recalls that in determining whether a speech constitutes a direct and public incitement to commit genocide, it may be helpful to examine how the speech was understood by its intended audience in order to determine its true message.[6175] The Trial Chamber's analysis reveals that this was the assessment the Trial Chamber undertook.

2679. In this regard, the Appeals Chamber finds that Kanyabashi's challenge fails to appreciate that the Trial Chamber's conclusion concerning the public understanding of the words that he used in his megaphone announcements was primarily based on the evidence of Witnesses QJ and QI as well as Expert Witness Ntakirutimana who testified that the term "enemy" or "*Inkotanyi*" meant Tutsis.[6176]

2680. Furthermore, and contrary to Kanyabashi's contentions, the Trial Chamber's sentencing deliberations reveal that, while it considered the number of victims resulting from the attacks at the Matyazo Clinic and Kabakobwa Hill, it did not consider killings resulting from the megaphone announcements in determining his sentence.[6177] Consequently, Kanyabashi fails to identify an error that would invalidate his sentence or have occasioned a miscarriage of justice.

2681. As a result, the Appeals Chamber dismisses Kanyabashi's contentions regarding the ensuing killings without further consideration.

(g) Conclusion

2682. In light of the foregoing, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate any error in the Trial Chamber's assessment of the evidence concerning the late May and mid-June 1994 megaphone announcements that occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber.

[6173] Trial Judgement, paras. 5930, 5931.
[6174] Trial Judgement, para. 6010. *See also ibid.*, para. 6009.
[6175] *Cf. Nahimana et al.* Appeal Judgement, paras. 701, 711.
[6176] Trial Judgement, paras. 3814, 3825, 3826.
[6177] Trial Judgement, para. 6254.

2. Criminal Responsibility

2683. In the "Factual Findings" section of the Trial Judgement, the Trial Chamber determined that the term "enemy" as heard by Witness QJ in the late May 1994 megaphone announcement was a reference to Tutsis in general.[6178] It similarly accepted Witness QI's interpretation of Kanyabashi's mid-June 1994 megaphone announcement that his use of the expression "*Inkotanyi*" was a reference to "Tutsis hiding in the bushes".[6179] In both instances, the Trial Chamber considered interpretations of the words "enemy" and "*Inkotanyi*" given by Prosecution Expert Witness Évariste Ntakirutimana that supported this conclusion.[6180]

2684. In the "Legal Findings" Section of the Trial Judgement, the Trial Chamber recalled the following:

> Around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them. Further, around mid-June 1994 Kanyabashi used a megaphone to tell the population to clear bushes along the road in order to remove potential hiding places for the *Inkotanyi*, to flush out people who were hiding in the bushes, and to kill those found there, including children, old men and women. After both of Kanyabashi's announcements in mid-May and June 1994 searches were conducted for Tutsis, and consequently, more Tutsis were killed [...].
>
> The Chamber recalls that after hearing Kanyabashi's announcements by megaphone in May and June 1994, the public understood that the "enemy" and "*Inkotanyi*" were Tutsis and they were to be killed, as further evidenced by the fact that after both megaphone announcements searches were conducted and more Tutsis were killed.[...]
>
> The Chamber also considers Kanyabashi's spoken words encouraging the population to search for the "enemy" and "clear bushes", being references to killing Tutsis, evidences Kanyabashi had the requisite intent to destroy, in whole or in part, the Tutsi ethnic group.[6181]

2685. Kanyabashi submits that Witness QJ's evidence is too ambiguous to support as the only reasonable conclusion that the term "enemy" meant Tutsis and, consequently, that he possessed genocidal intent.[6182] In support of his contention, he asserts that this term was used in late May 1994 during the RPF advance and reasonably could have been a reference to these combatants.[6183] During the appeals hearing, Kanyabashi further pointed to Witness QJ's evidence reflecting that "no one was going through the roadblocks" when this announcement was made as well as evidence which, in his view, suggests that Kanyabashi was only speaking to the persons manning the roadblock rather than the public in general.[6184] Kanyabashi argued that, based on the evidence, it could not be

[6178] Trial Judgement, para. 3814.
[6179] Trial Judgement, paras. 3825, 3826.
[6180] *See* Trial Judgement, paras. 3814, 3825.
[6181] Trial Judgement, paras. 6009, 6010, 6012.
[6182] Kanyabashi Appeal Brief, para. 336.
[6183] Kanyabashi Appeal Brief, para. 336.
[6184] AT. 20 April 2015 pp. 21, 22, *referring to* Witness QJ, T. 12 November 2001 pp. 32, 33, 40, 41 (French), T. 14 November 2001 pp. 107, 141, 143 (French), T. 15 November 2001 p. 14 (closed session) (French).

concluded that his statements satisfied the public element of the crime of direct and public incitement to commit genocide.[6185]

2686. Kanyabashi also contends that the evidence of Witness QI is insufficient to establish that Kanyabashi incited the population to clear the bushes with the intention to kill Tutsis.[6186] He argues that the limited number of crimes that followed the megaphone announcements belies the conclusion that his statements constituted direct and public incitement to commit genocide.[6187] Finally, Kanyabashi appears to argue that the Trial Chamber erred in relying on Expert Witness Ntakirutimana's evidence when it refused to hear his own Defence expert evidence in rebuttal.[6188]

2687. The Prosecution responds that the Trial Chamber correctly interpreted the evidence and concluded that Kanyabashi's statements amounted to direct and public incitement to commit genocide and that Kanyabashi fails to substantiate his interpretations to the contrary.[6189] It argues that the Trial Chamber reasonably found that Kanyabashi's incitement by megaphone was of a public nature by virtue of the fact it was made through a public-address system.[6190] The Prosecution also contends that Kanyabashi's contentions concerning the absence of killings is irrelevant as this crime is an inchoate offence.[6191]

2688. The Appeals Chamber finds no merit in Kanyabashi's argument that Witness QJ's evidence was too ambiguous to support as the only reasonable conclusion that the term "enemy" used in the late May 1994 megaphone announcement was a reference to Tutsis in general.[6192] The Trial Chamber considered that the witness's interpretation that the reference to the "enemy" included Tutsis was supported by the evidence of Expert Witness Ntakirutimana, Defence Expert Witness Eugène Shimamungu, and a prior finding of the Trial Chamber – based on an extensive

[6185] AT. 20 April 2015 pp. 22, *referring to Ngirabatware* Appeal Judgement, paras. 53-60.
[6186] Kanyabashi Appeal Brief, para. 336.
[6187] Kanyabashi Appeal Brief, para. 337.
[6188] Kanyabashi Appeal Brief, para. 336, *referring to The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision on Kanyabashi's Three Motions to Vary His List of Witnesses and to Admit Written Statements under Rule 92*bis*, 24 April 2008 ("24 April 2008 Decision").
[6189] Prosecution Response Brief, paras. 1951-1954.
[6190] AT. 20 April 2015 pp. 43-45.
[6191] Prosecution Response Brief, para. 1954.
[6192] *See* Witness QJ, T. 12 November 2001 pp. 26 ("A. [Kanyabashi] used to say that the bourgmestre of Ngoma commune is informing the people of Ngoma that the enemies are among us and you are requested to seek them everywhere."), 33, 34 ("Q. What did the word 'enemy' mean? A. When they said Umwanzi or enemy – I spell Umwanzi. U-M-W-A-N-Z-I. When this word was used, it is also intended to mean Tutsi. And, again, to refer to the Tutsis, they could say 'snakes' or 'Nyenzi', or so on, and so forth.").

review of evidence – which reflected that, at the time, words such as "enemy" were used to refer to Tutsis.[6193]

2689. Furthermore, the Appeals Chamber finds that Kanyabashi's contention that Witness QJ's evidence shows that Kanyabashi only intended to address persons manning the roadblock and that there was no public audience when he made the allegedly inciting statement reflects a fragmented reading of the record and the Trial Chamber's findings. The Trial Chamber conclusions, which are reasonably supported by Witness QJ's testimony, are that Kanyabashi was addressing the "population", that he was using a megaphone, and that he drove through town making the announcement.[6194] Kanyabashi's reliance on an incomplete understanding of the record and the Trial Chamber's conclusions fails to demonstrate that the Trial Chamber erred in finding that the announcement as described by Witness QJ was "public".[6195]

2690. Likewise, Kanyabashi fails to show that Witness QI's evidence was insufficient to establish that Kanyabashi incited the population to clear the bushes with the intention to kill Tutsis.[6196] The Trial Chamber assessed the meaning of the term "*Inkotanyi*" based on Witness QI's testimony and that of Expert Witness Ntakirutimana.[6197] Kanyabashi does not demonstrate any error in the Trial Chamber's assessment of their evidence in this regard. Furthermore, Witness QI testified, *inter alia*, that the instruction to clear the bushes so that the *Inkotanyi* would not find anywhere to hide was accompanied by an additional instruction to "flush out people hiding in the bushes, and everybody found in those bushes should die, including children, old men and women."[6198]

[6193] *See* Trial Judgement, para. 3814, *referring to ibid.*, Section 3.4.12.2. *See also ibid.*, paras. 573-578. The Appeals Chamber notes that Kanyabashi provides additional citations in support of his contention in his reply brief. *See* Kanyabashi Reply Brief, para. 132, *referring to* Exhibit D574 (Kambanda's speech of 15 May 1994), pp. 2-4, 11-13, 18, 22, 23, 27, Witness D-2-5-W, T. 4 October 2007 p. 17 (closed session), Filip Reyntjens, T. 21 November 2007 pp. 47, 66, 67. Recalling that reply briefs shall be limited to arguments in reply to the response brief, and noting that the Prosecution did not have the opportunity to respond to Kanyabashi's argument in this respect, the Appeals Chamber will not consider these additional references. In any event, the Appeals Chamber observes that Kanyabashi merely refers to abstracted excerpts of evidence, most of which was considered and relied upon by the Trial Chamber in reaching its conclusions elsewhere in the Trial Judgement that "enemy" was used to refer to Tutsis. *See* Trial Judgement, paras. 574-578, 583, 867-890, 5555-5558, 5563-5565. The Trial Chamber did not consider the evidence of Witness D-2-5-W in this respect; however, Kanyabashi merely refers to a portion of his testimony in which he states that at a meeting he attended with Kanyabashi, someone referred to the enemy as "anyone supporting the RPF or anyone working for the RPF". *See* Witness D-2-5-W, T. 4 October 2007 p. 17 (closed session).

[6194] *See* Trial Judgement, para. 3813. *See also* Witness QJ, T. 12 November 2001 p. 25, T. 14 November 2001 pp. 97-100.

[6195] *See* Trial Judgement, para. 6011. In light of this conclusion, Kanyabashi's reliance on paragraphs 53-60 of the *Ngirabatware* Appeal Judgement is misplaced. Similarly, the Appeals Chamber considers that Kanyabashi's references to the Presiding Judge's summary of Witness QJ's evidence, as confirmed by the Prosecution, is not a reflection of the evidence on the record but how a limited number of individuals might have understood it at the time. *See* Witness QJ, T. 15 November 2001 pp. 45, 46. This, however, does not demonstrate any error in the Trial Chamber's ultimate evaluation of Witness QJ's testimony.

[6196] *See* Witness QI, T. 23 March 2004 pp. 59, 60 (closed session) ("A. He meant the Tutsi that were in the bushes that were being sought after in the bushes they were hiding."), 68 (closed session), T. 24 March 2014 pp. 77, 78 (closed session); Witness QI's Statement.

[6197] Trial Judgement, paras. 3825, 3826.

[6198] *See* Trial Judgement, para. 3815.

The Appeals Chamber considers that Kanyabashi has not demonstrated that these remarks allowed for a reasonable inference other than reflecting the intention of those following the instructions to kill Tutsis.

2691. Moreover, the Appeals Chamber has already considered and rejected Kanyabashi's contentions concerning the relevance of the Trial Chamber's determination as it relates to killings that followed the megaphone announcement.[6199] The Appeals Chamber finds that, in the circumstances of this case, the same rationale applies in this instance.

2692. Finally, Kanyabashi appears to simply disagree with the Trial Chamber's decision rejecting his motion to replace one Defence expert witness with another without demonstrating how it erred in reaching this conclusion.[6200]

2693. Based on the foregoing, the Appeals Chamber finds, Judge Pocar and Judge Agius dissenting, that Kanyabashi has not demonstrated that the Trial Chamber erred in convicting him for direct and public incitement to commit genocide.

3. Conclusion

2694. In light of the above, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, finds that Kanyabashi has failed to demonstrate that the Trial Chamber erred in finding him responsible for directly and publicly inciting the commission of genocide by making megaphone announcements in Butare Town in late May and mid-June 1994 and dismisses Grounds 3.2 through 3.8 of Kanyabashi's appeal.

[6199] *See supra*, para. 2681.
[6200] *See* 24 April 2008 Decision, paras. 18, 20, 52-54.

IX. APPEAL OF ÉLIE NDAYAMBAJE

2695. The Trial Chamber found Ndayambaje guilty of committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute for inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994 and based on a speech he made at his swearing-in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994.[6201] The Trial Chamber also found Ndayambaje guilty of genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994; and (ii) instigating the killings of Tutsi women and girls abducted from Mugombwa Sector on the basis of his words at the statue of the Virgin Mary ("Virgin Mary Statue") after his swearing-in ceremony of 22 June 1994.[6202]

2696. Ndayambaje raises challenges to his indictment and submits that the Trial Chamber showed bias in the assessment of the evidence. He also challenges the Trial Chamber's findings regarding his alibi and contends that the Trial Chamber erred in not conducting site visits. Ndayambaje further challenges the Trial Chamber's findings concerning his responsibility in relation to the incidents at Mugombwa Church on 20 and 21 April 1994, the killings perpetrated at Kabuye Hill on 22, 23, and 24 April 1994, his swearing-in ceremony held on 22 June 1994, and the abduction of Tutsi women and girls after his swearing-in ceremony. The Appeals Chamber will address these contentions in turn.

[6201] Trial Judgement, paras. 5995-6002, 6026-6029, 6038, 6186.
[6202] Trial Judgement, paras. 5949, 5976, 5977, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186. *See also infra*, para. 3246, fns. 6351, 7443.

A. Indictment (Grounds 1 to 6)

2697. Ndayambaje submits that he was not charged with the criminal conduct on the basis of which he was convicted or lacked notice thereof, and that he was materially prejudiced in the preparation of his defence.[6203] He also contends that the "immeasurable accumulation of events not pleaded in the Indictment has caused [him] irreparable prejudice."[6204] Ndayambaje requests that the Appeals Chamber overturn all his convictions.[6205]

2698. The Appeals Chamber will examine Ndayambaje's submissions related to notice of the allegations pertaining to the incidents at Mugombwa Church, before turning to his submissions related to notice of the allegations concerning Kabuye Hill, his swearing-in ceremony, and the abduction of Tutsi women and girls.[6206]

1. Mugombwa Church (Grounds 1, 2, and 6 in part)

2699. Based primarily on the evidence of Prosecution Witness QAR,[6207] the Trial Chamber found that, by his presence at Mugombwa Church, Muganza Commune, Butare Prefecture, on 20 and 21 April 1994 and given his "considerable moral authority", Ndayambaje encouraged the attacks on the Tutsis taking refuge inside the church that took place on these two days, resulting in the deaths of hundreds, if not thousands, of Tutsis.[6208] The Trial Chamber also determined that, on 20 April 1994, Ndayambaje spoke to a group of armed people posted outside the church and told them that their work would no longer be very difficult since the refugees were all gathered together

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[6203] Ndayambaje Notice of Appeal, paras. 5-9, 14-65; Ndayambaje Appeal Brief, paras. 7-138. To facilitate legibility, the Appeals Chamber will use the term "Indictment" in the body text of the present section when referring to the Ndayambaje Indictment.

[6204] Ndayambaje Notice of Appeal, para. 17. *See also* Ndayambaje Appeal Brief, paras. 22, 134, 137.

[6205] Ndayambaje Notice of Appeal, paras. 27, 31, 39, 49, 58, 64, 65; Ndayambaje Appeal Brief, paras. 43, 49, 79, 99, 119, 132, 138.

[6206] The Appeals Chamber notes that Ndayambaje submits that the Trial Chamber erred in law in deferring until deliberations its decision on objections relating to the exclusion of evidence of facts that were not pleaded in the Ndayambaje Indictment. He argues that, as a result, he was only notified of the charges against him during the delivery of the Trial Judgement. He contends that, in doing so, the Trial Chamber deprived him of his right to be clearly informed of the charges against him in order to prepare his defence. *See* Ndayambaje Appeal Brief, para. 18. *See also* Ndayambaje Notice of Appeal, para. 53. The Appeals Chamber reiterates that the practice of trial chambers in the exercise of their discretion to postpone consideration of Defence objections to the admission of testimonial evidence on the ground of lack of notice to the phase of their final deliberations on the case is a cause of concern. As held above, leaving the issue of whether facts could be relied upon as a potential basis for liability unresolved until the end of the trial creates uncertainty, which can be a source of potential prejudice to the Defence. *See supra*, para. 1280. However, the Appeals Chamber considers that, as any matter related to the conduct of the proceedings before a trial chamber, the timing of the ruling on the motions before it, in the absence of any specific provision, is a matter within the discretion of the trial chamber. The Appeals Chamber recalls that, in order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber committed a discernible error resulting in prejudice to that party. *See supra*, para. 138. The Appeals Chamber considers that Ndayambaje's general contention of error as developed in his appeal brief fails to demonstrate that he was prejudiced by the Trial Chamber's decision to postpone consideration of a number of his objections.

[6207] Trial Judgement, paras. 1227, 1232, 1241, 1245, 1246.

[6208] Trial Judgement, paras. 5754-5757.

inside the church and that some of them should stay and watch the people in the church while others should search for those hiding in ditches and bushes.[6209] It further determined that the next morning, Ndayambaje again addressed the crowd outside the church, stating that "he could see they were interested in the Tutsis' cows and asking them what they would pay if the Tutsi owners of the cattle escaped."[6210] The Trial Chamber found that Ndayambaje's public addresses at Mugombwa Church on 20 and 21 April 1994 directly and publicly incited the commission of genocide.[6211]

2700. On this basis, the Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide (Count 4) as well as aiding and abetting genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common of the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute.[6212]

2701. In summarising the Prosecution case against Ndayambaje with respect to these allegations, the Trial Chamber referred to paragraph 6.37 of the Indictment.[6213] The Indictment indicates that the allegations in paragraph 6.37 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6214]

2702. Prior to examining the relevant evidence, the Trial Chamber noted that the location and dates of the massacre at Mugombwa Church were not specified in the Indictment and that Ndayambaje's role therein was not sufficiently pleaded.[6215] It found that the Indictment was therefore defective in this regard.[6216] However, the Trial Chamber determined that the defect was cured and that the Prosecution gave Ndayambaje timely, clear, and consistent notice that he was "accused of participating in, including through giving orders, and supervising the massacre at

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[6209] Trial Judgement, paras. 1245, 5754.
[6210] Trial Judgement, paras. 1246, 5755.
[6211] Trial Judgement, paras. 5995-6002.
[6212] Trial Judgement, paras. 1245, 1246, 5754-5758, 5976, 5977, 5995-6002, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186.
[6213] Trial Judgement, paras. 1018, 1019. Paragraph 6.37 of the Ndayambaje Indictment reads as follows:

> 6.37 As from 20 April, in Muganza *commune* and the surrounding area, Élie Ndayambaje ordered, supervised and participated in massacres of the Tutsi population, committed by militiamen, soldiers, communal policemen and communal authorities.

[6214] Ndayambaje Indictment, pp. 40-46.
[6215] Trial Judgement, para. 1024.
[6216] Trial Judgement, para. 1024.

Mugombwa Church, Muganza *commune*, along with other *commune* authorities in late April 1994."[6217]

2703. Ndayambaje submits that the location and dates of the massacre perpetrated at Mugombwa Church as well as his participation therein were not pleaded in the Indictment, and that such defect was neither curable nor cured.[6218] He also argues that the Indictment failed to put him on notice that he was alleged to have aided and abetted the killings at the church and that he was charged with direct and public incitement to commit genocide based on his addresses at the church.[6219] He contends that the Trial Chamber therefore erred in convicting him in relation to the events at Mugombwa Church and that his convictions should be reversed.[6220]

(a) Location, Dates, and Participation in the Attacks

2704. As noted above, the Trial Chamber found that the location and dates of the massacre at Mugombwa Church were not specified in the Indictment and that Ndayambaje's role therein was not sufficiently pleaded.[6221] It nonetheless determined that the summary of the anticipated evidence of Prosecution Witnesses FAG, FAU, and TU appended to the Prosecution Pre-Trial Brief, together with the Prosecution's opening statement, gave timely, clear, and consistent notice to Ndayambaje that he was accused of participating in, including through giving orders, and supervising the massacre at Mugombwa Church in late April 1994.[6222] It found that the defect in paragraph 6.37 of the Indictment was cured and that Ndayambaje was not prejudiced in the preparation of his defence.[6223]

2705. Ndayambaje submits that the defect in the Indictment concerning the location and dates of the massacre perpetrated at Mugombwa Church as well as his participation therein was neither curable nor cured.[6224] Pointing out that the Prosecution was in possession of the relevant material facts when filing the Indictment, Ndayambaje submits that the Prosecution chose not to mention these facts in the Indictment and that, as a result, it was legitimate for him to understand that these

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[6217] Trial Judgement, paras. 1029, 1031.
[6218] Ndayambaje Notice of Appeal, paras. 5, 6, 16, 19-27, 29; Ndayambaje Appeal Brief, paras. 26-43. *See also* AT. 21 April 2015 pp. 11-17, 65-67.
[6219] Ndayambaje Notice of Appeal, paras. 26, 28-30, 59-61, 63; Ndayambaje Appeal Brief, paras. 32, 35, 44-49, 126. *See also* AT. 21 April 2015 pp. 21, 22.
[6220] Ndayambaje Notice of Appeal, paras. 25-27, 31, 59-61, 63; Ndayambaje Appeal Brief, paras. 43, 48, 49, 124, 131, 132.
[6221] Trial Judgement, para. 1024.
[6222] Trial Judgement, paras. 1025-1031, *referring to* Witness Summaries Grid, item 32, Witness FAU ("Witness FAU's Summary"), item 96, Witness TU ("Witness TU's Summary"), Witness FAG's Summary, Prosecution Opening Statement, T. 12 June 2001 p. 85.
[6223] Trial Judgement, para. 1031.
[6224] Ndayambaje Notice of Appeal, paras. 5, 6, 16, 19-27, 29; Ndayambaje Appeal Brief, paras. 7-17, 26-43, 47. *See also* Ndayambaje Reply Brief, paras. 8-10; AT. 21 April 2015 pp. 11-17, 66, 67.

events were not part of the Prosecution case.[6225] He contends that, by convicting him on the basis of his participation in this massacre, the Trial Chamber proceeded to a "*de facto* illegal expansion of the Indictment"[6226] as the allegation concerning these events constituted a separate charge which could only have been added through a formal amendment of the Indictment.[6227]

2706. Ndayambaje further submits that, since none of the summaries of the anticipated evidence relied upon by the Trial Chamber were marked as relevant to paragraph 6.37 of the Indictment, they could not be considered as providing unambiguous information.[6228] He also asserts that: (i) Witness FAG's Summary and prior statements do not provide clear and consistent notice regarding his presence at the church on 20 and 21 April 1994;[6229] (ii) Witness FAU's prior statements are contradictory with one another and Witness FAU's Summary directly contradicts Witness FAG's Summary;[6230] (iii) Witness TU's Summary is inconsistent with Witnesses FAU's and FAG's summaries as it refers to events at Mugombwa Church on 24 April 1994;[6231] and (iv) the Prosecution's opening statement refers to massacre at the church in late April 1994 without specifying the date or his alleged criminal conduct.[6232] Ndayambaje adds that the Prosecution failed to indicate in its pre-trial brief that Witness QAR, the sole witness who testified to his presence at the church, would testify in relation to the attacks on Mugombwa Church, and that the Trial Chamber erred in admitting evidence in relation to these events.[6233]

2707. Ndayambaje submits that the lack of notice regarding the events at Mugombwa Church caused him serious prejudice as it prevented him from conducting efficient investigations and organising his defence.[6234]

[6225] Ndayambaje Appeal Brief, para. 27. *See also* Ndayambaje Reply Brief, para. 8. Ndayambaje also highlights that, in contrast with the Ndayambaje Indictment, the Prosecution pleaded specific locations in Ngoma Commune in the Kanyabashi Indictment. *See* Ndayambaje Appeal Brief, para. 28.
[6226] Ndayambaje Appeal Brief, para. 27.
[6227] Ndayambaje Notice of Appeal, paras. 5, 6, 14-23; Ndayambaje Appeal Brief, paras. 10, 26-29.
[6228] Ndayambaje Notice of Appeal, para. 18; Ndayambaje Appeal Brief, paras. 14, 33, 34, 37, 38. *See also* Ndayambaje Appeal Brief, paras. 59, 92; Ndayambaje Reply Brief, para. 11; AT. 21 April 2015 p. 69.
[6229] Ndayambaje Appeal Brief, paras. 36, 37, *referring to* statements of Witness FAG of 11 August 1998, 18 November 1999, and 23 February 2000 admitted as Exhibit D261 on 18 October 2004 and Exhibits D188 and D189 on 24 March 2004, respectively (confidential) ("Witness FAG's 1998 Statement", "Witness FAG's 1999 Statement", and "Witness FAG's 2000 Statement", respectively). Ndayambaje argues that Witness FAG did not provide clear and consistent information regarding his presence at the church as Witness FAG did not see him driving attackers to the church on 20 and 21 April 1994. In light of this, he submits that he could not understand that Witness FAG was directly implicating him in the events at Mugombwa Church. *See idem.*
[6230] Ndayambaje Appeal Brief, paras. 38, 39, *referring to* statements of Witness FAU of 9 October 1999, 29 December 1999, 22 February 2001 (admitted on 22 February 2001 as Exhibit D195 (confidential)) ("Witness FAU's Statement"), and 22 November 2001. *See also* Ndayambaje Reply Brief, para. 19.
[6231] Ndayambaje Appeal Brief, para. 40.
[6232] Ndayambaje Appeal Brief, para. 41.
[6233] Ndayambaje Notice of Appeal, paras. 14, 23; Ndayambaje Appeal Brief, para. 35, *referring to* Trial Judgement, para. 1025. *See also* Ndayambaje Appeal Brief, para. 202; Ndayambaje Reply Brief, para. 16.
[6234] Ndayambaje Notice of Appeal, para. 24; Ndayambaje Appeal Brief, paras. 22, 29. *See also* AT. 21 April 2015 pp. 68, 69.

2708. The Prosecution responds that the Trial Chamber correctly found that the defective indictment was cured by post-indictment information and that Ndayambaje received sufficient notice of his participation in the Mugombwa Church attacks and suffered no prejudice since he was able to prepare a comprehensive defence.[6235]

2709. There is no dispute that the Indictment was defective in relation to the allegation concerning Ndayambaje's responsibility for the massacre at Mugombwa Church on 20 and 21 April 1994 as there is no mention of the relevant location and dates in paragraph 6.37 of the Indictment or anywhere else in the Indictment.[6236]

2710. However, the Appeals Chamber finds that the allegation of Ndayambaje's participation in the Mugombwa Church massacre did not constitute a new charge but fell within the broader allegation relating to Ndayambaje's participation in massacres of the Tutsi population in Muganza Commune from 20 April 1994 pleaded in paragraph 6.37 of the Indictment.

2711. Moreover, the Appeals Chamber is not persuaded by Ndayambaje's argument that it was legitimate for him to interpret the Prosecution's failure to set forth the relevant material facts of this specific allegation in the Indictment as indicating that it was not part of its case. While the Prosecution should have specifically pleaded the material facts of the dates, location, and Ndayambaje's participation in the Mugombwa Church massacre in the Indictment that were in its possession prior to the filing of the Indictment,[6237] the Appeals Chamber does not consider that these omissions could have reasonably been understood as demonstrating that the Prosecution did not intend to prosecute Ndayambaje in relation to this massacre. In the view of the Appeals Chamber, the fact that the Prosecution disclosed the prior statements of Witnesses QAR and TU which expressly refer to the attacks on Mugombwa Church and Ndayambaje's involvement therein

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[6235] Prosecution Response Brief, paras. 1997-1999, 2002-2009, 2052, 2053. *See also* AT. 21 April 2015 pp. 36, 37. In particular, the Prosecution contends that: (i) Witnesses FAU's, FAG's, and TU's summaries were linked to the counts with which Ndayambaje was charged and it was not required to link the summaries to a specific paragraph in the Ndayambaje Indictment; and (ii) the fact that Witness QAR's evidence related to Mugombwa Church was not summarised in its pre-trial brief is irrelevant to the question of whether Ndayambaje received sufficient notice of the charge. *See* Prosecution Response Brief, paras. 1997, 2002.

[6236] *See* Trial Judgement, para. 1024.

[6237] *See* statements of Witness QAR of 20 June 1995, 20 May 1997, and 14 October 1997, disclosed on 21 January 1997 and 4 November 1998 and admitted on 22 November 2001 as Exhibit D11B (confidential) ("Witness QAR's 1995 Statement", "Witness QAR's May 1997 Statement", and "Witness QAR's October 1997 Statement", respectively); statement of Witness TU of 18 December 1996, disclosed on 4 November 1998 on 16 June 1999 ("Witness TU's Statement"). *See also The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Letter from the Prosecution, 21 January 1997; 4 November 1998 Disclosure; *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, "Transmission of Redacted Statements in the case of The Prosecutor v Elie Ndayambaje (ICTR – 96 – 8)", 16 June 1999. The Appeals Chamber notes that the statements of Witnesses FAG and FAU concerning Ndayambaje's involvement in the Mugombwa Church massacre were either made or disclosed after the filing of the Ndayambaje Indictment on 11 August 1999.

in 1997, 1998, and 1999,[6238] prior to the filing of the Indictment, shows that these attacks formed part of the Prosecution case at the time the Indictment was issued.

2712. The Appeals Chamber therefore rejects Ndayambaje's contentions that the Trial Chamber allowed a "*de facto* illegal expansion of the Indictment" by convicting him in relation to this massacre and that the defect in the Indictment related to Ndayambaje's responsibility for the killings perpetrated at Mugombwa Church on 20 and 21 April 1994 was not curable.

2713. Turning to Ndayambaje's challenge to the Trial Chamber's finding that the defect regarding the dates, location, and his general participation in the massacre was cured, the Appeals Chamber finds no merit in Ndayambaje's argument that the summaries of the Prosecution witnesses' anticipated evidence appended to the Prosecution Pre-Trial Brief could not inform him of the allegation against him as they were not explicitly linked to any paragraph of the Indictment.[6239] The Appeals Chamber considers that it would have been preferable for the Prosecution to provide greater specificity given the vagueness of the Indictment and its pre-trial brief in this respect. However, it is satisfied that the contents of Witnesses FAG's, FAU's, and TU's summaries and the fact that they were expressly marked relevant to Ndayambaje and to Counts 1 through 9 of his Indictment – which, in turn, were linked to paragraph 6.37 of the Indictment[6240] – provided clear notice to Ndayambaje that the Prosecution intended to rely on the evidence of these witnesses in support of the allegation of his participation in the massacres of the Tutsi population in Muganza Commune set forth in paragraph 6.37.

2714. With regard to Ndayambaje's allegation of inconsistencies within and between the witnesses' statements and summaries, the Appeals Chamber is not persuaded that Witness FAG's Summary and prior statements gave inconsistent information regarding Ndayambaje's implication in the events at Mugombwa Church. While Witness FAG's Summary and prior statements did not explicitly mention Ndayambaje's presence at Mugombwa Church during the days of the attacks, they clearly and consistently implicated him in the events there.[6241] The Appeals Chamber also

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[6238] *See supra*, fn. 6237.

[6239] The Appeals Chamber observes that the jurisprudence Ndayambaje points to does not require that the witness's summaries appended to a Prosecution's pre-trial brief be linked to the relevant paragraphs of an indictment in order to provide timely, clear, and consistent information detailing the factual basis underpinning the charge. It also notes that Rule 73*bis*(B)(iv)(c) of the Rules relied upon by Ndayambaje only states that, at the pre-trial conference, the trial chamber may order the Prosecutor to file "[t]he points in the indictment on which each witness will testify" and that, in paragraph 108 of the Trial Judgement, the Trial Chamber merely recalled the well-established jurisprudence that the summaries appended to a Prosecution's pre-trial brief may in some cases serve to put the accused on notice of the allegations against him. *See* Ndayambaje Notice of Appeal, para. 18, *referring to* Rule 73*bis*(B)(iv)(c) of the Rules, Trial Judgement, para. 108; Ndayambaje Appeal Brief, paras. 14, 33, 34, 37, 38.

[6240] *See* Ndayambaje Indictment, pp. 40-45.

[6241] In relevant part, Witness FAG's Summary reads as follows:

> FAG states that they were ordered by Venant, Kanyenzi, Bosco, the assistant bourgmestre of Muganza, and Viateur to go to Mugombwa where there was group of attackers that was brought there by Ndayambaje. FAG

rejects Ndayambaje's contention that Witness FAU's prior statements are contradictory as unsubstantiated. It also finds that his argument that Witness FAU's Summary contradicts Witness FAG's Summary is without merit as the fact that Witness FAU's Summary did not refer to Ndayambaje's involvement in the same terms as Witness FAU's Summary does not render the summaries of their anticipated evidence contradictory.

2715. Furthermore, while Witness TU's Summary refers to the date of the attack on Mugombwa Church as 24 April 1994, the Appeals Chamber finds that this discrepancy was minor and was not inconsistent with Witness FAU's Summary which referred to "April 1994" or Witness FAG's Summary which did not provide any date. Likewise, Ndayambaje fails to demonstrate any inconsistency between the date range "as from 20 April" provided in the Indictment,[6242] the dates indicated in the relevant witnesses' summaries, and the Prosecution's opening statement which referred to "the end of April".[6243] While Witnesses FAG's, FAU's, and TU's summaries and the Prosecution's opening statement did not mention the exact dates in late April 1994 or Ndayambaje's specific criminal conduct in relation to the Mugombwa Church attacks, the Appeals Chamber finds no error in the Trial Chamber's conclusion that these materials, read together, put Ndayambaje on notice that the Prosecution intended to hold him responsible for his participation in the killings at Mugombwa Church that occurred in late April 2014.

2716. Finally, the Appeals Chamber is of the view that the fact that the Prosecution failed to indicate that Witness QAR – the sole witness who ultimately testified to his presence at Mugombwa Church during the attacks – would testify about the Mugombwa Church massacre in the summary of her anticipated evidence is irrelevant. The question at issue is whether Ndayambaje had sufficient notice of the material facts underpinning the charge against him so as to prepare his defence, not whether the charge was proven through the witnesses initially identified by the

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states that the attackers threw grenades at the Tutsi and killed them. The attackers finished off the survivors. FAG saw Ndayambaje driving the pick-up with about twenty Burundians on board.

In relevant part, Witness FAG's 1999 Statement reads as follows:

> In April 1994, [...] Ndayambaje sought assistance from Burundian refugees armed with grenades, fuel. They attacked Mugombwa where the Tutsis had sought refuge. I participated in this attack. Many of the victims of Mugombwa parish [were] buried a few days later.

In relevant part, Witness FAG's 2000 Statement reads as follows:

> In April 1994, [...] KANYENZI, Venant, [...] Bosco, Assistant *Bourgmestre* of Muganza, and VIATEUR who was then *Conseiller* of Mugombwa ordered the inhabitants of Bishya to go to Mugombwa. On that location, we found a group of attackers made up of the inhabitants of Mugombwa [...]. Some of the attackers said that it was Elie NDAYAMBAJE who had brought them there. Grenades were thrown at Tutsis who were hiding in the *cellule* parish. Some of the Tutsis died on the spot.

The Appeals Chamber considers Ndayambaje's reference to Witness FAG's 1998 Statement irrelevant as it does not discuss any incident at Mugombwa Church.

[6242] Ndayambaje Indictment, para. 6.37.

[6243] Prosecution Opening Statement, T. 12 June 2001 p. 85.

Prosecution.[6244] The Appeals Chamber also finds no error in the Trial Chamber's admission of Witness QAR's evidence on the Mugombwa Church attacks as a trial chamber may admit any relevant evidence which has probative value, such as evidence which is relevant to the proof of an allegation pleaded in the indictment.[6245]

2717. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding that the defects in the Indictment concerning the dates and location of the Mugombwa Church attacks as well as his participation therein were cured.

(b) Aiding and Abetting Responsibility

2718. Ndayambaje submits that the Trial Chamber erred in convicting him for aiding and abetting the killings perpetrated at Mugombwa Church as this form of responsibility was not mentioned in the Indictment, the Prosecution Pre-Trial Brief, or the Prosecution's opening statement.[6246] He also argues that the Indictment failed to put him on notice that he was alleged to have had knowledge that his acts and omissions aided and abetted the assailants and that the assailants possessed genocidal intent.[6247]

2719. The Prosecution responds that the paragraphs in the charging section include all forms of responsibility under Article 6(1) of the Statute and that paragraph 6.56 of the Indictment, which is of general application, specifically emphasised that Ndayambaje aided and abetted massacres.[6248] It argues that all material facts were pleaded in the Indictment and that further notice was provided in its pre-trial brief, leaving no doubt that Ndayambaje was charged "at a minimum" with aiding and abetting.[6249] The Prosecution further argues that Ndayambaje did not raise any objections at trial concerning the modes of liability or argued that he did not know that he was charged pursuant to aiding and abetting in his closing brief.[6250] It contends that Ndayambaje suffered no prejudice as he fully defended against all material facts of aiding and abetting.[6251]

[6244] *Cf. Ntabakuze* Appeal Judgement, para. 50.
[6245] *See Kanyarukiga* Appeal Decision, para. 11; Admissibility Appeal Decision of 2 July 2004, para. 15.
[6246] Ndayambaje Notice of Appeal, paras. 59-61, 63-65; Ndayambaje Appeal Brief, paras. 120-126, 131, 132. *See also* Ndayambaje Reply Brief, paras. 39, 40; AT. 21 April 2015 pp. 21, 22, 66, 67.
[6247] Ndayambaje Appeal Brief, para. 32.
[6248] Prosecution Response Brief, para. 2047. *See also* AT. 21 April 2015 pp. 36, 37, 41.
[6249] Prosecution Response Brief, paras. 2048-2050. The Prosecution asserts that Ndayambaje's *mens rea* for aiding and abetting as well as his knowledge of the perpetrators' genocidal intent could be inferred from the facts pleaded in the Ndayambaje Indictment. *See ibid.*, para. 2049.
[6250] Prosecution Response Brief, para. 2051, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje's Defence Brief, 17 February 2009 (originally filed in French, English translation filed on 3 April 2009) (confidential) ("Ndayambaje Closing Brief"), para. 70.
[6251] Prosecution Response Brief, paras. 2052, 2053. *See also* AT. 21 April 2015 p. 37. The Prosecution points out that Ndayambaje extensively cross-examined Witness QAR on the events at Mugombwa Church, challenged the evidence

2720. Ndayambaje replies, *inter alia*, that the Prosecution's argument that he did not suffer prejudice from the lack of notice is "irrational" and without merit.[6252]

2721. The Trial Chamber did not discuss in the Trial Judgement whether Ndayambaje had received sufficient notice that he could be held responsible for aiding and abetting the Mugombwa Church massacre, concluding generally that he was put on notice that he was "accused of participating in, including through giving orders, and supervising the massacre at Mugombwa Church, Muganza *commune*, along with other *commune* authorities in late April 1994."[6253] Although Ndayambaje did not specifically object to the vagueness of paragraph 6.37 of the Indictment regarding his alleged form of responsibility under Article 6(1) of the Statute,[6254] the Appeals Chamber considers that it would have been preferable for the Trial Chamber to explain why it was satisfied that Ndayambaje was put on sufficient notice that he could be held responsible for aiding and abetting the killings perpetrated at Mugombwa Church.

2722. The Appeals Chamber recalls that the alleged nature of the responsibility of the accused should be stated unambiguously in the indictment and that the Prosecution should therefore indicate precisely which form of responsibility is invoked based on the facts alleged.[6255] When it is alleged that the accused planned, instigated, ordered, or aided and abetted the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or the "particular course of conduct" on the part of the accused which forms the basis for the charges in question.[6256]

2723. The Appeals Chamber observes that the Prosecution generally indicated in the charging section of the Indictment that the relevant counts were pursued pursuant to Article 6(1) of the Statute, without specifying any particular form of responsibility. In paragraph 6.37 of the Indictment, the Prosecution alleged that Ndayambaje "ordered, supervised and participated in massacres", without identifying any particular acts on the part of Ndayambaje that may characterise a responsibility for aiding and abetting. Although the Prosecution alleged in paragraph 6.56 of the Indictment, which elaborates on Ndayambaje's responsibility in broad terms, that Ndayambaje

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that he said "encouraging words" to the attackers, did not argue that his cross-examination was impeded in any manner, and called several witnesses to establish that he was not present at the church. It also points out that Ndayambaje questioned Witness QAR on the identity of several persons in order to ascertain whether they were at the church with her, which illustrates that Ndayambaje had time to investigate these events. *See* Prosecution Response Brief, paras. 2001, 2005-2007, 2052.

[6252] Ndayambaje Reply Brief, para. 44.

[6253] Trial Judgement, para. 1031.

[6254] Ndayambaje had objected to the vagueness of paragraph 6.37 of the Ndayambaje Indictment as regards the nature of his participation in the massacres referred therein. *See* Ndayambaje Closing Brief, paras. 61-63.

[6255] *Uwinkindi* Appeal Decision, para. 48; *Blaškić* Appeal Judgement, para. 215.

[6256] *See, e.g., Ndindiliyimana et al.* Appeal Judgement, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Blaškić* Appeal Judgement, para. 213.

"aided and abetted [his] subordinates and others in carrying out the massacres", it failed to link this paragraph to paragraph 6.37 or the allegation concerning Ndayambaje's participation in killings in Muganza Commune and the surrounding area pleaded therein, and to specify Ndayambaje's impugned conduct. In this context, the Appeals Chamber is not satisfied that the Indictment put Ndayambaje on sufficient notice of his particular acts or course of conduct which formed the basis for the charge of aiding and abetting the massacres invoked in paragraph 6.37. The Appeals Chamber stresses that the relevant question is not whether Ndayambaje was given notice that he was charged with aiding and abetting crimes, but whether he was given notice that he was charged with aiding and abetting the killings alleged in paragraph 6.37 and whether the particular acts or course of conduct on his part with respect to the killings which formed the basis of the charge against him were identified.

2724. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the allegation that Ndayambaje aided and abetted the massacres in which he was alleged to have participated in paragraph 6.37 of the Indictment.

2725. The Appeals Chamber, however, finds that this error does not invalidate the Trial Chamber's decision to convict Ndayambaje on this basis as it considers that the ambiguity of the Indictment was remedied by the information provided by the Prosecution in its pre-trial brief. Specifically, the Appeals Chamber finds that the Indictment read in conjunction with Witnesses FAG's, FAU's, and TU's summaries gave notice to Ndayambaje that he was alleged to have contributed to the Mugombwa Church massacre through, *inter alia*, his presence at the church during the days of the attacks and his influence and moral authority over the assailants.[6257] Ndayambaje's alleged knowledge of his contribution to the massacre and of the assailants' genocidal intent was also abundantly clear from these materials.[6258] While the information provided through the summaries also indicated that Ndayambaje transported attackers and grenades to the church, supervised the massacre and issued instructions, this was not inconsistent with the fact that Ndayambaje may also have been responsible for aiding and abetting the crimes by providing moral support and encouragement by his presence. The Appeals Chamber concludes that the subsequent

[6257] In paragraph 30 of the Prosecution Pre-Trial Brief, it is only stated in a very general manner that, knowing that massacres of the civilian population were being committed, Ndayambaje and others took no measures to stop them and "[i]nstead of intervening to control and appeal to the perpetrators, [Ndayambaje and others] ordered, aided and abetted the acts."

[6258] Ndayambaje also argues in general terms in his appeal brief that the Trial Chamber erred in convicting him as the Ndayambaje Indictment failed to plead his genocidal intent. *See* Ndayambaje Appeal Brief, para. 131. The Appeals Chamber considers that any error as regards the pleading of Ndayambaje's genocidal intent in relation to his participation in the killings perpetrated at Mugombwa Church would not have the potential of invaliding his convictions for aiding and abetting these killings as this form of responsibility does not require a finding that the aider and abetter had genocidal intent. In any case, the Appeals Chamber notes that the Prosecution pleaded under the count of genocide

information provided to Ndayambaje through Witnesses FAG's, FAU's, and TU's summaries sufficiently informed him of the course of conduct on his part supporting the generally pleaded charge of aiding and abetting, thereby curing the defect in the Indictment.

2726. This conclusion is bolstered by a review of the conduct of Ndayambaje's defence at trial which reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation that his presence at Mugombwa Church encouraged the killings perpetrated there on 20 and 21 April 1994. In defending against the allegation that he was not present during the days of the attacks, Ndayambaje testified and called witnesses to support his alibi for 20 and 21 April 1994 and to rebut the allegations of his presence which, together with his moral authority, is the basis of his conviction for aiding and abetting the killings at Mugombwa Church.[6259] Ndayambaje also extensively cross-examined Witness QAR on aspects of her evidence regarding his role and presence during the days of the attacks.[6260]

2727. In these circumstances, the Appeals Chamber finds that Ndayambaje was ultimately provided with sufficient information detailing the factual basis supporting his conviction for aiding and abetting the killings perpetrated at Mugombwa Church and dismisses Ndayambaje's appeal in this respect.

(c) Direct and Public Incitement to Commit Genocide

2728. Ndayambaje submits that the Trial Chamber erred in convicting him of direct and public incitement to commit genocide on the basis of alleged inciting statements he made at Mugombwa Church as the Indictment does not contain any specific allegations of inciting statements.[6261] He argues that these specific "events at the Church warranted separate charges"[6262] and that the Trial Chamber erred in failing to consider whether the Indictment had been cured of its defects in this respect or assess the prejudice suffered.[6263] In the alternative, he submits that the defect was not cured through the summary of the anticipated evidence of Witnesses QAR, FAU, FAG, or TU

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that Ndayambaje acted "with the intent to destroy, in whole or in part, a racial or ethnic group". *See* Ndayambaje Indictment, p. 41.

[6259] Trial Judgement, para. 1196. *See also ibid.*, paras. 1094-1118, 1122-1126, 1136, 1137, 1144, 1149, 1154, 1165-1173, 1181-1193. *See also The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Pre-Defence Brief, 23 December 2004 (originally filed in French, English translation filed on 8 February 2005) ("Ndayambaje Pre-Defence Brief"), Annex 3 "List of Defence Witnesses".

[6260] Witness QAR, T. 20 November 2001 pp. 115, 116, 119-121, 124-128, 130-134; T. 21 November 2001 pp. 5-13, 33-34, 38-49, 52-56.

[6261] Ndayambaje Notice of Appeal, paras. 16, 26, 28-31; Ndayambaje Appeal Brief, para. 45; Ndayambaje Reply Brief, para. 21. *See also* AT. 21 April 2015 p. 67.

[6262] Ndayambaje Appeal Brief, para. 45.

[6263] Ndayambaje Appeal Brief, paras. 46, 48; Ndayambaje Reply Brief, para. 21.

"such as analyzed" in the Trial Judgement.[6264] He also argues that the Indictment failed to put him on notice that he was alleged to have had genocidal intent.[6265]

2729. In its response brief, the Prosecution does not respond directly to Ndayambaje's submissions about the lack of notice of the charge of direct and public incitement to commit genocide at Mugombwa Church, simply pointing out that "Ndayambaje's inciting words at the church" were mentioned in Witness QAR's prior statement of 20 May 1997.[6266] It also asserts that Ndayambaje did not raise a contemporaneous objection to Witness QAR's testimony at trial and that his behaviour at trial shows that he had sufficient notice of what he was charged with and suffered no prejudice from the alleged lack of notice.[6267] In this respect, the Prosecution argues that Ndayambaje extensively cross-examined Witness QAR on the events at Mugombwa Church, notably about her prior statements, did not argue that his cross-examination was impeded in any manner, and called several witnesses to establish that he was not present at the church.[6268] According to the Prosecution, all of this shows that Ndayambaje understood the Mugombwa Church charges, had thoroughly investigated the charges, and was well equipped to defend against them.[6269] At the appeals hearing, in response to a specific question by the Appeals Chamber, the Prosecution argued that paragraph 6.33 of the Indictment "was found to be vague" but that "the vagueness was cured through the post-indictment material that specified [Ndayambaje's] inciting words and the impact [they] had."[6270]

2730. The Appeals Chamber notes that Ndayambaje objected to Witness QAR's testimony at trial on the ground that there was no allegation about Mugombwa Church in the Indictment.[6271] He also objected in his closing brief to the vagueness of paragraph 6.37 of the Indictment as regards the nature of his participation in the massacres referred therein[6272] as well as that of paragraph 5.8 of the Indictment which alleged that he publicly incited the people to exterminate the Tutsi population

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[6264] Ndayambaje Appeal Brief, para. 47.
[6265] Ndayambaje Appeal Brief, para. 32.
[6266] Prosecution Response Brief, para. 2001, *referring to* Witness QAR's May 1997 Statement.
[6267] Prosecution Response Brief, paras. 2000, 2004, 2005.
[6268] Prosecution Response Brief, paras. 2001, 2005-2007. *See also ibid.*, para. 2052 where the Prosecution asserts that Ndayambaje challenged the evidence that he said "encouraging words" to the attackers.
[6269] Prosecution Response Brief, paras. 2006-2008.
[6270] AT. 21 April 2015 pp. 37, 38, *referring to* the summaries and prior statements of Witnesses TO and QAQ. When told by the Appeals Chamber that the summaries and prior statements of Witnesses TO and QAQ referred to Ndayambaje's Swearing-In Ceremony and not Mugombwa Church, the Prosecution argued that Witness QAR's statement and summary provided Ndayambaje with notice. *See ibid.*, p. 42.
[6271] Witness QAR, T. 3 March 2004 p. 42 (closed session); *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Requête en extrême urgence d'Elie Ndayambaje aux fins d'exclure les témoignages et/ou les portions de témoignages des témoins entendus au procès sur des faits qui sont en dehors de l'acte d'accusation*, 31 May 2006 ("31 May 2006 Motion"), paras. 140-182. The Trial Chamber dismissed Ndayambaje's request for exclusion of witnesses' testimonies for lack of notice in the Ndayambaje Indictment primarily because it was not "satisfied that there [was] a basis to exclude the concerned testimonies at this stage." It stated that "[s]ome of the matters raised may be considered at a later stage of the proceedings". *See* 1 September 2006 Decision, para. 25, p. 9.

and its accomplices.[6273] He further specifically claimed that the allegations of incitement made in paragraphs 5.8 and 6.33 of the Indictment were unrelated and too general in nature to include his specific acts at Mugombwa Church as recounted by Witnesses QAR and FAG.[6274]

2731. The Trial Chamber failed to address Ndayambaje's contention that the allegation of incitement at Mugombwa Church was not pleaded in the Indictment. The Trial Chamber instead limited its examination to the question of whether Ndayambaje was put on notice regarding the dates, location, and his general participation, including through giving orders and supervising, in the Mugombwa Church massacre.[6275] The Appeals Chamber recalls that a trial chamber is not obliged to address each and every submission made at trial and has discretion to decide which argument to address.[6276] However, considering the importance of the matter, the Appeals Chamber considers that the Trial Chamber should have addressed Ndayambaje's claim that he was not charged with direct and public incitement to commit genocide at Mugombwa Church. The Appeals Chamber finds that the Trial Chamber's failure to address Ndayambaje's contention regarding the pleading of his responsibility for direct and public incitement to commit genocide in relation to the Mugombwa Church massacre infringed Ndayambaje's right to a reasoned opinion under Article 22 of the Statute and Rule 88(C) of the Rules. The Appeals Chamber will determine whether this error of law invalidates the Trial Chamber's decision to convict Ndayambaje for direct and public incitement to commit genocide in relation to the Mugombwa Church massacre in examining whether Ndayambaje was charged on this basis and, if so, whether he was provided with sufficient information on the material facts underpinning the charge against him.

2732. The Appeals Chamber observes that, as argued by Ndayambaje, paragraph 6.33 of the Indictment could not put him on notice of the allegation of incitement at Mugombwa Church on 20 and 21 April 1994 as it expressly refers to Ndayambaje inciting the population to kill Tutsis "[i]n June 1994". The Appeals Chamber also notes that there is no mention of any inciting statements in paragraph 6.37 of the Indictment. This paragraph, however, was among those expressly relied upon in support of the count of direct and public incitement to commit genocide (Count 4).[6277] The Appeals Chamber considers that this reliance gave notice to Ndayambaje that the Prosecution intended to engage his responsibility under this count in relation to the massacres referred to in paragraph 6.37. The Appeals Chamber also observes that paragraph 5.8 of the

[6272] Ndayambaje Closing Brief, paras. 61-63.
[6273] Ndayambaje Closing Brief, para. 48.
[6274] Ndayambaje Closing Brief, paras. 80, 81. *See also ibid.*, paras. 78, 79, fn. 74. *See also* 31 May 2006 Motion, paras. 144, 145, 182.
[6275] *See* Trial Judgement, paras. 1023-1031.
[6276] *See, e.g., Gatete* Appeal Judgement, para. 65; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Kvočka et al.* Appeal Judgement, para. 23.
[6277] *See* Ndayambaje Indictment, p. 42.

Indictment, which was being pursued under Count 4 pursuant to Article 6(1) of the Statute, clearly indicates that Ndayambaje was alleged to have publicly incited people to exterminate the Tutsi population.[6278]

2733. The Appeals Chamber finds that paragraph 6.37 of the Indictment read together with paragraph 5.8 and the charging section of the Indictment put Ndayambaje on notice that he was charged with direct and public incitement to commit genocide through inciting the massacres of the Tutsi population in Muganza Commune. The allegation concerning Ndayambaje's inciting statements at Mugombwa Church did not therefore constitute a separate charge.

2734. However, as Ndayambaje was convicted based on the statements he made at Mugombwa Church on 20 and 21 April 1994, such statements constitute material facts underpinning his responsibility for direct and public incitement to commit genocide which should have been pleaded in the Indictment. Nevertheless, there is no mention of any inciting statements in paragraph 6.37 of the Indictment, and paragraph 5.8 of the Indictment does not refer to the attacks on Mugombwa Church. The Indictment is therefore defective in this regard.

2735. Turning to whether the defect was cured, the Appeals Chamber observes that there is no reference to Mugombwa Church in Witness QAR's Summary[6279] and no mention of Ndayambaje making inciting statements at Mugombwa Church in Witnesses FAU's, FAG's, and TU's summaries or prior statements or in the Prosecution's opening statement. While Witness TU's Summary and Witness FAG's Statement refer to Ndayambaje's "instruct[ions]" and "orders" to kill Tutsis,[6280] the Appeals Chamber considers that they could reasonably be understood as underpinning the charges of ordering genocide, murder, extermination, or violence to life rather than that of direct and public incitement to commit genocide. The Prosecution correctly points out that Witness QAR's May 1997 Statement mentions that Ndayambaje proffered inciting words against Tutsis at the church.[6281] However, the Prosecution did not signal in its pre-trial brief that it

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[6278] Ndayambaje Indictment, p. 42. Paragraph 5.8 of the Ndayambaje Indictment reads as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. [...] Elie Ndayambaje [...] publicly incited the people to exterminate the Tutsi population and its "accomplices".

[6279] Witness Summaries Grid, item 5, Witness QAR ("Witness QAR's Summary").

[6280] The Appeals Chamber notes that Witness TU's Summary refers to Ndayambaje "speaking over a microphone, ordering the Hutus to kill the Tutsis" in Muganza Commune in the commune vehicle on 20 April 1994. However, read in context, this statement does not appear to relate to Mugombwa Church. A review of Witness TU's prior statement to Tribunal investigators of 18 December 1996 confirms that these orders given through microphone from the commune vehicle do not relate to Mugombwa Church but to Bishya. *See* Witness TU's Statement, p. 2241 (Registry pagination).

[6281] *See* Witness QAR's May 1997 Statement, which reads, in relevant part, as follows:

> Then around 1 pm, through the broken church windows, I saw Elie NDAYAMBAJE arrive outside the church in a white Toyota pick-up. [...] He said the following to a crowd of Hutus assembled there: "The Tutsis must not escape for their God has delivered them" Then he added: "I am going to give weapons to those who do not have any."

intended to rely on this aspect of Witness QAR's evidence. The Appeals Chamber recalls that mere service of witness statements is insufficient to inform the Defence of material facts that the Prosecution intends to prove at trial.[6282]

2736. The Appeals Chamber finds that, even when Witness QAR testified at trial that Ndayambaje made inciting statements to the assailants and the crowd gathered outside the church,[6283] it was not clear that the Prosecution intended to rely on that part of her testimony to prove that Ndayambaje committed direct and public incitement to commit genocide at Mugombwa Church. In any event, any information in this regard would have been provided too late in the proceedings to constitute "timely" notice.

2737. Consequently, the Appeals Chamber finds that the defect in the Indictment concerning Ndayambaje's inciting statements at Mugombwa Church was not cured through post-indictment disclosures.

2738. The Appeals Chamber recalls that a vague or ambiguous indictment which is not cured of its defect by the provision of timely, clear, and consistent information causes prejudice to the accused.[6284] The defect may only be deemed harmless through demonstrating that the accused's ability to prepare his defence was not materially impaired.[6285] When an appellant raises a defect in the indictment for the first time on appeal, the appellant bears the burden of showing that his ability to prepare his defence was materially impaired.[6286] When, however, an accused has previously raised the issue of lack of notice before the trial chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare his defence was not materially impaired.[6287]

2739. The Appeals Chamber recalls that Ndayambaje raised a contemporaneous objection to Witness QAR's testimony in relation to the allegation related to Mugombwa Church and objected to the vagueness of the Indictment regarding the allegation of direct and public incitement to

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[6282] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 162; *Ntagerura et al.* Appeal Judgement, para. 139; *Ntakirutimana* Appeal Judgement, para. 27.
[6283] *See* Witness QAR, T. 19 November 2001 pp. 17, 26, 27, 29. The Appeals Chamber observes that Witness QAR's testimony on Ndayambaje's inciting statements was not made as a response to the Prosecution's specific inquiry on the matter, but was part of a response to the Prosecution's general question about the conduct of the people who were outside the Mugombwa Church and whether Ndayambaje was carrying anything in his vehicle. *See ibid.*, pp. 16, 17, 26.
[6284] *See, e.g., Šainović et al.* Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58.
[6285] *See, e.g., Šainović et al.* Appeal Judgement, para. 262; *Ntabakuze* Appeal Judgement, para. 82; *Ntakirutimana* Appeal Judgement, para. 58; *Kupreškić et al.* Appeal Judgement, para. 122.
[6286] *See, e.g., Nzabonimana* Appeal Judgement, para. 30; *Šainović et al.* Appeal Judgement, para. 224; *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[6287] *See, e.g., Nzabonimana* Appeal Judgement, para. 30; *Ntabakuze* Appeal Judgement, fn. 189; *Niyitegeka* Appeal Judgement, para. 200; *Kupreškić et al.* Appeal Judgement, paras. 122, 123.

commit genocide at the church.[6288] Thus, the burden rests on the Prosecution to prove that the ability of Ndayambaje to prepare his defence was not materially impaired.

2740. The Appeals Chamber finds that the Prosecution has failed to meet this burden. The Prosecution correctly points out that Ndayambaje called several witnesses and extensively cross-examined Witness QAR at trial in relation to the massacre perpetrated at Mugombwa Church. However, an examination of the trial record shows that Ndayambaje's defence primarily focussed on establishing that he was not present during the attacks on Mugombwa Church and his role in a distribution of weapons.[6289] At no point during cross-examination did Ndayambaje question Witness QAR concerning the inciting statements such as the content of the statements, the audience, the manner in which the statements were uttered, or the place and other circumstances in which the statements were made. The fact that Ndayambaje did not call any witnesses[6290] or made any attempt at trial to refute any allegation concerning direct and public incitement to commit genocide in relation to the Mugombwa Church attacks demonstrates his lack of preparation.

2741. Although Ndayambaje objected, particularly in his 31 May 2006 Motion and closing brief, to the vagueness of the Indictment regarding the charge of public and direct incitement to commit genocide in relation to the events at Mugombwa Church,[6291] his objections do not reflect that he fully understood that Witness QAR's evidence on his addresses at the church on 20 and 21 April 1994 was intended to underpin the charge of direct and public incitement to commit genocide.

2742. For the foregoing reasons, the Appeals Chamber finds that the Prosecution has failed to prove on appeal that Ndayambaje's ability to prepare his defence was not materially impaired by the defect in the Indictment concerning his responsibility for committing direct and public incitement to commit genocide based on his statements at Mugombwa Church on 20 and 21 April 1994. The Appeals Chamber, accordingly, concludes that the Trial Chamber erred in convicting Ndayambaje of committing direct and public incitement to commit genocide on this basis.

[6288] *See supra*, para. 2730.
[6289] *See* Witness QAR, T. 20 November 2001 pp. 115, 119-121, 124-128, 130-134, T. 21 November 2001 pp. 5-13, 33, 34, 38-49, 52-56.
[6290] *See also* Ndayambaje Pre-Defence Brief.
[6291] 31 May 2006 Motion, paras. 140-182; Ndayambaje Closing Brief, paras. 80, 81. *See also* Ndayambaje Closing Brief, paras. 78, 79, fn. 74.

2. Kabuye Hill (Grounds 5, and 6 in part)

2743. The Trial Chamber found that, on 20 April 1994, Ndayambaje and several armed soldiers and communal policemen travelled to Ngiryi Bridge where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, following which soldiers and policemen escorted the refugees to Kabuye Hill.[6292] The Trial Chamber also found that Ndayambaje was present at Kabuye Hill on 22 April 1994 when soldiers, policemen, and armed civilians attacked Tutsis gathered on the hill, resulting in the death of thousands of Tutsis.[6293] In addition, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they participated in attacks against Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and at the Muganza commune office on 23 April 1994, which were later used in the massacres at Kabuye Hill; and (iii) was present during the attacks at Kabuye Hill on 23 and 24 April 1994 that resulted in thousands of deaths.[6294]

2744. After finding that the interception at Ngiryi Bridge and forced escorting of the refugees to Kabuye Hill did not constitute an act of genocide and did not rise to a similar gravity as other crimes against humanity, the Trial Chamber acquitted Ndayambaje of genocide and persecution as a crime against humanity for the interception and forced movement of the Tutsi refugees from Ngiryi Bridge to Kabuye Hill.[6295] However, the Trial Chamber convicted Ndayambaje of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for aiding and abetting the killings at Kabuye Hill from 22 to 24 April 1994.[6296]

2745. In summarising the Prosecution case against Ndayambaje with respect to the events of 20 April 1994 and the attacks at Kabuye Hill from 22 to 24 April 1994, the Trial Chamber referred to paragraphs 6.30, 6.31, and 6.32 of the Indictment.[6297] The Indictment indicates that the

[6292] Trial Judgement, paras. 1414, 5766.
[6293] Trial Judgement, paras. 1423, 1424, 5769.
[6294] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6295] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6296] Trial Judgement, paras. 5777, 5976, 5977, 6064-6066, 6107, 6108, 6175, 6176, 6186.
[6297] Trial Judgement, para. 1248, fn. 2672. Paragraphs 6.30, 6.31, and 6.32 of the Ndayambaje Indictment read as follows:

> 6.30 On 20 April 1994, Elie Ndayambaje took communal policemen to Gisagara. Teaming up with soldiers, they arrested the refugees and took them to the neighboring hill, which was called Kabuye. The soldiers and communal police separated the Tutsi from the other refugees and forced them to relinquish their traditional tools.
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> 6.31 On 22 April 1994, Elie Ndayambaje, accompanied by communal policemen, gendarmes, soldiers and civilians armed with traditional tools and weapons, attacked the Tutsi refugees who had gathered at Kabuye.

allegations in paragraphs 6.30, 6.31, and 6.32 were being pursued under, *inter alia*, Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute.[6298]

2746. Addressing Ndayambaje's assertion that paragraphs 6.30, 6.31, and 6.32 of the Indictment lacked specificity, the Trial Chamber found that, when reading the Indictment as a whole, these paragraphs provided sufficient notice to Ndayambaje to enable him to prepare his defence.[6299] Specifically, the Trial Chamber found that the "key elements of the Kabuye Hill events", such as the movements of Tutsis to Kabuye Hill, the attacks that took place there, and the distribution of weapons, were "linked" in the Indictment to a specific date or dates and to a specific location.[6300] Similarly, it stated that: (i) Ndayambaje was "placed at the scene of each of these events"; (ii) Ndayambaje's role as a superior over subordinates could be "inferred from the Prosecution's allegations elsewhere in the Indictment"; and (iii) the alleged attackers were identified by reference to their category.[6301] The Trial Chamber further found that the mode of transportation used, the precise number of grenades thrown into the crowd of Tutsis, and the precise number of victims were not material to the Prosecution case.[6302]

2747. Ndayambaje submits that the Trial Chamber erred in finding that: (i) the interception of refugees at Ngiryi Bridge was pleaded in the Indictment and in admitting evidence related to this event; (ii) the circumstances surrounding the transportation of the attackers were not material; (iii) he was sufficiently on notice of the distribution of weapons; (iv) he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the unidentified attackers at Kabuye Hill; and (v) he aided and abetted the massacres at Kabuye Hill because this mode of participation was not pleaded in the Indictment.[6303] Consequently, Ndayambaje requests the Appeals Chamber to reverse all the findings and convictions related to the events at Ngiryi Bridge, to the transportation of attackers, and to the crimes committed at Kabuye Hill.[6304] The Appeals Chamber will address Ndayambaje's contentions in turn.

> Numerous Tutsis were killed or wounded. During the night, armed civilians surrounded the survivors and prevented them from escaping.
>
> 6.32 On 23 and 24 April 1994, the attacks on the Tutsi refugees at Kabuye continued. Elie Ndayambaje transported the attackers to Kabuye and issued them weapons. Elie Ndayambaje threw grenades into the crowd of refugees. During these attacks, numerous Tutsi were killed or wounded.

[6298] Ndayambaje Indictment, pp. 40-45.
[6299] Trial Judgement, paras. 1253-1255.
[6300] Trial Judgement, para. 1255.
[6301] Trial Judgement, para. 1255.
[6302] Trial Judgement, para. 1255.
[6303] Ndayambaje Notice of Appeal, paras. 51, 52, 54, 55, 59-61, 63; Ndayambaje Appeal Brief, paras. 100-118, 120-126, 131, 132. *See also* Ndayambaje Reply Brief, paras. 31, 32, 34; AT. 21 April 2015 pp. 10, 11, 21, 22, 67.
[6304] Ndayambaje Notice of Appeal, paras. 57, 58, 64, 65; Ndayambaje Appeal Brief, paras. 109, 119, 132, 138.

(a) Interception at Ngiryi Bridge and Forced Return to Gisagara

2748. Ndayambaje submits that the allegation that, on 20 April 1994, he travelled to Ngiryi Bridge with several armed soldiers and communal policemen, where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, was not pleaded in the Indictment.[6305] He argues that the events at Ngiryi Bridge cannot be linked to the events at Gisagara, which is pleaded in paragraph 6.30 of the Indictment, or to Kabuye Hill since these were different places.[6306] Ndayambaje asserts that the Trial Chamber erred in failing to inquire whether he had received sufficient notice of the allegation concerning the interception of refugees at Ngiryi Bridge despite the fact that the allegation was a separate charge that had to be specified in the Indictment.[6307] Ndayambaje contends that, in "admitting evidence thereon, [the Trial Chamber] radically and illegally transformed the Indictment."[6308] He underlines that "in admitting evidence of the events at Ngiryi not pleaded in the Indictment" the Trial Chamber caused him serious prejudice.[6309]

2749. The Prosecution responds that Ndayambaje's challenge is moot since he was not convicted for the interception of refugees at Ngiryi Bridge and forced movement of the Tutsi refugees and that the Trial Chamber "only relied on the incident as one piece of evidence for determining the *mens rea* for the Kabuye Hill massacre."[6310]

2750. Ndayambaje replies that he can dispute on appeal whether he was on notice of these incidents since the Trial Chamber relied on these facts in support of its finding that he possessed genocidal intent in relation to the events at Kabuye Hill.[6311] He also argues that, had the Trial Chamber correctly concluded that this charge was not in the Indictment, it would have excluded the related evidence.[6312]

2751. As noted above, the Trial Chamber did not convict Ndayambaje for his role in intercepting and forcing Tutsi refugees to return to Gisagara and then go to Kabuye Hill on 20 April 1994.[6313] To the extent that Ndayambaje argues that the Trial Chamber erred with regard to the pleading of the interception and forced movement of the Tutsi refugees on 20 April 1994 as a separate

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[6305] Ndayambaje Notice of Appeal, paras. 52, 54; Ndayambaje Appeal Brief, paras. 100-102, *referring to* Trial Judgement paras. 1248, 1414. *See also* Ndayambaje Appeal Brief, paras. 105, 106.
[6306] Ndayambaje Notice of Appeal, para. 55; Ndayambaje Appeal Brief, paras. 102, 106.
[6307] Ndayambaje Notice of Appeal, para. 53; Ndayambaje Appeal Brief, paras. 102, 105.
[6308] Ndayambaje Appeal Brief, para. 103. *See also* Ndayambaje Notice of Appeal, para. 52; Ndayambaje Appeal Brief, para. 107.
[6309] Ndayambaje Appeal Brief, para. 108. *See also* Ndayambaje Notice of Appeal, para. 56.
[6310] Prosecution Response Brief, para. 2040.
[6311] Ndayambaje Reply Brief, para. 31 (French).
[6312] Ndayambaje Reply Brief, para. 31.
[6313] *See supra*, para. 2744. *See also* AT. 21 April 2015 p. 26.

allegation underpinning criminal charges, his argument is dismissed as it does not have the potential to impact Ndayambaje's conviction or sentence.[6314]

2752. However, the Appeals Chamber notes that the Trial Chamber relied on the interception and forced movement of Tutsi refugees and Ndayambaje's role in these events in finding that he had the required *mens rea* for the crimes of which he was ultimately convicted in connection with the events at Kabuye Hill on 22 April 1994.[6315] As discussed below, the Appeals Chamber is satisfied that the Indictment put Ndayambaje on notice that he was alleged to have had the requisite *mens rea* to incur responsibility for aiding and abetting genocide at Kabuye Hill on 22 April 1994.[6316] The Appeals Chamber recalls that, with respect to the *mens rea*, an indictment may plead either: (i) the state of mind of the accused, in which case the facts by which that state of mind is to be established are matters of evidence, and need not be pleaded, or (ii) the evidentiary facts from which the state of mind is to be inferred.[6317] As the interception of the Tutsi refugees at Ngiryi Bridge and their forced return to Gisagara and subsequent movement to Kabuye Hill, including Ndayambaje's role therein, was ultimately merely relied upon as evidence of Ndayambaje's state of mind expressly pleaded in the Indictment, the Appeals Chamber considers that the evidentiary facts by which Ndayambaje's *mens rea* would be established did not need to be pleaded in the Indictment.

2753. In addition, insofar as Ndayambaje is contesting the admission of evidence concerning the interception of the refugees and their forced return to Gisagara, the Appeals Chamber recalls that a trial chamber may admit any relevant evidence which it deems to have probative value, such as evidence which is relevant to the proof of an allegation pleaded in the Indictment.[6318] Ndayambaje's argument that the Trial Chamber would have excluded the related evidence had it correctly concluded that the charge regarding the interception and forced movement of the refugees was not pleaded in the Indictment fails to appreciate that this evidence was relevant to Ndayambaje's *mens rea* which was pleaded in the Indictment.

2754. For the foregoing reasons, as Ndayambaje was not convicted for the interception of Tutsi refugees and their forced return to Gisagara, the Appeals Chamber finds that any error regarding the pleading of these events in the Indictment would not have invalidated the Trial Judgement.

[6314] *See supra*, para. 34.
[6315] Trial Judgement, paras. 5770, 5771. The Trial Judgement reflects that the Trial Chamber did not rely on the events that led the refugees to Kabuye Hill to establish the genocidal intent of those who attacked the refugees at Kabuye Hill on 23 and 24 April 1994. *See ibid.*, paras. 5771, 5773.
[6316] *See infra*, para. 2773.
[6317] *See, e.g.*, *Kanyarukiga* Appeal Decision, para. 9; *Nchamihigo* Appeal Judgement, para. 136; *Nahimana et al.* Appeal Judgement, para. 347. *See also Blaškić* Appeal Judgement, para. 219.
[6318] *See Kanyarukiga* Appeal Decision, para. 11; Admissibility Appeal Decision of 2 July 2004, para. 15.

The Appeals Chamber also finds no error in the Trial Chamber admitting this evidence to prove Ndayambaje's *mens rea* for the crimes for which he was ultimately convicted in connection with the events at Kabuye Hill.

(b) Transportation of Attackers

2755. Ndayambaje submits that the Trial Chamber erred in finding that the circumstances surrounding the transportation of policemen and soldiers were not material to the Prosecution case.[6319] In his view, as transportation is the alleged criminal conduct on the basis of which he was ultimately found guilty, the points of departure and destination, the means used, the dates and times, the identity of those transported, and their behaviour had to be specified in the Indictment.[6320]

2756. The Prosecution responds that all of the material facts for the Kabuye Hill massacres were pleaded in the Indictment, including the place of the massacre, the timeframe, Ndayambaje's participation, and the identity of the attackers, who were identified by categories.[6321]

2757. The Appeals Chamber recalls that where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation, or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[6322]

2758. The Appeals Chamber notes that paragraph 6.32 of the Indictment specifies that, on 23 and 24 April 1994, Ndayambaje transported attackers to Kabuye Hill, and that paragraph 6.31 of the Indictment identifies the attackers by reference to their category of "communal policemen, gendarmes, soldiers and civilians armed with traditional tools and weapons". In the view of the Appeals Chamber, the acts which formed the basis for the charge pertaining to the transportation of attackers were clearly set forth in the Indictment and the identification of the attackers by reference to their category was sufficient to provide appropriate notice. The Appeals Chamber is also not convinced by Ndayambaje's undeveloped assertion that the Trial Chamber erred in finding that the mode of transportation used was not material to the Prosecution case. Similarly, the Appeals Chamber finds unsubstantiated and unmeritorious Ndayambaje's argument that the behaviour of the

[6319] Ndayambaje Notice of Appeal, para. 54; Ndayambaje Appeal Brief, para. 110. *See also* AT. 21 April 2015 pp. 10, 11.
[6320] Ndayambaje Appeal Brief, para. 110.
[6321] Prosecution Response Brief, para. 2041. The Prosecution contends that, in any event, witnesses' summaries and statements disclosed to Ndayambaje further fleshed out the charges against him, including regarding the transport of soldiers, and that Ndayambaje knew what he was charged with and suffered no prejudice. *See ibid.*, paras. 2043-2046.
[6322] *Ndindiliyimana et al.* Appeal Judgement, para. 172; *Ntawukulilyayo* Appeal Judgement, para. 188; *Blaškić* Appeal Judgement, para. 213.

attackers during the transportation was a material fact.[6323] Rather, the material fact was that the attackers whom Ndayambaje transported attacked Tutsis after they arrived at Kabuye Hill.

2759. Accordingly, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that the material facts concerning the transportation of the attackers to Kabuye Hill were sufficiently pleaded in the Indictment.

(c) Distribution of Weapons

2760. Ndayambaje submits that the Trial Chamber erred in finding that he had been sufficiently notified of the allegation of weapons distribution at Kabuye Hill.[6324] Specifically, he argues that, in its assessment of whether he was provided with clear and consistent information on the distribution of weapons at Kabuye Hill, the Trial Chamber failed to consider the fact that the Prosecution Pre-Trial Brief, the Prosecution's opening statement, and the witnesses' statements did not provide further information but rather exacerbated the confusion as to the information that was provided to him.[6325] Ndayambaje also points to the fact that the Trial Chamber found elsewhere that the Indictment was defective and was not cured in respect of the distribution of weapons at Mugombwa Church and argues that the same holds true for the distribution of weapons at Kabuye Hill.[6326]

2761. The Prosecution responds that the allegation of Ndayambaje's participation in the massacres by distributing weapons was pleaded in the Indictment and reaffirmed in its closing brief, and that witnesses' summaries and statements provided Ndayambaje with additional information regarding the charge against him.[6327] The Prosecution further argues that Ndayambaje has not pointed to any confusing information from the witnesses' statements.[6328]

2762. The Appeals Chamber notes that paragraph 6.32 of the Indictment clearly put Ndayambaje on notice that, on 23 and 24 April 1994, he was alleged to have transported attackers to Kabuye Hill

[6323] *See* Ndayambaje Appeal Brief, para. 110; Trial Judgement, para. 1255.
[6324] Ndayambaje Notice of Appeal, para. 54; Ndayambaje Appeal Brief, para. 111. *See also* AT. 21 April 2015 pp. 10, 11.
[6325] Ndayambaje Appeal Brief, paras. 111, 112. Ndayambaje contends that the written statements of witnesses exacerbated the confusion as to the information provided to him with regard to the location of the distribution of weapons, as the witnesses stated that it occurred at Kabuye, at a neighbouring hill, at the office in Muganza Sector, in Butare, or at Bishya, in various and incompatible circumstances. *See idem.* Ndayambaje contends that Prosecution Witness EV is the sole witness who placed the distribution of weapons at Kabuye Hill. *See ibid.*, para. 112.
[6326] Ndayambaje Appeal Brief, paras. 113, 512.
[6327] Prosecution Response Brief, paras. 2041, 2043. With regard to Ndayambaje's argument that the information provided to him states that he was involved in criminal conduct at different places, the Prosecution avers that this is simply due to the fact that witnesses saw him in different places, including at Kabuye Hill and Muganza Commune on his way to or from Kabuye Hill. The Prosecution contends that in any event, Ndayambaje knew what he was charged with and suffered no prejudice. *See ibid.*, paras. 2044-2046.
[6328] Prosecution Response Brief, para. 2043.

and issued them weapons.[6329] Ndayambaje's argument that he was insufficiently notified of the allegation of weapons distribution at Kabuye Hill is undeveloped and Ndayambaje fails to specify which material facts were ambiguously or not sufficiently pleaded in the Indictment. In the absence of any demonstration of defect in the Indictment, the Appeals Chamber fails to see why the Trial Chamber should have considered the information provided in the Prosecution's pre-trial brief and opening statement and the witnesses' statements in this respect.

2763. Moreover, Ndayambaje's argument relating to the notice of the distribution of weapons at Mugombwa Church is inapposite. With regard to Mugombwa Church, the Trial Chamber found that the Indictment did not specify the alleged site of the distribution of weapons or the identities of those who received the weapons, that the Indictment was defective, and that this defect was subsequently not cured.[6330] In contrast, paragraph 6.32 of the Indictment related to Kabuye Hill states the site of the weapons distribution and paragraph 6.31 of the Indictment clearly identifies the attackers by category.

2764. For the above reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that he was provided with sufficient notice of the allegation of distribution of weapons at Kabuye Hill on 23 and 24 April 1994.

(d) Authority Over Unidentified Attackers

2765. Ndayambaje submits that the Trial Chamber erred in finding that he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the unidentified attackers.[6331] According to him, the Trial Chamber "erred in law in finding that in the instant case, identification by fictitious categories was sufficient to inform [him], leaving paragraphs 6.30 to 6.32 vague and not informing him in a clear and consistent manner as to his involvement in the events of Kabuye and his possible authority over poorly identified attackers."[6332]

2766. The Prosecution responds that all material facts for the events at Kabuye Hill were pleaded, including the categories of attackers.[6333] It submits that Ndayambaje's argument is obscure, undeveloped, and incapable of showing that the Trial Chamber erred in finding that his authority

[6329] *See also* Trial Judgement, para. 1255.
[6330] Trial Judgement, paras. 1032, 1036, 1037.
[6331] Ndayambaje Appeal Brief, paras. 114, 117. *See also* AT. 21 April 2015 pp. 10, 11.
[6332] Ndayambaje Appeal Brief, para. 117.
[6333] Prosecution Response Brief, para. 2041.

and importance were pleaded and that his contentions as to the pleading of this issue are moot as he was not found responsible as a superior.[6334]

2767. Ndayambaje replies that he did not raise the issue of his responsibility as a superior, but rather underscored the illogical approach of the Trial Chamber in stating that the transportation and distribution of weapons at Kabuye Hill had been pleaded in the Indictment because of his authority over unidentified attackers.[6335]

2768. Contrary to Ndayambaje's contention, the Trial Judgement does not reflect that the Trial Chamber relied on his authority over unidentified attackers in finding that the transportation and distribution of weapons in Kabuye Hill had been sufficiently pleaded in the Indictment. It is clear from the Trial Judgement that the Trial Chamber found that the key elements of the Kabuye Hill events, such as the attacks that took place there and the distribution of weapons, were pleaded in paragraphs 6.31 and 6.32 of the Indictment with sufficient specificity.[6336] The Trial Chamber referred to other paragraphs of the Indictment only to clarify Ndayambaje's "alleged relationship with his subordinates"[6337] and "his role as a superior over subordinates"[6338] in relation to the pleading of Ndayambaje's superior responsibility.[6339] As far as Ndayambaje argues that his position of authority is not sufficient to identify the attackers at Kabuye Hill, the Appeals Chamber recalls that it already determined that the Trial Chamber did not err in finding that the identification of the attackers by reference to their category provided Ndayambaje with sufficient notice.[6340]

2769. The Appeals Chamber therefore rejects Ndayambaje's arguments that the Trial Chamber erred in finding that he was informed of his involvement in the events at Kabuye Hill by reason of his authority over the attackers, as it did not rely on Ndayambaje's authority to find that the charge was sufficiently pleaded in the Indictment or that the attackers were sufficiently identified in the Indictment.

(e) Responsibility for Aiding and Abetting

2770. Ndayambaje submits that the Trial Chamber erred in finding that he aided and abetted the massacres at Kabuye Hill from 22 through 24 April 1994 whereas this form of responsibility was

[6334] Prosecution Response Brief, para. 2042.
[6335] Ndayambaje Reply Brief, para. 32.
[6336] Trial Judgement, para. 1255.
[6337] Trial Judgement, para. 1254.
[6338] Trial Judgement, para. 1255.
[6339] The Appeals Chamber recalls that Ndayambaje was not convicted for the events at Kabuye Hill on the basis of superior responsibility pursuant to Article 6(3) of the Statute. *See* Trial Judgement, paras. 5768, 5780.
[6340] *See supra*, para. 2758.

not pleaded in the Indictment.[6341] Ndayambaje adds that neither the Prosecution's pre-trial brief nor its opening statement mentioned aiding and abetting and that the Trial Chamber chose that form of responsibility *proprio motu*.[6342]

2771. The Prosecution responds that the paragraphs in the charging section of the Indictment include all modes of liability under Article 6(1) of the Statute and that paragraph 6.56 of the Indictment, which is of general application, specifically emphasised that Ndayambaje aided and abetted massacres.[6343] It argues that all material facts were pleaded in the Indictment, that further notice was provided in the Prosecution Pre-Trial Brief, and that Ndayambaje did not suffer any prejudice.[6344]

2772. The Appeals Chamber notes the general reference to Article 6(1) of the Statute in the charging section of the Indictment[6345] and that, in paragraph 6.56 of the Indictment which elaborates in broad terms on Ndayambaje's responsibility, it is stated that Ndayambaje "aided and abetted [his] subordinates and others in carrying out the massacres of the Tutsi population and its accomplices." As held above in relation to Mugombwa Church, the Appeals Chamber considers that this, on its own, was insufficient to put Ndayambaje on notice that he was charged with aiding and abetting the killings at Kabuye Hill and of his conduct underpinning this charge.[6346]

2773. However, the Appeals Chamber observes that paragraphs 6.31 and 6.32 of the Indictment informed Ndayambaje of the material facts underpinning the charge of aiding and abetting the killings of Tutsi refugees at Kabuye Hill from 22 to 24 April 1994. Paragraph 6.31 sets forth that on 22 April 1994, Ndayambaje, accompanied by communal policemen, gendarmes, soldiers, and civilians armed with traditional tools and weapons attacked the Tutsi refugees who had gathered at Kabuye Hill. Paragraph 6.32 expressly states that Ndayambaje "transported the attackers to Kabuye and issued them weapons." In the view of the Appeals Chamber, the information provided in these paragraphs characterises Ndayambaje's conduct for aiding and abetting the killings of Tutsi

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[6341] Ndayambaje Notice of Appeal, paras. 59-61; Ndayambaje Appeal Brief, paras. 124, 126, 131. *See also* Ndayambaje Appeal Brief, paras. 120-123; AT. 21 April 2015 pp. 21, 22, 67.
[6342] Ndayambaje Appeal Brief, paras. 126, 132. In the alternative, Ndayambaje argues that the Trial Chamber erred in convicting him as the Indictment failed to plead his genocidal intent. *See ibid.*, paras. 104, 131. As held above in relation to Mugombwa Church, the Appeals Chamber considers that any error as regards the pleading of Ndayambaje's genocidal intent in relation to his participation in the killings perpetrated at Kabuye Hill would not have the potential of invaliding his convictions for aiding and abetting these killings as this form of responsibility does not require a finding that the aider and abetter had genocidal intent. *See supra*, fn. 6258. In any case, the Appeals Chamber recalls that the Prosecution pleaded under the count of genocide that Ndayambaje acted "with the intent to destroy, in whole or in part, a racial or ethnic group". *See* Ndayambaje Indictment, p. 41, *referring, inter alia, to ibid.*, paras. 6.31, 6.32.
[6343] Prosecution Response Brief, paras. 2047, 2049. The Prosecution also reiterates that Ndayambaje did not raise any objections at trial concerning modes of liability. *See ibid.*, para. 2051.
[6344] Prosecution Response Brief, paras. 2048, 2052, 2053. *See also* AT. 21 April 2015 p. 41.
[6345] Ndayambaje Indictment, pp. 40-46.
[6346] *See supra*, paras. 2723, 2724.

refugees at Kabuye Hill from 22 to 24 April 1994. Similarly, the Appeals Chamber is satisfied that the Indictment, when read as a whole, put Ndayambaje on notice that he was alleged to have been aware of the genocidal intent of the attackers at Kabuye Hill and to have known that his actions would assist the attackers in the killing of Tutsi refugees.[6347] Considering the Indictment as a whole, and in particular its charging section as well as paragraph 6.56 in combination with paragraphs 6.31 and 6.32, the Appeals Chamber finds that Ndayambaje was sufficiently put on notice that he was charged with aiding and abetting the killings at Kabuye Hill from 22 to 24 April 1994 and of his conduct which formed the basis of this charge.

2774. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that he was not sufficiently put on notice of the allegation that he aided and abetted the killings of Tutsi refugees at Kabuye Hill from 22 to 24 April 1994.

3. Ndayambaje's Swearing-In Ceremony (Grounds 3, and 6 in part)

2775. The Trial Chamber found that, on the occasion of his public swearing-in ceremony as the *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, Ndayambaje, together with Nteziryayo, "told the population to continue with their 'work' and urged them to 'sweep the dirt outside'", as well as instructed that those hiding Tutsis and refusing to hand them over should be killed.[6348] The Trial Chamber also found it established beyond reasonable doubt that, after the ceremony, searches for Tutsis took place and killings followed.[6349] The Trial Chamber concluded that the audience understood the words used by Ndayambaje to mean they needed to kill Tutsis and that this was further evidenced by the searches conducted and the killings of Tutsis after the ceremony.[6350] The Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute on the basis of the statements he made at his swearing-in ceremony.[6351]

[6347] *See, e.g.*, Ndayambaje Indictment, paras. 5.17, 6.9, 6.17, 6.18, 6.24, 6.26, 6.27, 6.30-6.32, 6.51, 6.54, 6.56.
[6348] Trial Judgement, paras. 4642, 4645, 5948, 6026.
[6349] Trial Judgement, para. 4645.
[6350] Trial Judgement, para. 6027.
[6351] Trial Judgement, paras. 6029, 6038, 6186. In the "Legal Findings" section of the Trial Judgement related to genocide, the Trial Chamber also considered Ndayambaje's utterances at the swearing-in ceremony in the context of his responsibility for instigating the ensuing abduction and killings of Tutsi women and girls from Mugombwa Sector. The Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including one named Nambaje, and that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide. *See ibid.*, paras. 5953-5956. The Trial Chamber also held that, by his words at the Virgin Mary Statue in Mugombwa Sector during the abduction, Ndayambaje instigated the killing of the abducted women and girls, including Nambaje. *See ibid.*, paras. 5957-5959, 6031. The Trial Judgement reflects that the Trial Chamber did not ultimately convict Ndayambaje of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje, based on his

2776. In summarising the Prosecution case against Ndayambaje with respect to the incitement of the population to kill Tutsis during Ndayambaje's Swearing-In Ceremony, the Trial Chamber referred to paragraphs 5.8, 6.33, and 6.38 of the Indictment.[6352] The Indictment indicates that the allegations in paragraphs 5.8, 6.33, and 6.38 were being pursued under Counts 1 through 3 and 5 through 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6353]

2777. The Trial Chamber found that paragraph 6.38 of the Indictment did not refer to Ndayambaje's Swearing-In Ceremony or to any criminal conduct by Ndayambaje.[6354] It also determined that paragraphs 5.8 and 6.33 of the Indictment "encompass[ed] the allegation that Ndayambaje incited the population at his swearing-in ceremony"[6355] but that paragraph 5.8 was very general in nature and paragraph 6.33 failed to provide details of specific incidents of incitement and concluded that both paragraphs were, therefore, defective.[6356] However, the Trial Chamber found that the defect in the Indictment regarding the charge of incitement at Ndayambaje's Swearing-In Ceremony in June 1994 was cured by clear, consistent, and timely information, and that no prejudice was caused to Ndayambaje with respect to this allegation.[6357]

2778. When addressing, in the Trial Judgement, Ndayambaje's contention that the Indictment failed to plead the killings that allegedly followed the ceremony, the Trial Chamber further relied on paragraph 6.37 of the Indictment.[6358] It held that, although this paragraph failed to refer to any

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utterances at his swearing-in ceremony, but instead solely relied on his utterances at the Virgin Mary Statue after the ceremony. *See ibid.*, paras. 5957-5959, 5976 ("Ndayambaje also instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 5977, 6064 ("The Chamber has found Ndayambaje guilty of genocide for [...] instigating the killing of Tutsis *after* his swearing-in ceremony".), 6066, 6107 ("Ndayambaje [...] instigated the killing of Tutsis *after* his swearing-in ceremony."), 6108, 6125, 6175 ("Ndayambaje [...] instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 6176, 6186 (emphasis added).

[6352] Trial Judgement, para. 4261, fns. 11642-11644. Paragraphs 5.8, 6.33, and 6.38 of the Ndayambaje Indictment read as follows:

> 5.8 From April to July 1994, incitement to hatred and violence was propagated by various prominent persons, including members of the Government and local authorities. The President, Théodore Sindikubwabo, the Prime Minister, Jean Kambanda, Ministers Pauline Nyaramasuhuko and André Rwamakuba, local authorities such as the *Préfets*, Sylvain Nsabimana and Alphonse Nteziryayo, the *Bourgmestres* Joseph Kanyabashi, Elie Ndayambaje and Ladislas Ntaganzwa, publicly incited the people to exterminate the Tutsi population and its "accomplices".
>
> 6.33 In June 1994, Elie Ndayambaje incited the population to kill Tutsis.
>
> 6.38 Despite these crimes, Elie Ndayambaje was appointed *Bourgmestre* of Muganza on 20 June 1994 by the Interim Government led by Jean Kambanda.

[6353] Ndayambaje Indictment, pp. 40-45.
[6354] Trial Judgement, para. 4285.
[6355] Trial Judgement, para. 4286.
[6356] Trial Judgement, paras. 4286, 4287.
[6357] Trial Judgement, para. 4297. *See also ibid.*, paras. 4290-4296.
[6358] Trial Judgement, paras. 4298, 4300. For paragraph 6.37 of the Ndayambaje Indictment, *see supra*, fn. 6213.

specific crimes which Ndayambaje allegedly ordered, supervised, or participated in, this defect was cured through post-indictment disclosures.[6359]

2779. Ndayambaje submits that the allegations relating to the inciting statements made at his swearing-in ceremony and the ensuing killings were not pleaded in the Indictment, and that such defects were neither curable nor cured.[6360] Ndayambaje requests the Appeals Chamber to reverse all his convictions entered on the basis of his conduct at the ceremony.[6361] The Prosecution responds that the Trial Chamber correctly found that the defects of the Indictment concerning those allegations were cured and that Ndayambaje suffered no prejudice.[6362]

2780. The Appeals Chamber notes that there is no dispute that the Indictment was impermissibly vague in relation to the allegation concerning Ndayambaje's inciting statements during his swearing-in ceremony. While paragraph 6.38 of the Indictment mentions Ndayambaje's appointment as *bourgmestre* of Muganza Commune on 20 June 1994, it does not refer to Ndayambaje's Swearing-In Ceremony, the speeches during this event, or any criminal conduct by Ndayambaje. Similarly, paragraphs 5.8 and 6.33 of the Indictment do not mention Ndayambaje's Swearing-In Ceremony but plead in broad terms that Ndayambaje incited the population to kill Tutsis.[6363] These paragraphs do not specify the date, location, circumstances or the alleged utterances of Ndayambaje that were found to constitute incitement.

2781. With respect to the pleading of the killings that followed the ceremony, the Appeals Chamber observes that Ndayambaje was not ultimately convicted on the basis that killings were perpetrated as a result of his utterances at the ceremony. The Trial Chamber solely relied on the fact that Tutsis were killed after the ceremony as evidence that the audience understood Ndayambaje's message that they needed to kill Tutsis.[6364] For his words at the ceremony, the Trial Chamber only convicted Ndayambaje of committing direct and public incitement to commit genocide.[6365] As the crime of direct and public incitement to commit genocide is an inchoate crime, the crime is punishable irrespective of whether the incitement substantially contributed to the commission of acts of genocide.[6366] Consequently, the Appeals Chamber considers that there is no need to examine

[6359] Trial Judgement, paras. 4302, 4304-4307.
[6360] Ndayambaje Notice of Appeal, paras. 32-36; Ndayambaje Appeal Brief, paras. 50-75, 78. *See also* AT. 21 April 2015 pp. 10, 11, 17-22.
[6361] Ndayambaje Notice of Appeal, para. 39; Ndayambaje Appeal Brief, para. 79.
[6362] Prosecution Response Brief, paras. 2010-2029.
[6363] The Trial Judgement reflects that the Trial Chamber relied solely on paragraphs 5.8 and 6.33 of the Ndayambaje Indictment, and not paragraph 6.38 of the Ndayambaje Indictment, to find that the Ndayambaje Indictment was defective, curable, and cured. *See* Trial Judgement, paras. 4285-4288.
[6364] *See* Trial Judgement, para. 6027.
[6365] Trial Judgement, para. 6029. *See supra*, para. 2775, fn. 6351.
[6366] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana* et al. Appeal Judgement, para. 678.

whether Ndayambaje was given sufficient notice of the killings that followed his swearing-in ceremony and dismisses Ndayambaje's arguments in this respect.

2782. The Appeals Chamber will now consider whether the Trial Chamber erred in finding that the defect in the Indictment concerning the charge of direct and public incitement to commit genocide through Ndayambaje's utterances at his swearing-in ceremony was curable, and if so, whether the Trial Chamber erred in finding that the defect was cured.

(a) Whether the Defect Was Curable

2783. Ndayambaje submits that the Trial Chamber erred in convicting him on the basis of alleged inciting statements made during his swearing-in ceremony as the Indictment does not contain any allegation of incitement at this event.[6367] He contends that the Trial Chamber erroneously and artificially linked this charge to paragraphs 5.8, 6.33, and 6.38 of the Indictment.[6368] Ndayambaje further argues that, by doing so, the Trial Chamber contradicted its own position: (i) in paragraph 3233 of the Trial Judgement, where it found that the defect in paragraphs 5.8 and 6.33 could not be cured;[6369] and (ii) in paragraph 2912 of the Trial Judgement, where it concluded that mentioning a "main element", which was not pleaded in the Indictment, in the summaries of anticipated evidence appended to the Prosecution Pre-Trial Brief constituted a radical transformation of the Prosecution case.[6370] Ndayambaje submits that, by convicting him on the basis of inciting statements at his swearing-in ceremony, the Trial Chamber proceeded to an illegal expansion of the Indictment as the facts underpinning the allegation were additional material facts which supported on their own a separate charge, and could only have been added through a formal amendment of the Indictment.[6371]

2784. The Prosecution responds that the Trial Chamber correctly found that the vagueness in paragraphs 5.8, 6.33, and 6.38 of the Indictment concerning Ndayambaje's incitement at his swearing-in ceremony was cured.[6372]

[6367] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 50-57. *See also* AT. 21 April 2015 pp. 10, 11, 17-22.
[6368] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 50, 54, 57. *See also* AT. 21 April 2015 pp. 17-20. At the appeals hearing, Ndayambaje further argued that, since paragraph 6.38 of the Ndayambaje Indictment reads that he was appointed *bourgmestre* on 20 June 1994 "[d]espite these crimes", "it is clear that the in[cite]ment referred to in 6.33 occurred before June 1994." *See ibid.*, p. 20 and p. 25 (French).
[6369] Ndayambaje Notice of Appeal, para. 34; Ndayambaje Appeal Brief, para. 51. *See also* AT. 21 April 2015 pp. 18, 20.
[6370] Ndayambaje Appeal Brief, paras. 56, 57; Ndayambaje Reply Brief, paras. 24, 25.
[6371] Ndayambaje Notice of Appeal, para. 33; Ndayambaje Appeal Brief, paras. 52, 54, 57.
[6372] Prosecution Response Brief, paras. 2010, 2011. The Prosecution elaborates that in paragraph 5.8 of the Ndayambaje Indictment it is alleged that Ndayambaje incited the population to kill Tutsis between April and July 1994, and that in paragraph 6.33 of the Ndayambaje Indictment it is alleged, more precisely, that he so incited in June 1994.

2785. The Appeals Chamber finds that the allegation concerning Ndayambaje's inciting statements at his swearing-in ceremony did not constitute a new charge but fell within the broader allegation relating to Ndayambaje's public incitement to exterminate the Tutsi population in June 1994 expressly pleaded in paragraph 6.33 of the Indictment and, in broader terms, in paragraph 5.8 of the Indictment.[6373] Similarly, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its convictions could have, on their own, supported a separate charge. As vague as the charge set out in paragraphs 5.8 and 6.33 was, the Indictment nonetheless pleaded the charge for which Ndayambaje was ultimately convicted, namely his responsibility for directly and publicly inciting the extermination of Tutsis in June 1994.

2786. The Appeals Chamber also rejects Ndayambaje's argument that the Trial Chamber's finding that paragraphs 5.8 and 6.33 of the Indictment could be cured contradicts its own conclusion in paragraph 3233 of the Trial Judgement. The Appeals Chamber notes that, in paragraph 3233 of the Trial Judgement, the Trial Chamber found that paragraphs 5.8 and 6.33 could not be relied upon to include the allegation that Ndayambaje ordered that roadblocks be erected and encouraged those at roadblocks to search for and kill Tutsis. It found that such allegations were new charges that could not be cured by subsequent disclosures. As Ndayambaje was charged in paragraphs 5.8 and 6.33 with inciting the population to kill Tutsis, the Appeals Chamber considers that paragraph 3233 of the Trial Judgement does not contradict the Trial Chamber's finding that paragraphs 5.8 and 6.33 could include allegations relating to Ndayambaje's inciting speech at his swearing-in ceremony.

2787. Ndayambaje's argument that the Trial Chamber contradicted its own reasoning in paragraph 2912 of the Trial Judgement is likewise without merit. In this paragraph, the Trial Chamber found that his participation in meetings was "an essential ingredient" of the crime of conspiracy to commit genocide which was not contained in the Indictment and, therefore, the subsequent inclusion of such information in the Witness Summaries Grid appended to the Prosecution Pre-Trial Brief constituted a radical transformation of the Prosecution case. Contrary to its finding in paragraph 2912 of the Trial Judgement, the Trial Chamber did not find with regard to the events at Ndayambaje's Swearing-In Ceremony that an essential ingredient was not pleaded in

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The Prosecution adds that paragraph 6.38 of the Ndayambaje Indictment refers to the appointment of Ndayambaje as Muganza *bourgmestre* on 20 June 1994. *See idem.*

[6373] The Appeals Chamber is not convinced by Ndayambaje's argument during the appeals hearing that reading paragraphs 5.8 and 6.33 of the Ndayambaje Indictment in conjunction with paragraph 6.38 of the Ndayambaje Indictment leads to the conclusion that the crime described in paragraphs 5.8 and 6.33 necessarily occurred before Ndayambaje was appointed *bourgmestre* of Muganza. In the view of the Appeals Chamber, a plain reading of the Ndayambaje Indictment shows that the phrase "despite these crimes" in paragraph 6.38 relates to the criminal conduct of Ndayambaje in Muganza Commune and the surrounding area from 20 April 1994 as alleged in paragraph 6.37 of the Ndayambaje Indictment.

the Indictment, but rather that paragraphs 5.8 and 6.33 of the Indictment were very general in nature and, for this reason, defective.[6374]

2788. The Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that the defect in the Indictment regarding his responsibility for direct and public incitement to commit genocide through his utterances at his swearing-in ceremony of 22 June 1994 was curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defect was cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(b) Whether the Defect Was Cured

2789. The Trial Chamber determined that the summary of the anticipated evidence of Prosecution Witnesses TO and QAQ appended to the Prosecution Pre-Trial Brief,[6375] their corresponding witness statements,[6376] and the subsequent addition of Witness RV to the Prosecution's witness list in July 2001[6377] provided Ndayambaje with clear, consistent, and timely information that the allegation that he incited the population to kill Tutsis at his swearing-in ceremony in June 1994 was part of the Prosecution case.[6378] In particular, the Trial Chamber found that, despite the fact that Witness TO's Summary and Witness TO's June 1997 Statement referred to this event as occurring in May 1994, "the description of the event as 'Ndayambaje's swearing-in ceremony' and the reference to Nteziryayo being the *préfet* of Butare at the time of the meeting, sufficed to put the Ndayambaje Defence on notice that the 'meeting' in question concerned Ndayambaje's swearing-in ceremony which occurred in June 1994."[6379] Similarly, while the Trial Chamber found that Witness QAQ's 1997 Statement refers only to "a meeting in May",[6380] it also found that

[6374] Trial Judgement, paras. 4286, 4287.
[6375] Trial Judgement, paras. 4290, 4292, *referring to* Witness Summaries Grid, item 11, Witness QAQ ("Witness QAQ's Summary"), Witness TO's Summary.
[6376] Trial Judgement, paras. 4291, 4292, *referring to* statement of Witness TO of 11 June 1997, disclosed on 25 March 1999 and 4 December 2000 and admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's June 1997 Statement"); statement of Witness QAQ of 14 May 1997, disclosed on 4 November 1998 and 17 June 1999 and admitted as Exhibit D85 on 13 November 2002 (confidential) ("Witness QAQ's 1997 Statement").
[6377] Trial Judgement, para. 4296. *See also ibid.*, para. 4282, *referring in turn to* statement of Witness RV of 15 January 1997, disclosed on 14 March 2001 and statement of Witness RV of 2 October 1997, disclosed on 14 March 2001.
[6378] Trial Judgement, paras. 4290-4297.
[6379] Trial Judgement, para. 4294. The Trial Chamber refers to the previous section of the Trial Judgement discussing Nteziryayo's notice of the allegation against him concerning Ndayambaje's Swearing-in Ceremony. *See ibid.*, para. 4279.
[6380] Trial Judgement, para. 4294. The Trial Chamber refers to the previous section of the Trial Judgement discussing Nteziryayo's notice of the allegation against him concerning Ndayambaje's Swearing-in Ceremony. *See ibid.*, para. 4279. The Appeals Chamber notes that, in paragraph 4294 of the Trial Judgement, the Trial Chamber stated that Witness QAQ's 1997 Statement referred to "a meeting in May", whereas it stated in paragraph 4277 of the Trial Judgement that, according to the witness, the meeting took place towards "the end of May or early June 1994". The latter is the correct quote of Witness QAQ's 1997 Statement.

Ndayambaje would have been aware that the meeting Witness QAQ referred to in this statement was Ndayambaje's Swearing-In Ceremony since the statement mentioned that "during this meeting *Préfet* Nteziryayo sacked *Bourgmestre* Chrysologue Bimenyimana and replaced him with Ndayambaje."[6381]

2790. Ndayambaje submits that the Trial Chamber erred in finding that the Indictment was cured of its defect concerning the allegation of incitement to commit genocide at his swearing-in ceremony.[6382] In particular, Ndayambaje reiterates that the Trial Chamber erred in not considering that the Prosecution failed to link the relevant summaries of anticipated evidence to the relevant paragraphs of the Indictment.[6383]

2791. In addition, Ndayambaje argues that the Trial Chamber: (i) noted that Witness TO's Summary and Witness TO's June 1997 Statement referred to "May 1994" as the date of the ceremony but failed to take this inconsistency into consideration;[6384] (ii) failed to consider the inconsistencies between Witness TO's June 1997 Statement, which it expressly considered, and Witness TO's prior written statements of 8 October 1995 and 16 October 1997 "which placed the meeting respectively in May or/and in late June 1994 and which mentioned another subsequent meeting which allegedly took place two weeks later";[6385] (iii) erred in finding that Witness QAQ's Summary and Witness QAQ's 1997 Statement provided him with clear notice, since they referred to a meeting that was held in late May or early June 1994;[6386] and (iv) failed to consider the inconsistencies between Witness QAQ's Summary and Witness QAQ's 1997 Statement, on one hand, and the witness's statement of 19 June 1995, on the other hand.[6387]

2792. The Appeals Chamber understands Ndayambaje to further argue that the information provided through the prior statements of Prosecution Witness TP and the summaries of the anticipated evidence of Prosecution Witnesses TP, QAR, QAF, QAL, FAD, FAL, FAU, SM, TW, and TX was not coherent with that provided by Witnesses TO's and QAQ's summaries and

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[6381] Trial Judgement, para. 4294.
[6382] Ndayambaje Appeal Brief, paras. 58-75; AT. 21 April 2015 pp. 18, 19.
[6383] Ndayambaje Notice of Appeal, paras. 18, 32, 35, 36; Ndayambaje Appeal Brief, paras. 14, 58, 59. *See also* AT. 21 April 2015 pp. 69, 70.
[6384] Ndayambaje Appeal Brief, para. 63 (French).
[6385] Ndayambaje Appeal Brief, para. 63 (internal references omitted), *referring to* statement of Witness TO of 8 October 1995, disclosed on 7 May 2001 in French and Kinyarwanda and on 1 October 2001 in English, admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's 1995 Statement"), Witness TO's June 1997 Statement, *and* statement of Witness TO of 16 October 1997, disclosed on 4 November 1998 and admitted as part of Exhibit D13 on 6 March 2002 (confidential) ("Witness TO's October 1997 Statement").
[6386] Ndayambaje Appeal Brief, para. 65.
[6387] Ndayambaje Appeal Brief, paras. 65-67 (French), *referring to* statement of Witness QAQ of 19 June 1995, disclosed on 7 May 2001 in French and on 19 September 2001 in English, and admitted as Exhibit D84 on 13 November 2002 (confidential) ("Witness QAQ's 1995 Statement"). Ndayambaje relies on the fact that Witness QAQ's 1995 Statement states that he became *bourgmestre* at the end of May 1994 and held a meeting in June 1994 following which all Tutsi girls were killed. *See ibid.*, para. 66.

statements and added to the confusion since none of them refer to his swearing-in ceremony but instead to another meeting undated or held in May or June 1994.[6388] Ndayambaje adds that, while the Trial Chamber acknowledged that the Prosecution's opening statement was silent on his alleged incitement during the swearing-in ceremony, it failed to imply from this silence that this allegation was not part of the Prosecution case against him.[6389]

2793. Ndayambaje also submits that, as there was no indication in the Indictment that any crime was committed during his swearing-in ceremony, it was not possible to specify the form of responsibility.[6390] In the alternative, Ndayambaje argues that the Trial Chamber erred in convicting him as the Prosecution failed to plead his genocidal intent in his Indictment.[6391]

2794. The Prosecution responds that the Trial Chamber correctly found that the defect in paragraphs 5.8, 6.33, and 6.38 of the Indictment concerning this allegation was cured.[6392] It contends that the prior statements and summaries of the anticipated evidence of Witnesses "TO, QAQ, and QAF supported the allegation that Ndayambaje had incited the population to kill the Tutsis" at Ndayambaje's Swearing-In Ceremony.[6393] While acknowledging that there were minor variations as to the exact date of the events referred to by Witnesses TO and QAQ, the Prosecution argues that "the two witnesses describe the events in a clear and consistent manner that would have enabled Ndayambaje to understand the charges against him."[6394]

2795. The Prosecution further responds that the information provided in Witness TP's summary and statements was not inconsistent with the information provided by other witnesses[6395] and that Ndayambaje fails to demonstrate that the slight difference regarding the dates given in the summaries of the other witnesses he points to caused confusion to an extent that would undermine the Trial Chamber's finding that he had sufficient notice of the incitement at his swearing-in ceremony.[6396]

2796. Concerning Ndayambaje's argument that it failed to plead the form of responsibility in the Indictment, the Prosecution responds that Ndayambaje's conduct at trial showed that he was never

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[6388] Ndayambaje Appeal Brief, paras. 69-74.
[6389] Ndayambaje Appeal Brief, para. 75 (French).
[6390] Ndayambaje Notice of Appeal, para. 63; Ndayambaje Appeal Brief, para. 130; AT. 21 April 2015 pp. 21, 22.
[6391] Ndayambaje Appeal Brief, para. 131.
[6392] Prosecution Response Brief, para. 2010.
[6393] Prosecution Response Brief, para. 2013, *referring to* Witness TO's Summary, Witness QAQ's Summary, Witness Summaries Grid, item 35, Witness QAF ("Witness QAF's Summary"). *See also ibid.*, paras. 2014, 2015; AT. 21 April 2015 p. 38, 39. The Prosecution argues that the Trial Chamber did nor err in finding that there were no inconsistencies as to the date or the description of the meeting in Witnesses TO's and QAQ's summaries and statements. *See* Prosecution Response Brief, paras. 2018-2020.
[6394] Prosecution Response Brief, para. 2021.
[6395] Prosecution Response Brief, paras. 2023. *See also ibid.*, para. 2025.
[6396] Prosecution Response Brief, para. 2026.

concerned about the form of responsibility as he never raised a contemporaneous objection on this matter, and that he challenged every piece of evidence that he asked people to kill Tutsis at his swearing-in ceremony.[6397]

2797. The Appeals Chamber finds no merit in Ndayambaje's argument that the witness summaries appended to the Prosecution Pre-Trial Brief could not inform him of the allegations against him because the Prosecution did not indicate "the relevant paragraphs on which their testimonies would be based".[6398] The Appeals Chamber is of the opinion that it would have been preferable for the Prosecution to provide greater specificity given the vagueness of the Indictment and its pre-trial brief in this respect. However, it is satisfied that the contents of Witnesses TO's and QAQ's summaries and the fact that they were expressly marked relevant to Ndayambaje and, *inter alia*, to Count 4 of the Indictment – which, in turn, was linked to the relevant paragraphs, including paragraphs 5.8 and 6.33 of the Indictment[6399] – provided clear notice to Ndayambaje that the Prosecution intended to rely on the evidence of these witnesses in support of the allegation that he publicly incited the population to kill Tutsis in June 1994 set forth in paragraphs 5.8 and 6.33.[6400]

2798. The Appeals Chamber also notes that, contrary to Ndayambaje's argument, the Trial Chamber considered the inconsistency between Witness TO's Summary and Witness TO's June 1997 Statement, which referred to "May 1994" as the date of the meeting in Muganza Commune during which Ndayambaje would have incited the commission of genocide.[6401] The Appeals Chamber concurs with the Trial Chamber that from the description of the meeting as "Ndayambaje's swearing-in ceremony" it should have been clear to Ndayambaje that the meeting in question was Ndayambaje's Swearing-In Ceremony which occurred in June 1994.[6402]

2799. The Appeals Chamber further notes that, as argued by Ndayambaje, the Trial Chamber did not discuss Witness TO's 1995 Statement and Witness TO's October 1997 Statement. While these statements are consonant with each other and with Witness TO's June 1997 Statement with respect

[6397] Prosecution Response Brief, paras. 2051, 2052.
[6398] Ndayambaje Appeal Brief, para. 59.
[6399] *See* Ndayambaje Indictment, p. 42.
[6400] *See also supra*, fn. 6239.
[6401] Trial Judgement, para. 4294.
[6402] *See* Trial Judgement, para. 4294. The Appeals Chamber observes, however, that Witness TO's Summary, while clearly stating that Ndayambaje made public incitements at his swearing-in ceremony, is confusing as it appears to suggest that the witness attended two meetings at which Ndayambaje and Nteziryayo made inciting speeches – in May 1994, being Ndayambaje's Swearing-In Ceremony, and in late June 1994 where Nteziryayo introduced Ndayambaje. Notwithstanding this ambiguity in the phrasing of Witness TO's Summary, when reading it in conjunction with the witness's written statements previously disclosed to Ndayambaje, which Ndayambaje should have been prompted to examine upon reading Witness TO's Summary, it is clear that the witness was expected to testify that he attended only one meeting where Nteziryayo and Ndayambaje were present and made inciting speeches and that this meeting was Ndayambaje's Swearing-In Ceremony.

to Ndayambaje's Swearing-In Ceremony,[6403] Witness TO's October 1997 Statement states that the swearing-in ceremony took place in late June 1994.[6404] However, Witness TO clarified in his June 1997 statement, which the Trial Chamber considered, that he "no longer remember[ed] the exact date of this ceremony but [that] it probably took place at the beginnin[g] of May 1994."[6405] The Appeals Chamber considers that, in light of Witness TO's admission that he no longer remembered the exact date of the ceremony and the clear indication that Witness TO's Summary and prior statements referred to the meeting held to swear-in Ndayambaje as *bourgmestre* of Muganza Commune, the references to May 1994 in the witness's summary and June 1997 statement were not such as to affect the clarity of the notice provided to Ndayambaje that the Prosecution intended to prove through Witness TO that he made inciting statements at his swearing-in ceremony.

2800. Likewise, the Appeals Chamber rejects Ndayambaje's argument regarding alleged inconsistencies and lack of clarity in Witness QAQ's Summary and prior statements. The Appeals Chamber notes that, according to Witness QAQ's Summary, Ndayambaje made direct and public incitements at a meeting at "the end of May/early June 1994", but that Witness QAQ's Summary does not provide further information concerning this meeting. However, when Witness QAQ's Summary is read together with Witness QAQ's 1997 Statement, it is clear that the meeting took place in the yard of the Muganza commune office and that on this occasion "the *Préfet* replaced the sacked *Bourgmestre* Chrisologue with Ndayambaje".[6406] Since Witness QAQ's Summary contained clear allegations against Ndayambaje and was expressly linked to his Indictment, the Appeals Chamber considers that Ndayambaje should have been prompted to examine the contents of Witness QAQ's 1997 Statement upon reading Witness QAQ's Summary. Finally, the Appeals Chamber fails to see any inconsistency between Witness QAQ's 1995 Statement and Witness QAQ's Summary and Witness QAQ's 1997 Statement as Ndayambaje submits.[6407]

[6403] *See* Witness TO's 1995 Statement, p. K0181563 (Registry pagination) (describing the meeting as the swearing-in ceremony of *bourgmestre* Ndayambaje); Witness TO's June 1997 Statement, p. K0043434 (Registry pagination) (describing the meeting as "Elie Ndayambaje's new swearing-in ceremony which took place in the woods near the communal office"); Witness TO's October 1997 Statement, p. K0052738 (Registry pagination) (describing the meeting as "the meeting to introduce the new *Bourgmestre*, Elie Ndayambaje, who had just replaced Chrysologue Bimenyimana"). The Appeals Chamber is of the view that the fact that Witness TO's Summary, Witness TO's 1995 Statement, and Witness TO's June 1997 Statement mention another meeting two weeks later, where Ndayambaje asked people to strengthen the roadblocks and night patrols because the "*Inkotanyi*" arrived, is irrelevant as to whether Ndayambaje was on notice that he made inciting statements at his swearing-in ceremony in June 1994.
[6404] Witness TO's October 1997 Statement, p. K052738 (Registry pagination). The Appeals Chamber notes that there is no reference to the date of the meeting in Witness TO's 1995 Statement.
[6405] Witness TO's June 1997 Statement, p. K0043434 (Registry pagination). *See also* Witness TO's October 1997 Statement, p. K052738 (Registry pagination).
[6406] Witness QAQ's 1997 Statement, p. K0043430 (Registry pagination).
[6407] *See* Witness QAQ's 1995 Statement, pp. K0181567, K0181568 (Registry pagination).

2801. Accordingly, the Appeals Chamber considers that, despite the minor inconsistencies as regards their estimates of when the meeting took place in May or June 1994, it was clear from Witnesses TO's and QAQ's summaries and prior statements that they were referring to Ndayambaje's Swearing-In Ceremony. The Appeals Chamber also finds that, according to the information provided in paragraph 6.38 of the Indictment, Ndayambaje was on clear notice that it was alleged that his swearing-in ceremony could not have taken place before he was appointed as *bourgmestre* of Muganza Commune on 20 June 1994, which coincides with the allegation in paragraph 6.33 of the Indictment that Ndayambaje incited the population to kill Tutsis in June 1994.

2802. Turning to Ndayambaje's arguments that the prior written statements of Witness TP and the summaries of the anticipated testimonies appended to the Prosecution Pre-Trial Brief of Witnesses TP, QAR, QAF, QAL, FAD, FAL, FAU, SM, TW, and TX did not refer to the swearing-in ceremony but to a meeting that occurred on a different date, the Appeals Chamber finds that Ndayambaje failed to explain how this could render the information provided by the Prosecution concerning Ndayambaje's alleged criminal conduct at his swearing-in ceremony inconsistent or unclear. The fact that other witnesses mentioned a meeting held in May or in June 1994, which was not identified as Ndayambaje's Swearing-In Ceremony, does not render, in and of itself, the information provided by Witnesses TO and QAQ regarding Ndayambaje's Swearing-In Ceremony unclear or inconsistent.[6408] Moreover, given its brevity, the Appeals Chamber does not find that the lack of reference in the Prosecution's opening statement to Ndayambaje's alleged incitement during his swearing-in ceremony affects the timely, clear, and consistent information provided to Ndayambaje in this respect by the Prosecution.

2803. Regarding the pleading of the form of responsibility, the Appeals Chamber notes that, in the charging section of the Indictment, Ndayambaje is generally charged with the crime of direct and public incitement to commit genocide (Count 4) pursuant to Article 6(1) of the Statute.[6409] However, the Appeals Chamber observes that, in paragraphs 5.8 and 6.33 of the Indictment, it is clearly pleaded, respectively, that Ndayambaje "publicly incited the people to exterminate the Tutsi population and its 'accomplices'" and "incited the population to kill Tutsis". It is therefore clear from the relevant paragraphs of the Indictment that Ndayambaje was charged with committing direct and public incitement to commit genocide.

2804. Finally, the Appeals Chamber finds Ndayambaje's undeveloped alternative argument that the Trial Chamber erred in convicting him as the Indictment failed to plead his genocidal intent

[6408] Witness Summaries Grid, items 5, 16, 24, 32, 35, 40, 79, 94, 97, 98; statement of Witness TP of 20 June 1995, disclosed on 15 November 2000 in French, on 4 December 2000 in Kinyarwanda and on 23 May 2001 in English; statement of Witness TP of 16 October 1997, disclosed on 4 November 1998.

unmeritorious since, in Count 4, the Prosecution specifically pleaded that Ndayambaje was "responsible for direct and public incitement to kill and cause serious bodily or mental harm to members of the Tutsi population with the intent to destroy, in whole or in part, a racial or ethnic group".[6410]

2805. In light of the above, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber erred in finding that he was provided with timely, clear, and consistent information putting him on notice of the allegation that he committed direct and public incitement to commit genocide through statements he made at his swearing-in ceremony in June 1994.

4. Abduction of Tutsi Women and Girls in Mugombwa (Grounds 4, and 6 in part)

2806. The Trial Chamber found that, after Ndayambaje's Swearing-in Ceremony on 22 June 1994, a group of Tutsi women and girls from Mugombwa Sector, Muganza Commune, including one named Nambaje, were abducted by assailants from Saga.[6411] It determined that the assailants came to search for the women and girls because they had attended the swearing-in ceremony "where they were told to search for and throw out dirt".[6412] The Trial Chamber further found that, during the abduction, Ndayambaje came to the Virgin Mary Statue in Mugombwa Sector and made it clear to the abductors that they "were free to do what they wanted with the girls".[6413] The Trial Chamber found that the abducted women and girls were subsequently taken to a brick factory at Gasenyi where they were killed.[6414] On the basis of his words at the Virgin Mary Statue, the Trial Chamber convicted Ndayambaje of genocide (Count 2), extermination and persecution as crimes against humanity (Counts 6 and 7, respectively), and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 9) pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje.[6415]

[6409] Ndayambaje Indictment, p. 42.
[6410] Ndayambaje Indictment, p. 42.
[6411] Trial Judgement, paras. 4708, 4717, 5949.
[6412] Trial Judgement, para. 5953. *See also ibid.*, para. 4717.
[6413] Trial Judgement, paras. 4746, 5949, 6030.
[6414] Trial Judgement, paras. 4723, 4746, 5949.
[6415] Trial Judgement, paras. 5959, 5976, 5977, 6064, 6066, 6107, 6108, 6125, 6175, 6176, 6186. The Trial Chamber determined that, because Ndayambaje's words at the Virgin Mary Statue were only addressed to the abductors and not to the general public, Ndayambaje could not be held responsible for direct and public incitement to commit genocide in relation to this event. *See ibid.*, paras. 6030, 6032, 6033. As discussed in Section IX.A.3 above, although the Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including Nambaje, and held that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide, Ndayambaje was ultimately not convicted for instigating genocide for the killing of the abducted women and girls based on his inciting statements at his swearing-in ceremony. *See supra*, para. 2775, fn. 6351. As a result, the Appeals Chamber will disregard Ndayambaje's arguments under Ground 4 of his appeal alleging lack of notice that his utterances at the swearing-in ceremony instigated genocide for the killing of the abducted Tutsi women and girls. *See* Ndayambaje Appeal Brief, paras. 85, 87, 92.

2807. In summarising the Prosecution case against Ndayambaje with respect to the abduction of Tutsi women and girls, the Trial Chamber referred to paragraph 6.37 of the Indictment.[6416] The Indictment indicates that the allegations in paragraph 6.37 were being pursued under Counts 2, 6, 7, and 9 pursuant to Articles 6(1) and 6(3) of the Statute and under Count 4 pursuant to Article 6(1) of the Statute.[6417]

2808. The Trial Chamber found that the allegation with regard to Ndayambaje's presence during the abduction of the Tutsi women and girls was not sufficiently pleaded in the Indictment, as it failed to specify the site or the date of the allegation, and that the Indictment was therefore defective.[6418] However, the Trial Chamber determined that the defect was subsequently cured and that Ndayambaje was put on adequate notice of the material facts underpinning the relevant charge.[6419]

2809. Ndayambaje submits that the allegation regarding his responsibility for the killing of the abducted Tutsi women and girls was not pleaded in the Indictment and that such defect was neither curable nor cured.[6420] He requests the Appeals Chamber to reverse all his convictions entered on the basis of his involvement in these killings.[6421] The Prosecution responds that the Trial Chamber correctly found that the defect of the Indictment concerning this allegation was cured and that Ndayambaje suffered no prejudice.[6422]

2810. The Appeals Chamber concurs with the Trial Chamber that the Indictment was impermissibly vague in relation to the allegation concerning Ndayambaje's responsibility in the killing of the abducted Tutsi women and girls in Mugombwa. In particular, there is no mention in paragraph 6.37 of the Indictment, or anywhere else in the Indictment, of the abduction of the Tutsi women and girls, the specific date of the abduction, the presence of Ndayambaje at the Virgin Mary Statue and his role in the killing of the Tutsi women and girls. The Appeals Chamber will now discuss whether the Trial Chamber erred in finding that the defect in the Indictment in this regard was curable and, if so, whether the Trial Chamber erred in finding that the defect was cured.

[6416] Trial Judgement, para. 4646, fn. 12370. For paragraph 6.37 of the Ndayambaje Indictment, *see supra*, fn. 6213.
[6417] Ndayambaje Indictment, pp. 40-46.
[6418] Trial Judgement, para. 4649.
[6419] Trial Judgement paras. 4650-4654.
[6420] Ndayambaje Notice of Appeal, paras. 40-45, 47, 59, 60, 62; Ndayambaje Appeal Brief, paras. 80-99, 120-125, 127-129, 131. *See also* AT. 21 April 2015 pp. 10, 11.
[6421] Ndayambaje Notice of Appeal, paras. 49, 50, 64, 65; Ndayambaje Appeal Brief, paras. 99, 132.
[6422] Prosecution Response Brief, paras. 2030-2039, 2047, 2049, 2052, 2517.

(a) Whether the Defect Was Curable

2811. Ndayambaje submits that the Trial Chamber erred in linking the abduction of the Tutsi women and girls after his swearing-in ceremony on 22 June 1994 to paragraph 6.37 of the Indictment since this paragraph "was too vague and too general to support such a specific charge."[6423] Ndayambaje argues that the abduction of the Tutsi women and girls was a material fact that could not properly support a conviction unless it was formally incorporated in the Indictment and that the Trial Chamber radically transformed the Indictment in convicting him on this basis.[6424]

2812. The Prosecution responds that Ndayambaje's argument that paragraph 6.37 of the Indictment was too vague in order to be cured ignores that curing applies to vague allegations and that Ndayambaje simply disagrees with the Trial Chamber's view without providing any reasons.[6425]

2813. The Appeals Chamber finds that the allegation concerning Ndayambaje's responsibility for instigating the killing of the abducted Tutsi women and girls from Mugombwa Sector fell within the broader allegation relating to the killing of Tutsis throughout Muganza Commune pleaded in paragraph 6.37 of the Indictment. Similarly, the Appeals Chamber does not consider that the material facts on which the Trial Chamber entered its convictions could have, on their own, supported separate charges. As vague as the charge set out in paragraph 6.37 was, the Indictment nonetheless pleaded the charge for which Ndayambaje was ultimately convicted, namely his participation in the killing of Tutsis in Muganza Commune from 20 April 1994.

2814. Accordingly, the Appeals Chamber considers that the defect in the Indictment regarding Ndayambaje's responsibility for instigating the killing of the abducted Tutsi women and girls was curable. The Appeals Chamber now turns to consider whether the Trial Chamber erred in finding that the defect was cured by the provision of clear, consistent, and timely information detailing the factual basis underpinning the charge.

(b) Whether the Defect Was Cured

2815. The Trial Chamber found that the summary of the anticipated evidence of Witnesses QAR and QAF appended to the Prosecution Pre-Trial Brief and their respective prior written statements provided Ndayambaje with clear, timely, and consistent notice that following a meeting at Muganza

[6423] Ndayambaje Appeal Brief, para. 80. *See also* Ndayambaje Notice of Appeal, paras. 42, 44; Ndayambaje Appeal Brief, para. 83; AT. 21 April 2015 pp. 10, 11, 17, 18, 20, 21.
[6424] Ndayambaje Appeal Brief, paras. 81, 83. Ndayambaje contends that the Prosecution was aware of the allegations related to the abductions of Tutsi women and girls four years before the amendment of the indictment in August 1999 and that it should have requested an amendment of the indictment before the start of the trial. *See ibid.*, para. 82.

commune office in June 1994 an abduction of Tutsi women and girls took place in Mugombwa Sector by assailants from Saga, that he was present during the abduction, and that the women and girls were subsequently killed.[6426]

2816. Ndayambaje submits that the Trial Chamber erred in finding that the defect was cured and that he did not suffer prejudice from the lack of notice.[6427] Specifically, Ndayambaje argues that the Prosecution Pre-Trial Brief did not provide any information regarding his alleged responsibility for instigating the abduction at the Virgin Mary Statue or regarding his genocidal intent or knowledge of the attackers' genocidal intent.[6428] Similarly, he contends that the Prosecution's opening statement did not refer to this incident.[6429] Ndayambaje also avers that Witnesses QAR's and QAF's summaries were not linked to paragraph 6.37 of the Indictment.[6430]

2817. In addition, Ndayambaje claims that Witnesses QAR's and QAF's prior statements were inconsistent and insufficient to provide him with clear and consistent information on the abduction of the Tutsi women and girls and his involvement thereon.[6431] In particular, Ndayambaje argues that: (i) there is no reference to his presence during the abduction in Witness QAF's Statement; (ii) Witness QAR's 1995 Statement mentions a massacre that was linked by the witness to the events "at the Church in April 1994 and not to the swearing-in ceremony in June 1994"; (iii) Witness QAR's May 1997 Statement does not refer to any abduction, an omission that was "excused by the [Trial] Chamber; thereby acting *ultra vires*"; and (iv) Witness QAR's October 1997 Statement does not mention the fate of the four abducted girls to whom it refers.[6432] Ndayambaje adds that he was not provided with any information regarding the abduction of the woman named Nambaje on the basis of which he was also convicted.[6433]

2818. Furthermore, Ndayambaje submits that the Trial Chamber erred in law in finding that he instigated the killing of the abducted Tutsi women and girls because this form of responsibility was not pleaded in the Indictment or any other documents of the Prosecution.[6434] In the alternative,

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[6425] Prosecution Response Brief, para. 2031.
[6426] Trial Judgement, paras. 4650-4654, *referring to* Witness Summaries Grid, Witness QAR's Summary, Witness QAF's Summary, Witness QAR's 1995 Statement, Witness QAR's October 1997 Statement; statement of Witness QAF of 14 October 1997, disclosed on 4 November 1998 and on 15 November 2000 in French and English, respectively, admitted as part of Exhibit D158 on 4 March 2004 ("Witness QAF's Statement").
[6427] Ndayambaje Notice of Appeal, para. 40; Ndayambaje Appeal Brief, paras. 84-97.
[6428] Ndayambaje Appeal Brief, para. 85 (French). *See also ibid.*, para. 92.
[6429] Ndayambaje Appeal Brief, para. 94.
[6430] Ndayambaje Notice of Appeal, para. 43; Ndayambaje Appeal Brief, paras. 86, 92; AT. 21 April 2015 pp. 69, 70.
[6431] Ndayambaje Appeal Brief, paras. 87-92.
[6432] Ndayambaje Appeal Brief, paras. 88-92.
[6433] Ndayambaje Notice of Appeal, para. 47; Ndayambaje Appeal Brief, para. 93.
[6434] Ndayambaje Notice of Appeal, paras. 59, 60, 62; Ndayambaje Appeal Brief, paras. 120-125, 127-129, 131 (French); AT. 21 April 2015 pp. 21, 67.

Ndayambaje argues that the Indictment failed to plead his genocidal intent.[6435] Finally, Ndayambaje submits that the Trial Chamber erred in concluding that he suffered no prejudice from the lack of notice.[6436]

2819. The Prosecution responds that the Trial Chamber correctly found that paragraph 6.37 of the Indictment was cured and that Ndayambaje received sufficient and consistent notice through the summaries and statements of Witnesses QAR and QAF that, following Ndayambaje's Swearing-in Ceremony, Tutsi women and girls were abducted, that he was present during the abduction, and that the Tutsi women and girls were subsequently killed.[6437] With respect to the form of responsibility, the Prosecution responds that the paragraphs in the charging section include all forms of responsibility under Article 6(1) of the Statute and that the Prosecution Pre-Trial Brief notified Ndayambaje that authorities, such as himself, instigated massacres.[6438] It also reiterates that Ndayambaje did not raise any objection at trial concerning the modes of liability or argue in his closing brief that he did not know that he was charged pursuant to instigating.[6439] It submits that the record reflects that Ndayambaje understood the nature of the case against him and was fully prepared to defend against this particular allegation, which shows that he did not suffer any prejudice.[6440]

2820. The Appeals Chamber notes that, as underlined by Ndayambaje, neither the Prosecution's pre-trial brief nor its opening statement provided information regarding the abduction of Tutsi women and girls and Ndayambaje's responsibility in their killing. The Trial Chamber, however, found that Witnesses QAF's and QAR's summaries and statements provided the relevant information to Ndayambaje.

2821. The Appeals Chamber observes that Witness QAF's Summary was marked relevant to the counts of conspiracy to commit genocide and direct and public incitement to commit genocide (Counts 1 and 4, respectively), and not to any of the counts for which Ndayambaje was convicted in relation to the killing of the abducted Tutsi women and girls. In addition, while providing information that the morning after a meeting in Muganza Commune, where Ndayambaje made a speech, Tutsi girls were taken from their hiding places and killed, Witness QAF's Summary does not implicate Ndayambaje in the abduction of the Tutsi girls.[6441] In the view of the Appeals

[6435] Ndayambaje Appeal Brief, para. 131 (French). *See also ibid.*, para. 85.
[6436] Ndayambaje Notice of Appeal, paras. 45, 47; Ndayambaje Appeal Brief, paras. 80, 83, 84, 95-97.
[6437] Prosecution Response Brief, paras. 2030, 2032-2035. *See also* AT. 21 April 2015 p. 40.
[6438] Prosecution Response Brief, paras. 2047, 2048, *referring to* Prosecution Pre-Trial Brief, para. 28.
[6439] Prosecution Response Brief, para. 2051, *referring to* Ndayambaje Closing Brief, para. 70.
[6440] Prosecution Response Brief, paras. 2036-2039. *See also* AT. 21 April 2015 p. 41.
[6441] The Appeals Chamber also notes that Witness QAF's Statement does not provide any information suggesting that Ndayambaje was directly involved in this abduction of Tutsi women and girls.

Chamber, Ndayambaje could not have therefore reasonably understood on the basis of Witness QAF's Summary that he was alleged to have instigated the killing of Tutsi women and girls, abducted after the ceremony, through the utterances he made at the Virgin Mary Statue. The Appeals Chamber finds that the Trial Chamber erred in concluding otherwise.

2822. By contrast, Witness QAR's Summary was marked relevant to Counts 1 through 9 of the Indictment which, in turn, were linked in the Indictment to paragraph 6.37 of the Indictment.[6442] The Appeals Chamber finds that the link between Witness QAR's Summary and paragraph 6.37, together with the contents of the summary, put Ndayambaje on notice that the Prosecution intended to rely on Witness QAR's evidence in support of the allegation of his participation in the massacres in Muganza Commune, as set forth in paragraph 6.37.[6443]

2823. Moreover, the Appeals Chamber finds that, contrary to Ndayambaje's unsubstantiated submission,[6444] it is clear that the incident described in Witness QAR's 1995 Statement in which "women and girls who had been spared were massacred on the orders of Ndayambaje", following an exchange of words regarding their fate between perpetrators from Saga and Ndayambaje, does not refer to another event in April 1994.[6445] This is also clear from the fact that in this incident Ndayambaje is described as the *bourgmestre*, a position he only regained in June 1994.[6446] The Appeals Chamber also rejects Ndayambaje's argument that the Trial Chamber acted *ultra vires* because it "excused" the fact that Witness QAR's May 1997 Statement did not mention the abduction incident.[6447] As the Trial Chamber noted, Witness QAR's May 1997 Statement "dealt solely with the massacre at Mugombwa Church in April 1994".[6448] It is not uncommon that a specific statement of a witness focuses, as a result of investigatory considerations, on a particular event.

2824. The Appeals Chamber also observes, as the Trial Chamber correctly noted,[6449] that Witness QAR's Summary is consistent with Witness QAR's October 1997 Statement, in which it is

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[6442] *See* Ndayambaje Indictment, pp. 40-46. In relevant part, Witness QAR's Summary reads as follows:

> In June 1994, QAR attended a meeting chaired by Nteziryayo, also in attendance was Ndayambaje. [...] The next day, there was a house-to-house search for girls and women hiding. QAR states that four girls and a teacher were brought out. [...] The people were divided as to whether or not these women should be killed. It was decided to wait for Ndayambaje to ask him what to do with them. Ndayambaje arrived and said "were you not told that if you sweep the dirt towards your house, it heaps up and ends up chasing you out of your house? Then throw away the dirt." QAR later heard that the women were taken by a group to the Mugombwa brickyard.

[6443] *See also supra*, fn. 6239.
[6444] *See* Ndayambaje Appeal Brief, para. 88.
[6445] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination).
[6446] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination).
[6447] *See* Ndayambaje Appeal Brief, para. 89.
[6448] Trial Judgement, para. 4651.
[6449] *See* Trial Judgement, para. 4651.

specified that the assailants were waiting for Ndayambaje to decide what to do with the abductees at the Virgin Mary Statue, as some of the abductors wanted to kill them.[6450] Considering the chain of events, as described in the witness's summary and October 1997 statement, and the fact that Witness QAR's evidence was marked relevant, *inter alia*, to the counts of murder and extermination as crimes against humanity,[6451] the fate of the abductees was sufficiently clear to allow Ndayambaje to prepare an effective defence against the allegation. The Appeals Chamber, therefore, does not find any error in the Trial Chamber's approach to Witness QAR's prior statements.

2825. Notwithstanding the Trial Chamber's erroneous reliance on Witness QAF's summary and statement, the Appeals Chamber considers that Witness QAR's Summary, which attributes to Ndayambaje a major and decisive role in the killing of the abductees, along with Witness QAR's 1995 and October 1997 statements, which were disclosed to Ndayambaje before the beginning of the trial, provided him with timely, clear, and consistent information that his involvement at the Virgin Mary Statue in the killing of Tutsi women and girls who were abducted in June 1994 was part of the Prosecution case. The Appeals Chamber does not find that the lack of reference in the Prosecution's pre-trial brief itself and opening statement to Ndayambaje's responsibility for the killing of these Tutsi women and girls affected the timely, clear, and consistent information that was provided to Ndayambaje through Witness QAR's summary and statements.

2826. Moreover, the Appeals Chamber observes that the Trial Chamber appears to have ultimately considered that Nambaje was part of the group of Tutsi women and girls abducted from Mugombwa Sector and killed at Gasenyi.[6452] Leaving apart whether the Trial Chamber erred in this regard,[6453] the Appeals Chamber considers that, to the extent that the Trial Chamber found that Nambaje was part of the same group of women and girls abducted from their homes that Witness QAR was expected to testify about, Ndayambaje had the requisite notice and his contention to the contrary is rejected.

2827. With respect to Ndayambaje's argument regarding the lack of notice of the form of responsibility, the Appeals Chamber notes that the Trial Chamber did not discuss in the Trial Judgement whether Ndayambaje had received sufficient notice that he could be held responsible for

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[6450] Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination). Since Witness QAR's Summary contained clear allegations against Ndayambaje and was expressly linked to the Ndayambaje Indictment in the Prosecution Pre-Trial Brief, the Appeals Chamber considers that Ndayambaje should have been prompted to examine the contents of Witness QAR's statements disclosed to him upon reading Witness QAR's Summary. *See also supra*, para. 1101.
[6451] *See supra*, para. 2822.
[6452] *See infra*, Section IX.H.1(a).
[6453] *See infra*, Section IX.H.1(a).

instigating the killing of the abducted women and girls, concluding generally that he was put on notice that he was "present during the abduction and that the women and girls were subsequently killed."[6454] Although Ndayambaje did not specifically object to the vagueness of paragraph 6.37 of the Indictment regarding his alleged form of responsibility under Article 6(1) of the Statute,[6455] the Appeals Chamber considers that it would have been preferable for the Trial Chamber to explain why it was satisfied that Ndayambaje was put on sufficient notice that he could be held responsible for instigating the killing of the abducted women and girls.

2828. As discussed in relation to the notice of Ndayambaje's responsibility in the Mugombwa Church massacre, the Appeals Chamber observes that the Indictment only generally indicates in its charging section that the relevant counts were pursued pursuant to Article 6(1) of the Statute and, in paragraph 6.37 of the Indictment, that Ndayambaje was alleged to have "ordered, supervised and participated in massacres of the Tutsi population" that were committed by others. In the absence of identification of any particular acts on the part of Ndayambaje that may characterise a responsibility for instigating in paragraph 6.37, the Appeals Chamber does not consider that the general reference to Article 6(1) of the Statute and the reference to participation in paragraph 6.37 put Ndayambaje on sufficient notice that he was charged with instigating the killings of the abducted Tutsi women and girls. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to find that the Indictment was defective in relation to the allegation that he instigated the massacres in which he was alleged to have participated in paragraph 6.37.

2829. However, the Appeals Chamber considers that it is clear from Witness QAR's Summary and her 1995 and October 1997 statements that Ndayambaje was alleged to have ordered or prompted the killing, when he answered the questions of the abductors regarding the fate of the Tutsi women and girls at the Virgin Mary Statue.[6456] The Appeals Chamber finds, therefore, that the failure of the Prosecution to specify the exact form of responsibility in the Indictment was cured since, when reading the Indictment in conjunction with Witness QAR's summary and prior statements, Ndayambaje was put on notice that he was alleged to have instigated the killing of the Tutsi women and girls who were abducted and brought to the Virgin Mary Statue.

[6454] Trial Judgement, para. 4654.
[6455] *See supra*, fn. 6254.
[6456] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination) ("[T]he women and girls who had been spared were massacred on the orders of NDAYAMBAJE [...]. He claimed that some of the refugees knew how to write and correspond with the *Inkotanyi* [...]. [T]he *Bou[r]gmestre* replied as follows: 'Do as you please. Are they not the ones who are going to relate what happened when the *Inkotanyi* arrive?'"); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination) ("When the *Bourgmestre* arrived, he said: 'Were you not told that if you sweep the dirt towards your house, it heaps up and ends up chasing you out of your house? Then throw away the dirt.'"). The Appeals Chamber also notes that the Prosecution Pre-Trial Brief states that "[t]he massacres and the assaults thus perpetrated were the result of a strategy planned, adopted, instigated, and elaborated by political, civil and military authorities in the country both at the national and local levels." *See* Prosecution Pre-Trial Brief, para. 28.

2830. Finally, the Appeals Chamber finds Ndayambaje's general and undeveloped alternative argument that the Trial Chamber erred in convicting him as the Prosecution failed to plead his genocidal intent in the Indictment unmeritorious since, in Count 2, in which he is charged with genocide, the Prosecution specifically pleaded that Ndayambaje acted with genocidal intent.[6457]

2831. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber's erroneous reliance on Witness QAF's summary and statement did not invalidate its conclusion that Ndayambaje received clear, timely, and consistent information putting him on notice that, following a meeting at Muganza commune office in June 1994, an abduction of Tutsi women and girls took place in Mugombwa Sector by assailants from Saga, that he was present during the abduction, and that they were subsequently killed. The Appeals Chamber further considers that the subsequent information provided to Ndayambaje through Witnesses QAR's summary and statements sufficiently informed him of the course of conduct on his part supporting the generally pleaded charge of instigating, thereby curing the defect in the Indictment as regards the form of responsibility.

2832. This conclusion is bolstered by a review of the conduct of Ndayambaje's defence at trial which reflects that he was provided with sufficient information to conduct meaningful investigations and prepare an effective defence against the allegation that Ndayambaje instigated the killings of the abductees at the Virgin Mary Statue. In particular, the Appeals Chamber observes that Ndayambaje cross-examined Witness QAR at length regarding the abduction of Tutsi women and girls at the Virgin Mary Statue.[6458] Specifically, Ndayambaje asked questions to the witness about his presence at the Virgin Mary Statue and his behaviour during this event.[6459] Moreover, Ndayambaje called several witnesses in order to challenge and contradict the Prosecution's allegation that he was involved in the deaths of the abducted Tutsi women and girls.[6460] The Appeals Chamber also notes that Ndayambaje challenged in his closing brief the evidence regarding Witness QAR and the allegation that he was involved in the killing of Tutsi women and girls who were abducted and brought to the Virgin Mary Statue.[6461]

2833. Accordingly, the Appeals Chamber finds that Ndayambaje was provided with sufficient information detailing the factual basis on which he was convicted in relation to the killing of the abducted Tutsi women and girls from Mugombwa Sector to prepare a meaningful defence.

[6457] Ndayambaje Indictment, pp. 40, 41.
[6458] Witness QAR, T. 21 November 2001 pp. 95-113.
[6459] Witness QAR, T. 21 November 2001 pp. 99, 100, 104.
[6460] Ndayambaje called, *inter alia*, Witnesses ANGES, BOZAN, JAMES, KWEPO, MATIC, MUZIK, SABINE, and Stan. *See* Trial Judgement paras. 4648, 4673-4706. *See also* Ndayambaje Pre-Defence Brief, Annex 3, items 31, 34, 37.
[6461] *See* Ndayambaje Closing Brief, paras. 201, 781-798.

5. Conclusion

2834. Based on the above, the Appeals Chamber finds that the Trial Chamber erred in convicting Ndayambaje for committing direct and public incitement to commit genocide on the basis of his statements at Mugombwa Church on 20 and 21 April 1994 in the absence of sufficient notice that he was prosecuted on this basis. Accordingly, the Appeals Chamber grants Ground 2 of Ndayambaje's appeal and reverses his conviction for committing direct and public incitement to commit genocide at Mugombwa Church. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

2835. Nevertheless, the Appeals Chamber dismisses Ndayambaje's contentions that he was not charged with or lacked sufficient notice of his alleged responsibility for aiding and abetting the killings at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 22 to 24 April 1994, committing direct and public incitement to commit genocide at his swearing-in ceremony on 22 June 1994, and instigating the killings of Tutsi women and girls abducted from Mugombwa Sector after his swearing-in ceremony.

2836. The Appeals Chamber also dismisses Ndayambaje's claim of prejudice resulting from the accumulation of events not pleaded in the Indictment.[6462] The Appeals Chamber recalls that it has found that Ndayambaje was charged with the criminal conduct on the basis of which he was convicted and, with the exception of the charge of direct and public incitement to commit genocide at Mugombwa Church, that the defects in the Indictment concerning these charges were curable and cured by the provision of timely, clear, and consistent information. The Appeals Chamber does not minimise the extent of the Prosecution's failure to provide adequate notice in the Indictment: in respect of the four incidents for which Ndayambaje was found guilty, three were not adequately pleaded in the Indictment. However, Ndayambaje has not demonstrated that the defects in the Indictment materially hampered the preparation of his defence.

2837. Accordingly, the Appeals Chamber dismisses Grounds 1 and 3 through 6 of Ndayambaje's appeal.

[6462] *See* Ndayambaje Notice of Appeal, para. 17; Ndayambaje Appeal Brief, paras. 22, 134, 137.

B. Bias (Ground 8)

2838. Ndayambaje submits that the Trial Chamber demonstrated bias in applying different standards when assessing Prosecution and Defence evidence.[6463] He contends that the fairness of the trial was affected by the fact that the Trial Chamber "unequally assessed the evidence depending on whether it was adduced by the Prosecution or by the Defence".[6464] He argues that this led to a miscarriage of justice and requests the Appeals Chamber "to apply the proper standard in the assessment of all the evidence on the record."[6465]

2839. Specifically, Ndayambaje submits that the Trial Chamber considered as a rule that Prosecution witnesses were credible,[6466] which led it to never reject their evidence entirely, while it "rejected *a priori*" Defence evidence on material facts or only relied on it to corroborate Prosecution evidence.[6467] He also argues that the Trial Chamber: (i) "wrongly and deliberately 'excused'" contradictions and inconsistencies in Prosecution evidence, while rejecting Defence evidence on the basis of "fictitious contradictions" or "futile" and "falsely incriminating reasons";[6468] (ii) adopted a fragmentary approach in its assessment of Prosecution evidence, assessing the credibility of Prosecution witnesses by event and not integrally, while determining that Defence witnesses were not credible in light of an overall assessment of their entire evidence;[6469] (iii) rejected the evidence of Defence witnesses on the basis of the "close ties" they had with him, when it did not discredit Prosecution witnesses on that basis and even found that it enhanced their credibility;[6470] and (iv) relied on the fact that Prosecution witnesses were Tutsis and survivors of the genocide to excuse inconsistencies and weaknesses in their testimonies or enhance their credibility, while considering a Defence witness not credible because the witness merely stated that victims of the massacres were both Tutsis and Hutus.[6471]

[6463] Ndayambaje Notice of Appeal, paras. 76-82; Ndayambaje Appeal Brief, paras. 197-242. *See also* AT. 21 April 2015 p. 28.
[6464] Ndayambaje Appeal Brief, para. 197. *See also* Ndayambaje Reply Brief, para. 62.
[6465] Ndayambaje Appeal Brief, paras. 241, 242. *See also* AT. 21 April 2015 p. 71. In his notice of appeal, Ndayambaje requested the Appeals Chamber to reverse the Trial Chamber's findings regarding its assessment of the credibility of Prosecution and Defence evidence, and to exclude the testimonies of all detained Prosecution witnesses who were awaiting judgement or who were convicted for crimes related to the 1994 events as well as the evidence of the witnesses "who had any dispute with [Ndayambaje] in the past." *See* Ndayambaje Notice of Appeal, paras. 83, 84.
[6466] Ndayambaje Appeal Brief, para. 202.
[6467] Ndayambaje Appeal Brief, para. 203. *See also* Ndayambaje Notice of Appeal, para. 78; Ndayambaje Appeal Brief, paras. 206, 207.
[6468] Ndayambaje Appeal Brief, para. 198. *See also* Ndayambaje Notice of Appeal, para. 79; Ndayambaje Appeal Brief, paras. 201, 233; Ndayambaje Reply Brief, para. 78. Ndayambaje relies on the example of Prosecution Witness QAR to illustrate the Trial Chamber's alleged erroneous assessment of the testimonies of Prosecution witnesses. *See* Ndayambaje Appeal Brief, paras. 209-218; Ndayambaje Reply Brief, para. 97.
[6469] Ndayambaje Appeal Brief, para. 234.
[6470] Ndayambaje Appeal Brief, para. 225. *See also* Ndayambaje Notice of Appeal, para. 77; Ndayambaje Appeal Brief, para. 226; Ndayambaje Reply Brief, para. 63.
[6471] Ndayambaje Appeal Brief, paras. 227, 228.

2840. Ndayambaje also contends that the Trial Chamber "deliberately accused Defence witnesses of lying and attributed to them partial responsibility in the massacres" in the absence of tangible evidence against them,[6472] and relied on these "inventions" and "false incriminations and speculations" to discredit their evidence and enhance Prosecution evidence at all costs.[6473] Ndayambaje further purports that the Trial Chamber failed to provide a reasoned opinion in accepting the evidence of Prosecution witnesses who were detained at the time of their testimonies and failed to take into account this factor when evaluating their credibility, although it did so for Defence witnesses.[6474]

2841. In addition, Ndayambaje submits that the Trial Chamber considered as a "simple omission" the Prosecution's failure to include charges in the Indictment, while finding that the late notification of his alibi suggested that it was fabricated and tailored to suit the Prosecution case and faulting him for not cross-examining Prosecution witnesses about his alibi.[6475] He also argues that the Trial Chamber "saw nothing wrong" with the late addition of Prosecution Witness RV, while faulting him for reinstating Defence Witness MARVA to his witness list in 2008.[6476]

2842. The Prosecution responds that the Trial Chamber did not disbelieve Defence witnesses because of some unexplained bias but because they were not credible.[6477] It argues that Ndayambaje's generic contention that the Trial Chamber treated Prosecution and Defence witnesses differently is undeveloped and should fail because Ndayambaje merely compared isolated aspects of the Trial Chamber's assessment of the evidence without showing that the evidence of Prosecution and Defence witnesses, when seen in context, required similar treatment.[6478] The Prosecution contends that Ndayambaje's claims aimed at showing that the Trial Chamber erred

[6472] Ndayambaje Appeal Brief, para. 219 (internal reference omitted).
[6473] Ndayambaje Appeal Brief, heading 2.3.1.4 at p. 50, paras. 219-224. To illustrate his argument, Ndayambaje relies on the example of Ndayambaje Defence Witness BOZAN, whose testimony regarding the abduction of Tutsi women and girls in Mugombwa Sector was rejected by the Trial Chamber on the basis of his participation in the massacre at Mugombwa Church despite the fact that there was no evidence on the record establishing his criminal involvement. *See ibid.*, para. 229.
[6474] Ndayambaje Notice of Appeal, paras. 80, 81; Ndayambaje Appeal Brief, paras. 198, 208, 235-237. In his notice of appeal, Ndayambaje pointed to a motion in which he requested the exclusion of the testimonies of detained witnesses, which he argues was entirely rejected by the Trial Chamber, like his application for certification to appeal. *See* Ndayambaje Notice of Appeal, para. 81, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje Confidential and Extremely Urgent Motion for Inadmissibility of Testimonies of Witnesses Heard During Trial Who, Prior to their Testifying, were Detained in Lock-Ups and other Detention Centres in Rwanda, 13 October 2004 (originally filed in French, English translation filed on 18 April 2005) (confidential). In the absence of any identification of error and any substantiation in his appeal brief, the Appeals Chamber finds that Ndayambaje has abandoned this contention.
[6475] Ndayambaje Appeal Brief, paras. 204, 205.
[6476] Ndayambaje Appeal Brief, para. 205.
[6477] *See* Prosecution Response Brief, paras. 2085, 2089, 2123.
[6478] Prosecution Response Brief, paras. 2086, 2139, 2151. *See also ibid.*, para. 2087.

in its assessment of the evidence are generally undeveloped and unsupported by the record and should be summarily dismissed.[6479]

2843. The Appeals Chamber recalls that a presumption of impartiality attaches to the judges of the Tribunal and that this presumption cannot be easily rebutted.[6480] An appearance of bias exists if, notably, "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias."[6481] It is for the appealing party alleging bias to rebut the presumption of impartiality enjoyed by judges of this Tribunal.[6482] The Appeals Chamber also reiterates that it would be "truly extraordinary" that decisions rendered by a judge or a chamber could suffice to establish bias.[6483]

2844. In the present case, the Appeals Chamber observes that, like Nyiramasuhuko,[6484] Ndayambaje seeks to demonstrate bias on the part of the Trial Chamber through a fragmented view and incomplete reading of the Trial Judgement, challenging only the Trial Chamber's exercise of its discretion in assessing specific parts of the record and particular aspects of the evidence which led to adverse findings.[6485] In particular, Ndayambaje's submissions ignore the Trial Chamber's analysis that led to the rejection of Prosecution evidence implicating him in certain crimes[6486] as well as the fact that he was acquitted of some of the charges brought against him by the Prosecution.[6487] Ndayambaje also overlooks that the Trial Chamber provided reasons for rejecting the testimony of Defence witnesses[6488] and accepting the evidence of Prosecution witnesses despite

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[6479] Prosecution Response Brief, paras. 2142, 2143, 2150.
[6480] *Karemera and Ngirumpatse* Appeal Judgement, para. 24; *Hategekimana* Appeal Judgement, para. 16; *Nahimana et al.* Appeal Judgement, para. 48; *Akayesu* Appeal Judgement, para. 91. *See also Renzaho* Appeal Judgement, para. 43; *Furundžija* Appeal Judgement, para. 197. *See also supra*, paras. 95, 273, 405.
[6481] *Šainović et al.* Appeal Judgement, para. 1055; *Nahimana et al.* Appeal Judgement, para. 49, *quoting Akayesu* Appeal Judgement, para. 203. *See also Furundžija* Appeal Judgement, para. 189.
[6481] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125.
[6482] *Renzaho* Appeal Judgement, para. 23; *Karera* Appeal Judgement, para. 254; *Niyitegeka* Appeal Judgement, para. 45. *See also Rutaganda* Appeal Judgement, paras. 39-125.
[6483] *See supra*, para. 406.
[6484] *See supra*, Section IV.A.1.
[6485] Ndayambaje's challenges to the assessment of the evidence raised under Ground 8, where developed, have been addressed by the Appeals Chamber in the context of the challenges to each of his convictions. *See infra*, Sections IX.C, E-H.
[6486] *See, e.g.*, Trial Judgement, paras. 1427, 1450, 1451, 4602, 4603, 4607, 4643.
[6487] *See* Trial Judgement, paras. 5719-5728 (conspiracy to commit genocide), 5766-5768 (arrest and forced movement of refugees to Kabuye Hill as genocide), 5765, 5778-5781 (superior responsibility for the events at Mugombwa Church and Kabuye Hill), 6109-6114 (arrest and forced movement of refugees to Kabuye Hill as persecution as a crime against humanity), 6129-6131 (guarding the refugees at night at Kabuye Hill as other inhumane acts as a crime against humanity).
[6488] *See, e.g.*, Trial Judgement, paras. 1197-1199, 1202-1207, 1209, 1213-1217, 1220-1223, 1387-1396, 1401-1404, 1416, 1417, 1445, 1446, 4620, 4636, 4637-4640, 4721, 4722, 4731, 4735-4740, 4744. The Appeals Chamber has nonetheless determined that the Trial Chamber erred in failing to consider Ndayambaje Defence evidence on two occasions. *See infra*, paras. 3106, 3152, 3153.

the existence of contradictions or inconsistencies,[6489] and relied on Defence evidence in establishing certain material facts[6490] and in instances where their testimonies were not corroborative of Prosecution evidence.[6491] Likewise, Ndayambaje fails to appreciate that, where relevant, the Trial Chamber expressly referred to its assessment of the evidence of Prosecution witnesses regarding particular incidents when deliberating on the evidence of the same witnesses concerning different incidents.[6492] Contrary to Ndayambaje's claim, the Trial Judgement also reflects that the relationship between Defence witnesses and Ndayambaje was just one of several factors considered by the Trial Chamber when assessing their evidence,[6493] and that the Trial Chamber did not rely on the fact that Prosecution witnesses were Tutsis or survivors of the genocide to "excuse inconsistencies and weaknesses" in their testimonies or reject the evidence of a Defence witness merely because the witness stated that the victims of the massacres were both Tutsis and Hutus.[6494]

2845. Moreover, Ndayambaje's contention that the Trial Chamber "deliberately accused Defence witnesses of lying and attributed to them partial responsibility in the massacres" in the absence of tangible evidence and relied on these "inventions" and "false incriminations" to discredit their evidence is not supported by a review of the Trial Judgement. The passages of the Trial Judgement Ndayambaje points to reflect the Trial Chamber's normal exercise of its judicial function to draw conclusions from the evidence on the record and provide a reasoned opinion for its conclusions.[6495] The fact that the Trial Chamber may have committed some errors in the assessment of the evidence cannot reasonably be interpreted as implying any deliberate or malicious intention on the part of professional judges who are bound by the highest standards of integrity and impartiality.[6496]

[6489] The Appeals Chamber has addressed and dismissed Ndayambaje's specific challenges to the Trial Chamber's assessment of Prosecution Witness QAR in the sections examining his allegations of error pertaining to Mugombwa Church, Ndayambaje's Swearing-In Ceremony, and the abduction and killing of Tutsi women and girls from Mugombwa Sector. *See infra*, Sections IX.E.1, IX.G.1, IX.H.1. Likewise, the Appeals Chamber has found no merit in Ndayambaje's challenges to the assessment of the evidence of Prosecution Witnesses TP, QAL, FAU, RV, FAL, FAG, and QAQ related to Kabuye Hill and Ndayambaje's Swearing-In Ceremony. *See infra*, Sections IX.F.2(a)(i), (iv)-(vi), IX.G.1(b), (c), (e), (f), (h), (i).

[6490] *See, e.g.*, Trial Judgement, paras. 1227, 1229-1231, 1243, 1244, 1410, 1430, 1435, 1448, 4724-4726, 4728, 4729.

[6491] *See, e.g.*, Trial Judgement, paras. 1402, 1403, 1411, 1412.

[6492] *See, e.g.*, Trial Judgement, paras. 4602, 4710.

[6493] *See, e.g.*, Trial Judgement, paras. 1202-1206, 1209, 1213-1217, 1220-1223, 1388-1394, 1401-1404, 1417, 1446, 4636, 4742, 4744.

[6494] *See* Ndayambaje Appeal Brief, fn. 305, *referring to* Trial Judgement, paras. 1243, 1405, 1448, 4710, 4746. The Appeals Chamber notes that the Trial Chamber did not reject the evidence of Ndayambaje Defence Witness SABINE on the basis that he stated that the victims were both Hutus and Tutsis but rather because the Trial Chamber found that his testimony amounted to a denial of the genocide and suffered from internal inconsistencies. *See* Trial Judgement, para. 4722.

[6495] *See* Ndayambaje Appeal Brief, paras. 219-221, fns. 275, 284-287, 293, *referring to* Trial Judgement, paras. 1198, 1199, 1203-1206, 1212-1217, 1220-1223, 1228, 1230, 1243, 1389-1393, 1395-1398, 1401, 1446, 4636-4640, 4721, 4722, 4731, 4737, 4739, 4744.

[6496] In this respect, the Appeals Chamber refers to its finding that, although the Trial Chamber erred in its assessment of Witness BOZAN's responsibility in the massacres at Mugombwa Church at one point in the Trial Judgement, this error has not occasioned a miscarriage of justice. *See infra*, para. 3289. The Appeals Chamber does not see how this error, which is the only one Ndayambaje points to under Ground 8 of his appeal in support of his contention, shows that the Trial Chamber wrongly and deliberately tried to discredit Defence evidence as Ndayambaje claims it did.

The Appeals Chamber also notes that Ndayambaje's contention regarding the failure to consider the detained status of Prosecution witnesses is likewise without any merit as the Trial Chamber expressly considered and discussed their status when evaluating their credibility.[6497]

2846. Neither the arguments addressed above, nor Ndayambaje's remaining submissions regarding the lack of notice in the indictment, the Trial Chamber's assessment of Ndayambaje's alibi evidence, and the timing of addition of witnesses, even if they revealed errors in the Trial Chamber's exercise of its discretion, would lead a reasonable observer, properly informed, to reasonably apprehend bias on the part of the Trial Chamber.

2847. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber applied a double standard in its assessment of Prosecution and Defence evidence and to rebut the presumption of impartiality attached to the judges of the Trial Chamber. Accordingly, the Appeals Chamber dismisses Ground 8 of Ndayambaje's appeal.

See Ndayambaje Appeal Brief, para. 219, fn. 276. Similarly, the Appeals Chamber does not see how the Trial Chamber's error regarding Ndayambaje Defence Witness KEPIR's implication in the Kabuye Hill attacks discussed under Ground 7 of Ndayambaje's appeal shows bias from the Trial Chamber. *See infra*, Section IX.C.3(c)(vi).

[6497] The Appeals Chamber understands Ndayambaje's submissions and references as pointing to the evidence adduced by Prosecution Witnesses FAG, FAU, RV, QBZ, QAF, and FAL. *See* Ndayambaje Appeal Brief, para. 237, fn. 331. The Appeals Chamber observes that the Trial Chamber considered the detained status of Witnesses FAG, FAL, FAU, RV, and QAF in the Trial Judgement. *See* Trial Judgement, paras. 1226, 1429, 4630, 4713. The Appeals Chamber notes that the Trial Chamber did not rely on the evidence provided by Witness QBZ. *See ibid.*, paras. 393, 1260.

C. Alibi (Ground 7)

2848. At trial, Ndayambaje presented alibi evidence for the period of 20 through 24 April 1994, seeking to raise doubt as to his participation or involvement in: (i) the interception of refugees at Ngiryi Bridge on the morning of 20 April 1994; (ii) the subsequent massacre at Mugombwa Church on 20 and 21 April 1994; and (iii) the distribution of weapons, transportation of attackers, and attacks on Kabuye Hill from 22 through 24 April 1994.[6498]

2849. The Trial Chamber noted that Ndayambaje filed his notice of alibi less than one month before the commencement of his Defence case and took this into account when weighing the credibility of the alibi.[6499] The Trial Chamber ultimately concluded that Ndayambaje's alibi evidence failed to raise reasonable doubt with respect to the Prosecution case that Ndayambaje participated in the interception of Tutsis at Ngiryi Bridge on the morning of 20 April 1994, was present at Mugombwa Church for 15 minutes between about noon and 1.00 p.m. on 20 April 1994 and in the morning of 21 April 1994, and participated in the distribution of weapons, transportation of attackers, and attacks on Kabuye Hill from 22 through 24 April 1994.[6500]

2850. Ndayambaje argues that the Trial Chamber erred in its assessment of the late notice of alibi, reversed the burden of proof relevant to alibi evidence, and erred in its assessment of the alibi evidence.[6501] The Appeals Chamber will address these contentions in turn.

1. Notice of Alibi

2851. On 1 March 2005, the Trial Chamber directed Ndayambaje and his co-accused to "immediately make the necessary disclosures in accordance with Rule 67" of the Rules if they wished to raise an alibi.[6502] More than three years later, and less than one month before the commencement of his Defence case, on 29 April 2008, Ndayambaje filed a document entitled "*Avis additionnel et identification des témoins d'alibi*", in which he recalled that he clearly indicated in his pre-defence brief that he would be contesting his presence at Mugombwa Church and Kabuye Hill at the time of the events based on evidence that he was at the Muganza commune office and in

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[6498] Trial Judgement, paras. 1196-1218, 1220-1223, 1386-1404, 1414, 1416, 1417, 1445, 1446.
[6499] Trial Judgement, paras. 1197, 1198, 1387, 1388. Ndayambaje opened his case on 20 May 2008. *See ibid.*, para. 6582.
[6500] Trial Judgement, paras. 1218, 1244, 1245, 1390-1394, 1397, 1404, 1414, 1417, 1423, 1424, 1431, 1443-1446, 1452. *See also ibid.*, paras. 1225, 1245 (finding that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and "remained on the spot for about 15 minutes and left").
[6501] Ndayambaje Notice of Appeal, paras. 66-75; Ndayambaje Appeal Brief, paras. 139-192; Ndayambaje Reply Brief, paras. 46-60. The Appeals Chamber also addresses in this section Ndayambaje's specific and sufficiently developed challenges to the assessment of the alibi evidence raised under Grounds 8, 17, and 18 of his appeal.
[6502] Alibi Decision, para. 29, p. 7. *See also* Trial Judgement, paras. 1197, 1387, 6439.

Kibayi Commune successively.[6503] On 23 May 2008, the Trial Chamber considered that this filing of a "further notice of alibi" was the first specific notice of alibi filed by Ndayambaje and that it did not contain sufficient information pertaining to the addresses of certain proposed alibi witnesses.[6504]

2852. In the Trial Judgement, the Trial Chamber recalled that Ndayambaje failed to comply with the Alibi Decision, found that the Ndayambaje Notice of Alibi was no substitute for providing the Prosecution with formal notice of alibi in accordance with the Rules, and took this failure into account when weighing the credibility of the alibi.[6505] When considering the late notice of alibi in the context of crimes committed at Kabuye Hill, the Trial Chamber stated that "the late notice the Defence gave regarding its decision to bring alibi evidence suggests that the alibi may be a fabrication, tailored to suit the Prosecution's case."[6506]

2853. Ndayambaje submits that the Trial Chamber erred in considering that the alibi was fabricated to rebut the Prosecution case based on the late filing of his notice of alibi.[6507] To demonstrate this error, Ndayambaje contends that the Prosecution and the Trial Chamber were informed of his defence of alibi prior to the filing of the Ndayambaje Notice of Alibi through: (i) the statements he gave in 1995 and 1996 to Belgian authorities and the Prosecution; (ii) Prosecution Witness RV's February 2004 testimony; and (iii) his pre-defence brief filed in December 2004.[6508] Ndayambaje also takes specific issue with the Trial Chamber's decision to discredit the evidence of Ndayambaje Defence Witnesses MARVA and Father Tiziano Pegoraro on the "mere suspicion" that it was fabricated based on the fact that they were not identified in the Ndayambaje Notice of Alibi.[6509] In this regard, he points out that Witness MARVA was initially withdrawn from his witness list in 2006 at the Trial Chamber's request before being reinstated as an alibi witness in June 2008.[6510] Ndayambaje adds that the Trial Chamber improperly described

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[6503] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Avis additionnel et identification des témoins d'alibi*, 29 April 2008 (confidential) ("Ndayambaje Notice of Alibi"), paras. 3-6.
[6504] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Prosecution Motion for Further Particulars of Élie Ndayambaje's Alibi Pursuant to Rule 67 (A)(ii)(a), 23 May 2008 (confidential) ("23 May 2008 Decision"), paras. 1, 10, 15.
[6505] Trial Judgement, paras. 1197, 1198, 1387, 1388.
[6506] Trial Judgement, para. 1388.
[6507] Ndayambaje Appeal Brief, para. 175, *referring to* Trial Judgement, paras. 1198, 1387, 1388. *See also ibid.*, para. 185.
[6508] Ndayambaje Appeal Brief, paras. 178, 185. *See also* Ndayambaje Reply Brief, paras. 47, 49, 56; AT. 21 April 2015 p. 70. Ndayambaje also argues that the Alibi Decision directing the Defence to provide particulars of the alibi reflects that the Prosecution and the Trial Chamber were aware of his alibi defence at this date and that the Trial Chamber's later 23 May 2008 Decision reflects that the Prosecution, after having reviewed summaries contained in the Ndayambaje Pre-Defence Brief, understood that Ndayambaje would be raising an alibi. *See* Ndayambaje Appeal Brief, paras. 177, 178.
[6509] Ndayambaje Appeal Brief, para. 202, *referring to* Trial Judgement, para. 1198. *See also ibid.*, para. 205.
[6510] Ndayambaje Appeal Brief, paras. 178, 399, *referring to The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-96-42-T, Decision on Ndayambaje's Motion to Vary His List of Witnesses, 4 June 2008. Ndayambaje highlights that, by contrast, the Trial Chamber did not take into account the Prosecution's failure to indicate that certain Prosecution witnesses would testify about certain events in the evaluation of the witnesses' credibility on these particular events. *See ibid.*, paras. 202, 205.

Ndayambaje Defence Witnesses Stan, ANGES, BOZAN, and ALIZA as alibi witnesses and improperly used the late notice of alibi to reject their evidence.[6511]

2854. Ndayambaje further argues that the Trial Chamber erred in using the lateness of the notice of alibi to discard it as the Trial Judgement reflects that Ndayambaje received insufficient notice of several of the charges against him, including the fact that the dates of several crimes were not specified.[6512] In this context, and considering the investigative burdens on the Defence, Ndayambaje submits that the Trial Chamber's sole reliance on the late filing of the notice of alibi to justify adverse credibility findings of the alibi witnesses was "overly used" and "contrary to the spirit of the law" on alibi.[6513]

2855. The Prosecution responds that Ndayambaje failed not only to provide timely notice of his alibi, but that the document he filed also did not contain the particulars required to constitute a notice of alibi as required by Rule 67(A) of the Rules.[6514] It argues that, contrary to Ndayambaje's claim, neither the Belgian statements nor the Ndayambaje Pre-Defence Brief disclosed his alibi as presented at trial, and that the differences between them and the evidence adduced at trial reflect that the alibi was fabricated.[6515] The Prosecution emphasises that the failure to raise an alibi in a timely manner may suggest that it was invented to respond to the Prosecution case and contends that the contradictory and evolving nature of all of Ndayambaje's alibi evidence demonstrates that it was in fact invented.[6516]

2856. The Appeals Chamber recalls that Rule 67(A)(ii)(a) of the Rules requires the Defence to notify the Prosecution of its intent to enter a defence of alibi "[a]s early as reasonably practicable and in any event prior to the commencement of the trial". It also reiterates that the manner in which an alibi is presented may impact its credibility and further recalls that it has previously held that failure to raise an alibi in a timely manner may suggest fabrication of the alibi in order to respond to the Prosecution case.[6517]

[6511] Ndayambaje Appeal Brief, para. 176; Ndayambaje Reply Brief, para. 58.
[6512] Ndayambaje Appeal Brief, paras. 179, 180, 205, *referring to* Trial Judgement, paras. 1024, 1034, 1053, 1056, 1407, 1450, 4649. *See also ibid.*, para. 183; Ndayambaje Reply Brief, para. 46.
[6513] Ndayambaje Appeal Brief, paras. 181-185. In Ndayambaje's view, the Trial Chamber's conduct reflected a predisposition towards conviction. *See ibid.*, para. 185.
[6514] Prosecution Response Brief, paras. 2055, 2057. *See also* AT. 21 April 2015 p. 44.
[6515] Prosecution Response Brief, paras. 2056-2059. The Prosecution argues that Ndayambaje's statements to Belgian authorities and his pre-defence brief did not contain the names and addresses of alibi witnesses. *See ibid.*, para. 2057. *See also* AT. 21 April 2015 pp. 43, 44.
[6516] Prosecution Response Brief, paras. 2054, 2062. The Prosecution further argues that if an accused testifies in support of his alibi after having heard other alibi evidence, as Ndayambaje did, the trial chamber is obligated to take this into account when assessing the weight to be given to such testimony. *See ibid.*, paras. 2054, 2061. *See also* AT. 21 April 2015 p. 51.
[6517] *See, e.g.*, *Ndahimana* Appeal Judgement, paras. 113, 114; *Kanyarukiga* Appeal Judgement, paras. 97, 101, 102; *Munyakazi* Appeal Judgement, para. 18.

2857. In the present case, Ndayambaje does not dispute that he did not satisfy the requirements of Rule 67(A)(ii)(a) of the Rules in providing formal notice of his alibi only several years after the close of the Prosecution case. Instead, Ndayambaje submits that the late notice he provided should not have detracted from the alibi's credibility given that elements of his alibi were present in his prior statements to Belgian authorities and the Prosecution and in other evidence before the Trial Chamber.[6518]

2858. The Appeals Chamber, however, observes that Ndayambaje has failed to provide precise references with respect to his prior statements to Belgian authorities or the Prosecution to substantiate his argument. Moreover, the Appeals Chamber notes that the Trial Chamber sustained Ndayambaje's objection to the Prosecution using the statements to the Belgian authorities in court[6519] and that, similarly, his prior statement to the Prosecution does not form part of the trial record. Under these circumstances, Ndayambaje fails to demonstrate how any consistencies between these statements and the alibi evidence he presented at trial were relevant to the Trial Chamber's determination that the manner in which the alibi was presented could factor into its assessment of its credibility and its determination that the late notice "suggest[ed] that the alibi may be a fabrication, tailored to suit the Prosecution's case."[6520]

2859. Having reviewed the testimony of Witness RV highlighted by Ndayambaje as well as the Ndayambaje Pre-Defence Brief,[6521] the Appeals Chamber is also not persuaded that the information they provided on Ndayambaje's alibi was so comprehensive or consistent with the evidence led at trial that it would have prevented a reasonable trier of fact from considering the manner in which the alibi was raised when assessing its credibility. Ndayambaje does not demonstrate any error in this regard.[6522]

[6518] In his reply brief, Ndayambaje further argues that the 1995 statements of Witness Stan to Journalist van den Abeele and his interview before Magistrate Damien Vandermeersch also confirmed elements of his alibi. *See* Ndayambaje Reply Brief, para. 49. Having reviewed these statements, the Appeals Chamber is not persuaded that information contained in these statements prevented the Trial Chamber from considering that the late notice of alibi adversely impacted its credibility.

[6519] Ndayambaje, T. 25 November 2008 pp. 4, 5. Ndayambaje's counsel argued that the statements were obtained in violation of the Tribunal's Rules and Statute. *See idem. See also* AT. 21 April 2015 p. 69 (acknowledging that Ndayambaje's statements to the Belgian authorities were not part of the record).

[6520] Trial Judgement, para. 1388.

[6521] *See* Witness RV, T. 18 February 2004 pp. 9-11, 18, 19 (closed session); Ndayambaje Pre-Defence Brief, pp. 9 ("ANGES: [...] The witness also knows about the activities and movements of Élie Ndayambaje and his family from April to July 1994."), 13 ("GABON: [...] Moreover, around 20.4.94 he witnessed the circumstances surrounding the events when Élie Ndayambaje and his family came to seek refuge in the communal office. A few days later, he also saw Élie Ndayambaje and his family leave the communal office to go and seek refuge in the neighbouring Kibayi *commune*."), 18 ("KEPIR: [...] The witness will also be in a position to give evidence on several events that occurred in Muganza *commune* office in 1994 [...]."), 21 ("MARVA: [...] The witness followed Élie Ndayambaje's family wherever they went in 1994.").

[6522] Ndayambaje also argues that the Prosecution had remedies available to it to prevent it from being prejudiced by the late notice of alibi and that the Prosecution only exercised them with respect to two alibi witnesses, further

2860. Ndayambaje also fails to show that the Trial Chamber erred in observing in paragraphs 1198 and 1388 of the Trial Judgement that Witnesses MARVA and Tiziano were not named in the Ndayambaje Notice of Alibi. The fact that Witness MARVA was reinstated on the witness list in June 2008, after having been initially removed in January 2006, was expressly taken into consideration by the Trial Chamber[6523] and does not demonstrate any error in its analysis. More importantly, Ndayambaje's argument that Witnesses MARVA's and Tiziano's evidence was erroneously rejected on the basis that they were not identified in the Ndayambaje Notice of Appeal ignores the several other reasons the Trial Chamber relied upon in finding that their evidence did not raise reasonable doubt in the Prosecution case.[6524]

2861. With respect to Ndayambaje's contention that the Trial Chamber incorrectly described Witnesses Stan, ANGES, BOZAN, and ALIZA as alibi witnesses and improperly used the late notice of alibi to reject their evidence, the Appeals Chamber is of the view that, because the evidence of Witnesses Stan and ANGES tended to show that Ndayambaje was not present at the time of alleged crimes, it was reasonably considered as alibi evidence by the Trial Chamber.[6525] The Appeals Chamber further observes that the Trial Chamber provided reasons other than the manner in which the notice of alibi was raised to find that the evidence of Witness Stan did not raise doubt with respect to the Prosecution case[6526] and that the Trial Judgement does not reflect that Witness ANGES's evidence was rejected based on the belated notice of alibi.[6527] As for Witnesses BOZAN and ALIZA, the Trial Chamber appears to have erroneously designated their

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demonstrating that the Trial Chamber placed too much emphasis on the late notice. *See* Ndayambaje Appeal Brief, paras. 183-185. *See also* Ndayambaje Reply Brief, paras. 46, 48. The Prosecution responds that the question of whether remedies were available as a result of the late notice of alibi is irrelevant to the consideration of whether the credibility of the alibi defence is impacted due to its late disclosure. *See* Prosecution Response Brief, para. 2058. The Appeals Chamber rejects Ndayambaje's argument on the basis that a trial chamber is not required to consider whether the Prosecution suffered prejudice from the late notice of alibi when assessing its credibility. *See Ndahimana* Appeal Judgement, para. 113; *Kanyarukiga* Appeal Judgement, para. 98.

[6523] Trial Judgement, paras. 1198, 1388.

[6524] With respect to Witness MARVA, the Trial Chamber observed that the witness, an employee of Ndayambaje living in his house at the time of the events, did not specify when she saw Ndayambaje on the morning of 20 April 1994 and further found that her testimony that Ndayambaje remained with her in the same room in the "IGA building" until 23 April 1994 was contradicted by other evidence and was not credible. *See infra*, Section IX.C.3(c)(iv). As regards Witness Tiziano, the Trial Chamber found, *inter alia*, his evidence contradictory and lacking credibility as to the sequence of events in the morning of 20 April 1994. *See infra*, Section IX.C.3(c)(ii). The Appeals Chamber notes that it has determined in Section IX.C.3(c)(i) below that the Trial Chamber erred in its assessment of Witness Tiziano's alibi evidence in paragraph 1202 of the Trial Judgement but that this error has not occasioned a miscarriage of justice. *See infra*, para. 2892, fn. 6600.

[6525] *See* Trial Judgement, paras. 1213-1217, 1390, 1394, 1413, 1415. This is implicitly acknowledged by Ndayambaje in his appeal submissions, which rely on the evidence of these two witnesses as alibi evidence. *See* Ndayambaje Appeal Brief, paras. 154, 404, 410, 413, 443, 527.

[6526] In particular, the Trial Chamber found that Witness Stan's evidence concerning Ndayambaje's alibi was not credible based on: (i) the witness's testimony about his own conduct during the events and his description of the prevailing situation; (ii) inconsistencies between his evidence and prior statements; (iii) his close friendship with Ndayambaje and because he was a "close associate" of Burundian refugees implicated in massacres at Mugombwa Church and Kabuye Hill. *See infra*, Section IX.C.3(c)(iii).

[6527] *See infra*, para. 2881.

testimonies relevant to 20, 21, and 23 April 1994 as alibi evidence.[6528] Notwithstanding this error, the Trial Judgement reflects that the Trial Chamber did not reject Witness BOZAN's evidence related to this period of time,[6529] and provided reasons unrelated to the notice of alibi to find that the evidence of Witness ALIZA did not raise doubt with respect to the Prosecution case.[6530] For these reasons, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber placed improper emphasis on the late notice of alibi to discredit the evidence of either witness.[6531]

2862. Furthermore, the Appeals Chamber observes that the Trial Chamber considered that sufficient notice was given to Ndayambaje with respect to the timing of the attacks on Mugombwa Church,[6532] and that the Ndayambaje Indictment provided a precise date range of 20 to 24 April 1994 as it related to Ndayambaje's involvement in events leading up to the massacres at Kabuye Hill.[6533] Ndayambaje fails to demonstrate how alleged insufficient notice related to these events or investigative burdens would have prevented him from providing notice of his alibi in compliance with Rule 67 of the Rules.

2863. Additionally, Ndayambaje's arguments focus on two conditional statements in paragraphs 1198 and 1388 of Trial Judgement, which reflect that the manner in which the notice of alibi was raised *could* impact its credibility and the Trial Chamber's finding that the belated notice suggests that the alibi *may* be a fabrication. However, as discussed in greater detail below, a review of the Trial Chamber's analysis of Ndayambaje's alibi reflects that the Trial Chamber took into account several other factors in concluding that the alibi lacked credibility or that it was of insufficient probative value to raise reasonable doubt in the Prosecution case.

2864. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in considering the manner in which Ndayambaje raised his alibi in evaluating its credibility.

[6528] *See* Trial Judgement, para. 1196, 1415. A review of Witnesses BOZAN's and ALIZA's testimonies, as summarised by the Trial Chamber, reveals that the witnesses did not provide evidence tending to show that Ndayambaje was not present at the time of alleged crimes. *See ibid.*, paras. 1093, 1165-1177, 1319-1327.

[6529] There is no indication in the Trial Judgement that the Trial Chamber did not find the witness credible with respect to the events of 20 and 21 April 1994 at Mugombwa Church. In fact, the Trial Chamber relied on Witness BOZAN's testimony as corroborative of some aspects of the Prosecution evidence. *See* Trial Judgement, paras. 1227, 1228, 1235. The Appeals Chamber discusses the Trial Chamber's assessment of Witness BOZAN's evidence on 20 and 21 April 1994 at length in Section IX.E.4(c).

[6530] *See* Trial Judgement, paras. 1413, 1415 (assessing the credibility or probative value of the evidence of Witnesses Stan and ALIZA).

[6531] *See also infra*, paras. 2881, 3014.

[6532] *See* Trial Judgement, para. 1031 (finding that Ndayambaje had sufficient notice of attacks at Mugombwa Church "in late April 1994").

[6533] *See* Ndayambaje Indictment, paras. 6.30-6.32. *See also* Trial Judgement, para. 1248.

2. Reversal of the Burden of Proof

2865. The Trial Chamber set forth the relevant principles concerning the assessment of the alibi evidence in paragraphs 185 through 187 of the Trial Judgement. The Trial Chamber notably stated that "[t]o sustain a conviction, the Prosecution must demonstrate that, regardless of the alibi, the facts as alleged are true beyond a reasonable doubt, either by demonstrating that the alibi evidence offered does not negate the presence of the accused at the critical place and at the critical time, or that the alibi evidence is not credible."[6534]

2866. Ndayambaje submits that the Trial Chamber misconstrued the standard of proof applicable to alibi evidence when stating that the Prosecution must demonstrate that the alibi evidence offered "does not negate" the presence of the accused at the critical place and time.[6535] He contends that the Trial Chamber discarded alibi evidence that did not "negate" the Prosecution evidence and improperly shifted the burden of proof on to him.[6536] He points to particular language in paragraphs 1198, 1201, 1209, 1211, 1212, 1220, 1223, 1396, 1400, 1403, and 1404 of the Trial Judgement as a reflection of this burden shifting.[6537] Ndayambaje further contends that the Trial Chamber erroneously applied a beyond reasonable doubt standard in its assessment of some alibi evidence.[6538] In this regard, he refers to the assessment of Witness MARVA's evidence and points out that the Trial Chamber assessed and discredited the alibi evidence prior to its assessment of the Prosecution evidence.[6539]

2867. The Prosecution responds that the Trial Chamber correctly stated the burden of proof applicable to the assessment of alibi evidence and did not reverse the burden of proof.[6540] In its view, the Trial Chamber did not use the term "negate" in the manner in which it had been found in the *Zigiranyirazo* case to show a reversal of the burden of proof, but used this term to explain that alibi evidence may be "irrelevant if it does not address the accused's whereabouts at the critical time".[6541] The Prosecution also contends that the language identified by Ndayambaje in the Trial Judgement does not show that the Trial Chamber reversed the burden of proof.[6542] It adds that the Trial Chamber did not have to address evidence in a specific order.[6543]

[6534] Trial Judgement, para. 186, *referring to Zigiranyirazo* Appeal Judgement, para. 18.
[6535] Ndayambaje Notice of Appeal, paras. 66, 69; Ndayambaje Appeal Brief, para. 145.
[6536] Ndayambaje Appeal Brief, paras. 140, 146, *referring to Zigiranyirazo* Appeal Judgement, para. 19. *See also ibid.*, paras. 139, 141-143.
[6537] Ndayambaje Appeal Brief, paras. 147, 158, 160, 162. *See also ibid.*, paras. 148, 173, 174.
[6538] Ndayambaje Appeal Brief, para. 151.
[6539] Ndayambaje Appeal Brief, paras. 151, 167, 182, 188.
[6540] Prosecution Response Brief, paras. 2063-2065.
[6541] Prosecution Response Brief, paras. 2064, 2065.
[6542] Prosecution Response Brief, para. 2066.
[6543] Prosecution Response Brief, para. 2072. *See also ibid.*, para. 2129.

2868. The Appeals Chamber observes that, when setting forth the principles concerning the assessment of alibi evidence, the Trial Chamber stated that alibi "does not carry a separate burden of proof" and that "[i]f the defence is reasonably possibly true, it must be successful."[6544] It then recalled the standard of assessing alibi evidence as articulated by the Appeals Chamber in the *Zigiranyirazo* case, stating that "alibi does not shift the burden of proof to the accused" and that if the alibi evidence is "'likely to raise a reasonable doubt in the Prosecution case,' and '[...] is reasonably possibly true, it must be accepted.'"[6545] It is in this context that the Trial Chamber stated that "[t]o sustain a conviction, the Prosecution must demonstrate that, regardless of the alibi, the facts as alleged are true beyond a reasonable doubt, [...] by demonstrating that the alibi evidence offered does not negate the presence of the accused at the critical place and at the critical time".[6546]

2869. The Appeals Chamber recalls that phrasing such as "an accused must 'negate' the Prosecution evidence" might indicate that a trial chamber misapplied the burden of proof.[6547] However, the statement with which Ndayambaje takes issue does not indicate that the Trial Chamber imposed a burden on the Defence to negate the Prosecution case. To the contrary, the impugned statement expressly relates to the burden of the *Prosecution* to prove its case beyond reasonable doubt despite the alibi.[6548] As recalled above, the Trial Chamber clearly specified that introducing an alibi does not carry a separate burden of proof and that, if the alibi is reasonably possibly true, it must be accepted.

2870. The Appeals Chamber also rejects Ndayambaje's contention that the particular language identified in paragraphs 1198, 1201, 1209, 1211, 1212, 1220, 1223, 1396, 1400, 1403, and 1404 of the Trial Judgement reflects that the Trial Chamber required Ndayambaje to "negate" the Prosecution evidence.[6549] With respect to paragraph 1198 of the Trial Judgement, the language identified by Ndayambaje simply indicates that he did not challenge the Prosecution witnesses with the proposition that Ndayambaje was not at the scene of the crime and that this, in the view of the

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[6544] Trial Judgement, para. 185.
[6545] Trial Judgement, para. 186, *quoting Zigiranyirazo* Appeal Judgement, para. 17.
[6546] Trial Judgement, para. 186.
[6547] *Zigiranyirazo* Appeal Judgement, para. 19.
[6548] Indeed, the Appeals Chamber observes that the Trial Chamber referred to paragraph 18 of the *Zigiranyirazo* Appeal Judgement when articulating this standard. There, the Appeals Chamber, in relevant respects, stated: "Where an alibi is properly raised, the Prosecution must establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true. The Prosecution may do so, for instance, by demonstrating that the alibi does not in fact reasonably account for the period when the accused is alleged to have committed the crime."
[6549] Ndayambaje argues that the Trial Chamber speculated as to his whereabouts and discarded alibi evidence from witnesses who were unable to "guarantee [Ndayambaje's] whereabouts that they were testifying to". *See* Ndayambaje Appeal Brief, para. 172, *referring to* Trial Judgement, paras. 1398, 1402-1404. With the exception of his specific contentions concerning paragraphs 1403 and 1404 of the Trial Judgement which are addressed below, Ndayambaje does not develop this argument further. Having reviewed the relevant paragraphs, the Appeals Chamber dismisses this argument without further consideration as Ndayambaje fails to demonstrate any error.

Trial Chamber, detracted from the credibility of the alibi.[6550] This is consistent with the Trial Chamber's conclusion that the belated nature of the notice of alibi impacted its credibility.[6551]

2871. As for the statements identified by Ndayambaje in paragraphs 1201, 1209, and 1211 of the Trial Judgement,[6552] which are repeated in part in paragraphs 1400 and 1403, the Trial Chamber's analysis reflects that the alibi evidence concerning Ndayambaje's whereabouts on the morning of 20 April 1994 was not comprehensive and, by implication, did not reasonably account for the period when he was alleged to have engaged in the relevant conduct. The additional language identified by Ndayambaje in paragraphs 1209[6553] and 1404[6554] of the Trial Judgement does not suggest the imposition of a burden to negate the Prosecution case, but is merely an express reflection of the Trial Chamber's finding that the alibi evidence for the morning of 20 April 1994 was not reasonably possibly true.

2872. With respect to paragraphs 1212 and 1396 of the Trial Judgement, where the Trial Chamber stated that it did not find Ndayambaje's account regarding his whereabouts, and those of his mother on 20 April 1994 to be convincing, the Appeals Chamber considers that using the term "convincing" could suggest an incorrect standard for assessing alibi evidence.[6555] However, read in the context of the analysis that preceded this statement, the Appeals Chamber finds that the Trial Chamber was merely expressing that Ndayambaje's evidence was *prima facie* "not credible" and was contradicted by other evidence.[6556]

[6550] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, para. 1198 ("[T]he Prosecution witnesses were not confronted with the Defence's assertion that Ndayambaje could not have been at the scene of the events because he had an alibi. This further detracts from the credibility of the alibi."). *See also ibid.*, para. 205.
[6551] Trial Judgement, para. 1198. *See also ibid.*, para. 1388.
[6552] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, paras. 1201 ("Witness MARVA [...] does not specify when she saw him for the first time that day."), 1209 ("Witness MARVA did not testify to the whereabouts of the Accused during a substantial part of the morning of 20 April 1994."), 1211 ("Recalling Witness MARVA's evidence above, it is clear that her alibi evidence does not cover the period between 12.00 p.m. and 1.00 p.m. on 20 April 1994"). In addition, Ndayambaje argues that the Trial Chamber's conclusion in paragraph 1211 that "this would be more than enough time for Ndayambaje to travel from Muganza *commune* office to his house and the church" is an additional reflection that it imposed a burden on the alibi to exclude the Prosecution case, rather than require the Prosecution to prove its case beyond a reasonable doubt. *See ibid.*, para. 158. The Appeals Chamber is not persuaded by this argument as this statement, read in context, reflects the Trial Chamber weighing the probative value of alibi evidence in light of the proximity of locations and the time to take to travel between them. *See* Trial Judgement, para. 1211.
[6553] Ndayambaje Appeal Brief, para. 160, *quoting* Trial Judgement, para. 1209 ("[T]he Chamber considers that he could have made a return trip from his home to Gisagara in the time between being seen by Witness RV at around 7.30 a.m. and hiding Chanvrier in his guest room [...]. In the absence of any other explanation for the Accused's whereabouts, the Chamber considers that the Defence alibi evidence is not reasonably possibly true, and therefore finds it does not raise a reasonable doubt in the Prosecution case as regards the morning of 20 April 1994.").
[6554] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, para. 1404 ("In the absence of any other explanation for the Accused's whereabouts, the Chamber considers the Defence alibi as regards the morning of 20 April 1994 not to be reasonably possibly true."). *See also ibid.*, paras. 157, 158, 172.
[6555] *Cf. Zigiranyirazo* Appeal Judgement, para. 19.
[6556] Trial Judgement, paras. 1212, 1395.

2873. Likewise, the statements from paragraphs 1220 and 1223 of the Trial Judgement pointed out by Ndayambaje[6557] do not show that the Trial Chamber imposed a burden on him to negate the Prosecution case. Rather the Trial Chamber's analysis reveals its conclusion that Defence witnesses' testimonies that they were with Ndayambaje at all times and that he never left the Muganza commune office compound on 21 April 1994 were not credible given the size and layout of the commune office as well as the number of people present.

2874. Turning to Ndayambaje's assertion that the Trial Chamber applied a beyond reasonable doubt standard in assessing some alibi evidence, the Appeals Chamber recalls that an accused does not bear the burden of proving his alibi beyond reasonable doubt.[6558] Rather the accused must simply produce evidence tending to show that he was not present at the time of the alleged crime.[6559] In this case, the Appeals Chamber observes that the Trial Chamber's assessment of Witness MARVA's alibi evidence pointed out by Ndayambaje does not suggest the application of an incorrect burden of proof.[6560] In the same vein, the Appeals Chamber finds that the manner in which the Trial Chamber organised its assessment of the evidence, primarily identifying and assessing the alibi evidence before assessing the merits of the Prosecution evidence, in no way reflects a failure to properly apply the applicable burden of proof.

2875. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to show that the Trial Chamber misconstrued the relevant standard of proof applicable to alibi evidence or reversed the burden of proof.

3. Assessment of Alibi Evidence

2876. Ndayambaje submits that the Trial Chamber erred in assessing the alibi evidence relevant to his participation in the events at Ngiryi Bridge, Mugombwa Church, and Kabuye Hill.[6561]

[6557] Ndayambaje Appeal Brief, para. 147, *quoting* Trial Judgement, paras. 1220 ("With respect to the alibi evidence brought by the Defence regarding the whereabouts of Ndayambaje on 21 April 1994, Witness GABON testified that Ndayambaje did not leave the *commune* office compound on 21 April 1994. [...] Witness GABON would therefore not have had sight of Ndayambaje at all times during 21 April 1994 due to the size and layout of the *commune* office"), 1223 ("Given the relatively large geographical space and the large number of people present at the *commune* office, the Chamber does not find that the evidence of Witnesses GABON, KEPIR and MARVA that they were with Ndayambaje at all times over the course of 21 April 1994 to be credible and finds that they were not in a position to state that Ndayambaje never left the *commune* office on 21 April 1994."). *See also ibid.*, para. 162; Ndayambaje Reply Brief, paras. 53, 55. The Appeals Chamber considers that Ndayambaje's piecemeal quotation of these paragraphs of the Trial Judgement omits analysis showing that the Trial Chamber properly assessed alibi evidence in light of the applicable standard.

[6558] *See, e.g., Nizeyimana* Appeal Judgement, para. 35; *Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Nahimana et al.* Appeal Judgement, para. 414.

[6559] *See, e.g., Ndahimana* Appeal Judgement, para. 91; *Zigiranyirazo* Appeal Judgement, para. 17; *Musema* Appeal Judgement, para. 202.

[6560] Ndayambaje Appeal Brief, paras. 151, *referring to* Trial Judgement, para. 1201. *See also* Trial Judgement, paras. 1221, 1222, 1416, 1417.

[6561] Ndayambaje Appeal Brief, paras. 173, 174.

Specifically, he contends that the Trial Chamber erred in: (i) failing to consider evidence supporting his alibi; (ii) improperly relying on his relationships with the alibi witnesses; and (iii) its assessment of the alibi evidence.[6562] Ndayambaje requests that the Appeals Chamber reverse the findings of the Trial Chamber and re-assess the alibi evidence.[6563]

2877. Prior to addressing Ndayambaje's contentions, the Appeals Chamber reiterates that a trial chamber enjoys broad discretion in assessing the credibility of witnesses and in determining the weight to be accorded to each testimony.[6564] It is within the discretion of the trial chamber to consider whether the evidence taken as a whole is reliable and credible, and to accept or reject the fundamental features of the evidence.[6565]

(a) Failure to Consider Evidence

2878. Ndayambaje contends that Witnesses ANGES and RV provided evidence that confirmed his alibi with respect to the events at Mugombwa Church but that the Trial Chamber ignored it.[6566] Specifically, Ndayambaje argues that the Trial Chamber failed to consider Witness ANGES's testimony that, on 20 April 1994, she saw him at his residence in Mugombwa at 7.30 a.m. and later on the road from Mugombwa around noon, and Witness RV's testimony that Ndayambaje did not leave the Muganza commune office in the morning of 21 April 1994.[6567]

2879. The Prosecution responds that the Trial Chamber assessed and rejected Witness ANGES's evidence relating to 20 April 1994, which lacked credibility, and that Witness RV did not testify that Ndayambaje never left the Muganza commune office in the morning of 21 April 1994.[6568]

2880. The Appeals Chamber observes that the Trial Chamber found that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and was there for about 15 minutes.[6569]

[6562] Ndayambaje Notice of Appeal, para. 72; Ndayambaje Appeal Brief, paras. 149-152, 154, 156, 163, 168, 202, 387-389, 395, 405-412. *See also* Ndayambaje Reply Brief, paras. 52, 54-58; AT. 21 April 2015 pp. 25, 26.
[6563] Ndayambaje Appeal Brief, para. 192. *See also ibid.*, para. 191.
[6564] *Ndahimana* Appeal Judgement, para. 43; *Kanyarukiga* Appeal Judgement, para. 121; *Bikindi* Appeal Judgement, para. 114.
[6565] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[6566] Ndayambaje Appeal Brief, paras. 163, 345, 347, 359, 404, 418. *See also* Ndayambaje Notice of Appeal, paras. 141, 143, 149; Ndayambaje Reply Brief, para. 132.
[6567] Ndayambaje Appeal Brief, paras. 163, 345, 347, 359, 404, *referring, inter alia, to* Trial Judgement, paras. 1162-1164, Witness RV, T. 16 February 2004 pp. 37-43, 49 (closed session), T. 18 February 2004 pp. 10, 11, 18-23 (closed session). *See also* Ndayambaje Notice of Appeal, paras. 141, 143, 149; Ndayambaje Reply Brief, para. 132, *referring to* Witness RV, T. 18 February 2004 p. 19 (closed session).
[6568] Prosecution Response Brief, paras. 2076, 2189, 2264, 2265.
[6569] Trial Judgement, para. 1245. The Appeals Chamber has concluded in Section IX.E.3 below that the Trial Chamber erred in finding that Ndayambaje was present at Bishya trade centre on the morning of 20 April 1994 but that this error has not occasioned a miscarriage of justice as that event was not a basis for Ndayambaje's convictions. *See infra*, para. 2991. In this context, the Appeals Chamber considers it unnecessary to assess the alibi in relation to Ndayambaje's presence at Bishya trade centre on 20 April 1994.

It further found established beyond reasonable doubt that Ndayambaje came to Mugombwa Church for half an hour at around 10.00 a.m. on 21 April 1994, left and returned around 10.30 a.m. before departing again.[6570]

2881. The Trial Chamber expressly set forth Witness ANGES's evidence that Ndayambaje claims is relevant to his alibi, namely that she saw Ndayambaje at his residence at around 7.30 a.m. on 20 April 1994 and later saw him driving on the road from Mugombwa towards the Muganza commune office in Remera Sector around midday.[6571] The Trial Chamber likewise noted that Witness ANGES provided alibi evidence in relation to the events at Mugombwa Church.[6572] While the Trial Chamber did not expressly discuss this evidence in the course of its deliberations, the Appeals Chamber, mindful that a trial chamber is not required to articulate every step of its reasoning for each finding it makes or refer to every piece of evidence on the trial record,[6573] is not convinced that the witness's evidence was such that it required express consideration in the Trial Judgement. Indeed, the Appeals Chamber notes that Ndayambaje's presence at his home around 7.30 a.m. on 20 April 1994 was not disputed.[6574] Witness ANGES's testimony that she saw Ndayambaje driving on the road from Mugombwa towards the Muganza commune office in Remera Sector around midday that day is also not necessarily inconsistent with the Trial Chamber's finding that "Ndayambaje came to Mugombwa Church at about noon on 20 April 1994" and "remained on the spot for about 15 minutes and left".[6575]

2882. Turning to the evidence of Witness RV, the Appeals Chamber notes that, while the Trial Chamber did not expressly recount the witness's evidence about Ndayambaje's presence at the Muganza commune office on the morning of 21 April 1994,[6576] it referred to the relevant portions of the transcripts that contain this evidence.[6577] The Appeals Chamber sees no error in the Trial Chamber's decision not to address expressly this testimony in the Trial Judgement. Witness RV's evidence was general in nature and, while the witness mentioned Ndayambaje's presence at the

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[6570] Trial Judgement, para. 1246.
[6571] *Compare* Ndayambaje Appeal Brief, para. 404 (*referring to* Witness ANGES, T. 20 August 2008 pp. 26, 27, 34, 35, 37-40) *with* Trial Judgement, paras. 1162-1164 (*referring, inter alia, to* Witness ANGES, T. 20 August 2008 pp. 26, 27, 31, 32).
[6572] Trial Judgement, para. 1196. Notably, the Trial Chamber recalled that "all of the alibi witnesses have close ties to Ndayambaje." *See ibid.*, para. 1199. While the Trial Chamber did not expressly refer to Witness ANGES in this context, the witness's testimony reflects that she had known Ndayambaje for years and was a former employee of Ndayambaje who had frequent contact with him in that capacity. *See* Witness ANGES, T. 20 August 2008 pp. 16, 17, 19, 20, 43 (closed session).
[6573] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 215; *Ntabakuze* Appeal Judgement, para. 161; *Kvočka et al.* Appeal Judgement, para. 23.
[6574] *See* Trial Judgement, paras. 1200, 1202, 1209. *See also ibid.*, paras. 1065, 1067.
[6575] *See* Trial Judgement, para. 1245. *See also ibid.*, para. 1218 (finding that Ndayambaje's alibi "does not raise a reasonable doubt in the Prosecution case that Ndayambaje was present at Mugombwa Church for 15 minutes between about noon and 1.00 p.m. on 20 April 1994.").
[6576] Witness RV, T. 18 February 2004 pp. 18 (closed session), 19.
[6577] *See* Trial Judgement, para. 1070, fn. 2160.

Muganza commune office on that morning, he did not specify whether he was in a position to observe that Ndayambaje remained at the commune office the whole morning of 21 April 1994.[6578] Witness RV's testimony therefore lacked probative value as to Ndayambaje's continued presence at the Muganza commune office on 21 April 1994.[6579]

2883. Consequently, the Appeals Chamber finds that Ndayambaje has not shown that the Trial Chamber erred in failing to consider evidence relevant to his alibi.

(b) Relationships with Alibi Witnesses

2884. Ndayambaje argues that the Trial Chamber erred by rejecting alibi evidence from witnesses who had professional, personal, or financial ties with him, ignoring that these would be the people with whom Ndayambaje would be in contact during a crisis and who would recall being with him.[6580]

2885. The Prosecution responds that the Trial Chamber did not err in considering, among other factors, the personal ties between Ndayambaje and the alibi witnesses when assessing their credibility.[6581]

2886. The Appeals Chamber recalls that it is settled jurisprudence that a witness's close personal relationship to an accused is one of the factors which a trial chamber may consider in assessing the witness's evidence.[6582] The Appeals Chamber finds that the Trial Chamber did not err in considering these circumstances or in placing improper emphasis on them when assessing the alibi evidence.[6583] In particular, the Appeals Chamber notes that the relationship between alibi witnesses

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[6578] *See* Witness RV, T. 18 February 2004 pp. 19-22 (closed session). The Appeals Chamber also observes that Witness RV was not questioned about Witness QAR's testimony that Ndayambaje came to Mugombwa Church on the morning of 21 April 1994.

[6579] The Appeals Chamber observes that the Trial Chamber also dismissed alibi evidence that, similar to Witness RV's evidence, lacked probative value. *See* Trial Judgement, para. 1223.

[6580] Ndayambaje Notice of Appeal, para. 72; Ndayambaje Appeal Brief, paras. 149, 152, 168, 395, 400, 402, 405, 406; Ndayambaje Reply Brief, para. 52. *See also* AT. 21 April 2015 p. 25.

[6581] Prosecution Response Brief, paras. 2067, 2068, 2249, 2262, 2270, 2273.

[6582] *See, e.g., Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.

[6583] Ndayambaje has pointed to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with alibi witnesses. Ndayambaje merely argues that the Trial Chamber observed that he did not have any *de jure* or *de facto* control over Witness GABON, suggesting that the Trial Chamber erred in assessing his relationship with the witness. *See* Ndayambaje Appeal Brief, paras. 402, 403. However, Ndayambaje does not dispute the evidence concerning the nature of their relationship prior to 1994 nor demonstrate how the absence of *de jure* or *de facto* authority over the witness in 1994 prevented a reasonable trier of fact from noting their prior relationship when assessing Witness GABON's testimony.

and Ndayambaje was just one of several factors considered by the Trial Chamber when assessing their evidence.[6584] The Appeals Chamber therefore dismisses this contention.

(c) Assessment of the Alibi Evidence

2887. Ndayambaje argues that the Trial Chamber erred in assessing and discrediting his evidence as well as evidence of Witnesses Tiziano, Stan, MARVA, GABON, and KEPIR.[6585] The Appeals Chamber will assess Ndayambaje's challenges as they relate to him and each witness in turn.[6586]

(i) Ndayambaje

2888. The Trial Chamber found that the evidence of Ndayambaje and Witness Tiziano that Ndayambaje was at his home at 9.00 a.m. on 20 April 1994 was contradicted by Witness RV and was therefore not credible.[6587] In this context, it noted that "Ndayambaje's testimony must be treated with appropriate caution as he has a personal interest in demonstrating that he was not present at Ngiryi Bridge on the morning of 20 April 1994."[6588] The Trial Chamber also did not find Ndayambaje's account as to why he did not evacuate his mother on 20 April 1994 convincing, which cast further "doubt on the version of events given by Ndayambaje."[6589] It also considered that the evidence of Ndayambaje as well as the evidence of Witnesses GABON, KEPIR, and MARVA that Ndayambaje never left the Muganza commune office on 21 April 1994 was not credible.[6590]

2889. Ndayambaje contends that the Trial Chamber violated the presumption of innocence by assuming, without any proof, that he had an incentive to minimise his role in the events.[6591] With respect to his alibi for 20 April 1994 in particular, he submits that the Trial Chamber: (i) used insignificant contradictions in his evidence and that of Witnesses RV and Tiziano to undermine the credibility of his alibi; (ii) contradicted itself by finding an artificial contradiction between Witness RV's evidence, on one hand, and Ndayambaje's and Witness Tiziano's evidence, on the other, after having determined that their testimonies were coherent regarding their movements and how they met; and (iii) erred in finding him not credible based on the evidence that he did not

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[6584] *See* Trial Judgement, paras. 1198-1201, 1203-1207, 1209-1211, 1220-1223, 1389-1394, 1400, 1402-1404, 1413, 1416, 1417, 1445, 1446.
[6585] Ndayambaje Appeal Brief, paras. 150-152, 154-156, 169, 170, 201, 202, 387-389, 395-398, 401-403, 405-415, 417. *See also* AT. 21 April 2015 p. 23.
[6586] In several instances, Ndayambaje generally challenges the Trial Chamber's assessment of the alibi evidence without articulating or identifying how it erred. *See* Ndayambaje Appeal Brief, paras. 443, 477, 479, 527, 529, 579. The Appeals Chamber has assessed Ndayambaje's challenges pertaining to specific witnesses and evidence when developed elsewhere in his appeal but has declined to address his general and unsubstantiated arguments which fail to satisfy the formal requirements applicable on appeal. *See supra*, Section II.
[6587] Trial Judgement, paras. 1200, 1203, 1401.
[6588] Trial Judgement, paras. 1203, 1401.
[6589] Trial Judgement, para. 1212.
[6590] Trial Judgement, para. 1223.
[6591] Ndayambaje Appeal Brief, paras. 413, 415, *referring to* Trial Judgement, paras. 1203, 1401.

immediately evacuate his mother on 20 April 1994.[6592] As regards his alibi for 21 April 1994, Ndayambaje contends that his evidence that he did not leave the Muganza commune office on 21 April 1994 was corroborated by Witnesses GABON, MARVA, and KEPIR and was improperly rejected based on an incorrect assessment of the size of the commune office compound due to the Trial Chamber's failure to conduct a site visit.[6593]

2890. The Prosecution responds that the Trial Chamber was entitled to consider Ndayambaje's incentive to deny criminal conduct and that, contrary to his claim, the Trial Chamber considered several other factors when finding that his evidence was not credible.[6594]

2891. The Appeals Chamber notes that the Trial Chamber's statement that "Ndayambaje's testimony must be treated with appropriate caution as he has a personal interest in demonstrating that he was not present at Ngiryi Bridge on the morning of 20 April 1994"[6595] followed the Trial Chamber's assessment of Ndayambaje's and Witness Tiziano's evidence placing Ndayambaje at his home around 9.00 a.m.[6596] The Trial Chamber did not find this aspect of Ndayambaje's and Witness Tiziano's testimonies credible as it was contradicted by Witness RV's evidence.[6597] The Appeals Chamber finds that a reasonable trier of fact could have considered the possibility of Ndayambaje's incentive to provide exculpatory evidence in the context of all the relevant evidence and that the Trial Chamber's consideration does not denote a violation of the presumption of innocence.[6598]

2892. Moreover, while Ndayambaje argues that the inconsistencies in his and Witness Tiziano's evidence and that of Witness RV are insignificant, he fails to demonstrate any error in the Trial Chamber's exercise of its discretionary power in assessing this evidence.[6599] In addition, although

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[6592] Ndayambaje Appeal Brief, paras. 150, 154, 387, 414. Ndayambaje argues that the evidence showed that the decision to flee was taken in a hurry in light of the emergency and that it was never established that his mother lived under his roof or was under his care or that he allegedly abandoned or neglected his mother. *See ibid.*, para. 414. *See also* Ndayambaje Reply Brief, paras. 164, 165.
[6593] Ndayambaje Appeal Brief, para. 417, *referring to* Trial Judgement, para. 1223.
[6594] Prosecution Response Brief, paras. 2281-2283.
[6595] Trial Judgement, paras. 1203, 1401.
[6596] Trial Judgement, para. 1200.
[6597] Trial Judgement, para. 1200.
[6598] *Cf. Musema* Appeal Judgement, para. 50 ("It is correct to state that the sole fact that evidence is proffered by the accused is no reason to find that it is, *ipso facto*, less reliable. Nevertheless, the source of a document may be relevant to the Trial Chamber's assessment of the reliability and credibility of that document. Where such a document is tendered by an accused, a Trial Chamber may determine, for example, if the accused had the opportunity to concoct the evidence presented and whether or not he or she had cause to do so. This is part of the Trial Chamber's duty to assess the evidence before it.").
[6599] The Trial Chamber observed that Ndayambaje and Witness Tiziano testified that Ndayambaje went to Witness Tiziano's home around 6.00 a.m., departed to see Witness RV, and returned to Ndayambaje's home around 9.00 a.m. *See* Trial Judgement, para. 1200. While Witness RV confirmed that Ndayambaje and Witness Tiziano came to see him around 6.00 a.m., he testified to going to Ndayambaje's home at 7.30 a.m. and informing Ndayambaje and Witness Tiziano that he was going to Butare, which the Trial Chamber found contradicted the evidence of Ndayambaje and Witness Tiziano that they waited in vain for Witness RV outside Ndayambaje's residence at 9.00 a.m. in order to

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Ndayambaje correctly notes that the Trial Chamber reached contradictory conclusions as to whether his evidence and that of Witness Tiziano was inconsistent, he fails to demonstrate how the error occasioned a miscarriage of justice.[6600]

2893. With respect to Ndayambaje's submission that the Trial Chamber erred in emphasising that he did not evacuate his mother from the Mugombwa health centre with the rest of his family when they left for the Muganza commune office on 20 April 1994, the Appeals Chamber considers that, in determining whether his alibi was reasonably possibly true, it was within the Trial Chamber's discretion to consider and assess his claim that he fled with his family to seek refuge in the commune office on 20 April 1994, yet failed to bring his mother with them despite her proximity to Ndayambaje's home. While Ndayambaje contends that no evidence demonstrated that the situation was sufficiently alarming when he evacuated his family to the commune office or that he was responsible for and consequently abandoned his mother, he ignores the Trial Chamber's observation that three nuns in charge of the health centre fled Mugombwa parish in the afternoon of 20 April 1994.[6601]

2894. Turning to Ndayambaje's contention regarding the assessment of his alibi for 21 April 1994, the Appeals Chamber observes that Ndayambaje points to no evidence demonstrating that the Trial Chamber incorrectly described the Muganza commune office as a "relatively large geographical space" or stated that there were a "large number of people present" on that day.[6602] As discussed in

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go to Kabuga to address the population. *See idem.* Consequently, the Appeals Chamber finds that a reasonable trier of fact could have found that Witness RV's evidence was materially inconsistent with the evidence of Ndayambaje and Witness Tiziano.

[6600] The Trial Chamber recalled that Witness Tiziano testified that Ndayambaje came to see him around 6.00 a.m. on 20 April 1994, that they went to see Witness RV, that they left the commune office together, that the witness dropped Ndayambaje near his home at an unspecified time before 9.00 a.m., and that the witness later saw Ndayambaje again at the latter's home around 9.00 a.m. *See* Trial Judgement, para. 1200. The Trial Chamber noted this evidence was "consistent with Ndayambaje's account of his movements on the morning of 20 April 1994" and that Witness RV confirmed that Ndayambaje and Witness Tiziano did come to see him at 6.00 a.m. *See idem.* However, the Trial Chamber later concluded that Witness Tiziano's "testimony contradicts that of Ndayambaje and Witness RV regarding Ndayambaje's movements on 20 April 1994." *See ibid.*, para. 1202. To support its conclusion, the Trial Chamber highlighted Witness Tiziano's evidence that "he went to Ndayambaje's house at about 9.30 a.m. and left shortly afterwards to return to the parish", that this "was the last time that he saw Ndayambaje", and that he "further testified that when he drove to the Muganza *commune* office at around 11.30 a.m. to report the situation to the authorities, he was alone." *See idem.* The Trial Chamber found that this evidence "contradicts Ndayambaje's testimony that he went to [Witness] Tiziano's house at 6.00 a.m. and that they went to the Muganza *commune* office together to warn the authorities of the insecurity in the area" and that "Ndayambaje's testimony is in concordance with that of Witness RV who testified that he was woken at 6.00 a.m. by Ndayambaje and Father Tiziano warning him of insecurity in the area." *See idem.* The Appeals Chamber finds that the Trial Chamber's analysis is contradictory in this regard. *See also* Prosecution Response Brief, para. 2241. However, the error has no impact on the Trial Chamber's conclusion that the evidence of Ndayambaje and Witness Tiziano on Ndayambaje's presence at his home at around 9.00 a.m. is not credible, as their evidence that they returned to Ndayambaje's home only around 9.00 a.m. remains inconsistent with Witness RV's evidence that he saw them there around 7.30 a.m. *See* Trial Judgement, paras. 1200, 1202.

[6601] Trial Judgement, para. 1212.

[6602] *See* Trial Judgement, para. 1223. The Appeals Chamber observes that the Trial Chamber relied, in part, on a sketch provided by Ndayambaje when stating that the Muganza commune office comprises a number of buildings. *See* Trial Judgement, para. 1220, *referring to* Exhibit D694 (Sketch Map, by Ndayambaje).

detail below in Section IX.D of this Judgement, Ndayambaje also fails to demonstrate any error in the Trial Chamber's decision not to conduct a site visit.[6603] The Appeals Chamber considers that it was within the Trial Chamber's discretion to consider that the relatively large area of the Muganza commune office, coupled with the large number of people present on 21 April 1994, supported the conclusion that Witnesses KEPIR, GABON, and MARVA were not in a position to state that Ndayambaje never left the commune office on 21 April 1994.[6604]

2895. Accordingly, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of his evidence regarding his whereabouts on 20 and 21 April 1994.

(ii) Witness Tiziano

2896. The Trial Chamber found that Witness Tiziano's testimony that he had asked those seeking refuge in Mugombwa Church to leave because it was not safe and, on cross-examination, that he asked them to lay down their weapons because he did not think the refugees would be attacked in the church was contradictory.[6605] The Trial Chamber also stated that "Witnesses QAR and FAU gave first-hand testimony that Father Tiziano attempted to, or succeeded in locking the doors to the church in the morning of 20 April 1994 before leaving the site."[6606] On this basis, it later concluded that, "[c]onsidering the testimon[ies] of Witnesses QAR and FAU placing Father Tiziano at the massacre site and Father Tiziano's incentive to minimise his role, in addition to his testimony that he did not request help for those seeking refuge in the church", Witness Tiziano's testimony was "not credible as to the sequence of events in the morning of 20 April 1994."[6607]

2897. Ndayambaje submits that the Trial Chamber assessed Witness Tiziano's evidence out of context and erred in finding that: (i) his evidence was contradictory; (ii) he did not want to seek help for the refugees in Mugombwa Church; and (iii) he had an incentive to minimise his role in the events.[6608] In particular, Ndayambaje contends that the Trial Chamber erred in relying on the evidence of Prosecution Witnesses QAR and FAU that Witness Tiziano locked refugees inside the church to discredit Witness Tiziano, as it had not yet assessed Witnesses QAR's and FAU's

[6603] *See infra*, para. 2941.
[6604] Ndayambaje argues that Witness RV partially corroborates his alibi that he never left the Muganza commune office on 21 April 1994. *See* Ndayambaje Appeal Brief, fn. 632. However, Ndayambaje also observes that Witness RV testified about going to Mugombwa Church with Ndayambaje that same afternoon. *See ibid.*, para. 418. Ndayambaje fails to demonstrate how the Trial Chamber erred in disbelieving his evidence that he never left the commune office on 21 April 1994.
[6605] Trial Judgement, para. 1204.
[6606] Trial Judgement, para. 1204.
[6607] Trial Judgement, para. 1205.

testimonies which were contradictory and lacked credibility.[6609] He submits that Witness FAU's evidence is hearsay and reflects that he only arrived at the church on 22 April 1994, and therefore could not corroborate Witness QAR's evidence of this event, which she testified happened on 20 April 1994.[6610]

2898. The Prosecution responds that the Trial Chamber correctly found that Witness Tiziano's testimony was contradictory and that he had an incentive to minimise his role in the events.[6611] It argues that Ndayambaje's contentions that the Trial Chamber erred in discussing Witnesses QAR's and FAU's evidence after assessing Witness Tiziano's evidence and that the evidence of Witnesses QAR and FAU was contradictory or lacked credibility are without merit.[6612] The Prosecution further points to evidence that Witness Tiziano could have sought help from authorities at the Muganza commune office yet instead returned with a person implicated in the attack on Mugombwa Church.[6613]

2899. The Appeals Chamber finds that Ndayambaje fails to substantiate his contention that the Trial Chamber assessed Witness Tiziano's evidence out of context and erred in finding it contradictory. While Ndayambaje argues that the Trial Chamber erred in finding that Witness Tiziano's testimony reflected that "he did not request help for those seeking refuge in the church",[6614] he fails to appreciate that the Trial Chamber's statement was based on the witness's own acknowledgement that he did not ask the assistant *bourgmestre* for Muganza Commune whom he had brought to Mugombwa Church to "help in ensuring the security of those seeking refuge in the church."[6615] Ndayambaje also overlooks evidence in the record that the assistant *bourgmestre* whom Witness Tiziano transported to the church was armed with a machete and was viewed as a killer.[6616] Ndayambaje's citations to evidence, primarily from Witness Tiziano, that Witness Tiziano sought help for the refugees fail to demonstrate that the Trial Chamber erred in its assessment of this witness's evidence.[6617]

[6608] Ndayambaje Appeal Brief, para. 388, *referring to* Trial Judgement, paras. 1204-1206. *See also* Ndayamabaje Reply Brief, para. 146 (arguing that Witness Tiziano's evidence that he went to Muganza commune office to get help was partially corroborated by Witnesses FAU, RT, RV, BOZAN, GABON, and Ndayambaje); AT. 21 April 2015 p. 23.
[6609] Ndayambaje Appeal Brief, paras. 152, 202, 388-391. In particular, Ndayambaje argues that the Trial Chamber ignored evidence that only one of the several doors at the church could be locked from the outside and that refugees left the church after Witness Tiziano left, undermining the conclusion that Witness Tiziano locked refugees in the church. *See ibid.*, paras. 390-395. *See also* Ndayambaje Reply Brief, para. 53; AT. 21 April 2015 pp. 23-25, 65.
[6610] Ndayambaje Appeal Brief, paras. 350-355.
[6611] Prosecution Response Brief, paras. 2072, 2240, 2242, 2243. *See also* AT. 21 April 2015 p. 52.
[6612] Prosecution Response Brief, paras. 2072, 2245-2248.
[6613] Prosecution Response Brief, para. 2243. *See also ibid.*, para. 2244.
[6614] Trial Judgement, para. 1205.
[6615] Trial Judgement, para. 1204.
[6616] *See* Witness BOZAN, T. 17 September 2008 pp. 30, 34 (closed session).
[6617] *See* Ndayambaje Appeal Brief, para. 388; Ndayambaje Reply Brief, para. 146.

2900. Turning to Ndayambaje's argument that the Trial Chamber erred in relying on the "unassessed" testimonies of Witnesses QAR and FAU to find that Witness Tiziano locked persons seeking refuge in Mugombwa Church, the Appeals Chamber, having reviewed the evidence cited by the Trial Chamber, finds no error in the Trial Chamber's statements or assessment of this evidence, which reasonably shows that Witness Tiziano sought to keep refugees locked in the church.[6618] Ndayambaje does not demonstrate that Witness FAU's evidence reflects that Witness Tiziano sought to lock the church on 22 April 1994 rather than 20 April 1994 or that it was hearsay rather than direct evidence.[6619] Furthermore, to the extent that the Trial Chamber's subsequent statement that Witnesses QAR and FAU gave "convincing eyewitness testimony [...] that Father Tiziano *locked* those seeking refuge inside the church"[6620] is inconsistent with their evidence that he *attempted* to lock the door or other evidence that locking the door would not lock the entire church, the Appeals Chamber considers that any factual inaccuracy would not have occasioned a miscarriage of justice in the present context. Indeed, the Appeals Chamber considers that, whether or not Witness Tiziano actually locked those seeking refuge inside the church, a reasonable trier of fact could have considered that he was implicated in the attack and that, consequently, he had an incentive to minimise his role in it.[6621]

2901. Furthermore, the Appeals Chamber considers that the fact that the Trial Chamber discussed the evidence of Witnesses QAR and FAU after discussing that of Witness Tiziano in the Trial Judgement cannot reasonably be interpreted as an indication that the Trial Chamber had not assessed their evidence prior to referring to it when assessing Witness Tiziano's testimony. Read as a whole, the Trial Judgement clearly reflects that the Trial Chamber expressly considered the reliability of Witnesses QAR's and FAU's evidence based on other evidence in the record and assessed their testimonies in light of several credibility challenges.[6622]

2902. In light of the above, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the assessment of Witness Tiziano's alibi evidence that would warrant the intervention of the Appeals Chamber.

[6618] *See* Witness QAR, T. 21 November 2001 pp. 12-14; Witness FAU, T. 10 March 2004 pp. 4, 6, 7, 11.
[6619] *See* Witness FAU, T. 10 March 2004 pp. 4, 6, 7, 11, 20.
[6620] Trial Judgement, para. 1206 (emphasis added).
[6621] Ndayambaje argues that the Trial Chamber engaged in speculation and relied on facts not publicly mentioned during the hearings in order to discredit Witness Tiziano. *See* Ndayambaje Appeal Brief, paras. 220-224. However, because Ndayambaje fails to substantiate this claim with references to specific findings, the Appeals Chamber dismisses it without further consideration.
[6622] *See* Trial Judgement, paras. 1228-1235, 1237-1244, 1439-1443.

(iii) Witness Stan

2903. The Trial Chamber found that Witness Stan's evidence concerning Ndayambaje's alibi was not credible based on: (i) his testimony about his own conduct during the events and his descriptions of the prevailing situation; (ii) inconsistencies between his evidence and prior statements; (iii) his close friendship with Ndayambaje and because he was a "close associate" of Burundian refugees implicated in massacres at Mugombwa Church and Kabuye Hill.[6623]

2904. Ndayambaje contends that the Trial Chamber erred in discrediting Witness Stan's evidence on the basis of having "insinuated" that he was an accomplice witness.[6624] He further argues that the Trial Chamber erred in discrediting Witness Stan as a result of an unsupported finding that he had authority over Burundian refugees responsible for attacking Mugombwa Church and Kabuye Hill[6625] and in finding that the witness failed to inform the authorities of the prevailing insecurity, which was contradicted by his evidence.[6626] According to Ndayambaje, the Trial Chamber further erred in using insignificant contradictions between the witness's prior statements and testimony to discredit him, although it found similar contradictions in Prosecution evidence minor or immaterial.[6627] He emphasises that the witness, a friar, had devoted his life to the care of refugees and that the Trial Chamber's credibility findings are inconsistent with the fact that he was later rewarded for his service to humanity.[6628]

2905. The Prosecution generally responds that the Trial Chamber did not err in assessing contradictions in Ndayambaje Defence evidence and that Ndayambaje has not shown how inconsistencies within Witness Stan's testimony were so similar to those in the Prosecution witnesses' evidence that they should have been treated alike.[6629] It further submits that the Trial Chamber was correct in treating Witness Stan's evidence with caution.[6630]

[6623] Trial Judgement, paras. 1213-1217, 1390-1394.
[6624] Ndayambaje Appeal Brief, paras. 154, 169, 405, 408, 412, *referring to* Trial Judgement, paras. 1213, 1391, 1392. *See also* AT. 21 April 2015 p. 26.
[6625] Ndayambaje Appeal Brief, paras. 405, 407, 412. Ndayambaje argues that the evidence established that Witness Stan's duty was to teach about 1,000 youths in the Saga Camp and that he was not responsible for the camp and had no authority over the 60,000 Burundian refugees. *See ibid.*, para. 407, *referring to* Witness Stan, T. 18 September 2008 pp. 25, 26, T. 22 September 2008 pp. 8, 9, T. 23 September 2008 p. 19. *See also* Ndayambaje Reply Brief, paras. 142, 160.
[6626] Ndayambaje Appeal Brief, paras. 405, 409.
[6627] Ndayambaje Appeal Brief, paras. 155, 170, 405, 410, *referring to* Trial Judgement, paras. 1216, 1238-1241, 1393, 1408, 1436, 4592, 4710, 4711. *See also* AT. 21 April 2015 p. 70.
[6628] Ndayambaje Appeal Brief, paras. 405, 411.
[6629] Prosecution Response Brief, paras. 2071, 2078. *Cf.* AT. 21 April 2015 pp. 43, 44.
[6630] Prosecution Response Brief, paras. 2274-2277.

2906. The Appeals Chamber finds that the Trial Chamber did not "insinuate" that Witness Stan was an accomplice,[6631] nor did it err in its assessment of the witness' alibi evidence.

2907. The Trial Chamber did not suggest that it viewed Witness Stan as an accomplice, but stated that it had doubts about Witness Stan's credibility, noting that he had testified that attacks against Tutsis had started by 18 April 1994, yet two days later he left two Tutsis, Mr. Fidèle and his pregnant wife, at a roadblock manned by armed soldiers.[6632] The Trial Chamber also noted that Witness Stan did not attempt to find out what happened to these Tutsis but believed that they may have been killed.[6633] Ndayambaje does not show that the Trial Chamber erred in considering Witness Stan's conduct in the midst of the genocide when assessing the witness's credibility. Moreover, Ndayambaje's contention that Witness Stan did apprise himself of what happened to the two Tutsis he had left at the roadblock is not supported by the witness's testimony, which merely reflects that, when he returned to the roadblock, he was informed that they had gone to the hospital.[6634] Ndayambaje demonstrates no error in the Trial Chamber's statement that Witness Stan "did not attempt to find out what happened to them but [...] believed they may have been killed", as nothing in the witness's evidence suggests otherwise.[6635]

2908. Furthermore, the Trial Chamber stated that it found weak Witness Stan's testimony that he could not have disarmed the Burundian refugees from the Saga Camp even though he knew that they had participated in killings on or around 20 April 1994, and that machetes were necessary to the work of the refugees.[6636] The Trial Chamber noted that Witness Stan was not just a "simple priest", but worked in education in the camp and "therefore exercised a degree of authority over the refugees".[6637] It further noted that the Burundian refugees were not working in the fields at the time, casting doubt on Witness Stan's statement that the machetes were for the refugees' work.[6638] In the view of the Appeals Chamber, nothing in these statements suggests that the Trial Chamber treated Witness Stan as an accomplice. Moreover, in support of his contention that the Trial Chamber baselessly attributed to Witness Stan duties which were not his, Ndayambaje simply points to other evidence offered by the witness without demonstrating that the Trial Chamber erred in its reflection

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[6631] *See Niyitegeka* Appeal Judgement, para. 98 ("The ordinary meaning of the term 'accomplice' is 'an associate in guilt, a partner in crime.'") (internal reference omitted). *See also Karemera and Ngirumpatse* Appeal Judgement, para. 42; *Munyakazi* Appeal Judgement, para. 93; *Ntagerura et al.* Appeal Judgement, para. 203.
[6632] Trial Judgement, para. 1213.
[6633] Trial Judgement, para. 1213. The Trial Chamber conducted the same analysis when reviewing Witness Stan's evidence later in the Trial Judgement. *See ibid.*, para. 1390.
[6634] Ndayambaje Appeal Brief, para. 408; Witness Stan, T. 23 September 2008 p. 4.
[6635] Trial Judgement, para. 1213, *referring to* Witness Stan, T. 23 September 2008 p. 4, T. 24 September 2008 p. 40.
[6636] Trial Judgement, para. 1391. *See ibid.*, para. 1214.
[6637] Trial Judgement, para. 1391. *See ibid.*, para. 1214.
[6638] Trial Judgement, para. 1391. *See ibid.*, para. 1214.

or analysis of the witness's testimony in this regard, or in expressing doubts about why he chose not to try to disarm the Burundian refugees.[6639]

2909. In addition, the Trial Chamber expressed doubts about Witness Stan's evidence that he did not inform the prefectoral authorities that the Burundian refugees involved in the killings were armed with traditional weapons because he "had never heard of any measure by a *bourgmestre* to take away a person's tools".[6640] The Trial Chamber also stated that Witness Stan, while he had the ability to move freely in Butare prior to 25 April 1994, "made no attempt to notify the authorities of the unrest" until the Kibayi commune office secretary requested that Witness Stan accompany him on a visit to the authorities.[6641] Again, the Appeals Chamber considers that these statements cannot reasonably be construed as "insinuations" that Witness Stan was an accomplice. Furthermore, while Ndayambaje contends that, contrary to the Trial Chamber's finding, Witness Stan's trip of 20 April 1994 to Butare with the Kibayi commune office secretary demonstrates that he sought to inform authorities of the insecurity situation,[6642] the Appeals Chamber finds that he simply disagrees with the Trial Chamber's interpretation of the evidence without demonstrating that the Trial Chamber inaccurately recalled it[6643] or abused its discretion when considering it.[6644]

2910. The Appeals Chamber further finds that Ndayambaje presents no arguments as to how the Trial Chamber erred in identifying or assessing inconsistencies between Witness Stan's testimony and prior statements and fails to substantiate how the Trial Chamber's approach was unreasonable

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[6639] Ndayambaje Appeal Brief, para. 407. Ndayambaje argues that the Trial Chamber found Witness Stan not credible because of his association with Burundians responsible for the massacres at Mugombwa Church and Kabuye Hill. *See ibid.*, para. 405. However, because Ndayambaje fails to develop this argument, that the Appeals Chamber dismisses it without further consideration.

[6640] Trial Judgement, para. 1392.

[6641] Trial Judgement, para. 1392. *See also ibid.*, para. 1215.

[6642] Ndayambaje Appeal Brief, para. 409, *referring to* Witness Stan, T. 18 September 2008 pp. 37-40, T. 23 September 2008 pp. 19, 20.

[6643] *See, in particular*, Witness Stan, T. 18 September 2008 p. 37 ("Q. And can you tell us whether the secretary of the Kibayi *communal* office [...] did he give you any reasons for stopping your vehicle? A. He told me that at the *communal* office there was disorder, that there had been attacks, and he asked me to accompany him to go and inform the *bourgmestre* of Kibayi. Q. And did you know at that time where the *bourgmestre* of Kibayi *commune* was? A. No, I did not know. It was the secretary of Kibayi who told me that the *bourgmestre* had gone to Butare. Q. In the light of this information and facing this request from the *communal* secretary, what did you decide to do? A. [...] I dropped the supplies in a store below the road. I turned, and together we went back to Butare to inform the *bourgmestre* of Kibayi on the disorder at the *communal* office."), T. 23 September 2008 p. 60 ("Q. Now, just to round up on these series of questions, Mr. Witness, did you make any attempt to see the *préfet* of Butare with regard to disarming Burundian refugees, those who were armed with machetes or what you term were just tools for their usage? A. The Burundian refugees were not armed. They had agricultural instruments. And I did not inform. I would not have known how to go about informing the *préfectural* authorities.").

[6644] Ndayambaje appears to argue that the Trial Chamber also erred in its analysis in paragraph 1215 of the Trial Judgement in concluding, similarly with paragraph 1392 of the Trial Judgement, that Witness Stan failed to notify the authorities. *See* Ndayambaje Appeal Brief, para. 405. Paragraph 1215 of the Trial Judgement generally tracks the analysis in paragraph 1392 of the Trial Judgement. For the reasons detailed above, the Appeals Chamber dismisses Ndayambaje's contention.

in light of its analysis of the Prosecution evidence in the other paragraphs of the Trial Judgement to which he points.[6645]

2911. Finally, Ndayambaje's arguments concerning Witness Stan's position as a friar and the fact that he was later rewarded for his service to humanity fail to demonstrate how the Trial Chamber erred in its assessment of the evidence that formed part of the trial record.

2912. For these reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness Stan's alibi evidence.

(iv) Witness MARVA

2913. In assessing Witness MARVA's alibi evidence, the Trial Chamber observed that the witness, an employee of Ndayambaje living in his house at the time of the events,[6646] did not specify when she saw Ndayambaje on the morning of 20 April 1994.[6647] It further found that her testimony that Ndayambaje remained with her in the same room in the "IGA building" until 23 April 1994 was contradicted by other evidence and was not credible.[6648]

2914. Ndayambaje submits that the Trial Chamber erred in concluding that Witness MARVA did not testify about the time she saw Ndayambaje on the morning of 20 April 1994.[6649] In addition, he argues that the Trial Chamber's finding that Witness MARVA's testimony that Ndayambaje remained in the IGA building of the Muganza commune office until 23 April 1994 was contradicted by the evidence of Witnesses GABON and KEPIR as well as Ndayambaje was based on a misunderstanding of the various locations in the Muganza commune office and Witness MARVA's evidence.[6650] In support of this contention, Ndayambaje argues that a site visit, complemented by Exhibits P38, D553, D554, and D694, would have demonstrated how small the location was and how there was no contradiction in their evidence.[6651] Moreover, Ndayambaje contends that Witness MARVA's testimony that she remained in the same room with Ndayambaje only concerned 21 April 1994.[6652]

2915. The Prosecution responds that the Trial Chamber was entitled to find that Witness MARVA's evidence did not raise a reasonable doubt in the Prosecution case as she could

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[6645] *See* Trial Judgement, paras. 1238-1241, 1408, 1436, 4710, 4711.
[6646] Trial Judgement, paras. 1199, 1389.
[6647] Trial Judgement, paras. 1201, 1207, 1400, 1402. *See also ibid.*, paras. 1209, 1403.
[6648] Trial Judgement, paras. 1201, 1221-1223, 1416, 1417.
[6649] Ndayambaje Appeal Brief, para. 201, fn. 217, *referring to* Trial Judgement, paras. 1201, 1207.
[6650] Ndayambaje Appeal Brief, paras. 201, 401, *referring to* Trial Judgement, para. 1201. *See also* AT. 21 April 2015 pp. 25, 26.
[6651] Ndayambaje Appeal Brief, para. 401. *See also* Ndayambaje Reply Brief, para. 153.
[6652] Ndayambaje Appeal Brief, para. 201, fn. 217.

not account for Ndayambaje's whereabouts for a substantial part of the morning of 20 April 1994 and her testimony as to Ndayambaje's whereabouts was contradicted by other Defence witnesses.[6653] It further contends that the evidence and a site visit would not demonstrate that Ndayambaje could be inside the IGA building, as testified to by Witness MARVA, and outside it at the same time, as testified to by Witnesses KEPIR and GABON.[6654]

2916. Having reviewed the testimony referred to by Ndayambaje, the Appeals Chamber finds that a reasonable trier of fact could have considered that Witness MARVA did not specify the time when she saw Ndayambaje on the morning 20 April 1994.[6655]

2917. The Appeals Chamber further finds that Ndayambaje's argument that a site visit, complemented by Exhibits P38, D553, D554, and D694, would have prevented the Trial Chamber from discrediting Witness MARVA's evidence is speculative and does not demonstrate any error in the Trial Chamber's analysis of this evidence.[6656] Moreover, while Ndayambaje argues that Witness MARVA only testified that Ndayambaje remained in a room in the IGA building on 21 April 1994, a review of the relevant evidence cited by the Trial Chamber[6657] does not demonstrate any error in the Trial Chamber's interpretation of Witness MARVA's evidence that Ndayambaje remained in the room until Saturday 23 April 1994[6658] or its conclusion that this

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[6653] Prosecution Response Brief, para. 2254, *referring to* Trial Judgement, paras. 1201, 1209.
[6654] Prosecution Response Brief, para. 2257. *See also* AT. 21 April 2015 p. 52.
[6655] Ndayambaje Appeal Brief, para. 201, fn. 217, *referring to* Witness MARVA, T. 1 July 2008 pp. 19, 20 (closed session); Trial Judgement, paras. 1201 ("Witness MARVA testified that she was with Ndayambaje on the morning of 20 April 1994 at his home although she does not specify when she saw him for the first time that day.") (internal reference omitted), 1402 (noting that Witness MARVA "said she saw Ndayambaje at an unspecified time in the morning of 20 April 1994 when he hid Chanvrier in the guest room" and that she "could not specify at what time Ndayambaje left his home or the time when he was reunited with his family and the witness at Witness KEPIR's residence.") (internal reference omitted). Notably, Witness MARVA's testimony reflects the approximate time when Chanvrier arrived at Ndayambaje's home and that Ndayambaje hid this individual in a guest room, without specifying when exactly Ndayambaje did this. *See* Witness MARVA, T. 1 July 2008 p. 20 (closed session) ("Q. In any case, witness, are you in a position to tell us at about what time Chanvrier arrived at Ndayambaje's residence? A. I would be hard put to tell the time because this happened a long time ago, but I think the time was about 8:00 or 8:30 a.m. if my memory is not failing me, of course. [...] Q. And when Chanvrier showed up at Ndayambaje's residence, what was done to him? A. He was put in the guest room and he was locked up inside for him to hide. Q. Madam, who is it who put Chanvrier in the guest room in order to hide him? A. Élie Ndayambaje is the one who put him in that room and he locked up the room in order to prevent people from noticing that he was there?").
[6656] *See* Trial Judgement, para. 1201. With respect to the question of the site visits, *see also supra*, para. 2894; *infra*, Section IX.D.
[6657] *See* Trial Judgement, para. 1201, *referring to* Witness MARVA, T. 1 July 2008 pp. 24-27 (closed session), T. 2 July 2008 pp. 16, 17 (closed session).
[6658] *See, in particular*, Witness MARVA, T. 1 July 2008 pp. 25, 26 (closed session) ("Q. And on that day when you reached the IGA building in the company of all those individuals you have just mentioned, Madam Witness, what day of the week was it? A. It was a Wednesday. Q. Where did you spend the rest of that Wednesday, Madam Witness? A. We stayed in the building, the IGA building. Q. And in the evening and during the following night, [...] where did you then go? A. We spent the night in the very same place. Q. And during that day, and during the evening and the night thereafter, was Mr. Élie Ndayambaje in your company at that place? A. Yes, Mr. Ndayambaje spent the night in the same room as us [...]. Q. Madam Witness, on the next day, that is to say, the Thursday, where did you spend the day? A. We spent the entire day in the very same room. Q. And on that Thursday, where was Mr. Ndayambaje? A. Mr. Élie Ndayambaje spent the day in that very same room. Q. And up to what point in time did you remain at the *communal* office, Madam Witness, in the IGA building, that is? A. We stayed there until Saturday."), T. 2 July 2008

evidence contradicted the evidence of Witnesses KEPIR and GABON as well as Ndayambaje's testimony that he did not remain in that room during this entire period.[6659]

2918. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness MARVA's alibi evidence.

(v) Witness GABON

2919. The Trial Chamber found that the evidence of Witness GABON, a former employee of Ndayambaje,[6660] that he slept 27 minutes between 20 and 24 April 1994 "unrealistic" in this respect or not "plausible"[6661] and considered that his alibi evidence was not credible.[6662]

2920. Ndayambaje argues that the Trial Chamber erred in discrediting Witness GABON's testimony based on his evidence that he only slept for 27 minutes over the course of a four day period.[6663] In this regard, he submits that the French version of the transcript reflects that the witness stated he slept approximately 20 to 25 minutes, and not precisely 27 minutes, and that the Trial Chamber placed too much emphasis on the incorrect English translation and this secondary aspect of Witness GABON's testimony.[6664] Ndayambaje also contends that the Trial Chamber was in no position to find that Witness GABON would not have been able to see Ndayambaje at all times on 21 April 1994 as it did not conduct a site visit.[6665]

2921. The Prosecution responds that the Trial Chamber correctly assessed Witness GABON's evidence.[6666]

2922. Recalling the broad discretion trial chambers enjoy in assessing witness credibility, the Appeals Chamber finds that Ndayambaje does not demonstrate that it was unreasonable for the Trial Chamber to consider that the limited amount of time Witness GABON testified to sleeping from 20 to 24 April 1994 impacted the plausibility of his testimony, particularly when the point of

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p. 16 (closed session) ("Q. Witness, when you got to the IGA, I am suggesting to you that Élie Ndayambaje did not spend all night and all of the next day inside that enclosed room. What do you say to that suggestion? A. He spent the entire day in the IGA room. Q. So your evidence is he never went outside to get some fresh air, to use the bathroom facilities, to check on his vehicle, that he remained inside that room for 24 hours? Have I understood you? A. Upon our arrival at the *commune* office, he went to see Chrisologue in order to ask about the situation. *And when he returned to the room, he never went out again.*") (emphasis added).

[6659] *See* Trial Judgement, para. 1201.

[6660] Trial Judgement, paras. 1199 ("Witness GABON is a former policeman employed by Ndayambaje. [...] Accordingly, their evidence must be reviewed bearing these personal ties in mind.") (internal reference omitted), 1389.

[6661] Trial Judgement, paras. 1220, 1389.

[6662] Trial Judgement, paras. 1220, 1223, 1417, 1446.

[6663] Ndayambaje Appeal Brief, paras. 156, 169, 402, *referring to* Trial Judgement, paras. 1220, 1389. *See also* AT. 21 April 2015 p. 25.

[6664] Ndayambaje Appeal Brief, para. 402, *referring to* Witness GABON, T. 3 September 2008 pp. 8, 9, 13-17 (closed session) (French).

[6665] Ndayambaje Appeal Brief, para. 156. *See also* Ndayambaje Reply Brief, para. 153.

the witness's evidence was to account for Ndayambaje's whereabouts during that specific period.[6667] While Ndayambaje highlights variances between the English and French transcripts as to the precise amount of time Witness GABON slept and argues that the Trial Chamber erred in relying on the incorrect English version, he does not demonstrate that the identified variance is material to the Trial Chamber's analysis.[6668] Finally, Ndayambaje fails to demonstrate how the absence of a site visit rendered the Trial Chamber's assessment of Witness GABON's evidence unreasonable.[6669]

2923. Based on the above, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness GABON's alibi evidence.

(vi) Witness KEPIR

2924. In relevant parts of the Trial Judgement, the Trial Chamber found that the fact that Witness KEPIR, a friend of Ndayambaje, was implicated in the massacres at Kabuye Hill by Prosecution Witnesses EV and FAU had a bearing on Witness KEPIR's credibility.[6670]

2925. Ndayambaje argues that the Trial Chamber erred in fact by relying on the evidence of Witnesses EV and FAU to conclude that Witness KEPIR was among the attackers at Kabuye Hill, and then discrediting his evidence on this basis.[6671] He argues that Witnesses EV's and FAU's identification of Witness KEPIR was merely based on the presence of a vehicle and points to evidence that contradicts Witness FAU's description of Witness KEPIR's vehicle to argue that it was unreasonable for the Trial Chamber to rely on Witness FAU's evidence in this regard.[6672]

2926. The Prosecution does not directly respond to these arguments.

2927. The Appeals Chamber observes that the Trial Chamber expressly stated that Witnesses EV and FAU provided "eyewitness accounts" that "implicated" Witness KEPIR in the massacres at

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[6666] Prosecution Response Brief, paras. 2258-2263. *See also ibid.*, para. 2078.
[6667] *See* Trial Judgement, paras. 1220, 1389.
[6668] *Compare* Witness GABON, T. 3 September 2008 p. 17 (closed session) ("Q. So, Witness, from Wednesday, Thursday, Friday, and the day of Saturday, you only slept for a total of 27 minutes. [...] A. That is correct. Over those three days, I only slept for 27 minutes.") *with ibid.*, p. 20 (closed session) (French) ("*Q. Monsieur le Témoin, mercredi, jeudi, vendredi et toute la journée de samedi, pendant tout ce temps, vous n'avez dormi au total que 25 minutes ; c'est bien cela ?* [...] *R. C'est exact. Au cours de ces trois journées, je n'ai dormi que pendant ces 25 minutes.*").
[6669] The Appeals Chamber recalls that it has found that Ndayambaje has failed to demonstrate that the Trial Chamber erred by not conducting site visits. *See infra*, Section IX.D.
[6670] Trial Judgement, paras. 1199, 1389. *See also ibid.*, para. 1446.
[6671] Ndayambaje Appeal Brief, paras. 202, 396-398. Ndayambaje notes that Witness KEPIR denied being present at Kabuye Hill. *See ibid.*, para. 396, *referring to* Witness KEPIR, T. 10 September 2008 pp. 74, 75 (closed session), T. 15 September 2008 pp. 26, 27 (closed session).
[6672] Ndayambaje Appeal Brief, para. 397, *referring to* Witness ANGES, T. 20 August 2008 pp. 41, 42 (closed session), Witness GABON, T. 1 September 2008 pp. 20, 21 (closed session), Witness KEPIR, T. 4 September 2008 p. 22 (closed session), Ndayambaje, T. 22 October 2008 pp. 35, 36.

Kabuye Hill and concluded that this had "a bearing on Witness KEPIR's credibility".[6673] The Appeals Chamber notes, however, that Witness FAU did not identify Witness KEPIR at Kabuye Hill and that Witness EV's testimony is too equivocal to be reasonably relied upon as an "eyewitness" account of Witness KEPIR's presence at Kabuye Hill.[6674] Accordingly, the Appeals Chamber finds that no reasonable trier of fact could have found that "eyewitness accounts" "implicated" Witness KEPIR in attacks on Kabuye Hill based on Witnesses FAU's and EV's evidence.[6675]

2928. However, the Appeals Chamber finds that this error does not affect the Trial Chamber's conclusion that Witness KEPIR's alibi evidence was not credible or did not raise reasonable doubt in the Prosecution case regarding Ndayambaje's whereabouts from 20 to 24 April 1994.[6676] The Trial Chamber noted that Witness KEPIR was a friend of Ndayambaje and had previously reported to him on professional matters;[6677] circumstances which Ndayambaje does not dispute. The Appeals Chamber has found that the Trial Chamber did not err in weighing this type of evidence when assessing the credibility of witnesses.[6678] Furthermore, the Trial Chamber correctly recalled Witness FAU's evidence that Ndayambaje used Witness KEPIR's vehicle to pick up weapons for use at Kabuye Hill.[6679] While Ndayambaje points to evidence that Witness KEPIR's vehicle was a colour other than that described by Witness FAU,[6680] the Appeals Chamber is not persuaded that a reasonable trier of fact could not have considered Witness FAU's evidence that Witness KEPIR's car was used in the process of obtaining weapons to be used in an attack when assessing Witness KEPIR's credibility. More importantly, Ndayambaje fails to explain how the Trial Chamber erred when concluding that it did not find credible Witness KEPIR's evidence that

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[6673] Trial Judgement, para. 1199, fn. 2555, *referring to* Witness EV, T. 25 February 2004 pp. 74, 75, T. 26 February 2004 pp. 60, 61, Witness FAU, T. 4 March 2004 pp. 71, 72, 78, T. 9 March 2004 pp. 46, 47.
[6674] *See* Witness EV, T. 25 February 2004 p. 75, T. 26 February 2004 p. 61. *See also* Exhibit D676 (Witness KEPIR's Personal Identification Sheet).
[6675] Ndayambaje argues the Trial Chamber engaged in speculation in order to discredit Witness KEPIR. *See* Ndayambaje Appeal Brief, paras. 220-224. Other than the conclusion based on Witness EV's evidence placing Witness KEPIR at Kabuye Hill, Ndayambaje fails to substantiate this claim with references and the Appeals Chamber dismisses this contention without further consideration.
[6676] Trial Judgement, paras. 1223, 1399, 1417, 1446.
[6677] *See* Trial Judgement, para. 1389.
[6678] *See supra*, Section IX.C.3(b).
[6679] *See* Trial Judgement, para. 1389, *referring to* Witness FAU, T. 4 March 2004 pp. 71, 72, T. 9 March 2004 pp. 42, 46, 47.
[6680] *Compare* Witness FAU, T. 4 March 2004 p. 71 *with* Witness ANGES, T. 20 August 2008 pp. 41 (closed session) *and* Witness GABON, T. 1 September 2008 p. 21 (closed session). Ndayambaje also refers to the testimony of Witness KEPIR. *See* Ndayambaje Appeal Brief, para. 397, *referring to* Witness KEPIR, T. 4 September 2008 p. 22 (closed session). However, a review of this evidence reflects that it is not relevant. Likewise, while Ndayambaje also refers to his own testimony at T. 22 October 2008 pp. 35, 36, the only vehicle described in this excerpt is Witness Tiziano's blue, single cabin Toyota Hilux.

he was with Ndayambaje at all times over the course of 21 April 1994 and concluded that he was not in a position to state that Ndayambaje never left the Muganza commune office on that day.[6681]

2929. The Appeals Chamber therefore concludes that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of Witness KEPIR's alibi evidence that would warrant the intervention of the Appeals Chamber.

4. Conclusion

2930. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in relation to his alibi and, accordingly, dismisses Ground 7 of Ndayambaje's appeal.

[6681] Trial Judgement, para. 1223.

D. Denial of Site Visits (Ground 12)

2931. On 23 September 2004, the Trial Chamber denied a request for site visits made by the Prosecution on the ground that, if the visits were to be made, it was "desirable that they be made at the end of the presentation of the cases of both Parties" and invited the parties to make such a request at the end of the presentation of their cases.[6682] In June 2008, the Prosecution again moved the Trial Chamber to conduct site visits,[6683] to which Ndayambaje responded that the request was premature.[6684] On 26 February 2009, the Trial Chamber dismissed the Prosecution's request for site visits in Rwanda, concluding that the visits were no longer necessary since: (i) a considerable number of exhibits, including photographs and maps, had already been tendered to assist the Trial Chamber's familiarisation with the relevant locations; (ii) visiting the sites, which unlikely remained in the same condition 14 years after the events in question, may not provide much assistance in the discovery of the truth and fair determination of the relevant issues; and (iii) the sites proposed were too numerous, may have had "extraordinary logistical and cost implications for the Tribunal", and the visits may not have been "completed in a short period of time."[6685]

2932. In his closing arguments, Ndayambaje claimed that the Trial Chamber's refusal to authorise site visits, in particular to Kabuye Hill, led "to a great incomprehension of the sites and, therefore, have caused a great prejudice".[6686] In the Trial Judgement, the Trial Chamber noted that Ndayambaje did not describe the prejudice he allegedly suffered as a result of the Trial Chamber's refusal to conduct site visits or explain the purported "incomprehension" of the sites caused by it.[6687] The Trial Chamber recalled that it had considered a number of video and photo exhibits as well as sketches relating to Kabuye Hill and concluded that Ndayambaje's allegation of prejudice was not established and that there was no reason to reconsider the Site Visits Decision.[6688]

2933. On appeal, Ndayambaje submits that the reasons advanced by the Trial Chamber for its refusal to conduct the site visits constitute an error of law which led to errors of fact causing a miscarriage of justice.[6689] In particular, Ndayambaje argues that the Trial Chamber erred in:

[6682] *See The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Decision on Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence, 23 September 2004 ("2004 Site Visits Decision"), paras. 14, 15, p. 5.
[6683] *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence, 26 June 2008.
[6684] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse d'Elie Ndayambaje à* "Prosecutor's Motion for Site Visits in the Republic of Rwanda under Rules 4 and 73 of the Rules of Procedure and Evidence", 30 June 2008 ("Ndayambaje Site Visits Response of 2008"), paras. 5-7.
[6685] Site Visits Decision, para. 21, p. 7. *See also* Trial Judgement, para. 1262.
[6686] Ndayambaje Closing Arguments, T. 30 April 2009 p. 6.
[6687] Trial Judgement, para. 1263.
[6688] Trial Judgement, para. 1263.
[6689] Ndayambaje Notice of Appeal, para. 107, *referring to* Trial Judgement, para. 1262, *quoting* Site Visits Decision, para. 21; Ndayambaje Appeal Brief, paras. 270, 274, 275, 290.

(i) making findings regarding the state of the relevant sites due to the passage of time that were speculative and in disregarding the fact that many locations and geographic landmarks remained unchanged even after 14 years;[6690] (ii) concluding that the analysis of photographs, maps, and sketches alone was sufficient to enable the Trial Chamber to familiarise itself with the locations of the relevant sites;[6691] and (iii) "sacrific[ing]" trial fairness for logistical and financial considerations.[6692] Ndayambaje also contends that it was "incomprehensible and unacceptable"[6693] for the judges composing the Trial Chamber to refuse to conduct site visits in the present case when they conducted such visits in other cases at the Tribunal, even more than 14 years after the relevant events, acknowledging the importance of those visits to the assessment of the evidence.[6694]

2934. Ndayambaje further submits that visiting the sites was necessary to enable the Trial Chamber to acquire a better understanding of the evidence.[6695] In his view, because the Trial Chamber lacked knowledge of the relevant sites, it erred in its assessment of the evidence, which resulted in a number of erroneous findings concerning multiple sites and caused him prejudice.[6696] Ndayambaje requests that the Appeals Chamber disregard all the erroneous findings made by the Trial Chamber resulting from its lack of knowledge of the locations.[6697]

2935. The Prosecution responds that Ndayambaje's claim that he suffered prejudice as a result of the Trial Chamber's decision to deny its request for site visits is baseless and should be dismissed.[6698] The Prosecution argues that, during trial, Ndayambaje never asked for a site visit, opposed its request for site visits as premature, and only raised in his closing arguments a cursory and unsubstantiated complaint that the Trial Chamber did not visit Kabuye Hill.[6699] It submits that,

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[6690] Ndayambaje Appeal Brief, para. 283.
[6691] Ndayambaje Appeal Brief, para. 282. *See also* Ndayambaje Reply Brief, para. 109.
[6692] Ndayambaje Appeal Brief, para. 287. *See also ibid.*, para. 288.
[6693] Ndayambaje Appeal Brief, para. 284.
[6694] Ndayambaje Appeal Brief, paras. 284, 285, *referring to* the *Hategekimana*, *Nzabonimana*, and *Ngirabatware* trials.
[6695] Ndayambaje Notice of Appeal, para. 102. *See also* Ndayambaje Appeal Brief, para. 278; Ndayambaje Reply Brief, para. 111.
[6696] Ndayambaje Notice of Appeal, paras. 103-106; Ndayambaje Appeal Brief, paras. 278-282, 289, 290. *See also* Ndayambaje Reply Brief, paras. 110, 112, 113; AT. 21 April 2015 pp. 72, 73. Ndayambaje refers in particular to: Mugombwa Church; Kabuye Hill; Muganza commune office; the distance between Muganza Commune and Gisagara; the distance between Gisagara and Ngiryi River; the distance between Muganza Commune and the *bourgmestre*'s residence in Kibayi Commune; the distance between Ndayambaje's residence in Mugombwa and the Muganza commune office; the Muganza-Gisagara-Butare road; and the Virgin Mary Statue. *See* Ndayambaje Notice of Appeal, para. 104; Ndayambaje Appeal Brief, para. 280. The Appeals Chamber notes that, under Ground 12 of his appeal, Ndayambaje broadly impugns the Trial Chamber's factual findings in relation to all of his convictions, without indicating the manner in which these findings were flawed, save for a specific example related to the descriptions of the layout and size of the Muganza commune office by Defence witnesses. *See* Ndayambaje Appeal Brief, para. 279, *referring to* Trial Judgement, para. 1223; Ndayambaje Reply Brief, para. 113. The Appeals Chamber notes, however, that in other parts of his appeal, Ndayambaje highlights specific findings of the Trial Chamber, which, he contends, were affected by the lack of site visits. *See, e.g.*, Ndayambaje Appeal Brief, paras. 106, 156, 188, 314, 337, 401, 417, 427, 495, 500, 636.
[6697] Ndayambaje Notice of Appeal, para. 108; Ndayambaje Appeal Brief, para. 290.
[6698] Prosecution Response Brief, paras. 2164, 2168.
[6699] Prosecution Response Brief, paras. 2164, 2165. *See also* AT. 21 April 2015 p. 36.

on appeal, Ndayambaje does not explain his failure to seek admission of additional visual aids to further clarify matters of geography and fails to support his allegations of errors of fact by any explanations or evidence.[6700]

2936. Ndayambaje replies that he never opposed a site visit but instead argued that the Prosecution's request of 2008 was premature at the time as he had not yet presented his defence.[6701] At the appeals hearing, Ndayambaje further argued that he joined the Prosecution's request for site visits, adding a number of sites to be visited.[6702]

2937. The Appeals Chamber notes that, when the Prosecution moved the Trial Chamber to conduct site visits in March 2004, Ndayambaje responded that he agreed with the principle and the necessity of a site visit.[6703] However, when the Prosecution made another request for site visits in June 2008, Ndayambaje responded that the request was premature as the presentation of the Defence evidence was still ongoing.[6704] Ndayambaje also explicitly expressed his "serious reservations about the utility of such a site visit 14 years after the events, insofar as the configuration of the sites (vegetation, new constructions, renovation of buildings, roads and trails, etc.) [was] no longer the same".[6705]

2938. The Appeals Chamber further notes that Ndayambaje did not alert the Trial Chamber about the reversal of the position he took in 2008 regarding the utility of the site visits until his closing arguments where, for the first time, he voiced "regrets" that the Trial Chamber did not authorise site visits, arguing that this led to "a great incomprehension of the sites" and therefore "caused a great prejudice".[6706] As discussed above, the Trial Chamber interpreted this claim as a request to reconsider the Site Visits Decision, which it dismissed on the grounds that Ndayambaje had failed to substantiate his claim of prejudice and explain how or why there was a purported incomprehension of the sites.[6707]

[6700] Prosecution Response Brief, paras. 2165-2168.
[6701] Ndayambaje Reply Brief, paras. 107, 108, *referring, inter alia, to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse à la Requête du Procureur intitulée* "Prosecutor's motion for site visits in the Republic of Rwanda under Rules 4 and 73 of the [R]ules of Procedure and Evidence", 1 June 2004 ("Ndayambaje's Site Visits Response of 2004"), paras. 4-6, 9.
[6702] AT. 21 April 2015 pp. 86, 87 (French), *referring to* the 2004 Site Visits Decision.
[6703] Ndayambaje's Site Visits Response of 2004, para. 4. *See also ibid.*, paras. 5, 6. Ndayambaje nonetheless noted that the Prosecution's motion was vague and requested that the Trial Chamber order the Prosecution to adduce further information. *See ibid.*, paras. 7, 8, p. 3.
[6704] Ndayambaje Site Visits Response of 2008, paras. 5-7.
[6705] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Réponse d'Elie Ndayambaje au* "Scheduling Order" *rendu par la Chambre le 26 Septembre 2008*, 29 September 2008, para. 5 (informal translation).
[6706] Ndayambaje Closing Arguments, T. 30 April 2009 p. 6.
[6707] Trial Judgement, para. 1263.

2939. The Appeals Chamber finds no error in the Trial Chamber's decision to deny reconsideration of the Site Visits Decision. Indeed, in his closing submissions, apart from vaguely expressing "regrets that the Trial Chamber did not authorise a visit to Kabuye because this decision does affect the overall view of the Defence" and alleging that it "le[d] to a great incomprehension of the sites", particularly as regards Kabuye Hill, Ndayambaje did not advance any argument to substantiate his assertion that he was prejudiced by the Trial Chamber's refusal to authorise site visits, nor did he seek to demonstrate a clear error of reasoning or that the reconsideration of the impugned decision was necessary to prevent an injustice.[6708] Ndayambaje neither elaborated how his Defence case was affected by the fact that the Trial Chamber did not visit the relevant sites nor, as noted by the Trial Chamber, did he "explain how or why there [was] 'incomprehension' of the sites".[6709] Notably, only on appeal did Ndayambaje argue, *inter alia*, that the "analysis of the photos, sketches and maps tendered in the trial was insufficient to help [the Trial Chamber] to know and familiarize itself with the locations" and that "[o]nly a site visit would have enabled it to really understand the layout of the sites and avoid making a ruling in the abstract."[6710]

2940. The Appeals Chamber also observes that, on appeal, Ndayambaje complains about the fact that the Trial Chamber did not undertake site visits without explaining why he did not move the Trial Chamber to conduct one after the end of the presentation of his case and advances arguments against the Site Visits Decision that were never raised at trial.[6711] Recalling that a party should not be permitted to refrain from raising a matter which was apparent during the course of the trial to raise it only on appeal in the event of an adverse finding against that party,[6712] the Appeals Chamber considers that Ndayambaje has waived his right to introduce this issue as a valid ground of appeal and will accordingly dismiss Ndayambaje's submissions in this regard without further consideration.

2941. Based on the foregoing, the Appeals Chamber dismisses Ground 12 of Ndayambaje's appeal in its entirety.

[6708] The Appeals Chamber recalls that a chamber may reconsider a decision it has previously made if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. *See Munyagishari* Appeal Decision, para. 13; *Kajelijeli* Appeal Judgement, para. 203; *Barayagwiza* 4 February 2005 Appeal Decision, p. 2.
[6709] Trial Judgement, para. 1263.
[6710] Ndayambaje Appeal Brief, para. 282.
[6711] Ndayambaje Appeal Brief, paras. 283-288. *See also* Ndayambaje Reply Brief, paras. 109-113.
[6712] *See Nahimana et al.* Appeal Judgement, para. 215; *Niyitegeka* Appeal Judgement, para. 199; *Čelebići* Appeal Judgement, para. 640; *Tadić* Appeal Judgement, para. 55.

E. Mugombwa Church (Grounds 9 in part, and 17)

2942. The Trial Chamber found that, by his presence on 20 and 21 April 1994 at Mugombwa Church, Muganza Commune, and given his considerable moral authority, Ndayambaje encouraged the attacks on the Tutsis taking refuge inside the church that took place on these two days, resulting in the deaths of hundreds, if not thousands, of Tutsis.[6713] It also found that Ndayambaje's public addresses at Mugombwa Church on 20 and 21 April 1994 directly and publicly incited the commission of genocide.[6714] On this basis, the Trial Chamber convicted Ndayambaje of committing direct and public incitement to commit genocide as well as aiding and abetting genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute.[6715]

2943. Ndayambaje submits that the Trial Chamber erred in its assessment of the evidence related to this event and in finding that he "publicly" incited the commission of genocide and possessed genocidal intent.[6716] The Appeals Chamber recalls that it has found that the Trial Chamber erred in convicting Ndayambaje of committing direct and public incitement to commit genocide at Mugombwa Church as he lacked notice that he was charged on this basis and, consequently, reversed his conviction for committing direct and public incitement to commit genocide at Mugombwa Church.[6717] In these circumstances, Ndayambaje's contentions regarding his conviction for direct and public incitement to commit genocide and his genocidal intent have become moot and need not be addressed.[6718] With respect to his convictions for aiding and abetting the killings at the church, Ndayambaje contends that the Trial Chamber erred in: (i) its assessment of Witness QAR's evidence; (ii) ignoring contradictions in the Prosecution evidence; (iii) failing to consider the lack of corroboration; and (iv) its assessment of Defence evidence.[6719] The Appeals Chamber will address these contentions in turn.

[6713] Trial Judgement, paras. 1245, 1246, 5754-5757.
[6714] Trial Judgement, paras. 1245, 1246, 5995-6001.
[6715] Trial Judgement, paras. 5758, 5976, 5977, 6002, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186.
[6716] Ndayambaje Appeal Brief, paras. 333, 334, 339, 347-349, 355-358, 360-364, 368, 371, 372, 379-381, 384, 386-388, 394, 395, 398, 400, 402, 404, 407, 412, 415, 416, 418, 420-422, 424. *See also* Ndayambaje Notice of Appeal, paras. 141, 142, 144.
[6717] *See supra*, Sections IX.A.1(c), IX.A.5.
[6718] The Appeals Chamber notes that Ndayambaje was otherwise convicted of aiding and abetting genocide and that this form of responsibility does not require that the aider and abetter had genocidal intent.
[6719] Ndayambaje Notice of Appeal, paras. 141-148; Ndayambaje Appeal Brief, paras. 333-386, 422, 424.

1. Assessment of Witness QAR's Evidence

2944. In finding that Ndayambaje participated in the events at Mugombwa Church, the Trial Chamber relied primarily on the evidence of Prosecution Witness QAR.[6720] It noted that Witness QAR placed Ndayambaje at Mugombwa Church on 20 and 21 April 1994.[6721] It found her evidence compelling, consistent, and detailed and further noted that it was corroborated by Prosecution and Defence witnesses in several respects.[6722] The Trial Chamber also considered alibi evidence, inconsistencies, and contradictions in Witness QAR's evidence, and potentially contradictory Prosecution evidence in the Trial Judgement and concluded that this evidence did not cast doubt on the witness's credibility.[6723]

2945. The Appeals Chamber will examine Ndayambaje's submission that the Trial Chamber erred in its assessment of Witness QAR's evidence that she saw him at Mugombwa Church, before turning to his contentions that the Trial Chamber failed to apply the standards applicable to identification under difficult circumstances and ignored material inconsistencies and contradictions within Witness QAR's evidence.[6724]

(a) Presence of Ndayambaje at Mugombwa Church

2946. The Trial Chamber recalled Witness QAR's testimony that, through one of the church's broken windows, she saw Ndayambaje outside the church about 10 metres away from where she stood at about noon on 20 April 1994.[6725] It also noted that Witness QAR testified to seeing Ndayambaje at Mugombwa Church at 10.00 a.m. on 21 April 1994 about 10 metres away from her position inside the church.[6726] The Trial Chamber relied on these aspects of Witness QAR's evidence to find that Ndayambaje was present at Mugombwa Church on 20 and 21 April 1994.[6727]

2947. Ndayambaje submits that the Trial Chamber erred in finding that Witness QAR saw him at Mugombwa Church on 20 April 1994 through one of the church's broken windows.[6728] He argues that: (i) Exhibit P41 contradicts Witness QAR's evidence and shows that the witness could not possibly see him from the position where she claimed she stood; (ii) Witness QAR could not see outside because of the opacity of the window panes; (iii) Witness QAR could not have seen him

[6720] Trial Judgement, paras. 1211, 1219, 1227-1235, 1237-1244.
[6721] Trial Judgement, paras. 1219, 1227, 1232.
[6722] Trial Judgement, paras. 1204, 1205, 1227-1229, 1231, 1233-1235, 1237, 1239, 1242-1245.
[6723] Trial Judgement, paras. 1218, 1230, 1241, 1243, 1244.
[6724] Ndayambaje Notice of Appeal, paras. 142-144; Ndayambaje Appeal Brief, paras. 243-245, 335, 337-341, 348. *See also* Ndayambaje Reply Brief, paras. 125-131, 135; AT. 21 April 2015 pp. 22, 23.
[6725] Trial Judgement, para. 1227.
[6726] Trial Judgement, para. 1232.
[6727] *See* Trial Judgement, paras. 1244-1246.
[6728] Ndayambaje Appeal Brief, paras. 335, 337-341. *See also* Ndayambaje Notice of Appeal, paras. 141, 144.

from behind a window as stones were being thrown and she would have been exposing herself to the stones.[6729] Ndayambaje also contends that the Trial Chamber failed to consider the testimonies of Witnesses BOZAN and Tiziano that the panes of a single window were broken at 12.30 p.m., which contradicts Witness QAR's testimony that the panes of several windows were broken at 12.00 p.m.[6730]

2948. Ndayambaje further submits that the Trial Chamber erred in finding that Witness QAR saw him at Mugombwa Church on 21 April 1994 since neither her viewpoint, nor the crowd inside and outside the church, would have allowed the witness to see and hear everything she described.[6731] He contends that Witness QAR acknowledged her inability to see outside the church and to identify the person who threw grenades at the church on 21 April 1994.[6732] Moreover, Ndayambaje argues that the witness's implausible account of his distribution of weapons at the church, which was excluded by the Trial Chamber, shows Witness QAR's lack of credibility and that, having found her evidence related to his swearing-in ceremony not credible, the Trial Chamber had no reasons to believe the witness in relation to Mugombwa Church.[6733] In his view, the Trial Chamber further erred in assessing Witness QAR's testimony in an isolated manner and not in light of the other events she testified about.[6734]

2949. In addition, Ndayambaje submits that the Trial Chamber erred as a matter of law in relying on the fact that Witness QAR's testimony on Ndayambaje's presence at Mugombwa Church was consistent with Witness QAR's prior statements to bolster the witness's credibility.[6735]

2950. The Prosecution responds that Witness QAR gave consistent, detailed, and clear testimony, supported by video, of her vantage point from where she saw Ndayambaje on 20 April 1994.[6736] It submits that: (i) Exhibit P41 actually corroborates the witness's testimony; (ii) Witness QAR would not have been exposing herself to stone throwers while observing Ndayambaje through the window since the stone throwers stopped upon Ndayambaje's arrival; and (iii) the Trial Chamber merely "observed" that Witness QAR was consistent in her previous statements and that, in any

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[6729] Ndayambaje Appeal Brief, paras. 337, 340, 341. *See also* Ndayambaje Reply Brief, paras. 128, 129. Ndayambaje also asserts that Witness QAR's admission that she could not observe the exterior of the church to identify the person who allegedly threw grenades further demonstrated the implausibility of her account and that a site visit would have allowed the Trial Chamber to see these contradictions. *See* Ndayambaje Appeal Brief, para. 337. The Appeals Chamber has already rejected Ndayambaje's allegations of error regarding the denial of site visits. *See supra*, Section IX.D.
[6730] Ndayambaje Appeal Brief, para. 339.
[6731] Ndayambaje Appeal Brief, para. 343.
[6732] Ndayambaje Appeal Brief, para. 337, *referring to* Witness QAR, T. 21 November 2001 pp. 23, 25, 26.
[6733] Ndayambaje Appeal Brief, paras. 344, 370, 578, 579, *referring to* Trial Judgement, paras. 1036, 1037, 1244-1246, 4602-4604.
[6734] Ndayambaje Appeal Brief, paras. 209, 375.
[6735] Ndayambaje Appeal Brief, para. 334.
[6736] Prosecution Response Brief, para. 2180; AT. 21 April 2015 pp. 49, 50.

case, relying on consistent portions of the witness's prior statements to bolster her credibility was permissible in order to rebut the charge of fabrication of testimony.[6737]

2951. The Appeals Chamber observes that Ndayambaje did not question Witness QAR on Exhibit P41, the videotape of the commune office and Mugombwa Church made by a Prosecution investigator.[6738] Ndayambaje also did not raise any arguments related to this exhibit in his closing brief or during his closing arguments.[6739] More importantly, having reviewed Exhibit P41, the Appeals Chamber is not persuaded that it effectively shows that Witness QAR could not possibly see Ndayambaje from the position where she claimed she stood.

2952. The Appeals Chamber also finds no merit in Ndayambaje's argument on the opacity of the window panes given Witness QAR's testimony, which the Trial Chamber accepted, that she saw Ndayambaje speaking to the attackers through a *broken* window, not through a window pane.[6740] Similarly, the Appeals Chamber observes that Ndayambaje's argument that Witness QAR could not have stood near one of the church's windows while stones were being thrown ignores that Witness QAR testified that the crowd outside the church stopped throwing stones upon Ndayambaje's arrival at the church.[6741]

2953. The Appeals Chamber further observes that, contrary to Ndayambaje's claim, the Trial Chamber expressly considered the evidence of Witnesses BOZAN and Tiziano as to the number of church windows broken and when they were broken.[6742] The Trial Chamber noted that Witness BOZAN testified to only one window being broken but considered that his view of the church was restricted to one side of the church and concluded that his evidence therefore did not cast doubt on Witness QAR's testimony that more than one window was broken.[6743] Ndayambaje does not show how the Trial Chamber erred in reaching this finding. The Trial Chamber also noted Witness Tiziano's evidence that the windows in the church were broken by about 12.30 p.m. and found that this corroborated Witness QAR's evidence.[6744] Ndayambaje does not demonstrate how

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[6737] Prosecution Response Brief, paras. 2178, 2180-2184.
[6738] *See* Witness QAR, T. 20 November 2001 pp. 112-135, T. 21 November 2001 pp. 4-13, 19-24, 33-52.
[6739] *See* Ndayambaje Closing Brief, paras. 154-254; Ndayambaje Closing Arguments, T. 29 April 2009 pp. 42-84, T. 30 April 2009 pp. 4-46.
[6740] Witness QAR, T. 19 November 2001 p. 20; Trial Judgement, para. 1227.
[6741] Witness QAR, T. 20 November 2001 pp. 115, 116.
[6742] *See* Trial Judgement, paras. 1227, 1228.
[6743] *See* Trial Judgement, para. 1228.
[6744] *See* Trial Judgement, para. 1228. *See also* Tiziano Pegoraro, T. 9 September 2008 pp. 11, 13. The Appeals Chamber also notes Ndayambaje's argument that Witness Tiziano's testimony that, upon returning to the church, he saw "*les vitres brisées de l'église* [...]" was erroneously translated into English in "the broken windows of the church." Ndayambaje argues that the word "*vitre*" in French translates into "pane" in English and should therefore not have been translated into "window". *See* Ndayambaje Appeal Brief, para. 339. The Appeals Chamber considers that a reasonable trier of fact, whether relying on the French or English version of Witness Tiziano's testimony, could have found that his testimony corroborated Witness QAR's account of stones being thrown at the church and the breaking of the church's windows. *Compare* Tiziano Pegoraro, T. 9 September 2008 p. 11 (English) *with ibid.*, p. 13 (French).

the evidence of Witnesses QAR and Tiziano is inconsistent in this regard, as Witness Tiziano testified that he came back to the church "[t]oward 12.30" and that upon arrival before entering the parish he saw that the windows of the church were broken,[6745] which is not inconsistent with Witness QAR's testimony that the windows were broken around noon.[6746] Ndayambaje's contention that the Trial Chamber failed to consider the relevant testimonies of Witnesses BOZAN and Tiziano is therefore rejected.

2954. Furthermore, the Appeals Chamber considers that Witness QAR's evidence that she could not see the person who threw grenades at the church on 21 April 1994 does not establish, as Ndayambaje argues, that she would not have been able to see him on that day. The Appeals Chamber observes that the witness testified being at different locations at the moment she saw Ndayambaje and at the moment when the unidentified person threw grenades at the church.[6747] Moreover, the Appeals Chamber notes that the Trial Chamber did not find Witness QAR's account regarding the distribution of weapons implausible, but declined to consider it due to a lack of notice.[6748] Ndayambaje does not substantiate his contention that this particular aspect of Witness QAR's testimony was implausible and how it relates to the witness's ability to observe the events at Mugombwa Church on 21 April 1994. Similarly, Ndayambaje does not explain why the rejection of Witness QAR's testimony related to his swearing-in ceremony, which was based on elements that were specific to this very aspect of the witness's testimony,[6749] required the Trial Chamber to also reject her evidence regarding events at Mugombwa Church.[6750] His general and undeveloped argument that the Trial Chamber considered Witness QAR's testimony in an "isolated manner" also fails to demonstrate any error in the Trial Chamber's assessment of Witness QAR's testimony pertaining to Mugombwa Church.[6751]

2955. Turning to Ndayambaje's argument regarding the Trial Chamber's reliance on Witness QAR's prior consistent statements, the Appeals Chamber recalls that prior consistent statements cannot be used to bolster a witness's credibility, except to rebut a charge of recent

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[6745] Tiziano Pegoraro, T. 9 September 2008 pp. 11, 13.
[6746] Witness QAR, T. 20 November 2001 p. 119. *See also ibid.*, p. 120.
[6747] *See* Witness QAR, T. 19 November 2001 pp. 11, 13, 20. *See also* Witness QAR, T. 21 November 2001 pp. 22, 26. Witness QAR testified that when she saw Ndayambaje on 21 April 1994 she was standing near the door from which she came out, near a window which was broken. On the other hand, she testified to being near the alter of the church when the grenades were thrown at the church on 21 April 1994. *See idem.*
[6748] Trial Judgement, paras. 1036, 1037.
[6749] Trial Judgement, paras. 4602-4604.
[6750] *See also infra*, para. 3270. It is well-established jurisprudence that trial chambers have the discretion to accept some, but reject other parts of a witness's testimony. *See, e.g., Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[6751] The Appeals Chamber notes that it has found no error in the Trial Chamber's assessment of the credibility of Witness QAR's account related to the abduction of Tutsi women and girls in Mugombwa. *See infra*, Section IX.H.1(b).

fabrication of testimony.[6752] In the *Ntakirutimana* Appeal Judgement, to which Ndayambaje points, the Appeals Chamber also clarified that "there is a difference between using a prior consistent statement to bolster the indicia of credibility observed at trial and rejecting a Defence challenge to credibility based on alleged inconsistencies between testimony and earlier statements. The former is a legal error, while the latter is simply a conclusion that the Defence's arguments are not persuasive."[6753]

2956. In his closing brief, Ndayambaje challenged Witness QAR's credibility on the basis of inconsistencies between her testimony and earlier statements and argued, in particular, that Witness QAR did not see him at the church and that her claim was "pure fabrication".[6754] It is in the context of addressing one of these alleged inconsistencies in the Trial Judgement that the Trial Chamber "observe[d] that [Witness QAR] is consistent in her previous statements that she saw Ndayambaje at the site."[6755] The Appeals Chamber considers that it is clear from the Trial Judgement that Witness QAR's prior consistent statements were not used to bolster her credibility, but to rebut Ndayambaje's challenges of fabrication of evidence and lack of credibility of the witness. Accordingly, the Appeals Chamber finds that the Trial Chamber did not impermissibly rely on Witness QAR's prior consistent statements to bolster her credibility.

2957. Based on the above, the Appeals Chamber finds that Ndayambaje has not demonstrated that no reasonable trier of fact could have accepted Witness QAR's evidence of seeing Ndayambaje at Mugombwa Church on 20 and 21 April 1994.

(b) Identification under Difficult Circumstances

2958. Ndayambaje submits that identification done by a witness in circumstances such as those of Witness QAR required caution and corroboration.[6756] He contends that, in such a situation, the Trial Chamber was required to fully reason its decision, identify the factors it relied upon in support of the identification, and adequately address the factors impacting negatively on the reliability of the identification evidence, which it failed to do.[6757] Ndayambaje argues that the Trial Chamber merely stated that it had considered the circumstances surrounding the identification made by

[6752] *Ntakirutimana* Appeal Judgement, para. 147.
[6753] *Ntakirutimana* Appeal Judgement, para. 148.
[6754] *See* Ndayambaje Closing Brief, paras. 160-171.
[6755] Trial Judgement, para. 1239. *See also ibid.*, paras. 1238, 1240, 1241.
[6756] Ndayambaje Appeal Brief, para. 348. *See also* Ndayambaje Notice of Appeal, paras. 85, 86; Ndayambaje Appeal Brief, paras. 243, 251. Ndayambaje refers to the following circumstances: (i) the church was full of refugees who had to protect themselves from attackers who were throwing stones and could not have exposed themselves near the windows; (ii) Witness QAR moved about "relentlessly" in the crowd; (iii) Witness QAR was close to the door leading to the sacristy; and (iv) Witness QAR did not see Ndayambaje arrive at the church but was merely informed of his arrival by the other refugees. *See* Ndayambaje Appeal Brief, para. 348, fn. 494.
[6757] Ndayambaje Appeal Brief, paras. 244, 348.

Witness QAR but never provided a reasoned opinion for accepting the identification made by the witness.[6758]

2959. The Prosecution responds that corroboration of Witness QAR's identification evidence was not required and that, in any event, her evidence was corroborated on many accounts.[6759] It submits that the Trial Chamber made no error in its assessment of Witness QAR's identification evidence as it noted that the witness had no difficulty seeing Ndayambaje at Mugombwa Church, that she did not have to identify him as many refugees in the church recognised him, and that, in any event, she knew him since childhood and correctly identified him in court.[6760]

2960. Ndayambaje replies that identification of an accused under difficult circumstances cannot automatically be inferred on the sole basis of the witness having prior knowledge of the accused and reiterates that a fully reasoned opinion in such situations is required.[6761]

2961. The Appeals Chamber finds that the fact that Witness QAR's identification of Ndayambaje at Mugombwa Church was not corroborated did not prevent the Trial Chamber from relying on this aspect of her evidence. The Appeals Chamber recalls that a trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[6762]

2962. The Appeals Chamber nonetheless recalls that "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion."[6763] In these instances, the Trial Chamber must "carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence".[6764]

[6758] Ndayambaje Appeal Brief, para. 245. *See also* Ndayambaje Notice of Appeal, para. 86; Ndayambaje Reply Brief, para. 135.
[6759] Prosecution Response Brief, para. 2193.
[6760] Prosecution Response Brief, paras. 2152, 2193. *See also* AT. 21 April 2015 p. 48.
[6761] Ndayambaje Reply Brief, para. 135. Ndayambaje adds that none of the refugees who allegedly corroborate Witness QAR's identification evidence testified in court. *See idem.*
[6762] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, para. 251; *Nchamihigo* Appeal Judgement, para. 42; *Milošević* Appeal Judgement, para. 215. The jurisprudence cited by Ndayambaje does not suggest otherwise. *See* Ndayambaje Appeal Brief, para. 348, *referring to Kordić* Appeal Judgement, para. 274; *Bagilishema* Appeal Judgement, paras. 78, 79.
[6763] *Lukić and Lukić* Appeal Judgement, para. 136; *Renzaho* Appeal Judgement, para. 527; *Kupreškić et al.* Appeal Judgement, para. 39. *See also Kalimanzira* Appeal Judgement, para. 96.
[6764] *Lukić and Lukić* Appeal Judgement, para. 136; *Haradinaj et al.* Appeal Judgement, para. 152; *Kupreškić et al.* Appeal Judgement, para. 39.

2963. The Trial Chamber did not state that Witness QAR's identification of Ndayambaje was made under difficult circumstances.[6765] Rather, it found that Witness QAR saw Ndayambaje outside the church about 10 metres away from where she stood on 20 April 1994 through one of the church's broken windows, and from about 10 metres away from her position inside the church on 21 April 1994.[6766] The Appeals Chamber is not convinced that any of the elements Ndayambaje points to demonstrate that the circumstances in which Witness QAR identified Ndayambaje required further reasoning from the Trial Chamber.[6767] While Witness QAR had sought refuge in Mugombwa Church on 20 and 21 April 1994, her identification of Ndayambaje at Mugombwa Church did not occur in circumstances that would have made Ndayambaje difficult to identify.[6768]

2964. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness QAR's identification evidence.

(c) Inconsistencies and Contradictions within Witness QAR's Evidence

2965. The Trial Chamber noted discrepancies between Witness QAR's testimony at trial and her prior statements to Tribunal investigators.[6769] It found Witness QAR's explanations that the discrepancies were a result of her statements not being properly recorded by the investigators to be reasonable and accepted them.[6770] It concluded that the discrepancies between Witness QAR's testimony and her prior statements were not material and did not cast doubt on her credibility.[6771]

2966. Ndayambaje submits that no reasonable trier of fact would have accepted Witness QAR's evidence in light of the numerous material inconsistencies and contradictions between her prior statements and her testimony at trial, which undermined her credibility.[6772] Ndayambaje lists a number of inconsistencies and contradictions between Witness QAR's testimony and her prior statements which, he argues, concerned key material facts and should have led the Trial Chamber to reject the witness's evidence.[6773] According to Ndayambaje, it was against all logic that the Trial

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[6765] *See* Trial Judgement, para. 1244.
[6766] Trial Judgement, paras. 1227, 1232.
[6767] *See* Ndayambaje Appeal Brief, para. 348, fn. 494. The Appeals Chamber has already rejected Ndayambaje's argument that Witness QAR could not have been standing by the church's window. *See supra*, para. 2951.
[6768] The Appeals Chamber also notes that the Trial Chamber found that Witness QAR knew Ndayambaje since her childhood, a finding Ndayambaje does not challenge. *See* Trial Judgement, para. 1227.
[6769] Trial Judgement, paras. 1238-1241.
[6770] Trial Judgement, para. 1240.
[6771] Trial Judgement, paras. 1239, 1241.
[6772] Ndayambaje Appeal Brief, paras. 363-367, 373. *See also* Ndayambaje Notice of Appeal, paras. 141, 142, 144, 149; Ndayambaje Appeal Brief, para. 215.
[6773] Ndayambaje Appeal Brief, paras. 336, 364, 365. Ndayambaje contends that the Trial Chamber failed to take into account that the previous statements of Witness QAR, although recorded within a few months of each other, are contradictory. *See ibid.*, para. 372.

Chamber considered that these contradictions were not material and that they were attributable to errors on the part of the investigators who recorded Witness QAR's prior statements.[6774]

2967. Ndayambaje further contends that the Trial Chamber failed to consider the contradictions within Witness QAR's testimony in court regarding whether she saw him coming from Remera around 12.00 p.m. or whether she did not see him arrive and was informed of his arrival by the other refugees.[6775] In his view, the witness's contradictory versions demonstrate the implausibility of her account.[6776] He also argues that the Trial Chamber erred in law and in fact in failing to take into account that Witness QAR was hostile when asked about the discrepancies in her evidence.[6777]

2968. The Prosecution responds that the Trial Chamber examined all the inconsistencies raised by Ndayambaje and that he does not demonstrate that it was unreasonable for the Trial Chamber to accept Witness QAR's explanation for them or to consider that they were not material.[6778]

2969. Ndayambaje replies that Witness QAR's allegation that the investigators erred in taking her statements is not believable since it is improbable that the investigators could have made so many mistakes and since the witness signed the statements after they were read back to her.[6779]

2970. The Appeals Chamber observes that the Trial Chamber addressed and found that the inconsistencies between Witness QAR's testimony and prior statements related to the following matters were not material: (i) whether Witness QAR saw Ndayambaje arrive in a vehicle or was informed of his arrival by others; (ii) whether Ndayambaje was holding a gun or not; (iii) whether or not Witness QAR saw who distributed grenades to the attackers, who threw the grenade, and knew the number of grenades thrown; and (iv) whether Witness QAR arrived at the church at 8.00 a.m. or 2.00 p.m. on 20 April 1994.[6780] Ndayambaje fails to demonstrate that the first three discrepancies in Witness QAR's evidence referenced above concern key material facts and that the Trial Chamber erred in concluding that they were not material and did not cast doubt on the witness's credibility.

2971. By contrast, the Appeals Chamber considers that a reasonable trier of fact could not have considered that the discrepancy regarding the time Witness QAR arrived at the church on

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[6774] Ndayambaje Appeal Brief, para. 366 (French).
[6775] Ndayambaje Appeal Brief, para. 338.
[6776] Ndayambaje Appeal Brief, para. 338.
[6777] Ndayambaje Appeal Brief, para. 368, *referring to* Witness QAR, T. 21 November 2001 pp. 56, 57, 59, 79, *Rwamakuba* Trial Judgement, paras. 115, 190, 193.
[6778] Prosecution Response Brief, paras. 2171-2177. The Prosecution submits that some of the inconsistencies show, if anything, that Witness QAR did not try to incriminate falsely Ndayambaje because her testimony in court was less incriminating than what was recorded in her statements. *See idem.*
[6779] Ndayambaje Reply Brief, para. 126. *See also ibid.*, para. 125.
[6780] *See* Trial Judgement, paras. 1238-1241. *See also ibid.*, paras. 1038, 1043.

20 April 1994 was not material since it related directly to the witness's ability to see Ndayambaje at the church at around noon.[6781] However, the Appeals Chamber recalls that it is within the trial chamber's discretion to determine whether an alleged inconsistency is sufficient to cast doubt on the witness's credibility.[6782] In the case at hand, the Trial Chamber expressly accepted Witness QAR's testimony that she arrived at Mugombwa Church at around 8.00 a.m. because it found her explanation that the discrepancy regarding her time of arrival resulted from the improper recording of her statement by Tribunal investigators.[6783] Ndayambaje questions the reasonableness of the Trial Chamber's decision by primarily relying on other trial judgements in which trial chambers allegedly rejected similar explanations.[6784] The Appeals Chamber recalls that a trial chamber's assessment of the appropriate weight and credibility to be accorded to the testimony of a witness is made on a case-by-case basis.[6785] Ndayambaje's submissions fail to recognise that the circumstances in the cases he refers to are distinct[6786] and do not demonstrate the unreasonableness of the Trial Chamber's conclusion concerning this particular inconsistency.[6787]

2972. The Appeals Chamber also considers that Ndayambaje's argument that it is improbable that the investigators made so many mistakes while taking Witness QAR's statements is speculative and unsubstantiated. Furthermore, his reliance on the fact that the witness signed the relevant statements, thereby verifying their content in his view, ignores the witness's explanation as to the conditions under which she signed one of the statements[6788] and that she was not questioned on whether the contents of the other statement were read back to her before she placed her thumbprint on it.[6789] Ndayambaje does not establish that no reasonable trier of fact could have accepted Witness QAR's explanation for the discrepancies between her testimony and prior statements.

[6781] *See* Trial Judgement, paras. 1238, 1241.
[6782] *Hategekimana* Appeal Judgement, para. 190; *Rukundo* Appeal Judgement, para. 86; *Kajelijeli* Appeal Judgement, para. 96.
[6783] *See* Trial Judgement, paras. 1238, 1241.
[6784] *See* Ndayambaje Appeal Brief, paras. 366, 367, *referring to Gatete* Trial Judgement, paras. 206-212, *Bagilishema* Trial Judgement, paras. 613 *et seq.*, *Bizimungu et al.* Trial Judgement, para. 211.
[6785] *See Nchamihigo* Appeal Judgement, para. 47.
[6786] The Appeals Chamber notes that, in all cases cited by Ndayambaje, the trial chambers' decisions to reject the evidence of a particular witness were not based solely on the inconsistencies with the witness's previous statements or refusal to accept the witness's explanation that the previous statements had not been properly recorded, but also on the basis of a global assessment of the witness's evidence and credibility. *See Gatete* Trial Judgement, paras. 208-215; *Bagilishema* Trial Judgement, paras. 613-636; *Bizimungu et al.* Trial Judgement, paras. 211, 216.
[6787] *Cf. Ntawukulilyayo* Appeal Judgement, para. 15 ("It is only when the evidence relied on by the Trial Chamber could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is wholly erroneous, that the Appeals Chamber can substitute its own finding for that of the Trial Chamber").
[6788] Witness QAR explained that the person who had driven her to the place where her May 1997 statement was given retrieved her before she had finished giving her statement. She also explained that her statement was read to her and that she disagreed with certain aspects of it but was told by the investigators that it would not be a problem so she quickly signed it because she had to leave. *See* Witness QAR, T. 20 November 2001 pp. 30, 40.
[6789] Ndayambaje submits that an entry on Witness QAR's 1995 Statement shows that its content was read to the witness and that she approved it. However, this aspect was not put to the witness by Ndayambaje who, instead, simply asked the witness whether she was shown such a statement and whether she put her thumbprint on it. She was not questioned on

Against this background, the Appeals Chamber finds that Ndayambaje fails to demonstrate that the Trial Chamber's error in finding that the discrepancy was not material occasioned a miscarriage of justice.

2973. With regard to the inconsistencies in Witness QAR's evidence concerning whether the distribution of weapons took place on "Wednesday" 20 April 1994 or "Thursday" 21 April 1994 and whether Ndayambaje was present when the doors of the church were broken that were not expressly addressed by the Trial Chamber,[6790] the Appeals Chamber observes that Ndayambaje simply enumerates inconsistencies and argues that so many inconsistencies raise doubt as to the witness's credibility without developing or substantiating how these particular inconsistencies undermined the credibility of the witness.[6791] In these circumstances, and considering that minor inconsistencies commonly occur in witness evidence without rendering the evidence unreliable, the Appeals Chamber finds that Ndayambaje does not demonstrate that the Trial Chamber erred by not expressly discussing these inconsistencies, which do not concern the fundamental features of the witness's evidence.[6792]

2974. Likewise, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber erred in failing to consider the contradiction in Witness QAR's testimony regarding whether she saw Ndayambaje arriving at Mugombwa Church or was informed of his arrival. Not only does the Trial Judgement reflect that the Trial Chamber did not disregard this discrepancy,[6793] but the Appeals Chamber also considers that this discrepancy did not concern a key material fact and did not prevent a reasonable trier of fact from concluding that the fundamental features of Witness QAR's evidence were credible.[6794]

2975. Finally, with respect to the issue of Witness QAR's purported hostility during cross-examination, the Appeals Chamber considers that, after having reviewed the entirety of the witness's cross-examination, none of the portions of the witness's testimony referenced by

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whether its content was in fact read back to her before she placed her thumbprint on it. *See* Witness QAR, T. 19 November 2001 pp. 135-139.

[6790] *See* Ndayambaje Appeal Brief, para. 365. As for the alleged inconsistency regarding Ndayambaje's alleged intervention to allow the Hutu women and their children to get out of the church, the Appeals Chamber notes that Ndayambaje does not provide any references in support of his claim. The Appeals Chamber declines to entertain this argument further. *See supra*, para. 35.

[6791] Ndayambaje Appeal Brief, paras. 365, 366 (French).

[6792] Moreover, the Appeals Chamber notes that Witness QAR explained these inconsistencies in the same manner as she explained the discrepancies expressly addressed in the Trial Judgement and for which the Trial Chamber accepted her explanation. *See* Witness QAR, T. 21 November 2001 pp. 47, 54-57; Trial Judgement, para. 1240.

[6793] The Appeals Chamber observes that the Trial Chamber expressly noted the discrepancy in Witness QAR's testimony on whether or not she saw Ndayambaje arriving at Mugombwa Church when summarising her evidence. It also discussed the same discrepancy in relation to Witness QAR's previous statement in its deliberations, concluding that it was not material and did not cast doubt on the witness's credibility. *See* Trial Judgement, paras. 1238, 1240, 1241.

[6794] *See supra*, para. 2971.

Ndayambaje revealed conduct that required explicit consideration on the part of the Trial Chamber.[6795]

2976. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness QAR's credibility in light of inconsistencies within her evidence and the witness's demeanour.

2. Contradictions in Prosecution Evidence

2977. Ndayambaje submits that Witness EV's testimony that Ndayambaje was at Ngiryi Bridge in the morning of 20 April 1994 where he intercepted refugees attempting to flee to Burundi before he left for Gisagara and Kabuye directly contradicts Witness QAR's testimony that Ndayambaje was at Mugombwa Church at about noon on 20 April 1994.[6796] He argues that since Witnesses EV's and QAR's testimonies are contradictory and mutually exclusive, the Trial Chamber was not in position to conclude which one was true and should have given Ndayambaje the benefit of the doubt, instead of speculating about distances and times.[6797] Ndayambaje also underlines that Witness RT placed Ndayambaje at Ngiryi Bridge around 11.00 a.m. on 21 April 1994.[6798]

2978. Ndayambaje further contends that Witness QAR's testimony that she saw Ndayambaje at Mugombwa Church in the commune vehicle on 20 and 21 April 1994 cannot possibly be true as it was contradicted by the evidence of Witnesses EV and RV.[6799] Ndayambaje asserts that since Muganza Commune had a single vehicle in 1994, the one described by Witness QAR, he could not have possibly been in Butare and at the commune office, at Mugombwa Church, and in "Gisagara-Ngiryi-Kabuye" at the same time.[6800] He submits that the Trial Chamber erred in failing to consider these contradictions in the Prosecution evidence.[6801]

2979. The Prosecution responds that Witness EV's testimony can be read as saying that he saw Ndayambaje for the first time on 22 April 1994 and that, in any event, he should not have been relied upon.[6802] It also submits that Witness RT's testimony does not conflict with Witness QAR's

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[6795] The Appeals Chamber considers that the trial record shows that Witness QAR merely exhibited frustration with Ndayambaje's counsel when challenged with inconsistencies that the witness considered she had already explained. *See* Witness QAR, T. 20 November 2001 pp. 111, 112, T. 21 November 2001 pp. 10, 11, 24, 25, 31, 33, 37, 38, 56, 57, 112, 113. Moreover, Ndayambaje's comparison of Witness QAR's demeanour to that of other witnesses in the *Rwamakuba* Trial Judgement does not show any error on the part of the Trial Chamber as a witness's demeanour must be assessed on case-by-case basis. *See* Ndayambaje Appeal Brief, para. 368, *referring to Rwamakuba* Trial Judgement, paras. 115, 190, 193.
[6796] Ndayambaje Appeal Brief, paras. 342, 346. *See also* AT. 21 April 2015 p. 23.
[6797] Ndayambaje Appeal Brief, paras. 342, 422. *See also ibid.*, para. 190.
[6798] Ndayambaje Appeal Brief, para. 345, *referring to* Trial Judgement, para. 1277. *See also ibid.*, para. 190.
[6799] Ndayambaje Appeal Brief, paras. 345-347, 359, 418. *See also* Ndayambaje Reply Brief, para. 130.
[6800] Ndayambaje Appeal Brief, paras. 345-347, 422.
[6801] Ndayambaje Appeal Brief, para. 347.
[6802] Prosecution Response Brief, para. 2190; AT. 21 April 2015 pp. 45, 46.

evidence because both witnesses provided estimates of the times when they saw Ndayambaje.[6803] It underlines that the evidence does not show that Ndayambaje would not have had time to travel between Mugombwa Church and Ngiryi Bridge on 21 April 1994.[6804] The Prosecution further responds that Witness QAR saw Ndayambaje driving a "white vehicle" which was not necessarily the commune vehicle.[6805] It submits that Ndayambaje mischaracterises the evidence of the other witnesses regarding this vehicle.[6806]

2980. Ndayambaje replies that, even though Witnesses QAR and RT only provided estimates as to when they saw him, this does not eliminate the fact that it was impossible for him to have been at the two locations in different cars at the stated times because of the distance between them.[6807] Ndayambaje also emphasises that Witness QAR could only have been referring to the Muganza commune vehicle.[6808]

2981. The Appeals Chamber observes that, while in support of his submission under this ground of appeal Ndayambaje relies on the Trial Chamber's understanding of Witness EV's timeline of events with respect to his movements on 20 April 1994, he argues in other parts of his appeal that the Trial Chamber erred in assessing Witness EV's timeline for the events at Ngiryi Bridge as the witness's testimony reflects that he saw Ndayambaje at Ngiryi Bridge on Thursday, 21 April 1994 and not Wednesday, 20 April 1994 as found by the Trial Chamber.[6809] The Prosecution does not dispute that the Trial Chamber misconstrued Witness EV's testimony about his timeline.[6810] As discussed in further detail in Section IX.F.1 below, a careful review of Witness EV's testimony shows that the witness testified that he was intercepted at Ngiryi Bridge by Ndayambaje on 21 April 1994 and that the Trial Chamber therefore erred in finding that Witness EV testified that the interception at Ngiryi Bridge took place on 20 April 1994.[6811] The Appeals Chamber therefore finds no merit in Ndayambaje's argument under this ground of appeal that Witness EV's testimony on Ndayambaje's presence at Ngiryi Bridge contradicted Witness QAR's testimony that Ndayambaje was at Mugombwa Church for approximately 15 minutes around noon on 20 April 1994.

[6803] Prosecution Response Brief, para. 2191; AT. 21 April 2015 p. 45.
[6804] Prosecution Response Brief, para. 2191.
[6805] Prosecution Response Brief, para. 2185. The Prosecution asserts that there were two other white cars besides the commune vehicle to which the witness could have been referring. *See ibid.*, paras. 2186-2188.
[6806] Prosecution Response Brief, paras. 2189-2192. The Prosecution submits that, while Witness RT testified to sending his driver in a car to Mugombwa Church on the morning of 21 April 1994, he did not testify sending the driver in the commune vehicle. It also points out that Witness RT testified to seeing Ndayambaje in a red Toyota-type single cabin truck and not the white commune vehicle. *See ibid.*, paras. 2190, 2192.
[6807] Ndayambaje Reply Brief, para. 134. Ndayambaje points out that he was seen in a white vehicle in Mugombwa and in a red one at Ngiryi Bridge. *See idem.*
[6808] Ndayambaje Reply Brief, paras. 131, 133.
[6809] Ndayambaje Appeal Brief, paras. 435-437, 457, 460, 463.
[6810] Prosecution Response Brief, para. 2298.
[6811] *See infra*, para. 3028.

2982. As regards Ndayambaje's reliance on Witness RT's alleged contradictory testimony, the Appeals Chamber observes that the Trial Chamber found that the witness's account of Ndayambaje's presence at Ngiryi Bridge at around 11.00 a.m. pertained to 20 April 1994 *or* 21 April 1994.[6812] Regardless of whether Witness RT's account pertained to 20 or 21 April 1994, the Appeals Chamber finds that, given that both witnesses only provided estimates and that undisputed evidence reflects that the travel between the locations took approximately one hour,[6813] Witness RT's evidence of seeing Ndayambaje at 11.00 a.m. at Ngiryi Bridge is not incompatible with Witness QAR's evidence that she saw Ndayambaje at Mugombwa Church around noon on 20 April 1994 and between 10.00 and 10.30 a.m on 21 April 1994. Ndayambaje's argument that the witnesses referred to different cars also fails to take into account the Trial Chamber's finding that Ndayambaje had access to both a white and a red vehicle at the time.[6814]

2983. The Appeals Chamber further notes that Ndayambaje misinterprets the Trial Judgement concerning the use of the Muganza commune vehicle. The Trial Chamber did not find that Ndayambaje came to Mugombwa Church in the Muganza commune vehicle[6815] and, contrary to Ndayambaje's suggestion, Witness QAR did not testify to seeing him at the church in the commune vehicle. The witness merely referred to a "white vehicle".[6816] Having reviewed the relevant parts of Witness QAR's testimony, the Appeals Chamber is not persuaded by Ndayambaje's argument that the witness must have been referring to the Muganza commune vehicle. Even assuming that the vehicle Witness QAR saw was the commune vehicle, Ndayambaje's submissions fail to show that he could not have used this vehicle on 20 and 21 April 1994 to go to Mugombwa Church.[6817]

2984. The Appeals Chamber therefore concludes that Ndayambaje has failed to show any contradiction between Witnesses EV's, RV's, and RT's evidence and the testimony of Witness QAR.

[6812] Trial Judgement, paras. 1406, 1407.
[6813] *See* Trial Judgement, para. 1398.
[6814] Trial Judgement, para. 1409.
[6815] *Cf.* Trial Judgement, paras. 1245, 1246.
[6816] *See* Witness QAR, T. 19 November 2001 pp. 16, 21, T. 20 November 2001 p. 120. *See also* Trial Judgement, paras. 1040, 1229, 1232.
[6817] The Appeals Chamber notes that Ndayambaje merely refers to the summary of Witness RV's evidence in support of his assertion that Witness RV used the commune vehicle throughout the day on 20 April 1994. Having reviewed the evidence pointed out by Ndayambaje, the Appeals Chamber does not find that such evidence conclusively establishes that Witness RV used the commune vehicle during the entire day on 20 April 1994 or went to Butare with that particular vehicle on that day. *See* Ndayambaje Appeal Brief, para. 345; Trial Judgement, paras. 1065-1071; Witness RV, T. 16 February 2004 p. 41 (closed session), T. 17 February 2004 pp. 67-69 (closed session), T. 18 February 2004 p. 7 (closed session). Similarly, Ndayambaje's suggestion that Witness RV sent his driver to Mugombwa Church in the commune vehicle and that this precluded Ndayambaje from using this vehicle at 10.00 a.m. on 21 April 1994 is not supported by the evidence to which he refers. *See* Ndayambaje Appeal Brief, paras. 345, fn. 488, *referring to* Trial Judgement, para. 1070. *See also ibid.*, paras. 359, 418.

3. Lack of Corroboration

2985. The Trial Chamber found that aspects of Witness QAR's evidence on the events of 20 and 21 April 1994 were corroborated by: (i) Witnesses BOZAN and Tiziano, who confirmed that the windows of the church were broken; (ii) Witnesses FAU and MAJIK, who also testified about the absence of policemen, priests, and soldiers; (iii) Witnesses JAMES, ALIZA, and FAU, who corroborated the time the attack was launched on 20 April 1994; (iv) Witness FAG, who gave evidence consistent with Witness QAR as to the time the attack was launched on 21 April 1994, that grenades were thrown at the church, and that the attackers set the church on fire; (v) Witnesses FAG and JAMES, who confirmed the presence of Burundian refugees among the assailants and that attackers tried to break down the church door; (vi) Witnesses BOZAN and JAMES, who identified some of the same attackers as Witness QAR; and (vii) Witness JAMES, who also testified that Witness QAR was spared after the intervention of the Hutu father of her child.[6818]

2986. Ndayambaje submits that the Trial Chamber erred in relying on Witness FAG to corroborate Witness QAR's evidence on the events at Mugombwa Church.[6819] He contends that the Trial Chamber failed to exercise appropriate caution in assessing Witness FAG's credibility, noting that the witness was awaiting a *Gacaca* decision when he testified in this case and that he had been released from custody in exchange for confessions in which he had hidden his involvement in the massacre at Mugombwa Church.[6820] Ndayambaje also argues that the Trial Chamber erroneously relied on Witness FAG's testimony concerning the events of 20 April 1994 as his evidence did not pertain to 20 April but to 21 April 1994.[6821]

2987. In addition, Ndayambaje submits that, while the Trial Chamber found that Witness QAR's evidence was corroborated in several aspects, it failed to find corroboration for her testimony that

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[6818] Trial Judgement, paras. 1227-1229, 1231, 1233-1235, 1237, 1242.

[6819] Ndayambaje Notice of Appeal, paras. 142, 144, 145, 151; Ndayambaje Appeal Brief, paras. 356-358, 361, 362. The Appeals Chamber notes that Ndayambaje also challenges under this ground of appeal the credibility of Witness FAU's evidence and notes that these challenges have been addressed above in the section related to Ndayambaje's challenges to the Trial Chamber's findings on his alibi in relation to Witness Tiziano. *See* Ndayambaje Appeal Brief, paras. 350-356; *supra*, paras. 2899-2902.

[6820] Ndayambaje Appeal Brief, para. 356. *See also* Ndayambaje Notice of Appeal, paras. 142, 144, 145, 151.

[6821] Ndayambaje Appeal Brief, paras. 357, 358. In his reply brief, Ndayambaje submits that nothing suggests that the testimony of Witness FAG related to 21 April 1994, which is contradictory with his submissions in his appeal brief. *See* Ndayambaje Reply Brief, para. 136. The Appeals Chamber will therefore not entertain this contradictory submission. *See supra*, para. 35. Ndayambaje adds that the Trial Chamber confused Witness FAG's testimony regarding events that occurred at Kabuye on 22 April 1994 with his account of what happened at Mugombwa Church on 21 April 1994, thus creating new evidence. *See* Ndayambaje Appeal Brief, para. 358, *referring to* Trial Judgement, paras. 1048, 1049, Witness FAG, T. 1 March 2004 pp. 14, 15, 18, 19. However, Ndayambaje merely points to paragraphs of the Trial Judgement and portions of Witness FAG's testimony without identifying any error or explaining its impact. The Appeals Chamber therefore declines to consider the merits of this undeveloped argument.

he was present at the church and involved in the crimes committed there.[6822] According to him, the Trial Chamber erred in using the evidence of Witnesses FAU, FAG, JAMES, and MAJIK to corroborate Witness QAR's evidence since these witnesses did not see Ndayambaje at the church.[6823] Ndayambaje also submits that, having made factual findings premised on this error, it is impossible to know if the Trial Chamber's findings regarding his presence and his involvement in the crimes at the church would have been identical without such corroboration.[6824]

2988. The Prosecution responds that the Trial Chamber was correct in finding that Witness FAG corroborated several aspects of Witness QAR's accounts.[6825] It argues that the Trial Chamber's mistake in stating that Witness FAG saw Ndayambaje on 20 April instead of 21 April 1994 has no impact on the Trial Chamber's findings as the witness provided relevant evidence on the attack on Mugombwa Church of 21 April 1994.[6826] According to the Prosecution, the absence of corroboration of Witness QAR's evidence on Ndayambaje's presence at Mugombwa Church is insufficient to invalidate the Trial Chamber's findings.[6827]

2989. With respect to the credibility of Witness FAG, the Appeals Chamber observes that the Trial Chamber expressly considered all the information Ndayambaje points to on appeal[6828] and stated that it would treat his testimony with caution considering that the witness may have had an incentive to lie during his testimony in order to obtain preferential treatment in connection with his *Gacaca* sentence.[6829] Ndayambaje simply disagrees with the manner the Trial Chamber exercised caution without demonstrating any error in the exercise of its discretion in the assessment of the evidence.

2990. The Appeals Chamber notes that the Trial Chamber did not find that Witness FAG corroborated Witness QAR's testimony with regard to events on 20 April 1994 but regarding the circumstances of the attack that was launched on 21 April 1994.[6830] The Trial Chamber also

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[6822] Ndayambaje Appeal Brief, paras. 360-362. *See also* Ndayambaje Notice of Appeal, para. 141; AT. 21 April 2015 p. 23.
[6823] Ndayambaje Appeal Brief, paras. 349, 354, 357, 380.
[6824] Ndayambaje Appeal Brief, para. 361.
[6825] Prosecution Response Brief, paras. 2198-2206. *See also* AT. 21 April 2015 pp. 48, 49.
[6826] Prosecution Response Brief, paras. 2204, 2205. *See also* AT. 21 April 2015 p. 46.
[6827] Prosecution Response Brief, para. 2195.
[6828] The Trial Chamber noted that Witness FAG participated in the attacks on Mugombwa Church and that, at the time of his testimony, he was awaiting a decision by a *Gacaca* court. It further took into consideration that, while giving detailed information regarding the identities of the assailants and the sequence of events at Mugombwa Church in his testimony, Witness FAG had not mentioned the attacks on Mugombwa Church in his confession to the Rwandan authorities. It accepted the witness's explanation that he omitted this information because "he was afraid, and there were things he could not talk about at the time", and accepted the witness's evidence insofar as it related to the massacre at Mugombwa Church on 21 April 1994 and his account of how he came to find himself at Mugombwa Church. *See* Trial Judgement, paras. 1224, 1226, 1236.
[6829] Trial Judgement, para. 1226.
[6830] *See* Trial Judgement, paras. 1233, 1234, 1237.

expressly stated that it accepted Witness FAG's evidence insofar as it related to the massacre at Mugombwa Church on 21 April 1994 and his account of how he came to find himself at the church.[6831]

2991. A review of Witness FAG's testimony, as correctly summarised by the Trial Chamber, reflects that the witness testified that Ndayambaje spoke with community leaders at Bishya trade centre on 21 April 1994.[6832] However, in its conclusions on the events at Mugombwa Church, the Trial Chamber found that "on the morning of 20 April 1994, Ndayambaje spoke with community leaders at Bishya trade centre who immediately thereafter directed men at Bishya, including Witness FAG, to Mugombwa Church".[6833] The Trial Chamber provided no reference to the evidence upon which it based this finding and a review of the Trial Chamber's summary of the evidence relevant to Mugombwa Church reveals that no witness provided evidence about such a meeting taking place on 20 April 1994.[6834] As pointed out by Ndayambaje, the Trial Chamber's finding appears to be based on Witness FAG's evidence.[6835] The Appeals Chamber therefore finds that the Trial Chamber erred in concluding that the meeting between Ndayambaje and community leaders at Bishya trade centre took place on 20 April 1994 since Witness FAG's evidence, as accepted by the Trial Chamber, indicates that the meeting took place on 21 April 1994.[6836] The Appeals Chamber nonetheless finds that this error has not occasioned a miscarriage of justice as none of Ndayambaje's convictions rests on the misstatement of the date when Ndayambaje spoke with community leaders at Bishya trade centre.[6837]

2992. Ndayambaje is correct in his assertion that the Trial Chamber relied exclusively on Witness QAR to conclude that Ndayambaje was present at Mugombwa Church on 20 and 21 April 1994 and for his involvement in the events there.[6838] The Trial Chamber expressly noted that Witnesses FAU, FAG, JAMES, and MAJIK did not testify to the presence of Ndayambaje at the church on these dates, but found that this aspect of their evidence was not incompatible with

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[6831] Trial Judgement, para. 1236.
[6832] In the Trial Judgement, the Trial Chamber repeatedly referred to Witness FAG's evidence in the context of Mugombwa Church as pertaining to 21 April 1994. The Trial Chamber noted that the witness did not provide a specific date for the events at the church but relied on the witness's explanation that the events took place on the Thursday two weeks after the death of President Habyarimana. *See* Trial Judgement, paras. 1048-1056. *See also ibid.*, para. 1048, fn. 2088; Witness FAG, T. 1 March 2004 pp. 6, 15 (closed session), T. 2 March 2004 pp. 16-19.
[6833] Trial Judgement, para. 1245.
[6834] *See* Trial Judgement, paras. 1038-1193. The Prosecution does not dispute that no witness provided evidence about such a meeting taking place on 20 April 1994. *See* Prosecution Response Brief, paras. 2205, 2318.
[6835] *See* Ndayambaje Appeal Brief, para. 358; Trial Judgement, paras. 1048-1056.
[6836] *See* Trial Judgement, paras. 1245, 5754.
[6837] The Trial Judgement clearly reflects that, in finding Ndayambaje guilty in relation to the crimes perpetrated at Mugombwa Church on 20 and 21 April 1994, the Trial Chamber relied on evidence of Ndayambaje's presence at Mugombwa Church on 20 and 21 April 1994, his addresses to the attackers while at the church, and his moral authority. *See* Trial Judgement, paras. 5756-5758, 5995-6002, 6064-6066, 6107, 6108, 6175, 6176.
[6838] Trial Judgement, paras. 1219, 1227, 1229, 1230, 1232, 1234, 1244.

Witness QAR's testimony.[6839] Ndayambaje fails to appreciate that nothing in the Statute or the Rules prevents a trial chamber from relying on uncorroborated evidence. A trial chamber has the discretion to decide in the circumstances of each case whether corroboration is necessary and whether to rely on uncorroborated, but otherwise credible, witness testimony.[6840] Ndayambaje does not demonstrate that the evidence of Witness QAR was so lacking in reliability and credibility that no reasonable trier of fact could have relied on it without corroboration.

2993. As to Ndayambaje's argument that the Trial Chamber erred in finding corroboration of Witness QAR's evidence from witnesses who did not corroborate the key fact of his presence at Mugombwa Church, the Appeals Chamber recalls that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.[6841] Every witness presents what he has seen from his own point of view at the time of the events, or according to how he understood the events recounted by others.[6842] It follows that corroboration may exist even when some details differ between testimonies, provided that no credible testimony describes the facts in question in a way which is not compatible with the description given in another credible testimony.[6843] Recalling that the Trial Chamber found that the evidence of Witnesses FAU, FAG, JAMES, and MAJIK was not incompatible with Witness QAR's testimony as to Ndayambaje's presence at Mugombwa Church on 20 and 21 April 1994,[6844] Ndayambaje's argument that the evidence of these witnesses could not be found to corroborate that of Witness QAR because they only corroborated peripheral aspects of her testimony lacks merit.

2994. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in concluding that Ndayambaje's meeting with community leaders at Bishya trade centre took place on 20 April 1994.[6845] However, the Appeals Chamber finds that this error has no impact on Ndayambaje's convictions. The Appeals Chamber dismisses the remainder of Ndayambaje's arguments related to an alleged lack of corroboration.

[6839] *See* Trial Judgement, paras. 1080, 1083, 1230, 1234.
[6840] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[6841] *See Nzabonimana* Appeal Judgement, para. 184; *Ntabakuze* Appeal Judgement, para. 150; *Ntawukulilyayo* Appeal Judgement, para. 24. *See also Munyakazi* Appeal Judgement, para. 103.
[6842] *Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103; *Nahimana et al.* Appeal Judgement, para. 428.
[6843] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Setako* Appeal Judgement, para. 31; *Hategekimana* Appeal Judgement, para. 82; *Nahimana et al.* Appeal Judgement, para. 428.
[6844] *See* Trial Judgement, paras. 1080, 1083, 1230, 1234.
[6845] *See* Trial Judgement, paras. 1245, 5754.

4. Assessment of Defence Evidence

2995. Ndayambaje submits that the Trial Chamber erred in rejecting the evidence of Defence Witnesses JAMES, MAJIK, and BOZAN related to Mugombwa Church.[6846]

(a) Witness JAMES

2996. The Trial Chamber observed that Witness JAMES testified that he saw Witness QAR at a bar on the evening of 21 April 1994 and knew that she spent the night at a nearby house, contradicting Witness QAR's evidence that she spent the night of 21 April 1994 at the priest's house.[6847] The Trial Chamber determined that Witness JAMES's testimony that Witness QAR was not telling the truth about where she spent the night of 21 April 1994 did not contradict Witness QAR's evidence in any material aspect.[6848] The Trial Chamber accepted Witness QAR's evidence that she spent the night of 21 April 1994 at the priest's house, noting that "it is possible that Witness JAMES was mistaken and that he in fact saw her on the following evening."[6849] It concluded that Witness JAMES's evidence did not cast doubt on Witness QAR's credibility.[6850]

2997. Ndayambaje submits that the Trial Chamber erred in rejecting without any valid reason Witness JAMES's evidence even though he raised a reasonable doubt as to the presence of Ndayambaje at Mugombwa Church on 20 and 21 April 1994 and contradicted Witness QAR's evidence on every aspect.[6851] He contends that the Trial Chamber speculated that Witness JAMES might have been mistaken and that this shows that Witness JAMES's evidence raised a doubt.[6852]

2998. The Prosecution responds that the Trial Chamber reasonably concluded that Witness JAMES may have been mistaken about the day he saw Witness QAR as the witness conceded that he was not good with dates as he was very young at the time of the events.[6853]

2999. The Appeals Chamber notes that Ndayambaje's claim that Witness JAMES contradicted Witness QAR in every respect is not supported by the portions of the Trial Judgement to which he

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[6846] *See* Ndayambaje Appeal Brief, paras. 379-386. *See also* Ndayambaje Notice of Appeal, paras. 146-148, 150; AT. 21 April 2015 p. 23. Under Ground 17 of his appeal, Ndayambaje advances arguments challenging the Trial Chamber's assessment of the alibi evidence. *See* Ndayambaje Appeal Brief, paras. 387-389, 395-415, 417. *See also* AT. 21 April 2015 pp. 23, 24, 26. These submissions have been addressed above by the Appeals Chamber in Section IX.C.
[6847] Trial Judgement, para. 1242.
[6848] Trial Judgement, para. 1243.
[6849] Trial Judgement, para. 1243.
[6850] Trial Judgement, para. 1243.
[6851] Ndayambaje Appeal Brief, para. 379. *See also* Ndayambaje Notice of Appeal, paras. 147, 148; AT. 21 April 2015 p. 25.
[6852] Ndayambaje Appeal Brief, para. 381.
[6853] Prosecution Response Brief, para. 2218.

refers.[6854] In fact, many of the paragraphs Ndayambaje referenced show that the Trial Chamber found Witness JAMES to corroborate Witness QAR's testimony in several aspects.[6855]

3000. Moreover, the Appeals Chamber does not agree that the Trial Chamber rejected Witness JAMES's evidence on the basis of mere speculation. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible.[6856] In this case, the Trial Chamber found that Witness QAR's eyewitness account was compelling and accepted her account that she spent the night of 21 April 1994 at the priest's house, noting that Witness JAMES's account did not contradict Witness QAR's evidence in any material respect.[6857] Ndayambaje disregards this part of the Trial Chamber's reasoning and focuses exclusively on the Trial Chamber's observation that Witness JAMES may have been mistaken regarding the date. Ndayambaje therefore fails to show that no reasonable trier of fact could have accepted Witness QAR's evidence over Witness JAMES's evidence.[6858]

3001. The Appeals Chamber dismisses Ndayambaje's submissions regarding the Trial Chamber's assessment of Witness JAMES's evidence concerning Witness QAR's whereabouts on 21 April 1994.

(b) Witness MAJIK

3002. The Trial Chamber noted that Witness MAJIK testified that she first "passed by Mugombwa Church at about 11:30 a.m. on 20 April 1994" and that, "[o]n her way back past the church an hour later[,] the attackers had not attacked the church."[6859] It further noted that Witness MAJIK testified that she did not see Ndayambaje on either of her journeys.[6860] The Trial Chamber observed,

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[6854] *See* Ndayambaje Appeal Brief, para. 379, *referring to* Trial Judgement, paras. 1073-1087, 1227, 1231, 1234, 1235, 1237, 1242, 1244.
[6855] *See* Trial Judgement, paras. 1231 (finding that the explosions coming from the church that were heard by Witness JAMES corroborated Witness QAR's account of grenades being thrown at the church), 1234 (finding that Witness JAMES's account that he overheard the attackers talking about an attack in which an axe was used to break down a door corroborated Witness QAR's account of how the church's door was broken), 1235 (Witness JAMES corroborated the identity of some of the attackers), 1237 (finding that Witness JAMES corroborated Witness QAR's account regarding the presence of Burundian refugees among the attackers), 1242 (finding that Witness JAMES corroborated Witness QAR with respect to the intervention of the Hutu father of her child in saving her), 1244 (finding that Witness JAMES corroborated Witness QAR with respect to the time of the attack launched on 21 April 1994 and the throwing of grenades).
[6856] *See, e.g.*, *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29 ("Where testimonies are divergent, it is the duty of the [t]rial [c]hamber, which heard the witnesses, to decide which evidence it deems to be more probative, and to choose which of the two divergent versions of the same event it may admit.") (internal reference omitted).
[6857] Trial Judgement, para. 1243.
[6858] The Appeals Chamber notes that the Trial Chamber rejected other aspects of Witness JAMES's testimony in light of the evidence in the record. *See* Trial Judgement, paras. 4605, 4737, 4738, 4740.
[6859] Trial Judgement, para. 1229.
[6860] Trial Judgement, para. 1230.

however, that Witness MAJIK was a passer-by and that she was not at the church for an extended period of time on 20 April 1994.[6861] In light of this, it concluded that Witness MAJIK's testimony did not cast doubt on Witness QAR's eyewitness testimony that Ndayambaje came to the church for 15 minutes at about midday on 20 April 1994.[6862]

3003. Ndayambaje submits that the Trial Chamber misconstrued Witness MAJIK's testimony when finding that she only returned to Mugombwa Church at 12:30 p.m.[6863] He claims that the witness testified that she was at the church at about noon on 20 April 1994 and that she did not see him there.[6864] In his view, a reasonable trier of fact could not have rejected Witness MAJIK's evidence on the basis that she was a passer-by.[6865]

3004. The Prosecution responds that the Trial Chamber was correct in describing Witness MAJIK as a passer-by since the witness was only in the vicinity of the church for a limited period of time.[6866] It also highlights that the Trial Chamber did not state that Witness MAJIK came back to the church only at 12.30 p.m. but rather that she left the parish grounds around 12.30 p.m., having remained there for about half an hour.[6867]

3005. Ndayambaje replies that what is important is not the amount of time Witness MAJIK spent at the church but rather that she was there when Witness QAR alleged to have seen Ndayambaje.[6868]

3006. The Appeals Chamber notes that Witness MAJIK testified that she passed in front of Mugombwa Church at "about 11.30" in the morning of 20 April 1994.[6869] She stated that she stopped at the parish for a short while to ask a young man what had happened, before continuing to the homes of her aunt and uncle, both of which were closed.[6870] Witness MAJIK testified that she then returned to Mugombwa Church to see if her uncle was there.[6871] She added that she stayed on the parish grounds for "about half an hour" and thought that she left "around 12:25 or 12:30".[6872]

3007. In light of this evidence, the Appeals Chamber finds that the Trial Chamber did not err in taking into consideration that Witness MAJIK only stayed on the parish grounds for limited

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[6861] Trial Judgement, para. 1230.
[6862] Trial Judgement, para. 1230.
[6863] Ndayambaje Appeal Brief, paras. 385, 386, *referring to* Trial Judgement, paras. 1088-1092, 1225, 1229, 1230.
[6864] Ndayambaje Appeal Brief, para. 386, *referring to* Witness MAJIK, T. 17 June 2008 pp. 56, 57.
[6865] Ndayambaje Appeal Brief, paras. 385, 386. *See also* Ndayambaje Reply Brief, para. 143; AT. 21 April 2015 p. 25.
[6866] Prosecution Response Brief, para. 2229.
[6867] Prosecution Response Brief, para. 2230. The Prosecution also argues that, in any event, Witness MAJIK's evidence is unbelievable and shows that she wanted to help Ndayambaje. *See ibid.*, paras. 2231-2239; AT. 21 April 2015 pp. 50, 51.
[6868] Ndayambaje Reply Brief, para. 143.
[6869] Witness MAJIK, T. 17 June 2008 p. 41 (closed session). *See also* Trial Judgement, para. 1088.
[6870] Witness MAJIK, T. 17 June 2008 pp. 42, 44 (closed session). *See also* Trial Judgement, para. 1089.
[6871] Witness MAJIK, T. 17 June 2008 pp. 44, 45 (closed session). *See also* Trial Judgement, paras. 1089, 1090.
[6872] Witness MAJIK, T. 17 June 2008 pp. 44, 45 (closed session). *See also* Trial Judgement, para. 1090.

amounts of time. In the view of the Appeals Chamber, the Trial Chamber nonetheless did not accurately recall her evidence when stating that she returned to Mugombwa Church "an hour later" after having previously passed by the church at 11.30 a.m., as her testimony reflects that she estimated her return to the church around 12.00 p.m.[6873]

3008. The Appeals Chamber, however, finds that this error has no impact on the Trial Chamber's conclusion that Witness MAJIK's testimony did not cast doubt on Witness QAR's eyewitness testimony that Ndayambaje came to Mugombwa Church for 15 minutes at about midday on 20 April 1994.[6874] Indeed, both Witnesses QAR and MAJIK were very clear that they could not provide exact times but only estimates of what they witnessed or of their whereabouts on 20 April 1994.[6875] In these circumstances, a reasonable trier of fact could have considered that Witness MAJIK was present at the church before or after Ndayambaje's short visit at the church, which Witness QAR observed.[6876]

3009. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that no reasonable trier of fact could have found that Witness MAJIK's testimony did not cast doubt on Witness QAR's evidence concerning Ndayambaje's presence at Mugombwa Church on 20 April 1994.

(c) Witness BOZAN

3010. The Trial Chamber noted Witness QAR's evidence that, on 20 April 1994, she saw, through a broken window, Ndayambaje speaking to the attackers as well as that of Witnesses BOZAN, Tiziano, and JAMES that it was not possible to look through the windows of the church unless they were broken, given that they were made of opaque coloured glass.[6877] The Trial Chamber added that "[t]his evidence supports Witness QAR's account of her sighting of Ndayambaje in the church grounds on that day."[6878] The Trial Chamber further found that:

[6873] *See* Trial Judgement, para. 1229. However, the Appeals Chamber observes that the Trial Chamber accurately recalled Witness MAJIK's testimony when summarising it. *See ibid.*, paras. 1088-1092.
[6874] *See* Trial Judgement, para. 1230.
[6875] *See* Witness QAR, T. 20 November 2001 pp. 119 ("I would say [Ndayambaje] got [to the church] around noon"), 131, 132 ("Q. When [Ndayambaje] came around noon, which is the approximate time you gave, when he came with the vehicle and the picture, would it be correct to say that he spent less than 15 minutes in the church premises? A. Yes, that's correct."); Witness MAJIK, T. 17 June 2008 pp. 41 ("Q. So, madam, I will repeat my question. At what time of the day on Wednesday did you pass in front of the church? And if you are able to tell the Court, please do. Tell us at about what time or hour. A. I think the time was at about – was about 11:30.") (closed session), 44 ("Q. For how long did you stay on the church grounds on that occasion? A. I stayed there for about an hour – about half an hour instead."), 45 ("I think I left the church premises around 12:25 or 12:30.") (closed session). *See also* Trial Judgement, paras. 1040, 1042, 1088, 1090.
[6876] Trial Judgement, para. 1230.
[6877] Trial Judgement, para. 1227.
[6878] Trial Judgement, para. 1227.

> there are conflicting accounts of precisely when the windows in the church were broken. Witness QAR testified that as she entered the church at about 8.00 a.m. on 20 April 1994, people were throwing stones at the church, breaking the windows. According to her testimony, the window by which she was standing was broken by noon, enabling her to see Ndayambaje outside the church. Witness BOZAN testified that the attackers had not started throwing stones at the church by around 9.30 a.m. but that later he saw from his vantage point near the presbytery, that at about 11.15 a.m. a single window nearest the priest's house was broken. The Chamber observes that Witness BOZAN testified that he watched the assailants throwing stones from the presbytery gate where he saw only one window broken. His view of the church was restricted to one side of the church and does not cast doubt on the testimony of Witness QAR that more than one window was broken.[6879]

In addition, the Trial Chamber found that Witness BOZAN partially corroborated Witness QAR's account with respect to the identity of the assailants on 20 April 1994.[6880]

3011. Ndayambaje submits that the Trial Chamber erred in its assessment of Witness BOZAN's testimony.[6881] He asserts that the Trial Chamber erred in stating that the witness testified about 21 April 1994 since in fact he testified about 20 April 1994.[6882] Moreover, Ndayambaje contends that the Trial Chamber erred in rejecting Witness BOZAN's evidence that he did not see him while at Mugombwa Church on 20 April 1994 between 10.00 a.m. and 1.00 p.m. on the basis of the witness's "unspecified" close ties to him and the witness's involvement in the massacre at the church.[6883] He argues that the Trial Chamber confused Witness BOZAN with another person.[6884] According to Ndayambaje, Witness BOZAN was credible and undermined the credibility of Witness QAR.[6885]

3012. The Prosecution concedes that the Trial Chamber mistook Witness BOZAN for another person in relation to another incident but argues that the witness's evidence was in any event incapable of raising a doubt in the Prosecution case against Ndayambaje.[6886]

3013. A review of Witness BOZAN's testimony shows that the event he recounted occurred on 20 April 1994.[6887] While the Trial Chamber, when summarising his evidence, stated that the witness was talking about 21 April 1994,[6888] a plain reading of the Trial Judgement shows that the Trial

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[6879] Trial Judgement, para. 1228 (internal references omitted).
[6880] Trial Judgement, para. 1235.
[6881] Ndayambaje Appeal Brief, para. 384.
[6882] Ndayambaje Appeal Brief, para. 383, *referring to* Trial Judgement, para. 1177; Witness BOZAN, T. 17 September 2008 pp. 51, 52.
[6883] Ndayambaje Appeal Brief, para. 382. *See also* AT. 21 April 2015 p. 25.
[6884] Ndayambaje Appeal Brief, para. 382. *See also* Ndayambaje Notice of Appeal, paras. 147, 148; Ndayambaje Reply Brief, para. 141; AT. 21 April 2015 p. 25.
[6885] Ndayambaje Appeal Brief, para. 382.
[6886] Prosecution Response Brief, para. 2220. In addition, the Prosecution responds that Witness BOZAN undoubtedly had close ties to Ndayambaje as he reported to him while Ndayambaje was *bourgmestre*. *See ibid.*, para. 2221. The Prosecution adds that, in any event, Witness BOZAN is not credible. *See ibid.*, para. 2222; AT. 21 April 2015 pp. 51, 52.
[6887] *See* Witness BOZAN, T. 17 September 2008 pp. 44 (closed session), 51.
[6888] *See* Trial Judgement, para. 1177.

Chamber only assessed his evidence with regard to events that occurred on 20 April 1994.[6889] The Appeals Chamber considers that the Trial Chamber's misstatement of the date in one paragraph of the Trial Judgement within the summary of Witness BOZAN's evidence had no bearing on its findings and has therefore not occasioned a miscarriage of justice.[6890]

3014. The Appeals Chamber observes that Ndayambaje's remaining arguments are all based on the premise that the Trial Chamber found Witness BOZAN not credible and rejected his evidence. There is, however, no indication in the Trial Judgement that the Trial Chamber did not find the witness credible with respect to the events at Mugombwa Church. In fact, the Trial Chamber relied on Witness BOZAN's testimony as corroborative of some aspects of Witness QAR's evidence.[6891] The Trial Chamber did not refer to, let alone reject, Witness BOZAN's alleged testimony that he did not see Ndayambaje at the church while he was there between 10.00 a.m. and 1.00 p.m. and Ndayambaje does not provide any reference to support his assertion that the witness so testified.[6892] During Witness BOZAN's examination-in-chief, Ndayambaje did not ask the witness whether he was at the church on the morning of 20 April 1994 and whether he saw him there.[6893] While, upon cross-examination by the Prosecution, Witness BOZAN stated that he was at Mugombwa Church on the morning of 20 April 1994 between 9.30 a.m. and 12.30 p.m. and answered "no" when asked whether he saw Ndayambaje around the church that day,[6894] the Defence objected to any follow-up questions as to whether it was possible that Ndayambaje would have been there and the witness would not have seen him and the Prosecution moved to another line of questioning.[6895] The Appeals Chamber considers that no reasonable trier of fact could have relied on this aspect of Witness BOZAN's testimony in these circumstances and that, as a result, the Trial Chamber did not have to discuss it.

3015. As Ndayambaje submits, the Trial Chamber mistook Witness BOZAN for another person and erroneously stated that Witness BOZAN was involved in the massacre at Mugombwa Church.[6896] However, this erroneous finding was made and relied upon in relation to the abduction of Tutsi women and girls after Ndayambaje's Swearing-In Ceremony, a separate event for which

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[6889] *See* Trial Judgement, paras. 1227, 1228, 1244.
[6890] *See* Trial Judgement, para. 1177.
[6891] *See, e.g.*, Trial Judgement, paras. 1227, 1228, 1235.
[6892] *See* Ndayambaje Appeal Brief, para. 382.
[6893] Witness BOZAN, T. 16 September 2008 pp. 5-10. *See also* T. 17 September 2008 pp. 39, 43, 44 (closed session). There is also no indication in Witness BOZAN's summary of evidence by the Trial Chamber that he testified that he did not see Ndayambaje at Mugombwa Church on 20 April 1994. *See* Trial Judgement, paras. 1165-1177.
[6894] Witness BOZAN, T. 17 September 2008 pp. 14, 15, 44 (closed session), 47.
[6895] Witness BOZAN, T. 17 September 2008 pp. 47-49.
[6896] *See* Trial Judgement, para. 4744. The Appeals Chamber addresses this issue in more detail below in Section IX.H. *See infra*, para. 3289.

Ndayambaje was convicted.[6897] As noted above, the Trial Chamber did not reject Witness BOZAN's evidence insofar as it related to Mugombwa Church.[6898] Likewise, the Trial Judgement does not reflect that the Trial Chamber relied on Witness BOZAN's alleged ties with Ndayambaje in reaching its findings on his evidence relating to the Mugombwa Church incidents.[6899]

3016. Accordingly, the Appeals Chamber dismisses Ndayambaje's arguments concerning the assessment of Witness BOZAN's evidence pertaining to Mugombwa Church.

5. Conclusion

3017. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the Trial Chamber's assessment of the evidence relating to his involvement in crimes perpetrated at Mugombwa Church on 20 and 21 April 1994 that occasioned a miscarriage of justice and warrants the intervention of the Appeals Chamber. Recalling that Ndayambaje's submissions pertaining to his responsibility for committing direct and public incitement to commit genocide at Mugombwa Church have become moot, the Appeals Chamber concludes that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings committed at Mugombwa Church on 20 and 21 April 1994 and, accordingly, dismisses the relevant part of Ground 9 and Ground 17 of Ndayambaje's appeal.

[6897] *See* Trial Judgement, paras. 4744, 4746, 5957-5959. The Appeals Chamber will discuss the impact of this error below in the section on the abductions of Tutsis women and girls in Mugombwa. *See infra*, Section IX.H.

[6898] *See* Trial Judgement, paras. 1227, 1228, 1235.

[6899] The Appeals Chamber notes that the Trial Chamber found that Witness BOZAN gave alibi evidence for Ndayambaje. *See* Trial Judgement, para. 1196. When the Trial Chamber assessed the credibility of the alibi witnesses it found that they all have close ties with Ndayambaje but when discussing these ties in more detail, the Trial Chamber did not mention Witness BOZAN. *See ibid.*, para. 1199. Moreover the summary of Witness BOZAN's evidence does not reflect that the witness provided alibi evidence for Ndayambaje at Mugombwa Church on 20 or 21 April 1994. *See ibid.*, paras. 1165-1177. In light of the foregoing, the Appeals Chamber considers that there is no indication in the Trial Judgement that the Trial Chamber found that Witness BOZAN was not credible because he had close ties with Ndayambaje.

F. Kabuye Hill (Grounds 9 in part, 10, 11, 18)

3018. The Trial Chamber found that, on 20 April 1994, Ndayambaje travelled to Ngiryi Bridge with several armed soldiers and communal policemen where they arrested Tutsi refugees fleeing to Burundi and forced them to return to Gisagara marketplace, following which soldiers and policemen escorted the refugees to Kabuye Hill.[6900] The Trial Chamber also found that Ndayambaje was present at Kabuye Hill on 22 April 1994 when soldiers, policemen, and armed civilians attacked Tutsis gathered on the hill, resulting in the death of thousands of Tutsis.[6901] In addition, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they participated in attacks against Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and the Muganza commune office on 23 April 1994, which were later used in the massacres of Tutsis at Kabuye Hill; and (iii) was present during the attacks at Kabuye Hill on 23 and 24 April 1994 that resulted in thousands of deaths.[6902]

3019. After finding that the interception at Ngiryi Bridge and forced escorting of the refugees to Kabuye Hill did not constitute an act of genocide and did not rise to a similar gravity as other crimes against humanity, the Trial Chamber acquitted Ndayambaje of genocide and persecution as a crime against humanity for the interception and forced movement of the Tutsi refugees from Ngiryi Bridge to Kabuye Hill.[6903] However, the Trial Chamber convicted Ndayambaje for aiding and abetting genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for his role in the attacks at Kabuye Hill from 22 to 24 April 1994.[6904]

3020. Ndayambaje submits that the Trial Chamber erred in its assessment of the evidence related to the events at Ngiryi Bridge and in convicting him in relation to the attacks at Kabuye Hill. The Appeals Chamber will examine Ndayambaje's challenges to the Trial Chamber's findings pertaining to the events at Ngiryi Bridge and Kabuye Hill on 20 and 22 April 1994 before turning to his submissions related to the attacks on Kabuye Hill on 23 and 24 April 1994.

3021. As a preliminary remark, the Appeals Chamber recalls that, on 9 April 2015, it admitted as additional evidence on appeal a confidential witness statement dated 30 January 2013 relevant to the assessment of the credibility of Prosecution Witness EV, whose evidence was relied upon by the

[6900] Trial Judgement, paras. 1414, 5766.
[6901] Trial Judgement, paras. 1423, 1424, 5769.
[6902] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6903] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6904] Trial Judgement, paras. 5777, 5976, 6064-6066, 6107, 6108, 6175, 6176, 6186.

Trial Chamber in relation to the events at Kabuye Hill.[6905] On 12 May 2015, the Appeals Chamber admitted as additional evidence on appeal a prior statement and part of the testimony of Witness Claver Habimana in the *Ntawukulilyayo* case relevant to the assessment of the credibility of Prosecution Witness RT, whose evidence was also relied upon by the Trial Chamber in relation to the events at Kabuye Hill.[6906] In accordance with the relevant standard, if the Appeals Chamber determines that a reasonable trier of fact could have reached the conclusion of guilt beyond reasonable doubt on the basis of the trial record alone, the Appeals Chamber will then determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to the finding of guilt.[6907]

1. Interception of Tutsi Refugees at Ngiryi Bridge on 20 April 1994 and Attack on Kabuye Hill on 22 April 1994

3022. Based on the evidence of Prosecution Witnesses EV, RT, and TP, the Trial Chamber determined that, on 20 April 1994, Ndayambaje travelled to Ngiryi Bridge with several armed soldiers and communal policemen where they arrested fleeing Tutsi refugees and forced them to return to Gisagara marketplace.[6908] Specifically, the Trial Chamber found that Witness EV testified that he and other refugees were intercepted at Ngiryi Bridge at daybreak on 20 April 1994.[6909] It also held that his testimony reflected that he arrived at Kabuye Hill before 6.00 p.m. on the same day.[6910]

3023. Relying on Witness EV's evidence, as corroborated by the circumstantial evidence of Witnesses RT and TW about Ndayambaje's general involvement in the Kabuye Hill events, the Trial Chamber further found that Ndayambaje was present during the attack at Kabuye Hill on 22 April 1994.[6911] It relied on its finding that, on the third day of Witness EV's stay at Kabuye Hill, "which would have fallen on 22 April 1994", the witness saw from a distance of about 20 meters Ndayambaje arriving at Kabuye Hill at around 10.00 a.m.[6912]

[6905] *See* Decision on Ndayambaje's First Motion to Present Additional Evidence, 9 April 2015 (confidential) ("9 April 2015 Appeal Decision"), pp. 1, 4; *infra*, paras. 3107, 3108.
[6906] *See* Decision on Ndayambaje's First, Second, Third, and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence, 12 May 2015 (confidential) ("12 May 2015 Appeal Decision"), paras. 25, 90, 91; *infra*, paras. 3107, 3108.
[6907] *See supra*, para. 33.
[6908] Trial Judgement, paras. 1405-1410, 1414.
[6909] Trial Judgement, paras. 1265, 1406. *See also ibid.*, para. 1407.
[6910] Trial Judgement, paras. 1406, 1407.
[6911] Trial Judgement, paras. 1418-1424.
[6912] Trial Judgement, para. 1420.

3024. Ndayambaje challenges the Trial Chamber's findings that he was present at Ngiryi Bridge on 20 April 1994 and at Kabuye Hill on 22 April 1994.[6913] In particular, he contends that the Trial Chamber erred in assessing Witness EV's timeline for the events at Ngiryi Bridge and Kabuye Hill.[6914] He argues that Witness EV's testimony reflects that, during the night of "Wednesday" to "Thursday" he was at Ngiryi Bridge and that it was only the following day, on "Thursday", 21 April 1994 – and not Wednesday, 20 April 1994 as found by the Trial Chamber – that he returned to Gisagara.[6915] Ndayambaje adds that Witness EV stated that he returned from Ngiryi Bridge to Gisagara on the day President Sindikubwabo addressed the crowd in Gisagara, which is well known to have been Thursday, 21 April 1994.[6916] According to Ndayambaje, the Trial Chamber therefore erred in concluding that Witness EV arrived at Kabuye Hill on Wednesday, 20 April 1994 since the witness's evidence indicates that he arrived on Thursday, 21 April 1994.[6917] He contends that the Trial Chamber further erred in finding that Witness EV testified to Ndayambaje's presence at Kabuye Hill on 20 and 22 April since the witness was in fact referring to 21 and 23 April 1994.[6918] Ndayambaje also challenges the Trial Chamber's assessment of other aspects of Witness EV's evidence as well as its reliance on the evidence of other Prosecution witnesses to establish his presence at Ngiryi Bridge on 20 April 1994 and at Kabuye Hill on 22 April 1994.[6919]

3025. The Prosecution acknowledges that the Trial Chamber misinterpreted Witness EV's testimony about his timeline as the witness situated the interception of refugees at Ngiryi Bridge on 21 April 1994, and not on 20 April 1994 as found by the Trial Chamber.[6920] It argues that the Trial Chamber should not have relied on Witness EV's evidence since "his timeline was confused and cannot be considered reliable" and aspects of his testimony were contradicted by other Prosecution witnesses.[6921] In the view of the Prosecution, however, Witness EV's unreliability and the Trial Chamber's erroneous reliance thereupon do not affect the Trial Chamber's finding that Ndayambaje

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[6913] Ndayambaje Notice of Appeal, paras. 89-99, 153-181; Ndayambaje Appeal Brief, paras. 253-270, 425-441, 444-461, 463-465, 468-473, 477-479, 519-523, 531. *See also* Ndayambaje Reply Brief, paras. 100-106, 168-173, 182, 193-195; AT. 21 April 2015 p. 27.
[6914] Ndayambaje Appeal Brief, paras. 435-437, 457, 460, 463.
[6915] Ndayambaje Appeal Brief, para. 435.
[6916] Ndayambaje Appeal Brief, paras. 435, 436.
[6917] Ndayambaje Appeal Brief, para. 437. Ndayambaje argues that the Trial Chamber prevented the Defence from clarifying this timeframe during the cross-examination of Witness EV. *See idem.*
[6918] Ndayambaje Appeal Brief, paras. 457, 460, 463.
[6919] Ndayambaje Notice of Appeal, paras. 89-99, 153-181; Ndayambaje Appeal Brief, paras. 253-270, 425-434, 436, 438-441, 444-459, 461, 464, 465, 468-473, 477-479, 519-523, 531; Ndayambaje Reply Brief, paras. 100-106, 168-173, 182, 193-195.
[6920] Prosecution Response Brief, para. 2298; AT. 21 April 2015 p. 45.
[6921] Prosecution Response Brief, paras. 2296, 2297, 2299, 2300, 2315, 2321. *See also* AT. 21 April 2015 p. 46.

turned back refugees at Ngiryi Bridge since the finding was further supported by Witnesses QAQ's, RT's, and TP's testimonies.[6922]

3026. The Prosecution further responds that the Trial Chamber's confusion concerning the timeline of events does not impact its finding about Ndayambaje's involvement in the attack on Kabuye Hill of 22 April 1994 since, even disregarding Witness EV's evidence that should not have been relied upon, "taking the evidence as a whole, there was sufficient circumstantial evidence" from Prosecution Witnesses FAG and QAL "to remove any reasonable doubt that Ndayambaje was involved at Kabuye Hill" on 22 April 1994.[6923]

3027. Ndayambaje replies that it is not possible to speculate as to what the Trial Chamber's conclusions would have been, had it not incorrectly assessed Witness EV's evidence.[6924] He contends that he is prejudiced by the Prosecution moulding its case on appeal by now claiming that the Trial Chamber should not have relied on Witness EV's testimony while pleading that the witness was credible at trial.[6925]

3028. The Appeals Chamber notes that a careful review of Witness EV's testimony shows that the witness testified that he was intercepted at Ngiryi Bridge on 21 April 1994 and that he arrived at Kabuye Hill in the evening of the same day, as both Ndayambaje and the Prosecution submit.[6926]

[6922] Prosecution Response Brief, paras. 2301, 2304, 2307-2311, 2325. *See also ibid.*, paras. 2297, 2306. The Prosecution further argues that, even if the finding related to Ngiryi Bridge was overturned, it would have no impact on Ndayambaje's convictions as the Trial Chamber merely relied on this finding as one of several factors showing that Ndayambaje knew of the genocidal intent of the Kabuye Hill assailants. *See ibid.*, paras. 2301, 2305, 2320.

[6923] Prosecution Response Brief, paras. 2380, 2424. At the appeals hearing, the Prosecution also suggested that Witness QBZ testified that he saw Ndayambaje at Kabuye Hill on 22 April 1994. *See* AT. 21 April 2015 p. 46, *referring to* Prosecution Response Brief, para. 1194, Witness QBZ, T. 23 February 2004 p. 25 *et seq.* The Trial Chamber found that Witness QBZ in the cited portions of his testimony relied upon by the Prosecution recounted an event that occurred around 13 April 1994. *See* Trial Judgement, para. 1428. The Prosecution does not challenge this finding. Accordingly, the Appeals Chamber declines to consider this argument further. The Prosecution also argues that, although the Trial Chamber relied on an aspect of Witness EV's testimony that related to 23 April 1994 in reaching its finding for 22 April 1994, another part of Witness EV's testimony in any case reflects that the witness saw Ndayambaje at Kabuye Hill on 22 April 1994. It submits that, accordingly, Ndayambaje fails to demonstrate any error in the Trial Chamber's reliance on Witness EV as to Ndayambaje's presence at Kabuye Hill on 22 April 1994. *See* Prosecution Response Brief, paras. 2322, 2324, 2332, *referring to* Witness EV, T. 26 February 2004 pp. 60, 61, T. 25 February 2004 pp. 75, 76. *See also* AT. 21 April 2015 p. 46. Given that the Prosecution has repeatedly submitted that the Trial Chamber should not have relied on Witness EV's testimony, and given the phrasing of its additional arguments, the Appeals Chamber understands them to be made in the alternative and in order to respond to Ndayambaje's submissions. *See* Prosecution Response Brief, paras. 2296, 2297, 2300, 2301, 2306, 2315, 2320, 2321.

[6924] Ndayambaje Reply Brief, paras. 169, 172, 175.

[6925] Ndayambaje Reply Brief, paras. 169-172. *See also* AT. 21 April 2015 p. 26.

[6926] Witness EV insisted several times that he hardly remembered the dates, but rather remembered weekdays. He stated in examination-in-chief that he left his residence on 19 April 1994 and, although he was first confused under cross-examination as to whether he left his house on 18 or 19 April 1994, he further stated that the "events broke out" on "a Tuesday to Wednesday" and that he left his house on a "Tuesday". A review of his testimony shows that, after he left his home with his family, they wandered all night, and the group only decided to leave the town and head to Burundi the next morning. Witness EV's testimony further reflects that he passed by Kabuye Hill on his way to Burundi on "Wednesday", then by Gisagara, before leaving the place in the evening, and that it was only the following morning that they were intercepted at Ngiryi Bridge. He further stated that following the interception, he returned to Gisagara, where President Sindikubwabo spoke to the crowd and that he arrived at Kabuye Hill the same day in the evening,

The Trial Chamber therefore erred in finding that Witness EV testified that the interception at Ngiryi Bridge took place on 20 April 1994 and that he arrived at Kabuye Hill on that same day.

3029. Likewise, the Trial Chamber erred in finding that Witness EV testified to seeing Ndayambaje during the attack on the refugees at Kabuye Hill on 22 April 1994 based on a part of his testimony that pertained to the "third day" he spent at Kabuye Hill, since this day corresponded to 23 April 1994 and not 22 April 1994.[6927] Another part of Witness EV's testimony nonetheless reflects that the witness did testify about seeing Ndayambaje at Kabuye Hill the day after his arrival, which is 22 April 1994.[6928] However, the Appeals Chamber notes that one key aspect of this uncorroborated part of Witness EV's testimony – erroneously considered to relate to 20 April 1994 by the Trial Chamber[6929] – was rejected by the Trial Chamber as unconvincing.[6930]

3030. Considering that the Trial Chamber found that Witness EV was the only witness testifying to Ndayambaje's presence at Kabuye Hill on 22 April 1994[6931] and that neither Witness FAG nor Witness QAL relied upon by the Prosecution[6932] testified to Ndayambaje's presence at Kabuye Hill on that date,[6933] the Appeals Chamber finds that no reasonable trier of fact could have concluded as proven beyond reasonable doubt that Ndayambaje was present at Kabuye Hill on 22 April 1994.

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a "Thursday". *See* Witness EV, T. 25 February 2004 pp. 69-76, T. 26 February 2004 pp. 22-45 (French). The Appeals Chamber notes that it is not disputed that President Sindikubwabo was present in Gisagara on Thursday, 21 April 1994. *See* Ndayambaje Appeal Brief, para. 436; Prosecution Response Brief, para. 2298.

[6927] *See* Trial Judgement, paras. 1269-1271, 1420-1422.

[6928] *See* Witness EV, T. 25 February 2004 p. 75, T. 26 February 2004 p. 60. *See also* Trial Judgement, paras. 1269, 1270.

[6929] *See* Trial Judgement, paras. 1269, 1270, 1434, 1450. A review of Witness EV's testimony shows that the witness testified that he saw Ndayambaje arriving at Kabuye Hill "before noon" the day *following his own arrival* at Kabuye Hill and not as the Trial Chamber found *on the day* he arrived at Kabuye Hill. *See* Witness EV, T. 25 February 2004 pp. 73-75, T. 26 February 2004 pp. 45-49, 54, 60. *See also* Trial Judgement, paras. 1267, 1269. The Appeals Chamber acknowledges that according to the English version of the transcripts, Witness EV testified that he saw Ndayambaje "on the day when [he] arrived." *See* Witness EV, T. 25 February 2004 p. 75 ("Q. On the day when you arrived, were you able to recognise any people amongst the attackers? A. I saw Elie Ndayambaje."). However, the French version of the transcripts differs in this respect, the witness answering in the affirmative to the question whether he recognised anyone the day that followed his own arrival. *See* Witness EV, T. 25 February 2004 p. 84 (French) ("*Q. Le jour qui a suivi, donc, votre arrivée, avez-vous été en mesure de reconnaître qui que ce soit parmi les assaillants ?* "). Having listened to the relevant audio-recording, the Appeals Chamber notes that the English version of the transcripts does not capture correctly the question asked in English by the Prosecution, which clearly was about the day following Witness EV's arrival. *See* audio-recording of Witness EV's testimony of 25 February 2004, at 11:24-11:35. This matter was also later clarified during cross-examination, since Witness EV was directly asked if he witnessed Ndayambaje for the first time on Kabuye Hill on the second day of his own arrival at the scene. *See* Witness EV, T. 26 February 2004 pp. 54, 59, 60.

[6930] Trial Judgement, paras. 1450, 1451 ("While the Chamber agrees that it would have been impossible for Witness EV to remember all the details of his stay at Kabuye Hill, the Chamber considers that an incident as striking as the throwing of a grenade by a figure of authority such as Ndayambaje would have been at the forefront of the witness' mind when he recorded his experience in his previous statements. For that reason, the Trial Chamber accepts the witness' testimony that Ndayambaje distributed weapons at Kabuye Hill but finds his uncorroborated account that Ndayambaje threw grenades and shot at the refugees to be unconvincing.").

[6931] Trial Judgement, paras. 1421, 1424.

[6932] *See* Prosecution Response Brief, para. 2424.

[6933] *See* Trial Judgement, paras. 1299, 1311-1314, 1418.

3031. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in holding Ndayambaje responsible for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994 on the basis of his presence during the attack and reverses his convictions for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994.

3032. With respect to the Trial Chamber's findings relating to the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill on 20 April 1994, the Appeals Chamber recalls that Ndayambaje was not convicted for these events.[6934] The Trial Judgement also clearly reflects that the Trial Chamber only relied on its factual findings concerning the interception and forced movement to determine the *mens rea* of the assailants who attacked the refugees at Kabuye Hill on 22 April 1994 and Ndayambaje's knowledge thereof.[6935] Because the Appeals Chamber reversed Ndayambaje's convictions for the killings perpetrated at Kabuye Hill on 22 April 1994, the Appeals Chamber finds it unnecessary to examine the impact of the Trial Chamber's error in assessing Witness EV's evidence concerning the date of the interception and forced movement of the refugees on the Trial Chamber's findings on these specific events as any error in this respect would not have occasioned a miscarriage of justice. For the same reason, the Appeals Chamber declines to consider Ndayambaje's remaining challenges to the Trial Chamber's findings regarding the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill.

2. Attacks on Kabuye Hill on 23 and 24 April 1994

3033. As noted above, the Trial Chamber found that Ndayambaje: (i) transported soldiers, civilians, and communal policemen to Kabuye Hill, where they attacked Tutsis on 23 and 24 April 1994; (ii) distributed weapons at Kabuye Hill and the Muganza commune office on 23 April 1994, which were later used in the massacres of Tutsis at Kabuye Hill; (iii) was present on 23 and 24 April 1994 during the attacks against Tutsis at Kabuye Hill that resulted in thousands of deaths.[6936]

3034. In concluding that Ndayambaje transported attackers to Kabuye Hill on 23 and 24 April 1994, the Trial Chamber relied on the testimonies of Witnesses EV, RT, TW, QAQ, and FAG.[6937] Concerning the distributions of weapons on 23 April 1994, the Trial Chamber relied on Witness RT's account as supported by Witnesses EV's and QAL's testimonies concerning the

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[6934] Trial Judgement, paras. 5767, 5768, 6110-6113.
[6935] Trial Judgement, paras. 5770, 5771. *See also ibid.*, paras. 5772-5776. *See also* Ndayambaje Appeal Brief, para. 451; Prosecution Response Brief, para. 2295. The Trial Judgement reflects that the Trial Chamber did not rely on the events that led the refugees to Kabuye Hill to establish the genocidal intent of those who attacked the refugees at Kabuye Hill on 23 and 24 April 1994. *See ibid.*, paras. 5769, 5771, 5773.
[6936] Trial Judgement, paras. 1431, 1444, 1452, 1455, 1456, 5772.
[6937] Trial Judgement, paras. 1426, 1428-1431.

distribution at Kabuye Hill, and on the accounts of Witnesses RV and FAU concerning the distribution that took place at the Muganza commune office.[6938] The Trial Chamber relied on Witnesses EV, RT, TW, QAQ, and to some extent on Defence Witnesses ALIZA and KEPIR, in finding that attacks were perpetrated on 23 and 24 April 1994 at Kabuye Hill and that Ndayambaje was present during the attacks.[6939]

3035. Ndayambaje challenges the Trial Chamber's assessment of Prosecution and Defence evidence regarding these events.[6940]

(a) Assessment of Prosecution Evidence

(i) Witness QAQ

3036. In the section of the Trial Judgement where it discussed the evidence related to the transportation of attackers to Kabuye Hill on 23 and 24 April 1994, the Trial Chamber noted that Witness QAQ testified that "[o]n the day following his arrival at Kabuye Hill, which would have fallen on 24 or 25 April 1994, [he] saw Ndayambaje driving a white vehicle transporting over five *gendarmes* to Kabuye Hill."[6941] The Trial Chamber relied on Witness QAQ's evidence, along with that of Witnesses EV, RT, TW, and FAG, to conclude that Ndayambaje transported soldiers, civilians, and policemen to Kabuye Hill on 23 and 24 April 1994 where they participated in attacks against Tutsis and that he was present at Kabuye Hill during the attacks perpetrated against the Tutsi refugees on 23 and 24 April 1994.[6942]

3037. Ndayambaje submits that the Trial Chamber erred in its assessment of Witness QAQ's testimony.[6943] Specifically, he argues that, contrary to the Trial Chamber's finding, it was impossible for Witness QAQ to be in Kabuye Hill on 23 or 24 April 1994 given the timeline the witness gave during his testimony.[6944] In his view, Witness QAQ's testimony reflects that he could not have been in Kabuye Hill before 26 April 1994, namely after the attacks on the refugees.[6945]

[6938] Trial Judgement, paras. 1432, 1434-1443.
[6939] Trial Judgement, paras. 1448-1452.
[6940] Ndayambaje Notice of Appeal, paras. 85-95, 153-160, 164-170; Ndayambaje Appeal Brief, paras. 243-246, 248-260, 480-531. *See also* Ndayambaje Reply Brief, paras. 178-198.
[6941] Trial Judgement, para. 1426. *See also ibid.*, para. 1448; *infra*, fn. 6953.
[6942] Trial Judgement, paras. 1431, 1452.
[6943] Ndayambaje Appeal Brief, para. 486.
[6944] Ndayambaje Appeal Brief, paras. 481-483. Ndayambaje adds that Witness QAQ confirmed the timeline he gave during his testimony to Defence Witness Évariste-Emmanuel Siborurema. *See ibid.*, para. 482, *referring to* Évariste-Emmanuel Siborurema, T. 25 August 2008 pp. 52-60 (closed session). The Appeals Chamber observes that Évariste-Emmanuel Siborurema is at times referred to under the pseudonym "Witness NAVIC" in the Trial Judgement, a protective measure the witness asked to lift when testifying in court. *See* Évariste-Emmanuel Siborurema, T. 25 August 2008 p. 3.
[6945] *See* Ndayambaje Appeal Brief, para. 483.

He also contends that Witness QAQ acknowledged that he neither saw nor identified Ndayambaje at Kabuye Hill.[6946]

3038. In addition, Ndayambaje avers that the testimonies of Witness TW and Defence Witness KWEPO show that Witness QAQ never went to Kabuye Hill since he was hidden elsewhere "during the events".[6947] Ndayambaje also contends that, having found that Witness QAQ's evidence related to Ndayambaje's Swearing-In Ceremony was not credible, the Trial Chamber should have also found him not credible in relation to the events at Kabuye Hill.[6948]

3039. The Prosecution responds that it can be inferred from Witness QAQ's evidence that he was on Kabuye Hill either on 23 or 24 April 1994 and that the witness had no reason to lie about Ndayambaje's involvement.[6949] The Prosecution adds that Witnesses TW's and KWEPO's evidence does not necessarily contradict Witness QAQ's testimony in this respect.[6950]

3040. As reflected in the Trial Judgement, Witness QAQ did not give a clear timeline between the moment he left his house and his arrival at Kabuye Hill.[6951] The witness specified that he was only providing estimates concerning the dates.[6952] The Appeals Chamber nonetheless understands that, in light of his testimony as to the sequence of events and the description given by other Prosecution witnesses, the Trial Chamber concluded that the transportation of attackers that Witness QAQ recounted occurred on 24 April 1994.[6953] Having carefully reviewed Witness QAQ's testimony, the Appeals Chamber considers that a reasonable trier of fact could have concluded from his testimony, considered in light of the rest of the evidence, that he arrived at Kabuye Hill on 23 April 1994[6954]

[6946] Ndayambaje Appeal Brief, para. 481.
[6947] Ndayambaje Appeal Brief, para. 484. *See also* Ndayambaje Reply Brief, para. 187.
[6948] Ndayambaje Appeal Brief, para. 485, *referring to* Trial Judgement, para. 4607. *See also ibid.*, para. 579; Ndayambaje Reply Brief, para. 183.
[6949] Prosecution Response Brief, paras. 2347, 2348. The Prosecution submits that Witness QAQ had lost all notion of time and was not certain about times or the sequence of events. *See ibid.*, paras. 2349, 2350.
[6950] Prosecution Response Brief, paras. 2352-2355. The Prosecution contends that Witness Siborurema contradicted Witness KWEPO and probably tailored his testimony in light of Witness QAQ's evidence. *See ibid.*, paras. 2356-2358.
[6951] Trial Judgement, para. 1426 ("On the day following his arrival at Kabuye Hill, which would have fallen on 24 or 25 April 1994, Witness QAQ [...].") *See also ibid.*, paras. 1289, 1290.
[6952] The Appeals Chamber notes that Witness QAQ repeatedly indicated before the Trial Chamber that he was only providing estimates concerning the dates, and was not sure "how many days" he spent hiding on the hill before going to Kabuye Hill. *See* Witness QAQ, T. 12 November 2002 pp. 50, 56 (closed session). *See also* T. 11 November 2002 p. 25 (closed session), T. 12 November 2002 pp. 14 and 61, 62, 66 (closed session).
[6953] The Appeals Chamber notes that the Trial Chamber stated that Witness QAQ saw Ndayambaje driving a vehicle transporting gendarmes "on 24 or 25 April 1994" and, after discussing the evidence of Witnesses EV, RT, TW, and FAG, concluded that the evidence of these five witnesses demonstrated that Ndayambaje was involved in the transportation of attackers on 23 and 24 April 1994. *See* Trial Judgement, paras. 1426, 1431. As Witness QAQ was not found to have testified about 23 April 1994, the Appeals Chamber understands that the Trial Chamber concluded that he was testifying about 24 April 1994, and not 25 April 1994 as his testimony could also suggest. The Appeals Chamber notes that the Trial Chamber's later reference to the witness testifying about seeing Ndayambaje "on 23 or 24 April 1994" seems to be a typographical mistake in light of the Trial Chamber's summary of the witness's evidence and its discussion of the most relevant part of his evidence. *See ibid.*, paras. 1289, 1290, 1426, 1448.
[6954] The Appeals Chamber observes that it is not clear from the witness's evidence whether he left his house on Tuesday, 19 April 1994 or on Wednesday, 20 April 1994. *See* Witness QAQ, T. 11 November 2002 p. 23 (closed

and that his testimony as to the presence of Ndayambaje, the day after his arrival, pertained to 24 April 1994.[6955]

3041. As to whether Witness QAQ saw Ndayambaje at Kabuye Hill, the Appeals Chamber notes that the Trial Chamber stated in its deliberations that the witness "saw Ndayambaje" driving a vehicle transporting gendarmes to Kabuye Hill.[6956] When summarising his evidence, however, the Trial Chamber correctly noted that Witness QAQ explained during cross-examination that "from where he was he could not personally say whether the person in the car was Ndayambaje" and that he was told by other refugees that the vehicle he saw was Ndayambaje's vehicle and was the same vehicle that had prevented them from continuing on their way to Burundi.[6957] The Trial Chamber therefore erred in stating that Witness QAQ saw Ndayambaje at Kabuye Hill. It is unclear to what extent the Trial Chamber relied on this erroneous statement when reaching its finding on Ndayambaje's involvement in the transportation of attackers to Kabuye Hill on 23 April 1994 as the Trial Chamber generally concluded that "the testimony of Witnesses EV, RT, TW, QAQ and FAG [was] credible on the issue of Ndayambaje's involvement in the transportation of attackers and therefore [found] that on 23 and 24 April 1994, Ndayambaje transported soldiers, civilians and policemen to Kabuye Hill."[6958] In any event, Ndayambaje fails to demonstrate that no reasonable trier of fact could have relied on Witness QAQ's testimony, as correctly summarised, that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle, as corroborative of Witness TW's testimony that Ndayambaje transported attackers to Kabuye Hill in the white commune vehicle on 24 April 1994.[6959]

3042. With regard to Ndayambaje's reliance on Witness KWEPO's evidence as contradicting Witness QAQ's testimony that he was present at Kabuye Hill, the Appeals Chamber observes that Witness KWEPO merely gave hearsay evidence that Witness QAQ had been hidden by someone

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session), T. 12 November 2002 p. 55 (closed session). Witness QAQ stated that then, he "hid for three or four day[s], and [...] had to move to at least four places of residence" before going to Kabuye Hill, possibly placing his arrival at Kabuye Hill on 23 or 24 April 1994. *See* Witness QAQ, T. 11 November 2002 pp. 24, 25 (closed session), T. 12 November 2002 p. 50 (closed session). The Appeals Chamber notes that Witness QAQ also testified that indeed he spent a single night at three different people's houses and maybe two nights at the house of an old lady. *See* Witness QAQ, T. 12 November 2002 p. 51 (closed session). However, the Appeals Chamber observes that Witness QAQ was hesitating and did not give a categorical statement regarding the number of nights he spent at the house of the old lady. *See idem*, p. 51 (closed session) ("*I think* I went there on two occasions.") (emphasis added), 58 ("I don't remember very well, but I think I spent two nights there [...]. Probably we could ask [...], but I don't know if she herself can remember the number of nights I spent at her place."). *See also* Witness QAQ, T. 11 November 2002 pp. 24, 25 (closed session). The Appeals Chamber observes that Witness QAQ's testimony about how many nights he spent where was unclear and approximate. *See* Witness QAQ, T. 12 November 2002 pp. 51, 55-58 (closed session). *See also ibid.*, pp. 95, 104 (closed session) (French).

[6955] Witness QAQ, T. 11 November 2002 pp. 26, 30, 31 (closed session).

[6956] Trial Judgement, para. 1426.

[6957] Trial Judgement, para. 1290; Witness QAQ, T. 11 November 2002 pp. 26, 28, 31 (closed session), T. 12 November 2002 pp. 83-85 (closed session).

[6958] Trial Judgement, para. 1431.

during the events and that he did not see him between May and July 1994.[6960] Given the limited probative value of this testimony, the Appeals Chamber considers that a reasonable trier of fact could have decided that it did not cast doubt on Witness QAQ's account that he was present during the relevant period at Kabuye Hill. As for Witness TW, the Appeals Chamber notes that his testimony does not show that Witness QAQ did not go to Kabuye Hill, but rather that he did not see Witness QAQ at Kabuye Hill and that he could not say whether Witness QAQ was there because there were many people.[6961] Ndayambaje's argument that Witness TW's testimony contradicts Witness QAQ's account is therefore without merit.

3043. Finally, recalling that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony, the Appeals Chamber rejects Ndayambaje's unsubstantiated claim that the Trial Chamber erred in accepting Witness QAQ's testimony regarding Kabuye Hill, while rejecting his evidence related to Ndayambaje's Swearing-In Ceremony since this rejection was based on elements that were specific to this very aspect of his testimony.[6962]

3044. In light of the foregoing, the Appeals Chamber finds that, although the Trial Chamber erred in stating that Witness QAQ saw Ndayambaje at Kabuye Hill, Ndayambaje has not demonstrated that a reasonable trier of fact could not have relied on Witness QAQ's evidence that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle, as corroborative of Witness TW's testimony on the attacks on 24 April 1994 at Kabuye Hill.

(ii) Witness RT

3045. The Trial Chamber noted that Witness RT testified that, on the day after his arrival at Kabuye Hill, which would have fallen on 23 April 1994, he saw Ndayambaje "[arriving] at Kabuye Hill in a white Toyota *commune* vehicle" and "distributing what he thought to be grenades to the attackers and supervising their distribution."[6963] The Trial Chamber concluded that Witness RT's eyewitness testimony on the distribution of grenades by Ndayambaje on 23 April 1994 was clear and convincing and that Witnesses EV's and QAL's testimonies lent weight to his account,

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[6959] *See infra*, para. 3063.
[6960] Witness KWEPO, T. 27 August 2008 pp. 8, 9 (closed session) ("Q. Did you see [Witness QAQ] in the months of May, June and July in your region, that is, May, June, July '94? A. I didn't see him during those months, but I learnt of where he was.").
[6961] *See* Witness TW, T. 12 February 2004 p. 15 (closed session) (French).
[6962] *See* Trial Judgement, paras. 4606-4608.
[6963] Trial Judgement, para. 1432. The Trial Chamber noted that, while Witness RT did not actually see grenades in Ndayambaje's hands, he stated that Ndayambaje must have been distributing grenades as many assailants subsequently threw grenades at the refugees and that the grenades could only have come from Ndayambaje. *See idem.*

providing circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill."[6964]

3046. Ndayambaje submits that the Trial Chamber erred in relying on Witness RT's testimony and in finding that his testimony evidenced the distribution of weapons at Kabuye Hill.[6965] In particular, Ndayambaje argues that Witness RT never testified to seeing him at Kabuye Hill on 23 April 1994 as the witness testified about seeing him at Dahwe Hill.[6966]

3047. Ndayambaje also contends that the Trial Chamber erred in finding that Witness RT's testimony on the distribution of weapons on 23 April 1994 was corroborated by Witnesses EV and QAL.[6967] Ndayambaje argues that Witness QAL's testimony about seeing him on a "Thursday" and Witness EV's testimony about seeing him on "20 April 1994" cannot corroborate Witness RT's account of a distribution that allegedly took place on "Saturday", 23 April 1994.[6968]

3048. Ndayambaje further submits that the Trial Chamber failed to provide a reasoned opinion in finding that Witness RT identified him despite the extremely difficult circumstances in which the identification was made.[6969] The Appeals Chamber also understands Ndayambaje to argue that it was unreasonable on the part of the Trial Chamber to rely on Witness RT's account of his purported distribution of grenades on 23 April 1994 where the Trial Chamber had itself recognised the "uncertainty" of the witness's account in this respect.[6970] Finally, Ndayambaje suggests that the Trial Chamber could not have found that he distributed weapons on 23 April 1994 on the basis of Witness RT's indirect evidence as it was not the only reasonable possible conclusion.[6971]

3049. The Prosecution responds that Witness RT was a consistent, reliable, and credible witness and that Ndayambaje's undeveloped challenges should be rejected.[6972] It contends that Ndayambaje's claim about the fact that Witness RT saw Ndayambaje on Dahwe Hill and not Kabuye Hill is irrelevant given that "Dahwe Hill is opposite Kabuye Hill and was one of the places

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[6964] Trial Judgement, paras. 1434, 1438.
[6965] Ndayambaje Appeal Brief, paras. 492-497. *See also* Ndayambaje Reply Brief, para. 180.
[6966] Ndayambaje Appeal Brief, paras. 492, 495-497. *See also* Ndayambaje Reply Brief, paras. 178, 180; AT. 21 April 2015 p. 27. Ndayambaje reiterates that a site visit was indispensable. *See* Ndayambaje Appeal Brief, para. 495; Ndayambaje Reply Brief, para. 111. The Appeals Chamber has addressed and rejected this claim in Section IX.D above.
[6967] Ndayambaje Appeal Brief, paras. 245, 493-497.
[6968] Ndayambaje Appeal Brief, paras. 493, 497, 503, 508. *See also* Ndayambaje Reply Brief, paras. 180, 189.
[6969] Ndayambaje Notice of Appeal, para. 85; Ndayambaje Appeal Brief, paras. 243-245, 248, 249, 495. Ndayambaje argues that when a finding of guilt is based on identification made under difficult circumstances, such as in this case, a trial chamber should take into account factors that undermined the probative value of this evidence, which the Trial Chamber failed to do so, amounting to a failure to provide a reasoned opinion. *See idem.*
[6970] Ndayambaje Appeal Brief, para. 494, *referring to* Trial Judgement, para. 1432.
[6971] Ndayambaje Appeal Brief, para. 523.
[6972] Prosecution Response Brief, paras. 2333, 2337.

where attackers disembarked and grouped before going to Kabuye Hill."[6973] In the Prosecution's view, there was ample circumstantial evidence supporting Witness RT's testimony of Ndayambaje distributing weapons at Kabuye Hill on 23 April 1994 and Ndayambaje's unsubstantiated arguments regarding identification should be dismissed.[6974]

3050. Ndayambaje replies that the Trial Chamber never established that Dahwe Hill was one of the "places where attackers disembarked and grouped before going to Kabuye Hill."[6975]

3051. In summarising Witness RT's testimony about the attacks on Kabuye Hill, the Trial Chamber noted that the witness testified that, on "Saturday", attackers were "gathered near Dahwe and Gahondo" and that "[s]ubsequently, Ndayambaje arrived".[6976] In the course of its discussion of the evidence, the Trial Chamber referred to Witness RT testifying to seeing Ndayambaje "aboard or arriving with vehicles transporting individuals to Kabuye Hill" [6977] and "arrive at Kabuye Hill".[6978] A review of Witness RT's evidence reflects that he testified that on "Saturday", he saw Ndayambaje and soldiers coming in a Toyota vehicle and that they stopped "on the road that crosses Dahwe hill."[6979] Given that the evidence reflects that Dahwe Hill was the place where attackers disembarked from the vehicles before launching attacks on Kabuye Hill where the refugees were gathered[6980] and that Dahwe Hill was within sight of Kabuye Hill,[6981] the Appeals Chamber finds no merit in Ndayambaje's argument that Witness RT did not see him at Kabuye Hill.

3052. Turning to the issue of corroboration, a plain reading of the Trial Judgement shows that the Trial Chamber relied on Witness RT's evidence alone to find that Ndayambaje distributed weapons at Kabuye Hill on 23 April 1994.[6982] The Trial Chamber merely relied on Witnesses EV's and QAL's evidence as circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill", "lend[ing] weight to Witness RT's account of weapons

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[6973] Prosecution Response Brief, para. 2335. *See also ibid.*, para. 2386; AT. 21 April 2015 pp. 53, 54. The Prosecution further submits that, in any event, Witness RT did not state that he saw Ndayambaje at Dahwe Hill but in the valley between Kabuye Hill and Dahwe Hill. *See* Prosecution Response Brief, para. 2338.
[6974] Prosecution Response Brief, paras. 2336, 2340.
[6975] Ndayambaje Reply Brief, para. 178. Ndayambaje adds that, contrary to Witness RT's testimony that he saw Ndayambaje in the commune vehicle on 23 April 1994, Witness RV never testified about Ndayambaje using the commune vehicle on that date. *See idem.* The Appeals Chamber notes that Ndayambaje does not provide any reference to support this contention and will therefore not entertain it further.
[6976] Trial Judgement, para. 1279.
[6977] Trial Judgement, para. 1426.
[6978] Trial Judgement, para. 1432.
[6979] Witness RT, T. 11 March 2004 pp. 67, 68, 70, 71.
[6980] Witness RT, T. 10 March 2004 p. 67, T. 11 March 2004 pp. 66, 67; Witness QAQ, T. 11 November 2002 p. 26 (closed session); Witness TP, T. 12 February 2004 pp. 70, 71.
[6981] *See* Witness RT, T. 10 March 2004 p. 67 ("A. Someone in Dahwe and someone in Kabuye, they would be able to see each other."); Witness QAQ, T. 11 November 2002 pp. 26, 30 (closed session), T. 12 November 2002 pp. 84, 85 (closed session); Witness TP, T. 12 February 2004 pp. 70, 71; Witness SHICO, T. 23 June 2008 pp. 24, 25; Witness MAJIK, T. 17 June 2008 p. 56; Witness SABINE, T. 12 June 2008 p. 20.
[6982] Trial Judgement, paras. 1434, 1438.

distribution by Ndayambaje" on 23 April 1994.[6983] For the reasons developed below, the Appeals Chamber considers that Witness EV's testimony as misconstrued by the Trial Chamber could not reasonably provide corroboration of Witness RT's account. However, given the limited weight accorded to his testimony by the Trial Chamber regarding the distribution of weapons on 23 April 1994, the Appeals Chamber considers that this error does not affect the Trial Chamber's finding. Ndayambaje's contention that the Trial Chamber erred in finding that Witness QAL could corroborate Witness RT because his testimony did not pertain to 23 April 1994 but to Thursday, 21 April 1994 is also unpersuasive as corroboration can be found in circumstantial evidence as long as it concerns a sequence of linked facts,[6984] which is the case here. In any event, the Appeals Chamber recalls that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[6985]

3053. Regarding Ndayambaje's contention related to his identification by Witness RT, the Appeals Chamber recalls that "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a reasoned opinion"[6986] and that "identifications made in difficult circumstances, such as darkness, obstructed view, or traumatic events, require careful and cautious analysis by a trial chamber."[6987]

3054. The Appeals Chamber notes that the Trial Chamber did not state that Witness RT's identification of Ndayambaje was made under difficult circumstances and did not specifically address in its deliberations the circumstances under which Witness RT identified Ndayambaje.[6988] Ndayambaje points to two elements that, in his view, constitute "difficult circumstances": (i) Kabuye Hill was so far away from Dahwe Hill that it rendered identification impossible; and (ii) Witness RT was being attacked and needed to hide.[6989] However, Ndayambaje ignores Witness RT's testimony that when he saw Ndayambaje distributing grenades, he was situated "maybe 80 to 100 steps" away at "a place where [he] could see clearly."[6990] In addition, although

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[6983] Trial Judgement, paras. 1434, 1438.
[6984] *Cf. Nizeyimana* Appeal Judgement, para. 96; *Gatete* Appeal Judgement, para. 125; *Kanyarukiga* Appeal Judgement, paras. 177, 220; *Ntawukulilyayo* Appeal Judgement, para. 121; *Nahimana et al.* Appeal Judgement, para. 428.
[6985] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[6986] *Lukić and Lukić* Appeal Judgement, para. 136; *Renzaho* Appeal Judgement, para. 527; *Kupreškić et al.* Appeal Judgement, para. 39. *See also Kalimanzira* Appeal Judgement, para. 96.
[6987] *See, e.g., Gatete* Appeal Judgement, para. 193; *Renzaho* Appeal Judgement, para. 527; *Kalimanzira* Appeal Judgement, para. 96. *See also Lukić and Lukić* Appeal Judgement, para. 137.
[6988] *See* Trial Judgement, paras. 1426, 1432, 1448.
[6989] Ndayambaje Appeal Brief, para. 495.
[6990] *See* Witness RT, T. 10 March 2004 p. 69. *See also* T. 11 March 2004 pp. 67, 68 ("Q. And from where you were, up to the point where the vehicle stopped, what would you say was the distance between those two places? A. The place was quite visible. There is nothing that prevented me from seeing. I would say the distance was about 100 metres. It's a

the record reflects that there was shooting at the refugees the morning Witness RT saw Ndayambaje, the witness explained that he was at a place where he could see the vehicle with the soldiers and Ndayambaje but that the attackers could not see him.[6991] The Appeals Chamber is not convinced that the elements Ndayambaje points to demonstrate that the circumstances in which Witness RT identified him were such as to require further analysis from the Trial Chamber.

3055. As to Ndayambaje's argument that it was unreasonable on the part of the Trial Chamber to rely on Witness RT's account where it recognised its "uncertainty", the Appeals Chamber notes that the Trial Chamber did not state that this part of the witness's testimony was uncertain but merely observed that:

> The witness saw Ndayambaje distributing what he thought to be grenades to the attackers and supervising their distribution. While he did not actually see grenades in Ndayambaje's hands, Witness RT stated that the Accused must have been distributing grenades because many assailants subsequently threw grenades at the refugees and the grenades could only have come from the Accused.[6992]

3056. Apart from generally claiming that the Trial Chamber's finding was unreasonable, Ndayambaje does not develop any argument to demonstrate that the Trial Chamber erred in accepting Witness RT's "clear and convincing" eyewitness account of the distribution of grenades and his inference that Ndayambaje must have distributed the grenades. Ndayambaje merely disagrees with the Trial Chamber's conclusion without showing any error. His contention is accordingly dismissed.

3057. Finally, in the absence of substantiation, the Appeals Chamber dismisses Ndayambaje's contention regarding the existence of other reasonable inferences available from the evidence regarding Ndayambaje's involvement in the distribution of weapons on 23 April 1994 at Kabuye Hill.

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place that you could see if you are on Gahondo hill, you could see the place, and if you are in Dahwe it is even closer to you."), 71 ("I said so yesterday that Ndayambaje also came in the same vehicle. Moreover, he was at a place where he could be seen and I saw him."); Trial Judgement, para. 1279. In addition, the Appeals Chamber notes that the evidence Ndayambaje relies upon does not support his assertion that Kabuye Hill and Dahwe Hill were far away from each other. The Appeals Chamber is also of the view that Ndayambaje misinterpreted the testimony of the witnesses he refers to in support of his claim that they testified about the impossibility of being able to identify someone positioned on Dahwe Hill from Kabuye Hill. It appears clearly from a review of the relevant transcripts that these witnesses were testifying about what they could see from the place they were standing. *See* Witness SHICO, T. 23 June 2008 pp. 24, 25; Witness MAJIK, T. 17 June 2008 pp. 56, 57; Witness SABINE, T. 12 June 2008 pp. 19, 20; Witness GLANA, T. 11 June 2008 p. 11 (closed session); Witness QAQ, T. 12 November 2002 pp. 84, 85 (closed session).

[6991] Witness RT, T. 11 March 2004 pp. 69-71. The Appeals Chamber also observes that Witness RT had known Ndayambaje prior to the events of 1994, "used to see him often, at least twice a week" and that he identified him in court, aspects that Ndayambaje does not challenge. *See* Trial Judgement, para. 1281. *See also* Witness RT, T. 10 March 2004 pp. 76, 77.

[6992] Trial Judgement, para. 1432 (internal references omitted).

3058. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness RT's evidence relating to the attacks on Kabuye Hill.

(iii) Witness TW

3059. When discussing the events at Kabuye Hill on 22 April 1994, the Trial Chamber noted that Witness TW testified that he saw Ndayambaje transporting armed attackers to Kabuye Hill "on three consecutive days", which, by the Trial Chamber's estimation, "would have fallen on 23, 24 and 26 April 1994."[6993] In this part of the Trial Judgement, the Trial Chamber relied on Witness TW's evidence, along with that of Witnesses EV and RT, as circumstantial evidence pointing to "Ndayambaje's general involvement in the Kabuye Hill events" and supporting "the contention that he was also present on 22 April 1994."[6994]

3060. With respect to the events at Kabuye Hill on 23 and 24 April 1994, the Trial Chamber noted Witness TW's testimony that he "saw Ndayambaje at Kabuye Hill on 24 April 1994 driving a white double-cabin Toyota Hilux carrying Hutu civilians armed with traditional weapons."[6995] The Trial Chamber concluded based on this testimony, along with the evidence of Witnesses EV, RT, QAQ, and FAG, that Ndayambaje transported attackers to Kabuye Hill and was present at Kabuye Hill during the attacks on 23 and 24 April 1994.[6996]

3061. Ndayambaje submits that the Trial Chamber erred in finding that Witness TW saw him on Kabuye Hill on 23 April 1994 since the witness testified to seeing him for the first time on 24 April 1994, as reflected in the Trial Chamber's summary of the witness's evidence.[6997] He argues that the Trial Chamber abused its discretion in explaining that, unlike Witnesses EV and RT, Witness TW did not mention that Ndayambaje distributed weapons by the fact that a multitude of refugees were present at Kabuye Hill and the hill was vast.[6998] Ndayambaje further contends that the Trial Chamber did not take into account Witness TW's incentive to lie due to "obvious personal motives of vengeance and hatred."[6999]

[6993] Trial Judgement, para. 1421.
[6994] Trial Judgement, para. 1421.
[6995] Trial Judgement, para. 1426. *See also ibid.*, para. 1448.
[6996] Trial Judgement, paras. 1426, 1431, 1448, 1452.
[6997] Ndayambaje Appeal Brief, paras. 498, 499, *referring to* Trial Judgement, paras. 1282-1287, 1421. *See also* Ndayambaje Reply Brief, para. 181.
[6998] Ndayambaje Appeal Brief, para. 500, *referring to* Trial Judgement, para. 1433.
[6999] Ndayambaje Appeal Brief, para. 501.

3062. The Prosecution responds that Ndayambaje fails to demonstrate any error in the Trial Chamber's assessment of Witness TW's evidence.[7000]

3063. According to the Appeals Chamber, a careful review of Witness TW's testimony reflects that Witness TW testified that he saw Ndayambaje at Kabuye Hill for the first time on 24 April 1994.[7001] The Trial Chamber therefore misstated his testimony in stating that Witness TW saw Ndayambaje on 23 April 1994 in the section related to the events on 22 April 1994.[7002] This appears to be a typographical error as the Trial Chamber correctly referred to Witness TW testifying to seeing Ndayambaje on 24 April 1994, and not 23 April 1994, everywhere else in the Trial Judgement.[7003] In any event, the Appeals Chamber finds that this error has not occasioned a miscarriage of justice as the Trial Chamber relied on Witness TW's correct account that he saw Ndayambaje on 24 April 1994 in its deliberations as to the events of 23 and 24 April 1994.[7004]

3064. The Trial Chamber expressly noted that, unlike Witnesses EV and RT, Witness TW did not mention that Ndayambaje distributed weapons at Kabuye Hill. It was of the view that "these witnesses may not have had the same opportunities to witness the events in question."[7005] Ndayambaje's unsubstantiated contention that the Trial Chamber erred in this respect reflects mere disagreement with the Trial Chamber's conclusion and is rejected without further consideration.

3065. Likewise, the Trial Chamber expressly noted that "Witness TW acknowledged that before the 1994 events, he and his brother had been arrested, detained and beaten up on the orders of the Accused" and that "Ndayambaje had been involved in the forced closure of his bar."[7006] It nonetheless concluded that the witness's denial that those events "may have influenced his testimony was vigorous and believable."[7007] Ndayambaje's argument does not show that the Trial Chamber's determination was unreasonable.

3066. The Appeals Chamber concludes that Ndayambaje has failed to demonstrate that the Trial Chamber erred in assessing Witness TW's credibility as it relates to the events at Kabuye Hill on 23 and 24 April 1994.

[7000] Prosecution Response Brief, paras. 2341-2343.
[7001] *See* Witness TW, T. 10 February 2004 pp. 7, 8, 11, 12 and 44-46, 48, 51-54 (closed session), T. 11 February 2004 p. 44.
[7002] Trial Judgement, para. 1421.
[7003] *See* Trial Judgement, paras. 1426, 1448.
[7004] The Appeals Chamber recalls that it reversed Ndayambaje's conviction for the events at Kabuye Hill on 22 April 1994 and that, accordingly, any issue related to a possible impact of this error on the events at Kabuye Hill on 22 April 1994 is moot. *See supra*, paras. 3031-3032.
[7005] Trial Judgement, para. 1433. The Trial Chamber noted that "there were many thousands of refugees on Kabuye Hill, which covered an expansive area." *See idem.*
[7006] Trial Judgement, para. 1449.
[7007] Trial Judgement, para. 1449.

(iv) Witness TP

3067. The Trial Chamber found that Witness TP's account contained "a number of serious discrepancies that rendered her testimony unreliable, but only as it relates to 24 April 1994" and concluded that it would not rely on her evidence as it relates to that day.[7008]

3068. Ndayambaje submits that Witness TP did not see any policeman, soldier, or vehicle on Kabuye Hill on 23 April 1994 and that, since she was not found credible by the Trial Chamber as to the "Sunday", she does not corroborate any witness on the transportation of attackers to Kabuye Hill by Ndayambaje on 24 April 1994.[7009]

3069. The Prosecution responds that Ndayambaje's argument that Witness TP did not give corroborating evidence as to Ndayambaje transporting attackers is correct but irrelevant.[7010]

3070. The Appeals Chamber observes that a plain reading of the Trial Judgement shows that the Trial Chamber did not rely on Witness TP's evidence for the transport of attackers to Kabuye Hill on 23 or 24 April 1994.[7011] Ndayambaje does not show that Witness TP's evidence, which the Trial Chamber did not rely upon, undermines the reasonableness of the Trial Chamber's findings for 23 and 24 April 1994. The Appeals Chamber therefore dismisses Ndayambaje's obscure argument about Witness TP's evidence without further consideration.

(v) Witness QAL

3071. The Trial Chamber found that Witness QAL, who testified that she witnessed Ndayambaje transporting guns and grenades in the direction of Kabuye Hill "one Thursday in April 1994", provided circumstantial evidence that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill."[7012]

3072. Ndayambaje submits that Prosecution and Defence evidence contradicts Witness QAL's testimony, pointing to: (i) Defence Witness MACHO's evidence that Witness QAL arrived in Muganza Sector "on a Friday at 2 p.m." to find refuge in her parents' house; (ii) Witness RV's testimony that, on Thursday, 21 April 1994, he went to Mugombwa Church with Ndayambaje in the communal vehicle; and (iii) Nteziryayo's and Defence Witness AND-44's testimonies that it was not materially possible to transport unprotected grenades in the rear compartment of a vehicle and

[7008] Trial Judgement, para. 1427.
[7009] Ndayambaje Appeal Brief, para. 502, *referring to* Trial Judgement, paras. 1295, 1427.
[7010] Prosecution Response Brief, para. 2346.
[7011] *See* Trial Judgement, paras. 1426-1431.
[7012] Trial Judgement, paras. 1434, 1438.

on rough roads without a risk of explosion.[7013] Ndayambaje further argues that the Trial Chamber accepted Witness QAL's testimony on the sole basis that she was Hutu and that Ndayambaje officiated at her wedding and ignored the fact that the witness omitted to mention any transport of weapons in her prior statement to Tribunal investigators of 17 October 1997.[7014]

3073. The Prosecution responds that Witness QAL's testimony was credible and reliable.[7015] It argues that Witness MACHO's testimony lacked credibility and reliability, that Witness RV's testimony was not incompatible with Witness QAL's account, and that Nteziryayo and Witness AND-44 did not state that it was impossible to transport grenades in the back of a pickup truck.[7016] The Prosecution also submits that, given the detailed, credible, and consistent nature of Witness QAL's evidence, the Trial Chamber was entitled to accept her testimony despite the inconsistency with her prior statement.[7017]

3074. The Appeals Chamber notes that the Trial Chamber did not discuss in the Trial Judgement Witness MACHO's testimony that Witness QAL arrived in Muganza Sector on a Friday,[7018] although it relied on Witness QAL's testimony that she witnessed Ndayambaje driving in the direction of Kabuye Hill one Thursday in April 1994.[7019] The Appeals Chamber observes that Witness QAL was not sure about the date and that it is only under cross-examination that she referred to seeing Ndayambaje going to Kabuye Hill on a "Thursday".[7020] She was not cross-examined on the basis of Witness MACHO's evidence, which only arose when Witness MACHO testified four years after her, and thus never had an opportunity to clarify the matter.[7021] In these circumstances, and considering that the Trial Chamber relied on Witness QAL's evidence solely as circumstantial evidence that Ndayambaje was generally involved in distributing weapons at Kabuye Hill,[7022] the Appeals Chamber finds that a reasonable trier of fact could have considered that Witness MACHO's evidence did not undermine the credibility of Witness QAL's account and that any error as to whether Witness QAL saw Ndayambaje on "Thursday", 21 April 1994, or "Friday", 22 April 1994 would have no impact on any material issue. Against this

[7013] Ndayambaje Notice of Appeal, para. 175; Ndayambaje Appeal Brief, paras. 504-506.
[7014] Ndayambaje Appeal Brief, paras. 503, 507. *See also ibid.*, para. 576.
[7015] Prosecution Response Brief, para. 2360.
[7016] Prosecution Response Brief, paras. 2361, 2364, 2365. The Prosecution adds that, even if Witness MACHO's testimony was true, it is compatible with Witness QAL's statement that she saw Ndayambaje transporting weapons to Kabuye Hill. *See ibid.*, para. 2363.
[7017] Prosecution Response Brief, para. 2366.
[7018] Witness MACHO, T. 2 July 2008 pp. 45, 46 (closed session).
[7019] Trial Judgement, paras. 1434, 1438; Witness QAL, T. 25 February 2004 p. 35.
[7020] Witness QAL, T. 25 February 2004 pp. 8, 35.
[7021] Witness QAL, T. 25 February 2004 pp. 7-22 and 23-60 (closed session). The Appeals Chamber notes that Witness QAL was only asked when exactly she lived with her parents between April to July 1994. *See ibid.*, p. 25 (closed session).
[7022] Trial Judgement, paras. 1434, 1438.

background, the Appeals Chamber finds no error in the Trial Chamber's decision not to expressly discuss this aspect of Witness MACHO's evidence.

3075. Likewise, the Appeals Chamber is not persuaded that Witnesses RV's and QAL's evidence is mutually exclusive as Witness RV's testimony does not conclusively establish the whereabouts of Ndayambaje for the entire afternoon of 21 April 1994.[7023] Accordingly, the Appeals Chamber finds that a reasonable trier of fact could have decided not to discuss this particular aspect of the evidence in the Trial Judgement and to consider that Witness RV's testimony did not undermine Witness QAL's account. The Appeals Chamber also finds no contradiction between Nteziryayo's and Witness AND-44's evidence and Witness QAL's account as neither Nteziryayo nor Witness AND-44 testified that transporting grenades in the back of a pickup truck would necessarily lead to an explosion but rather gave their personal opinion about the security measures that would generally have to be taken in order to avoid an explosion.[7024]

3076. Furthermore, contrary to Ndayambaje's contention, the Appeals Chamber notes that the Trial Chamber did not accept Witness QAL's evidence "on the sole basis" that she was Hutu and that Ndayambaje officiated at her wedding. Rather, after considering her testimony including this aspect, the Trial Chamber concluded that she would not have had any reason to lie.[7025] Ndayambaje does not adduce any argument to show that the Trial Chamber erred in this regard.

3077. The Appeals Chamber observes that the Trial Chamber did not address in the Trial Judgement the fact that Witness QAL's prior statement of 17 October 1997 did not refer to the transport of weapons about which she testified at trial. During cross-examination, Witness QAL denied stating in her prior statement that she saw Ndayambaje transporting attackers, explaining that what she saw was weapons in Ndayambaje's vehicle.[7026] Bearing in mind that the Trial Chamber relied on Witness QAL's testimony solely as circumstantial evidence to support the contention that "Ndayambaje was generally involved in distributing weapons at Kabuye Hill",[7027] the Appeals Chamber is not persuaded that the discrepancy between Witness QAL's testimony and her prior statement was such as to undermine the credibility of her evidence or require express consideration by the Trial Chamber in the Trial Judgement.

3078. Based on the above, the Appeals Chamber dismisses Ndayambaje's challenges to the Trial Chamber's assessment of Witness QAL's evidence related to the attacks on Kabuye Hill.

[7023] *See* Witness RV, T. 18 February 2004 pp. 18, 19 (closed session). *See also* Trial Judgement, para. 1070.
[7024] *See* Nteziryayo, T. 2 July 2007 pp. 59-61; Witness AND-44, T. 19 April 2007 pp. 19-21, 24.
[7025] Trial Judgement, paras. 1434, 1435, 1437.
[7026] Witness QAL, T. 25 February 2004 pp. 54, 55 (closed session), 59. *See also* Exhibit D172 (Witness QAL's Statement, dated 17 October 1997).
[7027] Trial Judgement, paras. 1434, 1438.

(vi) Witnesses RV and FAU

3079. The Trial Chamber noted that Witness RV testified to seeing Ndayambaje at the Muganza commune office on 23 April 1994 with a communal policeman, taking ammunition and a gun from the weapons store and leaving in the direction of Kabuye Hill.[7028] It also found that Witness FAU testified that he travelled with Ndayambaje to the Muganza commune office, that Brigadier Pierre took a gun there, and that he accompanied Ndayambaje and two policemen to Kabuye Hill.[7029] The Trial Chamber determined that their testimonies partly corroborated each other and that the contradictions between their testimonies did not cast doubt on their eyewitness accounts that Ndayambaje was involved in this distribution of weapons at the Muganza commune office on 23 April 1994.[7030] The Trial Chamber concluded that the Prosecution had proven beyond reasonable doubt that "Ndayambaje distributed weapons at [...] the Muganza *commune* office".[7031]

3080. Ndayambaje submits that the Trial Chamber erred in giving substantial weight to the testimonies of Witnesses FAU and RV, notably because neither of them testified that he "distributed" weapons.[7032] He also points out that both witnesses had an incentive to lie since they were detained and accused in trials for genocide-related crimes at the time of their testimonies.[7033] Ndayambaje also asserts that Witness FAU referred to three Kalashnikovs in cross-examination, while he had initially only mentioned one pistol during examination-in-chief, and that Witness RV testified about a single old gun whereas he had mentioned ten guns in his prior statement.[7034]

3081. In addition, Ndayambaje contends that Witnesses FAU's and RV's testimonies contradicted each other as to: (i) the time of the event;[7035] (ii) the number and type of weapons that were taken;[7036] (iii) the identity of the persons who opened the store and distributed the weapons;[7037]

[7028] Trial Judgement, para. 1439.
[7029] Trial Judgement, para. 1440.
[7030] Trial Judgement, paras. 1439, 1441-1443.
[7031] Trial Judgement, para. 1444. *See also ibid.*, para. 5772.
[7032] Ndayambaje Appeal Brief, para. 515. Ndayambaje also submits that "Witness FAU never mentioned the date on which the event allegedly took place" and that "[a]s it did in paragraphs 1034 to 1037, the Chamber had to consider this aspect with regard to the Indictment which was itself vague as to the date of the alleged weapons distribution". *See ibid.*, para. 512, *referring to* Trial Judgement, paras. 1034-1037. The Appeals Chamber recalls that it has already addressed and rejected Ndayambaje's arguments with respect to the lack of notice concerning Kabuye Hill and, to the extent Ndayambaje is developing a new argument, dismisses it as unclear. *See supra*, paras. 2762-2764.
[7033] Ndayambaje Appeal Brief, paras. 509-511, 520, *referring to* Trial Judgement, paras. 1226, 1439, 1440.
[7034] Ndayambaje Appeal Brief, para. 514. Ndayambaje also avers that Witness RV testified that the weapons were taken at 4.00 p.m. during examination-in-chief, and at 2.00 p.m. on cross-examination. *See ibid.*, para. 513.
[7035] Ndayambaje submits that Witness FAU testified that the weapons were taken in the morning and that, according to Witness RV, it happened in the afternoon. *See* Ndayambaje Appeal Brief, para. 513.
[7036] Ndayambaje Appeal Brief, para. 514.
[7037] Ndayambaje submits that, according to Witness FAU's testimony, the weapons store was opened by Brigadier Pierre who distributed the Kalashnikovs to policemen, whereas Witness RV testified that he opened it himself. *See* Ndayambaje Appeal Brief, para. 515.

(iv) the vehicle allegedly used by Ndayambaje;[7038] and (v) Ndayambaje's whereabouts after the distribution of weapons.[7039] Ndayambaje also asserts that the Trial Chamber did not take into account the fact that Witnesses FAU and RV contradicted Witnesses EV and QBZ who placed Ndayambaje elsewhere on Saturday, 23 April 1994.[7040]

3082. The Prosecution responds that the Trial Chamber treated Witnesses RV and FAU with appropriate caution and made no errors in its assessment.[7041] It submits that Ndayambaje is "splitting hairs" when pointing out that Witnesses RV and FAU did not testify that Ndayambaje personally took weapons and distributed them as both testified that he was "the driving force behind bringing weapons and attackers to Kabuye Hill."[7042] It contends that Ndayambaje's unsubstantiated claim regarding their status as detained witnesses awaiting trial should be summarily dismissed.[7043]

3083. The Prosecution further argues that Ndayambaje does not explain how the Trial Chamber erred in: (i) accepting Witnesses RV's and FAU's evidence despite the fact that they placed the distribution of weapons at different times of the day; (ii) assessing Witness RV's evidence; and (iii) finding that the slight contradiction about the time when Ndayambaje left the commune office on 23 April 1994 in Witnesses FAU's and RV's evidence did not cast doubt on their testimonies.[7044] It adds that Witnesses QBZ and EV did not contradict Witnesses RV and FAU.[7045]

3084. The Appeals Chamber notes that, in support of its finding that "Ndayambaje distributed weapons" at the Muganza commune office, the Trial Chamber relied on Witnesses RV's and FAU's evidence that Ndayambaje took the initiative of going to the commune office to take weapons and distribute them and that, although he did not personally proceed with the actual physical distribution

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[7038] Ndayambaje submits that Witness RV mentioned a khaki-coloured vehicle belonging to the Health Centre, that no other witness mentioned, while Witness FAU spoke about a white *Projet Agricole de Muganza* ("PAMU") vehicle. *See* Ndayambaje Appeal Brief, paras. 516, 521.

[7039] Ndayambaje submits that, while Witness FAU testified that Ndayambaje went to Kabuye around 11.00 a.m. and to Butare around 1.00 p.m., driving the PAMU vehicle, and that Charles joined them in Kabuye Hill driving the commune vehicle, Witness RV testified that he saw Ndayambaje around 1.00 p.m. on his way to Kibayi in the khaki-coloured vehicle belonging to the Health Centre and around 2.00 p.m., heading for Kabuye Hill together with Witness FAU, in the vehicle driven by Charles. *See* Ndayambaje Appeal Brief, para. 517.

[7040] Ndayambaje submits that: (i) Witness EV placed Ndayambaje on Saturday, 23 April 1994 in Kabuye from 10.00 a.m. to 5.00. p.m.; and (ii) Witness QBZ placed Ndayambaje on Saturday, 23 April 1994 in Kabuye Hill "from morning to evening". *See* Ndayambaje Appeal Brief, para. 518. Ndayambaje contends that Witnesses FAU's testimony is also contradicted by Defense Witnesses GABON and KEPIR who placed Ndayambaje at the Muganza commune office in the afternoon after an attack that took place there. *See idem.* The Appeals Chamber recalls that the Trial Chamber rejected the alibi evidence provided by Witnesses GABON and KEPIR as to Ndayambaje's whereabouts on 23 and 24 April 1994 and that it has affirmed this finding above in Section IX.C. *See supra*, paras. 2919-2929.

[7041] Prosecution Response Brief, paras. 2368, 2369.

[7042] Prosecution Response Brief, para. 2373.

[7043] Prosecution Response Brief, para. 2368.

[7044] Prosecution Response Brief, paras. 2370-2372, 2375.

[7045] Prosecution Response Brief, paras. 2376-2384. The Prosecution also argues that Witness RV described the colour of the vehicle as "white tending towards khaki". *See ibid.*, para. 2374.

of weapons, he was involved in all steps of its material realization.[7046] In this context, the Appeals Chamber finds no merit in Ndayambaje's emphasis that the witnesses did not testify that he personally distributed weapons at the Muganza commune office; a fact that the Trial Chamber duly considered.[7047]

3085. The Trial Judgement also reflects express consideration that Witnesses RV and FAU may have had incentives to lie because of their status as detained witnesses convicted or awaiting trial in the assessment of their evidence pertaining to the distribution of weapons at Muganza Commune.[7048] Ndayambaje does not demonstrate any error in this respect.

3086. Turning to the alleged inconsistencies in the evidence of Witnesses RV and FAU regarding the number and types of weapons, the Appeals Chamber notes that the Trial Chamber expressly recalled Witness FAU's examination-in-chief and cross-examination in this respect and did not find that his testimony was inconsistent but rather that it "was clarified during cross-examination".[7049] Ndayambaje does not advance any argument to show that the Trial Chamber erred in this assessment.[7050] Ndayambaje also ignores that Witness RV explained in subsequent written statements that his prior statement had not been recorded correctly regarding the number of weapons that were taken from the commune office and that he had asked for a formal correction of this statement.[7051]

3087. Furthermore, the Appeals Chamber observes that the Trial Chamber expressly considered the inconsistencies that Ndayambaje points out between Witnesses FAU's and RV's evidence regarding the time of the day of the distribution of weapons, the type and number of weapons that were taken, and the identity of the person who proceeded with the removal and distribution of weapons and concluded that they did not cast doubt on their eyewitness evidence that Ndayambaje

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[7046] *See* Trial Judgement, paras. 1304-1306, 1308, 1309, 1439-1443.
[7047] Trial Judgement, paras. 1439, 1443.
[7048] Trial Judgement, paras. 1439, 1440.
[7049] Trial Judgement, paras. 1440, 1441. *See also ibid.*, para. 1309.
[7050] The Appeals Chamber also notes that, in examination-in-chief, Witness FAU testified that Pierre took a "gun" from the weapons store. In cross-examination, he stated that Pierre took one gun for himself and gave one to each of the two policemen and that the guns were Kalashnikovs. *See* Witness FAU, T. 4 March 2004 p. 72, T. 9 March 2004 p. 45.
[7051] Exhibit D176 (Witness RV's statement, dated 29 July 1997), p. 4 ("I never told the investigator that I gave ten guns to Celestin, or perhaps the interpreter did not give a proper translation of what I said. What I told the interpreter in my statement was that the communal police had ten guns in[t]heir possession, aside from the *commune* weapons store."); Exhibit D178 (Witness RV's statement, dated 7 and 8 March 2001), p. K0169405 (Registry pagination) ("on line 9 on the distribution of arms, I wish to make a substantial change to the words on the distribution of weapons, since what is recorded does not appear to represent what I said during the taking of the statement [...]. [D]elete the words described and substitute them with the following new words [...] *Les fusils de la Commune étaient en mains des policiers communaux.*"). Witness RV also confirmed during cross-examination that there must have been an error of interpretation. *See* Witness RV, T. 18 February 2004 pp. 33, 34 (closed session).

was involved in the distribution of weapons at the Muganza commune office on 23 April 1994.[7052] Ndayambaje does not advance any argument to show that this conclusion was unreasonable.

3088. By contrast, the Trial Chamber did not explicitly discuss the inconsistencies within Witnesses FAU's and RV's testimonies underscored by Ndayambaje concerning the vehicle he used and his whereabouts after the distribution of weapons at the commune office. The Trial Chamber nonetheless expressly noted these aspects of their evidence in the course of its analysis of the evidence pertaining to the distribution of weapons.[7053] Ndayambaje does not explain why it was unreasonable for the Trial Chamber not to discuss these inconsistencies expressly and fails to advance any argument to demonstrate how these minor inconsistencies undermine the credibility of Witnesses FAU's and RV's accounts of Ndayambaje's involvement in the distribution of weapons.

3089. With respect to Ndayambaje's contentions regarding the contradictions between Witnesses RV's and FAU's testimonies, on one hand, and Witnesses EV's and QBZ's testimonies, on the other hand, the Appeals Chamber does not consider that Witness QBZ's account about Ndayambaje's whereabouts on a "Saturday" in April 1994[7054] contradicts Witnesses RV's and FAU's accounts in light of the Trial Chamber's finding that the event Witness QBZ testified about "occurred about one week after the death of the President, *i.e.* around 13 April 1994"; a finding that Ndayambaje does not challenge.[7055] As for Witness EV, the Appeals Chamber notes that, given that the witness could only provide estimates and did not testify to have constantly seen Ndayambaje, his testimony that on 23 April 1994 he saw Ndayambaje arriving at Kabuye Hill at about 10.00 a.m. and leaving at approximately 3.00 or 4.00 p.m.[7056] is not incompatible with Witnesses RV's and FAU's testimonies recalled by the Trial Chamber that they saw Ndayambaje at the Muganza commune office in the late morning or around 2.00 p.m., before he headed for Kabuye Hill.[7057]

3090. Accordingly, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in finding that Ndayambaje was involved in the distribution of weapons at the Muganza commune office on 23 April 1994 based on Witnesses FAU's and RV's evidence.

[7052] Trial Judgement, paras. 1442, 1443.
[7053] Trial Judgement, paras. 1303, 1304, 1308, 1309.
[7054] Witness QBZ, T. 24 February 2004 pp. 75, 76 (closed session).
[7055] *See* Trial Judgement, para. 1428. *See also ibid.*, paras. 1315, 1316. The Appeals Chamber notes that the Trial Chamber did not rely on the testimony of Witness QBZ regarding any of its findings concerning Ndayambaje's presence at Kabuye Hill on 23 April 1994. *See ibid.*, paras. 1431, 1448.
[7056] Witness EV, T. 26 February 2004 pp. 61, 67, 68 (English), and 79 (French).
[7057] Trial Judgement, paras. 1308, 1309, 1439, 1442.

(vii) Witness EV

3091. The Trial Chamber found that Witness EV testified that he saw Ndayambaje arriving in a convoy of vehicles on the fourth day of his stay at Kabuye Hill, "which would have fallen on 23 April 1994", and that he saw him there again on 24 April 1994.[7058] The Trial Chamber relied on Witness EV's evidence as it interpreted it: (i) together with the evidence of Witnesses RT, TW, QAQ, and FAG to find that Ndayambaje transported attackers to and was present at Kabuye Hill on 23 and 24 April 1994;[7059] and (ii) as circumstantial evidence that Ndayambaje was involved in the distribution of weapons at Kabuye Hill on 23 April 1994.[7060]

3092. Ndayambaje submits that the Trial Chamber's misconstruction of the timeline of events recounted by Witness EV led to the erroneous finding that Witness EV saw him at Kabuye Hill on 23 and 24 April 1994 in the circumstances he described since the witness was in fact testifying about 24 and 25 April 1994.[7061] He also argues that the Trial Chamber erred in finding that Ndayambaje used the Muganza commune vehicle to transport assailants and that there is "an obvious problem with the identification made by Witness EV."[7062]

3093. As mentioned above, the Prosecution submits that Witness EV's evidence should not have been relied upon.[7063] It argues that, "even without EV's evidence, there was considerable Prosecution evidence establishing that Ndayambaje transported attackers, distributed weapons and was present during the attacks against Tutsis at Kabuye on 23 and 24 April."[7064] The Prosecution also responds that the timing of the witness was not clear and that, whichever day Witness EV testified about, his testimony did not cast doubt on the other witnesses' evidence regarding the use of the communal vehicle.[7065]

3094. Ndayambaje replies that his convictions in relation to 23 April 1994 should be quashed as Witness EV is the only witness relied upon by the Trial Chamber to convict him for crimes committed on this day.[7066]

[7058] Trial Judgement, paras. 1426, 1448.
[7059] Trial Judgement, paras. 1426-1431, 1448, 1449, 1452.
[7060] Trial Judgement, paras. 1432-1438.
[7061] Ndayambaje Appeal Brief, para. 487.
[7062] Ndayambaje Appeal Brief, paras. 488-491. The Appeals Chamber notes that Ndayambaje also submits that Witnesses EV, RV, RT, FAU, and FAG gave contradictory evidence as they placed within the same time frame Ndayambaje in four different vehicles going into different directions. *See ibid.*, para. 521. Ndayambaje, however, fails to provide any specific reference to sustain his contention, which the Appeals Chamber therefore dismisses.
[7063] Prosecution Response Brief, paras. 2296, 2297, 2300, 2301, 2306, 2315, 2320, 2321.
[7064] Prosecution Response Brief, para. 2387.
[7065] Prosecution Response Brief, paras. 2381-2387.
[7066] Ndayambaje Reply Brief, para. 176.

3095. The Appeals Chamber recalls that the Trial Chamber misconstrued the timeline provided by Witness EV in his testimony.[7067] As a result of this error, the Trial Chamber erroneously relied on aspects of Witness EV's testimony that pertained to 24 April 1994 in support of its findings concerning events on 23 April 1994, and on aspects of the witness's testimony that pertained to 25 April 1994 in support of its findings on 24 April 1994.

3096. However, the Appeals Chamber is not convinced that the Trial Chamber's error occasioned a miscarriage of justice given the Trial Chamber's reliance on other direct evidence in support of its findings about the events of 23 and 24 April 1994. Contrary to Ndayambaje's submission, Witness EV was not the only witness the Trial Chamber relied upon to establish that Ndayambaje was present and transported attackers on 23 April 1994. The Trial Judgement reflects that the Trial Chamber primarily relied on Witness RT's direct testimony in this respect, which it found clear and convincing.[7068] For the distribution of weapons, the Trial Chamber relied on the direct evidence of Witnesses RT, RV, and FAU, as further corroborated by Witness QAL's circumstantial evidence.[7069] Likewise, the Trial Chamber's finding on Ndayambaje's presence and transport of attackers to Kabuye Hill on 24 April 1994 was primarily based on the direct evidence of Witness TW, as corroborated by Witness QAQ's testimony that he saw a white vehicle transporting attackers, which the other refugees recognised as Ndayambaje's vehicle.[7070] The Appeals Chamber has found no error in the Trial Chamber's reliance on this evidence.

3097. In light of the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber's error in assessing Witness's EV testimony occasioned a miscarriage of justice since the Trial Chamber's findings based on Witness EV's testimony were supported by other credible evidence. For this reason, the Appeals Chamber finds it unnecessary to consider Ndayambaje's remaining arguments relating to the assessment of the evidence of Witness EV concerning 23 and 24 April 1994.

(b) Assessment of Defence Evidence

3098. Ndayambaje submits that the Trial Chamber erred in failing to consider and discuss in the Trial Judgement the relevant testimonies of his Defence Witnesses ALIZA, GLANA, MAJIK, SHICO, and JEVAN related to the events at Kabuye Hill on 23 and 24 April 1994, thereby failing in its duty to provide a reasoned opinion.[7071] Ndayambaje argues that Witnesses GLANA's,

[7067] *See supra*, paras. 3028, 3029.
[7068] Trial Judgement, para. 1438.
[7069] Trial Judgement, paras. 1438, 1443.
[7070] *See* Trial Judgement, paras. 1426, 1448. *See also supra*, paras. 3040, 3041, 3063.
[7071] Ndayambaje Notice of Appeal, paras. 89, 90, 93, 94, 153, 154, 157, 158, 167-169; Ndayambaje Appeal Brief, paras. 253-257, 259, 524-526, 529. Ndayambaje states that Witness ALIZA was the only Defence witness to be

MAJIK's, and SHICO's evidence that he was not involved in the attacks at Kabuye Hill was "specific and reliable" as they were present among the refugees gathered on Kabuye Hill from 20 to 25 April 1994.[7072] He asserts that their testimonies corroborated Witness ALIZA's evidence and contradicted the Prosecution witnesses' testimonies, particularly as regards the timeline, his presence, and his involvement in the events at Kabuye Hill.[7073] With respect to Witness JEVAN, Ndayambaje highlights that his testimony that the green MRND vehicle was sold prior to 1994 contradicted Witness EV's testimony.[7074] He adds that the testimonies of these five witnesses were not challenged by the Prosecution and that the Trial Chamber did not find contradictions or implausibility in their evidence or establish that they had particular ties with him or any interest in protecting him.[7075] In Ndayambaje's view, this disregarded evidence had "the potential of casting reasonable doubt on the events of Kabuye".[7076]

3099. The Prosecution responds that the evidence pointed out by Ndayambaje was incapable of raising a reasonable doubt in its case.[7077] It argues that Witness ALIZA's evidence was properly considered by the Trial Chamber and that, in any event, he was not a credible witness as he had an incentive to lie for Ndayambaje.[7078] It further submits that: (i) a review of Witnesses GLANA's, MAJIK's, and SHICO's testimonies shows that they were neither reliable nor credible;[7079] (ii) Witnesses GLANA's, MAJIK's, and SHICO's testimonies do not support the contention that Ndayambaje was not at Kabuye Hill;[7080] and (iii) the reason why the Trial Chamber rejected

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considered and assessed by the Trial Chamber in relation to the events at Kabuye Hill but solely for the alibi and for 22 April 1994. *See* Ndayambaje Appeal Brief, paras. 256, 474, 524; Ndayambaje Reply Brief, para. 193. Ndayambaje emphasises that the Trial Chamber did not mention Witnesses GLANA, MAJIK, SHICO, and JEVAN in the list it made of the witnesses Ndayambaje relied upon in support of his arguments regarding Kabuye Hill. *See* Ndayambaje Notice of Appeal, paras. 90, 154, *referring to* Trial Judgement, para. 1252. At the appeals hearing, Ndayambaje claimed that the Trial Chamber also overlooked the testimonies of Defence Witnesses KANUC and Stefaan Marysse related to the events at Kabuye Hill. *See* AT. 21 April 2015 p. 28. The Appeals Chamber observes that, Ndayambaje not only did not raise this allegation in his written appeal submissions but also failed to substantiate and provide any reference to support his claim that the evidence of these witnesses was relevant to the Trial Chamber's findings on the events at Kabuye Hill and should have been addressed in the Trial Chamber's reasoning. Accordingly, the Appeals Chamber declines to consider this argument and dismisses it without further consideration.

[7072] Ndayambaje Notice of Appeal, paras. 91, 155, 168; Ndayambaje Appeal Brief, paras. 255, 257, 476, 524. Ndayambaje Reply Brief, para. 195.

[7073] Ndayambaje Notice of Appeal, paras. 91, 92, 155, 156, 169; Ndayambaje Appeal Brief, paras. 257, 526. Ndayambaje refers to Witnesses EV, RT, TP, TW, FAU, QAQ, and QBZ. *See* Ndayambaje Appeal Brief, para. 525.

[7074] Ndayambaje Appeal Brief, para. 525.

[7075] Ndayambaje Appeal Brief, paras. 257, 524, 526.

[7076] Ndayambaje Notice of Appeal, para. 169; Ndayambaje Appeal Brief, para. 526.

[7077] Prosecution Response Brief, paras. 2153, 2395, 2417, 2423; AT. 21 April 2015 p. 55.

[7078] Prosecution Response Brief, paras. 2153, 2390-2394, 2417, *referring to* Witness ALIZA, T. 4 June 2008 pp. 31, 33, 34 (closed session), 57, T. 5 June 2008 pp. 33, 37, 38 (closed session), 57, 61, 62, T. 9 June 2008 p. 13.

[7079] Prosecution Response Brief, paras. 2395, 2399-2409, 2411, 2412. The Prosecution argues that: (i) the content of Witness GLANA's account of her experience at Kabuye Hill makes it unreliable and not credible and shows that she was not in a position to be able to identify the assailants, even if she pretended to; (ii) Witness GLANA never gave satisfactory explanation as to why she chose to flee to Zaire, "the very place where many *génocidaires* went", and "over-stated her evidence", claiming that no members of the authorities were present at Kabuye Hill, contrary to the evidence that showed that authorities directed the attacks; and (iii) Witness SHICO overstated her evidence and "made over-reaching assertions that were not consistent with her limited ability to observe". *See idem.*

[7080] Prosecution Response Brief, paras. 2395, 2413.

Witness ALIZA's testimony, namely that he had a different experience on the hill from other witnesses and that the fact that he did not see or hear Ndayambaje does not mean that the latter was not there, applies equally to Witnesses GLANA's, MAJIK's, and SHICO's evidence.[7081] The Prosecution also argues that Witness JEVAN's evidence about the MRND Muganza commune vehicle has no impact on the Trial Chamber's findings.[7082]

3100. The Appeals Chamber recalls that a trial chamber need not refer to every piece of evidence provided that there is no indication that the trial chamber completely disregarded any particular piece of evidence; such disregard is shown where evidence that is clearly relevant to the findings is not addressed by the trial chamber's reasoning.[7083]

3101. Contrary to Ndayambaje's contention, the Trial Judgement reflects consideration of Witness ALIZA's evidence in relation to the events at Kabuye Hill on 23 and 24 April 1994. Not only did the Trial Chamber summarise Witness ALIZA's evidence in this regard, but it also referred to it in its deliberations related to the events at Kabuye Hill on 23 and 24 April 1994.[7084] Although the Trial Chamber did not explicitly discuss Witness ALIZA's relevant testimony that he did not see Ndayambaje or hear of his presence at Kabuye Hill on "Saturday afternoon", it is clear that the Trial Chamber's finding that the witness's statement that he did not see or hear about his presence on 22 April 1994 "[did] not mean that [Ndayambaje] was not present at all on that day" was meant to apply equally to the witness's testimony about Saturday, 23 April 1994.[7085] Notably, the Trial Chamber also observed that the witness conceded that, when the attack was launched, he could not see everything that was happening or every person on the hill.[7086] Ndayambaje's argument regarding the assessment of Witness ALIZA's testimony about the attacks on Kabuye Hill of 23 April 1994 is consequently dismissed.

[7081] Prosecution Response Brief, paras. 2396, 2397. The Prosecution submits that the particular circumstances of the Kabuye Hill massacres make it understandable for the witnesses not to have noticed the presence of Ndayambaje. *See ibid.*, para. 2398. *See also* AT. 21 April 2015 p. 55.

[7082] Prosecution Response Brief, paras. 2153, 2327, 2328, 2418.

[7083] *See Kvočka et al.* Appeal Judgement, para. 23. *See also Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127; *Kalimanzira* Appeal Judgement, para. 195.

[7084] *See* Trial Judgement, paras. 1324, 1325, 1448. The Appeals Chamber further observes that Witness ALIZA's testimony that he did not see Ndayambaje during the interception of refugees or at Kabuye Hill on 22 April 1994 was expressly addressed in the Trial Judgement in relation to the events on the 20 and 22 April 1994 and that the Trial Chamber concluded that his testimony did not cast a doubt on the testimony of the Prosecution witnesses. *See ibid.*, paras. 1413, 1415.

[7085] Trial Judgement, para. 1415. Witness ALIZA testified that, on 24 April 1994, he returned to Kabuye Hill to look for family members, but that because he saw armed civilians killing women and children who had survived, he fled and hid at a sorghum farm. *See ibid.*, para. 1326.

[7086] *See* Trial Judgement, para. 1325, *referring to* Witness ALIZA, T. 5 June 2008 p. 40 (closed session), T. 9 June 2008 pp. 15, 16.

3102. While Ndayambaje is correct in asserting that the Trial Chamber did not refer to Witness MAJIK's testimony in the portion of its judgement relating to Kabuye Hill,[7087] the Trial Judgement reflects express consideration of this witness's evidence in the section addressing the massacres at Mugombwa Church.[7088] Given the limited relevance of Witness MAJIK's testimony to the events that took place at Kabuye Hill on 23 and 24 April 1994 – the witness testifying that she remained at home on 23 April 1994 and only returned to Kabuye Hill on Sunday, 24 April 1994, when there were no more refugees there[7089] – the Appeals Chamber considers that the Trial Chamber was under no obligation to expressly discuss this aspect of Witness MAJIK's evidence when reaching its findings on the allegation of Ndayambaje's involvement in the Kabuye Hill massacres of 23 and 24 April 1994.

3103. The Trial Chamber did also not refer to the evidence of Witnesses GLANA and SHICO in relation to the attacks at Kabuye Hill.[7090] Although the Trial Chamber referred to Witness SHICO's testimony elsewhere in the Trial Judgement,[7091] Witness GLANA's testimony is not mentioned at all in the Trial Judgement. As pointed out by Ndayambaje, Witnesses GLANA and SHICO testified that, together with other refugees, they had sought refuge at Kabuye Hill, where they were on Saturday, 23 April 1994.[7092] Both testified that they did not see Ndayambaje or his vehicle on that day or hear about his presence from other refugees.[7093] The Trial Chamber omitted to note in the Trial Judgement that Ndayambaje relied on these aspects of Witnesses GLANA's and SHICO's testimonies in his closing submissions.[7094]

3104. Given the direct relevance of this evidence and the absence of any indication in the Trial Judgement that the Trial Chamber assessed and weighed it, the Appeals Chamber finds that the

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[7087] *See* Trial Judgement, paras. 1248-1456.
[7088] Trial Judgement, Section 3.6.4. *See also ibid.*, paras. 1088-1092.
[7089] Witness MAJIK, T. 18 June 2008 p. 4. *See also* Ndayambaje Closing Brief, paras. 470, 471.
[7090] *See* Trial Judgement, paras. 1248-1456.
[7091] *See* Trial Judgement, paras. 1178-1180.
[7092] Witness GLANA, T. 11 June 2008 pp. 42-44; Witness SHICO, T. 23 June 2008 pp. 31-33, 47. Witness GLANA stated that he left Kabuye Hill on Sunday, 24 April 1994 early in the morning to return home. *See* Witness GLANA, T. 11 June 2008 p. 44. Witness SHICO testified that she left Kabuye Hill on Saturday when it started raining and went back to her house where she arrived in the morning. *See* Witness SHICO, T. 23 June 2008 p. 34. In light of the foregoing and to the extent that Ndayambaje submits that the Trial Chamber failed to consider Witnesses GLANA's and SHICO's testimony for the events at Kabuye Hill on 24 April 1994, the Appeals Chamber dismisses Ndayambaje's arguments as their evidence cannot be seen as clearly relevant to the events at Kabuye Hill on that particular day.
[7093] Witness GLANA, T. 11 June 2008 pp. 42, 74; Witness SHICO, T. 23 June 2008 pp. 32, 33. *See also* Ndayambaje Closing Brief, paras. 484, 501, 503, 507. Ndayambaje's submissions also seek to demonstrate that Witnesses GLANA's and SHICO's evidence raises a reasonable doubt as to the features and the timeline of the attacks at Kabuye Hill. However, the Appeals Chamber notes that, apart from very general considerations without reference, Ndayambaje only refers to the events of Friday, 22 April 1994. *See* Ndayambaje Notice of Appeal, paras. 91, 155; Ndayambaje Appeal Brief, paras. 257, 476, 526. The Appeals Chamber therefore finds that Ndayambaje fails to substantiate his claim and dismisses his argument in this respect as to the events of 23 and 24 April 1994.
[7094] Trial Judgement, para. 1252 ("In support of its submissions, the Ndayambaje Defence relies on the testimony of Ndayambaje Defence Witnesses ALIZA, TOVIA, KEPIR, GABON, MARVA, BIDI, Father Tiziano, SABINE,

Trial Chamber erred by failing to consider the evidence of Witnesses GLANA and SHICO with respect to the events at Kabuye Hill on 23 April 1994. However, Ndayambaje does not demonstrate that this error invalidates the Trial Chamber's conclusions concerning his role in the attacks at Kabuye Hill. The Appeals Chamber notes that, although Witnesses GLANA and SHICO testified that they did not see or hear about the presence of Ndayambaje on 23 April 1994, their testimonies also suggest that they could not reliably establish that Ndayambaje was not there. In particular, their testimonies reveal that they were not in a position to identify any of the assailants on 23 April 1994.[7095] Moreover, Witness SHICO's testimony reflects that she could not observe everything that was happening because she was taking care of her children and shared information only with people from the same locality as her.[7096] As for Witness GLANA, her testimony shows that, as there was gunfire, she went into hiding from 4.00 p.m. beside a banana tree and laid down to avoid being hit by a bullet.[7097] Recalling the Trial Chamber's finding that "there were many thousands of refugees on Kabuye Hill, which covered an expansive area",[7098] the Appeals Chamber is of the view that the fact that Witnesses GLANA and SHICO did not see Ndayambaje or hear about his presence is of very limited probative value and would not have precluded a reasonable trier of fact from finding that Ndayambaje was present at Kabuye Hill on 23 April 1994 as testified by a credible Prosecution witness and corroborated by circumstantial evidence.

3105. Finally, the Appeals Chamber observes that Ndayambaje fails to provide any reference to the relevant parts of testimonies or the Trial Judgement to support his allegation that Witness JEVAN's evidence contradicts that of Witness EV about the use of the MRND vehicle.[7099] In any case, the Appeals Chamber recalls that the Trial Chamber erred in its assessment of Witness EV's testimony and that it has concluded above that the Trial Chamber's findings nonetheless remain reasonable without Witness EV's evidence.

3106. For these reasons, the Appeals Chamber finds that the Trial Chamber erred in failing to consider the evidence of Witnesses GLANA and SHICO relevant to the question of Ndayambaje's presence at Kabuye Hill on 23 April 1994. However, the Appeals Chamber finds that Ndayambaje

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Nteziryayo Defence Witness AND-5 and Ndayambaje."); Ndayambaje Closing Brief, paras. 483-488, 501-507. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 pp. 43, 44.

[7095] *See* Witness GLANA, T. 11 June 2008 pp. 41 ("Q. Did you, with your very eyes, see the people who had opened fire on you, those who had guns? A. No, but people were saying that it was soldiers that were firing. And people said that these – those who were shooting were dressed in military uniform. But I did not see these persons because I was very, very frightened."), 75; Witness SHICO, T. 23 June 2008 p. 33 ("Q. [...] did you see the people that were opening fire on Kabuye hill? A. [...] From where I was, I did not see the people that were opening fire, but I was seeing people as they fell. [...] I did not personally see the persons that were opening fire.").

[7096] Witness SHICO, T. 23 June 2008 pp. 50, 51.

[7097] Witness GLANA, T. 11 June 2008 pp. 39, 41, 73.

[7098] Trial Judgement, para. 1433.

[7099] *See* Ndayambaje Appeal Brief, para. 525, *referring to* Exhibit D672 (Photo depicting Ndayambaje and other persons close to a vehicle with the mention "M.R.N.D. *Commune* Muganza").

has failed to demonstrate that this error invalidates the Trial Chamber's conclusions regarding his responsibility in the attacks on Kabuye Hill of 23 April 1994. The Appeals Chamber dismisses as without merit Ndayambaje's remaining contentions about the assessment of the Defence evidence.

3. Additional Evidence Admitted on Appeal

3107. On the basis of the trial record alone, the Appeals Chamber has found that the Trial Chamber erred in holding Ndayambaje responsible for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994 and reversed his convictions on this basis.[7100] Consequently, the Appeals Chamber finds it unnecessary to examine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to Ndayambaje's guilt in this respect.[7101]

3108. By contrast, the Appeals Chamber has found that, on the basis of the trial record alone, the Trial Chamber did not err in finding Ndayambaje responsible for aiding and abetting the killings perpetrated during attacks on Kabuye Hill on 23 and 24 April 1994 by transporting attackers to Kabuye Hill, distributing weapons that were later used in the massacres, and being present during the attacks. In accordance with the relevant standard, the Appeals Chamber will therefore determine whether, in light of the trial evidence and the additional evidence admitted on appeal, it is itself convinced beyond reasonable doubt as to this finding of guilt.

3109. The Appeals Chamber recalls that it admitted as additional evidence on appeal: (i) a confidential witness statement dated 30 January 2013 relevant to the assessment of the credibility of Prosecution Witness EV;[7102] and (ii) a prior statement given confidentially to Tribunal investigators by Witness Claver Habimana ("Habimana") on 9 June 2009 and part of his testimony in the *Ntawukulilyayo* case relevant to the assessment of the credibility of Prosecution Witness RT.[7103]

3110. The Appeals Chamber further recalls that it has found that the Trial Chamber's error in assessing Witness EV's testimony on the events of 23 and 24 April 1994 at Kabuye Hill have not occasioned a miscarriage of justice, given the Trial Chamber's reliance on other direct evidence in

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[7100] *See supra*, Section IX.F.1.
[7101] The Appeals Chamber also recalls that Ndayambaje was not convicted in relation to the interception at Ngiryi Bridge and forced movement of the Tutsi refugees to Kabuye Hill on 20 April 1994. *See supra*, Section IX.F.1.
[7102] 9 April 2015 Appeal Decision, pp. 1, 4, *referring to* Élie Ndayambaje's Motion for Admission of Witness Grégoire Hategekimana's Statement as Additional Evidence, 1 May 2013 (originally filed in French, English translation filed on 10 July 2013) (confidential), Annex A (Statement dated 30 January 2013).
[7103] 12 May 2015 Appeal Decision, paras. 25, 90, 91, fn. 50, *referring to* Élie Ndayambaje's Motion on Violation of Disclosure Obligations by the Prosecutor and for Admission of Additional Evidence, 29 November 2012 (originally filed in French, English translation filed on 7 February 2013), Annex B, Statement of Witness Claver Habimana of 9 June 2009 (confidential) ("Habimana's Statement"), *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Witness Habimana, T. 6 October 2009 pp. 7, 11-17, 27 and i-ix (confidential) ("Habimana's Testimony") (collectively "Habimana's Materials").

support of its findings about these events.[7104] In these circumstances and given that the 30 January 2013 witness statement admitted as additional evidence on appeal concerns solely the credibility of Witness EV, the Appeals Chamber finds it unnecessary to examine it in light of the trial evidence to determine whether it is itself convinced beyond reasonable doubt as to Ndayambaje's guilt regarding these events.

3111. Turning to the additional evidence admitted on appeal relevant to the credibility of Witness RT, the Appeals Chamber recalls that, when admitting Habimana's Materials, it stated:

> Habimana's Materials reflect that Witness RT allegedly arrived at Witness Habimana's house approximately a week after the death of President Habyarimana and stayed there until 16 April 1994, according to Witness Habimana's estimate, whereupon he walked with Witness RT to the border of Burundi and assisted him to cross the river separating Rwanda from Burundi. The Appeals Chamber notes that this evidence is inconsistent with Witness RT's testimony at trial that he was present at Ngiryi Bridge and Kabuye Hill between 20 and 24 April 1994. The Appeals Chamber finds that, had Habimana's Materials been available at trial, they could have impacted the Trial Chamber's assessment of the credibility of Witness RT's testimony.[7105]

3112. Ndayambaje submits that Habimana's Materials: (i) show that Witness RT was no longer in Rwanda on the dates, which according to the witness's testimony, Witness RT saw him at Ngiryi Bridge and Kabuye Hill between 20 and 24 April 1994; and (ii) establish that Witness RT lied at trial and falsely incriminated him.[7106] He also argues that Habimana's Materials call into question the overall assessment of the credibility of the Defence evidence, which, in his view, was rejected for the most part because of the substantial weight granted by the Trial Chamber to the testimony of Witness RT.[7107] Ndayambaje contends that all of the Trial Chamber's findings relying on the evidence of Witness RT should be overturned and that the remainder of the Prosecution evidence is not sufficient to sustain the findings of guilt beyond reasonable doubt.[7108]

3113. The Prosecution submits that the evidence contained in Habimana's Materials is not credible and could not have been a decisive factor at trial, and that Ndayambaje's convictions for the events

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[7104] *See supra*, Section IX.F.2(a)(vii).
[7105] 12 May 2015 Appeal Decision, para. 60 (internal reference omitted).
[7106] Written Submissions Subsequent to the "Decision on Ndayambaje's First, Second, Third and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence" of 12 May 2015, 26 May 2015 (originally filed in French, English translation filed on 3 July 2015) (confidential) ("Ndayambaje Submissions on Additional Evidence"), paras. 6-8, 10-13. The Appeals Chamber recalls that it allowed Ndayambaje and the Prosecution, if they deem it necessary, to file written submissions discussing the possible impact of Habimana's Materials on the Trial Chamber's findings. *See* 12 May 2015 Appeal Decision, para. 91.
[7107] Ndayambaje Submissions on Additional Evidence, para. 14.
[7108] Ndayambaje Submissions on Additional Evidence, paras. 14, 20, 25, 27-29. Ndayambaje also submits that, since Habimana's Materials should not have been taken into account to discredit the Defence witnesses who also testified in relation to the events at Mugombwa Church, Habimana's Materials also invalidate the Trial Chamber's findings related to Mugombwa Church. *See ibid.*, paras. 14, 29. The Appeals Chamber finds that this claim is without merit as the Trial Chamber did not rely on Witness RT's evidence to reject any of the Defence evidence relating to Mugombwa Church. *See supra*, Section IX.E.

at Kabuye Hill would in any event stand without Witness RT's evidence based on other evidence on the record.[7109]

3114. The Appeals Chamber finds Witness RT's testimony pertaining to the interception of Tutsi refugees trying to flee to Burundi at Ngiryi Bridge, his arrival at Kabuye Hill on 22 April 1994, the attacks on the Tutsis who had sought refuge there, and Ndayambaje's distribution of grenades on 23 April 1994 detailed and coherent.[7110] His evidence is first-hand and his identification of Ndayambaje is compelling.[7111] Witness RT's explanations given in cross-examination concerning alleged inconsistencies about how many times and where he saw Ndayambaje during the events are clear and convincing.[7112]

3115. Habimana's Materials reflect that Witness RT allegedly arrived at Habimana's house approximately a week after the death of President Habyarimana and stayed there until 16 April 1994, whereupon he walked with Witness RT to the border of Burundi and assisted him to cross the river separating Rwanda from Burundi.[7113] This evidence directly contradicts Witness RT's testimony that he was present at Kabuye Hill on 23 April 1994, where he saw Ndayambaje distributing grenades, and left for Burundi on 25 April 1994.[7114]

3116. However, upon careful review of his evidence and the totality of the evidence in the trial record, the Appeals Chamber does not find Habimana's evidence that Witness RT came to hide at his place as early as 13 April 1994 credible. The Appeals Chamber notes that Habimana's Statement that Witness RT told Habimana that "[Witness RT] could not spend the night at [Witness RT's] home in Remera as the killings had started there"[7115] is inconsistent with Habimana's Testimony that Witness RT came to hide at Habimana's place because "[Witness RT] had observed that there were disturbances", "tension between Hutus and Tutsis", and "unlawful gatherings everywhere".[7116] It is also not disputed that the killings in Muganza Commune started on

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[7109] Prosecution's Submission on Evidence of Claver Nahimana (alias Habimana) and Request for A[d]mission of Rebuttal Evidence, 26 May 2015 (confidential) ("Prosecution Submissions on Additional Evidence"), paras. 1, 2, 25, 26. The Appeals Chamber observes that the Prosecution claims that the name of the witness who testified as Claver Habimana in the *Ntawukulilyayo* trial is, in fact, Claver "Nahimana". *See ibid.*, paras. 1, 3. The Appeals Chamber finds it unnecessary to determine the issue in light of its conclusions on the credibility of the witness. For the sake of clarity, the Appeals Chamber will refer to the relevant individual as Claver "Habimana".
[7110] Witness RT, T. 10 March 2004 pp. 47-72, 76, 77, T. 11 March 2004 pp. 7-9, 21-26, 32-76, 79-90, 103, 104 and 11-20, 28-31, 92, 93, 105 (closed session).
[7111] Witness RT, T. 10 March 2004 pp. 68, 69, 76, 77 and 98-100 (closed session), T. 11 March 2004 pp. 70-72, 83.
[7112] Witness RT, T. 11 March 2004 pp. 85-89.
[7113] Habimana's Testimony, pp. 7, 11-17, 27 and i-ix (extracted); Habimana's Statement, pp. 3456/A-3453/A (Registry pagination).
[7114] Witness RT, T. 11 March 2004 pp. 86 and 93 (closed session).
[7115] Habimana's Statement p. 3454/A (Registry pagination).
[7116] Habimana's Testimony, p. 11.

19 or 20 April 1994, and not a week after the death of the President.[7117] As noted by the Prosecution, Defence and Prosecution evidence consistently shows that people in Muganza Commune started fleeing around 20 April 1994,[7118] which is consistent with Witness RT's account.[7119] Moreover, while Habimana stated that he accepted to help Witness RT because they were friends and because he knew "that a human being's life is very precious",[7120] there is evidence on the record that Habimana was one of the community leaders involved in the genocide.[7121]

3117. Considering Witness RT's detailed and convincing account of the events at Kabuye Hill together with the inconsistencies in the Habimana's Materials, the Appeals Chamber finds that the additional evidence admitted on appeal does not undermine the credibility of Witness RT's account about Ndayambaje's involvement in a distribution of grenades at Kabuye Hill on 23 April 1994. The Appeals Chamber makes this determination in light of the totality of the evidence in the trial record, including the evidence pointed out by Ndayambaje at trial and on appeal regarding the circumstances in which Witness RT identified him at Kabuye Hill on 23 April 1994[7122] as well as the evidence of Ndayambaje and Witnesses ALIZA, ANGES, BIDI, GABON, GLANA, KEPIR, MAJIK, MARVA, SABINE, SHICO, and Stan concerning the events at Kabuye Hill and/or Ndayambaje's alibi highlighted by Ndayambaje in his closing brief and referred to by the Trial Chamber.[7123]

3118. In light of the trial evidence and the additional evidence admitted on appeal, the Appeals Chamber is itself convinced beyond reasonable doubt of Ndayambaje's guilt concerning the killing of Tutsis perpetrated at Kabuye Hill following the distribution of grenades on 23 April 1994.

[7117] In this respect, the Appeals Chamber notes that Ndayambaje testified at trial that, during the period before 18 April 1994, "there was no unrest [in Muganza Commune] for people to seek refuge in churches or other buildings". *See* Ndayambaje, T. 26 November 2008 p. 11. *See also* Ndayambaje, T. 2 December 2008 p. 29.

[7118] *See* Prosecution Submissions on Additional Evidence, para. 19, fn. 32, *referring to* Witness FAG, T. 1 March 2004 p. 13 (closed session), Witness QAL, T. 25 February 2004 p. 36, Witness QAQ, T. 11 November 2002 pp. 23, 24 (closed session), Witness TP, T. 11 February 2004 p. 8, Witness TW, T. 10 February 2004 p. 7, Witness BOZAN, T. 16 September 2008 pp. 8, 9, Witness GLANA, T. 10 June 2008 p. 72, Witness JAMES, T. 2 June 2008 p. 25, Witness KEPIR, T. 10 September 2008 p. 38, Witness KWEPO, T. 28 August 2008, p. 21 (closed session), Witness MATIC, T. 18 June 2008 p. 57 (closed session), Witness SHICO, T. 23 June 2008 pp. 19, 20 (closed session); Tiziano Pegoraro, T. 8 September 2008 p. 62, Witness ALIZA, T. 4 June 2008 p. 35 (closed session).

[7119] Witness RT, T. 10 March 2004 pp. 47, 48, T. 11 March 2004 pp. 7, 8 and 11, 12 (closed session).

[7120] Habimana's Testimony, p. 12.

[7121] *See* Witness FAG, T. 1 March 2004 p. 21 (closed session). The Appeals Chamber notes that, while Witness FAG did not refer to Habimana by his last name, his testimony clearly reflects that he was referring to him. *Compare idem with* Habimana's Statement, p. 3456/A (Registry pagination). The Appeals Chamber further observes that, although the Trial Chamber applied caution to Witness FAG's testimony in light of the fact that witness was still awaiting a decision by a *Gacaca* court at the time of his testimony, it relied on several aspects of his testimony for the events at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill as well as for Ndayambaje's Swearing-In Ceremony. *See* Trial Judgement, paras. 1226, 1233, 1234, 1236, 1237, 1244, 1245, 1409, 1410, 1425, 1428-1431, 4590, 4610, 4621-4623, 4627, 4629. The Appeals Chamber finds Witness FAG's testimony about the implication of Habimana in the genocide credible and reliable.

[7122] *See, e.g.*, Witness RT, T. 11 March 2004 pp. 58-78, 84-89 and 100-105 (closed session); Ndayambaje Closing Brief, paras. 336-343, 349, 447-451; *supra*, Section IX.F.2(a)(ii).

4. Conclusion

3119. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in finding that Ndayambaje was present at Kabuye Hill on 22 April 1994. The Appeals Chamber grants this part of Ground 18 of Ndayambaje's appeal and, accordingly, reverses his convictions for aiding and abetting genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol in relation to the attacks on Kabuye Hill of 22 April 1994. The Appeals Chamber will examine the impact of this finding, if any, in Section XII below.

3120. However, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for aiding and abetting the killings perpetrated during attacks on Kabuye Hill on 23 and 24 April 1994 by transporting attackers to Kabuye Hill, distributing weapons that were later used in the massacres, and being present during the attacks. Accordingly, the Appeals Chamber dismisses the relevant part of Ground 9 as well as Grounds 10 and 11 and the remaining parts of Ground 18 of Ndayambaje's appeal.

[7123] *See* Ndayambaje Closing Brief, paras. 458-518, 523-622; Trial Judgement, paras. 1319-1327, 1333-1347, 1352-1385, 1389-1398, 1430, 1435, 1445-1447. *See also supra*, Sections IX.C, IX.F.2(b).

G. Ndayambaje's Swearing-In Ceremony (Ground 19)

3121. The Trial Chamber found that, during Ndayambaje's public swearing-in ceremony as the *bourgmestre* of Muganza Commune on 22 June 1994 held in the woods near the Muganza commune office, "Nteziryayo and Ndayambaje told the population to continue with their 'work' and urged them to 'sweep the dirt outside'" in reference to the killing of Tutsis and instructed that those hiding Tutsis who refused to hand them over should be killed.[7124] It also found it established beyond reasonable doubt that, after the ceremony, searches for Tutsis took place and killings followed.[7125] The Trial Chamber convicted Ndayambaje pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide on the basis of the statements he made at his swearing-in ceremony.[7126]

3122. Ndayambaje submits that the Trial Chamber erred in the assessment of Prosecution and Defence evidence and made imprecise and unsupported findings.[7127] The Appeals Chamber will address these contentions in turn.

1. Assessment of Prosecution Evidence

3123. In reaching its findings regarding Ndayambaje's Swearing-In Ceremony, the Trial Chamber considered, *inter alia*, the evidence of Prosecution Witnesses FAG, FAL, FAU, QAF, QAL, QAQ, QAR, RV, TO, and TP.[7128]

3124. Ndayambaje contends that the Trial Chamber erred in: (i) failing to exercise sufficient caution with respect to Prosecution witnesses generally; (ii) the assessment of the evidence of Prosecution Witnesses FAL, FAG, QAF, RV, FAU, TO, TP, and QAL; and (iii) determining that all the witnesses were testifying about the same event.[7129]

[7124] *See* Trial Judgement, paras. 4616, 4642, 4645, 5948, 6026, 6027.
[7125] Trial Judgement, paras. 4645, 5948, 6026.
[7126] Trial Judgement, paras. 6029, 6038, 6186. The Appeals Chamber recalls that, although the Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of Tutsi women and girls from Mugombwa Sector, it did not ultimately convict Ndayambaje on this basis. *See supra*, fn. 6351.
[7127] *See generally* Ndayambaje Notice of Appeal, paras. 182-193; Ndayambaje Appeal Brief, paras. 532-611; Ndayambaje Reply Brief, paras. 199-246.
[7128] *See* Trial Judgement, paras. 4589-4632, 4642-4645.
[7129] Ndayambaje further "prays the Appeals Chamber to assume jurisdiction over the motions and requests for certification of appeal which were otherwise denied on grounds of judicial economy." *See* Ndayambaje Appeal Brief, para. 581, *referring to* Trial Judgement, paras. 4311-4313, 6426. The Prosecution objects to the relief Ndayambaje now seeks, as he failed to raise it in his notice of appeal. *See* Prosecution Response Brief, para. 2471. In the absence of any identification of errors or of the necessary references, the Appeals Chamber dismisses this unsubstantiated and unsupported contention. In addition, Ndayambaje, like Nteziryayo, argues that the Trial Chamber erred in relying on the testimonies of Witnesses QAQ and QAR "for the purposes of fictitious corroboration", despite finding elsewhere in the Trial Judgement that they did not attend the swearing-in ceremony and that certain aspects of their evidence were implausible. *See* Ndayambaje Appeal Brief, para. 578, *referring to* Trial Judgement, paras. 4595, 4596, 4603, 4604,

(a) Insufficient Caution

3125. Ndayambaje submits that despite acknowledging that Witnesses FAG, FAL, QAF, RV, and TO had an incentive to implicate him, the Trial Chamber failed to exercise sufficient caution when assessing their evidence.[7130] He also contends that the Trial Chamber erred in failing to consider that similar caution should have been exercised with respect to Witness FAU's testimony, which required corroboration as the witness was detained and awaiting sentencing and therefore had an incentive to lie.[7131]

3126. Ndayambaje also argues that the Trial Chamber failed to consider that Witnesses FAG, FAL, FAU, and RV were detained together, purportedly often discussing the events at Muganza Commune.[7132] Ndayambaje submits that, because these witnesses and Witness QAF took part in *Gacaca* proceedings while in prison, they influenced each other's evidence which, consequently, should have been rejected.[7133] Ndayambaje further contends that the Trial Chamber failed to consider sufficiently the evidence of Defence Witness GABON that he and Witness RV were mistreated and that pressure was put on them to testify against Ndayambaje, and argues that Witness RV's evidence should be rejected on this basis.[7134]

3127. The Prosecution responds that the Trial Chamber considered the challenges raised by Ndayambaje and submits that he does not demonstrate any error in its assessment.[7135] It also argues that Ndayambaje misrepresents the evidence regarding the collective participation of these witnesses in *Gacaca* proceedings as well as the purported influence their participation had on their testimonies.[7136] It contends that Ndayambaje does not substantiate his arguments regarding Witness RV's potential motivation to implicate him.[7137]

4607, 4608. *See also* Ndayambaje Notice of Appeal, paras. 185, 189; Ndayambaje Reply Brief, para. 233. Given that the Trial Judgement reflects that the Trial Chamber declined to rely on the accounts of Witnesses QAQ and QAR about Ndayambaje's Swearing-In Ceremony, the Appeals Chamber dismisses these arguments without further consideration. *See* Trial Judgement, paras. 4602-4608. *See also supra*, Section VII.B.1(a).

[7130] Ndayambaje Appeal Brief, paras. 534, 535, 539, 543, 550, 552, 555, 580, *referring to* Trial Judgement, para. 4630. *See also* Ndayambaje Reply Brief, paras. 202, 225.

[7131] Ndayambaje Appeal Brief, paras. 543, 580.

[7132] Ndayambaje Appeal Brief, para. 580.

[7133] Ndayambaje Appeal Brief, para. 552. *See also* Ndayambaje Reply Brief, para. 218.

[7134] Ndayambaje Appeal Brief, paras. 554, 590. Ndayambaje, without precise reference, "repeats his submissions in his motion to reject detainee witnesses" when challenging Witness RV's credibility. *See ibid.*, para. 554. The Appeals Chamber recalls that merely referring the Appeals Chamber to the arguments set out at trial is insufficient as an argument on appeal. The Appeals Chamber therefore declines to consider this part of Ndayambaje's submissions further. *See, e.g., Mugenzi and Mugiraneza* Appeal Judgement, para. 34; *Nchamihigo* Appeal Judgement, para. 369; *Haraqija and Morina* Appeal Judgement, para. 26.

[7135] Prosecution Response Brief, paras. 2428, 2434.

[7136] Prosecution Response Brief, paras. 2450-2452.

[7137] Prosecution Response Brief, para. 2453.

3128. As discussed previously, the Appeals Chamber observes that the Trial Judgement reflects express consideration of the admitted involvement of Witnesses FAG, FAL, QAF, and RV in the genocide as well as the fact that Witness RV was detained and Witnesses FAG and FAL were awaiting sentencing decisions when they testified.[7138] The Trial Chamber further recognised that the impugned witnesses "may have had incentives to implicate either Ndayambaje or Nteziryayo in order to secure favourable or lenient treatment or to apportion blame to the authorities" and that because Witness TO was imprisoned during Ndayambaje's tenure as *bourgmestre*, he may have "a motive to seek revenge against Ndayambaje".[7139] Similarly, the Appeals Chamber has considered and dismissed similar arguments that the Trial Chamber failed to consider sufficiently Witness FAU's status as a detained witness when analysing the evidence related to Ndayambaje's Swearing-In Ceremony, as a holistic reading of the Trial Judgement reflects that it did.[7140]

3129. In addition to its comprehensive discussion of the circumstances raising concerns about the impugned witnesses' motives to implicate the co-Accused, the Trial Chamber's analysis of the evidence of these detained witnesses concerning the ceremony also reflects that it took into account various factors relevant to a cautious assessment of their credibility, including the consideration of discrepancies and inconsistencies in their evidence.[7141] Moreover, it reflects the reliance on these witnesses' testimonies regarding the content and meaning of the utterances made during the ceremony as to which the Trial Chamber found broad corroboration.[7142] Against this background, the Appeals Chamber rejects Ndayambaje's contention that the Trial Chamber failed to apply sufficient caution.

3130. Regarding the purported impact of the witnesses' detention and participation in *Gacaca* proceedings, the Appeals Chamber observes that nothing in the transcripts cited by Ndayambaje demonstrates that through discussing events in Muganza Commune while in custody, Witnesses FAG, FAL, FAU, QAF, and RV influenced each other's evidence.[7143] With respect to purported coercion Witness RV experienced in detention, the Appeals Chamber notes that, while Witness GABON's testimony indicates that both he and Witness RV were mistreated in custody, it

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[7138] *See supra*, Section VII.B.1(b), para. 2326, fn. 5373. Contrary to Ndayambaje's contention that Witness QAF was awaiting judgement at the time of his testimony, the Appeals Chamber observes that, at the time of his testimony, Witness QAF had been released pursuant to a presidential decree. *See* Ndayambaje Appeal Brief, para. 539; Trial Judgement, paras. 4630, 4663.
[7139] *See supra*, Section VII.B.1(b), para. 2326, fns. 5374, 5375.
[7140] *See supra*, Section VII.B.1(b), para. 2325, fns. 5371, 5372.
[7141] *See* Trial Judgement, paras. 4589-4593, 4596, 4610-4617.
[7142] *See* Trial Judgement, paras. 4622-4628.
[7143] *See* Witness FAL, T. 9 February 2004 pp. 49-52, 79, 80 (closed session); Witness RV, T. 17 February 2004 pp. 33-35, T. 18 February 2004 pp. 58-66, T. 19 February 2004 pp. 43, 44, 68, 69 (closed session); Witness QAF, T. 6 February 2004 pp. 32, 33 (closed session); Witness FAG, T. 1 March 2004 pp. 46, 47, T. 2 March 2004 pp. 9, 10 (closed session); Witness FAU, T. 8 March 2004 pp. 85-87, T. 10 March 2004 pp. 31-36 (closed session).

was Witness GABON who was asked to accuse Ndayambaje.[7144] Ndayambaje fails to demonstrate that the Trial Chamber erred in its assessment of Witness RV's evidence in light of the testimony of Witness GABON.

3131. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber failed to exercise sufficient caution when assessing evidence from these witnesses concerning Ndayambaje's Swearing-In Ceremony.

(b) Witness FAL

3132. When evaluating the content of the speeches made during the swearing-in ceremony, the Trial Chamber recalled that Witness FAL, consistent with Witness FAG, testified that "both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside."[7145] It further observed that Witness FAL, like Witnesses FAG and TO, testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed and that Witness FAL gave evidence that Nteziryayo talked about killing the Tutsis.[7146]

3133. Ndayambaje submits that the Trial Chamber failed to consider that Witness FAL contradicted himself as to the time when he arrived at the ceremony, specifically whether he arrived before or after its start.[7147] He further submits that the witness's testimony that there were 5,000 armed participants who protested against Nteziryayo's criticism of the outgoing *bourgmestre* and that Ndayambaje climbed on the table and Sebukeye spoke at the ceremony was contradicted in numerous respects by other witnesses, which made the witness's attendance at the swearing-in ceremony improbable.[7148] In particular, Ndayambaje highlights that: (i) Witness FAG did not see Witness FAL at the meeting, recounted that there were only 1,000 unarmed attendees, and did not recall Ndayambaje climbing on the table or any other attendees taking the floor;[7149] and (ii) Witness QAF testified that none of the attendees carried weapons.[7150] Ndayambaje also highlights Defence evidence, which in his view was erroneously discredited without sufficient reasoning, that the participants were not armed, that Ndayambaje did not climb on the table, that

[7144] *See* Witness GABON, T. 2 September 2008 pp. 26-28 (closed session).
[7145] Trial Judgement, para. 4622. *See also ibid.*, para. 4345.
[7146] Trial Judgement, paras. 4625, 4627. *See also ibid.*, paras. 4344, 4345. The Trial Chamber also noted aspects of Witness FAL's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting. *See ibid.*, para. 4632.
[7147] Ndayambaje Appeal Brief, paras. 533.
[7148] Ndayambaje Appeal Brief, paras. 533, 534. *See also* Ndayambaje Notice of Appeal, para. 185; Ndayambaje Reply Brief, para. 201.
[7149] Ndayambaje Appeal Brief, para. 536.
[7150] Ndayambaje Appeal Brief, para. 541. Ndayambaje adds that Witness QAF testified that nobody in attendance asked questions. *See idem.*

Sebukeye did not attend the ceremony, and that the participants did not protest against the replacement of the outgoing *bourgmestre*.[7151]

3134. The Prosecution responds that the Trial Chamber was aware that Witness FAL was the only witness to recount certain features of the swearing-in ceremony and that Ndayambaje misrepresents other aspects of the witness's testimony.[7152]

3135. The Appeals Chamber observes that the Trial Chamber noted that Witness FAL testified that he arrived after the start of the meeting but then clarified that he actually arrived half an hour before it started.[7153] Ndayambaje does not demonstrate how this clarification by Witness FAL undermined the credibility of his testimony or would have required express consideration by the Trial Chamber.

3136. The Appeals Chamber further observes that Ndayambaje's contention that Witness FAG did not see Witness FAL at the swearing-in ceremony is not supported by the reference he provides.[7154] In any event, the Appeals Chamber fails to see the purported significance of this aspect of Witness FAG's evidence given the Trial Chamber's findings about the large number of attendees, discussed in more detail below. As regards discrepancies between Witness FAL's evidence that the attendees at the meeting were armed and other evidence to the contrary, the Trial Chamber noted that Witnesses FAL, TP, RV, and QAL testified that the population brought traditional arms, whereas Witnesses FAG and QAF as well Nteziryayo and Defence Witnesses GABON, KEPIR, AND-11, and AND-73 testified that the population was not armed.[7155] The Trial Chamber observed that the evidence showed that between 1,000 and 5,000 people were present and considered "it possible that while some people may have come bearing machetes and other instruments which may double as traditional weapons, others did not, which may account for the discrepancy in the witnesses' evidence."[7156] It did not find any discrepancy as to whether the population was armed "significant."[7157] Ndayambaje does not demonstrate any error in this analysis.

3137. The Trial Chamber also expressly referred to the testimonies of Witness FAL that more than 5,000 people were present and Witness FAG that there were about 1,000 people at the meeting when noting that the evidence showed "that between 1,000 and 5,000 people were present".[7158] This reflects that the Trial Chamber did not consider that the variance as to the number of people attending rendered Witnesses FAL's and FAG's testimonies incompatible. Ndayambaje does not

[7151] Ndayambaje Appeal Brief, para. 585.
[7152] Prosecution Response Brief, paras. 2430-2432.
[7153] Trial Judgement, para. 4341.
[7154] *See* Ndayambaje Appeal Brief, para. 536, *referring to* Trial Judgement, para. 4330.
[7155] Trial Judgement, para. 4610. *See also ibid.*, para. 4596.
[7156] Trial Judgement, para. 4611.
[7157] Trial Judgement, para. 4611.
[7158] *See* Trial Judgement, para. 4611, fn. 12275.

show any error in this respect, particularly because these witnesses were simply providing estimates.[7159]

3138. Furthermore, the Appeals Chamber finds that Ndayambaje fails to identify material differences in the testimonies of Witnesses FAL and FAG as to whether Ndayambaje climbed on a table during the ceremony. The Trial Chamber recounted Witness FAL's evidence that Nteziryayo told Ndayambaje to climb on the table before swearing Ndayambaje in as *bourgmestre* and that the swearing-in took place "at the beginning of the meeting and was very quick."[7160] The Trial Chamber also recalled Witness FAG's testimony that he did not see Ndayambaje climb on a chair or table and that "[t]he witness did not personally see the swearing-in of the *bourgmestre*".[7161] Ndayambaje's contentions ignore that Witness FAG's evidence does not demonstrate that he would have been present when Witness FAL heard Nteziryayo instruct Ndayambaje to climb on the table.[7162]

3139. While Ndayambaje and Nteziryayo testified that Ndayambaje did not climb on the table,[7163] Defence Witness KEPIR merely testified that he did not notice Ndayambaje climb on the table,[7164] and several Defence witnesses, including Witness KEPIR, recounted that the dignitaries were seated in front of the table during the swearing-in ceremony.[7165] The Trial Chamber did not ignore this evidence as it noted all of it.[7166] Considering the lack of relevance of this alleged discrepancy to any of the material facts on the basis of which Ndayambaje was found responsible, the Appeals Chamber sees no error in the Trial Chamber not expressly considering it in the Trial Judgement.

3140. Turning to Ndayambaje's argument that only Witness FAL testified that Sebukeye spoke at the ceremony and that the participants protested against Nteziryayo's criticism of the outgoing *bourgmestre*, having reviewed the relevant transcripts, the Appeals Chamber observes that Witness FAL merely testified that Sebukeye was present at the ceremony and at some later time

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[7159] *See* Witness FAL, T. 9 February 2004 p. 76 (closed session) ("Q. But can you give us an approximate figure, 1,000, 2,000, 10,000? A. More than 5,000."); Witness FAG, T. 3 March p. 22 ("Q. Could we say more than 100 persons, 1,000 persons? A. Let us say 1,000; 1,000 persons."). *See also* Trial Judgement, paras. 4341, 4611, *referring*, *inter alia*, *to* Witness FAL, T. 9 February 2004 pp. 76, 77 (closed session). The Trial Chamber also noted that Witness RV estimated that 1,000 people were present and that Witness QAF was not able to estimate how many people were present but that there were many participants. *See ibid.*, paras. 4358, 4370, 4611, fn. 12275.
[7160] Trial Judgement, para. 4343. In this regard, the Appeals Chamber observes that neither Witness FAL's testimony nor the Trial Chamber's summary of it definitively indicates that Ndayambaje did climb on the table after being instructed by Nteziryayo to do so. *See idem*; Witness FAL, T. 9 February 2004 pp. 38 (English) and 45 (French).
[7161] Trial Judgement, para. 4330.
[7162] Trial Judgement, paras. 4330, 4343.
[7163] *See* Trial Judgement, paras. 4524, 4581.
[7164] *See* Trial Judgement, para. 4503.
[7165] *See* Trial Judgement, paras. 4454, 4503, 4555.
[7166] *See* Trial Judgement, paras. 4454, 4503, 4524, 4555, 4581.

said that the orders given there had to be implemented.[7167] The Appeals Chamber fails to see why the fact that other witnesses, including Defence witnesses, did not overhear this conversation is material to the assessment of Ndayambaje's conduct during the ceremony. The Appeals Chamber notes that Ndayambaje himself testified that he did not know whether Sebukeye attended the swearing-in ceremony,[7168] and other Defence witnesses relied upon by Ndayambaje stated that they did not see Sebukeye at the ceremony.[7169]

3141. The Appeals Chamber further observes that the Trial Chamber noted that, like Witness FAL, Witness TO testified that Nteziryayo criticised the outgoing *bourgmestre*.[7170] The Trial Chamber also expressly noted that, apart from these two witnesses, no other witness confirmed that Nteziryayo criticised the outgoing *bourgmestre*.[7171] The Appeals Chamber considers that the Trial Chamber was not required to provide a more detailed analysis of Defence evidence on this issue and finds that Ndayambaje has not demonstrated that Witness FAL's account of the ceremony was incompatible with other evidence.

3142. The Appeals Chamber therefore finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness FAL's evidence regarding his swearing-in ceremony.

(c) Witness FAG

3143. As noted above, the Trial Chamber observed that Witness FAG, like Witness FAL, testified "that both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside"[7172] and, consistent with Witnesses FAL and TO, testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed.[7173] The Trial Chamber also noted aspects of Witness FAG's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7174]

3144. Ndayambaje submits that the Trial Chamber erred in accepting Witness FAG's testimony regarding the swearing-in ceremony.[7175] He argues that Witness FAG was recalled to explain his

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[7167] *See* Trial Judgement, para. 4350, *referring to* Witness FAL, T. 9 February 2004 pp. 48 (closed session), 63. *See also* Witness FAL, T. 9 February 2004 p. 77 (closed session).
[7168] *See* Trial Judgement, para. 4525.
[7169] *See* Trial Judgement, paras. 4463, 4508, 4561, 4569. The Appeals Chamber observes that, although the summary of Witness BOZAN's evidence by the Trial Chamber indicates that the witness stated that Sebukeye did not attend the swearing-in ceremony, a review of the testimony cited shows that he merely indicated he did not see him in attendance. *See ibid.*, para. 4463, *referring to* Witness BOZAN, T. 16 September 2008 p. 40.
[7170] *See* Trial Judgement, para. 4377, *referring to* Witness TO, T. 4 March 2002 pp. 13, 14.
[7171] *See* Trial Judgement, para. 4624. *See also ibid.*, para. 4625.
[7172] *See* Trial Judgement, para. 4622. *See also ibid.*, para. 4327.
[7173] *See* Trial Judgement, para. 4627. *See also ibid.*, para. 4327.
[7174] Trial Judgement, para. 4632.
[7175] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Notice of Appeal, para. 185.

previous silence on crimes which he had hidden from the Trial Chamber and that the latter incorrectly assessed these omissions, which discredited the witness.[7176] He also stresses that the witness did not mention Ndayambaje making a speech in his prior statements of 1999 and 2000.[7177]

3145. In addition, Ndayambaje appears to argue that, since Witness FAG conceded that he was not present for the swearing-in part of the ceremony, the witness could not have heard Nteziryayo or Ndayambaje speak.[7178] The Appeals Chamber further understands Ndayambaje to argue that, because the witness testified that Nteziryayo repeated Ndayambaje's speech, he reversed the order of the speakers, placing the speeches long after Ndayambaje took the oath.[7179]

3146. Ndayambaje also contends that Witness FAG intentionally placed the murder of a woman named Josepha after the swearing-in ceremony in order to implicate him and highlights that the witness, when recalled, testified that the murder took place in May 1994, before the swearing-in ceremony.[7180] Ndayambaje also points to the testimony of Defence Witness KANUC, which, he alleges, contradicted Witness FAG's testimony that Josepha's murder was a consequence of the ceremony and shows that Witness FAG is patently unreliable.[7181]

3147. The Prosecution responds that the Trial Chamber was aware of the omissions from Witness FAG's prior statements and the witness's explanation for them, which Ndayambaje ignores.[7182] It submits that Ndayambaje misrepresents Witness FAG's account of the ceremony and his testimony about the timing of the murder following it.[7183] It adds that the Trial Chamber acted reasonably in assessing Witness KANUC's evidence.[7184]

3148. The Appeals Chamber notes that the Trial Chamber expressly referred to the fact that, upon recall, Witness FAG admitted to having participated in more killings than the ones he had testified about during his initial appearance before the Tribunal[7185] and the witness's explanation for not mentioning those other killings previously when summarising his evidence on Ndayambaje's Swearing-In Ceremony.[7186] It also noted that Witness FAG did not mention Ndayambaje taking the

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[7176] Ndayambaje Appeal Brief, para. 535.
[7177] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Reply Brief, para. 208.
[7178] Ndayambaje Appeal Brief, para. 537.
[7179] Ndayambaje Appeal Brief, para. 537.
[7180] Ndayambaje Appeal Brief, para. 538. *See also* Ndayambaje Reply Brief, para. 206.
[7181] Ndayambaje Appeal Brief, para. 567. *See also* Ndayambaje Notice of Appeal, para. 189.
[7182] Prosecution Response Brief, para. 2438.
[7183] Prosecution Response Brief, paras. 2436, 2437.
[7184] Prosecution Response Brief, paras. 2437, 2460.
[7185] *See* Trial Judgement, paras. 4333, 4334, *referring to* Witness FAG, T. 1 March 2004 p. 34, T. 6 September 2004 pp. 8-10, 12-14 (closed session), T. 6 September 2004 p. 10 (closed session) (French). *See also ibid.*, para. 4332.
[7186] *See* Trial Judgement, paras. 4334, 4335. The Trial Chamber noted that, when asked about previously denying having participated in other killings, Witness FAG explained that he did not mention these killings but would have admitted having participated in them if asked about them. The Trial Chamber also noted Witness FAG's explanation

floor in his confession to Rwandan authorities of 18 November 1999 and his statement of 23 February 2000 to Tribunal investigators[7187] as well as the witness's explanations for these omissions.[7188] Ndayambaje does not develop any argument to challenge the reasonableness of the witness's explanations or show that no reasonable trier of fact could have accepted Witness FAG's testimony about the swearing-in ceremony, particularly where it was corroborated, despite these omissions.[7189]

3149. The Trial Chamber noted Witness FAG's testimony that he "did not personally see the swearing-in of the *bourgmestre*".[7190] It also noted that the witness nevertheless expressly mentioned that he "heard both Nteziryayo and Ndayambaje address the crowd in parables".[7191] Given the evidence that the incendiary remarks were made both during and after the swearing-in part of the ceremony,[7192] Ndayambaje's suggestion that Witness FAG's evidence demonstrates that he must not have heard what Ndayambaje and Nteziryayo said is not persuasive.

3150. The Appeals Chamber is similarly not persuaded by Ndayambaje's suggestion that, by claiming that Nteziryayo repeated what was said by Ndayambaje, Witness FAG reversed the order of speakers. The Appeals Chamber observes that Witness FAG specified that he did not pay attention to the order in which the speakers spoke.[7193] In any event, the Trial Chamber noted that the evidence was equivocal as to whether Nteziryayo or Ndayambaje took the floor first and found the variances insignificant.[7194] Ndayambaje does not demonstrate any error in this respect.

3151. Regarding the timing of the murder of Josepha, the Appeals Chamber observes that, in summarising Witness FAG's evidence, the Trial Chamber expressly noted that the appointment ceremony for Ndayambaje as *bourgmestre* occurred between May and June 1994[7195] and that the witness estimated that Josepha, who was killed after the statements made at the ceremony, died in May 1994.[7196] The Trial Chamber acknowledged that Witness FAG was equivocal as to the timing

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that he made a distinction between the events in which he participated and could be punished for and those that did not concern him personally and for which he could not be punished. *See idem.*

[7187] *See* Trial Judgement, para. 4331, *referring to* Exhibit D188 (Witness FAG's Confession, dated 18 November 1999) (confidential), Witness FAG's 2000 Statement. Ndayambaje also relies upon the French translation of Witness FAG's 1999 Statement and 2000 Statement. *See* Ndayambaje Appeal Brief, para. 538.

[7188] *See* Trial Judgement, para. 4331. The Trial Chamber noted that Witness FAG explained that "it was difficult to remember everything when giving statements" and that "it was hard to always repeat the same things." It also noted that, when asked about his failure to mention Ndayambaje taking the floor in his statement of 23 February 2000 to Tribunal investigators, the witness explained that he was questioned about Nteziryayo, not Ndayambaje, and therefore did not talk about Ndayambaje with the investigators. *See idem.*

[7189] *See* Trial Judgement, paras. 4622, 4627.

[7190] *See* Trial Judgement, para. 4330.

[7191] *See* Trial Judgement, para. 4327.

[7192] *See* Trial Judgement, paras. 4327, 4328, 4342-4345, 4356-4363, 4376-4378, 4382, 4390-4393, 4421-4427.

[7193] *See* Trial Judgement, para. 4326.

[7194] *See* Trial Judgement, paras. 4610, 4611. *See also ibid.*, paras. 4597, 4598.

[7195] *See* Trial Judgement, paras. 4322, 4323.

[7196] *See* Trial Judgement, para. 4333, *referring to* Witness FAG, T. 6 September 2004 pp. 8, 9 (closed session).

of the swearing-in ceremony, but Ndayambaje fails to demonstrate that the witness was equivocal as to whether the killing of Josepha occurred after it or that Witness FAG's evidence in this regard was aimed at maliciously implicating him.[7197]

3152. The Trial Chamber relied on Witness FAG's evidence that Josepha's death occurred after the swearing-in ceremony when observing "the consistent, albeit often general, evidence of the Prosecution witnesses to the effect that after the meeting, killings occurred".[7198] Despite relying on this aspect of Witness FAG's testimony, the Trial Chamber did not address in the Trial Judgement Witness KANUC's evidence of seeing Josepha dead prior to Ndayambaje's swearing-in as *bourgmestre* or any aspects of Witness KANUC's evidence.[7199] Given the direct relevance of this evidence, to which Ndayambaje expressly referred in his closing submissions,[7200] and the absence of any indication in the Trial Judgement that the Trial Chamber assessed and weighed it, the Appeals Chamber finds that the Trial Chamber erred in failing to consider this evidence.

3153. The Appeals Chamber, however, finds that the Trial Chamber's failure to consider Witness KANUC's evidence does not invalidate any of the Trial Chamber's findings pertaining to the swearing-in ceremony. Indeed, the Appeals Chamber observes that the Trial Chamber relied on the evidence of several other witnesses concerning the killings that followed the swearing-in ceremony to conclude that killings occurred and, more importantly, that Ndayambaje was not held responsible on the basis of any resulting killing.[7201] Having reviewed Witness KANUC's testimony, which incidentally was equivocal as to the date of another killing,[7202] the Appeals Chamber also does not consider that the Trial Chamber abused its discretion when finding that Witness FAG testified about Ndayambaje's Swearing-In Ceremony or relying on aspects of his evidence concerning the utterances made during it.[7203]

3154. In light of the above, the Appeals Chamber finds that Ndayambaje has not demonstrated any error in the assessment of Witness FAG's evidence that would invalidate the Trial Chamber's findings relating to Ndayambaje's Swearing-In Ceremony.

See also Witness FAG, T. 6 September 2004 p. 9 (closed session) ("Q. Witness FAG, you say the event took place in May 1994; is that correct? A. Yes, that is correct. Q. So, Witness FAG, can one say that this event, the death of Joseph[a], did not take place at the end of June 1994? A. As a matter of fact, when I said May, I was *estimating*. I think that the event took place at that time, but it was *a mere reckoning*.") (emphasis added).

[7197] *See* Trial Judgement, para. 4590. *See also ibid.*, paras. 4322, 4333.

[7198] *See* Trial Judgement, para. 4632, *referring to* Witness FAG, T. 1 March 2004 pp. 33, 34, T. 3 March 2004 p. 25.

[7199] *See* Witness KANUC, T. 9 June 2008 pp. 54, 58-64. The Appeals Chamber observes that the transcript refers to "Yozefa". However, both Witnesses FAG and KANUC identify this person as having the same father. *Compare* Witness FAG, T. 1 March 2004 p. 34 *with* Witness KANUC, T. 9 June 2008 p. 54.

[7200] Ndayambaje Closing Brief, paras. 820, 821.

[7201] *See* Trial Judgement, para. 4629.

[7202] *See* Witness KANUC, T. 10 June 2008 p. 56 (closed session).

[7203] *See supra*, para. 3149.

(d) Witness QAF

3155. The Trial Chamber noted that, consistent with Witness RV, Witness QAF testified that "only Ndayambaje recounted the fable of sweeping dirt", which meant that surviving Tutsis needed to be killed.[7204] The Trial Chamber also considered Witness QAF's evidence that "Nteziryayo congratulated the population for their work", which meant "to kill", and urged them to continue.[7205]

3156. Ndayambaje submits that Witness QAF did not attend the swearing-in ceremony and that the Trial Chamber erred in relying on his evidence.[7206] Specifically, he argues that, contrary to the Trial Chamber's assertion, Witness QAF testified that he attended a security meeting in May 1994, two weeks after the killings in April 1994.[7207] Ndayambaje argues that, because Witness QAF arrived late, missed the swearing-in part of the meeting, and did not notice Ndayambaje wearing "a scarf with national colours", he also could not have heard Nteziryayo's remarks.[7208]

3157. The Prosecution responds that Ndayambaje fails to demonstrate an error in the Trial Chamber's assessment of Witness QAF's testimony.[7209]

3158. Ndayambaje replies that "[s]ince the wearing of a scarf was the tradition during the swearing in of a *bourgmestre*, if [Ndayambaje] was not wearing one it means that it was another meeting."[7210]

3159. The Appeals Chamber notes that, contrary to Ndayambaje's claim, Witness QAF did not specify that the "public safety" meeting[7211] he testified about took place two weeks after the killings started in April 1994, but stated that, after the start of the war in his area in April 1994, "the war stopped for about two weeks, and that it was during that lull of two weeks that the meeting took place" which was "well after the outbreak of the war of April 1994".[7212] The witness also indicated

[7204] *See* Trial Judgement, para. 4623. *See also ibid.*, para. 4363.
[7205] *See* Trial Judgement, paras. 4624, 4626. *See also ibid.*, paras. 4360, 4361. The Trial Chamber also noted aspects of Witness QAF's evidence when observing the "consistent, albeit often general, evidence of Prosecution witnesses" that killings occurred after the meeting. *See ibid.*, para. 4632.
[7206] Ndayambaje Appeal Brief, para. 542. *See also* Ndayambaje Notice of Appeal, para. 185.
[7207] Ndayambaje Appeal Brief, para. 540.
[7208] Ndayambaje Appeal Brief, para. 540.
[7209] Prosecution Response Brief, para. 2440.
[7210] *See also* Ndayambaje Reply Brief, para. 209, *referring to* Ndayambaje, T. 8 November 2008 pp. 42, 43.
[7211] Witness QAF, T. 5 February 2004 pp. 65, 85, T. 9 February 2004 p. 8, *referred to in* Trial Judgement, para. 4591.
[7212] *See* Witness QAF, T. 6 February 2004 p. 11. *See also ibid.*, p. 12 (French); Trial Judgement, para. 4354. The Appeals Chamber observes that the English version of the transcript erroneously refers to "June" as the month when the "war started" whereas the French version refers to "*avril*". *See* Witness QAF, T. 6 February 2004 p. 11; *ibid.*, p. 12 (French). A review of Witness QAF's testimony reveals that the reference to "June" in the English version of the transcript must have been an error since the witness, as reflected in both English and French transcripts, later referred to "April" as the reference for the "outbreak of war".

that he had poor recollection of the date of the meeting.[7213] Ndayambaje's argument is therefore without merit.

3160. The Appeals Chamber is also not persuaded by Ndayambaje's contention that the late arrival of Witness QAF to the meeting and the fact that he was not present for the swearing-in part of the ceremony demonstrate that he could not have heard Nteziryayo's remarks. In this respect, the Appeals Chamber recalls that Ndayambaje has not demonstrated that missing the swearing-in part of the ceremony precluded another witness from hearing him and Nteziryayo make incendiary remarks during the gathering.[7214] Likewise, the Appeals Chamber does not consider that Witness QAF's failure to notice Ndayambaje wearing a scarf with national colours shows that he did not attend Ndayambaje's Swearing-In Ceremony, given that, as noted by the Trial Chamber, the witness simply stated that he "did not pay any attention as to whether Ndayambaje wore any distinct emblem."[7215]

3161. Accordingly, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness QAF's evidence concerning his swearing-in ceremony.

(e) Witness RV

3162. As recalled above, the Trial Chamber noted that Witness RV, like Witness QAF, testified that "only Ndayambaje recounted the fable of sweeping dirt", understood by the witness to mean that surviving Tutsis needed to be killed.[7216]

3163. Ndayambaje argues that Witness RV's testimony is "peppered with major contradictions and inconsistencies."[7217] Specifically, he points to the witness's evidence that, despite claiming that Ndayambaje spoke after Nteziryayo, he also testified that he left the ceremony during Nteziryayo's speech.[7218] Ndayambaje suggests that the witness's explanation that Nteziryayo spoke twice, once before and once after Ndayambaje, is unbelievable, as is his evidence that he could remember the content of Nteziryayo's speech.[7219]

[7213] *See* Witness QAF, T. 6 February 2004 p. 11 ("Now as concerns the date, I do not have a recollection of what happened.").
[7214] *See supra*, para. 3138.
[7215] *See* Trial Judgement, para. 4358, *referring to* Witness QAF, T. 5 February 2004 p. 66, T. 6 February 2004 p. 5, T. 9 February 2004 pp. 15, 16, 21-23, 28.
[7216] *See* Trial Judgement, paras. 4623, 4628. *See also ibid.*, para. 4372.
[7217] Ndayambaje Appeal Brief, para. 550. *See also* Ndayambaje Notice of Appeal, para. 185.
[7218] Ndayambaje Appeal Brief, para. 551.
[7219] Ndayambaje Appeal Brief, para. 551. *See also* Ndayambaje Reply Brief, paras. 209, 217.

3164. Ndayambaje also argues that the Trial Chamber's refusal to rely on Witness RV's evidence relating to Nteziryayo's involvement in events at Kirarambogo due to ambiguity within it should equally apply to the ambiguity surrounding Witness RV's testimony as to his continuous presence at the swearing-in ceremony and ability to recall the "inflammatory speeches" Ndayambaje allegedly made.[7220]

3165. The Prosecution responds that the Trial Chamber was aware of and reasonably assessed the inconsistencies in Witness RV's account of the swearing-in ceremony.[7221]

3166. The Appeals Chamber observes that, when summarising Witness RV's testimony, the Trial Chamber recalled that Witness RV testified that "[h]e could not recall what Nteziryayo said or if he was present for the entirety of Nteziryayo's speech", that "Nteziryayo spoke twice because he spoke again after Ndayambaje's speech",[7222] and that "Ndayambaje was probably the last to speak".[7223] The Trial Chamber further observed that the witness was cross-examined on this alleged inconsistency and noted that Witness RV explained that "he heard Ndayambaje", that the events "occurred a long time ago", and that he left while Nteziryayo was speaking on the second occasion after Ndayambaje spoke.[7224] Ndayambaje simply points to this evidence without demonstrating why it was material to the Trial Chamber's assessment of the witness's testimony. Considering that the Trial Chamber noted Witness FAL's testimony that Nteziryayo addressed the public both before and after Ndayambaje was installed and took the oath,[7225] the Appeals Chamber finds that a reasonable trier of fact could have accepted Witness RV's evidence concerning the ceremony.

3167. Ndayambaje's argument that the Trial Chamber failed to take a consistent approach to the assessment of different parts of Witness RV's evidence likewise lacks merit. The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[7226] When assessing the evidence regarding the events at Kirarambogo and Nteziryayo's involvement in them, the Trial Chamber noted that Witness RV could not remember the exact date of a particular meeting in May 1994, which Nteziryayo purportedly chaired.[7227] It observed that the witness "was a figure of authority at the time the meeting was alleged to have taken place", "affirmed that he convened and organised the meeting at issue", and concluded "that

[7220] Ndayambaje Appeal Brief, para. 553, *referring to* Trial Judgement, paras. 3668, 4373.
[7221] Prosecution Response Brief, para. 2449.
[7222] Trial Judgement, para. 4371, *referring to* Witness RV, T. 17 February 2004 pp. 5, 7 (closed session), T. 18 February 2004 pp. 43, 44 (closed session).
[7223] Trial Judgement, para. 4372, *referring to* Witness RV, T. 18 February 2004 p. 43 (closed session).
[7224] Trial Judgement, para. 4373, *referring to* Witness RV, T. 18 February 2004 pp. 44, 45 (closed session).
[7225] *See* Witness FAL, T. 9 February 2004 pp. 37, 38, 55, 57-60, 64 and 77, 78, 81 (closed session), *referred to* in Trial Judgement, paras. 4342-4345.
[7226] *See, e.g., Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.

the ambiguity of his testimony as to the date of the meeting undermines his credibility."[7228] The Trial Chamber rejected his evidence in light of the credibility problems arising from this particular part of his testimony, in light of his status as an accomplice witness, and due to the absence of corroborating evidence.[7229] In this context, the Appeals Chamber fails to see how the rejection of Witness RV's evidence in that instance required the Trial Chamber to reject his credible and corroborated evidence concerning Ndayambaje's remarks during the swearing-in ceremony.[7230]

3168. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its assessment of Witness RV's evidence concerning his swearing-in ceremony.

(f) Witness FAU

3169. The Trial Chamber noted that Witness FAU provided hearsay corroboration to the evidence of Witnesses FAL and FAG "that both Nteziryayo and Ndayambaje used parables concerning the need to clean the house of dirt and place it outside".[7231] The Trial Chamber also considered that Witness FAU's evidence corroborated other evidence as to the meaning of this metaphor, observing that "he testified that the killers told him that those protecting Tutsis who refused to hand them over would be killed."[7232]

3170. Ndayambaje submits that contradictions between Witness FAU's prior statements to Tribunal investigators and his testimony called for the rejection of his evidence.[7233] Specifically, Ndayambaje observes that, while Witness FAU testified that he did not attend the ceremony, his prior statement of 22 February 2001 reflects that he did and details that "he sat close to Nteziryayo and heard what he said."[7234] Ndayambaje further notes that the witness's statement of 9 October 1999 reveals that the meeting could have taken place prior to the attacks on Mugombwa Church and Kabuye Hill, which occurred from 20 to 24 April 1994.[7235] Ndayambaje highlights that, elsewhere in the Trial Judgement, the Trial Chamber found Witness FAU not

[7227] *See* Trial Judgement, para. 3668.
[7228] *See* Trial Judgement, para. 3668.
[7229] *See* Trial Judgement, para. 3669. *See also ibid.*, paras. 3665-3668.
[7230] *See* Trial Judgement, paras. 4622-4628.
[7231] *See* Trial Judgement, para. 4622. *See also ibid.*, paras. 4398, 4400, 4401.
[7232] *See* Trial Judgement, para. 4624. *See also ibid.*, para. 4398.
[7233] Ndayambaje Appeal Brief, paras. 546, 547. *See also* Ndayambaje Notice of Appeal, para. 185.
[7234] Ndayambaje Appeal Brief, paras. 544, 546. *See also* Ndayambaje Reply Brief, para. 215.
[7235] Ndayambaje Appeal Brief, para. 546. Ndayambaje does not identify any other inconsistencies or contradictions between Witness FAU's prior statements and his testimony despite mentioning other statements admitted into the record. *See ibid.*, para. 545, fn. 829.

credible because of the "confusion" between his prior statements and his testimony at trial as well as his status as an accomplice witness.[7236]

3171. Ndayambaje further contends that the Trial Chamber rejected Defence Witness KWEPO's "entire testimony without any explanation" even though his evidence that Witness FAU rejoined the Rwandan Army in May 1994 and did not return to Muganza Commune contradicts Witness FAU's account that he was in Muganza Commune at the time of the swearing-in ceremony.[7237]

3172. The Prosecution responds that certain aspects of Witness FAU's testimony were corroborated and that the Trial Chamber was aware of and reasonably assessed the discrepancies between Witness FAU's prior statements and his testimony.[7238] The Prosecution adds that, contrary to Ndayambaje's submissions, the Trial Chamber provided reasons for rejecting Witness KWEPO's evidence.[7239]

3173. The Appeals Chamber observes that the Trial Chamber expressly noted in the section of the Trial Judgement addressing Ndayambaje's Swearing-In Ceremony that, when it was put to Witness FAU that his prior statement of February 2001 outlined that he sat close to Nteziryayo and heard what he was saying, the witness explained that "he knew Nteziryayo's words because those returning from the meeting told him so".[7240] Elsewhere in the Trial Judgement, the Trial Chamber also expressly noted Witness FAU's explanation when confronted with his prior statement to the Rwandan Prosecutor that he saw Nteziryayo at the meeting that this was a recording error as he did not attend the meeting.[7241] Ndayambaje does not challenge the reasonableness of the witness's explanations or advance arguments to demonstrate why the Trial Chamber was prevented from relying on Witness FAU's evidence despite these contradictions.

3174. The Appeals Chamber also notes that, contrary to Ndayambaje's contention, Witness FAU's statement of October 1999 to Tribunal investigators indicates that the witness said that the meeting occurred *after* the events at Mugombwa Church and Kabuye Hill not before them.[7242] Ndayambaje's submission in this respect is therefore without merit.

[7236] Ndayambaje Appeal Brief, para. 545, *referring to* Trial Judgement, paras. 5226-5230.
[7237] Ndayambaje Appeal Brief, para. 548 (emphasis omitted). *See also* Ndayambaje Notice of Appeal, para. 189.
[7238] Prosecution Response Brief, paras. 2442, 2444.
[7239] Prosecution Response Brief, para. 2447.
[7240] *See* Trial Judgement, para. 4404.
[7241] *See* Trial Judgement, para. 4671.
[7242] Exhibit D192 (Witness FAU's Statement, dated 9 October 1999) (confidential), p. K0113046 (Registry pagination). The Appeals Chamber observes that the Trial Chamber erroneously stated that "it was put to the witness that his statement of October 1999 said the meeting took place before the killings at Mugombwa Church and Kabuye Hill" in paragraph 4403 of the Trial Judgement as Witness FAU's testimony reflects that he was questioned about his statement of 29 December 1999. *See* Witness FAU, T. 10 March 2004 pp. 25-27. The Appeals Chamber considers this erroneous reference to be inconsequential as, in any event, Witness FAU did not agree with counsel's suggestion that his prior

3175. The Appeals Chamber is also not persuaded by Ndayambaje's contention that the Trial Chamber's rejection of Witness FAU's testimony concerning alleged training and distribution of weapons to militiamen by Ndayambaje reflected an overall denunciation of this witness's evidence. In dismissing this part of Witness FAU's evidence, the Trial Chamber noted his status as a detained witness, highlighted discrepancies between his previous statements and testimony, and rejected his explanations for the discrepancies.[7243] It also considered that his testimony contained internal discrepancies with respect to the allegation, including concerning its key aspect.[7244] In light of these circumstances as well as the fact that Witness FAU was the sole witness that could be relied upon in relation to that allegation,[7245] the Trial Chamber found that it was not proven beyond reasonable doubt.[7246] Bearing in mind that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony,[7247] the Appeals Chamber does not consider that the Trial Chamber's rejection of an isolated aspect of Witness FAU's testimony rendered its decision to rely on his hearsay evidence about the content of the speeches made by Ndayambaje and Nteziryayo during the swearing-in ceremony unreasonable, particularly as it was corroborated by direct evidence.

3176. With respect to the evidence of Witness KWEPO, the Appeals Chamber observes that the Trial Chamber noted that Witness FAU's testimony as to the timeline of the events following the swearing-in ceremony appeared confused.[7248] It nevertheless accepted his testimony regarding a particular abduction and explicitly rejected Witness KWEPO's testimony as to Witness FAU's whereabouts at that time.[7249] Ndayambaje does not demonstrate that the Trial Chamber rejected Witness KWEPO's evidence without providing a reasoned opinion.

3177. The Appeals Chamber therefore dismisses Ndayambaje's submissions concerning the Trial Chamber's assessment of Witness FAU's evidence related to his swearing-in ceremony.

(g) Witness TO

3178. The Trial Chamber noted that Witness TO, in contrast with Witnesses FAG and FAL, testified that only Nteziryayo told the metaphor concerning sweeping dirt and found that

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statement of December 1999 indicated that the ceremony took place before the attacks on Mugombwa Church and Kabuye Hill. *See ibid.*, p. 27.

[7243] *See* Trial Judgement, paras. 5227, 5228.

[7244] Trial Judgement, para. 5229.

[7245] The Trial Chamber determined that it would be unduly prejudicial to the Defence for it to consider the evidence of Witness TO with respect to these allegations. *See* Trial Judgement, para. 5223.

[7246] *See* Trial Judgement, paras. 5229, 5230.

[7247] *See, e.g.*, *Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.

[7248] *See* Trial Judgement, para. 4620.

[7249] *See* Trial Judgement, para. 4620.

Witness TP corroborated Witness TO's evidence on this issue.[7250] However, it considered that, consistent with Witnesses FAG and FAL, Witness TO testified that Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed.[7251] The Trial Chamber also noted aspects of Witness TO's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7252]

3179. Ndayambaje argues that the Trial Chamber failed to exercise sufficient caution with respect to Witness TO, highlighting that Defence Witness SABINE testified that Witness TO was sentenced and imprisoned for a murder he committed in 1994, a fact Witness TO denied.[7253] Ndayambaje contends that the Trial Chamber failed to consider this factor and prevented him from exhaustively exploring it.[7254]

3180. Ndayambaje further contends that Witness TO's credibility was "obliterated" because several aspects of his testimony were not supported by any other witness or were contradicted by other evidence.[7255] In particular, Ndayambaje points to the fact that Witness TO "invented" the practice of shooting bows and arrows during the swearing-in ceremony and stories about long ears and tails of *Inkotanyi*, as well as testified about consuming alcohol during a certain event, which led to his recall before the Tribunal on 21 June 2004.[7256] Ndayambaje argues that Defence evidence contradicting Witness TO's testimony concerning the practice of shooting bows and arrows was erroneously rejected.[7257] Ndayambaje also notes that the witness's statement of 11 June 1997 placed the meeting in May 1994.[7258]

3181. In addition, Ndayambaje submits that the Trial Chamber ought to have considered the evidence of Witness SABINE which, in his view, discredited Witness TO's evidence that the murders of Witness TO's cousins took place the day after Ndayambaje's Swearing-In Ceremony.[7259] Specifically, Ndayambaje argues that Witness SABINE, who was found guilty and had served his sentence for these murders, testified that they occurred following the events at Kabuye Hill in April 1994, not after the swearing-in ceremony in June 1994.[7260]

[7250] *See* Trial Judgement, para. 4623. *See also ibid.*, para. 4378.
[7251] *See* Trial Judgement, para. 4627. *See also ibid.*, para. 4382.
[7252] Trial Judgement, para. 4632.
[7253] Ndayambaje Appeal Brief, para. 559.
[7254] Ndayambaje Appeal Brief, para. 559. *See also* Ndayambaje Reply Brief, para. 223.
[7255] Ndayambaje Appeal Brief, para. 561. *See also* Ndayambaje Notice of Appeal, para. 185.
[7256] Ndayambaje Appeal Brief, para. 561. *See also ibid.*, para. 556.
[7257] Ndayambaje Appeal Brief, para. 585.
[7258] Ndayambaje Appeal Brief, para. 557.
[7259] Ndayambaje Appeal Brief, paras. 558, 560.
[7260] Ndayambaje Appeal Brief, paras. 558, 560, *referring to* Trial Judgement, para. 4384, Witness SABINE, T. 12 June 2008 pp. 33-38 (closed session). Ndayambaje argues that Witness TO lied about the timing of these murders to deliberately incriminate him. *See idem.*

3182. Finally, Ndayambaje points out that Witness TO mentioned another meeting two weeks after the swearing-in ceremony.[7261] In his view, the Trial Chamber "confused the two meetings mentioned by Witness TO, who, alone, referred to a second meeting which [Ndayambaje] allegedly chaired at the same place as the swearing-in ceremony, two weeks after."[7262] Ndayambaje further highlights that Defence Witness Stan testified that there were no other meetings in Muganza Commune after 22 June 1994, contradicting Witness TO's evidence.[7263]

3183. The Prosecution responds that the Trial Chamber was aware of the elements relied upon by Ndayambaje to impugn the testimony of Witness TO and that Ndayambaje fails to demonstrate an error in the Trial Chamber's consideration of them.[7264] It argues that the Trial Chamber provided reasons for rejecting Witness SABINE's evidence, which Ndayambaje misrepresents.[7265]

3184. The Appeals Chamber notes that, while a review of the transcripts cited by Ndayambaje reflects that Witness SABINE testified that, in 2007, a *Gacaca* court tried and convicted Witness TO for murders he committed in 1994, Witness TO's testimony, as cited by Ndayambaje, does not reflect that Witness TO denied his participation in crimes.[7266] In any event, the Appeals Chamber does not consider that the Trial Chamber was required to take into account Witness SABINE's claim given that it did not find him either reliable or credible.[7267] The Trial Chamber made it clear that it treated the evidence of Witness TO with caution in view of his imprisonment during Ndayambaje's previous tenure as *bourgmestre*, which may have provided the witness with a motive to seek revenge against Ndayambaje.[7268] Furthermore, having reviewed the portion of Witness TO's testimony cited by Ndayambaje, the Appeals Chamber does not find that the Trial Chamber unfairly curtailed Ndayambaje's ability to examine Witness TO about the witness's conduct as the Presiding Judge, after extensive questioning of the witness by counsel, stopped him from asking the witness questions concerning the conduct of other persons.[7269]

3185. Turning to the contradictory aspects of Witness TO's account of the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber set forth Witness TO's evidence that, prior to

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[7261] Ndayambaje Appeal Brief, para. 561.
[7262] Ndayambaje Appeal Brief, para. 562, *referring to* Trial Judgement, para. 4384.
[7263] Ndayambaje Appeal Brief, para. 599.
[7264] Prosecution Response Brief, para. 2455.
[7265] Prosecution Response Brief, para. 2456.
[7266] *See* Witness SABINE, T. 12 June 2008 pp. 55-58 (closed session); Witness TO, T. 5 March 2002 pp. 88-90. *See also* Witness SABINE, T. 12 June 2008 pp. 58-61 (closed session) (French); Witness TO, T. 5 March 2002 pp. 104-108 (French).
[7267] *See* Trial Judgement, para. 4722. The Appeals Chamber further notes that Witness TO's alleged trial for the impugned crimes would have taken place in 2007 according to Witness SABINE, *i.e.* after Witness TO's 2002 testimony in the present proceedings. Thus, there is no basis to assert that, at the time of his testimony, Witness TO had an interest in implicating Ndayambaje in order to receive consideration in Rwanda.
[7268] *See* Trial Judgement, para. 4630.
[7269] *See* Witness TO, T. 5 March 2002 pp. 89-91.

the ceremony, the population practiced shooting bows and arrows.[7270] The Trial Chamber also noted that Witness FAL recounted a bow-and-arrow shooting exercise near the venue of the meeting, albeit not on the same day as the meeting,[7271] and the evidence of Defence witnesses that they did not see any archery practice or did not take part in it.[7272] Ndayambaje largely repeats arguments made at trial[7273] without showing that no reasonable trier of fact could have found that Witness TO was nonetheless testifying about the swearing-in ceremony.

3186. The Appeals Chamber is similarly not persuaded that Witness TO's evidence was incredible based on one element of his testimony concerning how the *Inkotanyi* were portrayed in Rwanda at the time.[7274] In addition, Ndayambaje, who simply refers to Witness TO's testimony upon recall, fails to explain how the basis of the witness's recall, which concerned his demeanour when testifying about an event other than the swearing-in ceremony,[7275] or his testimony regarding consumption of alcoholic beverages at Nteziryayo's parents' house in 1990, undermined the witness's credibility and prevented the Trial Chamber from relying on his evidence concerning the content of Nteziryayo's and Ndayambaje's remarks during the ceremony.[7276]

3187. As regards the date of the meeting, the Appeals Chamber observes that Ndayambaje merely highlights that Witness TO's prior statement indicated that the swearing-in ceremony occurred in May 1994, which was expressly noted by the Trial Chamber,[7277] without demonstrating that no reasonable trier of fact could have found that the witness was nonetheless testifying about Ndayambaje's Swearing-In Ceremony, which it found to have occurred on 22 June 1994.[7278]

3188. The Appeals Chamber further notes that, contrary to Ndayambaje's submission, the Trial Chamber assessed the part of Witness SABINE's testimony upon which Ndayambaje relies when evaluating evidence regarding the abductions of Tutsi women and girls in June 1994 in

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[7270] *See* Trial Judgement, para. 4383.
[7271] *See* Trial Judgement, para. 4340.
[7272] *See* Trial Judgement, paras. 4554, 4582.
[7273] *See* Ndayambaje Closing Brief, para. 649.
[7274] The Appeals Chamber observes that the Trial Chamber recalled Witness TO's understanding of "*Inkotanyi*" as Tutsis who had been driven from the country and were considered enemies and cited the pages of his testimony that also contained his recollection as to how they were portrayed. *See* Trial Judgement, para. 4383, fn. 11834, *referring, inter alia, to* Witness TO, T. 6 March 2002 pp. 15, 16. Notably, like Witness TO, Witness FAL also recounted that the terms "*Inkotanyi*" and Tutsi were used interchangeably and that they were considered the enemy. *See* Witness FAL, T. 9 February 2004 pp. 58, 59. *See also* Trial Judgement, paras. 4344, 4625.
[7275] *See* 6 May 2004 Decision on Motion to Recall Witness TO, paras. 9, 10, p. 4.
[7276] *See* Ndayambaje Appeal Brief, para. 561. *See also* Witness TO, T. 21 June 2004 pp. 5-12.
[7277] *See* Trial Judgement, para. 4375, *referring to* Witness TO, T. 5 March 2002 pp. 28-30, 38, 43, T. 6 March 2002 pp. 28-30, 58, 59. The Trial Chamber also noted the witness's explanation for the variance, namely that he "was not in a position to provide exact dates, since this was of little concern to him" and that the witness later estimated that the meeting occurred in June 1994. *See idem. See also* Witness TO, T. 5 March 2002 p. 28 ("It is true that so far as the dates are concerned, I am not in a position to give you the exact dates. I have given approximate dates".).
[7278] *See* Trial Judgement, paras. 4374, 4375.

another part of the Trial Judgement.[7279] The Trial Chamber found that Witness SABINE was neither reliable nor credible.[7280] Consequently, the Appeals Chamber finds that the Trial Chamber was not required to expressly discuss his evidence in its consideration of the allegation pertaining to the swearing-in ceremony.

3189. Turning to the meeting two weeks after the swearing-in ceremony recounted by Witness TO, the Appeals Chamber considers that Ndayambaje's contention that the Trial Chamber confused the swearing-in ceremony with this other meeting is based on an erroneous reading of the transcript.[7281] Moreover, the Trial Chamber excluded Witness TO's evidence about the meeting following the ceremony due to insufficient notice of the allegations related to this meeting, noting that, in any event, the evidence was not sufficient to prove these allegations beyond reasonable doubt.[7282] Ndayambaje merely highlights Witness Stan's testimony that there were no other public meetings in Muganza Commune after Ndayambaje's Swearing-In Ceremony, which was expressly noted by the Trial Chamber,[7283] without explaining how it was material to the Trial Chamber's consideration of Witness TO's evidence concerning the witness's presence at the swearing-in ceremony and the content of the speeches made during it.

3190. For these reasons, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness TO's evidence pertaining to his swearing-in ceremony.

(h) Witness TP

3191. As noted above, the Trial Chamber considered that Witness TP's evidence corroborated Witness TO's evidence that only Nteziryayo used the metaphor concerning sweeping dirt.[7284] The Trial Chamber further considered Witness TP's testimony that Nteziryayo and Ndayambaje thanked the population for their "work", which meant "to kill", and urged them to continue.[7285]

[7279] *See* Trial Judgement, para. 4722. *See ibid.*, paras. 4702, 4703.
[7280] *See* Trial Judgement, para. 4722.
[7281] The Appeals Chamber observes that Witness TO testified that, after the meeting chaired by Prefect Nteziryayo during which Ndayambaje was reappointed *bourgmestre*, the population did not comply with the instructions that were issued during the meeting, save for some scoundrels and certain bandits, who engaged in flushing out women and children and in looting. *See* Witness TO, T. 4 March 2002 pp. 10, 11, 26 and 31 (French) ("*Après la réunion dirigée par le préfet, Élie Ndayambaje a aussi pris la parole... Après le discours du préfet, Élie Ndayambaje a également pris la parole. Il n'a pas dit grand-chose à la population, à part lui assurer sa collaboration, et après, la population est rentrée. Mais la population ne s'est pas impliquée dans les massacres pour appliquer les instructions reçues au cours de la réunion, à part quelques voyous et certains bandits qui se sont mis à débusquer les femmes et les enfants, et à commettre le pillage.*"). *See also* Trial Judgement, para. 4384, *referring to* Witness TO, T. 4 March 2002 pp. 26, 27, T. 6 March 2002 pp. 46, 60, 61.
[7282] *See* Trial Judgement, para. 5223.
[7283] *See* Trial Judgement, para. 4487.
[7284] *See* Trial Judgement, paras. 4623, 4627. *See also ibid.*, para. 4391.
[7285] *See* Trial Judgement, para. 4626. *See also ibid.*, paras. 4390, 4391.

Finally, the Trial Chamber also noted aspects of Witness TP's evidence when observing the "consistent, albeit often general, evidence of the Prosecution witnesses" that killings occurred after the meeting.[7286]

3192. Ndayambaje submits that Witness TP's testimony "was peppered with inconsistencies and contradictions",[7287] arguing that while the Trial Chamber restated many of them – including the place of the meeting, the content of the speeches, and the order of the speakers – it erroneously described them as minor.[7288] He also argues that the Trial Chamber misstated Witness TP's evidence which, in Ndayambaje's view, reflects that she testified about attending Nteziryayo's swearing-in ceremony and not his.[7289]

3193. Ndayambaje further observes that the witness placed Prefect Nteziryayo's swearing-in ceremony not in the small eucalyptus woods where Ndayambaje's Swearing-In Ceremony took place, and argues that the Trial Chamber erred in characterising this discrepancy about the location as minor.[7290] Ndayambaje adds that the Trial Chamber erroneously relied on the English interpretation of Witness Stan's French testimony to corroborate Witness TP's evidence regarding the location of the ceremony.[7291] In his view, the Trial Chamber incorrectly suggested that Witness Stan, like Witness TP, placed the swearing-in ceremony near the football pitch, whereas Witness Stan instead placed it in the small woods close to the road leading from the commune office to Bishya.[7292]

3194. Finally, Ndayambaje argues that Witness TP deliberately placed the abduction of her son and abduction and killing of the son of her brother-in-law after the swearing-in ceremony to implicate him.[7293] He contends that the Trial Chamber disregarded the contradictory evidence of Witness KANUC, who pleaded guilty and served his sentence for the impugned murder and testified that the killing occurred after the events in Kabuye in April 1994 instead of after his swearing-in ceremony.[7294]

[7286] Trial Judgement, para. 4632.
[7287] Ndayambaje Appeal Brief, para. 568.
[7288] *See* Ndayambaje Appeal Brief, para. 566, *referring to* Trial Judgement, paras. 4388-4391, 4611, 4623.
[7289] Ndayambaje Appeal Brief, para. 563, *referring to* Trial Judgement, para. 4592. *See also* Ndayambaje Notice of Appeal, para. 185.
[7290] Ndayambaje Appeal Brief, paras. 564, 565.
[7291] Ndayambaje Appeal Brief, para. 564. *See also* Ndayambaje Reply Brief, para. 227.
[7292] Ndayambaje Appeal Brief, para. 594, *referring to* Trial Judgement, para. 4613.
[7293] Ndayambaje Appeal Brief, paras. 567, 568.
[7294] Ndayambaje Appeal Brief, para. 567, *referring to* Trial Judgement, para. 4394, Witness KANUC , T. 10 June 2008 pp. 4, 12 (closed session), Exhibit P201A (Gacaca Court Document Titled "*Urwego Rw'igihugu Rushinzwe Inkiko Gacaca. Inyandiko Y'urubanza Rw'ibyaha Byo Mu Rwego Rwa Kabiri*", dated 7 September 2006). *See also* Ndayambaje Notice of Appeal, paras. 189, 190. Ndayambaje acknowledges that he was not held responsible for this murder. *See* Ndayambaje Appeal Brief, para. 567.

3195. The Prosecution responds that it was within the Trial Chamber's discretion to accept Witness TP's testimony despite its various inconsistencies.[7295] It submits that the Trial Chamber's reliance on the erroneous English interpretation of Witness Stan's French testimony was not significant since the Trial Chamber also took into account other elements when considering the location of the meeting mentioned by Witness TP.[7296] It further argues that Ndayambaje does not demonstrate that the Trial Chamber erred in disregarding Witness KANUC's testimony.[7297]

3196. The Appeals Chamber finds that Ndayambaje simply disagrees with the Trial Chamber's assessment of purported inconsistencies in Witness TP's evidence about the location of the meeting, the content of the speeches, and the order of the speakers, without identifying how the Trial Chamber abused its discretion. Moreover, a review of the relevant parts of Witness TP's testimony does not support Ndayambaje's argument that the witness testified about Nteziryayo's swearing-in ceremony, not his.[7298] When asked about how she found out about the meeting, Witness TP stated that when she "went to the meeting and [she] witnessed the swearing in of the *bourgmestre*, [...] the *préfet* was introduced to [them]."[7299] Accordingly, the Trial Chamber did not misstate the witness's evidence when noting that the testimony of Witness TP showed that during the course of the meeting she attended, Ndayambaje was reappointed *bourgmestre*.

3197. The Appeals Chamber is also not persuaded that the Trial Chamber erred in relying on Witness TP's testimony about her attendance at Ndayambaje's Swearing-In Ceremony because she placed it elsewhere than the eucalyptus woods. The Trial Chamber noted that Witness TP testified that the meeting took place outside the commune office, in the courtyard, and observed that this contrasted with other evidence that it took place in the woods near the commune office.[7300] However, the Trial Chamber further recounted that Witness Stan described the venue as woodland area near the Muganza commune office, just before the football pitch, which was on the opposite side of the Muganza commune office from the woods.[7301] The Trial Chamber, in view of "the relative proximity of the woods where the meeting actually took place *vis-à-vis* the *commune* office

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[7295] Prosecution Response Brief, paras. 2457, 2459.
[7296] Prosecution Response Brief, para. 2458.
[7297] Prosecution Response Brief, para. 2460.
[7298] *See* Trial Judgement, para. 4592, *referring to* Witness TP, T. 12 February 2004 pp. 38, 39. *See also* Ndayambaje Appeal Brief, paras. 563, 564, *referring to* Trial Judgement, para. 4388, Witness TP, T. 12 February 2004 pp. 39, 40.
[7299] *See* Witness TP, T. 12 February 2004 p. 38. The Appeals Chamber notes that Witness TP, in response to a suggestion by Nteziryayo that she earlier stated that "the purpose of the meeting was for the installation", responded that "[i]t was for the installation of *Préfet* Alphonse". However, the description of the purported installation she provided accorded with her earlier testimony that Nteziryayo was being introduced at the meeting rather than installed as a new prefect. *See ibid.*, p. 40 ("Q. Who had to install him, Élie Ndayambaje? Was it Élie Ndayambaje? A. I don't know. I'm describing to you what we saw when we arrived at the meeting venue. The Accused took the floor and he said he was going to introduce to us Alphonse, who was the new *préfet*. Perhaps the new *préfet* had been introduced at the level of the whole *préfecture* and now it was time for him to be introduced to us in our *secteur* or *commune*.").
[7300] *See* Trial Judgement, paras. 4388, 4613.
[7301] *See* Trial Judgement, para. 4613, *referring to* Witness Stan, T. 18 September 2008 p. 50.

and the football field, where Witness TP and [Witness] Stan respectively testified the meeting took place, variously described as between 30 and 100 metres", did not "consider the discrepancies in these witnesses' testimony significant."[7302] Ndayambaje is correct in asserting that the relevant excerpt of the French transcript of Witness Stan's testimony, unlike the English transcript relied upon by the Trial Chamber, does not contain a mention of a football pitch.[7303] However, the Appeals Chamber fails to see the purported relevance of this variance given the Trial Chamber's finding that the discrepancy as to the venue of the meeting was not significant. Ndayambaje's contention simply reflects disagreement with the Trial Chamber's conclusion without demonstrating that it erred.

3198. As to Witness TP's testimony regarding the events after the meeting, the Trial Chamber recounted that Witness TP testified that her brother-in-law's children were killed on the day of Ndayambaje's Swearing-In Ceremony, and that she witnessed the killing of her own son who was taken the night after.[7304] The Trial Chamber, while accepting the witness's account of these events, noted that she did not identify who the killers were or how Nteziryayo or Ndayambaje were otherwise implicated in the events.[7305] The Trial Chamber concluded that the Prosecution had not proven beyond reasonable doubt that either Nteziryayo or Ndayambaje were responsible, directly or indirectly, for the impugned killings given the absence of evidence that they were present or in some other ways responsible for the taking of the children.[7306] The Appeals Chamber, to the extent that Ndayambaje argues that Witness KANUC's evidence demonstrates that Witness TP was trying to implicate him, and recalling that it is not necessary for a trial chamber to refer to the testimony of every witness or every piece of evidence on the trial record,[7307] does not consider that the Trial Chamber was under an obligation to discuss expressly the contradictory evidence of Witness KANUC.

[7302] Trial Judgement, para. 4613.
[7303] *Compare* Witness Stan, T. 18 September 2008 p. 50 ("Q. Is it possible to be much clearer regarding the location of the area and venue of the swearing-in ceremony of Mr. Ndayambaje, Witness. A. The ceremony took place in a woodland where reforestation was being done below. And just before you go into the football pitch of Muganza and away from Bishya just before your entrance, there was to your right a reforestation area, a woodland. That is where the meeting took place.") *with ibid.*, p. 51 (French) ("Q. *Est-ce qu'il vous est possible d'être un peu plus précis quant à la localisation exacte de l'endroit où s'est déroulée cette cérémonie d'investiture, Monsieur le Témoin? R. La cérémonie s'est déroulée dans un reboisement — ce qu'on appelle reboisement. Un peu en bas, avant d'entrer à l'intérieur même du terrain de la commune Muganza, quand on vient de Bishya, avant d'entrer, il y avait un reboisement, à droite. C'est là que s'est tenue la réunion.*").
[7304] *See* Trial Judgement, para. 4394. *See also ibid.*, para. 4643.
[7305] *See* Trial Judgement, para. 4643.
[7306] *See* Trial Judgement, para. 4644.
[7307] *See Kvočka et al.* Appeal Judgement, para. 23. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 648; *Đorđević* Appeal Judgement, para. 864; *Kanyarukiga* Appeal Judgement, para. 127.

3199. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in the assessment of Witness TP's evidence related to his swearing-in ceremony.

(i) Witness QAL

3200. The Trial Chamber noted that Witness QAL provided corroborative hearsay evidence that Ndayambaje told the population to clean up and put the dirt out, which the witness understood to mean that good and bad people should be separated and people who were undesirable should be killed.[7308] The Trial Chamber also noted that Witness QAL corroborated Witness QAF's evidence that Nteziryayo questioned people about whether they carried out the instructions given to them and asked those who were married to Tutsis and had children to kill all the Tutsis.[7309]

3201. Ndayambaje argues that elements of Witness QAL's evidence about the swearing-in ceremony – that the participants were armed, that Nteziryayo spoke after Ndayambaje, and that Nteziryayo asked the attendees to raise and show their spears, clubs, and machetes – are unsupported by any other witness or only find corroboration from Witness TP.[7310] In his view, the Trial Chamber erroneously minimised these materially inconsistent aspects of Witness QAL's evidence, undermining the credibility of her evidence about her attendance at the ceremony.[7311] Ndayambaje also points to the evidence of Witness RV as well as Nteziryayo and Ndayambaje that Nteziryayo spoke first, arguing that this evidence was rejected without reason.[7312]

3202. Ndayambaje also contends that the Trial Chamber erred in finding that Witnesses TP, QAR, and QAQ corroborated Witness QAL's evidence, as the Trial Chamber found that their accounts of attending the swearing-in ceremony were implausible.[7313]

[7308] *See* Trial Judgement, paras. 4623, 4628. *See also ibid.*, para. 4426.
[7309] *See* Trial Judgement, para. 4624. *See also ibid.*, para. 4427.
[7310] Ndayambaje Appeal Brief, paras. 572, 573. *See also* Ndayambaje Notice of Appeal, para. 185. Ndayambaje adds that Witnesses TP and QAL testified that speakers did not use microphones. The Appeals Chamber observes, however, that Ndayambaje's contention in this regard is not supported by the reference he provides since the Trial Chamber noted that the witnesses instead testified that the speakers did not use megaphones. *See* Ndayambaje Appeal Brief, para. 573, *referring to* Trial Judgement, paras. 4425, 4389. This contention is therefore dismissed.
[7311] Ndayambaje Appeal Brief, paras. 570, 573. Ndayambaje also argues that the Trial Chamber erred in finding that "Witness QAL gave detailed and credible evidence about the swearing-in ceremony, including such details as who she went to the meeting with" because it did not hear evidence about who accompanied the witness to the meeting. *See* Ndayambaje Appeal Brief, para. 571 (emphasis omitted), *referring to* Trial Judgement, para. 4600. The Appeals Chamber notes, however, that in citing the relevant portion of Witness QAL's testimony, the Trial Chamber noted that the witness went to the meeting with three other people, including her brother-in-law. *See* Trial Judgement, para. 4600, fn. 12236, *referring to* Witness QAL, T. 25 February 2004 pp. 19 and 24, 39 (closed session). *See also ibid.*, para. 4425. The Appeals Chamber therefore dismisses Ndayambaje's contention in this regard.
[7312] Ndayambaje Appeal Brief, para. 585.
[7313] Ndayambaje Appeal Brief, para. 574.

3203. Ndayambaje further argues that the Trial Chamber erred in the assessment of Witness QAL's evidence in light of Defence Witness MACHO's testimony that he was with Witness QAL the entire day of the ceremony and contradicted her evidence that she attended it.[7314] Ndayambaje contends that the Trial Chamber "arbitrarily preferred" Witness QAL's testimony "because she was Hutu and [Ndayambaje] had officiated at her wedding", even though Witness MACHO did not have ties to Ndayambaje or an interest in defending him.[7315] He further submits that by rejecting Witness MACHO's contradictory evidence because Ndayambaje did not cross-examine Witness QAL on the possibility that she was not at the ceremony reflected the Trial Chamber's bias and a reversal of the burden of proof.[7316]

3204. Finally, Ndayambaje contends that the Trial Chamber could not have believed Witness QAL's evidence that she attended the swearing-in ceremony because she testified that her daughter was abducted the day of the ceremony and her husband the following day but placed these events in May, rather than June 1994.[7317] Ndayambaje also argues that Witness GABON undermined Witness QAL's evidence, testifying that the murder of Witness QAL's husband occurred in April 1994 and "contradict[ing] the abduction and ransom paid for Witness QAL's daughter."[7318] Ndayambaje adds that Witness MACHO further contradicted Witness QAL's evidence about the abduction and murder and was rejected by the Trial Chamber without reason.[7319]

3205. The Prosecution responds that Ndayambaje merely disagrees with the Trial Chamber's assessment of Witness QAL's account of the swearing-in ceremony without advancing arguments that demonstrate an error in this regard.[7320] It submits that Ndayambaje similarly does not demonstrate an error in the Trial Chamber's rejection of Witness MACHO's evidence, arguing that it was within the Trial Chamber's discretion to consider the failure of the Defence to challenge certain aspects of the evidence of the Prosecution witnesses.[7321] The Prosecution further submits that the Trial Chamber was correct to disbelieve Witness GABON.[7322]

[7314] Ndayambaje Appeal Brief, para. 576. *See also* Ndayambaje Notice of Appeal, para. 189.
[7315] Ndayambaje Appeal Brief, para. 576. *See also ibid.*, para. 591.
[7316] Ndayambaje Appeal Brief, para. 577. Ndayambaje adds that the Trial Chamber had the power to recall the witness to request clarification. *See idem.*
[7317] Ndayambaje Appeal Brief, paras. 569, 575. Ndayambaje also argues that Witness QAL's evidence is implausible as she testified to making a complaint about the murder to a criminal investigation officer which, Ndayambaje claims, is "a gesture she should not have logically made, had the murder been committed on the instructions of the commune authorities." *See ibid.*, para. 575, *referring to* Witness QAL, T. 25 February 2004 pp. 49, 50. The Appeals Chamber considers that Ndayambaje's contention is speculative and does not demonstrate any error in the Trial Chamber's analysis of Witness QAL's evidence. The Appeals Chamber therefore dismisses it without further consideration.
[7318] Ndayambaje Appeal Brief, para. 589.
[7319] Ndayambaje Appeal Brief, para. 576.
[7320] Prosecution Response Brief, paras. 2462-2464, 2466.
[7321] Prosecution Response Brief, para. 2469.
[7322] Prosecution Response Brief, para. 2467.

3206. The Appeals Chamber notes that it has previously addressed and rejected Ndayambaje's argument that the Trial Chamber erroneously assessed contrasting evidence as to whether those attending the swearing-in ceremony were armed.[7323] As to the order in which Nteziryayo and Ndayambaje spoke, the Trial Chamber noted that Witness QAL's evidence that Nteziryayo spoke after Ndayambaje contrasted with other Prosecution evidence.[7324] However, it considered that this discrepancy did "not go to the root of the witness' account of the meeting" and that the witness's clarity on this issue could have been "affected by the passage of time."[7325] The Trial Chamber further noted that Witness TP, like Witness QAL, testified that Nteziryayo took the floor after Ndayambaje, in contrast with evidence of the other witnesses and concluded that it did not regard as significant the discrepancy as to the order of the speakers.[7326] Ndayambaje simply disagrees with this analysis without demonstrating any error in the Trial Chamber's reasoning.

3207. The Appeals Chamber also considers that Ndayambaje's contention about Witness QAL's testimony that Nteziryayo asked the attendees to raise and show their spears, clubs, and machetes is based on an erroneous reading of the Trial Judgement, which reflects that Nteziryayo merely asked the participants with different weapons to raise their hands.[7327] Given the Trial Chamber's finding that between 1,000 and 5,000 people attended the meeting,[7328] Ndayambaje does not demonstrate that this aspect of Witness QAL's evidence was material to the Trial Chamber's assessment of the evidence about the ceremony, or that it was incompatible with other accounts given the large number of participants and varying vantage points of witnesses.

3208. Furthermore, the Appeals Chamber finds no merit in Ndayambaje's contention that the Trial Chamber improperly relied on the evidence of Witnesses TP, QAR, and QAQ to corroborate Witness QAL's account as it found the former witnesses' testimonies about the ceremony implausible.[7329] First, the Appeals Chamber observes that the Trial Chamber reached no such finding with respect to Witness TP and, in fact, accepted that the witness was testifying about Ndayambaje's Swearing-In Ceremony.[7330] Similarly, while the Trial Chamber observed similarities in the evidence of Witnesses QAR, QAQ, and QAL,[7331] the Trial Chamber found that Witness QAR did not attend the ceremony and, after expressing doubts about whether Witness QAQ attended this ceremony, concluded that any probative weight to be accorded to the testimony of Witness QAQ

[7323] *See supra*, para. 3136.
[7324] *See* Trial Judgement, para. 4597.
[7325] Trial Judgement, para. 4598.
[7326] Trial Judgement, paras. 4610, 4611.
[7327] *See also* Trial Judgement, para. 4427. *See also* Witness QAL, T. 25 February 2004 p. 12.
[7328] Trial Judgement, para. 4611.
[7329] Ndayambaje Appeal Brief, para. 574, *referring to* Trial Judgement, paras. 4595, 4596, 4602-4608.
[7330] Trial Judgement, para. 4592.
[7331] *See* Trial Judgement, paras. 4594, 4595.

was minimal.[7332] None of the findings made by the Trial Chamber to the extent that it expressly relied on Witness QAL's testimony reflects that it did so in light of the corroborative aspects of the evidence of Witnesses QAR and QAQ.[7333] Indeed, the Trial Chamber specifically stated that it would only consider the evidence of Witnesses FAG, FAL, FAU, QAF, QAL, RV, TO, and TP when evaluating the Prosecution's evidence concerning the swearing-in ceremony.[7334]

3209. Concerning the evidence of Witness MACHO, the Trial Chamber noted that it contradicted Witness QAL's evidence of attending the swearing-in ceremony, as Witness MACHO testified that they spent that day together at his godmother's house.[7335] The Trial Chamber observed that Witness QAL was not cross-examined on the basis of this evidence, which only arose when Witness MACHO testified four years after Witness QAL.[7336] It further considered that Witness QAL gave detailed and credible evidence about the swearing-in ceremony, including such details as with whom she went to the meeting, and that aspects of it were consistent with the testimonies of the other Prosecution witnesses whose presence at the meeting was not contested.[7337]

3210. The Appeals Chamber recalls that, when faced with competing versions of the same event, it is the prerogative of the trial chamber to decide which version it considers more credible.[7338] The Appeals Chamber will defer to a trial chamber's findings on such issues, including its resolution of disparities among different witnesses' accounts, and will only find an error of fact if it determines that no reasonable trier of fact could have made the impugned findings.[7339] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in accepting the evidence of Witness QAL over that of Witness MACHO. Notably, the Trial Chamber found that Witness QAL's evidence about the timing and the location of the meeting, Ndayambaje's attire, the presence of Witness Stan, the population being armed, the use of proverbs and the call to kill Tutsis during the ceremony was broadly corroborated.[7340] Ndayambaje also does not show that the Trial Chamber placed undue emphasis on the fact that Witness QAL was a Hutu and had been married by

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[7332] *See* Trial Judgement, paras. 4602, 4603, 4608. *See also ibid.*, paras. 4604-4607.
[7333] *See* Trial Judgement, paras. 4596-4598, 4609, 4623-4625, 4628, 4629.
[7334] *See* Trial Judgement, para. 4621. *See also ibid.*, para. 4632.
[7335] *See* Trial Judgement, para. 4599.
[7336] *See* Trial Judgement, para. 4599.
[7337] *See* Trial Judgement, para. 4600. Ndayambaje also argues that some aspects of Witness QAL's testimony were inconsistent with the testimony of other Prosecution witnesses and that the Trial Chamber erroneously implied that Ndayambaje conceded that all Prosecution witnesses were present at the swearing-in ceremony. *See* Ndayambaje Appeal Brief, para. 570. The Appeals Chamber considers, however, that Ndayambaje fails to identify any error as the Trial Chamber assessed various inconsistencies between Witness QAL's account of the meeting and that of other Prosecution witnesses. *See* Trial Judgement, paras. 4597-4599. Moreover, the Trial Chamber's reasoning does not reflect that Ndayambaje conceded that *all* Prosecution witnesses were present at the meeting but merely reflects that Witness QAL's testimony was consistent with that of certain witnesses whose presence at the swearing-in ceremony was not contested. *See ibid.*, para. 4600.
[7338] *See, e.g., Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7339] *See Ndahimana* Appeal Judgement, para. 46. *See also Setako* Appeal Judgement, para. 31.

Ndayambaje,[7341] or that it was required to credit Witness MACHO's evidence because she had no incentive to provide exculpatory evidence for Ndayambaje. The Appeals Chamber also fails to see how the Trial Chamber's observation that Witness QAL was not cross-examined on the possibility that she was not at the ceremony evinces bias or a reversal of the burden of proof, particularly given its detailed consideration of inconsistencies and contradictions with other evidence.[7342]

3211. With respect to the date of abduction of Witness QAL's daughter and murder of her husband after the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber noted that Witness QAL, as well as Witnesses FAG, FAL, QAF, and TP, testified that after the ceremony further attacks against Tutsis occurred.[7343] However, when noting the consistent, albeit often general, evidence of the Prosecution witnesses to the effect that after the meeting, killings occurred, the Trial Chamber did not rely on Witness QAL.[7344] The Trial Chamber also expressly noted that Witness QAL did not remember the date of the meeting but recalled that it was held shortly before the RPF invasion of Muganza Commune at the end of June or beginning of July 1994 and that at the time Ndayambaje was *bourgmestre* of Muganza Commune.[7345] While Ndayambaje is correct that the witness testified that her husband died in May 1994, she also specifically testified that her husband was killed the day following the meeting and that her daughter was abducted on the same day as the meeting, when Ndayambaje was introduced as *bourgmestre* of Muganza Commune.[7346] Given the Trial Chamber's acknowledgement that Witness QAL did not remember the day of the meeting,[7347] and its limited reliance on the witness's evidence regarding the abduction of her daughter and murder of her husband, the Appeals Chamber does not consider that the fact that the witness indicated that the murder of her husband took place in May 1994 precluded the Trial Chamber from considering that this witness testified about the swearing-in ceremony.

3212. Similarly, the Appeals Chamber finds no merit in Ndayambaje's argument that the testimony of Witness GABON that Witness QAL's husband was killed at the end of April 1994 and that Witness GABON did not hear about the abduction of Witness QAL's daughter undermined Witness QAL's testimony about the swearing-in ceremony.[7348] The Appeals Chamber observes that, whereas Witness GABON's evidence about the killing of Witness QAL's husband and abduction of

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[7340] *See* Trial Judgement, paras. 4595, 4596, 4609, 4610, 4623, 4625, 4628, 4629.
[7341] *See also supra*, para. 3076.
[7342] *See* Trial Judgement, paras. 4597, 4610, 4611.
[7343] *See* Trial Judgement, para. 4629.
[7344] *See* Trial Judgement, para. 4632.
[7345] *See* Trial Judgement, paras. 4422, 4595. *See also* Witness QAL, T. 25 February 2004 pp. 12, 13, and 25, 41, 42 (closed session).
[7346] *See* Witness QAL, T. 25 February pp. 23-25, 41, 42, 48 (closed session). *See also* Trial Judgement, para. 4431.
[7347] *See* Trial Judgement, para. 4595.
[7348] *See* Trial Judgement, para. 4495.

her daughter was hearsay, Witness QAL was an eyewitness to the events.[7349] Of greater significance, the Trial Chamber considered Witness GABON's testimony "unrealistic" and not "plausible", discrediting his alibi evidence in relation to Ndayambaje's involvement in another event.[7350] The Appeals Chamber therefore considers that a reasonable trier of fact could have relied on Witness QAL's evidence notwithstanding Witness GABON's testimony.

3213. Finally, since the Trial Chamber rejected Witness MACHO's testimony concerning Witness QAL's whereabouts during the swearing-in ceremony,[7351] the Appeals Chamber considers that it was under no obligation to provide further justification for rejecting this witness's inextricably linked evidence about the abduction of Witness QAL's daughter on the same day.[7352] Because the Trial Chamber did not rely on Witness QAL's evidence about the murder of her husband,[7353] the Appeals Chamber finds that it was not necessary for the Trial Chamber to assess the differences in the evidence of Witnesses QAL and MACHO in this regard.

3214. The Appeals Chamber therefore finds that Ndayambaje has not demonstrated that the Trial Chamber erred in the assessment of Witness QAL's evidence on his swearing-in ceremony.

(j) Date

3215. Ndayambaje submits that no Prosecution witness specified the date of his swearing-in ceremony to be 22 June 1994.[7354] In his view, other reasonable inferences were therefore open regarding the meeting recounted by the Prosecution witnesses.[7355]

3216. The Prosecution responds that the Trial Chamber considered that Prosecution witnesses did not indicate 22 June 1994 as the date of the swearing-in ceremony.[7356]

3217. The Appeals Chamber observes that the Trial Chamber found that the Prosecution evidence established beyond reasonable doubt that Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune occurred "on 22 June 1994".[7357] The Appeals Chamber notes that, earlier in its deliberations, the Trial Chamber recalled that Witnesses FAG, RV, and TO testified that

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[7349] *Compare* Witness GABON, T. 2 September 2008 pp. 18-21 (closed session) *with* Witness QAL, T. 25 February 2004 pp. 23, 48 (closed session).
[7350] *See* Trial Judgement, paras. 1220, 1223, 1389,1417, 1446.
[7351] *See supra*, paras. 3209, 3210.
[7352] *See* Trial Judgement, para. 4587.
[7353] The Appeals Chamber is of the view that, while the Trial Chamber referred to the aspect of Witness QAL's evidence regarding the killing of her husband, the Trial Chamber did not rely on this evidence to demonstrate that killings occurred after the ceremony. *Compare* Trial Judgement, para. 4629 *with ibid.*, paras. 4632, 4645.
[7354] Ndayambaje Appeal Brief, para. 582, *referring to* Trial Judgement, paras. 3440, 4322, 4323, 4354, 4369, 4375, 4386, 4590, 4591. *See also ibid.*, para. 608.
[7355] Ndayambaje Appeal Brief, para. 582.
[7356] Prosecution Response Brief, para. 2472.
[7357] Trial Judgement, para. 4645.

Ndayambaje's Swearing-In Ceremony took place "on various dates in June 1994"[7358] and that Witnesses FAL, QAF, and TP testified about a meeting at Muganza Commune "on or around 22 June 1994".[7359] It also noted that Witness QAL testified to attending a meeting near the Muganza commune office "around May or June 1994" but could not remember its precise date.[7360]

3218. The Appeals Chamber sees no error in the Trial Chamber's summary of the evidence of Witnesses FAG, RV, and TO concerning the timing of the ceremony and Witness QAL's estimate as to the timing of the meeting described.[7361] However, as determined previously, the evidence of Witnesses FAL, QAF, and TP, as relied upon by the Trial Chamber cannot reasonably be interpreted as supporting the conclusion that the meeting occurred specifically "on or around 22 June 1994".[7362] Accordingly, the Appeals Chamber considers that *all* of the Prosecution evidence, as suggested by Ndayambaje, is ambiguous as to the precise date of the swearing-in ceremony whereas the Trial Judgement indicates otherwise.[7363]

3219. Nevertheless, Ndayambaje does not demonstrate that the Trial Chamber erred in concluding that all the Prosecution witnesses it relied upon were testifying about his swearing-in ceremony in Muganza Commune, which the parties do not dispute occurred on 22 June 1994. The Trial Chamber considered the discrepancies in the Prosecution evidence as to the precise date of the meeting and determined that they were minor and understandable in light of the time that had elapsed between the event and the witnesses' appearances in court.[7364] It determined that all the witnesses were discussing the same event given the consistent descriptions of the fundamental features of it.[7365] Ndayambaje only suggests that other reasonable inferences were available without demonstrating any error in the Trial Chamber's ultimate conclusion that all relevant witnesses were referring to his swearing-in ceremony.

3220. The Appeals Chamber therefore concludes that Ndayambaje has not shown that the Trial Chamber erred in determining that the relevant witnesses were testifying about his swearing-in ceremony on 22 June 1994.

[7358] Trial Judgement, para. 4590.
[7359] Trial Judgement, para. 4591.
[7360] Trial Judgement, paras. 4594, 4595. *See also ibid.*, para. 4422.
[7361] *See* Witness FAG, T. 1 March 2004 p. 33 (testifying that the meeting was held between the end of May and early June 1994); Witness RV, T. 17 February 2004 pp. 5, 6 (closed session) (referring to 21 June 1994); Witness TO, T. 4 March 2002 pp. 11, 12 (testifying that the meeting was held in June 1994); Witness QAL, T. 25 February 2004 pp. 12, 13 and 25, 40-42 (closed session) (testifying that she did not remember the date of the meeting, but recalled it was held shortly before the RPF invasion of Muganza Commune that occurred at the end of June or beginning of July).
[7362] *See supra* Section, VII.B.1(d), para. 2351.
[7363] Trial Judgement, para. 4591.
[7364] Trial Judgement, para. 4592. *See also ibid.*, para. 4595.
[7365] Trial Judgement, paras. 4592, 4593, 4595.

2. Assessment of Defence Evidence

3221. When considering evidence in relation to Ndayambaje's Swearing-In Ceremony, the Trial Chamber compared the relevant Prosecution and Defence evidence concerning Nteziryayo's and Ndayambaje's speeches.[7366] Specifically, it observed that the relevant Defence witnesses, in contrast to the Prosecution witnesses, testified that Nteziryayo's speech concerned security and that Ndayambaje did not use proverbs, including inflammatory metaphors, and that he denounced wrong-doers.[7367] The Trial Chamber noted, however, that all of the witnesses called by Ndayambaje had close ties with him[7368] and that Nteziryayo Defence Witnesses AND-11 and AND-73 were well-acquainted with Nteziryayo.[7369] The Trial Chamber found that, "notwithstanding the largely consistent nature of the testimony of these witnesses", their credibility was "diminished by the potential motivations and personal ties of each of the Defence witnesses with Ndayambaje and Nteziryayo."[7370] The Trial Chamber also noted that Nteziryayo and Ndayambaje "may have a motive in seeking to reduce their personal responsibility for the alleged incitement".[7371]

3222. Ndayambaje submits that the Trial Chamber erred in discrediting the Defence evidence that Nteziryayo and Ndayambaje did not use inciting proverbs during the swearing-in ceremony and that no violence against Tutsis followed it.[7372] In particular, he argues that the Trial Chamber erred in rejecting evidence from Defence witnesses who had professional or personal ties with him.[7373] Ndayambaje also argues that the Trial Chamber erred in finding that the credibility of Defence Witnesses AND-11 and AND-73, who had no connection to him, was diminished only because they knew Nteziryayo.[7374] Moreover, Ndayambaje contends that the Trial Chamber improperly rejected

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[7366] Trial Judgement, paras. 4633, 4634.
[7367] Trial Judgement, paras. 4633, 4634.
[7368] Trial Judgement, para. 4636. In particular, the Trial Chamber recalled that Witnesses Stan and KEPIR were friends of Ndayambaje and that Witnesses GABON and BOZAN had professional ties with him, noting that the evidence of these Defence witnesses with respect to Ndayambaje must be reviewed bearing these personal ties in mind. *See ibid.*, para. 4637.
[7369] Trial Judgement, para. 4638.
[7370] Trial Judgement, para. 4639.
[7371] *See* Trial Judgement, para. 4636.
[7372] Ndayambaje Appeal Brief, para. 585. *See also* Ndayambaje Notice of Appeal, para. 186; Ndayambaje Appeal Brief, paras. 588, 605, 607; AT. 21 April 2015 pp. 28, 30. Ndayambaje adds that no reasonable trier of fact would have made findings to "excuse" and "justify the incompatibilities, contradictions and inconsistencies" in the Prosecution evidence concerning the content of the speeches made at the swearing-in ceremony, while rejecting the entire contradictory Defence evidence. *See* Ndayambaje Appeal Brief, para. 607. *See also* Ndayambaje Notice of Appeal, paras. 184, 188. Ndayambaje's contentions as they relate to the Prosecution evidence, as well as specific Defence evidence contradicting it, have been previously addressed. *See supra*, Section IX.G.1. Ndayambaje adds that the Trial Chamber erred in disregarding evidence of Nsabimana concerning the swearing-in ceremony. *See* Ndayambaje Notice of Appeal, para. 187. The Appeals Chamber notes, however, that Ndayambaje did not provide any supporting references in his notice of appeal and failed to reiterate or develop this argument in his appeal brief. Accordingly, the Appeals Chamber dismisses this unsubstantiated allegation without further consideration.
[7373] Ndayambaje Appeal Brief, paras. 587, 588, 591, 597, 600. *See also* Ndayambaje Notice of Appeal, para. 186.
[7374] Ndayambaje Appeal Brief, para. 592, *referring to* Trial Judgement, para. 4639. Ndayambaje adds that in so doing the Trial Chamber applied "a banal credibility test" and abused its discretion. *See ibid.*, para. 593.

his testimony as well as that of Nteziryayo for the sole reason that they had an interest in minimising their responsibility.[7375]

3223. In addition, Ndayambaje argues that the Trial Chamber rejected the testimony of his Witness Évariste-Emmanuel Siborurema that no inciting speeches were made during the ceremony without providing a reasoned opinion.[7376] He further contends that the Trial Chamber erred in its assessment of Witness Stan's evidence concerning the content of the speeches made during the ceremony, basing its rejection of his evidence on an erroneous English interpretation of his French testimony.[7377] According to him, the Trial Chamber also misread Witness Stan's 1995 interview with a Belgian judge which, in his view, is consistent with his testimony that the expression "dusting behind the fireplace" was not used by him but was a suggestion put to him by the judge who conducted the interview.[7378]

3224. Finally, Ndayambaje submits that the Trial Chamber erred in discounting differences between Prosecution and Defence evidence concerning the presence of Muvunyi, Kalimanzira, and Nyiramasuhuko at the ceremony and erred in not rejecting contradictory Prosecution evidence.[7379] He similarly argues that the Trial Chamber erred in discrediting testimonies of Defence witnesses that the swearing-in ceremony took place in the afternoon,[7380] in contrast with Prosecution witnesses who all testified that it took place before noon.[7381] In his view, by relying on the fact that Prosecution witnesses did not have the opportunity to refute Defence evidence as to the timing of the event when discrediting Defence evidence, the Trial Chamber reversed the burden of proof or disregarded the presumption of innocence.[7382]

3225. The Prosecution responds that the Trial Chamber reasonably assessed the Defence evidence relevant to the swearing-in ceremony and was entitled to consider Ndayambaje's and Nteziryayo's incentives to deny criminal conduct.[7383] It further argues that the Trial Chamber was correct in disbelieving Witness Siborurema and that, despite the errors in the English interpretation of

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[7375] Ndayambaje Appeal Brief, para. 602. *See also* Ndayambaje Reply Brief, para. 243.
[7376] Ndayambaje Appeal Brief, para. 604, *referring* to Trial Judgement, paras. 4511-4514.
[7377] Ndayambaje Appeal Brief, para. 595, *referring* to Trial Judgement, paras. 4485, 4640.
[7378] Ndayambaje Appeal Brief, para. 596 (French), *referring to* Witness Stan, T. 23 September 2008 pp. 44-47 (French); Exhibit P204A (French original of Frère Constant Julius Goetschalckx's Statement to Judge Damien Vandermeersch, dated 24 November 1995) ("Witness Stan's Statement"). *See also* Ndayambaje Appeal Brief, para. 599.
[7379] Ndayambaje Appeal Brief, para. 585.
[7380] Ndayambaje Appeal Brief, para. 585, *referring to* Trial Judgement, paras. 4453, 4492, 4493, 4537. In particular, Ndayambaje highlights the evidence of Witnesses AND-30 and AND-31 who, according to him, did not have ties to him or interest in protecting him. *See ibid.*, para. 586, *referring to* Trial Judgement, para. 4369, Nsabimana, T. 16 September 2006 pp. 65, 66 (French), Witness AND-30, T. 21 February 2007 pp. 16, 17, 43, 44, Witness AND-31, T. 27 February 2007 pp. 50, 51.
[7381] Ndayambaje Appeal Brief, para. 586, *referring to* Trial Judgement, para. 4593.
[7382] Ndayambaje Appeal Brief, para. 583, *referring to* Trial Judgement, paras. 162, 163, 4615. *See also* Ndayambaje Notice of Appeal, para. 183.
[7383] Prosecution Response Brief, paras. 2476-2482. *See also ibid.*, para. 2474.

Witness Stan's testimony, it was also correct in not crediting his evidence.[7384] In addition, the Prosecution submits that Ndayambaje does not demonstrate any errors in the Trial Chamber's assessment of conflicting Prosecution and Defence evidence as to the timing of the ceremony.[7385]

3226. The Appeals Chamber recalls that the existence of ties between an accused and a witness is a factor which may be considered in assessing the witness's credibility,[7386] and concludes that the Trial Chamber did not err in considering these circumstances or placed improper emphasis on them when rejecting Defence evidence.[7387] The Appeals Chamber likewise considers that a reasonable trier of fact could have considered Ndayambaje's and Nteziryayo's incentive to provide exculpatory evidence in the context of all the relevant evidence.[7388] Bearing in mind that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible,[7389] the Appeals Chamber is not persuaded that no reasonable trier of fact could have noted weaknesses in the credibility of Defence witnesses as well as rejected such evidence in light of the virtually unanimous, credible Prosecution evidence that inciting speeches were made during Ndayambaje's Swearing-In Ceremony.[7390]

3227. As to Ndayambaje's contention concerning the evidence of Witness Siborurema,[7391] the Appeals Chamber observes that the Trial Chamber set forth the witness's evidence and cited to it when evaluating Defence evidence about the contents of the speeches made at the swearing-in ceremony.[7392] As nothing in the evidence referred to by the Trial Chamber reflects that the witness had personal ties with Ndayambaje or Nteziryayo,[7393] the Trial Chamber must have considered that, as part of "the Defence evidence on the whole", his evidence was also "not sufficiently credible as to raise a reasonable doubt about the nature of the utterances made by Ndayambaje and Nteziryayo at Ndayambaje's swearing-in ceremony."[7394] In light of the clear indication that Witness Siborurema's evidence was considered by the Trial Chamber and the repetitive nature of his evidence, the Appeals Chamber rejects Ndayambaje's allegation that the Trial Chamber ignored

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[7384] Prosecution Response Brief, paras. 2480, 2482, 2483.
[7385] Prosecution Response Brief, para. 2475.
[7386] *See, e.g., Kanyarukiga* Appeal Judgement, para. 121; *Karera* Appeal Judgement, para. 137; *Bikindi* Appeal Judgement, para. 117.
[7387] Ndayambaje does not dispute that such professional and personal connections existed and points to no specific error in the Trial Chamber's reflection of the evidence concerning his relationships with Defence witnesses. *See* Ndayambaje Appeal Brief, paras. 588, 591, 597, 600.
[7388] *Cf. Musema* Appeal Judgement, para. 50.
[7389] *See, e.g., Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7390] *See* Trial Judgement, paras. 4622-4632, 4636-4639.
[7391] Ndayambaje Appeal Brief, para. 482, *referring to* Évariste-Emmanuel Siborurema, T. 25 August 2008 pp. 52-60 (closed session).
[7392] *See* Trial Judgement, para. 4633.
[7393] *See* Trial Judgement, paras. 4511, 4637-4640.
[7394] *See* Trial Judgement, para. 4641.

this relevant evidence or was required to provide any further detail for its rejection given the consistent, credible Prosecution evidence that inciting remarks were made during the ceremony.

3228. With respect to the assessment of Witness Stan's evidence, the Trial Chamber noted that an earlier statement given by the witness to a Belgian judge in 1995 contained references to Ndayambaje talking about "restoring order in the house" and "the dust behind the fireplace".[7395] The Trial Chamber noted Witness Stan's explanations that he only recalled statements concerning "putting order in … Muganza *commune*" and that the Belgian judge must have added the expression concerning the dust behind the fireplace, thereby putting words in Witness Stan's mouth.[7396] The Trial Chamber considered that the discrepancies between the statement and his testimony as well as his explanations for them, which it did not find credible, cast doubt on Witness Stan's testimony as to the contents of the speeches at Ndayambaje's Swearing-In Ceremony.[7397]

3229. Contrary to Ndayambaje's submissions, the Appeals Chamber finds no material discrepancy between the French and English transcripts of Witness Stan's testimony as both reflect that he testified that he did not remember using the expression "the dust behind the fireplace" when speaking with the Belgian judge and that these words appeared in his statement because of the nature of the questioning by the Belgian judge.[7398] The same is true for the French and English versions of Witness Stan's Statement, which both reflect that the judge asked the witness whether Ndayambaje talked about dusting behind the fireplace and that the witness answered that he did not know whether Ndayambaje used this expression.[7399]

[7395] Trial Judgement, para. 4640.
[7396] *See* Trial Judgement, para. 4640. *See also ibid.*, para. 4485; Witness Stan, T. 23 September 2008 pp. 40-43.
[7397] Trial Judgement, para. 4640.
[7398] *Compare* Witness Stan, T. 23 September 2008 p. 43 ("Q. Now, Witness, in reference to 'putting the house in order', you have stated that, 'I do not know if he used that term, 'the dust behind the fireplace'.' Do you remember saying this to the investigative judge? A. I see that this sentence is written in this statement, but I do not remember having said it in these terms to the investigative judge. I know that these words were not used in the speech delivered by Mr. Élie Ndayambaje. [...] Q. So do you think that the judge was mistaken in including these words in your statement? A. I believe that the investigative judge, Vandermeersch, wanted me – was putting words in my mouth, making me say things that I had not said and which I had not declared. He was not neutral in his stance or in his position.") *with ibid.*, p. 47 (French) ("*Q. Monsieur le Témoin, s'agissant de mettre de l'ordre dans la maison, vous avez déclaré: 'Je ne sais pas s'il a utilisé pour cela le terme de «poussière derrière le poêle'. Ceci, vous souvenez-vous l'avoir dit au juge d'instruction? R. Je vois que cette phrase est écrite dans ce rapport. Je ne me souviens pas de l'avoir dit dans ces termes au juge d'instruction. Je sais que ces termes n'ont pas été utilisés dans le discours de Monsieur Ndayambaje.* [...] *Q. Donc, pensez-vous qu'il s'agit là d'une erreur du juge lorsqu'il a enregistré votre déclaration? R. Je crois que le juge d'instruction Vandermeersch a voulu me faire dire des choses que je n'avais pas voulu dire, que je n'avais pas déclaré. Ce n'était pas tout à fait neutre dans sa position.*").
[7399] *Compare* Witness Stan's Statement, p. 11 ("*Vous me demandez si à un moment donné il a parlé de nettoyer la poussière derrière le poêle. Il a entre autre dit de restituer les biens à ceux qui étaient restés derrière, soit les survivants. Il a parlé de mettre de l'ordre dans la maison. Je ne sais pas s'il a utilisé pour cela le terme de poussière derrière le po[ê]le.*") *with* Exhibit P204B (English translation of Frère Constant Julius Goetschalckx's Statement to Judge Damien Vandermeersch, dated 24 November 1995), p. 10 ("You asked me whether at one point he talked about dusting behind the pan. He, among other things, talked about returning the property of those who had remained behind, namely, the survivors. He talked about putting the house in order. I do not know whether he used the expression dusting

3230. However, the Appeals Chamber considers that the Trial Chamber erred in finding that there was a discrepancy between Witness Stan's testimony and prior statement as to whether Ndayambaje had used the expression "the dust behind the fireplace". Consistent with Witness Stan's testimony, his prior statement reflects that he was unaware of Ndayambaje using this expression. Contrary to the Trial Chamber's determination, no discrepancy exists in this regard. The Trial Chamber was nonetheless correct in finding a discrepancy between Witness Stan's Statement referring to Ndayambaje talking about "restoring order in the house" and his testimony that he had not said this during this interview and only recalled Ndayambaje talking about "putting order in ... Muganza *commune*".[7400] The Appeals Chamber considers that Ndayambaje does not demonstrate that no reasonable trier of fact could have found that this discrepancy, and Witness Stan's explanation for it, cast doubt on the witness's subsequent testimony about the contents of the speeches at the swearing-in ceremony.[7401] In these circumstances, the Appeals Chamber finds that the Trial Chamber's error in relying on a discrepancy within Witness Stan's evidence that did not exist has not occasioned a miscarriage of justice.

3231. Turning to Ndayambaje's challenge to the Trial Chamber's assessment of contradictory evidence as to the presence of various officials, the Appeals Chamber observes that the Trial Chamber expressly considered that Defence evidence diverged from some Prosecution evidence as to the presence of Muvunyi, Kalimanzira, and Nyiramasuhuko during the ceremony.[7402] The Trial Chamber determined it unnecessary to make findings as to the presence of Muvunyi and Kalimanzira and found that any discrepancy as to their presence was not significant.[7403] Ndayambaje fails to demonstrate why no reasonable trier of fact could have assessed the evidence in this manner.

3232. The Appeals Chamber further notes that the Trial Chamber considered that Witness RV may have been mistaken as to Nyiramasuhuko's presence during the swearing-in ceremony, noting that Ndayambaje, Nteziryayo, and other Defence witnesses contradicted this aspect of his evidence.[7404] However, the Trial Chamber observed that Witness RV's evidence was consistent with Defence evidence as to the presence of certain other dignitaries, and highlighted that all Defence witnesses testified to the presence of another female minister, who Witness RV did not identify.[7405] In this context, the Trial Chamber rejected Witness RV's evidence as to Nyiramasuhuko's presence but

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behind the pan."). The Appeals Chamber observes that the English translation of Witness Stan's Statement erroneously refers to dusting behind the "pan" rather than "fireplace". *See also* Witness Stan, T. 23 September 2008 pp. 41-43.
[7400] *See* Trial Judgement, para. 4640, *referring to* Witness Stan, T. 23 September 2008 pp. 42, 43.
[7401] Trial Judgement, para. 4640.
[7402] *See* Trial Judgement, paras. 4610-4612.
[7403] Trial Judgement, para. 4611.
[7404] Trial Judgement, para. 4612.
[7405] Trial Judgement, para. 4612.

found that this did "not weaken the credibility of [his] testimony with respect to more significant aspects of the swearing-in ceremony."[7406] Once again, Ndayambaje simply highlights his disagreement with this finding, ignoring that it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.[7407]

3233. Regarding Ndayambaje's challenges to the Trial Chamber's assessment of Prosecution and Defence evidence about the timing of the swearing-in ceremony, the Appeals Chamber observes that the Trial Chamber acknowledged that "in contrast to all the Prosecution evidence, the Defence witnesses testified that the swearing-in ceremony took place in the afternoon of 22 June 1994, because Nteziryayo was occupied with the swearing-in ceremony for the new *bourgmestre* of Ndora *commune*" and that Witness RV also corroborated the latter aspect of the Defence evidence.[7408] The Trial Chamber, noting that the Prosecution witnesses testified between 2001 and 2004, while Defence witnesses testified between 2007 and 2008, observed that it was never put to the Prosecution witnesses that they may be mistaken as to the timing of the swearing-in ceremony and that they never had the opportunity to refute the testimony of the Defence witnesses that it occurred in the afternoon.[7409] The Trial Chamber concluded, however, that it did not consider this discrepancy to be important given that the Prosecution and the Defence witnesses were consistent on the significant features of the meeting, including that it was the swearing-in ceremony of Ndayambaje, that it took place on or around 22 June 1994, and that it was held in the woods near the Muganza commune office as well as that Ndayambaje and Nteziryayo spoke at the meeting.[7410] The Trial Chamber determined that the witnesses testified to the same event, namely Ndayambaje's Swearing-In Ceremony on 22 June 1994.[7411] The Appeals Chamber considers that Ndayambaje, who largely repeats the arguments he advanced at trial,[7412] fails to demonstrate any error in the Trial Chamber's analysis as to the differences in the timing of the event and its determination that it was insignificant in light of the totality of the evidence.

3234. Likewise, the Appeals Chamber is not persuaded that, by noting that Prosecution witnesses did not have the opportunity to respond to Defence evidence as to the timing of the swearing-in ceremony, the Trial Chamber reversed the burden of proof or disregarded the presumption of innocence. The Appeals Chamber notes that the Prosecution evidence reflects estimates as to the

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[7406] Trial Judgement, para. 4612.
[7407] *See, e.g., Nizeyimana* Appeal Judgement, para. 108; *Bagosora and Nsengiyumva* Appeal Judgement, para. 243; *Ntawukulilyayo* Appeal Judgement, para. 155; *Munyakazi* Appeal Judgement, para. 103.
[7408] Trial Judgement, para. 4614 (internal reference omitted).
[7409] Trial Judgement, para. 4615.
[7410] Trial Judgement, para. 4616.
[7411] Trial Judgement, para. 4617. Since Defence evidence regarding the timing of the swearing-in ceremony was not rejected due to ties between Defence witnesses and Ndayambaje, the Appeals Chamber dismisses Ndayambaje's contention regarding Witnesses AND-30 and AND-31 without further consideration.
[7412] *See* Ndayambaje Closing Brief, paras. 639-648.

timing of the ceremony.[7413] The Appeals Chamber considers that the fact that the Trial Chamber observed that the Prosecution witnesses were not challenged as to the timing implies that the differences between Prosecution and Defence evidence on this point might have reasonably resulted from a failure to question the Prosecution witnesses on the issue. The Appeals Chamber finds no error in the Trial Chamber's determination that the variance in timing was insignificant and its reliance instead on the similar features of the meeting to determine that all witnesses were referring to the one that included Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune.

3235. Based on the foregoing, the Appeals Chamber rejects Ndayambaje's challenges to the Trial Chamber's assessment of the Defence evidence relating to his swearing-in ceremony.

3. Imprecise and Unsupported Findings

3236. Ndayambaje argues that the Trial Chamber failed to determine beyond reasonable doubt who between him and Nteziryayo made inciting speeches during his swearing-in ceremony.[7414] In particular, he contends that the Prosecution evidence does not specify which speaker encouraged the crowd to "sweep out the dirt."[7415] He further argues that the Trial Chamber erred in finding that he possessed the requisite genocidal intent to "commit the crime of genocide."[7416]

3237. The Prosecution responds that it was not unreasonable for the Trial Chamber not to attribute specific utterances to Ndayambaje and Nteziryayo, if it was satisfied that the requisite elements of the offence were met.[7417] It further submits that Ndayambaje's unsubstantiated claim regarding the lack of genocidal intent should be summarily dismissed.[7418]

3238. The Appeals Chamber observes that, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber made the following findings:

> Accordingly, the Chamber finds it established beyond a reasonable doubt that on the occasion of Ndayambaje's swearing in ceremony on 22 June 1994, an event attended by the general population, *Nteziryayo and Ndayambaje* told the population to continue with their "work" and urged them to "sweep the dirt outside". [...][7419]
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> [...]
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> [...] the Prosecution has established beyond a reasonable doubt that at Ndayambaje's swearing-in as the *bourgmestre* of Muganza *commune* on 22 June 1994, an event attended by the general population, *Ndayambaje and Nteziryayo* urged the population to "sweep the dirt" and instructed that those hiding Tutsis who refused to hand them over should be killed. Further, the Chamber

[7413] *See* Trial Judgement, para. 4593, fn. 12217.
[7414] Ndayambaje Appeal Brief, para. 608, *referring to* Trial Judgement, para. 4645. *See also* Ndayambaje Notice of Appeal, paras. 182, 192; AT. 21 April 2015 p. 29.
[7415] Ndayambaje Appeal Brief, para. 608. *See also* Ndayambaje Reply Brief, para. 245; AT. 21 April 2015 p. 29.
[7416] Ndayambaje Appeal Brief, para. 606.
[7417] Prosecution Response Brief, para. 2485; AT. 21 April 2015 pp. 56, 57.
[7418] Prosecution Response Brief, para. 2480.
[7419] Trial Judgement, para. 4642 (emphasis added).

> finds it established beyond a reasonable doubt that after Ndayambaje's swearing-in ceremony searches for Tutsis took place and killings followed. [...][7420]

The Appeals Chamber further notes that, prior to reaching this conclusion, the Trial Chamber extensively considered the consistency of Prosecution evidence as to the content of the speeches given at the swearing-in ceremony and whether Ndayambaje, Nteziryayo, or both made inciting statements.[7421] In particular, the Trial Chamber observed that Witnesses FAG and FAL testified that Ndayambaje and Nteziryayo used metaphors concerning the need to clean the house of dirt and place it outside,[7422] and that Witness FAU gave corroborative evidence to this effect.[7423] It also noted contrasting evidence from Witnesses TO and TP that only Nteziryayo used the metaphor concerning sweeping dirt,[7424] while Witnesses RV and QAF testified that only Ndayambaje used this metaphor and that Witness QAL provided hearsay corroboration of the evidence of Witnesses RV and QAF.[7425]

3239. In addition, the Trial Chamber recounted that, according to Witnesses FAG, FAL, and TO, Ndayambaje explained the metaphor to mean that surviving Tutsis needed to be killed,[7426] that Witness TP had a similar understanding of the metaphor (as uttered by Nteziryayo),[7427] and that Witnesses RV and QAF understood the speech of Ndayambaje in the same way.[7428] The Trial Chamber also considered evidence concerning Nteziryayo and Ndayambaje thanking the population for their "work" or urging them to continue their "work", which meant "to kill".[7429]

3240. The Appeals Chamber also observes that when finding Ndayambaje guilty of direct and public incitement to commit genocide, the only crime for which he was convicted on the basis of his remarks at the ceremony,[7430] the Trial Chamber recalled that "*Nteziryayo and Ndayambaje* told the population to continue with their 'work' and urged them to 'sweep the dirt outside'".[7431] It also

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[7420] Trial Judgement, para. 4645 (emphasis added).
[7421] Trial Judgement, paras. 4622-4628.
[7422] *See* Trial Judgement, para. 4622. *See also ibid.*, paras. 4327, 4328, 4345.
[7423] *See* Trial Judgement, para. 4622. *See also ibid.*, paras. 4398, 4400, 4401.
[7424] *See* Trial Judgement, para. 4623. *See also ibid.*, paras. 4378, 4391.
[7425] *See* Trial Judgement, para. 4623. *See also ibid.*, paras. 4363, 4372, 4426.
[7426] *See* Trial Judgement, para. 4627. *See also ibid.*, paras. 4327, 4328, 4345, 4378, 4382.
[7427] *See* Trial Judgement, para. 4627. *See also ibid.*, paras. 4391, 4393.
[7428] *See* Trial Judgement, para. 4628. *See also ibid.*, paras. 4363, 4372.
[7429] *See* Trial Judgement, para. 4626.
[7430] The Appeals Chamber notes that Ndayambaje argues that the Trial Chamber erred in finding that his remarks at his swearing-in ceremony had a substantial effect on killings that ensued. *See* Ndayambaje Appeal Brief, paras. 655, 656. The Prosecution responds that there was a sufficient connection between Ndayambaje's conduct at the ceremony and the ensuing killings. *See* Prosecution Response Brief, para. 2515. While the Trial Chamber noted that killings occurred after the swearing-in ceremony, the Appeals Chamber observes that whether his words had a substantial effect on the ensuing killings is not an element of the inchoate crime of direct and public incitement to commit genocide of which he is convicted. *See, e.g.*, Trial Judgement, paras. 4645, 6026, 6027. As noted above, Ndayambaje was ultimately not convicted for instigating the killings of the Tutsi women and girls abducted from Mugombwa Sector after the ceremony. *See supra*, fn. 6415. Accordingly, the Appeals Chamber dismisses this contention without further consideration.
[7431] Trial Judgement, para. 6026 (emphasis added).

recalled that "the audience understood the words *of both Accused*, namely 'to work' and 'sweeping dirt', to mean they needed to kill Tutsis."[7432]

3241. Considering the conclusions in the factual and legal findings sections of the Trial Judgement as well as the relevant evidence, it is apparent that the Trial Chamber accepted evidence reflecting that both Ndayambaje and Nteziryayo made inciting speeches by employing the metaphor concerning sweeping the "dirt" and using the term "work" during the ceremony. The Appeals Chamber recalls that trial chambers enjoy broad discretion in choosing which witness testimony to prefer[7433] and that two *prima facie* credible testimonies need not be identical in all aspects or describe the same fact in the same way in order to be corroborative.[7434] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in accepting evidence demonstrating that Ndayambaje and Nteziryayo made inciting speeches that included remarks to sweep the "dirt" and to "work".

3242. As to Ndayambaje's argument that the Trial Chamber erred in finding that he possessed the requisite intent to "commit genocide", the Appeals Chamber observes that the Trial Chamber concluded that, "[i]n light of the substance of these statements, the context in which they were made, and the evidence as a whole, the [Trial] Chamber has no doubt that [...] Ndayambaje possessed genocidal intent when [he] addressed the population."[7435] Ndayambaje only advances his contention by repeating references to arguments that have already been considered and rejected above.[7436]

3243. Consequently, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in making imprecise and unsupported findings concerning who made inciting speeches during his swearing-in ceremony.

4. Conclusion

3244. For the foregoing reasons, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in finding him responsible for committing direct and public incitement to commit genocide through his utterances at his swearing-in ceremony on 22 June 1994 and, accordingly, dismisses Ground 19 of Ndayambaje's appeal.

[7432] Trial Judgement, para. 6027 (emphasis added). *See also ibid.*, para. 6029.
[7433] *Nizeyimana* Appeal Judgement, para. 254; *Muvunyi* Appeal Judgement of 1 April 2011, para. 44. *See also Muhimana* Appeal Judgement, para. 58.
[7434] *See Nzabonimana* Appeal Judgement, para. 184; *Ntabakuze* Appeal Judgement, para. 150. *See also Ntawukulilyayo* Appeal Judgement, para. 24; *Munyakazi* Appeal Judgement, para. 103.
[7435] Trial Judgement, para. 6028. *See also ibid.*, para. 5956.
[7436] *See* Ndayambaje Appeal Brief, para. 606; *supra*, Section IX.G.2.

H. Abduction of Tutsi Women and Girls in Mugombwa (Ground 20)

3245. Based primarily on the evidence of Prosecution Witness QAR, as corroborated by Prosecution Witnesses FAU and QAF, the Trial Chamber found that, after Ndayambaje's Swearing-In Ceremony on 22 June 1994, a group of Tutsi women and girls from Mugombwa Sector, Muganza Commune, including one named Nambaje, were abducted by assailants from Saga.[7437] It determined that the assailants came to search for the girls because they had attended the ceremony "where they were told to search for and throw out dirt".[7438] The Trial Chamber further found that, during the abduction, Ndayambaje came to the Virgin Mary Statue in Mugombwa Sector and made it clear to the abductors that they "were free to do what they wanted with the girls".[7439] The Trial Chamber found that the abducted women and girls were subsequently taken to a brick factory at Gasenyi, a valley between Mugombwa and Kibayi, where they were killed.[7440]

3246. The Trial Chamber found that there was a causal connection between Ndayambaje's words at his swearing-in ceremony and the abduction and killing of the Tutsi women and girls, including one named Nambaje, and that, by prompting the assailants to perpetrate these crimes, Ndayambaje instigated genocide.[7441] The Trial Chamber also held that, by his words at the Virgin Mary Statue during the abduction, Ndayambaje instigated the killing of the abducted women and girls, including Nambaje.[7442] The Trial Judgement reflects that the Trial Chamber ultimately convicted Ndayambaje of genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls, including Nambaje, based on his words at the Virgin Mary Statue after the swearing-in ceremony.[7443]

[7437] Trial Judgement, paras. 4708, 4717, 5949.
[7438] Trial Judgement, para. 5953. *See also ibid.*, para. 4717.
[7439] Trial Judgement, paras. 4746, 5949, 6030.
[7440] Trial Judgement, paras. 4723, 4746, 5949.
[7441] Trial Judgement, paras. 5953-5956.
[7442] Trial Judgement, paras. 5957-5959, 6031.
[7443] Trial Judgement, paras. 5959, 5976 ("Ndayambaje also instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 5977, 6064 ("The Chamber has found Ndayambaje guilty of genocide for [...] instigating the killing of Tutsis *after* his swearing-in ceremony".), 6066, 6107 ("Ndayambaje [...] instigated the killing of Tutsis *after* his swearing-in ceremony."), 6108, 6125, 6175 ("Ndayambaje [...] instigated the killing of Tutsis *after* his swearing-in ceremony on 22 June 1994."), 6176, 6186 (emphasis added). The Trial Chamber determined that, because Ndayambaje's words at the Virgin Mary Statue were only addressed to the abductors and not to the general public, Ndayambaje could not be held responsible for direct and public incitement to commit genocide in relation to this event. *See ibid.*, paras. 6030, 6032, 6033. As discussed above, the Trial Chamber nonetheless convicted Ndayambaje of committing direct and public incitement to commit genocide on the basis of his words at his swearing-in ceremony. *See ibid.*, paras. 6026-6029; *supra*, Section IX.G. In these circumstances, Ndayambaje's arguments under Ground 20 of his appeal related to the link between the swearing-in ceremony and the abduction have been addressed only to the extent that they related to Ndayambaje's ultimate conviction for instigating killings through his words at the Virgin Mary Statue.

3247. Ndayambaje submits that the Trial Chamber erred in fact and in law in its findings relating to the abduction of Tutsi women and girls from Mugombwa Sector.[7444] In particular, Ndayambaje contends that the Trial Chamber erred in: (i) its assessment of the Prosecution evidence; (ii) its assessment of the Defence evidence; and (iii) finding that all elements of the crimes of genocide and extermination as a crime against humanity were met in relation to this event. The Appeals Chamber will address these contentions in turn.

1. Assessment of Prosecution Evidence

3248. Ndayambaje submits that the Trial Chamber erred in: (i) finding that Witnesses FAU and QAF corroborated Witness QAR's account of the abduction and killings that followed his alleged utterances at the Virgin Mary Statue; and (ii) its assessment of the credibility of Witnesses QAR and FAU.[7445]

(a) Absence of Corroboration

3249. The Trial Chamber determined that Witness QAR's account of the abduction of Tutsi women and girls in Mugombwa Sector was credible and compelling and, on this basis, found that the Prosecution had proven beyond reasonable doubt that Ndayambaje came to the Virgin Mary Statue during the abduction, that he made it clear that the abductors were free to do what they wanted with the girls, and that the abducted women and girls were subsequently killed at Gasenyi.[7446]

3250. The Trial Chamber found that Witness QAR's account of the abduction of Tutsi women and girls in Mugombwa by assailants from Saga was corroborated by Witnesses FAU and QAF regarding the timing and reason for the abduction.[7447] Specifically, the Trial Chamber found that Witness QAF gave a credible testimony that the abduction took place on the day after Ndayambaje's Swearing-In Ceremony, which corroborated Witness QAR's testimony that the abduction occurred in June 1994.[7448] Based on Witness FAU's evidence that the assailants who came to his house to abduct Nambaje told him that they had attended a meeting the purpose of which was to swear in Ndayambaje, it considered "Witness FAU's hearsay testimony to corroborate

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[7444] The Appeals Chamber notes that Ndayambaje's contention under Ground 20 of his appeal that the abduction of the Tutsi women and girls was not pleaded in the Indictment has been considered and rejected above in Section IX.A.4. *See* Ndayambaje Appeal Brief, para. 674.
[7445] Ndayambaje Notice of Appeal, paras. 194, 196, 198, 199, 201; Ndayambaje Appeal Brief, paras. 202, 209-215, 218, 619-623, 625, 630, 647-654, 668, 669, 672. *See also* Ndayambaje Reply Brief, para. 249; AT. 21 April 2015 pp. 30, 31.
[7446] Trial Judgement, para. 4746.
[7447] Trial Judgement, paras. 4715, 4717.
[7448] Trial Judgement, para. 4712.

Witnesses QAR and QAF with regard to the date of the abduction."[7449] The Trial Chamber concluded that, "[n]otwithstanding the evidence brought by the Ndayambaje Defence, and the specific date provided by Witness QAR, [...] the detailed evidence proffered by Prosecution Witnesses QAF and FAU affirms that the abduction took place after Ndayambaje's swearing-in ceremony on 22 June 1994."[7450] It further found that Witness QAR's account was corroborated by Witnesses QAF and FAU on the fact that some of the abducted were adolescent girls and that the abducted women and girls were taken from homes, and by Witness QAF regarding the identity of the attackers.[7451]

3251. Ndayambaje contends that the Trial Chamber erred in fact and in law in finding that Witness QAR's evidence was corroborated by that of Witnesses FAU and QAF, whose contradictory testimonies related to different events and did not mention the presence of Ndayambaje.[7452] In particular, Ndayambaje argues that "[i]f Witness QAR was referring to a meeting other than the swearing-in ceremony, the abduction she was a victim of would no longer be the consequence of the swearing-in ceremony" and her evidence "would no longer" corroborate that of Witnesses FAU and QAF as to the date of the abduction.[7453]

3252. Ndayambaje further submits that the Trial Chamber "erroneously fused together in its findings two distinct factual events, namely the abduction of the Mugombwa Tutsi girls and women and the abduction and murder of a certain Nambaje from Baziro *secteur*."[7454] He points out that Witness QAF testified that the abduction of the group of Mugombwa women and girls by attackers from Saga on the morning following the swearing-in ceremony took place at the Virgin Mary Statue, whereas Witness FAU testified that the abduction of Nambaje took place in Baziro Sector on the day of the ceremony and was conducted by attackers from Baziro and did not refer to the presence of Ndayambaje.[7455] In his view, the Trial Chamber erred in "mixing up" these two events, which occurred neither on the same date or place, nor concerned the same actors.[7456]

3253. The Prosecution responds that Ndayambaje fails to demonstrate that the Trial Chamber erred in finding that Witness QAF directly corroborated Witness QAR's testimony that the women and girls were killed and that Witness FAU provided corroboration that the killings occurred after

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[7449] Trial Judgement, para. 4715.
[7450] Trial Judgement, para. 4717.
[7451] Trial Judgement, paras. 4723, 4724, 4726, 4727, 4730, fn. 12535.
[7452] Ndayambaje Appeal Brief, paras. 619-621. *See also* AT. 21 April 2015 pp. 30, 31.
[7453] Ndayambaje Appeal Brief, para. 619, *referring to* Trial Judgement, paras. 4712, 4715, 4717.
[7454] Ndayambaje Notice of Appeal, para. 195. *See also ibid.*, paras. 202, 207; Ndayambaje Appeal Brief, paras. 647, 670.
[7455] Ndayambaje Appeal Brief, paras. 620, 647.
[7456] Ndayambaje Appeal Brief, para. 670. *See also ibid.*, paras. 647, 663, 665; AT. 21 April 2015 p. 30.

the swearing-in ceremony.[7457] The Prosecution submits that the killing of Nambaje and the killing of the Mugombwa women and girls were not unrelated incidents but were part of the same "pattern of killings" as both were consequences of the speeches given at the ceremony.[7458] As such, it argues, the testimonies of Witnesses QAF and FAU were not contradictory but both supported the Trial Chamber's finding that Tutsis were searched for and killed following the ceremony.[7459]

3254. Ndayambaje replies that Witnesses QAF and FAU cannot be said to have provided corroborative evidence as they contradicted each other on material aspects, which clearly indicates that their accounts concerned different events.[7460]

3255. The Appeals Chamber observes that, contrary to what Ndayambaje's speculative argument about the meeting that Witness QAR attended suggests, the Trial Chamber did not find that the meeting in Muganza Commune about which Witness QAR testified was Ndayambaje's Swearing-In Ceremony.[7461] It did not conclude that the abduction of the Mugombwa Tutsi women and girls followed the ceremony based on Witness QAR's testimony, but based on Witnesses FAU's and QAF's testimonies.[7462] Ndayambaje does not substantiate his claim that Witness QAF's evidence was contradictory or related to a different event and does not develop any argument to show that the Trial Chamber's reliance on this part of Witness QAF's evidence was erroneous in any other respect.[7463] Ndayambaje's allegation of error pertaining to the Trial Chamber's reliance on Witness QAF's evidence as relevant to the timing of the abduction and corroborative of Witness QAR's evidence regarding the incident is therefore without merit.

3256. As to Ndayambaje's arguments regarding the Trial Chamber's reliance on Witness FAU's testimony as corroborative of Witness QAR's evidence on the abduction, the Appeals Chamber observes that, after reaching its finding on Ndayambaje's involvement in the abduction of the women and girls subsequently killed at Gasenyi, the Trial Chamber specifically referred to

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[7457] Prosecution Response Brief, para. 2493. *See also ibid.*, para. 2491; AT. 21 April 2015 p. 58.
[7458] Prosecution Response Brief, paras. 2492, 2512.
[7459] Prosecution Response Brief, paras. 2492, 2512. During the appeals hearing, the Prosecution argued that, while the killers of Nambaje were at the swearing-in ceremony, it was "not know[n] whether [the killers of the victims at the Virgin Mary Statue] were there." *See* AT. 21 April 2015 p. 60.
[7460] Ndayambaje Reply Brief, para. 250. Ndayambaje also argues that it does not make sense for the Prosecution to concede that Witnesses QAR and FAU testified about two distinct incidents while, at the same time, argue that they are linked in the absence of any evidence to this effect. *See ibid.*, paras. 247, 267-270.
[7461] Trial Judgement, para. 4710 ("Furthermore, the Chamber observes that Witness QAR may well have been mistaken while placing the purported meeting in mid-June 1994 due to the various meetings she attended at the Muganza *commune* office before, during and after the war. Furthermore, the Chamber recalls its previous finding that Witness QAR did not attend Ndayambaje's swearing-in ceremony, given that she was a Tutsi".) (internal reference omitted).
[7462] Trial Judgement, paras. 4712, 4713, 4715, 4717.
[7463] *See* Ndayambaje Appeal Brief, para. 621. The Appeals Chamber recalls that it has addressed and dismissed Ndayambaje's submissions related to Witness QAF's evidence relating to Ndayambaje's Swearing-In Ceremony in Section IX.G.1(d) above.

Witness FAU's evidence of the abduction and killing of a woman named Nambaje and the young girl she was looking after by three assailants who said that they had just attended a meeting for the swearing-in of Ndayambaje.[7464] The Trial Chamber noted that Witness FAU testified that Nambaje and the young girl were killed after their abduction in the home of a man named Kinyagiro.[7465]

3257. When discussing the timing and reason for the abduction of the group of Tutsi women and girls from Mugombwa by assailants from Saga in the "Factual Findings" section of the Trial Judgement,[7466] the Trial Chamber stated that "Witness FAU testified that the *abductions* took place in late May or early June 1994, and gave hearsay evidence that this followed a meeting at the Muganza *commune* office",[7467] the purpose of which was to swear-in Ndayambaje, and considered "Witness FAU's hearsay testimony to corroborate that of Witnesses QAR and QAF with regard to the date of the *abduction*."[7468] The Trial Chamber further concluded that:

> the detailed evidence proffered by Prosecution Witnesses QAF and FAU affirms that the *abduction* took place after Ndayambaje's swearing-in ceremony of 22 June 1994. On the basis of Witness FAU's hearsay evidence that the assailants came to search for the girls because they were told to search for and throw out dirt, the Chamber also accepts that searches were carried out with a view to locating Tutsis.[7469]

When discussing "Ndayambaje's Alleged Presence During the *Abductions*",[7470] the Trial Chamber referred to Witness FAU as one of the witnesses who "testified to having witnessed various stages of the *abduction*"[7471] and stated that "Witness FAU's testimony that Nambaje was taken from a house by the attackers" corroborated Witness QAR's testimony that the women and girls were taken from their homes.[7472]

3258. In the "Legal Findings" section of the Trial Judgement, the Trial Chamber found that:

> a group of Tutsi women and girls from Mugombwa *secteur*, Muganza *commune*, were abducted by assailants from Saga after Ndayambaje's swearing-in ceremony of 22 June 1994 *including one Nambaje who was abducted from a home*. During the *abduction*, Ndayambaje came to the Statue of the Virgin Mary and made it clear that the abductors were free to do what they wanted with the girls, and the abducted women and girls were subsequently taken to a brick factory at Gasenyi where they were killed [...].[7473]

[7464] Trial Judgement, paras. 4713, 4715, 4717, 4730.
[7465] Trial Judgement, para. 4730.
[7466] *See* Trial Judgement, para. 4708, Section 3.6.44.4.1.
[7467] Trial Judgement, para. 4713 (emphasis added).
[7468] Trial Judgement, para. 4715 (emphasis added).
[7469] Trial Judgement, para. 4717 (emphasis added).
[7470] *See* Trial Judgement, heading Section 3.6.44.4.2 at p. 1139 (emphasis added).
[7471] Trial Judgement, para. 4720 (emphasis added).
[7472] Trial Judgement, para. 4727, fn. 12553, *referring to* Witness FAU, T. 9 March 2004 p. 22 (closed session). *See also ibid.*, para. 4723 ("Witness QAR's eyewitness testimony of the abduction is corroborated by both Prosecution and Defence witnesses with respect to [...] [the fact that the girls] were abducted from houses in *Mugombwa*") (emphasis added), fn. 12535, *referring to* Witness FAU, T. 8 March 2004 p. 89 (closed session), T. 9 March 2004 p. 22 (closed session).
[7473] Trial Judgement, para. 5949 (emphasis added). *See also ibid.*, para. 5953.

When further discussing Ndayambaje's responsibility in relation to his utterances at the Virgin Mary Statue specifically, the Trial Chamber declared it proven that "Ndayambaje committed the *actus reus* of instigating the killing of the abducted Tutsi girls *and one Nambaje*"[7474] and that he "knew he was assisting in the deaths of the abducted girls *and Nambaje.*"[7475]

3259. In the view of the Appeals Chamber, the Trial Chamber's findings show that it ultimately considered that Nambaje, about whom Witness FAU testified, was part of the group of Tutsi women and girls abducted from Mugombwa Sector by assailants from Saga and killed at Gasenyi following Ndayambaje's utterances at the Virgin Mary Statue.

3260. However, as Ndayambaje points out and as the Trial Chamber correctly noted in other parts of the Trial Judgement,[7476] Witness FAU testified that Nambaje was abducted from his home which was located in Baziro Sector, that the assailants were Casien Ngona, Nyambindi and Rutabana from Baziro Sector, and that Nambaje was taken to the home of a Tutsi named Kinyagiro where she was killed.[7477] The abduction Witness FAU testified about did not concern women from Mugombwa Sector, was not led by assailants from Saga, did not involve a stop at the Virgin Mary Statue or Ndayambaje, and did not end with killings in a brick factory at Gasenyi.

3261. As acknowledged by the Prosecution,[7478] it is apparent that Witnesses QAR and FAU testified about two different incidents of abductions involving different perpetrators and victims. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in considering that Nambaje was part of the group of victims abducted from Mugombwa Sector and killed at Gasenyi following Ndayambaje's words at the Virgin Mary Statue and, consequently, in convicting Ndayambaje for instigating her killing through his words at the Virgin Mary Statue.[7479]

3262. As to the question whether Witness FAU could nonetheless be relied upon as corroborating aspects of Witness QAR's evidence, the Appeals Chamber recalls that the Trial Chamber relied upon his evidence as corroborative of Witness QAR's regarding: (i) the timing of the abduction of the group of Tutsi women and girls, namely in June 1994;[7480] (ii) the fact that the women and girls were taken from their homes;[7481] and (iii) the fact that the group of abductees included adolescent

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[7474] Trial Judgement, para. 5957 (emphasis added).
[7475] Trial Judgement, para. 5958 (emphasis added).
[7476] Trial Judgement, paras. 4668, 4730; Ndayambaje Appeal Brief, paras. 620, 647, 649.
[7477] *See* Witness FAU, T. 9 March 2004 pp. 21, 22 (closed session).
[7478] Prosecution Response Brief, para. 2512. *See also ibid.*, para. 2493; AT. 21 April 2015 p. 60.
[7479] The Appeals Chamber recalls that the Trial Judgement reflects that Ndayambaje was ultimately not convicted in relation to the abductions discussed in this section on the basis of his utterances at his swearing-in ceremony. *See supra*, fns. 6351, 6415, 7443.
[7480] *See* Trial Judgement, paras. 4711, 4713, 4717.
[7481] Trial Judgement, para. 4727.

girls.[7482] Because Witness FAU testified to a different event, the Appeals Chamber finds that the Trial Chamber erred in relying on his evidence as corroborating these aspects of the different abduction about which Witness QAR testified.

3263. However, because the Trial Judgement does not reflect that Witness FAU's evidence was material to the Trial Chamber's finding that Witness QAR's account of the abduction of Tutsi women and girls – which was in part corroborated by Witness QAF – was credible and proved beyond reasonable doubt Ndayambaje's involvement in the abduction,[7483] the Appeals Chamber finds that the Trial Chamber's erroneous reliance on Witness FAU's evidence as corroborative of Witness QAR's evidence does not invalidate the Trial Chamber's finding in this respect and has not occasioned a miscarriage of justice.

(b) Credibility of Prosecution Witnesses

3264. Ndayambaje submits that the Trial Chamber erred in its assessment of the credibility of Witnesses QAR and FAU.[7484] However, because the Appeals Chamber has concluded above that the Trial Chamber erred in finding Ndayambaje responsible for the abduction recounted by Witness FAU and in relying on his testimony as corroborating Witness QAR's evidence, it finds it unnecessary to address Ndayambaje's submissions concerning Witness FAU's credibility. Consequently, the Appeals Chamber will only examine Ndayambaje's arguments related to the Trial Chamber's assessment of Witness QAR's evidence.

3265. Ndayambaje submits that the Trial Chamber erred in relying on Witness QAR's testimony pertaining to the abduction of Tutsi women and girls from Mugombwa.[7485] Ndayambaje argues that Witness QAR could not be found credible given that her testimony that she did not attend his swearing-in ceremony was not found plausible and that her testimony is implausible in many other respects.[7486] He also avers that it was unreasonable on the part of the Trial Chamber to explain that Witness QAR's specific reference to 18 June 1994 as the date of her abduction may have been the result of a distorted view of the timing due to the passage of time.[7487] Ndayambaje emphasises in

[7482] Trial Judgement, para. 4726.
[7483] Trial Judgement, para. 4746.
[7484] Ndayambaje Notice of Appeal, paras. 194, 196, 198, 199, 201; Ndayambaje Appeal Brief, paras. 202, 209-215, 218, 619-623, 625-630, 647-654, 668, 669, 672. *See also* Ndayambaje Reply Brief, para. 249; AT. 21 April 2015 pp. 30, 31. Ndayambaje submits that the Trial Chamber erred in finding Witness FAU credible and in relying on his contradictory evidence in relation to the date of the abduction and murder of Nambaje. *See* Ndayambaje Notice of Appeal, para. 196; Ndayambaje Appeal Brief, paras. 202, 621, 628, 629, 650, 651, 672, *referring*, *inter alia*, *to* Trial Judgement, paras. 4620, 4715.
[7485] Ndayambaje Notice of Appeal, paras. 194, 198, 199, 201; Ndayambaje Appeal Brief, paras. 615-630, 668, 669. *See also* Ndayambaje Reply Brief, para. 255.
[7486] Ndayambaje Appeal Brief, paras. 214, 616, *referring to* Trial Judgement, paras. 4602, 4603.
[7487] Ndayambaje Appeal Brief, para. 618.

this respect that the Trial Chamber had considered that an ambiguity in a witness's testimony as to the date of another event undermined the witness's credibility.[7488]

3266. Ndayambaje further contends that the Trial Chamber erred in accepting Witness QAR's testimony despite the numerous and material inconsistencies and contradictions within her evidence.[7489] He points in particular to the fact that Witness QAR: (i) said in her 1995 statement that she was an eyewitness to the massacre of four abducted young girls, while she testified at trial that she was part of the group of abducted women and that this group was composed of eight victims; (ii) contradicted her 1995 statement by testifying that the abducted women were not killed at the Virgin Mary Statue but transported to Gasenyi where they were killed; (iii) was inconsistent during her testimony regarding whether she was also one of the victims and transported to Gasenyi; (iv) stated that the assailants were led by the *conseiller* of Saga in her 1994 statement, while she testified at trial that they were led by one man named Masima; and (v) failed to mention the swearing-in ceremony and the abduction in her statement of May 1997.[7490] Ndayambaje argues that Witness QAR's explanation that the investigators recorded her statement poorly is not credible given the nature and materiality of the contradictions and omissions.[7491] In Ndayambaje's view, the Trial Chamber erred in ignoring or considering as insignificant the inconsistencies and contradictions within Witness QAR's evidence and failed to provide a reasoned opinion for accepting Witness QAR's contradicted and doubtful testimony about the abduction.[7492]

3267. The Appeals Chamber also understands Ndayambaje to submit that the Trial Chamber erred in accepting Witness QAR's account on his presence and words spoken at the Virgin Mary Statue during the abduction because it was uncorroborated.[7493]

3268. The Prosecution responds that Ndayambaje fails to demonstrate that the Trial Chamber erred in relying on Witness QAR's consistent evidence.[7494] It argues that a trial chamber can reject parts of a witness's evidence and accept others, that it was reasonable for the Trial Chamber to find that the abduction Witness QAR recounted must have occurred after the swearing-in ceremony in

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[7488] Ndayambaje Appeal Brief, para. 618, *referring to* Trial Judgement, para. 3668.
[7489] Ndayambaje Appeal Brief, paras. 622-630, *referring to* Witness QAR's 1995 Statement, Witness QAR's May 1997 Statement, Witness QAR's October 1997 Statement.
[7490] Ndayambaje Appeal Brief, paras. 212, 213, 616, 622, 625, 626. *See also* Ndayambaje Reply Brief, paras. 248-254. In support of his argument regarding whether the witness was one of the victims, Ndayambaje quotes portions of Witness QAR's testimony about the abduction, in which the witness excluded herself from the narrative and referred to "those ladies and young girls" or "the women and girls", comparing them with Witness QAR's testimony on the Mugombwa Church massacre, where she explicitly included herself into the narrative. *See* Ndayambaje Appeal Brief, fn. 262.
[7491] Ndayambaje Appeal Brief, para. 623.
[7492] Ndayambaje Appeal Brief, para. 668. *See also ibid.*, paras. 638, 640. Ndayambaje argues that, according to the jurisprudence of the Appeals Chamber, the doubt and ambiguity raised by Witness QAR's testimony ought to have been interpreted in his favour. *See ibid.*, para. 669, *referring to Čelebići* Appeal Judgement, para. 452.
[7493] Ndayambaje Notice of Appeal, para. 194; Ndayambaje Appeal Brief, paras. 612, 615, 620.

light of Witnesses QAF's and FAU's evidence, and that the inconsistencies within her evidence highlighted by Ndayambaje do not exist or are not material.[7495]

3269. Ndayambaje replies that, contrary to the Prosecution's assertions, Witness QAR repeatedly changed her testimony with respect to her presence at the events.[7496] He argues that the fact that she failed to mention being one of the victims in her prior statements cannot be considered as non-material.[7497]

3270. The Appeals Chamber observes that the Trial Chamber expressly considered that Witness QAR testified that the abduction took place in the days following a meeting at Mugombwa commune office which Ndayambaje and Nteziryayo attended.[7498] However, the Trial Chamber found that "it [was] not evident that the meeting about which Witness QAR testified [was] Ndayambaje's swearing-in ceremony",[7499] explaining that it was not "plausible" that she attended the meeting in question given that she was a Tutsi and relying on the several inconsistencies between her account and the testimony of other witnesses in this regard.[7500] Ndayambaje does not develop any argument to explain why a reasonable trier of fact could not have accepted Witness QAR's corroborated and detailed testimony about the abduction at Mugombwa, while concluding that she did not personally attend his swearing-in ceremony. His contention in this respect is accordingly rejected. The Appeals Chamber also dismisses Ndayambaje's undeveloped submission that Witness QAR's testimony was implausible in many other respects.

3271. The Trial Chamber recalled in the course of its deliberations that Witness QAR testified that the meeting that preceded the abduction about which she spoke took place on 18 June 1994.[7501] It considered that Witness QAR "may well have been mistaken while placing the purported meeting in mid-June 1994 due to the various meetings she attended at the Muganza *commune* office before, during and after the war" and "may have had a distorted view of the timing of the events in question

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[7494] Prosecution Response Brief, para. 2491.
[7495] Prosecution Response Brief, paras. 2488-2491, 2496-2499. The Prosecution submits that Witness QAR was clear at trial that she was detained with the other women and girls kept at the Virgin Mary Statue and that she was not taken to Gasenyi but went home because when her name was read out, another woman who had the same first name was taken. It argues that the English transcript of her testimony does not reflect that she testified that she went to "Mugasenyi" and that, even if the witness in fact testified that "*On nous a conduites à un endroit qu'on appelle 'Mu Gasenyi*'" as reflected in the French transcript, this can be easily explained as a "slip of the tongue". *See ibid.*, para. 2489 (emphasis in original), *referring to* Witness QAR, T. 19 November 2001 p. 65 (French). The Prosecution also points out that Ndayambaje failed to cross-examine Witness QAR on the fact that she omitted to mention in her prior statements that she was part of the group of abducted women. It further contends that Witness QAR did not mention her own victimisation because she did not find it important, as illustrated by the fact that she only mentioned it in response to the question why she could be certain about the date of the incident. *See ibid.*, para. 2498.
[7496] Ndayambaje Reply Brief, paras. 248-253.
[7497] Ndayambaje Reply Brief, para. 254.
[7498] Trial Judgement, para. 4710.
[7499] Trial Judgement, para. 4710.
[7500] Trial Judgement, paras. 4602, 4603, 4710.

given the passage of the time", finding her to be "credible in all other respects".[7502] Ndayambaje does not show that this determination was unreasonable. He merely refers to the assessment of the credibility of the account of another witness about a different meeting that has no connection with this particular instance and is, as such, irrelevant.[7503]

3272. The Appeals Chamber further observes that, prior to concluding that Witness QAR provided credible evidence with respect to the abduction of the Tutsi women and girls in Mugombwa Sector, the Trial Chamber addressed a number of the alleged inconsistencies and contradictions within Witness QAR's evidence pointed out by Ndayambaje as well as the witness's explanations for them.[7504]

3273. In particular, the Trial Chamber discussed the alleged inconsistencies between Witness QAR's testimony at trial and her prior statements regarding the number of abducted women and girls, whether they were immediately killed, and where they were killed.[7505] The Trial Chamber accepted the witness's explanation that her statements were not recorded correctly and found that these inconsistencies were minor and did not go to the root of her account.[7506] Having reviewed the relevant excerpts of Witness QAR's prior statements and testimony, the Appeals Chamber finds that the Trial Chamber's conclusion was not unreasonable.

3274. The Trial Chamber did not expressly discuss the purported inconsistencies in Witness QAR's evidence relating to whether she was part of the group of abducted women, whether she was transported to Gasenyi, her failure to mention the ceremony and the abduction in her May 1997 statement as well as who was leading the assailants. The Appeals Chamber notes that Ndayambaje did not draw the Trial Chamber's attention to these inconsistencies, notwithstanding his position on appeal that they are so material that Witness QAR's evidence is unbelievable.[7507]

3275. Moreover, concerning Witness QAR's evidence as to whether or not she was part of the group of abducted women, the Appeals Chamber considers that the witness's reference to the group of abducted women and girls as "they", "them", or "these women and girls" in her 1995 and

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[7501] Trial Judgement, para. 4710.
[7502] Trial Judgement, paras. 4710, 4711.
[7503] Ndayambaje Appeal Brief, para. 618, *referring to* Trial Judgement, para. 3668 (discussing Witness RV's testimony to the effect that he took part in three meetings in Kirarambogo between April and June 1994).
[7504] Trial Judgement, paras. 4660, 4661, 4733, 4734, 4746.
[7505] Trial Judgement, paras. 4733, 4734.
[7506] Trial Judgement, paras. 4733, 4734.
[7507] The Appeals Chamber observes that the only arguments that Ndayambaje raised in his closing submissions were that Witness QAR falsely testified that she was part of the abducted women and that her testimony was inconsistent about whether the girls and women were killed "on the spot" or brought to and killed at Gasenyi. *See* Ndayambaje Closing Brief, pp. 781-783; Ndayambaje Closing Arguments, T. 30 April 2009 pp. 29, 30.

October 1997 statements and at times in her testimony[7508] is reasonably explained by the fact that she was addressing the issue or answering questions put to her which specifically related to the fate of the women and girls who were abducted *and killed*.[7509] When specifically being asked how she could remember the date of the abduction, Witness QAR unambiguously testified that she was part of the group of abducted women but did not share the fate of others as she was released.[7510] The Appeals Chamber therefore sees no contradiction in Witness QAR's evidence on this issue. It is also not persuaded that, given the witness's emphasis on the fact that the abducted women and girls were killed and the circumstances of her presence at the Virgin Mary Statue, Witness QAR's failure to mention that she was one of the abducted women in her prior statements is material and required discussion by the Trial Chamber.

3276. With respect to whether Witness QAR contradicted herself in stating that she was brought to Gasenyi with the other women and girls, the Tribunal's language section clarified that the French transcript of Witness QAR's testimony given in Kinyarwanda does not accurately reflect the witness's testimony.[7511] Witness QAR did not testify as reflected in the French transcript that she was transported to Gasenyi with the group of abducted women and girls but, instead, consistently stated that she was not taken to Gasenyi.[7512] Ndayambaje's argument in this respect – which relies on the French transcript of the witness' testimony – is therefore rejected.

3277. As to the alleged inconsistency regarding the identity of the leader of the assailants, the Appeals Chamber observes that it is indicated in Witness QAR's 1995 Statement that the group of assailants was led by "the *conseillers* of Saga", whereas she refuted this in court and testified that the leader was not a *conseiller* but a man named Masima.[7513] As noted by the Trial Chamber, Witness QAR explained that her 1995 statement had not been correctly recorded.[7514] The Appeals Chamber reiterates that it is within the discretion of a trial chamber to evaluate inconsistencies in

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[7508] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination); Witness QAR, T. 19 November 2001 pp. 57, 58, 60, 61; T. 21 November 2001 pp. 97, 98, 100.

[7509] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K0052277 (Registry pagination); Witness QAR, T. 19 November 2001 pp. 57, 58; T. 21 November 2001 pp. 96-102, 107.

[7510] Witness QAR, T. 19 November 2001 pp. 57, 58, T. 21 November 2001 pp. 96-99, 102, 107.

[7511] *Compare* Witness QAR, T. 19 November 2001 p. 65 (French) ("*On nous a conduites à un endroit qu'on appelle 'Mu Gasenyi'*") *with* audio recording of Witness QAR's testimony of 19 November 2001, at 02:27:22-02:28:18 ("*Ni ahantu bita Mu Gasenyi hari amatanura. Niho babajyanye*"). *See also* Witness QAR, T. 19 November 2001 p. 58 ("They took them to a place called Mugasenyi"). The Appeals Chamber notes that, according to the Tribunal's language section, the English translation of Witness QAR's testimony in Kinyarwanda is correct.

[7512] *See* Witness QAR, T. 21 November 2001 p. 101 ("Q. You, yourself, madam, were you taken to Gasenyi? A. No, I wasn't taken there."). *See also* Witness QAR, T. 19 November 2001 p. 58, T. 21 November 2001 pp. 97, 102; Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR's October 1997 Statement, p. K005227 (Registry pagination).

[7513] Witness QAR's 1995 Statement, p. K0181455 (Registry pagination); Witness QAR, T. 21 November 2001 pp. 97, 109-111.

[7514] Trial Judgement, para. 4734, *referring to* Witness QAR, T. 21 November 2001 pp. 111-113.

the evidence, to consider whether the evidence taken as a whole is reliable and credible,[7515] without explaining its decision in every detail,[7516] and that the fact that a trial chamber does not address or mention alleged discrepancies does not necessarily mean that it did not consider them.[7517] In this instance, Ndayambaje does not demonstrate the unreasonableness of Witness QAR's explanation or that the inconsistency in her evidence as regards the identity of the leader of the assailants was such that it required express consideration and undermines the Trial Chamber's finding on Witness QAR's credibility.

3278. Likewise, the Appeals Chamber finds no merit in Ndayambaje's argument that Witness QAR did not mention Ndayambaje's Swearing-In Ceremony or the abduction in her May 1997 Statement given that it is evident from the reading of the statement that it was made in response to queries concerning the Mugombwa Church massacre specifically.[7518]

3279. Finally, the Appeals Chamber recalls that corroboration is not a requirement and that a trial chamber has the discretion to rely on uncorroborated, but otherwise credible, witness testimony.[7519] In the absence of a demonstration that it was unreasonable for the Trial Chamber to rely on Witness QAR's uncorroborated testimony about Ndayambaje's presence and utterances at the Virgin Mary Statue, the Appeals Chamber rejects Ndayambaje's allegation of error in this respect.

3280. The Appeals Chamber therefore finds that Ndayambaje's arguments addressed above do not demonstrate that the Trial Chamber erred in its assessment of the credibility of Witness QAR's account of the abduction.

2. Assessment of Defence Evidence

3281. Ndayambaje submits that the Trial Chamber erred in rejecting without valid reason the evidence of Defence Witnesses JAMES, BOZAN, MUZIK, ANGES, and Stan as well as his own testimony that he was not involved in the abduction of the women and girls from Mugombwa.[7520]

[7515] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 467; *Hategekimana* Appeal Judgement, para. 82; *Setako* Appeal Judgement, para. 31; *Rukundo* Appeal Judgement, para. 207.
[7516] *See, e.g., Nizeyimana* Appeal Judgement, para. 223; *Rukundo* Appeal Judgement, para. 81; *Karera* Appeal Judgement, para. 174; *Kvočka et al.* Appeal Judgement, para. 23.
[7517] *See, e.g., Ntawukulilyayo* Appeal Judgement, para. 152; *Nchamihigo* Appeal Judgement, para. 165; *Krajišnik* Appeal Judgement, para. 139; *Musema* Appeal Judgement, paras. 18-20.
[7518] *See* Witness QAR's May 1997 Statement.
[7519] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 251. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 462; *Bizimungu* Appeal Judgement, para. 241; *Hategekimana* Appeal Judgement, para. 150; *Nchamihigo* Appeal Judgement, para. 42.
[7520] Ndayambaje Notice of Appeal, paras. 201-206; Ndayambaje Appeal Brief, paras. 631-641, 645, 646, 668. *See also* Ndayambaje Reply Brief, paras. 256-265. The Appeals Chamber notes that Ndayambaje further referred to Witness MATIC's testimony but, because he merely points to the main features of the witness's evidence in his appeal brief without developing any specific argument relating to the assessment of this witness's evidence regarding the

(a) Witnesses JAMES and BOZAN

3282. The Appeals Chamber notes that the Trial Chamber accepted Witness JAMES's evidence insofar as it corroborated Witness QAR's account of the abduction of the Tutsi women and girls, the number of abducted women and girls, the identity of the leader of the group of assailants, and their gathering at the Virgin Mary Statue.[7521] The Trial Chamber similarly accepted Witness BOZAN's evidence insofar as it corroborated Witness QAR's account as to the identity of the leader of the group of assailants, the sequence of events, including the stop at the statue, and the fact that the abducted women and girls were taken to Gasenyi to be killed.[7522]

3283. The Trial Chamber noted that Witnesses JAMES and BOZAN directly contradicted Witness QAR since both testified that Witness QAR was not part of the group of the abducted women and girls and that Ndayambaje did not come to the Virgin Mary Statue.[7523] It found that, because Witness JAMES was working on that day and stayed at the statue for less than five minutes, he was not in a position to testify that Witness QAR did not leave the house where she was staying at all on the day of the abduction and his testimony did not "preclude" Witness QAR's or Ndayambaje's presence at the statue after he left.[7524] It further recalled its previous finding that Witness JAMES was not credible in respect of Witness QAR's whereabouts during the Mugombwa Church massacre and Ndayambaje's Swearing-In Ceremony.[7525] Moreover, the Trial Chamber determined that Witness BOZAN, like Witness JAMES, was not in a position to testify that Witness QAR or Ndayambaje were not present at the statue during the abduction as the witness only stayed there about five minutes.[7526] It also found that Witness BOZAN's testimony was not credible based on his failure to take steps to protect the abducted women and girls or arrest the assailants, even though he knew them, and based on his implication in the Mugombwa Church massacre.[7527] The Trial Chamber concluded:

> In summary, the presence of Witnesses BOZAN and JAMES in the vicinity of the Statue of the Virgin Mary on the day of the abduction, for a short overlapping period of time, does not preclude

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abduction, the Appeals Chamber will not examine the Trial Chamber's findings regarding this particular witness's evidence. *See* Ndayambaje Appeal Brief, paras. 642-644. The Appeals Chamber will also not discuss Ndayambaje's challenges to the assessment of the evidence of Witnesses SABINE and KWEPO that he developed under Ground 20 of his appeal as they specifically relate to the abduction of Nambaje and Witness FAU's credibility. *See ibid.*, paras. 657-661. As the Appeals Chamber has found above that the Trial Chamber erred in convicting Ndayambaje for the murder of Nambaje and in relying on Witness FAU's evidence, it is therefore unnecessary to discuss his arguments relating to the Trial Chamber's assessment of this evidence. *See supra*, Section IX.H.1(a).

[7521] Trial Judgement, paras. 4724, 4725, 4728, 4736.

[7522] Trial Judgement, paras. 4724, 4728, 4729, 4741.

[7523] Trial Judgement, paras. 4735, 4736, 4742, 4745.

[7524] Trial Judgement, paras. 4737-4739.

[7525] Trial Judgement, para. 4740.

[7526] Trial Judgement, para. 4742. The Trial Chamber noted that Witness BOZAN testified that he returned to the Virgin Mary Statue only one hour and 15 minutes to one hour and 25 minutes later. *See ibid.*, para. 4743.

[7527] Trial Judgement, para. 4744.

> either Witness QAR's or Ndayambaje's presence at the site. Their evidence, although consistent, is not conclusive.[7528]

3284. Ndayambaje submits that the Trial Chamber erred in rejecting the testimonies of Witnesses JAMES and BOZAN contradicting Witness QAR's evidence regarding her presence as well as that of Ndayambaje at the Virgin Mary Statue even though it found their evidence consistent.[7529] With respect to Witness JAMES, Ndayambaje submits that the Trial Chamber's finding that the witness was not in a position to testify that Witness QAR did not leave the house at all on the day of the abduction because he was working on that day is "not justified" given that Witness JAMES "worked just by the entrance of Witness QAR's house".[7530] He also asserts that, contrary to the Trial Chamber's finding, Exhibit D655 – a sketch and photographs of the relevant premises – shows that Witness QAR could not have arrived at the Virgin Mary Statue or come back home after the incident without being seen by Witness JAMES.[7531] He adds that, given Witness JAMES's vantage point at the time, the witness would necessarily have seen Ndayambaje's vehicle pass in front of his place of work and seen him at the statue if he had been there.[7532]

3285. With respect to Witness BOZAN, Ndayambaje submits that the Trial Chamber erred in finding that the witness was not credible on the grounds that he was implicated in the Mugombwa Church massacre and that he failed to take any steps to protect the abducted women or arrest the assailants afterwards, even though it acknowledged that the witness had made considerable efforts to rescue the abducted girls and alert the commune authorities.[7533] Ndayambaje contends that no evidence suggested that Witness BOZAN had either the power or the means to arrest the armed attackers who came from another commune and that the Trial Chamber wrongly ignored that the witness reported the incident to the then *bourgmestre* of Muganza Commune, which also indicated

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[7528] Trial Judgement, para. 4745.

[7529] Ndayambaje Appeal Brief, paras. 633, 637, 638, 641. Ndayambaje further argues that the Trial Chamber should have applied the same reasoning applied by the Appeals Chamber in the *Kalimanzira* case and by the Trial Chamber in this case with respect to Witness BCZ's evidence on meetings at the Hotel Ihuliro and that the Trial Chamber impermissibly shifted the burden of proof when assessing Witnesses JAMES's and BOZAN's evidence. *See* Ndayambaje Notice of Appeal, para. 203, *referring to* Trial Judgement, para. 4745; Ndayambaje Appeal Brief, para. 641, *referring to Kalimanzira* Appeal Judgement, para. 185, Trial Judgement, paras. 3103-3106, 4745. In the absence of any explanation as to the pertinence of the assessment of the evidence of other witnesses concerning other incidents in the *Kalimanzira* case and the other parts of the Trial Judgement and as to how the Trial Chamber allegedly reversed the burden of proof, the Appeals Chamber dismisses these contentions without further consideration.

[7530] Ndayambaje Appeal Brief, para. 634, *referring to* Trial Judgement, para. 4737.

[7531] Ndayambaje Appeal Brief, para. 636. *See also* Ndayambaje Appeal Brief, para. 635; Ndayambaje Reply Brief, para. 256.

[7532] Ndayambaje Appeal Brief, para. 636. *See also* Ndayambaje Reply Brief, para. 256. Ndayambaje argues that a site visit by the Trial Chamber would have removed this ambiguity. *See ibid.*

[7533] Ndayambaje Appeal Brief, para. 639, *referring to* Trial Judgement, paras. 4741-4744, fn. 558. *See also ibid.*, para. 229, fn. 276; Ndayambaje Reply Brief, para. 257.

that the abduction took place well before Ndayambaje's Swearing-In Ceremony as *bourgmestre* of Muganza.[7534]

3286. The Prosecution responds that Ndayambaje's submissions regarding Witness JAMES should be rejected as he fails to demonstrate that the Trial Chamber erred in finding that the witness was not credible and that his arguments as to the witness's ability to observe the incident from his place of work are "unsupported and unreferenced speculations".[7535] The Prosecution further responds that, while Ndayambaje is correct that the Trial Chamber erred in finding that Witness BOZAN was implicated in the Mugombwa Church massacre, he does not show that the Trial Chamber erred in finding that the witness was neither reliable nor credible.[7536]

3287. The Appeals Chamber observes that, contrary to the Prosecution's assertion, the Trial Judgement is unclear as to whether the Trial Chamber rejected the evidence of Witnesses JAMES and BOZAN relating to the abduction because it found that they were not credible. Although the Trial Chamber referred to their lack of credibility, its ultimate finding regarding the assessment of their evidence quoted above, and the fact that it relied on certain parts of their evidence as corroborative of that of Witness QAR, suggest that the Trial Chamber concluded that their evidence was not incompatible with Witness QAR's account.

3288. That being said, the Appeals Chamber finds that Ndayambaje does not demonstrate why the Trial Chamber was unreasonable in finding that Witness JAMES could not have accounted for Witness QAR's whereabouts during the whole day and for all events at the Virgin Mary Statue, including on Ndayambaje's presence there. Ndayambaje fails to appreciate that the Trial Chamber carefully considered Witness JAMES's testimony that he was working on that day and the short time that he was present at the statue together with evidence of the proximity of his workplace to the relevant locations.[7537] His arguments regarding Witness JAMES's place of work and the layout of the site are therefore rejected.

3289. Concerning the assessment of Witness BOZAN's evidence, the Appeals Chamber notes that, as held above, the Trial Chamber erred in stating that the witness was "implicated in the massacres at Mugombwa and was said that have had a machete when he went there" as the Trial Chamber did not make such findings anywhere in the Trial Judgement and that they are not supported by the evidence on the record.[7538] However, the Appeals Chamber considers that this mistake has no

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[7534] Ndayambaje Appeal Brief, para. 640. *See also* Ndayambaje Reply Brief, para. 263.
[7535] Prosecution Response Brief, paras. 2500-2502. *See also* AT. 21 April 2015 p. 59.
[7536] Prosecution Response Brief, para. 2503.
[7537] *See* Trial Judgement, paras. 4737, 4739; Witness JAMES, T. 2 June 2008 pp. 50-51 (closed session).
[7538] Trial Judgement, para. 4744. *See also supra*, para. 3014. The Trial Chamber confused Witness BOZAN's name with that of another person bearing the same first name. *See supra*, para. 3015.

bearing on the Trial Chamber's findings pertaining to the abduction because the Trial Chamber found that Witness BOZAN's evidence of his presence at the Virgin Mary Statue for a short period of time was not necessarily inconsistent with evidence of Witness QAR's and Ndayambaje's presence at the statue.[7539] Ndayambaje does not demonstrate that the Trial Chamber erred in this respect.

3290. The Trial Judgement also reflects that the Trial Chamber did consider Witness BOZAN's evidence that the abduction took place in mid-May 1994 when Ndayambaje was not *bourgmestre* of Muganza Commune but preferred the detailed evidence of Witness QAF concerning this event.[7540] Recalling that, when faced with competing versions of the same event, it is the prerogative of the trier of fact to decide which version it considers more credible,[7541] the Appeals Chamber dismisses Ndayambaje's contention that the Trial Chamber erred in not preferring Witness BOZAN's account of when the incident occurred.

3291. For these reasons, the Appeals finds that Ndayambaje has not demonstrated that the Trial Chamber erred in relying on Witness QAR's evidence despite Witnesses JAMES's and BOZAN's evidence.

(b) Witness MUZIK

3292. The Trial Chamber found that Witness MUZIK's account of the abduction was not credible because he was not present during the abduction but accepted his testimony to the extent that it corroborated Witness QAR's evidence that the abducted women and girls were killed at Gasenyi.[7542]

3293. Ndayambaje argues that the Trial Chamber erred in finding that Witness MUZIK was not credible because he was not present during the abduction and could not save the girls despite relying on other aspects of his testimony that corroborated that of Witness QAR.[7543] He also submits that the Trial Chamber erroneously ignored that Witness MUZIK's testimony that he

[7539] Trial Judgement, para. 4745.
[7540] Trial Judgement, paras. 4716, 4717, fn. 12529.
[7541] *See, e.g., Nizeyimana* Appeal Judgement, para. 254; *Ndahimana* Appeal Judgement, para. 46; *Gacumbitsi* Appeal Judgement, para. 81; *Rutaganda* Appeal Judgement, para. 29.
[7542] Trial Judgement, paras. 4725, 4729, 4731.
[7543] Ndayambaje Appeal Brief, para. 644, *referring to* Trial Judgement, para. 4731. *See also ibid.*, fn. 276. Ndayambaje argues that the Trial Chamber not only deliberately ignored the efforts made by Witness MUZIK to rescue the girls but also failed to draw a similar negative inference as it pertains to Witness FAU's failure to protect Nambaje. *See ibid.*, para. 644.

reported the incident to the then *bourgmestre* of Muganza Commune, who was not Ndayambaje, confirmed that the abduction occurred well before Ndayambaje's Swearing-In Ceremony.[7544]

3294. The Prosecution responds that the Trial Chamber was correct to find that Witness MUZIK's testimony was not credible.[7545]

3295. The Appeals Chamber notes that, although the Trial Chamber referred to Witness MUZIK's inability to prevent the death of the two Tutsi girls he had in custody, the Trial Judgement reflects that the Trial Chamber rejected Witness MUZIK's testimony on their abduction because he was not present during the incident and that his evidence was therefore "questionable", which the Appeals Chamber understands to mean that the evidence lacked probative value.[7546] Ndayambaje does not demonstrate the unreasonableness of this finding.

3296. A review of the Trial Judgement also shows that the Trial Chamber considered Witness MUZIK's evidence that the abduction took place in mid-May 1994 when Ndayambaje was not *bourgmestre* of Muganza Commune but preferred the detailed evidence of Witness QAF in this regard.[7547] Ndayambaje does not show that the Trial Chamber erred in the exercise of its discretion in the assessment of the evidence in reaching its conclusion.

3297. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's assessment of Witness MUZIK's testimony relevant to the abduction in Mugombwa.

(c) Witnesses ANGES, Stan, and Ndayambaje

3298. The Trial Chamber noted that Ndayambaje gave hearsay testimony about the attack and that Witnesses ANGES and Stan corroborated Witness QAR's testimony that the group of abductees included adolescent girls and that the women and girls were taken to Gasenyi, where they were killed.[7548]

3299. Ndayambaje submits that Witnesses ANGES's and Stan's testimonies that they were aware of the abduction of women and girls in mid-May 1994, but did not see or hear about his involvement contradict "the possibility that this event was the consequence of the swearing-in ceremony."[7549] Ndayambaje submits that the Trial Chamber also failed to take into account his own

[7544] Ndayambaje Appeal Brief, para. 643. *See also* Ndayambaje Reply Brief, para. 263.
[7545] Prosecution Response Brief, paras. 2505, 2506.
[7546] Trial Judgement, paras. 4684, 4731.
[7547] Trial Judgement, paras. 4716, 4717, fn. 12529.
[7548] Trial Judgement, paras. 4720, 4726, 4729.
[7549] Ndayambaje Appeal Brief, para. 645.

evidence that he was not involved in the abduction, about which he learned in mid-May 1994, prior to his swearing-in ceremony.[7550]

3300. The Prosecution responds that Ndayambaje's reliance on the evidence of Witnesses ANGES and Stan as well as on his own testimony is "unwarranted, since the Trial Chamber rejected the testimony of all three".[7551]

3301. The Appeals Chamber notes that the Trial Chamber summarised the evidence of Witnesses ANGES and Stan to which Ndayambaje points and referred to it in its deliberations on the abduction,[7552] which shows that it did not ignore this evidence. Similarly, the Trial Chamber referred to Ndayambaje's testimony.[7553] Ndayambaje's suggestion that the Trial Chamber failed to consider this evidence is therefore without merit. To the extent that Ndayambaje also intended to challenge the Trial Chamber's assessment of the evidence, the Appeals Chamber dismisses Ndayambaje's claim in the absence of a demonstration of how the Trial Chamber abused its discretion in assessing this evidence.

3302. Accordingly, the Appeals Chamber rejects Ndayambaje's contention regarding the assessment of his testimony as well as the testimonies of Witnesses ANGES and Stan related to the abduction of the Tutsi women and girls in Mugombwa.

3. Criminal Responsibility

3303. Having regard to the events that preceded the abductions, and the situation in Rwanda generally, and considering that the assailants asked Ndayambaje what they should do with the abducted Tutsi women and girls at the Virgin Mary Statue, the Trial Chamber found that Ndayambaje must have known of the assailants' genocidal intent.[7554] It also found that the killings of the abducted women and girls "taken by themselves or collectively [with the killing of Tutsis at Mugombwa Church and Kabuye Hill] occurred on a large scale."[7555] As noted above, the Trial Chamber concluded that Ndayambaje was responsible of instigating genocide, persecution and extermination as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in relation to the killings of the abducted women and girls.[7556]

[7550] Ndayambaje Appeal Brief, para. 646
[7551] Prosecution Response Brief, para. 2508 (internal references omitted).
[7552] Trial Judgement, paras. 4696-4699, 4720, 4726, 4729.
[7553] Trial Judgement, para. 4707.
[7554] Trial Judgement, paras. 5958, 6065.
[7555] Trial Judgement, para. 6065. *See also ibid.*, para. 6064.
[7556] Trial Judgement, paras. 5955-5959, 6064, 6066, 6107, 6108, 6125, 6175, 6176, 6186.

3304. Ndayambaje submits that there is no evidence establishing that the assailants from Saga received instructions at his swearing-in ceremony or attended the event, or evidence supporting the inference that they possessed genocidal intent.[7557] He claims that, consequently, he could not know of their genocidal intent.[7558] In his view, it was deliberate on the part of the Trial Chamber to maintain confusion between the group of assailants from Baziro which were found to have acted pursuant to the instructions received at the ceremony and the group of assailants from Saga.[7559]

3305. The Appeals Chamber also understands Ndayambaje to contend that the Trial Chamber erred in convicting him of extermination in relation to the abduction because the abduction of eight identifiable women and girls in Mugombwa and of Nambaje in Baziro does not satisfy the large scale requirement that characterises the crime of extermination.[7560]

3306. The Prosecution responds that Ndayambaje's claim that the evidence did not establish that the attackers had genocidal intent is unsubstantiated and should therefore be dismissed.[7561] It also contends that Ndayambaje overlooks that the killings of Nambaje and the child she was taking care of and the eight women and girls abducted from Mugombwa were part of a larger pattern of killings following the swearing-in ceremony.[7562] It adds that the victims of the post-swearing-in wave of violence were also linked to the previous mass killings committed at Mugombwa Church and Kabuye Hill and that it would be artificial to consider these killings of victims targeted because of their Tutsi ethnicity in isolation.[7563]

3307. Ndayambaje replies in relation to the crime of extermination that it "is not sufficient for the actions in question to be within the context of 'a larger pattern'" and that the "killing of ten people, even under these circumstances, did not meet the criterion of a 'substantial contribution to extermination'" required for a conviction for extermination.[7564]

[7557] Ndayambaje Appeal Brief, para. 664.
[7558] Ndayambaje Appeal Brief, para. 664.
[7559] Ndayambaje Appeal Brief, para. 665. *See also* AT. 21 April 2015 p. 30.
[7560] Ndayambaje Appeal Brief, paras. 666, 667, *referring to Mpambara* Trial Judgement, paras. 9-11, *Zigiranyirazo* Trial Judgement, para. 438. Ndayambaje also refers to the fact that the girls were abducted by a group of identifiable attackers, coming from a commune other than Ndayambaje's and whose intentions Ndayambaje neither shared nor knew, and that Witness QAR, whom Ndayambaje and everyone knew to be a Tutsi, was released. *See ibid.*, para. 666. The Appeals Chamber understands Ndayambaje's reference to the number of victims as relating to the large scale requirement of the crime of extermination as a crime against humanity, but fails to see how the fact that the group was composed of "perfectly identifiable" girls and abducted by a group of "identifiable" attackers demonstrates that the elements of the crime of extermination were not met.
[7561] Prosecution Response Brief, para. 2513.
[7562] Prosecution Response Brief, para. 2514, *referring to Lukić and Lukić* Appeal Judgement, para. 538.
[7563] Prosecution Response Brief, para. 2514.
[7564] Ndayambaje Reply Brief, para. 271, *referring, inter alia, to Bagosora and Nsengiyumva* Appeal Judgement, para. 396.

3308. The Appeals Chamber notes that the Trial Chamber found that the individuals responsible for the killing of the abducted Tutsi women and girls had genocidal intent based on "the widespread killing of Tutsis throughout Rwanda as well as the fact that the assailants who abducted Nambaje came to a house claiming to look for Tutsis".[7565] The Appeals Chamber recalls its finding that the Trial Chamber erred in considering the abduction of Nambaje and the abduction of the Tutsi women and girls as one event and in convicting Ndayambaje for the abduction of Nambaje.[7566] In this context, the Appeals Chamber finds that the Trial Chamber could not reasonably rely on the circumstances of the abduction of Nambaje to infer the *mens rea* of those who abducted and killed the Tutsi women and girls from Mugombwa Sector. However, Ndayambaje does not demonstrate that no reasonable trier of fact could have concluded that the assailants possessed genocidal intent based on "the widespread killing of Tutsis throughout Rwanda" at the relevant time and the fact that the abducted women and girls were targeted because they were Tutsis.[7567] As Ndayambaje does not show that the Trial Chamber erred in finding that the assailants had genocidal intent, his argument that he could not know of their genocidal intent because they had no such intent is similarly rejected.

3309. With respect to the crime of extermination, the Appeals Chamber recalls that the *actus reus* of extermination is the act of killing on a large scale.[7568] "Large scale" does not suggest a strict numerical approach with a minimum number of victims.[7569] The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.[7570] Relevant factors include, *inter alia*, the time and place of the killings, the selection of the victims and the manner in which they were targeted, and whether the killings were aimed at the collective group rather than victims in their individual capacity.[7571]

3310. It is unclear whether the individual killing of the eight abducted Tutsi women and girls Witness QAR testified about could be considered to meet the "large scale" requirement.[7572] In any event, the Appeals Chamber finds that the Trial Chamber did not err in finding that, taken collectively with the killings perpetrated at Mugombwa Church and Kabuye Hill for which

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[7565] Trial Judgement, para. 5954.
[7566] *See supra*, Section IX.H.1(a).
[7567] Trial Judgement, paras. 4708, 5954. The Appeals Chamber finds no merit in Ndayambaje's argument that Witness QAR, known to be a Tutsi, was nonetheless released.
[7568] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 660; *Lukić and Lukić* Appeal Judgement, para. 536; *Bagosora and Nsengiyumva* Appeal Judgement, para. 394; *Ntakirutimana* Appeal Judgement, para. 516. The Appeals Chamber notes that Ndayambaje failed to raise the alleged error pertaining to the crime of extermination in his notice of appeal. However, since the Prosecution did not object on this basis and responded to Ndayambaje's submission, the Appeals Chamber will exercise its discretion to consider Ndayambaje's arguments developed in his appeal brief.
[7569] *See, e.g., Lukić and Lukić* Appeal Judgement, para. 537; *Rukundo* Appeal Judgement, para. 185; *Ntakirutimana* Appeal Judgement, para. 516. *See also Bagosora and Nsengiyumva* Appeal Judgement, fn. 924.
[7570] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.
[7571] *Lukić and Lukić* Appeal Judgement, para. 538 and references cited therein.

Ndayambaje was also convicted, the killing of the group of abducted women and girls "occurred on a large scale". The Appeals Chamber observes that the killing of the abducted women and girls was perpetrated in the same commune as the Mugombwa Church massacre and not far from the Kabuye Hill attacks,[7573] that Ndayambaje similarly encouraged by his presence or his words the assailants to perpetrate the crimes,[7574] and that the victims were not targeted in their individual capacity but as part of a collective aim to exterminate the Tutsis.[7575] The instant situation therefore differs from the situation addressed in the *Bagosora and Nsengiyumva* Appeal Judgement which Ndayambaje relies upon in support of his contention that the "large scale" requirement was not met regarding the killings of the abducted women and girls.[7576]

3311. In the circumstances of this case, the Appeals Chamber finds no error in the Trial Chamber's collective consideration of the events on the basis of which Ndayambaje was convicted to find him guilty of extermination as a crime against humanity for the killings of the group of abducted Tutsi women and girls.[7577] The Appeals Chamber dismisses Ndayambaje's argument in this respect.

4. Conclusion

3312. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering that Nambaje was part of the same group of abducted women and girls Witness QAR testified about and, consequently, in convicting Ndayambaje for instigating her killing through his words at the Virgin Mary Statue. However, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in finding him responsible for genocide, extermination and persecution as crimes against humanity as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killing of the Tutsi women and girls from Mugombwa Sector based on his utterances at the Virgin Mary Statue in June 1994.

[7572] *Cf. Lukić and Lukić* Appeal Judgement, para. 537.
[7573] *See* Trial Judgement, paras. 1018, 1398, 5949.
[7574] *See* Trial Judgement, paras. 5754, 5757, 5774, 5955.
[7575] Trial Judgement, paras. 5756, 5773, 5954. The Appeals Chamber is mindful that there is no genocidal intent requirement for the crime of extermination as a crime against humanity. However, the Appeals Chamber finds that the Trial Chamber's findings with respect to the perpetrators' and Ndayambaje's genocidal intent are relevant in this case to establish that the killings were directed against Tutsis as a collective group rather than victims in their individual capacities.
[7576] *See also supra*, para. 2125.
[7577] The Appeals Chamber nonetheless recalls that it has concluded that the Trial Chamber erred in convicting Ndayambaje for instigating the killing of Nambaje in June 1994. *See supra*, Section IX.H.1(a).

3313. Accordingly, the Appeals Chamber grants in part Ground 20 of Ndayambaje's appeal and reverses Ndayambaje's convictions for instigating the killing of Nambaje. It will discuss the impact of this finding, if any, in Section XII below. The Appeals Chamber dismisses the remainder of Ground 20 of Ndayambaje's appeal.

X. APPEAL OF THE PROSECUTION

3314. The Trial Chamber found that Nsabimana's Swearing-In Ceremony held on 19 April 1994 was attended by President Sindikubwabo, Prime Minister Kambanda, Nyiramasuhuko, Kanyabashi, and a number of ministers from the Interim Government.[7578] It held that the speeches given at this ceremony by Prime Minister Kambanda and President Sindikubwabo were inflammatory and contained coded language that was understood by the attendees and the public as a call to identify and kill Tutsis and their accomplices.[7579] The Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches contributed to triggering the subsequent widespread killings and large-scale massacres in Butare Prefecture that constituted genocide,[7580] thereby advocating and inciting genocide and contributing to these genocidal killings.[7581]

3315. The Trial Chamber determined that Kanyabashi's presence at the ceremony and his failure to dissociate himself from the statements made by Kambanda and Sindikubwabo constituted tacit approval of their inflammatory statements and the directives and instructions to the population contained therein.[7582] It also found that Kanyabashi gave his own speech ("Kanyabashi's Speech") following those of Kambanda and Sindikubwabo, which supported their message and contained a commitment to execute the directives and instructions they announced.[7583] The Trial Chamber, however, did not find that Kanyabashi's Speech was inflammatory or that it substantially contributed to the genocide that followed.[7584] It concluded that, although Kanyabashi stated his support and commitment for the preceding speeches, his conduct did not rise to the level of directly inciting genocide and that the Prosecution had not adduced sufficient evidence to support that Kanyabashi substantially contributed to any incitement made by Kambanda, Sindikubwabo, or other speakers at the ceremony.[7585] Accordingly, the Trial Chamber acquitted Kanyabashi of genocide and of direct and public incitement to commit genocide in relation to the speech he made at Nsabimana's Swearing-In Ceremony.[7586]

3316. The Prosecution advances two grounds of appeal challenging Kanyabashi's acquittals on the charges of genocide and direct and public incitement to commit genocide based on Kanyabashi's

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[7578] Trial Judgement, para. 865.
[7579] Trial Judgement, paras. 890, 898, 911, 925. *See also ibid.*, paras. 5671, 5676, 5738, 5990.
[7580] Trial Judgement, paras. 932, 5673, 5741, 5753. *See also ibid.*, paras. 933, 5742, 5746.
[7581] Trial Judgement, paras. 5753, 5992.
[7582] Trial Judgement, paras. 918, 926, 5712, 5739.
[7583] Trial Judgement, paras. 910, 911, 918, 926, 5713, 5740, 5992. *See also ibid.*, paras. 917 ("the words used by Kanyabashi when he concluded his speech [...] constituted an unambiguous commitment to support the objectives of the Interim Government as set forth in the speeches of Sindikubabwo and Kambanda."), 5752 ("Kanyabashi gave his own speech in which he supported their message and committed to carrying out their instructions.").
[7584] Trial Judgement, para. 5753.
[7585] Trial Judgement, para. 5993.
[7586] *See* Trial Judgement, paras. 5753, 5994.

Speech at Nsabimana's Swearing-In Ceremony.[7587] It argues that the Trial Chamber erred in failing to find that Kanyabashi's express support to Kambanda's and Sindikubwabo's inflammatory speeches and his promise to carry out their directives to kill Tutsis made him criminally liable for the resulting genocide and also constituted direct and public incitement to commit genocide.[7588] The Prosecution submits that the Trial Chamber erred in acquitting Kanyabashi of the crime of genocide that he committed or, in the alternative, instigated or aided and abetted, by delivering his speech on 19 April 1994 and in not finding him responsible for committing or aiding and abetting direct and public incitement to commit genocide through his speech.[7589] The Prosecution therefore requests that, for his speech at Nsabimana's Swearing-In Ceremony, the Appeals Chamber: (i) convict Kanyabashi of committing or, in the alternative, instigating or aiding and abetting genocide;[7590] (ii) convict Kanyabashi of committing or, in the alternative, aiding and abetting direct and public incitement to commit genocide;[7591] and accordingly (iii) impose a life sentence on Kanyabashi or, in the alternative, substantially increase his sentence.[7592]

3317. Kanyabashi responds that the Prosecution fails to demonstrate that the Trial Chamber erred by acquitting him of genocide and direct and public incitement to commit genocide for his speech at Nsabimana's Swearing-In Ceremony and that there is no ground to increase his sentence.[7593] In addition, Kanyabashi raises seven supplementary grounds of appeal challenging the Trial Chamber's findings concerning Nsabimana's Swearing-In Ceremony on which the Prosecution relies in support of its submissions.[7594]

[7587] Prosecution Notice of Appeal, paras. 2-5; Prosecution Appeal Brief, paras. 1-44. *See also* AT. 22 April 2015 pp. 3-9.
[7588] Prosecution Appeal Brief, para. 2.
[7589] Prosecution Notice of Appeal, paras. 3, 5; Prosecution Appeal Brief, paras. 9-40.
[7590] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 9, 19, 23, 27, 42.
[7591] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 2, 9, 32, 40, 43.
[7592] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 9, 41, 44.
[7593] Kanyabashi Response Brief, paras. 120, 121, 138, 141, 143, 155, 164, 165, 168. Kanyabashi adds that entering a new conviction on appeal would violate his fundamental right to appeal and that, in any event, an increase of his current sentence of 35 years would not be in the interests of justice. *See ibid.*, paras. 166, 167.
[7594] Kanyabashi Response Brief, paras. 6, 15-118, *referring, inter alia, to* Practice Direction on Formal Requirements on Appeal, para. 5 ("if an Appellant relies on a particular ground to reverse an acquittal, the Respondent may support the acquittal on additional grounds"). Specifically, Kanyabashi submits that the Trial Chamber erred in: (i) in denying his request to call Fidèle Mpiranya to replace François-Xavier Munyarugerero as an expert witness to analyse the speeches delivered at Nsabimana's Swearing-In Ceremony; (ii) failing to find that the fact that he expressed support for Kambanda's speech through his speech exceeded the scope of the Indictment and could therefore not serve as a basis for entering a conviction against him; (iii) concluding that he spoke after having heard Kambanda's and Sindikubwabo's inflammatory statements; (iv) concluding that Kambanda's and Sindikubwabo's Speeches shared common themes and that Kambanda's Speech was inflammatory; (v) finding that his speech constituted an unambiguous commitment to support the objectives of the Interim Government as set forth in Kambanda's and Sindikubwabo's Speeches; (vi) limiting its acceptance of the defence of duress he raised at trial to the count of conspiracy to commit genocide; and (vii) finding that Kambanda's and Sindikubwabo's Speeches triggered the massacres in Butare Prefecture. *See idem. See also* AT. 22 April 2015 pp. 9-22.

3318. The Appeals Chamber will first address the Prosecution's submissions relating to Kanyabashi's responsibility for genocide before turning to its submissions concerning Kanyabashi's responsibility for direct and public incitement to commit genocide.

A. Crime of Genocide (Ground 1)

3319. As noted above, the Prosecution submits that the Trial Chamber erred in not convicting Kanyabashi of committing or, in the alternative, instigating or aiding and abetting genocide through his speech at Nsabimana's Swearing-In Ceremony.[7595]

1. Committing Responsibility

3320. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech was not inflammatory and consequently not a trigger for the genocide that followed in Butare Prefecture as well as in failing to find that Kanyabashi was responsible for committing genocide.[7596] In support of its contentions, the Prosecution argues that a plain reading of Kanyabashi's Speech shows that, rather than dissociating himself from Kambanda's and Sindikubwabo's inflammatory statements, he approved and embraced as his own their genocidal instructions.[7597] It contends that Kanyabashi's influential position and leadership role in the community gave weight to his endorsement and that, considered in context, his speech was as inflammatory and as much a trigger for the ensuing genocide as Kambanda's and Sindikubwabo's Speeches.[7598] As such, the Prosecution argues that Kanyabashi's call to support and implement instructions to commit genocide was as much an integral part of the genocide as the carrying out of the killings by the physical perpetrators and, therefore, constitutes the *actus reus* of committing genocide.[7599] It further submits that the Trial Chamber's findings provide a basis for the conclusion that Kanyabashi acted with genocidal intent when he pronounced his speech at the ceremony.[7600] The Prosecution therefore requests the Appeals Chamber to enter a conviction against Kanyabashi for committing genocide under Count 2 of the Kanyabashi Indictment for the mass killings that were triggered in Butare.[7601]

3321. Kanyabashi responds that the Prosecution does not demonstrate any error in the Trial Judgement justifying a reversal of his acquittal for committing genocide on the basis of the speech he delivered at Nsabimana's Swearing-In Ceremony.[7602] He contends that the conclusion that he is responsible for committing genocide through this speech is not the only reasonable one from the

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[7595] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 2, 9, 19, 23, 27, 42.
[7596] Prosecution Appeal Brief, paras. 10, 15, 19. *See also* AT. 22 April 2015 pp. 3, 8, 9.
[7597] Prosecution Appeal Brief, paras. 10, 13.
[7598] Prosecution Appeal Brief, paras. 10, 12, 14, 15. The Prosecution contends that Kanyabashi's Speech should not have been viewed in isolation as all three speeches were part of the same event and "were elements of one composite unified call to violence." *See ibid.*, para. 14. *See also* Prosecution Reply Brief, paras. 42-44.
[7599] Prosecution Appeal Brief, paras. 10, 11, 16, *referring to Munyakazi* Appeal Judgement, para. 135, *Seromba* Appeal Judgement, paras. 161, 171, *Gacumbitsi* Appeal Judgement, para. 60. *See also* Prosecution Reply Brief, paras. 67-70; AT. 22 April 2015 p. 8.
[7600] Prosecution Appeal Brief, paras. 17, 18.
[7601] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 19, 42.

evidence and that it is not demonstrated beyond reasonable doubt that his speech had any impact on the subsequent killings and massacres.[7603] Kanyabashi further submits that the jurisprudence quoted by the Prosecution cannot lead to his conviction because it concerns accused who were intimately linked with the crimes committed whereas the evidence in this case is not even sufficient to support a conviction for aiding and abetting genocide.[7604]

3322. The Appeals Chamber has held in relation to genocide that "committing" under Article 6(1) of the Statute, which envisions the physical perpetration of a crime, does not only mean physical killing and that other acts can constitute direct participation in the *actus reus* of the crime.[7605] The question is whether an accused's conduct was "as much an integral part of the [crimes] as were the killings which it enabled."[7606] In the cases where the Appeals Chamber has concluded that an accused's role constituted an integral part of the crimes, the accused were present at the crime scene and conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators.[7607]

3323. Even if the Appeals Chamber were to overturn the Trial Chamber's findings that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the subsequent killings, it is not convinced that Kanyabashi's approval of Kambanda's and Sindikubwabo's Speeches, his position of authority, and the contents of his speech are sufficient to qualify Kanyabashi's overall conduct as that of "committing" genocide. The Appeals Chamber considers that, where it is not established that the accused was present at the scene of the crimes, conducted, supervised, directed, played a leading role, or otherwise fully exercised influence over the physical perpetrators, making a speech days, if not weeks, before the physical perpetration of killings cannot be deemed to constitute "direct participation in the *actus reus*" of the killings. Nor can such circumstances compel the conclusion that the conduct of the individual who gave the speech was as much an integral part of the genocide as were the killings which it allegedly enabled. In the view of the Appeals Chamber, the notion of commission by playing an integral part in the crime is not as expansive as the Prosecution argues in the present case. Consequently, the Appeals Chamber finds it unnecessary to discuss the Prosecution's submissions concerning Kanyabashi's genocidal intent.

[7602] Kanyabashi Response Brief, paras. 126, 138. *See also* AT. 22 April 2015 pp. 20-22.
[7603] Kanyabashi Response Brief, paras. 126, 128, 131.
[7604] Kanyabashi Response Brief, para. 130.
[7605] *Munyakazi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60.
[7606] *Munyakazi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 219; *Seromba* Appeal Judgement, para. 161; *Gacumbitsi* Appeal Judgement, para. 60. *See also Nzabonimana* Appeal Judgement, para. 477.
[7607] *See Munyakazi* Appeal Judgement, paras. 135, 136; *Seromba* Appeal Judgement, paras. 171, 172; *Gacumbitsi* Appeal Judgement, paras. 60, 61. *See also Nzabonimana* Appeal Judgement, para. 477; *Kalimanzira* Appeal Judgement, paras. 219, 220.

3324. The Appeals Chamber therefore dismisses this aspect of the Prosecution's appeal.

2. Instigating Responsibility

3325. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's conduct did not substantially contribute to the massacres in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony as well as in failing to conclude, on the basis of its own factual findings, that Kanyabashi's Speech amounted to instigating genocide.[7608] The Prosecution contends that "[t]he prompting here was Kanyabashi's public commitment that he and the population would carry out the instructions to massacre Tutsis" and that "[t]he substantial contribution his prompting made to the commission of genocide flowed from the weight of his authority, as the elder of the Butare *bourgmestres*, and the influence and respect he commanded among the people."[7609] It further contends that Kanyabashi was, at a minimum, aware of the substantial likelihood that massacres would be committed following his speech.[7610] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for instigating genocide under Count 2 of the Kanyabashi Indictment.[7611]

3326. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred by acquitting him of instigating genocide for his speech at Nsabimana's Swearing-In Ceremony.[7612] In Kanyabashi's view, there is no basis to conclude that the three speeches were elements of one composite unified call to violence and that it is not the only reasonable conclusion from the evidence.[7613] Kanyabashi submits that the jurisprudence quoted by the Prosecution shows that it needed to establish a link between his speech and the killings that followed and that such a connection was not established in this case.[7614]

3327. The Appeals Chamber recalls that the *actus reus* of instigating is to prompt another person to commit an offence.[7615] It is not necessary to prove that the accused was present when the

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[7608] Prosecution Appeal Brief, paras. 20, 23. *See also* AT. 22 April 2015 p. 8.
[7609] Prosecution Appeal Brief, para. 21 (internal references omitted), *referring to* Trial Judgement, paras. 795, 932, 6255. *See also* Prosecution Reply Brief, paras. 46, 47, 56-58.
[7610] Prosecution Appeal Brief, para. 22.
[7611] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras. 23, 42.
[7612] Kanyabashi Response Brief, paras. 139, 141.
[7613] Kanyabashi Response Brief, paras. 128, 139. Kanyabashi also submits that he was acquitted of conspiracy to commit genocide and that the Prosecution did not appeal this conclusion. *See ibid.*, para. 128. Regarding the *mens rea*, Kanyabashi asserts that the Prosecution only relies on Expert Witness Guichaoua and that it goes beyond the weight that can be given to an expert witness's testimony. *See ibid.*, paras. 129, 140.
[7614] Kanyabashi Response Brief, para. 139, *referring to Seromba* Appeal Judgement, para. 45.
[7615] *See, e.g., Nzabonimana* Appeal Judgement, para. 146; *Nahimana et al.* Appeal Judgement, para. 480; *Kordić and Čerkez* Appeal Judgement, para. 27.

instigated crime was committed[7616] or that the crime would not have been perpetrated without the involvement of the accused; it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[7617]

3328. The Trial Chamber found that Kanyabashi's Speech was not inflammatory and did not substantially contribute to the genocide in Butare Prefecture that followed the ceremony.[7618] The Trial Chamber did not further discuss Kanyabashi's alleged responsibility for instigating genocide in relation to his speech. The Appeals Chamber is not persuaded by the Prosecution's contention that Kanyabashi's conduct as found by the Trial Chamber satisfies the *actus reus* of instigating. As noted above, the Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to identify and kill Tutsis and their accomplices, and that Kanyabashi gave a speech following those of Kambanda and Sindikubwabo, in which he supported their message and committed to execute their directives and instructions. The Appeals Chamber considers that Kanyabashi's commitment to execute the directives and instructions announced by Kambanda and Sindikubwabo to identify and kill Tutsis does not necessarily amount to *prompting* the attendees or the people in Butare Prefecture to kill Tutsis.[7619] In the absence of any evidence discussed by the Trial Chamber or pointed out by the Prosecution that Kanyabashi's Speech was understood as instigating the killing of Tutsis or had any impact on the conduct of those who subsequently committed killings,[7620] the Appeals Chamber finds that a reasonable trier of fact could have concluded that Kanyabashi did not instigate genocide through his speech.

3329. In light of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in not finding that Kanyabashi's Speech prompted the people in Butare Prefecture to kill Tutsis and that Kanyabashi was therefore liable for instigating genocide. The Appeals Chamber therefore dismisses this part of the Prosecution's appeal.

3. Aiding and Abetting Responsibility

3330. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not substantially contribute to the subsequent massacres and, contrary to

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[7616] *Nahimana et al.* Appeal Judgement, para. 660. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 125, fn. 347.
[7617] *See, e.g., Nzabonimana* Appeal Judgement, para. 146; *Nahimana et al.* Appeal Judgement, paras. 480, 660; *Kordić and Čerkez* Appeal Judgement, para. 27.
[7618] Trial Judgement, para. 5753.
[7619] The Black's Law Dictionary defines the verb "prompt" as "to incite, especially to immediate action". *See* Black's Law Dictionary, 9th edition, 2009. In the Oxford Dictionary the verb "prompt" is defined as "to incite to action; to move or induce (a person, etc.) *to* or *to do* something". *See* Oxford English Dictionary, 2015.
[7620] *See also infra*, para. 3333.

its own factual findings, in failing to conclude that his speech constituted aiding and abetting genocide.[7621] It contends that Kanyabashi's contribution to the ensuing massacres was rendered substantial when he committed to Kambanda's and Sindikubwabo's instructions to massacre Tutsis, embraced these instructions as his own, and lent moral support through his influential position.[7622] The Prosecution further argues that Kanyabashi's endorsement of and promise to execute the Interim Government's genocidal instructions while knowing that mass killings were taking place in neighbouring prefectures signaled, at a minimum, that he knew of the likelihood that genocide would be committed following the speeches and that his conduct would assist in its commission.[7623] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for aiding and abetting genocide under Count 2 of the Kanyabashi Indictment.[7624]

3331. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred in finding that his speech did not substantially contribute to the killings that followed in Butare Prefecture.[7625] He reiterates that the conclusion that the three speeches were elements of one composite unified call to violence is not the only reasonable conclusion from the evidence.[7626] Kanyabashi further restates that his speech did not substantially contribute to the killings that followed Nsabimana's Swearing-In Ceremony since no link was established between his speech and the principal perpetrators of the killings.[7627]

3332. The Appeals Chamber recalls that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."[7628] It is also well-established "that proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition to the commission of the crime, is not required" as long as "the support of the aider and abettor has a substantial effect upon the perpetration of the crime."[7629] Whether a particular contribution qualifies as "substantial" is a

[7621] Prosecution Appeal Brief, paras. 24, 27. *See also* AT. 22 April 2015 p. 8.
[7622] Prosecution Appeal Brief, para. 25.
[7623] Prosecution Appeal Brief, para. 26.
[7624] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, para. 27.
[7625] Kanyabashi Response Brief, paras. 142, 143. Kanyabashi contends that the Prosecution does not rely on any evidence to state that Kanyabashi was an influential figure in all Butare Prefecture. *See ibid.*, paras. 127, 142.
[7626] Kanyabashi Response Brief, paras. 128, 142. Kanyabashi also submits that he was acquitted of conspiracy to commit genocide and that the Prosecution did not appeal this conclusion. *See ibid.*, para. 128.
[7627] Kanyabashi Response Brief, paras. 126, 130, 132-137, 142, 143. Regarding the *mens rea*, Kanyabashi argues that the Prosecution only relies on the evidence of Prosecution Expert Witness Guichaoua which goes beyond the weight that can be given to an expert witness's testimony. *See ibid.*, paras. 128, 142, 144.
[7628] *Šainović et al.* Appeal Judgement, para. 1649. *See also Popović et al.* Appeal Judgement, para. 1758; *Blaškić* Appeal Judgement, para. 46.
[7629] *Brđanin* Appeal Judgement, para. 348. *See also Simić* Appeal Judgement, para. 85; *Blaskić* Appeal Judgement, paras. 46, 48; *Kayishema and Ruzindana* Appeal Judgement, para. 201.

fact-based inquiry.[7630] Moreover, the *actus reus* may occur before, during, or after the principal crime has been perpetrated and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[7631] The Appeals Chamber further recalls that it is not necessary for the principal perpetrator to be aware of the aider and abettor's contribution.[7632]

3333. The Appeals Chamber is not persuaded that the Trial Chamber erred in finding that Kanyabashi's Speech did not substantially contribute to the genocide in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony.[7633] The Appeals Chamber notes that, although the Trial Chamber appears to have primarily relied on its finding that Kanyabashi's Speech was not inflammatory to reach its conclusion, it also relied on "the evidence in its totality".[7634] The Prosecution fails to demonstrate that the evidence on the record shows otherwise and eliminates all reasonable doubt that Kanyabashi's Speech substantially contributed to the subsequent massacres in Butare Prefecture. Indeed, the Appeals Chamber observes that, while the Trial Chamber found that Kambanda's and Sindikubwabo's Speeches contributed to the genocide in Butare Prefecture,[7635] the Prosecution does not point to any evidence to support the conclusion that Kanyabashi's Speech did.[7636] In particular, the Prosecution does not point to any evidence showing or suggesting that Kanyabashi's supportive message and commitment to execute Kambanda's and Sindikubwabo's instructions encouraged or provided moral support to the attendees or the people of Butare Prefecture to kill Tutsis. The Prosecution also does not rely on any evidence connecting Kanyabashi's Speech in any way to the genocidal acts that occurred in the prefecture after the swearing-in ceremony, including the massacres expressly cited by the Trial Chamber.[7637] In light of this and bearing in mind the Trial Chamber's finding that Kanyabashi's Speech was not of the same

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[7630] *Lukić and Lukić* Appeal Judgement, para. 438; *Kalimanzira* Appeal Judgement, para. 86; *Blagojević and Jokić* Appeal Judgement, para. 134.
[7631] *See Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 372; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.
[7632] *Kalimanzira* Appeal Judgement, para. 87; *Tadić* Appeal Judgement, para. 229.
[7633] Trial Judgement, para. 5753.
[7634] Trial Judgement, para. 5753.
[7635] Trial Judgement, paras. 932, 5673, 5741, 5753. *See also ibid.*, paras. 933, 5742, 5746. The Appeals Chamber observes that, as part of his supplementary grounds of appeal, Kanyabashi challenges the Trial Chamber's finding that Kambanda's and Sindikubwabo's Speeches triggered the genocide in Butare Prefecture that occurred after the swearing-in ceremony. *See* Kanyabashi Response Brief, paras. 109-118. The Appeals Chamber considers it unnecessary to discuss this issue in light of its conclusions on the merits of the Prosecution's appeal.
[7636] The Appeals Chamber observes that neither the Trial Chamber nor the Prosecution cited evidence showing or suggesting that Kanyabashi's Speech was one of the factors that triggered the ensuing genocide. The Trial Chamber's conclusion that Kambanda's and Sindikubwabo's Speeches triggered the genocide was primarily based on the evidence on the impact of Sindikubwabo's Speech and the evidence that widespread killings of Tutsis did not occur in Butare Prefecture prior to 19 April 1994 and that there was "overwhelming evidence that massacres in most of the Butare *communes* started in the wake of the events of 19 April 1994." *See* Trial Judgement, paras. 853-856, 927, 930, 932, 933. The Trial Chamber also cited Expert Witnesses Des Forges's and Reyntjens's testimonies that they also considered that both Kambanda's and Sindikubwabo's Speeches were factors that triggered the genocide in Butare Prefecture. *See ibid.*, paras. 640, 643-645 (Alison Des Forges), 786 (Filip Reyntjens). *See also ibid.*, paras. 668, 692-694 (André Guichaoua).
[7637] *See* Trial Judgement, para. 5753, *referring to, e.g.*, *ibid.*, Sections 4.2.2.3.3 (Mugombwa Church), 4.2.2.3.4 (Kabuye Hill), 4.2.2.3.6 (Kabakobwa Hill).

nature as those of Kambanda and Sindikubwabo, the Appeals Chamber finds no error in the Trial Chamber's finding that Kanyabashi's Speech did not substantially contribute to the killings in Butare Prefecture that followed Nsabimana's Swearing-In Ceremony.

3334. In light of the foregoing, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Kanyabashi's Speech did not substantially contribute to the genocide that followed Nsabimana's Swearing-In Ceremony and, consequently, in not holding him criminally responsible for aiding and abetting genocide on this basis. Consequently, the Appeals Chamber finds it unnecessary to discuss the Prosecution's submissions concerning Kanyabashi's *mens rea* and dismisses this remaining part of Ground 1 of the Prosecution's appeal.

B. Crime of Direct and Public Incitement to Commit Genocide (Ground 2)

3335. As noted above, the Prosecution submits that the Trial Chamber erred in not convicting Kanyabashi of committing or, in the alternative, aiding and abetting direct and public incitement to commit genocide through his speech at Nsabimana's Swearing-In Ceremony.[7638]

1. Committing Responsibility

3336. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not directly incite genocide and, consequently, in failing to convict him of committing direct and public incitement to commit genocide.[7639] The Prosecution contends that, by unambiguously committing himself and the people under his authority to execute genocidal instructions, Kanyabashi embraced these instructions as his own and called on the population to kill Tutsis.[7640] It further submits that the Trial Chamber's findings of Kanyabashi's genocidal intent in relation to the megaphone incidents in May and June 1994 as well as the fact that he knew that genocide was raging throughout Rwanda when he gave his speech and that he knew that the instructions he promised to carry out were instructions for genocide support the conclusion that Kanyabashi acted with the required *mens rea* for direct and public incitement to commit genocide.[7641] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for committing direct and public incitement to commit genocide under Count 4 of the Kanyabashi Indictment.[7642]

3337. Kanyabashi responds that the Prosecution does not explain the alleged error of law committed by the Trial Chamber and why his guilt is the only reasonable conclusion from the evidence.[7643] He argues that the Trial Chamber did not err in its application of the jurisprudential criteria in finding that his speech did not constitute direct incitement to commit genocide.[7644]

[7638] Prosecution Notice of Appeal, para. 5; Prosecution Appeal Brief, paras. 2, 9, 32, 40, 43.
[7639] Prosecution Notice of Appeal, para. 4; Prosecution Appeal Brief, paras. 28, 32. *See also* AT. 22 April 2015 p. 3.
[7640] Prosecution Appeal Brief, paras. 29, 30. *See also* Prosecution Reply Brief, paras. 48-53; AT. 22 April 2015 p. 7. At the appeals hearing, the Prosecution pointed out that whether an incitement is direct depends on the meaning of the words and their specific context and argued that Kanyabashi did not only promise to implement the Interim Government's objective to carry out genocide but also used genocidal language that ultimately meant that the Tutsis had to be killed. *See* AT. 22 April 2015, pp. 5, 7.
[7641] Prosecution Appeal Brief, para. 31, *referring to ibid.*, paras. 17, 18. *See also* AT. 22 April 2015 pp. 3, 7.
[7642] Prosecution Appeal Brief, para. 32.
[7643] Kanyabashi Response Brief, paras. 145, 146. *See also ibid.*, paras. 147-153.
[7644] Kanyabashi Response Brief, paras. 145, 146. *See also ibid.*, paras. 147-153. Kanyabashi also contends that there is no evidence that members of the population were present at the ceremony, that he knew that his speech was being recorded to be broadcast subsequently, and that he contributed to the drafting of Kambanda's and Sindikubwabo's Speeches. He argues that he did not have the required *mens rea* and that his speech was not made publicly. *See ibid.*, paras. 154, 155, 157; AT. 22 April 2015 pp. 20, 21.

3338. The Appeals Chamber recalls that a person may be found guilty of direct and public incitement to commit genocide pursuant to Article 2(3)(c) of the Statute if he directly and publicly incited the commission of genocide (*actus reus*) and had the intent to directly and publicly incite others to commit genocide (*mens rea*).[7645] Direct incitement to commit genocide requires the speech to be a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a vague or indirect suggestion.[7646]

3339. The Trial Chamber determined that Kambanda's and Sindikubwabo's Speeches were inflammatory and constituted a call to the public to kill Tutsis and their accomplices.[7647] It also found that Kanyabashi addressed the audience after Kambanda and Sindikubwabo, that his own speech was not inflammatory but that it supported their speeches, and that his address contained a commitment to execute the directives and instructions announced by them.[7648] The Trial Chamber found that this conduct did not rise to the level of directly inciting genocide.[7649]

3340. The Appeals Chamber is not convinced by the Prosecution's contention that, by embracing as his own Kambanda's and Sindikubwabo's Speeches, Kanyabashi's Speech amounted to a call to kill Tutsis. The Appeals Chamber finds that a reasonable trier of fact could have found that Kanyabashi's support and own commitment to Kambanda's and Sindikubwabo's Speeches did not rise to the level of directly appealing to the people in Butare Prefecture to carry out Kambanda's and Sindikubwabo's genocidal instructions.[7650] Accordingly, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that Kanyabashi's Speech did not rise to the level of direct incitement to commit genocide and dismisses this part of the Prosecution's appeal without further consideration.

2. Aiding and Abetting Responsibility

3341. The Prosecution submits that the Trial Chamber erred in law and in fact in finding that Kanyabashi's Speech did not substantially contribute to Kambanda's and Sindikubwabo's inciting speeches and, consequently, in failing to convict Kanyabashi of aiding and abetting direct and

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[7645] *Nzabonimana* Appeal Judgement, paras. 121, 231, 381; *Bikindi* Appeal Judgement, para. 135; *Kalimanzira* Appeal Judgement, para. 155; *Nahimana et al.* Appeal Judgement, para. 677.
[7646] *Nahimana et al.* Appeal Judgement, para. 692.
[7647] Trial Judgement, paras. 890, 898, 911, 925, 5671, 5676, 5690, 5712, 5722, 5738, 5990.
[7648] Trial Judgement, paras. 910, 911, 917, 918, 926, 5713, 5740, 5752, 5992, 5993.
[7649] Trial Judgement, para. 5993.
[7650] *See supra*, para. 3328. The Appeals Chamber finds no merit in the Prosecution's contention raised at the appeals hearing that Kanyabashi's Speech amounted to a call to kill Tutsis because he used genocidal language. The Appeals Chamber observes that the Trial Chamber expressly considered Kanyabashi's reference to the "enemy of Rwanda" and to the issue of security in his speech but concluded that Kanyabashi's Speech did not amount to an inflammatory speech. The Prosecution merely disagrees with the Trial Chamber's assessment without showing any error therein. *See* AT. 22 April 2015 pp. 5, 7; Trial Judgement, paras. 911, 5753.

public incitement to commit genocide.[7651] The Prosecution contends that Kambanda's and Sindikubwabo's Speeches amounted to direct and public incitement to commit genocide and that, by reiterating and reinforcing their message and calling for their instructions to be put into action immediately thereafter, Kanyabashi substantially contributed to their inciting acts.[7652] It argues that "all three speeches comprised a single composite event", complemented one another, and were mutually reinforcing and "brought home the same message: Tutsis must be killed."[7653] The Prosecution also asserts that the fact that Kanyabashi spoke after Kambanda and Sindikubwabo does not mean that he could not have aided and abetted their speeches since the *actus reus* of aiding and abetting may occur after the principal crime has been perpetrated.[7654] The Prosecution therefore requests that the Appeals Chamber enter a conviction against Kanyabashi for aiding and abetting direct and public incitement to commit genocide under Count 4 of the Kanyabashi Indictment.[7655]

3342. Kanyabashi responds that the Prosecution does not demonstrate that the Trial Chamber erred in finding that there was insufficient evidence to support the conclusion that he substantially contributed to any incitement by Kambanda and Sindikubwabo, or other speakers at the ceremony.[7656] He contends that the Trial Chamber had to be convinced beyond reasonable doubt that he knew that his speech contributed to the commission of the crime of direct and public incitement to commit genocide by Kambanda and Sindikubwabo.[7657] Kanyabashi argues that if he spoke last as argued by the Prosecution, the crimes of direct and public incitement committed by Kambanda and Sindikubwabo were already completed.[7658] He submits that, because the crime of direct and public incitement is completed as soon as the discourse in question is uttered or published even though the effects of incitement may extend in time, the Prosecution should have demonstrated that he had previously discussed with Kambanda or Sindikubwabo or that his speech contributed to or influenced their speeches, which it failed to do.[7659] In Kanyabashi's view, in the absence of any evidence that he or his speech had any impact on Kambanda's and Sindikubwabo's Speeches, it cannot be established that he substantially contributed to their speeches.[7660]

[7651] Prosecution Notice of Appeal, paras. 4, 5; Prosecution Appeal Brief, paras. 33, 40.
[7652] Prosecution Appeal Brief, paras. 34-36.
[7653] Prosecution Appeal Brief, paras. 36, 39.
[7654] Prosecution Appeal Brief, paras. 36-39.
[7655] Prosecution Appeal Brief, para. 40.
[7656] Kanyabashi Response Brief, para. 156.
[7657] Kanyabashi Response Brief, para. 161. In relation to Kambanda's and Sindikubwabo's Speeches, Kanyabashi challenges that the speeches were made publicly and submits, accordingly, that their speeches cannot constitute "public" incitement to commit genocide as required by the jurisprudence. *See ibid.*, para. 157. *See also* AT. 22 April 2015 pp. 20, 21.
[7658] Kanyabashi Response Brief, para. 161.
[7659] Kanyabashi Response Brief, paras. 161-163. Kanyabashi contends that there is no evidence that he contributed to the drafting of Kambanda's and Sindikubwabo's Speeches. *See* AT. 22 April 2015 p. 21.
[7660] Kanyabashi Response Brief, paras. 161-163.

3343. The Appeals Chamber reiterates that the *actus reus* of aiding and abetting "consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime".[7661] The *actus reus* need not serve as condition precedent for the crime and may occur before, during, or after the principal crime has been perpetrated.[7662]

3344. The Trial Chamber found that "the Prosecution [had not] adduced sufficient evidence to support that Kanyabashi substantially contributed to any incitement made by Kambanda, Sindikubwabo, or other speakers at this event."[7663] The Appeals Chamber sees no error in the Trial Chamber's determination. Even if Kambanda's and Sindikubwabo's conduct at Nsabimana's Swearing-In Ceremony were found to constitute direct and public incitement to commit genocide,[7664] nothing in the Trial Chamber's findings or in the evidence relied upon by the Prosecution sustains the conclusion that Kanyabashi's Speech substantially contributed to the perpetration of the crime of direct and public incitement to commit genocide committed by Kambanda and Sindikubwabo.

3345. As an inchoate crime,[7665] direct and public incitement to commit genocide is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time,[7666] and is punishable even if no act of genocide has resulted therefrom.[7667] Accordingly, in order for Kanyabashi to be found responsible for aiding and abetting direct and public incitement to commit genocide, it would have to be established that he substantially contributed to Kambanda's and Sindikubwabo's inciting speeches themselves and not, as the Prosecution suggests, to the effects of their incitements by "reiterat[ing] and reinforc[ing] their message".[7668] The Appeals Chamber recalls that the Trial Chamber determined that Kanyabashi spoke after Kambanda and Sindikubabwo delivered their speeches.[7669] The Prosecution points to no evidence or findings demonstrating that Kanyabashi's conduct provided substantial assistance to

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[7661] *Šainović et al.* Appeal Judgement, para. 1649. *See also Popović et al.* Appeal Judgement, para. 1758; *Blaškić* Appeal Judgement, para. 46.
[7662] *See Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 372; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48.
[7663] Trial Judgement, para. 5993.
[7664] The first issue raised by the Prosecution is whether Kambanda's and Sindikubwabo's conduct at Nsabimana's Swearing-In Ceremony constituted direct and public incitement to commit genocide. The Trial Chamber did not make specific legal findings in this respect. Nevertheless, in light of its conclusions on the merits of the Prosecution's appeal, the Appeals Chamber finds it unnecessary to decide this issue and to address Kanyabashi's arguments relating to the "public" nature of the speeches delivered at the ceremony. *See* Prosecution Appeal Brief, para. 34; Prosecution Reply Brief, paras. 54, 55; Kanyabashi Response Brief, para. 157; AT. 22 April 2015 pp. 7, 8, 20, 24.
[7665] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al.* Appeal Judgement, para. 678.
[7666] *Nahimana et al.* Appeal Judgement, para. 723.
[7667] *Nzabonimana* Appeal Judgement, para. 234; *Nahimana et al.* Appeal Judgement, para. 678.
[7668] *See* Prosecution Appeal Brief, para. 35.
[7669] Trial Judgement, para. 910. *See also ibid.*, paras. 5752, 5992. The Appeals Chamber observes that, as part of his supplementary grounds of appeal, Kanyabashi challenges the Trial Chamber's finding that he spoke after Kambanda

Sindikubwabo or Kambanda in the commission of their direct and public incitement to commit genocide, either before, during, or after their respective speeches.

3346. In these circumstances, the Appeals Chamber finds that the Prosecution has failed to demonstrate that the Trial Chamber erred in finding that there was insufficient evidence to support the conclusion that Kanyabashi substantially contributed to any incitement made by Kambanda or Sindikubwabo during Nsabimana's Swearing-In Ceremony. The Appeals Chamber consequently dismisses this remaining part of Ground 2 of the Prosecution's appeal.

and Sindikubwabo. *See* Kanyabashi Response Brief, paras. 29-52. The Appeals Chamber finds it unnecessary to discuss the issue in light of its conclusion on the merits of the Prosecution's appeal.

C. Conclusion

3347. Based on the foregoing, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber erred in law or in fact in acquitting Kanyabashi of genocide and direct and public incitement to commit genocide in relation to the speech he gave at Nsabimana's Swearing-In Ceremony. Accordingly, the Appeals Chamber dismisses the Prosecution's appeal in its entirety. In these circumstances, the Appeals Chamber finds that Kanyabashi's supplementary grounds have become moot and need not be addressed.

XI. SENTENCING APPEALS

3348. The Trial Chamber sentenced Nyiramasuhuko, Ntahobali, and Ndayambaje to life imprisonment and imposed sentences of 25, 30, and 35 years of imprisonment on Nsabimana, Nteziryayo, and Kanyabashi, respectively.[7670] Each convicted person challenges the Trial Chamber's sentencing determinations.[7671]

3349. Before turning to the parties' contentions, the Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.[7672] As a rule, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless the appealing party demonstrates that the Trial Chamber committed a discernible error in exercising its discretion, or failed to follow the applicable law.[7673]

[7670] Trial Judgement, para. 6271.
[7671] The Appeals Chamber observes that Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, and Ndayambaje failed to raise in their notice of appeal some of the allegations of error they developed in their appeal brief in contravention with the relevant formal requirements applicable on appeal. The Appeals Chamber refers to: (i) Nyiramasuhuko's allegations of error concerning her aggravating circumstances and the imposition of a life sentence; (ii) Ntahobali's allegation of error concerning double-counting; (iii) Nsabimana's allegation of error concerning the double-counting of the vulnerability of the victims; (iv) Nteziryayo's allegation of error regarding the principle of parity; and (v) Ndayambaje's allegations of error in relation to his aggravating factors. *See* Nyiramasuhuko Appeal Brief, paras. 1299, 1314; Ntahobali Appeal Brief, para. 988-990; Nsabimana Appeal Brief, paras. 529-531; Nteziryayo Appeal Brief, paras. 293-297; Ndayambaje Appeal Brief, paras. 684-687. Considering the nature of the allegations and the fact that the Prosecution did not object to these allegations on this basis and responded to the appellant's submissions, the Appeals Chamber will exercise its discretion to consider these allegations of error.
[7672] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 676; *Ntabakuze* Appeal Judgement, para. 264; *Ntawukulilyayo* Appeal Judgement, para. 232.
[7673] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 676; *Ntabakuze* Appeal Judgement, para. 264; *Setako* Appeal Judgement, para. 277.

A. Nyiramasuhuko's Sentencing Appeal (Ground 32)

3350. The Trial Chamber sentenced Nyiramasuhuko to a single term of life imprisonment for her convictions for conspiracy to commit genocide, genocide, extermination, rape, and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons, and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7674]

3351. Nyiramasuhuko submits that the Trial Chamber erred in: (i) its consideration of the aggravating circumstances; (ii) failing to consider certain mitigating circumstances; and (iii) sentencing her to life imprisonment.[7675] She requests that her sentence be reduced.[7676]

1. Aggravating Circumstances

3352. The Trial Chamber determined that the vast number of victims was far in excess of the threshold for extermination as a crime against humanity and considered this as an aggravating circumstance in determining Nyiramasuhuko's sentence.[7677] It further considered as an aggravating circumstance "the catastrophic number of victims across Butare *préfecture* who perished and suffered as a result of Nyiramasuhuko's participation in the conspiracy to commit genocide."[7678] It also found as an additional aggravating circumstance the numerous victims of rapes and killings at the Butare Prefecture Office, many of whom were particularly vulnerable.[7679]

3353. The Trial Chamber further took into account Nyiramasuhuko's abuse of her position of authority as an aggravating circumstance.[7680] Specifically, it held that Nyiramasuhuko's position as Minister for Family and Women's Affairs made her a person of high authority and influence who was respected throughout Rwanda and in particular in Butare Prefecture from where she came.[7681] It found that, on a number of occasions, instead of preserving peaceful co-existence between communities and the welfare of the family, she used her influence over *Interahamwe* to commit crimes such as rape and murder.[7682]

3354. Nyiramasuhuko submits that the Trial Chamber impermissibly double-counted the large number of victims at the Butare Prefecture Office as an aggravating circumstance as it had already

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[7674] Trial Judgement, paras. 6186, 6271.
[7675] Nyiramasuhuko Appeal Brief, paras. 1298-1305, 1307-1314.
[7676] Nyiramasuhuko Notice of Appeal, para. 12.1; Nyiramasuhuko Appeal Brief, paras. 1298, 1315.
[7677] Trial Judgement, para. 6206.
[7678] Trial Judgement, para. 6208.
[7679] Trial Judgement, para. 6208.
[7680] Trial Judgement, para. 6207.
[7681] Trial Judgement, para. 6207.
[7682] Trial Judgement, para. 6207.

considered this when assessing the gravity of the offences.[7683] Stressing that aggravating factors must be proven beyond reasonable doubt, she contends that the Trial Chamber erred in considering the number of victims killed in relation to attacks at the prefectoral office, because its finding in this regard was "doubtful".[7684] She also argues that it was inappropriate for the Trial Chamber to consider the number of victims "across Butare Prefecture" that resulted from her participation in a conspiracy to commit genocide as an aggravating factor as the Trial Chamber could only consider the number of victims of the specific crimes for which she was convicted.[7685] Finally, Nyiramasuhuko contends that the Trial Chamber erred in considering her abuse of authority as an aggravating factor, as this was an element of the crimes for which she was convicted pursuant to Articles 6(1) and 6(3) of the Statute.[7686]

3355. The Prosecution responds that the Trial Chamber properly considered the aggravating circumstances in determining Nyiramasuhuko's sentence.[7687]

3356. The Appeals Chamber dismisses as unfounded Nyiramasuhuko's contention that the Trial Chamber improperly double-counted the number of victims at the Butare Prefecture Office in determining her sentence. Although factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances,[7688] the Appeals Chamber considers that the Trial Chamber's reference to the fact that "hundreds of Tutsis were abducted, raped and killed" at the prefectoral office in its consideration of the gravity of the offences was used to punctuate "the seriousness and atrocity of crimes repetitively perpetrated" at the prefectoral office as opposed to reflecting that the Trial Chamber considered the number of victims in determining the gravity of the offences.[7689]

3357. As for Nyiramasuhuko's submission that the Trial Chamber's finding as to the number of victims killed during attacks at the prefectoral office is "doubtful", the Appeals Chamber recalls that it has previously determined that the record is insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks in which Ntahobali participated.[7690]

[7683] Nyiramasuhuko Appeal Brief, para. 1299.
[7684] Nyiramasuhuko Appeal Brief, para. 1303, *referring, inter alia, to* Trial Judgement, para. 2779. Nyiramasuhuko further argues that it was improper for the Trial Chamber to consider "the magnitude of the crimes committed" as this was inherent in her convictions for genocide and extermination as a crime against humanity. *See ibid.*, para. 1302.
[7685] Nyiramasuhuko Appeal Brief, para. 1301.
[7686] Nyiramasuhuko Appeal Brief, para. 1300.
[7687] Prosecution Response Brief, paras. 726-728. *See also* AT. 14 April 2015 pp. 57, 58.
[7688] *See, e.g.*, *Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7689] *See* Trial Judgement, para. 6205.
[7690] *See supra*, Section V.I.2(f).

This conclusion equally applies to Nyiramasuhuko.[7691] Notwithstanding this conclusion, the Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the Trial Chamber's error in its determination of the number of refugees abducted and killed during the attacks in which she participated would have prevented a reasonable trier of fact from considering "the numerous victims of rapes and killings at the Butare *préfecture* office in particular, many of whom were particularly vulnerable" as an aggravating circumstance.[7692]

3358. Nyiramasuhuko's contention that the Trial Chamber erred in considering the number of victims across Butare Prefecture in general as an aggravating factor is equally without merit. The Appeals Chamber recalls that the Trial Chamber convicted Nyiramasuhuko of conspiracy to commit genocide against the Tutsi population throughout Butare Prefecture between 9 April 1994 and 14 July 1994 and expressly found that in doing so she took part in Cabinet meetings and Interim Government decisions that "triggered the onslaught of massacres in Butare *préfecture*".[7693] Accordingly, it was within the discretion of the Trial Chamber to consider the number of victims in Butare Prefecture in general as an aggravating circumstance.

3359. With respect to the Trial Chamber's consideration of Nyiramasuhuko's abuse of her authority as an aggravating factor, the Appeals Chamber recalls that the Trial Chamber convicted

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[7691] The Appeals Chamber recalls that the Trial Chamber's determination that Ntahobali and Nyiramasuhuko participated in attacks that led to the abduction and killing of "hundreds of Tutsi refugees" principally relies on the Trial Chamber's conclusion that "the pickup was nearly full on at least seven occasions" during the attacks from mid-May to June 1994. *See supra*, para. 1884. However, the Appeals Chamber recalls that Nyiramasuhuko was only convicted for killings on the basis of her conduct during the Mid-May Attack and the Night of Three Attacks. *See supra*, Sections IV.F.1(a), IV.F.1(c). Accordingly, the Appeals Chamber considers that no reasonable trier of fact could have determined the number of victims abducted and killed based on the seven occasions the pickup truck left the prefectoral office, as it included the Last Half of May Attacks and the First Half of June Attacks for which Nyiramasuhuko was not convicted. Consequently, no basis exists to attribute criminal responsibility to Nyiramasuhuko for ordering killings during these attacks. As regards the remaining occasion when the pickup left the prefectoral office during the attacks for which Nyiramasuhuko was convicted for killings – namely the Mid-May Attack and the Night of Three Attacks – the Appeals Chamber recalls that it has previously considered that the record is insufficient to attribute responsibility for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office for the Mid-May Attack. *See supra*, paras. 1886, 1887. Moreover, having considered the record with respect to the Night of Three Attacks, the Appeals Chamber finds that, while the evidence relied upon by the Trial Chamber paints a nearly categorical picture of numerous persons being loaded onto the vehicle accompanying Nyiramasuhuko that night, it is insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the the Night of Three Attacks. *See* Trial Judgement, paras. 2253, 2278, 2285, 2287, 2289, 2303, 2307, 2308, 2331, 2332. *See also ibid.*, paras. 2703, 2704, 2710-2712, 2714, 2732, 2736, 2738. The Appeals Chamber is of the view that, even when considering the Mid-May Attack and the Night of Three Attacks together, the record remains insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during these attacks.

[7692] Trial Judgement, para. 6208 (internal reference omitted). The Appeals Chamber also dismisses Nyiramasuhuko's contention that the Trial Chamber erred in considering "the magnitude of the crimes committed" as this was inherent in her convictions for genocide and extermination as a crime against humanity. The Appeals Chamber recalls that there is no minimum number of victims required for a conviction of genocide and that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against humanity where the extent of the killings exceeds that required for extermination. *See Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135. *See also Nzabonimana* Appeal Judgement, para. 465. Consequently, Nyiramasuhuko's position lacks merit in light of the Trial Chamber's conclusion that the killings exceeded the threshold required to establish extermination as a crime against humanity. *See* Trial Judgement, para. 6206.

[7693] *See* Trial Judgement, paras. 5669-5678, 5727, 6186.

her pursuant to Article 6(1) of the Statute for ordering the killings of Tutsis taking refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks.[7694] It also found her responsible as a superior under Article 6(3) of the Statute for these killings, which the Trial Chamber stated it would consider in sentencing.[7695] This is consistent with the jurisprudence that when, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both provisions and the accused could be found liable for both, the Trial Chamber should enter a conviction on the basis of Article 6(1) of the Statute alone and consider the superior position of the accused as an aggravating factor in sentencing.[7696] In the present case, the Appeals Chamber, Judge Liu dissenting, finds no error in the Trial Chamber's conclusion that Nyiramasuhuko "used her influence over *Interahamwe* to commit crimes such as [...] murder" and that this supported the conclusion that her "abuse of general authority" constituted an aggravating factor.[7697] In the view of the Appeals Chamber, Judge Liu dissenting, Nyiramasuhuko does not demonstrate that the Trial Chamber impermissibly double-counted an element of the crime as an aggravating factor.

3360. The Trial Chamber also convicted Nyiramasuhuko as a superior pursuant to Article 6(3) of the Statute for the rapes committed by *Interahamwe* following her orders during the Night of Three Attacks and one of the First Half of June Attacks at the Butare Prefecture Office.[7698] The Appeals Chamber recalls that a superior position in itself does not constitute an aggravating factor but that it is the abuse of such a position which may be considered as an aggravating factor.[7699] Given that Nyiramasuhuko was found to have ordered rapes but was only convicted pursuant to Article 6(3) of the Statute – which does not require proof of ordering – Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in concluding that her "abuse of general authority" constituted an aggravating factor by relying, in part, on the finding that Nyiramasuhuko "used her influence over *Interahamwe* to commit crimes such as rape".[7700] For the same reasons, she fails to demonstrate that the Trial Chamber impermissibly double-counted an element of the offence as an aggravating factor.

[7694] *See supra*, Sections IV.F.1(a), IV.F.1(c).
[7695] Trial Judgement, paras. 5886, 5970, 6052. *See also supra*, Sections IV.F.1(a), IV.F.1(c).
[7696] *Setako* Appeal Judgement, para. 266; *Renzaho* Appeal Judgement, para. 564; *Nahimana et al.* Appeal Judgement, para. 487.
[7697] Trial Judgement, para. 6207.
[7698] *See supra*, Sections IV.F.1(b), IV.F.1(c), IV.F.4.
[7699] *See, e.g.*, *Simba* Appeal Judgement, para. 284; *Stakić* Appeal Judgement, para. 411; *Kayishema and Ruzindana* Appeal Judgement, paras. 358, 359; *Babić* Sentencing Appeal Judgement, para. 80; *Kamuhanda* Appeal Judgement, para. 347.
[7700] Trial Judgement, para. 6207.

3361. The Appeals Chamber, Judge Liu dissenting with respect to Nyiramasuhuko's abuse of her authority as an aggravating factor, therefore dismisses Nyiramasuhuko's submissions concerning the aggravating circumstances considered by the Trial Chamber in determining her sentence.

2. Mitigating Circumstances

3362. In discussing Nyiramasuhuko's mitigating circumstances, the Trial Chamber stated that it had "considered [her] background and individual circumstances".[7701] It noted her service as a government minister and "long service in the Ministry of Health" but considered that these were "of a very limited weight, given the gravity of the crimes committed by [her]".[7702]

3363. Nyiramasuhuko argues that the Trial Chamber erred by failing to consider the following factors which she raised in mitigation at trial: (i) her age; (ii) the inhumane conditions of solitary confinement she faced as the only woman detained at the Tribunal's detention facility; and (iii) incidences of discrimination against her in prison, including physical violence.[7703]

3364. The Prosecution responds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred in its assessment of mitigating circumstances.[7704]

3365. The Appeals Chamber recalls that under Rule 86(C) of the Rules, the parties shall address matters of sentencing in their closing arguments. It was thus Nyiramasuhuko's prerogative to identify any mitigating circumstances she wished to have considered by the Trial Chamber and she cannot raise them for the first time on appeal.[7705] Nyiramasuhuko did not identify her age as a mitigating circumstance to be considered by the Trial Chamber in her closing brief and only referred to the fact that she was "around 60" in her closing arguments without indicating that it was a relevant mitigating factor to be considered in sentencing.[7706] Accordingly, the Appeals Chamber

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[7701] Trial Judgement, para. 6209.
[7702] Trial Judgement, para. 6209.
[7703] Nyiramasuhuko Notice of Appeal, para. 12.2; Nyiramasuhuko Appeal Brief, paras. 1307-1313. *See also* AT. 15 April 2015, pp. 9, 10. Nyiramasuhuko further contends that "[t]he Trial Chamber erred in not taking into consideration the unreasonable delay of 14 years of detention on remand" she raised as a violation of her rights under Rule 20(4)(c) of the Rules at trial, which she argues "must be remedied, at least by a reduction of the sentence". *See* Nyiramasuhuko Appeal Brief, para. 1306 (internal references omitted). *See also* AT. 15 April 2015 pp. 9-11. The Appeals Chamber notes that Nyiramasuhuko raised this contention as a relevant sentencing consideration at trial. However, as Nyiramasuhuko's arguments were dismissed, the Trial Chamber was not required to consider this contention as a mitigating circumstance. *See Setako* Appeal Judgement, para. 297.
[7704] Prosecution Response Brief, paras. 726, 729-732. *See also* AT. 14 April 2015 pp. 58, 59.
[7705] *See, e.g., Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7706] Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53 ("Imperfectly [*sic*] aware of the sentencing grill [*sic*] which are normally handed out by the ICTR, I've been here for quite some time and able to know them. This lady, who is around 60, is devoted to her country – has devoted her life to the cause of women."). The Appeals Chamber notes that Nyiramasuhuko did not make any submission in relation to sentencing in her closing brief.

finds that the Trial Chamber did not err in not considering this circumstance in mitigation and dismisses Nyiramasuhuko's contention in this respect.

3366. Likewise, while Nyiramasuhuko referred to her situation in detention "as a condition of isolation" in her oral closing arguments, she does not demonstrate that it was erroneous for the Trial Chamber not to have considered it as a mitigating factor.[7707] Nyiramasuhuko's vague statement does not clearly suggest that the nature of her detention as the only woman within the Tribunal's detention facility was inhumane or violated human rights standards – arguments only made clear on appeal – nor does it demonstrate that such alleged violations had been established by the preponderance of the evidence.[7708] Nyiramasuhuko similarly did not raise the alleged instances of discrimination and physical violence she encountered while in detention as mitigating factors in her closing submissions.[7709] Consequently, Nyiramasuhuko does not demonstrate that the Trial Chamber erred in not considering her conditions of detention and the alleged incidences of discrimination against her in prison in determining her sentence.

3367. In light of the above, the Appeals Chamber finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in failing to consider mitigating circumstances in determining her sentence.

3. Life Sentence

3368. Nyiramasuhuko argues that the Trial Chamber erred in sentencing her to imprisonment for the remainder of her life because the Tribunal has signed detention agreements with States that have no domestic provisions for conditional release, thereby potentially imposing upon her a life sentence without the possibility of reduction, which constitutes inhumane treatment.[7710]

[7707] *See* Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53 ("I would like to add that the life condition of Mrs. Nyiramasuhuko is very difficult and it will be more difficult if she is the first and the only woman accused and convicted of genocide in history. And here the life condition of the only woman, can be described as a condition of isolation, when she's almost always alone. This is a burden which can be borne by very few people, and should not be borne, Your Honour and I would like you to take this, too, into account.").

[7708] The Appeals Chamber recalls that an accused bears the burden of establishing mitigating factors by a preponderance of the evidence. *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294. The Appeals Chamber further recalls that it found that, as the only woman in the Tribunal's custody, Nyiramasuhuko's conditions of detention differed from those of the other detainees. However, it considered that Nyiramasuhuko has failed to substantiate her claim on appeal that the prejudice resulting from the prolongation of her detention on remand was greater than that suffered by her co-Accused. Accordingly, the Appeals Chamber rejected Nyiramasuhuko's contention that she was adversely affected by the undue delay in the present proceedings due to her status as the only female detainee in the Tribunal's custody. *See also supra*, para. 389.

[7709] *See* Nyiramasuhuko Closing Arguments, T. 22 April 2009 p. 53.

[7710] Nyiramasuhuko Appeal Brief, para. 1314.

3369. The Prosecution responds that Nyiramasuhuko's assertion "that her life sentence may be inhumane treatment is totally without merit and must fail."[7711]

3370. Nyiramasuhuko's argument that the Trial Chamber erred in sentencing her to life imprisonment because she may be transferred to a State that does not contain domestic legal provisions permitting conditional release is speculative.[7712] In addition, the selection of the State in which Nyiramasuhuko will serve her sentence was not within the discretion of the Trial Chamber when it rendered the Trial Judgement.[7713] As trial chambers are vested with the discretion to sentence convicted persons to imprisonment for the remainder of their lives under Rule 101(A) of the Rules, the Appeals Chamber finds that Nyiramasuhuko has not demonstrated that the Trial Chamber erred in this respect.

4. Conclusion

3371. The Appeals Chamber, Judge Liu dissenting with respect to Nyiramasuhuko's abuse of her authority as an aggravating factor, finds that Nyiramasuhuko has failed to demonstrate that the Trial Chamber erred in its assessment of the relevant aggravating and mitigating circumstances or in imposing a sentence of life imprisonment. Accordingly, the Appeals Chamber dismisses Ground 32 of Nyiramasuhuko's appeal.

[7711] Prosecution Response Brief, para. 732. *See also* AT. 14 April 2015 p. 57.
[7712] In this respect, Nyiramasuhuko merely refers to States "including Mali" without pointing to anything in Malian domestic legal provisions to support her contention. *See* Nyiramasuhuko Appeal Brief, para. 1314.
[7713] *See* Rule 103(A) of the Rules.

B. Ntahobali's Sentencing Appeal (Ground 5)

3372. The Trial Chamber sentenced Ntahobali to a single term of life imprisonment for his convictions for genocide, extermination, rape, and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons and outrages upon personal dignity as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7714]

3373. Ntahobali submits that his sentence should be reduced because the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) its consideration of certain aggravating circumstances; (iii) failing to consider or accord sufficient weight to certain mitigating circumstances; (iv) imposing a higher sentence than that imposed in similar cases; and (v) sentencing him to life imprisonment in violation of his fundamental human rights.[7715]

1. Gravity of the Offences

3374. The Trial Chamber determined that the rapes and killings of Tutsis at the Hotel Ihuliro roadblock and at the Butare Prefecture Office, the killings of Tutsis at the IRST, the killing of the Rwamukwaya family, and the killing of Tutsis abducted from the EER were crimes "of the utmost gravity".[7716] It noted that these crimes were not isolated instances, but occurred in various parts of Butare Prefecture over a significant period of time.[7717] It further considered "the seriousness and atrocity of crimes repetitively perpetrated at the Butare *préfecture* office, where hundreds of Tutsis were abducted, raped and killed."[7718]

3375. Ntahobali submits that the Trial Chamber erred in considering the crimes as having "occurred in various parts of Butare *préfecture*" because he was "convicted only of crimes committed in Butare town itself".[7719] He further argues that the Trial Chamber erred in taking into account "rapes" perpetrated at the Hotel Ihuliro roadblock in assessing the gravity of the offences because he was found guilty of having perpetrated only one rape at this location.[7720]

3376. The Prosecution responds that Ntahobali's contention that the Trial Chamber wrongly considered more than one rape at the roadblock was raised for the first time in his appeal brief and

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[7714] Trial Judgement, paras. 6186, 6271.
[7715] Ntahobali Notice of Appeal, paras. 347-357; Ntahobali Appeal Brief, paras. 985-1012.
[7716] Trial Judgement, paras. 6216, 6217.
[7717] Trial Judgement, para. 6217.
[7718] Trial Judgement, para. 6217.
[7719] Ntahobali Appeal Brief, para. 985, *quoting* Trial Judgement, para. 6217. Ntahobali argues in particular that "[t]he Trial Chamber exaggerated the geographical scope of the crimes [...] and attributed to them a higher level of gravity and, in the process, erroneously considered a piece of evidence". *See idem.*
[7720] Ntahobali Appeal Brief, para. 986 (emphasis omitted), *referring to* Trial Judgement, paras. 6077-6082, 6216.

should be summarily dismissed.[7721] It also discounts as misleading Ntahobali's remaining argument on the basis that the Butare Prefecture includes Butare Town and further contends that the Trial Chamber determined that Tutsis were abducted and then killed in various locations.[7722]

3377. Ntahobali replies that the interests of justice require that his argument concerning the rapes at the Hotel Ihuliro roadblock be considered.[7723]

3378. The Appeals Chamber fails to see the relevance of Ntahobali's contention that the Trial Chamber erred in finding that he committed crimes "in various parts" of Butare Prefecture while these crimes only occurred in Butare Town, since Ntahobali was convicted of crimes that occurred at several sites within Butare Prefecture.

3379. As to the Trial Chamber's consideration of the "rapes" perpetrated at the Hotel Ihuliro roadblock, Ntahobali does not dispute that he failed to raise this alleged error in his notice of appeal.

3380. The Appeals Chamber recalls that an application to vary the grounds of appeal must be done by way of a motion.[7724] It further recalls that it has prevented Nteziryayo from raising specific challenges in relation to the Trial Chamber's determination of his sentence due to the failure to properly raise them in his notice of appeal as they concerned a distinct legal error.[7725] The Appeals Chamber considers that the current situation is materially similar in that Ntahobali's contention in his appeal brief impermissibly expands the scope of his appeal and the Prosecution objects on this basis. In this context, and given that all the co-Appellants shall be treated equally,[7726] the Appeals Chamber, Judge Agius and Judge Liu dissenting, considers that the interests of justice do not require consideration of this argument.[7727]

3381. For these reasons, the Appeals Chamber, Judge Agius and Judge Liu dissenting, dismisses Ntahobali's challenges pertaining to the determination of the gravity of his offences.

2. Aggravating Circumstances

3382. The Trial Chamber considered as aggravating circumstances in determining Ntahobali's sentence: (i) the vast number of victims, far in excess of the threshold for extermination as a crime against humanity; (ii) the premeditated nature of the atrocities perpetrated by Ntahobali at the

[7721] Prosecution Response Brief, para. 1225.
[7722] Prosecution Response Brief, para. 1224.
[7723] Ntahobali Reply Brief, para. 403.
[7724] Practice Direction on Formal Requirements on Appeal, para. 2.
[7725] 8 May 2013 Appeal Decision, paras. 70, 72(vi), 74.
[7726] *See* Article 20(1) of the Statute.

Butare Prefecture Office, which it determined was shown by the repetitive nature of the attacks; and (iii) Ntahobali's superior responsibility in relation to the Hotel Ihuliro roadblock, the Butare Prefecture Office, and the EER.[7728]

3383. Ntahobali argues that the Trial Chamber engaged in impermissible double-counting by considering the number of victims and the repetitive nature of the crimes perpetrated at the prefectoral office in determining the gravity of the offences and the aggravating circumstances.[7729] He also contends that the Trial Chamber erred in considering as an aggravating circumstance the premeditated nature of the crimes at the prefectoral office because, in his view, premeditation was not proven beyond a reasonable doubt.[7730] Ntahobali further argues that the Trial Chamber erred in considering the number of victims as being far in excess of the threshold for extermination as a crime against humanity because an element of a crime cannot be considered as an aggravating circumstance.[7731]

3384. The Prosecution responds that Ntahobali's argument concerning double-counting the number of victims "is undeveloped and must be summarily dismissed."[7732] It submits that premeditation does not depend on the length of time the crimes persisted but rather on whether Ntahobali planned these acts in advance, a fact which the Trial Chamber found established.[7733] The Prosecution also argues that the Trial Chamber's finding that the number of victims exceeds the threshold for extermination as a crime against humanity is in accordance with the jurisprudence and was proven beyond reasonable doubt based on the evidence.[7734]

3385. With regard to Ntahobali's contention that the Trial Chamber improperly considered the number of victims in the gravity of the offences and again as an aggravating factor, the Appeals Chamber reiterates that factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances.[7735] The Appeals Chamber notes that the Trial Chamber referred to the fact that "hundreds of Tutsis were abducted, raped and killed" at the Butare Prefecture Office in its consideration of the gravity of the offences.[7736]

[7727] *See Gatete* Appeal Judgement, para. 279.
[7728] Trial Judgement, paras. 6218-6220.
[7729] Ntahobali Appeal Brief, paras. 988-990.
[7730] Ntahobali Notice of Appeal, para. 350; Ntahobali Appeal Brief, para. 991. *See also* Ntahobali Reply Brief, para. 404. Ntahobali argues that premeditation was never addressed in the Trial Judgement and the language used by the Trial Chamber indicates that it was speculative. *See* Ntahobali Appeal Brief, para. 991, *referring to* Trial Judgement, para. 6219.
[7731] Ntahobali Notice of Appeal, paras. 347, 348; Ntahobali Appeal Brief, para. 992.
[7732] Prosecution Response Brief, para. 1226.
[7733] Prosecution Response Brief, para. 1227.
[7734] Prosecution Response Brief, para. 1226, *referring, inter alia, to Ndindabahizi* Appeal Judgement, para. 135.
[7735] *See, e.g., Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7736] *See* Trial Judgement, para. 6217.

However, the Appeals Chamber considers that the Trial Chamber employed this language to punctuate "the seriousness and atrocity of crimes repetitively perpetrated" at the prefectoral office and did not consider the number of victims in determining the gravity of the offences.[7737]

3386. Indeed, the Appeals Chamber observes that, in finding that "the vast number of victims" during the course of *all* attacks and massacres constituted an aggravating factor, the Trial Chamber did not limit its finding to the number of victims at the prefectoral office alone.[7738] The Appeals Chamber considers that it was the overall number of victims of Ntahobali's crimes that was assessed as an aggravating circumstance and that, as such, it was not the same factor that was taken into account when assessing the gravity of the offence.[7739] Ntahobali's contention that the Trial Chamber erred in double-counting the number of victims is therefore ill-founded.

3387. Ntahobali's contention that the Trial Chamber engaged in double-counting with respect to the repetitive nature of the crimes at the prefectoral office similarly lacks merit. The Appeals Chamber notes that the Trial Chamber did not consider this as an aggravating circumstance in and of itself, but rather relied on this factor as support for its finding that Ntahobali's actions at the prefectoral office were premeditated.[7740]

3388. As to Ntahobali's argument that premeditation had not been established beyond reasonable doubt, the Appeals Chamber observes that the Trial Chamber concluded that the attacks at the prefectoral office were "methodical"[7741] and that, between mid-May and mid-June 1994, Ntahobali with others came to the prefectoral office on various occasions to abduct Tutsis, who were then physically assaulted, raped, and killed.[7742] In these circumstances, the Appeals Chamber considers that Ntahobali does not demonstrate that the Trial Chamber erred in concluding that the repetitive attacks were premeditated and dismisses his argument in this respect.

3389. The Appeals Chamber recalls that where an aggravating factor for the purposes of sentencing is at the same time an element of the offence, it cannot also constitute an aggravating factor for the purposes of sentencing.[7743] It also reiterates that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against

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[7737] *See* Trial Judgement, para. 6217.
[7738] *See* Trial Judgement, para. 6218.
[7739] *See Ntabakuze* Appeal Judgement, para. 273.
[7740] *See* Trial Judgement, para. 6219 (noting that the repetitive atrocities perpetrated by Ntahobali at the prefectoral office demonstrated premeditation and stating that "[s]uch premeditation amounts to an aggravating factor.").
[7741] Trial Judgement, para. 5683.
[7742] Trial Judgement, paras. 5867-5875.
[7743] *See, e.g., Ndindabahizi* Appeal Judgement, para. 137; *Blaškić* Appeal Judgement, para. 693; *Vasiljević* Appeal Judgement, paras. 172, 173.

humanity where the extent of the killings exceeds that required for extermination.[7744] In the present case, the Trial Chamber found that Ntahobali, *inter alia*, ordered the killing of about 200 Tutsis at the IRST.[7745] The Appeals Chamber, Judge Liu dissenting, has also affirmed Ntahobali's convictions for ordering the killing of Tutsis abducted and killed during the Mid-May Attack.[7746] Consequently, the Appeals Chamber considers that Ntahobali does not show that the Trial Chamber erred in considering the number of victims as an aggravating circumstance in light of its finding that the number of victims exceeded that required for extermination.[7747]

3390. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's arguments concerning the aggravating circumstances considered by the Trial Chamber in determining his sentence.

3. Mitigating Circumstances

3391. The Trial Chamber determined that four mitigating circumstances weighed in Ntahobali's favour.[7748] It accorded the following three mitigating circumstances "very limited weight": (i) his young age during the events; (ii) the fact that he is the father of three young children; and (iii) his good character before the events.[7749] The Trial Chamber gave greater weight to the fact that Ntahobali voluntarily surrendered himself to the Tribunal.[7750] However, the Trial Chamber considered that, despite the weight accorded to these mitigating circumstances, "they pale[d] in comparison to the sheer gravity of Ntahobali's crimes, even before aggravating circumstances [were] taken into account."[7751]

3392. Ntahobali submits that the Trial Chamber erred in according limited weight to the mitigating circumstances such as his age at the time of the events and arrest, his family circumstances, and his good conduct in detention, which indicate the possibility of rehabilitation.[7752] He also contends that

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[7744] *Nzabonimana* Appeal Judgement, para. 465; *Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135.
[7745] Trial Judgement, paras. 1480, 5782, 6053.
[7746] *See supra*, Sections V.I.3(a), V.I.3(c).
[7747] Trial Judgement, para. 6218. In so finding, the Appeals Chamber, Judge Khan dissenting, recalls that Ntahobali was not convicted in relation to the killings perpetrated during the Night of Three Attacks and the First Half of June Attacks. *See supra*, Sections V.I.1(a)(iii), V.I.1(c). It also has considered its prior conclusion that the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office is not sustained by the record. *See supra*, Section V.I.2(f).
[7748] Trial Judgement, para. 6221.
[7749] Trial Judgement, para. 6221.
[7750] Trial Judgement, para. 6221.
[7751] Trial Judgement, para. 6222.
[7752] Ntahobali Notice of Appeal, paras. 353, 356; Ntahobali Appeal Brief, para. 994-996, *referring to Erdemović* Sentencing Judgement, para. 16. Ntahobali argues that a reasonable trier of fact would not have imposed a sentence of life imprisonment because the consequences of imposing such a sentence on a detainee who is only 27 years old far outweigh those borne by a detainee receiving such a sentence at the age of 50 or 60. He further contends that his age, his family circumstances, and his good conduct indicate that he can be rehabilitated into society and warrant the possibility of being released.

the Trial Chamber abused its discretion by not considering that he "did not hold a position of authority in Rwanda and was not one of the architects of the genocide".[7753]

3393. The Prosecution responds that the Trial Chamber did not err in weighing Ntahobali's mitigating circumstances.[7754]

3394. The Appeals Chamber recalls that, while a trial chamber has the obligation to consider any mitigating circumstances when determining the appropriate sentence, it enjoys a considerable degree of discretion in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded to it.[7755] Accordingly, the existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of life imprisonment where the gravity of the offence so requires.[7756]

3395. The Appeals Chamber notes that the Trial Chamber expressly took into account Ntahobali's young age during the events, the fact that he was the father of three children, and his good character before the events.[7757] In light of a trial chamber's discretion in determining the weight, if any, to be accorded to mitigating circumstances, the Appeals Chamber considers that Ntahobali does not demonstrate that the Trial Chamber erred in failing to give sufficient weight to these mitigating circumstances and dismisses his arguments in this respect.

3396. The Appeals Chamber further observes that Ntahobali argues for the first time on appeal that the fact that he did not hold any position of *de jure* authority in Rwanda warranted mitigation.[7758] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7759] the Appeals Chamber considers that Ntahobali has waived his right to have this circumstance considered on appeal.

[7753] Ntahobali Notice of Appeal, para. 352; Ntahobali Appeal Brief, para. 997, *referring to Simba* Trial Judgement, paras. 435, 436, *Kayishema and Ruzindana* Appeal Judgement, paras. 349, 352. Ntahobali submits that "the principle of gradation of hierarchy in sentencing requires that the longest sentences be reserved for the most serious offences" and that "[o]ffenders receiving the most severe sentences also tend to be senior authorities". *See* Ntahobali Appeal Brief, para. 997, *quoting Nahimana et al.* Appeal Judgement, para. 1060, *Nchamihigo* Trial Judgement, para. 388, *and referring to Tadić* Appeal Judgement, para. 55.

[7754] Prosecution Response Brief, paras. 1229-1231.

[7755] *See, e.g., Nizeyimana* Appeal Judgement, para. 445; *Ndahimana* Appeal Judgement, para. 223; *Ntabakuze* Appeal Judgement, para. 280; *Bikindi* Appeal Judgement, para. 158.

[7756] *See, e.g., Nizeyimana* Appeal Judgement, para. 445; *Ntabakuze* Appeal Judgement, para. 280; *Niyitegeka* Appeal Judgement, para. 267.

[7757] *See* Trial Judgement, para. 6221.

[7758] *See* Ntahobali Closing Brief, paras. 776-780; Ntahobali Closing Arguments, T. 23 April 2009 pp. 53-58.

[7759] *See, e.g., Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.

3397. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions related to the Trial Chamber's consideration of the mitigating circumstances relevant to the determination of his sentence.

4. Comparability of Sentences

3398. Ntahobali argues that his sentence is excessive because it is disproportionate to those rendered in similar cases concerning the same offences.[7760] In support of his argument, Ntahobali refers to the cases of Yussuf Munyakazi, Obed Ruzindana, and Gérard Ntakirutimana in which the accused received sentences of 25 years of imprisonment.[7761]

3399. The Prosecution responds that Ntahobali fails to demonstrate that the Trial Chamber committed a discernible error or abused its discretion in determining his sentence.[7762]

3400. The Appeals Chamber recalls that comparison between cases is of limited assistance in challenging a sentence given the broad discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7763] As repeatedly held, any given case may contain a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual,[7764] and often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results for every individual.[7765] Aside from referring to cases in which lesser sentences were imposed and which he contends are similar to his, Ntahobali fails to demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of life imprisonment in light of the sentences imposed on other convicted persons he has identified.

3401. Accordingly, the Appeals Chamber dismisses Ntahobali's contention in this respect.

[7760] Ntahobali Notice of Appeal, para. 351; Ntahobali Appeal Brief, para. 999.
[7761] Ntahobali Appeal Brief, paras. 1000-1003, *referring to Munyakazi* Trial Judgement, paras. 5, 24, 26, 134, 425, 501, 508, 522, *Munyakazi* Appeal Judgement, para. 188, *Kayishema and Ruzindana* Trial Judgement, paras. 564-566, 571, *Ntakirutimana* Trial Judgement, para. 924, *Ntakirutimana* Appeal Judgement, paras. 554-564.
[7762] Prosecution Response Brief, para. 1228.
[7763] *See, e.g., Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7764] *Ntabakuze* Appeal Judgement, para. 298; *Simba* Appeal Judgement, para. 336; *Strugar* Appeal Judgement, para. 348.
[7765] *See, e.g., Ntabakuze* Appeal Judgement, para. 298; *Milošević* Appeal Judgement, para. 326; *Nahimana et al.* Appeal Judgement, para. 1046, *citing Čelebići* Appeal Judgement, para. 719.

5. Life Sentence

3402. Ntahobali submits that, while the Statute of the International Residual Mechanism for Criminal Tribunals ("Residual Mechanism Statute" and "Residual Mechanism", respectively) provides for the possibility of pardon or commutation of sentence, the realisation of such possibility depends on the law of the State where the sentence is being served.[7766] He argues that, given that certain States in which persons convicted by the Tribunal may serve their sentences do not provide for the possibility of parole,[7767] there is a risk that he may be subjected to serving a sentence of life imprisonment without the possibility of parole in violation of, *inter alia*, Article 7 of the ICCPR and other instruments prohibiting cruel, inhumane or degrading treatment or punishment.[7768] Ntahobali further contends that the "Appeals Chamber should take the opportunity to state unequivocally that [a life] sentence violates [his] fundamental rights [...] and that the absence of a formal provision in the [Residual Mechanism] Statute enabling mandatory review of sentences after a mandatory period of service of a life sentence violates those rights."[7769] He adds that persons sentenced by the ICTY and ICTR should be treated equally and that, while he may have no prospect of conditional release if his sentence is affirmed, persons convicted by the ICTY generally serve their sentences in States which recognise the principle of conditional release in the case of life sentences.[7770]

3403. The Prosecution responds that Ntahobali does not demonstrate any error of law or fact committed by the Trial Chamber and that his allegations are based on material not on the record and mere assertions unsupported by any evidence.[7771] It submits that Article 7 of the ICCPR does not list life imprisonment as a degrading and inhumane treatment.[7772]

[7766] Ntahobali Appeal Brief, para. 1004, *referring to* Article 26 of the Residual Mechanism Statute.
[7767] Ntahobali points out that countries such as Mali and Rwanda do not provide for the possibility of parole but only refers to Rwandan domestic legislation. *See* Ntahobali Appeal Brief, para. 1005.
[7768] Ntahobali Notice of Appeal, paras. 354, 355; Ntahobali Appeal Brief, paras. 1005-1008, *referring*, *inter alia*, *to* Article 3 of the European Convention on Human Rights, Article 5 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples' Rights, Article 16 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 10 of the Rome Statute. Ntahobali also refers to a number of cases before the ECtHR in support of his contention. *See* Ntahobali Appeal Brief, para. 1008, *referring to Kafkaris v. Cyprus*, ECtHR, No. 21906/04, Judgment, 12 February 2008, para. 97, *Einhorn v. France*, ECtHR, No. 71555/01, Judgment, 16 October 2001, para. 27, *Nivette v. France*, ECtHR, No. 44190/98, Decision, 3 July 2001, *Vinter and others v. United Kingdom*, ECtHR, Nos. 66069/09, 130/10, 3896/10, Judgment, 17 January 2012, paras. 56-58, *Kafkaris v. Cyprus*, ECtHR, No. 21906/04, *Opinion partiellement dissidente commune aux Juges Tulkens, Cabral Barreto, Fura-Sandström, Spielmann et Jebens*, 12 February 2008, para. 6, *Vinter and others v. United Kingdom*, ECtHR, Nos. 66069/09, 130/10, 3896/10, Dissenting Opinion of Judges Garlicki, Thórn Björgvinsson and Nicolaou, 17 January 2012, p. 39.
[7769] Ntahobali Appeal Brief, para. 1009, *referring to Selmouni v. France*, ECtHR, No. 25803/94, Judgment, 28 July 1999, para. 95, *V. v. United Kingdom*. ECtHR, No. 24888/94, Judgment, 16 December 1999.
[7770] Ntahobali Appeal Brief, paras. 1006, 1010.
[7771] Prosecution Response Brief, para. 1232.
[7772] Prosecution Response Brief, para. 1232.

3404. The Appeals Chamber notes that nothing precludes a trial chamber from imposing a term of life imprisonment when the gravity of the offence so requires,[7773] and that neither Article 7 nor Article 10 of the ICCPR prohibits life imprisonment.[7774] The Appeals Chamber considers that Ntahobali's submissions concerning the enforcement of his sentence are speculative. Furthermore, the Appeals Chamber observes that sentence enforcement issues were not matters for the Trial Chamber and that, as such, there can be no error on behalf of the Trial Chamber in this respect. His arguments concerning pardon, commutation of sentence, and early release are therefore dismissed.

3405. The Appeals Chamber further dismisses Ntahobali's contention that the absence in the Residual Mechanism Statute of a mandatory review of his life sentence after a fixed period would violate his fundamental rights. The Appeals Chamber observes that Ntahobali will retain the possibility to directly petition the President of the Residual Mechanism for pardon, commutation of sentence, or early release.[7775]

3406. Based on the foregoing, the Appeals Chamber dismisses Ntahobali's contentions concerning the imposition of a sentence of life imprisonment.

6. Conclusion

3407. The Appeals Chamber, Judge Agius and Judge Liu dissenting with respect to the gravity of the offences, finds that Ntahobali has failed to demonstrate any error in the Trial Chamber's determination of his sentence and, accordingly, dismisses the remainder of Ground 5 of his appeal.

[7773] *See* Rule 101(A) of the Rules; *Ntawukulilyayo* Appeal Judgement, fn. 581; *Munyakazi* Appeal Judgement, para. 186, *quoting* Rukundo Appeal Judgement, para. 260 ("there is no category of cases within the jurisdiction of the Tribunal where the imposition of life imprisonment is *per se* barred, there is also no category of cases where it is *per se* mandated.").
[7774] *See Stakić* Appeal Judgement, para. 395.
[7775] *See* Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence, and Early Release of Persons Convicted by the ICTR, the ICTY or the Mechanism, MICT/3, 5 July 2012, para. 3.

C. Nsabimana's Sentencing Appeal (Grounds 15 and 16)

3408. The Trial Chamber sentenced Nsabimana to a single term of 25 years of imprisonment for his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental-well being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7776]

3409. Nsabimana submits that the Trial Chamber erred in: (i) assessing the aggravating circumstances; (ii) failing to consider or accord sufficient weight to certain mitigating circumstances; and (iii) imposing a sentence manifestly disproportionate to the form and degree of his participation in the crimes.[7777] He requests that the Appeals Chamber "revise the sentence imposed by the Trial Chamber to faithfully reflect the particular circumstances of this case."[7778]

1. Aggravating Circumstances

3410. The Trial Chamber found that the vulnerability of the victims at the Butare Prefecture Office constituted an aggravating circumstance when imposing Nsabimana's sentence.[7779] It noted that other potentially aggravating factors had not been proven.[7780]

3411. Nsabimana argues that the Trial Chamber engaged in impermissible double-counting because it considered the vulnerability of the victims both when assessing the gravity of the offences and as an aggravating circumstance.[7781] He submits that the Trial Chamber also impermissibly considered his participation in the crimes through omission as an aggravating circumstance, as this was also an element of the form of aiding and abetting for which he was convicted.[7782]

3412. The Prosecution responds that Nsabimana does not demonstrate any discernible error in the Trial Chamber's determination that the vulnerability of the refugees at the prefectoral office constitutes an aggravating circumstance.[7783]

[7776] Trial Judgement, paras. 6186, 6271.
[7777] Nsabimana Notice of Appeal, paras. 112-129; Nsabimana Appeal Brief, paras. 503-546; Nsabimana Reply Brief, paras. 188-194.
[7778] Nsabimana Appeal Brief, para. 546.
[7779] Trial Judgement, para. 6231.
[7780] Trial Judgement, para. 6231.
[7781] Nsabimana Appeal Brief, paras. 529-531; Nsabimana Reply Brief, para. 193.
[7782] Nsabimana Notice of Appeal, paras. 113-119; Nsabimana Appeal Brief, paras. 506-510, 533-536, *referring to* Trial Judgement, para. 6230. Nsabimana also submits that the Trial Chamber's "acknowledgement that there was no premeditation" on his part "amounts to confirming that he could not have been aware of the violent acts committed at the [Butare Prefecture Office] because premeditation presupposes preparation prior to the commission of the offence." *See* Nsabimana Appeal Brief, para. 508.
[7783] Prosecution Response Brief, paras. 1412, 1421.

3413. The Appeals Chamber finds that the Trial Chamber relied on the vulnerability of the victims in assessing the gravity of the crimes[7784] and the aggravating circumstances.[7785] By doing so, the Trial Chamber engaged in impermissible double-counting as factors taken into consideration as aspects of the gravity of a crime cannot be additionally taken into account as separate aggravating circumstances and *vice versa*.[7786] Accordingly, the Appeals Chamber finds that the Trial Chamber erred in considering the same factor in assessing the gravity of the offences and as a separate aggravating circumstance and will consider the impact of this error, if any, in Section XII below.

3414. Nsabimana's remaining argument that the Trial Chamber impermissibly considered his indirect participation in crimes committed at the prefectoral office as an aggravating factor as this also constituted an element of aiding and abetting through omission is without merit. As indicated above, the Trial Chamber only considered the vulnerability of the victims as an aggravating factor and, in fact, considered that his indirect participation in crimes through omission warranted "substantial mitigation."[7787]

2. Mitigating Circumstances

3415. The Trial Chamber considered Nsabimana's indirect participation in the crimes at the prefectoral office and the fact that he eventually discharged his legal duty in June 1994 to protect the refugees there as mitigating factors.[7788] It considered as further mitigating circumstances his: (i) humanitarian actions in helping individuals and groups find refuge; (ii) assistance in evacuating orphans, including approximately 600 children from the *Groupe scolaire*; and (iii) remorsefulness and good behaviour in detention as further mitigating circumstances.[7789]

[7784] *See* Trial Judgement, paras. 6229 (noting the "particularly vulnerable" refugees at the Butare Prefecture Office), 6230 ("the magnitude of human devastation could only have occurred because he failed to discharge his legal duty. Nsabimana's position as *préfet* imposed upon him a duty to act to protect those vulnerable people within his realm. His omission in this regard at the Butare *prefecture* office, despite his knowledge that these acts were occurring around him, was central to the crimes that resulted.").
[7785] *See* Trial Judgement, para. 6231 ("The victims of the attacks at the Butare *prefecture* office were particularly vulnerable. The Chamber considers this as an aggravating circumstance.").
[7786] *See Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338. *See also supra*, para. 3385.
[7787] *See* Trial Judgement, para. 6232. To the extent that, through his reference to paragraph 6230 of the Trial Judgement which relates to the Trial Chamber's assessment of the gravity of the offences, Nsabimana intended to argue that the Trial Chamber impermissibly double-counted his participation in the crimes through omission both in assessing the gravity of the offences and as an element of his form of responsibility, the Appeals Chamber recalls that the determination of the gravity of the offences requires a consideration of the particular circumstances of the case as well as the form and degree of the participation of the convicted person in the crime. *See Kanyarukiga* Appeal Judgement, para. 281; *Rukundo* Appeal Judgement, para. 243. The Appeals Chamber therefore finds no error in the Trial Chamber's consideration of the nature of Nsabimana's contribution to the crimes at the prefectoral office when assessing the gravity of his offences.
[7788] Trial Judgement, para. 6232.
[7789] Trial Judgement, paras. 6232, 6233.

3416. Nsabimana submits that the Trial Chamber failed to consider certain mitigating circumstances such as his inexperience for his appointment as prefect, the length of his trial, and his humanitarian actions in providing blankets and food to refugees.[7790] He also argues that the Trial Chamber failed to accord sufficient weight to the factors it considered which, in his view, would have led to a significant reduction of the sentence imposed.[7791]

3417. The Prosecution responds that the Trial Chamber correctly assessed the mitigating circumstances and that Nsabimana fails to identify any error in the Trial Chamber's exercise of its discretion when assessing them.[7792]

3418. The Appeals Chamber notes that Nsabimana failed to identify his inexperience, the length of the proceedings, and his humanitarian acts in assisting refugees by providing food and blankets as mitigating circumstances in his closing brief or oral closing arguments.[7793] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7794] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and considers that Nsabimana has waived his right to have them considered on appeal.

3419. Turning to Nsabimana's remaining contentions that the Trial Chamber failed to give sufficient weight to the mitigating factors it did identify, the Appeals Chamber recalls that mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, or that it should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[7795] The Appeals Chamber observes that the Trial Chamber explicitly stated that Nsabimana's indirect participation "warrants substantial mitigation", listed concrete examples of individuals, families, and groups he aided, and expressly considered his words of remorse as well as an attestation of his good conduct in detention.[7796] Nsabimana does not demonstrate any error in the Trial Chamber's assessment.

[7790] Nsabimana Notice of Appeal, paras. 122-126; Nsabimana Appeal Brief, paras. 511-514, 518-520, 525, 526; Nsabimana Reply Brief, paras. 189-192.
[7791] Nsabimana Notice of Appeal, para. 127; Nsabimana Appeal Brief, paras. 515, 516, 521-524, 527, 528.
[7792] Prosecution Response Brief, paras. 1413, 1416-1418. *See also* AT. 16 April 2015 pp. 60, 61.
[7793] *See* Nsabimana Closing Brief, paras. 1996-2019; Closing Arguments, T. 27 April 2009 p. 23. In this respect, the Appeals Chamber considers that Nsabimana's general statement that he "provided better protection for the lives of some Rwandan Tutsis and Hutus alike through food, drugs etc..." in paragraph 2016 of his closing brief is not sufficiently detailed to identify mitigating circumstances and fails to demonstrate their existence by a preponderance of the evidence. *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294.
[7794] *See, e.g., Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7795] *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 693; *Nchamihigo* Appeal Judgement, para. 157. *See also Martić* Appeal Judgement, para. 19.
[7796] *See* Trial Judgement, paras. 6232, 6233, fns. 14888, 14889.

3420. Based on the foregoing, the Appeals Chamber dismisses Nsabimana's contentions related to the Trial Chamber's consideration of the mitigating circumstances relevant to the determination of his sentence.

3. Form and Degree of Participation in the Crimes

3421. In determining the gravity of his offences, the Trial Chamber noted that it had not found that "Nsabimana was a direct perpetrator in any massacre or killing perpetrated in Butare *préfecture* or that he ordered or was in any other way directly associated with any given attack."[7797] The Trial Chamber, however, considered that "the magnitude of human devastation could only have occurred because he failed to discharge his legal duty" and that "[h]is omission in this regard at the Butare *préfecture* office [...] was central to the crimes that resulted."[7798]

3422. Nsabimana submits that the sentence imposed by the Trial Chamber is excessive and manifestly disproportionate given the indirect mode of participation by omission of which he was convicted and the absence of premeditation and lack of direct collaboration.[7799] He argues that secondary or indirect forms of responsibility have generally resulted in lower sentences and that he should have received a sentence of less than 15 years.[7800]

3423. The Prosecution responds that Nsabimana fails to show that the Trial Chamber committed an error in exercising its discretion or in following the applicable law in determinating his sentence.[7801]

3424. The Appeals Chamber considers that Nsabimana's participation in the killings of Tutsis who had sought refuge at the Butare Prefecture Office constituted his culpable conduct and that the fact that he was not found to have acted with premeditation or directly collaborated with the principal perpetrators or those who ordered the crimes does not reduce that culpability. It is correct, however, that aiding and abetting is a form of responsibility that has generally warranted lower sentences than forms of direct participation.[7802] In the specific circumstances of this case and in light of the form and degree of participation of Nsabimana in the crimes committed, the Appeals Chamber considers that the sentence imposed by the Trial Chamber is excessive. Accordingly, the Appeals Chamber

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[7797] Trial Judgement, para. 6230.
[7798] Trial Judgement, para. 6230.
[7799] Nsabimana Notice of Appeal, para. 129; Nsabimana Appeal Brief, paras. 538, 541. *See also* AT. 16 April 2015 p. 51.
[7800] Nsabimana Appeal Brief, paras. 539-543, *referring to Semanza* Trial Judgement, para. 563; Nsabimana Reply Brief, paras. 197-199. He further submits that his sentence should be revised due to the errors of fact and law committed by the Trial Chamber in assessing the aggravating and mitigating circumstances. *See* Nsabimana Appeal Brief, paras. 544-546.
[7801] Prosecution Response Brief, paras. 1422-1424. *See also* AT. 16 April 2015 pp. 60, 61.
[7802] *Ntawukuliyayo* Appeal Judgement, para. 244 and references cited therein.

finds that the Trial Chamber committed a discernible error in exercising its discretion and will consider the impact of this error, if any, in Section XII below.

4. Conclusion

3425. Based on the foregoing, the Appeals Chamber finds that the Trial Chamber erred in considering the vulnerability of the victims in assessing the gravity of the offences and as a separate aggravating factor. The Appeals Chamber further finds that, in light of the form and degree of participation of Nsabimana in the crimes committed, the sentence imposed by the Trial Chamber is excessive and that the Trial Chamber committed a discernible error in exercising its discretion in this regard. The Appeals Chamber will consider the impact of these errors, if any, in Section XII below. The Appeals Chamber dismisses the remainder of Grounds 15 and 16 of Nsabimana's appeal.

D. Nteziryayo's Sentencing Appeal (Grounds 10 and 11)

3426. The Trial Chamber sentenced Nteziryayo to a single term of 30 years of imprisonment for his convictions for direct and public incitement to commit genocide.[7803]

3427. Nteziryayo submits that the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) its consideration of certain aggravating factors; (iii) failing to consider or accord sufficient weight to certain mitigating factors; (iv) failing to impose a sentence proportionate to his criminal conduct; and (v) failing to impose a sentence similar to those imposed in comparable cases.[7804] Nteziryayo requests that his sentence be reduced to time served.[7805]

1. Gravity of the Offences

3428. When considering the gravity of Nteziryayo's offences, the Trial Chamber recalled that he "incited the population to kill Tutsis at meetings."[7806] It further noted, however, that Nteziryayo "was not a direct perpetrator in any massacre or killing perpetrated in Butare *préfecture*."[7807] The Trial Chamber then stated the following:

> The Chamber has determined that Nteziryayo had a leadership role in the civil defence programme in Butare *préfecture*, and that he was later sworn in as *préfet* of Butare, on 17 June 1994. As such, he exerted considerable authority and power in Butare *préfecture* at this time. During this period, soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates.[7808]

3429. Nteziryayo contends that the Trial Chamber erred in considering his role in the civil defence programme as well as crimes committed by "civilian militiamen" in determining the gravity of the offences as it elsewhere found that he could not be held criminally responsible in relation to his involvement in the civil defence programme and acquitted him of crimes committed by its members.[7809]

3430. The Prosecution responds that the Trial Chamber found it established beyond reasonable doubt that Nteziryayo had a leadership role in the civil defence programme in Butare Prefecture,

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[7803] Trial Judgement, paras. 6186, 6271.
[7804] Nteziryayo Notice of Appeal, paras. 70, 71, 73-75; Nteziryayo Appeal Brief, paras. 289-328.
[7805] Nteziryayo Notice of Appeal, paras. 72, 77.
[7806] Trial Judgement, para. 6239.
[7807] Trial Judgement, para. 6239.
[7808] Trial Judgement, para. 6240.
[7809] Nteziryayo Appeal Brief, paras. 306(a), 307-310, 312(b) (emphasis omitted), 325(a), (b), 326, 328, *referring, inter alia, to* Trial Judgement, paras. 5966, 5967. *See also* Nteziryayo Notice of Appeal, paras. 73, 74; Nteziryayo Reply Brief, paras. 130-133; AT. 17 April 2015 pp. 19, 20.

even though it was not satisfied that the only reasonable inference was that Nteziryayo was responsible for the attacks by civil defence forces.[7810]

3431. The Appeals Chamber recalls that the determination of the gravity of the offence requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the convicted person in the crime.[7811] The Appeals Chamber finds that the Trial Chamber's consideration of Nteziryayo's leadership role in the civilian defence programme when assessing the gravity of his offences constitutes a discernible error as the Trial Chamber had previously found that Nteziryayo could not be held responsible for his role in the civil defence programme and acquitted him for the crimes committed by its members.[7812] Moreover, the Appeals Chamber finds that the Trial Chamber's unreferenced statement that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates"[7813] is insufficiently linked to the crime for which Nteziryayo was convicted – direct and public incitement to commit genocide – and, consequently, irrelevant to the consideration of its gravity.

3432. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in taking into account Nteziryayo's role in the civil defence programme in Butare Prefecture in determining the gravity of his offences and will consider the impact of this error, if any, in Section XII below.

2. Aggravating Circumstances

3433. When assessing Nteziryayo's aggravating circumstances, the Trial Chamber stated the following:

> In aggravation, the Chamber has considered Nteziryayo's role as leader of the civil defence programme and his position as *préfet* of Butare *préfecture*. Given his high profile position, Nteziryayo's active incitement and encouragement of the public to commit genocide demonstrates the abuse of his position. This constitutes an aggravating factor.[7814]

3434. In addition to arguing that he was not found to have committed crimes in relation to his participation in the civil defence programme, Nteziryayo submits that the Trial Chamber's findings as to his role and responsibility in the civil defence programme were vague, preventing the Trial

[7810] Prosecution Response Brief, para. 1588.
[7811] *See Kanyarukiga* Appeal Judgement, para. 281; *Rukundo* Appeal Judgement, para. 243.
[7812] Trial Judgement, paras. 5967, 5968. *See also ibid.*, para. 5589.
[7813] Trial Judgement, para. 6240.
[7814] Trial Judgement, para. 6241 (internal references omitted).

Chamber from considering it "in aggravation".[7815] He contends that the Trial Chamber erred in its assessment of the evidence concerning his participation in the civil defence programme.[7816]

3435. The Prosecution responds that the Trial Chamber correctly found that Nteziryayo had a high profile position based on his role in the civil defence programme and position as Butare Prefect and reasonably concluded that his abuse of his position constituted an aggravating factor.[7817]

3436. The Appeals Chamber recalls that Nteziryayo's conviction for direct and public incitement to commit genocide is based on conduct that he engaged in his official capacity as prefect of Butare.[7818] The Appeals Chamber considers that this finding alone reasonably supports the Trial Chamber's determination that his abuse of his authority constituted an aggravating factor.

3437. Consequently, Nteziryayo's challenges about the ambiguity of the Trial Chamber's findings as to his role in the civil defence programme as well as its alleged erroneous assessment of the evidence relating to it, if substantiated, could not invalidate the sentence or lead to a miscarriage of justice. As a result, the Appeals Chamber dismisses these arguments without further consideration.

3. Mitigating Circumstances

3438. In discussing Nteziryayo's mitigating factors, the Trial Chamber stated:

> [The Chamber] has taken into account [Nteziryayo's] selective assistance to some Tutsis in Butare *préfecture* during this period, including Egide Gatera and his wife Rose Umulisa, who he welcomed into his house and helped evacuate to Burundi, as well as, among others, six seminarians of Mbazi, in cooperation with Father Vieckoslav. The Chamber has assessed his efforts to facilitate the evacuation of orphans on 18 June 1994 and 3 July 1994 respectively. It is mindful of Nteziryayo's endeavours in relation to the protection of Bishop Gahamanyi, a Tutsi, and other priests, Tutsi nuns and monks at the Karubanda minor seminary, and religious personalities in Save, including the Tutsi parish of Father Calver Rahundi and the Mother Superior of the Benebikira sisters, where many Tutsi refugees had sought sanctuary. In the Chamber's view, this selective assistance carries only limited weight as a mitigating factor.[7819]

The Trial Chamber concluded, however, that "helping a handful of Tutsi civilians does not outweigh the gravity of the crimes for which Nteziryayo has been charged" and that "the gravity of the crimes and the aggravating factors negate[d] any mitigating factors."[7820]

3439. Nteziryayo submits that the Trial Chamber erred in failing to consider or explain why it did not accord any weight in mitigation to his deteriorating health as well as in failing to consider his: (i) assistance to the refugees in Rango; (ii) participation in an evacuation on 5 June 1994; (iii) role

[7815] Nteziryayo Appeal Brief, paras. 306(b), 313-317, 326-328. *See also* Nteziryayo Notice of Appeal, paras. 73, 74; Nteziryayo Reply Brief, paras. 129, 131-135; AT. 17 April 2015 pp. 19, 20.
[7816] Nteziryayo Appeal Brief, paras. 318-323. *See also* Nteziryayo Reply Brief, paras. 136-139.
[7817] Prosecution Response Brief, paras. 1586-1588. *See also ibid.*, paras. 1589-1600; AT. 17 April 2015 pp. 37, 38.
[7818] *See* Trial Judgement, paras. 3672, 3674, 3677, 3691, 5945, 6022-6029, 6036.
[7819] Trial Judgement, para. 6242 (internal references omitted).

in the evacuation of 600 school children on 30 June 1994; (iv) assistance in evacuating a Rwandan woman who was the wife of an expatriate on 25 June 1994; and (v) implementation of security directives which saved thousands of lives.[7821]

3440. Nteziryayo further contends that the Trial Chamber erred in finding that his assistance was selective and that he helped only a handful of Tutsis.[7822] He argues that the Trial Chamber failed to consider the entire scale of his assistance, which shows a consistent pattern of conduct aimed at indiscriminately saving hundreds if not thousands of civilians.[7823]

3441. The Prosecution responds that Nteziryayo failed to demonstrate any discernible error in the Trial Chamber's assessment of the mitigating circumstances.[7824] It submits that Nteziryayo's alleged deteriorating health was considered and that Nteziryayo's submissions are insufficient to establish that it should have been considered as a mitigating factor.[7825] The Prosecution also argues that Nteziryayo did not make submissions at trial regarding his alleged assistance to the Rango refugees, his involvement in the evacuation of a Rwandan woman on 25 June 1994, and his participation in the evacuation of 600 school children on 30 June 1994, which precludes him from raising them for the first time on appeal.[7826]

3442. The Appeals Chamber finds no merit in Nteziryayo's contention that the Trial Chamber failed to consider his health as a mitigating circumstance. The Trial Chamber expressly summarised Nteziryayo's submission that his health problems should be considered in mitigation in the Trial Judgement.[7827] Nteziryayo does not demonstrate that the Trial Chamber committed a discernible error in not giving weight to this argument in light of the vague and unsupported submissions he made at trial.[7828]

[7820] Trial Judgement, para. 6243.
[7821] Nteziryayo Notice of Appeal, para. 71; Nteziryayo Appeal Brief, paras. 298-300, 302, 303. *See also* Nteziryayo Reply Brief, para. 125. Nteziryayo also refers to evacuations on 6 June, 18 June, and 3 July 1994 that the Trial Chamber expressly discussed. *See* Nteziryayo Appeal Brief, para. 302(ii); Trial Judgement, para. 6242. *See also* AT. 17 April 2015 p. 45.
[7822] Nteziryayo Appeal Brief, paras. 301, 304.
[7823] Nteziryayo Appeal Brief, paras. 302, 304. *See also* Nteziryayo Reply Brief, paras. 127, 128; AT. 17 April 2015 p. 45.
[7824] Prosecution Response Brief, paras. 1578-1585.
[7825] Prosecution Response Brief, para. 1580. The Prosecution contends that Nteziryayo did not, for example, refer to any medical documentation to support his claim. *See idem.*
[7826] Prosecution Response Brief, paras. 1583, 1584.
[7827] *See* Trial Judgement, para. 6238.
[7828] Nteziryayo Closing Arguments, T. 28 April 2009 p. 31 ("Apart from that, we would like to draw your kind attention to the fact of the Trial Chamber actually taking into account mitigating circumstances when they look at an accused's health. Recently Alphonse Nteziryayo has been experiencing serious health problems which continue to dog him. Therefore, the judgement of 24th February 2003 in the Prosecutor versus Elizaphan, [...] in paragraph 898, agreed to mitigating factors because the Accused was ill. Therefore, we request the Trial Chamber to take into account mitigating circumstances in respect of the Accused Alphonse Nteziryayo.").

3443. The Appeals Chamber also observes that, as noted by the Prosecution, Nteziryayo failed to identify as mitigating circumstances in his closing brief or oral closing arguments his assistance to the Rango refugees, his role in evacuating 600 school children on 30 June 1994, and his assistance in the evacuation of a Rwandan woman who was the wife of an expatriate on 25 June 1994.[7829] Recalling that it is the accused's prerogative to identify any mitigating circumstances he wished to have considered by the Trial Chamber and cannot raise them for the first time on appeal,[7830] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and considers that Nteziryayo has waived his right to have them considered on appeal.

3444. The Appeals Chamber notes that Nteziryayo did identify, albeit vaguely, the 5 June 1994 evacuation from the *Groupe scolaire* and that he implemented security directives that resulted in the saving of thousands of lives as mitigating factors in his oral closing arguments.[7831] Although the Trial Chamber did not expressly discuss these factors, the Trial Judgement reflects that they were considered by the Trial Chamber.[7832] Moreover, the Appeals Chamber observes that the Trial Chamber found that Nteziryayo "attempted to prevent the evacuation from Butare of about 300 orphans and their adult supervisors and selected about 30 individuals whom they believed to be Tutsi adults and forced them to remain in Rwanda."[7833] The Appeals Chamber therefore finds no error in the Trial Chamber's decision not to consider the 5 June 1994 evacuation in mitigation of Nteziryayo's sentence. Given that an accused bears the burden of establishing mitigating factors by a preponderance of the evidence,[7834] the Appeals Chamber is also not persuaded that, although Nteziryayo's counsel briefly indicated that evidence of Nteziryayo's assistance could be found in his testimony,[7835] the Trial Chamber was required to search for and expressly assess whether Nteziryayo met his burden in establishing that security directives he issued contributed to saving the lives of thousands given the vague and ambiguous nature of his submissions.[7836]

[7829] *See* Nteziryayo Closing Arguments, T. 28 April 2009 pp. 27-31. As for the alleged assistance to the Rango refugees, the Appeals Chamber observes that, in his closing arguments, Nteziryayo merely pointed to Expert Witness Des Forges's testimony that the refugees who had been sent to Rango were fed and survived, without pointing, as he does now for the first time on appeal, to the fact that he visited the refugees and ensured their safety. *See idem.*

[7830] *See, e.g.*, *Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.

[7831] *See* Nteziryayo Closing Arguments, T. 28 April 2009 p. 29.

[7832] Trial Judgement, para. 6238, fn. 14894, *referring to* Nteziryayo Closing Argument, T. 28 April 2009 pp. 27-31.

[7833] Trial Judgement, para. 4875.

[7834] *See, e.g.*, *Karemera and Ngirumpatse* Appeal Judgement, para. 694; *Rukundo* Appeal Judgement, para. 255; *Muhimana* Appeal Judgement, para. 231; *Kajelijeli* Appeal Judgement, para. 294.

[7835] Nteziryayo Closing Arguments, T. 28 April 2009 p. 29.

[7836] *See* Nteziryayo Closing Arguments, T. 28 April 2009 p. 29 (stating without any reference to the record: "[w]hen the situation became desperate and the population was trying to flee into exile, *Préfet* Nteziryayo took measures to warn urban population in the vicinity of urban centers so that the people there could have directives regarding their own security with regard to when to evacuate from the city. This enabled thousands of lives to be saved, Mr. President.").

3445. The Appeals Chamber also considers that Nteziryayo does not show that the Trial Chamber committed any discernible error in finding that this assistance was selective and that he helped a limited number of Tutsis.

3446. Accordingly, the Appeals Chamber finds that Nteziryayo has failed to demonstrate that the Trial Chamber erred in failing to consider or according sufficient weight to certain mitigating circumstances.

4. Proportionality of Sentence

3447. Nteziryayo submits that a sentence of 30 years of imprisonment is disproportionate to the offences of which he was convicted.[7837] He emphasises the Trial Chamber's findings that there was "limited evidence of any specific acts committed by members of the population subsequent to Nteziryayo's speeches" and "insufficient evidence to establish that Nteziryayo's words at [Muyaga and Kibayi Communes] meetings substantially contributed to any subsequent crime".[7838] Nteziryayo argues that his sentence is excessive and disproportionate "where no harm, in terms of consequential crime, is established".[7839]

3448. The Prosecution responds that the offence of direct and public incitement to commit genocide, of which Nteziryayo was convicted, is a crime warranting a serious punishment and that the sentence imposed on Nteziryayo was proportionate to the degree of his responsibility.[7840]

3449. The Appeals Chamber observes that the gravity of the crime of direct and public incitement to commit genocide derives from that of the crime of genocide, a crime of the most serious gravity.[7841] The Trial Chamber found that Nteziryayo committed direct and public incitement to commit genocide on three separate occasions.[7842] Accordingly, the Appeals Chamber considers that, regardless of whether or not deaths resulted from his statements, the imposition of a sentence of 30 years of imprisonment was not beyond the Trial Chamber's sentencing discretion.

3450. In light of the above, the Appeals Chamber dismisses Nteziryayo's contention that the Trial Chamber imposed a sentence disproportionate to his criminal conduct.

[7837] Nteziryayo Notice of Appeal, paras. 70, 71; Nteziryayo Appeal Brief, para. 291. *See also* Nteziryayo Notice of Appeal, para. 75; Nteziryayo Reply Brief, para. 120.
[7838] Nteziryayo Appeal Brief, para. 290 (emphasis omitted), *quoting* Trial Judgement, para. 5946.
[7839] Nteziryayo Appeal Brief, para. 291, *referring to Kamuhanda* Appeal Judgement, para. 359. Nteziryayo also highlights that he was acquitted of several crimes. *See ibid.*, fn. 361. *See also* AT. 17 April 2015 pp. 43, 44, 46.
[7840] Prosecution Response Brief, paras. 1569, 1570. *See also* AT. 17 April 2015 pp. 38, 39.
[7841] *Cf. Bikindi* Appeal Judgement, para. 208.
[7842] *See* Trial Judgement, paras. 6022-6029, 6036.

5. Comparability of Sentences

3451. Nteziryayo points to parallels between his case and those of Muvunyi, Simon Bikindi ("Bikindi"), Aloys Simba, and Nsabimana[7843] and argues that his criminal conduct "was no more serious than in each of the four cases" and that the higher sentence imposed on him by the Trial Chamber "was wholly unjust in all the circumstances."[7844] In particular, with respect to Nsabimana, Nteziryayo emphasises that his tenure as prefect of Butare was much shorter and that Nsabimana was convicted of more crimes.[7845]

3452. The Prosecution responds that comparing sentences imposed in other cases is not a proper avenue for challenging the exercise of the Trial Chamber's discretion on sentencing and points to factors that distinguish Nteziryayo's case from the cases he cites.[7846]

3453. The Appeals Chamber reiterates that comparison between cases is of limited assistance in challenging a sentence given the discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7847] Aside from referring to cases before the Tribunal in which lesser sentences were imposed and which Nteziryayo contends are similar to his, Nteziryayo does not demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of 30 years of imprisonment in light of the sentences imposed on the other convicted persons he has identified.

3454. With respect to the sentence imposed on Nsabimana, while Nteziryayo highlights the respective length of his and Nsabimana's tenures as prefects of Butare and the number of counts upon which the Trial Chamber entered convictions, his submissions ignore the difference in his and Nsabimana's criminal conduct as well as the aggravating and the mitigating factors considered by the Trial Chamber.[7848] The Appeals Chamber therefore finds that Nteziryayo does not demonstrate that the sentence imposed on him by the Trial Chamber was out of reasonable proportion in comparison to that imposed on Nsabimana.

3455. Accordingly, the Appeals Chamber dismisses Nteziryayo's arguments in this respect.

[7843] Nteziryayo Appeal Brief, paras. 292-296.
[7844] Nteziryayo Appeal Brief, para. 297.
[7845] Nteziryayo Appeal Brief, para. 296.
[7846] Prosecution Response Brief, paras. 1571-1577.
[7847] *See, e.g.*, *Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7848] *See* Trial Judgement, paras. 6229-6233, 6239-6243.

6. Conclusion

3456. The Appeals Chamber finds that the Trial Chamber erred in considering Nteziryayo's role in the civil defence programme and the unspecified conclusion that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates" when assessing the gravity of his offences. It will consider the impact of this error, if any, in Section XII below. The Appeals Chamber nonetheless finds that Nteziryayo has failed to demonstrate any other error in the Trial Chamber's findings that may impact the determination of his sentence and dismisses the remainder of Grounds 10 and 11 of his appeal.

E. Kanyabashi's Sentencing Appeal (Ground 8)

3457. The Trial Chamber sentenced Kanyabashi to a single term of 35 years of imprisonment for his convictions for genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7849]

3458. Kanyabashi submits that the Trial Chamber erred in: (i) assessing the gravity of the offences; (ii) double-counting the aggravating circumstances; (iii) failing to consider or accord sufficient weight to mitigating circumstances; and (iv) imposing a disproportionate sentence which the Appeals Chamber should substantially reduce.[7850] He requests that his sentence be substantially reduced.[7851]

1. Gravity of the Offences

3459. When assessing the gravity of Kanyabashi's offences, the Trial Chamber determined that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries."[7852]

3460. Kanyabashi submits that the Trial Chamber erred in relying on the killings that resulted from the May and June 1994 megaphone announcements that support his conviction for direct and public incitement to commit genocide since the Trial Chamber found that the evidence was insufficient to establish that the megaphone announcements contributed to subsequent killings.[7853] He further contends that it was erroneous and illogical for the Trial Chamber to have considered the number of victims with respect to the Kabakobwa Hill attack in assessing the gravity of the offences as he was found to have failed to punish his culpable subordinates, an act that would have had no impact on the number of casualties.[7854]

3461. The Prosecution did not respond to these contentions.

3462. The Appeals Chamber finds that, contrary to Kanyabashi's contention, the Trial Chamber did not consider the killings that followed the megaphone announcements in order to determine the

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[7849] Trial Judgement, paras. 6186, 6271.
[7850] Kanyabashi Notice of Appeal, sub-paras. 8.1.1-8.1.4, para. 35; Kanyabashi Appeal Brief, paras. 383-394.
[7851] Kanyabashi Appeal Brief, para. 397.
[7852] Trial Judgement, para. 6253.
[7853] Kanyabashi Notice of Appeal, sub-para. 8.1.1; Kanyabashi Appeal Brief, para. 383, heading 8.1.1 at p. 131; Kanyabashi Reply Brief, para. 148.
[7854] Kanyabashi Notice of Appeal, sub-para. 8.1.2; Kanyabashi Appeal Brief, para. 384; Kanyabashi Reply Brief, paras. 147, 148.

gravity of his offences. Rather, the Trial Chamber considered that "all [of Kanyabashi's] crimes are of an obvious gravity, resulting in a significant number of casualties in terms of death and injuries."[7855] The Appeals Chamber notes that the Trial Chamber's conclusions related to the casualties that occurred as a result of attacks on Kabakobwa Hill and Matyazo Clinic alone supported the finding as it concerned the "significant number of casualties".[7856] The fact that the Trial Chamber only relied on these casualties in determining Kanyabashi's sentence is obvious as it only considered the number of victims resulting from Kabakobwa Hill and Matyazo Clinic when determining that the number of victims constituted an aggravating circumstance.[7857] Consequently, the Appeals Chamber is not persuaded that the Trial Chamber considered the resulting killings in assessing the gravity of the offence as it related to his conviction for direct and public incitement to commit genocide. Accordingly, the Appeals Chamber dismisses Kanyabashi's challenge in this regard.

3463. With respect to Kanyabashi's argument that the Trial Chamber erred in taking into account the casualties resulting from the attack at Kabakobwa Hill, the Appeals Chamber finds that he does not demonstrate that his responsibility under Article 6(3) of the Statute as determined by the Trial Chamber would have prevented the Trial Chamber from considering this factor in determining the gravity of the offences in sentencing.[7858] Accordingly, the Appeals Chamber dismisses his arguments in this respect.

2. Aggravating Circumstances

3464. The Trial Chamber considered Kanyabashi's abuse of authority in committing the crimes that occurred at Matyazo Clinic and the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as aggravating circumstances in determining his sentence.[7859]

3465. Kanyabashi submits that the Trial Chamber erred in relying on his abuse of authority with respect to the killings at Matyazo Clinic since an element of a crime cannot be also considered as an aggravating factor.[7860] He also contends that the Trial Chamber erred in double-counting the

[7855] Trial Judgement, para. 6253.
[7856] Trial Judgement, paras. 2103, 5791, 6061, 6253.
[7857] Trial Judgement, para. 6254.
[7858] *Ntabakuze* Appeal Judgement, para. 302 ("the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates, *i.e.* the gravity of the crimes committed by the direct perpetrator(s)"). *See also Čelebići* Appeal Judgement, para. 738.
[7859] Trial Judgement, paras. 6254, 6255.
[7860] Kanyabashi Notice of Appeal, para. 8.1.3; Kanyabashi Appeal Brief, para. 385, *referring to Naletilić and Martinović* Appeal Judgement, paras. 610-613. *See also* Kanyabashi Reply Brief, para. 149.

number of victims of the attacks on Kabakobwa Hill and at Matyazo Clinic when assessing the gravity of the offences and factors in aggravation.[7861]

3466. The Prosecution responds that the Trial Chamber properly assessed Kanyabashi's aggravating factors and that it did not err in considering his abuse of authority as an aggravating circumstance since it is not an element of superior responsibility.[7862] It also submits that Kanyabashi's sentence reflects his extensive criminal culpability and that, "although the Trial Chamber erred in double counting the number of victims, this error does not warrant a lower sentence."[7863]

3467. With respect to the Trial Chamber's consideration of Kanyabashi's abuse of authority as an aggravating factor, the Appeals Chamber observes that, while Kanyabashi was only convicted pursuant to Article 6(3) of the Statute, the Trial Chamber, Judge Ramaroson dissenting, found that he ordered soldiers to open fire on the Tutsis at Matyazo Clinic, resulting in the deaths of many Tutsi refugees.[7864] As an abuse of authority is not an element of superior responsibility under Article 6(3) of the Statute, the Appeals Chamber finds that it was not improper for the Trial Chamber to consider Kanyabashi's abuse of authority through, for instance, ordering the killings as an aggravating circumstance.[7865]

3468. Turning to Kanyabashi's argument that the Trial Chamber erred in double-counting the number of the casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic for the purpose of the gravity of the offences and as an aggravating factor, the Appeals Chamber recalls that factors taken into consideration as aspects of the gravity of a crime cannot additionally be taken into account as separate aggravating circumstances.[7866] Since the Trial Chamber clearly relied on the number of victims from the attacks at Kabakobwa Hill and Matyazo Clinic when assessing the gravity of the offences,[7867] this same factor could not be taken into account as an aggravating circumstance.[7868]

[7861] Kanyabashi Notice of Appeal, sub-para. 8.1.3; Kanyabashi Appeal Brief, para. 386.
[7862] Prosecution Response Brief, paras. 1976-1979.
[7863] Prosecution Response Brief, para. 1982. *See also ibid.*, paras. 1980, 1981.
[7864] Trial Judgement, paras. 2103, 5818.
[7865] *See Karemera and Ngirumpatse* Appeal Judgement, para. 682, *referring to Simba* Appeal Judgement, para. 310; *Ndindabahizi* Appeal judgement, para. 136; *Hadžihasanović and Kubura* Appeal Judgement, para. 320; *Aleksovski* Appeal Judgement, para. 183. In this regard, Kanyabashi's reliance on the *Naletilić and Martinović* Appeal Judgement is misplaced since Kanyabashi has been convicted only pursuant to Article 6(3) of the Statute despite his direct participation in the killing on Kabakobwa Hill.
[7866] *See, e.g., Gatete* Appeal Judgement, para. 275; *Milošević* Appeal Judgement, para. 306; *Semanza* Appeal Judgement, para. 338.
[7867] Trial Judgement, para. 6253.
[7868] Trial Judgement, para. 6254.

3469. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

3. Mitigating Circumstances

3470. The Trial Chamber took into account "Kanyabashi's purported good character and his 20 years of service as a *bourgmestre*" as well as his "efforts, on occasions, to stop the massacres from spreading and to assist the refugees" as mitigating circumstances in determining his sentence.[7869] However, it found that these mitigating circumstances were of limited weight given the gravity of Kanyabashi's crimes.[7870]

3471. Kanyabashi submits that the Trial Chamber "gravely underestimated the exculpatory evidence".[7871] He also argues that the Trial Chamber did not consider his assistance to a Tutsi woman called Rumiya,[7872] his 18 years of employment at the Butare University Hospital, and the undue delay of the proceedings which resulted in violation of his fair trial rights.[7873] He also contends that the Trial Chamber disregarded his advanced age and his good conduct in detention.[7874] Kanyabashi suggests that, since he was born in 1937, a sentence of 35 years in effect equals a sentence of imprisonment for life.[7875]

3472. The Prosecution responds that the Trial Chamber properly assessed the mitigating circumstances and that, in any case, their existence does not automatically imply a reduction of the sentence.[7876] It also submits that the length of the proceedings is not a factor that a trial chamber must consider as a mitigating circumstance.[7877]

3473. The Appeals Chamber finds that Kanyabashi's contention that the Trial Chamber "underestimated exculpatory evidence" lacks merit. When discussing potential mitigating factors,

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[7869] Trial Judgement, para. 6256.
[7870] Trial Judgement, para. 6256.
[7871] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, para. 389. Kanyabashi also submits that the Trial Chamber failed to consider as a mitigating circumstance "all the elements of the theory of the Appellant's case as stated under Ground of Appeal 5.1". *See* Kanyabashi Notice of Appeal, sub-para. 8.1.4.
[7872] Kanyabashi Appeal Brief, para. 389. Kanyabashi also highlights that during his closing arguments he emphasised: (i) his deep attachment to the people that he governed regardless of their ethnicity; (ii) the fact that he was deeply affected by the death of innocent people; and (iii) his attempts to stop the genocide. *See* Kanyabashi Appeal Brief, para. 390; Kanyabashi Reply Brief, para. 146.
[7873] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, para. 388.
[7874] Kanyabashi Notice of Appeal, sub-para. 8.1.4; Kanyabashi Appeal Brief, paras. 391, 393; Kanyabashi Reply Brief, para. 146.
[7875] Kanyabashi Appeal Brief, para. 393.
[7876] Prosecution Response Brief, paras. 1971, 1973, 1974. *See also* AT. 20 April 2015 p. 46.
[7877] Prosecution Response Brief, para. 1972.

the Trial Chamber specifically took into account evidence indicative of his efforts to stop the massacres from spreading and assisting the refugees, but it found that these mitigating elements carried limited weight in light of the gravity of the crimes for which Kanyabashi was convicted.[7878] The Appeals Chamber finds that Kanyabashi merely disagrees with the Trial Chamber's determination without demonstrating that it erred and, accordingly, dismisses his contention without further consideration.

3474. The Appeals Chamber also observes that Kanyabashi failed to identify, either in his closing brief or his closing arguments, his assistance to a Tutsi refugee called Rumiya, his previous employment at the Butare University Hospital, and the violation of his right to be tried without undue delay as mitigating circumstances before the Trial Chamber. Given that an accused cannot raise mitigating circumstances for the first time on appeal,[7879] the Appeals Chamber finds that the Trial Chamber did not err in not considering whether these circumstances warranted mitigation and finds that Kanyabashi has waived his right to have them considered on appeal.

3475. With respect to Kanyabashi's age and good conduct in detention, the Appeals Chamber notes that, while Kanyabashi did not identify these factors as mitigating circumstances in his closing brief, he referred to them as such in his oral closing submissions.[7880] The Trial Chamber did not expressly refer to these arguments or consider them when assessing his individual circumstances in sentencing.[7881] Instead, it indicated that Kanyabashi did not provide any specific sentencing submissions, referring only to his closing brief and not to his oral closing arguments.[7882]

3476. The Appeals Chamber recalls that the age and state of health of an accused may be relevant factors in sentencing.[7883] While the Trial Judgement clearly reflects that the Trial Chamber was cognisant of Kanyabashi's age, the Appeals Chamber considers that its statement in the "Sentencing" section of the Trial Judgement suggests that it did not consider this as a possible mitigating circumstance. Likewise, the absence of any reference to Kanyabashi's contention concerning his good conduct in detention, of which Kanyabashi gave evidence through the

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[7878] Trial Judgement, para. 6256. *See also ibid.*, paras. 6250-6252, *referring to* Kanyabashi Closing Brief, paras. 23, 24, 27, 108, 174-177, 635, 644-646.
[7879] *See, e.g., Nzabonimana* Appeal Judgement, para. 459; *Kanyarukiga* Appeal Judgement, para. 274; *Bikindi* Appeal Judgement, para. 165; *Kamuhanda* Appeal Judgement, para. 354.
[7880] Kanyabashi Closing Arguments, T. 29 April 2009 pp. 38, 39.
[7881] Trial Judgement, paras. 6250-6252, 6256.
[7882] Trial Judgement, para. 6250 ("The Kanyabashi Defence does not make any submission in relation to sentencing; however, throughout its Closing Brief it refers to a series of factors that might be considered as mitigating circumstances by the Chamber in determining a sentence against Kanyabashi."), *referring to* Kanyabashi Closing Brief, para. 666. In this regard, the Appeals Chamber considers that the Trial Chamber's general statement that Defence teams addressed mitigation in varying degrees during closing arguments does not demonstrate that the Trial Chamber considered the mitigating factors raised by Kanyabashi during them. *See* Trial Judgement, fn. 14855.
[7883] *See Simba* Appeal Judgement, para. 287; *Blaškić* Appeal Judgement, para. 696. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 693.

presentation of a letter from the commander of the Tribunal's detention facility and of which the Trial Chamber took note,[7884] shows that the Trial Chamber also disregarded this factor.

3477. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention in determining his individual circumstances relevant to sentencing. The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

4. Proportionality of Sentence

3478. Kanyabashi submits that his sentence is manifestly excessive in light of the fact that he was acquitted of a number of charges, that he did not personally participate in the killings at Kabakobwa Hill, and that no killings resulted from the megaphone announcements.[7885]

3479. The Prosecution responds that the lack of direct participation in the killings at Kabakobwa Hill does not detract from the seriousness of Kanyabashi's conviction under Article 6(3) of the Statute.[7886]

3480. The Appeals Chamber, Judge Pocar and Judge Agius dissenting, has affirmed Kanyabashi's convictions pursuant to Article 6(1) of the Statute for committing direct and public incitement to commit genocide in relation to megaphone announcements he made in Butare Town in May and June 1994.[7887] However, the Appeals Chamber has reversed Kanyabashi's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a result of its findings that the Trial Chamber erred in finding Kanyabashi guilty of the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994.[7888]

3481. In light of the fact that a majority of Kanyabashi's convictions have been overturned on appeal, the Appeals Chamber finds it unnecessary to rule on Kanyabashi's contentions as to whether his sentence is manifestly excessive but will consider these arguments when determining the impact of the Appeals Chamber's findings on his sentence in Section XII below.

[7884] *See* Kanyabashi Closing Arguments, T. 29 April 2009 pp. 38, 39. Specifically, Kanyabashi submitted a letter from the commander of the Tribunal's detention facility dated 17 February 2009 certifying his good conduct while in detention. *See ibid.*, p. 38. While the Trial Chamber did not admit the letter, it took note of its contents. *See ibid.*, p. 39.
[7885] Kanyabashi Appeal Brief, paras. 384, 394.
[7886] Prosecution Response Brief, para. 1975.
[7887] *See supra*, Section VIII.E.
[7888] *See supra*, Sections VIII.B.1, VIII.B.4, VIII.C, VIII.D.

5. Conclusion

3482. Based on the foregoing, the Appeals Chamber concludes that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. The Appeals Chamber further concludes that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention when determining his mitigating circumstances relevant to sentencing. It will consider the impact of this error, if any, in Section XII below.

3483. Moreover, the Appeals Chamber notes that, in light of the fact that Kanyabashi's convictions for the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994 have been overturned on appeal, the Trial Chamber's conclusion in its sentencing deliberations that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries" and its reliance on the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as an aggravating circumstance are no longer supported.[7889] Likewise, the Trial Chamber's conclusion that Kanyabashi abused his authority in relation to the crimes that occurred at Matyazo Clinic also lacks support.[7890] The Appeals Chamber will consider the impact of this error, if any, in Section XII below.

3484. The Appeals Chamber also concludes that, in light of the fact that a majority of Kanyabashi's convictions have been overturned on appeal, the Appeals Chamber will consider Kanyabashi's contentions as to whether his sentence is manifestly excessive when determining the impact of its own findings on his sentence in Section XII below. The Appeals Chamber grants these parts of Ground 8 of Kanyabashi's appeal and dismisses his remaining challenges under this ground.

3485. The Appeals Chamber dismisses the remainder of Ground 8 of Kanyabashi's appeal.

[7889] Trial Judgement, paras. 6253, 6254. *See also supra*, Section XI.E.1.
[7890] Trial Judgement, para. 6254.

F. Ndayambaje's Sentencing Appeal (Ground 21)

3486. The Trial Chamber sentenced Ndayambaje to a single term of life imprisonment for his convictions for genocide, direct and public incitement to commit genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.[7891]

3487. Ndayambaje submits that the Trial Chamber erred in: (i) assessing certain aggravating factors; (ii) failing to consider or accord sufficient weight to certain mitigating factors; (iii) imposing a sentence disproportionate to the degree of his participation in the crimes; (iv) failing to impose a sentence similar to those imposed in comparable cases; and (v) imposing a single sentence of life imprisonment.[7892] He requests that his sentence be reduced.[7893]

1. Aggravating Circumstances

3488. When discussing Ndayambaje's aggravating factors, the Trial Chamber recalled "that hundreds, if not thousands, of predominantly Tutsis who took refuge at Kabuye Hill and at Mugombwa Church perished following days of intensified attacks."[7894] The Trial Chamber further found that the number of victims "surpasse[d] the threshold for extermination" and considered this as an aggravating factor.[7895] Noting that "Ndayambaje was an influential, respected figure in Butare" who committed crimes before and during his tenure as *bourgmestre* of Muganza Commune in 1994, the Trial Chamber concluded that he "used his status and influence to further these grave crimes" and considered this abuse of authority as an aggravating factor.[7896] Finally, the Trial Chamber was of the view that "the premeditated nature" of the attacks on Mugombwa Church and Kabuye Hill, as evidenced by their prolonged and repetitive nature, also constituted an aggravating factor.[7897]

3489. Ndayambaje argues that the Trial Chamber impermissibly considered the number of victims, abuse of authority, and premeditation as aggravating factors as these were also elements of the offences for which he was convicted.[7898] He also contends that the Trial Chamber erroneously

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[7891] Trial Judgement, paras. 6186, 6271.
[7892] Ndayambaje Notice of Appeal, para. 215-219; Ndayambaje Appeal Brief, paras. 677-697.
[7893] Ndayambaje Notice of Appeal, para. 220. *See also* Ndayambaje Appeal Brief, paras. 692, 695; AT. 21 April 2015 p. 31.
[7894] Trial Judgement, para. 6267.
[7895] Trial Judgement, para. 6267.
[7896] Trial Judgement, para. 6268.
[7897] Trial Judgement, para. 6269.
[7898] Ndayambaje Appeal Brief, para. 684, *referring to* Trial Judgement, paras. 6195, 6266, 6269, *Gatete* Appeal Judgement, para. 275, *Ndindabahizi* Appeal Judgement, para. 137. *See also* Ndayambaje Reply Brief, paras. 279-281.

"confused the notions of 'influence' and 'authority'" in finding that he "used his status and influence to further these grave crimes" and considering "this abuse of authority as an aggravating factor".[7899]

3490. Furthermore, Ndayambaje submits that the Trial Chamber erred in relying on the *Semanza* Appeal Judgement because, in relation to his convictions for the crimes committed at Mugombwa Church and Kabuye Hill, he "was just a student at the time", unlike Laurent Semanza who was appointed to serve as a member of Parliament.[7900] In this context, he argues that "[i]t was inconceivable to liken him to an authority [like Semanza] and that he abused an influence which he did not have."[7901] Alternatively, Ndayambaje points to the *Rugambarara* case to argue that, with respect to his convictions for events that occurred after he was installed as *bourgmestre* of Muganza Commune, the position of *bourgmestre* is an insufficiently high level of authority so that abuse of such authority could not constitute an aggravating factor.[7902]

3491. The Prosecution responds that Ndayambaje does not show any error in the Trial Chamber's reliance on the aggravating factors he challenges and that his claims should be summarily dismissed.[7903]

3492. The Appeals Chamber notes that, when finding that the number of victims was an aggravating factor in relation to the attacks at Mugombwa Church and Kabuye Hill, the Trial Chamber recalled that "hundreds, if not thousands, of predominantly Tutsis who took refuge at [these locations] perished" and determined that the number of victims "far surpasse[d] the threshold for extermination".[7904] The Appeals Chamber recalls that there is no minimum number of victims required for a conviction of genocide and that a particularly large number of victims can be an aggravating circumstance in relation to the sentence for extermination as a crime against humanity where the extent of the killings exceeds that required for extermination.[7905] None of the other crimes for which Ndayambaje was convicted in relation to these events requires a minimum number of victims. Accordingly, the Appeals Chamber dismisses Ndayambaje's contention that the Trial

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Ndayambaje adds that "[t]hese factors also constituted crimes that were not pleaded in the Indictment". *See* Ndayambaje Appeal Brief, para. 684, *incorporating by reference* Grounds 1 to 6 of his appeal. However, as Ndayambaje's challenges pertaining to insufficient notice have been dismissed, the Appeals Chamber also dismisses this contention which is not developed further under this ground of appeal.

[7899] Ndayambaje Appeal Brief, para. 685. *See also* Ndayambaje Reply Brief, para. 281.

[7900] Ndayambaje Appeal Brief, para. 686, *referring, inter alia, to Semanza* Appeal Judgement, para. 336, Trial Judgement, paras. 64, 1281, 1327, 4338, 4579, 4677, 4706, 5762.

[7901] Ndayambaje Appeal Brief, para. 686, *referring to* Trial Judgement, para. 5762. *See also ibid.*, para. 682.

[7902] Ndayambaje Appeal Brief, para. 687, *referring to Rugambarara* Sentencing Judgement, para. 28.

[7903] Prosecution Response Brief, para. 2528.

[7904] Trial Judgement, para. 6267.

[7905] *Ndahimana* Appeal Judgement, para. 231; *Ndindabahizi* Appeal Judgement, para. 135. *See also Nzabonimana* Appeal Judgement, para. 465.

Chamber erred in considering the number of victims both as an element of the offence and as an aggravating factor.[7906] Likewise, Ndayambaje does not demonstrate that his abuse of authority or the premeditated nature in which the attacks at Mugombwa Church and Kabuye Hill were perpetrated constituted elements of the offences for which he was convicted and that, consequently, they could not be considered as aggravating circumstances.

3493. Turning to Ndayambaje's contention that the Trial Chamber erred in confusing notions of abuse of influence and authority, the Appeals Chamber recalls that a trial chamber may consider the abuse of a convicted person's influence as an aggravating factor in sentencing.[7907] Ndayambaje simply points to semantic differences without demonstrating how the Trial Chamber erred in relying on findings that Ndayambaje used "his status and influence to further [...] grave crimes" when determining that his abuse of authority was an aggravating factor.[7908] Moreover, the Trial Chamber did not liken Ndayambaje's authority to that of Laurent Semanza but merely cited the *Semanza* Appeal Judgement in its summary of the applicable law in support of the principle that it "may consider an individual's influence as an aggravating circumstance".[7909] Ndayambaje does not demonstrate how any finding concerning Laurent Semanza's abuse of authority in the *Semanza* case prevented the Trial Chamber from concluding that Ndayambaje abused his authority in relation to the crimes of which it convicted him. Ndayambaje's submission that he was not a public official at the time of the attacks on Mugombwa Church and Kabuye Hill does not demonstrate that the Trial Chamber erred in finding that he was nonetheless influential within the commune and used his "influence to further these grave crimes".[7910]

3494. Moreover, the Appeals Chamber is not persuaded that, simply because the Trial Chamber found the evidence insufficient to establish that he could bear superior responsibility over perpetrators of the attacks at Mugombwa Church and Kabuye Hill, the Trial Chamber erred in finding that he abused his authority in relation to these events. The Trial Chamber considered that "Ndayambaje was an influential, respected figure in Butare" who: (i) "had been *bourgmestre* of Muganza *commune* between 1983 and 1992, prior to his participation in the attacks at Mugombwa Church and Kabuye Hill"; (ii) "committed genocide and incitement to commit genocide both before

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[7906] As noted previously by the Appeals Chamber, while extermination as a crime against humanity has been found in relation to the killing of thousands of persons, it has also been found in relation to fewer killings, such as the killings of approximately 60 individuals and less. *See Ndahimana* Appeal Judgement, para. 231 and references cited therein. *See also supra*, para. 2123 ("The Appeals Chamber recalls that the *actus reus* of extermination is the act of killing on a large scale. This is what distinguishes the crime of extermination from the crime of murder. The Appeals Chamber further recalls that "large scale" does not suggest a strict numerical approach with a minimum number of victims. The assessment of "large scale" is made on a case-by-case basis, taking into account the circumstances in which the killings occurred.") (internal references omitted).
[7907] *See Karemera and Ngirumpatse* Appeal Judgement, para. 682.
[7908] Trial Judgement, para. 6268.
[7909] Trial Judgement, para. 6196, *referring to Semanza* Appeal Judgement, paras. 335, 336.

and after his reinstallation as *bourgmestre* in June 1994"; and (iii) "used his status and influence to further these grave crimes."[7911] Indeed, when assessing his potential superior responsibility for the attacks at Mugombwa Church, the Trial Chamber emphasised that "Ndayambaje, as former *bourgmestre* of Muganza *commune* for a period of 11 years, and the holder of a number of other offices, was a well-known authority figure and was influential within his *commune*."[7912] The Trial Chamber also referred to "the prominent role that Ndayambaje played in contributing to the attacks at Kabuye Hill".[7913]

3495. With respect to Ndayambaje's final contention that holding a position of *bourgmestre* was insufficient to constitute an aggravating factor given a finding of this nature in the *Rugambarara* Sentencing Judgement, the Appeals Chamber stresses that "the precedential effect of previous sentences rendered by the [ICTY and the Tribunal] is not only 'very limited' but 'also not necessarily a proper avenue to challenge a Trial Chamber's finding in exercising its discretion to impose a sentence'."[7914] Ndayambaje's emphasis on the *Rugambarara* Sentencing Judgement fails to appreciate, for example, that the Appeals Chamber affirmed another trial chamber's determination in the case of Sylvestre Gacumbitsi – who was a *bourgmestre* and an important and influential personality in Rusumo Commune – that the abuse of his powers as a *bourgmestre* constituted an aggravating factor.[7915]

3496. In light of the above, the Appeals Chamber concludes that Ndayambaje has not demonstrated that the Trial Chamber erred in its consideration of the aggravating factors in determining his sentence.

2. Mitigating Circumstances

3497. The Trial Chamber considered the propriety of Ndayambaje's first tenure as *bourgmestre* between 1983 and October 1992 as well as the facts that he was described as an honest man concerned about the welfare of the people and the agricultural sector and that he accommodated two Tutsis during the events of May 1994 in his home as mitigating factors.[7916] However, in view of the

[7910] *See* Trial Judgement, para. 6268.
[7911] Trial Judgement, para. 6268.
[7912] Trial Judgement, para. 5763.
[7913] Trial Judgement, para. 5779.
[7914] *Babić* Sentencing Appeal Judgement, para. 32, *quoting Nikolić* Sentencing Appeal Judgement, para. 19. *See also Čelebići* Appeal Judgement, para. 821.
[7915] *See Gacumbitsi* Appeal Judgement, paras. 190, 191, *referring to Gacumbitsi* Trial Judgement, para. 345.
[7916] Trial Judgement, para. 6270.

gravity of Ndayambaje's crimes and the nature of his involvement in them, the Trial Chamber accorded these circumstances "very limited weight".[7917]

3498. Ndayambaje contends that, when assessing his mitigating circumstances, the Trial Chamber erred in failing to consider adequately his age, the possibility of his social reintegration, and the facts that he is the father of three children and that he did not have a criminal record.[7918] Ndayambaje also highlights that he expressed remorse and compassion towards the victims and adds that he was not subject of disciplinary measures while detained.[7919]

3499. Ndayambaje also contends that the Trial Chamber erred in failing to afford mitigation for the violation of his right to an expeditious trial, in particular for the length of his detention on remand.[7920] He argues that he was subject to "the longest preventative detention" and requests a remedy of a considerable reduction in his sentence.[7921]

3500. The Prosecution responds that since Ndayambaje made no submissions regarding mitigating circumstances at trial, he cannot now raise them on appeal for the first time.[7922] It further contends that Ndayambaje has failed to demonstrate undue delay and that a remedy was required in this regard.[7923]

3501. Ndayambaje replies that he identified mitigating circumstances at trial but that the Trial Chamber "incorrectly assessed" them.[7924]

3502. The Appeals Chamber observes that, in his sentencing submissions at trial, Ndayambaje principally argued that "it [was] premature and almost impossible to discuss the sentence at this stage of the proceedings"[7925] and requested that he "be given the broadest mitigating circumstances, taking into account everything that emerged from this trial relating to his personality and the circumstances under which he experienced the extremely difficult events from April to June 1994."[7926] Given the ambiguity of these submissions, the Appeals Chamber considers that the

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[7917] Trial Judgement, para. 6270.
[7918] Ndayambaje Notice of Appeal, para. 218; Ndayambaje Appeal Brief, para. 688, *referring to* Trial Judgement, para. 6270. *See also* Ndayambaje Appeal Brief, para. 690.
[7919] Ndayambaje Appeal Brief, paras. 689, 691. *See also* AT. 21 April 2015 pp. 71, 72.
[7920] Ndayambaje Notice of Appeal, para. 218; Ndayambaje Appeal Brief, para. 693. *See also* AT. 21 April 2015 p. 31.
[7921] Ndayambaje Appeal Brief, para. 695. *See also ibid.*, para. 692.
[7922] Prosecution Response Brief, para. 2529, *referring to Bikindi* Appeal Judgement, para. 165.
[7923] Prosecution Response Brief, para. 2530. *See also ibid.*, paras. 4, 7. At the appeals hearing, the Prosecution opposed Ndayambaje's claim that he expressed compassion towards the victims. *See* AT. 21 April 2015 p. 61.
[7924] Ndayambaje Reply Brief, para. 282, *referring to* Ndayambaje Closing Brief, para. 1025, Trial Judgement, para. 6270.
[7925] Ndayambaje Closing Brief, para. 1021. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 p. 46, *referring to* Ndayambaje Closing Brief, paras. 1021-1025.
[7926] Ndayambaje Closing Brief, para. 1025. *See also* Ndayambaje Closing Arguments, T. 30 April 2009 p. 46, *referring to* Ndayambaje Closing Brief, paras. 1021-1025.

Trial Chamber was under no obligation to consider the mitigating circumstances Ndayambaje now points to and that he has waived his right to have them considered on appeal.

3503. Moreover, the Appeals Chamber notes that, notwithstanding the nature of his submissions at trial, the Trial Chamber nevertheless considered as mitigating factors: (i) the propriety of Ndayambaje's first tenure as *bourgmestre* between 1983 and October 1992 as well as the fact that Ndayambaje was described as an honest man concerned about the welfare of the people and the agricultural sector; and (ii) the fact that Ndayambaje accommodated two Tutsis during the events of May 1994 in his home.[7927] However, as noted above, they were accorded only "very limited weight".[7928] While Ndayambaje generally argues that the Trial Chamber "incorrectly assessed" the mitigating circumstances, he does not demonstrate how it committed a discernible error in this respect.

3504. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has not demonstrated that the Trial Chamber erred in its consideration of the mitigating factors in determining his sentence.

3. Degree of Participation in the Crimes

3505. Ndayambaje submits that the sentence imposed by the Trial Chamber was disproportionate to the degree of his participation in the crimes as he was only convicted of aiding and abetting and inciting certain crimes.[7929] Quoting the Trial Chamber's finding that "[w]hile Ndayambaje played a role in events surrounding the killings, and substantially contributed to them, the Chamber does not find that his conduct was as much an integral part of genocide as the killings themselves",[7930] Ndayambaje argues that his direct participation in the crimes was not established and the sentence of life imprisonment imposed by the Trial Chamber was excessive and disproportionate.[7931] He further contends that the sentence was disproportionate because he was not a superior and did not possess *de jure* or *de facto* authority over the principal perpetrators.[7932]

[7927] Trial Judgement, para. 6270.
[7928] Trial Judgement, para. 6270.
[7929] Ndayambaje Notice of Appeal, para. 216. *See also* Ndayambaje Appeal Brief, paras. 677-679.
[7930] Ndayambaje Appeal Brief, para. 679, *quoting* Trial Judgement, para. 5776.
[7931] Ndayambaje Notice of Appeal, para. 216; Ndayambaje Appeal Brief, paras. 679, 680.
[7932] Ndayambaje Appeal Brief, para. 682. Ndayambaje adds that a conviction under both Articles 6(1) and 6(3) of the Statute warrants a heavier sentence than a conviction under Article 6(1) of the Statute alone. *See ibid.*, para. 683.

3506. The Prosecution responds that, given the scale of the crimes for which Ndayambaje was found responsible, a life sentence was not disproportionate and that the Trial Chamber did not abuse its discretion.[7933]

3507. The Appeals Chamber recalls that the Trial Chamber found that Ndayambaje aided and abetted the killings of Tutsis at Mugombwa Church and Kabuye Hill, committed direct and public incitement to commit genocide prior to an attack on Mugombwa Church and during his swearing-in ceremony as the new *bourgmestre* of Muganza Commune, and instigated the killings of Tutsi women and girls abducted from Mugombwa Sector.[7934] Furthermore, while the Trial Chamber determined that "his conduct [at Mugombwa Church and Kabuye Hill] was [not] as much an integral part of the genocide as the killings themselves" when determining that aiding and abetting rather than committing best characterised his responsibility under Article 6(1) of the Statute,[7935] it nevertheless "found Ndayambaje guilty of genocide for his direct participation in the massacres at Mugombwa Church and Kabuye Hill".[7936] The Appeals Chamber finds that the Trial Chamber's conclusions as to Ndayambaje's participation in the attacks at Mugombwa Church and Kabuye Hill support the characterisation that he directly participated in the massacres even though he was only found to have aided and abetted them.[7937] Moreover, Ndayambaje's contentions ignore that, with respect to the other events for which he was convicted, he was found responsible under Article 6(1) of the Statute for directly participating in the crimes through committing or instigating them.[7938]

3508. Furthermore, the Appeals Chamber considers that the fact that the Trial Chamber found that the Prosecution failed to lead sufficient evidence that Ndayambaje exercised effective control over the perpetrators of the attacks at Mugombwa Church and Kabuye Hill did not prevent the Trial Chamber from imposing a sentence of life imprisonment.[7939]

3509. In light of the gravity of the crimes which the Trial Chamber described as leading "to a loss of life on a massive scale and caused immense human suffering",[7940] the Appeals Chamber dismisses Ndayambaje's contention that the Trial Chamber imposed a sentence disproportionate to the form and degree of his participation in the crimes of which he was convicted at trial.

[7933] Prosecution Response Brief, paras. 2520-2527. *See* AT. 21 April 2015 pp. 60, 61.
[7934] *See* Trial Judgement, paras. 5949, 5976, 5977, 5995-6002, 6026-6029, 6038, 6064-6066, 6107, 6108, 6125, 6175, 6176, 6186. *See also ibid.*, para. 6266.
[7935] Trial Judgement, para. 5776, *referring to Seromba* Appeal Judgement, para. 182.
[7936] Trial Judgement, para. 6266.
[7937] *See* Trial Judgement, paras. 1245, 1246, 1424, 1431, 1455, 1456, 5754, 5755, 5769, 5772, 5774, 5775.
[7938] *See* Trial Judgement, paras. 5976, 5977, 6002, 6029, 6031, 6038, 6064, 6066, 6107, 6108, 6125, 6175, 6176.
[7939] *See* Trial Judgement, paras. 5764, 5779.
[7940] *See* Trial Judgement, para. 6266.

4. Comparability of Sentences

3510. Ndayambaje submits that the Trial Chamber erred in not applying the principle of parity and not imposing a similar sentence on him as those imposed on Elizaphan and Gérard Ntakirutimana, Muvunyi, Emmanuel Rukundo, Bikindi, Kalimanzira, and Dominique Ntawukulilyayo.[7941]

3511. The Prosecution did not directly respond to these submissions.

3512. The Appeals Chamber recalls that comparison between cases is of limited assistance in challenging a sentence given the broad discretion afforded to trial chambers in determining the appropriate sentence on account of their obligation to tailor the penalties to fit the individual circumstances of the convicted person and to reflect the gravity of the crimes.[7942] Apart from referring to other cases before the Tribunal that he argues are comparable to his, Ndayambaje does not demonstrate that the Trial Chamber committed a discernible error in imposing a sentence of life imprisonment in light of the sentences imposed on other convicted persons he has identified.

3513. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate that the Trial Chamber erred in this respect.

5. Life Sentence

3514. Ndayambaje submits that, in imposing a life sentence without a possibility of conditional release, the Trial Chamber violated his rights under Articles 19 and 20 of the Statute as well as his rights under Article 7 of the ICCPR.[7943] In his appeal brief, Ndayambaje further argues that the Trial Chamber erred in imposing a life imprisonment without providing a reasoned opinion and, that, by sentencing him to a single sentence for all of his crimes, the Trial Chamber deprived him of the benefit of any credit based on the period already spent in detention.[7944]

3515. The Prosecution responds that Ndayambaje does not show any error and that his argument should be dismissed.[7945]

[7941] Ndayambaje Notice of Appeal, para. 216, fn. 178; Ndayambaje Appeal Brief, para. 681, fn. 1034.
[7942] *See, e.g., Ntabakuze* Appeal Judgement, para. 298; *Muvunyi* Appeal Judgement of 1 April 2011, para. 72; *Rukundo* Appeal Judgement, para. 263; *Semanza* Appeal Judgement, para. 394. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 701.
[7943] Ndayambaje Notice of Appeal, para. 219. Ndayambaje, without providing specific references, adds that the ECtHR as well as national courts held that a life sentence should be combined with the possibility of conditional release. *See idem.*
[7944] *See* Ndayambaje Appeal Brief, paras. 696, 697.
[7945] Prosecution Response Brief, para. 2531.

3516. In the absence of substantiation, the Appeals Chamber dismisses Ndayambaje's claim that his sentence of life imprisonment, which is provided for in the Rules, violates Articles 19 and 20 of the Statute and Article 7 of the ICCPR.

3517. The Appeals Chamber also dismisses Ndayambaje's claim that imposing a single life sentence deprived him of the benefit of any credit based on the period already spent in detention and that the Trial Chamber erred in failing to provide a reasoned opinion in this regard. Rule 101(C) of the Rules states that "[c]redit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal". This provision, however, does not affect the ability of a trial chamber to impose the maximum sentence, as provided for by Rule 101(A) of the Rules.[7946]

3518. Moreover, the Appeals Chamber recalls that Rule 87(C) of the Rules provides that "[i]f the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall impose a sentence in respect of each finding of guilt [...] unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."[7947] Ndayambaje does not demonstrate that the Trial Chamber abused its discretion in deciding to impose a single sentence in this instance.

3519. Based on the foregoing, the Appeals Chamber dismisses Ndayambaje's arguments concerning the imposition of a sentence of life imprisonment.

6. Conclusion

3520. Based on the foregoing, the Appeals Chamber finds that Ndayambaje has failed to demonstrate any error in the Trial Chamber's determination of his sentence and dismisses Ground 21 of his appeal.

[7946] *See Karera* Appeal Judgement, para. 397.

[7947] The Appeals Chamber notes that Rule 87(C) of the Rules was amended on 14 March 2008 to expressly provide for the imposition of single sentences. *See, e.g., Karemera and Ngirumpatse* Appeal Judgement, para. 679, fn. 1828; *Ntabakuze* Appeal Judgement, para. 276, fn. 631. Prior to this amendment, the Appeals Chamber confirmed the propriety of this practice. *See Nahimana et al.* Appeal Judgement, paras. 1042, 1043; *Kambanda* Appeal Judgement, paras. 111, 112.

XII. IMPACT OF THE APPEALS CHAMBER'S FINDINGS ON SENTENCES

A. Nyiramasuhuko

3521. With respect to Nyiramasuhuko, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that her right to be tried without undue delay had not been violated, and that this violation caused her prejudice.[7948] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Nyiramasuhuko's conviction for persecution as a crime against humanity.[7949]

3522. However, the Appeals Chamber has upheld Nyiramasuhuko's convictions for: (i) conspiracy to commit genocide pursuant to Article 6(1) of the Statute by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;[7950] (ii) genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killings of Tutsis who had sought refuge at the office of Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks;[7951] and (iii) rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.[7952]

3523. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Nyiramasuhuko's sentence of life imprisonment to 47 years of imprisonment.

B. Ntahobali

3524. With respect to Ntahobali, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7953] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Ntahobali's conviction for persecution as a crime against

[7948] *See supra*, Section III.K.
[7949] *See supra*, Section V.M.
[7950] *See supra*, Section IV.D.
[7951] *See supra*, Section IV.F. The Appeals Chamber has further upheld the Trial Chamber's finding that Nyiramasuhuko also bore responsibility as a superior under Article 6(3) of the Statute for these crimes. *See supra*, Section IV.F.4.
[7952] *See supra*, Section IV.F.

humanity.[7954] In addition, the Appeals Chamber has reversed Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) killing numerous Tutsis, other than a Tutsi girl, at the Hotel Ihuliro roadblock in late April 1994; and (ii) aiding and abetting the killing of Rwamukwaya and his family around 29-30 April 1994.[7955] It has also reversed Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) raping Tutsi women, other than Witness TA, at the Butare Prefecture Office; and (ii) ordering the rapes of six Tutsi women, other than Witness TA, at the prefectoral office during the First Attack of the Last Half of May Attacks.[7956]

3525. However, the Appeals Chamber, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack, has upheld Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) killing a Tutsi girl he had first raped at the Hotel Ihuliro roadblock in late April 1994; (ii) ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, killings of Tutsis at the IRST on 21 April 1994, and killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack; and (iii) aiding and abetting the killings of Tutsis abducted from the EER perpetrated between mid-May and early June 1994.[7957] The Appeals Chamber has further upheld Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II

[7953] *See supra*, Section III.K.
[7954] *See supra*, Section V.M.
[7955] *See supra*, Sections V.G, V.H.
[7956] *See supra*, Section V.I. The Appeals Chamber recalls that it has further reversed the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the rapes of six Tutsi women, other than Witness TA, at the prefectoral office during the First Attack of the Last Half of May Attacks.
[7957] *See supra*, Sections V.F, V.G, V.I, V.J. With respect to the Mid-May Attack for which Ntahobali was convicted for ordering killings of Tutsis who had sought refuge at the Butare Prefecture Office, although the Appeals Chamber, Judge Liu dissenting, upheld Ntahobali's responsibility for ordering the killings of Tutsi abducted during the Mid-May Attack, it recalls that is has also found that the Trial Chamber's apparent attribution of responsibility to Ntahobali for the killings of hundreds of Tutsi refugees abducted from the Butare Prefectoral Office is not sustained by the record or is based on findings for which Ntahobali was not convicted by the Trial Chamber. *See supra*, Section V.I. The Appeals Chamber recalls that it has, Judge Liu dissenting with respect to Ntahobali's responsibility for the Mid-May Attack, further upheld the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack, and the killings of Tutsis abducted from the EER perpetrated between mid-May and early June 1994. *See supra*, Sections V.G, V.I, V.J. The Appeals Chamber, Judge Liu dissenting, has further upheld the Trial Chamber's finding that Ntahobali also bore responsibility as a superior under Article 6(3) of the Statute for the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks. *See supra*, Section V.I.

pursuant to Article 6(1) of the Statute for: (i) raping a Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks at the prefectoral office; (ii) ordering the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks; and (iii) aiding and abetting the rapes of Witness TA at the prefectoral office during the First Half of June Attacks.[7958]

3526. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Ntahobali's sentence of life imprisonment to 47 years of imprisonment.

C. Nsabimana

3527. With respect to Nsabimana, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7959] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Nsabimana's conviction for persecution as a crime against humanity.[7960] The Appeals Chamber has also found that the Trial Chamber erred in considering the vulnerability of the victims in assessing the gravity of the offences and as a separate aggravating factor and that, in light of the form and degree of participation of Nsabimana in the crimes committed, the sentence imposed by the Trial Chamber is excessive and that the Trial Chamber committed a discernible error in exercising its discretion in this regard.[7961]

3528. However, the Appeals Chamber has upheld Nsabimana's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence.[7962]

3529. In light of the above, the Appeals Chamber reduces Nsabimana's sentence of 25 years of imprisonment to 18 years of imprisonment.

D. Nteziryayo

3530. With respect to Nteziryayo, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and

[7958] *See supra*, Sections V.G, V.I
[7959] *See supra*, Section III.K.
[7960] *See supra*, Section V.M.
[7961] *See supra*, Section XI.C.

that this violation caused him prejudice.[7963] The Appeals Chamber has also found that the Trial Chamber erred in considering Nteziryayo's role in the civil defence programme and the unspecified conclusion that "soldiers and civilian militiamen participated in a widespread and systematic campaign of slaughter and targeted Tutsi civilians, including those who were particularly vulnerable, as well as Hutu moderates" when assessing the gravity of his offences.[7964]

3531. However, the Appeals Chamber has upheld Nteziryayo's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's Swearing-In Ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994.[7965]

3532. In light of the above, the Appeals Chamber reduces Nteziryayo's sentence of 30 years of imprisonment to 25 years of imprisonment.

E. Kanyabashi

3533. With respect to Kanyabashi, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7966] In addition, the Appeals Chamber has reversed Kanyabashi's convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994.[7967] The Appeals Chamber recalls that, in Section XI.E above, it has concluded that, in light of the fact that a majority of Kanyabashi's convictions have been overturned

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[7962] *See supra*, Section VI.D.
[7963] *See supra*, Section III.K.
[7964] *See supra*, Section XI.D.
[7965] *See supra*, Sections VII.B-VII.D.
[7966] *See supra*, Section III.K.
[7967] *See supra*, Sections VIII.B.1, VIII.B.4, VIII.C, VIII.D. *See also supra*, Section V.M. The Appeals Chamber recalls that it had also found that the Trial Chamber erred in considering the number of casualties of the attacks on Kabakobwa Hill and at Matyazo Clinic both in assessing the gravity of the offences and as a separate aggravating circumstance. *See supra*, Section XI.E. The Appeals Chamber further recalls that it has found that, in light of the fact that Kanyabashi's convictions for the killings of Tutsis committed by members of the Ngoma commune police at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994 have been overturned on appeal, the Trial Chamber's conclusion in its sentencing deliberations that his crimes were "of an obvious gravity resulting in a significant number of casualties in terms of death and injuries" and its reliance on the number of victims resulting from the killings at Kabakobwa Hill and Matyazo Clinic as an aggravating circumstance are no longer supported. Likewise, the Appeals Chamber has found that the Trial Chamber's conclusion that Kanyabashi abused his authority in relation to the crimes that occurred at Matyazo Clinic also lacks support. *See supra*, Section XI.E.

on appeal, the Appeals Chamber will consider Kanyabashi's contentions as to whether his sentence is manifestly excessive when determining the impact of its own findings on his sentence. The Appeals Chamber has also found that the Trial Chamber erred in failing to consider Kanyabashi's age and good conduct in detention when determining his mitigating circumstances relevant to sentencing.[7968]

3534. However, the Appeals Chamber, Judge Pocar and Judge Agius dissenting, has upheld Kanyabashi's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in late May and mid-June 1994 calling on the population to kill Tutsis.[7969]

3535. In light of the above, the Appeals Chamber reduces Kanyabashi's sentence of 35 years of imprisonment to 20 years of imprisonment.

F. Ndayambaje

3536. With respect to Ndayambaje, the Appeals Chamber recalls that it has found that the Trial Chamber erred in finding that his right to be tried without undue delay had not been violated, and that this violation caused him prejudice.[7970] The Appeals Chamber further recalls that it has reversed, Judge Agius dissenting, Ndayambaje's conviction for persecution as a crime against humanity.[7971] In addition, the Appeals Chamber has reversed Ndayambaje's convictions for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994.[7972] It has also reversed Ndayambaje's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Kabuye Hill on 22 April 1994; and (ii) instigating the killing of a Tutsi girl named Nambaje abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994.[7973]

3537. However, the Appeals Chamber has upheld Ndayambaje's conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making a

[7968] *See supra*, Section XI.E.
[7969] *See supra*, Section VIII.E.
[7970] *See supra*, Section III.K.
[7971] *See supra*, Section V.M.
[7972] *See supra*, Sections IX.A.1.(c), IX.A.5.
[7973] *See supra*, Sections IX.F, IX.H.

speech containing inciting statements to commit genocide at his swearing in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994.[7974] The Appeals Chamber has further upheld Ndayambaje's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for: (i) aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 23 to 24 April 1994; and (ii) instigating the killings of Tutsi women and girls, other than one named Nambaje, abducted from Mugombwa Sector based on his utterances at the Virgin Mary Statute after his swearing-in ceremony on 22 June 1994.[7975]

3538. In light of the above, the Appeals Chamber, Judge Agius dissenting as to the number of years, reduces Ndayambaje's sentence of life imprisonment to 47 years of imprisonment.

[7974] *See supra*, Section IX.G.
[7975] *See supra*, Sections IX.E, IX.F, IX.H.

XIII. DISPOSITION

3539. For the foregoing reasons, **THE APPEALS CHAMBER**,

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

NOTING the written submissions of the parties and their oral arguments presented at the appeals hearing between 14 and 17 April 2015 as well as between 20 and 22 April 2015;

SITTING in open session;

WITH RESPECT TO PAULINE NYIRAMASUHUKO'S APPEAL

GRANTS Ground 1 of Nyiramasuhuko's appeal in part, **FINDS** that the Trial Chamber erred in concluding that her right to be tried without undue delay had not been violated, and **FINDS** that this violation caused her prejudice;

DISMISSES Nyiramasuhuko's appeal in all other respects;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting Nyiramasuhuko for persecution as a crime against humanity, **REVERSES** Nyiramasuhuko's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

AFFIRMS Nyiramasuhuko's convictions for:

- conspiracy to commit genocide pursuant to Article 6(1) of the Statute by entering into an agreement with members of the Interim Government on or after 9 April 1994 to kill Tutsis within Butare Prefecture;
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for ordering the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack and the Night of Three Attacks; and
- rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish rapes perpetrated by *Interahamwe* at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks;

REDUCES Nyiramasuhuko's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period she has already spent in detention since her arrest on 18 July 1997;

WITH RESPECT TO ARSÈNE SHALOM NTAHOBALI'S APPEAL

GRANTS Ground 1.1 of Ntahobali's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS, Judge Agius dissenting, Ground 4.6 of Ntahobali's appeal, **REVERSES** Ntahobali's conviction for persecution as a crime against humanity, and **ENTERS** a verdict of acquittal under Count 8 of the Nyiramasuhuko and Ntahobali Indictment;

GRANTS Ground 4.2 of Ntahobali's appeal in part and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for killing numerous Tutsis, other than a Tutsi girl, at the Hotel Ihuliro roadblock in late April 1994;

GRANTS Grounds 3.4, in part, and 4.7 of Ntahobali's appeal and **REVERSES** his convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killing of Rwamukwaya and his family around 29-30 April 1994;

GRANTS, in part, Grounds 3.6, and 4.2 through 4.4, of Ntahobali's appeal and **REVERSES** his convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping Tutsi women, other than Witness TA, at the Butare Prefecture Office; and
- ordering the rapes of six Tutsi women, other than Witness TA, at the Butare Prefecture Office during the First Attack of the Last Half of May Attacks;

DISMISSES Ntahobali's appeal in all other respects;

AFFIRMS, Judge Liu dissenting with respect to Ntahobali's responsibility for ordering killings during the Mid-May Attack at the Butare Prefecture Office, Ntahobali's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- killing a Tutsi girl he had first raped at the Hotel Ihuliro roadblock in late April 1994;
- ordering the killing of Ruvurajabo at the Hotel Ihuliro roadblock on 21 April 1994, the killing of Tutsis at the IRST on 21 April 1994, and the killing of Tutsis who had sought refuge at the Butare Prefecture Office during the Mid-May Attack; and
- aiding and abetting the killings of Tutsis abducted from the EER between mid-May and early June 1994;

AFFIRMS Ntahobali's convictions for rape as a crime against humanity and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for:

- raping a Tutsi girl near the Hotel Ihuliro roadblock in late April 1994 as well as Witness TA during the Mid-May Attack and the First Attack of the Last Half of May Attacks at the prefectoral office;
- ordering the rape of Witness TA at the prefectoral office during the Second Attack of the Last Half of May Attacks; and
- aiding and abetting the rapes of Witness TA at the prefectoral office during the First Half of June Attacks;

REDUCES Ntahobali's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 24 July 1997;

WITH RESPECT TO SYLVAIN NSABIMANA'S APPEAL

DISMISSES Nsabimana's appeal in all respects;

FINDS, *proprio motu*, that the Trial Chamber erred in concluding that Nsabimana's right to be tried without undue delay had not been violated and **FINDS** that this violation caused him prejudice;

FINDS, *proprio motu*, Judge Agius dissenting, that the Trial Chamber erred in convicting

Nsabimana for persecution as a crime against humanity, **REVERSES** Nsabimana's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Nsabimana and Nteziryayo Indictment;

AFFIRMS Nsabimana's convictions for genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting by omission the killing of Tutsis who had sought refuge at the Butare Prefecture Office by failing to discharge his duty to provide assistance to people in danger and to protect civilians against acts of violence;

REDUCES Nsabimana's sentence of 25 years of imprisonment imposed by the Trial Chamber to 18 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 18 July 1997;

WITH RESPECT TO ALPHONSE NTEZIRYAYO'S APPEAL

GRANTS Ground 9 of Nteziryayo's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

DISMISSES Nteziryayo's appeal in all other respects;

AFFIRMS Nteziryayo's convictions for direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making speeches that constituted direct appeals to the population to kill Tutsis at public meetings held in Muyaga and Kibayi Communes in mid to late June 1994 and at Ndayambaje's Swearing-In Ceremony as the new *bourgmestre* of Muganza Commune that took place on 22 June 1994;

REDUCES Nteziryayo's sentence of 30 years of imprisonment imposed by the Trial Chamber to 25 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 26 March 1998;

WITH RESPECT TO JOSEPH KANYABASHI'S APPEAL

GRANTS Ground 6 of Kanyabashi's appeal, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Grounds 1.1 and 2.2 of Kanyabashi's appeal, **REVERSES** his convictions for genocide extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II as a superior pursuant to Article 6(3) of the Statute for failing to prevent and punish the killings of Tutsis perpetrated by Ngoma commune policemen at Kabakobwa Hill on 22 April 1994 and by soldiers at Matyazo Clinic in late April 1994, and **ENTERS** a verdict of acquittal under Counts 2, 6, 7, and 9 of the Kanyabashi Indictment;

DISMISSES, Judge Pocar and Judge Agius dissenting with respect to the incitement by megaphone, Kanyabashi's appeal in all other respects;

AFFIRMS, Judge Pocar and Judge Agius dissenting, Kanyabashi's convictions for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making megaphone announcements on two occasions in late May and mid-June 1994 calling on the population to kill Tutsis;

REDUCES Kanyabashi's sentence of 35 years of imprisonment imposed by the Trial Chamber to 20 years of imprisonment, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 28 June 1995;

WITH RESPECT TO ÉLIE NDAYAMBAJE'S APPEAL

GRANTS Ground 15 of Ndayambaje's appeal in part, **FINDS** that the Trial Chamber erred in concluding that his right to be tried without undue delay had not been violated, and **FINDS** that this violation caused him prejudice;

GRANTS Ground 2 of Ndayambaje's appeal and **REVERSES** his conviction for committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by directly inciting a crowd outside Mugombwa Church to kill the Tutsis who were taking refuge in the church on 20 and 21 April 1994;

GRANTS Ground 18 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for aiding and abetting the killings perpetrated at Kabuye Hill on 22 April 1994;

GRANTS Ground 20 of Ndayambaje's appeal in part and **REVERSES** his convictions for genocide, extermination and persecution as crimes against humanity, and violence to life,

health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol pursuant to Article 6(1) of the Statute for instigating the killing of a Tutsi girl named Nambaje abducted from Mugombwa Sector after his swearing-in ceremony on 22 June 1994;

DISMISSES Ndayambaje's appeal in all other respects;

FINDS, *proprio motu*, that the Trial Chamber erred in convicting Ndayambaje for persecution as a crime against humanity, **REVERSES** Ndayambaje's conviction for this crime, and **ENTERS** a verdict of acquittal under Count 7 of the Ndayambaje Indictment;

AFFIRMS Ndayambaje's convictions for:

- committing direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute by making a speech containing inciting statements to commit genocide at his swearing in ceremony as the new *bourgmestre* of Muganza Commune on 22 June 1994;
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for aiding and abetting the killings of Tutsis at Mugombwa Church on 20 and 21 April 1994 and at Kabuye Hill from 23 to 24 April 1994; and
- genocide, extermination as a crime against humanity, and violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute for instigating the killings of Tutsi women and girls, other than one named Nambaje, abducted from Mugombwa Sector based on his utterances at the Virgin Mary Statute after his swearing-in ceremony on 22 June 1994;

REDUCES Ndayambaje's sentence of life imprisonment imposed by the Trial Chamber to 47 years of imprisonment, Judge Agius dissenting as to the number of years, subject to credit being given under Rules 101(C) and 107 of the Rules for the period he has already spent in detention since his arrest on 28 June 1995;

WITH RESPECT TO THE APPEAL OF THE PROSECUTION

DISMISSES the Prosecution's appeal in its entirety;

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

ORDERS, in light of time served, Nsabimana's and Kanyabashi's immediate release; and

ORDERS that, in accordance with Rules 103(B) and 107 of the Rules, Nyiramasuhuko, Ntahobali, Nteziryayo, and Ndayambaje are to remain in the custody of the Tribunal pending the finalisation of arrangements for their transfer to the State where their sentence will be served.

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

Fausto Pocar
Presiding Judge

Carmel Agius
Judge

Liu Daqun
Judge

Khalida Rachid Khan
Judge

Bakhtiyar Tuzmukhamedov
Judge

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Fausto Pocar and Judge Carmel Agius append a joint dissenting opinion.

Judge Carmel Agius appends dissenting and separate opinions.

Judge Liu Daqun appends partially dissenting and dissenting opinions.

Judge Khalida Rachid Khan appends a dissenting opinion and a declaration.

Dated this fourteenth day of December 2015, in Arusha, Tanzania.

[Seal of the Tribunal]

XIV. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. At trial, the Prosecution submitted an initial indictment against Nyiramasuhuko and Ntahobali on 26 May 1997, which was confirmed on 29 May 1997.[1] On 10 August 1999 the Prosecution was granted leave to amend the indictment, which included, *inter alia*, adding six new counts.[2]

2. In deciding to grant the Prosecution leave to amend the indictment as requested, the Trial Chamber held that there was no need to inquire whether or not a *prima facie* case had been established in support of the new counts since it had only been seised of a motion to amend the indictment pursuant to Rule 50 of the Rules.[3] The Trial Chamber only satisfied itself that the Prosecution "provided sufficient grounds both in fact and in law".[4]

3. In this Judgement, the Appeals Chamber finds Nyiramasuhuko's allegation that the Trial Chamber erred in law by not requiring the Prosecution to present a *prima facie* case in support of the six new counts to be without merit.[5] Likewise, the Appeals Chamber also dismisses Ntahobali's similar arguments.[6] I respectfully disagree with both the reasoning and the conclusion of the majority of the Appeals Chamber ("Majority") in this respect.

4. Although on 10 August 1999 when the Prosecution was granted leave to amend the initial indictment against Nyiramasuhuko and Ntahobali Rule 50(A)(ii) of the Rules had not been adopted yet,[7] for the reasons already expressed in my opinion of 12 February 2004 in the *Casimir Bizimungu et al.* case, I believe that – even prior to the adoption of Rule 50(A)(ii) of the Rules – an amendment to an indictment to include new counts could not be allowed if the conditions for confirming the indictment set forth in Rule 47 of the Rules were not satisfied.[8] For the completeness of my argument, I hereby reproduce the relevant paragraphs of my previous opinion:

> 2. [...] In paragraph 11 of the decision, it is stated that "...Rule 50 of the Rules assigns the decision to allow an amendment to the indictment to the discretion of the Trial Chamber...." This may give the impression that a decision to allow an amendment rests solely in the discretion of a Trial Chamber, without more. I do not believe, however, that such a decision is solely a matter of discretion, because the conditions set forth in Rule 47 of the Rules must be taken into account by the Trial Chamber when it carries out its assessment. To dispel confusion, the Appeals Chamber should have pronounced on the issue even if the parties did not raise it expressly.

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[1] Appeal Judgement, para. 443. *See also* Trial Judgement, paras. 13, 6294.
[2] *See* Appeal Judgement, para. 443.
[3] *See* Appeal Judgement, para. 444, *referring to* 10 August 1999 Decision, para. 17.
[4] *See* Appeal Judgement, para. 444, *quoting* 10 August 1999 Oral Decision, p. 4.
[5] Appeal Judgement, para. 450.
[6] Appeal Judgement, paras. 1077, 1079.
[7] As noted in this Judgement, Rule 50(A)(ii) of the Rules was introduced in the Rules on 15 May 2004, following the 14th plenary session held on 23 and 24 April 2004. *See* Appeal Judgement, para. 450, fn. 1051.
[8] *Bizimungu et al.* 12 February 2004 Appeal Decision, Individual Opinion of Judge Pocar, para. 1. I note that Rule 47 of the Rules applicable on 10 August 1999 is similar to Rule 47 of te Rules applicable today.

3. Article 18(1) of the Statute of the International Tribunal provides that "[t]he judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed." The confirmation of an indictment can therefore only take place if a *prima facie* case exists. This statutory requirement is echoed in Rule 47(E) of the Rules, which states that "[t]he reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect."

4. Rule 50 of the Rules governs the amendment of indictments. This rule does not set forth conditions for allowing an amendment to an indictment. But it does preserve the rights of the accused in relation to new charges—for example, it provides for a further appearance to enable the accused to enter a plea on the new charges, and it also provides for a further period of thirty days to file preliminary motions pursuant to Rule 72 in relation to the new charges. Hence, after a request for an amendment is allowed, the new charges are subject to the same rules that would have applied if they had been presented in the original indictment.

5. In the same way, before an amendment is allowed, the inquiry must be governed by Rule 47, applicable to all indictments submitted, and a *prima facie* case must be presented. The illogic of any contrary view aside, the following may be noted. First, Rule 50 is placed in the same section in which the provisions for the confirmation of indictments are located, and no derogation from the general rule can be inferred from the text. Second, it cannot be that an amended indictment satisfies fewer requirements than those that were necessary for the original indictment's confirmation. Such an approach would allow the conditions set out in the Statute and Rule 47 to be circumvented in a given case on any number of additional amendments.

6. For these reasons, I believe that the Appeals Chamber should have stated, in this decision, that an amendment to an indictment should not be allowed if the conditions for confirming the indictment, articulated in Rule 47 of the Rules, are not satisfied.

5. In light of the above, I dissent from the Majority's conclusion that Nyiramasuhuko's – and Ntahobali's – allegation that the Trial Chamber erred in law by not requiring the Prosecution to present a *prima facie* case in support of the six new counts is without merit.

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

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

Judge Fausto Pocar

[Seal of the Tribunal]

XV. JOINT DISSENTING OPINION OF JUDGE POCAR AND JUDGE AGIUS

1. In this Judgement, the Appeals Chamber considers that, although the Trial Chamber erred in failing to find that the Indictment was defective in relation to the number of incidents of incitement by megaphone of which Kanyabashi was alleged to be responsible, Kanyabashi was ultimately put on adequate notice of the relevant material facts with respect to the number of alleged incidents of incitement by megaphone and that the vagueness of the Indictment did not impair his ability to prepare his defence.[1] Accordingly, the Appeals Chamber finds that the Trial Chamber's error concerning the form of the Indictment regarding the number of incidents of incitement by megaphone did not invalidate its decision to convict Kanyabashi on the basis of the late May and mid-June 1994 megaphone announcements and, therefore, dismisses Kanyabashi's contentions that he lacked sufficient notice of his alleged responsibility for committing direct and public incitement to commit genocide through two megaphone announcements in late May and mid-June 1994.[2]

2. Moreover, when examining the merits of Kanyabashi's appeal against his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994, the Appeals Chamber concludes that Kanyabashi has not demonstrated that the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony with respect to the megaphone announcement in late May 1994.[3] In light of this conclusion and after having found that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered to the population of Ngoma Commune from April through June 1994, the Appeals Chamber finds that Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, is sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[4] Accordingly, the Appeals Chamber finds that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice and that Kanyabashi has failed to demonstrate that the Trial

[1] Appeal Judgement, para. 2558.
[2] Appeal Judgement, paras. 2558, 2560.
[3] Appeal Judgement, para. 2626. *See also ibid.*, paras. 2621-2625.
[4] Appeal Judgement, paras. 2644, 2648.

Chamber erred in finding that, around late May 1994, he drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[5]

3. Similarly, with respect to the megaphone announcement in mid-June 1994, the Appeals Chamber rejects Kanyabashi's contention related to this event and finds that the Trial Chamber's error in finding the existence of a *modus operandi* did not result in a miscarriage of justice as Witness QI's evidence alone was sufficient to support the Trial Chamber's conclusions as to the mid-June 1994 megaphone announcement.[6]

4. In light of the above, the Appeals Chamber: (i) finds that Kanyabashi has failed to demonstrate any error in the Trial Chamber's assessment of the evidence concerning the late May and mid-June 1994 megaphone announcements that occasioned a miscarriage of justice and warrants its intervention; (ii) dismisses Grounds 3.2 through 3.8 of his appeal; and (iii) upholds his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994.[7]

5. For the reasons mentioned below, we disagree with both the reasoning and the conclusions of the Majority concerning Kanyabashi's conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994.

1. Kanyabashi Indictment: Mid-June 1994 Incident

6. On one hand, the Appeals Chamber – and we concur with this conclusion – finds that paragraph 5.8 of the Kanyabashi Indictment[8] was overly vague as regards the number of times Kanyabashi was alleged to have incited the population through a megaphone while driving through Butare Town.[9] On the other hand, the Majority – and we disagree with this conclusion – is not persuaded by Kanyabashi's argument that paragraph 5.8 was defective regarding the pleading of the

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[5] Appeal Judgement, paras. 2648, 2649.
[6] Appeal Judgement, para. 2673.
[7] Appeal Judgement, paras. 2682, 2694, 3539.
[8] Paragraph 5.8 of the Kanyabashi Indictment reads as follows:

> 5.8 From April to July 1994, various prominent persons, including members of the government and local authorities propagated incitement to hatred and violence. On or about April 19, 1994, after the interim president Théodore Sindikubwabo delivered a speech in Butare encouraging people to fight the enemy, Joseph KANYABASHI, gave a speech in support of the interim president, encouraging the population to follow Sindikubwabo's instructions. Shortly thereafter, widespr[]ead attacks on Tutsis began in the area. In or around late May, 1994, on at least on one occasion, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone. He encouraged the population to systematically search for the "enemy" in the commune and immediately afterwards, more Tutsis were killed in Ngoma commune. Also in or around May, 1994 Joseph KANYABASHI held at least two meetings in Cyarwa sector, Ngoma commune, at which he encouraged local residents to kill Tutsis. In the days following the meetings, Tutsis in the area were attacked.

[9] Appeal Judgement, para. 2551.

dates of the incidents.[10] In particular, the Majority considers that, while the Kanyabashi Indictment does not refer to the month of June in particular, the timeframe "[i]n or around late May, 1994" was sufficiently specific to allow Kanyabashi to prepare his defence against *two* allegations of incitement occurring in late May and mid-June 1994.[11] In this respect, the Majority notes that, although the Prosecution was in possession of information regarding the date of the late May incident through Witness QJ's written statements, it did not have information regarding the date of the June incident at the time of the filing of the Indictment.[12] Accordingly, the Majority finds no error in the Trial Chamber's finding that the allegation of a megaphone announcement by Kanyabashi in mid-June 1994 fell under the scope of paragraph 5.8 and considers that the timeframe of the allegation of megaphone announcements by Kanyabashi pleaded in this paragraph was sufficient to provide him adequate notice.[13]

7. In our view, the two above-mentioned conclusions of the Majority are contradictory. Indeed, how can the Majority finds, on one hand, that the Kanyabashi Indictment is defective as to the number of times Kanyabashi was alleged to have incited the population through a megaphone and, on the other hand, that it is not defective regarding the pleading of the date*s* of the incident*s*? In this respect, we recall that paragraph 5.8 of the Kanyabashi Indictment only mentions that, "*[i]n or around late May*, 1994, *on at least on one occasion*, Joseph KANYABASHI drove through the town of Butare and spoke to the population through a megaphone."[14] If the Kanyabashi Indictment does not indicate how many times Kanyabashi is alleged to have incited the population through a megaphone while driving through Butare Town, how can it be not defective regarding the pleading of the date*s* of the incident*s*, especially with respect to the mid-June 1994 incident? Thus, we consider that – after having found that the Kanyabashi Indictment is defective as to the number of times Kanyabashi was alleged to have incited the population through a megaphone – the Majoriy had no other choice than to find that the Trial Chamber also erred with respect to the pleading of the date of the mid-June 1994 incident. We consider that Kanyabashi has demonstrated that the phrase "[i]n or around late May, 1994, on at least on one occasion" pleaded in paragraph 5.8 did not provide him with notice that he was to defend against a *second* allegation of incitement by megaphone *occurring in mid-June 1994*. The Trial Chamber therefore erred in determining that the mid-June 1994 megaphone incident fell within the scope of paragraph 5.8 and that Kanyabashi was put on notice that he was alleged to have incited to the commission of genocide through a megaphone announcement while driving though Butare Town in mid-June 1994.

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[10] Appeal Judgement, para. 2552.
[11] Appeal Judgement, para. 2552 (emphasis added).
[12] Appeal Judgement, para. 2552.
[13] Appeal Judgement, para. 2552.
[14] Emphasis added. *See also supra*, fn. 8.

8. We also note that, while the Prosecution was in possession of information regarding the date of the late May incident through Witness QJ's written statements when charging Kanyabashi, it did not have information on any incident of incitement by megaphone occurring *in mid-June 1994*.[15] In this respect, we recall that it is the well established jurisprudence of the Appeals Chamber that "the Prosecution is expected to know its case before proceeding to trial and may not rely on the weaknesses of its own investigation in order to mould the case against the accused in the course of the trial depending on how the evidence unfolds."[16] In light of the fact that the Prosecution only charged Kanyabashi based on megaphone incident(s) taking place "[i]n or around late May, 1994, on at least on one occasion" in paragraph 5.8 of the Kanyabashi Indictment and was not in possession of any information regarding the mid-June 1994 incident when charging Kanyabashi and up until Witness QI testified at trial, we are of the view that the mid-June 1994 megaphone incident was not part of the Prosecution case against Kanyabashi at the time of the filing of the Indictment.

9. Accordingly, we believe that the Trial Chamber erred in convicting Kanyabashi of an incident of incitement by megaphone in mid-June 1994 since he was not charged on this basis in the Kanyabashi Indictment. We would therefore have acquitted Kanyabashi of the mid-June 1994 incident.

2. Assessment of the Evidence: Late May 1994 Incident

10. Turning to the merits of Kanyabashi's appeal against his conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town, we would also have acquitted Kanyabashi of the late May 1994 incident for the reasons expressed below.

11. We recall that the Appeals Chamber – and we concur with this conclusion – found that the Trial Chamber erred in finding that the evidence established that megaphone announcements from a moving vehicle were part of a *modus operandi* by which messages from Kanyabashi were delivered

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[15] In this respect, we note that, in paragraph 2556 of the Appeal Judgement, the Majority – after having found that the Kanyabashi Indictment was defective but could be cured by the provision of timely, clear, and consistent information – correctly notes that "there is no mention of the allegation of megaphone announcements in the Prosecution's pre-trial brief or opening statement." The Majority then proceeds to examine whether Witnesses QJ's and QI's summaries and prior statements can remedy the defect in the Kanyabashi Indictment. While the Majority concludes that, "[a]lthough not obvious from a reading of Witnesses QJ's and QI's summaries", "a review of the witnesses' prior statements confirms that both witnesses were referring to two distinct incidents implicating Kanyabashi in delivering a message using a megaphone", it fails short to provide any explanation. *See idem.* Indeed, a review of the witnesses' prior statements, even in light of the witnesses' summaries, does not confirm that both witnesses were referring to two distinct incidents. While they contain differences, they are also very similar in many respects. *See ibid.*, fns. 5934-5936. In our view, these materials are inconclusive at to whether the witnesses were referring to two distinct incidents and, more importantly, certainly do not prove that the Prosecution intended to charge Kanyabashi with a second incident occurring in mid-June1994.

[16] *See, e.g., Ntagerura et al.* Appeal Judgement, para. 27. *See also Kupreškić et al.* Appeal Judgement, para. 92; *Niyitegeka* Appeal Judgement, para. 194; *Kvočka et al.* Appeal Judgement, para. 30.

to the population of Ngoma Commune from April through June 1994.[17] We further recall that, as correctly noted by the Appeals Chamber,[18] the Trial Chamber relied on Witness QJ's evidence to reach its factual conclusion with respect to the late May 1994 megaphone announcement in the following terms:

> Insofar as Witness QJ's account was also corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system, the Chamber finds that the Prosecution has proven beyond a reasonable doubt that around late May 1994 Kanyabashi drove through Butare town with a megaphone and instructed the population to search for the enemy among them.[19]

12. In light of the wording of the Trial Chamber's conclusion, it is clear that the Trial Chamber only relied on Witness QJ's evidence concerning the May 1994 megaphone announcement "[i]nsofar as [his] account was corroborated and complemented by evidence establishing a pattern of *préfecture* announcements being disseminated from a vehicle with a public address system".[20] Having determined that the Trial Chamber's findings as they concern the *modus operandi* were unreasonable, the Majority finds that "Witness TK's evidence alone, which the Trial Chamber found credible and corroborative of Witness QJ's testimony, sufficient to sustain the Trial Chamber's reliance on Witness QJ's direct evidence that around late May 1994 Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them."[21] It adds that "this evidence is sufficiently complementary and corroborative of Witness QJ's evidence of 'announcements being disseminated from a vehicle with a public address system'."[22] In light of these findings, the Majority concludes that the Trial Chamber's error in finding and relying on the existence of a *modus operandi* has not occasioned a miscarriage of justice and, therefore, finds that Kanyabashi has failed to demonstrate that the Trial Chamber erred in finding that, around late May 1994, Kanyabashi drove through Butare Town with a megaphone and instructed the population to search for the enemy among them.[23]

13. However, in our view, and contrary to the Majority's position,[24] the Trial Chamber erred in concluding that Witness TK's evidence partly corroborated Witness QJ's testimony.[25] Indeed, Witness TK's evidence that an announcement was made to the public with a megaphone from a vehicle by someone else than Kanyabashi is insufficiently linked to Witness QJ's testimony that Kanyabashi directly and publicly incited genocide using a megaphone announcement in late

[17] Appeal Judgement, paras. 2600-2602. *See also ibid.*, para. 2644.
[18] Appeal Judgement, para. 2645.
[19] Trial Judgement, para. 3813.
[20] Trial Judgement, para. 3813.
[21] Appeal Judgement, para. 2648.
[22] Appeal Judgement, para. 2648, *quoting* Trial Judgement, para. 3813.
[23] Appeal Judgement, paras. 2648, 2649.
[24] Appeal Judgement, paras. 2624, 2626.
[25] Trial Judgement, para. 3804. *See also ibid.*, para. 3802.

May 1994. Witness TK's evidence concerns the conduct of someone else than Kanyabashi. Thus, it simply cannot be corroborative of Witness QJ's testimony. On this basis, we believe that no reasonable trier of fact could have found that Witness TK's evidence corroborated Witness QJ's evidence of Kanyabashi inciting the population using a megaphone in May 1994.

14. Having found that the Trial Chamber's findings as they concern the *modus operandi* were unreasonable and that the Trial Chamber erred in concluding that Witness TK's evidence corroborated Witness QJ's concerning the May 1994 megaphone announcement, we would have found that Witness QJ's evidence is no longer corroborated in the manner in which the Trial Chamber required it to be in order to reach findings beyond reasonable doubt. Consequently, we believe that these errors have occasioned a miscarriage of justice and that fairness requires that the findings concerning the May 1994 megaphone announcement must be set aside.

3. Conclusion

15. For the foregoing reasons, we disagree with both the reasoning and the conclusions of the Majority concerning Kanyabashi's conviction for direct and public incitement to commit genocide by making megaphone announcements in Butare Town in late May and mid-June 1994. Given that the mid-June 1994 incident was never part of the Prosecution case against Kanyabashi at the time of the filing of the Indictment and up until Witness QI testified at trial, we would have acquitted Kanyabashi of the mid-June 1994 incident. Moreover, having found that Witness QJ's testimony is no longer corroborated in the manner in which the Trial Chamber required it to be in order to reach findings beyond reasonable doub, we would also have acquitted Kanyabashi of the late May 1994 incident. Accordingly, we would have reversed Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 megaphone announcements.

16. In light of the above, and the fact that the Appeal Chamber reversed Kanybashi convictions in relation to the killings perpetrated at Kabakobwa Hill on 22 April 1994 as well as his convictions for failing to prevent the soldiers from committing the killings at Matyazo Clinic in late April 1994 and punish them,[26] we would have acquitted Kanyabashi fully.

[26] Appeal Judgement, paras. 2520, 2563, 2575, 3539.

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

Judge Fausto Pocar

Judge Carmel Agius

Dated this fourteenth day of December 2015, in Arusha, Tanzania.

[Seal of the Tribunal]

XVI. DISSENTING AND SEPARATE OPINIONS OF JUDGE AGIUS

1. I respectfully disagree with the Majority's position concerning: (i) Ndayambaje's and Nteziryayo's arrest and initial appearance; (ii) the reversal of the convictions of Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as a crime against humanity; (iii) Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 Megaphone Announcements; (iv) Ntahobali's appeal on sentencing related to the Trial Chamber's assessment of the gravity of the offences; and (v) the impact of the Appeals Chamber's findings on Nyiramasuhuko's, Ntahobali's, and Ndayambaje's sentences. Moreover, I attach to this Judgement a separate opinion setting out my position in relation to the mode of responsibility of aiding and abetting.

2. My position concerning Kanyabashi's conviction for direct and public incitement to commit genocide for the late May and mid-June 1994 Megaphone Announcements is expressed above, in a joint dissenting opinion with Judge Pocar.[1] I discuss my views in relation to the other matters below.

A. Dissenting Opinion: Ndayambaje's and Nteziryayo's Arrest and Initial Appearance

1. Ndayambaje's Arrest and Initial Appearance

3. In this Judgement, the Majority declines to consider on the merits Ndayambaje's submissions concerning the legality of his detention prior to the issuance of the indictment against him, as well as the delays in his transfer to the Tribunal and in his initial appearance following the issuance of his indictment.[2] The Majority also declines to examine Ndayambaje's submissions that these delays resulted in violations of his right to be promptly informed of the charges against him, his right to counsel, and his right to initial appearance without delay.[3] It does so on the basis that Ndayambaje failed to raise these submissions during the course of his trial and in his notice of appeal, and that he has failed to identify the error allegedly committed by the Trial Chamber which would justifiy the intervention of the Appeals Chamber.[4] Further, the Majority states that it "does not consider that the seriousness of the violations alleged by Ndayambaje constitutes special circumstances warranting the consideration on the merits of these allegations raised for the first time in the Ndayambaje Appeal Brief or at the appeal hearing."[5] The Majority concludes that

[1] *See supra*, Joint Dissenting Opinion of Judge Pocar and Judge Agius.
[2] Appeal Judgement, para. 63. *See* Ndayambaje Appeal Brief, para. 308; Appeal Judgement, para. 59.
[3] Appeal Judgement, para. 63. *See* Ndayambaje Appeal Brief, para. 308; AT. 21 April 2015 pp. 7-9.
[4] Appeal Judgement, para. 62.
[5] Appeal Judgement, para. 63.

Ndayambaje has therefore waived his right to raise these issues on appeal, and dismisses the relevant part of Ndayambaje's appeal "without further consideration".[6]

4. For the reasons set out below, I respectfully disagree with the approach taken by the Majority and its decision not to consider Ndayambaje's submissions on the merits. In my view, the Appeals Chamber ought to examine the merits of his submissions.

(a) The Issue of Waiver

5. I accept that, as a general principle, if a party raises no objection to a particular issue before the Trial Chamber, in the absence of "special circumstances", the Appeals Chamber will find that the party has waived its right to adduce the issue on appeal.[7] I am also aware that this waiver principle has been applied to allegations of fair trial violations, including allegations of violations of the right to initial appearance without delay and the right to counsel of one's own choosing.[8] However, as set out below, I am not convinced that Ndayambaje did waive his right to adduce the issues on appeal. On the contrary, in my view, he sufficiently raised the issues at trial. Furthermore, even if Ndayambaje had failed to raise these issues, I consider that the nature of the alleged fair trial violations, and particularly their gravity and seriousness in the circumstances described by Ndayambaje, constitutes "special circumstances" requiring the Appeals Chamber to address his submissions on the merits, or otherwise warrants its intervention in the interests of justice.

6. I should note at the outset that I am not in a position to properly assess the merits or accuracy of Ndayambaje's submissions or to establish the precise nature and extent of any violation of his rights. In my view, were the Appeals Chamber minded to consider his submissions on the merits, it would require and indeed should request submissions in writing from both Ndayambaje and the Prosecution.[9] My point is that the seriousness of the alleged violations warrants the attention and concern of the Appeals Chamber, which, upon full briefing by the parties, would then make its own determination on the issues. I will therefore limit my dissenting opinion to whether the Majority rightfully declined to examine Ndayambaje's submissions.

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[6] Appeal Judgement, para. 63.
[7] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 31; *Musema* Appeal Judgement, paras. 127, 341; *Kambanda* Appeal Judgement, para. 25. *Cf. Renzaho* Appeal Judgement, para. 17.
[8] *See Bagosora and Nsengiyumva* Appeal Judgement, para. 31 (right to initial appearance without delay); *Kambanda* Appeal Judgement, paras. 25, 28 (right to counsel of own choosing). *See also*, *Musema* Appeal Judgement, paras. 127 (right to effective cross-examination), 341 (right to have adequate time and facilities for the preparation of the defence); *Akayesu* Appeal Judgement, paras. 361, 370, 375, 376 (right to be informed promptly and in detail of the nature of the charges); *Čelebići* Appeal Judgement, paras. 640, 649, 650 (alleged violation of fair trial right to the attention of judges to the proceedings); *Tadić* Appeal Judgement, para. 55 (right to equality of arms). *See* Appeal Judgement, fn. 169.
[9] *See Augustin Ndindiliyimana et. al v. The Prosecutor*, Case No. ICTR-00-56-A, Order for Further Submissions and Severance, 7 February 2014, pp. 1, 2.

(i) Whether Ndayambaje failed to raise the issues at trial

7. I agree with the Majority that Ndayambaje did not raise the allegations of violations of his right to be promply informed of the charges against him and his right to counsel in his notice of appeal.[10] However, I respectfully disagree with the Majority that "Ndayambaje has further failed to demonstrate that he raised these allegations of violations of his rights at trial".[11] In particular, I take a different view from the Majority when it states that "contrary to Ndayambaje's argument, these allegations were not raised in the motions he referred to during the appeals hearing."[12] I consider that the relevant motions do in fact raise the relevant issues.

8. At the appeal hearing, in response to the Prosecution's submission that he failed to previously raise any issue concerning the appointment of counsel,[13] Ndayambaje referred to a motion dated 28 November 1996, which he stated "underscored his difficulties" in relation to the right to counsel of one's choosing.[14] I note that the Motion of 29 November 1996 indicates, *inter alia*, that Ndayambaje was assigned counsel by the Registrar of the Tribunal on 22 November 1996 and that they met for the first time on the eve of Ndayambaje's initial appearance, on 28 November 1996.[15] The Motion of 29 November 1996 further reflects that Ndayambaje sought to be represented by a different counsel than the assigned counsel, and that the assigned counsel requested the Trial Chamber's intervention to resolve the dispute between Ndayambaje and the Registrar on the assignment of counsel.[16] I note further that, in a correspondence to the Registrar dated 3 December 1996, Ndayambaje reiterated his position that the assigned counsel was not counsel of his choice and provided the names of several lawyers whose assignment would satisfy him.[17] Nonetheless, it appears that Ndayambaje continued to be represented by the assigned counsel at least until 7 July 1998, when the Trial Chamber granted motions by Ndayambaje for the withdrawal of the assigned counsel and the assignment of new counsel to his case.[18]

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[10] Appeal Judgement, para. 62; Ndayambaje Notice of Appeal.
[11] Appeal Judgement, para. 62.
[12] Appeal Judgement, para. 62.
[13] AT. 21 April 2015 pp. 32, 33.
[14] AT. 21 April 2015 p. 62, *referring to The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-I, *Requ[ê]te aux fins de règlement d'une question préalable*, dated 28 November 1996, filed 29 November 1996 ("Motion of 29 November 1996").
[15] Motion of 29 November 1996, p. 42*bis* (Registry pagination). *See also* Appeal Judgement, para. 58.
[16] Motion of 29 November 1996, pp. 42*bis*, 41*bis*, 38*bis* (Registry pagination). The Motion of 29 November 1996 also outlined that Ndayambaje's chosen counsel had not been appointed to the case due to the fact that she was found unqualified by the Registrar. *See* Motion of 29 November 1996, p. 41*bis* (Registry pagination). *See also* AT. 21 April 2015 p. 62.
[17] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-0160, Ndayambaje's Letter to the Registrar of the Tribunal, 3 December 1996.
[18] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Motion of the Accused for the Replacement of Appointed Counsel, 7 July 1998.

9. In response to the Prosecution's submissions that he had also failed to raise issues regarding the delay in service of the Indictment and other pre-trial delays,[19] Ndayambaje referred to an extremely urgent motion for provisional release dated 15 August 2002 and filed 21 August 2002.[20] Ndayambaje stated that, while the violation of his right to counsel had prevented him from raising arguments during the initial pre-trial period with respect to the right to be informed of the charges against him, all of the relevant circumstances, dates and delays were "clearly indicated in that motion".[21] I observe that in the Motion of 21 August 2002, Ndayambaje requested provisional release on the basis of the unduly long period of time in which he had been in detention and the prospect of the trial being exceptionally long, asserting that continued detention throughout the trial would be prejudicial to him.[22] Ndayambaje also asserted that, as of 24 January 1996, his detention in Belgium was based on the request of the ICTR Prosecutor, and that while an indictment was issued against him on 21 June 1996, it was not served on him until 12 August 1996.[23] He further noted that he was transferred to Arusha three months later, on 8 November 1996, which according to him was 289 days after his provisional arrest at the request of the ICTR Prosecutor.[24] Additionally, in describing the many delays to the commencement of his trial, Ndayambaje pointed to the fact that he made his initial appearance before the Trial Chamber on 29 November 1996.[25] Finally, he argued that "his detention to date largely exceeds any acceptable standard".[26]

10. In these circumstances, I am unable to see how Ndayambaje can be claimed to have failed to raise any objection to the alleged violations before the Trial Chamber. In my view, Ndayambaje set out in detail the factual circumstances which form the basis of his allegations and sought remedies for these alleged violations before the Trial Chamber. Furthermore, the Trial Chamber issued its determination on the issues raised by Ndayambaje in a decision on the Motion of 21 August 2002, rejecting his submission that the delays suffered by him were unacceptable.[27] Recalling that "[t]he obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation",[28] and emphasising the duty of the Trial Chamber to ensure the

[19] AT. 21 April 2015 pp. 32, 33.
[20] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Extremely Urgent Motion for the Provisional Release, Under Conditions, of the Accused, 21 August 2002 (originally filed in French, English translation filed on 3 October 2002) ("Motion of 21 August 2002").
[21] AT. 21 April 2015 p. 62.
[22] Motion of 21 August 2002, pp. 48, 49.
[23] Motion of 21 August 2002, paras. 12, 16.
[24] Motion of 21 August 2002, para. 17 (original emphasis omitted).
[25] Motion of 21 August 2002, para. 18.
[26] Motion of 21 August 2002, para. 111.
[27] *The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Decision on the Defence Motion for the Provisional Release of the Accused, 22 October 2002, paras. 23, 24, 28.
[28] *Kambanda* Appeal Judgement, para. 25, *citing Tadić* Appeal Judgement, para. 55.

fairness of the trial,[29] I consider that Ndayambaje sufficiently brought his complaints to the Trial Chamber's attention in such a way as to oblige the Trial Chamber to act on the issues and address his allegations with careful attention.

11. Further, in my view, any waiver of the right to adduce issues on appeal must be *unequivocal*. I emphasise in this respect that the European Court of Human Rights ("ECtHR") has held that a waiver of a procedural right, including the right to appeal, must be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance.[30] I consider that these principles should apply in the instant case, particularly as it concerns allegations of breaches of fundamental fair trial rights.[31] Moreover, I find it very difficult to accept that Ndayambaje has *unequivocally* waived his right to raise the relevant matters on appeal, for the following reasons.

12. First, as set out above, in my view the Motion of 29 November 1996 and Motion of 21 August 2002 clearly relate to the same issues that Ndayambaje elaborated upon in his oral submissions (even if they do not precisely mirror those submissions), and request the Trial Chamber to grant appropriate relief.[32] Second, in his oral submissions in reply, Ndayambaje disputed the Prosecution's assertion that he had not raised the relevant issues before the Trial Chamber, and drew the Appeals Chamber's attention to the motions.[33] Third, in his appeal brief Ndayambaje clearly (albeit briefly) set out his allegations concerning the delays he suffered before his initial appearance and the alleged violation of his right to be informed of the charges.[34] Fourth, Ndayambaje's submission that he was without legal counsel for almost all of the period between his

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[29] *See Sainović* Appeal Judgement, para. 100 ("The Appeals Chamber recalls that the primary duty of the trial chamber is to safeguard the fairness of the trial, ensuring that the proceedings are conducted with full respect for the rights of the accused. In this context, the Appeals Chamber also recalls that the right to be tried without undue delay is provided under Article 21(4)(c) of the Statute and embodied in numerous international human rights instruments and is an inseparable and constituent element of the right to a fair trial. Accordingly, the trial chamber has a duty to be proactive in ensuring that the accused is tried without undue delay, regardless of whether the accused himself asserts that right.") (internal references omitted).

[30] *See, e.g., Litwin v. Germany*, ECtHR, No. 29090/06, Judgment, 3 November 2011, para. 37 ("the Court reiterates that the waiver of a procedural right – in so far as it is permissible under the Convention – must be established in an unequivocal manner. Moreover, such waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance. The Court further considers that the waiver of a right to appeal is, in principle, permissible if the principles mentioned above are adhered to."); *Natsvlishvili and Togonidze v. Georgia*, ECtHR, No. 9043/05, Judgment, 29 April 2014, para. 91 ("it is also a cornerstone principle that any waiver of procedural rights must always, if it is to be effective for Convention purposes, be established in an unequivocal manner and be attended by minimum safeguards commensurate with its importance. In addition, it must not run counter to any important public interest."). When examining the circumstances to ensure minimum safeguards are in place, the ECtHR considered, *inter alia*, whether an applicant benefited from legal representation and whether he was aware of the consequences of his waiver and waived his right to appeal voluntarily. *See, e.g., Natsvlishvili and Togonidze v. Georgia*, ECtHR, No. 9043/05, Judgment, 29 April 2014, paras. 93, 97; *Litwin v. Germany*, ECtHR, No. 29090/06, Judgment, 3 November 2011, para. 45; *Thind v. Germany*, ECtHR, No. 29752/04, Decision, 23 March 2010, p. 11.

[31] *See infra*, paras. 14-16.

[32] *See supra*, paras. 8, 9.

[33] AT. 21 April 2015 p. 62.

[34] Ndayambaje Appeal Brief, para. 308.

arrest and initial appearance[35] raises serious questions as to whether he was in a position to be able to effectively object to issues before the Trial Chamber during that time.[36] To my mind, these are strong indications that Ndayambaje has not waived his right unequivocally. Regardless, if there is the slightest doubt as to whether the appellant has waived his right, and where the relevant submissions address fundamental fair trial rights, I firmly believe that we ought to err in favour of the appellant in considering those submissions.

(ii) Whether the Appeals Chamber should nevertheless consider Ndayambaje's submissions

13. As noted above, the Majority "does not consider that the seriousness of the violations alleged by Ndayambaje constitutes special circumstances warranting the consideration on the merits of these allegations raised for the first time in the Ndayambaje Appeal Brief or at the appeal hearing."[37] Here, I must respectfully but strongly disagree. Even if I were to agree with the Majority that Ndayambaje did not object to the relevant issues at trial, in my view, the seriousness of the alleged violations in this case most certainly warrants the attention and consideration of the Appeals Chamber.

14. I emphasise in this respect that Ndayambaje has raised issues of the utmost gravity regarding breaches of his fundamental fair trial rights. He alleges, *inter alia*, that he was in detention for **202** days without a warrant of arrest and without an indictment;[38] that he was without legal counsel for **303** days after his arrest;[39] and that the total number of days between his arrest and initial appearance was **311** days.[40]

15. The Tribunal has acknowledged the crucial importance of the rights of a detainee to be brought promptly before a Judge and to be informed of the charges against him.[41] These rights concern the fundamental right to liberty and their protection is key to ensuring that other basic rights of the detainee are respected.[42] I note that the Appeals Chamber held in the *Kajelijeli* Appeal

[35] AT. 21 April 2015 p. 62.
[36] *Supra*, fn. 30.
[37] Appeal Judgement, para. 63.
[38] AT. 21 April 2015 p. 7.
[39] AT. 21 April 2015 p. 9.
[40] AT. 21 April 2015 pp. 8, 9.
[41] *Kajelijeli* Appeal Judgement, paras. 226, 229-233; *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999, paras. 46, 63.
[42] *Kajelijeli* Appeal Judgement, paras. 229-233. *See also*, with regard to the right to be brought promptly before a judge, *McKay v. The United Kingdom*, ECtHR, No. 543/03, Judgment, 3 October 2006, para. 33 ("The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision"); *Öcalan v. Turkey*, ECtHR, No. 46221/99, Judgment, 12 May 2005, para. 103 ("The Grand Chamber notes

Judgement that a delay of 85 days in serving an arrest warrant and a redacted indictment after a suspect's arrest could not be considered "prompt" or "immediate" within the meaning of the Tribunal's Statute and Rules, and that it was "clearly unlawful and was in violation of the suspect's rights under the Tribunal's Statute and Rules as well as international human rights law".[43] In the present case, where Ndayambaje asserts that he was kept in custody for a period of over six months without a warrant of arrest and without receiving notice of the charges against him, the extent of the alleged violations is far more serious and alarming.

16. Ndayambaje's submission that he was without legal representation from the time of his arrest and until the assignment of duty counsel on 22 November 1996 is also extremely concerning. The right to counsel is one of the fundamental features of a fair trial, being crucial for the ability of the accused to defend himself and to protect his procedural rights.[44] In this light, I am also most concerned by Ndayambaje's submission that, because he was without counsel for almost all of the period between his arrest and initial appearance, he was not able to make submissions before the Trial Chamber concerning alleged violations of other fair trial rights during that time.[45]

17. For these reasons, I simply cannot agree with the Majority that the violations alleged by Ndayambaje are insufficiently serious to constitute "special circumstances". On the contrary, I would consider such breaches, if substantiated, to be an egregious violation of Ndayambaje's fair trial rights. While I again make no comment as to whether such violations have occurred,[46] the very nature of the allegations disturbs me to my core.

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at the outset the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial authority promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment"). Concerning the right of a suspect to be promptly informed about the reasons for his arrest, *see Lutsenko v. Ukraine*, ECtHR, No. 6492/11, Judgment, 3 July 2012, para. 77 ("The Court reiterates that Article 5 § 2 of the Convention contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. By virtue of this provision any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness"); *Nechiporuk and Yonkalo v. Ukraine*, ECtHR, No. 42310/01, Judgment, 21 April 2011, para. 208. Concerning the right of an accused to be promptly informed of the nature and cause of the accusations, *see Nuutinen v. Finland*, ECtHR, No. 45830/99, Judgment, 24 April 2007, para. 30 ("Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. In criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair"); *Mulosmani v. Albania*, ECtHR, No. 29864/03, Judgment, 8 October 2013, para. 123.

[43] *Kajelijeli* Appeal Judgement, para. 231.

[44] *See* Article 14 of the International Covenant on Civil and Political Rights; Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. *See also Krombach v. France*, ECtHR, No. 29731/96, Judgment, 13 February 2001, para. 89; *Omelchenko v. Ukraine*, ECtHR, No. 34592/06, Judgment, 17 July 2014, para. 46.

[45] *See* AT. 21 April 2015 p. 62.

[46] *See supra*, para. 6.

18. I acknowledge (as noted above) that the waiver principle has been applied in cases involving alleged violations of fair trial rights.[47] However, in my view, the seriousness of the allegations in this case eclipses that of the alleged violations in those cases.[48] Further, I note that in other cases concerning alleged violations of fair trial rights, the Appeals Chamber has decided to consider submissions – *notwithstanding* a party's failure to object to the relevant issues at trial – given the general importance of the matter[49] or because it concerned an integral component of the right to a fair trial.[50] I consider that the principles established therein clearly allow the Appeals Chamber to intervene and examine Ndayambaje's submissions in the present case.[51]

19. Most notably, the Appeals Chamber has exercised its discretion in such a manner *in the present Judgement*. In the section of the Judgement dealing with the appellants' right to be tried without undue delay,[52] the Appeals Chamber has considered Nteziryayo's submissions on undue delay despite the fact that he did not raise them at trial.[53] In addition, it has *proprio motu* considered the impact of its findings on undue delay on Nsabimana's rights, regardless of the fact that he did not raise allegations on this issue at all.[54] The Appeals Chamber has addressed these arguments "[c]onsidering the extraordinary length of these proceedings, the Trial Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated, and the interests of justice".[55] I fully agree with this approach.

20. In these circumstances, I am unsure why the Majority is unwilling to also examine Ndayambaje's arguments in the interests of justice, given that his submissions – like Nteziryayo's – relate to serious matters of delay, *inter alia*, and the Trial Chamber made determinations on the

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[47] *See supra*, para. 5, fn. 8.
[48] *See, e.g., Bagosora and Nsengiyumva* Appeal Judgement, paras. 28-31 (concerning an alleged delay of almost 10 months between arrest and transfer, and 27 days between the transfer and plea, however unlike in the present case there were no additional allegations of being held without warrant or indictment, or of lack of legal counsel); *Akayesu* Appeal Judgement, paras. 365, 372 (concerning an alleged delay of approximately four months in being informed of the charges while in detention, including also delays in transfer and initial appearance).
[49] *Furundzija* Appeal Judgement, paras. 173, 174; *Galić* Appeal Judgement, para. 34; *Kambanda* Appeal Judgement, para. 55. *See Šainović et al.* Appeal Judgement, para. 182.
[50] *Renzaho* Appeal Judgement, para. 17.
[51] I note further that the Appeals Chamber has, in previous cases, *proprio motu* addressed arguments even though these were not raised by the parties, if they concern an issue of general importance for the case-law or functioning of the Tribunal or if interests of justice so require. *See Krnojelac* Appeal Judgement, para. 6; *Boškoski and Tarčulovski* Appeal Judgement, para. 19; *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005, para. 26; *Kordić and Čerkez* Appeal Judgement, para. 1031; *Erdemović* Appeal Judgement, para. 16 (where it was stated that "[t]he Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties.").
[52] Appeal Judgement, paras. 342-399.
[53] Appeal Judgement, paras. 358, 397. As with Ndayambaje's submissions, the Prosecution submitted that Nteziryayo's submissions should be summarily dismissed because he failed to raise them at trial and had therefore waived his right to challenge the issue on appeal. *See* Prosecution Response Brief, para. 1567; AT. 17 April 2015 pp. 35, 36; Appeal Judgement, para. 355.
[54] Appeal Judgement, paras. 358, 398.
[55] Appeal Judgement, para. 358 (internal references omitted).

relevant issues.[56] I consider that the allegations raised by Ndayambaje concern not one, but *several*, integral components of a fair trial, and that these matters are undoubtedly of "general importance". I emphasise further that, as held in the *Mucić et al* case, the Appeals Chamber "has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done."[57] I strongly believe that the allegations brought before us by Ndayambaje relate to the protection of the most fundamental fair trial rights, and indeed call on the Appeals Chamber to utilise its inherent powers in the interests of justice.

(b) Conclusion

21. For the foregoing reasons I respectfully, but strongly, disagree with the Majority that Ndayambaje has waived his right to raise the alleged violations of his fair trial rights on appeal. I also respectfully, but strongly, disagree that the seriousness of these alleged violations does not warrant consideration of his arguments on the merits. In my view, the interests of justice dictate that the Appeals Chamber consider the merits of Ndayambaje's submissions. Accordingly, and it pains me to say it, I cannot accept that the Majority's refusal to consider Ndayambaje's submissions will lead to a just result.

2. Nteziryayo's Arrest and Initial Appearance

22. In the 5 July 2013 Appeal Decision, the Appeals Chamber, of which I was a part, granted the Prosecution's request for summary dismissal of Nteziryayo's allegation of violation of his rights as a result of the delay between his arrest and his initial appearance, on the ground that Nteziryayo had waived his right to raise the issue on appeal.[58] At the appeals hearing, Nteziryayo requested *inter alia* that the Appeals Chamber reconsider its decision to summarily dismiss his submissions, in light particularly of the fact that the length of delay now appeared to be "no less than 144 days".[59]

23. In this Judgement, the Majority declines to reconsider the 5 July 2013 Appeal Decision and to examine on the merits Nteziryayo's allegation of violation of his rights resulting from the delay between his arrest and initial appearance.[60] For the reasons explained below, I respectfully disagree with the reasoning and the outcome reached by the Majority.

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[56] *See supra*, paras. 8, 10.
[57] *Prosecutor v. Zdravko Mucić et al* , Case No. IT-96-21-A*bis*, Judgment on Sentence Appeal, 8 April 2003, para. 16.
[58] 5 July 2013 Appeal Decision, paras. 14-18, 23.
[59] AT. 17 April 1994 p. 18. *See* AT. 17 April 1994 p. 19.
[60] Appeal Judgement, paras. 56, 57.

24. I recall that the Appeals Chamber may reconsider a previous interlocutory decision under its inherent discretionary power to do so if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.[61] In this case, I consider that the Appeals Chamber should have reconsidered the 5 July 2013 Appeal Decision as it contains a clear error of reasoning. Moreover, although I am not in a position to assess whether reconsideration is necessary to prevent an injustice, I consider that Nteziryayo's allegations, if substantiated, would constitute serious violations of his fair trial rights.[62]

25. In the 5 July 2013 Appeal Decision, the Appeals Chamber found that "none of the arguments raised by Nteziryayo constitute special circumstances that may convince the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegation of error despite his failure to raise the issue in the nearly 14 years that the trial proceedings lasted in his case."[63] I observe that, at the time, Nteziryayo had submitted *inter alia* that the issue of the delay between his arrest and initial appearance was a central feature of the right to a fair trial, and that summary dismissal was inappropriate given the Prosecution's acknowledgement of the "anomalous" delay between his arrest and initial appearance.[64]

26. Having reconsidered the issue, I find that Nteziryayo's arguments should have led the Appeals Chamber to conclude, in 2013, that special circumstances existed and therefore should have convinced the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegation of violation of his fair trial rights in light of the delays between his arrest and initial appearance. In this respect, I emphasise that Nteziryayo had raised serious issues regarding breaches of his fundamental fair trial rights. In his relevant appeal submissions, Nteziryayo alleged that 115 days had elapsed between his arrest on behalf of the Tribunal and his presentation to a Judge during his initial appearance, and that the delay between his transfer and initial appearance amounted to 88 days.[65] For the reasons explained above in relation to Ndayambaje, I cannot agree that such alleged violations are insufficiently serious to constitute "special circumstances".[66] I would consider such breaches, if substantiated, to be serious violations of Nteziryayo's fair trial rights. While I cannot make any comment as to whether such violations actually occurred,[67] the very nature of the

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[61] *See* Appeal Judgement, para. 56 and references cited therein.
[62] *See infra*, para. 26.
[63] 5 July 2013 Appeal Decision, para. 16.
[64] 5 July 2013 Appeal Decision, para. 12, *referring to* Nteziryayo's Response to Prosecutor's Motion for Summary Dismissal or in the Alternative for Clarification of the Record on Appeal and Admission of Evidence under Rule 115, 23 May 2013 (confidential), para. 9(a) and (h).
[65] *See* Nteziryayo Notice of Appeal, para. 66; Nteziryayo Appeal Brief, paras. 265-277. *See also* 5 July 2013 Appeal Decision, para. 3.
[66] *See supra*, paras. 15-18.
[67] I am not in a position to properly assess the merits or accuracy of Nteziryayo's submissions. I observe that, at the time of the 5 July 2013 Appeal Decision, the Prosecution had requested the Appeals Chamber, as an alternative to the summarily dismissal of Nteziryayo argument, to: (i) instruct the Registry to certify that five documents pertaining to

allegations is sufficiently serious to warrant the Appeals Chamber's attention. I therefore conclude that the Appeals Chamber erred in considering in its 5 July 2013 Appeal Decision that none of Nteziryayo's arguments constituted "special circumstances". I further find that the fact that the authorities of Burkina Faso have since indicated that the date of Nteziryayo's arrest was almost a month earlier than the date taken into account in the Trial Judgement and in the 5 July 2013 Appeal Decision,[68] increases the seriousness of the possible violations. Indeed, it reinforces my conclusion that the 5 July 2013 Appeal Decision should have been reconsidered by the Appeals Chamber.

27. Moreover, I find the way the Majority deals with the waiver principle in this Judgement to be inconsistent and unpredictable. I recall that, in dealing with the appellants' right to be tried without undue delay, the Appeals Chamber has considered Nteziryayo's submissions on undue delay despite the fact that he did not raise them at trial.[69] The Appeals Chamber has addressed his arguments "[c]onsidering the extraordinary length of these proceedings, the Trial Chamber's determination in the Trial Judgement that none of the co-Accused's right to a trial without undue delay had been violated, and the interests of justice".[70] As indicated previously, I am in full agreement with this approach.[71] However, I find no valid reason for the Majority not to apply the same reasoning to other serious allegations of violations of Nteziryayo's rights resulting from the delay between his arrest and initial appearance. To the contrary, I find that the Majority's decision to treat these similar allegations of fair trial violations in a different manner creates inconsistency and unpredictability in the application of the waiver principle in this case.[72] Here again, I believe that the Appeals Chamber's decision to address Nteziryayo's arguments on undue delay, despite the waiver principle, strongly supports that there was a clear error of reasoning in the 5 July 2013 Appeal Decision, and that special circumstances exist in this case that should have convinced the Appeals Chamber to exercise its discretion to entertain Nteziryayo's allegations on the merits.

Nteziryayo's arrest and detention in Burkina Faso and his transfer to the Tribunal's detention facility ("Documents") were part of the record on appeal or, if the Appeals Chamber found that the Documents were not part of the record, admit them as additional evidence on appeal pursuant to Rule 115 of the Rules of Procedure and Evidence of the Tribunal; and (ii) instruct the Registry pursuant to Rule 33(B) of the Rules to provide clarifications on the dates of, and actions related to, Nteziryayo's arrest, transfer, appointment of counsel, and initial appearance. *See* 5 July 2013 Appeal Decision, para. 4. In my view, were the Appeals Chamber minded to reconsider the 5 July 2013 Appeal Decision and consider Nteziryayo's submissions on the merits, the alternative request of the Prosecution should have been considered and dealt with, and further submissions requested from both Ndayambaje and the Prosecution. Upon full briefing by the parties, the Appeals Chamber would then make its own determination on the issues.

[68] As a result of Nteziryayo's request for clarification of the date of his arrest, the Appeals Chamber instructed the Registrar to make written representations as to Nteziryayo's date of arrest. *See* 5 July 2013 Appeal Decision, paras. 19-23. On 14 March 2014, the Registrar indicated that the authorities of Burkina Faso provided the date of the arrest of Nteziryayo as 26 March 1998. *See* Appeal Judgement, fn. 18. The Trial Chamber initially stated in the Trial Judgement that Nteziryayo was arrested in Burkina Faso on 24 April 1998. *See* Trial Judgement, paras. 49, 6309.

[69] Appeal Judgement, paras. 355, 358. In addition, the Appeals Chamber has *proprio motu* considered the impact of its findings on undue delay on Nsabimana's rights, regardless of the fact that he did not raise allegations on this issue at all. *See* Appeal Judgement, paras. 358, 398. *See also supra*, para. 19.

[70] Appeal Judgement, para. 358 (internal references omitted).

[71] *Supra*, para. 19.

[72] *See also supra*, paras. 19, 20.

28. Based on the foregoing, I find myself unable to agree with the Majority's decision not to reconsider the 5 July 2013 Appeal Decision and examine on the merits Nteziryayo's allegations of violations of his right resulting from the delay between his arrest and initial appearance.

B. Dissenting Opinion: the Crime of Persecution as a Crime Against Humanity

29. The Trial Chamber convicted Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as a crime against humanity on the basis of their individual criminal responsibility for killings of Tutsis between April and June 1994.[73] In this Judgement, the Majority overturns their convictions in this respect.[74] For the reasons detailed below, I respectfully, but strongly, disagree with the reasoning and the conclusion reached by the Majority.

30. I should first emphasise that I do not contest that, in light of Article 3(h) of the Statute, the jurisdiction of the Tribunal over the crime of persecution as a crime against humanity is limited to the three listed discriminatory grounds, namely "racial, political and religious grounds."[75] As a result, I agree with the Appeals Chamber's finding that the Trial Chamber erred in law to the extent that it intended to convict Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje on the basis that they acted with discriminatory intent on "ethnic" grounds as a separate discriminatory ground.[76]

31. I also concur with the Appeals Chamber's statement that while the Statute "is legally a very different instrument from an international treaty", it is to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose, within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which reflects customary international law.[77] However, I disagree with the way the Majority applies this principle of interpretation in this case. In my view, the interpretation conducted by the Majority erroneously leads it to conclude that discrimination on the basis of "ethnicity" cannot be included in one of the three listed discriminatory grounds of persecution and, in particular, under "racial grounds".[78]

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[73] Trial Judgement, paras. 6098-6103, 6105-6108, 6120-6122, 6124, 6125.
[74] Appeal Judgement, para. 2141.
[75] Appeal Judgement, para. 2136. I also do not dispute that the Trial Chamber's reliance on the *Nahimana et al.* Appeal Judgement to reach this finding was misplaced. *See* Appeal Judgement, para. 2138.
[76] Appeal Judgement, para. 2139.
[77] Appeal Judgement, para. 2137 and references cited therein.
[78] Appeal Judgement, para. 2137.

32. The Majority reasons as follows: it first notes that the *chapeau* of Article 3 of the Statute distinguishes "ethnicity" from "race" in the listed discriminatory grounds for the attack against a civilian population.[79] The Majority then finds that:

> "[a]ccording to the ordinary meaning of the terms of the provision, such distinction reflects the autonomy between the two notions. This conclusion is also supported by a contextual reading of Article 3 of the Statute which makes it clear that 'ethnicity' cannot be encapsulated in 'race'. Indeed, interpreting the discriminatory ground of 'race' in Article 3(h) of the Statute as including 'ethnicity' would render the distinction in the *chapeau* of Article 3 of the Statute redundant, illogical, and superfluous."[80]

33. I disagree that the fact that "ethnic" and "racial" are listed as two separate terms under the *chapeau* element of Article 3 of the Statute indicates that the two notions are autonomous with respect to persecution as a crime against humanity. I am of the view that this distinction does not mechanically lead to the conclusion that discrimination on the basis of ethnicity cannot overlap or be encompassed in other discriminatory grounds for persecution, in particular, "racial" grounds. The Majority does not interpret the Statute in accordance with the ordinary meaning to be given to the terms "ethnic" and "racial" in their context, but merely states that since the Statute refers to both "ethnicity" and "race", these terms must be different and cannot overlap in any way. This reasoning appears overly restrictive.

34. I further note that when the Majority states that interpreting the discriminatory ground of "racial" in Article 3(h) of the Statute as including "ethnicity" would render the distinction in the *chapeau* of Article 3 of the Statute redundant, illogical, and superfluous, it implies that the intention of the drafters of the Statute was to deliberately exclude discrimination on the basis of ethnicity from the definition of persecution by mentioning in the *chapeau* of Article 3 of the Statute both the terms "ethnic" and "racial". However, as outlined below, I do not detect any such intention from the drafters of the Statute to exclude crimes committed on the basis of ethnicity from the crime of persecution. Further, in my view, the Majority places too much emphasis on the *chapeau* of Article 3 of the Statute, while in fact this additional jurisdictional requirement is of a very different nature from the discriminatory intent required for persecution as a crime against humanity.[81] In doing so, the Majority fails to address the relevant question in this case, which is to define

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[79] Appeal Judgement, para. 2137. I note that the Majority refers to "ethnicity" in its reasoning while in the *chapeau* of Article 3 of the Statute the term "ethnic" is used.
[80] Appeal Judgement, para. 2137.
[81] In this respect, I observe that the additional discriminatory grounds contained in the *chapeau* of Article 3 of the Statute narrow the jurisdiction of the Tribunal over crimes against humanity further than would otherwise have been necessary under international customary law, and do not create an additional requirement of discriminatory intent for crimes against humanity other than for the crime of persecution. *See Akayesu* Appeal Judgement, paras. 465, 466, 469; *Tadić* Appeal Judgement, para. 305. *See also Bagosora et al.* Trial Judgement, paras. 2166, 2208. I also note that the discriminatory grounds contained in the *chapeau* of Article 3 of the Statute are not reproduced in Article 5 of the ICTY Statute.

persecution on "racial grounds" as a crime against humanity under Article 3(h) of the Statute at the time the Statute was adopted.

35. In this respect, I recall that as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or discerned from other authoritative sources.[82] I cannot discern such will to depart here. Indeed it appears that the intention of the drafters of the Statute was to mirror the definition of crimes against humanity adopted in the Charter of the International Military Tribunal for the Trial of the Major War Criminals annexed to the London Agreement of 8 August 1945 ("Nuremberg Charter") and in the Control Council Law No. 10, which the Secretary General considered to be reflective of international customary law.[83]

36. Having reviewed relevant international sources, I conclude that at the time of the adoption of the Statute, persecution on "racial grounds" as a crime against humanity was understood under international customary law as including discrimination on the basis of ethnicity. In this respect, I observe that Article 1.1 of the broadly ratified International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin."[84] Indeed, the CERD differentiates the terms "race" and "ethnic", just as the Statute does, but also establishes that exclusion, restriction or preference based on "race" and "ethnic" origin constitutes "racial" discrimination in both cases.

37. Moreover the *travaux préparatoires* of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 ("Genocide Convention") do not support the conclusion that the notions "ethnical" and "racial" were autonomous at the time of the adoption of

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[82] *Tadić* Appeal Judgement, para. 296. *See also Tadić* Appeal Judgement, para. 287 ("In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules").

[83] *See* Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, paras. 47-49 ("Report of the Secretary General on ICTY"); Report of the Secretary General Pursuant to Paragraph 5 of the Security Council Resolution 955 (1994), U.N. Doc. S/1995/134, 13 February 1995, para. 11, fn. 5 ("Report of the Secretary General on ICTR"). There is no discussion in the Report of the Secretary General on ICTY about the proposed definition of persecution as a crime against humanity and its limitation to persecution committed on "political, racial and religious grounds" in the ICTY Statute. The Report of the Secretary General on ICTY reflects, however, that the definition of persecution suggested by the United Nations Secretary General was based on the definition of the crime provided for in the Nuremberg Charter and the Law No. 10 of the Control Council. The Report of the Secretary General on ICTR merely refers to the list of crimes against humanity defined in Article 5 of the ICTY Statute, suggesting that the definition of the crime was by analogy also based on the Nuremberg Charter and Law No. 10 of the Control Council.

[84] Article 1.1, International Convention on the Elimination of All Forms of Racial Discrimination adopted by General Assembly Resolution 2106(XX), UN Doc. A/RES/20/2106, 21 December 1965, entered into force on 4 January 1969 ("CERD"). I note that there are currently 177 States Parties to the CERD.

the Genocide Convention. It appears that there, the term "ethnical" was added at a late stage in the negotiation process and there was no controversy over its addition since it did not appear to be a "fresh category" compared to the groups already listed in the draft of the Genocide Convention, namely "national", "racial", and "religious". No clear delineation of the concept of ethnicity emerged from the *travaux préparatoires* of the Genocide Convention, in which the concept was considered by the States as largely overlapping or as synonymous with the term "racial" but also in some cases as a "sub-group of a national group" or as "linguistic group".[85]

38. I further note that the post-World War II cases reflect that several convictions were entered for persecution on "racial grounds" as a crime against humanity against the "Poles" and "Jews".[86] In my view, this shows that persecution on "racial grounds" as a crime against humanity was understood in international law at the time as including a broad range of features, including descent or national origin.

39. In my opinion, the foregoing strongly supports the conclusion that at the time the Statute was adopted, persecution on "racial grounds" as a crime against humanity was understood in international customary law as including discrimination on the basis of ethnicity. Accordingly, I consider that persecution on "racial grounds" in Article 3(h) of the Statute should be interpreted as encompassing discrimination on the basis of ethnicity.

40. Moreover, I underline that the Tribunal was created to adjudicate alleged crimes committed in Rwanda in 1994. In this respect, I observe that the Report of the Secretary General on ICTR explicitly makes reference to crimes allegedly committed against the "Tutsi ethnic group."[87] In my view, it would be illogical for the drafters of the Statute to give the Tribunal jurisdiction over persecution as a crime against humanity, but wilfully exclude from its jurisdiction the ground upon which it considered the Tutsis had been persecuted. Concluding otherwise leads to an unreasonable interpretation of Article 3(h) of the Statute.[88]

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[85] *See* UN ORGA, Sixth Committee, Third Session, 74th meeting, UN Doc. A/C.6/SR.74, 14 October 1948, pp. 99, 106; UN ORGA, Sixth Committee, Third Session, 75th meeting, UN Doc. A/C.6/SR.75, 15 October 1948, pp. 115, 116.

[86] *The United States of America v. Alstoetter et al.*, U.S. Military Tribunal, Judgement, 3 and 4 December 1947, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. III, pp. 1041, 1118, 1136, 1142, 1144-1156, 1161; *The United States of America v. Greifelt et al.*, U.S. Military Tribunal, Judgement, 10 March 1948, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. V, p. 152; *The United States of America v. von Weizsaecker et al.*, U.S. Military Tribunal, Judgement, 11 April 1949, Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (1951), Vol. XIV, p. 575. *See also The United States of America, the French Republic, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics against Herman Wilhelm Göring et al.*, Judgement, 1 October 1946, Trial of Major War Criminals Before the International Military Tribunal Under Control Council Law No. 10, Vol. 1 (1947), pp. 66, 67, 282, 287, 288, 295-298, 300-307, 328-330, 339-341.

[87] Report of the Secretary General on ICTR, para. 3.

[88] The ICTY Appeals Chamber, considering whether the ICTY Statute should be interpreted to include internal conflicts, or solely international conflicts, held that it would defeat the Security Council's purpose to exclude internal

41. I further note that, although the jurisprudence on the matter is not settled, this interpretation finds some support in the jurisprudence of the ICTY. I highlight the *Brđanin* Trial Judgement, for instance, where the trial chamber stated that "the concept of 'race' includes 'ethnicity', which [the trial chamber] finds more appropriate to refer to in the context of the present case."[89] The *Đorđević* Trial Judgement, in which Vladimir Đorđević was convicted of persecution as a crime against humanity on "racial grounds" committed against Kosovo Albanians, also provides support in this respect. In that case, the trial chamber found that the Kosovo Albanians were discriminated against on the basis of their ethnicity.[90] Although this question was not directly addressed by the ICTY Appeals Chamber, the *Đorđević* Appeal Judgement recalled the applicable law as including only the intent to discriminate on "political, racial, or religious grounds."[91] It then held that the victims were discriminated against on the basis of their ethnicity before concluding that the requirements for persecution were fulfilled, without further precision on the ground under which this conviction was entered.[92] In my view, the *Đorđević* Appeal Judgement provides further support for considering that discriminatory intent on the basis of ethnicity is covered by "racial grounds".

42. As a result, I consider that, even if the Trial Chamber erred in law to the extent that it intended to convict Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi and Ndayambaje on the basis that they acted with discriminatory intent on "ethnic" grounds as a separate discriminatory ground, this error does not invalidate the Trial Chamber's decision to convict them for persecution as a crime against humanity. Having articulated the correct legal standard above, I would conclude that the Trial Chamber's factual findings that Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje acted with discriminatory intent against the Tutsi on the basis of their ethnicity

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conflicts as it would be "illogical for the drafters of the Statute to confer on the International Tribunal the competence to adjudicate the very conduct with which they were concerned only in the event that the context was an international conflict, when they knew that the conflicts at issue in the former Yugoslavia could have been classified, at varying times and places, as internal, international, or both." *See Tadić* Appeal Decision on Jurisdiction, para. 78.

[89] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, fn. 2484.

[90] *Đorđević* Trial Judgement, paras. 1758, 1759, 2230. *See also Đorđević* Appeal Judgement, para. 930. *See also Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2011 ("*Kvočka et al.* Trial Judgement"), paras. 194, 195 (where the trial chamber appears to consider that the terms "racial" and "ethnic" are interchangeable for the purpose of persecution as a crime against humanity). *See however Kvočka et al.* Trial Judgement, para. 610 (where the trial chamber stated that non-Serbs were detained by reason of their religion, politics, race, or ethnicity).

[91] *Đorđević* Appeal Judgement, para. 886.

[92] *See Đorđević* Appeal Judgement, paras. 892, 893, 895, 897, 898, 901, 929, p. 380. I also note that, in several cases, ICTY trial chambers reasoned in a similar way to the *Đorđević* Appeals Chamber. In these cases, trial chambers recalled the applicable law for persecution as including only the intent to discriminate on "political, racial, or religious grounds", but then went on to define the discriminated-against group by reference to ethnicity before concluding that the requirements for persecution were fulfilled. In my view, these ICTY trial judgements provide further support for considering that discriminatory intent on the basis of ethnicity is covered by "racial grounds" for the crime of persecution as a crime against humanity. *See Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010, paras. 968, 991, 995; *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, paras. 113, 118, 358, 363, 367, 411, 416, 432, 473; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Judgement, 27 September 2006, paras. 734, 787, 788, 1126; *See also Kordić and Čerkez* Appeal Judgement, para. 950.

support their convictions for persecution on "racial grounds" as a crime against humanity. Accordingly, I would uphold their convictions in this respect.[93]

43. For these reasons, I find myself unable to agree with the Majority that the convictions of Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje for persecution as crime against humanity should be overturned on appeal.

C. Separate Opinion: Aiding and Abetting

44. In the *Perišić* Appeal Judgement, the majority, of which I was part, set out why "specific direction" had always been an element of aiding and abetting liability pursuant to the jurisprudence of this Tribunal.[94] I acknowledge that appeal judgements have subsequently been issued in the *Šainović et al.* and the *Popović et al.* cases, departing from the approach adopted in the *Perišić* case.[95] However, I remain of the opinion that the decision in the *Perišić* Appeal Judgement was the correct one, and am not convinced by the reasoning expressed in these subsequent cases. Therefore, I must express my disagreement with paragraphs 1955, 3332, and 3343 of the Judgement to the extent that these paragraphs do not mention "specific direction" when recalling the applicable law on aiding and abetting.[96]

D. Dissenting Opinion: Sentencing

1. Ntahobali's Appeal on the Gravity of the Offences in Sentencing

45. The Majority dismissed Ntahobali's argument that the Trial Chamber erred in taking into account rapes perpetrated at the Hotel Ihuliro roadblock in assessing the gravity of the offences,[97] because Ntahobali failed to raise this alleged error in his notice of appeal, and thus impermissibly expanded the scope of his appeal.[98] The Majority further finds that the interests of justice do not require consideration of this argument.[99] I respectfully disagree with the Majority for the reasons developed by Judge Liu in his dissenting opinion in this respect. To the extent that Judge Liu explains the reasons why the Majority should have considered Ntahobali's argument and finds that

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[93] I underline that the question is theoretical in the case of Kanyabashi since I support the reversal of all of his convictions and that, in any event, the Appeals Chamber overturns in this Judgement the factual basis relied upon by the Trial Chamber to convict Kanyabashi for persecution as a crime against humanity. *See* Appeal Judgement, pp. 1211, 1212; Joint Dissenting Opinion of Judge Pocar and Judge Agius.
[94] *See Perišić* Appeal Judgement, paras. 25-40. *See also Perišić* Appeal Judgement, Joint Separate Opinion of Judges Theordor Meron and Carmel Agius.
[95] *See Šainović et al.* Appeal Judgement, paras. 1617-1651; *Popović et al.* Appeal Judgement, paras. 1758, 1764.
[96] Appeal Judgement, paras. 1955, 3332, 3343.
[97] Ntahobali Appeal Brief, para. 986.
[98] Appeal Judgement, paras. 3379-3381.
[99] Appeal Judgement, para. 3380.

the Trial Chamber erred in determining the gravity of the offences in relation to Ntahobali's sentence, I fully endorse his position.[100]

46. I wish, however, to add a further point. I note that the reasons relied upon by the Majority in deciding not to consider Ntahobali's argument are that: (i) all of the co-Appellants shall be treated equally, and that since Nteziryayo was prevented from raising challenges due to his failure to raise them in his notice of appeal, the same should apply to Ntahobali; and (ii) the Prosecution objected to Ntahobali's failure to raise his argument in his notice of appeal.[101] I find this reasoning inconsistent with footnote 7671 of the Judgement, where, contrary to the equality of treatment relied upon by the Majority in declining to examine Ntahobali's argument on the gravity of the offences, the Appeals Chamber exercises its discretion to consider allegations of error on sentencing that were not raised in some of the co-Appellants' notices of appeal.

47. In this footnote, the Appeals Chamber explains that it exercises its discretion to consider allegations of error that some of the co-Appellants' failed to raise in their respective notices of appeal, in light of "the nature of the allegations and the fact that the Prosecution did not object to these allegations on this basis and responded to the appellant's submissions." As explained by Judge Liu, the nature of Ntahobali's allegation on the gravity of the offences clearly justifies the consideration of his argument.[102] In my opinion, it appears that the only difference between Ntahobali's allegation relating to the gravity of the offences and the other co-Appellants' arguments is whether or not the Prosecution objected to the expansion of the scope of the appeal. I do not believe that whether or not the Prosecution objects should be the decisive, if not the only, element to determine whether it is in the interests of justice to examine on the substance an appellant's contention when he or she failed to raise it in his or her notice of appeal.

2. Impact of the Appeals Chamber's Findings on Nyiramasuhuko's, Ntahobali's, and Ndayambaje's Sentences

48. The Majority, addressing the impact of the Appeals Chamber's findings on the Co-Appellants' sentences, reduces the life sentences imposed on Nyiramasuhuko, Ntahobali, and

[100] Partially Dissenting and Dissenting Opinions of Judge Liu, paras. 25-27. I note that Judge Liu further indicates that, given this error regarding the gravity of offences as well as the error he identified in relation to Ntahobali's liability for ordering the killings and superior responsibility at the Butare Prefecture Office, Ntahobali's sentence should be further reduced. *See* Partially Dissenting and Dissenting Opinions of Judge Liu, para. 28. I do not endorse this statement since, with the Majority, I find that the Trial Chamber did not err in relation to Ntahobali's liability for ordering the killings and superior responsibility at the Butare Prefecture Office. My view on the impact of the Appeals Chamber's findings on Ntahobali's sentence is expressed below. *See infra*, para. 48.
[101] Appeal Judgement, para. 3380.
[102] Partially Dissenting and Dissenting Opinions of Judge Liu, paras. 25-27.

Ndayambaje to 47 years of imprisonment.[103] I find myself unable to agree with the sentences imposed by the Majority in this respect. Having given due consideration to the violation of Nyiramasuhuko's, Ntahobali's, and Ndayambaje's rights to be tried without undue delay and the related prejudice they suffered, as well as the errors committed by the Trial Chamber,[104] I believe that a sentence of 45 years of imprisonment in lieu of life imprisonment more adequately reflects the overall criminal responsibility of Nyiramasuhuko, Ntahobali, and Ndayambaje in the present case.

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

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

Judge Carmel Agius

[Seal of the Tribunal]

[103] Appeal Judgement, paras. 3523, 3526, 3538.
[104] Appeal Judgement, paras. 3521, 3524, 3536. In this respect, I recall that I disagree with the Majority's reversal of Nyiramasuhuko's, Ntahobali's, and Ndayambaje's convictions for persecution as a crime against humanity. *See supra*, paras. 29-43.

XVII. PARTIALLY DISSENTING AND DISSENTING OPINIONS OF JUDGE LIU

1. I respectfully disagree with the Majority's position on the following: (i) regarding the appeals of Nyiramasuhuko and Ntahobali on leave to amend the indictment, the Majority upheld the Trial Chamber's position of not requiring the Prosecution to present a *prima facie* case in support of the new counts;[1] (ii) as to Ntahobali's responsibility at the Butare Prefecture Office, the Majority upheld the Trial Chamber's determination that he was responsible for ordering killings during the Mid-May Attack,[2] and was responsible as a superior over the *Interahamwe* who committed crimes based on his orders;[3] and (iii) with respect to sentencing, the Majority found no error in the Trial Chamber's assessment of Nyiramasuhuko's abuse of authority as an aggravating factor,[4] and it declined to consider Ntahobali's appeal on gravity of offences because his contention impermissibly expanded the scope of his appeal.[5] I will discuss my views on these matters in turn.

A. Partially Dissenting Opinion: Leave to Amend Indictment

2. On 10 August 1999, the Trial Chamber granted the Prosecution leave to amend the indictment against Nyiramasuhuko and Ntahobali.[6] The Trial Chamber held that, under Rule 50 of the Rules, there was no necessity to assess whether a *prima facie* case had been met prior to granting the amendment.[7] The Trial Chamber was satisfied that the Prosecution "provided sufficient grounds both in fact and in law",[8] and determined that the accused will suffer no prejudice as any prejudice can be remedied through Rule 72 of the Rules.[9]

3. Nyiramasuhuko and Ntahobali both argue, *inter alia*, that the Trial Chamber erred in law in failing to ascertain the existence of *prima facie* evidence before granting leave to include six new counts in the indictment and the addition of the charge of superior responsibility.[10] The Majority

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[1] Appeal Judgement, paras. 450, 453, 1077, 1079.
[2] Appeal Judgement, paras. 1898-1906, 1918, 1945.
[3] Appeal Judgement, paras. 1934-1941, 1943, 1945.
[4] Appeal Judgement, para. 3359, *referring to* Trial Judgement, para. 6207.
[5] Appeal Judgement, paras. 3379-3381.
[6] I note that with respect to Nyiramasuhuko several new charges were added, including: conspiracy to commit genocide, rape as a crime against humanity, as well as her responsibility pursuant to Article 6(3) of the Statute. As for Ntahobali, his superior responsibility under Article 6(3) of the Statute was added in relevant and existing counts of the indictment. *See* 10 August 1999 Oral Decision; 10 August 1999 Decision, p. 6.
[7] 10 August 1999 Decision, para. 17. *See also* 1 November 2000 Nyiramasuhuko Decision, para. 61; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 September 1998, para. 13.
[8] *See* 10 August 1999 Oral Decision, p. 4; 10 August 1999 Decision, para. 23. *See also ibid.*, p. 2-3.
[9] 10 August 1999 Decision, para. 20.
[10] Nyiramasuhuko Notice of Appeal, paras. 1.9-1.11; Nyiramasuhuko Appeal Brief, paras. 72, 83, 86-88, 90-92, 95-98, 100, 101, 104, 111, 112, 114, 117, 122-125, 127, 129; Ntahobali Notice of Appeal, para. 146; Ntahobali Appeal Brief, paras. 319-324.

dismissed this submission on the basis that: (a) the requirement to establish a *prima facie* case for granting leave to amend an indictment pursuant to Rule 50(A)(ii) of the Rules was only introduced on 15 May 2004; (b) prior to this enactment, the practice of trial chambers of the Tribunal was not uniform regarding the need to establish a *prima facie* case; and (c) the Appeals Chamber, when seised with the matter, provided no guidance on this issue.[11]

4. From the Majority's position, it appears that, on the basis of Rule 50 of the Rules at the time, the Trial Chamber had full discretion to choose whether a *prima facie* case had to be met or not before granting amendment of the indictment. Respectfully, I disagree. As a matter of law, I believe that prior to granting leave to amend an indictment, a trial chamber must ensure that the new charges satisfy the same requirements applied at the confirmation stage of the original indictment.[12] Specifically, according to Article 18(1) of the Statute, a judge of the Trial Chamber shall confirm an indictment "[i]f satisfied that a *prima facie* case has been established by the Prosecutor", and if not satisfied, shall dismiss the indictment.[13]

5. While not explicitly stated in Rule 50 of the Rules at the time, it is my view that a *prima facie* case was required prior to granting an amendment to the indictment against Nyiramasuhuko and Ntahobali. In particular, I note that Rule 50 of the Rules was placed within the same section of provisions for the confirmation of indictments and no derogation from the general rule could be inferred from the text.[14] In addition, it would be illogical that an amended indictment satisfies lower thresholds than those necessary for the original indictment's confirmation.[15] Finally, allowing an amendment that fails to satisfy a *prima facie* case could have allowed the Prosecution to insert new counts and undermined the accused's right to be adequately informed of the nature and cause of the charges against him so as to be able to prepare a meaningful defence.[16]

6. Having reviewed the relevant parties' submissions and decisions of the Trial Chamber, I am of the view that a *prima facie* case could have been, in any event, established prior to the Trial

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[11] Appeal Judgement, paras. 450, 1077.
[12] *See The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, Individual Opinion of Judge Pocar, 12 February 2004 ("Judge Pocar Individual Opinion"), paras. 2-4.
[13] In the same vein, Rule 47(E) of the Rules, at the time, also provided that the "reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect." *See* Judge Pocar Individual Opinion, para. 3.
[14] *See* Judge Pocar Individual Opinion, para. 5.
[15] *See* Judge Pocar Individual Opinion, para. 5.
[16] *See* Article 20(4)(a) of the Statute stipulating that the accused shall be entitled "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". *See also Kvočka et al.* Appeal Judgement, para. 28; *Ntakirutimana* Appeal Judgement, paras. 25, 27, 28, 58; *Kupreškić et al.* Appeal Judgement, paras. 88, 122.

Chamber granting leave to amend the indictment.[17] Despite my disagreement with the Majority's reasoning, I would therefore reject this submission from Nyiramasuhuko's and Ntahobali's appeals.

B. Dissenting Opinion: Ntahobali's Responsibility at the Butare Prefecture Office

1. Ordering Responsibility for Killings at the Mid-May Attack

7. The Trial Chamber found that, in mid-May 1994, Nyiramasuhuko, Ntahobali, and about 10 *Interahamwe* came to the Butare Prefecture Office in a camouflaged pickup truck and that Nyiramasuhuko pointed out Tutsi refugees to the *Interahamwe*, ordering them to force the refugees onto the pickup truck.[18] The Trial Chamber found that "Ntahobali also gave the *Interahamwe* orders, telling them to stop loading the truck because it could not accept anymore dead."[19] The Trial Chamber concluded that refugees were taken to other locations in Butare and killed, and it found that "both Nyiramasuhuko and Ntahobali were responsible for ordering the killings of numerous Tutsi refugees who were forced on board the pickup."[20]

8. While determining that the Trial Chamber erred in its obligation to provide a reasoned opinion, the Majority concluded that the error did not invalidate the Trial Chamber's decision, as its findings and relevant evidence sustain the conclusion that Ntahobali is responsible under Article 6(1) of the Statute for ordering the killings of numerous Tutsi refugees who were forced on board the pickup during the Mid-May Attack at the prefectoral office.[21] Contrary to the Majority's position, I cannot agree that the Trial Chamber's error in failing to provide a reasoned opinion did not invalidate Ntahobali's conviction for ordering killings during this specific attack.

9. I recall that a person in a position of authority may incur responsibility for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[22] I find that the Trial Chamber, having concluded that Ntahobali ordered killings of

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[17] *See The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998; *Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Brief in Support of Prosecutor's Request for Leave to File an Amended Indictment, 18 August 1998, paras. 14-17. *See also* Attachments (Annexes) A and B to the Prosecutor's Request for Leave to Amend Indictment, 18 August 1998. *See also* 10 August 1999 Decision, paras. 18, 23; 10 August 1999 Oral Decision, pp. 2, 3; *The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, T. 9 August 1999.

[18] Trial Judgement, para. 5867.

[19] Trial Judgement, para. 5867.

[20] Trial Judgement, para. 5867.

[21] Appeal Judgement, para. 1906.

[22] *See e.g., Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. Responsibility for ordering is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order. Ordering with such awareness has to be regarded as accepting that crime. *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.

Tutsis during the Mid-May Attack,[23] failed to refer to any express order to kill, identify a particular instruction that had a direct and substantial effect on the eventual killings of Tutsis forced to board the pickup truck, or state that it inferred as the only reasonable conclusion that Ntahobali ordered the killings.[24]

10. In my view, the Trial Chamber's failure to provide a reasoned opinion in this regard was further compounded by the absence of findings or relevant evidence that could sustain Ntahobali's conviction for ordering killings during this specific attack. The only order that the Trial Chamber identified was Ntahobali's instruction to the *Interahamwe* to stop putting refugees on the pickup truck.[25] I fail to see how this instruction could lead to the only reasonable inference that it had direct and substantial effect on the killing of Tutsi refugees who were forced on board the pickup truck.[26] In addition, having reviewed relevant parts of the Trial Judgement and the record, I find that Ntahobali's responsibility cannot be supported on the basis of Witness TA's evidence. According to Witness TA, only Nyiramasuhuko, and not Ntahobali, selected individuals to be placed on the vehicle.[27] Thus, the Trial Chamber's finding that the *Interahamwe* were acting under Ntahobali's orders to load the truck with Tutsi refugees is not supported by the evidence.

11. For the foregoing reasons, I consider the evidence on the record insufficient to support as the only reasonable conclusion that Ntahobali ordered killings during the Mid-May Attack at the prefectoral office. In these circumstances, I therefore consider that Ntahobali's convictions on this basis should be overturned.

2. Superior Responsibility

12. Recalling that "Nyiramasuhuko and Ntahobali issued orders to *Interahamwe* and the *Interahamwe* complied with these orders and perpetrated the acts asked of them, which included abductions, rapes and killings" as well as "considering the evidence in its entirety", the Trial Chamber found that Ntahobali and Nyiramasuhuko were in a superior-subordinate relationship over the *Interhamwe* at the prefectoral office and wielded effective control over them.[28] On this basis, the Trial Chamber determined that Ntahobali was responsible pursuant to Article 6(3) of the Statute for

[23] Trial Judgement, para. 5867.
[24] Trial Judgement, paras. 5866-5871. *See ibid.*, paras. 6053, 6100, 6168.
[25] Trial Judgement, para. 5867.
[26] Trial Judgement, para. 5867.
[27] *See* Trial Judgement, paras. 2178, 2628. *See also* Witness TA, T. 25 October 2001 p. 28.
[28] Trial Judgement, para. 5884.

the acts of the *Interahamwe* against Tutsis who had sought refuge at the Butare Prefecture Office, including their perpetration of rapes and killings.[29]

13. The Majority upheld Ntahobali's responsibility under Article 6(3) of the Statute[30] and also considered that, as reflected in the Trial Judgement, he was only held liable as a superior for crimes committed by the *Interahamwe* who followed his orders.[31] Having considered the jurisprudence and reviewed the evidence, I respectfully disagree with the Majority's position to uphold the Trial Chamber's finding as to Ntahobali's superior responsibility at the Butare Prefecture Office.[32] In my view, the Trial Chamber erroneously conflated Ntahobali's liability for ordering and superior responsibility, and no reasonable trier of fact could have concluded that Ntahobali had effective control over the *Interahamwe* at the prefectoral office. As discussed below, I distinguish this from circumstances at the Hotel Ihuliro roadblock and the EER, where I agree that Ntahobali should have incurred superior responsibility over the acts of the *Interahamwe*.

14. I recall that the imposition of superior responsibility necessitates a pre-existing superior-subordinate relationship between the accused and the perpetrators.[33] A commander or superior is "one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed."[34] While "the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts."[35]

15. For a superior to be found criminally liable, it must be shown that he or she exercised effective control over subordinates who have committed crimes.[36] The indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate.[37] According to the jurisprudence of the Tribunal, an accused's ability to issue orders and the fact that his orders were actually followed

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[29] Trial Judgement, para. 5886. *See also ibid.*, paras. 6056, 6086.
[30] Appeal Judgement, paras. 1941, 1943, 1945.
[31] Appeal Judgement, para. 1925, *referring to* Trial Judgement, paras. 5884-5886.
[32] This applies both to his orders to kill (Mid-May Attack) and orders to commit rape (Last Half of May Attacks).
[33] *Halilović* Appeal Judgement, para. 210. *See also Bizimungu* Appeal Judgement, para. 133.
[34] *Čelebići* Appeal Judgement, para. 192.
[35] *Čelebići* Appeal Judgement, para. 197. I note that the Appeals Chamber in *Čelebići* has also stated that generally possession of *de jure* power in itself may not suffice for finding command responsibility if it does not manifest in effective control. *See idem.*
[36] *See e.g.*, *Popović et al.* Appeal Judgement, para. 1857 and references cited therein. The Appeals Chamber in *Čelebići* has stated that "[a]s long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of crimes if he failed to exercise such abilities of control." *See Čelebići* Appeal Judgement, para. 198.

can demonstrate effective control.[38] However, this cannot be the *sole* indicator nor does it automatically establish effective control.[39] Indeed, "[i]n circumstances where a superior would not be able to perform the functions necessary to prevent or punish, the superior could not be said to possess the material ability required to exercise effective control."[40] Additionally, a superior need not know the exact identity of his or her subordinates who perpetrate crimes.[41] However, where multiple groups of subordinates may exist, there should be evidence linking the accused to the specific group committing the crimes.[42]

16. In comparison, the threshold to establish authority for ordering liability under Article 6(1) of the Statute is lower than that for superior responsibility. Based on the Tribunal's jurisprudence, ordering liability requires no formal superior-subordinate relationship between the accused and the perpetrator[43] and no effective control.[44] Additionally, the authority may be informal or of a purely temporary nature,[45] and physical perpetrators, those receiving orders, may be identified generally by group.[46] It is sufficient that there is proof of a position of authority on the part of the accused that would compel another person to commit a crime.[47] Whether such authority exists is a question of fact[48] and is a "more subjective criterion that depends on the circumstances and the perceptions of the listener."[49]

17. Turning to the circumstances at the Butare Prefecture Office, I believe that, based on the evidence, no reasonable trier of fact could have found that Ntahobali was in a superior-subordinate relationship with the *Interahamwe* and that he had effective control over them. I observe the Trial Chamber's consideration that, *inter alia*: (i) Nyiramasuhuko *and* Ntahobali (although mostly

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[37] *Blaškić* Appeal Judgement, para. 69. *See also Popović et al.* Appeal Judgement, para. 1860; *Ndahimana* Appeal Judgement, para. 53; *Strugar* Appeal Judgement, para. 254.
[38] *Halilović* Appeal Judgement, para. 207. *See also Karemera and Ngirumpatse* Appeal Judgement, para. 260; *Nizeyimana* Appeal Judgement, para. 202; *Ndahimana* Appeal Judgement, para. 54, fn. 139; *Kajelijeli* Appeal Judgement, paras. 90, 91.
[39] The Appeals Chamber in *Setako* has stated that "a superior's authority to issue orders is one indicator of effective control, but that it does not automatically establish such control." *Setako* Appeal Judgement, para. 272. It further held that "convictions under Article 6(3) of the Statute are generally based on a thorough analysis of various indicators of effective control." *Setako* Appeal Judgement, fn. 615 and references cited therein. According to the Appeals Chamber in *Strugar*: "a superior's authority to issue orders does not *automatically* establish that a superior had effective control over his subordinates." *Strugar* Appeal Judgement, para. 253 (emphasis in original). Furthermore, the Appeals Chamber in *Blaškić* found that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over troops that received the orders." *Blaškić* Appeal Judgement, para. 485.
[40] *Popović et al.* Appeal Judgement, para. 1857.
[41] *Blagojević and Jokić* Appeal Judgement, para. 287.
[42] *Cf. Ntabakuze* Appeal Judgement, paras. 169-174.
[43] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361.
[44] *Seromba* Appeal Judgement, para. 202.
[45] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgemnet, para. 363.
[46] *See Boškoski and Tarčulovski* Appeal Judgement, para. 75, fn. 216 and references cited therein.
[47] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 361. *See also Boškoski and Tarčulovski* Appeal Judgement, para. 164.
[48] *Setako* Appeal Judgement, para. 240; *Semanza* Appeal Judgement, para. 363.
[49] *Gacumbitsi* Appeal Judgement, para. 182.

Nyiramasuhuko) appeared to be in charge of assailants;[50] (ii) Ntahobali had the ability to stop the *Interahamwe* from putting more refugees on the pickup truck;[51] and (iii) the *Interahamwe* referred to him as "*Shalom, chef*" and he told them "to do their work seriously."[52] From the evidence and Trial Chamber's findings as to the attacks occurring between May and June 1994 at the prefectoral office, I also note the identification of the *Interahamwe* to be extremely vague.[53] It is unclear whether the *Interahamwe*, who came during separate and multiple attacks, were the same individuals, from the same group, under the same authority, or otherwise. Indeed, as indicated in this Appeal Judgement, Ntahobali was not found liable as a superior of *Interahamwe* who committed crimes on the basis of Nyiramasuhuko's orders.[54]

18. In my view, the evidence could demonstrate that Ntahobali was at most in some temporary position of authority over the *Interahamwe* and this may have been sufficient for ordering liability under Article 6(1) of the Statute. However, irrespective of the Majority's position regarding the alleged repeated nature of his "orders" and the fact that they were followed,[55] there is insufficient evidence, outside these "orders", to conclude that Ntahobali had a *de facto* superior-subordinate relationship over the *Interahamwe* during attacks at the prefectoral office. In assessing Ntahobali's superior responsibility, the Trial Chamber stated that it "consider[ed] the evidence in its entirety".[56] However, other than his orders, it is unclear upon what solid evidence the Trial Chamber relied. There is also inadequate evidence to show that he could materially prevent crimes of the *Interahamwe* before their commission or punish crimes thereafter. The insufficiency of evidence is revealed by the Trial Chamber's circular reasoning in assessing his ability to prevent or punish:

> [Nyiramasuhuko's and Ntahobali's] *orders* demonstrate that they knew that the *Interahamwe* were about to commit a crime and had later done so, and that they failed to prevent the crimes. It is also clear from that evidence that they did not punish the *Interahamwe* for obeying their *orders*.[57]

19. I distinguish the situation at the prefectoral office from the circumstances at the Hotel Ihuliro roadblock and at the EER, where there appears to be stronger indicia of his effective control

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[50] *See* Trial Judgement, para. 2178 (emphasis added). *See also* Witness TA, T. 25 October 2001 pp. 66, 67, T. 29 October 2001 pp. 46, 47.
[51] *See* Trial Judgement, para. 2178. *See also* Witness TA, T. 29 October 2001 pp. 46, 47.
[52] *See* Trial Judgement, paras. 2668, 2681. *See also* Witness TK, T. 20 May 2002, p. 88, T. 23 May 2002 p. 93.
[53] *See e.g.*, Trial Judgement, paras. 2628-2632, 2634, 2636, 2638, 2644-2646, 2648-2651, 2653, 2681, 2687, 2688, 2691, 2693, 2694, 2696, 2698, 2699, 2702-2709, 2711-2715, 2717-2719, 2721, 2727-2730, 2732-2736, 2738, 2741, 2742, 2747, 2748, 2770, 2771, 2773, 2781. I note that an individual named Kazungu was identified as either an *Interahamwe* or a soldier. *See ibid.*, paras. 2707-2709. The Trial Chamber considered that other *Interahamwe* were identified, but none appears to be linked to attacks that Ntahobali allegedly ordered. *See ibid.*, para. 2755.
[54] *See* Appeal Judgement, para. 1926.
[55] *See* Appeal Judgement, para. 1936. I consider that, based on my position regarding the Mid-May Attack, I do not believe that Ntahobali was or should have been convicted for ordering killings at the Butare Prefecture Office.
[56] Trial Judgement, para. 5884.
[57] Trial Judgement, para. 5885 (emphasis added).

over the *Interahamwe* present.[58] In particular, at the roadblock, aside from his order to kill Ruvurajabo, the Trial Chamber considered direct evidence that the *Interahamwe*, identified to be present at the time, specifically sought instructions from Ntahobali.[59] At the EER, the Trial Chamber considered concrete evidence that Ntahobali was the leader of the *Interahamwe*,[60] he led attacks at the EER,[61] and that the *Interahamwe* at the scene feared and obeyed him.[62]

20. On the basis of the foregoing, I would accordingly conclude that no reasonable trier of fact could have found that Ntahobali had superior responsibility over the crimes committed by the *Interahamwe* at the prefectoral office.

C. Partially Dissenting Opinion: Sentencing

1. Double-Counting Nyiramasuhuko's Abuse of Authority

21. The Trial Chamber found Nyiramasuhuko guilty of ordering the killing of Tutsi refugees at the Butare Prefecture Office.[63] In determining her sentence, the Trial Chamber stated that "Nyiramasuhuko, on a number of occasions, used her influence over *Interahamwe* to commit crimes such as rape and murder" and concluded that this "abuse of general authority *vis-à-vis* the assailants is an aggravating factor."[64] Nyiramasuhuko submits that the Trial Chamber erred in considering her abuse of authority as an aggravating factor since this was an element of the crimes for which she was convicted.[65]

22. The Majority found no error in the Trial Chamber's conclusion and dismissed Nyiramasukuo's appeal that the Trial Chamber impermissibly double-counted an element of the crime as an aggravating factor.[66] I respectfully disagree with the Majority's conclusion in this regard.

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[58] *See* Appeal Judgement, paras. 1471-1476, 2106-2113.
[59] The Trial Chamber considered that the *Interahamwe* asked Ntahobali "what shall we do with [Ruvurajabo]", to which Ntahobali responded, "[k]ill him." *See* Trial Judgement, paras. 2959, 5847.
[60] *See* Trial Judgement, paras. 3858, 3951; Witness RE, T. 24 February 2003 p. 13.
[61] *See* Trial Judgement, para. 3965.
[62] *See* Trial Judgement, paras. 3878, 3951. According to Witness SX: "[Ntahobali] was their leader, he ordered [the *Interahamwe*] around. He ordered them to arrest anybody. He could turn to anybody to say something and the other would say in turn, Shalom, but they were scared of him because he was their boss. At any rate, when he came, he [was] consulted when there was any issue to be consulted about." Witness SX, T. 27 January 2004 p. 26.
[63] Based on her orders to kill at the prefectoral office, the Trial Chamber convicted Nyiramasuhuko of genocide, extermination and persecution as crimes against humanity, as well as violence to life, health, and physical or mental well-being of persons as a serious violation of Article 3 common of the Geneva Conventions and of Additional Protocol II pursuant to Article 6(1) of the Statute. Trial Judgement, paras. 5876, 5969, 5970, 6049-6051, 6098, 6099, 6120, 6166, 6167, 6186.
[64] Trial Judgement, para. 6207.
[65] Nyiramasuhuko Appeal Brief, para. 1300.
[66] Appeal Judgement, para. 3359.

23. According to the Tribunal's jurisprudence, a factor considered by a trial chamber as an element of a crime cannot also be considered as an aggravating circumstance.[67] The *actus reus* of ordering responsibility requires a person in a position of authority to issue an instruction to commit a crime.[68] In my view, it follows that the abuse of a position of authority is inherent in the mode of liability for ordering.[69] Given Nyrimasuhuko's position as Minister for Family and Women's Affairs[70] and her authority over the *Interahamwe* during the events at the prefectoral office,[71] any order issued by her in breach of the priniciples of international criminal law necessarily entailed an abuse of her position of authority and influence.

24. Based on the foregoing, I would conclude that the Trial Chamber erred by impermissibly double-counting an element of the crime as an aggravating factor when it determined Nyiramasukuo's sentence.

2. Consideration of Argument in Gravity of Offences

25. In assessing gravity of the offences in relation to Ntahobali's sentence, the Trial Chamber considered that the crimes included, *inter alia*, "the rapes and killings of Tutsis at the Hotel Ihuliro roadblock".[72] Ntahobali submits that the Trial Chamber erred in taking into account "rapes" perpetrated at this roadblock because he was found guilty of only perpetrating one rape at this location.[73] Considering that Ntahobali only raised this contention in his appeal brief and not in his notice of appeal, the Majority dismissed his contention because it impermissibly expanded the scope of his appeal and determined that the interests of justice do not require consideration of this argument.[74] I respectfully disagree with the Majority's position and believe that it is in the interests of justice to address Ntahobali's submission. For the reasons set out below, I consider that the Trial Chamber erred in its assessment of gravity of offences and that Ntahobali should not be prejudiced in this regard.

26. I observe that the language in the gravity portion of the "Sentencing" section of the Trial Judgement gives the impression that Ntahobali was found responsible for the rapes of multiple Tutsis at the Hotel Ihuliro roadblock.[75] However, the Trial Chamber's detailed legal findings reflect

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[67] *See e.g.*, *Nzabonimana* Appeal Judgement, para. 464 and references cited therein.
[68] *See e.g.*, *Setako* Appeal Judgement, para. 240 and references cited therein.
[69] *See Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, Partly Dissenting Opinion of Judge Liu Daqun, 12 November 2009, para. 30.
[70] Trial Judgement, para. 6207.
[71] Trial Judgement, paras. 5884-5886, 6088.
[72] Trial Judgement, para. 6216.
[73] Ntahobali Appeal Brief, para. 986, *referring to* Trial Judgement, paras. 6077-6082, 6216.
[74] Appeal Judgement, paras. 3379-3381.
[75] Trial Judgement, para. 6216 ("The Chamber has found Ntahobali guilty of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, with respect

that Ntahobali was found responsible for having committed the rape of a single woman at this roadblock.[76] Moreover, while it determined that other rapes were committed against members of the Tutsi population when Ntahobali manned the roadblock, it found that the evidence was insufficient to establish that Ntahobali could be held responsible as a superior for the rapes that occurred near this roadblock.[77] Consequently, the Trial Chamber stated that it would not take into account this "alleged responsibility [...] in sentencing."[78] Accordingly, I would find that the Trial Chamber erred to the extent that it considered that Ntahobali was held responsible for more than one rape at the Hotel Ihuliro roadblock and took it into consideration when determining the gravity of the offences.

27. Given that the Trial Chamber erred in determining the gravity of the offences and that this may impact Ntahobali's sentence, I am of the view that he should not bear the burden of this error on the Trial Chamber's part. Thus, contrary to the Majority's findings, I believe his argument should have been considered in the interest of justice and not dismissed on the basis of a technicality.

28. Given my dissent regarding gravity of offences as well as to Ntahobali's liability for ordering killings and superior responsibility at the Butare Prefecture Office, I am of the view that his sentence should be further reduced.

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

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

Judge Liu Daqun

[Seal of the Tribunal]

to his involvement in various crimes. These crimes include the rapes [...] of Tutsis at the Hotel Ihuliro roadblock").
[76] *See* Trial Judgement, paras. 6077-6080.
[77] *See* Trial Judgement, paras. 6081, 6082.
[78] *See* Trial Judgement, para. 6082.

XVIII. DISSENTING OPINION AND DECLARATION OF JUDGE KHAN

A. Dissenting Opinion: Ntahobali's Responsibility at the Butare Prefecture Office

1. In this Judgement, the Majority finds that the Trial Chamber did not convict Ntahobali for ordering the killings committed during the Night of Three Attacks and the First Half of June Attacks.[1] The Majority concludes that, although the evidence of Prosecution Witnesses TK, QBQ, RE, SS, SU, FAP, and TA appears to reflect that Ntahobali participated in abductions and killings, issued orders, and held a position of authority over the assailants during these events, the Trial Chamber's discussion of this evidence does not demonstrate that it relied on this evidence to find Ntahobali responsible for ordering killings of Tutsis who sought refuge at the prefectoral office.[2] The Majority therefore concludes that Ntahobali was not convicted for the killings perpetrated during these attacks in the absence of: (i) relevant factual or legal findings underlying Ntahobali's responsibility for ordering such killings; or (ii) any clear indication that the Trial Chamber intended to convict him on this basis.[3] While I see merit to the Majority's conclusion, for the reasons set forth below, I respectfully disagree.

1. The Trial Chamber Convicted Ntahobali for Ordering Killings in Relation to These Attacks

2. At the outset, I fully endorse the Majority's position that, on their face, the Trial Chamber's conclusions in the "Factual Findings" and "Legal Findings" sections of the Trial Judgement about the Night of Three Attacks and the First Half of June Attacks do not: (i) refer to an express order to kill given by Ntahobali or a particular instruction that had a direct and substantial effect on the relevant killings; or (ii) specify the category of assailants to whom Ntahobali gave an order.[4] However, for the reasons set forth below, I find that these omissions are the result of the Trial Chamber's failure in its obligation to provide a reasoned opinion in accordance with Article 22(2) of the Statute and Rule 88(C) of the Rules. The omissions do not, in my view, reflect that the Trial Chamber did not convict him on the basis of his participation in the abduction and killing of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks.

3. As noted by the Majority, in the "Factual Findings" section of the Trial Judgement, the Trial Chamber stated as follows concerning Ntahobali's involvement in crimes which occurred at the Butare Prefecture Office during the Night of Three Attacks:

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[1] *See supra*, Appeal Judgement, para. 1545.
[2] *See supra*, Appeal Judgement, para. 1544.
[3] *See supra*, Appeal Judgement, para. 1545.
[4] *See supra*, Appeal Judgement, para. 1543.

> the Chamber finds beyond a reasonable doubt that Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] three times abducting Tutsi refugees on each occasion on this night.[5]
>
> [...]
>
> the Chamber is convinced beyond a reasonable doubt that Ntahobali and *Interahamwe* attacked many different women and children at the [Butare Prefecture Office], assaulted them and forced them aboard the pickup. It further finds that Nyiramasuhuko gave orders to the *Interahamwe* to commit these crimes. The women and children were taken away from the [Butare Prefecture Office] and killed elsewhere.[6]
>
> [...]
>
> Therefore, based upon the evidence of Witnesses TK, QBQ, RE, SS, SU and FAP, including the specific evidence as to the abduction of Mbasha's wife and children, the assault of a woman named Trifina and the assault of an unnamed woman and her children, the Chamber finds it established beyond a reasonable doubt that at the end of May or beginning of June 1994, Nyiramasuhuko, Ntahobali and about 10 *Interahamwe* came to the [Butare Prefecture Office] aboard a camouflaged pickup. Nyiramasuhuko ordered the *Interahamwe* to force Tutsi refugees onto the pickup. The pickup left the [Butare Prefecture Office], abducting Tutsi refugees in the process, some of whom were forced to undress.[7]

4. In the same section, the Trial Chamber found, in relevant respects, the following regarding Ntahobali's involvement in crimes which occurred at the prefectoral office during the First Half of June Attacks:[8]

> the Chamber finds it established beyond a reasonable doubt, based on the testimony of Witnesses TA, QBP and TK that, in addition to those attacks described above, Ntahobali, injured soldiers and *Interahamwe* came to the [Butare Prefecture Office] in June 1994 to rape women and abduct refugees.[9]

As noted by the Majority, the Trial Chamber recalled these conclusions when summarising its factual findings related to Nyiramasuhuko's and Ntahobali's involvement in crimes committed at the prefectoral office during the Night of Three Attacks and the First Half of June Attacks.[10] Furthermore, it is worth noting that when concluding in the "Factual Findings" section of the Trial Judgement that "hundreds of Tutsi refugees were abducted from the [prefectoral office] and killed", the Trial Chamber relied, in part, on Ntahobali's participation in the Night of Three Attacks and the First Half of June Attacks.[11]

5. It is my view that the Trial Chamber's extensive and repeated conclusions concerning Ntahobali's participation in the abductions and killing of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks in the "Factual Findings" section of the Trial Judgement support the conclusion that the Trial Chamber intended to convict Ntahobali based on his

[5] Trial Judgement, para. 2715.
[6] Trial Judgement, para. 2736.
[7] Trial Judgement, para. 2738.
[8] *See* Trial Judgement, Section 3.6.19.4.9.
[9] Trial Judgement, para. 2773.
[10] *See* Trial Judgement, para. 2781(iii)-(v).
[11] *See* Trial Judgement, para. 2779.

involvement in these attacks. That the Trial Chamber did convict him for his role in these attacks is, in my view, evident from the fact that, in the "Legal Findings" section, the Trial Chamber again recalled its findings of Ntahobali's participation in the Night of Three Attacks[12] and the First Half of June Attacks[13] before ultimately concluding that Ntahobali was responsible for ordering the killing of "Tutsis taking refuge at the Butare *préfecture* office".[14] Furthermore, in the "Sentencing" section of the Trial Judgement, the Trial Chamber noted, with respect to the gravity of the crimes, the "seriousness and atrocity of crimes repetitively perpetrated at the [Butare Prefecture Office], where hundreds of Tutsis were abducted, raped and killed."[15]

6. Consequently, a holistic reading of the Trial Judgement leads to the conclusion that, when convicting Ntahobali of genocide, crimes against humanity, and a serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office",[16] the Trial Chamber entered these convictions on the basis of its findings that Ntahobali was involved in the abduction and killings of Tutsis during the Night of Three Attacks and the First Half of June Attacks. For these reasons, I respectfully disagree with the Majority's interpretation of the Trial Judgement that Ntahobali was only convicted for ordering killings during the Mid-May Attack.[17]

2. The Absence of a Reasoned Opinion Does Not Invalidate the Verdict

7. As noted, above, I find that the Trial Chamber erred in law by failing to provide a reasoned opinion in support of Ntahobali's conviction for ordering killings in relation to the Night of Three Attacks and the First Half of June Attacks in accordance with Article 22(2) of the Statute and Rule 88(C) of the Rules.[18] In this respect, the Trial Chamber failed to set out in a clear and articulate manner the factual and legal findings on the basis of which it concluded that Ntahobali was responsible for ordering killings in relation to these attacks. Instead, Ntahobali has had to interpret imprecise legal and scattered factual findings as well as the evidence supporting them in order to decipher the basis of his conviction for ordering these killings.

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[12] *See* Trial Judgement, para. 5873 ("Around the end of May to the beginning of June 1994, Ntahobali, Nyiramasuhuko and *Interahamwe* came to the [Butare Prefecture Office] on board a camouflaged pickup on three occasions in one night. They abducted Tutsi refugees each time, some of whom were forced to undress, and took them to other sites in Butare *préfecture* to be killed.").
[13] *See* Trial Judgement, para. 5874 ("In the first half of June 1994, [...] Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to rape women and abduct refugees.").
[14] Trial Judgement, paras. 5971, 6053, 6100, 6168. *See also ibid.*, para. 5876 (concluding, after reviewing all the crimes during the various attacks at the Butare Prefecture Office, "Ntahobali responsible for ordering killings" and finding him responsible pursuant to Article 6(1) of the Statute).
[15] Trial Judgement, para. 6217.
[16] Trial Judgement, paras. 5971, 6053, 6100, 6168.
[17] *See supra*, Appeal Judgement, paras. 1545, 1568.
[18] *See supra*, Dissenting Opinion and Declaration of Judge Khan, para. 2.

8. I recall that a reasoned opinion in the trial judgement is essential to allow for a meaningful exercise of the right of appeal by the parties and to enable the Appeals Chamber to understand and review the trial chamber's findings.[19] In this regard, despite the Trial Chamber's failure to provide a reasoned opinion, I do not think that Ntahobali has been denied the opportunity to fully exercise his right to appeal this aspect of his convictions. I note, in particular, that the Appeals Chamber requested further briefing from the Prosecution and a response from Ntahobali as to what evidence cited in the Trial Judgement and findings of the Trial Chamber would support a conviction for ordering the killings of Tutsis who had sought refuge at the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.[20]

9. Having found that Ntahobali's right to appeal has not been infringed, I will proceed to examine the Trial Chamber's findings in order to define the scope of Ntahobali's liability for ordering killings before considering whether the findings and the evidence the Trial Chamber relied upon as well as the evidence identified by the parties could sustain its conclusions that Ntahobali was responsible for ordering the killings in relation to the Night of Three Attacks and the First Half of June Attacks.

3. The Scope of Ntahobali's Liability in Relation to These Attacks

10. The imprecision in the Trial Judgement has fuelled considerable confusion as to the scope of Ntahobali's liability for ordering the killings of Tutsi refugees during the Night of Three Attacks and the First Half of June Attacks. For example, the Prosecution's arguments suggest that Ntahobali's liability is based on the conduct of soldiers and *Interahamwe* for killings committed at the Butare Prefecture Office and elsewhere.[21] Ntahobali's argues that he could not be convicted for the conduct of soldiers[22] and submits that the Trial Judgement is unclear as to whether he was convicted for killings that occurred at the prefectoral office or only for the killings of Tutsis removed from it during the Night of Three Attacks and the First Half of June Attacks.[23]

11. I recall the Appeals Chamber's previous observation that the Trial Chamber found that, although soldiers played a role in events at the Butare Prefecture Office, "no evidence has been led to establish any relationship between the soldiers and [...] Ntahobali".[24] Even though this finding was made in the context of assessing Ntahobali's superior responsibility, the Appeals Chamber has

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[19] *See Bizimungu* Appeal Judgement, para. 18; *Hadžihasanović and Kubura* Appeal Judgement, para. 13. *See also Nchamihigo* Appeal Judgement, para. 165; *Karera* Appeal Judgement, para. 20.
[20] *See* 25 March 2015 Order, p. 2.
[21] *See* Prosecution Supplementary Submissions, paras. 1, 2, 6, 21, 31, 33, 34, 41, 52.
[22] *See* Ntahobali Appeal Brief, paras. 890, 953. *See also* Ntahobali Supplementary Submissions, paras. 5, 14, 33, 37.
[23] *See* Ntahobali Appeal Brief, para. 893. *See also* Ntahobali Supplementary Submissions, para. 3.
[24] *See supra*, Appeal Judgement, fn. 3557, *referring to* Trial Judgement, para. 5887.

found that "it suggests that no finding of any liability was imposed on Ntahobali for the conduct of soldiers" as it concerns attacks at the prefectoral office.[25] I fully endorse this conclusion and reject any suggestion that the Trial Chamber convicted Ntahobali in relation to killings committed by soldiers during these attacks.[26] Rather, the relevant findings demonstrate that Ntahobali was found responsible in relation to the killings committed by the *Interahamwe*.[27]

12. Unquestionably, there is evidence of Ntahobali issuing orders at the Butare Prefecture Office in relation to killings committed at the prefectoral office during these attacks.[28] Furthermore, the Trial Chamber generally found that Ntahobali was responsible for "ordering the killing of Tutsis taking refuge at the Butare *préfecture* office".[29] However, the Trial Chamber's most detailed findings in the "Legal Findings" section of the Trial Judgment necessarily limit Ntahobali's responsibility to ordering the killings of Tutsi refugees who were abducted and taken to other locations in Butare Prefecture to be killed.[30] That the Trial Chamber intended to limit Ntahobali's responsibility for killings in this respect is further reflected by the fact that, when considering the extent of the killings in relation to the attacks perpetrated by Nyiramasuhuko and Ntahobali, the Trial Chamber limited its conclusion specifically to the number of Tutsi refugees who *were abducted and killed*.[31]

13. In light of the above, it is clear to me that Ntahobali was found to have ordered killings of Tutsis abducted from the prefectoral office during the Night of Three Attacks and the First Half of June Attacks, which were perpetrated by *Interahamwe* who participated in these attacks with him.

4. The Record Sustains Ntahobali's Convictions for Ordering Killings During These Attacks

14. I note that the Prosecution points to findings and evidence credited by the Trial Chamber that it contends support the elements establishing Ntahobali's ordering responsibility in relation to

[25] *See supra*, Appeal Judgement, fn. 3557.
[26] *See* Prosecution Supplementary Submissions, para. 6.
[27] *See* Trial Judgement, paras. 2682, 2715, 2727, 2736, 2738, 2781(iii), 5873, 5876.
[28] *See, e.g.*, Trial Judgement, paras. 2184, 2218, 2681, 2735, 2736, 2771, *referring to, inter alia,* Witness TA, T. 29 October 2001 pp. 7-9; Witness TK, T. 20 May 2002 pp. 75, 88, 89; Witness TK, T.22 May 2002 p. 109.
[29] Trial Judgement, paras. 5971, 6053, 6100, 6168.
[30] With respect to the Night of Three Attacks, the Trial Chamber concluded that Ntahobali "*abducted* Tutsi refugees" and "took them to other sites in Butare *préfecture* to be killed". *See* Trial Judgement, para. 5873 (emphasis added). It similarly found with respect to the First Half of June Attacks that "Ntahobali, injured soldiers, and *Interahamwe* came to the [Butare Prefecture Office] to [...] *abduct refugees*". *See ibid.*, para. 5874 (emphasis added). Furthermore, the Trial Chamber's findings reflect that those abducted during the First Half of June Attacks were killed. *See ibid.*, para. 2779. *Cf. ibid.*, para. 5867 ("Between mid-May and mid-June 1994, [...] Ntahobali [...] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; *and were killed in various locations throughout Butare [Prefecture].*") (emphasis added).
[31] *See* Trial Judgement, para. 2779.

the Night of Three Attacks[32] and the First Half of June Attacks.[33] Ntahobali's argues that no reasonable trier of fact could rely on the sole order he issued during the Mid-May Attack – the order to stop loading the truck – to find that he ordered all the killings during the subsequent attacks.[34] He further submits that neither the evidence nor the factual and legal findings concerning the Night of Three Attacks and the First Half of June Attacks supports the conclusion that he ordered killings during the Night of Three Attacks[35] or the First Half of June Attacks.[36]

15. I recall that a person in a position of authority may incur responsibility under Article 6(1) of the Statute for ordering another person to commit an offence if the order has a direct and substantial effect on the commission of the illegal act.[37] Responsibility is also incurred when an individual in a position of authority orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[38]

16. At the outset, I disagree with Ntahobali's contention that the finding of his liability for ordering killings during the Night of Three Attacks and First Half of June Attacks in the Trial Judgement is based solely on the instruction he gave to *Interahamwe* to stop loading the truck during the Mid-May Attack. The Trial Chamber considered the various attacks committed at the Butare Prefecture Office collectively, evidence of Ntahobali's participation therein, as well as the similarity among them to reach its conclusions as to his criminal liability.[39] I note the extensive evidence cited by the Trial Chamber[40] and its findings[41] describing the violent nature of the attacks at the prefectoral office on the Night of Three Attacks as well as the roles that Ntahobali, Nyiramasuhuko, and *Interahamwe* played in abducting Tutsi refugees, as well as their killings. The evidence and findings indicate a regular and systematic pattern of attacks aimed at eliminating Tutsis refugees at the prefectoral office. I therefore find Ntahobali's contention in this respect unpersuasive.

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[32] Prosecution Supplementary Submissions, paras. 21, 23, 24, 26, 28-33, *referring to* Trial Judgement, paras. 2212, 2231, 2278, 2662, 2668, 2681, 2705, 2744, 2749, 2779, 2781(iii), (iv), 5873, 5884.
[33] Prosecution Supplementary Submissions, paras. 37-41, *referring to* Trial Judgement, paras. 2771, 5874.
[34] Ntahobali Appeal Brief, para. 951; Ntahobali Supplementary Submissions, para. 45. *Cf.* Ntahobali Supplementary Submissions, para. 36.
[35] Ntahobali Supplementary Submissions, paras. 11, 16, 20, 25, 26, 31, 33, 35, 36, 39, 45, *referring to* Trial Judgement, paras. 2744, 2773, 2779, 2781(iv), 5867, 5870, 5872-5875, 5884.
[36] *See* Ntahobali Supplemental Submissions, paras. 43-46, *referring to* Trial Judgement, para. 2771. *See also ibid.*, paras. 30-35, *referring to* Trial Judgement, para. 2749.
[37] *Ndindiliyimana et al.* Appeal Judgement, paras. 291, 365; *Hategekimana* Appeal Judgement, para. 67; *Renzaho* Appeal Judgement, para. 315; *Kamuhanda* Appeal Judgement, paras. 75, 76. *See also Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.
[38] *See Blaškić* Appeal Judgement, para. 42. *See also Galić* Appeal Judgement, para. 157; *Kordić and Čerkez* Appeal Judgement, para. 30.
[39] *See, e.g.*, Trial Judgement, para. 5867 ("Between mid-May and mid-June 1994, [...] Ntahobali [...] went to the [Butare Prefecture Office] to abduct hundreds of Tutsis; the Tutsi refugees were physically assaulted and raped; and were killed in various locations throughout Butare *préfecture*."). *See also supra*, Appeal Judgement, paras. 1901, 1902.
[40] *See, e.g.*, Trial Judgement, paras. 2703, 2704, 2706-2715, 2731-2736.
[41] *See, e.g.*, Trial Judgement, paras. 2715, 2736, 2738, 2749.

17. With respect to Ntahobali's ordering responsibility in relation to the Night of Three Attacks, the Appeals Chamber has accepted Ntahobali's submission that Witness SJ's evidence cannot be relied upon in relation to the Night of Three Attacks.[42] I extend this conclusion to my own analysis and will not consider the Prosecution's arguments that rely on this witness's evidence in establishing Ntahobali's responsibility for ordering the killings of Tutsis abducted from the prefectoral office.[43] Nonetheless, the Trial Chamber credited Witness TK's evidence concerning the Night of Three Attacks and, in particular, her testimony as to Ntahobali's conduct and position of authority *vis-à-vis* the *Interahamwe*. The Trial Chamber referred to Witness TK's evidence that *Interahamwe* surrounded Ntahobali and referred to him as "*Shalom, chef.*"[44] The Trial Chamber similarly pointed to Witness TK's testimony that upon arriving at the prefectoral office during the Night of Three Attacks, Ntahobali "and some of the *Interahamwe* exclaimed that nobody should be spared or treated leniently", that Ntahobali "told the *Interahamwe* to do their work seriously", that "*Interahamwe* attacked the group of refugees and chose people to be taken away to be killed", and that the "truck left behind certain *Interahamwe* to select those who were to be loaded on the next trip."[45] Similarly, the Trial Chamber credited evidence that Tutsi refugees who were abducted from the prefectoral office during, *inter alia*, the Night of Three Attacks were killed.[46]

18. Ntahobali does not demonstrate that it was unreasonable for the Trial Chamber to rely on these aspects of Witness TK's evidence or that it mischaracterised the witness's evidence.[47] Witness TK's evidence demonstrates Ntahobali's authority over the *Interahamwe* present at the prefectoral office and reflects that they followed his instructions.[48] Ntahobali also fails to demonstrate that a reasonable trier of fact could not have concluded that refugees abducted from the prefectoral office during the Night of Three Attacks and other attacks were killed.[49]

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[42] *See supra*, Appeal Judgement, Sections V.I.2(b)(iii)a.ii, V.I.2(d)(ii)a.
[43] *See* Prosecution Supplementary Submissions, paras. 24, 26.
[44] Trial Judgement, para. 2668, *referring to* Witness TK, T. 23 May 2002 p. 93.
[45] Trial Judgement, para. 2681, *referring to* Witness TK, T. 20 May 2002 pp. 75, 88, 89. Ntahobali's assertion that Witness TK's testimony about the alleged instructions issued by Ntahobali cannot reasonably be interpreted as instructions to kill and that the evidence fails to support the conclusion that *Interahamwe* attacked refugees at the prefectoral office based on his orders reflects mere disagreement and does not demonstrate any error on the part of the Trial Chamber. *See* Ntahobali Supplementary Submissions, para. 31.
[46] *See* Trial Judgement, paras. 2739-2749.
[47] The Appeals Chamber has previously considered and rejected contentions that the Trial Chamber failed to apply sufficient caution when assessing Witness TK's evidence. *See supra*, Appeal Judgement, Section III.J.3. It has also found that the Trial Chamber acted reasonably in relying on Witness TK's evidence, notwithstanding its disbelief that Witnesses TK and QJ did not discuss the events at issue in this proceeding or their plans to testify before the Tribunal. *See supra*, Appeal Judgement, Section VIII.E.1(a). Similarly, the Appeals Chamber has rejected contentions that Witness TK's testimony cannot be believed due to variances between her account of the Night of Three Attacks and that of other witnesses who were in proximity to her that evening. *See supra*, Appeal Judgement, Section IV.F.2(e)(iii). I find no merit to any of Ntahobali's additional challenges to the credibility and reliability of Witness TK's evidence concerning the Night of Three Attacks. *See, e.g.*, Ntahobali Supplementary Submissions, paras. 25, 26.
[48] I also find no merit to Ntahobali's contention that the record fails to demonstrate that he possessed the requisite authority over the perpetrators. *See* Ntahobali Supplementary Submissions, paras. 16, 20.
[49] *See supra*, Appeal Judgement, Section V.I.2(d)(vi).

19. Furthermore, I am not persuaded by Ntahobali's contention that no evidence could support the conclusion that he ordered killings, in the absence of clear findings and evidence establishing the exact perpetrators of the killings.[50] Based on the evidence relied upon by the Trial Chamber, its general findings that Ntahobali ordered killings and that refugees abducted by Ntahobali and *Interahamwe* from the prefectoral office during, *inter alia*, the Night of Three Attacks were killed, it is clear that the Trial Chamber concluded as the only reasonable inference that some of the *Interahamwe* who participated in the attacks at the prefectoral office subsequently killed the refugees elsewhere on Ntahobali's orders.[51] In my view, it was well within the discretion of the Trial Chamber to make such an inference, notwithstanding its findings that Nyiramasuhuko also ordered killings of Tutsis who were abducted from the prefectoral office during this attack. Given the entire record before the Trial Chamber, including the finding affirmed by the Appeals Chamber, Judge Liu dissenting, that Ntahobali is responsible for ordering killings of Tutsis abducted during the Mid-May Attack,[52] I find that a reasonable trier of fact could have convicted Ntahobali for ordering killings of Tutsi refugees who were abducted and killed during the Night of Three Attacks.

20. Regarding the First Half of June Attacks, the Trial Chamber accepted Witness TK's evidence that Ntahobali came to the Butare Prefecture Office on a number of evenings accompanied by *Interahamwe* "or" disabled soldiers, that he "committed crimes on each evening he came to the [Butare Prefecture Office]" and that, on some occasions, Ntahobali "came to determine whether there were any men left, who were then taken away to be killed".[53] The Trial Chamber also noted that Witness TK testified that Ntahobali "would say to the *Interahamwe*, '[b]e firm in your actions,' when he meant, 'kill all of them.'"[54] The Trial Chamber similarly recalled Witness TA's evidence that "a group of eight *Interahamwe*, including Shalom arrived at the [Butare Prefecture Office] in the same vehicle and attacked the refugees with machetes, hammers, Rwandan clubs and sticks"[55] and that "[th]ey killed some, wounded others and threw the dead and wounded into their vehicle".[56]

21. The Appeals Chamber has previously dismissed Ntahobali's contentions as to the unreliability of the evidence of Witnesses TK and TA that would relate to killings during the First Half of June Attack.[57] I consider Ntahobali's additional submissions challenging this evidence as

[50] *See, e.g.*, Ntahobali Supplementary Submissions, paras. 33, 35.
[51] In this respect, Ntahobali's contention that the record fails to demonstrate that his words and actions had a direct and substantial effect on the perpetration of the killings is unpersuasive. *See* Ntahobali Supplementary Submissions, paras. 33, 35.
[52] *See supra*, Appeal Judgement, paras. 1902, 1905, 1906.
[53] Trial Judgement, para. 2771.
[54] Trial Judgement, para. 2771.
[55] Trial Judgement, para. 2770. *See also ibid.*, para. 2184.
[56] Trial Judgement, para. 2184.
[57] *See supra*, Appeal Judgement, Section V.I.2(e)(ii).

unpersuasive.[58] Given the Trial Chamber's factual findings as to Ntahobali's conduct during other attacks at the prefectoral office starting in mid-May 1994 and its conclusions that Tutsis who were abducted from the prefectoral office were killed – findings that have been sustained on appeal[59] – I am also satisfied that it was within the discretion of the Trial Chamber to infer as the only reasonable inference that Ntahobali ordered *Interahamwe* to kill Tutsis who were abducted from the prefectoral office during the First Half of June Attacks.[60]

22. For the foregoing reasons, I conclude that the findings of the Trial Chamber, the evidence it relied upon, and the evidence identified by the parties sustain the conclusion that Ntahobali is responsible for ordering the killings of Tutsi refugees abducted from the Butare Prefecture Office during the Night of Three Attacks and the First Half of June Attacks.

5. The Record Sustains Ntahobali's Superior Responsibility for Killings During These Attacks

23. With regards to his responsibility as a superior, as stated in this Judgement, the Trial Chamber held Ntahobali responsible as a superior only of those crimes that he ordered and for which he was convicted under Article 6(1) of the Statute.[61] I agree with this conclusion but, in light of the above, would extend it to include the killings of abducted refugees committed by *Interahamwe* on the basis of Ntahobali's orders during the Night of Three Attacks and the First Half of June Attacks.[62]

6. Number of Refugees Abducted and Killed

24. The Appeals Chamber in this Judgement has found the record insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks of which Ntahobali was convicted by the Trial Chamber.[63] Notwithstanding my view that Ntahobali was convicted for ordering the killings of Tutsi refugees abducted during the Night of Three Attacks and the First Half of June Attacks, I continue to agree that the record remains insufficient to affirm that hundreds of Tutsi refugees were abducted and killed during the attacks in which Ntahobali participated.[64]

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[58] In particular, Ntahobali's contention that that Witness TK's uncorroborated evidence cannot be relied upon and that her testimony that, during these attacks, he instructed *Interahamwe* to "be firm in [their] actions" is taken out of context and cannot be understood as an order to kill reflects mere disagreement without demonstrating error. *See* Ntahobali Supplementary Submissions, para. 43, *referring to* Trial Judgement, para. 2771, Witness TK, T. 22 May 2002 p. 109.
[59] *See generally supra*, Appeal Judgement, Section V.I.2.
[60] In this respect, I find unpersuasive Ntahobali's contentions that the record is insufficient to demonstrate that any one who killed abducted Tutsis from the prefectoral office was acting on Ntahobali's instructions or that his instructions had a direct and substantial effect on the perpetration of the killings. *See* Ntahobali Supplementary Submissions, paras. 44, 46. *See also ibid.*, paras. 30-35.
[61] *See supra*, Appeal Judgement, paras. 1927, 1928.
[62] The analysis and findings in paragraphs 1929-1943 of the Appeal Judgement apply with equal force to these events.
[63] *See supra*, Appeal Judgement, paras. 1884-1887.
[64] With respect to the Night of Three Attacks, the evidence of Witnesses TK, SU, SS, RE, FAP, QJ, and QBQ found credible by the Trial Chamber reflects that the purpose of the attacks that night was to target the refugees at the

Nevertheless, I consider that the evidence reflects Ntahobali's involvement in a regular and systematic pattern of attacks aimed at eliminating Tutsi refugees at the prefectoral office and reasonably demonstrates that he is responsible for a large number of killings of Tutsis abducted from the prefectoral office.

B. Declaration: Joinder

25. I am in full agreement with the conclusion in this Judgement to dismiss the appeals of Nyiramasuhuko and Ntahobali concerning the issues of joinder and severance in the context of this case.[65] The relevant decisions of the Trial Chamber fall within, *inter alia*, the boundaries imposed by Rules 48 and 82 of the Rules as guided by Article 20 of the Statute.[66] Furthermore, I agree with the finding of the Appeals Chamber that "the argument that the excessive length of the proceedings in this case was an unavoidable and clearly foreseeable consequence of the joinder decision is not substantiated."[67] I also agree with the conclusion that "the mere contention that separate trials would have proceeded faster is insufficient to substantiate a claim that undue delay occurred as a result of the joinder."[68]

26. However, armed with the benefit of hindsight, it is my view that the legacy of joined cases in this Tribunal serves as a cautionary one. On the completion of this, the last and longest case of the Tribunal, now is the time to consider the theoretical considerations that have commonly supported the joinder of cases alongside the empirical reality of joined cases before this Tribunal. Ultimately, for the reasons explained below, it is my view that international criminal tribunals should take a more rigorous approach when examining whether joinder is appropriate, notwithstanding permissive rules that might otherwise allow it.

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prefectoral office. *See supra*, Appeal Judgement, Section V.I.2(d); Trial Judgement, paras. 2212, 2253, 2254, 2284, 2287, 2289, 2307. *See also* Trial Judgement, paras. 2705, 2706, 2708, 2709. The evidence further describes persons being loaded onto the vehicle accompanying Ntahobali and Nyiramasuhuko that night. *See* Trial Judgement, paras. 2253, 2278, 2285, 2287, 2289, 2303, 2307, 2308, 2331, 2332. *See also* Trial Judgement, paras. 2703, 2704, 2710-2712, 2714, 2732, 2736, 2738. Notably, Witness TK specified that on at least one occasion the vehicle was full when it left with the abducted refugees. *See* Trial Judgement, para. 2215. With respect to the First Half of June Attacks, Witness TK's evidence, as summarised and relied upon by the Trial Chamber, is of principal relevance as to the number of persons abducted by Ntahobali to be killed, but her account does not provide a specific or estimated number of victims. *See* Trial Judgement, para. 2218. Nonetheless, and as noted by the Trial Chamber, the evidence reflects that those who were abducted from the prefectoral office were, almost without exception, killed. *See* Trial Judgement, paras. 2703, 2740-2749.

[65] *See generally supra*, Appeal Judgement, Section III.B.

[66] *See, e.g.*, *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.17, Decision on Slobodan Praljak's Appeal of the Trial Chamber's Refusal to Decide Upon Evidence Tendered Pursuant to Rule 92 *bis*, 1 July 2010, para. 20; *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Tolimir et al.* Decision of 27 January 2006"), para. 8. I note that Article 20 of the Statute contains similar provisions to that of Article 21 of the Statute of the ICTY.

[67] *See supra*, Appeal Judgement, para. 365.

[68] *See supra*, Appeal Judgement, para. 365.

1. Examining the Theoretical Justifications for Joinder

27. In theory, joint proceedings require less court time and judicial resources,[69] minimise hardship to witnesses and ensure the presentation of evidence that might not be available in the future,[70] avoid undue delay for the defendants,[71] and minimise the possibility of inconsistent verdicts while enhancing procedural and substantive fairness among defendants through uniform proceedings.[72] Furthermore, it must be stressed that the purpose of joining cases is to serve the interests of justice and avoid undue delay.[73]

28. Examining first the judicial efficiency theory that joint trials will require less court time and judicial resources, the history of joint proceedings in this Tribunal reflects that they have required more trial days to hear witnesses than single accused trials.[74] On average, a witness's evidence in a multi-accused case will last for nearly two and a quarter trial days while a witness's testimony in a single accused case will last around one trial day.[75] Explained differently, trials with one defendant,

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[69] *See, e.g., Gotovina et al.* Appeal Decision on Joinder, para. 44 ("Two separate trials, whether conducted simultaneously or otherwise, are still likely to require more court hours in total than one joint trial and require more judicial time and resources."). *See also Ntabakuze* Appeal Decision on Severance, para. 25.

[70] *See, e.g., Gotovina et al.* Appeal Decision on Joinder, para. 47 ("The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to generally conclude [...] that there will be lesser hardship for some witnesses if only one trial is held and that this should weigh in favour of joinder."); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Request for Severance of Three Accused, 27 March 2006, para. 3 ("A joint trial relieves the hardship that would otherwise be imposed on witnesses, whose repeated attendance might not be secured.").

[71] *Tolimir et al.* Decision of 27 January 2006, para. 25 ("It is possible that if the Appellant were tried separately from the other Accused, further delay would result as it is not obvious that his separate trial could commence at the same time as this joint trial.").

[72] *See Ntabakuze* Appeal Decision on Severance, para. 25 ("Joint appeal proceedings not only enhance fairness as between the appellants by ensuring a uniform procedure against all but also minimize the possibility of inconsistencies in (a) treatment of such evidence, (b) common legal findings of the Trial Chamber, (c) sentencing, or (d) other matters that could arise from separate appeals."); *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36, Decision on Request to Appeal, 16 May 2000 ("Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts.").

[73] *Cf. Gotovina et al.* Appeal Decision on Joinder, para. 44; *Tolimir et al.* Decision of 27 January 2006, para. 8.

[74] In reaching this calculation, I was unable to determine the trial days for the following proceedings before the Tribunal: *Gacumbitsi*; *Kajelijeli*; *Kamuhanda*; *Kayishema*; *Mpambara*; *Ndahimana*; *Rutaganda*; *Seromba*. My calculations in this declaration are based on information provided in the trial and appeal judgements of the relevant cases before the Tribunal.

[75] Single accused trials: *Akayesu* (43 trial days; 41 witnesses); *Bagilishema* (60 trial days; 33 witnesses); *Bikindi* (61 trial days; 57 witnesses); *Gatete* (30 trial days; 49 witnesses); *Hategekimana* (43 trial days; 40 witnesses); *Kajelijeli* (91 trial days; 42 witnesses); *Kalimanzira* (37 trial days; 66 witnesses); *Kanyarukiga* (28 trial days; 34 witnesses); *Karera* (33 trial days; 43 witnesses); *Muhimana* (34 trial days; 52 witnesses); *Munyakazi* (19 trial days; 31 witnesses); *Musema* (39 trial days; 30 witnesses); *Muvunyi I* (80 trial days; 48 witnesses); *Muvunyi II* (9 trial days; 13 witnesses); *Nchamihigo* (57 trial days; 60 witnesses); *Ndindabahizi* (27 trial days; 34 witnesses); *Ngirabatware* (75 trial days; 62 witnesses); *Niyitegeka* (33 trial days; 24 witnesses); *Nizeyimana* (54 trial days; 84 witnesses); *Nsengimana* (42 trial days; 43 witnesses); *Ntawukulilyayo* (33 trial days; 35 witnesses); *Nzabonimana* (87 trial days; 60 witnesses); *Renzaho* (49 trial days; 53 witnesses); *Rukundo* (66 trial days; 50 witnesses); *Rutaganda* (108 trial days; 41 witnesses); *Rwamakuba* (78 trial days; 49 witnesses); *Semanza* (73 trial days; 51 witnesses); *Setako* (60 trial days; 55 witnesses); *Simba* (53 trial days; 36 witnesses); *Zigiranyirazo* (90 trial days; 66 witnesses). Multi-accused trials: *Bagosora et al.* (408 trial days; 242 witnesses); *Bizimungu et al.* (399 trial days; 171 witnesses); *Karemera et al.* (374 trial days; 153 witnesses); *Nahimana et al.* (238 trial days; 93 witnesses); *Ndindiliyimana et al.* (395 trial days; 216 witnesses); *Ntagerura et al.* (161 trial days; 123 witnesses); *Ntakirutimana and Ntakirutimana* (57 trial days; 43 witnesses); *Nyiramasuhuko et al.* (714 trial days; 189 witnesses).

on average, have used 53 trial days to hear around 46 witnesses. Proceedings with multiple defendants have, on average, required around 343 trial days to hear only around 154 witnesses. I must also note that not a single multi-accused case had more witnesses testify than trial days,[76] standing in marked contrast to several single-accused cases.[77]

29. In my view, this comparative inefficiency in hearing witnesses is not simply explained by the greater substantive complexity of multi-accused trials or the notion that witnesses will testify longer in multi-accused trials because they are necessarily giving evidence against more than one accused. Having presided over a multi-accused trial as well as participated in multi-appellant appeal proceedings, it is apparent to me that, in some circumstances, the examination of witnesses in multi-accused cases tends to be less focused and unnecessarily lengthy because the size of the cases can prevent the parties – the prosecution in particular – from fully grasping what evidence is and is not crucial to their case. Furthermore, it is my view that the inefficiency is also a result of the inherently greater procedural complexity that accompanies trials when more than two parties are litigating a case.

30. In addition, when considering judicial resources outside the court room, one must consider that proceedings with multiple defendants present weighty, practical and legal challenges that would not otherwise arise in a single accused case. Motions to sever may arise from pre-trial proceedings through appeal. Defence objections to evidence or motions to exclude evidence may arise not only in relation to prosecution evidence but in relation to inculpatory evidence presented by a co-accused. Health issues concerning one defendant or a single defendant's refusal to participate in proceedings involves extra litigation and inevitably delays proceedings for his co-defendants. The proceedings for co-defendants may also be delayed when: (i) disputes between one defendant and his counsel arise during the proceedings; (ii) there are disputes between one defendant's counsel and the administration that require judicial intervention; or (iii) counsel for one defendant needs to be replaced. While Rule 82 of the Rules requires that "each accused shall be accorded the same rights as if such accused were being tried separately"[78] and empowers a chamber to sever cases when "it is necessary to avoid a conflict of interests that might cause serious

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[76] *See Bagosora et al.* (408 trial days; 242 witnesses called); *Bizimungu et al.* (399 trial days; 171 witnesses called); *Karemera et al.* (374 trial days; 153 witnesses called); *Nahimana et al.* (238 trial days; 93 witnesses called); *Ndindiliyimana et al.* (395 trial days; 216 witnesses called); *Ntagerura et al.* (161 trial days; 123 witnesses called); *Ntakirutimana and Ntakirutimana* (57 trial days; 43 witnesses called); *Nyiramasuhuko et al.* (714 trial days; 189 witnesses called).

[77] *See, e.g., Gatete* (30 trial days; 49 witnesses called); *Kalimanzira* (37 trial days; 66 witnesses called); *Kanyarukiga* (28 trial days; 34 witnesses called); *Muhimana* (34 trial days; 52 witnesses called); *Munyakazi* (19 trial days; 31 witnesses called); *Muvunyi II* (9 trial days; 13 witnesses called); *Nchamihigo* (57 trial days; 60 witnesses called); *Ndindabahizi* (27 trial days; 34 witnesses called); *Nizeyimana* (54 trial days; 84 witnesses called); *Nsengimana* (42 trial days; 43 witnesses called); *Ntawukulilyayo* (33 trial days; 35 witnesses called); *Renzaho* (49 trial days; 53 witnesses called).

[78] Rule 82(A) of the Rules.

prejudice to an accused or to protect the interests of justice",[79] the issues identified above present perplexing practical and legal questions that require careful consideration by the judiciary. Resolving them can be a difficult and time consuming process.

31. I turn now to the theoretical consideration that joined proceedings will minimise the hardship to witnesses and/or ensure the presentation of evidence that might not be available in the future. There is no question that being a witness is a disruptive and often uncomfortable exercise. For victims of sexual and physical violence or persons who lost loved ones, testifying about such incidents can result in new trauma. Furthermore, there is no certainty that a witness will be able to testify in multiple proceedings. However, let us consider this theory in the context of the *Muvunyi*, *Hategekimana*, and *Nizeyimana* proceedings. In January 2000, a joint indictment was confirmed against these three military figures whose criminal liability was principally based on the crimes committed by *École des sous-officiers* ("ESO") and Ngoma Camp soldiers in and around Butare Town during the genocide. In December 2003, the *Muvunyi* case was severed from that of the *Hategekimana* and *Nizeyimana* cases as Hategekimana had only been arrested in February of that year and was unprepared for trial and because Nizeyimana remained at large.[80] In September 2007, the *Hategekimana* case was severed from the *Nizeyimana* case, as Nizeyimana remained a fugitive.[81] Nizeyimana was eventually arrested in October 2009.[82]

32. What can be seen from an examination of these three cases is that there was considerable overlap as it pertains the crime bases for which each defendant was pursued at trial.[83] What is also clear is that, in three different trials held between February 2005 and September 2011, the relevant

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[79] Rule 82(B) of the Rules.

[80] *See The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-51-I, Decision Regarding the Prosecutor's Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi, 11 December 2003, paras. 1, 7.

[81] *See The Prosecutor v. Ildéphonse Nizeyimana and Ildephonse Hategekimana*, Case No. ICTR-00-55-I, Decision on the Prosecutor's Application for Severance and Leave to Amend the Indictment of I[l]delphonse Hategekimana, 25 September 2007, paras. 1, 6, p. 11. In granting severance of the *Hategekimana* trial from the *Nizeyimana* case, the Trial Chamber also accepted the prosecution's submission that the "key allegations against Mr. Hategekimana are largely distinct from those made against Mr. Nizeyimana, so a joint trial is not likely to promote judicial economy." *See ibid.*, para. 6.

[82] *See The Prosecutor v. Ildéphonse Nizeyimana*, Case No. ICTR-00-55C-T, Judgement and Sentence, pronounced on 19 June 2012, filed on 22 June 2012 ("*Nizeyimana* Trial Judgement"), Annex A, para. 2.

[83] Muvunyi and Nizeyimana were both pursued on the basis of crimes committed by ESO soldiers at roadblocks throughout Butaré Town as well as for attacks at the Butare University and the Butare University Hospital. *See Nizeyimana* Trial Judgement, Sections II.5 (Butare University), II.7.3 (roadblocks), II.8 (Butare University Hospital); *Muvunyi* Trial Judgement of 12 September 2006, Sections II.5.3 (roadblocks), II.5.6 (Butare University Hospital), II.5.8 (Butare University). Muvunyi, Hategekimana, and Nizeyimana were all pursued with respect to the attacks on *Groupe Scolaire* and the Benebrika Convent in late April 1994. *See Nizeyimana* Trial Judgement, Section II.7.3 (Benebrika), II.10 (*Groupe Scolaire*); *The Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-00-55B-T, Judgement and Sentence, pronounced on 6 December 2010, filed on 14 February 2011 ("*Hategekimana* Trial Judgement"), Sections III.C.12 (*Groupe Scolaire*), III.C.14 (Benebrika); *Muvunyi* Trial Judgement of 12 September 2006, Sections II.5.7 and II.5.12.3 (Benebrika), II.5.10.3 (*Groupe Scolaire*). Hategekimana and Nizeyimana were both tried on the basis of alleged orders issued during a 7 April 1994 meeting at the ESO as well as the rapes about which Witness BUQ testified. *See Nizeyimana* Trial Judgement, Sections II.1 (rapes), II.2 (7 April 1994 meeting); *Hategekimana* Trial Judgement, Sections III.C.1 (7 April 1994 meeting), III.C.2 (rapes).

prosecution and defence teams were able to produce evidence on the same or related events in successive proceedings. Witnesses – including at least one who was a victim of sexual violence – testified in more than one proceeding. While I acknowledge that this "survey sample" is small, it is nonetheless suggestive that we must not blindly fear that hardship on witnesses will prevent them from testifying more than once. Indeed, this Tribunal, like other international criminal tribunals, is equipped with a witness and victims support section with a broad mandate and well trained personnel to mitigate the hardship faced by witnesses through their participation in trials. Likewise, fears that evidence will no longer be available in future proceedings should be examined in light of the fact that evidence of the same or largely similar events was presented in several successive trials before this Tribunal.[84]

33. Let us now examine the theoretical consideration that joined trials avoid undue delay. Based on my calculation from proceedings before this Tribunal, a single accused proceeding from opening statement to the issuance of a trial judgement will last on average 641 days,[85] whereas the length for a multiple accused trial is on average 2,026 days.[86] On average, the time between closing arguments to the issuance of trial judgements in single accused cases before the Tribunal is 196 days,[87] where

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[84] As an example, Ndayambaje, Kalimanzira, and Ntawakulilyayo were each prosecuted on the basis of the attacks at Kabuye Hill in April 1994. *See* Trial Judgement, Section III.3.6.5 (Kabuye Hill); *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Judgement and Sentence, pronounced on 3 August 2010, filed on 6 August 2010, Sections II.1.3.2 and II.1.3.4 (Kabuye Hill); *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement, 22 June 2009, Section III.2.4 (Kabuye Hill). Munyakazi, whose trial started in April 2009, was prosecuted on the basis of attacks in Nyamasheke Parish, Shangi Parish, and Mibilizi Parish, which also featured in the *Ntagerura et al.* trial, whose evidentiary phase was completed in first quarter of 2003. *See Munyakazi* Trial Judgement, Sections II.3.7 (Nyamasheke Parish), II.3.8 (Shangi Parish), II.3.9 (Mibilizi Parish); *Ntagerura et al.* Trial Judgement, Sections II.B.5.b (Shangi Parish), II.B.5.c (Mibilizi Parish), II.B.5.d (Nyamasheke Parish). In addition, Ndahimana, Kanyarugika, and Seromba were prosecuted on the basis of attacks at Kivumu Commune and Nyange Parish. *See The Prosecutor v. Grégoire Ndahimana*, Case No. ICTR-01-68-T, Judgement and Sentence, pronounced on 17 November 2011, signed on 30 December 2011, filed on 18 January 2012, Sections III.1(Kivumu Commune), III.5 and III.6 (Nyange Parish); *The Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-02-78-T, Judgement and Sentence, pronounced on 1 November 2010, filed on 9 November 2010, Sections III.2 (Kivumu Commune), III.5 and III.6 (Nyange Parish); *Seromba* Trial Judgement, Sections II.3 (Kivumu Commune), II.6 and II.7 (Nyange Parish). Beyond these anecdotal references, the general reliance on incarcerated witnesses – a practice ubiquitous to proceedings before the Tribunal – also tends to reduce the risk that witnesses will not be located or will be unavailable to testify in more than one proceeding.

[85] *See Akayesu* (632 days); *Bagilishema* (590 days); *Bikindi* (807 days); *Gacumbitsi* (326 days); *Gatete* (528 days): *Hategekimana* (709 days); *Kajelijeli* (994 days); *Kalimanzira* (414 days); *Kamuhanda* (647 days); *Kanyarukiga* (436 days); *Karera* (705 days); *Mpambara* (359 days); *Muhimana* (396 days); *Munyakazi* (440 days); *Musema* (368 days); *Muvunyi I* (568 days); *Muvunyi II* (240 days); *Nchamihigo* (780 days); *Ndahimana* (500 days); *Ndindibahizi* (319 days); *Ngirabatware* (1248 days); *Niyitegeka* (334 days); *Nizeyimana* (523 days); *Nsengimana* (912 days); *Ntawukulilyayo* (458 days); *Nzabonimana* (960 days); *Renzaho* (950 days); *Rukundo* (850 days); *Rutaganda* (994 days); *Rwamukuba* (469 days); *Semanza* (942 days); *Seromba* (821 days); *Setako* (554 days); *Simba* (471 days); *Zigiranyirazo* (1173 days).

[86] *Bagosora et al.* (2506 days) ; *Bizimungu et al.* (2905 days); *Karemera et al.* (2990 days); *Kayishema and Ruzindana* (775 days); *Nahimana et al.* (1139 days); *Ndindiliyimana et al.* (2462 days); *Ntagerura et al.* (1256 days); *Ntakirutimana and Ntakirutimana* (522 days); *Nyiramasuhuko et al.* (3685 days).

[87] *See, e.g., Akayesu* (161 days); *Bikindi* (191 days); *Gacumbitsi* (109 days); *Gatete* (117 days); *Hategekimana* (293 days); *Kajelijeli* (139 days); *Kalimanzira* (64 days); *Kamuhanda* (253 days); *Kanyarukiga* (170 days); *Karera* (379 days); *Mpambara* (132 days); *Muhimana* (99 days); *Munyakazi* (159 days); *Musema* (214 days); *Muvunyi I* (82 days); *Muvunyi II* (133 days); *Nchamihigo* (295 days); *Ndahimana* (119 days); *Ndindabahizi* (136 days); *Ngirabatware* (212 days); *Niyitegeka* (78 days); *Nizeyimana* (199 days); *Nsengimana* (340 days); *Ntawukulilyayo* (54 days); *Nzabonimana*

in multiple accused cases it is 479 days.[88] From notice of appeal to appeal judgement, the duration for a case involving a single convicted person is 556 days,[89] where it is 973 days when it involves multiple convicted persons.[90] The average length from the date of arrest to final judgement on appeal for a single accused proceeding before the Tribunal is 2395 days[91] (or around six and a half years), while the length of multiple accused proceedings is approximately 4825 days (or just over 13 years).[92]

34. These numbers do not necessarily reflect the occurrence of undue delay in joined proceedings. However, that an accused convicted at trial in a joined proceeding might expect to spend around six and a half years more in preventative detention before receiving a final verdict than an accused who proceeds at trial and appeal alone reflects a staggering difference.

35. I concede that the data reflecting that single accused proceedings generally advance faster than multiple accused proceedings does not eliminate the possibility of other logistical considerations that could delay the commencement of single accused cases.[93] However, I would nonetheless support that defendants be tried individually, particularly where the circumstances I discuss below that could lead to more efficient joint proceedings are not present,[94] given the relative efficiency of single accused proceedings when compared to multi-accused proceedings.

(249 days); *Renzaho* (547 days); *Rukundo* (388 days); *Rutaganda* (173 days); *Rwamakuba* (153 days); *Semanza* (331 days); *Seromba* (170 days); *Setako* (116 days); *Simba* (159 days); *Zigiranyirazo* (204 days).

[88] *See Bagosora et al.* (620 days); *Bizimungu et al.* (1225 days); *Karemera et al.* (162 days); *Kayishema and Ruzindana* (186 days); *Nahimana et al.* (209 days); *Ndindiliyimana et al.* (722 days); *Ntagerura et al.* (195 days); *Ntakirutimana and Ntakirutimana* (184 days); *Nyiramasuhuko et al.* (806 days).

[89] *See, e.g., Akayesu* (975 days); *Bagilishema* (360 days); *Bikindi* (443 days); *Gacumbitsi* (357 days); *Gatete* (526 days); *Hategekimana* (345 days); *Kajelijeli* (510 days); *Kalimanzira* (457 days); *Kamuhanda* (776 days); *Kanyarukiga* (517 days); *Karera* (386 days); *Mpambara* (358 days); *Muhimana* (481 days); *Munyakazi* (442 days); *Musema* (322 days); *Muvunyi I* (688 days); *Muvunyi II* (383 days); *Nchamihigo* (378 days); *Ndahimana* (669 days); *Ndindabahizi* (887 days); *Ngirabatware* (619 days); *Niyitegeka* (386 days); *Nizeyimana* (799 days); *Ntawukulilyayo* (465 days); *Nzabonimana* (823 days); *Renzaho* (547 days); *Rukundo* (555 days); *Rutaganda* (1238 days); *Semanza* (705 days); *Seromba* (419 days); *Setako* (549 days); *Simba* (685 days); *Zigiranyirazo* (306 days).

[90] *See Bagosora and Nsengiyumva* (1007 days); *Ntabakuze* (1155 days); *Karemera et al.* (939 days); *Kayishema and Ruzindana* (715 days); *Mugenzi and Mugiraneza* (442 days); *Nahimana et al.* (1389 days); *Ndindiliyimana et al.* (938 days); *Augustin Bizimungu* (1086 days); *Ntagerura et al.* (835 days); *Ntakirutimana and Ntakirutimana* (634 days); *Nyiramasuhuko et al.* (1566 days).

[91] So as not to skew the statistics when comparing single accused cases to multi-accused proceedings, I have excluded from this calculation single accused cases where guilty pleas were entered as well as cases where defendants were acquitted at trial and where such acquittals were not appealed.

[92] The length of multi-accused cases consists of the entire proceedings through appeal, even where one or multiple defendants was or were acquitted at trial and where such acquittals were not appealed.

[93] In this respect, where defendants who *could be* tried jointly are tried separately, the separate proceedings would require either: (i) more court space and additional judges to hear the separate proceedings; (ii) one bench to hear both cases and splitting the court time for both so that each may proceed at the same time; or (iii) one bench hear both proceedings consecutively, with one defendant waiting for his case to start after the close of the first defendant's case. Thus, the last scenario validates the concern that "further delay would result as it is not obvious that his separate trial could commence at the same time as this joint trial." *See Tolimir et al.* Decision of 27 January 2006, para. 25.

[94] *See infra*, Dissenting Opinion and Declaration of Judge Khan, para. 38.

36. Let us now consider the theoretical justification that joined trials minimise the possibility of inconsistent verdicts while enhancing procedural and substantive fairness among defendants through uniform proceedings. While the work of the Tribunal will contribute to the collective history of the Rwandan genocide, its purpose is not to create a cohesive historical narrative. The Tribunal, like all criminal courts, is tasked with determining the individual criminal liability of each defendant tried before it. "Inconsistent verdicts" might occur in any trial due to the rigorous application of the high standard of proof in criminal proceedings to the evidence of the acts and omissions of each individual defendant, even where they are alleged to bear criminal responsibility for the same or related events. Furthermore, the fairness of proceedings before the Tribunal is enshrined in Article 20 of the Statute and required by Article 19 of the Statute. It is my view that joining trials does not inherently provide further guarantees of such fairness for defendants even where evidence and the alleged crime base is overlapping.

2. Considering Joinder in the Future

37. Having compared the theoretical justifications for joinder with some empirical data, I must first concede that the calculations I have used above are an imperfect reflection of how trials and appeals proceeded before the Tribunal. I have drawn heavily from my personal experiences or used anecdotes to raise questions about broad theories. Furthermore, I also acknowledge that not all single accused cases have proceeded "efficiently" and not all joint proceedings were slow. In fact, the *Kayishema and Ruzindana* and *Ntakirutimana and Ntakirutimana* trials and appeals moved rapidly, even when compared to cases involving single defendants. The *Mugenzi and Mugiraneza* appeal, for example, was quick.[95] However, what can be seen from these cases is that: (i) the crime bases were limited; and (ii) the record in support of the criminal liability for each accused was, or was almost, entirely overlapping.

38. The purpose of this declaration is not to criticise the joinder practice of the Tribunal. The reality for this Tribunal is that the Rules allowing joinder are permissive[96] and cases have been joined accordingly. Nonetheless, I hope that this declaration serves as a starting point for international criminal tribunals to take a more nuanced and sceptical approach to the joinder of the cases before them. It is my suggestion that the judiciary of international criminal tribunals, when

[95] In this respect, I note that Mugenzi and Mugiraneza were prosecuted on the basis of several different actions and particular crimes in the *Bizimungu et al.* trial. However, their appeal was based on their convictions for the two same events, which were supported by the same evidentiary record. *See generally Mugenzi and Mugiraneza* Appeal Judgement.

[96] Rule 48 of the Rules provides that "persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried." Rule 2 of the Rules defines "transaction" as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan."

reviewing the prospective joinder of cases, review the relevant indictments, the prosecution disclosures – including witness statements – and the prosecution pre-trial submissions – such as its pre-trial brief – and ask the following questions: (i) is the crime base limited; (ii) are each of the prospective prosecution witnesses intended to give evidence that is central to establishing the criminal responsibility of *all or almost all of the accused*; and (iii) are the forms of liability for each accused such that the prosecution evidence against one accused is relevant to all accused.

39. If these questions are answered in the affirmative, the possibility of realising the theoretical underpinnings supporting joinder – judicial economy, minimising hardship to witnesses, and avoiding undue delay – is high. However, the theoretical justifications for joinder might not be realised even if some overlap exists where: (i) the crime base is large – *e.g.* an overlapping charge of conspiracy related to an entire conflict; and (ii) it is clear that the case against each accused will require the presentation of unique evidence from different witnesses due to the fact that there are distinct crime bases and/or particular acts and omissions that are unique to each accused.

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

Dated this fourteenth day of December 2015,
in Arusha,
Tanzania.

Judge Khalida Rachid Khan

[Seal of the Tribunal]

XIX. ANNEX A: PROCEDURAL HISTORY

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

A. Briefing

2. Trial Chamber II of the Tribunal pronounced the judgement in this case on 24 June 2011 and issued its written Trial Judgement in English on 14 July 2011. Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje, and the Prosecution appealed the Trial Judgement.

1. Notices of Appeal

3. On 22 July 2011, the Pre-Appeal Judge granted, in part, motions for extensions of time and ordered that the Prosecution file its notice of appeal no later than 1 September 2011 and that Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje file their respective notices of appeal no later than 17 October 2011.[1] Because of the inability of Nteziryayo and his counsel to work in English, the Pre-Appeal Judge, in the same decision, ordered that Nteziryayo file his notice of appeal no later than 90 days from service of the French translation of the Trial Judgement.[2]

4. The Prosecution filed its notice of appeal on 1 September 2011.[3] Nsabimana filed his notice of appeal on 10 October 2011.[4] Nyiramasuhuko,[5] Ntahobali,[6] Kanyabashi,[7] and Ndayambaje[8] filed their respective initial notices of appeal on 17 October 2011.

5. On 22 February 2012, the Appeals Chamber granted Nyiramasuhuko's and Ntahobali's motions to amend their respective notices of appeal.[9] Each filed their first amended notice of appeal on 24 February 2012.[10]

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[1] Decision on Motions for Extension of Time for the Filing of Appeal Submissions, signed on 22 July 2011, filed on 25 July 2011 ("22 July 2011 Appeal Decision"), paras. 13, 16.
[2] 22 July 2011 Appeal Decision, paras. 13, 16.
[3] Prosecutor's Notice of Appeal, 1 September 2011.
[4] Notice of Appeal, 10 October 2011 (originally filed in French, English translation filed on 25 January 2012).
[5] *Acte d'appel [de] Pauline Nyiramasuhuko*, 17 October 2011. Nyiramasuhuko filed a corrigendum to her notice of appeal on 19 October 2011. *See Corrigendum de l'acte d'appel de Pauline Nyiramasuhuko*, 19 October 2011.
[6] *Acte d'appel d'Arsène Shalom Ntahobali*, 17 October 2011.
[7] *Acte d'appel de Joseph Kanyabashi*, 17 October 2011 (confidential; public redacted version filed on 12 May 2014). Kanyabashi filed a corrected notice of appeal on 18 October 2011. *See* Notice of Appeal by Joseph Kanyabashi, 18 October 2011 (originally filed in French, English translation filed on 19 April 2012) (confidential).
[8] Notice of Appeal, 17 October 2011 (originally filed in French, English translation filed on 8 December 2011). Ndayambaje filed a corrigendum to his notice of appeal on 4 January 2012. *See* Corrigendum to Élie Ndayambaje's Notice of Appeal, 4 January 2012 (originally filed in French, English translation filed on 13 February 2012).
[9] Decision on Pauline Nyiramasuhuko's and Arsène Shalom Ntahobali's Motions to Amend Notices of Appeal, 22 February 2012, para. 12.

6. On 1 March 2012, subsequent to the appointment of an English speaking co-counsel to Nteziryayo's Defence, the Pre-Appeal Judge, *proprio motu*, reconsidered his 22 July 2011 Appeal Decision and ordered Nteziryayo to file his notice of appeal no later than 1 May 2012.[11] Nteziryayo filed his initial notice of appeal on 26 April 2012.[12]

7. On 23 October 2012, the Appeals Chamber granted Ntahobali's motion to amend his first amended notice of appeal.[13] Ntahobali filed his second amended notice of appeal on 29 October 2012.[14]

8. On 18 February 2013, the Appeals Chamber granted, in part, Nyiramasuhuko's motion to amend her first amended notice of appeal.[15] Nyiramasuhuko filed her second amended notice of appeal on 21 February 2013.[16]

9. On 5 April 2013, the Appeals Chamber allowed Kanyabashi and Ndayambaje to amend their respective notices of appeal.[17] Ndayambaje and Kanyabashi each filed a second amended notice of appeal on 8 April 2013.[18]

10. On 8 May 2013, the Appeals Chamber granted, in part, Nteziryayo's motion to amend his notice of appeal.[19] Nteziryayo filed his amended notice of appeal on 13 May 2013.[20] On 5 July 2013, the Appeals Chamber granted the Prosecution's request to summarily dismiss Nteziryayo's appeal as it concerned the delay between his arrest and initial appearance, finding that Nteziryayo had waived his right to raise this issue on appeal.[21]

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[10] Pauline Nyiramasuhuko's Amended Notice of Appeal, 24 February 2012 (originally filed in French, English translation filed on 25 June 2012); Amended Notice of Appeal of Arsène Shalom Ntahobali, 24 February 2012 (originally filed in French, English translation filed on 25 July 2012).
[11] Decision on the Filing of Alphonse Nteziryayo's Appeal Submissions, 1 March 2012 ("1 March 2012 Appeal Decision"), paras. 1, 6.
[12] Alphonse Nteziryayo's Notice of Appeal, 26 April 2012.
[13] Decision on Arsène Shalom Ntahobali's Motion to Amend his Amended Notice of Appeal, 23 October 2012, para. 13.
[14] Second Amended Notice of Appeal of Arsène Shalom Ntahobali, 29 October 2012 (originally filed in French, English translation filed on 24 January 2013).
[15] Decision on Pauline Nyiramasuhuko's Motion to Amend her Amended Notice of Appeal, 18 February 2013, paras. 27, 28.
[16] Pauline Nyiramasuhuko's Re-Amended Notice of Appeal, 21 February 2013 (originally filed in French, English translation filed on 25 April 2013).
[17] Decision on Joseph Kanyabashi's Motion to Amend his Notice of Appeal, 5 April 2013, para. 32; Decision on Élie Ndayambaje's Motion to Amend his Notice of Appeal, 5 April 2013, paras. 33, 34.
[18] Élie Ndayambaje's Amended Notice of Appeal, 8 April 2013 (originally filed in French, English translation filed on 7 June 2013); Amended Notice of Appeal by Joseph Kanyabashi, 8 April 2013 (originally filed in French, English translation filed on 24 May 2013) (confidential; French public redacted version filed on 12 May 2014).
[19] 8 May 2013 Appeal Decision, para. 74.
[20] Alphonse Nteziryayo's Amended Notice of Appeal, 13 May 2013.
[21] 5 July 2013 Appeal Decision, paras. 16, 18, 23. In the same decision, the Appeals Chamber also granted Nteziryayo's request to have the date of his arrest in Burkina Faso clarified and ordered the Registrar file written submissions in this respect. *See ibid.*, paras. 22, 23.

2. Appeal Briefs

11. On 22 July 2011, the Pre-Appeal Judge ordered that Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje file their respective appeal briefs no later than 60 days from the date of service of the French translation of the Trial Judgement.[22]

12. The Prosecution filed its appeal brief on 15 November 2011.[23]

13. On 13 December 2012, the Pre-Appeal Judge granted, in part, motions for extension of the word limits, and authorised: (i) Nyiramasuhuko and Ntahobali to file appeal briefs not exceeding 80,000 words; (ii) Kanyabashi to file an appeal brief not exceeding 40,000 words; and (iii) Ndayambaje to file an appeal brief not exceeding 50,000 words.[24]

14. The French translation of the Trial Judgement was filed on 1 February 2013.[25] On 8 April 2013, Nyiramasuhuko,[26] Ntahobali,[27] Nsabimana,[28] Nteziryayo,[29] Kanyabashi,[30] and Ndayambaje[31] filed their respective appeal briefs.[32] Ndayambaje filed a corrigendum to his appeal brief on 19 April 2013.[33]

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[22] 22 July 2011 Appeal Decision, paras. 11, 16. *See also* 1 March 2012 Appeal Decision, paras. 1, 6.
[23] Prosecutor's Appellant's Brief, 15 November 2011.
[24] Decision on Nyiramasuhuko's, Ntahobali's, Kanyabashi's, and Ndayambaje's Motions for Extensions of the Word Limit for their Appeal Briefs, 13 December 2012 ("13 December 2012 Appeal Decision"), para. 20.
[25] *Jugement portant condamnation*, 1 February 2013.
[26] Pauline Nyiramasuhuko's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 30 April 2014) (confidential). A public version of Nyiramasuhuko's appeal brief in French was filed on 7 June 2013. On 17 March 2014, the Appeals Chamber ordered Nyiramasuhuko to file an amended public redacted version that preserved the confidentiality of certain information contained therein as well as ordered the reclassification of Nyiramasuhuko's initial public redacted appeal brief as confidential. *See* Decision on Prosecution's Motion to Withdraw Public Filings and on Nyiramasuhuko's and Ntahobali's Counter Motions to Reclassify Confidential Materials, signed on 14 March 2014, filed on 17 March 2014, para. 29 (confidential) ("14 March 2014 Appeal Decision"). Nyiramasuhuko filed the amended public version of her appeal brief in French on 3 April 2014.
[27] Arsène Shalom Ntahobali's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 15 April 2014) (confidential). A public version of Ntahobali's appeal brief in French was filed on 24 May 2013. On 17 March 2014, the Appeals Chamber ordered Ntahobali to file a public redacted version that preserved the confidentiality of certain information contained therein as well as ordered the reclassification of Ntahobali's initial public redacted appeal brief as confidential. *See* 14 March 2014 Appeal Decision, para. 29. Ntahobali filed a second public version of his appeal brief in French on 24 March 2014.
[28] Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 26 September 2013). On 11 April 2013, Nsabimana filed a corrigendum to his appeal brief in order to include the word count of his appeal brief. *See Corrigendum du nombre de mots*, 11 April 2013.
[29] Confidential Appeal Brief on Behalf of Alphonse Nteziryayo, 8 April 2013 (confidential).
[30] Joseph Kanyabashi's Appellant's Brief, 8 April 2013 (originally publicly filed in French, English translation filed on 11 August 2014) (confidential; public redacted version filed in French on 8 May 2014). On 23 April 2014, the Appeals Chamber ordered Kanyabashi to file a public redacted version of his appeal brief that maintained the confidentiality of the content of filings classified as confidential as well as directed the Registry to permanently reclassify Kanyabashi's initial public redacted appeal brief as confidential. *See* Decision on Kanyabashi's Motion to Lift Confidential Status of Certain Documents or to Refer Publicly to Certain Confidential Documents, 23 April 2014 ("23 April 2014 Appeal Decision") (confidential), para. 25. Kanyabashi filed an amended public redacted appeal brief in French on 8 May 2014.
[31] Élie Ndayambaje's Appellant's Brief, 8 April 2013 (originally filed in French, English translation filed on 26 July 2013) (confidential).

15. On 8 May 2013, the Appeals Chamber granted, in part, a Prosecution's motion to strike paragraphs of Nteziryayo's appeal brief containing new grounds of appeal and ordered Nteziryayo to file a revised appeal brief no later than 13 May 2013.[34] Nteziryayo filed his confidential corrected revised appeal brief on 14 June 2013.[35] On 16 July 2013, he filed an addendum to his confidential corrected revised appeal brief.[36]

3. Response Briefs

16. On 28 October 2011, Kanyabashi was granted leave to file his response brief to the Prosecution's appeal no later than 30 days from the service of the French translation of the Trial Judgement and the Prosecution's appeal brief, whichever occurred later.[37] Kanyabashi filed his response to the Prosecution's appeal on 6 March 2013.[38]

17. In his decision of 13 December 2012, the Pre-Appeal Judge allowed the Prosecution to file a consolidated response brief not exceeding 270,000 words in total or separate response briefs not exceeding the word limit granted for the corresponding appeal brief.[39] On 22 April 2013, the Pre-Appeal Judge granted, in part, the Prosecution's motion for an extension of time to file its response briefs, ordering that they be filed no later than 100 days from the date of filing of each corresponding appeal brief.[40]

18. The Prosecution filed a consolidated response brief on 17 July 2013.[41] On 19 July 2013, the Pre-Appeal Judge ordered the Prosecution to re-file a consolidated response brief not exceeding 270,000 words that complied with the formal requirements on appeal no later than

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[32] On 15 April 2013, the Pre-Appeal Judge noted that the appeals briefs filed by Ntahobali, Kanyabashi, and Ndayambaje had systematically omitted necessary spaces between words, numbers, and punctuation marks and considered that, if corrected, these appeal briefs would exceed the word limits imposed on them. The Pre-Appeal Judge issued a formal warning under Rule 46(A) of the Rules to the counsel for Ntahobali, Kanyabashi, and Ndayambaje but, in light of the need to facilitate expeditious appellate proceedings and in order not to prejudice Ntahobali, Kanyabashi, and Ndayambaje for the misconduct of their respective counsel, found their respective appeal briefs validly filed. *See* Order Issuing a Formal Warning to Counsel for Ntahobali, Kanyabashi, and Ndayambaje, 15 April 2013.
[33] Corrigendum Élie Ndayambaje's Appellant's Brief, 19 April 2013 (originally filed in French, English translation filed on 26 July 2013) (confidential; public redacted version filed in French on 4 June 2013).
[34] 8 May 2013 Appeal Decision, paras. 72-74. The Appeals Chamber subsequently denied Nteziryayo's motion for reconsideration of the 8 May 2013 Appeal Decision. *See* 12 July 2013 Appeal Decision, paras. 17, 25.
[35] Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (confidential; public redacted version filed on the same day).
[36] Addendum to Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 16 July 2013.
[37] Decision on Joseph Kanyabashi's Motion for Extension of Time to File his Response Brief, 28 October 2011, p. 826/H (Registry pagination).
[38] Joseph Kanyabashi's Brief in Response to the Prosecutor's Brief, 6 March 2013 (originally filed in French, English translation filed on 13 February 2014).
[39] 13 December 2012 Appeal Decision, para. 20.
[40] Decision on Prosecution's Motion for Extension of Time to File its Response Briefs, 22 April 2013.
[41] Prosecution Consolidated Respondent Brief, 17 July 2013. *See also* Corrigendum to Prosecution Consolidated Respondents [*sic*] Brief, 17 July 2013.

21 August 2013.[42] The Prosecution filed its revised consolidated response brief on 21 August 2013.[43]

4. Reply Briefs

19. The Prosecution filed its reply brief on 21 March 2013.[44]

20. On 27 August 2013, the Pre-Appeal Judge granted, in part, motions for the extension of time and word limits and authorised and ordered: (i) Nyiramasuhuko to file a reply brief of no more than 21,000 words no later than 45 days from the filing of the Prosecution's revised response brief; (ii) Ntahobali to file a reply brief of no more than 23,000 words no later than 45 days from the filing of the Prosecution's revised response brief; (iii) Nsabimana to file his reply brief no later than 30 days from the filing of the Prosecution's revised response brief; (iv) Kanyabashi to file a reply brief of no more than 11,000 words no later than 30 days from the date of the filing of the Prosecution's revised response brief; and (v) Ndayambaje to file a reply brief not exceeding 16,000 words no later than 35 days from the date of filing of the Prosecution's revised response brief.[45] In the same decision, the Pre-Appeal Judge, *proprio motu*, authorised Nteziryayo to file his reply brief no later than 30 days from the date of the filing of the Prosecution's revised response brief.[46]

21. Nsabimana,[47] Nteziryayo,[48] and Kanyabashi[49] each filed their respective reply briefs on 20 September 2013. Ndayambaje filed his reply brief on 25 September 2013.[50] Nyiramasuhuko[51] and Ntahobali[52] each filed their respective reply briefs on 7 October 2013.

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[42] *See* Decision on Prosecution's Motion for Order *Nunc Pro Tunc* and on Ntahobali's Motion to Reject the Prosecution Response Brief, 19 July 2013, p. 4. In the same decision, the Pre-Appeal Judge denied the Prosecution's motion requesting an extension *nunc pro tunc* of 57,330 words for its response brief and issued a formal warning to counsel for the Prosecution, within the meaning of Rule 46(A) of the Rules, to strictly abide by the Appeals Chamber's decisions and practice directions applicable on appeal subject to sanctions for abusive conduct. *See idem.*

[43] Prosecution Consolidated Respondent's Brief, 21 August 2013 (confidential; public redacted version filed on 4 October 2013).

[44] Prosecution Reply Brief, 21 March 2013.

[45] Decision on Motions for Extensions of Time Limit and Word Limit for the Filing of the Reply Briefs, 27 August 2013 ("27 August 2013 Appeal Decision"), p. 5.

[46] 27 August 2013 Appeal Decision, p. 5.

[47] Brief in Reply, 20 September 2013 (originally filed in French, English translation filed on 9 April 2014).

[48] Reply Brief on Behalf of Alphonse Nteziryayo, 20 September 2013.

[49] Joseph Kanyabashi's Brief in Reply to the Prosecutor's Response, 20 September 2013 (originally filed in French, English translation filed on 14 May 2014). On 23 April 2014, the Appeals Chamber ordered Kanyabashi to file an amended public redacted version of his reply brief that maintained the confidentiality of the content of filings classified as confidential as well as directed the Registry to permanently reclassify Kanyabashi's initial public redacted reply brief as confidential. *See* 23 April 2014 Appeal Decision, para. 25. Kanyabashi filed an amended public redacted reply brief in French on 7 May 2014.

[50] Élie Ndayambaje's Brief in Reply, 25 September 2013 (originally filed in French, English translation filed on 4 April 2014) (confidential; public redacted version filed in French on 1 November 2013).

[51] Pauline Nyiramasuhuko's Brief in Reply, 7 October 2013 (originally filed in French, English translation filed on 24 June 2014) (confidential).

B. Assignment of Judges

22. On 15 July 2011, the Presiding Judge of the Appeals Chamber, Judge Patrick Robinson, assigned the following Judges to hear the appeal: Judge Fausto Pocar (Presiding), Judge Liu Daqun, Judge Andrésia Vaz, Judge Theodor Meron, and Judge Carmel Agius.[53] On 21 July 2011, Judge Fausto Pocar assigned himself as Pre-Appeal Judge.[54]

23. On 17 November 2011, Judge Theodor Meron became the Presiding Judge of the Appeals Chamber and assigned Judge Patrick Robinson to replace him in this case.[55] On 11 July 2012, Judge Theodor Meron assigned Judge Bakhtiyar Tuzmukhamedov to replace Judge Liu Daqun.[56]

24. On 2 October 2012, Judge Theodor Meron denied Ndayambaje's motion requesting the disqualification of Judge Fausto Pocar from this case.[57]

25. On 19 March 2013, Judge Theodor Meron assigned Judge Liu Daqun to replace Judge Andrésia Vaz.[58] On 8 October 2013, Judge Theodor Meron assigned Judge Khalida Rachid Khan to replace Judge Patrick Robinson.[59] On 17 November 2015, Judge Carmel Agius became the the Presiding Judge of the Appeals Chamber and, on 18 November 2015, ordered that the Bench in this case shall not change in composition and that Judge Fausto Pocar shall remain the Presiding Judge of this case.[60]

C. Status Conference

26. A status conference was held by the Pre-Appeal Judge on 10 May 2013 in Arusha, Tanzania.[61]

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[52] Arsène Shalom Ntahobali's Brief in Reply, 7 October 2013 (originally publicly filed in French, English translation filed on 5 August 2014) (confidential). Ntahobali's reply brief was initially filed publicly. However, on 17 March 2014, the Appeals Chamber ordered Ntahobali to file a public redacted version of his reply brief that preserved the confidentiality of certain information contained therein as well as ordered the permanent reclassification of Ntahobali's reply brief as confidential. *See* 14 March 2014 Appeal Decision, para. 29. Ntahobali filed a second public redacted version of his reply brief in French on 24 March 2014.
[53] Order Assigning Judges to a Case before the Appeals Chamber, 15 July 2011.
[54] Order Assigning a Pre-Appeal Judge, 21 July 2011.
[55] Order Replacing a Judge in a Case before the Appeals Chamber, 17 November 2011. *See also* Corrigendum to Order Replacing a Judge in a Case before the Appeals Chamber, 21 November 2011.
[56] Order Replacing a Judge in a Case before the Appeals Chamber, 11 July 2012.
[57] Decision on Motion for Disqualification of Judge Fausto Pocar, 2 October 2012, paras. 1, 22.
[58] Order Replacing a Judge in a Case before the Appeals Chamber, 19 March 2013.
[59] Order Replacing a Judge in a Case before the Appeals Chamber, 8 October 2013.
[60] Order on the Composition of the Bench in a Case Before the Appeals Chamber, 18 November 2015.
[61] Status Conference, AT. 10 May 2013. *See also* Order Scheduling a Status Conference, 8 March 2013.

D. Motions for Stay of the Proceedings, Provisional Release, and Severance

27. On 7 February 2014, the Appeals Chamber allowed the Prosecution's application to strike Nyiramasuhuko's motion for a stay of proceedings filed by Nyiramasuhuko on 21 November 2013, finding that Nyiramasuhuko's motion was an unauthorised attempt to expand the scope of her arguments in her written appeal submissions.[62]

28. On 10 September 2014, the Appeals Chamber dismissed Nsabimana's motion for provisional release, finding that Nsabimana failed to satisfy the requirements of Rule 65(I)(iii) of the Rules.[63]

29. On 21 November 2014, the Appeals Chamber denied Nsabimana's request for severance of his appeal on the ground that Nsabimana did not establish a conflict of interest causing him serious prejudice or demonstrate that the severance of his case would protect the interests of justice.[64]

E. Motions for the Admission of Additional Evidence on Appeal

30. In response to a motion filed by Ntahobali, the Appeals Chamber, on 23 November 2012, clarified that *amicus curiae* reports relating to false testimony and contempt investigations were part of the record on appeal, and determined that Ntahobali's request that they be admitted as additional evidence on appeal was moot.[65]

31. On 9 April 2015, the Appeals Chamber granted, in part, a motion filed by Ndayambaje to present additional evidence on appeal and admitted a witness statement as additional evidence on appeal.[66] In the same decision, the Appeals Chamber denied Ndayambaje's request for the admission of a second witness statement.[67]

32. On 14 April 2015, the Appeals Chamber granted, in part, a motion filed by Ntahobali and admitted as additional evidence on appeal statements given by Witness QCB during investigations in Canadian criminal proceedings.[68] The Appeals Chamber denied Ntahobali's further request for the admission of letters and testimony as additional evidence on appeal in the same decision.[69]

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[62] Decision on Prosecution's Motion to Strike Nyiramasuhuko's Motion for Stay of Proceedings, 7 February 2014, pp. 2, 3.
[63] Decision on Nsabimana's Motion for Provisional Release, 10 September 2014 (confidential), p. 4.
[64] Decision on Nsabimana's Motion for Severance, 21 November 2014, p. 4.
[65] 23 November 2012 Appeal Decision, p. 2.
[66] 9 April 2015 Appeal Decision, pp. 3, 4.
[67] 9 April 2015 Appeal Decision, pp. 3, 4.
[68] 14 April 2015 Appeal Decision, paras. 37, 49.
[69] 14 April 2015 Appeal Decision, paras. 25, 48, 49.

33. On 12 May 2015, the Appeals Chamber also granted, in part, Ndayambaje's request to admit as additional evidence on appeal a prior statement and testimony given by a witness in the *Ntawukulilyayo* case.[70] The Appeals Chamber denied Ndayambaje's requests to admit as additional evidence on appeal testimonies and statements from the *Kalimanzira* case and the *Ntawukulilyayo* case in the same decision.[71] On 1 October 2015, the Appeals Chamber dismissed the Prosecution requests to admit rebuttal evidence in light of the additional evidence admitted on appeal.[72]

34. In decisions issued on 27 March 2015,[73] 2 April 2015,[74] 8 April 2015,[75] 9 April 2015,[76] 17 April 2015,[77] 6 May 2015,[78] and 6 October 2015,[79] the Appeals Chamber denied all other motions for the admission of additional evidence on appeal.

F. Appeals Hearing

35. In accordance with the scheduling order of 5 March 2015,[80] the 19 March 2015 order setting the timetable for the appeal hearings,[81] and the 25 March 2015 order inviting the appellants to address certain issues,[82] oral arguments of the parties were heard at a hearing held between 14 and 17 and between 20 and 22 April 2015 in Arusha, Tanzania.

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[70] 12 May 2015 Appeal Decision, paras. 61, 90, 91.
[71] 12 May 2015 Appeal Decision, paras. 72, 83, 89, 91.
[72] Decision on Prosecution's Requests for Admission of Rebuttal Evidence and on Ndayambaje's Motion to Dismiss, 1 October 2015 (confidential). In the same decision, the Appeals Chamber dismissed Ndayambaje's request to declare inadmissible and dismiss one of the Prosecution's requests to admit rebuttal evidence pursuant to Rule 115(A) of the Rules. *See idem.*
[73] Decision on Nteziryayo's Motion to Present Additional Evidence, 27 March 2015; Decision on Ntahobali's Fifth Motion to Present Additional Evidence, 27 March 2015.
[74] Decision on Nyiramasuhuko's Third Motion and Ntahobali's Sixth Motion to Present Additional Evidence and on Prosecution's Motion to Strike, 2 April 2015 (confidential); Decision on Ndayambaje's Second Motion to Present Additional Evidence, 2 April 2015 (confidential).
[75] Decision on Nyiramasuhuko's Second Motion for Relief for a Rule 68 Violation and on Ntahobali's Third Motion to Present Additional Evidence, 8 April 2015 (confidential).
[76] Decision on Nyiramasuhuko's First Motion for Relief for Rule 68 Violations and to Present Additional Evidence, 9 April 2015.
[77] Decision on Ndayambaje's Fifth Motion for Relief for Rule 68 Violations and to Present Additional Evidence, 17 April 2015 (confidential).
[78] Decision on Kanyabashi's Motion for Admission of Additional Evidence, 6 May 2015 (confidential).
[79] Decision on Ntahobali's Seventh Motion to Present Additional Evidence, 6 October 2015 (confidential).
[80] Scheduling Order, 5 March 2015.
[81] Order Setting the Timetable for the Appeals Hearing, 19 March 2015.
[82] 25 March 2015 Order.

XX. ANNEX B: CITED MATERIALS AND DEFINED TERMS

A. Jurisprudence

1. Tribunal

AKAYESU Jean-Paul

The Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgment, 1 June 2001 (originally filed in French, English translation filed on 23 November 2001) ("*Akayesu* Appeal Judgement").

BAGILISHEMA Ignace

The Prosecutor v. Ignace Bagilishema, Case No. ICTR-95-1A-A, Judgement, 3 July 2002 (originally filed in French, English translation filed on 16 June 2003) ("*Bagilishema* Appeal Judgement").

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

BAGOSORA Théoneste *et al.*

Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor, Case No. ICTR-98-41-A, Judgement, 14 December 2011 ("*Bagosora and Nsengiyumva* Appeal Judgement").

Théoneste Bagosora et al. v. The Prosecutor, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze's Motion for Severance, Retention of the Briefing Schedule and Judicial Bar to the Untimely Filing of the Prosecution's Response Brief, 24 July 2009 ("*Ntabakuze* Appeal Decision on Severance").

The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, and Anatole Nsengiyumva, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008 ("*Bagosora et al.* Trial Judgement").

The Prosecutor v. Théoneste Bagosora et al., Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006 ("*Bagosora et al.* Appeal Decision on Exclusion of Evidence").

The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze, Case Nos. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999 ("*Kabiligi* 8 October 1999 Decision").

BIKINDI Simon

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

BISENGIMANA Paul

Paul Bisengimana v. The Prosecutor, Case No. ICTR-00-60-T, Corrigendum-Judgement and Sentence, 20 April 2006 ("*Bisengimana* Sentencing Judgement").

BIZIMUNGU Augustin

See Augustin Bizimungu v. The Prosecutor, Case No. ICTR-00-56B-A, Judgement, 30 June 2014 ("*Bizimungu* Appeal Judgement").

BIZIMUNGU Casimir *et al.*

The Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka, and Prosper Mugiraneza, Case No. ICTR-99-50-T, Judgement and Sentence, 30 September 2011 ("*Bizimungu et al.* Trial Judgement").

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-AR73.8, Decision on Appeals Concerning the Engagement of a Chambers Consultant or Legal Officer, 17 December 2009 ("*Bizimungu et al.* Appeal Decision").

The Prosecutor v. Casimir Bizimungu et al., Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004 ("*Bizimungu et al.* 12 February 2004 Appeal Decision").

GACUMBITSI Sylvestre

Sylvestre Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgement, 7 July 2006 ("*Gacumbitsi* Appeal Judgement").

The Prosecutor v. Sylvestre Gacumbitsi, Case No. ICTR-2001-64-T, Judgment, 17 June 2004 ("*Gacumbitsi* Trial Judgement").

GATETE Jean-Baptiste

Jean-Baptiste Gatete v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2012 ("*Gatete* Appeal Judgement").

The Prosecutor v. Jean-Baptiste Gatete Case No. ICTR-00-61-T, Judgement and Sentence, 31 March 2011 ("*Gatete* Trial Judgement").

HATEGEKIMANA Ildephonse

Idelphonse Hategekimana v. The Prosecutor, Case No. ICTR-00-55B-A, Judgement, 8 May 2012 ("*Hategekimana* Appeal Judgement").

KAJELIJELI Juvénal

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

KALIMANZIRA Callixte

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

KAMBANDA Jean

Jean Kambanda v. The Prosecutor, Case No. ICTR-97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement").

KAMUHANDA Jean de Dieu

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

Jean de Dieu Kamuhanda v. the Prosecutor, Case No. ICTR-95-54A-T, Judgement, 22 January 2004 ("*Kamuhanda* Trial Judgement").

KANYARUKIGA Gaspard

Gaspard Kanyarukiga v. the Prosecutor, Case No. ICTR-02-78-A, Judgement, 8 May 2012 ("*Kanyarukiga* Appeal Judgement").

Gaspard Kanyarukiga v. The Prosecutor, Case No. ICTR-02-78-AR73.2, Decision on Gaspard Kanyarukiga's Interlocutory Appeal of a Decision on the Exclusion of Evidence, 23 March 2010 ("*Kanyarukiga* Appeal Decision").

KAREMERA Édouard *et al.*

Édouard Karemera and Matthieu Ngirumpatse v. The Prosecutor, Case No. ICTR-98-44-A, Judgement, 29 September 2014 ("*Karemera and Ngirumpatse* Appeal Judgement").

Édouard Karemera, Matthieu Ngirumpatse, and Joseph Nzirorera v. The Prosecutor, Case No. ICTR-98-44-AR91.2, Decision on Joseph Nzirorera's and the Prosecutor's Appeals of Decision Not to Prosecute Witness BTH for False Testimony, 16 February 2010 (confidential) ("*Nzirorera* Appeal Decision of 16 February 2010").

The Prosecutor v. Édouard Karemera et al., Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals pursuant to Rule 15*bis*(D), 20 April 2007 ("*Karemera et al.* 20 April 2007 Appeal Decision").

KARERA François

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

The Prosecutor v. François Karera, Case No. ICTR-01-74-T, Judgement and Sentence, 7 December 2007 ("*Karera* Trial Judgement").

KAYISHEMA Clément and RUZINDANA Obed

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NZABIRINDA Joseph

The Prosecutor v. Joseph Nzabirinda, Case No. ICTR-2001-77-T, Sentencing Judgement, 23 February 2007 ("*Nzabirinda* Sentencing Judgement").

NZABONIMANA Callixte

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The Prosecutor v. Callixte Nzabonimana, Case No. ICTR-98-44D-T, Judgement and Sentence, 31 May 2012 ("*Nzabonimana* Trial Judgement").

RENZAHO Tharcisse

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

RUGAMBARARA Juvénal

The Prosecutor v. Juvénal Rugambarara, Case No. ICTR-00-59-T, Sentencing Judgement, 16 November 2007 (*Rugambarara* Sentencing Judgement).

RUKUNDO Emmanuel

Emmanuel Rukundo v. The Prosecutor, Case No. ICTR-2001-70-A, Judgement, 20 October 2010 ("*Rukundo* Appeal Judgement").

RUTAGANDA Georges Anderson Nderubumwe

Georges Anderson Nderubumwe Rutaganda v. The Prosecutor, Case No. ICTR-96-3-A, Judgement, 26 May 2003 (originally filed in French, English translation filed on 9 February 2004) ("*Rutaganda* Appeal Judgement").

RWAMAKUBA André

André Rwamakuba v. The Prosecutor, Case No. ICTR-98-44C-A, Decision on Appeal Against Decision on Appropriate Remedy, 13 September 2007 ("*Rwamakuba* Appeal Decision").

The Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-T, Decision on Appropriate Remedy, 31 January 2007 ("*Rwamakuba* Decision").

The Prosecutor v. André Rwamakuba, Case No. ICTR-98-44C-T, Judgement, 20 September 2006 (*Rwamakuba* Trial Judgement).

SEMANZA Laurent

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SETAKO Ephrem

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SIMBA Aloys

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

The Prosecutor v. Aloys Simba, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005 ("*Simba* Trial Judgement").

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

ALEKSOVSKI Zlatko

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

BABIĆ Milan

Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Sentencing Appeal Judgement").

BLAGOJEVIĆ Vidoje and JOKIĆ Dragan

Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ Tihomir

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

BOŠKOSKI Ljube and TARČULOVSKI Johan

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

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Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement).

"ČELEBIĆI"

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić, and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

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ĐORĐEVIĆ Vlastimir

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GALIĆ Stanislav

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

GOTOVINA Ante *et al.*

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Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

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Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj, Case No. IT-04-84-A, Judgement, 19 July 2010 ("*Haradinaj et al.* Appeal Judgement").

Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, Judgement, 3 April 2008 ("*Haradinaj et al.* Trial Judgement of 3 April 2008").

HARAQIJA Astrit and MORINA Bajrush

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

JELISIĆ Goran

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

KARADŽIČ Radovan

Prosecutor v. Radovan Karadžić, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("*Karadžić* Appeal Decision").

KORDIĆ Dario and ČERKEZ Mario

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

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KRAJIŠNIK Momčilo

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik* Appeal Judgement").

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KUPREŠKIĆ Zoran *et al.*

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KVOČKA Miroslav *et al.*

Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, and Dragoljub Prcać, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement").

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LIMAJ Fatmir *et al.*

Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu, Case No. IT-03-66-A, Judgement, 27 September 2007 ("*Limaj et al.* Appeal Judgement").

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Prosecutor v. Milan Lukić and Sredoje Lukić, Case No. IT-98-32/1-A, Judgement, 4 December 2012 ("*Lukić and Lukić* Appeal Judgement").

MARTIĆ Milan

Prosecutor v. Milan Martić, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić* Appeal Judgement").

MILOŠEVIĆ Dragomir

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević* Appeal Judgement").

MILUTINOVIĆ Milan *et al.*

Prosecutor v. Milan Milutinović et al., Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to Its 65*ter* Witness List, 20 April 2007 ("*Milutinović et al.* Appeal Decision").

MRKŠIĆ Mile and ŠLJIVANČANIN Veselin

Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement").

NALETILIĆ Mladen and MARTINOVIĆ Vinko

Prosecutor v. Mladen Naletilić, a.k.a. "TUTA", and Vinko Martinović, a.k.a. "ŠTELA", Case No. IT-98-34-A, Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement").

NIKOLIĆ Dragan

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Nikolić* Sentencing Appeal Judgement").

Prosecutor v. Dragan Nikolić, Case No. IT-94-2-AR73, Decision on Interlocutory Appeal Concerning Legality of Arrest, 5 June 2003 ("*Nikolić* Appeal Decision").

ORIĆ Naser

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement, 3 July 2008 ("*Orić* Appeal Judgement").

PERIŠIĆ Momčilo

Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, Decision on Prosecution's Motion to Substitute Expert Witness, 30 October 2009 ("*Perišić* 30 October 2009 Decision").

POPOVIĆ Vujadin *et al.*

Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero, and Vinko Pandurević, Case No. IT-05-88-A, Judgement, 30 January 2015 ("*Popović et al.* Appeal Judgement").

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Prosecutor v. Zdravko Tolimir, Radivoje Miletić, and Milan Gvero, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused, 27 January 2006 ("*Miletić* Appeal Decision on Joinder").

Prosecutor v. Vinko Pandurević and Milorad Trbić, Case No. IT-05-86-AR73.1, Decision on Vinko Pandurević's Interlocutory Appeal against the Trial Chamber's Decision on Joinder of Accused, 24 January 2006 ("*Pandurević* Appeal Decision on Joinder").

PRLIĆ Jadranko *et al.*

Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić, and Berislav Pušić, Case No. IT-04-74-AR73.13, Decision on Jadranko Prlić Consolidated Interlocutory Appeal Against the Trial Chamber's Orders of 6 and 9 October 2008 on Admission of Evidence, 12 January 2009 ("*Prlić et al.* Appeal Decision").

Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal Against the Trial Chamber's Oral Decision of 8 May 2006 Relating to Cross-Examination By Defence and on Association of Defence Counsel's Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 ("*Prlić et al.* Appeal Decision on Joinder").

ŠAINOVIĆ Nikola *et al.*

Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, and Sreten Lukić, Case No. IT-05-87-A, Judgement, 23 January 2014 ("*Šainović et al.* Appeal Judgement").

SIMIĆ Blagoje

Prosecutor v. Blagoje Simić, Case No. IT-95-9-A, Judgement, 28 November 2006 ("*Simić* Appeal Judgement").

STAKIĆ Milomir

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement").

STRUGAR Pavle

Prosecutor v. Pavle Strugar, Case No. IT-01-42-A, Judgement, 17 July 2008 ("*Strugar* Appeal Judgement").

TADIĆ Duško

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

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-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Appeal Decision on Jurisdiction").

VASILJEVIĆ Mitar

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

3. International Residual Mechanism for Criminal Tribunals

Augustin Ngirabatware v. The Prosecutor, Case No. MICT-12-29-A, Judgement, 18 December 2014 ("*Ngirabatware* Appeal Judgement").

4. Human Rights Committee

B. Lubuto v. Zambia, Human Rights Committee, Communication No. 390/1990 (Views adopted on 31 October 1995), UN Doc. CCPR/C/55/D/390/1990 (1995), 3 November 1995.

5. African Commission on Human and People's Rights

Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia, African Commission on Human and People's Rights, Communication No. 301/05, 12 October 2013.

6. Inter-American Court of Human Rights

Jean Paul Genie-Lacayo v. Nicaragua, Inter-American Court of Human Rights, Judgment, 29 January 1997.

7. European Court of Human Rights

Abdoella v. The Netherlands, ECtHR, No. 12728/87, Judgment, 25 November 1992.

Bracci v. Italy, ECtHR, No. 36822/02, *Arrêt*, 15 February 2006.

Dimitrov and others v. Bulgaria, ECtHR, No. 77938/11, Judgement, 1 July 2014.

EKO-Energie, SPOL. S.R.O v. The Czech Republic, ECtHR, No. 65191/01, Judgment, 17 May 2005.

Mansur v. Turkey, ECtHR, No. 16026/90, Judgment, 8 June 1995, para. 68; Dobbertin *v. France*, ECtHR, No. 13089/87, Judgment, 25 February 1993.

Neumeister v. Austria, ECtHR, No. 1936/63, Judgment, 27 June 1968 ("ECHR *Neumeister* Judgment").

Previti v. Italy, ECtHR, No. 45291/06, *Décision sur la recevabilité*, 8 December 2009.

Sofri and others v. Italy, ECtHR, No. 37234/97, Decision, 4 March 2003.

Vocaturo v. Italy, ECtHR, No. 11891/85, Judgment, 24 May 1991.

Yagci and Sargin v. Turkey, ECtHR, Nos. 16419/90 and 16426/90, Judgment, 8 June 1995.

B. Defined Terms

1. Acronyms and Abbreviations

16 April *Communiqué*	*Communiqué* sanctioning the security of the authorities of Butare and Gikongoro issued on 16 April 1994, admitted as Exhibit D240
27 April Directive	Instructions to restore security in the country issued on 27 April 1994, admitted as Exhibit P118
23 January 1974 Law	Law of 23 January 1974, *Création de la Gendarmerie*, admitted as part of Exhibit D468
11 March 1975 Law	Law of 11 March 1975, Structure and Functioning of the *Préfecture*, admitted as part of Exhibit D468
African Charter on Human and Peoples' Rights	African (Banjul) Charter on Human and Peoples' Rights, adopted on 27 June 1986, entered into force on 21 October 1986
American Convention on Human Rights	American Convention on Human Rights "Pact of San Jose, Costa Rica", adopted on 22 November 1969, entered into force on 18 July 1978
***Amici Curiae* Reports**	First *Amicus Curiae* Report and Second *Amicus Curiae* Reports
Appeals Chamber	Appeals Chamber of the International Criminal Tribunal for Rwanda
AT.	Transcript from hearings on appeal in the present case. All references are to the official English transcript, unless otherwise indicated.
Butare Prefecture Office	Office of the prefecture of Butare, Butare Town, Ngoma Commune
Butare University Hospital	Butare University Hospital, Butare Town, Ngoma Commune
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, General Assembly Resolution 2106(XX), UN Doc. A/RES/20/2106, 21 December 1965, entered into force on 4 January 1969
Co-Accused *or* Co-Appellants	Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Sylvain Nsabimana, Alphonse Nteziryayo, Joseph Kanyabashi, and Élie Ndayambaje

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by General Assembly resolution 39/46 on 10 December 1984, entered into force on 26 June 1987
Des Forges Report	*Expert Report by Alison Des Forges Prepared for the Butare Case ICTR-98-42-T*, admitted as Exhibit P110
ECtHR	European Court of Human Rights
EER	*École évangéliste du Rwanda*, Butare Town, Ngoma Commune
ESO	*École des sous-officiers*, Butare Town, Ngoma Commune
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950, entered into force on 3 September 1953
First *Amicus Curiae*	First *Amicus curiae* designated by the Registrar to investigate the allegations of false testimonies of Witnesses QA, QY, and SJ
First *Amicus Curiae* Report	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Report of Boniface Njiru *Amicus Curiae* Appointed by the International Criminal Tribunal for Rwanda to Investigate and Report to the Trial Chamber II [on] False Testimony and Contempt of Court Relative to Prosecution Witnesses QA, QY and SJ, 2 July 2009 (confidential)
First Attack	The first attack of the Last Half of May Attacks conducted against Tutsis who had sought refuge at the Butare Prefecture Office, which occurred seven days after the Mid-May Attack
First Half of June Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place in the first half of June 1994
Guichaoua Report	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Full Statement of Expert Witness André Guichaoua, Filed under Rule 94*bis* (A) for Disclosure to the Defence and to Be Filed with the Trial Chamber, 28 April 2004
ICC	International Criminal Court, established on 17 July 1998
ICCPR	International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI), UN Doc. A/RES/21/2200, 16 December 1966, entered into force on 23 March 1976
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

ICTY Rules of Procedure and Evidence	Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia (IT/32/Rev. 39)
Interim Government	Interim Government of Rwanda sworn in on 9 April 1994 and headed by Prime Minister Jean Kambanda
IRST	*Institut de recherche scientifique et technique*, Butare Town, Ngoma Commune
Judge Bossa Certification	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Certification in the Matter of Proceedings under Rule 15*bis*(D), 5 December 2003
Judge Ramaroson Dissenting Opinion	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Dissenting Opinion of Judge Arlette Ramaroson, dated 24 June 2011, signed 18 July 2011, filed 19 July 2011 (the English translation of the French original was filed on 21 May 2014)
Kambanda's and Sindikubwabo's Speeches	Kambanda's and Sindikubwabo's speeches given at Nsabimana's swearing-in ceremony of 19 April 1994
Kambanda's Speech	Kambanda's speech given at Nsabimana's swearing-in ceremony of 19 April 1994
Kanyabashi's Speech	Kanyabashi's Speech given at Nsabimana's swearing-in ceremony of 19 April 1994
Last Half of May Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place seven and 11 days after the Mid-May Attack
Matyazo Clinic	Clinic (or dispensary) of Matyazo Sector, Ngoma Commune, Butare Prefecture
Mid-May Attack	Attack against Tutsis who had sought refuge at the Butare Prefecture Office that took place in mid-May 1994
MRND	*Mouvement révolutionnaire national pour la démocratie et le développement* [before 5 July 1991] *Mouvement républicain national pour la démocratie et le développement* [after 5 July 1991]
Ndayambaje's Swearing-In Ceremony	Ndayambaje's swearing-in as the *bourgmestre* of Muganza Commune held in Muganza Commune, Butare Prefecture, on 22 June 1994
Night of Three Attacks	Attacks against Tutsis who had sought refuge at the Butare Prefecture Office that took place three times in one night around the end of May or the beginning of June 1994

Nsabimana's Swearing-in Ceremony	Nsabimana's swearing-in ceremony as the prefect of Butare held in Butare on 19 April 1994
Ntakirutimana Report on Sindikubwabo's Speech	*Tolerance or Intransigence in Sindikubwabo's Speech in Butare?*, by Évariste Ntakirutimana, admitted as Exhibit P159
Ntakirutimana's Reports	*Tolerance or Intransigence in Sindikubwabo's Speech in Butare?*, by Évariste Ntakirutimana, admitted as Exhibit P159 *and Sociolinguistic Analysis of Polysemic Terms Produced During the War Period (1990-1994) in Rwanda*, by Évariste Ntakirutimana, admitted as Exhibit P158
Ntakirutimana Sociolinguistic Analysis	*Sociolinguistic Analysis of Polysemic Terms Produced During the War Period (1990-1994) in Rwanda*, by Évariste Ntakirutimana, admitted as Exhibit P158
ORINFOR	*Office rwandais d'information* (Rwandan Office of Information)
PAMU	*Projet agricole de Muganza*
PL	*Parti libéral*
Practice Direction on Formal Requirements on Appeal	Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005
Prosecution	Office of the Prosecutor of the International criminal Tribunal for Rwanda
PSD	*Parti social démocrate*
RCMP	Royal Canadian Mounted Police
Registrar	Registrar of the International Criminal Tribunal for Rwanda
Registry	Registry of the International Criminal Tribunal for Rwanda
Residual Mechanism	International Residual Mechanism for Criminal Tribunals

Residual Mechanism Statute	Statute of the International Residual Mechanism for Criminal Tribunals established by Security Council Resolution 1966 (2010)
Reyntjens Report	Expert Report by Filip Reyntjens, admitted as Exhibit D571
Rome Statute	Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, entered into force on 1 July 2002
RPA	Rwandan Patriotic Army
RPF	Rwandan (also Rwandese) Patriotic Front
Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
SCSL	Special Court for Sierra Leone, established to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000
Second *Amicus Curiae*	Second *Amicus curiae* designated by the Registrar to investigate the allegations of false testimonies of Witnesses QA, QY, and SJ
Second *Amicus Curiae* Report Concerning Witness QA	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QA, 25 March 2010 (confidential)
Second *Amicus Curiae* Report Concerning Witnesses QY and SJ	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Report of *Amicus Curiae* on Rule 77 and Rule 91 Investigation Related to Witness QY and SJ, 18 May 2010 (confidential)
Second *Amicus Curiae* Reports	Second *Amicus Curiae* Report Concerning Witness QA and Second *Amicus Curiae* Report Concerning Witnesses QY and SJ (confidential)
Second Attack	The second attack of the Last Half of May Attacks conducted against Tutsis who had sought refuge at the Butare Prefecture Office, which occurred 11 days after the Mid-May Attack
Security Council	Security Council of the United Nations
Shimamungu Report	*Butare 1994: Political Communication of the "Abatabazi" Interim Government and its Impact on the Population*, by Eugène Shimamungu, admitted as Exhibit D278 (confidential)

Sindikubwabo's Speech	Sindikubwabo's speech given at Nsabimana's swearing-in ceremony of 19 April 1994 (transcripts admitted as Exhibit P151B)
Statute	Statute of the International Criminal Tribunal for Rwanda established by Security Council Resolution 955 (1994)
Statute of the ICTY	Statute of the International Criminal Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (25 May 1993)
T.	Transcript from hearings at trial in the present case. All references are to the official English transcript, unless otherwise indicated
Trial Chamber	Trial Chamber II of the International Criminal Tribunal for Rwanda seized of the *Nyiramasuhuko et al.* proceedings
Trial Judgement	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgement and Sentence, pronounced on 24 June 2011, issued in writing on 14 July 2011
Tribunal *or* ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994
UNAMIR	United Nations Assistance Mission for Rwanda
Vienna Convention	Vienna Convention on The Law of Treaties, 23 May 1969, United Nations, *Treaty Series*, Vol. 1155
Virgin Mary Statue	Statue of the Virgin Mary in Mugombwa Sector, Muganza Commune, Butare Prefecture

2. Filings of the Parties

Indictments	Operative indictments of all co-Accused
Kanyabashi Amended Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999
Kanyabashi Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 4 February 2014)

Kanyabashi Closing Brief	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Joseph Kanyabashi's Closing Brief, 17 February 2009 (the English translation of the French original was filed on 6 April 2009) (confidential)
Kanyabashi Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of 12 August 1999, 11 June 2001
Kanyabashi Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Amended Notice of Appeal by Joseph Kanyabashi, 8 April 2013 (the English translation of the French original was filed on 24 May 2013) (confidential; public redacted version originally filed in French on 12 May 2014)
Kanyabashi Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Brief in Reply to the Prosecutor's Response, 20 September 2013 (the English translation of the French original was filed on 14 May 2014) (confidential; public redacted version originally filed in French on 7 May 2014)
Kanyabashi Response Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Joseph Kanyabashi's Brief in Response to the Prosecutor's Brief, 6 March 2013 (the English translation of the French original was filed on 13 February 2014)
Kanyabashi Third Amended Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Amended Indictment As Per the Decision of Trial Chamber II of 12 August 1999 and 31 May 2000, 2 November 2000
Ndayambaje Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 26 July 2013) (confidential), as corrected by *Corrigendum du Mémoire d'appel d'Élie Ndayambaje*, 19 April 2013 (confidential; public redacted version originally filed in French on 4 June 2013)
Ndayambaje Closing Brief	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Élie Ndayambaje's Defence Brief, 17 February 2009 (the English translation of the French original was filed on 3 April 2009) (confidential)
Ndayambaje Indictment	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999
Ndayambaje Notice of Alibi	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, *Avis additionnel et identification des témoins d'alibi*, 29 April 2008 (confidential)

Ndayambaje Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Amended Notice of Appeal, 8 April 2013 (the English translation of the French original was filed on 7 June 2013)
Ndayambaje Pre-Defence Brief	*The Prosecutor v. Élie Ndayambaje*, Case No. ICTR-96-8-T, Pre-Defence Brief, 8 February 2005
Ndayambaje Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Élie Ndayambaje's Brief in Reply, 25 September 2013 (the English translation of the French original was filed on 4 April 2014) (confidential; public redacted version originally filed in French on 1 November 2013)
Ndayambaje Submissions on Additional Evidence	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Written Submissions Subsequent to the "Decision on Ndayambaje's First, Second, Third and Fourth Motions for Relief for Rule 68 Violations and to Present Additional Evidence" of 12 May 2015, 26 May 2015 (originally filed in French, English translation filed on 3 July 2015) (confidential)
Nsabimana and Nteziryayo Indictment	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-I, Amended Indictment As Per the Decision of Trial Chamber II of August 12 1999, 12 August 1999
Nsabimana Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 26 September 2013) (originally filed confidentially, reclassified as public)
Nsabimana Closing Brief	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Final Brief of Sylvain Nsabimana's Trial, 17 February 2009 (the English translation of the French original was filed on 6 April 2009) (confidential)
Nsabimana Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Notice of Appeal, 10 October 2011 (the English translation of the French original was filed on 25 January 2012)
Nsabimana Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Brief in Reply, 20 September 2013 (the English translation of the French original was filed on 9 April 2014)
Ntahobali Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 15 April 2014) (confidential; public redacted version originally filed in French on 24 March 2014)

Ntahobali Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Arsène Shalom Ntahobali's Final Trial Brief and Annexes Thereto, 17 February 2009 (the English translation of the French original was filed on 20 July 2009) (confidential)
Ntahobali Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Second Amended Notice of Appeal of Arsène Shalom Ntahobali Pursuant to Article 24 of the Statute and Rule 108 of the Rules of Procedure and Evidence, 29 October 2012 (the English translation of the French original was filed on 24 January 2013)
Ntahobali Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Brief in Reply, 7 October 2013 (the English translation of the French original was filed on 5 August 2014) (confidential; public redacted version originally filed in French on 24 March 2014)
Ntahobali Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Arsène Shalom Ntahobali's Response to The Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing, 5 May 2015 (the English translation of the French original was filed on 3 August 2015) (confidential)
Nteziryayo Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Confidential Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (confidential) *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Public Corrected Revised Appeal Brief on Behalf of Alphonse Nteziryayo, 14 June 2013 (public redacted version)
Nteziryayo Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Alphonse Nteziryayo's Closing Brief, 17 February 2009 (confidential)
Nteziryayo Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Alphonse Nteziryayo's Amended Notice of Appeal, 13 May 2013
Nteziryayo Pre-Defence Brief	*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-T, Alphonse Nteziryayo's Pre-Defence Brief for Presentation of Defence Case, 31 December 2004 (the English translation of the French original was filed on 4 February 2005)
Nteziryayo Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Reply Brief on Behalf of Alphonse Nteziryayo, 20 September 2013
Nyiramasuhuko and Ntahobali Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 1 March 2001

Nyiramasuhuko and Ntahobali Second Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment, signed 27 November 1997, filed 8 December 1997
Nyiramasuhuko and Ntahobali Third Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Amended Indictment As Per the Decision of Trial Chamber II of August 10th 1999, 11 August 1999
Nyiramasuhuko Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Appellant's Brief, 8 April 2013 (the English translation of the French original was filed on 30 April 2014) (confidential; public redacted version originally filed in French on 3 April 2014)
Nyiramasuhuko Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Closing Brief of Pauline Nyiramasuhuko with Annex, 17 February 2009 (the English translation of the French original was filed on 1 April 2009) (confidential)
Nyiramasuhuko Notice of Alibi	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, *Avis au Procureur de l'intention de la Défense de Pauline Nyiramasuhuko d'invoquer une défense d'alibi*, 4 March 2005 (confidential)
Nyiramasuhuko Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Re-Amended Notice of Appeal Filed Pursuant to Article 24 of the ICTR Statute, Rule 108 of the Rules of Procedure and Evidence, Article 1 of the Practice Direction on Formal Requirements for Appeals from Judgement, 21 February 2013 (the English translation of the French original was filed on 25 April 2013)
Nyiramasuhuko Pre-Defence Brief	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-T, Pauline Nyiramasuhuko's Revised Pre-Defence Brief, 5 January 2005 (the English translation of the French original was filed on 25 January 2005) (confidential)
Nyiramasuhuko Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Pauline Nyiramasuhuko's Brief in Reply, 7 October 2013 (the English translation of the French original was filed on 24 June 2014)
Nyiramasuhuko Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appellant Pauline Nyiramasuhuko's Response to "Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing", 30 April 2015 (the English translation of the French original was filed on 1 July 2015)
Prosecution Appeal Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Appellant's Brief, 15 November 2011

Prosecution Closing Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Closing Brief, 17 February 2009 (confidential)
Prosecution Notice of Appeal	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Notice of Appeal, 1 September 2011
Prosecution Pre-Trial Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B), 11 April 2001
Prosecution Reply Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Reply Brief, 21 March 2013
Prosecution Response Brief	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Consolidated Respondent's Brief, 21 August 2013 (confidential) *The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution Consolidated Respondent's Brief, 4 October 2013 (public redacted version)
Prosecution Submissions on Additional Evidence	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecution's Submission on Evidence of Claver Nahimana [alias Habimana] and Request for Admission of Rebuttal Evidence, 26 May 2015 (confidential)
Prosecution Supplementary Submissions	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Prosecutor's Supplemental Submissions Pursuant to 25 March 2015 Order for the Preparation of the Appeals Hearing, 8 April 2015
Supporting Material to Kanyabashi Indictment	*The Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-I, Prosecutor's Request for Leave to Amend Indictment, Attachment B "Supporting Material", 18 August 1998 (confidential)
Supporting Material to Nyiramasuhuko and Ntahobali Third Amended Indictment	*The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali*, Case No. ICTR-97-21-I, Supporting Material, 18 August 1999 (confidential)
Witness Summaries Grid	*The Prosecutor v. Pauline Nyiramasuhuko et al.*, Case No. 98-42-T, Prosecutor's Pre-Trial Brief Pursuant to Rule 73*bis*(B), 11 April 2001, "List of Intended Prosecution Witnesses Butare Cases–Witness Summaries Grid (6 April 2001) Appendix"