## C. Alleged errors in relation to the credibility of Defence and Prosecution witnesses

434. Appellant Ngeze contends that the Trial Chamber did not apply the same standards when assessing Prosecution and Defence evidence. According to the Appellant, the Trial Chamber rejected the testimonies of the Defence's witnesses, due to their numerous inconsistencies, but overlooked the numerous inconsistencies and ambiguities in the testimonies of the Prosecution's witnesses.[1036] The Appellant submits that the alibi evidence raises a reasonable doubt, sufficent to conclude, contrary to the testimonies of Prosecution Witnesses Serushago, AHI and EB, that he did not distribute weapons or commit any other criminal act in Gisenyi on 7 April 2004, and in fact was not there.[1037]

435. More specifically, the Appellant challenges the credibility of Prosecution Witness Serushago, not only because he is a self-confessed serial killer, but also because his testimony that no one could have arrested the Appellant or himself during the period from April to June 1994 is contradicted by 11 witnesses present in Gisenyi at the time, who declared that the Appellant had been arrested during the period in question.[1038] According to the Appellant, the charges brought against him rest on the credibility of Serushago. He argues that the Trial Chamber found his testimony credible because it was corroborated by two other Prosecution witnesses, who said they had seen Appellant Ngeze in Gisenyi town on 7 April 1994 at different times of the day. However, according to the Appellant, the evidence of these other two witnesses is only indirect, none of the witnesses in question having been able to confirm the accuracy of Witness Serushago's testimony.[1039]

436. The Prosecutor responds that it is incorrect to imply that the Prosecution case against the Appellant rests on the credibility of Witness Serushago.[1040] He refers in detail to the testimonies of Witnesses AHI, EB and AGX and cites extracts from the Judgement relating to the words and conduct of Appellant Ngeze from 7 April 1994 onwards in order to argue that, contrary to the statements of Defence witnesses, these testimonies were credible, and raised no reasonable doubt as to their veracity.[1041] The Prosecutor further submits that the Trial Chamber evaluated and examined the testimony of Witness Serushago with the caution it deemed necessary in the circumstances and only accepted his testimony to the extent that it was sufficiently corroborated by other evidence.[1042]

437. Appellant Ngeze replies that the testimonies of Prosecution Witnesses AHI, EB, AGX, AEU and Serushago regarding his acts on 7 and 8 April 1994 are devoid of probative value in light of the additional evidence presented on appeal.[1043] The Appellant further submits that "the evidence of Prosecution Witness Serushago is of no value, as no amount of corroboration can make unreliable evidence [...] reliable".[1044]

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[1036] *Ibid.*, para. 211.
[1037] *Ibid.*, para. 213.
[1038] *Ibid.*, para. 215.
[1039] *Ibid.*, para. 216.
[1040] Respondent's Brief, paras. 264-265.
[1041] *Ibid.*, para. 264.
[1042] Respondent's Brief, para. 265.
[1043] Ngeze Brief in Reply, para. 72.
[1044] *Idem.*

1. Alleged differential treatment of Defence and Prosecution witnesses

438. The Appeals Chamber has already found that the Trial Chamber erred in concluding that Defense witnesses' testimonies were "thoroughly inconsistent" in relation to the alleged dates of arrest and detention of the Appellant in April 1994.[1045] The question whether this error invalidates the conclusion that the Appellant committed criminal acts at Gisenyi on 7 and 8 April 1994 will be discussed later. As to the allegation of inconsistency and ambiguity with respect to the Prosecution witnesses (other than Serushago), the Appellant confines himself to general and unsupported assertions, which cannot suffice to demonstrate error on the part of the Trial Chamber. The appeal on this point is dismissed.

439. With respect to the testimony of Witness Serushago, the Appeals Chamber considers that the fact that that Prosecution's witness was "a self-confessed serial killer" does not as such imply that the witness was not credible. It recalls that the jurisprudence of both *ad hoc* Tribunals does not *a priori* exclude the testimony of convicted persons, including those who could be qualified as "accomplices", *stricto sensu*, of the accused. This jurisprudence requires that such testimonies be treated with special caution, the main question being to assess whether the witness concerned might have motives or incentives to implicate the accused.[1046] In the instant case, the Trial Chamber, "[r]ecognizing that Serushago [was] an accomplice and in light of the confusion and inconsistency of his testimony, although the Chamber accept[ed] many of the clarifications and explanations offered by Serushago, [...] considered that his testimony [was] not consistently reliable and accept[ed] his evidence with caution, relying on it only to the extent that it [was] corroborated",[1047] which is fully consistent with this jurisprudence. The Appellant has not shown that no reasonable trier of fact could have concluded as the Trial Chamber did.

440. The Appeals Chamber turns now to the argument that Witness Serushago's statement that nobody could have arrested the Appellant or himself during the period between April and June 1994 is contradicted by 11 witnesses who were in Gisenyi at the relevant time and who testified that the Appellant had been arrested during this period. This statement was merely an "opinion" of the witness with no probative value; the Trial Chamber, having moreover treated Serushago's testimony with caution, did not rely on this aspect of his testimony in order to reject the Appellant's alibi.

441. The Appellant further submits that the case against him rests on the credibility of Witness Serushago. However, as noted above, the Trial Chamber stated that it only relied on Serushago's testimony to the extent that it was corroborated by credible evidence. The Appellant has not shown that, contrary to what it had said, the Trial Chamber in fact relied on uncorroborated statements of Witness Serushago. The Appeals Chamber notes that the Trial Chamber considered the following elements from the testimony of Witness Serushago in relation to the events of 7 and 8 April 1994 to be corroborated:

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[1045] Judgement, para. 828.
[1046] *Ntagerura et al.* Appeal Judgement, paras. 203-206, recalling both *ad hoc* Tribunals' relevant jurisprudence.
[1047] Judgement, para. 824.

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(1) As to the presence of the Appellant in Gisenyi on 7 April 1994, the Trial Chamber considered this portion of the testimony of Witness Serushago to be corroborated by among others Witnesses AHI and AGX;[1048]

(2) The Trial Chamber concluded that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population"[1049] on the basis of the testimony of Witnesses Serushago and AHI.[1050]

442. The Appellant merely asserts generally that "the evidence corroborated [*sic*] the testimony of PW Serushago is indirect evidence since none of the Prosecution witnesses' testimony could corroborated [*sic*] the same event",[1051] without making any reference to the transcripts or showing specifically that, contrary to what the Trial Chamber concluded, the various testimonies did not corroborate the evidence of Witness Serushago. This argument therefore cannot succeeed.

443. For these reasons, the appeal submissions relating to the assessment by the Trial Chamber of the testimony of Witness Serushago are dismissed.

### 2. Credibility of Witness EB

444. Following the admission of additional evidence on appeal, the Appeals Chamber has to address specific arguments regarding the credibility of Witness EB.[1052] The Appeals Chamber will examine each of these arguments in turn, after placing them in context.

#### (a) Developments on appeal

445. The Trial Chamber relied in part on the testimony of Witness EB in order to find that Appellant Ngeze had committed certain criminal acts in Gisenyi on 7 and 8 April 1994.[1053] On 25 April 2005, Appellant Ngeze presented a motion seeking the admission of additional evidence on appeal,[1054] to which two typed documents were annexed, one in Kinyarwanda

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[1048] *Ibid.*, para. 825. The Trial Chamber also accepted the testimony of Witness EB regarding the Appellant's acts on 7 April 1994. However, for the reasons given in the following section, the Appeals Chamber considers that the testimony of Witness EB must be rejected.

[1049] *Ibid.*, para. 837. The finding that Appellant Ngeze aided and abetted the killing of Tutsi civilians, which supports the conviction for genocide, also relies on this factual finding (Judgement, paras. 956, 977A).

[1050] *Ibid.*, para. 831. The Trial Chamber also accepted Witness AFX's testimony on the stocking of weapons but, for the reasons given *infra* XII. C. 3. (b) (ii) , the Appeals Chamber considers that Witness AFX's trial testimony must be rejected.

[1051] Ngeze Appellant's Brief, para. 216.

[1052] Prosecutor's Submissions following the Rule 115 Evidentiary Hearing pertaining to the Alleged Recantation of Witness EB's Trial Testimony, filed confidentially on 30 April 2007 ("Prosecutor's Submissions Following Second Expert Report"); Appellant Hassan Ngeze's Written Submissions in connection with the Conclusion of the Handwriting Expert Report and their [*sic*] Impact on the Verdict, in pursuance of Appeals Chamber's Order dated 16 January 2007, pages 66-68, filed confidentially on 3 May 2007, the title of the document having been corrected by the Appellant on 6 June 2007 ("Appellant Ngeze's Conclusions Following Second Expert Report"); Appellant Jean Bosco-Barayagwiza's Submissions regarding the Handwriting Expert's Report pursuant to the Appeals Chamber's Orders dated 7th February 2007 and the 27th March 2007, filed publicly on 7 May 2007 but sealed on the same day following intervention by the Appeals Chamber ("Appelant Barayagwiza's Conclusions Following Second Expert Report").

[1053] Judgement, paras. 789-790, 812, 825, 836-837.

[1054] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed confidentially on 25 April 2005 ("Motion of 25 April 2005").

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dated 5 April 2005 allegedly written by Witness EB and containing a recantation of his trial testimony of 15, 16 and 17 May 2001 ("First Recantation Statement")[1055] and, the other, presented as its "free translation" into English.[1056]

446. The Appeals Chamber first asked the Prosecutor to investigate further the circumstances of the alleged recantation of Witness EB.[1057] The results of this investigation were filed on 7 July 2005.[1058] These Prosecutor's Additional Conclusions contained *inter alia* as annexes:

- A statement from Witness EB dated 23 May 2005, in which he indicates that he never signed or sent documents to Arusha and denied being the author of the First Recantation Statement;[1059]

- A handwriting expert report from M. Antipas Nyanjwa, dated 20 June 2005 ("First Expert Report"),[1060] concluding *inter alia* that the handwriting and signatures contained in photocopies of the typed and handwriting versions of the First Recantation Statement and those contained in an authentified specimen[1061] are from the same hand (in other words, the expert concludes that Witness EB is indeed the author of the alleged recantation);[1062]

- A statement from Witness EB dated 23 June 2006 where, confronted with the First Expert Report's conclusions, Witness EB reaffirms that he is not the author of the alleged recantation.[1063]

447. By confidential decision of 23 February 2006, the Appeals Chamber admitted as additional evidence on appeal a photocopy of the typed version of the First Recantation Statement (Confidential Exhibit CA-3D1) and the First Expert Report (Exhibit CA-3D2), to

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[1055] A photocopy of a typed version of the First Recantation Statement was annexed to the Motion of 25 April 2005, while the handwritten version of the First Recantation Statement (dated not 5, but 27 April 2005) was filed by Appellant Ngeze as an annex to the "CORRIGENDUM – Request to treat the Statement of Witness EB in Kinyarwanda Language as Annex IV to the Appellant Hassan Ngeze's Motion for presenting Additional evidence under Rule 115 of the Rules of Procedure and Evidence of witness [REDACTED] - EB filed on 25 April 2005" dated 5 May 2005, filed publicly but made confidential following the intervention of the Appeals Chamber. A copy of the same handwritten document is also filed as Annex to Annex 4 of "Prosecutor's Additional Submissions in Response to Hassan Ngeze's Motion for Leave to Present Additional Evidence of Witness EB" filed confidentially on 7 July 2005.

[1056] The date of 10 April 2005 indicated on the document containing the "free translation" into English of the document in Kinyarwanda differs from that indicated on the latter document, *i.e.* 5 April 2005.

[1057] (Confidential) Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, paras 45 and 48.

[1058] Prosecutor's Additional Submissions in Response to Hassan Ngeze's Motion for Leave to Present Additional Evidence of Witness EB, 7 July 2005 ("Prosecution's Additional Conclusions").

[1059] Annex 2 to Prosecution's Additional Conclusions.

[1060] Annex 4 to Prosecution's Additional Conclusions.

[1061] Document D, Annex 4 of Prosecution's Additional Conclusions.

[1062] First Expert Report, p. 2. The expert indicates that the photocopies submitted to him were of sufficiently good quality to allow him to conclude without reservation. The expert also considers the handwriting and signature of Witness EB contained in other documents (including a specimen of his writing and signature taken by the Prosecution's investigators on 23 May 2005), stressing that the quality of photocopies submitted is "not very clear", but noting however strong indications of a possible common authorship between the documents compared.

[1063] Annex 5 to Prosecution's Additional Conclusions.

which the handwritten version of the First Recantation Statement was annexed.[1064] The Appeals Chamber also ordered the hearing of Witness EB as an Appeals Chamber witness.[1065]

448. By decision of 27 November 2006, the Appeals Chamber admitted as additional evidence a photocopy of a statement dated 15 December 2005,[1066] purportedly written by Witness EB and confirming the First Recantation Statement ("Additional Statement", a photocopy of which was admitted as confidential Exhibit CA-3D3, the original having been admitted by the Appeals Chamber as confidential Exhibit CA-3D4 at the hearing of 16 January 2007).[1067] The Chamber also admitted *proprio motu,* as rebuttal evidence, photocopies of certain envelopes allegedly sent by Witness EB to the Prosecutor (Exhibit CA-P5).[1068]

449. By confidential decision of 13 December 2006, the Appeals Chamber admitted the following documents as rebuttal evidence: (1) Statement from Investigator Moussa Sanogo dated 21 November 2006 (confidential Exhibit CA-P1); (2) End of Mission Report (16-18 October 2006), dated 18 October 2006 (confidential Exhibit CA-P2); (3) Investigation Report of 23 August 2006 with Annexes (confidential Exhibit CA-P3); (4) Statements from Witness EB dated 22 May and 23 June 2005 (confidential Exhibit CA-P4).[1069] It also ordered that Moussa Sanogo be heard by the Appeals Chamber.[1070]

450. At his hearing by the Appeals Chamber in Arusha on 16 January 2007, Witness EB was first questioned by the President and several Appeals Chamber Judges, before being cross-examined by the Defence for Appellant Ngeze, then by the Prosecutor and the Defence for Appellant Barayagwiza. After a short summary of his testimony at trial against Appellant Ngeze, the witness indicated that he did not intend to recant that testimony.[1071] After being shown confidential Exhibits CA-3D1, CA-3D2 and CA-3D4, Witness EB denied being the author of the typed version of the Kinyarwanda statement of 5 April 2005 (CA-3D1),[1072] as well as of the handwritten version of the First Recantation Statement dated 27 April 2005,

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[1064] (Confidential) Decision on Appelant Hassan Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006 ("Decision of 23 February 2006"), paras. 29 and 41. The originals of the typed and handwritten versions of the First Recantation Statement are not included in the case-file, since the parties claim never to have had them in their possession. These documents were given exhibit numbers by the Registry following the Appeals Chamber's Decision of 27 November 2006 : [Public and Redacted Version] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Request for Leave to Present Additional Evidence of Witnesses ABC1 and EB, 27 November 2006 ("Decision of 27 November 2006"), para. 45.

[1065] Decision of 23 February 2006, paras. 29 and 81; (Confidential) Decision on the Prosecutor's Motion for an Order and Directives in Relation to Evidentiary Hearing on Appeal Pursuant to Rule 115, 14 June 2006.

[1066] Although dated 15 December 2005, it was only in July 2006 that a photocopy of the Additional Statement reached the Prosecutor who, on 3 August 2006, informed Appellant Ngeze and the Appeals Chamber of it (see Request for a Further Extension of the Urgent Restrictive Measures in the Case *Prosecutor v. Hassan Ngeze*, Pursuant to Rule 64 [of the] Rules Covering the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal, filed confidentially on 3 August 2006, para. 5).

[1067] Decision of 27 November 2006, paras. 39 and 44.

[1068] *Ibid.*, paras. 42 and 44.

[1069] Confidential Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006 ("Decision of 13 December 2006"), paras. 8-10, 17.

[1070] *Ibid.*, para. 17.

[1071] T(A) 16 January 2007, p. 7.

[1072] *Idem.*

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annexed to the First Expert Report (CA-3D2) and the original of the Additional Statement (CA-3D4).[1073] On the other hand, the witness confirmed being the author of the statements of 22 May and 23 June 2005 (CA-P4) taken by the Prosecutor's investigators.[1074] Questioned about Witness AFX, Witness EB confirmed that he knew him but denied having handed over a statement to him,[1075] and stated that he suspected him of fabricating false statements.[1076] Finally, Witness EB confirmed having maintained his accusations against Appellant Ngeze at *Gacaca* sessions where he had testified.[1077] Furthermore, when confronted in cross-examination with the fact that confidential Exhibit CA-3D5,[1078] a document supposedly corresponding to his hearing by the *Gacaca* made no mention of any accusations against Appellant Ngeze, the witness claimed that the document was obviously incomplete, since it failed to mention the name of Ngeze – who was at the top of the list of people he testified against – as well as that of another accused, and also failed to list the names of all of the *Gacaca* members present.[1079] During the same hearing, the Appeals Chamber admitted as confidential exhibits a series of additional samples of Witness EB's handwriting.[1080]

451. The Appeals Chamber also heard Mr. Moussa Sanogo, charged by the Prosecutor with two investigation missions in relation to Witness EB in Gisenyi, Rwanda, the first from 19 to 24 May 2005, during which he met with Witness EB on 22 and 23 May 2005,[1081] and the second from 16 to 18 October 2006, during which Mr. Sanogo met various individuals, including survivors from Gisenyi, one of whom described himself as a very close friend of Witness EB, and a *Gacaca* representative. It appears from the 16-18 October 2006 mission report (CA-P2) that the alleged "friend" of Witness EB,[1082] after indicating that EB had not informed him that he had recanted his testimony against Appellant Ngeze, "agreed" to approach Witness EB, and later confirmed to Mr. Sanogo that Witness EB had admitted

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[1073] *Ibid.*, pp. 10-12 (closed session). Confronted in cross-examination with the fact that the First Expert Report identifies him as the author of the handwritten version of the First Recantation Statement, Witness EB continued to deny being its author (T(A) 16 January 2007, p. 30 (closed session)).

[1074] *Ibid.*, p. 10 (closed session).

[1075] *Idem.*

[1076] *Ibid.*, p. 11 (closed session).

[1077] *Ibid.*, pp. 13-14 and 21 (closed session).

[1078] Admitted during the hearing: T(A) 16 January 2007, p. 18 (closed session).

[1079] T(A) 16 January 2007, pp. 21-22 (closed session).

[1080] Confidential Exhibits CA-3D6 and CA-3D7, which contain two lists of names written by Witness EB as well as Confidential Exhibit CA-1, containing a short specimen of the same handwriting. Finally, at the end of the appeal hearing of 18 January 2007, the Appeals Chamber ordered further that specimens of Witness EB's handrwriting and signature be taken in the presence of the parties: T(A) 18 January 2007, p. 81 The document in question forms Confidential Exhibit CA-2: Report to the Appeals Chamber of the taking of specimen of Witness EB's handwriting and signature, filed on 29 January 2007.

[1081] Report on this contact between Mr. Sanogo and Witness EB, written by the former and dated 21 November 2006, forms Confidential Exhibit CA-P1, and Witness EB's statement taken by the investigators forms Confidential Exhibit CA-P4. Witness EB was heard for the second time by the Prosecution's investigators on 23 June 2005, in the absence of Mr. Sanogo. Confronted with the results of the First Expert Report, Witness EB maintained his denial and indicated that the expert was wrong in attributing the First Recantation Statement to him (Annex 5 to Prosecution Additional Conclusions; the statement in question forms Confidential Exhibit CA-P4).

[1082] During his cross-examination by Appellant Ngeze's Counsel, Witness EB denied even knowing the person in question (T(A) 16 January 2007 (closed session), pp. 14-16). For his part, Mr. Sanogo confirmed that he had not been in a position to check the information in question (T(A) 16 January 2007, pp. 52-53) and explained that he had indicated in his report the identity under which the individual in question had introduced himself, without taking any further steps to check it (T(A) 16 January 2007, pp. 64-65).

having recanted, without explaining why.[1083] This "friend" of Witness EB also indicated to Mr. Sanogo that he was not surprised by Witness EB's recantation, because he was a spendthrift and always in need of money and would do anything for money.[1084] The "friend" was also told by another friend that he had been contacted by Witness AFX and had gone to his home, where he had also met Witness EB. Witness AFX had allegedly proposed to that "other friend" and to Witness EB that they should testify in favour of Appellant Ngeze in return for money. Following some discussion, the "other friend' and Witness EB had allegedly accepted the offer to testify for 150,000 RWF, and Witness AFX had given the "other friend" an advance payment of 30,000 RWF.[1085]

452. The other survivors from Gisenyi heard by Mr. Sanogo had confirmed that Witness EB would do anything for money; one person even alleged that at *Gacaca* hearings he had made false allegations of genocide against refugees who had returned home, and then later ask to be paid in order to withdraw them.[1086] According to the same mission report, a *Gacaca* representative had indicated that he did not regard Witness EB as a credible witness, although he still testified at almost every trial.[1087] The same representative had heard "credible witnesses" who claimed that Witness EB had been hiding with close relatives, had witnessed nothing and had invented.[1088]

453. Finally, Mr. Sanogo reported that, in July 2006, after an informer had proposed introducing him to a potential important source of information, it was Witness AFX, whom Mr. Sanogo knew already, who had shown up at the meeting and, recognizing Mr. Sanogo, had given no information. Mr. Sanogo indicated that he had the impression that Witness AFX, thinking he was dealing with a novice, had come to make up a story and earn himself some money, but had changed his mind when he recognized who it was. Mr. Sanogo believed that Witnesses AFX and EB "seemed to have made a business out of the genocide".[1089] During his testimony, Mr. Sanogo confirmed this information, as well as that contained in his mission reports.[1090]

454. Moreover, seized of Appellant Ngeze's oral request to order a comparison of Exhibits CA-3D6 and CA-3D7 with CA-3D4, in order to determine whether the original Additional Statement was written and signed by Witness EB, the Appeals Chamber ordered an expert report, pursuant to Rules 54, 89(D) and 107 of the Rules, calling for (1) a forensic examination of the photocopy of the handwritten version of the First Recantation Statement and of the original Additional Statement, with a view to determining whether the two Statements had been written by the same person; (2) a comparison between these documents and the samples of Witness EB's handwriting taken during the hearings of 16 and

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[1083] Confidential Exhibit CA-P2, paras. 3-7.
[1084] *Ibid.*, para. 5.
[1085] *Ibid.*, paras. 8-9.
[1086] *Ibid.*, paras. 23-26. During his cross-examination, Witness EB denied having ever accepted money to recant his testimony, but said that he possessed information that Witness AFX had offered money to other witnesses (T(A) 16 January 2007, (closed session) p. 36).
[1087] *Ibid.*, paras. 27-28. Confronted at the hearing with these allegations, Witness EB expressed surprise, and maintained his earlier statement (T(A) 16 January 2007 (closed session), pp. 27-29).
[1088] *Ibid.*, para. 28.
[1089] *Ibid.*, paras. 36-42 (Quotation taken from para. 42). When this was put to him in cross-examination, Witness EB maintained that he had never associated with Witness AFX in activities of this kind (T(A) 16 January 2007, p. 33 (closed session)).
[1090] T(A) 16 January 2007, pp. 50-60.

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18 January 2007 (CA-3D6, CA-3D7, CA-1 and CA-2), with a view to determining whether Witness EB was indeed the author of the two Statements.[1091]

455. The handwriting expert appointed by the Appeals Chamber, Mr. Stephen Maxwell, filed his report on 19 April 2007.[1092] In this Second Expert Report, Mr. Maxwell notes, after examining the photocopy of the handwritten version of the First Recantation Statement that it consists of a photocopy/fax of poor quality and that, although there are similarities between the disputed writing on this document and that on the specimen material, it is not possible to offer conclusive opinions based on the examination of "photocopied documents".[1093] With regard to the comparison between the Additional Statement and the certified samples of Witness EB's handwriting, Mr. Maxwell notes both similarities but also differences, which might be significant.[1094] Consequently, on the basis of the material submitted, he cannot determine conclusively whether the Additional Statement was written by Witness EB. He adds that it is also possible that the First Recantation Statement and the Additional Statement might have been written by Witness EB, using different handwriting styles, but he offers no conclusive opinion in this respect.[1095] Finally, Mr. Maxwell points out that the short, illegible signature on the Additional Statement is similar in structure and arrangement to the specimen signatures attributed to Witness EB, which would support the proposition that Witness EB is the writer. He does not however exclude the possibility that it is a good quality forgery.[1096]

456. At the invitation of the Appeals Chamber,[1097] the parties filed their submissions relating to the Second Expert Report, to the credibility of Witness EB and to its impact on the verdict.[1098]

(b) Arguments of the Parties

457. Appellant Ngeze raises the following main arguments to demonstrate the lack of credibility of Witness EB: (1) the First Expert Report establishes that the First Recantation Statement is from Witness EB[1099] and the Second Expert Report establishes that the signature

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[1091] Public Order Appointing a Handwriting Expert with Confidential Annexes, 7 February 2007. See also Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 21 February 2007 where, at the expert's request, the Appeals Chamber ordered that additional documents be handed over to the expert for comparison and extended his mission accordingly. See finally Second Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 27 March 2007, where the Appeals Chamber further extended the expert's mission to include for comparison with the disputed documents the *original* of a specimen of Witness EB's handwriting taken by the Prosecutor's investigators on 23 May 2005.

[1092] Report of Stephen Maxwell, Case number 1640/07, Examination of Handwriting and Signatures Witness EB, dated 3 April 2007 and filed confidentially on 12 April 2007 ("Second Expert Report").

[1093] Second Expert Report, p. 3.

[1094] In particular, the arrangement of the writing with respect to the edge of the page, the relative sizes of the letters and the structure of some of the letter designs (Second Expert Report, p. 3).

[1095] Mr. Maxwell *inter alia* indicates that further specimen from Witness EB, written not for the purpose of this investigation, might prove to be more suitable for comparison purposes (Second Expert Report, p. 3).

[1096] Second Expert Report, p. 4.

[1097] T(A) 16 January 2007, pp. 55-57.

[1098] Appellant Ngeze's Conclusions Following Second Expert Report; Appellant Barayagwiza's Conclusions Following Second Expert Report; Prosecution's Submissions Following Second Expert Report.

[1099] Appellant Ngeze's Conclusions Following Second Expert Report, pp. 15, 16 and 18. See also pp. 13 and 16, where Appellant Ngeze submits that the conclusion reached by the first expert in this respect satisfies the highest standard of probability that can be expected of a handwriting expert.

on the Additional Statement is also Witness EB's;[1100] (2) the results of Mr. Sanogo's investigation show that Witness EB is not credible;[1101] (3) invited by the President of the Appeals Chamber to summarize the main aspects of the events about which he testified at trial, Witness EB was unable to recall all the details of the events of 7 April 1994.[1102] Appellant Ngeze concludes that the exclusion of Witness EB's testimony would potentially invalidate his conviction, since, in his submission, the testimonies of Witnesses AGX, AHI and AEU are not sufficient to prove beyond reasonable doubt the criminal acts with which he is charged.[1103]

458. Appellant Barayagwiza argues that the two handwriting experts recognized that Witness EB was indeed the author of the two recantation statements, a conclusion confirmed by the evidence gathered by the Prosecutor's investigators.[1104] He adds that the new evidence and testimonies admitted on appeal show that Witness EB is a liar.[1105] He accordingly concludes that Witness EB's trial testimony could not be relied upon as evidence against himself or against Appellant Ngeze.[1106]

459. The Prosecutor submits that the purported recantation statement from Witness EB has no probative value and is merely a manipulation, designed to exculpate Appellant Ngeze.[1107] In support of this submission, he points out that Witness EB consistently denied being the author of the statements,[1108] that the forensic expertise ordered by the Appeals Chamber does not contradict this,[1109] and that the First Recantation Statement and the Additional Statement are not credible.[1110] He concludes that the assessment of Witness EB's testimony by the Trial

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[1100] *Ibid.*, p. 17. According to Appellant Ngeze, the second expert concludes that the Additional Declaration is from Witness EB, a conclusion with which he himself agrees, while stressing that the expert's proviso that he cannot exclude the possibility of a good-quality forgery is not otherwise supported.

[1101] *Ibid.*, pp. 12, 13 and 18. To demonstrate the lack of credibility of Witness EB, the Appellant also submits that the *Gacaca* documents show that, contrary to the witness' allegations during the appeal hearing, he did not incriminate Appellant Ngeze before the *Gacaca*: Appellant Ngeze's Conclusions Following Second Expert Report, p. 10.

[1102] *Ibid.*, pp. 8 and 18. The Appeals Chamber is of the view that the testimony of Witness EB during the appeal hearing does not support Appellant's Ngeze's assertion, since the President invited the witness to "briefly recall the main facts upon which [he had testified] on 15, 16 and 17 May 2001", without further precision (T(A) 16 January 2007, p. 7).

[1103] *Ibid.*, pp. 18-20.

[1104] Appellant Barayagwiza's Conclusions Following Second Expert Report, para. 15.

[1105] *Ibid.*, para. 16.

[1106] *Ibid.*, paras. 16-17.

[1107] Prosecution's Submissions Following Second Expert Report, para. 3.

[1108] *Ibid.*, paras. 5, 16-26.

[1109] *Ibid.*, paras. 5-10.

[1110] *Ibid.*, paras. 18-20, 23-24, 27-44. The Prosecutor submits in particular that (1) the recantation appeared at the same time as a series of similar alleged recantations, sent to the same persons from the same fax machine (paras. 18 and 41); (2) the Additional Statement appeared in suspicious circumstances (paras. 23, 38-40); (3) the recantation may have been made in exchange for payment (para. 24); (4) Witness EB's testimony at trial was supported by other credible evidence (paras. 28-30); (5) the reasons given in the First Recantation Statement for having given false testimony at trial are not credible (paras. 31-32); (6) contrary to what is stated in the Additional Statement, the typed and handwritten versions of the First Recantation Statement do not appear to have been written by the same person, as is shown by differences in spelling as between the two versions (paras. 33-35); (7) it is surprising that Witness EB should have waited until April 2005 (four years after his trial testimony) before recanting it (para. 36); and (8) it is surprising that Witness EB knew the contact details of the Appellant and his newly appointed counsel, as well as those of the ICTR President and Prosecutor (para. 37).

Chamber should be maintained.[1111] In the alternative, the Prosecutor argues that, even if the testimony of Witness EB were to be rejected, there would nonetheless remain sufficient evidence to support Appellant Ngeze's conviction and sentence.[1112]

(c) Analysis

460. The Appeals Chamber considers that, since Witness EB denies being the author of the two recantation statements admitted as additional evidence,[1113] it is necessary to begin by examining the effect of the two expert reports. The Appeals Chamber considers that the issue here is not whether it can be established beyond reasonable doubt that Witness EB is the author of one or both of these statements but, rather, whether the expert reports raise doubt as to his credibility, given his denial of authorship.

461. With respect to the handwritten version of the First Recantation Statement, the Appeals Chamber recalls that the original of that document is not in the case-file, and that the two experts who examined copies of this document came to different conclusions as to whether the photocopy submitted to them was of sufficient quality to enable a conclusive opinion to be reached: the first expert states that the photocopies he examined were of a sufficient quality to allow him to reach a conclusion, and he expressly identifies Witness EB as the author of the First Recantation Statement;[1114] the second expert states that it is not in principle possible to reach a conclusive opinion based on photocopies of documents, and he evidently believes that the poor quality of the document submitted to him does not justify making an exception to that principle.[1115]

462. With respect to the Additional Statement, the Appeals Chamber notes that the second expert explains that he is not in a position, based on a comparison of the documents, to determine whether Witness EB wrote this document.[1116] The second expert adds, however, that the handwriting evidence would support the proposition that Witness EB signed the Additional Statement, although the possibility that it is a forgery cannot be excluded.[1117] The

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[1111] Prosecution's Submissions Following Second Expert Report, paras. 45-50. The Prosecutor argues in particular that it is not surprising that the *Gacaca* documents do not mention that Witness EB gave evidence against Appellant Ngeze, because the extracts in question contain information given by the witness in relation to individuals who carried out the attacks in Gisenyi and not on those (such as the Appellant) who instigated those attacks (para. 47). The Prosecutor further contends that mere opinions to the effect that Witness EB was not credible are not capable of challenging his trial testimony (para. 49).

[1112] *Ibid.*, paras. 51-54.

[1113] The Appeals Chamber notes incidentally that the position taken by Witness EB makes it unnecessary to consider the Prosecutor's arguments that the recantation as set out in the two statements is not credible (Prosecution's Submissions Following Second Expert Report, paras. 18-20, 23, 24, 27-44).

[1114] First Expert Report, p. 2. The Appeals Chamber notes that in his Additional Conclusions the Prosecutor acknowledges that that report identifies the signatures contained in the disputed documents as originating from Witness EB, but omits to mention the fact that the report reaches the same conclusion as to the *handwriting* in those documents.

[1115] Second Expert Report, p. 3. The Appeals Chamber notes in this respect that the document submitted to the second expert consists of a print-out of a scanned version of the photocopy annexed to the First Expert Report, which may explain why the two experts differ as to the quality of the photocopy.

[1116] Second Expert Report, p. 3.

[1117] *Ibid.*, p. 4.

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Appeals Chamber considers, therefore, that the Second Expert Report is not conclusive as to the author of the Additional Statement.[1118]

463. In the view of the Appeals Chamber, Witness EB's formal identification by the first expert as the author of the First Recantation Statement raises a serious doubt as to Witness EB's credibility in view of his denial that he is the author of that statement. This doubt is not dispelled by the Second Expert Report, even though that report is not conclusive. The Appeals Chamber does not exclude the possibility that the Additional Statement is a forgery, fabricated after Witness EB denied being the author of the First Recantation Statement, but this does not dispel the doubt raised as to Witness EB's credibility by the first expert's identification of him as the author of the First Recantation Statement. Before assessing the impact of such doubt, the Appeals Chamber finds it relevant to consider Appellant Ngeze's argument that the results of Mr. Sanogo's investigation demonstrate Witness EB's lack of credibility.

464. The Appeals Chamber recalls that, following receipt of the Additional Statement by his office, the Prosecutor instructed Mr. Sanogo to carry out a second investigation in Gisenyi in October 2006, in the course of which the latter obtained information suggesting that Witness EB was paid to recant his testimony.[1119] According to the Prosecutor, even if that were proved, the recantation would be of no probative value. However, the Prosecutor appears to take the view that in any event the issue is moot, since the investigation did not obtain reliable evidence of the alleged bribe, and Witness EB ultimately did not recant his testimony.[1120] In the view of the Appeals Chamber, that is to fail to give proper weight to the information obtained during the investigation and to Mr. Sanogo's testimony at the hearing. The fact that the Prosecutor's own chief investigator, sent by the Prosecutor to investigate Witness EB's purported recantation, himself adds to the serious doubt raised as to the witness' credibility is surely disturbing. The Appeals Chamber is well aware of the limits of the investigation in question. As Mr. Sanogo admitted, he was unable to check some of the negative information he received on Witness EB.[1121] Furthermore, his impression that "EB and AFX seemed to have made a business out of the genocide" merely represented his "feeling".[1122] Finally, he admitted that he did not check the identity given by one of his informers.[1123] Mr. Sanogo's report and testimony are undeniably insufficient to establish with certainty that the First Recantation Statement, attributed by the first expert to Witness EB, was made by the latter in exchange for payment in the circumstances described by one of the individuals interviewed by Mr. Sanogo. However, the Appeals Chamber cannot ignore this information, which undeniably casts additional doubt on the credibility of Witness EB.

465. Turning now to the impact of the doubts raised both by the First Expert Report and the Prosecutor's investigator, Appellant Ngeze submits that, whether false or true, the

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[1118] Since the Second Expert Report is not conclusive as to the authorship of the Additional Statement, the Appeals Chamber considers that it need not address the Prosecutor's specific arguments regarding the circumstances of the document's sending and its content, which, in his view, are evidence of a concerted effort to manipulate the appeal proceedings (Prosecution's Submissions Following Second Expert Report, paras. 23, 38-42).
[1119] Prosecution's Submissions Following Second Expert Report, para. 24.
[1120] *Ibid.*, paras. 24-25.
[1121] T(A) 16 January 2007, pp. 52-53.
[1122] *Ibid.*, p. 62.
[1123] *Ibid.*, pp. 64-65.

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recantation statements require that his conviction be set aside, since Witness EB's testimony is not credible.[1124] On the other hand, the Prosecutor submits that, even if the Appeals Chamber disbelieved Witness EB's denial that he had recanted, this would not affect the Trial Chamber's finding regarding the witness' credibility.[1125]

466. The Appeals Chamber does not share the Prosecutor's view that, since Witness EB has not recanted his trial testimony, the additional evidence admitted on appeal could not have constituted a decisive factor capable of affecting the Trial Chamber's findings. It is apparent from paragraph 812 of the Judgement that the Trial Chamber considered the following elements before declaring Witness EB credible: (1) reasonable and adequate responses were given by the witness to questions put to him in cross-examination in relation to the omission (a) of the Appellant's name in two of his three written statements and (b) of certain incidents mentioned in his testimony such as the looting of his parents' house and the torture of his pregnant sister; and (2) the fact that Witness EB was clear in his account of events, and that he was careful to distinguish what he did and saw from what he was reporting. The Appeals Chamber is of the view that if, after hearing Witness EB's testimony at trial, the Trial Chamber had been aware of the facts currently before the Appeals Chamber – namely (1) the fact that Witness EB denies before the Chamber being the author of a recantation statement, but an expert retained by the Prosecutor unhesitatingly attributes to him the handwriting and signature on that statement; and (2) the fact that the Prosecutor's investigator raises serious doubts as to the morality of the witness and reports that several genocide survivors consider him ready to do anything for money – the Trial Chamber would have been bound to find that these matters raised serious doubts as to Witness EB's credibility. As a reasonable trier of fact, it would have rejected Witness EB's testimony, or at least required corroboration of his testimony by other credible evidence. The Appeals Chamber accordingly decides to reject Witness EB's trial testimony to the extent that it is not corroborated by other credible evidence.

### D. Impact on the verdict

467. The Prosecutor submits that, even if Witness EB's testimony were to be rejected, there would still remain sufficient evidence to maintain Appellant Ngeze's conviction and sentence.[1126]

468. On reading the Judgement, the Appeals Chamber finds that the following of the Trial Chamber's conclusions rely exclusively on Witness EB's testimony and will be set aside: "Hassan Ngeze ordered the *Interahamwe* in Gisenyi on the morning of 7 April 1994 to kill Tutsi civilians and prepare for their burial at the *Commune Rouge*";[1127] "[m]any were killed in

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[1124] Appellant Ngeze's Conclusions Following Second Expert Report, para. 18.
[1125] Prosecution's Submissions Following Second Expert Report, para. 46.
[1126] *Ibid.*, paras. 28, 30, 51-54.
[1127] Judgement, para. 836. The Appeals Chamber understands that this finding relies exclusively on the testimony of Witness EB, summarized as follows by the Trial Chamber at paragraph 825 of the Judgement (see also para. 789 and 790):

> Witness EB gave a clear and detailed account of an attack that day against the Tutsi population in Gisenyi by the *Interahamwe*, an attack in which he and his family were targeted as victims [...] Although there is no evidence that he was present during these killings, this attack was ordered by Hassan Ngeze, communicated through a loudspeaker

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the subsequent attacks that happened immediately thereafter and later on the same day";[1128] "[a]mong those killed were Witness EB's mother, brother and pregnant sister. Two women, one of whom was Ngeze's mother, inserted the metal rods of an umbrella into her body";[1129] "[t]he attack that resulted in these and other killings was planned systematically, with weapons distributed in advance, and arrangements made for the transport and burial of those to be killed".[1130] The Appeals Chamber notes that these findings form the entire factual findings underlying Appellant Ngeze's conviction for ordering genocide.[1131] That conviction must therefore be set aside. The same goes for the Appellant's conviction for ordering extermination.[1132]

469. The Appeals Chamber will now examine whether the findings in paragraph 837 of the Judgement supporting Appellant Ngeze's conviction for aiding and abetting genocide,[1133] committing direct and public incitement to commit genocide,[1134] aiding and abetting extermination[1135] and committing persecution[1136] can be maintained on the basis of testimonies other than that of Witness EB.

470. The evidentiary bases of the factual findings set out in paragraph 837 of the Judgement are as follows:

- The finding that "Ngeze helped secure and distribute, stored, and transported weapons to be used against the Tutsi population" essentially relies on Witness AHI's testimony that the Appellant took part in a distribution of weapons on 8 April 1994, and on Witness AFX's testimony that the Appellant had stored weapons at an unspecified date;[1137]

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from his vehicle. Ngeze ordered the *Interahamwe* to kill the Tutsi and ordered some of them to go to *Commune Rouge* to dig graves.

[1128] Judgement, para. 836. The Appeals Chamber understands that this finding also relies exclusively on the above mentioned summary of Witness EB's testimony.

[1129] *Idem.* The Trial Chamber summarizes as follows the testimony of Witness EB supporting this finding: "[h]e saw his brother killed, the body of his pregnant sister sexually violated, and his mother attacked with a nail studded club and killed. He himself was severely injured" (Judgement, para. 825. See also para. 789).

[1130] Judgement, para. 836. The Appeals Chamber understands that this finding is also based exclusively on Witness EB's testimony as summarized at paragraph 825 of the Judgement:

> [Witness EB's] description of the attack suggests that it was planned systematically. Weapons were distributed from a central location, Samvura's house, where Witness EB saw the *Interahamwe* picking them up. Graves were dug in advance, and vehicles were organized to transport the bodies. The brief dialogue recounted between the *Interahamwe* and Witness EB's mother, before she was clubbed in the head, indicates that the attackers and their victims knew each other. The attackers were wondering why she was still alive, signifying that the *Interahamwe* intended to kill all their Tutsi neighbors.

[1131] Judgement., paras. 836, 955, 977A.

[1132] *Ibid.*, para. 1068, erroneously referring to para. 954 instead of paras. 955-956.

[1133] *Ibid.*, paras. 956 and 977A.

[1134] *Ibid.*, para. 1039.

[1135] *Ibid.*, para. 1068, erroneously referring to para. 954 instead of paras. 955-956.

[1136] *Ibid.*, para. 1084 referring to para. 1039.

[1137] *Ibid.*, para. 831. The Trial Chamber also refers to Witness Serushago's testimony that the Appellant transported weapons on 7 April and between 13 and 20 April 1994. However, it does not appear that the Trial Chamber relied on this statement for anything other than its finding that Witnesses AHI and AFX were

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- The finding that the Appellant "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*" essentially relies on Witness AHI's testimony.[1138] The Trial Chamber also observed that Witness AHI's testimony corroborates Serushago's testimony that Ngeze played an active and supervisory role in the identification and targeting of Tutsi at roadblocks, who were subsequently killed at the *Commune Rouge*;[1139]

- The finding that Appellant Ngeze "often drove around with a megaphone in his vehicle, mobil[iz]ing the population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority", which also partly supports the Trial Chamber's finding related to the Appellant's genocidal intent,[1140] also relies on the testimonies of Witnesses Serushago, ABE, AAM and AEU;[1141]

- Finally, the Trial Chamber's finding that "[a]t Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared", which also partly supports the Trial Chamber's finding that the Appellant had a genocidal intent,[1142] is based on the testimony of Witness LAG, who heard and saw Ngeze say at Bucyana's funeral that if Habyarimana were to die "we would not be able to spare the Tutsi".[1143]

471. Admittedly, the findings in paragraph 837 of the Judgement do not directly rely on Witness EB's testimony. However, Witness EB was one of the four witnesses who claimed to have seen the Appellant on 7 and 8 April 1994, and on whom the Trial Chamber partly relied in order to reject the Appellant's alibi.[1144] The Appeals Chamber is bound to ask itself whether, in the absence of Witness EB's testimony, the Trial Chamber's rejection of the alibi and resultant finding, in paragraphs 831 and 837 of the Judgement, that the Appellant had taken part in the distribution of weapons on 8 April 1994 can be sustained. The Appeals Chamber turns now to this issue, taking into account the fact that the Trial Chamber erred in finding that the alibi testimonies were "thoroughly inconsistent".[1145]

472. The Appeals Chamber recalls that, over and above the substantial inconsistencies that the Trial Chamber deemed to have noted in the defence testimonies regarding the alibi, it considered even more important the fact that "none of the Defence witnesses had evidence other than hearsay that Ngeze was arrested at all. Their sources of information were vague, with the exception of three witnesses who learned of the arrest from Ngeze himself".[1146] The

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corroborated by Witness Serushago's testimony as to the fact that Ngeze transported weapons in his vehicle (dates unspecified): see Judgement, para. 831.

[1138] *Ibid.*, para. 833.

[1139] *Idem.*

[1140] *Ibid.*, para. 968.

[1141] *Ibid.*, para. 834.

[1142] *Ibid.*, para. 968.

[1143] *Ibid.*, para. 835.

[1144] *Ibid.*, para. 829:

"Four Prosecution witnesses saw Ngeze on 7 April 1994. Their eyewitness testimony under oath is not shaken by the hearsay of the Defence witnesses or the contradictory testimony of Ngeze himself".

[1145] *Supra* X. B. 3.

[1146] Judgement, para. 828.

Appeals Chamber considers that statement to be incorrect: in addition to witnesses having learned of Appellant Ngeze's arrest from Ngeze himself, Witness BAZ-1 stated that he had heard of the arrest from the Appellant's immediate neighbours, whose names he gave.[1147] Similarly, Witness RM-112 stated that it was the Appellant's servant who informed him of the arrest when he went to Ngeze's house in the morning of 7 April 2007.[1148]

473. Thus the reasons relied on by the Trial Chamber in order to conclude that the alibi raised no reasonable doubt as to the Appellant's acts between 6 and 9 April 1994 are erroneous in two respects: (1) the testimonies of Defence witnesses were not "thoroughly inconsistent" and (2) the witnesses' sources of information were only vague in some instances. Furthermore, the fact that the evidence from Defence witnesses regarding Appellant Ngeze's arrest was only hearsay does not in itself suffice to render their testimony not credible. Under these circumstances, the Appeals Chamber considers that there is a risk of a miscarriage of justice if the Trial Chamber's finding on the alibi is upheld, particularly in view of the fact that, with the rejection of Witness EB's testimony, there remain only three witnesses (Witnesses Serushago, AHI and AGX) who allegedly saw the Appellant between 6 and 9 April 1994, the testimony of one of these witnesses (Witness Serushago) being moreover acceptable only to the extent that it is corroborated.[1149]

474. The Appeals Chamber accordingly reverses the Trial Chamber's finding on the alibi and concludes that it has not been established beyond reasonable doubt that the Appellant took part in a distribution of weapons on 8 April 1994. However, the fact that there exists reasonable doubt as to Witness AHI's testimony that Appellant Ngeze participated in a distribution of weapons on 8 April 1994 does not necessarily imply that his testimony must be rejected in its entirety. Thus the existence of reasonable doubt as to the truth of a statement by a witness is not evidence that the witness lied with respect to that aspect of his testimony, nor that the witness is not credible with respect to other aspects. Consequently, the Appeals Chamber considers that the following factual findings in paragraph 837 of the Judgement are not affected by the above findings: that the Appellant stored weapons at his home before 6 April 1994;[1150] that he "set up, manned and supervised roadblocks in Gisenyi in 1994"; that he identified "targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*"; that he "often drove around with a megaphone in his vehicle, mobil[iz]ing the population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic

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[1147] T. 27 January 2003, p. 67.

[1148] T. 13 March 2003, p. 3.

[1149] See Judgement, para. 824.

[1150] In paragraph 837 of the Judgement, the Trial Chamber finds that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population". This finding relied on the testimony of Witnesses AHI, AFX and Serushago (see Judgement, para. 831). Since Witness AHI's testimony with regard to the distribution of weapons by the Appellant on 8 April 1994 cannot be accepted, only the testimonies of Witnesses AFX and Serushago remain. Witness AFX only asserted that, on an unspecified date before the killings of April 1994, Appellant Ngeze showed him the weapons he was keeping at his home (see Judgement, paras. 796 and 831). Witness Serushago's testimony can only be accepted if it is corroborated by other evidence (Judgement, para. 824). Accordingly, only the finding that the Appellant stored weapons before 6 April 1994 remains. However, this factual finding must also be set aside for the reasons set out below (*Infra* XII. C. 3. (b) (ii) ).

minority"[1151] and that "[a]t Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared".[1152]

## XI. MODES OF RESPONSIBILITY

475. Before examining whether the Trial Chamber could find that the crimes charged in the Indictments were committed, and that the Appellants should be held responsible for them, the Appeals Chamber considers it helpful to recall certain principles applicable to modes of responsibility.

476. The relevant provisions are found in Article 6(1) and (3) of the Statute:

> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
>
> 3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

### A. Responsibility under Article 6(1) of the Statute

477. The Appeals Chamber notes that, in convicting the Appellants under Article 6(1) of the Statute for various crimes, the Trial Chamber has not always identified the mode of responsibility on which the conviction was based. The Appeals Chamber must therefore identify the relevant mode of responsibility (if any) for each charge on which the Trial Chamber entered a conviction. The Appeals Chamber is of the view that the following modes of responsibility may be relevant in the instant case: committing; planning; instigating; ordering; aiding and abetting.

478. The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise.[1153] However, it does not appear that the Prosecutor charged the Appellants at trial with responsibility for their participation in a joint criminal enterprise,[1154] and the Appeals Chamber does not deem it appropriate to discuss this mode of participation here.[1155]

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[1151] Judgement, para. 837. The findings that Appellant Ngeze possessed the intent to destroy the Tutsi population and acted with the intent to destroy in whole or in part the Tutsi ethnical group, supporting his conviction for genocide, notably rely on this factual finding (Judgement, paras. 968 and 977A).

[1152] *Idem*. The findings that Appellant Ngeze possessed the intent to destroy the Tutsi population and acted with the intent to destroy in whole of in part the Tutsi ethnical group, supporting his conviction for genocide, notably rely on this factual finding (Judgement, paras. 968 and 977A).

[1153] *Tadić* Appeal Judgement, para. 188.

[1154] Even if such a charge could possibly be inferred from certain paragraphs of the Indictments, for example: *Nahimana* Indictment, para. 6.27; *Barayagwiza* Indictment, para. 7.13; *Ngeze* Indictment, para. 7.15.

[1155] For a more detailed discussion of this form of participation, see *Brđanin* Appeal Judgement, paras. 389-432; *Stakić* Appeal Judgement, paras. 64-65; *Kvočka et al.* Appeal Judgement, paras. 79-119; *Ntakirutimana* Appeal Judgement, paras. 461-468; *Vasiljević* Appeal Judgement, paras. 94-102; *Krnojelac* Appeal Judgement, paras. 28-33, 65 *et seq.*; *Tadić* Appeal Judgement, paras. 185-229.

479. The *actus reus* of "planning" requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated.[1156] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[1157] The *mens rea* for this mode of responsibility entails the intent to plan the commission of a crime or, at a minimum, the awareness of substantial likelihood that a crime will be committed in the execution of the acts or omissions planned.[1158]

480. The *actus reus* of "instigating" implies prompting another person to commit an offence.[1159] It is not necessary to prove 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.[1160] The *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a miminum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.[1161]

481. With respect to ordering, a person in a position of authority[1162] may incur responsibility for ordering another person to commit an offence,[1163] if the person who received the order actually proceeds to commit the offence subsequently. 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, and if that crime is effectively committed subsequently by the person who received the order.[1164]

482. The *actus reus* of aiding and abetting[1165] is constituted by acts or omissions[1166] aimed specifically at assisting, furthering or lending moral support to the perpetration of a specific

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[1156] *Kordić and Čerkez* Appeal Judgement, para. 26.

[1157] *Kordić and Čerkez* Appeal Judgement, para. 26. Although the French version of the Judgement uses the terms "*un élément déterminant*", the English version – which is authoritative – uses the expression "factor substantially contributing to".

[1158] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 31.

[1159] *Ndindabahizi* Appeal Judgement, para. 117; *Kordić and Čerkez* Appeal Judgement, para. 27.

[1160] *Gacumbitsi* Appeal Judgement, para. 129; *Kordić and Čerkez* Appeal Judgement, para. 27. Once again, although the French version of the *Kordić and Čerkez* Judgement reads "*un élément déterminant*", the English version – which is authoritative – reads "factor substantially contributing to".

[1161] *Kordić and Čerkez* Appeal Judgement, paras. 29 and 32.

[1162] It is not necessary to demonstrate the existence of an official relationship of subordination between the accused and the perpetrator of the crime: *Galić* Appeal Judgement, para. 176; *Gacumbitsi* Appeal Judgement, para. 182; *Kamuhanda* Appeal Judgement, para. 75; *Semanza* Appeal Judgement, para. 361; *Kordić and Čerkez* Appeal Judgement, para. 28.

[1163] *Galić* Appeal Judgement, para. 176; *Ntagerura et al.* Appeal Judgement, para. 365; *Kordić and Čerkez* Appeal Judgement, paras. 28-29.

[1164] *Galić* Appeal Judgement, paras. 152 and 157; *Kordić and Čerkez* Appeal Judgement, para. 30; *Blaškić* Appeal Judgement, para. 42.

[1165] The French version of some Appeal and Trial Judgements of this Tribunal and of the ICTY mention the term "*complicité*" ("complicity") rather than "*aide et encouragement*" ("aiding and abetting"). The Appeals Chamber prefers "*aide et encouragement*" because these terms are the ones used in Article 6(1) of the Statute. Furthermore, the Statute uses the word "*complicité*" in a very specific context (see Article 2(3)(e) of the Statute); it should thus be reserved for that context.

[1166] *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.

crime, and which substantially contributed to the perpetration of the crime.[1167] Contrary to the three modes of responsibility discussed above (which require that the conduct of the accused precede the perpetration of the crime itself), the *actus reus* of aiding and abetting may occur before, during or after the principal crime.[1168] The *mens rea* for aiding and abetting is knowledge that acts performed by the aider and abettor assist in the commission of the crime by the principal.[1169] It is not necessary for the accused to know the precise crime which was intended and which in the event was committed,[1170] but he must be aware of its essential elements.[1171]

483. The Appeals Chamber concludes by recalling that the modes of responsibility under Article 6(1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.[1172]

### B. Responsibility under Article 6(3) of the Statute

484. The Appeals Chamber recalls that, for the liability of an accused to be established under Article 6(3) of the Statute, the Prosecutor has to show that: (1) a crime over which the Tribunal has jurisdiction was committed; (2) the accused was a *de jure* or *de facto* superior of the perpetrator of the crime and had effective control over this subordinate (*i.e.*, he had the material ability to prevent or punish commission of the crime by his subordinate); (3) the accused knew or had reason to know that the crime was going to be committed or had been committed; and (4) the accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.[1173]

485. The Appeals Chamber adds that, for the purposes of Article 6(3) of the Statute, the "commission" of a crime by a subordinate must be understood in a broad sense. In the *Blagojević and Jokić* Appeal Judgement, the ICTY Appeals Chamber confirmed that an accused may be held responsible as a superior not only where a subordinate committed a crime referred to in the Statute of ICTY, but also where a subordinate planned, instigated or otherwise aided and abetted in the planning, preparation or execution of such a crime:

> As a threshold matter, the Appeals Chamber confirms that superior responsibility under Article 7(3) of the Statute encompasses all forms of criminal conduct by subordinates, not

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[1167] *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370 and footnote 740; *Blaškić* Appeal Judgement, paras. 45 and 48; *Vasiljević* Appeal Judgement, para. 102.

[1168] *Blagojević and Jokić* Appeal Judgement, para. 127; *Simić* Appeal Judgement, para. 85; *Blaškić* Appeal Judgement, para. 48. See also *Čelebići* Appeal Judgement, para. 352, citing with approval the conclusion of the Trial Chamber in that case that it is not necessary that the assistance in question be given at the time of the commission of the crime.

[1169] *Blagojević and Jokić* Appeal Judgement, para. 127; *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, paras. 45 and 49; *Vasiljević* Appeal Judgement, para. 102; *Aleksovski* Appeal Judgement, para. 162.

[1170] *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50.

[1171] *Brđanin* Appeal Judgement, para. 484; *Simić* Appeal Judgement, para. 86; *Blaškić* Appeal Judgement, para. 50; *Aleksovski* Appeal Judgement, para. 162.

[1172] *Ndindabahizi* Appeal Judgement, para. 122; *Kamuhanda* Appeal Judgement, para. 77.

[1173] See *Halilović* Appeal Judgement, paras. 59 and 210; *Gacumbitsi* Appeal Judgement, para. 143; *Blaškić* Appeal Judgement, paras. 53-85; *Bagilishema* Appeal Judgement, paras. 24-62; *Čelebići* Appeal Judgement, paras. 182-314.

> only the "committing" of crimes in the restricted sense of the term, but all other modes of participation under Article 7(1). The Appeals Chamber notes that the term "commit" is used throughout the Statute in a broad sense, encompassing all modes of responsibility covered by Article 7(1) and that such a construction is clearly manifest in Article 29 (co-operation and judicial assistance) of the Statute, referring to States' obligation to co-operate with the International Tribunal "in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law."
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> The Appeals Chamber has previously determined that criminal responsibility under Article 7(3) is based primarily on Article 86(2) of Protocol I. Accordingly, the meaning of "commit", as used in Article 7(3) of the Statute, necessarily tracks the term's broader and more ordinary meaning, as employed in Protocol I. The object and purpose of Protocol I, as reflected in its preamble, is to "reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application". The preamble of Protocol I adds further that "the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments." The purpose of superior responsibility, as evidenced in Articles 86(1) and 87 of Protocol I, is to ensure compliance with international humanitarian law. Furthermore, one of the purposes of establishing the International Tribunal, as reflected in Security Council Resolution 808, is to "put an end to [widespread violations of international humanitarian law] and to take effective measures to bring to justice the persons who are responsible for them". And, more particularly, the purpose of superior responsibility in Article 7(3) is to hold superiors "responsible for failure to prevent a crime or to deter the unlawful behaviour of [their] subordinates."
>
> In this context, the Appeals Chamber cannot accept that the drafters of Protocol I and the Statute intended to limit a superior's obligation to prevent or punish violations of international humanitarian law to only those individuals physically committing the material elements of a crime and to somehow exclude subordinates who as accomplices substantially contributed to the completion of the crime. Accordingly, "commit" as used in Article 7(3) of the Statute must be understood as it is in Protocol I, in its ordinary and broad sense.[1174]

486. The Appeals Chamber endorses this reasoning and holds that an accused may be held responsible as a superior under Article 6(3) of the Statute where a subordinate "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute",[1175] provided, of course, that all the other elements of such responsibility have been established.

### C. There can be no cumulative responsibility under Article 6(1) and (3) in respect of the same count

487. The Appeals Chamber recalls that it is inappropriate to convict an accused for a specific count under both Article 6(1) and Article 6(3) of the Statute. When, for the same count and the same set of facts, the accused's responsibility is pleaded pursuant to both Articles and the accused could be found liable under both provisions, the Trial Chamber should rather 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 circumstance.[1176]

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[1174] *Blagojević and Jokić* Appeal Judgement, paras. 280-282 (footnotes omitted).
[1175] Article 6(1) of the Statute.
[1176] *Galić* Appeal Judgement, para. 186; *Jokić* Appeal Judgement, paras. 23-28; *Kajelijeli* Appeal Judgement, para. 81; *Kvočka et al.* Appeal Judgement, para. 104; *Kordić and Čerkez* Appeal Judgement, paras. 34-35; *Blaškić* Appeal Judgement, para. 91.

488. The Appeals Chamber notes that in the instant case the Trial Chamber convicted the Appellants on several counts under both Article 6(1) and Article 6(3) in respect of the same set of facts, which was an error. The consequences of this error will be examined in the discussion of the Appellants' liability.

## XII. THE CRIME OF GENOCIDE

### A. Introduction

489. The Trial Chamber found Appellant Nahimana guilty of the crime of genocide pursuant to Article 6(1) of the Statute for using RTLM "to instigate the killing of Tutsi civilians".[1177] The Chamber found Appellant Barayagwiza guilty of the crime of genocide pursuant to Article 6(1) of the Statute for "instigating acts of genocide committed by CDR members and *Impuzamugambi*",[1178] and pursuant to Article 6(3) of the Statute "[f]or his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM"[1179] and "[f]or his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*".[1180] Lastly, Appellant Ngeze was found guilty of genocide pursuant to Article 6(1) of the Statute "[a]s founder, owner and editor of *Kangura*, a publication that instigated the killing of Tutsi civilians, and for his individual acts in ordering and aiding and abetting the killing of Tutsi civilians".[1181]

490. The Appellants contend that the Trial Chamber committed errors of law and of fact in finding them guilty of genocide,[1182] particularly in regard to the existence of a causal link between the acts attributed to them and acts of genocide,[1183] as well as to their state of mind.[1184]

### B. The crime of genocide

#### 1. Applicable law

491. Article 2 of the Statute provides:

> 1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

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[1177] Judgement, para. 974.
[1178] *Ibid.*, para. 975.
[1179] *Ibid.*, para. 973.
[1180] *Ibid.*, para. 977.
[1181] *Ibid.*, para. 977A.
[1182] Nahimana Notice of Appeal, pp. 10-12, 15-17; Nahimana Appellant's Brief, paras. 562-577, also referring to earlier submissions on direct and public incitement to commit genocide; Barayagwiza Notice of Appeal, pp. 1-2 (Grounds 6-29); Barayagwiza Appellant's Brief, paras. 103-240; Ngeze Notice of Appeal, paras. 120-146; Ngeze Appellant's Brief, paras. 333-387.
[1183] Nahimana Appellant's Brief, paras. 233-241, 567-573; Barayagwiza Appellant's Brief, paras. 168, 169, 194 and 195; Ngeze Appellant's Brief, paras. 339-345, 347-351.
[1184] Nahimana Appellant's Brief, para. 574, referring to paras. 242-294; Barayagwiza Appellant's Brief, paras. 108-139; Ngeze Appellant's Brief, para. 353, referring to paras. 273-285.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

   (a) Killing members of the group;

   (b) Causing serious bodily or mental harm to members to the group;

   (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

   (d) Imposing measures intended to prevent births within the group;

   (e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

   (a) Genocide;

   (b) Conspiracy to commit genocide;

   (c) Direct and public incitement to commit genocide;

   (d) Attempt to commit genocide;

   (e) Complicity in genocide.

492. A person commits the crime of genocide (Article 2(3)(a) of the Statute) if he or she commits one of the acts enumerated in Article 2(2) of the Statute (*actus reus*) with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such ("genocidal intent").[1185] Furthermore, even if an accused has not committed genocide himself, his responsibility may be established under one of the modes of responsibility provided for in Article 6(1) and (3) of the Statute. Where a person is accused of having planned, instigated, ordered or aided and abetted the commission of genocide by one or more other persons pursuant to Article 6(1) of the Statute, the Prosecutor must establish that the accused's acts or omissions substantially contributed to the commission of acts of genocide.[1186]

### 2. Submissions of Appellants Nahimana and Ngeze concerning the group protected in the definition of the crime of genocide

#### (a) Arguments of the Parties

493. Appellants Nahimana and Ngeze argue that the Trial Chamber erred in considering as acts of genocide acts committed against Hutu opponents, thus unlawfully broadening the notion of protected group.[1187]

494. The Prosecutor responds that it has not been demonstrated that the Trial Chamber relied solely on the attacks perpetrated against Hutu in order to find the Appellants guilty of genocide.[1188] According to the Prosecutor, the Trial Chamber's approach is in line with established jurisprudence that groups targeted for genocide may be defined subjectively, on the basis of a variety of criteria, including the perception of the perpetrators themselves.[1189]

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[1185] Other terms are also used, such as "special intent", "specific intent", "particular intent" or "*dolus specialis*". Genocidal intent is examined *infra* XII. C.

[1186] *Supra* XI. A.

[1187] Nahimana Appellant's Brief, paras. 564-566 and Ngeze Appellant's Brief, paras. 337-338; both Appellants refer to paragraph 948 of the Judgement.

[1188] Respondent's Brief, paras. 447-448, referring to paragraph 948 of the Judgement.

[1189] *Ibid.*, paras. 447 and 449.

He submits that in the present case the perpetrators, including the Appellants, regarded all Hutu who supported Tutsi as Tutsi, and placed them in the same category: Hutu victims thus fell within the protected group pursuant to the applicable law on genocide.[1190]

(b) Analysis

495. In paragraph 948 of the Judgement, the Trial Chamber asserts that "acts committed against Hutu opponents were committed on account of their support of the Tutsi ethnic group and in furtherance of the intent to destroy the Tutsi ethnic group", but gives no further explanation. Subsequently, the Chamber finds that there is a causal connection between RTLM broadcasts and the killing of some Tutsi as well as "Hutu political opponents who supported the Tutsi ethnic group".[1191] It also considers that, by fanning "the flames of ethnic hatred, resentment and fear against the Tutsi population and Hutu political opponents who supported the Tutsi ethnic group, [...] *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy".[1192]

496. In the opinion of the Appeals Chamber, the presence of these findings by the Trial Chamber in the section of the Judgement dealing with the crime of genocide poses a problem. Indeed, the acts committed against Hutu political opponents cannot be perceived as acts of genocide, because the victim of an act of genocide must have been targeted by reason of the fact that he or she belonged to a protected group. In the instant case, only the Tutsi ethnic group may be regarded as a protected group under Article 2 of the Statute and Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide,[1193] since the group of "Hutu political opponents" or the group of "Tutsi individuals and Hutu political opponents" does not constitute a "national, ethnical, racial or religious group" under these provisions.[1194] Furthermore, although the jurisprudence of the *ad hoc* Tribunals acknowledges that the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining membership of a protected group,[1195] in this instance neither the Trial Chamber nor the Prosecutor cited any evidence to suggest that the Appellants or the perpetrators of the crimes perceived Hutu political opponents as Tutsi. In other words, in the present case Hutu political opponents were acknowledged as such and were not "perceived" as Tutsi. Even if the perpetrators of the genocide believed that eliminating Hutu political opponents was necessary for the successful execution of their genocidal project against the Tutsi population, the killing of Hutu political opponents cannot constitute acts of genocide.

497. The Appeals Chamber observes, however, that it is not certain that the Trial Chamber effectively found that the acts committed against Hutu political opponents amounted to acts of genocide. It seems, on the contrary, that the Chamber relied only on the killing of Tutsi in

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[1190] *Ibid.*, para. 450, referring to *Bagilishema* Judgement, para. 65.
[1191] Judgement, para. 949.
[1192] *Ibid.*, para. 950.
[1193] UN GA Resolution 260 A (III) of 9 December 1948 ("Genocide Convention").
[1194] In this regard, see *Stakić* Appeal Judgement, para. 22, which recalls that the drafters of the Genocide Convention declined to include destruction of political groups within the definition of genocide.
[1195] See *Stakić* Appeal Judgement, para. 25; *Muhimana* Trial Judgement, para. 500; *Ndindabahizi* Trial Judgement, para. 468; *Gacumbitsi* Trial Judgement, para. 255; *Kajelijeli* Trial Judgement, para. 813; *Bagilishema* Trial Judgement, para. 65; *Musema* Trial Judgement, para. 161; *Rutaganda* Trial Judgement, para. 56.

order to find the Appellants guilty of the crime of genocide. Thus the Judgement states that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, *Kangura* and CDR, before and after 6 April 1994";[1196] that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group"[1197] and that they should be held responsible for the "killing of Tutsi civilians".[1198] In these circumstances, the Appeals Chamber is not convinced that the Appellants have demonstrated that there was an error, even if, to avoid any ambiguity, the Trial Chamber should have refrained from discussing the killing of Hutu political opponents in the section of the Judgement dealing with genocide. In any case, even if it were considered that the Trial Chamber effectively found that the killing of Hutu political opponents amounted to acts of genocide, such error would not be sufficient to invalidate the verdict on the count of genocide, which can be upheld on the basis of acts committed against the Tutsi ethnic group.

### 3. Instigation of acts of genocide by RTLM, *Kangura* and the CDR

#### (a) Arguments of the Parties

498. The Appellants argue that the Trial Chamber erred in finding that RTLM broadcasts, *Kangura* publications and CDR activities instigated the commission of acts of genocide within the meaning of Article 6(1) of the Statute, because the required causal link between these broadcasts, publications and activities and the acts of genocide had not been adequately established.[1199]

499. Appellant Nahimana argues specifically that the Trial Chamber committed an error of fact in finding that there was a causal link between RTLM broadcasts prior to 6 April 1994 and the acts of genocide and extermination committed after that date.[1200] He submits that the causal link between three broadcasts prior to 6 April 1994 and killings after 6 April 1994 rests on testimonies that clearly have no probative value,[1201] and that the existence of a causal link between these murders and RTLM broadcasts is therefore purely hypothetical.[1202]

500. Appellant Ngeze submits that the Trial Chamber has not established the existence of a causal link between the issues of *Kangura* before 6 April 1994 and the crimes of genocide and extermination committed after that date.[1203] He asserts that an in-depth analysis of the evidence shows that no causal link can be established between the articles published in *Kangura* and the anti-Tutsi attacks committed from May 1990 to April 1994.[1204] With regard to the articles, "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", Appellant Ngeze recalls that these were published before 1994 and are thus excluded from

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[1196] Judgement, para. 953.
[1197] *Ibid.*, para. 969.
[1198] *Ibid.*, paras. 973-975, 977 and 977A.
[1199] Nahimana Appellant's Brief, paras. 233-241, 568-573; Barayagwiza Appellant's Brief, paras. 168-169, 194-195; Ngeze Appellant's Brief, paras. 339-345, 347-351.
[1200] Nahimana Notice of Appeal, p. 16; Nahimana Appellant's Brief, para. 572.
[1201] Nahimana Appellant's Brief, paras. 237-240.
[1202] *Ibid.*, para. 241.
[1203] *Ibid.*, paras. 347 and 350.
[1204] *Ibid.*, para. 348.

the temporal jurisdiction of the Tribunal.[1205] As for the other articles and editorials, Appellant Ngeze takes issue with the imprecise approach adopted by the Trial Chamber, which merely asserts that "other editorials and articles published in *Kangura* echoed the contempt and hatred for Tutsi found in The *Ten Commandments*".[1206]

501. The Prosecutor does not respond to Appellant Ngeze's submissions. By contrast, he responds to Appellant Nahimana by submitting in the first place that it is not necessary that the acts charged against an accused constitute a necessary condition to the commission of the crime; it is sufficient that the accused's conduct "substantially and directly contributed to the crime".[1207] He points out that several factual findings in the Judgement examine in detail the context in which RTLM was able to exert an influence on the public and address Nahimana's submissions on the alleged lack of causal link between RTLM and the acts of genocide. The Prosecutor concludes that the Trial Chamber examined RTLM activities in their globality and could find that its broadcasts played a primordial role in the perpetration of the genocide and other acts of violence targeting Tutsi, thereby directly and substantially contributing to the killings and other acts of violence for which Appellant Nahimana was held responsible.[1208]

(b) Analysis

502. The Appeals Chamber recalls that it suffices for *Kangura* publications, RTLM broadcasts and CDR activities to have substantially contributed to the commission of acts of genocide in order to find that those publications, broadcasts and activities instigated the commission of acts of genocide; they need not have been a pre-condition for those acts.[1209]

(i) Causal link between RTLM broadcasts and the acts of genocide

503. Paragraph 949 of the Trial Judgement reads as follows:

> The Chamber found, as set forth in paragraph 486, that RTLM broadcasts engaged in ethnic stereotyping in a manner that promoted contempt and hatred for the Tutsi population and called on listeners to seek out and take up arms against the enemy. The enemy was defined to be the Tutsi ethnic group. These broadcasts called explicitly for the extermination of the Tutsi ethnic group. In 1994, both before and after 6 April, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents who supported the Tutsi ethnic group. In some cases these persons were subsequently killed. A specific causal connection between the RTLM broadcasts and the killing of these individuals - either by publicly naming them or by manipulating their movements and directing that they, as a group, be killed - has been established (see paragraph 487).

504. The Appeals Chamber notes that the first part of paragraph 949 of the Judgement, in an attempt to summarise the factual findings contained in paragraph 486, seems to have altered their meaning so that statements inciting contempt and hatred are characterised, without further explanation, as explicit calls for the extermination of Tutsi. Paragraph 486 of

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[1205] *Ibid.*, para. 342.
[1206] *Ibid.*, para. 343, see also para. 351.
[1207] Respondent's Brief, paras. 453-455 (quotation taken from para. 455; italics in original version), referring to *Kayishema and Ruzindana* Appeal Judgement, para. 198.
[1208] *Ibid.*, para. 456.
[1209] See *supra* XI. A.

the Judgement thus states that, initially, RTLM promoted contempt and hatred for the Tutsi population, the Tutsi group being constantly perceived as the "enemy"; but that it was only after 6 April 1994 that the virulence and intensity of RTLM broadcasts increased and the broadcasts explicitly called for the extermination of the Tutsi.

505. The Appeals Chamber also notes the last sentence of paragraph 949 of the Judgement, which appears to conclude that the causal link between the acts of genocide and RTLM broadcasts had been established only for the killings of certain Tutsi announced on the airwaves, or whose movements had been manipulated.[1210] Nevertheless, the paragraphs which follow paragraph 949 conclude more generally that RTLM broadcasts contributed to the massacre of Tutsi civilians. In this regard, it should be noted that the Trial Chamber finds at paragraph 953 of the Judgement that "the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM [...] before and after 6 April 1994" and subsequently finds Appellants Nahimana and Barayagwiza responsible for the "killing of Tutsi civilians".[1211] Thus it appears that the conclusion contained in the paragraphs following paragraph 949 is not entirely consistent with that provided in the last sentence of that paragraph. In these circumstances, the Appeals Chamber believes that it should be presumed that the requisite causal link between RTLM broadcasts and the acts of genocide was established only for the cases described in the last sentence of paragraph 949 of the Judgement.[1212] Thus, contrary to what Appellant Nahimana avers,[1213] the Appeals Chamber believes that the Trial Chamber did indeed identify the RTLM broadcasts, and the acts of genocide to which those broadcasts contributed.

506. The Appeals Chamber will examine in the following sections whether the Trial Chamber erred in finding that certain RTLM broadcasts substantially contributed to killings, and thus instigated the commission of acts of genocide. For this purpose, it will distinguish between broadcasts before 6 April 1994 and those after that date, this distinction being relevant in connection with the criminal responsibility of Appellants Nahimana and Barayagwiza, which will be analysed in the last section of this chapter.

a. Broadcasts before 6 April 1994

507. In light of the Trial Chamber's factual findings, the Appeals Chamber can identify in the Judgement four cases in which persons of Tutsi origin were killed after their names were mentioned in RTLM broadcasts made before 6 April 1994: Charles Shamukiga, killed on

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[1210] The last sentence of paragraph 949 refers to paragraph 487 of the Judgement, which reads:

> Both before and after 6 April 1994, RTLM broadcast the names of Tutsi individuals and their families, as well as Hutu political opponents. In some cases, these people were subsequently killed, and the Chamber finds that to varying degrees their deaths were causally linked to the broadcast of their names. RTLM also broadcast messages encouraging Tutsi civilians to come out of hiding and to return home or to go to the roadblocks, where they were subsequently killed in accordance with the direction of subsequent RTLM broadcasts tracking their movement.

[1211] Judgement, paras. 973-974.

[1212] In this regard, the Appeals Chamber recalls that it has already found that only murders of Tutsi could constitute acts of genocide (see *supra* XII. B. 2. (b) ). Hence, only denunciations of persons of Tutsi origin could have substantially contributed to the commission of acts of genocide.

[1213] Nahimana Appellant's Brief, paras. 568-570.

7 April 1994, whose name was mentioned on RTLM from December 1993 and "in the first few months of 1994"[1214] and who voiced his concern following these threats;[1215] the children of Manzi Sudi Fahdi – Espérance, Clarisse and Cintré – who were identified by name in an RTLM broadcast of 14 March 1994, which reported that their father was a member of the RPF;[1216] Daniel Kabaka, whose name was mentioned in RTLM broadcasts in the second half of March and after 6 April 1994 and who was killed a few days after 7 April 1994;[1217] the Medical Director of Cyangugu, denounced in a broadcast of 3 April 1994 for having organised a meeting of a small group of Tutsi, and burnt alive in front of his house a few days later.[1218]

508. Appellant Nahimana argues that there is no probative value in the three testimonies on which the Trial Chamber based its findings. He submits in the first place that evidence of the death of Manzi Sudi Fahdi's children rests exclusively on the single testimony of Expert Witness Chrétien, and that his testimony to this effect amounts to third-degree hearsay evidence.[1219] The Appeals Chamber notes that the Trial Chamber appears to have relied exclusively on the testimony of Expert Witness Chrétien to make its finding on the death of Manzi Sudi Fahdi's children, and this part of his testimony was itself apparently based on information obtained from Manzi Sudi Fahdi by a Prosecutor investigator.[1220]

509. The Appeals Chamber recalls first that it is settled jurisprudence that hearsay evidence is admissible as long as it is of probative value,[1221] and that it is for Appellant Nahimana to demonstrate that no reasonable trier of fact would have taken this evidence into account because it was second-degree hearsay evidence,[1222] which he has failed to do. Nevertheless, the Appeals Chambers agrees with the Appellant that the fact that evidence of the death of Manzi Sudi Fahdi's children was given by Expert Witness Chrétien does pose a problem. The Appeals Chamber recalls that the role of expert witnesses is to assist the Trial Chamber in its assessment of the evidence before it, and not to testify on disputed facts as would ordinary witnesses.[1223] The Appeals Chamber notes that the Appellant had raised objections about this part of Expert Witness Chrétien's testimony at the hearing, but that the Trial Chamber had closed the discussion by deciding that the issue would be resolved when the Prosecutor investigators filed their report.[1224] However, the Judgement does not mention any such report

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[1214] Judgement, para. 366

[1215] *Ibid.*, para. 478 relying on the statement by Witness Nsanzuwera; see also *ibid.*, paras. 119, 364-366, 444 and 470.

[1216] *Ibid.*, para. 477.

[1217] *Ibid.*, paras. 478-479; see also *ibid.*, paras. 119, 446-448. The Appeals Chamber notes that in paragraph 119, the Trial Chamber affirms that Daniel Kabaka died on 7 April 1994, while paragraph 447 indicates that Kabaka's house was attacked with grenades on 7 April 1994, that Kabaka was wounded and that gendarmes came to kill him a few days later. It is this last version that comes closest to the testimony of Witness FY: T. 9 July 2001, pp. 31-37.

[1218] *Ibid.*, paras. 384-385 and 476.

[1219] Nahimana Appellant's Brief, paras. 237-238.

[1220] Judgement, para. 477. The broadcast is referred to in paragraphs 377 and 378 of the Judgement; T. 1 July 2002, pp. 165-166.

[1221] *See* references mentioned *supra*, footnote 521.

[1222] Appellant Nahimana claimed that it was third-degree hearsay. The Appeals Chamber disagrees. If Manzi Sudi Fahdi had appeared to confirm the death of his children before the Tribunal, his testimony would not have constituted hearsay. Since the information was given by Manzi Sudi Fahdi to the Prosecution investigators, who then reported it to Expert Witness Chrétien, it is only second-degree hearsay.

[1223] See *supra* IV. B. 2. (b) .

[1224] T. 1 July 2002, pp. 165-173.

as a source of information on the death of Manzi Sudi Fahdi's children, the only source mentioned being the testimony of Expert Witness Chrétien.[1225] In these circumstances and in the absence of any indication that the investigators' report was indeed filed, the Appeals Chamber cannot conclude that the murder of Manzi Sudi Fahdi's children was sufficiently proved, and the discussion which follows will make no mention of it.

510. Appellant Nahimana further submits that Dr. Blam's account, taken from a book by Expert Witness Chrétien, and not supported by testimony from its author, has no probative value.[1226] The Appeals Chamber notes that Dr. Blam's account was translated in full by Expert Witness Chrétien in his work "*Le défi de l'ethnisme*" [*The Challenge of Ethnicism*], and that this translation was admitted into evidence.[1227] The Appeals Chamber notes that this account briefly refers to the circumstances surrounding the death of the Medical Director of Cyangugu a few days after RTLM broadcasts on 3 April 1994,[1228] which – wrongly, according to Dr. Blam – linked the doctor to the RPF. [1229] The Appeals Chamber is of the opinion that the Trial Chamber could admit this evidence, even if Dr. Blam himself did not testify at the hearing.[1230] However, the Appeals Chamber is of the view that a reasonable trier of fact could not rely solely on the short account by Doctor Blam in order to establish beyond reasonable doubt proof of the murder of the Medical Director of Cyangugu, of the circumstances surrounding it and of its date. In the absence of other evidence corroborating Doctor Blam's account, the Trial Chamber consequently erred in finding that the murder of

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[1225] See Judgement, para. 477.

[1226] Nahimana Appellant's Brief, para. 239.

[1227] Exhibit P164. The Appeals Chamber notes that the reference to the "book by Wolfgang Blam" at paragraph 385 of the Judgement seems to be wrong, since the Exhibit in fact cites a collective work in German, entitled *Ein Volk verlässt sein Land, Krieg und Völkermord in Rwanda* [A Land Forsaken by its People: War and Genocide in Rwanda], edited by H. Schürings and published in 1994 in Cologne.

[1228] The Appeals Chamber notes that Dr. Blam's account makes reference to a broadcast of 4 April 1994 (see Exhibit P164, p. 106 of the book, p. 28925 in the Registry numbering), whereas Exhibit P103/192E containing the French translation of this broadcast indicates that the broadcast was made on 2 April 1994. The transcript of the broadcast in Kinyarwanda (P103/192A) and the English translation of the transcript (P103/192D) give a date of 3 April 1994).

[1229] Exhibit P164, p. 106 of the book, p. 28925 in the Registry numbering:

> *Par téléphone on avait déjà été mis au courant des massacres de Kamembe-Cyangugu, au cours desquels par exemple le médecin régional de Cyangugu que nous connaissons avait été brûlé vif devant sa maison. Sur la radio incendiaire RTLM du parti extrémiste CDR, juste trois jours plus tôt, le lundi (4 avril), il avait été insulté comme complice des rebelles, organisateur de réunions de rebelles à Cyangugu. Lors d'un entretien le mardi avant l'attentat, donc le 5 avril, je ne lui avais pas parlé de ces diffamations, parce que je connaissais son honnêteté et que je tenais ces accusations pour totalement absurdes.*
>
> [I'd already heard on the phone about the Kamembe-Cyangugu massacres, during which the Medical Director for Cyangugu Region, whom we knew, had been burned alive in front of his house. Just three days earlier, on the Monday (4 April), on RTLM, the inflammatory radio station of the extremist CDR party, he had been vilified as an accomplice of the rebels, accused of organising rebel meetings in Cyangugu. When I met him on the Tuesday before the murder, I didn't mention these libels, because I knew him as an honest man, and regarded the accusations as totally absurd.]

[1230] Dr. Blam's account could be admitted under Rule 89(C) of the Rules. This would also be the case today: since the account was not specifically written for proceedings in the instant case, it could be admitted without necessarily complying with the standards of Rule 92 *bis* of the Rules, which was added to the Rules on 6 July 2002: see *Naletilić and Martinović* Appeal Judgement, paras. 222-223; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(C) of the Rules, 7 June 2002, paras. 28-31.

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the Medical Director of Cyangugu was proved. The paragraphs which follow will therefore not refer to this incident.

511. With regard, lastly, to Appellant Nahimana's argument that Witness FY's testimony did not prove the existence of a causal link between RTLM broadcasts and the murder of Daniel Kabaka,[1231] the Appeals Chamber considers that the fact that Daniel Kabaka was allegedly arrested as a suspect in 1990 and that soldiers linked to a "crisis committee" were allegedly responsible for his murder, which was committed after 6 April 1994, does not suffice to demonstrate that it was unreasonable to find that the mention of this person on RTLM had substantially contributed to his murder. Moreover, the Appellant omits to indicate the specific references to the transcripts which mention these acts, and hence has not complied with the requirements for making submissions at the appeal stage. The appeal on this point is dismissed.

512. The Appeals Chamber will now determine whether it was reasonable for the Trial Chamber to find that the RTLM broadcasts prior to 6 April 1994 which mentioned Charles Shamukiga and Daniel Kabaka substantially contributed to the commission of acts of genocide.

513. In the opinion of the Appeals Chamber, evidence of a link between the broadcasts aired on RTLM before 6 April 1994 and the acts of genocide committed against the individuals so named seems, at the very least, tenuous, especially when the date of the broadcast in question is not provided or when the period between the broadcast denouncing a person and the killing of that person is relatively long. This applies notably to the killing of Charles Shamukiga[1232] and Daniel Kabaka.[1233] Thus the longer the lapse of time between a broadcast and the killing of a person, the greater the possibility that other events might be the real cause of such killing and that the broadcast might not have substantially contributed to it. Moreover, even though RTLM was widely listened to in Rwanda, there is no evidence that the unidentified persons responsible for killing Charles Shamukiga and Daniel Kabaka heard the RTLM broadcasts denouncing them. The Appeals Chamber is therefore of the opinion that it has not been sufficiently demonstrated that RTLM broadcasts before 6 April 1994 substantially contributed to the killing of these individuals. Therefore, the Trial Chamber committed an error which partially invalidates the verdict in finding in paragraph 949 of the Judgement that RTLM broadcasts prior to 6 April 1994 substantially contributed to the commission of acts of genocide.

b. Broadcasts after 6 April 1994

514. The Appeals Chamber observes that Appellant Nahimana does not appear to dispute that the broadcasts after 6 April 1994 contributed to the commission of acts of genocide.[1234] For his part, Appellant Barayagwiza contends, without elaborating, that no link was

[1231] Nahimana Appellant's Brief, paras. 240-241.
[1232] Charles Shamukiga "had been mentioned often on RTLM in the first few months of 1994" (Judgement, para. 366); he was killed on 7 April 1994 by Presidential Guard soldiers (Judgement, paras. 366 and 478).
[1233] Daniel Kabaka was named on RTLM "beginning in mid-March", and also after 7 April 1994 (Judgement, paras. 446, 447 and 467); he was killed a few days after the beginning of the genocide.
[1234] See Nahimana Appellant's Brief, paras. 233-241, 572-573. The Appellant only disputes that broadcasts before 6 April 1994 could have contributed to the commission of acts of genocide.

established between the RTLM broadcasts and the killings.[1235] In the absence of any arguments in support of this contention, it cannot suffice to demonstrate that the Trial Chamber erred in finding that the RTLM broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide.

515. The Appeals Chamber notes that the Trial Chamber found that in several instances after 6 April 1994 the naming of persons of Tutsi origin on the airwaves contributed to the commission of acts of genocide. Such persons included the brother of Witness FS, who was named on RTLM on 7 April 1994 and was later killed with his wife and his seven children,[1236] and Désiré Nsunguyinka, who was killed at a roadblock with his wife, his sister and his brother-in-law after RTLM broadcast the licence number of the car they were travelling in, announcing that a vehicle with these plates was carrying *Inkotanyi*.[1237] The Appeals Chamber also notes the case of Father Muvaro, Father Ngoga and Father Ntagara, whose names were mentioned in a broadcast of 20 May 1994;[1238] the three of them were subsequently killed.[1239] The Trial Chamber also referred to instances of RTLM broadcasting information designed to facilitate the killing of Tutsi. Thus Charles Kalinjabo was killed at a roadblock after RTLM called on all Tutsi who were not *Inkotanyi* to join their Hutu comrades at the roadblocks.[1240] The neighbours of Witness FW, including "Rubayiza Abdallar" and "Sultan", were killed on 11 April 1994, when they returned home after an RTLM broadcast aired on the same day telling all the Tutsi who had fled their homes to return because a search for guns was to be conducted and the houses of all those who were not home would be destroyed.[1241] The Appeals Chamber is of the opinion that it has not been demonstrated that it was unreasonable for the Trial Chamber to find that the RTLM broadcasts after 6 April 1994 substantially contributed to the killing of these individuals.[1242]

(ii) Link between articles in *Kangura* and the commission of acts of genocide

516. Paragraph 950 of the Trial Judgement reads as follows:

> 950. The Chamber found, as set forth in paragraphs 245 and 246, that *The Appeal to the Conscience of the Hutu* and *The Ten Commandments*, published in *Kangura* No. 6 in December 1990, conveyed contempt and hatred for the Tutsi ethnic group, and for Tutsi

[1235] Barayagwiza Appellant's Brief, para. 169.
[1236] Judgement, para. 482; see also paras. 445 and 895. The witness' Tutsi origin is mentioned in paragraph 890 of the Judgement.
[1237] *Idem*; see also para. 444.
[1238] *Idem*; see also paras. 410-411. The Appeals Chamber notes that only Father Muvaro's Tutsi origin is specifically confirmed by the Trial Chamber on the basis of Appellant Nahimana's testimony: Judgement, paras. 411 and 482. The Appeals Chamber notes however that the remarks made in the broadcast – in particular the sentence "We could not imagine that a priest would ever dare take up a gun, begin to shoot or even distribute guns to people taking refuge in the church, the latter then begin launching sporadic attacks in order to eliminate the Hutus, and then retreat into the church … daring to desecrate God's house" – seems to indicate that the three priests were Tutsi: Judgement, para. 410, referring to Exhibit P103/132E.
[1239] Father Ngoga, who had earlier managed to escape, was killed in Butare 11 days after the broadcast: Judgement, para. 411.
[1240] Judgement, para. 482; see also para. 449.
[1241] *Ibid.*, paras. 449 and 482.
[1242] As held above (*supra* IV. A. 2. (c) (iii) ), the testimony of Witness FS has been excluded with respect to Appellant Barayagwiza. The Appeals Chamber is however of the view that the finding that the RTLM broadcasts after 6 April 1994 substantially contributed to the commission of acts of genocide should be upheld on the basis of other evidence mentioned here.

> women in particular as enemy agents, and called on readers to take all necessary measures to stop the enemy, defined to be the Tutsi population. Other editorials and articles published in *Kangura* echoed the contempt and hatred for Tutsi found in The *Ten Commandments* and were clearly intended to fan the flames of ethnic hatred, resentment and fear against the Tutsi population and Hutu political opponents who supported the Tutsi ethnic group. The cover of *Kangura* No. 26 promoted violence by conveying the message that the machete should be used to eliminate the Tutsi, once and for all. This was a call for the destruction of the Tutsi ethnic group as such. Through fear-mongering and hate propaganda, *Kangura* paved the way for genocide in Rwanda, whipping the Hutu population into a killing frenzy.

The Trial Chamber thus found that *Kangura* contributed, at least in part, to the killing of Tutsi civilians,[1243] and that Appellant Ngeze must be held responsible on this account.[1244]

517. The Appeals Chamber is of the view that these findings are problematic in several respects. First, the Appeals Chamber recalls that the provisions on the temporal jurisdiction of the Tribunal precluded the Trial Chamber from relying on acts of instigation dating from before 1 January 1994 in convicting Appellant Ngeze.[1245] The Appeals Chamber has also held that the Appellant could not be convicted on the basis of publications of *Kangura* prior to 1 January 1994, allegedly re-circulated or repeated as a result of the competition organized in 1994.[1246] Thus the question which should have been addressed by the Trial Chamber was whether the *Kangura* articles published in 1994 (and not all of the articles published in *Kangura*) did in effect substantially contribute to the commission of acts of genocide in 1994.

518. Further, the Trial Chamber considered that, even though "the evidence does not establish a specific link between the publication and subsequent events, [...] a link was clearly perceived by many witnesses such as Witness AHI, Witness ABE and Nsanzuwera, suggesting that *Kangura* greatly contributed to the climate leading to these events, if not causing them directly".[1247] The Trial Chamber then adds that "[a]t times *Kangura* called explicitly on its readers to take action. More generally, its message of prejudice and fear paved the way for massacres of the Tutsi population".[1248] The Appeals Chamber emphasizes, however, that the specific examples given by Witness Nsanzuwera and Witness ABE of attacks on individuals following the publication of *Kangura* articles date back to 1990 and 1991 and do not fall within the temporal jurisdiction of the Tribunal. Moreover, none of the testimonies makes explicit reference to the impact of *Kangura* issues published after 1 January 1994.

519. While there is probably a link between the Appellant's acts, because of his role in *Kangura*, and the genocide, owing to the climate of violence to which the publication contributed and the incendiary discourse it contained,[1249] the Appeals Chamber considers that there was not enough evidence for a reasonable trier of fact to find beyond reasonable doubt

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[1243] Judgement, para. 953.
[1244] *Ibid.*, para. 977A.
[1245] See *supra* VIII. B. 2.
[1246] See *supra* IX. E. 3.
[1247] Judgement, para. 242.
[1248] *Ibid.*, para. 243.
[1249] See *Kangura* publications mentioned in paragraphs 136-243 of the Judgement. See also the Trial Chamber's findings in paragraphs 245, 246, 950 and 1036 of the Judgement, which make specific reference to "The Appeal to the Conscience of the Hutu" and "The Ten Commandments", and to *Kangura* No. 26.

that the *Kangura* publications in the first months of 1994 susbstantially contributed to the commission of acts of genocide between April and July 1994. Therefore, the Appeals Chamber is of the opinion that the Trial Chamber erred in finding Appellant Ngeze guilty of the crime of genocide under Article 6(1) of the Statute for having "instigated" the killing of Tutsi civilians as founder, owner and editor of *Kangura*.[1250]

(iii) Link between CDR activities and the acts of genocide

520. Appellant Barayagwiza contends that no causal link was established between the activities of the CDR and the acts of genocide.[1251]

521. The Trial Chamber explained in paragraph 951 of the Judgement that:

> [t]he Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.

It then found that the massacre of Tutsi civilians resulted, at least in part, from the message of ethnic targeting for death disseminated through the CDR before and after 6 April 1994.[1252] However, the Appeals Chamber understands that the Trial Chamber found Appellant Barayagwiza guilty of genocide only on the basis of acts of genocide committed by CDR militants and *Impuzamugambi* (and not on account of alleged acts of instigation to genocide by the CDR which would have substantially contributed to the commission of genocidal acts).[1253] In the circumstances, the question whether the extermination discourse of the CDR substantially contributed to the massacre of Tutsi civilians is not relevant. The important point is that the Trial Chamber concluded that militants of the CDR and *Impuzamugambi* themselves committed acts of genocide. As explained below,[1254] the Appellant has failed to show that this conclusion was unreasonable.

## C. Genocidal intent of the Appellants

522. The Trial Chamber found that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group".[1255] The Appellants appeal against this finding. Before

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[1250] Judgement, para. 977A.
[1251] Barayagwiza Appellant's Brief, paras. 194-195.
[1252] Judgement, para. 953.
[1253] *Ibid.*, paras. 975 ("the Chamber finds Jean-Bosco Barayagwiza guilty of instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute") and 977 ("For his active engagement in CDR, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians by CDR members and *Impuzamugambi*, the Chamber finds Barayagwiza guilty of genocide pursuant to Article 6(3) of its Statute").
[1254] See *infra* XII. D. 2. (b) (vii) .
[1255] Judgement, para. 969.

examining their respective grounds of appeal, the Appeals Chamber considers it helpful to set out the jurisprudence of the *ad hoc* Tribunals on genocidal intent.

### 1. Applicable law

523. Article 2(2) of the Statute defines genocidal intent as the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[1256] It is the person who physically commits one of the enumerated acts in Article 2(2) of the Statute who must have such intent. However, an accused can be held responsible not only for committing the offence, but also under other modes of liability, and the *mens rea* will vary accordingly.[1257]

524. The jurisprudence accepts that in most cases genocidal intent will be proved by circumstantial evidence.[1258] In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference from the totality of the evidence.[1259]

525. Furthermore, the Appeals Chamber recalls that it will defer to the findings of the Trial Chamber unless a party shows that no reasonable trier of fact could have found that genocidal intent was proved beyond reasonable doubt.[1260]

### 2. Appellant Nahimana

526. The Appeals Chamber concludes below that Appellant Nahimana's conviction for genocide based on Article 6(1) of the Statute must be set aside.[1261] Consequently, there is no need to examine whether the Trial Chamber could conclude that the Appellant had the intent to destroy, in whole or in part, the Tutsi ethnic group.

### 3. Appellant Barayagwiza

527. The Trial Chamber found that Appellant Barayagwiza had genocidal intent[1262] based on the following elements: he said "let's exterminate them" at public meetings, "them" being

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[1256] The Appeals Chamber recalls that genocidal intent must be distinguished from motive:

> The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadić* appeal judgement the Appeals Chamber stressed the irrelevance and "inscrutability of motives in criminal law".

*Jelisić* Appeal Judgement, para. 49 (footnote omitted). See also *Stakić* Appeal Judgement, para. 45; *Kayishema and Ruzindana* Appeal Judgement, para. 161; *Tadić* Appeal Judgement, para. 269.

[1257] *Supra* XI.

[1258] *Gacumbitsi* Appeal Judgement, paras. 40-41; *Krstić* Appeal Judgement, para. 34; *Rutaganda* Appeal Judgement, para. 525; *Jelisić* Appeal Judgement, para. 47; *Kayishema and Ruzindana* Appeal Judgement, para. 159.

[1259] *Gacumbitsi* Appeal Judgement, para. 41; *Ntagerura et al.* Appeal Judgement, paras. 306 and 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128 and 131; *Čelebići* Appeal Judgement, para. 458. For examples of elements which may be taken into account, see, *inter alia*, *Gacumbitsi* Appeal Judgement, paras. 40-41 and 44; *Stakić* Appeal Judgement, para. 52; *Krstić* Appeal Judgement, paras. 20, 33-34; *Rutaganda* Appeal Judgement, para. 525; *Jelisić* Appeal Judgement, paras. 47-48; *Kayishema and Ruzindana* Appeal Judgement, paras. 159-160.

[1260] *Stakić* Appeal Judgement, paras. 52, 56 and 219; *Vasiljević* Appeal Judgement, para. 131.

[1261] See *infra* XII. D. 1.

[1262] Judgement, para. 969.

understood by those who heard it as a reference to the Tutsi population;[1263] his threats and intimidations towards the Bagogwe Tutsi;[1264] and more generally, his involvement in RTLM and the CDR, which both conveyed an explicitly genocidal discourse.[1265]

528. Appellant Barayagwiza contends that the finding of the Trial Chamber is erroneous.[1266] First, he submits that the following facts have not been established: (1) the use of the expression "*tubatsembatsembe*" or "let's exterminate them";[1267] and (2) his acts and utterances against the Bagogwe Tutsi.[1268] He further contends that the Trial Chamber erred in assessing exculpatory evidence, which allegedly shows that he did not have genocidal intent,[1269] and in considering evidence prior to 1 January 1994.[1270]

(a) Use of the terms "*tubatsembatsembe*", "*gutsembatsemba*" and "*tuzitsembatsembe*"

(i) Appellant Barayagwiza's submissions

529. Appellant Barayagwiza submits that the Trial Chamber erred in finding that he had used the term "*tubatsembatsembe*" ("let's exterminate them"),[1271] since the evidence adduced at trial does not support such a conclusion:[1272]

- Contrary to what is stated at paragraph 308 of the Judgement, the only inference from Witness AFB's testimony is that the Appellant used the term "*tuzabatsembatsemba*" and not "*tubatsembatsembe*", which, in the Appellant's view, makes an important difference, since "*tuzabatsembatsemba*" means "*nous vous exterminerons*" or "we shall exterminate them", a wording using the future tense and "conditional on other events".[1273] Witness AFB's testimony merely establishes that the Appellant said that the *Inyenzi* would be exterminated if they did not change, which does not constitute a clear extermination threat.[1274] Moreover, these utterances did not call for the extermination of Tutsis but rather the *Inyenzi* and their accomplices, thus including Hutu;[1275]

- While Witness X testified that the Appellant had used the term "*gutsembatsemba*" at a CDR meeting in February or March 1992, the Trial Chamber erred in holding that

[1263] *Ibid.*, para. 967. See also *ibid.*, para. 719 ("Barayagwiza himself said '*tubatsembatsembe*' or 'let's exterminate them' at CDR meetings").
[1264] *Idem.* See also *ibid.*, para. 719.
[1265] *Ibid.*, paras. 963-965.
[1266] Barayagwiza Notice of Appeal, pp. 1-2 (Grounds 6-11); Barayagwiza Appellant's Brief, paras. 108-139; Barayagwiza Brief in Reply, paras. 80-89. Appellant Barayagwiza's Ground 10 is examined in the chapter on direct and public incitement to commit genocide.
[1267] Barayagwiza Appellant's Brief, Ground 7, paras. 111-124; Barayagwiza Brief in Reply, paras. 80-82.
[1268] *Ibid.*, Grounds 8-9, paras. 125-131; Barayagwiza Brief in Reply, paras. 83-86.
[1269] *Ibid.*, Ground 11, paras. 134-138.
[1270] *Ibid.*, Ground 11, para. 139.
[1271] *Ibid.*, para. 111.
[1272] *Ibid.*, paras. 111 and 122.
[1273] *Ibid.*, paras. 112-115 and 119; see also Barayagwiza Brief in Reply, para. 80. The Appellant further submits that the English version of the transcripts of Witness AFB's testimony cites the term "*tulabatembatemba*", which does not exist in Kinyarwanda; see Barayagwiza Appellant's Brief, para. 112.
[1274] *Ibid.*, paras. 116-118. The Appeals Chamber notes that Appellant Barayagwiza does not give any specific reference to the relevant transcripts.
[1275] *Ibid.*, paras. 120 and 123.

this meant "kill the Tutsis", since this word is simply the infinitive of the verb "to exterminate";[1276]

- Even if some CDR members did use the term "*tuzazitsembatsemba*" or "*tuzitsembatsembe*", the President of the CDR explained at a meeting held in Butare on 5 and 6 December 1992 that these terms targeted the *Inyenzi* and not the Tutsi.[1277]

530. The Appellant further contends that it would have been impossible to call for the extermination of Tutsi, since the Ministry of Justice was at the time controlled by the PL [Liberal Party], the majority of whom were Tutsis and allied to the RPF.[1278]

(ii) Analysis

531. The Appeals Chamber observes that minor linguistic discrepancies or typographical errors may occur in the process of translating and transcribing witnesses' testimonies and other judicial documents into the two working languages of the Tribunal.[1279] It is nevertheless important to assess whether the purported linguistic discrepancies between the English and French versions of the transcripts on the one hand, and between the transcripts and the Judgement on the other, led the Trial Chamber to make erroneous findings occasioning a miscarriage of justice.

532. At the outset, the Appeals Chamber dismisses Appellant Barayagwiza's argument that the President of the CDR, Martin Bucyana, explained at a meeting held in Butare in December 1992 that the terms "*tuzazitsembatsemba*" or "*tuzitsembatsembe*" did not target the Tutsi but only the *Inyenzi*.[1280] The evidence relied on by the Appellant is not part of the record on appeal and has not been admitted as additional evidence pursuant to Rule 115 of the Rules.[1281]

533. The Appeals Chamber observes that the Trial Chamber expressly relied on the fact that Appellant Barayagwiza had uttered slogans calling for the extermination of Tutsi in order to find that he had genocidal intent.[1282] To reach that finding, the Trial Chamber appears to have based itself on the testimonies of Witnesses AFB, X and AAM.[1283]

534. The Appeals Chamber specifically notes that the Trial Chamber relied on the testimonies of Witnesses AFB and X to find that the Appellant used the Kinyarwanda expression "*tubatsembatsembe*" ("let's exterminate them")[1284]. The Trial Chamber also

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[1276] *Ibid.*, para. 121, citing paragraph 310 of the Judgement; see also Barayagwiza Brief in Reply, para. 80.
[1277] *Ibid.*, para. 123, referring to "*Cassettes* KV00-0024".
[1278] *Ibid.*, para. 124; Barayagwiza Brief in Reply, para. 82.
[1279] The ICTY Appeals Chamber has considered such issues in many cases; see for instance *Kupreškić et al.* Appeal Judgement, para. 209, footnote 343, and *Krnojelac* Appeal Judgement, para. 227, footnote 364.
[1280] Barayagwiza Appellant's Brief, para. 123.
[1281] The Appellant had requested that new evidence relating to that meeting be admitted on appeal (The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), filed confidentially on 28 December 2005, paras. 71-73). His motion was dismissed because the Appellant had failed to show good cause for its late filing: Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras. 25-28.
[1282] Judgement, para. 967, see also paras. 340, 719 and 964.
[1283] *Ibid.*, paras. 308, 319 and 708 concerning Witness AFB; paras. 310, 336 and 708 concerning Witness X; paras. 702, 718 and 797 concerning Witness AAM.
[1284] *Ibid.*, para. 336.

mentions on various occasions in its findings that the Appellant used the term "*tubatsembatsembe*", without referring to a particular testimony.[1285] The Appeals Chamber observes, however, that the transcripts of the testimonies of Witnesses AFB and X do not explicitly state that Appellant Barayagwiza used the term "*tubatsembatsembe*".[1286] The Appeals Chamber also detected other discrepancies in the translations while examining this ground of appeal.[1287]

535. Following requests for re-certification by the Pre-Appeal Judge,[1288] the translation services confirmed that:

- Witness AFB did not use the term "*tubatsembatsembe*", as stated in paragraph 308 of the Judgement, but used the term "*tuzabatsembatsemba*", which was correctly translated as "*nous les exterminerons*" and "we shall exterminate them";[1289]

- Witness X, who testified by video-link and spoke in French with simultaneous interpretation into English, used the terms "*gutsembatsemba*" and "*tuzabatsembatsemba*", not the expression "*tubatsembatsembe*", as stated in paragraph 336 of the Judgement;[1290]

- Witness AAM used the term "*tuzitsembatsembe*" as indicated in the French version of the transcripts, and not "*tuzatsembatsembe*", as indicated at paragraph 702 of the Judgement and in the English version of the transcripts; the witness also used "they", which shows that he was not solely referring to Appellant Barayagwiza, but also to the *Impuzamugambi*;[1291]

- Witness AGK used the terms "*tuzitsembatsembe*" and "*tubatsembatsembe*", as indicated in the English version of the transcripts; the term "*tuzitsembambe*" is simply a mistake by the interpreter.[1292]

536. The translation services also confirmed that "*tubatsembatsembe*" and "*tuzitsembatsembe*" mean "let's exterminate them"; "*tuzabatsembatsemba*" and "*tuzazitsembatsemba*" mean "we shall exterminate them"; "*gutsembatsemba*" means "to exterminate"; and "*tuzatsembatsembe*" means "let's exterminate" [in the future]. They also

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[1285] *Ibid.*, paras. 340, 697, 719, 975 and 1035. Some paragraphs mention the term "*tubatsembasembe*"; see paras. 708 and 964, probably due to a typographical error (see Respondent's Brief, para. 480, footnote 467).
[1286] Although the expressions "*nous les exterminerons*" or "we shall exterminate them", as cited in the French and English versions of the transcripts of Witness AFB's testimony, appear to correspond to the translation of "*tubatsembatsembe*", this term is not specifically mentioned in the transcripts, while other Kinyarwanda terms are; see T. 6 March 2001, pp. 21, 51-52. The transcript of Witness X's testimony does not appear to contain the Kinyarwanda term "*tubatsembatsembe*" or its translation, but refers to the expression "*gutsembatsemba*": T. 18 February 2002, pp. 72-73, 75-76. See also T. 19 February 2002, p. 120 (closed session); T. 21 February 2002, p. 48.
[1287] Compare for instance *CRA du 12 février 2001, p. 106*, with T. 12 February 2001, p. 103 (Witness AAM's testimony); *CRA du 21 juin 2001, p. 104, 106 et 107*, with T. 21 June 2001, pp. 96-97, 99 (Witness AGK's testimony).
[1288] Order of 6 December 2006, pp. 2-3.
[1289] *Supports Audio pour confirmation des témoignages* [Audio Confirmation of Testimony], 4 January 2007, p. 2.
[1290] *Ibid.*, 4 January 2007, pp. 4-5.
[1291] *Ibid.*, pp. 1-2.
[1292] *Ibid.*, pp. 3-4.

confirmed that the expressions "*tulabatembatemba*", "*tabatsembatsembe*" and "*tuzitsembambe*" do not exist in Kinyarwanda.[1293]

537. While recognizing that the Trial Chamber erred in finding that Appellant Barayagwiza had used the term "*tubatsembatsembe*" on the basis of the testimonies of Witnesses AFB and X, the Appeals Chamber is not satisfied that this error occasioned a miscarriage of justice for the Appellant. As confirmed by the translation services, the expressions cited above have in common that they all relate to the notion of extermination, whether future or conditional, whether imperative or not. The Appeals Chamber is of the opinion that a reasonable trier of fact could consider that the aforementioned terms called for the extermination of Tutsi and not just the extermination of members and accomplices of the RPF. Thus Witnesses X and AAM confirmed that the Appellant talked about exterminating the Tutsi.[1294] The Appeals Chamber also notes that the Appellant's speech during the CDR meeting at Umuganda stadium in 1993, as reported by Witness AFB, is particularly revealing in this respect:

> [Barayagwiza] continued with his speech; he started off by explaining from where the Tutsis came, he said that the latter came from Ethiopia and that the Hutu were the inhabitants of Rwanda before the arrival of the Tutsis. He explained that the Tutsis were bad people and that it was difficult to know what they thought and he said that if the *Inyenzi* and their accomplices did not change their ways they were going to be crushed.[1295]

538. Turning to the argument that it was impossible to say these words in public at the time, the Appeals Chamber is not convinced that the fact that the Ministry of Justice was controlled by the PL party and that prosecutions had been initiated by the Rwandan authorities against Léon Mugesera following his inflammatory speech of 22 November 1992 show that it was impossible to publicly utter threats against the Tutsi.[1296] In any event, the Appeals Chamber considers that the Appellant's argument is manifestly unfounded in view of its vagueness and the absence of any reference in the Appeal Brief to one or more parts of the appeal file.

539. The Appeals Chamber finds that the Trial Chamber could reasonably conclude from the totality of the evidence relied on by it that, at CDR meetings, Appellant Barayagwiza had himself used slogans calling for the extermination of Tutsi, such as "*gutsembatsemba*", "*tuzabatsembatsemba*" and "*tuzitsembatsembe*" and that the use of these expressions was a determining fact for the purpose of proving his genocidal intent. This ground of appeal is dismissed.

(b) Humiliation and death threats against the Bagogwe Tutsi

(i) Appellant Barayagwiza's submissions

540. In his eighth ground of appeal, Appellant Barayagwiza submits that the Trial Chamber erred in finding in paragraph 967 of the Judgement that he had humiliated the Tutsi by forcing them to perform the *Ikinyemera,* their traditional dance, since the evidence on file

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[1293] *Ibid.*, pp. 5-6.
[1294] T. 18 February 2002, pp. 72-73, 75-76 (Witness X) ; T. 12 February 2001, p. 103 (Witness AAM).
[1295] T. 6 March 2001, p. 20; *see also* pp. 51-53.
[1296] See Barayagwiza Appellant's Brief, para. 124.

merely shows that he had asked them to do so (and not that he had forced them), as the Trial Chamber acknowledged in paragraph 719 of the Judgement.[1297]

541. In his ninth ground of appeal, Appellant Barayagwiza argues that the Trial Chamber further erred when it stated that the Appellant had intimidated and threatened the Bagogwe Tutsi at several public meetings.[1298] He contends that only Witness AAM alleged that he had threatened the Bagogwe Tutsi during a meeting in 1991, but this meeting could not have been held, because the CDR did not exist at the time.[1299] Further, the Appellant contends that, when it considered Witness AAM's testimony, the Trial Chamber wrongly reversed the burden of proof, and, since Witness AAM's testimony was not corroborated, the Trial Chamber could not have found that he had intimidated and threatened the Bagogwe Tutsi.[1300]

(ii) Witness AFX's credibility

542. In his eighth and ninth grounds of appeal, Appellant Barayagwiza disputes the Trial Chamber's findings based in part on Witness AFX's testimony. It is thus for the Appeals Chamber to consider whether the Witness AFX's credibility has been impugned by the additional evidence admitted on appeal pursuant to Rule 115 of the Rules. In this respect, Appellant Barayagwiza submits that both Witness EB and the Prosecutor's investigator, Mr. Sanogo, challenged Witness AFX's integrity, and he asks that the totality of this witness' testimony be dismissed.[1301]

543. The Appeals Chamber observes that Witness EB's accusations against Witness AFX do not concern the reliability of Witness AFX's testimony regarding Appellant Barayagwiza. Rather, Witness EB alleges that Witness AFX was involved in attempts to suborn witnesses,[1302] and that he had stated – falsely, according to Witness EB – that he had received a letter from Witness EB.[1303] Similarly, according to information obtained by Mr. Sanogo, Witness AFX allegedly asked Witness EB and another person to come and testify in favour of Appellant Ngeze in return for money, and both of them accepted.[1304] Moreover, Mr. Sanogo saw Witness AFX again in July 2006, after an informant had offered to introduce him to meet someone who had information. Mr. Sanogo states that he had the impression that Witness AFX hoped to make money by "inventing a story", but that the witness changed his mind after recognizing him. Mr. Sanogo got the impression that both Witness EB and Witness AFX appeared to have made a business out of the genocide.[1305] All of this was confirmed by Mr. Sanogo when he testified before the Appeals Chamber.[1306]

544. Having already found that Witness EB lacked credibility, the Appeals Chamber considers that the fact that Witness EB put forward a number of matters potentially casting

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[1297] *Ibid.*, paras. 125-128; Barayagwiza Brief in Reply, paras. 83-84.
[1298] *Ibid.*, para. 129.
[1299] *Ibid.*, para. 130.
[1300] *Ibid.*, para. 131; Barayagwiza Brief in Reply, para. 86, referring to his fortieth ground of appeal.
[1301] Appellant Barayagwiza's Conclusions Following Second Expert Report, paras. 19-22.
[1302] T(A) 16 January 2007, p. 45 (closed session). The Appeals Chamber further notes that the recantation letters allegedly signed by Witness EB, as well as some of his statements, mention Witness AFX and the fact that he had also recanted his testimony at trial (see Confidential Exhibits CA-3D3 and CA-3D4).
[1303] *Ibid.*, pp. 9, 11 and 45 (closed session).
[1304] Confidential Exhibit CA-P2, paras. 8-9. See *supra* X. C. 2. (a) .
[1305] *Ibid.*, paras. 36-42 (Quotation taken from para. 42).
[1306] T(A) 16 January 2007, pp. 50-65.

doubt on Witness AFX's testimony[1307] is irrelevant. However, Mr. Sanogo's statements are problematic, although the Appeals Chamber has conceded that Mr. Sanogo's feeling that "Witnesses EB and AFX seem to have made a business out of the genocide" was a mere "impression".[1308]

545. The Trial Chamber found that, despite some inconsistencies, Witness AFX had given reasonable responses to the questions put to him in cross-examination, and held that his testimony was credible.[1309] In the view of the Appeals Chamber, even if the investigation report and Mr. Sanogo's testimony are insufficient to establish with certainty that Witness AFX was paid for his testimony against Appellant Barayagwiza, it is nonetheless difficult to ignore this possibility, which undeniably casts doubt on the credibility of this witness. The Appeals Chamber considers that if the Trial Chamber had been aware of the fact that the Prosecutor's investigator questioned the witness' moral character, suspecting him of having been involved in the subornation of other witnesses and of being prepared to testify in return for money – the Trial Chamber would have been bound to find that these matters cast serious doubt on Witness AFX's credibility. Hence, like any reasonable trier of fact, it would have disregarded his testimony, or at least would have required that it be corroborated by other credible evidence. The Appeals Chamber accordingly decides to dismiss Witness AFX's testimony insofar as it is not corroborated by other credible evidence.

(iii) Examination of the alleged errors of fact

546. On the basis of the testimonies of Witnesses AAM and AFX,[1310] the Trial Chamber found, in paragraph 719 of the Judgement, that Appellant Barayagwiza "order[ed] the separation of Hutu and Tutsi present at a meeting in Mutura commune in 1991, and asking Bagogwe Tutsi to do their traditional dance at this meeting and at another meeting in Mutura commune in 1993, publicly humiliating and intimidating them and threatening to kill them". This factual finding is repeated at paragraph 967 of the Judgement in the following terms, in order to demonstrate the Appellant's genocidal intent: "[a]fter separating the Tutsi from the Hutu and humiliating the Tutsi by forcing them to perform the *Ikinyemera,* their traditional dance, at several public meetings, Barayagwiza threatened to kill them and said it would not be difficult."

547. The Appeals Chamber concluded in the previous section that it would only accept Witness AFX's testimony insofar as it is corroborated by other evidence. The Appeals Chamber recalls in this respect that two testimonies corroborate each other when one *prima facie* credible testimony is compatible with the other *prima facie* credible testimony regarding the same fact or sequence of linked facts.[1311] In the present case, the Appeals Chamber notes that, although the Appellant's statements as reported by Witness AFX and Witness AAM are in similar terms, the two witnesses did not attend the same meetings. Witness AAM gave evidence on a meeting held in 1991, while Witness AFX referred to a meeting held in 1993. Since the two testimonies refer to different events, which took place two years apart, it is difficult to conclude that Witness AAM corroborates Witness AFX. Accordingly, the

[1307] *Ibid.*, p. 11 (closed session).
[1308] *Ibid.*, p. 62.
[1309] Judgement, para. 712.
[1310] *Ibid.*, paras. 701, 704, 711-712, 716.
[1311] See *supra* X. B. 3.

Appeals Chamber will not consider further submissions based on Witness AFX's testimony. It will rely solely on Witness AAM's testimony in the analysis which follows.[1312]

548. In the part of his testimony concerning the statements about the Bagogwe Tutsi,[1313] Witness AAM explained that, after the killings of Tutsi in Mutura commune in 1991, Appellant Barayagwiza arrived with the *sous-préfet* and the two of them convened a meeting with the entire population. At this meeting, the Appellant "said that all the Hutus should stay on one side and the Tutsis on the other side" and "then requested the Tutsis to dance for him and they danced a lot, a dance that is called Ikinyemera".[1314] According to Witness AAM, the Appellant allegedly threatened the Tutsi:

> He then told – said that you are saying that you are dead – a lot of people have been killed from among you but I can see that you are many. There are many of you, where as you are saying that a lot of people are being killed from among you, we heard that on radio but if we hear that once again, we are going to kill you, because killing you is not a difficult task for us.[1315]

549. The Appeals Chamber considers that, even if the transcripts of Witness AAM's testimony do not explicitly mention that Appellant Barayagwiza forced the Bagogwe Tutsi to dance, the Trial Chamber could reasonably conclude, on the basis of that testimony, that the Appellant's request was not just aimed at humiliating the Tutsi but also at intimidating them, thus giving it a compulsory character.

550. Turning to the argument that the aforementioned meeting could not have taken place in 1991 because the CDR did not exist at the time, the Appeals Chamber observes that Witness AAM never said that this was a CDR meeting.[1316] Nor does Paragraph 716 of the Judgement state that the meeting referred to by Witness AAM was a CDR meeting. Thus, even if the language of paragraph 719 of the Judgement seems to imply that the meeting held in 1991 was a CDR meeting, that interpretation must be rejected.

551. Finally, the Appeals Chamber has already dismissed the contention that the Trial Chamber reversed the burden of proof when it assessed Witness AAM's credibility.[1317]

552. Accordingly, the Appeals Chamber is not satisfied that the Appellant has shown that the Trial Chamber erred when it accepted Witness AAM's testimony. The finding that, at a meeting in 1991, the Appellant humiliated and threatened the Bagogwe Tutsi is therefore

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[1312] The Appeals Chamber has also recalled several times that the jurisprudence of the Tribunal does not in principle require corroboration of a single testimony: *Muhimana* Appeal Judgement, para. 101; *Gacumbitsi* Appeal Judgement, para. 72; *Semanza* Appeal Judgement, para. 153; *Ntakirutimana* Appeal Judgement, para. 132; *Niyitegeka* Appeal Judgement, para. 92; *Rutaganda* Appeal Judgement, para. 29; *Musema* Appeal Judgement, para. 36; *Kayishema and Ruzindana* Appeal Judgement, para. 154. *See* also *Limaj et al.* Appeal Judgement, para. 203; *Kvočka et al.* Appeal Judgement, para. 576; *Kordić and Čerkez* Appeal Judgement, paras. 274-275; *Kunarac et al.* Appeal Judgement, para. 268; *Kupreškić et al.* Appeal Judgement, para. 33; *Čelibići* Appeal Judgement, paras. 492 and 506; *Aleksovski* Appeal Judgement, para. 62; *Tadić* Appeal Judgement, para. 65.

[1313] See Judgement, paras. 701 and 716.

[1314] T. 12 February 2001, p. 94.

[1315] *Idem.*

[1316] *Ibid.*, pp. 94-95. See also Judgement, para. 701.

[1317] See *supra* IV. B. 1.

upheld. Moreover, the Appeals Chamber is of the view that this finding is evidence of the Appellant's genocidal intent.

(c) Exculpatory evidence

553. In his eleventh ground of appeal, Appellant Barayagwiza contends that, in order to determine whether he had genocidal intent, the Trial Chamber should have taken the following exculpatory evidence into account:[1318] (1) the Appellant's previous writings, in particular his book, "*Le sang hutu est-il rouge* ?" [*Is Hutu Blood Red?*];[1319] (2) various documents attributed to him, including annotations to a speech by the President of the CDR, Martin Bucyana;[1320] (3) statements by the Appellant at the constituent assembly of the CDR;[1321] (4) statements by the Appellant in an RTLM broadcast of 12 December 1993.[1322]

554. The Appeals Chamber recalls that the Trial Chamber is not required to refer to all the evidence considered in reaching its findings. Moreover, only evidence that might suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence may be considered exculpatory evidence.[1323]

555. As regards the first item of exculpatory evidence, the Appeals Chamber notes that the content of Appellant Barayagwiza's book, "*Le sang hutu est-il rouge?*", is analysed in detail in the Judgement,[1324] and observes that the Appellant does not explain how this book shows that the Trial Chamber erred in finding that he had the intent to destroy the Tutsi ethnic group in whole or in part. In the view of the Appeals Chamber, the Trial Chamber could reasonably conclude that the views expressed in this book did not conflict with its finding that Appellant Barayagwiza had genocidal intent.

556. The same applies to the annotated speech of the President of the CDR (P141) and to the letter sent to the Belgian newspaper, *La Libre Belgique* (P136), both of which are mentioned in the Judgement;[1325] the Appellant does not explain how this evidence adduced at trial by the Prosecutor demonstrates an absence of genocidal intent.[1326]

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[1318] Barayagwiza Appellant's Brief, paras. 134-138; Barayagwiza Brief in Reply, paras. 88-89.
[1319] *Ibid.*, paras. 134-135.
[1320] *Ibid.*, para. 136, referring to T. 21 May 2002, pp. 64-65 (mentioning Exhibit P136, a letter dated 11 July1992 to a Belgian newspaper), 101-124 (mentioning Exhibit P141, a speech drafted by Martin Bucyana and allegedly annotated by Appellant Barayagwiza), 154-162 (Appellant Barayagwiza's speech). The Appeals Chamber notes that the document discussed at pp.154-162 was not admitted to the case-file, and will not therefore refer to it in subsequent discussions.
[1321] Barayagwiza Appellant's Brief, para. 137.
[1322] *Idem.*
[1323] See Article 68(A) of the Rules.
[1324] Judgement, paras. 736-742. See paragraph 280 of the Judgement, which summarizes Expert Witness Des Forges' analysis of the ethnic dimension of the conflict through Appellant Barayagwiza's writings and statements and cites an extract from the book, "*Le sang hutu est-il rouge* ?", and paragraph 289 of the Judgement, also summarizing Expert Witness Des Forges'analysis concerning similarities between this book and other documents attributed to Appellant Barayagwiza.
[1325] See Judgement, paras. 278-280, concerning the letter to *La Libre Belgique*, and para. 260, concerning Martin Bucyana's speech annotated by Appellant Barayagwiza.
[1326] The Appeals Chamber notes that the speech annotated by Appellant Barayagwiza mainly shows the real power of the Appellant within the CDR hierarchy and in the formulation of CDR ideology. In his letter to the editor of *La Libre Belgique*, the Appellant expresses his views on the goals and true nature of the RPF and clearly indicates that, "although the party [CDR] will use peaceful methods for its political action, it will defend

557. The Appeals Chamber finds itself bound to reach a similar conclusion with respect to the statements made by Appellant Barayagwiza during the constituent assembly of the CDR[1327] – also referred to by the Trial Chamber[1328] – since the Appellant similarly fails to substantiate his argument concerning the alleged evidence of lack of genocidal intent.

558. Finally, regarding the tapes of the RTLM broadcast of 12 December 1993,[1329] the Appeals Chamber notes that the Trial Chamber accepted that what Appellant Barayagwiza said did not, as such, constitute incitement to commit genocide,[1330] but conveyed the Appellant's personal experience and aimed at raising awareness about the discrimination suffered by the Hutu.[1331] There was thus nothing in the Appellant's statements inherently incompatible with an intent to destroy the Tutsi ethnic group in whole or in part, and capable of refuting the Trial Chamber's findings with respect to his genocidal intent.

559. The Appeals Chamber concludes that the Trial Chamber was entitled to find that none of this evidence contradicted its finding that Appellant Barayagwiza had, beyond reasonable doubt, genocidal intent. This ground of appeal must fail.

(d) Temporal jurisdiction of the Tribunal

560. Appellant Barayagwiza contends that the findings from which the Trial Chamber inferred his genocidal intent are based on facts outside the Tribunal's temporal jurisdiction, and that the Trial Chamber's findings that he had genocidal intent must be quashed.[1332]

561. The Appeals Chamber recalls that it has already considered the Trial Chamber's interpretation of the Tribunal's temporal jurisdiction and reaffirmed that Article 7 of the Statute does not prevent the admission of evidence of events prior to 1 January 1994, insofar as the Trial Chamber deemed such evidence relevant and of probative value, and there was no compelling reason to exclude it.[1333] This applies *inter alia* to evidence of criminal intent.[1334]

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by all means the interests of the majority, the popular majority, the Hutu popular majority against the hegemonic and violent objectives of the Tutsi minority" (P136, p. 3. See also T. 21 May 2002, p. 66).

[1327] The Appeals Chamber notes that the correct reference is Exhibit 1D66B, "*Annotations de la vidéo cassette KV00 - 0199*", submitted by the Defence and admitted on 12 September 2001, and not Exhibit 2D12 as indicated by Appellant Barayagwiza in his Appellant's Brief at footnote 138. This document sets out the Appellant's view of the objectives of the CDR and *inter alia* restates his position as to the impossibility of unity between Hutu and Tutsi and the need to root out all trouble-makers and to create a party to address the problems of the Hutu, finally reiterating his categorical refusal to accept the integration of *Inkotanyi* into the national armed forces.

[1328] Judgement, para. 259.

[1329] Exhibit P103/101B.

[1330] Judgement, paras. 1019-1020; see also paragraphs 345, 468 of the Judgement for the factual analysis.

[1331] *Ibid.*, para. 468.

[1332] Barayagwiza Appellant's Brief, para. 139.

[1333] See *supra* VIII. B. 3.

[1334] *Idem*, citing *Aloys Simba v. the Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, 29 July 2004, p. 3; *Emmanuel Rukundo v. the Prosecutor*, Case No. ICTR-2001-70-AR72, *Décision (Acte d'appel relatif à la Décision du 26 février 2003 relative aux exceptions préjudicielles)* [Decision (Notice of Appeal from the Decision of 26 February 2003 on the Preliminary Objections)], 17 October 2003, p. 5; *Juvénal Kajelijeli v. The Prosecutor*, Case No. ICTR-98-44A-T [*sic*], Appeal Judgement (*Appel de la Décision du 13 mars 2001 rejetant la* "Defence Motion Objecting to the Jurisdiction of the Tribunal" [Appeal from the Decision of 13 March 2001 dismissing the "Defence Motion Objecting to the Jurisdiction of the Tribunal"]), 16 November 2001, p. 4; Separate Opinion of Judge Shahabuddeen to the Decision of 5 September 2000, paras. 9-17.

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The Appeals Chamber accordingly takes the view that consideration of evidence of events prior to 1 January 1994 in order to establish Appellant Barayagwiza's criminal intent in 1994 is not a breach of Article 7 of the Statute. This ground of appeal is dismissed.

(e) Conclusion regarding Appellant Barayagwiza's genocidal intent

562. Appellant Barayagwiza has not shown that the Trial Chamber erred when it found that he had the intent to destroy, in whole or in part, the Tutsi ethnic group.

4. Appellant Ngeze

563. The Trial Chamber found that Appellant Ngeze acted with the intent to destroy, in whole or in part, the Tutsi ethnic group, on the basis of the following elements: articles and editorials published in *Kangura,* of which the Appellant was the owner, founder and editor-in-chief, in particular the articles and editorials he himself wrote; the Radio Rwanda interview of 12 June 1994; the statements made at Martin Bucyana's funeral and on other occasions in Gisenyi; and the fact that he ordered an attack on Tutsi civilians in Gisenyi.[1335] Appellant Ngeze challenges this finding.[1336]

(a) Writings in *Kangura*

564. Appellant Ngeze contends that the Trial Chamber could not rely on articles published in *Kangura* in order to infer his genocidal intent, since: (1) it was not entitled to rely on articles written by others;[1337] (2) the articles published before 1994 are outside the temporal jurisdiction of the Tribunal, and the Trial Chamber accepted that the articles published in 1994 did not instigate the commission of genocide;[1338] and (3) the articles did not target the Tutsi but only RPF members and sympathisers.[1339]

565. With respect to the first argument, the Appeals Chamber is of the view that any reasonable trier of fact would have considered the articles written by others in *Kangura* in order to determine whether Appellant Ngeze had genocidal intent. As owner, founder and editor-in-chief of *Kangura*, Appellant Ngeze exercised control over all the articles and editorials published in *Kangura*. Accordingly, all of these articles and editorials could legitimately be ascribed to him personally and directly.[1340] As for the argument relating to temporal jurisdiction, the Appeals Chamber recalls that it has already concluded that the Trial Chamber committed no error in accepting evidence prior to 1 January 1994 in order to establish the Appellant's genocidal intent.[1341] As for the assertion that the *Kangura* articles did not target the Tutsi population as a whole, it has not been substantiated and can be dismissed summarily. The fact is that the Trial Chamber identified the writings in *Kangura*, which, in its view, targeted the Tutsi population as a whole;[1342] it referred in particular to one such article in which Appellant Ngeze wrote that the Tutsi "no longer conceal the fact that

[1335] Judgement, paras. 965, 968-969.
[1336] Ngeze Notice of Appeal, paras. 89-93; Ngeze Appellant's Brief, paras. 275-285.
[1337] Ngeze Appellant's Brief, para. 276(a), read in conjunction with para. 275(b).
[1338] *Ibid.*, para. 280(a).
[1339] *Ibid.*, para. 282.
[1340] See Judgement, paras. 135, 977A and 1038.
[1341] See *supra* VIII. B. 3.
[1342] Judgement, paras. 961-963.

this war pits the Hutus against the Tutsis".[1343] The Appellant has failed to demonstrate that the Trial Chamber's conclusions were unreasonable. This ground of appeal is dismissed.

(b) Appellant's statements

566. Appellant Ngeze contends that statements made by him at Martin Bucyana's funeral "were isolated and do not demonstrate any genocidal intent".[1344] He further submits that the broadcast of 12 June 1994 on Radio Rwanda does not constitute a call to kill, and therefore cannot be evidence that he had genocidal intent.[1345]

567. The Trial Chamber found on the basis of Witness LAG's testimony that the Appellant stated at Bucyana's funeral that "if Habyarimana were also to die, we would not be able to spare the Tutsi".[1346] Appellant Ngeze does not explain how these remarks were taken out of context and could not be relied upon in determining his genocidal intent. The appeal on this point is dismissed.

568. As for Appellant Ngeze's interview on Radio Rwanda, to which reference is made in paragraph 968 of the Judgement, the Trial Chamber considered that:

> [...] through the Radio Rwanda and RTLM broadcasts, Ngeze was trying to send a message, or several messages, to those at the roadblocks. One clear message was: do not kill the wrong people, meaning innocent Hutu who might be mistaken for Tutsi because they had Tutsi features, or because they did not have identification, or because they had identification marked "RPF". In the broadcasts is also the message that there were enemies among the Hutu as well, even some at the roadblocks. In mentioning Kanyarengwe, the Hutu RPF leader, Ngeze reminded listeners that the enemy could be Hutu as well as Tutsi. This is not the same as saying that the Tutsi is not the enemy and should not be killed. In the broadcasts, Ngeze did not tell those at the roadblocks not to kill the Tutsi. The message was to be careful and bring suspects to the authorities, as much to ensure that the enemy does not mistakenly get through the roadblock as to ensure that the wrong people, meaning innocent Hutu, are not killed. In his testimony, Ngeze provided many explanations for what he said, describing various scenarios, including one to suggest he was trying to trick those at the roadblock into letting him pass with Tutsi refugees carrying false Hutu identity cards. Nevertheless, in the Chamber's view, Ngeze also made it clear in his testimony that his message was not to kill Hutu by mistake.
>
> The Chamber is of the view that in telling those at the roadblock not to kill Hutu by mistake, Ngeze was also sending a message that there was no problem with the killing of Tutsi at the roadblock. Such a message was implicit in the broadcasts, which repeatedly urged that suspects not be killed but rather be brought to the authorities. In these convoluted circumstances, the Chamber does not find that these broadcasts constituted a call to kill as alleged.[1347]

569. The Appeals Chamber considers that this last paragraph is unclear, since the Trial Chamber concluded, first, that there was an implicit message in the broadcasts, namely that

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[1343] *Ibid.*, para. 968, referring specifically to *Kangura* No. 40, which is analysed in paragraph 181 of the Judgement.
[1344] Ngeze Appellant's Brief, para. 280(c).
[1345] *Ibid.*, para. 280(b).
[1346] Judgement, paras. 800, 835, 837 and 968. Paragraph 800 of the Judgement refers to the cross-examination of Witness LAG, T. 3 September 2001, pp. 24-25; see also examination-in-chief of Witness LAG, T. 30 August 2001, pp. 50-57, which confirms these statements.
[1347] *Ibid.*, paras. 754-755.

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"in telling those at the roadblock not to kill Hutu by mistake, Ngeze was also sending a message that there was no problem with the killing of Tutsi at the roadblock", but then declined to conclude that these "broadcasts constituted a call to kill". The Trial Chamber thus seems to have implicitly excluded the notion that these statements could amount to evidence of Appellant Ngeze's genocidal intent. The Trial Chamber therefore erred in citing in its legal findings on genocidal intent the fact that the Appellant called on listeners not to mistakenly kill Hutu instead of Tutsi.[1348] The Appeals Chamber considers, nonetheless, that this error does not affect the Appellant's conviction for the crime of genocide, having regard to the entire body of evidence accepted by the Trial Chamber in establishing his genocidal intent.[1349]

(c) Exculpatory evidence

570. Appellant Ngeze contends that the Trial Chamber erred in law and in fact in refusing to consider the acts and words proving the absence of a genocidal intent on his part.[1350] He argues in particular that he personally saved the lives of thousands of Tutsi and publicly went on record many times to say that not all Tutsi were bad.[1351]

571. The Appeals Chamber considers that Appellant Ngeze fails to substantiate his vague submission in relation to the Trial Chamber's purported error in its assessment of the weight to be afforded to the exculpatory evidence. The Appeals Chamber further notes that the Trial Chamber considered the allegation that the Appellant saved thousands of Tutsi, but concluded that "a small circle of individuals were saved by his intervention, in particular Tutsi of the Muslim faith and Tutsi close relatives [...], the Chamber considers it highly improbable that Ngeze saved over 1,000 Tutsi individuals, as he claimed".[1352] The Trial Chamber added:

> The Chamber also notes that in saving Witness AEU and her children, Ngeze extorted her employer, extracting the price of $1,000 for their lives. Moreover, Witness AEU testified that those who joined in another initiative of Ngeze, presented to them as a humanitarian intervention, were in the end lured to their death by Ngeze rather than saved by him. The Chamber notes that Ngeze's innovative method of saving Tutsi through transport by barrel also involved lucrative trading in much needed fuel that he brought back to Rwanda in the barrels. At the time of his arrest, by his own admission Ngeze had a bank balance in the region of $ 900,000.[1353]

The Trial Chamber then concluded that the Appellant's "role in saving Tutsi individuals whom he knew does not, in the Chamber's view, negate his intent to destroy the ethnic group as such".[1354] The Appellant has failed to demonstrate that these findings were unreasonable. In the opinion of the Appeals Chamber, it was reasonable for the Trial Chamber to find that the Appellant had a genocidal intent while also recognizing that he had saved Tutsi.[1355]

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[1348] *Ibid.*, para. 968.
[1349] *Idem.*
[1350] Ngeze Appellant's Brief, para. 276(b).
[1351] *Ibid.*, para. 285, no reference provided.
[1352] Judgement, para. 850.
[1353] *Idem.*
[1354] *Ibid.*, para. 968.
[1355] In this respect, see *Muhimana* Appeal Judgement, para. 32; *Rutaganda* Appeal Judgement, para. 537.

572. Lastly, the Appellant cites no evidence in support of his claim that he went on record many times to say that not all Tutsi were bad. In any event, the Appeals Chamber is of the opinion that, even if this were true, it would not be sufficient to raise a reasonable doubt in regard to the Appellant's genocidal intent as established by the Prosecution evidence. This ground of appeal cannot succeed.

(d) Conclusion

573. The Appeals Chamber recalls that it has already quashed the finding that the Appellant ordered an attack on Tutsi civilians in Gisenyi on 7 April 1994.[1356] That finding cannot therefore constitute proof of the Appellant's genocidal intent. However, the Appeals Chamber is of the opinion that there is sufficient evidence to conclude that the Appellant had genocidal intent in 1994, and affirms the Trial Chamber's findings in this regard.

## D. Criminal liability of the Appellants for genocide

### 1. Individual Criminal Responsibility of Appellant Nahimana under Article 6(1) of the Statute

(a) Findings on the involvement of Appellant Nahimana based on facts prior to 1 January 1994

574. Appellant Nahimana alleges that the Trial Chamber committed errors of law and fact that invalidate the Judgement by holding him responsible for RTLM on the basis of facts prior to 1 January 1994, which are outside the temporal jurisdiction of the Tribunal.[1357] The Appellant argues that these facts are not relevant and lack probative value for purposes of assessing his responsibility from 1 January 1994,[1358] and that the Trial Chamber's factual findings confirm that he played an active role in RTLM "only when it was created and technically put in place, that is, well before 1 January 1994".[1359]

575. The Appeals Chamber reiterates that Appellant Nahimana's responsibility could not be based on criminal conduct prior to 1 January 1994, but that evidence of pre-1994 facts could nonetheless have probative value.[1360] With regard to the Appellant's arguments, the Appeals Chamber considers that a mere reference to a series of paragraphs in the Judgement does not meet the requirements for the presentation of arguments on appeal, and that the broad allegation that the Trial Chamber erred in law and in fact by taking into consideration pre-1994 facts in order to find him responsible cannot succeed, since the Appellant fails to demonstrate that his conviction for genocide was based on pre-1994 facts, or that the evidence of pre-1994 facts had no probative value for purposes of finding him responsible for RTLM broadcasts.

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[1356] See *supra* IX. D.
[1357] Nahimana Appelant's Brief, paras. 79-82. Paragraph 79 refers to paragraph 52 of the same brief, which lists the following paragraphs of the Judgement that cite facts falling outside the Tribunal's temporal jurisdiction: paras. 490-492, 495-499, 506-507, 509-511, 514, 554-556, 567, 572-583, 609-611, 617, 619, 970-971 and 974.
[1358] *Ibid.*, para. 81.
[1359] *Ibid.*, para. 80.
[1360] See *supra* VIII. B. 3.

576. The Appeals Chamber notes moreover that the Trial Chamber relied on post-1994 facts in assessing Appellant Nahimana's control over RTLM, such as: his participation in the Steering Committee and his role as President of the Technical and Program Committee;[1361] his alleged role as Director of RTLM;[1362] his intervention in order to halt the attacks on UNAMIR and General Dallaire;[1363] the interview with the Appellant broadcast on Radio Rwanda on 25 April 1994; and his conversation with Witness Dahinden in June 1994.[1364] For the same reasons, the assertion by the Appellant that the factual findings of the Trial Chamber confirm that he played an active role in RTLM "only when it was created and technically put in place, that is, well before 1 January 1994",[1365] must be rejected. The Appeals Chamber is therefore not persuaded that it has been demonstrated that the Trial Chamber exceeded its temporal jurisdiction by taking account of the Appellant's role in the setting up of RTLM in 1993 and in its management from the time of its creation, in order to assess the criminal responsibility of the Appellant after 1 January 1994. This ground of appeal is dismissed.

(b) Conviction for the crime of genocide

577. In various sections of his Appellant's Brief, Appellant Nahimana presents several arguments related to paragraph 974 of the Judgement, which are grouped and analyzed together below. Although the Appellant submits most of these arguments in relation to the crime of direct and public incitement to commit genocide, the Appeals Chamber has decided to analyze all of them in relation to the conviction for the crime of genocide, since they all relate to paragraph 974 of the Judgement, which is included in the section devoted to the responsibility of the Appellants for that crime. The effect of this analysis on the convictions on the other counts will be examined in the chapters dealing with these.

(i) Arguments of the parties

578. Appellant Nahimana argues first that, on the count of genocide, he was indicted only under Article 6(1) of the Statute, and he claims that the Trial Chamber committed serious errors of law and fact in its legal findings, since there is no fact supporting the finding of his "direct and personal participation in acts of genocide".[1366]

579. The Appellant alleges the following legal errors:

- The Trial Chamber holds him responsible under Article 6(1) of the Statute not by virtue of his personal and direct intervention in the commission by RTLM of the crime of instigation, but rather because he was "responsible of RTLM's programming"; the Trial Chamber thus confuses responsibility under Article 6(1) with superior responsibility under Article 6(3) of the Statute;[1367]

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[1361] Judgement, paras. 561-562 and 567.
[1362] *Ibid.*, paras. 553, 565 and 567.
[1363] *Ibid.*, paras. 563 and 565.
[1364] *Ibid.*, para. 564.
[1365] Nahimana Appellant's Brief, para. 80.
[1366] *Ibid.*, paras. 575-577 (quotation drawn from para. 577). The Appellant refers back to his arguments relating to his responsibility for direct and public incitement to commit genocide (paras. 296-336 with regard to his responsibility under Article 6(1) of the Statute). The argument developed at paragraph 297 deals only with the responsibility of the Appellant for direct and public incitement to commit genocide.
[1367] *Ibid.*, paras. 298-299. See also T(A) 17 January 2007, pp. 15-16.

- The Judges did not find that the Appellant had himself made statements directly and publicly inciting the commission of genocide, or that he had ordered that such declarations be broadcast or had participated in any other way in their broadcasting.[1368] The only allegation of direct intervention on his part – that, in March 1994, he had ordered an RTLM journalist to read on air a telegram which accused the Prosecutor-General of Rwanda of plotting against the President[1369] – does not refer to broadcasts of statements instigating the commission of genocide, but to "comments [which] concern a political controversy involving a high judicial authority from the Hutu community".[1370] In these circumstances, the assertion that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians", cannot be linked to any specific act of the Appellant;[1371]

- In the absence of direct participation, the Trial Chamber bases the Appellant's responsibility on the fact that he was "satisfied" with RTLM broadcasts and that "RTLM did what Nahimana wanted it to do".[1372] Even if this fact were established, "[i]t is not possible to establish that the Appellant personally participated in the criminal act by alleging that he was 'satisfied' with the crime committed",[1373] and the fact that he might have expressed in such manner an opinion or intent cannot constitute "the *actus reus* of participation in the crime"[1374] because "opinion and intention are never punishable as long as they do not materialize into a specifically identified criminal act";[1375]

- The Trial Chamber erred in finding him responsible for RTLM broadcasts after 6 April 1994[1376] without providing any particulars of his involvement in such broadcasts[1377] and in finding him responsible for acts committed by others, solely on the ground that such acts were a continuation of similar acts which he had allegedly committed earlier.[1378] Such responsibility for the acts of others is not provided under the Statute, and conflicts with the principles laid down by international and domestic law.[1379]

580. With regard to factual errors, the Appellant Nahimana contends that:

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[1368] *Ibid.*, paras. 300-301.
[1369] See Judgement, paras. 517 and 557.
[1370] Nahimana Appellant's Brief, para. 302. The Appellant also argues that this finding was erroneous in fact because it resulted from a "single hearsay testimony without any probative value": *infra* XIII. D. 1. (b) (ii) a. , and Nahimana Appellant's Brief, paras. 303, 441-442.
[1371] *Ibid.*, para. 304, citing paragraph 974 of the Judgement. See also Nahimana Appellant's Brief, para. 334.
[1372] *Ibid.*, para. 305, citing paragraph 974 of the Judgement.
[1373] *Ibid.*, para. 308.
[1374] *Ibid.*, para. 309.
[1375] *Ibid.*, para. 307.
[1376] *Ibid.*, para. 313.
[1377] *Ibid.*, paras. 311-312.
[1378] *Ibid.*, p. 38, sub-title 2.4 and para. 313.
[1379] *Ibid.*, paras. 314-316. See also T (A), 17 January 2007, p. 7.

- The finding that he was satisfied with the RTLM broadcasts is erroneous, because he personally condemned RTLM for becoming a "tool for killing" during the genocide;[1380]

- The Trial Chamber wrongly found that he exercised control over RTLM s.a. and the RTLM radio station in his role as founder of RTLM, in asserting that the "RTLM was a creation that sprang from Nahimana's vision more than anyone else" and that "it was his initiative and his design",[1381] whereas the only evidence related to the genesis of RTLM is his testimony at trial, and he challenges this analysis.[1382] Furthermore, the mere fact that he was "one of the key founding members of a radio station which was subsequently used as an instrument of hatred and violence does not suffice to establish criminal responsibility of any sort";[1383]

- The finding that he was the principal ideologist of RTLM is too vague, thus preventing the Appeals Chamber from exercising its power of review.[1384] Furthermore, the evidence adduced at trial did not support such a finding by the Trial Chamber: Witness Kamilindi simply expressed an opinion, which was not supported by any evidence and, on the contrary, confirmed that the Appellant had only a limited role in RTLM before 6 April 1994;[1385] Witness Strizek conceded that his opinion on this point did not result from his own research, but that he had merely lifted it from other publications.[1386] In any event, the Appellant did not express his views on air and his political activities and scientific analyses were neither commented on nor supported by the journalists;[1387]

- There was no justification for the Trial Chamber's finding that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians",[1388] since it was established that the Appellant (1) spoke only once on RTLM, "on 20 November 1993 when he made statements that have been endorsed by the Judges"; (2) never intervened on air between 1 January and 31 December 1994; and (3) stopped all contacts with the radio station after 8 April 1994, that is, before it became a weapon "in the war, the civil war and genocide";[1389]

- There is no evidence suggesting any type of involvement on his part in RTLM after 6 April 1994.[1390] To the contrary, it has been demonstrated that he had severed relations with RTLM and had no contact with the journalists after 8 April 1994.[1391] This severance of contact refutes the argument of the Prosecutor, endorsed in paragraph 974 of the Judgement, that the Appellant had used RTLM as a weapon to instigate the killing of Tutsi, since, if this had been the case, the Appellant would not

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[1380] *Ibid.*, para. 306.
[1381] *Ibid.*, para. 319 and sub-heading preceding this paragraph.
[1382] *Ibid.*, para. 320.
[1383] *Ibid.*, para. 321.
[1384] *Ibid.*, paras. 322 and 328, referring to paragraph 974 of the Judgement.
[1385] *Ibid.*, paras. 324-326.
[1386] *Ibid.*, para. 327.
[1387] *Ibid.*, para. 328.
[1388] *Ibid.*, para. 304 and sub-title 3.4 preceding paragraph 334.
[1389] *Ibid.*, para. 335.
[1390] *Ibid.*, paras. 329-330, which refers to paragraph 974 of the Judgement in its translation of 5 April 2004.
[1391] *Ibid.*, para. 331.

have severed contact with the radio station at the very moment when this alleged project was being implemented.[1392]

581. Appellant Nahimana thus submits that there was no positive, personal act, substantially linked to the instigation of genocide by RTLM, which could be attributed to him.[1393]

582. The Prosecutor responds that the arguments of Appellant Nahimana are unfounded.[1394] He refers to his arguments on the responsibility of the Appellant for direct and public incitement to commit genocide and for persecution as a crime against humanity.[1395] A general reference of this kind presents problems, since the Prosecutor fails to make it clear whether all of those arguments apply also to the Appellant's responsibility for instigation to commit genocide pursuant to Article 6(1) of the Statute. However, it is the Appeals Chamber's understanding that the Prosecutor's position is as follows.

583. The Prosecutor submits that Appellant Nahimana was rightly found guilty of having instigated the commission of genocide, since he used RTLM and its journalists to accomplish his criminal purpose.[1396] In this respect, the Prosecutor argues that the Appellant participated in the creation of RTLM; that he was a member of its Steering Committee; that he played a role in its financial management; that he presided over the Technical and Program Committee; that he represented RTLM at meetings with the Minister of Information; and that he had the last word over all of the activities of RTLM, including its broadcasts and its editorial policy, even after 6 April 1994.[1397] The Prosecutor adds that the Appellant "unambiguously supported RTLM's activities of directly and publicly inciting the killings of Tutsis both in meetings with the Minister of Information, as well in his public statement on Radio Rwanda at the height of massacres", and that he "acquiesced to the incitement perpetrated by journalists".[1398] The Prosecutor maintains that, contrary to what the Appellant appears to argue, the Trial Chamber did not rely on purely intentional elements in order to convict him: it considered the statements made by the Appellant in the interview of 25 April 1994 as an admission of guilt, not as an element of the offence.[1399]

584. The Prosecutor further argues, in the alternative, that, on the basis of the acts discussed above, the Appellant could have been found guilty of having instigated others to instigate genocide, of having aided and abetted others in instigating genocide, or having

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[1392] *Ibid.*, paras. 332-333.
[1393] *Ibid.*, para. 336.
[1394] Respondent's Brief, paras. 458-459.
[1395] *Ibid.*, para. 459.
[1396] *Ibid.*, para. 352. See also para. 336, where the Prosecution submits that the Appellant "both intended and facilitated" the broadcasting of genocidal messages before and after 6 April 1994 (although the certified French translation reads: "*Il [l'Appelant] a bel et bien **planifié et encouragé** la diffusion de messages génocidaires par la RTLM avant et après le 6 avril 1994*", the English version – being the authoritative one – states: "The genocidal messages in the broadcasts of RTLM both prior to and after 6 April 1994 were something that he [the Appellant] both **intended and facilitated**"), and para. 423, in which the Prosecution submits that the Appellant "used the RTLM as communication weaponry" in order to instigate the commission of crimes against the Tutsi. See also T(A) 18 January 2007, p. 12.
[1397] *Ibid.*, paras. 337-338, 351-352, 361 and 423.
[1398] *Ibid.*, para. 423.
[1399] *Ibid.*, para. 366.

planned the instigation of genocide.[1400] The Prosecutor recalls in this regard that several modes of liability may be supported by the same set of facts and that the Appeals Chamber may substitute one form of responsibility for another.[1401]

585. Appellant Nahimana replies that the Prosecutor himself acknowledges the Judgement's deficiencies, and seeks to address them by invoking for the first time in his Respondent's Brief modes of responsibility which are mentioned neither in the Indictment nor in the Judgement.[1402] The Appellant submits that the Indictment pleads only one mode of liability, namely the mode of commission, thereby implicitly excluding any other type of criminal participation,[1403] and that any attempt at invoking other forms of responsibility would adversely affect his defence rights.[1404]

586. The Appellant argues in this respect that he cannot be held liable of having instigated the commission of genocide through "indirect participation", because the Statute does not provide for such a mode of liability and the Prosecutor did not plead it as such at trial.[1405] He further submits that the *Akayesu* Appeal Judgement, as well as the *travaux préparatoires* of the Genocide Convention, show that an act of instigation to genocide which does not meet the criteria of direct and public incitement to commit genocide cannot entail criminal responsibility;[1406] the Prosecutor's thesis that the Appellant had, through indirect participation in RTLM, "instigated" the journalists to commit genocide must therefore be rejected.[1407]

587. With regard to the compounded modes of liability proposed in the alternative by the Prosecutor, the Appellant maintains that:[1408]

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[1400] *Ibid.*, paras. 351, 353-354, 424-430. Paragraphs 351, 353 and 354 suggest that the Appellant could be convicted not only of having "committed" direct and public incitement to commit genocide, but also of having instigated or aided and abetted the commission of the crime of direct and public incitement to commit genocide. (The Appeals Chamber notes in this respect that the French translation of paragraph 353 of the Respondent's Brief is inaccurate in that it refers to "*incitation directe et publique à commettre le génocide*" while it should have referred to "*l'incitation à l'incitation directe et publique à commettre le génocide*": see original English version of para. 353 of the Respondent's Brief). Paragraphs 424 to 430 suggest that the Appellant could be found responsible for having planned or aided and abetted persecution as a crime against humanity. Since the Prosecutor refers to his arguments concerning direct and public incitement to commit genocide and persecution in relation to the Appellant's responsibility for genocide (see Respondent's Brief, para. 459), the Appeals Chamber understands that the arguments presented at paragraphs 351, 353, 354 and 424 to 430 of the Respondent's Brief must also be applied to the criminal conduct of RTLM staff in instigating to commit genocide.

[1401] Respondent's Brief, para. 425.

[1402] Nahimana Brief in Reply, paras. 90-91.

[1403] *Ibid.*, para. 94.

[1404] *Ibid.*, para. 95.

[1405] *Ibid.*, paras. 96 to 101. In these paragraphs, the Appellant replies to the Prosecution argument that the Appellant used RTLM journalists to *commit* the crime of direct and public incitement to genocide. Since the Appeals Chamber has transposed this argument to the question of the Appellant's responsibility for instigation to commit genocide under Article 6(1) of the Statute, the Reply must likewise be transposed.

[1406] *Ibid.*, paras. 108-109, referring to para. 480 of the *Akayesu* Appeal Judgement.

[1407] *Ibid.*, para. 110. See also paras. 96-101, where the Appellant argues that his "indirect participation" cannot be assimilated to the crime of direct and public incitement to commit genocide.

[1408] The Appellant further submits that there cannot be any criminal liability for having instigated others to commit direct and public incitement to genocide, or for having aided and abetted others in directly and publicly inciting the commission of genocide: Nahimana Brief in Reply, paras. 102-107 and 115-117. The arguments presented by the Appellant in these paragraphs relate exclusively to the modes of liability applicable to the crime of public and direct incitement to commit genocide (Article 2(3)(c) of the Statute) and cannot be

- He could not be found guilty of having, by omission, aided and abetted direct and public incitement to commit genocide.[1409] Liability for an omission can exist only in two exceptional cases: where there has been a failure to discharge a legal duty to act under criminal law,[1410] or in the case of the "approving spectator", where, by virtue of his superior position, "the accused's mere presence on the scene of the crime constitutes a positive act of aiding and abetting, which had a direct and significant effect on the commission of the crime".[1411] However, these situations are not relevant here: in the first case, there was no legal rule, under either Rwandan or international law, which imposed a duty to act upon the Appellant;[1412] in the second case, the jurisprudence requires that the accused be present at the scene of the crime, in close proximity to the principal perpetrator,[1413] which was not the case here, since the Appellant had no contact with RTLM after 8 April 1994; [1414]

- He could not be found responsible for having planned direct and public incitement to commit genocide, because this form of responsibility in the third degree is not recognized under international criminal law and, in any event, there could be no such form of responsibility in the present case, since he "never gave orders or directives to staff of the radio [station]".[1415]

(ii) Analysis

588. The Appeals Chamber recalls that it has already concluded that some of the RTLM broadcasts after 6 April 1994 instigated the commission of acts of genocide.[1416] The question which must be addressed now is whether Appellant Nahimana can be held responsible for these acts of instigation under Article 6(1) of the Statute.

589. At the outset, the Appeals Chamber notes that there is no evidence on file suggesting that Appellant Nahimana played an active part in broadcasts after 6 April 1994 which instigated the killing of Tutsi.[1417] However, in paragraph 974 of the Judgement, the Trial

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transposed to the question of instigation to instigate genocide (Article 6(1) of the Statute), or of aiding and abetting the instigation of genocide (Article 6(1) of the Statute). It might nonetheless be thought appropriate to consider whether a defendant can be found guilty of having instigated others to instigate genocide under Article 6(1) of the Statute, or of having aided and abetted others in instigating genocide under Article 6(1) of the Statute. However, for the reasons set out below, the Appeals Chamber finds that it is unnecessary to rule on this issue in the present case.

[1409] Nahimana Brief in Reply, paras. 118-123.

[1410] *Ibid.*, paras. 118-119, referring to paragraph 188 of the *Tadić* Appeal Judgement, to paragraph 334 of the *Čelibići* Appeal Jugement, to paragraph 601 of the *Krstić* Trial Judgement and to paragraph 663 of the *Blaškić* Appeal Judgement.

[1411] *Ibid.*, para. 121.

[1412] *Ibid.*, para. 120.

[1413] *Ibid.*, para. 122, referring to paragraph 35 of the *Bagilishema* Trial Judgement, to paragraphs 452, 689 and 693 of the *Akayesu* Trial Judgement, and to paragraph 657 of the *Blaškić* Appeal Judgement.

[1414] *Ibid.*, para. 123.

[1415] *Ibid.*, para. 127.

[1416] See *supra* XII. B. 3.

[1417] The only example of intervention by the Appellant with RTLM after 6 April 1994 is his action to put an end to the attacks on UNAMIR and General Dallaire. As explained below (XIII. D.1. (b) (ii) a. (iii.)), this intervention confirms the Appellant's effective control of RTLM after 6 April 1994, but it does not prove that the Appellant played an active role in the broadcasts instigating the killing of Tutsi.

Chamber cites the following facts in order to convict Appellant Nahimana under Article 6(1) of the Statute on account of all RTLM broadcasts which instigated the killing of Tutsi:

- The fact that he was one of the founders of RTLM;
- His role as principal ideologist of RTLM;
- The fact that the Appellant was "satisfied with his work", according to the view expressed in his interview of 25 April 1994 with Radio Rwanda, at a time when the massacre of the Tutsi population was ongoing;
- The fact that the RTLM "did what Nahimana wanted it to do", playing a key role in the "awakening of the majority people" and in "mobilizing the population to stand up against the Tutsi enemy".

The Trial Chamber concluded that "RTLM was Nahimana's weapon of choice, which he used to instigate the killing of Tutsi civilians" and that Nahimana was "guilty of genocide pursuant to Article 6(1) of [the] [S]tatute".[1418] The Appeals Chamber understands that the Trial Chamber found that the Appellant had himself instigated the commission of genocide, by using RTLM as a tool for this purpose.

590. The Appeals Chamber will examine first whether the Trial Chamber's factual findings were reasonable, and will then determine whether Appellant Nahimana's conviction can be upheld.

a. The Appellant's "satisfaction".

591. In paragraph 564 of the Judgement, the Trial Chamber held as follows:

> Nahimana testified that when he met Phocas Habimana in July in Gisenyi, he asked him how he could do what he was doing at RTLM. According to Nahimana's testimony, RTLM was hijacked and turned into a "tool for killing". This testimony stands in sharp contrast to the other evidence of what Nahimana said at the time. Not a single witness other than Nahimana himself testified that Nahimana had concerns about RTLM broadcasting between April and July 1994, or expressed such concerns. On 25 April 1994, in a public broadcast on Radio Rwanda, Nahimana associated himself with RTLM as one of its founders and said he was happy that RTLM had been instrumental in raising awareness. He indicated that he had been listening to the radio. He was clearly aware of the concern others had, as he quoted the former Burundian Ambassador as having expressed this concern. The Chamber notes that RTLM broadcasts were particularly vehement in the weeks immediately following 6 April and that Nahimana made reference in the broadcast to information on the radio about the population having "worked" with the armed forces, "work" being a code word that was used by the radio to refer to killing.

592. The Appeals Chamber is of the view that Appellant Nahimana's alleged condemnation of RTLM for having become a "tool for killing" does not suffice to demonstrate that the Trial Chamber's factual finding was unreasonable, particularly as the Trial Chamber had specifically addressed this part of the Appellant's testimony.

[1418] Judgement, para. 974.

593. The Appeals Chamber agrees, however, that the sole fact that the Appellant expressed his satisfaction over broadcasts having allegedly instigated the killing of Tutsi could not support the finding that he was responsible under Article 6(1) of the Statute. This fact cannot in itself represent an act or omission capable of constituting the *actus reus* of one of the modes of liability provided under Article 6(1) of the Statute.

b. The Appellant's Role in the creation of RTLM

594. For the reasons set out below,[1419] the Appeals Chamber is of the view that Appellant Nahimana has failed to demonstrate that the Trial Chamber could not reasonably have concluded that he had played a key role in the creation and the setting up of RTLM. However, even though the role of founder of RTLM could be taken into consideration by the Trial Chamber in order to show that the Appellant had certain powers within RTLM, the Appeals Chamber finds that this fact is not sufficient to support the Appellant's conviction under Article 6(1) of the Statute. This was not an act or omission capable of constituting the *actus reus* of one of the modes of liability provided under that provision, and the role of founder of RTLM does not in itself sufficiently establish that the Appellant substantially contributed to the commission of the crime of genocide.

c. The Appellant was the ideologist of RTLM and used it as his weapon of choice

595. As noted above, the Trial Chamber found that Appellant Nahimana was the principal ideologist of RTLM, that RTLM did what Nahimana wanted it to do and that RTLM was his weapon of choice to instigate the killing of Tutsi civilians.[1420] The Appeals Chamber notes that the Judgement does not indicate clearly which facts support these legal findings. The Appeals Chamber recalls that, for the Appellant to be convicted under Article 6(1) of the Statute, it must have been established that specific acts or omissions of the Appellant themselves constituted an instigation to the commission of genocide. An alternative would be that specific acts or omissions of the Appellant may have substantially contributed to instigation by others.

596. The Appeals Chamber observes that the Trial Chamber concludes in paragraph 567 of the Judgement that, in addition to his executive functions at RTLM, "Nahimana also played an active role in determining the content of RTLM broadcasts, writing editorials and giving journalists texts to read". The Appeals Chamber understands that it is on this basis that the Trial Chamber found that the RTLM did what Nahimana wanted it to do and that RTLM was his weapon of choice to instigate the killing of Tutsi civilians. However, the Appeals Chamber is of the opinion that these two conclusions can only be upheld if the fact that the Appellant played an active role in the broadcasts instigating the commission of genocide was established beyond reasonable doubt.

597. On this point, the Appeals Chamber recalls that there is no evidence that Appellant Nahimana played an active part in the broadcasts after 6 April 1994 which instigated the commission of genocide. Furthermore, the appeal record contains no evidence that Appellant Nahimana had, before 6 April 1994, given instructions to RTLM journalists to instigate the

[1419] See *infra* XIII. D. 1. (b) (ii) a. ii.
[1420] Judgement, para. 974.

killing of Tutsi. The Appeals Chamber observes that, although Witness Kamilindi affirmed in general terms that the Appellant was the real boss and that he was the one who gave orders,[1421] he did not specifically state that the Appellant had ordered journalists to instigate the killing of Tutsi.

598. With regard to the factual finding, based on the testimony of Witness Nsanzuwera, that the Appellant had written editorials and given texts to journalists to be read out on air,[1422] it is not sufficient to demonstrate that the Appellant played an active role in broadcasts which instigated the killing of Tutsi. The statements by Kantano Habimana reported by Witness Nsanzuwera related to the fact that the Appellant had written certain editorials read out by RTLM journalists or had given them texts to read, but in the absence of any further precision on the content of these editorials, the Appeals Chamber has difficulty in finding that there is sufficient evidence to show that such editorials or texts instigated killings of Tutsi. The only concrete example given in the testimony of Witness Nsanzuwera is the telegram accusing the Prosecutor-General of Rwanda of plotting against the President. The Appeals Chamber notes, however, that the Trial Chamber made no finding that the text of the telegram had instigated the killing of Tutsi, which is reasonable, since the ethnicity of Prosecutor-General Nkubito is not specified in the Judgement.[1423] The Appeals Chamber must therefore conclude that there is no proof that the editorials and other texts that the Appellant allegedly asked to be read out on air instigated the killing of Tutsi.

599. In the view of the Appeals Chamber, the present analysis shows that no reasonable trier of fact could have concluded, on the basis of the evidence before it, that the Appellant had played an active role in broadcasts instigating the killing of Tutsi, or that he had used RTLM for such purpose. There is therefore no need to determine whether, in law, the Appellant could be found guilty of instigation to commit genocide because he used the radio – and in particular its journalists – to instigate the killing of Tutsi, just as if he had instigated the killings himself.

### d. Appellant Nahimana "set the course" for RTLM

600. The Trial Chamber nonetheless appears to take the view that Appellant Nahimana was responsible under Article 6(1) of the Statute for the broadcasts after 6 April 1994 because they did not "deviate from the course" that he had set before 6 April 1994.[1424] Since the Appeals Chamber has already concluded that it has not been established beyond reasonable doubt that the Appellant had, before 6 April 1994, "set" such a "course" in order to instigate the killing of Tutsi, it follows that the finding that the broadcasts after 6 April 1994 had not deviated from that course must likewise be set aside. Consequently, there is no need to determine whether, in law, the Appellant could be held responsible under Article 6(1) of the Statute for broadcasts which had not deviated from the course set before, or which were "built on the foundations created for it before 6 April".[1425]

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[1421] *Ibid.*, paras. 510 and 554.
[1422] *Ibid.*, paras. 516-517, 557 and 567. In this respect, the Appeals Chamber concludes below that this finding must be maintained: see *infra* XIII. D. 1. (b) (ii) a. ii.
[1423] The Appeals Chamber notes that the Appellant alleges that Mr. Nkubito was a Hutu: Nahimana Appellant's Brief, para. 302.
[1424] Judgement, para. 974.
[1425] *Idem.*

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e. Conclusion

601. The Appeals Chamber reverses the finding of the Trial Chamber that, through RTLM, Appellant Nahimana instigated the commission of genocide pursuant to Article 6(1) of the Statute. The Appeals Chamber does not deem it necessary to address the Prosecutor's arguments that the Appellant could also be found responsible for having planned, instigated, or aided and abetted instigation to genocide by RTLM journalists, since the facts of the case cannot in any event support a conviction based on these other modes of liability.[1426] The above analysis shows that it has not been sufficiently established that the Appellant had carried out acts of planning, instigation or aiding and abetting with a view to instigating the commission of genocide.

602. The Appeals Chamber accordingly reverses the conviction of Appellant Nahimana on the count of genocide. In light of these conclusions, there is no need to address his other grounds of appeal.

2. Appellant Barayagwiza

(a) Individual criminal responsibility for RTLM broadcasts under Article 6(3) of the Statute

603. Appellant Barayagwiza submits that the Trial Chamber committed several errors in finding that he incurred superior responsibility for the crimes committed by the employees and journalists of RTLM.[1427]

(i) The law

604. Appellant Barayagwiza submits that the Trial Chamber incorrectly applied the test for superior responsibility.[1428] The Prosecutor responds that the Appellant does not demonstrate how the Trial Chamber erred and that, in any event, the facts as found by the Trial Chamber satisfy the test for superior responsibility.[1429] In reply, the Appellant argues that the Trial Chamber failed to apply the superior-subordinate relationship test, since it identified no specific facts showing his effective control over RTLM and its journalists.[1430]

605. The Appeals Chamber has previously recalled the requirements for convicting a defendant under Article 6(3) of the Statute.[1431] In his twelfth ground of appeal, Appellant Barayagwiza outlines his interpretation of the effective control test without explaining the nature of the Trial Chamber's alleged error. This ground of appeal therefore cannot succeed. Moreover, the Appeals Chamber recalls that, contrary to what the Appellant seems to assert,[1432] the case-law of the *ad hoc* Tribunals affirms that there is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that

[1426] For this reason, the Appeals Chamber does not deem it necessary to examine whether the modes of liability invoked by the Prosecution are recognized under Article 6(1) of the Statute, or under international customary law.
[1427] Barayagwiza Notice of Appeal, p. 2 (Grounds 12-14); Barayagwiza Appellant's Brief, paras. 140-167; Barayagwiza Brief in Reply, paras. 3-4, 90-108.
[1428] Barayagwiza Appellant's Brief, paras. 140-149 (Ground 12).
[1429] Respondent's Brief, paras. 507-516.
[1430] See in particular Barayagwiza Brief in Reply, paras. 94-95.
[1431] See *supra* XI. B.
[1432] See Barayagwiza Appellant's Brief, paras. 146 and 149.

exercised by a military commander in order to incur superior responsibility: every civilian superior exercising effective control over his subordinates, that is, having the material ability to prevent or punish the subordinates' criminal conduct, can be held responsible under Article 6(3) of the Statute.[1433] The Appeals Chamber further considers it worth recalling that "it is appropriate to assess on a case-by-case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof".[1434]

606. As to the argument raised in reply, the Appeals Chamber is of the opinion that the Trial Chamber systematically identified the facts permitting it to find that the Appellant had superior responsibility over the employees and journalists of RTLM. With regard to the Appellant's superior status and effective control, paragraph 970 of the Judgement cites the following facts:

- Appellant Barayagwiza was "No. 2" at RTLM;
- The Appellant represented the radio at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of the company;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, to which RTLM announcers and journalists were accountable;
- The Appellant chaired the Legal Committee.

607. Paragraph 971 of the Judgement deals with the criminal nature of the RTLM broadcasts – also described in greater detail in paragraph 949 of the Judgement – and relies on the facts below as establishing that the Appellant knew or had reason to know that his subordinates had committed or were about to commit criminal acts, and that he failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators:

- Appellant Barayagwiza was fully aware, as early as October 1993, of the fact that the message conveyed by RTLM was causing concern;
- He nonetheless defended RTLM's editorial policy at meetings with the Ministry of Information in 1993 and 1994;
- He acknowledged that there was a problem and tried to address it, thereby demonstrating his own sense of responsibility for RTLM programming;

[1433] *Kajelijeli* Appeal Judgement, paras. 85-87; *Bagilishema* Appeal Judgement, paras. 50-55. See also *Čelebići* Appeal Judgement, paras. 193-197.
[1434] *Bagilishema* Appeal Judgement, para. 51, referring to *Musema* Trial Judgement, para. 135.

- Ultimately, the concern was not addressed and RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April.

608. Similarly, in paragraph 972 of the Judgement the Trial Chamber held that, even after 6 April 1994, Appellants Nahimana and Barayagwiza (1) still had the powers vested in them as office-holding members of the governing body of RTLM and the *de facto* authority to give orders to RTLM employees and journalists, as evidenced by Appellant Nahimana's intervention to halt RTLM attacks on UNAMIR and General Dallaire; (2) "knew what was happening at RTLM"; and (3) failed to exercise the authority vested in them "to prevent the genocidal harm that was caused by RTLM programming".[1435]

609. Appellant Barayagwiza's twelfth ground of appeal cannot therefore succeed.

(ii) Responsibility of Appellant Barayagwiza for RTLM broadcasts

a. Arguments of the Parties

610. Appellant Barayagwiza contends that the Trial Chamber erred in law and fact in concluding, in paragraph 973 of the Judgement, that he had superior responsibility at RTLM.[1436]

611. The Appellant challenges the finding that he was "No. 2" at RTLM, and argues that the Trial Chamber failed to analyse correctly his role and responsibilities as a member of the Steering Committee of RTLM.[1437] In this respect, he contends that, by virtue of Article 20 of the Statutes of RTLM,[1438] responsibility for the administration, management and supervision of the company lay with the Director-General, under delegation from the Board of Directors,[1439] and that only "specific limited authority to implement decisions taken by the Steering Committee was delegated to Kabuga, Nahimana and Appellant on 24 May 1993 for emergency matters necessary for the setting up of the company".[1440] The Appellant states that it was for that reason that he was authorized to sign documents and cheques, and that he had been given no decision-making power.[1441] The Appellant acknowledges that he was in charge of the rules committee that had been set up within the Steering Committee, but claims that there was no evidence that he gave legal advice to the company or that he was in charge of its

[1435] See also Judgement, paras. 561-565 and 568, which support the findings in paragraph 972.
[1436] Barayagwiza Appellant's Brief, paras. 150-167 (Grounds 13 and 14). These two grounds are examined together: both the argument developed under Ground 13, that the Appellant was not "No. 2" at RTLM, and the arguments in Ground 14 seek to show that the Trial Chamber erred in finding that he was a superior with effective control over RTLM employees and journalists.
[1437] Barayagwiza Appellant's Brief, paras. 150-156.
[1438] Exhibit 1D11. In paragraph 151 of his Appellant's Brief, Appellant Barayagwiza erroneously refers to Exhibit P53, entitled "*Organisation et structure du comité d'initiative élargi*" [Organization and Structure of the Expanded Steering Committee].
[1439] Barayagwiza Appellant's Brief, para. 151. In this respect, Appellant Barayagwiza contends that Phocas Habimana was appointed as Director-General at the RTLM General Assembly held on 11 July 1993, which was presided over by Félicien Kabuga: Barayagwiza Appellant's Brief, para. 154, referring to the testimony of Appellant Nahimana (T. 23 September 2002, pp. 164-166).
[1440] Barayagwiza Appellant's Brief, para. 152.
[1441] *Idem*; Barayagwiza Brief in Reply, para. 106; T(A) 17 January 2007, p. 73.

Legal Committee. He denies having had anything to do with the management of RTLM or its programming and claims that he had nothing to do with the administrative affairs of RTLM outside the Steering Committee.[1442]

612. Appellant Barayagwiza further submits that the finding that he was the "No. 2" at RTLM is based solely on the hearsay evidence of Witness Dahinden, following an interview with Gaspard Gahigi in August 1993, and that it is clear that, in the interview, Gaspard Gahigi was speaking of the period prior to the setting up of the company.[1443] He contends that Witnesses GO, Nsanzuwera, X and Kamilindi did not state that he was No. 2 at RTLM, but simply testified to his functions as founding-member of RTLM (Witness GO), in charge of public relations (Witness X) and advisor (Witness Kamilindi).[1444]

613. The Appellant argues further that the evidence presented in paragraph 970 of the Judgement was not sufficient to establish that he was a superior exercising effective control over RTLM employees and journalists. He submits in this respect that:

- The mere fact that he participated in meetings with the Minister of Information only indicates his influence and was not sufficient to establish that he had superior responsibility;[1445]

- If RTLM journalists were ultimately accountable to the Steering Committee (as found in paragraph 970 of the Judgement), this Committee acted as a collective organ and by consensus;[1446]

- As noted in paragraph 556 of the Judgement, of the four committees working under the Steering Committee, only the Technical and Program Committee – which was chaired by Appellant Nahimana – had any responsibilities for RTLM programming.[1447] Appellant Barayagwiza was not a member of this Committee and no evidence was adduced that he was involved in determining the content of RTLM broadcasts.[1448]

614. Appellant Barayagwiza further alleges that the Trial Chamber failed to distinguish between the periods before and after 6 April 1994, arguing that it accepted that the Steering Committee did not meet after 6 April 1994.[1449] In the Appellant's view, the Trial Chamber found that he exercised effective control over RTLM after 6 April 1994 on the basis of his alleged remark, at a meeting in Geneva with Witness Dahinden on 15 June 1994, that RTLM was to be transferred to Gisenyi.[1450] The Appellant contends that it was not possible for the Trial Chamber to conclude that the Appellant had said this, since Witness Dahinden had stated in cross-examination that it was Appellant Nahimana who made this remark.[1451]

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[1442] *Ibid.*, para. 153; T(A) 17 January 2007, p. 73.
[1443] *Ibid.*, paras. 155-156.
[1444] *Ibid.*, para. 155, referring to paragraphs 573, 608, 617 of the Judgement; see also Barayagwiza Brief in Reply, paras. 103-105.
[1445] *Ibid.*, para. 158.
[1446] *Ibid.*, para. 159.
[1447] *Ibid.*, para. 160; Barayagwiza Brief in Reply, para. 100.
[1448] *Ibid.*, para. 161.
[1449] *Ibid.*, para. 162; referring to Judgement, para. 561.
[1450] Barayagwiza Appellant's Brief, para. 162.
[1451] *Ibid.*, paras. 163-165.

Appellant Barayagwiza adds that, in any event, this testimony was inconsistent with Witness Dahinden's written statement.[1452] The Appellant further alleges that the Trial Chamber wrongly inferred from a statement by Witness Dahinden – to the effect that Appellant Barayagwiza suggested that the radio station that Dahinden wanted to set up would be in competition with RTLM – his "identification with, rather than dissociation from, RTLM",[1453] since this statement was uncorroborated, and the witness had not been cross-examined on it.[1454]

615. Appellant Barayagwiza submits, finally, that the Trial Chamber merely concluded that, if Appellant Nahimana "exercised *de jure* power over RTLM, then the appellant must also have done so",[1455] which amounts to guilt by association and to an error of law and fact.[1456]

616. The Prosecutor responds that the Appellant's authority as a high level manager of RTLM gave him powers of a superior over those who worked under him and the material ability to control the nature of RTLM broadcasts.[1457] He submits in this regard that the Appellant was an active member of the Committee, which functioned as a board of directors, that he controlled the finances of the company, that he was one of three representatives of RTLM at meetings with the Government and that as such, "he had the material ability to affect a change of the programming, to sanction reporters who did not abide by the Steering Committee's policies or to recommend disciplinary action for such reporters".[1458]

617. The Prosecutor further submits that the evidence supports the finding that Appellant Barayagwiza was No. 2 at RTLM.[1459] He argues that, in challenging this finding, the Appellant extrapolates many inferences and conclusions that have no basis in the Statutes of RTLM or in any of the evidence produced at trial, and even attempts to introduce new evidence without complying with the Rule 115 procedure, concerning the reason he was authorized to sign cheques and his responsibilities as head of the Legal Committee.[1460] The Prosecutor therefore moves that the substance of paragraphs 152 and 153 of Barayagwiza Appellant's Brief be entirely disregarded.[1461] The Prosecutor further argues that, even though not all the witnesses described the Appellant as having been No. 2 at RTLM, the important point is that these witnesses presented evidence of the Appellant holding an extremely high position within RTLM.[1462] Additionally, he maintains that Gaspard Gahigi's testimony that

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[1452] *Ibid.*, para. 165; see also Barayagwiza Brief in Reply, para. 108.
[1453] *Ibid.*, para. 166, referring to Judgement, para. 564; Barayagwiza Brief in Reply, paras. 107-108.
[1454] Barayagwiza Appellant's Brief, para. 166.
[1455] *Ibid.*, para. 167.
[1456] *Idem.*
[1457] Respondent's Brief, para. 512.
[1458] *Ibid.*, para. 513.
[1459] *Ibid.*, paras. 517-523.
[1460] *Ibid.*, paras. 518-519.
[1461] *Ibid.*, para. 519.
[1462] *Ibid.*, paras. 520-521, arguing (1) that Witness GO testified that the Appellant was one of the top three persons of the management team of RTLM attending very important meetings with the Minister of Information on the very topic of the content of the RTLM broadcasts (see also Respondent's Brief, para. 528) and (2) that Witness X described a meeting of RTLM, attended by 1,000 people, where Barayagwiza was one of the small group of people who presided over the meeting.

the Appellant was No. 2 at RTLM also applies to the period after 6 April 1994, in the absence of any evidence that the Appellant's position had changed after this date.[1463]

618. The Prosecutor further submits that the Trial Chamber's finding that Appellant Barayagwiza was "No. 2" at RTLM cannot be divorced from the totality of the factual findings regarding the Appellant's superior responsibility at RTLM[1464] and that "it is not decisive, nor is it treated as such by the Trial Chamber, in the ultimate finding of guilt".[1465]

619. The Prosecutor maintains that it was reasonable for the Trial Chamber to find that Appellant Barayagwiza continued to exercise control over RTLM after 6 April 1994. He argues, first, that, contrary to the Appellant's assertion, the Trial Chamber simply observed that it was not established that the Steering Committee met after 6 April 1994, without however, excluding the possibility that it might have done so.[1466] The Prosecutor submits that, in any event, the crucial part of this finding is that there was no evidence that the Steering Committee was disbanded, on the basis of which the Trial Chamber found that both the Committee and the Appellant continued to have *de jure* governing authority over RTLM's operations.[1467] As for Witness Dahinden's testimony, the Prosecutor submits that "[a]t no time was the witness asked to distinguish what was said by Nahimana or Barayagwiza, nor did the witness provide such distinctions", but simply confirmed a proposition put to him by Defence Counsel.[1468] Further, even though Witness Dahinden's oral testimony differed from his written statement, the Trial Chamber could accept his testimony and "the fact that the Trial Chamber may not have specifically mentioned an alleged inconsistency does not render the finding of the Trial Chamber regarding the witness' credibility an error".[1469] Finally, as for the Appellant's joke about the competition that a new radio station would represent for RTLM, the Prosecutor argues that "it was reasonable to conclude that only someone with an interest and connection to RTLM would be thinking about competitive issues", and that "Barayagwiza was identifying himself with RTLM through this comment".[1470]

620. Appellant Barayagwiza replies that the assertion that he exercised control at the highest level at RTLM is based on an erroneous interpretation of the functions of the Steering Committee and the respective roles of each of its members.[1471] He challenges the Prosecutor's suggestion that the Steering Committee was an executive committee[1472] or a board of directors.[1473] The Appellant also rejects the allegation that he attempted to introduce new evidence in violation of Rule 115 of the Rules, since he was simply explaining the errors committed by the Trial Chamber.[1474] As to whether he had effective control after

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[1463] Respondent's Brief, para. 522.
[1464] *Ibid.*, para. 517.
[1465] *Ibid.*, para. 523.
[1466] *Ibid.*, para. 527.
[1467] *Idem*, referring to the Judgement, para. 561. See also Respondent's Brief, para. 522, where the Prosecutor submits that "[i]n the absence of evidence that their positions [meaning those of Barayagwiza and Nahimana] in the company had changed, the Trial Chamber made a reasonable finding, based on the record before it, that their roles continued after 6 April 1994".
[1468] Respondent's Brief., para. 529, referring to T. 24 October 2000, pp. 144 and 147.
[1469] *Ibid.*, para. 530.
[1470] *Idem*, referring to the Judgement, para. 564.
[1471] Barayagwiza Brief in Reply, para. 100.
[1472] *Ibid.*, para. 101.
[1473] *Ibid.*, para. 106.
[1474] *Ibid.*, para. 102.

6 April 1994, Appellant Barayagwiza replies that the Prosecutor failed to prove that the Steering Committee continued to exist after this date.[1475]

b. Analysis

621. The Appeals Chamber will first consider whether Appellant Barayagwiza has demonstrated that the Trial Chamber erred in finding that he was a superior exercising effective control over RTLM employees and journalists before 6 April 1994. It will then turn to situation which prevailed after that date.

i. Superior responsibility before 6 April 1994

622. As noted *supra*,[1476] the Trial Chamber finding that Appellant Barayagwiza was a superior exercising effective control over RTLM employees and journalists before 6 April 1994 is based on the factual findings set out in paragraph 970 of the Judgement.

623. Appellant Barayagwiza submits first that the Trial Chamber erred in concluding that he was No. 2 at RTLM.[1477] In the opinion of the Appeals Chamber, the Judgement does not clearly indicate if this finding is based solely on Gaspard Gahigi's interview with Witness Dahinden in August 1993, as is asserted by Appellant Barayagwiza,[1478] or also on the Appellant's role as a member of the Steering Committee of RTLM, on the fact that he represented RTLM to outsiders in an official capacity, or on the fact that he exercised control over the company's finances and oversaw the activities of RTLM, taking remedial action when necessary to do so.[1479] In any event, the Appeals Chamber is not satisfied that the Appellant has demonstrated that the Trial Chamber erred in relying on Gahigi's interview with Witness Dahinden. First, the mere fact that the matter may have been hearsay cannot be sufficient ground for excluding this evidence.[1480] Secondly, the Appeals Chamber is of the opinion that a reasonable trier of fact could find such evidence to be credible and relevant: (1) Gaspard Gahigi was the editor-in-chief of RTLM; (2) a video recording of Witness Dahinden's interview with Gaspard Gahigi was tendered into evidence;[1481] (3) even though the interview took place in August 1993, it demonstrated at the very least that Appellant Barayagwiza was considered to be one of the main leaders when RTLM first started. The Appeals Chamber observes further that the fact that Witnesses GO, X and Kamilindi referred to Appellant Barayagwiza, respectively, as "founding-member" of RTLM, "in charge of public relations" and "adviser" to RTLM is not necessarily irreconcilable with the fact that he was "No. 2" at RTLM.

624. In any event, the Appeals Chamber agrees with the Prosecutor that this question is not "decisive", and that, as noted by the Trial Chamber, the "question of title" is somewhat artificial.[1482] First, it does not seem that the Trial Chamber meant to say that Appellant held *de jure* a position which made him No. 2 at RTLM; rather, it seemed to be concerned about the

[1475] *Ibid.*, para. 107.
[1476] See *supra* XII. D. 2 (a) (i).
[1477] This factual finding was first made in paragraph 567 of the Judgement and then repeated in paragraph 970.
[1478] Barayagwiza Appellant's Brief, para. 155.
[1479] Judgement, para. 567. See also paras. 552, 554, 555, 558-560.
[1480] See the references provided *supra*, footnote 521.
[1481] Exhibit P3.
[1482] Judgement, para. 554.

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*de facto* position, which was the correct approach. Also, the key issue is whether the Appellant was a superior exercising effective control over RTLM employees and journalists. In the opinion of the Appeals Chamber, the Appellant's core argument in his thirteenth and fourteenth grounds of appeal is that the Trial Chamber failed to analyse correctly his role and responsibilities as a member of the Steering Committee, and that hence the finding that he was No. 2 at RTLM and exercised effective control is erroneous. He adds that the real power was held by the Director-General or by the Steering Committee acting collectively, and that the powers delegated to him were not sufficient to support the conclusion that he exercised effective control over the employees and journalists of RTLM. The Appeals Chamber will now examine these arguments.

625. The Appeals Chamber notes first of all that, athough the Statutes of RTLM provided that "[t]he Board of Directors vests the power of management in the Director-General",[1483] this does not demonstrate that the Trial Chamber erred in concluding that the Appellant exercised *de facto* control over the staff of the RTLM. The test for effective control is not the possession of *de jure* authority, but rather the material ability to prevent or punish the proven offences. Possession of *de jure* authority may obviously imply such material ability, but it is neither necessary nor sufficient to prove effective control. Furthermore, it is clear from the Statutes of RTLM that powers of management were not exclusively vested in the Director-General, and that the Director-General was accountable to the Board of Directors.[1484] In effect, the Steering Committee, of which Appellant Barayagwiza was a member, acted *de facto* as the Board of Directors[1485] and exercised overall control over RTLM,[1486] a fact that the Appellant does not dispute.

626. The Appellant, however, contends that he could not exercise effective control simply as a member of the Steering Committee and that effective control was vested in the Steering Committee as a collegiate body. Here again, the Appeals Chamber is of the opinion that, while it has been established that the Steering Committee had power to intervene collectively in order to control RTLM, this did not relieve the Appellant of his responsibility to approach the Committee, and if necessary object to the editorial policy of the editor-in-chief and the journalists; nor did it exclude the possibility that the Appellant himself had sufficient *de facto* authority to exercise effective control over the staff of RTLM.

627. The Appellant argues that his powers and attributions in practice were limited, as he had no decision-making power and was only authorised to sign cheques in order to implement decisions taken by the Steering Committee.[1487] However, he does not explain how the only evidence he cited in this regard – Exhibit P107/1 – invalidates the Trial Chamber's finding that he controlled RTLM's finances together with Appellant Nahimana. This Exhibit in fact confirms that the Steering Committee had authorized Appellants Nahimana and

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[1483] Exhibit 1D11, Article 20 (excerpt).

[1484] *Idem*, which further provides that the Director-General "shall be responsible for executing the decisions taken by the Board of Directors" and that "[t]he Board of Directors or the General Assembly can remove him at any time".

[1485] See Judgement, paras. 552 and 567. In fact the Appellant acknowledges that the Steering Committee acted as an interim board of directors (see Barayagwiza Appellant's Brief, para. 152).

[1486] *Ibid.*, paras. 558-559 and 567.

[1487] Barayagwiza Appellant's Brief, para. 152; Barayagwiza Brief in Reply, para. 106, referring to Exhibit P107/1.

Barayagwiza, as well as Félicien Kabuga, to manage RTLM's finances.[1488] Moreover, even though the authorization was initially given "until the next General Assembly", the Prosecutor produced numerous documents to prove that Appellants Nahimana and Barayagwiza continued to manage the finances long after the General Assembly of 11 July 1993,[1489] and Appellant Nahimana acknowledged that, even after the General Assembly, at which an interim administrator was named, Appellant Barayagwiza, Félicien Kabuga and he himself continued to sign cheques.[1490] The Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to find that Appellants Nahimana and Barayagwiza "controlled the financial operations" of RTLM at least until 6 April 1994.[1491]

628. Appellant Barayagwiza further asserts that, even though he was in charge of the committee responsible for drafting the rules and regulations, that committee was not a legal committee as such and had no responsibility over RTLM programming, unlike the Technical and Program Committee, which was chaired by Appellant Nahimana. The Appeals Chamber notes that Appellant Barayagwiza provides no evidence to prove that the committee he headed was not a legal committee. Moreover, the Appeals Chamber notes that the term Legal Committee was used by Appellant Nahimana.[1492] In any event, regardless of the name or responsibilites of the committee chaired by Appellant Barayagwiza, the Trial Chamber found that, together with Appellant Nahimana, he supervised all the activities of RTLM, including programming, and that they took remedial action when they considered it necessary to do so.[1493] This finding was based not only on the exercise by the Steering Committee of its power over RTLM programming,[1494] but also on the fact that Appellants Nahimana and Barayagwiza represented RTLM at meetings with the Minister of Information, "defending RTLM programming and undertaking to correct mistakes that journalists had made".[1495]

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[1488] Exhibit P107/1, p. 9 (numbered "8"). In any case, even if, as the Appellant claims, he only had the power to sign cheques to put into effect the decisions of the Steering Committee of the RTLM, the fact would remain that, as a member of that same Steering Committee, he had a say in these financial decisions.

[1489] See Judgement, para. 506 and the exhibits cited there. In particular, the Prosecutor produced RTLM cheques signed by Appellants Nahimana and Barayagwiza in January and February 1994, and a letter to RTLM's bank, dated 7 February 1994, signed by both Appellants (Exhibit P107/1, pp. 7, 22-24 (pp. 6, 21-23, according to the actual pagination)).

[1490] T. 23 September 2002, pp. 183-187; Judgement, paras. 499 and 555.

[1491] Judgement, para. 567.

[1492] In his testimony, Appellant Nahimana stated that Appellant Barayagwiza was given the chairmanship of the Legal Committee not only because he was a well-known lawyer, but also because of his contacts, notably within the Government, which could be helpful "in bringing in shareholders to the company": Judgement, para. 494, referring to T. 23 September 2002, p. 120. As to the reliability of Appellant Nahimana's testimony, the Appeals Chamber is mindful of the Trial Chamber's reservations in its assessment of this Appellant's credibility. There is, however, little doubt that the Trial Chamber considered the portions of Nahimana's testimony concerning the structure and duties of RTLM's decision-making organs to be generally reliable.

[1493] Judgement, para. 567.

[1494] While taking account of Appellant Nahimana's testimony that discipline was exercised first and foremost by the head of section, then by the editor-in-chief, and lastly by Phocas Habimana, the Trial Chamber nonetheless quoted concrete examples, reported by Nahimana, of the exercise by the Steering Committee of effective control over RTLM programming (Judgement, para. 558). It notably referred to one incident where the Steering Committee took action following a broadcast in February or March 1994 reporting that a man who had left Kigali for Cyangugu had *Inkotanyi* in his vehicle. The Steering Committee decided that this kind of broadcast was unacceptable and instructed Kantano Habimana to ensure that the person mentioned in the broadcast be found (Judgement, para. 501).

[1495] Judgement, para. 558.

629. The Appellant argues that his participation in meetings with the Minister of Information merely showed that he had influence. The Appeals Chamber considers, on the contrary, that the Trial Chamber could reasonably find that the Appellant's participation in meetings with the Minister of Information on 26 November 1993[1496] and 10 February 1994[1497] demonstrated his superior responsibility and effective control over RTLM , as well as his knowledge of the concern caused by RTLM programming.

630. The Appeals Chamber considers that the Appellant has failed to show that it was unreasonable for the Trial Chamber to find that he was a superior exercising effective control over employees and journalists of RTLM before 6 April 1994.

ii. Appellant Barayagwiza's responsibility for RTLM broadcasts after 6 April 1994

631. The Trial Chamber found in paragraph 972 of the Judgement that:

> [a]fter 6 April 1994, although the evidence does not establish the same level of active support, it is nevertheless clear that Nahimana and Barayagwiza knew what was happening at RTLM and failed to exercise the authority vested in them as office-holding members of the governing body of RTLM, to prevent the genocidal harm that was caused by RTLM programming. That they had the de facto authority to prevent this harm is evidenced by the one documented and successful intervention of Nahimana to stop RTLM attacks on UNAMIR and General Dallaire. Nahimana and Barayagwiza informed Dahinden when they met him in June 1994 that RTLM was being moved to Gisenyi. Together with Barayagwiza's jovially competitive remark about Dahinden's radio initiative, this conversation indicates the sense of continuing connection with RTLM that Nahimana and Barayagwiza maintained at that time.[1498]

Finally, the Trial Chamber found that Appellant Barayagwiza incurred superior responsibility "[f]or his active engagement in the management of RTLM prior to 6 April, and his failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM".[1499] This finding is somewhat ambiguous in that it is unclear if the Trial Chamber found that Appellant Barayagwiza was only responsible for the broadcasts prior to 6 April or if it simply wanted to make it clear that it was only until 6 April that the Appellant was "*actively* involved in the daily affairs of RTLM",[1500] but that he nonetheless incurred responsibility for the broadcasts after 6 April 1994. In view of the analysis in paragraph 972 of the Judgement, the Appeals Chamber considers that it was this latter view that the Trial Chamber took. The Appeals Chamber will now examine the Appellant's submissions on this point.

632. The Appellant submits, first, that he could not be held responsible for the broadcasts after 6 April 1994, since the Trial Chamber accepted that the Steering Committee did not

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[1496] *Idem*; see also paras. 573-583, 617-619, specifically paragraphs 574 and 578, which mention the remarks made by Appellant Barayagwiza at the meeting held on 26 November 1993, and paragraphs 591, 597 and 618, reporting Appellant Barayagwiza's vehement reaction to the criticism from the Minister of Information at the meeting of 10 February 1994.

[1497] Judgement, para. 558; see also paras. 584-607, 617-619.

[1498] *Ibid.*, paras. 561-565 and 568.

[1499] *Ibid.*, para. 973. The Appeals Chamber notes that the term "instigated" as used in the English original of paragraph 973 of the Judgement should have been translated as *"incité à commettre"* (the French translation of "instigated" in Article 6(1) of the Statute) and not as "*encouragé*".

[1500] Emphasis added.

meet after that date.[1501] The Appeals Chamber notes that, in its factual analysis, the Trial Chamber held that the corporate and management structure of RTLM did not change after 6 April 1994, that, "[a]lthough there is no evidence that the Steering Committee met, nor is there evidence that it was disbanded", and that, "as RTLM continued to operate, the Steering Committee as a corporate entity continued to have *de jure* governing authority over these operations",[1502] such that Appellant Barayagwiza "had particular responsibility to take action" as a member of the Steering Committee and Chairman of the Legal Committee.[1503] In the opinion of the Appeals Chamber, the mere fact that there was no evidence that the Steering Committee met after 6 April 1994 does not invalidate the findings of the Trial Chamber. In any event, the Appeals Chamber recalls that the key question is whether the Appellant had effective control; even if the Steering Committee did not meet after 6 April 1994, this would not be sufficient to demonstrate that the Appellant could not exercise effective control over RTLM after 6 April 1994.

633. As to the Trial Chamber's findings arising out of Witness Dahinden's testimony, the Appeals Chamber recalls first that it is settled case-law that, save in particular circumstances, a witness' testimony need not be corroborated in order to have probative value; a fact can be established by a single testimony.[1504] The Appeals Chamber further notes that the fact that this witness was not cross-examined by Counsel for Appellant Barayagwiza does not affect the validity of his testimony. The Appeals Chamber refers to its analysis of Appellant Barayagwiza's appeal submissions regarding his representation from 23 October 2000 to 6 February 2001 and recalls that the Appellant himself instructed his Counsel not to cross-examine the witnesses heard during this period.[1505]

634. As to the argument that it was unreasonable for the Trial Chamber to find that Appellant Barayagwiza had spoken to Witness Dahinden about the relocation of RTLM, the Appeals Chamber notes first that, in examination-in-chief, Witness Dahinden stated that he was informed of the transfer by Appellants Nahimana and Barayagwiza.[1506] In cross-examination, Counsel for Appellant Nahimana asked him to confirm that, in his written statement and in examination-in-chief, he had stated that Appellant Nahimana had told him of the transfer, to which Witness Dahinden answered in the affirmative.[1507] In the opinion of the Appeals Chamber, the apparent inconsistency between the witness' examination-in-chief and cross-examination is due to the way the question of Counsel for Appellant Nahimana was phrased, as it referred exclusively to his client. As to the alleged inconsistency between

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[1501] Barayagwiza Appellant's Brief, para. 162, referring to Judgement, para. 561.

[1502] Judgement, para. 561.

[1503] *Ibid.*, para. 562.

[1504] In this connection, see the case-law cited in footnote 1312.

[1505] See *supra* IV. A. 2. (b) . Witness Dahinden testified from 24 October to 1 November 2000.

[1506] T. 24 October 2000, p. 143:

> Ferdinand Nahimana and Jean-Bosco Barayagwiza confirmed that it was about to be transferred. I cannot remember exactly, but I think they said it was going to be transferred from Kigali to Gisenyi.

[1507] T. 1 November 2000, p. 90:

> Q: You said in your written testimony that *"Ferdinand Nahimana confirmed to me that RTLM had* withdrawn *and moved from Kigali to Gitarama because of the bombing"* and you also testified that Nahimana had told you that RTLM was in the process of being transferred, is that correct, being moved?
>
> A: Yes [...].

Witness Dahinden's testimony and his written statement on this subject, the Appellant does not even provide the reference to the witness' written statement.[1508] The appeal on this point is dismissed.

635. That said, the Appeals Chamber agrees with Appellant Barayagwiza that the statements made during the conversation with Witness Dahinden regarding the relocation of RTLM, and the joke about competition between RTLM and the witness' planned radio station, were not sufficient to demonstrate that the Appellant continued to exercise effective control over RTLM after 6 April 1994. Further, the fact that Appellant Nahimana was able to intervene to halt the broadcast of attacks on UNAMIR and General Dallaire, even if it were considered sufficient to demonstrate effective control on the part of Appellant Nahimana, does not necessarily imply that Appellant Barayagwiza too could exercise effective control over RTLM after 6 April 1994. In this respect, the Appeals Chamber recalls that Appellant Barayagwiza occupied *de facto* the second position after Appellant Nahimana within the structure of RTLM, and could not therefore be regarded as having as much authority as Appellant Nahimana. Lastly, even though the Trial Chamber held that the Steering Committee had continued to have *de jure* authority to manage the activities of RTLM, no evidence was led at trial regarding the existence of effective control by the Steering Committee or regarding interventions by Appellant Barayagwiza's on behalf of the Steering Committee after 6 April 1994. In these circumstances, the Appeals Chamber finds that the Trial Chamber erred in finding that Appellant Barayagwiza was able to exercise effective control over the journalists and employees of RTLM after 6 April 1994.

iii. Conclusion

636. The Appeals Chamber recalls that it has previously found that only the RTLM broadcasts after 6 April 1994 instigated acts of genocide.[1509] The Appeals Chamber has also found that Appellant Barayagwiza could only be held liable on the basis of superior responsibility for RTLM broadcasts before 6 April 1994. It follows that Appellant Barayagwiza's convictions on account of the RTLM broadcasts must be reversed.

(b) Appellant Barayagwiza's individual criminal responsibility resulting from CDR activities

637. Appellant Barayagwiza takes issue with several findings of the Trial Chamber underlying the overall finding relating to his conviction on account of CDR activities.

(i) The CDR was not a party exclusively reserved for Hutu

638. In his sixteenth ground of appeal, Appellant Barayagwiza argues that the Trial Chamber erred in finding at paragraph 339 of the Judgement that the CDR was a party reserved exclusively for Hutu and that recruitment of Tutsi was not allowed.[1510] The Appellant alleges that this finding rested on testimonies that were confused and often

[1508] See Barayagwiza Appellant's Brief, para. 164, referring to a question by Nahimana's defence, cited in the previous footnote; T. 1 November 2000, p. 90.
[1509] See *supra* XII. B. 3.
[1510] Barayagwiza Notice of Appeal, p. 2; Barayagwiza Appellant's Brief, paras. 171-172; Barayagwiza Brief in Reply, paras. 111-113.

contradictory, and based on "individual opinions and rumour rather than solid fact".[1511] He further contends that the Trial Chamber itself admitted that there may have been some members of CDR who were Tutsi,[1512] as testified by several witnesses.[1513] In reply, the Appellant adds that this supposed policy of exclusion was not reflected in the speech of 23 March 1993 by the CDR President, nor in the CDR Constitution, or in the CDR Manifesto.[1514]

639. The Appeals Chamber notes that Appellant Barayagwiza does not support his allegation that the Trial Chamber based its finding on testimonies that were confused and contradictory.[1515] The Appellant merely – very often without giving any specific references – mentions evidence which, in his opinion, establishes that the CDR was open to Tutsi. This does not, however, suffice to demonstrate that the Trial Chamber's finding that the general policy of the CDR was that party membership was not open to Tutsi was unreasonable,[1516] especially since the Trial Chamber itself noted that "there may have been a few Tutsi individuals who attended CDR meetings or were even referred to as CDR members", adding that, "based on the evidence, [...] such number would be negligible and would not render the characterization of the CDR as a Hutu party inaccurate".[1517] The appeal on this point is dismissed.

(ii) The CDR had no militia

640. In his seventeenth ground of appeal,[1518] Appellant Barayagwiza alleges that the Trial Chamber erred in finding that the CDR had a "youth wing" called *Impuzamugambi*, which became the CDR militia,[1519] and that "the Appellant had any involvement in it".[1520] According to the Appellant, the Constitution of the CDR indeed shows that the word *Impuzamugambi* was used in the party's very name and means "coalition", and that, in such circumstances, all CDR members could properly be referred to as *Impuzamugambi*.[1521] The Appellant submits that the CDR did not have an organized youth wing at the end of 1993, or even on 6 April 1994.[1522] He asserts that "[t]here was no evidence produced to explain how the CDR youth could have spontaneously transformed themselves into an organized militia"; that the allegations by Expert Witness Des Forges in this regard are not supported by any evidence and there was never any mention of the existence of a CDR militia in his book, "*Le sang hutu*

[1511] Barayagwiza Appellant's Brief, para. 171. See also Barayagwiza Brief in Reply, para. 113.
[1512] Barayagwiza Appellant's Brief, para. 171, and Barayagwiza Brief in Reply, para. 112, both referring to Judgement, para. 335.
[1513] Barayagwiza Appellant's Brief, para. 171, and Barayagwiza Brief in Reply, para. 113.
[1514] Barayagwiza Brief in Reply, para. 111. The Appellant does not provide any precise reference concerning the alleged speech of the CDR President.
[1515] Barayagwiza Appellant's Brief, para. 171. In paragraph 113 of his Brief in Reply, the Appellant explains that he "contests the credibility given to the testimonies of the Prosecution's witnesses in the Ground 40". The Appeals Chamber has already dismissed Ground 40 of appeal: see *supra* IV. B. 1.
[1516] Judgement, para. 339.
[1517] *Ibid.*, para. 335.
[1518] Barayagwiza Notice of Appeal, p. 2; Barayagwiza Appellant's Brief, paras. 173-177; Barayagwiza Brief in Reply, paras. 114-117.
[1519] Barayagwiza Appellant's Brief, para. 173.
[1520] *Ibid.*, para. 177.
[1521] *Ibid.*, para. 174.
[1522] *Ibid.*, paras. 175-176; see also Barayagwiza Brief in Reply, para. 116.

*est-il rouge?*"[1523] In conclusion, the Appellant states that he was contesting the credibility of other testimonies supporting this finding in his fortieth ground of appeal.[1524]

641. The Appeals Chamber recalls, first, that it has already dismissed the Appellant's arguments raised under his fortieth ground.[1525] With regard to the meaning of the word *Impuzamugambi*, the Appeals Chamber considers that the Trial Chamber specifically addressed this issue in paragraph 337 of the Judgement, noting that the word was also included in the party's name proper, but also finding, on the basis of the testimonies of several witnesses[1526] – including Expert Witness Des Forges[1527] – and the Appellant's views in his book entitled "*Le sang hutu est-il rouge?*",[1528] that "*Impuzamugambi* referred to the youth wing of the CDR and was generally understood as such".[1529] The Appellant has not shown that this finding was unreasonable.

642. Concerning the issue of the formal organization of this "youth wing", the Appeals Chamber observes that the Trial Chamber admitted that "the formal structure of the CDR youth wing does not emerge from the evidence".[1530] The Appellant does not show how this should have impelled the Trial Chamber to different conclusions.

643. Lastly, regarding the finding by the Trial Chamber that the *Impuzamugambi* had become the CDR militia,[1531] the Appeals Chamber considers that Appellant Barayagwiza has not demonstrated the unreasonable nature of this finding, which is based on testimony from Witnesses B3, AHI, BI, AAM, ABC, AHI, LAG and Serushago.[1532] The Appeals Chamber remarks further that Witnesses BI, AAM, ABC, AHI, LAG and Serushago specifically indicated that the attacks led by the *Impuzamugambi* clearly targeted the Tutsi civilian population and were attributed to the CDR,[1533] thus confirming that the *Impuzamugambi* played in actual fact, if not formally, the role of an armed militia of the CDR. This ground is dismissed.

(iii) The Appellant had no authority to organise public meetings and rallies

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[1523] Barayagwiza Appellant's Brief, para. 176; see also Barayagwiza Brief in Reply, para. 115.

[1524] Barayagwiza Brief in Reply, para. 117. The Appeals Chamber notes that the Appellant states in this same paragraph that "none of the witnesses gave any precise evidence on any specifically identified member of the CDR party or of its youth in relation to massacres which occurred after 6 April 1994 with precise information on the involvement of the CDR party or the Appellant himself". The Appeals Chamber refers in this regard to its analysis of Ground 28 of Appellant Barayagwiza's appeal; see *infra* XII. D. 2. (b) (vii) .

[1525] See *supra* IV. B. 1.

[1526] Judgement, para. 319, relying on the testimonies of Prosecution Witnesses AHI, AFB, AGX and Serushago and of Defence Witness ASI.

[1527] *Ibid.*, para. 320.

[1528] *Ibid.*, paras. 320 and 337. The Appelant Barayagwiza stated in his book, "*Le sang hutu est-il rouge?*" (Exhibit P148, p. 99), that the *Impuzamugambi* were the youth wing of the CDR party, even though he denied that this youth wing had been organised as a militia.

[1529] Judgement, para. 337.

[1530] *Idem*; see also para. 320, summarising the relevant points of the testimony of Expert Witness Des Forges concerning the steps taken to restructure the youth wing of the party.

[1531] *Ibid.*, para. 341.

[1532] *Ibid.*, para. 337; see also *ibid*, para. 317, summarising the testimony of Witness B3; para. 319, summarising the testimony of Witness AHI; para. 325 summarising the testimony of Witness BI; para. 324 summarising the testimony of Witness AAM; paras. 316 and 324 summarising the testimony of Witness ABC; para. 326 summarising the testimony of Witness LAG; para. 327 summarising the testimony of Witness Serushago.

[1533] Judgement, paras. 319 and 337.

644. In his twenty-third ground of appeal, Appellant Barayagwiza contends that the Trial Chamber committed errors of fact and of law in convicting him on account of CDR meetings and demonstrations on the basis of unsafe inferences, and without establishing the specific role that he had played.[1534] According to the Appellant, the witnesses' testimonies on which these findings are based are vague, contradictory and imprecise; the meetings referred to were in general outside the temporal jurisdiction of the Tribunal; the evidence adduced was not probative of the allegations in the Indictment; and the witness testimonies "have [...] been distorted and wrongly relied on [...] in finding that the Appellant's presence and/or participation was consistent with genocidal intent".[1535] Furthermore, the Appellant argues that no evidence was produced to show that he had authority to organise CDR meetings, and that he had no official position in the CDR prior to his election as President of CDR in Gisenyi on 6 February 1994.[1536] The Appellant also disputes the finding in paragraph 714 of the Judgement that he participated in the planning of a CDR demonstration in May 1993, acted in unison with the demonstrators and was in a position of control over them.[1537] For the Appellant, this finding does not rest on direct evidence; it is pure speculation, and was not established beyond reasonable doubt.[1538]

645. In paragraph 714 of the Judgement, the Trial Chamber uses the fact that Appellant Barayagwiza walked freely out of the Ministry of Foreign Affairs during a demonstration organized by the CDR in May 1993 – at a time when no one else was able to leave for several hours – to infer that "he was nevertheless in a position of coordination with or control over the demonstrators". The Trial Chamber adds in the same paragraph "[t]hat he was a participant in the planning of the demonstration could be inferred from the evidence of his leadership role in the CDR". The Trial Chamber finds, moreover, in paragraph 719 of the Judgement that "Jean Bosco Barayagwiza convened CDR meetings and spoke at these meetings"; that he intimidated and threatened Tutsi during some meetings in Mutura in 1991 and 1993; that he was present at and participated in demonstrations where CDR demonstrators armed with cudgels chanted "*Tubatsembatsembe*" or "let's exterminate them", and that he supervised roadblocks manned by the *Impuzamugambi*, set up to stop and kill Tutsi.

646. The Appeals Chamber further notes that, in its legal findings on the individual criminal responsibility of Appellant Barayagwiza on account of his involvement in the CDR, the Trial Chamber relies on the fact that "the killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of "*tubatsembatsembe*" or "let's exterminate them" by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population."[1539] It continues its reasoning by emphasizing "the direct involvement of Barayagwiza in the expression of genocidal intent"; that he "was at the organizational helm"; and that "he was on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians." Finally, it finds "Jean-Bosco Barayagwiza guilty of

[1534] Barayagwiza Appellant's Brief, para. 197, referring to the testimonies of Witnesses AGK, AHI, AAM, AAJ, Serushago, X, ABE, AFX, AAJ, and AFB.
[1535] *Ibid.*, para. 198.
[1536] *Ibid.*, para. 199.
[1537] *Ibid.*, paras. 200-201.
[1538] *Idem.*
[1539] Judgement, para. 975.

instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute".[1540]

647. The Appeals Chamber points out, however, that the events described in paragraphs 714 to 719 refer to meetings and rallies that took place before 1 January 1994. The Appeals Chamber considers that paragraph 975 of the Judgement is ambiguous because it does not clearly explain whether the Appellant's participation in CDR meetings prior to 1 January 1994 is cited as a material element of instigation for which the Appellant incurs individual responsibility pursuant to Article 6(1) of the Statute – which would be *ultra vires* – or whether this fact is simply mentioned as a contextual fact, or as evidence demonstrating the Appellant's criminal intent in 1994 – which is permissible.[1541] The Appeals Chamber holds that the Trial Chamber erred in failing to be specific in its legal findings. However, such error is not sufficient to invalidate the Appellant's conviction for genocide, since the Trial Chamber also based its finding on this count on the fact that the Appellant supervised "roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi".[1542]

(iv) The Appellant's role in the distribution of weapons and participation in the planning of massacres

648. In his twenty-fourth ground of appeal, Appellant Barayagwiza alleges that the Trial Chamber erred in paragraph 730 of the Judgement in relying on the uncorroborated testimony of Witness AHB to find that he had distributed weapons in Gisenyi, because this testimony was not credible.[1543] In his twenty-fifth ground of appeal, Appelant Barayagwiza alleges that the Trial Chamber committed an error of fact in finding in paragraph 954 of the Judgement that the role he played in the distribution of weapons proved that he "was involved in the planning of the killings which took place in Gisenyi".[1544]

649. The Appeals Chamber notes that paragraph 954 of the Judgement endorses the finding in paragraph 730 of the Judgement that Appelant Barayagwiza orchestrated a distribution of weapons which were then used to kill Tutsi. However, the Trial Chamber does not rely on this finding in order to convict the Appellant of the crime of genocide in paragraph 975 of the Judgement. Accordingly, the Appeals Chamber consider that it is not necessary to address here the submissions put forward by the Appellant in this regard.[1545]

(v) Supervision of roadblocks

650. In his twenty-sixth ground of appeal, Appellant Barayagwiza submits that the Trial Chamber committed an error of fact in relying on the testimony of Witness ABC in order to find in paragraph 719 of the Judgement that the Appellant "supervised roadblocks manned by the *Impuzamugambi* established to stop and kill Tutsi."[1546] He submits that the testimony of

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[1540] *Idem.*
[1541] See *supra* VIII. B.
[1542] Judgement, para. 975.
[1543] Barayagwiza Appellant's Brief, paras. 208-217.
[1544] *Ibid.*, paras. 208-219.
[1545] The Appeals Chamber notes, however, that the conviction of Appellant Barayagwiza for extermination rests on this distribution of weapons: Judgement, para. 1067, which refers to paragraph 954. The arguments advanced by the Appellant in regard to this distribution of weapons are therefore reviewed *infra* XV. B. 2.
[1546] Barayagwiza Appellant's Brief, paras. 220-227.

Witness ABC was uncorroborated, that the witness was unable to give the precise date when this was alleged to have occurred, or any particulars of those manning the barricades, and that his testimony therefore lacked probative value.[1547] The Appellant further argues that neither Witness X, Witness Ruggiu nor Witness Bemeriki reported his presence at roadblocks in Kigali, even though they were well informed of what was happening at these roadblocks between April and June 1994.[1548] He further argues that, if he had actually supervised the roadblocks in Kigali, it would have been mentioned by Witness Nsanzuwera who, as Kigali Prosecutor, conducted investigations into "what had occurred during the war".[1549] The Appellant also claims that it was impossible for a civilian organization such as *Impuzamugambi* to erect barricades in the area indicated by Witness ABC, because of the heavy Rwandan, Belgian and French military presence around the various international institutions.[1550] "Further or in the alternative", the Appellant submits that the burden of proof has been incorrectly applied in assessing the credibility of this witness, since the Trial Chamber ignored the fact that the witness dissociated himself from his previous statement and that he (the Appellant) was either out of Kigali or abroad during the relevant period.[1551]

651. The summary of the relevant section of the testimony of Witness ABC is found in paragraph 707 of the Judgement, which reads as follows:

> Witness ABC, a Hutu from Kigali, testified that sometime in the middle of April 1994 he saw Barayagwiza at the road below Kiyovu hotel leading to the French school, where there was a roadblock that was manned by *Impuzamugambi*. Barayagwiza was in a white Pajero vehicle with a soldier from the Presidential Guard, who was his bodyguard, and he was speaking to the *Impuzamugambi*. Witness ABC was about 2 to 3 metres away from Barayagwiza and heard him tell them not to allow Tutsi or persons from Nduga to pass the roadblock unless these individuals showed that they had CDR and MDR party cards; otherwise, they were to be killed. The witness explained that Nduga referred to the region of Gitarama and Butare. He said there were about 15 people manning the roadblock, carrying machetes, grenades and firearms, with a radio set tuned to RTLM, which was encouraging them to pursue Tutsi. The witness was at the roadblock because his employer was in hiding and had sent him to buy a drink. He was there for about five minutes. Barayagwiza was there before the witness arrived and left before the witness left. Witness ABC was allowed through the roadblock because his identity card stated he was a Hutu, and because the witness was employed and was a refugee. He said that there were three roadblocks on that road at estimated intervals of one kilometre. The witness said that the roadblocks were manned by the *Impuzamugambi* and members of CDR, and Barayagwiza supervised the roadblocks in that location. After this incident, Witness ABC would see Barayagwiza passing by in his vehicle, supervising the roadblocks. He deduced that he was supervising the roadblocks as they were manned by CDR members and Barayagwiza was the CDR boss in that district. He said his observation that Barayagwiza monitored the work being done, to see if Tutsi were being killed, was confirmed by the *Impuzamugambi*.[1552]

The Appeals Chamber notes that the Trial Chamber concluded in paragraph 331 of the Judgement that the testimony of Witness ABC was credible.

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[1547] *Ibid.*, paras. 220-221.
[1548] *Ibid.*, para. 222.
[1549] *Ibid.*, para. 223.
[1550] *Ibid.*, para. 225.
[1551] *Ibid.*, para. 227.
[1552] Footnotes omitted.

652. The Appeals Chamber is of the view that many of the arguments raised by Appellant Barayagwiza can be dismissed without further consideration. First, it is established case-law that, barring special circumstances, the testimony of a witness does not need to be corroborated for it to have probative value.[1553] Furthermore, even if certain witnesses did not say that the Appellant supervised roadblocks in Kigali, this would not be sufficient to show that the testimony of Witness ABC was not reliable.[1554] The Appeals Chamber further notes that the Appellant cites no evidence to support the assertion that roadblocks were unlikely to have been set up at the locations mentioned by Witness ABC; this argument cannot therefore succeed. The Appeals Chamber also rejects the argument that the Trial Chamber ignored the fact that Witness ABC had dissociated himself from his previous statement, noting that paragraph 331 of the Judgement discusses inconsistencies between this statement and his testimony at trial and then concludes "none of the issues raised on cross-examination effectively challenged the credibility of the witness". Lastly, the Appeals Chamber will not consider the contention that the testimony of Witness ABC was not credible because the Appellant "was either out of Kigali or abroad during the relevant period", since no evidence has been provided to support this assertion.

653. Regarding the vagueness of the dates on which Witness ABC is alleged to have seen Appellant Barayagwiza, the Appeals Chamber observes that the witness stated in his testimony that he saw the Appellant in the middle of the month of April 1994[1555] and, subsequently, in May and June 1994, close to a roadblock where he used to go.[1556] The Appeals Chamber further notes that this witness was also cross-examined in relation to the dates on which he allegedly saw the Appellant.[1557] The Appeals Chamber is of the opinion that the relative imprecision of Witness ABC as to these dates may be explained by the prevailing circumstances and the passage of time between the acts and his testimony. The Appeals Chamber is not satisfied that a reasonable trier of fact would not have found this witness credible solely because he failed to give specific dates on which certain events occurred. The Appeals Chamber also rejects the argument that the witness failed to give particulars of the individuals manning the roadblocks, noting that the witness described them as *Impuzamugambi*, CDR members and *Interahamwe*,[1558] armed with machetes, grenades and firearms[1559] and that, generally, they were about 15 in number.[1560] Clearly, the Trial Chamber found this description adequate and the Appellant has failed to show that such an assessment was unreasonable.[1561] This ground is rejected.

(vi) "Shouting Match" with the US Ambassador

[1553] In this regard, see case-law quoted in footnote 1312.
[1554] It should furthermore be recalled that the testimonies of Witnesses Ruggiu and Bemeriki were rejected in their entirety (Judgement, paras. 549 and 551), and that the Appellant has not shown on appeal that it was unreasonable for the Trial Chamber to have done so.
[1555] T. 28 August 2001, p. 21.
[1556] *Ibid.*, pp. 30-31.
[1557] *Ibid.*, pp. 56-58.
[1558] *Ibid.*, pp. 22, 24-26 and 30.
[1559] *Ibid.*, p. 23.
[1560] *Idem*; T. 29 August 2001, pp. 43-44.
[1561] The Appellant moreover fails to cite any evidence to show that the witness was allegedly pressed to provide particulars of the identity of the militiamen manning the roadblocks, but was unable to do so.

654. In his twenty-seventh ground of appeal, Appellant Barayagwiza accuses the Trial Chamber of having committed an error of fact in inferring, in paragraph 336 of the Judgement, that he sought to justify the violence attributed to CDR members, on the basis of Alison Des Forges's evidence that the Appellant had had a conversation with US Ambassador Rawson that was virtually a "shouting match".[1562] The Appellant argues that such inference is unreasonable, because it relies only on a single hearsay report, and the witness refused to produce her notes.[1563] The Appellant contends that, in any event, the Trial Chamber could not reasonably rely on this evidence to find that he had defended the acts of violence attributed to CDR members.[1564]

655. The Appeals Chamber has already rejected Appellant Barayagwiza's submissions relating to this conversation in its consideration of his forty-first ground.[1565] It will therefore confine itself to considering whether the Trial Chamber could reasonably find, on the basis of this conversation, that the Appellant had defended the acts of violence attributed to CDR members.[1566]

656. In the opinion of the Appeals Chamber, the language used by the Trial Chamber in paragraph 336 of the Judgement is ambiguous, and it is difficult to determine with certainty whether the Judges found beyond all reasonable doubt that Appellant Barayagwiza, in his conversation with Ambassador Rawson, defended the acts of violence perpetrated by some CDR members, or whether they were simply putting forward a hypothesis which had no impact on their subsequent findings. The Appeals Chamber observes, in any event, that the factual findings in paragraphs 339 to 341 of the Judgement do not rely on the impugned finding and are based, as concerns the Appellant's involvement in the acts of violence perpetrated by CDR members, on other more precise factual findings relating to the Appellant's calls for the murder of Tutsi, his direct supervision of the *Impuzamugambi* at roadblocks and his supplying of weapons to the *Impuzamugambi*. Thus the conversation in question does not go to the root of any factual or legal finding that led to the conviction of the Appellant. The appeal on this point is dismissed.

(vii) Causal link between the Appellant's acts of instigation and the killing of Tutsi

657. In his twenty-eighth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber made an error of law in "finding the Appellant guilty of genocide pursuant to Article 6(1) in respect of CDR", without first having found that the acts of instigation attributed to him actually caused the killing of Tutsi[1567] and without identifying the specific acts of instigation attributable to him.[1568] The Appellant stresses that, although the Trial Chamber found — wrongly, in the Appellant's view — that he supervised roadblocks established to stop and kill Tutsi, the Trial Chamber could not point to any evidence that he

[1562] Barayagwiza Appellant's Brief, para. 228.
[1563] *Ibid.*, para. 229. The Appellant also appears to criticise the Appeals Chamber for refusing any further investigation into this matter in its Decision of 4 October 2005 (Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator), but does not explain in what way this decision was wrong.
[1564] *Ibid.*, para. 230.
[1565] *Ibid.*, para. 336. See *supra* IV. B. 2. (b) .
[1566] Judgement, para. 336.
[1567] Barayagwiza Appellant's Brief, para. 231.
[1568] *Ibid.*, para. 233.

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was actually present when any Tutsi was killed, and it was not established that he ordered the killing of any person, or that any person actually killed anyone because of what he allegedly said.[1569] The Appellant also criticizes the vague language used by the Trial Judges and contends that "what is required is proof that the Appellant instigated a particular killing or series of killings".[1570]

658. The Trial Chamber found the Appellant guilty of genocide for "instigating acts of genocide committed by CDR members and *Impuzamugambi*, pursuant to Article 6(1) of its Statute".[1571] This finding results from an analysis set out in paragraphs 951, 953, 954 and 975 of the Judgement. Certain of these paragraphs have been cited above, but it is worth reproducing them here for greater convenience:

> 951. The Hutu Power movement, spearheaded by CDR, created a political framework for the killing of Tutsi and Hutu political opponents. The CDR and its youth wing, the *Impuzamugambi*, convened meetings and demonstrations, established roadblocks, distributed weapons, and systematically organized and carried out the killing of Tutsi civilians. The genocidal cry of "*tubatsembatsembe*" or "let's exterminate them", referring to the Tutsi population, was chanted consistently at CDR meetings and demonstrations. As well as orchestrating particular acts of killing, the CDR promoted a Hutu mindset in which ethnic hatred was normalized as a political ideology. The division of Hutu and Tutsi entrenched fear and suspicion of the Tutsi and fabricated the perception that the Tutsi population had to be destroyed in order to safeguard the political gains that had been made by the Hutu majority.
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> 953. The Defence contends that the downing of the President's plane and the death of President Habyarimana precipitated the killing of innocent Tutsi civilians. The Chamber accepts that this moment in time served as a trigger for the events that followed. *Cela est évident*. But if the downing of the plane was the trigger, then RTLM, Kangura and CDR were the bullets in the gun. The trigger had such a deadly impact because the gun was loaded. The Chamber therefore considers the killing of Tutsi civilians can be said to have resulted, at least in part, from the message of ethnic targeting for death that was clearly and effectively disseminated through RTLM, Kangura and CDR, before and after 6 April 1994.
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> 954. As found in paragraph 730, Barayagwiza came to Gisenyi, one week after 6 April, with a truckload of weapons that were distributed to the local population and used to kill individuals of Tutsi ethnicity. Barayagwiza played a leadership role in the distribution of these weapons, which formed part of a predefined and structured plan to kill Tutsi civilians. From Barayagwiza's critical role in this plan, orchestrating the delivery of the weapons to be used for destruction, the Chamber finds that Barayagwiza was involved in planning this killing. As set forth in paragraph 719, Barayagwiza supervised roadblocks manned by the *Impuzamugambi*, established to stop and kill Tutsi.
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> 975. As found in paragraphs 276, 301, 339-341, Jean Bosco Barayagwiza was one of the principal founders of CDR and played a leading role in its formation and development. He was a decision-maker for the party. The CDR had a youth wing, called the *Impuzamugambi*, which undertook acts of violence, often together with the *Interahamwe*, the MRND youth wing, against the Tutsi population. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of "*tubatsembatsembe*" or "let's exterminate them" by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population. Barayagwiza supervised roadblocks manned by the *Impuzamugambi*,

[1569] *Ibid.*, para. 232.
[1570] *Ibid.*, para. 234.
[1571] Judgement, para. 975.

established to stop and kill Tutsi. The Chamber notes the direct involvement of Barayagwiza in the expression of genocidal intent and in genocidal acts undertaken by members of the CDR and its *Impuzamugambi*. Barayagwiza was at the organizational helm. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians. For this reason, the Chamber finds Jean-Bosco Barayagwiza guilty of instigating acts of genocide committed.

659. The Appeals Chamber notes that paragraph 975 refers back to paragraphs 276, 301 and 339 to 341 of the Judgement. Paragraphs 276 and 301 contain factual findings relating to Appellant Barayagwiza's career within CDR as founder, leader and, as of February 1994, CDR Chairman, and to CDR opposition to the Arusha Accords and its assimilation of Tutsi to the RPF and enemies of the Hutu, thereby defending the recourse to violence against them. The following are the factual findings contained in paragraphs 339 to 341 of the Judgement:

- The Appellant publicly expressed that CDR membership was open only to Hutu;[1572]
- During the year 1994, and in particular the period 6 April to 17 July 1994, Barayagwiza exercised effective leadership over the CDR and its members;[1573]
- The CDR and the Appellant promoted the killing of Tutsi, using slogans at mass rallies which openly called for their extermination;[1574]
- The Appellant supervised CDR militants and the party's youth wing, the *Impuzamugambi*, which became a militia;[1575]
- The *Impuzamugambi*, together with CDR militants, acted under the Appellant's orders when they perpetrated killings and acts of violence;[1576]
- The Appellant ordered the *Impuzamugambi* at roadblocks not to allow the Tutsi to pass and to kill them unless they had CDR or MRND cards;[1577]
- The Appellant supplied weapons to the *Impuzamugambi* to kill the Tutsi;[1578]
- The *Impuzamugambi*, together with the *Interahamwe*, killed large numbers of Tutsi civilians in Gisenyi *préfecture*.[1579]

660. The Appeals Chamber recalls that, for a defendant to be convicted of instigation to commit a crime under Article 6(1) of the Statute, it must be established that the acts charged contributed substantially to the commission of the crime, but they need not be a *sine qua non* condition for its commission. The Appeals Chamber further recalls that, contrary to what the

[1572] *Ibid.*, para. 339.
[1573] *Ibid.*, para. 340.
[1574] *Idem.*
[1575] *Ibid.*, para. 341.
[1576] *Idem.*
[1577] *Idem.*
[1578] *Idem.*
[1579] *Idem.*

Appellant appears to contend,[1580] the accused does not need to be actually present when the instigated crime is committed.

661. The Appeals Chamber notes that paragraph 975 of the Judgement relied on the following acts to find the Appellant guilty of instigation to commit genocide : (1) "the chanting of '*tubatsembatsembe*' or 'let's exterminate them' by Barayagwiza himself and by CDR members in his presence at public meetings and demonstrations"; (2) the Appellant supervised roadblocks manned by the *Impuzamugambi*, set up to stop and kill Tutsi.

662. The Appeals Chamber notes that it has already found that there was no proof that the chant "*tubatsembatsembe*" or "let's exterminate them" was sung by the Appellant, or by CDR members in his presence, at CDR public rallies in 1994;[1581] the Appellant could not therefore be convicted of instigation to commit genocide on that basis. The Appeals Chamber adds that it has, however, rejected the Appellant's arguments relating to his supervision of roadblocks in Kigali. It remains to be determined whether the Trial Chamber could reasonably find that such supervision contributed substantially to the commission of acts of genocide.

663. The Appeals Chamber notes that the Trial Chamber did not expressly find that the *Impuzamugambi* at the roadblocks supervised by Appellant Barayagwiza in Kigali actually killed large numbers of Tutsi.[1582] However, it is of the opinion that such a finding was implicit and it could reasonably be based on the testimony of Witness ABC. This witness specifically described a number of murders of Tutsi by the *Impuzamugambi* at roadblocks supervised by the Appellant,[1583] and it has not been shown that his testimony lacked probative value. Consequently, the Appeals Chamber is of the view that the Trial Chamber could reasonably find that, because of his involvement in the supervision of roadblocks erected during the genocide, and of the instructions given to the *Impuzamugambi* manning those roadblocks to stop and kill the Tutsi who came there – instructions that were in fact followed – the Appellant instigated the commission of genocide. The Appeals Chamber adds *obiter* that it would in all probability have been open to the Trial Chamber to rely also on other modes of responsibility, such as planning, ordering or aiding and abetting. This ground of appeal is dismissed.

(viii) Conclusion on Appellant Barayagwiza's responsibility under Article 6(1) of the Statute

664. The Appeals Chamber finds that it has not been shown that the Trial Chamber was in error when it found that certain of Appellant Barayagwiza's acts in the context of his CDR activities instigated the commission of genocide. However, as explained earlier, the Appellant can only be convicted on this head if he can also be shown to have intended to instigate others to commit acts of genocide.[1584]

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[1580] See Barayagwiza Appellant's Brief, para. 232.
[1581] See *supra* XII. D. 2. (b) (iii) . See also *infra* XIII. D. 2. (b) (i) .
[1582] *Cf.* Judgement, para. 341, which states that the *Impuzamugambi*, together with the *Interahamwe*, killed large numbers of Tutsi civilians in Gisenyi *préfecture*.
[1583] Judgement., para. 316; see also T. 28 August 2001, pp. 31-33.
[1584] See *supra* XI. A.

665. The Trial Chamber did not state expressly that the Appellant had been shown to have such intent, confining itself to holding that it had been shown that the Appellants "acted with intent to destroy, in whole or in part, the Tutsi ethnic group".[1585] The Appeals Chamber has already rejected the Appellant's arguments against this finding.[1586] On this basis and of the acts proved against Appellant Barayagwiza, the Appeals Chamber is of the view that there can be no doubt that the Appellant had the intent to instigate others to commit genocide. The Appellant's conviction for instigating the commission of genocidal acts by members of the CDR and its *Impuzamugambi* is therefore upheld.

(ix) The Trial Chamber could not convict the Appellant under both paragraphs (1) and (3) of Article 6 of the Statute

666. In his twenty-ninth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber erred in law in convicting him of genocide both under Article 6(1) of the Statute for instigating acts of genocide committed by CDR members and under Article 6(3) on account of his alleged superior responsibility.[1587]

667. The Appeals Chamber recalls that a defendant cannot be convicted under Article 6(1) and (3) of the Statute for one and the same conduct under one and the same count.[1588] In convicting Appellant Barayagwiza under Article 6(1) and (3) of the Statute on account of acts of genocide by CDR members and *Impuzamugambi*, the Trial Chamber committed an error. It should have convicted him solely under Article 6(1) of the Statute, and treated the Appellant's abuse of his superior position as an aggravating circumstance to be considered during sentencing.[1589] Since the Appeals Chamber has found that Appellant Barayagwiza was properly convicted under Article 6(1) of the Statute, it will not consider in this chapter Appellant Barayagwiza's responsibility based on his superior position.

3. Individual criminal responsibility of Appellant Ngeze on account of his personal acts in Gisenyi

668. The Appeals Chamber has already set aside the conviction of Appellant Ngeze for having ordered the commission of acts of genocide,[1590] and there is therefore no need to consider the Appellant's arguments against this conviction.[1591] However, the Appeals Chamber recalls that its findings on the Appellant's alibi do not affect the following factual findings, which are set out in paragraph 837 of the Trial Judgment and which, in certain instances, form the basis for the Appellant's conviction for aiding and abetting genocide:[1592]

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[1585] Judgement, para. 969.
[1586] See *supra* XII. C. 3. (e) .
[1587] Barayagwiza Appellant's Brief, paras. 237-239.
[1588] See *supra* XI. C.
[1589] *Stakić* Appeal Judgement, para. 411; *Kamuhanda* Appeal Judgement, para. 347; *Jokić* Appeal Judgement, paras. 23-28; *Kajelijeli* Appeal Judgement, paras. 81-82; *Kvočka et al.* Appeal Judgement, para. 104; *Kordić and Čerkez* Appeal Judgement, paras. 34-35; *Blaškić* Appeal Judgement, para. 91.
[1590] See *supra* X. D.
[1591] See Ngeze Appellant's Brief, paras. 356-362, 372-387; Ngeze Brief in Reply, paras. 85-89.
[1592] See Judgement, paras. 956 and 977A.

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- The Appellant stored weapons at his home before 6 April 1994;[1593]

- The Appellant "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*";

- The Appellant "often drove around with a megaphone in his vehicle, mobilizing the Hutu population to come to CDR meetings and spreading the message that the *Inyenzi* would be exterminated, *Inyenzi* meaning, and being understood to mean, the Tutsi ethnic minority";

- "At Bucyana's funeral in February 1994, Ngeze said that if President Habyarimana were to die, the Tutsi would not be spared."

669. The first of these factual findings is based on the testimony of Witnesses AFX and Serushago. However, the Appeals Chamber has already concluded that, because of the new evidence admitted on appeal, the testimony of Witness AFX cannot be relied on in the absence of corroboration by other credible evidence.[1594] The same applies with respect to the testimony of Witness Serushago.[1595] These two testimonies are not capable of corroborating one another, and the Appeals Chamber accordingly reverses the finding that the Appellant stored weapons at his home before 6 April 1994.

670. Appellant Ngeze does not raise any specific arguments concerning the last two factual findings, and those are therefore upheld. However, the Trial Chamber did not base its conclusion that the Appellant aided and abetted the massacre of Tutsi civilians on these findings, but rather on the fact that the Appellant had "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population" and that he had "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*".[1596] The Appeals Chamber has already reversed the finding that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population"; therefore, the only remaining issue is whether the Appellant could be convicted for aiding and abetting genocide for having "set up, manned and supervised roadblocks in Gisenyi in 1994 that identified targeted Tutsi civilians who were subsequently taken to and killed at the *Commune Rouge*".

671. This finding is based on the testimonies of Witnesses AHI and Serushago, which are summarized as follows by the Trial Chamber:

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[1593] As explained in footnote 1150, the Trial Chamber concluded in paragraph 837 of the Judgement that the Appellant "helped secure and distribute, stored, and transported weapons to be used against the Tutsi population". This conclusion is based on the testimonies of Witnesses AHI, AFX and Serushago (see Judgement, para. 831). Since the Appeals Chamber has concluded that the testimony of Witness AHI cannot be relied upon with respect to the distribution of weapons by the Appellant on 8 April 1994, only the testimonies of Witnesses AFX and Serushago remain. Witness AFX only stated that, at an unspecified date before the killings in April 1994, Appellant Ngeze showed him the weapons which he was storing (see Judgement, paras. 796 and 831). The testimony of Witness Serushago can be accepted only insofar as it is corroborated by other evidence (Judgement, para. 824). Hence the only remaining finding is that the Appellant stored weapons before 6 April 1994.

[1594] See *supra* XII. C. 3. (b) (ii) .

[1595] Judgement, para. 824.

[1596] *Ibid.*, para. 956.

> Witness AHI saw Ngeze at roadblocks in Gisenyi in 1994 and named him as among those who had set up additional roadblocks in 1994. He testified that Ngeze manned or monitored a roadblock and gave instructions to others at the roadblocks: to stop and search vehicles, to check identity cards, and to "set aside" persons of Tutsi ethnicity. These Tutsi were transported to and killed at the *Commune Rouge*. Omar Serushago testified that Ngeze was moving around Gisenyi town selecting Tutsi at roadblocks and directing them to the *Commune Rouge* to kill them. He said he personally saw Ngeze selecting Tutsi at roadblocks several times. The Chamber notes that the testimony of Witness AHI corroborates the testimony of Serushago that Ngeze played an active and supervisory role in the identification and targeting of Tutsi at roadblocks, who were subsequently killed at the *Commune Rouge*.[1597]

672. The only specific argument raised by the Appellant in this respect is that it has not been shown that he exercised authority over the persons present at the roadblocks.[1598] The Appeals Chamber would begin by recalling that, in order to convict a defendant of aiding and abetting another in the commission of a crime, it is unnecessary to prove that he had authority over that other person;[1599] it is sufficient to prove that the defendant's acts or omissions substantially contributed to the commission of the crime by the principal perpetrator.[1600] In the instant case, the Appellant himself identified and selected Tutsi at the roadblocks; he also gave instructions to those manning the roadblocks to stop and search every vehicle which passed, to ask for identity cards from those in the vehicles, and to set aside those whose identity cards indicated that they were Tutsi, who were then taken to *Commune Rouge* and killed.[1601] The Appellant has failed to show that it was unreasonable to conclude that his acts substantially contributed to the massacres of Tutsi civilians at the *Commune Rouge*. In particular, the Appeals Chamber rejects Appellant Ngeze's argument that the fact that he gave instructions at the roadblocks does not imply that these instructions were followed, noting that it is clear from the testimony of Witness AHI that the Appellant's instructions were indeed followed,[1602] and that the Appellant has cited no evidence suggesting the contrary. The Appeals Chamber is of the view that the Trial Chamber was entitled to conclude on the basis of these factual findings that the Appellant aided and abetted the commission of genocide. Furthermore, there is no doubt that the Appellant was aware that his acts were contributing to the commission of genocide by others. This conviction is upheld.

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[1597] *Ibid.*, para. 833. See also para. 792, referring to T. 4 September 2001, pp. 69-74 (testimony of Witness AHI), and para. 786, referring to T. 16 November 2001, pp. 53-60 (testimony of Witness Serushago).

[1598] See Ngeze Appellant's Brief, paras. 356, 376-387; Ngeze Brief in Reply, paras. 87-89. In particular, the Appellant asserts that the fact that he was "seen at roadblocks monitoring and giving instructions to others does not mean that the orders were followed by the people to whom they were addressed, if at all" (Ngeze Appellant's Brief, para. 377).

[1599] *Muhimana* Appeal Judgement, para. 189; *Blagojević and Jokić* Appeal Judgement, para. 195. However, it could be necessary to establish an accused's authority over another person in some particular circumstances, for example if it is alleged that the accused had authority over the principal perpetrator of the crime and that, through his failure to act, he aided and abetted the commission of the crime; see *Brđanin* Appeal Judgement, para. 273, and *Kayishema and Ruzindana* Appeal Judgement, paras. 201-202.

[1600] See *supra* XI. A.

[1601] See Judgement, paras. 786, 792, 833 and 837.

[1602] T. 4 September 2001, pp. 79-86. Witness AHI explains that the persons manning the roadblocks effectively identified Tutsi, who were then taken to the *Commune Rouge* and killed.

## XIII. CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE

673. The Trial Chamber considered that RTLM was systematically engaged in incitement to commit genocide.[1603] On this basis, it found Appellants Nahimana and Barayagwiza guilty of direct and public incitement to commit genocide under Article 2(3)(c) of the Statute, pursuant to Article 6(1) and (3) of the Statute in the case of Appellant Nahimana and to Article 6(3) of the Statute in the case of Appellant Barayagwiza.[1604]

674. Appellant Barayagwiza was also convicted of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute on account of his personal participation in calls for genocide made by the CDR, and under Article 6(3) of the Statute for his "failure to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by CDR members".[1605]

675. The Trial Chamber further found that *Kangura* had directly incited the commission of genocide and found Appellant Ngeze guilty of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[1606] The Chamber also found Appellant Ngeze guilty of direct and public incitement to commit genocide under Article 6(1) on account of his personal acts, "which called for the extermination of the Tutsi population".[1607]

676. The Appellants contend that the Trial Chamber committed errors of law and of fact in finding them guilty of direct and public incitement to commit genocide,[1608] and consequently request that their convictions on this count be overturned.[1609]

### A. Constituent elements of the crime of direct and public incitement to commit genocide

677. A person may be found guilty of the crime specified in Article 2(3)(c) of the Statute if he or she directly and publicly incited the commission of genocide (the material element or *actus reus*) and had the intent directly and publicly to incite others to commit genocide (the intentional element or *mens rea*). Such intent in itself presupposes a genocidal intent.[1610]

678. The Appeals Chamber considers that a distinction must be made between instigation[1611] under Article 6(1) of the Statute and public and direct incitement to commit

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[1603] Judgement, para. 1031.
[1604] *Ibid.*, paras. 1033-1034. The French translation of paragraph 1034 of the Judgement refers to Appellant Barayagwiza's responsibility under Articles 6(1) and 6(3) of the Statute, but this is a translation error; the original English version mentions only Article 6(3) of the Statute.
[1605] *Ibid.*, para. 1035.
[1606] *Ibid.*, para. 1038.
[1607] *Ibid.*, para. 1039.
[1608] Nahimana Notice of Appeal, pp. 12-13, 15-17; Nahimana Appellant's Brief, paras. 55-60, 71-73, 186-536; Nahimana Brief in Reply, paras. 96-107, 115-117; Barayagwiza Notice of Appeal, p. 3 (Grounds 32-33); Barayagwiza Appellant's Brief, paras. 257-270; Ngeze Notice of Appeal, paras. 9, 71-87; Ngeze Appellant's Brief, paras. 14, 24-33, 217-272, 227 and 278; Ngeze Brief in Reply, paras. 26, 29-38, 80-83.
[1609] Nahimana Appellant's Brief, para. 115; Barayagwiza Appellant's Brief, para. 270; Ngeze Appellant's Brief, para. 10.
[1610] In this respect, see *Akayesu* Trial Judgement, para. 560, quoted and approved in the Judgement, para. 1012.
[1611] "*Incit[ation]*" in the French version of Article 6(1) of the Statute.

genocide under Article 2(3)(c) of the Statute. In the first place, instigation under Article 6(1) of the Statute is a mode of responsibility; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute.[1612] By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide.[1613] In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the *travaux préparatoires* to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts.[1614] The Appeals Chamber further observes — even if this is not decisive for the determination of the state of customary international law in 1994 — that the Statute of the International Criminal Court also appears to provide that an accused incurs criminal responsibility for direct and public incitement to commit genocide, even if this is not followed by acts of genocide.[1615]

679. The second difference is that Article 2(3)(c) of the Statute requires that the incitement to commit genocide must have been direct and public, while Article 6(1) does not so require.

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[1612] See *supra* XI. A.

[1613] *Kajelijeli* Trial Judgement, para. 855; *Niyitegeka* Trial Judgement, para. 431; *Musema* Trial Judgement, para. 120; *Rutaganda* Trial Judgement, para 38; *Akayesu* Trial Judgement, para. 562. The Trial Chamber endorsed this jurisprudence (Judgement, paras. 1013 and 1015) and the Appellants do not challenge this finding: see Nahimana Appellant's Brief, para. 189; Barayagwiza Appellant's Brief, para. 259; Ngeze Appellant's Brief, paras. 255-256; Ngeze Brief in Reply, para. 31.

[1614] The United States proposed amendment to remove incitement from the list of punishable acts (see UN ORGA, Sixth Committee, Third Session, 84th meeting, UN Doc. A/C.6/3/SR. 84, 26 October 1948, pp. 213-214) was rejected by 27 votes to 16, with 5 abstentions: UN ORGA, Sixth Committee, Third Session, 85th meeting, UN Doc. A/C.6/3/SR. 85, 27 October 1948, p. 229. Many delegations which voted to reject this amendment explained that it was important to make direct and public incitement to commit genocide punishable even when it was not followed by acts, so that the Convention should be an effective instrument for the prevention of genocide: see UN ORGA, Sixth Committee, Third Session, 84th and 85th meetings, UN Doc. A/C.6/3/SR. 84 and UN Doc. A/C.6/3/SR. 85, 27 and 27 October 1948, p. 208 (Venezuela), 215 and 226 (Poland), 216 (Yugoslavia), 219 (Cuba), 219, 227 and 230 (USSR), 222 (Uruguay), 223 (Egypt).
The Appeals Chamber notes that the Draft Code of Crimes against the Peace and Security of Mankind by the International Law Commission in 1996 provides that direct and public incitement to commit genocide is punishable only if the act in fact occurs: see Articles 2(f) and 17 of the Draft Code of Crimes against the Peace and Security of Mankind and the comments relating thereto, 1996, Report of the International Law Commission on the deliberations of its 48th meeting, 51 UN ORGA Supp. (No. 10), reproduced in the Yearbook of the International Law Commission, 1996, vol. II (Part Two) (hereinafter "Draft Code of Crimes against the Peace and Security of Mankind"). However, the Appeals Chamber considers that this position does not reflect customary international law on the matter. Indeed, the International Law Commission itself specified that this limitation "does not in any way affect the application of the general principles independently of the Code or of similar provisions contained in other instruments, notably article III of the Convention on the Prevention and Punishment of the Crime of Genocide": Draft Code of Crimes against the Peace and Security of Mankind, footnote 45 (para. 6, p. 20).

[1615] Indeed, Article 25(3)(b) of the Statute of the International Criminal Court provides that any person who "orders, solicits or induces" the commission of a crime falling under the jurisdiction of the Court shall be individually responsible for such a crime "which in fact occurs or is attempted". However, Article 25(3)(e) of the Statute of the International Criminal Court provides that a person may incur criminal responsibility for direct and public incitement to commit genocide and it does not require the "commission or attempted commission of such a crime".

1. Arguments of the Parties

680. Appellants Nahimana and Ngeze contend that the Trial Chamber erred in referring to the international jurisprudence on incitement to discrimination and violence in order to analyse and define the elements of the crime of direct and public incitement to commit genocide.[1616] They argue that "international criminal law does not consider as international crimes hate speeches or appeals for violence which do not constitute a direct and public call for genocide".[1617] In this regard, Appellant Nahimana submits that:

- The International Military Tribunal ("IMT") made a clear distinction, on the one hand, between the virulent anti-Semitic propaganda of Hans Fritzsche ("Fritzsche") which incited fighting against the "*Judaeo-Bolshevik enemy*", but did not appeal directly to extermination, and, on the other hand, the direct appeals for extermination of Julius Streicher ("Streicher"), broadcast, with knowledge, at the very time of the actual extermination;[1618]

- The suggested amendments to the Genocide Convention criminalizing hate speeches aimed at instigating the commission of genocide were rejected by a very large majority, and only direct and public incitement to commit genocide was retained as a crime;[1619]

- The *Akayesu* Trial and Appeal Judgements have punished only direct appeals to exterminate;[1620]

- The Statute of the International Criminal Court makes incitement a crime only insofar as it is direct and public, and is aimed at the commission of the crime of genocide alone, and not simply one of the other crimes within its jurisdiction.[1621]

681. Appellant Ngeze further argues that the Trial Chamber erred in holding that the crime of direct and public incitement to commit genocide required a different approach when the media were involved.[1622]

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[1616] Nahimana Appellant's Brief, paras. 191-198; Ngeze Appellant's Brief, paras. 233-234.

[1617] *Ibid.*, para. 192. See also Ngeze Appellant's Brief, para. 233. Appellant Nahimana adds that, below this exceptional level of gravity, international law leaves it to States to prosecute and punish hate propaganda and calls for violence (Nahimana Appellant's Brief, para. 193) and that, although this type of propaganda may form part of a process leading to genocide, that does not suffice to make it a crime punishable under Article 2 of the Statute (Nahimana Appellant's Brief, para. 197). He submits that, even if the factual findings of the Trial Chamber were accepted (findings which he disputes), the Prosecution evidence relied on by the Judges (the broadcast of ethnic stereotypes inciting disdain and hatred against the Tutsi population; broadcasts equating the Tutsi population to the enemy; broadcasts generating concern, heightening a sense of fear and danger "giving rise to the need for action by listeners"; broadcasts denigrating the Tutsi ethnic group and describing its members as accomplices of the enemy; and broadcasts denouncing individuals by name as being members of the rebellion) cannot constitute a direct appeal to exterminate the Tutsi population, which the crime of direct and public incitement to commit genocide would presuppose (Nahimana Appellant's Brief, paras. 194-196).

[1618] Nahimana Appellant's Brief, paras. 192 and 199.

[1619] *Ibid.*, para. 192.

[1620] *Idem.*

[1621] *Idem.*

[1622] Ngeze Appellant's Brief, para. 236, referring to paragraphs 978-980 and 1000 of the Judgement.

682. Furthermore, Appellants Nahimana and Ngeze submit that the Trial Chamber erred in accepting that language that is equivocal or ambiguous, and consequently open to differing interpretations, can constitute the crime of direct and public incitement to commit genocide.[1623] They assert that "[t]he requirement that the incitement be direct, which further requires that attention be paid to the immediate and unequivocal meaning of the speech, aims at avoiding risks of interpretation of an equivocal pronouncement that is necessarily subject to controversy".[1624] Appellants Nahimana and Ngeze submit that the Nuremberg Judgement demonstrates that only unequivocal calls for genocidal extermination fall under direct incitement to commit genocide.[1625] Appellant Nahimana also notes that a Canadian Court decided in the *Mugesera* case that an equivocal speech which was open to differing interpretations could not constitute direct and public incitement to commit genocide.[1626]

683. Lastly, Appellants Nahimana and Ngeze submit that the Trial Chamber erred in holding that the intention of the perpetrator is critical in assessing the criminal nature of the speech itself.[1627] In this regard, they argue that "a speech which does not contain, as such, any direct appeal to extermination cannot be considered to be the *actus reus* of the crime of incitement simply because its author was alleged to have a criminal intent",[1628] because this position would clearly run counter to the general principle of criminal law that intent alone is not punishable.[1629] Appellant Nahimana adds that the Trial Chamber erred, when deciding whether a speech constituted direct incitement to commit genocide, in referring to the notion of potentially dangerous acts[1630] and to the political or community affiliation of the author of the speech.[1631]

684. In response, the Prosecutor submits that the distinction between "hate speech" and language which incites to genocide is a false one: the real question is whether the statement in question, "given its ordinary meaning and considered in context", incites to genocide.[1632]

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[1623] Nahimana Appellant's Brief, paras. 199-207; Nahimana's Response to the *Amicus Curiae* Brief, p. 3; Ngeze Appellant's Brief, paras. 222-232; Ngeze Brief in Reply, paras. 38 and 83. Appellant Nahimana alleges that "the Judges base their argument on equivocation: according to the Chamber, RTLM broadcasts prior to 6 April 1994 were criminal because the expressions '*Inyenzi*' or '*Inkotanyi*' used by Radio RTLM journalists to describe the RPF armed rebellion might, in some cases, be interpreted as targeting the entire Tutsi population in an equivocal and undifferentiated manner" (Nahimana Appellant's Brief, para. 203, emphasis in original). Similarly, Appellant Ngeze submits that the speeches cited by the Trial Chamber were equivocal, and that the Chamber erred in considering that *Inyenzi* and *Inkotanyi* designated one and the same thing, namely the Tutsi (Ngeze Appellant's Brief, para. 228).

[1624] Nahimana Appellant's Brief, para. 202.

[1625] *Ibid.*, paras. 199-201; Ngeze Appellant's Brief, para. 223.

[1626] *Ibid.*, paras. 206-207, referring to the Judgement of the Canadian Federal Court of Appeal, 8 September 2003, in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2004] 1 F.C.R. 3, 2003 FCA 325.

[1627] *Ibid.*, paras. 208-210; Ngeze Appellant's Brief, paras. 238-239.

[1628] *Ibid.*, para. 209.

[1629] *Ibid.*, para. 210; Ngeze Appellant's Brief, para. 239.

[1630] *Ibid.*, paras. 211-213.

[1631] *Ibid.*, paras. 214-216. Appellant Nahimana submits that the Judges were proposing a discriminatory and political approach to the *actus reus* of the offence of direct and public incitement to commit genocide when they stated that the rules of international law protecting freedom of expression needed to be applied more restrictively where the speech in question emanates from a majority group enjoying government support.

[1632] Respondent's Brief, para. 306.

685. In the Prosecutor's view, the Appellants are effectively arguing that incitement has to be explicit, that is, each statement must incite genocide, with no need for it to be interpreted or considered in context.[1633] However, according to the Prosecutor, the meaning of any speech or pronouncement must be gauged by its own style within its particular context.[1634] For the Prosecutor, "the directness of speech is confirmed by the fact that its meaning is immediately appreciated by its intended audience and must be gauged by reference to the way speech is used in its society and country of origin".[1635]

686. The Prosecutor submits that the Trial Chamber made a correct analysis of the *Streicher* and *Fritzsche* cases by showing that the conviction of the former and the acquittal of the latter was not, as claimed by the Appellants, based on the distinction between direct speech on the one hand and implied or ambiguous speech on the other, but that Hans Fritzsche was acquitted because he was considered a "conduit" of propaganda, not a legally responsible participant, and because it was not proven that Fritzsche had genocidal intent and there was no proof that Fritzsche knew that his news reports were false.[1636] Concerning the *Mugesera* case, the Prosecutor points out that the Supreme Court of Canada has overruled the Federal Court of Appeal and held that Mugesera's speech did constitute direct incitement to commit genocide.[1637] The Prosecutor notes that the Supreme Court of Canada held that the direct element of incitement should be viewed in the light of its historical, cultural and linguistic context.[1638]

687. The Prosecutor submits that the assertion that the Trial Chamber found no direct appeal to extermination but assumed the *actus reus* of the crime on the basis of the supposed intent of the Appellants is "bald and badly referenced and oversimplified".[1639] He submits that the Chamber correctly found that not only was genocidal language used but that the Appellants possessed the necessary specific intent for the existence of the crime of incitement.[1640] He also submits that the Trial Chamber correctly considered the potential danger of a speech, as the crime in Article 2(3)(c) is an inchoate offence.[1641]

688. Appellant Nahimana replies that the position of Fritzsche in the hierarchy of the Propaganda Ministry played no role in the International Military Tribunal's decision as to whether or not his speeches were of a criminal nature.[1642] He contends that the Tribunal considered separately the anti-semitic propaganda broadcast by the radio station for which Fritzsche was responsible and the speeches made by the accused himself.[1643] Appellant

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[1633] *Ibid.*, para. 301.
[1634] *Ibid.*, para. 300.
[1635] *Ibid.*, para. 305.
[1636] *Ibid.*, paras. 311-314.
[1637] *Ibid.*, paras. 308 and 317.
[1638] *Ibid.*, paras. 318 and 319.
[1639] *Ibid.*, para. 320, footnote 288. The French translation of the first sentence of paragraph 320 of the Respondent's Brief contains an error and should have read: "*Nahimana affirme que la Chambre de première instance n'a relevé aucun appel direct à l'extermination mais a présumé l'existence de l'élément* ***matériel*** [not "moral"] *sur la base de l'intention supposée des appellants*" ("Nahimana asserts that the Trial Chamber found no direct appeal to extermination but assumed the *actus reus* of the crime on the basis of the supposed intent of the appellants").
[1640] Respondent's Brief, para. 320.
[1641] *Ibid.*, para. 311.
[1642] Nahimana Brief in Reply, para. 72.
[1643] *Idem.*

Nahimana emphasises that, in relying on the fact that Fritzsche had not been shown to have been aware that the extermination was in progress, the Tribunal's judges had clearly indicated that the incitement must be of a direct nature.[1644] Appellant Nahimana submits that Streicher was convicted only on account of his direct calls for extermination broadcast at the time of the extermination and not because of his prior publications.[1645] Lastly, Appellant Nahimana maintains that the decision of the Supreme Court of Canada in the *Mugesera* case strengthens his argument, because, in his opinion, the differing views expressed by the various judges demonstrate the uncertainties and dangers of any attempt at interpreting speech.[1646]

### 2. The *Amicus Curiae* Brief and the responses of the Parties

689. *Amicus Curiae* submits that the Judgement could be interpreted to subsume hate speech that does not contain a call to action of violence under the rubric of direct and public incitement to commit genocide.[1647] *Amicus Curiae* further submits that, for the interpretation of Article 2(3)(c) of the Statute, the Trial Chamber should first have turned to the Genocide Convention and to the relevant *travaux préparatoires*, rather than to certain international treaties that allow or require States parties to proscribe hate speech in their domestic law.[1648] *Amicus Curiae* submits on this subject that the drafters of the Genocide Convention explicitly considered and repeatedly rejected the notion that hate speech that did not call for genocide should be criminalized.[1649] *Amicus Curiae* concedes that, in examining the specific charges against the Appellants, the Trial Chamber seems to have drawn a distinction between simple hate speeches that do not call for violence and actual incitement to commit genocide; however, *Amicus Curiae* calls on the Appeals Chamber to clarify this distinction and to reaffirm that speech that does not incite its audience to commit genocide does not constitute the crime of direct and public incitement to commit genocide.[1650]

690. The Appellants mark their agreement with the position and arguments raised by *Amicus Curiae* in this regard.[1651] For his part, the Prosecutor responds that the Trial Chamber did not confuse speech which amounted to an incitement to commit genocide and speech which did not.[1652] The Prosecutor observes that *Amicus Curiae* did not identify any instance where the Trial Chamber misidentified speech which was merely discriminatory and wrongly

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[1644] Nahimana Brief in Reply., para. 74.
[1645] *Ibid.*, para. 75.
[1646] *Ibid.*, para. 77.
[1647] *Amicus Curiae* Brief, pp. 2, 3, 9-18. In this regard, the *Amicus Curiae* submits that an ambiguous definition of the crime of direct and public incitement to commit genocide could be exploited by some authoritites (particularly in Africa) to suppress overly critical speech (*Amicus Curiae* Brief, pp. 2-8). The Appeals Chamber is not convinced by this argument, and it notes that Article 20(2) of the ICCPR and Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") already obliges States parties to these treaties (at least those that have not filed reservations to these provisions) to prohibit or even criminalize hate speech.
[1648] *Amicus Curiae* Brief, pp. 9, 10, 13 and 14. See also pp. 17-18, where the *Amicus Curiae* emphasises the fundamental difference between the Genocide Convention (which defines a crime in international law and represents customary international law) and covenants like the ICCPR or the ICERD, whose provisions on hate speech do not represent customary international law according to the *Amicus Curiae*.
[1649] *Amicus Curiae* Brief, pp. 10-13.
[1650] *Ibid.*, pp. 15-17.
[1651] Nahimana's Response to *Amicus Curiae* Brief (FV), p. 4; Barayagwiza Reply to *Amicus Curiae* Brief, paras. 7-14 and 20; Ngeze's Response to *Amicus Curiae* Brief, pp. 2-5 (paras. 2-3).
[1652] Prosecutor's Response to *Amicus Curiae* Brief, paras. 5, 13-20.

suggested that it amounted to an incitement to commit genocide.[1653] The Prosecutor submits that reference to international covenants such as the ICCPR and CERD does not cause any confusion, uncertainty or ambiguity.[1654] He posits that hate speech and incitement to commit genocide are not mutually exclusive categories; in particular, an incitement to commit genocide must inevitably amount to hate speech, and therefore jurisprudence concerning hate speech may be useful in analyzing the crime of incitement to commit genocide.[1655] The Prosecutor also believes that the Trial Chamber did not err in its interpretation of the Genocide Convention debates, in that, while the proscription of hate speech was rejected, there was a genuine concern that hate speech could lay the foundation for genocide.[1656]

### 3. Analysis

691. Since the Appellants do not allege that the Trial Chamber erred with regard to the meaning of "public" incitement, the Appeals Chamber will focus on the meaning of "direct" incitement to commit genocide.

#### (a) Hate speech and direct incitement to commit genocide

692. The Appeals Chamber considers that there is a difference between hate speech in general (or inciting discrimination or violence) and direct and public incitement to commit genocide. Direct incitement to commit genocide assumes that the speech is a direct appeal to commit an act referred to in Article 2(2) of the Statute; it has to be more than a mere vague or indirect suggestion.[1657] In most cases, direct and public incitement to commit genocide can be preceded or accompanied by hate speech, but only direct and public incitement to commit genocide is prohibited under Article 2(3)(c) of the Statute. This conclusion is corroborated by the *travaux préparatoires* to the Genocide Convention.[1658]

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[1653] *Ibid.*, paras. 8 and 13.

[1654] *Ibid.*, paras. 14 and 20.

[1655] *Ibid.*, paras. 14-16. See also para. 19:

> In the end, the use made by the Trial Chamber of the "hate speech" jurisprudence is both logical and uncontroversial. It was simply used to assist in determining the limits of free speech, a universally recognized human right, when considering criminal liability. The question of the limits of freedom of speech was a live issue in the trial. This is particularly so where the speech being examined may not explicitly call for genocide, but is capable of being interpreted that way when examined in context.

[1656] *Ibid.*, para. 17.

[1657] *Kajelijeli* Trial Judgement, para. 852; *Akayesu* Trial Judgement, para. 557; *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, para. 87. See also Comments of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind, p. 22: "The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion."

[1658] Articles 2(2) and (3) of the Statute reproduce Articles 2 and 3 of the Genocide Convention. The *travaux préparatoires* of the Genocide Convention can therefore shed light on the interpretation of Articles 2(2) and (3) of the Statute. In particular, the *travaux préparatoires* demonstrate that Article 3(c) (Article 2(3)(c) of the Statute of the Tribunal) is intended to criminalize only direct appeals to commit acts of genocide and not all forms of incitement to hatred. Indeed, the first draft of the Convention, which was prepared by a group of experts on behalf of the United Nations Secretary General (UN Doc. E/447), contained provisions criminalizing not only direct and public incitement to commit genocide (Article II(II)(2.)), but also all forms of public propaganda tending by their systematic and hateful character to promote genocide, or tending to make it appear as necessary, legitimate or excusable (Article III). The second draft of the Convention (prepared by the *Ad Hoc* Committee of the Economic and Social Council, UN Doc. E/794), contained only one provision criminalizing

693. The Appeals Chamber therefore concludes that when a defendant is indicted pursuant to Article 2(3)(c) of Statute, he cannot be held accountable for hate speech that does not directly call for the commission of genocide. The Appeals Chamber is also of the opinion that, to the extent that not all hate speeches constitute direct incitement to commit genocide, the jurisprudence on incitement to hatred, discrimination and violence is not directly applicable in determining what constitutes direct incitement to commit genocide. However, it is not entirely clear if the Trial Chamber relied on this jurisprudence in defining direct incitement to commit genocide. The Trial Chamber held:

> The present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994 and the related legal question of what constitutes individual criminal responsibility for direct and public incitement to commit genocide. Unlike Akayesu and others found by the Tribunal to have engaged in incitement through their own speech, the Accused in this case used the print and radio media systematically, not only for their own words but for the words of many others, for the collective communication of ideas and for the mobilization of the population on a grand scale. In considering the role of mass media, the Chamber must consider not only the contents of particular broadcasts and articles, but also the broader application of these principles to media programming, as well as the responsibilities inherent in ownership and institutional control over the media.
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> To this end, a review of international law and jurisprudence on incitement to discrimination and violence is helpful as a guide to the assessment of criminal accountability for direct and public incitement to genocide, in light of the fundamental right of freedom of expression.[1659]

694. After recalling the jurisprudence of the IMT, the United Nations Human Rights Committee and the European Court of Human Rights, the Trial Chamber held that:

- Editors and publishers have generally been held responsible for the media they control;[1660]

- It is necessary to review whether the aim of the discourse is a lawful one, having regard, for example, to the language used and to the content of the text (in particular, whether it is intended to establish a critical distance from the words of others);[1661]

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direct and public incitement to commit genocide, regardless of whether it was made in public or in private, and of whether it was successful or not (Article IV(c)). The Soviet delegate had suggested the inclusion of a provision criminalizing hate propaganda and propaganda tending to incite acts of genocide, but the suggestion was rejected by the majority of the *Ad Hoc* Committee (UN Doc. E/794, p. 23). Later, the Soviet delegate again suggested to the 6th Committee of the General Assembly an amendment of Article III (UN Doc. A/C.6/215/Rev. 1) criminalizing "all forms of public propaganda (press, radio, cinema, etc.) that tend to incite racial, national or religious hatred" and "all forms of propaganda that are aimed at provoking the commission of acts of genocide". The amendment was rejected (UN ORGA, 6th Committee, 3rd Session, 87th meeting, p. 253). The reasons for rejecting the two parts of the amendment seem to have been the same as those for rejecting the Soviet amendment presented to the *Ad Hoc* Committee: the first part of the amendment fell outside the framework of the Genocide Convention (see addresses of the delegates of Greece, France, Cuba, Iran, Uruguay and India) while the second part was a duplication of the provision prohibiting incitement of direct and public incitement to commit genocide (see addresses of the delegates of Greece, Cuba, Iran, Uruguay, Egypt, the United States of America). See UN ORGA, 6th Committee, 3rd Session, 86th meeting, UN Doc. A/C.6/3/CR. 86, 28 October 1948, pp. 244-248, and UN ORGA, 6th Committee, 3rd Session, 87th meeting, UN Doc. A/C.6/3/CR. 87, 29 October 1948, pp. 248-254.

[1659] Judgement, paras. 979-980.

[1660] *Ibid.*, paras. 1001 and 1003.

[1661] *Ibid.*, paras. 1001-1003.

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- The speech must be considered in its context when reviewing its potential impact;[1662]

- It is not necessary to prove that the speech at issue produced a direct effect.[1663]

695. Although the Trial Chamber then characterised these elements as "a number of central principles [...] that serve as a useful guide to the factors to be considered in defining elements of 'direct and public incitement to genocide' as applied to mass media",[1664] it did in fact articulate certain broad guidelines for interpreting and characterizing media discourse. The Appeals Chamber considers that the Trial Chamber did not alter the constituent elements of the crime of direct and public incitement to commit genocide in the media context (which would have constituted an error).

696. Furthermore, the Appeals Chamber notes that several extracts from the Judgement demonstrate that the Trial Chamber drew a distinction between hate speech and direct and public incitement to commit genocide, for example:

- The Trial Chamber held that one RTLM broadcast constituted hate speech, but that "this broadcast, which does not call on listeners to take action of any kind, does not constitute direct incitement";[1665]

- After holding that the RTLM broadcasts as a whole denigrated the Tutsi,[1666] the Trial Chamber cited a broadcast which, in its view, did constitute public and direct incitement to commit genocide;[1667]

- The Trial Chamber concluded that "[m]any of the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices".[1668] It then noted that "not all of the writings published in *Kangura* and highlighted by the Prosecutor constitute direct incitement", citing the example of an article "brimming with ethnic hatred but [that] did not call on readers to take action against the Tutsi population".[1669]

697. The Appeals Chamber will now turn to the Appellants' submissions that the Trial Chamber erred (1) in considering that a speech in ambiguous terms, open to a variety of interpretations, can constitute direct incitement to commit genocide, and (2) in relying on the presumed intent of the author of the speech, on its potential dangers, and on the author's political and community affiliation, in order to determine whether it was of a criminal nature. The Appellants' position is in effect that incitement to commit genocide is direct only when it is explicit and that under no circumstances can the Chamber consider contextual elements in

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[1662] *Ibid.*, paras. 1004-1006.
[1663] *Ibid.*, para. 1007.
[1664] *Ibid.*, para. 1000.
[1665] *Ibid.*, para. 1021.
[1666] *Ibid.*, para. 1031.
[1667] *Ibid.*, para. 1032. See also, for example, Judgement, para. 483, which identifies broadcasts that explicitly called for extermination.
[1668] *Ibid.*, para. 1036.
[1669] *Ibid.*, para. 1037.

determining whether a speech constitutes direct incitement to commit genocide. For the reasons given below, the Appeals Chamber considers this approach overly restrictive.

(b) Speeches that are open to several interpretations

698. In conformity with the *Akayesu* Trial Judgement, the Trial Chamber considered that it was necessary to take account of Rwanda's culture and language in determining whether a speech constituted direct incitement to commit genocide.[1670] In this respect, the Trial Chamber quotes the following excerpts from the *Akayesu* Trial Judgement:

> However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience. The Chamber further recalls that incitement may be direct, and nonetheless implicit. [...]
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> The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.[1671]

699. The Appeals Chamber notes that this approach has been adopted in several other judgements[1672] and by the Supreme Court of Canada in *Mugesera*.[1673]

700. The Appeals Chamber agrees that the culture, including the nuances of the Kinyarwanda language, should be considered in determining what constitutes direct and public incitement to commit genocide in Rwanda. For this reason, it may be helpful to examine how a speech was understood by its intended audience in order to determine its true message.[1674]

701. The principal consideration is thus the meaning of the words used in the specific context: it does not matter that the message may appear ambiguous to another audience or in another context. On the other hand, if the discourse is still ambiguous even when considered in its context, it cannot be found beyond reasonable doubt to constitute direct and public incitement to commit genocide.

702. The Appeals Chamber is not persuaded that the *Streicher* and *Fritzsche* cases demonstrate that only discourse explicitly calling for extermination, or discourse that is entirely unambiguous for all types of audiences, can justify a conviction for direct and public

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[1670] *Ibid.*, para. 1011.
[1671] *Akayesu* Trial Judgement, paras. 557-558 (footnote omitted).
[1672] *Muvunyi* Trial Judgement, para. 502; *Kajelijeli* Trial Judgement, para. 853; *Niyitegeka* Trial Judgement, para. 431.
[1673] *Mugesera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40, paras. 87 and 94. The Appeals Chamber summarily dismisses Appellant Nahimana's submission that the contrary conclusions of the Federal Court of Appeal and the Supreme Court of Canada demonstrate the uncertainties and dangers of seeking to interpret speech, the Judgement of the Supreme Court of Canada having reversed that of the Federal Court of Appeal.
[1674] In this respect, while it is not necessary to prove that the pronouncements in question had actual effects, the fact that they did have such effects can be an indication that the receivers of the message understood them as direct incitement to commit genocide. *Cf. infra* XIII. A. 3. (c) (i) .

incitement to commit genocide. First, it should be recalled that Streicher and Fritzsche were not charged with direct and public incitement to commit genocide, as there was no such crime under international law at the time. Second, it should be noted that the reason Fritzsche was acquitted is not because his pronouncements were not explicit enough, but rather because they did not, implicitly or explicitly, "[intend] to incite the German people to commit atrocities on conquered peoples".[1675]

703. The Appeals Chamber therefore concludes that it was open to the Trial Chamber to hold that a speech containing no explicit appeal to commit genocide, or which appeared ambiguous, still constituted direct incitement to commit genocide in a particular context. The Appeals Chamber will examine below if it was reasonable to conclude that the speeches in the present case constituted direct and public incitement to commit genocide of the Tutsi.[1676]

(c) Reliance on the intent of the speech's author, its potential dangers and the author's political and community affiliation

(i) Intent

704. Referring to paragraphs 1000 to 1002 of the Judgement, Appellants Nahimana and Ngeze contend that the Trial Chamber erred in holding that speech containing no direct appeal to extermination could nevertheless constitute the *actus reus* of the crime of incitement simply because its author had a criminal intent.[1677]

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[1675] Nuremberg Judgement, pp. 161-163:

> War crimes and crimes against humanity
> The prosecution has asserted that Fritzsche incited and encouraged the commission of war crimes, by deliberately falsifying news to arouse in the German people those passions which led them to the commission of atrocities under Counts Three and Four. His position and official duties were not sufficiently important, however, to infer that he took part in originating or formulating propaganda campaigns.
> Excerpts in evidence from his speeches show definite anti-Semitism on his part. He broadcast, for example, that the war had been caused by Jews and said their fate had turned out "as unpleasant as the Fuehrer predicted". But these speeches did not urge persecution or extermination of Jews. There is no evidence that he was aware of their extermination in the East. The evidence moreover shows that he twice attempted to have publication of the anti-Semitic "Der Sturmer" suppressed, though unsuccessfully.
> In these broadcasts Fritzsche sometimes spread false news, but it was not proved he knew it to be false. For example, he reported that no German U-boat was in the vicinity of the "Athenia" when it was sunk. This information was untrue; but Fritzsche, having received it from the German Navy, had no reason to believe it was untrue.
> It appears that Fritzsche sometimes made strong statements of a propagandistic nature in his broadcasts. But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort.

[1676] In particular, the Appeals Chamber will examine whether it was reasonable for the Trial Chamber to find that the words *Inkotanyi* and *Inyenzi* as used in certain RTLM broadcasts referred to the Tutsi population as a whole.

[1677] Nahimana Appellant's Brief, paras. 208-210; Ngeze Appellant's Brief, paras. 238-239. The Appeals Chamber notes that Appellant Nahimana also makes references to paragraph 1029 of the Judgement, but considers that this paragraph raises a different issue, which is addressed below.

705. The Appeals Chamber is not satisfied that the Trial Chamber held that speech containing no direct appeal to commit genocide constituted direct and public incitement to commit genocide simply because its author supposedly had a criminal intent. The relevant paragraphs of the Trial Judgement read as follows:

> 1001. Editors and publishers have generally been held responsible for the media they control. In determining the scope of this responsibility, the importance of intent, that is the purpose of the communications they channel, emerges from the jurisprudence – whether or not the purpose in publicly transmitting the material was of a *bona fide* nature (e.g. historical research, the dissemination of news and information, the public accountability of government authorities). The actual language used in the media has often been cited as an indicator of intent. For example, in the *Faurisson* case, the term "magic gas chamber" was seen by the UN Human Rights Committee as suggesting that the author was motivated by anti-Semitism rather than pursuit of historical truth. In the *Jersild* case, the comments of the interviewer distancing himself from the racist remarks made by his subject were a critical factor for the European Court of Human Rights in determining that the purpose of the television program was the dissemination of news rather than propagation of racist views.
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> 1002. In the Turkish cases on national security concerns, the European Court of Human Rights carefully distinguishes between language that explains the motivation for terrorist activities and language that promotes terrorist activities. Again, the actual language used is critical to this determination. In *Sürek (No.1)*, the Court held a weekly review responsible for the publication of letters from readers critical of the Government, citing the strong language in these letters, which led the Court to view the letters as "an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices..." In contrast, in *Sürek and Özdemir* the European Court upheld the right of the same weekly review to publish an interview with a PKK leader, in which he affirmed his determination to pursue his objective by violent means on the grounds that the text as a whole should be considered newsworthy rather than as "hate speech and the glorification of violence". The sensitivity of the Court to volatile language goes to the determination of intent, as evidenced by one of the questions put forward in a concurring opinion in this case: "Was the language intended to inflame or incite to violence?"

706. It is apparent from Paragraph 1001 of the Trial Judgement that the Trial Chamber employed the term "intent" with reference to the purpose of the speech, as evidenced, *inter alia*, by the language used, and not to the intent of its author.[1678] The Appeals Chamber is of the opinion that the purpose of the speech is indisputably a factor in determining whether there is direct and public incitement to commit genocide, and it can see no error in this respect on the part of the Trial Chamber. It is plain that the Trial Chamber did not find that a speech constitutes direct and public incitement to commit genocide simply because its author had criminal intent.

707. Appellants Barayagwiza and Ngeze further submit that the Trial Chamber erred in finding in paragraph 1029 of the Judgement that the media's intention to cause genocide was evidenced in part by the fact that genocide did occur.[1679] The Prosecutor responds that the

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[1678] See also Judgement, para. 1003 ("A critical distance was identified as the key factor in evaluating the purpose of the publication").

[1679] Barayagwiza Appellant's Brief, paras. 132-133; Barayagwiza Brief in Reply, para. 87; Ngeze Appellant's Brief, paras. 277-278.

Trial Chamber committed no error and submits that the fact that genocide was perpetrated can be one of many indices of *mens rea*.[1680]

708. Paragraph 1029 of the Trial Judgement reads as follows:

> With regard to causation, the Chamber recalls that incitement is a crime regardless of whether it has the effect it intends to have. In determining whether communications represent an intent to cause genocide and thereby constitute incitement, the Chamber considers it significant that in fact genocide occurred. That the media intended to have this effect is evidenced in part by the fact that it did have this effect.

709. The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors.[1681] However, the Appeals Chamber notes that paragraph 1029 of the Judgement concludes that the fact that "the media intended to [cause genocide] is evidenced *in part* by the fact that it did have this effect". The Appeals Chamber cannot conclude that this reasoning was erroneous: in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. The Appeals Chamber, notes, however, that this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.

(ii) Potential dangers

710. As noted above, Appellant Nahimana contends that the Trial Chamber erred in relying on the potential dangers of a speech in determining whether it constitutes direct incitement to commit genocide.[1682] He argues that, even though some speeches inciting hatred may contain inherent dangers, they do not necessarily qualify as direct and public incitement to commit genocide, which, he contends, presupposes an unequivocal call for extermination.[1683]

711. The Appeals Chamber is not persuaded that the Trial Chamber took the view that any potentially dangerous hate speech constitutes direct incitement to commit genocide. The Trial Chamber referred to the possible impact of certain remarks in its analysis of the context in which such remarks were made. As explained above, the meaning of a message can be intrinsically linked to the context it which it is formulated. In the opinion of the Appeals

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[1680] Respondent's Brief, para. 499. At paragraph 500, the Prosecutor cites several elements which, in his view, demonstrate that it was reasonable for the Trial Chamber to find that Appellant Barayagwiza had the requisite criminal intent.

[1681] For example: the fact that many civilians were killed in the course of a military offensive does not necessarily mean that the attackers intended to target civilians, as civilians could have been killed as a result of misdirected fire.

[1682] Nahimana Appellant's Brief, paras. 211-213, referring to the Judgement, paras. 1004, 1006, 1007, 1015, 1022.

[1683] *Ibid.*, para. 212.

Chamber, the Trial Chamber was correct in concluding that it was appropriate to consider the potential impact in context – notably, how the message would be understood by its intended audience – in determining whether it constituted direct and public incitement to commit genocide.[1684] The appeal on this point is dismissed.

(iii) Political or community affiliation

712. Appellant Nahimana submits that the Trial Chamber erred in evaluating the criminal character of a speech on the basis of the political or community affiliation of its author.[1685] He bases his submission on paragraphs 1008 and 1009 of the Judgement:

> 1008. The Chamber notes that international standards restricting hate speech and the protection of freedom of expression have evolved largely in the context of national initiatives to control the danger and harm represented by various forms of prejudiced communication. The protection of free expression of political views has historically been balanced in the jurisprudence against the interest in national security. The dangers of censorship have often been associated in particular with the suppression of political or other minorities, or opposition to the government. The special protections developed by the jurisprudence for speech of this kind, in international law and more particularly in the American legal tradition of free speech, recognize the power dynamic inherent in the circumstances that make minority groups and political opposition vulnerable to the exercise of power by the majority or by the government. These circumstances do not arise in the present case, where at issue is the speech of the so-called "majority population", in support of the government. The special protections for this kind of speech should accordingly be adapted, in the Chamber's view, so that ethnically specific expression would be more rather than less carefully scrutinized to ensure that minorities without equal means of defence are not endangered.
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> 1009. Similarly, the Chamber considers that the "wider margin of appreciation" given in European Court cases to government discretion in its restriction of expression that constitutes incitement to violence should be adapted to the circumstance of this case. At issue is not a challenged restriction of expression but the expression itself. Moreover, the expression charged as incitement to violence was situated, in fact and at the time by its speakers, not as a threat to national security but rather in defence of national security, aligning it with state power rather than in opposition to it. Thus there is justification for adaptation of the application of international standards, which have evolved to protect the right of the government to defend itself from incitement to violence by others against it, rather than incitement to violence on its behalf against others, particularly as in this case when the others are members of a minority group.

713. The Appeals Chamber has a certain difficulty with these paragraphs. It notes, on the one hand, that the relevant issue is not whether the author of the speech is from the majority ethnic group or supports the government's agenda (and by implication, whether it is necessary to apply a stricter standard), but rather whether the speech in question constitutes direct incitement to commit genocide. On the other hand, it recognises that the political or community affiliation of the author of a speech may be regarded as a contextual element which can assist in its interpretation.

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[1684] In this respect, the Appeals Chamber points out that the crime of direct and public incitement to commit genocide is punishable as such precisely because of the potential dangers inherent in discourse directly and publicly inciting the commission of genocide.
[1685] Nahimana Appellant's Brief, paras. 214-216.

714. In the final analysis, the Appeals Chamber is not persuaded that the Trial Chamber was in effect more inclined to conclude that certain speeches constituted direct incitement to commit genocide because they were made by Hutu or by individuals speaking in support of the Government at the time. In this respect, the Appeals Chamber notes that, in its analysis of the charges against the Appellants, the Trial Chamber made no reference to their political or community affiliation.[1686] The Appeals Chamber concludes that no error has been shown.

(iv) Conclusion

715. The Appeals Chamber is of the opinion that the Trial Chamber did not confuse mere hate speech with direct incitement to commit genocide. Moreover, it was correct in holding that the context is a factor to consider in deciding whether discourse constitutes direct incitement to commit genocide. For these reasons, the Appeals Chamber concludes that the Trial Chamber committed no error with respect to the notion of direct incitement to commit genocide.

## B. Is incitement a continuing crime?

716. The Trial Chamber held that the crime of direct and public incitement to commit genocide "is an inchoate offence that continues in time until the completion of the acts contemplated",[1687] and that "the entirety of RTLM broadcasting, from July 1993 through July 1994, [...] falls within the temporal jurisdiction of the Tribunal to the extent that the broadcasts are deemed to constitute direct and public incitement to genocide".[1688] The Appellants contend that these findings amount to errors of law.[1689]

### 1. Submissions of the Parties and of *Amicus Curiae*

717. The Appellants submit that the Trial Chamber confused the notion of an inchoate crime and that of a continuing crime; that the crime of direct and public incitement exists independently of whether or not genocide is committed; that it is consummated in all its elements through the public dissemination of a speech and is hence precisely situated in time, even if it can be repeated and its effects may continue over a period; that it cannot be compared to the crime of conspiracy to commit genocide; and that the commission of genocide in 1994 thus cannot justify the inclusion within the jurisdiction of the Tribunal of crimes of incitement committed before 1 January 1994.[1690] The position adopted in the *Amicus Curiae* Brief is to the same effect.[1691]

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[1686] Judgement, paras. 1016-1039.

[1687] *Ibid.*, para. 1017. See also para. 104 (the crime of incitement "continues to the time of the commission of the acts incited").

[1688] Judgement, para. 1017.

[1689] Nahimana Appellant's Brief, paras. 55-60, 71-73; Nahimana's Response to the *Amicus Curiae* Brief, p. 4; Barayagwiza Appellant's Brief, paras. 258-261; Barayagwiza Brief in Reply, paras. 21-22; Barayagwiza's Response to the *Amicus Curiae* Brief, para. 15; Ngeze Appellant's Brief, paras. 14, 15, 24-33, 43, 255-257; Ngeze Brief in Reply, paras. 26, 29-38; Ngeze's Response to the *Amicus Curiae* Brief, p. 6.

[1690] Nahimana Appellant's Brief, paras. 55-60, 71-73; Barayagwiza Appellant's Brief, paras. 259 and 261; Barayagwiza's Response to the *Amicus Curiae* Brief, para. 15; Ngeze Appellant's Brief, paras. 14, 24-33, 256; Ngeze Brief in Reply, paras. 26, 29-38; Ngeze's Response to the *Amicus Curiae* Brief, p. 6.

[1691] *Amicus Curiae* Brief, pp. 19-24. The *Amicus Curiae* submits that the crime is consummated as soon as an individual publicly encourages his audience to commit genocide with the intent to incite; it maintains that the Trial Chamber did not have jurisdiction to convict the Appellants on the basis of incitement prior to 1994.

718. Appellant Nahimana further submits that the Trial Chamber criminalized RTLM "programming" in general without specifying the speeches constituting the crime of direct and public incitement to commit genocide.[1692] He submits that the Trial Chamber improperly extended criminalization to "the collective and continuing programming of speeches, which in themselves were not criminal and were by different authors", thereby implying a form of collective responsibility that is impermissible in international law and setting "no clear-cut criteria whereby a journalist can be aware, at the time when he is speaking, of the extent of his right to free speech".[1693]

719. The Prosecutor responds that the Trial Chamber did not err, since direct and public incitement to commit genocide can be characterized as a continuing crime.[1694] In this respect, he argues that there is a continuing offence when "an accused commits a number of acts separated in time and place but connected by his *mens rea*; the acts form the constituent parts of a larger design".[1695] He contends that the definition of genocide and that of direct and public incitement to commit genocide can encompass a persistent or ongoing course of conduct.[1696] The Prosecutor accordingly submits that the Trial Chamber was correct in relying on acts occurring before 1994 in order to conclude that a violation of international humanitarian law took place in 1994.[1697] He contends that, with respect to the continuing crime of direct and public incitement to commit genocide, it would be difficult to distinguish between events prior to 1994 and those in 1994, since, when an accused "embarks upon a course directed towards inciting, or instigating genocide, every discrete act which is done in the pursuit of that goal necessarily builds upon and renews the preceding acts done for the same purpose".[1698] Hence, for the Prosecutor, the publications of *Kangura* and the broadcasts of RTLM formed part of a continuous transaction calculated to incite genocide.[1699]

## 2. Analysis

### (a) Inchoate and continuing crimes

720. The Appeals Chamber considers that the notions "inchoate" and "continuing" are independent of one another. An inchoate offence ("*crime formel*" in civil law) is consummated simply by the use of a means or process calculated to produce a harmful effect, irrespective of whether that effect is produced.[1700] In other words, an inchoate crime penalizes the commission of certain acts capable of constituting a step in the commission of another

[1692] Nahimana Appellant's Brief, paras. 189-190. Nahimana's Response to the *Amicus Curiae* Brief, pp. 2-3.
[1693] Nahimana's Response to the *Amicus Curiae* Brief, p. 3. See also T(A) 18 January 2007, pp. 37-38.
[1694] Respondent's Brief, paras. 127-140; Prosecutor's Response to the *Amicus Curiae* Brief, paras. 22-24.
[1695] *Ibid.*, para. 130.
[1696] *Ibid.*, paras. 134-135 ("In the present case, if an accused publishes or broadcasts a number of messages on the same theme, why cannot they be considered to be the one act of incitement?"). In paragraph 136, the Prosecutor submits that this approach is consistent with that in the case of Streicher, who was convicted of incitement to murder and extermination for the dozens of articles he published demanding the annihilation and extermination of the Jews.
[1697] Respondent's Brief., para. 137.
[1698] *Idem*. In paragraph 138, the Prosecutor adds that incitement to commit genocide is "a substantial task".
[1699] Respondent's Brief, paras. 138-140; Prosecutor's Response to the *Amicus Curiae* Brief, para. 22.
[1700] See Roger Merle et André Vitu, *Traité de droit criminel*, 7ème *édition, Tome* 1, Paris, 1997, No.° 514. See also *Musema* Trial Judgement, para. 193, and *Akayesu* Trial Judgement, para. 562.

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crime, even if that crime is not in fact committed.[1701] As stated at the beginning of this chapter, the crime of direct and public incitement to commit genocide is an inchoate offence, like conspiracy to commit genocide (Article 2(3)(b) of the Statute) and attempt to commit genocide (Article 2(3)(d) of the Statute).

721. A continuing crime implies an ongoing criminal activity. According to Black's Law Dictionary, a continuing crime is:

> 1. A crime that continues after an initial illegal act has been consummated; a crime that involves ongoing elements [...] 2. A crime (such as driving a stolen vehicle) that continues over an extended period.[1702]

(b) Is direct and public incitement to commit genocide a continuing crime?

722. The Appeals Chamber considers that the IMT decision in *Streicher* sheds no light on this question, as the IMT did not rule on the question of continuity. Nor does the jurisprudence of the Tribunal appear to have addressed this issue. In particular, the Trial Chamber in the *Akayesu* case stated that the crime of direct and public incitement to commit genocide is an inchoate offence, but did not consider whether it was a continuing crime.[1703]

723. The Appeals Chamber is of the opinion that the Trial Chamber erred in considering that incitement to commit genocide continues in time "until the completion of the acts contemplated".[1704] The Appeals Chamber considers that the crime of 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. The Appeals Chamber accordingly holds that the Trial Chamber could not have jurisdiction over acts of incitement having occurred before 1994 on the grounds that such incitement continued in time until the commission of the genocide in 1994.

724. The Prosecutor submits, however, that the *Kangura* articles and the RTLM broadcasts constituted one continuing incitement to commit genocide, and that the Trial Chamber could therefore convict the Appellants on the basis of the totality of the articles published in *Kangura*, and of the RTLM broadcasts, even those prior to 1994. The Appeals Chamber is not convinced by this argument. It recalls that, even where offences may have commenced before 1994 and continued in 1994, the provisions of the Statute on the temporal jurisdiction of the Tribunal mean that a conviction may be based only on criminal conduct having occurred during 1994.[1705] Thus, even if it could be concluded that the totality of the articles published in *Kangura* and of the RTLM broadcasts constituted one continuing incitement to commit genocide (a question that the Appeals Chamber does not consider necessary to decide here), the fact would remain that the Appellants could be convicted only for acts of direct and public incitement to commit genocide carried out in 1994.

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[1701] In this respect, see Black's Law Dictionary (8th ed., 2004), definition of "inchoate offense" ("A step toward the commission of another crime, the step in itself being serious enough to merit punishment").
[1702] Bryan A. Garner (ed.), Black's Law Dictionary, 8th ed. (Saint Paul, Minnesota: Thomson West Publishing Company, 2004), p. 399.
[1703] *Akayesu* Trial Judgement, paras. 549-562.
[1704] Judgement, para. 1017.
[1705] See *supra* VIII. B. 4.

725. The Appeals Chamber would, however, add that, even if a conviction for incitement could not be based on any of the 1993 RTLM broadcasts, the Trial Chamber could have considered them, for example as contextual elements of the 1994 broadcasts.[1706] Thus the Appeals Chamber is of the opinion that the 1993 broadcasts could explain how the RTLM listeners perceived the 1994 broadcasts and the impact these broadcasts may have had. Similarly, the pre-1994 *Kangura* issues were not necessarily inadmissible, since they could be relevant and have probative value in certain respects.

(c) The acts constituting direct and public incitement to commit genocide must be specified

726. The Appeals Chamber agrees with Appellant Nahimana that an accused cannot be convicted simply on the basis of "programming". As noted *supra*, it appears from the *travaux préparatoires* of the Genocide Convention that only specific acts of direct and public incitement to commit genocide were sought to be criminalized and not hate propaganda or propaganda tending to provoke genocide.[1707] Thus the Appeals Chamber is of the opinion that the acts constituting direct and public incitement to commit genocide must be clearly identified.

727. In the present case, it is not certain that the Trial Chamber convicted Appellant Nahimana on the basis of "programming". The Trial Chamber does not appear to have considered that the entirety of RTLM broadcasting constituted direct and public incitement to commit genocide, but rather that certain broadcasts did.[1708] However, the Appeals Chamber agrees with the Appellant that the Trial Chamber should have identified more clearly all of the broadcasts which, in its opinion, constituted direct and public incitement to commit genocide. Thus the Trial Chamber erred in this respect.

## C. Application of the legal principles to the facts of the case

728. The Appellants contend that the Trial Chamber erred in convicting them of direct and public incitement to commit genocide.[1709] The Appeals Chamber will now consider whether the Trial Chamber could find that certain RTLM broadcasts in 1994, statements made by some CDR members and *Kangura* articles published in 1994 constituted direct and public incitement to commit genocide. The issue of each Appellant's responsibility is addressed in the following section.

### 1. The RTLM broadcasts

(a) Submissions of the Parties

729. Appellants Nahimana and Barayagwiza contend that RTLM broadcasts prior to 6 April 1994 did not constitute direct and public incitement to commit genocide.[1710]

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[1706] See *supra* VIII. B. 3.
[1707] See *supra*, footnote 1658.
[1708] See Judgement, para. 1032 (referring to the broadcast of 4 June 1994 as "illustrative of the incitement engaged in by RTLM"). See also para. 483 (referring to the broadcast of 13 May 1994 and the one of 5 June 1994 as explicitly calling for extermination).
[1709] Nahimana Appellant's Brief, paras. 186-536; Barayagwiza Appellant's Brief, paras. 262-270; Ngeze Appellant's Brief, paras. 217-285, Ngeze's Brief in Reply, paras. 81-82.
[1710] Nahimana Appellant's Brief, paras. 217-232; Barayagwiza Appellant's Brief, para. 263.

730. Appellant Nahimana first argues that the historical and political context precludes considering the broadcasts made prior to 6 April 1994 as calls for the extermination of the Tutsi population: the editorial policy prior to 6 April 1994 was not to target Tutsi civilians for extermination but to denounce in a time of war the actions and intentions of the RPF.[1711] He further argues that an unbiased analysis of the 18 excerpts from broadcasts made before 6 April 1994, which were admitted by the Judges as evidence against the Accused, does not reveal any utterance amounting to incitement to hatred and violence against the Tutsi population and much less direct and public incitement to commit genocide.[1712] He further contends that RTLM journalists' statements were ambiguous (in particular in the use of the terms *Inyenzi* and *Inkotanyi*) and could not therefore constitute direct incitement to commit genocide against the Tutsi.[1713]

731. Appellant Nahimana argues that the recordings of RTLM broadcasts constitute the "best evidence" to assess the existence of the crime of incitement, that their huge volume, covering the entire period of activity of Radio RTLM, reinforces their probative value and that the testimonies of Prosecution witnesses are not sufficiently reliable and precise for making an assessment of the actual content of the broadcasts, let alone overturning the conclusions emerging from the recordings themselves.[1714] That said, Appellant Nahimana contends that a significant number of Prosecution witnesses, including Witnesses Nsanzuwera and GO, confirmed that up to 6 April 1994 there was no call for killings,[1715] and that Witnesses AGR and Ruggiu also confirmed that prior to 6 April 1994 the terms *Inyenzi* and *Inkotanyi* referred only to RPF combatants and not to the Tutsi population as a whole.[1716] Appellant Nahimana further contends that Expert Witness Des Forges had no competence in media issues, particularly for linguistic reasons; her evidence on the meaning and scope of the broadcasts is simply "hearsay", the source of which is not specified.[1717] He also argues that Expert Witness Ruzindana did not have the requisite independence for his testimony to be deemed credible, since he had been employed by the Prosecutor to select, transcribe and translate broadcasts intended to bolster the Prosecution case.[1718]

732. Appellant Barayagwiza adds that the Trial Chamber erred in concluding that, after 6 April 1994, RTLM entered systematically into a process of incitement "to take action against the enemy and enemy accomplices, equated with the Tutsi population",[1719] since no

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[1711] *Ibid.*, paras. 217-220. In paragraph 198, the Appellant adds that "the fact of targeting individuals by name and identifying them by name on the basis of perceived membership of a rebellion is insufficient to establish the crime, even though the ethnic identity of the individual in question would constitute a determining factor in disclosure of his identity".

[1712] Nahimana Appellant's Brief, paras. 222-224. See also paras. 194-196. Appellant Nahimana further submits that it has not been established that RTLM broadcasts prior to 6 April 1994 resulted in attacks against Tutsi (Nahimana Appellant's Brief, paras. 233-241). However, as explained above (*supra* XIII. A.), direct and public incitement to commit genocide is punishable as such, and it is not necessary to show that the speech in question substantially contributed to the commission of genocidal acts.

[1713] Nahimana Appellant's Brief, paras. 203-205. See also Barayagwiza Appellant's Brief, para. 264, and Ngeze Appellant's Brief, para. 228.

[1714] *Ibid.*, paras. 225-227.

[1715] *Ibid.*, paras. 229-230.

[1716] *Ibid.*, para. 228.

[1717] *Ibid.*, para. 231.

[1718] *Ibid.*, para. 232.

[1719] Barayagwiza Appellant's Brief, para. 265.

evidence was adduced that RTLM journalists directly and specifically equated the Tutsi with the enemy and that the terms *Inyenzi* and *Inkotanyi* varied according to the context.[1720] In particular, Appellant Barayagwiza argues that the broadcast of 4 June 1994 (cited by the Trial Chamber as an example of direct and public incitement to commit genocide) did not call on people to kill the Tutsi, but rather to take action against those whom RTLM perceived as enemies.[1721] Appellant Barayagwiza further contends that the Trial Chamber failed to take into account the fact that "these broadcasts were made at a time when the country was under attack, and [that] it could therefore be expected that their virulence would increase in response to fear of what the consequence would be if the RPF invasion were successful".[1722]

733. The Prosecutor responds that the testimonies of Witnesses Nsanzuwera and GO as well as others show that genocidal discourse was the substance of broadcasts made by RTLM from its inception.[1723] He argues that it was within the Trial Chamber's discretion to admit Expert Witness Des Forges' evidence and, give it such probative weight as it deemed appropriate, recalling that the Trial Chamber has a wide discretion in admitting hearsay evidence.[1724] He argues that Alison Des Forges had proven expertise in the study of the Rwandan conflict and knew from her personal experience that the "RTLM had an enormous impact in encouraging the killing of the Tutsis and of others who might support and protect the Tutsis during this genocide".[1725] The Prosecutor further submits that Appellant Nahimana failed to adduce any evidence to show that Expert Witness Ruzindana's testimony lacked credibility and was unreliable.[1726]

734. The Prosecutor does not respond directly to Appellant Barayagwiza's contention that RTLM broadcasts after 6 April 1994 were not direct and public incitement to commit genocide, but submits elsewhere in his Respondent's Brief that RTLM broadcasts both before and after 6 April 1994 incited the population to take action against the Tutsi.[1727]

(b) Broadcasts prior to 6 April 1994

735. As stated above, the Trial Chamber did not clearly identify all broadcasts which it deemed constituted direct and public incitement to commit genocide, but merely mentioned one broadcast after 6 April 1994 as an example of this crime.[1728] Paragraph 486 of the Judgement – in which the Trial Chamber found that: "After 6 April 1994, the virulence and the intensity of RTLM broadcasts propagating ethnic hatred and calling for violence increased" – could give the impression that the Trial Chamber found that it was only from 6 April 1994 that RTLM incited the population directly and publicly to commit genocide. On the other hand, this same excerpt – notably read in the light of paragraphs 473 to 480, 487 and 949 of the Judgement – clearly suggests that RTLM was already calling for violence

[1720] *Ibid.*, paras. 265-267.
[1721] *Ibid.*, para. 265.
[1722] *Ibid.*, para. 267.
[1723] Respondent's Brief, para. 326. See also *ibid.*, para. 397 ("Both the pre and the post 6 April 1994 RTLM broadcasts, explicitly identified the enemy as the Tutsi, or equated the RPF (*Inkotanyi* or *Inyenzi*) with all Tutsis, and called upon the public to take action").
[1724] Respondent's Brief, para. 328.
[1725] *Ibid.*, para. 329.
[1726] *Ibid.*, para. 330.
[1727] See, for example, Respondent's Brief, para. 397.
[1728] Judgement, paras. 1031-1032, referring to the broadcast of 4 June 1994.

against the Tutsi prior to 6 April 1994, which could constitute direct and public incitement to commit genocide.

736. The vagueness of the Judgement, in itself an error on the part of the Trial Chamber,[1729] compels the Appeals Chamber to examine the broadcasts between 1 January and 6 April 1994 referred to in the Judgement in order to determine whether one or more of them directly incited the commission of genocide. As recalled in the Introduction,[1730] when the Trial Chamber errs in law, the Appeals Chamber must determine whether it is itself satisfied beyond reasonable doubt in regard to the disputed finding before it can affirm it on appeal.

(i) Historical context and editorial policy up to 6 April 1994

737. The Appeals Chamber will begin by considering Appellant Nahimana's submission that the historical and political context shows that the broadcasts prior to 6 April 1994 did not call for the extermination of the Tutsi population but rather denounced the RPF's actions and intentions. To this end, the Appellant refers back to the arguments in his Closing Brief at trial.[1731] The Appeals Chamber first recalls that an appellant's brief must contain all his submissions.[1732] However, even if the submissions in Nahimana's Closing Brief at trial were to be considered, they would not suffice to show that the Trial Chamber erred: an appellant may not merely reiterate arguments that were not accepted by the Trial Chamber; he must demonstrate the error committed by the Trial Chamber. In any event, the Appeals Chamber notes that the Trial Chamber did take into account the historical and political context and accepted that certain RTLM broadcasts expressed a legitimate fear in the face of the armed insurrection by the RPF.[1733]

(ii) The broadcasts

738. The Appeals Chamber notes that Appellant Nahimana's arguments as to the content and meaning of the broadcasts prior to 6 April 1994 are only developed in Annex 5 of his Appellant's Brief.[1734] As already explained, those arguments should have been made in the body of the Brief.[1735] The Appeals Chamber will therefore disregard them.

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[1729] As recalled in the *Naletilić and Martinović* Appeal Judgement, paragraph 603, and in the *Limaj et al.* Appeal Judgement, paragraph 81, a trial judgement must be sufficiently reasoned to allow the parties to exercise their right of appeal and the Appeals Chamber to assess the Trial Chamber's conclusions.

[1730] See *supra* I. E.

[1731] See Nahimana Appellant's Brief, para. 220, referring to pp. 239-244 and 380-388 of Nahimana's Closing Brief.

[1732] See Practice Directions on Formal Requirements for Appeals from Judgement, para. 4. An appellant may not circumvent the provisions regarding the length of briefs on appeal by incorporating arguments made in other documents (Practice Direction on the Length of Briefs and Motions on Appeal, para. 4 by analogy).

[1733] See, for example, Judgement, para. 468.

[1734] Nahimana Appellant's Brief, para. 224, referring to Annex 5 of the same brief. The Appellant refers also to pp. 231-244, 380-388 of his Closing Brief before the Trial Chamber.

[1735] The Appeals Chamber recalls that annexes to an appeal brief cannot contain submissions, but only "references, source materials, items from the record, exhibits, and other relevant, non-argumentative material": Practice Direction on the Length of Briefs and Motions on Appeal, para. 4. See Order Expunging from the Record Annexures "A" Through "G" of Appendix "A" to the Consolidated Respondent's Brief Filed on 22 November 2005, 30 November 2005. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on the Motion to Strike Defence Brief in Reply and Annexes A-D, 7 June 2007, paras. 6, 8-11.

739. The Appeals Chamber would begin by pointing out that the broadcasts must be considered as a whole and placed in their particular context. Thus, even though the terms *Inyenzi* and *Inkotanyi* may have various meanings in various contexts (as with many words in every language), the Appeals Chamber is of the opinion that it was reasonable for the Trial Chamber to conclude that these expressions could in certain cases be taken to refer to the Tutsi population as a whole.[1736] The Appeals Chamber further considers that it was reasonable to conclude that certain RTLM broadcasts had directly equated the Tutsi with the enemy.[1737]

740. The Judgement specifically considers the following broadcasts made between 1 January and 6 April 1994:

- The broadcast of 1 January 1994[1738]

741. This broadcast is referred to in paragraphs 369 and 370 of the Judgement. The Trial Chamber found that this RTLM broadcast "heated up heads".[1739] The Appeals Chamber agrees with the Trial Chamber: the broadcast of 1 January 1994 encouraged ethnic hatred. The Appeals Chamber notes that the broadcast also wanted to "warn" the Hutu majority against an impending "threat". The implicit message was perhaps that the Hutu had to take action to counter that "threat". However, in the absence of other evidence to show that the message was actually a call to commit acts of genocide against the Tutsi, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.

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[1736] For example, the broadcast of 5 January 1994, extracts from which are cited below in footnote 1740 (see also Judgement, paras. 351, 355 and 471) and those of 30 November 1993 (Exhibit C7, CD 104, K0159514, cited in paragraph 358 of the Judgement: "Earlier you heard an *Inkotanyi* woman who telephoned to insult me. You heard how she warned me, but I cannot stand the atrocities committed by the *Inkotanyi*. They are people like everyone else. We know that most of them are Tutsi and that not all Tutsis are bad. And yet, the latter rather than help us condemn them, support them.") and 1 December 1993 (Exhibit C7, CD 104, C5/K95, RTLM 0142, K0159515, cited in paragraph 359 of the Judgement: "*Inkotanyi* is an organization of refugees who left in 1959 and others even following that. But it is mainly an ethnic organization") clearly equated the Tutsi with *Inkotanyi*.

[1737] See Judgement, para. 362 (broadcast of 1 February 1994, extracts from which are cited below in footnote 1742, where Kantano Habimana stated that "Tutsis and the RPF are the same"), paras. 369-370 (broadcast of 1 January 1994, extracts from which are cited below in footnote 1738, where Kantano Habimana presented the Tutsi as enemies of the majority people, *i.e.* the Hutu).

[1738] The Judgement cites the following excerpt from Exhibit P36/38D, pp. 12 -13:

> Very small children, Tutsi small children came and said: "Good morning Kantano. We like you but do not heat up our heads." I split my sides with laughter and said: "You kids, how do I heat up your heads?" They said: "You see, we are few and when you talk of Tutsis, we feel afraid. We see that CDR people are going to pounce on us. Leave that and do not heat up our heads."
>
> You are really very young... That is not what I mean. However, in this war, in this hard turn that Hutus and Tutsis are turning together, some colliding on others, some cheating others in order to make them fall fighting... I have to explain and say: "This and that...The cheaters are so-and-so..." You understand... If Tutsis want to seize back the power by tricks... Everybody has to say: "Mass, be vigilant... Your property is being taken away. What you fought for in '59 is being taken away."... So kids, do not condemn me. I have nothing against Tutsis, or Twas, or Hutus. I am a Hutu but I have nothing against Tutsis. But in this political situation I have to explain: "Beware, Tutsis want to take things from Hutus by force or tricks." So, there is not any connection in saying that and hating the Tutsis. When a situation prevails, it is talked of.

[1739] Judgement, para. 370.

- The broadcast of 5 January 1994[1740]

742. This broadcast is referred to in paragraphs 351 to 356, 471 and 472 of the Judgement. The Trial Chamber found that the broadcast was an "example of inflammatory speech", that the journalist's obvious intention "was to mobilize anger against the Tutsis" and to make fun of them.[1741] However, the broadcast contains no direct and public incitement to commit genocide against the Tutsi.

- The broadcast of 1 February 1994[1742]

743. This broadcast is referred to in paragraph 362 of the Judgement. Even if the broadcast equated the Tutsi with the RPF, it was not a direct and public incitement to commit genocide against the Tutsi.

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[1740] The Judgement cites the following excerpt from Exhibit 1D9, pp. 3354 *bis*-3352 *bis*, p. 3347 *bis*

> The *Inkotanyi* said, "Kantano hates the *Inkotanyi* so much; he hates the Tutsi. We really want him. We must get that Kantano of RTLM. We must argue with him and make him change his mind. He has to become a partisan of the *Inkotanyi* ideology." All the *Inkotanyi* wanted to see that Hutu who "hates the Tutsi." I do not hate the Tutsi! I do not think it is their real opinion. It is not. Why should I hate the Tutsi? Why should I hate the *Inkotanyi*? The only object of misunderstanding was that the *Inkotanyi* bomb shelled us. They chased us out of our property and compelled us to live at a loss on wastelands like Nyacyonga. That was the only reason for the misunderstanding. There is no reason for hating them anymore. They have now understood that dialogue is capital. They have given up their wickedness and handed in their weapons. . .
>
> Then I met Dr. Rutaremara Tito.. . That tall Tutsi, from those species commonly called "prototypes", that man from Murambi is one of those haughty men who would say: "Shehe yewe sha!" [Hey, small Sheikh!]. . . Then he [Rutaremara] asked me to share a glass of beer with him. I briefed him on the situation here on our side. Their hotel was full of *Inkotanyi* [males] and *Inkotanyikazi* [females]. . . It was a big coming and going crowd of drinking people. Most of the people were drinking milk... [inaudible] Some drank milk because they simply had some nostalgia of it. It is surprising to see someone drinking 2 or 3 liters of Nyabisindu or Rubilizi dairy and so forth. There should have been a shortage of milk in the dairies. Someone wrote to me: "Please, help! They are taking all the milk out of the dairy!" I saw this myself. They hold a very big stock of milk.
>
> You can really feel that they want also to get to power. They want it [...]
>
> He (Rutaremara) thought that his ideas could not be transmitted on RTLM. I want to prove him the contrary. An individual's ideas or an *Inkotanyi's* ideas can be transmitted on RTLM. Yes. They are also Rwandans. Their ideas would at least be known by other people. If we do not know their ideas, we will not know them either [...]
>
> I hope that he now understood that even the *Inkotanyi* can speak on our radio. We do not want anybody to be silenced. Even the *Inkotanyi* can speak on our radio...
>
> So, those who think that our radio station sets people at odds with others will be amazed. You will find out that you were wrong. At the end, it will prove to be the mediator of people. It is that kind of radio that does not keep any rancor. Even its journalists do not have any ill feelings. So, the truth is said in jokes. It is not a radio to create tension as it is believed to. Those who believe [sic] that it "heats up heads" are those who lost their heads. They cannot keep on telling lies.

[1741] Judgement, para. 471.

[1742] The Judgement cites the following excerpt from Exhibit P36/44C:

> You cannot depend on PL party Lando. PL Lando is Tutsi and Tutsis and the RPF are the same.

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- The broadcast of 14 March 1994[1743]

744. This broadcast is discussed in paragraphs 377 to 379 and 477 of the Judgement. The broadcast named a person said to be an RPF member and his family members. The broadcast did not directly call on anyone to kill the children, although it was perhaps an implicit call to do so. However, in the absence of other evidence to that effect, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast directly and publicly incited the commission of genocide.

- The broadcast of 15 March 1994[1744]

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[1743] The Judgement cites the following extracts from Exhibit P36/54B: (The French translation of the full text of this broadcast (Exhibit P36/54E) was admitted into evidence by Trial Chamber Decision of 3 June 2003.)

> At RTLM, we have decided to remain vigilant. I urge you, people of Biryogo, who are listening to us, to remain vigilant. Be advised that a weevil has crept into your midst. Be advised that you have been infiltrated, that you must be extra vigilant in order to defend and protect yourself. You may say: "Gahigi, aren't you trying to scare us?" This is not meant to scare you. I say that people must be told the truth. That is useful, a lot better than lying to them. I would like to tell you, inhabitants of Biryogo, that one of your neighbors, named Manzi Sudi Fadi, alias Bucumi, is no longer among you. He now works as a technician for Radio Muhabura. We have seized a letter he wrote to Ismael Hitimana, alias Safari,. . . heads a brigade of *Inkotanyi* there the [sic] in Biryogo area, a brigade called *Abatiganda*. He is their coordinator. It's a brigade composed of *Inkotanyi* over there in Biryogo.
>
> Our investigations indicate that brigades like this one exist in other parts of Kigali. Those living in the other areas of Kigali must also be vigilant. But, for those who may be inclined to think that this is not true - normally, I'm not supposed to read this letter on RTLM airwaves, because we respect the confidentiality of those documents – but let me tell you that in his letter - I'll read you a few excerpts just to prove that the letter is not something I made up – Manzi Sudi Fadi, alias Bicumi Higo, wrote: "The young people within *Abatiganda* brigade, I, once again, salute you, ... you the young people who aspire for change in our country, and who have come together in the *Inkotanyi* RPF family, I say to you: "Love one another, be ambitious and courageous.'" He asks: "How are you doing in Biryogo?"... Such is the greeting of Manzi Sudi Fadi, alias Bicumbi to the young members of the brigade in Biryogo. As you can see, the brigade does exist in the Biryogo area. You must know that the man Manzi Sudi is no longer among you, that the brigade is headed by a man named Hitimana Ismaël, coordinator of the *Abatiganda* brigade in Biryogo. The Manzi Sud also wrote: "Be strong. I think of you a great deal. Keep your faith in the war of liberation, even though there is not much time left. Greetings to Juma, and Papa Juma. Greetings also to Espérance, Clarisse, Cintré and her younger sister, ... Umutoni".

[1744] The Judgement cites the following excerpt from Exhibit C7, CD 126, K0146968-69, translation from French:

> But in Bilyogo I carried out an investigation, there are some people allied with the *Inkotanyi*, the last time, we caught Lt Eric there, I say to him that if he wants, that he comes to see where his beret is because there is even his registration, we caught him at Nyiranuma's house in Kinyambo. There are others who have become *Inkotanyi*, Marc Zuberi, good day Marc Zuberi (he laughs ironically), Marc Zuberi was a banana hauler in Kibungo. With money from the *Inkotanyi* he has just built himself a huge house there, therefore he will not be able to pretend, only several times he lies that he is *Interahamwe*; to lie that you are *Interahamwe* and when the people come to check you, they discover that you are *Inkotanyi*. This is a problem, it will be like at Ruhengeri when they (*Inkotanyi*) came down the volcanoes taking the names of the CDR as their own, the population welcomed them with joy believing that it was the CDR who had come down and they exterminated them. He also lies that he is *Interahamwe* and yet he is *Inkotanyi*, it's well-

745. This broadcast is discussed in paragraphs 375, 376 and 474 of the Judgement. The Trial Chamber found that this broadcast named Tutsi civilians not because they were RPF members or because there were reasons to believe so, but simply on the basis of their ethnicity.[1745] The Appeals Chamber notes the following statements from the broadcast: "How does he manage when we catch his colleague *Nkotanyi* Tutsi? Let him express his grief". Those statements were perhaps intended as an incitement to violence against the Tutsi. However, in the absence of more precise evidence to show that that was the case, the Appeals Chamber cannot conclude beyond reasonable doubt that this was a direct and public incitement to commit genocide.

- The broadcast of 16 March 1994[1746]

746. This broadcast is discussed in paragraphs 371, 372 and 473 of the Judgement. The Trial Chamber, after initially finding that there was nothing to support the view that the term *Inkotanyi* as cited in the broadcast referred to the Tutsi as a whole, even though that might be the case in other broadcasts,[1747] later stated the following:

> Although some of the broadcasts referred to the *Inkotanyi* or *Inyenzi* as distinct from the Tutsi, the repeated identification of the enemy as being the Tutsi was effectively conveyed to listeners, as is evidenced by the testimony of witnesses. Against this backdrop, calls to the public to take up arms against the *Inkotanyi* or *Inyenzi* were interpreted as calls to take up arms against the Tutsi. Even before 6 April 1994, such calls were made on the air, not only in general terms, such as the broadcast by Valerie Bemeriki on 16 March 1994, saying "we shall take up any weapon, spears, bows" [...]

At first sight, the Trial Chamber's findings may appear contradictory. However, the Appeals Chamber understands that what the Trial Chamber meant was that, if the broadcast of 16 March 1994 were to be taken in isolation, it could not be concluded that the term *Inkotanyi* referred to the Tutsi as a whole; when other broadcasts were taken into account as contextual

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> known. How does he manage when we catch his colleague *Nkotanyi* Tutsi? Let him express his grief.
>
> Let's go to Gitega, I salute the council, let them continue to keep watch over the people because at Gitega there are many people and even Inkotanyi. There is even an old man who often goes to the CND, he lives very close to the people from MDR, near Mustafa, not one day passes without him going to the CND, he wears a robe, he has an eye nearly out of its socket, I do not want to say his name but the people of Gitega know him. He goes there everyday and when he comes from there he brings news to Bilyogo to his colleague's house, shall I name them? Gatarayiha Seleman's house, at the house of the man who limps "Ndayitabi".

[1745] Judgement, paras. 376 and 474.

[1746] The Judgement cites the following excerpt from Exhibit P36/60B:

> We know the wisdom of our armed forces. They are careful. They are prudent. What we can do is to help them whole-heartedly. A short while ago, some listeners called to confirm it to me saying: 'We shall be behind our army and, if need be, we shall take up any weapon, spears, bows'. ...Traditionally, every man has one at home, however, we shall also rise up. Our thinking is that the Inkotanyi must know that whatever they do, destruction of infrastructure, killing of innocent people, they will not be able to seize power in Rwanda. Let them know that it is impossible.They should know, however, that they are doing harm to their children and grand-children because they might one day have to account for those actions.

[1747] Judgement, para. 372.

background (those naming the enemy as the Tutsi or equating the *Inkotanyi* and *Inyenzi* with the Tutsi population), the broadcast of 16 March 1994 could in fact be understood as a call to take up arms against the Tutsi. However, the Appeals Chamber is not satisfied that this was the only reasonable interpretation of the broadcast: it is possible the journalist was calling for arms to be taken up only against the RPF. The Appeals Chamber cannot therefore conclude beyond reasonable doubt that the broadcast represented a direct and public incitement to commit genocide.

- The broadcast of 23 March 1994[1748]

747. This broadcast is referred to in paragraphs 361 and 362 of the Judgement. The Trial Chamber noted that this broadcast warned RTLM listeners about a long-standing plan in process of execution by the RPF. The Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide.

- The broadcast of 1 April 1994[1749]

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[1748] The Judgement cites the following excerpt from Exhibit P36/73B:

> All this is part of an existing plan, as Kagame himself said, even if the armies are merged, the *Inkotanyi* still have the single objective: to take back the power that the Hutus seized from them the Tutsis in 1959; take back power and keep it for as long as they want. They tell you that the transitional period should serve as a lesson to us.

[1749] The Judgement cites the following excerpt from Exhibit P103/189B, K0165912-13:

> Let us now talk about the death of Katumba, which has sparked off a lot of concern... It is being reported that yesterday, Kigali town came to a stand-still because of his death... Apart from misleading public opinion, was it only Katumba who died in this town Kigali? Or wasn't it, on the other hand, because of the death of a Tutsi called Maurice? Surely, was it the death of Katumba, a Hutu, which caused the stoppage of all activities in Kigali? Can't such a situation be brought about by the death of a Tutsi? Let them not deceive anybody. Are Katumba's assassins not the same people who killed Maurice to cause confusion, that is to say, in order to give the impression that a Tutsi and a Hutu lost their lives in the same circumstances? We are not stupid. Let them not spread confusion, because from the rumours I have just received, Dr. André Nyirasanyiginya (*sic*), a radiologist at King Fayçal Hospital, the most modern hospital in the country, ...he also works at the CHK on part-time basis,...huh...people are saying: "From what we know about him, ha!, he has never stopped saying,... even when he was still in Brussels, that he would support the *Inkotanyi*. Let us assume that those are rumours, but if it is true, let his neighbours telephone us again and tell us that the doctor and his family are no longer in his house. Huh...Dr. Pierre Iyamuremye is a native of Cyangugu... huh...his mother is a Hutu and the father is a Tutsi, not so? But then (laughter)... he works at the ENT (Ear, Nose & Throat) Department of CHK (laughter)... As a result, the flight of people who were in the habit of talking about Katumba, could serve as a clue in the investigation to find the real assassin. The same inquiry could help reveal whether the doctors, in case some people can confirm that Katumba used to disturb the doctors in their duties – for Katumba was a driver...huh... in the Ministry of Health. If it is revealed that the doctors used to talk of him saying: "this CDR bastard who is disturbing us." Therefore, if they indeed ran away because of Katumba's death, then they are the ones who know the cause of the man's death and who did it, huh...(laughter).
>
> So, my dear André, if you are within the CND and are listening to RTLM, you should know that you are to be held responsible for Katumba's death, because you were not on good terms with each other and everyone at your work place is aware of that. If, as a result of that, you fled,...but if at all you are at home, ring us or come here and ask us to allow

748. This broadcast is referred to in paragraphs 381 to 383 and 474 of the Judgement. The Trial Chamber found that the broadcast falsely accused certain doctors (one of whom was clearly a Tutsi[1750]) of the murder of a Hutu called Katumba and added that it "note[d] the request that if rumours of Dr. Ngirabanyiginya's support for the *Inkotanyi* were true, 'let his neighbours telephone us again and tell us that the doctor and his family are no longer in his house', a request, in the Chamber's view, that action be taken against the doctor and his family".[1751] In the Appeals Chamber's view, the Trial Chamber failed to show the evidence on which it based its assessment, and its findings thus appear speculative. In the absence of other evidence that this broadcast was indeed an incitement to kill designated individuals principally because they were of Tutsi ethnicity, the Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide.

- The broadcast made between 1 and 3 April 1994[1752]

749. This broadcast is discussed in paragraphs 380 and 381 of the Judgement. It is possible that the persons accused in the broadcast of being *Inkotanyi* accomplices were so accused simply because of their Tutsi ethnicity and that the broadcast's real message was to call for their murder (which would amount to direct and public incitement to commit genocide). However, in the absence of evidence that these individuals had been falsely accused, and that the real reason for their being singled out was their ethnicity, the Appeals Chamber cannot conclude beyond reasonable doubt that this broadcast was a direct and public incitement to commit genocide.

- The broadcast of 3 April 1994[1753]

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> you use our radio to clear your name by saying that you and Katumba were on good terms and declare personally that you, Doctor André Iyamuremye, are physically present.
>
> I meant Dr. Ngirabanyiginya. As for Iyamuremye, his first name is Pierre. Hum! Both of them had personal problems with Katumba and it seems they are both on the run. Therefore, if they have left, then they have automatically betrayed themselves. They have betrayed themselves and as a result, the circumstances surrounding Katumba's death seem to be getting clearer.

[1750] Dr. Pierre Iyamuremye. Dr. André Nyirasanyiginya's (*sic*) ethnicity was not explicitly mentioned but the RTLM journalist appears to suggest his Tutsi ethnicity through a number of references (for example, the suggestion that he had always called himself "an *Inkotanyi* supporter" and the suggestion that he was at the "CND").

[1751] See Judgement, para. 383.

[1752] The Judgement cites the following excerpt from Exhibit C7, CD91, K0198752, translation from French:

> There are the people that we see collaborating with the *Inkotanyi*, we have made a note of them, here are the people that we see collaborating with the *Inkotanyi*: Sebucinganda from Butete in Kidaho, Laurence the woman from Gakenyeri, the named Kura from Butete. The councillor from Butete also collaborates with the *Inkotanyi*, and Haguma an *Inkotanyi* who has an inn in the Kidaho commune in the house of the woman from Gakenyeri and she who speaks English with the people from UNAMIR to disconcert the population, it's Haguma who speaks English. And the young people of Gitare sector, known as Rusizi, and the young people of Burambi, it seems that they know each other.

[1753] The Judgement cites the following excerpt from Exhibit P103/192D:

> There is a small group in Cyangugu, a small group of Tutsis who came from all over, some came from Bujumbura. Yesterday, 2 April 1994, beginning at 10:00 a.m., at the Izuba hotel, I said Izuba. I meant the Ituze hotel, an important meeting took place at the Ituze

750. This broadcast is discussed in paragraphs 384 to 387 and 476 of the Judgement. The Trial Chamber noted that reference was made in this broadcast to a "meeting of Tutsis", but that "other than the ethnic references, no indication is given in the broadcast as to the basis for concluding that the meeting was an RPF meeting".[1754] As stated above,[1755] it does not appear that there was any basis for accusing the named persons of meeting to support the RPF's objectives. The broadcast perhaps implicitly called for the murder of the named persons. However, in the absence of any other evidence to show that this was the true message, the Appeals Chamber cannot conclude beyond reasonable doubt that the broadcast was a direct and public incitement to commit genocide.

- The broadcast of 3 April 1994[1756]

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hotel, it was the venue of an important meeting of Tutsis – some of whom had come from Bujumbura – under the chairmanship of the Medical Director of the Cyangugu regional health district. He was the one who chaired the meeting, something he does not deny... in the company of Emilien, hmm, yes, he was with Emilien, Emilien came secretly from Bujumbura. ... The people of Cyangugu came to know about him recently before he fled to Burundi. He is now back, and is in Cyangugu.

He should deny that he was not with Venuste, Kongo, Kongo, son of Kamuzinzi, and some people claim that he is a Hutu. He should come out and say that he was not with them.

These people were gathered to lend their support to the RPF's objective, hmm. They were with other people, many of them, and I can name them: Karangwa, the financial comptrollers and tax inspectors. Hum!

These natives of Cyangugu tell me, "Tell those people not to tarnish our region. They continue to tarnish our region by organizing meetings. They should look for another venue for their meetings, they should go to Bujumbura or elsewhere, but not Cyangugu..... ».

If I name the people who informed me about that, there is a danger of setting Cyangugu ablaze. That's not good, it's not good but the people are vigilant.

[1754] Judgement, para. 387.

[1755] See *supra* XII. B. 3. (b) (i) a.

[1756] The Judgement cites the following excerpt from Exhibit P103/192B:

They want to carry out a little something during the Easter period. In fact, they're saying: "We have the dates hammered out." They have the dates, we know them too.

They should be careful, we have accomplices among the RPF. . . who provide us with information. They tell us, "On the 3rd, the 4th and the 5th, something will happen in Kigali city." As from today, Easter Sunday, tomorrow, the day after tomorrow, a little something is expected to happen in Kigali city; in fact also on the 7th and 8th. You will therefore hear gunshots or grenade explosions.

Nonetheless, I hope that the Rwandan armed forces are vigilant. There are Inzirabwoba [fearless], yes, they are divided into several units!. The *Inkotanyi* who were confronted with them know who they are...

As concerns the protection of Kigali, yes, indeed, we know, we know, on the 3rd, the 4th and the 5th, a little something was supposed to happen in Kigali. And in fact, they were expected to once again take a rest on the 6th in order to carry out a little something on the 7th and the 8th ... with bullets and grenades. However, they had planned a major grenade attack and were thinking: "After wrecking havoc in the city, we shall launch a large-scale attack, then..."

751. This broadcast is discussed in paragraphs 388 and 389 of the Judgement. Even if this broadcast was calculated to cause fear among the population by predicting an imminent attack by the RPF, the Appeals Chamber cannot conclude beyond reasonable doubt that it was a direct and public incitement to commit genocide.

(iii) The witness evidence

752. The Appeals Chamber notes Appellant Nahimana's argument that the recordings constitute the "best evidence" and that testimonies cannot be deemed to be sufficiently reliable and precise for making an assessment of the actual content of the broadcasts.[1757] Appellant Nahimana further argues that some Prosecution witnesses confirm that RTLM did not call for killings of Tutsi before 6 April 1994[1758] and that others confirmed that before 6 April 1994, the terms "*Inyenzi*" and "*Inkotanyi*" referred to RPF combatants and not to the Tutsi population as a whole.[1759]

753. The Appeals Chamber has already found that the broadcasts between 1 January and 6 April 1994 examined in the Trial Judgement did not directly incite the commission of genocide against the Tutsi. After examining the evidence discussed in paragraphs 434 to 485 of the Trial Judgement, the Appeals Chamber is not satisfied that the testimonies discussed are capable of showing beyond reasonable doubt that the broadcasts made between 1 January and 6 April 1994 represented a direct incitement to commit genocide against the Tutsi. Thus:

- Witness GO, whose testimony is summarized at paragraphs 435 to 438 and 455 of the Trial Judgement, asserted that "at one stage" – seemingly around the month of October 1993[1760]– "RTLM then continued to incite Rwandans",[1761] but the incitement consisted, in the witness' view, in "call[ing] the Hutus to be vigilant"[1762] and in "incit[ing] division within the population based upon ethnic differences".[1763] Moreover, the Trial Chamber did not cite from her testimony any specific example of one or more direct incitements to commit genocide broadcast by RTLM between 1 January and 6 April 1994;

- Witness FW, of whom the Trial Chamber noted at paragraph 438 of the Trial Judgement that he said that he had heard an RTLM broadcast mention "The Ten Commandments", could not date this broadcast[1764] and he did not report any other example of direct incitement to commit genocide;

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[1757] Nahimana Appellant's Brief, paras. 225-227.

[1758] *Ibid.*, paras. 229 (referring to the testimony of Witness Nsanzuwera, T. 24 April 1994 (*sic*) [2001], pp. 40-41) and 230 (referring to the testimony of Witness GO, T. 6 June 2001, pp. 35-37).

[1759] *Ibid.*, para. 228 (referring to the testimony of Witness AGR (T. 22 February 2001, pp. 119-120) and of Witness Ruggiu (T. 27 February 2002, pp. 87-88 and T. 4 March 2002, pp. 124-125)).

[1760] T. 5 April 2001, p.81, see also pp. 106-108 and p. 111.

[1761] *Ibid.*, p. 81.

[1762] *Ibid.*, p. 90, 107-109.

[1763] *Ibid.*, p. 129; see also T. 5 April 2001, p. 85, 103,159-160, 162; T. 9 April 2001, pp. 23-24, 27-28; T. 10 April 2001, pp. 118-120; T. 24 May 2001, pp. 70-72; T. 6 June 2001, p. 36. The Appeals Chamber notes that Witness GO clearly mentioned that, after 7 April 1994, RTLM broadcasts were "constantly asking people to kill other people, to look for those who were in hiding, and to describe the hiding places of those who were described as being accomplices" (T. 10 April 2001, pp. 58-61; see also T. 4 June 2001, pp. 30-31).

[1764] Judgement, para. 438; T. 1 March 2001, pp. 122-124.

10619 4s/A

- As the Trial Chamber noted at paragraph 439 of the Trial Judgement, Witness AGX indicated that RTLM "ma[de] [people] aware or, rather, to raise discord between the Hutus and the Tutsi",[1765] but there is nothing in his testimony to indicate that RTLM directly incited the commission of genocide against Tutsi between 1 January and 6 April 1994;

- Witness BI, whose testimony is discussed at paragraphs 441 to 443 of the Judgement, referred to RTLM broadcasting and stressed how the Tutsi were being identified with *Inkotanyi*.[1766] She testified that RTLM had on several occasions (in December 1993, January or February and March 1994) pointed to her as an accomplice, a "member" or "instrument" of the *Inkotanyi* and that, following this, she had been assaulted several times.[1767] However, in the absence of details regarding these broadcasts, the Appeals Chamber is unable to conclude beyond reasonable doubt that they constituted direct incitement to commit genocide. Furthermore, since Witness BI is a Hutu, calls for violence against her could not be regarded as acts of incitement to commit genocide;

- In the view of Witness Nsanzuwera, whose testimony is discussed at paragraphs 440, 444, 449 and 455 of the Trial Judgement, direct calls for killing by RTLM only started after 7 April 1994, and the previous broadcasts rather contained "messages of hatred and incitement to violence";[1768]

- The Trial Chamber noted, in paragraphs 446 to 448 of the Trial Judgement, that Witness FY had said that he "first started hearing the names of [...] persons being mentioned towards the end of March, and [he] also heard their names mentioned during April 1994".[1769] RTLM had named people suspected to be *Inkotanyi* or their accomplices, including Daniel Kabaka, a builder, a physician and a woman who worked at the Belgian Embassy. Once again, since there were no detailed particulars of what was said during these broadcasts, the Appeals Chamber cannot find beyond reasonable doubt that they constituted direct incitement to commit genocide;

- A review of the trial transcripts shows that the facts reported by Witness Kamilindi and summarized at paragraph 452 of the Judgement occurred after 6 April 1994;[1770]

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[1765] *Ibid.*, para. 439; T. 11 June 2001, p. 54 and 57; T. 14 June 2001, pp. 70-71.

[1766] T. 8 May 2001, pp. 63-65; T. 14 May 2001, pp. 126-127.

[1767] T. 8 May 2001, p. 105, see also pp. 90-95; T. 14 May 2001, pp. 151-162, 163-169. Witness BI also said that women had been assaulted in a neighborhood of Kigali *préfecture* following an RTLM broadcast which had mentioned that "they were disturbing the Hutu men" living in this neighborhood. However, the witness could not specify the date of this event (T. 14 May 2001, pp. 147-152).

[1768] T. 24 April 2001, p. 40-41. See also T. 23 April 2001, pp. 39-40, 43, 50-51; T. 24 April 2001, pp. 162-164:

> Q. : Mr. Nsanzuwera [...] would you be able to give us even one broadcast where an RTLM journalist would have asked Hutus to massacre the Tutsis before 7 April 1994?
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> A. : I spoke of incitement to hatred, and possibly to killing, and later I made a distinction between the time before April 7 and the period after April 7, which to me is a distinct period or the period before April, where there was incitement and preparations, was the period after April 7, the programs are true broadcasts in which there was call for people to be killed.

[1769] T. 9 July 2001, pp. 23; see also pp.16-18, pp. 21-23.

[1770] T. 21 May 2001, pp. 87-103.

10618bis/A

- As to the remaining evidence referred to by the Trial Chamber in paragraphs 434 to 485 of the Trial Judgement (namely the testimonies of Witnesses ABE, ABC, X, Braeckman, Dahinden and Des Forges), there is no report of any direct incitement to commit genocide by RTLM against Tutsi between 1 January and 6 April 1994.

(iv) Conclusion

754. The Appeals Chamber thus finds that, although it is clear that RTLM broadcasts between 1 January and 6 April 1994 incited ethnic hatred, it has not been established that they directly and publicly incited the commission of genocide.

(c) Broadcasts after 6 April 1994

755. Appellant Barayagwiza submits that the RTLM broadcasts made from 7 April 1994 did not amount to direct and public incitement to commit genocide against the Tutsi. The only specific argument that Appellant Barayagwiza raises is that the broadcast of 4 June 1994 could not be interpreted as a call to kill the Tutsi, because this broadcast used the term *Inkotanyi,* and that was not synonymous with Tutsi. For the reasons cited earlier,[1771] the Appeals Chamber considers that it was reasonable to find that, in certain contexts, the term *Inkotanyi* was used to refer to the Tutsi. In particular, the Appeals Chamber considers that it was reasonable to find that the broadcast of 4 June 1994, which described the *Inkotanyi* as having the physical features popularly associated with the Tutsi, equated the *Inkotanyi* with the Tutsi, and that it amounted to direct and public incitement to commit genocide against the Tutsi.[1772]

756. The Appeals Chamber further notes that, although paragraph 1032 of the Judgement only mentions the broadcast of 4 June 1994 to illustrate the incitement engaged in by RTLM, the Trial Chamber also considered that other broadcasts made after 6 April 1994 explicitly called for the extermination of the Tutsi:

> Many of the RTLM broadcasts explicitly called for extermination. In the 13 May 1994 RTLM broadcast, Kantano Habimana spoke of exterminating the *Inkotanyi* so as "to wipe them from human memory", and exterminating the Tutsi "from the surface of the earth... to make them disappear for good". In the 4 June 1994 RTLM broadcast, Habimana again talked of exterminating the *Inkotanyi*, adding "the reason we will exterminate them is that they belong to one ethnic group". In the 5 June 1994 RTLM broadcast, Ananie Nkurunziza acknowledged that this extermination was underway and expressed the hope that "we continue exterminating them at the same pace". On the basis of all the programming he listened to after 6 April 1994, Witness GO testified that RTLM was constantly asking people to kill other people, that no distinction was made between the *Inyenzi* and the Tutsi, and that listeners were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like.[1773]

These broadcasts constitute, as such, direct and public incitement to commit genocide. Appellant Barayagwiza does not raise any argument relating to them.

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[1771] *Supra* XIII. C. 1. (b) (ii).
[1772] Judgement, paras. 396 and 1032.
[1773] *Ibid.*, para. 483.

757. Regarding the assertion by Appellant Barayagwiza that "the country was under attack, and it could therefore be expected that the virulence of the broadcasts would increase in response to fear of what the consequences would be if the RPF invasion were successful",[1774] this has no impact on the finding that the RTLM broadcasts in fact targeted the Tutsi population. As the Trial Chamber noted, RTLM broadcasts exploited "the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group".[1775]

758. The Appeals Chamber finds that it has not been demonstrated that the Trial Chamber erred in considering that some of the RTLM broadcasts after 6 April 1994 called for the extermination of Tutsi[1776] and amounted to direct and public incitement to commit genocide.

2. Direct and public incitement by the CDR

759. The Trial Chamber found that CDR members had promoted the killing of Tutsi civilians (1) by the chanting of "*tubatsembatsembe*" ("let's exterminate them!") at public meetings and demonstrations; the reference to "them" was understood to mean the Tutsi population; and (2) "through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population".[1777] The Trial Chamber then found Appellant Barayagwiza guilty of direct and public incitement to commit genocide on the grounds, *inter alia*, of these factual findings.[1778] In his grounds of appeal relating to direct and public incitement to commit genocide, Appellant Barayagwiza does not directly challenge the finding that the CDR promoted the killing of Tutsi. Nevertheless, he submits that he could not be found guilty of direct and public incitement to commit genocide on the basis of acts which occurred before 1994.[1779] For the reasons given earlier, the Appeals Chamber concurs with this argument.[1780] The Appeals Chamber will now consider whether the acts cited in paragraph 1035 of the Judgement in order to convict Appellant Barayagwiza occurred in 1994.

760. The Trial Chamber found that the words "*tubatsembatsembe*" or "let's exterminate them" were chanted by CDR militants and *Impuzamugambi* during public meetings, without specifying when these meetings were held.[1781] However, it seems that the Chamber considered that these slogans were chanted both before and during 1994, as transpires from

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[1774] Barayagwiza Appellant's Brief, para. 267.

[1775] Judgement, para. 488:

> Radio was the medium of mass communication with the broadest reach in Rwanda. Many people owned radios and listened to RTLM – at home, in bars, on the streets, and at the roadblocks. The Chamber finds that RTLM broadcasts exploited the history of Tutsi privilege and Hutu disadvantage, and the fear of armed insurrection, to mobilize the population, whipping them into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group. The *Interahamwe* and other militia listened to RTLM and acted on the information that was broadcast by RTLM. RLTM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to be eliminated once and for all.

[1776] *Ibid.*, para. 486.

[1777] *Ibid.*, para. 1035.

[1778] *Idem.*

[1779] Barayagwiza Appellant's Brief, paras. 258-261.

[1780] See *supra* VIII. B. 2. and XIII. B. 2. (b) .

[1781] Judgement, para. 340.

its assessment of the evidence.[1782] Appellant Barayagwiza has failed to show that it was unreasonable to find that the words "*tubatsembatsembe*" or "let's exterminate them" were chanted by CDR militants and *Impuzamugambi* during public meetings held in 1994; this finding is therefore upheld.

761. Concerning the communiqués and other writings of the CDR which allegedly called for the killing of Tutsi, the Appeals Chamber notes that the Trial Chamber referred only to communiqués or writings that pre-dated 1994.[1783] Consequently, these communiqués and writings could not be relied on in order to find the Appellant guilty of direct and public incitement to commit genocide.

762. The Appeals Chamber will consider later in the Judgement the consequences of these findings in relation to Appellant Barayagwiza's conviction for the crime of direct and public incitement to commit genocide.[1784]

### 3. *Kangura*

#### (a) Arguments of the Parties

763. Appellant Ngeze submits that it was the exceptional events of 1994 which led to the genocide; that the genocide would still have occurred even if the articles published in *Kangura* had never existed, and that it has thus not been proved that these articles incited genocide;[1785] moreover, at the time when the genocide was being committed *Kangura* was not being published.[1786]

764. The Appellant argues that none of the *Kangura* articles considered by the Trial Chamber could constitute direct and public incitement to commit genocide.[1787] He submits, as Expert Witness Kabanda explained, that the themes of the articles published in *Kangura* consisted of: "(a) anti-Tutsi ethnic hatred; (b) the need for self-defence on the part of the majority, which was threatened by the minority; (c) the struggle against Hutu who did not tow [*sic*] the line; (d) the mobilization of the Hutu population to fight this danger";[1788] and that none of these themes "can be associated to a direct call to the extermination of the Tutsi population as required by the crime of direct and public incitement to commit genocide".[1789] He further contends that the articles cited by the Trial Chamber were ambiguous (in particular with regard to the meaning of the words *Inkotanyi* and *Inyenzi*), and that they thus could not

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[1782] See Judgement, para. 336, which mentions, *inter alia*, the testimony of Appellant Nahimana that there were complaints against the CDR at the end of 1993 and beginning of 1994 for singing a song using the word "*tubatsembatsembe*". The Appeals Chamber also notes that Witness BI, whose testimony was accepted by the Trial Chamber (Judgement, para. 465), stated that in March 1994 *Impuzamugambi* were going round everywhere singing "*tubatsembatsembe*" at the top of their voices: T. 8 May 2001, pp. 96-97, and Judgement, para. 443.

[1783] See Judgement, paras. 278-301.

[1784] See *infra* XIII. D. 2. (b) .

[1785] Ngeze Appellant's Brief, paras. 241-253.

[1786] *Ibid.*, para. 267.

[1787] *Ibid.*, paras. 258-268. In particular, Appellant Ngeze submits that the article entitled "The Appeal to the Conscience of the Hutu" and the cover of No. 26 of *Kangura* could not constitute an unequivocal call to commit genocide, Ngeze Appellant's Brief, para. 261.

[1788] Ngeze Appellant's Brief, para. 263 (references to paragraphs of the Judgement omitted).

[1789] *Ibid.*, para. 264.

constitute direct incitement to commit genocide.[1790] Finally, Appellant Ngeze contends that the Trial Chamber erred in relying on witness testimonies in order to conclude that the content of *Kangura* incited the commission of genocide.[1791]

(b) Analysis

765. The Trial Chamber found that "[m]any of the writings published in *Kangura* combined ethnic hatred and fear-mongering with a call to violence to be directed against the Tutsi population, who were characterized as the enemy or enemy accomplices".[1792] As examples, it mentioned "The *Appeal to the Conscience of the Hutu*" (published in December 1990) and the cover of *Kangura* No. 26 (November 1991), and it noted the "increased attention in 1994 issues of *Kangura* to the fear of an RPF attack and the threat that [the] killing of innocent Tutsi civilians [...] would follow as a consequence".[1793] The Trial Chamber then recognized that not all of the writings published in *Kangura* and highlighted by the Prosecutor constituted direct incitement.[1794] Finally, it considered that, as founder, owner and editor of *Kangura*, Appellant Ngeze was responsible for the content of *Kangura*, and it found him guilty of direct and public incitement to commit genocide.[1795]

766. The Appeals Chamber summarily dismisses Appellant Ngeze's argument that the genocide would have occurred even if the *Kangura* articles had never existed, because it is not necessary to show that direct and public incitement to commit genocide was followed by actual consequences.[1796] Regarding the argument that *Kangura* was not being published at the time of the genocide, this is not relevant in deciding whether the *Kangura* publications constituted direct and public incitement to commit genocide.

767. Appellant Ngeze further submits that the testimony of Expert Witness Kabanda shows that *Kangura* never made a direct call for the extermination of the Tutsi.[1797] The Trial Chamber summed up the testimony on these facts as follows:

> Having read *Kangura* in its entirety, Prosecution Expert Witness Marcel Kabanda was asked to identify particular themes espoused by the newspaper. He enumerated four: anti-Tutsi ethnic hatred; the need for self-defense by the majority, which was threatened by the minority; the struggle against the Hutu who did not tow the line; and the mobilization of the Hutu population to fight this danger. Kabanda testified that in *Kangura* the enemy was well defined as those threatening the majority population, the Tutsi-*Inyenzi*. While the newspaper differentiated Tutsi in and outside the country, it underscored the fact that the two groups were in solidarity and working together to exterminate the Hutu and regain power, enslaving Hutu who survived.[1798]

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[1790] *Ibid.*, para. 228.
[1791] *Ibid.*, para. 266.
[1792] Judgement, para. 1036.
[1793] *Idem.*
[1794] Judgement, para. 1037.
[1795] *Ibid.*, para. 1038.
[1796] *Supra* XIII. A.
[1797] Ngeze Appellant's Brief, paras. 263-264.
[1798] Judgement, para. 233, wrongly making reference to T. 14 May 2002, pp. 11-13, whereas the corresponding part is found on pp. 14-16.

768. It clearly appears that Expert Witness Kabanda considered that *Kangura* was calling on the Hutu majority to use every means to fight the "danger" posed by the Tutsi. Accordingly, the Appeals Chamber cannot see any inconsistency between this testimony and the Trial Chamber finding that certain *Kangura* articles constituted direct and public incitement to commit genocide.

769. The Appeals Chamber also dismisses the assertion by Appellant Ngeze that the Trial Chamber erred in relying on witness evidence in order to find that the content of *Kangura* had incited the commission of genocide. It notes that Appellant Ngeze has not raised any specific argument to support this assertion, and agrees with the Trial Chamber that witness evidence could be helpful in "assess[ing] the impact of *Kangura* on its readership, and the population at large".[1799]

770. However, the Appeals Chamber notes that the Trial Chamber did not clearly identify all the extracts from *Kangura* which, in its view, directly and publicly incited genocide, confining itself to mentioning only extracts from *Kangura* published before 1 January 1994 to support its findings.[1800] The Appeals Chamber has already found that the Trial Chamber erred in basing the convictions of the Appellant on pre-1994 issues.[1801] Moreover, as explained previously,[1802] the lack of particulars concerning the acts constituting direct and public incitement to commit genocide represented an error, and obliges the Appeals Chamber to examine the 1994 issues of *Kangura* mentioned in the Judgement in order to determine, beyond reasonable doubt, whether one or more of them constituted direct and public incitement to commit genocide.

- "The Last Lie"

771. In an article headed the "Last Lie", which appeared in issue No. 54 of *Kangura* (January 1994), Appellant Ngeze wrote:

> Let's hope the *Inyenzi* will have the courage to understand what is going to happen and realize that if they make a small mistake, they will be exterminated; if they make the mistake of attacking again, there will be none of them left in Rwanda, not even a single accomplice. All the Hutus are united...[1803]

The Appeals Chamber agrees with the Trial Chamber[1804] that the term "accomplice" refers to the Tutsi in general, in light of the sentence which immediately follows this reference and which was written by the Appellant: "All the Hutus are united...". The Appeals Chamber considers that this article called on the Hutu to stand united in order to exterminate the Tutsi if the RPF were to attack again. In the view of the Appeals Chamber, the fact that this call was conditional on there being an attack by RPF does nothing to lessen its impact as a direct call to commit genocide if the condition should be fulfilled; the Appeals Chamber finds that this article constituted direct and public incitement to commit genocide.

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[1799] *Ibid.*, para. 232.
[1800] *Ibid.*, paras. 1036-1038.
[1801] See *supra* VIII. B. 2. and XIII. B. 2. (b).
[1802] See *supra* XIII. B. 2 (c).
[1803] Exhibit P10, p. K0151349. This article is discussed by the Trial Chamber in paras. 213-217 of the Judgement.
[1804] Judgement, para. 217.

- "Who will survive the war of March?"

772. An article headed "Who Will Survive the War of March?", which appeared in issue No. 55 (January 1994) and was signed *Kangura*, included the following passage:

> If the *Inkotanyi* have decided to massacre us, the killing should be mutually done. This boil must be burst. The present situation warrants that we should be vigilant because they are difficult. The presence of U.N. forces will not prevent the *Inkotanyi* to start the war (...). These happenings are possible in Rwanda, too. When the *Inkotanyi* must have surrounded the capital of Kigali, they will appeal to those of Mulindi and their accomplices within the country, and the rest will follow. It will be necessary for the majority people and its army to defend itself ... On that day, blood will be spilled. On that day, much blood must have been spilled.[1805]

The Appeals Chamber notes that this article contains an appeal to "the majority people" to kill the *Inkotanyi* and their "accomplices within the country" (meaning the Tutsi) in case of an attack by the RPF. Accordingly, the Appeals Chamber finds that this article constituted direct and public incitement to commit genocide.

- "How Will the UN Troops Perish?"

773. An editorial signed by Appellant Ngeze and published in issue No. 56 of *Kangura* (February 1994) stated that, after the departure of the United Nations troops, "[a]ll the Tutsis and cowardly Hutus will be exterminated".[1806] The Trial Chamber found that this editorial was both a prediction and a threat.[1807] In the opinion of the Appeals Chamber, this article goes even further: it implicitly calls on its readers to exterminate Tutsi (and "cowardly Hutus") after the departure of the United Nations troops. The Appeals Chamber finds that this article constituted direct and public incitement to commit genocide against the Tutsi.

- "One Would Say That Tutsis Do Not Bleed, That Their Blood Does Not Flow"

774. Paragraphs 227 to 229 of the Judgement also refer to an extract from an article headed "One Would Say That Tutsis Do Not Bleed, That Their Blood Does Not Flow", published in

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[1805] Exhibit P117B, pp. 27163. This article is examined at paras. 220-224 of the Judgement.

[1806] Exhibit P115/56-A, p. K0151339. The relevant excerpt is as follows:

> As happened in Somalia where about two hundred UN soldiers were killed because of their partisan stance, in Rwanda the Government will soon be formed and those who will be left out will fight against it, and so will those participating in the Government but without recognizing it. The country will be teeming with opponents. The United Nations troops will continue supporting the Arusha Accords because they justify their presence here. Those who reject the Accords will take it out on those soldiers and will massacre them; they will throw grenades at them and they will die each day. A time will come when those soldiers would grow weary and leave. And it is after their departure that blood will really flow. All the Tutsis and the cowardly Hutus will be exterminated. The *Inyenzi* would once more enlist MUSEVENI's support in attacking the Hutus, who will be tortured to death. The tragedy would be as a result of the ill-conceived accords.

The excerpt cited in paragraph 225 of the French translation of the Judgement differs somewhat from P115/56-A, pp. 8082*bis* and 8081*bis*; it would appear that it is a translation of the English version of Exhibit P115/56-A, p. K0151339.

[1807] Judgement, para. 226.

issue No. 56 of *Kangura* (February 1994).[1808] This article does not appear to threaten all the Tutsi, but only the Tutsi who acclaimed Tito Rutaremara and who, in doing so, demonstrated their support for an armed insurrection. In the absence of any element demonstrating that all the Tutsi were actually targeted by this article, or that some Tutsi were targeted on the sole basis of their ethnicity, the Appeals Chamber cannot find that this article constituted direct incitement to commit genocide.

(c) Conclusion

775. The Appeals Chamber finds that *Kangura* articles published in 1994 directly and publicly incited the commission of genocide

## D. Responsibility of the Appellants

### 1. Responsibility of Appellant Nahimana

(a) Responsibility pursuant to Article 6(1) of the Statute

776. Appellant Nahimana contends that he could not be convicted of direct and public incitement to commit genocide pursuant to Article 6(1) of the Statute.[1809] The Appeals Chamber has already concluded that the Appellant could not be convicted under Article 6(1) of the Statute for RTLM broadcasts which instigated genocide.[1810] For the same reasons, the Appellant could not be convicted on the basis of Article 6(1) for RTLM broadcasts which directly and publicly incited the commission of genocide; the Appeals Chamber also quashes that conviction.

(b) Responsibility pursuant to Article 6(3) of the Statute

777. Appellant Nahimana asserts that the Trial Chamber erred in finding that he incurred superior responsibility pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide by RTLM employees and journalists.[1811] The Appeals Chamber will examine in turn the errors of law and fact alleged by the Appellant.

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[1808] Footnote 132 of the Judgement makes reference to T. 3 April 2003, pp. 33-34, where Appellant Ngeze reads the following excerpt from *Kangura* No. 56:

> What Kanyarengwe did to them must be true what was said of the Tutsis, that they are like children, that they are childish. During the press conference that the *Inkotanyi* recently gave at *Hôtel Diplomate*, they stated things, which were surprising to the people in attendance. Tito Rutaremara said, 'I took arms to fight against the dictatorship. I will once again take up those arms to fight against the dictatorship, the same dictatorship.' And there was applause, there was sustained applause.
>
> The Tutsis who acclaimed Rutaremara, do they remember that they themselves can have their bloodshed? The war that was threatened by Rutaremara, it is obvious that he will be the first victim instead of those related to him. That question should be put to him.

Once again, para. 227 of the French translation of the Judgement does not cite the precise words of the transcript for 3 April 2003.

[1809] Nahimana Appellant's Brief, paras. 296-336; Nahimana Brief in Reply, paras. 90-127.

[1810] See *supra* XII. D. 1. (b) (ii) e.

[1811] Nahimana Appellant's Brief, paras. 337-535; Nahimana Brief in Reply, paras. 128-163. The arguments raised by Appellant Nahimana on this issue also concern his conviction for the crime of persecution as a crime

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- The Appellant was responsible for RTLM editorial policy;[1824]

- Appellants Nahimana and Barayagwiza were the two most active members of the Steering Committee;[1825]

- As a member of the Technical and Program Committee, the Appellant oversaw RTLM programming;[1826]

- After 6 April 1994, the Appellant had the authority to prevent the commission of crimes;[1827]

- The Appellant maintained a continuing connection with RTLM until July 1994.[1828]

782. In his Brief in Reply, the Appellant adds that, in order to find that he had control over RTLM staff after 6 April 1994, the Trial Chamber relied solely on facts from before that date, ignoring the drastic changes that had occurred at that time and reversing the burden of proof by requiring him to prove that he had no control after 6 April 1994, rather than determining whether the Prosecutor had tendered positive evidence to show that the alleged power of control prior to 6 April 1994 had remained effective after that date.[1829]

783. The Appellant further maintains that the Trial Chamber erred in law in finding that the fact that he knew that RTLM broadcasts were generating concern sufficed to establish the *mens rea* required pursuant to Article 6(3) of the Statute, whereas, in his view, it had to be shown that he had direct and personal knowledge of what was actually being said.[1830]

784. Finally, the Appellant appears to take issue with the Trial Chamber for its failure sufficiently to explain what necessary or reasonable measures he omitted to take in order to prevent or punish the commission of crimes by his subordinates.[1831]

### b. Analysis

#### i. Superior position and effective control

[1823] *Ibid.*, paras. 364-368, 383-385. The Appellant submits in this respect that the mere fact that he was a member of the RTLM Steering Committee, a collegiate body, does not justify the inference that he personally had a power of control. He adds in paragraphs 436 and 437 that the fact that the Judges noted that the Steering Committee convened a meeting with RTLM employees and journalists to discuss an RTLM broadcast of concern shows that none of its members personally possessed such a power of control. See also Nahimana Brief in Reply, paras. 128-132.
[1824] Nahimana Appellant's Brief, para. 369.
[1825] *Ibid.*, para. 371. The Appellant argues that "this assertion does not sufficiently establish the effective power of coercion of a particularly high degree required to hold a civilian liable for the charge of a crime against humanity or genocide under Article 6.3 of the Statute" (emphasis omitted).
[1826] *Ibid.*, para. 372.
[1827] *Ibid.*, para. 374. The Appellant argues in this respect that the power to prevent the commission of crimes does not suffice to establish his status as superior pursuant to Article 6(3) of the Statute.
[1828] *Ibid.*, para. 375.
[1829] Nahimana Brief in Reply, paras. 133-137.
[1830] Nahimana Appellant's Brief, paras. 376-380.
[1831] *Ibid.*, paras. 389-391.

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(i) Errors of law

a. The Appellant's submissions

778. Appellant Nahimana first submits that the Trial Chamber erred in law when it held that mere civilians, acting in a purely private context and without any authority analogous to that of military commanders, could be held responsible as superiors pursuant to Article 6(3) of the Statute.[1812] He argues that only civilian leaders possessing "excessive *de jure* or *de facto* powers in ordinary law similar to the powers of public authorities" have, so far, been convicted on the basis of their superior responsibility.[1813]

779. Secondly, the Appellant asserts that the Trial Chamber committed an error of law in failing to apply the effective control test,[1814] which in his view requires a direct and individualized relationship.[1815] In this respect, the Appellant argues that international jurisprudence confirms that "mere belonging to leading organs or a group of leaders" does not suffice to establish effective control.[1816]

780. Thirdly, the Appellant submits that the Trial Chamber erred in concluding that he possessed a *de jure* power over RTLM, since neither Rwandan law nor the Statutes of RTLM, or any other official document, gives the Appellant a *de jure* power of control over RTLM employees.[1817]

781. The Appellant further argues that "none of the elements admitted by the Judges gives room for establishing the existence of an effective and compelling superior-subordinate nexus".[1818] He accordingly contends that, in the absence of detailed evidence,[1819] none of the following elements is capable of supporting the Trial Chamber's finding that he was a superior exercising effective control over RTLM employees:

- The Appellant was "number one" in the management of RTLM;[1820]
- The Appellant represented RTLM at meetings with the Ministry of Information;[1821]
- The Appellant controlled the finances of RTLM;[1822]
- The Appellant was a member of the RTLM board of directors;[1823]

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against humanity. The Appeals Chamber will examine the question of the Appellant's superior responsibility in the present section and will assess the impact of its conclusions on the conviction for the crime of persecution as a crime against humanity in the relevant chapter.

[1812] Nahimana Appellant's Brief, paras. 337-348.

[1813] *Ibid.*, paras. 340-347 (quotation taken from para. 345, emphasis omitted).

[1814] *Ibid.*, para. 353.

[1815] *Ibid.*, paras. 349-352.

[1816] *Ibid.*, para. 352.

[1817] *Ibid.*, paras. 355- 359, 482.

[1818] *Ibid.*, para. 360.

[1819] The Appellant submits that the finding that he had the material ability to prevent or punish the commission of crimes by his subordinates is not sufficiently motivated: Nahimana Appellant's Brief, paras. 387-391.

[1820] Nahimana Appellant's Brief, para. 361.

[1821] *Ibid.*, para. 362.

[1822] *Ibid.*, para. 363.

785. The Appeals Chamber has already recalled the elements which must be proved in order to establish superior responsibility.[1832] It has also pointed out that civilian leaders need not be vested with prerogatives similar to those of military commanders in order to incur such responsibility under Article 6(3) of the Statute: it suffices that the superior had effective control of his subordinates, that is, that he had the material capacity to prevent or punish the criminal conduct of subordinates.[1833] For the same reasons, it does not have to be established that the civilian superior was vested with "excessive powers" similar to those of public authorities. Moreover, the Appeals Chamber cannot accept the argument that superior responsibility under Article 6(3) of the Statute requires a direct and individualized superior-subordinate relationship.[1834]

786. The Appeals Chamber is not convinced either by the Appellant's argument that the Trial Chamber failed to apply the effective control test. Although the Trial Chamber did not explicitly use the expression "effective control", the Appeals Chamber is of the view that it is clear from paragraphs 970 and 972 of the Judgement that it in fact applied that test.[1835]

787. The Appellant further contends that the Trial Chamber could not conclude that he possessed a *de jure* power, since neither the law of Rwanda, nor the RTLM Statutes or any other official document so provided. The Appeals Chamber recalls that a person possesses a *de jure* power when legally vested with such power.[1836] The Chamber is of the view that this power can derive from law, from a contract or from any other legal document; it may have been conferred orally or in writing and may be proved by documentary or any other type of evidence. The Appeals Chamber will examine below whether the Trial Chamber could conclude that the Appellant was vested with a *de jure* power over the RTLM staff, but considers that, in any event, this is not a decisive factor for the issue of effective control.[1837]

788. The Appeals Chamber further recalls that the authority enjoyed by a defendant must be assessed on a case-by-case basis, so as to determine whether he had the power to take necessary and reasonable measures to prevent the commission of the crimes charged or to punish their perpetrators. Consequently, while the Appeals Chamber concedes that mere membership of a collegiate board of directors does not suffice, *per se*, to establish the existence of effective control, it considers, nonetheless, that such membership may, taken together with other evidence, prove control.

789. With respect to the Appellant's argument that none of the evidence relied upon by the Trial Chamber supports the finding that he had superior status and effective control over RTLM staff, the Appeals Chamber would point out that these are matters which, along with

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[1832] See *supra* XI. B.
[1833] See *supra* XII. D. 2. (a) (i) .
[1834] *Halilović* Appeal Judgement, para. 59; *Kordić and Čerkez* Appeal Judgement, para. 828; *Blaškić* Appeal Judgement, para. 67; *Čelebići* Appeal Judgement, paras. 251-252, 303.
[1835] In this respect, see *supra* XII. D. 2. (a) (i).
[1836] See the definition of "*de jure*" in Bryan A. Garner (ed.), *Black's Law Dictionary*, 8th ed., Saint Paul, Minnesota, Thomson West Publishing Company, 2004, p. 458 ("Existing by right or according to law"). Thus, the jurisprudence describes a superior *de jure* as one whose power derives from an official appointment: *Kajelijeli* Appeal Judgement, para. 85; *Bagilishema* Appeal Judgement, para. 50 ; *Čelebići* Appeal Judgement, para. 193.
[1837] In this respect, see *supra* XII. D. 2. (a) (ii) b. i., where the Appeals Chamber explains that, even if the possession of *de jure* powers can certainly suggest a material capacity to prevent or punish criminal acts by subordinates, it is neither necessary nor sufficient to demonstrate such capacity.

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the other constituent elements of superior responsibility, must be established beyond reasonable doubt on the basis of *the totality* of the evidence adduced.[1838] The Appeals Chamber will examine below whether the Appellant's superior position and effective control were, in the instant case, established beyond reasonable doubt.

790. Finally, the Appeals Chamber finds that there is no evidence that the Trial Chamber reversed the burden of proof and required the Appellant to show that he did not have effective control after 6 April 1994. It was indeed for the Prosecutor to prove the Appellant's effective control over RTLM after 6 April 1994. The Appeals Chamber will examine below whether the Trial Chamber could conclude that the Prosecutor had established this beyond reasonable doubt.

ii. The *Mens Rea*

791. Under Article 6(3) of the Statute, the *mens rea* of superior responsibility is established when the accused "knew or had reason to know" that his subordinate was about to commit or had committed a criminal act.[1839] The "reason to know" standard is met when the accused had "some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates"; such information need not provide specific details of the unlawful acts committed or about to be committed by his subordinates.[1840] The Appellant is therefore wrong when he contends that direct personal knowledge, or full and perfect awareness of the criminal discourse, was required in order to establish his superior responsibility. The Appellant cites no precedent and provides no authority to support his assertion that the crime of direct and public incitement requires direct personal knowledge of what is being said. The Appeals Chamber rejects this submission.

iii. Necessary and reasonable measures

792. The Appeals Chamber is not satisfied that the Trial Chamber failed properly to explain what necessary and reasonable measures the Appellant omitted to take in order to prevent or punish the commission of crimes by his subordinates. Having found that Appellant had the power to prevent or punish the broadcasting of criminal discourse by RTLM, the Trial Chamber did not need to specify the necessary and reasonable measures that he could have taken. It needed only to find that the Appellant had taken none.

(ii) Errors of fact

793. The Appeals Chamber will address the alleged errors by reference to the criteria for establishing superior responsibility under Article 6(3) of the Statute to which those errors relate.

a. Superior position and effective control

[1838] *Ntagerura et al.* Appeal Judgement, paras. 172-175, 399.
[1839] *Blaškić* Appeal Judgement, para. 62; *Bagilishema* Appeal Judgement, para. 28; *Čelebići* Appeal Judgement, paras. 216-241.
[1840] *Bagilishema* Appeal Judgement, paras. 28 and 42; *Čelebići* Appeal Judgement, paras. 238 and 241.

794. Before undertaking its examination, the Appeals Chamber observes that the Trial Chamber relied on the following facts in order to find that Appellant Nahimana had superior status and exercised effective control over RTLM employees from the station's creation until 6 April 1994:

- The Appellant was "number one" at RTLM;
- The Appellant represented RTLM at the highest level in meetings with the Ministry of Information;
- The Appellant controlled the finances of RTLM;
- The Appellant was a member of the Steering Committee, which functioned as a board of directors for RTLM, and to which the staff and journalists of RTLM were accountable;
- The Appellant was responsible for RTLM editorial policy.[1841]

795. The Trial Chamber found, in paragraph 972 of the Judgement, that even after 6 April 1994 Appellant Nahimana retained the authority vested in him as an office-holding member of the governing body of RTLM and had *de facto* authority to intervene with RTLM employees and journalists, as is evidenced by his intervention with RTLM personnel to halt attacks on UNAMIR and General Dallaire.

### i. The Appellant's submissions

796. The Appellant contends that the factual findings supporting the conclusion that he was a superior and had effective control over RTLM employees before 7 April 1994 are erroneous in several respects.[1842] In particular, the Trial Chamber allegedly erred:

- In failing to distinguish between RTLM s.a. and the RTLM radio station;[1843]
- In finding that the role played by the Appellant in establishing RTLM vested him with the authority to control and manage. First, in his interview with Dahinden in August 1993, Gaspard Gahigi did not refer to Nahimana as the Director of RTLM, but as "number one" among its founders or inceptors.[1844] Secondly, this interview of August 1993 is irrelevant in determining the Appellant's position in 1994.[1845] Thirdly, the Appellant did not admit that he personally had decided to create the radio; he had

[1841] Judgement, para. 970.
[1842] Nahimana Appellant's Brief, paras. 392-478. The Appeals Chamber notes that the Appellant frequently refers back to arguments developed by him in his Closing Brief at trial (see Nahimana Appellant's Brief, paras. 393, 414, 428, 440, 446, 476, 503, 509, 527). As explained above (*supra* XIII. C. 1. (b) (i)), an appellant's arguments must be presented in his appeal pleadings. Furthermore, a mere reference back to trial submissions cannot serve to establish an error by the Trial Chamber. Hence, the Appeals Chamber will not consider such references to arguments developed in Nahimana's Closing Brief at trial.
[1843] Nahimana Appellant's Brief., para. 394.
[1844] *Ibid.*, paras. 400-404.
[1845] *Ibid.*, para. 405.

merely had this decision endorsed by the Steering Committee, which held the decision-making power;[1846]

- In holding that membership of the RTLM Steering Committee *de jure* gave the Appellant power of control over RTLM's staff;[1847]

- In finding that the Appellant controlled the company's finances, whereas he merely possessed a power of signature for banking purposes, strictly circumscribed and shared with two other members of the Steering Committee.[1848] Furthermore, such power of signature was not evidence of any power of control by the Appellant over RTLM editorial policy and staff;[1849]

- In finding that the Technical and Programme Committee of the Steering Committee was responsible for overseeing RTLM programming, although there was no evidence to support that finding;[1850]

- In holding that his chairmanship of the Technical and Programme Committee gave him authority to intervene with RTLM journalists and management, and that it imposed on him a particular obligation to take action;[1851]

- In finding that his participation in meetings at the Ministry of Information on 26 November 1993 and 10 February 1994 demonstrated his control over RTLM, although he was not representing the company but merely accompanying its legal representatives, the President, Félicien Kabuga, and its Director, Phocas Habimana;[1852]

- In finding that he had the capacity to give orders, or that he played an active role in determining the content of RTLM broadcasts, when there was no evidence to support these findings;[1853]

- In relying on the testimonies of Witnesses GO, Nsanzuwera, Dahinden and Braeckman, as well as on reports from the Belgian Intelligence Service and the

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[1846] *Ibid.*, paras. 406-408.

[1847] Nahimana Appellant's Brief, paras. 409-411, 437. The Appellant states that the Steering Committee's powers could only be exercised on a collegiate basis, and that only the Director-General had a *de jure* personal power of decision under Article 20 of the RTLM Statutes in regard to the way the company was run.

[1848] *Ibid.*, paras. 395, 412-417.

[1849] *Ibid.*, para. 418.

[1850] *Ibid.*, paras. 395, 419-425. See also Nahimana Brief in Reply, para. 145.

[1851] *Ibid.*, paras. 426-427.

[1852] *Ibid.*, paras. 430-432. See also Nahimana Brief in Reply, para. 148.

[1853] *Ibid.*, paras. 433-443. In this respect, the Appellant argues that : (1) Witness Kamilindi's statement that the Appellant was the "brain behind the operation" and that he was "the boss who gave orders" is a mere opinion without factual basis (paras. 434-435); (2) the fact that the Steering Committee called in journalists and members of the board of directors to discuss an RTLM broadcast shows that none of the members of the Steering Committee had, individually, the power to give orders (paras. 436 and 437); and (3) the Trial Chamber should not have relied on Witness Nsanzuwera's testimony that an RTLM journalist had told him that the radio editorials were written by the Appellant, because (a) Witness Nsanzuwera's testimony shows an appearance of bias, since Nsanzuwera later joined the Prosecutor's Office of ICTR, (b) the statements attributed to the RTLM journalist are highly suspect, since they were given in the course of criminal proceedings against him, doubtless in the hope of exonerating himself of his own responsibility, and (c) his testimony is basically hearsay, and not corroborated by other evidence (paras. 438-443). See also Nahimana Brief in Reply, para. 146.

French National Assembly, to find that Appellant Nahimana was the Director of the RTLM company, whereas the witnesses in question had no personal knowledge of the internal functioning of the company and the reports merely presented opinions without specifying their sources;[1854]

- In ignoring the evidence showing the real hierarchical structure of the company and of radio RTLM and stating the identity of the real managers,[1855] in particular Witness Bemeriki's testimony.[1856]

797. Appellant Nahimana further submits that the Trial Chamber's conclusion that he possessed *de jure* and *de facto* authority over RTLM radio after 6 April 1994 is based on erroneous factual findings.[1857] He specifically contends that:

- The evidence shows that after 6 April 1994 RTLM radio was under the control of the army, and managed by its Director, Phocas Habimana, and the Editor-in-Chief, Gaspard Gahigi;[1858]

- The Appellant, having had no *de jure* or *de facto* management authority prior to 6 April 1994, could not "continue" to exercise such powers after that date;[1859]

- The Appellant was under no obligation to act in lieu of the chairman of the Steering Committee, who was in Rwanda and still in contact with RTLM journalists even after 6 April 1994, as is clear from Witness Ruggiu's testimony;[1860]

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[1854] Nahimana Appellant's Brief, paras. 444-450. The Appellant further argues that: (1) Witness GO's testimony lacks credibility, in particular because there are substantial inconsistencies between his statements to the Prosecution investigators and his live testimony (para. 446); (2) Witness Nsanzuwera abandoned any attempt to present the Appellant as Director of RTLM and provided no indication of the position held by the Appellant within RTLM (para. 446); (3) Witness Dahinden uses metaphorical expressions ("spiritual father", "kingpin") which make it impossible to ascertain the Appellant's precise duties (para. 446); (4) Witness Braeckman did not describe the Appellant as Director of RTLM (para. 446); and (5) the Report of the French National Assembly Mission of Enquiry includes a letter from former Rwandan Prime Minister, Faustin Twagiramungu (Exhibit 1D54), formally stating that the Appellant had never been Director of RTLM, but the Trial Chamber failed to consider it (paras. 448-450). See also Nahimana Brief in Reply, para. 146.

[1855] Nahimana Appellant's Brief, paras. 451-478. The Appellant submits that the authorities who had effective control over RTLM s.a. and RTLM radio were known: the President of RTLM s.a. was Félicien Kabuga, and its Director-General was Phocas Habimana, while the Editor-in-Chief of the radio was Gaspard Gahigi (paras. 451, 452, 472-478, referring *inter alia* to Exhibits 1D11, 1D39, P53, 1D148 A and B, 1D149). See also Nahimana Brief in Reply, para. 147.

[1856] Nahimana Appellant's Brief, paras. 454-471. The Appellant asserts in this respect that the Judges wrongly dismissed the in-court testimony of Valerie Bemeriki, although (1) she was a direct witness in regard to the meeting at the Ministry of Information on 10 February 1994 and to the internal functioning and hierarchical structure of RTLM during the period January to July 1994 (paras. 455-457), and confirmed that the Appellant never interfered with the management of the radio (paras. 458 and 459); (2) her credibility in this respect was not questioned by the Prosecution or the Judges (paras. 461-464); (3) contrary to what the Trial Chamber stated, her testimony was consistent with her statement to the Prosecution's investigators (paras. 465-467); and (4) contrary to the view taken by the Trial Chamber, none of the inconsistencies noted by the Judges concerned matters affecting the Appellant's defence (paras. 468-471). See also Nahimana's Brief in Reply, para. 140.

[1857] Nahimana Appellant's Brief, paras. 479-501, 527-535.

[1858] *Ibid.*, paras. 480, 527-535, referring to testimonies of Witnesses Bemeriki and Ruggiu. See also Nahimana Brief in Reply, paras. 160-163.

[1859] *Ibid.*, para. 482 (see also the heading preceding this paragraph).

- Witness Dahinden's testimony cannot support the finding that the Appellant had maintained continuous links with RTLM, or been involved in the activities of the station after 6 April 1994;[1861]

- The finding that the Appellant possessed *de facto* control over RTLM after 6 April 1994 is based solely on his alleged intervention to halt RTLM attacks on General Dallaire and UNAMIR. However, this single "piece of evidence" relies solely on Expert Witness Des Forges' testimony, which was inadmissible, since (1) an expert witness cannot also testify as a factual witness; (2) Expert Witness Des Forges' testimony was second-degree hearsay evidence collected more than five years after the event, and (3) the Prosecutor did not call any direct witness, and the Judges refused to hear another direct witness, or an indirect witness, on this point.[1862] Furthermore, Expert Witness Des Forges' testimony on this issue has no probative value, since (1) there was no evidence that the Appellant in fact intervened with RTLM after being asked to do so, nor that it was such intervention, rather than an order from the military, that caused the halting of the broadcasts; and (2) this aspect of Expert Witness Des Forges' testimony is contradicted by the testimonies of the Appellant and of Witness Bemeriki.[1863]

### ii. Effective control before 6 April 1994

798. The Appeals Chamber will first examine the factual errors alleged by the Appellant before determining whether the finding that he was a superior and exercised effective control over RTLM staff before 6 April 1994 can be upheld in light of the confirmed factual findings.

- The distinction between the company RTLM and RTLM radio

799. With respect to the alleged confusion between the *company* RTLM and RTLM *radio*, the Appeals Chamber notes that the Trial Chamber expressly stressed that it "finds no significance in the distinction drawn by Nahimana between the company, RTLM s.a., and the radio station RTLM",[1864] explaining that:

> The radio was fully owned and controlled by the company as a matter of corporate structure. When confronted with the public comment he made in 1992 on the responsibility of a media owner for the policy expressed through that media, Nahimana did not deny this responsibility. He testified that when the RTLM board became aware of programming that violated accepted principles of broadcasting, they stood up and raised these concerns with management.[1865]

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[1860] *Ibid.*, paras. 483-487.
[1861] *Ibid.*, paras. 488-494. The Appellant stresses in particular that (1) at the start of the meeting of June 1994 described by the witness, the Appellant indicated that he had no control over RTLM; (2) the witness did not specify which, of Appellants Nahimana and Barayagwiza, told him that Radio RTLM was about to be transferred to Gisenyi; (3) RTLM was only transferred to Gisenyi on 3 July 1994, which showed that the person who provided the previous information was particularly ill-informed about the activities of RTLM and had no connection with it. See also Nahimana Brief in Reply, paras. 152, 153, 156-159.
[1862] Nahimana Appellant's Brief, para. 496; Nahimana Brief in Reply, para. 154.
[1863] *Ibid.*, paras. 497-499; Nahimana Brief in Reply, paras. 155, 158.
[1864] Judgement, para. 559.
[1865] *Idem*, implicitly relying on evidence set out in paragraphs 504-505.

800. In the view of the Appeals Chamber, the mere allegation of confusion cannot demonstrate on appeal that it was unreasonable to conclude that the distinction betwen the *company* RTLM and RTLM *radio* was of no significance. This contention by the Appellant is therefore rejected.

- The Appellant's role in the creation of RTLM

801. The Appeals Chamber is not satisfied that the Trial Chamber misinterpreted the interview with Gaspard Gahigi. During this interview, Gahigi described the Appellant as "the top man" or "the number one" at RTLM, and not just as number one among the founders or inceptors of this project.[1866] Paragraph 554 of the Judgement gives a correct account of the content of the interview, stating that: "Gaspard Gahigi referred to Nahimana as 'the top man'" at RTLM. The Appeals Chamber takes the view that the interview of August 1993 demonstrates at the very least the importance of the role played by the Appellant in the early days of RTLM.

802. With respect to the alleged misinterpretation of Appellant Nahimana's testimony, the Appeals Chamber notes that the latter declared during his examination-in-chief:

> [...] at my level, I was already working together with the small committee that we had formed. I decided that the RTLM-to-be should, over and above the administrative section, the accounting and so forth, should start off with the radio. So the priority for me and for this RTLM was the setting up of the radio station. Once this selection, made by the small technical and programming committee, had been discussed by the comité d l'initative [*sic*] and adopted, my second level of involvement, together with my small committee, was the selection of equipment to be ordered. And then there was contact with suppliers.[1867]

However, contrary to what the Appellant asserts, paragraph 555 of the Judgement exactly summarizes this portion of his testimony, explaining that "[b]y Nahimana's own account, he was the one who decided that the first priority for the RTLM company was the creation of the radio station and he brought this priority to the Steering Committee, which endorsed it".[1868]

803. In consequence, the Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that the evidence showed that the Appellant played a role of primary importance in the creation of RTLM. Furthermore, although this fact alone would not suffice to demonstrate that the Appellant was a superior exercising effective control over RTLM staff in 1994, it was reasonable to find that that role suggested that the Appellant was vested with a certain authority with respect to RTLM staff, even in 1994.

- Membership of the Steering Committee

804. In the view of the Appeals Chamber, although the Appellant's membership of the Steering Committee did not vest him with a general *de jure* authority within RTLM, such

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[1866] T. 31 October 2000, pp. 144-146. The Appeals Chamber notes that Exhibit P3 consists of an audiovisual recording of Witness Dahinden's interview with Gaspard Gahigi. It is clear from the Exhibit itself and from the transcripts of Witness Dahinden's testimony that this interview was in French (see T. 31 October 2000, pp. 27-30, 145). Consequently, the Appeals Chamber considers that the French version of the court transcripts in respect of this interview must prevail over their English version.
[1867] T. 23 September 2002, p. 67.
[1868] See also Judgement, para. 492.

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membership at least suggests that the Appellant possessed *de facto* a certain general authority within RTLM. The Trial Chamber could therefore rightly rely on this fact in order to determine whether it had been established that the Appellant was a superior exercising effective control over RTLM staff.

- Control over RTLM finances

805. The Appellant claims that he possessed no control over RTLM company finances, and that all he had was a power of signature for banking purposes. The Appeals Chamber has already rejected Appellant Barayagwiza's similar argument; it accordingly refers back to the discussion *supra*,[1869] and concludes that the Trial Chamber could reasonably rely on this factual finding when determining whether the Appellant's superior position and effective control were proven.

- The role of the Technical and Programme Committee and the capacity of its Chairman

806. The Trial Chamber noted that a document tendered into evidence (Exhibit P53) indicated that the Technical and Programme Committee was *inter alia* responsible for the "review and improvement of RTLM program policy".[1870] The Trial Chamber then noted that "[n]o other of the four committees working under the Steering Committee have responsibilities relating to RTLM programming", and it concluded that the Technical and Programme Committee had delegated authority from the Steering Committee, acting as a board of directors, to oversee RTLM programming.[1871] The Appeals Chamber is of the view that this was a reasonable conclusion to reach, and that the Appellant has not shown that, in so doing, the Trial Chamber wrongly rejected the evidence tendered by him in this respect.[1872] In the absence of any argument on the point in the Appellant's pleadings, the Appeals Chamber finds that it was equally reasonable to conclude that the Appellant's position as Chairman of the Technical and Programme Committee entailed a specific obligation to take action to prevent or punish the broadcast of criminal discourse.

- The meetings at the Ministry of Information

807. The Appellant does not dispute that he attended meetings between RTLM and the Ministry of Information in 1993 and 1994, but he submits that he was not representing RTLM and was only accompanying its legal representatives. The Appeals Chamber is not convinced by this argument. Even if, at a purely formal level, the Appellant may not have had authority to represent RTLM, the Appeals Chamber considers that his presence at these meetings and the views he expressed there are highly indicative of his role and real powers within RTLM. In this respect, the Trial Chamber stated:

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[1869] See *supra* XII. D. 2. (a) (ii) b. i.

[1870] Judgement, para. 556. See also Judgement, para. 507 and Exhibit P53, p. 4.

[1871] Judgement, para. 556.

[1872] In particular, the Appellant has not shown why any reasonable trier of fact would have accepted Witness ZI's testimony or Exhibits 1D149 and 1D7. Nor does he show that this evidence contradicted the Trial Chamber's finding. In this respect, the Appeals Chamber notes that Witness ZI, who was a member of the Technical and Program Committee according to Exhibit P53 (last page), said that he had taken part in the restructuring of RTLM programming: T. 5 November 2002, pp 28-35 (closed session); see also Exhibit 1D149. As to Exhibit 1D7, it does not mention the Technical and Program Committee and, a fortiori, does not show that its powers were limited as contended by the Appellant.

> Nahimana and Barayagwiza participated in both meetings. Each acknowledged mistakes that had been made by journalists and undertook to correct them, and each also defended the programming of RTLM without any suggestion that they were not entirely responsible for the programming of RTLM.[1873]

The Appellant does not show that these factual findings were erroneous. The appeal on this point is accordingly dismissed.

- The Appellant's power to give orders and his role in determining the content of RTLM broadcasts

808. First, the Appeals Chamber takes the view that a reasonable trier of fact could accept Witness Kamilindi's testimony that the Appellant was "the brain behind the operation" and "the boss who gave orders". Witness Kamilindi identified Gaspard Gahigi as his source for this information and gave precise indications as to the circumstances in which he received it.[1874] Moreover, Witness Kamilindi himself acknowledged that the Appellant held no official function at the RTLM, but he maintained that he was "the brain behind the project" and "the boss who gave orders".[1875] Accordingly, the Appellant's arguments are rejected.

809. Secondly, the Appeals Chamber finds that the fact that the Steering Committee called in journalists and members of the RTLM board of directors to discuss a broadcast does not necessarily mean that the Appellant did not personally exercise effective control.

810. With respect to Witness Nsanzuwera's testimony, the Appeals Chamber recalls that, except in special circumstances, there is no need for corroboration in order for a testimony to have probative value.[1876] The Appeals Chamber also rejects the argument regarding Witness Nsanzuwera's credibility. Since the witness was not a member of the Office of the Prosecutor when he testified, the Trial Chamber could reasonably conclude that no appearance of bias affected his testimony. Moreover, even assuming that it was in the context of a criminal investigation that the RTLM journalist told Witness Nsanzuwera that the Appellant had ordered him to read a text on air, the Trial Chamber was informed of this circumstance, and the Appeals Chamber is not satisfied that the Trial Chamber erred in relying on this portion of Witness Nsanzuwera's testimony.

- The directorship of RTLM

811. Appellant Nahimana submits that the Trial Chamber could not rely on the testimonies of Witnesses GO, Nsanzuwera, Dahinden and Braeckman, or on documents emanating from the Belgian Intelligence Service and from the French National Assembly, in order to find in paragraph 567 of the Judgement that he was the Director of RTLM s.a.

812. The Appellant argues that Witness GO's testimony lacked credibility because it was inconsistent with his previous statements, without specifying what these inconsistencies were; he has therefore failed to show that it was unreasonable to rely on this testimony.

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[1873] Judgement, para. 619.
[1874] See T. 21 May 2001, pp. 55 *et seq.*; Judgement, para. 510.
[1875] T. 22 May 2001, p. 125, and T. 23 May 2001, pp. 27, 59. See also Judgement, para. 510.
[1876] See *supra*, footnote 1312.

813. Furthermore, contrary to what the Appellant submits, Witness Nsanzuwera did not withdraw his description of the Appellant as Director of RTLM. On the contrary, during his cross-examination by the Appellant's Counsel, he confirmed that, at a meeting at the Ministry of Information in February 1994, the Appellant introduced himself as such.[1877]

814. With respect to the testimonies of Witnesses Dahinden and Braeckman, the Appeals Chamber notes that Witness Dahinden stated:

> I wanted to show in using that terminology ["kingpin"] that was out of the formal structure that is the reality behind the said titles or formal positions of responsibility.[1878]

Similarly, Witness Braeckman indicated that Appellant Nahimana had been introduced as Director of RTLM and took the floor "as the principal official of the RTLM at the time" during the conference which took place at the Kigali *préfecture* on 15 March 1994,[1879] adding: "call it manager, call it director. There was no doubt for those who were present in the hall and in the panel".[1880] These two witnesses thus precisely stressed that they were describing the position occupied by the Appellant *de facto* within RTLM. On this point, their respective testimonies fully corroborate one other. The Appeals Chamber accordingly rejects the Appellant's allegation that the Trial Chamber misinterpreted these two testimonies.

815. The Belgian Intelligence Service's report (Exhibit P153) is referred to at paragraphs 515 and 553 of the Judgement. This report is dated[1881] and identifies its author by name as well as its addressees. Review of the transcripts of the examination-in-chief – during which the report was admitted into evidence – and cross-examination of Expert Witness Des Forges reveal no question put to the witness as to the origin of Exhibit P153.[1882] Only one objection was raised by Appellant Ngeze's Counsel during the examination-in-chief, to which Witness Des Forges responded.[1883] Nor does a review of the trial record show that a motion was ever filed by Appellant Nahimana with the Trial Chamber, requesting the appearance of the author of the report presented as Exhibit P153. In these circumstances, the Appeals Chamber finds that the Appellant has failed to show on appeal that it was unreasonable for the Trial Chamber to find that Exhibit P153 had probative value when he himself had not challenged it at trial. The Appeals Chamber accordingly rejects the Appellant's appeal on this point.

816. With respect to the report of the French National Assembly, which is referred to in paragraphs 544 and 553 of the Judgement and was admitted as Exhibit P154,[1884] the Appellant

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[1877] T. 25 April 2001, pp. 47-48, 61-62.
[1878] T. 1 November 2000, pp. 122-123.
[1879] T. 30 November 2001, pp. 115-116 (quote at p. 116).
[1880] *Idem.* See also Judgement, para. 512.
[1881] This report is a supplement dated 2 February 1994 issued by the Belgian Intelligence Services and initially discussed in the Parliamentary Commission of Enquiry on Rwanda, set up by the Belgian Senate.
[1882] See T. 20 to 31 May 2002, in particular T. 22 May 2002, pp. 215-221.
[1883] See T. 22 May 2002, pp. 216-222.
[1884] Extract from the *Rapport de la Mission d'information de l'Assemblée nationale française sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994* [Report of the French National Assembly Mission of Enquiry into the Military Operations Conducted by France, Other Countries and the United Nations in Rwanda between 1990 and 1994], citing statements by Jean-Christophe Belliard, French representative in an observer capacity at the Arusha negotiations.

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appears to question its probative value in light of Exhibit 1D54,[1885] in particular criticizing the Trial Chamber for having failed to examine this latter exhibit. However, the Appeals Chamber is not convinced that the lack of a reference to Exhibit 1D54 in the Judgement shows any error. The Appeals Chamber recalls that the fact that an item of evidence or a testimony, even if inconsistent with the Trial Chamber's finding, is not mentioned in a judgement does not necessarily mean that the Trial Chamber did not take it into account.[1886] The Appeals Chamber takes the view that the Appellant has not shown that the finding that, although not officially Director of RTLM, he was nevertheless "referred to as the Director of RTLM, and [...] he referred to himself as the Director of RTLM" [1887] was unreasonable in light of the inconsistency noted by him between Exhibits P154 and 1D54. First, Exhibit 1D54 could be understood as merely stating that the Appellant was never formally appointed director of RTLM. Secondly, the fact that the witness who spoke to the French parliamentary mission repeatedly referred to Appellant Nahimana as Director of RTLM in Exhibit P154[1888] fully supports the Trial Chamber's finding that he was perceived as the station head. The Appeals Chamber accordingly rejects the appeal on this point.

817. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber was entitled to find that the Appellant was referred to as the Director of RTLM, and that he referred to himself as such, even if that was not his official title, and that this factual finding could be taken into consideration when assessing whether the Appellant was a superior exercising effective control over RTLM staff before 6 April 1994.

- Exculpatory evidence

818. The Appeals Chamber is not convinced that no reasonable trier of fact could have concluded that the Appellant was a superior exercising effective control over RTLM employees in light of Exhibits 1D11, 1D39, P53, 1D148A, 1D148B and 1D149. It recalls that, even if certain of these Exhibits are not referred to in the Judgement,[1889] this does not mean that the Trial Chamber failed to consider them. The Appeals Chamber further finds that, even if Exhibits 1D11, 1D39, P53 and 1D148A and B could provide an idea of the structure and give information on who was formally responsible for RTLM, this is not necessarily conclusive for purposes of assessing whether, in fact, the Appellant was a

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[1885] Letter dated 25 May 1998 from Faustin Twagiramungu to President Paul Quilès, annexed to the *Rapport de la Mission d'information de l'Assemblée nationale française* [Report of the French National Assembly Mission of Enquiry]. In this letter, Twagiramungu states that the Appellant was never RTLM Director, but that he was "one of the principal promoters of the project for the creation and installation of RTLM" (p. 2).

[1886] *Ndindabahizi* Appeal Judgement, para. 75, citing *Kvočka et al.* Appeal Judgement, para. 23 ("It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.")

[1887] Judgement, para. 553.

[1888] This description of the Appellant is repeated at pages 283 and 288 of Exhibit P154.

[1889] Exhibits 1D148A and B and 1D149 are not mentioned in the Judgement. Exhibits 1D148A and B consist of a diagram drawn by Appellant Nahimana himself, based on Exhibits 1D11 and P53 (see T. 23 September 2002, pp. 96-97), mentioned above and showing the structure of RTLM s.a. Exhibit 1D149 is a working document on the restructuring of the RTLM programming grid dated 10 March 1994 and signed by Gaspard Gahigi and Froduald Ntawulikura. Exhibits P53 (entitled "*Organisation et structure du Comité d'initiative élargi*" ["Organisation and Structure of the Expanded Steering Committee" ]) and 1D39 (copy of an employment certificate signed by Phocas Habimana as RTLM Director-General) are respectively referred to in paragraph 507 and footnote 548 of the Judgement. Paragraph 493 of the Judgement also refers to the RTLM articles of incorporation [Statutes] (Exhibit 1D11).

superior exercising effective control. Thus the Trial Chamber could reasonably rely on other evidence which, in its view, established the real powers within RTLM. As to Exhibit 1D149, the Appellant has in no way explained how this evidence was capable of affecting the findings of the Trial Chamber; the Appeals Chamber accordingly rejects the appeal on this point.

819. The Appellant further argues that the Trial Chamber improperly rejected Witness Bemeriki's entire testimony. The credibility of this witness is addressed at paragraphs 550 and 551 of the Judgement. In rejecting this testimony in its entirety, the Trial Chamber relies on (1) the witness' own admission that many statements made by her to the Prosecution investigators were false – which is supported by Witness Bemeriki's cross-examination transcripts;[1890] (2) that she repeatedly testified in response to specific questions that she did not know the answer when the answer was clearly of a nature that she would know;[1891] (3) the numerous evasions and lies in her testimony.[1892]

820. The Appeals Chamber considers that the fact that the Prosecutor did not cross-examine Witness Bemeriki on some aspects of her testimony, or that the Judges did not put questions to her on certain points cannot imply that the Trial Chamber should have accepted as credible certain aspects of her testimony.[1893] The Trial Chamber could reasonably hold that the above-mentioned discrepancies, silences and evasions discredited Witness Bemeriki's testimony in its entirety. The Appeals Chamber will not consider the Appellant's argument that Witness Bemeriki's testimony was corroborated at trial,[1894] since he fails to substantiate it.

821. Nor can the Appeals Chamber accept the argument that the Trial Chamber misinterpreted Witness Bemeriki's testimony when it concluded that her testimony was a

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[1890] See in particular T. 9 April 2003, pp. 31-35; T. 10 April 2003, pp. 14-18, 25.

[1891] Judgement, para. 551. The Trial Chamber mentioned the following example:

> Her claim, for example, that there are many named Juvenal Habyarimana in Rwanda, without acknowledging that one such person was the President of the Republic, does not manifest a desire to tell the truth in full.

[1892] *Idem*:

> In contrast, Bemeriki mixed her responses, often in answer to the same question, saying for example that she remembered well her statement that *Kangura* was an extremist publication and shortly thereafter saying she did not remember making the statement [...] In her testimony, she lied repeatedly, denying that she made many statements, including her own broadcast, until confronted with them. Evasive to the point of squirming, her voice often reaching the feverish pitch of her broadcasts, which have been played in the courtroom, this witness made a deplorable impression on the Chamber.

[1893] Moreover, contrary to what the Appellant appears to allege (see Nahimana Appellant's Brief, para. 463), the Trial Chamber was under no compulsion to accept any part of a testimony which had not been directly challenged during cross-examination. Notwithstanding the somewhat infelicitous language of paragraph 334 of the Judgement, referred to by the Appellant, the Trial Chamber assesses the credibility of a number of individual testimonies, but does not lay down a general standard for assessment. It accepts that these testimonies were credible on certain issues only, on the basis that these points were not challenged in cross-examination. The Appeals Chamber recalls that it is not unreasonable for a trier of fact to accept some parts of a witness' testimony, but reject others: see *Ntagerura et al.* Appeal Judgement, para. 214. Moreover, it is clear that a party is under no obligation to challenge the credibility of a testimony during cross-examination; credibility can also be impugned by other evidence. The party in question is entitled to take the view that cross-examination is pointless, since there has already been enough to show that the witness is not credible.

[1894] Nahimana Appellant's Brief, para. 460.

volte-face that accommodated the Appellant's defence. The Trial Chamber noted that Witness Bemeriki had acknowledged in earlier statements that the Tutsi had been victims of genocide and that RTLM had played a role in this respect, but had denied this during her testimony.[1895] The Appellant has failed to show that there was no such discrepancy.[1896] The Appeals Chamber finds, as did the Trial Chamber, that this represented an inconsistency on a key issue,[1897] and concludes that the Trial Chamber could reasonably consider that Witness Bemeriki's testimony was a volte-face that accommodated the Appellant's defence.

- Conclusion

822. In light of the foregoing, the Appeals Chamber is of the view that a reasonable trier of fact could have found, on the basis of the confirmed factual findings, that Appellant Nahimana was a superior and had the material capacity to prevent or punish the broadcasting of criminal discourse by RTLM staff at least until 6 April 1994.

iii. Control after 6 April 1994

- The Defence position

823. Relying on the testimonies of Witnesses Bemeriki and Ruggiu, the Appellant asserts that the Defence evidence establishes that from 6 April 1994 onwards RTLM was managed by Phocas Habimana and Gaspard Gahigi, and that it was controlled by the army. Both testimonies were rejected in their entirety by the Trial Chamber,[1898] and the Appeals Chamber has already concluded that the Appellant did not demonstrate that it was unreasonable to reject Witness Bemeriki's testimony in its entirety.

824. Turning to Witness Ruggiu's testimony, the Appeals Chamber observes that the Trial Chamber rejected it in its entirety because of (1) the number of inconsistencies between pre-trial statements and his trial testimony, which could not be reconciled; (2) the witness' own admission that he had lied several times in his pre-trial statements; and (3) the fact that he was an accomplice to the crimes for which the Appellants were charged.[1899] The Appellant nevertheless argues that the Trial Chamber should have accepted certain portions of Witness Ruggiu's testimony because they were in conformity with his previous statements, and had not been challenged, or were corroborated by Witness Bemeriki's testimony and by other evidence.[1900] The Appeals Chamber considers that this assertion does not suffice to establish an error on the part of the Trial Chamber in assessing Witness Ruggiu's credibility. The Trial Chamber, having found Witness Ruggiu not credible, was under no obligation to accept portions of his testimony that were consistent with his previous statement or which had not been challenged in cross-examination. Moreover, the mere fact that some portions of a non-credible witness' testimony are "corroborated" by another non-credible witness' testimony can in no way demonstrate that the Trial Chamber should have accepted the uncontested

[1895] See Judgement, paras. 529 and 550.
[1896] The Appellant merely asserts, providing no precise reference, that Witness Bemeriki's testimony during examination-in-chief was wholly consistent with the statements she had earlier made to Prosecution investigators: Nahimana Appellant's Brief, para. 467, merely referring to the Transcript of 8 April 2002.
[1897] See Judgement, para. 550.
[1898] *Ibid.*, paras. 549 (Witness Ruggiu), 551 (Witness Bemeriki).
[1899] *Ibid.*, paras. 548-549.
[1900] Nahimana Brief in Reply, paras. 141-143.

portions. Finally, with respect to the existence of other evidence which allegedly corroborates Witness Ruggiu's testimony, the Appellant merely refers to this generally, without citing any items or identifying them precisely. For these reasons, the Appeals Chamber rejects the appeal on this point.

825. The Appeals Chamber accordingly finds that Appellant Nahimana's claim that the army exercised control over RTLM after 6 April 1994 is without foundation.

- Continuing authority after 6 April 1994

826. The Appellant submits that, since he had no *de jure* or *de facto* authority prior to 6 April 1994, the thesis that such authority continued after 6 April 1994 was necessarily precluded.[1901] The Appeals Chamber has concluded that the Trial Chamber did not err in finding that before 6 April 1994 the Appellant was a superior with the material capacity to prevent or punish the broadcast of criminal discourse by RTLM journalists. The Appellant's argument must therefore fail.

827. The Appeals Chamber has also found that the Appellant has failed to show that RTLM came under control of the military after 6 April 1994. Consequently, the Chamber is of the view that the Trial Chamber could reasonably conclude that the Appellant continued to possess the power to intervene at RTLM, unless there was reasonable doubt as to whether such powers continued to exist after 6 April 1994. The Appeals Chamber will now examine this question.

- Witness Dahinden's testimony

828. With respect to the Appellant's challenge to the Trial Chamber's finding that the Appellant maintained a connection with RTLM after 6 April 1994, the Appeals Chamber notes that Witness Dahinden stated that *both* Appellants Nahimana and Barayagwiza had, on 15 June 1994, "confirmed that it [RTLM] was about to be transferred".[1902] In consequence, the Appeals Chamber considers that the Trial Chamber not only faithfully reproduced Witness Dahinden's testimony in paragraphs 542 and 564 of the Judgement, but also reasonably concluded that, in stating that RTLM had been, was being, or was about to be, transferred to Gisenyi, less than 20 days before its actual transfer, the Appellants clearly showed that "they were in contact with RTLM and familiar with its future plans".[1903] The Appeals Chamber accordingly rejects the appeal on this point.

- Intervention to halt RTLM attacks on UNAMIR and General Dallaire

829. The Trial Chamber found in paragraphs 565, 568 and 972 of the Judgement that Appellant Nahimana intervened in late June or early July 1994 to put an end to RTLM attacks on General Dallaire and UNAMIR. The Appeals Chamber observes that these findings rely exclusively on Expert Witness Des Forges' report and testimony, according to which the French Ambassador Yannick Gérard told the Appellant around the end of June or the beginning of July 1994 that the RTLM broadcasts attacking General Dallaire and UNAMIR

[1901] Nahimana Appellant's Brief, para. 482.
[1902] T. 24 October 2000, p. 143.
[1903] Judgement, para. 564.

must cease, that the Appellant promised to intervene with the RTLM journalists, and that the attacks ceased shortly thereafter.[1904]

830. The Appeals Chamber has already recalled that the role of expert witnesses is to assist the Trial Chamber in assessing the evidence before it and not to testify to facts in dispute as would ordinary witnesses.[1905] However, the Appellant does not appear to have objected at trial to this part of Expert Witness Des Forges' testimony.[1906] The Appeals Chamber recalls that, in principle, a party cannot refrain from raising an objection on an issue that was evident at trial, with a view to raising it on appeal if it has lost the case at first instance.[1907] In these circumstances, the Appeals Chamber considers that the Appellant waived his right to raise an objection to this portion of Expert Witness Des Forges' report and testimony.

831. Turning to the argument that the information received from Expert Witness Des Forges was secondary hearsay collected more than five years after the event, the Appeals Chamber recalls that trial chambers may admit and rely on hearsay testimony if they consider it to have probative value.[1908] In the instant case, the Trial Chamber noted that "Des Forges specifies in detail that her source of information about Nahimana's interaction with the French Government is a diplomat who was himself present in meetings between Nahimana and French Ambassador Yannick Gérard, who had a documentary record of the interaction in the form of a diplomatic telegram", and it considered that this piece of information was reliable.[1909] The Appeals Chamber finds that this conclusion was reasonable.

832. The Appellant further submits that, even if the matters reported by Expert Witness Des Forges were true, they could not constitute evidence that the Appellant effectively intervened with RTLM journalists to halt the attacks on UNAMIR and General Dallaire. The Appeals Chamber notes that, according to Expert Witness Des Forges' report and testimony, the said attacks ceased "immediately"[1910] or within two days[1911] after the Appellant met Ambassador Gérard. In these circumstances, the Appeals Chamber is of the view that the Trial Chamber could reasonably conclude that it was the Appellant's intervention that put an end to these attacks. The fact that the Appellant and Witness Bemeriki denied that there was such intervention in their respective testimonies does not show that the Trial Chamber's

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[1904] *Ibid.*, para. 543, referring to Exhibit P158A (Des Forges Expert Report), pp. 52-53, and to T. 23 May 2002, pp. 211-213. However, contrary to what the Chamber appears to be saying in paragraph 543 of the Judgement, Expert Witness Des Forges did not rely solely on her conversation of 28 February 2000 with Jean-Christophe Belliard at the French Ministry of Foreign Affairs; in her report, she also cites a press report by Anne Chaon of 7 July 2002.

[1905] See *supra* IV. B. 2. (b) and XII. B. 3. (b) (i) a.

[1906] Nahimana Appellant's Brief does not refer to any specific objection raised at trial. The Appeals Chamber notes that Appellant Nahimana submitted a written motion objecting generally to the scope of Witness Des Forges' testimony (see Motion to Restrict the Testimony of Alison Desforges [*sic*] to Matters Requiring Expert Evidence, 10 May 2002), but this motion did not specifically object to that aspect of Expert Witness Des Forges' report. Moreover the Appellant's motion was submitted prior to Witness Des Forges' testimony on this issue.

[1907] See, for example, *Niyitegeka* Appeal Judgement, para. 199; *Kayishema and Ruzindana* Appeal Judgement, para. 91.

[1908] See *supra*, para. 215 (footnote 519).

[1909] Judgement, para. 563.

[1910] Exhibit P158A, p. 53.

[1911] T. 23 May 2002, p. 212.

conclusion was erroneous. The Trial Chamber in fact rejected these testimonies,[1912] and the Appellant has failed to show that it was unreasonable to do so.[1913]

833. The Appeals Chamber finds that the Appellant has not demonstrated that the Trial Chamber erred in concluding that he intervened with RTLM journalists to halt attacks on General Dallaire and UNAMIR in late June or early July 1994.

- Conclusion

834. The Appeals Chamber has rejected all of Appellant Nahimana's arguments relating to his effective control after 6 April 1994. It further finds that the facts proved against the Appellant demonstrate that he had the material capacity to prevent or punish RTLM broadcasts of criminal discourse even after 6 April 1994. The Appeals Chamber will consider later whether the Appellant made use of these powers.

b. *Mens Rea*

835. The Appeals Chamber would begin by observing that the Trial Chamber examined the *mens rea* standard applicable to superior responsibility pursuant to Article 6(3) of the Statute in two stages: before and after 6 April 1994. Thus, for the period prior to that date, paragraph 971 of the Judgement cites the following facts in support of the finding that the Appellant knew or had reason to know that his subordinates had committed, or were about to commit, criminal acts:

- Appellant Nahimana, as a member of the provisional board, knew that RTLM programming was generating concern;
- However, he defended RTLM programming at meetings with the Ministry of Information in 1993 and 1994;
- RTLM programming followed its trajectory, steadily increasing in vehemence and reaching a pitched frenzy after 6 April.

836. In paragraph 972 of the Judgement, the Trial Chamber concluded that "[a]fter 6 April 1994, [...] it is clear that Nahimana [...] knew what was happening at RTLM".

i. The Parties' submissions

837. The Appellant submits that the Trial Chamber wrongly found that he possessed the required *mens rea* for a conviction pursuant to Article 6(3) of the Statute. With respect to RTLM broadcasts prior to 6 April 1994, the Appellant asserts that "despite constant monitoring by the Rwandan administrative and judicial authorities, who were politically opposed to RTLM, no *crime* was reported during this period; no legal or administrative

[1912] The Trial Chamber "[did] not generally accept" the Appellant's testimony: Judgement, para. 696; Witness Bemeriki's testimony was rejected in its entirety: Judgement, para. 551.

[1913] Concerning Witness Bemeriki's testimony, see *supra* XIII. D. 1. (b) (ii) a. ii. The Appellant does not specifically dispute the Trial Chamber's finding regarding the lack of credibility of his own testimony.

population.[1923] Therefore, there can be no doubt that the Appellant "knew or had reason to know" that his RTLM subordinates were preparing to broadcast, or had already broadcast, speeches inciting the killing of Tutsi, and there is no need to address the Appellant's other arguments in this respect.

c. Reasonable and necessary measures to prevent or punish commission of the crime

842. The Trial Chamber concluded that the Appellant failed to exercise the authority vested in him to "prevent the genocidal harm that was caused by RTLM programming".[1924]

i. The Parties' submissions

843. Appellant Nahimana submits that the Trial Chamber wrongly concluded that, in the absence of Félicien Kabuga, it was for Appellants Nahimana and Barayagwiza to convene the Steering Committee, although Witness Ruggiu testified that Kabuga was actually present in Gisenyi in May 1994.[1925]

844. Appellant Nahimana further submits that he could not take measures to put an end to RTLM broadcasts without risking his life and the lives of his family.[1926] He argues that his position as personal adviser to the interim President was no guarantee against such a threat.[1927] The Appellant adds that he never played any role within the interim Government, that his position as personal adviser to the President gave him no power of decision or of intervention, but that he nevertheless specifically drew the President's attention to the need to take steps to put an end to the RTLM broadcasts.[1928]

845. The Prosecutor responds that the Appellant's argument that he could no longer intervene with the management of RTLM and was powerless to do anything about the threat represented by the station is contradicted by his conduct after 25 April.[1929]

846. Appellant Nahimana appears to reply that he could not take the sole reasonable and necessary measure evoked by the Trial Chamber in its Judgement, namely reporting the crimes to the appropriate authorities, since the latter were perfectly well aware of the broadcasts.[1930]

ii. Analysis

[1923] T. 24 September 2002, pp. 44-47. In particular, at page 46, Appellant Nahimana admitted that he heard broadcasts where the journalist urges listeners to flush out the enemy, the word "enemy" being capable of being understood as the Tutsi in general. See also Nahimana Appellant's Brief, para. 506.
[1924] Judgement, para. 972.
[1925] Nahimana Appellant's Brief, paras. 483-487.
[1926] *Ibid.*, paras. 513, 516-519. In this respect, the Appellant stresses that the Trial Chamber itself noted that "in the context of events as they unfolded after 6 April 1994, any attempt to oppose or protest, exposed one to the risk of immediate reprisals" (para. 516).
[1927] *Ibid.*, paras. 514-519.
[1928] *Ibid.*, paras. 520-526.
[1929] Respondent's Brief, para. 348.
[1930] Nahimana Brief in Reply, paras. 138-139.

proceedings were undertaken; no punishment was meted out".[1914] Furthermore, the Minister of Information only reproached RTLM for broadcasting messages of ethnic hatred and false propaganda, not for committing crimes.[1915]

838. As to RTLM broadcasts after 6 April 1994, the Appellant asserts that "the great majority of broadcasts considered criminal that were examined at trial were only brought to the attention of the Appellant on the occasion of the trial".[1916] He acknowledges having personally heard some broadcasts after 6 April 1994 calling for violence against the Tutsi population,[1917] but he submits that, at the time of his interview broadcast by Radio Rwanda (on 25 April 1994), he was not "perfectly" or "fully" aware of the criminal nature of these broadcasts.[1918] He further submits that, having been evacuated to Burundi, he could not receive RTLM broadcasts. Specifically, of the 27 broadcasts from after 6 April 1994 that were cited in the Judgement, only two of them dated from the month of April 1994 and he could not have heard that of 13 April 1994, because he was in Burundi at that time.[1919]

### ii. Analysis

839. As explained above, the mental element required pursuant to Article 6(3) of the Statute is that the accused "knew or had reasons to know" that his subordinates had committed or were about to commit crimes.[1920]

840. The Appeals Chamber is not convinced by the Appellant's arguments. As did the Trial Chamber,[1921] the Appeals Chamber finds that the Appellant "knew or had reason to know", as soon as he received the letter of 25 October 1993, or at least from the meeting of 26 November 1993 at the Ministry of Information. Moreover, the Appeals Chamber considers that the meeting of 10 February 1994, at which the Minister of Information repeated the concerns raised by the promotion of ethnic division by RTLM, leaves no doubt that Appellant Nahimana had the mental element required pursuant to Article 6(3) of the Statute. Indeed, from that moment the Appellant "had general information in his possession which would put him on notice of possible unlawful acts by his subordinates"; such information did not need to "contain precise details of the unlawful acts committed or about to be committed by his subordinates".[1922] In this respect, the Appeals Chamber stresses that the fact that no crime was denounced at the time or that the Ministry of Information did not describe the broadcasts as criminal is irrelevant: the Appellant had at a minimum reason to know that there was a significant risk that RTLM journalists would incite the commission of serious crimes against the Tutsi, or that they had already done so.

841. The Appeals Chamber notes, moreover, that the Appellant himself admitted having heard RTLM broadcasts after 6 April 1994 calling for violence against the Tutsi

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[1914] Nahimana Appellant's Brief, para. 503 (emphasis in the original).
[1915] *Ibid.*, para. 504.
[1916] *Ibid.*, para. 505.
[1917] *Ibid.*, para. 506.
[1918] *Ibid.*, paras. 285-286, 508 and 510.
[1919] *Ibid.*, paras. 283-284 and 511.
[1920] *Supra* XIII. D. 1. (b) (i) b. ii.
[1921] See Judgement, paras. 617-619 and 971.
[1922] *Supra* XIII. D. I. (b) (i) b. ii, referring to *Bagilishema* Appeal Judgement, paras. 28 and 42 and to *Čelebići* Appeal Judgement, paras. 238 and 241.

of a number of testimonies.[1933] The Appeals Chamber considers that the Trial Chamber erred in failing to motivate its finding.

852. Nevertheless, the Appeals Chamber notes that, when testifying, Expert Witness des Forges stated:

> Mr. Nahimana played the role of councillor [*sic*] to the President, Sindikubwabo, who was generally acknowledged to be an extremely weak and ineffective President, one who had serious problems, it has since emerged, with the Government itself, to such a point where he was even considering resigning at the end of May. Mr. Nahimana, who accompanied the President abroad, appeared to exercise a position of some importance in his company. There was testimony before this Court, I believe, by Mr. Dahindin [*sic*], who sought to meet the President in Geneva and who was referred to Mr. Nahimana as the person who had the authority to approve that meeting with the President. In addition, Mr. Nahimana engaged in two meetings with the senior French representative who was running *operation turquoise* in early July [...] The President was part of the Government and in that sense his advisor was also part of the Government, although, here, we may have a translation problem because, in one sense of the English usage, government is a restricted term meaning ministers, heads of departments. In another sense government means that group in charge of the country. In the sense of group in charge of the country, rather than ministerial -- occupants of ministerial posts; indeed, Mr. Nahimana would have been counted a member of the Government [...] Mr. Nahimana has been seen throughout this entire period as serving as a spokesperson for the Government, as a kind of public relations man, as the term would be in American-English, someone who would present and justify and argue for the stand of the Government beginning in October 1990. Subsequently, [...] in this capacity as presidential advisor, Mr. Nahimana was called upon repeatedly to be the educated, articulate public face of the Rwandan Government. He is described in French diplomatic correspondence as the director of RTLM and he is received by the head of the French diplomatic mission in Goma as a spokesperson for the Government in the company of the foreign minister, Mr. Bicamumpaka.[1934]

In the view of the Appeals Chamber, these extracts suffice to show that, on the basis of his capacity as adviser to the interim President and of the fact that he presented himself as spokesperson for the interim Government, the Appellant indeed occupied an important position *with* the Government.

853. As to the Appellant's argument that this was contradicted by Witness AGR's testimony,[1935] it suffices to note that the Trial Chamber did not accept this testimony,[1936] which the Appellant does not dispute on appeal. The Appeals Chamber therefore finds that the Trial Chamber could reasonably conclude that the Appellant had occupied an important position with the interim Government. This finding supports the conclusion that the Appellant enjoyed sufficient influence to take necessary and reasonable measures to prevent RTLM broadcasts of criminal discourse without having to fear for his own life, or for the lives of his family.

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[1933] Expert Witness Des Forges stated that the Appellant was political advisor or "*Conseiller*" to President Sindikubwabo and the Appellant himself said that he had been invited by the President to Gitarama on 25 or 26 May 1994, then to Tunis for the OAU summit in June (see Judgement, para. 540). Witness Dahinden testified that, having requested a meeting with the President of the Interim Government in June 1994, he was in fact received by Nahimana (see Judgement, para. 542).

[1934] T. 23 May 2002, pp. 203-208.

[1935] Nahimana Appellant's Brief, para. 523.

[1936] The Judgement does not mention Witness AGR, and it seems logical to assume that the Chamber did not accept his testimony.

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- The obligation to act in the absence of the RTLM President

847. The Appeals Chamber is not convinced that the Appellant has shown that the Trial Chamber should have found that the RTLM President, Félicien Kabuga, was in Rwanda after 6 April 1994. The only evidence supporting this hypothesis is Witness Ruggiu's assertion that he saw Félicien Kabuga in Gisenyi around 20 May 1994. However, the Trial Chamber rejected Witness Ruggiu's testimony in its entirety, and the Appeals Chamber has already found that the Appellant has not shown that this was unreasonable. The appeal on this point must accordingly be rejected.

848. In any event, even if Félicien Kabuga had been present in Rwanda after 6 April 1994, the Appeals Chamber fails to see how this could exonerate the Appellant from all responsibility. Since the Appellant was a superior who enjoyed power of effective control after 6 April 1994, he was under an obligation to exercise that power, even if it was shared with others.

- The risk of taking measures

849. The Appeals Chamber notes that the Trial Chamber took into account the Appellant's argument that he could not, without risking his life, or the lives of his family members, take any measure to prevent or punish the broadcast of criminal discourse by RTLM.[1931] However, the Trial Chamber rejected this argument, noting that the Appellant's allegations stood in sharp contrast with the evidence of his role at the time. It observed in particular that the Appellant was Political Adviser to the President, and that he played an important role within the interim Government. It also noted that the Appellant had *de jure* authority over RTLM and that the one occasion on which he did intervene to stop RTLM from broadcasting attacks on General Dallaire and UNAMIR showed that he had *de facto* power.[1932] The Appeals Chamber has upheld this latter finding.

850. The Appeals Chamber takes the view that the fact that the Appellant possessed *de facto* authority to intervene with RTLM suggests that he had nothing to fear from his subordinates. It was thus not unreasonable for the Trial Chamber to have rejected the Appellant's assertion that he could not take measures without risking his life or the lives of his family members, particularly in light of the fact that the Trial Chamber did not generally accept the Appellant's testimony. In any event, the Appeals Chamber considers that it was reasonable for the Trial Chamber to find that the Appellant's position as personal adviser to the interim President protected him against such risks.

851. The Appellant concedes having been personal adviser to the interim President. What he disputes is (1) the possession of any decision-making power, or the capacity to intervene, as a result of this position; and (2) his role within the interim Government. The Appeals Chamber agrees that the Appellant's role *within* the interim Government was not established in the Judgement. The Trial Chamber cited no evidence to support this finding, although the Appellant's position as personal adviser to the interim President was established on the basis

[1931] Judgement, para. 565.
[1932] *Idem*.

- The only measure the Appellant could have taken would have been useless

854. The Appeals Chamber is not convinced that the only measure the Appellant could have taken was to inform the authorities that RTLM was broadcasting criminal discourse. On this point, it refers to it discussion *supra*, upholding the Trial Chamber's finding that the Appellant could himself have intervened to prevent and punish the broadcast of criminal discourse. Consequently, the Appellant's argument that there was no point in informing the authorities of crimes they were already aware of cannot exonerate him. It was incumbent on the Appellant to take all necessary and reasonable measures in his power to stop the broadcast of criminal discourse and to punish its authors.

- The Appellant drew the interim President's attention to the need to intervene with RTLM

855. As to the assertion that the Appellant testified without being challenged that he drew the interim President's attention to the need to take measures to stop the RTLM broadcasts, the Appeals Chamber notes that the Trial Chamber did not generally accept the Appellant's version of events.[1937] The Appellant does not dispute this finding. Furthermore, the extract from the transcripts mentioned in his Appellant's Brief does not suffice to demonstrate that he took all necessary and reasonable measures in his power. His testimony in this respect was evasive,[1938] while there was no other evidence with probative value to support this defence. In consequence, the Appeals Chamber finds that the Appellant has failed to demonstrate any error on the part of the Trial Chamber. The appeal on this point is accordingly dismissed.

- Conclusion

856. For the foregoing reasons, the Appeals Chamber finds that Appellant Nahimana has not shown that the Trial Chamber erred in concluding that he failed to take necessary and reasonable measures to prevent or punish direct and public incitement to murder Tutsi in 1994 by RTLM staff.

(c) Conclusion

857. The Appeals Chamber accordingly upholds the Appellant's conviction for direct and public incitement to commit genocide, pursuant to Article 6(3) of the Statute.

2. Responsibility of Appellant Barayagwiza

(a) RTLM broadcasts

[1937] Judgement, para. 696.

[1938] The Appeals Chamber moreover notes that, during his testimony, Appellant Nahimana did not spontaneously indicate that he had mentioned the matter to the President. It was only when asked by Judge Pillay that Appellant Nahimana stated :

> [...] as from June 1994 when I was able, indeed, to have contact with President Sindikubwabo, I was able to meet a number of ministers; the minister of foreign affairs was with me in Tunis. I did discuss it. (T. 18 October 2002, pp. 42-44)

858. The Trial Chamber found Appellant Barayagwiza guilty of direct and public incitement to commit genocide pursuant to Article 6(3) of the Statute.[1939] The Appeals Chamber has already found that the Trial Chamber was entitled to conclude that the Appellant was a superior with effective control over the journalists and employees of RTLM before 6 April 1994.[1940] However, the Appeals Chamber has also concluded that it could not be held beyond reasonable doubt that RTLM broadcasts between 1 January and 6 April 1994 constituted direct and public incitement to commit genocide.[1941] Therefore, the Appeals Chamber is of the view that Appellant Barayagwiza could not be convicted pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide by RTLM staff.

(b) CDR

859. The Appeals Chamber notes that the Trial Chamber found Appellant Barayagwiza guilty of direct and public incitement to commit genocide on account of his activities within the CDR and as a superior of CDR members and *Impuzamugambi*:

> As found in paragraph 276, Jean-Bosco Barayagwiza was one of the principal founders of CDR and played a leading role in its formation and development He was a decision-maker for the party. The killing of Tutsi civilians was promoted by the CDR, as evidenced by the chanting of *"tubatsembatsembe"* or "let's exterminate them", by Barayagwiza himself and by CDR members and *Impuzamugambi* in his presence at public meetings and demonstrations. The reference to "them" was understood to mean the Tutsi population. The killing of Tutsi civilians was also promoted by the CDR through the publication of communiqués and other writings that called for the extermination of the enemy and defined the enemy as the Tutsi population. The Chamber notes the direct involvement of Barayagwiza in this call for genocide. Barayagwiza was at the organizational helm of CDR. He was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi civilians. For these acts, the Chamber finds Jean-Bosco Barayagwiza guilty of direct and public incitement to genocide under Article 2(3)(c) of its Statute, pursuant to Article 6(1) of its Statute. The Chamber found in paragraph 977 above that Barayagwiza had superior responsibility over members of CDR and the *Impuzamugambi*. For his failure to take necessary and reasonable measures to prevent the acts of direct and public incitement to commit genocide caused by CDR members, the Chamber finds Barayagwiza guilty of direct and public incitement to commit genocide pursuant to Article 6(3) of its Statute.[1942]

860. In his submissions concerning direct and public incitement to commit genocide, Appellant Barayagwiza does not specifically challenge this conviction. However, the Appellant challenges elsewhere many of the factual findings underlying it, and the Appeals Chamber will now consider these arguments.

(i) Responsibility pursuant to Article 6(1) of the Statute

[1939] Judgement, para. 1034. As noted above (footnote 1604), the French translation of this paragraph states that the Appellant was convicted under Article 6(1) and (3) of the Statute, but this is a translation error, the original English version referring only to Article 6(3) of the Statute.
[1940] See *supra* XII. D. 2. (a) (ii) (b).
[1941] See *supra* XIII. C. 1. (b) (iv).
[1942] Judgement, para. 1035.

861. The Appeals Chamber has already rejected the Appellant's arguments that he never directly called for the extermination of the Tutsi.[1943] However, the witnesses who stated that the Appellant Barayagwiza had personally called for the extermination of Tutsi referred only to events that occurred before 1994.[1944] It follows that the Appellant's conviction for direct and public incitement to commit genocide could not be based on those facts.

862. The Appeals Chamber notes that, in convicting the Appellant of direct and public incitement to commit genocide under Article 6(1) of the Statute, the Trial Chamber also relied on the fact that CDR promoted the killing of Tutsi, that the Appellant "was at the organizational helm of CDR" and that "he was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for the killing of Tutsi".[1945] However, the Judgement does not explain how these facts constituted personal acts of the Appellant which would form a basis for his conviction for direct and public incitement to commit genocide under any of the modes of responsibility set out in Article 6(1) of the Statute. In particular, the supervision of roadblocks cannot form the basis for the Appellant's conviction for direct and public incitement to commit genocide; while such supervision could be regarded as instigation to commit genocide, it cannot constitute public incitement, since only the individuals manning the roadblocks would have been the recipients of the message and not the general public. Therefore, the Appeals Chamber sets aside the Appellant's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide.

(ii) Responsibility pursuant to Article 6(3) of the Statute

863. The Trial Chamber also found that the Appellant could be held liable under Article 6(3) of the Statute for the acts of direct and public incitement to commit genocide of CDR members.[1946] The Appeals Chamber has already held that the conviction of the Appellant could be based only on acts of direct and public incitement having taken place in 1994.[1947] It has also held that a reasonable trier of fact was entitled to find that in 1994 CDR militants had engaged in chanting, directly and publicly inciting the commission of genocide against the Tutsi.[1948] The Appeals Chamber will now consider whether the Appellant could be convicted under Article 6(3) of the Statute on account of that chanting.

a. Elements to be established

864. Appellant Barayagwiza submits that, in order to prove that he had superior responsibility under Article 6(3), it was necessary for the Prosecutor to prove the following: (1) that he had a *dolus specialis*; (2) that he had superior responsibility for CDR members; and (3) that CDR members killed Tutsi civilians.[1949]

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[1943] See *supra* XII. C. 3. (a) (ii) .
[1944] See *supra* para. 647. Witness AFB asserted that he had heard Appellant Barayagwiza call for the extermination of Tutsi at a CDR meeting held at Umuganda stadium in 1993: T. 6 March 2001, pp. 20-21, 52; Judgement, paras. 308 and 708. Witness X stated that he had heard Appellant Barayagwiza call for the murder of Tutsi during a CDR meeting held at Nyamirambo stadium in February or March 1992: T. 18 February 2002, pp. 72-76; Judgement, paras. 310 and 708. Witness AAM referred to demonstrations in the town of Gisenyi towards the end of 1992: T. 12 February 2001, pp. 102-105; Judgement, paras. 702 and 718.
[1945] Judgement, para. 1035.
[1946] *Idem.*
[1947] See *supra* VIII. B. 2.
[1948] See *supra* XIII. C. 2.
[1949] Barayagwiza Appellant's Brief, para. 178.

865. The Appeals Chamber has already recalled the elements to be established in order to convict a defendant under Article 6(3) of the Statute.[1950] In particular, it is not necessary for the accused to have had the same intent as the perpetrator of the criminal act; it must be shown that the accused "knew or had reason to know that the subordinate was about to commit such act or had done so".[1951] Furthermore, it is not necessary for the Appellant's subordinates to have killed Tutsi civilians: the only requirement is for the Appellant's subordinates to have committed a criminal act provided for in the Statute, such as direct and public incitement to commit genocide.

866. The Appeals Chamber will now consider whether Appellant Barayagwiza could be convicted under Article 6(3) of the Statute on account of acts of direct and public incitement to commit genocide by CDR militants in 1994.

b. Analysis of the Appellant's submissions

i. National President of the CDR

867. Appellant Barayagwiza maintains that the Trial Chamber erred in finding that in February 1994, after the assassination of Martin Bucyana, he became National President of the CDR.[1952] The Appellant argues that this finding was not established beyond reasonable doubt, since it was based on "unsupported hearsay"[1953] and not supported by any documentary evidence.[1954] The Appellant further contends that, under Article 19 of the CDR constitution, the Vice-President of the CDR automatically became its President until new elections were called.[1955] He also points out that, at a CDR press conference held on 2 April 1994, he was only introduced as "an advisor to the executive committee".[1956] In his Brief in Reply, the Appellant adds that (1) the Trial Chamber could not rely on issues 58 and 59 of *Kangura* in order to conclude that he had become National President of the CDR, since Appellant Ngeze had explained — giving plausible reasons — that the information in these issues was inaccurate;[1957] and (2) contrary to what the Prosecutor submits,[1958] Colonel Bagosora did not write that he (Appellant Barayagwiza) was National President of the CDR, but only that he was one of its leaders.[1959]

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[1950] See *supra* XI. B.

[1951] Article 6(3) of the Statute.

[1952] Barayagwiza Notice of Appeal, p. 2 (Ground 18); Barayagwiza Appellant's Brief, paras. 181-184; Barayagwiza Brief in Reply, paras. 118-122; T(A) 17 January 2007, pp. 59-65. The Appellant also filed a motion seeking the admission of additional evidence in support of this ground of appeal (The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 13 September 2006), but this motion was dimissed because the Appellant failed to show that the additional evidence sought to be admitted (1) was unavailable at trial and (2) that its exclusion on appeal would lead to a miscarriage of justice (Decision of 8 December 2006, paras. 25-31).

[1953] Barayagwiza Appellant's Brief, para. 184. See also Barayagwiza Brief in Reply, para. 120.

[1954] *Ibid.*, para. 182.

[1955] *Ibid.*, para. 183 (reference to the relevant exhibit not provided); Barayagwiza Brief in Reply, para. 119.

[1956] *Ibid.*, para. 183 (referring to a "*Cassette* CE56/95 of RTLM (2 April 1994)"); Barayagwiza Brief in Reply, paras. 118-119; T(A) 17 January 2007, p. 60, referring to "Exhibit P103".

[1957] Barayagwiza Brief in Reply, para. 121.

[1958] Respondent's Brief, para. 546, referring to Exhibit P142, p. 26.

[1959] Barayagwiza Brief in Reply, para. 122.

868. The Trial Chamber's finding that Appellant Barayagwiza became National President of the CDR in February 1994[1960] is based on the following evidence: the testimonies of Witnesses ABC, LAG, Serushago, AHB and Kamilindi, and of Expert Witnesses Kabanda and Des Forges, and on extracts from *Kangura* issues 58 and 59.[1961] The Appellant asserts that the Trial Chamber's finding is erroneous because based on "unsupported hearsay", but he does not otherwise support this assertion; the appeal on this point therefore cannot succeed.[1962] The Appeals Chamber notes, however, that the reference to the testimony of Expert Witness Des Forges in paragraph 266 of the Judgement cannot support the conclusion that Appellant Barayagwiza had become President of the CDR on the death of Martin Bucyana.[1963] Nevertheless, the Appeals Chamber is satisfied that this conclusion could be reached on the basis of the other evidence cited by the Trial Chamber.

869. The Appeals Chamber also dismisses the Appellant's argument based on the CDR constitution, recalling that this argument was considered by the Trial Chamber,[1964] which nonetheless found on the basis of other evidence that the Appellant had become National President of the CDR. The Appellant has not shown that this finding was unreasonable.[1965] The same applies to the argument that the information in *Kangura* issues 58 and 59 was inaccurate: this argument was considered and rejected by the Trial Chamber,[1966] and the Appellant has not demonstrated that this was unreasonable.

870. As to the argument that the Appellant was introduced merely as "an advisor to the executive committee" at a CDR press conference on 2 April 1994, the Appellant cites no

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[1960] Judgement, para. 276.

[1961] *Ibid.*, paras. 266, 267 and 273, the latter paragraph referring more specifically to the testimonies of Witnesses ABC and Serushago, as well as to issues No. 58 and 59 of *Kangura*.

[1962] The only specific argument raised by the Appellant in this connection is that Witness Kamilindi was not credible because he was a member of the PSD, a party allied to the RPF and staunchly opposed to the CDR (Barayagwiza Brief in Reply, para. 120). However, this argument does not suffice to demonstrate that it was unreasonable to accept this testimony, especially since the Trial Chamber was aware of this fact (T. 21 May 2001, p. 82 and T. 22 May 2001, pp. 29-30). At the appeal hearing, Appellant Barayagwiza also attacked the testimony of Expert Witness Des Forges with respect to the alleged struggle for power between Appellant Barayagwiza and Martin Bucyana within the CDR (T(A) 17 January 2007, p. 60-64), but the arguments made in this connection do not show why it was unreasonable to conclude that the Appellant became President of the CDR on the death of Bucyana.

[1963] Footnote 200 to the Judgement refers to T. 21 May 2002, pp. 55-56, where Expert Witness Des Forges explains that Appellant Barayagwiza was one of the main founders of the CDR. However, Des Forges later states that witnesses told her that Barayagwiza was the real head of the CDR: T. 21 May 2002, pp. 150-151.

[1964] See Judgement, para. 267.

[1965] Moreover, Article 19 of the CDR constitution (Exhibit 2D9), to which the Appellant refers, does not provide that the Vice-President of the CDR automatically becomes its President until new elections are called, but reads as follows:

> The President of the Executive Committee is the President of the Party. He is its Legal Representative.
>
> The first Vice-President of the Executive Committee is the first Substitute Legal Representative.
>
> The second Vice-President of the Executive Committee is the second Substitute Legal Representative.

In any case, even if it were the case that in theory the Vice-President succeeded the President until new elections were called, this would not necessarily imply that this is what happened in practice.

[1966] See Judgement, paras. 266 and 273.

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evidence on file (or at least gives no specific reference), and the Appeals Chamber will accordingly not consider it.[1967]

871. Finally, the Trial Chamber did not rely on the article by Colonel Bagosora in order to conclude that the Appellant had become National President of the CDR. In any event, the Appeals Chamber notes that what Colonel Bagosora wrote was: "[t]he example of the attack on the residence of Mr Barayagwiza Jean Bosco, leader of the Coalition for the Defence of the Republic (C.D.R.) was the most eloquent".[1968] It is not clear whether Colonel Bagosora meant to say that the Appellant was "the" leader or "one of the" leaders of the CDR; this extract therefore cannot invalidate the finding that the Appellant had become National President of the CDR. The Appellant's appeal on these points is dismissed.

### ii. Head of the CDR in Gisenyi

872. The Appellant submits that the Trial Chamber erred in finding that he "was President of CDR in Gisenyi before 1994"; he maintains that he was in fact elected to this position on the 5th or the 6th of February 1994, as demonstrated by a fax dated 6 February 1994.[1969]

873. The Trial Chamber found on the basis of a series of testimonies[1970] that "[a]t some time prior to February 1994, Barayagwiza became the head of the CDR in Gisenyi prefecture".[1971] The Appellant's assertion that "[t]his finding was based on nothing more than rumour and hearsay"[1972] is unsupported and cannot therefore show that the Trial Chamber erred.[1973] As to the fax of 6 February 1994, it is not even on record.[1974] The Appellant's appeal on these points is dismissed.

### iii. Membership in the Executive Committee of the CDR

874. The Appellant argues that the Trial Chamber erred in finding that he was a member of the Executive Committee of the CDR.[1975] First, he asserts that "[t]his finding was based entirely on rumour, or vague and unfounded information from dubious sources";[1976] in

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[1967] The Appellant has referred to a "*Cassette* CE56/95 of RTLM (2 April 1994)" (Barayagwiza Appellant's Brief, para. 183) and to Exhibit P103 (T(A) 17 January 2007, p. 60). It is unclear whether the tape mentioned by the Appellant is in the case-file. With respect to Exhibit P103, the Appellant fails to make it clear what he is referring to (Exhibit P103 contains a whole series of tapes in Kinyarwanda).

[1968] Exhibit P142, p. 26.

[1969] Barayagwiza Notice of Appeal, p. 2 (Ground 19); Barayagwiza Appellant's Brief, para. 185 (stating that the Appellant was elected on 5 February 1994); Barayagwiza Brief in Reply, para. 123 (stating that the Appellant was elected on 6 February 1994).

[1970] Judgement, paras. 264, 265 and 273, relying on the testimonies of Witnesses AHI, BI, EB, AFX, Serushago and Kamilindi, and of Expert Witness Des Forges.

[1971] *Ibid.*, para. 276.

[1972] Barayagwiza Appellant's Brief, para. 185.

[1973] The Appeals Chamber considers that this conclusion has not been affected by the fact that, following the admission of additional evidence on appeal, the testimonies of Witnesses EB and AFX can no longer be accepted, since a reasonable trier of fact could reach this conclusion on the basis of other evidence adduced.

[1974] At para. 123 of his Brief in Reply, the Appellant argues that this fax was part of the supporting material in his Indictment (no reference provided). Even if this were the case, it would not make the fax an exhibit admitted to the record.

[1975] Barayagwiza Notice of Appeal, p. 2 (Ground 20); Barayagwiza Appellant's Brief, paras. 186-189; Barayagwiza Brief in Reply, paras. 124-129; T(A) 17 January 2007, pp. 68-70.

[1976] Barayagwiza Appellant's Brief, para. 186. See also Barayagwiza Brief in Reply, para. 129.

particular, the statement by Expert Witness Des Forges that the Appellant was "self-chosen" as member of the Executive Committee, or that the CDR could have acted in breach of its own rules, was unfounded.[1977] The Appellant maintains that the authenticity of the only document produced in support of the Trial Chamber's finding – a letter from CDR President, Martin Bucyana, to General Dallaire which included the Appellant's name in a list of members of the CDR for which protection was requested – has not been established,[1978] and that, in any case, this letter "was not intended to provide a complete list of members of the Executive Committee of the CDR".[1979] The Appellant adds that the official documents of the party filed with the Ministry of Internal Affairs show that he was not a member of the Executive Committee, that the Prosecutor did not produce any document proving his election to the Executive Committee and that he had always been known and designated as adviser to the Executive Committee.[1980] In his Brief in Reply, the Appellant maintains that: (1) the disputed finding is in contradiction with the CDR constitution, which provides that the general assembly elects the members of the executive committee; (2) he was not elected at the only general assembly, held on 22 February 1992; and (3) a letter dated 14 December 1992 shows that the Appellant was not a member of the Executive Ccommittee.[1981]

875. The Trial Chamber found that "[a]t some time prior to February 1994, Barayagwiza became [...] a member of the national Executive Committee".[1982] This finding appears to rely on the testimonies of Witness Kamilindi, Expert Witness Chrétien and Appellant Ngeze, as well as on the letter from the President of the CDR to General Dallaire.[1983]

876. In the opinion of the Appeals Chamber, the Appellant has not shown that the Trial Chamber erred in relying on the letter from the President of the CDR, Martin Bucyana, to General Dallaire. First, the fact that the Prosecutor was able to produce only a copy of the letter is not sufficient to cast doubt on its authenticity.[1984] Second, the letter's content is clear: the President of the CDR requests General Dallaire to provide protection for the nine named members of the Executive Committee, who include Appellants Barayagwiza and Ngeze.[1985] It

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[1977] *Ibid.*, para. 188; Barayagwiza Brief in Reply, para. 125, referring to T. 29 May 2002, pp. 242-249 (In French) and 30 May 2002, pp. 13-14.
[1978] *Ibid.*, para. 187.
[1979] *Ibid*, para. 188.
[1980] *Idem.*
[1981] Barayagwiza Brief in Reply, paras. 125-128, referring to Exhibits 2D9, 2D12 and P203.
[1982] Judgement, para. 276.
[1983] *Ibid.*, paras. 261, 264-265, 273.
[1984] Moreover, contrary to what the Appellant appears to argue (Barayagwiza Appellant's Brief, para. 187), the Prosecutor did not have to produce a "certified copy signed by the Registrar".
[1985] Exhibit P107/37, the relevant part of which reads as follows:

> SUBJECT: Protection of members of the Executive Committee of the CDR Party
>
> General,
>
> I have the honour to inform you that recently the members of the Executive Committee of the CDR Party have received death threats from individuals not sharing their ideology.
>
> I would therefore ask you to ensure the security of the following persons: [...]
>
> 8. Mr. NGEZE Hassan, residing in the Biryogo Sector, Nyarugenge Commune.
>
> 9. Mr. BARAYAGWIZA Jean Bosco, residing in the Nyarugenge Sector, Nyarugenge Commune [...]

The letter is signed "BUCYANA Martin President of the CDR Party" and bears the stamp of the CDR.

was certainly not unreasonable to rely on this letter of 30 December 1993 in order to conclude that the Appellant had become a member of the Executive Committee of the CDR at some time prior to February 1994.

877. As to the argument that the testimony of Expert Witness Des Forges should have been rejected, the Appeals Chamber notes that, when she was questioned as to why she thought the Appellant was a member of the Executive Committee of the CDR, she answered that she relied on the letter to General Dallaire,[1986] adding that it was reasonable to assume that the President of the party knew who the members of his Executive Committee were.[1987] Co-Counsel Pognon objected that there was no evidence that the Appellant had been elected to the Committee after the assembly of 22 February 1992,[1988] but Ms. Des Forges maintained her answer, limiting herself to suggesting how the Appellant might have become a member of the Committee.[1989] This cannot invalidate her testimony on this point.

878. The Appeals Chamber notes that the Appellant raises no specific argument to show that the Trial Chamber erred in accepting the testimonies of Witness Kamilindi and Expert Witness Chrétien. The Appeals Chamber finds that, on the basis of these testimonies and the letter sent by the President of the CDR to General Dallaire on 30 December 1993, it was reasonable to conclude that the Appellant had become a member of the Executive Committee of the CDR before February 1994. The fact that he was not elected to the Committee at the general assembly of the CDR of 22 February 1992[1990] – a fact recognized by the Trial Chamber[1991] – or that documents of 1992 and 1993 did not refer to him as a member of the Committee cannot invalidate this finding. The appeal on this point is therefore dismissed.

iv. Effective control over CDR militants and *Impuzamugambi*

879. The Appellant asserts that the Trial Chamber erred in finding that he could be held liable as hierarchical superior of the CDR militants and *Impuzamugambi*.[1992] Invoking *Kordić* and *Čerkez*[1993] and the analysis of the Trial Chamber at paragraph 976 of the Judgement, he maintains that, even if he was National President of the CDR, this would not imply that he was the hierarchical superior of the CDR militants, in the absence of a showing by the Trial Chamber that his powers met the criterion of effective control.[1994]

880. The Prosecutor responds that the Appellant "truncated the Trial Chamber's position regarding the accountability of political party leadership for acts committed by members or

[1986] T. 29 May 2002, p. 209.
[1987] T. 30 May 2002, pp. 8, 15.
[1988] T. 29 May 2002, p. 210; T. 30 May 2002, pp. 6-17.
[1989] T. 29 May 2002, p. 210 ("That would presume if he was elected, perhaps he was self-chosen.") and 211; T. 30 May 2002, p. 12, 14 ("Q. Do you agree with me that in order for one to be a member of a bureau of a party, one has to go through an electoral process? A. That depends on the rules of the party and whether or not they are observed.").
[1990] In this connection, the Appeals Chamber notes that it appears that the Executive Committee elected on 22 February 1992 was a provisional one: Exhibit 2D12, p. 172*bis* (Registry numbering).
[1991] Judgement, para. 272.
[1992] Barayagwiza Notice of Appeal, p. 2 (Ground 21); Barayagwiza Appellant's Brief, paras. 190-193; Barayagwiza Brief in Reply, paras. 90-91.
[1993] Barayagwiza Appellant's Brief, para. 191, no specific reference provided.
[1994] *Ibid.*, paras. 190-192; Barayagwiza Brief in Reply, paras. 90-91.