affiliates to the party", the Trial Chamber having found that CDR militants and *Impuzamugambi* acted in conformity with the dictates or instructions of the party.[1995] The Prosecutor further argues that the Appellant misrepresents the criteria for superior responsibility, since proof of an official position is not required.[1996] The Prosecutor finally submits that the Trial Chamber did not have to examine the powers deriving from the position of CDR President, since it had concluded that the Appellant had in practice exercised effective control over CDR members and *Impuzamugambi*, noting in particular that they were directed and supervised by the Appellant and that he had given them weapons.[1997]

881. Paragraph 976 of the Judgement reads as follow:

> The Chamber notes that, in *Musema*, the Tribunal found that superior responsibility extended to non-military settings, in that case to the owner of a tea factory. The Chamber has considered the extent to which Barayagwiza, as leader of the CDR, a political party, can be held responsible pursuant to Article 6(3) of its Statute for acts committed by CDR party members and *Impuzamugambi*. The Chamber recognizes that a political party and its leadership cannot be held accountable for all acts committed by party members or others affiliated to the party. A political party is unlike a government, military or corporate structure in that its members are not bound through professional affiliation or in an employment capacity to be governed by the decision-making body of the party. Nevertheless, the Chamber considers that to the extent that members of a political party act in accordance with the dictates of that party, or otherwise under its instruction, those issuing such dictates or instruction can and should be held accountable for their implementation. In this case, CDR party members and *Impuzamugambi* were following the lead of the party, and of Barayagwiza himself, who was at meetings, at demonstrations, and at roadblocks, where CDR members and *Impuzamugambi* were marshalled into action by party officials, including Barayagwiza or under his authority as leader of the party. In these circumstances, the Chamber holds that Barayagwiza was responsible for the activities of CDR members and *Impuzamugambi*, to the extent that such activities were initiated by or undertaken in accordance with his direction as leader of the CDR party.[1998]

882. The Appeals Chamber is of the view that these factual findings were capable of supporting a conviction of the Appellant pursuant to Article 6(1) of the Statute for having ordered or instigated certain acts of CDR militants and *Impuzamugambi*. The Appeals Chamber has indeed already upheld the conviction of this Appellant on this count.[1999] The question here is whether the Appellant could incur liability as a superior for all of the acts committed by CDR militants and *Impuzamugambi*. The Appeals Chamber is not convinced that the evidence cited by the Trial Chamber suffices to establish the effective control of the Appellant over all CDR militants and *Impuzamugambi* in all circumstances. In particular, as noted by the Trial Chamber, the leaders of a political party "cannot be held accountable for all acts committed by party members or others affiliated to the party".[2000] Although the Appellant doubtless exerted substantial influence over CDR militants and *Impuzamugambi*, that is insufficient – absent other evidence of control – to conclude that he had the material

[1995] Respondent's Brief, para. 552, referring to the Judgement, para. 976.
[1996] *Ibid.*, para. 553.
[1997] *Ibid.*, para. 554, referring to Judgement, paras. 261, 314, 336, 340-341, 954 and 977.
[1998] Judgement, para. 976 (referring to *Musema* Trial Judgement, paras. 148 and 905).
[1999] See *supra* XII. D. 2. (b) (viii) .
[2000] Judgement, para. 976.

capacity to prevent or punish the commission of crimes by all CDR militants and *Impuzamugambi*.[2001]

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883. Accordingly, the Appeals Chamber sets aside the Appellant's conviction pursuant to Article 6(3) of the Statute for direct and public incitement to commit genocide on account of acts by CDR militants and *Impuzamugambi*.

3. Responsibility of Appellant Ngeze

(a) *Kangura* articles

884. Appellant Ngeze appeals against his conviction by the Trial Chamber for various crimes in his capacity as founder, owner and editor of *Kangura*, alleging that none of the articles in the paper support the thesis that he directly and personally participated in the perpetration of these crimes.[2002]

885. The Trial Chamber concluded that Appellant Ngeze "was the owner, founder and editor of *Kangura*. He controlled the publication and was responsible for its contents".[2003] This finding was based on the following evidence:

> That Hassan Ngeze was the founder and editor of *Kangura* is not contested. The Chamber notes that Ngeze accepted responsibility for and defended the publication in his testimony. Others such as Witness AHA, who worked for *Kangura*, confirmed that Ngeze was "the boss" and had the last word in editorial meetings.[2004]

The Trial Chamber then found the Appellant guilty of direct and public incitement to commit genocide on the basis of *Kangura* articles.[2005]

886. The Appeals Chamber has already concluded that certain articles and editorials published in *Kangura* in 1994 directly and publicly incited the commission of the genocide.[2006] The Appellant has failed to demonstrate that he could not have been held personally responsible for matters published in *Kangura*. The Appeals Chamber considers that, on the basis of the evidence before it, the Trial Chamber could reasonably attribute the totality of articles and editorials published in *Kangura* to Appellant Ngeze. Moreover, the Appellant had himself written two of the three articles published in 1994 found to have constituted direct and public incitement to commit genocide (the other article being signed *Kangura*).[2007] Furthermore, there can be no doubt that, by his acts, the Appellant Ngeze had the intent to instigate others to commit genocide. The Appeals Chamber accordingly upholds the conviction of the Appellant for having directly and publicly incited the commission of genocide through matters published in *Kangura* in 1994.

[2001] See in this connection *Čelebići* Appeal Judgement, para. 266 (stating that substantial influence is insufficient to establish effective control). See also *Kordić and Čerkez* Trial Judgement, paras. 838-841, finding that, even though Kordić had substantial influence as political leader, this was insufficient to conclude that he had effective control (this finding was not challenged on appeal by the ICTY Prosecutor).

[2002] Ngeze Appellant's Brief, paras. 354-355.

[2003] Judgement, para. 135. See also paras. 977A and 1038.

[2004] *Ibid.*, para. 134.

[2005] *Ibid.*, para. 1038.

[2006] See *supra* XIII. C. 3. (c).

[2007] See *supra* XII. C. 3. (b).

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(b) Acts of the Appellant in Gisenyi

887. Appellant Ngeze argues that the Trial Chamber erred in considering that the fact that he mobilized the population to attend CDR meetings and spread the message that the *Inyenzi* would be exterminated were acts which called for the extermination of the Tutsi population.[2008] He submits that to invite the population to attend a political meeting is not a crime and contends that, even if he had mobilized the population by driving around with a megaphone in his vehicle, it was the entire population that he was mobilizing, not just the Hutu.[2009] He further claims that the Trial Chamber erred in finding it established beyond reasonable doubt that he announced through a megaphone that the *Inyenzi* would be exterminated.[2010]

888. The Trial Chamber found Appellant Ngeze guilty of direct and public incitement to commit genocide under Articles 2(3)(c) and 6(1) of the Statute for his acts which called for the extermination of the Tutsi population: "Hassan Ngeze 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."[2011]

889. The Appeals Chamber notes that the Trial Chamber did not rely solely on the invitation to attend CDR meetings in convicting Appellant Ngeze of the crime of direct and public incitement to commit genocide, but rather on this fact coupled with his announcements that the *Inyenzi* (*i.e.*, the Tutsi) would be exterminated.

890. The Appeals Chamber notes Appellant Ngeze's argument that, even if he had in fact mobilized people to come to CDR meetings, it was the entire population that he was mobilizing, and not just the Hutu. However, whether or not Appellant Ngeze sought to mobilize the Hutu population or the entire population is of no relevance; what is important is that direct and public incitement to commit genocide did occur.

891. Appellant Ngeze further argues that paragraph 834 of the Judgement demonstrates that it was not proved beyond reasonable doubt that he announced through a megaphone that the *Inyenzi* would be exterminated. However, this paragraph shows that, even though some Defence witnesses testified that Appellant Ngeze did not have a megaphone in his vehicle, the Trial Chamber was satisfied beyond reasonable doubt that the Appellant was seen with a megaphone. Appellant Ngeze has failed to demonstrate any error on the part of the Trial Chamber.

892. Nonetheless, the Trial Chamber did not specify when the acts in question took place. The factual finding in paragraph 837 of the Judgement is based on the testimonies of Witnesses Serushago, ABE, AAM and AEU.[2012] The Appeals Chamber notes that Witness Serushago refers to events which allegedly took place in February 1994,[2013] Witness ABE to

[2008] Ngeze Appellant's Brief, paras. 269-272.
[2009] *Ibid.*, para. 270.
[2010] *Ibid.*, para. 271.
[2011] Judgement, para. 1039, referring to para. 837.
[2012] *Ibid.*, para. 834.
[2013] T. 15 November 2001, pp. 118-119; Judgement, paras. 784 and 834.

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events in 1993,[2014] and Witness AAM to events prior to 1994.[2015] As for Witness AEU, it is not clear when the events which the witness describes occurred.[2016] Since only Witness Serushago clearly refers to events which allegedly took place in February 1994 and this testimony cannot be relied on if it is not corroborated by other reliable evidence,[2017] it has not been demonstrated beyond reasonable doubt that in 1994 Appellant Ngeze "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". For this reason, this part of Appellant Ngeze's conviction for the crime of direct and public incitement to commit genocide must be quashed.

XIV. CONSPIRACY TO COMMIT GENOCIDE

893. The Appellants contend that, in convicting them of the crime of conspiracy to commit genocide, the Trial Chamber committed several errors of law and fact.[2018]

A. Elements of the crime of conspiracy to commit genocide

894. Conspiracy to commit genocide under Article 2(3)(b) of the Statute has been defined as "an agreement between two or more persons to commit the crime of genocide".[2019] The existence of such an agreement between individuals to commit genocide (or "concerted agreement to act"[2020]) is its material element (*actus reus*); furthermore, the individuals involved in the agreement must have the intent to destroy in whole or in part a national, ethnical, racial or religious group as such (*mens rea*).[2021]

B. Alleged errors

895. Appellants Nahimana and Ngeze argue that the Trial Chamber could not infer the existence of an agreement to commit genocide based on the concerted or coordinated action of a group of individuals, because "[t]he fact that individuals react simultaneously and in the same way to a common situation (war, political crisis, murder of political leaders, ethnic conflicts, etc.) does not in any way prove the existence of a prior agreement and a concerted

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[2014] T. 26 February 2001, p. 95.
[2015] T. 12 February 2001, pp. 104, 110-111, 131-132; Judgement, para. 797.
[2016] The Trial Chamber (Judgement, para. 798, footnote 824) referred to the following portions of Witness AEU's testimony: T. 26 June 2001, pp. 5-9, 32-36 and T. 27 June 2001, pp. 119-121. Although Witness AEU stated that she had seen Appellant Ngeze at the front of the convoys going to the CDR meetings and bragging about having killed *Inkotanyi* (T. 26 June 2001, pp. 34-35), the time when this occurred is not specified.
[2017] Judgement, para. 824.
[2018] Nahimana Notice of Appeal, pp. 11-15; Nahimana Appellant's Brief, paras. 50, 55-57, 76-78, 585-639; Nahimana Brief in Reply, paras. 28-37; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 241-256; Barayagwiza Brief in Reply, paras. 56-68; Ngeze Notice of Appeal, paras. 94-119; Ngeze Appellant's Brief, paras. 24-27, 32, 45-47, 286-332; Ngeze Brief in Reply, paras. 24, 26, 75-79.
[2019] *Ntagerura et al.* Appeal Judgement, para. 92. See also *Kajelijeli* Trial Judgement, para. 787; *Niyitegeka* Trial Judgement, para. 423; *Ntakirutimana* Trial Judgement, para. 798; *Musema* Trial Judgement, para. 191.
[2020] The jurisprudence of the Tribunal refers to an "agreement" and to a "concerted agreement to act", in which a number of individuals join (*Ntagerura et al.* Appeal Judgement, para. 92; *Kajelijeli* Trial Judgement, paras. 787-788; *Niyitegeka* Trial Judgement, para. 423; *Musema* Trial Judgement, para. 191).
[2021] *Niyitegeka* Trial Judgement, para. 423; *Musema* Trial Judgement, para. 192.

plan".[2022] They contend that the *Rutaganda* Appeal Judgement rejected any form of responsibility "in application of '*guilt by association*', including guilt from '*similarity of conduct*'".[2023] They argue that the jurisprudence of the Nuremberg International Military Tribunal and of this Tribunal requires, in order for a defendant to be convicted of conspiracy, his or her direct and personal participation in meetings to plan crimes.[2024] Appellant Barayagwiza maintains that a tacit agreement cannot establish conspiracy to commit genocide, adding that "[t]he Prosecution could not prove any individual criminal act attributable to the Appellant Barayagwiza".[2025]

896. The Appeals Chamber recalls that the *actus reus* of the crime of conspiracy to commit genocide is a concerted agreement to act for the purpose of committing genocide. While such *actus reus* can be proved by evidence of meetings to plan genocide, it can also be inferred from other evidence.[2026] In particular, a concerted agreement to commit genocide may be inferred from the conduct of the conspirators.[2027] However, as in any case where the Prosecutor seeks, on the basis of circumstantial evidence, to prove a particular fact upon which the guilt of the accused depends,[2028] the existence of a conspiracy to commit genocide must be the only reasonable inference based on the totality of the evidence.

897. The Appeals Chamber takes the view that the concerted or coordinated action of a group of individuals can constitute evidence of an agreement. The qualifiers "concerted or coordinated" are important: as the Trial Chamber recognized, these words are "the central element that distinguishes conspiracy from 'conscious parallelism', the concept put forward

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[2022] Nahimana Appellant's Brief, paras. 586-588 (the extract cited above is at para. 588). See also Ngeze Appellant's Brief, para. 289(ii). Appellant Nahimana adds that "the fact of sharing the same convictions or the same 'objective' does not presuppose any prior interaction, and does not of necessity lead to the conception of a *concerted plan* aimed at achieving these": Nahimana Appellant's Brief, para. 594 (emphasis in the original). In reply, Appellant Nahimana concedes that the conspirators' conduct could constitute circumstantial evidence of a criminal conspiracy, but he adds that such conduct must be reasonably explicable only by the existence of a conspiratorial agreement, which is not the present case: Nahimana Brief in Reply, paras. 28-30.

[2023] Ngeze Appellant's Brief, para. 289(ii) (emphasis in the original). See also Nahimana Appellant's Brief, para. 590.

[2024] Nahimana Appellant's Brief, paras. 591-592; Nahimana Brief in Reply, paras. 31-32; Ngeze Appellant's Brief, para. 289(iii) and (v).

[2025] Barayagwiza Brief in Reply, para. 57. Appellant Barayagwiza adds at para. 59 :

> The Prosecution has failed to prove that the conversations between Nahimana and Barayagwiza were part of an agreement to kill off Tutsi, nor were there any individual criminal acts from which such a conspiracy could be inferred. The theory of the Appellant being a lynchpin (§§ 1050 of the judgement) was not based on any evidence, nor was it ever alleged by the Prosecution, in the indictment or the later amendment.

[2026] See, in this respect, *Kajelijeli* Trial Judgement, para. 787 ("[t]he agreement in a conspiracy is one that may be established by the prosecutor in no particular manner, but the evidence must show that an agreement had indeed been reached"). In the *Ntakirutimana*, *Niyitegeka* and *Kajelijeli* cases, the Trial judges noted that the accused had attended meetings although they did not require meetings as elements of the crime of conspiracy to commit genocide: see *Kajelijeli* Trial Judgement, paras. 434-453, 787-788, 794; *Niyitegeka* Trial Judgement, paras. 423-429; *Ntakirutimana* Trial Judgement, paras. 799-800.

[2027] In this respect, the Appeals Chamber notes that a number of legal systems explicitly recognize that the agreement can be inferred from the conduct of the parties to the conspiracy: United States: *Glasser v. United States*, 315 U.S. 60, 80 (1942); United Kingdom: *R. v. Anderson*, [1986] A.C. 27, 38; Canada: *R. v. Gagnon*, [1956] S.C.R. 635, para. 12.

[2028] *Ntagerura et al.* Appeal Judgement, paras. 306, 399; *Stakić* Appeal Judgement, para. 219; *Krstić* Appeal Judgement, para. 41; *Vasiljević* Appeal Judgement, paras. 120, 128, 131; *Čelebići* Appeal Judgement, para. 458.

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by the Defence to explain the evidence in this case".[2029] The Appeals Chamber thus considers that the Appellants were not found guilty by association or by reason of the similarity of their conduct: rather, the Trial Chamber found that there had been a concerted or coordinated action and, on the basis *inter alia* of this factual finding, it inferred the existence of a conspiracy. The Appeals Chamber will consider below whether such findings and inference were the only reasonable ones that could be drawn from the evidence.

898. Turning to Appellant Barayagwiza's argument, the Appeals Chamber considers that the agreement need not be a formal one.[2030] It stresses in this respect that the United States Supreme Court has also recognized that the agreement required for conspiracy "need not be shown to have been explicit".[2031] The Appellant is thus mistaken in his submission that a tacit agreement is not sufficient as evidence of conspiracy to commit genocide. The Appeals Chamber recalls, however, that the evidence must establish beyond reasonable doubt a concerted agreement to act, and not mere similar conduct.

899. The Appeals Chamber will now consider whether, in the instant case, the Trial Chamber could find that the existence of a concerted agreement to act between the Appellants had been established beyond reasonable doubt.

900. The Trial Chamber concluded that the Appellants had "consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction".[2032] It subsequently declared the Appellants guilty of conspiracy to commit genocide "through personal collaboration as well as interaction among institutions within their control, namely RTLM, *Kangura* and CDR".[2033]

901. In the absence of direct evidence of the Appellants' agreement to commit genocide, the Trial Chamber inferred the existence of the conspiracy on the basis of circumstantial evidence. The Appeals Chamber will now consider whether this was the only possible reasonable inference.

1. The Parties' submissions

902. The Appellants contend that the evidence of their personal collaboration does not establish an agreement to commit genocide.[2034] In this respect, Appellants Nahimana and Ngeze submit that the Trial Chamber's findings in regard to the content of the meetings between the Appellants are not supported by any evidence.[2035]

903. The Appellants deny that there was any "interaction among institutions", and submit that, even if there had been, that would not establish beyond reasonable doubt that those who

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[2029] Judgement, para. 1048. See also paras. 1045, 1047.
[2030] As held by common law courts with respect to *conspiracy*: see for example, *R. v. Anderson*, [1986] A.C. 27, 37 (United Kingdom).
[2031] *Iannelli v. United States*, 420 U.S. 770, 777, footnote 10 (1975), reaffirming *Direct Sales Co. v. United States*, 319 U.S. 703, 711-713 (1943).
[2032] Judgement, para. 1054.
[2033] *Ibid.*, para. 1055.
[2034] Nahimana Appellant's Brief, paras. 601-605, 628-630; Nahimana Brief in Reply, paras. 34-37; Barayagwiza Appellant's Brief, paras. 244, 247, 249; Barayagwiza Brief in Reply, paras. 59, 66-67; Ngeze Appellant's Brief, paras. 310-314, 326-327.
[2035] Nahimana Appellant's Brief, paras. 618-620; Ngeze Appellant's Brief, paras. 305-306.

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concerns by defending the programming of RTLM and by undertaking to correct the journalists' mistakes;[2043]

(3) Appellants Nahimana and Barayagwiza attended clandestine meetings between the MRND and the CDR at the Ministry of Transport.[2044] The content of these meetings is not known;

(4) Appellants Nahimana and Barayagwiza together met Witness Dahinden in Geneva to talk about RTLM.[2045] The Appellants told him that "RTLM was about to be transferred to Gisenyi" and the Trial Chamber found that, in so doing, they had indicated "that they were in contact with RTLM and familiar with its future plans";[2046]

(5) Appellants Barayagwiza and Ngeze were together at CDR meetings and demonstrations;[2047]

(6) Appellants Nahimana and Ngeze met with Barayagwiza at his office at the Ministry of Foreign Affairs;[2048] Appellants Barayagwiza and Ngeze also met without Appellant Nahimana.[2049] During their meetings, Appellants Barayagwiza and Ngeze "discussed RTLM, CDR and *Kangura* as all playing a role in the struggle of the Hutu against the Tutsi";[2050]

(7) All three Appellants participated in a MRND rally in Nyamirambo Stadium, where both Appellants Nahimana and Barayagwiza spoke about "Hutu empowerment" and the "fight against the *Inyenzi*";[2051]

[2043] Judgement, paras. 617-619.

[2044] This is stated in paragraph 887 of the Judgement, on the basis of Witness MK's testimony (see Judgement, paras. 884, 886).

[2045] This is stated in paragraph 564 of the Judgement, on the basis of Witness Dahinden's testimony (see Judgement, para. 542).

[2046] Judgement, para. 564.

[2047] The Appeals Chamber observes, however, that the Trial Chamber did not expressly state this finding. It simply noted, at paragraph 339 of the Judgement, that the CDR policy was "explicitly communicated to members and the public by Barayagwiza and Ngeze", but it did not specify whether the two Appellants communicated it *together* or separately. However, apart from this reference, three sections of the Judgement discussing evidence mention meetings between Appelants Barayagwiza and Ngeze, at the CDR Constituent Assembly (Judgement, para. 274), at the MRND meeting at Nyamirambo Stadium (Judgement, para. 907) and at Martin Bucyana's funeral in February 1994 (Judgement, para. 333).

[2048] This factual finding appears in paragraph 887 of the Judgement. It relies on the testimonies of Witnesses AHA (see Judgement, paras. 879, 887) and AGK (see Judgement, paras. 883, 887). Witness AGK does not make it clear whether Appellants Nahimana and Ngeze's visits took place at the same time: see Judgement, para. 883, and T. 21 June 2001, p. 70-73, 86.

[2049] This factual finding appears at paragraph 887 of the Judgement and relies on Witness AHA's testimony (summarized in para. 879 of the Judgement).

[2050] Judgement, para. 1050. The Trial Chamber acknowledged that there was no information as to the content of the Appellants' meetings, except for the meetings between Appellants Barayagwiza and Ngeze, which Witness AHA attended (see Judgement, para. 879, 887).

[2051] In its factual findings in paragraph 907 of the Judgement, the Trial Chamber found that Appellant Nahimana had "said [that] RTLM should be used to disseminate their ideas relating to Hutu empowerment, and he requested that people support RTLM with financial contributions", while Appellant Barayagwiza "spoke about collaboration with the CDR and working together to fight the *Inyenzi*. He also spoke of using RTLM to fight against the *Inyenzi*. He said the *Inyenzi* were not far, and were even there among them".

controlled those institutions had come to an agreement to commit genocide.[2036] The Appellants also dispute the existence of a "common media front" between *Kangura*, RTLM and the CDR,[2037] contending that the fact that news media and a political party shared a common objective in a specific situation is not sufficient to establish the existence of a criminal conspiracy.[2038]

904. The Prosecutor challenges the Appellants' "piecemeal approach", arguing that the totality of the evidence shows the existence of a conspiracy to commit genocide among the Appellants, both on a personal and institutional level, and that the Appellants have not shown that the Trial Chamber's findings were unreasonable.[2039] At the Appeals hearings, the Prosecutor added that the institutional coordination, which went beyond mere business promotion or publicity, was undoubtedly aimed at calling for Hutu solidarity and extermination of the Tutsi.[2040]

2. Could criminal conspiracy be inferred from the personal collaboration between the Appellants?

905. In order to conclude that the Appellants had personally collaborated, the Trial Chamber relied, in paragraphs 1049 and 1050 of the Judgement, on the following factual findings:

(1) Appellants Nahimana and Barayagwiza were the two most active members of the RTLM Steering Committee and they had the power to sign cheques on behalf of the company;[2041]

(2) Appellants Nahimana and Barayagwiza both attended meetings at the Ministry of Information, where they represented RTLM.[2042] The Trial Chamber noted in this respect that the Minister of Information expressed concern at RTLM's promotion of ethnic hatred, and that Appellants Nahimana and Barayagwiza had responded to these

[2036] Nahimana Appellant's Brief, paras. 606-617; Nahimana Brief in Reply, para. 33; Barayagwiza Appellant's Brief, paras. 244, 248-249; Barayagwiza Brief in Reply, paras. 62-63, 67; Ngeze Appellant's Brief, paras. 308-309, 315-327. See also Appellant Nahimana's submissions during the appeal hearings (T(A) 17 January 2007, pp. 5-6).
[2037] See Judgement, para. 943.
[2038] Nahimana Appellant's Brief, paras. 587-589, 594-595; Barayagwiza Appellant's Brief, paras. 244, 248; Ngeze Appellant's Brief, paras. 289(ii), 298-299, 301-303. During the appeal hearings, Appellant Nahimana, citing the *Kambanda* case, stressed that RTLM had been founded by MRND supporters, that President Habyarimana was its main shareholder and that *Kangura* had constantly attacked the MRND and RTLM: T(A) 17 January 2007, p. 7.
[2039] Respondent's Brief, paras. 284-290.
[2040] T(A) 18 January 2007, p. 35.
[2041] The finding that Appellants Nahimana and Barayagwiza were the two most active members of the RTLM Steering Committee appears at para. 554 of the Judgement; it relies on various items of evidence (see Judgement, paras. 552-560). Paragraphs 552, 555 and 567 of the Judgement deal with the Appellants' authority to sign cheques on behalf of the company and their control of its financial operations.
[2042] The Trial Chamber appears to have relied here on the findings concerning the meetings of 26 November 1993 and 10 February 1994 (see Judgement, paras. 617-619; see also paras. 573-599, 606-607, where the testimonies of Witnesses GO and Nsanzuwera are summarized, as well as the exhibits on which the Trial Chamber relied).

(8) All three Appellants were depicted "on the cover of *Kangura* in connection with the creation of RTLM in a cartoon which showed the three Accused as representing the new radio initiative within the framework of advancing a common Hutu agenda".[2052]

906. The Appeals Chamber finds that, even if this evidence is capable of demonstrating the existence of a conspiracy to commit genocide among the Appellants, on its own it is not sufficient to establish the existence of such a conspiracy beyond reasonable doubt. It would also have been reasonable to find, on the basis of this evidence, that the Appellants had collaborated and entered into an agreement with a view to promoting the ideology of "Hutu power" in the context of the political struggle between Hutu and Tutsi, or even to disseminate ethnic hatred against the Tutsi, without, however, going as far as their destruction in whole or in part. Consequently, a reasonable trier of facts could not conclude that the only reasonable inference was that the Appellants had conspired together to commit genocide.

3. Could a criminal conspiracy be inferred from the interaction between the institutions?

907. The Appeals Chamber is of the opinion that in certain cases the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions. As explained above, the existence of the conspiracy would, however, have to be the only reasonable inference to be drawn from the evidence.

908. In order to conclude that RTLM, CDR and *Kangura* interacted together, the Trial Chamber relied on various factual findings, which are summarized in paragraphs 1051 to 1053 of the Judgement :

(1) *Kangura* was a shareholder of RTLM;[2053]

(2) *Kangura* welcomed the creation of RTLM as an initiative in which *Kangura* had a role to play;[2054]

(3) RTLM promoted issues of *Kangura* to its listeners;[2055]

(4) *Kangura* and RTLM undertook the joint initiative of a competition to make readers and listeners familiar with the contents of past issues of *Kangura* and to

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[2052] Judgement, para. 1050. See also paras. 932, 940, 943. Paragraph 932 describes this evidence in the following terms (Exhibit P6, *Kangura* No. 46, cover page) :

> In the cartoon, Ngeze says that RTLM should be the way to protect the people in its fight with those who did not accept the Republic. Barayagwiza says that RTLM should be the banner of collaboration between the Hutu. Nahimana says that RTLM should be a forum for Hutu intellectuals who are working for the masses.

[2053] This finding appears at paragraph 940 of the Judgement on the basis of the testimonies of Witnesses Nsanzuwera and Musonda and of two exhibits mentioned in paragraph 508.

[2054] The Trial Chamber so found in paragraph 940 of the Judgement, on the basis of an article from *Kangura* No. 46, as indicated in paragraph 931 of the Judgement.

[2055] This finding appears in paragraph 941 of the Judgement. The Trial Chamber relies on the testimonies of Witnesses AFB, GO and Kabanda, as well as on the transcript of extracts from RTLM broadcasts (see Judgement, paras. 933-934, 938).

survey readers and listeners on their views regarding RTLM broadcasts, reserving one of the prizes for CDR members only;[2056]

(5) *Kangura* welcomed the creation of the CDR with a special issue devoted to it and it urged its readers to join CDR;[2057]

(6) *Kangura* associated Appellant Ngeze with the CDR;[2058]

(7) A *Kangura* article published in May 1992 called on readers to join the CDR in a "mental revolution";[2059]

(8) RTLM was primarily made up of MRND and CDR shareholders, some of whom were key officials in both RTLM and CDR, such as Stanislas Simbizi and Appellant Barayagwiza;[2060]

(9) Stanislas Simbizi was a member of the CDR Executive Committee, of the RTLM Steering Committee and of the editorial board of *Kangura*;[2061]

(10) An article published in *Kangura* in January 1994 links all three entities;[2062]

(11) Appellants Nahimana, Barayagwiza and Ngeze were depicted in a cartoon on the cover of *Kangura* in connection with the creation of RTLM, which was represented as a step forward in the promotion of a common Hutu agenda;[2063]

(12) *Kangura* worked together with RTLM;[2064]

(13) *Kangura* worked together with the CDR.[2065]

909. On the basis of these factual findings, the Trial Chamber drew two further conclusions on which the inference of coordination among the three institutions relies:

[2056] This finding is made by the Chamber in paragraph 257 of the Judgement – it is repeated in paragraphs 939, 943 – on the basis of various exhibits and of Expert Witness Kabanda's testimony (see Judgement, paras. 247-256).
[2057] This finding, in paragraphs 925 and 930 of the Judgement, relies on Expert Witness Kabanda's testimony on the special *Kangura* issue (see Judgement, paras. 914-915).
[2058] This finding appears in paragraph 930 of the Judgement, on the basis of the evidence discussed in paragraphs 914-927.
[2059] This article is mentioned in paragraph 916 of the Judgement.
[2060] This finding relies on the evidence examined by the Trial Chamber in paragraph 560 of the Judgement; it is set out in paragraph 566 of the Judgement.
[2061] The Trial Chamber found that Stanislas Simbizi was a member of the CDR Executive Committee and of the RTLM Steering Committee in paragraph 566 of the Judgement, on the basis of various exhibits (see Judgement, paras. 494, 507). The Trial Chamber appears to have concluded that Stanislas Simbizi was a member of the editorial board of *Kangura* on the basis of Expert Witness Kabanda's testimony (Judgement, para. 919).
[2062] An extract from *Kangura* No. 54 and the Expert Witness Kabanda's testimony (see Judgement, para. 937) support this finding, which appears in paragraphs 942 and 943 of the Judgement.
[2063] The Trial Chamber relied on the evidence mentioned in paragraph 932 of the Judgement in order to make the finding in paragraph 940.
[2064] This finding is set out in paragraph 943 of the Judgement, although in slightly different terms ("*Kangura* and RTLM functioned as partners in a Hutu coalition"), on the basis of the evidence referred to in paragraphs 931-939 and discussed in paragraphs 940-942 of the Judgement.
[2065] This finding appears to have been inferred from a number of the previous findings set out above.

- *Kangura* interacted extensively with both RTLM and CDR;

- CDR provided an ideological framework for genocide, and the two media institutions formed part of a coalition that disseminated the message of CDR.[2066]

910. At this stage, the question for the Appeals Chamber is to determine whether, assuming that such institutional coordination has been proved, a reasonable trier of fact could find that the only possible reasonable inference was that the coordination was the result of a conspiracy to commit genocide. There is no doubt, in the Appeals Chamber's view, that the aforementioned factual findings are compatible with the existence of "a joint agenda" aiming at committing genocide. However, it is not the only reasonable inference. A reasonable trier of fact could also find that these institutions had interacted to promote the ideology of "Hutu power" in the context of a political struggle between Hutu and Tutsi, or to disseminate ethnic hatred against the Tutsi without going as far as the destruction, in whole or in part, of that group.

911. Accordingly, it is not necessary to consider whether the Trial Chamber's findings on interinstitutional coordination were reasonable, or whether the Trial Chamber was entitled to infer that the Appellants controlled and used RTLM, the CDR and *Kangura*.

4. Conclusion

912. The Appeals Chamber finds that a reasonable trier of fact could not conclude beyond reasonable doubt, on the basis of the elements recalled above, that the only reasonable possible inference was that the Appellants had personally collaborated and organized institutional coordination beween RTLM, the CDR and *Kangura* with the specific purpose of committing genocide. The Chamber allows this ground of appeal of the Appellants and sets aside the convictions of Appellants Nahimana, Barayagwiza and Ngeze for the crime of conspiracy to commit genocide (first Count of the Appellants' Indictments). The effect of this decision will be addressed later in this Judgement, in the section on sentencing. The Appeals Chamber further dismisses, as moot, the other submissions of the Appellants.

XV. CRIMES AGAINST HUMANITY

913. The Appellants contend that the Trial Chamber erred in law and in fact in finding them guilty of crimes against humanity.[2067]

A. Header to Article 3 of the Statute

914. The Appellants submit first that the Trial Chamber erred in holding that there was a widespread and/or systematic attack before 7 April 1994, or that certain of their acts formed part of such attack.[2068]

[2066] Judgement, para. 1053.

[2067] Nahimana Notice of Appeal, pp. 13-17; Nahimana Appellant's Brief, paras. 537-561, 578-584; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 271-312; Ngeze Notice of Appeal, paras. 147-179; Ngeze Appellant's Brief, paras. 388-448.

[2068] Nahimana Appellant's Brief, paras. 74-75, 548-556; Nahimana Brief in Reply, paras. 38-51; Barayagwiza Appellant's Brief, paras. 271-274, 279-285; Barayagwiza Brief in Reply, para. 73; Ngeze Appellant's Brief, paras. 389-392.

1. Meaning of "as part of a widespread or systematic attack against a civilian population"

(a) Attack

915. Appellant Nahimana contends that the Trial Chamber erred in finding that there was an attack (within the meaning of Article 3 of the Statute) against the Tutsi population before 7 April 1994, since "the notion of 'attack' [...] requires a demonstration of inhumane acts which themselves fall within the *actus reus* of the crime against humanity".[2069] Appellant Ngeze argues to the same effect,[2070] while Appellant Barayagwiza submits in his Brief in Reply that, while the attack is not necessarily limited to the use of armed force, there must be violence or severe mistreatment directed at the civilian population targeted.[2071]

916. According to the *Kunarac et al.* Trial Judgement, an attack "can be described as a course of conduct involving the commission of acts of violence".[2072] This characterization was endorsed by the Appeals Chamber of ICTY,[2073] which added the following:

> The concepts of "attack" and "armed conflict" are not identical. Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it. Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population.[2074]

917. This position is reiterated in the *Kordić and Čerkez* Appeal Judgement[2075] and was adopted in a number of ICTY Trial judgements.[2076] According to the *Kayishema and Ruzindana* Trial Judgement:

> The attack is the event of which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation.[2077]

918. In agreement with these authorities, the Appeals Chamber concludes that, for purposes of Article 3 of the Statute, an attack against a civilian population means the perpetration against a civilian population of a series of acts of violence, or of the kind of mistreatment referred to in sub-paragraphs (a) to (i) of the Article.[2078] The Appeals Chamber

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[2069] Nahimana Appellant's Brief, para. 553.
[2070] Ngeze Appellant's Brief, para. 390.
[2071] Barayagwiza Brief in Reply, para. 72.
[2072] *Kunarac et al.* Trial Judgement, para. 415. See also *Krnojelac* Trial Judgement, para. 54.
[2073] *Kunarac et al.* Appeal Judgement, para. 89.
[2074] *Ibid.*, para. 86.
[2075] *Kordić and Čerkez* Appeal Judgement, para. 666.
[2076] *Limaj et al.* Trial Judgement, paras. 182, 194; *Blagojević and Jokić* Trial Judgement, para. 543; *Brđanin* Trial Judgement, para. 131; *Galić* Trial Judgement, para. 141; *Stakić* Trial Judgement, para. 623; *Naletilić and Martinović* Trial Judgement, para. 233; *Vasiljević* Trial Judgement, para. 29.
[2077] *Kayishema and Ruzindana* Trial Judgement, para. 122.
[2078] Likewise, the Elements of Crimes under the Statute of the International Criminal Court (ICC-ASP/1/3, Article 7 Crimes Against Humanity, Introduction, para. 3) provide:

> "Attack directed against a civilian population" is understood in this context to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population. [...] The acts need not constitute a military attack.

will examine *infra* if, in this instance, the Trial Chamber erred in finding that there was an attack directed against the Tutsi population before 6 April 1994.

(b) Widespread and/or systematic

919. Appellants Nahimana and Barayagwiza submit that a conviction for a crime against humanity requires proof that the acts charged were part of an attack that was *both* generalized *and* systematic.[2079] They point out that, whereas the English version of Article 3 of the Statute uses the conjunction "or", the French version uses the conjunction "*et*" ["and"]; they contend that the French version should be followed, as it is the least damaging to the accused's interests.[2080] They add that, since the Trial Chamber did not conclude that there was a widespread *and* systematic attack before 7 April 1994, they cannot be convicted of crimes against humanity for acts committed prior to this date.[2081]

920. The Appeals Chamber rejects this argument. It is well established that the attack must be widespread *or* systematic.[2082] In particular, the Appeals Chamber has held that the conjunction "*et*" in the French version of Article 3 of the Statute is a translation error.[2083] The Appeals Chamber further recalls that:

> "widespread" refers to the large-scale nature of the attack and the number of victims, whereas "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence." Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.[2084]

2. Existence of a plan or a policy and use of substantial resources

921. Appellant Nahimana submits that crimes against humanity must be carried out "on the basis of a common policy and involving substantial public or private resources".[2085] Likewise, Appellant Barayagwiza submits that "the widespread and systematic attack must result from a discriminatory policy led by a group or organization"[2086] and that it must be proven that the act charged "is part of widespread or systematic attack done following a plan, a preconceived policy".[2087] Appellant Ngeze makes a similar argument.[2088]

922. The Appeals Chamber rejects the Appelants' arguments on this point. It is well established that, while it may be helpful to prove the existence of a policy or plan, that is not

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[2079] Nahimana Appellant's Brief, para. 548; Barayagwiza Appellant's Brief, para. 272; Barayagwiza Brief in Reply, para. 71.
[2080] *Idem.*
[2081] Nahimana Appellant's Brief, para. 550; Barayagwiza Appellant's Brief, paras. 279-285.
[2082] *Ntakirutimana* Appeal Judgement, footnote 883; *Kordić and Čerkez* Appeal Judgement, para. 93; *Blaškić* Appeal Judgement, para. 98; *Kunarac et al.* Appeal Judgement, para. 97.
[2083] *Ntakirutimana* Appeal Judgement, footnote 883.
[2084] *Kordić and Čerkez* Appeal Judgement, para. 94. See also *Blaškić* Appeal Judgement, para. 101; *Kunarac et al.* Appeal Judgement, para. 94.
[2085] Nahimana Appellant's Brief, para. 555. See also Nahimana Brief in Reply, paras. 41-43.
[2086] Barayagwiza Appellant's Brief, para. 273.
[2087] *Ibid.*, para. 274. See also para. 272, defining a systematic attack as one "perpetrated on the basis of a policy or a pre-conceived plan".
[2088] Ngeze Appellant's Brief, para. 390.

a legal element of crimes against humanity.[2089] The same applies to "substantial resources". Contrary to what certain early Tribunal judgements might be taken to imply,[2090] "substantial resources" do not constitute a legal element of crimes against humanity. It is the widespread or systematic attack which must be proved.

3. Multiplicity of victims

923. Appellant Nahimana argues that "[t]he inhumane acts that constitute the *actus reus* of the crime against humanity must be carried out against a 'multiplicity of victims'" and that "[s]ingle or isolated acts are excluded".[2091]

924. The Appeals Chamber considers that, except for extermination,[2092] a crime need not be carried out against a multiplicity of victims in order to constitute a crime against humanity. Thus an act directed against a limited number of victims, or even against a single victim, can constitute a crime against humanity, provided it forms part of a widespread or systematic attack against a civilian population.[2093]

4. Was there a systematic attack before 6 April 1994, and did the Appellants' acts form part thereof?

925. The Appellants further submit that the Trial Chamber erred in holding that there was a widespread attack on the Tutsi population before 6 or 7 April 1994. In this respect, Appellant Nahimana submits that the Trial Chamber relied only on events prior to 1 January 1994, which shows *a contrario* that there was no systematic attack on the Tutsi population between 1 January and 7 April 1994.[2094] Likewise, Appellant Ngeze contends that the Trial Chamber cites no act of violence directed against the Tutsi population during this period.[2095] Moreover, since no *Kangura* issues were published after March 1994, he could not be found guilty of crimes against humanity.[2096] For his part, Appellant Barayagwiza contends that, if there were widespread and systematic attacks before 6 April 1994, these were carried out by the RPF and were largely directed against Hutu civilians.[2097]

926. The Appellants further submit that the Trial Chamber erred in finding that the *Kangura* issues, the RTLM broadcasts before 6 or 7 April 1994 and the activities of the CDR

[2089] *Gacumbitsi* Appeal Judgement, para. 84; *Semanza* Appeal Judgement, para. 269; *Blaškić* Appeal Judgement, para. 120; *Krstić* Appeal Judgement, para. 225; *Kunarac et al.* Appeal Judgement, paras. 98, 104.
[2090] For example, paragraph 580 of the *Akayesu* Trial Judgement suggests that a systematic attack implies "a common policy ... involving substantial public or private resources".
[2091] Nahimana Appellant's Brief, para. 555. See also Ngeze Appellant's Brief, para. 390.
[2092] Extermination requires a great number of victims: *Stakić* Appeal Judgement, para. 259; *Ntakirutimana* Appeal Judgement, paras. 521-522.
[2093] *Deronjić* Appeal Judgement, para. 109; *Kordić and Čerkez* Appeal Judgement, para. 94; Blaškić Appeal Judgement, para. 101; *Kunarac et al.* Appeal Judgement, para. 96.
[2094] Nahimana Appellant's Brief, paras. 74-75, 556. In paragraphs 71 and 75, Appellant Nahimana submits that the Trial Chamber exceeded its jurisdiction in relying on acts that took place before 1 January 1994 in order to establish the *actus reus* and *mens rea* of the charges brought against him. As stated *supra* at VIII. B. 3. , a Trial Chamber can rely on evidence of pre-1994 crimes to establish by inference the constituent elements of criminal conduct occurring in 1994.
[2095] Ngeze Appellant's Brief, paras. 389, 391.
[2096] *Ibid.*, para. 392.
[2097] Barayagwiza Appellant's Brief, para. 284.

formed part of an attack on the Tutsi population.[2098] In this regard, Appellant Nahimana contends that the RTLM broadcasts before 7 April 1994 could not form part of an attack on the Tutsi population, "because mere speeches do not, by themselves, constitute the *actus reus* of a crime against humanity"[2099] and that these broadcasts "can on no account be considered as forming part of a widespread and systematic attack that began *after* that date",[2100] because "the responsibility of the Accused must be established for a period that matches the attack, and one of the conditions for his responsibility is knowledge of the said attack".[2101] Appellant Barayagwiza argues that the Trial Chamber failed to indicate the evidence on which it relied in order to conclude that *Kangura* issues, the RTLM broadcasts and the activities of CDR formed part of widespread or systematic attacks on the Tutsi population.[2102] Finally, Appellant Ngeze submits that the *Kangura* articles published before 7 April 1994 cannot form an integral part of an attack, since an article cannot be a material element of a crime against humanity.[2103]

927. The Prosecutor responds that the Appellants have not shown that the Trial Chamber erred in holding that there was a systematic attack against a civilian population before 6 April 1994. According to the Prosecutor:

> the evidence adduced at trial clearly showed that prior to 6/7 April 1994, there were systematic attacks against a civilian population, mainly Tutsis. Those attacks were organized, generally regular and not merely random or accidental, thus meeting the tests of being systematic.[2104]

928. The Prosecutor submits that "it was clear that the attacks launched by the Appellants were part of the systematic attacks directed against a civilian population".[2105] He further contends that the attacks launched by the Appellants before 6 April 1994 were also part of the widespread and systematic attacks which started on 6 and 7 April 1994.[2106] Moreover, RTLM broadcasts prior to and after 6 April 1994 should be considered together, as forming part of a continuous systematic criminal attack.[2107]

929. The Trial Chamber found that there were a number of attacks on Tutsi civilians, beginning in 1990:

> In her evidence Des Forges named seventeen such attacks between 1990 and 1993, mostly in the northwestern part of Rwanda. The Chamber considers that these attacks formed part of a larger initiative, beginning in 1990, which systematically targeted the Tutsi population

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[2098] Nahimana Appellant's Brief, paras. 554-556; Barayagwiza Appellant's Brief, paras. 279-285; Ngeze Appellant's Brief, paras. 389-392.
[2099] Nahimana Appellant's Brief, para. 554.
[2100] *Ibid.*, para. 551 (emphasis in original).
[2101] *Ibid.*, para. 552.
[2102] Barayagwiza Appellant's Brief, para. 282.
[2103] Ngeze Appellant's Brief, para. 390.
[2104] Respondent's Brief, para. 400, referring to Judgement, paras. 110-120,136-389. See also Respondent's Brief, para. 404.
[2105] Respondent's Brief, para. 405.
[2106] *Ibid.*, paras. 378, 406-408, 468-470.
[2107] *Ibid.*, para. 407.

> as suspect accomplices of the RPF. The Chamber notes that attacks by the RPF against civilians during this time have also been documented.[2108]

930. On the basis of these factual findings, the Trial Chamber considered that systematic attacks against the Tutsi population also took place prior to 6 April 1994 and that:

> the broadcasting of RTLM and the publication of *Kangura* prior to the attack that commenced on 6 April 1994 formed an integral part of this widespread and systematic attack, as well as the preceding systematic attacks against the Tutsi population. Similarly, the activities of the CDR that took place prior to 6 April 1994 formed an integral part of the widespread and systematic attack that commenced on 6 April, as well as the preceding systematic attacks against the Tutsi population.[2109]

931. The Appeals Chamber observes that, in finding that systematic attacks against the Tutsi took place before 6 April 1994, the Trial Chamber relied only on pre-1994 events.[2110] In particular, the Trial Chamber accepted that at least 17 attacks on Tutsi civilians took place between 1990 or 1991 and 1993.[2111] The Appeals Chamber notes first that the only reference provided in the Judgement on this matter does not support such a finding.[2112] At most, the extract from Expert Witness Des Forges' report supports the finding that, while repelling the first RPF incursion in 1990, Rwandan forces killed between 500 and 1000 civilians, mostly Bahima, people usually identified with the Tutsi, who were accused of having aided the RPF.[2113] However, even if there were indeed 17 attacks on Tutsi civilians between 1990 or 1991 and 1993, this does not support the conclusion that there was an ongoing systematic attack against Tutsi civilians between 1 January and 6 April 1994.

932. Moreover, while the Trial Chamber considered that there was "a larger initiative, beginning in 1990, which systematically targeted the Tutsi population as suspect accomplices of the RPF",[2114] it did not clearly explain what the initiative involved (other than stating that 17 attacks took place between 1990 or 1991 and 1993). Thus the Trial Chamber identified no evidence showing that there was a systematic attack (within the meaning explained above) against the Tutsi population between 1 January and 6 April 1994.[2115] The Appeals Chamber accordingly concludes that it was not possible in the instant case to find that there was such an attack.

[2108] Judgement, para. 118. See also para. 120.

[2109] *Ibid.*, para. 1058. See also para. 1070.

[2110] *Ibid.*, paras. 110-120.

[2111] *Ibid.*, paras. 110 (attacks between 1991 and 1993) and 118 (attacks between 1990 and 1993).

[2112] See Judgement, footnote 20, referring to Exhibit P158 (Expert Witness Des Forges' Report), p. 24.

[2113] Exhibit P158B, p. 16:

> Within several weeks, Rwandan troops had driven the RPF back towards the Ugandan border. As the government soldiers advanced through the northeastern region of Mutara, they killed between 500 and 1,000 civilians. The victims were largely Bahima, a people usually identified with Tutsi, and they were accused of having aided the RPF (footnote omitted).

[2114] Judgement, para. 118.

[2115] In paragraph 314 of the Judgement, the Trial Chamber noted in Expert Witness Des Forges' testimony that, after CDR President Bucyana was killed, the *Interahamwe* and the CDR attacked Tutsi and members of opposition political parties; killing about 70 people. However, the Trial Chamber did not mention those events in support of its finding that there was a systematic attack on the Tutsi population before 6 April 1994. In any event, the Appeals Chamber is of the opinion that those events alone are not sufficient to conclude that there was a systematic attack on the Tutsi population between 1 January and 6 April 1994.

933. Nor is the Appeals Chamber satisfied that the *Kangura* issues, the RTLM broadcasts and the activities of the CDR prior to 6 April 1994 could be regarded as forming part of the widespread and systematic attacks which occurred after that date; rather, they preceded them.

934. Nonetheless, those publications, broadcasts and activities could have substantially contributed to the commission of crimes against humanity after 6 April 1994, for which a defendant could be held liable under other modes of responsibility pleaded, such as planning, instigation or aiding and abetting. Whereas the crime *per se* must be committed as part of a widespread and systematic attack, preparatory acts, instigation or aiding and abetting can be accomplished before the commission of the crime and the occurrence of the widespread and systematic attack.[2116] The Appeals Chamber will consider below whether it has been established that the *Kangura* issues, RTLM broadcasts and activities of the CDR between 1 January and 6 April 1994 substantially contributed to the commission of crimes against humanity after 6 April 1994.

B. Extermination

1. Convictions on account of RTLM broadcasts

935. The Trial Chamber considered that the RTLM broadcasts formed an integral part of the systematic attacks against the Tutsi population before 6 April 1994, as well as of the widespread and systematic attack that took place from this date.[2117] It then stated that RTLM broadcasts had instigated killings on a large scale,[2118] and went on to find Appellants Nahimana and Barayagwiza guilty of extermination "for RTLM broadcasts in 1994 that caused the killing of Tutsi civilians".[2119]

936. Appellant Nahimana submits that extermination presupposes the perpetration of mass killings, but it is common knowledge that no mass killings took place betwen 1 January 1994 and 7 April 1994; the RTLM broadcasts prior to 7 April 1994 could thus not establish the crime of extermination.[2120] He further contends that no causal link was established between RTLM broadcasts and massacres of Tutsi civilians,[2121] that it was not established that he had the requisite *mens rea*[2122] and that he could not be convicted of extermination, since there was no factual evidence of his direct and personal participation in the extermination.[2123]

[2116] By its nature, planning occurs before the commission of the crime. The same applies to instigation under Article 6(1) of the Statute, while aiding and abetting can take place before, during or after the commission of the crime: see *supra* XI. A.
[2117] Judgement, para. 1058.
[2118] *Ibid.*, para. 1062. The French version of paragraph 1062 states: "*[t]ant* Kangura *que la RTLM ont encouragé la perpétration de meurtres à grande échelle*". The original English version of this paragraph reads as follows: "Both *Kangura* and RTLM instigated killings on a large-scale". Hence the French translation should have used the term "*incité*" (Article 6(1) of the Statute) rather than "*encouragé*".
[2119] *Ibid.*, paras. 1063-1064.
[2120] Nahimana Appellant's Brief, paras. 579-581.
[2121] *Ibid.*, para. 582, referring back to the submissions relating to the convictions for genocide and persecution.
[2122] *Ibid.*, para. 583, referring back to the submissions relating to the conviction for direct and public incitement to commit genocide.
[2123] *Ibid.*, par. 584, referring back to the submissions relating to the convictions for genocide and direct and public incitement to commit genocide.

937. For his part, Appellant Barayagwiza submits that the Trial Chamber erred in finding that RTLM encouraged killings on a large scale, because it did not state the evidence it relied on to support this finding.[2124] He further submits that he did not have superior responsibility for RTLM and that no causal link had been established between his actions and RTLM.[2125]

938. The Prosecutor responds that Appellant Nahimana fails to explain how the Trial Chamber erred or what was the impact of such error,[2126] and that, in any event, the Trial Chamber was right in convicting Appellant Nahimana of extermination.[2127] He submits that the Trial Chamber was correct in considering that RTLM broadcasts both before and after 6 April 1994 contributed to the 1994 large-scale killings, and that they formed an integral part of the widespread and systematic attacks that commenced on 6 April 1994;[2128] the Trial Chamber committed no error in considering that Nahimana had the requisite *mens rea* for extermination.[2129] The Prosecutor does not specifically respond to the issues raised by Appellant Barayagwiza.

(a) Did the RTLM broadcasts instigate extermination?

939. The Appeals Chamber will first consider Appellant Nahimana's contention that the RTLM broadcasts before 7 April 1994 could not establish the crime of extermination, since no large-scale killings took place before that date. In the opinion of the Appeals Chamber, this argument is misconceived, since the Trial Chamber found that the RTLM broadcasts instigated extermination and that such instigation could obviously occur before the commission of the crime of extermination (which took place after 6 April 1994).[2130] Rather, the real issue is whether the RTLM broadcasts before 6 April 1994 substantially contributed to extermination after that date.

940. The Appeals Chamber has already found that, while the pre-6 April 1994 RTLM broadcasts incited ethnic hatred, it has not been established that they substantially contributed to the killing of Tutsi.[2131] Consequently, it cannot be concluded that these broadcasts substantially contributed to the extermination of Tutsi civilians.

941. Regarding RTLM broadcasts after 6 April 1994, the Appeals Chamber has already found that these broadcasts substantially contributed to the killing of large numbers of

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[2124] Barayagwiza Appellant's Brief, paras. 287-289.
[2125] *Ibid.*, para. 290.
[2126] Respondent's Brief, para. 461.
[2127] *Ibid.*, para. 463, referring back to the submissions relating to genocide, persecution and direct and public incitement to commit genocide.
[2128] *Ibid.*, paras. 468-470.
[2129] *Ibid.*, para. 472, referring back to the submissions relating to Appellant Nahimana's intent under the heading Direct and Public Incitement to Commit Genocide.
[2130] In this regard, it is important to point out that it cannot be reasonably be disputed that the Tutsi population was the target of widespread and systematic attacks between 6 April and 17 July 1994, resulting in the death of large numbers of Tutsi: *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision of Judicial Notice, 16 June 2006, paras. 28-31 (see also paras. 33-38, judicial notice of the genocide of the Tutsi in Rwanda between 6 April and 17 July 1994); *Semanza* Appeal Judgement, para. 192.
[2131] See *supra* XII. B. 3. (b) (i) a.

Tutsi.[2132] It accordingly follows that they substantially contributed to the extermination of Tutsi.

(b) Responsibility of Appellants Nahimana and Barayagwiza

942. Appellant Nahimana was charged and convicted of extermination only on the basis of his responsibility under Article 6(1) of the Statute.[2133] The Appeals Chamber has already found that the Appellant could not be found liable under Article 6(1) of the Statute for RTLM broadcasts.[2134] The Appeals Chamber accordingly sets aside the conviction of Appellant Nahimana on the count of extermination as a crime against humanity.

943. Appellant Barayagwiza was convicted of extermination as a superior of RTLM staff.[2135] However, the Appeals Chamber has already found that the Appellant could not be held responsible as a superior for the crimes committed by RTLM staff after 6 April 1994.[2136] Since it cannot be concluded that RTLM broadcasts prior to 6 April 1994 substantially contributed to extermination, Appellant Barayagwiza could not be convicted of extermination on account of RTLM broadcasts. This part of his conviction is therefore set aside.

2. Responsibility of Appellant Barayagwiza for the activities of the CDR

944. The Trial Chamber found that the CDR and the *Impuzamugambi* caused killing on a large-scale, often following meetings and demonstrations.[2137] It then found Appellant Barayagwiza guilty of ordering or instigating the extermination of Tutsi civilians by CDR members and *Impuzamugambi*;[2138] it also convicted him of the same crimes under Articles 3(b) and 6(3) of the Statute as a superior of CDR members and *Impuzamugambi*.[2139] Lastly, it found the Appellant guilty of planning extermination by organizing the distribution of weapons in Gisenyi one week after 6 April 1994 and supervising roadblocks manned by *Impuzamugambi*.[2140]

(a) Responsibility for having ordered or instigated extermination

945. Appellant Barayagwiza contends that the Trial Chamber erred in finding that the activities of the CDR and the *Impuzamugambi* provoked killings on a large scale.[2141] He argues that the Prosecutor did not adduce any evidence in that regard and that the Trial Chamber did not state the evidence on which it relied in reaching this finding.[2142] The Prosecutor does not appear to respond specifically to this contention.

[2132] See *supra* XII. B. 3. (b) (i) b.
[2133] Judgement, para. 1063.
[2134] See *supra* XII. D. 1. (b) (ii) e.
[2135] Judgement, para. 1064.
[2136] See *supra* XII. D. 2. (a) (ii) b.
[2137] Judgement, para. 1062.
[2138] *Ibid.*, para. 1065. This paragraph does not clearly indicate which mode of liability the Trial Chamber relied on in this regard; it speaks of Appellant Barayagwiza giving orders ("at the direction of" in the original English version). However, paragraph 975 (to which paragraph 1065 refers) talks of "instigating".
[2139] *Ibid.*, para. 1066.
[2140] *Ibid.*, para. 1067, referring to paragraph 954, which in turn refers to paragraphs 719 and 730.
[2141] Barayagwiza Appellant's Brief, para. 287.
[2142] *Ibid.*, paras. 288-289.

946. With the exception of the killings at roadblocks manned by members of the CDR and the *Impuzamugambi*, the Trial Chamber did not clearly indicate the large-scale killings having occurred in 1994 which, in its view, were attributable to the CDR and the *Impuzamugambi*.[2143] On reading the Judgement, the Appeals Chamber is not persuaded that it was established that the activities of the CDR and the *Impuzamugambi* substantially contributed to the killing of Tutsi, with the exception of those carried out at roadblocks. However, the Appeals Chamber notes with regard to these killings that the Trial Chamber found that, under the leadership of Appellant Barayagwiza, members of the CDR and the *Impuzamugambi* killed a large number of Tutsi civilians at roadblocks.[2144] This finding was based on a detailed analysis of the evidence adduced.[2145] The Appeals Chamber is of the opinion that Appellant Barayagwiza has not shown that these findings were unreasonable; therefore his conviction under Articles 3(b) and 6(1) of the Statute for instigating or ordering extermination is upheld. However, the Appellant's conviction for the same crimes under Article 6(3) of the Statute[2146] must be set aside.[2147]

(b) Responsibility for having planned extermination

947. As noted above,[2148] Appellant Barayagwiza submits that the Trial Chamber erred (1) in relying on the uncorroborated testimony of Witness AHB to find, in paragraph 730 of the Judgement, that he had distributed weapons in Gisenyi;[2149] and (2) in finding, in paragraph 954 of the Judgement, that his role in the distribution of weapons showed that "he was involved in planning this killing [of Tutsi civilians in Gisenyi]".[2150]

(i) Distribution of weapons

948. Appellant Barayagwiza raises eight arguments to support his contention that the Trial Chamber should not have accepted Witness AHB's testimony on the distribution of weapons in Gisenyi:[2151] (1) Witness AHB gave several versions of events;[2152] (2) there were uncertainties as to the origin of the weapons allegedly distributed by the Appellant;[2153] (3) the Appellant did not own a red vehicle as the witness alleged;[2154] (4) the witness acknowledged that his testimony before the Chamber did not exactly reflect what he had said in his statement to the Rwandan Public Prosecutor, which was used by the Prosecution investigators;[2155] (5) the Trial Chamber did not cross-check the witness's statements as to details of names and distances, although these were erroneous in several regards;[2156] (6) the details provided in cross-examination undermined the credibility of the witness;[2157] (7) the

[2143] See Judgement, para. 341. See also para. 336.
[2144] Judgement, para. 341.
[2145] See *supra* XII. D. 2. (b) (vii) . See also Judgement, paras. 313-338.
[2146] Judgement, para. 1066.
[2147] See *supra* XI. C.
[2148] See *supra* XII. D. 2. (b) (iv).
[2149] Barayagwiza Appellant's Brief, paras 208, 217.
[2150] *Ibid.*, paras. 218-219.
[2151] *Ibid.*, paras. 209-217.
[2152] *Ibid.*, para. 210; T(A) 17 January 2007, p. 78-79.
[2153] *Ibid.*, para. 211.
[2154] *Idem.*
[2155] Barayagwiza Appellant's Brief, para. 212.
[2156] *Ibid.*, para. 213.
[2157] *Ibid.*, para. 214.

Trial Chamber wrongly shifted the burden of proof onto the Appellant by asking him to prove the date on which an RTLM antenna was installed;[2158] (8) the fact, according to the witness, that the Appellant allegedly took part in a CDR meeting in 1991 is incorrect, since the CDR was only formed in 1992, and there is no evidence that a preliminary meeting may have taken place in 1991.[2159]

949. The Appeals Chamber recalls that the jurisprudence of the Tribunal does not require the corroboration of the testimony of a sole witness,[2160] and that the trial Judges are in the best position to assess the credibility of a witness and the reliability of the evidence adduced.[2161]

950. The Appeals Chamber considers at the outset that the Appellant's claim that Witness AHB committed many errors in his testimony concerning names of persons and locations and distances between locations[2162] should be dismissed without further consideration, in the complete absence of any details in this regard in the Appellant's Brief. Similarly, the Appeals Chamber will not examine the argument that the many inconsistencies in the witness' testimony should have impelled the Trial Chamber to find that the explanations provided by Witness AHB in cross-examination had the effect of undermining, not strengthening, his credibility,[2163] since this argument is not substantiated. Furthermore, the Appeals Chamber considers that the arguments as to the origin of the weapons distributed by the Appellant[2164] do not demonstrate that Witness AHB's testimony was unreliable, and cannot invalidate the finding of the Trial Chamber. Lastly, the allegation that the Appellant did not own a red vehicle[2165] does not show that Witness AHB's testimony was unreliable. These arguments are therefore summarily dismissed.

951. As to the allegation that Witness AHB gave several different versions of the events, the Appeals Chamber notes that, according to Appellant Barayagwiza, the witness "initially said that the Appellant contributed to the killings which started on 7th April 1994 because the Appellant delivered arms to Gisenyi. The second version of his evidence was that there were arms delivered by the army which were used on 7 April to kill Tutsi. In a third version the witness stated that the arms delivered by the Appellant were used to kill people who were not killed in the first phase."[2166] The Appeals Chamber observes that, contrary to what the Appellant claims, the extracts from Witness AHB's testimony at the hearing show that the witness had always asserted that the arms brought by Appellant Barayagwiza were used to kill Tutsi who were not killed in the attacks which took place on 7 April 1994.[2167]

952. With regard to the argument based on the inconsistencies between the witness' written statement and his testimony at trial, the Appeals Chamber notes that, in cross-examination, the witness explained that those who transcribed his statement confused some events and

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[2158] *Idem.*
[2159] Barayagwiza Appellant's Brief, paras. 215-216.
[2160] See the case-law cited *supra*, footnote 1312.
[2161] *Rutaganda* Appeal Judgement, para. 188; *Akayesu* Appeal Judgement, para. 132; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64.
[2162] Barayagwiza Appellant's Brief, para. 213.
[2163] *Ibid.*, para. 214.
[2164] *Ibid.*, para. 211.
[2165] *Idem.*
[2166] Barayagwiza Appellant's Brief, para. 210, referring to T. 28 November 2001, pp. 46-48, 54-55, 111-117.
[2167] T. 28 November 2001, pp. 47-48, 52, 54-55.

omitted some details,[2168] and that the transcript of his statement was not read back to him.[2169] Moreover, he provided the clarifications requested by the Defence and gave additional details on the events in question.[2170] In the opinion of the Appeals Chamber, the Appellant has not demonstrated that it was unreasonable to accept the testimony of this witness because of the alleged inconsistencies between his written statement and testimony at trial.

953. The Appeals Chamber turns now to the argument that the Trial Chamber reversed the burden of proof as to the date an RTLM antenna was installed, a matter raised during the testimony of Witness AHB.[2171] Paragraph 726 of the Judgement notes "that although the witness was challenged on the date of this event and Barayagwiza's presence for it, no evidence was adduced by the Defence that the antenna was not installed in 1993 or that Barayagwiza was not present."[2172] The Appeals Chamber notes that this paragraph examines the evidence adduced by the Defence to challenge the credibility of the witness, and that the Trial Chamber confines itself to observing that the Defence challenge was not supported by any evidence. This does not amount to a reversal of the burden of proof in respect of a fact that must be proved beyond a reasonable doubt; rather this is a finding that the Defence has not succeeded in demonstrating in cross-examination that the testimony lacked credibility in relation to the events in question.

954. Appellant Barayagwiza submits lastly that the Trial Chamber had no basis for its inference that it was "possible that a preliminary meeting of the party for recruitment purposes took place prior to [...] the official launch" of the CDR.[2173] The Appeals Chamber notes that, in paragraph 726 of the Judgement, the Trial Chamber merely accepted the explanation given by Witness AHB, namely that there was a local meeting of the CDR separately from its official launch, which happened much later, and, after a detailed examination, found him credible. The Appeals Chamber considers that the Trial Chamber in the instant case did not exceed the bounds of its discretionary power in assessing the evidence. This ground of appeal is dismissed.

(ii) Participation in the planning of killings

955. In his twenty-fifth ground of appeal, Appellant Barayagwiza contends that the Trial Chamber erred in finding in paragraph 954 of the Judgement that the Appellant "was involved in planning the killing [in Gisenyi]". He argues that the Chamber reached this conclusion on the basis of its finding in paragraph 730 of the Judgement that the Appellant had delivered weapons to Gisenyi, and submits that, if this finding – which is in fact challenged in the preceding ground – is set aside, then the finding in paragraph 954 must be set aside also.[2174] He adds that, even if the Appeals Chamber were to find that he did deliver weapons to Gisenyi, this would not be sufficient to prove that he was involved in planning the killings, given that there is no evidence showing his participation in discussions at which the killings were planned.[2175]

[2168] *Ibid.*, pp. 45-47.
[2169] *Ibid.*, pp. 60-61, 63-64.
[2170] Judgement, paras. 724, 726; T. 28 November 2001, pp. 45-47, 54.
[2171] Barayagwiza Appellant's Brief, paras. 209, 214.
[2172] Judgement, para. 726.
[2173] Barayagwiza Appellant's Brief, para. 209. See also para. 215.
[2174] *Ibid.*, para. 218.
[2175] *Ibid.*, para. 219.

956. In paragraph 730 of the Judgement, the Trial Chamber notes the following facts:

> The Chamber finds that Barayagwiza came to Gisenyi in April 1994, one week after the shooting of the plane on 6 April, with a truckload of weapons for distribution to the local population. The weapons were to be used to kill Tutsi civilians, and outreach to three cellules was coordinated in advance, to recruit attackers from among the residents of these cellules and bring them together to collect the weapons. That same day at least thirty Tutsi civilians were killed, including children and older people, with the weapons brought by Barayagwiza. Barayagwiza played a leadership role in the distribution of these weapons.

957. In its legal findings, the Trial Chamber holds that "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."[2176]

958. The Appeals Chamber has already found that Appellant Barayagwiza has not shown that the Trial Chamber erred in finding that he was involved in the distribution of weapons in Gisenyi. The Trial Chamber, relying on the factual findings resulting from an examination of Witness AHB's testimony, which is summarized in paragraphs 720 to 722 of the Judgement, could, notwithstanding the absence of direct evidence, reasonably infer that the killings of Tutsi had been planned at the local level, and that the Appellant had participated in the planning through his involvement in the distribution of weapons in Gisenyi one week after the downing of the presidential plane. The trial Judges described the Appellant's role in the matter as one of "leadership",[2177] or as having "orchestrated" it.[2178] The Appellant brought the weapons in his vehicle to the house of Ntamaherezo, MRND President in the commune;[2179] he was accompanied by two *Impuzamugambi*, who remained there and took part in the killing of Tutsi;[2180] his arrival was announced and a message was disseminated by CDR and MRND leaders indicating that people were to meet at Ntamaherezo's house to collect weapons;[2181] the Appellant conversed with Ntamaherezo while the weapons were being offloaded;[2182] once the delivery of the weapons was complete, the Appellant left in the same vehicle with part of the weapons in the company of some *Impuzamugambi*;[2183] some of the weapons were delivered to Aminadab in Kabari and to Ruhura, Barayagwiza's younger brother, who was the CDR Chairman in Kanzenze sector.[2184]

959. Although the Trial Chamber did not explicitly state that the weapons distribution substantially contributed to the extermination of Tutsi, the factual findings underlying the legal finding in paragraph 954 of the Judgement clearly indicate that this was indeed its opinion. Thus the Chamber found in paragraph 730 of the Judgement that "the weapons distributed to the local population ... were to be used to kill Tutsi civilians." This finding is

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[2176] Judgement, para. 954.
[2177] *Ibid.*, para. 730.
[2178] *Ibid.*, para. 954.
[2179] *Ibid.*, para. 720.
[2180] *Idem.*
[2181] *Idem* and para. 721.
[2182] Judgement, para. 720.
[2183] *Idem.*
[2184] Judgement., para. 722.

supported by the testimony of Witness AHB referred to above. The Appellant has not demonstrated that the Trial Chamber's finding was unreasonable.

(iii) Conclusion

960. Appellant Barayagwiza's conviction for having planned extermination[2185] is upheld.

3. Responsibility of Appellant Ngeze for acts in Gisenyi

961. The Trial Chamber found Appellant Ngeze guilty of extermination on account of his acts in ordering and aiding and abetting the killing of Tutsi civilians.[2186] The Appeals Chamber has already found that the Appellant cannot be held liable for having ordered the killing of Tutsi civilians in Gisenyi on 7 April 1994 or for having distributed weapons on 8 April 1994,[2187] and it is therefore not necessary to examine the Appellant's challenge to these findings.

(a) Submissions of the Parties

962. Appellant Ngeze submits that the Trial Chamber erred in finding him guilty of extermination.[2188] He notes first that the Trial Chamber found him liable "for his acts in ordering and aiding and abetting the killing of Tutsi civilians, as set forth in paragraph 954" of the Judgement, but that paragraph does not deal with his acts;[2189] he argues that this error, whether or not typographical, totally invalidates the Judgement, because it prevents him from knowing on precisely which facts his conviction for extermination is based.[2190]

963. Appellant Ngeze submits further that he could not be found guilty of extermination on the basis of his alleged activities in the Gisenyi region.[2191] He argues in particular that none of the witnesses directly testified to having received instructions from him at a roadblock, but had only heard him giving instructions at the roadblocks to others.[2192] Appellant Ngeze further submits that the Trial Chamber erred in finding that he had the necessary authority to give orders or instructions to others,[2193] and that he had the requisite *mens rea* for extermination.[2194]

(b) Analysis

964. The Appeals Chamber notes, as stated by Appellant Ngeze, that paragraph 1068 of the Judgement refers erroneously to paragraph 954, which does not concern the acts of Appellant Ngeze, but those of Appellant Barayagwiza. However, the Appeals Chamber considers that the reference to paragraph 954 is clearly a typographical error; the reference should have been to paragraphs 955 and 956 of the Judgement, which deal with the activities of Appellant

[2185] *Ibid.*, para. 1067.
[2186] *Ibid.*, para. 1068, referring erroneously to para. 954 of the Judgement, instead of paras. 955 and 956.
[2187] See *supra* X. D.
[2188] Ngeze Notice of Appeal, paras. 151-161; Ngeze Appellant's Brief, paras. 393-421.
[2189] Ngeze Appellant's Brief, paras. 393-395, referring to Judgement, para. 1068.
[2190] *Ibid.*, para. 395.
[2191] *Ibid.*, paras. 409-412.
[2192] *Ibid.*, para. 411(b), referring to Judgement, para. 833.
[2193] *Ibid.*, paras. 420-421.
[2194] *Ibid.*, paras. 417-419.

Ngeze. In the opinion of the Appeals Chamber, Appellant Ngeze did not suffer any prejudice because of this typographical error, and it does not warrant setting aside his conviction for extermination.

965. The Appellant's conviction for extermination therefore rests on the acts described in paragraphs 955 and 956 of the Judgement. Some of the factual findings in this regard have already been set aside by the Appeals Chamber in the chapter on alibi.[2195] However, 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*" still stands.[2196] The Appeals Chamber is not persuaded that the Appellant has demonstrated that this finding was unreasonable. First, it is not clear how Appellant Ngeze's submissions on this issue, even if they were to succeed, would invalidate this finding.[2197] Secondly, the Appeals Chamber finds no inconsistency in the evidence capable of invalidating the Trial Chamber's finding. Witness AHI saw the Appellant giving instructions to individuals manning roadblocks; this evidence corroborates that of Omar Serushago.[2198]

966. As to Appellant Ngeze's contention that he did not have the authority to give instructions at roadblocks, the Appeals Chamber recalls that it is not necessary, in order to convict an accused of having aided and abetted another person in the commission of a crime, to prove that the accused had authority over that other person.[2199]

967. Finally, the Appeals Chamber is of the opinion that Appellant Ngeze has not shown that the Trial Chamber was wrong in finding that he had the requisite intent to be convicted for aiding and abetting extermination. The fact is that the acts retained against Appellant Ngeze are sufficient to sustain the inference that he knew that his acts were contributing to the perpetration of extermination by others. Further, the Appeals Chamber is of the opinion that the Appellant himself had the intent to destroy the Tutsi in whole or in part.[2200]

968. For these reasons, the Appeals Chamber upholds Appellant Ngeze's conviction for aiding and abetting extermination.

4. Responsibility of Appellant Ngeze on account of *Kangura* publications

969. Although the Trial Chamber found in paragraph 1062 of the Judgement that *Kangura* instigated killings on a large scale, paragraph 1068 of the Judgement does not base Appellant Ngeze's conviction for extermination on his responsibility for publishing *Kangura*, as is noted by the Appellant himself.[2201] There is thus no need to examine the Appellant's submission that he could not be convicted of extermination on account of matters published in *Kangura*.[2202]

[2195] See *supra* X. D.
[2196] Judgement, para. 956.
[2197] Although no witness testified to receiving instructions from the Appellant at a roadblock, but only to hearing such instructions given to others at roadblocks, this does not in any way prove that the Appellant played no role in the setting up and supervision of roadblocks in Gisenyi.
[2198] See Judgement, para. 833.
[2199] See *supra* XII. D. 3.
[2200] See *supra* XII. C. 4. (d) .
[2201] Ngeze Appellant's Brief, para. 396.
[2202] See *ibid.*, paras. 399-406.

C. Persecution

970. The Trial Chamber found the Appellants guilty of persecution on the following grounds:

- Appellant Nahimana: for RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population, guilty of persecution under Articles 3(h), 6(1) and 6(3) of the Statute;[2203]

- Appellant Barayagwiza: for RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population, guilty of persecution under Articles 3(h) and 6(3) of the Statute;[2204]

- Appellant Barayagwiza: for his own acts and for the activities of CDR that advocated ethnic hatred or incited violence against the Tutsi population, guilty of persecution under Articles 3(h), 6(1) and 6(3) of the Statute;[2205]

- Appellant Ngeze: for *Kangura* publications advocating ethnic hatred or inciting violence against the Tutsi population, as well as for his own acts that advocated ethnic hatred or incited violence against the Tutsi population, guilty of persecution under Articles 3(h) and 6(1) of the Statute.[2206]

971. The Appellants allege that the Trial Chamber erred in law and in fact in finding them guilty of persecution as a crime against humanity.[2207]

1. Can hate speech constitute the *actus reus* of persecution as a crime against humanity?

(a) Submissions of the Parties

972. The Appellants submit that hate speech cannot constitute an act of persecution pursuant to Article 3(h) of the Statute. In this connection, they argue that:

- hate speech is not regarded as a crime under customary international law (except in the case of direct and public incitement to commit genocide), and to condemn the Appellants for such acts under the count of persecution would violate the principle of legality;[2208]

[2203] Judgement, para. 1081.
[2204] *Ibid.*, para. 1082.
[2205] *Ibid.*, para. 1083
[2206] *Ibid.*, para. 1084.
[2207] Nahimana Notice of Appeal, pp. 13, 15-17; Nahimana Appellant's Brief, paras. 537-557; Nahimana Brief in Reply, paras. 38-70; Barayagwiza Notice of Appeal, p. 3 (grounds of appeal 36-38); Barayagwiza Appellant's Brief, paras. 292-312; Barayagwiza Brief in Reply, paras. 70-78; Ngeze Notice of Appeal, paras. 162-179; Ngeze Appellant's Brief, paras. 422-448; Ngeze Brief in Reply, paras. 94-96.
[2208] Nahimana Appellant's Brief, paras. 539-541; Nahimana Brief in Reply, paras. 58-60; Barayagwiza Appellant's Brief, paras. 302, 308; Ngeze Appellant's Brief, paras. 428-430. The Appellants refer to para. 209 and footnote 272 of the *Kordić and Čerkez* Trial Judgement. At para. 308 of his Appeal Brief, Appellant Barayagwiza argues that the Trial Chamber erred in holding that there is a rule of international law prohibiting discrimination and in failing to make it clear "whether such a norm, which allegedly exists in international law

- hate speech does not fall within the definition of the crime against humanity of persecution, because it does not lead to discrimination in fact and is not as serious as other crimes against humanity, as recognized by the *Kordić and Čerkez* Trial Judgement;[2209]

- the Trial Chamber erred in relying on the *Ruggiu* Trial Judgement to conclude that hate speech targeting a population by reason of its ethnicity is sufficiently serious to constitute a crime against humanity, because that judgement was not the result of a real trial; the Trial Chamber "only confirmed the guilty plea of that accused and the content of the agreement he had signed with the Prosecutor", without any adversarial debate;[2210]

- international criminal law cannot adopt the extensive meaning given to the concept of "persecution" in international refugee law, because (1) that would violate the principle of legality[2211] and (2) in international refugee law, the concept of persecution is used for the protection of refugees, whereas in international criminal law the concept relates to criminal prosecution.[2212] In any case, even in international refugee law, "the mere fact of belonging to a group targeted by speeches calling for hatred and violence is not sufficient for admission to the status of refugee."[2213]

973. The Prosecutor responds that hate speech and incitement to ethnic violence can constitute persecution as a crime against humanity.[2214] He maintains that the Trial Chamber did not confuse ordinary racial discrimination with persecution as a crime against humanity.[2215] He further argues that the reference to the *Kordić and Čerkez* and *Kupreškić et al.* Trial Judgements does not support the Appellants' position because: (1) these Judgements do not bind the ICTR;[2216] (2) the position adopted in the *Kordić and Čerkez* Trial Judgement "only excludes from the ambit of persecution criminal speeches falling short of criminal incitement to violence"; however, in the instant case, "the criminal speech in question reached the form of direct and public incitement to commit genocide and is thus persecutory

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to protect human rights, also exists in international criminal law". In this connection, he argues that: (1) even if Streicher was convicted for anti-semitic propaganda, this is insufficient to create a norm of customary international criminal law; (2) the decisions of the ECHR cited by the Trial Chamber do not relate to crimes against humanity and cannot contribute to the establishment of a norm of customary international criminal law.

[2209] Nahimana Appellant's Brief, para. 542; Nahimana Brief in Reply, paras. 52-57; Barayagwiza Appellant's Brief, paras. 300-306; Ngeze Appellant's Brief, paras. 430-433. The Appellants all refer to *Kordić and Čerkez* Trial Judgement, para. 209 and footnote 272.

[2210] Barayagwiza Appellant's Brief, para. 305; Barayagwiza Brief in Reply, para. 75. The Appellant adds that none of the Appellants in the current case had the opportunity to challenge the assertions made by Ruggiu in the agreement with the Prosecutor, but that, at their trial, they succeeded in convincing the Chamber that George Ruggiu's testimony was not reliable nor credible (Barayagwiza Appellant's Brief, para. 305, referring to the Judgement, para. 549).

[2211] Nahimana Appellant's Brief, para. 543; Barayagwiza Appellant's Brief, para. 303. In this respect, the Appellants refer to *Kupreškić et al.* Trial Judgement, para. 589.

[2212] Nahimana Appellant's Brief, para. 544.

[2213] *Idem.*

[2214] Respondent's Brief, paras. 378, 380-393, 409-418.

[2215] *Ibid.*, paras. 380-381.

[2216] *Ibid.*, paras. 382-383.

within the meaning of *Kordić* itself";[2217] and (3) the paragraphs of the *Kupreškić et al.* Trial Judgement cited by the Appellants were not specifically concerned with hate speech or incitement to violence as persecution, and the Appellants have not demonstrated that the Trial Chamber in the instant case applied the definition of persecution as contained in international refugee law or human rights law in violation of paragraph 589 of the *Kupreškić et al.* Trial Judgement.[2218]

974. The Prosecutor further submits that the Trial Chamber adopted a definition of persecution in accordance with the applicable jurisprudence and, on the basis of the evidence before it, concluded that the tests enunciated in that definition were satisfied.[2219] He recalls that the list of persecutory acts is inexhaustive and that persecutory acts need not be considered as crimes in international law.[2220]

975. The Prosecutor takes the view that the Trial Chamber correctly found that hate speech and incitement to violence targeting a population on the basis of ethnicity are capable of reaching the level of gravity of the crimes in Article 3 of the Statute, and can thus constitute persecution.[2221] He notes that, in the instant case, "the *actus reus* was systematic incitement to hatred and violence, having been consistently executed over a considerable period of time, and contributed to acts of violence directed against a civilian population, mainly Tutsi."[2222] Thus, according to the Prosecutor, the Trial Chamber correctly found that the broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a serious deprivation of the fundamental rights to life, liberty and basic humanity.[2223] In the instant case, the cumulative effect of the speeches was sufficiently serious to constitute persecution.[2224]

976. In response to Appellant Barayagwiza's claim that the Trial Chamber erred in relying on the *Ruggiu* Trial Judgement to find that a hate speech may be characterized as persecution, the Prosecutor submits that the Trial Chamber relied on this Judgement for a point of law and that the fact that the Judgement is pursuant to a plea of guilt is irrelevant.[2225]

977. The Prosecutor contends that the Trial Chamber committed no error in fnding that there need not be a link between persecution and violence.[2226] He maintains that in any case such nexus was established by the evidence before the Trial Chamber.[2227]

978. Finally, regarding Appellant Barayagwiza's argument that customary international law does not prohibit discrimination, the Prosecutor responds that the materials and practices

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[2217] *Ibid.*, para. 382.
[2218] *Ibid.*, para. 383.
[2219] *Ibid.*, paras. 384-385.
[2220] *Ibid.*, para. 386.
[2221] *Ibid.*, paras. 386, 409.
[2222] *Ibid.*, para. 386. At para. 389, the Prosecutor maintains that the Trial Chamber properly concluded that the gravity of the acts must be assessed in their context and taking into account their cumulative effect.
[2223] Respondent's Brief, para. 386, referring to Judgement, para. 1072. See also Respondent's Brief, para. 439.
[2224] *Ibid.*, paras. 390-393, 396.
[2225] *Ibid.*, para. 433.
[2226] *Ibid.*, paras. 434-435.
[2227] *Ibid.*, para. 436.

reviewed by the Trial Chamber point, on the contrary, to the existence of such a norm.[2228] Moreover, even assuming such norm did not exist, no error of law was committed, since the crime of persecution consists of an act or omission which discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law. In the instant case, it is indisputable that freedom from discrimination as well as the right to life, liberty and human dignity (rights violated by hate speech and incitement to ethnic violence) are part of international customary and treaty law.[2229]

(b) *Amicus Curiae* Brief and responses thereto

979. *Amicus Curiae* submits that the Trial Chamber erred in convicting the Appellants for persecution on account of hate speech not inciting to violence.[2230] First, he argues that the interpretation of the *Streicher* case relied on by the Trial Chamber is wrong, because Streicher was not found guilty of persecution "for anti-semitic writings that significantly predated the extermination of Jews in the 1940s,"[2231] but for prompting "to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions";[2232] thus the Streicher case does not show that hate speech short of incitement to violence can constitute persecution, but the contrary.[2233] *Amicus Curiae* submits that this interpretation of the *Streicher* case is confirmed by the fact that the IMT acquitted Hans Fritzsche, on grounds that his hate speeches did not seek "to incite the Germans to commit atrocities against the conquered people."[2234] *Amicus Curiae* further argues that the *Ruggiu* Trial Judgement cannot provide support for the Trial Chamber's finding that hate speech which contains no call for violence could constitute persecution because what that Judgement shows is that it is only speech whose ultimate aim is to destroy life that constitutes persecution.[2235] Lastly, *Amicus Curiae* criticizes the Trial Chamber for having failed to follow the *Kordić and Čerkez* Trial Judgement, which had found that mere hate speech could not constitute persecution.[2236]

980. In response to the *Amicus Curiae* Brief, the Prosecutor asserts that it is clear from case-law of the Tribunal that hate speech can constitute persecution, since such discourse violates the fundamental right to equality, and such violation may attain the same degree of gravity as other crimes against humanity.[2237] The Prosecutor explains that persecution does not necessarily have to occur through physical violence,[2238] and that the Appeals Chamber has acknowledged that harassment, humiliation and psychological violence may constitute acts of persecution.[2239] The Prosecutor further contends that the *Streicher* Judgement does not preclude the criminalization of hate speech; in any case, international human rights law has

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[2228] *Ibid.*, para. 438.
[2229] *Ibid.*, para. 439. At the Appeal hearings, the Prosecutor also referred to the right to equality: T(A) 18 January 2007, pp. 33-34.
[2230] *Amicus Curiae* Brief, p. 3-4, 28-34.
[2231] Judgement, para. 1073.
[2232] *Amicus Curiae* Brief, p. 29, citing the Nuremberg Judgement, p. 131.
[2233] *Ibid.*, p. 30.
[2234] *Ibid.*, p. 31, citing the Nuremberg Judgement, p. 163.
[2235] *Ibid.*, pp. 31-32.
[2236] *Ibid.*, p. 32, referring to the *Kordić and Čerkez* Trial Judgement, para. 208.
[2237] Prosecutor's Response to the *Amicus Curiae* Brief, paras. 32-37.
[2238] *Ibid.*, paras. 36, 38-41.
[2239] *Ibid.*, para. 39, referring to the *Kvočka et al.* Appeal Judgement, paras. 323-325.

developed since Nuremberg and the Tribunal should recognize that violation of the right to equality can constitute persecution.[2240] Lastly, the Prosecutor argues that, even if only hate speech inciting to violence can constitute persecution, the speech in question here incited to violence, whether considered on its own or in context.[2241]

981. Appellant Nahimana repeats the arguments of *Amicus Curiae* that a simple hate speech cannot constitute persecution.[2242] He also notes that *Amicus Curiae* seems to suggest that a speech calling for violence could constitute the *actus reus* of crime against humanity (persecution), but he asserts in this regard that international criminal law prosecutes only direct calls for extermination.[2243] The Appellant further submits that no call for violence has been identified in any RTLM broadcasts prior to 6 April 1994.[2244]

982. Appellants Barayagwiza and Ngeze agree with *Amicus Curiae* that hate speech cannot constitute an act of persecution.[2245] In this regard, they reiterate several of the arguments in their Appeal Briefs and in the *Amicus Curiae* Brief.[2246]

(c) Analysis

983. The Trial Chamber defined the crime of persecution as "'a gross or blatant denial of a fundamental right reaching the same level of gravity' as the other acts enumerated as crimes against humanity under the Statute."[2247] The Chamber then stated:

> It is evident that hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches this level of gravity and constitutes persecution under Article 3(h) of its Statute. In *Ruggiu*, the Tribunal so held, finding that the radio broadcasts of RTLM, in singling out and attacking the Tutsi ethnic minority, constituted a deprivation of "the fundamental rights to life, liberty and basic humanity enjoyed by members of the wider society." Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.[2248]

984. The Trial Chamber explained that the speech itself constituted the persecution and that there was therefore no need for the speech to contain a call to action,[2249] or for there to be a link between persecution and acts of violence.[2250] It recalled that customary international law prohibits discrimination and that hate speech expressing ethnic and other forms of

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[2240] *Ibid.*, para. 42.
[2241] *Ibid.*, paras. 43-44.
[2242] Nahimana's Response to the *Amicus Curiae* Brief, p. 5.
[2243] *Ibid.*, pp. 5-6.
[2244] *Ibid.*, pp. 6-7.
[2245] Barayagwiza's Response to the *Amicus Curiae* Brief, para. 21; Ngeze's Response to the *Amicus Curiae* Brief, p. 7.
[2246] Barayagwiza's Response to the *Amicus Curiae* Brief, paras. 36-43; Ngeze's Response to the *Amicus Curiae* Brief, pp. 7-10.
[2247] Judgement, para. 1072, referring to *Ruggiu* Trial Judgement, para. 21.
[2248] *Ibid.*, para. 22.
[2249] Judgement, para. 1073. In paragraph 1078, the Trial Chamber added that persecution is broader than direct and public incitement to commit genocide, including advocacy of ethnic hatred in other forms.
[2250] Judgement, para. 1073.

discrimination violates this prohibition.[2251] It found that the expressions of ethnic hatred in the RTLM broadcasts, *Kangura* publications and the activities of the CDR constituted persecution under Article 3(h) of the Statute.[2252]

985. The Appeals Chamber reiterates that "the crime of persecution consists of an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*)."[2253] However, not every act of discrimination will constitute the crime of persecution: the underlying acts of persecution, whether considered in isolation or in conjunction with other acts, must be of a gravity equal to the crimes listed under Article 3 of the Statute.[2254] Furthermore, it is not necessary that these underlying acts of persecution amount to crimes in international law.[2255] Accordingly, there is no need to review here the Appellants' arguments that mere hate speech does not constitute a crime in international criminal law.

986. The Appeals Chamber considers that hate speech targeting a population on the basis of ethnicity, or any other discriminatory ground, violates the right to respect for the dignity[2256] of the members of the targeted group as human beings,[2257] and therefore constitutes "actual discrimination". In addition, the Appeals Chamber is of the view that speech inciting to violence against a population on the basis of ethnicity, or any other discriminatory ground, violates the right to security[2258] of the members of the targeted group and therefore constitutes "actual discrimination". However, the Appeals Chamber is not satisfied that hate speech alone can amount to a violation of the rights to life, freedom and physical integrity of the human being. Thus other persons need to intervene before such violations can occur; a speech cannot, in itself, directly kill members of a group, imprison or physically injure them.

987. The second question is whether the violation of fundamental rights (right to respect for human dignity, right to security) is as serious as in the case of the other crimes against humanity enumerated in Article 3 of the Statute. The Appeals Chamber is of the view that it is not necessary to decide here whether, in themselves, mere hate speeches not inciting

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[2251] *Ibid.*, paras. 1074-1076.
[2252] *Ibid.*, para. 1077.
[2253] *Krnojelac* Appeal Judgement, para. 185 (citing with approval *Krnojelac* Trial Judgement, para. 431), reiterated in *Simić* Appeal Judgement, para. 177; *Stakić* Appeal Judgement, paras. 327-328; *Kvočka et al.* Appeal Judgement, para. 320; *Kordić and Čerkez* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 131; *Vasiljević* Appeal Judgement , para. 113.
[2254] *Brđanin* Appeal Judgement, para. 296; *Simić* Appeal Judgement, para. 177; *Naletilić and Martinović* Appeal Judgement, para. 574; *Kvočka et al.* Appeal Judgement, para. 321; *Kordić and Čerkez* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 135; *Krnojelac* Appeal Judgement, paras. 199, 221.
[2255] Brđanin Appeal Judgement, para. 296; *Kvočka et al.* Appeal Judgement, para. 323. Contrary to what the Appellants contend, this is not a breach of the legality principle, since the crime of persecution as such is sufficiently defined in international law.
[2256] On the content of this right, see for example the Universal Declaration on Human Rights, the Preamble of which expressly refers to the recognition of dignity inherent to all human beings, while the Articles set out its various aspects.
[2257] In this regard, it should be noted that, according to the *Kvočka et al.* Appeal Judgement (paras. 323-325), violations of human dignity (such as harassment, humiliation and psychological abuses) can, if sufficiently serious, constitute acts of persecution.
[2258] On the right to security, see for example Article 3 of the Universal Declaration on Human Rights ("Everyone has the right to life, liberty and security of person").

violence against the members of a group are of a level of gravity equivalent to that for other crimes against humanity. As explained above, it is not necessary that every individual act underlying the crime of persecution should be of a gravity corresponding to other crimes against humanity: underlying acts of persecution can be considered together. It is the cumulative effect of all the underlying acts of the crime of persecution which must reach a level of gravity equivalent to that for other crimes against humanity. Furthermore, the context in which these underlying acts take place is particularly important for the purpose of assessing their gravity.

988. In the present case, the hate speeches made after 6 April 1994[2259] were accompanied by calls for genocide against the Tutsi group[2260] and all these speeches took place in the context of a massive campaign of persecution directed at the Tutsi population of Rwanda, this campaign being also characterized by acts of violence (killings, torture and ill-treatment, rapes ...) and of destruction of property.[2261] In particular, the speeches broadcast by RTLM – all of them by subordinates of Appellant Nahimana[2262] –, considered as a whole and in their context, were, in the view of the Appeals Chamber, of a gravity equivalent to other crimes against humanity.[2263] The Appeals Chamber accordingly finds that the hate speeches and calls for violence against the Tutsi made after 6 April 1994 (thus after the beginning of a systematic and widespread attack against the Tutsi) themselves constituted underlying acts of persecution.[2264] In addition, as explained below,[2265] some speeches made after 6 April 1994 did in practice substantially contribute to the commission of other acts of persecution against the Tutsi; these speeches thus also instigated the commission of acts of persecution against the Tutsi.

[2259] As explained *infra* XV. C. 2 (a) (ii) a. and XV. C. 2. (c), speeches made before 6 April 1994 cannot constitute acts of persecution since it cannot be concluded that they took place in the context of a systematic or widespread attack.

[2260] See *supra* XII. B. 3. (b) (i) b. and XIII. C. 1 (c), where the Appeals Chamber has concluded that post-6 April 1994 RTLM broadcasts directly called for the murder of Tutsi.

[2261] It should be recalled that it cannot reasonably be disputed that the Tutsi population was the victim of generalized and systematic attacks between 6 April and 17 July 1994, resulting in the murder of a great number of Tutsi: *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision of Judicial Notice, 16 June 2006, paras. 28-31 (see also paras. 35-38, taking judicial note of the genocide committed against the Tutsi in Rwanda between 6 April and 17 July 1994); *Semanza* Appeal Judgement, para. 192.

[2262] See *supra* XIII. D. 1. (b) (ii) a. iii.

[2263] Such speeches constituted a grave violation of the right to human dignity of the Tutsi, as well as very seriously threatening their physical and mental security.

[2264] The Appeals Chamber notes that an ICTY Trial Chamber has found that speeches inciting hatred on political or other grounds, as alleged in the present case, could not constitute acts of persecution (*Kordić and Čerkez* Trial Judgement, para. 209). This legal finding was not appealed and the *Kordić and Čerkez* Appeal Judgement accordingly did not address the issue. The reasoning underlying that finding is, however, inconsistent with the established case-law of the Appeals Chamber, which does not require that the underlying acts of persecution be "enumerated as a crime elsewhere in the International Tribunal Statute" (*Kordić and Čerkez* Trial Judgement, para. 209) or regarded as crimes under customary international law. Moreover, it is not necessary that each underlying act of persecution be of a gravity equal to the other crimes against humanity; the underlying acts can be considered together. Finally, the finding that hate speech can constitute an act of persecution does not violate the principle of legality, as the crime of persecution is itself sufficiently well defined in international law. Moreover, the Appeals Chamber is not convinced by the argument that mere hate speech cannot constitute an underlying act of persecution because discourse of this kind is protected under international law.

[2265] See *infra* XV. C. 2. (a) (ii) b.

2. The Trial Chamber's conclusions in the present case

(a) Responsibility for RTLM broadcasts

989. The Trial Chamber found Appellants Nahimana and Barayagwiza guilty of persecution "[f]or RTLM broadcasts in 1994 advocating ethnic hatred or inciting violence against the Tutsi population".[2266] Appellant Nahimana was convicted under Article 6(1) and (3) of the Statute, and Appellant Barayagwiza under Article 6(3).[2267]

(i) Arguments of the Parties

990. Appellant Nahimana submits that RTLM broadcasts prior to 6 April 1994 did not contain calls for hatred and violence against the Tutsi, and that none of those broadcasts reached the level of gravity required to constitute a crime against humanity.[2268] Moreover, it had not been proved that he possessed the requisite intent to be convicted of persecution.[2269]

991. Appellant Barayagwiza submits that RTLM broadcasts before 6 April 1994 could not amount to a crime against humanity because the Prosecutor had failed to show that Tutsi had been deprived of any fundamental right as a result of these broadcasts.[2270] The Appellant further contends that the Trial Chamber confuses crimes against humanity and unlawful ethnic discrimination, and that it failed to show "how the ethnic hate speech attributed to the RTLM radio rises from ordinary racial discrimination level to the level of crime against humanity."[2271]

992. The Prosecutor responds that RTLM broadcasts both before and after 6 April 1994 instigated ethnic hatred and violence, and that they contributed to the commission of acts of violence.[2272] In particular, contrary to the Appellants' submissions, RTLM broadcasts before 6 April 1994 did contain direct calls for genocide against the Tutsi.[2273] As a result of their cumulative effect (as well as in conjunction with *Kangura*),[2274] the RTLM broadcasts reached a sufficient level of gravity to constitute persecution.[2275] The Prosecutor further submits that

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[2266] Judgement, paras. 1081-1082.
[2267] *Idem*.
[2268] Nahimana Appellant's Brief, para. 546 ; Nahimana Brief in Reply, paras. 61-69.
[2269] Nahimana Appellant's Brief, para. 557, referring to the arguments on genocidal intent and explaining that "the discriminatory intent required for crime against humanity (persecution) is the same as for genocide, with the one exception that it is not necessary to show intent to *destroy* the targeted group" (emphasis in the original, footnote omitted).
[2270] Barayagwiza Appellant's Brief, paras. 300-301, 306; Barayagwiza Brief in Reply, para. 73.
[2271] Barayagwiza Appellant's Brief, para. 301. See also para. 309. In that paragraph, the Appellant adds: "In paragraph 1078 of the Judgement, the Chamber maintains that RTLM broadcast the 'Ten Commandments' published by *Kangura* in 1990, but the Prosecutor produced no evidence of this." However, the Trial Chamber did not find that RTLM had broadcast the "Ten Commandments": see Judgement, para. 1078.
[2272] Respondent's Brief, paras. 378, 394-398.
[2273] *Ibid.*, para. 395. The Prosecutor refers to his arguments that the broadcasts prior to 6 April 1994 constituted a form of direct and public incitement to commit genocide.
[2274] *Ibid.*, para. 398.
[2275] *Ibid.*, paras. 396-397.

the Trial Chamber did not err in concluding that Appellant Nahimana had the necessary criminal intent to be convicted of persecution.[2276]

(ii) RTLM broadcasts in 1994

a. Broadcasts prior to 6 April 1994

993. The Appeals Chamber is of the view that the RTLM broadcasts from 1 January to 6 April 1994 cannot amount to underlying acts of persecution pursuant to Article 3 of the Statute, since it cannot be concluded that they were part of a widespread or systematic attack against the Tutsi population. These broadcasts could, however, have instigated the commission of persecution.

994. The Appeals Chamber has already determined that it has not been established that the broadcasts prior to 6 April 1994 substantially contributed to the murder of Tutsi after 6 April 1994. Consequently, the Appeals Chamber cannot conclude that broadcasts prior to 6 April 1994 instigated the commission of acts of persecution.

b. Broadcasts after 6 April 1994

995. The Appeals Chamber has already concluded that certain RTLM broadcasts after 6 April 1994 (*i.e.*, after the start of the widespread and systematic attack against the Tutsi) substantially contributed to the commission of genocide against Tutsi.[2277] The acts characterized as acts of genocide committed against the Tutsi also constituted acts of persecution,[2278] and hence these broadcasts also instigated the commission of acts of persecution. Furthermore, the Appeals Chamber is of the view that hate speeches and direct calls for genocide broadcast by RTLM after 6 April 1994,[2279] while a massive campaign of violence against the Tutsi population was being conducted, also constituted acts of persecution.[2280] Judge Meron does not agree with these findings.

(iii) Responsibility of the Appellants

a. Appellant Nahimana

996. For the reasons set out above, the Appeals Chamber considers that Appellant Nahimana could not be convicted of persecution pursuant to Article 6(1) of the Statute on account of RTLM broadcasts after 6 April 1994.[2281] However, the Appellant's conviction under Article 6(3) is upheld, since he did not take necessary and reasonable measures to

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[2276] *Ibid.*, para. 419, referring to submissions on Appellant Nahimana's intent in the section on direct and public incitement to commit genocide.
[2277] See *supra* XII. B. 3. (b) (i) b.
[2278] In particular, the murders of Tutsi committed after 6 April 1994 (see *supra* para. 515) constitute not only acts of genocide, but also acts of persecution against the Tutsi population.
[2279] The broadcasts are examined in paragraphs 390-433 and 468 *et seq.* of the Judgement.
[2280] See *supra*, para. 988.
[2281] See *supra* XII. D. 1. (b) (ii) e.

prevent or punish the acts of persecution and instigation to persecution committed by RTLM staff after 6 April 1994. Judge Meron does not agree with these findings.

b. Appellant Barayagwiza

997. Appellant Barayagwiza was convicted of persecution as a superior of RTLM staff.[2282] However, the Appeals Chamber has already found that the Appellant could not be held responsible as a superior for the crimes committed by RTLM staff after 6 April 1994.[2283] Since it could not be found that RTLM broadcasts before 6 April 1994 had substantially contributed to persecution, Appellant Barayagwiza could not be convicted of persecution on account of RTLM broadcasts. That part of his conviction is acordingly set aside.

(b) Appellant Barayagwiza's responsibility for CDR activities

998. Appellant Barayagwiza submits that the Trial Chamber erred in convicting him of persecution on account of CDR activities, because it does not explain how such activities constituted persecution, but merely makes a general finding, based on no specific act.[2284] The Appellant further argues that he could not be convicted under both Article 6(1) and Article 6(3) of the Statute in respect of the same acts.[2285]

999. The Prosecutor does not appear to respond to these arguments.

1000. The Trial Chamber found Appellant Barayagwiza guilty of persecution pursuant to Articles 3(h) and 6(1) of the Statute "[f]or his own acts and for the activities of CDR that advocated ethnic hatred or incited violence against the Tutsi population", as discussed in paragraph 975 of the Judgement.[2286] The Trial Chamber also convicted the Appellant under Article 6(3) of the Statute for "his failure to take necessary and reasonable measures to prevent the advocacy of ethnic hatred or incitement of violence against the Tutsi population by CDR members and *Impuzamugambi*."[2287]

(i) Responsibility pursuant to Article 6(1) of the Statute

1001. The Trial Chamber first found Appellant Barayagwiza guilty "[f]or his own acts".[2288] The Appeals Chamber understands this to be a reference by the Trial Chamber to Appellant Barayagwiza's acts as described in paragraph 975 of the Judgement, namely: (1) the chanting of a song instigating the extermination of the Tutsi; (2) supervising roadblocks manned by *Impuzamugambi*; (3) the fact that he "was at the organizational helm"; (4) the fact that he "was also on site at the meetings, demonstrations and roadblocks that created an infrastructure for and caused the killing of Tutsi civilians". With respect to the first item, the Appeals Chamber concluded above that it had not been established that the Appellant had himself chanted the song in 1994;[2289] this cannot therefore support the Appellant's conviction. With respect to the third and fourth items, the Appeals Chamber cannot see how these facts

[2282] Judgement, para. 1082.
[2283] See *supra* XII. D. 2. (a) (ii) b.
[2284] Barayagwiza Appellant's Brief, paras. 310-311. See also Barayagwiza Brief in Reply, para. 70.
[2285] Barayagwiza Appellant's Brief, para. 312.
[2286] Judgement, para. 1083.
[2287] *Idem.*
[2288] *Idem.*
[2289] See *supra* XII. D. 2. (b) (iii).

could constitute personal acts of the Appellant justifying his conviction for persecution pursuant to one of the modes of responsibility in Article 6(1) of the Statute.

1002. Turning to the second item, the Appeals Chamber recalls that it has already concluded that the Appellant's supervision of roadblocks manned by *Impuzamugambi* substantially contributed to the murder of many Tutsi.[2290] The Appeals Chamber considers that murders of Tutsi at the roadblocks after 6 April 1994 also constituted acts of persecution. In consequence, it finds that the supervision of roadblocks by the Appellant substantially contributed to the commission of acts of persecution, and it finds the Appellant guilty pursuant to Article 6(1) of the Statute for having instigated[2291] persecution.

(ii) Responsibility pursuant to Article 6(3) of the Statute

1003. The Appeals Chamber concluded above that the Appellant Barayagwiza could not be convicted as a superior for acts of CDR militants and *Impuzamugambi*.[2292] The Appeals Chamber accordingly sets aside the Appellant's conviction for persecution pursuant to Article 6(3) of the Statute on account of acts committed by CDR members and *Impuzamugambi*.

(c) Appellant Ngeze's Responsibility

1004. The Trial Chamber found Appellant Ngeze guilty of persecution pursuant to Articles 3(h) and 6(1) of the Statute "[f]or the contents of this publication [*Kangura*] that advocated ethnic hatred or incited violence, as well as for his own acts that advocated ethnic hatred or incited violence against the Tutsi population".[2293]

1005. Appellant Ngeze submits that he was wrongly convicted of persecution.[2294] He notes first that paragraph 1084 of the Judgement states that his responsibility for the content of *Kangura* is based on findings set out in "paragraphs 977 and 978",[2295] but that these paragraphs do not deal with his responsibility, which in his view invalidates the verdict.[2296] Appellant Ngeze further contends that the articles published in *Kangura* in 1994 before 7 April do not represent a call for hatred or violence[2297] and that, although the Trial Chamber concluded at paragraph 1078 of the Judgement that two articles constituted persecution ("A Cockroach Cannot Give Birth to a Butterfly", and "The Ten Commandments"), these were published before 1994 and were therefore outside the temporal jurisdiction of the Tribunal.[2298] He further argues that there is no evidence of a causal link between the comments in *Kangura*

[2290] See *supra* XII. D. 2. (b) (vii).
[2291] Paragraph 1083 of the Judgement does not indicate on which mode of responsibility under Article 6(1) of the Statute the Appellant's conviction relies. However, in para. 975 of the Judgement, the Trial Chamber treats supervision of roadblocks as an act instigating the commission of genocide (see *supra* XII. D. 2. (b) (vii)). The Appeals Chamber considers that the same mode of responsibility should be relied on for the crime of persecution.
[2292] See *supra* XIII. D. 2. (b) (ii) b. iv.
[2293] Judgement, para. 1084.
[2294] Ngeze Notice of Appeal, paras. 162-179; Ngeze Appellant's Brief, paras. 422-448.
[2295] Judgement, para. 1084.
[2296] Ngeze Appellant's Brief, paras. 422-423.
[2297] *Ibid.*, para. 434.
[2298] *Ibid.*, para. 435.

and the events that occurred after 6 April 1994 (in particular the maltreatment of Tutsi women), and that this had indeed been acknowledged by the Trial Chamber.[2299]

1006. Appellant Ngeze further submits that the Trial Chamber erred in also finding him guilty of persecution for having urged the Hutu population to attend CDR meetings and for having announced that the *Inyenzi* would be exterminated.[2300] In this respect, he asserts that (1) "some witnesses place these facts at dates falling outside the Tribunal's jurisdiction";[2301] (2) it has not been established that he urged the Hutu population to attend CDR meetings after 7 April 1994, when the widespread and systematic attack against the Tutsi population started;[2302] (3) even if he had urged the population to attend CDR meetings, this could not constitute persecution as a crime against humanity;[2303] (4) it was not proved that he invited only Hutu to attend such meetings;[2304] and (5) even if he had stated that the *Inyenzi* would be exterminated, there was no evidence of a causal link between these words and the massacre of Tutsi civilians.[2305]

1007. Appellant Ngeze asserts that the Trial Chamber erred in finding that he possessed the requisite *mens rea* to be convicted of persecution.[2306] He refers in this respect to the arguments developed by him in relation to genocidal intent.[2307] Furthermore, he submits that the Trial Chamber erred in that, rather that relying on the personal acts of the Accused in order to determine whether they had the required discriminatory intent, it based itself on the fact that RTLM, *Kangura* and the CDR targeted Tutsi and Hutu opponents.[2308]

1008. Lastly, Appellant Ngeze submits that he could not be convicted of persecution pursuant to Article 6(1) of the Statute,[2309] in particular because it had not been shown that he had "the authority required under Article 6(1) of the Statute".[2310]

1009. The Prosecutor responds that the *Kangura* publications are capable of constituting the crime of persecution,[2311] and that Appellant Ngeze has not demonstrated in what way the Trial Chamber erred in this respect.[2312]

1010. The Appeals Chamber rejects from the outset the Appellant's arguments that his *mens rea* for the crime of persecution was not established. It recalls that it has already upheld the Trial Chamber's conclusion that the Appellant possessed genocidal intent.[2313] As the Trial

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[2299] *Ibid.*, paras. 436 (referring to para. 242 of the Judgement) to 438.
[2300] *Ibid.*, paras. 439-443.
[2301] *Ibid.*, para. 441, no reference given.
[2302] *Idem.*
[2303] Ngeze Appellant's Brief., para. 442.
[2304] *Idem.*
[2305] Ngeze Appellant's Brief, para. 443.
[2306] *Ibid.*, paras. 444-445.
[2307] *Ibid.*, para. 444, where it is contended that "the discriminatory intent required for persecution as a crime against humanity is the same as that characterizing the crime of genocide, with the difference that, for a crime against humanity, there is no need to establish the intent to destroy the group in whole or in part."
[2308] *Ibid.*, para. 445.
[2309] *Ibid.*, paras. 446-448.
[2310] *Ibid.*, para. 447.
[2311] Respondent's Brief, para. 17, p. 184.
[2312] *Ibid.*, para. 582.
[2313] See *supra* XII. C. 4. (d) .

Chamber found,[2314] a person who possesses genocidal intent necessarily possesses the intent required for persecution.[2315] The Appeals Chamber finds that the Appellant had the required *mens rea* for persecution. It also finds that, on the basis of the acts committed by the Appellant, he also possessed the intent to instigate others to commit persecution against Tutsi. The Appeals Chamber will now consider whether the Appellant in fact committed acts of persecution or of instigation to persecution.

(i) Responsibility for the content of *Kangura*

1011. In convicting Appellant Ngeze of persecution, the Trial Chamber concluded that he was responsible for the content of *Kangura* as found in "paragraphs 977 and 978".[2316] The reference to paragraphs 977 and 978 is obviously a typographical error.[2317] It should instead have been a reference to paragraph 977A of the Judgement, where the Trial Chamber found Ngeze 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". The Appeals Chamber is of the view that the Appellant suffered no prejudice as a result of this error.

1012. The Appeals Chamber has already concluded that the Appellant could not be convicted on the basis of *Kangura* publications prior to 1994. Thus, the Appeals Chamber must determine whether *Kangura* issues published in 1994 could constitute persecution or instigation to persecution.

1013. The Appeals Chamber notes first that *Kangura* was not published between 6 April and 17 July 1994, when the widespread and systematic attack against the Tutsi population of Rwanda took place. Thus it is difficult to see how *Kangura* articles published between 1 January and 6 April 1994 can be regarded as forming part of that widespread and systematic attack, even if they may have prepared the ground for it. Consequently, the Appeals Chamber is unable to conclude that the *Kangura* articles published between 1 January and 6 April 1994 amounted to acts of persecution as a crime against humanity.

1014. Furthermore, for the aforementioned reasons, the Appeals Chamber is of the view that it could not be concluded that certain articles published in *Kangura* in the first months of 1994 substantially contributed to the massacres of Tutsi civilians after 6 April 1994.[2318] For the same reasons, it has not been established that these *Kangura* publications did in practice substantially contribute to the commission of acts of persecution against Tutsi. The Appeals Chamber accordingly considers that Appellant Ngeze cannot be convicted for having instigated the crime of persecution through matters published in *Kangura*.

(ii) Responsibility for his acts in Gisenyi

[2314] Judgement, para. 1077.
[2315] Thus the intent to destroy in whole or in part a group protected by the Genocide Convention necessarily includes the intent to discriminate, on prohibited grounds, the members of the group. See also *infra* XVI. D. 3.
[2316] Judgement, para. 1084.
[2317] Paragraph 977 of the Judgement deals with Barayagwiza's responsibility as a superior of the CDR members and *Impuzamugambi*; paragraph 978 deals with the elements of the crime of direct and public incitement to commit genocide.
[2318] See *supra* XII. B. 3. .

1015. The Trial Chamber considered that, by urging the Hutu population to attend CDR meetings and announcing that the *Inyenzi* would be exterminated, the Appellant committed persecution.[2319] The relevant factual conclusion is found at paragraph 837 of the Judgement and is based on the testimonies of Witnesses Serushago, ABE, AAM and AEU.[2320] The Appeals Chamber notes that it does not appear that these witnesses were referring to events having occurred after the start of the widespread and systematic attack against Tutsi on 6 April 1994. On the contrary, Witness Serushago refers to events having taken place in February 1994,[2321] Witness ABE to events in 1993[2322] and Witness AAM to events before 1994.[2323] With respect to Witness AEU, it is unclear when the events she describes occurred.[2324] In these circumstances, it cannot therefore be concluded that the acts of the Appellant formed part of the widespread and systematic attack against the Tutsi population which started on 6 April 1994. Consequently, these acts cannot constitute persecution as a crime against humanity.

1016. As to whether the acts of Appellant Ngeze instigated the commission of acts of persecution, the Appeals Chamber first considers that the Appellant has not shown that it was unreasonable to find that he had announced that the *Inyenzi* would be exterminated. However, as noted above, only Witness Serushago clearly places these words in 1994, and his testimony cannot be accepted unless it is corroborated by other credible evidence.[2325] Furthermore, the Appeals Chamber notes that the Trial Chamber did not find that the Appellant's words substantially contributed to massacres of Tutsi civilians. The conviction of the Appellant for persecution cannot therefore be founded on his acts in Gisenyi. His conviction for persecution as a crime against humanity must accordingly be set aside.

XVI. CUMULATIVE CONVICTIONS

1017. The Appellants contend that the Trial Chamber erred in entering cumulative convictions under Articles 2 and 3 of the Statute.[2326]

A. Applicable law in respect of cumulative convictions

1018. The three Appellants were found guilty of the crimes of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide and extermination and persecution as crimes against humanity.[2327] Appellants Ngeze and Barayagwiza challenge the legal standard applied by the Trial Chamber and submit that the propriety of entering

[2319] Judgement, para. 1084, referring to para. 1039.
[2320] *Ibid.*, para. 834.
[2321] T. 15 November 2001, pp. 118-119; Judgement, para. 834.
[2322] T. 26 February 2001, p. 95.
[2323] T. 12 February 2001, pp. 104, 110-111, 131-132; Judgement, para. 797.
[2324] See *supra* footnote 2016.
[2325] Judgement, para. 824.
[2326] Nahimana Notice of Appeal, p. 15; Nahimana Appellant's Brief, paras. 640-648; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 313-321; Ngeze Notice of Appeal, paras. 180-190; Ngeze Appellant's Brief, paras. 449-483; Ngeze Brief in Reply, paras. 97-107. As to the submissions relating to cumulative modes of responsibility under Articles 6(1) and 6(3) of the Statute, the Appeals Chamber refers to its analysis *supra* at XI. C.
[2327] Judgement, paras. 1091-1094.

cumulative convictions must be examined on a case-by-case basis depending on "what facts are relied on by the Prosecution for each count".[2328]

1019. The Appeals Chamber recalls that cumulative convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other.[2329] The test to be applied with respect to cumulative convictions is to take account of all the legal elements of the offences, including those contained in the provisions' introductory paragraph.[2330]

1020. Moreover, like the ICTY Appeals Chamber,[2331] the Appeals Chamber considers that whether the same conduct violates two distinct statutory provisions is a question of law. Accordingly, contrary to the Appellants' contentions, the legal elements of each offence, not the acts or omissions giving rise to the offence, are to be taken into account in determining whether it is permissible to enter cumulative convictions.

1021. The Appeals Chamber will now examine the Appellants' contentions regarding the cumulative convictions entered by the Trial Chamber.

B. Cumulative convictions under Article 2 of the Statute

1. Cumulative convictions for genocide and direct and public incitement to commit genocide

1022. The Appellants contend that it is impermissible to enter cumulative convictions for direct and public incitement to commit genocide and the crime of genocide on the basis of the same facts.[2332] However, since a number of their convictions have been set aside, none of the Appellants is now in the situation of being convicted for both genocide and direct and public incitement to commit genocide on the basis of the same facts. This ground of appeal has thus become moot.

2. Cumulative convictions for genocide and conspiracy to commit genocide

1023. Appellants Nahimana and Ngeze further submit that the Trial Chamber erred in convicting them of genocide and conspiracy to commit genocide on the basis of the same facts.[2333] However, since the Appeals Chamber has set aside the Appellants' convictions for the crime of conspiracy to commit genocide, this ground of appeal has thus become moot.

[2328] Barayagwiza Appellant's Brief, para. 316. In his Brief in Reply (para. 99), Appellant Ngeze submits generally that the conduct for which he was convicted is the same for all the convictions. See also Nahimana Notice of Appeal, p. 15, and Nahimana Appellant's Brief, paras. 643-645 (where Appellant Nahimana raises this argument with specific reference to cumulative convictions for the counts of genocide, direct and public incitement to commit genocide and conspiracy to commit genocide).

[2329] See *Ntagerura et al.* Appeal Judgement, para. 425, where the Appeals Chamber further stated that an element is materially distinct from another if it requires proof of a fact not required by the other.

[2330] *Musema* Appeal Judgement, para. 363.

[2331] *Stakić* Appeal Judgement, para. 356; *Kordić and Čerkez* Appeal Judgement, para. 1033.

[2332] Nahimana Appellant's Brief, paras. 642-644; Barayagwiza Appellant's Brief, paras. 313, 318-319, 321; Ngeze Appellant's Brief, paras. 456, 460-461; Ngeze Brief in Reply, para. 100. See also T(A) 18 January 2007, pp. 52, 55-56.

[2333] Nahimana Appellant's Brief, paras. 641, 645; Ngeze Appellant's Brief, paras. 454-456, 462-464, citing *Musema* Judgement, para. 198. See also Ngeze Brief in Reply, para. 101.

C. Cumulative convictions under Article 3 of the Statute

1024. Appellants Nahimana and Ngeze submit that the Trial Chamber was wrong in convicting them of both extermination and persecution as crimes against humanity. They contend that persecution does not have any materially distinct element to be proved that is not present as an element of the crime of extermination.[2334] They emphasize in this regard that the Trial Chamber acknowledged that "persecution when it takes the form of killings is a lesser included offence of extermination".[2335] In his Brief in Reply, Appellant Ngeze relies on the *Kupreškić et al.* Trial Judgement in submitting that the count of persecution, as *lex generalis,* ought to be subsumed by extermination, which he qualifies as *lex specialis.*[2336]

1025. The Appeals Chamber recalls that it has set aside the conviction entered against Appellant Nahimana for extermination as a crime against humanity,[2337] as well as Appellant Ngeze's conviction for persecution as a crime against humanity.[2338] As a consequence, the question of cumulative convictions for the crimes of persecution (Article 3(h) of the Statute) and extermination (Article 3(b) of the Statute) as crimes against humanity is no longer relevant for these Appellants, and their appeals on this point could therefore be declared to have become moot. However, the Appeals Chamber has upheld Appellant Barayagwiza's convictions for extermination and persecution as crimes against humanity on account of the killings committed by CDR militants and *Impuzamugambi* at roadblocks supervised by him.[2339] The Appeals Chamber therefore considers it necessary to consider the question of these cumulative convictions, even though Appellant Barayagwiza did not raise it.

1026. The Appeals Chamber observes in this respect that in the *Kordić and Čerkez* Appeal Judgement the ICTY Appeals Chamber found that cumulative convictions are permissible for persecution and other inhumane acts, since each offence has a materially distinct element not contained in the other.[2340] Relying on this jurisprudence, the ICTY Appeals Chamber found in the *Stakić* Appeal Judgement that it was permissible to enter cumulative convictions for extermination and persecution as crimes against humanity on the basis of the same facts. It found that extermination requires proof that the accused caused the death of a large number of people, while persecution requires proof that an act or omission was in fact discriminatory and that the act or omission was committed with specific intent to discriminate.[2341] The Appeals Chamber endorses the analysis of the ICTY Appeals Chamber.

1027. According to the foregoing, the Appeals Chamber finds that it is permissible to convict Appellant Barayagwiza cumulatively of both persecution and extermination on the basis of the same facts, Judge Güney dissenting from this finding.

[2334] Nahimana Appellant's Brief, paras. 646-647; Ngeze Appellant's Brief, paras. 465-467.
[2335] Nahimana Appellant's Brief, paras. 646-647; Ngeze Appellant's Brief, paras. 465-466, citing paragraph 1080 of the Judgement.
[2336] Ngeze Brief in Reply, paras. 102-103, referring to paragraphs 706 and 708 of the *Kupreskić et al.* Trial Judgement.
[2337] See *supra* XV. B. 1. (b).
[2338] See *supra* XV. C. 2. (c).
[2339] See *supra* XV. B. 2. (a) and XV. C. 2. (b) (i).
[2340] *Kordić and Čerkez* Appeal Judgement, paras. 1040-1043.
[2341] *Stakić* Appeal Judgement, paras. 364, 367.

10540bis/A

D. Cumulative convictions under Articles 2 and 3 of the Statute

1. Cumulative convictions for genocide and extermination as a crime against humanity

1028. Appellants Ngeze and Barayagwiza appeal against their cumulative convictions for genocide and extermination as a crime against humanity for having ordered and aided and abetted the killing of Tutsi civilians.[2342] Appellant Ngeze invokes in particular the *Kayishema and Ruzindana* Trial Judgement in contending that the two offences protect the same social interest.[2343] Appellant Barayagwiza concedes that the requisite elements for genocide and extermination are not the same, but contends that "on the facts of this case, the conviction for the offence of extermination added nothing to the conviction for genocide", since "[t]he required 'widespread and systematic attack against a civilian Tutsi population' was subsumed within the large-scale killings".[2344]

1029. It is established case-law that cumulative convictions for genocide and crime against humanity are permissible on the basis of the same acts, as each has a materially distinct element from the other, namely, on the one hand, "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group", and, on the other, "a widespread or systematic attack against a civilian population".[2345]

1030. Accordingly, the Appeals Chamber finds that the Trial Chamber was right to enter cumulative convictions under Articles 2(3)(a) and 3(b) of the Statute on the basis of the same acts. It therefore dismisses the Appellants' appeal on this point.

2. Cumulative convictions for genocide and persecution as a crime against humanity

1031. Appellant Ngeze appeals against his convictions for both genocide and persecution as a crime against humanity.[2346] Since Appellant Ngeze's conviction for persecution has been set aside,[2347] this ground could be said to have become moot.

1032. However, since this issue could be raised in connection with Appellant Barayagwiza (whose convictions for both instigating genocide and persecution have been upheld),[2348] the Appeals Chamber would recall that the crime of genocide *inter alia* requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such. Persecution, like the other acts enumerated in Article 3 of the Statute, must have been committed as part of a widespread and systematic attack on a civilian population. It was therefore open to the Trial Chamber to enter cumulative convictions under Articles 2(3)(a) and 3(h) of the Statute on the basis of the same acts. This ground is therefore dismissed.

[2342] Barayagwiza Appellant's Brief, para. 320; Ngeze Appellant's Brief, paras. 469-476. See also Ngeze Brief in Reply, para. 106.
[2343] Ngeze Appellant's Brief, paras. 473-475, referring to the *Rutaganda* Trial Judgement, para. 113, and to the *Kayishema and Ruzindana* Trial Judgement, para. 627.
[2344] Barayagwiza Appellant's Brief, para. 320.
[2345] *Ntagerura et al.* Appeal Judgement, para. 426; *Semanza* Appeal Judgement, para. 318. With specific reference to cumulative convictions for genocide and extermination, see *Ntakirutimana* Appeal Judgement, para. 542; *Musema* Appeal Judgement, paras. 366-367, 370.
[2346] Ngeze Appellant's Brief, para. 477.
[2347] See *supra* XV. C. 2. (c).
[2348] See *supra* XII. D. 2. (b) (viii) and XV. C. 2. (b) (i).

3. Cumulative convictions for direct and public incitement to commit genocide and persecution as a crime against humanity

1033. Appellants Nahimana and Ngeze challenge their cumulative convictions for direct and public incitement to commit genocide and persecution as a crime against humanity, contending that the Trial Chamber itself noted that the material and mental elements of both crimes are the same.[2349]

1034. The Appeals Chamber recalls that the crime of incitement requires direct and public incitement to commit genocide as a material element and the intent to incite others to commit genocide (itself implying a genocidal intent) as a mental element, which is not required by Article 3(h) of the Statute. As stated *supra*, persecution as a crime against humanity requires the underlying act to have been committed as part of a widespread and systematic attack on a civilian population, unlike the crime of direct and public incitement to commit genocide.

1035. The argument that the Trial Chamber noted that the material and mental elements of both crimes are the same is manifestly unsubstantiated. The Appeals Chamber notes, first, that in paragraph 1077 of the Judgement the Trial Chamber noted no such thing: it merely stated that, as genocidal intent was established for the communications, "the lesser intent requirement of persecution, the intent to discriminate" had also been met.[2350] Secondly, the Appeals Chamber emphasizes that, while the intent to discriminate required by persecution can in practice be considered to be subsumed within genocide, the reverse is not true. The fact remains that the crime of direct and public incitement to commit genocide, like the crime of genocide, requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, which is not required for persecution as a crime against humanity.

1036. The Appeals Chamber accordingly finds that the Trial Chamber did not err in entering cumulative convictions under Articles 2(3)(c) and 3(h) of the Statute on the basis of the same acts, and dismisses the Appellants' appeal on this point.

XVII. THE SENTENCES

A. Introduction

1037. Article 24 of the Statute allows the Appeals Chamber to "affirm, reverse or revise" a sentence imposed by a Trial Chamber. However, the Appeals Chamber recalls that Trial Chambers have a wide power of discretion in determining the appropriate sentence. This stems from their obligation to tailor the sentence according to the individual circumstances of the accused and the gravity of the crime.[2351] Generally, the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber unless it has been shown

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[2349] Nahimana Appellant's Brief, para. 648 (Appellant Nahimana raises this ground of appeal in the alternative); Ngeze Appellant's Brief, para. 468. Both Appellants cite paragraph 1077 of the Judgement. See also Ngeze Brief in Reply, paras. 104-105.

[2350] Judgement, para. 1077: "Having established that all communications constituting direct and public incitement to genocide were made with genocidal intent, the Chamber notes that the lesser intent requirement of persecution, the intent to discriminate, has been met with regard to these communications".

[2351] *Ntagerura et al.* Appeal Judgement, para. 429; *Naletilić and Martinović* Appeal Judgement, para. 593; *Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 312; *Čelebići* Appeal Judgement, para. 717.

that the latter committed a manifest error in exercising its discretion, or failed to follow the applicable law.[2352]

1038. The factors that a Trial Chamber is obliged to take into account in sentencing a defendant are set out in Article 23 of the Statute and in Rule 101 of the Rules. They are:

> (1) the general practice regarding prison sentences in the courts of Rwanda. However, Trial Chambers are not obliged to conform to that practice but need only to take account of it;[2353]
>
> (2) the gravity of the offences (*i.e.* the gravity of the crimes of which the accused has been convicted, and the form or degree of responsibility for these crimes). It is well established that this is the primary consideration in sentencing;[2354]
>
> (3) the individual circumstances of the accused, including aggravating and mitigating circumstances. Aggravating circumstances must be proved by the Prosecutor beyond reasonable doubt;[2355] the accused bears the burden of establishing mitigating factors based on the most probable hypothesis (or according to the term of art used in certain jurisdictions, "on a balance of probabilities").[2356] While the Trial Chamber is legally required to take into account any mitigating circumstances, what constitutes a mitigating circumstance and the weight to be accorded thereto is a matter for the Trial Chamber to determine in the exercise of its discretion.[2357] In particular, the existence of mitigating circumstances does not automatically imply a reduction of sentence or preclude the imposition of a sentence of life imprisonment;[2358]
>
> (4) the extent to which any sentence imposed on the defendant by a court of any State for the same act has already been served.

The Appeals Chamber further recalls that credit shall be given for any period of detention of the defendant prior to final judgement.[2359]

[2352] *Ntagerura et al.* Appeal Judgement, para. 429; *Naletilić and Martinović* Appeal Judgement, para. 593; *Jokić* Appeal Judgement, para. 8; *Kajelijeli* Appeal Judgement, para. 291; *Semanza* Appeal Judgement, para. 312; *Musema* Appeal Judgement, para. 379; *Tadić* Judgement on Sentencing Appeal, para. 22.

[2353] *Jokić* Appeal Judgement, para. 38; *D. Nikolić* Appeal Judgement, para. 69; *Kordić and Čerkez* Appeal Judgement, para. 1085; *Čelebići* Appeal Judgement, paras. 813, 816; *Serushago* Appeal Judgement, para. 30.

[2354] *Muhimana* Appeal Judgement, paras. 233, 234; *Ndindabahizi* Appeal Judgement, para. 138; *Gacumbitsi* Appeal Judgement, para. 204; *Kamuhanda* Appeal Judgement, para. 357; *Musema* Appeal Judgement, para. 382; *Kayishema and Ruzindana* Appeal Judgement, para. 352; *Čelebići* Appeal Judgement, paras. 731, 847-849; *Aleksovski* Appeal Judgement, para. 182.

[2355] *Kajelijeli* Appeal Judgement, para. 294; *Blaškić* Appeal Judgement, paras. 686, 688; *Čelebići* Appeal Judgement, para. 763.

[2356] *Muhimana* Appeal Judgement, para. 231; *Babić* Appeal Judgement, para. 43; *Kajelijeli* Appeal Judgement, paras. 294, 299; *Blaškić* Appeal Judgement, para. 697; *Čelebići* Appeal Judgement, para. 590.

[2357] *Zelenović* Appeal Judgement, para. 18; *Ntagerura et al.* Appeal Judgement, para. 430; *Niyitegeka* Appeal Judgement, para. 266; *Musema* Appeal Judgement, paras. 395, 396; *Kupreškić et al.* Appeal Judgement, para. 430; *Čelebići* Appeal Judgement, para. 775; *Kambanda* Appeal Judgement, para. 124.

[2358] *Muhimana* Appeal Judgement, para. 234; *Kajelijeli* Appeal Judgement, para. 299; *Niyitegeka* Appeal Judgement, para. 267; *Musema* Appeal Judgement, para. 396.

[2359] Rule 101(D) of the Rules.

1039. Having found the three Appellants guilty of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, persecution and extermination as crimes against humanity, the Trial Chamber imposed on each Appellant a single sentence of life imprisonment.[2360] However, the Trial Chamber reduced the sentence of Appellant Barayagwiza to 35 years to take account of the violation of his rights, as instructed by the Appeals Chamber in its Decision of 31 March 2000.[2361] The Appellants raise a number of grounds of appeal against the sentences imposed by the Trial Chamber.[2362]

B. Single sentence

1040. Appellants Nahimana[2363] and Ngeze[2364] argue that the Trial Chamber committed an error of law in failing to impose a separate sentence in respect of each offence, as required under Rule 87(C) of the Rules.

1041. Paragraph 1104 of the Judgement reads as follows:

> The Chamber notes that in the case of an Accused convicted of multiple crimes, as in the present case, the Chamber may, in its discretion, impose a single sentence or one sentence for each of the crimes. The imposition of a single sentence will usually be appropriate in cases in which the offences may be recognized as belonging to a single criminal transaction.[2365]

1042. The Appeals Chamber notes that, under Rule 87(C) of the Rules, "if the Trial Chamber finds the accused guilty on one or more of the counts contained in the indictment, it shall also determine the penalty to be imposed in respect of each of the counts". However, the Appeals Chamber has held that Trial Chambers may impose a single sentence in respect of multiple convictions in the following circumstances:

> Where the crimes ascribed to an accused, regardless of their characterisation, form part of a single set of crimes committed in a given geographic region during a specific time period, it is appropriate for a single sentence to be imposed for all convictions, if the Trial Chamber so decides. [2366]

1043. The Appeals Chamber has further held that, when the acts of the accused are linked to the systematic and widespread attack which occurred in 1994 in Rwanda against the Tutsi, this requirement is fulfilled and a single sentence for multiple convictions can be imposed.[2367] The Appeals Chamber reaffirms the position stated in the *Kambanda* Appeal Judgement. In the present case, since the acts of the Appellants were all linked to the genocide of the Tutsi in Rwanda in 1994, the Trial Chamber could impose a single sentence. The Appellants' appeals on this point are therefore rejected.

[2360] Judgement, paras. 1105-1106, 1108.
[2361] *Ibid.*, paras. 1106, 1107.
[2362] Nahimana Notice of Appeal, p. 17; Nahimana Appellant's Brief, paras. 651-652; Nahimana Brief in Reply, paras. 164-174; Barayagwiza Notice of Appeal, p. 3; Barayagwiza Appellant's Brief, paras. 339-379; Ngeze Notice of Appeal, para. 191; Ngeze Appellant's Brief, paras. 484-494; Ngeze Brief in Reply, paras. 108-112.
[2363] Nahimana Brief in Reply, para. 164.
[2364] Ngeze Appellant's Brief, para. 485.
[2365] Judgement, para. 1104, citing *Blaškić* Trial Judgement, para. 807, and *Krstić* Trial Judgement, para. 725.
[2366] *Kambanda* Appeal Judgement, para. 111.
[2367] *Ibid.*, para. 112.

C. Appellant Nahimana

1044. Appellant Nahimana contends that the Trial Chamber imposed a clearly excessive sentence having regard to international jurisprudence and to the following facts: (1) the Appellant never personally or directly committed, or ordered or approved the commission of any of the crimes provided for in the Statute; (2) he was a mere civilian, he held no post of authority and did not have any means by which he could effectively oppose the crimes committed in Rwanda in 1994; and (3) he always made himself available to the judicial authorities before his arrest, and fully participated in the trial out of concern for the truth to be ascertained.[2368] In his Brief in Reply, the Appellant further argues that (1) his criminal responsibility was at most indirect and this type of responsibility has never been punished by imprisonment for life;[2369] (2) the Trial Chamber should have taken into account the fact that "the slightest initiative to oppose the killings exposed the opponents to fatal reprisals";[2370] and (3) the Trial Chamber, notwithstanding what it said in paragraph 1099 of the Judgement, never took into account the representations by Defence witnesses affirming his refusal to adhere to extremist ideologies.[2371]

1045. The reasons given by the Trial Chamber to justify the sentence of imprisonment for life were as follows:

- the crimes of which the Appellant had been convicted were of the gravest kind;[2372]
- the Appellant was involved in the planning of the criminal activities;[2373]
- the Appellant abused his authority and betrayed the trust placed in him;[2374]
- no representations on sentencing were made on his behalf at trial.[2375]

1. Comparison with other cases

1046. In his Appellant's Brief, the Appellant contends that the sentence imposed by the Trial Chamber was clearly excessive in light of the jurisprudence, but he does not substantiate this affirmation.[2376] In his Brief in Reply, the Appellant refers to *Blaškić* and *Rutaganira*,[2377] but does not explain how these cases were so similar to his case that a similar sentence should have been imposed. The Appeals Chamber recalls that Trial Chambers have broad discretion to tailor the penalties to fit the individual circumstances of the accused and

[2368] Nahimana Appellant's Brief, para. 651.
[2369] Nahimana Brief in Reply, paras. 166-168, referring to *Blaškić* Appeal Judgement and *Rutaganira* Trial Judgement (without giving any specific reference).
[2370] *Ibid.*, para. 171.
[2371] *Ibid.*, paras. 172-174.
[2372] Judgement, paras. 1096, 1103.
[2373] *Ibid.*, para. 1102.
[2374] *Ibid.*, paras. 1098, 1099.
[2375] *Ibid.*, para. 1099.
[2376] See Nahimana Appellant's Brief, para. 651.
[2377] See Nahimana Brief in Reply, paras. 167 (footnote 161) and 168.

the gravity of the crime.[2378] The comparison between cases is thus generally of limited assistance.[2379] As the Appeals Chamber explained in the *Čelebići* Appeal Judgement:

> While it [the Appeals Chamber] does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results.[2380]

1047. The appeal on this point is dismissed.

2. Impossibility of intervention

1048. The Appellant contends that he could not intervene with RTLM without exposing himself to danger and that this should have been considered as a mitigating circumstance. The Trial Chamber found that the Appellant could intervene without danger for himself, and the Appeals Chamber has confirmed this finding.[2381] This argument of the Appellant is dismissed.

3. Attitude of the Appellant towards the Tribunal

1049. The Appeals Chamber likewise rejects the Appellant's argument that the fact that he made himself available to the judicial authorities and that he fully participated in the trial should have been taken into consideration as a mitigating circumstance. The Appeals Chamber repeats that the Appellant did not put this forward at trial as a mitigating circumstance, and the Appellant cannot raise this issue for the first time at the appeal stage,[2382] particularly since his appeal does not include any submission regarding the quality of his representation at trial.

4. Representations by Defence witnesses

1050. The Appeals Chamber is of the view that the Appellant has failed to show that the Trial Chamber declined to take account of statements by Defence witnesses that he had refused to adhere to extremist ideologies or organisations. As noted in paragraph 1099 of the Judgement, the Trial Chamber clearly took into account these statements but refused to give them any weight, considering more meaningful the fact that the Appellant had betrayed the trust placed in him. The Appellant has not shown that the Trial Chamber committed an error in the exercise of its discretion.

[2378] *Semanza* Appeal Judgement, paras. 312, 394; *Krstić* Appeal Judgement, para. 248; *Kayishema and Ruzindana* Appeal Judgement, para. 352; *Čelebići* Appeal Judgement, para. 731.

[2379] *Limaj et al.* Appeal Judgement, para. 135; *Blagojević and Jokić* Appeal Judgement, para. 333; *M. Nikolić* Appeal Judgement, para. 38; *Semanza* Appeal Judgement, para. 394; *D. Nikolić* Appeal Judgement, para. 19; *Musema* Appeal Judgement, para. 387; *Čelebići* Appeal Judgement, para. 719.

[2380] *Čelebići* Appeal Judgement, para. 719, cited with approval in *Musema* Appeal Judgement, para. 387. See also *Furundžija* Appeal Judgement, para. 250:

> A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise, a Trial Chamber is limited only by the provisions of the Statute and the Rules.

[2381] See *supra* XIII. D. 1. (b) (ii) c. ii.

[2382] *Muhimana* Appeal Judgement, para. 231; *Bralo* Appeal Judgement, para. 29; *Kamuhanda* Appeal Judgement, para. 354; *Deronjić* Appeal Judgement, para. 150; *Babić* Appeal Judgement, para. 62.

5. Consequences of the findings of the Appeals Chamber

1051. The Appeals Chamber recalls that it has set aside the convictions of Appellant Nahimana under Article 6(1) of the Statute for:

- conspiracy to commit genocide (Count 1 of Nahimana's Indictment);[2383]
- genocide (Count 2 of Nahimana's Indictment); [2384]
- direct and public incitement to commit genocide (Count 3 of Nahimana's Indictment);[2385]
- extermination as a crime against humanity (Count 6 of Nahiman's Indictment);[2386]
- persecution as a crime against humanity (Count 5 of Nahimana's Indictment).[2387]

On the other hand, the Appeals Chamber has upheld the convictions of Appellant Nahimana under Article 6(3) of the Statute for:

- direct and public incitement to commit genocide (Count 3 of Nahimana's Indictment);[2388]
- persecution as a crime against humanity (Count 5 of Nahimana's Indictment).[2389]

1052. Having regard to the sentence imposed by the Trial Chamber and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber finds that the sentence of Appellant Nahimana should be reduced to one of 30 years' imprisonment, Judge Meron dissenting.

D. Appellant Barayagwiza

1. Gravity of the offences and Appellant's degree of responsibility

(a) The Appellant did not personally commit acts of violence

1053. Appellant Barayagwiza argues that the sentence is excessive and disproportionate in view of the fact that "the major part of the crimes imputed to the responsibility of the Barayagwiza are attributed to non identified third persons", that he "had been found innocent of any crime related to murder"[2390] and that "there was no evidence he had personally engaged in acts of violence".[2391]

[2383] See *supra* XIV. B. 4.
[2384] See *supra* XII. D. 1. (b) (ii) e.
[2385] See *supra* XIII. D. 1. (a).
[2386] See *supra* XV. B. 1. (b).
[2387] See *supra* XV. C. 2. (a) (iii) a.
[2388] See *supra* XIII. D. 1. (c).
[2389] See *supra* XV. C. 2 (a) (iii) a.
[2390] Barayagwiza Appellant's Brief, para. 347.
[2391] *Ibid.*, para. 339(i), where the Appellant argues that the fact that George Ruggiu had not personally committed any act of violence was "considered to be a mitigating factor".

1054. In the view of the Appeals Chamber, the Appellant has not shown that the sentence imposed by the Trial Chamber was excessive and disproportionate. The Trial Chamber found the Appellant guilty of extremely serious crimes. In particular, the Trial Chamber found that he planned, ordered or instigated the commission of crimes by others. In these circumstances, the Trial Chamber was entitled to hold that the fact that the Appellant had not personally committed acts of violence did not mitigate his guilt, as the Appellant had carried out preliminaries to acts of violence, substantially contributing to the commission of such acts by others.[2392]

1055. That said, the Appeals Chamber has set aside certain of the Appellant's convictions, and will consider later whether the sentence imposed on the Appellant should accordingly be revised.

(b) Purposes of the sentence

1056. Appellant Barayagwiza argues that, in determining his sentence, the Trial Chamber placed too much emphasis on the objectives of retribution and deterrence, and not enough on those of national reconciliation and rehabilitation.[2393]

1057. The Appeals Chamber is not convinced by this argument. First, the Appellant does not explain how the sentence imposed by the Trial Chamber would damage national reconciliation. Secondly, the Appeals Chamber is of the opinion that, in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight.[2394] In these circumstances, and having regard to the crimes of which the Appellant has been convicted, the Appeals Chamber cannot find that the Trial Chamber committed an error by giving undue weight to the purposes of retribution and deterrence.

(c) Categorization of offenders

1058. Appellant Barayagwiza argues that the Trial Chamber committed an error of law by finding, on the basis of the Rwandan law, that the three Accused "fall into the category of the most serious offenders".[2395] The Appellant contends that (1) the Statute of the Tribunal, its Rules or general international criminal law do not provide for such categorization; (2) categorization was introduced into Rwandan law following the entry into force of a Law of 30 August 1996; and (3) categorization is not based "on judicial decisions, but on decisions which are clearly political" and it "rests on ethnic discrimination and presumption of guilt of all Hutu associated with the former regime".[2396]

1059. In paragraph 1097 of the Judgement, the Trial Chamber stated the following:

> The Chamber considers that life imprisonment, being the highest penalty permissible at the Tribunal, should be reserved for the most serious offenders, and the principle of gradation in sentencing allows the Chamber to distinguish between crimes, based on their gravity.

[2392] *Cf.*, *Stakić* Appeal Judgement, para. 380.
[2393] Barayagwiza Appellant's Brief, para. 340.
[2394] *Stakić* Appeal Judgement, para. 402; *Deronjić* Appeal Judgement, paras. 136-137; *Kordić and Čerkez* Appeal Judgement, para. 1079; *Ćelibići* Appeal Judgement, para. 806; *Aleksovski* Appeal Judgement, para. 185.
[2395] Judgement, para. 1103.
[2396] Barayagwiza Appellant's Brief, para. 343.

> The Chamber is mindful that it has an "overriding obligation to individualize the penalty", with the aim that the sentence be proportional to the gravity of the offence and the degree of responsibility of the offender. The Chamber has also considered the provisions of the Rwandan Penal Code and Rwandan Organic Law relating to sentencing, and the sentencing practices in both ad-hoc Tribunals.[2397]

The Trial Chamber then found that "[h]aving regard to the nature of the offences, and the role and the degree of participation of the Accused, the Chamber considers that the three Accused fall into the category of the most serious offenders."[2398]

1060. The Appeals Chamber cannot discern any error in the findings of the Trial Chamber. First, the Appellant does not explain what leads him to assert that the Trial Chamber based itself on the categories introduced by the Rwandan Law of 1996. Furthermore, although there is no pre-established hierarchy between crimes within the jurisdiction of the Tribunal,[2399] and international criminal law does not formally identify categories of offences, it is obvious that, in concrete terms, some criminal behaviours are more serious than others. As recalled above, the effective gravity of the offences committed is the deciding factor in the determination of the sentence:[2400] the principle of gradation or hierarchy in sentencing requires that the longest sentences be reserved for the most serious offences.[2401] The Trial Chamber merely applied this principle to the case at hand. The Appellant's appeal on this point is dismissed.

(d) Practice of courts and tribunals

1061. Appellant Barayagwiza argues that the 35 year sentence imposed by the Trial Chamber is not in conformity with the practice of the Rwandan courts or of the Tribunal.[2402] He adds that Article 77(1) of the Statute of the International Criminal Court provides for a maximum fixed term of imprisonment of 30 years.[2403]

(i) Practice of the Rwandan courts

1062. Appellant Barayagwiza argues that the sentence of 35 years imprisonment imposed by the Trial Chamber is clearly excessive by comparison with the practice of the Rwandan courts. In this connection, he refers to Article 83 of the Rwandan Penal Code, which "provides substantial reductions for the most serious offences"[2404] and to Article 35 of that Code, where the maximum term of imprisonment is allegedly 20 years. Finally, the Appellant relies on the principle that criminal penalties cannot be increased retrospectively in order to argue that the Rwandan Organic Law of 30 August 1996 did not apply.[2405]

[2397] References omitted.
[2398] Judgement, para. 1103.
[2399] *Stakić* Appeal Judgement, para. 375.
[2400] See *supra* XVII. A.
[2401] As recognized by the Trial Chamber; see Judgement, para. 1097.
[2402] Barayagwiza Appellant's Brief, para. 344.
[2403] *Idem.*
[2404] Barayagwiza Appellant's Brief, para. 348. Article 83 of the Rwandan Penal Code provides: "Where there are mitigating circumstances, [...] the sentence of life imprisonment shall be replaced by a sentence of imprisonment for a fixed period, which shall not be less than 2 years".
[2405] Barayagwiza Appellant's Brief, paras. 348-349.

1063. The Appeals Chamber recalls that, while the Trial Chamber must take account of the general practice regarding sentences in the Rwandan courts,[2406] it is well established in the jurisprudence that the Trial Chamber is not bound by that practice.[2407] The Trial Chamber is therefore "entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts".[2408]

1064. The Appeals Chamber notes that, in reaching its decision, the Trial Chamber made it clear that it had had regard to Rwandan law.[2409] The Trial Chamber was not obliged to follow Articles 35 and 83 of the Rwandan Penal Code. In any event, the Appeals Chamber notes that, contrary to what the Appellant alleges, the maximum term of imprisonment in Rwanda is not 20 years but life.[2410] Regarding the Rwandan Organic Law of 30 August 1996, the Appellant has produced no evidence that it was applied by the Trial Chamber. The Appellant's appeal on this point is dismissed.

(ii) Practice of international criminal tribunals

1065. Appellant Barayagwiza argues that the sentence of 35 years imposed at first instance is not in conformity with the jurisprudence of the Tribunal or of the ICTY.[2411] In support of this claim, he cites the prison sentences imposed on Elizaphan and Gérard Ntakirutimana, Obed Ruzindana and Laurent Semanza, and notes that the length of the sentences pronounced by the Tribunal varies between 10 and 25 years.[2412] The Appellant further points out that the accused in the *Ruggiu* and *Serushago* cases received sentences of 12 and 15 years respectively, despite the fact that their fundamental rights had not been violated.[2413]

1066. As recalled above, Trial Chambers are under an obligation to tailor penalties to fit the gravity of the crime and the individual circumstances of the case and of each accused; a comparison of cases is thus often of limited assistance.[2414] In the present case, the Appellant has done nothing to show how his case was so similar to those of Elizaphan and Gérard Ntakirutimana, Obed Ruzindana and Laurent Semanza as to require a similar sentence. As to the *Ruggiu* and *Serushago* cases, the Appeals Chamber notes that the sentences imposed in these cases relied on mitigating circumstances capable of justifying a reduction of the sentence, namely: a guilty plea, expressions of remorse and substantial cooperation with the Prosecution,[2415] which is not the case here. The Appeals Chamber dismisses the appeal on this point.

(iii) The Statute of the International Criminal Court

[2406] Article 23(1) of the Statute; Rule 101(B)(iii) of the Rules.
[2407] *Semanza* Appeal Judgement, paras. 377, 393; *Akayesu* Appeal Judgement, para. 420; *Serushago* Appeal Judgement, para. 30. See also *Stakić* Appeal Judgement, para. 398; *D. Nikolić* Appeal Judgement, para. 69; *Čelebići* Appeal Judgement, para. 813;
[2408] *Semanza* Appeal Judgement, para. 393. See also *Krstić* Appeal Judgement, para. 262.
[2409] Judgement, paras. 1095, 1097.
[2410] Rwandan Penal Code, Article 34 ("Imprisonment may be either for life or for a fixed period"). Article 35 moreover provides that imprisonment can exceed 20 years "in cases of repeated or other offences where the law has fixed other limits".
[2411] Barayagwiza Appellant's Brief, paras. 344, 377-379.
[2412] *Ibid.*, para. 344.
[2413] *Ibid.*, paras. 377-379.
[2414] See *supra* XVII. C. 1.
[2415] *Serushago* Trial Judgement, paras. 31-35, 38, 40-41; *Ruggiu* Trial Judgement, paras. 53-58, 69-72.

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1067. Appellant Barayagwiza argues that the Statute of the International Criminal Court provides for a maximum fixed term of imprisonment of 30 years.[2416]

1068. This provision does not bind the Tribunal, and the Appellant has not shown that it reflects the state of international customary law in force in 1994. The Appeals Chamber recalls that Rule 101(A) of the Rules does not limit the length of the custodial sentence that can be imposed by the Tribunal. The Appeals Chamber accordingly rejects the appeal on this point.

2. Mitigating circumstances

1069. On appeal, Appellant Barayagwiza has raised a series of matters which he claims should have been taken into account by the Trial Chamber as mitigating circumstances. However, most of these were not presented as mitigating circumstances at the trial and, in the view of the Appeals Chamber, the Appellant has not shown that the failure to present them constituted negligence on the part of his Counsel; rather, it was due to the refusal of the Appellant to cooperate with Counsel. In any event, and for the following reasons, the Appeals Chamber is not convinced that the matters now presented by the Appellant constitute mitigating circumstances, or that they would have played a significant role in the determination of the sentence:

- the Appellant argues that his actions were lawful, democratic and peaceful.[2417] He further appears to argue that the genocide was a reaction of the population to the invasion by the RPF and the murder of the President, and that he was unable to exercise any real control in this context.[2418] However, he makes no reference to anything in the case record to support his argument. Further, the acts proved against the Appellant contradict his claims: in particular, the Appellant played an active role in planning, ordering and instigating the killing of Tutsi;[2419]

- the Appellant argues that the Trial Chamber should have taken into account his previous good reputation, his lack of a criminal record and the fact that he is a father.[2420] However, no reference to the record is made to sustain these claims. Furthermore, the Appeals Chamber recalls that, according to the jurisprudence of the Tribunal and of the ICTY, the previous good moral character of the accused carries little weight in the determination of the sentence;[2421] similarly, the lack of a previous

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[2416] Barayagwiza Appellant's Brief, para. 344, referring to Article 77(1)(a) and (b) of the Statute of the International Criminal Court, which provides:

> (1) Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
>
> (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
>
> (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

[2417] *Ibid.*, para. 339 (ii) to (vi).
[2418] *Ibid.*, para. 339 (vii) to (ix).
[2419] See *supra* XII. D. 2. and XV. B. 2.
[2420] Barayagwiza Appellant's Brief, paras. 342, 347.
[2421] *Babić* Appeal Judgement, para. 50; *Kajelijeli* Appeal Judgement, para. 301; *Semanza* Appeal Judgement, para. 398; *Niyitegeka* Appeal Judgement, paras. 264-266.

criminal record "is a common characteristic among many accused persons which is accorded little if any weight in mitigation absent exceptional circumstances".[2422] As to a defendant's family situation, the Tribunal and the ICTY do not treat it as an important factor, save in exceptional circumstances, the main factor being the gravity of the crimes.[2423]

1070. The Appellant's appeal on these points is dismissed.

3. Lack of reasoning

1071. The Appellant argues that the Trial Chamber did not give any reasons for its decision to impose a custodial sentence of 35 years.[2424] The Appeals Chamber observes that, in support of the sentence imposed, the Trial Chamber noted *inter alia* the gravity of the offences, the individual circumstances of Appellant Barayagwiza and, in accordance with the Decision of 31 March 2000, the violations of his right to a fair trial.[2425] The Appeals Chamber accordingly considers that the Trial Chamber did not fail to provide reasons for the sentence. Nor does the Appellant specifically explain in what way the Trial Chamber's reasoning was insufficient, confining himself to general observations on the importance of providing reasons to explain a sentence. The appeal on this point is dismissed.

4. Excessive delay in rendering the Judgement

1072. Appellant Barayagwiza contends that his sentence should have been reduced because of the undue delay in trying him.[2426] He argues that the delay between his arrest and his conviction (7 years, 8 months and 5 days) is abusive, inexcusable and solely attributable to the Trial Chamber and to the Prosecutor.[2427] The Appellant adds to this the delays in the appeal, claiming in particular that the Registrar refused for a year to allow him to exercise "his right to the assistance of a competent counsel of his choice".[2428]

1073. The Appeals Chamber observes at the outset that, in pleading the excessive length of the proceedings, the Appellant is in fact raising a substantive issue going to the regularity of the trial. However, inasmuch as the Appellant raises this issue in his appeal against sentence

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[2422] *Ntagerura et al.* Appeal Judgement, para. 439.
[2423] *Jokić* Appeal Judgement, para. 62; *Kunarac et al.* Appeal Judgement, para. 413 ; *Jelisić* Trial Judgement, para. 124; *Furundžija* Trial Judgement, para. 284.
[2424] Barayagwiza Appellant's Brief, paras. 351-352.
[2425] Judgement, paras. 1096, 1098, 1100, 1102-1103, 1106-1107. In particular, the Trial Chamber noted: (1) the gravity of the crimes of which the Appellant had been convicted; (2) that the Appellant occupied a position of leadership and public trust but that he acted contrary to the duties imposed by his position; (3) that despite his declared attachment to human rights, the Appellant violated the most fundamental human right (the right to life) through the institutions he created, and through his own personal acts; (4) that it could find no mitigating circumstances in his case. The Trial Chamber went on to state that the appropriate sentence was one of life imprisonment, but that, because of the violations of his rights noted in the Decisions of 3 November 1999 and 31 March 2000, a reduced sentence should be imposed.
[2426] Barayagwiza Appellant's Brief, paras. 353-357.
[2427] *Ibid.*, para. 354. In support of his claim that the delay between his arrest and the Trial Chamber Judgement represented an abuse of his rights, the Appellant cited *Lubuto v. Zambia*, Communication No. 390/1990, CCPR/C/55/D/390/1990, 17 November 1995, para. 7.3, in which the Human Rights Committee found that a delay of eight years between arrest and conviction was excessive.
[2428] *Ibid.*, para. 355.

with a view to having it reduced, and a reduction of sentence is one of the remedies[2429] available to redress the alleged violation, the Appeals Chamber will examine these arguments in this section. Nevertheless, the Appeals Chamber notes that the length of the proceedings is not one of the factors that a Trial Chamber must consider, even as a mitigating circumstance, in the determination of the sentence.[2430]

1074. The right to be tried without undue delay is provided in Article 20(4)(c) of the Statute. This right only protects the accused against *undue* delays.[2431] Whether there was undue delay is a question to be decided on a case by case basis.[2432] The following factors are relevant:

- the length of the delay;
- the complexity of the proceedings (the number of counts, the number of accused, the number of witnesses, the quantity of evidence, the complexity of the facts and of the law);
- the conduct of the parties;
- the conduct of the authorities involved; and
- the prejudice to the accused, if any.[2433]

1075. In the present case, the Appeals Chamber has already found that some initial delays, attributable to the Prosecutor or to the Cameroonian authorities, violated the fundamental rights of the Appellant, and the Trial Chamber reduced the Appellant's sentence in accordance with the instructions given in the Decision of 31 March 2000.[2434] It remains to be decided if the Appellant has established that there was undue delay since the Decision of 31 March 2000.

1076. In support of his argument on this point, the Appellant refers first to the period elapsed since his arrest, and cites a case where the Human Rights Committee found that a delay of 8 years between arrest and conviction was excessive. However, as explained above, what constitutes undue delay depends on the circumstances of each case, and a reference to another case is helpful only if strong similarities are shown, which the Appellant has failed to do. In this regard, the Appeals Chamber notes in particular that the case cited to support the Appellant's argument relates to criminal proceedings before a domestic court and not before

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[2429] As the Appeals Chamber notes *infra*, other remedies are possible, such as the termination of proceedings against the accused or the award of compensation (see *infra*, footnote 2451).
[2430] See *supra* XVII.A.
[2431] *The Prosecutor v. Sefer Halilović*, Case No. IT-01-48-A, Decision on Defence Motion for Prompt Scheduling of Appeal Hearing, 27 October 2006 ("*Halilović* Decision"), para. 17.
[2432] *Halilović* Decision, para. 17; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 14; *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 28. See also *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings, 3 June 2005, paras. 19 *et seq.*
[2433] *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief, 27 February 2004.
[2434] Judgement, paras. 1106-1107.

an international tribunal. However, because of the Tribunal's mandate and of the inherent complexity of the cases before the Tribunal, it is not unreasonable to expect that the judicial process will not always be as expeditious as before domestic courts. There is no doubt that the present case is particularly complex, due *inter alia* to the multiplicity of counts, the number of accused, witnesses and exhibits, and the complexity of the facts and the law, and that the proceedings could be expected to extend over an extended period.

1077. The Appellant further claims that the delays are attributable to the Prosecutor, to the Trial Chamber and to the Registrar of the Tribunal, but he does not provide any detail in this respect. In particular, the Appellant does not explain how the delay in the assignment of his counsel on appeal is attributable to the Registrar. He has thus failed to show that his right to be tried without undue delay has been violated. The appeal on these points is dismissed.

5. Grounds of Appeal relating to the Decision of 31 March 2000

(a) Alleged errors in the Decision of 31 March 2000

1078. Appellant Barayagwiza submits that the Appeals Chamber committed a number of errors in its Decision of 31 March 2000, and that the violations of his fundamental rights were more extensive than was found in that decision.[2435] He thus appears to argue that the sentence imposed by the Trial Chamber should have been further reduced in order adequately to reflect the extent of those violations.

1079. The Appeals Chamber understands that the Appellant contends first that the Decision of 31 March 2000 wrongly found that he was informed at latest on 3 May 1996 of the general nature of the charges against him (and that he had thus spent a maximum of 18 days in detention without being informed of the reasons for his detention),[2436] whereas the Decision of 3 November 1999 had found that the Appellant had been informed of the general nature of the charges against him only on 10 March 1997 (and that he had thus spent 11 months in detention without being informed why).[2437] The Appeals Chamber notes that the Decision of 31 Mars 2000 found 3 May 1996 to be the relevant date because it appeared, in light of the new facts presented by the Prosecutor, that the Appellant had been aware of the general nature of the charges against him by that date, rather than 10 March 1997.[2438] The Appellant has failed to show in what way the date of 3 May 1996 was wrong. The appeal on this point is accordingly dismissed.

1080. The Appellant next appears to argue that the Appeals Chamber wrongly found that the Prosecutor had decided on 16 May 1996 not to prosecute him. The Appellant's argument in this regard appears to rely on a footnote to the Decision of 3 November 1999, which would rather suggest the date of 15 October 1996.[2439] However, the Appellant has not shown how the date of 16 May 1996 was wrong, and his appeal on this point is therefore dismissed.

1081. The Appellant also appears to claim that the calculations of the Appeals Chamber regarding the delays in the service of the indictment and in his initial appearance were wrong.

[2435] Barayagwiza Appellant's Brief, paras. 358-360.
[2436] See Decision of 31 March 2000, paras. 54-55.
[2437] Decision of 3 November 1999, para. 85.
[2438] Decision of 31 March 2000, paras. 54-55.
[2439] Decision of 3 November 1999, footnote 122.

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Once again, however, the Appellant fails to explain what errors were committed, confining himself to citing various paragraphs in the Decisions of 3 November 1999 and 31 March 2000 without further explanation. The appeal on this point is dismissed.

1082. The Appellant maintains that the Appeals Chamber was wrong in attributing to the Cameroonian authorities the delay in transferring the Appellant from Cameroon to the Tribunal.[2440] Again, the Appellant fails to show what error was committed, confining himself to references to the paragraphs in the Decision of 31 March 2000 which explained that the new facts showed that the delay in transferring the Appellant was attributable to the Cameroonian authorities.[2441] The appeal on this point is therefore dismissed.

1083. The Appellant further argues that the Decision of 31 March 2000 failed to sanction the Prosecutor for the delay in preparing the indictment against him.[2442] The Appeals Chamber cannot accept this argument: the Decision of 31 March 2000 did not modify the finding in the Decision of 3 November 1999 that the delay in preparing the indictment against the Appellant constituted a violation of his rights; on the contrary, it confirmed it.[2443]

1084. Finally, the Appellant appears to argue that the Decision of 31 Mars 2000 was based on documents containing errors or falsified by the Prosecutor; he adds that in refusing, on 14 September 2000,[2444] to examine his motion for review and/or reconsideration of the Decision of 31 March 2000, the Appeals Chamber committed a miscarriage of justice.[2445] However, the Appellant does not even identify the documents alleged to have contained errors or falsifications; nor has he produced any evidence of errors or falsification in the documents on which the Decision of 31 March 2000 was based. Moreover, he has failed to show in what way the Decision of 14 September 2000 was wrong. The appeal on this point is dismissed.

(b) <u>The Appeals Chamber should have specified in the Decision of 31 March 2000 the remedy to be provided</u>

1085. In his forty-eighth ground of appeal, the Appellant argues:

> In the Decision of 31st March 2000, the Appeal [*sic*] Chamber failed to direct the Trial Chamber as to the appropriate remedy. Yet, in the *Semanza* case which is identical to the Appellant's, the Appeals Chamber specified that the reduction must be done pursuant to article 23 of the Statute of the Tribunal. The Judges of the Trial Chamber III, in *Semanza* case considered therefore that this reduction had to be taken into account as mitigating circumstances. The Trial Chamber failed to consider this factor in the light of the mitigating circumstances applied by courts in Rwanda ante.[2446]

1086. In its Decision of 31 March 2000, the Appeals Chamber stated that the remedy to be granted by the Trial Chamber for the violation of the Appellant's rights was the following:

[2440] Barayagwiza Appellant's Brief, para. 358.
[2441] See Decision of 31 March 2000, paras. 56-58.
[2442] Barayagwiza Appellant's Brief, para. 359.
[2443] See Decision of 31 March 2000, paras. 74-75.
[2444] Decision of 14 September 2000.
[2445] Barayagwiza Appellant's Brief, para. 360.
[2446] *Ibid.*, para. 361 (footnotes omitted). See also para. 362 ("The Appeals Chamber erred in law in that it failed to provide a clear and certain remedy [...]").

3) DECIDES that for the violation of his rights the Appellant is entitled to a remedy, to be fixed at the time of the judgement at first instance, as follows:

a) If the Appellant is found not guilty, he shall receive financial compensation;

b) If the Appellant is found guilty, his sentence shall be reduced to take account of the violation of his rights.[2447]

The precise remedy to be granted was thus left to the discretion of the Trial Chamber, since the Appeals Chamber could not anticipate at that time whether the Appellant would be found guilty or, a fortiori, what sentence he would receive. Hence the Appeals Chamber could not give the Trial Chamber more detailed instructions. Nor can the Appeals Chamber discern in what way the disposition of the Decision of 31 May 2000 in the *Semanza* case, as cited by the Appellant, was more precise than that of the Decision of 31 March 2000: the only difference is the express reference to Article 23 of the Statute in the *Semanza* decision.[2448] Finally, the fact that the violation of the defendant's rights was not treated as a mitigating circumstance did not constitute an error. What was important was that the sentence should be reduced in order to take account of the rights violation, and this was done.[2449] The Appeals Chamber agrees with the Trial Chamber that the violation of the Appellant's rights was not a mitigating circumstance in the true sense of the term.

1087. For these reasons, the appeal on this point is dismissed. The Appeals Chamber will examine below the Appellant's argument that the reduction of sentence granted by the Trial Chamber was insufficient.

(c) The remedy granted in the Decision of 31 March 2000 was unlawful

1088. The Appellant argues that the remedy granted by the Appeals Chamber in the Decision of 31 March 2000 was not provided for by the Statute or the Rules of the Tribunal, and that the Appeals Chamber thus exceeded its powers.[2450] In the view of the Appeals Chamber, there can be no doubt that the Chambers of the Tribunal have the power to reduce a sentence to take into account the violation of the rights of an accused or to order any other remedy they deem appropriate.[2451] The appeal on this point is dismissed.

[2447] Decision of 31 March 2000, para. 75.

[2448] See *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, point 6 of the Disposition:

> DECIDES that for the violation of his rights, the Appellant is entitled to a remedy which shall be given when judgement is rendered by the Trial Chamber, as follows:
>
> (a) If he is found not guilty, the Appellant shall be entitled to financial compensation;
>
> (b) If he is found guilty, the Appellant's sentence shall be reduced to take into account the violation of his rights, pursuant to Article 23 of the Statute.

[2449] Judgement, para. 1107.

[2450] Barayagwiza Appellant's Brief, paras. 362-364.

[2451] See *e.g. André Rwamakuba v. The Prosecutor*, Case No. ICTR-98-44C-A, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007, paras. 23-30 ("*Rwamakuba* Decision"); *Kajelijeli* Appeal Judgement, para. 255; *Semanza* Appeal Judgement, para. 325, referring to *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Decision, 31 May 2000, point 6 of the operative part. As stated in the *Rwamakuba* Decision, para. 26 (footnotes omitted):

(d) The Decision of 31 March 2000 did not grant any remedy for the unlawful detention after 3 November 1999

1089. The Appellant argues that, since the Decision of 3 November 1999 had ordered his release, his detention from that date until 31 March 2000 was unlawful, and he is entitled to a remedy for this violation of his rights.[2452]

1090. As recalled above,[2453] the release of the Appellant could only take place after the Registrar had made the necessary arrangements for his delivery to the Cameroonian authorities.[2454] This did not occur because of the events following 3 November 1999,[2455] so that the continued detention of the Appellant until 31 March 2000 was thus not unlawful.

1091. The Appellant further argues that the Decision of 31 March 2000 constituted an abuse of process and was *ultra vires*, and that his detention following this decision was unlawful.[2456] The Appeals Chamber understands that the Appellant refers back to his arguments under his second ground of appeal concerning the question of abuse of process. The Appeals Chamber has already dismissed those arguments.[2457] Accordingly, the Appellant has not shown that his detention after 31 March 2000 was unlawful. These submissions are dismissed.

(e) Excessive delay in granting a remedy

1092. The Appellant argues that the remedy provided in the Decision of 31 March 2000 was ordered too late, explaining that, in order for the remedy to produce "its optimal effect, it must not be too distant from the moment when the prejudice occurred. This must be so in order to satisfy the expectations of the prejudiced person and to stop the impunity and prevent all desire of recidivism on behalf of the author of the damaging act."[2458]

1093. The Appeals Chamber is of the view that the remedy ordered by the Decision of 31 March 2000 was adequate. The Appellant does not cite any authority to support his argument and does not explain how the remedy ordered was unduly prejudicial to him. The appeal on this point is dismissed.

6. The remedy granted in the Judgement

1094. The Appellant argues that the remedy granted in the Judgement was not proportional to the serious violations of his fundamental rights, and that it did not represent an effective

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The authority in the Statute to provide an effective remedy flows from Article 19(1) of the Statute, which obliges the Trial Chambers to ensure a fair trial and full respect for the accused's rights. The existence of fair trial guarantees in the Statute necessarily presumes their proper enforcement. In this respect, the Appeals Chamber observes that the Statute and Rules do not expressly provide for other forms of effective remedy, such as the reduction of sentences, yet such a remedy has been accorded on several occasions.

[2452] Barayagwiza Appellant's Brief, paras. 365-366.
[2453] See *supra* II. B. 2. (a) .
[2454] This condition had in fact been explicitly reaffirmed in the Order of 25 November 1999.
[2455] See *supra* II. B. 1.
[2456] Barayagwiza Appellant's Brief, paras. 365-366.
[2457] See *supra* III.
[2458] Barayagwiza Appellant's Brief, paras. 367-368 (citation taken from para. 367).

remedy.[2459] In particular, he contends that the Trial Chamber in fact gave him a life sentence, since he would be more than 80 years old at the time of his release and, having regard to the average life expectancy in Tanzania, it is unlikely that he will ever be released.[2460]

1095. The Appeals Chamber is not convinced by the Appellant's arguments. The Appeals Chamber agrees with the Trial Chamber that the remedy ordered in the Judgement did constitute a significant reduction of the sentence, which adequately compensated the Appellant for the violation of his fundamental rights. Furthermore, despite his age, the Appellant might still one day be released, which – if the possibility of a pardon or commutation of sentence is excepted[2461] – would not be possible if the Appellant had been sentenced to life imprisonment. The appeal on this point is dismissed.

7. Consequences of the findings of the Appeals Chamber

1096. The Appeals Chamber recalls that it has set aside Appellant Barayagwiza's conviction for conspiracy to commit genocide (Count 1 of Barayagwiza's Indictment).[2462] It has also set aside all of the Appellant's convictions relating to RTLM broadcasts.[2463] With regard to the responsibility of the Appellant for the activities of CDR members and *Impuzamugambi*, the Appeals Chamber has set aside Appellant Barayagwiza's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide (Count 4 of Barayagwiza's Indictment).[2464] On the other hand, it has upheld the Appellant's convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Barayagwiza's Indictment), under the mode of responsibility of instigation;[2465]
- extermination as a crime against humanity (Count 5 of Barayagwiza's Indictment), under the mode of responsibility of ordering or instigating and planning;[2466]
- persecution as a crime against humanity (Count 7 of Barayagwiza's Indictment), under the mode of responsibility of instigation.[2467]

The Appeals Chamber has also set aside the Appellant's convictions as superior of CDR members and *Impuzamugambi*.[2468]

[2459] *Ibid.*, paras. 370-376.
[2460] *Ibid.*, paras. 370-375. The Appellant also cites the case of *R v.W (Sentencing: Age of the Defendant)*, an appeal court decision in which it was apparently held that a sentence should be reduced if it would result in the release of the offender when he was "well into his eighties"; but the only reference is a report from *The Times* of 26 October 2000. In any event, the Chambers of this Tribunal are not bound by the judicial practice of other jurisdictions.
[2461] See also Article 27 of the Statute, Rules 124-126 of the Rules, and Practice Direction on the Procedure for the Determination of Applications for Pardon, Commutation of Sentence and Early Release of Persons Convicted by the International Criminal Tribunal for Rwanda, 10 May 2000.
[2462] See *supra* XIV. B. 4.
[2463] See *supra* XII. D. 2. (a) (ii) b. iii (genocide), XIII. D. 2. (a) (direct and public incitement to commit genocide), XV. B. 1. (b) (extermination), and XV. C. 2. (a) (iii) b. (persecution).
[2464] See *supra* XIII. D. 2. (b) (i).
[2465] See *supra* XII. D. 2. (b) (viii).
[2466] See *supra* XV. B. 2. (a) and XV. B. 2. (b) (iii).
[2467] See *supra* XV. C. 2. (b) (i).

1097. Taking into account the sentence imposed by the Trial Chamber, which reflects, *inter alia*, the reduction of sentence granted to the Appellant for various violations of his rights, and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber considers that the sentence of Appellant Barayagwiza should be reduced to a term of imprisonment of 32 years.

E. Appellant Ngeze

1. Gravity of the crimes

1098. Appellant Ngeze argues that the sentence imposed on him by the Trial Chamber is too harsh.[2469] He stresses in this respect that he was acquitted of the murder charge and that "there was no evidence that he killed anyone".[2470]

1099. In the view of the Appeals Chamber, the Appellant has not demonstrated any error on the part of the Trial Chamber. Even if Appellant Ngeze was acquitted of the murder charge, the Trial Chamber found him guilty of having committed, ordered, instigated and aided and abetted the commission of crimes such as conspiracy to commit genocide, genocide, direct and public incitement to commit genocide, persecution and extermination. In these circumstances, the Trial Chamber could, pursuant to its discretionary power, impose a sentence of life imprisonment.

1100. However, the Appeals Chamber has set aside certain of the Appellant's convictions. The impact of these findings on the Appellant's sentence will be examined later.

2. Mitigating factors

1101. The Appellant puts forward the following mitigating factors:

- he was not part of the Government or of the military;[2471] he was not sufficiently important in the country's hierarchy to have abused a position of trust, nor was he an architect of the strategy of genocide;[2472]
- he saved a number of Tutsi in 1994;[2473]
- his young age and the fact that his family depends on him (an aged mother and young children);[2474]
- his right to a Counsel of his own choosing was violated, and the Defence had limited resources.[2475]

[2468] See *supra* XII. D. 2. (b) (ix) (genocide), XIII. D. 2. (b) (ii) b. iv (direct and public incitement to commit genocide), XV. B. 2. (a) (extermination), and XV. C. 2. (b) (ii) (persecution).
[2469] Ngeze Appellant's Brief, para. 485.
[2470] *Ibid.*, para. 493.
[2471] *Ibid.*, para. 486.
[2472] Ngeze Brief in Reply, para. 111. The Appellant thus distinguishes his situation from that of former Prime Minister Jean Kambanda, who was also sentenced to life imprisonment.
[2473] Ngeze Appellant's Brief, para. 487.
[2474] *Ibid.*, para. 489; Ngeze Brief in Reply, para. 109.

(b) Assistance to a number of victims

1106. In its discussion of the Appellant's individual circumstances, the Trial Chamber took account of his submission that he had saved the lives of Tutsi in 1994. However, it did not give significant weight to this, as it found that "[h]is power to save was more than matched by his power to kill".[2482] The Appeals Chamber cannot find any error in the exercise of its discretion by the Trial Chamber.

(c) Family situation

1107. Appellant Ngeze submits that the Trial Chamber erred in disregarding his family situation (an "aged mother" and children under the age of 16). In this respect, he cites the *Jelisić* case, in which the Trial Chamber took into consideration the fact that the accused was the father of a young son.[2483]

1108. The Appeals Chamber notes that, in general, the Tribunal and the ICTY do not accord great weight to the family situation of the accused, given the gravity of the crimes committed.[2484] Therefore, even if the Trial Chamber had erred, such error could not have had any impact in this particular case, given the gravity of the crimes committed by the Appellant and the absence of exceptional family circumstances. The Appeals Chamber accordingly dismisses the present ground of appeal.

(d) Fair trial violations

1109. The Appeals Chamber recalls that it has already examined and rejected[2485] Appellant Ngeze's argument that the Trial Chamber erred in dismissing his motion for withdrawal of his Counsel.[2486]

1110. The Appeals Chamber further recalls that it has also considered and dismissed[2487] Appellant Ngeze's arguments concerning the appearance of Defence witnesses and failure to translate *Kangura* issues.[2488]

3. Deduction of the period of provisional detention

1111. Appellant Ngeze argues that the Trial Chamber failed to take into account the period of his provisional detention in accordance with Rule 101(D) of the Rules.[2489]

1112. The Appeals Chamber notes that, pursuant to Rule 101(D) of the Rules, the Chambers are obliged to give credit for any period during which a convicted person was held in

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[2482] *Idem.*, The Trial Chamber also rejected the Appellant's claim that he had saved hundreds or thousands of Tutsi (Judgement, para. 850). The Appellant does not show that this was unreasonable, confining himself to a reference to his testimony (Ngeze Appellant's Brief, para. 487).

[2483] Ngeze Appellant's Brief, para. 489; Ngeze Brief in Reply, para. 109, referring to *Jelisić* Trial Judgement, para. 124.

[2484] *Jokić* Appeal Judgement, para. 62; *Kunarac et al.* Appeal Judgement, para. 413; *Jelisić* Trial Judgement, para. 124; *Furundžija* Trial Judgement, para. 284.

[2485] See *supra* VII. B.

[2486] Ngeze Appellant's Brief, para. 491, reproducing the arguments developed in paras. 127-143.

[2487] See *supra* VII. A. and VII. E.

[2488] Ngeze Appellant's Brief, para. 492.

[2489] *Ibid.*, para. 490; Ngeze Brief in Reply, para. 110, referring to *Kajelijeli* Appeal Judgement, paras. 289-290.

1102. The Trial Chamber found:

> Hassan Ngeze, as owner and editor of a well-known newspaper in Rwanda, was in a position to inform the public and shape public opinion towards achieving democracy and peace for all Rwandans. Instead of using the media to promote human rights, he used it to attack and destroy human rights. He has had significant media networking skills and attracted support earlier in his career from international human rights organizations who perceived his commitment to freedom of expression. However, Ngeze did not respect the responsibility that comes with that freedom. He abused the trust of the public by using his newspaper to instigate genocide. No representations as to sentence were made on his behalf by his Counsel. The Chamber notes that Ngeze saved Tutsi civilians from death by transporting them across the border out of Rwanda. His power to save was more than matched by his power to kill. He poisoned the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.[2476]

1103. As recalled above, mitigating circumstances must be presented at trial.[2477] The Appellant made no representation as to sentence during his trial. This in itself would suffice for the Appeals Chamber to reject his arguments. However, the Chamber will now briefly examine the Appellant's arguments before dismissing them.

(a) The Appellant's position in Rwanda

1104. The Appellant submits that he was neither part of the Government nor of the military.[2478] In his Reply, he stresses that he was given the same sentence as the former Prime Minister Jean Kambanda, although he did not hold the same position in the country's hierarchy, nor was he one of the main architects of the strategy of genocide.[2479]

1105. In the opinion of the Appeals Chamber, the Appellant has failed to show that the Trial Chamber erred. Even if Appellant Ngeze was not part of the Government or of the military, this does not suffice to show that the Trial Chamber abused its discretion in imposing a sentence of life imprisonment. The Trial Chamber found that the Appellant had committed very serious crimes[2480] and that he had abused the public's trust while using his newspaper to instigate genocide.[2481] Furthermore, as regards the comparison between the Appellant's situation and that of Jean Kambanda, the Appeals Chamber recalls that the defendant's authority or influence is not the sole element to be taken into consideration when determining the sentence, since the latter must also be proportional to the seriousness of the crimes and the degree of responsibility of the offender. In any event, the Appeals Chamber finds that the *Kambanda* precedent does not buttress the Appellant's case, since (1) Jean Kambanda was sentenced to life imprisonment although he had pleaded guilty, which is not the Appellant's case; (2) life imprisonment being the maximum sentence, the fact that Jean Kambanda might have played a more significant role than the Appellant in the crimes committed in Rwanda in 1994 does not imply that the latter should automatically be given a lesser sentence, as the conduct of the Appellant could be sufficiently grave in itself to justify the maximum sentence. The appeal on this point is dismissed.

[2475] Ngeze Appellant's Brief, paras. 491-492.
[2476] Judgement, para. 1101.
[2477] See *supra* XVII. C. 3.
[2478] Ngeze Appellant's Brief, para. 486.
[2479] Ngeze Brief in Reply, para. 111.
[2480] Judgement, paras. 1096, 1102-1103.
[2481] *Ibid.*, para. 1101.

provisional detention. Even though the sentence imposed here was life imprisonment, the Trial Chamber should have made it clear that Appellant Ngeze would be credited with the time spent in detention between his arrest and conviction, as this could have an effect on the application of any provisions for early release.

4. Consequences of the findings of the Appeals Chamber

1113. The Appeals Chamber recalls that Appellant Ngeze's conviction for conspiracy to commit genocide has been set aside (Count 1 of Ngeze's Indictment).[2490] With regard to the Appellant's responsibility for matters published in *Kangura*, the Appeals Chamber has set aside his convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment);[2491]
- persecution as a crime against humanity (Count 6 of Ngeze's Indictment).[2492]

On the other hand, the Appeals Chamber has upheld the Appellant's conviction under Article 6(1) of the Statute for direct and public incitement to commit genocide (Count 4 of Ngeze's Indictment).[2493]

1114. With regard to the Appellant's responsibility for certain acts committed in Gisenyi, the Appeals Chamber recalls that it has set aside his convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment), under the mode of responsibility of ordering;[2494]
- direct and public incitement to commit genocide (Count 4 of Ngeze's Indictment);[2495]
- extermination as a crime against humanity (Count 7 of Ngeze's Indictment), under the mode of responsibility of ordering;[2496]
- persecution as a crime against humanity (Count 6 of Ngeze's Indictment).[2497]

On the other hand, the Appeals Chamber has upheld the Appellant's convictions under Article 6(1) of the Statute for:

- genocide (Count 2 of Ngeze's Indictment), under the mode of responsibility of aiding and abetting;[2498]

[2490] See *supra* XIV. B. 4.
[2491] See *supra* XII. B. 3. (b) (ii).
[2492] See *supra* XV. C. 2. (c) (i).
[2493] See *supra* XIII. D. 3. (a).
[2494] See *supra* X. D.
[2495] See *supra* XIII. D. 3. (b).
[2496] See *supra* X. D.
[2497] See *supra* XV. C. 2. (c) (ii).
[2498] See *supra* XII. D. 3.

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- extermination as a crime against humanity (Count 7 of Ngeze's Indictment), under the mode of responsibility of aiding and abetting.[2499]

1115. Having regard to the sentence imposed by the Trial Chamber and the setting aside of certain convictions in the present Appeal Judgement, the Appeals Chamber finds that Appellant Ngeze's sentence should be reduced to a term of imprisonment of 35 years.

[2499] See *supra* XV. B. 3. (b).

XVIII. DISPOSITION

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

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

NOTING the written submissions of the parties and the hearings on 16, 17 and 18 January 2007;

SITTING in open session;

WITH RESPECT TO THE GROUNDS OF APPEAL OF FERDINAND NAHIMANA

ALLOWS IN PART the second ground of appeal of Appellant Nahimana (temporal jurisdiction of the Tribunal), as well as the grounds (no number given) by which he challenges his convictions for the crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity;

DISMISSES all other grounds of appeal of Appellant Nahimana;

REVERSES the convictions of Appellant Nahimana based on Article 6(1) of the Statute for the crimes of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and extermination and persecution as crimes against humanity;

AFFIRMS the convictions of Appellant Nahimana based on Article 6(3) of the Statute, but only in respect of RTLM broadcasts after 6 April 1994, for the crimes of direct and public incitement to commit genocide and, Judge Meron dissenting, persecution as a crime against humanity; and

REPLACES the sentence of life imprisonment imposed by the Trial Chamber by a sentence of 30 years, Judge Meron dissenting, subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

WITH RESPECT TO THE GROUNDS OF APPEAL OF JEAN-BOSCO BARAYAGWIZA

ALLOWS IN PART grounds 4, 14, 21, 23, 29, 30, 32-36 and 38 of Appellant Barayagwiza;

DISMISSES all other grounds of appeal of Appellant Barayagwiza;

REVERSES the convictions of Appellant Barayagwiza based on Article 6(1) of the Statute for the crimes of direct and public incitement to commit genocide for his acts within the CDR and conspiracy to commit genocide, as well as his convictions based on Article 6(3) of the Statute in respect of his acts within RTLM and the CDR for the crimes of genocide, direct and public incitement to commit genocide, and extermination and persecution as crimes against humanity;

AFFIRMS the convictions of Appellant Barayagwiza pursuant to Article 6(1) of the Statute for (1) having instigated the commission of genocide by CDR members and *Impuzamugambi* in Kigali; (2) having ordered or instigated the commission of extermination as a crime against humanity by CDR members and *Impuzamugambi* in Kigali, Judge Güney dissenting, and having planned this crime in the *préfecture* of Gisenyi; and (3) having instigated the commission of persecution as a crime against humanity by CDR members and *Impuzamugambi* in Kigali; and

REPLACES the sentence of 35 years imprisonment imposed by the Trial Chamber by a sentence of 32 years, subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

WITH RESPECT TO THE GROUNDS OF APPEAL OF HASSAN NGEZE

ALLOWS IN PART grounds 1, 3, 4, 5 and 6 of Appellant Ngeze;

DISMISSES all other grounds of appeal of Appellant Ngeze;

REVERSES the convictions of Appellant Ngeze based on Article 6(1) of the Statute for (1) the crimes of conspiracy to commit genocide and persecution as a crime against humanity; (2) having instigated genocide through matters published in his newspaper *Kangura* and having ordered genocide on 7 April 1994 in Gisenyi; (3) having directly and publicly incited the commission of genocide in the *préfecture* of Gisenyi; (4) having ordered extermination as a crime against humanity on 7 April 1994 in Gisenyi;

AFFIRMS the convictions of Appellant Ngeze pursuant to Article 6(1) of the Statute for (1) having aided and abetted the commission of genocide in the *préfecture* of Gisenyi; (2) having directly and publicly incited the commission of genocide through matters published in his newspaper *Kangura* in 1994; (3) having aided and abetted extermination as a crime against humanity in the *préfecture* of Gisenyi; and

REPLACES the sentence of life imprisonment imposed by the Trial Chamber by a sentence of 35 years, subject to credit being given under Rule 101(D) for the period already spent in detention;

Judge Shahabuddeen partly dissents from these findings;

and finally,

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

ORDERS, in accordance with Rules 103(B) and 107 of the Rules, that Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze are to remain in the custody of the Tribunal pending their transfer to the State in which each will serve his sentence.

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

[Signed]	[Signed]	[Signed]
Fausto Pocar Presiding	Mohamed Shahabuddeen Judge	Mehmet Güney Judge
Andrésia Vaz Judge	Theodor Meron Judge	

Judge Pocar appends a partly dissenting opinion to this Judgement.

Judge Shahabuddeen appends a partly dissenting opinion to this Judgement.

Judge Güney appends a partly dissenting opinion to this Judgement.

Judge Meron appends a partly dissenting opinion to this Judgement.

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

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XIX. PARTLY DISSENTING OPINION OF JUDGE FAUSTO POCAR

1. I cannot concur with the majority with respect to one of the findings in this Appeal Judgement.

2. The Appeals Chamber held that under Article 7 of the Statute, which limits the Tribunal's temporal jurisdiction to the period starting on 1 January 1994 and ending on 31 December 1994, "even where such criminal conduct commenced before 1994 and continued during that year, a conviction may be based only on that part of such conduct having occurred in 1994".[1] I wish to state that I disagree with this finding, even if the issue of the application of Article 7 of the Statute to crimes characterized by criminal conduct which commenced prior to 1994 and continued after 1 January 1994 does not affect the verdict against the Appellants, in light of the quashing of the conviction for conspiracy and the findings in the Appeal Judgement regarding the crime of direct and public incitement to commit genocide.[2] I am not convinced that it is correct to hold that a conviction can be based solely on that part of the criminal conduct which took place in 1994. Insofar as offences are repeated over time and are linked by a common intent or purpose, they must be considered as a continuing offence, that is a single crime.[3] There can thus be no question of excluding a part of this single offence and relying only on acts committed after 1 January 1994. I further note that the observations of certain delegates during the adoption of Security Council Resolution 955 establishing the Tribunal do not justify the conclusion that the drafters of the Statute intended to exclude from the Statute's temporal scope a crime of which certain material elements were committed prior to 1 January 1994.[4]

3. With respect to the Appeals Chamber's findings on persecution as a crime against humanity, I would like to make the following clarifications. Paragraph 987 of the Appeal Judgement does not appear to rule definitively on the question whether a hate speech can *per se* constitute an underlying act of persecution. In my opinion, the circumstances of the instant case are, however, a perfect example where a hate speech fulfils the conditions necessary for it to be considered as an underlying act of persecution. Indeed, the hate speeches broadcast on RTLM by Appellant Nahimana's subordinates were clearly aimed at discriminating against the Tutsi and led the

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[1] Appeal Judgement, para. 317, see also para. 724, which reaches the same conclusion with specific reference to direct and public incitement to commit genocide.

[2] Appeal Judgement, paras. 723-724. I wish to add that in the instant case there was clearly no direct and public incitement to commit genocide of a continuing nature on the part of RTLM or *Kangura* having commenced prior to 1 January 1994 and continued thereafter.

[3] For example, Article 81 of the Italian Criminal Code provides that a "*reato continuato*" is constituted by a plurality of independent acts or omissions that form part of a single criminal purpose ("*disegno criminoso*"), and is relevant in determining sentence. In the United Kingdom, Lord Diplock stated for the House of Lords that "[...] two or more acts of a similar nature committed by one or more defendants are connected with one another in the time and place of their commission, or by their common purpose, [...] they can fairly be regarded as forming part of the same transaction or criminal enterprise" *DPP v. Merriman* [1973] A.C. 584, 607. In French law, it is the concept of a "continuing offence", defined as "the repetition of a series of instantaneous offences of a similar nature, linked by a single intention", that would be most apt here; see Georges Levasseur, Albert Chavanne, Jean Montreuil, Bernard Bouloc, *Droit pénal général et procédure pénale*, 13th ed., (Paris: Sirey, 1999) pp. 30-31. Moreover, in such case, French law provides that the statute of limitation starts to run only from the time when the offence is completed, and that, in case of conflict in the application of statututory law over time, the law to be applied is that which was in force at the time when the offence ceased, even if that law is more severe, *Ibid.*, p. 31. Lastly, I note by way of subsidiary point that a number of decisions of national courts relating to the scope of their territorial jurisdiction for cross-border crimes tend, by analogy, to support this view; see *DPP v. Doot* [1973] A.C. 807, 817-818, 826-827 (H.L.) (United Kingdom); *Libman v. The Queen* [1985] 2 R.C.S. 178, paras. 25, 38-42 (Canada); *Liangsiriprasert v. United States* [1991] A.C. 225, 251 (Privy Council).

[4] See Appeal Judgement, para. 311.

population to discriminate against them, thus violating their basic rights. Taken together and in their context, these speeches amounted to a violation of equivalent gravity as other crimes against humanity. Consequently, the hate speeches against the Tutsi that were broadcast after 6 April 1994 – that is, after the beginning of the systematic and widespread attack against this ethnic group – were *per se* underlying acts of persecution.

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

[Signed]

Fausto Pocar
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

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XX. PARTLY DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I concur in part with the judgement of the Appeals Chamber. Unfortunately, there are areas in which I have been unable to do so. Also, on some aspects of the concurrence, I have a different point of view. These are my reasons.

A. The nature of conspiracy

2. I agree with the Appeals Chamber that conspiracy is proved by agreement. As the Appeals Chamber said:[1]

> *L'entente en vue de commettre le génocide, incriminée par l'article 2(3)(b) du Statut, est définie comme « une résolution d'agir sur laquelle au moins deux personnes se sont accordées, en vue de commettre un génocide ». Cet accord entre des individus ayant pour but la commission du génocide (ou « résolution d'agir concertée ») en constitue l'élément matériel (actus reus) ; en outre, les individus parties à l'accord doivent être animés de l'intention de détruire en tout ou en partie un groupe national, ethnique, racial ou religieux comme tel (l'élément intentionnel ou* mens rea*).*

I interpret this to mean that agreement is the only legal requirement for the creation of a conspiracy. There is, however, a view that it is additionally necessary for the indictment to aver 'overt acts'. Because of the importance of that view and its possible relevance to this case, I shall state why I do not share it.

3. The common law accepts the necessity for proof of overt acts, but it limits the necessity to proof of the making of an agreement of conspiracy. The making of an agreement of conspiracy is regarded as an overt act for the reason that, where parties combine or otherwise collaborate in making such an agreement, the matter has moved from one of mere thought to one of positive action to implement the thought. By so combining, they have committed 'an act in advancement of the intention', to use the words of Lord Chelmsford in *Mulcahy v. R.*[2] But, as that and other cases show, there is no further necessity for proof of overt acts. In the words of Willes, J, giving the opinion of the judges in *Mulcahy*, 'a conspiracy [meaning an agreement of conspiracy] is a sufficient overt act'.[3] Thus, the common law[4] does not regard 'overt acts' (apart from the making of the agreement of conspiracy) as an element of conspiracy.

4. The civil law[5] does not accept the common law view, or accepts it but only to a limited extent. The French Judge M. Donnedieu de Vabres exemplified this at Nuremberg: visions of thought-crimes were strong. An international tribunal has to take account of other legal systems – willingly. In 1924 M. Politis, counsel for Greece, had complained that '[l]es gouvernements des pays anglo-saxons ont eu depuis longtemps la tendance de transporter ces habitudes judiciaires du domaine de la justice interne dans celui de la justice internationale'.[6] The Tribunal, as an

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[1] Appeals Chamber Judgement, para. 894 (footnotes omitted). At the time of this writing, there is no official English translation of the Appeals Chamber Judgement.

[2] [1868] L.R. 3 H.L. 306.

[3] *Ibid.*, para. 12.

[4] By statutes, the United States position is, in parts, similar to the civil law system. See 18 U.S.C., para. 371. But see section 5.03(5) of the U.S. model penal code, which stipulates that an overt act is necessary for criminal responsibility, 'other than [in the case of] a felony of the first or second degree'. So, under the U.S. model penal code, the position is saved in serious crimes: no overt acts have to be proved.

[5] This is only a general view. *Cf.* the German Penal Code, Section 129 ('Formation of Criminal Organizations'), and see the French criminal code, articles 212-3.

[6] *Mavrommatis Concessions, P.C.I.J., Series C, No. 5-I,* (1924) p. 43.

international body, must have regard to that ongoing complaint. But, here, it seems to me that the common law point of view has come to be generally accepted in relation to genocide.

5. The civil law aversion to the common law position prevailed in international humanitarian law, but not in respect of the most heinous of crimes.[7] Nehemiah Robinson says '"Conspiracy to commit Genocide" means an agreement among a number of people to commit any of the acts enumerated in Art. II (of the Genocide Convention), even if these acts were never put into operation'.[8] Thus, the accepted view of the convention was that the essence of the crime lay in the agreement – even if, as Robinson says, the agreed acts were 'never put into operation'.

6. This was the view of an ICTR Trial Chamber in *Musema*.[9] There, after reviewing the *travaux preparatoires* of the Genocide Convention on the particular question of the common law and civil law understandings of conspiracy, the Trial Chamber held 'that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide'. Authors are of different opinions. I respect but am not persuaded by the views of those who support the need for proof of overt acts; there seems to be greater merit in the opposite view. Having considered material on both sides, one scholar concludes: 'To establish conspiracy, the prosecution must prove that two or more persons agreed upon a common plan to perpetrate genocide.' [10] Two writers say that it 'is the process of conspiring itself that is punishable and not the result'.[11] In my view, these statements are correct: international humanitarian law treats the process of making an agreement to commit genocide as an autonomous crime.[12]

B. The Trial Chamber has not expanded the scope of persecution as a crime against humanity

7. In a prosecution for persecution as a crime against humanity, the acts of the accused have to be proved to be grave; the standard of gravity is generally taken to be that of the other acts enumerated in article 3 of the Statute.[13] I understand the appellants to be arguing *inter alia* that, where statements are relied on as the underlying acts, this standard is met only where the statements amount to incitement to commit genocide or extermination.[14] Where there is a conviction although the standard is not so met, the appellants contend that the Trial Chamber is unlawfully expanding the scope of persecution as a crime against humanity.

8. If the appellants' argument is sound, there can be no complaint, for the Trial Chamber said:

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[7] See generally Virginia Morris and Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, Vol. 1 (New York, 1998), pp. 270-271, and Antonio Cassese, *International Criminal Law*, (Oxford, 2003), pp. 191 and 197.

[8] Nehemiah Robinson, *The Genocide Convention, A Commentary*, (New York, 1950), p. 66, fn. 1. He seems to be of the view that, in respect of genocide, the Convention reflected the common law concept of conspiracy.

[9] ICTR-96-13-T, 27 January 2000, para. 191.

[10] William A. Schabas, *Genocide in International Law*, (Cambridge, 2000), p. 265.

[11] John R.W.D. Jones and Stephen Powles, *International Criminal Practice* (Oxford, 2003), p.178, para. 4.2.152.

[12] I do not think that the United States case of *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), yields a different result. In addition to other matters, the view that is relevant was expressed in an individual opinion of four judges; it was not the opinion of the United States Supreme Court.

[13] See *Kupreškić*, IT-95-16-T, 14 January 2000, paras 619-621. See also *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 102. Acts other than the listed ones can be included provided that they measure up to the standard of the listed acts.

[14] See, for example, Mr Barayagwiza's Appeal Brief, para. 304. Mr Nahimana's Appeal Brief, para. 450, and Mr. Nahimana's Response to the *amicus curiae* brief, pp. 5-6.

> In Rwanda, the virulent writings of *Kangura* and the incendiary broadcasts of RTLM functioned in the same way, conditioning the Hutu population and creating a climate of harm, as evidenced in part by the extermination and genocide that followed.[15]

Interpretations of this statement may differ, but the view which I accept is that the Trial Chamber was considering a particular kind of incitement – one directed, at least in part, to causing 'extermination and genocide'. That meets the appellants' case, and thus there cannot be any complaint. On this view, it is not necessary to examine the appellants' argument. In case I am wrong, however, I shall consider it.

9. To begin with, it has to be remembered that persecution as a crime against humanity is wider than incitement to commit genocide.[16] To limit the former, effectively, to cases in which there is incitement to commit genocide is at variance with that verity. If the limitation is sound, the prosecution may as well charge for the crime of incitement to commit genocide; there will be a prosecutorial advantage in doing so, for, in that case, there is no requirement to prove a widespread and systematic attack on a civilian population, something that has to be proved if the other route is taken, *i.e.*, if the charge is for persecution as a crime against humanity.

10. The appellants rely on *Fritzsche*.[17] Fritzsche was acquitted of persecution as a crime against humanity because in the view of the International Military Tribunal he did not take part 'in originating or formulating propaganda campaigns'.[18] That was a sufficient reason for the acquittal. It is true that the Tribunal noted that[19] -

> 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.

11. Fritzsche had limited himself to making statements which, though 'strong', were only of a 'propagandistic' nature. This meant that, while he was arousing 'popular sentiment in support of Hitler and the German war effort', he was presenting no particular proposal for action which constituted a crime at international law. The additional observation concerning 'atrocities on conquered peoples' does not bear the inference upon which the appellants rely. They argue that it shows that the International Military Tribunal regarded it as essential to the success of a charge for persecution (by making public statements) as a crime against humanity that it should be shown that the statements advocated genocide or extermination. It appears to me that it simply happened that 'atrocities on conquered peoples' were the particular acts referred to in Fritzsche's case. The case did not announce any general requirement to establish extermination or genocide in cases of prosecution for persecution as a crime against humanity.

12. A more satisfactory test is that an allegation of persecution as a crime against humanity has to show harm to 'life and liberty'. The expression was used in *Flick*, where it was said that these allegations must 'include only such as affect the life and liberty of the oppressed peoples'.[20]

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[15] Trial Judgement, para. 1073.
[16] See *Kupreškić*, IT-95-16-T, 14 January 2000, paras 605-606.
[17] Judgement of the International Military Tribunal, Trial of Major War Criminals (1946), Vol. 1.
[18] *Ibid.*, p.128. Fritzsche's co-accused Streicher was convicted. Streicher had been notoriously involved in weekly publications calling for the extermination of the Jews.
[19] It is not suggested that the additional observation may be disregarded.
[20] *Flick Case*, Trials of War Criminals, (Nuernberg, 1949), Vol. VI, p. 1215.

Similarly, in *Einsatzgruppen* the United States Military Tribunal said that '[c]rimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty'.[21] What acts will be comprised in that description are debatable. Cases involving deprivation of industrial property are excluded,[22] on the ground no doubt that they do not impact on individual 'life and liberty' – at least in a 'wholesale' way. But economic and political discrimination by the Nazis against the Jews has been included, on the presumable ground that such discrimination *could* impact on the 'life and liberty' of victims in a 'wholesale' way.[23] It is not necessary to prove a physical attack.

13. In the *Ministries* case,[24] the United States Military Tribunal found as follows:

> The persecution of Jews went on steadily from step to step and finally to death in foul form. The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation, and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they were worked to exhaustion and death; they became slave laborers; and finally over six million were murdered.[25]

In that case, to be sure, there were crimes of violence, but it is clear that there were acts of mistreatment not involving violence and that such acts were admissible as evidence of persecution. That happened in a trial held immediately after World War II. So, in the usual way, the case may be accepted as reflective of customary international law.

14. Not surprisingly, in *Kvočka* the Trial Chamber noted that –

> [J]urisprudence from World War II trials found acts or omissions such as denying bank accounts, educational or employment opportunities, or choice of spouse to Jews on the basis of their religion, constitute persecution. Thus, acts that are not inherently criminal may nonetheless become criminal and persecutorial if committed with discriminatory intent.[26]

On appeal, the Appeals Chamber recalled 'incidentally that acts underlying persecution under Article 5(h) of the Statute need not be considered a crime in international law'.[27] It went on to say:

> The Appeals Chamber has no doubt that, in the context in which they were committed and taking into account their cumulative effect, the acts of harassment, humiliation and psychological abuse ascertained by the Trial Chamber are acts which by their gravity constitute material elements of the crime of persecution.[28]

In my argument, the court may well regard the 'cumulative effect' of harassment, humiliation and psychological abuse as impairing the quality of 'life', if not of 'liberty', within the meaning of the test laid down in the *Einsatzgruppen*.

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[21] *Einsatzgruppen Case*, Trials of War Criminals, (Nuernberg, 1949), Vol. IV, p. 498.
[22] *Flick*, Trials of War Criminals, (Nuernberg, 1949), Vol. VI, p. 1215.
[23] Judgement of the International Military Tribunal, Trial of Major War Criminals, (1946), Vol. 1, pp. 259, 300, 305, 329.
[24] *Ernst von Weizsaker ('Ministries Case')*, Trial of War Criminals, (Nuernberg, 1949), Vol. XIV, p. 471.
[25] *Ibid.*
[26] IT-98-30/1-T, 2 November 2001, footnote omitted.
[27] *Kvočka*, IT-98-30/1-A, para. 323.
[28] *Ibid.*, para. 324.

15. *Kordić and Čerkez* may be thought to support a narrower view.[29] There the Trial Chamber excluded an allegation in the indictment of 'encouraging, instigating and promoting hatred, distrust and strife on political, racial, ethnic or religious grounds, by propaganda, speeches or otherwise',[30] holding that no crime at international law was alleged. I agree that such an allegation *standing alone* cannot found a charge of persecution. But, in my view, it is different where the case is that there was a campaign of persecution. Where that is the case, such an allegation, if it forms part of the campaign, may be presented. This would seem to have been the case in the prosecution presented in *Kordić and Čerkez*. Count 1 of the indictment read:[31]

> This campaign of widespread or systematic persecutions was perpetrated, executed and carried out by or through the following means:
> (a) attacking cities, towns and villages inhabited by Bosnian Muslim civilians;
> (b) killing and causing serious injury or harm to Bosnian Muslim civilians, including women, children, the elderly and the infirm, both during and after such attacks;
> (c) encouraging, instigating and promoting hatred, distrust and strife on political, racial ethnic or religious grounds, by propaganda, speeches and otherwise;
> (d) selecting, detaining and imprisoning Bosnian Muslims on political, racial, ethnic or religious grounds;
> (e) dismissing and removing Bosnian Muslims from government, municipal and other positions;
> (f) coercing, intimidating, terrorising and forcibly transferring Bosnian Muslim civilians from their homes and villages;
> (g) physical and psychological abuse, inhumane acts, inhuman treatment, forced labor and deprivation of basic human necessities, such as adequate food, water, shelter and clothing, against Bosnian Muslims who were detained or imprisoned;
> (h) using detained or imprisoned Bosnian Muslims to dig trenches;
> (i) using detained or imprisoned Bosnian Muslims as hostages and human shields;
> (j) wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock, and
> (k) the destruction and wilful damage of institutions dedicated to Muslim religion or education.

16. In my opinion, the Trial Chamber's judgement in that case overlooked the fact that it is not possible fully to present a campaign as persecutory if integral allegations of hate acts are excluded. What is pertinent to such a case is the general persecutory campaign, and not the individual hate act as if it stood alone. The subject of the indictment is the persecutory campaign, not the particular hate act. This was why non-crimes were included with crimes in the *Ministries* case.[32] It may be said that an act, which is ordinarily a non-crime, can no longer be treated as a non-crime if it can be prosecuted when committed in a special context. But the possibility of the act being regarded as criminal if committed in a certain context only reinforces the proposition that the Trial Chamber's exclusion of it in *Kordić and Čerkez*[33] is not consistent with the *Ministries* case, or with other cases of the ICTY; the exclusion is contrary to customary international law and is incorrect.

17. The Appeals Chamber recognised[34] that the Trial Chamber was aware of the distinction between a mere hate speech and a hate speech which amounts to a direct and public incitement to commit genocide.[35] Without more, the Trial Chamber knew that a mere hate speech, *standing alone*, does not amount to direct and public incitement to commit genocide in international law.[36] I

[29] IT-95-14/2-T, 26 February 2001.
[30] *Ibid.*, para. 209 and p. 349.
[31] *Ibid.*, p. 349.
[32] *Ernst von Weizsaker ('Ministries Case')*, Trial of War Criminals, (Nuernberg, 1949), Vol. XIV, p. 471.
[33] IT-95-14/2-T, 26 February 2001.
[34] Appeals Chamber Judgement, para. 696.
[35] See Trial Judgment, paras 978-1029.
[36] *Ibid.*, paras 984 *et seq.*

understand it to be saying that mere 'hate' publications could indeed progress into direct and public incitement to commit genocide but that, unless there was such progression, the crime of direct and public incitement to commit genocide was not committed.[37] Thus, it held that a publication, which was merely a hateful discussion of ethnic consciousness, did not rise to the level of counselling violence against the Tutsis and therefore was not incitement to commit genocide.[38]

18. The problem in this case hinges on the fact that the Trial Chamber made a comparison with the position under certain human rights instruments, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of all Forms of Racial Discrimination, which in pertinent parts require participating states, in their domestic arrangements, to proscribe propaganda that incites racial hatred, discrimination or violence – violence not being indispensable.[39] These instruments operate on the basis that a mere hate speech could be criminalised in domestic law: freedom of expression is not absolute.[40] But the Trial Chamber did not mean that the fact that a prosecution could be brought domestically by virtue of legislation enacted pursuant to these instruments necessarily showed that a similar prosecution could be brought internationally. Those instruments were illustrative, not foundational; they were used by the Trial Chamber to illustrate the nature of the rights breached at international law, not to found a right to complain of a breach at international law.

19. All that can be legitimately extracted from the post-World War II jurisprudence, including *Fritzsche*, is that the underlying acts must be sufficiently grave to affect the 'life and liberty' of the victims – though not necessarily by a physical act against them. It is for an international court to exercise its powers of clarification[41] by explaining what concrete cases will satisfy that criterion. It may be recalled that the ICTY Appeals Chamber, in its discussion of customary international law, unanimously[42] held that 'where a principle can be shown to have been so established, it is not an objection to the application of the principle to a particular situation to say that the situation is new if it reasonably falls within the application of the principle'. A new case, thus decided, is not an extension of customary international law; it is a further illustration of the workings of that law. This at the same time answers criticisms that the principle of legality was breached in this case. In holding that proof of extermination or genocide is not required, a Trial Chamber is not making new law with retrospective application, or at all.

20. To respond to what I believe to be the position of the appellants, I am of the view that, where statements are relied upon, the gravity of persecution as a crime against humanity can be established without need for proof that the accused advocated the perpetration of genocide or extermination.

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[37] *Ibid.*, paras 1020-1021.

[38] *Ibid.*

[39] For example, article 20 of the International Covenant on Civil and Political Rights provides that 'any advocacy of hatred that constitutes incitement to discrimination, hostility or violence' shall be prohibited by law.

[40] See *Gitlow v.People of New York*, 268 U.S. 652, 666 (1925), Mr Justice Sanford stating: 'It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled licence that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.' The problem is to fix the exact limitations of the freedom.

[41] *Aleksovski*, IT-95-14/1-A, 24 March 2000, para. 127.

[42] *Prosecutor v. Hadžihasanović*, IT-01-47-AR72, *Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003*, para. 12. On the particular point, the decision was unanimous, although on some matters there were dissenting opinions.

C. The crime of direct and public incitement to commit genocide is a continuous crime

21. I regret that I am not able to support the finding of the Appeals Chamber that the crime of direct and public incitement of genocide is not a continuous crime; I agree with the contrary view of the Trial Chamber. The matter arises this way:

22. As was recognised by the Trial Chamber, the Tribunal does not have jurisdiction over offences occurring outside of the jurisdictional year of 1994. Article 1 of the Statute expressly confines the jurisdiction of the Tribunal to 'violations committed ... between 1 January 1994 and 31 December 1994.' Based on this fact, the Appeals Chamber holds that *'la Chambre de première instance ne pouvait avoir compétence sur une incitation commise avant 1994 au motif que celle-ci se serait continuée dans le temps jusqu'à la survenance du génocide en 1994.'* [43] It considers that *'l'infraction d'incitation directe et publique à commettre le génocide est consommée dès que les propos en question ont été tenus ou publiés, même si les effets d'une telle incitation peuvent se prolonger dans le temps.'* [44] In other words, the crime is 'instantaneous' – though the word has not been used in the judgement of the Appeals Chamber. So, if the statements were made before 1994, any crime of incitement to commit genocide which they produced was instantaneous and not continuous, and the Tribunal has no jurisdiction. By contrast, the Trial Chamber considers that the crime of incitement to commit genocide 'continues to the time of the commission of the acts incited',[45] and that a previous incitement could therefore be prosecuted provided that liability could only be assigned as from 1 January 1994. Which view is right?

23. There is not much authority in the field. This no doubt is why the judgement of the Appeals Chamber has cited no cases in support of its conclusion.[46] I grant that the absence of precedent is not the same thing as the want of law. The law is to be extracted from the principles of the law as they stand. In considering the state of the law, all relevant sources must of course be taken into account. However, the generality of the issues allows for the exploration of the matter through the only system of which I have some knowledge. It is a principle of that system, and I take it of all legal systems, that caution is to be observed in construing a criminal statute. But, in my respectful opinion, that being done, the applicable law supports a conclusion opposite to that reached by the Appeals Chamber.

24. The inquiry may begin by considering this theoretical situation: An accused perpetrates direct and public incitement to commit genocide on 31 December 1993 – the last day of the previous non-jurisdictional period. He knows that the genocide will not be accomplished immediately. However, it commences on the very next day – on the first day of the jurisdictional period. Is there something to prevent him from being held to have directly and publicly incited the commission of genocide in the jurisdictional period?

25. As the cases show, incitement operates by way of the exertion of 'influence'.[47] Influence is a function of the processes of time.[48] The 1993 acts of the accused did not mysteriously cease to exert

[43] Appeals Chamber Judgement, para. 723.
[44] *Ibid.*
[45] Trial Judgement, para. 104.
[46] See Appeals Chamber Judgement, paras 722 – 723.
[47] See Holmes JA in *Nkosiyana* 1966 (4) SA 655 at 658, AD, defining an inciter as 'one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive'. See also Lord Denning MR in *Race Relations Board v. Applin*, [1973] Q.B. 815 at 825, to the effect that incitement includes both 'persuasion' and 'pressure'.

influence at the moment when they were done. It is true that the crime is complete even though the incited persons do not succumb to the influence. But that is only due to the fact that, as will be argued, the development of the law placed the emphasis on punishing an inciter before the 'innocent' suffered from the commission of the incited crime; it was not meant to prevent punishing an inciter on the basis that his incitement continued – as in fact it would – until it ceased or was fulfilled by the commission of the incited crime.

26. The focus is not on the continuing effect of a cause which is done once and for all,[49] such as a continuing ailment caused by a serious assault; there the effect continues but the cause is instantaneous. Here the focus is on the continuing operation of the cause itself: the continuing operation of the influence exerted by an incitement may cause fresh outbreaks of genocide from time to time. One might consider the act of unlawfully detonating a nuclear device, which causes harm even to children yet unborn. Is the causative act completed at the time of explosion? Or, is the explosion merely the triggering of a cause, which then continues to produce new effects?[50]

27. Consideration may be given to the basis on which *conspiracy*, another inchoate crime, is regarded as continuous. A conspiracy is complete on the making of an agreement to commit an unlawful act or a lawful act by unlawful means.[51] Yet a 'conspiracy does not end with the making of the agreement: it will continue as long as there are two or more parties to it intending to carry out the design'.[52] Why?

28. First, there is a helpful general approach taken by the Supreme Court of Canada. What was before the court was a case in which it was alleged that a fraudulent solicitation was made in Canada of people in the United States. The question was where was the crime committed. Delivering the judgement of the court, La Forest, J., observed that 'the English courts have decisively begun to move away from definitional obsessions and technical formulations aimed at finding a single *situs* of a crime by locating where the gist of the crime occurred or where it was completed'.[53] But here, as it has been said, 'the difficulty lies not in the new ideas, but in escaping from the old ones'.[54] It is prudent to attend to that remark.

29. Second, where parties intend to carry out the design of a conspiracy, they may be regarded – both in English law and in American law – as renewing their agreement of conspiracy from day to day.[55] This is so for the reason given by Lord Salmon, namely, that the parties are 'still agreeing and conspiring'[56] up to the performance of the agreement or its abandonment. Thus, though criminal

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[48] See, too, the above discussion relating to persecution as a crime against humanity.

[49] As in an indictment for procuring the murder of a specific person. That happened in *R. v. Gonzague*, 4 C.C.C. (3rd) 505, 508 (1983), in which the Ontario Court of Appeal said that the offence of procuring 'is complete when the solicitation or incitement occurs even though it is immediately rejected by the person solicited ...'.

[50] This consideration may explain and distinguish *R. v. Wimbledon Justices, ex parte Derwent*, [1953] Q.B. 380, in which it was held that an act of letting a house at a rate in excess of the prescribed maximum was not a continuous offence, i.e., apart from considerations based on the particular wording of the statute involved.

[51] This definition will do for present purposes. However, the exact definition is a matter of controversy. Lord Denman, who originated the definition, seemed to have doubts about its accuracy. See Smith and Hogan, *Criminal Law*, 11th ed. (Oxford, 2005), p.359, footnote 78.

[52] *Archbold, Criminal Pleading, Evidence and Practice, 2007* (London, 2007), para. 34-8.

[53] *Libman v. The Queen*, 21 C.C.C. (3d) 206, 221 (para. 42), cited by the Privy Council in *Liangsiriprasert v. United States*, [1991] A.C. 225.

[54] J.M.Keynes, quoted by Chief Justice Earl Warren at p. 295 of his 'Toward a more active International Court', (1971) 11 Vir. J.I.L. 295.

[55] *DPP v. Doot*, [1973] A.C. 807, Viscount Dilhorne (825), Lord Pearson (829-830), Lord Salmon (835-836). And see *Hyde and Schneider v. U.S.* (1912) 225 U.S.347, and *People v. Mather*, 4 Wend. (N.Y.) 261.

[56] *DPP v. Doot*, [1973] A.C. 807, 835 (H.L.).

jurisdiction is ordinarily[57] territorial, a prosecution may be brought in a territory other than that in which the conspiratorial agreement was made if the intention was to implement it, in whole or in part, in this other territory.

30. The 'renewal' view neutralizes the effect of the agreement of conspiracy being regarded as having been made once and for all, or of the crime being regarded as instantaneous at the time of the first making of the agreement of conspiracy. In similar fashion, it may be said that an inciter stands to be regarded as having renewed his incitement from day to day. I uphold the written submission of the prosecution that 'the violation is constantly renewed by the continuing maintenance of the original criminal purpose'.[58] This view would mean that, in this case, there would be a fresh incitement within the jurisdictional year.

31. The Appeals Chamber has not taken issue with the starting view of the Trial Chamber that, in the case of conspiracy, parties are to be considered as renewing the conspiracy agreement from time to time. If the Appeals Chamber was challenging the 'renewal' view, it could have said so, more particularly as that view was set out in the Trial Judgement.[59] What the Trial Chamber did was to apply the reasoning underlying that view, which related to *conspiracy*, to the case of *incitement*. It is this extension by the Trial Chamber which the Appeals Chamber is disputing. The Appeals Chamber is relying on its own authority, no citations being given.[60] I respect the Appeals Chamber's authority. But I prefer the conclusion reached by the Trial Chamber as being more consonant with principle.

32. Third, as 'Lord Tucker pointed out in Board of Trade v. Owen [1957] 1 All ER 411 at 416, [1957] AC 602 at 626, inchoate crimes of conspiracy, attempt and *incitement*[61] developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the crime.'[62] Lord Tucker referred to Stephen's *History of the Criminal Law*, vol. 2, p. 227, citing Coke's statement that 'in these cases the common law is a law of mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it'.[63] This *justifies* punishing an inciter for his incitement even before the commission of the incited crime; it does not *prevent* him from being punished for his incitement at the time of the commission of the incited crime. This also explains statements to the effect that a crime of incitement is complete when the inciting acts are done; it does not follow that the crime of incitement comes to an end at that point.

33. Fourth, there is ground for considering that a crime which would otherwise be instantaneous would be continuous if repeated in circumstances in which the various acts are closely linked.[64] Thus, the repeated and unlawful holding of a Sunday market 'is a single offence and not a series of

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[57] There are various qualifications.
[58] Consolidated Respondent's Brief, para. 127.
[59] Trial Judgement, paras 101, 104.
[60] See Appeals Chamber Judgement, paras 722 - 723.
[61] Emphasis added.
[62] *Liangsiriprasert v. United States Government*, [1991] 1 A.C. 225, per Lord Griffiths, delivering the judgment of the Privy Council.
[63] *Board of Trade v. Owen*, [1957] A.C. 602, 626. And see Coke's statement in *The Poulterers'* case, 9 Co. Rep. 57a.
[64] See Judge Dolenc's opinion that a crime is continuous if separate acts are closely linked. His view, as set out in a separate and dissenting opinion appended to the Trial Chamber Judgement in *Semanza*, ICTR- 97-20-T, 15 May 2003, para. 32, reads: 'For these acts to be joined together, certain linking elements should be taken into account, such as the repetition of the same kind of crimes, the uniformity of the perpetrator's intent, the proximity in time between the acts, the location, the victim or class of victims, the object or purpose, and the opportunity'. That view, which presumably reflects the civil law position, is not in principle different from the common law position.

separate offences'.[65] In the circumstances of the instant case, an act of incitement, though committed in 1993, would fall to be considered as having been repeated from day to day right into 1994. Some reinforcement of the foregoing view is to be had from the fact that, in *Streicher*,[66] the International Military Tribunal at Nuremberg acted on the view that the many articles published in a weekly from 1938 to 1944 and calling for the destruction of the Jews manifested one course of criminal conduct.[67]

34. Fifth, it is interesting that a work of authority couples incitement with conspiracy for jurisdictional purposes. Archbold writes: 'The common law jurisdiction in respect of incitement appears to be the same as that for conspiracy,...'. [68] That would mean that the Tribunal would have jurisdiction over incitement to the same extent that it would have jurisdiction over conspiracy. Hence, if, as is agreed, conspiracy is a continuing crime, so is incitement.

35. The cases in the books do not concern a special jurisdictional bar such as the kind set up in this case by the vesting of jurisdiction in the Tribunal for only one year, namely, 1994. But, in my opinion, that confined jurisdiction is not to be interpreted as excluding a prosecution for a pre-1994 incitement to commit genocide if it could be reasonably inferred, as the Trial Chamber by implication found, that the appellants knew and intended that the persuasion exerted by such an incitement continued to work in the jurisdictional year. They were engaged in a continuous crime of inciting the commission of genocide. I agree with the view of the Trial Chamber.

D. A pre-jurisdictional act can extend into the later jurisdictional period so as to coexist with an attack on the civilian population during the latter period

36. If the foregoing conclusion is correct, it assists in resolving a related problem. I am referring to a difficulty which I have with the view of the Appeals Chamber that the fact that Kangura was not published during the attack on the civilian population which began on 6 April 1994 defeats the charge of persecution as a crime against humanity on the ground of non-satisfaction of a legal requirement to show that Kangura appeared during the attack. The Appeals Chamber says:

> *La Chambre d'appel note tout d'abord que Kangura n'est pas paru entre le 6 avril et le 17 juillet 1994, période pendant laquelle avait lieu l'attaque généralisée et systématique contre la population tutsie au Rwanda. Ainsi, les articles de Kangura publiés entre le 1er janvier et le 6 avril 1994 peuvent difficilement être considérés comme s'inscrivant dans le cadre de cette attaque généralisée et systématique, même si ces articles peuvent l'avoir préparée. En conséquence, la Chambre d'appel ne peut conclure que les articles de Kangura publiés entre le 1er janvier et le 6 avril 1994 ont réalisé la persécution constitutive de crime contre l'humanité.*[69]

37. It is important to distinguish between the physical publication of *Kangura* and the act of the appellant Mr Ngeze in disseminating his message through *Kangura*; it is to the nature of that act of dissemination that attention should be addressed and not to the physical publication of *Kangura*. The charge of persecution relates not really to the physical publication of *Kangura*, but to the act of the accused in disseminating offending material through *Kangura*. This is not a case in which the

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[65] *Hodgetts v. Chiltern District Council*, [1983] 2 AC 120, 128, HL, Lord Roskill. The idea underlies the practice of indicting in deficiency cases.

[66] Judgement of the International Military Tribunal, Trial of Major War Criminals (1946).

[67] The Trial Chamber considered the case at paras 1007, 1073 and 1076 of the Judgement. *Akayesu*, ICTR-96-4-T, 2 September 1998, was mentioned by the appellants. It concerned a question as to whether the accused could be convicted even though the incited crime was not committed (para. 562). It is not helpful on the problems of continuity raised in this case.

[68] *Archbold, Criminal Pleading, Evidence and Practice, 2007*, (London, 2007), paras 34-74.

[69] Appeals Chamber Judgement, para. 1013.

accused is charged, as he could be in some domestic jurisdictions, with physically publishing a newspaper without complying with some reasonable official requirement (such as the printing of the identity of the publisher); there it would be proper to regard the publication as an instantaneous affair. Not so the act of the accused in disseminating his message through *Kangura*. That act was an act of persuasion; it was not a once-for-all affair. By its very nature, it would continue[70] to send out its message after the publication of *Kangura*. Not merely would it produce a particular effect at a given time, but it could continue as an independent cause of many effects occurring at different later times.

38. It is true that the Appeals Chamber said that the *mens rea* of crimes against humanity is satisfied when, *inter alia*, the accused 'knows that there is an attack on the civilian population and also knows that his acts comprise part of that attack'.[71] It is said that the requirement cannot be satisfied if *Kangura* did not appear during the attack. But that dictum presents no difficulty if the act which the accused does is such, by reason of its nature, as to endure throughout the attack against the civilian population. The important thing is not whether *Kangura* appeared during the attack, but whether the act of the accused in disseminating his message was still exerting its influence. Publication might have been discontinued, but not the influence exerted by the publication. The influence of the publication would have continued during the attack.

39. It is not said that the publication did not, at least in part, cause the attack. That is virtually admitted: in the language of the Appeals Chamber, the publications '*peuvent l'avoir préparée*' or 'may have prepared' the attack.[72] No question of excess of temporal jurisdiction arises. On the views of the Appeals Chamber, granted everything else, the prosecution for persecution would fail even if the last issue of *Kangura* was published on the very eve of the attack. The improbability of an acquittal on that ground is palpable. As I understand the applicable legal concepts, they do not mandate so farcical a result.

E. The pre-1994 *Kangura* publications constituted enough evidence of incitememt to commit genocide

40. The Appeals Chamber disregarded the pre-1994 *Kangura* publications because it held that they were outside of its temporal jurisdiction. For this reason, it did not make a finding as to whether those publications provided evidence on which a trier of fact could reasonably find that the appellants had incited genocide.[73] However, given my view that a pre-1994 incitement can give rise to liability for inciting genocide in 1994, it is necessary to examine these pre-1994 publications to determine whether they constituted evidence of direct and public incitement to commit genocide on which a trier of fact could reasonably make a finding of fact to that effect.

41. As has been noted above, the Appeals Chamber recognised[74] that the Trial Chamber was aware of the distinction between a mere hate speech and a hate speech which amounts to direct and public incitement to commit genocide.[75] With the distinction in mind, the Trial Chamber made a wide-ranging survey of the evidence. In four months, many Tutsis were slaughtered in Rwanda; it is

[70] The subject of continuous offences is dealt with above.
[71] *Blaškić*, IT-95-14-A, 29 July 2004, para. 124. See also *Kordić and Čerkez*, IT-95-14/2-A, 17 December 2004, para. 99.
[72] Appeals Chamber Judgement, para. 1013.
[73] *Ibid.*, para. 314.
[74] *Ibid.*, para. 696.
[75] See Trial Judgment, paras. 978-1029.

common knowledge[76] that some 800,000 perished – possibly more. That was an act of genocide – of monumental proportions, particularly in view of the short time and the basic way in which the crime was perpetrated; even if not the largest such tragedy known to humanity, it was stupendous in scale. The genocide did not spring from nowhere; it would be natural to presume that some developments in the previous years led to it.[77] At the same time, it would be incorrect to assume any particular development. The Trial Chamber made no assumption. It carefully examined the evidence. It found that in the previous years Hutus were systematically incited to do violence against Tutsis.[78] It concluded that the incitement was largely the work of the media. It did not cite every detail of the evidence; it did not have to do that. The judgement runs to 361 pages, in single space. It gave examples of the incitement – many examples. If the argument is that these examples were insufficient to base the conclusion reached by the Trial Chamber, on an appeal the burden of persuading the Appeals Chamber that the Trial Chamber erred lay on the appellants. In my opinion, they have not discharged it.

42. By contrast, the evidence before the Trial Chamber showed that readers were told by the pre-1994 publications to 'cease feeling pity for the Tutsi'. They were asked 'What weapons shall we use to conquer the *Inyenzi* once and for all?', a machete being shown alongside the question and a finding being made that the Inyenzis were the Tutsis.[79] Commenting in paragraph 950 of its judgement, the Trial Chamber considered that the 'cover of *Kangura* ... promoted violence by conveying the message that the machete should be used to eliminate the Tutsi, once and for all.' The evidence supported the reasonableness of that comment.

43. Pre-1994 publications, appearing in *Kangura*, included *The Ten Commandments*, which was published in *Kangura* No. 6 in December 1990.[80] Commandment 16 stated that if 'we fail to achieve our goal, we will use violence'.[81] The Trial Chamber heard testimony that, by reason of the publication of *The Ten Commandments*, 'some men started killing their Tutsi wives, or children of a mixed marriage killed their own Tutsi parents'.[82] With 'regard to the commandment that the Hutu should not take pity on the Tutsi, [another witness] understood this to mean, "In other words they can even kill them", adding, "And that is actually what happened, and I think this was meant to prepare the killings"'.[83] The Trial Chamber said that these 'witnesses perceived a link between *The Ten Commandments* and the perpetration of violence against Tutsi'. The *Kangura* article, an *'Appeal to the Conscience of the Hutu'*, within which *The Ten Commandments* appeared, claimed that the enemy was 'waiting to decimate us'; it called on Hutus to 'wake up', and to 'take all necessary measures to deter the enemy from launching a fresh attack'. The particular wording does not deceive anyone. It is difficult to disagree with the Trial Chamber's finding that the 'text' of the *Appeal to the Conscience of the Hutu* 'was an unequivocal call to the Hutu to take action against the Tutsi ...'.[84]

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[76] See *Karemera*, ICTR 98-44-AR73(C), 16 June 2006, where the Appeals Chamber directed the Trial Chamber to take judicial notice under Rule 94(A) of the fact that '[b]etween 6 April 1994 and 17 July 1994, there was a genocide in Rwanda against the Tutsi ethnic group'.
[77] See the observation of the Soviet delegate on the occasion of the adoption of the Genocide Convention, referred to in para. 551 of *Akayesu*, ICTR-96-4-T, 3 September 1998, and Trial Judgement, para. 978.
[78] Trial Judgement, paras 120-121, 1026-1034.
[79] *Ibid.*, paras 158-160, 170-173.
[80] *Ibid.*, para. 138.
[81] *Ibid.*, para. 144.
[82] *Ibid.*, para. 140.
[83] *Ibid.*, para. 141.
[84] *Ibid.*, para. 153.

44. The Trial Chamber believed the witnesses as to how the publications were in fact interpreted by Hutus. It said that it 'considers the views of these witnesses to be well-founded and a reasonable illustration that an anti-Tutsi message of violence was effectively conveyed and acted upon'.[85] For a reasonable tribunal of fact to have found otherwise would have been curious, to say the least. Straighter terms in a public message were not to be expected; but, taking account of code words, metaphors, double entendre, 'mirror' expressions, and local culture, I am of the view that there was enough evidence on which the Trial Chamber could reasonably hold that the language used was understood by the public in Rwanda to be genocidal in import.

45. The appellants were deliberately pounding out a series of drumbeats with the expectation that, incrementally, these would one day explode in the national genocide which in fact took place. The appellants could not be prosecuted for any liability accruing in the years before 1994; but they would have liability as from 1 January 1994 for previous publications and could be prosecuted for that liability.

F. In any event, there was enough evidence that, in the jurisdictional year of 1994, *Kangura* published inciting material

46. I support the view of the Appeals Chamber that, in any event, there was enough evidence that, in 1994, *Kangura* published inciting material.[86] It is only necessary to refer specifically to two points.

47. The first point, on which I agree with the Appeals Chamber,[87] concerns an editorial. In February 1994, an editorial in *Kangura* said that 'blood will really flow. All the Tutsis and the cowardly Hutus will be exterminated'.[88] The Trial Chamber was entitled to say – and to say without difficulty – what this meant to those to whom it was addressed. It said, 'While the content is in the form of a political discussion, the descriptive and dispassionate tenor of journalism is notably absent from the text, which consequently has a threatening tone rather that an analytical one'.[89] So the Trial Chamber considered the possible interpretations to be placed on the text. The interpretation which it accepted was reasonably supported by the evidence: the paper was not merely saying what was possible; it was calling for extermination. It was not analysing, it was threatening – threatening with genocide. The Appeals Chamber has rightly accepted the views of the Trial Chamber.

48. The second point, on which I respectfully disagree with the majority, concerns a competition. Twice in March 1994 *Kangura* advertised a competition asking questions requiring a reading of pre-1994 *Kangura* articles which, as explained above, incited genocide; it also offered prizes. The Appeals Chamber considers that the earlier publications were not 'put back into circulation in March 1994'[90] by the competition organized in that month. If the test were whether the pre-1994 articles were 'put back into circulation in March 1994' in the sense of being republished physically in that month, I would agree. But that is not the test. The test is whether the acts of the appellant (Mr Ngeze) in 1994 incited genocide. Here it is necessary to see what he did through the 1994 advertisement. He invited the public to read the pre-1994 articles. Since those articles incited genocide, by inviting the public in 1994 to read those articles the appellant in 1994

[85] *Ibid.*, para. 158 – 'an anti-Tutsi message of violence was effectively conveyed and acted upon'.
[86] Appeals Chamber Judgement, para. 886.
[87] *Ibid.*, para. 773.
[88] Trial Judgement, para. 225.
[89] *Ibid.*, para. 226.
[90] *Ibid.*, paras 436 and 553.

(the jurisdictional year) did commit an act which incited genocide. It was the act of inviting readers to read the old articles that mattered, not the physical reproduction of the articles.

49. It is true, as noted by the Appeals Chamber,[91] that there is not enough evidence to demonstrate that all the pre-1994 issues of *Kangura* were easily available.[92] The pre-1994 issues went back four or five years; only the very recent ones, such as Nos. 58, 59 and 60, could reasonably be expected to be still available for sale. But readers were fairly understood to be asked to familiarise themselves with all the material – whether in their possession or in that of others, whether to be purchased or not. For example, issue No 58 asked readers, 'in which edition of *Kangura* did this appear?' As counsel for the prosecution said, 'that was a call, an invitation to read back editions'.[93] It was clear to the Trial Chamber that, as it found, in 'light of its stated purpose, the exercise was in fact designed to familiarise readers with past issues and ideas of *Kangura*'.[94] I have difficulty in disagreeing with that finding. In addition, it was not a question whether readers could in fact do what they were asked to do; the question was what were they asked to do. By one means or another, *Kangura* intended to renew public memory of pre-1994 incitements. The process of renewal was occurring in 1994. Therefore, there was a fresh incitement in that jurisdictional year.

50. The Trial Chamber found 'that the competition was designed to direct participants to any and to all of these issues of the publication and that in this manner in March 1994 *Kangura* effectively and purposely brought these issues back into circulation'.[95] By the phrase 'in this manner', the Trial Chamber was saying the same thing as above. The old publications were of course not physically republished, and the Trial Chamber did not say that, but attention was being drawn to them – all of them – more so because prizes were being offered. It was in that 'manner' that the Trial Chamber found that the old publications of *Kangura* were 'effectively and purposely brought ... back into circulation'. The finding of the Trial Chamber was reasonably supported by the evidence.

51. The Appeals Chamber also takes the view that the fact that the competition allegedly 'brought back into circulation' issues of *Kangura* published prior to 1 January 1994 was not pleaded in Mr Ngeze's indictment.[96] The objection mixes up averments of fact with evidence of the fact. The former have to be pleaded in the indictment, not the latter. The indictment averred that the appellants worked 'out a plan with intent to exterminate the civilian Tutsi population' and that the 'incitement to ethnic hatred and violence was a fundamental part of the plan'.[97] That was the required averment of fact. The prosecution sought to support that averment of fact by adducing evidence of the competition in March 1994 which had the effect of reproducing certain incitements of the pre-1994 period. With respect, the criticism of the course taken by the prosecution is weak.

G. <u>There was enough evidence that, in 1994, RTLM broadcast inciting material</u>

52. Two periods of the jurisdictional year need to be considered, *viz.*, 1 January 1994 to 6 April 1994, and the remainder of that year. The break does not mark a jurisdictional boundary; it marks only the time when the appellants' level of control over RTLM itself, or over RTLM

[91] Appeals Chamber Judgement, para. 409.
[92] Trial Judgement, para. 436.
[93] Trial transcript, 14 May 2002, pp. 154. See also, *ibid.*, pp. 171-172.
[94] Trial Judgement, para. 256.
[95] *Ibid.*, para. 257.
[96] Appeals Chamber Judgement, paras 406 - 407.
[97] See, for example, paras 5.1 and 5.2 of the indictment against Mr Nahimana.

journalists and employees, changed, coinciding with the commencement of the genocide. Still, it would be convenient to discuss the matter in the framework of the two periods.

1. 1 January 1994 to 6 April 1994

53. I am unable to support the Appeals Chamber's view that RTLM did not incite genocide from 1 January 1994 to 6 April 1994.[98] RTLM's interaction with *Kangura* has to be considered. The Trial Chamber correctly found that RTLM and *Kangura* were conducting a 'joint enterprise'.[99] That was said in relation to the *Kangura* competition of March 1994, which I consider amounted to incitement. RTLM made a broadcast of the *Kangura* competition later that month. Thus, like the March 1994 issues of *Kangura* itself, RTLM adopted all of the *Kangura* articles of the pre-1994 period, which the Trial Chamber clearly considered incited genocide. There is nothing vague about the Trial Chamber's position on the question whether between 1 January 1994 and 6 April 1994 *Kangura* incited genocide. The contrary view really amounts to a rejection of the Trial Chamber's finding that the March 1994 competition had the effect of bringing back into circulation the pre-1994 issues of *Kangura.* On the rules regulating the functioning of an appellate court, I consider that rejection of the Trial Chamber's finding to be in excess of the authority of the Appeals Chamber.

54. In another RTLM broadcast, which was unquestionably made on 16 March 1994 by Valerie Bemeriki (otherwise found to be a liar), she said that listeners were ready to support their army by taking 'up any weapon, spears, bows ... Traditionally, every man has one at home, however, we shall rise up'.[100] Hutus were being called to arms before 6 April 1994; any suggestion to the contrary cannot be right. And the object was clear – to kill the Tutsis as a racial group.

55. In these ways, RTLM became a party to the incitement before 6 April 1994. However, it is sought to say that this is not the case. That contrary view is based on the fact that the Trial Chamber found that '[a]fter 6 April 1994 [when the genocide started], the fury and intensity of RTLM broadcasting increased, particularly with regard to calls on the population to take action against the enemy'.[101] I am not in favour of a view that this means that, in the opinion of the Trial Chamber, RTLM had not been engaged, before 6 April 1994, in incitement to commit genocide. The statement does not mean that there was no incitement before that date, or that such incitement as there was before that date was neither furious nor intense. Incitement existed; it was furious and intense; its furiousness and intensity merely increased later.

2. The period after 6 April 1994

56. Here I agree with the Appeals Chamber that the RTLM was inciting genocide in the period following 6 April 1994.[102] As explained above, the momentum increased after 6 April 1994, when the genocide commenced; it is not to be overlooked that subsequent broadcasts were made against the background of an ongoing genocide and were clearly intended to be understood as endorsing that genocide. In an RTLM broadcast of 13 May 1994, Kantano Habimana, a journalist, spoke of exterminating the Inkotanyi so as 'to wipe them from human memory' and of exterminating the Tutsi 'from the surface of the earth ... to make them disappear for good'.[103] On 23 May 1994, he

[98] Appeals Chamber Judgement, para. 754.
[99] Trial Judgement, para. 255.
[100] *Ibid.*, para. 387.
[101] Trial Judgement, para. 481. See also para. 486.
[102] Appeals Chamber Judgement, para. 758.
[103] Trial Judgement, para. 483.

said on RTLM, 'At all costs, all Inkotanyi have to be exterminated, in all areas of our country'.[104] Another RTLM broadcast was made on 4 June 1994, in which he said, 'One hundred thousand young men must be recruited rapidly. They should all stand up so that we kill the Inkotanyi and exterminate them, all the easier ... [T]he reason we will exterminate them is that they belong to one ethnic group'.[105] A few days later there was a bloodcurdling RTLM broadcast in which he said that the Inkotanyi 'looked like cattle for the slaughter'.[106] The 'fighting' words 'kill' and 'exterminate', used in these broadcasts, had occurred in the Jew-baiting articles published in Der Stürmer. The Appeals Chamber agreed with the Trial Chamber that the reference to the Inkotanyi was a reference to the Tutsis[107] - a finding that is important. Symptomatic of its evolution, by 6 April 1994 the RTLM became known as 'Radio Machete'.[108] Thus, the Appeals Chamber was correct in agreeing with the Trial Chamber that RTLM was inciting genocide in the period following 6 April 1994.

H. The Trial Chamber had enough evidence that the appellants personally collaborated with the specific purpose of committing genocide

57. I regret that I cannot support the finding of the Appeals Chamber that there was not sufficient evidence that the appellants collaborated over the commission of genocide.[109] The Appeals Chamber accepts that a genocidal agreement among them can be inferred from the evidence.[110] But, in dealing with the evidence, it then says:

> *La question à ce stade pour la Chambre d'appel est de savoir si, à supposer que cette coordination institutionnelle ait été établie, un juge des faits raisonnable pouvait en conclure que la seule déduction raisonnable possible était que cette coordination institutionnelle résultait d'une résolution d'agir concertée en vue de commettre le génocide. Or, s'il ne fait aucun doute que l'ensemble de ces conclusions factuelles sont compatibles avec l'existence d'un « programme commun » visant la commission du génocide, il ne s'agit pas là de la seule déduction raisonnable possible. Un juge des faits raisonnable pouvait aussi conclure que ces institutions avaient collaboré pour promouvoir l'idéologie « Hutu power » dans le cadre du combat politique opposant Hutus et Tutsis ou pour propager la haine ethnique contre les Tutsis, sans toutefois appeler à la destruction de tout ou partie de ce groupe.*[111]

In paragraph 912 of its judgement, the Appeals Chamber concludes:

> *La Chambre d'appel considère qu'un juge des faits raisonnable ne pouvait conclure au-delà de tout doute raisonnable, sur la base des éléments récapitulés ci-dessus, que la seule déduction raisonnable possible était que les Appelants avaient collaboré personnellement et qu'ils avaient organisé une coordination institutionnelle entre la RTLM, la CDR et Kangura dans le but de commettre le génocide. Elle fait droit au moyen correspondant des Appelants et annule les déclarations de culpabilité prononcées contre les Appelants Nahimana, Barayagwiza et Ngeze pour le crime d'entente en vue de commettre le génocide (premier chef d'accusation des trois Actes d'accusation dressés à leur encontre). L'incidence de ces annulations sera considérée plus loin, dans le chapitre consacré à la peine. Elle rejette, les considérant sans objet, les autres arguments soulevés par les Appelants.*

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[104] *Ibid.*, para. 425.
[105] *Ibid.*, para. 396.
[106] *Ibid.*, para. 415.
[107] Appeals Chamber Judgement, para. 53. *Cf. ibid.*, paras 740 -751, relating to the broadcast of 16 March 1994; the text of the broadcast was not directed to the equivalence between Inkotanyi and Tutsis, but the general context showed it.
[108] Trial Judgement, paras 444 & 1031.
[109] See Appeal Chamber Judgement, para. 912.
[110] *Ibid.*, para. 896.
[111] *Ibid.*, para. 910.

58. It does not appear that the Appeals Chamber held that the accused did not personally collaborate. What it held was that they did not personally collaborate '*dans le but de commettre le génocide*'.[112] The question raised by the Appeals Chamber was whether they collaborated merely over the promotion of 'Hutu power' by non-genocidal means, or whether they collaborated over the achievement of that aim by the specific means of genocide.

59. The Appeals Chamber accepts that genocidal purposes were '*compatibles avec l'existence d'un « programme commun » visant la commission du génocide*'[113]; in other words, it accepted that the evidence *could* support the view that the collaboration had a genocidal purpose. What it says is that a more limited purpose was equally compatible with the existence of that '*programme commune*' or 'joint agenda', namely, the purpose of promoting Hutu power by non-genocidal means, and that therefore the promotion of Hutu power by genocide was not proved beyond reasonable doubt. There are four answers.

60. First, since the Appeals Chamber had no 'doubt' that a genocidal purpose was 'compatible' with the 'joint agenda' of the appellants, the Appeals Chamber is to be taken to admit that there was evidence before the Trial Chamber on which it *could* reasonably hold that the purpose of their collaboration was to commit genocide. The Appeals Chamber has no basis for disagreeing with the holding which the Trial Chamber *proceeded* to make on that evidence; that holding is not shown to have been unreasonable.

61. Second, there seems to have been no argument before the Trial Chamber as to whether the aim of any collaboration was the establishment of Hutu power by means short of genocide. Paragraph 906 of the Appeals Chamber Judgement does not suggest that there was any such argument. There was no such argument because the argument would imply that the appellants did collaborate on some matters – and this they stoutly denied.[114] Thus, the argument that the aim of any collaboration was limited to the establishment of Hutu power by non-genocidal means was not made. In the result, the Appeals Chamber is without the benefit of the views of the parties or of the Trial Chamber on the argument.

62. Third, there is a consideration concerning the limited thrust of an argument that, in addition to the principle that guilt must be proved beyond reasonable doubt, in cases in which the evidence is purely circumstantial, the court must acquit unless the facts are not only consistent with guilt but are also inconsistent with any other rational explanation. The principle sought to be invoked by the argument does not stand in glorious independence of the principle that guilt must be proved beyond reasonable doubt, but is a consequence of the latter: if another explanation can with equal reason be drawn, it follows that guilt has not been proved beyond reasonable doubt.[115] No doubt, the rule about there being another equally reasonable explanation is a suitable way (particularly if there is a jury) of applying the general rule about reasonable doubt in some cases of circumstantial

[112] *Ibid.*, para. 912.
[113] Appeals Chamber Judgement, para. 910.
[114] See, for example, Nahimana's submissions during the appeal hearing, Transcript of the Appeals Chamber, 17 January 2007, at p. 6; Barayagwiza Appellant's Brief, para. 244; Ngeze Appellant's Brief, para. 289(ii).
[115] *McGreevy v. DPP* [1973] 1 All E.R. 503, HL. There are variations in other jurisdictions. See, for example, *Barca v. The Queen*, [1975] 113 C.L.R. 82, 104, *De Gruchy v. The Queen*, 211 CLR 85 (2002) HCA, para. 47, and *R. v. Chapman*, [2002] 83 S.A.S.R. 286, 291.

evidence,[116] and it has been employed by the Tribunal; but it does not introduce a separate or more stringent rule, being more a matter of form than of substance.

63. And, fourth, it has to be borne in mind that the trial jurisdiction was given to the Trial Chambers – not to the Appeals Chamber. The Appeals Chamber is to correct any errors which the Trial Chambers made; it must exercise that corrective jurisdiction firmly; but it must take care not to wrest the jurisdiction of the Trial Chambers or to act as an overseer. Appellate jurisdiction is not to be exercised to determine whether the appellate court agrees with a finding of fact made by the trial court, except in the sense of determining whether there was evidence on which a reasonable trier of fact could make that finding. If there was such evidence before the Trial Chamber, in the absence of a clear error of reasoning, it is immaterial that the Appeals Chamber, if it were the Trial Chamber, would have made a different finding of fact.[117] Otherwise, the competence of the Appeals Chamber to say whether there was evidence before the Trial Chamber on which a reasonable trier of fact could have made the same finding as the Trial Chamber degenerates into a device for escaping from the Appeals Chamber's duty to defer to the Trial Chamber's findings of fact.

64. In my view, there was enough material on which the Trial Chamber could reasonably find, as it did, that the three appellants personally collaborated with the specific purpose of committing genocide. Nor is the legal consequence of that collaboration to be overlooked. It meant that the appellants were responsible for the acts committed by each other; thus, there is no need for the Appeals Chamber to be preoccupied with the question whether the liability for any act physically done by one of the appellants is to be confined to him alone. More particularly, it meant that any inadequacy in the publications in *Kangura* could be filled by the transmissions of RTLM, and *vice versa*. It was only if the total material disseminated by both *Kangura* and the RTLM was deficient that the prosecution would fail; I do not find any basis for suggesting an overall deficiency.

I. Whether any incitement was direct and public

65. A last point is whether any incitement was direct and public. It is not necessary to debate whether any incitement was public: it clearly was. It is more useful to consider whether it was direct. On this point, I fully accept that a prosecution fails if all that is established is that the incitement was vague or indirect; there must be no room for misunderstanding its meaning. Sometimes it is said that the incitement has to be 'immediate', which term is probably used in the dictionary sense of 'pressing or urgent'. The incitement must call for immediate action, but it certainly is not the case that the prosecution has to show that genocide in fact followed immediately after the message or at all. That would collide with the established law that the desired result does not have to be proved. So the fact that earlier messages were not followed by a genocide is not relevant. But some other qualifications have to be understood.

66. First, it is not necessary to require proof that incitement to commit genocide was made expressly, or that the term 'direct' was used in the findings of the Trial Chamber, even though the

[116] See *Knight v. The Queen*, (1992) 175 CLR 495, at 502, in which Mason CJ, Dawson and Toohey JJ considered the rule that the jury had to be directed that they should only find by inference an element of the crime charged if there were no other inference or inferences which were favourable to the appellant, and remarked that the rule 'is a direction which is no more that an amplification of the rule that the prosecution must prove its case beyond reasonable doubt and the question to which it draws attention - that arising from the existence of competing hypotheses or inferences – may occur in a limited way in a case which is otherwise one of direct rather than circumstantial evidence'.
[117] *Kupreškić*, IT-95-16-A, 23 October 2001, para. 30, quoting *Tadić*, IT-94-1-A, first separate opinion, para. 30.

term was in fact used by it; there is no need for sacramental words.[118] Euphemisms are often employed; and local culture has to be taken into account. As the Trial Chamber indicated, there may be no 'explicit call to action'.[119] But, as it found in this case, 'The message was nevertheless direct. That it was clearly understood is overwhelmingly evidenced by the testimony of witnesses that being named in *Kangura* would bring dire consequences'.[120] In other words, the question is, how was the message understood by those to whom it was addressed?

67. Second, it is necessary to attend to the methodology used by the Trial Chamber in answering the question whether the appellants intended specifically to incite others to commit genocide. Sometimes, the Trial Chamber would answer the question as a formal part of its findings. Sometimes it would impliedly answer the question in the course of dealing with the testimony of witnesses. Sometimes it might say expressly that the witness was credible, sometimes it might not. It does not matter how the Trial Chamber proceeded, provided that its position was clear. In my view, it was.

68. Third, whether the incitement was specific has to be judged on the evidence of the public's understanding of it, and that is *ultimately* a question of fact to be determined by the Trial Chamber. The Appeals Chamber could interfere but only if it considered that the inference which the Trial Chamber drew from the evidence was one which no reasonable tribunal of fact could draw. There could be lack of reasonableness if the Trial Chamber drew an inference of guilt from evidence which merely showed that the appellants were preaching a sermon on the mount. But this lamentably is not that kind of case.

69. The Trial Chamber had many RTLM broadcasts before it. I do not know of any rule which required it to reproduce them individually or verbatim in its judgement. Giving its impression of the broadcasts taken together, it said that 'many of the RTLM broadcasts explicitly called for extermination'.[121] Likewise, it said, 'The Chamber has also considered the progression of RTLM programming over time – the amplification of ethnic hostility and the acceleration of calls for violence against the Tutsi population. In light of [the] evidence..., the Chamber finds this progression to be a continuum that began with the creation of RTLM radio to discuss issues of ethnicity and gradually turned into a seemingly non-stop call for the extermination of the Tutsi.'[122] Then there is this passage in the Trial Judgement:

> The [Trial] 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. RTLM actively encouraged them to kill, relentlessly sending the message that the Tutsi were the enemy and had to (*sic*) [be] eliminated once and for all.[123]

70. Also, the relaxation of the hearsay rule permitted the Trial Chamber to rely on the evidence of witnesses who had listened to the programmes of RTLM. 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

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[118] M. Politis said that international law avoids sacramental words; see his argument in *Mavrommatis Concessions, P.C.I.J., Series C, No. 5-I*, (1924), p.50.
[119] Trial Judgement, para. 1028.
[120] *Ibid.*
[121] Trial Judgement, para. 483. See also, *ibid.*, paras. 484-485.
[122] *Ibid.*, para. 485.
[123] *Ibid.*, para. 488.

were encouraged to continue killing them so that future generations would have to ask what *Inyenzi* or Tutsi looked like'.[124] The Trial Chamber found Witness GO to be credible.[125] Dahinden, whom the Trial Chamber also considered to be credible,[126] 'said that beginning on 6 April 1994, RTLM had "constantly stirred up hatred and incited violence against the Tutsis and Hutu in the opposition, in other words, against those who supported the Arusha Peace Accords of August 1993."'[127]

71. Prosecution Expert Witness Alison Des Forges might be challenged in other fora[128] on other points but this does not affect her testimony in the Trial Chamber that –

> [T]he message she was getting from the vast majority of people she talked to at the time of the killings was 'stop RTLM'. She noted that potential victims listened to RTLM as much as they could, from fear, and took it seriously, as did assailants who listened to it at the barriers, on the streets, in bars, and even at the direction of authorities. She recounted one report that a *bourgmestre* had said, 'Listen to the radio, and take what it says as if it was coming from me'. Her conclusion on the basis of the information she gathered was that RTLM had an enormous impact on the situation, encouraging the killing of Tutsis and of those who protected Tutsis.[129]

72. Matters previously referred to must not be revisited. Enough has been cited to show that there was evidence on which the Trial Chamber could reasonably find that RTLM was 'constantly asking people to kill other people', namely, Tutsis; that it was engaged in an 'acceleration of calls for violence against the Tutsi population'; that it was 'whipping them [the Hutus] into a frenzy of hatred and violence that was directed largely against the Tutsi ethnic group'; that it was making 'a seemingly non-stop call for the extermination of the Tutsi'. In these and other ways, RTLM was directly inciting the public to commit genocide. Because of collaboration, all the appellants would be caught by that finding. In addition, they would have liability through the *Kangura* publications. In sum, there was ample evidence on which the Trial Chamber could reasonably find that incitement by the appellants through both *Kangura* and RTLM was direct.[130]

J. Conclusion

73. The case is apt to be portrayed as a titanic struggle between the right to freedom of expression and abuse of that right. That can be said, but only subject to this: No margin of delicate appreciation is involved. The case is one of simple criminality. The appellants knew what they were doing and why they were doing it. They were consciously, deliberately and determinedly using the media to perpetrate direct and public incitement to commit genocide. The concept of guilt by association is a useful analytical tool, but, with respect, it can also be a battering ram; in my opinion, there is no room for its employment here. It was the acts of the appellants which led to the deeds which were done: a causal nexus between the two was manifest. The appellants were among the originators and architects of the genocide: that they worked patiently towards that end does not reduce their responsibility. The evidence reasonably supported the finding by the Trial Chamber that –

> *Kangura* and RTLM explicitly and repeatedly, in fact relentlessly, targeted the Tutsi population for destruction. Demonizing the Tutsi as having inherently evil qualities, equating the ethnic group with 'the enemy' and portraying its women as seductive enemy agents, the media called for the

[124] *Ibid,*. para. 483.
[125] *Ibid,*. para. 464.
[126] *Ibid,*. paras 464 and 546.
[127] *Ibid,*. para. 457.
[128] See *Mugesera v. Canada*, 2003 FCA 325.
[129] Trial Judgement, para. 458. Other footnotes omitted.
[130] *Ibid.*, paras 1033, 1034 and 1038.

extermination[131] of the Tutsi ethnic group as a response to the political threat that they associated with Tutsi ethnicity.[132]

74. In the light of that and other similar findings, the Trial Chamber correctly noted that the 'present case squarely addresses the role of the media in the genocide that took place in Rwanda in 1994'.[133] In its view, the 'case raises important principles concerning the role of the media, which have not been addressed at the level of international criminal justice since Nuremberg. The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences'.[134] I agree.

75. For the foregoing reasons, I would maintain the judgement of the Trial Chamber save on three points. First, I agree with the Appeals Chamber in reversing the convictions of Mr Ngeze as far as they relate to his acts in Gisenyi;[135] this is due to the findings of the Appeals Chamber as to the credibility of a prosecution witness, there being in particular a question as to whether he recanted his testimony after the trial. Second, I agree with the Appeals Chamber that Mr. Barayagwiza cannot be held liable for all the acts committed by any CDR members,[136] and accordingly support the reversal of his convictions pursuant to article 6(3) insofar as they relate to his superior responsibility over CDR militias and *Impuzamugambi*. Third, I agree with the Appeals Chamber in reversing a conviction in cases where two convictions for the same conduct have been made under both paragraphs 1 and 3 of article 6 of the Statute, only a conviction under one paragraph being allowed.

76. These variations do not disable me from recognising that the case was a long and complicated one. The Trial Judgement has been the subject of many comments – all useful and interesting, if occasionally unsparing. For myself, I am mindful of the danger of thinking differently from respected fellow-members of the bench. I am sensible to the force of the opposing arguments, and appreciate the wisdom of being wary of a 'doctrinal disposition to come out differently'.[137] These weighty considerations oblige me to regret that, on the record, I see no course open to me but to dissent in part.

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[131] Emphasis added.
[132] Trial Judgement, para. 963.
[133] *Ibid.*, para. 979.
[134] *Ibid.*, para. 945.
[135] Appeals Chamber Judgement, para. 468.
[136] *Ibid.*, para. 882, 1003
[137] *See Lewis v. Attorney General of Jamaica and Another*, [2001] 2 AC 50 at 90, Lord Hoffmann, dissenting.

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

[Signed]

Mohamed Shahabuddeen
Judge

Signed 22 November 2007 at The Hague, The Netherlands
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

10490 6s/A

XXI. PARTLY DISSENTING OPINION OF JUDGE GÜNEY

1. In *Kordić and Čerkez*[1] and *Naletilić and Martinović*,[2] Judge Schomburg and I clearly stated that we were opposed to the reversal of the case-law by the majority of the Judges of the ICTY Appeals Chamber on the issue of cumulative convictions entered for persecution as a crime against humanity – a crime punishable under Article 5 of the ICTY Statute – and for imprisonment, murders, expulsion, extermination and other inhumane acts entered pursuant to the same Article and based on the same facts. I also made my position known on this issue in my Dissenting Opinion appended to the Appeals Chamber's Judgement in *Stakić*.[3] In the instant case, the majority of the Appeals Chamber agrees with the reasoning of the majority in the *Kordić and Čerkez* and *Stakić* Appeal Judgements and, on the basis of the same facts,[4] found Appellant Barayagwiza guilty of both persecution and extermination as crimes against humanity under Article 3 of the ICTR Statute.[5] I cannot endorse the findings of the majority of the Appeals Chamber in this matter and remain in disagreement with the underlying reasoning.

2. I shall not repeat here all the arguments I have developed in my previous Dissenting Opinions, and would specifically refer to these. I am, however, concerned to make the point that persecution as a crime against humanity has, in my view, to be seen as an empty hull, a sort of residual category designed to cover any type of underlying act. It is only when the underlying act of persecution is identified that the offence punishable under Article 3(h) of the ICTR Statute – Article 5(h) of the ICTY Statute - takes on a concrete form. Without the underlying act, the hull represented by the offence of persecution remains empty.

3. I therefore consider it futile to construe in a rigid and purely theoretical manner the concept of "materially distinct element", which is central to ICTR and ICTY case-law on cumulative convictions for purposes of a comparison between the crime of persecution and other crimes against humanity.[6] Thus I believe that, in specific cases where a Chamber has to consider the issue of cumulative convictions entered in respect of the same facts for persecution and for other crimes against humanity, it cannot – if it wishes to give an account of the accused's criminal conduct in as complete and fair a manner as possible – merely compare the constituent elements of the crimes in question, but must also consider the acts underlying the crime of persecution, without which there is no crime.

4. Hence, faced as it was in the present case with the issue of cumulative convictions for persecution and extermination as crimes against humanity on the basis of the same acts, the Appeals

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[1] *Dario Kordić and Mario Čerkez v. Prosecutor*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement"), Chapter XIII: "Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions".

[2] *Mladen Naletilić, alias "Tuta", and Vinko Martinović, alias "Štela" v. Prosecutor*, Case No. IT-98-34-A, Appeal Judgement, 3 May 2006 ("*Naletilić and Martinović* Appeal Judgement"), Chapter XII: "Joint Dissenting Opinion of Judge Schomburg and Judge Güney on Cumulative Convictions".

[3] *Milomir Stakić v. Prosecutor*, Case No. IT-97-24-A, Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), Chapitre XIV: "*Opinion dissidente du Judge Güney sur le cumul de déclarations de culpabilité*".

[4] Namely, the murders committed by CDR militants and *Impuzamugambi* at roadblocks supervised by Appellant Barayagwiza: Appeal Judgement, para. 1025; see also paras. 946 and 1002.

[5] Appeal Judgement, paras. 1026-1027.

[6] I am referring to the test applied in the *Čelebići* Appeal Judgement, namely that cumulative convictions for the same fact and on the basis of different statutory provisions are permissible only if each provision involved has a materially distinct element not contained in the other. According to this Judgement, an element is materially distinct from another if it requires proof of a fact not required by the other: *Čelebići* Appeal Judgement, paras. 400 *et seq*.

Chamber should have relied, in order to convict Appellant Barayagwiza, only on the most specific provision, namely the crime of persecution.

5. Should I decide to remain silent on this matter in future cases, my silence should not in any way be construed as an approval of the reversal of the case-law by the majority of the Judges of the ICTR and ICTY Appeals Chambers.

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

[Signed]

Mehmet Güney
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

10488bis/A

XXII. PARTLY DISSENTING OPINION OF JUDGE MERON

A. The Case Should Have Been Remanded

1. The sheer number of errors in the Trial Judgement indicates that remanding the case, rather than undertaking piecemeal remedies, would have been the best course. Although any one legal or factual error may not be enough to invalidate the Judgement, a series of such errors, viewed in the aggregate, may no longer be harmless, thus favoring a remand. Such is the case here. Throughout the Appeals Judgement, the Appeals Chamber has identified several errors in the Trial Chamber decision, some of which it deems insufficient to invalidate the Judgement.[1] At other times, the Appeals Chamber has acted as a fact-finder in the first instance and substituted its own findings in order to cure the errors[2] when, in fact, the Trial Chamber is the body best suited to this task.

2. The volume of errors by the Trial Chamber is obvious as demonstrated by the numerous convictions that the Appeals Chamber reverses as well as the issue that I discuss below. Based on the quashed convictions and the cumulative effect of other errors, I believe that a remand was clearly warranted.

B. Nahimana's Conviction for Persecution (RTLM Broadcasts)

3. The Trial Chamber convicted Appellant Nahimana for persecution pursuant to Articles 3(h), 6(1), and 6(3) of the Statute, and the Appeals Chamber has affirmed the conviction based on Articles 3(h) and 6(3). The conviction rests on Appellant Nahimana's superior responsibility for the post-6 April RTLM broadcasts. My objections to the conviction for persecution are two-fold: first, from a strictly legal perspective, the Appeals Chamber has improperly allowed hate speech to serve as the basis for a criminal conviction; second, the Appeals Chamber has misapplied the standard that it articulates by failing to link Appellant Nahimana directly to the widespread and systematic attack.

4. By way of clarification, when I refer to "mere hate speech," I mean speech that, however objectionable, does not rise to the level of constituting a direct threat of violence or an incitement to commit imminent lawless action.[3] Hate speech, by definition, is vituperative and abhorrent, and I

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[1] To take a few examples: The Appeals Chamber explicitly holds that the Trial Chamber violated Appellant Barayagwiza's *right to counsel, one of the most fundamental rights enjoyed by an accused in a criminal proceeding.* Appeals Judgement, para. 173 (noting that the Trial Chamber undermined the equity of the proceedings and violated the principle of equality of arms). In addressing Appellant Ngeze's alibi defense, the Trial Chamber asserted that Ngeze's alibi was no alibi at all because, even if it were true, Ngeze still could have committed the acts with which he was charged. The Appeals Chamber finds such "pure speculation" to be an error. Appeals Judgement, para. 433. The Appeals Chamber also finds that the Trial Chamber erred when it noted that Ngeze reminded RTLM listeners not to kill Hutus accidentally instead of Tutsis. Ascribing to Ngeze the converse of this statement—that killing Tutsis at the roadblocks was acceptable—would have been an impermissible basis for finding genocidal intent. Appeals Judgement para. 569. Similarly, with regard to Appellant Barayagwiza, the Appeals Chamber finds that the Trial Chamber erred by failing to specify for what purpose it referred to Barayagwiza's pre-1994 statements at CDR meetings. If the Trial Chamber had used such statements to establish a material fact (owing to the vagueness, the purpose was impossible to discern), then there would have been a violation of the Tribunal's temporal jurisdiction. Appeals Judgement, para. 647. Again, none of the errors, in isolation, was sufficient to invalidate the Judgement, but the prevalence of these and other errors should give the Appeals Chamber greater pause.

[2] For instance, the Appeals Chamber observes that the Trial Chamber did not explicitly find that the *Impuzamugambi* whom Appellant Barayagwiza supervised at roadblocks actually killed large numbers of Tutsis. Rather, the Appeals Chamber deems the finding to have been implicit. The Appeals Chamber's conclusion was critical because Barayagwiza's supervision of the roadblocks was the only evidence of his genocidal intent following the exclusion of his statements at the pre-1994 CDR meetings. Appeals Judgement, para. 663. This is fact-finding in the first instance.

[3] *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

personally find it repugnant. But because free expression is one of the most fundamental personal liberties, any restrictions on speech—and especially any criminalization of speech—must be carefully circumscribed.

1. Mere Hate Speech is Not Criminal

5. Under customary international law and the Statute of the Tribunal, mere hate speech is not a criminal offense. Citing the obligation to ban hate speech under the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Trial Chamber held that "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination."[4] Although the Appeals Chamber does not address the accuracy of this statement,[5] the Trial Chamber incorrectly stated the law. It is true that Article 4 of the CERD and Article 20 of the ICCPR require signatory states to prohibit certain forms of hate speech in their domestic laws, but do not criminalize hate speech in international law. However, various states have entered reservations with respect to these provisions. Several parties to the CERD objected to any obligation under Article 4 that would encroach on the freedom of expression embodied in Article 5 of the CERD and in their own respective laws.[6] For example, France stated: "With regard to article 4, France wishes to make it clear that it interprets the reference made therein to the principles of the Universal Declaration of Human Rights and to the rights set forth in article 5 of the Convention as releasing the States Parties from the obligation to enact anti-discrimination legislation which is incompatible with the freedoms of opinion and expression and of peaceful assembly and association guaranteed by those texts."[7] With respect to Article 20 of the ICCPR, several states reserved the right not to introduce implementing legislation precisely because such laws might conflict with those states' protections of political liberty.[8] The United States has entered arguably the strongest reservations in light of the fact that the American Constitution protects even "vituperative" and "abusive" language[9] that does not qualify as a "true threat" to commit violence.[10] Critically, no state party has objected to such reservations. The number and extent of the reservations reveal that profound disagreement persists in the international community as to whether mere hate speech is or should be prohibited, indicating that Article 4 of the CERD and Article 20 of the ICCPR do not reflect a settled principle.[11] Since a consensus among states has not crystallized, there is clearly no norm under customary international law criminalizing mere hate speech.

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[4] Trial Judgement, para. 1076.

[5] Appeals Judgement, para. 987.

[6] International Convention on the Elimination of All Forms of Racial Discrimination, Reservations and Declarations, U.N. Doc. CERD/C/60/Rev. 4.

[7] *Id.* at 17. Similarly, the relevant reservation by the United States declares "[t]hat the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States." *Id.* at 28.

[8] United Nations, General Assembly, Human Rights Committee, Reservations, Declarations, Notifications and Objections Relating to the International Covenant on Civil and Political Rights and the Optional Protocols Thereto, U.N. Doc. CCPR/C/2/Rev. 3, *reproduced* in Manfred Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Appendix at 749 (Australia), 762 (Malta), 765 (New Zealand), 770 (United Kingdom), 770 (United States) (1993).

[9] *Watts v. United States*, 394 U.S. 705, 708 (1969).

[10] *Id.* at 706, 708 (holding that a draft protester's statement that "[i]f they ever make me carry a rifle the first man I want to get in my sights is [the President]" did not qualify as a "true threat").

[11] *See* Nowak at 369 (summarizing the reservations and declarations of sixteen states restricting their interpretations of and obligations under Article 20 of the ICCPR).

6. The drafting history of the Genocide Convention bolsters this conclusion. An initial provision, draft Article III, stated: "All forms of public propaganda tending by their systematic and hateful character to provoke genocide, or tending to make it appear as a necessary, legitimate or excusable act shall be punished."[12] As the commentary to draft Article III made clear, the provision was not concerned with direct and public incitement to commit genocide, which fell under the purview of draft Article II; rather, draft Article III was aimed unequivocally at mere hate speech.[13] Importantly, the final text of the Convention did not include draft Article III or subsequent proposals by the Soviet delegation that also would have codified a ban on mere hate speech.[14] As a result, the Genocide Convention bans only speech that constitutes direct incitement to commit genocide; it says nothing about hate speech falling short of that threshold.

7. Furthermore, the only precedent of either International Tribunal to address this precise question notes that hate speech is not prohibited under the relevant statute or customary international law. The language of the *Kordić* Trial Judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) is instructive.

> The Trial Chamber notes that the Indictment against Dario Kordić is the first indictment in the history of the International Tribunal to allege [hate speech] as a crime against humanity. The Trial Chamber, however, finds that this act, as alleged in the Indictment, does not by itself constitute persecution as a crime against humanity. It is not enumerated as a crime elsewhere in the International Tribunal Statute, but most importantly, it does not rise to the same level of gravity as the other acts enumerated in Article 5. Furthermore, the criminal prohibition of this act has not attained the status of customary international law. Thus to convict the accused for such an act as is alleged as persecution would violate the principle of legality.[15]

The Prosecution did not appeal this important determination, and the Appeals Chamber did not intervene to correct a perceived error, lending credence to the notion that the *Kordić* Trial Judgement accurately reflects the law on hate speech. Notably, Article 5 of the Statute of the ICTY, including the prohibition against persecution, is virtually identical in scope to Article 3 of the Statute of the ICTR under which Nahimana was convicted.

8. In light of the reservations to the relevant provisions of the CERD and the ICCPR, the drafting history of the Genocide Convention, and the *Kordić* Trial Judgement, it is abundantly clear that there is no settled norm of customary international law that criminalizes hate speech. Similarly, a close textual analysis demonstrates that the Statute of the ICTR does not ban mere hate speech. This is as it should be because the Statute codifies established principles of international law, including those reflected in the Genocide Convention.[16] Were it otherwise, the Tribunal would violate basic principles of fair notice and legality. The Appeals Chamber asserts that finding that hate speech can constitute an act of persecution does not violate the principle of legality as the crime of persecution itself "is sufficiently precise in international law."[17] I find this statement

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[12] The Secretary-General, Draft Convention on the Crime of Genocide, at 7, art. III, U.N. Doc. E/447 (26 June 1947).
[13] *Id.* at 32.
[14] U.N. Econ. & Soc. Council, 5 Apr. – 10 May 1948, Report of the Ad Hoc Committee on Genocide, at 9, U.N. Doc. E/794 (24 May 1948).
[15] *Prosecutor v. Kordić & Cerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001, para. 209 (citations omitted).
[16] *See* The Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, art. 1 (8 Nov. 1994), 33 I.L.M. 1598, 1602 (1994) ("Statute").
[17] Appeals Judgement, para. 988 n. 2264. The original French text reads: "le traitement d'un simple discours haineux comme un acte sous-jacent de persécution ne saurait en tant que tel constituer une entorse au principe de légalité puisque le crime de persécution lui-même est suffisamment défini en droit international."

puzzling. In international criminal law, a notion must be precise, not just "sufficiently precise." The Brief of *Amicus Curiae* correctly observes that "[i]n contrast to most other crimes against humanity . . . 'persecution' by its nature is open to broad interpretation."[18] Citing *Kordić*, which is given short shrift by the Appeals Chamber,[19] the Brief of *Amicus Curiae* continues: "Mindful of the attendant risks to defendants' rights, international courts have sought to ensure the 'careful and sensitive development' of the crime of persecution 'in light of the principle of *nullem crimen sine lege*'."[20] The Tribunal must proceed with utmost caution when applying new forms of persecution because, of the various crimes against humanity, persecution is one of the most indeterminate.[21] There are difficulties with the rubric or definition of persecution itself, and even more so with the vagueness of its constituent elements. The combined effect of this indeterminacy and the Tribunal's desire to address effectively such an egregious crime as persecution is to gravitate towards expansion through judicial decisions. Understandable as such tendency is, it may clash, as in the present case, with the fundamental principle of legality.

2. Why Hate Speech is Protected

9. The debate over the wisdom of protecting hate speech has raged for decades, and I do not purport to summarize the debate here. While some scholars have defended the protection of hate speech on the ground that tolerant societies must themselves exemplify tolerance or that the best antidote to malevolent speech is rational counterargument (rather than suppression), my objective here is more practical. Because of the extent to which hate speech and political discourse are often intertwined, the Tribunal should be especially reluctant to justify criminal sanctions for unpopular speech.

10. From an *ex post* perspective, courts and commentators may often be tempted to claim that no harm, and in fact much good, could come from the suppression of particularly odious ideas. In many instances, hate speech seems to have no capacity to contribute to rational political discourse. What, then, is its value? The reason for protecting hate speech lies in the *ex ante* benefits. The protection of speech, even speech that is unsettling and uncomfortable, is important in enabling political opposition, especially in emerging democracies. As *amicus curiae* in the instant case, the Open Society Justice Initiative has brought to the Tribunal's attention numerous examples of regimes' suppressing criticism by claiming that their opponents were engaged in criminal incitement. Such efforts at suppression are particularly acute where political parties correspond to ethnic cleavages. As a result, regimes often charge critical journalists and political opponents with "incitement to rebellion" or "incitement to hatred."[22] The threat of criminal prosecution for legitimate dissent is disturbingly common,[23] and officials in some countries have explicitly cited the example of RTLM in order to quell criticism of the governing regimes.[24] "[S]weepingly overbroad definitions of what constitutes actionable incitement enabled governments to threaten and often punish the very sort of probing, often critical, commentary about government that is of vital

[18] Brief of *Amicus Curiae*, p. 27.
[19] Appeals Judgement, para. 988 n. 2264.
[20] Brief of *Amicus Curiae*, p. 27.
[21] *Cf.*, Appeals Judgement, para. 985 n. 2255, para. 988 n. 2264.
[22] Brief of *Amicus Curiae*, p. 4.
[23] *See* Brief of *Amicus Curiae*, pp. 5-8.
[24] Brief of *Amicus Curiae*, p. 5 ("Repressive governments in countries with genuine ethnic problems have increasingly used the example of RTLM as an excuse to clamp down on legitimate criticism in the local press and civil society . . . ." (internal quotation marks omitted)).

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importance to a free society."[25] In short, overly permissive interpretations of incitement can and do lead to the criminalization of political dissent.

11. The *ex ante* benefit of protecting political dissent, especially in nascent democracies, is the reason that speakers enjoy a wide berth to air their viewpoints, however crassly presented. Even when hate speech appears to be of little or no value (the so-called "easy cases"), criminalizing speech that falls short of true threats or incitement chills legitimate political discourse, as various countries have recognized. In South Africa, one of the few countries that has removed certain hate speech from constitutional protection, speech may be criminalized only when it "constitutes incitement to cause harm."[26] Similarly, the American Constitution does not protect "true threats"[27] or incitement designed and likely to provoke imminent lawless action.[28] However, "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[29]

12. The Statute of the ICTR explicitly prohibits genocide and incitement to commit genocide.[30] When hate speech rises to the level of inciting violence or other imminent lawless action, such expression does not enjoy protection. But for the reasons explained above, an attempt, under the rubric of persecution, to criminalize unsavory speech that does not constitute actual imminent incitement might have grave and unforeseen consequences. Thus, courts must remain vigilant in preserving the often precarious balance between competing freedoms.

3. Mere Hate Speech May Not Be the Basis of a Criminal Conviction

13. In upholding Appellant Nahimana's conviction, the Appeals Chamber has impermissibly predicated the conviction on mere hate speech. As noted above, my colleagues do not decide whether hate speech, without more, can be the *actus reus* of persecution under the Statute, but hate speech nonetheless is an important and decisive factor in the conviction for persecution.[31] In effect, the Appeals Chamber conflates hate speech and speech inciting to violence and states that both kinds of speech constitute persecution.[32] This, to my mind, is a distinction without a meaningful difference.

14. I agree with the Appeals Chamber that under the Tribunal's jurisprudence, cumulative convictions under different statutory provisions are permissible as long as each provision has at least one distinct element that the Prosecution must prove separately.[33] The same act – here, Nahimana's responsibility for the post-6 April RTLM broadcasts – may form the basis for convictions of direct and public incitement to commit genocide as well as persecution; however, the unique element of persecution is that the acts must be part of a widespread and systematic attack on

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[25] Brief of *Amicus Curiae*, p. 8.
[26] S. Afr. Const. ch. 2, § 16(2)(c).
[27] *Watts v. United States*, 394 U.S. 705, 708 (1969).
[28] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[29] *Texas v. Johnson*, 491 U.S. 397, 414 (1989).
[30] Articles 6(1) & 6(3) of the Statute.
[31] *See* Appeals Judgement, paras 987-88.
[32] Appeals Judgement, para. 988. The original French text reads: "La Chambre d'appel conclut donc que les discours haineux et les discours appelant à la violence contre les Tutsis tenus après le 6 avril 1994 . . . constituent en eux-mêmes des actes de persécution."
[33] Appeals Judgement, para. 1019.

a civilian population.[34] Because of Nahimana's responsibility for the post-6 April broadcasts, the only remaining question concerns whether the unique element of persecution existed.

15. One might argue that the post-6 April broadcasts in themselves are enough to establish the existence of a widespread and systematic attack on a civilian population. The Appeals Chamber recognizes the weakness of such a conclusion; otherwise, the analysis would have been much more straightforward and would not have required a finessing of the hate speech question.[35] Clearly, then, the existence of mere hate speech contributed to the Appeals Chamber's finding of a widespread and systematic attack. My distinguished colleagues defend this approach by noting (1) that "underlying acts of persecution can be considered jointly"[36] and (2) that "it is not necessary that . . . underlying acts of persecution amount to crimes in international law."[37] According to this view, hate speech, though not criminal, may be considered along with other acts in order to establish that the Appellant committed persecution.

16. The fundamental problem with this approach is that it fails to appreciate that speech is unique—expression which is not criminalized is protected. As Justice Oliver Wendell Holmes has observed: "Every idea is an incitement."[38] But in the case of conflicting liberties, a balance must be struck, and speech that falls on the non-criminal side of that balance enjoys special protection. This stands in stark contrast to other non-criminal acts that have no such unique status and indeed may contribute to the aggregate circumstances a court can consider.[39] The Appeals Chamber, even without deciding whether hate speech alone can justify a conviction, nevertheless permits protected speech to serve as a basis for a conviction for persecution. Such a tack abrogates the unique status accorded to non-criminal expression and, in essence, criminalizes non-criminal speech.

4. Nexus Between Nahimana and the Widespread and Systematic Attack

17. Having discussed my objections to the legal question of what role, if any, mere hate speech may play in justifying a conviction for persecution, I turn now to a factual problem. In describing the widespread and systematic attack on a civilian population that must underpin the conviction, the Appeals Chamber takes cognizance of a campaign "characterised by acts of violence (killings, ill-treatments, rapes, . . .) and of destruction of property."[40] Nowhere in the Judgement, however, does the Appeals Chamber establish a nexus between these vile acts and Appellant Nahimana. Unless there is a causal nexus between the underlying acts committed by an accused and the systematic attack to which they contributed, a conviction for persecution would be based on guilt by association.

18. The Appeals Chamber notes that mere hate speech "contributed" to the other acts of violence and thus constituted an instigation to persecution.[41] It also observes that the hate speech

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[34] Appeals Judgement, para. 1034.
[35] *See* Appeals Judgement, paras 983-88, 995-96.
[36] Appeals Judgement, para. 987. The original French text reads "les actes sous-jacents de persécution peuvent être considérés ensemble."
[37] Appeals Judgement, para. 985. The original French text reads: "il n'est pas nécessaire que ces actes sous-jacents constituent eux-mêmes des crimes en droit international."
[38] *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).
[39] *See, e.g., Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004, paras 1049, 1067 (treating denial of employment as a factor that can contribute to persecution).
[40] Appeals Judgement, para. 988.
[41] Appeals Judgement, para. 988.

occurred in the midst of a "broad campaign of persecution against the Tutsi population."[42] While the Appeals Chamber has thus correctly recognized the necessity of establishing a causal nexus between Nahimana's actions and the widespread and systematic attack, it has marshaled no evidence to this effect. The supposed nexus rests on nothing more than *ipse dixit* declarations that Nahimana's hate speech "contributed" to a larger attack.[43]

19. It is true that Nahimana's responsibility for the post-6 April broadcasts occurred within the same temporal and geographic context as the wider Rwandan genocide. Generalizations about the atrocities that took place, though, cannot convert Nahimana's conviction for direct and public incitement to commit genocide into a conviction for persecution as well. It is quite possible that a direct link exists between Nahimana's actions and the wider attack, but a vague appeal to various killings, rapes, and other atrocities does not pass muster under norms of legality and due process.

20. The conclusion, then, is that the evidence of Nahimana's connection to a widespread attack rests on only two sources: first, certain post-6 April broadcasts, which the Appeals Chamber itself deemed insufficient when considered alone, to establish that such an attack took place; and, second, non-criminal hate speech, which I have argued should not form the basis, in whole or in part, of any conviction. Nahimana's conviction for persecution is thus left on extremely weak footing and cannot stand.

21. For the foregoing reasons, I believe that the Appeals Chamber should have reversed Nahimana's conviction for persecution.

5. Nahimana's Sentence

22. Because I would reverse the conviction of Appellant Nahimana for persecution, I believe that the only conviction against him that can stand is for direct and public incitement to commit genocide under Article 6(3) and based on certain post-6 April broadcasts. Despite the severity of this crime, Nahimana did not personally kill anyone and did not personally make statements that constituted incitement. In light of these facts, I believe that the sentence imposed is too harsh, both in relation to Nahimana's own culpability and to the sentences meted out by the Appeals Chamber to Barayagwiza and Ngeze, who committed graver crimes. Therefore, I dissent from Nahimana's sentence.

[42] Appeals Judgement, para. 995. The original French text reads: "une vaste campagne de violence à l'encontre de la population tutsie."
[43] Appeals Judgement, paras. 988, 995.

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

[Signed]

Theodor Meron
Judge

Signed 22 November 2007 at The Hague, The Netherlands,
and rendered 28 November 2007 at Arusha, Tanzania.

[Seal of the Tribunal]

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ANNEX A

PROCEDURAL BACKGROUND

1. The Trial Chamber rendered its Judgement in the present case on 3 December 2003.[1] Ferdinand Nahimana ("Appellant Nahimana"), Jean-Bosco Barayagwiza ("Appellant Barayagwiza") and Hassan Ngeze ("Appellant Ngeze") lodged appeals. The main aspects of the appeal proceedings are summarized hereafter.

A. Assignment of Judges

2. By Orders of 17 and 19 December 2003 the following Judges were assigned to hear the appeal: Judges Theodor Meron (presiding), Mohammed Shahabuddeen, Florence Mumba, Fausto Pocar and Inés Mónica Weinberg de Roca, who was designated Pre-Appeal Judge.[2] On 15 July 2005, Judge Andrésia Vaz was assigned to replace Judge Inés Mónica Weinberg de Roca, with effect from 15 August 2005;[3] Judge Andrésia Vaz was also designated Pre-Appeal Judge.[4] On 18 November 2005, Judge Liu Daqun was assigned to replace Judge Florence Mumba[5] and, on 24 November 2005, Judge Mehmet Güney was assigned to replace Judge Liu Daqun.[6]

B. Filing of written submissions

1. Appellant Nahimana

3. On 19 December 2003, following a motion by Appellant Nahimana for extension of time to file his Notice of Appeal,[7] the Pre-Appeal Judge ordered the Appellant to file his Notice of Appeal and his Appellant's Brief within 30 and 75 days respectively from the communication of the French translation of the Judgement.[8] An uncertified French version of the Judgement having been made available on 5 April 2004, the Appellant filed his Notice of Appeal on 4 May 2004.[9] He filed a first Brief on 17 June 2004.[10] Since this did not comply with the applicable Practice Directions, in

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[1] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence, 3 December 2003 ("Judgement"). The English version of the Judgement (being authoritative) was filed on 5 December 2003. An uncertified French translation of the Judgement was filed on 5 April 2004. The certified French translation of the Judgement was filed on 8 March 2006.

[2] Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 17 December 2003; Order of the Presiding Judge Assigning Judges and Designating the Pre-Appeal Judge, 19 December 2003, ordering that *Hassan Ngeze v. The Prosecutor* and *Ferdinand Nahimana and Jean-Bosco Barayagwiza v. The Prosecutor* be treated as a single case.

[3] Order replacing a Judge in a case before the Appeals Chamber, 15 July 2005.

[4] Order of the Presiding Judge Designating the Pre-Appeal Judge, 19 August 2005; see also Corrigendum to the Order entitled "Order of the Presiding Judge Designating the Pre-Appeal Judge," 25 August 2005.

[5] Order Replacing a Judge in a Case before the Appeals Chamber, 18 November 2005.

[6] Order Replacing a Judge in a Case before the Appeals Chamber, 24 November 2005.

[7] Defence Motion for extension of time to file the Notice of Appeal of the Judgement delivered on 3 December 2003 against Ferdinand Nahimana (Rules 108 and 116 of the Rules of Procedure and Evidence), 12 December 2003.

[8] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003. See also Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4 (ordering the three Appellants to file their Notices of Appeal and Appellant's Briefs no later than 30 and 75 days respectively from the communication of the Judgement in the French language).

[9] Notice of Appeal, 4 May 2004.

[10] *The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, *Mémoire d'appel*, 17 June 2004. On 25 May 2004 (Decision Denying Further Extension of Time), the Pre-Appeal Judge rejected the Appellant's motion for

particular in regard to page limits, on 24 June 2004 the Pre-Appeal Judge ordered the Appellant to file a new Brief by 9 July 2004 that was consistent with the Rules and the Practice Directions.[11] On 8 July 2004, the Appellant requested the full bench of the Appeals Chamber to grant him leave to file an Appellant's Brief which, although shorter than the Brief filed on 17 June 2004, still exceeded the prescribed page limits.[12] Before the Appeals Chamber had rendered a decision on the matter, the Appellant filed this new Appellant's Brief.[13] On 31 August 2004, the Appeals Chamber dismissed the Appellant's motion and ordered him to file a new version of his Appellant's Brief consistent with the Rules and the Practice Directions.[14] The Appellant filed confidentially a new Brief with annexes on 27 September 2004.[15] A public version of this Brief was filed on 1 October 2004.

4. Following the filing of the Respondent's Brief (in English only) on 22 November 2005, the Pre-Appeal Judge instructed the Registrar to provide a French translation to Appellant Nahimana by 31 March 2006, specifying that the Appellant would then have 15 days in which to file his Reply.[16] The Appellant received the French translation of the Respondent's Brief only on 7 April 2006. He filed his Brief in Reply on 21 April 2006.[17]

2. Appellant Barayagwiza

5. On 19 December 2003, following a motion by Appellant Barayagwiza for extension of time to file his Notice of Appeal,[18] the Pre-Appeal Judge ordered the Appellant to file his Notice of Appeal and his Appellant's Brief within 30 and 75 days respectively from the communication of the French translation of the Judgement.[19] On 3 February 2004, the Appellant in person (and not his Counsel) filed a "notice of request for annulment" of the Judgement.[20] Counsel for the Appellant filed a Notice of Appeal on 22 April 2004[21] and the Appellant in person filed an amended Notice of

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extension of time to file his Appellant's Brief (Defence Motion for extension of time to file the Appellant's Brief and time to present additional evidence, 14 May 2004, re-filed on 18 May 2004).

[11] Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana Appellant's Brief, 24 June 2004.

[12] *Requête de la Défense aux fins de dépôt du mémoire d'appel révisé*, 8 July 2004.

[13] *The Prosecutor v. Ferdinand Nahimana*, Appellant's Brief (Revised), 20 July 2004.

[14] Decision on Ferdinand Nahimana's Second Motion for an Extension of Page Limits for Appellant's Brief, 31 August 2004.

[15] *The Prosecutor v. Ferdinand Nahimana*, Appellant's Brief (Revised), filed confidentially on 27 September 2004.

[16] Scheduling Order Concerning the Filing of Ferdinand Nahimana's Reply to the Consolidated Respondent's Brief, 6 December 2005.

[17] Defence Reply, 21 April 2006. On 20 April 2006, the Pre-Appeal Judge rejected the Appellant's motion for leave to file his Defence Reply of 60 pages or 18,000 words, on grounds that he had failed to establish the existence of exceptional circumstances justifying his exceeding the page limits prescribed by the Practice Directions: *Décision sur la requête de Ferdinand Nahimana aux fins d'extension du nombre de pages autorisées pour la réplique de la Défense*, 20 April 2006.

[18] *Requête de la Défense aux fins de report du délai de dépôt de l'acte d'appel contre le Jugement rendu le trois décembre 2003 contre Jan Bosco (sic) Barayagwiza (articles 108 et 116 du Règlement de procédure et de preuve)*, 17 December 2003.

[19] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003. The Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, and the Decision on Barayagwiza's Motion for Determination of Time Limits, 5 March 2004, reconfirmed those time limits.

[20] Notice of request for annulment of the Judgement rendered on 3 December 2003 by Chamber I in "*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, ICTR-99-52-T," 3 February 2004. On 2 March 2004, the Pre-Appeal Judge granted leave to the Appellant to amend the said notice at any time prior to the deadline for filing the Notices of Appeal: Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4.

[21] Notice of Appeal (pursuant to Article 24 of the Statute and Rule 108 of the Rules), 22 April 2004.

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Appeal on 27 April 2004.[22] Following an order requesting him to indicate which document he intended to rely on as his Notice of Appeal,[23] the Appellant designated the Amended Notice of Appeal filed on 27 April 2004.[24]

6. On 19 May 2004, the Appeals Chamber stayed proceedings against the Appellant until various problems relating to his representation were resolved.[25] The Pre-Appeal Judge ended this stay of proceedings on 26 January 2005 and ordered the Appellant to file any Amended or New Notice of Appeal no later than 21 February 2005, and any Amended or New Appellant's Brief no later than 9 May 2005.[26] At a Status Conference held on 1 April 2005, the Pre-Appeal Judge granted leave to the Appellant to file his Appellant's Brief no later than 75 days from the assignment of a full team to defend him, while any amendment to the Notice of Appeal was to be filed within the following week.[27] The Appellant filed a new motion before the Appeals Chamber for a further extension of time.[28] On 17 May 2005, the Appeals Chamber granted leave to the Appellant to file an amended Notice of Appeal and a new Appellant's Brief not later than four months after a full Defence team had been assigned.[29] Appellant Barayagwiza filed his Notice of Appeal and Appellant's Brief on 12 October 2005.[30]

7. As noted above, the Prosecutor filed his Respondent's Brief on 22 November 2005, but this document was not communicated to Appellant Barayagwiza and his Lead Counsel until some days later.[31] On 6 December 2005, the Pre-Appeal Judge granted in part a motion of Appellant Barayagwiza, allowing him to file his Reply by not later than 15 December 2005, but dismissing his request to exceed the number of pages allowed.[32] On 12 December 2005, the Appellant filed his Brief in Reply.[33]

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[22] *Acte d'appel modifié aux fins d'annulation du jugement rendu le 03 décembre 2003 par la Chambre I dans l'affaire "Le Procureur contre Ferdinand Nahimana, Jean-Bosco Barayagwiza et Hassan Ngeze*, ICTR-99-52-T," 27 April 2004.

[23] Order Concerning Multiple Notices of Appeal, 3 May 2004

[24] *Notification sur la détermination de mon Acte d'appel*, filed in person by Appellant Barayagwiza on 5 May 2004.

[25] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004. See also *infra* I. C. 1

[26] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005. On 31 January 2005, the Appellant filed a "*Demande de sursis à l'application de l'Ordonnance du 26 janvier 2005*", which was dismissed on 4 February 2005 (Order Concerning Filing by Jean-Bosco Barayagwiza).

[27] T(A) Status Conference of 1 April 2005, p. 20.

[28] Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice, filed confidentially on 2 May 2005.

[29] Decision on "Appellant Jean-Bosco Barayagwiza's Urgent Motion for Leave to Have Further Time to File the Appeals Brief and the Appeal Notice", 17 May 2005. At the same time, the Appeals Chamber dismissed a series of requests for extension of the page limits of the Appellant's Brief, additional visits to Arusha and communication between the Appellant and the Defence team. Regarding the time limits for filing the Notice of Appeal and the Appellant's Brief, see also the Decision on Clarification of Time Limits and on Appellant Barayagwiza's Extremely Urgent Motion for Extension of Time to File his Notice of Appeal and his Appellant's Brief, 6 September 2005.

[30] Amended Notice of Appeal, 12 October 2005; Appellant's Appeal Brief, 12 October 2005. By Order of 14 November 2005 (Order Concerning Appellant Jean-Bosco Barayagwiza's Filings of 7 November 2005), the Appeals Chamber rejected the versions of Barayagwiza's Notice of Appeal and Appellant's Brief filed without leave on 7 November 2005.

[31] See Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005, pp. 5-6.

[32] Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for Their Replies to the Consolidated Prosecution Response, 6 December 2005; Corrigendum to the "Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response", 7 December 2005.

[33] The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005.

8. On 17 August 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motions to add seven further grounds of appeal to his Appellant's Brief and to amend his Notice of Appeal accordingly; however, it granted the Appellant's motion to correct his Appellant's Brief.[34] By Decision of 30 October 2006, the Pre-Appeal Judge granted Appellant Barayagwiza's motion to correct grammatical and typing errors in his Brief in Reply; it also accepted in part 2 of the 19 corrections proposed by the Appellant to the French translation of his Brief in Reply.[35]

3. Appellant Ngeze

9. On 19 December 2003, following Appellant Ngeze's motion seeking an extension of time for filing his Notice of Appeal,[36] the Pre-Appeal Judge ordered the Appellant to file this Notice by 9 February 2004 and his Appellant's Brief not later than 75 days from that date.[37] On 6 February 2004, the Pre-Appeal Judge granted leave to the Appellant to file his Notice of Appeal not later than 30 days from the communication of the French translation of the Judgement, and his Appellant's Brief not later than 75 days from such communication.[38] Counsel for Appellant Ngeze nonetheless filed a Notice of Appeal on 9 February 2004.[39] The Appellant was subsequently granted leave to amend this Notice of Appeal not later than 30 days from the communication of the French translation of the Judgement, and to file his Appellant's Brief not later than 75 days from such communication.[40] On 30 April 2004, the Appellant (and not his Counsel) filed a document apparently amending the Notice of Appeal of 9 February 2004.[41] On 5 May 2004, the Pre-Appeal Judge ordered Appellant Ngeze to indicate clearly which document he intended to rely on as his Notice of Appeal.[42] Since the Appellant's response in person did not comply with the directives he had been given,[43] the Pre-Appeal Judge ordered that the Notice of Appeal filed by the Appellant's Counsel on 9 February 2004 be considered as the Notice of Appeal.[44]

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[34] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant's Brief, 17 August 2006.

[35] Decision on Barayagwiza's Corrigendum Motions of 5 July 2006, 30 October 2006. The Pre-Appeal Judge noted, however, that it would have been sufficient to file a corrigendum.

[36] Motion of the Ngeze Defence Seeking an Extension of Time for Filing the Notice of Appeal (Pursuant [to] Rules 7, 108 and 116 of the Rules of Procedure and Evidence), 19 December 2003.

[37] Decision on Motions for an Extension of Time to File Appellants' Notices of Appeal and Briefs, 19 December 2003.

[38] Decision on Ngeze's Motion for an Additional Extension of Time to File his Notice of Appeal and Brief, 6 February 2004.

[39] Defence Notice of Appeal (Pursuant to [Rule] 108 of the Rules of Procedure and Evidence), 9 February 2004.

[40] Decision on Ngeze's Motion for Clarification of the Schedule and Scheduling Order, 2 March 2004, p. 4.

[41] Prisoner Hassan Ngeze 1st amendment of appeal notice. Pursuant to Rule 108 of the Rules of Procedure and Evidence, 30 April 2004.

[42] Order Concerning Ngeze's Amended Notice of Appeal, 5 May 2004, p. 3. The Pre-Appeal Judge also ordered the Appellant – in case he elected to rely jointly on the Notice of Appeal filed on 9 February 2004 and the amendment of 30 April 2004, or elected to maintain only the amendment of 30 April 2004 – to re-file, not later than 12 May 2004, a single Notice of Appeal complying with the Rules and the Practice Directions.

[43] The Appellant merely indicated that both the Notice of Appeal of 9 February 2004 and the document of 30 April 2004 formed his Notice of Appeal: The Appellant Hassan Ngeze Clarification of What Will Be his Notice of Appeal as per Appeal Order Concerning Ngeze's Amendment Notice of Appeal of May 5th 2004, Document (A) and (B) to Be Considered as a Single Notice of Appeal, 10 May 2004.

[44] Order Concerning Filings by Hassan Ngeze, 24 May 2004, pp. 3-4. By this Order, the Pre-Appeal Judge also rejected the two motions filed by the Appellant (The Appellant Motion to Compel the Registrar to Disclose Report Made by Jean Pele Fometé, with the UNDF Report Cited in Media Judgement Paragraph 84 Page 23, for the Purpose of my Appeal Notice and Brief, filed confidentially on 6 May 2004; Appellant Hassan Extremely Urgent Memorandum Requesting the Appeal Chamber to Disregard and Reject in Totality what Counsel John Floyd Filed on 10th May 2004 which he Called [*sic*] Ngeze Counsel Memorandum Regarding the Notice of Appeal, 12 May 2004), and ordered the Appellant to file all documents through his Counsel. This Order was subsequently reconfirmed: Order Concerning Filings by Hassan Ngeze, 17 September 2004.

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10. Following the dismissal of further motions filed by Appellant Ngeze seeking an extension of time to file his Brief,[45] an Appeal Brief was filed on behalf of the Appellant on 21 June 2004.[46] The assignment of the Appellant's Counsel terminated on the same day.[47] The Pre-Appeal Judge ordered a stay of proceedings against the Appellant until another Counsel was assigned, and granted leave to the Appellant to file a revised Notice of Appeal and a new Appellant's Brief following the assignment.[48] Mr. Bharat Chadha, Co-Counsel assigned to the Appellant since 6 May 2004, was eventually appointed Lead Counsel for the Appellant on 17 November 2004.[49] In response to a further motion by the Appellant for an extension of time,[50] the Pre-Appeal Judge ordered him to file any motion to amend his Notice of Appeal by 17 December 2004, and to file his Appellant's Brief by 1 March 2005.[51] Time for filing an amended Notice of Appeal and Appellant's Brief was again extended on 15 December 2004[52] and on 4 February 2005.[53] Appellant Ngeze finally filed a confidential version of his Appellant's Brief on 2 May 2005,[54] and a confidential version of his Notice of Appeal on 9 May 2005.[55]

11. Following the filing of the Prosecutor's Respondent's Brief on 22 November 2005, the Pre-Appeal Judge granted in part a motion by Appellant Ngeze, allowing him to file his Reply by 15 December 2005, but dismissing his request to exceed the page limits.[56] On 15 December 2005, the Appellant filed his Brief in Reply.[57]

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[45] Order Concerning Ngeze's Motion, 5 May 2004; Decision Denying Further Extension of Time, 25 May 2004. On 2 March 2004, the Pre-Appeal Judge rejected the Appellant Ngeze's motion seeking leave to exceed the number of pages prescribed for the Appellant's Brief: Decision on Ngeze's Motion for an Extension of Page Limits for Appeals Brief, 2 March 2004. The Pre-Appeal Judge also rejected the Appellant's motion seeking review of this decision: Decision on Ngeze's Motion for Reconsideration of the Decision Denying an Extension of Page Limits [to] his Appellant's Brief, 11 March 2004.

[46] Defence Appeal Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 21 June 2004.

[47] Decision of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004 (Registrar's Decision).

[48] Decision on Ngeze's Motion for a Stay of Proceedings, 4 August 2004.

[49] The delay in appointing Counsel was due to the Appellant's refusal to comply with certain procedures. The Appeals Chamber, considering that further delays in the appointment of Counsel for the Appellant could affect negatively the rights of the other Appellants, ordered the Registrar to assign the person selected by the Appellant (Co-Counsel Chadha) before 18 November 2004, despite the Appellant's failure to observe the formalities: Order Concerning Appointment of Lead Counsel to Hassan Ngeze, 11 November 2004, p. 3.

[50] Appellant Hassan Ngeze's Motion for the Grant of Extension of Time to File Motion for the Amendment of Notice of Appeal and Appeal Brief, 29 November 2004.

[51] Decision on Hassan Ngeze's Motion for an Extension of Time, 2 December 2004.

[52] The Appellant was granted leave to file his amended Notice of Appeal and amended Appellant's Brief simultaneously on 1 April 2005, due to his new Co-Counsel's delay in taking up office: Oral Decision on Ngeze's Extremely Urgent Motion for Reconsideration of the Decision on Motion for Extension of Time, 15 December 2004.

[53] The Appellant was granted leave to file his Appellant's Brief by 2 May 2005, and any amendment to his Notice of Appeal by 9 May 2005: Decision on Hassan Ngeze's Motion for an Extension of Time, 4 February 2005. On 27 April 2005, the Pre-Appeal Judge rejected a new motion for extension of time: Decision Concerning Appellant Hassan Ngeze's Extremely Urgent Motion for the Extension of Time, 27 April 2005.

[54] Appellant's Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), 2 May 2005.

[55] Amended Notice of Appeal, 9 May 2005.

[56] Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response, 6 December 2005; Corrigendum to the "Decision on Jean-Bosco Barayagwiza's and Hassan Ngeze's Urgent Motions for Extension of Page and Time Limits for their Replies to the Consolidated Prosecution Response", 7 December 2005.

[57] Appellant Hassan Ngeze's Reply Brief (Rule 113 of the Rules of Procedure and Evidence), 15 December 2005.

12. On 30 August 2007, the Appeals Chamber ordered the Appellant to file within 30 days public versions of his Notice of Appeal and Appellant's Brief.[58] The Appellant filed public versions of those filings on 27 September 2007.[59] Having noted that only Annexes 4 and 5 of the public version of Appellant Ngeze's Brief contained redacted portions and that there were discrepancies, both editorial and substantive, between the public and confidential versions of the said Brief, the Appeals Chamber decided (1) to lift the confidentiality of the Appellant's Brief filed on 2 May 2005, save for Annexes 4 and 5; (2) to regard Annexes 4 and 5 of the Appellant's Brief filed on 27 September 2007 as the public version of Annexes 4 and 5; (3) to declare the remainder of the Appellant's Brief filed on 27 September 2007 inadmissible.[60]

4. The Prosecutor

13. On 24 June 2004, the Pre-Appeal Judge clarified the time limits applicable to the filing of the Respondent's Brief, namely 40 days from the filing of each Appellant's Brief or 40 days from the filing of the last Appellant's Brief if the Prosecution intended to file a single consolidated Respondent's Brief.[61] On 15 November 2005, the Pre-Appeal Judge granted in part the Prosecutor's motion, allowing him to file a consolidated Respondent's Brief of up to 200 pages or 60,000 words.[62] The Prosecutor filed his Respondent's Brief in English on 22 November 2005.[63] On 30 November 2005, the Pre-Appeal Judge rejected Annexures A through G of Appendix A to the Respondent's Brief.[64]

5. *Amicus Curiae* Brief

14. On 12 January 2007, the Appeals Chamber granted leave to the NGO, "Open Society Justice Initiative," to file an *Amicus Curiae* Brief; it also granted leave to the parties to respond to the said Brief,[65] which they did within the prescribed time limit.[66]

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[58] Order to Appellant Hassan Ngeze to File Public Versions of his Notice of Appeal and Appellant's Brief, 30 August 2007.

[59] Amended Notice of Appeal (Pursuant to the Order of the Appeals Chamber of [*sic*] dated 30 August 2007 to Appellant Hassan Ngeze to File Public Version of his Notice of Appeal and Appellant's Brief), 27 September 2007; Appeal Brief (Pursuant to the Order of the Appeals Chamber of [*sic*] dated 30 August 2007 to Appellant Hassan Ngeze to File Public Version of his Notice of Appeal and Appellant's Brief), 27 September 2007.

[60] Order Concerning Appellant Hassan Ngeze's Filings of 27 September 2007, dated 4 October 2007, but filed on 5 October 2007. The Appeals Chamber also sanctioned the Appellant's Counsel for not complying with the explicit instructions given in the Order of 30 August 2007.

[61] Decision on Ferdinand Nahimana's Motion for an Extension of Page Limits for Appellant's Brief and on Prosecution's Motion Objecting to Nahimana Appellant's Brief, 24 June 2004.

[62] Decision on the Prosecutor's Extremely Urgent Motion for Extension of Page Limits, 15 November 2005.

[63] Consolidated Respondent's Brief, 22 November 2005. The French translation of this document was filed on 4 April 2006 and communicated to the parties on 7 April 2006.

[64] 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.

[65] Decision on the Admissibility of the *Amicus Curiae* Brief Filed by the "Open Society Justice Initiative" and on its Request to Be Heard at the Appeals Hearing, 12 January 2007.

[66] The Appellant Jean-Bosco Barayagwiza's Response to the *Amicus Curiae* [Brief] filed by "Open Society Justice Initiative," 8 February 2007; *Réponse au mémoire de l'*amicus curiae, 12 February 2007; Appellant Hassan Ngeze's Response to *Amicus* Brief Pursuance [*sic*] to the Appeal [*sic*] Chamber's Decision of 12.01.2007, 12 February 2007; Prosecutor's Response to the "*Amicus Curiae* Brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*," 12 February 2007.

6. Six new grounds of appeal submitted by Appellant Barayagwiza

15. On 5 March 2007, the Appeals Chamber rejected the Prosecutor's motion[67] repeating his oral request[68] that the Chamber disregard certain arguments made by Appellant Barayagwiza at the appeals hearing on 17 January 2007; however, it granted the Prosecutor leave to file a written response to the new grounds raised by Appellant Barayagwiza,[69] which he did on 14 March 2007.[70] On 21 March 2007, Appellant Barayagwiza filed his reply.[71]

C. Representation of the Appellants

1. Appellant Barayagwiza's representation

16. On 25 March 2004, Appellant Barayagwiza filed a "Very urgent motion to appeal refusal of request for legal assistance," in which he made a number of complaints against Counsel Barletta-Caldarera (his Counsel at the time) and requested the Appeals Chamber to instruct the Registrar to assign new Counsel to represent him. On 19 May 2004, the Appeals Chamber decided that, although the Appellant had not clearly requested withdrawal of his Counsel Barletta-Caldarera, it had to be understood that this was what he was requesting; the Appeals Chamber then instructed the Registrar to take a decision on this request.[72] After discussions with the parties concerned,[73] the Registrar withdrew the assignment of Counsel Barletta-Caldarera on 24 June 2004.[74] On 7 September 2004, the Appellant personally filed a "*Demande d'arrêt définitif des procédures pour abus de procédure*," alleging that the Registrar's failure to assign new Counsel amounted to an abuse of process. The Registrar submitted in reply that the delay was due to the Appellant's refusal to complete certain forms.[75] On 22 October 2004, the Appeals Chamber settled the issue by ordering the Registrar to appoint Counsel for the Appellant before 29 October 2004, even though the latter had failed to complete certain forms.[76] Following new delays due mainly to the unavailability of

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[67] The Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 6 February 2007.

[68] T(A) 18 January 2007, pp. 15-16.

[69] Decision on the Prosecutor's Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007.

[70] The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007.

[71] The Appellant Jean-Bosco Barayagwiza's Reply to "Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007", 21 March 2007. On 19 March 2007, the Appeals Chamber granted a two-day extension of time for the filing of this reply: Decision on Appellant Jean-Bosco Barayagwiza's Motion for Extension of Time, 19 March 2007. Appellant Nahimana also filed a reply to the Prosecutor's Response to the Six New Grounds of Appeal (*Réponse de la Défense à* The Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, filed on 20 March 2007). In footnote 830 of this Appeal Judgement, the Appeals Chamber explains that this reply was not authorized and refuses to take it into account.

[72] Decision on Jean-Bosco Barayagwiza's Motion Appealing Refusal of Request for Legal Assistance, 19 May 2004. The Appeals Chamber also stayed proceedings against the Appellant until the Registrar had taken a decision on the Appellant's representation.

[73] On 27 May 2004, Mr. Barletta-Caldarera commented in a letter on the Appellant's complaints against him. The Appellant responded in a letter of 4 June 2004.

[74] *Décision de retrait de la commission d'office de Me. Giacomo Caldarera conseil principal de l'accusé Jean Bosco Barayagwiza*, 24 June 2004.

[75] Registrar's Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding Jean Bosco Barayagwiza's Motion for a Stay of Proceedings, 17 September 2004.

[76] Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings, 22 October 2004, corrected on 26 October 2004 (Corrigendum to Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings of 22 October 2004).

persons initially chosen by the Appellant,[77] Mr. Peter Donald Herbert was assigned as Lead Counsel for the Appellant by the Registrar on 30 November 2004. Subsequently, the Appeals Chamber rejected the Appellant's objection to this assignment[78] and his motion for reconsideration.[79] On 23 May 2005, the Registrar assigned Ms. Tanoo Mylvaganam as Co-Counsel for the Appellant.

17. On 27 March 2006, the Registrar denied a request by the Appellant's Lead Counsel to terminate the assignment of Co-Counsel Mylvaganam. [80] The Appellant subsequently filed a motion to review this decision,[81] which was denied on 29 August 2006 by the President of the Tribunal.[82] The Appeals Chamber confirmed this decision on 23 November 2006.[83]

2. Appellant Ngeze's representation

18. By Order of 9 June 2004, the Pre-Appeal Judge requested the Registrar to file a response by 21 June 2004 to Appellant Ngeze's request for the withdrawal of his Counsel, John Floyd III.[84] On 21 June 2004, the Registrar terminated the assignment of this Counsel.[85] The Pre-Appeal Judge subsequently ordered a stay of proceedings against the Appellant until a new Counsel was assigned.[86] On 2 November 2004, in light of the delay in the appeals proceedings due to the non-assignment of Counsel for Appellant Ngeze, the Pre-Appeal Judge ordered the Registrar to file a report on this matter by 8 November 2004, and to take the necessary measures to ensure that Counsel was appointed promptly.[87] On 11 November 2004, the Appeals Chamber ordered the Registrar to appoint Mr. Chadha as Counsel,[88] which was done on 17 November 2004.

19. On 2 December 2004, the Pre-Appeal Judge requested the Registrar to expedite the appointment of Co-Counsel.[89] The issue was further discussed at a Status Conference on 15 December 2004. On 19 January 2005, as Co-Counsel had yet to be assigned, the Pre-Appeal Judge ordered the Registrar to file a report indicating the reasons for this delay and the measures

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[77] See Order to Appoint Counsel to Jean Bosco Barayagwiza, 3 November 2004, and Registrar's Representation pursuant to Rule 33(B) of the Rules of Procedure and Evidence Regarding the Appeals Chamber Decision on Jean-Bosco Barayagwiza's Motion for Appointment of Counsel or a Stay of Proceedings, 2 December 2004.

[78] Decision on Jean Bosco Barayagwiza's Motion concerning the Registrar's Decision to Appoint Counsel, 19 January 2005.

[79] Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005, 4 February 2005.

[80] Decision of the Registrar Denying the Request of the Lead Counsel Mr. Peter Herbert to Terminate the Assignment of Co-Counsel Ms. Tanoo Mylvaganam Representing the Appellant Mr. Jean-Bosco Barayagwiza, 27 March 2006.

[81] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, filed confidentially on 3 May 2006. The Registrar filed submissions on this motion: Registrar's Submission under Rule 33(B) in Respect of the Appellant Jean-Bosco Barayagwisa's Urgent Motion for the President of the ICTR to Review the Decision of the Registrar Relating to the Continuing Involvement of Co-Counsel, 17 May 2005.

[82] Review of the Registrar's Decision Denying Request for Withdrawal of Co-Counsel, 29 August 2006.

[83] Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal of Co-Counsel, 23 November 2006.

[84] Order to the Registrar, 9 June 2004.

[85] Decision of Withdrawal of Mr. John C. Floyd III as Lead Counsel for the Accused Hassan Ngeze, 21 June 2004.

[86] Decision on Ngeze's Motion for a Stay of Proceedings, 4 August 2004.

[87] Order to Registrar, 2 November 2004. The Registrar made his representations on 8 November 2004: Registrar's Representations pursuant to Rule 33 (B) of the Rules of Procedure and Evidence regarding the order of the Appeals Chamber regarding assignment of Counsel to Hassan Ngeze.

[88] Order Concerning Appointment of Lead Counsel to Hassan Ngeze, 11 November 2004.

[89] Decision on Hassan Ngeze's Motion for an Extension of Time, 2 December 2004.

taken to ensure that Appellant Ngeze's legal team was appointed promptly.[90] The Appellant's Lead Counsel also submitted a report on this issue.[91] Co-Counsel Behram N. Shroff was finally assigned on 26 January 2005.[92]

20. On 30 January 2006, the Registrar denied a first request by Co-Counsel Shroff[93] to withdraw from the case.[94] Co-Counsel Shroff was, however, allowed to withdraw from the case on 5 January 2007 for health reasons. [95] On 9 January 2007, Mr. Dev Nath Kapoor was assigned as Co-Counsel for the Appellant.

D. Pre-Appeal Conferences

21. A first Status Conference was held on 15 December 2004 in the presence of Appellant Ngeze and his Lead Counsel only.[96] A second conference was held on 9 March 2005,[97] in the absence of Counsel for Appellant Barayagwiza.[98] Counsel for Appellant Barayagwiza participated in the 1 April 2005 Conference by video link.[99] On 7 April 2006, a Status Conference was held in Arusha in the absence of Counsel for Appellant Barayagwiza.[100]

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[90] Order to Registrar, 19 January 2005. The Registrar filed his comments on 25 January 2005: A Report by the Registrar Indicating the Reasons for the Delay in Appointing Co-Counsel for the Appellant Ngeze and the Steps Taken by the Registrar to Ensure that Appellant Ngeze's Legal Team is Appointed Promptly.

[91] Order to Registrar, 19 January 2005. Counsel for the Appellant filed his comments on 24 January 2005: Report to the Pre-Appeal Judge – The Honourable Inés Mónica Weinberg de Roca – on the Steps Taken by the Defence to Ensure that Appellant Hassan Ngeze's Legal Team is Appointed Promptly pursuant to the Order to the Registrar of Dated [*sic*] 19th January 2005.

[92] A Report by the Registrar Indicating the Reasons for the Delay in Appointing Co-Counsel for the Appellant Ngeze and the Steps Taken by the Registrar to Ensure that Appellant Ngeze's Legal Team is Appointed Promptly, 26 January 2005.

[93] E-mail from the Co-Counsel addressed to the Registry purporting to submit his resignation with effect from 30 November 2005, 27 November 2005.

[94] Decision of the Registrar Denying the Request of the Co-Counsel Mr. Behram N. Schroff to Withdraw from Representing Appellant Mr. Hassan Ngeze, 30 January 2006.

[95] Decision for the Withdrawal of Mr. Behram Shroff as Co-Counsel of the Accused Hassan Ngeze, 5 January 2007 (Decision of the Registrar).

[96] This Status Conference was held pursuant to the Order of 14 December 2004 (Scheduling Order). Delays by the parties in making their filings, problems concerning the translation of exhibits, the appointment of Co-Counsel, and the issue of Appellant Ngeze's marriage were discussed.

[97] This Status Conference was held pursuant to the Order of 8 February 2005 (Order Scheduling a Status Conference). The following issues were discussed: translation of filings by the parties and exhibits; Registry's assistance in additional investigations on appeal; budgetary constraints on the Defence; financing of travel by Counsel to Arusha; schedule of proceedings; composition of Appellant Ngeze's Defence team; outstanding motions; Appellant Ngeze's marriage; Appellant Barayagwiza's health.

[98] Order Concerning Status Conference of 9 March 2005, 18 February 2005. The Pre-Appeal Judge ordered the Registrar to provide Appellant Barayagwiza, if he so desired, with the assistance of a duty counsel during the conference.

[99] This Status Conference was held pursuant to the Order of 29 March 2005 (Order Concerning Status Conference by Video Link). The following issues were discussed: Appellant Barayagwiza's representation; transmission of documents; extension of time for filing the Notice of Appeal; communication between Appellant Barayagwiza and the Defence team members, delays in appeals proceedings due to the appointment of a new Defence team to represent Appellant Barayagwiza.

[100] This Status Conference was held pursuant to the Order of 9 March 2006. The following issues were discussed: time limit for filings and translation; health and detention conditions of the Appellants; unjustified motions.

E. Appeals hearings

22. By Decision of 16 November 2006, the Appeals Chamber scheduled the appeals hearings for 16, 17 and 18 January 2006.[101] On 5 December 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion requesting postponement of the appeal hearings and refused to give the parties additional time for their oral submissions.[102] On 15 January 2007, the Appeals Chamber dismissed Appellant Ngeze's motion requesting postponement of the appeals hearings.[103] The hearings were held as scheduled on 16, 17 and 18 January 2007.

F. Appellant Barayagwiza's motion for reconsideration/review

23. On 26 September 2005, Appellant Barayagwiza requested the Appeals Chamber to examine his motion of 28 July 2000 on its merits, [104] and to reconsider and set aside the Decision of 31 March 2000.[105] This request was dismissed on 23 June 2006.[106]

G. Motions to admit additional evidence on appeal

1. Appellant Nahimana

24. On 14 December 2006,[107] Appellant Nahimana joined in Appellant Barayagwiza's motion for leave to present the *Ordonnance de soit-communiqué* [Disclosure Order] of the French Investigating Judge, Jean-Louis Bruguière, containing the findings of the investigation into the circumstances of President Habyarimana's assassination.[108] The Appeals Chamber dismissed the

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[101] Scheduling Order for Appeals Hearing and Decision on Hassan Ngeze's Motion of 24 January 2006, 16 November 2006. The Appeals Chamber also dismissed Appellant Ngeze's request to be allowed 90 minutes to plead his case in person during appeal hearings, but it allowed each Appellant 10 minutes to address the Appeals Chamber personally at the end of the hearings.

[102] Decision on the Appellant Jean-Bosco Barayagwiza's Motion Concerning the Scheduling Order for the Appeals Hearing, 5 December 2006.

[103] Decision on the Appellant Hassan Ngeze's Motion Requesting a Postponement of the Appeal Hearing, 15 January 2007.

[104] *Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, *Requête en extrême urgence de l'Appelant en révision et/ou réexamen de la décision de la Chambre d'appel rendue le 31 mars 2000 et pour sursis des procédures*, 28 July 2000.

[105] Urgent Motion Requesting Examination of the Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process, 26 September 2005. See also the Prosecutor's Response to "Appellant Jean-Bosco Barayagwiza's Motion Requesting Examination of Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process", 6 October 2005; Appellant's Reply to "Prosecutor's Response, dated 6th October 2005, to the Appellant Jean-Bosco Barayagwiza's Urgent Motion Requesting Examination of the Defence Motion Dated 28 July 2000, and Remedy for Abuse of Process", 14 October 2005.

[106] *Décision relative à la requête de l'Appelant Jean Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure*, 23 June 2006; *Corrigendum à la Décision relative à la requête de l'Appelant Jean Bosco Barayagwiza demandant l'examen de la requête de la Défense datée du 28 juillet 2000 et réparation pour abus de procédure*, 28 June 2006. The Appeals Chamber also granted the Prosecutor's motion requesting the rejection of the affidavit of Mr. Justry Patrick Lumumba Nyaberi (Prosecutor's motion to have affidavit of Justry Patrick Lumumba Nyaberi rejected, 20 October 2005), filed confidentially by the Appellant on 18 October 2005.

[107] *Requête urgente de la Défense aux fins d'être autorisé* [sic] *à présenter un élément de preuve supplémentaire (article 115 RPP)*, 14 December 2006.

[108] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 December 2006.

motion on 12 January 2007 on the ground that this document was not relevant and could not have any impact on the decision.[109]

2. Appellant Barayagwiza

25. On 29 March 2004, Counsel Barletta-Caldarera filed a motion on behalf of Appellant Barayagwiza for leave to present additional evidence.[110] Following the replacement of Counsel Barletta-Caldarera and the lifting of the stay of proceedings against the Appellant, the Pre-Appeal Judge requested Appellant Barayagwiza to notify him whether he intended to proceed with or withdraw the Motion of 29 March 2004.[111] Following the Appellant's failure to notify the Appeals Chamber of his intention within the prescribed time limits, the Chamber concluded that the motion had been withdrawn.[112]

26. The Appellant subsequently filed a number of motions for leave to present additional evidence, which were all dismissed because they did not meet the criteria set out in Rule 115 of the Rules:

- Motion of 28 December 2005,[113] dismissed on 5 May 2006;[114]
- Motions of 7 July 2006,[115] 13 September 2006[116] and 14 November 2006,[117] dismissed on 8 December 2006;[118]
- Motion of 7 December 2006,[119] dismissed on 12 January 2007.[120]

[109] Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence pursuant to Rule 115, 12 January 2007.
[110] Motion for Admission of Additional Evidence for Good Cause Permitting an Extension of Time Pursuant to Rule 115 of the Rules of Procedure and Evidence (concerning the Report by French investigating Judge Jean-Louis Bruguière on the crash of the Rwandan President's plane), 29 March 2004.
[111] Order Lifting the Stay of Proceedings in Relation to Jean-Bosco Barayagwiza, 26 January 2005, ordering the Appellant to notify the Appeals Chamber of his intention to continue with or abandon the motion of 29 March 2004 no later than 21 February 2005.
[112] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, paras. 17, 28.
[113] The Appelant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), filed confidentially on 28 December 2005. On 23 January 2006, the Pre-Appeal Judge granted (1) Appellant's motion for leave to present additional evidence of 40 pages; and (2) Prosecution's motion granting him leave to exceed the number of pages authorized in his response to the Appellant's motion: [Confidential] Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006. The Pre-Appeal Judge further ordered that both versions of the Appellant's Reply, together with the Prosecution's Rejoinder, be expunged from the record. Lastly she ordered the Appellant to re-file, by 30 January 2005, the annexes to his motion to present additional evidence.
[114] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006.
[115] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 July 2006. On 26 May 2006, the Pre-Appeal Judge granted Appellant Barayagwiza's motion for leave to present additional evidence of 15 pages or 4,500 words relating to Expert Witness Alison Des Forges: Decision on Jean-Bosco Barayagwiza's Motion for Extension of the Page Limits to File a Motion for Additional Evidence.
[116] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 13 September 2006.
[117] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 14 November 2006.
[118] Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence pursuant to Rule 115 of the Rules of Procedure and Evidence, 8 December 2006.

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3. Appellant Ngeze

27. On 30 April 2004, Appellant Ngeze submitted to the Appeals Chamber a series of documents and a videotape. As explained in a letter of 4 May 2004, the purpose of these was to present additional evidence on appeal.[121] The Pre-Appeal Judge dismissed the motion on the ground that it was incompatible with Rule 115 of the Rules and the applicable Practice Directions.[122]

28. On 12 May 2004,[123] Appellant Ngeze sought to join in the motion filed on 29 March 2004 by Counsel for Appellant Barayagwiza. The Appeals Chamber dismissed his request on 24 May 2004 on the ground that the motion filed by Counsel for Appellant Barayagwiza did not contain the evidence that he sought to present on appeal; the Chamber then requested Appellant Ngeze to file a new motion in accordance with the applicable rules.[124]

29. Appellant Ngeze subsequently filed several motions for leave to present additional evidence, the majority of which were dismissed because they did not meet the criteria set out in Rule 115 of the Rules:

- Motion of 11 January 2005,[125] dismissed on 14 February 2005;[126]
- Motions of 4 and 11 April 2005,[127] dismissed on 24 May 2005;[128]
- Motions of 12 and 18 May 2005,[129] dismissed on 23 February 2006;[130]
- Motion of 4 July 2006,[131] dismissed on 27 November 2006;[132]

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[119] The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence (Rule 115), 7 December 2006.
[120] Decision on Appellants Jean-Bosco Barayagwiza's and Ferdinand Nahimana's Motions for Leave to Present Additional Evidence pursuant to Rule 115, 12 January 2007.
[121] Appellant Hassan Ngeze Urgent Letter to the Appeals Chamber Requesting the Rescheduling Time of Appeal Brief, Until I get a New Counsel, Under Exception [*sic*] Circumstances & Good Reason, 4 May 2004.
[122] Order Concerning Ngeze's Motion, 5 May 2004. This Order was without prejudice to Appellant Ngeze's right to file a motion in accordance with the applicable rules.
[123] Ngeze Defence's Notice in Support of the Motion for Aditional [*sic*] Evidence Filed by Defence Counsel Caldarera, 12 May 2004.
[124] Order concerning Hassan Ngeze's Request to Join Co-Appellant's Motion, 24 May 2004.
[125] Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 11 January 2005.
[126] Decision on Appellant Hassan Ngeze's Motion for Leave to Present Additional Evidence, 14 February 2005.
[127] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, filed confidentially on 4 April 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence, 11 April 2005.
[128] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005.
[129] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of Witness ABQ, filed confidentially on 12 May 2005; Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of Witness OQ, filed confidentially on 18 May 2005.
[130] [Confidential] Decision on Appellant Hassan Ngeze's Six Motions for Admission of Additional Evidence and/or further Investigation at the Appeal Stage, 23 February 2006.
[131] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness ABC1 as per Prosecutor's Disclosure of Transcript of Defence Witness ABC1's Testimony in *The Prosecutor v. Bagosora et al.*, Filed on 22nd June 2006 Pursuant to Rule 75(F)(ii) and Rule 68 of the Rules of Procedure and Evidence, filed confidentially on 4 July 2006.
[132] 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, rendered on 7 November 2006 (both public and confidential versions).

Motion of 5 January 2007,[133] dismissed on 15 January 2007.[134] 10468613/17

However, certain of the Appellant's motions to present additional evidence relating to Witness EB were granted, as explained below.

- Witness EB

30. On 25 April 2005, Appellant Ngeze filed a motion for leave to present a statement dated 5 April 2005, purporting to have been made by Witness EB and indicating that this witness wished to recant his Trial testimony.[135] On 24 May 2005, the Appeals Chamber requested the Prosecutor to conduct further investigations into this statement, and to report to the Appeals Chamber a month later.[136] This time limit was subsequently extended to 7 July 2005.[137] The Prosecutor submitted the results of his investigation on 7 July 2005[138] and Appellant Ngeze filed a reply on 18 July 2005.[139]

31. On 15 July 2005, Appellant Ngeze filed a confidential motion for leave to have the members of the Prosecution investigating team give evidence, and to present as additional evidence a handwriting expert's report on the statement attributed to Witness EB.[140]

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[133] Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Potential Witness Colonel Nsengiyumva as per Prosecutor's Disclosure of his Confidential Letter Dated 18th September 2005 Entitled *"Dénouncer [sic] les manoeuvres de Monsieur Hassan Ngeze*["]. Pursuant to Rule 66(B) and 75(F)(i) and (ii) of the Rules of Procedure and Evidence", filed confidentially on 5 January 2007.

[134] [Confidential] Decision on Hassan Ngeze's Motion for Leave to Present Additional Evidence of Potential Witness Colonel Nsengiyumva, 15 January 2007.

[135] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB, filed confidentially on 25 April 2005 and corrected on 28 April 2005. The Prosecutor confidentially responded on 5 May 2005 (Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB" and Request to be allowed to file additional submissions in due course [Rules 54, 107]), and Appellant Ngeze filed his Reply on 11 May 2005 (Appellant Hassan Ngeze's Reply to the Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB and Request to be allowed to file additional submissions in due course [Rules 54, 107]). On 13 May 2005, the Prosecutor asked the Appeals Chamber for leave to file a Rejoinder (Prosecutor's Further Submissions to "Appellant Hassan Ngeze's Reply to the Prosecutor's Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB" and Request to be allowed to file additional submissions in due course [Rules 54, 107]"). On 24 May 2005, the Appeals Chamber held that it was unnecessary to rule on this request (Confidential Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, para. 3).

[136] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005, para. 43.

[137] [Confidential] Decision on Prosecution's Urgent Motion for Extension of Time to File Results of Investigation into the New Evidence of Witness EB, 28 June 2005.

[138] Prosecutor's Additional Submissions in Response to "Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB", filed confidentially on 7 July 2005.

[139] Appellant Hassan Ngeze's Reply to the Prosecution Additional Submissions In Response To "Appellant Hassan Ngeze Urgent Motion For Leave to Present Additional Evidence (Rule 115) of Witness EB'; and his Request to Grant 45 Days to File Additional Submissions in this Regard" (Rules 54, 107), filed confidentially on 18 July 2005.

[140] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of The Prosecution Investigation's Team Namely; Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115, filed confidentially on 15 July 2005. The Prosecutor filed his confidential response on 25 July 2005 (Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of the Prosecution Investigation's Team Namely: Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115), and Appellant Ngeze filed his

32. On 25 July 2005, the Prosecutor sought leave of the Appeals Chamber to investigate an alleged attempt by Appellant Ngeze or persons in his entourage to suborn Witnesses AFX and EB.[141] On 6 September 2005, the Appeals Chamber ordered the Prosecutor to conduct investigations into the matter.[142]

33. By a confidential decision of 23 February 2006, the Appeals Chamber granted the motion of 25 April 2005 and, partially, that of 15 July 2005, admitting as additional evidence Witness EB's alleged statement (both the handwritten[143] and typed[144] versions) and the Report by the handwriting expert on the said statement;[145] it also decided to call Witness EB.[146] The same day, in a confidential decision, the Appeals Chamber dismissed Appellant Ngeze's motion seeking a copy of all reports by the Special Prosecutor assigned by the Prosecutor's Office to investigate the allegations of interference with the administration of justice in the case of *Kamuhanda* and in the instant case.[147]

34. Ruling on a Prosecution motion on 14 June 2006,[148] the Appeals Chamber (1) refused to order Appellant Ngeze to produce the originals of Witness EB's alleged recantation statement and to grant the Prosecution leave to conduct a forensic analysis on those documents; and (2) ordered Witness EB to appear before the Appeals Chamber to be heard as a witness of the Chamber.[149]

35. In a decision of 27 November 2006,[150] the Appeals Chamber (1) dismissed Appellant Ngeze's motion[151] to order the Prosecution to disclose all documents relating to the investigations

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Reply on 1 August 2005 (Reply to the Prosecutor's Response to Appellant Hassan Ngeze's Urgent Motion for Leave to Present Additional Evidence of the Members of the Prosecution Investigation's Team Namely: Maria Warren, Chief, Information and Evidence Support, Mr. Moussa Sanogo, Mr. Ulloa Larosa, Adolphe Nyomera Investigators, Interpreter Jean-Pierre Boneza, with the Forensic Expert Mr. Antipas Nyanjwa under Rule 115).

[141] Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, filed confidentially on 25 July 2005. Appellant Ngeze filed his confidential Response on 3 August 2005 (Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, With a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively), and the Prosecutor filed his confidential Reply on 8 August 2005 (Prosecutor's Reply to "Appellant Hassan Ngeze's Response to the Prosecutor's Urgent Motion Pursuant to Rules 39(iv), 54, and 107, for an Order, pursuant to Rule 77(C)(i) and Rule 91(B)(i), Directing the Prosecutor to Investigate Certain Matters, with a View to the Preparation and Submission of Indictments for Contempt and False Testimony, Respectively").

[142] Order Directing the Prosecution to Investigate Possible Contempt and False Testimony, 6 September 2005.

[143] This document is part of Confidential Exhibit CA-3D2.

[144] Confidential Exhibits CA-3D1 (in Kinyarwanda), CA-3D1(F) (in French) and CA-3D1(E) (in English).

[145] Confidential Exhibit CA-3D2.

[146] Confidential Decision on Appellant Ngeze's Six Motions for Admission of Additional Evidence on Appeal and/or Further Investigation at the Appeal Stage, 23 February 2006.

[147] *Décision [confidentielle] relative à la requête de l'Appelant Hassan Ngeze concernant la communication du rapport de l'avocat général chargé de l'enquête sur les allégations d'entrave au cours de la Justice*, 23 February 2006.

[148] Prosecutor's Urgent Motion for an Order to the Appellant Hassan Ngeze to Produce the Original Texts of the Proffered Recantation Statements of Witness EB and for Certain Directives [Rules 54, 39(iv), and 107], 8 March 2006.

[149] 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.

[150] Decision on Motions Relating to the Appellant Hassan Ngeze's and the Prosecution's Requests for Leave to Present Additional Evidence of Witnesses ABC1 and EB, rendered confidentially on 27 November 2006. A public version of this Decision was filed on 1 December 2006 ([Public 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, 1 December 2006).

[151] [Confidential] Appellant Hassan Ngeze's Motion to Order The Prosecutor to Disclose Material and/or Statement/s of Witness EB Which Might Have Come in his Possession Subsequent to the Presentation of Forensic Expert's Report on Witness EB's Recanted Statement [*sic*], 19 June 2006.

conducted into Witness EB's purported recantation; (2) found that Appellant Ngeze's motion for leave to present on appeal Witness EB's statement before a *Gacaca* court[152] had been withdrawn by Appellant Ngeze's Counsel;[153] (3) granted Appellant Ngeze's motion[154] for leave to present as additional evidence a copy of a statement purporting to have been signed by Witness EB and confirming the recantation statement of 5 April 2005 ("Additional Statement")[155]; and (4) admitted *proprio motu*, as rebuttal evidence, copies of the envelopes in which copies of the above-mentioned statement had been received by the Prosecution.[156]

36. On 13 December 2006, the Appeals Chamber partially granted a Prosecution motion,[157] admitting as evidence in rebuttal a statement made by Investigator Moussa Sanogo on 21 November 2006,[158] a report of the mission of 16 to 18 October 2006 to Gisenyi,[159] an investigation report dated 23 August 2006[160] and statements by Witness EB dated 22 May and 23 June 2005;[161] it further directed that Investigator Moussa Sanogo appear before the Appeals Chamber on 16 January 2007.[162]

37. On 12 January 2007, the Appeals Chamber dismissed Appellant Ngeze's motion for leave to present rejoinder evidence.[163]

38. At the hearing of 16 January 2007, the Appeals Chamber admitted a series of additional evidence, one of these being the original of the Additional Statement.[164]

39. On 7 February 2007, following Appellant Ngeze's oral motion at the appeal hearings,[165] the Appeals Chamber, pursuant to Rules 54, 89(D) and 107 of the Rules, ordered a further handwriting report by Mr. Stephen Maxwell; the Appeals Chamber also granted the parties leave to file

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[152] [Confidential] Appellant Hassan Ngeze's in Person Urgent Motion for Leave to Present Additional Evidence (Rule 115) of Witness EB as per Prosecutor's Disclosure Filed on 20th June 2006 of the Relevant Pages of the Gacaca Records Book Given Before the Gacaca on 9th February 2003, 14 July 2006.

[153] Letter from B.B. Chadha to Félicité A. Talon, dated 21 September 2006.

[154] [Confidential] Appellant Hassan Ngeze's Urgent Motion for Leave to Present Further Additional Evidence (Rule 115) of Witness EB, 28 August 2006.

[155] Confidential Exhibit CA-3D3. The original version of this document was admitted during the hearing of 16 January 2007 as confidential Exhibit CA-3D4.

[156] Confidential Exhibit CA-P5.

[157] Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence pursuant to Rules 54, 85, 89, 107 and 115, 27 November 2006; Strictly Confidential Annexes to the Prosecutor's Urgent Motion for Leave to Call Rebuttal Evidence pursuant to Rules 54, 85, 89, 107 and 115, 27 November 2006.

[158] Confidential Exhibit CA-P1.

[159] Confidential Exhibit CA-P2.

[160] Confidential Exhibit CA-P3.

[161] Confidential Exhibit CA-P4.

[162] Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006. The Appeals Chamber further noted that the Prosecutor's failure to make timely disclosure of the investigation report and of the statements attached thereto was inconsistent with his obligations, and warned the Prosecutor that a repeat of such violations could lead to disciplinary action.

[163] Confidential Decision on Hassan Ngeze's Motion for Leave to Present Rejoinder Evidence, 12 January 2007.

[164] Confidential Exhibit CA-3D4 (see T(A) 16 January 2007, p. 3). See also T(A) 16 January 2007, pp. 22, 31, 32 (closed session), where several samples of Witness EB's handwriting (Confidential Exhibits CA-3D6 and CA-3D7) were admitted, as well as a document alleged to represent this witness' testimony before a *Gacaca* court (Confidential Exhibit CA-3D5). Immediately after the hearing of 16 January 2007, the witness gave another short sample of his handwriting and signature, which was also admitted as Confidential Exhibit CA-1. Finally, on 18 January 2007, the Appeals Chamber collected an additional sample of his handwriting, admitted as Confidential Exhibit CA-2 (T(A) 18 January 2007, p. 81. See also *Rapport à la Chambre d'appel, Recueil d'un exemplaire d'écriture et de signature du Témoin EB*, filed on 29 January 2007).

[165] T(A) 16 January 2007, p. 34 (closed session).

submissions relating to Mr. Maxwell's findings.[166] The terms of reference of the report were modified by the Appeals Chamber on 21 February[167] and 27 March 2007.[168]

40. The handwriting report by Mr. Maxwell was filed on 12 April 2007.[169] On 30 April 2007, the Prosecutor confidentially filed his submissions relating to the findings of this report.[170] On 3 May 2007, the Appeals Chamber granted Appellant Barayagwiza's motion[171] for a five-day extension of the time limit fixed for the filing of his submissions.[172] The same day, Appellant Ngeze filed his submissions on Mr. Maxwell's findings.[173] Appellant Barayagwiza followed suit on 7 May 2007.[174]

H. Re-certification of materials filed and of court transcripts

41. On 6 December 2006, having noted discrepancies between the English and French translations of certain Kinyarwanda terms, the Pre-Appeal Judge *proprio motu* instructed the Registrar (1) to revise translations of extracts from the statements of Witnesses AAM, AFB, AGK et X; (2) to confirm the English and French translations of certain Kinyarwanda terms; and (3) to revise the translation of an extract from Appellant Nahimana's interview of 25 April 1994 on Radio Rwanda.[175] The Registry submitted its report on 4 January 2007.[176]

42. Following a motion by Appellant Barayagwiza,[177] the Appeals Chamber instructed the Registry to revise and re-certify the transcripts of the appeal hearings relating to submissions by Counsel for Appellant Barayagwiza, in both French and English.[178] The Registry submitted a first

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[166] Public Order Appointing a Handwriting Expert with Confidential Annexes, 7 February 2007.
[167] Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 21 February 2007.
[168] Second Order Extending the Scope of the Examination by the Handwriting Expert Appointed by Order of 7 February 2007, 27 March 2007. Further, on 3 April 2007 the Appeals Chamber dismissed a motion by Appellant Ngeze (Appellant Hassan Ngezes's Urgent Motion to Order the Prosecutor and the Registry to Provide the Original Documents as Directed by the Appeals Chamber Vide its Order of 21st February 2007, 29 March 2007) and refused to order the Prosecutor and the Registry to disclose the originals of certain documents already disclosed to the handwriting expert pursuant to the Order of 21 February 2007 (Decision on Hassan Ngeze's Motion of 29 March 2007, 3 April 2007).
[169] Examination of Handwriting and Signatures Witness EB, dated 3 April 2007 but filed on 12 April 2007.
[170] Prosecutor's Submissions (Following the Rule 115 Evidentiary Hearing Pertaining to the alleged recantation of Witness EB's trial testimony), 30 April 2007.
[171] The Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Permit Extra Time to File Written Submissions in Response to the Forensic Experts Report Filed on 19th April 2007 Pursuant to the Order of the Appeal Court, 30 April 2007.
[172] Decision on Appellant Jean-Bosco Barayagwiza's Motion for Extension of Time, 3 May 2007.
[173] Appellant Hassan Ngeze's Written Submissions in connection with the conclusion of the Handwriting Expert Report and their impact on the verdict, in pursuance of Appeals Chamber's Order dated 16 January pages 66-68, 3 May 2007, title corrected by the Appellant on 6 June 2007.
[174] The 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, 7 May 2007. The Appellant had failed to file this document confidentially. The error was immediately corrected by the Registry at the request of the Appeals Chamber.
[175] Order for Re-certification of the Record, 6 December 2006.
[176] *Supports audio pour confirmation des témoignages* [Audio Confirmation of Testimony].
[177] The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion relating to the Appeal Transcript of 17th and 18th January 2007, 11 April 2007.
[178] Decision on "The Appellant Jean-Bosco Barayagwiza's Corrigendum Motion relating to the Appeal Transcript of 17th and 18th January 2007", 16 May 2007. The Appeals Chamber stated that, in case of irreconcilable differences between the French and English versions of the transcripts of the hearing with respect to the statements of Counsel for

document on 22 June 2007.[179] On 12 July 2007, re-certified versions of the transcripts of the appeals hearings of 17 and 18 January 2007 (French and English) were filed. On 23 July 2007, Appellant Barayagwiza filed a new motion on the same matter,[180] which was dismissed by the Appeals Chamber.[181]

I. Other motions

1. Appellant Nahimana

43. On 6 April 2005, Appellant Nahimana filed a "Motion for Various Measures Relating to the Registry's Assistance to the Defence at the Appellate Stage", which was partially granted on 3 May 2005.[182]

44. On 12 September 2006, the Appeals Chamber dismissed Appellant Nahimana's motion[183] to order the Prosecution to explain why the recording of an interview given by the Appellant to a Radio Rwanda journalist was incomplete, or to order the Rwandan authorities to transmit to the Tribunal the said interview in its entirety.[184]

45. On 20 November 2006, the Appeals Chamber dismissed Appellant Nahimana's motion for the translation of recordings of RTLM broadcasts contained in Exhibit C7.[185]

46. On 8 December 2006, the Appeals Chamber partially granted a motion by Appellant Nahimana,[186] authorizing him to have access to the confidential plea agreement made in the *Serugendo* case.[187] By the same decision, the Appeals Chamber dismissed the Appellant's request for assistance from the Registry for the conduct of additional investigations on appeal.[188]

Appellant Barayagwiza, the English version would take precedence, since Counsel for Appellant Barayagwiza had spoken in English.

[179] Certified verification of the transcripts of the hearing of 17 and 18 January 2007.

[180] The Appellant Jean-Bosco Barayagwiza's Motion relating to the Registrar's Submission concerning the Transcript of the Final Oral Hearing of 17th and 18th January 2007, 23 July 2007.

[181] Decision on "The Appellant Jean-Bosco Barayagwiza's Motion relating to the Registrar's Submission concerning the Transcript of the Final Oral Hearing of 17th and 18th January 2007", 29 August 2007.

[182] Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase, 3 May 2005, as corrected on 6 May 2005 (Further Decision on Appellant Ferdinand Nahimana's Motion for Assistance from the Registrar in the Appeals Phase).

[183] *Requête aux fins de communication d'éléments de preuve disculpatoires* [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105,* filed confidentially on 10 April 2006.

[184] *Décision sur la Requête de Ferdinand Nahimana aux fins de communication d'éléments de preuve disculpatoires* [sic] *et d'investigations sur l'origine et le contenu de la pièce à conviction P105,* 12 September 2006.

[185] Decision on Ferdinand Nahimana's Motion for the Translation of RTLM tapes in Exhibit C7, 20 November 2006.

[186] *Requête aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de Appelant,* 10 July 2006.

[187] *Décision sur les requêtes de Ferdinand Nahimana aux fins de divulgation d'éléments en possession du Procureur et nécessaires à la Défense de l'Appelant et aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel,* 8 December 2006.

[188] *Requête urgente de la Défense aux fins d'assistance du Greffe pour accomplir des investigations complémentaires en phase d'appel,* 10 October 2006.

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2. Appellant Barayagwiza

47. On 4 October 2005, the Appeals Chamber dismissed Appellant Barayagwiza's motion[189] for leave to appoint an investigator at the expense of the Tribunal.[190]

48. On 17 August 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion[191] to allow a legal assistant to have privileged access to Appellant Barayagwiza for a limited period of time.[192]

49. On 8 December 2006, the Appeals Chamber dismissed Appellant Barayagwiza's motion[193] for clarification regarding an Appeals Chamber decision in the *Karemera* case; the Appeals Chamber also refused to grant the Appellant leave to amend his Notice of Appeal and Appellant's Brief.[194]

50. On 15 January 2007, the Appeals Chamber dismissed Appellant Barayagwiza's motion for leave to call an expert witness in the Kinyarwanda language and in political discourse.[195]

3. Appellant Ngeze

51. On 3 December 2004, Appellant Ngeze filed an urgent motion for the translation into English of all the issues of the journal *Kangura*.[196] On 10 December 2004, the Pre-Appeal Judge instructed the Registrar to indicate to the Chamber the number of pages that needed to be translated and approximately how long this would take.[197] The Registrar filed his report on 14 December 2004,[198] and the matter was discussed at the Status Conference of 15 December 2004. The Pre-Appeal Judge ultimately dismissed the Appellant's motion and requested him to include in

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[189] Appellant Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, filed confidentially on 12 August 2005.

[190] Decision on Jean-Bosco Barayagwiza's Extremely Urgent Motion for Leave to Appoint an Investigator, 4 October 2005. The Appeals Chamber also granted a motion by the Prosecution (Prosecutor's Urgent Motion for an Order that the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request to Appoint an Investigator" and the "Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request for Further Time to Lodge Appeal Brief dated 16th August 2005" Be Deemed as the Actual Replies of the Appellant and for Rejection of the Requests for an Extension of Time to File Additional Replies, 2 September 2005) holding the Appellant's "Preliminary Response" to the Prosecution's motion (Appellant's Preliminary Response to Prosecution Reply [*sic*] to Appellant's Request to Appoint Investigator, 29 August 2005) to be his final Reply.

[191] The Appellant Jean Bosco-Barayagwiza's [*sic*] Extremely Urgent Motion Requesting Privileged Access to the Appellant without the Attendance of Lead Counsel, 31 July 2006.

[192] Decision on Jean-Bosco Barayagwiza's Urgent Motion Requesting Privileged Access to the Appellant without Attendance of Lead Counsel, 17 August 2006.

[193] The Appellant Jean-Bosco Barayagwiza's Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Date [*sic*] 16th June 2006 in *Prosecutor v. Karemera et al.*, 17 August 2006.

[194] Decision on Jean-Bosco Barayagwiza's Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in *Prosecutor v. Karemera et al.* Case and Prosecutor's Motion to Object the Late Filing of Jean-Bosco Barayagwiza's Reply, 8 December 2006. The Appeals Chamber also dismissed a reply filed belatedly by Appellant Barayagwiza (The Appellant Jean-Bosco Barayagwiza's Reply to the Prosecution Response to the Appellant "Urgent Motion for Clarification and Guidance Following the Decision of the Appeals Chamber Dated 16 June 2006 in '*Prosecutor v Karemera et al.*'", 18 September 2006).

[195] Decision on The Appellant Jean-Bosco Barayagwiza's Motion for Leave to Call an Expert Witness in the Kinyarwanda Language and in Political Speech, 15 January 2007.

[196] Appellant Hassan Ngeze's Urgent Motion for Supply of English Translation of 71 Kangura News Papers Filed by the Prosecutor with the Registry During Trial, 3 December 2004.

[197] Order to Registrar, 10 December 2004.

[198] Report of the Registrar in Compliance with the Orders of the Pre-Appeal Judge dated 10 December 2004, 14 December 2004.

his Appellant's Brief those extracts from *Kangura* that he considered relevant, translated by himself; the Pre-Appeal Judge indicated that she would request the Registry to provide an official translation of the extracts selected by the Appellant.[199]

52. Appellant Ngeze also filed several motions seeking funds to conduct further investigations on appeal, all of which were dismissed:

- Motion of 21 March 2005,[200] dismissed on 3 May 2005;[201]
- Motions of 16 June and 15 September 2005,[202] dismissed on 23 February 2006;[203]
- Motions of 6 and 16 January 2006,[204] dismissed on 20 June 2006.[205]

J. Appellant Ngeze's detention

53. By a decision of 25 April 2005, the Appeals Chamber dismissed Appellant Ngeze's motion[206] for leave to allow his Defence Counsel to communicate with him outside the prescribed periods.[207]

54. On 5 July 2005, finding that there were reasonable grounds to believe that Appellant Ngeze was involved in attempts to interfere with witnesses, the Prosecutor requested the Commander of the Tribunal's detention facility to take restrictive measures relating to Appellant Ngeze's detention.[208] On 1 August 2005, the President of the Tribunal dismissed the Appellant's objection to such measures.[209] On 20 September 2005, the Pre-Appeal Judge dismissed the Appellant's request for the holding of a status conference to allow him to challenge the restrictive measures taken against him.[210] On 24 October 2005, Appellant Ngeze requested a psychological test and treatment by independent specialists, alleging that the conditions in which he was being held were affecting

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[199] T. Status Conference of 15 December 2004, p. 4.
[200] The Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 21 March 2005.
[201] Decision on Appellant Hassan Ngeze's Motion for the Approval of the Investigation at the Appeal Stage, 3 May 2005.
[202] Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness AEU, filed confidentially on 16 June 2005, and Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Witness BP and Witness AP, 15 September 2005.
[203] [Confidential] Decision on Appellant Hassan Ngeze's Motions for Admission of Additional Evidence on Appeal, 24 May 2005.
[204] Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – Jean Bosco Barayagwiza (Co-Appellant), 6 January 2006; Appellant Hassan Ngeze's Motion for the Approval of Further Investigation of the Specific Information Relating to the Additional Evidence of Potential Witness – the then Corporal Habimana, 16 January 2006.
[205] Decision on Appellant Hassan Ngeze's Motions for Approval of Further Investigations on Specific Information Relating to the Additional Evidence of Potential Witnesses, 20 June 2006.
[206] Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with Him During Afternoon Friday, Saturday, Sunday and Public Holidays, 4 April 2005.
[207] Decision on "Appellant Hassan Ngeze's Motion for Leave to Permit his Defence Counsel to Communicate with him During Afternoon Friday, Saturday, Sunday and Public Holidays", 25 April 2005.
[208] Prosecutor's Urgent Request to the Commanding Officer of the United Nations Detention Facility, filed confidentially on 5 July 2005.
[209] Decision on Request for Reversal of the Prohibition of Contact dated 29 July 2005, but filed on 1 August 2005.
[210] Decision on Hassan Ngeze's "Request of an Extremely Urgent Status Conference Pursuant to Rule 65 *bis* of Rules of Procedure and Evidence", 20 September 2005.

his mental health.[211] The Appeals Chamber dismissed his motion on 6 December 2005.[212] On 12 December 2005, the Pre-Appeal Judge refused to grant the Appellant leave to file a complaint before the Appeals Chamber regarding, in particular, the restrictive measures taken against him.[213] On 13 December 2005, the Pre-Appeal Judge dismissed a new request by the Appellant for a status conference to challenge the restrictive measures taken against him.[214]

55. By a decision of 23 February 2006, the Appeals Chamber dismissed Appellant Ngeze's motion[215] to rectify the unequal treatment of detainees of ICTR and ICTY.[216] By a confidential decision of 27 February 2006, the Appeals Chamber dismissed Appellant Ngeze's motion[217] to order an investigation into the alleged falsification of the date of filing of a Prosecutor's motion[218] seeking an extension of the restrictive measures relating to his detention.[219]

56. By a confidential decision of 10 April 2006, the President of the Tribunal dismissed two motions by Appellant Ngeze[220] for reversal of the restrictive measures relating to his detention.[221] The Appellant filed a new motion to set aside that decision,[222] which was dismissed by the Appeals Chamber on 20 September 2006.[223] By the same decision, the Appellant's motions relating to the

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[211] The Appellant Hassan Ngeze's Urgent Motion to Order the Registrar to Arrange for an Urgent Pshychological [*sic*] Examination and Treatment of the Appellant Hassan Ngeze under Rule 74 *bis* of the Rules of Procedure and Evidence by Experts on Account of the Mental Torture Suffered by him at the UNDF, 24 October 2005.

[212] Decision on Hassan Ngeze's Motion for a Psychological Examination, 6 December 2005. On the same day, the Appeals Chamber dismissed the Appellant's request to "consummate" his marriage and obtain conjugal visits, on the ground that the refusal of the Registrar and of the President of the ICTR to grant such requests did not violate the Appellant's right to fair proceedings: Decision on Hassan Ngeze's Motion to Set Aside President Møse's Decision and Request to Consummate his Mariage [*sic*], 6 December 2005.

[213] Decision on Hassan Ngeze's Request to Grant Him Leave to Bring his Complaints to the Appeals Chamber, 12 December 2005.

[214] Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2005.

[215] Appellant Hassan Ngeze's Request for the Appeal [*sic*] Chamber to take Appropriate Steps to Rectify the Differential and Unequal Treatment Between the ICTR and ICTY in Sentencing Policies and Other Rights, 28 November 2005.

[216] Decision on Hassan Ngeze's Motion Requesting to Rectify the Differential and Unequal Treatment between the ICTR and ICTY in Sentencing Policies and Other Rights, 23 February 2006.

[217] Appellant Hassan Ngeze's Urgent Motion Requesting for Immediate Action against the Registry Clerks(s) and Other Officer from the Office of the OTP, who Participated in Falsifying the Filing Date of the Prosecutor's Request for a Further Extension of the Urgent Restrictive Measures of 12 December, 2005, Marked with Index Numbers 615 3/A-6 150/A, Which Were Already Assigned to Another Document Titled 'The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief', filed on 12 December 2005", 19 December 2005.

[218] Prosecution's Confidential Request for a Further Extension of the Urgent Restrictive Measures in the Case *Prosecutor v. Hassan Ngeze*, pursuant to Rule 64 Rules Covering the Detention of Persons Awaiting Trial or Appeal before the Tribunal or Otherwise Detained on the Authority of the Tribunal, 12 December 2005.

[219] Decision on Hassan Ngeze's Motion Requesting Immediate Action in Respect of Alleged Falsification of the Prosecutor's Request for a Further Extension of the Restrictive Measures of 12 December 2005, 27 February 2006.

[220] The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of the Prosecutor' Request of Extension of Restrictive Measures of 13th February pursuant to Rule 64 of the Rules of Detention, filed confidentially on 24 February 2006; The Appellant Hassan Ngeze's Extremely Urgent Motion to the Honorable President for Reversal of the Prosecutor's Request of Extension of Restrictive Measures of 9th March, 06 pursuant to Rule 64 of the Rules of Detention, filed confidentially on 21 March 2006.

[221] Decision on the Request for Reversal of the Prohibition of Contact, rendered confidentially on 10 April 2006.

[222] Appellant Hassan Ngeze's Extremely Urgent Motion for Setting Aside the Decision of the President Judge Erik Mose [*sic*] on his Request for the Reversal of the Prohibition of Contact of 7th April, 2006, filed confidentially on 12 May 2006.

[223] Decision on Hassan Ngeze's Motions Concerning Restrictive Measures of Detention, rendered confidentially on 20 September 2006. The Appeals Chamber also ordered the Registry to expunge from the appeal record Appellant Ngeze's "reminder" concerning his motion (Appellant Hassan Ngeze's Reminder for Consideration of his Motion Titled: "Appellant Hassan Ngeze's Motion for Setting Aside the Decision of the President Judge Erik Mose [*sic*] on his

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conditions of his detention, which had been directly submitted to the Appeals Chamber, were dismissed.[224]

57. On 25 October 2006,[225] 23 November 2006[226] and 28 May 2007,[227] the President of the Tribunal rendered further decisions upholding the restrictive measures applicable to the Appellant's detention.

58. On 13 December 2006, the Pre-Appeal Judge dismissed Appellant Ngeze's request for a status conference to discuss, *inter alia,* his physical and mental condition.[228]

Request for the Reversal of the Prohibition of Contact" of 7th April, 2006, Filed on 12th May 2006, filed confidentially on 21 August 2006).

[224] The Appellant Hassan Ngeze's Urgent Motion In Person before the Appeals Chamber Requesting Permission to Receive Phone Calls and Visits from his Mother, Sisters, Brothers, Cousins Due to Seemingly Endless Prohibition from Communicating with his Family and Relatives since July of 2005, While Awaiting the Decision of his Various Motions Pending before the Appeals Chamber and President's Office, filed confidentially on 21 August 2006; The Appellant Hassan Ngeze's Urgent Motion In Person before the Appeals Chamber Requesting to Consider What is Stated in the Newly Discovered Additional Statement of Witness EB Disclosed to the Defence by the Prosecutor on 17th & 22nd of August 2006 while Dealing with his Pending Motion Concerning Restrictive Measures, filed confidentially on 25 August 2006.

[225] Decision on Requests for Reversal of Prohibition of Contact, 25 October 2006.

[226] Decision on Request for Reversal of Prohibition of Contact, 23 November 2006.

[227] Decision on Request for Reversal of Prohibition of Contact, 28 May 2007.

[228] Decision on Hassan Ngeze's Request for a Status Conference, 13 December 2006.

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ANNEX B

GLOSSARY AND REFERENCES

A. Acronyms (by alphabetical order)

CDR	*Coalition pour la défense de la République* (Coalition for the Defence of the Republic)
CRA	Transcript of the Trial Chamber hearings (French version)
CRA(A)	Transcript of the appeal hearings (French version)
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965
ICTR or Tribunal	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
IMT	International Military Tribunal established by the London Agreement of 8 August 1945
MRND	*Mouvement révolutionnaire national pour le développement* (National Revolutionary Movement for Development)
ORINFOR	Rwandan Office of Information
RPF	Rwandan Patriotic Front
RTLM	*Radio Télévision Libre des Mille Collines*
T.	Transcript of the Trial Chamber hearings (English Version)
T(A)	Transcript of the appeal hearings (English Version)

B. Defined Terms

1. Filings of the parties on appeal (in alphabetical order)

***Amicus Curiae* Brief**	*Amicus Curiae* Brief on Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor (ICTR Case No. ICTR-99-52-A), submitted for the first time on 18 December and again on 3 January 2007 to which the parties were allowed to respond by the Appeal Chamber Decision of 12 January 2007
Annex to the Prosecutor's Response to the New Grounds of Appeal	Confidential Annexes to the Prosecutor's Response to the Six New Grounds of Appeal Raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007
Appellant Barayagwiza's Conclusions Following Second Expert Report	The Appellant's Jean Bosco-Barayagwiza's submissions regarding the handwriting expert's report pursuant to the Appeals Chamber's orders dated 7th February 2007 and 27th March 2007, filed publicly on 7 May 2007 but sealed on the same day following intervention by the Appeals Chamber
Appellant Ngeze's Conclusions 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
Barayagwiza Appellant's Brief	Appellant's Appeal Brief, 12 October 2005
Barayagwiza Brief in Reply	The Appellant Jean-Bosco Barayagwiza's Reply to the Consolidated Respondent's Brief, 12 December 2005
Barayagwiza Notice of Appeal	Amended Notice of Appeal, 12 October 2005 (English version)
Barayagwiza's Reply to the New Grounds of Appeal	The Appellant Jean-Bosco Barayagwiza Reply to the Prosecutor Response to the Six New Grounds of Appeal raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 21 March 2007
Barayagwiza's Response to the *Amicus Curiae* Brief	The Appellant Jean-Bosco Barayagwiza's Response to the *Amicus Curiae* [Brief] filed by "Open Society Justice Initiative", 8 February 2007

Nahimana Appellant's Brief	Appeal Brief (Revised), 1 October 2004 [public version]
Nahimana Defence Reply	Defence Reply, 21 April 2006
Nahimana Notice of Appeal	Notice of Appeal, 4 May 2004
Nahimana's Response to the *Amicus Curiae* Brief	*Réponse au Mémoire de l'amicus curiae*, 12 February 2007
Ngeze Appellant's Brief	Appeal Brief (Pursuant to Rule 111 of the Rules of Procedure and Evidence), filed confidentially on 2 May 2005; the confidentiality was lifted following an order of the Appeals Chamber (Order concerning Appellant Hassan Ngeze's Filings of 27 September 2007, dated 4 October 2007 but filed 5 October 2007), save for Annexes 4 and 5, the public version of which was provided by the Appellant on 27 September 2007 (Appeal Brief (Pursuant to the Order of the Appeals Chamber of dated [*sic*] 30 August 2007 to Appellant Hassan to File Public Version of his Notice of Appeal and Appellant's Brief))
Ngeze Brief in Reply	Appellant Hassan Ngeze's Reply Brief (Article [*sic*] 113 of the Rules of Procedure and Evidence), 15 December 2005
Ngeze Notice of Appeal	Amended Notice of Appeal, filed confidentially on 9 May 2005, an identical version of this document was filed publicly on 27 September 2007: Amended Notice of Appeal (Pursuant to the Order of the Appeals Chamber of dated [*sic*] 30 August 2007 to Appellant Hassan to File Public Version of his Notice of Appeal and Appellant's Brief)
Ngeze's Response to the *Amicus Curiae* Brief	Appellant Hassan Ngeze's Response to *Amicus Curiae* Brief Pursuance [*sic*] to the Appeal [*sic*] Chamber's Decision of 12.01.2007, 12 February 2007
Respondent's Brief	Consolidated Respondent's Brief, 22 November 2005
Prosecution's Conclusions Following Second Expert Report	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 Response to the *Amicus Curiae* Brief	Prosecutor's Response to the "*Amicus Curiae* Brief in *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*", 12 February 2007
Prosecutor's Response to the New Grounds of Appeal	The Prosecutor's Response to the Six New Grounds of Appeal raised by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 14 March 2007

2. Other references related to the case (in alphabetical order) 10456bis/A

Appeal of 19 October 1999	*The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-72, Notice of Appeal, 19 October 1999
Appeal of 18 September 2000	*The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-AR72, Notice of Appeal, 18 September 2000
Application of 11 June 2001	*The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-I, Prosecutor's *Ex-Parte* Application to the Trial Chamber Sitting in Camera for Relief from Obligation to Disclose the Existence, Identity and Statements of New Witness X, 11 June 2001
Barayagwiza Indictment	*The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, Amended Indictment, 14 April 2000
Barayagwiza Initial Indictment	*The Prosecutor v. Jean-Bosco Barayagwiza*, Case No. ICTR-97-19-I, Indictment, 22 October 1997
Barayagwiza's Closing Brief	*The Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Closing Brief for Jean Bosco Barayagwiza, 31 July 2003 (French original), 15 August 2003 (English translation) [confidential]
Decision of 3 November 1999	*Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision, 3 November 1999
Decision of 5 November 1999	*The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 5 November 1999
Decision of 31 March 2000	*Jean-Bosco Barayagwiza v. The Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000
Decision of 5 September 2000	*Hassan Ngeze and Ferdinand Nahimana v. The Prosecutor*, Cases No. ICTR-97-27-AR72 and ICTR-96-11-AR72, *Décision sur les appels interlocutoires*, 5 September 2000
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To: / *A:*

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