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Registry: Adama Dieng

Judgment of: 1 June 2001

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THE PROSECUTOR

v.

JEAN-PAUL AKAYESU

JUDGMENT

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Solomon Loh
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Translation certified by LCSS, ICTR

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The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January and 31 December 1994 ("the Appeals Chamber" and "the Tribunal" respectively) is seized of appeals lodged by Jean-Paul Akayesu ("Akayesu" or "the Appellant") and the Prosecutor against the Judgment and the Sentencing Judgment rendered by Trial Chamber I of the Tribunal ("the Trial Chamber") on 2 September 1998 and 2 October 1998 respectively in the case of *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T. ("The Judgment" and "the Sentencing Judgment" respectively).[1]

1. Having heard the parties and their submissions, the Appeals Chamber

HEREBY RENDERS ITS JUDGMENT.

[1] Judgment, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 September 1998 and Sentencing Judgment, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, 2 October 1998. A list of designations and abbreviations used in this Appeals Judgment is included in Annex C.

I. INTRODUCTION

A. Trial Proceedings

3. The original indictment charged Akayesu, as *bourgmestre* of Taba *commune*, Murehe *secteur*, with involvement in criminal acts committed between 7 April and the end of June 1994 in this *commune*.("the original indictment") Akayesu was charged under Article 6(1) of the Statute (individual criminal responsibility, with 12 counts of crimes within the jurisdiction of the Tribunal as follows: Genocide, punishable by Article 2(3)(a) of the Statute (count 1); Complicity in Genocide, punishable by Article 2(3)(e) of the Statute (count 2); Crimes against Humanity, punishable by Article 3(a), 3(b) and 3(f) (counts 3, 5, 7, 9, and 11); Direct and Public Incitement to Commit Genocide, punishable by Article 2(3)(c) of the Statute (count 4); violations of Article 3 common to the Geneva Conventions of 1949, as incorporated in Article 4(a) of the Statute (counts 6, 8, 10 and 12).[2]

4. On 17 June 1997, the original indictment was amended with three additional counts of sexual violence, violence and murder perpetrated at the *bureau communal* between 7 April and the end of June 1994 being included ("The indictment"). Akayesu was thus charged (individual criminal responsibility) under Article 6(1) and /or Article 6(3) of the Statute with: Crimes Against Humanity, (rape) punishable by Article 3(g) of the Statute (count 13), crimes against Humanity (other inhumane acts) punishable by Article 3(i) of the Statute, (count 14), and violations of Article 3 common to the Geneva Conventions of 1949 and of Article 4(2)(e) of Additional Protocol II, as incorporated in Article 4(e) of the Statute (outrages upon personal dignity, in particular rape, humiliating and degrading treatment and indecent assault (count 15).[3]

5. Akayesu pleaded not guilty to all counts in the original indictment (on 30 May 1996) and the amended indictment (on 23 October 1997). The trial commenced on 9 January 1997 and concluded on 26 March 1998 when it was adjourned for deliberations.

6. By Judgment dated 2 September 1998 the Trial Chamber found Akayesu guilty of the following crimes under Article 6(1) of the Statute:

Count 1	Genocide
Count 4	Direct and public incitement to commit genocide
Counts 3, 5, 7, 9, 11, 13 and 14	Crimes against humanity.

7. It found him not guilty of:

Count 2	Complicity in genocide
Counts 6, 8, 10, 12 and 15	Violations of Article 3 common to the Geneva Conventions of 1949 and, under count 15 of violations of Additional Protocol II.

[2] As referred to in the original indictment.

[3] See indictment.

8. Akayesu was found individually criminally responsible under Article 6(1) alone. By Sentencing Judgment dated 2 October 1998, Akayesu was sentenced to several terms of imprisonment ranging from 10 years to life in respect of the counts he was convicted of. The Trial Chamber decided that each sentence should be served concurrently and therefore directed that Akayesu should serve a single sentence of life imprisonment.

B. Proceedings on Appeal[4]

9. Both Akayesu and the Prosecutor appealed from the Judgment. In addition, Akayesu lodged an appeal against the Sentencing Judgment.

10. The grounds of appeal raised by Akayesu can be summarized as follows:[5]

1. Akayesu was denied the right to be defended by Counsel of his own choice.
2. Akayesu was denied the right to competent Counsel.
3. The Tribunal was biased and lacked independence.
4. Absence of the Rule of law/Errors invalidating the finding of guilty.
    - i. Unlawful amendment of the original indictment;
    - ii. Improper treatment of prior statements;
    - iii. Failure to apply the "beyond a reasonable doubt", standard of proof; substantive errors of fact;
    - iv. Out-of-court evidence;
    - v. Other issues;
        - (a) Judicial notice of United Nations reports;
        - (b) Interpretation;
        - (c) Non conforming transcripts;
        - (d) Disclosure of evidence;
        - (e) Expert witnesses;
        - (f) Witness Protection;
        - (g) Unlawful treatment of defence witnesses and court interference;
        - (h) Informal conversations between a judge and a witness before the Tribunal.
5. Total absence of the Rule of Law.
6. Improper treatment of hearsay evidence.
7. Irregularities during direct examination and cross-examination.
8. Unlawful disclosure of defence witness statements.
9. Letter of Witness DAAX to the judges.
10. Unlawful detention.[6]
11. Appeal against the sentencing judgment.

[4] The Appellant proceedings are detailed in Annex A.
[5] In general, the grounds of appeal are set out here as presented by Akayesu and grouped by the Appeals Chamber. Annex B provides a detailed presentation.
[6] This is a "proposed ground of appeal." *See,* in the relevant section below, Tenth Ground of Appeal.

(i) Denial of right to counsel during pre-sentencing hearing on 28 September 1998;
(ii) Denial of right to counsel during the 2 October 1998 hearing;
(iii) Unreasonable and unwarranted sentence.

11. The Prosecution's grounds of appeal, are as follows:[7]

1. The Trial Chamber erred in law in applying a "public agent of government representative test" in determining who can be held responsible for Serious Violations of Common Article 3 and Additional Protocol II thereto. (para. 630-631 and 640);

2. *Alternative Ground of Appeal:* Having applied the "public agent or government representative test," the Trial Chamber erred in fact in finding that Jean-Paul Akayesu did not fall within the category of persons who could be responsible under Article 4. (para. 641-643);

3. The Trial Chamber erred in law in finding that discriminatory intent is required for a crime mentioned in Article 3 to constitute a crime against humanity by holding that "The victim must have been murdered because he was discriminated against on national, ethnic racial, political or religious grounds" (para. 590);

4. The Trial Chamber erred in law in holding that instigation[8] in Article 6(1) must be direct and public.

II. GENERAL ISSUES RAISED ON APPEAL

A. Admissibility of the Prosecution's Appeal

1. Arguments of the Parties

12. Akayesu submits that the Prosecution's appeal must be found inadmissible since no error that the Prosecutor attributes to the Trial Chamber falls within the scope of Article 24 of the Statute.[9] Indeed, the Prosecutor alleges errors which will not affect the Judgment and seeks no remedy which would impact on the verdict of culpability. Akayesu recognizes that to be sure ICTY Appeals Chamber considered in the *Tadic* Appeal Judgment, issues which did not fall within the terms of Article 25 of ICTY Statute but were of general significance to the Tribunal's jurisprudence.[10] It is Akayesu's submission, that that matter must be distinguished from the instant case. In the *Tadic* case, the Appeals Chamber had considered general issues raised together with other grounds of appeal which fell squarely within the confines of Article 25 of ICTY Statute and

[7] Such grounds are set out here as they appear in the Prosecutor's Notice of appeal.
[8] The original Notice of appeal was filed in English. It refers to "instigation". Therefore, the Chamber uses here the original term and not its French rendition in the Statute (incitation).
[9] Following the filing of the Prosecutor's Brief, Akayesu filed, in response, a document titled "Motion for inadmissibility of the Appellant's Brief and Respondent's Brief", in which he prayed the Appeals Chamber to dismiss the Prosecution's appeal. See annex A. Cf. Akayesu's Response, paras. 1 to 14; T(A), 2 November 2000, p.4.
[10] The text of this article is identical to that of Article 24 of ICTR Statute.

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within the context of an appeal which "stood on its own".[11] In the instant case, a decision by the Appeals Chamber to entertain the Prosecution's appeal would be a complete departure from the provisions of the Statute, amounting to creating a new appellate jurisdiction devoid of a legal basis,[12] vested with an "advisory ... jurisdiction over academic and general issues".[13] Akayesu recalls that national jurisdictions which consider such questions do so with statutory authority.

13. Akayesu further submits that all of the Prosecutor's grounds of appeal deal with *obiter dicta* that are immaterial to the Judgment. Akayesu submits that, the Prosecution only seeks to widen the scope the Tribunal's jurisdiction,[14] since "there is no dispute or tangible conflict between the Prosecutor and the Respondent regarding the matters raised by the Prosecutor, and [therefore] the prerequisite for the exercise of appellate jurisdiction seems to be lacking".[15] Citing Canadian jurisprudence, Akayesu submits that the adversarial principle is a fundamental tenet of the Tribunal and that, as a result he should not be called upon to participate in an academic or theoretical debate. Akayesu argues that such questions may alone give rise to an appeal.[16]

14. The Prosecution acknowledges that in and of themselves the errors alleged in Grounds 1, 3 and 4 of its appeal will not invalidate the findings made in the Trial Judgment as to Akayesu's culpability so as to expressly fall within the ambit of Article 24 of the Statute.[17] Nevertheless it submits that errors were committed by the Trial Chamber which raise important matters of general significance to the Tribunal's jurisprudence.[18] The Prosecution submits that while Article 24 of the Statute governs the proceedings on appeal, the functioning of the Appeals Chamber is not restricted

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[11] Akayesu's Response, para. 5.
[12] Akayesu's Response, para. 5.
[13] T(A). 2 November, 2000, p.6. What the Prosecution is asking here, is creation of a new legal appeal with no legal text. Cf. T(A), 2 November 2000, pp. 8 and 9: "...".
[14] Akayesu's Response, para. 9.
[15] Akayesu's Response, para. 9.
[16] Generally speaking, Akayesu submits that each of the Grounds concerns alleged errors, which would not affect the verdict of the Trial Chamber as the alleged findings were *obiter dicta*. As to Grounds 1 and 2, he submits that "The remark made by the Trial Chamber on the mandate test seems to be incidental and *obiter* (sic); even if the Chamber set them aside that will not have altered anything in its decision not to apply Article 4 for lack of a nexus between the alleged facts and the armed conflict. This ground of appeal therefore seems to be futile (sic). Regarding Prosecution Ground 3, Akayesu submits that the Prosecutor "suggests an interpretative Statement on how Article 3 is to be construed. The remedy sought has no bearing on the verdict or the finding on this point.. She challenges the Respondent, Akayesu, to an academic debate that does not concern him, but other accused. Consequently, the Respondent does not wish to engage the Prosecutor in a debate that has no direct relationship with his case and whose conclusion will have no bearing on him. The respondent is not bound to subscribe to the interpretation of Article 3 sought by the Prosecutor, nor does he have to fight against it. The statements impugned by the Prosecutor seem to be *obiter* and their revision by the Appeals Chamber will not in any way alter the legal finding [of the Trial Chamber]". Lastly, concerning Ground 4, Akayesu submits that like in Ground 3, " The remedy sought by the Prosecutor would have no effect on the Respondent and would allow the Prosecutor to broaden the scope of the Statute in such a way as to encompass scenarios outside its ambit. It is therefore with respect to future cases that the Prosecutor wants to correct the purported deficiencies of the Statute". Cf. Akayesu Response, para. 8. See also T(A) 2 November 2000, pp. 8 and 9: " We didn't want to involve ourselves in this kind of exercise and we thought that may be you could have chosen a case which was more interesting where the stakes or issues would be discussed in depth by the two parties interested in an interlocutory debate".
[17] Prosecution's Brief, para. 1.17; T(A) 1 November 2000, p. 236.
[18] Prosecution's Brief, para. 1.17, It submits that the Appeals Chamber has already considered such issues in the past and the Prosecution believes "that it is very important for the Appeals Chamber to pronounce on these questions for a variety of reasons ... to give one example, the test of the link with the armed conflict which was laid down in the *Akayesu* decision, has also been taken over by other trial chambers ...And as regards all the questions which form the grounds of appeal, we believe they are of general importance for the jurisprudence of this Tribunal and for the developments and clarification of international criminal law. All these questions are questions of law which are important to all trial chambers. *Cf.*T(A). 2 November 2000, pp. 22 to 26.

to a narrow area within purview of Article 24; on the contrary, the Appeals Chamber may consider issues which strictly do not fall within Article 24 of the Statute; in other words it may consider errors which in themselves would not invalidate the decision or occasion a miscarriage of justice.[19] In the Prosecution's submission the Appeals Chamber should follow the approach taken by ICTY Appeals Chamber in the *Tadic* Appeals Judgment and resolve issues it characterizes as being "of general significance to the Tribunal's jurisprudence.[20]

15. As to who has standing to bring such an appeal, the Prosecution submits that reference to various national jurisdictions suggests that guidance on points of law may be sought by the Prosecution for the purpose of future practice before the courts.[21] However, the Prosecution also submits that if the Appeals Chamber should find that the Prosecution is not properly before it, (given the nature of the errors alleged and the fact that they fall outside the scope of Article 24 of the Statute), the Prosecution can properly raise these issues as a Respondent. Lastly, it submits that the Appeals Chamber still has the power to review such issues *proprio motu.*[22]

2. Discussion

16. Article 24 of the Statute outlines the circumstances under which a party may appeal from a Judgment by a Trial chamber.[23] A party raising a particular ground of appeal, must show an error under Article 24 which provides:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
>
> (a) An error on a question of law invalidating the decision; or
>
> (b) An error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

17. Article 24 of the Statute seeks to circumscribe the scope of review on appeal. On this point, the Appeals Chamber endorses the statement by ICTY Appeals Chamber that "the role of the Appeals Chamber *is limited,* pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice" (emphasis added).[24] Nevertheless the Appeals Chamber underscores that within the framework predefined by the Statute, the Appeals Chamber may consider issues *proprio motu,* as previously held by ICTY Appeals Chamber in the *Erdemovic* case.[25]

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[19] Prosecution's Reply, paras. 2.5 and 2.6; T(A), 1 November 2000, pp. 236 – 238.
[20] Citing the *Tadic* Judgment. The Prosecution submits that "it would be very interesting if the Appeals Chamber can entertain these appeals and come out with judgments that will help shape the future of appeals, the future of trials, both to Trial Chambers and the parties before the Tribunal" *(sic)* T(A), 1 November 2000, pp. 239 and 240. See generally, Prosecution's Reply paras. 2.6 – 2.8.
[21] Prosecution's Reply, paras. 2.10 – 2.14 T(A), 1 November 2000, pp. 240 – 243.
[22] Prosecution's Reply, paras. 2.16 and 2.17.
[23] In the *Tadic Decision* (interlocutory motion), ICTY Appeals Chamber recalled that Article 25 of ICTY Statute (it should be recalled, is identical to Article 24 of ICTR Statute) "[...] opens up the possibility of appellate proceedings within the International Tribunal. [...] stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal" (para. 4).
[24] *Furundzija* Judgment, para 40.
[25] Indeed, ICTY Appeals Chamber stated: "The Appeals Chamber has raised preliminary issues *proprio motu* pursuant to its inherent powers as an appellate body once being seized of an appeal lodged by either party pursuant to Article 25

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18. Can the Appeals Chamber consider all the alleged errors of law? Article 24 (1) covers *prima facie* only errors of law invalidating the decision, that is, errors which, if proved, would have an effect on the verdict of guilty. Yet, ICTY Appeals Chamber has agreed to consider errors of law the review of which had no bearing on the verdict and which therefore did not *stricto sensu* fall within the scope of the provisions of the Statute relating to appellate proceedings. Indeed, in the *Tadic* case, the Prosecution had raised several grounds of appeal three of which raised issues of general significance to the jurisprudence and functioning of the Tribunal.[26]The Prosecutor had acknowledged that the Appeals Chamber's decision would have no bearing on the relevant charges. But the Appeals Chamber explained each ground of appeal in issue, respectively:

> 247. Neither party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute. Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.
>
> [...]
>
> 281. Thus, this ground of appeal does not, *prima facie*, appear to fall within the scope of Article 25(1). Nevertheless, and as with the previous ground of appeal, the Appeals Chamber finds that this issue is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.
>
> [...]
>
> 315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1), they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. [...]
>
> 316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber.

19. The Appeals Chamber endorses the above line of reasoning and, like ICTY Appeals Chamber, rules that it has jurisdiction to determine issues which, though they have no bearing on the verdict reached by a Trial Chamber, are of general significance to the Tribunal's jurisprudence.

20. However, as submitted by Akayesu, the Appeals Chamber must be mindful of the difference between the *Tadic* case and the instant case referred to it. In the instant, the Prosecution's grounds of appeal raise solely issues of general importance, which are the reason for its appeal. In the *Tadic* Judgment, issues of general significance were raised together with a series of grounds of appeal which met the requirements of Article 24 of the Statute, that is, they were likely to have a bearing on the verdict of guilt. At issue in the case at bar is therefore whether the Appeals Chamber may entertain an appeal that raises only issues which fall outside the scope of Article 24 of the Statute or whether, on the contrary, such issues must necessarily be raised alongside grounds of appeal which meet the requirements of Article 24 of the Statute.

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of the Statute. The Appeals Chamber finds nothing in the Statute or the Rules, nor in practices of international institutions or national judicial systems, which would confine its consideration of the appeal to the issues raised formally by the parties". Cf. *Erdemovic* Judgment, para. 16.

[26] The three grounds of appeal were as follows: Appeal Ground 3 contends that the Trial Chamber erred in considering that crimes against humanity cannot be committed for purely personal motives (*Tadic* Judgment, paras. 238 to 272); Ground 4 contends that the Appeals Chamber erred in considering that all crimes against humanity require a discriminatory intent (*Tadic* Judgment, paras. 237 to 305) and Ground 5 concerned dismissal of Prosecution motion for disclosure of Defence witness statements (*Tadic* Judgment, paras. 306 to 326).

21. To that end, it may be useful to recall the rationale behind the approach taken by ICTY Appeals Chamber. In this case, it was agreed that issues of general significance may be raised essentially in order to ensure the development of the Tribunal's jurisprudence. As ICTY Appeals Chamber explained, consideration of an issue of general significance is appropriate since its resolution is important to the development of the Tribunal's jurisprudence and since at issue here is an important point of law which merits review. Thus, the need to pass on issues of general importance is justified in light of the Appeals Chamber's role in unifying the applicable law. Indeed, the Appeals Chamber must provide guidance to the Trial Chambers in interpreting the law. Such a role of "the final arbiter of the law of the Tribunal",[27] must be defined according to the special nature of the Tribunal and, in particular, as an *ad hoc* and temporary body. As submitted by the Prosecution " The Tribunal is at an early stage of its development and the Appeals Chamber would therefore be justified in allowing the Parties to raise points of law, which affects the jurisprudence of the Tribunal in order to ensure an effective and equal administration of justice".[28]

22. Indeed, the Appeals Chamber recalls that since the Tribunal is not a permanent court, its jurisdiction is time bound.[29] Furthermore, the crimes covered by the Statute of the Tribunal are, by nature, particularly serious and their definition given the courts contributes to the overall development of international humanitarian law and criminal law. Such a definition must be uniform. ICTY Appeals Chamber specified that "The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more ponounced."[30] Consequently, the Appeals Chamber is of the opinion that in deciding to pass on an issue of general importance, it is playing its role of unifying the law.

23. That an appeal is based solely on issues of general importance does not fundamentally change the case. Akayesu submits that were it to entertain such an appeal the Appeals Chamber would be arrogating powers it does not have and which are not provided in the Statute. The Appeals Chamber recalls that consideration of issues of general significance does not seek to create a new remedy or a possible advisory power. Unlike the International Court of Justice[31] or certain municipal courts,[32] the Appeals Chamber of the Tribunal does not have advisory power. On the

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[27] *Furundzija* Judgment on Appeal, para. 35.
[28] Prosecution's Brief in Reply, para. 2.14.
[29] Article 1 of the Statute of the Tribunal provides: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute".
[30] *Aleksovski* Judgment, para. 113.
[31] An avenue provided for under Article 65 of the Statute of the International Court of Justice. Any organ or agency authorized by the United Nations Charter may apply to the Court for advisory opinion on any legal issue.
[32] Common Law prohibits the Prosecutor from lodging an appeal where a person tried on indictment is acquitted of a crime. However, he may refer an issue to the High Court in order to clarify a point of law. In such a case, the opposing party is not compelled to refute the arguments submitted by the Prosecutor. Here, the purpose of such reference is not to alter the verdict on the matter before the Tribunal, but rather to explain the law in view of its application in future cases. The Court's response will affect only future decisions and not the decision on the ongoing case. Cf. Section 36 of the *Criminal Justice Act 1972* as amended by the *Prosecution of Offences Act 1985* (Great Britain): "Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Attorney General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it" [Section 36(1)]. Cf. Also *Criminal Procedure (Scotland) Act 1995*: "123. –(1) Where a person tried on indictment is acquitted

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other hand, it may deem it necessary to pass on issues of general importance if it finds that their resolution is likely to contribute substantially to the development of the Tribunal's jurisprudence. The exercise of such a power is not contingent upon the raising of grounds of appeal which strictly fall within the ambit of Article 24 of the Statute. In other words, it is within its discretion. While the Appeals Chamber may find it necessary to address issues, it may also decline to do so. In such a case (if the Appeals Chamber does not pass on an issue raised), the opinion of the Trial Chamber remains the sole formal pronouncement by the Tribunal on the issue at bar. It will therefore carry some weight.

24. Therefore, the Appeals Chamber will not consider all issues of general significance. Indeed, the issues raised must be of interest to legal practice of the Tribunal and must have a nexus with the case at hand.

25. In the case at bar, issues raised by the Prosecution concern, in the main: firstly, the application by the Trial Chamber of the " 'public agent or Government representative test' to determine persons who may be held responsible for serious violations of Article 3 and Additional Protocol II thereto";[33] secondly, the requirement to prove a discriminatory intent for a crime stipulated under Article 3 of the Statute to be defined as a crime against humanity; thirdly, the requirement that instigation as provided under Article 6(1) of the Statute be direct and public.

26. The Prosecution explains why, in its submission, all issues raised are "of general significance to the Tribunal's jurisprudence and practice".[34] With respect to the second issue, in particular, it submit that "crimes against humanity under Article 3 of the Statute are alleged in all of the indictments currently issued by ICTR. There is a possibility (and the Prosecution would submit, danger) that the Trial Chamber's conclusions regarding the requirements of murder as a crime against humanity may be extended to the other enumerated crimes in Article 3 of the Statute. Clarification of the requirements of Article 3 is, therefore, timely and will provide guidance to Trial Chambers and the parties in future cases"[35] Regarding the third issue, the Prosecution submits that "As instigation under Article 6(1) is one of the pillars of individual criminal responsibility under the Statute, [it is submitted] that clarification of this issue by the Appeals Chamber would be of benefit to Trial Chambers and the parties in future cases".[36]

27. The Appeals Chamber is satisfied by the Prosecution's arguments and finds that the issues raised in the instant case, do meet the above-mentioned admissibility requirements. Indeed, all the issues raised relate to the legal definition of certain offences covered in the Statute and as such go to the jurisdiction *ratione materiae* of the Tribunal. Therefore they relate to the legal practice of the Tribunal. Moreover, all the issues have a nexus with the case before the Trial Chamber. Indeed, they all concern the constituent elements adopted by the Trial Chamber in its interpretation of Articles 3, 4 and 6 of the Statute.[37]

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or convicted of a charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge to the High Court for their opinion [...]".

[33] This issue constitutes the First Ground of Appeal raised along with another ancillary ground of appeal based on the erroneous application of the test defined by the Trial Chamber: indeed, in the Prosecution's submission, having applied the public agent or Government representative test, the Trial Chamber erred in fact in finding that Akayesu did not fall within the category of persons who could be held responsible under Article 4.

[34] Prosecutor's Akayesu Brief, para. 1.17.

[35] Prosecutor's Akayesu Brief, para. 4.5.

[36] Prosecutor's Akayesu Brief, para. 5.3.

[37] Indeed, the Trial Chamber held with respect to the first issue raised, that: "The Chamber further finds that it has not been proved beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfill the war efforts" (para. 643 of the Trial Judgment); regarding the

28. For all the foregoing reasons, the Appeals Chamber shall address the four grounds of appeal raised by the Prosecutor.

B. Preliminary issues relating to Akayesu's Appeal

1. Akayesu's strategy

29. Akayesu's strategy in his appeal has been to somehow call into question the entirety of the trial proceedings. To this end, he has adopted the following approach:

30. Firstly, the Appeals Chamber observes that Akayesu has attempted to establish some hierarchy among his grounds of appeal making his first alleged denial by the Tribunal of Counsel of his own choosing and second (alleged denial of assistance by competent counsel) grounds of Appeal the linchpin of his entire case. Thus, he alleges that the Tribunal denied him the right to be assisted by Counsel of his own choosing and that, on the other hand, Counsel assigned to him by the Registry were incompetent. Regarding the alleged incompetence of his Counsel, Akayesu submits that, in general, the latter failed to afford him a proper defence and raises, in this respect, several of his other grounds of appeal. The Appeals Chamber observes, in particular, that whenever Akayesu has alleged on appeal that the Trial Chamber committed an error of law or of fact, he has attributed his failure to react before the Trial Chamber to the incompetence of his Counsel at the time.[38] Consequently, in the opinion of the Appeals Chamber following such an approach, the first two grounds of appeal thus govern all the others (which mainly concern proceedings before the Trial Chamber).

31. Secondly, Akayesu envisages three remedies for the alleged errors: he contends that some of the errors alleged in his grounds of appeal could in and of themselves justify an order "for termination of proceedings to cure the discernibly irreparable prejudice",[39] he requests the "setting aside of the verdict" for the other sentences;[40] and as regards the eighth ground of appeal and what

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second issue, the Trial Chamber found that in ordering the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, in ordering the killing of eight refugees and in ordering the killing of five teachers, Akayesu had " the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds" (paras. 650, 658 and 668 of the Judgment); concerning the third issue, the Trial Chamber explained that it "is satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide, as defined above. In addition, the Chamber finds that the direct and public incitement to commit genocide as engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the *commune* of Taba" (paras. 674 and 675 of the Judgment).

[38] Allegations of incompetence raised under grounds of appeal 3 to 11 are covered as a whole in the section on the Second Ground of Appeal (incompetence of Counsel).

[39] Akayesu's Brief, Chapter 15, para.1. Akayesu included the first and second grounds of appeal (choice of counsel and incompetence of Counsel), the third ground of appeal (lack of independence and impartiality of the Tribunal), the fourth ground of appeal (fatal errors of the verdict of culpability), the fourth submission of the last ground of appeal (out-of-court evidence) and ninth ground of appeal (the letter from DAAX to the judges). See also Akayesu's Reply, para. 9.

[40] Akayesu's Brief, Chapter 15, para. 3. Akayesu also prays the Appeals Chamber to rule "that the specific findings in respect of the above chapters support the central or fundamental submission of the Appellant for a termination of proceedings". This includes the fourth ground of appeal in its first submissions (amendment to the initial indictment),

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the Appeals Chamber referred to as "Other issues", he submits that the alleged irregularities discussed therein constitute an additional justification for ordering "a stay of proceedings".[41]

32. Thirdly, Akayesu submits that the Appeals Chamber should consider, *in their entirety,* the errors which, he alleges in his grounds of appeal, were committed by the Trial Chamber. He submits that:

> The above violations would justify a retrial or an order for a stay of proceedings. Taken separately, some of the irregularities would not justify recourse to such an exceptional remedy to wit, a stay of proceedings. But, taken together, they involve or call into question the Rule of Law: each error of law or of fact and each violation of the rights of the Appellant is serious and affects his right to a just and fair trial.[42]

33. Akayesu submits that if such grounds of appeal taken together (and not separately), and once all the alleged errors have been proved, the Appeals Chamber must rule that they offer sufficient ground to "order a complete stay of proceedings and his immediate release".[43]

34. The Appeals Chamber is of the opinion that it is necessary to reaffirm here its role in appellate proceedings under Article 24 of the Statute.

35. As a rule, it falls to the Appellant to prove that the alleged error of law and of fact is such as would invalidate the decision or occasion a miscarriage of justice.[44] In other words, an error of law or of fact does not necessarily require the intervention of the Appeals Chamber.[45] The Appeals Chamber shall address this issue in due course in this judgment. As to the remedies that the Appeals Chamber may grant, Article 24(2) of the Statute limits them by providing for the power to "affirm, reverse or revise" the impugned decision.

36. The Appeals Chamber indicates that, in the instant case, it shall consider, as a matter of priority, those grounds of appeal in which Akayesu submitted that the alleged error had a bearing on the verdict of the Trial Chamber. This applies in particular to Akayesu's fourth and eighth grounds of appeal. During the hearing on appeal, the Appeals Chamber confirmed to Akayesu which issues would be grouped under the fourth ground of appeal.[46] Those are the following four issues which the Appeals Chamber shall address which are separate "grounds of appeal ":

(1) Improper amendment of the initial indictment;

(2) Improper treatment of prior statements;

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second submission (prior statements) and third submission (reasonable doubt), sixth submission (hearsay evidence) and seventh ground of appeal (cross-examination).

[41] Appellant's Brief, Chapter 15, para. 4.

[42] Akayesu's Reply, para. 13. See also Akayesu's Reply, paras. 7 to 13 in general.

[43] Akayesu's Reply, para. 13.

[44] The principle requiring the Appellant to prove his allegations is, however, not absolute, since the Appeals Chamber may, if necessary, exercise its discretionary power in the matter. *See Furundzija*, paras. 35 to 37, *Kambanda* Appeals Judgment, para. 98.

[45] *Furundzija* Appeals Judgment, paras. 36 and 37.

[46] Statement by the Appeals Chamber. The Appeals Chamber is of the opinion that Akayesu has mixed up the grounds of appeal in the first notice of appeal with those contained in the second notice of appeal and, in certain cases, has gleaned from both in order to present an argument. Akayesu accepted the grouping of his grounds of appeal by the Appeals Chamber.

(3) Non-application of the reasonable doubt standard and resulting material errors of fact; and

(4) Out-of-court evidence.

37. The Appeals Chamber indicates that several other "grounds" raised by Akayesu mainly in Chapter 13 of his brief, which also includes the eighth ground, are also grouped under the fourth ground of appeal. However, the Appeals Chamber observes that Akayesu has, in fact, withdrawn or renounced several of these grounds of appeal;[47] some are incorporated in the arguments set out in other grounds of appeal,[48] whereas by the Decision of 22 August 2000, he was denied leave to add two other grounds of appeal.[49] Grounds abandoned or excluded shall therefore be disregarded.

38. As to the rest, there are eight "Other Issues"[50] that the Appeals Chamber has grouped under the fourth ground of appeal, and on which it ruled at the same time as the Eighth ground. It is not Akayesu's contention that, taken individually, the alleged errors caused him irreparable prejudice and that they are such as would invalidate the judgment rendered by the Trial Chamber or that they occasioned a miscarriage of justice. Thus he submits that he lacks sufficient evidence to support the allegation relating to interpretation, but, however, he maintains the said allegation all the more since a reading of the trial record shows serious interpretation problems throughout the trial;[51] that inaccurate transcripts of his trial "caused difficulties to the Appellant, although he cannot aver that such shortcomings are in and of themselves fatal or material;"[52] that although no evidence in the transcripts supports the allegation that a judge and a witness held, on at least one occasion, informal conversations and although such irregularity would not invalidate the judgment, he argues that "such a conduct is unacceptable".[53] Other allegations are simply made but are not supported by any

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[47] These grounds of appeal are: Ground 19, first notice of appeal, concerning the illness of Witness DFX (Akayesu's Brief, Chap. 8, para. 7); Ground 30, First Notice of Appeal and Ground 4(z), Second Notice of Appeal, concerning the Trial Chamber's rejection of a motion for false testimony by Witness R. The Appeals Chamber observes that regarding this issue, Akayesu first stated that he had erred in the title he gave to this ground, which he had withdrawn. Nevertheless, he insists " that Witness R is completely without credibility". The Appeals Chamber has no reason to further consider such an unfounded assertion, since this ground of appeal has been withdrawn (Akayesu's Brief Chap. 13, para. 11; Ground 6, first Ground of Appeal concerning corroboration (Akayesu's Brief, Chap. 13, para. 13); Ground 4(w), Second Notice of Appeal concerning testimony behind curtains (Akayesu's Brief, Chap. 13, para. 14). The Appeals Chamber observes that Ground 28 of the first notice of appeal relates to the latter issue and must be included in the abandoned grounds.

[48] Grounds 33 of first Notice of Appeal and 4(cc) of the second Notice of Appeal concern the disclosure of evidence. Akayesu submits that this argument is discussed in the first Ground of Appeal and the Second submission of the fourth Ground of Appeal (Akayesu's Brief, Chap. 13 para. 4). The Appeals Chamber observes that Akayesu has not included the merit of Ground 4(cc) in the above-mentioned notices of appeal. Consequently, the Appeals Chamber classes it as one of the other issues. Grounds 26 of the first Notice of Appeal and 4(y) of the second Notice of Appeal concern the allegation that the Trial Chamber erred in deciding that General Dallaire was an expert witness. Akayesu submits that this argument is discussed in the second Ground of Appeal (Akayesu's Brief, Chap. 13, para. 5). Ground 31 of the first Notice of Appeal, concerning the Trial Chamber's dismissal of the motion by the accused for an inspection of the site for purposes of forensic analysis, considering in particular, Count 15 of the indictment, is discussed in the Third submission of the fourth Ground of Appeal (Akayesu's Brief, Chap. 13, para. 10).

[49] Grounds of appeal concerning the testimony of Dr. Mathias Ruzindana, expert-witness, and Trial Attorney Pierre Prosper (Akayesu's Brief, Chap. 13, para. 5), were excluded by the Appeals Chamber.

[50] The Appeals Chamber observes that Akayesu mentioned these issues just briefly in Chapter 13 of his Brief and advanced no substantial argument, neither in his Reply nor during his hearing on appeal. Only arguments effectively presented have been included in the text.

[51] Akayesu's Brief, Chap. 13, para. 2 (sic). Regarding paragraph 1 (the Trial Chamber erred in taking certain United Nations reports into account), Akayesu submits that he "does not know which facts in these reports were relied on in his trial and cannot therefore aver that this error of law alone might have caused him irreparable prejudice".

[52] Akayesu's Brief, Chap. 13, para. 3.

[53] Akayesu's Brief, Chap. 13, para. 12.

submissions, detailed arguments or references to a prejudice possibly suffered. In his Reply, Akayesu makes a reference to these issues by referring to "Other irregularities of lesser importance".[54]

39. The Prosecution argues generally that Akayesu has failed to identify any legal and/or factual errors and seeks to support his allegations without any arguments to which the Prosecutor can respond.[55] It submits that such allegations must, as a result, all fail.[56] The Prosecution has made no substantial submissions in response. During the hearing on appeal, Akayesu submitted the following in response:

> [*Le Procureur] a fait référence au chapitre 13. Le chapitre 13, nous ne l'avons pas développé, nous ne l'avons pas beaucoup développé. Il s'agit de questions qui sont claires et simples, certaines des erreurs dont il [n']y a [pas] de preuve. [Nous avons dit qu'elles ne sont pas prouvées]. Il s'agit d'autres questions, il y a également des erreurs, des vices, nous n'avons pas dit qu'elles affectaient le Jugement. Mais, Messieurs les Juges, en tant que juristes, je pense qu'il est important de comprendre, lorsque l'on doit prendre note, ce dont on doit tenir compte. Nous disons qu'à votre [...] en tant que juges, Messieurs les Juges, vous devez savoir exactement ce dont il faut tenir compte.* [57] (*sic*)

40. However, Akayesu had, in general, submitted that, taken as a whole, the errors alleged may constitute *an additional justification* for ordering "a stay of proceedings".[58] He has not expressly alleged that these grounds of appeal independently provide justification for a relief, such as is provided in Article 24 of the Statute..

41. Under these conditions, the Appeals Chamber shall deal with these issues (as defined above) and the appeal, in general, as follows. It will first consider what it has identified as Akayesu's main grounds of appeal, to determine whether the Trial Chamber has committed the errors alleged. There after it will decide whether to consider what Akayesu has referred to as "Other irregularities of lesser importance" that is, the other issues and ground eight. Only then will it consider, if necessary, the errors alleged as a while (provided they have been proved).

2. Form of the Prosecution's Response

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[54] Akayesu's Brief in Reply.para. 13I.

[55] Prosecution's Response, para. 14. 3.

[56] T(A), 1 November 2000, pp.149 and 150. The Prosecution submits that " The Appellant has failed in the Prosecution's submission to sustain these grounds in his appeal brief with any argument, as the Prosecution has pointed out in Chapter 14 of the respondent brief. Today the Appellant did not make any argument to sustain all the allegations or any of the allegations in Chapter 13 of his appeal brief and the Prosecution, therefore, submits that all these grounds must fail".

[57] T(A), 1 November 2000. The English version of the transcripts (pp. 183 to 184) reflects the following: "*[The Prosecution] referred to chapter 13, and chapter 13, we didn't develop it in a great deal terribly. And there are issues which are clear and simple. Some of the errors there's no proof of – we said there is no proof of it. Others are questions which are errors inappropriate. We did not say it affected the Judgment but, your Lordships, as jurists, I think it is important to understand what one can take judicial notice of, because if you take judicial notice of United Nations reports, you don't need trials.*" The Appeals Chamber is of the opinion that the last sentence of this quotation should be rendered as follows: "[...] But as jurists, I believe it is important for us to know what can be judicially noticed, because if you take judicial notice of UN reports, then you do not need a trial". The last observation concerned the ground of appeal alleging that the Chamber had erred in law by deciding that it could take judicial notice of United Nations reports (Akayesu's Brief, Chap. 13, para. 1). See also T(A), 1 November 2000, p.117 (French): "*Le chapitre 14 ...13, nous allons donc vous renvoyer à notre mémoire, étant donné que nous n'avons pas beaucoup de temps*". But the English version (p. 85) states: "Chapter 13, which we will leave you with that, because we've stated clearly there are not enough".

[58] Akayesu's Brief, Chap. XV, para. 4: "[...] the Appellant requests this Chamber to find that other irregularities discussed therein constitute an additional justification for ordering a stay of proceedings".

42. The Appeals Chamber notes that in the Prosecution's Response, the Prosecution appears to have adopted a policy with regard to certain grounds of appeal by designating the issues which, it believes to have been raised by Akayesu under the particular ground of appeal and addressing only those issues. In addition, the Prosecution elected not to respond to any of the "[o]ther [i]ssues" under Ground 4 nor to the ninth Ground of appeal. It submitted in this regard that: "Should the Appeals Chamber wish to have the Prosecution's response to other questions raised by the Appellant [...] the Prosecution would respectfully seek leave to file a supplementary response on any such matter".[59]

43. The Appeals Chamber confirms that the Prosecution's right to file a response to an appellant's brief is *prima facie* laid down by Rule 112 of the Rules which provides that "a Respondent's brief shall contain all the arguments and authorities. It shall be served on the other party and filed with the Registrar within thirty days of the filing of the Appellant's brief." On the other hand, there is no provision in the Rules that a party may chose the issues to which it will respond, in the hope that if it erred in so doing, it would have the opportunity to file a supplementary response at a later date.[60] The Prosecution errs in so assuming. The Appeals Chamber will only consider the submissions contained within the Prosecution's Response and those made during the hearing on appeal.

III. AKAYESU'S GROUNDS OF APPEAL

A. First Ground of Appeal: Akayesu was denied the right to be defended by Counsel of his choice [61]

44. Akayesu submits generally, that the Trial Chamber erred in depriving him of his right to Counsel of his own choosing, and of his right to defend himself in person. He contends that the resulting prejudice carries a termination of proceedings.[62]

1. Factual and procedural background

45. On 8 March 1996, Akayesu made a request to the Registrar for assignment of counsel to be paid by the Tribunal. On 25 April 1996, Akayesu requested that Mr. Scheers be assigned as his Counsel.[63] On 10 May 1996, the Registrar assigned Mr. Scheers.[64] Mr. Karnavas, with Mr. Scheer's

[59] Prosecution's Response, para. 9.6. See also para. 11.5 and 14.4.
[60] Subject of course to the decision on the motion for extension of time-limit, as long as the requesting party shows good cause, in the meaning of Rule 116 of the Rules.
[61] The grounds of appeal grouped under this general ground of appeal are detailed in annex B. The Appeals Chamber notes that Akayesu himself withdrew the following ground of appeal from his Consolidated Notice of Appeal: " One other time, on or about 27 January 1997, the Appellant asked to change counsel. An Attorney offered to defend him *pro bono*, but the court refused. Once more, the Court committed an error of law that goes to jurisdiction, by violating the Statute." The Appeals Chamber further adds, that on 17 April 2000, it requested the Registrar to furnish both parties with copies of certain documents relating to the trial before the Trial Chamber. See Decision of 17 April 2000. On the other hand, in its Decision of 22 August 2000, the Chamber dismissed Akayesu's "Motion for an Order to Produce the Transcript of the Hearing of 23 January 1997 and for the Transcript to be Admitted as New Evidence, and for Leave to Amend the Notice of Appeal with regard to the Exclusion of the Appellant from the Said Hearing." Akayesu wanted to add a new ground of appeal relating to the choice of Counsel based on the transcript of the aforementioned hearing. Therefore, the Appeals Chamber did not consider that ground of appeal.
[62] Akayesu's Brief, Chapter 15, para. 1.
[63] Jean-Paul Akayesu's request for assignment of Counsel, filed on 24 June 1996.

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agreement, represented Akayesu at the 31 October 1996 hearing.[65] At the beginning of the hearing, Mr. Karnavas made an oral request to represent Akayesu on an exceptional basis, and expressed the wish to be assigned as Lead Counsel by the Tribunal.[66] Akayesu did not object to said assignment.[67] Thus, on that same day, the Trial Chamber issued a decision directing the Registrar to withdraw Mr. Scheers' assignment as Counsel for Akayesu and to immediately assign Mr. Karnavas as his Lead Counsel.[68] On 1 November 1996, the Registrar formally assigned Mr. Karnavas and withdrew Mr. Scheers' assignment, on 4 November 1996.

46. On 11 November 1996, Akayesu filed an application with the Tribunal for the withdrawal of Mr. Karnavas' assignment, and on 12 November 1996, he requested the Registrar to assign Mr. Scheers as his Counsel. On 20 November 1996, the Tribunal heard *in camera* Akayesu's application to withdraw the assignment of Mr. Karnavas. At the end of the hearing, the Tribunal withdrew Mr. Karnavas' assignment and directed the Registrar to assign another counsel to Akayesu before the trial, which was scheduled to commence on 9 January 1997.[69]

47. On 22 November 1996, the Registrar assigned Mr. Tiangaye as Lead-Counsel for Akayesu. Akayesu continued to seek the services of other Counsel such as Mr. Lisulo.[70] On 16 December 1996, Akayesu wrote to the Registry insisting on his choice of Mr. Scheers and complaining about Mr. Tiangaye's assignment. On 27 December 1996, Akayesu requested that the Registrar assign to him another Counsel, Mr. Marchand. On 30 December 1996, the Registrar in reply to the letter of 27 December 1996, informed Akayesu that Mr. Tiangaye would be his Defence Counsel and that he would be assisted by Mr. Monthe as Co-counsel.

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[64] From the time of his arrest in Zambia until he was declared indigent by the Registrar, Akayesu was defended by Mr. Lisulo, Mr. De Temmerman and Mr. Scheers.

[65] Indeed, the Trial Chamber received a letter from the assigned Counsel in which he said that he would not be present at the 31 October 1996 hearing because of unresolved financial claims between himself and the Registry, but the rights of the accused would be adequately protected by the temporary assistance of Mr. Karnavas as Defence Counsel in his stead.

[66] Transcript of 31 October 1996, p. 50.

[67] *Ibid*, p. 52.

[68] Indeed the Trial Chamber held that 'Taking into account that the officially assigned defence counsel has not appeared before the Tribunal on the scheduled date for commencing the trial on 31 October 1996, which was fixed by the Chamber on 27 September 1996, due to unresolved financial claims presented to the Registrar; Being of the opinion that a financial dispute with the Registrar does not constitute an acceptable reason for refusing to appear on the scheduled trial date, which was fixed in agreement with the assigned Counsel; Finding, therefore that the non-appearance of the assigned counsel, based on reasons which are neither acceptable nor justifiable, provides an exceptional circumstance in this case within the meaning of Article 19 of the Directive [on the Assignment of Defence Counsel]" (Cf. Decision Concerning a Replacement of an Assigned Defence Counsel and Postponement of the Trial), 31 October 1996, p. 3.

[69] See Transcript, 20 November 1996, p. 101 (F). The Chamber's oral decision was confirmed in a written Decision of the same date: "Whereas Jean-Paul Akayesu has requested the replacement of Mr. Karnavas, the reason being the latter's behaviour which he considers inappropriate and which, in his opinion, would result in a total lack of confidence in the ability of his counsel to act fully for his defence; Whereas Mr. Karnavas takes exception to all the grievances set forth by Jean-Paul Akayesu, while not objecting, however, to the request made by his client and that, in that regard, he himself had written in his memorandum of 15 November 1996: 'Given the fact that Mr. Akayesu (...) is unwilling to accept his currently assigned Counsel, it behoves the Registrar to bring this matter immediately to the Tribunal's attention and urge that a hearing be scheduled forthwith. Mr. Akayesu is entitled to have counsel of his choice. We all must respect his wishes.'; Whereas the Tribunal, without taking a position in the conflict between the accused Akayesu and Mr. Karnavas, notes, however, that given the present circumstances and the resulting lack of confidence of the accused in his counsel, there was indeed an exceptional case, as provided in paragraph (D) of Article 19 of the Directive [on the Assignment of Defence Counsel], as a condition for the replacement of assigned counsel upon decision by a Chamber; Whereas the Tribunal consequently considers it appropriate to accede to the request made by Jean-Paul Akayesu for the replacement of his counsel". See "Decision on the Request of the Accused for the Replacement of Assigned Counsel," 20 November 1996, pp. 2 and 3.

[70] Mr. Lisulo has represented him in Zambia.

48. The trial commenced on 9 January 1997. On that same day, Akayesu filed a motion in which he requested that his Counsel be replaced and reiterated his wish to be represented by Mr. Marchand. On 13 January 1997, Akayesu made a request to the presiding judge, asking to be the only person allowed to cross-examine the first three witnesses and stating that he wished to defend himself in person. The Trial Chamber granted him leave to do so at that hearing, but stressed that both Counsel would remain his assigned Counsel pending the Chamber's decision on his request for replacement of Counsel.[71] On 16 January 1997, the Chamber rendered its decision dismissing Akayesu's request for change of Counsel on the grounds mainly that Akayesu had failed to show "exceptional circumstances" as required under Article 19(A) of the Directive on the Assignment of Defence counsel.[72] On 21 January 1997, at the start of the hearing, the Trial Chamber advised Akayesu that he could have another Counsel (i.e. Mr. Marchand), provided Counsel agreed to represent him *pro bano*.[73] On 31 January 1997, allegedly under pressure, from his Counsel, Akayesu wrote to the President of the Tribunal stating that he was satisfied with his Counsel.

2. Arguments of the parties

49. Akayesu submits that he was deprived of his right to counsel of his own choosing and of his right to defend himself in person. He argues that, those two rights are set forth in Article 20 (4) (d) of the Statute of the Tribunal.

(a) The right to counsel of one's own choosing

50. Akayesu recalls that the Tribunal refused to assign him two Counsel of his own choosing (Mr. Scheers and Mr. Marchand) on the ground that it could not bear the costs of assigning another defence counsel. He submits that despite such refusal, on 9 January 1997, the Registry assigned him two Counsel (Mr. Tiangaye and then Mr. Monthe) against his will. He submits further that on that date, the regulations in force did not allow for the assignment of more than one counsel. Akayesu contends that, the construction of the Statute by the Registry (denying indigent accused the right to counsel of their own choosing) "nullifies the right to choose one's own counsel since all those accused before the Tribunal are, as far as he knows, indigent".[74]

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[71] Transcript of 13 January 1997, p. 4.

[72] The Trial Chamber held that, "Considering the extensive correspondence from the accused Jean-Paul Akayesu addressed to the President of the Tribunal regarding the replacement of his Counsel, especially his letter dated 8 January 1997, in which he states that he no longer needs the Tribunal to act on his various letters concerning the assignment of his counsel; Taking note of the successive applications by the accused Jean-Paul Akayesu requesting replacement of counsel assigned to him, having already granted his request twice; Whereas Article 19 of the Directive on the Assignment of Defence Counsel states that only in exceptional cases may the assigned counsel be replaced; Whereas the Tribunal considers that the accused Jean-Paul Akayesu has not proved the existence of such exceptional circumstances" (See "Decision on the Request of the Accused for the Replacement of Assigned Counsel", 16 January 1997, p. 2.

[73] Indeed The Presiding Judge stated that "The Accused has stated that to the best of his interest [sic] this means that no Lawyer on his own initiative could present himself to defend the Accused. The Tribunal would like to know whether this is the right interpretation. The Registry wanted him to understand that the Tribunal can only pay for one counsel assigned to him but if he can pay for himself or if counsel is willing to represent him free of charge then there is no problem. If Mr. Marshall [sic] is going to represent himself at his expense the Tribunal will have no problem, the Tribunal will not be concerned if he wants to do it free of charge. The only condition is that Mr. Marshall will have to be a qualified counsel who would have all the qualifications to enable him to plead before this Tribunal. Before this Tribunal considers the qualifications of Mr. Marshall, the hearing can continue." Transcript, 21 January 1997, p 4.

[74] Akayesu's Brief, Chapter 12, para. 92.

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51. Relying on the Tribunal's case law, Akayesu contends that the right to counsel of one's own choosing must be real and effective.[75] Under Article 20 of the Statute, which is "constitutional in nature",[76] any person accused of such serious crimes must be able to freely choose counsel to represent him throughout the proceedings. It is Akayesu's submission that, such an interpretation is, in particular, supported by the practice before the Nuremberg Tribunal[77] with respect to assignment of counsel to the accused and, are also a reflection of international law, including the provisions of the International Covenant on Civil and Political Rights.[78] ("The ICCPR")"

52. Akayesu also points out inconsistencies in the Registry's conduct. Indeed, he asserts that at the 31 October 1996 hearing, the Tribunal denied him assistance by more than one counsel but two months later, "in contravention of the Rules", the Registrar assigned him two counsel who were, unknown to him.[79] He submits further that the delay in the trial is not attributable to him, but rather to the Tribunal's management services and to the Prosecution, which was late in disclosing evidence.[80]

53. Akayesu further avers that even if, at any particular time, he chose one or the other of the Counsel proposed by the Registry, such choice was not free and, in any case, was made under exceptional circumstances.[81] As regards Mr. Karnavas, Akayesu argues that he was "faced with an imminent trial and subjected to pressure from Mr. Karnavas, who gave him the impression that he ran the risk of being convicted if he did not say that he was his counsel", and consequently, he "acquiesced to being represented by Mr. Karnavas. Once he realized what Mr. Karnavas' tactics' were, he requested that his assignment be withdrawn."[82] Akayesu contends that, "in the face of the Tribunal's repeated and unjustified refusals, he was obliged to accept the situation but such acceptance should in no way be considered as a waiver of his right which had been systematically violated over the preceding months."[83] Consequently, all his efforts were "normal and logical actions in the circumstances."[84]

54. Moreover, Akayesu submits that he legitimately insisted on being represented by Mr. Scheers, firstly because the Trial Chamber had never explicitly ruled out the possibility of his

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[75] Particularly *Tadic* Decision (additional evidence); "Decision on the Prosecution Motion to Resolve Conflict of Interest Regarding Attorney Borislav Pisarevic, *The Prosecutor v. Blagoje Simic, Milan Simic, Miroslav Tadic, Stevan Todorovic, Simo Zaric"*, Case No. IT 95-9-PT, ICTY Trial Chamber III of 25 March 1999, See "Akayesu's Brief ", Chapter 12, para. 70.

[76] "Akayesu's Brief", Chapter 12, para 72.

[77] *Ibid*, para. 73.

[78] *Ibid*, para. 75.

[79] *Ibid*, para. 85.

[80] *Ibid*, Chapter 12, paras. 83 and 84. See also Akayesu's Reply, paras. 58 and 218.

[81] Transcript, 1 November 2000, p. 37.

[82] Akayesu's Reply, para. 19. According to Akayesu the choice of Mr. Karnavas was therefore dictated by circumstances. Akayesu states that all he accepted was for Mr. Karnavas to represent him for the day, on 31 October 1996. See Akayesu's Brief, Chapter 2, para. 87.

[83] Akayesu's Brief, Chapter 2, para 91.

[84] The following explanation is given of Akayesu's behaviour: "Firstly, he wanted to keep Mr. Scheers. Then, he sought the services of Mr. Lisulo, who had defended him in Zambia and whose name was on the list of assignable counsel. He told Mr. Tiangaye of his lack of confidence and satisfaction when he was appointed. He saw Mr. Tiangaye for only a few minutes after he was appointed. Shortly before the trial, Mr. Akayesu was alone: Mr. Tiangaye did not appear until only a few days before the trial. Akayesu's family had contacted Mr. Marchand, who came to the Tribunal to defend him. The Tribunal did not even allow Mr. Marchand to speak. Mr. Akayesu had emphasized, with good reason, that his lawyers' preparation of his case was inadequate [...]. The two Counsel, Tiangaye and Monthe, ought to have withdrawn from the Appellant's case, as they were ethically obliged to do." Akayesu's Brief , Chapter II, paras. 88 and 90.

being on the Defence team,[85] and secondly because he had never been informed that Mr. Scheers had been struck off the list of assignable counsel.[86]

55. Lastly, citing to the *Kambanda* Appeals Judgment, Akayesu contends that the Appeals Chamber can in no event hold that he waived the right to raise the issue of the violation of his right inasmuch as "he has, on several occasions, often expressed his dissatisfaction, both in writing and orally."[87]

56. On the other hand, the Prosecution submis that, neither the Statute nor the Rules expressly recognizes the right to counsel of one's own choosing. While the Tribunal's case law affords the accused the possibility of indicating their preference when counsel is to be assigned,[88] it remains that change of Defence Counsel occurs only under exceptional circumstances. Now, one of the factors to be taken into consideration in determining whether there exists such exceptional circumstances is the interests of justice. More specifically, the issue is whether change of counsel will cause undue delay in the proceedings.[89] The Prosecution submits that in the case at bench the prevailing practice at the Tribunal was complied with, and that the Trial Chamber's decision was justified in the interests of justice. Thus, the Trial Chamber properly exercised its discretion in directing the Registrar to withdraw Mr. Scheers' assignment to Akayesu after it had found that he had failed to appear before it without any acceptable or justifiable reason.[90]

57. It is the Prosecution's submission that, the Trial Chamber deemed it necessary to commence the trial on 9 January 1997: "necessary measures were thus taken to ensure that the trial proceed normally,"[91] including the assignment of a Co-counsel to Akayesu. The Prosecution points out that such assignment in no way caused prejudice to Akayesu and that, to the contrary, it was beneficial for him to be able to come to trial in the best of conditions on the date set by the Trial Chamber.[92]

(b) The right to defence in person

58. Akayesu contends that the Trial Chamber never ruled on this issue. He submits that he asked to defend himself in person on several occasions, namely on 17 January 1997, 21 January 1997, 27 January 1997 and 5 February 1997, and concludes that the Trial Chamber

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[85] Akayesu cites in support of his argument a Trial Chamber Decision whereby "Considering the request made by the accused before the Tribunal to have Mr. Karnavas assigned as his Defence Counsel without, however, excluding for all time Mr. Scheers as Co-Counsel, if and when the Directive is amended to this effect", "Decision Concerning a Replacement of an Assigned Co-Counsel and Postponement of the Trial", 31 October 1996, p. 3. See "Akayesu's Reply", para. 20. According to Akayesu , the Trial Chamber gave him the hope of seeing Mr. Scheers return as Co-Counsel (see Transcript, Appeals Chamber , p. 172).

[86] "Akayesu's Reply", para. 21. Akayesu adds that he has never seen any document showing that Mr. Scheers had been disqualified. See Transcript, Appeals Chamber, 1 November 2000, p. 172.

[87] Transcript, 1 November 2000, p. 35.

[88] "Decision on the Motions of the Accused for Replacement of Assigned Counsel", *The Prosecutor vs. Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Trial Chamber I, 11 June 1997, p. 6; "Decision on Request by Accused Mucić for Assignment of New Counsel", *Prosecutor vs. Zejnil Delalić et al.*, ICTY Case No. IT-96-21-T, 24 June 1996, para. 2.

[89] "Prosecution's Response", 4 September 2000, para. 3.13.

[90] *Ibid*., para. 3.23. At the hearing on appeal, the Prosecutor stated "Maître Scheers, for personal reasons, could not be in Arusha for the start of the trial. He was disqualified for that. I therefore do not see [...] what errors the Chamber made. [Akayesu] freely chose [Mr. Karnavas]. Mr. Scheers was disqualified only [...] at the end of the hearing" Transcript, Appeals Chamber, 1 November 2000, pp. 120 and 121.

[91] Transcript, Appeals Chamber, 1 November 2000, p. 123.

[92] *Ibid*, p. 165.

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nevertheless refused to entertain his requests. Akayesu submits further that he was fully capable of representing himself and that the Trial Chamber could not force him to be represented by counsel.[93]

59. In the Prosecution's submission it is up to the Trial Chamber to decide whether it is necessary for an accused to be represented by counsel.[94] The Prosecution argues that in the case at bench the Trial Chamber granted Akayesu leave to cross-examine witnesses.[95] In the Prosecution's submission, the Chamber ruled correctly when it required Akayesu to have counsel. It is the Prosecution's contention that such a decision was justified for three main reasons: firstly, Akayesu's attitude was not entirely clear inasmuch as he was at one and the same time asking to represent himself and to be represented by counsel of his own choosing. Secondly, Akayesu was charged with the most serious crimes under international law, which made for a more complex case. Thirdly, that he made repeated such requests shows that he required assistance of counsel.[96]

3. Discussion

(a) The right to counsel of one's own choosing

60. In general, the issue of the right of an indigent accused to counsel of his own choosing raises the issue of balancing two requirements: on the one hand, affording the accused as effective a defence as possible to ensure a fair trial, and on the other hand, proper use of the Tribunal's resources.

61. The Appeals Chamber holds that, in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing. The right to choose counsel applies only to those accused who can financially bear the costs of counsel. In this connection the Appeals Chamber recalls its findings in *Kambanda*:

> "The Appeals Chamber refers [...] to the reasoning of Trial Chamber I in the *Ntakirutimana* case and concludes, in the light of a textual and systematic interpretation of the provisions of the Statute and the Rules, read in conjunction with the right to choose one's counsel relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel."[97]

62. The Registrar assigns counsel to an indigent accused from a list of available counsel whom he finds eligible under the Tribunal's formal requirements.[98] To be sure, in practice an indigent accused may choose from among counsel including in the list and the Registrar generally takes into consideration the choice of the accused.[99] Nevertheless, in the opinion of the Appeals Chamber the

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[93] "Akayesu's Reply", paras. 26 and 27.
[94] "Prosecution's Response", 4 September 2000, paras. 3.25 to 3.40.
[95] At the hearing on 13 January 1997. *Ibid.*, para. 3.41.
[96] Prosecution's Response, para. 3.42.
[97] *Kambanda*, Appeal Judgment, pp. 11 and 12.
[98] Rule 45 (A) of the Rules provides that "A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar."
[99] The Appeals Chamber indeed endeavours to take into consideration the practice of the Tribunal in assessing the circumstances of the case. In its Judgment on the assignment of counsel, the Appeals Chamber held that "(..) the practice of the Tribunal has been to provide a list of approved counsel from which an accused may choose and that Mr. John Philpot was included in this list by the Registrar at the insistence of the Appellant that he desired that Mr. Philpot be assigned to him, and considering further that the Registrar thereby gave the Appellant a legitimate

Registrar is not necessarily bound by the wishes of an indigent accused. He has wide discretion, which he exercises in the interests of justice.

63. In the instant case, the Appeals Chamber holds that the rights of the Accused as provided under Article 2(4) of the Statute were indeed complied with. The Appeals Chamber recalls that Akayesu requested three times to change counsel, addressed numerous letters and requests to the President of the Tribunal and the Registrar, and that the Trial Chamber allowed him to change counsel twice. Firstly, Akayesu's initial request was for Mr. Scheers to be assigned to him as Counsel and, Mr. Scheers was indeed so assigned by the Registrar on 10 May 1996. Thus, Akayesu was granted his first choice. Secondly, as the Trial Chamber, in its Decision of 31 October 1996, had withdrawn Mr. Scheers' assignment,[100] the Registrar rightly concluded that said Counsel did not meet the Tribunal's requirements for inclusion in the list of counsel and, consequently, struck him from the list. Therefore, Akayesu could no longer request that Mr. Scheers be assigned to him. Lastly, once the trial had commenced, the Trial Chamber had a duty to ensure that the rights of the Accused were respected and that the trial proceeded fairly and expeditiously. In this context, the refusal to assign Mr. Marchand was justified, all the more so, since as the presiding judge stated on 21 January 1997, the credentials of said Counsel, at least at that time, had not been verified. Therefore, the Appeals Chamber is of the view that the Trial Chamber reasonably considered all the facts of the case, prior to and after the commencement of the trial. The Trial Chamber ensured that Article 91(1) of the Statute[101] and Article 19(A) of the Directive on Assignment of Defence Counsel were effectively applied. Indeed, the Appeals Chamber recalls that under Article 19(1) of the Directive assignment of counsel may be withdrawn only "in exceptional circumstances." [102]

64. In the circumstances of this case, the Appeals Chamber finds that there were indeed reasonable grounds for denying Akayesu's request for assignment of the two Counsel concerned. Akayesu failed to show any serious prejudice suffered by him. Accordingly, the Appeals Chamber dismisses all of Akayesu's grounds of appeal in respect of choice of counsel and finds it appropriate to state its disagreement with the manner in which the right for an indigent accused to legal assistance paid for by the international community was abused in the instant case.

(b) The right to conduct one's own defence

expectation that Mr. Philpot would be assigned to represent him before the Tribunal" Appeals Chamber, 27 July 1999, p. 2. See also "Decision on the Motions of the Accused for Replacement of Assigned Counsel", *The Prosecutor v. Gérard Ntakirutimana*, Case Nos. ICTR-96-10-T and ICTR-96-17-T, Trial Chamber I, 11 June 1997, p. 6; "Decision on Request by Accused Mucic for Assignment of New Counsel", *Prosecutor v. Zejnil Delalić et al.*, ICTY Case No. IT-96-21-T, 24 June 1996, para. 2.

[100] See "Decision on Replacement of Counsel and Postponement of Trial, *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR 96-4-T, Trial Chamber I, 31 October 1996.

[101] Article 19(1) of the Statute provides that: " The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses."

[102] Article 19(A) of the Directive provides that the Registrar may: (i) In exceptional circumstances, at the request of the accused, or his Counsel, withdraw the assignment of Counsel; (ii) In exceptional circumstances, at the request of Lead Counsel withdraw the assignment of Co-Counsel ; (iii) In the case of a serious violation of the Code of Conduct, withdraw the assignment of Counsel or Co-Counsel.

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65. Given Akayesu's insistence on being represented by counsel of his own choosing, the Appeals Chamber finds that it was difficult for the Trial Chamber to discern any firm and unyielding desire on the part of the accused to represent himself. Even though Akayesu did, on several occasions, express the desire to defend himself, his attitude towards the Chamber suggested otherwise. Moreover, the Appeals Chamber notes that the Trial Chamber allowed Akayesu, pending assignment of new counsel, to cross-examine Witness K by himself. Therefore, Akayesu has failed to show proof of alleged errors by the Trial Chamber.

66. The Appeals Chamber finds that Akayesu's allegations are without merit and that the Trial Chamber acted reasonably in light of most exceptional circumstances in the instant case. Therefore, the Appeals Chamber rejects all the grounds of appeal relating to the right to conduct one's own defence.

B. Second Ground of Appeal: Akayesu was denied the right to a competent attorney[103]

67. Akayesu alleges generally that he was not afforded assistance by a competent counsel. He submits that he was deprived of the possibility to defend himself and prays the Appeals Chamber to "remedy the serious miscarriage of justice by ordering a stay of proceedings or, in the alternative, a retrial."[104]

1. Arguments of the parties

68. Akayesu contends that he was deprived of his right to a full and complete defence and of his right to a competent counsel. He submits that his Counsel Mr. Tiangaye, and his Co-counsel, Mr. Monthe were incompetent. Akayesu argues that the issue warrants consideration by the Appeals Chamber due to the direct link between the misconduct of his Counsel and the prejudice he suffered, to wit the miscarriage of justice committed by the Trial Chamber.

(a) Standards of review

69. Akayesu reiterates that gross misconduct by Counsel can occasion a miscarriage of justice and constitute a ground of appeal. On this point, he refers to the reasoning by ICTY Appeals

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[103] The breakdown of the grounds of appeal grouped together under this general ground is to be found in annex B. In the second Notice of Appeal, Akayesu alleges primarily that: "The Accused was denied his right to a full and complete defence because he was deprived of his right to a competent Counsel. The trial was therefore totally vitiated by this violation causing a complete denial of justice for the accused." He presents a non-exhaustive list of several errors committed as follows: (he submits that the errors include [...])" In his Appellant's Brief, Akayesu makes "complaints" against his Counsel, presenting the "gist" of those complaints (Appellant's Brief, Chapter III, para. 8). Consequently, the Appeals Chamber considered the grounds of appeal set out in the Appellant's Brief in a global and comprehensive manner. However, the Appeals Chamber notes that certain grounds of appeal which initially figured in the first or second Notice of Appeal were not included by Akayesu either in his Brief or in his Brief in Reply. In particular, "The Chamber objected to the presentation of 19 important Defence witnesses, thus committing an error which goes to jurisdiction, in violation of the Statute of the International Criminal Tribunal for Rwanda (ICTR) as well as the basic rights of the accused" (first Notice of Appeal); "In its haste to end the trial, the court prevented the Appellant from exercising his right to a complete and unfettered defence by refusing illegally to hear the testimony of fourteen important defence witnesses. " (second Notice of Appeal , part 4, para. 4).

[104] Akayesu's Brief, Chapter 3, para. 48. See also Chapter 15, para. 1.

Chamber in *Tadic*.[105] He asserts that the question of incompetence of Counsel, must be linked to the principle of equality of arms.[106]

70. Akayesu submits that the legal tests applicable for bringing an appeal based on incompetence of Counsel should be defined in light of ICTY Appeals Chamber case law and the principles generally applied in Common Law read together.[107] Akayesu submits that the approach adopted by some Anglo-Saxon national jurisdictions, which prefer "not to assess and evaluate [misconduct of Counsel] on a qualitative basis, but rather [consider] the effect of such misconduct on the fairness of the trial is relevant."[108] It is the Appellant's submision that the misconduct and negligence by his Counsel should also be considered in light of the effects on the fairness of the trial.[109]

71. Citing ICTY Appeals Chamber case law, in particular in the *Tadic* (additional evidence), the Prosecutor submits that the Appellant has the burden of proving, on the one hand, gross professional misconduct by his Counsel, and on the other hand, the existence of reasonable doubt as to a possible miscarriage of justice.[110] In the Prosecution's submission the reference to the approach adopted by Anglo-Saxon national jurisdictions, which in its arguement apply "a different test"[111] shows the Appellant's willingness to disregard the first part of the test established by ICTY Appeals Chamber. Yet, Akayesu has failed to show that their exists in the instant case "cogent reasons [...] requiring a departure from a previous decision."[112] Therefore, the Prosecutor argues that the tests applicable in the instant are those laid down by ICTY Appeals Chamber.

(b) Evidence of incompetence of Counsel

72. On 22 August 2000, the Appeals Chamber rejected an affidavit by Akayesu on the incompetence of his counsel. Notwithstanding the rejection of said document, Akayesu claims that he can prove that his rights were violated by relying on two letters from him to the President of the Tribunal dated 9 January 1997 and 18 September 1998 respectively.[113]

73. Akayesu alleges:

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[105] Indeed ICTY Appeals Chamber held that: "The unity of identity between client and counsel is indispensable to the workings of the International Tribunal. If counsel acted despite the wishes of the Appellant, in the absence of protest at the time, and bearing special circumstances which do not appear, the latter must be taken to have acquiesced even if he did so reluctantly. An exception applies where there is some lurking doubt that injustice may have been caused to the accused by gross incompetence." "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence." *The Prosecutor v. Dusko Tadic*, Appeals Chamber, 15 October 1998, para. 65.

[106] Citing once again ICTY Appeals Chamber case law which, itself, refers to case law by the European Court of Human Rights (ECHR), Akayesu argues that the concept of "equality of arms" implies that "each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" *Tadic* Judgment on Appeal, para. 48.

[107] Akayesu's Brief, Chapter 3, paras. 39 to 48.

[108] *Ibid*, para. 43.

[109] Akayesu's Reply, para. 38.

[110] *Tadic* Decision (additional evidence), para. 49.

[111] Prosecution's Response, para. 4.10.

[112] *Aleksovski* Judgment on Appeal, para. 108.

[113] Akayesu's Reply, para. 40.

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(1) Counsel's lack of preparation[114] (failure to study the indictment, lack of a strategy, failure to retain investigators, etc.[115]) as well as other alleged errors[116] tend to raise doubts as to the existence of injustice. Akayesu contends that :

> " [...] a trial of such importance, which is ill prepared, starts without Defence witnesses, without investigators, without a Defence strategy, can only amount to a travesty of justice or a fictitious exercise in which the Appellant, almost powerless, is invited to watch the procession of Prosecution witnesses."[117]

(2) Failure to raise violations of fundamental rights that his Counsel[118] failed to raise the question of his detention was a "relevant and serious issue."[119] Akayesu submits that he was "deprived of a ground that could be relied upon for a stay of the proceedings", and, consequently, failure by Counsel to raise that issue occasioned injustice.[120]

(3) Failure to work with the Appellant and to give him adequate advice.[121]

(4) Failure to work together stemming from an uncoordinated rotational work system.[122] Akayesu submits that such a system "is, *ipso facto*, prejudicial to the rights of the accused, who, under it, does not have two counsel, but one counsel on duty alternating with the other, both of whom come from two different countries, do not receive transcripts of hearings in which they are absent and, therefore, are unaware of the proceedings. This system is worse than one in which the accused is entitled to only one counsel who, at least, will keep track of the various stages and

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[114] He cites in support of this allegation the letter of 9 January 1997.

[115] Akayesu insists on "the failure by Counsel to retain investigators under the pretext of confidentiality and on the consequences of such failure: inability to produce reliable witnesses for the defence or to make the most of the witnesses called. He blames his Counsel for failing to search for defence witnesses between January and February 1997 and to call a sufficient number of suitable witnesses." Akayesu's Brief, Chapter 3, para 11.

[116] In his Reply, Akayesu submits that "The lack of preparation and the fact that there were no depositions, witness statements on some of the acts, with which the accused was charged, certain counts and also the fact that the Counsel did not consult with each other, neither of them knew what the other was doing. They came late. They did not come back. They did not follow his instructions. Because Akayesu knew some of the witnesses, he knew why they were lying. He knew how to cross-examine them, but the Counsel did not follow his instructions. Transcript of the hearing of 1 and 2 November 2000, p. 74. Akayesu quotes a statement made by Mr. Muna to the effect that "[...] certain people lose their trial because of a mediocre lawyer, possibly poor Akayesu lost his trial because the lawyer didn't have the liveliness of spirit required to cross-examine experts and witnesses." Transcript of the hearings of 1 and 2 November 2000, p. 45.

[117] Akayesu's Reply, para. 43.

[118] On this point, Akayesu makes a distinction between initiatives taken by Mr. Scheers and those taken by his two assigned Counsel. He indeed submits that "Mr. Scheers, Counsel for the Appellant, had raised the issue of unlawful arrest in his motion of 30 May 1996 and at the hearing of 26 September 1996 as can be found in the trial record. The Prosecutor responded in writing to the submission of the Appellant. The issue of unlawfulness was therefore addressed at that time, though not fully examined. It is the Appellant's submission that counsel imposed on him should have examined the issue and followed it up." *Ibid*, paras. 44 and 45.

[119] *Ibid,* para. 46.

[120] *Ibid,* para. 46.

[121] Akayesu's Brief, Chapter 3. Para. 15. Akayesu submits that the letters of 9 January 1997 and 18 September 1998 contain specific assertions in this regard. See Akayesu's Brief in Reply, para. 48.

[122] Akayesu submits that the letter of 18 September 1998 supports certain allegations. See Akayesu's Reply, para. 52.

proceedings of the trial."[123] Akayesu argues that such an arrangement "proved" ineffective during the examination of General Dallaire.[124]

(5) Lateness and failure of Counsel to appear in court.[125] By their repeated lateness and absences, Counsel engendered "a feeling of injustice"[126] and undermined the fundamental principle of "unity between client and counsel", yet upheld by ICTY Appeals Chamber.[127]

(6) Failure to prepare the Appellant's testimony with him and to rebut the Prosecutor's submissions.[128] Akayesu submits that the Trial Judgment contains references to certain allegations or charges respecting which he did not testify.[129] Akayesu contends that the failure to prepare his testimony is a fundamental error on the part of his Counsel, particularly in light of the very prejudicial lack of defence witnesses.[130]

(7) Failure to follow the Appellant's instructions and to provide him with quality defence.[131] Akayesu submits that "appropriate and often pertinent questions were never put to the Prosecutor's witnesses in spite of his suggestion and appeals to Counsel to do so".[132]

(8) Failure to inform the Appellant of their management of the case.[133] Akayesu contends that he was kept "in the dark concerning the management and organization of his case and that he was unaware of the objectives and strategy pursued by Counsel, or their line and grounds of defence, the

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[123] Akayesu's Reply, para. 49. In general, see Akayesu's Brief , Chapter 3, paras. 16 to 20. Akayesu argues that the system put in place by his Counsel was "adopted without his knowledge, was against his wishes since both counsel were expected to work together to discuss and coordinate their actions. The system resulted in absences of counsel and several adjournments of hearing. " He cites in support of this argument several incidents which occurred during hearings and which testify to the lack of coordination between the Counsel as well as their repeated absences (paras. 17 to 18).

[124] Akayesu's Brief, Chapter 3, para. 20.

[125] Akayesu's Brief, Chapter 3, para. 2. 21 to 24. Akayesu takes the example of the absence of his counsel from the hearing of 10 March 1997 held to hear the arguments of the parties on the Defence motion filed on 29 January 1997. He explains that "(...) the hearing of this motion which could not take place on 10 March 1997 due to the absence of counsel imposed on the Appellant, only took place one year later, on 6 March 1998." Akayesu's Reply, para. 54.

[126] Akayesu's Reply, para 55.

[127] Akayesu echoes the words of ICTY Appeals Chamber to the effect that: "The unity of identity between client and counsel is indispensable to the workings of the International Tribunal", "Decision on the Appellant's Motion for the Extension of the Time-Limit and Extension of Additional Evidence", *Prosecutor v. Dusko Tadic*, Appeals Chamber, 15 October 1998, para. 65, Akayesu's Reply, para. 58.

[128] Akayesu's Brief, Chap. 3, paras. 25 to 27. Akayesu submits that the letter of 18 September 1998 proves this allegation.

[129] Akayesu cites paras. 254 and 267, 307 and 406 of the Trial Judgment. He submit: that "Such are monumental failures on the part of counsel: failing to cause their client to testify on charges of murder (paras. 254, 267 and 307) or threats (para. 406) where the accused has a defence." Akayesu's Reply , para. 63.

[130] *Ibid*, para 64. Akayesu's Çounsel declared during the appeal hearings, "Someone will probably (sic) read Akayesu's testimony [....] about 180 pp., is a monologue. A monologue is not the way to testify [...] Akayesu testified on some of the events. He did not testify on the murder of the Brothers of Karangwa. He did not testify on the assaults and threats against Witness K. The murders of the Brothers of Karangwa are central and the very weak testimony of Akayesu in the sense [...] he did not reply to the charges against him." Transcript of the hearings of 1 and 2 November 2000, p.47. See also p. 48 of the English version.

[131] Akayesu's Brief, Chapter 3, paras. 28 and 29. Akayesu submits that the factual basis of his allegations appear in the letter of 18 September 1998.

[132] *Ibid*, Chapter 3, para. 29. In general, Akayesu would have liked to ask the witnesses questions which were not asked by his Counsel. However, he contends on this point that "Asking the Appellant to show that success to obtain other evidence or discrediting the particular witnesses could have affected the outcome of the case is tantamount to asking the impossible." Akayesu's Reply, para 59.

[133] *Ibid*, Chapter 3, para. 30. He cites the letter of 18 September 1998 in support of this argument.

stakes involved in the trial, the state of the law or the rationale behind their actions."[134] Akayesu adds that his Counsel "participated, unbeknownst to him, in the status conference of 29 November 1996, in the hearing of 23 January 1997 and in the status conference of 6 February 1998."[135]

(9) Failure to raise timely objections.[136]

(10) Failure to locate defence witnesses (to procure their statements and to call them to testify). Akayesu blames his Counsel for not requesting that one or more investigators be appointed to assist them in their investigations."[137] Thus, Akayesu intends to prove "negligence and carelessness" on the part of his Counsel and to show that there was no opportunity for him to make his case.[138]

(11) Refusal of witnesses or failing to contact them through carelessness or negligence.[139]

74. The Prosecutor submits that the arguments raised by Akayesu are not admissible for several reasons which can be summarized as follows:

(1) The Prosecution submits, firstly, that most of Akayesu's arguments are not supported by any evidence.[140] The two letters on which Akayesu relied (following the rejection of his affidavit by the Appeals Chamber) are neither relevant, nor admissible. The letter dated 9 January 1997 only shows that Akayesu did not complain about the attitude of his Counsel during the trial while the letter of 18 September 1998 was admitted merely as additional evidence in support of the ground of appeal relating to choice of counsel (second ground of appeal), and not in support of the ground of appeal relating to his competence (third ground of appeal).[141] Moreover, in the Prosecution's submission a single letter written by the Appellant cannot have probative value.[142]

(2) The Prosecutor further submits that some of Akayesu's arguments (based on evidence other than the two letters referred to above) rely on a broad interpretation of the Trial Judgment or transcripts of hearings;

(3) Lastly, the Prosecutor submits that the arguments set forth in support of the evidence are devoid of any relevance.

75. Consequently, it is the Prosecutor's submission that Akayesu has failed to prove any negligence on the part of his Counsel and to show that it is reasonable to doubt that the Trial

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[134] *Ibid*, Chapter 3, para. 30.

[135] Akayesu's Reply, para. 67.

[136] *Ibid*, Chap. 3, para. 31. In his Brief, Akayesu recalls situations or proceedings to which his Counsel should have objected : "(1) The Prosecution fails to produce its witnesses' statements ; (2) The Prosecution consistently asks his witnesses leading questions; (3) The Chamber prohibits the Defence from asking leading questions during cross-examination; (4) Counsel fail to point the partiality of Mrs. Desforges , called as an expert ; (5) The experts give testimonies outside of their areas of expertise; (6) The Judges make inappropriate judicial statements; (7)The Judges receive private testimonies unbeknownst to the Appellant; (8) The Prosecutor's representative in charge of the case finds himself in a conflict of interest. He considers that such a failure is reflected in the trial record. Akayesu's Reply, para. 70.

[137] *Ibid*, Chapter 3, para. 32 to 34. Akayesu submits that the letter of 18 September 1998 "provides information on the list of defence witnesses transmitted by the Appellant to his Counsel ", that Counsel did not pursue. See Akayesu's Reply, para. 72.

[138] Akayesu's Reply, para. 74.

[139] Akayesu's Brief, Chapter 3, paras. 35 and 36.

[140] Transcript of the hearings of 1 and 2 November 2000, pp.124, 143 and 148.

[141] Transcript of the hearings of 1 and 2 November 2000, p. 142.

[142] Transcript of the hearing of 1 November 2000, p. 143.

Chamber committed a miscarriage of justice.[143] The Prosecutor concedes that Akayesu did not benefit from a good defence strategy, and agrees that the lateness and absences were indicative of a negligent attitude on the part of his Counsel.[144] However, said situation does not necessarily imply that he suffered injustice.[145] On the contrary, it is the Prosecutor's submission that the Presiding Judge of the Trial Chamber exercised efficient control over the trial proceedings, particularly by coming to his assistance during his examination of witnesses.[146]

2. Discussion

76. The Appeals Chamber recalls that indigent accused have the right to competent assigned counsel. The Appeals Chamber reiterates, in this connection, its findings in *Kambanda* that: the effectiveness of representation by assigned counsel must be assured in accordance with the principles relating to the right to a defence, in particular the principle of equality of arms.[147] It recalls that the right to competent counsel is guaranteed under the International Covenant on Civil and Political Rights (Article 14),[148] the European Convention on Human Rights (Article 6)[149] and the American Convention on Human Rights (Article 8).

77. With respect to the applicable tests for assessing counsel's ineptitude, the Appeals Chamber endorses the tests applied by ICTY Appeals Chamber in the *Tadic* Decision.[150] In this regard, ICTY Appeals Chamber held that an Appellant alleging incompetence of counsel must show the "gross incompetence" of the latter. The Appellant may do so by "demonstrate [ing] that there was reasonable doubt as to whether a miscarriage of justice resulted".[151] Indeed,

> "(..) when evidence was not called because of the advice of the defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Criminal Tribunal. If counsel acted despite the

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[143] Prosecution's Response, para. 4.65.
[144] Transcript of the hearings of 1 November 2000, pp. 146.
[145] *Ibid*, pp. 126 and 127.
[146] *Ibid*, p. 184.
[147] *Kambanda* Judgment on appeal, para. 34, including footnote 49.
[148] The Human Rights Committee has been seized of several cases in which the client argues incompetence of counsel resulting in unfair trial under Article 14.3(d) of the International Covenant on Civil and Political Rights. In the matter, *Hezekiah Price v. Jamaica*, in which the complainant alleges unfair trial due to the incompetence of his counsel ("legal aid lawyers"), the Committee held that it was not up to it to assess the performance of the counsel and that the national jurisdiction should not only ascertain whether the counsel has consequently consulted with and informed the accused but also whether counsel's conduct is in conformity with the interests of justice. *Cf.* *Hezekiah Price v. Jamaica*, Communication No. 572/594 of the Human Rights Committee of 20 November 1996, CCPR/C/58/D/572/1994. The Committee found that the accused did not enjoy effective representation during the appeal and that there was a violation of Article 14 of the International Covenant on Civil and Political Rights. See also *O. Brown and B. Parish v. Jamaica*, Communication No. 665/1995 of the Human Rights Committee, 5 August 1999, CCPR/C/66/D/665/1995.
[149] The European Commission for Human Rights endeavours to determine whether lack of diligence on the part of an accused's counsel could entail the responsibility of the State. To that end, it verifies whether national jurisdictions have effectively provided the Accused with adequate legal assistance. Cf. *Koplinger v. Austria*, European Commission for Human Rights, Decision 1850/63 (dismissal of motion). "The Commission recalls that, in accordance with its established precedents, the courts have a duty to provide the accused with *adequate legal assistance* (emphasis added). In the case "*F. v. Switzerland*, the Commission stated: "[...] it is up to the authorities responsible for providing free legal assistance and assigning defence counsel to make sure that counsel can defend the accused effectively" (*F. v. Switzerland*, European Commission for Human Rights, Decision of 9 May 1989, Motion No. 12152/86.
[150] *Tadic* Decision (additional evidence) paras. 46 to 50.
[151] *Tadic* Decision (additional evidence), para. 49.

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> wishes of the Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced, (...)".[152]

78. In other words, the Statute of the Tribunal affords an indigent accused the right to be represented by a competent counsel. The latter is presumed to be competent and such a presumption of competence can only be rebutted by evidence to the contrary. In most cases, the accused would have to show prejudice as set out in the above-mentioned *Tadic* Decision and should such prejudice be proven, the Appeals Chamber would have to acknowledge that the right of the Accused as guaranteed under the Statute had been violated. However, even if such prejudice is not proven the question remains, as to whether the proven incompetence constitutes a violation of the statutory right of the accused to assistance by competent counsel and would consequently warrant a remedy.

79. In the case at bench, did Akayesu show the incompetence of his Counsel? The Appeals Chamber has considered all the evidence adduced by Akayesu in support of his arguments. It has taken into consideration not only the submissions relating to the instant ground of appeal, but also those made in connection with other grounds of appeal. Indeed, as stated above by the Appeals Chamber, Akayesu views this ground of appeal as a material irregularity warranting a stay of proceedings, which explains why incompetence of counsel is raised not only under this ground of appeal but also with respect to several other grounds of appeal, such as in the third submission under the fourth ground as well as under the sixth, eighth and ninth grounds of appeal.

80. The Appeals Chamber finds that Akayesu has failed to prove incompetence of his Counsel (as understood by the Tribunal): he failed to provide any tangible example of gross professional misconduct by his Counsel such as resulted in a miscarriage of justice.

81. Firstly, the letters of 9 January 1997 and 18 September 1998[153] by Akayesu to the President do not constitute sufficient evidence. Indeed, the Appeals Chamber cannot accept Akayesu's own allegations at trial as evidence of incompetence of his Counsel. The two aforementioned letters have probative value only to the extent that they confirm Akayesu's insistence on having his assigned counsel withdrawn. Thus, assuming that the aforementioned letters suffice to prove incompetence of his Counsel, they cannot constitute sufficient and adequate proof since they emanate from the Appellant himself.

82. Secondly, Akayesu cites extracts from the Trial Judgment, including paragraphs 30, 254, 257, 307 and 406 as indicia of his Counsels' incompetence. The Appeals Chamber cannot accept such an allegation. The aforementioned paragraphs in no way show gross misconduct on the part of Akayesu's Counsel. Indeed, absence of a defence strategy may not be inferred from paragraph 30 of the Trial Judgment.[154] With respect to the remaining paragraphs, the Appeals Chamber does not find that they show "monumental failures on the part of Counsel", to wit, failing to cause their client to testify on charges of murder (paras. 254, 267 and 307) or threats (para. 406) where the

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[152] *Tadic* Decision (additional evidence) para. 65 (footnote omitted).

[153] The letter of 18 September was admitted into the record by the Appeals Chamber in its Decision of 17 April 2000. The Prosecutor submits that the said letter was not admitted as additional evidence in support of the first ground of appeal (Akayesu was deprived of the right to counsel of his choice . See Akayesu's Reply on this point , Transcript of 1 November 2000, pp. 229 and 230. The Appeals Chamber rejects that argument. The Decision of 17 April 2000 is clear : The Appeals Chamber directed the Registry to provide copies of the letter to the parties and to include it in the record on appeal .As an exhibit in the appeal case, it can be relied on for all grounds.

[154] Akayesu submits that the Trial Chamber's finding that "In essence, (...) insofar as the Chamber has been able to establish it – the Accused did not commit, order or participate in any killings, beatings or acts of sexual violence alleged in the Indictment" shows that the Trial Chamber "had difficulty in understanding where the defence was heading to" and suggests that the Defence had no strategy. See Akayesu's Reply, para. 41.

accused had a defence."[155] Such extracts from the Trial Judgment only define the scope and limitations of Akayesu's testimony. That the Accused did not respond to certain allegations does not constitute evidence of incompetence of his Counsel.

83. Lastly, with respect to the transcript extracts cited by Akayesu,[156] the Appeals Chamber finds that they clearly do not offer evidence of gross misconduct.[157] Furthermore, it should be noted, that Akayesu failed to quote some extracts in their proper context and that sometimes the transcripts submitted to the Appeal Chamber offer contradictory information. For example, while the absence of Akayesu's Counsel from Court at the start of the 19 March 1998 hearing has been established, and while it was categorically condemned by the President of the Tribunal, it would also appear that, as stated by the President of the Tribunal that "since the beginning" of the trial, Akayesu's Counsel had " shown a sense of cooperation."[158] With respect to the conduct of Counsel during trial, for example, their alleged failure to prepare adequately for effective examination and cross-examination, or to object to the admission of hearsay evidence, the Appeals Chamber finds that there is no evidence that the possible omissions by the Defence were not part of a strategy agreed on beforehand with Counsel. Similarly, where Akayesu asserts that Counsel failed to raise certain matters because of incompetence,[159] there is no reason to conclude that Counsel did not strategically choose to do so with the agreement of the Accused. Consequently, Counsel's failure to raise any issues or to raise objections[160] is not proof of incompetence. The Appeals Chamber further finds that, in any case, it was not incumbent upon the Trial Chamber to make up for Counsel's failure to react which is *a priori* deliberate. The Trial Chamber may intervene only where it observes offensive or prejudicial conduct.[161]

84. For all the foregoing reasons, the Appeals Chamber rejects the grounds of appeal relating to incompetence of Counsel.

C. Third Ground of Appeal : Biased and Partisan Tribunal[162]

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[155] Akayesu's Reply, para. 63.

[156] Akayesu cites *inter alia* the hearings of 16 January 1997, 27 January 1997, 28 October 1997, 31 October 1997, 9 February 1998, 25 February 1998, 12 March 1998 and 19 March 1998.

[157] For example the lateness (repeated) apparently due to transport (Transcript, 25 February 1998, p. 4) or mere misunderstanding between Counsel and their client (Transcript, 31 October 1997, pp. 140 and 141), in the opinion of the Chamber, do not offer sufficient proof.

[158] The President of the Tribunal in fact noted: "I think you are right. Since the beginning you have shown a sense of cooperation. We are aware of this and that is why the judges are rather surprised that at the end of this trial, at a moment as crucial as this one, we witness this kind of situation, the situation we saw this morning, which was considered by the judges as a serious contempt, and the judges felt that this morning you should have come at 9.30 to explain to them your difficulties and, if possible, ask for adjournment of the case or the trial. I think this point had to be raised." Transcript, 19 March 1998, pp. 101 and 102.

[159] For example, the issue of unlawful detention. See tenth Ground of Appeal.

[160] For example, Akayesu submits that the Trial Chamber did not allow the parties to raise objections and that in any case, no objection was raised. On that point, he criticizes altogether his Counsel, the Tribunal and the Prosecutor. See sixth Ground of Appeal.

[161] The Appeals Chamber notes that the Trial Chamber reasonably exercised its control provided for under the legal instruments by issuing a warning to the two defence counsel. Having failed to appear in court for the hearing of 19 March 1998, the Trial Chamber did, indeed, pursuant to Rule 46(A) of the Rules warn the counsel by threatening them with sanctions and specifying that: "the conduct of the two counsel in the instant case [..] is not only outrageous and disrespectful, but also constitutes a hindrance to the proceedings and runs counter to the interests of justice." See "*Avertissement aux conseils de la Défense* ", *The Prosecutor v. Jean-Paul Akayesu*, 19 March 1998, p. 2.

[162] The breakdown of the grounds of appeal appear in Annex B.

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85. Akayesu alleges that the Tribunal before which he was tried was neither impartial nor independent and that, he was not afforded a fair trial and that as a result, the guilty verdicts should be "quashed, with prejudice to the Prosecution."[163]

86. This ground of appeal was originally raised in Akayesu's second Notice of Appeal.[164] By a motion dated 7 December 1999,[165] Akayesu requested leave to amend this ground of appeal to include several more paragraphs and to present twenty-four documents as additional evidence. In its Decision of 22 August 2000 the Appeals Chamber rejected both requests.

87. The Prosecution submits that as Akayesu based this ground of appeal on the 24 documents which had been rejected "there is no support for the Appellant's allegations in the Record on appeal. As there is no factual basis for the Appellant's allegations and arguments in [*Akayesu's Brief*], it is the Prosecution's submission that they should be dismissed without further consideration."[166] Consequently, the Prosecution puts forward no arguments in response.

88. The Appeals Chamber notes that Akayesu did not respond to the submissions by the Prosecution in his Reply and that, although he did refer to the said ground of appeal briefly during the Hearing on Appeal,[167] he failed to clarify his position nor did he argue the matter further. Although, as recalled by the Prosecutor, all the evidence adduced by Akayesu in support of his arguments were rejected by the Appeals Chamber on 22 August 2000, nevertheless the Appeals Chamber agree that it is properly seized of this ground of appeal, which was not excluded by the Decision of 22 August 2000 and of which it is validly seized. Therefore, the Appeals Chamber cannot accept the argument put forward by the Prosecution that this ground of appeal should be rejected on that basis. Thus, the Appeals Chamber intends to consider the arguments put forth in support of such grounds, if being understood that only those arguments put forward in Akayesu's Brief and those which are not based exclusively on the evidence rejected by the Appeals Chamber will be taken into consideration. In this regard, the Appeals Chamber recalls that the onus is on the Appellant to provide the Appeals Chamber with enough evidence to prove either an error of fact or an error of law, such as may occasion a miscarriage of justice or invalidate the decision.

89. As matters stand, Akayesu's arguments may be summarized as follows:[168]

(a) The Trial Chamber was neither impartial nor independent

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[163] Akayesu's Brief, Chapter 6, para. 22.

[164] The Appeals Chamber notes that certain grounds of appeal set out in the first Notice of Appeal and which, in the Chamber's opinion, emanate from the general issue of the independence and impartiality of the Tribunal are not cited in the Akayesu's Brief (particularly in the Annex to Chapter 6). Therefore, grounds 9, 29 and 34 can be cited.

[165] "Motion to Amend Notice of Appeal relating to the Impartiality and Independence of the Tribunal and to Add New Grounds of Appeal."

[166] Prosecution's Response, paras. 7.3 to 7.4.

[167] Indeed, during the hearing on appeal Akayesu submitted: "So it will be, myself, who will present the majority of the grounds, and we may come back at points three and five and we may wish to have a discussion between ourselves on points three and five, given your Judgment on the 22nd of August which has left us in a state of not being perfectly sure how it will be presented...", See Transcript, 1 November 2000 p. 28.

[168] The Appeals Chamber notes that Akayesu did not wish to pursue the argument regarding the establishment of the Tribunal advanced in his First Notice of Appeal. Indeed, he submits in his Brief that "He does not intend to proceed with this argument in greater detail because the 2 October 1995 Decision of ICTY Appeals Chamber in *The Prosecutor v. Tadic,* seems to settle the matter. He therefore prefers to focus on another central aspect of his arguments, namely that the Tribunal fails to comply with fundamental guarantee of impartiality and independence." See Akayesu's Brief, Chapter 6, para. 2.

(i) Akayesu's submissions

90. Firstly, Akayesu submits that remarks made by the judges both in public and in private suggest a lack of impartiality on their part and constitute a violation of their duty to be independent and impartial.[169] He further alleges the existence of "pressure and special arrangements" that tended to undermine the independence of the Tribunal. Akayesu cites in support of that assertion the Judgment of 31 March 2000 rendered by the Appeals Chamber in the *Barayagwiza* case, which he claims "does not provide a remedy for the interference, pressure and arrangements that prevailed in the past [...]"[170] Finally, Akayesu points out the "defamatory and false statements made by the Registrar [which] constitute a serious violation of his obligation to exercise "judicial restraint"; they undermine the neutrality, impartiality and independence of the Tribunal".[171]

(ii) Discussion

91. As held by ICTY Appeals Chamber, there is a presumption of impartiality that attaches to a Judge or a Tribunal and, consequently, partiality must be established on the basis of adequate and reliable evidence. On this point, the Appeals Chamber endorses the standards of admissibility of an allegation of partiality as set out by ICTY Appeals Chamber in *Furundzija*, whereby:

> "[...] there is a presumption of impartiality which attaches to a Judge. This presumption has been recognized in municipal law."[172]
> [...] in the absence of evidence to the contrary, it must be assumed that the judges of the International Tribunal can disabuse their minds of any irrelevant personal beliefs or predispositions. It is for the Appellant to adduce sufficient evidence to satisfy the Appeals Chamber that [the Judge in question] was not impartial in his case. There is a high threshold to reach in order to rebut the presumption of impartiality."[173]

92. In the instant case, the arguments put forward by Akayesu are too general and abstract to rebut the presumption of impartiality. The arguments relating to biased statements allegedly made by certain Judges of the Tribunal are neither substantiated nor detailed. Similarly, there is no evidence that the Tribunal entered into "special arrangements", or that there was "influence" or "pressure" brought to bear by some authorities. Consequently, the Appeals Chamber rejects this patently unfounded allegation.

(b) Selective Prosecution

(i) Akayesu's submissions

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[169] Akayesu's Brief, Ch. 6, para. 4. The Appeals Chamber notes that Akayesu left out of his Brief, a ground of appeal that he had raised in his second Notice of Appeal. The said ground of appeal was formulated as follows: "Judge Laïti Kama has systematically violated the presumption of innocence of the Appellant. When several witnesses, alleged to be victims of sexual violence, finished testifying, he expressed sympathy for their suffering even before the defence had began He decided they were telling the truth in advance.. By deciding in advance that the witnesses were telling the truth, the judge violated the presumption of innocence invalidating the entire Judgment." Therefore, the Appeals Chamber will not consider the said ground of appeal but will rather remark on its similarity with another argument raised in the third and fourth grounds of appeal to which the Appeals Chamber has responded. See arguments advanced under the ground of appeal relating to paragraphs 12A and 12 B of the Indictment (charges of sexual violence).
[170] Akayesu's Brief, Chapter 6, para 12.
[171] Akayesu's Brief, Chapter 6, para. 13.
[172] *Furundzija* Judgment on appeal, para. 196.
[173] *Furundzija* Judgment on appeal, para. 197.

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93. Akayesu submits that the Tribunal is prosecuting only the "losers" in the Rwandan conflict by failing to prosecute the perpetrators of "crimes of extermination of the Hutu" who enjoy "complete immunity" from prosecution.[174] He submits that such failure exhibits partiality in the punishment of crimes committed in Rwanda during the relevant period. He compares this to the contrary situation before ICTY where persons from "both camps", including Croat leaders, have been prosecuted.

(ii) Discussion

94. The Appeals Chamber cannot admit Akayesu's argument that failure to prosecute persons possible perpetrators of crimes against the Hutu population is an indication of the Tribunal's partiality. On this point, the Appeals Chamber wishes to recall that "investigation and prosecution" of persons responsible for serious violations within the jurisdiction of the Tribunal fall to the Prosecutor[175] and that it is her responsibility to "assess the information received or obtained and decide whether there is sufficient basis to proceed."[176] On this point, the Appeals Chamber agrees with the analysis made by ICTY Appeals Chamber in *Celebici*, where it held that:

> "In the present context, indeed, in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation in indictments. [...]"[177]

95. The allegation that the failure to prosecute possible perpetrators of crimes against the Hutu population is an indication of the Tribunal's partiality cannot properly be sustained since Akayesu advanced no evidence in support thereof.

96. Assuming that the Prosecutor pursues a discriminatory prosecutorial policy, Akayesu has failed to show any causal relationship between such a policy and the alleged partiality of the Tribunal. Furthermore, Akayesu has failed to show how such a general allegation relates to his case, that is how the alleged discriminatory prosecution on policy pursued by the Prosecutor was so prejudicial to him as to put in issue the lawfulness of the proceedings instituted against him. Akayesu has not indicated to the Appeals Chamber whether he had raised the issue at trial, the most appropriate stage to do so. Nor did he show how the alleged prosecutorial policy has or had affected the arrest of other individuals. The Appeals Chamber recalls in this context the statements made by ICTY Appeals Chamber in *Celebici*:

> "[...] the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted. [...]"[178]

97. For all the foregoing reasons, the Appeals Chamber rejects this argument.

(c) Functioning of the Tribunal and approach to the conflict in Rwanda

(i) Akayesu's arguments

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[174] See Annex B. Akayesu's Brief, Chapter 6, paras. 5 to 8.
[175] Article 15 of the Statute.
[176] Article 17 (1) of the Statute.
[177] *Celebici* Judgment on appeal, para. 602.
[178] *Celebici* Judgment on appeal , para. 613.

98. Akayesu argues that the very functioning of the Tribunal suggests that he could not have had a fair trial. The difficulties encountered in conducting investigations were even recognized by the Prosecution during the trial[179] and the specific example of the problems concerning Witness DAAX, show that it was impossible for Akayesu to have a fair trial since the Witness himself was arrested and imprisoned in Rwanda after his testimony.[180] In addition, Akayesu submits that the Tribunal cannot properly function when it does not have the power to issue subpoenas and compel witnesses to appear before it.[181]

99. Akayesu further submits that the Trial Chamber's approach to the Rwandan conflict is erroneous. The Appeals Chamber notes, however, that most of the arguments put forward in support of such an allegation were not reiterated by Akayesu in his Brief. [182] Therefore, the Appeals Chamber will not consider the said arguments. Akayesu's Brief containg only the argument that the Tribunal made erroneous findings concerning the incident that sparked off the conflict in April 1994, to wit the crash of the presidential plane. Indeed, Akayesu submits that the Tribunal erred in its Judgment by "referring on nine occasions, without exception, to the missile attack on the Presidential plane which took place on 6 April 1994, as a "crash", [whereas] it was not a crash, but a ground to air missile attack. That attack, which sparked off the political and interethnic conflict which began in April 1994, was wrongly characterized thereby affecting the overall assessment of the evidence.[183]

(ii) Discussion

100. With respect to this argument, the Appeals Chamber finds that, here again, Akayesu failed to show the prejudice suffered by him in his own case. The allegations are too sweeping to be rightly considered by the Appeals Chamber. With respect, firstly, to the Prosecutor's statements on travel within Rwanda and the difficulties encountered in conducting investigations, Akayesu has failed to show the relevance of that example. Similarly, he failed to explain why the episode of the testimony of Witness DAAX illustrates the impossibility of having a fair trial. Lastly, the issue of erroneous findings regarding the "crash" of the presidential plane was not elaborated on and,

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[179] Akayesu refers to the hearing of 17 June 1997 during which the Prosecutor, in a bid to justify the belated amendment of the initial indictment, explained the difficulties encountered in conducting investigations. Indeed, the Prosecutor asserted that "We began our investigation but it was difficult. I have to say at that time back in March and April and even May. It was difficult because the majority of Rwanda was categorized as what is known as Phase 4. A phase 4 means that our investigators cannot travel into the field without armed escort [...]" See in connection with this point the issues grouped under this ground of appeal in relation to amendment of unlawful initial indictment (First sub-ground of the fourth ground of appeal).

[180] Akayesu's Brief, Chapter 6, paras. 9 to 10.

[181] Akayesu submits that "The Tribunal is not functional, because it lacks the power to subpoena, to order witnesses to appear before it. The only power of constraint held by the Tribunal is its power – legally dubious at that - to order the arrest of a suspect in a third country and his/her transfer – also probably illegal – to the seat of the Tribunal in Arusha. This disequilibrium between the power to arrest an accused person wherever he/she may be, and the absence of power to arrest an accused to appear before the Tribunal causes an incurable prejudice to the defence." See Annex B.

[182] The arguments concerned are the following: (set forth in the second Notice of Appeal): The Tribunal erred in fact and in law by characterising the conflict in Rwanda in 1994 as an internal conflict [para n]; The Tribunal made a crucial error by concluding that it was necessary to clearly distinguish the military conflict between the Rwandan Patriotic Front (RPF) and the Rwandan Armed Forces (RAF) from the civil conflict between those who were ostensibly non-combatants. [para. o]; The Tribunal ruled *ultra petita* that there was genocide in Rwanda between April and July 1994 [para p.]; The Tribunal erred in concluding that there had been a planned genocide against the Tutsi in Rwanda between April and July 1994 [para. q] See Annex B.

[183] See Annex B.

therefore, cannot be duly considered by the Appeals Chamber. Therefore, the Appeals Chamber rejects this last argument.

101. Consequently, and given the inadequacy of the arguments put forward, the Appeals Chamber rejects all the grounds of appeal relating to the impartiality of the Tribunal.

D. Ground Four: Total Absence of the Rule of Law: *Erreurs fatales au jugement de culpabilité.* [184]

1. Sub-Ground One: Improper amendment of the original indictment[185]

102. Broadly speaking, Akayesu submits that the Chamber erred in law in allowing the Prosecutor to amend the indictment to include three counts relating to sexual crimes. Therefore Akayesu prays the Appeals Chamber "to quash all convictions relating to sexual violence, with prejudice to the Prosecutor".[186]

(a) Arguments of the parties

103. Akayesu submits that at the hearing of 17 June 1997 the Trial Chamber erred in law, by belatedly granting leave to amend the original indictment. Indeed, during the said hearing, the Prosecutor moved orally the Trial Chamber for leave to amend the said indictment. Now, only on the eve of the hearing in the evening did the Prosecutor serve Counsel for Akayesu with copies of a few witness statements and the amended indictment. Despite objections from Akayesu's Counsel and his request for written submissions to argue the merits of the case, the Trial Chamber granted leave to amend the indictment without holding an *inter partes* hearing.[187]

104. Akayesu submits in the main that such late amendment caused him a substantial prejudice arising from several cumulative factors:

The timing of the amendment: the amendment was effected after all the Prosecution witnesses with respect to that specific crime (to wit Witnesses J and H) had been heard by the Chamber. Moreover, at the time the indictment was amended, the witnesses who had already been heard had returned to Rwanda.[188] Not only was Akayesu unable to cross-examine those witnesses after the amendment of the indictment,[189] but it was also impossible for him to do so during their testimony.[190] Indeed, the prior statements of those witnesses made no reference to sexual violence. Thus, it was not possible to cross-examine those witnesses in relation to the crimes of sexual violence during their appearance since such acts were not mentioned in the original indictment. Therefore, the Trial Chamber was wrong to blame him for failing to cross-examine the said witnesses on the allegations of sexual violence.[191]

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[184] This ground of appeal was so worded by Akayesu in his second Notice of Appeal and confirmed at the start of the hearing on appeal.
[185] See Annex B concerning the grounds of appeal relating to this issue.
[186] Akayesu's Brief, Chap. 5, para. 19; Akayesu's Brief, Chap. 15, para. 3.
[187] Akayesu's Brief, Chap. 5, paras. 4 to 6.
[188] Akayesu's Brief, Chap. 5, para. 16; T(A), 1 November 2000, p. 87 (French).
[189] Akayesu's Reply, para. 79.
[190] Akayesu's Reply, paa. 78.
[191] Akayesu quotes para. 453 of the Trial Judgment which states that: "In making its factual findings, the Chamber has carefully considered the cross-examination by the Defence of Prosecution witnesses and the evidence presented by the Defence. With regard to cross-examination, the Chamber notes that the Defence did not question the testimony of

The amended indictment as "completely new".[192] The amended indictment refers to events which took place between 7 April and the end of June 1994 and therefore goes beyond the period covered by in the original indictment, namely 18, 19 and 20 April 1994. Akayesu contends that the new indictment amounts to a "radical change in his trial".[193]

105. In the alternative, Akayesu submits that an additional factor aggravated the prejudice already suffered: that is the 19-month time lapse between the date of his detention and the date of amendment of the indictment.[194] Akayesu contends that the Prosecutor, "had she been diligent, could have brought the charges of sexual violence much earlier".[195]

106. Akayesu maintains that the consequences of such prejudice are irreparable and that the late amendment of the indictment resulted in a violation of his right to full answer and defence.[196] It is Akayesu's submission that both the case law of the Tribunal and that of the United Kingdom, the United States of America and Canada[197] show that the only test for granting leave to amend an indictment is the absence of prejudice to the accused.[198] Arguing tha there is "serious prejudice",[199] Akayesu prays the Appeals Chamber to set aside the conviction regarding sexual violence as a remedy.[200]

107. The Prosecution submits, firstly, that Akayesu failed to show prejudice caused to him and it is therefore not required to respond.[201] In any event, it submits that even by basing his argument on the case law of the Tribunal (which incidentally is only partially relied on) Akayesu failed to show that the amendment of the indictment was inadmissible.[202] Moreover, the Appellant failed to show that the postponement of his trial, under the circumstances, from 29 September to 23 October 1997 constituted undue delay.[203]

108. The Prosecution further submits that under Rule 50 of the Rules it may amend the indictment where evidence is obtained after the issuance of an indictment. In the instant case, it actually had, from an early stage of its investigations, certain information about sexual violence at the *Bureau communal*. However, this evidence was not sufficient to proffer any charges against Akayesu. The Prosecution moved for leave to amend the indictment as soon as it had evidence which showed Akayesu's responsibility for rape and other acts of sexual violence in Taba (in particular, the evidence of Witnesses J and H at trial satisfied it that sexual crimes had, indeed, been

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Witness J or H on rape at all, although the Chamber itself questioned both witnesses on this testimony;" Akayesu's Brief, Chapter 5, para. 16.

[192] Akayesu's Brief, Chapter 5, para. 16.

[193] Akayesu's Reply, para. 81. During the hearing on appeal, Akayesu argued that: "There was a complete change of the offences over a period of three months with regard to sexual violence". T(A), 1 November 2000, p. 87.

[194] Akayesu's Reply, paras. 76 and 80.

[195] Akayesu's Brief, Chapter 5, para. 5; Akayesu's Reply, para. 80.

[196] Akayesu's Brief, Chapter 5, para. 19.

[197] Akayesu's Brief, Chapter 5, paras. 10 to 14.

[198] Akayesu's Brief, Chapter 5, paras. 10 to 14; T(A), 1 November 2000, p. 86 (Fr.).

[199] T(A), 1 November 2000, p.88.

[200] Akayesu's Brief, Chapter 5, para. 19.

[201] Prosecution's Response, para. 6.4.

[202] Prosecution's Response, para. 6.7.

[203] Prosecutor's Response, Chapter 6, para.6.8. The Prosecutor refers to the oral decision rendered by the Trial Chamber on 17 June 1997 in which the said Chamber "decided to postpone the resumption date of the trial to 22 October 1997", T(A), 17 June 1997. See also the written Decision: "Leave to amend the Indictment", 17 June 1997, p. 3. Actually, the trial resumed only on 23 October 1997.

committed).[204] The Prosecution further submits that a large number of national jurisdictions allow amendments of indictments at trial.[205] Furthermore, the amendments to the indictment were neither substantial nor totally new.[206]

109. Lastly, the Prosecution acknowledges that Akayesu's Counsel did not cross-examine Witnesses J and H as reflected in the Judgment. However, the Trial Chamber, is assessing the evidence, questioned the witnesses about the acts attributed to Akayesu and found the charges of sexual violence in Taba proved beyond a reasonable doubt, based on numerous other testimonies.[207]

(b) Discussion

(i) Absence of *inter partes* hearing prior to the Trial Chamber's Decision

110. Following the filing by the Prosecution on 16 June 1997 of its written motion for the Trial Chamber to hold a hearing as soon as possible on the issue of amendment of the original indictment,[208] the Trial Chamber sat on 17 June 1997 in order mainly to hear the parties on the said motion. During the said hearing, the Prosecution put forth its arguments and Counsel responded thereto. However, Counsel did not submit on the merits of the issue. Counsel argued that he lacked adequate sufficient time to peruse the documents submitted in support of the motion and requested leave to file written submissions.

111. Following a short adjournment of the hearing, the Trial Chamber granted leave to the Prosecution to amend the original indictment provided the amended indictment was served on the Defence and the latter afforded a period of four months to prepare its defence.

112. The Appeals Chamber recalls that every accused is entitled to a fair hearing. Nevertheless, in the instant case, the Trial Chamber did not totally deny the Defence's right to be heard. The question here is whether the Trial Chamber acted reasonably in refusing to adjourn the hearing, which would have occasionned a delay of several weeks.

113. Akayesu argues that his right to be heard prior to the amendment of the original indictment has been violated because the time afforded him was inadequate. The Appeals Chamber holds that it must not consider this argument further. It observes that the accused had pleaded not guilty to the new charges and had actually pleaded his case with respect thereto without raising any further objection. In light of the foregoing, even if the rights of the accused had been violated, there is cause to find that the Defence had renounced all right to invoke such violations before the Appeals Chamber.

114. For the foregoing reasons, the Appeals Chamber finds that the grounds raised are not such as to warrant its intervention, although it concedes that had it been in the Trial Chamber's shoes it would have probably acted otherwise.

(ii) The merits of the leave granted by the Trial Chamber to amend the original indictment and the possible prejudice suffered by Akayesu

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[204] Prosecution's Response, para. 6.13.
[205] Prosecution's Response, paras. 6.14 to 6.22.
[206] T(A) 1November 2000, pp. 197 to 200 (Fr).
[207] Prosecution's Response, paras. 6.24 to 6.26.
[208] Prosecution's request to seize the Trial Chamber of an urgent oral motion seeking amendment of the indictment in the instant case, 16 June 1997.

115. In its decision dated 17 June 1997, the Trial Chamber held that it was "convinced" that the Prosecutor's motion "is well-founded".[209]

116. Rule 50 of the Rules as worded in June 1997 read as follows:

> The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, with leave of the Trial Chamber. If leave to amend is granted, the amended indictment shall be transmitted to the accused and to his counsel and where necessary the date for trial shall be postponed to ensure adequate time for the preparation of the defence.

117. The Appeals Chamber recalls that the said Rule must be applied pursuant to Article 9(2) of the ICCPR and Articles 19 and 20 of the Statute of the Tribunal. It recalls in this connection the decision rendered by ICTY Appeals Chamber in *Kovacevic*.[210]

118. To determine whether the Trial Chamber erred in granting leave to amend the indictment, the Appeals Chamber must take into account several factors so as to enable it to assess any prejudice Akayesu might have suffered.

The scope of the proposed amendments

119. The Trial Chamber granted the Prosecutor leave to include three new counts of sexual violence.[211] The original indictment against Akayesu includes 12 counts. Said indictment underwent several amendments which, the Appeals Chamber finds, are not such as would make the amended indictment a "completely new" one. Indeed, the three new counts related to the sites (Taba *commune*, in particular, the *Bureau communal*) and the material time (from April to end of June 1994), referred to in the initial indictment. Therefore, the purpose of the amendments to the indictment was to reflect more accurately Akayesu's actual responsibility in the crimes allegedly committed in Taba *commune* in particular at the *Bureau communal*. Therefore, the Trial Chamber did not err in law in finding that the scope of the amendments to the initial indictment was not objectionable.[212]

The timing of the amendment

120. The Appeals Chamber recalls that the Prosecutor may amend an indictment during trial subject to leave from the Trial Chamber. As the Appeals Chamber found in its *Barayagwiza* decision, such amendment may be sought based on the results of her investigations.[213] In the instant case, the reasons put forth at the hearing of 17 June 1999 by the Prosecution justified the belated filing of the amendment request. The Prosecution reminded the Trial Chamber of the stages in its

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[209] Leave to Amend the Indictment, 17 June 1997, p.3.
[210] Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *The Prosecutor v. Milan Kovecevic*, Case No. IT-97-24-AR73, ICTY Appeals Chamber, 2 July 1998.
[211] Count 13: Crimes against humanity (rape), crimes punishable under Article 3(g) of the Statute of the Tribunal; Count 14: Crimes against humanity (other inhumane acts), crimes punishable under Article 3(i) of the Statute; Count 15: Violations of Article 3 common to the Geneva Conventions and Article 4(2) (e) of Additional Protocol II as reproduced under Article 4(e) [Outrages upon personal dignity, in particular humiliating and degrading treatment rape and any form of indecent assault] of the Statute.
[212] The Appeals Chamber echoes the statements of ICTY Appeals Chamber to the effect that in order to assess whether the leave granted by the Trial Chamber to amend the indictment was well-founded in law asked itself "whether the size of the proposed amendments was objectionable". See "Decision Stating Reasons for Appeals Chamber Order of 29 May 1998," *The Prosecutor vs. Milan Kovacevic*, Case No. IT-96-24-AR73, ICTY Appeals Chamber, 2 July 1998, paras. 22 to 25.
[213] *Barayagwiza* Decision, para. 95.

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investigations and highlighted the particularly difficult security conditions prevailing in Rwanda at the time.[214] Furthermore, the Prosecution filed sufficient material in support of its request.[215] Consequently, the Trial Chamber properly granted leave to amend the indictment albeit belatedly.

121. As regards the fact that it was impossible for Akayesu's Counsel to cross-examine Witnesses J and H on sexual crimes (these witnesses appeared before the Trial Chamber prior to the amendment of the indictment[216]) the Appeals Chamber wishes to make the following observations: The Appeals Chamber holds the view that Akayesu's Counsel could not have guessed that there had been acts of sexual violence Akayesu was charged with subsequently after the Trial Chamber had granted the amendment of the indictment. Indeed, the prior statements of the relevant witnesses did not mention acts of rape perpetrated at or in the vicinity of the *Bureau communal.*[217] When Witnesses J and H testified to acts of rape on or near the premises of the *Bureau communal* in Taba[218] the judges of the Chamber questioned them about those crimes, but Counsel for Akayesu did not cross-examine them on those specific acts. However, it must be noted that Counsel for Akayesu did not choose to request the Trial Chamber subsequently to recall the witnesses. Consequently, the Appeals Chamber finds that the Trial Chamber did not err in law by taking into account in its factual findings the fact that Akayesu's Counsel "did not question the testimony of Witness J and Witness H on rape at all",[219] nor other evidence.

Extension of time afforded to Akayesu

122. In its Decision of 17 June 1997, the Trial Chamber, pursuant to Rule 50 of the Rules, granted Akayesu's Counsel a 4 month extension to prepare his defence adequately.[220] The Appeals Chamber holds that such time-limit was reasonable and adequate. It further holds that Akayesu did

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[214] The Prosecutor explained at the hearing of 17 June 1997 that the earlier investigations were not adequate to establish the responsibility of the Accused in the acts of violence. She had received statements from witnesses working with non-governmental organizations about the acts of sexual violence in Taba *commune* and had examined those statements in the summer of 1996. Thereafter, a team was established in October 1996 to look into the issue of sexual violence. However, the evidentiary material was still not sufficient because "the women were ashamed to admit to the sexual violence they had suffered." After the testimony of Witness H (March 1997), the Prosecutor decided to go further and refocus the investigations. The investigations were therefore continued "but it was difficult to come to any sort of conclusion in March, April or May, the task was not easy because Rwanda was in phase IV of the Security Plan, which means that [the] investigators could not go to the field without United Nations escort [...]. Conducting investigations on such an important issue as the protection of witnesses [...] with an armed escort, is not practical due to the risk of attracting attention to the witnesses." Thus, the Prosecutor resorted to other approaches in order to contact the witnesses. In this way, the investigators managed to take statements, which were forwarded to the Office of the Prosecutor one week before the hearing of 17 June 1997. T(A), 17 June 1997.

[215] Supporting material. Witness statements redacted pursuant to Order of 27 September 1996 to ensure confidentiality. This material was submitted to the Chamber on 17 June 1997. See "Leave to amend indictment", 17 June 1997, p. 2.

[216] Witness J appeared on 27 January 1997 and Witness H on 7 March 1997 or about five and three months and a half respectively prior to the amendment of the initial indictment.

[217] Exhibits 101 and 107.

[218] Witness J testified before the Trial Chamber that her six-year old daughter was raped by three *Interahamwe* who had come to kill her father and Witness H testified that she herself was raped in a field and that she had seen other Tutsi women being raped close to the *Bureau communal*. See Judgment, para. 416.

[219] More specifically, the Trial Chamber explained: "In making its factual findings, the Chamber has carefully considered the cross-examination by the Defence of prosecution witnesses and the evidence presented by the Defence. With regard to cross-examination, the Chamber notes that the Defence did not question the testimony of Witness J or Witness H at all, although the Chamber itself questioned both witnesses on this testimony." See para. 453 of the Judgment.

[220] After having granted leave to amend the original indictment, it "remind[ed] the Prosecutor of her obligation, under Rule 50 of the Rules, to transmit the amended indictment and the evidentiary material submitted in support of these amendments to the accused and his counsel, as soon as possible and in the two official languages of the Tribunal" and "decid[ed] to postpone the resumption date of the trial to Wednesday, 22 October 1997, at 09:30 hours". Cf. "Leave to amend the indictment", 17 June 1997, p. 3.

submit on the merits by pleading not guilty to the new charges, without subsequently challenging the amendment of the initial indictment.[221] Furthermore, the extension was not excessive and was in consonance with Articles 19 and 20 of the Statute."[222]

123. Consequently, the Appeals Chamber rejects all the grounds of appeal relating to the amendment of the original indictment.

2. Sub-Ground Two: Improper treatment of prior witness statements

124. Akayesu submits that:

> The court erred by taking a collective blanket decision to consider as more truthful the witness statements before the court as opposed to their prior out-of-court statements. Whenever there is divergence between a statement made in court and one made out of court, the court must consider on an individual basis – witness by witness and statement by statement – the divergences between the out-of-court statement and the statement in court. By taking a blanket decision, the court violated the presumption of innocence and favoured unduly Prosecution witnesses thereby causing a miscarriage of justice.[223]

125. Akayesu essentially submits that the Trial Chamber erred in adopting what he describes as a "policy" of accepting as more truthful, direct evidence of witnesses before the Trial Chamber than that contained in their prior statements ("Precedence of testimonies").[224] He also submits that the Trial Chamber erred in refusing to order the production of evidence proving the existence, contents and truthfulness (or otherwise) of prior statements made by witnesses, where the latter deny having made them. Lastly, Akayesu submits that the disclosure of evidence left much to be desired.[225]

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[221] For instance, the Appeals Chamber recalls the wording of Rule 73 of the Rules in force in June 1997: "Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. Such motions may be written or oral, at the discretion of the Trial Chamber".

[222] On this point, see "Decision Stating Reasons for Appeals Chamber Order of 29 May 1998", *The Prosecutor v. Milan Kovacevic,* Case No. IT-97-24-AR73, Appeals Chamber, 2 July 1998, paras. 26 to 33. It must be understood that the Trial Chamber showed concern for the rights of the Accused: "Whereas the Tribunal takes due note that the rights recognized to the accused thus correspond to the principles established under Article 20(4) of the Statute which provides in sub-article (a) that he must be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him; and in sub-article (b) to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing."

[223] The Appeals Chamber holds the view that this represents Akayesu's main ground of appeal in this section. See annex B. Akayesu also requested to amend this ground of appeal to include an allegation that the Trial Chamber erred in permitting the testimony of expert-witness Mathias Ruzindana, to explore matters which fell outside the witness's field of expertise. This included, *inter alia,* the fact the witness testified that Rwandans were more likely to tell the truth before the Tribunal than to investigators. Though these submissions are included in Chapter 8 of Akayesu's Brief (parts of paras. 1 and 6 and paras. 19 to 22 regarding "*oath helping*", the prohibition against calling evidence in general of the credibility of witnesses before such evidence has even been challenged, and the fact that a witness may not be called to lend weight to the credibility of another witness, para. 26 and part of para. 27), and the Appeals Chamber refused leave to amend this ground of appeal in its Decision of 22 August 2000 and therefore these arguments will not be considered. Akayesu submits that his grounds of appeal concerning the disclosure of evidence are also reproduced in this section. Akayesu's Brief, Chapter 13, Section 4. However, in arguments advanced in support of this ground of appeal, Akayesu only cited the shorter of the said grounds, that is, Ground 33 of the first Notice of Appeal.

[224] Akayesu's Brief, Chapter 8, para.6.

[225] Akayesu's Brief, Chapter 8, paras. 4 and 5. Akayesu also alleges that statements disclosed to him were incomplete and did not include the questions put to the witnesses.

126. In the Prosecution's submission the latter arguments concern the taking of evidence and fall outside the scope of this ground of appeal. They should therefore be disregarded.[226] The Appeals Chamber disagrees. It is not the case that each and every argument in support of a ground of appeal should be set out in the notice of appeal, which often is very brief. Clearly, it all depends on the facts of the case in case at bar, the Appeals Chamber finds that the issues are sufficiently linked for the Appeals Chamber to consider them as being raised in support of the main ground mentioned above.[227]

127. As to the remedy sought, Akayesu submits that the error committed has caused him irreparable prejudice and violated his right to a fair trial.[228] As a result, he prays the Appeals Chamber to order "*cassation du verdict*", "quash the verdict".[229] During the hearing on appeal, Akayesu submitted further that this issue was "central to the entire trial".[230] He stated that "the consequence of this is the invalidation of the entire trial unless the Prosecutor can prove that there's absolutely no consequence, because it permeates the entire trial".[231]

(a) The Trial Chamber's policy of favouring evidence given at trial[232]

(i) Arguments of the parties

128. Akayesu submits that while he does not allege that the Trial Chamber failed to look into contradictions between testimonies and prior statements, its "examination of the prior declarations was conditioned by a principle and by legal principles which are illogical".[233] In his submission, the Trial Chamber failed to evaluate the evidence before it on a case-by-case basis.[234] He asserts that

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[226] Prosecution's Response, paras. 9.3 and 9.4. As a result, the Prosecution does not put forward any arguments in response. In Akayesu's Reply, Akayesu submits that the two issues are clearly linked and that the Trial Chamber itself relied on the lack of access to transcripts of the interviews of witnesses, in adopting its policy with regard to prior witness statements. Akayesu holds the view that evidence produced supports the main ground of appeal and that he "is simply indicating in the said paragraph 5 of his Brief the appropriate procedure to be followed when a witness denies his prior statement or when there is inconsistency between his testimony at trial and his prior statement. The approach the Appellant adopts here supports the main ground of appeal and calls into question paragraph 137 of the Judgment, in which the Chamber does not consider whether it could or should call the investigators and/or interpreters to ascertain the content and accuracy of statements", Akayesu's Reply, paras. 90 and 91.

[227] The Prosecution also identifies other issues which it states are raised in this ground of appeal, including the alleged violation of the right to have adequate time and means to prepare the defence, and issues as to the right to have effective free legal assistance and which it submits have nothing to do with the main question raised. Prosecution's Response, para. 9.6. The Appeals Chamber has not identified these issues as having been raised by Akayesu in this ground of appeal and hence will not respond in relation to them.

[228] Akayesu's Brief, Chapter 13, para. 31.

[229] Akayesu's Brief, Chapter 15, para. 3.

[230] In the English transcripts of the hearing, Counsel for Akayesu stated that this issue was "central to the entire trial", TA(A), 1 November 2000, p. 77. This sentence is not in the French transcripts (the interpreter's microphone was closed, T(A), 1 November 2000, pp. 107 to 108.

[231] T(A), 1 November 2000, pp. 113 to114. See also Akayesu's Reply, para. 95: "The prejudice suffered by the Appellant is enormous and arises from testimonies given by most of the lay witnesses". He submits that "This constitutes a fatal error in the trial which pervades almost all the evidence, hence justifying the quashing of the verdict on all the counts".

[232] In his Brief, Akayesu submits that three issues are raised in this ground of appeal: "disclosure of evidence, discrepancies between statements and testimonies, and the precedence given to statements", Akayesu's Brief, Chapter 8, para. 3. However, the Appeals Chamber holds that, based on Appellant's arguments, it is proper to treat the first two issues together, since the third constitutes the main issue.

[233] T(A), 1 November 2000, p. 78 (French). In his Reply, Akayesu asserts that he has "never stated that the Chamber failed to consider witnesses' prior statements. He contended that the Chamber had adopted a policy according more probative value to the testimony at trial whenever there were discrepancies" (para. 93).

[234] Akayesu's Brief, Chapter 8, para. 6.

though on one or two occasions, prior statements justified the rejection of testimony, this does not mean that the judges were not applying a policy.[235] Akayesu submits that the Trial Chamber failed to consider the strengths and weaknesses of both the live testimony and prior statements before reaching a decision as to which is reliable.[236] He argues that, on the contrary, the Trial Chamber adopted one overall policy, which essentially favoured live testimony.[237] He submits that a Trial Chamber cannot reject prior declarations, "as a principle."[238] One of the primary ways of impeaching the credibility of a witness is by establishing that he or she made a contrary statement on another occasion. Akayesu submits that the Trial Chamber's overall policy of favouring live testimony prevented him from doing so.[239]

129. The Prosecution submits that on the contrary the Trial Chamber's findings illustrate that it did in fact assess discrepancies and inconsistencies on a case by case basis and not pursuant to a policy to reject the witnesses prior statements without assessing their credibility.[240]

(ii) Discussion

130. The Trial Chamber devoted considerable attention to the issue of prior statements and to the fact that there exists numerous inconsistencies between them and evidence given by witnesses in court.[241] The Appeals Chamber observes that in fact, as a result of the frequent allegations of in consistencies made by Akayesu during the trial, the Trial Chamber requested the Prosecutor "in view of the exceptional nature of the offences, to submit to the Tribunal all written witness statements already made available by her to the Defence Counsel in this case".[242] The Trial

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[235] T(A), 1 November 2000, Chapter 8, para. 6, p. 82 (English transcripts). This argument does not appear in its entirety in the French transcripts (p. 113).

[236] Akayesu's Brief, Chapter 8, paras. 6 and 24. In his view, it is necessary to consider the strengths and weaknesses of evidence and testimonies, as well as the reasons or explanations offered for any inconsistencies. Akayesu's Brief, Chapter 8, para. 8.

[237] Akayesu's Brief, Chapter 8, para. 6. Akayesu makes reference particularly to paras. 137, 140, 261 and 408 of the Judgment as illustrative of this approach. See also TA(A), 1 November 2000, pp. 113 and 114.

[238] T(A), 1 November 2000, p. 81.

[239] Akayesu's Brief, Chapter 8, para. 23. Akayesu submits that resort to prior statements accords with the presumption of innocence. This includes the right to evaluate evidence and witnesses by reference to their prior statements in order to consider both the strengths and weaknesses of testimony and prior statements, together with any reasons or explanations as to discrepancies between them. This is something which should be done on a case-by-case basis. Akayesu's Brief, Chapter 8, paras. 8 and 23. He submits: "By adopting a rule which, for all intents and purposes, establishes a presumption of veracity of live testimony even where the witness concerned had offered differing accounts, the Tribunal disregarded the principles of presumption of innocence and of reasonable doubt operating in favour of the accused. The Tribunal should have adopted a rule in consonance with the rule laid down in the *Kayishema* case where a discrepancy between testimonies before the Tribunal and statements to investigators should raise a doubt as to evidence of the fact in issue, and where the discrepancy is considerable, it should raise a doubt as to the witness's entire evidence."

[240] Prosecution's Response, para. 9.18. The Prosecution submits that Akayesu misconceives the Trial Chamber's reasoning and findings and that in fact "the Trial Chamber ... analyses all the inconsistencies and contradictions (alleged by both the Defence and the Prosecution throughout the proceedings) on a case by case basis. In doing so, the Trial Chamber makes it clear that it is the credibility of the witnesses that is at stake". Prosecution's Response, para. 9.11. The Prosecution proceeds to give examples as to when this was done. Prosecution's Response, paras. 9.12 to 9.18. It submits that contrary to Akayesu's allegations "The Trial Chamber treated the prior statements of both Prosecution and Defence witnesses in the same way." Prosecution's Response para. 9.19. In fact, the Prosecution submits in the same para. that a number of Prosecution witnesses wered declared unreliable due to contradictions between their prior statements and their testimony before the Trial Chamber".

[241] See also Akayesu's Brief, Chapter 8, para.30.

[242] Decision by the Tribunal on its request to the Prosecutor to submit the written witness statements, dated 28 January 1997.

Chamber clarified this decision following a Prosecution motion,[243] by stating that, this was sought specifically "so as to enable the Tribunal to better follow the arguments put forward by the parties and to monitor any possible contradictions".[244]

131. In the Judgment, the Trial Chamber initially set out what it referred to as "general evidentiary matters of concern".[245] By way of introduction, it indicated having "attached probative value to each testimony and each exhibit individually according to its credibility and relevance to the allegations at issue".[246] Having noted that both parties often relied on pre-trial statements in cross-examination, it found:

> In many instances, the Defence has alleged inconsistencies and contradictions between the pre-trial statements of witnesses and their evidence at trial. The Chamber notes that these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecution. These interviews were mostly conducted in Kinyarwanda and the Chamber did not have access to transcripts of the interviews, but only translations thereof. It was therefore unable to consider the nature and form of the questions put to the witnesses, or the accuracy of interpretation at the time. The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial *with caution* for these reasons, and in the light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.[247]

132. Akayesu alleges that the last sentence of the paragraph above, reflects a "policy" which gave precedence to testimonies over prior statements.[248] The Appeals Chamber disagrees and can find no error in such a general finding by the Trial Chamber for the following reasons. It is well established that a Trial Chamber is primarily responsible for assessing and weighing the evidence presented at trial. In this regard, ICTY Appeals Chamber has reaffirmed on several occasions that it is guided by the following overriding principle:

> Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial ...it is for a Trial Chamber to consider whether a witness is reliable and whether evidence

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[243] *Prosecution's motion to reconsider and rescind the order of 28 January 1997 for the disclosure of witness statements,* filed on 4 February 1997.

[244] *Decision on the Prosecutor's motion to reconsider and rescind the order of 28 January 1997,* dated 6 March 1997. The Trial Chamber found that "it is mainly because the Defence, during its cross-examinations, would frequently contend that there were contradictions between the statements made by the witnesses for the Prosecutor to the investigators of the Office of the Prosecutor and those made in court, that the Tribunal asked the Prosecutor to submit to the Tribunal copies of written witness statements already disclosed to the Defence so as to enable the Tribunal to better follow the arguments put forward by the parties and to monitor any possible contradictions". The Trial Chamber found that this decision "specifies clearly that the order of 28 January 1997 could only be interpreted with respect to written witness statements already disclosed to the Defence" (Decision of Trial Chamber I of March 1997, p. 5). This decision was also cited within the context of Akayesu's allegation, made in the eighth Ground of Appeal, that the Trial Chamber had ordered the disclosure of all Defence witness statements. The Appeals Chamber has already explained how it intends to proceed with this ground of appeal.

[245] Trial Judgment, para. 130.

[246] Trial Judgment, para. 131.

[247] Trial Judgment, para. 137 (emphasis added).

[248] Akayesu's Brief, Chapter 8, para. 6.

presented is credible. The Appeals Chamber therefore has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial.[249]

133. In the case at bar, the Trial Chamber observed that it was faced frequently with allegations of inconsistency between prior statements and live testimony. It found generally that "[i]n the circumstances, the probative value attached to the [prior] statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber".[250] The Appeals Chamber finds that such a general finding is, in the circumstances of a particular case, properly open to a Trial Chamber, but it is not, as suggested, reflective of a "policy".

134. Rule 90(A) of the Rules provides that "[w]itnesses shall, in principle, be heard by the Chambers unless a Chamber has ordered that the witness be heard by means of a deposition as provided for in Rule 71".[251] Although there are well-accepted exceptions to this rule, which will be discussed below,[252] the general principle is that Trial Chambers of the Tribunal shall hear live, direct testimony. In the opinion of the Appeals Chamber prior statements of witnesses who appear in court are as a rule relevant only insofar as they are necessary to a Trial Chamber in its assessment of the credibility of a witness.[253] It is not the case, as appears to be suggested by Akayesu, that they should or could generally in and of themselves constitute evidence that the content thereof is truthful. For this reason, live testimony is primarily accepted as being the most persuasive evidence before a court.

135. However, as pointed out by ICTY Appeals Chamber, disclosure of witness statements "is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of the accused person.[254] The Appeals Chamber finds that it is mainly in this context that any prior statement is considered by a Trial Chamber. Therefore, it falls to the Trial Chamber to assess and weigh the evidence before it, in the circumstances of each individual case, to determine whether or not the evidence of the witness as a whole is relevant and credible.

136. In the instant case, the Appeals Chamber finds that the credibility of witnesses was the primary concern of the Trial Chamber in considering the evidence. This is reflected both in its general observations and in its examination of the evidence before it reached its factual findings on each count of the Indictment.[255] The Trial Chamber stated that "[i]n its assessment of the evidence, as a general principle, the Chamber has attached probative value to each testimony and each

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[249] *Aleksovski* Appeal Judgment, para. 63; *Tadic* Appeal Judgment, para. 64; *Furundzija* Appeal Judgment, para. 37: "The reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known; the Trial Chamber has the advantage of observing witness testimony first-hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence"; See also *Celebici* appeal Judgment, para. 491.

[250] Judgment, para. 137.

[251] Rule 90(A) of the Rules governs witness testimony.

[252] See the sixth Ground of Appeal relating to hearsay evidence.

[253] *Kayishema/Ruzindana* Judgment, para. 77. See *Archbold* 2000, para. 8-130: "In criminal proceedings, the inconsistency goes to credit and the earlier statement cannot be treated as evidence of the truth of its contents."

[254] *Tadic,* Appeals Judgment, para. 317. The Appeals Chamber notes that the analysis carried out by the Appeals Chamber in this case concerned primarily the disclosure of prior statements of defence witnesses after examination-in-Chief. However, this principle concerns equally the disclosure of Prosecution witness statements, which enables a Trial Chamber to "fulfill its mandate to ascertain the credibility of the evidence brought before it." See, *Tadic* Appeals Judgment, para. 321. The Appeals Chamber also notes that Akayesu relies on the reasoning in this decision in his submissions in this ground of appeal, and in the *Kayishema and Ruzindana* Judgment, paras. 76 to 80. Akayesu's Brief, Chapter 8, para. 9 and 10.

[255] The factual findings are found in Trial Judgment, paras. 157 to 460. In general, see also the third sub-ground of the fourth Ground of Appeal.

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exhibit individually according to its credibility and relevance to the allegations at issue."[256] Thereafter, and as pointed out by the Prosecution, the Trial Chamber considered the testimony of each witness (both Prosecution and Defence)[257] on which it relied to convict or acquit Akayesu of the respective charges. In particular, it elaborated on and reasoned its findings respecting alleged inconsistencies between prior statements and live testimony which emerged during cross-examination.[258] In some cases, The Trial Chamber accepted the prior statement as more credible,[259] while in others it preferred the live testimony, accepting a witness's explanation for the inconsistency.[260] Contrary to Akayesu's submission it is not the view of the Appeals Chamber that such a review was carried out in a biased fashion such that inconsistencies in Prosecution evidence were always deemed immaterial, while those of Defence witnesses were adjudged material.[261] On the contrary, the Trial Chamber considered the inconsistencies in the light of its evaluation of the overall credibility of each particular witness.[262] For example, the Appeals Chamber notes the finding by the Trial Chamber that Akayesu had "successfully challenged" the credibility of a Prosecution witness, such that the Trial Chamber could not convict on paragraph 17 of the Indictment.[263] The Trial Chamber found that "[w]hile the Chamber has been cautious in allowing the contents of pre-trial written statements to impeach the testimony of witnesses before it, in this case the inconsistencies between the testimony and the written statement of Victim X are many and too significant to justify a finding of credibility without corroboration of other testimony."[264]

137. Akayesu relies on the fact the Trial Chamber found that there were "*many instances*" where inconsistencies arose.[265] He is selective in his citation of the Trial Judgment as in fact it is clear that it was Akayesu who alleged that there were such inconsistencies "[i]n many instances".

138. Akayesu lists in his Brief several instances where he alleged such discrepancies occurred.[266] However, he failed to show how the Trial Chamber erred in its assessment of the testimonies in question or how he suffered prejudice as a result. During the Hearing on Appeal, he stated that he

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[256] Trial Judgment, para. 131.
[257] This is contrary to Akayesu's allegation that in fact the Trial Chamber treated prior statements unfairly, as between Defence witnesses and Prosecution witnesses. Akayesu's Brief, Chapter 8, para. 30. He submits that: "the Chamber applied its rule of assessing prior statemens unfairly, often taking defence witnesses to task for having made different statements on another occasion". Akayesu's Brief, Chapter 8, para. 30.
[258] See also, Judgment para. 140.
[259] See Trial Judgment, para. 185, where the Trial Chamber held that concerning contradictions between Witness R's prior statements and live testimony, Witness R's prior statement, "rather it was a matter for the evaluation of the credibility of the witness in question". It held that despite the said contradictions, "taken in the light most favourable to the accused, it corroborates the accused's account".
[260] See Trial Judgment, para. 261, where the Trial Chamber stated that it " accepts [Prosecution Witness] Karangwa's explanation for the inconstant prior statement and notes that his evidence that this brother died of injuries inflicted by gunshots is consistent throughout his testimony an is corroborated by the testimony of Witness S". In the next para. 262, it found that "[W]itness S confirmed Karangwa's evidence in all material respects"; para. 266, where it found Witness S's explanation for the omission of a particular detail as being reasonable; paras. 454 and 455, where the Trial Chamber found that the inconsistencies raised by the defence as to the witnesses to the crimes of sexual violence, were "unfounded or immaterial". In para. 454, it found that "[t]he Chamber considers that the inconsistencies are not of material consequence and that they are not substantial enough to impeach the credibility of the witnesses."
[261] Akayesu's Brief, Chapter 8, para. 7.
[262] The Trial Chamber stated that "...the credibility of each witness must be assessed on its merits, taking into account the witness's demeanour and the consistency and credibility or otherwise of the answers given by him or her under oath". Trial Judgment para. 47.
[263] Trial Judgment, para. 407.
[264] Trial Judgment, para. 408.
[265] Akayesu's Brief, Chapter 8, para. 30, T(A), 1 November 2000, p. 82.
[266] [266] Akayesu's Brief, Chapter 8, paras. 5 and 30. Akayesu gives examples of inconsistencies between the testimonies of Prosecution witnesses and their prior statements, concerning Witnesses A, W,Z, V, G, E, J, R, Q, S, D (Ephrem Karangwa), U, A, JJ, OO, KK, NN and PP.

had a notebook full of other examples, referring in particular to Witnesses D and S.[267] Elsewhere in the present Judgment, the Appeals Chamber reviews in detail the evidence of these two witnesses. However, Akayesu failed to show, under this ground of appeal, how the Trial Chamber committed other errors in assessing such evidence.[268]

139. Akayesu gives two examples (Witness DFX and Akayesu), to show how the Trial Chamber had, in his view, treated Defence witnesses unfairly.[269] However, here again, he failed to put forward any argument in support of this allegation.

140. That the Trial Chamber did not accept as truthful Akayesu's testimony on some occasions, because of, *inter alia,* inconsistencies between his prior statement and his live testimony, does not suffice to show, as alleged by Akayesu unfairness by the Trial Chamber. It is *prima facie* within the Trial Chamber's discretion that is its right and duty to make a decision on the credibility of the witnesses before it.

141. With regard to Witness DFX, the Trial Chamber made no specific finding as to inconsistencies between her prior statement and her live testimony nor as to the credibility of the witness. It simply noted that with regard to the allegations of sexual violence, "on examination by the Chamber, the witness acknowledged that in her written statement submitted by the Defence she had mentioned reports that the *Interahamwe* were abducting beautiful Tutsi girls, and taking them home as mistresses. She conceded that such conduct could be considered sexual violence as it was not consensual."[270] Akayesu failed to show specifically why such findings (or others) are indicative of an unfair approach by the Trial Chamber.

142. The Appeals Chamber finds that there is no evidence that the Trial Chamber's assessment of the evidence was done on the basis of a pre-conceived notion that where there exist contradictions, all prior statements should be disregarded. The Appeals Chamber agrees with the finding in *Kayishema and Ruzindana* that, "inconsistencies may raise doubts in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole."[271] However, as stated above, in such circumstances, "[t]he Appeals Chamber ... has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial."[272] Akayesu has failed to show how the Trial Chamber erred in its assessment of the evidence, and hence, has failed to prove a specific prejudice suffered. It is the opinion of the Appeals Chamber that contrary to Akayesu's assertion, the Trial Chamber duly assessed the credibility of the witnesses in light of the numerous items before it, including the inconsistencies found between live testimony and prior statements.[273]

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[267] T(A), 1 November 2000, p.108, pp. 224 to 227. Akayesu also makes a brief reference to the statement of Witness D (Akayesu's Brief, Chapter 8, paras. 5 and 30) even if he puts forward no argument.

[268] As the Prosecutor explained, Akayesu "ought to have used all these examples to establish that there was any failure on behalf of the Trial Chamber in the assessment of the evidence. He has not done so". T(A), 1 November 2000, p.148.

[269] Akayesu's Brief, Chapter 8, para. 30.

[270] Trial Judgment, para. 444.

[271] *Kayishema and Ruzindana* Judgment, para. 77, as relied on by Akayesu in Akayesu's Brief, Chapter 8, para. 23. As specified in the *Celebici* Judgment, para. 496 (during the discussion on contradictions in statements in general): "inconsistency is a relevant factor 'in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable.' "

[272] *Aleksovski* Appeal Judgment, para. 63; *Tadic* Appeal Judgment, para. 64; *Furundzija* Appeal Judgment, para. 37.

[273] See, in general, *Celebici* Appeal Judgment, paras. 496 and 498.

143. Akayesu also disputes the reasons put forward by the Trial Chamber for following such a "policy", including its findings as to the impact of the lapse of time, the nature of the relevant testimony and difficulties in translation and interpretation. In Akayesu's submission it is not logical for the Trial Chamber to find that it is more difficult for a witness to recall events many years after the occurrence of such events and thereafter to accept such testimony as more reliable than a statement made at the time closer to the events. Akayesu submits that logic must surely go to support reliance on a statement or testimony given closer to the events over evidence given many years later.[274] He argues that the nature of the testimony being heard was such that many of the witnesses were sophisticated and understood both English and French. From this, he infers that such witnesses must have known what they were doing at the time they made their statements.[275]

144. Finally, Akayesu takes issue with the Trial Chamber's finding that evidence given in court under direct sworn testimony is more credible having been given under oath while statements previously given to investigators were not.[276] He submits that it follows from such reasoning that the Trial Chamber acknowledges that witnesses may have lied to investigators, which surely must call their credibility into question.[277]

145. The Prosecution did not respond to these allegations.

146. Akayesu has failed to show how such a reasoning was applied in any single case and how he might have been affected by such findings. At any rate, the Appeals Chamber finds that the Trial Chamber did not err in any way in its general reasoning regarding the overall evaluation and assessment of the credibility of witness testimony and the factors to be taken into account. The Trial Chamber found, as stated above, that it had to consider inconsistencies and contradictions between prior statements and testimony at trial, with caution, in the light of the time lapse, difficulties for witnesses in recollecting precise details, difficulties in translation, the fact that certain witnesses were illiterate and the fact statements were not made under solemn declaration.[278] These are *prima facie* reasonable conclusions for the Trial Chamber to draw. In addition, it found that:

> The majority of witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber and, on the other hand, their earlier statements to the Prosecutor and the Defence. However, this alone is not enough ground for believing that the witnesses in the instant case gave false testimony. Indeed, an often-levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact as to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalizing frailties in human perception[279]

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[274] Akayesu's Brief, Chapter 8, paras. 6 and 29. He submits: "Simple logic would ascribe *prima facie* greater accuracy to statements before the investigators as being closer in time. It is erroneous to give precedence to live testimonies for the reason given by the Tribunal". See also Akayesu's Reply, para. 93(d).

[275] Akayesu's Brief, Chapter 8, para. 7. He also alleges that the Trial Chamber ought to have considered the possibility of collusion between witnesses, which is all the more likely to take place before or during court appearances, than before statements are given to investigators. The Appeals Chamber notes that these are wholly unsubstantiated allegations. Akayesu has put forward no reason as to why the Trial Chamber should have taken these factors into consideration.

[276] Akayesu's Brief, chapter 8, para. 27.

[277] Akayesu's Brief, Chapter 8, paras. 7, 27 and 28; Akayesu's Reply, para. 93(a).

[278] Trial Judgment, para. 137.

[279] Trial Judgment, para. 140. See also para. 455.

147. The Appeals Chamber can find no error in this reasoning. As stated above, the Appeals Chamber finds that it is within a Trial Chamber's discretion, after seeing a witness, hearing their testimony (and that of other witnesses) and observing them under cross-examination, to accept or reject such testimony. It makes this decision on a case-by-case basis while bearing in mind its overall evaluation of such evidence. The factors set out above, which were generally taken into account by this Trial Chamber in assessing testimonial evidence are, in the opinion of the Appeals Chamber, both valid and reasonable. Indeed, such factors are often considered by the Trial Chambers of both ICTY and ICTR and which have recently been confirmed by the Appeals Chamber for ICTY as being acceptable.[280]

(b) Disclosure of evidence and extrinsic evidence

(i) Akayesu's arguments[281]

148. Akayesu submits that the Trial Chamber erred in refusing to order disclosure of copies of the questions asked to witnesses, tape recordings and notes of investigators, which materials would have enabled him to verify, *inter alia,* the reliability of the translations.[282] By refusing to order such disclosure, he submits that "the Tribunal deprived him of both his right and duty to investigate the evidence."[283]

149. Akayesu submits that several witnesses denied having said certain things to investigators.[284] He argues that whenever they did so, it was the duty of the Prosecution, the Tribunal and even the Defence, to require that the relevant investigator or the person who took the statement, be caused to appear to give evidence as to the existence and content of the prior statement, by producing their notes, the questions asked and possibly to secure from the relevant interpreter confirmation that the statement was in fact correct.[285] In Akayesu's submission the Trial Chamber should have ordered that such evidence be supplied.[286] He contends that:

> The veracity of the statement is to be presumed and, where there is discrepancy in the testimony, extrinsic evidence of the statement may be proffered. Where the investigator could not testify and the Prosecutor did not admit that the statement was in accord with the testimony, in the Appellant's submission the Tribunal should have discounted all or part of the testimony or terminated the proceedings because it was impossible for the accused to have a full and unfettered defence.[287]

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[280] *Celebici* Judgment, paras. 496 to 498.
[281] As stated above, the Prosecutor put forward no argument on these issues.
[282] Akayesu Brief, Chapter 8, para. 4.
[283] Akayesu's Brief, Chapter 8, para. 4. He submits that these statements were "incomplete and did not include the questions asked".
[284] Akayesu's Brief, Chapter 8, para.5.
[285] Akayesu's Brief, chapter 8, paras. 5 and 11. In the latter para., Akayesu submits that "Counsel for the Defence, for his part, must demand that the witnesses who made the statements be called to testify to their authenticity"(sic). In the instant case, he submits that the veracity of statements should have been tested since discrepancies between the testimony at trial and prior statements are material to the issue of witness's credibility. Akayesu's Brief, Chap 8, para. 13. See also paras. 24 and 25 and T(A), 1 November 2000, p. 112.
[286] Akayesu's Brief, Chapter 8, para. 11. Akayesu also submits that "[t]he only solution is that described in Chapter 8, paragraph 25 of the Appellant's [Akayesu's] Brief, requiring that the Chamber painstakingly verify the statement in the presence of the person who recorded it and with the help of the transcript of the statement, which includes the questions asked". Akayesu's Reply, para. 94.
[287] Akayesu's Brief, Chapter 8, para. 25. Akayesu refers in particular to precedent which regulates the cross-examination of witnesses as to prior inconsistent statements, the production to witnesses of their prior statements, and the production of "extrinsic evidence" as to the fact that there was a prior inconsistent statement. Akayesu's Brief, Ch. 8, paras. 12 –18. He submits that from this review, it is clear that firstly prior statements are an important tool in the

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(ii) Discussion

150. The Appeals Chamber holds the view that issues raised here "..."[288] Consequently, the Appeals Chamber will consider them on the merits. However, it points out that it regards them as ancillary to the main allegation which, as stated above, has been rejected.

151. Akayesu contends that the Trial Chamber erred in its decision of 31 October 1996 in refusing to order the disclosure of tape recordings of statements, questions asked by investigators and notes of investigators.[289] However, Akayesu has been very selective in his interpretation of the events of that day, and here it is worth recalling both the circumstances of the hearing and the specific findings made by the Trial Chamber.

152. Akayesu's trial was scheduled to commence on 31 October 1996.[290] Mr. Karnavas, Counsel for Akayesu at the time, moved for an adjournment on the grounds, *inter alia*, that the Prosecution had failed to fully comply with the Rules in terms of disclosure to the Defence.[291] The Trial Chamber granted the adjournment and ordered the Prosecution to comply with its disclosure duty under Rule 66 of the Rules. The Appeals Chamber finds no error in this decision nor in the reasons given by the Trial Chamber.

153. Contrary to Akayesu's assertions, the Appeals Chamber does not interpret the Trial Chamber's decision of 31 October 1996 as flatly denying the request by Akayesu's Counsel for disclosure of the material in question. Mr. Karnavas claimed generally that disclosure by the Prosecution was incomplete. No specifics were given, save for a general request for disclosure of tape recordings of interviews conducted with witnesses and copies of the questions asked, to which he asserted he was entitled as of right.[292] It must be recalled that trial had not yet commenced and that the request covered all such material and not specifically those relating to a particular witness and which had clearly become necessary.

154. The Trial Chamber found initially that Akayesu was entitled to disclosure of all Prosecution evidence as provided for under the Rules.[293] The Trial Chamber held that:

> .. it is not provided within our rules that we give you the recordings of the interviews of witnesses. That is one point. Second, when the prosecutor presents his own evidence and his expert witnesses you have the right to cross-examine these (sic) experts so it is not useful right now to go right away and interview these experts before. The third point is that the statements made by the witnesses are interpreted by interpreters who have taken the oath. Of course, you will have the time to examine, cross-examine these witnesses. This is not in civil law. This is in common law that once the prosecution has submitted or has presented his own witnesses the defence has the right there to cross-examine these witnesses. So I think

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evaluation of the credibility of witnesses and secondly, that when a witness denies having made a prior statement, it is both permissible and desirable to have extrinsic evidence of the prior declaration in order to establish the truth. Such a verification is effected on a case-by-case basis. Akayesu's Brief, Chapter 8, para. 18. See also Akayesu's Reply, para. 94.

[288] See para. 128.

[289] Akayesu's Brief, Chapter 8, para. 4.

[290] Judgment, para. 14.

[291] T(A), 31 October 1996, pp. 6-8.

[292] T(A), 31 October 1996, pp. 6 – 7, 10, 12 – 16, 22 – 25, 33 – 34, 39 – 41, 46, 47, 59, 61, 64 – 65 (English).

[293] T(A), 31 October 1997, para. 45 (French).

> you have enough rights which have been provided as far as the cross-examination of these witnesses. [294]

155. The Trial Chamber found that: on the face of it the Rules do not provide for disclosure of tape recordings of interviews conducted with witnesses; that witness statements were interpreted by sworn interpreters; and that the rights of the accused would be protected through the cross-examination of witnesses in court. The Appeals Chamber can find no material error in such findings.

156. Akayesu insisted during the same hearing on the Trial Chamber ordering disclosure of the questions asked to the witnesses. The Trial Chamber responded as follows:

> Counselor, in order to emphasize the point I use the word that you used earlier that it is difficult to find. First of all, the Court needs to establish the balance between the arguments by the prosecution and what is material in his presentation. Whether or not it is documents, whether it is something presented by the witness or something presented by the defence it's up to the Court to decide. However, you do have the right when the witness is present there for us to cross-examine him. Perhaps you may find that he makes a mistake but that's the system you are talking about.[295]

157. The Trial Chamber reached its decision by weighing the arguments put forward by Akayesu against the Prosecution. Although the Trial Chamber rejected the request at the time, the Appeals Chamber does not find that in so doing the Trial Chamber had closed the door to any further applications. The Trial Chamber found that: "Whether or not it is documents, whether it is something presented by the witness or something presented by the defence it's up to the court to decide." If it subsequently became clear that a particular statement was incomplete resulting in prejudice to the defence a further application by Akayesu would conceivably have been granted. Obviously, this would have depended on circumstances of the case.

158. Later during the same hearing Akayesu requested again disclosure of the tape recordings of Prosecution witness interviews. The Trial Chamber stated that it did not intend to limit the rights of the defence. On the contrary, it ordered that:

> if [the Prosecution] has not thus far given all evidence to the defence that [it] is obliged to give by the Rules...then...[it] should hand them over to the defence. And...the cross-examination of the witnesses will take place in the public trial."[296]

159. Although it appears unclear whether the Prosecution had possession of tape recordings of Prosecution witness interviews the Trial Chamber found that even if it did, the Rules did not place any obligation on it to disclose them. [297] Most importantly, the Trial Chamber concluded by specifically ordering the Prosecution to disclose all evidence, material to the preparation of the defence. It advised Akayesu that it was fully within his right to contact the Prosecution before the start of the trial should items come up missing, or on the contrary, to file any relevant motions before the Trial Chamber.[298]

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[294] T, 31 October 1996, pp. 56 *et seq.* (French).
[295] T, 31 October 1996, p. 60 (French).
[296] T, 31 October 1996, p. 54.
[297] T, 31 October 1996, pp. 82 to 86 (French).
[298] The Appeals Chamber notes that throughout this hearing, Akayesu persisted in asking in particular for the disclosure of the tape recordings of interviews with witnesses for the Prosecution. The Trial Chamber did not rule either way but

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160. The Appeals Chamber can find no errors in that. Notwithstanding Akayesu's allegations, it is of the opinion that this decision was broad enough to encompass any subsequent application for the disclosure of missing evidence which Akayesu could show to be material to his defence in any particular case. It is not the case that any general request for disclosure of evidence is to be automatically granted by the Trial Chamber. The Prosecution's obligations are clearly defined under the Rules, and Akayesu has failed to show that the Trial Chamber erred in this case, in finding that the Prosecution was at the time under no obligation to disclose the items sought. Should the need have arisen eventually and if in an identified case, Akayesu had succeeded in showing that he had problems with comprehension, then that would have been a different case. Thus, Akayesu had ample opportunity (no restriction was placed upon him in that regard) to make a specific application to the Trial Chamber for clarification. It is assumed that the Trial Chamber would have then considered the matter on its merits and reached a different decision. However, it would not have been under no obligation to automatically grant Akayesu's application. Akayesu has failed to show that he availed himself of this right.[299]

161. Akayesu alleges that there were contradictions between the Trial Chamber's 31 October 1996 decision and the findings in the Trial Judgment. In Akayesu's submission the Trial Chamber was inconsistent in asserting that prior statements had been translated by sworn interpreters (thereby suggesting that they were reliable) while in the Trial Judgment it found that such statements were not reliable because of problems with translations.[300] Akayesu alleges that the Trial Chamber was inconsistent in refusing on 31 October 1996 to order disclosure of the questions asked of the witnesses or recordings of the interviews (stating that it would be responsible for ascertaining the veracity of the witnesses), while it stated in the Trial Judgment that it "did not have access to transcripts of the interviews, but only translations thereof" and that therefore, it was "unable to consider the nature and form of the questions put to the witnesses, or the accuracy of the interpretation at the time."[301]

162. Here again Akayesu is somewhat selective in his reading of the Trial Chamber's findings on 31 October 1996. The Trial Chamber did state that the witness statements had been translated by interpreters under oath. However, as seen above, that statement was made by the Trial Chamber in the context of a discussion on the request made by Akayesu at the time. The Trial Chamber explained its reasons and one such reason was the fact that the interpreters who had translated the statements were under oath. It inferred therefrom that the witness statements should be *prima facie* deemed acceptable. The Appeals Chamber finds no error in such a statement.

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simply repeated that there is an obligation upon the Prosecution to disclose all documents that will enable the Defence to prepare. It found that if Akayesu felt it had not properly complied, it should raise the matter before the Trial Chamber. T, 31 October 1996, pp. 82 to 86 (French).

[299] Following the hearing of 31 October 1996, the Appeals Chamber has been directed to no instance where Akayesu made a subsequent precise request to the Trial Chamber to e provided with further disclosure or clarification regarding the statement of a witness. The Trial Chamber had stated that if Akayesu found that he did not have all materials necessary, he should notify the court. Akayesu did not indicate when his Counsel made any such notification. On 29 November 1996, first appearance of Akayesu's new Counsel, the Trial Chamber again directed the Prosecution to comply with the disclosure obligations and directed the Defence to apply to the court if it should find out that any items were lacking. Even if this new Counsel were not to be expected to lodge an application for the documents at this status conference (having received them only on the eve), the Trial Chamber stated clearly that should he request it, or encounter difficulties with the disclosed documents, it would hold another status conference before commencement of the trial on 9 January 1997. T(A) 29 November 1996, pp. 24-25 and 27. Akayesu has failed to indicate to the Appeals Chamber any motion he filed after that date.

[300] Akayesu's Brief, Ch. 8, para. 24. See also Akayesu's Reply, para. 93(b).

[301] Akayesu's Brief, Ch. 8, para. 24. Citation from Trial Judgment, para. 137.

163. With regard to the transcripts of witness interviews and copies of questions put to the witnesses, the Appeals Chamber finds that the Trial Chamber did not err in refusing to order disclosure of such items to Akayesu on 31 October 1996. Nevertheless, should it have required such items in its assessment of the credibility of a particular testimony, it is the case that it should have ensured it had access thereto. The Appeals Chamber recalls that the Trial Chamber considered this issue in light of several others and in the context of its overall assessment of the evidence before it. It did not find in relation to a particular testimony that such items were lacking and that as a result, it should disregard the prior statement. In any event, the Appeals Chamber finds that Akayesu has failed to point to any prejudice he suffered in a particular case as a result of problems in understanding any particular prior statement.

164. Lastly, it is Akayesu's submission that whenever a witness denies having stated something in a previous statement, it was incumbent upon the Prosecution, the Tribunal or the Defence to apply for leave to call the relevant investigator to testify as to the existence of and truthfulness of the previous statement.[302] Here again, Akayesu has failed to point to any instance where this should have been done and where he was caused prejudice.[303] Similarly, he has failed to point to any example of any instance where he made such an application which was wrongly denied by the Trial Chamber.

165. The Appeals Chamber dismisses this allegation as a whole.

166. As stated earlier, Trial Chambers are often faced with the situation where during his testimony and generally under cross-examination a witness, contradicts a statement given previously to investigators. In such a case, and as stated above, a Trial Chamber must be able to assess the credibility of the witness in question, for having witnessed their testimony both in chief and under cross-examination, and being in a position to assess it, where appropriate, against the alleged inconsistency and against the evidence of other witnesses. The question arises as to the weight to be attached to a particular inconsistency in assessing the overall credibility of the witness's testimony. Indeed, "[I]nconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole."[304] Such a decision falls within the discretion of the Trial Chamber. Neither the Prosecution nor the Trial Chamber itself are under any obligation to request that further evidence be furnished to the Trial Chamber to enable it to make its decision.

167. At the same time, the Appeals Chamber concedes that as a matter of principle an accused is not limited in any way, in the applications that he or she may bring before a Trial Chamber. Although it has not been a practice at the Tribunal to proffer "extrinsic evidence" of a prior statement, this does not imply that any application to do so would be automatically denied. On the contrary, as in all cases, a Trial Chamber would have to make a decision based on the facts before it.[305]

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[302] Akayesu's Brief, Ch. 8, para. 5.

[303] Akayesu states: "For example, a witness denied having made a statement whereas he confirmed it during his testimony". Akayesu's Brief, Chapter 8, para. 5. In the footnote, Akayesu makes reference to Witness D and transcripts of his testimony of 6 February 1997. No reason was given as to why such evidence should have been sought concerning this witness.

[304] *Kayishema and Ruzindana* Judgment, para. 77, as relied on by Akayesu in Akayesu's Brief, Ch. 8, para. 23.

[305] Akayesu acknowledges that a Trial Chamber would make such a decision on a case-by-case basis. Akayesu's Brief, Chapter 8, para. 18. He submits: "... when a witness denies having made a certain statement, it is permissible and desirable to lead extrinsic evidence of the statement in order to establish the truth. Such a verification is on a case-by-case basis, depending on the circumstances of the statement".

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168. However, Akayesu's allegation is more general. He submits that once a witness denies making a statement, the investigator who took such a statememt must be called to give evidence. He cites a case law to the effect that in his submission, before extrinsic evidence of a previous inconsistency may be called "a foundation" must be laid.[306] Without ruling on the applicability of such a test before the Tribunal, the Appeals Chamber notes that Akayesu has failed to show how such a "foundation" had been laid with regard to any of the witnesses in his case. Similarly, he has failed to show that at any given time he moved the Trial Chamber that extrinsic evidence should be called,[307] or that the Trial Chamber should have called such evidence *proprio motu*, at any given time but failed to do so. Akayesu has failed to show what prejudice was caused him as a result of the failure to call such evidence. It would be wrong to suggest that such evidence should be called in all cases.

(c) Conclusion

169. The Appeals Chamber does not dispute Akayesu's contention that prior statements constitute an important tool for assessing the credibility of a witness. The Trial Chamber has also acknowledged their importance in that regard. However, the Appeals Chamber finds that Akayesu has failed to show that the Trial Chamber did not properly assess the evidence before it nor that it assessed the credibility of witnesses in this case, in an unfair or biased fashion. Nor has Akayesu shown that the Trial Chamber adopted an improper policy as to the treatment of prior statements.

170. For these reasons, the grounds of appeal covered in this section must fail.

3. Sub-Ground Three: Non-application of the reasonable doubt standard and substantive factual errors.[308]

171. In support of this sub-ground of appeal, Akayesu advances several arguments, principally that:[309]

> The Court rendered its guilty verdict by applying the "balance of probabilities" standard of proof rather than the "beyond a reasonable doubt" standard;
>
> The Court distorted several testimonies, *inter alia*, by finding that the Appellant was seeking out Tutsis, whereas according to the evidence, he was looking for RPF infiltrators;
>
> The Chamber failed to take into consideration numerous improbabilities in the Accused's schedule, such as presented by the Prosecution witnesses;
>
> The Chamber based its Judgment solely on the testimonies of Prosecution witnesses, having dismissed beforehand the testimonies of Defence witnesses;

[306] Akayesu's Brief, Chapter 8, para. 17.
[307] When discussing this duty to call the investigator to give evidence, Akayesu refers in a footnote to the testimony of Witness D (Ephrem Karangwa), who he alleges denied making a previous statement to an investigator. In so doing, he appears to suggest that an investigator should have been called to verify his testimony. Akayesu's Brief, Ch. 8, para. 5. No application was made at the time to do so and other than the general reasoning discussed in the text, no reasons have been set out to establish why one should have been called.
[308] The Appeals Chamber reproduces here the wording used by Akayesu in his Brief. In the understanding of the Chamber Akayesu was referring to the non-application of the standard of proof beyond a reasonable doubt, resulting in substantive factual errors.
[309] See Annex B.

The Chamber often accorded probative value to irrelevant evidence;

The Chamber did not take into account the serious contradictions in the testimonies of Prosecution witnesses;

The Chamber contradicted itself on several points of fact;

The Chamber dismissed, without any valid reasons, the motion by the Accused for an inspection of the site for the purpose of forensic analysis.

172. The Appeals Chamber notes, firstly, that some of the aforementioned grounds of appeal (which are, in fact, presented in the introduction to Chapter 10 of Akayesu's Brief) were neither raised in Akayesu's Brief nor in his Reply, and were not mentioned during hearings on the appeal.[310] Furthermore, the said grounds are set out in the introduction in such general terms that the Appeals Chamber cannot, in the absence of any supporting arguments or examples, pass on their respective merits in law and in fact. Therefore, the Appeals Chamber will not address them.

173. Akayesu alleges both errors of law and of fact,[311] which he argues warrant that the factual findings relating to paragraphs 12A, 12B, 14 and 18 of the Indictment be reversed.[312]

(a) Scope of review on appeal

174. Before reviewing the allegations made by Akayesu, the Appeals Chamber wishes to respond to the preliminary observations made by Akayesu concerning the scope of appellate review. At issue is which standards are to be applied by the Appeals Chamber in considering possible errors of fact and/or of law committed by a Trial Chamber.

175. Akayesu cites ICTY case law on the principles governing the presumption of innocence and the burden of proof, placed on the Prosecutor.[313] Akayesu contends, in particular, that the principles applied by the Trial Chamber in *The Prosecutor vs. Delalic et al.* "should govern the instant appeal."[314] He explains that he is not requesting the Appeals Chamber to review all the facts and apply the standard of reasonableness as set forth in the Judgments rendered by ICTY Appeals Chamber in *Tadic* and *Aleksovski.* Akayesu argues that his approach is totally different:

> The Appellant's requests in this chapter do not emanate from an allegation of such unreasonable findings of fact as discussed by the Appeals Chamber in [the *Tadic* and *Aleksovski* cases]. The Tribunal's factual findings referred to in this chapter are

[310] The arguments in question are: The Tribunal distorted the testimonies of several witnesses, for example, by concluding that the Appellant was looking for Tutsis whereas, according to the evidence, he was looking for RPF infiltrators; the Chamber made erroneous findings in the Judgment due to a lack of knowledge of the geography of Taba *commune*. Moreover, it failed to take into account the numerous improbabilities in the Accused's schedule, such as presented by the Prosecution witnesses; the Chamber based its Judgment solely on the evidence given by Prosecution witnesses, while rejecting, *a priori*, that given by the Defence witnesses. The Chamber contradicted itself on several points of fact.

[311] Akayesu, in fact, explains that "The Chamber erred in law with respect to the burden of proof. In order to arrive at its findings, the Chamber at times relied on facts which contradicted the evidence, thus occasioning incurable prejudice to the Accused." Akayesu's Brief, Chapter 10, para. 2.

[312] Akayesu's Brief, Chapter 10, para 3. Akayesu's Brief, Chap. 15, para. 3.

[313] *Ibid*, paras. 4 and 5.

[314] *Ibid*, para. 5.

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erroneous because of the substantive errors of fact and law committed within the meaning of Article 24 of the Statute.[315]

176. To begin with, the Appeals Chamber points out that Akayesu misconstrues the provisions of the Statute and the case-law of the Tribunal.[316] Indeed, he confuses the provisions relating to the Appeals Chamber (Article 24 of the Statute) with those which apply to the Trial Chamber. In citing the *Delalic et al.* case, Akayesu is seeking application of standards for assessing evidence which are the Trial Chamber's,[317] but which standards are not suited to the specific function of the Appeals Chamber.

177. As stated by ICTY Appeals Chamber, an appeal is not, from the point of view of the Statute, a *de novo* review.[318] The Appeals Chamber may hear only appeals brought pursuant to Article 24 of the Statute. The standards applied by the Appeals Chamber to pass on both errors of fact and of law are derived from consistent ICTY Appeals Chamber case-law. The Appeals Chamber reiterates and upholds those standards in the instant Judgment.

178. With respect to errors of fact, the Appeals Chamber confirms that the standard to be applied is the standard of reasonableness of the impugned finding, it being understood that "it is not any and every error of fact which will cause the Appeals Chamber to overturn a decision of the Trial Chamber, but one which has led to a miscarriage of justice."[319] The onus is therefore on the Appellant to show that an error was committed by the Chamber, which error occasioned a miscarriage of justice. ICTY Appeals Chamber has, on several occasions, applied this standard which can be summed up as follows:

> [..]. The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which no reasonable tribunal of fact *could* have reached. If an appellant is not able to establish that the Trial Chamber's conclusion of guilt beyond reasonable doubt was one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond reasonable doubt of that guilt. Under those circumstances, the latter test of legal sufficiency is therefore redundant, and the appeal must be dismissed. Similarly, if an appellant is able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the appeal against conviction must be allowed and a Judgment of acquittal entered. In such a situation it is unnecessary for an appellate court to determine whether there was evidence (if accepted) upon which such a tribunal could have reached such a conclusion.[320]

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[315] *Ibid*, para 8.

[316] Indeed, Akayesu argues that: "The Appellant's requests in this chapter are not a contention of unreasonableness of the factual findings, as discussed by the Appeals Chamber in its Judgment of 15 July in The *Prosecutor v. Dusko Tadic*· or in the 24 March 2000 Judgment in The Prosecutor v. Aleksovski IT-95-14/1-A. The Courts's factual findings referred to in this chapter are erroneous because of the substantive errors of fact and law committed within the meaning of Article 24 of the Statute", Akayesu's Brief, Chapter 10, para. 8.

[317] Rule 87 (A) provides: "After presentation of the closing arguments, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that *guilt has been proved beyond reasonable doubt.* (Emphasis added).

[318] "*Tadic* Decision (Additional Evidence), para. 41. ICTY Appeals Chamber further held in its Judgment rendered in the *Furundzija* case: "The Appeals Chamber finds no merit in the Appellant's submission which it understands to mean that the scope of the appellate function should be expanded to include *de novo* review. This Chamber does not operate as a second Trial Chamber. The role of the Appeals Chamber is limited, pursuant to Article 25 of the Statute, to correcting errors of law invalidating a decision, and errors of fact which have occasioned a miscarriage of justice." See *Furundzija Judgment*, para. 40.

[319] *Furundzija* Appeal Judgment, para. 37.

[320] *Celebici* Appeal Judgment, paras. 434 and 435; see also *Tadic* Appeal Judgment, para. 64; *Aleksovski* Appeal Judgment, para. 63; *Furundzija* appeal Judgment, para. 37.

179. Where errors of law are concerned, the Appeals Chamber holds that the burden placed on the Appellant is somewhat different, although the Appellant must, similarly, prove the errors of law committed by the Trial Chamber and set forth arguments in support of his allegations:

> A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[321]

(b) Issues raised by Akayesu

180. Akayesu challenges on appeal the findings on the first four paragraphs of the Indictment (paras. 12A, 12B, 14 and 18) in a bid to show that generally, his trial "was unfair" and that the Trial Chamber committed substantive errors of fact.[322] The Appeals Chamber will therefore address the arguments of the parties relating to the said paragraphs of the Indictment. Thus, it will consider the merits of the remedy sought by Akayesu, namely, that the factual findings of the Trial Chamber on the aforementioned paragraphs of the Indictment should purely and simply be set aside.[323]

(i) Paragraphs 12A and 12B of the Indictment: Charges of sexual violence[324]

181. Here, Akayesu alleges several errors of fact and law. The Appeals Chamber wishes to recall the arguments of the parties regarding each of the errors alleged.

a. Paragraph 460 of the Judgment

182. Paragraph 460 of the Judgment reads as follows:

> "Faced with first-hand personal accounts from women who experienced and witnessed sexual violence in Taba and at the bureau communal, and who swore under oath that the Accused was

[321] *Furundzija* Appeal Judgment, para. 35.
[322] Akayesu's Brief, Chapter 10, para 9.
[323] *Ibid*, para. 7 and Chapter 15, para. 3.
[324] Para. 12 (A) of the Indictment: "Between April 7 and the end of June 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and /or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings."
Para. 12(B) of the Indictment: "Jean-Paul Akayesu knew that acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean-Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean-Paul Akayesu encouraged these activities".

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present and saw what was happening, the Chamber does not accept the statement made by the Accused. The Accused insists that the charges are fabricated, but the Defence has offered the Chamber no evidence to support this assertion. There is overwhelming evidence to the contrary, and the Chamber does not accept the testimony of the Accused. The findings of the Chamber are based on the evidence which has been presented in this trial. As the Accused flatly denies the occurrence of sexual violence at the bureau communal, he does not allow for the possibility that the sexual violence may have occurred but that he was unaware of it. "

(i) Arguments of the parties

183. It is Akayesu's submission that the French version of the Trial Judgment must be considered as the official version, since it is the one which is most favourable to the accused.[325] Now, the statement that "*la Chambre ne sait quoi penser de la déclaration faite par l'accusé*" ["the Chamber does not know what to make of the statement made by the accused"] in paragraph 460 of the French version would appear to show that there was doubt as to the culpability of the accused with respect to the perpetration of acts of sexual violence in Taba. Akayesu submits that, the Trial Chamber therefore erred by disregarding the version of the accused.[326]

184. The Prosecutor submits that the English version of the Judgment is the original and that there is no such wording in the English text. In any event, the Prosecutor asserts that Akayesu has failed to identify the type of error that was committed by the Chamber and how it could have caused an invalidation of the Judgment.[327]

(ii) Discussion

185. The Appeals Chamber confirms that the English version of the Trial Judgment is the original version. There can be no doubt on this point.[328] The Appeals Chamber dismisses Akayesu's argument that the version which corresponds to the language spoken and understood by the accused should be accepted.[329] Only the original version of the Judgment is authoritative.

186. To determine whether the Trial Chamber erred in law, the Appeals Chamber must therefore refer to paragraph 460 in the English version of the Judgment which reads as follows:

> Faced with first-hand personal accounts from women who experienced and witnessed sexual violence in Taba and at the bureau communal, and who swore under oath that the Accused was present and saw what was happening, *the Chamber does not accept the statement* made by the Accused. The Accused insists that the charges have been fabricated, but the Defence has offered the Chamber no evidence to support this assertion. There is overwhelming evidence to the contrary, and the Chamber does not accept the testimony of the Accused. The findings of the Chamber are based on the evidence which has been presented in this trial. As the Accused flatly denies the occurrence of sexual violence

[325] Akayesu's Brief, Chapter 10, para. 12; Akayesu's Reply, para. 103.
[326] Akayesu's Reply, para. 102.
[327] Prosecution's Response, paras. 11.13 and 11.16.
[328] In the top right-hand corner of the cover page of the Judgment is written (OR:ENG), showing that the Trial Chamber is of the opinion that only this version is authoritative.
[329] On this point, the Appeals Chamber notes the disparity between the Judgment and the Indictment. Indeed, the Trial Chamber indicated with respect to the "substantial disparity between the French and English versions of para. 14 of the Indictment", that [...] "the French version should be accepted in this particular case, because the Indictment was read to the Accused in French at his initial appearance, because the Accused and his Counsel spoke French during the hearings and, above all, because the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected". Cf. Judgment, para. 319.

> at the bureau communal, he does not allow for the possibility that sexual violence may have occurred but that he was unaware of it (Emphasis added).

187. Indeed, it appears that there is a difference between the English version and the French version of the Judgment as to the meaning of the impugned statement. In the English version, the Trial Chamber states that it does not accept the statement made by the Accused. At no time does the Trial Chamber suggest that it entertains any doubt as to his culpability nor that it does not know "what to make of it". The Appeals Chamber further observes that paragraph 460 serves, in fact, as a kind of epilogue to the Trial Chamber's factual findings on sexual crimes, where the testimony of the Accused is assessed against the various "first-hand personal accounts by women who witnessed the acts of sexual violence".[330] Twice in the paragraph in question,[331] the Trial Chamber states that it does not accept Akayesu's testimony. Thus, a simple reading of the impugned paragraph shows that Akayesu's allegations of doubts entertained by the Chamber are without merit.

188. Consequently, the Appeals Chamber holds that the Trial Chamber did not err on this point.

b. Testimony of the Accused

(i) Arguments of the parties

189. Akayesu submits that the Trial Chamber erred in stating that he had denied that acts of sexual violence had been committed. On this point, he refers to paragraph 460 (cited above) and paragraph 32 of the Judgment.[332] He alleges that indeed the testimony of the Accused stands in contrast to the Chamber's finding thereon. The Accused allegedly did not flatly deny the occurrence of sexual violence.[333]

190. The Prosecution refutes Akayesu's arguments. It cites extracts from the examination and cross-examination of Akayesu on 12 and 13 March 1998 which, in its submission, prove that the Chamber did not err on this point.[334]

(ii) Discussion

191. During his examination-in-chief, to the question "What do you know of cases of rape in Taba during the events?" Akayesu answered:

> "[...] believe me in the name of God, Almighty God, in fact this accusation, this charge is just made up. I never saw - I never heard from my policemen at least - I was not all the time at the *bureau communal* - I never heard that a woman, any woman was raped at the *bureau communal*, never.[335]

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[330] The approach taken by the Trial Chamber is crystal clear. The Chamber takes stock of the testimonies that it heard (and on which it commented earlier in the Judgment, in paras. 416 to 448) and ends its factual findings (paras. 449 to 459) by indicating that the "findings of the Chamber are based on the evidence which has been presented in trial."

[331] See the first and third sentences of para. 460.

[332] Para. 32 of the Judgment is worded as follows: "As for acts of sexual violence, the Defence case is somewhat different from that for killings and beatings, in that, whereas for the latter the Defence does not contest that there were killings and beatings, it does deny that there were acts of sexual violence committed, at least at the Bureau communal. During his testimony the Accused emphatically denied that any rapes had taken place at the Bureau communal, even when he was not there. The Chamber notes the Accused's emphatic denial of facts which are not entirely within his knowledge".

[333] Akayesu's Brief, Chapter 10, para. 14; Akayesu's Reply, para. 104.

[334] Prosecution's Response, paras. 11.17 to 11.23.

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192. There is nothing confusing about the tone used by Akayesu in answering this question.[336] True, under cross-examination, he testified to knowing about cases of rape that had been committed throughout the country, particularly in Kigali.[337] However, concerning Taba *commune*, in which the Trial Chamber was mainly interested, in light of the relevant paragraph of the Indictment, Akayesu insisted several times that he knew nothing of acts of sexual violence committed in his *commune*:

> "[...] but I heard here but nobody ever reported to me that it had taken place, that we had rape in my *commune*, and certainly nothing, to the best of my knowledge, was done in the *bureau communal* and I never saw with my eyes anybody being raped.[338] [...]
>
> [...] For me, therefore, this is an accusation. Allow me to say this. Allow me to say this as an accused. It is an invented accusation and I swore on everything yesterday I'm a Christian and I maintain it [...].[339]
>
> [...] It is possible. Nobody, in fact told me that at this or that point women or girls were taken and that they were raped but I would not say that I was everywhere. May be there were cases of rape but nobody talked to me about them [...].[340]

193. Akayesu's statements words are therefore clear. He, indeed, denied knowledge of acts of sexual violence being perpetrated. Therefore, the Appeals Chamber finds that the Trial Chamber did not commit any error.

c. Impartiality of the Trial Chamber Judges

194. Akayesu's allegations with respect to this ground of appeal relate to comments and questions by two Trial Chamber Judges (Judge Pillay and Judge Kama) during the proceedings.

(i) Arguments of the parties regarding Judge Pillay's comments

195. Akayesu submits that "the Trial Chamber showed prejudice against him."[341] He cites as an example a question on the occurrence of sexual violence put by Judge Pillay to a witness, at the start of trial, whereas no witness had testified to sexual violence being committed at Taba and whereas such crimes were not included in the Indictment.[342] Akayesu argues that, the question shows that Judge Pillay was not impartial with regard to the specific issue of sexual violence committed at Taba.

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335 T(A), 12 March 1998, pp. 215 and 216.
336 Akayesu repeated the adverb "never" more than five times. *Cf.* Transcript of the hearing of 12 March 1998, pp. 215 and 216.
337 T(A) , 13 March 1998, p. 189.
338 T(A), 13 March 1998, p. 190.
339 T(A), 13 March 1998, p. 200.
340 T(A),13 March 1998, p. 200.
341 Akayesu's Brief, Chapter 10, para. 15.
342 Akayesu's Reply, para. 105. Akayesu's stand concerning the acceptance (or non acceptance) of this ground of appeal is not clear. In his reply, he states that he "[...] partially accepts the Prosecutor's view but asserts that Judge Pillay had no cause whatsoever for raising such an issue at the beginning of the trial, given that sexual violence was not part of the charges brought against the Appellant, nor had it been raised by any witness before 17 January 1997." (para. 105). The Appeals Chamber further notes that during the Appeal hearings, Akayesu's Counsel said: "We made a comment about Judge Pillay which the Prosecutor clarified us on and we accept the correction". Cf. Transcript of the Appeal hearing of 1 November 2000, p. 93.

196. The Prosecutor refers to the general rule laid down by ICTY Appeals Chamber in the *Furundzija* Appeal Judgment concerning the impartiality of a judge and submits that, according to the said case-law, Akayesu must show bias and the part of the judge. In the instant case, Akayesu has failed to provide such proof .[343] Furthermore, the English version of Judge Pillay's statement shows that she was not referring to any particular incident.[344]

(ii) Discussion on Judge Pillay's comments

197. The Appeals Chamber will start by recalling the question challenged by Akayesu. On 17 January 1997, Witness Zacharia testified before the Trial Chamber. At the end of his cross-examination, Judge Pillay put the following question to the said Witness: "Did you come across any incidence of rape?"(*Est-ce que vous avez vu des incidents de viols?*") to which the Witness replied: "*Non, à ma connaissance non*". Judge Pillay then asked: "Any reports of incidence of rape that you may have heard? » (*Est-ce qu'on vous a parlé, tout au moins, de ces viols, de ces agressions sexuelles?)*. It is this last question that Akayesu challenges, because, in his submission, the use of the demonstrative article "*ces*" by Judge Pillay shows that she is biased, and at least, that she is referring to incidents she had prior knowledge of.

198. The Appeals Chamber observes that in the English version of the transcript of the hearing, Judge Pillay's question is worded as follows: "*Any report of incidence of rape that you have heard?*" No demonstrative article was therefore used by the Judge. This question was asked in a neutral tone, just like all the other questions that Judge Pillay asked.[345] In this case, Judge Pillay was not referring to a specific charge, but talking generally.

199. The Appeals Chamber points out that in case of a dispute over an extract from a court transcript, the version which reflects the language spoken by the person who asked the question or who made the impugned comment, in this case, the English language, spoken by Judge Pillay should prevail.

200. Since the question as posed in English is in no way confusing, and in the absence of any basis therefor, the Appeals Chamber dismisses the allegations made by Akayesu.

(iii) Arguments of the parties concerning Judge Kama's comments

201. Akayesu takes issue with the statements made by Judge Kama during the cross-examination of Witness JJ. The Presiding Judge of the Trial Chamber did indeed interrupt Akayesu's Counsel in order to ask him: "Is that important? ... She was raped so frequently that she can no longer remember how often it was; 4, 5, 6, 7 times...". In Akayesu's submission, "the Judge had decided

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[343] Prosecution's Response, paras. 11.24 to 11.32.

[344] Prosecution's Response, para. 11.31.

[345] In this particularly case, Judge Pillay's question was part of a more general question put to Witness Zacharia concerning crimes against humanity committed in Rwanda. She explained: ["Doctor, the Office of the Prosecutor informed us that you came here to give testimony on crimes against humanity, in accordance with Article 3. I am therefore going to read this Article with you to see whether you witnessed the said events. You spoke about all these crimes against humanity in your testimony, but there are some aspects that you did not talk about[...] We shall therefore go through the list of crimes against humanity, such as murder. Did you hear people talk about murder?"] A few minutes later, after mentioning murder and torture, Judge Pillay logically asked the witness to say something about the occurrence of rapes. Cf. Transcript of the hearing of 17 January 1997 pp. 64 to 65.

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that he believed the witness and wanted to protect her from questions that might have embarrassed her."[346]

202. The Prosecution submits that Akayesu's allegations are inadmissible. During cross-examination, Akayesu's Counsel asked the Witness several times if she had been raped and also asked her detailed questions about acts of sexual violence she had been subjected to. The Prosecution submits further that pursuant to Rule 90(F) of the Rules of Procedure and Evidence, the Trial Chamber has a duty to exercise control over the mode of cross-examination. The Chamber was therefore only exercising its role when it interrupted Akayesu's Counsel.[347]

(iv) Discussion of Judge Kama's comments

203. The Appeals Chamber recalls that impartiality is one of the obligations that the Judges undertook to abide by upon assuming their duties.[348] The tests governing the duty of impartiality, which derives from the Statute,[349] were defined by ICTY Appeals Chamber, thusly:

> "[..] a Judge should not only be subjectively free from bias, but also ... there should be nothing in the surrounding circumstances which objectively gives rise to an appearance of bias. On this basis, the Appeals Chamber considers that the following principles should direct it in interpreting and applying the impartiality requirement of the Statute:
>
> A. A Judge is not impartial if it is shown that actual bias exists.
>
> B. There is an unacceptable appearance of bias if:
>
> (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
>
> (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.[350]

204. In the case at bench, the Appeals Chamber is of the opinion that Akayesu has failed to show that Judge Kama was biased. The Appeals Chamber cannot be satisfied with the few arguments put

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[346] Akayesu's Brief, para. 106. During the hearing on appeal, Akayesu submitted that " [..] Judge Kama had, at this time, decided in his head that these people were telling the truth, and so in this case I think he decided in advance, and this is before Akayesu's testimony. So, we submit to the Court that he made up his mind in advance." Transcript of the hearing of 1November 2000, p. 66.

[347] Prosecution's Response, paras. 11.33 to 11.36.

[348] Rule 14 (A) of the Rules concerning the solemn declaration provides: " Before taking up his duties each Judge shall make the following solemn declaration: I solemnly declare that I will perform my duties and exercise my powers as a judge 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, honourably, faithfully, impartially and conscientiously." Rule 15 (A) of the Rules further provides: "A judge may not sit at a trial or appeal in any case in which he has a personal interest or concerning which he has or has had any association which might affect his impartiality. He shall in any such circumstance withdraw from that case. Where the judge withdraws from the Trial Chamber, the President shall assign another Trial Chamber Judge to sit in his place. Where a Judge withdraws from the Appeals Chamber, the Presiding Judge of that Chamber shall assign another Judge to sit in his place".

[349] Indeed, this duty is in fact laid down in the Statute. Article 12 (1) of the Statute provides that "The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices [...]".

[350] *Furundzija* Appeal Judgment, para. 189.

forward by Akayesu, especially as they are expressed in particularly vague terms.[351] At no time does Akayesu explain why Judge Kama would have wanted to protect the Witness under examination and why he believed her in advance. Therefore, the Appeals Chamber cannot address such serious allegations in the absence of any supporting argument.

205. Furthermore, the Appeals Chamber does not see what kind of error Judge Kama may have committed or how his comments could have been unlawful. The Appeals Chamber reiterates that Judge Kama's impugned comments must be placed in their proper context. In this particular case, Judge Kama was the Presiding Judge. During the cross-examination of Witness JJ, the Defence asked the witness how many times she had been raped. Seeing that the Witness had not answered the question specifically, the Presiding Judge intervened to put the question again to the Witness.[352] Finally, upon some further questioning, and on the basis of the Witness' statements, the Presiding Judge concluded that she had been raped at least seven times, leaving aside the other cases of rape she could not remember.[353] Subsequently, the Defence took the floor once again and resumed the cross-examination. Several questions were then asked as to the use of condoms when the rapes were being committed, and the question relating to the frequency of the rapes was therefore implicitly asked. The Presiding Judge interrupted once more to ask the Defence to "make some progress"[354] The Defence stated in reply to the Presiding Judge that "[...] there are a number of contradictions."[355] It was at this point that the Presiding Judge made the comment contested by Akayesu "[Is that important?] ... She was raped so many times that she no longer remembers the exact number of times [4, 5, 6, 7 times]."

206. The Appeals Chamber recalls that the practice of the Tribunal requires the Trial Chamber, generally, to exercise control over the examination and cross-examination of witnesses. Such general practice was sanctioned by Rule 90 (F) of the Rules of Procedure and Evidence adopted on 8 June 1998.[356] In the instant case, the Appeals Chamber notes that Judge Kama did not ignore the initial question put by the Defence. On the contrary, he himself asked the Witness to be more specific about what she had said. The Appeals Chamber therefore holds that the Presiding Judge of the Chamber, upon noting that the witness was finding it difficult to remember the exact number of times she had been raped and being of the opinion that the Defence was asking for superfluous details, properly interrupted the Defence Counsel and thus exercised his duty in a reasonable manner. It is the Chamber's view that Judge Kama's comment meant that the Witness's testimony indicated that she had been raped so many times that she could not remember exactly how many times she had been raped.

207. For the foregoing reasons, the Appeals Chamber holds that the Trial Chamber did not err on this point.

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[351] Akayesu explains: "The Judge affirmed that it was a painful experience for the Witness, that she was raped so many times that the court could move on to another matter. Evidently, he believed her. Which informed observer who is familiar with the circumstances of the instant case, including the duty of the judges to be impartial, would not believe that Judge Kama was already satisfied with the veracity of the statements made by Witness JJ, before the Defence presented its case? [...] Rather, the Judge had decided that he believed the Witness and wanted to protect her from questions that might have embarrassed her. This error vitiates the assessment of Witness JJ's testimony, which was deemed credible well before the presentation of evidence by the Defence." Akayesu's Reply, para. 107.

[352] Transcript, 24 October 1997, p. 15.

[353] Transcript, 24 October 1997, p. 10.

[354] Transcript, 24 October 1997, p. 23.

[355] Transcript, 24 October 1997, p. 11.

[356] Indeed, Rule 90 (F) provides that: "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence [...]".

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d. The words used for rape in Kinyarwanda

(i) Arguments of the parties

208. Akayesu refers to paragraphs 146, 152, 153 and 154 of the Judgment. In paragraph 146, the Trial Chamber presents certain words used by the witnesses, as well as expressions used in Kinyarwanda for rape. The Trial Chamber explains that it relied on the testimony of Mathias Ruzindana. Akayesu submits that this witness did not mention any words relating to rape during his testimony.[357] Regarding paragraphs 152, 153 and 154 of the Judgment, Akayesu contends that expert opinion was not sought on the terms used by the Trial Chamber. The evidence relied on by the Chamber (in this case, after consulting the Tribunal's interpreters) is not reflected in the transcripts and, therefore, Akayesu cannot respond thereto, in spite of it being significant as pointed out by the Trial Chamber itself.[358]

209. The Prosecution recalls that some 20 Prosecution and Defence witnesses testified before the Trial Chamber about sexual violence. At no time did Defence Counsel point out to the Trial Chamber that the words used by the witnesses did not mean rape. Moreover, there is no doubt that Witnesses J, H, JJ, OO, KK, NN and PP were actually testifying about rape and not consensual sexual intercourse.[359]

(ii) Discussion

210. Paragraph 146 of the Judgment reads as follows :

> The words *Inkotanyi, inyenzi, icyitso/ibyitso* and *Interhamwe* and the expressions used in Kinyarwanda for "rape", because of their significance to the findings of the Chamber, are considered particularly, as follows: The Chamber has relied substantially on the testimony of Dr. Mathias Ruzindana, an expert witness on linguistics, for its understanding of these terms. The Chamber notes that in ascertaining the specific meaning of certain words and expressions in Kinyarwanda it is necessary to place them contextually, both in time and in space.

211. It is the view of the Appeals Chamber that Akayesu misinterpreted the above-mentioned paragraph. True, one could understand from a simple reading of the paragraph that the Trial Chamber relied solely on the testimony of Mathias Ruzindana to interpret all the words listed in the first sentence, including "rape". Nevertheless, a comprehensive reading of the entire portion of the Judgment devoted to the interpretation of Kinyarwanda terms into English and French shows otherwise. Actually, the Trial Chamber relied on the testimony of the expert witness only to interpret the words *Inkotanyi, inyenzi, icytso/ibyitso and Interahamwe*, as reflected in paragraphs 147 to 151 of the Judgment. At no time, did the Trial Chamber rely on the testimony of Mathias Ruzindana to ascertain the meaning of the terms used in Kinyarwanda for "rape". Indeed, the paragraphs in the Judgment dealing with the meaning of those terms contain no reference to the testimony of the expert witness.[360]

212. Furthermore, on this last point, the Appeals Chamber does not see how consulting the official interpreters of the Tribunal, as well as using the dictionary of the National Institute for Scientific Research constitutes a substantive error. The Trial Chamber showed itself to be well-informed and vigilant about the problem of translation and particularly on "the obvious risks of

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[357] Akayesu's Brief, Chapter 10, para. 17; Akayesu's Reply, para. 108.
[358] *Ibid*, para. 19.
[359] Prosecution's Response, para. 11.37 to 11.39.
[360] See paras. 152 to 154 of the Judgment.

misunderstandings in the English version of the words spoken in the source language, *Kinyarwanda.*"[361] Akayesu submits that he could not challenge the meanings given to the words by the Chamber insofar as they do not appear in the transcripts of the proceedings. The Appeals Chamber holds that such allegations are without merit. As pointed out by the Prosecution, several Prosecution and Defence witnesses testified about sexual violence and at no time during the proceedings before the Trial Chamber did Akayesu raise the issue of a misuse of any term in Kinyarwanda or suggest that the witnesses were not referring to rape.

213. Consequently, in the absence of any valid argument, the Appeals Chamber holds that the Trial Chamber did not err in law.

214. Therefore, the Appeals Chamber dismisses all the arguments put forth by Akayesu with regard to the factual findings of the Trial Chamber on paragraphs 12 (A) and 12 (B) of the Indictment.

(ii) Paragraph 14 of the Indictment: the Meeting at Gishyeshye and the call for the killing of Tutsis in Taba.[362]

215. Akayesu alleges that the Trial Chamber committed two main errors, with respect to paragraphs 349, 361 and 362 of the Judgment. He submits generally, that "In order to find beyond a reasonable doubt[...] that there was a call to genocide, there had to be conclusive, consistent and corroborative evidence and the Chamber erred in law by conjuring up hypotheses in order to arrive at the finding that there had been a call to commit genocide or to kill the Tutsis."[363] Akayesu submits further that, "this is the most cogent error which weakens the Judgment."[364]

a. Paragraph 349 of the Judgment

216. Paragraph 349 of the Judgment reads as follows:

> With regard to the allegation made in paragraph 14 of the Indictment, the Chamber feels that it is not sufficient to simply establish a possible coincidence between the Gishyeshye meeting and the beginning of the killing of Tutsi in Taba, but that there must be proof of *a possible causal link*

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[361] Indeed, the Chamber, devoted a para. to translation difficulties. In para. 145, it explains in fact that "most of the testimony of witnesses at trial was given in Kinyarwanda. The Chamber notes that the interpretation of oral testimonies of witnesses from Kinyarwanda into one of the official languages of the Tribunal has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English. These difficulties affected the pre-trial interviews carried out by investigators in the field, as well as the interpretation of examination and cross-examination during proceedings in Court. Most of the testimony of witnesses at trial was given in Kinyarwanda, first interpreted into French, and then from French into English. This process entailed obvious risks of misunderstandings in the English version of words spoken in the source language by the witness in Kinyarwanda. For this reason, in cases where the transcripts differ in English and French, the Chamber has relied on the French transcript for accuracy. In some cases, where the words spoken are central to the factual and legal findings of the Chamber, the words have been reproduced in this Judgment in the original Kinyarwanda."

[362] Para. 14 of the Indictment reads as follows: "The morning of 19 April 1994, following the murder of M. Karera, Jean-Paul Akayesu led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvère Karera and urged the population to eliminate accomplices of RPF, which was understood by those present to mean Tutsis. Over 100 people were present at the meeting. The killing of Tutsis in Taba began shortly after the meeting."

[363] Akayesu's Brief, Chapter 10, para. 32.

[364] Transcript, 1 November 2000, p. 70. Akayesu specifies that para. 14 of the Indictment refers to the crime of incitement to commit genocide. According to him, "it is [...] the key factual determination for the finding of genocide", Transcript of the hearing 1 November 2000, p. 71.

between the statement made by the accused during the said meeting and the beginning of the killings (emphasis added).

[La Chambre considère que s'agissant de l'allégation ainsi formulée dans le paragraphe 14 de l'Acte d'accusation, il convient non seulement de démontrer une éventuelle coincidence entre le rassemblement de Gishyeshye et le début des massacres de Tutsis à Taba, mais encore de prouver *un lien de causalité éventuel* entre les propos tenus par l'Accusé lors dudit rassemblement et le début des massacres (non souligné dans l'original)]

(i) Arguments of the parties

217. Akayesu contends that the Trial Chamber erred by only requiring proof merely of a possible causal link between the gathering and the start of the massacres. Therefore, he alleges that the Trial Chamber substituted this standard of proof for the standard of proof beyond a reasonable doubt in assessing the events alleged in paragraph 14 of the Indictment.[365]

218. The Prosecutor submits that Akayesu has cited the Trial Chamber's statements out of context. The paragraph cited by Akayesu should be read in the context of paragraph 362 of the Judgment to understand the Trial Chamber's reasoning on the existence of a causal link between Akayesu's statements and the subsequent events.[366] The Prosecutor further submits that the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful, as stated by the Trial Chamber in paragraphs 561 and 562.[367]

(ii) Discussion

219. The Appeals Chamber recalls that the Trial Chamber must act pursuant to Rule 87 (A) of the Rules, which provides that the Prosecutor must prove the allegations brought against the accused beyond a reasonable doubt.

220. In the opinion of the Appeals Chamber the use of the word "possible" or "*éventuel*" in the paragraph at issue is unfortunate insofar as it can *a priori* be misleading. Indeed, it could, suggest that the Trial Chamber applied a less strict standard of proof than the standard of proof "beyond a reasonable doubt", by requiring the Prosecutor to prove a possible causal link rather than a causal link beyond a reasonable doubt. The Appeals Chamber finds that such interpretation, in the instant case, is overly simplistic and unfounded.

221. In fact, as submitted by the Prosecutor, Akayesu failed to cite the impugned paragraph in its proper context. The paragraph must be read in light of the following paragraphs, particularly, paragraph 362 which reads:

> Finally, relying on substantial evidence which was not essentially called into question by the Defence, and as it was confirmed by the accused, the Chamber is satisfied beyond reasonable doubt that there was a causal link between the statement of the accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba.

222. Furthermore, it is clear form a reading of the factual findings, that the Trial Chamber assessed the evidence before it (Witnesses C, W, A, N, as well as the testimonies of the accused

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[365] Akayesu's Brief, Chapter 10, para 23.
[366] Prosecution's Response, paras. 11.41 to 11.44.
[367] *Ibid*, paras. 11.47 to 11.50.

himself, Witness V and Joseph Matata) against the "beyond a reasonable doubt" standard. Paragraphs 359, 360 and 361 of the Judgment are clear on this point. In paragraph 359, the Trial Chamber states that "*it is satisfied beyond a reasonable doubt,* that the accused was present in Gishyeshye, during the early hours of 19 April 1994, and that he joined a crowd of more than 100 people gathered around the body of a young member of the *Interahamwe,* and that he took that opportunity to address the people [...]". The Chamber further states that "*it is satisfied beyond a reasonable doubt* that on that occasion, the accused, by virtue of his functions as *Bourgmestre* and the authority he held over the population, did lead the crowd and the ensuing proceedings." In paragraph 360, the Chamber "holds [...] that in the absence of conclusive evidence, the Prosecution has failed to establish *beyond reasonable doubt that* the accused publicly sanctioned the death of Sylvère Karera at the Gishyeshye gathering." In paragraph 361, the Chamber explains that "after considering the weight of all supporting and corroborative evidence, the Chamber is satisfied *beyond a reasonable doubt* that the accused clearly called on the population to unite and eliminate the sole enemy: the accomplices of the *Inkotanyi*". The Chamber goes on to state that "On the basis of consistent evidence heard throughout the trial and the information provided by Ruzindana, appearing as an expert witness on linguistic issues, *the Chamber is satisfied beyond a reasonable doubt* that the accused was himself fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against *Inkotanyi* accomplices could be construed as one to kill the Tutsi in general" (Emphasis added).

223. Nothing in the Trial Chamber's Judgment gives cause for doubting that the Trial Chamber complied with Rule 87 (A) of the Rules, and a simple reading of the paragraphs following paragraph 146 shows that the Chamber duly applied the reasonable doubt standard. Moreover, Akayesu did not provide the Appeals Chamber with other examples tending to show that the Trial Chamber did indeed violate the aforementioned Rule 87(A).

224. Accordingly, the Appeals Chamber finds that the Trial Chamber did not commit any error.

b. Paragraphs 361 and 362 of the Judgment

225. Paragraph 361 reads:

> "With regard to the allegation that the accused urged the population, during the said gathering, to eliminate the accomplices of the RPF, after considering the weight of all supporting and corroborative evidence, the Chamber is satisfied beyond a reasonable doubt that the accused clearly called on the population to unite and eliminate the sole enemy: accomplices of the *Inkotanyi.* On the basis of consistent evidence heard throughout the trial and the information provided by Dr. Ruzindana, appearing as an expert witness on linguistic issues, the Chamber is satisfied beyond reasonable doubt that the population construed the Accused's call as a call to kill the Tutsi. The Chamber is satisfied beyond a reasonable doubt that the Accused was himself fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against *Inkotanyi* accomplices could be construed as one to kill the Tutsi in general".

226. Paragraph 362 reads:

> "Finally, relying on substantial evidence which was not essentially called into question by the Defence, and as it was confirmed by the Accused, the Chamber is satisfied beyond a reasonable doubt that there was a causal link between the statement of the Accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba".

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(i) Arguments of the parties

227. Akayesu identifies in the paragraphs cited above, three errors allegedly committed with respect to the testimony of Mathias Ruzindana, other evidence referred to as "corroborative" and the so-called "confirmation" by Akayesu.

228. As regards the testimony of Mathias Ruzindana, the Appeals Chamber notes, at the outset, that on 22 August 2000, it dismissed Akayesu's request for leave to amend his Notice of Appeal with regard to the issue of the independence of the Tribunal, particularly in order to challenge the evidence of Pierre Prosper as an expert in sociolinguistics and that of Mathias Ruzindana as an expert witness.[368] Therefore, the Appeals Chamber will not address Akayesu's allegations with respect to Witness Mathias Ruzindana's testimony. Indeed, the allegations presented by Akayesu with respect to his request for leave to amend his Notice of Appeal are similar to those set out in his Brief.

229. As regards the testimonies of other witnesses, Akayesu submits that the said testimonies (Witnesses C, N, A, Z, V, E) are inconsistent on the date of the meeting, the people Akayesu targeted in his speech and the identity of the enemy.[369] On this point, he neither requests the Appeals Chamber "to reassess the evidence nor to apply the test of unreasonableness. Taking into account the Tribunal's findings, it is necessary for the Chamber to note the *total* absence of proof, of a specific intent on the part of the accused to kill the Tutsi"[370] in the section of the Judgment relating to paragraph 14 of the Indictment.

230. The Prosecutor recalls that the standard to be applied in the instant case is the standard of "unreasonableness" as held by ICTY Appeals Chamber in *Tadic*.[371] There was a consensus among Prosecution witnesses as to the content of Akayesu's statement during the said gathering. Furthermore, Akayesu has failed to show that the reasonable doubt standard has not been applied and that under the circumstances, any reasonable person confronted with the same evidence would have come to a different conclusion.[372]

231. Regarding the testimony of the accused, Akayesu claims that he neither acknowledged nor confirmed that there existed a link between his statements and the killings which took place in Taba, contrary to the finding of the Trial Chamber in paragraph 362 of the Judgment.[373] The Prosecutor submits, on the contrary, that Akayesu did not actually deny that there were killings in Taba and that those killings started after the 19 April 1994 gathering. In the Prosecutor's submission, the only denial made by Akayesu during his testimony related to the content of his speech at this gathering.[374]

(ii) Discussion

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[368] Decision of 22 August 2000.
[369] Akayesu's Brief, Chapter 10, para. 29. He explains, in fact, that "the testimonies were not adequately consistent to warrant the conclusion that the Appellant explicitly called for the killing of the Tutsi." Akayesu's Reply, para. 112.
[370] Akayesu's Reply, para. 115.
[371] The ICTY Appeals Chamber held that: "[..] the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a conclusion which no reasonable person could have reached."
[372] Prosecution's Response, para. 11.61.
[373] The Trial Chamber had indeed used the expression "as it was confirmed by the accused". See Judgment, para. 362. See Akayesu's Brief, Chapter 10, paras 30 and 31; Akayesu's Reply, para. 116.
[374] Prosecution's Response, para. 11.52.

232. Firstly, as regards alleged inconsistencies between the evidence given by Witnesses C, N, A, Z, V and E regarding the persons Akayesu targeted in his speech and the identity of the targeted enemy, the Appeals Chamber recalls that appellate proceedings are not intended as a trial *de novo*. In this case, the Appeals Chamber is guided by the following standard: "The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. [...] It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber".[375]

233. In the instant case, Akayesu has failed to show that plainly the Trial Chamber should not have found the above-mentioned testimonies to be inconsistent. Akayesu cites as an example the evidence of Witnesses C, N, A, Z, V, and E and provides with respect of each witness only a very brief background to the testimony and selected portions thereof. Akayesu merely submits that "the record shows that the Appellant urged the people to unite against the invaders or RPF or against the *Inkotanyi*, which appears to be a totally legitimate statement under the circumstances."[376] Akayesu does not explain why the Trial Chamber's findings are erroneous or without basis. In any case, the Appeals Chamber observes that the paragraphs of the Judgment dealing with the challenged witnesses, leave no doubt as to the consistency of the testimonies heard by the Trial Chamber, at least as regards the real meaning of Akayesu's statements during the meeting and interpretation thereof. The Trial Chamber explained in detail the content of each relevant testimony, and its finding in paragraph 361 appears quite logical and justified.[377]

234. Consequently, in the absence of any convincing explanation, the Appeals Chamber dismisses Akayesu's allegations.

235. Secondly, as regards the evidence given by the Accused, the Appeals Chamber emphasizes that it is the duty of the Trial Chamber to hear, assess and weigh the evidence presented at trial. In the instant case, the Trial Chamber found beyond a reasonable doubt that Akayesu's testimony included evidence which, in combination with the evidence of other witnesses, enabled it to find that there was "a causal link between the statement of the Accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba." The Appeals Chamber is of the opinion that such a finding is not unreasonable. A reading of the Prosecution's cross-examination of Akayesu shows that, indeed, he did not deny that there might have been a link between anti-RPF utterances and the massacre of Tutsis:

> Q.. My question was – please listen carefully – would you agree that by saying someone was an accomplice of the RPF it equals death, they would be killed?
>
> A. Of course. It's dangerous. [...]
>
> Q. [...] I want to touch upon something that you just said which is quite interesting, that is the saying by people that someone is an accomplice of the RPF where they have guns or they have lists to attack Hutus or whomever. Would you agree that that is a form of propaganda with an intent of, I guess, disturbing the *commune* or inciting the population?

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[375] *Tadic* Appeal Judgment, para. 64. See also *Celebici* Appeal Judgment, para. 435.
[376] Akayesu's Brief, Chapter 10, para. 29.
[377] On the basis of consistent testimonies heard throughout the trial and the information provided by Ruzindana, appearing as an expert witness on linguistic issues, the Chamber is satisfied beyond a reasonable doubt that the population construed the Accused's call as a call to kill the Tutsi.

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A. If you place yourself in the middle of a population, the midst of a population, and you start making statements saying that some people, these men are accomplices of the RPF, that means a lot. It includes a lot of things [...]

Q. Would the population be more likely to listen to the burgomaster hypothetically if he was saying that or just a common individual?

A. Not only an individual. The population is carefully – would carefully follow what an authority says, particularly in this case the burgomaster. So if the burgomaster takes it on himself to talk about somebody the population will certainly follow with a lot of interest. [...]

A. If ever a burgomaster said that, asking why were Tutsis that were accomplices of the RPF, certainly he would be pointing at people and the outcome of this would be that those people would be killed. That is certain. [...][378]

236. The Appeals Chamber stresses that the above-mentioned excerpt is taken from the portion of Akayesu's cross-examination relating specifically to the meeting of 19 April 1994. The Chamber observes that in his Brief, Akayesu quotes another part of his testimony which deals with Akayesu's public reading of the Prime Minister's letter calling on the population to mobilize to fight the enemy. To the question by the Presiding Judge of the Trial Chamber as to whether the content of said letter "could [it] not be understood by some persons, maybe some ill-intentioned persons, as meaning a green light to fight the enemies of the *Inkotanyis*", Akayesu, indeed answered in the negative .[379] Still, concerning specifically the meeting of 19 April 1994 mentioned in paragraph 14 of the Indictment, Akayesu did not openly deny that there was a causal link.

237. Therefore, the Trial Chamber properly mentionned, in its factual findings on paragraph 14 of the Indictment, the Accused's testimony as part of the evidence that enabled it to find "that there was a causal link between the statement of the Accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba." Therefore, the Appeals Chamber dismisses Akayesu's allegations.

238. Accordingly, the Appeals Chamber finds that the Trial Chamber did not err and therefore dismisses all the arguments put forth by Akayesu with respect to paragraph 14 of the Indictment.

(iii) Paragraph 18 of the Indictment: the killing of Ephrem Karangwa's brothers and the destruction of his house[380]

(a) Arguments of the parties

239. Akayesu alleges that the Trial Chamber erred in assessing witness evidence relating the killing of Ephrem Karangwa's brothers and the destruction of his house. He contends that the

[378] Transcript, 13 March 1998, pp. 147-149.
[379] See Transcript, 13 March 1998, p. 115.
[380] Para. 18 of the Indictment reads: "On or about April 19, 1994, the men, who, on Jean-Paul Akayesu's instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira *commune* and found Ephrem Karangwa's three brothers there. The three brothers – Simon Mutijima, Thaddée Uwanyiligira and Jean-Chrysostome Gakuba – tried to escape but Jean-Paul Akayesu blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean-Paul Akayesu ordered and participated in the killings of the three brothers.

charges contained in paragraph 18 of the Indictment are not substantiated by witness testimony before the Tribunal, notably that of Witness Ephrem Karangwa. Akayesu prays the Appeals Chamber to acquit him of Count 5, as "the decision was reached through an improper procedure and is unreasonable in view of the fact that the key-witness was not credible".[381]

240. Firstly, as regards the circumstances surrounding the death of Ephrem Karangwa's brothers and Akayesu's involvement in their murder, Akayesu submits that the Trial Chamber miscontrued Ephrem Karangwa's testimony and misapprehended the events alleged, having improperly accepted the said witness's account. In Akayesu's submission, Ephrem Karangwa's prior statements are inconsistent with his testimony before the Trial Chamber.[382] However, while acknowledging in paragraphs 260 and 261 of the Judgment that there are discrepancies in the Witness' testimony, the Trial Chamber considered the witness credible, stating that his evidence was corroborated by the testimony of Witness S. Now, Witness S's account of the circumstances surrounding the killing of Karangwa's brothers, was so different that Akayesu asserts that the two accounts are incompatible.[383] Moreover, Akayesu alleges that on 17 February 1998, the Trial Chamber denied a request by the Defence for a forensic analysis of the cause of their death, which might have proved conclusive.[384] Secondly, it is Akayesu's, submission that the witness's testimony regarding the burning down of his house is implausible in view of the location of the witness at the time. At a distance of at least 500 metres,[385] the witness would not indeed have been able to see and hear what was happening in his house, and, in particular, note the presence of Akayesu.[386]

241. With respect to the inconsistencies between Witness Karangwa's prior statements and his testimony before the Trial Chamber, the Prosecution, referring to *Kayishema/Ruzindana* Judgment,[387] submits that the witness explained them to and satisfied the Tribunal, which besides found that his testimony was corroborated by the testimony of another witness. Moreover, the Witness was consistent both throughout the examination-in-chief and the cross-examination.[388] Regarding Akayesu's request for forensic evidence, the Prosecution submits that the Trial Chamber acted properly in rejecting Akayesu's request on the basis that the location where Karangwa's brothers were purportedly buried had been the subject of previous exhumations and reburials. Furthermore, Akayesu fails to specify the nature of the error the Trial Chamber may have committed in refusing to order said forensic analysis.[389] With respect to the burning down of Karangwa's house, the Prosecution submits that the Trial Chamber did not act unreasonably in relying mainly upon Witness Karangwa's testimony to make its factual findings. Moreover,

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[381] Akayesu's Brief, para. 129.
[382] *Ibid*, paras. 38 to 40. In his Reply, Akayesu further submits that: "Here, the Chamber had to consider two different versions of a murder incident, but it was mistaken about the evidence by finding that Karangwa had denied his statement. Since the Chamber should have known that Karangwa had made a statement in November 1995 to the effect that he saw Akayesu first at this brother and that the two other s had been killed with machetes as they tried to flee, it should have questioned the statement made by this police inspector who is supposed to be capable of testifying correctly. " (para. 123).
[383] *Ibid*, paras 41 to 44.
[384] *Ibid*, para. 46.
[385] Taking note of the figure differences between the English and French versions of Witness D's testimony, Akayesu concludes finally that: "the distance mentioned by Karangwa from his hiding place to the house was not 150 metres but rather approximately 500 metres or more." (Unofficial Translation). See Akayesu's Reply, para. 126.
[386] *Ibid*, para. 48.
[387] In this case, the Trial Chamber stated "corroboration of evidence is not a legal requirement to accept a testimony." See "Judgment", *The Prosecutor vs. Clément Kayishema and Obed Ruzindana,* paras. 76 to 80.
[388] Prosecution's Response, para 11.70 and 11.71.
[389] Prosecution's Response, para. 11.75 to 11.76.

Karangwa's testimony on this point was consistent throughout the examination-in-chief and the cross-examination before the Chamber.[390]

(b) Discussion

242. Firstly, with respect to the circumstances surrounding the death of Ephrem Karangwa's brothers, the Appeals Chamber recalls that it falls to the Trial Chamber to satisfy itself beyond a reasonable doubt as to the credibility of each witness appearing before it. The Appeals Chamber only reviews the reasonableness or otherwise the Trial Chamber's factual findings.

243. In the case at bar, Ephrem Karangwa's testimony before the Chamber differs indeed on various aspects from his statements to the Prosecution's investigators. Such contradictions relate in particular to the type of weapon used to kill his brothers.[391] Under cross-examination, Witness Karangwa confirmed having testified during his examination-in-chief that his three brothers had been shot and admitted at the same time to having stated to the investigators that two of his brothers had been machetted to death.[392] The Witness then explained the discrepancy in his accounts.[393] The Appeals Chamber finds that the Trial Chamber took account of the discrepancies between the Witness's written statements and his live testimony. It did not consider that such discrepancies affected the Witness's credibility and accepted beyond reasonable doubt, the explanation given by the Witness:

> [...] The Chamber accepts Karangwa's explanation for the inconsistent prior statement and notes that his evidence that his brothers died by injuries inflicted by gun shots is consistent throughout his testimony and is corroborated by the testimony of witness S.[394]
>
> [...] The Chamber finds that Karangwa gave a truthful account of events actually witnessed by him and that he did so without exaggeration or hostility. The Chamber is satisfied that the witness could reasonably have seen and heard the matters to which he testified.[395]

244. Regarding Witness S, the Appeals Chamber does not accept Akayesu's argument that the evidence of Karangwa and Witness S "are too incompatible to be plausible" and that they are "fabricated."[396] Read together both testimonies are consistent in all material respects as to the

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[390] Prosecution's Response, para. 11.71.

[391] During his testimony of 6 February 1997, Karangwa explained that as he saw Akayesu carrying a gun and having heard Akayesu say "You should shoot at the – at them", and "I drew the conclusion that it was Akayesu who had shot the gun". See Transcript of the hearing of 6 February 1997, pp. 65 to 68 and pp. 117 and 178. He asserts that his three brothers were shot. In his previous statement, on the contrary, Ephrem Karangwa had stated: ""I could see from the place where I was hidden, that Akayesu killed my brother Jean-Chrysostome with his gun. I saw, that my other two brothers tried to escape but they were caught by Akayesu's men and were killed by them with machetes." (Exhibit No. 105) According to this statement, only one of his brothers was shot. The Defence raised this contradiction during cross-examination. When the witness was asked if he remembered his prior statement, he confirmed having made it to the investigators ("Yes, I said that"). See Transcript of the hearing of 6 February 1997, p. 170.

[392] On this point, Akayesu criticizes the Trial Chamber for incorrectly recording Karangwa's cross-examination, in which it states in para. 260 that during his cross-examination "Karangwa denied stating this to the Office of the Prosecutor" and "reaffirmed his testimony that all three of his brothers were shot." It is true that the witness did not explicitly deny his statements to the investigators when Defence Counsel reminded him of the contents of his statement. He even confirmed having said that. Nevertheless, the witness immediately explained the reasons for this contradiction, and he did not take over the substance of his testimony before the Trial Chamber.

[393] The Witness testified that "During that time when people were being killed, after they were killed, they would make- they would made them. They would fortune their bodies. Let me tell you that they would even – they would even cut out people's bones. They would do this to mock them simply because they were Tutsi." Transcript, 6 February 1997, pp. 170 and 171.

[394] Judgment, para. 261.

[395] Judgment, para. 262.

[396] Akayesu's Brief, Chapter 10, para. 44.

circumstances attending the death of Witness Karangwa's three brothers: Witness S confirms Karangwa's testimony regarding the vehicle used,[397] the main witnesses to the crimes,[398] the presence of a group of people around the three brothers,[399] the order given by Akayesu that they be shot[400] and the weapons used.[401]

245. Furthermore, the Appeals Chamber finds, that the Trial Chamber's decision refusing to order a forensic analysis was justified and founded.[402]

246. Secondly, regarding the destruction by fire of Witness Karangwa's house and that of his mother, the Appeals Chamber finds that the Trial Chamber's finding was reasonable. On the basis of Karangwa's testimony, including one main detail which was corroborated by other witnesses (in this case, the clothes that Akayesu was wearing that day), the Trial Chamber held that "the houses of Karangwa and his mother were destroyed in his [Akayesu's] presence by men under his control."[403] Moreover, as pointed out by the Prosecutor, Witness Karangwa maintained, in substance, the same account of the facts from the time he made his statement to the Tribunal's investigators[404] and throughout his examination-in-chief[405] and cross-examination.[406]

247. For all the foregoing reasons, the Appeals Chamber dismisses Akayesu's allegations regarding paragraph 18 of the Indictment. Accordingly, it dismisses all the arguments put forward by Akayesu under his third sub-ground of appeal.

4. Sub-Ground Four: Out-of court Evidence.[407]

248. Akayesu submits that the Trial Chamber erred by relying on out-of-court evidence to pass on a central issue in his trial. He alleges that the said error is "an error in law (miscarriage of

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397 Transcript, 5 February 1997, p. 22 (Witness S) and Transcript, 6 February 1997 (Witness Karangwa), p. 59.
398 Transcript , 5 February 1997, p. 23 (Witness S) and T, 6 February 1997 (Witness Karangwa), p. 64.
399 Transcript, 5 February 1997, p. 31 (Witness S) and T, 6 February 1997 (Witness Karangwa), p. 66.
400 Transcript, 5 February 1997, p. 49 (Witness S) and T, 6 February 1997 (Witness Karangwa), p. 67.
401 Transcript, 5 February 1997, p. 53 (Witness S) and T, 6 February 1997 (Witness Karangwa), p. 67.
402 On 17 February 1998, the Trial Chamber held in a decision on a Defence motion for forensic analysis of the three bodies that : "[...] considering the ancientness of the acts which allegedly occurred four years ago, and in light of the fact that a number of the purported mass graves, including, without a doubt, those supposedly in the vicinity of the Taba 'bureau communal', have been the subject of previous exhumations and reburials, the Tribunal finds that a new forensic analysis would not be appropriate nor, in any case, instrumental in the discovery of the truth. Rather, the Tribunal feels that the arguments raised by the Defence Counsel in support of his motion are pertinent mainly to evaluating the credibility of certain witness testimonies and not to showing the necessity for an exhumation and forensic analysis, as requested." See "Decision on "Defence Motion Requesting an Inspection of the Site and the Conduct of a Forensic Analysis," 17 February 1998.
403 Judgment, para. 268.
404 Exhibit No. 105.
405 Transcript, 6 February 1997, pp. 43 to 53.
406 Transcript, 6 February 1997, pp. 162 to 168.
407 See Annex B. In the Decision of 24 May 2001, the Appeals Chamber granted Akayesu leave to amend his Notice of Appeal. In the same Decision, the Chamber granted leave to admit certain pages of the transcripts from the hearing held on 14 October 1997 in the case of *The Prosecutor vs. Georges Rutaganda,* Case No. ICTR-96-3-T, but denied several other applications including a Request to Admit an Affidavit into the Record. By its Decision of 12 July 2000, the Appeals Chamber granted the Prosecution leave to admit into evidence other extracts from the hearing of the same date in the same case. See Annex A.

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justice) invalidating the decision."[408] Akayesu contends that the resulting prejudice carries a "termination of proceedings".[409]

(a) Arguments of the Parties

249. Akayesu alleges that:

> The court rendered its Judgment based on evidence taken outside the Court where the Appellant was being tried. The Appellant did not know about it and was absent.[410]

250. In particular, Akayesu argues that the Trial Chamber relied on evidence obtained outside his trial to find that like the other *Bourgmestres* and *Préfets*, he, Akayesu changed his attitude towards the genocide, after a meeting held on 18 April 1994.[411] Akayesu alleges that:

> The Chamber contravened the basic or cardinal principle which requires the judge to decide in the light of the evidence produced or adduced before the court or at trial and not on the basis of his personal knowledge obtained from other sources: [...][412]

251. Akayesu alleges, essentially, that the judges of Trial Chamber I took active steps to obtain additional evidence regarding his case from a witness testifying in another trial being heard before the same Trial Chamber, that is, *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T ("the *Rutaganda* case").[413] He alleges specifically that on 14 October 1997, while Expert Witness Filip Reyntjens ("the Expert Witness") was testifying in the *Rutaganda* case, the presiding judge suddenly changed the course of the witness's testimony by specifically asking questions on the alleged change in attitude of the *Bourgmestres* after the meeting held in Gitarama on 18 April 1994.[414] Akayesu argues that the Expert Witness testified that some *Bourgmestres* did change their attitude after this meeting, and stated that he knew that such change in attitude was of interest to the Trial Chamber in the context of the case of *Akayesu*.[415], In Akayesu's submission the issue was of no relevance to the *Rutaganda* case.[416] On the contrary, it concerned only the facts of his case.[417]

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[408] Akayesu's Brief, Chapter 11, para. 2.
[409] *Ibid*, para 26, *Ibid*, Chapter 15, para. 1 and Akayesu's Reply, paras. 13 and 135. The Appeals Chamber notes that Akayesu asserts in the last paragraph that: "Alternatively, the Appeals Chamber could quash the Judgment rendered by the Trial Chamber and order a re-trial." However, the Appeals Chamber stresses that such statements contradict other arguments put forward by Akayesu with respect to the remedy sought by him. Akayesu's Brief, Chapter 15, para. 2 where Akayesu submits that "such a remedy is not sought by the Appellant as an appropriate cure under the circumstances".
[410] Akayesu's Brief, Chapter 11, para. 1
[411] *Ibid*, para. 2.
[412] *Ibid*, Ch. 11, para. 23 (footnote omitted).
[413] In the case of *Rutaganda*, Trial Chamber I was composed of the same judges as in the case of Akayesu: Judge Laïty Kama (Presiding), Judge Lennart Aspegren and Judge Navanethem Pillay.
[414] Akayesu's Brief, Ch. 11, para. 8.
[415] *Ibid*, para. 9.
[416] Akayesu's Brief, Chapter 1, paras. 9 and 10 "requests the Prosecutor to indicate, where, if at all, in the transcript of the Georges Rutaganda trial the points raised by the Presiding Judge [...] are to be found", i.e. generally this alleged change in attitude. Should the Prosecutor fail to provide such information, the Appellant submits that the Appeals Chamber must infer that the questions put to the expert, Reyntjens, concerned the Appellant's trial, the only other ongoing trial before the Tribunal at the time. Akayesu's Brief, Chapter 11, para. 12. See also Akayesu's Reply, para. 133 and Transcript, 1 November 2000, p. 83.
[417] Akayesu's Brief, Chapter 11, paras. 10 to 12. Akayesu submits that the presiding judge's interventions during the Expert Witness's testimony, in particular when he referred to "*une question qui est revenue de manière récurrente dans*

252. Akayesu alleges that the questions asked by the presiding judge during the Expert Witness's testimony were at the heart of his trial[418] and were the basis of the finding in the Trial Judgment, that Akayesu had changed his attitude after the meeting on 18 April 1994.[419] Akayesu argues that he was not present when the Trial Chamber heard what he referred to as this crucial evidence from the Expert Witness.[420] Akayesu submits that the Trial Chamber made these findings on the basis of evidence heard in his absence,[421] obtained following what he referred to as an "investigation conducted by the Tribunal on pivotal facts of his case";[422] which were not disclosed to him; and in relation to which he was not afforded the opportunity to cross-examine the witness.[423] He asserts that the Trial Chamber undervalued the importance of his right to a fair and public hearing.[424] As a subsidiary argument, Akayesu submits that the Trial Chamber permitted the Expert Witness, at the end of his testimony, to make an "unfavourable and unsympathetic" comment about his case (sic).[425]

253. Akayesu submits that in obtaining evidence in this manner, that is in his absence, the Trial Chamber denied him the right to cross-examine the Witness and violated his fundamental rights. Thus, the Trial Chamber seriously has prejudiced the fairness and integrity of the trial and "discredit[ed]" the administration of the Trial Chamber.[426]

254. The Prosecution generally disputes both Akayesu's interpretation of the transcript in the *Rutaganda* case and his factual allegations. It is the Prosecution's submission that the presiding judge's questioning of the Expert Witness was, contrary to Akayesu's allegations, pertinent to that case, and relevant to placing the acts of Georges Rutaganda in proper context.[427] In the Prosecution's submission that through his questions the presiding judge was only seeking clarification on events relevant to that trial only, and did not venture beyond it into the realm of Akayesu's trial.[428]

255. The Prosecution submits that there is nothing on the Record supporting the contention that the presiding judge in *Rutaganda* questioned the expert witness for the purposes of obtaining

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le procès" (a question which has been recurring throughout the trial) of Georges Rutaganda, related not to that trial, but to his own.

[418] Akayesu submits that the argument of the Prosecutor (accepted by the Trial Chamber) was that the Appellant did a lot to protect the Tutsi minority until 18 April 1994. Thereafter, the Appellant allegedly changed and sought to exterminate the Tutsis." Akayesu's Brief, Chapter 11, para. 14.

[419] Akayesu's Brief, Chapter 11, para. 14.

[420] *Ibid*, para. 15.

[421] Akayesu submits that pursuant to Rule 80 of the Rules (regulating "Control of Proceedings"), he had the right to be present while the Expert Witness was testifying in relation to his case. Akayesu's Brief, Chapter 11, paras. 17 and 18.

[422] Akayesu's Brief, Chapter 11, para. 15.

[423] *Ibid*, paras. 15 and 17 to 20, Akayesu states that "[..] in the instant case, the conduct of the trial by the Chamber amounted to a hearing of evidence in closed session, in the absence of the accused." Akayesus's Brief, Chapter 11, para. 22. See also Akayesu's Reply, para. 135 and Transcript, 1 November 2000, p. 116.

[424] *Ibid*, para. 21.

[425] *Ibid*, para. 16.

[426] Akayesu's Brief, Chapter 11, para. 25.

[427] Prosecution's Response, para. 12.4. It submits that "the accused in that case was active throughout April and early May. The Presiding Judge was entitled to ask whatever questions he felt relevant to place the acts of that accused within the unfolding of the genocide in Rwanda during April 1994."

[428] Prosecution's Response, paras. 12.4 – 12.12. In para. 12.9, it is submitted that: "There is nothing on the Record supporting the contention that the Presiding Judge in *Rutaganda* began questioning the expert witness for the purposes of obtaining evidence in the *Akayesu* trial."

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evidence in the Akayesu trial.[429] In fact, the Prosecution asserts that the presiding judge made it clear that he did not want to engage the expert witness regarding Akayesu's trial.[430] In the Prosecution's submission the expert witness, on his own initiative, contemplated that his evidence may be of interest in the context of the Appellant's trial, without, however, saying more.[431] The Prosecution submits that the fact that the Trial Chamber in *Rutaganda* found the testimony of the expert witness generally instructive does not show that it used evidence obtained from that trial for the conviction of Akayesu.[432] Lastly, the Prosecution asserts that the Trial relied on ample evidence in finding that Akayesu changed his behaviour following the meeting of 18 April 1994.[433] It is the Prosecution submission that the Trial Chamber clearly indicated the basis on which it reached its conclusion and made no reference whatsoever to the testimony of the Expert Witness in *Rutaganda.*

(b) Discussion

256. Akayesu alleges that the Trial Chamber reached its findings on the basis of crucial evidence which was heard in his absence and in relation to which his right to a fair trial was violated, as he was deprived of the right to cross-examine the Witness. The Appeals Chamber recognizes that an accused generally has the right to cross-examine any Prosecution witness. Indeed, this right is guaranteed in Article 20(4)(e) of the Statute and Rule 85(B) of the Rules.[434] At issue is whether the Trial Chamber erred in the instant, in denying Akayesu the right to cross-examine a Prosecution witness. In this case, the Appeals Chamber must determine whether there is evidence to find that the expert witness was questioned by the Trial Chamber on issues pertaining to Akayesu's case. In particular, it must determine whether the Trial Chamber took such testimony into account in convicting Akayesu on the relevant counts in the Indictment.

257. The Appeals Chamber notes that both parties rely, in large part, on discrepancies they find in the translation of statements made by the Presiding Judge, as recorded in the relevant pages of the English transcripts in the case of *Rutaganda*.[435] The Appeals Chamber confirms that English and French are the two working languages of the Tribunal.[436] Transcripts are prepared simultaneously in both languages during live testimony of witnesses. However, since, in the instant case, certain

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[429] Prosecution's Response, para. 12.9.
[430] *Ibid*, paras. 12.11 to 12.12.
[431] *Ibid*, para. 12.10.
[432] *Ibid*, para. 12.14.
[433] Prosecution's Response, para. 12.16. The Prosecution also submitted that the English transcript in *Rutaganda* was wrong and that according to it, that transcript should clearly reflect that the Presiding Judge had asked a question regarding the issue which the Presiding Judge stated had arisen "throughout our trials" as opposed to only in his (Akayesu's) trial. (Prosecution's Response, paras. 12.6 to 12.8). The Prosecution has clearly failed to make a distinction between arguments put forward by Akayesu in his Brief, in support of this ground of appeal, and those which were included in his motion to amend this ground of appeal.("Motion for Extension of Time-Limits on Appeal for the Admission of New Evidence on Appeal pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence.") It is clear that Akayesu had abandoned this particular argument pursuant to the Decision of 24 May 2000 in which Akayesu's application to amend his Notice of Appeal was dismissed (See Akayesu's Reply, para. 134).
[434] The right to cross-examine a witness is of course subject to the exceptions to the principle of live, in court testimony which are discussed above with regard to hearsay evidence. In the case envisaged here, however, these exceptions do not apply, as the evidence concerned was allegedly provided in the course of the live testimony of a witness. There is also no suggestion by the Prosecution that it sought the admission of the testimony of the Expert Witness in the case of *Rutaganda* as for example, hearsay evidence.

[435] For example, Prosecution's Response, paras. 12.4 to 12.5 (relying on the English transcript), paras. 12.11 – 12.13 (relying on the French transcript). Akayesu's Brief (relying generally on the French transcripts), Akayesu's Reply, paras. 133 and 134.
[436] Rule 3(A) of the Rules.

discrepancies go to the heart of the issue raised in this ground of appeal, the Appeals Chamber will rely on the transcript reflecting the language in which the presiding judge spoke, that is French.[437]

258. The trial of Georges Rutaganda took place between 18 March 1997 and 17 June 1999[438] and therefore overlapped with the trial of Akayesu which commenced on 9 January 1997 and concluded on 16 March 1998. The expert witness testified in chief on 14 October 1997 in the *Rutaganda* case. Akayesu contends that the presiding judge suddenly changed the course of the expert witness's testimony to leave issues relevant to the *Rutaganda* case and "to make an assessment of evidence tendered during the trial of Jean-Paul Akayesu."[439]

259. Firstly, Akayesu has submitted no evidence (nor sought leave to do so) showing that the expert witness digressed so substantially from his earlier testimony. Secondly, it is clear from the transcript that the presiding judge did not, as suggested by Akayesu, suddenly change the course of the proceedings.[440] On the contrary, the Expert Witness had already finished answering a question put to him by Judge Aspegren. The presiding judge stated that he was going to adjourn, but before doing so he wished to put a question to the Expert Witness.[441] Akayesu provides no evidence to show that the Presiding Judge "changed the course of the proceedings."

260. As to the allegation that the Presiding Judge indeed sought evidence relevant only to the Akayesu trial, the Appeals Chamber can find no ambiguity in the statement made at the start of his question. Indeed, the Presiding Judge stated: "*Je demanderai au Professeur, je lui poserai une question qui est revenue d'une manière récurrente durant le procès.*"[442] This is translated in the English text as being "I would like to ask him a question which has been recurring throughout this trial."[443] The Appeals Chamber finds that this statement is not ambiguous and must, necessarily, refer to the ongoing trial (to wit the *Rutaganda* trial) and to an issue which the Presiding Judge considered to have been "recurring throughout this trial." In fact, the Presiding Judge went on to say:

> *You spoke of this earlier, that is to say, when the Government was moved to Gitarama. I would like to know why the Government was moved to Gitarama and, secondly, we also spoke of the cause-effect relationship between the moving of the Government and the speeches following which we saw a change in behaviour, a lot of the burgomasters and prefects who up to that time had seemed to want to protect the population and who after these speeches made a complete turnabout.*[444]

261. Here, the Presiding Judge appears to be linking his questions with testimony given earlier. Akayesu submits no evidence to show that the said issue had not been recurring during the trial before the Trial Chamber, both in general and during the testimony of the Expert Witness. The Appeals Chamber notes that Akayesu places upon the Prosecution the burden of showing where in the transcripts of the Rutaganda trial, the said issue arises in a recurrent manner.[445] Akayesu contends that since the Prosecution has failed to do so, the necessary implication is that the

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[437] See also Akayesu's Reply, para. 133.
[438] *Rutaganda* Trial Judgment, para. 11.
[439] Akayesu's Brief, Chapter 11, para. 8.
[440] Akayesu submits that the Presiding Judge "suddenly changed the course of the proceedings by venturing into a line of questioning outside of Rutaganda's case. [...] and he made an assessment of evidence tendered during the trial of Jean-Paul Akayesu." Akayesu's Brief, Chapter 11, para. 8.
[441] Transcript, *Rutaganda,* 14 October 1997, p. 73 (English) and 84 (French).
[442] *Ibid*, p. 84 (French).
[443] Transcript, *Rutaganda*, 14 October 1997, p. 73.
[444] Transcript, *Rutaganda,* 14 October 1997, p. 73.
[445] Akayesu's Brief, Chapter 11, para. 12; Akayesu's Reply, para. 132.

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Presiding Judge was referring to another trial, namely Akayesu's trial.[446] The Appeals Chamber does not share Akayesu's opinion and finds that he has failed to show that, as submitted by him, that there was "no connection with the examination-in-chief" of the Expert Witness.[447]

262. Akayesu submits that, clearly, the Presiding Judge was referring to his case because the questions he asked did not relate to the *Rutaganda* case but only to his case. It is not for the Appeals Chamber to determine whether the issues discussed by the Expert Witness in the *Rutaganda* case were relevant to the said case, if only because said case is not currently before it. The Appeals Chamber simply observes that it is neither unusual nor improper that ICTY and ICTR Trial Chambers generally refer to the historical context of or background to the events that took place in Yugoslavia and Rwanda (respectively), in order to fully appreciate the circumstance of the accused appearing before them.[448] In this regard, the Appeals Chamber agrees with the Prosecution's submission that the Presiding Judge had every right to ask any questions he felt were relevant in order to place the acts of the Accused Georges Rutaganda in proper context in the April 1994 genocide in Rwanda. Similarly, the Appeals Chamber holds that the fact that the Trial Chamber found in the *Rutaganda* case that the testimony of the Expert Witness allowed it "to have an overview of the general situation in the country", and that "the Tribunal found it very informative",[449] does not mean that the information obtained was relied on to convict Akayesu.[450]

263. Akayesu alleges that it is clear that the enquiry by the Trial Chamber was specifically directed at discovering facts that were of relevance only to his trial. In his submission, this is exemplified by the fact that the Expert Witness referred to *Akayesu*'s case, in the course of his testimony. While discussing in general terms, the events which occurred around 18 April 1994, the Expert Witness readily stated: "That is all I can say. That is all I can tell you as for the interest of the Akayesu trial, but I don't have any further information."[451] The Presiding Judge intervened immediately to say that he only wanted information "of a general nature."[452] The Presiding Judge made it very clear that he did not want any information regarding the *Akayesu* case and, in any event, the Expert Witness stated that he did not have any further information.[453] Clearly, the remarks made by the Expert Witness regarding Akayesu's trial were pure unsolicited speculation. They do not support the argument that the Trial Chamber or its Presiding Judge were seeking information regarding Akayesu's trial or that evidence had been obtained in that context.

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[446] Akayesu's Reply, para. 132; Transcript (A), 1November 2000, pp. 114 to 115 (see in particular the English version of the transcript, pp. 83 and 84).

[447] Akayesu's Brief, Chapter 11, para. 8.

[448]In this regard, the Appeals Chamber notes the remark made by the Presiding Judge at the conclusion of the Expert Witness's testimony, to the effect that : "*Et il me plaît de vous dire que votre interrogatoire a été plein d'enseignements pour nous parce qu'il nous a permis, au-delà du procès dirigé contre Georges Rutaganda, de connaître, d'avoir une vue de la situation d'ensemble de ce pays.*" (I can tell that your testimony was very informative to us. It has allowed us, in the context of the trial of Georges Rutaganda, it has allowed us to have an overview of the general situation in the country) Transcript, *Rutaganda,* 14 October 1997, p. 115. The Appeals Chamber notes that as pointed out by Akayesu (Akayesu Reply, para. 133), the English translation of this remark differs in the sense that the record indicates that the Presiding Judge observed that the testimony allowed the Trial Chamber "in the context of the trial of George Rutaganda...to have an overview of the general situation in the country." (p. 115). As the Presiding Judge spoke in French, the Appeals Chamber relies, as pointed out earlier, on the French transcript and construes this remark as expressing the Trial Chamber's intention to have an overview of the historical context and background to the situation

[449] Transcript, *Rutaganda,* 14 October 1997, p. 115.

[450] Prosecution's Response, para. 12.14.

[451] Transcript, *Rutaganda,* 14 October 1997, p. 74.

[452] *Ibid,* p. 86 (French).

[453] He testified that he could simply confirm that the meeting did occur and that "according to the facts before us, there were not all but some burgomasters who made, who changed after this meeting", Transcript, *Rutaganda,* 1 October 1997, p. 74.

264. Accordingly, the Appeals Chamber can find no evidence to conclude that the Trial Chamber sought or obtained evidence from the *Rutaganda* case, which pertained only to the *Akayesu* case. The evidence in question was elicited by a question put by the Presiding Judge, with regard to testimony of a general nature which the Trial Chamber did not link to the *Akayesu* trial and which can be said to have been elicited with the sole purpose of obtaining general information.

265. Furthermore, Akayesu submits, that the evidence elicited from the Expert Witness in the *Rutaganda* case was crucial to the Trial Chamber finding that, Akayesu's attitude changed after the meeting held on 18 April 1994 and convicting him on several counts, whenever it was established that he had committed acts after that date.[454] Akayesu provides no evidence in support of this allegation and fails to point to any passage in the Trial Judgment, from which one can reasonably (or at all) infer that the Trial Chamber relied on the evidence given by the Expert Witness in the *Rutaganda* case to find that Akayesu's attitude changed after 18 April 1994. On the contrary, and as submitted by the Prosecution, "the Trial Chamber clearly indicates the basis on which it reached its conclusion and makes no reference whatsoever to the testimony of 14 October 1997 in the *Rutaganda* case."[455]

266. The Trial Chamber found with respect to the allegations under paragraph 12 of the Indictment,[456] that it was "necessary to distinguish between the period before 18 April 1994 when the key meeting between members of the Interim Government and the *bourgmestres* took place in Murambi, in Gitarama, and the period after 18 April 1994. Moreover, on the Prosecution's own case, a marked change in the accused's personality and behaviour took place after 18 April 1994."[457] Although the Trial Chamber found that there was substantial evidence to conclude that Akayesu prevented acts of violence before 18 April 1994, in the *commune* of Taba,[458] it concluded that:

> *A substantial amount of evidence has been presented indicating that the conduct of the Accused, did, however, change significantly after the meeting on 18 April 1994, and many witnesses, including Witnesses E, W, PP, V and G, testified to the collaboration of the Accused with the Interahamwe in Taba after this date.*[459]

267. The Trial Chamber also relied on the testimonies of Witnesses A, DAX, DBB, R, DAAX, DCC, DCX and JJ to point out inconsistencies and defence testimony.[460] As a result, the Trial Chamber found:

> "[...] beyond a reasonable doubt that the conduct of the Accused changed after 18 April 1994 and that after this date the Accused did not attempt to prevent the killing of Tutsi in the *commune* of Taba. In fact, there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings [...] there is evidence establishing beyond a reasonable doubt that he consciously chose the course of collaboration with violence against Tutsis rather than shielding them from it"[461]

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[454] Akayesu's Brief, Chapter 11, paras. 14 and 15.
[455] Prosecution's Response, para. 12.19.
[456] The relevant passage reads as follows: "[...] Although he had the authority and responsibility to do so, Jean-Paul Akayesu never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence."
[457] Trial Judgment, para. 183.
[458] Trial Judgment, paras. 184 to 186 and 192.
[459] Trial Judgment, para. 187.
[460] Trial Judgment, paras. 187 to 191.
[461] Trial Judgment, para. 193.

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268. The Appeals Chamber finds that there is no evidence that the Trial Chamber relied on the testimony of the Expert Witness in making this finding. The Expert Witness did not testify in the Akayesu case, and consequently, there was no violation of Article 20(4)(e) of the Statute or Rule 85(B) of the Rules which guarantee the Accused the right to cross-examine Prosecution witnesses. Nor was the general principle[462] that an accused has a right to be present at his or her own trial violated. The Appeals Chamber points out that there was a partial overlap between Akayesu's trial and Rutaganda's trial. Akayesu has failed to demonstrate any error.

269. Lastly, the Appeals Chamber will briefly recall[463] that, as held by ICTY Appeals Chamber, it must be presumed that, "in the absence of evidence to the contrary, Judges of the Tribunal 'can disabuse their minds of any irrelevant personal beliefs or predispositions.'"[464] That is to say, judges of the Tribunal must be presumed to be impartial.[465] In the context of the allegations made in the instant case, it should be recalled in particular, that they "are professional judges, who are called upon to try a number of cases arising out of the same events [or arising out of the same contextual background], and that they may be relied upon to apply their mind to the evidence in the particular case before them."[466] The judges of this Tribunal and those of ICTY often try more than one case at the same time, which cases, given their very nature, concern issues which necessarily overlap. It is assumed, in the absence of evidence to the contrary, that by virtue of their training and experience, judges will rule fairly on the issues before them, relying solely and exclusively on the evidence adduced in the particular case. Akayesu has submitted no evidence to show that his trial judges imported into his case evidence adduced in another case, and that they relied on such evidence to make their findings.

270. Finally, Akayesu submits that the Expert Witness was allowed, "without the least reprimand" to make unfavourable and unsympathetic comments about his case.[467] No substantive argument is advanced in support of this allegation, and it appears that Akayesu has been somewhat selective in his citations from the transcripts. The Appeals Chamber wishes to put such adverse comment in perspective. At the conclusion of the examination-in-chief, the Presiding Judge stated that the Defence intended to cross-examine the Expert Witness at a date to be determined later.[468] A discussion ensued as to the date on which the Expert Witness would return. The Expert Witness discussed in general his up coming journeys and in so doing, stated:

> *Yes, and Mr. President, let me give you another piece of information, which may affect your schedule. I was contacted on two occasions by Counsel Monthe who is the Counsel to Akayesu, two months ago. I also received –I thought that I had convinced him that I would not be a good Defence witness in that case, but Counselor Monthe seems that he is still playing with the idea of calling me as an expert witness for the Defence. Now, perhaps, in that case, if that is the case, and I hope Counsel Monthe will not call me, but if that's the case then perhaps we could try to combine the two, [....] I'm*

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[462] A principle which is subject to exceptions under Rule 80 of the Rules.

[463] Having taken note, in this regard, of Akayesu's argument that "The conduct of the Trial Chamber is prejudicial to a pillar in the administration of justice or to the incontrovertible requirement 'of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done'" Akayesu's Brief, Chapter 11, para 24 (footnote omitted).

[464] *Furundzija* Appeal Judgment, para. 197, referring to the case of *President of the Republic of South Africa and Others v. South African Rugby Football Union and Others, Judgment on Recusal Application*, 1999 (7) BCLR 725 (CC), 3 June 1999, para. 48.

[465] *Furundzija* Appeal Judgment, para. 196: "In the view of the Appeals Chamber, there is a presumption of impartiality which attaches to a Judge." See also Celebici Appeals Judgment para. 683 and 697 Article 12 (1) of the Statute.

[466] "Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, *Prosecutor v. Radoslav Brdanin and Momir Talić* Case No. IT-99-36-PT, 18 May 2000, para. 17, reference *Čelebići* Appeal Judgment, para. 700.

[467] Akayesu's Brief, Chapter 11, para. 16.

[468] Transcript, *Rutaganda* , 14 October 1997, p. 110.

just informing you of that because that's an element which could perhaps help solve these scheduling problems.[469]

271. The Appeals Chamber finds that the Expert Witness simply made a remark in the course of a discussion as to his future testimony. This remark was unsollicited and it is, therefore, misleading for Akayesu to suggest that the Trial Chamber allowed the Expert Witness to make this remark "without the least reprimand."[470] There is no evidence to suggest that this remark was taken into account or even considered by the Trial Chamber in a manner, which would in any way have prejudiced his case as suggested by Akayesu.

272. The Appeals Chamber finds that Akayesu has failed to show that the Trial Chamber erred. This ground of appeal must fail.

5. Other issues[471]

273. Akayesu refers to such issues as "irregularities of lesser importance". The Appeals Chamber has stated above how it intends to treat issues identified as falling under this title. Indeed, it is only after having considered the main grounds of appeal that the Appeals Chamber would rule on these issues.[472]

E. Fifth Ground of Appeal: Total absence of the Rule of Law

274. Akayesu submits as a separate ground of appeal that there was a total absence of the rule of law and asserts that:

> The Tribunal was established to bring the Rule of Law to Rwanda and to end a so-called "culture of impunity". Since 1994, impunity is the rule for the new murderous dictators of Rwanda concerning their acts in Rwanda and in the East of Congo-Zaire from late 1996, 1997 and 1998. The Prosecutor, Appeal Justice Louise Arbour from Canada, hired Canadian policeman, Pierre Duclos known for fabricating false evidence in the Matticks affair. Duclos was assigned to "handle" ex-Prime Minister Jean Kambanda. The behaviour of the Tribunal and its administration and the systematic violation of the Appellant's fundamental rights as described in this notice of appeal would not be acceptable in Canada and in the Court of Appeal of Ontario from which the Appeal Justice Louise Arbour received leave to work as Chief Prosecutor for this Tribunal. The Appellant has the right to recover his human dignity and his freedom (sic).[473]

275. This ground of appeal, raised in Akayeus's Second Notice of Appeal, was neither discussed in his Brief, nor in his Reply nor at the hearing on appeal. Therefore, the Prosecution did not respond to it.

276. The Appeals Chamber finds that this ground of appeal must be rejected and consequently will not consider it.

F. Sixth Ground of Appeal: Improper hearsay evidence[474]

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[469] Transcript, *Rutaganda*, 14 October 1997, pp. 122 and 113.
[470] Akayesu's Brief, Chapter 11, paras. 2 and 16.
[471] See Annex B.
[472] See paras. 38 to 41.
[473] See Annex B.
[474] Decision of 24 May 2000, granted Akayesu leave to add the main ground of appeal in this section. In his Brief, Akayesu also cited two grounds of appeal initially included in his First Notice of Appeal.

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277. Akayesu submits that the Trial Chamber erred in the way it treated hearsay evidence. While submittting, on the one hand, that he cannot affirm that the Trial Chamber's treatment of hearsay evidence alone suffices to establish a miscarriage of justice or error of law,[475] Akayesu argues on the other hand, that should the Appeals Chamber admit this ground of appeal, such a finding would "invalidate in particular his conviction under Count 12 of the Indictment".[476]

1. Arguments of the Parties

278. Akayesu alleges that the Trial Chamber erred in generally admitting hearsay into evidence without applying the provisions of Rule 89(C) of the Rules and taking account of the requirements for admissibility of hearsay evidence, as laid down in *Tadic*.[477] As a result, hearsay evidence was admitted as a matter of practice throughout the trial without first testing its reliability.[478] Akayesu submits that although the Trial Judgment found that hearsay evidence was treated with prudence, in fact, this was not the reality.[479] He submits that the Trial Chamber did not permit the parties to raise objections[480] and that, in any event, no objection was raised. In this regard, he criticizes as a whole, his own Counsel, the Tribunal and the Prosecution.[481] Akayesu relies on ICTY case-law to submit that the Trial Chamber has a duty to verify the circumstances under which the evidence was obtained and the content of the statement, as well as to take into consideration "the truthfulness, voluntariness and trustworthiness" of the evidence.[482]

279. To illustrate the Trial Chamber's treatment of hearsay evidence, Akayesu cites its rejection of the testimony of Defence Witness DJX on two issues.[483] He submits that the Trial Chamber

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[475] Akayesu's Brief, Chapter 9, para. 14.
[476] Akayesu's Brief, Chapter 15, para. 3.
[477] Akayeus's main ground of appeal. Akayseus's Brief, Chapter 9, para. 1. The Appeals Chamber notes that although Akayesu began to discuss this ground of appeal during the Hearing on Appeal, in fact, he made no specific submissions thereon. Akayesu submits that the Rules are not as strict as the criminal procedure followed by common law jurisdictions but that despite that there is still the crucial obligation to establish the veracity of evidence. In other words, he alleges in general that during the trial, "hearsay was not discussed". T(A), 1 November 2000, pp. 90-91.
[478] Akayesu's Brief, Chapter 9, paras. 3, 12 and 13.
[479] Akayesu's Brief, Chapter 9, paras. 2 and 3.
[480] Akayesu's Brief, Chapter 9, para. 4. Akaysesu did not discuss this point under this ground of appeal. However, the Appeals Chamber observes that Akayesu made reference, in support of this allegation, to the cross-examination of Witness S. The Chamber's presiding Judge instructed the Prosecution to keep its comments (in fact, correction of a statement made by the Defence Counsel), for further cross-examination of the witness. He stated: "[...]" T(A), 5 February 1997, p.161. It is within this context that this observation was made and, at any rate, it has no link with the issue raised under this ground of appeal. In any case, Akayesu does not insist on this point.
[481] Akayesu's Brief, Chapter 9, paras. 4 and 14. Akayesu "criticized the Tribunal, his Counsel and the Prosecutor for the improper use of hearsay evidence". Akayesu's Reply, para. 96. The allegations as to incompetence of counsel are treated as a whole in the second Ground of Appeal. Akayesu's Brief, Chapter 9, note 7, Akayesu's Reply, note 44. In particular, it is recalled that the fact that counsel did not object to the admission of hearsay evidence cannot in itself be indicative of incompetence. It is not for the Appeals Chamber to try to understand the "strategy" employed by counsel in a particular case.
[482] Akayesu's Brief, Chapter 9, para. 6, relying on: Decision concerning Defence motion for collateral evidence, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Trial Chamber, 5 August 1996. He also relies on the *Blaskic* Judgment and the Decision relating to Prosecution's oral requests for admission of exhibit 155 into the file of evidence and for compelling the accused Zdravko Mućić to produce a sample of written documents, *The Prosecutor v. Zejnil Delalic et al,* Case No. IT-96-21-T, 19 January 1998 (Akayesu's Brief, Chapter 9, paras. 7 and 9). Akayesu also submits that the law that obtains in ICTY and the Tribunal should be uniform. Akayesu's Brief, Chapter 9, para. 5.
[483] The witness was testifying as to (1) the fact that his father had worked with Akayesu to calm the population and try to prevent further conflict (2) the fact the *Interahamwe* killed some police officers; and (3) the fact that Akayesu had saved the life of "one Gakwaya" Akayesu's Brief, Chapter 9, paras. 15 – 16.

rejected the Witness's evidence on the points in question without first testing its reliability.[484] This error by the Trial Chamber resulted in particular in rejecting relevant exculpatory evidence in relation to Count 12 of the Indictment. It is Akayesu's submission that as a result, the conviction under this ground should be reversed.[485] Finally, Akayesu submits that the Trial Chamber erred in admitting hearsay evidence proffered by the Prosecution while rejecting evidence tendered by the Defence, thereby showing what he refers to as "discriminatory attitude."[486]

280. The Prosecution submits generally that Akayesu has requested no remedy in this ground of appeal, and simply alleged that the error "in particular invalidates the conviction on Count 12"; that Akayesu should have "as a minimum specif[ied] what part of the Judgment is affected by the alleged errors"; that the words "in particular" (in his application for remedy) suggest that other unspecified counts may also be affected by the error alleged, that Akayesu has conceded that the admission of hearsay could not in and of itself invalidate the decision and that no objection was raised by the Defence at trial. As a result, the Appeals Chamber should dismiss this ground of appeal.[487]

281. In the Prosecution's submission citing the example of Witness DJX as illustrative of a practice of applying to Defence witnesses a higher standard for the admission of hearsay evidence is misleading[488]. The Prosecution submits that contrary to Akayesu's allegations, the testimony of Witness DJX was in fact admitted by the Trial Chamber, that Akayesu confuses the question of admissibility of evidence with the question of evaluation of evidence.[489] It is the Prosecution's submission that the issue of assessement of such evidence was not raised under this ground of appeal.[490] In addition, even if the Trial Chamber has excluded such testimony it nevertheless found that, as stated by the Witness, Akayesu had attempted to prevent killings before 18 April 1994.[491]

282. It is the Prosecution's submission that the Trial Chamber clearly considered the requirements for admission of hearsay evidence throughout the trial and Akayesu has not mentioned any instance where the Trial Chamber admitted hearsay evidence when it should not have.[492] The Prosecution recalls that Akayesu also requested the admission of hearsay evidence during the trial.[493] The Prosecution contends that the argument that the Trial Chamber admitted as a matter of policy Prosecution hearsay evidence as opposed to Defence hearsay evidence is "absolutely inaccurate."[494] It is the submission of the Prosecution that Akayesu has failed to mention any specific factual finding that could be vitiated due to improper admission of hearsay evidence. In the Prosecution's submission this is so because, firstly there was no such improper

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[484] Akayesu's Brief, Chapter 9, paras. 14 – 17. In para. 17, he asserts that: "On two occasions, the Chamber did not permit verification of the circumstances of the knowledge about the events and dismissed the hearsay evidence. The Chamber acted unreasonably and unlawfully to the prejudice of the Defence". Akayesu's Reply, para. 100.
[485] Akayesu's Brief, Ch. 9, para. 18. Akayesu's Reply, para. 100. Akayesu submits that "in excluding relevant hearsay evidence which could have cast doubt on the attitude of the Appellant towards the Tutsi population and on his attempts at protecting it, the Chamber committed a major error causing prejudice to the Appellant".
[486] Akayesu's Brief, Chapter 9, para. 3.
[487] Prosecution's Response, paras. 10.4 – 10.8.
[488] Prosecution's Response, para. 1024.
[489] Prosecution's Response, paras. 10.11 – 10.12.
[490] Prosecution's Response para. 10.12.
[491] Prosecution's Response, paras. 10.24 – 10.26.
[492] Prosecution's Response, paras. 10.16 – 10.17.
[493] Prosecution's Response, para. 10.18.
[494] Prosecution's Response, paras. 10.21 – 10.23. The Prosecution refers in particular to the Defence witnesses who testified regarding paras. 12A and 12B of the Indictment. It points out in particular, that in its factual findings in relation to these paras., the Trial Chamber took into consideration hearsay testimony of 10 defence witnesses.

admission of hearsay evidence and secondly because, there is no factual finding throughout the Trial Judgment which is solely supported by hearsay evidence.[495] The Prosecution submits that "[o]n the contrary, the Trial Chamber has not only assessed hearsay evidence with caution but, at most, it has used hearsay as corroborative evidence."[496]

283. Finally, the Prosecution submits that Akayesu did not oppose the admission of hearsay evidence during the trial and therefore he has waived his right to raise this issue on appeal.[497]

2. Discussion

284. The Appeals Chamber identifies two separate allegations in arguments put forward under this ground of appeal, firstly the allegation that the Trial Chamber frequently admitted hearsay evidence without first verifying their reliability, and secondly, the allegation that the Trial Chamber unfairly disregarded hearsay evidence, in particular, when it is tendered by the Defence.[498]

285. Before considering Akayesu's various submissions, in light of the general question raised by this ground of appeal, the Appeals Chamber deems it appropriate to clarify the law governing the admission and assessement of hearsay evidence before the Tribunal.[499] As pointed out by the Prosecution, the two issues must properly be separated.[500]

286. The Rules of both this Tribunal and ICTY generally reflect a preference for direct, live, in-court testimony. With respect to this Tribunal, such a rule is primarily laid down in Rule 90 of the Rules which provides that witnesses shall, in principle, be heard directly by the Chambers.[501] Such a rule is subject to one exception, where a Trial Chamber has ordered that the witness may be heard by means of deposition, as provided for in Rule 71 of the Rules.[502] However, Rule 89(C) of the Rules also provides that a "Chamber may admit any relevant evidence which it deems to have

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[495] Prosecution's Response, para. 10.20. The Prosecution stated its belief that the Trial Chamber did not admit any hearsay evidence which was inadmissible under Rule 89 (C). In addition it submits that, it has to be said that the Defence throughout the proceedings also shared this belief, insofar as the Defence did not oppose the admission by the Trial Chamber of hearsay evidence in any instance. Prosecution's Response para. 10. 17.

[496] Prosecution's Response, para. 10.20.

[497] Prosecution's Response, para. 10.18.

[498] Akayesu's Brief, Chapter 9, para. 3.

[499] The Appeals Chamber notes that this subject has been considered in some detail by the Trial Chambers and the Appeals Chamber of ICTY. *See* for example: *Prosecutor v. Duško Tadić, Decision on Defence Motion on Hearsay,* Case No. IT-94-1-T, 5 August 1996 (as relied on by Akayesu in Akayesu's Brief, Ch. 9, paras 1 and 6); *The Prosecution v. Tihomir Blaškić, Decision on the Standing Objection of the Defence to the Admission of Hearsay With no Inquiry as to its Reliability,* Case No. IT-95-14-T, 21 January 1998; *Blaškić* Trial Judgment; *Prosecutor v. Zlatko Aleksovski, Decision on Prosecutor's Appeal on Admissibility of Evidence,* Case No. IT-95-14/1-AR73, 16 February 1999 ("the *Aleksovski* Decision"); *Prosecutor vs. Dario Kordić and Mario Čerkez, Decision on Appeal Regarding Statement of a Deceased Witness,* Case No. IT-95-14/2-AR73.5, 21 July 2000 ("the first *Kordić* Decision") and *Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and one Formal Statement,* 18 September 2000 ("the second *Kordić* Decision") *(To Add ICTR Jurisprudence).*

[500] The Appeals Chamber agrees with the Prosecution's submission that Akayesu "is confusing the question of *admissibility* of evidence with the question of *evaluation* of evidence." *See,* Prosecution's Response, para. 10.12. Indeed, the Appeals Chabmer notes that in Akayesu's Reply, Akayesu persists in confusing the two concepts in his analysis of the testimony of Witness DJX. Akayesu's Reply, paras. 99 and 100.

[501] Rule 90 (A) of the Rules.

[502] The Appeals Chamber notes that a second exception to the general preference for live testimony, can be the filing of expert testimony, if the opposing party states that he or she does not wish to cross-examine the witness (Rule 94*bis* of the Rules). This Rule was added during the fifth plenary of 8 June 1998 and, consequently it did not apply to Akayesu's case.

probative value."[503] This provision grants a Trial Chamber a broad discretion in assessing admissibility of evidence and under ICTY case-law, "relevant out-of-court statements which a Trial Chamber considers probative, are admissibile under Rule 89(C)....Trial Chambers have a broad discretion under Rule 89(C) to admit relevant hearsay evidence."[504] This discretion, however, is not unlimited and on the contrary it has been found that "the reliability of a statement is relevant to its admissibility, and not just to its weight. A piece of evidence may be so lacking in terms of the indicia of reliability that it is not "probative" and is therefore inadmissible."[505] In the opinion of the Appeals Chamber the test to be met before ruling evidence admissible is accordingly high. It must firstly be shown that the evidence is so lacking in terms of the indicia of reliability as to be devoid of any probative value.

287. The Appeals Chamber recalls that in the case law cited by Akayesu and in the decisions referred to above, the Appeals Chamber and Trial Chambers were confronted with hearsay evidence in the form of either documents or formal statements which were sought to be admitted and in relation to which an opposing party had not been afforded an opportunity to cross-examine. The situation in the instant case is rather different.[506] Akayesu challenges in a general way, the admission of hearsay evidence in the form of statements made by witnesses during live testimony, regarding events which they allegedly had not witnessed first hand.[507] The Appeals Chamber considers that when a witness testifies, their evidence is admitted in that, in the absence of timely objection, it becomes part of the trial record, as reflected in the transcripts. ICTY Appeals Chamber has found that "Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable."[508] The main safeguard applicable in this case, is the preservation of the right to cross-examine the witness on the hearsay evidence, which has been called into question.[509] This right is enshrined in Article 20(4)(e) of the Statute[510] and Rule 85(B) of the Rules.[511] In these circumstances, the Appeals Chamber holds that although it will always depend on the case at hand, it is unlikely considering the stage of the proceedings and, in particular, in the absence of an objection, that a Trial Chamber would find that the live testimony of a witness it had just heard, was so lacking in terms of indicia of reliability as to be inadmissible.[512]

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[503] Rule 89 of the Rules provides in full: (A) The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence. (B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. (C) A Chamber may admit any relevant evidence which it deems to have probative value. (D) A Chamber may request verification of the authenticity of evidence obtained out of court.

[504] *See* the second *Kordić* Decision, para. 24, referring to the *Aleksovski* Decision, wherein it was also stated that "[i]t is well settled in the practice of the Tribunal that hearsay evidence is admissible." (para. 15.). See also first *Kordic* Decision, para. 23.

[505] The first *Kordić* Decision, para. 24.

[506] *See,* The first *Kordić* Decision, footnote 21.

[507] Akayesu's Brief, Chapter 9, para. 12.

[508] The first *Kordić* Decision, para. 22: *"Rule 89(C) must be interpreted so that safeguards are provided to ensure that the Trial Chamber can be satisfied that the evidence is reliable".*

[509] In the *Aleksovski* Decision, the Appeals Chamber found that "[t]he absence of the opportunity to cross-examine the person who made the statements, and whether the hearsay is "first-hand" or more removed, are also relevant to the probative value of the evidence." (para. 15, footnote omitted).

[510] Article 20(4)(e) of the Statute provides that the accused shall be entitled: "[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;"

[511] Rule 85(B) provides in particular that: "[e]xamination-in-chief, cross-examination and re-examination shall be allowed in each case".

[512] The first *Kordic* Decision, para. 24.

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288. In this case, the Trial Chamber found as follows

> 131. In its assessment of the evidence, as a general principle, the Chamber has attached probative value to each testimony and each exhibit individually according to its credibility and relevant to the allegations at issue....In accordance with Rule 89 of its Rules...the Chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.
> [....]
> 136. The Chamber can freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial. The Chamber finds that hearsay evidence is not inadmissible *per se* and has considered such evidence, with caution, in accordance with Rule 89.[513]

289. The Appeals Chamber finds that clearly the Trial Chamber has taken into account the requirements of Rule 89 of the Rules and has in particular lived up to its intention to assess hearsay evidence "with caution." The Appeals Chamber can find no substantive error in these general findings.

290. As stated above, in this case the hearsay evidence challenged by Akayesu was elicited in the course of live, in-court testimony.[514] It consisted of testimony given under oath before the Tribunal, that was subject to cross-examination by Akayesu and which was known to be, primarily but not solely "first hand" evidence, that is, evidence which was generally not far removed from the original source. In these circumstances, the Appeals Chamber finds that it falls in principle within the Trial Chamber's discretion to find that such testimony is sufficiently reliable to warrant admission under the general principle governing admissibility of hearsay evidence before the Tribunal. In any case, Akayesu has cited no specific instance of non-compliance with such rules.

291. Akayesu has not submitted that irrelevant hearsay evidence was admitted. In fact, Akayesu does not cite any instance where the Trial Chamber improperly admitted hearsay evidence or where his Counsel objected to the admission of hearsay evidence by the Trial Chamber. Similarly, Akayesu fails to identify any specific prejudice he suffered as a result. Akayesu submits generally that the Trial Chamber erred. This does not suffice to show that the error was such as to call for the Appeals Chamber's intervention. Accordingly, the Appeals Chamber finds that Akayesu has failed to show that the Trial Chamber erred in general in admitting hearsay evidence.[515]

292. The Appeals Chamber observes, that admission of hearsay evidence does not automatically carry any particular finding as to its assessement. That a Trial Chamber admits a hearsay statement, does not necessarily imply that it accepts it as reliable and probative. Those are qualities which a Trial Chamber will freely consider at the end of trial when weighing and evaluating the evidence as

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[513] Trial Judgment, paras. 131 and 136. The Appeals Chamber also makes reference to the testimony of Mathias Ruzindana who stated that " a clear distinction could be articulated by the witnesses between what they had heard and what they had seen". The Trial Chamber consequently made a consistent effort to ensure that "this distinction was drawn throughout the trial proceedings". Judgment, para. 155.

[514] Akayesu submits: "At trial, hearsay evidence was generally admitted. The expression 'Have you heard or did you hear it being said that' was frequent. Sometimes, the Tribunal or Counsel for the different parties specified that the testimony was hearsay or that the person was an eye-witness." Akayesu's Brief, Chapter 9, para.12.

[515] The Appeals Chamber notes that Akayesu relies in particular on the *Blaškić* case, regarding which he submits "the discussions were animated and acrimonious but in the Appellant's trial there were no discussions" Akayesu' Brief, Chapter. 9, para. 8. However, in that case, the Trial Chamber was primarily concerned with the admission of hearsay evidence submitted in the form of documents, or, for example the statement of a dead witness. A distinction has already been made between that case and the instant case.

a whole, in light of the context and of the nature of the evidence itself, including the credibility and reliability of the relevant witness. Akayesu submits that throughout the trial, the Trial Chamber failed to distinguish between admissibility of hearsay evidence and its probative value.[516] The Appeals Chamber has already recalled that the Trial Chamber had pledged to consider hearsay evidence "with caution." Akayesu has put forward no evidence to show that the Trial Chamber failed to do so. Accordingly, the Appeals Chamber has been given no reason to find that the Trial Chamber acted otherwise.[517]

293. Akayesu submits that the Trial Chamber unfairly admitted hearsay evidence by Prosecution witnesses while rejecting such evidence by Defence witnesses. As has been found, Akayesu has not pointed to any instance where the Trial Chamber unfairly admitted such Prosecution evidence. On the other hand, and as pointed out by the Prosecution, the Trial Chamber admitted a large amount of hearsay evidence presented by defence witnesses, many of whom testified to events which they had not witnessed.[518] This fact alone serves to rebut this argument. However, Akayesu cites in support of his argument one specific example, that is, the Trial Chamber's rejection of the testimony of Defence Witness DJX.[519] Akayesu submits that, "The Tribunal did not test the reliability of the information and, on its own initiative, excluded [the] evidence."[520] He argues that "the burden of proof is to raise a doubt."[521] Contends that, "in excluding relevant hearsay evidence which could have cast doubt on the attitude of the Appellant towards the Tutsi population and on his attempts to protect it, the Chamber committed a major error causing prejudice to the Appellant"[522]. In Akayesu's submission this prejudice "vitiated his conviction under Count 12 of the Indictment."[523] The Appeals Chamber identifies three arguments as based on this Witness's testimony.

294. Firstly, Akayesu appears to submit that this example is illustrative of the fact that the Trial Chamber applied a higher standard to the Defence hearsay evidence than to the Prosecution's.[524]

295. The Appeals Chamber points out that the Trial Chamber found Akayesu not guilty on Count 12 of the Indictment.[525] In addition, it observes that the Trial Chamber did not, as Akayesu

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[516] Akayesu's Reply, para. 100.

[517] This caution is also reflected in some of the findings reached by the Trial Chamber. For example, with regard to the charges of sexual violence in Counts 13 to 15 of the Indictment, the Trial Chamber found that "[i]n considering the role of the Accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the Chamber has taken into account only evidence which is direct and unequivocal." Trial Judgment, para. 451. See also para. 460.

[518] That is, insofar as the Trial Chamber makes clear references to testimonies during its determination of the case and does not exclude them. *See* for example, Trial Judgment, paras. 439 (Witness DBB), 444 (Witness DFX), 445 (Witness DEEX), 457 and 458 (concerning testimony by Defence witnesses in general, some of which was found to be first hand and other, hearsay).

[519] Akayesu's Brief, Chapter 9, paras. 14 to 17. The Prosecution argues that this example is in fact misplaced. It submits that this is the "only factual basis offered in support of the allegation that the Trial Chamber illegally admitted hearsay evidence" and that this example in fact concerns the Trial Chamber's alleged rejection of this witness's hearsay evidence. *See* Prosecution's Response, paras. 10.9 to 10.12.

[520] Akayesu's Brief, Chapter 9, para. 15.

[521] Akayesu's Brief, Chapter 9, para. 18.

[522] Akayesu's Reply, para. 100.

[523] Akayesu's Brief, Chapter 9, para. 18.

[524] In Akayesu's Reply, para. 99, he submits that "[...] the incident concerning DJX [...] suggests that the Chamber applied the rules in error."

[525] Akayesu was acquitted on Count 12 of the Indictment, namely, violation of Article 3 common to the Geneva Conventions (cruel treatment). The Appeals Chamber understands that Akayesu was referring to paragraph 12 of the Indictment.

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submitted, reject outright the testimony of Witness DJX. This witness testified on 11 February 1997.[526] His testimony was specifically mentioned by the Trial Chamber in the Trial Judgment in its consideration of the allegations of sexual violence (Counts 13 to 15 of the Indictment) and in the discussion of the accused's line of defence.[527]

296. Consequently, Akayesu has failed to show how the Trial Chamber erred in admitting and assessing this evidence. More specifically, in evaluating this evidence against Counts 13 to 15, the Trial Chamber noted, in particular, that Witness DJX was a minor, that he was 12 years old at the time of the events in question and that he did not go to the *bureau communal* during the material period.[528] Furthermore, the Trial Chamber considered his testimony in light of the other evidence before it from other witnesses on the allegations in question. There is no evidence that the Trial Chamber rejected this witness testimony, that is it refused to admit it. This also emerges from the specific context referred to by Akayesu, which will be discussed below.

297. Secondly, Akayesu suggests that the Trial Chamber's "discriminatory attitude" towards defence hearsay evidence is reflected in its treatment of Witness DJX testimony before it. Akayesu submits that the Presiding Judge interrupted Witness DJX as he was trying to answer questions, pressured him into testifying whether or not he had actually witnessed any event and expressed a sort of "satisfaction" when witness DJX finally testified that he had not.[529] It is Akayesu's submission that "[o]n two occasions, the Chamber did not permit verification of the circumstances of the knowledge of the events and dismissed the hearsay evidence. The Chamber acted unreasonably and unlawfully to the prejudice of the Defence".(sic)[530]

298. The Appeals Chamber finds that Akayesu's allegations are misplaced. During examination-in-chief, Witness DJX testified in general as to his knowledge of Akayesu during the relevant time period. The Presiding Judge did not interrupt during this questioning save to clarify one minor point with Akayesu's Counsel.[531] Under cross-examination the Witness testified (both in response to questions and on his own motion) *inter alia* that he had not witnessed certain of the events or acts he had referred to.[532] When the Prosecution asked the Witness whether he had seen the *Interahamwe* kill police officers, the Witness appears to have become evasive. Consequently, the Presiding Judge asked him to answer the question. When the Witness finally answered the Presiding Judge stated "*voila*."[533] Despite Akayesu's insinuations, the Appeals Chamber finds no error in this line of questioning and does not find that one can infer from this remark that the Trial Chamber was happy or pleased with witness DJX's response. This also applies to the questioning as

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526 T, 11 February 1998, pp. 47 to 67.

527 *See* Trial Judgment, paras. 443 and 458. See also Trial Judgment, para. 36.

528 Trial Judgment, paras. 443 and 458.

529 Akayesu's Brief, Ch. 9, paras. 15 to 17. Akayesu's Reply, para. 99. The Appeals Chamber here understands Akayesu to be suggesting a sort of satisfaction when he cites the Presiding Judge's response to the witness.

530 Akayesu's Brief, Chapter 9, para. 17. Akayesu's Reply, para. 99: Akayesu submits that "The Tribunal stopped the witness from providing details which might have been useful, according to the *Tadic* tests, as regards the reliability of such information with respect to the Appellant's actions in saving Gatwaya's life". (sic)

531 T, 11 February 1998, p. 7 to 8.

532 *See* T(A), 11 February 1998, p. 57, where the witness testified that: "...No, I was not able to go to the bureau communal but we learned what was happening there because people who would go there would come back and tell us what was happening especially concerning security." See also, pp. 60, 62 to 67.

533 T, 11 February 1998, pp. 64 to 66. The questioning ran as follows: Q : You mention that police officers were killed. Did you see this happening or happen ? You can answer with a yes or no. A : I cannot answer with a yes or no. I can explain how I heard the matter and how, what I saw. Q. Did you see someone kill a police officer, yes or no ? A : The *Interahamwe* killed policemen. Q : Did you see it happen ? A : That is what I want to explain. Mr. President : There is no explanation. You just have to say whether you saw it or not. That's all. The Witness : I heard people talk about it. Mr. President : But you didn't see it? Witness, you didn't see it happen ? The Witness : I heard people talk about it. Mr. President : But you didn't see it happen? The Witness : I didn't see it happen.

to whether or not Witness DJX had seen Akayesu save Gukwaya's life.[534] In light of the relevant transcripts, it is once again clear to the Appeals Chamber that Witness DJX had evinced evasiveness and that the Presiding Judge wished to establish whether or not he had witnessed the events.

299. The Appeals Chamber finds no error or impropriety in both the Prosecution and the Trial Chamber trying to establish whether Witness DJX had witnessed these events or rather had heard about them. It is important for a Trial Chamber to be in possession of such information to be in a position to assess any evidence before it. Contrary to Akayesu's assertions, the Appeals Chamber is not of the opinion that on both of these occasions, the Trial Chamber would not permit "the verification of the circumstances of the knowledge of the events and dismissed the hearsay evidence"[535] or that it prevented Witness DJX from providing details "which might have been useful" with respect to Gatwaya[536]. Once these questions had concluded (questions which in the opinion of the Appeals Chamber were neither improper nor intimidating), the Prosecution concluded its cross-examination. Akayesu's Counsel indicated that he did not wish to re-examine and the Witness was discharged. The Appeals Chamber finds that the Trial Chamber's treatment of this testimony in no way reflects an overall "discriminatory attitude" by the Trial Chamber with regard to defence hearsay evidence or an improper conduct towards the potential evidence of Witness DJX.

300. Thirdly, Akayesu alleges that the Trial Chamber erred in rejecting exculpatory evidence from this witness. Akayesu submits that Witness DJX provided evidence in rebuttal of the allegation in paragraph 12 of the Indictment, that "Akayesu never attempted to prevent the killing of Tutsis in the *commune* [...]"[537]. He further submits that the Trial Chamber failed to verify the reliability thereof.[538] The Prosecution submits that even if the Trial Chamber had excluded this Witness's testimony, "no harm would have been caused" because the Trial Judgment had already found "in relation to the period of time referred to by Witness DJX" that there was substantial evidence that before 18 April 1994, Akayesu had prevented acts of violence.[539] On the other hand, Akayesu submits that the Witness testified in general as to events prior to his departure on 28 June 1998 and that his testimony contradicted the findings by the Trial Chamber on this point. In addition, Akayesu submits that the Trial Chamber interrupted the Witness when he tried to explain how Akayesu had saved Gakwaya's life after 19 April 1994.[540]

301. The Appeals Chamber has already found that the Trial Chamber did not exclude the testimony of Witness DJX, which is sufficient to reach a finding on this issue.

302. Witness DJX testified during direct examination that the material time period extended to the date when he left Taba (which he guessed to be 25 June 1994.[541]) The parties disagree on the answer given by the witness under cross-examination when he was asked to state exactly the time

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[534] T, 11 February 1998, pp. 65 to 67.
[535] Akayesu's Brief, Ch. 9, para. 17.
[536] Akayesu's Reply, para. 99.
[537] Although the Witness expressed thanks before the re-examination Akayesu confirmed that he had no further questions to ask T, 11 February 1998 p. 67.
[538] Akayesu's Brief, Chapter 9, para. 18. Akayesu submits that "the evidence could have made a difference".
[539] Prosecutor's Response, para. 10.26. Citing Trial Judgment, para. 192.
[540] Akayesu's Reply, para. 99.
[541] T(A), 11 February 1998, pp. 53 to 54. See also pp. 57 and 59 to 60 [wherein 26 June and 28 June are mentioned respectively].

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period to which he referred.[542] Upon review of the transcript, the Appeals Chamber finds that Witness DJX testified in general terms about events which occurred up to the date he left Taba.

303. Therefore, the Appeals Chamber finds that this witness's evidence was relevant to events both before and after 19 April 1994. The Appeals Chamber observes also that the Trial Chamber did not specifically refer to this witness's testimony in reviewing the allegations contained in paragraph 12 of the Indictment and in reaching its findings in relation thereto.[543] However, the Trial Chamber mentioned it during its presentation of Akayesu's line of defence. It found that:

> Turning to the specific allegations contained in the Indictment, the Defence case is that there was no change in Akayesu's attitude or behaviour before and after the Murambi meeting of 18 April 1998. Both before and after, he attempted to save Tutsi lives. [...]. Witnesses DIX and DJX also heard that Akayesu had saved Tutsi lives.[544]

304. Here again, this shows that the Trial Chamber did not, as alleged, totally reject this testimony. As regards the Trial Chamber's discussion of paragraph 12 of the Indictment, it should be noted that it was conducted in two stages, corresponding to the periods before and after 19 April 1994. The Trial Chamber found as follows:

> The Chamber finds that the allegations set forth in paragraph 12 cannot be fully established. The Accused did take action between 7 April and 18 April to protect the citizens of his *commune*. It appears that he did also request assistance from national authorities at the meeting on 18 April 1994. Accordingly, the Accused did attempt to prevent the killing of Tutsi in his *commune*, and it cannot be said that he never did so.[545]

305. As to the period after 18 April 1994, the Trial Chamber found (for the reasons set forth in the Trial Judgment) that beyond this date Akayesu did not attempt to prevent killings of Tutsis in his *commune*. It found that a "substantial amount of evidence has been presented" indicating that Akayesu's conduct changed after the meeting on 18 April 1994. Thus it also referred to the testimony of Defence witnesses who testified that he had failed to prevent killings after this date.[546]

306. Although it could be argued that the Trial Chamber should have specifically explained why it did not accept Witness DJX's testimony on this point, it is also the case that the Trial Chamber is not obliged to set forth each and every reason for its decision.[547] As stated above, there is no evidence that the Trial Chamber rejected the testimony of Witness DJX and, in actuality, it did mention it in the Judgment. Concerning the weight given to it by the Trial Chamber, the Appeals Chamber recalls once again that "the task of hearing, weighing and assessing the evidence, lies primarily within the discretion of the Trial Chamber".[548] It falls to the Trial Chamber to rule on the reliability of evidence before it, in light of the circumstances of the case. The Trial Chamber found that there was substantial evidence on which it could base its findings on this paragraph. Akayesu has failed to establish that the Trial Chamber did not evaluate all the evidence before it[549] or that it erred in making its finding or that it erred in failing to mention specifically the testimony of

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[542] The Prosecution has alleged that the witness only provided evidence as to such events one or two weeks after the death of the President. Prosecutor's Response, para.10.26. Akayesu's Reply, para. 99.
[543] Trial Judgment, paras. 178 to 193.
[544] Trial Judgment, para. 36.
[545] Trial Judgment, para. 192.
[546] Trial Judgment, paras. 187 to 193.
[547] *Celebici* Judgment, para. 481. The Trial Chamber is not compelled to include in the Judgment detailed arguments concerning each witness.
[548] *Celebici* Judgment, paras. 491 and 506; *Aleksovski* Judgment, para.36; *Tadic* Judgment, para. 64.
[549] *Celebici* Judgment, para. 481.

Witness DJX in its finding on this allegation.[550] Akayesu has not shown why the Trial Chamber's finding is not one which could be reached by a reasonable court nor has he shown that the Trial Chamber reached such a finding because it had rejected the hearsay evidence in question by applying a test standard higher than was applied to Prosecution evidence.

307. Lastly, the Appeals Chamber notes that Akayesu also includes in his argument two grounds of appeal taken from his first Notice of Appeal:

> 10. In rendering its Judgment, the Chamber lent credence to hearsay.
> 11. The Chamber lent credence to circumstantial evidence not supported by any real evidence.[551]

308. The Appeals Chamber observes that these grounds of appeal are general in nature and unsupported by any specific arguments. The Appeals Chamber has already found that the Trial Chamber properly considered the evidence before it and that Akayesu has failed to show otherwise.

309. For the foregoing reasons, the grounds of appeal raised in this section must fail.

G. Seventh Ground of Appeal : Irregularities in the Examination and Cross-Examination

310. Akayesu raises several grounds of appeal with respect to AD cross-examination: [552]

> The Chamber refuted the manner in which his Counsel cross-examined the Defence witnesses, whereas the Prosecution had recourse, unperturbed, to the same methods in respect of Prosecution witnesses.
>
> The Accused was deprived of his right to cross-examine witnesses.
>
> At the outset of the trial, at the hearing of 15 January 1997, Judge Laïty Kama, disallowed the Accused from asking leading questions in cross-examining a Prosecution witness. Judge Kama made a statement of principle to that effect. That prohibition is unlawful. Leading questions are nearly always allowed on cross-examination On the other hand, Judge Kama allowed the Prosecutor to ask leading questions of his own witnesses on several occasions throughout the trial. In principle, leading questions by Counsel of their own witnesses is not permitted.

311. Akayesu raises two separate issues. Firstly, he submits that the Trial Chamber erred in law by restricting the scope of the cross-examination, and, secondly, that the Trial Chamber unlawfully prohibited the Accused from asking leading questions. Akayesu submits that the convictions on all counts should be quashed as a result of such irregularities.[553]

1. Limits on Cross-Examination

(a) Arguments of the Parties

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[550] The Appeals Chamber notes that Akayesu has submitted that " [t]he burden of proof of the Appellant is to raise a doubt" Akayesu's Brief, Chapter 9, para. 18. As has been pointed out, Akayesu errs in this assertion. It is not the case that on appeal, an appellant must simply raise a doubt. The standard of review on appeal has been set out above and an appellant must discharge his or her burden thereunder for a ground of appeal to succeed.

[551] Akayesu's first Notice of Appeal.

[552] Akayesu was granted leave to add a ground of appeal relating to this issue. See annex B.

[553] Akayesu's Brief, Chapter 7, para. 28; Chapter 15, para. 3.

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312. Akayesu submits that on 14 January 1997, the Trial Chamber set strict and improper limits on cross-examination when it directed the parties to ask questions which had direct bearing on the facts as set out in the Indictment. He submits that such prohibition violates Article 20 of the Statute as well as Sub-Rule 90 (G) of the Rules[554] and is at variance with jurisprudence of the United States, Great Britain and Canada.[555] Akayesu claims that, ultimately, his fundamental right to cross-examine Prosecution witnesses was violated. Therefore, Akayesu contends that he suffered grievous prejudice in that his Counsel were unable "to explore the various tools available to them to cross-examine witnesses for the Prosecution and the wide range of options to impugn the reliability of their testimony with facts not referred to in the Indictment."[556] The Trial Chamber was thus "deprived of information essential for its determination of the guilt of the accused."[557]

313. The Prosecution submits that Akayesu patently misinterpreted the remarks by the Presiding Judge of the Trial Chamber.[558] Furthermore, Sub-Rule 90 (G) was only adopted in June 1998 and was not in force in January 1997. Therefore, Akayesu cannot argue that such a provision of the Rules was breached.[559] It is the Prosecution's submission that Article 20 of the Statute was not breached either. Lastly, Akayesu failed to show that he suffered prejudice.[560] He also failed to cite a single example of material evidence which was not tendered before the Trial Chamber. Nor did he show that the testimony of any of the Prosecution witnesses might possibly have been impugned.

(b) Discussion

314. On 14 January 1997, the Presiding Judge of the Trial Chamber stated as follows:

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[554] Akayesu submits that although Sub-Rule 90 (G) was adopted only in June 1998 (and therefore not applicable at the time the impugned remarks were made), it still applies in the instant case. In his opinion, "the adoption of this rule goes to confirm principles already applied by legal systems where cross-examination is practised [...]. It is difficult to imagine that the right to cross-examine witnesses on matters that are not included in the indictment applies solely to trials that took place after June 1998, but not to that of the Appellant." See Akayesu's Reply, para. 84.

[555] Akayesu's Brief, Chapter 7, para. 4: Akayesu submits that the only limit to cross-examination is provided in Sub-Rule 90 (G) of the Rules, patterned on United States Law, i.e. that cross-examination shall be conducted taking into account the points raised in the examination-in-chief. See Transcript (A), 1 November 2000, p. 86.

[556] Akayesu's Brief, Chapter 7, para. 5. Akayesu submits that, "this amounts to a formal refusal to allow cross-examination on all peripheral issues, on all material matters which form part of the process of cross-examination which should go beyond the charges brought against the accused in the indictment." See Transcript (A), 1 November 2000, p. 87.

[557] Akayesu's Brief, Chapter 7, para. 25. Akayesu submits further that the question put to the lay witnesses and expert witnesses should have focussed on: the involvement of a witness's family in the RPF; recruitment of members of a witness's family by RPF since 1989; political activities of a witness in Rwanda since 1990; organization of witnesses, possible, membership in a syndicate of informers (here, Akayesu is referring to paras. 45, 46 and 47 of the Trial Judgment and submits that the Trial Chamber unfairly "criticised Defence Counsel for not questioning Prosecution witnesses on, *inter alia*, the "membership" of witnesses in a syndicate of informers"); the relationship between witnesses; evidence given by a witness in other trials in Rwanda; an interest or benefit to be derived in testifying and obtaining a verdict of guilty; their relationship with key witness, Ephrem Karangwa; persons who travelled with the witnesses; the preparation of testimony (with whom? when? etc...); bias on the part of the expert witness, Alison DesForges, and her involvement since the 1960s. See Akayesu's Brief, Chapter 7, para. 27.

[558] Prosecution's Response, para. 8.8 The Prosecutor notes that the passage cited by Akayesu actually contains two directives issued by the Presiding Judge of the Trial Chamber: first, he directed Akayesu to stay within the boundaries of the examination-in-chief and second, he made it known to the parties that other questions would be allowed as long as they did not take the form of general comments.

[559] Prosecution's Response, para. 8.11.

[560] *Ibid*, para. 8.14.

> Second important decision, as regards the accused, the cross-examination of the witness must be done within the limits of the Prosecutor's examination. In other words, the accused is free to ask for clarification on any point on which the answer was not clear. He may also ask other questions of the witness, given that these questions are only questions and that he does not provide commentary. I would also like to remind both the Defence and the Prosecution that questions put to a witness must be directly linked to the facts as they are described in the indictment and that they must not give general commentary.[561] [...]

315. Can Akayesu argue, on the basis of the Presiding Judge's remarks, that his right to cross-examine witnesses before the Trial Chamber was violated? It is the opinion of the Appeals Chamber that Akayesu may not, for several reasons.

316. The Appeals Chamber points out once again, that extracts from transcripts must, firstly, be placed in their proper context so that the intent of the persons who made the impugned remarks may be understood. In the instant case, the 14 January 1997 hearing was devoted, *inter-alia*, to the cross-examination of Witness K by Akayesu himself.[562] Judge Kama wished to open the hearing with some introductory remarks aimed at "remind[ing] [...] the parties of some provisions of the Rules which he deemed important for them to bear in mind",[563] i.e. Rules 77 and 80 of the Rules, as well as the rules of evidence.[564] The latter part of the Presiding Judge's remarks was more specifically directed at the accused. That is precisely when Judge Kama made general comments on the rules governing cross-examination together with the remarks impugned by Akayesu.

317. Thus, the Presiding Judge's remarks were mainly aimed at guiding and controlling the proceedings before the Trial Chamber. In this case, his remarks were addressed to all the parties at trial (including the Prosecution, the Accused and his Defence Counsel). Although the latter part of such remarks relating to cross-examination were specifically aimed at the Accused, (which was understandable since Akayesu was about to cross-examine a witness himself), the Presiding Judge's introductory remarks, challenged by Akayesu in the instant case, were intended for all the parties at trial.

318. Having recalled the context in which Judge Kama's remarks were made, it is easier to understand their true import. It is clear to the Appeals Chamber that the Presiding Judge of the Trial Chamber had actually sought to underscore the vital distinction to be made, during cross-examination, between matters germane to the case and other extraneous comments of a general nature. In other words, when Judge Kama directed the parties to ask questions that are directly related to the facts as described in the Indictment, and not general questions, he was reminding them, properly so, that cross-examination should not be impeded by matters that were immaterial and/or not relevant to the case. Thus, Judge Kama's remarks were made squarely within his duty as the Presiding Judge of the Trial Chamber, to ensure that cross-examination not be impeded by useless and irrelevant questions. Such clarification was in no way intended to restrict or limit

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[561] Transcript, 14 January 1997, pp. 8 and 9.

[562] At the time, Akayesu was personally cross-examining Witness K. On 13 January 1997, the Trial Chamber allowed Akayesu, together with Counsel assigned to him, to cross-examine Prosecution witnesses pending the Chamber's ruling on his motion to replace his Counsel. This provisional order was ultimately withdrawn on 16 January 1997. See "Decision on the Motion by the Accused to Replace Counsel Assigned to Him," *The Prosecutor vs. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 16 January 1997.

[563] Transcript, 14 January 1997, p. 2.

[564] Transcript, 14 January 1997, pp. 2 to 6.

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cross-examination.[565] It was solely meant to guide the proceedings to ensure that there were no undue departure from the case at bar. Accordingly, the Appeals Chamber finds that in so doing the Presiding Judge was merely performing his duty to exercise control over the process of examination and cross-examination of witnesses appearing before the Chamber as has since been enacted under the Rules.[566] Consequently, the Appeals Chamber finds that Judge Kama's remarks imposed no undue limitation on the scope of cross-examination nor did they unfairly deprive Akayesu of his right to cross-examine Prosecution witnesses.

319. The Appeals Chamber further notes that Akayesu had failed to cite a single example showing that he had clearly been denied his right to cross-examine witnesses. No transcript extract was tendered to show that Akayesu was not allowed to ask a particular question following the clarifications provided by Judge Kama. Thus, he failed to show any prejudice. Accordingly, the Appeals Chamber finds that no error was committed by the Trial Chamber in this regard.

2. Prohibition from asking Leading Questions

(a) Arguments of the parties

320. Akayesu submits that on 15 January 1997, the Trial Chamber unlawfully forbade him from asking leading questions during his cross-examination of a Prosecution witness. He recalls that while leading questions are not allowed during direct examination, they are generally allowed during cross-examination.[567] Such is the case under American, British and Canadian Law. Furthermore, the Trial Chamber imposed such restriction only on the Accused but not on his Counsel nor on the Prosecutor.[568]

321. The Prosecution recalls, firstly, that Akayesu has made no reference to the record to sustain his allegations[569] and, secondly, that he is not seeking any particular remedy for the prejudice he allegedly suffered.[570] The Prosecution further submits that the Statute and the Rules do not contain any provisions on leading questions. Akayesu relies on a number of examples drawn from domestic jurisprudence, but he has not established that in this case such jurisprudence is binding on the Tribunal.[571] Furthermore, it is within the Trial Chamber's discretion to determine the procedure

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[565] The limits to cross-examination were also outlined by the Presiding Judge of the Trial Chamber. He had stated, just before making the remarks now being challenged by Akayesu: "Second important clarification addressed to the accused, cross-examination by the accused must necessarily stay within the boundaries of matters raised by the Prosecutor in her examination-in-chief; in other words, the accused is absolutely free to seek clarification of any point to which the answer given did not seem to him to be clear." See Transcript (Trial Chamber), 14 January 1997, p. 8 Akayesu obviously does not disagree with the above remarks which are absolutely in conformity with generally accepted rules of cross-examination.

[566] Sub-Rule 90 (F) and (G) as adopted on 8 June 1998 provides that: "(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) make the interrogation and presentation effective for the ascertainment of the truth; and (ii) avoid needless consumption of time. (G) Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination.

[567] Akayesu's Brief, Chapter 7, para. 22; Akayesu's Reply, para. 88.

[568] Akayeus's Brief, Chapter 7, para. 7.

[569] Prosecution's Response, para. 8.16.

[570] *Ibid*, para. 8.18.

[571] *Ibid*, para. 8.19.

to be adopted for questioning,[572] and in the instant case, the Presiding Judge did exercise effective control over the trial proceedings.[573] In any event, Akayesu has failed to show any prejudice.

(b) Discussion

322. On 15 January 1997, the Presiding Judge of the Trial Chamber stated the following:

> I would like to say something to the Accused. When you are asking him a question, "So you went to the forest" it means you are giving him a suggestive, a leading question. Please, next time do not pose leading questions. Ask him, "Where were you taken to". Thank you.[574]

323. The Appeals Chamber recalls that the Rules of the Tribunal have never contained any specific provision on the issue of leading questions. However, they do lay down general rules on examination and cross-examination of witnesses,[575] which appear to be patterned on the United States Federal Rules of Evidence.[576] True, under this system, leading questions are allowed and used during cross-examination whereas they are not permitted during examination-in-chief. Still in the opinion of the Appeals Chamber, the Rules take on a life of their own upon adoption. Interpretation of the provisions thereof may be guided by the domestic system it is patterned after, but under no circumstance can it be subordinated to it.[577]

324. Did Akayesu suffer such prejudice as to invalidate the Judgment on account of the remarks made by Judge Kama on 15 January 1997? The Appeals Chamber points out that error invalidating a Judgment may not be shown by pointing to an anecdotal breach of the Rules by the Trial Chamber. It must be shown on an overall assessment of the trial that the Trial Chamber failed to render justice. In the instant case, Akayesu, firstly, failed to show that the Trial Chamber adopted a general policy on leading questions and applied it throughout the trial. The only example mentioned by Akayesu is that of the 15 January 1997 hearing. He does not cite any other example. The Appeals Chamber further notes that the prohibition imposed by Judge Kama on 15 January 1997 was directed solely at the Accused and not at his Counsel, much less at the Prosecution. It must also be observed that Akayesu suffered no prejudice during the hearing, since

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[572] *Ibid*, para. 8.20.

[573] Transcript, 1 November 2000, pp. 140 and 141.

[574] Transcript, 15 January 1997, p.30.

[575] These were adopted on 8 June 1998. Sub-Rule 90(F) provides that: "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to: (i) Make the interrogation and presentation effective for ascertaining the truth; and (ii) needless consumption of time." Sub-Rule 90(G) provides, on the other hand, that "Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems advisable, permit enquiry into additional matters, as if on direct examination.

[576] Rule 611 of the United States Federal Rules of Evidence reads as follows: "(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment; (b) Scope of the cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may in the exercise of discretion, permit inquiry into additional matters as if on direct examination; (c) Leading questions. Leading questions should not be used on the direct examination of a witness testimony. Ordinary leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions".

[577] In this connection, the Appeals Chamber recalls Rule 89(A) of the Rules: "The rules of evidence set forth in this Section shall govern the proceedings before the Chambers. The Chambers shall not be bound by national rules of evidence.

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the question disallowed by the Presiding Judge had already been put to and answered by the Witness before the Presiding Judge made his remarks. Lastly, Akayesu also failed to show any prejudice suffered by him as a result of Judge Kama's remarks. He did not show that he was subsequently prevented from effectively cross-examining all or most of the witnesses. The Appeals Chamber notes that during the appeal hearings, Akayesu conceded that his Counsel had been able to ask a number of questions and that there was no need "to exaggerate the importance of the refusal to allow leading questions." [578]

325. Accordingly, the Appeals Chamber finds that Akayesu has failed to show any prejudice such as would invalidate the Judgment.

326. As a result, in light of its findings with respect to the first issue raised by Akayesu and of its observations on the second issue, the Appeals Chamber rejects all the grounds of appeal against the cross-examination.

H. Eighth Ground of Appeal: Unlawful disclosure of Defence Witness Statements[579]

327. Akayesu describes the alleged error as a "minor irregularity". The Appeals Chamber has explained above how it intends to address issues falling under this heading. Indeed, only after the Appeals Chamber has addressed the main grounds of appeal will it pass on such issues.[580]

I. Ninth Ground of Appeal: The letter written by Witness DAAX to the judges [581]

328. This ground of appeal relates, essentially, to the testimony of Defence Witness DAAX and to a letter that he allegedly sent to the judges of Trial Chamber I following his testimony. Akayesu fails to specify whether the alleged error is one of fact or of law, but he submits in his Brief that the appropriate remedy is a "termination of proceedings" under the abuse of process doctrine.[582] He submits that the error committed is sufficient, in itself, to justify a termination of proceedings.[583]

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[578] Transcript (A), 1 November 2000, p. 122.

[579] The Appeals Chamber granted leave to Akayesu to add this ground of appeal in its Decision of 24 May 2000. See annex B.

[580] See paras. 38 to 41.

[581] The Appeals Chamber granted leave to Akayesu to add this ground of appeal in its Decision of 24 May 2000. See annex B for further details.

[582] Akayesu's Brief, Chapter 12, para. VII. In fact, Akayesu cites principles referred to in Chapter 4 of his Brief without detailing how they should be applied in the instant case. "The appropriate remedy to such a situation is a termination of proceedings in accordance with the principles laid down in Chapter 4 on conflict of interest." The request for leave to add the ground of appeal referred to in Chapter 4 was dismissed in the Decision of 22 August 2000. However, the Appeals Chamber also noted that, overall, the review of the case-law cited in that chapter related to the specific issue raised in ground of appeal and not to the ground of appeal envisaged in the instant case. See also Akayesu's Brief, para VII (sic) where Akayesu mentions the "irreparable prejudice caused to the Appellant by the accusatory letter (the verdict would have been different)."

[583] Akayesu's Brief, Chapter 15, para. 1. During the hearing on appeal, Akayesu did not put forward any arguments on the merit concerning this ground of appeal, except to say that "[..] Chapter 12 on DAAX we will leave you with. We will not address ourselves to that question, we understand it's a certain irregularity which in and of itself would not be sufficient to stay the proceedings by itself. It is an irregularity which we think should have been drawn out publicly." Transcript (A), 1 November 2000, p. 85. Since Akayesu has advanced specific arguments in his Brief, and since he stated in his Reply that he was reiterating his arguments as set out in his Brief, the Appeals Chamber will address this ground of appeal.

1. Issues raised

329. Two main issues will be addressed under this ground of appeal: (i) the impact (if any at all) of the letter sent by Witness DAAX to the judges of the Trial Chamber following his testimony; (ii) the allegedly inadequate and selective nature of Witness DAAX's testimony. Akayesu submits that it was impossible for him to have a fair trial under such circumstances.[584]

330. As a preliminary remark, the Appeals Chamber notes that Akayesu raises the issue of the alleged arrest of Witness DAAX upon his return to Rwanda following his testimony before Trial Chamber I. [585] Akayesu alleges that Witness DAAX was arrested and detained by the authorities of Rwanda on 1 May 1998, when he returned to Kigali.[586] Akayesu, submits in his Brief that he had written to the Registry about that,[587] but that at the time of filing his Brief, the Registry had not confirmed, as directed by the Decision of 24 May 2000,[588] whether Witness DAAX had been detained by the authorities of Rwanda. This arrest was later confirmed in a letter dated 20 June 2000 from the Registry, which was attached to a fax dated 13 July 2000.[589] Nevertheless, the Appeals Chamber notes that, upon receipt of said information, Akayesu failed to show either in his Reply nor during the Hearing on Appeal, [590] why the arrest of Witness DAAX was relevant to the issue raised in this ground of appeal.[591] The same goes for the other evidence sought to be disclosed in this regard.[592] Akayesu has failed to show the relevance of the information in question

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[584] Akayesu's Brief, Chapter 12. Para. 1.10.

[585] See also Akayesu's Brief, Chapter 6, para. 10 on Akayesu's third Ground of Appeal. In this Section, Akayesu submits that: "Furthermore, the Appellant intends to show, with supporting facts, that the incident testified to on 3 March 1998 by Witness DAAX (Defence Witness), does illustrate that the Appellant could not have had a just and fair trial under the circumstances, his witness having been arrested and detained upon his return to Rwanda following his testimony. He further intends to argue most strenuously that he was deprived of his right to produce his witnesses and to present his case, in breach of the guarantees affirmed by ICTR Appeals Chamber [..]" The Prosecutor submits in this instance that "t(here are allegations concerning the arrest of DAAX in Rwanda, but the Appellant has made no arguments and is seeking no relief in respect of them." Prosecution's Response, footnote 295.

[586] Akayesu's Brief, Chapter 12, para. 1. 9. Akayesu describes in some detail, the transfer of the Witness between prisons until he arrived several months after his arrest, in the Kimironko prison.

[587] Akayesu requests leave to file his letter to the Registry concerning this issue dated 19 June 2000. Akayesu's Brief, Chapter 12, para. V. The letter is later filed as Exhibit 51 in the Appellant's Appeal's Book Exhibits 30 to 53, Chapter 6 to 14. This letter has already been received by the Appeals Chamber and in any event, for the reasons which will be set out below as irrelevant to the issues raised in this ground of appeal. It is therefore not necessary to formally rule on this request.

[588] In the Decision of 24 May 2000, the Registry was directed to confirm, based on documentary material available to it at the time, whether Witness DAAX had been imprisoned by the authorities of Rwanda.

[589] Akayesu filed this confirmation letter in the Supplementary Appeals Book , Exhibit 6, on 13 October 2000. It appears that the letter was dated 20 June 2000, the Registry did not send it to Akayesu until the time for filing his Brief had lapsed. It is stated in this letter that "DAAX was a senior official in Rwanda who was called to appear by Akayesu's Counsel. The witness was subpoenaed and after discussion with him regarding and based on fears expressed by him, the Witnesses and Victims Support Section (WVSS) filed a request with the Trial Chamber for additional protective measures. Following a hearing in camera, the Trial Chamber granted the request and directing that the order sought be complied with. After testifying, Witness DAAX was sent back to Kigali. A month later, he was arrested."

[590] In his Reply (para. 136), Akayesu merely states that he reiterates and reaffirms the submissions made in Chapter 12 of his Brief and submits that the failure to denounce the disclosure of out of court evidence undermines the administration of justice.

[591] Or even under Akayesu's third Ground of Appeal

[592] This refers to the transcript of the meeting held in the Office of the Prosecutor (although the Decision of 24 May 2000 and subsequent correspondence refer to the "Prosecutor") and the motion filed on 18 February 1998 by the Witnesses and Victims Support Section. On appeal, Akayesu requested that the two documents be disclosed. The motion was disclosed by the Registry to him on 10 July 2000, but it appears that the minutes of the meeting were not disclosed. In any case, Akayesu failed to show the relevance of the documents.

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to this ground of appeal.[593] Witness DAAX testified on 3 March 1998. He was arrested on 1 May 1998, that is after he had testified. With respect to this ground of appeal, Akayesu failed to show the relevance of protective measures put in place to ensure the safety of Witness DAAX during his testimony before the Tribunal on the one hand and of his arrest following his testimony on the other hand.[594] The Appeals Chamber finds this information to be of no relevance. Therefore, it will disregard the documents in question and related facts.

(a) The Letter dated 3 March 1998 sent to the judges of Trial Chamber I

331. Akayesu alleges that his trial was tainted as a result of a letter dated 3 March 1998 ("the Letter"),[595] sent by Witness DAAX to the judges of Trial Chamber I following his testimony. Akayesu claims that in the Letter, Witness DAAX provides additional information on his, [Akayesu's], conduct during the events of 1994. Akayesu submits that the five points revisited or expanded in the Letter were very prejudicial to his case.

332. The Appeals Chamber notes, firstly, that Akayesu seeks leave to file a copy of the Letter before it.[596] The Prosecution does not deny that the Letter existed, nor its contents, nor the fact that it was sent.[597] Therefore, the Appeals Chamber considers that the said Letter may be considered under this Ground of Appeal.[598]

333. Akayesu sets out the contents of the Letter, of which only some parts relate to the testimony of Witness DAAX before the Trial Chamber.[599] He takes issue with the points raised as, for

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[593] Akayesu submits that "The Chamber also determined that as relates to the merits of the appeal, the Appellant would have to prove the allegation made in this ground of appeal. This implies putting into evidence the material and documents referred to in the motion to amend the Notice of Appeal." Akayesu's Brief, Chapter 12, para. 2.

[594] As mentioned earlier, Akayesu refers to the arrest of Witness DAAX under his third Ground of Appeal. In this third ground, while alleging that it was impossible for the Accused to have a fair trial due to the war in Rwanda, as well as intimidation and murder of potential defence witnesses, Akayesu submits (there again in very general terms), that several witnesses were afraid and did not come to testify. Akayesu's Brief, Chapter 6, Annex, para. 1L. Moreover, in his conclusions regarding "Other Issues" (protection of witnesses), he submits that the fact that the Trial Chamber disclosed information concerning protected witnesses, frightened other witnesses whom they wish to call. In particular, he referred to the disclosure to the Press of the name of his wife and the identity of the *Préfet* of Gitarama, as well as the identification by the Presiding Judge of the Trial Chamber of the identity of Witness DFX (although he states that the Presiding Judge apologized later). Lastly, he mentions that Witness DAAX was identified in the 6 March 1998 issue of the *Hirondelle* Newspaper as "that former high official." Akayesu's Brief, Chapter 13, para 6. The Appeals Chamber has already explained how it intends to address the issues raised in this section of Akayesu's Appeal. It notes, however, that such general allegations are not, no matter the context in which they are made, supported by any argument or examples of initiatives taken by Akayesu or his Counsel to call witnesses to the stand and specifying when and why such persons allegedly refused to testify and how it ties in with a ground of appeal. Similarly, Akayesu gives no example of instances where he brought such information to the attention of the Trial Chamber and requested assistance from the Chamber to prevent a witness from appearing. See with respect, generally, to the requirements for the presentation of witnesses at trial and recourse to protective and coercive measures: *Tadic* Decision (Additional Evidence).

[595] Akayesu's Brief, Chapter 12, para. 1. This seems to be the central issue of Ground 1 and moreover, is the only issue to which the Prosecution responded, para. 13.1 to 13.11.

[596] Akayesu's Brief, Chapter 12, para. 5, Akayesu has filed the Letter as exhibit 49 in the Appeals Book, Exhibits 30 to 53,Chapters 6 to 14.

[597] Prosecution's Response, para. 13.3 to 13.11. The Prosecution also submits that "it is not in dispute that a copy of this letter was in fact also received by counsel for the Prosecution and the Defence.", para. 13.9.

[598] In the Decision of 24 May 2000, the Appeals Chamber held that Akayesu could request a copy of the Letter from the Registrar and that he was at liberty to request that it be included in the Record on Appeal. The Registry misconstrued the Decision of 24 May 2000 – to its letter of 10 July 2000 sent to Akayesu, the Registry attached a document which it thought was the requested Exhibit R1, whereas the document concerned was the exhibit R1 referred to in Section 1 of the Decision of 24 May 2000 which had been rejected.

[599] Akayesu's Brief, Chapter 12, para. 1.7.

example, "pure denouncement or accusatory denigration based on hearsay with no possibility for the accused to defend himself."[600] He further asserts in the same vein that this was a "pernicious attack against the accused, behind his back "[601] and a "negative Judgment, which is an attack on the accused [...] a stab in the back of the accused [...]."[602]

334. Akayesu submits that it can be presumed that the Judges (and the Prosecution) received and read the Letter.[603] From that moment on, it was impossible for him to have a fair trial on the grounds, *inter alia,* that the Letter (private communication) generally constitutes a violation of his right to a fair and public trial; private communications between a Trial Chamber and a witness, in particular one who is a senior official, are inadmissible evidence which violate the fundamental principle that criminal trials are to be conducted in public; Akayesu was prevented from cross-examining Witness DAAX on the issues raised in the Letter; the Trial Chamber would have reached a different verdict if Akayesu had enjoyed a full and more zealous defence ; the Tribunal failed to condemn the fact that the Letter was sent and to take any safeguards in relation thereto.[604]

335. The Prosecution submits that if Akayesu wants to rely on the abuse of process doctrine, he must "show either that there has been a delay which has made a fair trial of the accused impossible, or that the circumstances of this case are such that proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct."[605] The Prosecution does not dispute the general proposition that "it is improper for a person who is not a party to the proceedings to send *ex parte* communications to a judge concerning the merits of issues in dispute in a matter pending before the judge."[606] However, the Prosecution argues that in the absence of evidence to the contrary, one must presume that a professional judge would "completely disregard" such communication.[607] The Prosecution submits that Akayesu fails to allege any evidence that the judges took the Letter into account in their Judgment. The Prosecution argues that since both itself and the Defence received the Letter and declined to raise the matter before the judges, it could indicate their "understanding and satisfaction that the Judges would disregard it." [608] The Prosecution submits that the Appellant's request for a stay of proceedings should be rejected.[609]

336. No evidence has been brought before the Appeals Chamber to show that the issue of the Letter and its impact was formally raised by either party before the Trial Chamber.[610] ICTY Appeals Chamber recently upheld the general principle that "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party."[611] However, in the instant case,

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[600] *Ibid*, para. 1.7(b) [referring to the second point raised].
[601] *Ibid*, para. 1.7(c) [referring to the third point raised and similar to the criticism under point 4, para. 1.7(d)].
[602] *Ibid*, para. 1.7 (e).
[603] *Ibid*, para. 1.8 Akayesu submits that: "The Appellant received a copy and is in possession of information to the effect that this important missive was actually read by those to whom to whom it was sent."
[604] Akayesu's Brief, chapter 12, para. 1.10 and chapter 6. As already explained, the question of Counsel's incompetence is addressed essentially under Akayesu's second Notice of Appeal.
[605] Prosecution's Response, para. 13.4.
[606] *Ibid*, para. 13.5.
[607] *Ibid*, para. 13.5 to 13.7. The Prosecution submits that " The mere fact that such a communication has been sent to and received by a Judge cannot give rise to a presumption that the Judge took the contents of the communication into account as evidence in the trial before any court, simply by sending a letter relating to the proceedings to the Judges."
[608] Prosecution's Response, para. 13.8.
[609] *Ibid*, para. 13.11.
[610] See Akayesus's Brief, Chapter 12, para. 1.10 (e), where Akayesu complains of the Counsel's incompetence in this regard (see below).
[611] *Celebici* Appeal Judgment, para. 640. See also *Tadic,* para. 55, quoted in the *Kambanda* Appeal Judgment, para. 25.

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the Letter had been sent to the judges. The parties do not appear to dispute the fact that the judges had received it. Under those circumstances, the Appeals Chamber finds that the matter had been brought to the attention of the Trial Chamber.[612] Consequently, the instant case is a "special circumstance" such as would warrant an exception to the principle of waiver.[613]

337. Akayesu's arguments are largely based on speculation as to decisions or action taken by the Trial Chamber upon receipt of the Letter. It bears recalling that Akayesu invoked the abuse of process doctrine in arguing for a stay of proceedings. The Appeals Chamber has already had occasion to consider the issue of abuse of process, albeit it in a different factual context. In the *Barayagwiza* Decision, the Appeals Chamber held that : "Under the doctrine of abuse of process, proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process."[614]

> "It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's right would prove detrimental to the court's integrity." [615]

338. The question that arises is whether the sending of the Letter violated Akayesu's right so as to cause the Appeals Chamber to consider that the Decision of the Trial Chamber to proceed on the charges against him, or a Decision by the Appeals Chamber to uphold the convictions "would cause serious harm to the integrity of the judicial process."[616]

339. It should be noted that case-law on this issue reflects mainly findings of serious injustice. Courts generally invoke procedural defects when they find it necessary to protect an accused from an abuse or a prejudice, for example. Abuse of process has been defined as "something so unfair and wrong that the court should not allow a Prosecutor to proceed with what is in all other respects a regular proceeding."[617] Indeed, the Appeals Chamber observes that Akayesu himself recognizes

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[612] See *Tadic* Appeal Judgment, para. 55, quoted in the *Kambanda* Judgment, para 25: "The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or the Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo* [..]."

[613] In *Kambanda's* Appeal Judgment, para 25, the Appeal Chamber held that: "t(he fact that the Appellant made no objection before the Trial Chamber...means that, in the absence of special circumstances, he has waived his right to adduce this issue as a valid ground of appeal." (reference *Furundzija* Appeal Judgment, para. 174). The Appeals Chamber notes that in para. 649 of the *Celebici* Appeal Judgment, ICTY Appeals Chamber held that, with respect to one of the grounds of appeal, it did not accept "the explanation by counsel [...] for her failure to raise the issue before the Trial Chamber itself." Nevertheless, ICTY Appeals Chamber considered the merits of the ground of appeal, at that stage, and eventually dismissed it for lack of real prejudice (para. 615).

[614] *Barayagwiza* Appeal Decision, para. 74. Reference is made to the case of R. Latif; R. Shahzad,[1996] 1All ER 353, or the House of Lords (citing *R. v. Horseferry Road Magistrates' Court*[1993] 3All ER 138)' held that "Proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."

[615] *Barayagwiza* Appeal Decision, para. 74.

[616] *Barayagwiza* Appeal Decision, para. 75.

[617] *Hui-Ch-Ming v. R* [1992] 1 A. C. 34, PC See also *Connelly v. DPP,* (1964 (AC, 1254 (HL): "'The power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice", *DPP v. Humphreys* (1977(A.C. 1, HL, at p. 55E-G: "While Judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice if in such fortunately rare cases...their hands were tied and they were obliged to allow the further trial to proceed." Also, *Re Barings Plc and others (No.2); Secretary of State for Trade and Industry v. Baker and others [1999]* 1 All E.R. 311, CA (Civ. Div), "a court may stay proceedings where to allow them to continue would bring the administration of justice into disrepute among right thinking people and that this would be the case if the court was allowing its process to be used as an instrument of oppression, injustice or unfairness." *See* also, *Hui-Ch-Ming v. R* (1992(1A.C. 34, PC.

that a stay of proceedings is an exceptional remedy for a finding of abuse of process,[618] although, he submits that this case warrants resort to such an exceptional remedy.

340. It is the opinion of the Appeals Chamber that the burden of showing that there has been an abuse of process rests with the accused. Establishing such abuse will depend on all the circumstances of the case.[619] The Appeals Chamber finds that it is, however, more important that the accused show that he had suffered prejudice. Thus, "an order staying proceedings on the ground of abuse of process [...] should never be made where there were other ways of achieving a fair hearing of the case, *still less where there was no evidence of prejudice to the defendant.*"[620]

341. This case is unique in that Akayesu has not shown in any way to what extent or on what grounds this doctrine is applicable to his case. Above all, he failed to explain how the sending of the Letter caused him prejudice and has merely alleged, in general terms, *inter alia* that the verdict would have been different (without explaining how), that he was denied the right to a fair and public hearing and that as a result of the Letter being sent he was denied the right to cross-examine the Witness on the contents thereof. Such rights could only be found to have been violated, if Akayesu had managed to show clearly that the contents of the Letter were taken into account as evidence against him. Now, Akayesu has offered no evidence to suggest that the contents were in any way taken into account or relied upon by the Trial Chamber in arriving at its above decision.

342. Witness DAAX testified *in camera* on 3 March 1998. The Trial Chamber referred to his testimony in its findings on paragraphs 3 and 4,[621] 12[622] 12(A) and 12(B)[623] of the Indictment. The Trial Chamber makes no direct reference to the Letter in its findings and Akayesu did not show how the findings in the Judgment reflect the said allegations.[624] Akayesu has failed to provide any evidence of a prejudice that he might have suffered.

343. The Appeals Chamber agrees with the Prosecution that in general "it is improper for a person who is not a party to the proceedings to send e*x parte* communications concerning the merits of issues in dispute in a matter pending before the judge."[625] However, the fact that this occurred is not sufficient to justify a stay of proceedings. As stated above, the judges of this Tribunal are professional judges – it must be assumed that they will consider each case before them on the basis of the evidence presented and admitted in that case and that they will disregard evidence not presented to them. Furthermore, it is to be presumed that they will only enter a conviction of guilt

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[618] Akayesu's Brief, Chapter 4, para. 37, where Akayesu states that: "a stay of proceedings is an exceptional remedy for abuse of process."
[619] Archbold 2000, para. 4-51 and 4-57: "Each case will depend on its own facts."
[620] *DPP v. Hussain*, The Times, 1 June 1994, cited in Archbold 2000, para. 4 to 55 (emphasis added).
[621] Trial Judgment, para. 75.
[622] Trial Judgment, paras. 185, 186 and 189.
[623] Trial Judgment, para. 458 – The Trial Chamber simply noted here that the witness was not in a position to know what occurred in the *bureau communal* as he was not present in the *commune* of Taba during this period. He also testified that he had lost contact with Akayesu after 18 April 1994 before the killings began.
[624] The Letter poses five questions which may be summarised as follows: (1) Why did Akayesu wear a military shirt and carry a military gun? (2) Why did the ex-*bougmestre* of Musambira allege that Akayesu took part in attacks on families in Musambira and killed Tutsis in certain families in the evening of 19 April 1994? (3) Why did Akayesu not warn the *Préfet* about a massive attack by the *Interahamwe* on refugees and certain families and only pointed out some acts of intimidation? (4) Why was Akayesu not dismissed, as recommended by a Minister of President Kambanda? and (5) Why did Akayesu stay with the *Interahamwe*, leaving the country with them when it was well known that most of the B*ourgmestres* not directly involved in the genocide did not leave Rwanda "so as to dissociate himslef, albeit belatedly, from the genocidal Government?" *See* also, Akayesu's Brief, Chapter 12, para. 1.7.
[625] Prosecution's Response, para. 13.5. See also Akayesu's Brief, Chapter 12, para. 1.10.

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if, solely on the evidence before them, they are satisfied beyond a reasonable doubt of the guilt of the Accused.[626]

344. The Appeals Chamber finds that Akayesu has failed to show that the sending of the Letter constituted a violation of his right to cross-examine Prosecution witnesses. Nor did Akayesu show that he suffered a prejudice as a result. Consequently, this argument is dismissed.

(b) Testimony of Witness DAAX

345. Secondly, Akayesu alleges that his trial was unfair as a result of the testimony given by Witness DAAX in camera on 3 March 1998. Akayesu characterizes the testimony as "selective" and asserts that the witness forgot to mention material facts, in particular, the fact that Akayesu had asked for more *gendarmes* prior to 18 April 1994 and his "*interventions*" during the meetings in Murambi on that date.[627] Here again, Akayesu contends that it was impossible for him to have a fair trial due, *inter alia*, to the said testimony.[628] The Prosecution did not respond to this argument.

346. It is important to state, from the outset, that it should be assumed that Akayesu was involved in the decision to call this Witness as a witness for the Defence. Clearly, in principle, such a decision rests solely with the person calling the witness, in this case the accused. Similarly, it should be presumed that the accused takes such a decision after having assessed the information and evidence that he believes he can reasonably elicit from the witness, generally after talking with the witness and collecting his/her prior statement. Akayesu submits that:

> 2. This witness who initially was a potential Prosecution witness, was expected to testify for the Prosecution. But he was not called by the Prosecutor because, on the one hand, the witness, out of fear, was reluctant to appear and, on the other hand, his testimony would be favourable to the Defence, in light in particular of his prior statement.
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> 3. Since the Prosecutor did not wish to call the witness, the Defence, which was not succeeding in causing the requested witnesses to appear in court, "recuperated" him and got him to testify "for the Defence" with leave from the Tribunal. [...].[629]

347. Akayesu alleges that the Prosecution had originally intended to call Witness DAAX. When the Prosecution thought the better of it, Akayesu moved the Trial Chamber by motion to subpoena the witness to appear for the Defence. It appears that this decision was based primarily on Witness DAAX's prior statement, which Akayesu considered to be favourable to his defence. The Trial Chamber granted the motion,[630] and the Witness was called. This is the factual background to the decision to call this Witness.

348. No party can predict with certainty what a witness will testify to in court. It is of course a risk that all parties take. The only duty imposed on any witness is that reflected in the solemn declaration which he or she must swear prior to testifying: "I solemnly declare that I will speak the

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[626] Rule 87(A) of the Rules: "After presentation of closing arguments, the Presiding Judge shall declare the hearing closed and the Trial Chamber shall deliberate in private. A finding of guilty may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."
[627] Akayesu's Brief, Chapter 12, para. 1.6.
[628] Akayesu describes the situation as "public failings" *Ibid*, para. 1.7.
[629] Akayesu's Brief, Chapter 12, paras. 1.2 and 1.3.
[630] "Decision on a Motion for the Appearance and Protection of Witnesses called by the Defence" 9 February 1998.

truth, the whole truth and nothing but the truth."[631] That the witness's evidence did not fully reflect what had allegedly been originally disclosed to Akayesu is no reason for Akayesu to suggest that the trial was inherently unfair or so tainted as to result in a miscarriage of justice. Here again, it should be recalled that it was open to the Trial Chamber to assess and weigh the evidence it had heard in light of both the context in which it had been elicited and the other testimonies and evidence.

349. The Appeals Chamber finds that this argument by Akayesu must fail.

2. Conclusion

350. For the foregoing reasons, the Appeals Chamber rejects this ground of appeal.

J. Tenth Ground of Appeal: Unlawful Detention[632]

1. Background

351. By motion dated 2 June 2000 Akayesu sought leave, *inter alia*, to amend his Notice of Appeal to include a ground of appeal challenging the legality of his detention.[633] In its Decision of 22 August 2000, the Appeals Chamber found that "the lawfulness of [Akayesu's] detention in Zambia was not raised before the Trial Chamber" and that as a result, there was "cause to reject [Akayesu's] request...to amend the Notice of Appeal."[634]

352. On 20 October 2000, Akayesu filed a motion requesting the Appeals Chamber to rectify its decision dated 22 August 2000, on the ground that issues relating to the lawfulness of his detention and the failure to inform him promptly of the charges brought against him had been raised before the Trial Chamber albeit in the pre-trial phase, within the framework of the motion for termination of proceedings.[635] Having received the Prosecution's response to the Motion to rectify,[636] and Akayesu's Reply,[637] the Appeals Chamber rendered an oral decision on 1 November 2000 at the start of the Hearing on Appeal in which it resolved: "to join to the appeals on the merits [and to

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[631] Rule 90(B) of the Rules of Procedure and Evidence (testimony). Witness DAAX was not an exception. Transcript, 3 March 1998, pp. 3 and 4 (in camera).

[632] See annex B.

[633] Consolidation or summarization of motions not yet disposed of (in execution of the Scheduling Order of 24 May 2000), filed on 2 June 2000. This request was originally included in the motion to amend the notice of appeal on the impartiality and independence of the Tribunal, and to add new grounds of appeal, filed on 7 December 1999.

[634] Decision of 22 August 2000.

[635] Notice of Motion to Rectify or Correct and Reconsider Part of the Decision of 22 August 2000 (Decision on the consolidation or summarization of motions not yet disposed of) (Re: Amendment of Notice of Appeal), filed on 20 October 2000 ("Motion to Rectify"). It is noted that almost two months elapsed between the issuance of the Decision of 22 August 2000 and the filing of the Motion to Rectify by Akayesu. In addition, it was filed less than two weeks before the Hearing on Appeal. Akayesu sets out reasons for the delay at para. 10 of the Motion to Reply, stating that although his Counsel noticed shortly after the rendering of the Decision of 22 August 2000 that there was a mistake, it was only"[o]n or about 16 October 2000" that they "conceived a possible legal remedy." Despite the very long delay in filing the Motion to Rectify, the Appeals Chamber decided at the Hearing on Appeal to hear the arguments of the parties on this issue.

[636] Prosecution's Response to "Notice of Motion to rectify or correct and reconsider part of the Decision of 22 August 2000", filed on 25 October 2000" ("Prosecution's Response to the Motion to Rectify).

[637] *Appellant's Reply to Prosecution's Response to his "Notice of Motion to rectify or correct and reconsider part of the Decision of August 22, 2000"(Decision on the consolidation or summarization of motions not yet disposed of) (Re: Amendment of Notice of Appeal),* filed 26 October 2000 ("Reply to the Motion to Rectify").

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allow the Appellant to submit] thereon for some minutes, [you will be authorized], but, at that point in time, the Prosecution will have to respond."[638]

353. During the Hearing on Appeal, the Prosecution stated that it wished to file certain documents to support its proposed response to the ground of appeal. Akayesu did not object and the Appeals Chamber accordingly granted the Prosecution leave to file the said documents.[639]

354. Akayesu submits that this ground of appeal is two fold. He alleges that there was a violation of his right: (1) to be charged promptly, and (2) to be informed promptly of the nature of the charges against him.[640] However, ultimately he appears to be submitting that he had been detained unlawfully in violation of Rule 40 of the Rules on provisional measures.[641] As a result, he submits as follows:

> The Appeals Chamber is hereby requested to order a stay of proceedings, the continuation of such in the face of the serious violations of the rights of the Appellant, would seriously undermine the integrity of the judicial process and bring into disrepute the international Criminal Court as an institution, as it did in the case of Jean-Bosco Barayagwiza.[642]

355. The Prosecution submitted on this ground only during the Hearing on Appeal on 1 and 2 November 2000 and in its Response to the Motion to Rectify.[643]

2. Discussion

356. Before proceeding to consider this ground of appeal on the merits, the Appeals Chamber must first determine whether it is properly before it.

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[638] T(A), 1 November 2000, p. 16.

[639] T(A), 1 November 2000, pp. 108 to 110. The Prosecution filed a letter dated 5 September 2000 from the Ministry of Legal Affairs, Republic of Zambia, enclosing a copy of a Judgment of the High Court of Zambia dated 1 February 1996, the Request for detention of Akayesu filed on 22 November 1995 by the Prosecution pursuant to Rule 40 of the Rules and Notice of Appeal against the decision of the Zambian High Court of 1 February 1996, filed on behalf of Akayesu on 16 February 1996. In addition, at the request of Akayesu, the Prosecution provided a copy of the letter it had sent to the Minister of Legal Affairs of Zambia to obtain information on the arrest and detention of Akayesu [T(A), 1 November 2000, pp. 177 to 179, 2 November 2000, p. 41].

[640] Akayesu's Brief, Ch. 1, para. 21. The submissions in relation to each limb are set out in Akayesu's Brief, Ch. 1, paras. 22 to 44 and paras. 45 to 53 respectively.

[641] Regarding his detention, Akayesu submitted the following facts: He entered Zambia between August 1994 and the start of 1995. He possessed a visa authorizing him to stay in Zambia until 29 October 1995. On 10 October 1995, he was arrested by the Zambian authorities following a letter from the Ambassador of Rwanda in a letter dated 6 September 1995, asking them to detain him and others on suspicion of having committed genocide in Rwanda. On 22 November 1995 the Prosecution submitted a request to the authorities of Zambia to detain Akayesu (and others) provisionally under Rule 40 of the Rules. On 1 February 1996 the High Court of Zambia ruled in a Judgment that Akayesu should not be released from custody but that he should be handed over to the Tribunal, pursuant to both the Prosecution request and Security Council resolution 978. On 13 February 1996, the Prosecution filed its Indictment against Akayesu. On 16 February 1996, the Indictment was confirmed, an arrest warrant issued and an order issued for the continued detention of Akayesu in Zambia. One week later the Indictment was submitted to the authorities of Zambia to be served on Akayesu. Akayesu submits that it was only on 29 March 1996 that the authorities of Zambia informed Akayesu of the arrest warrant, the extension of his detention and the decision by the Tribunal to confirm his indictment. He was transferred to the Detention Facility in Arusha on 26 May 1996 and had his initial appearance on 30 May 1996. *See* also, Trial Judgment, paras. 9 to 12.

[642] Akayesu's Brief, para. 54.

[643] As leave to add this ground of appeal was denied by the Appeals Chamber in the Decision of 22 August 2000, the Prosecution did not respond to Akayesu's arguments contained in Akayesu's Brief, para. 2.1. (T(A), 2 November 2000, pp. 31, 32). During the Hearing on Appeal, it did not request leave to file further written submissions.

357. Akayesu has submitted that both issues raised in this ground of appeal had been raised before the Trial Chamber.[644] That explains why he requested the Appeals Chamber to rectify its earlier decision denying him leave to add this ground of appeal and to consider the issue on the merits.

358. The Prosecution for its part submits that Akayesu has waived his right to raise on appeal the issue of the propriety of the request filed by the Prosecution under Rule 40 of the Rules, since it was never raised during proceedings before the Trial Chamber.[645] While conceding that Akayesu has filed a pre-trial motion raising several issues concerning his detention in general, the Prosecution however submits that the only issue relating to his arrest and detention concerned the lawfulness of his arrest by the Zambian authorities following a request by Rwanda, and his detention conditions.[646] The Prosecution alleges that Akayesu made no mention of the steps taken by the Prosecution to have him arrested or the request it filed under Rule 40.[647] The Prosecution submits that Akayesu never raised the issue again either through the so-called counsel of his choice or any other counsel, and that Akayesu can point to no place in the record where he raised the issue of the legality of the Prosecution's request for his arrest in Zambia.[648] It is the Prosecution's submission that the [...][649] that Akayesu has, as a result, waived his right to raise this issue now on appeal.[650]

359. The Appeals Chamber observes firstly that as to whether this issue was raised before the Trial Chamber, Akayesu appears to have put forward, during the appeal proceedings, rather contradictory and selective submissions. Although he alleges in certain submissions that the issue of the lawfulness of his detention had been raised at trial,[651] he takes issue with his Counsel, in his second Ground of Appeal, based on incompetence of counsel for failing to follow his instructions and to raise issues relating to the lawfulness of his arrest, detention and imprisonment.[652] Subsequently, in response to the Prosecution's criticism that he failed to prove that he had

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[644] Motion to Rectify, para. 1: "[T]he issue of unlawful detention and failure to notify the Appellant of the charges against him in a timely manner was raised before the Trial Chamber accompanied by a request to stay proceedings." Also, in Reply to the Motion to Rectify, paras. 5 – 7: Akayesu submits: "The Appellant never abandoned his complaints about unlawful detention and the failure to be informed of the charges pending against him that were duly raised before the Trial Chamber."

[645] T(A), 2 November 2000, p. 47. The Prosecution also began by presenting its arguments concerning the merits of this ground of appeal, that is, to know whether the detention was unlawful as Akayesu submits.

[646] T(A), 2 November 2000, pp. 48 and 49. Prosecution's Response to the Motion to Rectify, para. 12 *et seq.*

[647] T(A), 2 November 2000, pp. 48 to 51. The Prosecution submits that Akayesu was "challenging the manner in which Rwanda made its request, stating that it was improper that the Rwandan request was made through the embassy in Pretoria and not directly from Kigali, and different things of that nature." The Prosecution acknowledges that in the Prosecution's Response to the Preliminary Motion, it set out the facts relating to the request filed under Rule 40. However, it submits that Akayesu cannot rely on this as evidence that the issue was brought to the attention of the Trial Chamber such that it rebuts an argument of waiver. The Prosecution also submits that there is no mention of this issue in the transcript of the oral arguments of 26 September 1996, on statements by the parties on the preliminary motion.

[648] T(A), 2 November 2000, p. 51.

[649] Prosecution's Response to the Motion to Rectify, para. 13.

[650] T(A), 2 November 2000, pp. 50 to 54.

[651] Consolidation or summary of motions not yet disposed of (in execution of scheduling order dated 24 may 2000), filed on 2 June 2000, para.35; Motion to amend the notice of appeal on the impartiality and independence of the Tribunal, and to add new grounds of appeal, filed on 7 December 1999, para. 24; Akayesu's Brief, Chapter 1, paras. 14 and 15.

[652] Akayesu's Brief, chapter 3, paras. 10 and 14. Akayesu submits: "The Appellant blames his counsel for failing, despite his instructions, to raise issues related to the legality of his arrest, detention and imprisonment. They were expected to and should have raised the issue of the violation of his right to be informed promptly of the cause for his arrest and of his right, as an accused, to be informed promptly of the charges against him and to be arraigned before the Tribunal".

instructed to his Counsel to raise the issue of his unlawful detention in Zambia,[653] Akayesu asserted that Mr. Scheers, his Counsel at the time, did raise the issue of his unlawful detention, that the issue of unlawfulness was therefore addressed at that time, though not fully examined.[654] Akayesu blames the Counsel subsequently assigned to his defence for failing to examine and follow up the issue. He submits:

> Since it was not raised at trial by counsel for the Appellant, the Chamber ruled against raising the matter on appeal [...]. Yet, this is a relevant and serious issue. Failure by counsel imposed on Appellant to raise it occasioned a miscarriage of justice for the Appellant, who was deprived of a ground that could be relied upon for a stay of proceedings.[655]

360. In sum, Akayesu attempts to rely on this alleged failure to sustain his second Ground of Appeal, while alleging the opposite in support of the present ground. However, although this contradiction is not sufficient to justify the Appeals Chamber refusing to consider the issue, the Appeals Chamber notes the selective manner in which Akayesu presented the issue. Consequently, for the reasons stated below, the Appeals Chamber must first determine whether this issue was raised before the Trial Chamber.

361. It is well established by now that proceedings before the Appeals Chamber do not constitute a trial *de novo*.[656] On the contrary, a party is under an obligation to formally raise with the Trial Chamber (either during the trial or pre-trial,[657]) any issues that require resolution. A party "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*."[658] If a party raises no objection to a particular issue before the Trial Chamber (though all things considered it could reasonably have done so), in the absence of special circumstances the Appeals Chamber will find that the party "has waived his right to adduce the issue as a valid ground of appeal."[659]

362. During the Hearing on Appeal Akayesu submitted that the Prosecution's arguments as to waiver should be rejected, as the Appeals Chamber had already decided to grant the Motion to Rectify and "to allow [him] to plead on the merits with respect to the amended Notice of Appeal."[660] This is not the case. In the light of the Motion to Rectify which had been filed, particularly, at such a late stage, the Appeals Chamber permitted the parties to submit during the Hearing on Appeal both on the Motion to Rectify itself and on the merits of the proposed ground of appeal. At no point did the Appeals Chamber find that Akayesu had satisfied it that the issues raised in this ground of appeal had been properly brought before the Trial Chamber, such that the Appeals Chamber had erred in its Decision of 22 August 2000. This preliminary issue remained to be

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[653] The Prosecution asserts that "[w]ithout reference to any evidence the Appellant alleges that despite his instructions, his former Counsel did not file any motion concerning alleged violations of his rights during his detention in Zambia. The Prosecution submits that the Appellant failed to prove that any instructions were given and for this reason these allegations should be rejected". Prosecution's Response, para. 4.23.

[654] Akayesu's Reply, para. 44.

[655] Akayesu's Reply, paras. 45 and 46.

[656] *Celebici* Appeal Judgment, para. 724; *Furundzija* Appeal Judgment, para. 40; *Tadic* Decision (additional evidence), paras. 41 and 42.

[657] The ICTY Appeals Chamber has found that a party validly raises an issue, such that he or she rebuts an allegation of waiver, if it is raised either during the trial or pre-trial phase: *Furundzija* Appeals Judgment para. 174: "[The Appellant] could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On that basis, the Appeals Chamber could find that the Appellant has waived the right to raise the matter now and could dismiss his ground of appeal."

[658] *Tadic* Appeal Judgment, para. 55, cited in *Kambanda* Appeal Judgment, para. 25.

[659] *Kambanda* Appeal Judgment, para. 25. *See* also *Aleksovski* Decision , para. 20: "...no such complaint was made to the Trial Chamber...and it should not be permitted to be made for the first time on appeal." *Celebici* Appeal Judgment, para. 640.

[660] T(A), 2 November 2000, pp. 56 and 57.

resolved before the Appeals Chamber could consider the merits of the arguments put forward. In other words, did Akayesu, as he asserts, raise these issues before the Trial Chamber such that he did not waive the right to raise them on appeal?[661]

363. The Appeals Chamber will address this preliminary issue by considering successively the two limbs of this ground of appeal as put forward by Akayesu, to wit, violation of the right to be charged promptly and violation of the right to be informed of the nature of the charges.

(a) Violation of the right to be promptly charged

364. The Appeals Chamber finds that Akayesu's submissions are misplaced in this respect.

365. Akayesu relies on a preliminary motion filed on 27 May 1996 ("the Preliminary Motion")[662] and the subsequent hearings held before the Trial Chamber on 26 and 27 September 1996 as evidence that this issue was raised before the Trial Chamber.[663] It is not in dispute that Akayesu filed the Preliminary Motion, but contrary to his assertions, the Appeals Chamber finds no evidence to suggest that the particular issue raised in this ground of appeal was brought before the Trial Chamber. Akayesu's submissions in this proposed ground of appeal,[664] revolve around the allegation that the provisions of Rule 40 of the Rules, as worded at the time, were violated by his detention in Zambia at the behest of the Prosecution from 22 November 1995 (when the Prosecution requested the Zambian authorities to detain Akayesu (and others) provisionally under Rule 40 of the Rules), until confirmation of the Indictment on 16 February 1996, and his initial appearance on 30 May 1996.[665] Akayesu submits that a correct interpretation of this Rule meant that the Tribunal could only legally detain him for 20 days.[666] Therefore, after 9 December 1995, his detention was illegal.[667]

366. The Appeals Chamber finds that although Akayesu did raise certain issues concerning his arrest and detention as part of the Preliminary Motion, at no time did he raise concern regarding his

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[661] In this connection, during the Hearing on Appeal, the Appeals Chamber observed that "The initial question here is as to the admissibility of the ground. You raised with the Appeals Chamber a question of the legality of the detention of your client, and the Appeals Chamber granted your motion for inclusion of appropriate ground. This was done on the basis of your contention that the issue had been raised in the law of court (sic). So it becomes important, if not imperative, to scrutinize the arguments in the court below to see what were the grounds which were presented, because those are the grounds which will control the scope of the leave which this Appeals Chamber granted to you to raise this point". T(A), 2 November 2000, p.75.

[662] Preliminary Motion filed by Akayesu, on 27 May 1996, attached as exhibits 2 and 3 to Akayesu's Motion to Rectify (titled "conclusions").

[663] The Prosecution filed its response on 5 September 1996: *Réponse à la requête en exception préjudicielle introduite par la défense,* attached as exhibits 4 and 5 to the Motion to Rectify.

[664] Akayesu's Brief, Chapter 1, paras. 22 to 44. See, para. 42: "In the submission of the Appellant the period of time which he spent in custody, prior to confirmation of the indictment, was in violation of legal norms governing provisional detention of suspects under international law." See also, para. 44: "The Appellant submits that the Prosecutor unlawfully extended his custody in Zambia and that he could not detain the Appellant in such a manner under the pretext that investigations were yet to be completed and that he was not in a position to charge the Appellant. To avoid detaining Appellant unlawfully, the Prosecutor should have released the Appellant. No system of administration of justice should allow a Prosecutor to assume such broad powers as to deprive any detained person of his basic rights".

[665] T(A), 2 November 2000, p. 56.

[666] T(A), 1 November 2000, pp. 101 to 104.

[667] Akayesu's Brief, Chapter 1, para. 32.

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detention at the behest of the Prosecution and at no time did he allege that the Prosecution had violated Rule 40 of the Rules, as he argues now in his Brief.[668]

367. The Preliminary Motion was argued on 26 September 1996.[669] Here again, in the transcripts of the hearing, the Appeals Chamber finds no evidence of the fact that this particular issue was raised.[670] The Preliminary Motion was rejected in an oral decision rendered by the Trial Chamber the following day, 27 September 1996. It is important to recall here the intent of the Trial Chamber's Decision:

> During the oral presentation of his motion [...] the Counsel for the Defence departed significantly from his written submission and limited himself to raising a number of complaints regarding the conditions of detention [...] in custody in Zambia and the delay in communicating the indictment and the supporting material to him.
>
> The Chamber does not wish to contend the fact that the suspect was arrested by the Zambian authorities upon a request or a suggestion presented through the Rwandan Embassy in Pretoria, nor is the Chamber inclined to deny the possibility that the detention facilities in Lusaka may have been inadequate. Both objections, however, are beyond the realm of the Tribunal's competence.
>
> [···]
>
> **Having also heard** the oral arguments of the Prosecutor, [...].
> [...]
>
> Having then heard the pleading of the Defence in the cause of the hearing of this motion held on 26 September 1996, during which, however, the Counsel for the Defence limited himself in essence to raising complaints about the conditions of custody in Zambia and delays in communicating the indictment and the supporting material to him.
>
> [...][671]

368. In both filings seeking rectification of the Decision of 22 August 2000 (Motion to Rectify and Response to the Motion to Rectify) and during the Hearing on Appeal, Akayesu attempted to convince the Appeals Chamber that this matter had been raised before the Trial Chamber. Akayesu, in particular, sought to persuade the Appeals Chamber that arguments put forward in this ground of appeal had been raised in the Preliminary Motion. He submited that although it may not have been clear, the information was indeed before the Trial Chamber and it reached its decision based on it.[672]

369. The Appeals Chamber finds that the Preliminary Motion did not address the first issue raised in this ground of appeal, that is, the lawfulness of Akayesu's detention based on the interpretation of Rule 40 of the Rules in force at the time and the allegation that his detention

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[668] In the Motion, Akayesu argued: (in general) violation of the right to be notified of the charges against him; that neither he nor his lawyer had access to documents concerning his arrest and charges; that he had been arbitrarily arrested by the Zambian authorities; that he had been inhumanely treated in the detention centre in Lusaka central prison; that he was denied access to counsel while in detention in Lusaka and that the decision to transfer him to the Tribunal should not have been taken in his absence. In addition, he applied for the exclusion of certain evidence and alleged that his right to a fair and public trial by an independent and impartial court has been disregarded.

[669] T, 26 September 1996, pp. 10 to 39 (Akayesu) and pp. 39 to 45 (Prosecution).

[670] Akayesu submitted during the hearing: "The third problem [...] is the way in which...Akayesu was arrested in Zambia." Akayesu refers then to the letter requesting Akayesu's arrest from the Rwandan authorities. T, 26 September 1996, pp. 18 and 19.

[671] *Decisions on the Preliminary Motions presented by the Prosecution and the Defence*, before Trial Chamber I, 27 September 1996, p. 3 (emphasis added).

[672] T(A), 2 November 2000, pp. 57 to 65. Akayesu interprets the Motion, the Prosecution's Response to the Motion and oral argument by his Counsel on 26 September 1996, as effectively arguing at trial, the issue raised in the proposed ground of appeal. See also, T(A), 2 November 2000, p. 77.

exceeded the alleged statutory twenty-day limit. On the contrary, the Preliminary Motion raised more general complaints regarding his conditions of detention and the circumstances of his arrest.[673] Similarly, during the hearing on the Preliminary Motion, on 26 September 1996, Counsel for Akayesu did not raise this point as one of the issues in contention.[674] During the Hearing on Appeal, the Appeals Chamber specifically asked Counsel for Akayesu to direct it to the relevant part of the Record on Appeal which supported his submission that the matter had been raised before the Trial Chamber.[675] In particular, the Chamber asked him: "[I]s there anything in the citations which you have used which shows that Mr. Scheers presented to the Trial Chamber an argument to the effect that the provisional detention in Zambia exceeded the temporal limit specified in Rule 40?"[676] Counsel for Akayesu eventually conceded that there was not.[677]

370. The Appeals Chamber finds that Akayesu did not raise this matter before the Trial Chamber. In addition, Akayesu wrongly asserted in the Motion to Rectify that he had raised the matter. As a result, the Appeals Chamber finds that he has waived his right to raise it now on appeal.

(b) Violation of the right to be informed of the nature of the charges against him

371. Akayesu alleges that this issue was also properly raised before the Trial Chamber and that, therefore, he has not waived his right to raise it now on appeal.

372. Akayesu submits that his right to be promptly informed of the nature of the charges against him was violated. He submits that it was not until 29 March 1996, or six weeks after the indictment had been confirmed that he was informed of the cause for his arrest and of the charges against him, even though he had learned on three occasions that his detention was linked to events in Rwanda. Thus, his right to be promptly informed was violated.[678] Akayesu submits that he was only transferred to the Tribunal three and a half months after confirmation of the Indictment, in violation of Article 19 of the Statute.[679] In addition, he contends that he made his initial appearance six months after the Prosecution filed its motion under Rule 40 of the Rules and three and a half

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[673] As pointed out by the Prosecution "the issues raised in the [Motion] are not the same as those raised in [Akayesu's] additional Ground of Appeal." Prosecution Response to the Motion to Rectify, para. 13. *See* also, Trial Judgment, para. 14.

[674] The Appeals Chamber notes that the Prosecution submitted that it had stated in their response to the Preliminary Motion, the facts regarding the motion they filed under Rule 40. The Prosecution submits that although the matter was brought to the attention of the Trial Chamber, Akayesu could not rely on the Prosecution to bring up a ground of appeal if, for its part, he has not in one way or the other at least put forward some arguments in support of this ground. The Prosecution submits that Akayesu "cannot rely on the prosecutor bringing up an issue for his appeal if he has not, in some way or other, at least made some arguments on that issue". T(A), 2 November 2000, p. 50. The Appeals Chamber agrees that Akayesu cannot rely on the fact that the Prosecution had allegedly raised the issue before the Trial Chamber and holds that, in any case, Akayesu failed to further develop the material within the context of arguments worthy of the name. The Prosecution simply stated the information when it summarized the events.

[675] *See,* question asked by Judge Shahabuddeen during the Hearing on Appeal, T(A), 1 November 2000, pp. 245 and 246 and 2 November 2000, pp. 73 to 78.

[676] T(A), 2 November 2000, p. 74.

[677] T(A), 2 November 2000, pp. 74 and 76 to 78: "The argument raised by Mr. Scheers did not explicitly deal with the legality, whether there were 90 days in Rule 40....Mr. Scheers simply stated that it was illegal....I recognise that Mr. Scheers was not clear....The Prosecutor was very clear, and the Court weighed the arguments and applied the law."

[678] Akayesu's Brief, chapter 1, para.45. T(A), 1 November 2000, pp.106 to 107.

[679] Akayesu's Brief, Ch. 1, paras. 46 - 47. Akayesu submits that during his detention he was denied the right to be informed promptly of the general nature of the charges against him and that following the confirmation of the indictment, he was not immediately informed of the charges held against him.

months after he had been arrested and charged in accordance with the relevant provisions of the Statute and Rules.[680] Akayesu submits that whether he is considered as a suspect (detained since 22 November 1995) or as an accused (detained from 16 February 1996) he was informed only on 29 March 1996 of the legal and factual bases of his detention and the charges against him. Consequently, his right to be promptly informed was violated.[681]

373. The Prosecution submits that Akayesu was clearly aware of at least the nature of the charges against him. It recalls that Akayesu has himself conceded that he was informed "if not on the precise charges against him, then at least of the nature of the charges."[682]

374. Here again the Appeals Chamber finds that this issue was not raised before the Trial Chamber. In his Preliminary Motion, Akayesu had alleged that he had been detained as a result of a request by the Rwandan authorities and that "at no time [was he]...notified of the reasons for his arrest; it was rather during his interrogation on 10 and 11 April 1996 at the Lusaka Prison that [he]...was informed of the charges against him."[683] During the hearing on 26 September 1996, Akayesu reiterated this allegation and submitted that it was after seven months "that he knew or at least his counsel knew what the charges were that were brought against him"[684] In addition, Akayesu submits that he was served with the Indictment only on 30 May 1996.[685]

375. The Appeals Chamber finds no evidence that the specific facts and arguments cited in this limb of the ground of appeal were, as asserted by Akayesu, raised before the Trial Chamber. The submissions made at the time did not allege any error on the part of the Prosecution such as is being raised now before the Appeals Chamber. Rather, Akayesu confined himself to a general allegation that he had not been informed of the cause for his arrest, presumably as a result *inter alia* of an error by the authorities of Zambia. No clarification was provided thereon during the hearing of 26 September 1996. As a result, the Appeals Chamber finds that in this case too Akayesu has waived his right to raise this issue on appeal.

3. Conclusion

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[680] Akayesu's Brief, Chapter 1, para. 48. Akayesu submits that the right to be brought promptly before the Tribunal is guaranteed in both international human rights norms and before the Tribunal and that the period of time in question here clearly violates these norms. He submits that in *Barayagwiza*, the Appeals Chamber clearly confirmed the right to be informed of charges during the period of initial detention. Akayesu's Brief, paras. 51 and 52.

[681] Akayesu's Brief, Ch. 1, para. 51.

[682] T(A), 2 November 2000, p. 43 to 45. The Prosecution submits that Akayesu conceded that he knew even before the Rule 40 Request of 22 November 1995, that the Tribunal was interested in his case and that he himself has referred to a letter dated 31 October 1995 from the Prosecution of the Tribunal. In addition, he was aware of the decision of the High Court of Zambia of 1 February 1996 - it is clear from that decision that the whole issue of transfer to the Tribunal occupied the mind of the High Court. Finally, it is clear that Akayesu met with a former chief of investigations of the Tribunal at the start of February 1996. As to the allegation of late service of the Indictment, the Prosecution submits that the Indictment was confirmed on 16 February 1996 and served on the Zambian authorities on 8 March 1996 to be later served on Akayesu. Although Akayesu alleges that he received the Indictment late March 1996, the Prosecution submits that this can be through no fault of theirs.

[683] The Motion, para. B.2. He goes on to allege "even his Counsel has still not received a copy of the Indictment or of any subpoena served to the defendant and informing him formally of the charges made against his client."

[684] T, 26 September 1996, p. 16.

[685] T, 26 September 1996, pp. 15 to 17). In its oral decision on 27 September 1996, the Trial Chamber stated that "there ha[d] been apparently some delay in communication of the indictment and the supporting material in French to the Counsel for the Defence. The Office of the Prosecutor, however, is not bound by any specific time-limit in the Rules save the provision in Rule 66 that it shall be done as soon as practicable."

376. Akayesu was convicted and sentenced by the Trial Chamber on 2 September 1998 and 2 October 1998 respectively. Neither in the first Notice of Appeal filed by Akayesu himself nor in the second Notice of Appeal filed by Akayesu's Counsel was the question of the lawfulness of detention raised in the terms stated above. Although Akayesu filed several requests for leave to amend his Notice of Appeal during the course of 1999,[686] only on 7 December 1999 did Akayesu seek leave to amend his Notice of Appeal to add a ground of appeal challenging the legality of his detention.[687] Such a request may have been prompted by the Appeals Chamber's 3 November 1999 Decision in the matter of Jean-Bosco Barayagwiza.[688] Akayesu's request was denied by the Appeals Chamber in its Decision of 22 August 2000 on the grounds that the issue raised therein had not been raised at first instance. In his Reply, Akayesu seems to rely partly on this fact to show the incompetence of his Counsel. In the Motion to Rectify, Akayesu asserted that the issue had been raised at first instance and that the Appeals Chamber had erred on this point in its Decision of 22 August 2000. However, he has failed to show that this was so. The Appeals Chamber sees no reason to depart from its finding on this issue as reflected in its Decision of 22 August 2000 and finds accordingly that there is no cause for it to consider further the issues raised in this ground of appeal.

377. The Appeals Chamber denies the Motion to Rectify and upholds its Decision of 22 August 2000 denying leave to add this ground of appeal.

K. Eleventh Ground of Appeal: Appeal Against Sentencing Judgment [689]

378. In his appeal against the Sentencing Judgment, Akayesu raises three separate issues, which are referred to as grounds of appeal against the sentence in the relevant Notice of Appeal. For the purposes of this Section, the said issues shall be referred to as "sub-grounds of appeal against the sentence."[690] The first two sub-grounds of appeal against the sentence relate to alleged violations of Akayesu's rights during the pre-sentencing hearings held on 28 September 1998 and 2 October 1998, while the third sub-ground is a general allegation challenging the sentence imposed by the Trial Chamber. In his Notice of Appeal Against the Sentence, Akayesu prayed the Appeals Chamber: (1) to declare that the Trial Chamber acted illegally and without jurisdiction in its sentencing proceedings; (2) to join the sentence appeal to the pending appeal on the convictions;

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[686] Most of these requests were disposed of in the Decision of 24 May 2000.

[687] Motion to amend the notice of appeal on the impartiality and independence of the Tribunal and to add new grounds of appeal, filed on 7 December 2000, as reflected in consolidation or summary of motions not yet disposed of (in execution of the Scheduling Order dated 24 May 2000), filed on 2 June 2000.

[688] *Jean-Bosco Barayagwiza v. The Prosecutor, Decision*, Case No. ICTR-97-19-AR72, 3 November 1999. Akayesu acknowledges that this decision led him to apply for leave to add this ground of appeal. "The Appellant applied diligently to amend his Notice of Appeal on November 30, 1999 following the well-known November 3, 1999 Appeals Chamber decision...that established important new precedent in the area of illegal detention, *habeas corpus* and the right on an accused person to be informed of the charges against him." Notice to Rectify, para. 8. In the same vein, his initial request made reference in general to the development of "...". Motion to amend the notice of appeal on the impartiality and independence of the Tribunal , filed on 7 December 1999, para. 24. In the motion for consolidation, the Counsel stated that they had scrutinized the Decision. Consolidation or summary of motions not yet disposed of (in execution of the scheduling order dated 24 May 2000), filed on 2 June 2000, para. 35.

[689] See Annex B.

[690] The Appeals Chamber notes that in his Notice of Appeal Against the Sentence, Akayesu presents the background to the concerns raised, in relation to what he alleged to be a continuous violation of his fundamental rights by the Tribunal's Administration (paras. 27 *et seq*). His allegations reiterate concerns about the assignement of Counsel, citing firstly a letter dated 18 September 1998 from Akayesu to the Registrar of the Tribunal. In addition he refers to these facts in Chapter 15 of his Brief.

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and (3) if the appeal on the conviction is rejected, to reduce considerably the sentence on all counts.[691]

379. In his Notice of Appeal Against the Sentence, Akayesu set out the following sub-grounds of appeal:

> First ground of appeal against the sentence:
>
> The Appellant was deprived of his fundamental rights to defence by an attorney at the sentence hearing on 28 September 1998. He requested an attorney and was wilfully deprived of this fundamental right by the Tribunal. The Tribunal lost all jurisdiction to deal with the Appellant as a result of its most unconscionable behaviour.
>
> Second ground of appeal:
> On 2 October 1998, the Tribunal illegally deprived the Appellant of his right to address the Tribunal. Its unconscionable actions once again confirm the loss of all jurisdiction and moral authority.
>
> Third ground of appeal:
> The sentence is unreasonable and unwarranted.[692]

1. Akayesu's preliminary prayer

380. Before considering the merits of these sub-grounds of appeal against the sentence, it is necessary to review a preliminary prayer of Akayesu's.

(a) Arguments of the parties

381. Akayesu prays the Appeals Chamber to consider his appeal on the merits separately from his appeal against the sentence. He submits that if the Appeals Chamber dismisses his appeal against the merits, a full hearing relating to his appeal against sentence will be required, which would afford him an opportunity to seek admission of additional evidence and leave to file further submissions regarding his sentence.[693]

382. The Prosecution submits in response that such a separation of proceedings has never been the practice of the Appeals Chamber and that the Rules do not provide for such "bifurcation" in the appeals proceedings.[694] It submits that there is no precedent in the practice of the Tribunal for allowing the separation of the appeals proceedings on the merits and the appeal proceedings on the sentence.[695] The Prosecution notes that although the Rules, earlier on, provided for a Trial Chamber first rendering its findings on the merits and subsequently handing down the sentence, the Rules were amended in June 1998 to allow the Judgment on the merits and the Sentence to be delivered at the same time. So the said amendments were already in force when the Judgment and Sentencing

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[691] Notice of Appeal of Sentence, Prayers.
[692] Notice of Appeal of Sentence, para. 24.
[693] Akayesu's Brief, Chapter 14, para. 7 and Chapter 15, para. 5, Akayesu's Reply, para. 137. Akayesu provided no detailed argument in support of his third sub-ground of appeal (where he claims that the sentence was unreasonable and unwarranted). He reserves the right to present arguments regarding the determination of the sentence and the fact that he was detained for six months before his initial appearance. Regarding this latter prayer, it should be remembered that Akayesu's allegations concerning his unlawful detention were addressed by the Appeals Chamber in its consideration of the tenth Ground of Appeal (See *supra*).
[694] Prosecution's Response, para. 15.3.
[695] Prosecution's Response, para. 15.3.

were rendered and when Akayesu filed his appeal.[696] The Prosecution recalls that Akayesu himself had, in his Notice of Appeal of Sentence, asked the Appeals Chamber to join the sentence appeal "to the pending appeal on the convictions."[697] The Prosecution submits that Akayesu would not suffer any prejudice from joint proceedings on both appeals and that his request for a separate appeal proceeding on his appeal against the sentence should be dismissed.[698]

(b) Discussion

383. The Appeals Chamber notes, firstly, that in his Notice of Appeal against Sentence, Akayesu specifically requests the Appeals Chamber "... to join the sentence appeal to the pending appeal on the convictions...";[699] and that if the appeal on the conviction is rejected, the Appeals Chamber should "...[reduce] considerably the sentence on all counts."[700] In the opinion of the Appeals Chamber this request suggests *prima facie* that the Appellant prays the Appeals Chamber to consider both appeals as one.[701]

384. There is no explicit provision in the Rules of Procedure and Evidence, nor in the Statute which allows for a separate consideration of appeals on the merits and appeals against sentence. Infact, the Rules provide a specific time-limit for the parties to file their briefs. More specifically, under the Rules the Appellant shall file his or her Appellant's Brief within 90 days of the Notice of Appeal, which Appellant's Brief shall contain "all the arguments and authorities."[702] There is no provision in the Rules for a separate filing or filing within a separate time-limit of the Appellant's Brief relating to sentence. Rule 111 cannot be construed as meaning that once a Notice of Appeal against Sentence is filed, the Appellant's Brief may not include submissions on the appeals against sentence. Of course, time-limits under the Rules may always be extended by way of a motion for that purpose. In such cases, the moving party shall have to show good cause. [703] Akayesu did not call the attention of the Appeals Chamber to any such request. [704]Furthermore, it is the opinion of the Appeals Chamber that none of the arguments set forth in the above-mentioned Appeal Briefs could be viewed as a motion for extension of time-limits, all the more since no such motion was filed and no good cause shown.

385. It is the opinion of the Appeals Chamber that, to a certain extent, Akayesu advanced, both in his filings and during the hearing on appeal, arguments on the issue raised by what it characterized as the first sub-ground of Appeal in his Appeal against the Sentence.[705] Morever, the Appeals

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[696] Prosecution's Response, para. 15.5 to 15.7.
[697] Prosecution's Response, para. 15.7.
[698] Prosecution's Response, paras. 15.8 and 15.9.
[699] Notice of Appeal of Sentence, Prayers.
[700] Notice of Appeal of Sentence, Prayers.
[701] The Appeals Chamber also notes that another significant fact is that Akayesu included these grounds of appeal in what he referred to as "Consolidated Notice of Appeal", attached to his Brief. Akayesu's Brief, Introduction, para. 5
[702] Rule 111 provides that: "An Appellant's brief shall contain all the arguments and authorities. It shall be filed with the Registrar and served on the other party within ninety days of the notice of appeal pursuant to Rule 108 (As amended during the fifth plenary session of 8 June 1998).
[703] Rule 116 of the Rules provides that "The Appeals Chamber may grant a motion to extend a time-limit upon showing of good cause.
[704] In the Scheduling Order of 24 May 2000, the Appeals Chamber had ordered the parties to file their Appellant's Brief under Rule 111 of the Rules by 10 July 2000.
[705] In particular, during the hearing on appeal, it was not mentioned anywhere that the arguments relating to that ground of appeal should be considered merely as preliminary arguments, pending another hearing on the matter. In the Prosecution's Response, it is asserted that Akayesu's arguments on this issues "seem directed towards the request for a bifurcation of the Appeal procedure ..." Prosecution's Response, para. 15.11. Nevertheless, the Appeals Chamber finds that in reality, Akayesu seemed to be discussing the merit of this sub-ground of appeal against the sentence.

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Chamber confirmed that Akayesu filed a Notice of Appeal against the sentence at the beginning of the hearing on appeal. The Appeals Chamber had set a time-limit for Akayesu to orally present arguments in support of all his grounds of appeal, including his ground of appeal against the sentence.

386. The Appeals Chamber recalls that it has heretofore been the practice of the Appeals Chamber to consider both appeals against the merits and appeal against the sentence at the same time.[706] The consideration of an appeal lodged against a sentence has been withheld only once in a case before ICTY.[707] However, the Appeals Chamber notes that that was due to special circumstances which cannot be compared to those invoked in the instant case. Indeed, in that case, the Appellant had appealed from both the the Trial Chamber's Judgment and the sentence imposed by the Chamber. Having substituted findings of guilty for acquittals on certain counts, ICTY Appeals Chamber deemed it appropriate to withhold a ruling on the appeal against the sentence pending the outcome of the sentencing proceedings before a Trial Chamber on the new counts.[708]

387. The Appeals Chamber sees no reason to depart from the procedure set out under the Rules and the time-limits prescribed there under. It was incumbent upon Akayesu to exercize diligence and to file on time his submissions as part of his Appellant's brief. Consequently, the Appeals Chamber will proceed with a consideration of the issues brought before it, taking into account the arguments contained in Akayesu's written filings or those put by him orally during the hearing on appeal.[709]

2. First sub-ground of appeal against sentence

(a) Arguments of the parties

388. Akayesu submits that his right to be represented by Counsel was violated. He alleges that the right to counsel applies equally to proceedings on the merits and on sentence, and that in that context, he was deprived of the right to be represented by counsel at the pre-sentencing hearing held on 28 September 1998.[710] Akayesu also alleges that although he repeatedly requested assistance of counsel,[711] the Trial Chamber denied his requests and took issue with him for having waited until the sentencing hearing to request assignment of a new counsel.[712] He submits that as soon as he requested assistance of Counsel, the Trial Chamber should have adjourned the pre-sentencing hearing until such time as counsel was assigned to him.[713] However, the Trial Chamber

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[706] Appeal Judgments in *Furundzija, Celebici*, *Kambanda* and *Aleksovski.*
[707] *Tadic* Appeal Judgment.
[708] *Tadic* Appeal Judgment. Disposition. It should also be recalled that in the *Celebici* Appeal Judgment the issue of the sentence was deferred to a new Trial Chamber to be designated by the President. Also in that case, all the parties concerned had lodged appeals against sentence before the Appeals Chamber, which had ruled on the merits of the grounds of appeal against the sentence, but had left it to the discretion of a Trial Chamber, yet to be designated, to adjust the sentence to the new findings. *Celebici* Appeal Judgment, Disposition.
[709] See also *Kambanda's* Appeal Judgment, para. 97.
[710] Akayesu's Brief, Chapter 14, para. 7.
[711] *Ibid*, para 4. Akayesu submits that "he complained unequivocally about the absence of Counsel."
[712] *Ibid*, para. 4. Akayesu submits in this connection that the Trial Chamber seems to have forgotten that a 30-day time-limit is prescribed for the filing of a Notice of Appeal and that his Counsel had abandoned him. Akayesu submits that during the pre-sentencing hearing, he clearly requested repeatedly that he needed the services of counsel. See Akayesu's Reply, para. 137. See also Transcript (A), 1 November 2000, pp.93 and 94.
[713] Akayesu's Reply, para. 137. Akayesu submits that during the hearing he again complained that he could not adequately respond to the Prosecutor's submissions without counsel. See Akayesu's Brief , para. 137. See also Transcript (A), 1 November 2000, p. 94 where Akayesu submits that as a result of failure to adjourn the hearing the sentencing proceedings was fatally flawed.

did nothing and Akayesu submits that what transpired subsequently suggested that he had waived his right, whereas this was the result of a free choice.[714] Akayesu claims that if he had been assisted by Counsel, he would have been able to call defence witnesses and, furthermore, request the Trial Chamber to take account of the fact that he had been detained unlawfully, an issue that he had raised at the hearing held on 26 September 1996.[715] Lastly, Akayesu asserts that while the Presiding Judge wished to assign him duty counsel, that was not what he wanted.

> It's not that Akayesu wanted Counsel that he had confidence in, and he wanted a permanent Counsel. Another time Mr. Akayesu had already requested the assignment of Mr. Philpot, and Judge Kama, instead of reacting to the letter of Mr. Akayesu, was proposing to him the duty Counsel, for some hours. That is not exactly what the Appellant wanted.[716]

389. The Prosecution submits that Akayesu misrepresents what took place both prior to and at the pre-sentencing hearing on 28 September 1998.[717] Contrary to Akayesu's submissions, the Prosecution submits that it was rather the Presiding Judge who "was forcing" Akayesu to agree to be assigned Counsel.[718] He was not preventing Akayesu from having a Counsel.[719] After summing up the proceedings of that day, the Prosecutor submits that "there can be no doubt that ...[Akayesu]was informed that he could be assisted by Counsel if he so wished."[720] However, Akayesu "positively chose to make his own submissions on the question of sentence,"[721] and "voluntarily waived his right" to be represented at the pre-sentencing hearing.[722]

390. The Prosecution further submits that given his status and position in society, together with the fact that he was "responsible for the execution of laws and regulations and the administration of justice,"[723] Akayesu must certainly have "appreciated the consequences of a decision to waive counsel."[724] The Prosecutor submits that this is further exemplified by the fact that Akayesu was clearly familiar with the law and made detailed submissions on his own behalf during the pre-sentencing hearing in mitigation of sentence.[725] The Prosecution observes that Akayesu "displays a kind of knowledge, which cannot be ascribed to a lay person"[726] and submits that the instant appeal against sentence "is frivolous, [and] should be dismissed."[727]

(b) Discussion

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[714] Transcript (A), 1 November 2000, p. 187. The Prosecutor "suggest a waiver by Mr. Akayesu."
[715] Akayesu's Brief, Chapter 15, para. 7.
[716] Transcript(A), 1 November 2000, p. 190.
[717] Prosecution's Response, para. 15.12.
[718] Transcript(A), 1 November 2000, p. 164.
[719] Transcript (A) , 1 November 2000, p. 164.
[720] Prosecution's Response, para 15.18.
[721] *Ibid.*
[722] Prosecution's Response, paras. 15.13 to 15.18; Transcript (A), 1 November 2000, pp. 164 to 169.
[723] Prosecution's Response, para 15.20. The Prosecutor submits that 'a person in his position, that is one executing laws and administering justice must necessarily be acquainted with fundamental notions such as rights of accused individuals.
[724] Prosecution's Response, para. 15.21. The Prosecution submits that "in the circumstances of this case interest of justice did not require the Appellant to be represented by counsel at the pre-sentencing hearing.''
[725] Prosecution's Response, paras. 15.19 to 15.23.
[726] Prosecution's Response, para. 15. 23.
[727] Transcript (A), 1 November 2000, p. 169.

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391. The Appeals Chamber accepts the Prosecution's argument to the effect that Akayesu, misrepresented to a certain extent, the facts relating to the pre-sentencing hearing of 28 September 1998. It is the Appeals Chamber's opinion that contrary to Akayesu's assertions, he waived his right to have counsel present at the hearing and agreed to proceed without assistance of counsel, pleading his own case in favour of mitigation of sentence. A brief reminder of the facts will establish this fact.

392. By a letter dated 18 September 1998, Akayesu requested from the Trial Chamber a change of counsel, which request was granted.[728]

393. At the start of the hearing of 28 September 1998, before hearing the submissions of the parties, the Presiding Judge urged Akayesu to make clear his position on his counsel and to say whether or not he wished to be assisted by counsel at the pre-sentencing hearing. The Presiding Judge remarked as follows:

> The accused has decided once again to change counsel but I have been made to understand that this will - this applies to the appeals stage and I have sent a letter pointing out that, this does not apply to the guilt. I think the guilt has been pronounced, this may probably apply to the sentence. I would like to know your position following the letter that was written by the accused. Jean-Paul Akayesu you have the floor.[729]

394. Akayesu responded: "[...] you yourself have just said that in your understanding, you thought that I had asked that my counsel be changed for the appeal stage. But that was not necessarily so because we are still in the course of trial and I suppose that my trial is ending today, if I am not mistaken."[730] Having asked Akayesu why he had not waited until the end of the trial to request a change of Counsel, the Presiding Judge then stated that Akayesu's Counsel had not appeared at the hearing because they had received an insulting letter from Akayesu.[731] The following exchange ensued:

> [Presiding judge] [...] I am asking you now whether you are in a position to take the floor, so as to talk about mitigating circumstances or we are not coming back to the facts. Your guilt has been pronounced. So, what is your position?
>
> [Akayesu] Since that be the case, Mr. President, in my usual humility, I will take the floor as I can.[732]

395. Immediately after this exchange, the Prosecutor made his submissions on the sentence. The following exchange ensued after his submission:

> [Presiding Judge] Mr. Jean-Paul Akayesu, before I give you the floor, I want you to indicate to the tribunal, if, as I have told you, on behalf of the judges, that you intended yourself to make observations concerning mitigating circumstances, that's up to you. Or whether you wish to have counsel assigned in order to represent you on sentencing? For the appeal, you can see the matter later but we are dealing with the sentencing.
>
> [Akayesu] Mr. President, as you know, I'm I am preparing the appeal, in other words, I need time. I would wish that the hearing of today be adjourned, so that there could be counsel simply for the sentence. I am not well conversant with law, the few words which I have prepared, I can submit to you and we would have then finished with sentencing hearings.[733]

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[728] This letter was addressed in the Decision of 17 April 2000. See also with respect to this point, the Second Ground of Appeal.
[729] Transcript, 28 September 1998, p. 3.
[730] Transcript, 28 September 1998, pp. 4 and 5.
[731] Transcript, 28 September 1998, pp. 5 and 6.
[732] Transcript, 28 September 1998, p. 6.
[733] Transcript, 28 September 1998, pp. 25 and 26.

396. Consequently, the Presiding Judge gave Akayesu the floor to present any likely mitigating circumstances. However, Akayesu immediately began to repeat that his rights continued to be violated since his former Counsel was no longer assisting him and he had been assigned a new Counsel for the hearing.[734] Here again, the Presiding Judge asked him several times whether or not he wished to be represented by Counsel.[735] Finally, Akayesu answered:

> I think I will repeat, I am here for the sentencing and I don't have counsel in these circumstances.[736]

397. The Presiding Judge once again asked him: "[...] Do you not need any counsel?" Akayesu said he did not, [737] then he presented his arguments regarding the sentence. [738] The Appeals Chamber notes that twice during the said presentation, Akayesu mentioned, in passing, that he did not have a Counsel.[739] The Appeals Chamber finds that such brief references do not contradict the repeated assertions by Akayesu that he was happy to continue the proceedings without assistance of Counsel. On the transcripts of the hearing of 28 September 1998, and in particular, the extracts cited above, the Appeals Chamber finds no reason to hold that Akayesu did not voluntarily waive his right to assistance of counsel at that hearing.

398. Lastly, the Appeals Chamber notes that during the hearing on appeal, Akayesu acknowledged that, he had indeed, been offered the services of counsel, albeit not counsel of his choosing, but of duty counsel.[740] The Appeals Chamber confirms, as explained above, that when an accused is found to be indigent, he or she does not have the right to counsel of his own choosing.[741] In this regard, it held in the *Kambanda* Appeal Judgment that "... the right to free legal assistance does not confer the right to choose one's counsel "[742] Such a right is reserved for those who retain

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[734] Akayesu submitted: "[...] I must inform you that I do not know anything in law, nothing concerning procedures and therefore, under normal conditions, it's my counsel, who should have responded to the observations made by the prosecutor. Unfortunately, I am separated before them, a little before this present hearing and no counsel has been assigned to me. In other words, my interests are not being defended. However, I shall [...] " Transcript, 28 September 1998, pp. 26 and 27.

[735] Transcript, 28 September 1998, pp. 27 and 28 [Presiding Judge] " I don't want any confusion here. I have asked you before everyone here, we are talking about the sentencing. Do you want yourself to make your own observations or do you want to be assisted by counsel for the sentencing? And you said that you do not want to lose any time, so that, in order for us to finish today, you are going to defend yourself. So, let's not have a confusion in this matter at all. It's up to you to decide." Akayesu replied: "I would be going to the appeal myself." Still finding the answer unclear, the Presiding Judge asked the question again and stated: "Be clear. Do you want counsel to defend your interest in the matter of sentencing? I want this to be clear or do you want to do this yourself because we are dealing with sentencing here?" Again he said: "[..] Please answer. We must be very clear. What is your position?"

[736] *Ibid*, p. 28.

[737] *Ibid*, p. 28.

[738] *Ibid*, pp. 28 to 42.

[739] *Ibid*, pp. 34 and 35 "Now, Mr. President, I would like to avow sincerely to say that I am unable to adequately respond to the brief presented by the prosecutor, as would have done a professional person. I do not have any counsel. How therefore can I respond to the prosecutor since I do not have the same weapons? He is a lawyer, he is a man of law and very well experienced. He had persons in his assistance during this trial and he has tried to convince you of my guilt. How can I, before such a personality, a bourgmaster by a matter of chance, how can I also show how I can be protecting myself? I do not ---I am only a simple teacher and I could like to say on a few words on the exorbitant demands requested by the prosecutor." Once again, p. 42, Akayesu mentioned "the mitigating circumstances" although he was not able to present them "with the appropriate words and the necessary professionalism as a professional counsel would do."

[740] Transcript (A) 1 November 2000, p. 190.

[741] See Discussion under the first Ground of Appeal.

[742] *Kambanda* Appeal Judgment, para. 33 referring *inter alia* to "a textual and systematic interpretaion of the provisions of the Statute" read in conjunction with the relevant provisions of the Human Rights Committee and the organs of the

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counsel. The Appeals Chamber finds that Akayesu was offered assistance of counsel and positively turned it down.

399. For the foregoing reasons, this sub-ground of appeal against sentence is rejected.

3. Second sub-ground of appeal against sentence

400. Akayesu alleges that on 2 October 1998 he was unlawfully deprived of his right to address the Trial Chamber at the delivery of the Sentencing Judgment. He submits that the Trial Chamber's "unconscionable actions once again confirm the loss of all jurisdiction and moral authority" of the Tribunal.[743] Akayesu never elaborated on this argument, neither in his written submissions[744] nor during the hearing on appeal and the Prosecution, for its part, did not respond thereto either orally or in writing.

401. Accordingly, the Appeals Chamber finds that this sub-ground of appeal against sentence must be rejected and that there is no need to consider it further.[745]

4. Third sub-ground of appeal against sentence

(a) Arguments of the parties

402. Akayesu submits that the sentence is unreasonable and unjustified and that if the appeal on the conviction is rejected, the Appeals Chamber should reduce considerably the sentence on all counts he was convicted on.

403. The Prosecution submits firstly that since Akayesu has not advanced any meaningful argument in support of this sub-ground of appeal against sentence, the Appeals Chamber should reject it out right.[746] At the same time, it submits that, in any case, that general allegation is devoid of merit.[747] In that regard, it submits that the Trial Chamber gave due weight to the relevant provisions of the Statue and the Rules[748] and, considered *inter alia*, the gravity of the offences and the personal circumstances of Akayesu. It is the Prosecution's submission that " the sentence is well-founded in law and that the Trial Chamber committed no discernible error in the exercise of its discretion when it measured the sentence against the Appellant."[749]

(b) Discussion

European Commission on Human Rights....." read in conjunction with the relevant provisions of the Human Rights Committee and the organs of the European Commission on Human Rights.

[743] Akayesu Notice of Appeal Against Sentence, para. 24.

[744] Neither Akayesu's Brief nor his Reply refer to this allegation; the ground is mentioned only in the Brief.

[745] Here, the Appeals Chamber will simply note (without ruling on the matter) that on the transcripts of 2 October 1998, there is nothing to suggest that Akayesu asked to speak before the Trial Chamber or that the Trial Chamber refused such a request. Transcripts, 2 October 1998, pp. 1 to 35.

[746] Prosecution's Response, paras. 15.26 to 15.28. The Prosecution had advanced a similar argument in the submisisons filed in the Kambanda trial. See *Kambanda* Appeal Judgment, para. 96.

[747] Prosecution's Response,paras. 15.29 to 15.33.

[748] Prosecution's Response, para. 15.30.

[749] Prosecution's Response, para. 15.33.

404. As indicated above, the Appeals Chamber has previously considered a similar situation in *Kambanda*: in that case, the Appellant had practically put forward no argument at all in support of his appeal against sentence. The Appeals Chamber found that:

> In the case of errors of law, the arguments of the parties do not exhaust the subject. It is open to the Appeals Chamber, as the final arbiter of the law of the Tribunal, to find in favour of an Appellant on grounds other than those advanced: *jura nova curia*. Since the Appeals Chamber is not wholly dependent on the arguments of the parties, it must be open to the Chamber in proper cases to consider an issue raised on appeal even in the absence of substantial argument. The principle that an appealing party should advance arguments in support of his or her claim is therefore not absolute: it cannot be said that a claim *automatically* fails if no supporting arguments are presented.[750]

405. As in that case, the Appeals Chamber has decided to exercise its discretion to consider this ground of appeal on the merits.

406. For ease of reference, the relevant provisions of the Statute and the Rules are set out below:

Article 23 of the Statute: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 101 of the Rules: Penalties

(A) A person convicted by the Tribunal may be sentenced to imprisonment for a fixed term or the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23 (2) of the Statute, as well as such factors as:

(i) Any aggravating circumstances;

(ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) The general practice regarding prison sentences in the courts of Rwanda;

(iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9(3) of the Statute.

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.

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[750] *Kambanda* Appeal Judgment, para. 98.

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407. In the context of appeals lodged against sentence, ICTY Appeals Chamber has found that:

> Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the overriding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider both aggravating and mitigating circumstances relating to an individual accused. [751]

408. Given the "considerable amount of discretion" vested in the Trial Chamber, the question arises as to what role the Appeals Chamber should play in the consideration of an appeal against sentence, that is in the instant case, the penalty imposed by the Trial Chamber on Akayesu. In this instance, this Appeals Chamber will follow the test which has recently been upheld by ICTY Appeals Chamber as the appropriate test:

> The Appeals Chamber reiterates that "the appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." Appeal proceedings are rather of a corrective nature and, [...] they do not amount to a trial de novo
> [...].
> The test to be applied in relation to the issue as to whether a sentence should be revised is that moist recently confirmed in the Furundzija Appeal Judgment. Accordingly, as a general rule, the Appelas Cahmber will not substitute its sentence for that of a Trial Chamber unless it believes that the Trial Chamber has committed an error in exercising its discretion or has failed to follow applicable law." The Appeals Chamber will only intervene if it finds that the error was "discernible." As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence, the Appeals Chamber will not intervene. [752]

409. Consequently, before the Appeals Chamber is able to revise a sentence or substitute its own sentence for the one imposed by the Trial Chamber, it must be shown that the Trial Chamber ventured outside discretiona in imposing sentence.

410. The Trial Chamber's discretion is, primarily, governed by the Statute and the Rules which contain the general guidelines for a Trial Chamber to take into account in sentencing: "These amount to an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances (including substantial cooperation with the Prosecution), the gravity of the offence, the individual circumstances of the convicted person and the general practice regarding prison sentences in the courts"[753] of Rwanda. In the instant case, it was held that the Trial Chamber "will prefer to lean more on its unfettered discretion each time that it has to pass sentence [...],taking into account the circumstances of the case and the standing of the accused persons."[754] Taken out of context, this holding could be understood as meaning that the Trial Chamber enjoys unlimited discretion. In the opinion of the Appeals Chamber this is a matter of interpretation of the language used by the Trial Chamber and of the context in which the holding was made, which holding should be viewed as a whole. When that is done, it become apparent that the holding did not mean that the Trial Chamber was claiming unfettered power; clearly, the Trial Chamber was aware that it had to take into account the applicable law, the circumstances of the case and the conduct of the accused. Provided it took into account all relevant considerations, the Trial Chamber had wide discretion in sentencing as illustrated by the citation from the Trial Judgment contained in paragraph 412 below.

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[751] *Celebici* Appeal Judgment, para. 717.
[752] *Celebici* Appeal Judgment, paras. 724 and 725, citing respectively (footnote omitted): *Erdemovic* Appeal Judgment, para .15; *Tadic* Decision (Additional Evidence), paras. 41 and 42; *Furundzija* Appeal Judgment, para. 239; *Serushago* Appeal against Sentence Judgment, para. 32; *Tadic* Appeal against Sentence, para. 22; and *Aleksovski* Appeal Judgment, para. 187; *Tadic* Appeal against Sentence, para 20.
[753] *Celebici* Appeal Judgment, para. 716. Although, this applied to ICTY, the provisions in question are indentical to those applicable to theTribunal.
[754] Sentence, para 17. See also para. 21.

411. In the circumstances, the Appeals Chamber must now determine whether, in the instant case, the Trial Chamber considered the relevant factors and took due account thereof. Failing which, it would have committed an error of law. Whether or not said error was such as to invalidate the decision is another matter.[755]

412. In the Sentence, prior to proceeding with its review, the Trial Chamber enumerated the factors or arguments that it intended to take into account. In this connection, the Trial Chamber stated that it would consider the fact that the Judgment had been rendered one month earlier, the offences of which Akayesu was found guilty, the Prosecutor's Brief on the sentence, the submissions made by Akayesu and by the Prosecution at the pre-sentencing hearing held on 28 September 1998, and lastly, the relevant provisions of the Statute and the Rules.[756] This summary was *prima facie* correct.

413. It is equally clear to the Appeals Chamber that, in its review, the Trial Chamber duly considered and took account of the relevant factors. In its Sentence, the Trial Chamber discussed firstly how to interpret the relevant provisions of the Statute and the Rules. The Trial Chamber held, in particular, that "precisely on account of their extreme gravity, genocide and crimes against humanity must be punished appropriately."[757] Indeed, the Trial Chamber was to view the issue of sentencing from this perspective. In that regard, the Appeals Chamber endorses the well-established principle applied by the Appeals Chamber of ICTY whereby "the litmus test for the appropriate sentence is the gravity of the offence."[758] It requires "a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime."[759] It has not been shown that the Trial Chamber shirked its duty to undertake such a review.

414. After defining the legal principles on which it was to rely, the Trial Chamber set out its findings on the merits of the arguments put forward by Akayesu and the Prosecution. The Trial Chamber considered factors in mitigation and aggravation and held that : "the degree of the magnitude of the crime is still an essential criterion for evaluation of sentence. A sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender."[760] The Trial Chamber took into account the fact that "Akayesu consciously chose to participate in the systematic killings that followed in Taba,"[761] and that he was

> [...] the highest Government authority in Taba and as such he was entrusted with the protection of the population and he betrayed this trust. He publicly incited killings in Taba. He also ordered and participated in the killing of a number of people, some of whom were killed in his presence. He also condoned and by his presence and actions, encouraged the rape of many women at the *bureau communal*.[762]

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[755] *Kambanda* Appeal Judgment, paras. 116, 117, 123 and 124.
[756] Sentence, para. 2.
[757] Sentence, para. 10.
[758] *Celebici* Appeal Judgment, para. 731, endorsing the finding in the *Kupreskic* Judgment, para. 852 and cited in the *Aleksovski* Appeal Judgment, para. 182. See also *Kambanda* Appeal Judgment, para. 125.
[759] *Kupreskic* Judgment, para. 852, cited in *Aleksovski* Appeal Judgment, para. 152.
[760] Sentence, paras. 39 and 40.
[761] Sentence, para. 36.
[762] Sentence, para. 36.

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415. Consequently, the Appeals Chamber finds that the Trial Chamber duly considered and took into account the inherent gravity of the crimes Akayesu was convicted of and his degree of responsibility therefor.

416. In considering the factors set out under Article 23(2) of the Statute and Rule 101(B) of the Rules, the Trial Chamber submitted that "it is a matter, as it were, of individualizing the penalty."[763] To the Trial Chamber this meant that "as far as the individualization of penalties is concerned, the Judges cannot limit themselves to the factors mentioned in the Statute and the Rules. Here again their unfettered discretion to evaluate the facts and attendant circumstances should enable them to take into account any other factor they deem pertinent."[764] The Appeals Chamber finds no policy error in this finding. The right to take into account other pertinent factors goes hand in hand with the overriding obligation to individualize a penalty to fit the individual circumstances of the accused, the overall scope of his guilt and the gravity of the crime the overriding consideration being that the sentence to be imposed must reflect the totality of the accused's criminal conduct.[765] The Trial Chamber then turned its attention specifically to the mitigating and aggravating circumstances and to the individual circumstances of the Accused. It recalled the mitigating circumstances invoked by Akayesu during the pre-sentencing hearing held on 28 September 1998 and the counter aggravating circumstances raised by the Prosecution [766] in its brief and in its oral submissions at the hearing of 28 September 1998. The Trial Chamber held that it had "scrupulously examined all the submissions presented by the parties in determination of sentence." It drew the following conclusion therefrom:

> [...] the aggravating factors overwhelm the mitigating factors, particularly in the light of the fact that Akayesu consciously chose to participate in the genocide.[767]

417. The Appeals Chamber finds no error in this analysis. In particular, it has not been shown that the Trial Chamber committed an error of Judgment in according a weight to each of the arguments presented by the parties. Akayesu was individually responsible, under Article 6(1) of the Statute, for genocide, direct and public incitement to commit genocide, and crimes against humanity, all extremely serious crimes. The Appeals Chamber finds that the sentence imposed is proportionate to the gravity of the offences committed and, consequently, remains within the discretion of the Trial Chamber.

418. In light of the foregoing, in its summary of the acts which served as a basis for the counts on which Akayesu was found individually responsible, the Trial Chamber included *inter alia*: killing and causing serious or bodily or mental harm to members of the Tutsi group; aiding and abetting in the commission of acts of sexual violence, including rape and other inhuman acts; addressing a meeting, knowing full well that his utterances would be construed by the people present as a call to kill the Tutsi which touched off widespread killing of Tutsis in Taba; ordering the killing of three people ; ordering the killing of eight refugees, which order was executed in his presence; ordering the killing of five teachers ; as well as the torture of six victims.[768]

419. With respect to this last finding, the Trial Chamber identified the torture victims as Victims U, V, W, X, Y, and Z. Now, the same Chamber had found that the torture of Victim X had not

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[763] Sentence, para. 20.
[764] Sentence, para. 21.
[765] *Celebici* Appeal Judgment, paras. 429 and 771.
[766] Sentence, para. 37.
[767] Sentence, para. 37.
[768] Sentence, para 25

been shown.[769] The question is whether there can be discerned in this instance an error such as would warrant the Appeals Chamber intervening and substituting the sentence imposed by another sentence. Akayesu was sentenced to a term of 10 years of imprisonment for torture, as a crime against humanity. He was also handed three sentences of life imprisonment, four fifteen-year sentences and another ten-year prison sentence for the remainder of the crimes he was convicted of. It is the view of the Appeals Chamber that in light of all of the sentences imposed, the offences Akayesu was convicted of and the totality of his criminal conduct, the erroneous inclusion of Victim X in the brief summary contained in the Sentencing Judgment is not such as to justify a reduction of sentence.

420. Lastly, the Appeals Chamber confirms that Trial Chambers are duty bound to "resort" to the general practice regarding prison sentences in the courts of Rwanda. [770] and to "take account"[771] thereof. Neither the Rules nor the Statute specify to what extent the Trial Chamber must resort to said practice, although there is consistent authority at ICTR that the said provisions "do not oblige the Trial Chamber to conform to that practice; they only oblige the Trial Chambers to take account of that practice."[772] In the instant case, the Trial Chamber considered whether it could rely on the practice in courts of Rwanda. It found rightly, that the said practice "is but one of the factors that it has to take into account in determining sentences," and that, it should be used for guidance but is not binding.[773] The Trial Chamber held that although trials relating the 1994 events had been conducted in Rwanda resulting in death sentences and prison terms on several occasions, it had "not been able to have information on the contents of these decisions, particularly their underlying reasons."[774] Finally, the Trial Chamber recalled that "Rwanda, like all States which have incorporated genocide or crimes against humanity in their domestic legislation, has envisaged the most severe penalties in its criminal legislation."[775]

421. With the exception of the single error referred to above, the Appeals Chamber can discern no error in the Trial Chamber's overall analysis, nor in the sentence imposed on Akayesu (and, besides, none has been pointed to the Appeals Chamber). Such minor error by the Trial Chamber does not suffice to warrant a revision of the trial sentence by the Appeals Chamber.

422. Lastly, the Trial Chamber decided that all the sentences imposed shall be served concurrently and directed that Akayesu serve a single term of life imprisonment (*une peine unique d'emprisonnement à vie* in the French translation of the Sentence). Thus as found in the *Kambanda* Appeal Judgment this is the maximum sentence which may be imposed by the Tribunal, to wit, "imprisonment for [...] the remainder of [...] life" (*emprisonnement à vie*) as provided for under Rule 101 (A) of the Rules.[776] The sentence should be served in accordance with the applicable law of the State in which the convicted person will be detained, subject to the supervision of the Tribunal (Article 26 of the Statute). As a result, the sentence may always be reduced if so provided

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[769] Judgment, paras. 407, 676 to 684 and 713 ("Regarding the acts alleged in para. 17, the Prosecutor has failed to satisfy the Chamber that they were proven beyond a reasonable doubt.)"
[770] Article 23 (1) of the Statute.
[771] Rule 101 (B) of the Rules.
[772] *Serushago*, Judgment on Appeal, para. 30. See also the more recent Judgment of ICTY Appeals Chamber in the *Celebici* case, *Celebici* Appeal Judgment, para. 813.
[773] Sentence, para. 14.
[774] Sentence, para. 15. The reasons why the Trial Chamber had been confronted with such difficulties are unclear , but the Appeals Chamber is not in a position to speculate on the issue.
[775] Sentence, para. 11 and also para. 16.
[776] *Kambanda* Appeal Judgment, footnote 144. As in that case, the original text of the Sentence was drafted in French.

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for under the applicable law of the State and if the President of the Tribunal, in consultation with the judges, so decides (Article 27 of the Statute).

L. Finding on Akayesu's Appeal

423. The Appeals Chamber has considered all the arguments put forward by Akayesu, both separately and in conjunction with each other. The Appeals Chamber finds that Akayesu has failed to show that the Trial Chamber committed any of the errors of fact and law as alleged. Consequently, the Appeals Chamber holds that there is no need for it to consider the Other Issues and the eighty Ground of Appeal. As explained above, Akayesu has failed to fully articulate his grounds of appeal and he concedes that some of these grounds find no support in the evidence and consist, rather, of groundless allegations. As a result, all the grounds of appeal raised in these sections are rejected.

424. Lastly, since Akayesu neither explained nor even mentioned the other grounds of appeal set out in his first and second Notices of Appeal, the Appeals Chamber finds that it must reject them and therefore will not consider them.

IV. PROSECUTION'S GROUNDS OF APPEAL

A. First and Second Grounds of Appeal: Article 4 of the Statute (violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II)

425. The Prosecution raises two grounds of appeal relating to the Trial Chamber's analysis of Article 4 of the Statute. Akayesu was charged with five counts under Article 4 of the Statute and was acquitted on each of the said counts.[777] The first Ground of Appeal alleges that the Trial Chamber erred in law in applying a "public agent or government representative test" in determining who can be held responsible for Serious Violations of Common Article 3 and Additional Protocol II thereto ("the public agent test"). The second Ground of Appeal is raised as an alternative ground of appeal, with the Prosecution submitting that it will only be necessary for the Appeals Chamber to consider it if it rejects the Prosecution's first Ground of Appeal.[778] The Prosecution's second ground, alleges that, having applied the public agent or government representative test, the Trial Chamber erred in fact in finding that Jean Akayesu was not a public agent or government representative who could incur responsibility under Article 4 of the Statute.[779]

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[777] The Indictment charged Akayesu with five counts under Article 4 of the Statute as follows: Count 6 (murder) under Article 4(a) of the Statute; Count 8 (murder) under Article 4(a) of the Statute; Count 10 (murder) under Article 4(a) of the Statute; Count 12 (cruel treatment) under Article 4(a) of the Statute; Count 15 (Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault) under Article 4(e) of the Statute. Akayesu was found not guilty on each of these counts, the Trial Chamber having found that it had not been proved beyond reasonable doubt that the acts perpetrated at the time of the events, were committed in conjunction with the armed conflict, and that it had not been proved beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. *Cf.* Trial Judgment, para. 643.

[778] Prosecution's Brief, para. 1.18.

[779] The second ground concerns the application of the test to the facts of the case. The Prosecution intends to raise the issue of the application of the law and not of errors committed by the Trial Chamber. It submits that "[t]he application

426. As for the remedy sought, the Prosecution moves that with respect to the first Ground of Appeal, the Appeals Chamber set aside the Trial Chamber's findings on this issue. With respect to the second Ground of Appeal, the Prosecution moves the Appeals Chamber to hold that the Trial Chamber erred in applying the public agent test in its factual findings in this case.[780]

1. Arguments of the parties

427. The Prosecutor submits that the Trial Chamber erred in law in finding that for civilians to be responsible for violations of Common Article 3 and Additional Protocol II they must be "legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts".[781] The Prosecutor submits that there is no basis in neither the Statute (nor in the *travaux préparatoires* of the Statute) for the public agent test,[782] and similarly that it is contrary to the object and purpose of the Geneva Conventions and Additional Protocols,[783] as well as International Jurisprudence (including that of ICTY[784]) and Doctrine.[785]

428. With respect specifically to the object and purpose of the Geneva Conventions and Additional Protocols, it is the Prosecution's submission that the Trial Chamber itself indicated that these instruments' primary purpose is "to protect the victims as well as potential victims of armed conflicts".[786] It submits that international case-law and doctrine strongly support the view that humanitarian law "imposes obligations not only upon senior officers of a State's armed forces and the members of its government but all servicemen, whatever their rank, and, indeed, upon the entire civilian population".[787] In the Prosecution's submission the only general requirement under Article 4 of the Statute is "that there exist a link or nexus between the crimes committed and the armed conflict".[788] There is no general requirement that the perpetrator of crimes under Article 4 of the Statute belong to a particular class of persons.[789] Consequently, it submits that "[I]t would be an

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of the [test] ...to *Bourgmetstres* in Rwanda is of general importance to the jurisprudence of the Tribunal as a number of other accused before the Tribunal were *Bourgmestres* at the time of the crimes with which they are charged. It is respectfully submitted that the Appeals Chamber therefore has the inherent power to clarify the application of the Public Agent or Government Representative Test if the test is applicable under the law of the Statute". *Cf.* Prosecution's Brief, para. 1.19.

[780] *Ibid*, paras. 2.42 to 3.23 respectively; T(A), 1 November 2000, pp. 210 to 212.

[781] *Ibid*, para. 2.3; *Ibid*, paras 2.39 to 2.41.

[782] Prosecution's Brief, paras. 2.7 to 3.13. The Prosecution submits that it is clear from the formulation of the Statute and the intention of the Security Council, as set out in its Resolution 955, that any person who meets the conditions provided for in Articles 1, 4, 5, 6 and 7 of the Statute (none of which includes the test in question) may be prosecuted for the violations stipulated in Article 4 of the Statute. The import of the test is therefore contrary to the object and purpose of the Statute.

[783] *Ibid*, paras. 2.14, 2.16.

[784] *Ibid*, paras. 2.28 to 2.36; T(A), 1 November 2000, pp. 206 to 208.

[785] *Ibid*, paras. 2.17 to 2.27, 2.37 and 2.38.

[786] *Ibid*, paras. 2.4, 2.14 to 2.16; T(A), 1 November 2000, pp. 230 to 231. The citation is from the Trial Judgment, para. 630. The Prosecution submits that contrary to the Trial Chamber's holdings, the object and purpose of the Geneva Conventions "require that anyone who commits serious violations of Common Article 3 or Additional Protocol II, be held individually responsible for the crimes if those crimes are related to the armed conflict". Prosecution's Brief, para. 2.16.

[787] *Ibid*, para. 2.37.

[788] *Ibid*, para.2.6.

[789] *Ibid*, para. 2.5.

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aberration" if an ordinary civilian who commits an atrocity in relation to armed conflict would not entail individual criminal responsibility under Article 4 of the Statute.[790]

429. Akayesu submits that the disputed findings of the Trial Chamber must be reviewed within their proper context, and are not those alleged by the Prosecution.[791] He submits that if the Chamber did not to find him guilty under Article 4 of the Statute, it was because it found that it had not been proved beyond a reasonable doubt that the acts perpetrated were committed in conjunction with the armed conflict. The Trial Chamber's holdings on the test were mere *obiter dicta* and were not designed to add a further requirement to Article 4 of the Statute.[792] An analysis of the holdings shows that the Trial Chamber actually admitted that the criminal responsibility of civilians can be considered under Article 4 and hence that "the holdings of the Trial Chamber are more intricate than the Prosecutor would have us believe".[793]

2. Discussion

430. The Trial Chamber found as follows:

> 630. The four Geneva Conventions – as well as the two Additional Protocols – as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. *The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.*
>
> 631. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. *The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts.* The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols.[794]

431. Subsequently, having applied this finding to Akayesu's circumstance to determine whether he could be held individually responsible for the crimes charged under Article 4 of the Statute, the Trial Chamber held that:

> 640. For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of

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[790] T(A), 1 November 2000, p. 211.
[791] Akayesu's Reply, paras. 8(a) and 17 to 24.
[792] Akayesu's Response, para. 8(a); T(A), 2 November 2000, pp. 10 to 13.
[793] T(A), 2 November 2000, pp. 10 to 13. Akayesu also submits that insofar as the Prosecution renounced its ground of appeal relating to the Chamber's main finding on this issue (the Trial Chamber erred in not taking into account the totality of evidence presented at trial, which showed that the acts perpetrated by Akayesu were committed in conjunction with the armed conflict in Rwanda in 1994), this ground of appeal has no legal basis. Cf. Akayesu's Response, para. 25. This ground of appeal was renounced in the Prosecution's Brief, para. 1.13. The Prosecution submits that "if the Prosecution was to be successful on this ground of appeal the likely outcome would be that the matter would have to be remitted to the Trial Chamber. For reasons of judicial economy, the Prosecution – without prejudice to any position the Prosecution may take if the case for other reasons should be remitted to the Trial Chamber – does not wish a re-opening of the case solely on this matter".
[794] Trial Judgment, paras. 630 and 631 (emphasis added).

> hostilities. Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the Chamber recalls that Article 4 of the Statute also applies to civilians.[795]

432. In the opinion of the Appeals Chamber, there is no doubt that the Trial Chamber applied the public agent test in interpreting Article 4 of the Statute, to consider subsequently the particular circumstances of Akayesu's case. While pointing out that the Geneva Conventions and the Protocols have an "overall protective and humanitarian purpose"[796] and consequently, "the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted",[797] the Trial Chamber found that the category of persons likely to be held responsible for violations of Article 4 of the Statute includes "only [...] individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or de facto representing the Government, to support or fulfil the war efforts". The Trial Chamber, held that this approach would allow application of ... in a fashion which "corresponds best with the underlying protective purpose of the Conventions and the Protocols".[798]

433. The issue here is whether this interpretation is consistent with the provisions of the Statute in particular and international humanitarian law in general. To that end, it is necessary, firstly, to review the relevant provisions of the Statute as interpreted by the case-law of the Tribunals and, secondly, the object and purpose of Common Article 3 to the Geneva Conventions.[799]

434. The Appeals Chamber shall firstly recall the provisions of Article 4 of the Statute:

> Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II
>
> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment;
>
> (b) Collective punishments;
>
> (c) Taking of hostages;
>
> (d) Acts of terrorism;
>
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

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[795] Trial Judgment, para. 640.
[796] *Ibid*, para. 631.
[797] *Ibid*, para. 631.
[798] *Ibid*, para. 631 (emphasis added).
[799] Article 31(1) of the Vienna Convention on the Law of Treaties (1969) provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

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(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous Judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

435. Article 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision. It provides only that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed" in particular, serious violations of Article 3 common to the Geneva Conventions. A reading of Article 4 together with Articles 1 and 5 of the Statute respectively relating to the Tribunal's overall competence and personal jurisdiction, sheds no further light on the class of persons likely to be prosecuted under these articles, in particular under, Article 4. Indeed, the said Articles read as follows:

Article 1

[The Tribunal] shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States [...].

Article 5

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present statute.

436. Thus, there is no explicit provision in the Statute that individual criminal responsibility is restricted to a particular class of individuals. In actuality, articles of the Statute on individual criminal responsibility simply reflect the principle of individual criminal responsibility as articulated by the Nuremberg Tribunal.[800] An analysis of the provisions of the Statute is therefore not conclusive. As a result, the Appeals Chamber must turn to the article which serves as a basis for Article 4, to wit, Article 3 Common to the Geneva Conventions, which provides that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

[800] *Cf.* The Trial of the Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, Part. 22, p. 447.

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

437. It must be noted that Article 3 common to the Geneva Conventions does not identify clearly the persons covered by its provisions[801] nor does it contain any explicit reference to the perpetrator's criminal liability for violation of its provisions. The chapeau of Common Article 3 only provides that "each party to the conflict shall be bound to apply, as a minimum, the following provisions". The primary object of this provision is to highlight the "unconditional"[802] character of the duty imposed on each party to afford minimum protection to persons covered under Common Article 3. In the opinion of the Appeals Chamber, it does not follow that the perpetrator of a violation of Article 3 must of necessity have a specific link with one of the above-mentioned Parties.

438. Despite this absence of explicit reference in the common Article 3,[803] ICTY Appeals Chamber nevertheless held that authors of violation of provisions of this article incur individual criminal responsibility.[804] Furthermore, it developed a certain number of other tests for the application of article 3 which the Appeals Chamber can summarize here as follows:

- The offence (serious violation) must be committed within the context of an armed conflict;

- The armed conflict can be internal or international;[805]

- The offence must be against persons who are not taking any active part in the hostilities;[806]

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[801] *Celebici* Appeal Judgment, para. 153 [referring to the *Tadic* Appeal Judgment (objection to jurisdiction), para. 128].
[802] ICRC Commentary, p. 42.
[803] *Tadic* (jurisdiction Decision), para. 128; *Celebici* Appeal Judgment, para. 153.
[804] *Tadic*, (jurisdiction Decision), para. 128; *Celebici* Appeal Judgment, para. 153; The Appeals Chamber further recalled the terms used by the Secretary-General of the United Nations during adoption of the Statute: "Article 4 of the Statute [...] for the first time criminalizes common Article 3 of the Geneva Conventions (see Report of the Secretary-General of the United Nations, (Security Council resolution 955) on the establishment of an international tribunal for the [sole] purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law.
[805] In *Tadic* (jurisdiction Decision), ICTY Appeals Chamber indeed demonstrated, with reference to the Nicaragua case (para. 128) that "States specified certain minimum mandatory rules applicable to internal armed conflicts in common Article 3 of the Geneva Conventions of 1949" and that "[...] at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant" (para. 102). ICTY Appeals Chamber recently confirmed this interpretation in the *Celebici* case: "It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions". *Cf. Celebici* Appeal Judgment, para. 150.
[806] On this point, ICTY Appeals Chamber recently recalled that "Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute". *Cf. Celebici* Appeal Judgment, para. 420.

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- There must be a nexus between the violations and the armed conflict.[807]

439. Although ICTY Appeals Chamber has, on several occasions, addressed the issue of the interpretation of common Article 3, it should be noted that it has never found it necessary to circumscribe the category of persons who may be prosecuted under Article 3. Therefore, no clarification has to date been provided on this point in the jurisprudence of the Tribunals, except for recent holdings by an ICTY Trial Chamber. The latter indeed found that "common Article 3 may also require some relationship to exist between a perpetrator and a party to the conflict."[808] However, the Appeals Chamber observes that this holding finds no support either in statute or in case law. In any case, the *Kunarac* Trial Chamber has not found it necessary to elaborate on this point in light of the circumstances of the case.[809]

440. In this context, the Appeals Chamber deems it appropriate to analyze the object and purpose of common Article 3 in particular, and of the Geneva Conventions, in general, which object and purpose, in its view, are determinative in the interpretation of Article 4 of the Statute.[810]

441. ICRC commentaries outline the principles underlying the adoption of common Article 3:

> "This Article is common to all four Geneva Conventions [...]. It marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in the form of international obligations. It is an almost unhoped for extension of Article 2 [...]. Extending its solicitude little by little to other categories of war victims, in logical application of its fundamental principle [the Red Cross] pointed the way, first to the revision of the original Convention, and then to the extension of legal protection in turn to prisoners of war and civilians. The same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character". [811]

442. Thus, common Article 3 seeks to extend to non international armed conflicts, the protection contained in the provisions which apply to international armed conflicts. Its object and purpose is to broaden the application of the international humanitarian law by defining what constitutes minimum humane treatment and the rules applicable under all circumstances. Indeed, "[i]n the words of ICRC, the purpose of common Article 3 [is] to ensure respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself. These rules may thus be considered as the *quintessence* of humanitarian rules found in the Geneva Conventions as a whole".[812] *Protection of victims* is therefore the core notion of common Article 3.

443. The Appeals Chamber is of the view that the minimum protection provided for victims under common Article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be

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[807] ICTY Appeals Chamber noted that "[I]t is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict". *Cf. Tadic* Appeal Judgment (objection to jurisdiction), para. 70. In the instant case, the issue is not raised before the Appeals Chamber, nor is the interpretation of this requirement given by the Trial Chamber in the Judgment.
[808] *Kunarac* Judgment, para. 407.
[809] *Ibid.*
[810] See Article 31(1) of the Vienna Convention on the Law of Treaties. (*supra*)
[811] ICRC Commentaries, p. 38.
[812] *Celebici* Appeal Judgment, para. 143.

exonerated from individual criminal responsibility for a violation of common Article 3 under the pretext that they did not belong to a specific category.

444. In paragraph 630 of the Judgment, the Trial Chamber found that the four Conventions "were adopted primarily to protect the victims as well as potential victims of armed conflicts". It went on to hold that "[t]he category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces". Such a finding is *prima facie* not without reason. In actuality authors of violations of common Article 3 will likely fall into one of these categories. This stems from the fact that common Article 3 requires a close nexus between violations and the armed conflict. This nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict. However, such a special relationship is not a condition precedent to the application of common Article 3 and, hence of Article 4 of the Statute. In the opinion of the Appeals Chamber, the Trial Chamber erred in requiring that a special relationship should be a separate condition for triggering criminal responsibility for a violation of Article 4 of the Statute.

445. Accordingly, the Appeals Chamber finds that the Trial Chamber erred on a point of law in restricting the application of common Article 3 to a certain category of persons, as defined by the Trial Chamber.

446. For the foregoing reasons, the Appeals Chamber entertains this ground of appeal and finds further that it is therefore not necessary to pass on the Prosecution's alternative ground of appeal.

B. Third Ground of Appeal: Article 3 of the Statute (crimes against humanity)

1. Arguments of the parties

447. The Prosecution alleges that in holding in paragraph 590 of the Judgment that "[t]he victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds", the Trial Chamber committed an error of law in finding that the discriminatory intent was an essential element for one of the crimes enumerated under Article 3 of the Statute to constitute a crime against humanity. The Prosecution submits that the Trial Chamber's reasoning on this point is contradictory and inconsistent, and that it appears to have specifically found that a discriminatory intent is required in respect of one of the crimes enumerated under Article 3 of the Statute.[813] Although this ground of appeal refers explicitly to a finding in relation to murder, the Prosecution submits that the Trial Chamber committed the same error in its reasoning in relation to rape.[814]

448. The Prosecution submits that the holding in paragraph 590 of the Trial Chamber's Judgment is inconsistent with the plain language of the Statute and international customary law,[815] and is inconsistent with the humanitarian object and purpose of the Statute and international humanitarian law in general.[816] In the Prosecution's submission, the requirements of Article 3 are " very

[813] Prosecution's Brief, para. 4.6.
[814] Prosecution's Brief,.para. 4.6.
[815] Prosecution's Brief, para. 4.2.
[816] Prosecution's Brief, paras. 4.16 to 4.25. The Prosecution submits that "one of the prime objectives of international humanitarian law is the protection of the weak and the vulnerable in such situations where their lives and security are in danger and also the primary purpose of the establishment of both Tribunals is not to leave unpunished any person guilty of a serious violation of international humanitarian law", T(A), 1 November 2000, para. 222.

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different from the requirement that each enumerated crime be committed by a perpetrator who discriminates against a particular victim on any of the specific grounds".[817] It submits that the motive of the perpetrator is irrelevant.[818] What is required on the other hand is that the enumerated act "be committed by a perpetrator who knew that his act contributed to, or was part of, a widespread or systematic attack against a civilian population on discriminatory grounds".[819] The Prosecution submits that any other interpretation would mean that perpetrators of crime against humanity could evade conviction by invoking other motives in defence of their conduct. It argues that this would create significant lacunae by failing to protect victims who are killed on non-discriminatory grounds by perpetrators who, nonetheless, fully realize that their acts are connected to, or part of, a widespread or systematic attack against a civilian population on discriminatory grounds.[820]

449. In the Prosecution's submission, while the requirement of discriminatory grounds in the chapeau to Article 3 is a jurisdictional limitation upon the Tribunal, it does not transform such grounds into a substantive element of the *mens rea* of the crimes in question.[821] However, it is the Prosecution's submission that even if the discriminatory grounds requirement were a substantive element of the *mens rea* of the crimes, the provisions of the Statute should still be interpreted as stated above.[822] In the Prosecution's submission, the wording of Article 3 leads to the conclusion that the commission of an enumerated crime does not have to be on discriminatory grounds. If such an element were required, then the requirement in Article 3(h) that persecutions be on "political, racial and religious grounds" would be redundant.[823]

450. The Prosecution submits that the Security Council intended to deviate from customary international law in drafting Article 3 of ICTR Statute by requiring that the widespread or systematic attack against the civilian population be on discriminatory grounds.[824] It argues that no authority, however, is referred to by the Trial Chamber in support of the proposition that the Security Council, in doing so, intended to deviate from customary international law to the extent of requiring that each enumerated crime under Article 3 be committed on discriminatory grounds.[825] The Trial Chamber departed from customary international law, and the clear wording of the Statute by equating the requirement of "discriminatory grounds" in Article 3 with one of "discriminatory intent", whereas the former relate to objective knowledge while the latter relates to subjective motives.[826]

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[817] Prosecution's Brief, para. 4.9. The Prosecution submits that the provisions of Article 3 "are clear and unambiguous. There are four main requirements: a specified crime listed in Article 3 must be committed; these crimes must have been committed as part of a widespread or systematic attack; the attack must be against a civilian population, and the attack must be on national, political, ethnic, racial or religious grounds". See also T(A), 1 November 2000, pp. 218 to 220.
[818] TA(A), 1 November 2000, p. 220.
[819] Prosecution's Brief, para. 4.3 The Prosecution submits that "an enumerated crime may be committed without a discriminatory intent against the victim provided that the accused knows that his acts fit into the widespread or systematic attack against the civilian population on discriminatory grounds". Prosecution's Brief, para. 4.10; T(A), 1 November 2000, pp. 219 to 220.
[820] Prosecution's Brief, 4.22.
[821] Prosecution's Brief, para.4.11.
[822] Prosecution's Brief, para. 4.12.
[823] Prosecution's Brief, para. 4.14; T(A), 1 November 2000, p. 220. In the Prosecution's Response (para.5.3) it is also mentioned that Article 7 of the Rome Statute requires a discriminatory intent only in relation to the crime of persecution.
[824] Prosecution's Brief, para. 4.29.
[825] Prosecution's Brief, paras. 4.26 to 4.33.
[826] Prosecution's Brief, para. 4.32. The Prosecution cites several cases which, it submits, support the proposition that the crimes enumerated in Article 3 may be committed without a discriminatory intent (paras. 4.33 to 4.38).

451. As a remedy, the Prosecution moves that the Appeals Chamber set aside the finding in paragraph 590 of the Judgment and hold that the discriminatory grounds required in the chapeau of Article 3 of the Statute relate to the widespread or systematic attack against any civilian population.[827]

452. In response Akayesu submits that, in accordance with the basic rules of interpretation, Article 3 must be construed strictly.[828] He further submits that the Prosecution in its submissions moves from an interpretative approach to a "legislative"[829] approach, in suggesting that the terms in issue be struck out from the chapeau of the article. He avers that the Prosecutor must live with the Statute and its limitations and observes that in the article in question, the Security Council departed from customary international law.[830] Akayesu refers to the Statute of Rome as reflective of the state of international opinion.[831] He complains that he is invited "to participate in an academic debate, a theoretical debate which doesn't concern him but concerns other accused persons". He submits that "he doesn't have to subscribe to the interpretation suggested by the Prosecutor, [neither] does he have to challenge it".[832] He submits further that the findings made on the issue were *obiter dicta* and that a decision of the Appeals Chamber to set aside will not have any effect on the verdict.[833]

2. Introduction to the issue raised

453. The Trial Chamber found that the category of crimes enumerated in Article 3 of the Statute may be broadly broken down into four essential elements, including the requirement that "the act must be committed on one or more discriminatory grounds, namely national, political, ethnic, racial or religious grounds".[834]

> The Statute stipulates that inhumane acts committed against the civilian population must be committed on 'national, political, ethnic, racial or religious grounds.' Discrimination on the basis of a person's political ideology satisfies the requirement of 'political grounds envisaged in Article 3 of the Statute [...].
>
> Inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was to further his attacks on the ground discriminated against on one of the grounds mentioned in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity.[835]

454. The Prosecution submits that if the " intention" referred to is defined as including the conscious desire of the perpetrator that his crime further the attack on the group discriminated against, or knowledge or foresight that such a result is the likely consequence of his actions, then this holding is correct[836]. However, the Prosecution submits that it contradicts other findings by the Trial Chamber concerning murder and rape.

455. In its findings relating to murder as crime against humanity, the Trial Chamber held *inter alia* that:

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827 Prosecution's Brief, paras. 4.47 to 4.48.
828 Akayesu's Response, paras. 37 and 38.
829 Akayesu's Response, paras. 37 and 38.
830 Akayesu's Response, para. 41.
831 Akayesu's Response, para. 42.
832 T(A), 2 November 2000, pp. 17 to 18.
833 T(A), 2 November 2000, p. 18.
834 Trial Judgment, para. 578.
835 Trial Judgment, paras. 583 and 584 (footnotes omitted).
836 Prosecution's Brief, paras. 4.40 and 4.41.

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> Murder must be committed as part of a widespread or systematic attack against a civilian population. [...] The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.[837]

456. Similarly, regarding rape as crime against humanity, the Trial Chamber found *inter alia* that:

> The act must be committed: (a) as part of a widespread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely national, ethnic, political, racial, or religious grounds.[838].

457. On the other hand, with respect to extermination and torture as crimes against humanity, the Trial Chamber found that it is the *attack* which "must be on discriminatory grounds namely national, ethnic, political, racial, or religious grounds".[839]

458. The Appeals Chamber finds there appears to be *prima facie* a contradiction in the reasoning and the findings of the Trial Chamber. Indeed, although it appears to have found, on the one hand, that for murder and rape to constitute crimes against humanity their perpetrators must have the discriminatory *intent to* commit such crimes against the victim, and, on the other hand, that where extermination and torture are concerned, the *attack* must be on discriminatory grounds.

459. The issue before the Appeals Chamber is to determine whether this ingredient of crimes against humanity within the jurisdiction of the Tribunal, as referred to in the chapeau of Article 3 of the Statute, requires the perpetrator to have knowledge that his act is part of a widespread or systematic attack against a civilian population on discriminatory grounds, or is in furtherance of the attach, or whether this ingredient requires that the perpetrator of each crime enumerated in the article must have the discriminatory intent to commit the said crime against his victim in particular, on one of the enumerated grounds.

3. Discussion

460. The Appeals Chamber will first recall the provisions of Article 3 of the Statute.

> Article 3: Crimes against Humanity
>
> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Enslavement;
>
> (d) Deportation;
>
> (e) Imprisonment;

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837 Trial Judgment, para. 590.
838 Trial Judgment, para. 598.
839 Trial Judgment, para. 592 (concerning extermination). Para. 595 reflects, in similar terms, the Trial Chamber's interpretation of the ingredients of torture.

(f) Torture;

(g) Rape;

(h) Persecution on political, racial and religious grounds;

(i) Other inhumane acts.

461. ICTY Appeals Chamber has had occasion to consider the issue of discriminatory intent within the context of crimes against humanity, as defined in Article 5 of the Statute of ICTY. In the *Tadic* Appeal Judgment, the Appeals Chamber found that:

> [...]the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.[840]

462. This Appeals Chamber is, however, of the view that this jurisprudence as well as the interpretation of Article 5 of ICTY Statute are of limited relevance in the instant case and to the Appeals Chamber's consideration of Article 3 of the Statute especially as both provisions are substantially different. Indeed, Article 5 of ICTY Statute does not include the same requirement in its chapeau namely that crimes against humanity may be prosecuted "when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"[841]. However, it does not follow automatically that the "addition" to Article 3 of ICTR Statute allows a reading contrary to that contained in *Tadic* and that, consequently, Article 3 required that the perpetrator (s) of any crimes against humanity must have a discriminatory intent.

463. Therefore, the Appeals Chamber must pass on how the lawmaker (to wit, the Security Council) intended Article 3 of the Statute to be understood and, in particular, it must determine whether there exists a difference between Article 3 and Article 5 of ICTY Statute such that the Appeals Chamber must depart from the interpretation of crimes against humanity contained in *Tadic*.

464. In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity[842]. To that extent, the Appeals Chamber endorses the general conclusion and review contained in *Tadic*, as discussed above.[843] However, though such is not a requirement for the crime *per se*, all crimes against humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population. As held in *Tadic*: "[i]t is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically

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[840] *Tadic* Appeal Judgment, para. 305.

[841] Article 5 of ICTY Statute reads as follows "The Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; and (i) other inhumane acts".

[842] *Tadic* Appeal Judgment, para. 288.

[843] *Ibid*, para. 287 *et seq.* Following its review in para. 292, the Appeals Chamber found that "[t]his warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity". In *Tadic*, ICTY Appeals Chamber relied, in particular, on the interpretation of the London Agreement of 8 August 1945, the Statute of the International Tribunal for Tokyo, Council Control Law No. 10, the Draft Code of crimes against the peace and security of mankind and the Statute of Rome.

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targeted for national, political, ethnic, racial or religious reasons".[844] It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible crimes against humanity.

465. The Appeals Chamber found that in doing so, the Security Council did not depart from international humanitarian law[845] nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity. It *limited* at the very most the jurisdiction of the Tribunal to a sub-group of such crimes, which in actuality may be committed in a particular situation. By the same token, the Appeals Chamber notes that ICTY Statute contains in its Article 5 explicitly an express requirement for a nexus with an armed conflict. As held in *Tadic*, this "creates a narrower sphere of operation than that provided for crimes against humanity under customary international law".[846] Here again, by limiting the scope of the article, the Security Council did not, however, intend that the definition contained in ICTY Statute should constitute a departure from customary international law. In the case at bench, the Tribunal was conferred jurisdiction over crimes against humanity (as they are known in customary international law), but solely "when committed as part of a widespread or systematic attack against any civilian population" on certain discriminatory grounds; the crime in question is the one that falls within such a scope. Indeed, this narrows the scope of the jurisdiction, which introduces no additional element in the legal ingredients of the crime as these are known in customary international law.

466. Consequently, apart from this restriction of jurisdiction, such crimes continue to be governed in the usual manner by customary international law, namely that discrimination is not a requirement for the various crimes against humanity, except where persecution is concerned.

467. The meaning to be collected from Article 3 of the Statute is that even if the accused did not have a discriminatory intent when he committed the act charged against a particular victim, he nevertheless knew that his act could further a discriminatory attack against a civilian population; the attack could even be perpetrated by other persons and the accused could even object to it. As a result, where it is shown that the accused had knowledge of such objective nexus, the Prosecutor is under no obligation to go forward with a showing that the crime charged was committed against a particular victim with a discriminatory intent. In this connection, the only known exception in customary international law relates to cases of persecutions.

468. In light of this interpretation and the finding that persecution is the only crime which requires a discriminatory intent, the Appeals Chamber is of the view that any interpretation of the chapeau of Article 3 of the Statute such as would add a requirement for a showing of a discriminatory intent with respect to all crimes against humanity would likely render redundant the express if more succinct reference to discrimination – contained in Article 3 of the Statute

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[844] *Ibid*, para. 297.
[845] In this connection, the Appeals Chamber recalls the finding in *Tadic* (para. 296): "it is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law [footnotes omitted]. Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources".
[846] *Tadic* Judgment, footnote 356.

(Persecutions), which reference is understood as a requirement of a discriminatory intent.[847] As is known, one of the basic rules of interpretation requires that a provision or part thereof should not be interpreted in a manner to render it redundant or bereft of any object, unless such a conclusion is inevitable. One must proceed from the assumption that the lawmakers intended to give some effect to *each* of the words used.

469. For the foregoing reasons, the Appeals Chamber considers the present ground of appeal and finds that:

(1) Article 3 of the Statute does no require that all crimes against humanity enumerated therein be committed with a discriminatory intent.

(2) Article 3 restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, "as part of a widespread or systematic attack against any civilian population" on discriminatory grounds.

C. Fourth Ground of Appeal: Article 6 (1) of the Statute

1. Arguments of the parties

470. In the Fourth Ground of Appeal, the Prosecution submits that the Trial Chamber erred in law in finding that instigation under Article 6(1) of the Statute must be direct and public.[848] It is the Prosecution's submission that instigation has a broader ambit than direct and public incitement and specifically, that it is not limited by any direct and public requirement[849].

471. Relying on the canons of interpretation laid down in the 1969 Vienna Convention on the Law of Treaties, the Prosecution submits that "the forms of criminal participation set out in Article 6(1) should be given their ordinary and natural meaning in light of the object [of] purpose of the Statute [and] instigation its ordinary meaning [which] does not require [...] a public and direct element"[850]. The Prosecution argues that if the requirement set forth by the Trial Chamber is introduced, a person who instigates the commission of an offence falling within the jurisdiction of the Tribunal could be held criminally responsible only if the instigation happened to have been made in a "public place" so legally defined[851]. It submits that for criminal responsibility to attach, it

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[847] The chapeau refers to discrimination on "national, political, ethnic, racial or religious" grounds while Article 3(h) of the Statute envisages cases of "persecutions on political, racial and religious grounds".

[848] Prosecution's Brief, para. 5.1. The Prosecution observes that while Akayesu was found guilty of instigating various acts, no acquittal was entered on the basis of any alleged instigation not being direct and public. Prosecution's Brief, 5.2

[849] Prosecution's Brief, para. 5.9. The Prosecution recalls that the Trial Chamber relies on an observation made in *The International Criminal Tribunal for Rwanda* [of V. Morris and M. P. Scharf (hereinafter "Morris and Scharf"), *Transnational Publishers Inc.* 1998, Vol. P.239] and on a comparison between Article 6(1) of the Statute and Article 2(3)(b) of the Draft Code of crimes against the Peace and Security of Mankind of 1996 (hereinafter "the Code of Crimes"). The Prosecution alleges that whilst it is true that Morris and Scharf state that "instigation under Article 6(1) corresponds to Article 2(3)(f) of the Draft Code [...] it may be argued that ...[they]...simply meant that public and direct incitement falls within the concept of, and has some similarities to, instigation, but not, necessarily, that the latter is confined and limited to the former". Prosecution's Brief, para. 5.9. The Prosecution submits that reliance upon the Draft Code as a subsidiary guide to interpretation cannot supplant the plain meaning of the Statute. Prosecution's Brief, para. 5.12.

[850] Prosecution's Brief, para. 5.17, T(A), 1 November 2000, p. 235.

[851] Prosecution's Brief, para. 5.21.

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is immaterial whether the act of instigation is committed in a bus or public park, or in a private motor vehicle or a private garden, the moral responsibility of the instigator is the same. In both cases, individual criminal responsibility attaches under Article 6(1) of the Statute.[852] The Prosecutor further submits that to hold that incitement always has to be public and direct may render otiose the specific reference to "direct and public incitement to commit genocide" as stipulated under Article 2(3)(c) of the Statue.[853]

472. As a remedy, the Prosecution moves the Appeals Chamber to set aside the holding of the Trial Chamber.[854]

473. Akayesu submits that if the Appeals Chamber were to entertain this ground of appeal, that will not alter the verdict rendered by the Trial Chamber in any way and that, for that reason the Appeals Chamber need not even consider this ground of appeal.[855] Consequently, Akayesu submits that should the Chamber decide to hear this ground of appeal, it would also have to authorize Counsel for the other accused concerned to be joined to the proceedings.[856] Furthermore, Akayesu poses the question as to whether the issue raised warrants an intervention by the Appeals Chamber, and cites, in this respect, the Prosecution's reference to ILC Commentary on the Draft Code of Crimes.[857] Akayesu therefore submits that it is not necessary to entertain the Prosecution's appeal in order to make this cosmetic clarification.[858]

2. Discussion

474. The Trial Chamber reviewed Article 6 of the Statute (individual criminal responsibility) and found, *inter alia,* as follows:

> The second form of liability is 'incitation' (in the French version of the Statute) to commit a crime, reflected in the English version of Article 6(1) by the word *instigated.* In English, it seems the words incitement and instigation are synonymous. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments. However, in certain legal systems and, under Civil Law, in particular, the two concepts are very different. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2(3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion. The Chamber also accepts this interpretation.[859]

475. The Prosecution submits that this interpretation of Article 6(1) is erroneous, leading the Trial Chamber to require that "instigation" must be direct and public. Relying on a comparison of

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[852] Prosecution's Brief, para. 5.21. The Prosecution submits that the "public and direct" requirement would be "unwarranted and would frustrate the intention of the drafters of the Statute by restricting those who could be held criminally responsible and [...] deserving of penal sanction". Prosecution's Brief, para. 5.26.
[853] Prosecution's Brief, para. 5.27. Lastly, the Prosecutor submits that "[a]s long as a person knowingly instigates the commission of an offence (wishing it to be carried out or foreseeing that this is a likely consequence of his actions) and his participation directly and substantially affected the commission of that offence, he will be liable under Article 6(1)." Prosecution's Brief, para. 5.31.
[854] Prosecution's Brief, para. 5.32.
[855] Akayesu's Response, para. 44.
[856] Akayesu's Response, para. 45.
[857] Akayesu's Response, para. 46. Akayesu submits that if the Prosecution wanted to institute proceedings against inciters or instigators who acted privately, it could prepare their indictment taking into account the above remark.
[858] Akayesu's Response, para. 47.
[859] Trial Judgment, para. 481 (footnotes omitted).

Article 6(1) of the Statute (instigated) with Article 2(3)(c) of the Statute ([...] incitement to commit genocide), the Trial Chamber found that "some people" contend [instigation must include direct and public elements] adding that "it also accepts this interpretation".[860] In this holding, the Trial Chamber refers to the opinion of certain experts ("some people"), by citing Morris and Scharf in a footnote.

476. First and foremost, the Appeals Chamber considered the analysis made by Morris and Scharf in their book. In the opinion of the Appeals Chamber, it could be said that in fact Morris and Scharf only provided a general comparison of the approach followed by the Draft Code of Crimes (and commentaries included therein) with the approach contained in the Statute, with respect to individual criminal responsibility regarding incitement to commit crimes.[861] It is not clear that these authors reached specifically the alleged finding.[862] Regarding the Trial Chamber's review, its finding is based on a broad comparison of provisions of international instruments, which use the "public character" test and refer to it in the same context.[863] The issue here is whether the Trial Chamber erred in its review and, in particular, whether it erred in finding that the term "instigated" in Article 6(1) of the Statute is necessarily to be construed as direct and public incitement.

477. Article 6(1) of the Statute both texts of which are authoritative, provides that:

> A person who planned, *instigated,* ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.[864]

478. There is a glaring disparity between the English text and the French text: indeed, the English word "instigated" is translated into French as "*incité*". That said, the Appeals Chamber is of the opinion that linguistically the two terms are synonymous. The Appeals Chamber points out in particular that neither text contains any suggestion or recommendation that incitement must be direct and public. Consequently, by interpreting this provision "in accordance with [its] ordinary meaning",[865] the Appeals Chamber holds that, although instigation may, in certain circumstances, be direct and public, this does not, however, constitute a requirement. Nothing in Article 6 (1) suggests that there is such a requirement. The Appeals Chamber concurs with the Prosecution's argument that "[...][i]f the drafters of the Statute had wished to similarly confine 'instigation' to situations where it was 'public and direct', it would be reasonable to expect that they would have specifically required it".[866] It goes without saying that "[a] special meaning shall be given to a term if it is established that the parties so intended".[867] Such an intent has not been established.

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[860] *Ibid.*

[861] In pp. 238 and 239 of their book, Morris and Scharf write that "the Security Council condemned the breaches of international humanitarian law in Rwanda and recalled the principle of individual criminal responsibility for the instigation of such acts. This element of Article 6(1) corresponds to Article 2(3)(f) of the Draft Code which is explained in the commentary (by ILC) as follows" (footnote omitted).

[862] The Appeals Chamber holds in particular that nothing in the text suggests that Morris and Scharf considered in particular the fact that Article 6(1) of the Statute does not include the term "public".

[863] The Trial Chamber referred to Article 2(3)(f) of the Draft Code of Crimes (as cited by Morris and Scharf) and Article 2(3)(c) of the Statute, Trial Judgment para. 481.

[864] Emphasis added.

[865] Article 31(1) of the Vienna Convention on the Law of Treaties.

[866] Prosecution's Brief, para. 5.27.

[867] Article 31(4) of the Vienna Convention on the Law of Treaties.

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479. Furthermore, the Appeals Chamber is of the view that this interpretation is supported by Article 2(3)(c) of the Statute, where the Security Council specifically chose the same wording as that of the corresponding provision of the Convention on Genocide.[868] Article 2(3)(c) reads:

> The following acts shall be punishable:
>
> [...]
>
> (c) Direct and public incitement to commit genocide.[869]

480. With respect specifically to incitement to commit the crime of genocide, the Statute makes clear that the act must be direct and public, which plainly excludes any other form of incitement to commit genocide, including private incitement to commit genocide. Such additional element is not included in the text of Article 6(1) of the Statute. The Appeals Chamber is of the opinion that if such a requirement were to be included also in Article 6(1) of the Statute, then the specification contained in Article 2(3)(c) of the Statute would be superfluous.[870]

481. In this connection, it would be erroneous to superimpose this wording on the (discrete) wording of Article 6(1) of the Statute, so as to import into the latter language to the effect that Article 2(3)(c) of the Statute provides explicitly that incitement to commit genocide must be public. As stated above, this would run counter to the well-established rules of interpretation under, which, in general, disparities in meaning are seen as tantamount to disparities in language.

482. Consequently, the Appeals Chamber finds that there is no cause to hold that the Security Council intended Article 6(1) of the Statute to include an additional element (absent from the explicit language of the provision), which would require an interpretation inconsistent with its plain and ordinary meaning.

483. For the foregoing reasons, having considered this ground of appeal the Appeals Chamber finds that "incitement", as set out in Article 6(1) of the Statute, need not be "direct and public".

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[868] Article III of the Convention on the Prevention and Punishment of the Crime of Genocide: The Following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

[869] Article 2(3)(c) of the Statute (emphasis added). One may also cite Article 2(3)(f) of ILC Report which provides that "[a]n individual shall be responsible for a crime set out in articles 17, 18, 19 or 20 if that individual: [...] (f) directly and publicly incites another individual to commit such a crime which in fact occurs" .(p.18)

[870] *Tadic* Appeal Judgment para. 284.

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V. DISPOSITION

For these reasons, **The Appeals Chamber,**

Considering Article 24 of the Statute and Rule 118 of the Rules,

Noting the respective written submissions of the parties and their oral arguments at the hearings of 1 and 2 November 2000,

Sitting in open court,

Unanimously dismmisses each of the grounds of appeal raised by Jean-Paul Akayesu,

Affirms the verdict of guilty entered against Jean-Paul Akayesu of all the counts on which he was convicted and the sentence of life imprisonment handed down,

Rules that this judgement shall be enforced immediately pursuant to Rule 119 of the Rules,

Considers the First, Third and Fourth Grounds of Appeal of the Prosecutor and **Finds** that, with respect to the points of law in issue in the Prosecution's appeal, this Judgement sets out the relevant legal findings thereon.

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

(Signed)

Claude Jorda Lal Chand Vohrah Mohamed Shahabuddeen

Rafael Nieto-Navia Fausto Pocar

Judge Shahabuddeen appends a Declaration to this Judgment

Judge Nieto-Navia appends a Dissenting Opinion to this Judgment

Done on this first day of June 2001

At Arusha (United Republic of Tanzania)

[Seal of the Tribunal]

ANNEX A
PROCEEDINGS ON APPEAL[871]

A. Assignment of Counsel to Akayesu

484. As a result of certain issues that had arisen between Akayesu and Counsel assigned to defend him at trial, and following the verdict rendered on 2 September 1998,[872] Akayesu was left without Counsel. On 20 January 1999, Akayesu filed a Motion for judicial review, in which he requested the Appeals Chamber to rule *inter alia* "null and void and discriminatory" the Registrar's "policy" excluding John Philpot from assignment as his Counsel and to order the Registrar to assign Mr. Philpot as Defence Counsel for Akayesu's retroactively to 18 September 1998 ("the Motion for judicial review").[873] On 30 March 1999, the Appeals Chamber directed the Registrar to respond to the Motion for Judicial Review by 12 April 1999 and notified Akayesu that he had until 26 April 1999 to file his Reply together with the supporting documentation referred to in the Motion.[874]

485. At the same time, the Registrar was working on assigning a Defence Counsel to Akayesu and, thus, by letter of 9 February 1999, assigned Giacomo Barletta Caldarera as Lead Counsel for Akayesu. Following a correspondence from Giacomo Barletta Caldarera alleging that John Philpot and Akayesu were persistently urging him to withdraw as Counsel, the Registrar decided on 31 March 1999 to maintain Giacomo Barletta Caldarera as Defence Counsel for Akayesu.[875]

486. On 12 April 1999,[876] the Registrar filed his response to Akayesu's Motion for Judicial Review, and Akayesu filed his Reply on 28 April 1999.[877] Furthermore, the Appeals Chamber was seized of a petition dated 28 April 1999[878] from the *Association internationale des avocats de défense* (International Criminal Defence Attorneys Association) to appear as *amicus curiae*, pursuant to Rule 74 of the Rules.

487. The Appeals Chamber decided not to hold an *inter partes* hearing on the Motion for Judicial Review and rendered a decision on 27 July 1999 solely on the basis of the aforementioned filings.[879]

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[871] The titles of the documents cited in the footnotes to this annex reflect verbatim the original documents and therefore contain any errors or omissions reflected therein.
[872] This review procedure relates only to the assignment of counsel and the necessary intervention by the Appeals Chamber.
[873] Motion for Judicial Review under Article 19 of the Statute and Rules 73 and 105 of the Rules of Procedure and Evidence, urgent motion for oral hearing, filed on 20 January 1999.
[874] Scheduling Order, dated 30 March 1999 but issued on 31 March 1999.
[875] Decision to maintain Giacomo Barletta Caldarera as Counsel for Akayesu, dated 24 March 1999, but filed on 31 March 1999. Akayesu filed a "Reply" to the said Decision of 4 May 1999 (*Réplique d'Akayesu sur la décision du Greffier datée du 24 mars 1999 pour maintenir la commission de Me Giacomo*).
[876] Registry's Brief in Reply to Motion for Judicial Review under Article 19 of the Statute and Rules 73 and 105 of the Rules of Procedure and Evidence, filed on 12 April 1999.
[877] Appellant's Reply to Registrar's arguments, dated 23 April 1999 but filed on 28 April 1999.
[878] "Petition for Intervention as *Amicus Curiae* of the International Criminal Defence Attorneys Association (Rule 74 of the Rules of Procedure and Evidence)", filed 28 April 1999. On 1 June 1999, a Brief was filed in support of the said Petition ("Brief of the International Criminal Defence Attorneys Association [Article 74 of the Rules of Procedure and Evidence])". Rule 74 of the Rules provides that: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to any State, organization or person to appear before it and make submissions on any issue specified by the Chamber."
[879] Decision Relating to Assignment of Counsel, dated 27 July 1999 and rendered on 28 July 1999.

488. The Appeals Chamber found that although there is no provision in the Directive on Assignment of Defence Counsel for right of appeal against a decision by the Registrar not to assign a specific counsel, such a right is necessary in order to ensure that the accused is effectively able to exercise his rights under Article 20(4) of the Statute, and, indeed as recognized by ICTY in other cases. The Appeals Chamber, considering that John Philpot's name was included in the list of Counsel eligible for assignment by the Registrar at the Appellant's urgent request and, moreover, that the Registrar had thus given the Appellant a legitimate hope that Mr. Philpot would be assigned to defend him before the Tribunal, directed the Registrar to assign Mr. Philpot as Lead Counsel with effect from 22 September 1998, when his name was included in the list of counsel maintained by the Registry. The Appeals Chamber also decided to dismiss the petition by the International Criminal Defence Attorneys Association to appear as *amicus curiae.*

489. Subsequently, the Registrar, by a decision dated 10 August 1999, withdrew the assignment of Mr. Caldarera as Defence Counsel with effect from 27 July 1999.[880]

B. Background to the filings on appeal

1. Notices of appeal

490. Akayesu filed his first Notice of Appeal (a handwritten letter) on 1 October 1998. His second Notice of Appeal, prepared by his Counsel, was filed with the Registry on 2 October 1998.[881] Akayesu filed his Notice of Appeal Against Sentence on 2 November 1998.[882] In its Decision of 24 May 2000 the Appeals Chamber granted Akayesu leave to include four additional grounds in his Notice of Appeal relating to the admissibility of "hearsay" evidence, the refusal by the Trial Chamber to permit Akayesu to ask leading questions during cross-examination, the unlawful disclosure of Defence witness statements and an allegation concerning witness DAAX. Akayesu was also allowed to amend the ground of appeal relating to out-of-court evidence. In its Decision of 22 August 2000, the Appeals Chamber denied Akayesu leave to add further grounds of appeal or to amend certain grounds of appeal already filed.[883]

491. On 2 October 1998, the Prosecution filed its Notice of Appeal setting out eight grounds of appeal[884] in which it requested the Appeals Chamber: (1) to quash the Trial Chamber's verdict in respect of Counts 6, 8, 10, 12 and 15 (acquittals under Article 4 of the Statute), and to substitute verdicts of guilty for them; and (2) to quash the erroneous legal findings put forward in the Trial Judgement. On 15 October 1999, the Prosecution filed a Notice Abandoning Ground 6[885] while in

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[880] "Decision on Withdrawal of Barletta Caldarera as Counsel for Jean-Paul Akayesu, dated 10 August 1999 and filed on 1 December 1999.

[881] Notice of Appeal, filed on 2 October 1998. The Prosecution submitted that the Appeals Chamber must dismiss the first Notice of Appeal and only take into account the second Notice of Appeal. Prosecution's Response, paras. 1.33 to 1.38 (see with respect to this issue Akayesu's Reply, para. 3). At the start of the hearing on appeal, the Appeals Chamber dismissed the said argument. It found that although it had followed the grouping of Akayesu's grounds of appeal, as presented by him in his second Notice of Appeal, it had not rejected the first Notice of Appeal. Transcript(A) 1 November 2000, pp. 7 and 8.

[882] Notice of Appeal Against the Sentence rendered by the Chamber, filed on 2 November 1998.

[883] The Appeals Chamber notes that Akayesu withdrew or abandoned several grounds of appeal. These grounds of appeal are not referred to in this Judgment.

[884] Notice of Appeal, filed on 2 October 1998.

[885] Ground 6 alleged that the Trial Chamber erred in law in holding that an accused, to be found responsible for planning under Article 6(1), must have planned the crime with the perpetrator of the crime.

the Prosecution's Brief, it notified the Appeals Chamber that it no longer wished to proceed on Ground 4.[886] The Prosecution submitted that Ground 1 "does not as such constitute a ground of appeal, but rather intends to group Grounds 2 to 4" [887] and that it did not request that any further grounds be included under Ground 8.[888]

2. Filings

492. Following the filing by the parties of their respective notices of appeal, the issue of the assignment of Counsel to Akayesu arose. The Appeals Chamber ruled on the issue in its Decision of 27 July 1999 discussed above and, at the same time, issued a briefing schedule. The Appeals Chamber ordered that the parties must file their Appellant's Briefs by 25 October 1999, their Respondent's Briefs by 22 November 1999 and the Briefs in Reply by 6 December 1999.[889]

493. On 21 October 1999, the Appeals Chamber suspended the above time-limits pending a ruling on various motions filed by Akayesu on, *inter alia*, alleged errors in the composition of the trial record.[890] These motions were disposed of in the 24 May 2000 Decision. In a Scheduling Order also dated 10 August 2000, the pre-hearing Judge ordered that the Briefing schedule should be resumed, that Appellant's Briefs should be filed by 10 July 2000, Respondent's Briefs should be filed by 10 August 2000 with Briefs in Reply to be filed by 25 August 2000.[891]

494. Akayesu filed his Appellant's Brief on 7 July 2000 ("Akayesu's Brief")[892] and the Prosecution filed its Brief on 10 July 2000 ('Prosecution's Brief"). On 24 July 2000, Akayesu filed a motion for the Appeals Chamber to declare the Prosecutor's Brief inadmissible.[893] By a Decision dated 27 July 2000, the pre-hearing judge ruled that to the extent that the Appellant's motion addressed the "merit" of the Prosecution's appeal, it could be considered as Akayesu's Response, unless he chose to file another Respondent's Brief within the prescribed time-limit.[894] On the same date, the pre-hearing judge suspended the briefing schedule pending disposition of several pending motions. He ordered that the Respondent's Briefs and Briefs in Reply be filed within 13 to 28 days, respectively, from the date the Appeals Chamber rules on the pending motions.[895] The Appeals Chamber ruled on the pending motions in a Decision rendered on 22 August 2000 and the Prosecution filed its Respondent's Brief on 4 September 2000 (Prosecution's Response).[896] Akayesu

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[886] Ground 4 alleged that the Trial Chamber erred in fact in finding "...that it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the *commune* of Taba at the time of the events alleged in the Indictment were committed in conjunction with the armed conflict."
[887] Prosecution's Brief, para. 1.12.
[888] Prosecution's Brief para. 1.15. Ground 1 alleged that Trial Chamber erred in fact and in law in finding Jean-Paul Akayesu not guilty on Counts 6, 8, 10, 12 and 15 and Ground 8 intended to include such further grounds of appeal as the Prosecutor may advise and the Appeals Chamber may permit.
[889] Decision relating to Assignment of Counsel, delivered on 27 July 1999.
[890] Order for the suspension of time-limits for the filing of appeal briefs, dated 21 October 1999 but filed on 26 October 1999.
[891] Scheduling order issued on 24 May 2000.
[892] Akayesu filed together with his Brief, a document entitled "Consolidated Notice of Appeal" which "grouped together " the grounds of appeal set out in his two Notices of Appeal and other grounds added after the filing of motions.
[893] Motion Objecting Inadmissibility of Appellant's Brief and the Respondent's Brief, filed on 24 July 2000.
[894] Appeals Decision (Motion to Declare Prosecution's Appeal Inadmissible), rendered on 27 July 2000.
[895] Scheduling Order, issued on 27 July 2000.
[896] Prosecution's Response, filed on 4 September 2000.

did not file any response to the Prosecution's Brief. Akayesu and the Prosecution filed their Briefs in Reply on 19 September 2000 ("Akayesu's Reply" and "Prosecution's Reply") respectively.[897]

495. Lastly, by Order of 2 October 2000, the *inter partes* hearing on appeal was set for 1 November 2000 to continue on 2 November 2000, if necessary.[898]

C. Hearings on Appeal

496. The Appeals Chamber heard the arguments of the parties on 1 and 2 November 2000 at the seat of the Tribunal at Arusha.

D. Delivery of the Appeal Judgement

497. On 16 May 2001, the Appeals Chamber issued a Scheduling order stating that the appeal Judgment would be delivered at the seat of the Tribunal at Arusha on 1 June 2001.[899]

E. Motions filed by Akayesu

498. The instant appeal has been marked, primarily, by the filing, often in very rapid succession, of a large number of motions by Akayesu. In said motions, Akayesu raised both procedural issues and issues relating to the merits of his appeal, including requests for leave to add new grounds of appeal and to admit additional evidence on appeal.

499. Due to the number and, in particular, the frequency of the motions filed by Akayesu, the Appeals Chamber ordered him on two occasions to file "consolidated" motions in a bid to oblige him to set out clearly and concisely the arguments put forward in support of each of the requests made in his various motions. The relevant Scheduling Orders were issued on 30 November 1999[900] and 24 May 2001[901] respectively.

500. In the Order of 30 November 1999, the Appeals Chamber directed Akayesu to consolidate nine motions that he had filed between 23 September and 15 November 1999.[902] Akayesu filed his

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[897] On 22 August 2000, Akayesu filed another motion ("Urgent Motion by Defence Counsel to Suspend the Briefing Schedule") which was dismissed by an Order dated 24 August 2000 but rendered on 25 August 2000. The Prosecution filed a Response to that motion on 25 August 2000 ("Prosecution Response to Appellant's Motion for Extension of Time", dated 21 August 2000).

[898] Order (Hearing on appeal) issued on 2 October 2000. See below with respect to Akayesu's Motion for a postponement of the hearing date, filed on 30 October 2000.

[899] Scheduling order issued on 16 May 2001.

[900] Scheduling order issued on 30 November 1999.

[901] Scheduling order issued on 24 May 2001.

[902] Motion for Extension of Time-Limits and for Admission of New Evidence on Appeal pursuant to Rule 115 and 116 of the Rules of Procedure and Evidence, filed on 23 September 1999; Motion to Set Aside Registry's Certification of the Record on Appeal, to Rectify the Contents of the 'Record' and to Extend the Time-Limits in Respect of Appeals Pursuant to Articles 19 and 20 of the Statute and Rules 73 and 105 of the Rules of Procedure and Evidence, filed on 25 September 1999 and 4 October 1999; Motion on Violation of the Right to Counsel, for Extension of the Time-Limit for Appeal and Provisional Motion Seeking Admission of New Evidence on Appeal Pursuant to Rules 115 and 116 of

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Consolidated Motion on 10 December ("the First Consolidated Motion")[903] The Prosecution filed its Response on 21 December 1999[904] after having filed *inter alia*, on 15 December 1999, an urgent motion for extension of time-limits for filing its Response.[905] Said request was granted by Order of 30 December 1999,[906] and on 13 March 2000, the Prosecution filed an Additional Response.[907]

501. By a Decision dated 17 April 2000, the pre-hearing judge ruled on two motions grouped under the first consolidated motion and which related essentially to procedural issues and to the record on appeal. The pre-hearing judge directed the Registrar to incorporate certain documents in the record and to serve them on the parties.[908] In its Decision of 24 May 2000, the Appeals Chamber ruled on the other consolidated motions not already disposed of and which were included in the First Consolidated Motion ("the Decision of 24 May 2000").[909] The Appeals Chamber granted requests for leave to amend the Notice of Appeal and for Admission of New Evidence on Appeal.

502. In the Scheduling Order of 24 May 2001, the Appeals Chamber directed Akayesu to consolidate into a single document all his pending motions dating from 7 December 1999, namely all the motions filed since the Scheduling Order of 30 November 1999 and which had not been disposed of by the Appeals Chamber in its Decision of 24 May 2000.[910]Akayesu filed his

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the Rules of Procedure and Evidence, filed on 25 October 1999; Motion for New Evidence Under Appeal, Extension and Suspension of Time-Limits and Stay of Proceedings. Motion Seeking Leave to Amend the Notice of Appeal in Respect of the Motion for New Evidence Under Appeal, Extension and Suspension of Time-Limits and Stay of Proceedings, filed on 25 October 1999; *Requête en communication de preuve et en prorogation des délais d'appel suivant les règles 86, 73, 107, 115 and 116 du Règlement de procédure et de preuve et suivant l'article 20 du Statut du Tribunal*, filed on 26 October 1999; Motion Seeking Leave to Amend the Notice of Appeal in Respect of the Motion for New Evidence Under Appeal, Extension and Suspension of Time-Limits and Stay of Proceedings (re. Witness DAAX), filed on 10 November 1999; Reply to the Prosecution's Response to the motion entitled "Motion to Set Aside the Registry's Certification of the Record on Appeal, to Rectify the Contents of the 'record' and to Extend the Time-Limits in Respect of Appeals Pursuant to Articles 19 and 20 of the Statute and Rules 73 and 105 of the Rules of Procedure and Evidence, filed on 4 November 1999; Motion Seeking Leave to Amend Notice of Appeal and for Suspension of Time-Limits, filed on 15 November 1999. *Requête en reconstitution de le case file, en communication de documentss de première instance et en prorogation des délais d'appel*, filed on 15 November 1999. In its Order of 30 November 1999, the Appeals Chamber also mentioned two Responses that the Prosecution had filed on 15 October 1999, namely Prosecution's Response to Appellant Jean-Paul Akayesu's Motion for Annulment of the Certification of the Record and Prosecution's Response to Appellant Jean-Paul Akayesu's Motion for Extension of Time-Limits for Appeal and for Admission of New Evidence on Appeal Pursuant to Rules 115 and 116 of the Rules of Procedure and Evidence.

[903] The Appellant's Brief relating to the following motions referred to in the Scheduling Order of 30 November 1999, filed on 10 December 1999.

[904] Prosecution's Response to the "*Mémoire de l'appelant concernant les requêtes suivant visées par l'ordonnance comportant calendrier du 30 novembre 1999*, filed on 21 December 1999.

[905] Prosecution's Urgent Request for Extension of Time to Respond to the "*Mémoire de l'appelant concernant les requêtes suivant visées par l'ordonnance comportant calendrier du 30 novembre 1999*, filed on 15 December 1999

[906] Order (Prosecution's Urgent Motion for Extension of Time-Limits), issued on 30 December 1999.

[907] Addendum to Prosecution's Response to Brief filed by the Defence pursuant to Appeals Chamber's Order of 30 December 1999. The Prosecution also filed on 3 November 2000 an Addendum to the Prosecutor's Additional Response to the Defence Brief filed pursuant to the Appeals Chamber's Order of 30 December 1999.

[908] Decision on Grounds 1 and 7 of the Appellant's Brief relating to the following grounds referred to in the Scheduling Order of 30 November 1999 (concerning the record on appeal), dated 17 April 2000 and filed on 18 April 2000.

[909] Decision (concerning motions 2,3,4, 5, 6 and 8 Appellant's Brief Relative to the Following Motions Referred to by the Order dated 30 November 1999), delivered on 24 May 2000.

[910] Scheduling Order of 24 May 2000. The motions concerned were the following: Motion Seeking Leave to Amend the Notice of Appeal Relating to the Impartiality and Independence of the Tribunal and Add New Grounds of Appeal, filed on 7 December 1999; Motion to Amend the Notice of Appeal (re: to clarify Part Two of the Appeal Relating to 'Denial of the Right to a Competent Counsel"), filed on 20 January 2001 (noting that the Registry had filed its observations on the Motion pursuant to Rule 33(B) of the Rules "Registry's observations on the Motion to Amend the Notice of Appeal (re: to clarify Part Two of the Appeal Relating to 'Denial of the Right to a Competent Counsel"), filed

Consolidated Motion on 2 June ('the Second Consolidated Motion")[911] and the Prosecution filed its Response thereto on 12 June 2000.[912] The Appeals Chamber rendered a Decision on the Second Consolidated Motion on 22 August 2000 ("the Decision of 22 August 2000")[913] In said Decision, the Appeals Chamber dismissed Akayesu's Request for Leave to Amend his Notices of Appeal and for Admission of New Evidence on Appeal.

503. Akayesu filed several other motions which were addressed neither in the Decision of 24 May 2000 nor in the Decision of 22 August 2000, including a Motion to set a date for the holding of a Status Conference which was dismissed by the Scheduling Order of 24 May 2000,[914] a Motion for the translation of documents filed by Akayesu before the Appeals Chamber which was dismissed in a Decision rendered on 25 May 2000[915] and a motion for correction of an Order which was allowed and dismissed in part by an Order issued on 25 May 2000.[916]

504. Furthermore, Akayesu filed two last-minute motions before the start of the hearing on appeal. Firstly, on 20 October 2000, Akayesu filed a Motion to Rectify or Correct and Reconsider Part of the Decision of 22 August 2000 relating to the Appeals Chamber's finding on his request for leave to add a new ground of appeal concerning, in general, his unlawful detention.[917] The said motion, is ruled on in the instant Judgement, as part of the consideration of Akayesu's tenth ground of appeal. Subsequently, on 30 October 2000, Akayesu filed a motion for a postponement of the hearing on appeal (scheduled for 1 November 2000) to allow for the translation of certain documents. [918] The Prosecution filed its Response thereto on 31 October, arguing that the motion

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on 20 March 2000; Motion for an Order to transcribe the transcripts of the hearing of 23 January 1997 and to Amend the Notice of Appeal With Respect to Exclusion of the Accused from the Hearing, filed on 17 February 2000; *Requete pour produire des délais relativement à un conflit d'intérêt et inconduite du procureur*, filed on 17 February 2000; *Requête pour produire une preuve en appel re: Témoin Expert M. Serge A. Desouter (et Désistement d'un motif d'appel*, filed on 29 February 2000; Urgent Motion for Disclosure and for an Oral Hearing, filed on 10 April 2000 and Amended Urgent Motion for disclosure and for an oral Hearing and Motion to Amend, filed on 17 April 2000.

[911] Consolidation or Summary of Pending Appeals (pursuant to the Scheduling Order of 24 May 2000), filed on 2 June 2000.

[912] Prosecution's Response to the "Consolidation or Summary of Pending Appeals (Pursuant to the Scheduling Order of 24 May 2000).

[913] Decision on the Consolidation or Summary of Pending Appeals, delivered on 22 August 2000.

[914] Motion to Hold a Status Conference (Rules 65 *bis* and 107 of the Rules of Procedure and Evidence), filed on 12 February 2000. The Prosecution responded in its Prosecution's Response to the Defence Motion to Hold a Status Conference, filed on 13 March 2000.

[915] Decision (re: *Requête en urgence relative à la traduction de documents déposés par l'appelant pour étude par la Chambre d'appel),* 5 May 2000. The motion by Akayesu (*Requête en urgence relative à la traduction de documents déposés par l'appelant pour étude par la Chambre d'appel)* was filed on 7 March 2000 and the Reply (*Réplique d'Akayesu à la Requête en urgence relative à la traduction de documents déposés par l'appelant pour étude par la Chambre d'appel)* was filed on 21 March 2000.

[916] Decision [re: *Requête en rectification de l'ordonnance* (Prosecutor's Urgent Request for Extension of Time) filed on 30 December 1999], rendered on 25 May 2000. Akayesu's Motion [*Requête en rectification de l'ordonnance* (Prosecutor's Urgent Request for Extension of Time) filed on 30 December 1999, was filed on 13 January 2000. The Prosecution's Response (Prosecution's Response to the Defence's *Requête en rectification de l'ordonnance)* was filed on 20 January 2000.

[917] Notice of motion to Rectify or Correct and Reconsider part of the Decision of August 22, 2000 (Decision on the Consolidation or summarisation of motions Not Yet Disposed Of) (Re: Amendment of Notice of Appeal), filed on 20 October 2000.

[918] "Motion to Postpone a Hearing", filed on 30 October 2000. The Prosecution filed its Response on 31 October 2000 [Prosecution Response to the Motion for Postponement of the Hearing of the Appeal (filed on 31 October 2000). The Appeals Chamber was initially seized of the said motion through a letter from Counsel for Akayesu dated 24 October 2000 and filed on 25 October 2000 (Letter from John Philpot to Judge Claude Jorda, President of the Appeals Chamber).

was late and that such a postponement was unnecessary. On 1 November 2000, the Appeals Chamber denied the motion at the start of the hearing on appeal and proceeded with the hearing.[919]

505. Lastly, Akayesu filed two motions during the judges' deliberations following the hearing on appeal.

506. In his first motion, Akayesu sought translation of his Brief and Reply.[920] The Prosecution responded on 16 March 2001[921] and Akayesu filed a reply on 21 March 2001.[922] The Appeals Chamber rendered a decision on 29 March 2001 in which it stated that "it is imperative, for the proper administration of justice and for equality of treatment of the parties, that their written submissions, and particularly their briefs, are translated into the Tribunal's two working languages". Consequently, it directed the Registrar to have the briefs translated into English within a specific time-limit.[923]

507. On 17 April 2001, Akayesu filed a second motion requesting the Appeals Chamber to return the case to the Trial Chamber for review, pursuant to Rule 123 of the Rules,[924] which provides that: "If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion". At that juncture, Akayesu had already filed before the Trial Chamber, on 12 April 2001, a motion for review of the Trial Chamber's decision rendered on grounds of what he alleged to be newly discovered facts.[925] The Prosecution filed its response on 4 May 2001.[926] On 9 May 2001Akayesu filed[927] a notice of intention to file a reply to the Prosecution's response, which he did on 11 May 2001.[928]

508. The Appeals Chamber disposed of the motion on 16 May 2001 finding that in the circumstances of the case, there was no cause to return the case to Trial Chamber I. It ruled that: (1) the case is not deemed to be before the Trial Chamber unless the Appeals Chamber decides to remit the case to it and that, in the absence of such a remit, the Trial Chamber has no power to rule on the motion for review; (2) in deciding whether there is cause to return the case to a Trial Chamber, the Appeals Chamber takes note of the provisions governing review before the Tribunal; (3) it appears *prima facie,* in the instant case, that Akayesu did not present new facts; (4) even assuming that the Appeals Chamber equates the motion for return of the case with an application

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[919] Transcript, 1 November 2000, p. 5.

[920] Extremely urgent notice of motion requesting an order for translation of Appellant's Brief and Appellant's Brief in Reply, filed on 15 March 2001.

[921] Prosecution Response to the "extremely urgent notice of motion requesting an order for translation of Appellant's Brief and Appellant's Brief in Reply", filed on 16 March 2001.

[922] Reply to Prosecutor's Response to the Appellant's extremely urgent notice of motion requesting an order for translation of Appellant's Brief and Appellant's Brief in Reply, filed on 21 March 2001.

[923] Order (for translation of Appellant's Briefs), filed on 29 March 2001.

[924] Motion and Brief of argument pursuant to Rule 123 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, filed on 17 April 2001.

[925] Defence Motion for review of the Trial Chamber's decision of 2 September 1998 and Brief in support of Defence Motion for review of the Trial Chamber's decision of 2 September 1998, filed on 12 April 2001.

[926] Prosecution Response to Appellant's motion pursuant to Rule 123 of the Rules of Procedure and Evidence filed on 17 April 2001, filed on 4 May 2001.

[927] Notice of intention to file a reply to the Prosecution's response to the "Motion and brief of argument pursuant to Rule 123 of the (Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda), filed on 9 May 2001.

[928] Reply to the Prosecution's response to the "motion and brief of argument pursuant to Rule 123 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, filed on 11 May 2001.

for leave to present new evidence on appeal, such an application must be dismissed since the requirements of Rule 115 of the Rules are not met in the instant case.[929]

F. Motions filed by the Prosecution

509. On 13 March 2000, the Prosecution filed the "Prosecutor's urgent motion for protection of witnesses", following a motion filed by Akayesu which included a document[930] disclosing the names of 12 witnesses, some of whom were covered by witness protection orders made during the trial. The Appeals Chamber ordered, *inter alia*, that a redacted version of the document in question be prepared and that the identity of all protected witnesses not be disclosed to any member of the public or to any other person not involved in this appeal.[931]

510. On 31 May 2000, the Prosecution filed a motion for admission as new evidence,[932] of certain material extracted from the transcripts of the *Georges Rutaganda* case. Akayesu responded thereto on 16 June 2000, stating that he saw no problem.[933] By a decision dated 12 July 2000, the Appeals Chamber admitted the transcripts in question as additional evidence.[934]

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[929] *Decision (Motion for return of the case to Trial Chamber I)*, rendered on 16 May 2001.
[930] Motion to amend Notice of Appeal (Re: to clarify Part two of the Notice of Appeal relating to "Denial of the right to a competent counsel), filed on 24 January 2000.
[931] Order (Prosecutor's urgent motion for protection of witnesses), dated 20 March but rendered on 21 March 2000.
[932] Prosecution's Motion for admission of new evidence on appeal following the Appeals Chamber's Decision of 24 May 2000, filed on 31 May 2000.
[933] Response to the Prosecutor's Motion for admissibility of new evidence on appeal following the Appeals Chamber Decision on 24 May 2000, filed on 19 June 2000.
[934] Decision (Prosecution's Motion for admission of new Evidence on Appeal), rendered on 12 July 2000.

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ANNEX B
AKAYESU'S GROUNDS OF APPEAL[935]

A. First Ground of Appeal: Akayesu was denied the right to be defended by Counsel of his choice

First notice of appeal

The Accused was deprived of the choice of counsel from January 1998 when his trial opened. The Prosecution, in the person of Sarah Dareshori who was prosecuting the case, made public pronouncements about this in the New York Times. Proof thereof will be provided. (made available).[936]

The Accused was forced to accept Patrice Monthé and Nicholas Tiangaye whom he had earlier turned down. They were solely the choice of the Registrar.[937]

Disclosure was inadequate because the Prosecutor supplied names of witnesses too late, thereby impeding the preparation of a full answer and defence.[938]

At some stages in the proceedings, the Accused was forced to defend himself since no counsel of his choice was assigned to him in spite of his requests.[939]

Second Notice of appeal

(a) The Court and the Registrar deprived the Appellant of the right to choose his Defence Counsel. He could not have his first choice, Johan Scheers because of Andronico Adede, the former Registrar dismissed for his incompetence and Prisca Nyambe who worked for the Registrar's Office. On 31 October 1996, Michael Karnavas, Mr. Scheers' assistant who had contacted Scheers in Belgium, illegally coerced the Appellant to "choose" him as Defence Counsel in replacement of Mr. Scheers. The Appellant dropped Michael Karnavas because of his deceitful manoeuvers. Moreover, it has been discovered that Karnavas had been a candidate to work as Prosecutor and that he has already written and stated that he could never defend a "genocider." Appellant's second choice was Michel Marchand from Montreal, Canada who was present at the opening of his trial on 9 January 1997. The Prosecutor knew he was present as recognized by Prosecutor Sarah Dareshori in the New York Times on 8 September 1998. The Court and the Registrar illegally refused requests by Mr. Marchand to address the Court and meet his client. The Tribunal imposed on the Appellant two Counsel assigned by the Registrar on 9 January 1997, namely: Nicholas Tiangaye and Patrice Monthé. The trial began. The Appellant refused these two Counsel whom he did not know, did not want and who had not prepared his defence in the first trial for genocide since Nuremberg. This treatment of an accused is a flagrant violation of the Statute of the Tribunal and the fundamental principles of Human Rights. It is also totally different from the treatment of accused persons at Nuremberg: the Court in Nuremberg painstakingly ensured that this fundamental right of every accused to choose his own Defence Counsel was respected. According to some information available to the Appellant, the International Criminal Tribunal for the Former Yugoslavia recognizes the right of an accused person to choose his own attorney who is

[935] These grounds of appeal appear as reflected in the original filed and therefore contain the same errors or omissions.
[936] Ground 22.
[937] Ground 23.
[938] Ground 33.
[939] Ground 38.

subsequently assigned by the Registrar. This is an error in law that goes to jurisdiction causing irreparable prejudice to the Appellant. The Appellant will show proof of this violation of his fundamental right and of its consequences.

(b) After the registrar imposed on the Appellant the two Counsel he did not want, he fired them and asked to defend himself. For three days, he defended himself and asked the witnesses questions. The Court illegally allowed the two fired Counsel, Patrice Monthé and Nicholas Tiangaye, to ask questions. The Court then forced the Appellant to accept these two Counsel thereby violating the Tribunal's Statute that allows an accused to defend himself. This is an error of law which goes to jurisdiction and is in violation of the Statute of the tribunal.

(c) When the Court imposed upon the Accused the two Counsel whom he did not know and did not want, Judge Laïty Kama told him that the attorneys were competent and that he did not have the right to represent himself. But, at the time of the closing arguments by the Prosecutor, the two Counsel considered "competent" by Judge Kama were absent. The Court asked the Prosecutor to present his arguments in the absence of the two Counsel. And, this part of the trial continued without the appellant being represented. The Court committed an error of law which goes to jurisdiction.[940]

B. Second ground of appeal: Akayesu was denied the right to a competent Counsel.

First notice of appeal

The Chamber objected to the presentation of 19 important Defence witnesses, thus committing an error which goes to jurisdiction, in violation of the Statute of the International Criminal Tribunal for Rwanda (ICTR) as well as the basic rights of the Accused.[941]

The Accused was not represented by a competent lawyer. All the lawyer did was to bungle the entire case.[942]

The Chamber called General Dallaire as an expert witness, thus causing an irreparable prejudice to the Appellant.[943]

The Chamber lost all jurisdiction by asking the Prosecutor to present her arguments in the absence of Counsel for Accused.[944]

Second notice of appeal

The Accused was deprived of his right to full answer and defence because he was deprived of the right to a full defence by a competent or appropriate Counsel. The trial was totally affected by this violation causing a complete denial of justice for the Accused. The errors include among others:

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940 Part I.
941 Ground 7.
942 Ground 25.
943 Ground 26.
944 Ground 27.

5901/A bis

(i) The two attorneys assigned to defend him at the beginning of the trial had no choice but to ask for a postponement. They did not know the Accused, were not apprised of the evidence and could not defend the Accused adequately. For a fair defence, an accused person must be able to exchange and discuss the issues of the trial with his Counsel, decide if he has confidence in his Counsel, and inform him of all the details of the trial. This all must be done well in advance. It is all the more important given the seriousness of the charges – genocide and crimes against humanity - the eventual penalty and the stigma attached to a conviction.

a. The two assigned attorneys did not contact John Scheers who had already accomplished a great deal of work for the Accused.

b. The attorneys committed an unacceptable error in calling in defence as an expert witness the Canadian Romeo Dallaire. He was no more than an eyewitness. They could not therefore cross-examine General Dallaire on his close relations with General Paul Kagame, present dictator of Rwanda , nor on his divergent points of view such as his interview on French CBC television on 14 September 1994, where he said:

> Question from the Audience: Was it a two-sided genocide, as much by the Hutu as by the Tutsi?
>
> Dallaire: I would say that there was a national genocide, rather a genocide of a political nature, but not purely ethnic. Many Hutu and many Tutsi were killed. I would not deny that there were massacres behind the lines of the RPF just like there were massacres on the other side. But there is a wish to bring those people to justice and have them answer for their acts. Both sides should be sent to Court.
>
> (...)
>
> Jean-François Lépine from the Canadian Broadcasting Corporation.
>
> (...) the assassination of the President allowed for the implementation of a plan that existed, a plan of extermination?
>
> Dallaire: One hypothesis, there are dozens of hypotheses (...) rather on the political level, to eliminate the coalition of moderates. (...) But the excesses which we witnessed go much beyond that which could be conceived . But there was a process of political destruction of the moderates. (...) But, never, I think, could anyone have planned the scope of the excesses.
>
> Source: *Roméo Dallaire: un homme d'honneur*/ Societé Radio Canada
> Le point, 14 Septmber 1994. Duration 27 min. 30 sec.

c. The attorneys made unacceptable admissions in the trial. The most serious is to have conceded that on legal terms a genocide had taken place in Rwanda in 1994.

d. The attorneys did not call one or more expert witnesses to counter the dubious expert testimony of Alision DesForges. In this appeal, the Appellant will correct this failing.

e. Counsel admitted several other uncorroborated facts the details of which will be systematically provided from transcripts of hearings.

(vii) With respect to the syndicate of false witnesses paid and prepared for testimony before the International Criminal Tribunal for Rwanda, the attorneys failed to make specific evidence concerning each prosecution witness as required by Common Law.

(viii) The attorneys did not ask the Appellant to testify to counter specific allegations of several witnesses thereby committing an error in Common Law.[945]

In its haste to end the trial, the Court deprived the Appellant of his right to full answer and defence by illegally refusing the testimony of fourteen important Defence witnesses. This error of law and fact and law goes to juristiction.[946]

The Court erred in law in deciding that General Romeo Dallaire was an expert witness thereby causing a miscarriage of justice. Dallaire was witness on fact and nothing else.[947]

C. Third Ground of appeal: Biased and Partisan Tribunal

First notice of appeal

The Trial Chamber is not neutral. Evidence thereof will be made on appeal. In particular, its members spoke on several occasions about the collective guilt of the Hutu, of whom the Accused is one.[948]

The Chamber ruled *ultra petita* that there was a planned genocide in Rwanda between April and July 1994.[949]

It is impossible for an accused to enjoy a fair trial in the context of continuous warfare in the region and in the context of intimidation and killing of potential Defence witnesses.[950]

Second notice of appeal[951]

(e) The Court was illegally formed by the Security Council contrary to the provisions of the Charter of the United Nations thus judgement rendered is totally invalid.

(f) The Court is not neutral. The only accused are from one side of the conflict. The Ugandan RPF aggressors are totally unpunished and only those on the resistance side are accused for excesses apparently committed in the final phases of the four-year war of invasion, illegal under African law. The final phase commenced with the missile attack on the Presidential airplane on 6 April 1994. For example, the Gersony Report, accepted by the High Commissioner of the United Nations, confirmed that the victorious RPF had murdered at least 30,000 persons, mostly Hutu, between June and September 1994. There are no accusations based on this report hidden from the public for the last four years.

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945 Part Two.
946 Ground 4 (v).
947 Ground 4(y).
948 Ground 9.
949 Ground 29.
950 Ground 34.
951 As mentioned above, the Appeals Chamber recalls that the grounds of appeal appear as framed and presented by Akayesu himself. Errors in numbering stand therefore left uncorrected.

5899/Abs

(g) The members of the Court are not neutral. Judge Laïty Kama has behaved in a highly partisan manner. He sees his mission as one of punishing the authors of "genocide". He made public statements on several occasions about the collective guilt of the prisoners such as the arrest of "big fish". In a speech in Ethiopia, he spoke of where the convicted should serve their sentence. Had he decided that he would convict some accused? Proof of this allegation, though known to all the parties before the Tribunal, will be offered at the hearing on the merits of this appeal.

(h) Judge Laïty Kama has also systematically violated the presumption of innocence of the Appellant. When several witnesses, alleged to be victims of sexual violence, finished testifying, he expressed sympathy for their suffering even before the Defence had begun. He decided they were telling the truth in advance. The Appellant contested this evidence which was eventually accepted in the final judgement. By deciding in advance that the witnesses were telling the truth, the judge violated the presumption of innocence, thereby invalidating the entire trial.

(i) Judge Navanethem Pillay also violated systematically the presumption of innocence of the Appellant. She went on a public speaking tour before the defence had begun. Without commenting on individual testimony, she stated publicly on 12 November 1997, on a radio program on the Canadian Broadcasting Corporation (CBC) that victims of sexual violence in Rwanda don't dare use explicit sexual words. The only proof to that effect is a declaration by Prosecutor, Pierre-Richard Prosper. She also spoke of 200,000 victims of sexual violence and a political strategy of sexual violence none of which was proven properly before the Court. She made similar comments in at least one magazine and at a colloquium at York University, Toronto. She violated hereby the presumption of innocence of the Appellant. Proof thereof will be made at the hearing of this appeal. This error invalidates the final judgement.

(j) Judge Lennart Aspegren made the well-known comment that the prisoners at Arusha are too well treated as if he was echoing complaints of the Kigali Government. Proof will be made at the hearing of this appeal. He violated the presumption of innocence of the Appellant and his duty of neutrality.

(k) There is another ground for finding bias in the Court in its fact finding. The Court erred in law and in fact in referring on nine occasions without exception to the missile attack on the Presidential airplane which took place on 6 April 1994 as a "crash". (Judgement in English). It was not a "crash" but rather an attack by a land to air missile. This attack, which sparked the political and interethnic conflict which began in April 1994, was wrongly classified and therefore affected the appreciation of evidence as a whole. A crash could be an accident while a missile attack on the airplane carrying two Hutu presidents has highly political connotations and consequences. The Court put its head in the sand concerning the key issue: Who is responsible for the missile that killed the President of Rwanda, a country under siege in a four-year war of invasion? In committing this monumental factual error, the Tribunal caused a miscarriage of justice for the Appellant.

(l) It is impossible for the Accused to be tried fairly in the context of continual war in the region and the context of intimidation and assassination of real or potential witnesses for the Defence. The aggressive war on Rwanda by Uganda and the Rwandan Patriotic Front was transformed into a war of aggression by Rwanda and Uganda against Zaire (1996-1997) and then against the Congo-Zaire since 2 August 1998. War is raging in the interior of Rwanda. Rwanda is a monoethnic dictatorship. The Rwandan Patriotic Front uses terror throughout Africa, Europe and in Canada. Any witness expressing ideas contrary to the position of the RPF risks his life. One might mention the case of Mr. Fidèle Uwiyeze, a witness from Rwanda concerning the Remera Brigade. According to Amnesty International, he has disappeared and is presumed dead.

Furthermore, there is no agreement with countries such as Kenya so that potential witnesses can return there after testifying. Many of such witnesses are illegal residents of Kenya. Several witnesses for the Appellant are afraid and did not testify. The only remedy is to order a stay of proceedings.

(m) The Court is not functional, lacking a subpoena power, a power to force the appearance of witnesses. The only real power of constraint held by the Court is its power - legally dubious at that- to force the arrest of a suspect in a third country and his/her transfer -also probably illegal- to the seat of the Tribunal in Arusha. This power imbalance-a real power to arrest accused wherever they are as opposed to the absence of a power to force the attendance of a witness from afar causes a miscarriage of justice for the Defence. Furthermore, it is up to the accused to justify the calling of witnesses while generally in an accusatory legal system, the accused chooses his witnesses without the intervention of the Court.

(n) The Tribunal erred in fact and in law by characterizing the conflict in Rwanda in 1994 as an internal armed conflict. On the contrary, it was an illegal war by Uganda against Rwanda. On 22 September 1998, President Yoweri Museveni of Uganda even admitted to the Ugandan Parliament that his country had participated materially in favour of the Rwandan Patriotic Front in the four-year war. The consequence of this error is a full misunderstanding of the conflict. Those who resisted aggression and the infiltration of the enemy become the guilty ones, the "genociders" and those who collaborated with the veritable war makers are considered the victims. This error caused a miscarriage of justice.

(o) In the same way, the Court made a major error in concluding that it was necessary to distinguish fully between the military conflict between the Rwandan Patriotic Front (RPF) and the Rwandan Armed Forces (RAF) and the conflict between those who were not ostensibly military personnel. RPF had members infiltrating Rwanda since October 1990. The parties in this "civil" conflict coincided exactly with those of the military conflict and were inseparable. This specious distinction is contrary to the facts entered into evidence, contrary to additional facts to be adduced and caused a miscarriage of justice for the Appellant.

(p) The Tribunal ruled *ultra petita* that there was genocide in Rwanda between April and July 1994. To decide on the Appellant's case, as the Court admitted, it was not necessary to decide whether or not there was genocide in Rwanda between April and July 1994. The Appellant submits that the Court made a political declaration that was unnecessary. A court has no right to go beyond the facts and issues necessary to resolve the issue before it.

(q) The Court erred in concluding that there had been a planned genocide against the Tutsi in Rwanda between April and July 1994.[952]

D. Fourth ground of Appeal: other fatal errors invalidating the guilty verdict.

1. First sub-ground: illegal amendment of the initial indictment.

First notice of appeal

[952] Part III.

5897/A bis

The Chamber, composed of Judge Laïty Kama, Judge Navanethem Pillay, Judge Lennart Aspegren, accepted an amendment to the indictment, thereupon adding the crimes of rape, at the behest of the Prosecutor, on a third party. Logically, these judges should have stood down, yet they are the same who constituted the bench that tried the Accused contrary to established general principles of law.[953]

Second notice of appeal

On 17 June 1997, the Tribunal erred in law in allowing the amendment of the indictment to include three new counts of sexual violence.[954]

2. *Second sub-ground: unlawful use of prior statements*

First notice of appeal

Disclosure was inadequate because the Prosecutor supplied names of witnesses too late, thereby impeding the preparation of a full answer and defence.[955]

Second notice of appeal

The Court erred in taking collective blanket decision to consider as more truthful the witness statements before the Court as opposed to their prior out-of-court statements. Whenever there is divergence between a statement made in court and one made out of court, the Court must consider on an individual basis-witness by witness and statement by statement – the divergences between the out- of- court statement and the statement in Court. In taking a blanket decision, the Court violated the presumption of innocence and favoured unduly Prosecution witnesses thereby causing a miscarriage of justice.[956]

3. *Third sub-ground: the non-application of the criteria of reasonable doubt, errors of fact*

First notice of appeal

In its judgement, the Trial Chamber drew fallacious conclusions as a result of its poor knowledge of the geography of Taba *commune*. Furthermore, it did not take into consideration the discrepancies in the timetable of the Accused contained in the accounts of Prosecution witnesses.[957]

The Chamber based its judgement solely on the testimonies of Prosecution witnesses, having dismissed beforehand the testimonies of Defence witnesses. This will be amply demonstrated.[958]

The Chamber often attributed probative value to irrelevant testimony.[959]

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953 Ground 37.
954 Ground 4(t).
955 Ground 33.
956 Ground 4(bb).
957 Ground 2.
958 Ground 3.
959 Ground 4.

The Chamber did not take into account serious contradictions in the testimony of Prosecution witnesses.[960]

The Chamber contradicted itself on many points of fact.[961]

In Canada, Judge Navanethem Pillay of Trial Chamber I made public pronouncements on the credibility of Prosecution witnesses even before the Defence had presented its evidence, thereby demonstrating her flagrant partiality.[962]

In New York, Judge Laïty Kama, for his part, publicly admitted that there was evidence of rape prior to the presentation of evidence by the Defence, and equally demonstrating his prejudgment.[963]

The Chamber dismissed without any valid grounds therefor the motion by the Accused for an inspection of the site for the purpose of forensic analysis.[964]

Second notice of appeal

The Court rendered its judgement using the wrong burden of proof, by applying the standard of the "balance of probabilities" rather than the standard of "beyond all reasonable doubt."[965]

The Court distorted the testimony of several witnesses. For example, it concluded that the Appellant was looking for Tutsis whereas the evidence shows that he was looking for RPF infiltrators.[966]

4. Fourth sub-ground: out-of-court evidence

Amended in the Decision of 24 May 2000[967]

The Tribunal rendered its judgement on the basis of out-of-court evidence, without the trial of the Appellant, in the absence of the accused and without his knowledge. The presumed change in the attitudes of the *préfets* and *bourgmestres* following the meeting of 18 April 1994 and the presumed change in the attitude of the Appellant, was the core of the trial. Whereas in the trial of Georges Rutaganda on 14 October 1997, the Tribunal *proprio motu* or officially made comments appreciating the evidence tendered in the trial of the Appellant during the testimony of expert Filip Reynjtens and put questions to the latter that were directly material to the trial of the Appellant. The expert testified on those issues. Furthermore, the trial Chamber allowed expert Filip Reynjtens to make negative and disparaging comments on the case-file of the Appellant without any objections whatsoever. That error alone is an error in law (miscarriage of justice) which invalidates the decision. This will be demonstrated at the hearing of this appeal.

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960 Ground 5.
961 Ground 12.
962 Ground 14.
963 Ground 15.
964 Ground 31.
965 Ground 4(r).
966 Ground 4(dd).
967 Ground 24, First notice of appeal and ground 4(s), Second notice of appeal.

5895Abis

5. Other issues

(a) Judicial notice of United Nations investigation reports

Second notice of appeal

The Court erred in deciding that it could take judicial notice of some reports the contents of which are contested by the Appellant.[968]

(b) Interpretation

First notice of appeal

The Chamber used the services of an interpreter, a member of ARFM, to interpret the testimony of women who had come to testify on rape, whereas the said interpreter had just organized demonstrations in Kigali against sexual assault. ARFM is the association of Rwandan Media Women, well known for their political activities, and backed by the Tutsi regime in Kigali.[969]

(c) Inaccurate transcripts

First notice of appeal

The Appellant notes that the transcripts of his trial are not accurate and are not in conformity with the cassettes of the hearings, which prevented him from preparing his defence as he would have liked to.[970]

Second notice of appeal

The Appellant notes that, according to preliminary information, the transcripts of his trial are not accurate and in conformity with audio tape recordings of the hearings and that important points are missing.[971]

(d) Disclosure of evidence

Second Notice of appeal

The disclosure was inadequate because the prosecution provided witness names too late thereby preventing the preparation of a full defence. Not all statements were disclosed. The Prosecutor had about 90 hours of video or sound recordings of declarations of Jean Kambanda concerning the events dealt with in the judgement. The obligation to disclose, whether it be relevant or non-relevant, is not at the discretion of the Prosecutor but it is almost absolute. The Prosecutor had the obligation to disclose all the declarations of Jean Kambanda along with a detailed account of detention separate from the other accused without a lawyer and his handling by

[968] Ground 4(u). The reports referred to by Akayesu are not contained in the annex.
[969] Ground 21.
[970] Ground 35.
[971] Groud 7.

Canadian policeman Pierre Duclos. The Appellant requests the Appeals Chamber of this Court to order disclosure.[972]

(e) Expert witnesses

First notice of appeal

The Chamber took for irrefutable and universal truth the testimonies of Alison DesForges and Mathias Ruzindana, whereas their opinions are challenged in academic and scientific circles, or by other experts. The Defence did not have an opportunity to present its own expert witness to rebut their testimonies.[973]

(f) Witness protection

First notice of appeal

The Presiding Judge of Trial Chamber I and the Prosecution Counsel, Richard Proper, respectively disclosed the identity and address of DFX, Witness for the Accused, whereas he was a protected Witness. The grave consequences that ensued were characterized, in particular, by threats to the security of Witness DFX, and the refusal of certain witnesses to come and testify in favour of the Appellant.[974]

Second notice of appeal

The Court did not respect its own rules nor enforce the respect for these rules concerning the protection of witnesses and the non-publication of their identities thereby depriving the Appellant of the right to call other witnesses who would then be afraid to testify. The name of his wife and the identity of the *préfet* of Gitarama were rendered public.[975]

(g) Pressure on witnesses and intervention by the Tribunal

The Chamber discriminated against certain Defence witnesses. In certain cases, it did not hesitate to intimidate them.[976]

(h) Informal conversation between a judge and a witness during proceedings

First notice of appeal

On more than one occasion, the Chamber allowed questions to be put to witnesses while the Appellant conferred with his Counsel, thus causing prejudice to the Appellant.[977]

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[972] Ground 4(cc).
[973] Ground 17.
[974] Ground 18.
[975] Ground 4(x).
[976] Ground 8.
[977] Ground 32.

5893/A bis

Second notice of appeal

On at least one occasion, a member of the Tribunal, Judge Aspegren, continued asking questions to a witness while the Appellant was speaking with his lawyer causing a serious prejudice to the Appellant.[978]

E. Fifth ground of appeal: Total absence of the rule of law

The Court was formed to bring the Rule of law to Rwanda and to end a so-called "culture of impunity". Since 1994, impunity is the rule for the new murderous dictators of Rwanda concerning their acts in Rwanda, in the east of Congo-Zaire from late 1996, 1997 and through 1998. The Prosecutor, Appeal Justice Louise Arbour from Canada hired a Canadian policeman, Pierre Duclos, known for fabricating false evidence in the Matticks affair. Duclos was assigned to "handle" former Prime Minister Jean Kambanda. The behaviour of the Court and its administration and the systematic violation of the Appellant's fundamental rights as described in this notice of appeal would not be acceptable in Canada and in the Court of Appeal of Ontario from which the Appeal Justice Louise Arbour received leave to work as Chief Prosecutor for this Court. The Appellant has the right to recover his human dignity and his freedom.[979]

F. Sixth ground of appeal: Improper hearsay evidence

First notice of appeal

In rendering its judgement, the Chamber lent credence to hearsay.[980]

The Chamber lent credence to circumstantial evidence not supported by any real evidence.[981]

Added to the Decision of 24 May 2000

The Tribunal acted unlawfully by admitting without verifying the credibility of hearsay evidence thereby violating Sub-Rule 89 (C) of the Rules of Procedure and Evidence and disregarding the Judgement rendered in the *Prosecutor v. Tadic·*

G. Seventh Ground of Appeal: Irregularities in the examination and cross-examination

First Notice of Appeal

The Chamber refuted the manner in which Counsel cross-examined Defence witnesses, whereas the Prosecution had recourse, albeit unperturbed, to the same methods in respect of Prosecution witness.[982]

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[978] Ground 4(aa).
[979] Part V (para. ee).
[980] Ground 10.
[981] Ground 11.
[982] Ground 1.

The Accused was deprived of his right to cross-examine witnesses.[983]

Added in the Decision of 24 May 2000

At the beginning of the trial, at the hearing of 15 January 1997, Presiding Judge Laïty Kama did not allow the Accused to ask leading questions in cross-examination of a Prosecution witness. Judge Kama made a policy statement on this issue. Such prohibition is unlawful. Leading questions are almost always allowed in cross-examination. On the other hand, Judge Kama allowed the Prosecution to put leading questions to its own witnesses on many occasions during the proceedings. Leading questions by a Counsel to his own witness are in principle not allowed.

H. Eighth Ground of Appeal : Unlawful disclosure of Defence Witness Statements

Added in the Decision of 24 May 2000

On 28 January 1997, the Tribunal ordered that the Prosecutor should disclose to the Tribunal all witness statements and that all the statements referred to by the Prosecution or the Defence must be filed as exhibits. The final judgment establishes it.

I. Ninth Ground of Appeal : the letter of Witness DAAX to the Judges

Added in the Decision of 24 May 2000

During the Appellant's trial, on 3 March 1998 more specifically, Witness DAAX testified "for the Defence" in camera.

Witness DAAX, potentially a Prosecution witness at the outset, should normally have testified for the Prosecution, but the Prosecutor did not call him both because fear made the witness hesitant to come to testify and because such testimony as he would give would be favourable to the Defence, notably in view of his previous statement.

As the Prosecutor did not want to call Witness DAAX, the Defence, who was unable to secure the appearance of the witnesses it had cited, "recuperated" said witness and obtained that he testify "for the Defence" with leave of the Tribunal. DAAX accordingly testified for the Defence on 3 March 1998, upon being summoned as a Defence witness.

Prior to his 3 March 1998 testimony, the issue of the personal safety of the witness had been discussed in camera in the Chambers of the President of the Tribunal, Judge Laïty Kama, in the presence of Counsellors Pierre –Prosper Richard and James Stewart of the Office of the Prosecutor, Counsellor Nicolas Tiangaye, Defence Counsel, and Roland Amoussouga, OIC of the Witness Support Section. (The Minutes or conclusions of this meeting do not appear in the trial record).

Discussions at that meeting reportedly bore on the danger to the personal safety of the witness to leave Kigali to testify for the Defence, as shown by the motion filed by the Witness Support Section on 18 February 1998 (Case File, vol. VI, no. 84). In spite of the witness's fear and the dangers explained by the Witness Support Section, the witness accepted to testify.

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[983] Ground 20.

5891/A bis

Another aspect of said testimony relates to its selective nature: the witness forgot facts material to the defence of the Accused, notably the requests he made for more *gendarmes* before 18 April 1994 as well as the statements he made at the meetings of 18 April at Murambi to the same purpose.

Such public blunders, indeed serious, did not end there : on the same day, after testifying, Witness DAAX wrote a confidential letter (Exhibit R-1) to Judges Kama, Aspegren and Pillay because he deemed it "proper, to recall or add to the questions or responses addressed to me or my representatives at the time of my appearance and, which, in my opinion would be of interest to the Accused, who did not call me and to the International Criminal Tribunal ..." That letter raises five (5) issues:

The witness wonders why the Accused wore a military shirt and carried an army rifle in spite of his advice or order (this point was raised during public testimony);

He wonders why the former *bourgmestre* of Musambira claims that the accused participated in the attacks on certain families and killed Tutsis in the evening of 19 April 1994 (this point was not raised during public testimony). That is pure informatory incrimination or accusatory defamation, based on hearsay without any possibility for the accused to defend himself;

He asks himself what the accused's motives were in not warning the *Préfet* of "a widespread *Interahamwe* attack on a particular group of displaced persons or on a particular group of families" but merely reported a few acts of intimidation. That matter (alleged widespread attack on an unknown date) was not part of the testimony and is another malicious attack on the Accused, behind his back, without any possibility of answer or defence;

He wonders why the accused was not removed from office following the "highly applauded recommendation from Justin Mugenzi", a Minister under Kambanda. In plain language, DAAX insinuates that the accused was not removed because he was collaborating with the Government. Once again, the letter insinuates responsibility, by collaboration, behind the back of the accused who can do nothing to respond to something never raised in the course of the public testimony;

Lastly, he wonders why the accused-appellant stayed with the *Interahamwe* and their leaders "until he fled with them as a group, although it was known that most of the more serious *bourgmestres,* not directly involved in acts of widespread genocide, has stayed in Rwanda so as to disassociate themselves, however belatedly, from that genocidal Government". That opinion, negative and aggressive towards the accused is not found in the principal testimony; that was the stab in the back of the accused from a witness provided by the Prosecution and supposedly favourable to the Defence.

It is presumed that the letter, terribly damaging to the accused, was received and read by those to whom it was addressed: the judges, the Prosecution and Defence. Nothing in the Tribunal's records points to the contrary. The Appellant received a copy and is privy to information that this important missive was well and truly read by those to whom it was addressed.

Witness DAAX returned to Kigali after testifying and was arrested on 1 May 1998; he was detained at the *Gendarmerie* in Remera, then transferred to the military detention unit of the Presidential Guard at Kimihurura in Kigali, then moved to another military detention unit at Mulindi and ultimately sent to the Kimironko prison a few months later (we can prove this).

The Appellant claims that it was impossible to have a fair trial under the circumstances:

It is impossible to challenge the DAAX type of testimony, despite the considerable and irreparable prejudice caused, particularly on account of its concealment, its new and unexpected accusations (unconnected with evidence in open court) and the insinuations, opinions and condemnations conveyed therein;

Private communication between a witness, particularly a Government sponsored witness, and the Chamber is inadmissible evidence in all properly constituted legal systems and violates the fundamental principle of mandatory public hearings in criminal matters;

In the instant, there was moreover a violation of the principle of:

Public trial proceedings, and

The right to a fair and open trial,

as set forth under Rules 78 and 80 of the *Rules of Procedure and Evidence* and upheld by Common Law.
Scott et al. v. Scott, **[1913] A.C. 417, 463 (H.L)**
McPherson v. McPherson, **[1936] A. C. 177 (P.C.P)**
Addis v. Crocker et al., **[1960] 3 Weekly Law Reports 339, 345 and 346 (C. A. England)**

The Appellant was denied his right to cross-examine the witness which is a "constitutional error of the first magnitude", see *Davis v. Alaska,* ruling of the Supreme Court of the United States as cited in the *United States vs. Baglev* 473 U. S. 667, 105 S. Ct. 3375. 87 L. Ed 481 (1985), and there has been an offence against fundamental standards of a fair trial under any criminal law system : see, in particular, the opinion of Judge White in *Duncan vs. Louisiana,* 391 U. S. 145, 88 S. Ct. 1444, 20 L. Ed. 491 (1968).

Counsel for Defence were deficient and negligent and deprived the accused of his right to complete answer and defence and a fair trial. The devastating effect on the rights of the Appellant caused by the comments, insinuations and questioned voiced by DAAX, particularly in the private communication with the Judges, should have called for energetic and vigorous measures for protection and restoration of those rights. There was failure to take such measures and that negligence led to a "miscarriage of justice", which could have been avoided by Counsel totally committed to the cause of the Accused.

As we will show, analysis of the principle legal systems indicates that an incompetent defence of the accused makes the trial unfair and results in a miscarriage of justice. We note that precedent on the issue of incompetence of Defence Counsel is scanty because accused have in general, been represented by Counsel of their choice with whom they maintain harmonious relations. As the Accused was deprived of that right and was not afforded the vigorous, effective and independent defence he had expected, defence incompetence provides serious grounds for retrial.

The Appellant submits that the verdict could have been a different one had he been more vigorously assisted to provide full answer and defence.

J. Tenth Ground of Appeal : Unlawful detention

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[984] *Proposed Ground of Appeal (Decision of 22 August 2000)*

The Prosecutor detained the Appellant unlawfully on 22 November 1995, until his appearance on 30 May 1996. He was deprived of his right to know the cause for his detention. The Appellant himself and through his Counsel Johan Scheers complained about his unlawful detention.

K. Eleventh Ground of Appeal : Appeal Against Sentencing Judgment[984]

1. First Ground of Appeal Against Sentence

The Appellant was deprived of his fundamental right to defence by an attorney at the sentence hearing on 28 September 1998. He requested an attorney and was willfully deprived of this fundamental right by the Tribunal. The Tribunal lost all jurisdiction over the Appellant as result of its most unconscionable behaviour.

2. Second Ground of Appeal Against Sentence

On 2 October 1998, the Tribunal illegally deprived the Appellant of his right to address the Tribunal. Its inconscionable actions once again confirm the loss of all jurisdiction and moral authority.

3. Third Ground of Appeal Against Sentence

The sentence is unreasonable and unwarranted.

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[984] Notice of Appeal against sentence, para. 24.

ANNEX C:

GLOSSARY

A. Filings of the parties

1. Jean-Paul Akayesu's Appeal

First Notice of Appeal	Letter of 1 October 1998
Second Notice of Appeal	Notice of Appeal, filed on 2 October 1998
Notice of Appeal Against Sentence	Notice of Appeal of Sentence rendered by the Chamber, filed on 2 November 1998
Akayesu's Brief	Appellant's Brief, filed on 7 July 2000
Prosecution's Response	Prosecution's Respondent Brief, filed on 4 September 2000
Akayesu's Reply	Appellant's Brief in Reply, filed on 19 September 2000

2. Prosecutor's Appeal

Prosecution's Notice of Appeal	Notice of Appeal, filed on 2 October 1998
Notice abandoning Ground 6	Notice abandoning Ground six (6) of the Prosecution's Notice of Appeal dated 2 October 1998, filed on 15 October 1999
Prosecution's Brief	Prosecutor's Appellant Brief, filed on 10 July 2000
Akayesu's Response	Motion for inadmissibility of the Appellant's Brief and Respondent's Brief, filed on 24 July 2000
Annex to Akayesu's Response	Motion for inadmissibility of the Appellant's Brief and Respondent's Brief, annex, *Borowski v. Canada* (Attorney General), [1989], 1, S.C.R 342, filed on 25 July 2000
Prosecution's Reply	Prosecution's Brief in Reply, filed on 19 September 2000

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B. Other references

Akayesu or Appellant	Jean-Paul Akayesu
Archbold 2000	*Archbold 2000, Criminal Pleading Evidence and Practice (2000, Sweet and Maxwell), Eds. Richardson and Thomas (Sentencing Editor)*
Alesksovski Appeal Judgement	*Prosecutor v. Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000 (Appeals Chamber of ICTY)
Appeals Chamber	The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994
Additional Protocol I	1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977
Additional Protocol II	1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of victims of Non International Armed Conflicts, 12 December 1977
Barayagwiza Decision	Decision, *Jean-Bosco Barayagwiza v. The Prosecutor,* Case No. ICTR-97-19-AR72, 3 November 2000
Blaskic Judgement	*The Prosecutor v. Tihomir Blaskic,* Case No. UIT-95-14-T, Judgement, 3 March 2000 (ICTY Appeals Chamber)
Celebici Appeal Judgement	*The Prosecutor v. Zejnil Delalic et al.,* Case No. IT-96-21-A, Judgement, 20 February 2001 (Appeals Chamber of ICTY)
Common Article 3	Article 3 common to the four Geneva Conventions of 1949

Celebici Judgement	*The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-A, Judgement, 16 November 1998.
Decision of 17 April 2000	*Decision (Requests 1 and 7 of Mémoire de l'Appelant concernant les Requetes suivantes visées par ordonnance comportant calendrier du 30 novembre 1999 (regarding record on appeal)*, rendered on 17 April 2000
Decision of 24 May 2000	Decision (Concerning Motions 2, 3,4, 5, 6 and 8 Appellant's Brief Relative to the following Motions Referred to by the Order dated 30 November 1999), rendered on 24 May 2000
Decision of 22 August 2000	Decision (on the Consolidation or Summarization of Motions not yet Disposed of), rendered on 22 August 2000
Erdemovic Appeal Judgement	*The Prosecutor v. Drazen Erdemovic* , Case No. IT-96-22-A, Judgement, 7 October 1997 (Appeals Chamber of ICTY)
Eur Ct HR	European Court of Human Rights
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
Furundzija Appeal Judgement	*The Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-A, Judgement, 21 July 2000 (Appeals Chamber of ICTY)
First *Erdemovic* Sentencing Judgement	*The Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22-T, 29 November 1996 (ICTY Trial Chamber)
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949
Hearings on Appeal	Hearings on oral arguments of the parties on appeal, 2 November 2000
Initial Indictment	Indictment in *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, as confirmed on 16 February 1996
Indictment	Indictment in *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, as amended

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	by Trial Chamber I on 17 June 1997
ILC	Report of the International Law Commission, 48th session, 6 May-26 July 1996, UNGA, 51st Session, Supplement No. 10 (A/51/10)
ICJ	International Court of Justice
ICRC Commentary	Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958
ICRC Commentary on the Additional Protocol	Sandoz *et al.* (eds): Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross, Geneva, 1987
ICCPR [International Covenant]	International Covenant on Civil and Political Rights (1966)
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
The International Tribunal or the 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
Kambanda Appeal Judgement	*The Prosecutor v. Jean Kambanda,* Case No. ICTR-97-23-A, Judgement, 19 October 2000 (Appeals Chamber)
Kambanda Judgement	*The Prosecutor v. Jean Kambanda,* Case No. ICTR-97-23-S, Judgement, 4 September 1998 (Trial Chamber)
Kayishema/Ruzindana Judgement	*The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-AT, 21 May 1999 (Trial Chamber)
Kunarac Judgement	*Prosecutor v. Dragoljub Kunarac et. al.,* Case Nos. IT-96-23-T and IT-96-23/1-T, Judgement,

	22 February 2001 (ICTY Trial Chamber)
Kupreskic Judgement	*Prosecutr v. Zoran Kupreskic et al.,* Case No. IT-95-16 T, Judgement , 4 January 2000 (ICTY Trial Chamber)
Musema Judgement	*The Prosecutor v. Alfred Musema,* Case No. ICTR-96-13-T, Judgement and Sentence, 27 January 2000 (Trial Chamber)
Prosecution	Office of the Prosecutor
Rutaganda Judgement	*The Prosecutor v. Georges Anderson Nderubumwe Rutaganda,* Case No. ICTR-96-3-T Judgement and Sentence, 6 December 1999 (Trial Chamber)
Report of the Secretary-General	Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994) .UN Doc. S/1995/134, 13 February 1995
Rules	Rules of Procedure and Evidence of the Tribunal
Resolution 955	Security Council resolution 955 (1994) UN Doc., S/RES/955, 8 November 1994 (Establishment of the Tribunal)
Rome Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc. A/CONF.183/9
Serushago Sentencing Appeal Judgement	*Omar Serushago v. The Prosecutor,* Case No. ICTR-98-39-A, Reasons for Judgement, 6 April 2000 (Appeals Chamber)
Sentence	Sentence, *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, 2 October 1998 (Trial Chamber)
Second *Erdemovic* Sentencing Judgement	The *Prosecutor v. Drazen Erdemovic,* Case No. IT-96-22T *bis,* Sentencing Judgement 5 March 1998 (ICTY Trial Chamber)
Statute	Statute of the Tribunal
Tadic Appeal Judgement	*The Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A, Judgement, 15 July 1999 (ICTY Appeals Chamber)

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Tadic Jurisdiction Decision	*Prosecutor v. Dusko Tadic,* Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (ICTY Appeals Chamber)
Tadic Sentencing Appeal Judgement	*Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A, and IT-94-1-A*bis,* Judgement in Sentencing Appeals, 26 January 2000 (ICTY Appeals Chamber)
Trial Chamber	Trial Chamber I of the International Tribunal
T	Transcripts of Trial proceedings in *The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T. All page numbers referred to in this Judgement are those of the French unofficial and uncorrected version. Therefore, there could be some disparities in the page numbering between this Judgement and the final French version of the transcripts [Not applicable to the English version]
T (A)	Transcripts of the hearing on appeal held in Arusha (hearings of 1 and 2 November 2000). All page numbers of the transcripts of the hearings referred to in this Judgement are those of the unofficial and uncorrected French version. There could be some disparities in the page numbering between this Judgement and the final French version of the transcripts [Not applicable of the English version].
Tadic Additional Evidence Decision	*Prosecutor v. Dusko Tadic,* Case No. IT-94-1-A, Decision on Appellant's motion for the extension of the time-limit and admission of additional evidence, 15 October 1998 (ICTY Appeals Chamber)
Trial Judgement	*The Prosecutor v. Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 September 1998 (Trial Chamber)