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3774/A bis

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

APPEALS CHAMBER

Before Judges: Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgment of: 1 June 2001

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THE PROSECUTOR

v.

CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-A

JUDGMENT
(REASONS)

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Translation certified by LCSS, ICTR

3773/A bis

Page

Page

3771/A bis

Page

3769/A bis

1. 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 filed by Clément Kayishema ("Kayishema"), Obed Ruzindana ("Ruzindana") and the Prosecution against the Judgment and Sentence rendered by Trial Chamber II of the International Tribunal ("Trial Chamber") on 21 May 1999 in the case of *The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-T ("the Judgment" and "the Sentence" respectively).[1]

2. During the Hearing on appeal held in Arusha on 1 June 2001, the Appeals Chamber specified that the reasons for the Judgment on appeal would be made available to the parties as soon as possible. Accordingly, the paragraphs that follow set out the reasons for the judgment that was rendered orally by this Chamber on 1 June 2001. The Appeals Chamber recalls that the only authoritative version of the reasoning and findings of the Appeals Chamber is the one contained herein.

3. The Appeals Chamber

Sets forth herein the reasons for the Judgment.

[1] Trial Judgment, *The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-I-T, 21 May 1999. The list of titles and abbreviations used in the Judgment are attached hereto as Annex B.

3768/D
bis

I. INTRODUCTION

A. Trial proceedings

4. The amended indictment of 11 April 1997,[2] on the basis of which the trial against Kayishema and Ruzindana proceeded, charged both Accused with involvement in the massacres which took place in the *préfecture* of Kibuye, Republic of Rwanda. The trial commenced on 11 April 1997 and concluded on 17 November 1998.

5. Clément Kayishema was charged as *préfet* of Kibuye, under both Article 6 (1) and Article 6 (3) of the Statute, with involvement as a superior in four sets of massacres which occurred at the following sites: the Catholic Church and Home St. Jean complex (17 April 1994); the Stadium (18 and 19 April 1994); the church in Mubuga (14 to 17 April 1994); and in the area of Bisesero (9 April to 30 June 1994). He was charged in total with 24 counts falling within the jurisdiction of the Tribunal as follows:

- Genocide, pursuant to Article 2 (3) (a) of the Statute (counts 1, 7,13 and 19);
- Crimes against humanity, pursuant to Articles 3 (a), 3 (b) and 3 (i) of the Statute (counts 2, 3, 4, 8, 9, 10, 14, 15, 16, 20, 21 and 22);
- Violations of Article 3 common to the Geneva Conventions of 1949, pursuant to Article 4 (a) of the Statute (counts 5, 11, 17 and 23); and
- Violations of Additional Protocol II, pursuant to Article 4 (a) of the Statute (counts 6, 12, 18 and 24).

6. Ruzindana was charged with five counts (counts 19 to 24) of individual criminal responsibility under Article 6 (1) of the Statute with respect to crimes committed during the massacres in the area of Bisesero between 9 April and 30 June 1994. He was charged with:

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[2] Ruzindana was initially charged in the first indictment filed by the Prosecutor on 22 November 1995 and confirmed by Judge Pillay on 28 November 1995. Following a motion filed by the Prosecutor, on 6 May 1996, Judge Pillay ordered that the indictment be amended. On 26 March 1997, the Prosecutor filed a motion for the submission of the amended indictment against Ruzindana, Kayishema and Gérard Ntakirutimana. By decision of 10 April 1997, (*Decision on the motion filed by the Prosecutor for Confirmation of the Trial date and submission of Superseding indictment, The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-T), the Trial Chamber dismissed the Prosecutor's motion but granted leave to the Prosecutor to redact the names of the six Accused not in custody from the first amended indictment and also to delete Count 1 ("conspiracy" to commit genocide) and to rearrange the remaining counts accordingly.

3767/A
bis

- Genocide, pursuant to Article 2 (3) (a) of the Statute (count 19);
- Crimes against humanity, pursuant to Articles 3 (a), 3 (b) and 3 (i) of the Statute (counts 20, 21 and 22);
- Violations of Article 3 Common to the Geneva Conventions of 1949, pursuant to Article 4 (a) of the Statute (count 23); and
- Violations of Additional Protocol II, pursuant to Article 4 (a) of the Statute (count 24).

7. Both accused were found not guilty of the charges brought under Articles 3 (a) and (b) of the Statute, for the Trial Chamber found that these charges were fully subsumed by the charges brought under Article 2 of the Statute (that is, with respect to Kayishema, counts 2, 3, 8, 9, 14 and 15, and with respect to both accused, counts 20 and 21). Kayishema was convicted on four counts of genocide with respect to each of the aforementioned massacre charges (counts 1, 7, 13 and 19) and found not guilty of the remaining charges (counts 4, 5, 6, 10, 11, 12, 16, 17, 18, 22, 23 and 24). Ruzindana was convicted of one count of genocide in relation to the massacres in the area of Bisesero (count 19) and found not guilty of the remaining charges (counts 22, 23 and 24).

8. The Trial Chamber sentenced Kayishema to imprisonment for the remainder of his life, while Ruzindana was sentenced to twenty-five years imprisonment. The Trial Chamber ordered that all sentences should be served concurrently.

B. The Appeal[3]

9. The Appeals Chamber recalls that both Kayishema and Ruzindana appealed against the Judgment and Sentence pronounced by Trial Chamber II on 21 May 1999, while the Prosecution appealed against the Judgment and Sentence pronounced against Ruzindana.

10. During the hearing on appeal, the Appeals Chamber noted the fact that both Kayishema and Ruzindana had failed to strictly follow the presentation of the grounds of appeal as set out in their respective notices of appeal. The Appeals Chamber considered that in the interests of clarity and coherence, it would be appropriate that the grounds of appeal of each party be clearly identified. Therefore, the Appeals Chamber set out, at the start of the hearing on appeal, the

[3] *Cf.* annex A, for more information on the appeals proceedings.

3766/A
bis

grounds of appeal of Kayishema, Ruzindana and the Prosecution.[4] As all the parties have accepted these grounds as correctly enunciated, the Appeals Chamber now sets them out below, separating the grounds of appeal alleging errors in respect of the decision on the merits from those alleging errors in the Sentence.

1. Kayishema's Appeal[5]

(a) Appeal on the merits

11. Kayishema put forward the following grounds of appeal:

(i) The Trial was unfair in all aspects;

(ii) The Trial Chamber erred in its assessment of the status of the *préfet* and his effective means of action in the Rwandan context at the time of the facts under consideration;

(iii) The Trial Chamber erred in its assessment of the individual responsibility of a *préfet* and command responsibility or responsibility for acts committed by others, in light of the context and definition of subordinate, supervisory authority and, more amply, all corollary responsibility connected therewith (*bourgmestre,* communal police, *gendarmerie,* etc.) and of the Appellant's participation in the facts alleged;

(iv) The Trial Chamber erred in its assessment of civil defence: its meaning, its application and its connection with the Rwandan tragedy, such concepts as they ought to be understood;

(v) The Trial Chamber erred in its rejection of the defence of alibi;

(vi) The Trial Chamber erred in its findings of the crime of genocide: its legal and factual aspects and the way it has been applied to the events in Rwanda through Kayishema, *préfet* and citizen;

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[4] T(A), 30 October 2000, pp. 8 to 15.
[5] *Cf.* Kayishema's Notice of Appeal

3765/A
bis

(b) Appeal against sentence

12. Kayishema's appeal is with respect to:

(vii) Alleged errors in the Trial Chamber's assessment of the aggravating and mitigating circumstances: their definition and application;

(viii) The sentence imposed.

2. Ruzindana's Appeal[6]

(a) Appeal on the merits

13. Ruzindana claims that the Trial Chamber has erred in law and in fact with respect to:

(i) Its determination of intent;

(ii) Its findings regarding the individual responsibility of the Accused;

(iii) Its findings on the role of the Accused with respect to the essential ingredients of the crime of genocide;

(iv) Its findings on the concept of common criminal intent;

(v) Its findings on the personal status of the Accused;

(vi) Its findings regarding the defence of alibi;

(vii) Its appraisal of the testimony of Prosecution witnesses and reliability of eye witnesses;

(viii) Lack of specificity of the Indictment, with the result that the Accused was denied a fair trial, as he was not promptly informed of the nature of the charges against him nor allowed adequate time and facilities to prepare his defence.

[6] *Cf.* Ruzindana's Notice of Appeal

3764/A
bis

(b) Appeal against sentence

Ruzindana claims that:

(ix) The Trial Chamber erred in its analysis of aggravating and mitigating circumstances.

14. Having identified these grounds of appeal, the Appeals Chamber notes that several issues and grounds of appeal filed separately by each of the Accused overlap. For this reason, the Appeals Chamber has decided to structure this Judgment by addressing individual grounds of appeal separately and grouping together, where appropriate, the different issues raised in the grounds of appeal which overlap.

3763/A bis

II. ADMISSIBILITY OF THE PROSECUTION'S APPEAL AND RESPONDENT'S BRIEFS

1. Arguments of the Parties

15. In their briefs in response to the Prosecution's Appellant's brief, Kayishema and Ruzindana argue that the Appeals Chamber should rule the Prosecution's Appellant's brief out of time and its appeal inadmissible.[7] They have repeated these requests, which had already been made in motions and to which, they contend the Chamber has not responded directly or explicitly. At the hearing, Kayishema revisited the issue of time-bar and requested the Appeals Chamber to rule definitively on his preliminary motion.

16. Appellants Kayishema and Ruzindana had indeed lodged motions to bar the Prosecution's appeal as out of time and, accordingly, for the Appeals Chambre to rule it inadmissible.[8] The Appellants pointed out that the Prosecution had not observed the time limits set by the Appeals Chamber Decision of 14 December 1999,[9] which ordered the parties to file their Appellant's briefs by the end of ninety days following the day on which the Addendum to the Registry Certificate on the Record of the instant case was communicated to them.[10]

17. Kayishema avers that the Prosecution was served on 25 October 1999 with the Addendum to the Registry Certificate ordered by the Appeals Chamber.[11] On 24 January 2000, the Prosecution had not yet filed its Appellant's brief and had not sought an extension of time to that effet.[12] Thus, according to Kayishema, the Prosecution was time-barred from filing the Appellant's brief provided for under Rule 111.[13]

18. Kayishema notes that under Rule 108, a party seeking to appeal a judgment shall file and serve upon the other parties a written notice of appeal, setting forth the grounds — "that is,

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[7] Kayishema's Provisional Response; Ruzindana's Response; Ruzindana's Response (Sentence).
[8] Kayishema's Motion Seeking Time-Bar; "Motion Filed by the Appellant Obed Ruzindana for Inadmissibility of the Prosecutor's Appeal", 28 March 2000.
[9] "Decision (Appellants' Motions for Extension of Time-Limits and for a Visit with Another Prisoner)," 14 December 1999.
[10] *See* Ruzindana's Response, para. 6; Ruzindana's Response (Sentence), para. 19; Kayishema's Provisional Response, paras. 8 and 9.
[11] Kayishema's Provisional Response, para. 9.
[12] *Ibid.*
[13] *Ibid.* at paras. 14, 40.

3762/A bis

explain[ing] the basis of its arguments in accordance with Article 24 of the Statute."[14] Kayishema further submits that "because the Prosecutor failed to provide the slightest justification for her appeal ... by not filing a brief containing the arguments and authorities justifying her appeal"[15], "such appeal has no effect on the provisions of the Judgment acquitting Kayishema."[16] What is more, Kayishema contends, the Appeals Chamber cannot consider the Prosecution's Notice of Appeal or rule on its merits, that is, consider the grounds put forward by the Prosecution. [17] Kayishema also submits that the Prosecutor's Respondent's brief is time-barred and inadmissible, and that its being filed out of time, constitutes a tacit abandonment of its prosecution of Kayishema.[18] He maintains that as a result, he cannot be convicted of genocide.[19]

19. For the same reasons concerning the expiration of the time-limit set by the aforementioned Decision and the Prosecution's failure to file its briefs, Ruzindana submits that the Prosecutor's appeal is time-barred. Moreover, he emphasizes that the time-limit set for the Prosecution to file its Respondent's brief had also expired because it had not responded to his Appellant's brief within thirty days, in accordance with Rule 112.[20] The penalty for exceeding these two time-limits is, he argues, that the Prosecution appeal is inadmissible, including its initial Notice of Appeal, which, in violation of Rule 108, was not served on the Defence.[21] The Appellant asserts that Rules 108, 111, and 112 form an indissociable whole, a set of procedures dependent on the existence of all of the following items — notice of appeal, Appellant's brief, and Respondent's brief — each contributing to the validity of such whole.[22] Thus, the Prosecution has completely waived the right, by reason of the time-bar, to proceed before the Appeals Chamber seeking the setting aside of the Judgment and Sentence of 21 May 1999.[23]

20. Ruzindana also argues that, given that the Prosecution's appeal is deemed inadmissible, the Appeals Chamber ought not to take into account the Prosecution's Notice of Appeal, and consequently should have made the finding that the parts of the Judgment which have not been

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[14] Kayishema's Motion Seeking Time-Bar, para. 16. See also Kayishema's Provisional Response, para. 31.
[15] *Ibid.*, para. 19.
[16] *Ibid.*, para. 20.
[17] Kayishema's Provisional Response, para. 36.
[18] Kayishema's Definitive Reply, paras. 21, 36.
[19] *Ibid.* at para. 36.
[20] Ruzindana's Reply, para. 28.
[21] *Ibid.*, para. 33.
[22] *Ibid.*, para. 35.
[23] *Ibid.*, para. 35.

3761/A
65

appealed against by the parties are final.[24] He further avers that the Chamber may rule only within the limits of the Notice of Appeal, and that the Notice of Appeal sets forth no grounds as no brief has been filed in support thereof.[25] He adds that the Appeals Chamber judges cannot consider breaches of the Geneva Conventions and crimes against humanity in respect of which the Appellant has been found not guilty.[26]

21. Ruzindana further maintains that by failing to file a response to his Appellant's Brief, the Prosecutor must be taken as having tacitly accepted the brief and as having abandoned prosecution of the Appellant.[27] He argues that the Appeals Chamber has only Ruzindana's appeal before it and may not therefore make the outcome for him any worse by imposing a heavier sentence or amending, in the direction of greater severity, the characterization of his offences adopted by the Trial Chamber judges.[28]

22. In their responses to the Prosecution's Appellant's Brief, Kayishema and Ruzindana repeat their requests to the Appeals Chamber to time-bar the Prosecution appeal and rule it inadmissible.[29] Moreover, Ruzindana points out that the pre-hearing judge, by his Decision of 11 April 2000,[30] granted the Prosecution, at its request,[31] a new deadline of 28 April 2000, although the Prosecution was already out of time. Despite this order, the Prosecution's brief was filed on 2 May 2000, in other words, out of time, as evidenced by the Registry seal and the handwritten acknowledgement of receipt.

23. The Prosecution stresses in its written submission[32] that the Appeals Chamber has delivered several decisions concerning time-limits for the parties to file their briefs. The Decision of 14 December 1999 did indeed order the parties to file their briefs within ninety days from the date of service of the Addendum to the parts of the Record certified by the Registry. The Prosecution argues that it had previously filed, on 25 November 1999, a Motion to correct and

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[24] "Motion filed by the Appellant Obed Ruzindana for Inadmissibility of the Prosecutor's Appeal", 28 March 2000, para. 12.
[25] *Ibid.*
[26] *Ibid.* at paras 12, 15.
[27] Ruzindana's Reply, para. 37.
[28] *Ibid.*, para. 35.
[29] Kayishema's Provisional Response; Ruzindana's Response (Sentence).
[30] "Decision (Prosecutor's Motions for Correction and Clarification of Trial Record; for Clarification of Briefing Time-Limits, and to Extend the Time-Limit)," 11 April 2000.
[31] "Prosecution's Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal Brief and the Prosecution's Motion to Extend the Time-Limit for Filing its Appeal Brief", 4 April 2000.

3760/A

clarify the trial record[33] and that the Decision of 14 December 1999 did not address that Motion. By its Order of 29 December 1999,[34] the Appeals Chamber ordered the Prosecution to submit a draft order of the precise relief it had sought in its 25 November 1999 Motion. The Prosecution maintains that it filed the required draft Order,[35] in which it requested that the Registry rectify all errors and omissions in the record. On 2 March 2000, the Registry submitted a memorandum[36] to the Appeals Chamber with regard to the relief requested by the Prosecution in its 25 November 1999 Motion. The Prosecution avers that it did not receive it.[37] On 24 February 2000, the Prosecution filed a Motion[38] for it to be advised of the start date of the ninety-day time-limit.

24. In its briefs in reply[39] to the Respondent's briefs by Kayishema and Ruzindana, the Prosecution notes that by his Decision of 11 April 2000, [40] the pre-hearing judge granted its motion to extend the time-limit: it had been allowed up to 28 April 2000 to file its Appellant's Brief. The said Prosecution Appellant's Brief was dated 28 April 2000 and faxed to the Registry that same day. The pre-hearing judge ruled on the issue by stating in the Order of 26 May 2000[41] that the Prosecution Appellant's brief was filed on 2 May 2000, although the fax markings on the pages of the document show transmission on 28 April 2000.[42]

25. At the hearing,[43] Kayishema formally raised the issue of the Prosecution's briefs being time-barred. He recalled the various stages in the proceedings and submitted that procedural time-limits are mandatory. The Appellant contends that a request for an extension of time does not suspend the Prosecution's obligation to file its briefs within the prescribed time-limit. The issue of

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[32] *Ibid.*

[33] "Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal," 25 November 1999.

[34] "Order (Prosecutor's Motion for Correction and Clarification of the Trial Record and Record on Appeal)", 29 December 1999.

[35] "Response by the Prosecution to the 29 December 1999 *Order* of the Appeals Chamber", 5 January 2000.

[36] "Memorandum to the Appeals Chamber from the Registrar, Pursuant to Rule 33 (B), with Regard to the Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal of 25 November 2000", 2 March 2000.

[37] "Prosecution's Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal Brief and the Prosecution's Motion to Extend the Time-Limit for Filing its Appeal Brief", 4 April 2000, para. 19.

[38] "Prosecutor's Motion to Seek Clarification on the Time-Limits to File the Legal Brief", 24 February 2000.

[39] Prosecution's Definitive Reply to Kayishema; Prosecution's Reply to Ruzindana.

[40] "Decision (Prosecutor's Motions for Correction and Clarification of Trial Record; for Clarification of Briefing Time-Limits, and to Extend the Time-Limit)," 11 April 2000.

[41] "Order (Appellant's Motions to Extend Time-Limits)," 26 May 2000.

[42] Prosecution's Reply (Ruzindana's Sentence), 7 July 2000, para. 2.47.

[43] Hearing on Appeal, 31 October 2000.

3759/A bis

time-bar is not a scheduling, pre-hearing problem; it is a substantive issue which falls within the jurisdiction of the Appeals Chamber, and not of the pre-hearing judge who may not adjudicate on it. The pre-hearing judge's decisions granting the Prosecution extension of time do not have the effect of "saving" it from being out of time; the time-bar is therefore in effect. The Prosecution's Notice of Appeal of 18 June 1999, which sets forth no grounds, cannot suffice for the Chamber to consider it in the absence of a brief in support, in accordance with "Article 24 of the Statute." The Appeals Chamber, he argues, cannot make up for the Prosecution's failings by deciding the merits of the case solely on the basis of the Notice of Appeal.

26. In its response at the hearing,[44] the Prosecution revisited the main stages in the proceedings with respect to the filing of the parties' written submissions. It recalled all the motions filed by the Prosecution, either requesting extension of time limits or seeking clarification thereof. It submitted that in his 11 April 2000 Decision, the pre-hearing judge had indeed ordered the Prosecution to file its brief by 28 April 2000, which the Prosecution had done. For any other matters, the Prosecution requested the Chamber to refer to its written submissions.

2. Discussion

27. The primary issues raised by the Appellants concern the admissibility of the Prosecution appeal and its Appellant's briefs, as well as its responses to the Appellant's briefs by Kayishema and Ruzindana. The Appeals Chamber notes that two Prosecution Appellant's briefs are at issue, and that while each was filed separately, both constitute part of the Prosecution's appeal. They are the Prosecution's Brief Against Judgment (entitled "Prosecution's Appeal Brief" filed on 2 May 2000) and the Prosecution's Brief Against Sentence (entitled "Prosecution's Appeal Brief Against Sentence Imposed on Obed Ruzindana", filed on 2 May 2000). The Appeals Chamber considers that in order to resolve this issue of admissibility, it is necessary to examine the various relevant decisions, orders, and motions.

28. On 3 September 1999, the Appeals Chamber issued a Scheduling Order which established 28 October 1999 as the deadline for the Appellants to file their respective briefs. However, the following month, on 21 October 1999, the Appeals Chamber suspended the 28 October 1999 deadline, because of Kayishema's and Ruzindana's pending motions, filed on 7 October 1999,

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[44] *Ibid.*

requesting an extension of time to file their briefs on grounds of incompleteness of the Trial Record.

29. On 25 November 1999, the Prosecution filed a Motion for correction and clarification of the trial record on appeal. The Prosecution alleged numerous defects in the trial record as certified by the Registrar.[45] The Prosecution also raised other problems relating to Prosecution and Defence exhibits—namely, witness protection and confidentiality issues, uncertified translations of documentary exhibits, and inaccuracies and other issues relating to Prosecution and Defence exhibits. However, the Prosecution did not raise the issue of the time-limit within which to file its Appellant's brief.

30. On 14 December 1999, the Appeals Chamber granted Appellants' Motions for extension of time, and ordered the Appellants and the Prosecution to file their briefs by the end of ninety days following the day on which the Addendum to the Registry Certificate on the Record was communicated to each of them. The Prosecution had received this Addendum on 25 October 1999.[46] Time-limits for the filing of briefs in response, as well as briefs in reply, were also set in the 14 December 1999 decision. However, the 25 November 1999 Prosecution Motion for correction and clarification was not addressed by the Appeals Chamber in this decision.

31. Fifteen days later on 29 December 1999, the Appeals Chamber ordered the Prosecution to submit within seven days a draft order of the relief it was seeking in its 25 November 1999 motion. On 6 January 2000, the Prosecution's draft order was stamped as received by ICTR Registry.

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[45] In particular, the Prosecutor claimed that:

a. the Registry [...] included in the transferred material, internal and confidential Office of the Prosecution documents which constituted privileged material in some instances [3 indexed documents];

b. the transmitted volumes contained an abundance of pre-trial documents that the Prosecution [submitted] were not part of the trial record on appeal;

c. the seven-case volumes contain[ed] correspondence between the parties and/or the Registry [which] documents were not filed before the Trial Chamber, cannot be considered part of the trial record, and were not designated by the parties as constituting part of the appeals record; and

d. transcripts: the Prosecution did not receive a complete or accurate electronic record of the trial proceedings.

See also "Prosecution Motion for Correction and Clarification of the Trial Record on Appeal", 25 November 1999.

[46] In its Notice of Receipt of Exhibits, filed on 27 October 1999, the Prosecution notified the Appeals Chamber that on 25 October 1999, it "received a copy of an '*Addendum to the Registry Certificate on the record in Case No. ICTR-95-1-A; The Prosecutor v. C. Kayishema and O. Ruzindana*,' dated 14 October 1999 and signed on behalf of the Registrar along with a box of exhibits which purport[ed] to contain copies of all the exhibits filed before the Trial Chamber in that case." Prosecution Notice of Receipt of Exhibits, 27 October 1999, para. 1.4.

3757/A
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32. On 24 February 2000, the Prosecution submitted a motion to seek clarification of the time-limits to file its Appellant's brief.[47] However, it merely set out a chronology of some of the orders of the Appeals Chamber, and did not specify the exact nature and source of its confusion regarding the time-limits. Hence, the Appeals Chamber considers that the Prosecution failed to substantiate the basis upon which it was seeking relief.

33. On 2 March 2000, the Registrar submitted a Memorandum to the Appeals Chamber, pursuant to Rule 33(B),[48] with regard to the Prosecutor's Motion for correction and clarification of the trial record on appeal of 25 November 1999. The Registrar specified the ways in which it would cure the errors or omissions regarding the Prosecution and Defence exhibits, mentioned in paragraphs 2.27 to 2.53 of the Prosecution motion. The Registrar also responded to other contentions raised by the Prosecution in its motion.[49]

34. On 4 April 2000, in its "Response to the Defence Motion Aimed at Denying the Prosecution the Right to File its Appeal brief" the Prosecution submitted as follows:

> [d]ue to the fact that the Appeals Chamber has not yet ruled on the Response the Prosecution filed on 5 January 2000 in relation to correction and clarification of the trial record and the record on appeal, the fact that the Prosecution has not received the documents which the Registry promised to send in its Memorandum on 2 March 2000, and the fact that there has as yet been no decision on the Prosecution motion of 24 February 2000, seeking clarification of the time-limit for filing the appeal briefs, the Prosecution submits with all due respect that the issue of the applicable time-limit is still pending before the Appeals Chamber.

Alternatively, the Prosecution moved for an order of the Appeals Chamber to extend the time-limit for filing its Appellant's Brief in case the Appeals Chamber regarded the date set in its Decision of 14 December 1999 as still valid. The Appeals Chamber notes that in its 14 December 1999 decision, it had made no reference to the pending 25 November 1999 Motion of the Prosecution for clarification and correction. Instead, it addressed this motion separately in a subsequent decision (order) dated 29 December 1999. Thus, consideration of the motion was not warranted in the motion on the setting of time-limits for the filing of briefs.

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[47] "Prosecutor's Motion to Seek Clarification on the Time-Limits to File the Legal Brief required under Rule 111 of the Rules", 24 February 2000.

[48] "Memorandum to the Appeals Chamber from the Registrar, Pursuant to Rule 33 (B), with Regard to the Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal of 25 November 2000," 2 March 2000.

[49] These concerned, for instance, materials communicated by the Registry to the Parties in case files, as well as electronic transcripts. *Ibid.*

3756/A bis

35. On 11 April 2000, the pre-hearing judge assigned to this case rendered a Decision on the Prosecutor's Motions for Correction and Clarification of the Trial Record; for Clarification of Briefing Time-Limits; and to Extend the Time-Limit. The decision dismissed the Motion for clarification of briefing time-limits, stating that

> the Prosecutor's Motion for Clarification of Briefing Time-Limits is without object, since (a) the Appeals Chamber's decision of 14 December 1999 did clearly settle such time-limits, (b) the Prosecutor's Motion for Correction which did not have a prayer for suspension of time-limits could not have affected the time-limits established in the decision of 14 December 1999, and [c] the Appellants had already filed their briefs before the Prosecutor's Motion for Clarification of Briefing Time-Limits.

Nevertheless, the pre-hearing judge concluded that a limited extension of time might be granted to the Prosecution for the filing of its brief, without prejudice being caused to the Appellants, and set 28 April 2000 as the deadline.

36. In addressing this issue of admissibility, the Appeals Chamber notes that the decision of 14 December 1999, fixing a deadline for the filing of briefs, was unambiguous. Further, it was issued approximately three weeks following the filing of the Prosecutor's 25 November 1999 motion, and the Appeals Chamber did not deem it necessary to take into account this motion, which did not raise the issue of time-limits, when determining the applicable deadline.

37. In addition, about four months after the Addendum to the Registry Certificate on the Record was communicated to the Prosecution,[50] the Prosecution filed a motion seeking clarification of the time-limits to file its Appellant's brief. Such lapse of time indicates a lack of diligence on the part of the Prosecutor in pursuing the matter, and furthermore, the motion did not substantiate the precise basis upon which the Prosecution was seeking relief. Neither did it put forward a request for an extension of time to file its brief, even though the deadline set in the 14 December 1999 decision had long expired.

38. The Prosecution's formal motion to extend the time-limits for the filing of its brief was finally submitted on 4 April 2000, that is two months after the deadline established in the 14 December 1999 Decision had expired. In that motion, the Prosecution acknowledged that the Appeals Chamber, in its 14 December 1999 Decision, had ordered that the briefs be filed within ninety days from the date on which the Addendum to the Registry Certificate on the Record was communicated to the parties (that is, by 24 January 2000 for the Prosecution). At the same time,

3755/A bis

however, the Prosecution maintained that it had not yet filed its brief because uncertainty existed as to the applicable deadline.

39. The Prosecution also submitted, in said 4 April 2000 Motion, that the issue of the applicable time-limit was still pending before the Appeals Chamber because the Appeals Chamber had not yet ruled on its 6 January 2000 Response in relation to its 25 November 1999 Motion for correction and clarification of the trial record and record on appeal, because it had not received the documents which the Registry stated it would send in its 2 March 2000 memorandum (pertaining to the 25 November 1999 Motion), and because there had not been a decision on its 24 February 2000 Motion.

40. The Appeals Chamber disagrees with this contention. The 25 November 1999 Motion did not raise the issue of time-limits and did not indicate the material significance of the alleged defects in the trial record. Hence it is irrelevant to the issue of time-limits, as held by the pre-hearing judge in his Decision of 11 April 2000. The 24 February 2000 Motion for clarification of time-limits was unfounded, as found by the pre-hearing judge, because the 14 December 1999 decision was unambiguous, and furthermore, the Prosecution did not substantiate its claim in the motion.

41. However, the 11 April 2000 Decision of the pre-hearing judge granted the Prosecution an extension of time for the filing of its Prosecution's Brief (the Prosecutor's Motion for clarification on the time-limits to file the legal brief was dismissed). The said decision set 28 April 2000 as the deadline.

42. Nevertheless, the Prosecution did not comply with this deadline. As a result, the Appeals Chamber finds that it does not need to rule on the issue of whether the granting of the extension of time was justified; in any case, the Prosecution's briefs were filed outside the time-limit established in the 11 April 2000 Decision by the pre-hearing judge, a final example of its lack of diligence and untimeliness, unaccompanied by any showing of good cause or a request for permission to file out of time. It appears from the fax markings on the Prosecution's Brief Against Sentence that it was faxed to Arusha well after business hours on 28 April 2000.[51] It was

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[50] See "Prosecution Notice of Receipt of Exhibits," 27 October 1999, para. 1.4, *supra*.

[51] According to Article 29 of the Directive for the Registry of ICTR (21 February 2000), after-hours filing refers to the filing of documents outside of the following hours: 9 a.m. to 5.30 p.m. Monday through Thursday and 9 a.m. to 2.30 p.m. on Friday, or on weekends or public holidays. The Directive further states that a party anticipating a late

3754/A
bis

filed on 2 May 2000. Similarly, the Prosecution's Brief Against Sentence was filed on 2 May 2000. It should be noted that Kayishema filed his Appellant's brief on 19 January 2000, and Ruzindana filed his brief on 20 October 1999.

43. For all of the above reasons, the Appeals Chamber holds that the Prosecution's Appellant's briefs are time-barred and inadmissible, and will not be considered in this Judgment.

44. Ruzindana has also submitted that the Prosecutor's Respondent's briefs should be found inadmissible, having been filed outside the applicable time-limits. According to Rule 112, "a Respondent's brief shall [...] be filed [...] within thirty days of the filing of the Appellant's brief." The Appeals Chamber notes that Ruzindana's Appellant's brief was filed on 20 October 1999 and communicated to the Prosecution on the same day. However, by 19 November 1999, the Prosecution had not filed its response to this brief; nor had it requested an extension of time to file same. Its Respondent's brief was eventually filed on 14 June 2000. In light of these circumstances, the Appeals Chamber holds that the Prosecution's Response to Ruzindana's brief is inadmissible.

45. The Appeals Chamber further notes that Kayishema's Appellant's brief was filed on 19 January 2000, and communicated to the Prosecution on 20 January 2000. In its decision of 14 December 1999, the Appeals Chamber had ordered the Prosecution to file its Respondent's brief by the end of thirty days following the day on which the Appellant's briefs were communicated to it. Yet, by 20 February 2000, the Prosecution had not filed its Respondent's brief; nor had it sought additional time to file same. In its 24 February 2000 Motion for clarification on the time-limits to file the legal brief, the Prosecution did not raise the issue of the time-limits pertaining to its Respondent's briefs; neither did it do so in its 4 April 2000 "Motion to extend the time-limit for filing its Appeal Brief".[52] Its response to Kayishema's Appellant's brief was eventually filed on 24 July 2000. In light of these circumstances, the Appeals Chamber holds that the Prosecution's response to Kayishema's Appellant's brief is inadmissible.

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filing must notify the Court Management Section during business hours to request permission and instructions for after-hours filing. This was not done in this case. The transmission of the Prosecution's Brief Against Sentence appears to have taken place on Friday, 28 April 2000, late in the afternoon, at approximately 17.00 hours (or 18.00 hours in Arusha), well past the working hours of the Registry in Arusha.

[52] In this motion, the Prosecution in fact pointed out that under Rule 112, a Respondent's Brief "'shall be served on the other party and filed with the Registrar within thirty days of the Appellant's brief' [and that] accordingly, the Appellant will always have 30 days to respond to the brief filed [by] the Prosecutor." Para. 28. Despite its awareness of the applicable time-limits for the filing of respondent's briefs, it did not adhere to these limits.

3753/A bis

46. The Appeals Chamber further finds that the failure to file an Appellant's brief in support of a notice of appeal carries serious consequences as to the admissibility of the entire appeal. Rule 111 states that an Appellant's brief shall contain all the argument and authorities. An appeal, which consists of a Notice of Appeal that lists the grounds of Appeal but is not supported by an Appellant's brief, is rendered devoid of all of the arguments and authorities; the right to appeal may therefore be considered as having been waived if the Notice of Appeal is not followed by the timely filing of an Appellant's brief. The Appeals Chamber notes that procedural time-limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and to the fulfilment of its mission to do justice.[53] Violations of these time-limits, unaccompanied by any showing of good cause, will not be tolerated.[54]

47. In this case, the Prosecution failed to file its Appellant's brief on time, on two occasions. It failed to file its motion for an extension of time, in a timely manner. It failed to request permission for late filing prior to its eventual filing. It did not demonstrate good cause for any of these failures. Its Respondent's briefs were also filed out of time. As a result, the Prosecution's Appeal, its Appellant's briefs, and its Respondent's briefs, are inadmissible.

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[53] See *Istituto di Vigilanza v. Italy*, 265 Eur. Ct. H.R. (ser. A) at 35 (1993) ("...the finding is inescapable that the (European Commission of Human Rights) exceeded—albeit by only one day—the time allowed it. Furthermore, no special circumstance of a nature to suspend the running of time or justify its starting to run afresh is apparent from the file. The request bringing the case before the Court is consequently inadmissible as it was made out of time."); *Morganti v. France*, 320 Eur. Ct. HR (ser. A) at 48 (1995) ("(The Court) notes that the explanations put forward do not disclose any special circumstance of a nature to suspend the running of time or justify its starting to run afresh.... It follows that the application bringing the case before the Court is inadmissible as it is out of time."); *Kelly v. U.K.*, 42 Eur. Comm'n H.R. Dec. & Rep. 207, 208 (1985)("Delays in pursuing the case are only acceptable insofar as they are based on reasons connected with the case.... Notwithstanding the applicant's initial submission of 10 October 1980, the Commission considers in the present case 27 April 1983 to be the date of introduction of the application and it follows that the application, having thus been introduced out of time, must be rejected under Article 27, para. 3 of the Convention."); *Nauru v. Australia*, 97 I.L.R. 20 (I.C.J.) (1992) ("The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible.").

[54] In this regard, a brief discussion of Rule 127 of ICTY Rules of Procedure and Evidence is useful. The Rule states:

> (A) Save as provided by paragraph (C), a Trial Chamber may, *on good cause being shown by motion*,
>
> (i) enlarge or reduce any time prescribed by or under these Rules;
>
> (ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, *as is thought just* and whether or not that time has already expired.
>
> (B) In relation to any step falling to be taken in connection with an appeal or application for leave to appeal, the Appeals Chamber or a bench of three Judges of that Chamber may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out.
>
> ... (emphasis added).

The fact that an act performed after the expiration of a prescribed time may be recognized as validly done illustrates the following principle: timely filing is the rule, and filing after the expiration of a time-limit constitutes late filing, which is normally not permitted. However, if good cause is shown, the Rule establishes that despite the expiration of time and tardy filing, an act may be recognized as validly done, as a permitted derogation from the usual rule. Thus the Rule reinforces the principle that procedural time-limits are to be respected.

3752/A
bis

3. Conclusion

48. The Prosecution Appeal is inadmissible in its entirety. The Prosecution's Respondent's briefs are also inadmissible.

49. Judge Shahabuddeen appends a dissenting opinion in relation to the issues arising in this chapter.

3751/A bis

III. ISSUES RAISED ON APPEAL

A. Fair Trial

50. Kayishema puts forward five arguments to show the unfairness of his trial. The arguments are: independence of the Tribunal, inequality of arms, presumption of innocence, adversarial principle and the timing of disclosure of materials [Rule 66(A)(i) of the Rules].

51. Before examining Kayishema's arguments, the Appeals Chamber recalls that the principle of the right to a fair trial is part of customary international law. It is embodied in several international instruments, including Article 3 common to the Geneva Conventions[55] which, among other things, prohibits:

> "the passing of sentences (...) without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples"[56].

The Appeals Chamber notes that the Statute sets forth provisions guaranteeing the rights of the accused. According to Article 19(1) of the Statute, the Trial Chamber shall ensure that the trial is fair and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused. Article 20 and various provisions of the Rules set forth the rights of the accused by echoing the guarantees contained in international and regional instruments[57].

1. Independence of the Tribunal

(a) Kayishema's arguments

52. Kayishema refers to the events that occurred in Rwanda in 1994 and to the United Nations reaction in the face of those events[58]. He holds the United Nations partially responsible for the

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[55] See *Čelebići* Appeal Judgment, paras. 138 and 139.

[56] Article 3(d) of the Geneva Conventions of 12 August 1949.

[57] The instruments include: Article 10 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948, A/Res.217 A (III); Article 14 of the International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by the General Assembly resolution 2200 A (XXI) of 16 December 1966; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (Rome, 4 November 1950;), Article 8 of the American Convention of Human Rights (San Jose, Costa Rica, 22 November 1969, Inter-American Specialized Conference on Human Rights). See also *Tadić* Appeal Judgment, para. 44 *et seq.*

[58] Kayishema's Brief, paras. 8 to 10.

genocide that occurred in Rwanda[59] and questions the independence and legitimacy of the Tribunal[60]. In Kayishema's submission, the idea of the Tribunal administering justice to contribute "to the process of national reconciliation and to the restoration and maintenance of peace",[61] runs counter to the concept of Justice as understood by States under the rule of law[62]. Thus, he sees himself as a scapegoat since the Trial Chamber failed to address such observations, which, he also submits, amounts to a miscarriage of justice[63].

53. Kayishema questions the independence of the Tribunal[64] by citing newspaper articles, magazines, a press release and by resorting to political rather than legal arguments, and submits that as a result of pressure from the Government of Rwanda, the Tribunal systematically delivers verdicts against one ethnic group[65].

54. Kayishema raises once again the issue of the United Nations involvement in the events that occurred in Rwanda in 1994[66], suggesting in this case that the Tribunal could not possibly be independent since it was established by the United Nations which, he also submits, was responsible for the genocide that occurred in Rwanda.

(b) Discussion

55. As a rule, a fair trial requires that a set of procedural rules be established to ensure equality between the parties to the case and guarantee the independence of the Tribunal and the impartiality of the judges. A judge is presumed to be impartial until proven otherwise[67]. This is a subjective test: impartiality relates to the judge's personal qualities, his intellectual and moral integrity. A judge is bound only by his conscience and the law. That does not mean that he rules on cases subjectively, but rather according to what he deems to be the correct interpretation of the law, ensuring for an unbiased and knowledgeable observer that his objectivity does not give the impression that he his impartial, even though, in fact, he is. Moreover, before taking up his duties,

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[59] *Ibid.*, paras. 8 to 10. See also T(A) of 30 October 2000, pp 21 to 28
[60] *Ibid.*, paras. 8 to 10, para. 9 and para 9 *bis*
[61] Preambular para. seven of Security Council resolution 955 S/RES/955(1994) of 8 November.
[62] Kayishema's Brief, para. 10
[63] *Ibid.*, para. 10 *in fine.*
[64] *Ibid.*, paras. 18 to 21. See also T(A), pp. 35-36.
[65] *Ibid.*, paras. 18 to 21. See also T(A), pp.35-36.
[66] *Ibid.*, para. 21.
[67] See *Furundžija* Appeal Judgment, paras. 196 and 197. See also *Akayesu* Appeal Judgment, para. 90 *et seq.*, *Čelebići* Appeal Judgment, para. 682 *et seq.*, and para. 698 *et seq.*

3749/A bis

each judge makes a solemn declaration obliging him to perform his duties and exercise his powers as a judge "honourably, faithfully, impartially and conscientiously."[68] The independence of the Tribunal is measured by an objective test: as a judicial organ with jurisdiction, as established by Security Council resolution 955, it is entirely independent of the organs of the United Nations.

56. The Appeals Chamber wishes to recall that it is not its place to interpret the actions of the United Nations in general and that, as an *ad hoc* United Nations judicial organ, the Tribunal issues decisions within its jurisdiction, as established by Security Council resolution 955,[69] and within the inherent jurisdiction of any tribunal[70].

57. Furthermore, still with respect to Kayishema's Brief on the independence of the Tribunal, the Appeals Chamber notes that most of Kayishema's arguments relating to certain elements of the United Nations policy are based on newspaper excerpts, press releases, articles, etc. Kayishema did not submit those elements in evidence before the Trial Chamber, and the Appeals Chamber notes that it has not been seized of a request to admit such elements as additional evidence under Rule 115 or 86 of the Rules. For those reasons, the Appeals Chamber will not consider this issue.

58. The Appeals Chamber is satisfied that the view expressed by the Security Council with regard to the process of national reconciliation and to the restoration and maintenance of peace[71] is not prejudicial to the Tribunal's independence and impartiality, which the judges are required to exhibit in ruling on each case.

59. With regard to United Nations involvement in the events which occurred in Rwanda in 1994[72] – an issue raised by Kayishema, arguing that the Tribunal could not possibly be independent as it was established by the United Nations – the Appeals Chamber holds that the United Nations's role in the events in Rwanda is irrelevant to the present case and, consequently, there is no need to consider this issue.

60. By claiming to be a "sacrificial lamb", Kayishema does not refer to material in the record to support his contention, besides mere unsubstantiated allegations. The Appeals Chamber is of

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[68] Article 14(A) of the Rules.
[69] S/RES/955 of 8 November 1994, Annex, Statute of the International Tribunal for Rwanda.
[70] *Tadić* Appeal Judgment (Lack of jurisdiction), paras. 12 to 22.
[71] See Kayishema's Brief, para. 10.

3748/A bis

the opinion that since Kayishema's claims are unsubstantiated, the Trial Chamber properly ignored them, and that this does not constitute a miscarriage of justice.

61. Regarding the alleged pressure brought to bear by the Government of Rwanda, the Appeals Chamber notes that besides making a general allegation, Kayishema does not refer to any particular pressure brought to bear on the Tribunal in the instant. The Appeals Chamber finds that even assuming that were true, mere exertion of pressure does not imply that the Tribunal would give in to such pressure. Here again, Kayishema is making unsubstantiated allegations.

62. Moreover, the Appeals Chamber is satisfied that the mere fact of the Tribunal maintaining good relations with the Government of Rwanda or enjoying good cooperation from it does not mean that it is not independent. The Tribunal is dependent on State cooperation in the discharge of its activities, as was recognized by ICTY Appeals Chamber in *Blaškić*:

> "[...] it is self-evident that the International Tribunal, in order to bring to trial persons living under the jurisdiction of sovereign States, not being endowed with enforcement agents of its own, must rely upon the cooperation of States. The international Tribunal must turn to States if it is effectively to investigate crimes, collect evidence, summon witnesses and have indictees arrested and surrendered to the International Tribunal. The drafters of the Statute realistically took account of this in imposing upon all States the obligation to lend cooperation and judicial assistance to the International Tribunal."[73]

2. Inequality of arms

(a) Kayishema's arguments

63. During proceedings before the Trial Chamber, Counsel for Kayishema filed a Motion calling for full equality of arms between the Prosecution and the Defence[74] (that is, both parties must be afforded the same means and resources). The Trial Chamber rejected this argument and held that "the rights of the accused and equality between the parties should not be confused with

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[72] *Ibid.*, para. 21.

[73] Decision on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, *The Prosecutor v. Blaskić*, Case No. IT-95-14-AR108*bis*, 29 October 1997, para. 26.

[74] As quoted by the Trial Chamber in its Judgment, para. 56: "Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20(2) and 20 (4). The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence"

3747/A bis

the equality of means and resources"[75] and that "the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution".[76] Kayishema submits that this holding constitutes an error in law.[77]

64. Furthermore, Kayishema submits that due to the lack of permission from Rwanda his Counsel could not visit before trial the sites referred to in the Indictment so as to verify the Prosecutor's assertions *in situ*. The fact that the Prosecutor was able to visit the said sites while the Defence Counsel could not, is, in Kayishema's submission, an error of fact under Article 24 of the Statute[78].

65. Kayishema also argues that Defence witnesses were very few since the Defence could only locate and contact a few[79]. Kayishema further contends that the fact that the Judgment failed to address this issue is an error of fact and of law under Article 24 of the Statute.

66. It is Kayishema's submission that the proceedings were also characterized by the inequality of arms between the parties since the Prosecution was afforded one month to prepare its submissions, while the Defence was allowed only eight days[80].

(b) Discussion

67. The right of an accused to a fair trial implies the principle of equality of arms between the Prosecution and the Defence[81]. The Appeals Chamber finds that the Trial Chamber rightly held that:

> "The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20(2) states, "... the accused shall be entitled to a fair and public hearing... Article 20(4) also provides, "...the accused shall be entitled to the following minimum guarantees, in full equality...," then follows a series of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence."[82]

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[75] Trial Judgment, para. 20.
[76] *Ibid.*, para. 60.
[77] Kayishema's Brief. In support of these submissions, Kayishema cites *Dombo Beheer v. The Netherlands*, Eur. Court H. R., 27 October 1993, Series A274 and *John Campbell v. Jamaica*, Report of Human Rights Committee, Communication No. 307/1988, 24 March 1993, UN Doc. A/48/40 (Part II, Annex G).
[78] *Ibid.*, para. 14.
[79] *Ibid.*, para. 15.
[80] *Ibid.*, para. 16.
[81] *Tadić* Appeal Judgment, para. 48.
[82] Trial Judgment, para. 55.

3746/A bis

68. The Trial Chamber dismissed Kayishema's motion suggesting a duty to seek full equality between the Prosecutor and the Defence[83].

69. The Appeals Chamber observes in this regard that equality of arms between the Defence and the Prosecution does not necessarily amount to the material equality of possessing the same financial and/or personal resources[84]. In deciding on the scope of the principle of equality of arms, ICTY Appeals Chamber in *Tadić* held that "equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case"[85].

70. The Appeals Chamber endorses the Trial Chamber's ruling[86]. This is to ensure that the guarantees set forth in Article 20(2) and (4) of the Statute are respected[87].

71. Consequently, the Appeals Chamber holds that the Trial Chamber did not commit an error on a question of law under Article 24 of the Statute.

72. Regarding the fact that Counsel for Kayishema were unable to travel to sites in Rwanda referred to in the Indictment, the Appeals Chamber wishes, firstly, to recall the Trial Chamber's finding:

> "The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *préfecture* submitted by the Prosecution. However, the Trial Chamber is aware that investigators, paid [for] by the Tribunal, [was] put at the disposal of the Defence. Furthermore, Article 17 (C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. *The Trial Chamber is satisfied that all the necessary provisions for the preparation of a comprehensive defence were available,* and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber"[88]

Kayishema alleges that there was an error in law within the meaning of Article 24 of the Statute as "the Prosecutor herself visited the sites and Defence Counsel did not."[89]. In his Brief,

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[83] As quoted in para. 63 *supra*, the Trial Chamber held that " the rights of the accused and equality between the parties must not be confused with the equality of means and resources" and that "the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution."
[84] See, for example, *Hentrich v. France*, Eur. Court H. R., judgment of 22 September 1994, para. 56.
[85] *Tadić* Appeal Judgment, para. 48, in which ICTY Appeals Chamber cites several cases brought before the European Commission on Human Rights.
[86] Trial Judgment, para. 20.
[87] See also *Tadić* Appeal Judgment, para. 52.
[88] Trial Judgment, para. 61 (emphasis added).
[89] Kayishema's Brief, para. 14, *in fine*.

3745/A bis

Kayishema does not present any argument nor does he adduce evidence in support of this allegation. Similarly, he does not present any arguments to demonstrate that the fact that Defence Counsel were unable to visit Rwanda in person deprived him of a reasonable opportunity to plead his case. The Appeals Chamber agrees with the Trial Chamber's position and finds that the mere fact of not being able to travel to Rwanda is not sufficient to establish inequality of arms between the Prosecution and the Defence. Investigators, paid by the Tribunal, were put at the disposal of the Defence and the Trial Chamber was satisfied that "all the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case."[90]

73. The Appeals Chamber concurs with ICTY Appeals Chamber's position expressed in *Tadić*, that the principle of equality of arms does not apply to "conditions, outside the control of a court",[91] that prevented a party from securing the attendance of certain witnesses. Consequently, the Appeals Chamber dismisses Kayishema's claim that problems encountered in locating and contacting potential witnesses allegedly constitutes an error in fact and in law under Article 20 of the Statute.

74. The Appeals Chamber notes that the question of equality of arms with respect to the procedure was examined by the Trial Chamber, which found that designated time-limits had been accorded to both parties.[92] The Appeals Chamber holds that the Defence closing arguments do not constitute a response to the Prosecutor's closing brief and that the Defence had no cause to wait for the Prosecutor's closing remarks to prepare their closing arguments. The Appeals Chamber endorses the opinion expressed by the Trial Chamber that:

> "(...) were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an appropriate mode of raising the issue before the Chamber."[93]

The Appeals Chamber finds that the Trial Chamber did not commit any error in the exercise of its discretion and that there is nothing in Kayishema's Brief to support his allegation.

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[90] Trial Judgment, para. 61.
[91] *Tadić* Appeal Judgment, para. 49.
[92] Trial Judgment, paras. 63 and 64.
[93] *Ibid.* para. 64.

3744/A bis

3. Presumption of innocence

(a) Kayishema's arguments

75. Kayishema submits that Security Council resolution 955 runs counter to the principle of the presumption of innocence which is well-established in law[94]. He cites particularly the preamble of resolution 955 and contends that the expression "*persons responsible for*" runs counter to the principle of the presumption of innocence[95].

76. He further submits that the procedural improprieties are so serious that the Appeals Chamber cannot cure them adequately. Consequently, he should be presumed innocent[96].

(b) Discussion

77. The Appeals Chamber cannot accept the argument that the phrase "persons responsible for" used in resolution 955 implies that the Tribunal was unable to discharge its judicial functions. The Appeals Chamber recalls that the principle of the presumption of innocence is reiterated in Article 20(3) of the Statute:

> "The accused person shall be presumed innocent until proven guilty according to the provisions of the present Statute."

The Appeals Chamber reiterates with force its holding in *Barayagwiza*.[97]

78. Kayishema provides no evidence to support the allegation that the irregularities of the proceedings before the Trial Chamber are so serious that the Appeals Chamber would be unable to cure them. The Appeals Chamber therefore finds that such an allegation is meritless. In its view, it need not consider it.

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[94] In paragraph 10 of Kayishema's Brief, he cites particularly the preamble of resolution 955 and states that the expression *persons responsible for* runs counter to the principle of the presumption of innocence. The passage in question reads: The Security Council, "Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace", In: S/RES/955(1994) of 8 November.

[95] *Ibid.*

[96] Kayishema's Brief, para.17.

[97] *The Prosecutor v. Barayagwiza*, Decision (*Prosecutor's Request for Review and Reconsideration*), Case No. ICTR-97-19-AR72, 31 March 2000, para. 35.

3743/A bis

4. The adversarial principle

(a) Kayishema's arguments

79. Citing several cases[98] before the European Court of Human Rights, Kayishema argues that the Judgment did not adhere to the *adversarial* principle[99].

(b) Discussion

80. Kayishema advances no arguments to support his allegation that the Judgment did not adhere to the adversarial principle. The Appeals Chamber, like Kayishema[100], agrees with the opinion expressed by the European Court of Human Rights, that:

> "The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial.[...] The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party will be aware that observations have been filed and will get a real opportunity to comment thereon.."[101]

The adversarial principle under the Statute and the Rules is to the same effect and there is no evidence in Kayishema's Brief to show the contrary.

5. Timing of disclosure of materials [Rule 66(A)(I)] of the Rules

(a) Kayishema's arguments

81. Kayishema submits that the Defence had no material enabling it "to know the charges brought"[102] against him (Kayishema) by the Prosecutor. He had made his initial appearance on

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[98] Those cases are: *Günter Struppat v. FRG*, decision of the Commission of 16 July 1968, Year Book of the Eur. Convention H.R., Eur. Commission H.R., Eur. Court H.R., 1968, p. 381 *et seq* (French version), p. 380 *et seq* (English version); *Ruiz-Mateos v. Spain*, 23 June 1993; *Dombo Beheer v. The Netherlands*, 27 October 1993; *Hentrich v. France*, 22 September 1994; *Ankerl v. Switzerland*, 23 October 1996.

[99] Kayishema's Brief, para. 12

[100] *Ibid.*

[101] Eur. Court H.R., Decision in *Brandstetter v. Austria*, 20 August 1991, Series A, No. 211, paras. 66 and 71. See also Eur. Court of HR, Decision in *Ruiz-Mateos v. Spain*, 23 June 1993, Series A No. 262, para. 63.

[102] Kayishema's Brief, para. 13.

3742/A bis

31 May 1996, but only on 26 June 1997[103] did the Prosecutor disclose a substantial part of the materials, which, in his submission, is an error in law and in fact under Article 24 of the Statute.

(b) Discussion

82. Kayishema provides an erroneous account of the events in arguing that the Prosecution ignored the Defence requests for disclosure of evidence dated 11 June 1996, 26 June 1996 and 27 November 1996 and that as at 20 February 1997, the Defence "was in no position to know the nature of the charges brought against Kayishema."[104]

83. The Appeals Chamber notes that the Prosecution began disclosing supporting materials which accompanied the Indictment on 15 July 1996, or 45 days following Kayishema's initial appearance on 31 May 1996,[105] and that on 26 March 1997, the Prosecutor disclosed to the Defence the particulars of 28 of the 36 Prosecution witnesses and disclosed five other witness statements on 24 September 1997.[106]

84. However, the Appeals Chamber, notes that the Defence failed to seek appropriate relief from the Trial Chamber at trial. Therefore, it may not raise such issues on appeal.[107]

6. Conclusion

85. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

B. Specificity of the Indictment

86. Ruzindana argues in Ground Eight that due to the lack of specificity in the indictment he was denied a fair trial because he was not promptly informed of the nature of the charges against

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[103] *Ibid.*, para. 13.
[104] *Ibid.*
[105] The Appeals Chamber notes, however, that under Rule 66 (A) (i) of the Rules, the Prosecutor is required to disclose to the Defence: "Within *30 days* of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused" (emphasis added).
[106] Decision on the Prosecution Motion for Direction for the Scheduling of the Continuation of the Trial of Clément Kayishema and Obed Ruzindana on the Charges as Contained in the Indictment No. ICTR-95-I-T, 12 March 1998.
[107] *Kambanda* Appeal Judgment, para. 25. "The fact that the Appellant made no objection before the Trial Chamber to the Registry's decision means that, in the absence of special circumstances, he has waived his right to adduce the issue as a valid ground of appeal. See also *Čelebići*, paras. 640-649 (Obligation to Raise Issue at Trial).

3741/A bis

him nor was he allowed adequate time and facilities to prepare his defence.[108] In general, Ruzindana submits that because the Trial Chamber failed to recognize the imprecision in the indictment,[109] it violated his right to a fair trial and in particular the guarantees contained in, *inter alia,* Article 20(4)(a) and (b) of the Statute.[110]

87. Before deciding whether or not it should proceed to consider the substance of Ruzindana's submissions on this point, the Appeals Chamber must first address what has been raised as the primary argument of the Prosecution.

1. Whether Ruzindana has waived his right to raise the issue of imprecision

88. During the hearing on appeal, the Prosecution submitted that Ruzindana had waived his right to raise the issue of specificity before the Appeals Chamber.[111] The Prosecution contends that "when the indictment was filed on the first day of trial, the Appellant [Ruzindana] raised no objection to the indictment in terms of it being imprecise with respect to dates, locations and events".[112] Further, the next opportunity when Ruzindana could have raised a challenge to the indictment occurred on 14 October 1997, when Witness EE took the stand.[113] However, the Prosecution submits that when Witness EE took the stand on 14 October 1997, no objection was made by the Defence.[114] The Prosecution maintains that the following complaints[115] were lodged by Defence Counsel only after Witness EE began to give evidence, to wit, (i) that the Prosecution had violated the provisions of Rule 67 on disclosure; (ii) that the substance of the witness's testimony might well expose Ruzindana to charges involving sexual violence; and (iii) the discourtesy or uncouth manner in which the Prosecution apprised Defence Counsel that the Witness was going to testify the following day.

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[108] This ground of appeal is included in Ruzindana's Brief when he discusses what he refers to as "Evidentiary Matters"(*see*, Ruzindana's Brief, paras. 7-14).
[109] The relevant indictment on which the Prosecution relied and Ruzindana was tried is that as reproduced in the Trial Judgment, pp. 3 – 12 (as amended in *The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-T, Decision on the Motion filed by the Prosecutor for Confirmation of the Trial Date and submission of a Superseding Indictment, 10 April 1997).
[110] Ruzindana's Brief, para. 14.
[111] T(A), 30 October 2000, p. 197.
[112] *Ibid.*, p. 198.
[113] The Prosecution asserts that "on the evening preceding the witness's testimony, the Prosecution communicated to Defence Counsel, by way of a letter, that the witness was going to testify to certain matters that the Prosecution previously had no knowledge of, nor had those matters been disclosed to the Defence before", T(A), 30 October 2000, p. 199.
[114] T(A), 30 October 2000, p. 199.
[115] *Ibid.*, p. 200.

3740/A bis

The Prosecution also submitted that Counsel for Ruzindana had never: (i) sought an adjournment to prepare himself to cross-examine Witness EE; (ii) indicated to the Trial Chamber that Witness EE's testimony violated Ruzindana's right to be promptly informed of the nature of the charges against him; or (iii) indicated to the Trial Chamber that allowing Witness EE to proceed would affect Ruzindana's right to have adequate opportunity, time and facilities to prepare his defence.[116]

89. The Prosecution indicated to the Appeals Chamber that at no time during the proceedings below did Ruzindana seek to file an interlocutory appeal challenging defects in the form of the indictment.[117]

90. The Appeals Chamber notes that Ruzindana does not make any attempt to explain his failure to raise this issue before the Trial Chamber or to suggest that he has indeed done so. Ruzindana's Brief is silent on this point and, during the hearing on appeal, Counsel for Ruzindana made reference to his objections with regard to Witness EE and without being more specific, stated that " I raised this in my closing remarks [...] ".[118]

2. Discussion

91. The Appeals Chamber accepts that, as a general principle, 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. Thus, if a party raises no objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party, "has waived his right to adduce the issue as a valid ground of appeal."[119] A party is under an obligation to formally raise with the Trial Chamber

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[116] *Ibid.*, p. 200, the Appeals Chamber relies on the transcript of the hearing on appeal which reflects the language in which Counsel for the Prosecution spoke .
[117] *Ibid.*, p. 202, However, the Prosecution recognized that "[...] a prerequisite for an interlocutory appeal would be an adverse decision by a Trial Chamber, and the fact that the record reveals no such adverse decision may very well explain the absence of an interlocutory appeal."
[118] *Ibid.*, p. 247.
[119] *Kambanda* Appeal Judgment, para. 25. *See also*, *Čelebići* Appeal Judgment, para. 640; *Akayesu* Appeal Judgment, para. 361.

3739/A bis

(either during the trial or pre-trial[120]), any issues that require resolution. It "cannot remain silent on [a] matter only to return on appeal to seek a trial *de novo*"[121].

92. The main contention of Ruzindana under this ground of appeal is the fact that the amended indictment of 11 April 1997[122] suffers from imprecision with respect to dates, location and events involving the accused. Notwithstanding the absence of an explanation from Ruzindana, the Appeals Chamber will nevertheless briefly examine the trial record to ascertain whether this issue has been raised before the Trial Chamber.

93. Ruzindana was arrested on 20 September 1996 and made his initial appearance on 29 October 1996. On 11 April 1997, the trial of Kayishema and Ruzindana commenced before the Trial Chamber based on the amended indictment filed with the Registry on that day. The Defence teams commenced their case on 11 May 1998 and closed on 15 September 1998. Ruzindana's Defence presented closing arguments from 28 October 1998 to 2 November 1998.

94. At the pre-trial stage, Ruzindana filed a preliminary motion on 30 December 1996,[123] objecting to, *inter alia,* the form of the indictments. He advanced four specific challenges, namely (1) the indictments were not properly signed and dated, (2) the accompanying arrest warrant was not valid, (3) Ruzindana was not properly advised of his rights at the time of his arrest as the copies of the arrest warrants received did not include any enclosures referred to in Rule 55(A) of the Rules, and (4) the indictments did not bear an acknowledgement by Ruzindana. The motion

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[120] The 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: *Furundžija* Appeal 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 his right to raise the matter now and could dismiss his ground of appeal".

[121] *Tadić* Appeal Judgment, para. 55, cited in *Kambanda* Appeal Judgment, para. 25.

[122] Ruzindana was initially charged in the original indictment submitted by the Prosecutor on 22 November 1995. The indictment was confirmed by Judge Navanethem Pillay on 28 November 1995. Judge Pillay ordered that the indictment be amended on 6 May 1996. On 26 March 1997 the Prosecution brought a motion to file a superseding indictment against Ruzindana, Kayishema and Gérard Ntakirutimana which was denied by the Trial Chamber in, *The Prosecutor v. Clément Kayishema and Obed Ruzindana,* Case No. ICTR-95-1-T, "Decision on the Motion filed by the Prosecutor for Confirmation of the Trial Date and submission of a Superseding Indictment", 10 April 1997. In the decision of 10 April 1997, the Trial Chamber also granted leave to the Prosecution to redact the names of six other accused not in custody, from the first amended indictment and to delete Count 1 (conspiracy to commit genocide) of that indictment and to rearrange the remaining counts accordingly. During the hearing on appeal, the Prosecution submitted that "the two other indictments in this case: [...] the indictment of 1995, as well as the proposed superseding indictment of 1997 [...], are not relevant to the issue of waiver. Whatever challenges the Appellant brought to those respective indictments are irrelevant to the extent that they did not form the basis of his conviction", T(A), 30 October 2000, p. 198.

[123] Preliminary Motions, Cases Nos. ICTR 95-1-I and ICTR 96-10-I, filed on 8 January 1997.

 3738/A

was rejected by the Trial Chamber.[124] The Appeals Chamber notes that the preliminary motion raised an objection in relation to previous indictments other than the amended indictment of 11 April 1997.[125] Nevertheless, the Appeals Chamber considers that the challenges raised in the said preliminary motion are inconsistent with those Ruzindana now raises on appeal.

95. No further written motion on the form or specificity of indictment was filed by Ruzindana during the proceedings. An examination of the trial transcripts from the beginning of the trial,[126] during presentation of evidence by the Defence[127] and during closing arguments,[128] further indicates that Ruzindana did not raise the question of imprecision of the indictment in respect of the dates, locations and events relating to the charged offence. In addition, the "*Final Trial Brief Filed by the Defence*"[129] pursuant to Rule 86(B) of the Rules has similarly failed to raise this question.

96. The Appeals Chamber also finds that the objection raised by Ruzindana in relation to the late disclosure of the deposition of Witness EE[130] is, in substance, a challenge premised on an alleged violation of the procedure governing disclosure. Such an objection cannot amount to an objection based on defects in the form of an indictment in respect of the dates, locations and events pertaining to the charged crimes. In essence, Ruzindana challenged the late disclosure of evidence in light of Rule 67 (D) of the Rules and alleged that, as a result, new charges are being

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[124] Trial Judgment, para. 18.

[125] The issues raised in this motion pertained, *inter alia,* to the indictments in Case No. ICTR 95-1-I (Indictment of 22 November 1995, amended by order of Judge Pillay dated 6 May 1996) and Case No. ICTR 96-10-I (Indictment of 17 June 1996).

[126] T, 11 April 1997, pp. 14 - 15. When asked by the Presiding Judge if he had anything to say on the indictment Ruzindana replied that his date of birth as well as his place of occupation was incorrect. Subsequently when asked if there were any other comments by the Defence, the reply "Nothing" was recorded.

[127] T, 11 May 1998, pp. 6 – 20. The opening statement of Counsel for Ruzindana was given after the Prosecution has concluded presentation of evidence and before the presentation of evidence for the defence. It is noted that this opening statement was rendered one year later, after the beginning of the trial and Counsel for Ruzindana has not raised any objection about imprecision of indictment in respect of the dates, location and events surrounding the charged offence.

[128] T, 28 October 1998, pp. 61 – 63, pp. 79 – 81, Counsel for Ruzindana raised the issue of failure to specify charges under Article 2(2)(b) and 2(2)(c) of the Statute in relation to the 1995 indictment. At page 81 of the transcript, he confirms that the indictment was not precise with regard to Article 2(2)(b) and (c) of the Statute. No objection was raised concerning imprecision of indictment in respect of the dates, location and events surrounding the charged offence.

[129] Filed with the Registry on 16 October 1998.

[130] T, 14 October 1997, pp. 91 – 95. It is noted that the objection was only on the limited ground that the Prosecution had violated Rule 67 governing reciprocal disclosure. *See also*, T(A), 30 October 2000, pp. 198 –202, where the Prosecution submitted *inter alia,* that at no time did Ruzindana seek an adjournment to cross-examine Witness EE, nor indicate that the testimony was violating the right to be promptly informed, nor indicate that allowing him to proceed would affect his right to have adequate time to prepare his defence.

3737 bis

introduced in the indictment.[131] It should be noted that Counsel for Ruzindana expressly acknowledged that the introduction of new charges would only be effective through "a proposal for an amendment of the indictment".[132] It appears to the Appeals Chamber that the substance of such an objection cannot be equated with an objection as to the form and specificity of the amended indictment of 11 April 1997 with respect to the charges therein contained.

3. Conclusion

97. For these reasons, the Appeals Chamber finds that Ruzindana did not raise this matter before the Trial Chamber. Further, by failing to explain such omission in his Brief or during the hearing on appeal, Ruzindana has not demonstrated any special circumstances. As a result, the Appeals Chamber finds that he has waived his right to raise this matter now on appeal and accordingly dismisses Ground Eight.

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[131] T, 14 October 1997, p. 94.
[132] *Ibid.*, p. 95.

3736/A
bis

C. Alibi

98. Both Kayishema (Ground five) and Ruzindana (Ground six) alleged that the Trial Chamber had erred in fact and in law within the meaning of Article 24 of the Statute by holding that the defence of alibi raised by the Appellants was baseless.

99. Both Kayishema and Ruzindana raised a defence of alibi in respect of the charges laid against them by the Prosecutor. For his part, Kayishema submitted that he had gone into hiding for four days, from the morning of 16 April 1994 to the morning of 20 April 1994, thus contending that he was absent from the scene and at the time the crimes charged were committed. As for Ruzindana, he asserted that at the time of the events, he went on with his daily business in Mugonero village.

i. Arguments by the parties

(a) Kayishema's defence of alibi

100. Kayishema raised several arguments before the Appeals Chamber, which can be summarized as follows:

- By holding that "Defence witnesses proffered very little evidence as to the accused's whereabouts during the execution of the massacres",[133] the Trial Chamber was imposing an impossible burden of proof on him. Kayishema argues that since he was in hiding for three days, he was indeed not in a position to produce evidence of his absence from the scene of the massacres. He asserts that requiring such evidence would amount to shifting the burden of proof, thereby rendering the trial unfair;[134]

[133] Kayishema's Brief, para. 45.
[134] T(A), 30 October 2000, p. 77.

3735/A
bis

- By finding that Kayishema's diary contained no mention of him being in hiding nor of the *gendarme* mutiny,[135] the Trial Chamber erroneously relied on a trivial fact in arriving at its conclusion;[136]

- By using such words as "*amnésique*" [amnesic] and "*amnésie*" [amnesia] in paragraphs 253 and 256 (French version) of its judgment, the Trial Chamber demonstrated that it lacked objectivity in its assessment of Kayishema's alibi defence;[137]

- By stating that it was not satisfied that the holding of a meeting on 13 May 1994 was entered in Kayishema's diary at the time of the events (on the ground that said entry was in a language and ink which differed from that used for other entries in the diary), the Trial Chamber arrived at a hasty conclusion based on evidence that means nothing.[138]

101. The Prosecutor submits that the Trial Chamber in no way shifted the burden of proof.[139] On the contrary, the Trial Chamber held that the burden of proof rested squarely upon the Prosecution.[140] The Prosecutor recalls that the Trial Chamber was satisfied that Kayishema's guilt had been established beyond reasonable doubt and that the evidence adduced in support of the alibi was found to be unlikely to raise any reasonable doubt. In no way, she submitted, was Kayishema required to prove the impossible. The Prosecutor further submits that since Kayishema decided to enter the defence of alibi pursuant to Rule 67 of the Rules, he had to specify before the Trial Chamber the place or places at which he claimed to have been at the time of the events.[141] She asserts that the Chamber assessed the evidence presented by the Defence specifying the accused's whereabouts, and in light of Prosecution evidence, it found that the witnesses had proved that he was present at the site of the massacres.[142] In the Prosecutor's view, Kayishema has failed to show that the Trial Chamber's decision was unreasonable.

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[135] Kayishema's Brief, para. 58. Kayishema alleges that on 18 April, their (*gendarmes*) attitude totally changed, that a mutiny did indeed take place and that the *gendarmes* "who killed were those who mutinied [and that] no proof has been adduced that Kayishema was on their side."
[136] *Ibid.*, para. 46; T(A), 30 October 2000, p. 80.
[137] *Ibid.*, para. 47.
[138] *Ibid.*, para. 48.
[139] T(A), 30 October 2000, pp. 153 to 155.
[140] Trial Judgment, para. 234.
[141] T(A), pp. 153 - 154.
[142] *Ibid.*, p. 155.

3734/A
bis

(b) Ruzindana's defence of alibi

102. Ruzindana submits, on the one hand, that lack of precision in the indictment adversely affected his ability to assert his defence of alibi[143] and, on the other hand, that his alibi was "well founded and admissible".[144] He stresses that given the long period (three months) covered by the indictment, it was particularly difficult for him to adduce evidence that he was not at the site of the crime for all that period.[145] Furthermore, Ruzindana contends that the testimonies of all the witnesses favour the conclusion that he went frequently for shopping in this village, and that during that period it was logically impossible for him to participate in the commission of the crimes.[146] In his opinion, the entire evidence presented covered, on the whole, his schedule for the period from April to July 1994, that is, the period reflecting the continuation of his professional activity in Mugonero.

The Defence also recalled that "it was not the role of the Defence to prove their case on a twenty-four hour basis, that is, from 6 April 1994 [...] and from July 1994, the accused was in constant visual and physical contact with Defence witnesses".[147] The Defence asserts that the "body of evidence" adduced shows the consistency of the accused's alibi as well as its probability.[148] The Defence therefore avers that the testimonies were complementary and formed a coherent whole. In support of its contention, the Defence cited Judge Pillay's separate opinion in the Trial Chamber's judgment in *Musema* where she stated that the defence of alibi should be assessed in a comprehensive and general manner.[149] Such coherent evidence should have enabled the Trial Chamber to give probative value to the alibi defence.[150] Consequently, it submits that the Chamber's piecemeal assessment of the alibi defence constitutes an error of law and affects the rights of the accused.

103. As to how lack of precision in the indictment affects Ruzindana's defence, the Prosecutor, recalling the arguments put forward in support of this specific ground of appeal, submits that the

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[143] Ruzindana's Brief, para. 34.
[144] *Ibid.*, para. 40.
[145] T(A), 30 October 2000, p. 124.
[146] Ruzindana's Brief, paras. 36-39, T(A), 30 October 2000, p. 124.
[147] T(A), 30 October 2000, p. 126.
[148] *Ibid.*, p .206 (French).
[149] *Ibid.*, p. 247.
[150] *Ibid.*, p.380 (French).

3733/A bis

Appellant had waived his right to raise this issue on appeal.[151] She further contends that Ruzindana had failed to show that the Trial Chamber committed an error of fact by rejecting his defence of alibi.[152]

ii. Discussion

104. The Appeal Chambers identifies three main issues raised by the Appellants:

1. The burden of proof upon the Defence in the context of the defence of alibi;

2. The approach adopted by the Trial Chamber to assess the defence of alibi raised by the accused;

3. The Trial Chamber's assessment of witness credibility and its evaluation of the evidence adduced in the context of the defence of alibi.

(a) Burden of proof regarding the defence of alibi

105. Kayishema submits that the Trial Chamber erred by imposing an impossible burden of proof on him when it required Defence witnesses to testify to the accused's whereabouts at the time of the massacres. In this regard, he relies specifically on the Chamber's statements in paragraph 247 of the Judgment that "very little specific evidence was proffered [by Defence witnesses] as to the accused's whereabouts during [the] execution of said massacres". The Appellant therefore contends that the Trial Chamber had shifted the burden of proof, thereby rendering the trial unfair.

106. The Appeals Chamber considers that the defence of alibi implies that the person who raises it should establish before the Trial Chamber that objectively he was not in a position to commit the crime, particularly because he was in a place different from the one at which it was committed. Rule 67 (A) (ii) of the Rules, same as the corresponding provision in ICTY Rules, covers the "Defence of alibi". However, an alibi is based on evidence which the Accused intends to rely upon for an in-depth analysis of the Prosecution's case in order to show that the Prosecution has failed to discharged the burden of proof that rests on it. Now, since the

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[151] *Ibid.*, pp. 197 and 198-199. Concerning this point, see the section of this decision which deals with the ground relating to specificity of the Indictment (6) (B).
[152] *Ibid.*, p. 206.

 3732/A bis

Prosecution cannot anticipate the argument the Defence will raise, it is incumbent on the Defence to give the Prosecution notice of such argument. But this does not constitute an actual "defence". As ICTY Appeals Chamber pointed out in *Čelebići*:

> "It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a defence in its true sense at all. By raising that issue, *the defendant does not more that require the Prosecution to eliminate the reasonable possibility that the alibi is true*".[153] (Emphasis added)

107. The Appeals Chamber stresses that this position was followed recently in the *Foca* case, where ICTY Trial Chamber held that

> "The Prosecution bore the onus of establishing the facts alleged in the Indictment. Having raised the issue of alibi, the accused bore no onus in establishing that alibi. It was for the Prosecution to establish that, despite the evidence of the alibi, the facts alleged in the Indictment were nevertheless true".[154]]

The Appeals Chamber recalls that in conformity with the principle of presumption of innocence, as enunciated in the judgment,[155] *supra*, it is the duty of the Prosecution to prove the guilt of the accused beyond reasonable doubt.

108. Upon examining Kayishema's arguments, the Appeals Chamber recalls that in a criminal case, the accused's role at the level of preparation of the case should not be confused with his role at the trial stage before the Trial Chamber.

109. Indeed, the Appeals Chamber notes that Rule 67 (A) (ii) of the Rules of Procedure and Evidence provides that when the Defence intends to enter the defence of alibi, in addition to the duty to notify the Prosecutor thereof, the accused must also provide the evidence upon which he

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[153] *Čelebići* Appeal Judgment, para. 581 : "It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a defence in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true".

[154] *Kunarac* Trial Judgment, para. 625 : "The Prosecution bore the onus of establishing the facts alleged in the Indictment. Having raised the issue of alibi, the accused bore no onus in establishing that alibi. It was for the Prosecution to establish that, despite the evidence of the alibi, the facts alleged in the indictment were nevertheless true".

[155] See also the section of this Judgment on fair trial (III, A, paras. 50-51).

3731/A
bis

intends to rely to establish his alibi.[156] This rule, which applies at the level of case-preparation, only governs the reciprocal disclosure of evidence.

110. The Appeals Chamber is therefore of the opinion that this provision places no onus of proof on the Defence, in that it does not require the Defence to prove the existence of the facts, but rather provides for disclosure of evidence in support of the alibi. Thus, as reflected in Rule 67 referred to above, the Defence is required to disclose to the Prosecutor the place or places at which the accused claims to have been present at the time of the alleged crimes and, if it so desires, produce probative evidence tending to show that *since the accused was at a particular location at a specific time*, there was cause for reasonable doubt as to his presence at the scene of the crime at the alleged time. The accused is therefore at liberty to provide the Prosecution with such evidence as may establish the credibility of the alibi raised.

111. Consequently, it is the opinion of the Appeals Chamber that the purpose of entering a defence of alibi or establishing it at the stage of reciprocal disclosure of evidence is only to enable the Prosecutor to consolidate evidence of the accused's criminal responsibility with respect to the crimes charged. Thus, during the trial, it is up to the accused to adopt a defence strategy enabling him to raise a doubt in the minds of the Judges as to his responsibility for the said crimes, and this, by adducing evidence to justify or prove the alibi.

112. In the instant case, the Defence contends that it was impossible at trial to produce evidence to prove alibi, since Kayishema was compelled to hide and could not disclose the location of his hide-out. The Appeals Chamber is aware of the fact that failure to prove an alibi must not be construed as an indication of the Accused's guilt.[157] However, the Chamber affirms that the issue of disclosure of evidence falls within the preparation of the case and precedes the production of evidence at trial. If the Defence is not in a position to produce evidence of the accused's whereabouts, it is, nevertheless, at liberty to disclose to the Prosecutor, and then produce before the Trial Chamber, all evidentiary material likely to raise doubts as to the

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[156] Rule 67 (A) (ii) provides that "As early as reasonably practicable and in any event prior to the commencement of the trial:
[...] (ii) The Defence shall notify the Prosecutor of its intention to enter: (a) The Defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi".

[157] However, the Appeals Chamber is of the opinion that evidence showing solely that the accused was not present at the scene of the crime, without providing any specific alibi, does not, generally speaking, show proof of alibi.

3730/A
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accused's responsibility for the crimes charged. Accordingly, the Appeals Chamber holds that this cannot be considered as shifting the burden of proof at the trial.

113. The Appeals Chamber recalls that at the trial stage, the Trial Chamber limited itself to assessing the evidence presented by the parties. The Prosecutor must always prove the existence of the facts charged as well as the accused's responsibility therefor. The Defence, for its part, must produce evidence before the Chamber in support of its claims that the crimes charged cannot be imputed to the accused because of his alibi. However, in that case, the burden of proof is not shouldered by the Defence. It is merely required to produce evidence likely to raise reasonable doubt regarding the case of the Prosecution.

114. The Appeals Chamber notes that the Appellant takes issue with the manner in which the Trial Chamber exercised its discretionary power of assessment, since he avers in his written submissions that in assessing the evidence, the Chamber asked him to "produce"[158] impossible evidence. In the opinion of the Appeals Chamber, the Appellant's reading and interpretation of the paragraph in issue is restrictive.[159]

115. An overall analysis of paragraph 247 of the Trial Judgment shows that the Trial Chamber's statements fit into the overall assessment of the testimony of Defence witnesses wherein the Chamber simply noted that the testimony of witnesses called by the Defence was not sufficient to levy a reasonable doubt as to Kayishema's whereabouts during the massacres. Furthermore, it is the duty of the trial Judges to hear, assess and weigh the evidence adduced by the parties at the hearing.[160] The Trial Chamber thus determines if a witness is credible and if the evidence presented is reliable.[161]

116. The Appeals Chamber further holds that a reading of the Trial Judgment reveals that the Trial Chamber did not rely exclusively on Kayishema's actual escape to determine the relevance of the alibi. The fact that Kayishema failed to prove his presence at the alleged hide-out seemed

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[158] It should be noted that the English version of the Judgment (original) is a bit different from the French version: in fact, in the original version of the Judgment, the Trial Chamber stated that "very little specific evidence was proffered (which may be translated as "*présenté*" or "*proposé*") as to the accused's whereabouts during their execution, whereas the French version uses the word "*produire*". This undoubtedly led the Appellant to interpret it as shifting the burden of proof. The Appeals Chamber notes that since the original is deemed authentic, it is therefore bound, in the instant case, by the English version which is authoritative.

[159] Kayishema's Brief, para. 45. Kayishema contends that the Trial Chamber required the Defence to specify the accused's exact whereabouts at the time of the preparation of the massacres.

[160] *Tadić* Appeal Judgment, 1999, para. 64.

3729/A
bis

not to have been considered by the Chamber as a probative factor. On the contrary, the Trial Chamber seems to have weighed the evidence presented and found, beyond reasonable doubt, that the accused was present at the scene of the massacres. Indeed, it held that Defence witnesses had failed to produce sufficient evidence as to the accused's whereabouts at the time of the massacres[162] and that many contradictions had impaired the defence of alibi raised by the accused.[163] It thus concluded that the alibi defence raised by Kayishema was without merit and that its credibility had not been sufficient to levy any doubt whatsoever against the Prosecution case.[164]

117. After analyzing the Trial Judgment, the Appeals Chamber finds that the Trial Chamber had not imposed an impossible burden of proof on the accused nor shifted the burden of proof. The Trial Chamber had found, upon consideration of the evidence presented by the parties, that the evidence adduced in support of the alibi was not sufficient to give rise to a reasonable doubt. In the absence of any showing that the findings are unreasonable, the Appeals Chamber is satisfied with the assessment and, accordingly, dismisses this argument.

(b) Approach adopted by the Trial Chamber to assess the alibi

118. Ruzindana submits that the entire evidence presented covered, on the whole, his schedule and that such coherent evidence should have enabled the Trial Chamber to give probative value to the alibi defence. During the hearing on appeal, Ruzindana cited the dissenting opinion by Judge Pillay in the *Musema* case.[165] Thus, he asserts that the defence of alibi should be assessed in a comprehensive manner.

119. It is incumbent on the Trial Chamber to adopt an approach it considers most appropriate for the assessment of evidence. The Appeals Chamber must *a priori* lend some credibility to the Trial Chamber's assessment of the evidence proffered at trial, irrespective of the approach adopted. However, the Appeals Chamber is aware that whenever such approach leads to an unreasonable assessment of the facts of the case, it becomes necessary to consider carefully

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[161] *Aleksovski* Appeal Judgment, 2000, para. 63
[162] Trial Judgment, para. 247.
[163] *Ibid.*, paras. 249 to 256.
[164] *Ibid.*, para. 257.
[165] *Musema* Trial Judgment, pp. 325 to 337 (Dissenting Opinion by Judge Pillay).

3728/A bis

whether the Trial Chamber did not commit an error of fact in its choice of the method of assessment or in its application thereof, which may have occasioned a miscarriage of justice.

120. Ruzindana submitted at the hearing on appeal that the Trial Chamber should have followed Judge Pillay's dissenting opinion in its assessment of the evidence tendered by the Defence in support of the alibi. The Defence submits that it tendered coherent and sufficient evidence to establish the probability of Ruzindana's alibi.[166] In its view:

> "Judge Pillay said that the defence of alibi ought to be envisaged in an overall manner, a general manner and not on a separate basis. One witness testimony cannot support the defence of alibi of an accused to be able to prove, day by day, week by week. The witnesses have to establish, to prove the defence of alibi of the accused, if they are taken together, on a day-by-day, week-by-week basis."[167]

121. The Appellant then proposed an alternative,[168] namely that either the Appeals Chamber should uphold Judge Pillay's opinion on the totality of the alibi or hold that the witness must necessarily be attached by the arm, 24 hours a day, for the period under consideration.

122. In the instant case, the Trial Chamber adopted a different approach in its assessment of the evidence tendered in support of the alibi. If such approach is reasonable, the Chamber is bound to respect it.

123. The Trial Chamber's analysis reveals that it did not only consider individual witness statements to determine whether or not they constitute probative evidence in support of the alibi raised, but it also conducted an overall assessment in order to verify their credibility. In this overall assessment, which is part of a comprehensive analysis of Ruzindana's alibi, the Trial Chamber found, besides the contradictions raised, that Defence witnesses were unable to provide the specific dates on which they had seen Ruzindana.[169] The Trial Chamber also found that:

> "[...] Even if the evidence proffered by the Defence in support of alibi is accepted in its entirety, *it remains insufficient to raise doubt in relation to Ruzindana's presence in Bisesero at the times of the massacres*". (Emphasis added) [170]

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[166] T(A), p. 126.
[167] *Ibid.*, p. 127.
[168] *Ibid.*, p. 128.
[169] Trial Judgment, para. 271.
[170] *Ibid.*, para. 272.

3727/A bis

124. Regarding the argument that by not considering the alibi in its totality, the Trial Chamber committed an error,[171] the Appellant has failed to show in what way the Trial Chamber's analysis is so unreasonable that it caused a miscarriage of justice.

(c) Trial Chamber's assessment of the weight of evidence produced within the context of an alibi

125. Both Kayishema and Ruzindana call into question the Trial Chamber's assessment of evidence presented with respect to their alibis.

126. Kayishema submits that by taking into account the accused's failure to enter in his diary that he was in hiding, the Trial Chamber relied on a fact that means nothing to convict the Appellant.[172] The Appeals Chamber notes that a reading of the Judgment reveals that this fact, as well as the issue regarding entries in the diary written in one language and in a different type of ink, was not given probative value but was rather considered in the Trial Chamber's overall assessment of the evidence before it.[173] In the light of the many contradictions raised,[174] the Trial Chamber indeed held that the alibi raised by Kayishema was without merit. It thus found that the alibi was not sufficient to levy any doubt on the evidence against the accused.

127. Secondly, Kayishema avers that by using such words as "*amnésique*" [amnesic] and "*amnésie*" [amnesia] in paragraphs 253 and 256 of its Judgment, the Trial Chamber showed that it lacked objectivity in its assessment of his alibi.[175] The Appeals Chamber affirms that the authoritative version of the Judgment, namely the English version, does not contain these words, which, on the contrary, are couched in a neutral and objective context. It further affirms that assuming that the Trial Chamber used the said words, such use does not suggest the Chamber's bias or impartiality, which must, moreover, be established by the Appellant.

128. Ruzindana, for his part, submits that all the testimonies favour the conclusion that he frequently went to this village for his shopping and that, at that time, it was logically impossible

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[171] T(A), 30 October 2000, p.128.

[172] Kayishema's Brief, para. 46; T(A), 30 October 2000, p. 129 (French).

[173] Trial Judgment, paras. 240 and 257.

[174] The Chamber stated that there were contradictions particularly between Kayishema's previous statements and his testimony at the hearing (though the Chamber did not rely on the simple fact that Kayishema failed to mention his alibi during his first questioning, it found as unsatisfactory the explanations on the disparities), between evidence adduced by Kayishema and the other testimonies and, finally, between the testimony of Witness DU, the testimony of the accused and that of his wife.

3726/A
bis

for him to participate in the commission of the crimes.[176] He seems to call into question the Trial Chamber's overall assessment of Defence witnesses. In his Brief, the Appellant contented himself with listing a number of witnesses called in support of his alibi.[177] In this connection, the Chamber recalls that it is not conducting a trial *de novo*.[178]

129. The Appeals Chamber affirms once again that it is incumbent on the Trial Chamber to assess the credibility of a witness as well as the reliability of the evidence given by the parties. Therefore, the Appeals Chamber cannot and must not set aside the Trial Judge's findings except when a reasonable court would not have relied on the evidence for its decision or when the assessment of the evidence is completely erroneous. The Appeals Chamber stresses that it is the duty of the Trial Chamber to determine the probative value of each exhibit or witness testimony, based on their relevance and credibility.

130. The Trial Chamber held, in the instant case, that the testimony of Defence witnesses seemed to be consistent and that, generally, they established the accused's whereabouts during the period covered by the Indictment. It however held that the evidence which tends to show that the witnesses saw the accused (only for a few minutes) so as to give the impression that the latter went on with his business, cannot constitute a *sufficiently serious* alibi to establish the absence of Ruzindana at the time the crimes were committed.[179] As a result, the Trial Chamber found that those witnesses only sought to strengthen the impression that Ruzindana went on with his business activities. It consequently held that the testimonies specified the accused's whereabouts for only very limited periods of time[180] and that it was therefore not established with *precision* and *certainty* that the accused was not present at the scene of the crimes charged.

131. Although the period covered by the Indictment is long, the Trial Chamber found that Defence witnesses were unable to state the specific dates on which they had seen Ruzindana. It thus held that the defence of alibi raised by the accused did not validly rebut the Prosecution case and consequently rejected the alibi raised by the Defence. In this regard, the Appeals Chamber

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[175] Kayishema's Brief, para. 47.
[176] Ruzindana's Brief, paras. 36 to 39.
[177] *Ibid.*, paras. 36 to 38 (The Defence calls into question the Trial Chamber's assessment of Defence Witnesses Z, DC, DAA,DG, DD, DR, DW, DB, DL, DZ, DT, DQ, DS, DH, DF).
[178] See, for instance: "Decision relating to the Appellant's motion for extension of time-limits and admission of additional evidence" in *The Prosecutor v. Tadic*, Case No. IT-94-I-A, 15 October 1998, ICTY Appeals Chamber, para. 41; see also, in the same connection, *Furundžija* Appeal Judgment, para. 40.
[179] Trial Judgment, para. 261.

3725/A
bis

observes that the Trial Chamber relied on the *credibility of testimonies* and, hence, its *consideration of previous statements* and their effects on the instant case, as the main criterion for the assessment of the accused's alibi.

132. In conclusion, Ruzindana has failed to show how the Trial Chamber's findings are so unreasonable to the extent that they need to be corrected. He has merely recalled the facts and concluded, in the light of such presentation, that an error has been committed. The Appeals Chamber is also satisfied that the Trial Chamber did not commit any error in the exercise of its discretion in the assessment of the various testimonies.

133. The Appeals Chamber therefore concludes that the Trial Chamber correctly applied the standard of proof beyond reasonable doubt and, accordingly, rejects these grounds.

3. Conclusion

134. For the above reasons, the Appeals Chamber dismisses the grounds of appeal by Kayishema (ground five) and Ruzindana (ground six).

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[180] Trial Judgment, para. 262.

3724/A bis

D. Genocide

1. Kayishema's Appeal: Grounds Four and Six: Allegations of Factual and Legal Errors in Respect of the Crime of Genocide

(a) Arguments of the parties

135. In respect of these two grounds of appeal,[181] Kayishema raises various complaints mainly of a factual nature. First, he alleges that the Trial Chamber committed a series of errors in its factual determinations relating to (i) the existence of a genocidal plan (both on a national and regional level);[182] (ii) the meaning of the French words "*ratisser*" and "*travailler*";[183] (iii) the role of the civil defence programme;[184] and (iv) the question of whether he possessed the requisite *mens rea* for the crime of genocide.[185] Secondly, Kayishema contends that the Trial Chamber erred in law in its interpretation of the word "killing" referred to in Article 2(2)(a) of the Statute.[186] Thirdly, he appears to contest the charge brought against him pursuant to Article 2(2)(c) of the Statute.[187] In this connection, he complains that witness testimonies regarding sustained injuries were introduced without such corroborating evidence as medical certificates.[188] As to the remedy, the Appeals Chamber understands that Kayishema is seeking a reversal of the guilty verdicts.

136. For its part, the Prosecution submits that Kayishema has failed to demonstrate that the Trial Chamber's factual findings were unreasonable and that Ground Four and Six should, therefore, be dismissed.[189]

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[181] Kayishema Brief, paras 22- 43, 71-79, and T(A), 30 October 2000, pp. 83-93. The Appeals Chamber notes that errors relating to factual determinations on the civil defence programme were listed as an independent ground in the Notice of Appeal, pp 7-8. Subsequently, in the Kayishema Brief, this ground appears to have been incorporated under the headings "A. ON THE GENOCIDE" and "B. INDIVIDUAL CRIMINAL RESPONSIBILITY".
[182] *Ibid.*, paras 23-43.
[183] *Ibid.*, paras 92 and 100-101.
[184] *Ibid.*, paras 84-91.
[185] *Ibid.*, para. 72*bis*.
[186] *Ibid.*, paras. 75-79.
[187] *Ibid.*, para. 73. Article 2(2)(c) of the Statute relates to genocide by "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part".
[188] *Ibid.*, para. 74.
[189] T(A), 30 October 2000, pp. 165-172.

3723/A bis

(b) Discussion

(i) Challenge to factual determinations relating to the crime of genocide

137. The Appeals Chamber notes at the outset that, in respect of alleged errors of fact, the burden of showing that the Trial Chamber's findings were unreasonable is on Kayishema. This standard of appellate review means that the "task of hearing, assessing and weighing the evidence presented at trial is left" to the Trial Chamber. Hence, the Appeals Chamber must give "a margin of deference" to factual findings reached by the Trial Chamber.[190] One aspect of such burden is that it is up to the Appellant to draw the attention of the Appeals Chamber to the part of the record on appeal, which in his view supports the claim he is making. From a practical standpoint, it is the responsibility of the Appellant to indicate clearly which particular evidentiary material he relies upon. Claims that are not supported by such precise references to the relevant parts of the record on appeal[191] will normally fail, on the ground that the Appellant has not discharged the applicable burden.

a. Existence of a genocidal plan, the role of the civil defence programme and the interpretation of the words "*ratisser*" and "*travailler*"

138. As regards the first three aspects of the alleged errors in the Trial Chamber's factual determination, the Appeals Chamber makes the following observations. Section V of the Trial Judgment, paragraphs 273 to 313, is devoted to the question of whether genocide took place in Rwanda and in Kibuye *préfecture* in 1994. The Trial Chamber deemed it necessary to adjudicate upon this issue as part of its task "to make findings of fact based on the Indictment against the accused" and in order to allow for "a better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment".[192] The Trial Chamber underscored, however, that a finding that genocide took place in Rwanda was "not dispositive of the question of the accused's innocence or guilt".[193] It further opined (and the Appeals Chamber agrees) that even though a genocidal plan is not a constituent element of the crime of genocide,

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[190] *Tadić* Appeal Judgment, para. 64, *Aleksovski* Appeal Judgment, para. 63, and *Čelebići* Appeal Judgment para. 506.
[191] References should be made to relevant transcript page(s) and/or exhibit(s).
[192] Trial Judgment, paras 273-274.
[193] *Ibid.*, para. 273.

3722/A bis

the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.[194]

139. It follows from the Trial Judgment that the Prosecution's case during trial was that a genocide of the Tutsi population was planned and executed by public officials, both on a national and regional level, in Rwanda during 1994. The Prosecution, being unable to tender into evidence some official document outlining a genocidal plan, put forward a theory that such a plan could be inferred from the existence of such sufficient *indicia* as (i) the existence of lists of persons to be executed (targeting, *inter alia*, the Tutsi élite); (ii) the dissemination of extremist ideology through the Rwandan media; (iii) the use of the civil defence programme and the distribution of weapons to the civilian population; and (iv) the "screening" carried out at many roadblocks. The Trial Chamber considered that the relevant indicia had been proven by the Prosecutor. Consequently, it held that "the massacres of the Tutsi population indeed were 'meticulously planned and systematically co-ordinated' by top level Hutu extremists in the former Rwandan government at the time in question".[195]

140. As to the civil defence programme, the Trial Chamber found that it had become "[o]ne of the means by which an ordinary Rwandan became involved in the genocide" and that it was used "to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis".[196] In respect of Kibuye *préfecture*, the Trial Chamber held that the massacres which took place there were pre-arranged and implemented by public officials.[197] In this context, the Trial Chamber incidentally discussed certain written communications, involving Kayishema and other public officials, where the words "*ratisser*" and "*travailler*" appeared.[198] It is not clear from this discussion what is the exact meaning which the Trial Chamber ascribed to these words. However, since the Trial Chamber appears to have relied upon these communications to conclude that the massacres in Kibuye *préfecture* were pre-arranged, it may be assumed that the Trial Chamber

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[194] *Ibid.*, para. 276.
[195] *Ibid.*, para 289.
[196] *Ibid.*, para. 284.
[197] *Ibid.*, paras 309 and 312.
[198] *Ibid.*, para. 309.

3721/A bis

interpreted them as relating to the killing of members of the Tutsi population, as alleged by Kayishema.[199]

141. The Appeals Chamber understands Kayishema's submissions in the following way. He does not challenge the Trial Chamber's findings that approximately 800.000 people, mainly members of the Tutsi population, were killed in Rwanda during 1994. However, he disagrees with its conclusion that these massacres were the result of a genocidal plan executed with the involvement of public officials.[200] Kayishema appears to be suggesting that the killings were caused by "crowd psychology and paranoia" and "[a]n athmosphere of suspicion, revenge or denunciation over problems of land, livestock, weapons and even women"[201]. He asserts, in respect of Kibuye *préfecture*, that the Trial Chamber erred in not discussing events prior to 6 April 1994 and that it failed to recognize that there was no reason to imagine that there would be events of such crucial importance in that area.[202]

142. With regard to the civil defence programme, Kayishema submits that the notion that this programme became a springboard for the killing of Tutsis was a theory "designed to suit the needs of the Prosecution" and that this programme "did not exist on 25 May 1994 and, therefore, was not involved in the massacres of April 1994 in Kibuye".[203] He supports this contention with reference to certain questions put to Witness R[204] by one of the judges during the hearing on 1 October 1997[205] and to Prosecution exhibits 54 and 337. Referring to certain aspects of the testimony of Witness R and Prosecution exhibits 56 and 296, Kayishema further questions the Trial Chamber's finding in paragraph 309 of the Trial Judgment on the basis that the Chamber misconstrued the words "*ratisser*" and "*travailler*". He submits that these terms should be

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[199] *Ibid.*, para. 309. See, however, paras 329, 330 and 539 where the Trial Chamber's understanding of the word "work" is more explicit.

[200] He seeks to support this contention with references to Witnesses Pouget, Guichaoua, G and HH, (Kayishema's Brief, paras 29-43), but without indicating the relevant transcript pages. The only exact reference is the one to the testimony of Witness G where Kayishema states: "Witness G provides an excellent illustration when he testifies with regard to a certain Luveto (pp. 46 and 47 of the transcripts of 24 April 1997) that '*before the war, I did not know much about him, I saw him go by, he was a man whose job was to carry luggage and his behaviour became known during the war'... 'it was during the events. His character was revealed during the war but it was not madness, it was wickedness*'." (However, it seems that references to pages 46-17 [French transcript] are incorrect since it appears that Witness G discussed the matter in page 118 [French transcript]. (Kayishema's Brief, para. 41).

[201] Kayishema's Brief, paras 31-32.

[202] *Ibid.*, para 29.

[203] *Ibid.*, paras 84 and 88.

[204] *Ibid.*, para. 83. Witness R was one of several witnesses upon whose testimony the Trial Chamber relied in its determination on the function of the civil defence programme.

[205] See T., pp. 124-125.

3720/A bis

understood in their ordinary sense.[206] According to Kayishema, the former, put in context, means "to go and recover weapons that are the origin of the difficulties faced in Bisesero [sic]".[207]

143. As discussed above, the Trial Chamber answered the question whether genocide occurred in Rwanda and Kibuye in 1994 in the affirmative and found that it was the result of a plan executed with the involvement of public officials. The Appeals Chamber observes that these findings were reached on the basis of substantive evidence, in particular that of Prosecution Expert Witness René Degni-Segui.[208] The arguments advanced by Kayishema do not suffice to rebut the testimony of René Degni-Segui, or any other evidence upon which the Trial Chamber relied. He simply points to the evidence of Witnesses Pouget, Guichaoua, G and HH, which in his view, provides a basis for drawing different conclusions as to the relevant question. In the opinion of the Appeals Chamber, that is not sufficient to establish a case that the Trial Chamber acted unreasonably. As noted by ICTY Appeals Chamber, "two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence".[209] Accordingly, in his submissions, an appellant must not limit himself to proposing alternative conclusions that may have been open to the Trial Chamber on the basis of the evidence that was before it. In order for the Appeals Chamber to act, an appellant has to demonstrate that the particular findings made by the Trial Chamber were, in light of the evidence that was before it, unreasonable. The Appeals Chamber finds that Kayishema has not discharged that burden in respect of the Trial Chamber's findings that the massacres, which took place in Rwanda in 1994, were the result of a genocidal plan executed with the involvement of public officials.

144. On the whole, Kayishema's submissions have little direct bearing on the Trial Chamber's findings. For example, as far as the Appeals Chamber has been able to ascertain (no references to relevant transcript pages have been given by Kayishema), Witness Pouget gave evidence, *inter alia*, on crowd psychology in general, an issue which is not immediately relevant to the question whether a pre-planned genocide was carried out in Rwanda with the involvement of public

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[206] Kayishema's Brief, paras 92, 100-101.
[207] *Ibid.*, para. 92.
[208] During the second half of 1994, René Degni-Segui went to Rwanda on numerous occasions in his capacity as United Nations Special Rapporteur of the Commission on Human Rights. As part of his mandate, he was responsible for submitting various reports to the United Nations on the human rights situation in Rwanda during the relevant time. Some of these reports were tendered into evidence during trial. *See* also the testimony of Patrick de Saint-Exupéry, Sister Julianne Farrington, Witnesses A, B, C, E, F, G, O, OO, R, RR, T, U, Z, DA, DM and documentary evidence in the form of Prosecution exhibits 52-58, 76E, 296, 328-331.
[209] *Tadić* Appeal Judgment, para. 64.

3719/A
bis

officials. Furthermore, it may well be the case, as suggested by Kayishema, that the testimony of Witness Guichaoua demonstrates that the situation in Kibuye *préfecture* was peaceful prior to 6 April 1994 and that there were no reasons for suspecting that events would unfold the way they did. However, such a situation, in itself, hardly excludes the existence of a genocidal plan. Similarly, the parts, referred to, of the testimonies of Witnesses G and HH are peripheral to the issue at bar.

145. With regard to the civil defence programme, the Appeals Chamber is unable to see how the Trial Chamber's conclusion that the civil defence programme played a vital part in the execution of the genocidal plan was unreasonable. Also, this finding was based, to a large extent, on the evidence of René Degni-Segui.[210] His testimony is, as previously noted, uncontested by Kayishema. The fact that another witness, Witness R, who also gave evidence on this point, was asked by one of the members of the Trial Chamber whether the expressions "auto defence" or "self-defence" could be understood to mean the extermination of Tutsis, cannot serve as a basis for concluding that the Trial Chamber's findings on this point were unreasonable.[211] Likewise, Kayishema's argument that the civil defence programme did not exist on 25 May 1994 and, hence, could not have played a part in the genocide, is unpersuasive. In this context, the Appeals Chamber notes that Kayishema refers to a directive issued by Prime Minister Kambanda (Directives for Self-Organized Civil Defence) and to Prosecution exhibit 54. The former appears not to be part of the record on appeal and can, therefore, not be considered in support of the argument raised.[212] As to the latter document (exhibit 54), which is a letter from Edouard Karemera, Minister of Interior and Communal Development, to all *préfets* regarding the implementation of Prime Minister Kambanda's Directives for Self-Organized Civil Defence, the Appeals Chamber notes that it is inconclusive as to the question when the civil defence programme came into being.

146. Regarding the challenge to the Trial Chamber's construction of the words "*ratisser*" and "*travailler*", the Appeals Chamber notes that several witnesses gave evidence as to the

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[210] Other relevant testimonies were those of witnesses C, F and R.

[211] T., 1 October 1997, p. 124, "Judge Ostrovsky: Please, could you please tell me. Here, in this document I see that it is mentioned, a particular expression is used, auto defence or a self-defence. How could we understand these words? Could we understand this as meaning the extermination of the Tutsis? The Witness: Indeed, this is what this word means or this term means because all the Tutsis were referred to as *Inkotanyi*, and self-defence or auto defence was what they used to say kill the *Inkotanyi*."

connotations of the word "*travailler*".[213] However, as correctly pointed out by Kayishema, Witness R, in discussing the use of the word "*travailler*" in connection with Prosecution exhibit 53, stated that, although recognizing that "[w]ork meant to kill, particularly when it referred to killing the Tutsis", he would not interpret the word in such a way in relation to this particular document.[214] Accordingly, the question may be asked whether the Trial Chamber's reliance on exhibit 53 in paragraph 309 is misplaced.[215] The Appeals Chamber, however, finds that this is not sufficient to demonstrate that the Trial Chamber's overall finding relating to the existence of a genocidal plan executed with the assistance of public officials was unreasonable. Regarding the construction of the word "*ratisser*", the Appeals Chamber observes that Kayishema's submissions amount to little more than an unsupported assertion that this expression in context means "to go and recover the weapons that are the origin of the difficulties faced in Bisesero [sic]".[216] As previously stated, it falls upon an appellant to demonstrate the unreasonableness of the factual findings that he contests. Kayishema has failed to do so.

b. *Mens rea*

147. Kayishema submits that the Trial Chamber erred in finding that he possessed the requisite *mens rea* for the crime of genocide, a challenge which is limited to the factual aspects of the Trial Chamber's finding.[217] Accordingly, Kayishema does not take issue with the Trial Chamber's conclusion in respect of *how* intent may be inferred. His argument is that Witness O gave evidence during the trial to the effect that Kayishema was responsible for the rescue of 72 Tutsi children, who had survived the massacre at Home St Jean Complex, and that the Trial Chamber

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[212] At the Appeals Chamber's request, the Registry searched the record on appeal in order to ascertain whether this document was part of that record. The Registry subsequently informed the Appeals Chamber that the answer to that question was in the negative.

[213] Witnesses D, E and F.

[214] T., 1 October 1997, pp. 118-119.

[215] This paragraph reads: "Evidence presented to the Chamber shows that in Kibuye *préfecture* the massacres were pre-arranged. For months before the commencement of the massacres, *bourgmestres* were communicating lists of suspected RPF members and supporters from their *commune* to the *préfet*. In addition, the Prosecutor produced a series of written communications between the Central Authorities, Kayishema and the Communal Authorities that contain language regarding whether 'work has begun' and whether more 'workers' were needed in certain *commune*. Another letter sent by Kayishema to the Minister of Defence requested military hardware and reinforcement to undertake clean-up efforts in Bisesero." (Footnotes omitted.)

[216] Kayishema's Brief, para 92.

[217] *Ibid.*, para. 72*bis*.

3717/A
bis

failed to properly take this evidence into account.[218] He submits further that this particular piece of evidence demonstrates his innocence.[219]

148. The Trial Chamber found that Kayishema possessed the requisite "intent to destroy the Tutsi group in whole or in part",[220] which it inferred from the following factors: (i) the number of victims that were killed; (ii) the manner in which the killings were carried out (the methodology); and (iii) Kayishema's utterances during and after the massacres.[221] As submitted by Kayishema, Witness O's evidence could be taken in support of the assertion that the 72 children, who had survived the massacres at the Home St. Jean Complex, were taken to the hospital upon Kayishema's order.[222] However, in determining the *mens rea*, the Trial Chamber assessed and weighed *all* relevant evidence that had been presented to it, including also other aspects of Witness O's testimony.[223] On the basis of such evidence, it found that it had been established beyond reasonable doubt that the requisite *mens rea* was present.

149. The Appeals Chamber observes that in light of the overall evidence, the fact that the 72 children *may* have been taken to the hospital pursuant to Kayishema's instructions has little direct bearing on the question whether he possessed the requisite *mens rea*. Accordingly, the Appeals Chamber finds Kayishema's submissions to be unpersuasive and that he has failed to demonstrate the unreasonableness of the Trial Chamber's conclusion.

(ii) Challenge to the Trial Chamber's interpretation of "killing" ("*meurtre*") under Article 2(2)(a) of the Statute

150. Kayishema appears to be contesting the Trial Chamber's interpretation of the act of "killing" under Article 2(2)(a) of the Statute.[224] The English version of the provision prohibits "killing members of the group" whereas the French equivalent uses the expression "*meurtre de membres du groupe*". Kayishema argues that there is a difference between the act of "killing" and the act of "*meurtre*", in the sense that the latter is restricted to unlawful and *intentional* killing. He submits that the Trial Chamber failed to uphold this distinction as it equated "*meurtre*" with

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[218] *Ibid.*, paras 72*bis* and 81.
[219] *Ibid.*, para. 81.
[220] Trial Judgment, para. 540.
[221] *Ibid.*, para. 540. See also paras 531-539.
[222] T., 13 October 1997, pp. 131, 185-188.
[223] *Ibid.*, pp. 69-92, 96-103, 131-134.
[224] Kayishema's Brief, paras 75-79.

3716/A
bis

"killing" within the context of genocide. Kayishema concludes that the Trial Chamber thereby erred "on a question of law within the meaning of Article 24 thus invalidating its judgment".[225]

151. The Appeals Chamber understands the Trial Chamber's reasoning to be that, if a doubt exists in the interpretation of a statute, the doubt must be interpreted in favour of the accused. The Trial Chamber considered that "*meurtre*" is not the same as "killing".[226] However, having regard to the operative part of Article 2(2) of the Statute, it found that "there is virtually no difference" between the two terms as the term "killing" is linked to the intent to destroy in whole or in part.[227] The Appeals Chamber accepts this view, but states that if the word "virtually" is interpreted in a manner that suggests a difference, though minimal, between the two terms, it would construe them both as referring to intentional but not necessarily premeditated murder, this being, in its view, the meaning to be assigned to the word "*meurtre*". Yet, the Appeals Chamber still considers that such interpretation does not improve Kayishema's case. His argument that the Trial Chamber erred and that the error invalidates its judgment is therefore rejected.

(iii) Alleged error relating to a charge under Article 2(2)(c) of the Statute

152. Kayishema appears to be raising a complaint in respect of a charge brought against him under Article 2(2)(c) of the Statute and the giving of testimony without corroborating evidence in the form of medical certificates. In his Brief, he submits the following:

> 73. The initial indictment did not include the charge of "deliberate" infliction. This charge was only brought by the Prosecutor in the course of the proceedings without providing any serious or relevant rationale grounds for its inclusion.
>
> This new charge cannot, legally or in fairness, be ruled admissible as the accused is not afforded the opportunity to organize his defence. For that reason, the Appeals Chamber may wish to set aside any ruling on it. However, as further illustration of the futility of this charge, it must be stated that, in the instant case, evidence is yet to be adduced of the deliberate infliction on the Tutsi of conditions of life calculated to bring about their physical destruction in whole or in part. The suffering endured could not on its own result in death because the physical harm caused was not sufficiently grievous to achieve that objective, legally speaking of course, nor was the duration such as to achieve the said objective.
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[225] *Ibid.*, para. 79.
[226] Trial Judgment, para. 103.
[227] *Ibid.*, para. 104.

3715/A bis

> 74. The Prosecutor produced witnesses without a medical certificate prove [sic] that the injuries were sustained in the course of the events they were describing; physical examination should have been conducted between the period of interrogation by the investigators and the moment of testimony. Nowhere is justice satisfied with victims' testimony of poor treatment and injury nor does it dwell on unprofessional data in determining the origin and gravity of such injury.
>
> Consequently, there is abundant evidence to the effect that the Prosecutor is not in a position to prove that deliberate infliction of conditions with the intention of killing did on their own result in death.[228]

153. The Appeals Chamber observes that Kayishema's submissions lack clarity. In response to Kayishema's arguments, the Appeals Chamber deems it sufficient to refer to the fact that it follows from the Trial Judgment that the Trial Chamber agreed with his position when it found that:

> *[n]o evidence was proffered* to show that the accused persons, or Kayishema's *de facto* and *de jure* subordinates, deliberately inflicted, on the Tutsi group in Kibuye, conditions of life to bring about their physical destruction in whole or in part.[229]

154. As to Kayishema's arguments relating to the presentation of witness testimonies alleging sustained injuries without a medical certificate in support, the Appeals Chamber concurs with the opinion of ICTY Appeals Chamber that the testimony of a witness on a material fact may be accepted as evidence without the need for corroboration.[230]

(c) Conclusion

155. Based on the foregoing discussion, the Appeals Chamber finds that Kayishema's arguments are unfounded. The Appeals Chamber therefore holds that it has not been demonstrated that the Trial Chamber erred as alleged. Consequently, Grounds Four and Six fail.

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[228] Kayishema's Brief, paras 73-74.
[229] Trial Judgment, para. 548.
[230] *Tadić* Appeal Judgment, para. 65, *Aleksovski* Appeal Judgment, para. 62, and *Čelebići* Appeal Judgment, paras 492 and 506.

3714/A bis

2. Ruzindana's first and third Grounds of Appeal

(a) Ground One: Allegations of Errors of Law in the Determination of the Mental Element of the Crime of Genocide

(i) Arguments of the Parties

156. In short, Ruzindana submits that "the legal findings of the Trial Chamber on the *mens rea*...are erroneous, thereby invalidating the [Trial] Judgment".[231] The Appeals Chamber understands his more detailed submissions as follows: the Trial Chamber erred by failing to: (i) "establish ... [on his part] any explicit manifestation of intent to exterminate Tutsis";[232] (ii) legally define "persistent pattern of conduct", even though that concept was relied upon in the determination of the question whether the mental element of the crime was satisfied; and (iii) give a reasoned opinion.[233] As relief, Ruzindana requests the Appeals Chamber to reverse the guilty verdict under Count 19 of the Indictment.

157. During the hearing on appeal, the Prosecution made submissions on the first two aspects of this ground of appeal. It argued, in short, that the Trial Chamber's findings displayed no error on its part.[234] In the view of the Prosecution, Ground One should be dismissed.

(ii) Discussion

a. Lack of explicit manifestations of intent

158. The Appeals Chamber observes initially that the Trial Chamber, while acknowledging "the difficulty in finding explicit manifestations of a perpetrator's intent", held generally that such intent may be demonstrated by a pattern of purposeful actions and inferred from words and deeds.[235] In respect of Ruzindana's intent specifically, the Trial Chamber found that he "displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct" throughout the Bisesero area.[236] Under the heading "*Ruzindana's Utterances*", the Trial

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[231] Ruzindana's Brief, para. 24.
[232] *Ibid.*, para. 21.
[233] *Ibid.*, para. 21.
[234] T(A), 30 October 2000, pp. 172-177.
[235] Trial Judgment, para. 527. See also para. 93 where the Trial Chamber held that "[t]he perpetrator's actions, including circumstantial evidence ... may provide sufficient evidence of intent".
[236] Trial Judgment, para. 541.

3713/A bis

Chamber stated that witnesses had heard Ruzindana, in connection with the attacks carried out on members of the Tutsi population in the Bisesero area, making statements about "not sparing babies whose mothers had been killed because those attacking the country initially left as children" and "Tutsi refugees [being] 'the enemy'".[237] Furthermore, in respect of establishing intent by examining any pattern of purposeful actions, the Trial Chamber, under the heading "*Methodology-Persistent Pattern of Conduct*", found that Ruzindana:

> did bring Hutu assailants to the sites in his vehicles. Once at the site, Ruzindana directed attackers to kill and offered payment in exchange for the severed heads of well known Tutsis or identification cards of murdered Tutsis. Ruzindana was seen carrying fire arms at many massacre sites. The Chamber accepted evidence from witnesses who testified about overhearing conversations between the Hutu assailants who referred to Ruzindana as their patron. Yet other witnesses affirmed that *gendarmes*, speaking among themselves, stated that they were not concerned about using too many bullets, because Ruzindana would purchase more for them. As a result of Ruzindana's consistent pattern of conduct, thousands of Tutsis were killed or seriously injured; men, women and children alike.[238]

159. The Appeals Chamber finds that the Trial Chamber's approach as to *how* Ruzindana's intent may be determined does not display any error on its part. As noted by the Trial Chamber, explicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances. Consequently, the approach adopted by the Trial Chamber in determining whether Ruzindana possessed the requisite *mens rea* for the crime of genocide corresponds to how courts would generally resolve such a question.

160. Ruzindana contends that it was not demonstrated during the trial that he exhibited any anti-Tutsi sentiments or was affiliated to an extremist political party. The Appeals Chamber observes generally that neither of the two is a prerequisite as such for establishing genocidal intent, even though evidence of such a kind may be relevant to a determination of the *mens rea*. As to anti-Tutsi sentiments, it follows, however, from the Trial Judgment that the Trial Chamber, in discussing the *mens rea*, ascribed to Ruzindana certain utterances, which must be considered to carry anti-Tutsi connotations.[239] Thus, contrary to Ruzindana's assertion, the Trial Chamber found that anti-Tutsi sentiments on his part were demonstrated. Eventually, Ruzindana raises the

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[237] *Ibid.*, para. 542.
[238] *Ibid.*, para. 544.
[239] *Ibid.*, para 542.

argument that it had not been established that he exercised *de jure* or *de facto* political, administrative or military responsibilities. This submission appears to be based on a misunderstanding. It is not necessary to establish that an accused exercised such responsibilities for a finding of individual criminal responsibility under Article 6(1) of the Statute to be made.

161. Ruzindana contends further that certain witnesses ascribed to him a personal motive for his actions (such as the elimination of business competitors) and that "a person who commits a crime, in the quest of a personal goal, such as vengeance or lucre ... is not guilty of genocide but of an ordinary crime".[240] The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2(2)(a) through to (e) were committed "with intent to destroy, in whole or in part a national, ethnical, racial or religious group".[241]

b. Failure to legally define "persistent pattern of conduct"

162. As discussed above, the Trial Chamber, in assessing whether the requisite mental element of the crime of genocide was present, referred to the phrase "persistent pattern of conduct" in order to describe the nature of Ruzindana's acts and the circumstances in which they were carried out. Thus, this phrase was used by the Trial Chamber as indicating a means of proof.

163. The Appeals Chamber notes that a "persistent pattern of conduct" is not a legal ingredient of the crime of genocide as defined in Article 2 of the Statute and that the Trial Chamber relied on this phrase for purely evidential purposes in examining the question whether Ruzindana possessed the requisite mental element under that provision. Accordingly, the Appeals Chamber can see no reason why the Trial Chamber would have been obliged to "legally define" it.

c. Failure to provide a reasoned opinion

164. Ruzindana elaborates his allegation that the Trial Chamber erred in failing to give a reasoned opinion by submitting that the Trial Chamber (i) "noted (para. 542 of the [Trial] Judgment) only the statement of Witness Z, who failed to give a compelling explanation as to how he was able to hear Ruzindana's statements while he was on top of the hill";[242] and (ii) did not address certain Defence submissions to the effect that there were no facts present which

[240] Ruzindana's Brief, para. 23, with references to the testimonies of Witnesses X, CC, EE and II.
[241] See also *Tadić* Appeal Judgment, para. 269.

3711/A bis

"offered proof of any special intent on [his] part, either in his earlier conduct or in his endorsement of a policy of extermination".[243]

165. The Appeals Chamber recalls that Article 22(2) provides that a judgment "shall be accompanied by a reasoned opinion in writing".[244] ICTY Appeals Chamber has, in its interpretation of the corresponding provision in ICTY Statute,[245] drawn from the case-law developed under the European Convention on Human Rights. In conformity with this jurisprudence, the extent to which a court is to provide a reasoned opinion must be determined on a case by case basis and courts are generally "not obliged to give a detailed answer to every argument".[246] The Appeals Chamber concurs with this understanding of the requirement of providing a reasoned opinion in writing, as laid down in Article 22 of the Statute and considers that it is sufficient for the Trial Chamber to explain its position on the main issues raised. Upon a review of the relevant parts of the Trial Judgment and the evidence, the Appeals Chamber finds that this requirement has been satisfied.[247]

(iii) Conclusion

166. On the basis of the foregoing analysis, the Appeals Chamber finds that Ruzindana's arguments in respect of this ground of appeal are without merit. In view of this, the Appeals Chamber is unable to conclude that the Trial Chamber erred as alleged. Accordingly, Ground One fails.

(b) Ground Three: The Trial Chamber erred in law in its finding on the role of Ruzindana in respect of the essential ingredients of the crime of genocide

(i) Arguments of the parties

167. In relation to this ground of appeal, although presented as alleging errors of law by the Trial Chamber in respect of its findings under Article 6(1) of the Statute, the Appeals Chamber understands that the substance of Ruzindana's arguments discloses allegations of errors regarding

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[242] Ruzindana's Brief, para. 21.
[243] *Ibid.*, para. 21.
[244] See also Rule 88(C) of the Rules.
[245] Article 23 of ICTY Statute.
[246] *Furundžija* Appeal Judgment, para. 69 referring to *Van de Hurk v. The Netherlands*, Judgment of 19 April 1994, Eur. Ct. H. R. , Series A, vol. 288. *See* also *Čelebići* Appeal Judgment, para 481.
[247] Paras. 541-545.

the constituent elements of the crime of genocide provided for in Article 2 of the Statute.[248] He submits that the Trial Chamber did not address at law the means used to prepare for and commit genocide and, consequently, omitted conducting such an analysis in respect of the individual circumstances of Ruzindana. He alleges that the crime of genocide cannot be committed by isolated individuals or with trivial means. In support of his submission, Ruzindana refers to the final report of the Commission of Experts established pursuant to Security Council resolution 935.[249] He submits that the Trial Chamber has not demonstrated that he, who was an ordinary trader, had the means necessary for the perpetration of genocide, be they material, such as arms and logistics, or "intellectual", such as a position of authority over civilians and military personnel.[250] Ruzindana further alleges that, by failing to establish a nexus between the *modus operandi* of genocide and the personal circumstances of the accused, the Trial Chamber erred in law.[251]

168. During the hearing on appeal, the Prosecution submitted that Article 2 of the Statute requires neither proof that a person has certain financial or organisational means at his disposal nor proof that a particular organisation or genocidal plan is in place. It further submitted that the present case does not involve crimes committed by an isolated individual, as demonstrated by the Trial Chamber's findings. According to the Prosecution, Ruzindana's submissions are irrelevant and should be dismissed.[252]

(ii) Discussion

169. Article 2 of the Statute provides that "[g]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious

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[248] Ruzindana's Brief, paras. 29-32.

[249] During the hearing on appeal, Counsel for Ruzindana submitted, "In support of my argument, I would like to refer to the final report of the experts which led to the establishment of the International Criminal Tribunal for Rwanda pursuant to resolution 935 of the Security Council. This committee of experts lead [sic] by Mr. Degni-Ségui, and in his report, Mr. Degni-Ségui said that the testimony showed clearly that violence in Rwanda were [sic] done not spontaneously by small groups, but by individuals, and I emphasise under the direction of a responsible commander, which [sic] undertook military operations, which presupposes a planned strategy and status that have been elaborated.", T(A), 30 October 2000, pp. 115-116.

[250] Ruzindana's Brief, paras 30 - 31.

[251] *Ibid.*, para. 32.; During the hearing on appeal, Counsel for Ruzindana submitted, " I think, here, there is a missing link between the military authorities -- military, political and administrative authorities of Rwanda and the personal situation of the Accused. This missing link has never been put where it should be put, neither by the Trial Chamber nor the Prosecutor and, by leaving out this missing link, the Trial Chamber did not give a legal basis for its decision, therefore, making an error in the question of law", T(A), 30 October 2000, p. 117.

[252] T(A), 30 October 2001, pp. 180-182.

3709/A
bis

group, such as ...", the relevant acts in the instant case being genocide by killing members of the group and causing serious bodily or mental harm to members of the group. The Appeals Chamber finds that there is no legal ingredient in Article 2 of the Statute, which requires the establishment of a nexus between the manner in which a genocide was carried out and the personal circumstances of an accused. Similarly, the provision does not require proof that an accused had certain means at his disposal to prepare and commit genocide. The financial situation of an accused would normally not be of major importance to the question of whether he could be held liable for genocide.

170. Furthermore, genocide is not a crime that can only be committed by certain categories of persons. As evidenced by history, it is a crime which has been committed by the low-level executioner and the high-level planner or instigator alike. Accordingly, the Appeals Chamber finds the above aspects of Ruzindana's argument to be unpersuasive.

171. As to Ruzindana's argument that genocide cannot be committed by an individual in isolation, the Appeals Chamber notes that a reading of the Trial Judgment clearly reveals that Ruzindana was found guilty in respect of acts committed in concert with others, in the context of a full-blown genocide. The Trial Chamber, for instance, found Ruzindana guilty of participating in numerous attacks, which took place on Tutsi refugees in the Bisesero area during April to June 1994.[253] He was also held responsible for killings which occurred during those attacks on the basis of common design.[254] The Trial Chamber held that at the sites where Ruzindana had been found to have participated, he:

> committed one or more of the following acts: Headed the convoy of assailants; transported attackers in his vehicle; distributed weapons; orchestrated the assaults; lead the groups of attackers; shot at the Tutsi refugees; and, offered to reward the attackers with cash or beer. The Trial Chamber further found that Ruzindana personally mutilated and murdered individuals during the attack at the Mine at Nyiramurego Hill. These findings prove beyond reasonable doubt that Ruzindana, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group.[255]

172. Undoubtedly, Ruzindana's criminal conduct does not fit the description of a lone perpetrator. The much-debated question whether genocide could be committed by a person acting

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[253] Trial Judgment, paras. 570-571.
[254] *Ibid.*, paras. 203-204, and 545.
[255] *Ibid.*, para. 571.

3708/A bis

alone does not arise in the present case. Consequently, this issue will not be addressed by the Appeals Chamber.

3. Conclusion

173. Based on the foregoing analysis, the Appeals Chamber finds that Ruzindana's arguments are unfounded. The Appeals Chamber is, consequently, unable to conclude that, the Trial Chamber erred as alleged. Accordingly, Ground Three fails.

3707/A bis

E. Articles 6 (1) and 6 (3) of the Statute

174. Both Kayishema and Ruzindana allege errors by the Trial Chamber in respect of its findings under Article 6(1) of the Statute. Kayishema also alleges errors under Article 6(3) of the Statute.

1. Ruzindana's Responsibility under Article 6 (1)

175. During the hearing on appeal, Ruzindana grouped together three of his grounds of appeal relating to this issue: In Ground Two, he argued that the Trial Chamber erred in its findings regarding his individual responsibility; in Ground Four he argued that the Trial Chamber erred in its findings on the concept of common criminal intent; and in Ground Five he argued that the Trial Chamber erred in its findings regarding his personal status.

176. The Appeals Chamber notes that the oral and written submissions by Ruzindana in relation to individual responsibility provide no assistance on the aspect of the alleged errors or the remedy sought by Ruzindana. Save for the submissions under Ground Two, the Appeals Chamber finds his arguments in Grounds Four and Five respectively, grossly inadequate with respect to the issue of individual responsibility under Article 6 (1) of the Statute. In Ground Four, the Appeals Chamber notes that Ruzindana raised this ground of appeal in his Notice of Appeal,[256] but has not addressed or developed this ground in his Appeal Brief. During the hearing on appeal, Counsel for Ruzindana made brief reference to this ground but without addressing the alleged error made by the Trial Chamber or the relief sought by Ruzindana.[257] In Ground Five, the submissions made in Ruzindana's Brief[258] and during the hearing on appeal[259] do not correspond with the Ruzindana's Notice of Appeal,[260] where Ruzindana alleges errors of fact by the Trial Chamber with regard to his personal status. Ruzindana's submissions as appearing in Ruzindana's Brief

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[256] Ruzindana's Notice of Appeal, Part III (A)(4), p. 5.

[257] "This takes us to the common plan, the common plan of having met physically or on telephone to undertake a common operation, in the case of the Tutsis, the genocide. The individual responsibility of the Accused, according to Defence, should be examined the specific context that planning and implementation of a genocide presupposes. I think that the Trial Chamber and the Prosecution cannot fall short on the explanation of the isolated acts of Ruzindana and the genocide carried out in Rwanda and, more specifically, in the Kibuye *préfecture*", T(A), 30 October 2000, p. 116.

[258] Ruzindana's Brief, paras 29 – 32.

[259] T(A), 30 October 2000, pp. 114 – 117.

[260] Ruzindana's Notice of Appeal, Part III (B), entitled "Errors regarding the personal status of the accused", p. 6. It was alleged that, "the Tribunal describes Obed Ruzindana as "a successful businessman" whereas no evidence was adduced in any consideration of the wealth, however approximate, of the Appellant. Similarly, the Tribunal emphasizes Obed Ruzindana's influence on the population on the grounds that his father had been a *bourgmestre* in Mugonero, which is incorrect".

and during the hearing on appeal are in fact arguments supporting his Third Ground of Appeal and are addressed accordingly under Ground Three. Thus, no argument was put forward in support of Ground Five, either in Ruzindana's Brief or during the hearing on appeal.

177. The task of the Appeals Chamber, as defined by Article 24 of the Statute, is to hear appeals from the decisions of Trial Chambers on the grounds of an error on a question of law invalidating the decision or of an error of fact which has occasioned a miscarriage of justice. An appellant must show that the Trial Chamber erred in law or in fact, and the Appeals Chamber expects his arguments to be directed to that end. In the *Kambanda* Appeal Judgment, the Appeals Chamber was confronted with a similar situation, where the appellant in that case put forward no arguments in support of certain grounds of appeal. The Appeals Chamber found nevertheless that in cases of errors of law it "is not wholly dependent on the arguments of the parties." In such cases it found that it retained the discretion "in proper cases to consider an issue raised on appeal even in the absence of substantial argument."[261] The Appeals Chamber has decided to exercise its discretion to briefly address the questions raised in Ground Four, at the same time bearing in mind the fact that Ruzindana has failed to put forward arguments in support thereof. In the case of Ground Five, as the issue raised on appeal concerns errors of fact and as Ruzindana failed to put forward any argument thereof, the Appeals Chamber dismisses this Ground.

178. The Appeals Chamber will consider Grounds Two and Four together where the Appeals Chamber identifies the issues raised as errors of law.

179. The two specific issues to be addressed are whether the Trial Chamber erred in law:

(i) By finding Ruzindana individually responsible for committing killings within the meaning of Article 6 (1) inasmuch as the Prosecution failed to establish a resulting death (Ground Two); and

(ii) By failing to provide a clear definition of the concept of common intention or to apply the criteria thereof to Ruzindana's personal situation (Ground Four).

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[261] *Kambanda* Appeal Judgment, para. 98.

3705/A bis

(b) Arguments of the parties

180. Ruzindana submits that the Trial Judgment contains very little analysis on his individual responsibility. He notes that the Trial Chamber found that he incurred individual responsibility by committing killings with the intent to commit genocide.[262] He further submits that the Trial Chamber admitted in paragraph 469 of the Trial Judgment that, in examining the alleged attacks, the Prosecution failed to establish a resulting death.[263] He posits that his individual responsibility in the killings is thus not positively established.[264] Ruzindana submits that either the killings are established and the material and intentional elements are present for him to be found guilty, or, if they are not, then he is to be acquitted.[265]

181. Ruzindana also challenges the Trial Chamber's findings that he and others knowingly participated in the attacks with common criminal intent. He submits that the Trial Chamber did not provide any definition of the concept of common intention. Ruzindana also alleges that in the instant case, his involvement in a collective enterprise of extermination has not been proven.[266] During the hearing on appeal, Counsel for Ruzindana submitted that Ruzindana's individual responsibility should be examined within the specific context that the planning and implementation of a genocide presupposes, "the common plan of having met physically or on telephone to undertake a common operation, in the case of the Tutsis, the genocide".[267]

182. During the hearing on appeal, the Prosecution asserted that it is well established that for there to be a genocide, it is enough for the Prosecution to prove that one person was killed.[268] The Prosecution points out that paragraph 470 of the Trial Judgment describes how Ruzindana mutilated and personally killed an identified woman. The Prosecution submits that although it is true that the Trial Chamber, in a previous paragraph of the Trial Judgment, stated that the Prosecution had not been able to link both perpetrators with the killings of named individuals,

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[262] Ruzindana's Brief, para. 25.
[263] *Ibid.*, para. 27.
[264] *Ibid.*
[265] T(A), 30 October 2000, p. 113.
[266] Ruzindana also submits that, "to the contrary, it has been proven that he did not usually reside in the Kibuye *préfecture* and that he had no political or other mandate that would have given him any authority over the local population, let alone over the army or *gendarmerie*", Ruzindana's Notice of Appeal, Part III (A)(4), p. 5;
[267] T(A), 30 October 2000, p. 116.
[268] *Ibid.*, p. 178.

such is wholly irrelevant and the Trial Chamber has explained this reasonably.[269] The Prosecution also refers to paragraph 570 and 571 of the Trial Judgment and submits that the Trial Chamber found, beyond a reasonable doubt, that Ruzindana caused the death of Tutsis at numerous places in the Bisesero area and was also found responsible for all types of complicity under Article 6(1) of the Statute.[270]

183. The Prosecution has not responded to Ground Four.[271]

184. In his reply, during the hearing on appeal, Ruzindana does not develop or respond to the Prosecution's submissions but reiterates his main submission on Ground Two.[272]

(b) Discussion

(i) Error in finding Ruzindana individually responsible for committing killings within the meaning of Article 6 (1) by reason of the Prosecution's failure to establish a resulting death

185. Article 6(1) of the Statute provides that a person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime ... shall be individually responsible for the crime." This provision reflects the criminal law principle that criminal liability is not incurred solely by individuals who physically commit a crime, but may also extend to those who participate in and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability. Article 6 (1) may thus be regarded as intending to ensure that all those who either engage directly in the perpetration of a crime under the Statute, or otherwise contribute to its perpetration, are held accountable.[273]

186. The Appeals Chamber notes that the Trial Chamber did, earlier in the Judgment, discuss the general principles relating to criminal responsibility under Article 6 (1) of the Statute. The relevant paragraph of the Trial Judgment reads:

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[269] *Ibid.*, p. 179.
[270] *Ibid.*, pp. 179-180.
[271] It is interesting to note that the Prosecution has not seen fit to respond despite the fact that this ground was validly filed.
[272] T(A), 30 October 2000, pp. 236-238.
[273] See *Tadić* Appeal Judgment, para. 190 in relation to an identical provision in Article 7(1) of ICTY Statute; see also *Kordić* Trial Judgment, para. 373.

3703/A bis

> The Trial Chamber is of the opinion that, as was submitted by the Prosecution, there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6 (1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.[274]

The Appeals Chamber finds that this statement corresponds to the elements of individual criminal responsibility as set out, as follows, by the jurisprudence[275] of this Tribunal and that of ICTY:

1. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have a direct and substantial effect on the commission of the illegal act; and

2. The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act.

Ruzindana does not challenge the Trial Chamber's definition in relation to the elements that need to be satisfied in order to establish individual responsibility under Article 6 (1) of the Statute. However, he raises the specific issue of a material element required to establish responsibility for committing killings, namely "resulting death".

187. On the aspect of the legal element of "committing" referred to in Article 6 (1) of the Statute, the Appeals Chamber in the *Tadić* Appeal Judgment had occasion to consider an identical provision in Article 7 (1) of ICTY Statute and stated that:

> This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law.[276]

The Appeals Chamber accepts this statement as accurate. Thus, any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the Statute, together with the requisite knowledge. For the present

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[274] Trial Judgment, para. 198, This test was drawn from the *Tadić* Trial Judgment applying identical provisions in Article 7 (1) of ICTY Statute.
[275] *Tadić* Trial Judgment, paras. 674 and 689; *Čelebići* Trial Judgment, para. 326; *Akayesu* Trial Judgment, para. 477.

purposes, the Appeals Chamber sees no further necessity to attempt a detailed definition of what constitutes individual responsibility for the element of "committing" under Article 6 (1) of the Statute. It suffices to observe that according to the jurisprudence discussed, the element of "resulting death" is not an indispensable factor or element to be established in proving individual responsibility under Article 6(1) of the Statute. The Trial Chamber found, beyond a reasonable doubt, that Ruzindana was individually responsible for committing killings with the intent to commit genocide. In making this finding, the material fact of the resulting death is determined by the Trial Chamber in its assessment and weighing of the evidence, including witness testimonies, presented at trial. As held by the Appeals Chamber in the *Tadić* Appeal Judgment,[277] the *Aleksovski* Appeal Judgment[278] and the *Čelebići* Appeal Judgment,[279] the Trial Chamber is best placed to hear, assess and weigh the evidence, including witness testimonies presented at trial. Whether a Trial Chamber will rely upon a single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in light of the circumstances of each case. The Appeals Chamber therefore has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial.

188. In this regard, the Appeals Chamber recalls the relevant factual conclusions vis-à-vis Ruzindana[280] in the Trial Judgment in respect of the massacres in the area of Bisesero:

(1) After reviewing the witness testimonies and Prosecution exhibits, the Trial Chamber was satisfied, beyond a reasonable doubt, that Ruzindana was properly identified by Prosecution Witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, EE, Z, KK, RR and MM, as having participated in one or more of the assaults;[281]

(2) The Trial Chamber was satisfied beyond reasonable doubt that Ruzindana brought members of the *gendarmerie nationale,* communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack those Tutsis seeking refuge;[282]

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[276] *Tadic* Appeal Judgment, para. 188, cited in *Kordić* Trial Judgment, para. 376.
[277] *Tadić* Appeal Judgment, para. 65.
[278] *Aleksovski* Appeal Judgment, para. 63.
[279] *Čelibići* Appeal Judgment, para. 506.
[280] Ground Seven of Ruzindana's appeal in relation to the issue of appraisal of the testimony of the prosecution witnesses and reliability of eye witnesses is discussed in Section III (F).
[281] Trial Judgment, para. 461.
[282] *Ibid.*, para. 465.

3701/A bis

(3) The Trial Chamber was satisfied beyond reasonable doubt that Ruzindana personally attacked Tutsis seeking refuge during the assaults described in Bisesero;[283]

(4) The Trial Chamber was left with no doubt that Ruzindana aided and abetted the killings, through orchestration and direction, and through his provision of transportation and weapons. The evidence proves that Ruzindana personally assisted in attacks that resulted in the killings of Tutsi civilians;[284]

(5) The Trial Chamber was satisfied, beyond a reasonable doubt, that Ruzindana mutilated and personally killed Beatrice;[285]

(6) All survivor witnesses attested to the fact that thousands were killed in the Bisesero area during April through June 1994. Witnesses, including Dr. Haglund and several journalists, confirmed this fact. Kayishema himself testified that massive burial efforts had taken place in this area.[286]

189. Ruzindana has relied on the finding of the Trial Chamber in paragraph 469 of the Trial Judgment wherein it was observed that ".... [c]ases of personal killing by [...] Ruzindana relating to specific individuals is less certain [...] in most instances where a witness testified to one or both of the accused shooting at a refugee, the Prosecution failed to establish a resulting death." Furthermore, during the hearing on appeal, Counsel for Ruzindana submitted that "the Trial Chamber is saying that the Prosecutor did not manage to prove that the death of men, women and children followed the acts of the Accused."[287] In making these submissions, Ruzindana limited his argument to the issue of his individual responsibility for "committing" the killings. The Appeals Chamber notes that in respect of personal killings relating to specific individuals, the Trial Chamber had found Ruzindana responsible, beyond a reasonable doubt, for the death of one Beatrice.[288] More particularly, individual responsibility under Article 6 (1) of the Statute attaches not only to direct physical participation by the accused in the commission of the crime, but also to acts of participation which in fact contribute to, or have an effect on, the commission of the crime.

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[283] *Ibid.*, para. 467.
[284] *Ibid.*, para. 468.
[285] *Ibid.*, para. 470.
[286] *Ibid.*, para. 471.
[287] T(A), 30 October 2000, p. 237.

Ruzindana has failed to challenge the findings of the Trial Chamber with regard to the other forms of participation under Article 6 (1) of the Statute for which he was found individually responsible.

190. The Appeals Chamber recalls that Ruzindana was found individually responsible under Article 6 (1) of the Statute, not only for committing killings with the intent to commit genocide but also for instigating, ordering, committing and otherwise aiding and abetting in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group in Bisesero area.[289] As discussed above, the issue of resulting death is not a legal element in the determination of criminal responsibility under Article 6(1) of the Statute; it can be an evidential factor in the proof of such a responsibility. Accordingly, the Appeals Chamber is satisfied that it was open to the Trial Chamber to assess the evidence before it in order to establish whether death resulted. In fact, such an assessment enabled it to find beyond a reasonable doubt that Ruzindana's acts and omissions constituted an adequate form of participation for the purpose of ascribing criminal responsibility under Article 6 (1) of the Statute.

(ii) Error by failing to provide a clear definition of the concept of common intention and to apply the criteria thereof to Ruzindana's personal situation

191. As earlier noted, Ruzindana has failed to develop Ground Four relating to the concept of common intention. However, the Appeals Chamber understands the substance of Ruzindana's limited submissions as alleging errors of law by the Trial Chamber in its definition of criminal responsibility on the basis of participation in a common purpose or design within the scope of Article 6 (1) and its application thereof to Ruzindana. Although it did not discuss in detail the exact principles by which individuals will be held criminally responsible for participating in a common purpose or design, the Trial Chamber did, in its Judgment, discuss what is widely known as the "common purpose" doctrine. It cited the following statement from the Trial Chamber in the *Čelebići* Judgment:

> "....a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible.. and...[d]epending upon the facts of a given situation, the

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[288] Ruzindana appeared to be selective in his reference to the Trial Judgment and failed to refer to the findings of his responsibility for the killing of Beatrice. Furthermore, this finding was not challenged by Ruzindana during the hearing on appeal.

[289] Trial Judgment, para. 571.

3699/A bis

> culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abettor to, the crime in question."[290]

Immediately after this citation, the Trial Chamber stated:

> The Trial Chamber concludes, therefore, that the members of such a group would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts.[291]

The statement has to be read in the context of its reference to the *Čelebići* Judgment and of the conclusion of the Trial Chamber. Thus read, it appears to have been intended to refer to the liability of a person who knowingly participates in a criminal venture with others and may be held responsible for the criminal acts that result from their common purpose.

192. The Appeals Chamber does not consider that Ruzindana's submissions establish that the Trial Chamber erred in its findings as such. It will be helpful to recall that the Trial Chamber was satisfied, from all the evidence accepted, that:

> [T]he perpetrators of the culpable acts that occurred within the Kibuye *préfecture,* during the period in questions[sic], were acting with a common intent and purpose. That intent was to destroy the Tutsi ethnic group within Kibuye. Both Kayishema and Ruzindana played pivotal roles in carrying out this common plan.[292]

Ruzindana's submissions on this issue do not demonstrate the alleged error. Further, his submissions have been set out in such general terms that, in the absence of any argument or authorities in support thereof, the Appeals Chamber cannot determine the merits of the submission in law or in fact. The Appeals Chamber recalls that it is the duty of an appellant to demonstrate that the Trial Chamber erred and to direct his submissions to this end.

193. During the hearing on appeal Counsel for Ruzindana submitted that Ruzindana's individual responsibility should be examined within the specific context that planning and implementation of a genocide presupposes "....the common plan of having met physically or on telephone to undertake a common operation...". Ruzindana appears to be alleging a specific requirement for proof of a prearranged common plan or operation in relation to criminal responsibility pursuant to the common purpose doctrine. The Appeals Chamber does not agree with this interpretation and recalls the following summary given in the *Tadić* Appeal Judgment:

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[290] Trial Judgment, para. 203, citing *Čelebići* Trial Judgment, para. 328.
[291] *Ibid.*, para. 204.
[292] *Ibid.*, para. 545.

 3698/A bis

> In sum, the objective elements (*actus reus)* of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:
>
> i. *A plurality of persons*. They need not be organized in a military, political, or administrative structure…
>
> ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> iii. *Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.* This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[293]

Thus, there is no requirement that the plan or purpose must be previously arranged or formulated. Accordingly, while the fact of "having met physically or on telephone to undertake a common operation" may be a relevant factor to be considered, it is not constitutive of the *actus reus* element required for criminal responsibility pursuant to the common purpose doctrine. The submission in question is without merit. As noted above, the Trial Chamber found that Ruzindana played a pivotal role in carrying out the common plan which was the destruction of the Tutsi ethnic group within Kibuye. In addition, the Trial Chamber also found that at the sites where he was found to have participated, Ruzindana had not only been involved in the commission of crimes but his actions also assisted in and contributed to the execution of the joint criminal enterprise in various ways.[294] Ruzindana's submissions have failed to challenge these findings.

(c) Conclusion

194. Ruzindana has not demonstrated any error of law invalidating the Trial Judgment in the Trial Chamber's assessment of his individual criminal responsibility. For the foregoing reasons, Grounds Two and Four of the appeal are dismissed.

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[293] *Tadić* Appeal Judgment, para. 227.

[294] At para. 571 of the Trial Judgment it was stated that, "…[A]t the sites where he was found to have participated, Ruzindana committed one or more of the following acts: Headed the convoy of assailants; transported attackers in his vehicle; distributed weapons; orchestrated the assaults; lead the groups of attackers; shot at the Tutsi refugees; and, offered to reward the attackers with cash or beer. The Trial Chamber further found that Ruzindana personally mutilated and murdered individuals during the attack at the Mine at Nyiramurego Hill. These findings prove beyond reasonable doubt that Ruzindana, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group."

3697/A bis

2. Kayishema's Responsibility under Article 6 (1)

195. Kayishema contends that the findings of the Trial Chamber, in respect of the elements of responsibility are questionable (Ground 3), and challenges the Trial Chamber's assessment with respect to:

- The intent of the Accused;[295]
- The actual participation of the Accused.[296]

(a) The Intent of the Accused

196. Kayishema submits that the Trial Chamber erred in law and in fact in finding beyond a reasonable doubt, that the Accused, by his acts, had contributed to the commission of the crime or contributed substantially to its perpetration.[297]

(i) Arguments of the Parties

197. The Defence offers its interpretation of the civil defence[298] concept and of the terms "*ratisser*" and "*travailler*".[299] It concludes from the analysis of these terms that the Trial Chamber erred in law and in fact[300] in its assessment of the evidence presented.[301] Kayishema further

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[295] Kayishema's Brief, paras. 80-103.

[296] *Ibid.*, paras. 104-229

[297] *Ibid.*, para. 81. The Defence relies *inter alia* on the testimony of Witness O, which was allegedly discounted by the Trial Chamber, though it proved the Accused's intention to save Tutsi children.

[298] *Ibid.*, paras. 83 and following. In the opinion of the Defence the theory that the Rwandan genocide was implemented through the civil defence programme is a distortion of reality. The Appellant thus cites the testimony of "R" whose "unwarranted interpretation", according to him, appears to be slanted to fit the Prosecution theory. In other words, the Prosecutor allegedly "made use of the idea of "civil defence" (Kayishema's Brief, para. 86). Kayishema submits that in the absence of certainty, the Chamber may not speculate (para.93). See also Kayishema's Brief, para. 98. According to Kayishema, the Prosecutor failed to show the existence of a "diversion" of the civil defence programme. Consequently "in fairness and for the benefit of a presumption of innocence, [...] [it should] be understood within the meaning conveyed by the documents, upon a simple reading thereof".

[299] *Ibid.*, para. 92. The Defence submits that by the use of the word "*ratisser*" Kayishema did not mean "to wipe out the Tutsis" and that in placing these words in their context, it can readily be concluded that they meant "to go and recover weapons" (Exhibit 296 – telegraph of 12 June 1994). *See also* Kayishema's Brief, para. 100.

[300] *Ibid.*, paras. 101-103. Kayshema submits that the Chamber erred in paragraphs 309, 310 (Witness O) and 311 (Sister Farrington) of the Judgment, without further explanations.

[301] The Appeals Chamber notes that, during the hearing on appeal, the Prosecutor did not specifically respond to the arguments raised by Kayishema on the allegations respecting the use of the words "*ratisser*" and "*travailler*" as well as the interpretation of the concept of civil defence under the individual responsibility of the Accused.

3696/A
bis

argues in an unclear manner, that the Chamber erred in equating failure to act with aiding and abetting.[302]

(ii) Discussion

198. In line with the relevant international case law, referred to in the foregoing analysis, a person may be held criminally liable for any conduct, where it is determined that he participated knowingly in the commission of a crime, if his participation directly and substantially contributed to the perpetration of the crime.[303] The intent to participate in the commission of a crime may thus be inferred from the accused's participation, particularly from his aiding and abetting. Ultimately, and as acknowledged by the Trial Chamber, there must on the part of the Accused be a clear awareness that this participation will lead to the commission of a crime."[304] That intention may be inferred from a number of facts,[305] the assessment of which falls to the Trial Chamber. The Trial Chamber properly exercised its discretion, and found beyond a reasonable doubt that the Accused had the requisite intent. The Trial Chamber also found, upon review of the evidence adduced, that it was clearly established that Kayishema was present at each of the massacre sites, and that he had the intent to participate in the crimes perpetrated at these sites.[306]

199. The Appeals Chamber notes that Kayishema's arguments on the Trial Chamber's erroneous interpretation of the concept of civil defence as well as the terms *"ratisser"* and "*travailler*" have been dealt with under the ground on genocide. Insofar as these arguments constitute, in the opinion of the Appeals Chamber, a question that goes beyond the issue of individual responsibility and falls under either the separate ground on civil defence (Ground 4), or the separate ground of genocide (Ground 6),[307] the Appeals Chamber refers to its analysis in the previous section on genocide.

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[302] Kayishema's Brief, para. 95. Kayishema challenges the finding that by his presence at the site of the crime, he *aided* and *abetted* in the commission of the crimes perpetrated at the various massacre sites. In his submission, failure to act cannot be construed as a positive act and that "even passive presence at the scene does not constitute aiding and abetting".

[303] *Tadić* Trial Judgment, 1997, para. 674. The requirement of intent under Article 6 (1) thus includes *knowledge of the act of participation and a conscious decision to participate* by planning, instigating, ordering, committing or otherwise aiding and abetting in the preparation of a crime.

[304] Trial Judgment, para. 203.

[305] *Akayesu* Trial Judgment, para. 478.

[306] See for example, Trial Judgment, para. 352 (for the facts relating to the Catholic Church and Home St.-Jean), para. 76 (the Stadium), para. 404 (Mubuga Church) as well as paras. 461 and 468 (Bisesero).

[307] The Appeals Chamber specifies that the Defence had moreover raised this issue in its Notice of Appeal under the ground on genocide and civil defence. See Kayishema's Notice of Appeal, pp. 7 and 8. See also T(A),

3695/A bis

200. Regarding the argument on the Trial Chamber equating failure to act with aiding and abetting, Kayishema argues nebulously, that this was a consequence of the absence of the requisite intent which he had intended to show earlier.[308]

201. On the specific question of the passive presence of the Accused at the crime sites,[309] the Trial Chamber held that:

> "[...] an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity".[310]

Thus, the Trial Chamber found that a person's role in the commission of the proscribed act need not be tangible.[311] Even where the presence of the Accused need not be a condition *sine qua non,* he may still incur individual responsibility provided he is aware of the possible effect of his presence (albeit passive) on the commission of the crime. In the case at bar, the Trial Chamber held that the Accused's failure to oppose the killing constituted a form of tacit encouragement in light of his position of authority.[312] The Trial Chamber therefore found, based on the evidence presented by the parties, that the participation of the Accused, through encouragement and support afforded to the principals of the crimes committed at the various massacre sites, had been established beyond reasonable doubt.[313]

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30 October 2000, pp. 80 to 88 and, in particular, pp. 85 and 86 (Civil defence) and 86 to 88 ("*ratisser*" and "*travailler*").

[308] Kayishema's Brief, para. 95. Indeed, Kayishema presents this argument as part of what apparently is a discussion on the interpretation of the concept of civil defence (see para. 94). He submits that: "The Prosecutor insists on using the words "aiding and abetting" and in her opinion, these words should not be considered in the active voice, but that its examination should include the passive voice, that is considering failure to act as a positive act, aiding or abetting. [...]. Thus, for the Prosecution, even passive presence at the site of the crime constitutes aiding and abetting".

[309] *Aleksovski* Appeal Judgment, para. 162, citing *Furundžija* Trial Judgment, para. 249, which sets forth two requirements for aiding and abetting: "(i) It must be demonstrated that the accomplice committed acts intended to specifically aid, abet or give moral support to the principal perpetrator for the commission of the specific offence, and that such support had a substantial effect on the commission of the offence; and (ii) It must be shown that the accomplice knew that his acts furthered the commission of the specific offence by the principal".

[310] Trial Judgment, para. 200, citing *Furundžija* Trial Judgment , para. 207. The *Furundžija* case established *inter alia* that "assistance must have a *substantial effect* on the perpetration of the crime" (para. 234).

[311] See also *Furundžija* Trial Judgment, para. 232, where it was held that the assistance given by an accomplice *need not be tangible* and can consist of moral support in certain circumstances. While any spectator can be said to be encouraging a spectacle - an audience being a necessary element of a spectacle - the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimizing or encouraging effect on the principals" (emphasis added)

[312] Trial Judgment, para. 202.

[313] *Ibid.*, paras. 352, 404 and 468.

3694/A bis

202. The Appeals Chamber is satisfied that the Trial Chamber did not err in law or in fact in finding that the Accused did possess the criminal intent, and that consequently his presence, albeit passive, considering his position of authority, was tantamount to tacit encouragement.

(b) The issue of the overall assessment of the Accused's effective participation

203. The Appeals Chamber observes that since several arguments are often adduced in support of various allegations, it was not easy to follow the opaque structure of Kayishema's submissions. The Appeals Chamber has decided, for purposes of clarity, to restructure the presentation of arguments in support of this ground of appeal.

204. It was the Defence's intention to challenge the Trial Chamber's overall assessment of witnesses based on three main points which the Appeals Chamber would summarize as follows: (a) the implementation of the approach adopted by the Trial Chamber; (b) assessment of the credibility of evidence; and (c) the effective participation of the Accused at the various massacre sites.

(i) The issue of the Trial Chamber's approach in assessing the evidence presented

205. Kayishema challenges, generally, the Trial Chamber's approach in assessing evidence since he argues that the Trial Chamber committed errors of fact occasioning a miscarriage of justice.

a. Arguments of the parties

206. In support of his argument that the Trial Chamber erred in applying its adopted approach, Kayishema submits the following:

- Kayishema claims that the Trial Chamber failed to follow the rule enunciated by Expert Witness Pouget regarding consistent testimony of witnesses or applied said rule selectively[314].

[314] Kayishema's Brief, paras. 106 and 107. The Defence submits that the Trial Chamber erred in fact in failing to assess the witnesses' evidence in the light of the standard proposed by the expert even though it did not challenge it. In the submission of the Accused, the Trial Chamber concurred with Professor Pouget that consistent testimony, although it is not a criterion for assessing the reliability of witnesses, is nevertheless a factor to be taken into account.

3693/A
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- Kayishema claims that the Trial Chamber erred in fact in adopting a narrow approach in its assessment of testimonial evidence. Thus, Kayishema maintains that the Trial Chamber failed to sufficiently take into account the issue of leading questions put to the witnesses by the investigators from the Office of the Prosecutor during interviews or the time that elapsed between the events and the time when said events were recounted to the investigators. He submits that he had raised this issue on several occasions and that the failure to consider such a "crucial factor" constitutes an error.[315]

- Kayishema submits that the Trial Chamber admitted a document (by the Expert Lindsay) filed out of time by the Prosecution, in violation, of the principle of equality of arms.[316]

- Kayishema claims that the Trial Chamber failed to take into account Rwanda's specific culture that is characterized particularly by oral tradition.[317]

- Lastly, Kayishema submits that the Trial Chamber's failure to refer to the Defence's objections[318] with respect to the contradictions between the witnesses' oral testimony and prior statements, shows that the Chamber did not take into account the Defence's objections with respect to the assessment of evidence and, therefore, erred in its assessment of the evidence.

207. The Appeals Chamber notes that during the hearing on appeal, the Prosecution did not respond to such arguments and that Kayishema did not elaborate on them[319].

However, at the hearing on Appeal, the Defence submitted that "[It is not the method that was used which is being criticized susceptible to Article 24 but it is the use that was made" (See T(A), 30 October 2000, pp. 222 and 223).

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

[316] *Ibid.*, para. 108. Kayishema contends that the Trial Chamber dismissed Professor Pouget's expert evidence in favour of Lindsay's.

[317] *Ibid.*, paras. 109 and 117. Kayishema claims that the Trial Chamber fails to take due account of the specific concepts of hearsay and the Rwandan culture, language and translation problems (See also Kayishema's Brief, para. 111*bis*).

[318] *Ibid.*, para. 120. The Defence submits that the Chamber failed to adhere to the principles it had defined itself and this to the detriment of the Accused, since there is no reference to the Defence's objections. He submits that since the Trial Chamber did not mention the objections raised by the Defence, it did not consider them in its final assessment. In Kayishema's opinion, the Chamber therefore did not want to deal with the entire problem raised about depositions.

[319] T(A), 30 October 2000, pp. 218-233.

b. Discussion

208. In light of the arguments of the Defence, the Appeals Chamber is unable, after reviewing the judgment, to identify any particular approach allegedly relied on by the Trial Chamber in assessing the evidence presented by the parties. Indeed, the Appeals Chamber is of the view that the Trial Chamber clearly stated its position with respect to the assessment of evidence[320] and quite logically found that, notwithstanding its interest in the information provided by Professor Pouget, the Trial Chamber must assess the probative value of each testimony, which is a usual approach. It appears that in this regard, the Trial Chamber took due account of and analysed the arguments put forward by the expert witness[321] regarding the unreliability of eye-witnesses testimony but used its own discretion in providing a basis for its decision. Neither the Appellant nor the Appeals Chamber can hold this against the Trial Chamber.

209. Moreover, the Trial Chamber endorsed Professor Pouget's general observations regarding eyewitnesses.[322] Indeed, the Trial Chamber found that after assessing the probative value of each testimony in light of its presentation in Court and after its subjection to cross-examination,[323] "the Trial Chamber, in its examination of the evidence, has been alive to these various approaches"[324] and as a result went on to hold that "different witnesses, like different academics, think differently,"[325] and that testimonies cannot be disregarded simply because they describe traumatic events, even though the Trial Chamber is aware of the impact of trauma on the testimony of witnesses.[326] It is in light of the foregoing that the Trial Chamber properly decided to discount a particular testimony as a whole containing material inconsistencies.[327]

210. The Appeals Chamber emphasizes that once having heard testimonial evidence as proffered by the parties, it is up to the Trial Chamber to decide, by a reasoned opinion, to accept or to reject, in whole or in part, the testimony of an expert witness, provided the reasons for its

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[320] Trial Judgment, para. 70 and following.
[321] *Ibid* paras. 68 and 69.
[322] *Ibid.*, para. 70.
[323] *Idem.*
[324] *Ibid.*, para. 72.
[325] *Ibid.*, para. 74.
[326] *Ibid.*, para. 75.
[327] *Ibid.*, para. 77. In the English version of the Judgment, reference is made to "material inconsistencies".

3691/A bis

decision are reasonable.[328] In this regard, the Appeals Chamber notes that the assessment of the credibility of evidence given by an expert falls clearly to the trier of fact.

211. Having reviewed the Defence's arguments, the Appeals Chamber finds that the Appellant failed to show that the Trial Chamber made an unreasonable ruling in using its discretion to assess the testimony of Expert Witness Pouget. Having considered Kayishema's written submissions, the Appeals Chamber is unable to ascertain how the Trial Chamber may have acted unreasonably in considering, even partially, Professor Pouget's testimony or in considering it as one point of view, whereas the expert witness indeed had suggested to the Chamber an approach which was in no way binding on the trial judges in their final findings.

212. The Appeals Chamber finds that Kayishema has not shown that the findings of the Trial Chamber were so unreasonable as to occasion a miscarriage of justice. Indeed, in the opinion of the Appeals Chamber, Kayishema only raises general allegations without showing any error, or miscarriage of justice such as would cause him prejudice. Finally, the Appeals Chamber points out that, contrary to Kayishema's contention, in its review the Trial Chamber took into account the issue of the lapse of time between the events which occurred in 1994 and the oral evidence given by the witness in court,[329] as well as the inadequacies in the Prosecution's investigative process and found that it is not for the Trial Chamber to search for reasons to excuse them.[330]

213. With respect to the Trial Chamber's acceptance of the report presented by the Prosecution expert (Lindsay report), the Appeals Chamber is of the opinion that Kayishema has not shown why the report's admission was questionable, nor how the Trial Chamber allegedly erred in rejecting his objection. Indeed, the Appeals Chamber finds that the Trial Chamber did not violate the principle of equality of arms by admitting an academic paper, especially since it had, on the one hand, been presented to Witness Pouget and examined with him during cross-examination and, on the other hand, was submitted to the Defence which did not raise any objection at trial.[331]

214. Similarly, the Appeals Chamber finds that the argument that the Trial Chamber failed to take into account the specificity of Rwandan culture is a factual issue, which moreover was neither substantiated nor addressed in Kayishema's Brief. However, the Appeals Chamber wishes

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[328] *Tadić* Appeal Judgment, para. 64, and *Aleksovski* Appeal Judgment, para. 63.
[329] Trial Judgment, para. 77.
[330] *Ibid.*, para. 78..
[331] T., 2 July 1998, pp. 103 and 104.

3690/A bis

to point out that in line with the *Furundžija* [332] decision, the Trial Chamber cannot be expected to provide a detailed answer to every argument presented by the parties at trial.

215. Lastly, with respect to the fact that the Trial Judgment contains no reference to the Defence's exhibits, the Appeals Chamber wishes to point out that, contrary to the Defence's submission, the Trial Chamber did mention that exhibits were submitted to the Trial Chamber by both parties.[333] The Appeals Chamber therefore rejects the argument that the Trial Chamber would not consider the whole issue of inconsistencies in the previous statements solely on this basis and in the absence of any showing of the alleged error.

216. For the foregoing reasons, the Appeals Chamber rejects the allegation that the Trial Chamber erred in fact in its handling of evidence [with respect to the approach adopted and its application].

(ii) The issue of the credibility of witnesses

217. Kayishema contends that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice, on the one hand, in the Chamber's general assessment of the credibility of the evidence and, on the other hand, in the identification of the Accused by the witnesses.

a. The issue of the overall credibility of testimonies

i. Credibility of witnesses

Arguments of the parties

218. Generally, Kayishema contends that the Trial Chamber committed an error of fact in its general assessment of the credibility of witnesses[334] because, in spite of having adopted a procedure for dealing with the credibility of witnesses, the Chamber nevertheless heard witnesses considered by the Defence to lack credibility.[335]

219. Kayishema submits that the attitude of certain witnesses during hearings should have discredited them and caused the Trial Chamber to reject their testimonies. In his opinion, the Trial

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[332] *Furundžija* Appeal Judgment, para.69.
[333] Trial Judgment, para. 76. The Trial Chamber held indeed that "Both Prosecution and Defence Counsel submitted such exhibits".
[334] T(A), 30 October 2000, p. 223.

3689/A
bis

Chamber erred in its findings with regard to the general credibility of the witnesses insofar as it failed to take into account their demeanour at the hearing.[336]

220. Kayishema further asserts that the witnesses lacked credibility insofar as, with the passage of time and aided *a posteriori* by hearsay and the media,[337] they had developed a recollection that corresponds to their experience (secondary distortions).[338] In his view, the Trial Chamber wrongly rejected the arguments put forward by Professor Pouget regarding "the encoding of facts" by a surviving witness.[339]

Discussion

221. The Appeals Chamber finds, first of all, that the special procedure adopted by the Trial Chamber, explained in the Judgment[340] and defining the factors to be taken into account in assessing the credibility of a witness, seems to be sufficient and reasonable. The Defence has not presented sufficiently convincing arguments in support of this ground or shown the unreasonableness of the Trial Chamber's finding which caused a miscarriage of justice. The Appeals Chamber holds therefore that the Appellant's allegations are unfounded.

222. As regards the impugned demeanour of certain witnesses which should have "reasonably" caused the Trial Chamber to disqualify them, the Appeals Chamber is of the view that the trial judges are in the most appropriate position to assess the credibility of a testimony and the demeanor of a witness at a hearing. Once again, the Appeals Chamber notes that Kayishema does not refer to any specific witness[341] in his Brief, nor does he afford the Appeals Chamber any information that would enable it to assess his allegations. Kayishema should have submitted sufficiently probative arguments to show the unreasonable findings of the Trial Chamber. Furthermore, the Appeals Chamber underscores that the issue of witness demeanour at the

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[335] Kayishema's Brief, paras. 119 and 120.
[336] *Ibid.*, para. 122. The Defence submits indeed that their aggressiveness and refusal to answer questions during cross-examination should have discredited them.
[337] Kayishema's Brief, para. 113.
[338] *Ibid.*, para. 116.
[339] *Ibid.*, paras. 113 and following. In Kayishema's opinion, Professor Pouget exhaustively explained to the Trial Chamber the reasons why such testimonies, even when given in good faith, may not be considered credible and may not be evidence of the Accused's responsibility. In support of his allegations, Kayishema recalls Professor Pouget's explanations that events experienced by witnesses under strong emotional stress at the time of occurrence of the events have a harmful effect on precision and retention. Consequently, the witness most exposed to the events would not be the most credible.
[340] Trial Judgment, para. 76.

 3688/A bis

hearing should have been raised before the Trial Chamber and cannot be addressed for the first time at the appeal level.

223. The Appeals Chamber further notes that the Trial Chamber effectively took into account the demeanour of witnesses at the hearing, as reflected in the following finding:

> "Having observed the demeanor of the witnesses and listened closely to their oral testimony, the Trial Chamber is satisfied that the eyewitnesses were credible and did not attempt to invent facts".[342]

The Appeals Chamber therefore rejects this argument for lack of merit.

224. As regards the issue of secondary distortions and " encoding of events" by the surviving witness, apart from the fact that the Defence takes issue with the Trial Chamber for not having followed the principles outlined by Professor Pouget, the Appeals Chamber notes the general character of these allegations. It further notes that the dearth of cogent arguments by Kayishema does not enable it to enter a finding that the Trial Chamber erred and consequently finds this argument unfounded.

1. Credibility of testimonies and the issue of corroboration

Arguments of the parties

225. In the main, the Defence takes the Trial Chamber to task for its incorrect use of the evidence before it.[343] The Defence indeed acknowledges that it is within the discretion of the Trial Chamber to assess eyewitness testimony on the basis of the criteria adopted, provided the Chamber does so reasonably.[344] However, Kayishema contends that the Trial Chamber erred in this regard by not rejecting all the testimonies of witnesses, given the contradictions which mar the totality of the evidence and, therefore, all the testimonies on account of the interdependence which the Chamber sought to establish.[345]

226. Moreover, Kayishema submits that the Trial Chamber should not have adopted corroboration of testimonies as a test. Consistency in the testimony of several witnesses is no

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[341] Kayishema's Brief, para. 122.
[342] Trial Judgment, para. 397.
[343] T(A), 30 October 2000, p. 220.
[344] *Ibid.*, pp. 220 and 221.
[345] T(A), 30 October 2000, p. 222.

3687/A bis

proof or criterion of validity[346] because the doubt raised by one testimony cannot be removed by further corroborative testimony.[347] Thus, in matters of testimony, an approximation is, according to the Appellant, the opposite of truth.[348]

Discussion

227. The Appeals Chamber points out that the Trial Chamber very clearly stated that it did not consider corroboration of witness testimonies as a test but rather a factor for the assessment of the credibility of witnesses.[349] Similarly, the Trial Chamber deemed it necessary to take into account other factors in order to reach, beyond a reasonable doubt, a finding of the accused's culpability.[350]

228. The Appeals Chamber also notes that the Appellant raises the issue of the Trial Chamber's assessment of the credibility of witness testimonies without referring to specific witnesses, nor even guiding the Appeals Chamber in the analysis of this argument. The Appeals Chamber has already clearly stated that it is indeed the responsibility of the Appellant, who has lodged an appeal on the basis of Article 24 of the Statute to substantiate his grounds of appeal in order to show the alleged error. To the extent that the Defence's argument amounts to an issue of fact, the Appeals Chamber does not intend to carry out the above exercise on behalf of the Appellant. The Chamber therefore holds that this argument, as formulated by Kayishema and substantiated in his submissions, does not allow it to enter a finding of the existence of the alleged error.

229. The Appeals Chamber notes that Kayishema's argument that a partially doubtful testimony should be rejected in its entirety has already been discussed in the contested Judgment.[351] With respect to the fact that the absence of consistency in witness testimonies may

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[346] Kayishema's Brief, para. 110.
[347] *Ibid.*, para. 122.
[348] *Ibid.*, para. 115. Kayishema submits that the fact that testimonies are so similar gives rise to serious doubt as to their veracity.
[349] Trial Judgment, para. 70. The Trial Chamber indeed considered that "whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies".
[350] *Ibid.*,, para. 71: The Trial Chamber specified that other factors may be taken into account, for example, the fact that the witness had the ability and opportunity to observe the offender, the fact that the identification of the accused by the witness is the product of the witness's own recollection and the credibility of the witness, in other words his truthfulness and the reliability of his observations.
[351] *Ibid.*, para. 78. The Trial Chamber set out the reasoning to be followed in the instant case and held that "Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis

3686/A bis

raise doubt regarding the responsibility of the accused, the Appeals Chamber recalled the applicable principle in corroboration of evidence[352] and notes that the Appellant fails to mention any specific witness in support of this allegation and only makes sweeping arguments not supported by facts or proof. The same applies to the argument that when there is corroboration one cannot speak of consistency but rather of resemblance.

230. Moreover, it is for the trier of fact to assess the probative value of a testimony, such discretionary power also covering the manner in which the Trial Chamber decides to deal with apparent contradictions. In the absence of proof by the Appellant of the unreasonable nature of the reasoning adopted by the Trial Chamber, the Appeals Chamber rejects these arguments on the ground that the Trial Chamber's reasoning with respect to the treatment of contradictions in witness testimonies does not, in its view, appear unreasonable in any way.

a. Identification of the accused

i. Arguments of the parties

231. Kayishema submits that a reading of the Judgment shows that the identification of the accused is often expressed in approximations or indirect references to him.[353] In his opinion, although it claims to have reached its decision in light of a careful consideration of the relevant specific factors,[354] the Chamber did not take into account the specificities of Rwandan culture, nor did it mention these factors in its assessment of eyewitness testimonies.

ii. Discussion

232. The Appeals Chamber observes that the Defence seems to include its analysis of the issue of identification in its examination of criteria for examining eyewitness testimony in general. Indeed, the Defence submits that the accused was not clearly identified on the massacre sites since, on the one hand, the witnesses did not know him (the principle of prior knowledge)[355] or were not in a position to identify him (which calls into question their overall credibility). Thus,

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considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure".

[352] See *Tadić* Appeal Judgment, para. 65; *Aleksovski* Appeal Judgment, para.62; and *Čelebići* Appeal Judgment, paras. 492 and 506.

[353] Kayishema's Brief, para. 111*bis*.

[354] *Ibid.*, para. 117. The Defence takes the Trial Chamber to task for not taking into account Ruzindana's testimony in *Akayesu*.

[355] *Ibid.*, para. 111.

3685/A bis

the indirect[356] or approximate[357] or even programmed identification of the accused[358] cannot, in the opinion of the Appellant, justify the findings of the Trial Chamber regarding the responsibility of the accused.

233. The Appeals Chamber notes, after considering the Judgment, that the Trial Chamber fully took into account problems relating to the witnesses' knowing of the accused and found that the identification of Kayishema by the witnesses is all the more credible as the said witnesses knew him prior to the occurrence of the events of 1994[359] and that the Trial Chamber often addressed the identification of the accused with greater caution.[360] Besides, the Trial Chamber stated as follows:

> "It is apparent that when the witnesses stated that they 'knew' the accused, they were not always referring to personal acquaintance or friendship. Rather, the witnesses were sometimes referring to 'knowing of' or 'knowing who the accused was' due to his prominence in the community. The Trial Chamber is satisfied that the use of such phraseology was not an attempt by the witnesses to mislead the Trial Chamber. Indeed, it is consistent with common usage [...]. in any event, for the purpose of identification, it is the physical recognition of the accused rather than personal acquaintance which is most pertinent. The above evidence suggests that most of the witnesses who identified Kayishema and/or Ruzindana, were aware of the physical appearance of the accused prior to seeing them at the massacre sites" (emphasis added).[361]

234. After a careful consideration of the circumstances in which the witnesses saw the accused, the Trial Chamber found that the identification of the accused proves beyond a reasonable doubt his participation in the massacres. In the opinion of the Appeals Chamber, it is inappropriate to revisit in abstraction these findings made by the Trial Chamber since Kayishema has not advanced any cogent arguments before this Chamber in support of his allegations. The Chamber therefore dismisses Kayishema's arguments in support of the allegation that he was identified beyond reasonable doubt on the massacre sites.

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[356] *Ibid.*, para. 111*bis*, second subparagraph.
[357] *Ibid.*, para.117. Kayishema asserts that the witnesses did not really know the *préfet,* since they knew Kayishema only through hearsay.
[358] *Ibid.*, para. 111, The Defence submits that some witnesses were not even capable of recognizing Kayishema in court and that when they were able to identify him, the identification was not credible because prior to their appearance before the Chamber to testify, the witnesses had visited the scene of the crime and were therefore enabled to locate the accused during the hearing.
[359] See for example, Trial Judgment, para. 357.
[360] *Ibid.*, para. 375 (Witness L).
[361] Trial judgment, para. 458.

235. For the foregoing reasons, the Appeals Chamber rejects the allegations that the Trial Chamber erred in fact on the issue of the general reliability of testimonies.

(iii) The issue of assessment of testimonies with regard to the different massacre sites

236. The Appeals Chamber notes that Kayishema does not challenge the existence of the massacres[362] but contests the Trial Chamber's findings regarding the presence of Kayishema at each of the sites and his participation in the acts. In particular, he takes issue with the Trial Chamber to have committed errors in fact for not having taken into account the obvious inconsistencies in some of the testimonies as well as their lack of reliability in general or for having built up its conviction in a selective manner. The Prosecutor did not respond to them during the hearing on appeal.

237. The Appeals Chamber recalls that with respect to the errors in fact raised by the Appellant, "[it] has [...] to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial"[363], since "the task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber"[364]. The Chamber therefore finds that the Appellant only raises general allegations to challenge the findings of the Trial Chamber without, on the one hand, showing their unreasonableness and, on the other hand, the resulting miscarriage of justice.

a. Mubuga site[365]

i. Arguments of the parties

238. Kayishema challenges the Trial Chamber's findings by alleging that the inconsistencies existing between the testimonies of Witnesses (V, W, OO, PP, UU and NN) render improbable the Prosecution argument that Kayishema was on the site on 15, 16 and 17 April 1994.[366]. In fact, the Defence contends that there is nothing to prove Kayishema's presence, or even that he gave

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[362] See for example, Kayishema's Brief, paras. 123, 146 and 207.
[363] *Aleksovski* Appeal Judgment , para. 63.
[364] *Tadić* Appeal Judgment, para.64.
[365] Kayishema's Brief, paras. 123 to 145.
[366] *Ibid.*, para 124.

3683/A bis

orders to the assailants.[367] Kayishema therefore submits that the Trial Chamber committed an error by inferring from the presence of the officials that the Accused issued orders.[368]

239. Kayishema submits more specifically that the Trial Chamber committed an error in its assessment of the testimonies of Witnesses OO,[369] V,[370] NN,[371] PP,[372] UU,[373] and W[374], insofar as he argues that these witnesses lacked credibility in view of the many discrepancies in their statements (he argues that the witnesses arrived at the church on different dates and that they did not all experience the same acts.[375]) In fact, Kayishema alleges inconsistencies between Witnesses PP and V,[376] OO and W,[377] UU and W[378] with respect to their respective accounts of the events. Regarding the identification of the Accused at the Mubuga site on the dates of the massacres, Kayishema submits that said identification had not been established beyond a reasonable doubt.[379]

240. Kayishema also alleges that the Chamber committed an error of fact because it failed to take into account the testimony of Witness DV[380] and disqualified the testimony of Defence Witness DP.[381]

241. Kayishema moreover insists on the testimony of Witness OO which he alleges, should not have been accepted on grounds of lack of credibility.[382] In his opinion, the reasoning of this witness is unacceptable because he asserts that the *Préfet* did not shoot, but concludes nonetheless

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[367] *Ibid.*, para. 140. Kayishema submits that contrary to what the Trial Chamber affirms in its Judgment, there is no corroboration between these witnesses.
[368] *Ibid.*, para. 145.
[369] *Ibid.*, para. 127 to 130.; See also paras. 132 and 133.
[370] *Ibid.*, paras 131 and 135 to 137.
[371] *Ibid.*, para. 127. Kayishema submits that this witness was simply mentioned in the Judgment whereas he testified that he did not see the Accused on 14 April.
[372] *Ibid.*, paras 138 and 131.
[373] *Ibid.*, para. 139.
[374] *Ibid.*
[375] *Ibid.*, para 127.
[376] *Ibid.*, para.131.
[377] *Ibid.*, para 133.
[378] *Ibid.*, para. 139.
[379] *Ibid.*, paras. 139 and 141 (Kayishema submits particularly, that the identification by Witness W is not credible insofar as he did not know him prior to the attacks).
[380] *Ibid.*, paras. 143 and 144. Kayishema maintains that this testimony, which the Chamber did not take into consideration, is relevant since he testified that he did not see the vehicle of the *préfecture* nor the *préfet* on the days of the massacre.
[381] *Ibid.*, para. 125.

3682/A bis

that he was responsible for the killing (Kayishema submits that this witness' testimony is a deduction and it is fraught with inconsistencies[383]).

ii. Discussion

242. The Appeals Chamber notes that "the [Trial] Chamber is satisfied, beyond reasonable doubt, that Kayishema [...] were present and participated at the attacks at Mubuga Church between 14 and 16 April".[384] The Trial Chamber also found that Kayishema's presence and his participation in the crimes charged encouraged the killings of the Tutsis who had assembled to seek refuge in the church.[385] The Appeals Chamber notes that the Trial Chamber relied on Witnesses V, W, OO, PP and UU for this finding.[386]

243. Kayishema relies on the testimonies of Witnesses W, NN, OO, V, PP, UU, DV and DP in support of the allegation that the Trial Chamber committed an error of fact in its assessment of the actual participation of the Accused on this site.

244. The Appeals Chamber specifies first of all that as regards the allegations relating to Witnesses PP, UU, V, W and NN, it has already acknowledged that the assessment of the evidence presented at trial falls within the discretion of the trier of fact and would only revisit such assessment where the Appellant shows that the findings of the Trial Chamber were unreasonable. In the instant, the Appeals Chamber finds that the alleged errors have not been proven and, therefore, dismisses Kayishema's general allegations for lack of merit.

245. The Appeals Chamber also finds that the allegations with respect to Witnesses DV and DP constitute an issue of fact which has not been substantially addressed by Kayishema. The assessment of evidence is one of the responsibilities of the trial judges who, moreover, are not

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[382] *Ibid.*, para. 133. Kayishema challenges the overall credibility of Witness OO to the extent that he claimed he was the only one who remained up to 17 April, whereas the other witnesses testified that there were no survivors (contradiction with the testimony of Witness W).

[383] *Ibid.*, paras. 127 to 134. The accused does not call into question the presence of the witness at the church but alleges that this witness subsequently formed an opinion on what happened there. He confirmed on the other hand, the statements by the *gendarmes* that they were sent by the *préfet* to protect the refugees. In Kayishema's opinion, the *gendarmes* present protected the refugees from the Hutu assailants. He alleges also that the Trial Chamber discredited the witness (counting of the refugees) but, however, admitted his testimony. Moreover, the inconsistencies between the testimony of Witness OO and Witness V on the time of the attacks were not taken into account by the Chamber, whereas the testimony of this witness was also inconsistent with that of Witness PP regarding the activities of the accused on 15 April (Kayishema's Brief, para. 131). The Trial Chamber, he contends, admitted inconsistencies concerning the occurrence of the events and found that the testimonies were consistent and complementary.

[384] Trial Judgment, para. 404.

[385] *Ibid.*

3681/A bis

bound to respond in detail to each argument or evidence submitted by the parties in proceedings at trial.[387] In light of the general nature of Kayishema's allegations, the Appeals Chamber is unable to make any findings as to the existence of an error of fact in the assessment of the evidence. The Appeals Chamber therefore dismisses Kayishema's arguments.

246. Regarding Witness OO, with respect to whom Kayishema expresses a lot of reservations, the Appeals Chamber notes first of all that the Trial Chamber had ruled on the objections raised by the Defence at trial with regard to the identification of the Accused by Witness OO, which objections were again raised on appeal.[388] The Appeals Chamber also points out that the Trial Chamber stated having "observed the demeanour of the witnesses and listened closely to their oral testimony" to be "satisfied that the eyewitnesses were credible and did not attempt to invent facts".[389] The Trial Chamber further stated that "[D]uring cross-examination , some concerns of obstructed visibility were raised also in the case of OO, because he had placed Kayishema at the site by stating that while he (Witness OO) was lying under the corpses of slaughtered Tutsis, he heard Kayishema speaking with other local authorities". The Trial Chamber therefore found that the identification of the Accused by Witness OO was absolutely credible insofar as "the witness' prior familiarity with the Accused" and the fact of having heard his voice at other meetings would enable him to recognize his voice and render the identification of the Accused a trustworthy one".[390]

247. Consequently, in light of Kayishema's failure to show the unreasonable nature of the Trial Chamber's findings, the Appeals Chamber finds that the allegations with respect to his participation in the massacres perpetrated at the Mubuga site are unfounded.

b. The Attacks at Bisesero[391]

i. Arguments of the parties

248. The Appeals Chamber notes that Kayishema's approach aims at examining the Prosecution witnesses one after the other, "to demonstrate that the said witnesses lack credibility,

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[386] See for example, Trial Judgment, para. 382 and paras. 392 to 403.
[387] *Furundžija* Appeal Judgment, para. 69.
[388] Kayishema's Brief, para. 133.
[389] Trial Judgment, para. 397.
[390] *Ibid.*, para. 397.

given the many discrepancies in their written statements or during their testimony before the Chamber".[392]

249. The Chamber has identified four main arguments advanced by Kayishema in support of the allegation that the Trial Chamber committed errors of fact invalidating the decision or which occasioned a miscarriage of justice:

- Kayishema challenges the credibility of Witnesses OO[393] and NN.[394] He argues that witness OO's explanations are contradictory, which consequently affects his credibility. He submits, on the one hand, that "his assertions are therefore hearsay [which] hearsay itself flows from the fact that the refugees were blaming the authorities for having done nothing" and, on the other hand, that from the distance where he was he could not have seen the events. As regards Witness NN, Kayishema raises "inconsistencies with the progress of the attacks and time they took place in Bisesero".

- Kayishema advances many criticisms regarding the Trial Chamber's assessment of the testimonies of Witnesses CC, HH and W. In fact, he submits that there were many discrepancies in their testimonies which, in his opinion, the Trial Chamber "tried to undermine"[395] or ignored.[396] He submits moreover that these witnesses were unable to situate the attacks in time[397] and in space.[398]

- Kayishema maintains that the Chamber failed to take into account the distortions in the testimonies of Witnesses U and DD[399], which raises doubt as to the presence

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[391] Kayishema's Brief, paras. 146 to 183. In this section, the Appeals Chamber addresses Kayishema's allegations with respect to the "Bisesero site" (paras. 146 to 151), "the attacks at Bisesero" (paras. 152 to 173) as well as "the site at the cave" (paras. 174 to 183) insofar as these allegations refer to the attacks perpetrated at Bisesero.
[392] *Ibid.*, para. 153.
[393] Kayishema's Brief, para. 158.
[394] *Ibid.*, para. 159.
[395] *Ibid.*, para. 174.
[396] *Ibid.*, para. 182 (Kayishema is referring to the issue of determining the identity of the person who lit the fire at the cave).
[397] *Ibid.*, para. 175 (contradictions in the testimonies of W – referring to 6 October 1997, p. 96, and contradictions between the testimonies of Witnesses HH and W – referring to 16 February 1998, p. 97; Appellant's allegations refer to dates of the massacres and not the actual participation of the accused).
[398] *Ibid.*, para. 176 (contradiction between Witnesses HH and W) and para. 177.
[399] *Ibid.*, paras. 148 to 150.

3679/A bis

of Kayishema and his participation in the massacres on Karongi Hill.[400] Kayishema, moreover, holds the view that Witness U cannot be considered a credible witness[401] by the mere fact that his testimony corroborated that of Witness DD who, besides, was not at the site.[402]

- The Appellant points out contradictions in the reasoning of the Trial Chamber as regards Witness FF[403] (paras. 414, 426 and 427 of the Trial Judgment). He particularly criticizes the Trial Chamber for giving credibility to the testimony of this witness, whereas it is impossible, in his view, to recognize a voice through a megaphone.[404]

250. The Appeals Chamber notes that Kayishema submits in piecemeal fashion that the Trial Chamber ignored some information provided by some witnesses, including Witnesses G,[405] DD,[406] AA,[407] QQ,[408] X,[409] UU,[410] EE,[411] and MM,[412] which would have vitiated its decision insofar as these testimonies could have, in his view, raised doubt on his responsibility.

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[400] *Ibid.*, paras. 146 to 151.
[401] *Ibid.*, para. 149. Kayishema submits that Witness U changes his story between the beginning of his testimony and the end.
[402] *Ibid.*, para. 150. Kayishema submits that Witnesses U and DD lack credibility in their testimonies insofar as in his opinion, "it appears that the [Trial] Chamber failed to take into account serious distortions between Witnesses U and DD, which weakens the evidence that Kayishema [...] issued orders and participated in the massacres" (para. 148).
[403] Kayishema's Brief, para. 153. He refers to paras. 426 and 427 of the Judgment which in his view contradicts para. 414. The Defence also submits that it contested the testimony of this witness.
[404] *Ibid.*, para. 155. The Appellant submits that it is impossible to recognize a voice through a megaphone considering its deformation by distance or echo.
[405] *Ibid.*, para. 151. Kayishema submits that the Trial Chamber failed to consider the testimony of G, which according to him, is relevant since it confirmed that there were no soldiers among the assailants at Karongi.
[406] *Ibid.*, para. 160. The Defence submits that it raised several objections against the said witness which the Chamber ignored.
[407] *Ibid.*, para. 161. Kayishema submits that during cross-examination (referring to page 43) this witness did not at any time mention the accused when he was asked to tell who was leading the attacks.
[408] *Ibid.*, para. 161. Kayishema submits that the Chamber failed to mention this witness whereas he testified that he did not see the accused on 13 May, especially since he knew him.
[409] *Ibid.*, para. 161. According to Kayishema, this witness' testimony weakens considerably the testimony of witnesses for the Prosecution and it is probably the reason why it was disallowed (witness called out of some confusion).
[410] *Ibid.*, para. 167.
[411] *Ibid.*, para. 166.
[412] *Ibid.*, para. 168 *bis.*

3678/A bis

ii. Discussion

251. The Appeals Chamber notes that the Trial Chamber was satisfied beyond a reasonable doubt, that Kayishema was properly *identified* by Witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, U, DD and MM, as *having participated* in one or more of the assaults on the Tutsi population.[413] The Trial Chamber also finds that the Accused personally transported the attackers to Bisesero[414] and, particularly, that Kayishema directed the assaults (Muyira Hill[415]), gave instructions to the soldiers (Karongi Hill) or gave orders to the assailants to begin the assault (Bisesero Hill).[416] The Trial Chamber was satisfied beyond reasonable doubt that "there is an abundance of evidence that reveals how Kayishema and Ruzindana participated in the attacks"[417] and that "Kayishema and Ruzindana aided and abetted the killings through orchestration and direction".[418]

252. The Appeals Chamber notes that Kayishema takes issue with the Trial Chamber's assessment of Witnesses G, OO, HH, X, EE, FF, NN, AA, QQ, CC, W, U, DD, UU and MM.

253. Regarding the allegations in respect of Witnesses G, X, EE, AA, QQ, MM and UU, the Appeals Chamber points out the general nature of Kayishema's allegations. The Chamber reiterates its position as regards the allegations of errors of fact and recalls that unless the Appellant shows the unreasonableness of the Chamber's findings and the miscarriage of justice occasioned by the alleged errors, the Appeals Chamber does not find it necessary to review the trial judges' findings established beyond reasonable doubt. The Appeals Chamber therefore holds that there is no cause to examine Kayishema's arguments with respect to the witnesses referred to above and decides to proceed with the analysis of Kayishema's arguments in respect of Witnesses OO, NN, CC, HH, W, FF, U and DD.

254. Regarding Witness OO, the Trial Chamber in its Judgment, addressed the issue of contradictions between his testimony at the hearing and his previous statements and held that "any discrepancy is not a material contradiction".[419] Regarding Witness NN, the Trial Chamber took this witness' testimony into consideration to establish the presence of the Accused among

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[413] Trial Judgment, para. 461.
[414] *Ibid.*, paras. 462 and 463.
[415] *Ibid.*, para. 463.
[416] *Ibid.* para 464.
[417] *Ibid.*, par. 466.
[418] *Ibid.*, para 468.
[419] *Ibid.*, para. 416.

3677/A bis

the assailants[420] and the identification of Kayishema insofar as Witness NN knew the Accused.[421] Moreover, the Trial Chamber relied particularly on these two witnesses to establish, on the one hand, Kayishema's presence and, on the other hand, his actual participation in the acts. The Appeals Chamber finds, after examining Kayishema's arguments, that the allegations are too general and, in its opinion, have failed to show the alleged error of fact. Kayishema has failed to demonstrate the unreasonable nature of the Trial Chamber's findings and, thereby, the alleged error of fact. The Appeals Chamber therefore finds Kayishema's allegations with respect to Witnesses OO and NN unfounded.

255. As regards Witnesses CC, HH and W, the Appeals Chamber notes that the Trial Chamber has actually considered their testimonies in paragraphs 433 and 434 of the Judgment and found that these witnesses confirmed the participation of the Accused in the massacre at the cave. The Trial Chamber noted that the testimony of Witness HH was not completely clear as to whether there were any survivors in the cave[422]and proceeded to examine the objections raised by the Defence with respect to Witnesses CC, W and HH. After a careful review of Witness HH's testimony, the Trial Chamber found that:

> "HH stated that, although the rescuers opened the cave the same evening, they did not find any survivors on that day. HH testified that later one person came out alive. *This conforms with Witness CC's account*" (emphasis added)[423].

The Appeals Chamber finds that the arguments advanced by Kayishema do not make it possible to identify an error of fact. Thus, in the absence of clear proof of the unreasonableness of the Trial Chamber's findings, the Chamber can not rule on the existence of a possible contradiction that may have occasioned the alleged error. The Chamber therefore holds that Kayishema's allegations are unfounded.

256. With respect to Witnesses U and DD, the Trial Chamber actually took into account these witnesses to find beyond reasonable doubt that Kayishema participated in the massacres on Karongi Hill.[424] However, contrary to the Defence's assertions, the Trial Chamber took into account distortions in the testimony of Witness DD in light of his previous statements. The Trial

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[420] *Ibid.*, paras. 422 and 461.
[421] *Ibid.*, para. 455.
[422] *Ibid.*, para. 435.
[423] *Ibid.*, para. 436.
[424] *Ibid.*, paras. 440 to 443.

 3676/A bis

Chamber therefore found that with respect to the discrepancies between the written statement of Witness DD and his testimony before the Chamber, "[T]he doubt raised by this inconsistency, of which the Accused is entitled to the benefit, was not dispelled by the explanation of the witness".[425] With regard to the alleged contradictions between Witnesses U and DD, the Appeals Chamber holds that, given the general nature of Kayishema's arguments, it is unable to make a finding as to the alleged error regarding the identification and participation of Kayishema in the massacres on Karongi Hill. The Chamber therefore dismisses these allegations for lack of merit.

257. Regarding the Defence's difficulty in understanding the Judgment with respect to the Trial Chamber's treatment of Witness FF's testimony,[426] the Appeals Chamber acknowledges that some ambiguity exists on reading paragraphs 414, 426 and 427 of said judgments, considering the general nature of the Trial Chamber's findings with respect to the credibility of this witness.[427]

258. However, the Appeals Chamber recalls that it falls to the Trial Chamber, after actually finding that Witness FF was not wholly credible, to determine if the inconsistencies in his testimony substantially cast doubt on the overall credibility of the witness. This approach, which tallies perfectly with the one previously adopted by the Chamber and explained in paragraph 78 of the Trial Judgment, consists in considering, on a case-by-case basis, the circumstances surrounding the inconsistencies in order to determine whether the explanation by the witness is enough to remove the doubt raised by the alleged inconsistencies. The Appeals Chamber therefore finds, upon reading the Judgment and after examining the general line of reasoning adopted by the Trial Chamber, that the alleged inconsistencies are unfounded, especially as the paragraphs referred to by Kayishema relate to different events. In fact, the testimony of Witness FF in paragraph 414 relates to events which took place on *Bisesero* Hill, whereas paragraphs 426 and 427 refer to the attacks in *Muyira* [the findings in question state: "the Trial Chamber is not satisfied that FF had a clear view of *events* [*Muyira* Hill in May] and deems his evidence unreliable" (emphasis added)]. The Appeals Chamber holds that it is up to the Trial Chamber to decide whether this testimony should be partially or totally discarded from the proceedings, and

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[425] *Ibid.*, para. 443.

[426] Kayishema's Brief, para. 153. Indeed, Kayishema submits that it is difficult to understand the Trial Chamber's findings as regards Witness FF, since FF was considered unreliable in paras. 426 and 427 of the Judgment, but found credible in para. 414 on grounds that his testimony was "uncontroverted".

[427] Trial Judgment, para. 414 ("This Chamber finds this uncontroverted testimony"), and para. 426 ("The Trial Chamber is not satisfied that Witness FF had a clear view of events and deems his evidence unreliable").

3675/A bis

that in the absence of proof of the alleged error, the Appeals Chamber cannot revisit the Trial Chamber's findings which it deems reasonable.

259. Kayishema submits moreover that the identification of the Accused by Witness FF is not credible, insofar as, on the one hand, Witness FF testifies to have recognized Kayishema's voice through a megaphone and, on the other hand, he asserts that he could not identify the Accused, for if he knew him, he would have known that he was not a member of the Red Cross.[428] He further contends that "this is a major discrepancy" in the judgment "which raises an obvious doubt as to the presence of the Accused and as to his recognition through the voice".[429]

260. However, the Appeals Chamber points out that Kayishema gives an erroneous interpretation of Witness FF's testimony. As regards the argument that Witness FF recognized Kayishema's voice, the Appeals Chamber considers that the relevant parts in the transcript of Witness FF's testimony before the Trial Chamber are the following:[430]

> A. [...] we saw Kayishema, Ruzindana and Mika came to that spot. They had a megaphone which they used, they said that peace had returned,[...]
>
> Q. You said that, they came, they were speaking in a microphone or a megaphone. Now, who was speaking?
>
> A. It was Mika, who was using the megaphone.

Consequently, contrary to what Kayishema asserts, the identification of the Accused is not based on Witness FF's recognition of Kayishema's voice, but on the fact that Witness FF saw Kayishema, Ruzindana and Mika arrive on Bisesero Hill and that he observed the events. The Trial Chamber states in this respect, precisely in paragraph 414 of the Judgment, that regarding the Bisesero Hill:

> 414. Witness FF saw Kayishema, Ruzindana and Mika Muhimana, the *Conseiller* of the Gishyita sector, arriving at Bisesero in a white vehicle on 11 May. Kayishema was wearing a green shirt and carrying a megaphone [...]. *Mika said through a megaphone that they were working for the Red Cross and that peace had returned* [...]. Witness FF

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[428] Kayishema's Brief, paras. 154 and 155. Indeed, Kayishema submits that: "[...] this Witness [FF] later claims that at the time of the attacks, Kayishema gave the impression that he was coming to help or called the Red Cross to help in order to attract the refugees on Muyira Hill. If this Witness indeed knew the accused, he would have known that Kayishema was not a member of the Red Cross. *.This witness, like many others, testified that Kayishema was carrying a megaphone, in a bid to underscore the fact that he heard him giving orders.[...]* Moreover, *some witnesses stated that it was not Kayishema but somebody else called "Mika" who carried the megaphone"* (Emphasis added).

[429] *Ibid.*, para. 155.

[430] T., 17 November 1997, pp. 28-33 (FF's testimony in respect of the events which took place on Bisesero Hill).

3674/A
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observed these events from a distance of approximately ten metres. This Chamber finds this uncontroverted testimony (emphasis added).

261. Regarding the argument that Witness FF could not have known the Accused, and therefore identify him, for if he knew him, he would have known that Kayishema was not a member of the Red Cross, the Appeals Chamber notes, once again, the Defence's erroneous interpretation of Witness FF's testimony at trial. In fact, Witness FF did not testify that Kayishema stated he was working for the Red Cross, but that Mika "who was using a megaphone" said that "*they* were men of the Red Cross"[431] (emphasis added).

262. Consequently, the Chamber finds that the Trial Chamber's assessment of Witness FF is not erroneous and that Kayishema's allegations in this respect are unfounded.

c. The Catholic church and Home Saint-Jean[432]

i. Arguments of the Parties

263. The Defence submits that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice by considering Witnesses A,[433] B,[434] C,[435] D,[436] E[437] and F[438] to be credible for its finding that the accused was present at the site.[439] Kayishema also raises the issue of discrepancies in the testimonies[440] (more specifically in the testimonies of Witnesses A and D, and between these two testimonies[441]), as well as the resolve of the Chamber to disregard the objections raised by the Defence[442] and the testimonies raising doubt as to the guilt of Kayishema (T and Haglund).[443]

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[431] T., 17 November 1997, p. 30.
[432] Kayishema's Brief, paras. 184-206.
[433] *Ibid.*, para. 190.
[434] *Ibid.*, para. 200.
[435] *Ibid*, para. 201.
[436] *Ibid.*, para. 194.
[437] *Ibid.*, para. 198.
[438] *Ibid.*, para. 199.
[439] *Ibid.*, para. 185.
[440] Ibid, para. 188.
[441] *Ibid.*, paras. 190-194.
[442] *Ibid.*, para. 197.
[443] *Ibid.*, paras. 202 and 206. Witness T testified that there was total lack of control by the authorities. Regarding the Haglund Report, the latter confirmed the Appellant's view that the gendarmes did not participate in the killings as alleged.

3673/A
bis

ii. Discussion

264. The Appeals Chamber notes that the Trial Chamber relied on the testimonies of Witnesses A, B, C, D, E, F, G and T[444] in finding beyond reasonable doubt that Kayishema actually participated in the massacres perpetrated at this site (issuing orders to the assailants and personally participating in the massacres).

265. Kayishema challenges the Trial Chamber's assessment of the testimonies of Witnesses A, B, C, D, E, F, T and the Haglund Report. The Appeals Chamber notes, nonetheless, that Kayishema's allegations with respect to Witnesses T and Haglund have no bearing on Kayishema's challenge to his actual participation in the massacres. Indeed, inasmuch as Kayishema alleges that the Trial Chamber failed to consider certain aspects of their testimonies with respect to the victims, as well as the general context at the time, the Appeals Chamber finds that the general arguments advanced by the Defence are misplaced.

266. With respect to Witnesses A, B, C, D, E and F, Kayishema merely impugns generally their credibility while alleging that the Appeals Chamber failed to carefully consider the request to reject the witnesses the Defence did not consider to be credible.[445] The Appeals Chamber therefore holds that such submissions are too general and do not enable it to identify the material arguments that would cast doubt on the reasonable nature of the Trial Chamber's findings with respect to the actual participation of the accused. Consequently, the Appeals Chamber finds that the arguments are unfounded.

267. With respect to the alleged contradictions in the testimonies of Witnesses A and D, the Appeals Chamber underscores that the Trial Chamber considered the issue of the credibility of Witness A in paragraph 337 of the Judgment, where it held that:

> "This Chamber finds that although witness A's testimony may have lacked certain details, his testimony regarding Kayishema's presence and participation, on the whole, is credible. Moreover, witness A's description of Kayishema's attire and the weapon he carried conforms to the testimony of other witnesses, such as B, C and D. Further, witness A's identification of Kayishema is strengthened because he knew Kayishema prior to the events."

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[444] Trial Judgment, para. 346.
[445] Kayishema's Brief, para. 197.

 3672/A bis

As regards the allegations of inconsistencies in Witness A's testimony in relation to his previous statements,[446] the Appeals Chamber underscores, on reading the transcripts of the hearings,[447] that although this witness appears to have testified on facts that were challenged by the Defence,[448] the Trial Chamber succeeded in making its findings, beyond reasonable doubt, based on a multiplicity of testimonies (A, B, C, D, E, F, G and T). Moreover, the Appeals Chamber is of the view that Kayishema failed to adequately justify the need to reconsider the findings of Trial Chamber on this point and recalls that the Trial Chamber cannot be expected to provide a detailed answer to every argument presented by the parties at Trial.[449] In the absence of proof of the alleged error, the Appeals Chamber finds that it is not necessary to revisit the findings of the Trial Chamber.

268. As regards the alleged inconsistencies with respect to Witness D,[450] the Appeals Chamber holds that the Trial Chamber did not commit an error of fact in finding Witnesses A and D to be credible, as their testimonies could be relied on in establishing that Kayishema did participate in the massacres at the church and at Home St.-Jean. Indeed, with regard to inconsistencies in the testimonies (A and D), the Trial Chamber generally found that "minor discrepancies between witnesses did not raise a reasonable doubt as to the issue of Kayishema's participation".[451] In the absence of proof by Kayishema showing that the Trial Chamber's findings were unreasonable, the Appeals Chamber does not deem it necessary to reconsider the Trial Chamber's Decision.

269. Regarding the Trial Chamber's failure to take into account the objections raised by the Defence, the Appeals Chamber wishes to point out that the Trial Chamber actually considered the Defence's objections[452] in order to find that "the witnesses' testimonies proved, beyond a reasonable doubt, that Kayishema was present at and participated in the 17 April 1994 massacres

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[446] *Ibid.*, paras. 192 and 193 (inconsistencies between the witness testimony and his previous statements to the investigators in which he allegedly stated that a young man who was lying on top of him was cut with a sword by Kayishema, whereas during cross-examination, he stated that it was a baby on top of him).
[447] T., 15 and 16 April 1997.
[448] See, for example, T., 15 and 16 April 1997 *et seq.*, particularly with respect to the facts relating to the snatching of a child from its mother's arms (see also p. 110 *et seq.*) and pp. 44, 45, 52 *et seq.* regarding the witness' testimony in relation to the person lying on top of him who was cut with a sword.
[449] *Furundžija* Appeal Judgment, para. 69.
[450] Kayishema's Brief, para. 194. Kayishema argues that the testimonies of Witnesses A and D are contradictory regarding his snatching of a child from its mother's arms.
[451] Trial Judgment, para. 345.
[452] *Ibid.*, paras. 337 to 343.

3671/A
bis

at the Complex."[453] As the Defence has failed to demonstrate that the Trial Chamber's findings are erroneous, the Appeals Chamber holds that its arguments are unfounded.

270. Moreover, the Appeals Chamber notes that the Trial Chamber ruled on the Defence's more general objections in relation to this site and found that the Defence "failed to controvert the credibility of these witnesses or the reliability of the evidence on fundamental issues, in particular the identification of Kayishema during the attack".[454]

271. The Appeals Chamber therefore finds that Kayishema has failed to demonstrate the alleged error of the Trial Chamber as regards his actual participation in the massacres at the church and at Home St.-Jean, and consequently dismisses the allegations in relation to this site.

d. Kibuye Stadium[455]

i. Arguments of the Parties

272. Kayishema submits that the Trial Chamber committed errors of fact inasmuch as it accepted the testimonies of certain witnesses, although such testimonies were not found to be credible.[456] Moreover, he contends that the identification of the accused by the witnesses is not reliable.[457]

273. Kayishema alleges that the Trial Chamber, on the one hand, failed to consider the testimonies of crucial witnesses (Witnesses O and W)[458] and, on the other hand, accepted the testimonies of Witnesses I,[459] M,[460] K[461] and L[462] that the Defence does not consider reliable and, in certain cases, challenged the reliability of the testimonies[463] (Witnesses I and M).

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[453] *Ibid.*, para. 344.
[454] *Ibid.*, para. 345.
[455] Kayishema's Brief, paras. 207 to 229.
[456] *Ibid.*, para. 210.
[457] *Ibid.*, para. 214 and (for Witness L) para. 226.
[458] *Ibid.*, paras. 215, 216 (Witness O exculpates the accused) and 228 (Witness W is not reliable).
[459] *Ibid.*, para. 217. The Defence argues that the Trial Chamber considered Witness I the bedrock of its decision whereas in the Defence's opinion, he is "one of the most unreliable witnesses".
[460] *Ibid.*, paras. 218 and 219. The Defence argues that the Trial Chamber should have taken into account the inconsistencies in Witness M's testimony regarding the make of Kayishema's vehicle and the unreliability of his testimony in relation to Kayishema's alleged acts during the massacres.
[461] *Ibid.*, para. 224. The Defence challenges the overall credibility of Witness K.
[462] *Ibid.*, paras. 225 and 226. The Appellant challenges the credibility of Witness L who, although he testified to having seen the Appellant at the site, was subsequently unable to identify the accused at the hearing.
[463] *Ibid.*, paras. 217 (Witness I) and 218 (Witness M).

367.0/A
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Consequently, Kayishema submits that, "[I]n light of the above, the Chamber has committed errors of fact occasioning a miscarriage of justice under Article 24 of the Statute."[464]

ii. Discussion

274. The Appeals Chamber underscores that the Trial Chamber relied on the testimonies of Witnesses I, K, L and M in establishing beyond a reasonable doubt that Kayishema actually participated in the massacres in Kibuye stadium.[465] Indeed, the Trial Chamber found "the evidence of Kayishema's identification and participation convincing"[466] and consequently was satisfied beyond a reasonable doubt that on 18 April 1994, "Kayishema went to the Stadium and ordered members of the *gendarmerie nationale*, communal police and members of the *Interahamwe* to attack the Stadium".[467]

275. With respect to Kayishema's allegations that the Trial Chamber committed an error by accepting the testimonies of Witnesses K, L and M, deemed unreliable by the Defence, the Appeals Chamber is of the view that said allegations are apparently unfounded or of little moment considering the Trial Chamber's findings as regards Kayishema's responsibility in the massacres perpetrated at this site.[468] Indeed, the Appeals Chamber holds that the Trial Chamber established, in light of the above testimonies, that Kayishema was present at the Stadium on 18 April 1994 during the first massacre, and also that he effectively participated by giving orders to the attackers and by personally committing the crimes. After hearing Witnesses K, L and M, the Trial Chamber found that:

> "When considered together, the witness testimony shows that Kayishema first ordered the gendarmes to fire on the Tutsis and then grabbed a gun and personally fired twice into the Stadium, apparently to lead and set an example to start the massacre."[469]

As Kayishema has failed to cast a reasonable doubt on the assessment of the evidence presented before the Trial Chamber, the Appeals Chamber finds the Defence arguments unfounded.

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[464] *Ibid.*, para. 229.
[465] Trial Judgment, para. 371 *et seq.*
[466] *Ibid.*, para. 375.
[467] *Ibid.*, para. 376.
[468] See for example Trial Judgment, paras. 362 to 365.
[469] Trial Judgment, para. 364 (See also para. 375 regarding Witness L's credibility).

3669/A bis

276. With respect more specifically to the lack of credibility of Witness I, whom Kayishema considers the most unreliable due to inconsistencies in his testimony, the Appeals Chamber finds, on the one hand, that Kayishema has failed to demonstrate the alleged inconsistencies and, on the other hand, that the allegations are general. The Trial Chamber considered the credibility of the said witness[470] and accepted his testimony.[471] The Appeals Chamber is therefore of the opinion that Kayishema has failed to show the alleged error.

277. As regards Kayishema's allegation concerning the treatment of the objections raised by the Defence with respect to Witnesses I and M, the Chamber notes that, contrary to Kayishema's assertion, the Trial Chamber considered said objections. After analyzing Witness I's testimony and the inconsistencies pointed out by the Defence, the Trial Chamber found that his testimony that Kayishema fired two gunshots and that the two shots struck two refugees in the Stadium was relevant.[472] Indeed, the Trial Chamber found Witness I's testimony all the more pertinent as it was corroborated by Witness M. Moreover, the Appeals Chamber states that it falls to the trial judge to rule on the merits of the Defence objections and that as Kayishema has failed to show that the Trial Chamber's findings are unreasonable, the Appeals Chamber finds this allegation unfounded.

278. As regards the allegations that the Trial Chamber completely failed to consider the testimonies of Witnesses O and W,[473] the Appeals Chamber finds said allegations irrelevant in light of Kayishema's main ground, which challenges the Trial Chamber's assessment of the evidence of his actual participation in the massacres at the Stadium. Indeed, the Appeals Chamber notes that Kayishema's allegations with respect to Witness O directly relate to the question of the accused's intent, that has been dealt with in the preceding section, and that Witness W's testimony raises facts that are not directly related to the issue of the accused's actual participation.[474] The Chamber is therefore of the opinion that it is not necessary to review the evidence of those witnesses.

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[470] *Ibid.*, paras. 358 to 361.
[471] *Ibid.*, paras. 361, 371 and 375.
[472] *Ibid.*, para. 361.
[473] Kayishema's Brief, paras. 216 and 228.
[474] *Ibid.*, para. 228. Kayishema asserts that the witness is not credible as he allegedly testified that while at Gatwaro Stadium, he saw some authorities, including Bagosora, which, according to Kayishema, is a patent untruth.

c. Conclusion on Kayishema's responsibility under Article 6(1)

279. Accordingly, the Appeals Chamber dismisses Kayishema's third ground of appeal with respect to the *préfet*'s individual responsibility.[475]

3. Kayishema's responsibility under Article 6(3)

280. Kayishema submits that the Trial Chamber committed errors of fact and of law that invalidate the decision and occasion a miscarriage of justice (Grounds 2 and 3) in its assessment of the *préfet*'s status and powers.

281. It is Kayishema's core contention that the Chamber erred when it found, as ground for the accused's responsibility under Article 6(3), that the various entities present during the massacres were the *préfet*'s subordinates. The Appellant thus sets out to show that, given his status and powers, the *préfet* could not reasonably be held responsible for the reprehensible acts of the assailants, pursuant to Article 6 (3), and therefore could neither prevent nor punish the purported perpetrators of the massacres, considered by the Trial Chamber to have acted under his authority.

282. The Appeals Chamber observes that the Appellant therefore not only seems to call into question the findings of the Trial Chamber regarding the *préfet*'s *de jure* authority, but also attempts to show that, since the *préfet* had no *de jur*e authority, he could not in fact, and worse still, in the Rwandan context of 1994, exercise any such authority.

(i) Interpretation of the concept of subordinate

a. Arguments of the Parties

283. In his Appellant's Brief, Kayishema mainly raises the issue of the Trial Chamber's assessment of Kayishema's position as hierarchical superior over the various groups of assailants. In substance, he asserts that whatever the powers of the *préfet* were, the context of the time reduced them *de facto* to nothing.

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[475] Considering the fact that the Appeals Chamber finds the Prosecutor's Brief in Response inadmissible, and that, consequently, Kayishema's Brief in Reply will not be considered, the Appeals Chamber nonetheless holds that even if the additional issues raised in Kayishema's Brief in Reply were considered, that would not affect its findings.

3667/A bis

284. The Defence attempts to show that an analysis of the relevant statutory instruments[476] could lead to the conclusion that, given the Rwandan context of the time, the accused, as a *préfet*, had no subordinate.[477] The Defence submits that political changes which occurred as from 1992 caused considerable disruption in the *préfet*'s overall situation[478] in the sense that the hierarchical link with the decentralized services was already cut down[479] and, on the other hand, that the relation between the *préfets* and the *bourgmestres* in the context of 1994 implied a form of tutelage (monitoring of lawfulness) and not a hierarchical power structure.[480]

285. Relying on Professor Guibal's testimony,[481] the Defence argues that "*préfets* [were] in a position of great theoretical power and in a situation of real practical weakness",[482] which therefore rendered 'those civil servants legally impotent'". Kayishema thus contends that the Trial Chamber "artificially creat[ed] a powerful *préfet*",[483] which, according to him, constitutes an error of law.

286. As concerns the powers of the *préfet*, the Defence examined consecutively the powers of the *préfet* in general, and then his powers over the *bourgmestre*, the communal police, and the *gendarmerie*.

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[476] Kayishema's Brief, paras. 233 to 245.

[477] *Ibid.*, paras. 231 to 233*bis*.

[478] *Ibid.*, para. 233. Kayishema contends that the applicable statutory instruments were promulgated during the period of single party politics and that the crimes he is charged with occurred during the period of multiparty politics; according to him, "Kayishema neither had the authority on paper (*de jure*) nor effectively in concrete terms (*de facto*)." The Appellant thus cites the testimony of Professor Guibal, who testified on the legal situation in the country (paras. 235 to 245) and who mainly holds the view that the advent of multiparty politics, which was even worsened in 1994 (Kayishema avers that as from 1994 multipartyism became a "crisis") caused a decline in the *Préfet's* status and function" (para. 237).

[479] *Ibid.*, para. 236.2. It should be noted that the Appellant contends that the statutory instruments in force in Rwanda provided for "a highly centralized administrative system, run on the basis of organic and functional devolution and, in exceptional cases, some decentralization. According to Professor Guibal, there are two main consequences of the introduction of multiparty politics (para. 245): (1) the statutory position of the *Préfet* is weakened inasmuch as he no longer depends on a purely administrative hierarchy; (2) there is a dilution of his responsibilities and a decrease in his powers .

[480] *Ibid.*, para. 238.

[481] T (A), 30 October 2000, p. 45. During the hearing on appeal, Kayishema puts forward new arguments relating to the Chamber's assessment of the Guibal report. Thus, he advances three criticisms against the Tribunal concerning its treatment of Witness Guibal. In his view, the judges did not fully take into account that testimony on the grounds that: (1) Professor Guibal was a Frenchman and therefore did not qualify to testify on the status of the *Préfet*; (2) Professor Guibal's testimony was very theoretical; and (3) that the situation at the time required concrete analysis and the Chamber only gave priority to what could prove Kayishema's culpability.

[482] Kayishema's Brief, para. 240.

[483] *Ibid.*, paras. 90*bis* and 90*ter* (incorrectly numbered, and placed after para. 245).

3666/A bis

287. Kayishema proceeds with an analysis of legal provisions to show the *préfet*'s lack of power, making it impossible for him to assert himself within the context of 1994.[484] He reiterates the argument that the legal provisions organizing the administrative functioning of the *préfecture*, which remained in force in 1994, were totally ill-adapted to multiparty politics established in 1994,[485] to show that it is impossible to establish any direct link between the *préfet* and the crimes charged. The Defence thus submits that, since Kayishema was not a "camp commander or commander of a warring group", he was not responsible for "the victims for which he is being held to account".[486]

288. As concerns the *préfet's* power over the *bourgmestre*[487] and therefore over the communal police,[488] Kayishema once again invokes legal provisions to show the non-existence of hierarchical powers of the *préfet* over mayors, contrary to the findings of the Chamber which, in his view, erred in law.[489] According to him, the *préfet* certainly has hierarchical power over the *bourgmestre* but this is absolutely not the power of a superior over his subordinate, for he contends, "hierarchy does not mean subordination".[490] Kayishema submits, therefore, that the notion of hierarchy does not include that of superiority.

289. As for the communal police, Kayishema contends that "the very basis of the decision rendered is undermined", for according to him, the Trial Chamber "undertook a succinct examination[491] of the 1991 constitution and of the Arusha Accords".[492] He argues that the legal instruments do not allow for the conclusion that the *préfet* has indirect authority over the communal police through the *bourgmestre*.[493] After an analysis of the relevant legal provisions (in particular, Article 104), Kayishema concludes that the *préfet* can only requisition the communal police in case of "public disasters and disturbances". He therefore contends that the communal

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[484] *Ibid.*, paras. 246 to 257*bis*.
[485] *Ibid.*, paras. 246 to 248. According to him, "all these provisions, promulgated at the time of single party rule, remained in force under multipartyism but obviously totally ill adapted to the latter" (para. 248).
[486] *Ibid.*, para. 252.
[487] *Ibid.*, paras. 258 to 270.
[488] *Ibid.*, paras. 271 to 275 *et seq.* (it should be noted that the Appellant wrongly numbered paras. 259*bis* and *ter* on pp. 72 and 73 of his Brief).
[489] *Ibid.*, para. 265. He argues that the *préfet* has neither coercive nor supervisory power over the *bourgmestre* because the *bourgmestre* is free and independent. He attempts to show that the *préfet* has only hierarchical authority, which is equivalent to administrative supervision.
[490] *Ibid.*, para. 266.
[491] *Ibid.*, para. 259*bis*, following para. 275 on p. 72. Kayishema is referring to p. 16 of the Trial Judgment.
[492] *Idem.*
[493] *Ibid.*, para. 271.

3665/A
bis

police could not effectively intervene in the 1994 events. Legally, the *préfet* can certainly ask the communal police to intervene, but Kayishema denies the existence of any hierarchical authority. Moreover, Kayishema avers that "the concept of indirect subordination is a construction which does not exist in law",[494] that "authority is direct or it is not, and responsibility is never indirect; it either is or is not".[495]

290. Lastly, Kayishema disagrees with the Trial Chamber for having misconstrued the *préfet*'s[496] power of requisition, that is, the relationship between the *gendarmes* and the *préfet*. In this section, Kayishema also carries out an analysis of the relevant legal provisions to show that the *préfet* is not the hierarchical superior of the *gendarmes*[497] since "the legislation requires mutual cooperation".[498] Kayishema further submits that a requisition does not give the *préfet* any coercive power since, on the one hand, the latter must justify his request and, on the other hand, the request may be turned down.[499]

291. Kayishema asserts that "it must first be demonstrated that Kayishema had *de jure* authority and that, at the time, he had a *de facto* authority to be able to exercise his authority."[500] Consequently, the Defence concludes, "if no *de jure* authority exists, there is no subordinate and, therefore, no *de facto* authority".[501]

292. During the hearing on appeal, the Prosecution contended that the grounds of appeal raised by the Appellant were factual grounds,[502] and that the Defence did not provide evidence to show that the accused had no power over the various groups of attackers. The Prosecution asserts that Kayishema exercised effective authority and control over his subordinates. It concludes that the Trial Chamber has already adjudicated reasonably on the arguments, which arguments it does not

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[494] *Ibid.*, para. 275.
[495] T(A), pp. 68 and 69.
[496] Kayishema's Brief, paras. 276 to 291.
[497] *Ibid.*, para. 283.
[498] *Ibid.*, para. 282. He argues that the exceptional nature of the requisition and the attendant cumbrous procedure show that the *préfet,* who is forced to legitimate the measures requested, cannot be considered as a superior, since he does not have to "give orders in a formal way, failing which they are not followed". (Kayishema's Brief, para. 279)
[499] *Ibid.*, para. 280. Moreover, he recalls (para. 289) that the Bourgmestre could directly request the Commanding Officer of the Rwandan Armed Forces to intervene in the interest of public order. In this respect, he concludes that there is no hierarchy between the *préfet* and the *bourgmestre.* Hence, he asserts that "the Tribunal confused the concepts of disturbances, disaster and public order", since each of them requires a constitutionally different and appropriate response.
[500] T(A), p. 218.
[501] *Ibid.*, p. 219.
[502] *Ibid.*, p. 159.

consider convincing.[503] The Prosecution contends, referring to "a well-established principle: [that] the absence of *de jure* authority does not prevent a finding of *de facto* authority".[504] The Prosecution is of the view that the arguments presented by the Defence were not convincing and further asserts that said arguments had been adjudicated upon by the Trial Chamber. It argues that the fact that the *bourgmestre* was legally responsible in Rwanda does not mean that the *préfet* does not have *de facto* authority.[505] The Prosecution further argues that, even if the Appeals Chamber decided to come back on the fact that Kayishema had no *de jure* authority over the *bourgmestre*, the communal police and the *gendarmes*, the fact remains that he was indeed in a position of authority, which gave him *de facto* power. Accordingly, the Prosecution submits that "[...] no good cause has been shown on appeal to justify a re-examination of the factual findings of the Trial Chamber".[506]

(ii) Discussion

293. Kayishema alleges both legal and factual errors in the findings of the Trial Chamber with respect to his *de jure* authority over his subordinates. The Appeals Chamber understands his main argument to be that unless there is *de jure* authority there cannot be criminal responsibility under Article 6(3) of the Statute.[507] Kayishema appears to be contesting whether a *de facto* status can be determined without first establishing the *de jure* status.

294. Article 6(3) of the Statute on "Individual criminal responsibility", provides that:

> The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

With respect to the nature of the superior-subordinate relationship, the Appeals Chamber refers to the relevant principles expressed in the *Čelebići* Appeal Judgment in relation to the identical provision in Article 7(3) of ICTY Statute, as follows:

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[503] T(A), 30 October 2000, p. 161.
[504] *Idem.*
[505] T(A), 30 October, p. 161.
[506] *Ibid.*, p. 165.
[507] *Ibid.*, p. 219 ("Therefore, if there was no *de jure* authority, then there can be no subordinate and, therefore, there can be no *de facto* authority.")

3663/A bis

> (i) [A] superior is "one who possesses the power or authority in *either* a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed".[508] Thus, "[t]he power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment."[509]
>
> (ii) "In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles. [...]. In general the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. [T]he ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility and [...] the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met."[510]
>
> (iii) "The showing of effective control is required in cases involving both *de jure* and *de facto* superiors."[511]

This Appeals Chamber accepts these statements and notes that the Trial Chamber, in its Judgment, applied a similar approach when it found that:

> [E]ven where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, as we shall examine below, the mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation.[512]

Thus, "as long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control".[513] Therefore, Kayishema's argument that without *de jure* authority, there can be no subordinate and hence, no *de facto* authority, is misconceived. This question turns on whether the superior had effective control over the persons committing the alleged crimes. The existence of effective control may be related to the question whether the accused had *de jure* authority. However, it need not be; such control or authority can have a *de facto* or a *de jure* character.[514]

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[508] *Čelebići* Appeal Judgment, para. 192.
[509] *Ibid.*, para. 193.
[510] *Ibid.*, para. 197.
[511] *Ibid.*, para. 196.
[512] Trial Judgment, para. 491.
[513] *Čelebići* Appeal Judgment, para. 198.
[514] *Čelebići* Trial Judgment, para. 378, referred to and agreed with in the *Čelebići* Appeal Judgment, para. 196.

3662/A
b11

295. As to the remainder of Kayishema's arguments, the Appeals Chamber is of the view that they concern the allegation of an error on the part of the Trial Chamber in its evaluation of the evidence regarding the existence of *de jure* authority. This poses a question of fact and, in respect of a factual error, the Appeals Chamber recalls that the relevant "test" is that of reasonableness. Thus, "[i]t 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."[515] In paragraphs 479 – 516 of the Trial Judgment, a thorough analysis of the evidence led the Trial Chamber to conclude that Kayishema exercised clear, definitive control, both *de jure* and *de facto,* over the assailants at every massacre site set out in the indictment. Kayishema, who now disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.

296. The Appeals Chamber notes that during the closing arguments at trial, Counsel for Kayishema had argued to the effect that Kayishema did not enjoy *de jure* control over the appropriate administrative bodies and law enforcement agencies.[516] On appeal, he repeats these arguments both in the Kayishema Brief and during the hearing on appeal.

297. Kayishema argues that the Trial Chamber erred in its assessment of the testimony of Professor Guibal with respect to "crisis multi-partyism", the exceptional climate that reigned in 1994 and their effect on the existing legal texts on which the function and powers of the *préfet* were based. Having considered the testimony of Professor Guibal as confirming the *de jure* power of the *préfet,*[517] the Trial Chamber went on to consider the conclusion of Professor Guibal's testimony to the effect that such power was "emptied of any real meaning when the ministers, the ultimate hierarchical superiors to the police, *gendarmes* and army, were of a different political persuasion."[518] This conclusion led the Trial Chamber to find that:

> [S]uch assertions clearly highlight the need to consider the *de facto* powers of the Prefect between April and July 1994. Such an examination will be conducted below. However, the delineation of power on party political grounds, whilst perhaps theoretically sound, should only be considered in light of the Trial Chambers findings that the administrative bodies, law enforcement agencies, and even armed civilians were engaged together in a

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[515] *Tadić* Appeal Judgment, para. 64. See also *Aleksovski* Appeal Judgment, para. 63; *Furund`ijaž* Appeal Judgment, para. 37.
[516] Trial Judgment, para. 477; see also T, 3 November 1998 and 4 November 1998.
[517] *Ibid.*, paras. 484 – 485.
[518] *Ibid.*, para. 486.

3661/A bis

> common genocidal plan. The focus in these months was upon a unified, common intention to destroy the ethnic Tutsi population. Therefore, the question of political rivalries must have been, if it was at all salient, a secondary consideration.[519]

The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in its assessment of the testimony of Professor Guibal. The Trial Chamber adequately considered such testimony with respect to the events occurring at the material period and, hence, reasonably concluded that possession of *de jure* power would not suffice in the circumstances for the determination of effective control.

298. Kayishema submits that the *de jure* relationship between the *préfet* and *bourgmestre* (i.e. the hierarchical powers) under Rwandan law cannot be construed as one of a superior and a subordinate. Kayishema further relies on an analysis of the relevant legal text to claim, (i) that the *préfet* does not exercise an indirect *de jure* authority[520] over the communal police and (ii) that the *préfet*'s restricted powers of requisition over the *gendarmerie* refute a finding of *de jure* authority over the same. He submits that these arguments show that the Trial Chamber erred in ascribing criminal responsibility to Kayishema under Article 6(3) of the Statute. The Appeals Chamber notes that Kayishema's arguments are entirely premised on his main assertion that a finding of *de jure* authority is required for criminal responsibility under Article 6(3) of the Statute. As the Appeals Chamber has considered above that the argument is misplaced, it will not address Kayishema's arguments but, rather, it will briefly consider whether the Trial Chamber reasonably concluded that he exercised effective control over the assailants.

299. In the case of the *bourgmestre,* the Trial Chamber looked at the following factors (both *de jure* and *de facto*) to establish that Kayishema exercised effective authority: the legislative provisions of two Rwandan Statutes,[521] the actions of Kayishema himself showing the continued subordination of the *bourgmestres* to his *de jure* authority;[522] Kayishema's own evidence on his relationship with the *bourgmestre* of Gishyita *commune* indicating the importance of his presence at a scene and evidencing that the *préfet* was a "well-known, respected and esteemed figure

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[519] *Ibid.*, para. 487.

[520] It is relevant to note that the *Čelebići* Appeal Judgment (para. 254), has found that, "[...] references to concepts of subordination, hierarchy and chains of command [...] need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordination, in the sense of preventing or punishing criminal conduct, is satisfied.", see also *Kordić* Trial Judgment (para. 408), interpreting this statement from the *Čelebići* Appeal Judgment to the effect that, "the relationship of subordination may be direct or indirect".

[521] Trial Judgment, para. 481.

[522] *Ibid.*, para. 488.

3660/A
bis

within his community"[523]. Similarly, Kayishema was also found to have effective control over the communal police and the *gendarmerie*, as evidenced by legislative provisions,[524] and the actual control he wielded over all the assailants including the *gendarmes*, soldiers, prison wardens, armed civilians and members of the *Interahamwe* as demonstrated by the identification of Kayishema as leading, directing, ordering, instructing, rewarding and transporting them to carry out the attacks.[525] The Trial Chamber found that the facts of the case established that Kayishema exercised *de facto* control over all of the assailants.[526] At paragraph 504 of the Trial Judgment it was stated that:

> All of the factual findings need not be recounted here. These examples are indicative of the pivotal role that Kayishema played in leading the execution of the massacres. It is clear that for all crime sites denoted in the Indictment, Kayishema had *de jure* authority over most of the assailants, and *de facto* control of them all.

The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that Kayishema exercised effective control through its consideration of the *de jure* and *de facto* status of the authority enjoyed by him. Kayishema has sought to challenge the findings of the Trial Chamber with respect to command responsibility under Article 6(3) of the Statute, exclusively through an allegation of error in its findings of his *de jure* authority. Consequently, the Appeals Chamber finds that Kayishema has not shown that the Trial Chamber's findings with regard to his effective control were unreasonable so as to result in a miscarriage of justice.

(b) The issue of the *préfet*'s power to punish and prevent crime

(i) Arguments of the parties

300. Kayishema maintains that, given the prevailing context at the time, it emerges clearly that he could neither prevent the crimes committed in Kibuye *préfecture* nor punish the perpetrators thereof.[527] To this effect, he recalls the findings of Professor Guibal, who holds the opinion that

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[523] *Ibid.*, para. 499, the Trial Chamber had considered that the theoretical underpinning proffered by Professor Guibal did not reflect the reality that was found in Rwanda.
[524] Trial Judgment, paras. 482-483.
[525] *Ibid.*, paras. 501-503.
[526] *Ibid.*, para. 501; *see also* para. 476 ("*bourgmestres* and other members of the administration, *gendarmes*, soldiers, communal police, prison wardens, members of the *Interahamwe* and armed civilians were identified at the massacre sites and the Trial Chamber had found that they participated on the atrocities at these cites").
[527] Kayishema's Brief, para. 257.

3659/A bis

"the powers of administrative policing and of direct penalization of the *préfet* [...] were reduced and, in some cases, even disappeared".[528]

301. Kayishema recognizes that Article 10 of the legislative decree of 11 March 1975 provides that the *préfet*, in some cases, "could have a power which could be qualified as judicial since he may prosecute and punish".[529] But that provision cannot be relied upon as a ground for the responsibility of the accused under Article 6 (3). The Defence holds the view that Kayishema could neither control, contain, prevent nor even punish the assailants since he had neither the authority nor the necessary means to do so.[530]

(ii) Discussion

302. The Appeals Chamber notes that, in substance, Kayishema alleges a lack of means to prevent or punish, based on a similar argument of lack of *de jure* authority and, hence, an absence of *de facto* means, in the light of the circumstances of the material period. His submissions on this point are set out in general terms.

Article 6 (3) of the Statute establishes a duty to prevent a crime that a subordinate was about to commit or to punish such a crime after it is committed, by taking "necessary and reasonable measures". The Appeals Chamber recalls that the interpretation of "necessary and reasonable measures" has been considered in previous cases before ICTY. The *Čelebići* Trial Judgment found that:

> [A] superior should be held responsible for failing to take such *measures that are within his material possibility*... [T]he lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior".[531]

The Appeals Chamber agrees with this interpretation and further notes that the Trial Chamber applied a similar approach when it found that:

> In order to establish responsibility of a superior under Article 6 (3), it must also be shown that the accused was in a position to prevent or, alternatively, punish the subordinate perpetrators of those crimes. Clearly, the Trial Chamber cannot demand the

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[528] *Ibid.*, para. 238.
[529] *Ibid.*, para. 247.
[530] *Ibid.*, paras. 251-256.
[531] *Čelebići* Trial Judgment, para. 395.

3658/A
bis

> impossible. Thus, *any imposition of responsibility must be based upon a material ability of the accused to prevent or punish* the crimes in question.[532]

Thus, it is the effective capacity of the Accused to take measures which is relevant. Accordingly, in the assessment of whether a superior failed to act, it is necessary to look beyond formal competence to actual capacity to take measures. Kayishema's argument that he lacked the means to prevent or punish crime in the context of the material period through an absence of formal competence or *de jure* authority, is once again misplaced.

303. In particular, the Appeals Chamber also notes that the Trial Chamber found as follows :

> No evidence was adduced that he attempted to prevent the atrocities that he knew were about to occur and which were within his power to prevent.[533]

> On the issue of Kayishema's failure to punish the perpetrators, the Defence submitted that the only power held by the *préfet* in this respect was the ability to incarcerate for a period not exceeding 30 days. The Trial Chamber concurs with the Defence's submission that this would not be sufficient punishment for the perpetrators of the alleged crimes (though possibly sufficient as a short-term measure to help prevent further atrocities). However, the Trial Chamber is mindful that there is no evidence to suggest that in the 3 months between the start of these attacks and Kayishema's departure from Rwanda, no action was commenced which might ultimately have brought those barbarous crimes to justice.[534]

(c) Conclusion

304. In the light of the foregoing, the Appeals Chamber finds that Kayishema's arguments are unfounded. The Appeals Chamber, therefore, holds that it has not been demonstrated that the Trial Chamber erred as alleged. Consequently, Grounds Two and Three in relation to Kayishema's individual criminal responsibility under Article 6 (3) of the Statute are dismissed.

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[532] Trial Judgment, para. 511.
[533] *Ibid.*, para. 513.
[534] *Ibid.*, para. 514.

3657/A bis

F. Evidentiary matters

305. Under his seventh ground of appeal, Ruzindana alleges that on the whole, the Trial Chamber committed an error of fact in its assessment of testimonies of Prosecution witnesses and in its findings on the reliability of eyewitnesses' testimonies. He is requesting that the Appeals Chamber simply set aside the findings of the Trial Chamber.[535]

1. Arguments of the parties

306. In his submissions,[536] Ruzindana argues that by failing to identify the legal standards used to ascertain the reliability of testimonies of eyewitnesses or by simply failing to apply any such standards, and also, by relying, for its verdict, on testimonies deemed unreliable, the Trial Chamber failed to provide a legal basis for its decision.

307. Ruzindana submits that the reliability of eyewitnesses is a substantive issue, as the Trial Chamber itself acknowledged, because all the charges brought against Ruzindana are based on testimonies by Rwandan witnesses to the exclusion of such material evidence as documents, records, correspondence, etc.

308. Ruzindana submits that the Trial Chamber should have exercised greater caution in its assessment of eyewitness testimonies, especially as such testimonies would be the only basis for its verdict. Very few testimonies by Prosecution witnesses were excluded by the Trial Chamber on the ground that the reliability of the witnesses was seriously undermined. The Trial Chamber should have laid down a veritable set of criteria for assessing the reliability of witness evidence.

309. Moreover, the Trial Chamber failed to take into account in its verdict the negative findings on the reliability of some of the testimonies.[537]

310. Ruzindana holds the view that the Trial Chamber assessed these testimonies on a case-by-case basis taking into account the truthfulness of the witness and his ability to make reliable observations, without indicating clearly the means by which it satisfied itself of the overall

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[535] Ruzindana's Brief para. 60.
[536] *Ibid.*, paras. 41 to 60.
[537] Trial Judgment, paras. 427 and 449; and paras. 426 and 461.

reliability of the testimonies (the veracity of oral testimonies was not verified). The Defence had suggested the following criteria: psychological, political and specific circumstances criteria.

311. At the hearing on appeal, Ruzindana addressed again the issue of the reliability of testimonies and the failure by the Trial Chamber to adopt any criteria in assessing the credibility of witness testimonies.[538] Ruzindana argued that none of the Prosecution witnesses, with the exception of one, knew or had ever heard of Ruzindana prior to the events.[539] Ruzindana further contends that the circumstances under which they saw him from a distance were such that they could not identify him.

312. Ruzindana criticizes the Trial Chamber for finding that he participated in and incurred responsibility for the attacks carried out against the Tutsis at several sites of the Bisesero region. He alleges that the Trial Chamber erred in its assessment[540] of the evidence proffered before it. The Appellant proceeded to review, on a site-by-site basis, the errors allegedly committed by the Trial Chamber.

313. In the opinion of the Appeals Chamber, the arguments put forward by Ruzindana in support of his seventh ground of appeal raise two main issues: firstly, the assessment approach used by the Trial Chamber and its inherent contradictions, and secondly, the identification of the accused.

314. With respect to the first issue, Ruzindana submits the following arguments, to wit:

(a) The Trial Chamber contradicted itself in assessing the evidence of Witness FF[541] in paragraphs 414, 426 and 427 of its Judgment. The Trial Chamber committed a "patent" error of fact in paragraph 448 of its Judgment in assessing the credibility of Witness Z;[542]

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[538] T(A), 30 October 2000, see for example p. 129 and pp. 220-221.
[539] *Ibid.*, p. 186.
[540] Trial Judgment, paras. 405 to 472.
[541] Ruzindana's Brief, para. 42.
[542] *Ibid.*, para. 57. The Appellant is specifically referring to the Transcript of the hearing of 14 October 1997, pp. 5 and 36 to 41.

3655/A bis

(b) The Trial Chamber erred in discounting the testimony of Witness CC whose testimony called into question the very existence of an attack in Bisesero;[543]

(c) The Trial Chamber should have made the same finding with respect to Ruzindana, as it did in the case of Kayishema, in light of the testimony of Witness KK (para. 427 of the Trial Judgment);[544]

(d) The Trial Chamber's reasoning contradicts paragraph 450 of the Judgment since, on the basis of Witness MM, the Trial Judges held that the victim's death was not caused by a shot fired by the accused whereas, further on, it found that this testimony proved that the accused was among the attackers.[545]

315. Regarding the Trial Chamber's assessment of the reliability of the identification testified to by the witnesses, Ruzindana raises two complaints:

(a) The issue of ascertaining that the witnesses knew the accused; (the witnesses did not know Ruzindana, therefore the identification was doubtful and their testimonies should have consequently been discounted);[546]

(b) The actual identification of the accused by witnesses who supposedly knew him (the witnesses actually knew Ruzindana but the circumstances under which they saw him were such that they could not have identified him).

316. During the hearing on appeal, the Prosecutor focused her Response on four main issues which, in her view, emerged from a reading of Ruzindana's submissions:[547]

(a) The issue of the Appeals Chamber applying relevant legal standards or tests in considering the reliability of witnesses' testimony;

(b) The issue of applying such tests or standards;

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[543] *Ibid.*, para. 57. The Appellant is specifically referring to the Transcript of the hearing of 15 October 1997, pp. 68 to 71.
[544] Ruzindana's Brief, para. 55.
[545] *Ibid.*, para. 56.
[546] *Ibid.*, para. 44 (Witnesses PP, OO, II, JJ, NN, HH and UU), para. 48 (Witness PP), para. 49 (Witnesses CC and W) and para. 50 (Witness II).
[547] T(A), 30 October 2000, pp. 183 to 192.

3654/A bis

(c) The issue of the use of "partially credible" witness testimonies;

(d) The issue of the overall assessment of the evidence that led to the conviction of Ruzindana.

317. The Appeals Chamber notes that during the hearing on appeal, the Prosecution referred considerably to its written submissions and pointed out, with respect to whether the witnesses knew Ruzindana, that the Trial Chamber had found, particularly in paragraphs 456 and 457 of its decision, that the witnesses knew him.[548]

318. That the witnesses knew Ruzindana was relied on as a relevant factor in placing Ruzindana at the sites of the massacres. In the submission of the Prosecution, the fact that the witnesses had personal knowledge of Ruzindana was not a prerequisite for identification.[549] Moreover, Ruzindana has failed to show that no reasonable court would have made the same findings as the Trial Chamber made from such evidence.

2. Discussion

319. First of all, the Appeals Chamber wishes to underscore that it is neither possible nor proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner.[550] The Appeals Chamber concurs with the argument of the Trial Chamber that it is "for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination."[551]

320. The Appeals Chamber holds the view that when the testimony of only one witness is reasonable and reliable, such testimony may be admitted.[552] ICTY Appeals Chamber ruled on this same issue in the *Tadić* case when it stated as follows:

> "The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the

[548] As the Prosecutor's Appeal is time-barred, the Appeals Chamber shall only rely on the Prosecutor's oral submission at the hearing.
[549] T(A), 30 October 2000, p. 242.
[550] *Cf. supra*, para. 54 *et seq.* on the independence of the Tribunal.
[551] Trial Judgment, para. 70.
[552] *Cf. supra*, para. 187.

3653/A bis

> 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."[553]

The Appeals Chamber must defer to the findings of the trier of fact, unless the alleged error sufficiently shows that the Trial Chamber's findings are unreasonable, which findings have occasioned a miscarriage of justice.

321. In general, the Appeals Chamber notes that the Trial Chamber has clearly set forth criteria for the assessment of witness' testimonies.[554]

322. The Appeals Chamber reiterates[555] that accepting as evidence the uncorroborated testimony of a witness does not in itself constitute an error.[556]

323. Regarding the alleged contradiction in the assessment of Witness FF's testimony, it is incumbent on the Trial Chamber to assess whether the contradictions raised in this testimony substantially cast doubt on the overall credibility of the witness. The Appeals Chamber finds, upon reading the Judgment of the Trial Chamber, that the alleged contradictions are unfounded.[557]

324. Paragraph 448 of the Trial Judgment covers the second half of April 1994 and the fact that Witness Z testified that he did not see Ruzindana fire shots on 14 April 1994[558] is not inconsistent with his testimony that he saw Ruzindana fire shots at the Tutsis on other occasions.[559] However, the Appeals Chamber finds that the fact that Ruzindana fired shots during the attacks in the second half of April 1994 was not explicitly recounted by Witness Z.[560] All in all, Witness Z's testimony leaves no doubt:

> "that Ruzindana was present and played a pivotal role in the massacres at this site by ordering the assailants to surround the Hill and kill the Tutsis hiding there."[561]

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[553] Tadić Appeal Judgment, para. 64.
[554] Trial Judgment, paras. 65 to 80.
[555] Tadić Appeal Judgment, para. 65 *in fine*.
[556] Reference to Ruzindana's allegation in his Brief, para. 42 (witness FF-Bisesero Hill) and paras. 55 and 56 (witness KK and MM- Gitwa *cellule).*
[557] For more details, the Appeals Chamber refers to the analysis in respect of Kayishema's third ground of appeal, *cf. supra*, para. 257 *et seq.* See also the Prosecutor's argument, T(A), 30 October 2000, pp. 298 and 299.
[558] Ruzindana's Brief, para. 54; Trial Judgment, para. 448; T., 14 October 1997, pp. 5 to 9 and 61 to 64.
[559] T., 14 October 1977, pp. 6 and 67.
[560] *Ibid.*
[561] Trial Judgment, para. 448 *in fine*.

3652/A bis

325. Moreover, the Trial Chamber did not mention the portion of Witness CC's testimony in which he stated that there were no attacks in Bisesero Hill area on 20 April 1994.[562] However, the Appeals Chamber notes that the Trial Chamber considered that though some witnesses (including CC) did not give the exact date of the events,[563] that did not cast doubts on the fact that the events occurred. As noted by ICTY Appeals Chamber:

> "The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the judgment in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgment every step of its reasoning in reaching particular findings."[564]

The Appeals Chamber affirms that in a case where there are two conflicting testimonies, it falls to the Trial Chamber, before which the witnesses testified, to decide which of the testimonies has more weight.

326. Regarding the alleged errors in assessing the testimonies of Witnesses MM and KK, it should be noted that the Appellant only makes general allegations, without identifying the specific parts of such testimonies which support his allegations. Nor does Ruzindana advance sufficiently cogent arguments to show the alleged error.

327. The Appeals Chamber concurs with the line of reasoning adopted by the Trial Chamber[565] with respect to Ruzindana's argument that the fact that it was not established that the witnesses knew him is one of the factors that weakens the probative value of the evidence of identification of the Accused. Moreover, the Appeals Chamber finds that the witnesses' personal knowledge of Ruzindana is not a prerequisite for identification.[566]

328. As noted by the Trial Chamber, "prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness' testimonies."[567]

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[562] T., 15 October 1997, pp. 76 and 78.
[563] Trial Judgment, para. 437.
[564] *Čelebići* Appeal Judgment, para. 481.
[565] The Trial Chamber found beyond reasonable doubt that several witnesses knew the Accused, *Cf.* Trial Judgment, paras. 71, 456, 457, and 458.
[566] Refers to Ruzindana's allegations in his Brief, paras. 44 and 45, para. 48 (witness PP-Muyira Hill), para. 49 (Witnesses HH and W – the Cave), para. 50 (Witness RR – the Mine at Nyiramurengo Hill), para. 56 (Witness MM – Gitwa *cellule*) para. 57 (Witness II – the vicinity of Muyira Hill).
[567] Trial Judgment, para. 71. On the probative value, see *Čelebići* Appeal Judgment, para. 274.

3651/A bis

The fact that some of the witnesses did not personally know the accused prior to the events is not at all a sufficient reason to invalidate the testimony of a witness who identified the Accused.[568]

3. Conclusion

329. For all these reasons, the Appeals Chamber dismisses this ground of appeal.

[568] Trial Judgment, para. 71.

3650/A bis

G. Appeals Against Sentence

1. Arguments of the Parties

330. Each accused has appealed against the sentences imposed by the Trial Chamber.

(a) Kayishema's Arguments

331. In Grounds Seven and Eight, Kayishema alleges that, in general, the Trial Chamber erred in the sentence imposed, and in particular, in its assessment of the aggravating and mitigating factors presented at trial.

(b) Ruzindana's Arguments

332. In Ground Nine, Ruzindana alleges that the Trial Chamber erred in its analysis of the aggravating and mitigating factors presented at trial.

2. Discussion

(a) Relevant Provisions of the Statute and the Rules

333. For ease of reference, the relevant provisions of the Statute and Rules to the issues raised in these grounds are set out below.

Article 6(4) of the Statute

> The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

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.

3649/A bis

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 surrender to the Tribunal or pending trial or appeal.

(b) Standard of Review in an Appeal Against Sentence

334. A preliminary point to be considered before discussing the merits of these grounds is the standard of review under Article 24 of the Statute dealing with an appeal against sentence.[569]

335. The Appeals Chamber notes that a Trial Chamber is required, as a matter of law, under both the Statute and the Rules, to take into account aggravating and mitigating circumstances. Therefore, if it fails to do so, it commits an error of law. Article 23(2) of the Statute provides, *inter alia*, that in imposing sentence, the Trial Chamber "should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."

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[569] Article 24 of the Statute provides: "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers 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."

336. Rule 101(B) of the Rules is binding in that the Trial Chamber "shall take into account" the factors listed. Therefore, if it does not, it will be committing an error of law. The Appeals Chamber must first examine whether or not the Trial Chamber considered these factors.[570] Second, it must consider whether or not it properly took them into account.[571]

337. In considering the issue of whether a sentence should be revised, the Appeals Chamber notes that the degree of discretion conferred on a Trial Chamber is very broad. As a result, the Appeals Chamber will not intervene in the exercise of this discretion, unless it finds that there was a "discernible error"[572] or that the Trial Chamber has failed to follow the applicable law.[573] In this regard, it confirms that the weighing and assessing of the various aggravating and mitigating factors in sentencing is a matter primarily within the discretion of the Trial Chamber. Therefore, as long as a Trial Chamber does not venture outside its "discretionary framework"[574] in imposing a sentence, the Appeals Chamber shall not intervene.

338. The burden rests on the Appellants to "show that the Trial Chamber abused its discretion, so invalidating the sentence. The sentence must be shown to be outside the discretionary framework provided by the Statute and the Rules."[575]

(c) Preliminary Points Regarding Appeal Filed by Ruzindana

339. In relation to the grounds of appeal filed by Ruzindana, several preliminary points arise.

340. First, during the hearing on appeal, the Prosecution submitted that Ruzindana has supplemented his grounds of appeal since the filing of his Notice of Appeal on 18 June 2000.[576]

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[570] *Kambanda* Appeal Judgment, para. 122.
[571] *Ibid.*, paras. 122 and 123.
[572] *Aleksovski* Appeal Judgment, para. 187.
[573] *Serushago* Sentencing Appeal Judgment, para. 32. See also *Aleksovski* Appeal Judgment, para. 187, and *Tadić* Sentencing Appeal Judgment, paras. 20 and 22.
[574] *Tadić* Sentencing Appeal Judgment, para. 20. See also *Čelebići* Appeal Judgment, para. 775 ("...a decision as to the weight to be accorded to such acts in mitigation of sentence lies within the discretion of the Trial Chamber. In the absence of a finding that the Trial Chamber abused its discretion in imposing a sentence outside its discretionary framework as provided by the Statute and Rules, this argument must fail.") (citing *Kambanda* Appeal Judgment, para. 124).
[575] *Kambanda* Appeal Judgment, para. 115.
[576] T(A), 30 Oct. 2000, pp. 319-320. Specifically, it alleged that "in his notice of appeal...he lodged three grounds of appeal against the sentence. When he filed his Appellant's brief...he added two more grounds of appeal....When the Prosecution filed its brief attacking the sentence that was handed down to Ruzindana...[in his response]...the Appellant advanced three grounds of appeal against his sentence. That brings the number of grounds of appeal against his sentence to eight."

3647/A bis

The Appeals Chamber notes that in Ruzindana's Brief in response to the Prosecution's appeal against his sentence, he lists three grounds which, he submits, clarify and limit his own appeal. These are: (1) that the Trial Chamber took into account as an aggravating circumstance what in reality is a constituent element of the crime itself, that is, his *mens rea*; (2) that the Trial Chamber took into account as an aggravating circumstance what in reality is another constituent element of the crime itself, that is, the *actus reus* of the crime; and (3) that the Trial Chamber did not give sufficient weight to the mitigating circumstance that Ruzindana was not a *de jure* official.

341. The Appeals Chamber recalls that, at the start of the hearing on appeal, it identified each of the grounds of appeal which had been filed by Kayishema and Ruzindana. Each party was given the opportunity to put forward any relevant observations regarding this identification, which the Appeals Chamber stated it would consider. The Appeals Chamber identified Ruzindana's ground of appeal against sentence as generally relating to the treatment by the Trial Chamber of aggravating and mitigating circumstances.[577] Ruzindana confirmed at the appropriate time that he accepted this identification.[578] He did not submit that any issues had been omitted and therefore the Appeals Chamber proceeded on this basis.

342. The Appeals Chamber confirms that it does not consider the three issues clarified above to constitute independent grounds of appeal. Similarly, it does not consider that Ruzindana should have been obliged to apply for leave to amend his notice of appeal to include them.

343. The Appeals Chamber notes that, in his brief, Ruzindana submits that he intends to make further submissions "on the issue of mitigating and aggravating circumstances in the brief that he will file under Rule 112 of the Rules."[579] In addition, he submits that before he can make further submissions in respect of this appeal, "the Prosecutor must first cite the aggravating circumstance that she felt must be brought against the accused, since she has hitherto cited only one such circumstance."[580]

344. The Appeals Chamber notes that it has already considered similar issues concerning the presentation of new arguments in support of prior submissions in the *Kambanda* Appeal Judgment of 19 October 2000. In that case, the Prosecution had submitted that because the

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[577] *Ibid.*, p. 12.
[578] *Ibid.*, p. 26.
[579] Ruzindana's Brief, para. 62.
[580] *Ibid.*

3646/A bis

Appellant had failed to put forward any arguments in support of particular grounds of appeal related to sentence, "the grounds of appeal should be rejected without consideration of the merits."[581] The Appeals Chamber indeed found that the Appellant had not put forward any arguments in support of his grounds, in either his Appellant's brief or his reply, and further, that during the hearing, only one additional point was raised.[582] The Appeals Chamber held:

> ... Rule 111 expressly states that "[a]n Appellant's brief shall contain all the argument and authorities." Although Rule 114 provides that "the Appeals Chamber may rule on ...appeals based solely on the briefs of the parties", it also states that it can decide to hear the appeal in open court. It is intended that each party should advise the Appeals Chamber in full of all the arguments they wish to rely on in relation to each ground of appeal, through both written filings and orally.
>
> However, 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 novit 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.[583]

The Appeals Chamber will exercise its discretion to consider whether the grounds have merits.[584]

345. In this case, the Appeals Chamber similarly finds that Ruzindana has indeed failed to identify reasons in his Appellant's brief to support his submissions relating to sentence. However, he did supplement those submissions contained in his Notice of Appeal and his Appellant's brief during the hearing on appeal. In addition, the Appeals Chamber does not deem it warranted to classify arguments raised in any of his filings on this issue as new grounds of appeal. It confirmed that the relevant grounds related to the treatment by the Trial Chamber of aggravating and mitigating circumstances. In these circumstances, the Appeals Chamber accepts any arguments raised at the appropriate time, insofar as they relate to the relevant grounds.

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[581] *Prosecution's Response to Jean Kambanda's Provisional Appellant's Brief of 30 March 2000,"* filed on 2 May 2000, paras 4.144, 4.161, 4.165, 4.167-4.169, 4.171.
[582] *Kambanda* Appeal Judgment, para. 96.
[583] *Ibid.*, paras. 97 and 98.
[584] *Ibid.*, para. 99.

3645/A bis

(d) Aggravating and Mitigating Circumstances

(i) Treatment of Aggravating Factors

346. The main error alleged by both Kayishema and Ruzindana in their respective appeals overlaps, and therefore the Appeals Chamber considers it expedient to discuss the issue together.

347. Kayishema alleges that the Trial Chamber erred in its assessment of the aggravating and mitigating circumstances taken into account in his case, while Ruzindana alleges that the Trial Chamber erred in its analysis of aggravating and mitigating circumstances and in doing so imposed a sentence which was excessive.[585]

348. Ruzindana alleges, in particular, that the Trial Chamber erred in finding that the aggravating circumstances completely outweighed the mitigating circumstances, and in referring, in particular, to "the heinous means by which Ruzindana committed killings."[586] He submits that the Trial Chamber took into account, as an aggravating circumstance, the "odious manner in which the crime was committed. Furthermore, the Trial Chamber determined as to the odious manner of the crime, the murder of a young lady known as Beatrice."[587] He submits that in doing so and in sentencing him for a crime of genocide, the Trial Chamber confused "the material elements, the murder itself, and the aggravating circumstances."[588] He submits that there is an obvious error committed by the Trial Chamber in treating what was a material element of a crime as an aggravating circumstance.[589]

349. The Appeals Chamber notes that the Trial Chamber considered the heinous means by which Ruzindana committed the killings as an aggravating circumstance. It cited the murder of Beatrice, a 16 year old girl, at Nyiramurego Hill in the Bisesero sector, as an example, and described the particularly gruesome manner in which she was killed.[590] As a mitigating circumstance, the Trial Chamber considered the fact that Ruzindana was not a *de jure* official. It

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[585] Ruzindana's Brief, para. 61.
[586] Notice of Appeal against Sentence imposed on Obed Ruzindana, p. 2.
[587] T(A), 30 Oct. 2000, p. 242.
[588] *Ibid.*, pp. 242 and 243.
[589] *Ibid.*, p. 243.

3644/A bis

found "the presence of some mitigating circumstances for Ruzindana, but none of any significant weight in a case of this gravity."[591] It concluded that the aggravating circumstances outweighed the mitigating circumstances.

350. Ruzindana has claimed that by taking into account the heinous manner in which the young woman, Beatrice, was murdered, and by sentencing for the crime of genocide, the Trial Chamber confused the material elements of the crime and the aggravating circumstances, and in so doing, committed an error. The Appeals Chamber finds no merit in this argument. The particularly gruesome manner in which the victim, Beatrice, was killed, is an aggravating circumstance. The fact that this act of killing also supported a conviction for the crime of genocide, because it was part of the policy of genocide within Kibuye *préfecture*, does not prevent a separate finding that the manner in which it was carried out gave rise to an aggravating circumstance. Hence, this argument is dismissed.

351. The Appeals Chamber further notes that the Trial Chamber found that Ruzindana "voluntarily committed and participated in the offences and this represents an aggravating circumstance."[592] The Appeals Chamber interprets the Trial Chamber's finding as follows: it considers that the Trial Chamber was focusing, not simply on the fact that these acts were committed voluntarily, but also on the fact that they were committed with some element of zeal. The zeal with which a crime is committed may be viewed as an aggravating factor. As a result, the Trial Chamber's finding on this point was not erroneous.

352. Ruzindana also claims that the Trial Chamber erred in finding that the aggravating circumstances completely outweighed the mitigating circumstances, and that it imposed an excessive sentence. The Appeals Chamber notes that the Trial Chamber found "the presence of some mitigating circumstances for Ruzindana, but none of any significant weight in a case of this gravity".[593] The Appeals Chamber recalls that the degree of discretion conferred on a Trial Chamber in the area of sentencing is broad, and that the gravity of the offence is the primary consideration in imposing sentence.[594] Furthermore, as noted above, a Trial Chamber must

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[590] The Trial Chamber found: "Ruzindana ripped off her clothes and slowly cut off one of her breasts with a machete. When he finished, he cut off her other breast while mockingly telling her to look at the first one as it lay on the ground, and finally he tore open her stomach." Trial Judgment (Sentence), p. 4.
[591] *Ibid.*, p. 5.
[592] *Ibid.*, p. 3.
[593] *Ibid.*, p. 6.
[594] *Čelebići* Appeal Judgment, para. 731.

3643/A bis

consider the individual circumstances of the accused, as well as the aggravating and mitigating factors; weighing these factors is a task primarily within its discretion. The Appeals Chamber will not intervene in this exercise unless there has been an abuse of discretion. The Trial Chamber in this case considered the gravity of Ruzindana's conduct. It found him guilty of an extremely serious offence, an offence that "shocks the conscience of humanity."[595] It considered his individual circumstances. It considered the aggravating circumstances surrounding the killings he perpetrated, such as the cutting off of the breasts of a victim and the tearing open of her stomach, while he openly mocked her. On the other hand, it took account of the circumstance that Ruzindana, a businessman, was not a *de jure* official. It weighed these different circumstances, and concluded that the aggravating circumstances outweighed the ones in mitigation. The Appeals Chamber cannot find that the Trial Chamber abused its discretion in so concluding. In light of all those factors, the Appeals Chamber holds that the Trial Chamber did not abuse its discretion in imposing a sentence of twenty-five years' imprisonment on Ruzindana.

353. Kayishema submits that the Trial Chamber erred in taking into account as an aggravating circumstance the fact that he committed the crime of genocide by knowingly participating.[596] He submits that an error is committed by the Trial Chamber in finding that the commission of the crime of genocide itself constitutes an aggravating circumstance.[597] In his view, a Trial Chamber cannot make findings on both the essential ingredients of a crime and at the same time find that they constitute aggravating circumstances.[598]

354. The Appeals Chamber notes that the Trial Chamber found that Kayishema "voluntarily committed and participated in the offences and this represents one aggravating circumstance."[599] The Appeals Chamber further notes that Kayishema has been found responsible both as a direct participant under Article 6(1) of the Statute and as a superior under Article 6(3). He has been found guilty of the crime of genocide under Article 2(3)(a) of the Statute. As discussed above, the Appeals Chamber considers that in making its finding, the Trial Chamber was focusing, not simply on the fact that these acts were committed voluntarily, but also on the fact that they were committed with some element of zeal, which constitutes an aggravating circumstance. As a result, the Appeals Chamber holds that the Trial Chamber's finding on this point was not erroneous.

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[595] Trial Judgment (Sentence), p. 2.
[596] Kayishema's Brief, para. 294.
[597] *Ibid.*, para. 295.

3642/A bis

355. Kayishema also submits that the Trial Chamber erred by considering in aggravation the fact that he was *préfet* when it was on this basis that he was charged and convicted. This, he alleges, amounts to punishing him twice.[600]

356. The Appeals Chamber notes that the Trial Chamber found that the fact that Kayishema, as *préfet*, held a position of authority, was an aggravating circumstance. It found that he was a leader in the genocide in Kibuye *préfecture*, and that "this abuse of power and betrayal of his high office constitute[d] the most significant aggravating circumstance."[601]

357. The Appeals Chamber finds that the fact that the Accused held a position of authority or leadership may constitute an aggravating factor in sentencing. In the *Kambanda* Appeal Judgment, this Chamber, in affirming the sentence imposed by the Trial Chamber, expressly noted the Trial Chamber finding that "the aggravating circumstances surrounding the crimes negate the mitigating circumstances, especially since Jean Kambanda occupied a high ministerial post at the time he committed the said crimes."[602] Furthermore, in the *Aleksovski* Appeal Judgment, ICTY Appeals Chamber maintained that the Appellant's "superior responsibility as a warden seriously aggravated the Appellant's offences, [and that] instead of preventing it, he involved himself in violence against those whom he should have been protecting …".[603]

358. The Appeals Chamber would interpret the existing jurisprudence on this point as follows: Article 6(3) imposes liability on a superior if he knew or had reason to know that his subordinate was about to commit such acts or had done so, and had failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators. The mere fact that an accused has command authority is not an aggravating circumstance in sentencing, in respect of Article 6(3) charge; that goes only to conviction. However, a finding that superior responsibility lies because of such failure to prevent or punish does not preclude a further finding that the manner in which an accused exercises his command can be an aggravating circumstance in relation to sentencing. As a result, Kayishema's argument on this point is dismissed.

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[598] Kayishema's Notice of Appeal, pp. 8-9.
[599] Trial Judgment (Sentence), p. 3.
[600] Kayishema's Definitive Reply, para. 239.
[601] Trial Judgment (Sentence), p. 4.
[602] *Kambanda* Trial Judgment, para. 62.
[603] *Aleksovski* Appeal Judgment, para. 183.

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359. Finally, Kayishema submits that the Trial Chamber erred in considering four circumstances which it found to be aggravating: (1) the fact that, being *préfet,* he neither punished nor prevented the commission of crimes by his subordinates; (2) the fact that he committed the crimes alleged in a systematic and methodical way; (3) the fact that he abused his position of authority in committing the crimes alleged; and (4) the fact that he raised the issue of alibi and never stopped protesting his innocence.[604] The Appeals Chamber notes that the third circumstance has already been addressed above. The first two are not reflected in the Trial Chamber's Judgment, as will be seen below.

360. With regard to the other aggravating factors, the Appeals Chamber notes that the Trial Chamber found as follows:

> To give but one example of the zealousness of Kayishema's crimes, this Chamber recalls that Kayishema attacked places traditionally regarded as safe havens, such as the Complex and Mubuga Church. The harm suffered by victims and their families represents an aggravating circumstance, and this Chamber recalls the irreparable harm that Kayishema inflicted on his victims and their families. Kayishema asserted an alibi defence and at all times denied his guilt. This Chamber also finds that this fact, in light of the convictions, represents an additional aggravating circumstance.[605]

Thus, in addition to the fact that Kayishema held a position of authority, the Appeals Chamber finds that the Trial Chamber isolated these three additional aggravating factors: (1) his zeal in committing the crimes, exemplified by his attack on safe havens; (2) the harm suffered by the victims and their families; and (3) his assertion of an alibi and his denial of his guilt at all times. The Appeals Chamber considers that Kayishema, in attributing to the Trial Chamber the view that his failure to prevent subordinates' crimes and his committing of crimes in a systematic and methodical way were aggravating factors, misunderstood the Trial Chamber's position. These two factors were cited by the Trial Chamber in its list of the Prosecution's submissions as to the aggravating factors.

361. The Appeals Chamber finds that the two factors, namely the zeal shown in committing the crimes and the harm caused to the victims and families, were properly characterized as aggravating circumstances by the Trial Chamber. As noted above, an individual's great zeal or enthusiasm in committing a crime may be considered as an aggravating factor. Similarly, perpetrating a crime in a manner which brings about irreparable harm to the victims and their

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[604] Kayishema's Brief, paras. 296-297, Kayishema's Definitive Reply, paras. 244-245.
[605] Trial Judgment (Sentence), p. 4.

3640/A bis

families may also be considered an aggravation. When an individual commits a crime, there are differing degrees of physical and psychological harm to the victim which may result. Some types of harm are more severe than others. Certain forms of physical harm, for instance, are irreparable, particularly in the case of mutilation. The Trial Chamber found that Kayishema's acts inflicted irreparable harm not only to the victims, but also to their families. This constituted an aggravating circumstance to be taken into account in sentencing. Hence, Kayishema's argument concerning these two factors is dismissed.

362. The Trial Chamber also found Kayishema's assertion of an "alibi defence" and his repeated protestations of innocence as an aggravating factor in light of the gravity of the crimes for which he is convicted. The Chamber, in a footnote, referred to the *Tadić* Sentencing Judgment of 14 July 1997 for support. In that judgment, the Chamber stated that "Tadić has in no relevant way cooperated with the Prosecutor of the International Tribunal. Indeed, he has at all times denied his guilt for the crimes of which he has been convicted. Consequently, he is not entitled to any mitigation pursuant to ... Rule 101(B)(ii)."[606] That Chamber found denials of guilt as a factor preventing any mitigation. It did not find this factor as an aggravating circumstance.

363. The Appeals Chamber finds that it is not necessary for it to pronounce on whether the assertion of an alibi and persistent denials of guilt constitute aggravating circumstances. The Appeals Chamber concludes that even if the Trial Chamber were found to have erred on this point, such error would not invalidate the sentence imposed on Kayishema. In sentencing, the Trial Chamber is conferred a large degree of discretion, and the Appeals Chamber will not review a sentence unless there has been an abuse of discretion. The Appeals Chamber recalls again that the gravity of the offence is the primary consideration in imposing sentence. The Appeals Chamber finds that the Trial Chamber considered the extreme seriousness of Kayishema's crimes, his individual circumstances, mitigating factors, and other aggravating factors, and properly concluded that a sentence of imprisonment for the remainder of his life, for each count, was appropriate.

(ii) Treatment of mitigating factors

364. As to mitigating factors, Kayishema submits that the Trial Chamber erred in giving no weight to the factors he presented, because it held that "the nature of the events in Rwanda [were

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[606] See *Prosecutor v. Dusko Tadić*, Case No. IT-94-I-T, Sentencing Judgment, 14 July 1997, para. 58.

3639/A bis

such that they could not] allow for anyone's responsibility to be diminished, and that, on the other hand, it was not 'convinced of Kayishema's qualities of loyalty and honesty in light of his convictions in this case'."[607] He submits that mitigating circumstances should not be rejected on the grounds that the crimes he committed are grave. He sets out general mitigating factors as an introduction;[608] these include the arguments that no one could have done anything useful to prevent or limit the chaos, that no one could have done more than Kayishema, and that he has always been an honest man. He also submits that the Trial Chamber erred in ignoring the testimony of two witnesses as being without probative value, without providing an explanation.[609]

365. The Appeals Chamber notes that the Trial Chamber considered the mitigating circumstances put forward by Kayishema — namely, the "explosion of the rule of law in Rwanda in 1994," his being "overwhelmed by the events and the mob or 'crowd psychology' that existed in Rwanda in 1994", and his loyalty and honesty.[610] However, the Trial Chamber gave very little weight to these factors, and stated that "the two proposed mitigating circumstances rely on testimony that [it] finds not particularly probative."[611] Further, it stated that it was not convinced of Kayishema's qualities of loyalty and honesty in light of the circumstances of the case.[612] It concluded that there were some mitigating circumstances, but none of any significant weight in a case of this gravity, and that these were outweighed by the aggravating circumstances.[613]

366. The Appeals Chamber, in evaluating the Trial Chamber's treatment of the mitigating factors, recalls once again that weighing and assessing aggravating and mitigating factors in sentencing lies primarily within the discretion of the Trial Chamber, and that the Appellant bears the burden of demonstrating that the Trial Chamber abused its discretion and acted outside the boundaries of its discretion. The Appeals Chamber cannot find that this was the case here. The Trial Chamber considered the mitigating factors advanced by the Appellant, and ultimately found them unconvincing, in light of the testimony that it had heard during the trial and the circumstances of the case. It must be stressed at this juncture that a Trial Chamber is in the best position to assess and evaluate the evidence presented before it. The Trial Chamber did so in this

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[607] Kayishema's Notice of Appeal, p. 9.
[608] Kayishema's Brief, para. 292.
[609] *Ibid.*, para. 298.
[610] Trial Judgment (Sentence), p. 5.
[611] *Ibid.*
[612] *Ibid.*
[613] *Ibid.*

3638/A bis

case, and concluded, in light of all of the evidence in the case, that the mitigating factors proffered by the Appellant were weak, and were outweighed by the aggravating circumstances. The Appeals Chamber does not find that the Trial Chamber abused its discretion in so concluding, and the Appellant has not demonstrated that it did so. Hence, this argument is dismissed.

(e) Gravity of the Offences

367. With regard to Kayishema's allegation that the Trial Chamber erred in finding that genocide is the "crime of crimes" because there is no such hierarchical gradation of crimes,[614] the Appeals Chamber finds it necessary to examine closely the Trial Chamber's holding on this point. Under the heading "gravity of offences", the Trial Chamber found that the Appellants:

> have committed genocide, an offence of the most extreme gravity, an offence that shocks the conscience of humanity. Trial Chamber I of this Tribunal has held that genocide constitutes the "crime of crimes." Article 2 of the Statute defines the crime of genocide and its unique element of special intent to "destroy in whole or in part, a national, ethnic, racial or religious group as such." For purposes of determining sentences, this Chamber finds that Kayishema's four convictions of genocide and Ruzindana's one conviction of genocide constitute offences beyond human comprehension and of the most extreme gravity.[615] (citations omitted).

The Appeals Chamber remarks that there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are "serious violations of international humanitarian law",[616] capable of attracting the same sentence. The actual sentence imposed depends, of course, upon the evaluation of the various factors referred to in the Statute and the Rules. The Appeals Chamber finds that the Trial Chamber's description of genocide as the "crime of crimes" was at the level of general appreciation, and did not impact on the sentence it imposed. Furthermore, upon examining the statements of the Trial Chamber, it is evident that the primary thrust of its finding as to the gravity of the offences relates to the fact that genocide in itself is a crime that is extremely grave. Such an observation is correct, and for these reasons, there was no error in its finding on this point.

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[614] Kayishema's Notice of Appeal, p. 9, Kayishema's Definitive Reply, para. 246. It should be noted that this argument was raised in Kayishema's Notice of Appeal, under the heading "Aggravating Circumstances." The substance of the argument relates, however, to the Trial Chamber's consideration of the gravity of the offences in sentencing, and the Appeals Chamber deems it appropriate to consider it under a separate heading.

[615] Trial Judgment (Sentence), pp. 2 and 3.

[616] Article 1 of the Statute.

3637/A bis

(f) General Appeal Against Sentence Imposed on Kayishema

368. Kayishema submits that a complete and objective analysis of the facts of the case will show that he is not guilty of the crimes alleged, and that in these circumstances, the Trial Chamber has committed both an error of law and of fact in handing down a sentence for guilt which does not exist.[617]

369. A similar, though not identical issue, was raised in the appellate proceedings in the case of *Anto Furundžija* before ICTY. In that case, the Appellant submitted that there were "substantive issues that hang over the case", suggesting that innocence is a possibility and that that should be considered in sentencing. ICTY Appeals Chamber rejected such a submission, finding that:

> [g]uilt or innocence is a question to be determined prior to sentencing. In the event that an accused is convicted, or an Appellant's conviction is affirmed, his guilt has been proved beyond reasonable doubt. Thus a possibility of innocence can never be a factor in sentencing.[618]

370. Similarly in this case, a Trial Chamber cannot commit an error by sentencing an accused for crimes for which it has found that he is guilty beyond a reasonable doubt. The Appeals Chamber finds that there is simply no merit in Kayishema's submission. It further notes that the sentence imposed on Kayishema by the Trial Chamber, imprisonment for the remainder of his life for each count, falls within the discretionary framework provided by the Statute and Rules. The crimes for which he was convicted were of the most serious nature, and a sentence imposed must reflect the inherent gravity of the criminal conduct.[619] In light of these factors, the Appeals Chamber sees no reason to revise the sentence imposed by the Trial Chamber.

3. Conclusion

371. For the foregoing reasons, the Appeals Chamber upholds the sentences imposed by the Trial Chamber on Kayishema and Ruzindana.

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[617] Kayishema's Notice of Appeal, p. 10.
[618] *Furundžija*'s Appeal Judgment, para. 253.
[619] *Kambanda*'s Appeal Judgment, para. 125.

3636/A bis

IV. DISPOSITION

372. For the foregoing reasons, **The Appeals Chamber**, on 1 June 2001, ruled as follows:

"The Appeals Chamber,

Pursuant to Article 24 of the Statute of the Tribunal and Rule 118 of the Rules of Procedure and Evidence,

Considering the written submissions of the parties and their oral arguments at the hearings of 30 and 31 October 2000,

Sitting in open court,

Finds inadmissible by 4 votes (Judges Jorda, Vohrah, Nieto-Navia and Pocar) to 1 (Judge Shahabuddeen) the Prosecution appeal and the Prosecutor's Respondent's Brief;

Unanimously dismisses the grounds of appeal raised by Clément Kayishema and Obed Ruzindana against the Judgment and Sentence of the Trial Chamber delivered on 21 May 1999;

Affirms the verdict of guilty entered against Clément Kayishema for all the counts on which he was convicted and the sentence of life imprisonment imposed on him;

Affirms the verdict of guilty entered against Obed Ruzindana for the count on which he was convicted and the sentence of twenty-five years' imprisonment imposed on him;

Rules that this judgment shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence.

3635/A bis

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

Claude Jorda Presiding Judge	Lal Chand Vohrah Judge	Mohamed Shahabuddeen Judge
Rafael Nieto-Navia Judge	Fausto Pocar Judge	

Judge Shahabuddeen appends a Separate Opinion to this judgment.

Judge Nieto-Navia appends a Declaration to this judgment.

Dated this first day of June 2001
At Arusha, Tanzania

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

Claude Jorda Presiding Judge	Lal Chand Vohrah	Mohamed Shahabuddeen
Rafael Nieto-Navia	Fausto Pocar	

Dated this nineteenth day of July 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

3634/A bis

DECLARATION OF JUDGE NIETO-NAVIA

1. I support the decision by the majority in this case to declare the Prosecution appeal inadmissible. The express wording of Rules 108 and 111, governing the filing of a notice of appeal and appellant's brief respectively are sufficiently clear to permit such a conclusion. This is also supported by the following observations.

2. The purpose of a notice of appeal before the ICTR is simply to notify the Appeals Chamber and opposing party that an appeal will be filed. That is, it is notice of the *intention* of a party to appeal the trial judgement. The only formal requirement as to its content is that it must set forth the grounds of appeal.[1] It is not the case that it must set forth in detail the issues intended to be raised and the arguments in support.[2] For this reason alone, it is clear to me that this document is not intended to be, and cannot be self-standing. On the contrary it must be followed and supported by an appellant's brief containing "all the argument and authorities" timely filed.[3] This system reflects that employed in, for example, the United States where a notice of appeal precedes the substantive document setting out the arguments raised in support of the appeal.[4]

3. In this case, the Appeals Chamber stated that failure to file an appellant's brief in support of a notice of appeal may have grave consequences for the admissibility of the entire appeal.[5] It considered that a notice of appeal not followed by an appellant's brief is devoid of all arguments and authorities and consequently can be found to have been abandoned.[6] I agree with this interpretation.

4. A party has "thirty days from the date on which the full judgement and sentence are delivered in both English and French" to file and serve its notice of appeal.[7] The Prosecution filed its notice of appeal on 18 June 1999. This document was based on the summary of the judgement delivered orally on 21 May 1999 because the full written judgement had not yet been issued. Consequently, the Prosecution stated that it "reserve[d]

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[1] Rule 108(A) of the Rules.
[2] It is noteworthy that in the ICTY Rules the requirements are even less stringent, in that Rule 108 simply requires the appealing party to file "a notice of appeal" and not set forth the precise grounds of appeal.
[3] Rule 111 of the Rules.
[4] *See*, e.g., Rules 3-4, 28, 31 of the USCS Fed Rules App Proc.
[5] Majority Judgement, para. 46.
[6] *Ibid.*
[7] Rule 108(A) of the Rules.

[the] right to file an amended or revised notice of appeal based on the full written judgement."[8] It did not do so and therefore the original notice of appeal stood. This document was timely filed. However, from this moment on commenced the complicated and drawn out filing of the Prosecution appellant's briefs. Although this history has been set out at length in the majority judgement,[9] I wish to highlight the following salient points.

5. I start from the position that the Appeals Chamber could very well have decided to admit the Prosecution appellant's briefs (and thereby the Prosecution appeal) if it considered that the interests of justice so required, despite the fact that they had been filed four calendar days after the last scheduled deadline of 28 April 2000. However, in the circumstances of this case I agree that the decision taken and the drastic consequences which follow, are justified.

6. The Appeals Chamber issued a Scheduling Order on 3 September 1999, fixing 28 October 1999 as the deadline for each appellant to file its appellant's brief pursuant to Rule 111.[10] Kayishema and Ruzindana both requested extensions of time and having first suspended the time limits for filing,[11] these requests were granted by the Appeals Chamber on 14 December 1999. In doing so, the Appeals Chamber fixed a new deadline for the filing of appellant's briefs, "by the end of 90 days following the day on which the Addendum to the Registry Certificate on the Record was communicated."[12]

7. The Prosecution had already notified the Appeals Chamber on 27 October 1999 that it had received this addendum on 25 October 1999. Consequently, the time limit for the filing of its appellant's brief was to expire by the end of January 2000. The Prosecution did not comply. Instead, on 24 February 2000, that is, approximately four months after receiving the addendum and almost one-month after the deadline fixed in the aforementioned decision had expired, the Prosecution submitted a motion seeking clarification of the time limits to file its brief. It did not specifically request an extension of time. In fact, the formal request for an extension of time was only contained within its

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[8] Notice of Appeal, page 1. In the "Decision on the Prosecutor's motion for extension of time-limits pursuant to Article 24 of the Statute and Rules 108 and 116 of the Rules," dated 19 July 1999, the Prosecution was authorised to amend its grounds before 31 August 1999.
[9] Majority Judgement, paras. 28 - 35.
[10] "Scheduling Order," dated 3 September 1999.
[11] "Decision, suspension of time limit for filing of appeals briefs," dated 21 October 1999.
[12] "Decision (Appellant's motions for extension of time-limits and for a visit with another prisoner)," dated 14 December 1999.

document filed on 4 April 2000. An extension of time was granted by decision dated 11 April 2000, until 28 April 2000.[13] Again, this deadline passed and the Prosecution appellant's briefs were finally registered as filed on 2 May 2000. It is notable that the Prosecution failed to comply with both the time-limit established in the decision of 14 December 1999 and again, that established in the decision of 11 April 2000, accorded to give them one further opportunity to comply. Failure to comply with that decision however was the final example of the Prosecution's non-compliance and lack of due diligence.

8. The pre-hearing judge is not possessed of power in cases like this, to rule that an appeal filed out of time is inadmissible. This power lies with the Appeals Chamber and it has decided to make this decision now. What the Appeals Chamber has correctly considered is the overall behavior of the Prosecution, culminating in one final example of non-compliance. On this basis it has decided that in the circumstances of this case, it is not appropriate for it to exercise its discretion and admit the Prosecution appellant's briefs. This decision impacts the whole appeal and because insufficient reasons have been put forward to find otherwise, the Prosecution appeal must be found to be inadmissible.

9. As for the responses filed by the Prosecution to the appeals filed by Kayishema and Ruzindana, because they were not filed within thirty days of the filing of the respective appellant's briefs, the majority has decided to find that they were inadmissible.[14] Unfortunately I have difficulty in supporting this decision. By the decision dated 11 April 2000, an extension of time was granted permitting the Prosecution and appellants to file their responses by 28 May 2000. This time limit was extended until 23 June 2000 by decision dated 26 May 2000.[15] Both Prosecution responses were timely filed, albeit one was registered as having been filed on 24 July 2000. By decision dated 27 September 2000, an extension of time was granted to accept this filing based on the fact that it had been faxed, although incomplete, to the Registry on 15 June 2000 (well before the 23 June 2000 deadline), who only registered it on 24 July 2000.[16] Both responses were therefore timely

[13] "Decision (Prosecutor's motions for correction and clarification of trial record; for clarification of briefing time-limits, and to extend the time-limit)," dated 11 April 2001.
[14] Majority Judgement, paras. 44 and 45.
[15] "Order (Appellant's motions to extend time limits)," dated 26 May 2000.
[16] "Order (Prosecution motion on the filing of the Prosecution's brief in response to the appeal brief of Clement Kayishema)," dated 27 September 2000.

filed. In these circumstances, I see no reason why these documents should not have been admitted, a decision which also directly effects the appellants' briefs in reply.[17]

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

Rafael Nieto-Navia

Dated this nineteenth day of July 2001
At The Hague,
The Netherlands.

[17] Majority Judgement, footnote 475.

3630/A bis

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I agree with the judgement of the Appeals Chamber, with one exception. The exception relates to the holding that the briefs of the Prosecutor were not filed within the stipulated time-limits, with the consequence that (1) the appeal by the Prosecutor is inadmissible in its entirety, and (2) the respondent's briefs of the Prosecutor in the appeals by Mr Kayishema and Mr Ruzindana ("Defence") are also inadmissible. I appreciate the thinking of the Appeals Chamber, but consider that more convincing reasons speak for another conclusion.

I. THE PROSECUTOR'S APPEAL

(a) The issues before the Appeals Chamber

2. I understand the submission of the Defence to be, first, that the granting of the "limited extension of time" by the Pre-Hearing Judge on 11 April 2000 was ineffectual to sustain the existence of the Prosecutor's appeal, on the argument that the appeal had already become time-barred; second, that, even if that were not so, there was no "good cause" for the "limited extension of time" so granted; and, third, that, in any event, the Prosecutor failed to file her appellate brief within that extension of time.

3. The Appeals Chamber recognised that such an extension of time was granted by the Pre-Hearing Judge. It has not sought to invoke the reservation made by the Pre-Hearing Judge when, in granting the extension, he stated that he was doing so "without prejudice being caused to the Appellants". The reservation does not advance the case of Mr Kayishema and Mr Ruzindana. They could only be prejudiced if any time-barring was automatic, so as to give them an accrued right to peremptory dismissal of the Prosecutor's appeal; as argued below, this they did not have. The Appeals Chamber has not disturbed the extension of time granted on 11 April 2000; the extension stands. So far, I agree.

4. I respectfully disagree, however, in so far as the Appeals Chamber thereafter proceeded on the basis that the Pre-Hearing Judge did not grant a further extension of time to regularise the eventual filing of the Prosecutor's appellate brief on 2 May 2000. Alternatively, if the Appeals Chamber was correct in proceeding on that basis, I am of opinion that it was open to the Appeals Chamber to grant such an extension of its own accord; it did not do so because of a view, which I consider was not right, that there was no "good cause" for an extension. In sum, the position of the Appeals Chamber was this:

(i) The extension of time granted by the Pre-Hearing Judge on 11 April 2000 would not be disturbed; it would stand.

(ii) The Appeals Chamber proceeded on the basis that the Pre-Hearing Judge did not grant a further extension of time to regularise the late filing on 2 May 2000.

(iii) Regard being had to the general behaviour of the Prosecutor, there was not "good cause" for granting such a further extension; the Appeals Chamber did not itself grant one.

5. With respect, (i) is correct. I have the misfortune to be unable to support (ii) and (iii); I shall deal with these under (d) and (e) below. In (f) below I consider whether I am entitled to enter into the merits in circumstances in which the Appeals Chamber has not done so. But first there are two matters of a preliminary nature to be considered; they are treated of under (b) and (c) below.

(b) Is the question of dismissal of an appeal, for non-observance of a time-limit set by the Pre-Hearing Judge for the filing of an appellate brief, one for the Pre-Hearing Judge? Or, is it one for the Appeals Chamber?

6. The Defence submits that, although briefing time-limits could of course be fixed by the Pre-Hearing Judge, the question whether an appeal should be dismissed because of non-observance of a time-limit set by him for the filing of an appellate brief is one for the full Appeals Chamber, not one for him.[1] That is true. The occasions on which a single Judge can act are specified in the Statute. They do not include the case of a Pre-Hearing Judge: the institution of a Pre-Hearing Judge is not known to the Statute. The rule-making power conferred by Article 14 of the Statute on the Judges is wide enough to empower them to make a Rule authorising a single Judge to take certain preparatory steps. But, wide as the power is, it is not wide enough to empower them to make a Rule authorising a single Judge to exercise the substantial judicial power of the Appeals Chamber to dismiss an appeal where this has been properly brought under Article 24 of the Statute and therefore to withdraw the case from the jurisdiction of the full Appeals Chamber which is lawfully seised of it. There is no such Rule; if one existed, it would be *ultra vires* for that reason. It would be difficult to find any other authority: the general principle, I apprehend, is that, absent any clear enabling competence conferred by legislation, judicial power cannot be delegated[2].

7. It is not the case, however, that the Pre-Hearing Judge in this case purported to exercise a power to dismiss or not to dismiss the Prosecutor's appeal. He granted an extension of time for the

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[1] See paragraph 25 of the judgement of the Appeals Chamber.

[2] "[T]he judicial function can never be delegated", per Donaldson, LJ, in *R. v. Gateshead*, Ex parte *Tesco Stores Ltd.* [1981] Q.B. 470.

Prosecutor to file her appellate brief. As is more fully set out below, the argument of the Defence is that, at the time when he granted that extension, the Prosecutor's appeal had already become time-barred for failure to file her appellate brief; as from the moment of such failure, the time-bar was in force. The subsequent granting of the extension could not remove the time-bar, for the reason that, as it was said, "time-barring is not a scheduling, pre-hearing problem; it is a substantive issue which falls within the jurisdiction of the Appeals Chamber, not of the Pre-Hearing Judge, who may not dispose of it".[3]

8. But, although the effect of a time-bar is a matter for the Appeals Chamber, the question whether there is a time-bar depends on what were the time-limits fixed by the Pre-Hearing Judge. The Pre-Hearing Judge has power to grant an extension of time; the power may be exercised either directly or indirectly. If a filing falls within an extension of time directly or indirectly granted by him, the Appeals Chamber cannot dismiss the appeal on the ground of non-observance of a time-limit. As will appear below, much in this case turns on whether the Pre-Hearing Judge is to be regarded as having indirectly made such an extension to regularise the late filing on 2 May 2000. I think that he did, and that, when account is taken of that, the conclusion is that the Appeals Chamber cannot dismiss the Prosecutor's appeal.

(c) In what circumstances does non-observance of a time-limit for the filing of an appellate brief operate to bar the appeal?

9. The proposition underlying the Defence case, and a number of associated issues which it raises, is that, failing an extension of time previously applied for, an appeal is irrevocably time-barred at the moment of non-observance of a time-limit for the filing of an appellate brief. I do not consider that the position is so inflexible.

10. The argument of the Defence is that the last date on which the Prosecutor's appellate brief should have been filed was 24 January 2000; that, while time could be enlarged, this could be done only if a motion for extension of time had been made before the expiry of the time previously fixed; that a motion for extension was made only on 4 April 2000; that by then the appeal had already become time-barred; and that the extension of time subsequently granted by the Pre-Hearing Judge on 11 April 2000 was ineffectual to remove the bar. The Defence makes similar arguments in relation to the eventual filing of the Prosecutor's appellate brief on 2 May 2000; on this occasion, there was no motion for extension of time.

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[3] Judgement of the Appeals Chamber, para. 25. This and other excerpts from the judgement are provisional English translations from the French; the official English version of the judgement is not available at the time of writing.

11. It will be convenient to consider the general aspects of these arguments in the light of the law relating to the effect of non-observance of a time-limit for the filing of an appellate brief. It has not been disputed that the Appeals Chamber has competence to dismiss an appeal if the appellant has not observed such a time-limit. But non-observance of a time-limit does not lead automatically to dismissal; until the Appeals Chamber orders a dismissal, the case is still pending. Further, the power of the Appeals Chamber to dismiss is subject to a power to grant relief in proper circumstances. In paragraph 46 and in footnotes 53 and 54 of its judgement, the Appeals Chamber recognised the availability of this alleviatory power; but perhaps the power might be usefully discussed.

12. As it was said in one case, "failure to file a brief on time is not a *jurisdictional* bar to hearing the appeal."[4] In another case, the court said that the "late filing of the record and brief on appeal ... are at most non-jurisdictional defects in the prosecution of [this] appeal, which we consider insufficient to warrant dismissal".[5] In yet another case, it was said that the "court is not required to dismiss every appeal which does not meet the time limitations of " an applicable rule;[6] a "showing of 'extraordinary and compelling circumstances' may give the court cause to excuse the violation".[7]

13. This line of reasoning is sound. Obviously, in special circumstances it might not be humanly possible to do the required act before the expiry of the allotted time; it would be remarkable if the court were nevertheless powerless to grant a subsequent extension of time. Reference may be made to an "unless" type of case, in which the court ordered that a previous order be set aside subject to payment into court of a certain sum by a stated date; the payment not having been made by the stated date, an application was thereafter made for extension of time. The application was opposed on the argument that there was no jurisdiction to extend time. Considering the argument, a celebrated judge said:

> The court obviously has power to enlarge the time when the application is made within the time originally fixed. So also when it is made after the time has elapsed. ... Suppose a man is on his way to the court in time with money in his pocket. Then he is run down in an accident, or he is robbed of it. Or suppose that his cheque has been held up at the bank for a short time. Has the court no power to enlarge the time in such a case? Every court has inherent power to control its own procedure, even though there is nothing in the rules about it.[8]

Adverting to a previous authority which suggested the contrary, he added:

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[4] *Matute v. Procoast Navigation Ltd.*, (1991) 928 F. 2d 627 at 630; italics as in the original.
[5] *Phillips v. Employers Mutual Liability Insurance Company of Wisconsin,* (1956) 239 F. 2d 79, n. 2.
[6] *Marcaida v. Rascoe*, (1978) 569 F.2d 828 at 830.
[7] *Matute's case, supra.*
[8] *R. v. Bloomsbury and Maryleborne County Court, ex parte Villerwest Ltd.,* [1976] 1 All ER 897 at 900, per Lord Denning, M.R. Recalled also in *Samuels v. Linzi Dresses,* [1980] 1 All ER 803, C.A., at 810.

> It seems there to be suggested that if a condition is not fulfilled the action ceases to exist, as though no extension of a time can be granted. I do not agree with that line of reasoning. Even though the action may be said to cease to exist, the court always has power to bring it to life again, by extending the time.[9]

In the same case, another judge said:

> I do not doubt that a county court has an inherent jurisdiction, for it is necessary for him to possess it in order to do justice between the parties, to extend the time, whether before or after it has expired, for complying with such an order as paying into court arrears of rent or the like, within the time originally limited.

14. Many of the cases were civil; the time-limits with which they dealt did not all relate to the filing of briefs; in particular respects, the relevant legislation might differ from case to case; distinctions could be made. These matters have to be borne in mind; but I do not think that they affect the broad principle to be collected. Rules of procedure are not ornamental; they are important and must be adhered to. I readily agree with the observation of the Appeals Chamber in paragraph 46 of its judgement "that procedural time limits are to be respected, and that they are indispensable to the proper functioning of the Tribunal and its rendering of justice". But rules of procedure on the subject must be interpreted as intended to help the court in, and not to disable it from, discharging its paramount and fundamental mission to administer justice; they are not to be mechanically applied. To be sure, the inherent power thus retained is not a brooding omnipresence in the sky; it is in the nature of a reserve power and has to be cautiously used; but it can be used to extend time where this is required by the interests of justice. However dead the case may appear to be, it is not irretrievably dead at the very instant of time when an applicable briefing time-limit is exceeded.[10]

15. These general considerations furnish an answer to the question whether a motion for extension of time has to be brought before the allotted time has expired. Whether a dismissal order is made for failure to observe a briefing time-limit lies "in the court's discretion".[11] Illustrative of the way in which the discretion operates where a motion for extension has not been made before the expiry of the allotted time, it has been said that unless an "application for extended time is made so that it may be considered before the allotted time has expired, it is evidence of a lack of good faith and, failing extraordinary circumstances, it constitutes neglect which will not be excused".[12] In my view, the correct position is that, while the filing of a motion for extension after the expiry of the

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[9] *R. v. Bloomsbury and Maryleborne County Court, ex parte Villerwest Ltd.*, [1976] 1 All ER 897 at 900.

[10] It is not necessary to consider here a case which has progressed to the point where the court makes a formal order dismissing it for non-observance of a time-limit and so giving final judgement for the respondent. See *Manley Estates Ltd. v. Benedek*, [1941] 1 All ER 248, in which McKinnon LJ referred to "cases of a totally different nature, where, after an action was dismissed – and, therefore, judgment entered for the defendant ..." Prior to today's decision, no such dismissal order had been made in this case.

[11] *Matute v. Procoast Navigation Ltd.*, 928 F. 2d 627 (1991).

[12] *Gilroy v. Erie Lackawanna Railroad Co.*, 421 F.2d 1321 at 1323 (1970).

allotted time is a factor to be taken into account in the determination of the motion, it is not dispositive.[13] Cases are to be found in the books in which the courts entertained applications for extensions of time although the applications were made after the expiry of the allotted time.[14]

16. Indeed, there could be circumstances in which time could be extended even though no motion was ever made. In making the decision of 11 April 2000 and as that decision recalls, the Pre-Hearing Judge had before him a motion from the Prosecutor for extension of time, filed on 4 April 2000. But even if, as in the case of the order of 26 May 2000, there was no such motion before him, it was still competent for the Pre-Hearing Judge to extend time. Rule 116 says that the "Appeals Chamber may grant a motion to extend a time limit upon a showing of good cause". The Rule does not say that the Appeals Chamber may extend time only where there is before it a motion for extension: the inherent power of the Chamber to regulate its own procedure with a view to doing justice in the particular circumstances of the case remains intact, though of course having to be sparingly employed. Accordingly, one finds that cases have occurred in which an extension of time was granted although no motion was ever made[15]; in any event, the Appeals Chamber could treat the position taken by the appellant as amounting to a motion for extension.

17. True, the legislation[16] of some states can be appealed to in support of the view that a motion for extension of time has to be made, and has to be made before the expiry of the allotted time; in some cases the legislation expressly authorises an extension when the motion for extension has been made after the expiry of the allotted time.[17] But I do not consider that these readings control the operation of the applicable Rule so as to oblige the Appeals Chamber automatically to dismiss an otherwise lawfully pending appeal if a time-limit for the filing of an appellate brief has been exceeded. As noticed above, the leading principle to be extracted from the cases depends not so much on the specific structure of the applicable legislation as on more general considerations concerned with the mission of the court to do justice. This approach is not at variance with the

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[13] *Escobar-Ramos v. Immigration and Naturalization Service*, (1991) 927 F. 2d 482 at 485.
[14] Apart from the *Bloomsbury* case, *supra*, see, *inter alia, United States of America v. Raimondi*, 760 F.2d 460 (1985).
[15] See *HBZ Communications, Inc. v. Federal Communications Commission*, 825 F. 2d 516 at 517 (1987).
[16] The Criminal Appeal Act 1958 (UK) sates that the "time for giving notice [of appeal or of application for leave to appeal] may be extended, either before or after it expires, by the Court of Appeal". In the absence of express provision, an extension could not be made after expiry of the allotted time so far as the making of an appeal is concerned. But the principle has no necessary application outside of the cases dealt with.
[17] Cf. ICTY Rule 127, reading:
(A) Save as provided by paragraph (C), a Trial Chamber may, on good cause being shown by motion ,
(i) enlarge or reduce any time prescribed by or under these Rules;
(ii) recognize as validly done any act after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.
ICTY Rule 127(A)(ii) suggests that, under Rule 127(A)(i), extensions may be granted after the expiry of the allotted time. ICTR Rule 116 corresponds in substance to ICTY Rule 127 (A) (i).

wording of Rule 116 of the Rules of Procedure and Evidence; in my view, that wording is sufficiently flexible to accommodate motions made after expiry of the allotted time.

18. It seems to me that the understanding of the Pre-Hearing Judge did not differ from the substance of the foregoing. In granting the "limited extension of time" on 11 April 2000, he noted that the Defence was contending that the Prosecutor was "now out of time for filing her Appellant's brief and should thus be barred from so doing". So that particular argument was before the Pre-Hearing Judge; the "limited extension of time" which he granted was intended by him to bridge the very gap on which the Defence was relying. Likewise, in making an extension order on 27 September 2000, he noted an argument by Mr Kayishema "that there was ... cause to rule the Prosecutor time-barred and the Brief in Response inadmissible...". So, again, that argument was before the Pre-Hearing Judge, but it did not prevail, a distinct statement being made by him that "the Appeals Chamber may grant leave to file after expiry of the time limit if the delay is justified and if such filing does not prejudice the interests of the other Party"; as he noted, no plea of prejudice was made. With respect, in the light of the considerations mentioned above, that proposition was sound.

19. For these reasons, I consider that non-observance of a time-limit for the filing of an appellate brief does not create a time-bar leading to automatic dismissal; it creates a potential liability to dismissal. In deciding whether it would activate that liability, the court is entitled to take account of all the circumstances of the case. As will be shown below, in the circumstances of this case a dismissal would not be right.

(d) As to (a)(ii) above, the Pre-Hearing Judge impliedly extended time to regularise the late filing on 2 May 2000

20. As mentioned above, the power of the Pre-Hearing Judge to extend time could be exercised either directly or indirectly. The power was directly exercised in the case of the extension of time granted in the decision of 11 April 2000. In my view, the power was indirectly exercised in the order of 26 May 2000, the effect of which was to grant an extension of time to regularise the late filing on 2 May 2000. The Appeals Chamber has not considered whether there was such an indirect extension; it has assumed that there was no extension. In my respectful view, the facts relied upon by the Appeals Chamber do not support that assumption.

21. The Prosecutor's appellate brief was in fact recorded by the Registry as having been filed on 2 May 2000. It seems to me that, if the Pre-Hearing Judge treated the Prosecutor's appellate brief as having been properly filed on that date, he was necessarily doing so on the basis that an

appropriate extension of time to bridge any default had been granted by him - if need be, by implication. Did the Pre-Hearing Judge so treat the Prosecutor's appellate brief?

22. By his decision of 11 April 2000, the Pre-Hearing Judge granted a "limited extension of time" to cover a previous failure of the Prosecutor to file her appellate brief by 24 January 2000; she was now ordered to file it by 28 April 2000. As appears from the Pre-Hearing Judge's later order of 26 May 2000, the Prosecutor faxed her appellate brief to the Registry on the last day of the allotted time, namely, on Friday, 28 April 2000. But it was received too late for filing on that day, and so was not marked by the Registry as having been then filed. A long weekend intervened, the following Monday, 1 May 2000, being International Workers Day in Tanzania. The Prosecutor's appellate brief was then marked by the Registry as filed on Tuesday, 2 May 2000; it was therefore marked as filed on the next working day after the last day of the stipulated period.

23. How did the Pre-Hearing Judge react to the situation? It is obvious from the contents of his order of 26 May 2000 that he was treating the matter on the basis, as he said, that the Prosecutor "filed her Appeal Brief on 2 May 2000, although it appears from the markings on the top of the pages that it was faxed to the Registry on 28 April 2000". This was stated not merely as a neutral fact; the validity of the filing was being affirmed. On the stated basis that the Prosecutor had "filed her Appeal Brief on 2 May 2000", the Pre-Hearing Judge proceeded to direct the Defence (as well as the Prosecutor) to "file their Respondent's Briefs by 23 June 2000 pursuant to Rule 112 of the Rules". If the Prosecutor had not filed her appellate brief, it would be neither necessary nor permissible for the Defence to file a respondent's brief: there would be nothing to respond to. The Pre-Hearing Judge treated the Prosecutor's appellate brief as validly filed on 2 May 2000 and stands to be regarded as having impliedly granted an extension of time to permit it to be so treated.

24. In fact, the date (23 June 2000) fixed by the order of 26 May 2000 for the filing of respondents' briefs by the Defence represented an extension of the time-limit (expiring 28 May 2000) previously fixed for the purpose by the decision of 11 April 2000; the extension had been requested by the Defence on the ground that the Prosecutor's appellate brief was in English and that, until a French translation was prepared and made available, the Defence (who worked in French) could not respond. The Pre-Hearing Judge noted that "the French translation of the [Prosecutor's appellate] brief is expected to be filed by the end of the week commencing 29 May 2000". Clearly, he was treating the Prosecutor's appellate brief as having been "filed ... on 2 May 2000". He was not proceeding on the view that it had not been filed. Had he thought so, there should have been no need for further pleadings, and he should not have been under the necessity to make further pleading arrangements.

25. Thus, by necessary implication, the order of 26 May 2000 was treating the Prosecutor's appellate brief as having been filed on 2 May 2000. The Prosecutor's appellate brief could only be so treated on the basis that an enabling extension of time had been indirectly given by the Pre-Hearing Judge to bridge the 4-day gap between 28 April 2000 and 2 May 2000.

26. If the Pre-Hearing Judge did impliedly grant an extension of time, it remains to consider whether the Appeals Chamber would now be competent to interfere with the decision. The Pre-Hearing Judge's decision would continue to exert juridical force until recalled by competent authority. The Appeals Chamber would have such authority if it could sit on appeal from the decision; but, in my opinion, it could not. Rule 108*bis* (D) provides that the "Appeals Chamber may *proprio motu* exercise any of the functions of the Pre-Hearing Judge". The provision retains for the Appeals Chamber jurisdiction, if it chooses, to exercise a function of the Pre-Hearing Judge in an *ab initio* sense; it does not confer on the Appeals Chamber appellate jurisdiction over decisions made by him in the exercise of such a function. The fact that the Pre-Hearing Judge, as a member of the Appeals Chamber, would be sitting on the appeal shows the incongruity of an appellate relationship. I do not agree with the contrary view implied by the Appeals Chamber when, speaking in reference to the extension decision made by the Pre-Hearing Judge on 11 April 2000, it said "that it does not need to pronounce on the issue of whether the granting of the extension of time was justified" (paragraph 42 of today's judgement).

27. Even assuming that the Appeals Chamber could review the decision of the Pre-Hearing Judge on appeal, it seems to me that, once it is conceded that the Pre-Hearing Judge had jurisdiction to make an extension, whether or not there was "good cause" for the extension was one of the things in reference to which his jurisdiction had to be exercised. Following standard appellate criteria of review, the Appeals Chamber cannot simply substitute its view as to whether there was "good cause" for that of the Pre-Hearing Judge; it must find that, on the evidence, no reasonable tribunal could hold that there was "good cause". In my view, on the evidence, it cannot so find.

28. No doubt, the Appeals Chamber may, within limits, exercise the power of the Pre-Hearing Judge to reconsider the decision, as distinct from entertaining an appeal from it. But I do not see any ground on which such a course would result in a reversal of the decision.

29. To conclude this branch, the Pre-Hearing Judge granted an explicit extension of time by his decision of 11 April 2000 and an implicit extension of time by his order of 26 May 2000. The Appeals Chamber has not disturbed the former and has not referred to the latter. They both stand; as long as they do – in particular the latter - the late filing on 2 May 2000 falls to be regarded as having been regularised.

(e) As to (a)(iii) above, even if the Pre-Hearing Judge did not grant an extension of time to regularise the late filing on 2 May 2000, there was "good cause" for the Appeals Chamber itself to grant an extension

30. Although the Appeals Chamber did not pronounce on the question whether the extension of time granted by the Pre-Hearing Judge in his decision of 11 April 2000 was justified, it is clear that it considered that the Prosecutor's previous conduct was tardy, that the tardiness continued, and that there was therefore no "good cause" for any further extension of time to enable the eventual filing to be regarded as having been duly made.

31. The view so taken was that the dilatoriness of the Prosecutor was both chronic and general, going back to the beginning of things. In relation to the failure of the Prosecutor to file her appellate brief before 11 April 2000, the Appeals Chamber found (with apparent dissatisfaction) that her motion of 25 November 1999 "did not raise the issue of time limits" (paragraphs 29, 36 and 40 of today's judgement); that the length of time taken to file her motion of 24 February 2000 "indicates a lack of diligence" (paragraph 37); and that the Prosecutor insisted on maintaining that the reason why she had not yet filed her appellate brief was that there were some ambiguities in respect of the applicable time-limits (paragraph 38). In relation to the question of compliance with the extension granted by the order of 11 April 2000, the Appeals Chamber considered that the eventual filing made by the Prosecutor was "a final example of its lack of diligence and untimeliness" (paragraph 42). In paragraph 46, it said: "Violations of ... time limits, unaccompanied by any showing of good cause, will not be tolerated". In paragraph 47 it added:

> In this case, the Prosecution failed to file its appellate brief on time, on two occasions. It failed to file its motion for an extension of time, in a timely manner. It failed to request permission for late filing prior to its eventual filing. It did not demonstrate good cause for any of these failures.

32. It is apparent that the Appeals Chamber decided as it did on the basis of a chronicle of prosecutorial neglect which largely anteceded the extension of time granted on 11 April 2000. This must be so for otherwise, not having interfered with that extension of time, nothing appears to explain its decision to dismiss for failure of the Prosecutor to file her appellate brief before the close of business on the last day of the extended period: as has been noticed, the Prosecutor's brief was in fact received by the Registry on that day, but after the end of filing time. Considered by itself, the breach would appear to have been marginal. The reasons for the apparent severity of the ultimate sanction of effectively dismissing the Prosecutor's appeal must therefore derive from her earlier conduct. So this may be examined.

33. By motion dated 25 November 1999, the Prosecutor requested correction and clarification of the trial record. It is true that this motion "did not include a prayer for suspension of the time-limits within which the parties shall file their briefs"; a finding to that effect appears twice in the Pre-Hearing Judge's decision of 11 April 2000 and has now been thrice mentioned by the Appeals Chamber, which clearly attaches significance to the point (paragraphs 29, 36 and 40 of the judgement of the Appeals Chamber). How does that view square with the facts?

34. The Prosecutor's motion for clarification and correction of the record, of 25 November 1999, could not include "a prayer for suspension of the time-limits" for the reason that, at the time when that motion was filed, there were no time-limits to be suspended: there were no time-limits to be suspended because there were no time-limits in force. As is recalled in paragraph 28 of today's judgement, the previous time-limits had been suspended by the Appeals Chamber by its decision of 21 October 1999, which directed "that the time-limits for filing Appeal Briefs set by the Appeals Chamber's Scheduling Order of 3 September 1999 are suspended until further notice". New time-limits were not fixed until the making of the decision of 14 December 1999, that is to say, until after the filing of the Prosecutor's motion for correction and clarification of the trial record.

35. In any case, it would not be persuasive to suggest that a motion for correction and clarification of the trial record and the filing of an appellate brief are unrelated. In the case of the appeals brought by the Defence, the decision of the Appeals Chamber of 21 October 1999 recalled that the appellants (Mr Kayishema and Mr Ruzindana) were both seeking "extensions of time to file their briefs on grounds of incompleteness of the Trial Record", the briefs being appellate briefs. That decision went on to record the Appeals Chamber as "[c]onsidering that ... the Prosecution indicates its agreement with the Appellant that time-limits should be extended due to incompleteness of Trial Record". It is clear that the Appeals Chamber shared the implied view that there was a logical relationship between perfection of the trial record and the capacity of an appellant to file his appellate brief. A similar inference could be drawn from the contents of the Appeals Chamber's decision of 14 December 1999 and from those of the decision of the Pre-Hearing Judge of 11 April 2000; the matter being obvious, details need not be supplied.

36. So it is relevant to note that, in this case, the motion for correction and clarification of the trial record, though made on 25 November 1999, was not decided until 11 April 2000. The motion had not been addressed in the Appeals Chamber's decision of 14 December 1999 by which briefing time-limits were fixed. On 29 December 1999, the Appeals Chamber directed the Prosecutor to submit a draft order of the desired corrections of the trial record within seven days. On 6 January 2000, the Prosecutor submitted a draft order. The Registrar commented on it nearly two months

later - on 2 March 2000. The Prosecutor says she did not receive the Registrar's comments; her statement has not been controverted. In any case, it does not appear that she was required to do anything after submitting the draft order, as she did on 6 January 2000. However, it was not until 11 April 2000 that her motion for clarification and correction of the trial record was determined, when it was granted to an extent set out in no less than three pages of the decision of that date. It is not clear that an appellant could file an intelligible appellate brief on the basis of a trial record which needed to be so largely corrected.

37. As to briefing time-limits, by motion dated 24 February 2000, the Prosecutor asked to be advised of the start date of a 90-day period fixed by the Appeals Chamber in its decision of 14 December 1999 by reference to which the briefing time-limits established by that decision were to be calculated. Of course, the mere filing of the motion did not suffice to suspend those time-limits; the Prosecutor does not contend otherwise. However, as mentioned above, the motion was not decided until 11 April 2000; it was dismissed on that date, but, until the dismissal, the Prosecutor was entitled to regard it as being under consideration. I would add that, although the motion was dismissed, the Pre-Hearing Judge would have been equally entitled to take the view that the fact that there was a motion and that it had been pending was "good cause" for granting a "limited extension of time".

38. Thus, from 25 November 1999 to 11 April 2000, there was pending before the Appeals Chamber the Prosecutor's motion for clarification and correction of the trial record, while from 24 February 2000 to 11 April 2000 there was pending her motion for clarification of the briefing time-limits set by the decision of 14 December 1999. It is recognised that pleading sequences and connected considerations could have led to the passage of time, but, whatever the explanation, time did pass.

39. On this showing, I am not able to appreciate what was so unacceptable in the conduct of the Prosecutor as to justify a view that there was no "good cause" for the Appeals Chamber to grant an extension of time to regularise the eventual filing by the Prosecutor of her appellate brief on 2 May 2000 - assuming that the Pre-Hearing Judge had not already indirectly done exactly that. As mentioned above, the brief was in fact received by the Registry on the last day of the permitted period. The fact that it was received after the end of the filing time for that day was a breach. Equally, however, the breach was scarcely a major one: it was capable of being disregarded. The Appeals Chamber did not disregard it because it was of the view that "good cause" did not exist. With respect, I am not able to support that view. I think the Appeals Chamber could and should

have granted an extension of time if (contrary to my own thinking) it considered that one had not been granted by the Pre-Hearing Judge.

(f) Whether the merits of the Prosecutor's appeal may be considered

40. The question now is whether I may properly go on to consider the merits of the issues raised in the Prosecutor's appeal. It seems to me that I may. This is not a case in which the sole issue is whether the Prosecutor's appeal is admissible. The case concerns an appeal by the Prosecutor on certain grounds. It is that case which the Appeals Chamber is effectively dismissing. The Appeals Chamber is dismissing it on a particular ground, namely, that it is inadmissible. I disagree with the particular ground of dismissal of the appeal. But I could yet agree with the dismissal if I considered that the Prosecutor's grounds of appeal are ill-founded. Thus, I am entitled to consider whether those grounds are ill-founded or are well-founded.[18] However, I do not propose to use up my entitlement on this occasion.

II. THE DEFENCE APPEALS

41. I come now to the question whether the respondent's briefs of the Prosecutor should be excluded from the proceedings relating to the appeals brought by the Defence.

42. The Pre-Hearing Judge's order of 26 May 2000 stated, *inter alia,* that the "Decision of 11 April 2000 is varied to the extent that ...[t]he first Appellant, the second Appellant and Cross-Appellant shall file their Respondent's Briefs by 23 June 2000 pursuant to Rule 112 of the Rules". The cross-appellant was the Prosecutor.

43. In the case of the appeal by Mr Ruzindana, the Prosecutor's respondent's brief is recorded by the Registry as having been filed on 14 June 2000, though dated 15 June 2000. Thus, in this case, the filing was in time, being before the limit of 23 June 2000 fixed by the order of 26 May 2000. I am not able to support the holding of the Appeals Chamber that, in this case, the Prosecutor's respondent's brief should be excluded from the hearing. Paragraph 44 of the Appeals

[18] Consider the position of Judge Tanaka in *South West Africa, Second Phase, I.C.J. Reports 1966*, p. 250. The objection made by President Spender at p. 51 was impregnable in its self-assurance, but nonetheless vulnerable. The case was now before the Court on the merits, preliminary matters having been previously dealt with. The majority elected to "reject the claims" of the applicants on a particular ground, namely, inadmissibility. What they rejected on that ground was the case on the merits. Judge Tanaka disagreed with the particular ground on which the Court rejected the claims. But there is no basis for suggesting that he was then limited to a discussion of the particular ground on which the Court chose to reject the claims. In dissenting, he was entitled to say why the claims should be upheld on the merits. In *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 253, the Court was considering whether the applicant had a right to bring the case or to maintain it. It had two issues before it: admissibility and jurisdiction. It held against the applicant on admissibility. The minority disagreed with that finding and went on to consider jurisdiction. No doubt, domestic cases can be found to similar effect.

Chamber's judgement to that effect neither mentions nor challenges the validity of the extension expressly granted by the Pre-Hearing Judge in his order of 26 May 2000. The extension stands; it covers the case.

44. In the case of the appeal by Mr Kayishema, the Prosecutor's respondent's brief was dated 15 June 2000, but was recorded by the Registry as having been filed on 24 July 2000. The filing, as so recorded, was out of time, and the Appeals Chamber has so found in paragraph 45 of its judgement. However, in so finding, the Appeals Chamber has not referred to the extension of time expressly granted by the Pre-Hearing Judge in his order of 26 May 2000 and to a subsequent regularisation of that filing as mentioned below.

45. In a motion brought on 31 July 2000, the Prosecutor contended that she did transmit her brief by fax to the Registry on 15 June 2000; she produced supporting transmission receipts and asked the Pre-Hearing Judge to treat the brief as having been filed on 24 July 2000, alternatively to extend time to this date. In an order of 27 September 2000, the Pre-Hearing Judge found that "the Prosecutor had attempted transmission, although incomplete, of the Brief in Response; and that that act demonstrates a desire on her part to comply with Rule 112 ...". He considered "that the late filing of the Brief in Response is justified by the aforementioned circumstances", granted "an extension of time for the filing of the Brief in Response to 24 July 2000", and ordered that "that filing be confirmed as having occurred on the date on which the Registry did register the Brief in Response", i.e., on 24 July 2000.

46. It appears to me that the Pre-Hearing Judge had jurisdiction to extend time, properly found that there was good cause for doing so, and did so. Accordingly, the Prosecutor's respondent's brief fell to be regarded as having been filed within the allotted time. I am not persuaded that it should be excluded from the hearing of Mr Kayishema's appeal.

47. Thus, I regret that I am not able to support the conclusion of the Appeals Chamber that the Prosecutor's respondent's briefs in the appeals by Mr Kayishema and Mr Ruzindana are inadmissible.

3616/A
bis

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

Mohamed Shahabuddeen

Dated this nineteenth day of July 2001
At the Hague
The Netherlands

ANNEXE A : PROCEDURE EN APPEL

1. Requêtes relatives au dépôt des mémoires

1. Les parties appelantes ont introduit une série de requêtes aux fins d'obtenir des délais pour le dépôt de leurs mémoires respectifs. Après le dépôt de son acte d'appel le Procureur a déposé, le 28 mai 1999, une requête[1] demandant un report des délais aux motifs qu'il n'avait pas reçu copie du jugement.

2. La Chambre d'appel, par décision datée du 19 juillet 1999[2], a demandé au Greffier de notifier copie du jugement au Procureur avant le 2 août 1999. Après la certification du dossier de première instance intervenue le 29 juillet 1999 et la notification aux parties de copies du jugement le 30 juillet 1999, la Chambre d'appel, par Ordonnance[3] en date du 3 septembre 1999, a fixé au 28 octobre 1999 la date ultime pour le dépôt par les Appelants de leur mémoire d'appel. Les autres mémoires seraient déposés subséquemment et conformément aux dispositions des articles 112 et 113 du Règlement.

3. Le 7 octobre 1999 Ruzindana a déposé une requête[4] demandant une copie intégrale du dossier d'appel et notamment toutes les pièces à conviction. Ruzindana a estimé que le dossier certifié transmis n'était pas complet. Il a sollicité une prorogation d'un mois des délais pour le dépôt de son mémoire d'appel et ce à compter de la réception du dossier complet. Pour les mêmes motifs Kayishema a introduit 7 octobre 1999 une requête tendant aux mêmes fins[5].

4. Le 21 octobre 1999, statuant sur les requêtes du 7 octobre 1999 de Kayishema et Ruzindana, la Chambre d'appel a ordonné la suspension jusqu'à nouvel ordre des délais pour le dépôt des mémoires prescrits dans l'Ordonnance du 3 septembre 1999.

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[1] « *Motion for Extension of Time-Limits Pursuant to Article 24 and Rules 108 & 116* ».
[2] « *Decision on the Prosecutor's Motion for Extension of Time-Limits Pursuant to Article 24 of the Statute and Rules 108 and 116 of the Rules* ».
[3] « *Scheduling Order* ».
[4] « Requête en extrême urgence aux fins de report du délai de dépôt du mémoire d'appel – articles 111 et 116 du Règlement ».
[5] « Requête de Clément Kayishema auprès de la Chambre d'appel du Tribunal Pénal International pour le Rwanda en vue de report de délai de dépôt du mémoire d'appel (articles 111 et 116 du Règlement) ».

5. Le 25 novembre 1999, le Procureur a déposé une requête en rectification et en clarification du dossier d'appel[6].

6. Dans sa décision du 14 décembre 1999[7] la Chambre d'appel a accordé un report des délais de quatre-vingt dix jours à Kayishema et à Ruzindana ainsi qu'à l'Accusation, délais qui courent à compter de la date à laquelle l'addendum à la certification du dossier par le Greffe leur aura été communiqué.

7. Statuant sur la requête du 25 novembre 1999, la Chambre d'appel a demandé au Procureur de soumettre, dans les sept jours suivant sa décision, un projet d'ordonnance relatif à la mesure sollicitée[8]. Le 6 janvier 2000 le Procureur a déposé une réplique[9] en y attachant un projet d'ordonnance relatif à la clarification du dossier de première instance et du dossier d'appel. Le 2 mars 2000, le Greffier a déposé un rectificatif[10] au dossier certifié suite à la décision de la Chambre d'appel du 29 décembre 1999 et au projet d'ordonnance[11] présenté par le Procureur.

8. Le Procureur avait auparavant déposé le 24 février 2000 une requête[12] pour obtenir de la Chambre d'appel une précision sur le délai pour le dépôt de son mémoire d'appel. Le 11 avril 2000, le juge de la mise en état, désigné le 7 mars 2000 par Ordonnance du Président de la Chambre d'appel, a rejeté la requête en clarification des délais du Procureur et fixé au 28 avril 2000 la date butoir pour le dépôt par le Procureur de son mémoire d'appel. Le juge de la mise en état a, par ailleurs, demandé au Greffier d'apporter certaines corrections au dossier certifié de première instance.

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[6] « *Prosecution Motion for Correction and Clarification of the Trial Record on Appeal* ».
[7] « Décision (Requêtes des Appelants aux fins d'obtenir un report des délais et l'autorisation de rencontrer un autre prisonnier) », 14 décembre 1999.
[8] « Ordonnance (Requête du Procureur en rectification et en clarification du dossier de première instance et du dossier d'appel) », 29 décembre 1999.
[9] « Réplique du Procureur à l'ordonnance de la Chambre d'appel du 29 décembre 1999 (Requête du Procureur en rectification et en clarification di dossier de première instance et du dossier d'appel) ».
[10] « *Memorandum to the Appeals Chamber from the Registrar Pursuant to Rule 33 (B) with Regard to the Prosecutor's Motion for Correction and Clarification of the Trial Record on Appeal of 25 November 1999* », 2 mars 2000.
[11] « *Response by the Prosecution to the 29 December 1999* Ordonnance *of the Appeals Chamber* (Requête du Procureur en rectification et en clarification du dossier de première instance et du dossier d'appel) », 6 janvier 2000.
[12] « *Prosecutor's Motion to Seek Clarification on the Time-Limits to File the Legal Brief* »

9. Après le dépôt du mémoire d'appel du Procureur, Ruzindana a demandé prorogation[13] du délai pour le dépôt de son mémoire d'intimé compte tenu du délai accordé au Procureur dans l'Ordonnance du 11 avril 2000 et du dépôt par celui-ci de son mémoire le 2 mai 2000. Le 22 mai 2000 Kayishema a introduit une demande similaire[14]. Statuant sur les requêtes de Ruzindana et Kayishema en prolongation des délais, le juge de la mise en état a, par Ordonnance en date du 26 mai 2000, modifié son Ordonnance du 11 avril 2000 en spécifiant que les Appelants pouvaient déposer leur mémoire d'intimé au plus tard le 23 juin 2000 et leur réplique le 7 juillet 2000.

10. Le 8 juin 2000 Kayishema a sollicité une prolongation du délai pour le dépôt de ses écritures d'intimé au motif que le mémoire d'appel du Procureur ne lui était pas encore signifié en français.[15] Le 19 juin 2000 Ruzindana a demandé une prolongation du délai pour le dépôt de sa réplique au mémoire d'intimé du Procureur, aux motifs qu'il n'avait pas encore reçu la version française de ce mémoire[16]. Par Ordonnance datée du 4 juillet 2000, le juge de la mise en état a rejeté cette requête.

11. Le 6 juillet 2000 Kayishema a déposé une requête[17] demandant à être autorisé à compléter ses écritures datées du 23 juin 2000 en réponse au mémoire d'appel du Procureur. Par décision en date du 17 juillet 2000[18], le juge de la mise en état, statuant sur les requêtes de Kayishema en date des 8 juin 2000 et 6 juillet 2000, a autorisé celui-ci à déposer un complément à son premier Mémoire en réponse[19] au mémoire du Procureur, dans les 30 jours suivant le dépôt de la traduction en langue française des écritures d'appel du Procureur.

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[13] « Requête de l'appelant Obed Ruzindana en prolongation des délais pour le dépôt du mémoire d'intimé – Articles 112 et 113 du Règlement », 17 mai 2000.
[14] « Requête de l'Appelant Clément Kayishema aux fins de prolongation des délais (Art. 116 du Règlement) pour le dépôt du Mémoire d'Intimé (Art. 112 du Règlement) ».
[15] « Requête de l'Appelant Clément Kayishema aux fins de prolongation des délais (Art. 116 du Règlement) pour le dépôt du mémoire d'intimé (Art. 112 du Règlement) ».
[16] « Requête de l'Appelant Obed Ruzindana en prolongation des délais pour le dépôt de son mémoire en duplique – Articles 113 et 116 du Règlement ».
[17] « Requête de Clément KAYISHEMA aux fins de donner acte et d'autorisation de dépôt d'un complément au mémoire responsif de KAYISHEMA au mémoire principal du Procureur ».
[18] « *Order (Clément Kayishema's Motion to Extend Time Limit)* ».
[19] « Mémoire en réponse de Clément Kayishema au mémoire d'appelant du Procureur du Jugement rendu le 21 mai 1999 par le Tribunal ».

12. Le 27 juillet 2000 Kayishema a déposé une requête[20] demandant une prolongation des délais, d'une part jusqu'au 20 septembre 2000 pour lui permettre de participer à sa défense en raison de sa maladie, d'autre part jusqu'au 20 octobre 2000 pour lui permettre de déposer son Mémoire complémentaire en réponse au Mémoire d'appelant du Procureur. Dans sa décision datée du 4 août 2000,[21] le juge de la mise en état, statuant sur la Requête du 27 juillet 2000 de Kayishema, a, d'une part, ordonné au requérant de fournir, dans les sept jours, un certificat médical attestant de son incapacité à donner des instructions à son conseil et ce jusqu'au 20 septembre 2000, d'autre part, demandé au Greffier de s'assurer que la traduction française du Mémoire en réponse du Procureur soit déposé au plus tard le 20 septembre 2000.

13. Le 31 juillet 2000, le Procureur a introduit une requête[22] demandant à la Chambre d'appel de donner instruction au Greffe de considérer que l'Accusation a déposé ses écritures en réponse au mémoire d'appel de Kayishema dans les délais, à savoir le 15 juin 2000, comme prescrit par l'Ordonnance du 26 mai 2000 ou, à défaut, de valider par ordonnance, en vertu de l'article 116 du Règlement, le dépôt de son Mémoire en réponse portant la date du 24 juillet 2000. Le 27 septembre 2000, le juge de la mise en état, statuant sur la Requête du Procureur datée du 31 juillet 2000, a accordé une prolongation des délais pour le dépôt du Mémoire en réponse au 24 juillet 2000 et ordonné la confirmation du dépôt dudit Mémoire à la date laquelle le Greffe l'a enregistré[23].

14. Le 3 août 2000, Ruzindana, dans sa Réponse[24] à la Requête du 26 juillet 2000 (déposée le 27 juillet 2000) de Kayishema, a également sollicité un délai jusqu'au 5 octobre 2000 pour déposer un mémoire complémentaire en réplique au Mémoire du Procureur. Le 12 septembre 2000, le juge de la mise en état a rejeté cette requête de Ruzindana[25].

15. Le 11 août 2000, Kayishema a produit un certificat médical conformément à la décision du 4 août 2000 du juge de la mise en état. Le 11 septembre 2000, suite au dépôt par

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[20] « Requête générale de Clément Kayishema aux fins de solliciter des délais pour préparer sa Défense - regroupant toutes les Requêtes déposées à ce jour et restées sans réponses ».
[21] « *Decision (Kayishema's Motions for Extension of Time to File Briefs* ».
[22] « *Prosecution Motion on the Filing of the Prosecution's Brief in Response to the Appeal Brief of Clément Kayishema* ».
[23] « *Order (Prosecution Motion on the Filing of the Prosecution's Brief in Response to the Appeal Brief of Clément Kayishema)* ».
[24] « Réponse de l'Appelant Obed Ruzindana à la Requête "Générale" de Clément Kayishema en date du 26 juillet 2000, et Requête tendant aux mêmes fins ».
[25] « *Decision (Ruzindana's Motion to Supplement his Brief in Reply)* ».

Kayishema de son certificat médical, le juge de la mise en état a, d'une part, modifié son Ordonnance du 31 juillet 2000 et, d'autre part, autorisé celui-ci à déposer sa Réplique à la Réponse du Procureur au plus tard le 22 septembre 2000[26].

16. Le 14 septembre 2000, Kayishema a déposé une requête[27] demandant notification de la traduction française de l'Ordonnance du juge de la mise en état du 11 septembre 2000 et l'octroi d'un délai d'un mois, à compter de la notification, pour déposer un complément à sa Réponse au Mémoire d'appel du Procureur et sa Duplique.

17. Dans sa décision du 26 septembre 2000[28] la Chambre d'appel a rejeté la requête de Ruzindana datée du 8 mai 2000 et la requête de Kayishema en date du 29 mai 2000. Elle a, en outre, fait droit à la requête du 14 septembre 2000 de Kayishema dans la limite des modifications introduites dans l'Ordonnance du 4 août 2000. Ainsi Kayishema a bénéficié d'un report des délais jusqu'aux 2 octobre et 5 octobre 2000 pour compléter et déposer ses écritures.

2. Requêtes aux fins de présenter de nouveaux moyens de preuve

18. Kayishema introduit le 4 octobre et le 12 octobre 1999 deux requêtes[29] similaires aux fins d'autoriser son conseil à rencontrer Jean Kambanda. Une requête[30] aux mêmes fins est déposée le 7 octobre 1999 par Ruzindana. Par décision en date du 14 décembre 1999[31] la Chambre a statué sur les requêtes de Kayishema et Ruzindana relatives à une autorisation de rencontrer Kambanda et à un report des délais. Elle a d'une part rejeté la demande de rencontre avec Kambanda et d'autre part ordonné aux parties de déposer leur mémoire dans les 90 jours suivant réception de l'*Addendum* à la certification du dossier de première instance.

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[26] « *Order (Kayishema's Motion to Present Additional Evidence)* ».
[27] « Requête de Clément Kayishema aux fins de solliciter réponse à sa Requête du 29.05.2000 et des délais pour préparer sa défense en l'état de cette dernière – suite à l'ordonnance du Juge de la Mise en état en date du 11.09.2000) ».
[28] « Arrêt (Requêtes des Appelants aux fins d'autorisation de présenter de nouveaux moyens de preuve en appel) ».
[29] « Requête auprès de la Chambre d'appel pour l'organisation de la Défense de C. Kayishema après le refus du Procureur d'autorisation pour la Défense de rencontrer M. Kambanda », 4 octobre 1999; « Requête auprès de la Chambre d'appel pour l'organisation de la Défense de C. Kayishema Appelant des deux jugements du 21.05.99 du Tribunal Pénal International pour le Rwanda », 12 octobre 1999.
[30] « Requête pour l'organisation de la Défense de Ruzindana ».
[31] « Décision (Requêtes des Appelants aux fins d'obtenir un report des délais et l'autorisation de rencontrer un autre prisonnier) ».

19. Le 8 mai 2000 Ruzindana a demandé à être autorisé à présenter de nouveaux moyens de preuve, notamment un témoignage et la copie des procès-verbaux des audiences du 24 février 1999, 25 février 1999 et 4 mai 1999 dans l'affaire ICTR-96-13-T, *Le Procureur c. Alfred Musema*[32]. Le 29 mai 2000 Kayishema a introduit une demande à être autorisé à présenter des moyens de preuve supplémentaires notamment des documents et des témoignages[33]. Par Ordonnance datée du 2 juin 2000[34] le juge de la mise en état a demandé au Procureur de répondre, au plus tard le 14 juin 2000, aux requêtes de Kayishema et Ruzindana sur la présentation de nouveaux moyens de preuve. Dans sa décision du 26 septembre 2000[35], la Chambre d'appel a rejeté les deux requêtes aux motifs que les requérants n'ont pas fait preuve de la diligence requise pour présenter les témoins proposés ou qu'il était dans l'intérêt de la justice d'accueillir les documents soumis.

20. Le 29 mai 2000, Kayishema a demandé communication du Mémorandum[36], établi par un ancien enquêteur du Bureau du Procureur, M. Hourigan, sur le génocide rwandais de 1994. Ledit document avait été communiqué au Procureur par le Tribunal. Par décision en date du 27 juillet 2000[37] la Chambre d'appel a autorisé la communication à Kayishema dudit Mémorandum. Le 3 août 2000, Kayishema a introduit une seconde requête[38] demandant à la Chambre d'appel d'accepter que le Mémorandum de M. Hourigan soit versé au dossier d'appel et que celui-ci et Mme Arbour, ancien Procureur du Tribunal, soient entendus par la Chambre sur ce Mémorandum. Le 29 septembre 2000, la Chambre d'appel a rejeté la requête de Kayishema aux motifs que la teneur du Mémorandum n'avait aucun rapport avec les questions relatives au génocide auxquelles la Chambre de première instance devait se prononcer, et que par ailleurs il n'était pas dans l'intérêt de la justice d'entendre les deux témoins proposés[39].

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[32] « Requête de l'Appelant Obed Ruzindana en présentation de nouveaux moyens de preuves – article 115 du Règlement ».
[33] « Mémoire pour solliciter la présentation de moyens de preuve supplémentaires devant la chambre d'appel (art. 115 du Règlement) ».
[34] « *Order (Re: Motions to present additional Evidence)* ».
[35] « Arrêt (Requêtes des Appelants aux fins d'autorisation de présenter de nouveaux moyens de preuve en appel) ».
[36] « Requête aux fins de communication du Mémorandum établi par M. Hourigan sur le Génocide rwandais de 1994 et déposé au Tribunal (art. 73 du Règlement) ».
[37] « Arrêt (Requête aux fins de communication du Mémorandum des Nations Unies établi par M. Hourigan sur le génocide rwandais de 1994) ».
[38] « Deuxième Requête de C. Kayishema aux fins de présentation à la Chambre d'appel de nouveaux moyens de preuve (art. 115 du Règlement) à partir du Mémorandum rédigé par M. Hourigan ».
[39] « Décision (Deuxième Requête de C. Kayishema aux fins de présentation à la chambre d'appel de nouveaux moyens de preuve à partir du Mémorandum rédigé par M. Hourigan) ».

3. Dépôt des écritures des parties

21. Le 20 octobre 1999, Ruzindana a déposé son Mémoire d'appel[40]. Le 19 janvier 2000, Kayishema a déposé au Greffe son Mémoire d'appel.

22. Ruzindana et Kayishema ont déposé respectivement les 28 et 29 mars 2000 des requêtes en irrecevabilité et en forclusion de l'appel du Procureur. (Voir Forclusion du Procureur).

23. Le Mémoire d'appel du Procureur[41] a été enregistré au Greffe le 2 mai 2000. Dans ses écritures, le Procureur a décidé de se désister du quatrième motif d'appel contenu dans son Acte d'appel[42]. Le Mémoire d'appel du Procureur contre la peine[43] prononcée contre Ruzindana a été déposée ce même jour.

24. Le 26 mai 2000, Ruzindana a déposé son Mémoire[44] en réponse au Mémoire du Procureur sur la peine prononcée contre l'accusé. Le 10 juillet 2000, le Procureur a déposé sa Réplique[45] au Mémoire d'intimé de Ruzindana relativement à la peine infligée à celui-ci.

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[40] « Mémoire écrit de la Défense – Article 111 du Règlement ».
[41] « *Prosecution's Appeal Brief* ».
[42] Appel interjetté par le Procureur:
Appel quant au fond : Le Procureur fait valoir que :

i) La Chambre de première instance a commis une erreur sur un point de droit en déclarant Kayishema non coupable des chefs 2, 3, 8, 9, 14, 15, 20 et 21 et Ruzindana non coupable des chefs 20 et 21, au motif que le génocide et les crimes contre l'humanité sont des infractions en concours dont les accusés ne sauraient être tenus responsables à raison des même faits;
ii) La Chambre de première instance a commis une erreur sur un point de droit en appliquant le critère énoncé au paragraphe 110 du résumé du jugement, qui paraît exiger du Procureur qu'il établisse l'existence d'un lien entre les crimes allégués et le conflit armé, et d'un lien direct entre les accusés et les forces armées;
iii) La Chambre de première instance a commis une erreur sur un point de droit en estimant qu'il n'avait pas été prouvé que les actes des accusés étaient directement liés aux opérations militaires ou aux victimes du conflit armé, et qu'il n'avait pas davantage été prouvé qu'il existait un lien direct entre l'accusé et les forces armées.

Appel contre la sentence imposée à Ruzindana

iv) La Chambre de première instance a commis une erreur sur un point de droit, faute d'avoir prononcé la peine maximale prévue pour le génocide, c'est-à-dire l'emprisonnement à vie;
v) La Chambre de première instance a commis une erreur sur un point de droit en établissant un parallèle entre la responsabilité pénale de Kayishema et celle de Ruzindana et en concluant que Kayishema "mérite un châtiment plus sévère que Ruzindana";
vi) La Chambre de première instance a commis une erreur de fait en concluant à une plus grande culpabilité de Kayishema par rapport à Ruzindana.

[43] « *Prosecution's Appeal Brief against Sentence Imposed on Obed Ruzindana* ».
[44] « Mémoire de l'Appelant Obed Ruzindana en réponse au Mémoire du Procureur sur la peine prononcée contre l'accusé ».
[45] « *Prosecution Brief in Reply to Obed Ruzindana's Brief in Response to the Appeal Brief of the Prosecutor (Art. 112 of the Rules)*'.

25. Le 14 juin 2000, le Mémoire d'intimé[46] du Procureur à l'appel de Ruzindana a été enregistré au Greffe.

26. Le 23 juin 2000, Kayishema a déposé son Mémoire[47] en réponse au Mémoire d'appel du Procureur. À la même date, le Greffe a reçu de Ruzindana son Mémoire[48] en réponse au Mémoire du Procureur. Le 7 juillet 2000, Ruzindana a déposé un Mémoire provisoire en duplique au mémoire d'intimé du Procureur.

27. Le 10 juillet 2000, le Greffe a reçu une réplique[49] de Kayishema au Mémoire[50] en réponse du Procureur à son Mémoire d'appel. À cette date le Mémoire en réponse du Procureur n'était pas encore déposé.

28. Le 24 juillet 2000, le Procureur a enregistré au Greffe son Mémoire en réponse au mémoire d'appel de Kayishema.

29. Le 27 septembre 2000, Kayishema a déposé son Mémoire en réponse définitif[51] au Mémoire d'appelant du Procureur. Le 6 octobre 2000, Kayishema a déposé sa Réplique définitive[52] au Mémoire en réponse du Procureur.

30. Le 12 octobre 2000, le Procureur a déposé son Mémoire en réplique[53] au Mémoire en réponse définitif de Clément Kayishema.

4. Audience en appel

31. Le 28 septembre 2000, le juge de la mise en état a pris une Ordonnance[54] fixant aux 30 et 31 octobre 2000 la date de l'audience en appel.

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[46] « *Prosecution Brief in Response to the Appeal Brief of Obed Ruzindana* ».
[47] « Mémoire en réponse de Clément Kayishema au mémoire d'appelant du Procureur du Jugement rendu le 21 mai 1999 par le Tribunal Pénal International pour le Rwanda (art. 112 du règlement de procédure et de preuve) ».
[48] « *Defense Brief in Response to the Appeal Brief of the Prosecutor (Art. 112 of the Rules)* »
[49] « Duplique exceptionnelle et provisoire de l'Appelant Clément Kayishema en l'état de l'absence de Mémoire responsif du Procureur (art. 113 du Règlement) ».
[50] « *Prosecution Brief in Response to the Appeal Brief of Clément Kayishema* ».
[51] « Mémoire en réponse DÉFINITIF de Clément Kayishema au mémoire d'appelant du Procureur du Jugement rendu le 21.05.1999 par le Tribunal Pénal International pour le Rwanda ».
[52] « RÉPLIQUE DÉFINITIF (art. 113 du Règlement) de C. Kayishema à la réponse du Procureur en date du 15.07.2000 au Mémoire de l'appelant de la Défense déposé le 19.01.2000 ».
[53] « *Prosecution Brief in Reply to the Definitive Respondent's Brief of Clément Kayishema Filed on 27 September 2000* »
[54] « *Order (Hearing on Appeal)* ».

ANNEXE B : GLOSSAIRE

A. Ecritures des parties

1. Appel de Clément Kayishema

Acte d'appel de Kayishema	Acte d'appel de Clément Kayishema des deux jugements rendus contre lui le 21 mai 1999 par le Tribunal pénal international pour le Rwanda l'un prononçant le verdict, l'autre prononçant la sentence, déposé le 18 juin 1999
Mémoire de Kayishema	Mémoire d'appel des jugements rendus contre Clément Kayishema le 21 mai 1999 par le Tribunal pénal international pour le Rwanda (art. 111 du Règlement de procédure et de preuve), déposé le 24 janvier 2000
Réponse du Procureur à Kayishema	Mémoire du Procureur en réponse au Mémoire en appel de Clément Kayishema, déposé le 24 juillet 2000
Réplique provisoire de Kayishema	Duplique exceptionnelle et provisoire de l'appelant Clément Kayishema en l'état de l'absence de mémoire responsif du Procureur (art. 113 du RPP), déposé le 10 juillet 2000
Réplique définitive de Kayishema	Réplique définitive (art. 113 du RPP) de C. Kayishema à la Réponse du Procureur en date du 15.07.2000 au Mémoire d'appelant de la Défense déposé le 19.01.2000, déposé le 6 octobre 2000
Requête de Kayishema aux fins de forclusion	Requête en forclusion de l'appel du Procureur en date du 18-06-1999 formé contre le Jugement de C. Kayishema du 21-05-1999, déposé le 29 mars 2000

3606/A bis

2. Appel d'Obed Ruzindana

Acte d'appel de Ruzindana	Acte d'appel, déposé le 24 juin 1999
Mémoire de Ruzindana	Mémoire écrit de la Défense – Article 111 du Règlement, déposé le 20 octobre 1999
Réponse du Procureur à Ruzindana	Mémoire du Procureur en réponse au mémoire d'appel d'Obed Ruzidana, déposé le 14 juin 2000
Réplique de Ruzindana	Mémoire provisoire en duplique, déposé le 7 juillet 2000
Requête de Ruzindana aux fins de forclusion	Requête de l'appelant Obed Ruzindana en irrecevabilité de la procédure d'appel du Procureur, déposée le 28 mars 2000

3. Appel du Procureur

a) Premier appel du Procureur

Acte d'appel du Procureur	Acte d'appel (Article 24 du Statut et 108 du Règlement), déposé le 18 juin 1999
Mémoire du Procureur	Mémoire en appel du Procureur, déposé le 2 mai 2000
Réponse provisoire de Kayishema	Mémoire en réponse de Clément Kayishema au mémoire d'appelant du Procureur du Jugement rendu le 21 mai 1999 par le Tribunal pénal international pour le Rwanda (article 112 du Règlement de procédure et de preuve), déposé le 23 juin 2000
Réponse définitive de Kayishema	Mémoire en réponse définitif de Clément Kayishema au mémoire d'appelant du Procureur du Jugement rendu le 21.05.1999 par le Tribunal pénal international pour le Rwanda, déposé le 27 septembre 2000

Réponse de Ruzindana	*Defense Brief in response to the appeal brief of the Prosecutor (article 112 of the Rules)*, déposée le 23 juin 2001
Réplique provisoire du Procureur à Kayishema	Mémoire de l'Accusation en réplique au mémoire d'intimé de Clément Kayishema, déposé le 7 juillet 2000
Réplique définitive du Procureur à Kayishema	*Prosecution Brief in reply to the definitive respondent's brief of Clément Kayishema filed on 27 september 2000*, déposé le 12 octobre 2000
Réplique du Procureur à Ruzindana	Mémoire du Procureur en réplique au mémoire d'Obed Ruzindana en réponse au mémoire d'appel du Procureur (article 112 du Règlement), déposé le 10 juillet 2000

b) Deuxième appel du Procureur

Acte d'appel contre la sentence de Ruzindana	Acte d'appel de la peine prononcée contre Obed Ruzindana (Article 24 du Statut et 108 du Règlement), déposé le 18 juin 1999
Mémoire du Procureur contre la peine	Mémoire d'appel du Procureur de la peine prononcée contre Obed Ruzindana, déposé le 2 mai 2000
Réponse de Ruzindana (peine)	Mémoire de l'appelant Obed Ruzindana en réponse au Mémoire du Procureur sur la peine prononcée contre l'accusé, déposé le 26 mai 2000
Réplique du Procureur (sur la peine de Ruzindana)	Mémoire du Procureur en réplique au Mémoire en réponse à son Mémoire d'appel sur la peine prononcée contre Obed Ruzindana, déposé le 7 juillet 2000

3604/A bis

B. Références relatives à la présente affaire

Audiences en appel	Audiences en vue d'entendre les arguments en appel des parties, 30 et31 octobre 2000
Chambre de première instance	Chambre de première instance II du Tribunal international
Chambre d'appel	La Chambre d'appel du Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins entre 1er janvier et le 31 décembre 1994
CRA	Compte rendu des audiences en première instance dans *Le Procureur c. Clément Kayishema et Obed Ruzindana*, Affaire No. ICTR-95-1-T. Tous les numéros de pages de compte-rendu d'audiences mentionnés dans le présent Arrêt sont ceux de la version française non officielle et non corrigée. Il pourrait donc y avoir quelques décalages dans la numérotation entre ce document-ci et la version française finale.
CRA(A)	Compte-rendu des audiences en appel tenues à Arusha (audiences des 30 et 31 octobre 2000). Tous les numéros de pages de compte-rendu d'audiences mentionnés dans le présent jugement sont ceux de la version française non officielle et non corrigée. Il pourrait donc y avoir quelques décalages dans la numérotation entre ce document-ci et la version française finale.
Kayishema	Clément Kayishema
Jugement	*Le Procureur c. Clément Kayishema et Obed Ruzindana*, affaire No. ICTR-95-1-T, Jugement, 21 mai 1999 (Chambre de première instance)

Jugement (sentence)	Partie du Jugement en date du 21 mai 1999 sur la sentence
Procureur	Bureau du Procureur
Ruzindana	Obed Ruzindana

C. Décisions citées

Arrêt Akayesu	Arrêt, *Le Procureur c. Jean-Paul Akayesu*, affaire No. ICTR-96-4-A, 1er juin 2001 (Chambre d'appel)
Arrêt *Aleksovski*	Arrêt, *Le Procureur c. Zlatko Aleksovski*, affaire No. IT-95-14/1-A, 24 mars 2000 (Chambre d'appel du TPIY)
Arrêt *Čelebići*	Arrêt, *Le Procureur c. Zejnil Delalic et consorts*, affaire No. IT-96-21-A, 20 février 2001 (Chambre d'appel du TPIY)
Arrêt *Erdemović*	Arrêt, *Le Procureur c. Dražen Erdemović*, affaire No. IT-96-22-A, 7 octobre 1997 (Chambre d'appel du TPIY)
Arrêt *Furundžija*	Arrêt, *Le Procureur c. Anto Furundzija*, affaire No. IT-95-17/1-A, 21 juillet 2000 (Chambre d'appel du TPIY)
Arrêt *Kambanda*	Arrêt, *Le Procureur c. Jean Kambanda*, affaire No. ICTR-97-23-A, 19 octobre 2000 (Chambre d'appel)
Arrêt *Serushago* sur la sentence	Motifs du Jugement, *Omar Serushago c. le Procureur*, affaire No. ICTR-98-39-A, 6 avril 2000 (Chambre d'appel)
Arrêt *Tadić*	Arrêt, *Le Procureur c. Duško Tadić*, affaire No. IT-94-1-A, 15 juillet 1999 (Chambre d'appel du TPIY)
Arrêt *Tadić* (exception d'incompétence)	Arrêt relatif à l'appel de la défense concernant l'exception préjudicielle d'incompétence, *Le Procureur c. Duško Tadić*, affaire No. IT-94-1-AR72, 2 octobre 1995 (Chambre d'appel du TPIY)

Arrêt *Tadić* sur la sentence	Arrêt concernant le Jugement sur la sentence, *Le Procureur c. Duško Tadić*, affaire No. IT-94-1-A & IT-94-1-Abis, 26 janvier 2000 (Chambre d'appel du TPIY)
Jugement *Akayesu*	Jugement, *Le Procureur c. Jean-Paul Akayesu*, affaire No. ICTR-96-4-T, 21 mai 1999 (Chambre de première instance du TPIY)
Jugement *Blaškić*	Jugement, *Le Procureur c. Tihomir Blaškić*, affaire No. IT-95-14-T, 3 mars 2000 (Chambre de première instance du TPIY)
Jugement *Čelebići*	Jugement, *Le Procureur c. Zejnil Delalić et consorts*, affaire No. IT-96-21-T, 16 novembre 1998 (Chambre de première instance du TPIY)
Jugement *Jelisić*	Jugement, *Le Procureur c. Goran Jelisić*, affaire No. IT-95-10-T, 14 décembre 1999 (Chambre de première instance du TPIY)
Jugement *Kambanda*	Jugement et sentence, *Le Procureur c. Jean Kambanda*, affaire No. ICTR-97-23-S, 4 septembre 1998 (Chambre de première instance)
Jugement *Kordić*	Jugement, *Le Procureur c. Dario Kordić & Mario Čerkez*, affaire No. IT-95-14/2-T, 26 février 2001 (Chambre de première instance du TPIY)
Jugement *Kunarac*	Jugement, *Le Procureur c. Dragoljub Kunarac et consorts*, affaires Nos. IT-96-23-T & IT-96-23/1-T, 22 février 2001 (Chambre de première instance du TPIY)
Jugement *Kupreškić*	Jugement, *Le Procureur c. Zoran Kupreškić et consorts*, affaire No. IT-95-16-T1, 4 janvier 2000 (Chambre de première instance du TPIY)
Jugement *Musema*	Jugement et sentence, *Le Procureur c. Alfred Musema*, affaire No. ICTR-96-13-T, 27 janvier 2000 (Chambre de première instance du TPIY)
Jugement *Rutaganda*	Jugement et sentence, *Le Procureur c. Georges Anderson Nderubumwe Rutaganda*, affaire No.

	ICTR-96-3-T, 6 décembre 1999 (Chambre de première instance du TPIY)
Jugement *Tadić*	Opinion et Jugement, *Le Procureur c. Duško Tadić*, affaire No. IT-94-1-T, 7 mai 1997 (Chambre de première instance du TPIY)
Premier jugement *Erdemović* sur la sentence	Jugement portant condamnation, *Le Procureur c. Dražen Erdemovic*, affaire No. IT-96-22-T, 29 novembre 1996 (Chambre de première instance du TPIY)
Second jugement *Erdemovic* sur la sentence	Jugement portant condamnation, *Le Procureur c. Drazen Erdemovic*, affaire No. IT-96-22-T*bis*, 5 mars 1998 (Chambre de première instance du TPIY)

D. Autres références

Article 3 commun	Article 3 commun aux quatre Conventions de Genève de 1949
CDI	Rapport de la Commission du Droit International, 48ème session, 6 mai-26 juillet 1996, AG de O.N.U, 51ème Session, Supplément No. 10 (A/51/10)
Cour eur. D. H.	Cour Européenne des Droits de l'Homme
CIJ	Cour internationale de Justice
Convention européenne des droits de l'Homme	Convention européenne de Sauvegarde des Droits de l'Homme et des Libertés fondamentales, signée à Rome le 4 novembre 1950
Commentaires du CICR	Pictet (ed.), Commentaire de la Quatrième Convention de Genève relative à la protection des personnes civiles en temps de guerre,

	Comité international de la Croix-Rouge, Genève, 1958.
Commentaires du CICR sur les Protocoles additionnels	Sandoz et al. (eds.), Commentaires des Protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949, Comité international de la Croix-Rouge, Genève, 1987.
Law Reports	*Law Reports on Trial of War Criminals (London : Published for the United Nations War Crimes Commission by His Majesty's Stationary Office)*
PDCP [Pacte international]	Pacte international relatif aux droits civils et politiques (1966)
Protocole additionnel I	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux.
Protocole additionnel II	Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux
Rapport du Secrétaire général	Rapport du Secrétaire général en vertu du paragraphe 5 de la résolution 955 (1994) du Conseil de sécurité, U.N.Doc.S/1995/134, 13 février 1995
Règlement	Règlement de procédure et de preuve du Tribunal international
Résolution 955	Résolution 955 du Conseil de sécurité (1994), U.N.Doc.S/Res/955, 8 novembre 1994 (création du Tribunal)
Statut	Statut du Tribunal
Statut de Rome	Statut de la Cour pénale internationale adopté à Rome le 17 juillet 1998, Doc. ONU A/CONF.183/9
TPIY	Tribunal pénal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le

	territoire de l'ex Yougoslavie depuis 1991
Tribunal international ou Tribunal	Tribunal pénal international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994
TWC	*Trials of War Criminals before the Nuremberg Military Tribunals under Council Law No. 10 (U.S. Govt. Printing Office : Washington 1950)*
IVème Convention de Genève	Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949